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No. 23384-7-III

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

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

Appellants,

v.

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

Respondents.

APPELLANTS VAN DINTER'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. Did the trial court err by denying the Van Dinters' Cross-Motion for Summary Judgment against the Orrs for breach of statutory warranty deed?
2. Did the trial court err by granting Orrs' Motion for Summary Judgment Dismissing the Van Dinters' action for breach of statutory warranty deed?
3. Did the trial court err by granting Orrs' Motion for Summary Judgment dismissing the Van Dinters' action for Negligent Misrepresentation?
4. Did the trial court err by denying the Van Dinters' Motion for Summary Judgment on its breach of contract action against First American?
5. Did the trial court err in granting First American's Motion for Summary Judgment on the Van Dinters' breach of contract action?

II. STATEMENT OF FACTS

A. Undisputed Facts.

The relevant facts in this case are undisputed. Prior to January 22, 2003, Joseph and Lori Orr ("Orrs") owned the property located at 8700 East Sprague Avenue, Spokane, Washington ("Property"). (C.P. 119-20). On November 16, 1999, the Spokane County Board of County Commissioners adopted an ordinance that called for the construction of sewer and street improvements benefiting the Property. (C.P. 90). In

order to pay for the improvements, the ordinance also set a Capital Facility Rate ("CFR") to be assessed against each benefited parcel. (C.P. 90). In 2001, the sewer construction and street improvements benefiting the Property were completed. (C.P. 23-24; 86; and 141). The Orrs began attempts to sell the Property. In doing so, the Property was advertised as having all utilities including sewer. (C.P. 141).

Based on the representations by the Orrs and their agents, Mike Van Dinter and Sheryl Ann Van Dinter ("Van Dinters") purchased the Property on approximately January 23, 2003. (C.P. 22-23). In order to complete the transaction, the Orrs provided the Van Dinters a statutory warranty deed. (C.P. 23; C.P. 122). The statutory warranty deed, by law, warranted against all known and unknown encumbrances. (C.P. 9-11). At the time of the sale the Orrs did not indicate to the Van Dinters or their agents that any amounts were due and owing on the Property for the sewer construction and improvement or that the Property was encumbered in any way. (C.P. 23, 120).

In order to purchase the Property, the Van Dinters obtained financing from AmericanWest Bank. (C.P. 23). In

turn, AmericanWest Bank obtained title insurance from First American Title Company of Spokane through First American Title Insurance Company and First American Corporation (collectively "First American"). (C.P. 23). The policy obtained by AmericanWest Bank insured against any encumbrances on the title of the property, against liens, or against assessments for street improvements. Id. The Van Dinters also purchased a title insurance policy from First American. (C.P. 45). Similarly, the Van Dinters' policy also insured against any encumbrances. Id.

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

Both AmericanWest Bank and the Van Dinters filed formal notices of claim with First American because of the encumbrance. (C.P. 96). First American denied both of these claims. AmericanWest assigned its claims against First

American under the title insurance policy to the Van Dinters in order to protect its interest. (C.P. 40–41).

B. Procedural History.

As a result of the Orrs and First American's refusal to honor their commitments, the Van Dinters commenced the suit at issue to obtain payment of the encumbrance. (C.P. 3-11). The Van Dinters sought relief against the Orrs for breach of their statutory warranty deed and negligent misrepresentation of material facts in connection with the sale. (C.P. 3–11). The Van Dinters also sought relief against First American for breach of both of its title insurance policies. (C.P. 3–11). After First American and the Orrs answered, the Van Dinters moved for summary judgment against First American. (C.P. 64–66; C.P. 54–63). In turn, First American cross-moved for summary judgment. (C.P. 67–80). On July 26, 2004, the Orrs moved for summary judgment on the Van Dinters' causes of action for breach of statutory warranty deed and negligent misrepresentation. (C.P. 107–118). The Van Dinters then moved for summary judgment against the Orrs on their cause of action for breach of statutory warranty deed. (C.P. 156–163).

On August 20, 2004, the trial court heard argument on these motions. (C.P. 194). The trial court granted the Orrs' motion for summary judgment and First American's cross-motion for summary judgment. Both the Van Dinters' motion for summary judgment against First American and its cross-motion for summary judgment against the Orrs were denied. (C.P. 200–211). The present appeal was then initiated. (C.P. 212–226).

III. ARGUMENT

A. Standard Of Review.

An order of summary judgment is reviewed de novo and the Appellate Court applies the same legal standard as the trial court. City of Seattle v. Mighty Movers, Inc., 152 Wn.2d 343, 348, 96 P.3d 979 (2004). Summary judgment is appropriate *“if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”* Id. citing CR 56(c).

The object and function of summary judgment is the avoidance of useless trial. Mark v. Seattle Times, 96 Wn.2d 473, 484, 635 P.2d 1081 (1981); Meissner v. Simpson Timber Company, 69 Wn.2d 949, 951, 421 P.2d 674 (1966); Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). A material fact is one upon which the outcome of the litigation depends. Wojcik v. Chrysler Corp., 50 Wn. App. 849, 853, 751 P.2d 854 (1988). On review, the Appellate Court must accept all facts as true and consider all facts and reasonable inferences in the light most favorable to the nonmoving party. Dickinson v. Edwards, 105 Wn.2d 457, 461, 716 P.2d 814 (1986). A summary judgment motion is properly granted only if, from all of the evidence, reasonable men could reach but one conclusion. Barrie v. Hosts of America, 94 Wn.2d 640, 642, 618 P.2d 96 (1980).

Interpretation of an unambiguous contract term is an issue of law. Truck Center Corp. v. General Motors Corp., 67 Wn. App. 539, 543, 837 P.2d 631 (1992). All questions of law are reviewed de novo. Paradise Orchards Gen. P'ship v. Fearing, 122 Wn. App. 507, 516, 94 P.3d 372 (2004).

B. As A Matter Of Law, The Spokane County CFR Constituted An Encumbrance Against The Property. Thus, The Orrs Breached Their Warranty Deed.

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

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

RCW 64.04.030 (2004)(emphasis added).

It is well established that such a deed warrants "***against known as well as unknown defects and encumbrances . . .***"

Fagan v. Watters, 115 Wash. 454, 457, 197 P. 635

(1921)(emphasis added). An encumbrance is "any right to or interest in land which may subsist in third persons, to the diminution of value of the estate of the tenant . . ." Cowiche Basin P'ship v. Mayer, 40 Wn. App. 223, 228, 698 P.2d 567 (1985); see also Green v. Tidball, 26 Wash. 338, 343, 67 P. 84 (1901). Thus, in determining whether property is "encumbered" the determinative question is whether the right diminishes the value of the land. Id. In other words, is the land worth less because of the CFR?

Here, Spokane County created an obligation against the Property in 1999. (C.P. 90). This right was perfected in 2001 when the sewer was constructed. Id. The Supreme Court of Washington confirmed many years ago that this creates an encumbrance at the time the property is benefited.

Within these definitions [of the term "incumbrance"] there can be little doubt that the right of the city to levy an assessment upon these lands to pay the proportionate costs of the improvement made in the street was an incumbrance on the land at the time the deed in question was executed. The work had then been performed and accepted by the city. It was performed in pursuance of a resolution and ordinance of the city declaring that a just proportion of the cost of the improvement should

be charged upon this land. The benefit conferred upon the land which gave rise to the right to make the levy, and without which no right to levy could arise, had then been conferred. True, all of the steps necessary to perfect the charge had not then been taken, and the amount thereof, as it depended on various considerations, was undetermined, and the city might or might not thereafter enforce the right. In this sense the right may be said to have been inchoate; but it was, nevertheless, a right which the city could enforce against the will and consent of the owner, and in spite of any objection he might make. As such it was a burden on the land depreciative of its value, which did not conflict with his right to convey the land and fee, and hence an incumbrance.

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

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

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

Similarly, in this case, the right was created by the County's ordinance in 1999. (C.P. 90). The benefit was

conferred to the property when the construction was completed in 2001. (C.P. 23-24). At that time, the County maintained the right to enforce the charge. (C.P. 90). Whether the County chose to delay enforcing its right or sending a bill to the Orrs is immaterial. See Green, 26 Wash. at 343-344 ("*It was nevertheless, a right which the City could enforce against the will and consent of the owner*"). Thus, as a matter of law, the Property was encumbered in 2001 when construction was completed.

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

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

Consequently, the Orrs, as a matter of law, breached their statutory warranty deed. The Orrs warranted that the Property was free from all known and unknown encumbrances. (C.P. 122). Under Washington law, the CFR was an encumbrance regardless of whether the County chose to

exercise its rights. Williams, 57 Wash. at 63-64. The bottom line is that the CFR was a right or interest in land which subsisted in the County and diminished the value of the Property at the time the deed was executed in 2003. See Green, 26 Wash. at 343-344. The Orrs did not and cannot offer any legal authority to the contrary. By selling the Property subject to the CFR to the Van Dinters, the Orrs breached the statutory warranty deed causing damages to the Van Dinters. Therefore, the Van Dinters are entitled to judgment against the Orrs as a matter of law. Thus, the trial court erred when it denied the Van Dinters' Cross-Motion for Summary Judgment.

C. **Because The Property Was Encumbered, It Was Err To Dismiss The Van Dinters' Breach Of Warranty Deed Action.**

As explained above, the trial court erred as a matter of law when it granted the Orrs' Motion for Summary Judgment dismissing the Van Dinters' cause of action for breach of statutory warranty deed. The Orrs' statutory warranty deed warranted against all known and unknown encumbrances. Fagan, 115 Wash. at 457. The CFR is an encumbrance on the Property. Green, 26 Wash. at 343-344. The material facts are

not in dispute. (C.P. 90). The Orrs simply do not dispute the fact that the sewer was constructed in 2001. (C.P. 119-122; C.P. 141). It is also undisputed that the Orrs conveyed the property by warranty deed. (C.P. 122). Thus, the trial court erred by granting summary judgment based upon its erroneous legal conclusion that the CFR was not an encumbrance. Consequently, the trial court's decision should be reversed and the Van Dinters' Cross-Motion for Summary Judgment granted.

D. Genuine Issues Of Material Fact Exist With Regard To The Van Dinters' Negligent Misrepresentation Cause Of Action.

The trial court erred when it granted Orrs' Motion for Summary Judgment dismissing the Van Dinters' negligent misrepresentation cause of action. With regard to negligent misrepresentation, Washington has adopted the Restatement (Second) of Torts § 552(1) (1977). ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). In Washington, negligent misrepresentation occurs when:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for

pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Id. citing Restatement (Second) of Torts § 552(1) (1977)(emphasis added).

Issues of negligence and proximate cause are questions of fact for the jury and are not usually susceptible to summary judgment. Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). See also Blumenshein v. Voelker, 2004 WL 2521967, Slip Copy at *3, 100 P.3d 344 (Div. III. November 9, 2004)¹.

Here, the Orrs, through their agent, advertised that the Property had, "*UTILITIES: Public Sewer, Water & Gas.*" (C.P. 141). However, this was not accurate since the Orrs failed to pay the 2001 CFR for the sewer. (C.P. 23). The Van Dinters are now forced to pay the outstanding CFR for the sewer. (C.P.

¹ Blumenshein v. Voelker, 100 P.3d 344 (Div. III 2004) is a recent Division III decision filed on November 9, 2004. This is a published opinion, however the Washington Appellate Reporter cites and the pinpoint cites for the Pacific Reporter are currently unavailable. The case number for this case is No. 22583-6-III.

23). Thus, the advertisement represented that the Property had sewer but did not disclose the CFR for the sewer was unpaid. (C.P. 141).

The Van Dinters justifiably relied on the Property advertisement and the warranty deed when they purchased the Property. (C.P. 141; C.P. 122; C.P. 6). The Orrs' negligent misrepresentation that the Property had sewer is a question of fact for the jury. Ruff, 125 Wn.2d at 703.

The evidence presented by the Van Dinters create genuine issues of material fact with regard to the negligent misrepresentation by the Orrs. On the other hand, the Orrs failed to present any admissible evidence supporting their motion for summary judgment on the negligent misrepresentation claim. Thus, the trial court erred in granting the Orrs' motion for summary judgment.

E. The Trial Court Erred By Denying the Van Dinters' Motion for Summary Judgment Against First American.

An insurance policy is a contract. Panorama Village Condo Owners Assoc. Bd. v. Allstate Ins. Co., 144 Wn.2d 130, 137, 26 P.3d 910 (2001). *"The interpretation of insurance*

policies is a question of law." PUD No. 1 v. Int'l Ins. Co., 124 Wn.2d 789, 797, 881 P.2d 1020 (1994). If any ambiguities in the policy exist, those ambiguities shall be construed against the insurer. Weyerhaeuser Co. v. Aetna Cas. & Surety Co., 123 Wn.2d 891, 897, 874 P.2d 142 (1994). Failure to pay a covered claim constitutes a breach of the insurance policy and the insured is entitled to judgment. Simms v. Allstate Ins. Co., 27 Wn. App. 872, 879, 621 P.2d 155 (1980).

Courts will not disregard language used by the parties in a contract. Better Fin. Solutions v. Transtech, 112 Wn. App. 697, 711, 51 P.3d 108 (2002), rev. denied, 149 Wn.2d 1010 (2003). They will construe the contract so as to give effect to all of its provisions as opposed to rendering one or more provisions meaningless or ineffective. Id. Absent fraud or mistake, parole evidence may not be admitted to contradict or alter the express terms of a valid written contract. Schweitzer v. Schweitzer, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997). Further, contracts are construed against the drafter. Huber v. Coast Inv. Co., Inc., 30 Wn. App. 804, 809, 638 P.2d 609

(1981). Here, the policies at issue were drafted by First American. (C.P. 30; 45).

1. First American Breached Its AmericanWest Policy.

- a. First American breached its AmericanWest policy because the CFR is an encumbrance.**

The policy of title insurance sold to AmericanWest Bank provides:

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

2. Any defect in or lien or encumbrance on the title;...

6. The priority of any lien or encumbrance over the lien of the insured mortgage; . . .

7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material: (a) arising from an improvement or work related to the land which is contracted for or commenced prior to date of policy;...

8. Any assessments for street improvements under construction completed at date of policy which now have gained or hereafter may gain priority over the insured mortgage;...

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

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

First American insured AmericanWest Bank against any encumbrance against the Property. (C.P. 30) As discussed in detail above, the CFR at issue is an encumbrance which diminished the value of the property. Green, 26 Wash. at 343-344. Thus, AmericanWest Bank suffered a loss by reason of the encumbrance on the title. First American's failure to pay this loss is a breach of contract. See Simms, 27 Wn. App. at 879.

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

- b. First American also breached its AmericanWest policy because the CFR is a lien that has priority over the Bank's mortgage.

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

RCW 36.94.150 in the pertinent part states:

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

RCW 36.94.150 (2004)(emphasis added).

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

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

c. First American also breached its AmericanWest Policy because the CFR is an assessment for street improvements.

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

Under Washington law, a water or other pipeline is a street improvement. Hargreaves v. Mukilteo Water Distr., 37

Wn.2d 522, 528, 224 P.2d 1061 (1950). The Hargreaves court explained:

A street improvement, such as a water (or other) pipeline, outside of possible differences in excavation, costs approximately the same amount per lineal foot for installation. ... The installation of a water pipeline is, of course, a special benefit to land which fronts upon the improvement. The same is true of a sewer line . . .

Hargreaves, 37 Wn.2d at 528 (emphasis added).

A sewer pipeline is also an improvement and/or work related to the land. See RCW 60.04.021 (2004). Spokane County constructed a sewer and refurbished the road in front of 8700 East Sprague Avenue, Spokane, Washington. (C.P. 23). The cost of these street improvements were assessed against the property purchased by the Van Dinters. (C.P. 23). These street improvements were commenced and completed prior to January 24, 2003. (C.P. 23-24). The CFR has or will have priority over AmericanWest Bank's mortgage. RCW 36.94.150 (2004).

The term "assessments" is not defined in the policy. (C.P. 30-39). However, undefined terms are to be given their

plain, ordinary, and popular meanings. Queen City Farms v. Central Nat'l Ins. Co., 126 Wn.2d 50, 65, 882 P.2d 703 (1994). Assessment is defined as "*an amount assessed*". Webster's Dictionary, Second Edition, p.112. It has also been defined as "*the process of ascertaining and adjusting the shares respectively to be contributed by several persons toward a common beneficial object according to the benefit received.*" Black's Law Dictionary, Fifth Edition, p. 106.

Under the plain meaning of "*assessment*," the CFR is an assessment for the sewer installation because it represents the amounts owed by each property owner attributable to "*the costs of acquiring, constructing and installing the system of sewerage.*" (C.P. 84). Thus, the CFR is an assessment for street improvements which "*may gain priority over the insured mortgage.*" (C.P. 30); RCW 36.94.150 (2004).

Consequently, under the policy terms, First American is required to pay for this assessment. Because First American has failed to pay, the Van Dinters, through the rights acquired from AmericanWest Bank, are entitled to summary judgment as a matter of law.

2. First American Breached Its Van Dinter Policy because the CFR is an encumbrance.

The policy First American sold to the Van Dinters provides:

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

- 1. Title to the estate or interest described in Schedule A being vested other than as stated therein;*
- 2. **Any defect in or lien or encumbrance on the title;***
- 3. Unmarketability of the title; or*
- 4. Lack of a right of access to and from the land;*

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

(C.P. 45)(emphasis added).

First American insured against any encumbrance on the title. (C.P. 45-46). As discussed in detail above, the CFR at issue is an encumbrance which diminished the value of the property. Green, 26 Wash. at 343-344. First American's refusal to pay for the encumbrance is a breach of contract and

renders it liable for that loss. See Simms, 27 Wn. App. at 879. Thus, the trial court erred by denying the Van Dinters' Motion for Summary Judgment.

F. The Trial Court Erred By Granting First American's Cross-Motion For Summary Judgment.

The trial court erred in granting First American's Cross-Motion for Summary Judgment. An insurance policy protects the insured against some contingency. The facts at bar are not in dispute. AmericanWest Bank and the Van Dinters purchased the policies at issue to protect them in the event the property was encumbered or if there was a lien or an assessment for street improvements. (C.P. 30-39). AmericanWest Bank and the Van Dinters paid the required premiums, and First American accepted payment. (C.P. 31). However, when the CFR encumbered the property, a contingency that the policy protected against, First American refused to pay and breached its contracts. See discussion supra. Consequently, First American's Cross-Motion for Summary Judgment should not have been granted.

Further, the CFR constitutes a lien or assessment for street improvements that has or might have priority over AmericanWest Bank's mortgage, yet First American did not pay. First American's failure to pay is a breach of contract. Thus, the trial court wrongfully granted First American's Cross-Motion for Summary Judgment.

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

An insured is entitled to attorney fees incurred as a result of the insurance company's wrongful refusal to pay a covered claim. Olympic Steamship Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991). "*When an insured purchases a contract of insurance, it seeks protection from expenses arising from litigation, not vexatious, time-consuming, expensive litigation with his insurer.*" Id. at 52 (internal quotations omitted). Moreover, the insurance policy provided that First American would pay attorney fees as a result of defending the title. (C.P. 45).

The Van Dinters were forced to bring suit against First American with regard to First American's obligations. First

American failed to pay a covered claim. The Van Dinters are entitled to recover attorney fees they incurred as a result of First American's refusal. Thus, under Olympic Steamship and the insurance policy the Van Dinters request this Court grant their motion for attorney fees at both the trial court level and on appeal. This motion is made pursuant to RAP 18.1(b).

V. CONCLUSION

Pursuant to the foregoing, the Van Dinters respectfully request the following relief:

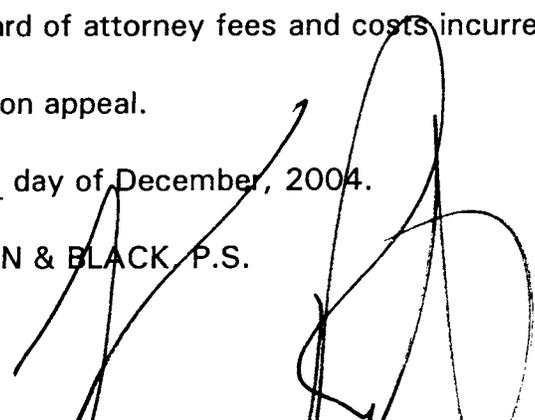
1. That the trial court's decision granting the Orrs' Motion for Summary Judgment be reversed.
2. That the trial court's decision granting First American's Cross-Motion for Summary Judgment be reversed.
3. That the trial court's decision denying the Van Dinters' Cross-Motion for Summary Judgment be reversed and the trial court be instructed to enter judgment in the Van Dinters' favor against the Orrs.
4. That the trial court's decision denying the Van Dinters' Motion for Summary Judgment against First American

be reversed and the trial court be instructed to enter judgment in favor of the Van Dinters against First American.

5. For an award of attorney fees and costs incurred at the trial court level and on appeal.

DATED this 2 day of December, 2004.

DUNN & BLACK, P.S.



KEVIN W. ROBERTS, WSBA #29473
NICHOLAS D. KOVARIK, WSBA #35462
Attorneys for Appellants Van Dinter

CERTIFICATE OF SERVICE

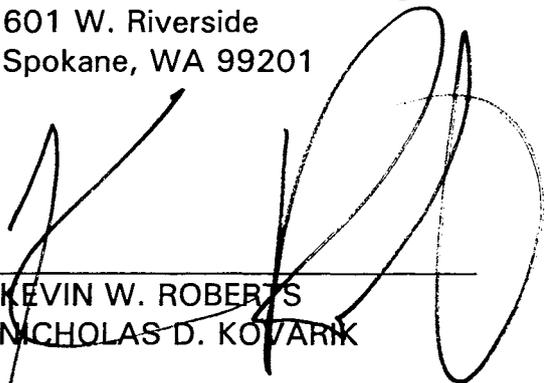
I HEREBY CERTIFY that on the 2 day of December, 2004, I caused to be served a true and correct copy of the foregoing document to the following:

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
 FAX TRANSMISSION

Mr. Stephen F. Backman
Backman & Blumel, P.S.
4407 N. Division Street,
Ste. 900
Spokane, WA 99207

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
 FAX TRANSMISSION

John D. Munding
Crumb & Munding, P.S.
1950 Bank of America Bldg.
601 W. Riverside
Spokane, WA 99201



KEVIN W. ROBERTS
NICHOLAS D. KOVARIK

RCW 64.04.030

Warranty deed -- Form and effect.

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

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

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

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

APPENDIX A

RCW 36.94.150

Lien for delinquent charges.

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

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

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

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

APPENDIX B

RCW 60.04.021
Lien authorized.

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

[1991 c 281 § 2.]

APPENDIX C