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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 marital community; FIRST AMERICAN TITLE
COMPANY OF SPOKANE, a Washington corporation; FIRST
AMERICAN TITLE INSURANCE COMPANY, a foreign
corporation; FIRST AMERICAN CORPORATION,
a foreign corporation,**

Respondents.

**BRIEF OF RESPONDENTS, FIRST AMERICAN TITLE
COMPANY OF SPOKANE, a Washington corporation; FIRST
AMERICAN TITLE INSURANCE COMPANY, a foreign
corporation; and FIRST AMERICAN CORPORATION, a foreign
corporation**

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TABLE OF CONTENTS

I. RESPONSE TO ASSIGNMENT OF ERROR2

 A. Response to Assignment of Error No. 4.2

 B. Response to Assignment of Error No. 5.2

II. STATEMENT OF FACTS3

 A. Van Dinters Purchase Real Property From Orr.3

 B. Van Dinters File Suit.5

III. ARGUMENT8

 A. Standard of Review.....8

 B. The Trial Court Did Not Error by Denying Van Dinters’
Contract Claim as a Matter of Law.....8

 1. Appellants Cannot Establish An Obligation On The
Part Of First American Arising Out of the Contract
Because of a Failure to Satisfy A Condition
Precedent.....9

 2. Van Dinters Failed to Establish Damages to
AmericanWest.....10

 C. The Trial Court Properly Concluded the CFR at Issue Was
Not a “Lien” Against the Property.....11

 D. The CFR Is Not An Assessment For Street Improvements
But Is A Charge For The General Health And Welfare.....14

 E. As a Matter of Law the CFR Portion of the Appellants’
Sewer Bill Is Not Covered By the AmericanWest Title
Insurance Policy.....16

F.	The CFR Is Not An Encumbrance Upon The Property As The Legislature Indicated When The Rights Of The County Should Attach.....	17
G.	Van Dinters Did Not Plead Or Argue To The Trial Court A Breach of Contract Under Their Title Insurance Policy.	18
H.	First American Is Entitled To An Award of Attorney's Fees Expended in Responding to This Appeal.	20
IV.	CONCLUSION.....	21

APPENDIX

1. RCW 36.94.020
2. RCW 36.94.150
3. SCC 8.03.9040
4. SCC 8.03.8120
5. SCC 8.03.8140

TABLE OF AUTHORITIES

CASES

<i>Ahrens v. Ladley</i> , 53 Wn.2d 507, 512 (1959)	10
<i>Allstate v. Edwards</i> , 116 Wash. App. 424, 65 P.3d 696 (2003)	8
<i>Arborwood Idaho v. Kennewick</i> , 151 Wn.2d 359, 365-373 (2004).	15, 16
<i>Dean v. McFarland</i> , 81 Wn.2d 215, 220 (1972)	13
<i>Estate of Bachmeier</i> , 147 Wn.2d 60, 68 (2002)	8
<i>Flajole v. Schulze</i> , 80 Wn. 483, 485 (1914).....	17, 18
<i>Goad v. Hambridge</i> , 85 Wn. App. 98, 105, 931 P.2d 200 (1977), <i>review denied</i> , 132 Wn.2d 1010, 940 P.2d 654 (1997).....	20
<i>Green v. Tydball</i> , 26 Wn. 388 (1901).....	17, 18
<i>Green River Community College v. Personnel Board</i> , 107 Wn.2d 427, 443, 730 P.2d 653 (1986).....	20
<i>Hodges v. Gronvold</i> , 54 Wn.2d 478, 483 (1959)	10
<i>Jones v. Sisters of Providence</i> , 140 Wn.2d 112, 116 (2000)	13
<i>Knowles v. Temple</i> , 49 Wn. 595, 597-598 (1908)	17, 18
<i>Northwest Independent Forest Manufacturers v. Dep't. of Labor and Industries</i> , 78 Wash. App. 707, 712 (1995).....	8
<i>Snohomish County v. Anderson</i> , 124 Wn.2d 834, 839 (1994)	19
<i>Wagg v. Estate of Dunham</i> , 146 Wn.2d 63, 42 P.3d 968 (2002).....	8
<i>Walter Implement, Inc. v. Focht</i> , 107 Wn.2d 553, 556-557 (1987)	9

STATUTES

RCW § 36.94.020 (West 2005).....11
RCW § 36.94.150 (West 2005).....12, 13, 18

OTHER AUTHORITIES

RAP 18.1.....20
RAP 18.9.....20

First American Title Company of Spokane, First American Title Insurance Company, and First American Corporation (collectively “First American”), by and through their counsel, John D. Munding of Crumb & Munding, P.S., submit the following response to the opening brief of Mike and Sheryl Van Dinter (“Van Dinters”).

I.

RESPONSE TO ASSIGNMENT OF ERROR

Van Dinters have asserted five separate assignments of error arising from the Trial Court’s dismissal of their case on summary judgment. Only two of the Van Dinters’ Assignments of Error, Nos. 4-5, pertain to First American.

A. Response to Assignment of Error No. 4.

Van Dinters’ Motion for Summary Judgment was based solely upon a claim that First American breached its insurance policy by failing to pay AmericanWest’s claim. (C.P. 58) The Trial Court did not error by denying Van Dinters’ Motion for Summary Judgment on this claim.

B. Response to Assignment of Error No. 5.

First American moved the Trial Court for summary judgment upon the following legal theories:

1. Plaintiffs' claims against First American based upon an assignment of claim from AmericanWest Bank fail as a matter of law. (C.P. 74)
2. The Spokane County Utility Divisions' CFR is not an insured loss under the title policy. (C.P. 75)
3. The Spokane County CFR is a utility charge, not an assessment for street improvements. (C.P. 77)
4. The CFR is excluded from coverage by virtue of the fact that any loss suffered is the result of governmental police power which is unrecorded at the date of policy. (C.P. 78)
5. Plaintiffs cannot establish a claim for breach of contract. (C.P. 79)

Based upon the record before this Court, the Trial Court did not commit error in granting First American's Motion for Summary Judgment.

II.

STATEMENT OF FACTS

A. Van Dinters Purchase Real Property From Orr.

On or about January 22, 2003, Van Dinters purchased the real property located at 8700 E. Sprague Avenue, Spokane, Washington, from the Respondents Orr. (C.P. 22-23). In conjunction with the real estate closing, First American issued a Policy of Title Insurance to Van Dinters.

(C.P. 45) First American also issued a lender policy of title insurance (“Title Policy”) to AmericanWest Bank. (C.P. 97-106) The Title Policy insured AmericanWest Bank as to the priority of its mortgage upon title to the real property at the time of closing. (C.P. 97)

The title insurance coverage sought by Van Dinters at the Trial Court level is alleged to arise under an assignment of the Title Policy issued to AmericanWest Bank by First American on January 24, 2003.

(C.P. 5) The Title Policy contains the following language:

- **SUBJECT TO THE EXCLUSIONS FROM COVERAGE, ... AND THE CONDITIONS AND STIPULATIONS** First American insures... against loss or damage, ... sustained or incurred by the insured by reason of:...
 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 the date of policy;
 8. Any assessments for street improvements under construction completed at the date of policy which now have gained or hereafter may gain priority over the insured mortgage. (Policy of insurance pg. 1)

- **EXCLUSIONS FROM COVERAGE** The following matters are expressly excluded from coverage of this policy and [First American] will not pay loss or damage, costs, attorney’s fees or expenses which arise by reason of:...
 1. ... (b) Any Governmental police power ... except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or

alleged violation affecting the land has been recorded in the public records at Date of policy.

3. Defects, liens, encumbrances, adverse claims, or other matters: ... (c) resulting in no loss to the insured claimant. (Policy of insurance pg. 7)

- **CONDITIONS AND STIPULATIONS ... 5. PROOF OF LOSS OR DAMAGE.** In addition to and after the notices required under Section 3 ... have been provided [First American], a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to [First American] within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. (Policy of insurance pg. 8)

(C.P. 103-104)

B. Van Dinters File Suit.

Over one year after the closing of the real property transaction, Van Dinters filed suit alleging that First American breached its contract with AmericanWest Bank. (C.P. 7) Van Dinters' claims were based entirely upon the premise that a post closing Capital Facilities Rate ("CFR") billed by the Spokane County Board of County Commissioners is a "covered loss" under the Title Policy as it interferes with the priority of AmericanWest's mortgage on the property. (C.P. 7)

The CFR at issue was imposed almost nine months post closing by the Spokane County Board of County Commissioners pursuant to Spokane County Code (SCC) Section 8.03.8120. CFRs of this nature are billed on

a monthly basis to the maturity date as reflected on the property owner's monthly bill. (SCC 8.03.8140). (C.P. 86-88)

To avoid any confusion regarding CFR's and their impact upon real property, the Spokane County Utilities Works Department has published the following information for the public education:

- Accounts that are in excess of sixty (60) days delinquent will receive a warning letter. The letter will be mailed to all interested parties known to the Division of Utilities (Known parties may include Owner, Mortgage Company, Landlord and Occupant in the case of rental property) regarding the delinquent amount. The warning letter will list the amount of charges in arrears, and will explain that the customer must pay the charges in full, or arrange for a payment plan within four weeks from the date of the warning letter. The warning letter will also provide notice that under the Revised Code of Washington, Spokane County may bring a foreclosure action against the property sixty (60) days after the attachment of the lien.
- The balance of this charge may be paid off at the time of sale or may be assumed by the new owner. **This CFR charge is not an assessment and will not show up in a title search.** This charge will need to be disclosed by the owner when you are preparing to sell the property. (Emphasis added)

(C.P. 93-94)

On April 30, 2003, four months after issuance of the Title Policy, Kevin Cooke, P.E. of Spokane Utilities Division, wrote to property owners regarding a proposed CFR as follows:

. . . Please note that this Account Summary is not a bill. Rather it is an opportunity for you to provide us with input concerning your parcel . . .

The prepayment notices will be sent June, 2003. They will identify the dates of prepayment period . . . If no prepayment is made, then the monthly CFR charge of \$35.00 per ERU will automatically begin following the prepayment period. (Dec. J. Munding, Ex. B) (C.P. 90)

On September 3, 2003, the Spokane County Utilities Department completed its final inspection of the sewer connection for the benefit of Plaintiffs' property. (C.P. 92) Pursuant to the Spokane County Code, the Spokane County Utilities Division commenced billing the property owners on a monthly basis for a 20 year period. (SCC 8.03.8120, 8.03.8140) (C.P. 86-88) Plaintiffs received their first bill for the CFR in October, 2003, over 10 months after issuance of the Title Policy.

On October 3, 2003, attorney Bruce Medeiros wrote a letter to First American Title on behalf of AmericanWest Bank. (C.P. 134-136) Although the letter purported to be a "Notice of Claim," it was **not** a "Proof of Loss." A Proof of Loss was never tendered by AmericanWest Bank to First American. (C.P. 96)

III.

ARGUMENT

A. Standard of Review.

A Trial Court's order granting or denying a motion for summary judgment is reviewed de novo. *Wagg v. Estate of Dunham*, 146 Wn.2d 63, 42 P.3d 968 (2002). The Appellate Court may affirm the Superior Court's decision granting a summary judgment on any ground supplied by the record. *Allstate v. Edwards*, 116 Wash. App. 424, 65 P.3d 696 (2003).

B. The Trial Court Did Not Error by Denying Van Dinters' Contract Claim as a Matter of Law.

Apart from the plain language of the CFRs, the statutes related thereto, and the terms and conditions of the Title Insurance Policy, Van Dinters still cannot prevail on a contract claim. In order to prevail on a breach of contract claim, Van Dinters need to establish (1) the imposition of a duty under the contract, (2) a breach of that duty, and (3) damages proximately caused by that breach to the party requesting recovery. See *Northwest Independent Forest Manufacturers v. Dep't. of Labor and Industries*, 78 Wash. App. 707, 712 (1995). The scope and extent of the duties that exist under a contract are determined by the terms of the agreement. See *Estate of Bachmeier*, 147 Wn.2d 60, 68 (2002). Since Van Dinters cannot establish the existence of a duty arising under the contract

between First American and AmericanWest, or the existence of damages resulting from a breach of any alleged duty, Van Dinters cannot succeed on their breach of contract claim.

1. **Appellants Cannot Establish An Obligation On The Part Of First American Arising Out of the Contract Because of a Failure to Satisfy A Condition Precedent.**

No obligation arose under the contract for First American to take any action for the benefit of AmericanWest since an express condition precedent did not occur. A condition precedent is an event occurring subsequent to the making of a valid contract which must occur before a duty arises on the part of one of the parties. *See Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 556-557 (1987). “The party seeking enforcement of the contract has the burden of proving performance of an express condition precedent.” *Id.* at 557.

Here, there is no dispute that there are two conditions precedent which must be satisfied before obligations arise on the part of First American to act for the benefit of AmericanWest: 1) the insured must file notice of a claim, and 2) submit proof of loss. (C.P. 104, 152). Van Dinters mention letters from counsel which are meant to suffice as proof of loss. (C.P. 152, referencing C.P. 134-136, 140). However, later correspondence with First American clearly indicates that these letters

failed to suffice as a proof of loss required by the contract. (C.P. 96 and 141).

Having failed to prove the existence of an obligation on the part of First American for a failure to satisfy a condition precedent, Van Dinters' breach of contract claim failed as a matter of law. The denial of Van Dinters' summary judgment and the granting of summary judgment to First American was correct.

2. **Van Dinters Failed to Establish Damages to AmericanWest.**

Van Dinters have shown no loss or damages or injury of any kind suffered by AmericanWest as a result of any actions or inactions of First American. The existence of damages suffered by the party seeking recovery is a necessary element in a breach of contract claim. *See Ahrens v. Ladley*, 53 Wn.2d 507, 512 (1959). Proof of damages includes "the amount or the extent of damages" as well as "the very fact of damages." *Hodges v. Gronvold*, 54 Wn.2d 478, 483 (1959) (emphasis in original). The contract insures AmericanWest's mortgage and guarantees the priority of AmericanWest's interest. (C.P. 97-106). AmericanWest's mortgage has not lost priority. (C.P. 169). Appellants have offered no evidence to establish the fact of damages suffered by AmericanWest, but instead have tried to substitute Appellants' unforeseen financial obligation

to pay the CFR portion of the sewer bill as evidence of damages suffered under AmericanWest's contract. (C.P. 154, 171). The contract only indemnifies against loss suffered by AmericanWest. (C.P. 97-106). Short of showing that AmericanWest's interest was subordinated or that AmericanWest suffered some other cognizable compensable loss under its policy, Van Dinters cannot prevail on the breach of contract claim against First American.

C. The Trial Court Properly Concluded the CFR at Issue Was Not a "Lien" Against the Property.

Van Dinters' portrayal of the CFR as a "perfected" interest in the property is attempted by omitting portions of the statutes they cite and misstating the facts as applied to the statute. The CFR is a charge by Spokane County for the cost of the installation of the sewer system to the property. (C.P. 84). This charge is authorized under Chapter 36.94 of the Revised Code of Washington. RCW § 36.94.020 (West 2005). The section selectively cited by the Appellants under which they argue Spokane County has an interest in the property which takes priority over AmericanWest's interest reads in its entirety:

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 a failure to pay 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 line 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 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.

RCW § 36.94.150 (West 2005) (emphasis added) (compare Appellants' brief at 18).

The language of the statute clearly restricted its scope to delinquencies and provides for attachment procedures for the county to secure payment by creating a lien against the property for delinquencies. *Id.* The Spokane County Code Section relying on this statute also restricts itself to delinquencies. SCC § 8.03.9040. Even the County acknowledges that under this statute a lien is not created automatically but "*may be* attached to the property ... for all *delinquent* rates." (C.P. 93)(emphasis

added). Appellants did not plead, argue, or offer any evidence that the CFR for the property is or ever was delinquent, but have instead continually selectively cited this statute and the County Ordinance and concluded that because Spokane County can ensure payment of delinquencies by filing a lien, Spokane County ipso facto has a lien for the CFR. (Appellants' brief at 18, C.P. 60, 146). This is not only incorrect, but is in conflict with Washington's rule of strictly construing statutory liens, and not extending them "for the benefit of those who do not *clearly* come within the terms of the statute." *Dean v. McFarland*, 81 Wn.2d 215, 220 (1972) (emphasis in original).

As a matter of law, Spokane County does not have a lien on the property, does not have the right to create a lien on the property absent delinquency, and as such, AmericanWest did not suffer a loss under the policy.

Van Dinters' brief omits the second paragraph of this statute which identifies the attachment process for a lien created under RCW 36.94.150, ignores S.C.C. 8.03.9040 (Appellants' brief at 18), and repeatedly identifies the CFR as "perfected" citing the declaration of Mr. Van Dinter as authority for this proposition. (Appellants' brief at 3, 8). "Two cardinal rules of statutory construction ... [are] that statutes should be read reasonably and as a whole." *Jones v. Sisters of Providence*, 140 Wn.2d

112, 116 (2000) (emphasis added). By failing to include relevant portions of the statute and completely reading out the word “delinquent” in the relevant statute and ordinance the Appellants have blatantly attempted to mislead the court. (Appellants’ brief at 18).

D. The CFR Is Not An Assessment For Street Improvements But Is A Charge For The General Health And Welfare.

While First American believes that a ruling on the correct characterization of the CFR as either an “assessment” or a “charge” is not necessary to resolve the matter before the court with respect to Van Dinters’ claims against First American, the correct characterization of the CFR establishes additional ground for the lack of merit of Appellants’ claims against First American. “This CFR charge is not an assessment” (C.P. 94, 77-78, 165-168). Van Dinters’ attempt to construe the CFR as an assessment is indicative of the fact that they are aware that the CFR has not created a lien that takes priority over AmericanWest’s interest. Appellants rely heavily on the language in the contract which allows for coverage for assessments which “hereafter may gain priority over the insured mortgage” as they are aware that AmericanWest’s mortgage has not lost priority. (C.P. 58, 62, 149, 150).

The fact that the CFR is not an assessment is undisputable as a matter of law. Assessments are taxes passed under the legislative

authority of the government, and the revenue raised from assessments is directed toward the general good. *See Arborwood Idaho v. Kennewick*, 151 Wn.2d 359, 365-373 (2004). Charges or fees, on the other hand, are authorized under the general police power and the money is used for the special benefit received. *See Id.* (C.P. 77-78, 165-168).

As a matter of law, the CFR is a charge authorized under the police power of the county for the general health and welfare and not an "assessment for street improvements". *Arborwood Idaho*, 151 Wn.2d at 370-371. As such, the CFR does not fall under the clause covering assessments for street improvements which "hereafter may gain priority over the insured mortgage." (C.P. 77-78).

Even if the use of the word "assessment" in the policy can be expanded to encompass the CFR, coverage under the policy does not equate to payment by First American. (C.P. 104). As discussed above, proof of actual monetary loss or damage by AmericanWest is required, and upon receipt of such, First American has a variety of rights arising under the contract. (C.P. 104) Contrary to Appellants' contention that coverage equals an obligation to pay, coverage amounts to nothing more than the conditional obligation for First American to take the appropriate action to secure the priority of AmericanWest's mortgage or compensate

AmericanWest for its actual monetary loss resulting from the loss of priority. (Compare Appellant's brief at 17, 19, 21 and C.P. 104)

E. **As a Matter of Law the CFR Portion of the Appellants' Sewer Bill Is Not Covered By the AmericanWest Title Insurance Policy.**

Undisputedly, the correct characterization of the CFR is as a charge implemented under the police power of the county which was not recorded in the public record at the date of the policy, and as such is excluded from coverage under AmericanWest's policy. *Arborwood Idaho*, 151 Wn.2d at 370-371 (C.P. 78-79, 103, 167). The purpose of title insurance is to guarantee the state of the title at an instant in time. (C.P. 70). The system is based upon the recording of interests and estates in land and individuals' reliance upon those records. (C.P. 196-197). The policy between AmericanWest and First American is clearly a creature of this system as it excludes any loss suffered by AmericanWest arising from

[a]ny governmental police power ... except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at the date of the policy.

(C.P. 103, 78-79) (emphasis added). As a matter of law the CFR is the result of governmental police power. *Arborwood Idaho*, 151 Wn.2d at 370-371. Any effect on the property resulting from the exercise of this

power was not on record as of the date of the issuance of the policy. (C.P. 79). As such, there is no coverage under the policy for the CFR portion of the Van Dinters' sewer bill under AmericanWest's insurance policy.

F. The CFR Is Not An Encumbrance Upon The Property As The Legislature Indicated When The Rights Of The County Should Attach.

Van Dinters go to great lengths to argue that the CFR is an encumbrance upon the property that existed and was perfected prior to the sale of the property and the issuance of the insurance policy. (Appellants' brief at 8-11). Appellants rely primarily on *Green v. Tydball*, 26 Wn. 388 (1901), citing long passages of the courts reasoning. (Appellants' brief at 8-9). However, not only does *Green* clearly not support the contention that there was an encumbrance on the property at the time of the issuance of the Title Policy, but subsequent treatment of this case clearly indicates it is no longer good law. See *Knowles v. Temple*, 49 Wn. 595, 597-598 (1908); *Flajole v. Schulze*, 80 Wn. 483, 485 (1914).

Green itself limited its holding to facts where the legislative enactment giving rise to the charge or assessment on the land did not specify when the encumbrance was created. *Green*, 26 Wn. at 344. The court in *Knowles* noted that the rationale of *Green*, "that the liability for the assessment accrues upon completion of the improvement cannot be

extended” where the statute clearly provides for the fixing of a different date. *Knowles*, 49 Wn. at 597-598. The *Knowles* court concluded “that the mere inchoate right to levy a tax or assessment constitutes an incumbrance cannot be accepted as one of general applicability.” *Id.* at 598.

In *Flajole*, the court noted that the *Knowles* treatment of *Green* could “only be read one way, and that is that the court no longer regarded *Green v. Tydball* as authoritative.” *Flajole*, 80 Wn. at 485. In the present matter, not only do the ordinances provide for the process for the commencement of billing of the charge, but the statute allows for attachment to the property only upon delinquencies. (C.P. 88) RCW § 36.94.150 (West 2005). The completion of the sewer improvement is irrelevant to determining the existence of an encumbrance. *Flajole*, 80 Wn. at 485.

G. Van Dinters Did Not Plead Or Argue To The Trial Court A Breach of Contract Under Their Title Insurance Policy.

Van Dinters argue on appeal for the first time that First American breached its contract with them. (Appellants’ brief 22-23). Van Dinters did not plead breach of contract under their Title Policy with First American and did not argue breach of this contract at the Trial Court level. (C.P. 7, 58) Appellants did, however, repeatedly attempt to combine the

two contracts into a hybrid in order to create a cause of action against First American. (C.P. 153, 171-172 (attempting to substitute Van Dinters' financial obligation for loss suffered by AmericanWest); C.P. 172 (citing to Van Dinter's contract for calculation of damages supposedly arising under AmericanWest's contract)).

If an issue was not briefed or argued at the Trial Court level, it will not be considered on appeal. *Snohomish County v. Anderson*, 124 Wn.2d 834, 839 (1994).

Even if considered, the Van Dinters cannot prevail under a breach of contract claim under their contract with First American. Again, regardless of the ultimate characterization of the CFR, there is no doubt or dispute that it was unrecorded as of the date of the purchase of the policy of insurance. (C.P. 79, 96, 138, 168). The Van Dinters' contract with First American explicitly and clearly excludes coverage of:

Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records. (C.P. 48)

First American explained in a letter to the Van Dinters that there was no coverage under their policy for the CFR as it was not on record. (C.P. 138-139). The record is devoid of any attempt by the Appellants to claim or argue a breach of their contract with First American. (C.P. 1-

244). No argument could have been successful at trial, and no such argument should be considered on appeal.

H. First American Is Entitled To An Award of Attorney's Fees Expended in Responding to This Appeal.

A party forced to respond to a frivolous appeal may be entitled to an award of sanctions, which may include reimbursement for attorney's fees expended on appeal, against the appellant. RAP 18.1; RAP 18.9. An appeal is considered frivolous – and an award of attorney's fees appropriate – if the appellant raises no debatable issues upon which reasonable minds could differ. *Green River Community College v. Personnel Board*, 107 Wn.2d 427, 443, 730 P.2d 653 (1986); *Goad v. Hambridge*, 85 Wn. App. 98, 105, 931 P.2d 200 (1977), *review denied*, 132 Wn.2d 1010, 940 P.2d 654 (1997).

The undisputed facts of this case and law confirms the Trial Court's decision and supports a finding that Van Dinters' appeal as to First American is frivolous. It is beyond debate, based upon the evidence in the record, the cited statutes, CFRs, and corresponding case law, that Van Dinters' breach of contract claim is contrary to established law, not to mention the readily available publications of the Spokane County Utility Department. Nothing within the record before this Court would support a decision contrary to that reached by the Trial Court. For bringing this

appeal against First American, an award of attorney's fees and costs is appropriate.

IV.

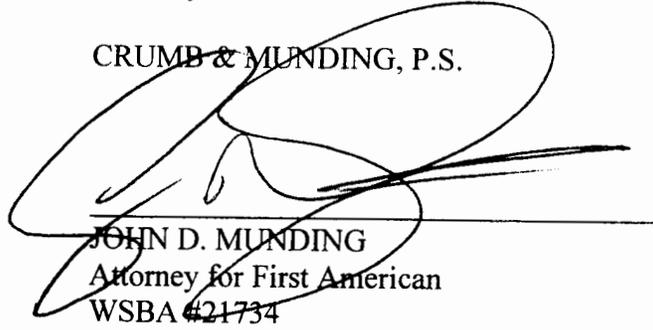
CONCLUSION

A title policy is a contract that indemnifies an **insured** against an **actual** financial loss up to the policy limits or value of the property, whichever is less, caused by a defect in title covered by the policy (i.e., not excluded or excepted from coverage). Title insurance is different from other types of insurance in that it is retrospective. In essence, the title policy operates as a "snap shot" of title at the time of closing. In this case, the "snap shot" was taken on January 24, 2003.

Based upon the record presented to this Court, Van Dinters have failed to demonstrate that they have complied with the contractual prerequisites to coverage under the Title Policy. Even if Van Dinters could prove compliance, they have not demonstrated that AmericanWest has sustained an insurable loss. Without an insurable loss, a claim does not exist. As a matter of law, the Trial Court's decision should be affirmed, and First American should be awarded attorney's fees and costs for having to respond to this appeal.

DATED this 3rd day of January, 2005.

CRUMB & MUNDING, P.S.



JOHN D. MUNDING
Attorney for First American
WSBA #21734

AFFIDAVIT OF SERVICE BY MAIL

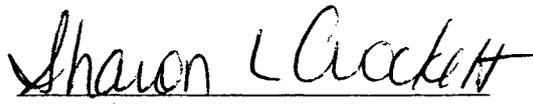
I, SHARON L. CROCKETT, being first duly sworn upon oath, depose and say:

I am competent to be a witness in the above-entitled matter; on the 3rd day of January, 2005, I caused to be mailed via U.S. Mail, a true and correct copy of the foregoing BRIEF OF RESPONDENT FIRST AMERICAN on the following:

KEVIN W. ROBERTS
NICHOLAS D. KOVARIK
DUNN & BLACK
10 N. Post, Suite 200
Spokane, WA 99201

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RCW 36.94.020

Purpose -- Powers.

The construction, operation, and maintenance of a system of sewerage and/or water is a county purpose. Subject to the provisions of this chapter, every county has the power, individually or in conjunction with another county or counties to adopt, provide for, accept, establish, condemn, purchase, construct, add to, operate, and maintain a system or systems of sanitary and storm sewers, including outfalls, interceptors, plans, and facilities and services necessary for sewerage treatment and disposal, and/or system or systems of water supply within all or a portion of the county. However, counties shall not have power to condemn sewerage and/or water systems of any municipal corporation or private utility.

Such county or counties shall have the authority to control, regulate, operate, and manage such system or systems and to provide funds therefor by general obligation bonds, revenue bonds, local improvement district bonds, utility local improvement district or local improvement district assessments, and in any other lawful fiscal manner. Rates or charges for on-site inspection and maintenance services may not be imposed under this chapter on the development, construction, or reconstruction of property.

Under this chapter, after July 1, 1998, any requirements for pumping the septic tank of an on-site sewage system should be based, among other things, on actual measurement of accumulation of sludge and scum by a trained inspector, trained owner's agent, or trained owner. Training must occur in a program approved by the state board of health or by a local health officer.

Before adopting on-site inspection and maintenance utility services, or incorporating residences into an on-site inspection and maintenance or sewer utility under this chapter, notification must be provided, prior to the applicable public hearing, to all residences within the proposed service area that have on-site systems permitted by the local health officer. The notice must clearly state that the residence is within the proposed service area and must provide information on estimated rates or charges that may be imposed for the service.

APPENDIX 1

A county shall not provide on-site sewage system inspection, pumping services, or other maintenance or repair services under this section using county employees unless the on-site system is connected by a publicly owned collection system to the county's sewerage system, and the on-site system represents the first step in the sewage disposal process. Nothing in this section shall affect the authority of a state or local health officer to carry out their responsibilities under any other applicable law.

A county may, as part of a system of sewerage established under this chapter, provide for, finance, and operate any of the facilities and services and may exercise the powers expressly authorized for county storm water, flood control, pollution prevention, and drainage services and activities under chapters 36.89, 86.12, 86.13, and 86.15 RCW. A county also may provide for, finance, and operate the facilities and services and may exercise any of the powers authorized for aquifer protection areas under chapter 36.36 RCW; for lake management districts under chapter 36.61 RCW; for diking districts, and diking, drainage, and sewerage improvement districts under chapters 85.05, 85.08, 85.15, 85.16, and 85.18 RCW; and for shellfish protection districts under chapter 90.72 RCW. However, if a county by reference to any of those statutes assumes as part of its system of sewerage any powers granted to such areas or districts and not otherwise available to a county under this chapter, then (1) the procedures and restrictions applicable to those areas or districts apply to the county's exercise of those powers, and (2) the county may not simultaneously impose rates and charges under this chapter and under the statutes authorizing such areas or districts for substantially the same facilities and services, but must instead impose uniform rates and charges consistent with RCW 36.94.140. By agreement with such an area or district that is not part of a county's system of sewerage, a county may operate that area's or district's services or facilities, but a county may not dissolve any existing area or district except in accordance with any applicable provisions of the statute under which that area or district was created.

[1997 c 447 § 11; 1981 c 313 § 1; 1967 c 72 § 2.]

NOTES:

Finding -- Purpose -- 1997 c 447: See note following RCW 70.05.074.

Severability -- 1981 c 313: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1981 c 313 § 23.]

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.]

NOTES:

Severability -- 1975 1st ex.s. c 188: See RCW 36.94.921.

Title 8 HEALTH AND SANITATION

Chapter 8.03 SANITARY SEWER CODE

8.03.9040 Payment--Delinquency--Lien.

(a) Spokane County shall have a lien for all delinquent rates, fees and/or charges due in accordance with this chapter, together with interest at eight percent per annum from the date due until paid. Penalties of ten percent of the amount due, shall be imposed in case of failure to pay the charges within thirty days after the date of billing.

(b) The lien shall be for all charges, interest and penalties and shall attach to the premises to which the services were furnished. The lien shall be superior to all other liens and encumbrances, except general taxes and local special assessments of the county. Said lien shall attach and foreclosed pursuant to RCW 36.94.150.

(c) This section shall not apply to GFCs assigned to properties as part of a ULID assessment, which GFCs shall be paid, become delinquent and accrue interest and penalties in accordance with statutory requirements applicable to the payment of ULID assessments.

(d) All additional lien and enforcement rights by statute and at common law are reserved by the county. (Res. 03-0447 Attachment A (part), 2003; Res. 97-0232 Attachment A (part), 1997; Res. 96-0752 Attachment A (part), 1996)

APPENDIX 3

Title 8 HEALTH AND SANITATION

Chapter 8.03 SANITARY SEWER CODE

8.03.8120 CFRs assigned to each annual sewer construction program.

(a) A constant monthly CFR will be established by the board for each annual sewer construction program on the basis of the ERUs allocated to the annual sewer construction program at the time the CFR is calculated. The CFR may be revised once final construction and/or financing costs are determined. The components of the CFR related to debt service may be based on estimates of the principal amount and interest costs of the bonds for such annual sewer construction program.

(b) The CFRs for each annual sewer construction program are as follows:

(1) The CFR for the 1997 annual sewer construction program is thirty-five dollars per month per-ERU, based on a "construction cost component" of three thousand two hundred twenty dollars (or thirteen dollars and forty-two cents per month), a "bond issuance cost component" of one hundred fifty-five dollars (or sixty-four cents per month), an "interest component" of three thousand nine hundred fifty dollars (or sixteen dollars and forty-six cents per month), a "GFC component" of one thousand seventy-five dollars (or four dollars and forty-eight cents per month), a total of one thousand eight hundred thirty-two ERUs and an estimated revenue bond maturity of two hundred forty months.

APPENDIX 4

(2) The CFR for the 1998 annual sewer construction program is thirty-five dollars per month per-ERU, based on a "construction cost component" of three thousand twenty dollars (or twelve dollars and fifty-nine cents per month), a "bond issuance cost component" of one hundred fifty-five dollars (or sixty-four cents per month), an "interest component" of three thousand nine hundred fifty dollars (or sixteen dollars and forty-six cents per month), a "GFC component" of one thousand two hundred seventy-five dollars (or five dollars and thirty-one cents per month), a total of one thousand five hundred seventy-three ERUs and an estimated bond maturity of two hundred forty months.

(3) The CFR for the 1999 annual sewer construction program is thirty-five dollars per month per-ERU, based on a "construction cost component" of three thousand twenty dollars (or twelve dollars and fifty-nine cents per month), a "bond issuance cost component" of one hundred fifteen dollars (or forty-eight cents per month), an "interest component" of three thousand eight hundred sixty-five dollars (or sixteen dollars and ten cents per month), a "GFC component" of one thousand four hundred dollars (or five dollars and eighty-three cents per month), a total of one thousand five hundred twenty-nine ERUs, and an estimated bond maturity of two hundred forty months.

(4) The CFR for the 2000 and 2001 Annual Sewer Construction Program is thirty-five dollars per month per ERU, based on a "construction cost component" of three thousand twenty dollars (or twelve dollars and fifty-nine cents per month), a "bond issuance cost component" of seventy-one dollars (or thirty cents per month), an "interest component" of three thousand six hundred forty-four (or fifteen dollars and seventeen cents per month), a "GFC component" of one thousand six hundred sixty-five dollars (or six dollars and ninety-four cents per month), a total of four thousand four hundred sixty-four ERUs and an estimated revenue bond maturity of two hundred forty months.

(5) The CFR for the 2002 and 2003 Annual Sewer Construction Programs is thirty-six dollars per month per-ERU, based on a "construction cost component" of three thousand sixty-five dollars (or twelve dollars and seventy-seven cents per month), an "interest component" of three thousand six hundred ninety dollars (or fifteen

dollars and thirty-eight cents per month), a “GFC component” of one thousand eight hundred eighty-five dollars (or seven dollars and eighty-five cents per month), a total three thousand four hundred twelve ERUs and a two hundred forty month repayment period.

(6) The CFR for the 2004 annual sewer construction program is thirty-six dollars and sixty-five cents per month per-ERU, based on a “construction cost component” of three thousand one hundred and sixty-five dollars (or thirteen dollars and nineteen cents per month), a “bond issuance cost component” of sixty-six dollars (or twenty-seven cents per month), an “interest component” of three thousand six hundred and eighty-two dollars (or fifteen dollars and thirty-four cents per month), a “GFC component” of one thousand eight hundred eighty-five dollars) or seven dollars and eighty-five cents per month), a total of two thousand two hundred and twenty-nine ERUs and a two hundred and forty month repayment period. (Res. 03-1031 (part), 2003; Res. 03-0447 Attachment A (part), 2003; Res. 01-1225 (part), 2001; Res. 99-1039, 1999; Res. 99-0062, 1999; Res. 97-1134, 1997; Res. 97-0232 Attachment A (part), 1997)

Title 8 HEALTH AND SANITATION

Chapter 8.03 SANITARY SEWER CODE

8.03.8140 Billing of CFRs.

(a) The county will commence monthly billing of the CFR within each sewer project after the system of sewerage becomes “available” to development parcels within such sewer project within the meaning of Section 8.03.3040.

(b) The CFR will be billed on a monthly basis through to the maturity date reflected on the property owner’s monthly bill, unless the property owner elects to discharge such charges earlier through prepayment(s) executed pursuant to 8.03.8160 or 8.03.8180. (Res. 03-0447 Attachment A (part), 2003; Res. 97-0232 Attachment A (part), 1997)