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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CSABA KISS,

Appellant,

v.

IVAN G. POPCHOI AND
VARVARA M. POPCHOI,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE BRUCE W. HILYER

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Csaba Kiss sold Mr. and Mrs. Popchoi a Bellevue lot on May 6, 2006 by Special Warranty Deed. Jim and Ilene Edmonson owned and lived in the home on the lot adjacent to the Pophoi lot's southern border. F/F 7, CP 142.[1] After the sale, the Edmonsons sued the Popchois, claiming adverse possession to a strip of the Popchois' land adjacent to their common border. Invoking the seller's statutory warranty of title and duty to defend the Popchois' title, the Popchois tendered defense of the adverse possession claim to Csaba Kiss on August 18, 2006. Tr. Ex. 2; F/F 8, CP 142-43. Mr. Kiss refused to defend the Popchoi's title, forcing the Popchois to retain an attorney to defend against the Edmonsons' adverse possession claim. C/L 6. Following considerable discovery, the Edmonsons obtained title to the disputed strip of land by summary judgment. F/F 22, 23, CP 137.

The Popchois' claims against Csaba Kiss for breach of warranty of title were tried before the Honorable Bruce Hilyer, King County Superior Court Judge, who foundthat Csaba Kiss had breached his warranty of title to land adversely possessed by the Edmonsons, for which the Popchois had paid Kiss $10,993.63. C/L 9, CP 153. The Trial Court ruled that Csaba Kiss

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[1] Appellant did not assign error to any of the findings of Fact or Conclusions of Law. The appellate court must treat unchallenged findings as verities on appeal. ***State v. Hill,*** 123 Wn.2d 641, 644, 870 P.2d 313 (1994); ***Standing Rock Homeowners Ass'n v. Misich,*** 106 Wn. App. 231, 238, 23 P.3d 520 (2001).

had also breached his duty to defend the Popchois' title and imposed judgment against Csaba Kiss for $30,281.90, which is the amount of attorneys fees and costs that the Popchois had paid to defend their title. C/L 7, CP 152. On February 2, 2009, the Trial Court entered judgment for these damages, plus $3,609.86 in interest on the excess land payment, for a total judgment of $44,885.39. CP 174-75.

Csaba Kiss appeals the judgment on the following two grounds:

A. That the seller should be permitted to "satisfy" the covenant to defend the buyer's title by demanding that the buyer convey the disputed land to the claimant and settle for a partial refund of the purchase price paid for the part of the land subject to the title dispute.

B. That the Popchois' survey disclosed the location of their lot's rear yard fence as several inches inside of their lot's south property line, which alerted the Buyers that "the neighbor's fence encroached onto the parcel." Appellant's Brief at 5. *See* Tr. Ex.'s 14, 102. Appellant claims that the Buyers had a duty to notify the Seller of the encroachment and that their failure to do so relieved the seller of his warranty of title obligations. CP 142.

Mr. Kiss cannot "satisfy" his statutory duty to defend the Popchois' title by conditioning his performance on the buyers' consenting to convey the disputed property to the adverse claimant and then accept a partial refund of the purchase price as damages. The seller's "condition" eliminates the seller's obligation to defend the buyer's title altogether, reducing the seller's statutory covenants to a single obligation – to refund to the buyer

the portion of the purchase price the buyer paid for the challenged portion of the property. Mr. Kiss's "conditions" require that the buyer consent to the seller's breach of his duty to defend the buyers' title (by consenting the buyers' demand that the disputed land be conveyed to the claimant) ***and*** consent to the seller's breach of both his warranty of seisin (good title) and his warranty of quiet enjoyment (by losing title to the disputed land and by dragging the buyer into a lawsuit with seller over damages). Mr. Kiss's condition, in effect, would require the buyers to waive the seller's liability to them for breaching all of these warranties.

In short, the warranties of title that accompany a Statutory Warranty Deed would be meaningless if the seller had the right to evade them simply by conveying the disputed land to the claimant and giving buyers a refund for the purchase price paid for disputed land.

Mr. Kiss claims that the buyer's failure to notify the seller of the encroachment of the neighbor's fence should relieve Mr. Kiss of his warranty obligations. Kiss V.P. 37-38. Mr. Kiss's claim is factually incorrect. The fence at issue did not belong to the neighbors. It belonged to the Popchoi lot because the fence had been erected by Kay Davis, a previous owner of the Popchoi lot, to fence in the back yard. CP 38; CP 207-215. Mr. Kiss testified that he knew that the fence was there, but never surveyed the property and did not know if it was on the property line. Kiss V.P. 22, 37-38; F/F 5, CP 142.

Facts disclosed by the buyers' survey cannot relieve the seller of his warranties of title for three, independent reasons. First, the placement of the rear-yard fence on the survey did not alert the buyers to the neighbors' adverse possession claim because that fence was installed by the previous owner of the Popchoi lot, not the neighbor, and the disputed strip of land extended far beyond the terminus of the fence, which covered less than half the disputed boundary. C/L 5, CP 151-52; Tr. Ex.'s 14, 102. In addition to the small portion of land between the lot line and the fence, the Edmonsons claimed to adversely possession a strip of land along over 80feetof common border, along the Popchois' side yard and front yard, where there was no fence at all, just grass merging the two lots. Summary Judgment Order, Tr. Ex. 18; photos, Tr. Ex. 108 (Exhibit 5).

Second, a buyer's knowledge of a possible title defect does not relieve the seller of any warranties of title, as a matter of law. ***Foley v. Smith,*** 14 Wn. App. 285, 539 P.2d 874 (1975), which held that the purchaser's knowledge of an outstanding potentially superior claim to the land does not defeat the purchasers' right to recover for breach of the warranty of title. The ***Foley*** court held that the seller's warranty obligation extends to both known and unknown claims and that the seller's duty to defend the title includes rightful claims, as well as wrongful claims. C/L 3, CP 151.

Third, the Trial Court correctly ruled that closing the sale after receiving the information disclosed by the survey did not constitute a knowing and voluntary waiver of the buyers' right to enforce the statutory warranties. C/L 11, CP 154. Appellant does not challenge any Findings of Fact or Conclusions of Law.

II. COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR

The Trial Court ruled correctly in:

A. Concluding that the seller, Csaba Kiss, had breached his covenant to defend the Popchois' title from their neighbor's adverse possession claim where the Popchois' properly tendered the defense of the adverse possession claim to Csaba Kiss, but Csaba Kiss refused to defend the claim, demanding instead, without investigation, that the Popchois agree to convey the disputed property to the claimants in return for a partial refund of their purchase price, because that course of action was less expensive for Csaba Kiss than defending the title. C/L 2-5, CP 151-52; Kiss V.P. 25-26.

B. Concluding that closing the sale after receiving a pre-purchase survey that showed an unidentified cyclone fence in the back yard of the sale residence, adjacent to, but not directly on, the purchase lot's south property line was not conduct unequivocally evidencing a knowing and voluntary waiver of the seller's statutory warranties of title as regards the neighbor's adverse possession claim. C/L 11, CP 154

C. Ruling that the seller could not be excused from his warranty of title covenants by the Popchois' possible awareness that the fence shown on a pre-sale survey might indicate a potential adverse possession claim because the seller's warranty obligation extends to both known and unknown defects and because, under Washington Law, the buyer's knowledge of an outstanding potentially superior claim to the land does not defeat the purchasers' right to recover for breach of the warranty of title. C/L 3, CP 151.

III. COUNTERSTATEMENT OF ISSUES RELATED TO ASSIGNMENTS OF ERROR

Respondents hereby designate the following issues:

A. Does the substantial evidence standard of review apply where the appellate court is reviewing a trial court's decision after a full trial on the merits, with live witnesses, followed by entry of Findings of Fact and Conclusions of Law? (Related to Assignments: ALL)

B. Did the trial court properly reject the seller's claim that he had a right to condition his duty to defend the Popchois' title on the Popchois' consent to conveyance of the disputed land to the claimant and acceptance of a partial refund of the purchase price, where the seller had performed no investigation of the merits of the claimant's adverse possession claim and the seller testified that he imposed these conditions only because it was less expensive for seller than defending the buyer's title? (Related to Assignment A)

C. Did the trial court correctly rule that the seller's duty to defend the buyer's title is not limited to wrongful claims and does not include the right to compromise the buyer's title, in breach of seller's warranties of seisin and of quiet enjoyment? (Related to Assignment A)

D. Did the trial court correctly rule that a seller is not entitled to condition performance of his duty to defend the buyer's title on the buyer's consent to convey the disputed property to the claimant and settle for a damages claim against the seller, where the seller admitted that he conducted no investigation to ascertain the merits of the adverse possession claim and admitted that he imposed these conditions solely because it was less expensive for the seller than defending the buyers' title. Kiss V.P. 25-26; F/F 16, CP 145. (Related to Assignment A)

E. Did the trial court properly reject Csaba Kiss's defense that the Popchois' possible knowledge of a title defect released the seller from his the covenants of title, reasoning that the seller's warranty obligations extend to both known and unknown defects and that the buyer's conduct in closing the sale after receiving the survey was not inconsistent with anything other than waiver of the seller's covenants of title? (Related to Assignment B)

F. Did the trial court correctly reject Csaba Kiss's defense that the Popchois' possible knowledge of a title defect excused the seller from his statutory covenant to defend the buyer's title because, under ***Foley v. Smith,*** 14 Wn. App. 285, 539 P.2d 874 (1975), the buyer's knowledge of an outstanding potentially superior claim to the land does not defeat the buyer's right to recover for breach of the warranty of title. C/L 3, CP 151. (Related to Assignment C)

IV. COUNTER-STATEMENT OF THE CASE

A. Csaba Kiss is an Experienced Real Estate Investor, Who Bought the Residential Lot for Investment and Sold it to the Popchois, Knowing That Ivan Popchoi was a Residential Builder, Who Intended to Build a Large House on the Lot For Sale.

Mr. Kiss is a licensed real estate agent and real property investor, who purchased the property for investment about a year before selling it to Mr. and Mrs Popchoi. F/F 1, CP 141. Csaba Kiss has been a licensed real estate agent for over 20 years, is an experienced real property investor, and testified that he is familiar with the warranty obligations imposed by a statutory warranty deed and has attended seminars addressing those obligations. F/F 3, CP 141.

Ivan Popchoi is a residential builder who purchased the Bellevue property in May 2006 for $575,000, for the purpose of tearing down the small older house and replacing it with a large, premium quality home which, Mr. Popchoi testified, has a fair market value of approximately $2,000,000. F/F 2,

CP 141. Mr. Kiss testified that he knew that Mr. Popchoi intended to build a house on the property for resale. ***Id.***

The Popchois needed to sell the home immediately after completion of construction in August or September 2007 because they needed to spend the profits on expenses relating to a second upscale home being built in 2007-08 and because they could not afford the $11,000/month mortgage payment after construction was replaced completed. V.P. 54[2]

B. Ivan Popchoi Had a Survey Prepared Before Buying the Lot, to Determine the Boundaries for the New Residence, Which Disclosed a Fence Along Part of the South Boundary.

On November 11, 2005, before buying the Kiss lot, Ivan Popchoi had a survey done to mark the corners of the property for later construction. The Record of Survey (Tr. Ex. 102) shows the southern boundary line and shows that a cyclone fence enclosed the back yard of the existing home, extending along the western half of the property's southern boundary line. F/F 4. The Record of Survey showed no structures along the eastern half of the Popchois' southern boundary. Photographs entered into evidence as Trial Exhibit 108 show that both lots had grass along approximately the eastern half of the

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Trial testimony was taken during two days, with Ivan Popchoi and David Williams testifying on December 15, 2008 and Csaba Kiss testifying on January 8, 2009. The VRP consists of one volume for December 15, 2008 and a second volume for January 8, 2009. Unfortunately, the court reporter's pagination ofvolume 2 starts over with page 1. So that record references are clear, all references to January 8, 2009 testimony will be denominated "Kiss VRP [page number]".

property line, without any structure demarcating the boundary line between them. F/F 4, CP 141-42.

The Record of Survey showed a back yard fence on the Popchoi lot extending east to west along the south boundary of the back yard, a few inches north of the southern boundary line at its east end, continuing along the south boundary to one foot north of the southwest corner of the Popchois' lot at its west end. F/F 5, CP 142. Csaba Kiss testified that he was aware of the property's rear yard fence and believed that it was on the property's southern property line, but had done nothing to verify that. F/F 5, CP 142.

1. The Back Yard Fence on the Popchois' Lot Was Not an "Encroachment" Because the Fence was Erected by the Previous Owner of the Popchoi Lot.

Appellant erroneously mischaracterizes the back yard fence shown on the Popchois' survey was an "encroachment" that the Popchois had an obligation to disclose to their seller. Appellant's brief at 5, 17. That is incorrect. In fact, the referenced rear yard fence was erected by Kay H. Davis, a previous owner of the Popchoi lot, who replaced the original wood fence in 1983 with the current chain link fence. Edmonsons S. J. Motion, CP 38, supported by Decl. of Kay H. Davis in Support of Plaintiffs' Motion for Summary Judgment, ¶¶ 5-7; CP 208-09. Appellant had no reason to assume that the fence belonged to the Edmonsons. Csaba Kiss testified that

he was aware of the fence before the Popchois' bought the lot and had no idea who had built it. Kiss V.P. 35-40. Appellant's claim that the Popchois' violated a duty to advise their seller of a fence encroachment shown by their survey fails as a matter of fact and law because the fence was not an encroachment.

C. *The Foundation of the Popchoi's New House was Placed 5 Feet from the South Property Line, in Compliance With Plans Approved by the City of Bellevue.*

Shortly after the sale closed in May 2006, Ivan Popchoi's crew started tearing down the existing house. F/F 6, CP 142. The City of Bellevue approved plans calling for the foundation of the new home to be placed 5 feet from the lot's southern boundary. Bellevue requires a 5 feet minimum side yard set back. An "As Built" house foundation survey shows the 5 feet side yard setback of the new house. Tr. Ex. 15.

D. *Immediately After the Edmonsons' Attorney Notified the Popchois of the Adverse Possession Claim, the Popchois' Attorney Notified Csaba Kiss by Letter of His Warranty Duty to Defend the Popchois' Title.*

Jim and Ilene Edmonson own and live in the home on the residential lot immediately adjacent to the Pophoi lot's southern border. By letter dated August 18, 2006, (Tr. Ex. 1) the Edmonsons' attorney, Joshua Sundt, notified the Popchois that the Edmonsons claimed to ownership by adverse

possession of a strip of land on the Popchois' lot immediately north of their common border. F/F 7; CP 142.

The Popchois retained attorney David Williams,who notified Csaba Kiss of the Edmonsons' adverse possession claim by letter dated August 31, 2006. Tr. Ex. 2. Mr. Williams's letter notified Mr. Kiss of his Warranty of Seisin and demanded that Mr. Kiss or his attorney immediately contact the Edmonsons and obtain a quit claim deed from them conveying the Popchois any Edmonsons interest in the Popchois' lot. ***Id.***

E. The Popchois' Attorney Notified Csaba Kiss Repeatedly of Substantial Damages That the Popchois Would Suffer if Mr. Kiss Breached His Warranty of Title, Including Delay Damages and a Side Yard Set Back Violation.

David Williams' August 31, 2006 letter to Csaba Kiss notified Mr. Kiss that the Edmonsons' adverse possession claim "calls into question my clients' ability to site the intended single family residence on the property and delays their ability to continue the development." Tr. Ex. 2. Specifically, the Popchois had already delayed pouring the concrete foundation for the new residence, the south side of which located the minimum 5 feet from the common property line with the Edmonsons. ***Id.*** Mr. Williams warned Mr. Kiss that "time is of the essence" in acting to resolve the Edmonsons' claim. Tr. Ex. 2. F/F 8; CP 143.

The Popchois' attorney wrote to Mr. Kiss again on September 6, 2006, notifying him that the Popchois could not delay pouring the home's foundation past September 11, 2006 because as each day of delay cost them substantial money. Tr. Ex. 3. F/F 9, CP 143. The attorney's letter advised Mr. Kiss that "all consequences of any failure to act on your part rest solely with you." Tr. Ex. 3.

F. Csaba Kiss and the Popchois' Attorney Testified That Each had Unsuccessfully Spoken to Mrs. Edmonson About Withdrawing Her Claim.

Mr. Kiss testified that he met with Irene Edmonsons a few times to try to resolve their claim informally, but the Edmonsons would not accept any of Mr. Kiss' proposals. F/F 10; CP 143. The Popchois' attorney, David Williams, testified to his efforts to persuade the Edmonsons, through their attorney, to settle their claim by accepting an easement, by selling their claimed real property interest and by other terms. F/F 11, CP 143. Mr. Williams was unsuccessful, as well. ***Id.*** By letter dated October 6, 2006, the Popchois' attorney notified Mr. Kiss that the Edmonsons had rejected all of his efforts to resolve their adverse possession claim, including an offer to buy the strip of land. Tr. Ex. 4; F/F 12, CP 143-44.

G. The Popchois' Attorney Warned Csaba Kiss That The Edmonsons' Title Claim Would Impair the Popchois' Title, Preventing Them From Conveying the Residence After Construction was Completed.

Mr. Williams warned Csaba Kiss in his October 6, 2006 letter that the Edmonsons' intransigence would prevent the Popchois from being able to sell their residence once construction was completed because they could not convey clear title. Tr. Ex. 4; F/F 12, CP143-44. He reminded Mr. Kiss that the Popchois needed to sell the residence shortly after completing construction, so Mr. Kiss needed to have the title cleared before then. ***Id.*** He again urged Mr. Kiss to retain an attorney to take the necessary steps to cure his breach of warranty within the necessary time frame. ***Id.***

Mr. Kiss testified that, after receiving the October 6, 2006 letter, he retained attorneys Melanie Leary and Matthew Davis to represent him in connection with the Popchois' warranty claims. F/F 12, CP 143-44.

H. The Edmonsons Filed Suit and Recorded a Lis Pendens on March 7, 2007, Causing Severe Damage to the Popchois' Construction Project – Their Lender Froze Construction Draws, Delaying Project Completion by Six Months and the Lis Pendens Prevented Marketing the Home Until September 2008, After the Real Estate Recession Had Destroyed the Market.

The Edmonsons filed their adverse possession lawsuit on March 7, 2007 and recorded a Lis Pendens against the Popchoi lot on April 19, 2007. Tr. Ex. 16. The Popchois' construction lender froze construction draws, preventing Ivan Popchoi from paying his subcontractors, who then went to work for other contractors. VRP 56-58; F/F 28; CP 149. With the help of an

attorney, the draws were resumed two months later, but Mr. Popchoi then had to hire new subcontractors during the busiest building months of 2007. ***Id.*** Altogether, project completion wasdelayed six months, from September 2007 until March 2008. ***Id.*** The Popchois' construction loan was set to terminate in September 2007, on the projected completion date. VRP 38. The Popchois had planned to finish the project by September 2007 and actively market the home starting in September 2007. VRP 53.

Failure to complete the project by the September 2007 completion date set by their lender caused the Popchois to suffer a financial penalty. VRP 38. Having to obtain an extension of the loan caused them an increase in loan rate and additional interest payments, starting in October 2007. VRP 38-40. The market for luxury homes was hot in September 2007 and was still good in March 2008, when the certificate of occupancy was finally obtained. VRP 57, 97. But the Popchois were prevented from marketing the home by the lis pendens. VRP 58-60, 68; Tr. Ex. 16.

The lis pendens was finally lifted in August 2008, permitting the Popchois to begin marketing the $2,000,000 home in September 2008. ***Id.;*** VRP 97-98. By then, however, the failure of the national financial markets and the national freeze on real estate loans had destroyed the market for

luxury homes. Although many potential buyers wereinterestedinthehome, no one could get financing. VRP 96-98. As of the December 2008 trial date, the Popchois had not sold their house and were continuing to incur thousands of dollars a month in mortgage interest payments that they lacked resources to pay. V.P. 65-68.

I. The Popchois Could Not Simply "Cave in" by Conveying the Disputed Land to the Edmonsons Because The Conveyance Would Cause The Lot to Incur Two Code Violations and Would Allow Their Lender to Exercise its Due-on-Sale Clause.

Nor could the Popchois just "cave in" to the Edmonsons demand that they convey the disputed land to the Edmonsons because the land was security for their construction loan. The Popchois needed their lender's agreement to any such conveyance. VRP 251. Their lender had frozen construction draws because of being named in the lawsuit and out of concern that loss of the disputed land would reduce their lot size to less than the minimum square footage required by Bellevue Code and would reduce their lot's side-yard set back to less than 3.5 feet, creating a second Code violation. VRP 60, 83-85. Conveying the disputed land to the Edmonsons without lender consent would have allowed the Popchois' lender to exercise its due-on-sale clause, forcing the Popchois to pay off the loan or lose the project.

VRP 245. According to the Popchois' real estate attorney:

> Simply conveying that disputed property made the Popchois' owners of a non-conforming lot, it also would have allowed their construction lender to exercise the due on sale clause at or at least arguably and we know that the lender cut off . . . their construction draws, so . . . any suggestion that you could have simply rolled over ... just wouldn't have worked – its simplistic, way too simplistic in this matter.

David Williams testimony, V.P. 250-51. The Popchois were very concerned about the action that their lender might take if they tried to give away the disputed land. V.P. 98. As they could not "cave in" the Popchois tendered defense of the Edmonsons' claim, to their seller, Csaba Kiss, who had warranted the title by executing a Statutory Warranty Deed.

J. The Edmonsons Filed Their Adverse Possession Lawsuit on March 7, 2007; the Popchois' Attorney, David Williams, Immediately Tendered the Defense to Csaba Kiss and Demanded That He Hold the Popchois' Harmless.

The Edmonsons filed their adverse possession lawsuit on March 7, 2007. By letter dated March 20, 2007 to attorney Melanie Leary, David Williams notified Mr. Kiss of the Edmonsons' lawsuit, formally tendered defense of the Edmonsons' claims to Mr. Kiss and demanded that he indemnify the Popchois:

> This is a tender of defense and demand to hold my clients harmless and indemnify them from any loss or damages, including attorney fees, expenses and other costs, arising out of this lawsuit. Since you are already familiar with this transaction, please advise acceptance within ten (10) days of

this letter's date. If your response is negative, we will take all appropriate action against Mr. Kiss.

Tr. Ex. 6. F/F 13, CP 144.

K. Matthew Davis, Csaba Kiss's Attorney, Notified David Williams on April 27, 2007 That Csaba Kiss's Acceptance ofthe TenderofDefense Was Conditioned On the Popchois' Acknowledgment That They Would "Retained No Rights" That RCW 64.04.030 Confers Only On the Grantor.

By letter dated April 27, 2007, Mr. Kiss's attorney, Matthew Davis, notified David Williams that Mr. Kiss "conditionally accepted" tender of "the right" to defend the Edmonsons' adverse possession claim, conditioning that acceptance on receipt of the Popchois' acknowledgment that they did not intend to retain any rights that RCW 64.04.030 confers only on the grantor and which grantees are not entitled to possess. Tr. Ex. 7; F/F 14, CP 144. RCW 64.04.030 states the terms and form of a warranty deed and obligates the grantor of a warranty deed to defend the buyer's title.[3] ***Mellor v. Chamberlin,*** 34 Wn. App. 378, 384, 661 P.2d 996 (1983).

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3 RCW 64.04.030 states in the following 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 premisestherein 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." *(Emphasis added.)*

L. John Hathaway Substituted as the Popchois Attorney on April 18, 2007, and Furnished Matthew Davis With the Requested Acknowledgment by Letter Dated May 2, 2007.

Attorney John W. Hathaway substituted as the Popchois' counsel of record on April 18, 2007 and by letter to Matthew Davis dated May 2, 2007 provided the requested acknowledgment:

> Please accept this letter as confirmation to Mr. Kiss that the Popchois do not intend to retain any rights that RCW 64.04.030 confers only on the grantor or rights that RCW 64.04.030 states that the grantees are not entitled to possess.

Tr. Ex. 9; F/F 15, CP 144-45.

1. Mr. Hathaway's May 2, 2007 Letter Also Advised Csaba Kiss That The Popchois' Damages Included Diminution in Land Value, Impairment of Marketability, and Construction Delays Because the Edmonsons' lis pendens Had Caused Their Construction Lender To Freeze Draws.

Mr. Hathaway's May 2, 2007 letter also notified Mr. Kiss that the Popchois were suffering substantial damages. If the Edmonsons' adverse possession claim succeeded, the square feet of the Popchois' lot would be reduced below the minimum lot size required by the City of Bellevue, thereby impairing marketability. The side yard setback would also be reduced below the 5 feet minimum required by Bellevue ordinances. The letter set out the damages that the Popchois expected to assert against Mr. Kiss if the

Edmonsons' claims were not resolved:

> As you stated in your letter, should the Edmonsons prevail, the Popchois are entitled to recover damages from Mr. Kiss for breach of warranties. Those damages include the diminution in value of the property caused by any property conveyed to the Edmonsons by adverse possession. Those damages also include any impairment in marketability of the property caused by loss of the adversely possessed land. Finally, Mr. Kiss's breach of warranty subjects him to liability for the Popchois' consequential damages, which may already include delays in construction because their lender has frozen construction draws and may include loss of their construction loan altogether if the delays continue.
>
> The construction lender also has expressed concern that subtracting the disputed land from the Popchois' lot will reduce the lot size to 8465 square feet, which is below the 8500 square feet minimum established by R-1 or R-4 zoning and by the plat. Finally, the loss of the disputed land will move the Popchois' southern boundary north by approximately 1 ½ feet, reducing the side yard set back for their new residence to 3 ½ feet, which is less that the 5 feet minimum required by land use law. The Popchois' damages caused by these code violations have not yet been determined.

Tr. Ex. 9. F/F 15, CP 144-45 (*Emphasis Added*).

M. Csaba Kiss Testified by "Conditionally" Accepting the Popchois' Tender of Defense, He Demanded the Right to Convey the Disputed Land to the Edmonsons and to Limit the Popchois' Remedy to Refund of Part of the Purchase Price.

Csaba Kiss testified that, by "conditional acceptance" of the Popchois' tender of defense, he meant that he would defend the adverse possession claim only if the Popchois assigned to Mr. Kiss the right to concede the validity of the Edmonsons' claim, convey the disputed strip of

land to the Edmonsons and limit the Popchois' remedy to damages for his breach of warranty of title, based on per square foot price paid for the conveyed land. F/F 16, CP 145.

Mr. Kiss testified that he imposed these conditions on his acceptance of the Popchois' tender of defense because conveying the disputed property to the Edmonsons and then refunding the amount paid for the conveyed land was less expensive for Mr. Kiss than the cost to defend the Popchois' lawsuit. F/F 16, CP 145. Mr. Kiss testified that he had authorized Matthew Davis to write his April 27, 2007 letter conditionally accepting the Popchois' tender of defense on the understanding that the conditions for accepting the tender included the right to concede the validity of the Edmonsons' claim, to convey the disputed strip of land to the Edmonsons and to limit the Popchois' remedy to damages for his breach of warranty of title, based on per square foot price the Popchois' paid for the conveyed land. F/F 16, CP 145. Csaba Kiss testified that the Popchois never accepted the conditions that he had imposed on his acceptance of their tender of defense. F/F 19, CP 146.

N. Neither Csaba Kiss Nor His Attorney Conducted Any Investigation of the Merits of the Edmonsons' Claim; Nor Took Any Action to Defend The Popchois' Title.

Mr. Kiss testified that he did not personally conduct any

investigation or research into the merits of the Edmonsons' adverse possession claim. F/F 17, CP 145-46. Mr. Kiss testified that he retained attorneys Melanie Leary and Matthew Davis to represent him in defending the Popchois' claims and relied upon them to take whatever action they deemed appropriate. ***Id.*** Mr. Kiss submitted no evidence that, as of April 27, 2007, his attorney had conducted any investigation of the merits of the Edmonsons' adverse possession claim. ***Id.*** Mr. Kiss submitted no evidence that he or his attorneys ever notified the Popchois or the Popchois' attorney of the results of any investigation of the merits of the Edmonsons' adverse possession claim. F/F 18, CP 146. Mr. Kiss did not submit any evidence of any expenses, legal fees or investigator fees that he had paid to investigate or research the merits of the Edmonsons' claims. ***Id.***

Mr. Kiss's only testimony was that he had conditioned acceptance of the tender of defense on the Edmonsons' assignment of the right to convey the disputed property to the Edmonsons and refund the price paid for the conveyed land because that was the least expensive resolution of the dispute for him. F/F 18, CP 146.

Mr. Kiss submitted no evidence that his attorneys took any steps to defend the Popchois from the Edmonsons' adverse possession claim. F/F

19. The court file in this action does not contain any pleading that Mr. Kiss's attorneys filed on the Popchois' behalf. Kiss's attorneys did not appear in the lawsuit on behalf of the Popchois. F/F 19, CP 146.

O. *Matthew Davis Appeared on Behalf of Csaba Kiss in the Edmonson Lawsuit in Response to the Popchois' Third PartyComplaint Against Csaba Kiss, But Took No Action to Participate in Defending the Adverse Possession Claim.*

On May 23, 2007, Matthew Davis accepted service of the Popchois' Third Party Complaint and Summons asserting their breach of warranty claims against Csaba Kiss. F/F 20, CP 146. Matthew Davis subsequently appeared in the lawsuit on behalf of Csaba Kiss, but continued taking no action to defend the Popchois against the Edmonsons' claim or to attempt to settle the claim. ***Id.***

P. *The Popchois' Attorney Investigated the Edmonsons' Claim and Defended the Popchois' Title.*

The time records of the Popchois' attorney, John Hathaway, show that he investigated and defended the adverse possession claim. Tr. Ex. 19; F/F 21, CP 146-47. He investigated the Edmonsons' claim, examined competing surveys, questioned the surveyor, examined and photographed the premises, and took the deposition of Mrs. Edmonson on July 10, 2007. The Edmonsons served interrogatories and document requests to Mr.

Popchoi and to Mrs. Popchoi, which Mr. Hathaway had to devote time to assisting the Popchois prepare responses. Tr. Ex. 19, CP 146-47. The time records show that, to ascertain the factual basis for the Edmonsons' claim, Mr. Hathaway prepared and served interrogatories and document requests on the Edmonsons. ***Id.*** Mr. Hathaway also initiated, prepared briefing and attended a mediation to negotiate asettlementof the Edmonsons' claim. Tr. Ex. 19. F/F 21, CP 146-47.

Q. The Edmonsons Served Their Summary Judgment Motion on Both the Popchois' Attorney and Csaba Kiss's Attorney, But Csaba Kiss's Attorney Made No Effort to Respond.

The Edmonsons moved for summary judgment on their adverse possession claim, serving all counsel of record, including Matthew Davis. F/F 22, CP 147. Csaba Kiss's attorneys did nothing to acknowledgethe motion. ***Id.*** Mr. Hathaway was required to perform the factual and legal research required to respond to the motion. ***Id.*** The court file shows that he prepared a substantial responding memorandum, opposing the motion and submitted declarations, with exhibits. Mr. Hathaway also argued in opposition to the motion on July 18, 2008. ***Id.*** Mr. Davis did not file any pleadings or attend the oral argument. ***Id.***

R. Judge Steven Gonzalez Granted Summary Judgment on July 18, 2008, Quieting Title in the Edmonsons by Adverse Possession to 165 Feet of the Popchois' Land.

Judge Steven Gonzalez heard the contested summary judgment motion on July 18, 2008, and granted the Edmonsons' motion. The Summary Judgment Order conveyed 165 square feet of the Popchois' land to the Edmonsons. Tr. Ex. 18; F/F 22, CP 147.

S. *The Popchois' Claims Against Csaba Kiss for Breach of Warranties of Title Were Tried on December 15, 2008 and January 8, 2009 Before King County Presiding Judge Bruce Hilyer.*

The Popchois' breach of warranty claims against Csaba Kiss proceeded to Trial before the Honorable Bruce Hilyer on December 15, 2008 and January 9, 2009. Judgment, CP 174-75. Witnesses consisted of Ivan Popchoi, attorney David Williams, and Csaba Kiss.

T. *The Trial Court Held That Csaba Kiss Had Breached His Covenant to Defend the Popchois' Title and Was Liable to the Popchois for Damages, Including Reimbursement of the Reasonable Attorneys Fees Spent Defending Their Title.*

The Trial Court held that, by selling the property to the Popchois by statutory warranty deed, Csaba Kiss made 5 covenants against title defects, that one of these covenants is the duty to defend the grantee's title. C/L 2, CP 151. Relying upon ***Mastro v. Kunakichi Corp.*** 90 Wn. App. 157, 162-63, 951 P.2d 817 (1998), the Trial Court also held that, as a seller who refused to defend the grantee's title after receiving notice and tender,

Csaba Kiss was liable to his grantee for breach of warranty, which includes contract damages and, as additional damages, reimbursement of the grantee's reasonable attorneys fees spent defending the grantee's title. C/L 2, CP 151

1. The Trial Court Rejected Csaba Kiss's Claim That He Could Condition His Duty to Defend the Popchois' Title On The Popchois' Consent To Convey the Disputed Land to The Claimant, Without Investigation, and Accept a Partial Refund of the Purchase Price.

The Trial Court concluded that Csaba Kiss did not have the right, at the outset, to condition acceptance of the defense of the Popchois' title on the Popchois' agreement to convey the disputed land to the Edmonsons and accept a refund of the portion of the purchase price that they had paid for the disputed land. C/L 5, CP 151-52. The Trial Court reasoned that Csaba Kiss had imposed these conditions shortly after the defense was tendered, without having investigated the merits of the adverse possession claim, based solely upon his consideration that it would cost him less to convey the Popchois' land and give them a partial refund than to defend their title. C/L 5, CP 151-52; V.P. 25-26.

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2. *The Trial Court Ruled That a Seller Is Not Entitled to Insist That the Buyer Agree to Convey Disputed Property to the Claimant Where the Seller Has Conducted No Investigation and Has No Basis to Conclude in Good Faith That the Buyer Has No Defense to the Claim.*

The Trial Court ruled that the seller is not entitled to insist that the buyer waive the right to defend the claim and agree to convey the property to the claimant unless the seller has conducted a reasonable investigation, informally and through formal discovery, and from the information so gained, reasonably concluded that the buyer has no good faith defense to the adverse possession claim. C/L 6, CP 152. To justify abandoning any defense, the seller would have to present the buyer with information demonstrating the lack of any defense to the claim. ***Id.*** Csaba Kiss submitted no evidence that he or his attorneys conducted such an investigation, or engaged in any formal discovery of the Edmonsons' claim. ***Id.*** Mr. Kiss submitted no evidence that he or his attorneys ever presented facts to the Popchois demonstrating that there was no defense to the Edmonsons' adverse possession claim. ***Id.***

The Trial Court ruled that the only evidence before the Court was

Csaba Kiss's testimony that he conditioned his "acceptance" of the tender of defense upon the Popchois agreement to abandon their right to a defense and to accept a partial refund of their purchase price solely because that course of action was less expensive for Csaba Kiss than the cost of defending the Popchois' title. ***Id.*** Csaba Kiss's refusal to defend the Popchois' title unless they agreed to these conditions therefore breached his covenant to defend their title against the Edmonsons adverse possession claim. ***Id.***

3. David Williams Testified That The Edmonsons' Adverse Possession Claim Was Weak and The Trial Court Ruled That the Merits of the Edmonsons' Adverse Possession Claim Were Not Clear Before the Motion for Summary Judgment.

Although the Edmonsons' adverse possession claim prevailed on summary judgment, the Trial Court held that the duty to defend cannot be based solely on the outcome of the claim. C/L 5, CP 151-52. The Popchois' initial attorney, David Williams, advised the Trial Court that, in his opinion, the Edmonsons could not prove their adverse possession claim, had it gone to trial. V.P. 243-45. The Trial Court ruled that the merits of the Edmonsons' claim was by no means obvious at the outset of the lawsuit. C/L 5. The fence upon which they relied extended along slightly less than half of the boundary line, while grass covered both lots for the remainder of the

properties. ***Id.*** The parties were unaware of what evidence the Edmonsons would submit to provetheelementsof adverse possession and to defeat the defenses of acquiescence and the like. ***Id.***

4. The Trial Court Rejected Csaba Kiss's Defense that the Popchois' Possible Knowledge of a Title Defect Could Excuse the Seller From the Covenants of Title Imposed by the Statutory Warranty Deed.

a. Seller's Warranty Obligation Extends to Known and Unknown Defects.

The Trial Court ruled that Csaba Kiss's waiver argument was without merit, based on the holding of ***Foley v. Smith,*** 14 Wn. App. 285, 539 P.2d 874 (1975), that the purchaser's knowledge of an outstanding potentially superior claim to the land does not defeat the purchasers' right to recover for breach of the warranty of title. C/L 3, CP 151. The Trial Court noted the ***Foley*** court's holding that the seller's warranty obligation extends to both known and unknown claims and that the seller's duty to defend the title extends to includes rightful claims, as well as wrongful claims. C/L 3, CP 151, 154. The Trial Court held that, under ***Foley,*** the buyers' knowledge of a potential claim does not affect their right to assert claims based on breach of warranties given by statutory warranty deed. ***Id.***

b. Closing the Sale After Receiving the Survey Was Not Conduct Inconsistent With Anything Other Than Waiver.

The Court also rejected Csaba Kiss's defense that the Popchois waived the right to assert the "defect in title" caused by the adverse

possession claim by closing the sale after receiving the Record of Survey showing that the back yardfence was not directly on the property line. C/L 11, CP 154. The Trial Court noted that waiver requires evidence of a knowing and voluntary waiver of a known right and that waiver by conduct requires conduct that is inconsistent with anything other than waiver of the known right. C/L 11, CP 154. The Trial Court determined that closing the sale after receipt of the Record of Survey showing that the back yard fence on the Popchoi lot is not directly on the south property line is not conduct inconsistent with any decision than other waiver of the Popchois' right to rely on the warranties in the statutory warranty deed. C/L 11, CP 154.

5. *The Trial Court Rejected Csaba Kiss's Defense Based On Marketable Title Language in the Purchase and Sale Agreement, Which Language Merged into the Statutory Warranty Deed, Which Imposes Warranties of Title on the Seller by Statute.*

The Trial Court also rejected the seller's argument that language in the purchase and sale agreement defining marketable title somehow limited the warranties provided by the statutory warranty deed, reasoning that these warranties are provided by statute, unaffected by the terms of the purchase and sale agreement, which terms merged into the deed when the sale was closed. C/L 13, CP154.

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U. The Trial Court Held That Csaba Kiss Was Liable to Refund The Popchois the Purchase Price Paid for the 165 Square Feet of Land Conveyed by Summary Judgment to the Edmonsons, Plus Interest.

The Popchois claimed at trial that, pursuant to the obligations imposed on Csaba Kiss by the statutory warranty deed (Tr. Ex. 11), Mr. Kiss was liable to them for the 165 square feet conveyed to the Edmonsons, plus interest. F/F 24, CP 147. Ivan Popchoi testified that the Popchois paid Csaba Kiss a purchase price of $575,000 for the lot. ***Id.*** The Popchois sought damages for the 165 square feet of land that they had purchased from Csaba Kiss that the Court later held was owned by the Edmonsons by adverse possession. Based on the $575,000 purchase price and the 8630 square feet lot size, they claimed thatCsaba Kisswas liable to refund them $10,993.63 for the 165 sq. feet owned by the Edmonsons. F/F 26, CP 148.

The POPCHOIS also sought a judgment against Csaba Kiss for interest on the $10,993.63 that they had paid him for land that he did not own, because Mr. Kiss wrongfully had the use of the Popchois' money from the May 4, 2006 closing date (Tr. Ex. 11) until the date that judgment is entered in this lawsuit. The per diem rate for interest at 12% per annum is .033% or $3.628. F/F 27, 148-49.

The Trial Court held that Csaba Kiss was liable to the Popchois for $10,993.63, plus $3,609.86 interest from May 4, 2006 to January 23, 2009, with interest accruing at the per diem rate of $3.628. C/L 8, 9, CP 153.

V. *The Trial Court Held That Csaba Kiss Was Liable to Reimburse the Popchois for The Attorneys Fees and Costs That They Had Paid John Hathaway to Defend Their Title.*

The Trial Court held that Csaba Kiss was liable to the Popchois to reimburse them for the reasonable fees and costs paid to defend to defend their title. C/L 7, CP 152. The Court found that the $30,281.90 in fees and costs paid by the Popchois and supported by the time records contained in Trial Exhibit 19 was reasonable and that judgment should be entered in favor of the Popchois and against Csaba Kiss for $30,281.90. C/L 7, CP 152.

W. *The Trial Court Declined to Award Damages Based on Impairment of Marketability Because the Amount of Damage Could Not Be Ascertained With Certainty*

Ivan Popchoi testified that the lot, which had contained 8,630 square feet, was reduced to 8465 square feet after entry of summary judgment conveying 165 square feet to the Edmonsons. F/F 24, CP 147; Tr. Ex. 18. The resulting lot size is below the minimum 8500 square feet required by Bellevue's R-4 zoning code. F/F 24, COP 147. The removal of 165 square feet from the south side of the Popchois' lot also reduced the side yard set back to approximately 1.5 feet less than the 5 feet minimum setback required by Bellevue's land use ordinances. F/F 24, CP 147.

Ivan Popchoi testified that the City of Bellevue approved his building plans and issued a certificate of occupancy before entry of the summary judgment conveying part of the Popchois' land to the Edmonsons. ***Id.*** Ivan

Popchoi testified that although Bellevue considers the Popchoi lot to be a legal nonconforming use, the lot owner will be required to bring the set backs into conformity before it will issue a permit for any further new improvements. ***Id.*** In addition to diminution in the value of the land caused by reduction of the lot size and reduction of side yard set back, the Popchois claimed damages for construction delay and for excess construction costs. F/F 24, 25, 28, CP 147-48. The Trial Court found that these damages were either technical or the amount unsupported by sufficientevidence to establish the amount with any degree of certainty, and declined to award them. C/L 10, CP 153-54.

V. ARGUMENT

A. Standard of Review: The Substantial Evidence Standard of Review Applies to this Court's Review of the Trial Court's Findings of Fact and Conclusions of Law, Entered Following a Trial With Live Testimony.

Appellant erroneously argues that appellate review of the Trial Court's decisions is *de novo*. Appellant's Brief at 9. This is an appeal from a judgment entered after trial before a judge, who entered Findings of Fact and Conclusions of Law following a trial involving live testimony of witnesses. Accordingly, appellate review of the Trial Court's decisions is by substantial evidence:

> The standard used to review a trial court's findings of fact and conclusions of law is a two-step process. We must first

> determine whether the findings are supported by substantial evidence in the record. If so, we must next decide whether those findings support the conclusions of law.

Scott v. Trans-System, Inc., 110 Wn. App. 44, 48, 38 P.3d 379 (2002), *rev'd on other grounds*, 148 Wn.2d 701, 64 P.3d 1 (2003), *citing* ***Landmark Dev., Inc. v. City of Roy,*** 138 Wn.2d 561, 573, 980 P.2d 1234 (1999); accord ***Robblee v. Robblee,*** 68 Wn. App. 69, 75-76, 841 P.2d 1289 (1992).

The Court summarized this application of standard in ***Xieng v. Peoples Nat'l Bank:***

> In reviewing whether substantialevidence supports the trial court's findings of fact, this court determines "whether the evidence mostfavorable totheprevailing party supports the challenged findings." ***State v. Black,*** 100 Wn.2d 793, 802, 676 P.2d 963 (1984). A trial court's interpretation of disputed testimony must be upheld when any reasonable view supports its findings, "even though there may be other reasonable interpretations." ***Ebling v. Gove's Cove, Inc.,*** 34 Wn. App. 495, 501, 663 P.2d 132, review denied, 100 Wn.2d 1005 (1983). In addition, the reviewing court"may not usurp the functions of the judge . . . and reverse the judgment because the weight of testimony seems to be on the other side, or because . . . the judge believed some witnesses and disbelieved some others." ***Papac v. Mayr Bros. Logging Co.,*** 1 Wn. App. 33, 36, 459 P.2d 57 (1969).

63 Wn. App. 572, 581, 821 P.2d 520 (1991)

B. The Trial Court's Judgment Must Be Affirmed Because Appellant Has Not Assigned Error to Any of the Findings of Fact or To the Conclusions of Law.

Appellant has not assigned error to any of the Findings of Fact,

which this Court must therefore treat as verities on appeal. ***State v. Hill,*** 123 Wn.2d 641, 644, 870 P.2d 313 (1994); ***Standing Rock Homeowners Ass'n v. Misich,*** 106 Wn. App. 231, 238, 23 P.3d 520 (2001). The detailed Findings of Fact clearly support the Conclusions of Law. This Court therefore must affirm the Trial Court's judgment.

C. *The Seller by Statutory Warranty Deed Makes 5 Covenants, Including the Covenant to Defend Title, and A Seller Who Fails to Defend the Buyer's Title Is Liable to Pay the Buyer's Attorneys Fees Defending Title.*

The seminal case concerning Mr. Kiss's obligations is ***Mastro v. Kunakichi Corp.*** 90 Wn. App. 157, 162-63, 951 P.2d 817 (1998), in which the Court of Appeals held that the grantor by statutory warranty deed makes 5 covenants against title defects, one of which is "that the grantor will defend the grantee's title." 90 Wn. App. at162. A seller who refuses to defend the grantee's title after receiving notice and tender is liable to the grantee for breach of warranty. ***Id.*** at 166. The grantee is entitled to recover his damages and attorneys fees:

> Where covenantsunder the warranty deed are breached, an injured grantee is entitled to recover both damages for lost property or diminution in property value, see, e.g., ***Brown v. Carpenter,*** 99 Wash. 227, 229, 169 P. 331 (1917), and attorney's fees incurred in defending title. See ***Melior v. Chamberlin,*** 100 Wn.2d 643, 650, 673 P.2d 610 (1983).

90 Wn. App. at 163.

The Popchois' attorney properly notified Mr. Kiss of the obligation that the statutory warranty deed imposed on him to defend the Edmonsons' claim. Quoting an earlier decision, the ***Mastro*** Court set out the tender requirement as follows:

> [Tender is] equivalent to "vouching in", a common law device by which a defendant notifies another (1) of the pendency of the suit against him, (2) that if liability is found, the defendant will look to the vouchee for indemnity, (3) that the notice constitutes a formal tender of the right to defend the action, and (4) that if the vouchee refuses to defend, it will be bound in a subsequent litigation between them to the factual determination necessary to the original judgment.

90 Wn.App at 164-65. The Popchois' attorneys' March 20, 2007 letter to Csaba Kiss clearly satisfied the tender requirements stated by the ***Mastro*** Court. Csaba Kiss clearly breached his warranty to defend the Popchois' title, entitling the Popchois to judgment against Csaba Kiss for their legal expenses defending the Edmonsons' claim.

D. The Seller's Duty to Defend the Buyer's Title is Not Limited to Wrongful Claims and Does Not Include The Right To Compromise the Buyer's Title, in Breach of Seller's Warranties of Seisin and of Quiet Enjoyment.

1. Seller's Warranty of Title Imposes the Duty to Defend All Claims Against the Buyer's Title.

The warranty of seisin imposes a duty on seller to defend title against one who claims possession regardless whether the adverse claim is rightful or wrongful:

> Accordingly, we hold that a vendor breaches the covenant of seisin if, at the time of sale, an adverse claimant is actually in possession of all or a portion of the land conveyed, *whether his claim is rightful or wrongful.* Further, a vendee who successfully ejects such a claimant is entitled to recover from his vendor his expenses of ejectment, provided he gave prior notice to his vendor and demanded that the vendor prosecute the action.

Double L. Properties, Inc. v. Crandall, 51 Wn. App. 149, 156, 751 P.2d 1208 (1988)(*Emphasis added*).

Whether the claim is rightful or wrongful is generally decided by lawsuit between the claimant and the buyer:

> The warranty to defend is a future covenant that no lawful, outstanding claims against the property exist. *See* 6A Richard R. Powell, *Powell on Real Property* ¶900[2][d], [e] (Patrick J. Rohan, ed., 1991). Because breaching this future warranty occurs only where there is either an actual or constructive eviction under paramount title, *see Foley v. Smith,* 14 Wash. App. 285, 539 P.2d 874 (1975), **a third person's claim of superior right is usually established in a lawsuit between the grantee and the third party. 18 *Stoebuck* § 13.4, at 97.**

Mastro v. Kumakichi, 90 Wn. App. 157, 164, 951 P.2d 817 (1998)(*Emphasis added*). The seller has the duty to defend that lawsuit. The grantor of a statutory warranty deed has a duty to defend title even if the claimant's title is, in fact, superior:

> The obligation in a general warranty of title is not that the covenantor is the true owner, or that he is seized in fee with right to convey, but *that he will defend and protect* the covenantee against the *rightful* claims of all persons.' 7 Ruling Case Law,1144.

McDonald v. Ward, 99 Wash. 354, 358-359, 169 P. 851, 852-853 (1918)(Buyer constructively evicted from portion of seller's land possessed by railroad at time of conveyance by federal grant.)(*Emphasis added*)

2. *The Seller's <u>Duty</u> to Defend the Buyer's Title Does not Transfer to Seller the <u>Right</u> to Compromise the Buyer's Title, Thereby Forcing Buyer to Sue Seller for Damages.*

Mr. Kiss could not satisfy his duty to defend the Popchois' title by conditioning his performance on the buyers' granting him the right to convey the disputed property to the claimantand then answer to the buyer in a lawsuit for damages. The condition actually demands that the buyers grant the seller <u>permission</u> to breach his duty to defend the buyers' title (by conveying the buyers' land to the claimant) <u>and</u> to breach both his warranties of seisin and of quiet enjoyment (by losing title to the disputed land and by dragging buyers into a lawsuit with seller). The condition, in effect, requires the buyers to waive the seller's liability to them for breaching these warranties. By conceding the Edmonsons' superior title and forcing the Popchois to settle for damages in a lawsuit against him, Mr. Kiss was breaching both the warranties of seisin(ownership) and of quiet possession (protecting them from lawsuits over title).

A seller cannot lawfully condition performance of his statutory obligation to defend thebuyer'stitle on the buyers' agreement to permit the

seller to breach other warranties. From the buyers' perspective, the Kiss condition is legally the equivalent of refusal to defend because it accomplishes the same result: giving up ownership, without investigation and without any effort to defend their title, and leaving the Popchois with only a lawsuit against the seller for breach of warranty damages.

Conditioning performance of his duty to defend on the buyers' waiver of their warranty rights is wrongful because it is an attempt to insulate the seller from liability for breaching his warranties of seisin and of quiet enjoyment, as well as his duty to defend. Mr. Kiss's condition was just a complicated way of refusing to defend title after receiving notice of the Edmonsons' claim.

E. The Buyer's Awareness of Facts Suggesting a Possible Paramount Title Claim Does Not Excuse the Seller From His Warranty Obligations.

The Trial Court correctly found that Csaba Kiss's warranty obligation could not be affected the Popchois' Survey because, under ***Foley Smith,*** 14 Wn. App. 285, 539 P.2d 874 (1975), the purchaser's knowledge of an outstanding potentially superior claim to the land does not defeat the purchasers' right to recover for breach of the warranty of title. F/F 3, CP 141. The ***Foley*** court held that the seller's warranty obligation extends to both known and unknown claims and that the seller's duty to defend the title extends to includes rightful claims, as well as wrongful claims. 14 Wn. App. at 287.

F. The Trial Court Correctly Concluded That the Popchoi Survey was Insufficient to Establish Waiver of the Seller's Warranties, in Any Case.

Waiver requires evidence of a knowing and voluntary waiver of a known right and waiver by conduct requires that the conduct be inconsistent with anything other than waiver of the known right. ***John Doe v. Gonzaga Univ.,*** 143 Wn.2d 687, 711, 24 P.3d 390 (2001):

> Waiver is the intentional and voluntary relinquishment of a known right; it may be either express or implied. ***Jones v. Best,*** 134 Wn.2d 232, 241, 950 P.2d 1 (1998). To constitute implied waiver, there must be unequivocal acts or conduct evidencing an intent to waive; intent will not be inferred from doubtful or ambiguous factors. ***Wagner v. Wagner,*** 95 Wn.2d 94, 102, 621 P.2d 1279 (1980).

The Trial Court correctly held that closing the sale after receipt of the Record of Survey showing the existence of a back yard fence that is not directly on top of the south property line is not conduct inconsistent with any decision other than waiver of the Popchois' right to rely on the warranties in the statutory warranty deed. C/L 11, CP 154.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the TrialCourt and dismiss Csaba Kiss's Appeal.

DATED this 14th day of September, 2009.

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