

MAY 04 2012

COURT OF APPEALS NO. 300200

Consolidated with
No. 300218

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

JANICE COURCHAINE, et al.,

Plaintiffs/Respondents,

v.

COMMONWEALTH LAND TITLE INSURANCE et al.,

Defendants/Appellants

RESPONDENTS BRIEF

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I. STATEMENT OF THE CASE

On September 13, 2008, respondents (hereinafter Courchaine) entered into a purchase and sale agreement regarding real property commonly known as 13119 E. Cataldo Ave., Spokane, Washington. (RP 11; Tr. Ex. 3)¹

The property had an existing residence, which was in very poor condition. RP 10. However, the residence was advertised as having a large lot and suited Courchaine's purpose of purchasing the property to create a duplex, with each plaintiff occupying one unit. (RP 6, 7)

The size of the lot is 145 feet wide by 135 feet deep. (Tr. Ex. 1)

In mid September of 2008, Courchaine signed a Real Estate Purchase Agreement and related documents. (Exhibit 3)

On September 29, 2008 Commonwealth issued a Commitment for Title Insurance. (Tr. Ex. 5) The Commitment failed to except from coverage a 75' Bonneville Power Administration (BPA) easement, recorded September 27, 1945 under recording number 666726A. (Tr. Ex. 5, 12) However, the policy did except a 1905 Modern Electric utility agreement at page two, special exception 6. (Tr. Ex. 5). The utility agreement was obvious to Courchaine's agent as there were electrical lines in the back yard that did not interfere with her plans to build a duplex. (RP1 46, 56)

Courchaine or her agent reviewed the title report; (RP 19, 20), communicated with the Spokane Valley Department of Community

¹ For purposes of this brief, the Report of Proceedings filed in October 4, 2011 will be referenced as "RP" and the supplemental record titled Excerpt Report of Proceedings filed March 1, 2012 will be referenced as RP1.

Development (RP1 46-48), purchased a Home Inspection Report (Tr. Ex. 8), considered each item excepted in the policy and found that the title report disclosed nothing that would make the property unfavorable (RP1 52-56).

On October 15, 2008, Courchaine purchased the property by Statutory Warranty Deed. (Tr. Ex. 11)

Subsequent to purchasing the property, Courchaine discovered that 75' BPA easement, which prevented her from using the property for the purposes for which she bought it. (RP 23-25)

On or about November 4, 2008, Courchaine made a claim against the policy for failing to except the 75' BPA easement. (Tr. Ex. 13) Since the BPA easement was not excepted, the title commitment and final policy insured that no such easement existed. (RP1 13-15, 19)

Based upon the foregoing, attorney Kennard M. Goodman, the claims adjustor for Commonwealth, wrote to Courchaine on February 4, 2009 and acknowledged coverage of the claim based on the fact that Commonwealth failed to list the 75' BPA easement as an exception to the title policy. (Tr. Ex. 15)

Shortly thereafter, Lisa Leick of Fidelity directly communicated with Courchaine that "...the persons who previously assisted you with this claim are now either not employed with Fidelity, or are no longer assigned to handle your claim." (Tr. Ex. 16, p. 1)

Following that e-mail, another communication from Lisa Leick stated, "Ms. Courchaine, thank you speaking [sic] with me today regarding the claim

you made with Commonwealth Title that is now handled by Fidelity National Title.” (Tr. Ex. 16, p. 2) In each of Ms. Leick’s e-mails, she is identified as the Claims Administrator for Fidelity National Title Group. (Tr. Ex. 16.)

Ms. Leick claimed that she was unable to obtain documentation from Commonwealth and requested that Courchaine obtain that information and forward it to her. (Id.)

On April 27, 2009 Courchaine received a letter stating that her claim was denied. (Tr. Ex. 18) Said letter was, in the opinion of the Commonwealth claims adjustor Kennard Goodman “wrong” and if he was teaching a class and that was the final exam, he would give her a D or F. (RP1. 40)

By May of 2009, Commonwealth had failed to issue the Owner’s Title Insurance Policy. However, several months later, an owner’s policy dated October 17, 2008 policy number B68-100126 (the “policy”) was issued. (Tr. Ex. 127) The policy did not contain an exception for the 75’ BPA easement, recorded September 27, 1945 under recording number 666726A. (Id.)

Plaintiff sued Commonwealth and Fidelity for breach of contract and violation of the Consumer Protection Act.

II. ARGUMENT

A. The trial court correctly ruled that Commonwealth breached its contract with Courchaine by failing to except the Bonneville Power Administration easement.

The provisions governing title insurance are found within the general title of the Revised Code of Washington dealing with insurance, Title 48 RCW.

See chapter 48.29 RCW. A "title policy" is "any written instrument, contract, or guarantee by means of which title insurance liability is assumed." RCW 48.29.010(3)(a). Chapter 48.29 RCW does not define title insurance itself, but it is generally understood as "[a]n agreement to indemnify against loss arising from a defect in title to real property, usu[ally] issued to the buyer of the property by the title company that conducted the title search." Black's Law Dictionary at 819 (8th ed. 2004). Title insurance "characteristically combines search and disclosure with insurance protection in a single operation." *Shotwell v. Transamerica Title Ins. Co.*, 16 Wn. App. 627, 631, 558 P.2d 1359 (1976), *aff'd*, 91 Wn.2d 161, 588 P.2d 208 (1978).

Because the business of title insurance is governed by Title 48 RCW, it "is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters." RCW 48.01.030.

Construction of an insurance contract is a question of law. In interpreting an insurance contract, courts look to the intent of the parties, which is ascertained from the language of the contract. *Campbell v. Ticor Title Insurance Company*, 166 Wn.2d 466, 209 P.3d 859 (2009); *Tsapralis v. Pub. Employees Mut. Cas. Co.*, 77 Wn.2d 581, 582, 464 P.2d 421 (1970).

"Construction which contradicts the general purpose of the contract or results in hardship or absurdity is presumed to be unintended by the parties."

Nautilus, Inc. v. Transamerica Title Ins. Co. of Wash., 13 Wn.App. 345, 349,

534 P.2d 1388 (1975). Language in an insurance contract is to be given its ordinary meaning, and courts should read the policy as the average person purchasing insurance would. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

The rule in Washington is that if there is any ambiguity, a contract is construed against the drafter. This rule is especially strong in the reading of insurance contracts. A number of times Washington appellate decisions have applied this rule to title insurance policies. *Shotwell v. Transamerica Title Insurance Co.*, 91 Wn.2d 161, 588 P.2d 208 (1978); *Miebach v. Safeco Title Insurance Com.* 49 Wn.App. 451, 743 P.2d 845 (1987).

The courts strictly and narrowly construe insurance policy exclusions. *Campbell v. Ticor Title Insurance Company*, 166 Wn.2d 466, 209 P.3d 859 (2009). It is interesting to note that Commonwealth and Fidelity's arguments are based upon the actual plat as well as the 75' Bonneville Power easement, recorded September 27, 1945 under recording number 666726A. Although the plat was referenced in the policy, neither the plat nor the 75' Bonneville Power easement, recorded September 27, 1945 under recording number 666726A were given to Courchaine along with the commitment or the actual policy and the recorded easement was never excepted from the policy.

The plat was filed in 1954 and although significant changes to the plat have been made since then (Mallon Avenue is now Cataldo Avenue; additional subdivisions about the original plat, etc.), the 75' Bonneville Power easement, recorded September 27, 1945 under recording number 666726A

remains in full force and effect. That is the document that should have been excepted in the commitment and the policy. Because the Bonneville Power easement was not specifically excepted, the trial court found Commonwealth, as the drafter of the title insurance contract, liable to Courchaine.

Commonwealth argues that because the plat is mentioned in the preliminary title report and final policy, Courchaine is bound by the easement on the face of the plat. This argument fails for several reasons.

Testimony at trial was that a residential title insurance commitment states the terms upon which the title company is willing to issue an insurance policy. (RP1. 19) The purpose of that policy is to protect a purchaser against certain risks in terms of the chain of title and the vesting of title. (RP1. 8) There are several parts to a commitment for title policy. (RP1. 9) First, there is the policy jacket, which is a preprinted form of all of the standard clauses. Second is Schedule A, which describes the property, who title is vested in, and the date of the policy. (RP1. 9) Third, and most relevant to this case, is Schedule B, which sets forth more specific items with reference to that particular property. (RP1. 9) Within Schedule B, again, there are some preprinted parts and then a portion that lists specific recorded instruments that are specific to that particular property. Those items are described as exceptions to the policy and are not covered. (Id.)

The title insurance commitment in this case excepted only one matter that would remain on record following the purchase of the property and the final

policy being issued: a 1906 Modern Electric agreement to supply water and electricity. (See Exhibit 5, Schedule B, #7)

Commonwealth attempts to convince this court that an easement on a plat map is an automatic exception to title. Although an easement may be created on a plat map, that has nothing to do with whether Commonwealth excepted the BPA easement from its coverage in this title report. An exception from title must be specifically noted within the title report, which is a contract for insurance. Commonwealth failed to make any such exception, but it did make one restriction:

7. RESTRICTIONS contained on the face of said plat, but omitting any covenants or restrictions, if any, based upon race, color, religion, sex, sexual orientation, familial status, marital status, disability, handicap, national origin, ancestry, or source of income, as set forth in applicable state or federal laws, except to the extent that said covenant or restriction is permitted by applicable law.

The only restriction on the face of the plat mandated that all lots within the plat were to be used for “residential purposes.” No other restrictions existed and because Courchaine was purchasing the property for residential purposes, she suffered no damages due to the restriction.

Commonwealth did not except “restrictions **and easements** contained on the face of said plat; it only excepted “restrictions contained on the face of said plat.” It also failed to except the recorded BPA easement, which was separate from the plat. Although Commonwealth was not legally bound to disclose the BPA easement, it is liable to Courchaine as the entity that issued

indemnity insurance in favor of Courchaine and failed to except the BPA easement from title. Disclosure may not be a legal requirement, but indemnity is.

Commonwealth argues that its preliminary title commitment offered to insure against losses pursuant to the terms of the policy. That is correct. Commonwealth argues that one of the *exceptions* of coverage was for matters that were shown on the Plat Map. That is not true. Commonwealth did not except the terms of the Plat Map, it only excepted restrictions contained in the face of the plat.

Commonwealth argues that Courchaine purchased the property without a proper investigation. However, Courchaine, through her agent, reviewed the title report (RT 51), contacted Spokane Valley Department of Community development (Tr. Ex. 6 and 7), and purchased a home inspection (Tr. Ex. 8). The trial court stated that Courchaine did a lot more investigation of the property she was buying than most buyers do prior to closing. (Findings of Fact, Court's Oral Ruling, P. 5)

The purpose of an indemnity contract is to make a party "whole" again should a contractually-specified event occur. Commonwealth and Fidelity argue that title insurance is an indemnity contract. Courchaine agrees. Commonwealth/Fidelity must indemnify Courchaine for those matters of title that are not excepted from the policy. Kennard Goodman, the attorney who was the claims adjuster for Commonwealth, testified that he reviewed the title policy and that there is nothing in it about the BPA easement. (RP1. 27)

Mr. Goodman testified that at best there is an ambiguity in the contract and ambiguities are construed in favor of the insured, and there is coverage. (RP 28; *Shotwell v. Transamerica Title Insurance Co.*, 91 Wn.2d 161, 588 P.2d 208 (1978); *Miebach v. Safeco Title Insurance Com.* 49 Wn.App. 451, 743 P.2d 845 (1987). The 75' BPA easement was not excepted from the policy and therefore Commonwealth must indemnify Courchaine from her loss.

On this issue the case should be remanded to the trial court for findings that substitute the word "exception" for "disclosure" thereby preserving the ruling that Commonwealth was in breach of contract in issuing a title report that failed to except the 75' BPA easement.

B. Commonwealth violated the Consumer Protection Act by failing to except the Bonneville Power Administration's easement from the Policy and failing to pay the claim.

Commonwealth not only breached its contract with Courchaine by failing to except the 75' BPA easement from the title report, it also violated the Consumer Protection Act (CPA) in so doing.

The elements of a private CPA claim are: (1) an unfair or deceptive act or practice; (2) which occurs in trade or commerce; (3) that impacts the public interest; (4) which causes injury to the plaintiff in his or her business or property; and (5) which injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105

Wn.2d 778, 780, 719 P.2d 531 (1986); *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 852, 792 P.2d 142 (1990).

Looking first at whether Commonwealth's failure to except the 75' BPA easement from the title report constitutes an unfair or deceptive act or practice, Courchaine need not show that the act in question was intended to deceive, but only that the act had the capacity to deceive a substantial portion of the public. *Hangman Ridge*, at 785, 719 P.2d 531; *McRae v. Bolstad*, 101 Wn.2d 161, 167, 676 P.2d 496 (1984).

A denial of coverage does not constitute an unfair or deceptive act or practice as long as it is based on reasonable conduct of the insurer. *Villella v. Pub. Employees Mut. Ins. Co.*, 106 Wn.2d 806, 821, 725 P.2d 957 (1986).

The facts established at trial are that coverage was accepted by Commonwealth, but nevertheless Commonwealth never paid the claim. Commonwealth violated the CPA when it failed to except the BPA easement and when it agreed to pay Courchaine's claim and then failed to do so.

C. The trial court correctly found that Fidelity is separately liable to Courchaine for violation of the Consumer Protection Act.

1. Direct Liability

Fidelity argues that Courchaine had no direct communications with Fidelity. This is not true.

Trial Exhibit 16 is two (2) emails directly to Courchaine from Lisa Leick. Ms. Leick's emails identify her as the claims administrator for Fidelity National Title Group. Ms. Leick specifically states that the Commonwealth

claim was being handled by Fidelity National Title. She goes on to say that she has requested the file from the title company; she makes no mention that the title company and Fidelity are one in the same. Fidelity knew the [Courchaine] had a valid claim. (CP 167) However, by letter dated April 27, 2009, [Courchaine was] informed by Lisa Leick that [her] claim was denied. (Id.) Therefore, there was no reasonable justification for denying the claim and a good faith mistake was not made. (Id.)

2. Agency Theory

Fidelity's argument that to hold a parent corporation liable on an agency theory requires that the parent exercise total control over the subsidiary, makes the case for Courchaine.

Fidelity argues that a parent has no liability on an agency theory where it does not direct and authorize the manner in which the subsidiary conducts its business. *Forsythe v. Clark USA, Inc.*, 224 Ill.2d 274, 289, 864 N.E. 2d 227 (2007). Courchaine agrees with that position.

The facts here are that an easement was missing from the title report issued by Commonwealth, acknowledged coverage for the claim and Fidelity, the parent corporation, exercised total control over Commonwealth and denied the claim. Therefore Fidelity exercised total control over Commonwealth and both corporations are liable to Courchaine: Commonwealth failed to except the 75' Bonneville Power easement,

recorded September 27, 1945 and Fidelity was negligent in its handling of the claim that it took control over and failed to acknowledge and pay.

3. Liability based on Fidelity handling the claim

Fidelity argues that although its claim center handled the claim, it is not liable. The case cited in support of its position is *J.I. Case Credit Corp. v. Stark*, 64 Wn.2d 470, 392 P.2d 215 (1964) where a farmer bought a combine which was manufactured by J.I. Case Company (Case) and the financing was through J.I. Credit Corporation (Credit). The court reasoned:

Credit's position is that it is a separate corporation, that any claim against Case cannot be used as a defense to this foreclosure, and that it is entitled to the immunities of a holder in due course without notice. The testimony of Case and Credit representatives revealed these facts: Credit is a wholly-owned subsidiary of Case; the secretary-treasurer of Case is president of Credit; all employees of Credit are paid by Case; the credit manager of Credit is also an employee of Case; both companies have the same address, the same lawyers, the same nonresident agent, and the same auditors; Credit is in business only to handle retail financing for Case.

The decisions in this state defining when the courts will 'pierce the veil' to look through the corporate organization and determine identity of responsibility are not so clearly harmonious as to render the law easy of application. The purport of the cases is that all of the elements of sameness just noted are insufficient in themselves to enable a court to declare two corporations to be identical in responsibility, but there must be such a commingling of property rights or interests as to render it apparent that they are intended to function as one, and, further, to regard them as separate would aid the consummation of a fraud or wrong upon others. (*Citations omitted*)

....

For the purpose of this suit, the corporate identities are one and the same. Although each of the items of identity may, in itself, be but a link in a chain to join the two corporations, the final connection is established by the duty owed. To hold otherwise would result in a wrong being perpetrated upon [the plaintiff].

The facts before this court are similar to those in *J.I. Case Credit Corp. v. Stark*. Commonwealth is a wholly owned subsidiary of Fidelity; both companies use the same address and have similar employees (Lisa Leick uses a designation for Fidelity in her e-mails, but her final communication with Courchaine was made in a letter with Commonwealth letterhead); both companies have the same attorney; and Fidelity proved that it has control over decisions made by Commonwealth when it reversed Commonwealth's decision to pay Courchaine's claim.

As in *J.I. Case Credit Corp. v. Stark*, each of the items of identity may, in itself, be but a link in a chain to join the two corporations; however, the final connection is established by the duty owed. Commonwealth and Fidelity both owe Courchaine the duty to acknowledge the claim under the title policy. To hold otherwise would result in a wrong being perpetrated upon Courchaine.

Fidelity argues that as the principle of its agent, Commonwealth, it cannot incur separate liability to Courchaine. Although this would be the standard finding, in this case the principle chose to misrepresent itself to the insured. This was done when Courchaine was told that Fidelity was taking over for Commonwealth, that Fidelity was unable to obtain records, and each of the emails were signed as "Fidelity National Title Group." (Tr. Ex. 16) The

trial court discussing Fidelity's involvement at finding of fact 28: Janice and Jayn Courchaine believed they were working with a separate entity regarding the claim. Although Commonwealth is a subsidiary of Fidelity, they acted in such a manner that it was reasonable for the Plaintiffs to believe they were separate, unrelated entities. (CP 166)

Having established that Fidelity has separate liability regardless of it being a principle of Commonwealth, the court was free to find that Fidelity incurred separate liability for its violation of the CPA for failing to accept Courchaine's claim.

Fidelity argues that it acted in good faith, citing a letter that it wrote to Courchaine dated April 27, 2009. (Tr. Ex. 18) In that letter Lisa Leick gives basically three reasons why she is denying the claim: 1) the BPA easement, she claims to be the Modern Electric agreement excepted on Schedule B, No. 6 of the commitment for title insurance; 2) the documents signed with the seller makes the title a third party beneficiary to those documents; and 3) the restrictions referenced at Schedule B, No. 7 make Courchaine responsible for all matters on the face of the plat.

Commonwealth's claims attorney, Kennard Goodman, testified each of Ms. Leick's claims in her letter of April 27, 2009 written by Ms. Leick were "wrong" and if he was teaching a class and that was the final exam, he would give her a D or F. (RP1. 40) When you couple this letter with the fact that Commonwealth had already accepted Courchaine's claim, the trial court had

a basis for finding bad faith. Therefore the CPA damages, including attorney fees, should be affirmed.

III. ATTORNEY FEES ON APPEAL

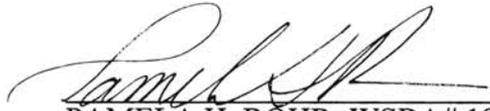
Courchaine requests attorney fees on appeal. This request is based on RCW 19.86.090 (the Consumer Protection Act), which entitles one who successfully litigates a claim under it to attorney fees and costs in connection with bringing the claim. Attorney fees in connection with Consumer Protection Act claims are also recoverable on appeal. *Keyes v. Bollinger*, 31 Wn.App. 286, 640 P.2d 1077 (1982).

IV. CONCLUSION

Commonwealth and Fidelity argue that the trial court made erroneous assumptions that a preliminary title insurance commitment and an abstract of title are the same thing. That is not what this case was about. Courchaine does not argue that she had the right to an abstract of title. She argues that she had a right to preliminary title insurance that either excepted the 75' BPA easement, or indemnifies her for the failure to except such an easement.

Findings of fact supported by substantial evidence is accepted as a verity on appeal. *Burba v. Vancouver*, 113 Wn.2d 800, 807, 783 P.2d 1056 (1989). Since the findings of fact in this case are supported by substantial evidence, Courchaine requests that they be accepted by this court as well.

Dated: May 2, 2012



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CERTIFICATE OF SERVICE

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

On the date given below I caused to be served the foregoing Respondents' Appellate Brief on the following individual in the manner indicated.

U.S. Mail Hand Delivery Facsimile Federal Express
Electronic Mail

Matthew Cleverly, Esq.
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May 4, 2012



PAMELA H. ROHR