

No. 305465

Superior Court No. 05-2-00108-4

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION III

THELMA, KARL, LORI, and KARIN KLOSTER,
Appellants and Cross-Respondents,

vs.

SCHENECTADY ROBERTS, et al.,
Respondents and Cross-Appellants.

APPELLANTS'S AND CROSS-RESPONDENTS'S
COMBINED REPLY BRIEF

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I. TABLE OF CONTENTS

I. TABLE OF CONTENTS.....	i
II. TABLE OF AUTHORITIES.....	v
III. INTRODUCTION.....	1
IV. THE KLOSTERS’S SUBSTANTIVE ARGUMENTS REGARDING THE ADEQUACY OF THE CROSS- APPEAL AND OF THE RESPONDENTS’S REPLIES TO THEIR OPENING BRIEF.....	1
A. First American’s Cross-Appeal Is Legally Inadequate.....	1
B. First American’s and Ameri-Title’s Reply To The Klosters’s Appeal Is Legally Inadequate.....	2
C. Roberts’s and Pacific Rim’s Reply To The Klosters’s Appeal Is Similarly Legally Inadequate.....	3
V. THE KLOSTERS’S RESPONSE TO FIRST AMERICAN’S CROSS-APPEAL.....	5
Introduction.....	5
A. The Trial Court’s Ruling That The Klosters’s Title Was Defective Abrogates First American’s Cross-Appeal Regarding Coverage.....	5
B. First American Has Not Appealed Judge Reynolds’ Ruling That The Title Policy’s Access Coverage Was Ambiguous.....	7
C. First American Had A Duty To Defend The Klosters’s Title Based On Both Judge Reynolds’s Ruling That The Title Policy’s Access Coverage Was Ambiguous And The Trial Court’s Ruling That The Klosters’s Title Was Defective.....	14

VI. THE KLOSTERS’S RESPONSE TO FIRST AMERICAN’S AND AMERI- TITLE’S REPLY TO THEIR APPEAL.....	17
Introduction.....	17
A. First American’s Coverage Determination Was Made In Bad Faith.....	18
B. Ameri-Title’s Failure To Discover And Disclose The Non-Recorded Access Easement Was Negligence.....	19
C. Because The Trial Court Erred In Refusing To Allow The Klosters To Present Evidence In Support Of Their Emotional Distress Claims, Respondents Cannot Now Claim That The Klosters Failed To Present Sufficient Evidence In Support Of Their Emotional Distress Claims.....	21
VII. THE KLOSTERS’S REPLY TO ROBERTS’S AND PACIFIC RIM’S OPPOSITION TO THEIR APPEAL.....	22
Introduction.....	22
A. The Trial Court’s Determination That The Title To Lot 1 Was Defective Abrogates Roberts’s And Pacific Rim’s Opposition To The Klosters’s Appeal.....	23
B. Roberts’s And Pacific Rim’s Claim That The Klosters Were Negligent In Not Discovering That The Access Easements Were Not Recorded Is Legally Irrelevant.....	24
C. Pacific Rim Was The Successor-In-Interest To Heany And Pacific Rim Properties And Had Successor Liability For Heany’s Faulty Development Of Pacific Rim Estates.....	26
D. Roberts And Pacific Rim Are Not Entitled To Attorney Fees Against The Klosters.....	29
VIII. CONCLUSION.....	30

Summary Conclusion By Issue.....	31
<u>Issue 1.</u> A Seller Of Real Property Is Liable For Negligent Misrepresentation By Failing To Convey Clear Title Because Of Non-Recorded Access Easements.....	31
<u>Issue 2.</u> A Real Estate Broker Which Is The Incorporation Of A Sole Proprietor Real Estate Developer Has Successor Liability For The Developer’s Failure To Record Access Easements To The Property Which It Sells.....	32
<u>Issue 3.</u> A Sole Proprietor Developer Who Failed To Record Access Easements Is An Indispensable Party.....	32
<u>Issue 4.</u> A Title Agent Is A Co-Insurer Of Title Where The Title Agent Is Contractually Responsible For The First \$3,500.00 Of Loss On Every Title Policy Which It Issues In The Title Insurer’s Name.....	33
<u>Issue 5.</u> A Title Insurance Agent Is Liable For Its Failure To Research Access Easements As Directed By The Title Insurer.....	33
<u>Issue 6.</u> A Title Insurer Breaches Its Policy, Its Duty To Defend, The UCSPA, The CPA, And Acts In Bad Faith Where It Refuses To Cover Non-Recorded Access Easements Which Preclude Clear Title.....	33
<u>Issue 7.</u> A Title Insurer Violates The UCSPA And The CPA Where It Has No Compliance Standards, Refuses To Investigate A Claim And Does Not Tell Its Insured That Its Title Agent Is Responsible.....	34
<u>Issue 8.</u> A Real Estate Buyer Who Does Not Receive Clear Title Because Of Non-Recorded	

Access Easements Is Not Limited To An “Economic Loss” Recovery.....	34
<u>Issue 9.</u> A Real Estate Buyer Who Does Not Receive Clear Title Because Of Non-Recorded Access Easements Is Owed A Defense Of Title.....	34
<u>Issue 10.</u> A Real Property Seller And Her Real Estate Agent Are Not Due Attorney Fees Under A VLPSA Where The Claims Against Them Were Not Based On A VLPSA And Where The VLPSA Merged Into The Deed.....	35
<u>Issue 11.</u> A CR 68 Offer Has No Application To The Determination Of An Attorney Fee Award Against An Insurer.....	35
PROOF OF SERVICE.....	38
APPENDIX	

II. TABLE OF AUTHORITIES

Cases:

American Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 229 P.3d 693 (2010).....	17
Barber v. Peringer, 75 Wn.App. 248, 877 P.2d 223 (1994).....	29, 30
Barstad v. Stewart Title Guar. Co., 145 Wn.2d 528, 39 P.3d 984 (2002).....	19, 20
Boguch v. Landover Co., 153 Wn.App. 595, 224 P.3d 795 (2009).....	30
Campbell v. Ticor Title Ins. Co., 166 Wn.2d 466, 209 P.3d 859 (2009).....	15, 16, 17
Edmonson v. Popchoi, 172 Wn.2d 272, 256 P.3d 1223 (2011).....	3, 25, 26, 29
Erickson v. Chase, 156 Wn.App. 151, 231 P.3d 1261 (2010), <i>review denied</i> , 170 Wn.2d 1018.....	17
Gross v. City of Lynnwood, 90 Wn.2d 395, 583 P.2d 1197 (1978).....	13
Hoffman v. Connall, 108 Wn.2d 69, 736 P.2d 242 (1987).....	24
Mastro v. Kumakichi Corp., 90 Wn.App. 157, 951 P.2d 817 (1998).....	16, 17, 23, 24
Quadrant Corp. v. American States Ins. Co., 154 Wn.2d 165, 884 P.3d 733 (2005).....	10
Rizzuti v. Basin Travel Service of Othello, Inc., 125 Wn. App. 602, 105 P.3d 1012 (2005).....	18

Santos v. Sinclair, 76 Wn.App. 320, 884 P.2d 941 (1994).....	9
Seaborn Pile Driving Co., Inc. v. Glew, 132 Wn.App. 261, 269, 131 P.3d 910 (2006), <i>review denied</i> , 158 Wn.2d 1027	30
Sheridan v. Aetna Casualty & Surety Company, 3 Wn.2d 423, 100 P.2d 1024 (1940).....	20
Smith v. Safeco Insurance Co., 150 Wn.2d 478, 78 P.3d 1274 (2003).....	19
Zimmerman v. Kyte, 53 Wn.App. 11, 765 P.2d 905 (1988).....	22

Other State Cases:

Stewart Title Guaranty Co. v. West, 110 Md.App. 114, 676 A.2d 953 (Maryland, 1996).....	6, 7
--	------

Statutes:

RCW 4.28.210.....	4
RCW 48.11.100.....	15
RCW 64.04.030.....	17

Court Rules:

CR 4(a)(3).....	4
CR 4.2(b).....	4
CR 11.....	22
CR 56(d).....	7, 10, 18, 27
RAP 5.1(a).....	3

RAP 10.3(a)(4).....2, 6, 13, 23, 24
RAP 10.3(b).....4
RAP 10.3(c).....3, 4
RAP 10.3(g).....2, 6, 13, 23, 24

Other Authority:

Washington Pattern Jury Instruction No. 1.01.....3, 18
Rule 1.2(f) of the Rules of Professional Conduct.....4

APPENDIX

Ruling of Court on Attorney’s Fees After Jury Verdict.....1-5

Order Granting The Klosters’ Motion *In Limine* Re:
Title Policy Ambiguity.....6-7

Order Granting The Klosters’ Motion *In Limine* Re:
Access Definition.....8-9

Order Granting The Klosters’ Motion *In Limine* Re:
Public Record Easement.....10-11

Supplemental Order On First American’s And
AmeriTitle’s Motions *In Limine*.....12-13

Order Granting The Klosters’ Motion *In Limine* Re:
Title Policy Exclusions.....14-15

Order On Defendants First American’s And
AmeriTitle’s Motion To Revise And Joinder On
Pacific Rim’s Motion For Summary Judgment
As To Specific Items Of Damages.....16-20

Order On First American’s And AmeriTitle’s
Motions *In Limine*.....21-22

Order Granting The Klosters’ Motion *In Limine* Re:
Successor Liability.....23-24

Exhibit 134 - Heany’s Communications With Klickitat
County Re: Development Of Pacific Rim Estates
On Pacific Rim Properties’s Letterhead.....25-39

Statutes:

RCW 48.11.100.....60

RCW 4.28.210.....60

RCW 64.04.030.....60-61

Court Rules:

CR 4(a)(3).....61

CR 4.2(b).....61

CR 11.....61-62

CR 56(d).....62-63

RAP 5.1(a).....63

RAP 10.3(a)(4).....63

RAP 10.3(b).....63

RAP 10.3(c).....64

RAP 10.3(g).....64

Other Authority:

Washington Pattern Jury Instruction No. 1.0164-69

Rule 1.2(f) of the Rules of Professional Conduct.....69-70

Text Authorities:

Stewart Title Guaranty Co. v. West,
110 Md.App. 114, 676 A.2d 953 (Maryland, 1996).....40-59

III. INTRODUCTION

Plaintiffs, appellants and cross-respondents Thelma, Karl, Lori and Karin Kloster (Klosters) respond and reply to: 1) the cross-appeal of defendant, respondent and cross-appellant First American Title Insurance Company (First American), 2) the reply of First American and defendant and respondent Ameri-Title, Inc. (Ameri-Title) to the Klosters's appeal, and 3) the reply of defendant and respondent Schenectady Roberts (Roberts) and defendant and respondent Pacific Rim Brokers, Inc. (Pacific Rim) to the Klosters's appeal. The Klosters do not reply to defendant and respondent Alvin Fred Heany, Jr. (Heany) because Heany has not filed a brief.

IV. THE KLOSTERS'S SUBSTANTIVE ARGUMENTS REGARDING THE ADEQUACY OF THE CROSS-APPEAL AND OF THE RESPONDENTS'S REPLIES TO THEIR OPENING BRIEF

A. First American's Cross-Appeal Is Legally Inadequate

First American's cross-appeal ignores crucial aspects of the record and misses the point of the coverage rulings below and the legal bases on which they were made. First American has not appealed, assigned error, or stated an issue with respect to either: 1) Judge Altman's (trial court) order that the Klosters's title to Lot 1 was defective (Clerk's Papers (CP) 4207-4211, 4210, Appendix (App) at 4) or 2) Judge Reynolds's order that First American's title policy access coverage was ambiguous. (CP 1446-1447, App at 7). Rather, First American has only appealed the trial court's denial of the

second of First American's several motions to set aside Judge Reynolds's pretrial order that First American's title policy access coverage was ambiguous. It has not appealed Judge Reynolds's order itself that the title policy's access coverage was ambiguous or the legal basis on which it was made.

Because of these aforementioned failures, First American has waived any appeal concerning the judicial determination of coverage under its title policy pursuant to **RAP 10.3(a)(4) and (g)**. First American is therefore bound by the trial court's order of defective title and Judge Reynolds's pretrial order that the title policy's access coverage was ambiguous as well as the legal bases on which both orders were made. In sum, the failure to appeal either of these two orders abrogates First American's appeal concerning the judicial determination of coverage under its title policy.

B. First American's and Ameri-Title's Reply To The Klosters's Appeal Is Legally Inadequate

First American's and Ameri-Title's failure to appeal the trial court's order that the Klosters's title was defective as well as Judge Reynolds's order that the title policy's access coverage was ambiguous, in addition to the legal bases on which both were made, also abrogates their opposition to the Klosters's appeal. Furthermore, First American and Ameri-Title have conceded that the trial court made factual determinations. First

American/Ameri-Title Brief at 1. These determinations were not within the trial court's purview under **Washington Pattern Jury Instruction No. 1.01** (**WPI**, App at 64-70), but, rather, were for the jury.

C. Roberts's And Pacific Rim's Reply To The Klosters's Appeal Is Similarly Legally Inadequate

Roberts and Pacific Rim also have not assigned error to the trial court's decisions. Roberts/Pacific Rim Brief at 4. Thereby, as a matter of law, they must be deemed to have accepted the trial court's determination that the unrecorded access easement was a defect in the Klosters's title to Lot 1 of Pacific Rim Estates. CP 4207-4211, 4210, App at 4. The uncontested ruling of the trial court that the Klosters's title to Lot 1 was defective also abrogates Roberts's and Pacific Rim's opposition to the Klosters's appeal. Whether Roberts knew that the easement was unrecorded was legally irrelevant in that a grantor pursuant to a statutory warranty deed guarantees title to the property prospectively and is not absolved from liability for defects in title once title to the property is transferred. **Edmonson v. Popchoi, 172 Wn.2d 272, 283-284, 256 P.3d 1223 (2011)**.

Roberts and Pacific Rim also have violated **RAP 10.3(c)** in that they dismissed out of hand the Klosters's issues on appeal and, then, have framed their own issues on appeal. They have done so even though they did not file a notice of appeal as required by **RAP 5.1(a)**. Rather, they have responded to

their own issues rather than responding at all to the Klosters's issues on appeal as required by **RAP 10.3(b)**.

In addition, and in violation of **Rule 1.2(f) of the Rules of Professional Conduct**, counsel for Roberts and Pacific Rim have responded on Heany's behalf to the Klosters's appeal of the trial court's dismissal of Heany from the action as well as to the trial court's refusal to grant the Klosters's motion to make Heany a party. They have so argued despite neither appearing on Heany's behalf in the trial court nor filing a notice of appearance on Heany's behalf in this court.

Finally, there has been no substitution of Heany's trial counsel, L. Eugene Hanson, by counsel for Roberts and Pacific Rim, all contrary to **Rules 4(a)(3) and 4.2(b) of the Civil Rules for Superior Court (CR)** and **RCW 4.28.210**. Counsel for Roberts and Pacific Rim nevertheless have listed Mr. Hanson on their proof of service, apparently acknowledging that Heany is represented by Mr. Hanson and not by them. Each of the arguments counsel for Roberts and Pacific Rim have put forward in opposition to the Klosters's appeal of the trial court's dismissal of Heany from the action as well as the trial court's refusal to grant the Klosters's motion to make Heany a party should be disregarded pursuant to **RAP 10.3(c)**.

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V. THE KLOSTERS'S RESPONSE TO FIRST AMERICAN'S CROSS-APPEAL

Introduction

First American's statement of facts in support of its cross-appeal is not helpful. First American has ignored the actual order (CP 1446-1447, App at 7) and the entire legal basis on which the ruling was made that its title policy's access coverage was ambiguous. It also has not addressed the impact of the trial court's ruling that the Klosters's title was defective. CP 4207-4211, 4210, App at 4. The Klosters's defective title was covered both legally and factually under each of the other three coverages of First American's title policy. Ex 95.

A. The Trial Court's Ruling That The Klosters's Title Was Defective Abrogates First American's Cross-Appeal Regarding Coverage

In its post-trial "Ruling of Court on Attorney's Fees After Jury Verdict" (CP 4207-4211, 4210, App at 4), the trial court ruled in part as follows:

"A contract of indemnity insures against actual loss from the existence of a title defect. Although the "cost of cure" was linked to the Pacific Rim jury instruction on liability, the jury found the plaintiffs suffered a real, actual loss. That loss was directly attributable to the defective title, for which there was coverage. The plaintiffs had to sue for coverage." (CP 4210, App at 4, emphasis added).

Because First American has not assigned error to -- or presented an

issue for review on -- the trial court's order that the Klosters's title to Lot 1 was defective and was covered under First American's title policy, its appeal is legally ineffective. **RAP 10.3(a)(4) and (g)**.

First American has cited no statute or case law that the non-recorded access easement was not a defect in title as the trial court ruled. In addition to the title policy's fourth coverage for lack of access (Ex 95), the defect in the Klosters's title was also insured under the first three coverages of First American's title policy: 1) title being vested other than as stated, 2) any defect in title, and 3) unmarketability of title. Exhibit (Ex) 95. As stated in the seminal case of **Stewart Title Guaranty Co. v. West, 110 Md.App. 114, 676 A.2d 953, 965 (Maryland, 1996)**, App at 54, access is an essential component of good title:

“Stewart Title, in a footnote in its reply brief, admits that the Property was landlocked, although it denies that this rendered the Property unmarketable. Yet there are few title problems that are more palpable than complete lack of access to a public road. When property completely lacks such access, it is usually held that its title is unmarketable, apparently on the ground that the purchaser would be subjected to the risk of a lawsuit to establish an easement by necessity in order to gain a right of access. See Regan v. Lanze, 40 N.Y.2d 475, 354 N.E.2d 818, 387 N.Y.S.2d 79 (N.Y. 1976). “A marketable title is one which is free from encumbrances and any reasonable doubt as to its validity and such that a reasonably intelligent person, who is well informed as to the facts and their legal bearing, and who is ready and willing to perform his contract, would be willing to accept in the exercise of ordinary business prudence.” Myerberg, Sawyer & Rue v. Agee, 51 Md. App. 711, 716, 446 A.2d 69 (1982), quoting

Berlin v. Caplan, 211 Md. 333, 343 - 44, 127 A.2d 512 (1956). Moreover, the Policy makes the lack of a right of access a separate and independent ground of recovery. Thus, since it is undisputed that the Property was landlocked as of the date the Policy was issued, there was an insured title problem, even if the triangular parcel and panhandle strip were not covered by the Policy.” (676 A.2d at 965, emphasis added, App at 54).

The Klosters’s motion for partial summary judgment that the non-recorded access easement was a defect in the Klosters’s title to Lot 1 (CP 2914-2919) should have been granted by the trial court before, not after trial. It would have allowed the Klosters to present evidence of the damage caused by the lack of good title and its consequent unmarketability, specifically ruled to be inadmissible by the trial court. Report of Proceedings (RP) 494.

B. First American Has Not Appealed Judge Reynolds’s Ruling That The Title Policy’s Access Coverage Was Ambiguous

Judge Reynolds granted the Klosters’s **CR 56(d)** motion (CP 1311-1327, 1316-1322) that First American’s access coverage was ambiguous and therefore was required to be interpreted in favor of the Klosters. (CP 1446-1447, App at 7). Judge Reynolds stated that he agreed with the Klosters’s analysis that the title policy’s access coverage was ambiguous. RP 245-246. There were four reasons which the Klosters set forth in their motion that the title policy’s access coverage was ambiguous.

First was the previous grant of the Klosters’s motion (CP 1103-1128)

that the title policy's access coverage was undefined and therefore, must be interpreted in accord with the understanding of the average person. CP 1293-1310, 1295-1296, App at 9. This ruling was in accord with the policy's language (Ex 95), First American's inter-office memo regarding insuring easements (Ex 144), and the testimony of First American's Washington State Underwriter, Michael Moore. CP 31-32, RP 774.

Second was the grant of the Klosters's motion (CP 1103-1128) that the access easement to Lot 1 existed as a matter of public record along the entire length of the southern border of Lot 1 of Pacific Rim Estates and also along the entire length of the northern border of the adjoining property to the south of Lot 1. CP 1293-1310, 1301-1302, RP 201, App at 11.

Third was the determination that the property described in the title policy included all of the attributes of the Pacific Rim Estates plat, including the easements shown on thereon, by virtue of the title policy's Schedule A description of the property as: "Lot 1, PACIFIC RIM ESTATES, according to the Plat thereof, recorded in Book 5, Page 31, Klickitat County Plat Records,-----". (Ex 95, emphasis added). Judge Reynolds made this determination when he denied First American's motion for an order that Schedule A of the title policy did not describe any specific easement for the land insured. CP 4524-4525, App at 12.

Fourth was Judge Reynolds's grant of First American's motion that

Schedule B, Section Two of the title policy (Ex 95) excepted from coverage all easements contained in plats WS-146 and Pacific Rim Estates. CP 4524-4525, App at 13. This created an ambiguity in coverage which was required to be resolved in favor of the Klosters.

The average person, looking at the undefined access coverage in the title policy and looking at the Pacific Rim Estates plat which showed the access easements as a matter of public record, would conclude that the existing access to Lot 1 was covered under the policy because the property description for Lot 1 in the title policy was “according to the [Pacific Rim Estates] Plat.” Also, Schedule B, Section One of the title policy excepted from coverage only matters which were not of public record. Once easements were shown as a matter of public record, they were covered under the title policy. **Santos v. Sinclair, 76 Wn.App. 320, 327-328, 884 P.2d 941 (1994)**. Accordingly, Judge Reynolds ruled that the Schedule B, Section One title policy exceptions were inapplicable to the Klosters’ claim for coverage. CP 1293-1310, 1305-1306, App at 15.

The ambiguity created was that, on the one hand, the Klosters had access coverage for the access road to Lot 1 shown on the recorded plat of Pacific Rim Estates but, on the other hand, all easements were excluded from coverage. The average person -- even First American’s Washington State underwriter, Michael Moore (RP 799-800) -- believed that the title policy

insured the Klosters's access to Lot 1 of Pacific Rim Estates.

Specifically, the title policy, in an exception to coverage, did not cover the access easements to Lot 1 of Pacific Rim Estates despite the fact that access was a specified and enumerated coverage. Nevertheless, the means by which such access was created and existed (easements) were excepted from coverage. This constituted a classic case of ambiguous and/or illusory coverage -- just as Judge Reynolds ruled. CP 1446-1447, App at 7.

As stated in **Quadrant Corp. v. American States Ins. Co., 154 Wn.2d 165, 184, 884 P.3d 733 (2005)**:

"The insureds contend that if the pollution exclusion is interpreted broadly, the exclusion will swallow all covered occurrences, making the policy illusory. See Taylor v. Shigaki, 84 Wn. App. 723, 730, (1997) (contracts must be construed to avoid rendering contractual obligations illusory)." (154 Wn.2d at 184, emphasis added).

This was the status of the case when Judge Reynolds retired. First American shortly thereafter filed its first motion to revise Judge Reynolds's **CR 56(d)** rulings, including his ruling that the title policy's access coverage was ambiguous. CP 2253-2282, 2260.

In ruling on First American's first motion to revise, the trial court erroneously made various factual determinations which were not permissible in summary adjudication proceedings, but it also expressly declined to set aside Judge Reynolds's ruling that the title policy's access coverage was

ambiguous. CP 2760-2764, 2762, App at 18. And, as noted above, First American has not appealed this trial court ruling.

First American then filed a second motion for a pretrial ruling that the title policy's access coverage was not ambiguous, again seeking to set aside Judge Reynolds's ruling. CP 2782-2822. The trial court again affirmed Judge Reynolds's ruling that the title policy's access coverage was ambiguous. CP 2911-2913. However, the trial court deviated in its second ruling from Judge Reynolds's analysis, reasoning that an average person would conclude that the access easement was covered, in part, because it was referenced in a map attached to the policy. CP 2912.

Although First American has appealed this second trial court order, it later moved again for a third time seeking to set aside Judge Reynolds's ruling. CP 2993-2995. The trial court denied that third motion; again affirming and concurring with Judge Reynolds's ruling that an average person purchasing title insurance would believe access coverage included the easements which provided the access. CP 3275-3281, 3276-3277. As a result, the trial court in its third and last ruling held that the title policy's access coverage was ambiguous. First American has not appealed this third trial court ruling.

Although First American has appealed the second of the trial court's orders which refused to set aside Judge Reynolds's ruling, the appeal is not

on the basis on which Judge Reynolds made his ruling but, rather, on the trial court's reliance on a map attached to the policy. Importantly, and to repeat, First American has not appealed the first and third rulings of the trial court denying its motions to set aside Judge Reynolds's ruling nor has it appealed Judge Reynolds's original ruling that the title policy's access coverage was ambiguous; only the denial of its second motion to set aside Judge Reynolds's ruling.

First American also has based its appeal on Karl Kloster's testimony that he did not rely on a map attached to the policy. First American/Ameri-Title Brief at 16. It is not surprising that Karl Kloster did not rely on a map attached to the policy. Instead he relied on the Pacific Rim Estates plat map given to him by Adrian Palmer (Palmer) of Pacific Rim (RP 988) and also on Palmer's assurance that the access easement existed on the adjoining property. RP 994. When the Klosters received the preliminary title commitment from Ameri-Title, Karl Kloster reviewed it and saw that there was no indication that the access easement to Lot 1 had not been recorded. Based on that review, Karl Kloster was confident that the access easement was properly recorded and that the access was insured by the title policy. RP 1001-1002, 1062-1063, 1070.

Thus, regardless of the basis on which the trial court denied First American's second motion to set aside Judge Reynolds's ruling that the title

policy's access coverage was ambiguous, neither Judge Reynolds's rulings nor the basis on which they were made have been appealed by First American. First American waived any appeal of Judge Reynolds's ruling that the title policy's access coverage was ambiguous. **RAP 10.3(a)(4) and (g)**.

Furthermore, First American's appeal of the title policy's ambiguous access coverage fails even if the trial court's reasoning for its refusal to set aside Judge Reynolds's ruling was incorrect because there was a fully briefed, alternate, and correct ground on which to sustain the finding of the title policy's ambiguous access coverage -- Judge Reynolds's own orders and reasoning. **Gross v. City of Lynnwood, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978)**.

All of the foregoing does not obviate the trial court's ruling that the Klosters's title was defective and the failure of First American and Ameri-Title to appeal that ruling. The trial court's ruling that the Klosters's title was defective invoked the other three coverages of First American's title policy. The Klosters's proposed findings of fact and conclusions of law which were based on the trial court's ruling that the Klosters's title was defective and invoked the further three coverages of First American's title policy (CP4373-4394, 4437-4442) were objected to by First American (RP 1347) and its objections were upheld by the trial court. RP 1348. The trial court ordered the Klosters's counsel to submit findings of fact and conclusions of law (RP

1350) which had to be approved by First American's counsel before judgment against First American and in favor of the Klosters would be entered. RP 1351-1352.

Notwithstanding the fact that the findings of fact and conclusions of law which supported the Klosters's judgment against First American were composed by First American (CP 4443-4447), First American has nevertheless objected to them. However, First American should not be allowed to complain about the findings of fact and conclusions of law which were entered in support of the Klosters's judgment in as much as its counsel composed them and exercised final and ultimate approval before submission for the trial court's signature. CP 4443-4447.¹

C. First American Had A Duty To Defend The Klosters's Title Based On Both Judge Reynolds's Ruling That The Title Policy's Access Coverage Was Ambiguous And The Trial Court's Ruling That The Klosters's Title Was Defective

First American claims that it did not have a duty to defend the Klosters's title because the Klosters were not sued by a third party. In support of this argument, First American claims that its duty to defend was strictly limited by the terms of its title policy. First American/Ameri-Title Brief at 41-43. This assertion is incorrect. Title insurance is defined by statute as

1. The Klosters's counsel was essentially made a scrivener to First American's counsel in the creation of the findings of fact and conclusions of law which were entered in support the Klosters's judgment against First American.

being insurance of owners of property against loss by defective titles or adverse claims to title. **RCW 48.11.100**. Nothing in that statute specifies that title insurance insures only against civil actions filed by third parties concerning defective titles and/or adverse claims to title.

It makes little policy sense that the duty to defend arises only when a civil action is filed by a third party rather than whenever superior title is claimed. In **Campbell v. Ticor Title Ins. Co., 166 Wn.2d 466, 470-471, 209 P.3d 859 (2009)**, the supreme court held that an insurer's duty to defend applies to title insurance and is broader than the duty to indemnify. As stated therein:

“A ‘title policy’ is ‘any written instrument, contract, or guarantee by means of which title insurance liability is assumed.’ RCW 48.29.010(3)(a). Chapter 48.29 RCW does not define title insurance itself, but it is generally understood as “[a]n agreement to indemnify against loss arising from a defect in title to real property, usu[ally] issued to the buyer of the property by the title company that conducted the title search.” Black’s Law Dictionary at 819 (8th ed.2004). Title insurance ‘characteristically combines search and disclosure with insurance protection in a single operation.’ *Shotwell v. Transamerica Title Ins. Co.*, 16 Wn.App. 627, 631, (1976), aff’d, 91 Wn.2d 161, (1978).

Because the business of title insurance is governed by Title 48 RCW, it ‘is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.’ RCW 48.01.030. This court has suggested that the duties outlined in RCW 48.01.030 help inform an insurer’s duty to defend. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386 - 89, (1986). Our considerable body of law concerning an

insurer's duty to defend therefore applies.

The duty to defend is broader than the duty to indemnify. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007). '[T]he duty to defend is triggered if the insurance policy *conceivably covers* the allegations in the complaint, whereas the duty to indemnify exists only if the policy *actually covers* the insured's liability.' *Id.* at 53. An insurer must defend unless it is clear from the face of the complaint that the claim is not covered by the applicable policy. *Id.* '[I]f it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer *must* investigate and give the insured the benefit of the doubt that the insurer has a duty to defend.' *Id.* "Where an insurer is unconvinced of its duty to defend, it may defend under a reservation of rights. Under a reservation of rights defense, "the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay."'" *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 914, (2007) (quoting *Truck Ins. Exch. v. Van Port Homes, Inc.*, 147 Wn.2d 751, 761, (2002) (quoting *Kirk v. Mount Airy Ins. Co.*, 134 Wn.2d 558, 563 n. 3, (1998) (citation omitted))). Generally, an insurer who reserves rights may bring a timely declaratory judgment action to determine coverage. *Truck Ins.*, 147 Wn.2d at 761." (166 Wn.2d at 470-471, emphasis added).

A breach of the warranty to defend occurs when a third party asserts a lawful right to the property and there is an actual or constructive eviction under paramount title. ***Mastro v. Kumakichi Corp.*, 90 Wn.App. 157, 164, 951 P.2d 817 (1998).**

Here, the Klosters were at the very least constructively, if not actually, evicted from their access easement -- as well as from their property by the lack of access -- and deprived of good title by virtue of the Rickeys's

paramount title. Thus, First American had a legal duty to defend the Klosters's title because the lack of the access easements was a defect in title, as the trial court ultimately ruled. CP 4210, App at 4.

Similarly, pursuant to **RCW 64.04.030** (App at 60-61), a seller of real property who gives a statutory warranty deed warrants good title free from encumbrances and guarantees title -- which includes a duty to defend -- regardless of whether an action is filed. **Erickson v. Chase, 156 Wn.App. 151, 158-159, 231 P.3d 1261 (2010)**. A defense is required when someone claims superior title, whether or not a complaint is ultimately filed. **Mastro, supra, 90 Wn.App. at 164**. A title insurer is a warrantor or guarantor of title by statute as well as by the terms of its policy. As the supreme court ruled in **Campbell, supra, 166 Wn.2d at 470-471**, a title insurer has a duty to defend an insured's title.

First American therefore had a duty to defend the Klosters's title and refused to do so, thereby: 1) breaching its duty to defend as a matter of law and 2) committing bad faith as a matter of law. **American Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 413, 229 P.3d 693 (2010)**.

VI. THE KLOSTERS'S RESPONSE TO FIRST AMERICAN'S AND AMERI-TITLE'S REPLY TO THEIR APPEAL

Introduction

Because this case was tried to a jury, factual determinations were for

the jury pursuant to **WPI No. 1.01** (App at 64), not the trial court. First American asserts in its introduction that the trial court found that the Klosters's causes of action had no factual basis (First American/Ameri-Title Brief at 1), thus conceding that the trial court actually made factual determinations. While a trial court may decide factual issues as a matter of law where there is no evidentiary basis for a particular claim pursuant to **CR 56(d)**, in this case there was more than sufficient evidence for the jury to determine the Klosters's claims against First American and Ameri-Title.

A. First American's Coverage Determination Was Made In Bad Faith

In Washington it is settled that an insurer that fails to undertake a full claim investigation before reaching its coverage determination acts in bad faith. **Rizzuti v. Basin Travel Service of Othello, Inc., 125 Wn. App. 602, 618, 105 P.3d 1012 (2005)**. The record here shows that First American never investigated whether the Klosters had "reasonable vehicular access" (RP 784-785, 794-795) -- the basis on which First American was supposed to evaluate whether an insured had adequate access to his or her property. (RP 695, 784; Ex 144).

Furthermore, if reasonable minds could differ on whether the insurer's actions were reasonable, then judgment in favor of the insurer is not appropriate. Even if the insurer can point to a reasonable basis for its action,

the insured may present evidence that the insurer's alleged reasonable basis was not the actual basis for its action or that other factors outweighed the alleged reasonable basis. **Smith v. Safeco Insurance Co., 150 Wn.2d 478, 485-486, 78 P.3d 1274 (2003).**

Here there was ample evidence that First American did not complete a full investigation before reaching its coverage determination and acted in bad faith as a matter of law or, if not, then it was very clear that the issue of bad faith was a factual matter for the jury to determine rather than the trial court. RP 784-785, 794-795.

The same is true with regard to the issue of First American's coverage determination. Both Judge Reynolds and the trial court determined that there was coverage, and neither judicial officer concluded that First American's denial of coverage was factually reasonable. Consequently, the determination of whether First American's coverage decision was made in bad faith was clearly a factual matter for the jury to decide.

B. Ameri-Title's Failure To Discover And Disclose The Non-Recorded Access Easement Was Negligence

First American and Ameri-Title have not responded to the Klosters's appeal of the dismissal of their cause of action for their failure to investigate and disclose that the access easements were not recorded. Instead, First American and Ameri-Title mistakenly rely on **Barstad v. Stewart Title**

Guar. Co., 145 Wn.2d 528, 39 P.3d 984 (2002) as support for their assertion that no claim can be made against a title insurance agent because a preliminary title commitment is only a statement of the conditions on which a title policy is to be issued. First American/Ameri-Title Brief at 29-30. But it must be noted that **Barstad** did not hold that a cause of action may not arise based on the assumed duty doctrine. Rather, it held that instances of liability may arise involving preliminary title commitments depending upon the particular factual circumstances. **Barstad, supra, 145 Wn.2d at 543-544.**

Here, neither First American nor Ameri-Title disputed the fact that First American required Ameri-Title to research whether access easements were properly created before issuing a preliminary commitment. Neither did they dispute that if the access easements were found not to have been properly created, then Ameri-Title had a duty to make a special note in the preliminary commitment and in the title policy so stating. The Klosters continue to argue that these requirements by First American of Ameri-Title to research whether access easements were properly created before issuing a preliminary commitment and to make a special note in the preliminary commitment and the title policy were an assumed duty under **Sheridan v. Aetna Casualty & Surety Company, 3 Wn.2d 423, 439, 100 P.2d 1024 (1940)** which were not barred by **Barstad, supra, 145 Wn.2d 528**. To repeat, the trial court simply had no factual or legal basis for dismissing the

Klosters's claim of negligence against Ameri-Title.

C. Because The Trial Court Erred In Refusing To Allow The Klosters To Present Evidence In Support Of Their Emotional Distress Claims, Respondents Cannot Now Claim That The Klosters Failed To Present Sufficient Evidence In Support Of Their Emotional Distress Claims

First American claims that the Klosters did not present sufficient evidence to support their claims of emotional distress against it and Ameri-Title. This argument fails because long before trial and long before the Klosters had the opportunity to present any evidence of their emotional distress suffered as a result of First American's and Ameri-Title's mishandling and denial of their claim, they moved to preclude the Klosters from making any such claim. CP 1136-1146. Their motion requested an order precluding the Klosters from making any claim for various categories of damages, including emotional distress. Their motion was based on the Klosters's discovery responses -- not on whether there was sufficient evidence to support those claims. CP 1136-1146. The motion was granted. CP 1291-1292, App at 21-22. The order granting the motion provided that the Klosters were not allowed to present any evidence in support of their claims of emotional distress against First American and Ameri-Title. CP 1291-1292, App at 21-22. The trial court clearly stated at the hearing on the motion that no claim for emotional distress against First American and Ameri-Title would be allowed. RP 211. First American and Ameri-Title simply cannot have it

both ways.

The Klosters sought on several occasions to change the trial court's rulings regarding their claim for emotional distress damages against First American and Ameri-Title, the last of which (CP 3300-3309) was met by a vehement request for **CR 11** sanctions (App at 61-62) by First American and Ameri-Title for the "irresponsible" actions of the Klosters's counsel. CP 3522.

Thus, First American and Ameri-Title cannot now be heard to complain that the Klosters presented insufficient evidence in support of their claims of emotional distress suffered at the hands of First American and Ameri-Title when First American and Ameri-Title had moved for and obtained an order precluding them from doing so. **Zimmerman v. Kyte, 53 Wn.App. 11, 14, 765 P.2d 905 (1988).**

VII. THE KLOSTERS'S REPLY TO ROBERTS'S AND PACIFIC RIM'S OPPOSITION TO THEIR APPEAL

Introduction

Roberts's and Pacific Rim's restatement of the issues on appeal is not helpful. Whether Roberts knew that access easements were not recorded is irrelevant, especially in light of the trial court's ruling that the title she gave to the Klosters was defective.

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A. The Trial Court's Determination That The Title To Lot 1 Was Defective Abrogates Roberts's And Pacific Rim's Opposition To The Klosters's Appeal

In their brief on page 4, Roberts and Pacific Rim stated:

"Assignments of Error

Ms. Raney [Roberts] and PRB assign no error to the trial court's decisions." (Emphasis added).

As noted above, the trial court determined that the title which the Klosters received from Roberts was defective. In as much as Roberts and Pacific Rim assign no error to the decisions of trial court, they must accept the trial court's determination that the title which Roberts delivered to the Klosters pursuant to a statutory warranty deed (Ex 101) was defective as well as the legal consequences which flow therefrom. **RAP 10.3(a)(4) and (g)**. In short, Roberts was liable to the Klosters as a matter of law for the defective title to Lot 1 of Pacific Rim Estates.

According to **Mastro, supra, 90 Wn.App. 157, 162-163**, a grantor pursuant to a warranty deed makes five warranties against title defects: 1) that she was seised of an estate in fee simple (warranty of seisin), 2) that she had a valid right to convey that estate (warranty of right to convey), 3) that title was free of encumbrances (warranty against encumbrances), 4) that the grantee, their 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). Here, when Roberts -- the grantor -- was served with summons and complaint in this action, she was on notice that the title was defective and that she was required to defend it. Roberts's alleged lack of knowledge concerning the defective title was irrelevant. **Mastro, supra, 90 Wn.App. 157, 167-168**. Contrary to Roberts's and Pacific Rim's assertion, innocent misrepresentation is a form of negligent misrepresentation. **Hoffman v. Connall, 108 Wn.2d 69, 72-73, 736 P.2d 242 (1987)**.

Although Roberts and Pacific Rim assign no error to the trial court's finding of defective title, they argue that the Klosters had actual good and marketable title. Roberts/Pacific Rim Brief at 25-26. They cannot have it both ways. The trial court ruled that the title to Lot 1 of Pacific Rim Estates was defective. Roberts and Pacific Rim did not challenge that finding and Roberts was liable pursuant to the statutory warranty deed for the defective title as a matter of law. **RAP 10.3(a)(4) and (g)**.

B. Roberts's And Pacific Rim's Claim That The Klosters Were Negligent In Not Discovering That The Access Easements Were Not Recorded Is Legally Irrelevant

Although it was never clear at trial on what basis the claim was made that the Klosters were contributorily negligent, Roberts and Pacific Rim have nevertheless asserted that the jury's finding that the Klosters were 100% at fault trumped all claims of error relating to them. Roberts/Pacific Rim Brief at 2-3. The basis for Roberts's and Pacific Rim's argument on appeal that the

Klosters were 100% at fault was that the Klosters failed to discover before they closed on the property that the access easements were not properly recorded. Roberts/Pacific Rim Brief at 12-13.²

But it is settled that whether the Klosters knew of the defective title before or after closing is irrelevant:

“Kiss’s claim that the Popchois waived the warranties of the deed is without merit. At least since 1901, Washington courts have followed the rule that a grantee does not waive the covenants of a deed by having knowledge of a defect. *Edmonson*, 155 Wn.App. at 389, 228 P.3d 780 (citing *W. Coast Mfg. & Inv. Co. v. W. Coast Improvement Co.*, 25 Wn. 627, 637, 66 P. 97 (1901)); accord *Fagan v. Walters*, 115 Wn. 454, 457, 197 P. 635 (1921). “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.” *Foley v. Smith*, 14 Wn.App. 285, 292, 539 P.2d 874 (1975). In *Foley*, both the grantee and grantor had knowledge of the defect, but as the Court of Appeals noted in this case, “This is a distinction without a difference.” *Edmonson*, 155 Wn.App. at 389, 228 P.3d 780.” (*Edmonson, supra*, 172 Wn.2d at 283-284, emphasis added).

The fact that the Klosters did not discover the defective title was not a basis on which they could be found to have been 100% responsible for not discovering the non-recorded access easements.

Furthermore, when First American and Ameri-Title were dismissed from the action before the case was submitted to the jury, this left the jury

2. Ironically, even though First American and Ameri-Title were paid to research title, they did not discover that the access easements were not properly recorded before they issued the preliminary title commitment and the title policy to the Klosters.

without any other parties to whom they could apportion responsibility -- and to which the Klosters objected. RP 1216-1217. As a result, the jury was left without any other party to whom to apportion fault for the non-recorded access easements -- even though whether or not the Klosters were aware of the missing access easements was entirely irrelevant. **Edmonson, supra, 172 Wn.2d at 283-284.**

C. Pacific Rim Was The Successor-In-Interest To Heany And Pacific Rim Properties And Had Successor Liability For Heany's Faulty Development Of Pacific Rim Estates

Pacific Rim has admitted that it was the successor-in-interest to Heany doing business as Pacific Rim Properties and incorporated both doing business as a real estate broker and also as a real estate developer. Roberts/Pacific Rim Brief at 8. Nevertheless, Pacific Rim erroneously claims that it did not include Heany's business as a developer when it incorporated. *Id.* Pacific Rim makes the unsupported claim that Judge Reynolds found that Pacific Rim did not incorporate Heany's development business. Roberts/Pacific Rim Brief at 18-19. This is incorrect.

Judge Reynolds specifically indicated that: 1) Heany was the real estate developer for Heany's sole proprietorship known as Pacific Rim Properties and, 2) Robert Blades (Blades), the present principal of Pacific Rim, was the real estate salesman for Heany's sole proprietorship known as Pacific Rim Properties:

“**Judge Reynolds:** But why isn’t Mr. Heany, also? Going back, Mr. -- I don't know. I’m just asking. It seems to me everybody is saying he’s the one that did this. I understand your argument on the successor issue, and as far as I -- it looks to me like there is also an issue there of successor. Mr. Blades and Mr. Heany were in business together, and Mr. Heany then was kind of the developer sort of part of the business and Mr. Blades was kind of the salesman, I think, and he’s, from what I -- what I read here, and then -- and then Mr. Blades bought out Mr. Heany for 4,000 bucks, or something, and then immediately incorporated, I think, into Pacific Rim Brokers, Incorporated, and so it does look like there was a successor issue -- or, I mean a successor business here that took over from Pacific Rim Properties.” (RP 185-186, emphasis added, see also RP 204-206).

The order so reflected:

“The Court further orders and finds that Defendant PACIFIC RIM is the successor-in-interest to PRP as the continuation and incorporation of the business of PRP’s principals, BLADES and HEANY, and is subject to successor liability herein.” (CP 1293-1310, 1307-1308, App at 24).

At trial, Heany testified that he used Pacific Rim Properties’ letterhead to communicate with the Klickitat County Planning Commission to develop Pacific Rim Estates. Ex 134, RP 548-552, App at 25-39. There was no evidence that Heany either did business under any other name or developed real estate under any other name. The evidence was uncontradicted that Heany developed Pacific Rim Estates doing business as Pacific Rim Properties. Ex 134, RP 548-552, App at 25-39.

The trial court set aside Judge Reynolds’s **CR 56(d)** order that Pacific Rim was the successor-in-interest to Pacific Rim Properties and bore

successor liability at the end of the Klosters's case, not on the basis that the evidence showed that Heany did not develop Pacific Rim Estates doing business as Pacific Rim Properties but rather on some type of factual basis which the trial court did not identify.

“Trial Court: Heany made a mistake years and years ago. In fact, he turned to the jury yesterday and he did a mea culpa right to the jury several times. Heany made a mistake. That became memorialized in the famous plat map that we've discussed at such length, and then during this transaction that plat map, unfortunately, became the document that certain parties relied on, including Pacific Rim, but no fraud happened.” (RP 1135-1136, emphasis added).

* * * *

“Trial Court: Yes. Rulings were made previously based on a certain status of the file, which, as I indicated earlier, has changed in subtle ways now that we finally have the evidence of live under-oath witnesses. I'm not going to allow Mr. Heany's error to be attributed to the defendant in this case, so to the extent that that's a previous ruling based on the facts as I knew them at the time, or Judge Reynolds did, that has changed.” (RP 1141, emphasis added).

The trial court should have entered a finding that Pacific Rim had successor liability for the non-recorded easement when Heany finally admitted his responsibility for the error. The Klosters previously moved for a ruling on that issue (CP 3282-3292) based upon Heany's declaration (CP 1937-1957) that he was responsible for recording the access easements and the Pacific Rim Estates plat with the Klickitat County Planning Commission. But the trial court denied the motion without explanation. RP 463-464.

Heany clearly did business as Pacific Rim Properties both developing and selling real estate, including Pacific Rim Estates. Pacific Rim's protestations to the contrary are meritless.

D. Roberts And Pacific Rim Are Not Entitled To Attorney Fees Against The Klosters

Roberts and Pacific Rim assert that their right to attorney fees against the Klosters are valid despite the following language from the supreme court in **Edmonson, supra, 172 Wn.2d at 284**, which fully supports the Klosters's claim for attorney fees against Roberts:

"The warranty to defend against another's claim to title under a statutory warranty deed means that, upon a grantee's tender of defense, a grantor must provide a good faith defense to title or face liability for breach of the warranty to defend. That warranty is not waived by the grantee's knowledge of and failure to disclose an encroachment. Accordingly, we affirm the Court of Appeals and trial court: Kiss is liable to the Popchois for breach of the warranty to defend and must pay the attorney fees they incurred to defend their title." (Emphasis added).

Barber v. Peringer, 75 Wn.App. 248, 254, 877 P.2d 223 (1994)

held that when the attorney fee provision is to enforce rights under a land purchase and sale agreement, it is not collateral to the deed but rather merges into the deed; as a result all parties' rights to attorney fees under the agreement end when the deed is executed and accepted. Additionally, **Barber, supra, 75 Wn.App. at 254**, recognized that it was obligated to follow established precedent even if the issue of merger was not presented

and argued in the trial court.

Roberts's and Pacific Rim's attempt to distinguish **Barber, *supra*, 75 Wn.App. at 254**, fails. The language used in the Vacant Land Purchase and Sale Agreement (VLPSA) was "this transaction" which meant the VLPSA. Otherwise, the VLPSA was ambiguous and must be construed against the drafter. **Seaborn Pile Driving Co., Inc. v. Glew, 132 Wn.App. 261, 269, 131 P.3d 910 (2006), review denied, 158 Wn.2d 1027.**

Additionally, under **Boguch v. Landover Co., 153 Wn.App. 595, 609-610, 618- 19, 224 P.3d 795 (2009)**, there is no right to recover attorney fees based on contract when the claim is based on negligence. The Klosters never claimed that the VLPSA was violated as required by **Boguch, *supra*, 153 Wn.App. at 618-619**. Under both **Barber, *supra*, 75 Wn.App. at 254**, and **Boguch, *supra*, 153 Wn.App. at 618-619**, Roberts's and Pacific Rim's claim for attorney fees should be rejected.

VIII. CONCLUSION

Neither First American nor Ameri-Title appealed the trial court's order that the unrecorded access easement was a defect in the Klosters' title to Lot 1 of Pacific Rim Estates. First American also did not appeal Judge Reynolds's ruling that the title policy's access coverage was ambiguous. Their failure to do so abrogates the entire basis for First American's cross-appeal and its and Ameri-Title's opposition to the Klosters's appeal. First

American's appeal should be denied and the Klosters's appeal of the trial court's orders concerning First American and Ameri-Title should be granted.

Neither Roberts nor Pacific Rim objected to the trial court's order that the unrecorded access easement was a defect in the Klosters' title to Lot 1 of Pacific Rim Estates. Their acceptance of the trial court's order that the Klosters's title was defective abrogates the entire basis for Roberts's and Pacific Rim's opposition to the Klosters's appeal. The Klosters's appeal of the trial court's orders concerning Roberts and Pacific Rim should be granted.

In as much as Heany filed no brief and has not opposed the Klosters's appeal of the orders quashing service on Heany and denying the Klosters's motion to substitute Heany into the action, the Klosters's appeal concerning Heany should be granted.

Summary Conclusion By Issue:

The Klosters contend that the failure of Roberts, Pacific Rim, Heany, First American and Ameri-Title to dispute the trial court's ruling that the title to Lot 1 of Pacific Rim Estates was defective and Judge Reynolds's ruling that the title policy's access coverage was ambiguous logically results in a favorable resolution of all of the Klosters's issues presented on appeal.

Issue 1. A Seller Of Real Property Is Liable For Negligent Misrepresentation By Failing To Convey Clear Title Because Of Non-Recorded Access Easements

Roberts did not contest the trial court's ruling that the title which she

gave to the Klosters was defective. Roberts is thereby liable to the Klosters for misrepresenting the non-recorded access easements and the defective title. She is also liable for her failure to defend the defective title pursuant to the statutory warranty deed which she gave to the Klosters regardless of the extent of her knowledge of the non-recorded access easements.

Issue 2. A Real Estate Broker Which Is The Incorporation Of A Sole Proprietor Real Estate Developer Has Successor Liability For The Developer's Failure To Record Access Easements To The Property Which It Sells

Pacific Rim also did not contest the trial court's ruling that the title to Lot 1 of Pacific Rim Estates was defective. Pacific Rim conceded that it was the incorporation of Heany's sole proprietorship of Pacific Rim Properties. The evidence was uncontradicted that Heany developed Pacific Rim Estates when he did business as Pacific Rim Properties. Heany conceded his responsibility for the failure to record the access easements to Lot 1 of Pacific Rim Estates. Judge Reynolds's order that Pacific Rim has successor liability for Heany and Pacific Rim Properties should be re-instated and successor liability imposed on Pacific Rim for Heany's failure to record the access easements to Lot 1 of Pacific Rim Estates.

Issue 3. A Sole Proprietor Developer Who Failed To Record Access Easements Is An Indispensable Party

Heany has not contested the Klosters's appeal of this issue and Heany should be re-instated as an indispensable party defendant to this action.

Heany admitted responsibility for the failure to record the access easements and is the person who bears ultimate liability for the defective title.

Issue 4. A Title Agent Is A Co-Insurer Of Title Where The Title Agent Is Contractually Responsible For The First \$3,500.00 Of Loss On Every Title Policy Which It Issues In The Title Insurer's Name

The record shows that Ameri-Title was responsible for the first \$3,500.00 of loss on the title policy which it issued to the Klosters. It thereby became a co-insurer of the Klosters's title and has insurer liability for the defective title.

Issue 5. A Title Insurance Agent Is Liable For Its Failure To Research Access Easements As Directed By The Title Insurer

Neither First American nor Ameri-Title disputed that First American required Ameri-Title to research whether access easements were properly created before issuing a preliminary commitment. Neither did they dispute that if the access easements were found not to have been properly created, then Ameri-Title had a duty to make a special note in the preliminary commitment and in the title policy so stating. This was a breach of an assumed duty for which both were liable for the defective title.

Issue 6. A Title Insurer Breaches Its Policy, Its Duty To Defend, The UCSPA, The CPA, And Acts In Bad Faith Where It Refuses To Cover Non-Recorded Access Easements Which Preclude Clear Title

First American did not appeal the trial court's ruling that the title to Lot 1 of Pacific Rim Estates was defective. It also did not appeal Judge

Reynolds's ruling that its title policy's access coverage was ambiguous. First American is therefor liable for breach of its policy, breach of its duty to defend the Klosters's title and breach of the Unfair Claims Settlement Practices Act (UCSPA) and the Consumer Protection Act (CPA).

Issue 7. A Title Insurer Violates The UCSPA And The CPA Where It Has No Compliance Standards, Refuses To Investigate A Claim And Does Not Tell Its Insured That Its Title Agent Is Responsible

First American did not dispute that it had no standards to comply with the UCSPA and that it did not tell the Klosters that its investigation found that its agent Ameri-Title was responsible for the failure to properly research the title to Lot 1 of Pacific Rim Estates. First American thereby violated both the UCSPA and the CPA.

Issue 8. A Real Estate Buyer Who Does Not Receive Clear Title Because Of Non-Recorded Access Easements Is Not Limited To An "Economic Loss" Recovery

It is undisputed that the Klosters were not allowed to present evidence to support their consequential damages, including lack of good title, or to support their claims of emotional distress. These claims are not limited by the "economic loss" rule, especially against First American which breached its title policy and its duty to defend and acted in bad faith.

Issue 9. A Real Estate Buyer Who Does Not Receive Clear Title Because Of Non-Recorded Access Easements Is Owed A Defense Of Title

In as much as all defendants and respondents did not dispute the trial

court's ruling that the title to Lot 1 of Pacific Rim Estates was defective, the Klosters were owed a defense of their title under their title policy and pursuant to the statutory warranty deed which Roberts gave them.

Issue 10. A Real Property Seller And Her Real Estate Agent Are Not Due Attorney Fees Under A VLPSA Where The Claims Against Them Were Not Based On A VLPSA And Where The VLPSA Merged Into The Deed

In as much as Roberts and Pacific Rim did not contest the trial court's ruling that the title to Lot 1 of Pacific Rim Estates was defective, Roberts was liable to the Klosters for their attorney fees in defending their title when Roberts refused to do so. Furthermore, both Roberts and Pacific Rim have liability for the non-recorded access easements and defective title and thereby have no basis to recover against the Klosters under any circumstances.

Issue 11. A CR 68 Offer Has No Application To The Determination Of An Attorney Fee Award Against An Insurer

First American cited no evidence in the record that it actually possessed the right to convey the non-recorded access easements and could provide them in settlement to the Klosters. In as much as First American has not appealed the trial court's ruling that the title to Lot 1 of Pacific Rim Estates was defective, it had a duty to provide the non-recorded access easements to the Klosters pursuant to its title policy to clear the cloud on the Klosters's title. First American did not provide the non-recorded access easements to the Klosters to clear the cloud on their title, thus demonstrating

that the settlement offer was a sham. The failure to accept the sham settlement offer should not act as a bar to the Klosters's full recovery of attorney fees against First American.

The Klosters therefor repeat their request that the following orders of the trial court be reversed:

1) the orders granting Roberts's motions for summary judgment and for an award her attorney fees and costs, and the order denying the Klosters's motion for summary judgment against Roberts;

2) the orders granting Pacific Rim's motions for judgment as a matter of law, for an award of its attorney fees and costs, and to set aside Judge Reynolds's CR 56(d) rulings that Pacific Rim had successor-in-interest status and liability, and the orders denying the Klosters's motions for summary judgment against Pacific Rim;

3) the order granting Heany's motion to quash service of summons, and the order denying the Klosters's motion to substitute Heany as Doe One;

4) the orders granting Ameri-Title's motions for judgment as a matter of law and to set aside Judge Reynolds's CR 56(d) ruling that Ameri-Title acted as an insurer of the Klosters's title, and the order denying the Klosters's motion for summary judgment against Ameri-Title;

5) the order granting First American's motion for judgment as a matter of law, and the orders denying the Klosters's motions for summary

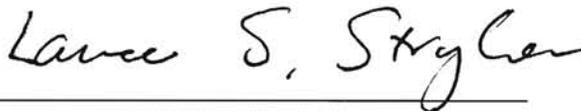
judgment against First American and for an award against First American of all of their attorney fees and costs in the underlying action and for indemnification for any award against them by Roberts, Pacific Rim, and Heany; and

6) the orders granting the defendants' joint and several motions for summary judgment dismissing the Klosters' claims for emotional distress and consequential damages, and the orders granting the defendants' joint and several motions limiting the Klosters's expert's testimony and redacting the claim report by Trummel of Ameri-Title to First American.

Finally, the Klosters request that this matter be remanded to the trial court for trial against Heany and for a jury's determination of the Klosters's damages against Roberts, Heany, Pacific Rim, Ameri-Title and First American.

November 28, 2012 Respectfully Submitted,

Lance S. Stryker, WSBA No. 35005



Lance S. Stryker
Attorney for Plaintiffs, Appellants and
Cross-Respondents Thelma, Karl, Lori and
Karen Kloster

PROOF OF SERVICE

The undersigned certifies that he served a true copy of the APPELLANTS REPLY BRIEF by placing the same in an envelope which was sealed and thereafter deposited in the United States mail with first class postage thereon fully prepaid; such deposit taking place at White Salmon, Washington, on the date set forth below, and addressed as follows:

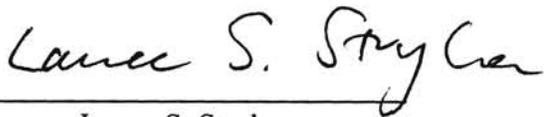
Donald Jeffrey Courser
Stoel Rives, LLP
805 Broadway, Suite 725
Vancouver, WA 98660

Jeffrey P. Downer
Lee Smart, P.S., Inc.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929

L. Eugene Hanson, Esq.
The Hanson Law Office
111 North Grant Street
Goldendale, WA 98620

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on November 28, 2012, in White Salmon, Washington.



Lance S. Stryker

APPENDIX

Ruling of Court on Attorney’s Fees After Jury Verdict.....1-5

Order Granting The Klosters’ Motion *In Limine* Re:
Title Policy Ambiguity.....6-7

Order Granting The Klosters’ Motion *In Limine* Re:
Access Definition.....8-9

Order Granting The Klosters’ Motion *In Limine* Re:
Public Record Easement.....10-11

Supplemental Order On First American’s And
AmeriTitle’s Motions *In Limine*.....12-13

Order Granting The Klosters’ Motion *In Limine* Re:
Title Policy Exclusions.....14-15

Order On Defendants First American’s And
AmeriTitle’s Motion To Revise And Joinder On
Pacific Rim’s Motion For Summary Judgment
As To Specific Items Of Damages.....16-20

Order On First American’s And AmeriTitle’s
Motions *In Limine*.....21-22

Order Granting The Klosters’ Motion *In Limine* Re:
Successor Liability.....23-24

Exhibit 134 - Heany’s Communications With Klickitat
County Re: Development Of Pacific Rim Estates
On Pacific Rim Properties’ Letterhead.....25-39

Statutes:

RCW 4.28.210.....60

RCW 48.11.100.....60

RCW 64.04.030.....60-61

Court Rules:

CR 4(a)(3).....61

C61

CR 11.....61-62

CR 56(d).....62-63

RAP 5.1(a).....63

RAP 10.3(a)(4).....63

RAP 10.3(b).....63

RAP 10.3(c).....64

RAP 10.3(g).....64

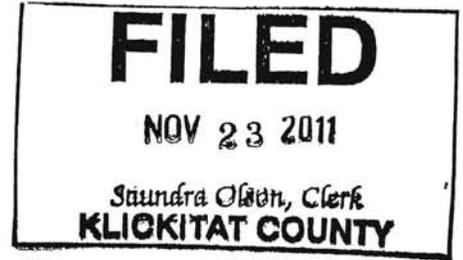
Other Authority:

Washington Pattern Jury Instruction No. 1.0164-69

Rule 1.2(f) of the Rules of Professional Conduct.....69-70

Text Authorities:

Stewart Title Guaranty Co. v. West,
110 Md.App. 114, 676 A.2d 953 (Maryland, 1996).....40-59



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KLICKITAT

Thelma, Karl, Lori, and)	
Karin Kloster,	)	No: 05-2-00108-4
)	
Plaintiffs,)	
	)	Ruling of Court
vs.	)	on Attorney's Fees
	)	After Jury Verdict
Schenectady Roberts, <i>et al</i> ,)	
)	
Defendants.)	

After oral argument on November 22, 2011, the court makes the following rulings dispositive of the attorney's fees issues:

I. Ruling on Schenectady Roberts and Pacific Rim Brokers, Inc., Motion for Attorney's Fees.

Defendants Schenectady Raney (f/n/a Schenectady Roberts) and Pacific Rim Brokers, Inc., move the court for an award of attorney's fees following their successful defense of all claims. The defendants argue that the plain language of the Vacant Land Purchase and Sale Agreement (VLPSA)

4207

applies to this case and requires the court to award fees to the prevailing party. The plaintiffs concede that the defendants were the prevailing parties, but argue that since the claims against the defendants were based in tort and not contract, it is inappropriate to base an award on the VLPSA, and that therefore no award of fees should be given.

Defendants are asking for a total of \$258,816.50 in fees and an additional \$11,101.58 in costs. The attorney's fees clause in the VLSPA between the Klosters and Ms. Raney appears to support the award. It says in relevant part:

ATTORNEY'S FEES/COSTS AND MEDIATION. If the Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to this transaction, any prevailing party shall recover reasonable attorneys' fees and costs (including those for appeals) which relate to the dispute.

Emphasis added by court.

This clause (paragraph 16 of the VLPSA) is also cited in the plaintiffs' complaint, in paragraph 26 of their first cause of action ("Negligent Misrepresentation and/or Concealment Against all Defendants"). In fact, the plaintiffs pled, "Pursuant to this clause, the KLOSTERS are entitled to, and demand, the benefit thereof and request an award of their legal fees, costs and expenses incurred in connection herewith according to proof at trial."

The issues before the court are 1) whether the actions against the defendants were in tort, exclusively, so that the terms of the VLPSA do not apply and, 2) if the action sounds partially in contract, thereby triggering the VLPSA, are the fees reasonable under a Lodestar analysis.

It is beyond dispute that the plaintiffs' causes of action which survived to jury trial—negligent misrepresentation, fraudulent misrepresentation, and fraudulent concealment—arose out of the VLSPA which was the initial legal document that gave birth to the entire lawsuit. But for the VLSPA, there would have been no action; the torts alleged were "on the contract" because they arose out of the parties' agreement to transfer ownership of the property. The contract was the cornerstone upon which the entire lawsuit was built.

The broad language of the VLSPA clearly contemplates an award of fees to the prevailing party for *any dispute* relating to the transaction. The Plaintiffs concede that the defendants are the prevailing parties. Therefore reasonable fees must be awarded.

The plaintiffs filed no papers objecting to the reasonableness of the fees and costs asserted by the defendants. The court finds the methodology and analysis of defendants' counsel in application of the lodestar method to be correct—in fact, the very model of how it should be done.

The defendants have shown and the court finds the rate charged by counsel was substantially below market.

The plaintiffs filed this case in 2005. Staring down the barrel of the VLSPA attorney's fees clause (which, as noted, they included in their complaint), the plaintiffs made a series of strategic decisions, with able counsel, which forced defendants to (expensively) defend. It should be recalled that the defendants were originally sued in an expansive complaint for everything they were worth. They had to defend. As it turned out, many of the original causes of action had no basis in fact and, of course, the jury dealt the final death blow to the plaintiffs' action. Nevertheless, all matters were hotly contested—every single issue was the subject of briefing and argument, which demanded defense. For a piece of property worth \$38,000 (which the plaintiffs believe has no value), and a \$9,000 “fix”, it was expensive litigation, and the hours expended were reasonable.

Total fees awarded to defendants: \$258,816.50. Total costs: \$11,101.58.

The court's Findings of Fact and Conclusions of Law and Judgment are attached to this ruling, and will be entered 30 days from this date (no later than 12/23/11) unless an objection is timely filed with the court. A hearing on objections and to settle the final record shall be limited to 30 minutes, and counsel may appear telephonically. No motions for reconsideration will be entertained.

II. Ruling on First American's Proposed Judgment on Verdict and Plaintiffs' Motion for Judgment against First American.

In a close question, the court has consistently found that the plaintiffs have coverage under First American's title policy. At trial, the jury was instructed that the court had found access coverage based upon an ambiguity in the policy as a whole. The jury announced a verdict of \$9,000 as a "cost of cure," and the narrow question before the court is whether "coverage" includes that amount. If it does, then Mr. Striker has an argument for his fees; if not, plaintiffs take nothing from First American.

First American argues the title insurance policy's insuring clauses are invoked on loss or damage to the insured from the existence of a listed title defect. Since the jury found there was no difference in the value of the plaintiffs' property as insured and as subject to defect, the plaintiffs failed to establish a claim for loss. In other words, the "cost of cure"—which the jury found to be \$9,000—never did apply to the plaintiffs' claim for access coverage.

This question must be resolved in favor of the plaintiffs. A contract of indemnity insures against actual loss from the existence of a title defect. Although the "cost of cure" was linked to the Pacific Rim jury instruction on liability, the jury found the plaintiffs suffered a real, actual loss. That loss was directly attributable to the defective title, for which there was coverage. The plaintiffs had to sue for coverage. Mr. Striker gets reasonable fees related to the coverage issues, and the plaintiffs take a judgment for \$9,000.

Mr. Courser requested review of fees in his papers, and it is anticipated that he will note this on the December 20th civil calendar for a hearing on objections to Mr. Striker's fees and to settle the final record.¹ Mr. Striker is to be prepared on the following concerns: "that his declarations fail to specify time entries asserted against First American, and the claimed costs include block billing, time spent of unsuccessful motions, vague entries, and time spent in mediation." If there is to be discussion as to pre-judgment interest, that will be the time to do it. Argument shall be limited to 30 minutes, and counsel may appear telephonically. No motions for reconsideration will be entertained.

¹ The Court Administrator informs me that 12:00 is a good time.

This ruling will be filed this date. So ordered.

November 23, 2011

A handwritten signature in black ink, appearing to read "B. Altman", with a long horizontal flourish extending to the right.

Brian Altman, Judge

FILED

MAY 18 2010

Sandra Olson, Clerk
KLICKITAT COUNTY

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KLICKITAT

THELMA, KARL, LORI
and KARIN KLOSTER,

Plaintiffs,

vs.

SCHENECTADY ROBERTS; et al.;

Defendants.

No. 05 2 00108-4

**ORDER GRANTING THE KLOSTERS' MOTION
IN LIMINE RE: TITLE POLICY AMBIGUITY**

Date: May 18, 2010

Time: 11:00 a.m.

Place: KLICKITAT COUNTY COURTHOUSE
205 South Columbus Avenue
Goldendale, WA

Judge: The Hon. E. Thompson Reynolds

The in limine motion of Plaintiffs THELMA, KARL, LORI and KARIN KLOSTER (hereafter "the KLOSTERS") for an order before trial pursuant to Rule 56(d) of the Civil Rules For Superior Court to establish that the title policy issued to the KLOSTERS is ambiguous as a matter of law and must be interpreted in the KLOSTERS' favor came on regularly for hearing before the above-entitled Court on Tuesday, May 18, 2010, in the Department of the Hon. E. Thompson Reynolds, Judge Presiding.

Plaintiffs and moving parties the KLOSTERS appeared by their attorney of record herein, Lance S. Stryker, Esq. Defendants FIRST AMERICAN TITLE INSURANCE COMPANY and AMERI-TITLE, INC., appeared by their attorney of record herein, D. Jeffrey Courser, Esq., of Stoel Rives LLP, and Defendants PACIFIC RIM BROKERS, INC., and SCHENECTADY

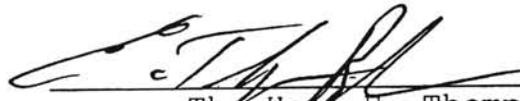
1 ROBERTS appeared by their attorney of record herein, Jeffrey P. Downer,
2 Esq., of Lee Smart, P.S., Inc.

3 Upon review and consideration of the moving and opposing papers,
4 argument of counsel, the Court being fully apprised in the premises and
5 good cause appearing therefor,

6 The Court orders that the in limine motion of Plaintiffs the
7 KLOSTERS to establish that the title policy issued to the KLOSTERS is
8 ambiguous as a matter of law ^{as to access coverage ETR} and must be interpreted in the KLOSTERS'
9 favor, be, and the same hereby is, granted; and

10 The Court further finds and hereby orders that the title policy
11 issued to the KLOSTERS is ambiguous as a matter of law ^{as to access coverage ETR} and must be
12 interpreted in the KLOSTERS' favor.

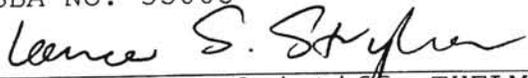
13 Dated: *May 15, 2010*



The Hon. E. Thompson Reynolds
Judge of the Klickitat County Superior Court

18 Form Of Order Presented By:

19 Lance S. Stryker, Esq.
20 WSBA No. 35005



21 Attorney for Plaintiffs THELMA,
22 KARL, LORI and KARIN KLOSTER

23 Approved as to form:

24 Jeffrey P. Downer, Esq.
25 WSBA No. 12625
26 Lee Smart, P.S., Inc.

D. Jeffrey Courser, Esq.
WSBA No. 15466
Stoel Rives, LLP

27 Attorney for Defendants PACIFIC
28 RIM BROKERS, INC., and
SCHENECTADY ROBERTS

Attorney for Defendants FIRST
AMERICAN TITLE INSURANCE CO.
and AMERI-TITLE, INC.

COPY-Original filed
SEP 01 2009
KLICKITAT COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KLICKITAT

COPY

10	THELMA, KARL, LORI	)	No. 05 2 00108-4
11	and KARIN KLOSTER,)	
12	Plaintiffs,	)	ORDER GRANTING THE KLOSTERS' MOTION
13	vs.	)	<u>IN LIMINE RE: ACCESS DEFINITION</u>
14	SCHENECTADY ROBERTS; et al.;	)	Date: July 21, 2009
15	Defendants.	)	Time: 2:00 p.m.
16		)	Place: KLICKITAT COUNTY COURTHOUSE
		)	205 South Columbus Avenue
		)	Goldendale, WA
		)	Judge: The Hon. E. Thompson Reynolds

The in limine motion of Plaintiffs THELMA, KARL, LORI and KARIN KLOSTER (hereafter "the KLOSTERS") for an order before trial to exclude the introduction of evidence, testimony or argument which mentions, refers to or otherwise attempts to raise an issue regarding the definition of title insurance access coverage came on regularly for hearing before the above-entitled Court on Tuesday, July 21, 2009, in the Department of the Hon. E. Thompson Reynolds, Judge Presiding. Plaintiffs and moving parties the KLOSTERS appeared by their attorney of record herein, Lance S. Stryker, Esq. Defendants PACIFIC RIM BROKERS, INC., and SCHENECTADY ROBERTS appeared by their attorney of record herein, Cally J. Korach, Esq., of Hoffman, Hart & Wagner, LLP, and Defendants FIRST AMERICAN TITLE INSURANCE COMPANY and AMERI-TITLE, INC.,

1 appeared by their attorney of record herein, D. Jeffrey Courser, Esq.,
2 of Stoel Rives LLP.

3 Upon review and consideration of the moving and opposing papers,
4 argument of counsel, the Court being fully apprised in the premises and
5 good cause appearing therefor,

6 The Court orders that the motion in limine of Plaintiffs the
7 KLOSTERS to exclude the introduction of evidence, testimony or argument
8 which mentions, refers to or otherwise attempts to raise an issue
9 regarding the definition of title insurance access coverage, be, and the
10 same hereby is, granted; and

11 The Court further finds and hereby orders that the access coverage
12 provided in the title insurance policy at issue herein is undefined and
13 shall be interpreted in accordance with the understanding of the average
14 person.

15 Dated: *9/1/09* E. Thompson Reynolds

16
17

The Hon. E. Thompson Reynolds
Judge of the Klickitat County Superior Court

18 Form Of Order Presented By:

19 Lance S. Stryker, Esq.
20 WSBA No. 35005

21 *Lance S. Stryker*
22

Attorney for Plaintiffs THELMA,
KARL, LORI and KARIN KLOSTER

23 Approved as to form:

24 Cally J. Korach, Esq.
25 WSBA No. 31127
Hoffman, Hart & Wagner, LLP

D. Jeffrey Courser, Esq.
WSBA No. 15466
Stoel Rives, LLP

26
27

Attorney for Defendants PACIFIC
28 RIM BROKERS, INC., and
SCHENECTADY ROBERTS

Attorney for Defendants FIRST
AMERICAN TITLE INSURANCE CO.
and AMERI-TITLE, INC.

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KLICKITAT COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KLICKITAT

THELMA, KARL, LORI)
and KARIN KLOSTER,)
Plaintiffs,)
vs.)
SCHENECTADY ROBERTS; et al.;)
Defendants.)

No. 05 2 00108-4
**ORDER GRANTING THE KLOSTERS' MOTION
IN LIMINE RE: PUBLIC RECORD EASEMENT**
Date: July 21, 2009
Time: 2:00 p.m.
Place: KLICKITAT COUNTY COURTHOUSE
205 South Columbus Avenue
Goldendale, WA
Judge: The Hon. E. Thompson Reynolds

The in limine motion of Plaintiffs THELMA, KARL, LORI and KARIN KLOSTER (hereafter "the KLOSTERS") for an order before trial pursuant to RCW § 58.10.020 to exclude the introduction of evidence, testimony or argument which mentions, refers to or otherwise attempts to raise an issue concerning whether the access easement at issue herein is a matter of public record came on regularly for hearing before the above-entitled Court on Tuesday, July 21, 2009, in the Department of the Hon. E. Thompson Reynolds, Judge Presiding. Plaintiffs and moving parties the KLOSTERS appeared by their attorney of record herein, Lance S. Stryker, Esq. Defendants PACIFIC RIM BROKERS, INC., and SCHENECTADY ROBERTS appeared by their attorney of record herein, Cally J. Korach, Esq., of Hoffman, Hart & Wagner, LLP, and Defendants FIRST AMERICAN TITLE

1 INSURANCE COMPANY and AMERI-TITLE, INC., appeared by their attorney of
2 record herein, D. Jeffrey Courser, Esq., of Stoel Rives LLP.

3 Upon review and consideration of the moving and opposing papers,
4 argument of counsel, the Court being fully apprised in the premises and
5 good cause appearing therefor,

6 The Court orders that the motion in limine of Plaintiffs the
7 KLOSTERS regarding whether the access easement at issue herein is a
8 matter of public record, be, and the same hereby is, granted; and

9 The Court further orders and finds that the easement at issue
10 herein existed along the entire length of the southern border of Lot 1
11 of Pacific Rim Estates and along the entire length of the northern
12 border of the adjoining property to the south of Lot 1 as a matter of
13 public record.

14 Dated:

9/1/09

E. Thompson Reynolds

The Hon. E. Thompson Reynolds
Judge of the Klickitat County Superior Court

17 Form Of Order Presented By:

18 Lance S. Stryker, Esq.
19 WSBA No. 35005

20 *Lance S. Stryker*

21 Attorney for Plaintiffs THELMA,
22 KARL, LORI and KARIN KLOSTER

23 Approved as to form:

24 Cally J. Korach, Esq.
25 WSBA No. 31127
26 Hoffman, Hart & Wagner, LLP

D. Jeffrey Courser, Esq.
WSBA No. 15466
Stoel Rives, LLP

27 _____
28 Attorney for Defendants PACIFIC
RIM BROKERS, INC., and
SCHENECTADY ROBERTS

Attorney for Defendants FIRST
AMERICAN TITLE INSURANCE CO.
and AMERI-TITLE, INC.

FILED
SEP 01 2009
Saundra Olson, Clerk
KLICKITAT COUNTY

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SUPERIOR COURT OF WASHINGTON
KLICKITAT COUNTY

THELMA KLOSTER, KARL KLOSTER,
LORI KLOSTER, and KARIN KLOSTER,

Plaintiffs,

v.

SCHENECTADY ROBERTS; PACIFIC
RIM BROKERS, INC., a corporation;
AMERITITLE, INC., a corporation;
MICHAEL MOORE; FIRST AMERICAN
TITLE INSURANCE COMPANY, a
corporation; and DOES ONE through
FIFTY, inclusive,

Defendants.

No. 05-2-00108-4

**SUPPLEMENTAL ORDER ON FIRST
AMERICAN'S AND AMERITITLE'S
MOTIONS IN LIMINE**

Defendants First American Title Insurance Company ("First American") and AmeriTitle, Inc. ("AmeriTitle") made motions in limine, and the Court having considered the records and files herein, and the argument of counsel, now therefore,

It is hereby ORDERED that First American's and AmeriTitle's motion to exclude purported evidence or argument contradicting the findings and conclusions that:

(a) Schedule A under the Klosters' First American title policy does not describe any specific easement for the land insured is:

_____ Granted _____ Denied

**SUPPLEMENTAL ORDER ON FIRST AMERICAN'S AND AMERITITLE'S MOTIONS
IN LIMINE - 1**

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Klickitat County Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KLICKITAT

THELMA, KARL, LORI)
and KARIN KLOSTER,)
Plaintiffs,)
vs.)
SCHENECTADY ROBERTS; et al.;)
Defendants.)

No. 05 2 00108-4
**ORDER GRANTING THE KLOSTERS' MOTION
IN LIMINE RE: TITLE POLICY EXCLUSIONS**
Date: July 21, 2009
Time: 2:00 p.m.
Place: KLICKITAT COUNTY COURTHOUSE
205 South Columbus Avenue
Goldendale, WA
Judge: The Hon. E. Thompson Reynolds

The in limine motion of Plaintiffs THELMA, KARL, LORI and KARIN KLOSTER (hereafter "the KLOSTERS") for an order before trial to exclude the introduction of evidence, testimony or argument which asserts that the exclusions set forth in Schedule B, Section One of the title policy are applicable to the KLOSTERS' claim came on regularly for hearing before the above-entitled Court on Tuesday, July 21, 2009, in the Department of the Hon. E. Thompson Reynolds, Judge Presiding. Plaintiffs and moving parties the KLOSTERS appeared by their attorney of record herein, Lance S. Stryker, Esq. Defendants PACIFIC RIM BROKERS, INC., and SCHENECTADY ROBERTS appeared by their attorney of record herein, Cally J. Korach, Esq., of Hoffman, Hart & Wagner, LLP, and Defendants FIRST AMERICAN TITLE INSURANCE COMPANY and AMERI-TITLE, INC.,

1 appeared by their attorney of record herein, D. Jeffrey Courser, Esq.,
2 of Stoel Rives LLP.

3 Upon review and consideration of the moving and opposing papers,
4 argument of counsel, the Court being fully apprised in the premises and
5 good cause appearing therefor,

6 The Court orders that the motion in limine of Plaintiffs the
7 KLOSTERS regarding the exclusions set forth in Schedule B, Section One
8 of the title policy, be, and the same hereby is, granted; and

9 The Court further orders and finds that there shall be no offers of
10 evidence, testimony or argument which assert that the exclusions set
11 forth in Schedule B, Section One of the title policy are applicable to
12 the KLOSTERS' claim.

13 Dated:

E. Thompson Reynolds

14 9/11/09

15 The Hon. E. Thompson Reynolds
16 Judge of the Klickitat County Superior Court

17 Form Of Order Presented By:

18 Lance S. Stryker, Esq.
19 WSBA No. 35005

20 *Lance S. Stryker*

21 Attorney for Plaintiffs THELMA,
22 KARL, LORI and KARIN KLOSTER

23 Approved as to form:

24 Cally J. Korach, Esq.
25 WSBA No. 31127
26 Hoffman, Hart & Wagner, LLP

D. Jeffrey Courser, Esq.
WSBA No. 15466
Stoel Rives, LLP

27 Attorney for Defendants PACIFIC
28 RIM BROKERS, INC., and
SCHENECTADY ROBERTS

Attorney for Defendants FIRST
AMERICAN TITLE INSURANCE CO.
and AMERI-TITLE, INC.

FILED
APR 19 2011
Saundra Olson, Clerk
KLICKITAT COUNTY

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SUPERIOR COURT OF WASHINGTON
KLICKITAT COUNTY

THELMA KLOSTER, KARL KLOSTER,
LORI KLOSTER, and KARIN KLOSTER,,

Plaintiffs,

v.

SCHENECTADY ROBERTS; PACIFIC
RIM BROKERS, INC., a corporation;
AMERITITLE, INC., a corporation;
MICHAEL MOORE; FIRST AMERICAN
TITLE INSURANCE COMPANY, a
corporation; and DOES ONE through
FIFTY INCLUSIVE,

Defendants.

No. 05-2-00108-4

**ORDER ON DEFENDANTS FIRST
AMERICAN'S AND AMERITITLE'S
MOTION TO REVISE AND JOINDER
ON PACIFIC RIM'S MOTION FOR
SUMMARY JUDGMENT AS TO
SPECIFIC ITEMS OF DAMAGES**

This matter having come regularly before the Court upon defendants First American Title Insurance Company's ("First American") and AmeriTitle, Inc.'s ("AmeriTitle") motions to revise and joinder on Pacific Rim's motion for summary judgment as to specific items of damages, and the Court having heard argument of counsel and having reviewed the records and files herein, including:

1. First American's and AmeriTitle's Motion to Revise Interlocutory Issues on Summary Judgment, or in the Alternative, Under CR 56(d) to Ascertain Material Facts and Conclusions of Law.
2. First American's and AmeriTitle's Memorandum of Law in Support of Their Motion to Revise Interlocutory Issues on Summary Judgment, or in the Alternative, Under CR 56(d) to Ascertain Material Facts and Conclusions of Law.

**ORDER ON DEFENDANTS FIRST AMERICAN'S AND AMERITITLE'S MOTION TO REVISE
AND JOINDER ON PACIFIC RIM'S MOTION FOR SUMMARY JUDGMENT AS TO SPECIFIC
ITEMS OF DAMAGES - 1**

- 1 3. Declaration of Jeffrey Courser in Support of First American's and AmeriTitle's
2 Motion to Revise Interlocutory Issues on Summary Judgment, or in the
Alternative, Under CR 56(d) to Ascertain Material Facts and Conclusions of Law.
- 3 4. Defendant Pacific Rim Brokers, Inc.'s Motion for Summary Judgment as to
4 Specific Items of Damages.
- 5 5. Memorandum in Support of Defendant Pacific Rim Brokers, Inc.'s Motion for
6 Summary Judgment as to Specific Items of Damages.
- 7 6. Declaration of Eric L. Lewis in Support of Defendant Pacific Rim Brokers, Inc.'s
8 Motion for Summary Judgment as to Specific Items of Damages.
- 9 7. First American's and AmeriTitle's Joinder on Pacific Rim's Motion for Summary
10 Judgment as to Specific Items of Damages.
- 11 8. Memo of Points and Authorities in Opposition to Pacific Rim's Motion for
12 Summary Judgment on Specific Damage Items of the Klosters.
- 13 9. Memo of Points and Authorities in Opposition to First American's and
14 AmeriTitle's Joinder in Damages Summary Judgment Motion.
- 15 10. Declaration of Lance Stryker in Opposition to Motion for Summary Judgment on
16 the Klosters' Damages.
- 17 11. Memo of Points and Authorities in Opposition to First American's Motion to
18 Review/Reverse Summary Judgment and/or Summary Adjudication Rulings.
- 19 12. Declaration of Lance Stryker in Opposition to First American's Motion to Revise.
- 20 13. Pacific Rim's Response to First American's and AmeriTitle's Motion to Revise
21 Interlocutory Issues.
- 22 14. Supplemental Declaration of D. Jeffrey Courser in Support of First American's
23 and AmeriTitle's Motion to Revise.
- 24 15. First American's and AmeriTitle's Reply to Pacific Rim in Support of Motion to
25 Revise.
- 26 16. First American's and AmeriTitle's Reply to the Klosters in Support of Motion to
Revise.
17. Reply Memorandum in Support of Pacific Rim Brokers, Inc.'s Motion for
Summary Judgment as to Specific Items of Damages.
18. Stryker letter to Judge Altman providing American Best Food, Inc. v. Alea
London, Ltd., 168 Wn.2d 398 (2010) and Holden v. Farmers Ins. Co. of
Washington, 169 Wn.2d 750 (2010).

ORDER ON DEFENDANTS FIRST AMERICAN'S AND AMERITITLE'S MOTION TO
REVISE AND JOINDER ON PACIFIC RIM'S MOTION FOR SUMMARY JUDGMENT AS
TO SPECIFIC ITEMS OF DAMAGES - 2

70592752.1 0090147-00090

1 Now therefore,

2 IT IS HEREBY ORDERED as follows:

3 1. First American's and AmeriTitle's motion to revise is granted in part and denied
4 in part as follows:

5 a. As to coverage of the Klosters' claim under the Klosters' First American
6 owner's policy, the Court finds:

- 7 (i) The Klosters have physical and legal access from their Lot 1 to a
8 public road via the southern 30' of Lot 2 and the eastern 30' of
9 Lots 5, 6 and 7 of Pacific Rim Estates;
- 10 (ii) The northern 30 feet across Parcel 2, WS-146 is not included in the
11 description of land in Schedule A of the Klosters' First American
12 Owner's Policy;
- 13 (iii) All specific easements in Pacific Rim Estates and WS-146 are
14 excluded from coverage under the Klosters' First American title
15 policy in Schedule B, Section Two; and
- 16 (iv) The Court otherwise denies First American's and AmeriTitle's
17 motion to revise regarding coverage.

18 b. As to AmeriTitle's status on issuance of the First American owner's
19 policy to the Klosters, the Court finds:

- 20 (i) The Washington Insurance Commissioner issued a license to First
21 American as a title insurer in the State of Washington;
- 22 (ii) The Washington Insurance Commissioner did not issue a license to
23 AmeriTitle as a title insurer in the State of Washington;
- 24 (iii) The Washington Insurance Commissioner issued an agent's license
25 to AmeriTitle as a title agent in the State of Washington;
- 26 (iv) First American and AmeriTitle entered into an Agency Contract
dated April 25, 2002 wherein First American appointed AmeriTitle
as its agent authorized to issue title policies on behalf of First
American and to collect premiums;
- (v) The Washington Insurance Commissioner issued an appointment
certificate authorizing AmeriTitle to represent First American as a
title agent in the State of Washington;
- (vi) AmeriTitle issued First American's Policy of Title Insurance
(Policy No. H300745) to the Klosters and collected a premium of
\$295;

- (vii) AmeriTitle was not a party to the Klosters' First American title policy;
- (viii) AmeriTitle never made an offer to the Klosters to indemnify or defend them on any matter related to the Klosters' Lot 1, Pacific Rim Estates;
- (ix) Accordingly, AmeriTitle, at the time of issuance of the First American title policy, was not an insurer but a licensed title agent and had a contract with First American under which it provided services to its agent. The contract for services was between First American and the Klosters, not between AmeriTitle and the Klosters; and
- (x) The motion to revise is granted to the extent the Klosters may not assert a claim against AmeriTitle as an insurer and all claims on that basis against AmeriTitle are dismissed with prejudice, including the Klosters' third cause of action for breach of insurance contract and breach of duty to defend and indemnify, fourth cause of action for bad faith insurance claim practices and bad faith breach of duty to defend and indemnify, and fifth cause of action under the Consumer Protection Act, chapter 19.86 RCW based on bad faith insurance claim practices and bad faith denial of insurance claim.

2. On First American's and AmeriTitle's joinder on Pacific Rim's Motion for Summary Judgment as to Specific Items of Damages on the Klosters' first cause of action for negligent misrepresentation and/or concealment and second cause of action for intentional misrepresentation and/or concealment, the Court grants the joinder motion and dismisses with prejudice the following items the Klosters claimed as damages against First American and AmeriTitle:

- a. Purchase price of the property: \$39,530.91.
- b. Cost of acquisition of the property: \$1,911.70.
- c. Ongoing cost of ownership of the property.
- d. Time and expense of property location: \$2,500.
- e. Loss of interest on funds to purchase property.
- f. Loss of business opportunity in property purchase: \$40,000 on land purchase/sale, and \$120,000 on building construction development/sale.

Provided that Plaintiff may present evidence as to measure of damages

1 g. Loss of time and expense in attempts to develop property: \$3,250 for 50
2 hours of skidder use, \$2,500 for labor for 100 hours of land clearing and
preparation.

3 h. Being defrauded into purchase of property: \$25,000 per person.

4 3. First American's and AmeriTitle's joinder motion, however, is denied, subject to
5 proof at trial with regard to the Klosters' claimed cost of cure, unusable water
6 connection, and easement survey.

7 4. The court reserves its ruling on loss of consortium.

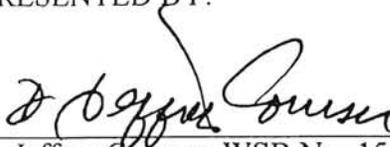
8 5. The court reserves its rulings on specific items of damages against First American
9 related to the Klosters' bad faith insurance claim and Consumer Protection Act
10 claim, Chapter 19.86 RCW.

11 6. Any prevailing party in this action that has a basis for claiming reasonable
12 attorneys' fees and costs may request such an award after trial.

13
14 Dated: April 19, 2011

15
16 
17 _____
The Honorable Brian Altman
Superior Court Judge

18 PRESENTED BY:

19
20 
21 _____
D. Jeffrey Courser, WSB No. 15466
22 Of Attorneys for First American Title Insurance
23 Company and AmeriTitle, Inc.
24
25
26

ORDER ON DEFENDANTS FIRST AMERICAN'S AND AMERITITLE'S MOTION TO
REVISE AND JOINDER ON PACIFIC RIM'S MOTION FOR SUMMARY JUDGMENT AS
TO SPECIFIC ITEMS OF DAMAGES - 5

70592752.1 0090147-00090

STOEL RIVES LLP
ATTORNEYS
805 Broadway, Suite 725, Vancouver, WA 98660
Telephone (360) 699-5900

COPY-Original filed
SEP 01 2009
KLUCKITAT COUNTY CLERK

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SUPERIOR COURT OF WASHINGTON
KLUCKITAT COUNTY

THELMA KLOSTER, KARL KLOSTER,
LORI KLOSTER, and KARIN KLOSTER,

Plaintiffs,

v.

SCHENECTADY ROBERTS; PACIFIC
RIM BROKERS, INC., a corporation;
AMERITITLE, INC., a corporation;
MICHAEL MOORE; FIRST AMERICAN
TITLE INSURANCE COMPANY, a
corporation; and DOES ONE through
FIFTY, inclusive,

Defendants.

No. 05-2-00108-4

**ORDER ON FIRST AMERICAN'S
AND AMERITITLE'S MOTIONS IN
LIMINE**

Defendants First American Title Insurance Company ("First American") and AmeriTitle, Inc. ("AmeriTitle") made motions in limine, and the Court having considered the records and files herein, and the argument of counsel, now therefore,

1. The Klosters shall not submit evidence or argument contradicting the findings and conclusions that the coverage limit on the Klosters' First American title policy (Policy No. 300745) is \$38,000.

2. The Klosters shall not submit evidence or argument against First American or AmeriTitle requesting emotional distress damages based upon the Klosters' supplemental response to First American's and AmeriTitle's Interrogatory 20 dated April 1, 2009.

ORDER ON FIRST AMERICAN'S AND AMERITITLE'S MOTIONS IN LIMINE - 1

COPY-Original filed
SEP 01 2009
KLICKITAT COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KLICKITAT

THELMA, KARL, LORI)
and KARIN KLOSTER,)
Plaintiffs,)
vs.)
SCHENECTADY ROBERTS; et al.;)
Defendants.)

No. 05 2 00108-4

**ORDER GRANTING THE KLOSTERS' MOTION
IN LIMINE RE: SUCCESSOR LIABILITY**

Date: July 21, 2009
Time: 2:00 p.m.
Place: KLICKITAT COUNTY COURTHOUSE
205 South Columbus Avenue
Goldendale, WA
Judge: The Hon. E. Thompson Reynolds

COPY

The in limine motion of Plaintiffs THELMA, KARL, LORI and KARIN KLOSTER (hereafter "the KLOSTERS") for an order before trial pursuant to Rule 56(d) of the Civil Rules to exclude the introduction of evidence, testimony or argument which mentions, refers to or otherwise denies that Defendant PACIFIC RIM BROKERS, INC. (hereafter "PACIFIC RIM") is the successor-in-interest to PACIFIC RIM PROPERTIES (hereafter "PRP") as the continuation and incorporation of the business of PRP's principals, ROBERT BLADES (hereafter "BLADES") and ALVIN FRED HEANY, JR. (hereafter "HEANY"), and is subject to successor liability therefor came on regularly for hearing before the above-entitled Court on Tuesday, July 21, 2009, in the Department of the Hon. E. Thompson Reynolds, Judge Presiding. Plaintiffs and moving parties the KLOSTERS appeared by their attorney of record herein, Lance S. Stryker, Esq. Defendants PACIFIC

1 RIM and SCHENECTADY ROBERTS appeared by their attorney of record herein,
2 Cally J. Korach, Esq., of Hoffman, Hart & Wagner, LLP, and Defendants
3 FIRST AMERICAN TITLE INSURANCE COMPANY and AMERI-TITLE, INC., appeared
4 by their attorney of record herein, D. Jeffrey Courser, Esq., of Stoel
5 Rives LLP.

6 Upon review and consideration of the moving and opposing papers,
7 argument of counsel, the Court being fully apprised in the premises and
8 good cause appearing therefor,

9 The Court orders that the motion in limine of Plaintiffs the
10 KLOSTERS regarding Defendant PACIFIC RIM as the successor-in-interest to
11 PRP, and subject to successor liability be, and the same hereby is,
12 granted; and

13 The Court further orders and finds that Defendant PACIFIC RIM is
14 the successor-in-interest to PRP as the continuation and incorporation
15 of the business of PRP's principals, BLADES and HEANY, and is subject to
16 successor liability herein.

17 Dated: *9/1/09* E. Thompson Reynolds
18 _____
The Hon. E. Thompson Reynolds
Judge of the Klickitat County Superior Court

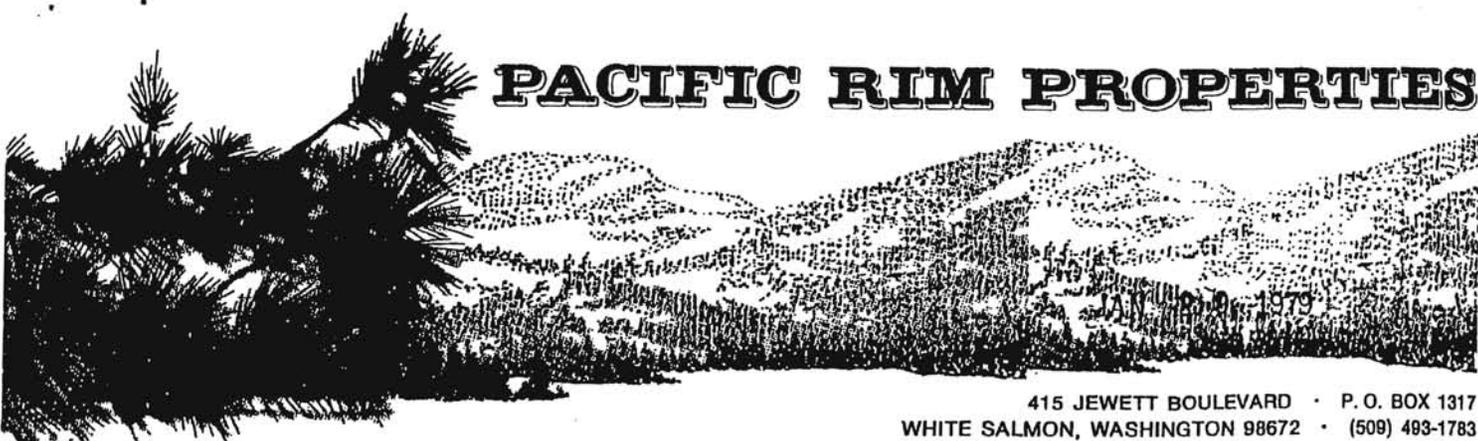
19 Form Of Order Presented By:
20 Lance S. Stryker, Esq.
21 WSBA No. 35005
22 *Lance S. Stryker*
23 Attorney for Plaintiffs THELMA,
KARL, LORI and KARIN KLOSTER

24 Approved as to form:
25 Cally J. Korach, Esq.
26 WSBA No. 31127
Hoffman, Hart & Wagner, LLP

D. Jeffrey Courser, Esq.
WSBA No. 15466
Stoel Rives, LLP

27 Attorney for Defendants PACIFIC
28 RIM BROKERS, INC., and
SCHENECTADY ROBERTS

Attorney for Defendants FIRST
AMERICAN TITLE INSURANCE CO.
and AMERI-TITLE, INC.



PACIFIC RIM PROPERTIES

415 JEWETT BOULEVARD • P. O. BOX 1317
WHITE SALMON, WASHINGTON 98672 • (509) 493-1783

January 26, 1978

Klickitat County Commissioners
Goldendale, Washington

RE: Long Plat SW $\frac{1}{4}$ of NW $\frac{1}{4}$ Section 21 Township 3 North Range 11 East
of W.M.

Gentlemen:

The above preliminary plat was submitted to you for your approval. Two of the lots were less than two acres. I was advised that I should change the lot sizes such that all lots were two (2) acres or more in size in order to comply with the comprehensive plan. The commissioners agreed that I could create an additional lot out of the larger lot #3 such that I would not lose a view lot provided the two acres could be maintained.

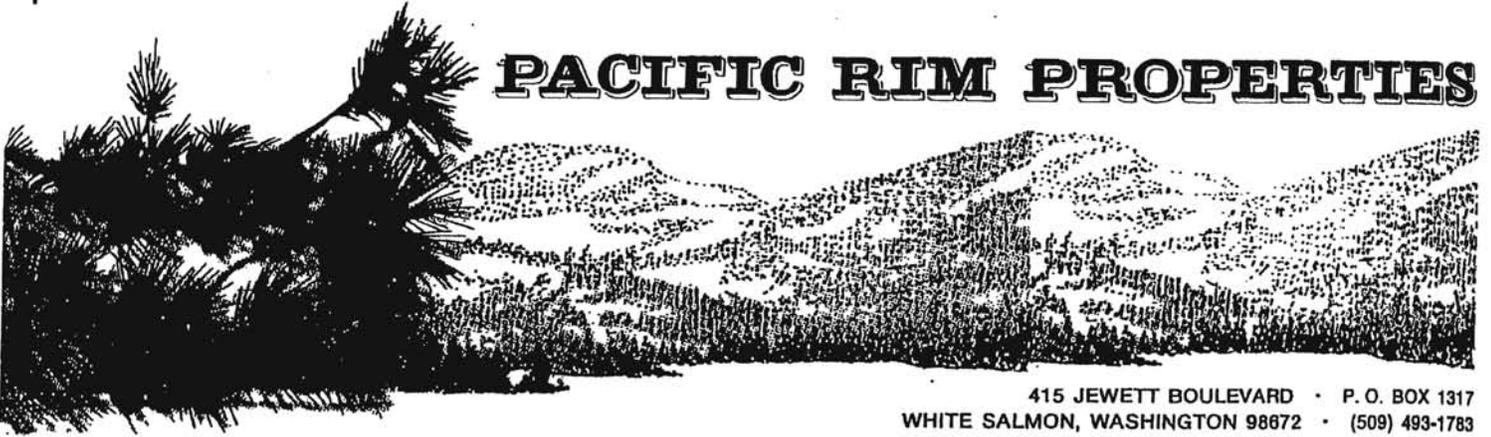
The short plat law provides that the lot size may include to the centerline of the county road. The long plat law makes no mention of the road in regard to lot size determination. In this particular case the county road is an easement (not deeded ownership).

If the long plat laws were consistent with the short plat laws the county road centerline would divide properties and be included for the purposes of area computations. It would seem practical on $\frac{1}{2}$ acre or larger that the area to the road centerline could be included. Should the lot description include the area to the road centerline, I will not "lose" any lots and all lots would be two (2) acres or larger.

Should I not include the area to the centerline, all lots would still be over two acres but I will lose one lot.

Please advise me whether or not I can include to the road centerline for this long plat for acreage computations. Also, please advise me as to whether I can have 9 lots instead of 8 if all comply with the two (2) acre minimum.

PACIFIC RIM PROPERTIES



415 JEWETT BOULEVARD • P. O. BOX 1317
WHITE SALMON, WASHINGTON 98672 • (509) 493-1783

February 12, 1979

Mr. Mark Haun
Planning Director
Klickitat County
Goldendale, Wash. 98620



RE: Long Plat SW $\frac{1}{4}$ of NW $\frac{1}{4}$ Section 21 T3N R11E of W.M.

Dear Mr. Haun:

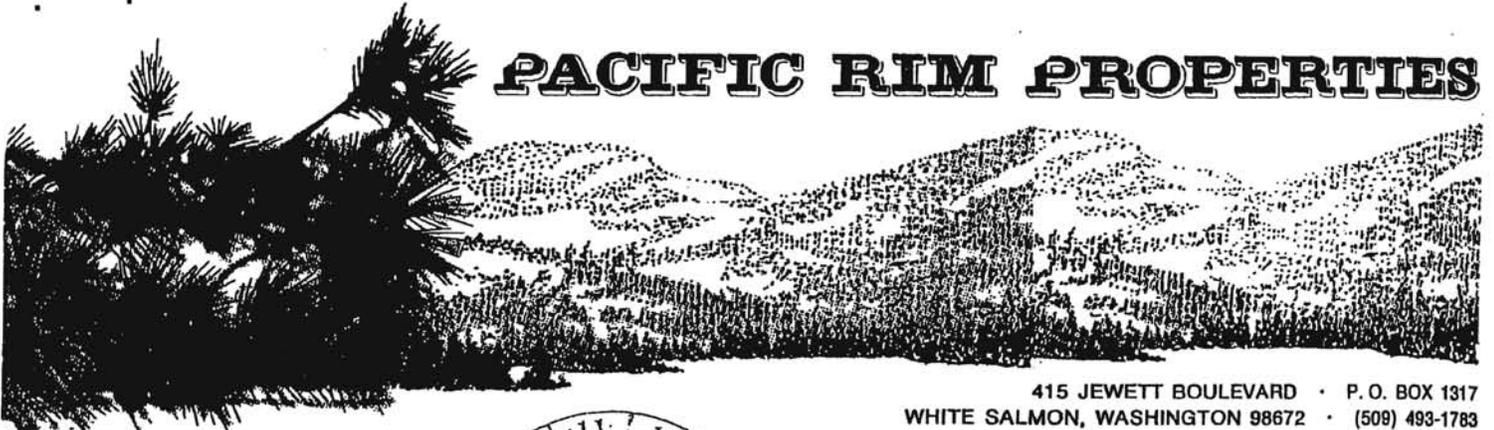
I would desire additional clarification of the status of my plat. May I now assume from your letter of February 8th that the preliminary plat is now approved by the county commissioners and that the final plat need only be redrawn to comply with the comprehensive plan and eight total lots?

If the preliminary plat is accepted, are there any other specific conditions in addition to the completed survey, title report, and plat map needed for final approval? I refer specifically to Frank Finch's general comments in regard to water supply and fire protection. My letter of January 26, 1978, advised the commissioners that I now have 1320 feet of buried 4 inch mainline distributing water around the property, and a 40 gpm well with pump and 315 gallon pressure reservoir. I certainly don't want to destroy any of the land with a fire break. A water system is in place when none is required for 2 acre and larger tracts under the subdivision and/or comprehensive plan.

Your prompt answer to my above questions will be most appreciated. Thank you.

Sincerely yours,

Fred Heany



PACIFIC RIM PROPERTIES

415 JEWETT BOULEVARD • P. O. BOX 1317
WHITE SALMON, WASHINGTON 98672 • (509) 493-1783



June 8, 1979

Mr. Mark Haun
Klickitat County Planner
Goldendale, Washington

RE: PACIFIC RIM ESTATES - Final Plat Approval

Dear Mr. Haun,

Enclosed is a final plat of the above property completely surveyed and staked. I will need a letter from you that the plat conforms with the comprehensive plan as called for under item 6, page 28 of the subdivision ordinance. Thank you.

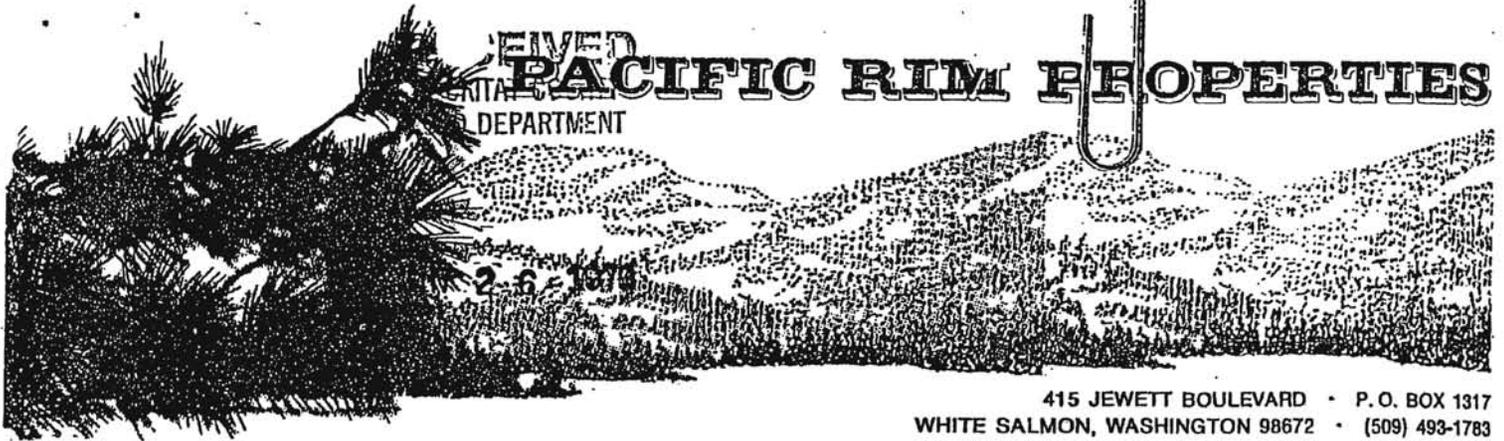
Sincerely yours,

Fred Heany
Fred Heany

FH/jih

RECEIVED
CLERK OF DISTRICT COURT
COUNTY OF CLATSOP
DEPARTMENT

PACIFIC RIM PROPERTIES



415 JEWETT BOULEVARD • P.O. BOX 1317
WHITE SALMON, WASHINGTON 98672 • (509) 493-1783

June 22, 1979

Mr. Ed Hoyle
Klickitat County Engineer
Goldendale, Washington

RE: PACIFIC RIM ESTATES - Final Plat Approval

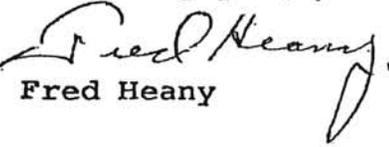
Dear Mr. Hoyle,

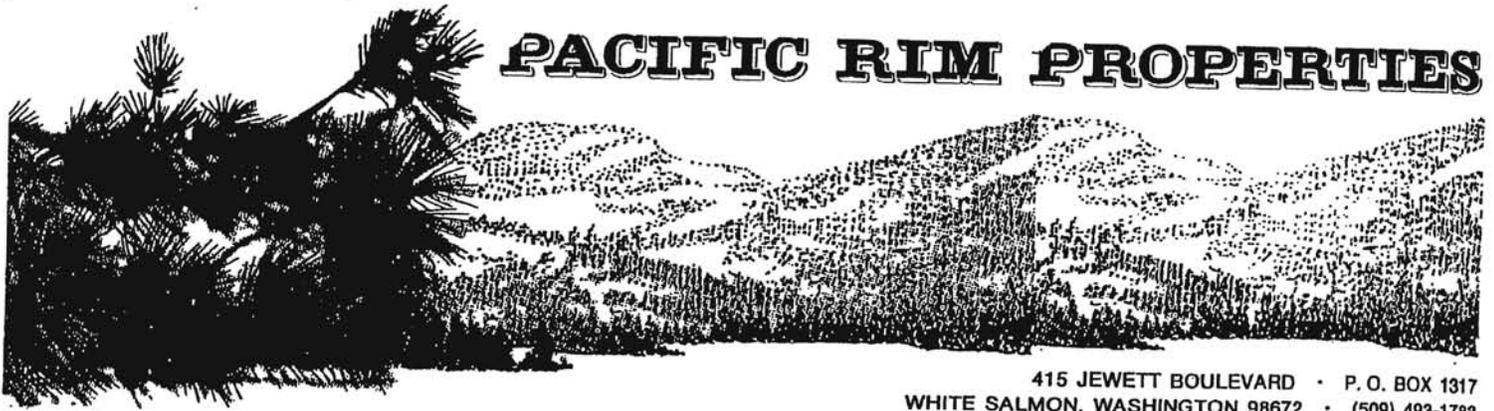
The above plat is completely surveyed and staked. I would desire to have your final approval on the plat approval sheet. We have set iron rods at the points of curvature offsetting 30' from the centerline of Tunnel Road. Will you also want iron rods placed in the centerline of the road? (The road is gravel.)

I have not placed rods at points 1, 2, and 3 of Heany Drive but have completely staked both sides offsetting 30 feet from centerline. Would you want 5/8 " X 30" rods at points 1, 2, and 3?

I would appreciate a letter from you in regard to whether the plat is satisfactory as called for under item 4, page 27 of the subdivision ordinance. If it is not, please advise what changes you would require. Your prompt consideration would be most appreciated. Thank you.

Sincerely yours,


Fred Heany



415 JEWETT BOULEVARD • P. O. BOX 1317
WHITE SALMON, WASHINGTON 98672 • (509) 493-1783

February 19, 1980

Mr. Mark Haun
Klickitat County Planners
Court House Annex
Goldendale, WA 98620

RE: Pacific Rim Estates - SW $\frac{1}{4}$, NW $\frac{1}{4}$, Section 21, TWN 3N, R 11, E of WM

Dear Mr. Haun,

This letter is to request a 1 year extension for final plat approval on the above approved preliminary plat. I feel this time is needed to complete all the detail work needed. The survey is complete, and an underground water and power system is now installed.

Thank you for your consideration.

Sincerely yours

Fred Heany

*See 6.32 - Sub. Ord.
- Have two years to complete
prelim. plat!*



PACIFIC RIM PROPERTIES

415 JEWETT BOULEVARD • P.O. BOX 1317
WHITE SALMON, WASHINGTON 98672 • (509) 493-1783

March 18, 1981

Klickitat County Commissioners
Goldendale, WA 98620

RE: Pacific Rim Estates
Final Plat Extension

Gentlemen

This letter is to confirm my earlier request to the planning department for an extension to the above plat for one year. I have now completed the underground power, survey, state approved water system, and a roughed in road.

I have been burried in paper work and a divorce for the last 18 months and have not had time to final the plat.

I would be most grateful for your consideration in extending me the additional 12 months to complete this plat.

I would also like to know if I could drop lots 1 and 2 from the plat and serve lot 3 with a 20 foot private driveway. The existing proposed private road serves only 3 platted parcels and I am concerned standards that may be required by the county engineer would not be feasible for these lots. If new Skamania County standards for a category III road were acceptable I could live with that and would want to keep the plat as is. (See enclosure for Skamania County private road standard). Your and the county engineers comments would be most appreciated. Thank you.

Sincerely yours,


Fred Heany

c.c. Steve Anderson
Klickitat County Planner



PACIFIC RIM PROPERTIES



415 JEWETT BOULEVARD • P. O. BOX 1317
WHITE SALMON, WASHINGTON 98672 • (509) 493-1783

April 16, 1981

Klickitat County Planning Commission
Goldendale Washington

RE: PACIFIC RIM ESTATES

Gentlemen

The above plat is substantially completed with underground water and power now in the ground and all surveyed corners installed. In order to final the plat I will need to complete the private road.

The private road is now roughed in and I will be grading it in the next few weeks. My private road profile on the preliminary plat shows compacted native earth (ie a dirt road) as the running surface. When the preliminary long plat was approved there were no private road standards and it is my understanding that at this time there still are no private road standards.

I would therefore request your guidance for an acceptable road standard other than county road specification for this private road. I have met with Ed Hoyle the county engineer and he indicated he felt the new proposed private road standards for Rural Minor Access would be acceptable (see enclosure). This standard would involve a road rocked 12 feet wide with turnouts every 600 feet and a base of 7.2 inches of compacted pit run ballast rock plus a running surface of 2.4 inches of crushed rock.

I feel the above standard is unusually deep in its requirement for ballast rock. I would request a standard similiar to the one adopted in 1980 by Skamania county for this class of private road, which is 3 inches of ballast and 1 inch of crushed 10 feet wide. I would however be willing to put in turnouts every 300 feet. This would provide a smooth rocked road with 5.71 inches of loose rock and 4 inches of compacted rock after rolled with type A compaction. I would feel this is more than adequate for this level well drained site. Gilbert county road which was rocked to a depth of 4 inches 3 years ago has held up very well. This road is East of mine and has more severe soil and slope conditions.

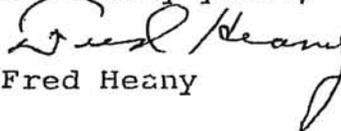
I would also request that I would have the option to drop lots 1 and 2 from the plat therefore having only 6 lots in the plat instead of 8, which would then have 5 of the 6 lots served by county road. If I do this I would then request that private road A - B - C be eliminated from the plat and be substituted by private road X - Y, or that I could at my option continue to develop only road A - B - C as originally proposed for this Plat.

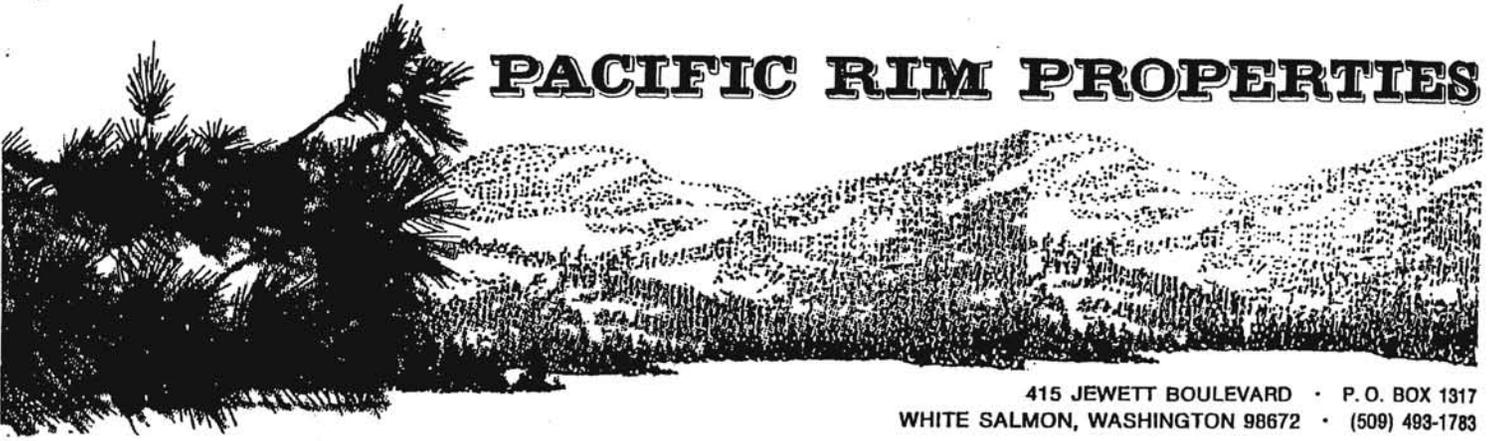
Thank you for your consideration.

c.c. Ed Hoyle

c.c. Steve Anderson

Sincerely yours,


Fred Heany



PACIFIC RIM PROPERTIES

415 JEWETT BOULEVARD • P. O. BOX 1317
WHITE SALMON, WASHINGTON 98672 • (509) 493-1783

October 1, 1981

Mr. Steven Anderson
Planning Director
Klickitat County
Goldendale, WA 98620

Re: Pacific Rim Estates

Dear Steve:

I have reviewed the comments summarized in the Engineer's letter of August 10, 1981, and respond as follows:

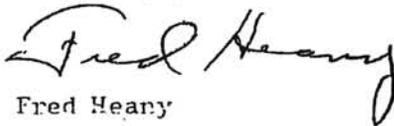
1. It is customary within covenants to allow provisions for change as new innovations in lifestyles, architecture, and economic factors affect what the people are purchasing. I have deleted my rights and amended the covenants to provide a more equitable provision for the property owner. See Exhibit A enclosed.
2. The lot descriptions will go to the center of the road to be consistent with the plat and recommendation of the county commissioners November 20, 1978. I will by separate document dedicate the 30 foot strip of Tunnel Road bordering the lots following acceptance of the plat.
3. As per (2) 30 foot strip to be dedicated.
4. Language to be changed to comply with page 27, item 4.
5. There is an existing fence around all the fields in the plat. I will stretch and recondition the fence and place a steel 14 foot gate on the private road in lieu of a cattle guard. The requirement for fencing and cattle guards would seem unnecessary and would request be waived by the commissioners for the following reasons:
 - a. Five lots fronting county road in time will probably put in driveways to county road without cattle guards.
 - b. All the herds in the area are in fenced pastures or fenced range land.

October 1, 1981

- c. The Bradshaws who are the closest resident to the plat (they border it) have stated that in all the time they have lived in their property (2 years) they have never had a problem with range cattle. (You may call them for verification 403-1068.)
- d. Appleton West, a plat recently approved did not require a cattle guard or gate on the private road going through lot 5 and connecting with county road. All the lots front on county road in this plat very similiar to mine with private access to other land.
6. County auditor said it would not be a problem, could be recorded and held in their files as is.
7. We will include file # of the surveys.
8. Short Plat number and auditor's file number will be shown on the plat.
9. Curve A radius and description shall be the same.

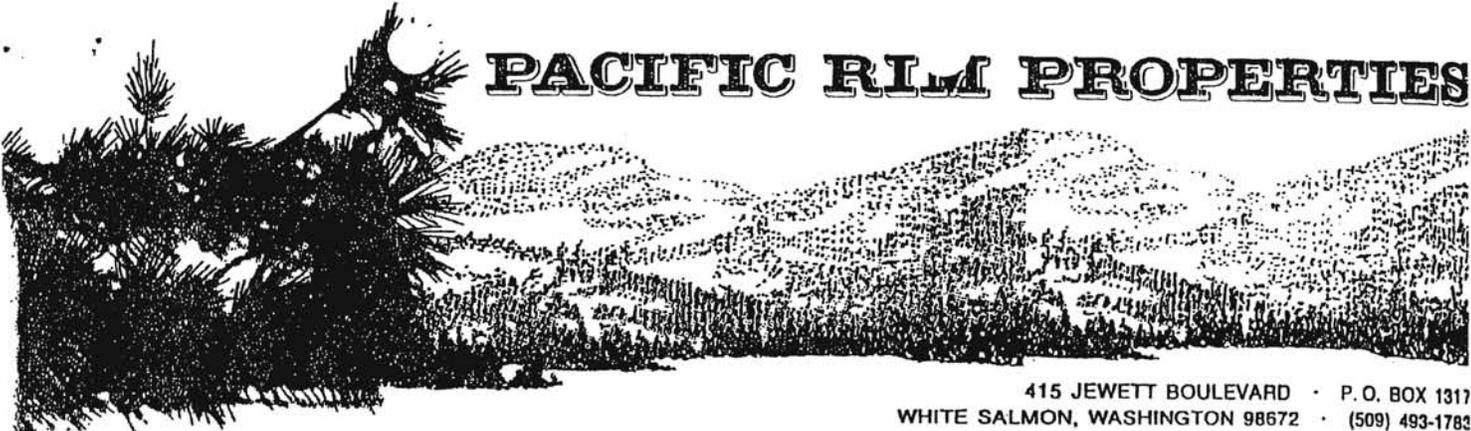
If all the forementioned changes are made will this satisfy your requirement for final plat approval? If not, would you please respond at this time as to any other conditions or changes you would request. Thank you for your co-operation.

Sincerely yours,



Fred Heany

FH:jg



PACIFIC RIM PROPERTIES

415 JEWETT BOULEVARD · P.O. BOX 1317
WHITE SALMON, WASHINGTON 98672 · (509) 493-1782

October 27, 1981

Mr. Steven Anderson
Planning Director
Klickitat County
Goldendale, WA 98620

RE: Pacific Rim Estates

Dear Steven

Attached is the final plat map with revisions as recommended. Also included are the computer printouts of the boundaries of lots 4 thru 8 to both the R/W and CL of tunnel road. The bearings are corrected to one second in red on the computer sheets. This is due to the calculator carrying dimensions to .001 feet and rounding off and therefore represents an insignificant correction.

I have also enclosed the legal description of the E $\frac{1}{2}$ of Tunnel Road adjacent to Pacific Rim Estates and will sign a deed conveying this rightaway to the county upon completion of final plat recording.

The fence has been reconditioned at considerable expense and labor and a 14 foot gate installed.

Freeze proof fire risers are installed at both the North and South end of the Plat.

Underground water and power is available to all the lots and is installed.

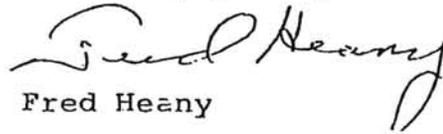
The road has been completed with both base rock and crushed rock exceeding the specifications called for (i.e. excessive yards were used in both the base and surface course). The road has been graded and compacted with a 20 ton vibrating roller.

KCPD 0092

All the lots have been satisfactorily evaluated by the health department for soil conditions.

Your expeditious processing of this final plat will be much appreciated. Thank you.

Sincerely yours,

A handwritten signature in cursive script that reads "Fred Heany". The signature is written in dark ink and is positioned above the typed name.

Fred Heany



PACIFIC RIM PROPERTIES

415 JEWETT BOULEVARD • P. O. BOX 1317
WHITE SALMON, WASHINGTON 98672 • (509) 493-1783

Exhibit A

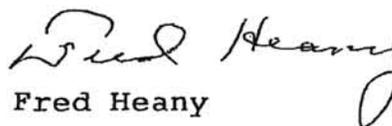
5. The grantor, Alvin Fred Heany Jr. does hereby and by these present subject said plat to the following building and use restrictions:
No mobile home shall be permitted as a "permanent" residence which is less than 24 feet in width. "Mobile Home shall mean a dwelling unit designed to be transportable upon the public streets or highways and certified as approved as such by the state of Washington Department of labor and industries. A single wide mobile home, motor home, garage or barn may be used as temporary residence for up to 18 months while a permanent residence is being erected. An extension to this time period may be granted provided 5 of the 8 lot owners approve of the extension.

7. These restrictions shall run with the land and shall be binding on the owner or tenant of any or all of said land and all persons claiming by, through, or under until January 1, 1988, at which time said covenants shall be automatically extended for successive ten (10) year periods, However, the covenants can be modified or ammended as follows: At any time prior to January 1, 1984 6 of the 8 lot owners or 75% must approve of the change, after January 1, 1984 5 of the 8 lot owners or 62.5 % must approve of the change.

General comments by the former fire marshall discuss fire protection including fire breaks around the plat. I now have 1320 feet of 4" buried pipe distributing water around the property and a 40 gpm well with pump and 315 gallon pressure reservoir. I certainly wouldn't desire to destroy any land with a fire break. Charlie George has reviewed all tracts for perk.

I would appreciate, as soon as possible, a letter stating the conditions needed for final acceptance of the plat. Thank you for your consideration.

Sincerely yours,


Fred Heany

FH/jih



KLICKITAT COUNTY PLANNING DEPARTMENT

Steven B. Andersen
Planning Director

Courthouse Annex
228 West Main, Room 150
Goldendale, WA 98620
(509) 773-5703

Park Center
White Salmon, WA 98672
(509) 493-2580

October 7, 1981

Mr. Fred Heany
Pacific Rim Properties
514 Jewett Blvd.
P. O. Box 1317
White Salmon, WA 98672

Re: Pacific Rim Estates: Letter of October 1, 1981

Dear Fred:

This letter is to confirm what I indicated to you in our telephone conversation yesterday with regard to your above-referenced letter.

As I had indicated to you, all of the nine items which you propose for final approval of Pacific Rim Estates are acceptable to this office and the county engineer with the exception of Item 5 wherein you make reference to an existing fence. The county engineer inspected the fence and does not consider such to be adequate. He indicated to me that in several places the fence is lying on the ground and would not inhibit livestock from entering the property. Be advised that the fence must be constructed to standards outlined in Section 9.04 of the county subdivision ordinance.

If questions arise, please don't hesitate to contact me again.

Sincerely,



Steven B. Andersen
Planning Director

SBA:jb

cc: Ed Hoyle, County Engineer

676 A.2d 953 (Md.App. 1996), 1077, Stewart Title Guar. Co. v. West

Page 953

676 A.2d 953 (Md.App. 1996)

110 Md.App. 114

STEWART TITLE GUARANTY COMPANY

v.

Thomas W. WEST, et ux.

No. 1077,

Court of Special Appeals of Maryland.

May 29, 1996

Page 954

[Copyrighted Material Omitted]

Page 955

[110 Md.App. 118] J. Mitchell Kearney (Miles & Stockbridge, on the brief), Baltimore, for appellant.

James D. O'Connor, Towson, for appellees.

Argued before BLOOM, WENNER and HOLLANDER, JJ.

HOLLANDER, Judge.

This appeal arises out of a claim by Thomas W. West and his wife, Dawn K. West, appellees, against Stewart Title Guaranty Company ("Stewart Title"), appellant, for breach of a title insurance policy. When the Wests purchased real property in New Windsor, Maryland in 1987, they obtained a title insurance policy issued by Stewart Title. In 1990, they filed suit in the Circuit Court for Carroll County against several defendants, including appellant, alleging that the land that they received was not what they had been promised in their contract, that their property lacked access to any public rights of way, and that defects in the title rendered the property unmarketable.

The circuit court entered summary judgment against Stewart Title on the ground that the Wests'

property was unmarketable. It awarded damages, prejudgment interest, and attorneys' fees in the total amount of \$272,978.68. Aggrieved [110 Md.App. 119] by this decision, Stewart Title now appeals and presents multiple issues for our consideration:

I. Did the lower court err in entering summary judgment against Stewart Title in the absence of an affidavit or any other competent evidence demonstrating that Stewart Title breached the policy?

II. Did the lower court err in entering summary judgment against Stewart Title in light of the provision which limits claims against the insurer in the event of litigation until there has been a final determination by a court of competent jurisdiction adverse to the title?

III. Did the lower court err in entering summary judgment against Stewart Title in the absence of certain necessary parties?

IV. Did the lower court err in awarding Appellees damages in excess of the face amount of the title policy?

Page 956

V. Did the lower court err in awarding Appellees damages in excess of their actual loss?

VI. Did the lower court err in awarding Appellees attorney's fees and pre-judgment interest?

For the reasons discussed below, we conclude that summary judgment was improper. Therefore, we shall vacate summary judgment and remand for further proceedings.

FACTUAL BACKGROUND

This case involves a long and complex factual and procedural history. We have gleaned the following summary of facts from the record.

In 1986, the Wests searched for property on which to build a home; they were particularly interested in land that was suitable for raising horses. In December of 1986, a real estate agent, Joseph M. DeChiara, showed them an unimproved 3.3658 acre parcel in Carroll County ("the Property"), owned by Adele Building & Supply Company ("Adele"). According to a plat of the land that DeChiara showed them, the Property was to have separate means of access to two nearby public [110 Md.App. 120] roads: Springdale Road to the west and Rowe Road to the south.

On June 6, 1987, the Wests signed a New Home Sales Agreement with Adele to purchase the Property, on which Adele was to construct a house. A plat of the Property, which was prepared by Sylvia Gorman, Adele's listing agent, was attached to the agreement. The plat, like the one that DeChiara previously had shown to the Wests, showed that a .4 acre triangular parcel of land in the northeast corner of the Property ("the triangular parcel") was included in the Property. In addition,

the plat indicated that, although the Property would be almost completely surrounded by adjacent properties, the Wests would have access to Springdale Road by means of a "panhandle strip" that they would own in fee simple, and they would also have use of a right-of-way to Rowe Road ("the right-of-way"). Attached to the agreement was a "Right-of-Way Agreement and Declaration of Maintenance Obligations" for the common use of the right-of-way.

After the house was constructed, the Wests hired Land Title Research of Maryland, Inc. ("Land Title") as their settlement agent. At settlement on June 26, 1987 in Land Title's offices, the Wests purchased two title insurance policies issued by Stewart Title. The first policy was an "owner's policy" ("the Policy") insuring the Wests, with a coverage limit of \$112,640.00. The second policy was a "lender's policy." [1] The owner's policy stated, in part, as follows:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, STEWART TITLE GUARANTY COMPANY, a corporation of Galveston, Texas, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the [110 Md.App. 121] amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

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

(Capitalization in original.)

At settlement, the Wests also obtained the deed to the Property, which contained a metes and bounds description of the Property. Unknown to them at the time, however, the deed did not convey either the triangular parcel or the panhandle strip. As the Policy contained the same erroneous Property description, it did not include the triangular parcel or the panhandle strip.

Page 957

The Wests did not learn of any problems with the title to their Property until the spring of 1988, when Mr. West was clearing shrubs in the triangular parcel. Lawrence E. Peach, who, along with his wife, Deborah A. Peach, owned the immediately contiguous parcel of land, approached Mr. West and told him that he believed Adele had sold the triangular parcel to him, and that he would

look into the matter. After the Wests heard nothing from Peach for several weeks, they decided to look into the matter themselves. Mr. West obtained a copy of his deed and "plat plan" [2] and took them to a surveyor, Daniel Staley, who earlier had prepared a survey of the Property that the Wests ordered for settlement but, apparently, never received.

After Staley compared the deed and his survey of the Property, he advised the Wests of several problems with their title. First, neither the triangular parcel nor the panhandle [110 Md.App. 122] strip was conveyed to the Wests. Second, the Wests were "landlocked," because their Property had no access to any public roads. Moreover, in what both Stewart Title and the Wests agree was a mistake, the instrument by which Adele had previously created the right-of-way actually identified the Peaches' lot, and not the Wests' lot, as one of the properties benefited by the right-of-way. Accordingly, the Wests were not entitled to use the right-of-way. In fact, in 1990, Donald A. Dustin, the owner of the property that the right-of-way crossed, hired an attorney who sent the Wests a letter instructing them not to use the right-of-way across his property. Dustin also erected cattle fencing and a barricade that substantially narrowed the right-of-way and made it difficult for the Wests to drive their horse trailers on it, although the right-of-way was not completely blocked.

Thereafter, in the summer of 1988, the Wests contacted Joseph Goldberg, the president of Land Title. Goldberg examined the Wests' deed, their "plat plan," and Staley's survey and agreed that the Wests were landlocked. Goldberg told the Wests not to contact anyone about the problems, and that he would take care of everything. Apparently, Goldberg made several attempts to contact Adele about the Wests' difficulties, but he ultimately was unsuccessful in resolving the problems. In December 1988, Ms. West contacted Goldberg about his progress. Goldberg advised her that, although he could resolve the problems involving access to Rowe and Springdale roads, he could not resolve the problem involving the triangular parcel because that parcel was not covered by the Wests' Policy. He advised Ms. West that she and her husband should hire an attorney.

At some point during this time period, the Wests discovered an additional problem with their title; Adele had left two unreleased mortgages on their Property. The parties agree, however, that, shortly after the Wests filed suit, Land Title was able to procure the release of both liens.

The problems with their title caused the Wests to have difficulty obtaining a second mortgage and re-financing for [110 Md.App. 123] their Property. In 1990, they obtained a \$34,000.00 second mortgage from Atlantic Federal Savings Bank, but at an interest rate of 13%, which was higher than the rate generally available. [3] In 1992, Atlantic Federal offered its employees an opportunity to obtain financing on their homes at the reduced rate of 7 1/2%. The Wests wanted to re-finance and consolidate their two mortgages at that time, but their application was denied because of the unmarketable status of their Property.

On June 22, 1990, the Wests filed a multi-count complaint in the Circuit Court for Carroll County against Adele, Robert L. Thomas (Adele's president), Land Title, Goldberg, Gorman, Long and Foster Real Estate, Inc. (Gorman's employer and the listing broker for the Property), DiChiara

(alleged to be the

Page 958

"selling agent" for the Property), Coldwell Banker Residential Real Estate, Inc. (DiChiara's employer), and Stewart Title. As to Stewart Title, appellees asserted a breach of contract and a negligence claim. They alleged, inter alia, that "the Plaintiffs purchased a policy of title insurance from Stewart Title ... whereby Stewart agreed to insure against defects or unmarketability of the title to the property and to insure a right of access to and from the land," that "there are defects in the title, the title is unmarketable and the Plaintiffs' [sic] lack a right of access to and from the land," and that "Stewart has failed to provide good and marketable title and access to and from the land and [in] breach of its agreement to insure same...." In their negligence claim, appellees alleged that appellant breached its "duty of care to the Plaintiffs to adequately supervise Stewart's agents...."

After suit was filed, settlement negotiations occurred among the parties and the Wests' neighbors. Several proposals were made that included various confirmatory or corrective conveyances to resolve the Wests' title problems. But these negotiations [110 Md.App. 124] were unsuccessful and, on October 6, 1992, the Wests filed a second amended complaint, adding two new counts and several new defendants (the Peaches, Dustin, and Leonard and Deborah Crunkilton, who owned the other parcel of land benefited by the right-of-way). The Wests asked for a declaratory judgment or the appointment of trustees to execute confirmatory deeds, or both, to establish the following: the Wests, and not the Peaches, were entitled to use the Rowe Road right-of-way; the Wests were the owners of the panhandle strip; Dustin did not have a right to use the right-of-way to Springdale Road.

At the same time that they filed their second amended complaint, the Wests filed a motion for summary judgment against Stewart Title, Land Title, and Goldberg. The motion asserted that these three defendants had issued to the Wests a title insurance policy from Stewart Title, that title to the Property "is defective, Plaintiffs lack access to and from the land and title is unmarketable," and that the defendants "have failed and refused to pay the Plaintiffs' loss" or costs and "have failed and refused to take the actions necessary to cure said defects." It added that the defendants had "failed and refused to take any action whatsoever regarding these claims as a result of which the Plaintiffs have been forced to file this litigation." Attached to the motion was a copy of a portion of the Policy, but no affidavit was attached to the motion.

On December 30, 1992, Stewart Title filed both a response to the Wests' motion and a cross-claim seeking the same relief with respect to the right-of-way that the Wests had sought in their second amended complaint. In its response to the Wests' motion, Stewart Title asserted that, since neither the triangular parcel nor the panhandle strip was included in the description of the Property insured by its Policy, "any alleged defects which arise with respect to these areas and which may affect marketability or access are not covered by the Policy." Stewart Title asserted that the Wests'

second amended complaint and its own cross-claim constituted "litigation" about this title defect, and Paragraph 7(b) of the Policy precluded [110 Md.App. 125] the Wests from pursuing their claim against Stewart Title until the litigation reached a final conclusion.

A hearing was held on the motion, at which the Wests' counsel outlined the problems with his clients' title associated with the triangular parcel, the panhandle strip, and the right-of-way. The Wests argued that they were entitled to collect under their Policy under any of three provisions: (1) the provision insuring against "unmarketability" of their title; (2) the provision insuring against "lack of a right of access" to and from their land; or (3) the provision insuring against defects in the title.

The circuit court granted the motion in a written opinion, dated May 18, 1993. After reviewing the conveyances in the Wests' subdivision, the court stated:

[A] rudimentary examination of the public record reveals the serious title defects of which the plaintiffs now complain. It is, therefore, apparent that Goldberg and Land Title conducted settlement on this land without examining the source of Adele's title and without properly examining

Page 959

the public record to determine what real property Adele owned.

The court recited the following problems with the Wests' property:

1. The Property "has no express access to Rowe Road."
2. The Wests "lack fee simple access to a public right of way."
3. They "may or may not be benefitted by a right of way to Springdale Road."
4. The "property is burdened by two liens which they did not create, having an aggregate principal amount of \$101,200.00." [4]
5. "Separate from and in addition to [the Wests'] lack of access problems," there was the problem that their Property "may be burdened by an unrecorded right of way" between [110 Md.App. 126] Dustin's lot and the Peaches' lot. The court cited the fact that Dustin received in his deed a right-of-way over the Peaches' land to Springdale Road, while the Peaches' deed (as a result of the mistake discussed earlier) granted them a right-of-way over Dustin's land to Rowe Road. But since the Wests' land is between Dustin's and the Peaches' lots, the Wests' Property "could be subject to an unrecorded right of way in favor of the Peach and Dustin lots."

From the foregoing, the court concluded that the Property was "unmarketable" and entered summary judgment in favor of the Wests and against Goldberg, Land Title, and Stewart Title. The

court also instructed the clerk to set a date for an inquisition on the Wests' damages. The inquisition was held on September 30, 1994. After the inquisition, the circuit court assessed damages against Stewart Title, Land Title, and Goldberg, jointly and severally, in the amount of \$272,978.68. This figure consisted of \$175,000.00 for the value of the Property, \$2,000.00 for the value of the triangular parcel, ^[5] \$650.00 in appraisal fees, attorneys' fees in the amount of \$18,195.68, and \$77,133.00 in prejudgment interest. The court also assessed additional damages of \$66,275.00 against Land Title and Goldberg, as compensation for the Wests' "having to live with this mess."

Stewart Title subsequently filed a motion to alter or amend the damages award or, alternatively, for reconsideration. At the hearing, Stewart Title's counsel stated to the court that "almost 90%" of the defects with the Wests' title had been resolved. He asserted that the Wests had already received both the triangular parcel and the panhandle strip, and he expected that a "confirmatory right-of-way agreement" would be signed by the Crunkiltons and the Peaches shortly. The Wests' counsel did not dispute that almost ninety percent of the problems had been resolved, although he asserted that the [110 Md.App. 127] resolution had occurred through the Wests' efforts. At the conclusion of the hearing, the court denied Stewart Title's motions. With respect to the motion to alter and amend, the court stated:

By the terms of the title insurance policy ... Stewart had two choices upon notice that the title defects existed. One was to correct the defects in the title--all defects, or two, pay the Plaintiffs the face amount of the policy, \$112,640.00. Stewart failed to do either, and having failed to perform their obligations under the policy, Stewart breached the contract with the Plaintiffs.

Accordingly, the Court has determined ... to deny the Motion to Alter or Amend. I don't feel that you can breach a contract and then attempt to rely on the protections of the contract.

At the request of both parties, the court certified the judgment against Stewart Title as final under Rule 2-602(b). We agree that this certification was appropriate under the rule and applicable case law. Stewart Title noted a timely appeal. ^[6]

Page 960

DISCUSSION

I.

Stewart Title contends that the circuit court erred in entering summary judgment against it, because there were disputed issues of material fact. It also complains that the court's written opinion does not contain a "finding" that it breached its insurance contract, but instead only concluded that the Wests' Property was "unmarketable." Appellant objects to the trial court's statement some two years later, at the hearing on its motion to alter or amend, that it had

"breached" the Policy. Appellant argues that "[f]or the lower court to state for the first time two years after the issuance of its May 18, [110 Md.App. 128] 1993 Memorandum Opinion that Stewart Title breached the Policy ... violates every fundamental concept of fairness and due process." It further asserts that there is no evidence to support the court's conclusion that it breached the Policy. In order for us to examine these issues, we begin with a review of the fundamental principles of title insurance.

A title insurance policy protects the insured against loss or damage as a result of defects in or the unmarketability of the insured's title to real property. 7 POWELL ON REAL PROPERTY p 1029 at 92-5 (1995); John Alan Appleman & Jean Appleman, INSURANCE LAW AND PRACTICE § 5201 at 2 (1981); *Walters v. Marler*, 83 Cal.App.3d 1, 18, 147 Cal.Rptr. 655, 665 (1978). Its purpose is to safeguard a transferee of real estate from the possibility of a loss through defects that may cloud the title. Appleman, INSURANCE LAW AND PRACTICE, § 5201 at 8; *McLaughlin v. Attorneys' Title Guaranty Fund*, 61 Ill.App.3d 911, 18 Ill.Dec. 891, 895, 378 N.E.2d 355, 359 (1978).

Ordinarily, there are three components of title insurance. D. Barlow Burke, Jr., REAL ESTATE TRANSACTIONS: EXAMPLES AND EXPLANATIONS 185 (1993). First, it is an indemnity agreement to reimburse the insured for loss or damage resulting from title problems. *Id.* Second, it is "litigation insurance," by which the insurer is required to defend the insured in the event the insured's title is attacked by a third party. *Id.* Finally, and "perhaps above all, it involves the hiring of experts in title matters." *Id.*

The predominant view today is that title insurance--at least as to its first-party aspect--is a contract of indemnity, and not a contract of guaranty or warranty. See *First Federal Savings and Loan Ass'n of Fargo, N.D. v. Transamerica Title Insurance Co.*, 19 F.3d 528, 530 (10th Cir.1994); *Chicago Title Insurance Co. v. McDaniel*, 875 S.W.2d 310, 311 (Tex.1994); *Karl v. Commonwealth Land Title Insurance Co.*, 20 Cal.App.4th 972, 978, 24 Cal.Rptr.2d 912, 915 (1993), rev. denied (March 17, 1994); *Gibraltar Savings v. Commonwealth Land Title Insurance Co.*, 905 F.2d 1203, 1205 (8th Cir.1990); *Willow Ridge Limited Partnership v. Stewart Title Guaranty* [110 Md.App. 129] *Co.*, 706 F.Supp. 477, 480 (S.D.Miss.1988), *aff'd* without opinion, 866 F.2d 1419 (5th Cir.1989); *Green v. Evesham Corp.*, 179 N.J.Super. 105, 430 A.2d 944, 946, cert. denied sub nom. *Midatlantic Nat'l Bank v. Chicago Title Insurance Co.*, 87 N.J. 422, 434 A.2d 1095 (1981). See also Appleman, INSURANCE LAW AND PRACTICE, *supra*, § 5201; 13A COUCH ON INSURANCE § 48:111 (Mark S. Rhodes rev. ed.1983). Consequently, a title insurer does not "guarantee" the status of the grantor's title. *Falmouth National Bank v. Ticor Title Insurance Co.*, 920 F.2d 1058, 1062 (1st Cir.1990).

As an indemnity agreement, the insurer agrees to reimburse the insured for loss or damage sustained as a result of title problems, as long as coverage for the damages incurred is not excluded from the policy. *First Federal Savings & Loan Ass'n of Fargo*, *supra*, 19 F.3d at 530; *Focus Investment Associates, Inc. v. American Title Insurance Co.*, 992 F.2d 1231, 1237 (1st

Cir.1993); *Lawrence v. Chicago Title Insurance Co.*, 192 Cal.App.3d 70, 74-75, 237 Cal.Rptr. 264, 266 (1987). We recognize, however, that there are cases that suggest that a title insurance policy constitutes a guaranty or warranty of title. See *Zions First National Bank v. National American Title Insurance Co.*, 749 P.2d 651, 653 (Utah 1988) ("title insurance is in the nature of a warranty"); *Drilling Service Co. v. Baebler*, 484 S.W.2d 1, 18 (Mo.1972)

Page 961

; *Lawyers Title Insurance Corp. v. Research Loan & Investment Corp.*, 361 F.2d 764, 767 (8th Cir.1966); *Luboff v. Security Title & Guaranty Co.*, 46 Misc.2d 599, 260 N.Y.S.2d 279, 283 (N.Y.Sup.Ct.1965).

When an insured notifies an insurer of a title problem, the insurer ordinarily has three choices. It may either (1) pay the insured for the loss up to the amount of the coverage limits of the policy, see 15A COUCH ON INSURANCE § 57:172; (2) clear the title defect within a reasonable time, see Appleman, INSURANCE LAW AND PRACTICE § 5214; or (3) show that the alleged unmarketability or other title problems do not really exist, and thus there is no way in which the insured could sustain any loss. See 15A COUCH ON INSURANCE § 57:177. [110 Md.App. 130]

In cases such as this one, a critical issue is when a title insurer may be deemed to have "breached" its insurance contract. Some authorities take the position that, when title is defective at the time the policy is delivered, the policy is breached and the insurer is immediately liable to the insured, even though the exact amount of legal loss would not necessarily be definitively ascertained at that juncture. See *Walker v. Transamerica Title Insurance Co.*, 65 Wash.App. 399, 828 P.2d 621, 624 n. 4 (1992); *Peoples Downtown National Bank v. Lawyers' Title Guaranty Fund*, 334 So.2d 105, 107 (Fla.Dist.Ct.App.1976); *In re Gordon*, 317 Pa. 161, 176 A. 494, 495 (1935); COUCH ON INSURANCE 2D, supra, § 48:113 at 109.

Other authorities, however, take the position that an insurer is not immediately in breach simply because title is defective on the day the policy is issued. Appleman, INSURANCE LAW AND PRACTICE, supra, § 5214 at 86; COUCH ON INSURANCE 2D, supra, § 57:172. Instead, their position is that, if defects are discovered, the insurer may comply with its obligations under the contract if it clears the title defects within a reasonable time. See Appleman, § 5214 at 86. For example, in *Sala v. Security Title Insurance & Guarantee Co.*, 27 Cal.App.2d 693, 81 P.2d 578 (1938), the court stated:

The theory of the trial court, and the contention of respondents as well, fails to take into account the contract in its entirety, and by thus disregarding the rights of the title company under the terms of the contract, assumes that the title company breached the contract as of the day the insurance policy was issued and that therefore on said date was liable in damages.... Such a theory is obviously unsound for the reason that it forecloses the title company, if it elects so to do, from exercising its right, according to the terms of the policy, to clear the title. Manifestly, the insurance

policy must be construed in its entirety, and it was as much the right of the insurance company to perform the contract according to its terms as it was the right of the assured to expect payment in the event of a failure upon the part of the title company so to do. [110 Md.App. 131]

Id., 81 P.2d at 583. See also *George K. Baum Properties, Inc. v. Columbian National Title Insurance Co.*, 763 S.W.2d 194, 201-02 (Mo.Ct.App.1988) (insurer's mere failure to pay claim does not, in and of itself, constitute a breach, when insurer has other options under the policy, including instituting suit or other actions deemed necessary or desirable in order to establish title in the insured).

We conclude that the latter view of what constitutes a "breach"--that the insurer is not immediately in breach simply because title is defective on the day the policy is issued--is more in line with both title insurance law and the standard form title insurance policy that we have before us. As we have observed, a title insurer does not guarantee the state of the title. Instead, a title insurance policy is a contract of indemnity. The view that a title insurer is in breach simply because there are defects in the title at the time the policy is issued would turn the title insurer into the guarantor of the grantee's title. Other courts that have construed standard form title insurance policies have held that a title insurer is not automatically in breach simply because the insured property is conveyed in an unmarketable state or with title defects; "the mere existence of a defect covered by the policy in and of itself is not sufficient to justify recovery." *Falmouth National Bank*, supra, 920 F.2d at 1063.

Page 962

Paragraph 5 of the Policy is titled "Options to pay or otherwise settle claims." It states:

The Company shall have the option to pay or otherwise settle for or in the name of the insured claimant any claim insured against or to terminate all liability of the Company hereunder by paying or tendering payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred up to the time of such payment or tender of payment, by the insured claimant and authorized by the Company.

Moreover, Paragraph 7(a) of the Policy provides Stewart Title with the option to clear a title defect in accordance with its contractual obligations. It states: [110 Md.App. 132] No claim shall arise or be maintainable under this policy ... if the Company, after having received notice of an alleged defect, lien or encumbrance insured against hereunder, by litigation or otherwise, removes such defect, lien or encumbrance or establishes the title, as insured, within a reasonable time after receipt of such notice.

The contractual language is consistent with the position that "a title insurance policy is breached only after notice of an alleged defect in title is tendered to the insurer and the insurer fails to cure the defect or obtain title within a reasonable time thereafter." *First Federal Savings & Loan Ass'n*

of Fargo, supra, 19 F.3d at 531 (emphasis in original).

II.

Maryland Rule 2-501(a) provides that, upon motion, the court shall enter summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and ... the party in whose favor judgment is entered is entitled to judgment as a matter of law." The purpose of summary judgment is not to resolve disputes of fact. See *Southland Corp. v. Griffith*, 332 Md. 704, 712, 633 A.2d 84 (1993). Rather, the purpose of summary judgment is to determine whether there exist any disputes of material facts so as to make a trial necessary. *Nixon v. State*, 96 Md.App. 485, 500, 625 A.2d 404, cert. denied, 332 Md. 454, 632 A.2d 151 (1993). If the material facts are undisputed, our task in reviewing a lower court's summary judgment decision is to determine whether the court was legally correct. *Baltimore Gas & Electric Co. v. Lane*, 338 Md. 34, 43, 656 A.2d 307 (1995).

A party moving for summary judgment " 'must include in the motion the facts necessary to obtain judgment and a showing that there is no dispute as to any of those facts.' " *Bond v. NIBCO, Inc.*, 96 Md.App. 127, 136, 623 A.2d 731 (1993), quoting Paul V. Niemeyer & Linda M. Schuett, MARYLAND RULES COMMENTARY 330 (2nd ed.1992) (emphasis omitted). If the moving party sets forth sufficient grounds for summary judgment, the non-moving party, in order to defeat [110 Md.App. 133] the motion, must show with some particularity that there is a genuine dispute as to material fact. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737, 625 A.2d 1005 (1993). "[G]eneral allegations which do not show facts in detail and with precision are insufficient to prevent summary judgment." *Id.* at 738, 625 A.2d 1005. Mere conclusory denials or allegations will not suffice to overcome a motion for summary judgment either. See *Seaboard Surety Co. v. Richard F. Kline, Inc.*, 91 Md.App. 236, 243, 603 A.2d 1357 (1992). Furthermore, even if the non-moving party identifies a factual dispute, this showing will not prevent summary judgment unless the dispute concerns a "material" fact, that is, a fact whose resolution will somehow affect the outcome of the case. *Bagwell v. Peninsula Regional Medical Center*, 106 Md.App. 470, 489, 665 A.2d 297 (1995), cert. denied, 341 Md. 172, 669 A.2d 1360 (1996).

The court, in ruling on the motion, must view the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Baltimore Gas & Electric*, supra, 338 Md. at 43, 656 A.2d 307. If there is any dispute as to a material fact, the motion for summary judgment must be denied. *Fireman's Fund Insurance Co. v. Rairigh*, 59 Md.App. 305, 313, 475 A.2d 509, cert. denied, 301 Md. 176, 482 A.2d 502 (1984). In addition, we will not ordinarily affirm a summary judgment on a ground on which the lower court did not rely and on which the lower court would have had discretion to deny summary judgment. *Hoffman*

Page 963

v. *United Iron and Metal Co., Inc.*, 108 Md.App. 117, 132-33, 671 A.2d 55 (1996).

In its memorandum opinion granting the Wests' motion for summary judgment, the circuit court reviewed the conveyances in the Wests' subdivision and listed the title defects. The court stated that the Wests were subjected to the threat of litigation because their Property had no access to a public road, it was burdened by two unreleased liens that the Wests had not created, and "may be burdened by an unrecorded right-of-way" between Dustin's lot and the Peaches' lot. Accordingly, the court concluded that the Property was " unmarketable" [110 Md.App. 134] and entered summary judgment in favor of the Wests. The court stated: "Given this record, litigation seems quite likely. We find, therefore, that Plaintiffs' title is unmarketable and we will enter summary judgment in favor of Plaintiffs and against [Stewart Title, Land Title, and Goldberg]."

A.

Stewart Title argues vigorously that summary judgment against it was premature because the Wests' litigation against all defendants had not been finally resolved. It bases this contention on Paragraph 7(b) of the Policy, which states:

No claim shall arise or be maintainable under this policy ... in the event of litigation until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, as insured, as provided in paragraph 3 hereof.

(Emphasis supplied.) In support of its position, Stewart Title relies on a treatise by Professor D. Barlow Burke, Jr., an authority on title insurance. See D. Barlow Burke, Jr., *LAW OF TITLE INSURANCE* (2nd ed.1993). While Professor Burke's views are certainly cogent, we believe that his views are not apposite. Therefore, we conclude that the insurer was not entitled to rely on Paragraph 7(b) under the circumstances of this case. We explain.

The Wests filed a multi-party suit, but they did not seek a declaration that their title was good. Instead, they claimed that there were defects in their title for which they sought relief. As it concedes in its reply brief, Stewart Title admitted that the Wests' Property was landlocked. Stewart Title further acknowledged that there was a title defect with respect to the Rowe Road right-of-way. ^[7] [110 Md.App. 135]

Paragraph 7(b) requires a final determination that is "adverse to the title." The qualifying phrase "adverse to the title" is not superfluous. It indicates that Paragraph 7(b) only applies when the "adverse" nature of the title is in dispute. Conversely, the provision would not apply when, as here, it is conceded that the insured's title is defective, and when there is thus no need for a court determination "adverse to the title." Stewart Title's interpretation to the contrary would have the effect of reading the "adverse to the title" language out of the policy. That construction would conflict with the settled principle that a contract should not be interpreted in a manner that disregards a meaningful part of the agreement. See *Bausch & Lomb, Inc. v. Utica Mutual Insurance Co.*, 330 Md. 758, 782, 625 A.2d 1021 (1993); *Arundel Federal Savings & Loan*

Association v. Lawrence, 65 Md.App. 158, 165, 499 A.2d 1298 (1985). Further, to the extent that

Page 964

the contractual language is ambiguous, we follow the rule, adopted from general contract law, that ambiguities in insurance policies are construed against the insurer, because the insurer is the party that drafted the policy. *Mutual Fire, Marine & Inland Insurance Co. v. Vollmer*, 306 Md. 243, 251, 508 A.2d 130 (1986); *Josey v. Allstate Insurance Co.*, 252 Md. 274, 279, 250 A.2d 256 (1969); *Lowitt v. Pearsall Chemical Corp. of Maryland*, 242 Md. 245, 259, 219 A.2d 67 (1966); *Bentz v. Mutual Fire, Marine & Inland Insurance Co.*, 83 Md.App. 524, 531, 575 A.2d 795 (1990). [110 Md.App. 136]

In this case, in which the title defects are conceded, we conclude that the Wests do not have to procure a "final determination ... adverse to the title" in order to recover from appellant. We find persuasive the reasoning of the court in *Endruschat v. American Title Insurance Co.*, 377 So.2d 738 (Fla. Dist. Ct. App. 1979). There, the court said that title insurance policy language is "but sophistry" if Paragraph 7(b) is interpreted "to mean that even if the claim is valid, the validity is, at a minimum, postponed if the Company arbitrarily denies coverage and the insured as a result is required to go it alone and file suit to clear or defend the title." *Id.* at 743.

Stewart Title cites Professor Burke's statement that the presence of Paragraph 7(b) is consistent with the view that title insurance indemnifies against loss, but does not constitute a guaranty of title. Burke, *supra*, § 12.43 at 12:49 to 12:50. But our interpretation of Paragraph 7(b) is not inconsistent with the indemnity nature of a title insurance policy. Once advised of a title problem, the insurer still has the option of paying the insured's loss, clearing the defects within a reasonable time, or showing that the defects do not exist. While the insurer may seek to participate in litigation concerning a title that it agrees is defective, it cannot rely on such litigation to avoid or delay compliance with its contractual obligations.

Stewart Title also quotes the following statement from Professor Burke as to why its liability should be delayed:

[T]he delay is consistent with other clauses in the policy in which an insurer is given a range of options in the policy by which he can clear the disputed title. The insurer needs time to pursue these options, both in order to mitigate the actual loss and to give insurer and insured an opportunity to fulfill their duties of cooperation and fair dealing with one another.

Burke, *supra*, § 12.4.3 at 12:50. Professor Burke's arguments may control when the insurer is defending an insured who is subjected to a title challenge, or the insured (or the insurer on his behalf) claims that title is good and pursues an action to establish that fact. Certainly, the insurer needs an opportunity [110 Md.App. 137] to pursue the litigation to its conclusion in order to attempt to establish the insured's title. But in this case, there is no dispute as to the defective

nature of the Wests' title. Moreover, Professor Burke's argument does not address the fact that Paragraph 7(b) requires not simply any "final determination," but instead only a final determination "adverse to the title."

Finally, Stewart Title quotes Professor Burke's justification for Paragraph 7(b) that "the outcome of litigation is often uncertain and damages are speculative until the outcome is clear." Burke, *supra*, § 12.4.3 at 12:50. This may be true, but in the context of this case, it is irrelevant. The outcome of the litigation with respect to whether the Wests' title is defective is not "uncertain," because Stewart Title admits the existence of title defects to the Property.

For these reasons, we conclude that the insurer may not use Paragraph 7(b) as a shield to delay its liability when it admits the defective nature of the insured's title. Instead, Paragraph 7(b) only applies in cases in which either (1) the insured, or the insurer on behalf of the insured, files suit claiming that the insured's title is good, or (2) a third party sues the insured claiming that the insured's title is defective. When, as here, both the insurer and the insured concede the existence of defects in the insured's title, litigation to final judgment is not a condition precedent to the insured's right to recover from the insurer.

Page 965

B.

Stewart Title also argues that the court erred in granting summary judgment because it summarily "resolved genuine disputes of material fact concerning the description of the property conveyed to the Wests and whether that description should or should not have been used in the Policy." Stewart Title bases this argument on the fact that the Wests' deed to the Property erroneously failed to convey either the triangular parcel or the panhandle strip, and the same erroneous Property description was used in the Policy. Therefore, [110 Md.App. 138] Stewart Title contends that title defects in the triangular parcel or panhandle strip are not covered by the Policy.

We agree with appellant that, because the triangular parcel and the panhandle strip were not part of the Property that was insured, a failure of title as to those parcels, or title defects with respect to those parcels, are not insured by the Policy.^[8] See *Canatella v. Davis*, 264 Md. 190, 206, 286 A.2d 122 (1972) (title insurer not liable when the land conveyed to the purchaser was less in amount than that which he had contracted to purchase, where the description of the land in the policy and land conveyed in the deed were the same). In our view, however, the question of whether Stewart Title is liable under the Policy does not necessarily depend on whether Stewart Title insured the triangular parcel or the panhandle strip. This is because the portion of the Property that was insured was entirely landlocked, and the Policy insured against a lack of a right of access. Moreover, property that is completely deprived of a right of access may well be unmarketable, as the court below concluded.

Stewart Title, in a footnote in its reply brief, admits that the Property was landlocked, although it denies that this rendered the Property unmarketable. Yet there are few title problems that are more palpable than complete lack of access to a public road. When property completely lacks such access, it is usually held that its title is unmarketable, apparently on the ground that the purchaser would be subjected to the risk of a lawsuit to establish an easement by necessity in order to gain a right of access. See *Regan v. Lanze*, 40 N.Y.2d 475, 387 N.Y.S.2d 79, 354 N.E.2d 818 (1976). " 'A marketable title [110 Md.App. 139] is one which is free from encumbrances and any reasonable doubt as to its validity and such that a reasonably intelligent person, who is well informed as to the facts and their legal bearing, and who is ready and willing to perform his contract, would be willing to accept in the exercise of ordinary business prudence.' " *Myerberg, Sawyer & Rue v. Agee*, 51 Md.App. 711, 716, 446 A.2d 69 (1982), quoting *Berlin v. Caplan*, 211 Md. 333, 343-44, 127 A.2d 512 (1956). Moreover, the Policy makes the lack of a right of access a separate and independent ground of recovery. Thus, since it is undisputed that the Property was landlocked as of the date the Policy was issued, there was an insured title problem, even if the triangular parcel and panhandle strip were not covered by the Policy.

From its analysis of the Property's title and access problems, the circuit court concluded, as we noted earlier, that the Property was "unmarketable." In concluding that the Property was unmarketable, the court seemed to consider only the Property that was insured by the Policy, i.e., the land that the Wests contracted to purchase, minus the triangular parcel and the panhandle strip. The court reasoned that the Property was unmarketable because: (1) the Wests' Property lacked access to a public road; (2) it was "burdened by two liens"; and (3) it was possibly burdened by an unrecorded right-of-way between Dustin's lot and the Peaches' lot.

The court did not mention the triangular parcel in its "Conclusions." While the court observed that the Wests "may or may not be

Page 966

benefitted by a right of way to Springdale Road," its reference to access to Springdale Road was made in the context of its finding that the Property insured by the Policy lacked access to a public road. [9] Therefore, even though a failure of title as to the triangular parcel or the triangular strip, and title defects with respect to those parcels, are not [110 Md.App. 140] insured by the Policy because the parcels were not included in the Policy's property description, the circuit court correctly considered only the Property that was insured by the Policy.

C.

Nevertheless, we conclude, on another ground, that the court erred in granting summary judgment. As we have observed, the court's decision was based on its conclusion that the Property was unmarketable. We have no quarrel with the circuit court's ability to decide the title's marketability in a summary judgment proceeding, because the marketability of title is a question of

law for the court. *Berlin v. Caplan*, 211 Md. 333, 341, 127 A.2d 512 (1956); *Fraidin v. State*, 85 Md.App. 231, 248, 583 A.2d 1065, cert. denied, 322 Md. 614, 589 A.2d 57 (1991). The issue of marketability, however, is not dispositive of liability in this case. Rather, the issue is whether Stewart Title breached the Policy. As we stated earlier, the mere existence of title defects does not, in and of itself, mean that a title insurer is in breach of the insurance policy, any more than the event of a fire means that the policy insuring against such loss has thereby been breached.

Appellant argues that the court did not determine the question of breach in its opinion granting summary judgment. We agree. In our review of the court's opinion, it appears that the court concluded only that, due to the various title defects, the Property was unmarketable. After concluding that the Property was unmarketable, the court would have had to determine whether there were disputed, material facts concerning Stewart Title's compliance with its contractual obligations. In particular, the court would have had to consider whether Stewart Title paid the Wests' loss or cleared the defects within a reasonable time after receipt of notification of the defects.

At the time of the summary judgment proceeding, Stewart Title conceded that the Property was landlocked. It is also undisputed that the insurer had not paid the Wests' loss and [110 Md.App. 141] that all of the defects had not been cleared. The proper focus, therefore, is whether a reasonable time had elapsed since Stewart Title was informed of the defects.

We recognize that, at the hearing on appellant's motion to alter or amend the judgment, almost two years after the entry of summary judgment, the court commented that Stewart Title had "breached" its contract because it had neither paid the Wests' loss nor cleared the defects after receiving notice of them. But the appropriate time for this analysis was when the court entered summary judgment, not at a hearing on a separate matter almost two years later. Moreover, the question was not simply whether Stewart Title had failed to cure the title defects. Instead, the question is whether, as a matter of law, the insurer failed to do so within a reasonable time after notice. What is a "reasonable time" is ordinarily a question of fact, see *Lynx, Inc. v. Ordnance Products, Inc.*, 273 Md. 1, 13, 327 A.2d 502 (1974), and is usually not a matter that is appropriate for resolution on summary judgment.

Accordingly, we hold that the circuit court erred in granting summary judgment in favor of the Wests. We caution, however, that our opinion should not be construed to suggest that the Wests are not entitled to recover from Stewart Title. On remand, the court should determine whether the Wests' Property, as covered by the Policy, had, at the time the Policy was issued, ^[10] any of the title problems insured by the Policy. While the court may rely on its previous determination

Page 967

that the Property was unmarketable and on Stewart Title's admission that the Property was landlocked, it may also decide to re-examine this issue. If the court finds that there existed

covered defects on the date the Policy was issued, it should then consider (a) whether Stewart Title paid for the Wests' loss within a reasonable time, ^[11] or (b) whether Stewart Title [110 Md.App. 142] cured the problems within a reasonable time after receipt of notice of them. If appellant did neither of those, then it breached the Policy.

Because of our decision to vacate the summary judgment, we decline to consider Stewart Title's various contentions that the circuit court improperly calculated the Wests' damages.

III.

Stewart Title also contends that the judgment against it must be vacated because the Wests failed to join their mortgage lender, Margaretten, which was a necessary party to the circuit court proceedings. We shall address this issue for the guidance of the court on remand.

Rule 2-211(a) governs necessary parties. It provides, in pertinent part:

Except as otherwise provided by law, a person who is subject to service of process shall be joined as a party in the action if in the person's absence

(1) complete relief cannot be accorded among those already parties, or

(2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action or may leave persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations by reason of the person's claimed interest.

Stewart Title bases its argument on the "noncumulative liability" provision contained in Paragraph 9 of the Wests' Policy. According to appellant, any payment to the Wests under their Policy reduces dollar-for-dollar the amount of insurance available to Margaretten under its lender's policy. Therefore, appellant argues that disposition of the current [110 Md.App. 143] action "impair[ed] or impede[d]" Margaretten's "ability to protect a claimed interest relating to the subject of the action," so that Margaretten is a necessary party under Rule 2-211(a).

Paragraph 9 of the Wests' Policy states:

LIABILITY NONCUMULATIVE

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring either (a) a mortgage shown or referred to in Schedule B hereof which is a lien on the estate or interest covered by the policy, or (b) a mortgage hereafter executed by an insured which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy. The Company shall have the option to apply to the payment of any such mortgages any amount that otherwise would be payable hereunder to the insured owner of the estate or

interest covered by this policy and the amount so paid shall be deemed a payment under this policy to said insured owner.

(Emphasis supplied.)

This provision does not reduce the amount of coverage on Margaretten's lender's policy by the amount paid to the Wests under their Policy. Instead, it only reduces the amount of coverage on the Wests' Policy by any amount paid to a mortgagee, such as Margaretten, under a lender's policy. Therefore, on the basis of Paragraph 9 of the Wests' Policy, Margaretten is not a necessary party. Nor has Stewart Title pointed us to any

Page 968

provision in Margaretten's policy that renders it a necessary party. ^[12]

SUMMARY JUDGMENT VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY APPELLEES.

Notes:

[1] As the Wests did not pay for their Property entirely in cash, they obtained a mortgage loan from Margaretten & Co., Inc. ("Margaretten"), in the amount of \$97,500.00. The lender's policy from Stewart Title insured Margaretten in the full amount of its loan.

[2] The parties refer to the Wests' "plat plan," but we have not found the "plat plan" in the record. Moreover, a reference to a "plat plan" has no inherent meaning, in contrast to a recorded subdivision plat.

[3] Ms. West is employed as an executive secretary for the chairman of the board and chief executive officer of Atlantic Federal. She testified that she obtained the loan because of her employment, but nevertheless was required to accept a higher interest rate.

[4] As Stewart Title asserts, and the Wests agree, the court was apparently unaware that these liens had been previously released.

[5] Matthew Smith, a certified real estate appraiser retained by the Wests, testified at the inquisition that the value of the triangular parcel was \$5,000.00. The court did not explain why it awarded a different figure.

[6] During the course of the litigation below, Land Title went into receivership. On May 8, 1995, the circuit court granted the receiver's motion to stay proceedings against Land Title.

[7] At the summary judgment hearing, Stewart Title's counsel stated: "With respect to the right-of-way agreement, there is ... a problem there.... [D]ue to some misdescription in the right-of-way, itself, the property benefits the lot; as you look at the West lot, the property directly to the right of that, which is now owned by the Peaches, I believe."

In addition, in the introduction to the counterclaim and cross-claim that Stewart Title filed on June 15, 1994, it stated, in part:

This is an action by Stewart Title, insurer of title to a parcel of land purchased by the Wests, to reform a right-of-way agreement ... in order to correct a mutual mistake made by the parties to the Right-of-Way Agreement. The Right-of-Way Agreement was intended to provide the Wests with access to their lot from Rowe Road. Due to a misdescription in the Right-of-Way Agreement, however, the Right-of-Way Agreement mistakenly benefits an adjacent parcel of land owned by the Peaches. This complaint is asserted in order to correct the mutual mistake and reform the Right-of-Way Agreement to conform with the intent of parties.

(Emphasis supplied.)

[8] The parties have not apprised us that a Property description was included in a binder issued for settlement. If such a binder was issued, we do not know if the Property description conflicted with the Property description in the Policy. Thus, that issue is not before us. In addition, our discussion does not address whether the parties intended a different Property description in the Policy or whether the Policy should be reformed to rectify a "scrivener's error." Nor do we express any opinion concerning the merits of any claim the Wests may have with respect to the omission of these parcels from the description of Property covered by the Policy.

[9] Some two years after entering summary judgment, the court awarded the Wests \$2,000.00 in damages for the value of the triangular parcel. The court did not explain why it made that award, and we shall not speculate as to its reasons. Moreover, given our decision to vacate summary judgment, we need not consider whether the court erred in making this award.

[10] The Policy insures against defects "as of Date of Policy."

[11] Paragraph 5 of the Policy, which governs the payment and settlement of claims, is silent as to the time by which the insurer must pay a claim. Under Maryland law, when a contract does not contain an express provision as to when performance is due, a reasonable time is implied. *Anne Arundel County v. Crofton Corp.*, 286 Md. 666, 673, 410 A.2d 228 (1980); *Evergreen Amusement Corp. v. Milstead*, 206 Md. 610, 617, 112 A.2d 901 (1955); *USEMCO, Inc. v. Marbro, Inc.*, 60 Md.App. 351, 365, 483 A.2d 88 (1984).

[12] Our discussion, of course, does not prevent Stewart Title from arguing on remand that Margaretten is a necessary party on the basis of a provision in its policy or on any other basis.

Statutes:

RCW 4.28.210 - Appearance, what constitutes

A defendant appears in an action when he or she answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his or her appearance. After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him or her. Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is a special appearance.

RCW 48.11.100 - "Title insurance" defined

"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 64.04.030 - Warranty deed - Form and effect

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

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

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his or her heirs and assigns, with covenants on the part of the grantor:

(1) That at the time of the making and delivery of such deed he or she was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same;

(2) that the same were then free from all encumbrances; and

(3) that he or she warrants to the grantee, his or her heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same, and such

covenants shall be obligatory upon any grantor, his or her heirs and personal representatives, as fully and with like effect as if written at full length in such deed.

Court Rules:

CR 4 - Process

(a) Summons--Issuance

(3) A notice of appearance, if made, shall be in writing, shall be signed by the defendant or his attorney, and shall be served upon the person whose name is signed on the summons. In condemnation cases a notice of appearance only shall be served on the person whose name is signed on the petition.

CR 4.2 - Process - Limited Representation

(b) Providing limited representation of a person under these rules shall not constitute an entry of appearance by the attorney for purposes of CR 5(b) and does not authorize or require the service or delivery of pleadings, papers or other documents upon the attorney under CR 5(b). Representation of the person by the attorney at any proceeding before a judge, magistrate, or other judicial officer on behalf of the person constitutes an entry of appearance pursuant to RCW 4.28.210 and CR 4(a)(3), except to the extent that a limited notice of appearance as provided for under CR 70.1 is filed and served prior to or simultaneous with the actual appearance. The attorney's violation of this Rule may subject the attorney to the sanctions provided in CR 11(a).

CR 11 - Signing and Drafting of Pleadings, Motions, and Legal Memoranda: Sanctions

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the

party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is well grounded in fact,

(2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law,

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

CR 56 - Summary Judgment

(d) **Case Not Fully Adjudicated on Motion.** If on motion under the rule

judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

RAP 5.1 - Review Initiated by Filing Notice of Appeal or Notice for Discretionary Review

(a) Review Initiated by Notice. A party seeking review of a trial court decision reviewable as a matter of right must file a notice of appeal. A party seeking review of a trial court decision subject to discretionary review must file a notice for discretionary review. Each notice must be filed with the trial court within the time provided by rule 5.2.

RAP 10.3

(a) - Brief of Appellant or Petitioner.

The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(4) Assignments of Error.

A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(b) - Brief of Respondent.

The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner. If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.

///

(c) - Reply Brief.

A reply brief should conform with subsections (1), (2), (6), (7), and (8) of section (a) and be limited to a response to the issues in the brief to which the reply brief is directed.

(g) - Special Provision for Assignments of Error.

A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Other Authority:

Washington Pattern Jury Instruction No. 1.01 - Advance Oral Instruction—Beginning of Proceedings

Part 1 - Before Voir Dire of Prospective Jurors:

This is a civil case brought by plaintiff _____ against defendant _____. The plaintiff's lawyer is _____. The defendant's lawyer is _____. This case arises out of _____, which occurred on _____ at _____.

The plaintiff claims _____. [The defendant admits _____.] The defendant denies _____. [The defendant also claims _____.]

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

The evidence in this case may include testimony of witnesses or actual physical objects, such as papers, photographs, or other exhibits. Any exhibits admitted into evidence will go with you to the jury room when you begin your deliberations. When witnesses testify, please listen very carefully. You will need to remember testimony during your deliberations because testimony will rarely, if ever, be repeated for you.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions. Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

In deciding this case, you will be asked to apply a concept called "burden of proof." The phrase "burden of proof" may be unfamiliar to you. Burden of proof refers to the measure or amount of proof required to prove a fact. [The burden of proof in this case is proof by a preponderance of the evidence. Proof by a preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true.] [The burden of proof in this case is proof by . Proof by means .] [Proof by will be defined for you later in the written instructions of the law.]

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from my instructions to the facts and in this way decide the case.

[In this courtroom we record all proceedings with a special [video] [audio] recording system. All of the proceedings are preserved to create a "court record."]

[At this time, I would like to introduce you to the court reporter, [Mr.] [Ms.] , who will record everything that is said or done in this courtroom during this trial. [He] [She] is responsible for recording these proceedings accurately. What [he] [she] transcribes is referred to as the “record.”]

I would [also] like to introduce you to the court clerk, [Mr.] [Ms.] , and the bailiff, [Mr.] [Ms.] . The job of the court clerk is to keep track of all documents and exhibits and to make a record of rulings made during the trial. The bailiff keeps the trial running smoothly. You will be in the care of the bailiff throughout this trial. [Mr.] [Ms.] will help you with any problems you may have related to jury service. Please follow any instructions that [he] [she] gives you.

(The judge explains the procedure for voir dire, and voir dire then begins.)
Part 2— After Voir Dire:

Now I will explain the procedure to be followed during the trial.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The plaintiff will present the testimony of witnesses or other evidence to you. When the plaintiff has finished, the defendant may present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will instruct you on what law applies to this case. I will read the instructions to you out loud. You will have [individual copies of] the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a “verdict.” Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. “No discussion” also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

You will be allowed to take notes during this trial. I am not instructing you

to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the bailiff will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please _____. At the end of the day, the note pads must be left _____. While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors. After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.

There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.

By giving you the opportunity to propose questions, I am not requesting or

suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

Throughout this trial, you must come and go directly from the jury room. Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. I have instructed the lawyers, parties, and witnesses not to talk to you during trial.

It is essential to a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. If you start to hear or read information about anything related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the issues, or the people involved in this case. This means you may not use [Google or other internet search engines] [internet resources] to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people (such as your employer) that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, e-mail, telephone, internet chat, blogs, or social networking web sites.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom, and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive a fair trial.

If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

[Remember that all phones, PDAs, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.] Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation.

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

To accomplish a fair trial takes work, commitment, and cooperation. A fair trial is possible only with a serious and continuous effort by each one of us, working together.

Thank you for your willingness to serve this court and our system of justice.

Rules of Professional Conduct

Rule 1.2 - Scope of Representation and Allocation of Authority Between Client and Lawyer

(f) A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order.