

64261-8

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No. 64261-8 I

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON  
DIVISION I

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**DAVE ROBBINS CONSTRUCTION, LLC,**  
a Washington Limited Liability Company,

Appellant,

v.

**FIRST AMERICAN TITLE COMPANY,**  
a domestic insurance company,

Respondents.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
STATE OF WASHINGTON  
THE HONORABLE DEBORAH FLECK

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REPLY BRIEF OF APPELLANT

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COMES NOW Appellant DAVE ROBBINS CONSTRUCTION LLC (“DRC”), by and through its attorney of record, MAHER AHRENS FOSTER SHILLITO PLLC, and Kelly DeLaat-Maher and Jordan K. Foster, and submits Appellant’s brief in reply to Respondent’s brief on Appeal as follows:

**I. RESTATEMENT/CLARIFICATION OF THE CASE**

Appellant, Dave Robbins Construction LLC (“DRC”) substantially relies on its statement of the case in its original briefing, though some further clarification is needed after the filing of Respondent First American Title Insurance Company’s brief (hereinafter “First American”).

In First American’s Statement of the Case, they argue that the Properties’ historical district designation was not a public record, nor were the difficulties in relation to revocation and reinstatement of the building permits a Covered Risk. Brief of Respondent p. 2-3. First American’s statements are misleading and in error.

Within the “Covered Risks” section of First American’s policy it clearly states that First American will insure against any loss or damages by reason of the following:

3. Unmarketable Title.

...

5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those

relating to building zoning) restricting, regulating, prohibiting, or relating to

(a) the occupancy, use, or enjoyment of Land;

(b) the character, dimensions, or location of any improvement erected on the Land;

...

If a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

*See* Title Policy – Covered Risks, CP 20; CP 29. First American suggested similar language was excluded from coverage, but the exclusion section cited by First American clearly reverts back and distinguishes that it does not exclude coverage listed in “Covered Risk 5” – which is the section cited above. In its Response brief, First American haphazardly omits from its recitation of the Exclusions from Coverage the following language: **This exclusion... does not modify or limit the coverage provided under Covered Risk 5.** CP 21. Thus, it is clear that the Covered Risks include (3) Unmarketable Title and (5) governmental restrictions on the use of land that could have been discovered by Public Records.

The First American policy defines Public Records as follows:

(i) “Public Records”: Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), “Public Records” shall also include

environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

CP 21; CP 30.

First American quotes the same policy language above in its Response brief, then delves into a passage regarding Washington's Recording Act (WRA), RCW 65.08.070. That statute states that "the conveyance of real property... may be recorded in the office of the recording officer of the county where the property is situated" and documents not so recorded shall be void against subsequent bonafide purchasers. RCW 65.08.070 (emphasis added). First American takes the position that this statute is controlling and documents affecting real property are *only* confined within the recorder's office. Yet, neither the WRA nor RCW 65.08.070 is defined, required, or cited by First American's policy. Furthermore, First American's policy does not require or specify that it *only* performs a search of records within county recorder's office, or searches exclusively for conveyances.

If anything, the Policy opens the door to additional public agencies by stating First American's search "shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located." The fact is the Policy does not limit the definition of Public Records to include *only* a

search within the recorder's office or solely to US District Court clerk's office. Rather the Policy claims that "Public Records" are those records established under "state statutes" at the Date of the Policy. The term "state statutes" is not defined under the policy and clearly not limited to RCW 65.08.070 – which is not referenced in the Policy. Thus, it only makes sense for "state statutes" to include all of Washington's statutes in affect at the Date of the Policy.

In this regard, both RCW 27.34 *et seq.* (WA State Historical Sites and Preservation) and RCW 27.53 *et seq.* (WA State Archaeological Sites) were enacted prior to the Date of the Policy – not having any significant amendments since 1993. As such, each of these statutes was clearly in affect at the Date of First American's policies issued herein.

Both RCW 27.34 *et seq.* and RCW 27.53 *et seq.* make it a matter of public interest in preserving historical and archaeological sites – giving additional oversight and interest to the local government and local Native American Tribes. As a matter of public record, RCW 27.34.220 makes it a requirement that a register of historical sites be created and compiled to establish and provide information to the public.

In this instance, the Green River Gorge Historical District (GRGHD) is an all-encompassing designation, registered with a public agency, which limits construction and use on the Land owned by

Appellant. CP 5. The GRGHD also serves as an encumbrance on the Land as the government, Native American Tribes, and the public all have authority and control over private development rights.

The GRGHD is a historic district designated in the Washington State Register of Historic Places under RCW 27.34.220. Pursuant to RCW 27.53.020, a ‘historic archaeological resource’ is one that is listed or is eligible for listing in the Washington State Register of Historic Places. Thus, based upon its placement within the GRGHD, the property is subject to RCW 27.53.060. That section provides in pertinent part as follows:

(1) on the Private and public lands of this state, it shall be unlawful for any person, firm, corporation, or any agency or institution of the state or a political subdivision thereof to knowingly remove, alter, dig into, or excavate by use of any mechanical, hydraulic, or other means, or to damage, deface, or destroy any historic or prehistoric resource or site. . . .without having first obtained a written permit from the director for such activities.

RCW 27.53.060.

Thus, by virtue of the GRGHD designation upon the Property, a permit should have been obtained for any work conducted within the district before it began. DRC was not required to do so, and was only advised to do so after the Native American artifacts were discovered and the Stop Work Orders issued. CP 6. Furthermore, any future owner of the

property would have to be advised by DRC, as seller, of any issues affecting title and/or use of the property, pursuant to RCW 64.06 *et. seq.*, simply based upon that designation.

As a result of the stop work order and GRGHD designation, DRC was not financially able to complete construction due to the stringent restrictions placed upon the parcels. Following placement of the Stop Work Orders, DRC proceeded to obtain an archaeological survey, as required by DDES and the Washington Department of Archaeology and Historic Preservation. The excess costs and time involved, and the potential restrictions on completion caused DRC to ultimately lose the properties to foreclosure.

Had DRC been aware of the historic district designation affecting title, it would not have purchased the lots due to their location within a historic designation and potential restrictions placed on development of those lots under RCW 27.53 *et. seq.* CP 6. Historical designations simply place additional burdens upon a developer, which require additional analysis before considering a purchase and whether profit can be made in developing particular sites. These additional burdens also affect construction timelines, which for a developer holding construction loans imputes timelines to deadlines. In not knowing these burdens ahead of

time, DRC walked blindly into this development and ended up causing the ultimate downfall of these developments.

In specific example in this case, upon placement of the stop work orders, DRC lost a sale of one of its lots. CP 6. Had an archaeological survey even been conducted as part of the plat requirement due to plat location within a Historical District under SEPA review, the artifacts would have been found, and the company would not have suffered delays in construction.

## **II. ARGUMENT**

### **A. STANDARD OF REVIEW**

The standard of review for a dismissal of a claim under CR 12(b)(6) is de novo. *Reid v. Pierce Cy.*, 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998). Dismissal of a claim is appropriate only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. *Reid*, at 201. The court accepts as true the allegations in a plaintiff's complaint and any reasonable inferences therein. *Reid*, 136 Wn.2d at 201. Dismissal here was inappropriate.

### **B. THE COURT ERRED IN DISMISSAL BECAUSE VALID CAUSES OF ACTION EXISTS FOR BREACH OF CONTRACT WHEN FIRST AMERICAN FAILED TO INSURE MARKETABLE TITLE AND FAILED TO DISCOVER VITAL INFORMATION**

As stated above the “Covered Risks” section of First American’s Policy stated that First American would insure against any loss or damages by reason of the following:

3. Unmarketable Title.

...

5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building zoning) restricting, regulating, prohibiting, or relating to

(a) the occupancy, use, or enjoyment of Land;

(b) the character, dimensions, or location of any improvement erected on the Land;

...

If a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

*See* Title Policy – Covered Risks, CP 20; CP 29. DRC’s Complaint and claims herein allege that First American failed to insure against these specific losses.

**1. The Court Erred in Dismissal of DRC’s Claims for Breach of Contract**

First American argues that they did not breach the title policy issued to DRC as they did not fail to indemnify loss arising from a defect in title insurance. They point to RCW 48.11.100, which defines title insurance as follows:

“Title insurance” is insurance of owners of property or others having an interest in real property, against loss by encumbrance, or defective titles, or adverse claim to title, and associated services.

RCW 48.11.100. By this statutory definition, it appears prudent that First American’s title insurance issued in favor of DRC should have covered it against loss incurred here.

Washington case law also favors coverage of insurance against the particular type of loss suffered here. “It must not be forgotten that the purpose of insurance is to insure, and that the construction should be taken which will render the contract operative rather than inoperative.” *Schroeder v. Royal Globe Ins.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983) (citations omitted). In this case, First American agreed to insure against any loss or damages by reason of (i) any governmental enforcement or regulation affecting the use, enjoyment, or character of the land, and also against loss for (ii) “unmarketable title”. CP 20, 29.

First American picks only portions of their title policy in support of their argument, thereby omitting portions in DRC’s favor. For example, First American states that a “Covered Risk” is defined as one “that has been created or attached or has been filed or recorded in the Public Records.” See Respondent’s Brief, p. 7. However, examination of

the section quoted reveals that it is only one of ten Covered Risks. The full section quoted states as follows:

10. Any defect or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to the date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A..

Other Covered Risks, as outlined above, include unmarketable title, and governmental regulations and building requirements located within the public record, along with an enforcement action based upon police power. CP 20, 29.

First American claims that GRGHD was not a matter of public record falling within the definition of Public Records located within the policy.

Within the policy, "Public Records" are defined as follows:

Records established under state statute at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include, for example, environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

Title Policy Definition of Terms (i), p. 2, CP 21; *see also* subsection 1(f), CP 44. Here, it is entirely reasonable that DRC expected public records to include historic designations such as the GRGHD issue here.

Language in an insurance contract is to be given its ordinary meaning, and courts should read the policy as the average person purchasing insurance would. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). Thus, a purchaser such as DRC would anticipate and in fact did anticipate that any matter of public record, including a historical designation, would show up as an exception to title or contain a reference on the deed.

In this instance, the GRGHD was identified as a historic site and kept with public records via state statute – at the time the policy was issued. The Washington Department of Archaeology and Historic Preservation, (a governmental and public agency), is entrusted with establishing and maintaining a list of historical sites pursuant to provisions RCW 27.34.220, and RCW 27.53 (state statutes), which were promulgated significantly prior to the issue of these policies. Because the GRGHD was a matter of public record many years prior to the development of the property, and that designation significantly impaired the title and use of property by DRC, First American had a specific duty to disclose this information. First American insured against the losses described herein,

and it would not have been unduly burdensome for it to check the historical site records with the Washington Department of Archaeology and Historic Preservation. The trial court erred in determining otherwise, under a Motion to Dismiss pursuant to CR 12(b)(6).

First American points to the case of *Ellingsen v. Franklin County*, 117 Wn.2d 24, 810 P.2d 910 (1990) as on point. Therein, an easement was recorded in the county engineer's office rather than the county auditor's office, and the court determined that that filing did not impart constructive notice. *Id.* at 29-30. This case can be distinguished from that the *Ellingsen* case. In *Ellingsen* it was a matter of filing a document in the *wrong governmental agency*. Thus, the decision in *Ellingsen* can be attributed to case of *user error*.

This is not a case of *user error* or filing a document in the *wrong governmental agency*. Since 1970, GRGHD has been designated as a historic district, which record is easily and readily available in the Washington DHAP. A simple phone call or web search of that department is not tantamount to the situation described in *Ellingsen*. The DHAP records contain statewide designations of historic places, and do not constitute a wild goose chase for records in every government office to the largest state agency.

## **2. First American Further Failed To Insure Against Loss Associated With An Unmarketable Title**

First American goes on to argue that DRC's reliance on "Unmarketable Title" as a covered risk is misplaced. The title insurance policy issued by First American specifically provided that it would cover any loss due to "unmarketable title." To clarify, DRC's position is that First American failed to inform DRC of encumbrances and regulations (GRGHD and its requirements) affecting the Properties. These encumbrances and regulations placed additional burdens and restrictions on DRC's development of the Properties. In having to comply with these additional restrictions, DRC lost the sale of one the lots because it was not able to timely complete construction coupled with the potential buyer's hesitancy to purchase a property with significant restrictions upon it. The potential purchaser's action of walking away and the burdens of construction are direct losses associated with an unmarketable title. The loss due to unmarketable title is even worse because the GRGHD designation is not something that can simply be removed or covered by a subsequent policy.

The First American title policy defines unmarketable title as follows: "Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be

released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.” CP 21; Title Policy Definition of Terms (1)(k), p.2; also CP 44. This definition of unmarketable title is analogous of and is a direct example of what took place in this case. A potential purchaser did not feel comfortable in purchasing the lot because of the restraints of the GRGHD; hence, DRC lost a potential sale due to unmarketable title.

First American suggests DRC’s argument is misplaced as to marketability of title, arguing that the cases cited by DRC do not support DRC’s argument. More specifically, First American took issue with the cases of *Hebb v. Severson*, 32 Wn.2d 159, 166, 201 P.2d 156, 159 (1948)<sup>1</sup> and *Empey v. Northwestern & Pacific Hypotheekbank*, 129 Wash. 392, 225 P. 228 (1924). These cases were not cited by DRC for the purpose of comparing arguments or specific facts or the outcome of those cases, but merely for providing guidance as to the definition of “marketable title” in comparison with the policy defined “unmarketable title.” More or less it was for comparative purpose of a definition, not an application of a case.

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<sup>1</sup> The *Hebb* case, citing to *Empey*, defined “marketable title” as “one that is free from reasonable doubt and such as reasonably well informed and intelligent purchasers, exercising ordinary business caution, would be willing to accept”; essentially equating to the ability of the purchaser of land to hold title *with security*, and *without doubt*, that the *title is secure* and he may hold title to the land peacefully, without the anxiety that the land he has invested money in may be taken away or have its marketable value disturbed or diminished. *Hebb v. Severson*, 32 Wn.2d at 166-167, citing *Empey v. Northwestern & Pacific Hypotheekbank*, 129 Wash. 392, 225 P. 228 (1924).

Because restrictions of the type associated with the parcels here can affect a buyer's willingness to purchase, disclosure of these restrictions are mandated under Washington law to be made as part of disclosure by a seller in the purchase and sale transaction. See RCW 64.06.015 (unimproved real property) and RCW 64.06.020 (improved real property). Amongst other disclosures these include "any study, survey project, or notice that would adversely affect the property" and any "unusual restrictions on the property that affect future construction or remodeling." See RCW 64.06.015 (G), (I). The quoted section is under the heading "Title" on the disclosure form. Thus, a condition of title exists which DRC must have disclosed had it been able to proceed with the construction and sale of the houses. This is a condition which also should have been disclosed by title, and should be considered a covered risk due to unmarketable title.

The fact of the matter is, DRC did not have a marketable title, it had an unmarketable title. DRC could not provide marketable title to any prospective purchaser because of the GRGHD designation and governmental, tribal and public interest and regulations. Simply put the GRGHD designation severely limits construction and development activities due to third party interests and rights in the land. All of which

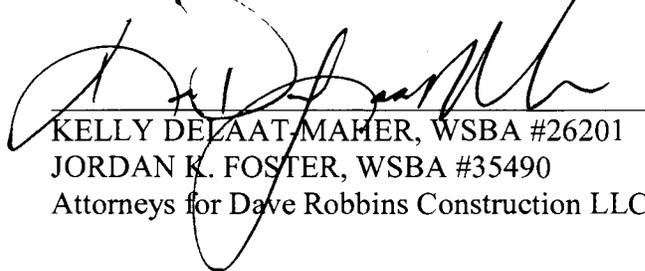
could have been avoided had First American checked the public records of DAHP.

### **III. CONCLUSION**

Dismissal was not appropriate. The action should be remanded to the court for trial on the merits.

RESPECTFULLY SUBMITTED this 2 day of April, 2010.

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**CERTIFICATION OF SERVICE**

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the above Appellant's Brief to counsel of record as follows:

Erin Stines Bishop White & Marshall 720 Olive Way, Suite 1301 Seattle, WA 98101-1801	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Delivered by Legal Messenger <input type="checkbox"/> Overnight Mail via Federal Express <input type="checkbox"/> Facsimile Transmission <input checked="" type="checkbox"/> E-mail Transmission

DATED this 6<sup>th</sup> day of April, 2010, in Tacoma, WA.

  
Erin Diamond

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