

FILED

SEP 13 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 308499

Superior Court No. 09 2 01656 3

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

C 1031 Properties, Inc.

Appellant

v.

First American Title Insurance Company

Respondent

APPELLANT'S OPENING BRIEF

Joseph P. Delay
WSBA No. 02044
Delay Curran Thompson Pontarolo & Walker, P.S.
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INTRODUCTION

The Court of Appeals granted C 1031 Properties Inc.'s. (C 1031) Motion for Discretionary Review. This appeal involves the legal interpretation of a title insurance policy issued by First American Title Insurance Company (First American). The issue is whether or not there is coverage under the title insurance policy for the insured for the loss where the easement has been filed of record. The title company failed to disclose the recorded easement in the title insurance policy. The insured, C 1031, had notice of the power lines, but did not have knowledge of the existing recorded easement at the time that the title insurance policy was issued. The title company denied coverage only on the basis that the insured suffered no damages. In the subsequent litigation it denied coverage on the basis of knowledge on the part of the insured.

III. ASSIGNMENTS OF ERROR

Assignment of Error No. 1.

The Court erred in entering Order Granting in part Plaintiff's Motion for Summary Judgment in that it concluded there were issues of material fact as to:

- a) Whether or not Plaintiff had or should have had actual knowledge of recorded easement;
- b) Whether or not actual and/or knowledge that should have been known by the Plaintiff would mitigate and/or bar damage, (CP 503-505).

Assignment of Error No. 2

Court erred in failing to grant Summary Judgment to the C 1031, including a Judgment for the amount of damages in the sum of \$60,000.00 and attorney's fees, (CP 503-505).

Assignment of Error No. 3.

Court erred in entering Order of April 24, 2012 in Granting Motion to Exclude Testimony of Expert Witness, (CP 826-829).

Assignment of Error No. 4.

Court erred in entering Order of April 24, 2012 in denying C 1031's Motion to Compel Discovery, (CP 826-829).

Assignment of Error No. 5.

Court erred in Denying Plaintiff's Motion for Reconsideration of December 2, 2010, (CP 512-513).

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1.

Whether, as a matter of law, C-1031 Inc. has coverage under the title insurance policy issued by First American for a missed recorded easement encumbering the property?

Issue No. 2.

Whether or not on a Summary Judgment proceeding where First American failed to controvert C 1031's Affidavit of Expert setting forth the amount of damages in the sum of \$60,000.00 entitled C 1031 to a summary judgment for the amount of damages (CP 24-30, 503-505).

Issue No. 3.

Whether the Trial Court appropriately limited C 1031's discovery, (CP 826-829).

Issue No. 4.

Whether the Trial Court properly excluded C-1031's expert testimony, (CP 826-829).

Issue No. 5

Whether C-1031 is entitled to attorney fees and costs assessed against First American in the Trial Court and on appeal?

V. STATEMENT OF THE CASE

In August 2007, C 1031 Properties, as Purchaser, entered into a Purchase and Sale Agreement (PSA) with the Seller, (CP 82, 116-117, 593-594). The real property involved in the PSA was the abandoned East Sprague Drive-in Theatre, located at 4th and Eastern Road, in Spokane, Washington. Prior to closing, C 1031 Properties saw the power line, but did not know of the existence of the recorded easement, (CP 269, 398). In August of 2007 before the closing, C 1031 employed Whipple Consulting Engineers to survey the property. The survey prepared by Whipple Consulting included identification of the power lines and power poles located on the property being purchased by C 1031, (CP 396-399, 382-

385). On August 10, 2007, First American provided a Commitment for Title Insurance. The Commitment for Title Insurance did not show a recorded power line easement. On October 17, 2007, C 1031 Properties closed the transaction. On October 31, 2007, First American Title issued a policy of insurance, (CP 42-49). Subsequent to the closing, C 1031 contacted the Grantee under the power line easement and asked the power line to be moved, as C 1031, relying on the title insurance, stated there was no easement of record, (CP 453-463). After the closing the Grantee of the easement at that time disclosed to C 1031 that there was a recorded easement, (CP 396-399). The power line easement was in fact recorded and missed by the title company, (CP 398).

First American denied coverage as it asserted that no loss or damages occurred to C 1031 Properties, (CP 619-620). No other reason at that time was stated for denial of coverage, (CP 619-620).

PLEADINGS

C 1031 by Second Amended Complaint sought to recover damages for breach of title insurance coverage against First American for the omission of the recorded power line easement, (CP 16-19).

C 1031 filed a Motion for Summary Judgment, (CP 80). First American filed a cross motion for Summary Judgment, (CP 190-191).

Among the Affidavits filed by C 1031, it included an Affidavit of its expert appraiser, Scot D. Auble, fixing the damages at \$60,000.00, (CP 24-30). First American did not file any controverting Affidavit from an expert, but merely denied that C 1031 sustained any damages, (CP 234, 206).

On November 8, 2012, the Court considered Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, (CP 80, 190-191). The Court denied First American's Motion for Summary Judgment and granted in part C 1031's Motion for Summary Judgment, (CP 503-505). In granting the Summary Judgment Order, the Court stated:

There are material questions of fact regarding:

Actual monetary loss or damage sustained or incurred by Plaintiff;

Whether or not Plaintiff had or should have had, actual knowledge of the recorded easement;

Whether or not actual and/or knowledge that should have been known by Plaintiff would mitigate and/or bar damages. (CP 505).

Because of the questions of Fact in the Order entered, C 1031 employed an insurance expert to testify at the trial, (CP 503-505). First American Title moved the Court for an Order to exclude the insurance

expert testimony, (CP 790-791). The Trial Court granted the motion on April 24, 2012, excluding the testimony of the insurance expert, (CP 826-829).

In addition, C 1031 filed a Motion to Compel Discovery when First American refused to produce certain documents, (CP 794-797). C 1031's Motion to Compel Discovery was denied in part. First American was only required to produce documents relating to or referring to assessment of damages, (CP 826-828).

C 1031 and First American Title both sought Discretionary Review, and discretionary review was granted, (CP 826-828).

STANDARD OF REVIEW

Interpretation of insurance policy presents a question of law subject to de novo review. *New Hampshire Indemnify Co. Inc. v. Budget Rent A Car Systems, Inc.*, 148 Wn.2d 929, 933, 64 P.3d 1239, 1241 (2003). The Standard of Review on appeal of a Summary Judgment Order is de novo. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). The reviewing Court must consider the facts submitted and all reasonable inferences from those facts in light most favorable to the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Standard of Review on appeal on denying the Motion

to Compel Discovery is abuse of discretion, *Johnson v. Jones*, 91 Wn. App. 127, 133, 955 P.2d 826, 830 (1998).

ARGUMENT

Issue No. 1. Whether as a matter of law C 1031 has coverage under the title insurance policy issued by First American Title for a recorded easement encumbering the property?

This issue deals with Assignments of Error Nos. 1 and 5, and Issue No. 1.

First American issued the title insurance policy that is at the heart of this appeal on October 31, 2007, (CP 42-49). “Title insurance is a guaranty of the accuracy of a company search and record title on a specific property” *Kiniski v. Archway Motel*, 21 Wn. App. 555, 586 P.2d 502 (1978). By paying consideration to a title insurer for their expert services in uncovering defects in title it is reasonable for the insured to believe and rely upon the fact that the insurer has discovered any encumbrances recorded in the public record. *Hu Hyun Kim v. Lee*, 145 Wash.2d 79, 91, 43 P.3d 1222 (2001). It is undisputed that a recorded easement benefiting Washington Water Power (now Avista Utilities) was missed by First American, (CP 21, 51). The title company admitted the omission in its Answer, (CP 21). The issue that then arises is whether any exception or

exclusion within the title insurance policy limits coverage for C-1031, (CP 7, 11).

The Trial Court, in its final ruling on Summary Judgment, dated November 4, 2010 held that:

“The Court Finds that First American Title Insurance Company’s title insurance policy insuring plaintiff does not limit/or exclude coverage for easement that have been recorded and/or are a matter of public record. There are material questions of fact regarding: (1) actual monetary loss or damage sustained or incurred by the plaintiff (2) whether or not plaintiff had, or should have had, actual knowledge or recorded easements (3) whether or not actual and/or knowledge that should have been known by the plaintiff would mitigate and/or bar damages”, (CP 504-505).

The Trial Court is clear in its decision that when First American issued the title insurance policy in this case it did so with the intent to insure against recorded easements, (CP 505). It is undisputed that a recorded easement existed on the property purchased by C-1031, (CP 21, 51). Furthermore First American issued a letter denying damages dated February 19, 2009 regarding this specific insurance policy, 1097957, where Regional Counsel stated, (CP 135, 136).

. . . Since there also appears to be no loss of value due to the Washington Water Power easement, there does not appear to be a compensable claim under the terms of the

policy. The claim tendered is therefore denied, and First American will take no further action at this time. . . , (CP 135-136).

Read in the alternative, this letter, denying coverage for an unrecorded easement on the same property, which is not involved in these proceedings, admits that the policy at issue covers easements of record that are not identified by First American. The policy in this case clearly and unambiguously states that ‘easements of record are covered’, (CP 88, 92). The “exception from coverage” only refers to encumbrances not shown by public record, (CP 88, 92). This infers that there is coverage if the easement is of record and omitted from the policy.

First American admits it did not identify the easement but failed to allow coverage because “plaintiff had notice and knowledge of the power lines.” (CP 21)

In construing the language of an insurance contract, the entire contract is to be construed together for the purpose of giving force and effect to each clause. A contract of insurance should be given a fair, reasonable and sensible construction, consonant with the apparent object and intent of the parties, a construction such as would be given the contract by the average man purchasing insurance.” *Ames v. Baker*, 68 Wash.2d 713, 415 P.2d 74 (1966); *Morgan v. Prudential Ins. Co. of Am.*, 86 Wash. 2d 432, 434, 545 P.2d 1193, 1194-95 (1976).

The Policy defines “knowledge” or “known” as actual knowledge, not constructive knowledge; and not notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title, (CP 7).

Here, C 1031 saw the power lines, but did not know that there was a recorded easement, (CP 269, 398). Indeed, the purpose of the insurance policy was to ensure that there was *not* an encumbrance on the property. Deposition testimony clearly states that C 1031 only drove past the property and did not set foot on the property prior to closing, (CP 269). Later, before closing, C 1031 conducted a survey and the survey showed the power lines on the property.

After the closing, believing that no easement existed, C 1031 sought to have the power company remove the lines. It was at that time the power company called C 1031’s attention to the recorded easement, (CP 453-463). This was after closing the transaction. Under the policy, Page 2, Paragraph (f), actual knowledge is not constructive knowledge, (CP 7). There is coverage under the title insurance policy when the easement has been recorded and is missed by the title company, (CP 7, 11). C 1031 saw the power lines, but, through reasonable reliance on First American’s guaranty, did not know of the recorded easement prior to closing, (CP 269-271, 398).

The Trial Court also found that actual and/or knowledge that should have been known by C 1031 would mitigate or bar damages, (CP 503-505). This is contrary to the policy. There is nothing in the title insurance policy that states that actual and/or knowledge that should have been known by C 1031 would mitigate or bar damages even if the easement of record was missed by the title insurance company, (CP 6-13). On Page 2, in the Definitions section, of the policy, 'constructive knowledge' is excluded, (CP 7). Without 'actual knowledge' of the easement, coverage must be granted under the undisputed facts. C 1031 did not have actual knowledge of the easement, but did see the power lines prior to closing, which at most gave it constructive knowledge. In fact, through reasonable reliance on First American's title search, C 1031 believed there was no easement as evidenced by his request to the power company to remove the power poles (CP 453-455). The failure of First American to discover the easement, at least arguably, removed any constructive knowledge C 1031 may have had through its reliance on the title search.

Under Schedule B, attachment to the policy, dealing with exceptions from coverage, items #1 through #7 all deal with matters not shown by public records, (CP 11). The exclusions on Page 2 of the policy form 'Coverage Exclusions' include easements not shown by public

records, encroachments which are not shown by public records, and liens which are not shown by public records, (CP 7). The power line easement here in question was recorded and shown in public records, so consequently there is coverage, (CP 51). The Court erred when it found that actual and/or knowledge that should have been known by C 1031 would mitigate and/or bar damage. There is no such provision precluding recovery under the title insurance policy where the easement is of record. In *Shotwell v. Transamerica Title*, 91 Wn.2d 161, 588, P.2d 208 (1978), the Court said at Page 170:

As stated in *Maggio v. Abstract Title & Mort. Corp.*, 277 App. Div. 940, 941, 98 N.Y.S.2d 1011, 1013 (1950):

In the case of a title insurance policy, the insurer undertakes to indemnify the insured if the title turns out to be defective. That is the purpose of procuring the insurance and knowledge of defects in the title by the insured in no way lessens the liability of the insurer. The doctrine of skill or negligence has no application to a contract of title insurance.

C 1031 is entitled to recover under the terms of the title insurance policy; regardless of the level of knowledge C 1031 had surrounding the existence of the power line.

C 1031 requests this Court to assume that C 1031 had actual knowledge of the transmission line poles located on the subject property.

First American's argument is that this knowledge of the poles exempts C 1031's claim due to the language under the insurance policy. However, a plain reading of the title insurance policy will show that First American's argument is incorrect, (CP 43). The title insurance policy requires an insured to notify First American when C 1031 has knowledge of an easement or other encumbrance that is not recorded, (CP 43). There is no such requirement if the easement is recorded. In the present case, the easement was, in fact, recorded and therefore does not meet the policy exclusion and there is coverage, (CP 43).

The Title Insurance Policy Exclusions from Coverage do not apply because the encumbrance at issue was recorded.

The Title Insurance Policy provides coverage under the "Covered Risks" provision, Page 1, Paragraph 2(c), (CP 42). The Policy, page 1, paragraph 2(c), specifically covers "[a]ny encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. . . .", (CP 42).

Similarly, the Policy provides a list of exclusions from coverage which prohibit the insured from recovering "loss or damage, costs,

attorneys' fees, or expenses" stemming from the exclusions. Page 2, Paragraph (3)(b) of the "Exclusions From Coverage" provision states

3. Defects, liens, encumbrances, adverse claims, or other matters . . . [are excluded from coverage when they are] b. not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy, (CP 43).

(emphasis added.)

Additionally, Page 6, Schedule "B" of the Policy provides:

Exceptions from Coverage

This Policy does not insure against loss or damage, and the Company will not pay Costs, Attorney Fees, or expenses that arise by reason of:..., (CP 42).

Part One:

. . .

3. Easements, claims of easements or encumbrances which are not shown by the public records. . . , (CP 47).

The implication is that there is insurance coverage if the easement is of public record. Here, the easement was of public record under "Covered Risks," Page 1, Paragraph 2(c) of the policy, (CP 42). None of

the exclusions apply as the easement in question was recorded. The Court should therefore find that coverage exists under the Policy and that knowledge of the existence of the transmission line poles is not relevant because the easement was recorded. C 1031 did not have actual knowledge of the recorded easement.

When an insurance policy provision is capable of more than one meaning, Washington Courts construe the meaning and construction most favorable to the insured. *Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 167. This is the case even when the insurer intended a different interpretation. *Id.*

In the present case, the conjunction "but" implies that each condition must occur in order for an encumbrance to be excluded from coverage under the policy. Thus, in order to be excluded from coverage under 3(b), page 2 of terms of the policy, the power line easement must: (1) not be known by First American Title; (2) not be recorded as a Public Record at the time the policy was issued; (3) known to C 1031, or Mr. Douglass; and, (4) not disclosed in writing to First American Title, (CP 43). All four of these elements must be present for an exclusion of coverage to apply. The easement here was recorded when the policy was issued, (CP 43).

First American Title did have constructive knowledge of the recorded easement.

The facts of this case have shown that First American did not have actual knowledge (only constructive knowledge) of the recorded easement. C 1031 does not contend that First American had actual knowledge of the easement, but rather agrees that it had constructive knowledge of the easement due to the fact that the easement was of record.

The easement was recorded at the time the insurance policy was issued.

It is undisputed that the easement at issue was granted by Harry Shulman to the Washington Water Power Company (now Avista) and was recorded on September 9, 1949, (CP 51). The easement was disclosed by Avista to C 1031 nearly a year after it acquired the property, (CP 398, 453). First American simply was negligent in not finding the existing easement of record.

C 1031 had knowledge that the transmission lines were located on the property and did not inform First American about their existence.

Even assuming C 1031 had knowledge of the existence of the transmission lines for purposes of this Brief, and did not notify First American of that fact; they are still entitled to recover under the title insurance policy because the easement was of record.

"Knowledge" is defined under the policy as:

[a]ctual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the title, (CP 43).

C 1031 contends that because the easement was recorded at the time of the policy's issuance, whether it has actual or constructive knowledge of the fact that the transmission lines traversed the subject property is moot when the easement has been recorded. There is coverage under the policy as the exclusions or provisions on both Page 2 and in Schedule "B" of the Policy do not apply due to the recorded easement, (CP 43, 47). In fact, C 1031 further argues that First American failed to diligently search the records for the existence of the recorded instrument. Thus, C 1031 should recover under the terms of the policy.

Although C 1031, through its Pleadings and Depositions of record, has shown that it had no actual knowledge of the easement of record, even charging C 1031 with knowledge of the easement does not foreclose its ability to recover under the policy because the exclusions of the policy do

not apply to C 1031 because the easement was recorded. The easement was recorded with the Spokane County Auditor. First American had a duty to thoroughly search the public records and find easements, which encumber the property. This is one of the main reasons a purchaser orders title insurance. First American's failure to adequately research and discover the recorded easement has damaged C 1031 by way of reduced property value. C 1031 is entitled to recovery of damages under the terms of the insurance policy, (CP 44).

First American Title violated the Washington Consumer Protection Act, RCW 19.86.010 et seq., as well as multiple administrative regulations under Washington's Unfair Claims Settlement Practices Regulation, WAC 284-030-300, et seq.

In 1961, the Washington Legislature adopted the Consumer Protection Act ("CPA") as a means of protecting consumers from "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. To prevail on a Washington CPA claim, the complaining party must show: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) that injured the plaintiff's business or property; and (5) that the unfair or deceptive act complained of caused the injury suffered. *Hangman Ridge Training*

Stables, Inc. v. Safeco Title Ins. Co., 105 Wash.2d 778, 784-85, 719 P.2d 531 (1986).

RCW 48.30.010 authorizes an insurance commissioner to define acts and practices in insurance which are considered unfair or deceptive. WAC 284-30-300. Violations of these regulations may constitute as *per se* violations of the CPA. *Truck Ins. Exch. v. VanPort Homes*, 147 Wn.2d 751, 764, 58 P.3d 276, 283-84 (2002).

C 1031 argues that First American violated a number of provisions under the Unfair Claim Settlement Practices Regulations. Namely, First American:

1. Misrepresent[ed] pertinent facts or insurance policy provisions;
2. Fail[ed] to acknowledge and act reasonably prompt upon communications with respect to claims arising under [the insurance policy];
...
4. Refus[ed] to pay claims without conducting a reasonable investigation;
5. Fail[ed] to affirm or deny coverage within a reasonable time after . . . loss documentation had been submitted; and
...
7. Compelled a . . . claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy . . .

WAC 284-30-330.

It is C 1031's contention that First American has misrepresented pertinent insurance policy provisions by leading C 1031 to believe that coverage existed, but denied payment on the basis that C 1031 did not suffer any damages, (CP 619, 620). During this litigation First American has denied coverage under the policy, (CP 20-23). C 1031 also contends that First American has failed to conduct a reasonable investigation, both before the issuance of the Policy and during the course of this claim. First American was notified of the claim on November 20, 2008, (CP 616). First American's first response was February 19, 2009, (CP 619). This response was 91 days later. C 1031 was also compelled to commence litigation in order to recover amounts due under the policy. All of which are violations of the Unfair Claim Settlement Practices Regulation under WAC 284-30-330.

Similarly, C 1031 argues that First American violated the Settlement Standards outlined by the insurance commissioner in WAC 284-30-380. Particularly, these standards require:

(1) Within fifteen working days after receipt by the insurer of fully completed and executed proofs of loss, the insurer must notify the first party claimant whether the claim has been accepted or denied. . . .

(3) If the insurer needs more time to determine whether a first party claim should be accepted or denied, it must notify the first party claimant within fifteen working days after receipt of the proofs of loss giving the reasons more time is needed. . . .

In *Van Noy v. State Farm Mut. Auto. Ins. Co.*, the court found that there was at least a question of fact as to whether State Farm violated the Unfair or Deceptive Practices Act when it failed to give any response other than an initial request for more information for a period of six months when dealing with an insurance claim that was eventually denied. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App 487, 983 P.2d 1129 (1999). There, the court said if the company engaged in either unfair claims settlement practices under WAC 284-30-330, or if it misrepresented its policy provisions as proscribed in WAC 284-30-350, it would result in a violation of RCW 48.30.010 because a violation under either one is sufficient to run afoul of the statute. *Id.* Here, given that First American failed to issue any response to the claim submitted by C 1031 prior to the 91st day after the claim had been submitted, it is certainly beyond what the court found as arguable in *Van Noy*. In *Van Noy*, the court of appeals held that even if the company was correct in denying coverage under the insurance policy, its failure to handle the claim in a timely fashion caused damages, which it was ultimately liable for. *Id.* at

497-498. For insurance policies, the state of Washington has indicated what a timely fashion is, fifteen (15) days after the claim has been submitted. First American's failure to provide any response to C 1031's claim for ninety-one (91) days is in clear violation of the statute, both in the letter of the law, and in the spirit of the law.

C 1031 notified First American of its claim under the Policy on November 20, 2008, via Certified Mail, Return Receipt, (CP 616). The first response C 1031 received from First American was ninety-one (91) days later, on February 19, 2009, (CP 619). First American did not provide notice to C 1031 of the delay in responding to C 1031's request for coverage under the policy. These examples of violations of the Unfair Claim Settlement Practices Regulation are *per se* violations of Washington's Consumer Protection Act.

C 1031 requests that coverage be granted under the Title Insurance policy because the easement was of record and was simply missed by the insurer. First American acknowledges that it 'did not identify the easement' and thus coverage should be granted because First American has not identified, nor has C 1031 acknowledged any exception to coverage, (CP 21).

Issue No. 2. Whether or not on a Summary Judgment proceeding where First American Title failed to controvert C-1031's Affidavit of Expert setting forth the amount of damages in the sum of \$60,000.00, precludes First American Title from contesting the amount of damages?

This issue deals with Assignments of Error 2, 3, and 4, and Issue No. 2.

First American rejected the claim because it contended that C 1031 suffered no damages resulting from First American's failure to adequately research the title to the land in question, (CP 135). Prior to litigation it did not state any other basis for rejection of the claim. First American alleges there is no coverage because C 1031 had 'actual or constructive knowledge' and C 1031 has failed to assert how it has suffered actual loss or damage, (CP 192-193). Issue #1 in this Brief resolved the question of knowledge; C-1031 did not have actual knowledge of the easement. First American has failed to assert any evidence to substantiate knowledge. The assertion that C-1031 did not assert how it has suffered actual loss or damage is false because C-1031's expert, Scot Auble, in his affidavit, clearly asserts \$60,000 in damages and First American failed to controvert this fact, (CP 24-26).

C 1031 contends that since First American did not controvert the Affidavit of C 1031's expert, Scot D. Auble, as to the amount of damages.

Damages is therefore not in dispute, (CP 24-26). The Trial Court erred in not granting summary judgment to C 1031 for the amount of damages of \$60,000.00, because the appraisal was never controverted.

It is undisputed that First American did not controvert the Affidavit of Scot Auble. Scot Auble, a MAI Appraiser, testified in his Affidavit that the amount of damages, in his expert opinion, was \$60,000.00, (CP 24-26). First American denied that there were any damages. It did not controvert the Affidavit of Scot Auble. C 1031 contends that since there was no controverting Affidavit on damages, the Court should have granted summary judgment in favor of C 1031 in the amount of \$60,000.00, (CP 506-507).

On June 11, 2009, C 1031 had an appraisal done on the purchased property encumbered with the easement, (CP 24-30, 162-165). The purpose of the appraisal was to determine the impact on Market Value for the undisclosed easement on the property as of October 18, 2007. The appraisal estimated the area of the property encumbered by the easement is 22,770 square feet. The appraisal damage due to the AVISTA Corp. power line easement was calculated to be approximately \$60,000, (CP 24-30, 162-165).

C 1031 contends that First American Title was required to submit Affidavit of an expert appraisal witness controverting the Affidavit of Mr.

Auble, (CP 24-30). Had First American presented expert testimony through a real-estate Appraiser controverting the amount of damages set out in Mr. Auble's Affidavit that would have given rise to a material issue of fact. Here, no such controverting Affidavit was submitted.

“An adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. 4 Wash. Prac., Rules Practice CR 56 (5th ed.).

The nonmoving party must set forth specific facts rebuffing the moving party's contentions. *Elcon Construction v. Eastern Washington University*, 174 Wn.2d 157, 273 P3d 975 (2012). First American failed to set forth specific facts rebutting the affidavit of Auble, (CP 24-30).

In *Coggle v. Snow*, 56 Wn.App. 499, 784 P.2d 554 (1990), which involved a medical malpractice action, the Court held that Plaintiff in a medical negligence action must produce evidence through an expert medical witness, citing *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). First American Title did not file such a controverting Affidavit. No material issue of fact was created. C 1031 filed a Motion for Reconsideration supporting the position that Mr. Auble's Affidavit was

uncontroverted, (CP 506-507). The Court denied C 1031's Motion for Reconsideration, (CP 512-513).

C 1031 demonstrated that there is no genuine issue of material fact by establishing by an expert Appraiser the amount of damages in the sum of \$60,000.00, (CP 24-30). First American may not rest on a general denial, but must demonstrate that there is a material issue of fact as to the amount of damages. (CR 56(e)) *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987). Here, First American had the obligation to present controverting facts, which would be admissible in evidence at trial and not ultimate facts or conclusions. *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 753 P.2d 517 (1988). Here, the Trial Court erred in not awarding judgment for the damages in the amount of \$60,000.00, as per the expert Affidavit of Auble, (CP 24-30). Mr. Auble is a bona fide appraiser and appraised the depreciated value of the real property by reason of the encumbrance.

Title insurance policies differ with respect to how they define actual loss. Paragraph 8 on Page 3 of the title policy reads:

8. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason

of matters insured against by this policy. . . .
(CP 44)

Here, C 1031, subsequent to closing, asked the Grantee of the easement to remove the power lines, (CP 453-455). The Grantee indicated it could remove the power poles and bury the lines underground as a cost of \$5,489.96 for one pole; there are three poles on the property, (CP 453-455). However, simply removing the poles does not extinguish the easement. The grantee still has a right to use of the property unless it relinquishes its right. Given that the Grantee offered to bury the lines, it is asserting its rights rather than relinquishing them. Likewise, C 1031 is still restricted in its use of the property. Therefore, even though the power poles could be buried for substantially less than \$60,000, doing so does not mitigate the damages C 1031 has suffered.

Thus, the measure of damages could not be the amount required to remove the encumbrance, because the encumbrance cannot be removed. *Securities Service, Inc. v. Transamerica Title Insurance Co.*, 20 Wn. App. 664, 583, P.2d 1217 (1978). The scrivener of this Brief could find no case law in Washington explicitly identifying the appropriate measure of damages, where the encumbrance is an easement. However, the inferred measure of damages is the diminution in value. See *Shotwell*, 91 Wn.2d 161. Any ambiguity with respect to the amount of loss available to C

1031 must be resolved in its favor. *Miebach v. Safeco Title Insurance*, 49 Wn. App. 451, 454, 743 P.2d 845 (1987). Since the encumbrance is a recorded easement, where compensation will not be able to remove the easement, C 1031 is entitled to damages in the amount of diminution in value of the property in the amount of \$60,000.00, (CP 19).

The damages sustained to C-1031 are appraised at \$60,000.00, (CP 658-688, 24-30). C-1031 had previously demanded this sum to avoid litigation, (CP 19). It is clear that the policy does cover omitted recorded easements, (CP 47). The remedy is to pay the damaged party the diminished value of the property of \$60,000.00 plus attorney fees. “Ordinarily when a defect insured against takes the form of a lien or encumbrance, owner’s loss is measured by amount of money required to remove offending lien or encumbrance. *Securities Service, Inc. v. Transamerica Title Ins. Co.*, 20 Wash.App. 664, 583 P.2d 1217 (1978).

What’s more, the court in *Miebach v. Safeco Title Insurance Co.* held that a title insurance policy that covers “actual loss” means more than “out of pocket” losses because it is more than a mere contract of indemnity, 49 Wash.App. 451, 743 P.2d 845 (1987). Many jurisdictions, including some Washington courts, have moved away from the archaic theory that a title insurance policy provider should only be required to reimburse the insured for the losses incurred, and have adopted a view

favoring a more modern and well-reasoned approach asserting title insurance is a guaranty of the accuracy of the company search and record title, or at the very least, is in the nature of a warranty against encumbrances. *Id.*

The Supreme Court of Texas held that the existence of an easement on property diminished the value of said property and no evidence of out-of-pocket costs was required to show damages. *Lunt Land Corp. v. Stewart Title Guaranty Co.*, 342 S.W.2d 376 (1961), rev'd on other grounds, 162 Tex. 435, 347 S.W.2d 584 (1961). Still, other jurisdictions have found that even though the title insurance policy is a contract of indemnity, the landowner has suffered a loss because the encumbrance has diminished the value of the property. *Summonte v. First American Title Ins. Co.*, 180 N.J. Super. 605, 436 A.2d 110, 116 (Ch. Div. 1981), judgment aff'd, 184 N.J. Super. 96, 445 A.2d 409 (App. Div. 1981) (insured sustained loss immediately upon acquisition of property subject to a judgment lien; that the holder of the lien had not yet attempted to enforce it did not delay the insurer's liability); *Green v. Evesham Corp.*, 179 N.J. Super. 105, 430 A.2d 944 (App. Div. 1981).

In the current case, the encumbrance cannot be removed thus the next logical calculation of damages is measured mathematically by the appraisal. C 1031 requests that the sum of \$60,000.00 be paid to Plaintiff

for this sum is the only calculable measurement of damages as well as the figure determined through appraisal. The Trial Court erred in failing to grant judgment to C 1031 for \$60,000.00 plus attorneys fees and costs.

Issue No. 3. Whether the Trial Court appropriately limited C 1031's discovery?

This Issue involves Assignment of Error No. 4.

C 1031 served discovery on First American. First American failed to respond to certain portions of the discovery, (CP 798-816). As a result, C 1031 filed a Motion to Compel Discovery, (CP 794-797). On April 24, 2012, the Trial Court denied in part the Motion to Compel Discovery, (CP 826-828). The Trial Court directed First American to produce only those documents related to or referring to the assessment of damages related under the title policy, (CP 826-829).

C 1031 contends that the Court erred in failing to enter an Order requiring the title company to produce the documents requested in Plaintiff's second set of pretrial discovery. Rule 34 permits a broad scope of discovery. *Wright v. Terrill*, 135 Wn. App. 722, 741; 145 P.3d 1230 (2006).

The standard of relevance for the purposes of discovery is very broad. The fact that evidence sought would be otherwise inadmissible at trial is not an impediment to discovery so long as information sought

appears reasonably calculated to lead to discovery of admissible evidence. *Barfield v. City of Seattle*, 100 Wn.2d 878, 676 P.2d 438 (1984). C 1031 believes the trial court abused its discretion in not granting C 1031's Motion to Compel Discovery, (CP-826-828). A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *Johnson v. Jones*, 91 Wash. App. 127, 133, 955 P.2d 826, 830 (1998).

The Trial Court is given reasonable discretion in determining how far a party should be required to go in answering interrogatories. *Weber v. Biddle*, 72 Wn.2d 22, 29, 431 P.2d 705 (1967). A reviewing Court will not disturb the Trial Court's determination on the appropriate scope of interrogatory answers unless there has been an abuse of discretion and unless the error is prejudicial. *Weber v. Biddle*, supra. *Dave Johnson Ins. v. Wright*, 167 Wn. App. 758, 777, 275 P.3rd 339 (2012). In *Dave Johnson Ins.*, the Trial Court went through each interrogatory and ruled on each objection. The aggrieved party did not show the Court that it abused its discretion or suffered any prejudice.

C 1031's discovery here dealt with only production of documents. Production No. 1 dealt with producing the title company's underwriting file; Production No. 2 dealt with producing Defendant's underwriting manual; Production No. 7 dealt with First American's manual dealing with

handling of claims; Production No. 9 dealt with record of all claims made, paid and rejected by the Spokane office; Production No. 10 dealt with claims made, paid and rejected by the Seattle office; Production No. 11 dealt with complaints against C 1031 made to or received from the Insurance Commissioner of the State of Washington; and Production No. 13 dealt with any advertising media by First American concerning prompt and timely service of processing claims, (CP 794-797). These are all relevant issues. First American rejected C 1031's claim based solely upon the assertion that there were no damages incurred by C 1031, (CP 619). Prior to litigation, First American denied there was any damage. First American took a different posture entirely after litigation. C 1031 would be prejudiced by not showing that there was in fact no basis for denying the claim, except as was originally stated in the letter denying coverage, because there were no damages, (CP 800-816).

C 1031 requests that the decision of the Trial Court in granting only 'documents related to or referring to Defendant's assessment of damages incurred by Plaintiff under the title policy' be expanded to include all documents that reasonably could lead to relevant information. The court abused its discretion in limiting discovery.

Issue No. 4. Whether the Trial Court properly excluded C-1031's expert testimony?

This involves Assignment of Error No. 3. This issue only becomes relevant in the event that the Court of Appeals upholds the Trial Court ruling concerning the material issues of fact and/or mitigation.

Rule of Evidence 704 provides:

OPINION ON ULTIMATE ISSUE.

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Here, an expert is necessary to testify concerning the interpretation of the policy because of the two issues of fact created by the Trial Court in its summary judgment order.

Rule of Evidence 702 provides that where specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert may testify.

The Washington cases in which an insurance expert has testified concerning the construction of a policy is minimal because in Washington the interpretation of an insurance policy is a legal issue reserved solely for the Court. *State Farm Ins. v. Emerson*, 102 Wn. 2d 477, 687 P.2d 1139

(1984). Insurance policies are to be construed as contracts and interpretation is a matter of law. *Id.*

In the event the Court of Appeals finds liability under the policy without any mitigating circumstances, then the issue of striking the expert is not relevant. C 1031 requests that the Court of Appeals reverse the Trial Court and allow the expert testimony should this Court affirm the Trial Court's Order of November 4, 2010, (CP 503-505).

**MOTION FOR FEES AND COSTS ON
APPEAL IN TRIAL COURT**

Issue No. 5. Whether C 1031 is entitled to attorney's fees and costs in the Trial Court and on appeal?

Paragraph 8 on Page 3 of the policy, Determination to the Extent of Liability, states as follows, (CP 44):

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured Claimant who has suffered loss or damage by reason of matters insured against by this policy. . . .

(c) In addition to the extent of liability under (a) and (b), the company will also pay those costs, attorney's fees, and expenses incurred in accordance with Section 5 and 7 of these conditions.

Also, on the front page of the policy under COVERED RISKS, at the bottom of Paragraph 10, the policy provides, (CP 42):

The company will also pay the costs, attorney's fees, and expenses incurred in defense of any matter insured against by this policy, but only to the extent provided in the conditions.

C 1031 also seeks attorney's fees and costs on the basis of *Olympic Steamship v. Centennial Insurance Co.*, 177 Wn.2d 37, 53, 811, P.2d 673 (1991) (where the court extended the right of an insured to recoup attorney fees that it incurs because an insurer refuses to pay the justified claim of the insured), and RAP 18.1. C 1031 is entitled to attorney fees in Trial Court and on appeal under RCW 4.84.330. Recovery of attorney fees and costs are mandatory *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007). Costs here include the appraiser's expert fee. C 1031 is entitled to a Judgment for all fees and costs herein incurred from the inception of these proceedings to the conclusion. C 1031 should be permitted to file an affidavit pursuant to RAP 18.1(a)(d).

IX. CONCLUSION

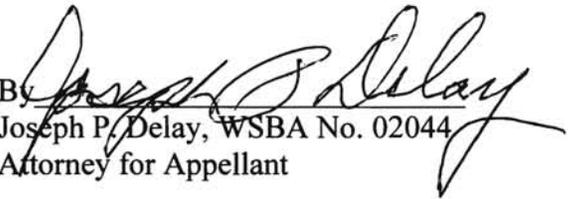
C 1031 respectfully requests the Court to reverse the Trial Court ruling to the extent that the Trial Court held that there were material issues

of fact and to grant Summary Judgment on the issue of liability and damages in the amount of \$60,000.00 to C 1031 Properties, together with reasonable attorney's fees and costs incurred in this appeal and in the Trial Court.

Dated this 12th day of September, 2012.

Respectfully Submitted.

**DELAY, CURRAN, THOMPSON,
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By 
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