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IN THE SUPREME COURT OF MISSOURI

Appeal No. SC100238

SANFORD SACHTLEBEN and LUCIANN HRUZA,
PLAINTIFFS-APPELLANTS

vs.

ALLIANT NATIONAL TITLE INSURANCE COMPANY,
DEFENDANT-RESPONDENT

Appeal from the Honorable Joseph Dueker, Circuit Judge
Circuit Court of St. Louis County, Missouri
Case No. 21SL-CC02156

SUBSTITUTE BRIEF OF DEFENDANT-RESPONDENT ALLIANT NATIONAL TITLE INSURANCE COMPANY

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STATEMENT OF FACTS

On August 29, 2016, the City of New Melle, Missouri ("City") filed its Petition for Injunction and Fines ("City's Original Petition") against Perry and Joanie Sullivan ("the Sullivans") in St. Charles County, Missouri Case No. 1611-CC00794 ("the Prior Lawsuit"). (D 47 at ¶ 4; D 48). In City's Original Petition, City alleged that the Sullivans owned the realty commonly known as 554 Foristell Road, New Melle, Missouri, 63385 ("the Property"), that the Property sits in an "R-1A Single Family Residential Zone District," that only single-family dwellings are permitted on the Property pursuant to one of City's ordinances, and that another City ordinance prohibits the use of accessory buildings at the Property prior to the construction of a principal building. (D 47 at ¶ 4; D 48 at ¶¶ 4-8).

City also alleged that while the Sullivans had applied for and received a permit to build a single-family dwelling at the Property, applied for and received a permit to build a barn at the Property "to house the building materials, establish electricity and water so as to facilitate the construction of a home at that site," and constructed a "barn-like structure" ("the Barn") at the Property, the Sullivans subsequently asked City to refund the fee that they paid for the permit to build a single-family dwelling at the Property, thus "indicating [the Sullivans] do not wish to build a single family [sic] dwelling." (D 47 at ¶ 4; D 48 at ¶¶ 9-13). Finally, City alleged that an ordinance violation existed by virtue of the Barn existing on the Property without a single-family dwelling ("the Ordinance Violation"). (D 47 at ¶ 4; D 48 at ¶¶ 14-15). City asked the Circuit Court of St. Charles County, Missouri ("the St. Charles Court") to enjoin the Sullivans from entering and using the Barn and order the Barn's demolition. (D 47 at ¶ 4; D 48 at p. 3).

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On September 28, 2016, the Sullivans conveyed the Property to Plaintiffs-Appellants Sanford Sachtleben and Luciann Hruza ("Appellants") via a General Warranty Deed. (D 39 at ¶ 1; D 40). In connection with the transaction between the Sullivans and Appellants, Defendant-Respondent Alliant National Title Insurance Company ("Alliant") issued, via countersignature by Investors Title Company ("Investors"), an Owner's Policy of Title Insurance ("the Policy") to Appellants. (D 39 at ¶ 3; D 41). Schedule A of the Policy defined "Date of Policy" as September 30, 2016. (D 39 at ¶ 8; D 41 at p. 5).

Covered Risk 5 of the Policy insures against losses resulting from violations of laws, ordinances, permits, or governmental regulations that restrict, regulate, prohibit, or relate to the occupancy, use, or enjoyment of land (hereinafter referred to generally as "land use laws"), stating as follows:

> **COVERED RISKS**
>
> **SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, ALLIANT NATIONAL TITLE INSURANCE COMPANY, a Colorado corporation (the "Company") Insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:**
>
> * * *
>
> **5. The violation or enforcement of any law, ordinance, permit, or government regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to**
>
> * * *

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

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

* * *

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

(D 39 at ¶ 9; D 41 at p. 1).

Covered Risk 5 uses a term, "Public Records," that Condition 1(i) of the Policy defines as follows:

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

* * *

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

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(D 39 at ¶ 10; D 41 at p. 2).

As of September 30, 2016, which was the Date of the Policy, St. Charles County, Missouri's land records did not contain any document that stated either that the Ordinance Violation existed or that City intended to enforce the Ordinance Violation against the Property. (D 39 at ¶ 11; D 42 at ¶¶ 7-8; D 47 at ¶ 11).

On October 19, 2016, City filed its First Amended Petition ("City's Amended Petition") in the Prior Lawsuit, naming the Sullivans and Appellants as defendants. (D 39 at ¶ 12; D 43). In City's Amended Petition, City restated its allegations about the Sullivans and the Barn and added an allegation that the Appellants had not applied for a permit to construct a single-family residence at the Property since their acquisition. (D 39 at ¶ 12; D 43 at ¶¶ 6-16). City requested that the Sullivans and Appellants be enjoined from entering and using the Barn and that the Barn be demolished. (D 39 at ¶ 14; D 43 at pp. 3-4). Appellants made demand on Alliant to defend Appellants against City's Amended Petition, and Alliant declined to do so. (D 47 at ¶ 17; D 49 at ¶ 11).

On March 25, 2021, and nearly five years after Appellants purchased the Property from the Sullivans, the St. Charles Court entered its Judgment ("the Prior Judgment") in the Prior Lawsuit. (D 39 at ¶ 15; D 44). The Prior Judgment found that the Ordinance Violation existed. (D 39 at ¶ 15; D 44 at ¶ 32). The Prior Judgment also enjoined Appellants from using or entering the Barn and ordered Appellants to demolish the Barn within 180 days unless they rezoned the Property or commenced construction of a single-family dwelling pursuant to a valid permit. (D 39 at ¶ 15; D 44 at p. 7).

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On May 13, 2021, Appellants sued the Sullivans, City, and others in St. Charles County, Missouri Case No. 2111-CC00419 ("Appellants' First Lawsuit"). In Appellants' First Lawsuit, Appellants sought damages for fraud, negligent misrepresentation, violations of Missouri's Merchandising Practices Act, and civil conspiracy. Minutes later, Appellants sued Alliant, Investors, and others in the case that now pends before this Court, *i.e.*, St. Louis County, Missouri Case No. 21SL-CC02156 ("Appellants' Second Lawsuit"). (D 33). In Appellants' Second Lawsuit, Appellants sought damages for breach of fiduciary duty, violations of Missouri's Merchandising Practices Act, fraud, negligent misrepresentation, civil conspiracy, and breach of contract. (D 33). The only claim that Appellants asserted against Alliant was for breach of contract, which Appellants identified as "Count VI," and which concerned the Policy. (D 33). Specifically, Appellants alleged that Alliant breached the Policy by not defending Appellants in the Prior Lawsuit and not indemnifying Appellants against the Prior Judgment. (D 33 at ¶ 86-88).

On November 17, 2021, Alliant filed its Motion for Summary Judgment on Count VI, Statement of Uncontroverted Material Facts ("Alliant's SUMF"), and Memorandum of Law Supporting Motion for Summary Judgment on Count VI. (D 38; D 39 – D 44; D 45). Alliant's SUMF contained sixteen factual assertions. (D 39). On December 17, 2021, Appellants filed their Response in Opposition to Defendant's Motion for Summary Judgment, along with their Response to Defendant's Statement of Uncontroverted Material Facts and Plaintiffs' Supplemental Statement of Undisputed Material Facts ("Appellants' Response to Alliant's SUMF"). (D 47 – D 53). In Appellants' Response to Alliant's SUMF, Appellants admitted that all sixteen of Alliant's factual assertions were true. (D 47). In that

same document, Appellants identified twenty-five additional factual assertions of their own. (D 47). One of Appellants' additional factual assertions concerned a Commitment for Title Insurance ("the Title Commitment") that purports to bear the signature of an authorized officer or agent of Investors and references the Prior Lawsuit. (D 47 at ¶ 10; D 51 at p. 3). Appellants' Response to Alliant's SUMF did not contain any factual assertions that could authenticate the Title Commitment. (D 47).

On January 18, 2022, Alliant filed its Reply in Support of Motion for Summary Judgment, along with its Response to Plaintiffs' Statement of Additional Facts ("Alliant's Response to Appellants' SOF"). (D 56; D 57). In Alliant's Response to Appellants' SOF, Alliant raised objections to each of Appellants' twenty-five factual assertions. (D 56). With respect to the Title Commitment, Alliant objected to its introduction into the summary judgment record under Rule 74.04 and *Green v. Fotoohighiam*, 606 S.W.3d 113, 117 (Mo. banc 2020). (D 56 at ¶ 10).

On April 7, 2022, Alliant and Appellants presented oral argument to the Honorable Joseph S. Dueker, who then sat in Division 4 of the Circuit Court of St. Louis County, and Judge Dueker took the matter under submission. (D 60). That same day, Judge Dueker severed Appellants' claim for breach of contract against Alliant from the other claims that Appellants asserted in Appellants' Second Lawsuit.

On May 10, 2022, Judge Dueker entered Partial Summary Judgment ("the Summary Judgment Order"). (D 61). The Summary Judgment Order favored Alliant and stated as follows:

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> **Among other things, the undisputed facts show (a) that the insurance contract only covers losses caused by ordinance violations if a notice of those ordinance violations was properly recorded with the [sic] St. Charles County, Missouri's Recorder of Deeds as of the contract's effective date; and (b) that, as of the insurance contract's effective date, a notice concerning the ordinance violations had not been recorded with the [sic] St. Charles County's Recorder of Deeds. Accordingly, as there is no genuine issue of material fact as to whether the insurance contract covers the losses caused by the ordinance violations, Alliant is entitled to judgment as a matter of law on Count VI of Plaintiffs' Petition.**

(D 61 at ¶ 3).

Judge Dueker also stated that the Summary Judgment Order was final and appealable. (D 61 at p. 2).

On May 19, 2022, Appellants filed their Notice of Appeal to the Missouri Court of Appeals – Eastern District ("the Court of Appeals"). (D 62). On July 21, 2022, Judge Dueker entered an Order that consolidated Appellants' Second Lawsuit, less Appellants' claim for breach of contract against Alliant, with Appellants' First Lawsuit and transferred Appellants' Second Lawsuit, less Appellants' claim for breach of contract against Alliant, to the St. Charles Court.

On July 25, 2023, the Court of Appeals issued its Opinion, which reversed the Summary Judgment Order. The Court of Appeals' Opinion contained numerous references to Alliant having actual notice of the Ordinance Violation via the Title Commitment but did not address whether Appellants properly authenticated the Title Commitment or Alliant's objection to the introduction of the Title Commitment into the summary judgment record.

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On August 9, 2023, Alliant filed a motion asking the Court of Appeals to rehear Appellants' appeal or transfer the case to this Court. On August 14, 2023, Alliant filed a supplemental motion based upon its discovery of evidence that, if true, would support a factual finding that Appellants saw and even initialed the Title Commitment, upon which the Court of Appeals appeared to rely heavily. On August 28, 2023, the Court of Appeals denied Alliant's requests.

On September 12, 2023, Alliant filed an Application to order the Court of Appeals to transfer this case to this Court. On October 24, 2023, this Court granted Alliant's request.

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ARGUMENT

I. APPELLANTS' FIRST POINT RELIED ON

A. Standard of Review

Appellants' First Point Relied On challenges the propriety of the Summary Judgment Order, which the Court of Appeals reversed. The Court of Appeals' Opinion does not bind this Court: "The grant of transfer vacates the Court of Appeals' decision; following the transfer grant, the Supreme Court decides the case 'as on original appeal,' without regard to the Court of Appeals' decision." *Sticker v. Ashcroft*, 539 S.W.3d 702, 713 n.9 (Mo. App. W.D. 2017). So, this Court reviews the Summary Judgment Order *de novo*: "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determinate the propriety of sustaining the motion initially." *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). "The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the recorded submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *Id*. at 372. Accordingly, this Court's charge is to determine whether Alliant is entitled to summary judgment.

Rule 74.04 governs motions for summary judgment. (App. 2). The process begins with the movant attempting to establish the *prima facie* grounds for its relief via Rule 74.04(c). *Id*. at 380. Rule 74.04(c)(1) requires a written motion, a statement of uncontroverted material facts organized and presented in a specific format, and a legal memorandum. If that *prima facie* showing demonstrates that the movant would be entitled

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to judgment as a matter of law, the burden shifts to the non-movant. *Id*. at 380. A *defendant* demonstrates its right to judgment as a matter of law by establishing uncontroverted facts that negate any one of the elements that the plaintiff would have to prove at trial. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 381 (Mo. banc 1993).

"[O]nce a movant has met the burden imposed by Rule 74.04(c) by establishing a right to judgment as a matter of law, the non-movant's *only* recourse is to show – by affidavit, depositions, answers to interrogatories, or admissions on file – that one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed." *Id*. at 381. "If the non-movant cannot contradict the showing of the movant, judgment is properly entered against the non-movant because the movant has already established a right to judgment as a matter of law." *Id*. at 381.

When considering whether a fact is genuinely disputed, a court reviews the record in the light most favorable to the non-movant, assumes that all the non-movant's facts are true, and gives the non-movant all the reasonable inferences that the record creates. *Id*. at 372. However, "[o]nly those factual disputes that might affect the outcome of the case under the applicable law are considered 'material' for purposes of summary judgment." *Tonkovich v. Crown Life Ins. Co.*, 165 S.W.3d 210, 214 (Mo. App. E.D. 2005). "For purposes of Rule 74.04, a 'genuine issue' exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts." *ITT*, 854 S.W.2d at 382. "A 'genuine issue' is a dispute that is real, not merely argumentative, imaginary or frivolous." *Id*. at 382. "Where the 'genuine issues' raised by

the non-movant are merely argumentative, imaginary or frivolous, summary judgment is proper." *Id.* at 382.

While determining whether a factual dispute exists is paramount, a court must limit the scope of its search for facts when considering the propriety of summary judgment. "Facts come into a summary judgment record *only* via Rule 74.04(c)'s numbered-paragraphs-and responses framework." *Jones v. Union Pacific Railroad Company*, 508 S.W.3d 159, 161 (Mo. App. S.D. 2016) (emphasis in original); *Green*, 606 S.W.3d at 116. "Courts determine and review summary judgment *based on that Rule 74.04(c) record*, not the whole trial court record." *Jones*, 508 S.W.3d at 161 (emphasis in original); *Green*, 606 S.W.3d at 116. "Affidavits, exhibits, discovery, *etc.* generally play only a secondary role, and then only as cited to support Rule 74.04(c) numbered paragraphs or responses, *since parties cannot rely on facts outside the Rule 74.04(c) record.*" *Jones*, 508 S.W.3d at 161 (emphasis in original); *Green*, 606 S.W.3d at 116.

Additionally, a court must disregard facts for which parties do not supply proper evidentiary support, even if those facts are asserted in Rule 74.04's numbered-paragraphs-and-responses framework. "Only evidence that is admissible at trial can be used to sustain or avoid summary judgment." *First National Bank v. Shirla Howard Revocable Living Trust*, 561 S.W.3d 434, 437 (Mo. App. S.D. 2018) (citing *Jones v. Union Pac. R.R. Co.*, 508 S.W.2d 159, 162 (Mo. App. 2016)). "Documents, to be admissible, must meet authentication and hearsay foundational requirements." *Id.* at 437 (citing *Jones v. Union Pac. R.R. Co.*, 508 S.W.2d 159, 162 (Mo. App. 2016)).

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B. Introduction and Overview

Appellants' only claim against Alliant is that Alliant breached the Policy by not covering losses that Appellants allegedly incurred because of the Ordinance Violation. Appellants bear the burden of proving that the Policy covers those losses. *American States Ins. Co. v. Herman C. Kempker Const. Co., Inc.*, 71 S.W.3d 232, 235 (Mo. App. W.D. 2002) (citation omitted). To prove that the Policy covers those losses, Appellants must establish that (1) Alliant issued and delivered the Policy; (2) Appellants paid the required premium; (3) Appellants incurred a loss because of a peril against which the Policy insured; and (4) Appellants tendered any required notice or proof of loss to Alliant. *Valentine-Radford, Inc. v. Am. Motorists Ins. Co.*, 990 S.W.2d 47, 51 (Mo. App. W.D. 1999). Alliant's Motion for Summary Judgment attacks the third element that Appellants would have to prove, *i.e.*, that the Policy insures against losses resulting from the Ordinance Violation.

Alliant's basis for seeking summary judgment is simple and straightforward: (1) Covered Risk 5 is the insuring provision in the Policy that offers coverage for losses resulting from violations of land use laws such as the Ordinance Violation; (2) Covered Risk 5 only covers losses resulting from the Ordinance Violation *if* as of September 30, 2016, a document describing the Ordinance Violation existed within the body of records with which a purchaser of the Property would have been charged with constructive notice pursuant to a Missouri statute; (3) the only Missouri statutes that charge purchasers with constructive notice of interests in realty are Mo. Rev. Stat. §§ 442.380 and 442.390, which requires recordation with St. Charles County, Missouri's Recorder of Deeds ("the Recorder") to establish constructive notice relative to the Property, and Mo. Rev. Stat. §

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511.350.1, which requires the proper entry and docketing of a judgment by St. Charles County, Missouri's Circuit Clerk ("the Circuit Clerk") to create constructive notice relative to the Property; (4) as of September 30, 2016, no one had recorded with the Recorder a document that described the Ordinance Violation; and (5) as of September 30, 2016, the Circuit Clerk had not docketed a judgment describing the Ordinance Violation. Based on these facts, which Alliant established via Alliant's SUMF, Appellants could never prove that the Policy insures against losses resulting from the Ordinance Violation. Accordingly, these facts also demonstrate Alliant's right to judgment as a matter of law.

So, Appellants' only means of avoiding summary judgment is to introduce affidavits, depositions, answers to interrogatories, or admissions that demonstrate that one of the material facts on which Alliant seeks summary judgment is genuinely disputed. *ITT*, 854 S.W.2d at 381. Specifically, Appellants must show that two plausible yet contradictory accounts of material facts exist. *Id*. at 382. Appellants cannot rely on disputes that are argumentative, imaginary, or frivolous. *Id*. at 382.

In their First Point Relied On, Appellants contend that a genuine dispute exists about whether Covered Risk 5 only covers losses resulting from violations of land use laws if as of September 30, 2016, *constructive* notice of such violations existed, *i.e.*, if a document describing such violations had been recorded with Recorder or the Circuit Clerk had docketed a judgment describing such violations. Specifically, Appellants suggest that Covered Risk 5 can be construed as also covering losses that stem from violations of land use laws of which Alliant had *actual* notice as of September 30, 2016. Therefore, Appellants contend, the Title Commitment triggered coverage under Covered Risk 5.

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Appellants offer four arguments in support of their First Point Relied On. First, Appellants argue that two words within the Policy's definition of "Public Records" – the words "without Knowledge" – should be isolated to create an insuring provision. This argument fails because courts must interpret all of an insurance contract's provisions together rather than in isolation, and when the words "without Knowledge" are reunited with their context, they cannot be construed reasonably as granting coverage for all matters of which Alliant had actual notice.

Second, Appellants argue that because constructive notice and actual notice are both types of notice and considered alternatively when resolving competing claims to realty, Alliant's actual notice of the Ordinance Violation would be sufficient to invoke Covered Risk 5's coverage. This argument fails because courts must enforce contracts as written, and in this case, the Policy's grant of coverage only concerns a specific form of notice – *constructive* notice arising under Mo. Rev. Stat. §§ 442.380, 442.390, and 511.350.1.

Third, Appellants argue that Covered Risk 5 is ambiguous and must be construed against Alliant. This argument fails because Appellants do not explain how Covered Risk 5 could be reasonably construed differently, and courts cannot use inventive powers to manufacture ambiguities and create obligations for which the parties did not contract. Fourth, Appellants argue that Alliant's construction of Covered Risk 5 violates public policy. This argument fails because Appellants fail to identify any statutory-based policies that Alliant's construction contravenes.

"As with any other contract, the interpretation of an insurance is generally a question of law, particularly in reference to the question of coverage." *D.R. Sherry Const., Ltd. V.*

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American Family Mut. Ins. Co., 316 S.W.3d 899, 902 (Mo. banc 2010). As written, Covered Risk 5 and Condition 1(i), which defines the term "Public Records," only grant coverage for losses resulting from the Ordinance Violation *if*, as of September 30, 2016, a document describing the Ordinance Violation had been recorded with the Recorder or the Circuit Clerk had docketed a judgment describing the Ordinance Violation. Appellants' First Point Relied On fails to demonstrate any basis for construing Covered Risk 5 otherwise. Therefore, Appellants' First Point Relied On fails.

C. Covered Risk 5 contains a condition precedent to Alliant's obligations to defend and indemnify Appellants against the Ordinance Violation.

"A condition precedent is a condition that must be fulfilled before the duty to perform an existing contract arises." *Vantage Credit Union v. Chisholm*, 447 S.W.3d 740, 746 (Mo. App. E.D. 2014). "Conditions precedent are usually created by such phrases as 'on condition,' 'provided that,' 'so that,' and the like, although such expressions are not necessary if the contract is of such a nature to show that parties intended to provide for a condition precedent." *Id*. at 746.

Covered Risk 5 states as follows (with added emphasis):

> **COVERED RISKS**
>
> **SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, ALLIANT NATIONAL TITLE INSURANCE COMPANY, a Colorado corporation (the "Company") Insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:**

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* * *

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

* * *

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

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

* * *

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

(D 39 at ¶ 9; D 41 at p. 1).

Covered Risk 5 uses a term, "Public Records," which Condition 1(i) defines as follows:

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

* * *

(i) "Public Records": Records established under statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to

> **Covered Risk 5(d), 'Public Records' shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.**
>
> * * *

(D 39 at ¶ 10; D 41 at p. 2).

Covered Risk 5 expressly states that Appellants only have coverage for violations of land use laws *if* a notice that describes the violations has been recorded in "the Public Records." The condition precedent to Appellants' coverage and Alliant's obligations is the recordation of a notice in the "Public Records." The word "if" plainly and unambiguously communicates that coverage for violations of land use laws does not arise unless that condition precedent is satisfied.

D. Covered Risk 5's condition precedent can only be satisfied by a document being recorded with the Recorder or the Circuit Clerk docketing a judgment.

Under Covered Risk 5 and Condition 1(i), losses resulting from the Ordinance Violation are only covered *if* as of September 30, 2016, a document describing the Ordinance Violation existed within the body of records of which a purchaser of the Property would have been charged with *constructive* notice pursuant to a Missouri statute. Constructive notice is a legal fiction. *White v. CitiMortgage, Inc.*, 864 F.3d 924 (8th Cir. 2017). It arises from a parcel of land's recorded chain of title: "It is well-settled law in this state that a purchaser of land is charged with constructive notice of everything contained or recited in the recorded deeds which lie in and constitute the chain of title under which

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he holds." *Black v. Banks*, 327 Mo. 341, 349, 37 S.W.2d 594, 598 (1931) (citing *Simms v. Thompson*, 291 Mo. Loc. Cit. 520, 236 S.W. 876, 882 (internal quotations omitted).

Missouri's legislature has statutorily codified this rule via Mo. Rev. Stat. §§ 442.380 and 442.390. Absent compliance with Mo. Rev. Stat. §§ 442.380 and 442.390, "there is no notice to subsequent purchasers and mortgagees." *State ex rel. and to Use of Crites v. Short*, 351 Mo. 1013, 1016, 174 S.W.2d 821, 822 (1943). Mo. Rev. Stat. § 442.380, which is titled, "Instruments to be recorded", states as follows:

> **Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner herein prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated.**

(App 12).

Mo. Rev. Stat. § 442.390, which is titled, "Notice imparted from time of filing for record", states as follows:

> **Every such instrument in writing, certified and recorded in the manner herein prescribed, shall, from time of filing the same with the recorder for record, impart notice to all persons of the contents thereof and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice.**

(App 14).

One additional source of constructive notice exists within Missouri's statutes. Mo. Rev. Stat. § 511.350.1 states as follows:

> **Judgments and decrees entered by the supreme court, by an United States district or circuit court held within this state, by any district of the court of appeals, by any circuit court and any probate division of the circuit court, except**

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> **judgments and decrees entered by associate, small claims and municipal divisions of the circuit courts, shall be liens on the real estate of the person against whom they are entered, situate in the county for which or in which the court is held.**

(App 16). Pursuant to Mo. Rev. Stat. § 511.350.1, purchasers of realty are also charged with constructive notice of properly entered and docketed court judgments. *Knutson v. Christeson*, 684 S.W.2d 549, 552 (Mo. App. S.D. 1984).

These are the only means by which to charge a purchaser of realty with constructive notice under Missouri's statutes. A document must be recorded with the Recorder of Deeds for the county in which the realty is located, or a Circuit Clerk must enter a court's judgment in the county where the realty is located. Otherwise, a purchaser of realty cannot be charged with constructive notice.

At least three courts have construed Covered Risk 5 and concluded what Alliant argues above, which is that Covered Risk 5's coverage is conditioned upon the existence of a document that would vest a purchaser of realty with constructive notice. One of those cases was *Dave Robbins Const., LLC v. First American Title Co.*, 158 Wash. App. 895 (2010). There, five parcels of realty existed within a designated historical district. *Id*. At *1. Dave Robbins Construction, LLC ("DRC") purchased the lots. *Id*. At 898. First American Title Insurance Company ("First American") issued policies of title insurance to DRC. *Id*. At 898. Subsequently, DRC applied for building permits and began making improvements. *Id*. At 898.

Then, DRC received stop-work orders concerning three of the lots, along with requests that it obtain archaeological surveys because the lots fell within the historical

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district's designation. *Id*. At 898. DRC proceeded with the surveys, one of which identified archaeological artifacts that further delayed construction. *Id*. At 898. DRC sued First American based upon the historical designation. *Id*. At 898. First American moved to dismiss DRC's lawsuit for failure to state a claim upon which relief could be granted. *Id*. At 898. The trial court granted First American's motion, and DRC appealed. *Id.* At 898.

The appeals court affirmed the trial court's decision not to allow DRC's lawsuit to proceed beyond the pleading stage. The appeals court focused on the fact that Covered Risk 5 only applies when a recorded notice exists: "Indeed, by the plain language of the policy, coverage exists for damage from regulation enforcement only 'if a notice, describing any part of the Land, is recorded in the Public Records setting forth the … intention to enforce[.]'" *Id.* At 904. Because no one had recorded a notice setting forth an intention to enforce the historical designation, the appeals court affirmed the trial court's dismissal of DRC's lawsuit.

First American Title Ins. Co. v. McGonigle, CIV.A. 10-1273-MLB, 2013 WL 1087353 (D. Kan. Mar 14, 2013) (unpublished), is another case that concerned Covered Risk 5. There, the prior owners ("the Riches") and the City of Hutchinson, Kansas ("City") entered into an agreement concerning their respective duties relative to a dam that existed on the subject realty. *Id*. At *1. Subsequently, City informed the Riches of City's position that the Riches had violated the agreement. *Id*. At *1. The Riches did not address City's violations and instead sold the realty to the insureds ("the McGonigles"). *Id*. At *1. First American issued a policy of title insurance to the McGonigles, and that policy did

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specifically identify the agreement between the Riches and City as an exception to coverage. *Id*. At *1.

City subsequently informed the McGonigles of the violations, which would cost $850,000.00 to repair. *Id*. At *1. The McGonigles tendered a claim to First American, which denied that claim and sought a declaratory judgment that it had no duty to defend or indemnify. *Id.* At *1. First American moved for summary judgment, arguing that Covered Risk 5 did not apply because the violations concerning the dam were not recorded. *Id*. At *4. The court agreed with First American: "First American is correct. The policy clearly states that a notice must be recorded in the public records for the risk to be covered under the policy. Therefore, First American's motion for summary judgment on this issue is granted." *Id*. At 4.

Just last year, another court construed Covered Risk 5 in *Fawn Second Avenue LLC v. First American Title Insurance Company*, 610 F. Supp. 3d 621, 631 (S. D. N.Y. 2022). There, the New York City Landmarks Preservation Commission ("LPC") designated the subject realty as part of the East Village / Lower East Side Historic District. *Id*. At 625. Fawn Second Avenue LLC ("Fawn") acquired the realty after LPC made its designation. *Id*. At 625. First American issued a title policy in favor of Fawn. *Id*. At 625-626. Subsequently, Fawn began making various improvements to the realty. *Id*. At 625. LPC demanded that Fawn cease its improvements. *Id*. At 625. Fawn tendered a claim to First American, which denied Fawn's claim. *Id*. At 625. Fawn filed suit, attempting to assert claims against First American for declaratory relief and breach of contract. *Id*. At 628.

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First American asked the Court to dismiss Fawn's claims, arguing that "the Property's landmark designation does not appear in the relevant Public Records concerning the Property's chain of title, meaning that Covered Risk 5 cannot entitle [Fawn] to indemnification for losses based on the LPC's unrecorded exercise of governmental power." *Id*. At 631. The court agreed with First American's interpretation of Covered Risk 5: ". . . [First American] offers *the only plausible reading* of Covered Risk 5, whereas [Fawn's] proffered interpretation is untethered from the Policy's language and imposes obligations on [First American] for which the parties did not contract." *Id*. At 631 (emphasis added). Accordingly, the court ruled in First American's favor and dismissed Fawn's lawsuit, stating as follows: "Therefore, by its plain terms, Covered Risk 5 is triggered only insofar as a notice of a legal violation or intent to enforce a law is recorded in the real property records maintained by the Office of the City Register." *Id*. At 632.

Given Covered Risk 5 and Condition 1(i)'s language, the requirements that Mo. Rev. Stat. §§ 442.380, 442.390, and 511.350.1 establish for creating constructive notice, and the holdings in the three referenced cases, the condition precedent that Covered Risk 5 contains can only be satisfied by recording a document with the Recorder or the Circuit Clerk docketing a judgment.

E. Appellants must prove that as of September 30, 2016, a document describing the Ordinance Violation had been recorded with the Recorder or the Circuit Clerk had docketed a judgment describing the Ordinance Violation.

As Alliant previously stated, Appellants must prove that the Policy insures against losses that result from the Ordinance Violation. *Valentine-Radford, Inc.*, 990 S.W.2d at 51.

To do so, and as discussed in § I-E, *supra*, Appellants must prove, among other things, that as of September 30, 2016, a document describing the Ordinance Violation had been recorded with the Recorder or the Circuit Clerk had docketed a judgment describing the Ordinance Violation.

F. **Appellants have admitted that Covered Risk 5's condition precedent has not been satisfied.**

Appellants admit that as of September 30, 2016, the Recorder's records did not include a document that described or referenced the Ordinance Violation. (D 39 at ¶ 11; D 42 at ¶ 7; D 47 at ¶ 11). Appellants also admit that the Prior Judgment was not entered until March 25, 2021. (D 39 at ¶ 15; D 44; D 47 at ¶ 15). These admitted facts demonstrate Alliant's right to judgment as a matter of law. Given these facts, Appellants could never prove that the Policy insures against losses arising from the Ordinance Violation. Appellants' inability to prove that the Policy insures against losses that result from the Ordinance Violation prohibits them from ever prevailing against Alliant on their claim that Alliant breached the Policy.

G. **Appellants attempt to stave off summary judgment by offering four arguments why Covered Risk 5 could be construed as granting coverage for losses resulting from violations of land use laws of which Alliant had actual notice.**

1. **First, Appellants argue that because Condition 1(i) contains the words "without Knowledge," Covered Risk 5, which uses the term that Condition 1(i) defines, could be construed as granting coverage for all matters of which Alliant *does* have knowledge.**

Condition 1(i), which supplies the definition of "Public Records," states as follows (with emphasis added):

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CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

* * *

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

* * *

(D 39 at ¶ 10; D 41 at p.2).

Condition 1(i) references another term, "Knowledge," which Condition 1(f) defines as follows:

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

* * *

(f) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that

> **impart constructive notice of matters affecting the Title.**

* * *

(D 41 at p. 2).

Courts must interpret all of an insurance contract's provisions together rather than in isolation. *Owners Insurance Company v. Craig*, 514 S.W.3d 614, 617 (Mo. Banc 2017) (citing *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. Banc 2007). Appellants' argument violates this rule by isolating two words, stripping them of their context within the Policy, and ascribing a new, self-serving meaning to them. Under existing Missouri law, this Court must free "without Knowledge" from the isolation that Appellants impose and consider those words in the context that they appear in the Policy.

Once the words "without Knowledge" are considered in their context, it becomes clear that Appellants' argument fails. The Policy defines "Public Records" as those that are "established under statutes . . . for the purpose of imparting constructive notice of matters relating to real property *to purchasers for value without Knowledge*." (D 41 at p.2) (emphasis added). The words "for value" and "without Knowledge" modify the word "purchaser" and describe the type of purchaser who will be charged with constructive notice. Stated another way, "Public Records" are those records that charge purchasers of real estate with constructive notice of matters affecting real estate even though the purchasers paid value and had no actual knowledge of those matters. Undoubtedly, Alliant was never a *purchaser* of the Property, and the words "without Knowledge" cannot sensibly be construed as referring to it or constituting a grant of insurance coverage.

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2. Second, Appellants argue that because constructive notice and actual notice are both types of notice and are considered alternatively when comparing competing interests to realty, Alliant's actual notice of the Ordinance Violation would be sufficient to trigger Covered Risk 5.

a. Actual notice is not the type of notice that triggers coverage under Covered Risk 5.

"Notice can be either constructive notice under the recording laws or actual notice." *Casady v. Fehring*, 360 S.W.3d 904, 908 (Mo. App. S.D. 2012) (citing *White v. Buntin,* 77 S.W.3d 702, 705 (Mo. App. E.D.2002) (emphasis added). That said, constructive notice and actual notice are two separate and distinct concepts. Constructive notice is a legal fiction. *White v. CitiMortgage, Inc.*, 864 F.3d 924 (8th Cir. 2017). It arises from land's recorded chain of title. *Black v. Banks*, 327 Mo. 341, 349, 37 S.W.2d 594, 598 (1931) (citing *Simms v. Thompson*, 291 Mo. Loc. Cit. 520, 236 S.W. 876, 882)). Conversely, actual notice exists "where the person either knows of the fact's existence or is conscious of having the means of knowing it, even though such means may not be used." *Weidner v. Anderson*, 174 S.W.3d 672, 679 (Mo. App. S.D. 2005) (citing *Walkenhorst-Newman v. Montgomery Elevator*, 37 S.W.2d 283, 286[6] (Mo. App. 2000)).

If Alliant had *acquired* title to the Property and claimed to have done so free and clear of some interest that affects *title*,[1] then either its constructive notice or its actual notice would be relevant. But Alliant never acquired or purported to acquire any interest in the

[1] In response to Appellants' Third, Fourth, Fifth, and Sixth Points Relied On, Alliant explains that the Ordinance Violation did not affect Appellants' *title* to the Property.

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Property and does not assert any claims in and to the Property. Notice is only relevant in this case because the Policy affords coverage *if* a specific form of notice exists – *constructive* notice arising under Mo. Rev. Stat. §§ 442. 380, 442.390, and 511.350.1, which require the recordation of a document with the Recorder or the Circuit Clerk docketing a judgment.

Insurance policies "must be enforced as written when their language is clear and unambiguous." *Seaton v. Shelter Mutual Insurance Company*, 574 S.W.3d 245, 247 (citing *Doe Run Res. Corp. v. Am. Guar. & Liab. Ins.*, 531 S.W.3d 508, 511 (Mo. Banc 2017)). Covered Risk 5 does not grant coverage for losses resulting from violations of land use laws of which Alliant or anyone else has "notice," *generally*. It only affords coverage with respect to violations of which a *specific* type of notice exists – *constructive* notice arising under Mo. Rev. Stat. §§ 442. 380, 442.390, and 511.350.1. Longstanding law prohibits this Court from simply substituting actual notice into Covered Risk 5 in place of constructive notice to create the coverage that Appellants desire.

b. In any event, Appellants cannot rely on the Title Commitment to prove actual notice.

Appellants' First Point Relied On is an attempt to bring relevance to the Title Commitment. The Title Commitment is dated September 9, 2016, and references the Prior Lawsuit, which concerned the Ordinance Violation. Appellants want to rely on the Title Commitment, but to do so, they must prove that Covered Risk 5 covers losses resulting from violations of land use laws of which Alliant had actual notice. However, Appellants

have not taken the steps necessary to place the Title Commitment before the Court's consideration.

In Paragraph 10 of the additional facts that Appellants included in Appellants' Response to Alliant's SUMF, Appellants alleged as follows: "In or about September 2016, Alliant issued the Title Commitment, which disclosed the New Melle Lawsuit said Lawsuit [sic] as a possible exception from any insurance coverage regarding the Property and specifically states 'the outcome of which [the New Melle Lawsuit] may affect the subject' Property [sic]." (D 47 at p. 6, ¶ 10). The evidentiary support that Appellants offered for this fact was a purported copy of the Title Commitment, which Appellants offered without any authentication of any kind. (D 51). The Title Commitment would not be admissible absent authentication. Therefore, Paragraph 10 of Appellants' additional facts and Title Commitment are not part of the summary judgment record, and this Court cannot consider either of them. *First National Bank*, 561 S.W.3d at 437.

In *First National Bank*, a bank seeking summary judgment asserted that an individual had transferred ownership of a bank account from herself to her trust. *Id*. At 437. The bank supported this assertion with printouts of its computer records, account statements that it issued, and copies of checks that the individual signed. *Id*. At 437. All those documents were deemed inadmissible hearsay because the summary judgment record did not include evidence of authentication, ***i.e.***, a business records affidavit or deposition testimony. *Id*. At 437. Based on *First National Bank*, this Court cannot consider documents that lack authentication, including the Title Commitment.

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3. <u>Third, Appellants complain that the Policy does not specifically except coverage for losses that stem from violations of land use laws of which Alliant has actual notice, so Covered Risk 5 is ambiguous and must be construed against Alliant.</u>

Appellants cite and discuss a variety of cases in which courts considered whether exceptions and exclusions within insurance contracts were ambiguous. Appellants accurately recite that insurers bear the burden of proving that exceptions and exclusions apply to bar their insureds' claims. What appears to escape Appellants is that Covered Risk 5 is an insuring provision, and they bear the burden of proving that Covered Risk 5 covers the Ordinance Violation. *Fischer v. First American Title Ins. Co.*, 388 S.W.3d 181, 187 (Mo. App. W.D. 2012) (reciting that insureds bear the burden of establishing coverage); *D.R. Sherry Const., Ltd. V. American Family Mut. Ins. Co.*, 316 S.W.3d 899, 904 (Mo. Banc 2010). Accordingly, all the cases that Appellants cite are inapplicable, and Appellants should not be heard to argue that Alliant bears the burden of proof with respect to Covered Risk 5.

"Whether an insurance policy is ambiguous is a question of law." *Martin v. U.S. Fidelity and Guar. Co.*, 996 S.W.2d 506, 508 (Mo. Banc 1999) (citing *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 813 (Mo. Banc 1997)). "An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy." Language is ambiguous if it is reasonably open to different constructions." *Id*. At 508 (quoting *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 813-814 (Mo. Banc 1997)). When policy language is ambiguous, it must be construed against the insurer." *Id*. At 508 (quoting *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. Banc 1997)).

However, "[a] court may not use its inventive powers to create an ambiguity where none exists or rewrite a policy to provide coverage for which the parties never contracted, absent a statute or public policy requiring coverage." *Lang v. Nationwide Mut. Fire Ins. Co.*, 970 S.W.2d 828, 830 (Mo. App. E.D. 1998) (citing *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 382 (Mo. Banc 1991)). Likewise, a court cannot create an ambiguity "to enforce a particular construction which it might feel is more appropriate." *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 382 (Mo. Banc 1991).

Appellants do not suggest that Covered Risk 5 could be reasonably read and construed differently. Therefore, they have not articulated any basis on which this Court could deem Covered Risk 5 ambiguous. And this Court cannot create an ambiguity to rewrite Covered Risk 5 in a manner that Appellants desire or which this Court simply finds more appropriate.

4. Fourth, Appellants claim that their construction would favor three public policies, to-wit: insureds would have assurances that they are paying for "actual protection," insureds would be vested with confidence, and title insurers would be forced to be "more transparent."

Courts do not have to enforce contractual provisions "that are contrary to the public policy of Missouri *as expressed by the legislature*." *First Nat. Ins. Co. of Am. V. Clark*, 899 S.W.2d 520, 521 (Mo. 1995) (emphasis added). Appellants have not made any effort to connect the three public policies on which they rely to any legislative product. Likewise, Appellants have not made any effort to explain how Alliant's construction of Covered Risk 5 is contrary to any legislation that Missouri has adopted. As such, Appellants' argument fails.

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While baselessly arguing that public policy favors them, Appellants mischaracterize the arguments that Alliant made when asking this Court to transfer this case from the Court of Appeals. Alliant did not allege that the Policy is infallible because ALTA created it or that the Court of Appeals' Opinion would negatively affect insured policyholders. Instead, Alliant stated that the Policy is a form document that has been adopted for use in Missouri, that it has been issued by and between countless numbers of Missouri landowners and Missouri-licensed title insurers, and therefore, the construction of Covered Risk 5 affects more than just Appellants and Alliant. These facts demonstrate that Covered Risk 5's construction is a matter of general interest or importance, which is one of the grounds on which Alliant requested that this Court transfer this case.

H. Appellants have failed to establish that a genuine issue exists about whether actual notice triggers Covered Risk 5 and thereby failed to rebut Alliant's *prima facie* claim for summary judgment.

Under Covered Risk 5's plain language, coverage only exists for losses that result from violations of land use laws *if* notice of those violations exists in the "Public Records," which Condition 1(i) plainly defines as those that create constructive notice, as of the Date of Policy, pursuant to a Missouri statute. The only options for creating constructive notice in Missouri are recording a document with a Recorder of Deeds or having a Circuit Clerk docket a judgment. Appellants agree that neither of those options has happened, which means that Covered Risk 5 does not insure against losses resulting from the Ordinance Violation.

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II. APPELLANTS' SECOND POINT RELIED ON

A. Standard of Review

Appellants' Second Point Relied On also challenges the propriety of the Summary Judgment Order. As Alliant explained in § I-A, *supra*, this Court reviews the Summary Judgment Order's propriety *de novo*. Alliant adopts and incorporates by reference § I-A as and for the remainder of § II-A.

B. Introduction and Overview

In their Second Point Relied On, Appellants again contend that a genuine dispute exists about whether Covered Risk 5 only covers losses resulting from violations of land use laws *if* as of September 30, 2016, a document describing such violations had been recorded with the Recorder or the Circuit Clerk had docketed a judgment describing such violations. This time, Appellants ignore Condition 1(i)'s definition of "Public Records" and suggest that Covered Risk 5 can be construed as insuring against losses that stem violations of land use laws that are described in *any* court filing, because *all* court filings are "public records." Therefore, Appellants contend, the pendency of City's Original Petition triggered coverage under Covered Risk 5.

Appellants offer four arguments why the term "Public Records" could be construed as including *all* court filings. First, Appellants argue that all court filings are "public records" pursuant to "the common law right of public access to court and other public records" and Mo. Rev. Stat. § 109.180, which characterizes "all state, county and municipal records kept pursuant to statute or ordinance" as "public records." Second, Appellants argue that Mo. Rev. Stat. § 511.350.1 charges purchasers with constructive notice of all

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court filings. Third, Appellants argue that Condition 1(i)'s definition of "Public Records" is ambiguous and must be construed to include all public records. Fourth, Appellants argue that City's Amended Petition must be a "public record" or else Investors would not have found City's Amended Petition and referenced it in the Title Commitment (which, again, Appellants did not properly or successfully enter into the summary judgment record).

"As with any other contract, the interpretation of an insurance is generally a question of law, particularly in reference to the question of coverage." *D.R. Sherry Const., Ltd. V. American Family Mut. Ins. Co.*, 316 S.W.3d 899, 902 (Mo. Banc 2010). As defined by Condition 1(i), "Public Records" are those that operate to charge a purchaser with constructive knowledge pursuant to a Missouri statute. Appellants' Second Point Relied On fails to demonstrate any basis for construing Condition 1(i) otherwise. As such, Appellants' Second Point Relied On fails.

C. Condition 1(i) defines the term "Public Records," and that definition controls.

"If a term within an insurance policy is clearly defined, the contract definition controls." *State Farm Mut. Auto Ins. Co. v. Ballmer*, 899 S.W.2d 523, 525 (Mo. Banc 1995) (citations omitted). To recap, Covered Risk 5 states as follows (with added emphasis):

COVERED RISKS

> **SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, ALLIANT NATIONAL TITLE INSURANCE COMPANY, a Colorado corporation (the "Company") Insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not**

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exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

* * *

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

* * *

IV. the occupancy, use, or enjoyment of the Land; [or]

V. the character, dimensions, or location of any improvement erected on the Land;

* * *

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

(D 39 at ¶ 9; D 41 at p. 1).

And again, Condition 1(i) defines "Public Records" as follows (with added emphasis):

__CONDITIONS__

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

* * *

(i) "Public Records": Records *__established__* *__under__* *__statutes__* at Date of Policy *__for__* *__the__*

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

* * *

(D 41 at p. 2).

The Policy plainly and unambiguously defines "Public Records," and that definition controls. *State Farm Mut. Auto Ins. Co.*, 899 S.W.2d at 525. The only applicable records are those of which future purchasers are deemed to have constructive knowledge pursuant to a Missouri statute.

D. The only "Public Records" that fall within Covered Risk 5's coverage are the documents that are recorded with the Recorder and the judgments that the Circuit Clerk dockets.

As Alliant explained in § I-D, *supra*, the only means by which to charge a purchaser of realty with constructive notice under Missouri law are by the Recorder of Deeds recording a document or the Circuit Clerk docketing a judgment. In pursuit of brevity, Alliant adopts and incorporates by reference § I-D, *supra*, as and for the balance of § II-D and as if Alliant and fully restated § I-D herein.

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E. Appellants must prove that as of September 30, 2016, a document describing the Ordinance Violation had been recorded with the Recorder or the Circuit Clerk had docketed a judgment describing the Ordinance Violation.

As Alliant explained in § I-E, *supra*, Appellants bear the burden of proving that Covered Risk 5 covers the Ordinance Violation and would have to prove that as of September 30, 2016, a document describing the Ordinance Violation had been recorded with the Recorder or the Circuit Clerk had docketed a judgment describing the Ordinance Violation. Alliant adopts and incorporates by reference § I-E, *supra*, as and for the balance of § II-E and as if Alliant and fully restated § I-E herein.

F. Appellants have admitted that as of September 30, 2016, a document describing the Ordinance Violation had not been recorded with the Recorder and the Circuit Clerk had not docketed a judgment describing the Ordinance Violation.

As Alliant explained in § I-F, *supra*, Appellants have admitted that as of September 30, 2016, a document describing the Ordinance Violation had not been recorded with the Recorder and the Circuit Clerk had not docketed a judgment describing the Ordinance Violation. (D 47 at ¶¶ 11, 15). Alliant adopts and incorporates by reference § I-F, *supra*, as and for the balance of § II-F and as if Alliant and fully restated § I-F herein. These facts demonstrate Alliant's right to judgment as a matter of law. Considering these facts, Appellants could never prove that Covered Risk 5 covers the Ordinance Violation, and Appellants' inability to prove that Covered Risk 5 covers the Ordinance Violation prohibits them from ever prevailing against Alliant on their claim that Alliant breached the Policy.

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G. Appellants attempt to avoid summary judgment by offering four arguments why Covered Risk 5 could be construed as including *all* court filings.

1. First, Appellants argue that all court filings are "public records" pursuant to "the common law right of public access to court and other public records" and Mo. Rev. Stat. § 109.180.

"If a term within an insurance policy is clearly defined, the contract definition controls." *State Farm Mut. Auto Ins. Co.*, 899 S.W.2d at 525. Condition 1(i) clearly defines "Public Records" as those that operate to charge a purchaser with constructive knowledge pursuant to a Missouri statute. So, for documents governed by the "common law right of public access" and Mo. Rev. Stat. § 109.180 to constitute "Public Records" under Condition 1(i), there must exist a Missouri statute that charges future purchasers of realty with constructive notice of those records. Appellants do not cite any such statutory authority, and none appears to exist. That ends the conversation of whether City's Original Petition is a "Public Record" based upon the "common law right of public access" and Mo. Rev. Stat. § 109.180.

2. Second, Appellants argue that Mo. Rev. Stat. § 511.350 operates to create constructive notice of *all* court filings.

To recap, Mo. Rev. Stat. § 511.350.1 states as follows (with added emphasis):

> ***Judgments*** **and** ***decrees*** **entered by the supreme court, by any United States district or circuit court held within this state, by any district of the court of appeals, by any circuit court and any probate division of the circuit court, except judgments and decrees entered by associate, small claims and municipal divisions of the circuit courts, shall be liens on the real estate of the person against whom they are entered, situate in the county for which or in which the court is held.**

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The Court of Appeals for Missouri's Southern District interpreted Mo. Rev. Stat. § 511.350.1 in *Knutson v. Christeson*, 684 S.W.2d 549, 552 (Mo. App. S.D. 1984), stating as follows (with added emphasis): "The recording of a ***judgment***, properly entered and docketed, is notice of what it contains or recites, as well as such facts as might be fairly inferred from its recital, and such record carries with it constructive notice of the facts therein expressly recited as well as such facts as might be fairly inferred from its recitals." Based upon Mo. Rev. Stat. § 511.350.1's plain language and *Knutson*, constructive notice only arises once a court enters a judgment or decree. Any suggestion that Mo. Rev. Stat. § 511.350.1 and *Knutson* create constructive notice of *all* court filings is simply baseless.

3. Third, Appellants argue that the Policy's definition of "Public Records" is ambiguous because it does not expressly reference Mo. Rev. Stat. § 442.390, on which Alliant relies to require recordation with the Recorder.

"[S]tatutes in force at the time and place of making a contract which affect its validity, performance, discharge or enforcement enter into and form a part of it as if they were expressly referred to or incorporated within the terms of the contract." *Heiden v. General Motors Corporation*, 567 S.W.2d 401, 403 (Mo. App. 1978). In *Heiden*, the parties signed a settlement agreement that required the parties to dismiss their claims "at defendant's costs." *Id*. at 402. Subsequently, a disagreement arose as to whether "costs" included the full amount of deposition expenses that the plaintiffs had incurred or only the amount of deposition expenses that are recoverable as costs under Mo. Rev. Stat. § 492.590. The court held that because Mo. Rev. Stat. § 492.590 existed when the parties contracted

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and provided a precise formula for calculating costs, it was deemed to have been expressly identified and referenced in the parties' agreement. *Id*. at 403.

Heiden refutes Appellants' argument. The Policy's definition of "Public Records" referenced the documents that, by statute, impart constructive notice to future purchasers. As of September 30, 2016, Missouri had enacted Mo. Rev. Stat. §§ 442.380 and 442.390, which specifically describes what must be accomplished to impart future purchasers with constructive notice. Mo. Rev. Stat. §§ 442.380 and 442.390 affects the performance, discharge, and enforcement of the Policy. Therefore, Mo. Rev. Stat. §§ 442.380 and 442.390 form a part of the Policy, which operates as if it had expressly referred to Mo. Rev. Stat. §§ 442.380 and 442.390 and incorporated it by reference.

Overall, Appellants' arguments concerning the Policy's definition of "Public Records" closely resemble those that Montana's Supreme Court rejected in *Miller v. Title Ins. Co. of Minnesota*, 987 P.2d 1151, 1152 (1999). There, the insureds ("the Millers") purchased a parcel of realty and received a policy of title insurance from Title Insurance Company of Minnesota ("TICM"). *Id*. at 1152. The policy defined "public records" as "those records which by law impart constructive notice of matters relating to said land." *Id*. at 1152.

The Millers subsequently discovered that a neighbor's water and sewer lines ran across their realty. *Id*. at 1152. Nothing in the Millers' chain of title reflected the existence of those water and sewer lines. *Id*. at 1153. However, records maintained by the city engineer and water department did reflect those sewer and water lines. *Id*. at 1153. The Millers tendered a claim to TICM, which denied the claim based on a policy provision that

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excluded coverage for easements that were not recorded in the "public records." *Id*. at 1153. Litigation ensued. *Id*. at 1152.

TICM prevailed before the trial court, which found the definition of "public records" to be unambiguous. *Id*. at 1153. The trial court also found that while the policy limited the Millers' coverage to matters for which constructive notice would exist, the Millers failed to identify any statute declaring that records in a city engineer's office impart constructive notice. *Id*. at 1153. So, the trial court entered summary judgment in TICM's favor. *Id*. at 1153.

On appeal, the Millers offered arguments nearly identical to those that Appellants now offer in this case. The Millers argued that they interpreted "public records" to mean "those records which relate to their property and that are open to the public to review and inspect." *Id*. at 1154. The Millers also argued that the Policy's definition of "public records" does not "adequately inform an insured that an examination of the Montana recording statutes codified at §§ 70-21-101, *et seq*., MCA, is required in order to determine what is meant by the term 'public records.'" *Id*. at 1154.

In response to the Millers' arguments, Montana's Supreme Court reviewed Montana's recording statutes. One of those statutes, Section 70-21-302, MCA, states as follows: "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law, *from the time it is filed with the county clerk for record, is constructive notice* of the contents thereof to subsequent purchasers and mortgagees." *Id*. at 1154 (emphasis in original). Then, the Court stated that "constructive notice," as that

term appears in the Policy's definition of "public records," means those documents recorded in accordance with 70-21-302, MCA. *Id.* at 1154.

From that point, Montana's Supreme Court proceeded to rule that the policy's definition of "public records" was not ambiguous and did not include any documents that were not recorded in accordance with 70-21-302, MCA. In doing so, the court rejected the insureds' construction of "public records":

> **In this case, the term 'public records' defined in the title policy is not reasonably subject to two different interpretations. The title policy issued to the [insureds] specifically defines 'public records' as 'those records which by law impart constructive notice of matters relating to said land.' This is entirely consistent with existing Montana statutory law and Montana recording procedures, which require that documents affecting title to real property be recorded with the county clerk and recorder of the county in which the real property is located. By law, upon filing and recordation with the proper officer in the county clerk's office, subsequent purchasers and mortgagees are deemed to have *constructive notice* of a conveyance of real property and its contents. In addition, judgments docketed in the clerk of the district court's office become liens on the real estate owned by the judgment debtor. These are the records that impart constructive notice of matters relating to real property and, for the purpose of this case, are the 'public records' defined in the title policy. *Id.* at 1154-1155 (citations omitted).**

Miller provides a framework for disposing of Appellants' argument that the Policy's definition of "Public Records" is ambiguous and must be construed as including anything that is generally referred to as a "public record." As Montana's Supreme Court held, Condition 1(i) is not reasonably subject to two different interpretations. Instead, it references a collection of records that is completely consistent with Mo. Rev. Stat. §

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442.380, which requires that documents affecting title to land be recorded with the Recorder of Deeds for the county in which the land sits. Pursuant to Mo. Rev. § 442.390, subsequent purchasers are deemed to have constructive notice of those recorded interests. In addition, judgments that are entered and docketed in accordance with Mo. Rev. Stat. § 511.350.1 become liens against the real estate that judgment debtors own. These are all the records that impart constructive notice of matters relating to land under Missouri law, and for this case's purposes, are the "Public Records" that Condition 1(i) describes.

4. Fourth, Appellants argue that court filings must be "Public Records" or else Investors would not have discovered The Prior Lawsuit.

Given Mo. Rev. Stat. § 511.350.1 and the fact that the proper entering and docketing of a court judgment creates constructive notice of that judgment's contents, diligent title insurance agents search court records when examining title. Presumably, that is how Investors came to know that the Prior Lawsuit existed. Regardless, the mere fact that the Prior Lawsuit came before Investors' eyes does not magically transform the Prior Lawsuit or City's Original Petition into something it is not, *i.e.*, a record that imparts constructive notice on future purchasers.

"Title insurance differs from most other types of insurance because it seeks to *eliminate* risk of loss arising from past events, rather than *assuming* risk of loss for future events and then distributing the risk among policy holders." *Crossman v. Yacubovich*, 290 S.W.3d 775, 779 (Mo. App. E.D. 2009) (citing Stephen M. Todd, *Title Insurance*, in 1 Mo. Real Estate Practice 2-1, § 2.2, at 2-4—2-5 (Mo. Bar ed., 4th ed.2000)) (emphasis added)."A title insurer eliminates risk by searching county records for all documents affecting *title* to

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the subject property, and analyzing those documents to determine whether any defects exist. *Id*. at 779 (citing Stephen M. Todd, *Title Insurance*, in 1 Mo. Real Estate Practice 2-1, § 2.2, at 2-4 (Mo.Bar, 4th ed.2000)) (emphasis added). So, naturally, title insurers will review more documents than they insure against, the reason being that not all documents affect title (as Alliant demonstrates in its response to Appellants' Third, Fourth, Fifth, and Sixth Points Relied On).

Indeed, title insurance agents encounter a bevy of information in connection with closing real estate transactions, as they often serve as the parties' settlement and escrow agent. For example, they typically receive copies of the contracts that the sellers and buyers have negotiated. Those contracts can contain information concerning various aspects of land, *e.g.*, that the land includes a house whose roof needs to be replaced. Title insurance agents may also receive copies of appraisal reports, which can describe the condition of improvements, status of maintenance, *etc.* They may also receive copies of building inspection reports, which may state, for example, that the foundation of the structure that sits on the land is failing, that a termite infestation exists, or that radon gas measurements exceed allowable levels.

A title insurance agent's knowledge that a foundation is failing does not convert that failing foundation into a matter of public record such that all future purchasers are deemed to have constructive notice that it exists. Likewise, that knowledge does not spontaneously create coverage for losses resulting from that failing foundation. Rather, the insured's coverage remains fixed by its policy's language.

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The same is true with respect to Investors' knowledge that the Prior Lawsuit existed. That knowledge did not transform the Prior Lawsuit or City's Original Petition into a "Public Record" of which all future purchasers would have constructive notice. It did not automatically create coverage for losses resulting from the Prior Lawsuit or City's Original Petition, either. Instead, Appellants' coverage remains fixed by the Policy, as written.

H. Appellants have failed to establish that a genuine issue exists about whether all court filings trigger Covered Risk 5 and thereby failed to rebut Alliant's *prima facie* claim for summary judgment.

The Policy should be enforced as written using the supplied definition of "Public Records," which only extends to those records of which purchasers of realty are deemed to have constructive notice pursuant to a Missouri statute. The only Missouri statutes that create constructive notice to purchasers or realty are Mo. Rev. Stat. §§ 442.380, 442.390, and 511.350.1. Under these statutes, a document describing the Ordinance Violation must be recorded with the Recorder or a judgment describing the Ordinance Violation must be entered by the Circuit Clerk. Again, Appellants admit that neither of those events occurred, which means that Covered Risk 5 does not insure against losses resulting from the Ordinance Violation.

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III. APPELLANTS' THIRD POINT RELIED ON

A. Standard of Review

Appellants' Third Point Relied On also challenges the propriety of the Summary Judgment Order. As Alliant explained in § I-A, *supra*, this Court reviews the Summary Judgment Order's propriety *de novo*. Alliant adopts and incorporates by reference § I-A as and for the remainder of § III-A.

B. Introduction and Overview

In their Third Point Relied On, Appellants contend that a genuine dispute exists about whether a different insuring provision, besides Covered Risk 5, insures against losses resulting from the Ordinance Violation. Specifically, Appellants contend that Covered Risk 2 covers losses stemming from the Ordinance Violation because the Ordinance Violation and the Prior Lawsuit were defects in or encumbrances on the Property's title as of September 30, 2016.

Appellants offer two arguments why the Ordinance Violation and the Prior Lawsuit were defects in or encumbrances on the Property's title as of September 30, 2016. First, they argue that "[i]t seems beyond question that having a lawsuit pending regarding a property, seeking to tear down the only structure on the property, creates a defect in title." *Appellants' Substitute Brief* at p. 41. This argument fails because Appellants are conflating matters that affect the Property, generally, with matters that affect the Property's title, specifically. Second, Appellants argue that the Prior Lawsuit must be a defect in or encumbrance on the Property's title because Investors discovered the Prior Lawsuit and referenced it in the Title Commitment. This argument fails because it lacks logic and relies

upon the Title Commitment, which as previously stated, Appellants did not introduce into the summary judgment record and is beyond this Court's consideration.

"As with any other contract, the interpretation of an insurance is generally a question of law, particularly in reference to the question of coverage." *D.R. Sherry Const., Ltd. V. American Family Mut. Ins. Co.*, 316 S.W.3d 899, 902 (Mo. banc 2010). Ultimately, Appellants' Third Point Relied On fails to create a genuine issue as to whether the Ordinance Violation or the Prior Lawsuit triggers Covered Risk 2's coverage.

C. <u>Covered Risk 2 only grants coverage for matters that affect the Property's *title*, specifically.</u>

Covered Risk 2 states as follows (with added emphasis):

> **COVERED RISKS**
>
> **SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, ALLIANT NATIONAL TITLE INSURANCE COMPANY, a Colorado corporation (the "Company") Insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:**
>
> * * *
>
> **2. Any defect in or lien or encumbrance *<u>on the Title</u>*.**
>
> * * *

(D 41 at p. 1).

Covered Risk 2 uses a defined term, "Title," which Condition 1(j) defines as follows:

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CONDITIONS

1. Definition of Terms.

The following terms when used in this policy mean:

* * *

(j) "Title": The estate or interest described in Schedule A.

* * *

(D 41 at p. 2).

In turn, Schedule A of the Policy states as follows:

SCHEDULE A

* * *

2. The estate or interest in the Land that is insured by this policy is: FEE SIMPLE

(D 41 at p. 5).

D. <u>For a defect *in title* to exist, there must be a perceived flaw in or doubt *about title*, and for an encumbrance *on title* to exist, a third party must possess an interest *in title*.</u>

In *Kling v. A.H. Greef Realty Co.*, 148 S.W. 203, 205 (Mo. App. 1912), this Court stated as follows:

> **The term 'a good title' is synonymous with 'a good, marketable title,' and the following definition of what constitutes a marketable title has received the approval of our Supreme Court, in *Mastin v. Grimes*, 88 Mo. 478, *Mitchener v. Holmes*, 117 Mo., loc. cit. 205, 22 S.W. 1070, and *Green v. Ditsch*, 143 Mo. 1, 44 S.W. 799: 'Every purchaser of land has a right to demand a title which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him, and probably take from him,**

> **or his representatives, land upon which money was invested. He should have a title which would enable him, not only to hold his land, but to do so in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value.**

Accordingly, a defect in title exists when there exists a real or perceived flaw in title or a doubt about title that allows or may allow others to challenge title.

In *Duffy v. Sharp*, 73 Mo. App. 316 (Mo. App. 1898), a Missouri appellate court referenced a treatise that defined an encumbrance on title as "any interest in a third person, consistent with a title in fee in the grantee, if such outstanding interest injuriously affects the value of the property." At 322 (citing *Jones on Law of Real Property*, § 852). Appellants appear to believe that the words "any interest" mean "any interest in the property," generally, as opposed to "any interest in title to the property," specifically. Appellants are incorrect.

Duffy addressed whether contractors' rights to perfect mechanic's liens in the future triggered a seller's liability under his covenant against encumbrances. In analyzing that issue, the court identified and relied on various legal authorities including *Jones on Law of Real Property*. The court also noted that "[a] covenant against incumbrances in a conveyance of land is a guaranty against the existence of any charge upon it which will compel the grantee to pay money to retain the land." *Id*. at 322 (citing *Redman v. Phoenix Fire Ins. Co.*, 51 Wis. 292, 293, 8 N.W. 226 (1881) (emphasis added)). Similarly, the court recited that "the usual covenant in deeds of conveyance against encumbrances extends to all adverse claims and liens on the estate conveyed, whereby the same may be defeated, wholly or in part, whether the claims or liens be uncertain and continent or otherwise." *Id*.

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at 322 (citing *Shearer v. Ranger*, 22 Pick. 447, 39 Mass. 447 (1839) (emphasis added). In light of its references to and reliance on *Redman* and *Shearer*, *Duffy*'s definition of "encumbrance" must be interpreted as any outstanding interest *in title* that a third person possesses.

E. Appellants must prove that as of September 30, 2016, the Ordinance Violation or the Prior Lawsuit created a real or perceived flaw in the Property's *title* or a doubt about the Property's *title*, or that City possessed or asserted an interest in the Property's *title* based upon the Ordinance Violation.

Appellants are the plaintiffs in this case. They accuse Alliant of breaching its obligations under an insurance contract, *i.e.*, not providing the coverage that Covered Risk 2 affords. Therefore, Appellants bear the burden of proving that Covered Risk 2 covers the Ordinance Violation or the Prior Lawsuit. *Fischer v. First American Title Ins. Co.*, 388 S.W.3d 181, 187 (Mo. App. W.D. 2012) (reciting that insureds bear the burden of establishing coverage); *D.R. Sherry Const., Ltd. V. American Family Mut. Ins. Co.*, 316 S.W.3d 899, 904 (Mo. banc 2010). To do so, and as discussed in § III-D, *supra*, Appellants must prove, among other things, that as of September 30, 2016, the Ordinance Violation or the Prior Lawsuit created a real or perceived flaw in the Property's *title* or a doubt about the Property's *title*, or that City possessed or asserted an interest in the Property's *title* based upon the Ordinance Violation.

F. As of September 30, 2016, neither the Ordinance Violation nor the Prior Lawsuit constituted a defect in or encumbrance on the Property's *title*.

The summary judgment record contains City's Original Petition and City's Amended Petition. (D 39 at ¶¶12, 15; D 48; D 43). Those filings establish that City did not

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challenge Appellants' *title* in the Prior Lawsuit, did not claim to own an estate in the Property, did not seek to terminate Appellants' estate in the Property, did not create or suggest any doubt about the fact that Appellants *own* title to the Property, and did not assert any interest whatsoever in the Property's *title*. (D 39 at ¶ 12; D 43). City only complained that the Barn existed on the Property without a residence, and City's only request was that a court enjoin Appellants from entering and using the Barn and order Appellants to demolish the Barn. (D 39 at ¶ 12; D 43). Consistent with City's Original Petition and City's Amended Petition, the Prior Judgment only enjoined Appellants from using and entering the Barn and ordered them to demolish the Barn unless they achieved rezoning or lawfully commenced construction of a single-family dwelling within six months. (D 39 at ¶ 15; D 44 at p. 7). Consequently, neither the Ordinance Violation nor the Prior Lawsuit ever constituted a defect in or encumbrance on the Property's *title*.

G. Appellants attempt to evade summary judgment via two arguments claiming that the Ordinance Violation or the Prior Lawsuit invoked Covered Risk 2.

1. First, Appellants argue that the Ordinance Violation and the Prior Lawsuit must be defects in or encumbrances because they affect the Property and the Barn, which is the only structure on the Property.

Courts have repeatedly construed violations of land use laws that only affect realty's use and condition, such as the Ordinance Violation, as not triggering Covered Risk 2's coverage. In one such case, *Somerset Savings Bank v. Chicago Title Insurance Company*, 420 Mass. 422, 649 N.E.2d 1123 (1995), Massachusetts' Supreme Court considered

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whether a statute requiring a state agency's consent to build improvements on land was a defect in or lien or encumbrance on title or rendered title unmarketable.

Massachusetts has enacted a statute that requires the consent of its Executive Office of Transportation and Construction ("EOTC") before the issuance of any permit that allows construction on former railroad rights-of-way. *Id.* at 424, 1125. In 1986, the insured ("Somerset") financed the purchase of land, part or all of which was owned by Boston and Maine Railroad in 1926. *Id.* at 423-424, 1125-1126. Somerset received a title insurance policy in connection with its loan. *Id.* at 424, 1125.

In 1987, the City of Revere ("City") issued a building permit allowing Somerset's borrower to construct a 72-unit condominium project. *Id.* at 423-424, 1125. In 1988, Massachusetts' Attorney General asked City to halt construction because EOTC had not consented to the building permit's issuance. *Id.* at 424, 1125. Soon thereafter, City issued a cease-and-desist order, halting construction. *Id.* at 424, 1125-1126.

Somerset tendered a claim to its title insurer ("CTIC"), which denied that claim because it failed to invoke a covered risk. *Id.* at 426, 1126. Then, Somerset sued CTIC, claiming, among other things, that CTIC had breached its obligations under the parties' title insurance policy. *Id.* at 426, 1126.

The court began its analysis by addressing whether building and zoning laws affect title. "It is well established that building or zoning laws are not encumbrances or defects affecting title to property." *Id.* at 428, 1127. "Such restrictions are concerned with the use of land." *Id.* at 428, 1127. "There is a difference between economic lack of marketability, which concerns conditions that affect the use of land, and title marketability, which relates

to defects affecting legally recognized rights and incidents of ownership." *Id*. at 428, 1127. "An individual can hold clear title to a parcel of land, although the same parcel of land is valueless or consider economically unmarketable because of some restriction or regulation on its use." *Id*. at 428, 1127.

Then, the court turned its attention to discussing title insurance's nature. "A title insurance policy provides protection against defects in, or liens or encumbrances on, title." *Id*. at 428, 1127. "Such coverage affords no protection for governmentally imposed impediments on the use of the land or for impairments in the value of the land." *Id*. at 428, 1127.

Based on these principles, the court ruled in CTIC's favor. "The requirement of EOTC approval, prior to the issuance of a building permit, is a restriction on the use of the property, but it does not affect the owner's title to the property." *Id*. at 428, 1128. "It is a restriction that may affect the value of the property and the marketability of the parcel, but it has no bearing on the title to the property." *Id*. at 428-429, 1128. Because the title insurance policy only afforded coverage for losses resulting from defects in *title*, encumbrances on *title*, and unmarketability of *title*, the court concluded as follows: "The existence of the statutory restriction, therefore, does not give rise to coverage under the policy."

In another case, *Elysian Investment Group v. Stewart Title Guaranty Co.*, 105 Cal. App. 4th 315, 129 Cal. Rptr. 2d 372 (2002), a California appeals court considered whether a recorded notice stating that the premises located on land were hazardous, substandard, or

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a nuisance constituted a defect in or lien or encumbrance on title or rendered title unmarketable.

In 1996, Los Angeles County's Department of Building and Safety ("Department") recorded a notice concerning land ("the Notice"). *Id*. at 318, 374. The Notice classified the premises that existed on the land as "substandard," noted a variety of building violations, and required the owner to discontinue using a structure as a dwelling and remove unapproved wiring and plumbing. *Id*. at 318, 374. By 1998, a lender ("Countrywide") had acquired title to the land via foreclosure. *Id*. at 317, 374. In 1998, Countrywide conveyed the land to the insured ("Elysian"). *Id*. at 317, 374. Elysian purchased a title insurance policy in connection with its purchase. *Id*. at 317-318, 374. Elysian's title insurance policy did not identify the Notice as an exception from coverage. *Id*. at 318, 374. Three months after purchasing the land, Elysian discovered the notice. *Id*. at 318, 374. Elysian tendered a claim to its title insurer ("Stewart"), which Stewart denied. *Id*. at 318, 374. Elysian sued Stewart for breach of contract, among other things. *Id*. at 318, 374. The trial court granted summary judgment in favor of Stewart, and Elysian appealed. *Id*. at 318-319, 374.

The appeals court began its analysis by reciting title insurance's nature. "Title insurance is a contract to indemnify against loss through defects in title or against liens or encumbrances that may affect the title at the time when the policy is issued." *Id*. at 320, 375-376 (quotations omitted). "There is no coverage for physical conditions of property that merely affect land value." *Id*. at 320, 376.

The court then turned its attention to considering whether the notice constituted a defect in or lien or encumbrance on the land's title. "The policy indemnifies against loss

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through defects, liens, or encumbrances affecting title." *Id*. at 320, 376. "An encumbrance has been defined as any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee." *Id*. at 320, 376 (quotations omitted).

From there, the court swiftly ruled in Stewart's favor. "The Notice did not affect Elysian's title to the property. It therefore is not a 'defect in or lien or encumbrance on the title.' The Notice, instead, warns that there are physical defects at the property." *Id*. at 320, 376. "It states that the property is substandard, as defined in the municipal code, that the owner must comply with the substandard order, and that the city may remedy the deficiencies if the owner does not do so." *Id*. at 320, 376. "The notice thus informed the owner of the existence of a duty, created by ordinance, to comply with local building and zoning requirements." *Id*. at 321, 377.

Elysian's claim for unmarketable title did not fare any better. "Elysian's contention that the Notice affected the marketability of its title also lacks merit." *Id*. at 324, 379. "The Notice … provides notice of the physical condition of the property, for which there is no coverage." *Id*. at 324, 379. "It does not raise any doubts about title." *Id*. at 324, 379. "One can hold perfect title to land that is valueless; one can have marketable title to land which the land itself is unmarketable." *Id*. at 324, 379 (quoting *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 651-652, 234 P.2d 625 (1951). "The fact that Elysian was required to bring the property up to code does not cast doubt upon who owns the Property." *Id*. at 324, 379.

In another case, *Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc.*, 920 P.2d. 759 (1996), Alaska's Supreme Court considered whether a wetlands designation created a

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defect in or encumbrance on title. In 1984, the owners ("the Coopers") began making improvements to certain land. *Id*. at 760. The Army Corps of Engineers ("Corps") ordered the Coopers to stop construction because the land included designated wetlands that required a permit to fill. *Id*. at 760.

The Coopers applied for wetlands permit, which Corps issued in April of 1985, and which became effective on May 2, 1985. *Id*. at 760. On May 8, 1985, the Coopers contracted to sell the land to the insured ("Bear Fritz"). *Id*. at 760. Bear Fritz closed its purchase at the end of May and received a title insurance policy dated June 10, 1985. *Id*. at 760. The wetlands permit expired on April 23, 1988. *Id*. at 760.

Bear Fritz claimed that it did not discover the wetlands designation until at least 1989. *Id*. at 760. Upon doing so, Bear Fritz sued its title insurer ("Ticor"), complaining of the failure to disclose the wetlands designation prior to closing. *Id*. at 760. The trial court granted summary judgment in favor of Ticor, and Bear Fritz appealed. *Id*. at 760.

On appeal, Bear Fritz argued that the land's wetlands designation and the restrictions associated with the wetlands permit were defects in or liens or encumbrances on the land's title. *Id*. at 761. In response, Ticor argued as follows: "Bear Fritz loses its coverage argument at the very first level of insurance policy analysis: as the permit in question did not affect title, it never came within the type of risk that this insurance purported to cover in the first place …" *Id*. at 761. Ticor further argued as follows: "Title insurance does not cover all risks involved in the purchase or ownership of property. As the name implies, title insurance provides protection against defects in *title* …" *Id*. at 761 (emphasis in original).

Alaska's Supreme Court sided with Ticor, stating that "[t]he law amply supports the distinction Ticor draws between defects or encumbrances affecting the *marketability of title* and defects affecting only the *market value of the property*." *Id*. at 761 (emphasis added). The court proceeded to hold that the wetlands designation fell into the second category. *Id*. at 762. The court compared the wetlands designation to building and fire codes, which are not "encumbrances" because they do not "give any third person a right to or interest in the property" and do not "burden the property with a lien, interest or servitude." *Id*. at 760.

In another case, *Choate v. Lawyers Title Insurance Corporation*, 2016 OK CIV APP 60, 385 P.3d 670, an Oklahoma appeals court considered whether a prior owner's commitment to demolish a building constituted a defect in or encumbrance on title or rendered title unmarketable. *Choate* concerned land on which a church had operated within a large building. *Id*. at ¶ 1, 673. In 1999, the church issued to the City of Seminole, Oklahoma ("City") a memorandum committing to demolish their building and move to other land. *Id*. at ¶ 4, 673. In 2001, the church conveyed the land to a third party, who in turn conveyed the land to the insured ("Choate") in 2005. *Id*. at ¶4, 673.

Following his acquisition of the land, Choate claimed to have discovered that prior to him completing his purchase, City had decided never to issue to him an occupancy permit for the church's former building; had considered adopting a policy that would delay dispatching firefighters if the building caught fire; and had adopted a policy to remove several dilapidated and blighted structures, including the church's former building. *Id*. at ¶ 5, 674.

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In 2007, the church's former building incurred severe damage from a fire. *Id.* at ¶ 3, 673. The day after the fire, City demolished the church's former building, leaving *Choate* with a vacant lot. *Id.* at ¶ 6, 674. After his title insurer ("Lawyers Title") denied his claim for losses resulting from the building's fire, Choate sued Lawyers Title, claiming, among other things, that City's various policy decisions triggered Lawyers Title's coverage against defects in, liens against, and encumbrances on his title and unmarketable title. *Id.* at ¶ 8, 674.

Lawyers Title filed a motion to dismiss Choate's policy-based claims. Lawyers Title argued that neither City's condemnation, nor the burning and demolition of the church's former building, nor Lawyers Title's agent's failure to disclose City's plan to accomplish those matters fit within the coverage that Choate's policy afforded. *Id.* at ¶ 31, 678. Lawyers Title also noted that Choate had not alleged that his title was "not good" or that anyone else had claimed any ownership interest in the land. *Id.* at ¶31, 678. The trial court granted Lawyers Title's motion. *Id.* at ¶ 15, 675.

The appeals court focused on the fact that title insurance focuses on title. "A title insurance policy insures against defects or clouds in *title* to land, not land itself." *Id.* at ¶ 37, 680 (citing 11 Couch on Ins. 3d, § 159:5) (emphasis in original)). "Many courts distinguish between matters that affect title to land and matters that affect only the physical condition of the land." *Id.* at ¶ 37, 680 (citing 1 Title Ins. Law § 5:5 (2015 ed.), "Defects, liens or encumbrances.")). "Similarly, several courts distinguish between loss caused by unmarketability of title and by physical conditions or other matters affecting the market value of the property." *Id.* at ¶ 38, 680 (citing 1 Title Ins. Law § 5:7 (2015 ed.),

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"Unmarketable title.") "Defects which merely diminish the value of the property, as opposed to defects which adversely affect a clear title to the property, will not render title unmarketable within the meaning and coverage of a policy insuring against unmarketable title." *Id*. at ¶ 38, 680 (quoting 11 Couch on Insurance 3d § 159:7)). The appeals court proceeded to hold that losing the church's former building did not affect Choate's title. *Id*. at ¶ 39, 680.

Based on Covered Risk 2's language, Missouri law, and the reasoning set forth in *Somerset*, *Elysian*, *Bear Fritz*, and *Choate*, neither the Ordinance Violation nor the Prior Lawsuit constituted a defect in or encumbrance on the Property's *title* as of September 2016, and neither the Ordinance Violation nor the Prior Lawsuit trigger Covered Risk 2's coverage.

2. Second, Appellants argue that the Prior Lawsuit must be a defect in or encumbrance in the Property's title or else Investors would not have identified it or referenced it in the Title Commitment.

Appellants' argument defies logic. Matters either constitute defects in or encumbrances on title, or they do not. A title commitment's reference to a matter that is neither a defect in or encumbrance on title cannot magically transform that matter into a defect in or encumbrance on title. Consider, for example, a situation in which a title insurance agent searches and examines title to Lot 1 of Shady Acres and mistakenly includes in its title commitment a reference to a Deed of Trust that only affects Lot 11 of Shady Acres. Under Appellants' reasoning, that title commitment spontaneously converts that Deed of Trust into a defect in or encumbrance on Lot 1's title.

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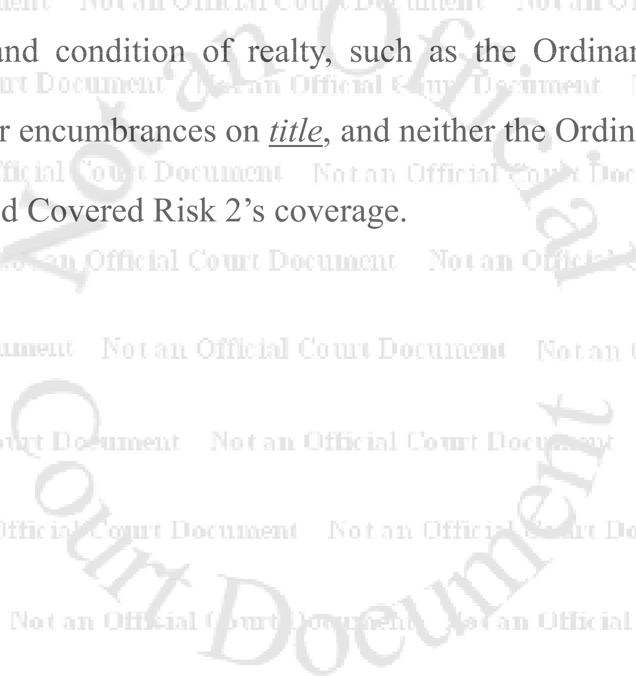
H. Appellants have failed to establish that a genuine issue exists about whether any losses resulting from the Ordinance Violation triggered coverage under Covered Risk 2 and thereby failed to rebut Alliant's *prima facie* claim for summary judgment.

The Ordinance Violation and the Prior Lawsuit only involved the use of the Barn and whether the Barn could remain on the Property without a single-family dwelling being constructed. City never asserted or received any interest in the Property's *title*. Matters that only affect the use and condition of realty, such as the Ordinance Violation, do not constitute defects in or encumbrances on *title*, and neither the Ordinance Violation nor the Prior Lawsuit triggered Covered Risk 2's coverage.



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IV. APPELLANTS' FOURTH POINT RELIED ON

A. Standard of Review

Appellants' Fourth Point Relied On also challenges the propriety of the Summary Judgment Order. As Alliant explained in § I-A, *supra*, this Court reviews the Summary Judgment Order's propriety *de novo*. Alliant adopts and incorporates by reference § I-A as and for the remainder of § IV-A.

B. Introduction and Overview

In their Fourth Point Relied On, Appellants again contend that a genuine dispute exists about whether a different insuring provision, besides Covered Risk 5, insures against losses resulting from the Ordinance Violation. Specifically, Appellants contend that Covered Risk 3 covers losses resulting from the Ordinance Violation and the Prior Lawsuit because the Ordinance Violation and the Prior Lawsuit rendered the Property's title unmarketable as of September 30, 2016.

Appellants state two arguments why the Ordinance Violation and the Prior Lawsuit invoke Covered Risk 3. First, they argue that the Policy's definition of "unmarketable title" is vague and ambiguous and must be construed so broadly as to cover any matter that would have allowed Appellants to rescind their transaction with the Sullivans. This argument fails because the Policy's definition of "Unmarketable Title" is not susceptible to multiple interpretations and must be enforced as written. Appellants also argue that the Ordinance Violation and the Prior Lawsuit rendered the Property's title unmarketable. This argument

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fails because, again, Appellants are conflating matters that affect the Property, generally, with matters that affect the Property's *title*, specifically.

"As with any other contract, the interpretation of an insurance is generally a question of law, particularly in reference to the question of coverage." *D.R. Sherry Const., Ltd. V. American Family Mut. Ins. Co.*, 316 S.W.3d 899, 902 (Mo. banc 2010). In the end, Appellants' Fourth Point Relied On fails to create a genuine issue as to whether the Ordinance Violation or the Prior Lawsuit triggers Covered Risk 3's coverage.

C. Covered Risk 3 only grants coverage for matters that render title unmarketable.

Covered Risk 3 states as follows:

> **COVERED RISKS**
>
> **SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, ALLIANT NATIONAL TITLE INSURANCE COMPANY, a Colorado corporation (the "Company") Insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:**
>
> * * *
>
> **3. Unmarketable Title.**
>
> * * *

(D 41 at p. 1).

Condition 1(k) defines "Unmarketable Title" as follows:

> **CONDITIONS**

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1. Definition of Terms.

The following terms when used in this policy mean:

* * *

(k) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

* * *

(D 41 at p. 2).

D. <u>For title to be unmarketable, there must be doubts suggesting that litigation will be required to perfect *title*.</u>

"A title which is doubtful and suggests the need of litigation to perfect it – so that an informed and prudent person otherwise willing to pay full value will not undertake to purchase – is not marketable." *Davis v. Stewart Title Guar. Co.*, 726 S.W.2d 839, 850 (Mo. App. W.D. 1987). Consequently, "Unmarketable Title," as defined in Condition 1(k), exists when there is doubt about the Property's *<u>title</u>*, and those doubts indicate that litigation will be required to perfect the Property's *<u>title</u>*.

E. <u>Appellants must prove that as of September 30, 2016, the Ordinance Violation or the Prior Lawsuit created a doubt about the Property's *title*, and that doubt indicated that litigation would be required to perfect the Property's *title*.</u>

Appellants are the plaintiffs in this case. They accuse Alliant of breaching its obligations under an insurance contract by not providing the coverage that Covered Risk 3

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affords. Therefore, Appellants bear the burden of proving that Covered Risk 3 covers the Ordinance Violation or the Prior Lawsuit. *Fischer v. First American Title Ins. Co.*, 388 S.W.3d 181, 187 (Mo. App. W.D. 2012) (reciting that insureds bear the burden of establishing coverage); *D.R. Sherry Const., Ltd. v. American Family Mut. Ins. Co.*, 316 S.W.3d 899, 904 (Mo. banc 2010). To do so, and as discussed in § IV-D, *supra*, Appellants must prove, among other things, that as of September 30, 2016, the Ordinance Violation or the Prior Lawsuit created a doubt about the Property's *title*, and that doubt indicated that litigation would be required to perfect the Property's *title*.

F. As of September 30, 2016, neither the Ordinance Violation nor the Prior Lawsuit created any doubt about the Property's *title* or suggested that litigation would be required to perfect the Property's *title*.

The summary judgment record contains City's Original Petition and City's Amended Petition. (D 39 at ¶¶12, 15; D 48, D 44). Those filings establish that City did not challenge Appellants' *title* in the Prior Lawsuit, did not claim to own an estate in the Property, did not seek to terminate Appellants' estate in the Property, did not create or suggest any doubt about the fact that Appellants *own* title to the Property, and did not assert any interest whatsoever in the Property's *title*. (D 39 at ¶ 12; D 43). City only complained that the Barn existed on the Property without a residence, and City's only request was that a court enjoin Appellants from entering and using the Barn and order Appellants to demolish the Barn. (D 39 at ¶ 12; D 43). Consistent with City's Original Petition and City's Amended Petition, the Prior Judgment only enjoined Appellants from using and entering the Barn and ordered them to demolish the Barn unless they achieved rezoning or lawfully commenced construction of a single-family dwelling within six months. (D 39 at ¶ 15; D

44 at p. 7). Consequently, neither the Ordinance Violation nor the Prior Lawsuit created any doubt about the Property's *title* or suggested that litigation would be required to perfect the Property's *title*. Therefore, neither the Ordinance Violation nor the Prior Lawsuit caused the Property's *title* to be unmarketable.

G. In an effort to sidestep summary judgment, Appellants set forth two arguments why the Ordinance Violation and the Prior Lawsuit rendered the Property's title unmarketable.

1. First, Appellants argue that Condition 1(i) is ambiguous and must be construed so broadly as to include any and all matters that would allow Appellants to rescind their transaction with the Sullivans.

"If a term within an insurance policy is clearly defined, the contract definition controls." *State Farm Mut. Auto Ins. Co.*, 899 S.W.2d at 525. Condition 1(k) clearly defines "Unmarketable Title" as that which would allow a buyer to be released from a contract in which its seller was obligated to convey "marketable title." Under Missouri law, "marketable title" is one that is free of doubts that suggest the need to perfect title via litigation. *Davis*, 726 S.W.2d at 850. As such, Condition 1(k) is not subject to multiple constructions and is not ambiguous. Condition 1(i) must be enforced as written.

2. Second, Appellants argue that the Ordinance Violation and the Prior Lawsuit rendered the Property's title unmarketable.

Courts have repeatedly rejected arguments that violations of land use laws that only affect realty's use, condition, *etc.*, such as the Ordinance Violation, invoke Covered Risk 3. *See* § III-G-1, *supra*, which Alliant adopts and incorporates by reference as though it had fully restated § III-G-1 herein.

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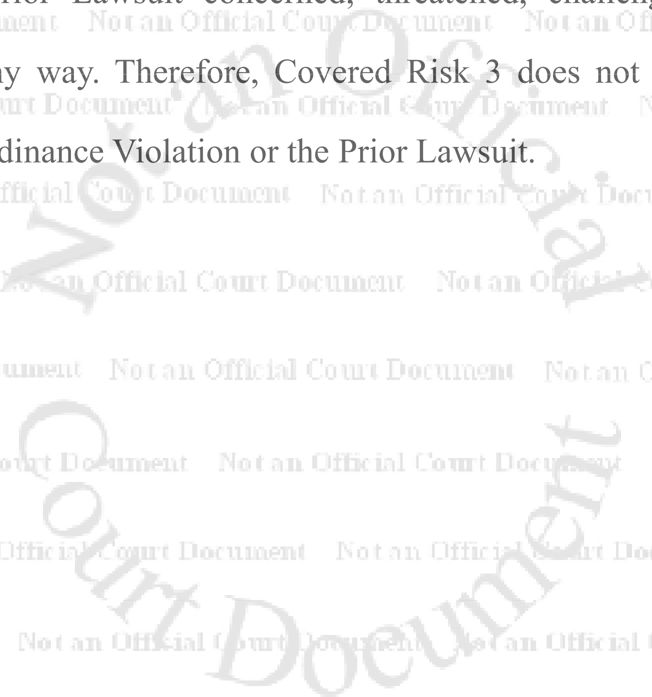
H. Appellants have failed to establish that a genuine issue exists about whether the Ordinance Violation or the Prior Lawsuit rendered the Property's *title* unmarketable and thereby failed to rebut Alliant's *prima facie* claim for summary judgment.

The Ordinance Violation and the Prior Lawsuit would only trigger Covered Risk 3 if they affected the Property's *title*. Undisputed facts establish that neither the Ordinance Violation nor the Prior Lawsuit concerned, threatened, challenged, or affected the Property's *title* in any way. Therefore, Covered Risk 3 does not insure against losses resulting from the Ordinance Violation or the Prior Lawsuit.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V. APPELLANTS' FIFTH POINT RELIED ON

A. Standard of Review

Appellants' Fifth Point Relied On also challenges the propriety of the Summary Judgment Order. As Alliant explained in § I-A, *supra*, this Court reviews the Summary Judgment Order's propriety *de novo*. Alliant adopts and incorporates by reference § I-A as if Alliant had restated it in this § V.

B. Appellants' Fifth Point Relied On presumes that the Ordinance Violation or the Prior Lawsuit were defects in or encumbrances on the Property's *title*, and therefore, it fails for the same reason that Appellants' Third Point Relied On and Fifth Point Relied on fail.

In their Fifth Point Relied On, Appellants again contend that a genuine dispute exists about whether a different insuring provision, besides Covered Risk 5, insures against losses resulting from the Ordinance Violation. Here, Appellants contend that Covered Risk 2(a)(i) covers any losses that Appellants incurred because (1) the Ordinance Violation and the Prior Lawsuit constituted defects in or encumbrances on the Property's title as of September 30, 2016; and (2) the Sullivans fraudulently concealed the Ordinance Violation and the Prior Lawsuit from Appellants.

Covered Risk 2(a)(i) states as follows:

> **COVERED RISKS**
>
> **SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, ALLIANT NATIONAL TITLE INSURANCE COMPANY, a Colorado corporation (the "Company") Insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not**

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exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

* * *

2. Any defect in or lien or encumbrance on Title. This Covered Risk includes but is not limited to Insurance against loss from

(a) A defect in the Title caused by

(i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation

* * *

(D 41 at p. 1).

In § III, *supra*, Alliant explained that neither the Ordinance Violation nor the Prior Lawsuit constituted a defect in or encumbrance on the Property's _title_ and that neither the Ordinance Violation nor the Lawsuit invoked Covered Risk 2. For all those same reasons, neither the Ordinance Violation nor the Lawsuit invoked Covered Risk 2(a)(i). The allegation that the Sullivans defrauded Appellants does not change the analysis. Alliant adopts and incorporates by reference § III, *supra*, as if it had fully restated § III herein.

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VI. APPELLANTS' SIXTH POINT RELIED ON

A. Standard of Review

Appellants' Sixth Point Relied On also challenges the propriety of the Summary Judgment Order. As Alliant explained in § I-A, *supra*, this Court reviews the Summary Judgment Order's propriety *de novo*. Alliant adopts and incorporates by reference § I-A as if Alliant had restated it in this § VI.

B. Appellants' Sixth Point Relied On presumes that the Ordinance Violation or the Prior Lawsuit were defects in or encumbrances on the Property's *title*, and therefore, it fails for the same reason that Appellants' Third Point Relied On and Fifth Point Relied on fail.

In their Sixth Point Relied On, Appellants also contend again that a genuine dispute exists about whether a different insuring provision, Covered Risk 6, insures against losses that stem from the Ordinance Violation. Now, Appellants contend that Covered Risk 2(a)(vi) covers any losses that Appellants incurred because (1) the Ordinance Violation and the Prior Lawsuit constituted defects in or encumbrances on the Property's title as of September 30, 2016; and (2) City did not record a notice of lis pendens, which would have created constructive notice of the Ordinance Violation and triggered coverage under Covered Risk 5.

Covered Risk 2(a)(vi) states as follows:

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, ALLIANT NATIONAL TITLE INSURANCE COMPANY, a Colorado corporation (the "Company") Insures, as of Date

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of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

* * *

2. Any defect in or lien or encumbrance on Title. This Covered Risk includes but is not limited to Insurance against loss from

(a) A defect in the Title caused by

(vi) A document not properly filed, recorded, or indexed in the Public Records, including failure to perform those acts by electronic means authorized by law

* * *

(D 41 at p. 1).

In § III, *supra*, Alliant explained that neither the Ordinance Violation nor the Prior Lawsuit constituted a defect in or encumbrance on the Property's title and that neither the Ordinance Violation nor the Lawsuit invoked Covered Risk 2. For all those same reasons, the non-recording of a notice of lis pendens did not invoke Covered Risk 2(a)(vi). Appellants are complaining about an event that would have created coverage, not an event that caused the Property's title to be defective or encumbered. Non-recordation of a notice of lis pendens does not change the fact that the Ordinance Violation and the Prior Lawsuit were not defects in or encumbrances on title. Alliant adopts and incorporates by reference § III, *supra*, as if it had fully restated § III herein.

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CONCLUSION

Alliant has established the following facts via the summary judgment record: (1) Covered Risk 5 is the only provision that grants any coverage for losses resulting from violations of land use laws; (2) Covered Risk 5 contains a condition precedent, which conditions Alliant's obligation to defend Appellants against losses resulting from violations of land use laws on one of the following having occurred as of the Date of Policy: (a) a document describing the violations having been recorded with the Recorder; or (b) the Circuit Clerk having docketed a judgment that describes the violations; and (3) as of the Date of Policy, which was September 30, 2016, the Recorder's records did not include any documents that described the Ordinance Violations and the Circuit Clerk had not docketed a judgment that described the Ordinance Violation. Based on these facts, Appellants could never prevail on their claim for breach of contract against Alliant because they will not be able to establish that the Policy insures against the losses that Appellants claimed to have incurred because of the Ordinance Violation. Accordingly, Alliant's SUMF demonstrates that it is entitled to judgment as a matter of law, and the Court's first consideration must be decided in Alliant's favor.

As set forth in *ITT*, once Alliant has established its right to judgment under Rule 74.04, this Court's second consideration is whether Appellants (the non-moving party) have shown "by affidavit, depositions, answers to interrogatories, or admissions on file—that one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed." *ITT,* 854 S.W.2d at 381. Appellants admitted each of

Alliant's facts and then alleged twenty-five additional facts, while raising twenty-five additional facts of their own.

The sum and substance of Appellants' additional facts is that the Ordinance Violation and the Prior Lawsuit originated during the Sullivans' ownership; that the Title Commitment referenced the Prior Lawsuit; that no one disclosed the Ordinance Violation or the Prior Lawsuit to Appellants prior to September 30, 2016; that Appellants did not possess knowledge of the Ordinance Violation or the Prior Lawsuit when they purchased the Property on September 30, 2016; that Appellants would not have purchased the Property if they had known of the Ordinance Violation or the Prior Lawsuit; that City subsequently joined Appellants as defendants in the Prior Lawsuit; that Alliant declined to defend Appellants in the Prior Lawsuit; that the Prior Lawsuit culminated with the entry of the Prior Judgment; that Covered Risk 2 covers losses that result from defects in and encumbrances on the Property's title, including those that result from fraud or the failure to record a document; and that Covered Risk that Covered Risk 3 covers losses that result from the Property's title being unmarketable.

The Title Commitment is immaterial because Appellants failed to authenticate it, which means it never entered the summary judgment record and falls outside this Court's consideration. But even if Appellants had authenticated the Title Commitment, it would still be immaterial. Appellants only raise the Title Commitment in hopes of establishing that Alliant had *actual* notice of the Ordinance Violation as of September 30, 2016. The Policy only covers losses resulting from violations of land use laws, such as the Ordinance Violation, *if* as of September 30, 2016, *constructive* notice of those violations existed. So,

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the only relevant issue is whether as of September 30, 2016, a document describing the Ordinance Violation had been recorded with the Recorder or the Circuit Clerk had docketed a judgment describing the Ordinance Violation. Appellants admit that no such documents existed, so Covered Risk 5 does not cover the Ordinance Violation. *See* § I-II, *supra*.

The Ordinance Violation's mere existence as of September 30, 2016, the Prior Lawsuit's pendency as of September 30, 2016, the fact that Appellants did not know about the Ordinance Violation or the Prior Lawsuit as of September 30, 2016, and Appellants' contention that they would not have purchased the Property if they had known about the Ordinance Violation or the Prior Lawsuit do not mean that a defect in or encumbrance against the Property's title existed as of September 30, 2016. Those facts do not indicate that the Property's title was unmarketable as of September 30, 2016, either. While the Ordinance Violation and the Prior Lawsuit both concerned the Property, generally, neither concerned the Property's <u>*title*</u>, specifically. So, the Ordinance Violation and the Prior Lawsuit did not trigger Covered Risk 2, Covered Risk 3, Covered Risk 2(a)(i), or Covered Risk 2(a)(vi). *See* §§ III-VI, *supra*.

None of the facts that Appellants set forth in Appellants' Response to Alliant's SUMF demonstrate that a genuine dispute about the Policy's coverage exists. Therefore, the Court's second consideration must also be resolved in Alliant's favor.

The only additional consideration for the Court is whether Appellants' various legal arguments about how certain provisions in the Policy should be construed. Those arguments either contradict the Policy's plain and unambiguous language in hopes of rewriting the contract to which Appellants and Alliant are parties or fail to identify any

alternative constructions such that provisions could be deemed ambiguous. Accordingly, this third and final consideration must be resolved in Alliant's favor, as well.

In sum, Alliant has asserted facts demonstrating that it is entitled to judgment as a matter of law, and Appellants have failed to demonstrate that a genuine dispute exists regarding any of the material facts that govern Alliant's right to judgment as a matter of law. Therefore, Alliant is entitled to summary judgment, and this Court should affirm the Summary Judgment Order.

WHEREFORE, Defendant-Respondent Alliant National Title Insurance Company prays this Court for an Order denying and overruling Appellants' appeal, affirming the Summary Judgment Order, and awarding and granting such other and further relief that this Court deems just and proper.

Respectfully submitted,

BRINER LAW GROUP, LLC

/s/ Shawn T. Briner
/s/ Jennifer A. Briner
/s/ Erin R. Hergenrother

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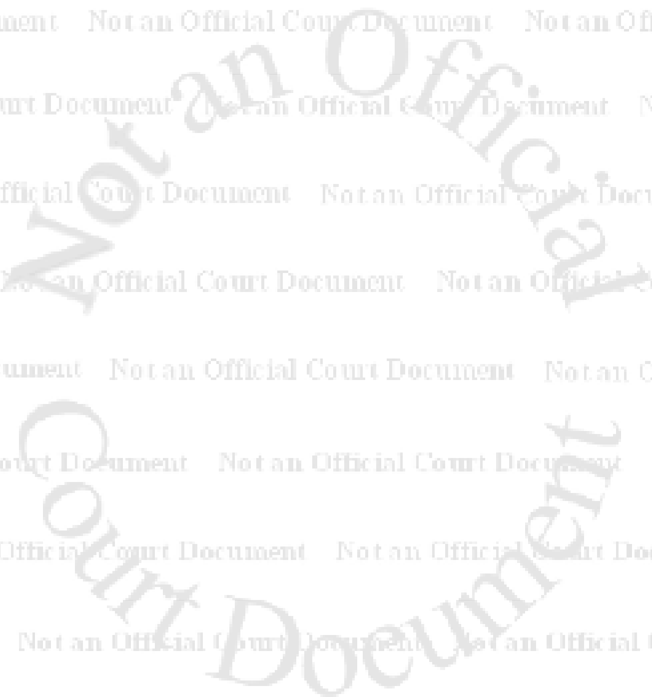
Rule 55.03(a) Certifications

The undersigned hereby certifies that they affixed their electronic signatures to the original copy of this pleading.

/s/ Shawn T. Briner

/s/ Jennifer A. Briner

/s/ Erin R. Hergenrother



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CERTIFICATE OF SERVICE

The undersigned hereby certify that on December 11, 2023, they served a copy of this pleading, Defendant-Respondent Alliant National Title Insurance Company's Substitute Respondent's Brief, on Daniel Batten, counsel for Plaintiffs-Appellants Sanford Sachtleben and Luciann Hruza, via an electronic mail message addressed to dbatten@chgolaw.com.

/s/ Shawn T. Briner
/s/ Jennifer A. Briner
/s/ Erin R. Hergenrother

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CERTIFICATE OF COMPLIANCE

COME NOW, Shawn T. Briner, Jennifer A. Briner, and Erin R. Hergenrother, counsel for Defendant-Respondent Alliant National Title Insurance Company, and pursuant to Supreme Court Rule 84.06 hereby certify that, according to their copy of Microsoft Word, Defendant-Respondent Alliant National Title Insurance Company's Substitute Respondent's Substitute Brief contains 20,730 words and thereby complies with Supreme Court Rule 84.06(b)'s limitations.

Respectfully submitted,

BRINER LAW GROUP, LLC

/s/ Shawn T. Briner
/s/ Jennifer A. Briner
/s/ Erin R. Hergenrother

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Rule 55.03(a) Certifications

The undersigned hereby certifies that he affixed his electronic signature to the original copy of this pleading.

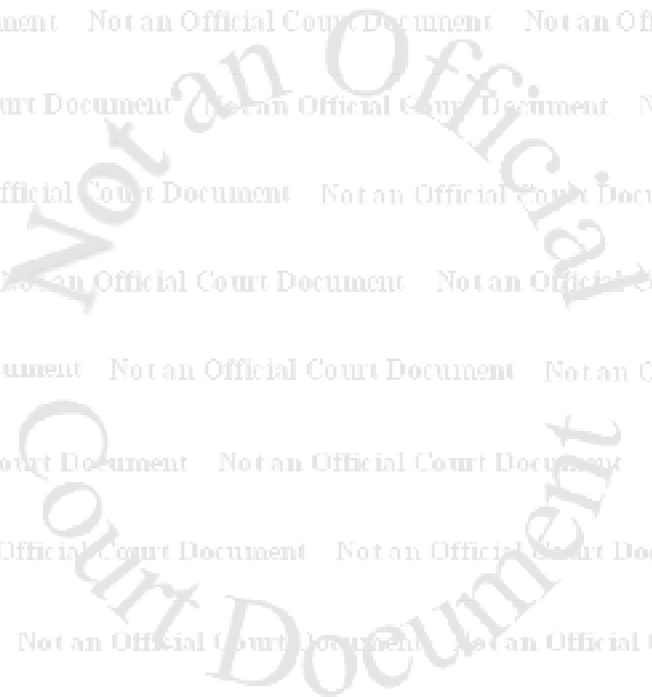
/s/ Shawn T. Briner

The undersigned hereby certifies that she affixed her electronic signature to the original copy of this pleading.

/s/ Jennifer A. Briner

The undersigned hereby certifies that she affixed her electronic signature to the original copy of this pleading.

/s/ Erin R. Hergenrother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