

FILED
JUN 21 2010

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

84695-2

Court of Appeal Cause No. 63051-2-I

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

J.E. EDMONSON and NAOMI I. EDMONSON,

Plaintiffs,

v.

IVAN G. POPCHOI and VARVARA M. POPCHOI,

Respondents,

v.

CSABA KISS,

Petitioner.

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PETITION FOR REVIEW

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1. IDENTITY OF PETITIONER

Petitioner Csaba Kiss, Appellant in the Court of Appeals, petitions the Court for review of the decision of Division One of the Court of Appeals in this action.

2. COURT OF APPEALS DECISION

Petitioner Csaba Kiss requests review of the Court of Appeals' April 5, 2010 published opinion and its May 13, 2010 Order denying reconsideration.

3. ISSUES PRESENTED FOR REVIEW

1. Whether the grantor under a Statutory Warranty Deed owes the grantee a duty to defend independent of the duty to indemnify.
2. Whether a grantor under a Statutory Warranty Deed who accepts a tender of an adverse possession claim may settle the claim for purely economic reasons.
3. Whether a grantor under a Statutory Warranty Deed who accepts a tender of an adverse possession claim owes the grantee a duty to investigate the claim before settling it.
4. Whether damages adequately compensate a grantee for breach of warranty.
5. Whether a purchaser who conceals an encumbrance from the grantor waives those warranties by closing without notice or objection.

4. STATEMENT OF THE CASE

In May 2006, Kiss sold a parcel of property in Bellevue to the Popchois for \$575,000. CP 159 at ¶ 1. The Popchois intended to construct a large home on the parcel for resale. CP 159 at ¶ 2.

Almost six months before closing, the Popchois had a survey of the property completed. CP 159-60 at ¶ 4. The survey plainly indicated that the neighbor's fence encroached onto the parcel. CP 160 at ¶ 5. Kiss was unaware of the survey or the encroachments. RP (01108/09) at 27-28.

A boundary dispute with the neighbor arose within three months after closing. Exhibit 1. Kiss was informed of the dispute in an August 31, 2006 letter. Exhibit 2. On October 6, 2006, the Popchois' attorney wrote to Kiss demanding "whatever acts are necessary to cure your breach of warranty." Exhibit 4. On October 17, 2006, counsel for Kiss wrote back with a detailed response to the Popchois' position. Exhibit 5.

By March 20, 2007, the neighbors had filed an adverse possession lawsuit. The Popchois forwarded the Summons and Complaint to counsel for Kiss with a "tender of defense and demand to hold my clients harmless and indemnify them from any loss or damages, including attorney fees, expenses and all other cost, arising out of this lawsuit." Exhibit 6.

The area claimed by the neighbor consisted of 165 square feet of the 8,630 square-foot parcel conveyed by Kiss. CP 165 at ¶ 24. Kiss

concluded that it would be more expensive to defend the lawsuit than it would be to simply pay Popchoi compensation for the small strip of land. CP 165 at ¶ 16.

Kiss therefore responded to the tender by informing Popchoi that Kiss intended to concede the claim and pay damages.

Mr. Kiss conditionally accepts the tender of the right to defend the adverse possession action. This acceptance is conditional only on your confirmation that the tender was made in accordance with RCW 64.04.030 and cases interpreting it. I point this out because your letter referred to the tender of "the defense" to the action rather than a "right to defend" it. A tender of the defense alone could be interpreted as retaining the right to control the defense, whereas a tender of the right to defend includes the right to compromise or settle the claim. If your client has tendered the right to defend the claim, Mr. Kiss accepts that tender. If your client intends to retain rights to which he is not entitled under RCW 64.04.030, then that tender is rejected.

Trial Exhibit 7.

At about the same time, the Popchois retained a new attorney for the case. David Williams, who had made the tender, did nothing but forward the letter to the Popchois' new attorney, John Hathaway. RP (12-15/2008) at 219.

On May 2, 2007, Hathaway responded to Kiss's attempt to accept the tender of the defense. Exhibit 9. That letter rejects Kiss's position that he had the right to settle the adverse claim and pay the buyer's damages.

Id. The record contains no further record of discussions regarding the tender from or to either party.

The Popchois continued to defend the adverse possession claim on the merits. On July 18, 2008, King County Superior Court Judge Steven Gonzalez granted summary judgment awarding the neighbor adverse possession. Trial Exhibit 18.

The Popchois' deed warranty claims proceeded to trial. At trial, the Popchois' attorney who made the tender and received the response stated his position that Kiss could not unilaterally settle the claim under the tender that was made. RP (12-15-2008) at 230-31. He confirmed this position in a lengthy series of questions from the court. RP (12-15-2008) at 240-47.

The trial court awarded the Popchois \$10,993.63 on a pro rata basis for the 165 square feet lost to adverse possession, along with prejudgment interest. CP 170 at ¶ ¶ 8-9. The trial court rejected all of the Popchois' other damage claims. CP 171-72 at ¶ 10.

With regard to the tender of the right to defend, the trial court ruled as a matter of law that sellers are required to defend against a tendered claim unless an investigation demonstrates that the buyer has no good faith defense to the claim.

5. The Court concludes that Csaba Kiss did not have the right, at the outset, to condition acceptance of the defense of the Popchois' title on the Popchois' agreement to convey the disputed land to the Edmonsons and accept a refund of the portion of the purchase price that they had paid for the disputed land. Csaba Kiss imposed these conditions shortly after the defense was tendered, without having investigated the merits of the adverse possession claim, solely based solely upon his determination that it would cost him less to convey the Popchois' land and refund part of the purchase price than to defend their title. Although it turned out that the Edmonsons' adverse possession claim prevailed on summary judgment, this court cannot judge the duty to defend based solely on the outcome of the claim. The merits of the Edmonsons' claim was by no means obvious at the outset of the lawsuit. The fence extended along slightly less than half of the boundary line, while grass covered both lots for the remainder of the properties. The parties were unaware of what evidence the Edmonsons would submit to prove the elements of adverse possession and to defeat the defenses of acquiescence and the like.

6. The seller is not entitled to insist that the buyer waive the right to defend the claim and agree to convey the property to the claimant unless the seller has conducted a reasonable investigation, informally and through formal discovery and, from the information so gained, reasonably concluded that the buyer has no good faith defense to the adverse possession claim. To justify abandoning any defense, the seller would have to present the buyer with information demonstrating the lack of any defense to the claim. Csaba Kiss submitted no evidence that he or his attorneys conducted such a thorough investigation, or formal discovery of the Edmonsons' claim. Mr. Kiss submitted no evidence that he or his attorneys ever presented facts to the Popchois demonstrating that there was no defense to the Edmonsons' adverse possession claim. The only evidence before the Court is Csaba Kiss's testimony that he conditioned his "acceptance" of the tender of defense upon the Popchois' agreement to abandon their right to a defense and to accept a partial refund of their purchase price solely

because that course of action was less expensive for Csaba Kiss than defending the Popchois' title. Csaba Kiss's refusal to defend the Popchois' title unless they agreed to these conditions breached his covenant to defend their title against the Edmonsons' adverse possession claim.

CP 169-70 at 5-6. Based on this ruling, the trial court concluded that Kiss had wrongfully denied the tender of the claim and therefore was liable for the Popchois' attorney fees. CP 170 at, 7.

The trial court rejected all arguments concerning the Popchois' prior knowledge of and silence about the encroachments without elaboration. CP 172 at ¶¶ 11-13.

The Court of Appeals affirmed in a published opinion that approved and expanded on the trial court's reasoning. Most notably, the Court of Appeals held that the grantor under a Statutory Warranty Deed owes the grantee a duty of good faith analogous to that owed by an insurer to its insured.

Even though the UIM insurer stands in the shoes of the tortfeasor and is “free to be adversarial within the confines of the normal rules of procedure and ethics,” the insured still has a “reasonable expectation” that he will be dealt with fairly and in good faith by his insurer.” These duties of good faith and fair dealing “require the insurer to conduct any necessary investigation in a timely fashion and to conduct a reasonable investigation before denying coverage. In the event the insurer fails in either regard, it will have breached the covenant and, therefore, the policy.” This does not mean, however, that an insurer must do the unreasonable: “an insurer is [not] required to pay claims which are not covered by the contract or take other actions

inconsistent with the contract.” So long as the insurance company acts honestly, bases its decision on adequate information, and does not overemphasize its own interest, the duty of good faith has not been breached.

A grantor owes to his grantee similar duties of good faith and fair dealing under the statutory covenants. Principles of contract interpretation apply when we interpret deeds, and in nearly every contract there is an implied covenant of good faith and fair dealing. Generally speaking, this requires mutual cooperation so that each party may enjoy the full benefit of performance. In the context of the warranty to defend, a grantee does not receive the full benefit of performance unless the grantor both conducts a reasonable investigation, through formal and informal means, into the merits of the tendered claim to determine whether a good faith defense exists and makes an informed decision about how to proceed after taking into consideration the investigation results.

Opinion at 9-10 (footnotes omitted). According to the Court of Appeals, Kiss could not simply concede his breach of warranty and pay the claim.

The Court of Appeals then explained its decision by questioning whether monetary damages could even compensate a buyer for the loss of a portion of the property.

Courts consider real property unique. “No piece of land has its counterpart anywhere else and it is impossible to duplicate by the expenditure of any amount of money.” For this reason, an obligation to defend a grantee’s possession of land may be more valuable to the grantee than a right to recover money from its grantor. In other words, damages may not adequately compensate a grantee for a grantor’s breach of its conveyance obligation. Accordingly, a grantor’s covenants in a warranty deed are not completely analogous to an insurer’s promises in an insurance contract.

Opinion at 11-12 (footnotes omitted).

The Court of Appeals declined to impose a corresponding duty of good faith on the grantee. After receiving the survey and learning of the encroachment, Popchoi sought and received a number of extensions of the closing date, but did not disclose the encroachment. Trial Exhibit 101; RP 12/15/2008 at 125. The Court of Appeals concluded that Popchoi had no duty to inform Kiss of the encroachment and “decline[d] Kiss’s invitation to limit the warranty in those circumstances where the grantee, but not grantor, has notice of a possible defect in title or possession.” Opinion at 15.

5. ARGUMENT

The Court of Appeals decision effectively compels a grantor to defend title claims to the satisfaction of the grantee. This is an unwise and unwarranted expansion of the grantor’s duties.

A. Duty to Investigate

The Court of Appeals held that a grantor owes the grantee a duty to investigate tendered claims similar to the duty of an insurer to its insured. Opinion at 10. The court correctly identified the duty of an insurer, but applied it out of context. As the Court of Appeals held,

These duties of good faith and fair dealing “require the insurer to conduct any necessary investigation in a timely

fashion and to conduct a reasonable investigation **before denying coverage.**

Opinion at 9 (emphasis added). If Kiss had denied the tender, this rule might have some bearing on the case, but Kiss did not deny the tender; he accepted it. No law compels an insurer to investigate a claim before **accepting** coverage.

B. The Duty to Defend

Kiss accepted the tender with the single condition that he control the defense of the case, including the right to settle the claim. Opinion at 3-4. The Court of Appeals found this acceptance to be a breach the warranty to defend, holding that the duty to defend is independent of the duty to indemnify. The court then layered onto this a duty of “good faith and fair dealing under the statutory covenants.” Slip Opinion at 10-11. The court again reached this determination by analogy to an insurer’s duties to its insured. *Id.*

Under the Court of Appeals decision, defending the claim appears to be required whenever a “good faith defense” exists. Opinion at 10. Grantors are precluded from making the purely economic decision that the claim does not merit the cost of defending the claim. Opinion at 11.

It would be a rare adverse possession case where the defendant cannot come up with a good faith defense. *See Riley v. Andres*, 107

Wn.App. 391, 395, 27 P.3d 618, 620 (2001). The court's decision thus creates a situation where the grantee can control the litigation, while the grantor pays the cost. By decoupling the duty to defend from the duty to indemnify, the court deprived the grantor of any ability to stop the process.

C. Adequacy of Damages.

The Court of Appeals based its decision in part on its determination that "damages may not adequately compensate a grantee for a grantor's breach of its conveyance obligation." Opinion at 11 (footnote omitted). This certainly may be true for the grantee as a subjective matter, but it is problematic as a legal rule.

Contract damages are intended to fully compensate injured parties by putting them "in as good a position as that party would have been in had the contract been performed." *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 849, 792 P.2d 142, 146 (1990). With respect to deed warranties, the general rule is "damages for lost property or diminution in property value." *Mastro v. Kumakichi Corp.*, 90 Wn.App. 157, 163, 951 P.2d 817, 820 (1998).

If those damages do not adequately compensate a grantee, then a grantor could never settle a claim over the grantee's objection. The Opinion also opens the door for an expansion of the grantee's remedies to

recover whatever additional damages are necessary for “adequate compensation.”

D. Waiver.

The duties announced by the Court of Appeals are strikingly one-sided. The grantor owes the grantee what amounts to almost unlimited duties, but the grantee owes the grantor no duty at all. In fact, the grantee may conceal a title defect from the grantor and then recover damages for it after closing.

It is true that since at least 1921, Washington courts have held that a grantee’s prior knowledge of an encumbrance does not preclude a later claim under a warranty deed. *Fagan v. Walters*, 115 Wash. 454, 197 P. 635 (1921); *Foley v. Smith*, 14 Wn.App. 285, 539 P.2d 874 (1975). However, no Washington case has considered the duty of a grantee under the circumstances of this case.

The grantee owes the grantor the same duty of good faith and fair dealing that is implied in every contract. *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 410 P.2d 33, 34 (1966). That duty requires the parties to “cooperate with each other so that each may obtain the full benefit of performance.” *Carlile v. Harbour Homes, Inc.*, 147 Wn.App. 193, 215, 194 P.3d 280, 291 (2008). That duty can include a duty to disclose information central to the contract.

Generally, participants in a business transaction deal at arm's length; it has been said that an individual has no particular duty to disclose facts nor any particular right to rely on the statements of the party with whom he contracts at arm's length. However, the existence of a fiduciary relationship between the parties and the general duty to contract in good faith may make it possible for an individual to rightfully rely on statements made by another with whom he contracts or on the validity of a transaction based on a failure to disclose relevant information concerning the agreement entered into between them.

* * * *

If in the exercise of good faith the defendants should have revealed to Mrs. Liebergesell the illegality of the proposed loans, they breached a contractual duty of fair dealing which would prevent them from asserting the usury defense.

Liebergesell v. Evans, 93 Wn.2d 881, 889, 894, 613 P.2d 1170, 1175 (1980).

Liebergesell does not impose an overarching duty to disclose facts beyond the performance of the contract itself (*Badgett v. Security State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356, 360 (1991)), but plainly does not allow a party to knowingly enter into an illegal or defective contract for tactical reasons.

In this case, Popchoi sought numerous extensions of the closing date after learning of the encroachment. Trial Exhibit 101; RP 12/15/2008 at 125. Each time, he had the opportunity to disclose the encroachment and permit Kiss to either remedy it, exclude it from the deed, or refuse the

extension. Just as the defendants in *Liebergesell* waived the usury defense by failing to disclose that a loan was illegal, Popchoi should be held to have waived the warranty claim by concealing the encroachment.

Liebergesell is particularly instructive here because it, too, arose from facts where one party knew and concealed the critical fact, while the other party was ignorant of it. This is not a case where both grantor and grantee were aware of the encumbrance, but one of concealment. *Fagan* and *Foley* should not be extended to apply to a grantee's concealment of an encumbrance.

E. Grounds for Review

The Court of Appeals opinion significantly alters the duties of a grantor under a statutory warranty deed. The Court should take judicial notice that the majority of residential real estate transactions are performed by statutory warranty deed. The court's opinion will directly affect most real estate sales across the state. The expansion of a grantor's duties truly is an issue of substantial public interest, and should be decided by this Court. RAP 13.4(b)(4).

The Court of Appeals' decision to impose a duty to investigate is based on authority concerning a denial of coverage, not an acceptance of coverage. To the extent that a duty to investigate exists, the Opinion

therefore is contrary to the very authority on which it relies. RAP 13.4(b)(2).

The refusal to apply the contractual duty of good faith to a purchaser who conceals an encumbrance from the grantor is contrary to *Liebergesell*. RAP 13.4(b)(1).

6. CONCLUSION

The grantor-grantee relationship was never intended to impose one-sided quasi-fiduciary duties. The Court of Appeals opinion drastically alters the law of statutory warranty deeds in a way that is unfair to grantors and will result in countless unwarranted lawsuits. This Court should grant review and reverse.

Dated this 14th day of June, 2010.

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DECLARATION OF SERVICE

I, Leslie Rothbaum, am over the age of 18 years, and based on my personal knowledge, state as follows:

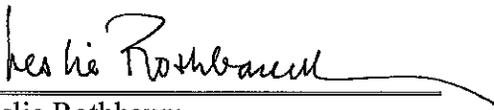
On this day I caused to be delivered the PETITION FOR REVIEW by ABC Legal Messenger Service for delivery on June 14, 2010, to:

Court of Appeals Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

and to:
John Hathaway
4600 Columbia Center
701 Fifth Avenue
Seattle, WA 98104

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of June, 2010 at Seattle, Washington.



Leslie Rothbaum

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

J.E. EDMONSON and NAOMI I. EDMONSON, husband and wife,)	NO. 63051-2-1
)	
Plaintiffs,)	DIVISION ONE
)	
v.)	
)	
IVAN G. POPCHOI and VARVARA M. POPCHOI, husband and wife,)	PUBLISHED OPINION
)	
Respondents,)	
)	
NATIONAL CITY MORTGAGE, INC., d/b/a NATIONAL CITY BANK, an Ohio corporation; and FIDELITY NATIONAL TITLE COMPANY OF WASHINGTON, INC., a Washington corporation,)	
)	
Defendants,)	
)	
CSABA KISS, a single person,)	
)	
Appellant.)	FILED: April 5, 2010
)	

Leach, J. — A statutory warranty deed incorporates the covenants defined in RCW 64.04.030. Csaba Kiss appeals the trial court's decision that he breached these covenants by conditioning acceptance of a defense tender upon his grantee's acknowledgement of his absolute right to settle a third party's

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adverse claim and pay his grantee damages. He also claims that his grantee waived these covenants by failing to disclose information about the adverse claim that the grantee acquired before closing. We affirm, holding that Kiss breached his duty to defend by demanding the right to settle based solely upon his own economic benefit without any investigation or evaluation of the merits of the adverse claim. We also hold that Kiss's covenants extended to potential claims for which his grantee had notice before closing.

FACTS

The facts of this case are largely undisputed. Kiss is an experienced real estate agent and real estate investor. Over the years, he has purchased 8 homes for his personal use and as many as 15 homes for use as rental properties. This case involves a rental property that Kiss purchased in 2002.

Ivan Popchoi is a residential builder. He hoped to buy Kiss's property, tear down the existing structure, and build a large, premium quality home. Kiss's property was not originally on the market, but Popchoi's real estate agent approached Kiss to negotiate a sale. In September 2005 Kiss agreed to sell.

Kiss granted Popchoi entry to conduct a lot survey two months later. The record of this survey, completed that same month, shows staked lot corners and an existing cyclone fence running east and west. This fence was situated approximately one foot north of the western half of the deeded property line.

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Only grass covered the eastern half of the same boundary.

Kiss did not ask to see the survey results, and Popchoi did not share them. Having never conducted his own survey, Kiss believed that the fence marked the southern boundary. The sale closed in May 2006 with Kiss conveying title by statutory warranty deed.

Eager to develop the site, Popchoi quickly set to work. But the adjacent neighbors to the south, the Edmonsons, claimed they owned the property up to the fence line, a total area of 165 square feet. In August 2006 the Edmonsons notified Popchoi by letter that they were planning to initiate an adverse possession action to establish their legal title to the disputed property. Popchoi promptly notified Kiss of his intent to invoke his covenant rights under the statutory warranty deed should the Edmonsons file suit.

In March 2007 the Edmonsons filed suit in King County Superior Court, asserting title by adverse possession. As promised, Popchoi tendered his defense to Kiss and demanded indemnity. Kiss conditionally accepted the tender, explaining,

This acceptance is conditional only on your confirmation that the tender was made in accordance with RCW 64.04.030 and cases interpreting it. I point this out because your letter referred to the tender of "the defense" to the action rather than a "right to defend" it. A tender of the defense alone could be interpreted as retaining the right to control the defense, whereas a tender of the right to defend includes the right to compromise or settle the claim. If your client has tendered the right to defend the claim, Mr. Kiss accepts

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that tender. If your client intends to retain rights to which he is not entitled under RCW 64.04.030, then the tender is rejected.

Popchoi refused to consent. A few weeks later, he sent a letter to Kiss explaining that Kiss did not have the right to unilaterally settle the adverse claim and compensate Popchoi for the lost property. He wrote that under settled Washington law, "A seller who refuses to defend the grantee's title after receiving notice and tender is liable to the grantee for breach of warranty." He identified as damages diminution of property value plus impairment to marketability of title and consequential damages, including delays in construction. The record contains no further correspondence between the parties discussing the tender.

Popchoi defended the adverse possession suit at his own expense and joined Kiss as a third party defendant, asserting claims for breach of the warranties of seisin and defense. In July 2008 the trial court entered summary judgment quieting title to the disputed parcel in Edmonsons. Popchoi's third party claims for breach of warranties proceeded to a bench trial. At trial, Kiss testified that he had taken continuing education courses, understood what a statutory warranty deed was, and was aware of the legal implications of Popchoi's tender of defense. He also testified that he preferred to settle and pay Popchoi damages equal to the value of the lost property rather than defend the claim because this was the least expensive option for him. Kiss also testified

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that the only investigation he undertook into the merits of the Edmonson claim was to hand it over to his attorney. No evidence was submitted at trial showing that his attorney took any steps to investigate the claim.

The trial court found that Kiss breached his warranty to defend:

The seller is not entitled to insist that the buyer waive the right to defend the claim and agree to convey the property to the claimant unless the seller has conducted a reasonable investigation, informally and through formal discovery and, from the information so gained, reasonably concluded that the buyer has no good faith defense to the adverse possession claim. . . . The only evidence before the Court is Csaba Kiss's testimony that he conditioned his "acceptance" of the tender of defense upon the Popchois' agreement to abandon their right to a defense and to accept a partial refund of their purchase price solely because that course of action was less expensive for Csaba Kiss than defending the Popchois' title. Csaba Kiss's refusal to defend the Popchois' title unless they agreed to these conditions breached his covenant to defend their title against the Edmonsons' adverse possession claim.

The court also rejected Kiss's alternative argument that Popchoi waived all warranties regarding the Edmonson claim by failing to disclose the record of survey before closing. The court reasoned that "warranties made in a statutory warranty deed protect the buyers from both known and unknown defects."

The court awarded Popchoi damages in the amount of \$10,993.63, together with prejudgment interest, for the adversely possessed parcel and \$30,281.90 for costs and attorney fees paid in defense of the Edmonson claim. It denied his claim for consequential damages.

Kiss appeals.

STANDARD OF REVIEW

On appeal from a bench trial, conclusions of law are reviewed de novo.¹ Findings of fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law.² "Substantial evidence is evidence 'in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.'"³ Unchallenged findings of fact are verities on appeal.⁴ Whether a party breaches warranty deed covenants is a mixed question of law and fact.⁵ The nature and extent of the obligation imposed by each covenant presents a question of law;⁶ whether a party breached an obligation presents a question of fact.⁷

ANALYSIS

¹ Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

² Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555, 132 P.3d 789 (2006).

³ J.E. Dunn Nw. Inc. v. Dep't of Labor & Indus., 139 Wn. App. 35, 43, 156 P.3d 250 (2007) (quoting Holland v. Boeing Co., 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978)).

⁴ Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

⁵ See, e.g., Niemann v. Vaughn Community Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005); Roeder Co. v. Burlington N., Inc., 105 Wn.2d 567, 571-72, 716 P.2d 855 (1986) (deed interpretation is a mixed question of fact and law).

⁶ Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

⁷ See, e.g., Cudmore v. Tjomsland, 44 Wn.2d 308, 308-09, 266 P.2d 1058 (1954) (breach of warranty as question of fact); Frank Coluccio Constr. Co. v. King County, 136 Wn. App. 751, 762, 150 P.3d 1147 (2007) (breach of contract is factual question).

Kiss contends that a grantor has the absolute right to discharge its covenant to defend title by settling an encroachment claim and paying damages to the grantee based solely upon the comparative cost of a defense and the amount of damages and without regard to the merits of the claim. Alternatively, Kiss claims that Popchoi waived his rights under the warranties of seisin and defense as regards to the Edmonson claim by failing to inform him of the fence encroachment disclosed by the survey before closing.

RCW 64.04.030 defines the form of a statutory warranty deed and the five covenants made by a grantor conveying property with this form of deed:

“(1) that the grantor was seised of an estate in fee simple (warranty of seisin); (2) that he had a good right to convey that estate (warranty of right to convey); (3) that title was free of encumbrances (warranty against encumbrances); (4) that the grantee, his heirs and assigns, will have quiet possession (warranty of quiet possession); and (5) that the grantor will defend the grantee’s title (warranty to defend).”⁸

Together, these warranties of title constitute the grantor's promise that the grantee will not suffer eviction by virtue of paramount title and that, should the grantee suffer a loss, the grantor will indemnify the grantee.⁹ When a grantor breaches these warranties, an injured grantee may recover damages for lost

⁸ Mastro v. Kumakichi Corp., 90 Wn. App. 157, 162, 951 P.2d 817 (1998) (quoting 17 William B. Stoebuck, Washington Practice: Real Estate: Property Law § 7.2, at 447 (1995)).

⁹ Wash. State Bar Ass’n, Washington Real Property Deskbook Series: Real Estate Essentials 1 & 2 § 5.4(2), at 5-7 (4th ed. 2009).

property or diminution in property value and, in the context of the warranty to defend, attorney fees proximately caused by the breach.¹⁰

Here, Kiss denies breaching the fifth warranty—the warranty to defend. He maintains that as a matter of law he had the right to condition acceptance of Popchoi's defense tender as described because the tender completely surrendered Popchoi's rights to control the defense of the adverse possession claim. For support, he analogizes to an insurer's duty to defend, citing Petersen-Gonzales v. Garcia.¹¹ In that case, the court held that the term "right to defend" clearly and unambiguously authorized an underinsured motorist (UIM) insurer's participation in the trial of a third party action, even over the objection of its insured.¹² Kiss reasons the rights and obligations of the grantor and grantee under a statutory warranty deed parallel those of a UIM insurer and its insured. Accordingly, because a UIM insurer has the right to participate at trial over the insured's objection, a grantor defending under a warranty deed covenant has a similar right to control the defense of an encroachment claim even to the point of settling the claim over the buyer's objection.

Kiss's analogy is incomplete and, in part, inapt. It is incomplete because he overlooks the duties of good faith and fair dealing that circumscribe any

¹⁰ Mastro, 90 Wn. App. at 163.

¹¹ 120 Wn. App. 624, 86 P.3d 210 (2004).

¹² Petersen-Gonzales, 120 Wn. App. at 631.

adversarial UIM insurer-insured relationship.¹³ And, just as an insurer's duties to defend and indemnify under an insurance contract are distinct and independent obligations,¹⁴ so are the grantor's parallel duties. The analogy is inapt to the extent it fails to account for the unique character of real property.

Even though the UIM insurer stands in the shoes of the tortfeasor and is "free to be adversarial within the confines of the normal rules of procedure and ethics," the insured still has a "reasonable expectation" that he will be dealt with fairly and in good faith by his insurer.¹⁵ These duties of good faith and fair dealing "require the insurer to conduct any necessary investigation in a timely fashion and to conduct a reasonable investigation before denying coverage. In the event the insurer fails in either regard, it will have breached the covenant and, therefore, the policy."¹⁶ This does not mean, however, that an insurer must do the unreasonable: "an insurer is [not] required to pay claims which are not covered by the contract or take other actions inconsistent with the contract."¹⁷

¹³ Petersen-Gonzales, 120 Wn. App. at 633 (observing that though the insurer need not put the insured's interest above its own in the UIM relationship, a minimum duty of good faith and fair dealing survives (citing Ellwein v. Hartford Accident & Indem. Co., 142 Wn.2d 766, 780, 15 P.3d 640 (2001))).

¹⁴ Viking Ins. Co. v. Hill, 57 Wn. App. 341, 346-47, 787 P.2d 1385 (1990).

¹⁵ Petersen-Gonzales, 120 Wn. App. at 633 (quoting Ellwein, 142 Wn.2d at 780).

¹⁶ Coventry Assocs. v. Am. States Ins. Co., 136 Wn.2d 269, 281, 961 P.2d 933 (1998) (quoting 1 Allan D. Windt, Insurance Claims & Disputes: Representation of Insurance Companies and Insureds, § 2.05, at 38 (3d ed. 1995)).

¹⁷ Coventry, 136 Wn.2d at 280.

So long as the insurance company acts honestly, bases its decision on adequate information, and does not overemphasize its own interest, the duty of good faith has not been breached.¹⁸

A grantor owes to his grantee similar duties of good faith and fair dealing under the statutory covenants. Principles of contract interpretation apply when we interpret deeds,¹⁹ and in nearly every contract there is an implied covenant of good faith and fair dealing.²⁰ Generally speaking, this requires mutual cooperation so that each party may enjoy the full benefit of performance.²¹ In the context of the warranty to defend, a grantee does not receive the full benefit of performance unless the grantor both conducts a reasonable investigation, through formal and informal means, into the merits of the tendered claim to determine whether a good faith defense exists and makes an informed decision about how to proceed after taking into consideration the investigation results.

The independence of the grantor's obligations to indemnify and defend reinforces this conclusion. In the context of an insurance contract, the duty to

¹⁸ Coventry, 136 Wn.2d at 280.

¹⁹ See, e.g., Carr v. Burlington N., Inc., 23 Wn. App. 386, 390-91, 597 P.2d 409 (1979) (ambiguity in a deed is resolved in favor of grantee and against grantor); Hoglund v. Omak Wood Prods., Inc., 81 Wn. App. 501, 504, 914 P.2d 1197 (1996) (parties' intent is derived from reading the deed as a whole, giving words their ordinary meaning).

²⁰ Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

²¹ See Ross v. Ticor Title Ins. Co., 135 Wn. App. 182, 190, 143 P.3d 885 (2006), aff'd sub nom. Ross v. Kirner, 162 Wn.2d 493, 172 P.3d 701 (2007).

defend is antecedent to the duty to indemnify and does not hinge upon the insurer's potential indemnity liability.²² The grantor's duty to defend against an alleged breach of the warranty of seisin is similar. The grantor's duty to defend is antecedent to any duty to indemnify and does not depend upon the merits of the adverse party's claim to a right of possession.²³ Therefore, it is not hinged upon the grantor's potential indemnity liability. Here, Kiss refused to defend a small claim solely because of the cost of defense as compared to the cost of indemnity. In effect, Kiss merged his two covenants into a single financial obligation and sought to minimize the amount of that obligation by placing upon Popchoi's shoulders the full cost of investigating and prosecuting any possible defense to the Edmonson claim.

As mentioned above, Kiss's analogy is also somewhat inapt. Courts consider real property unique. "No piece of land has its counterpart anywhere else and it is impossible to duplicate by the expenditure of any amount of money."²⁴ For this reason, an obligation to defend a grantee's possession of land may be more valuable to the grantee than a right to recover money from its grantor. In other words, damages may not adequately compensate a grantee for a grantor's breach of its conveyance obligation.²⁵ Accordingly, a grantor's

²² Viking, 57 Wn. App. at 346-47.

²³ Double L Props., Inc. v. Crandall, 51 Wn. App. 149, 156, 751 P.2d 1208 (1988).

²⁴ Carpenter v. Folkerts, 29 Wn. App. 73, 76, 627 P.2d 559 (1981).

covenants in a warranty deed are not completely analogous to an insurer's promises in an insurance contract.

Having decided that the statutory warranty of defense includes a grantor's obligation to investigate the merits of a claim, we examine whether the trial court's findings of fact establish that Kiss failed to investigate the merits of the Edmonson adverse possession claim. The trial court made the following findings:

17. Mr. Kiss testified that he did not personally conduct any investigation or research into the merits of the Edmonsons' adverse possession claim. . . . Mr. Kiss submitted no evidence that, as of April 27, 2007, his attorney had conducted any investigation of the merits of the Edmonsons' adverse possession claim.

18. Mr. Kiss submitted no evidence that he or his attorneys ever notified the Popchois or the Popchois' attorney of the results of any investigation of the merits of the Edmonsons' adverse possession claim. Mr. Kiss did not submit any evidence of any expenses, legal fees or investigator fees that he had paid to investigate or research the merits of the Edmonsons' claims. Mr. Kiss's only testimony was that he had conditioned acceptance of the tender of defense on the Edmonsons' assignment of the right to convey the disputed property to the Edmonsons and refund the price paid for the conveyed land because that was the least expensive resolution of the dispute for him.

19. . . . Mr. Kiss submitted no evidence that his attorneys took any steps to defend the Popchois from the Edmonsons' adverse possession claim. The court file in this action does not contain any pleading that Mr. Kiss's attorneys filed on the Popchois' behalf. Kiss's attorney did not appear in the lawsuit on behalf of the Popchois.

20. On May 23, 2007, [Kiss's attorney] accepted service of the Popchois' Third Party Complaint and Summons asserting their breach of warranty claims against Csaba Kiss. Mr. Kiss's attorneys

²⁵ Carpenter, 29 Wn. App. at 76.

appeared in the lawsuit, but continued taking no action to defend the Popchois against the Edmonsons' claim

Kiss does not challenge these findings on appeal. Because unchallenged findings of fact are verities on appeal, these findings support the legal conclusion that Kiss breached the warranty to defend.

Kiss excuses his breach on the basis that Popchoi waived his rights under the warranty of title by failing to disclose the survey results before sale. He maintains that the leading modern case, Foley v. Smith,²⁶ was either wrongly decided by this court or is factually distinguishable. We disagree on both accounts.

In Foley, we held that knowledge of potentially superior claims on the part of the grantee did not bar the grantee's right to recover for breach of the covenants made under the statutory warranty deed.²⁷ We relied on a Washington Supreme Court case, Fagan v. Walters,²⁸ where the court stated, "It is a well-settled rule that knowledge by the grantee at the time of the conveyance, of the existence of . . . a defect in the grantor's title, does not control the force and effect of the express covenants in the deed, or affect the question of breach." Following Fagan, we focused on the scope of the warranty of title:

²⁶ 14 Wn. App. 285, 539 P.2d 874 (1975).

²⁷ Foley, 14 Wn. App. at 292.

²⁸ 115 Wash. 454, 457, 197 P. 635 (1921) (quoting 8 Am. & Eng. Enc. Law 86 (2d ed. 1898)).

Such covenants warrant against known as well as unknown defects, and grantees with knowledge of an encumbrance have the right to rely on the covenants in the deed for their protection. The purpose of the covenant is protection against defects, and to hold that grantees can be protected only against unknown defects would rob the covenant of much of its value and destroy the force of its language.^[29]

Because Fagan and the Washington precedent it followed remain binding upon this court, we decline to revisit Foley.³⁰

Kiss seeks to distinguish Foley on the basis that the grantor and grantee each knew of the title defect while only Popchoi had knowledge of the survey results in this case. This is a distinction without a difference. The warranty to defend obliges the grantor to defend the grantee against subsequently asserted third party claims whether or not previously known.³¹ In an unbroken line of cases, beginning with West Coast Manufacturing & Investment Co. v. West Coast Improvement Co.³² in 1901, Washington courts have held that the warranty applies to all defects and has refused any invitation to limit its scope based upon the grantee's knowledge. We decline to do so here. Therefore, whether Popchoi knew of a possible defect before sale is immaterial.

Finally, nothing in the record evidences Popchoi's intent to waive, either

²⁹ Foley, 14 Wn. App. at 292-93 (citation omitted).

³⁰ 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (decisions by the state Supreme Court are binding on all lower courts).

³¹ See Foley, 14 Wn. App. at 291.

³² 25 Wash. 627, 637, 66 P. 97 (1901).

expressly or by conduct, the warranty to defend. "A 'waiver' is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right."³³ If a waiver is not found by express agreement, "[a] waiver by conduct occurs if the actions of the person against whom waiver is claimed are inconsistent with any intention other than waiver."³⁴ Here, the parties agree that there was no express waiver. Moreover, Popchoi's actions were not inconsistent with any intent other than to waive the warranty. Even Kiss admitted in his correspondence that Popchoi's actions appear to have been made in reliance on the warranties of title made under the statutory warranty deed.

CONCLUSION

We conclude that a grantor must conduct a reasonable investigation into the merits of a claim involving seisin and include a reasonable consideration of the results in any decision to settle that claim under the warranty to defend. In light of established precedent, we decline Kiss's invitation to limit the warranty in those circumstances where the grantee, but not grantor, has notice of a possible defect in title or possession. We affirm.

³³ Birkeland v. Corbett, 51 Wn.2d 554, 565, 320 P.2d 635 (1958).

³⁴ Shinn v. Thrust IV, Inc., 56 Wn. App. 827, 843-44, 786 P.2d 285 (1990) (citing Birkeland, 51 Wn.2d at 565).

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Leach, J.

WE CONCUR:

Dwyer, A.C.J.

Becker, J.