**IN THE SUPREME COURT OF MISSOURI**

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| SANFORD SACHTLEBEN and LUCIANN HRUZA, | ) | |
| Appellants/Plaintiffs, | ) | Appeal No. SC100238 |
| v. | ) | |
| ALLIANT NATIONAL TITLE INSURANCE CO. | ) | |
| Respondent/Defendant. | ) | |

# APPELLANTS' SUBSTITUTE RELY BRIEF

Appeal from the Circuit Court of St. Louis County
The Honorable Joseph Shocklee Dueker, Circuit Judge

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ATTORNEYS FOR APPELLANTS

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## STATEMENT OF ADDITIONAL FACTS

Appellants hereby supplement their Statement of Facts with the following additional facts.

The title policy Respondent Alliant National Title Co. ("Respondent") issued to Appellants Sanford Sachtleben and Luciann Hruza (collectively "Appellants") on September 30, 2016, for their property at 554 Foristell Road, New Melle, Missouri 63385 (the "Property") provides, *inter alia*, the following:

**EXCLUSIONS FROM COVERAGE**

> The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:
>
> ********
>
> 3. Defects, liens, encumbrances, adverse claims, or other matters
>
> (a) created, suffered, assumed, or agreed to by the Insured Claimant;
>
> (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insurance Claimant and not disclosed in writing to the Company by the Insurance Claimant prior to the date the Insured Claimant became an Insured under this policy;
>
> ********

D. 41 at p. 2.

The title commitment issued by Respondent includes the following information:

1. Letterhead states: "Alliant National Title Insurance Co."
2. "Effective date: 9th day of September, 2016 at 8:00 A.M."
3. "Proposed insured: Sanford Sachtleben, a single person and Luciann Hruza, a single person"
4. "Amount of Insurance $489,900.00"
5. "Title to the fee simple estate or interest in the land being insured is at the effective date vested: in Perry D. Sullivan and Joanie I. Sullivan, Husband and Wife"
6. "The land referred to in this Commitment is located in the County of Saint Louis, State of MO and is described as follows:
   See Attached Exhibit A
   554 Foristell Road, Wenzville, MO 63385"

D. 51, p. 1.

## REPLY ARGUMENT

### I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANTS AND IN FAVOR OF RESPONDENT BECAUSE THE TRIAL COURT MISAPPLIED THE LAW, IN THAT RESPONDENT HAD ACTUAL KNOWLEDGE OF THE ORDINANCE VIOLATIONS AND THE NEW MELLE LAWSUIT, WHICH TRIGGERED COVERAGE UNDER THE TITLE POLICY.

#### A. The Title Policy Does Not Exclude Actual Notice as a Condition that Triggers Respondent's Obligations to Defend and Indemnify Appellants.

Respondent Alliant National Title Insurance Company ("Respondent") argues in its Substitute Brief that summary judgment in its favor should be sustained because Respondent is not and should not be obligated to defend and indemnify Appellants for an otherwise covered claim even if it had **actual knowledge** of the covered condition pursuant to the Owner's Policy of Title Insurance (the "Policy") it issued to Appellants Sanford Sachtleben and Luciann Hruza (collectively "Appellants") prior to its issuance. Respondent insists that whether it had actual knowledge of a covered condition or not, Respondent's duties and obligations are only triggered if the covered condition at issue here, the lawsuit filed by the City of New Melle for zoning violations in building a barn and seeking a judgment to have the barn torn down (the "New Melle Lawsuit"), was recorded with the St. Charles County Recorder of Deeds.

Respondent's argument to exempt its actual knowledge focuses on the language at the end of Covered Risk 5 of the Policy, which states:

> 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. 41 at p. 1.

The Policy includes numerous exclusions, qualifications, and conditions that either trigger or excuse Respondent's duties pursuant thereto, which affect the other terms, conditions, and definitions provided in the Policy, including in the Exclusions from Coverage section. Id. at p. 2. However, the Policy at no point expressly disclaims, exempts or excludes its actual knowledge of a condition or defect. Further, the Policy does not expressly state that notice of a condition or defect is exclusively provided through those recorded in the Public Records, to the exclusion of any other notice that Respondent may have received (including actual notice).

The Policy is Respondent's form title insurance policy. If Respondent intended to exclude coverage for conditions and defects for which it had actual knowledge, it had the obligation and ability to include such an exclusion in addition to the numerous other express exclusions in the Policy. Doing so would put Appellants (and other customers) on notice that Respondent won't honor its policy for defects Respondent actually knows about.

Further, the Policy tacitly acknowledges its obligations upon its actual knowledge. The Policy's Exclusions from Coverage section identifies matters "expressly excluded" from coverage for which Respondent will not pay loss or damage. It includes an express exclusion for "defects, liens, encumbrances, adverse claims or other matters" that are

"not Known to the Company, not recorded in the Public Records" but "Known to the Insured Claimant" prior to the date of the Policy. D. 41 at p. 2, ¶ 3.

The inclusion of "not Known to the Company" as a condition for excluding coverage acknowledges that Respondent has the capability of having actual knowledge of a defect and that such knowledge or lack thereof may affect Respondent's obligations under the Policy.

Appellant's Substitute Brief argued that the Policy's definition of Public Records also considers actual knowledge. Public Records are those that provide constructive notice of matters of which a purchaser is "without Knowledge". This clearly contemplates that knowledge of facts in Public Records is only presumed in the instance that one does not have actual knowledge. In response, Respondent attempts to disregard the inclusion of "without Knowledge" because it is in association with "purchasers," and Respondent was not a purchaser; it was the title policy carrier.

Respondent's argument contradicts its own basis for seeking summary judgment. Respondent argues that its obligations are governed by, and it heavily relies upon, the definition of "Public Records": "Records established under state statutes at Date of Policy for the purpose of imparting constructive notice to matters relating to real property to purchasers for value and without Knowledge." The definition does not state that such records include those established for the purpose of imparting constructive notice to title companies. Therefore, Respondent's argument accepts that it assumes the position of "purchaser" for the purpose of defining Public Records constructive notice arising therefrom pursuant to the Policy. Similarly, it must accept that it can only limit its

presumed knowledge through Public Records if it did not have actual knowledge of a condition or defect.

**B. The Policy is Ambiguous as to Whether Respondent's Actual Knowledge is Excluded from a Condition That Would Triger Respondent's Obligations.**

Respondent argues that its actual knowledge of the New Melle Lawsuit does not trigger Respondent's obligations pursuant to the Policy because the only recognized "knowledge" of defects is through constructive knowledge through the Public Records. Respondent has previously asserted that that Mo.Rev.Stat. §§ 442.380 and 442.390 are the only statutes that fall under Policy's definition of Public Records. Now, Respondent concedes that both Respondent and the circuit court were incorrect; Mo.Rev.Stat. 511.350.1 also applies in defining "Public Records". (Respondent's Substitute Brief at pp 29-31; 47.) Respondent argues that this change of course defeats the ambiguity of whether a defect actually known by Respondent is covered under the Policy.

Neither Mo.Rev.Stat. §§ 442.390 and 442.390, nor Mo.Rev.Stat. § 511.350.1 state that the records required therein are the only way in which constructive knowledge of a condition or defect of a property's title and they do not discharge actual knowledge. Instead, they only establish avenues through which such notice may be provided. The Policy contemplates Respondent's actual knowledge that may obligate Respondent to defend or compensate Appellants for their loss and damages. However, to the extent Respondent raises questions whether its actual knowledge can bind Respondent, there is ambiguity that must be construed against Respondent.

### C. Holding Respondent Accountable for Covering Defects it Actually Knows will not have a Measurable Effect on Title Policies of other Missourians.

Respondent argues that the construction of Covered Risk 5 and, specifically, whether Respondent's actual knowledge of a defect affects its obligations under the Policy, could affect the title policies of other Missouri landowners and title insurers because it and other title companies use the same form. Respondent fails to articulate what the effects may be. It is unknown how many times Respondent or other title companies have refused to cover a claim of a defect or condition of a property that it had prior actual knowledge about. Also, there is no evidence as to the extent Respondent's form policy is used by other title companies. The only likely outcome will be that title companies will ensure that they honor their contracts in good faith and take the appropriate steps when they have actual knowledge of a property's conditions and defects that are being contractually covered.

### D. Respondents' Case Law Does Not Support that Respondent Should Not be Held Accountable for its Actual Knowledge.

Respondent relies on three cases to try to buttress its argument that is should not be bound to defend and pay damages to Appellants for its actual knowledge of the New Melle Lawsuit. However, in each case, it is unknown whether the Policy at issue here is the same as the insurance policies in those cited cases. Also, the cases are from foreign jurisdictions, and Respondent fails to establish that the laws of those foreign jurisdictions are comparable or similar to that of Missouri law regarding the dispute at issue. Further,

the facts in those cases are otherwise dissimilar. Therefore, the decisions therein cannot aid this Court in adjudicating this appeal.

Respondent first relies on the holding in Dave Robbins Const., LLC v. First American Title Co. This case relates to the purchase of properties that were within a designated historical district. Dave Robbins Const., LLC v. First American Title Co., 158 Wash. App. 895, 898 (2010). After closing, the plaintiff learned that the properties were within a historical district, requiring it to incur additional costs to develop same. Id.

There is no indication in Dave Robbins that the title company had actual knowledge of the subject defects. It also does not indicate which statutes the State of Washington had adopted for the purpose of imparting constructive notice as to matters relating to real property, whether there was a pending lawsuit to enforce those requirements and restrictions before the plaintiff purchased the property, or whether the title company had actually searched court records or other any other public record.

Respondent then cites to First American Title Ins. Co. v. McGonigle. As an unpublished district court case in Kansas, it provides no precedential value. Also, the dispute arose from property owners' agreement regarding the maintenance of a dam. First American Title Ins. Co. v. McGonigle, CIV.A. 10-1273-MLB, 2013 WL 1087353 at *1 (D.Kan. March 14, 2013) (unpublished). There is no evidence that the subject agreement was in any public record or that the subsequent purchaser or the title company knew about the agreement before closing on the sale. The court did not evaluate to any measurable degree the definition of "Public Record" in the subject policy. Id. Further,

court in McGonigle found that the buyer had notice of the dam prior to purchasing the property and so had notice that there may be some obligations related thereto. Id. at *4.

Respondent also relies on the holding in Fawn Second Avenue LLC v. First American Title Insurance Company. In that case, the plaintiff purchased property in a historic district. Fawn Second Avenue LLC v. First American Title Insurance Company, 610 F.Supp. 3d 621, 625-26 (S.D.N.Y. 2002). After purchasing the property, the plaintiff was unable to make the proposed improvements to the property because of the historic district's certain restrictions. Id. However, there is no discussion about whether the historic designation was located in any public records as defined in the subject policy, and only found that the designation was "unrecorded." Id. at p. 634-35. Also, the court in Fawn Second Avenue found that the historic designation was not a defect, lien or encumbrance because the historic district designation only regulates the use and development of the property. Id. at 630.

Furthermore, Appellants are not complaining that it was not advised of a restriction to their future development of their Property. Instead, Appellants complain that their Property had had a condition and defect arising from a lawsuit alleging an actual violation of zoning ordinances because of the prior construction of the barn by the sellers. And, the New Melle Lawsuit was recorded in this Court's records (which was found by Respondent through the course of its search).

**E. The Title Commitment is Competent Evidence.**

Incredulously, Respondent attempts to challenge the admission of its title commitment (D. 51) by arguing that it was not properly authenticated. Respondent does

not at any point deny that the title commitment letter is its title commitment and/or issued on its behalf, that it is not for the Property, that it was not in furtherance of Appellants' purchase of the Property, that the Policy was subsequently issued in furtherance of its representations in the title commitment, or that it is not a full, complete, authentic copy of the title commitment. Instead, Respondent merely raises objections to it based on Respondent's narrow interpretation of how the document can be authenticated and considered.

Appellant offered the title commitment letter in its Statement of Undisputed Material Facts as evidence that Respondent knew about the New Melle Lawsuit. See D. 47 at p. 6, ¶¶ 9, 10; D. 51. Respondent aggressively and liberally objected to every single statement of fact presented by Appellants. See D. 56. As to the title commitment letter specifically, Respondent raised several procedural objections, but notably did not object on the basis that Respondent challenged its authenticity. Id. at pp. 7-9, ¶¶ 9, 10. If Respondent had done so, Appellant would have had an opportunity to address the objection with the trial court, and could have sought additional discovery to establish its authenticity pursuant to Rule 74.04(f). Of course, if Respondent's title commitment letter was not that of Respondent, then Respondent could have simply denied that it was Respondent's document. Further, Rule 74.04(c) does not provide for a party to object to a proposed statement of facts. Instead, Respondent is required to "admit or deny each of movant's factual statements", and a denial must "demonstrate specific facts showing there is a genuine issue for trial." Rule 74.04(c)(2). Respondent failed to do so.

Also, evidence may be properly authenticated by other means than those argued by Respondent. "Federal Rule of Evidence 901(a) provides that the requirement of authentication is satisfied by 'evidence sufficient to support a finding that the matter in question is what its proponent claims.'" Jones v. National American University, 608 F.3d 1039, 1044-45 (8th Cir. 2010). "The party authenticating the exhibit 'need only prove a rational basis for that party's claim that the document is what it is asserted to be.'" Id. (quoting United States v. Wadena, 152 F.3d 831, 854 (8th Cir. 1998)). "This may be done with circumstantial evidence." Jones at 1045 (quoting Wadena at 854). See also Kaplan v. Mayo Clinic, 653 F.3d 720, 725-26 (8th Cir. 2011).

Here, there can be no dispute as to the authenticity of Respondent's title commitment. Besides Respondent's deafeningly quiet challenge that it is in fact Respondent's document, on its face the title commitment is clearly Respondent's authentic document. The rational bases that the title commitment is what Appellant claims, considering the direct and circumstantial evidence, is:

1. Respondent's name is on the letterhead (D. 51, p. 1);
2. It's dated September 9, 2016, the time when Appellants were purchasing the Property (id.);
3. It lists Appellants as the proposed insured (id.);
4. It lists the purchase price for the Property (id.);
5. It lists the address of the Property as the property to be insured (id.);

6. Appellant subsequently received the Policy issued by Respondent, which reiterates the same parties' names, address of the Property, and price of the Property (see D. 41).

Therefore, Respondent cannot avoid the consequences of its title commitment and ask this Court to ignore that Respondent had actual knowledge of the New Melle Lawsuit.

**F. Respondent Concedes that the New Melle Lawsuit Affected the Occupancy, Use or Enjoyment of the Property and the Character of an Improvement on the Property Pursuant to Covered Risk 5, so Respondent was Obligated to Defend Appellants and Compensate them for their Loss.**

Respondent does not contest that the New Melle Lawsuit affected Appellant's occupancy, use or enjoyment of the Property and the character of an improvement on the property under Covered Risk 5. Therefore, it can only succeed on its motion for summary judgment if it establishes both that this Court's records are not "Public Records" pursuant to the Policy and that it can ignore its actual knowledge of the condition and defect of the Property. As discussed above, both of these arguments fail. Therefore, the Court of Appeals' reversal of the Trial Court's judgment just be sustained.

## II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANTS AND IN FAVOR OF RESPONDENT BECAUSE THE TRIAL COURT INCORRECTLY APPLIED THE LAW IN FINDING THAT THE TITLE POLICY WAS UNAMBIGUOUS AND ONLY COVERS LOSSES CAUSED BY ORDINANCE VIOLATIONS IF A NOTICE OF

**THOSE ORDINANCE VIOLATIONS WERE RECORDED WITH THE ST. CHARLES COUNTY RECORDER OF DEEDS, IN THAT THE NEW MELLE LAWSUIT WAS PART OF THE PUBLIC RECORDS, THE TITLE POLICY IS AMBIGUOUS AS TO THE DEFINITION OF PUBLIC RECORDS, AND SUCH AMBIGUITY MUST BE CONSTRUED IN APPELLANTS' FAVOR.**

**A. This Court's Records are "Public Records" Under the Policy.**

Respondent originally argued that "Public Records" under Covered Risk 5 are only those recorded with the St. Charles County Recorder of Deeds because the only applicable statute "established under the states at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge" is Mo.Rev.Stat. §§ 442.380 and 442.390. (D. 45 at p. 4). Respondent doubled down on its position that "Public Records" could only mean those documents recorded pursuant to these statutes. (D. 57 at p. 18).

The trial court accepted Respondent's its narrow construction of the definition of "Public Records" in holding that "the insurance contract only covers losses caused by ordinance violations if a notice of those ordinance violations was property recorded with the St. Charles County, Missouri's Recorder of Deeds…" (D. 61 at ¶3.) Respondent then triple-downed on its narrow definition. (Respondent's Brief of October 20, 2022, at p. 24).

Respondent now concedes that Mo.Rev.Stat. § 511.350.1 also establishes records that fall under the Policy's definition of "Public Records." This statute provides that

judgments and decrees of Missouri courts shall create a lien on real property and, therefore, notice to subsequent purchasers of a condition or defect in the title. Mo.Rev.Stat. § 511.350.1. Therefore, Respondent also concedes that, pursuant to the Policy, Respondent had a duty (and did) search this Court's records.

Respondent attempts to limit the exposure of this admission by arguing that "Public Records" only include those of the Recorder of Deeds and judgments of the Circuit Clerk docket pursuant to Mo.Rev.Stat. 511.350.1, to the exclusion of pending claims. Respondent attempts to distinguish between "records" and the type of document that may be a part of those "records."

The Policy does not make a distinction between certain types of records that are in the Public Records. Also, this Court does not have a record system for pleadings and a separate record system for judgments that Respondent may search. Nonetheless, Respondent suggests that when it searches the Court records, it may turn a blind eye to those court records that may adversely affect or threaten the condition of property but are not yet judgments. This ridiculous argument raises the question of Respondent's good faith performance of its obligations pursuant to its title insurance policies. Also, the Policy's definition of "Public Records", within the four corners of the Policy, does not make such a distinction or limitation.

While Mo.Rev.Stat. 511.350.1 specifically refers to judgments and decrees that impart constructive knowledge, this statute did not create a separate public record for such judgments and decrees. Instead, the statute clearly adopts this Court's existing

public records as an avenue for imparting constructive knowledge, thus deeming the entire Court records as "Public Records" pursuant to the Policy.

Additionally, the notice recitation in the Policy expressly considers more than just judgments in the Public Record. Under Covered Risk 5, Public Records are those "setting forth the violation or intention to enforce." (D. 41 at p. 1, ¶ 5). In other words, Public Records include those containing both final adjudications and pending threats arising from violations that may be found in this Court's records.

Respondent's argument shamelessly proposes that it and other title companies can and should be able to ignore pending lawsuits that adversely affect the property because it is not a judgment. However, the Policy does not just provide coverage for judgments. It covers a wide array of adverse conditions in addition to judgments related to the Property, including any "violation or enforcement of any law, ordinance, permit or government regulation". (D. 41, P. 1, ¶ 5). Therefore, Public Records include both pending claims and actual judgments.

**B. Respondent's Own Actions Support that Notice is not Limited to Judgments in the Public Records.**

Respondent argues that it should not have the duty to search all court records, just those that are judgments. Setting aside the impracticality of this proposal, Respondent's own conduct refutes this argument. Respondent searched this Court's public records and identified the New Melle Lawsuit in its Title Commitment as something that may affect the Property's title: "We find of record a pending suit # 1611-CC00794 by and Between

The City of New Melle, Plaintiff and Perry Sullivan and Joanie Sullivan Defendents (sic), the outcome of which may affect the subject."

### C. Appellants are not Attempting to Enlarge the Definition of Public Records.

Respondent argues that Appellant is asking this Court to interpret the definition of "Public Records" to an untenable degree so as to include esoteric "public" records which will be overly burdensome upon Respondent and its business. This is simply not true. Appellants are seeking to hold Respondent responsible for covering conditions and defects that Respondent, in the course of searching this Court's records (which Respondent now admits are Public Records), found, identified and learned about as a condition and defect. Appellants are not asking this Court to hold Respondent liable for information it may have been able to find if it had searched any and every record that may be considered "public." Instead, Respondent should be held responsible for information in the public records that it has an obligation to search.

### D. The Title Policy is Ambiguous as to What Qualifies as "Public Records".

Respondent originally argued that "Public Records" under Covered Risk 5 are only those recorded with the St. Charles County Recorder of Deeds pursuant to Mo.Rev.Stat. §§ 442.380 and 442.390. (D. 45 at p. 4). Respondent now concedes that Mo.Rev.Stat. 511.350.1 also applies in defining "Public Records". Respondent's material flip-flopping over the "unambiguous" definition of "Public Records" and Respondent's concession that the circuit court incorrectly defined the scope of the Policy clearly shows

that (1) the trial court's summary judgment was in error, and (2) the definition of "Public Record" is ambiguous. If Respondent, as the presumably seasoned insurance carrier with the superior knowledge of its own contracts, is unsure what statutes apply, how can Respondent expect its policy owners including Appellants to have an unambiguous understanding of the definition? The ambiguity is further underscored by the fact that the Policy does not simply state the applicable statutes. Respondent must go outside of the four corners of the Policy to generate its own definition.

Respondent argues that it may look outside of the four corners of the Policy to define "Public Records" to avoid ambiguity. In support, Respondent relies on the holding in Heiden v. General Motors Corporation. However, the holding in Heiden does not assist this Court in resolving this dispute.

The dispute in Heiden arose from a dispute as to the definition of "costs" awarded to plaintiff pursuant to a settlement agreement arising from a personal injury claim. Heiden v. General Motors Corporation, 567 S.W.2d 401, 402 (Mo.App. 1978). Specifically, after plaintiff and defendant had conducted extensive discovery, the parties negotiated a settlement, and the parties' respective attorneys signed and filed a stipulation of dismissal "at defendant's costs." Id. at 402. The court clerk was requested to and did calculate the costs to which plaintiff was entitled pursuant to Missouri statute, which was approximately $1,000 less than plaintiff's actual costs. Id. The plaintiff, disappointed with this outcome, sued the defendant for fraud, claiming that the parties had an understanding that defendant would pay plaintiff's entire deposition costs because of the "custom and usage" in the legal industry of the actual expenses for depositions, rather

than the amount set by statute.[1] Id. at 402-03. In support of its refusal to consider that plaintiff was entitled to more in costs than the amount provided by statute, court in Heiden held that costs "did not exist in common law, and their allowance is a creature of statute." Id. (citations omitted).

Heiden is distinguished from this case for several reasons. First, the settlement agreement in Heiden was negotiated by the parties that were represented by counsel competent to negotiate and understand the terms being negotiated and the applicable law.[2] This would presumably include plaintiff's counsel's knowledge of Missouri statutes that govern how court costs are taxed. Here, the terms of the Policy were not negotiated, they were dictated by Respondent with their form contract. Also, Appellant was not represented by legal counsel at the time the Policy was executed, and there is no evidence to support that Appellant would or should have known at the time what Missouri statutes were established "for the purpose of imparting constructive notice of matters relating to real property." As discussed above, even Respondent's counsel has struggled with this definition.

Further, the dispute in Heiden essentially arose from the plaintiff's attorney's complaint that his client should be entitled to recovery of greater costs than that provided by statute that it appears he knew about (or should have, pursuant to Rule 4-1.1), rather

[1] Plaintiff's petition sought $1,000,000 in compensatory damages and $5,000,000 because of the defendant's refusal to pay the additional $1,000 in court costs. Heiden at 403. It is unlikely that the plaintiff's excessive prayer for relief was drew sympathy from the court.

[2] Pursuant to Rule 4-1.1, an attorney is required to provide competent representation, "which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for that attorney's representation." Rule 4-1.1 (2017).

than that another statute governs or that the definition was difficult to ascertain. Here, the definition of "Public Records" is vague and open to several interpretations, including Respondent's own conflicting interpretations.

Respondent's reliance on the holding in Miller v. Title Ins. Co. of Minnesota is also misplaced. The dispute in Miller arose from unknown water and sewer lines that ran across the plaintiff's property. Miller v. Title Ins. Co. of Minnesota, 987 P.2d 1151 at 1152 (1999). The court in Miller found that records that may be found in a city engineer's office are not public records that impart constructive notice. Id. at 1155. However, the decision in Miller relied on the fact that, at least at that time, "title insurers and abstractors search only record title in the office of the clerk and recorder and the clerk of the county in which the real property was located." Id. (emphasis added).

Appellant is not arguing that Respondent should have searched through a city engineer's office to find a defect and failed to do so. Appellant argues that this Court's court records are "Public Records" that Respondent actually searches in the course of offering title insurance.

The ambiguity of the definition of "Public Records" is clear and therefore it must be construed against Respondent and interpreted to include the entirety of this Court's public records.

**E. Appellants are not Seeking to Hold Respondent Responsible for Covering a Risk that Would not be Covered Under the Policy.**

Respondent suggests that Respondent's discovery of the New Melle Lawsuit in this Court's records should not trigger its liability under the Policy to defend Appellants

because title insurance is intended to eliminate risk of loss arising from past events, rather than future events. Appellant is not seeking recovery from a future event. Appellant purchased the Property from Perry and Joanie Sullivan, who were already being sued for a past event: the building of a barn in violation of the City of New Melle's zoning ordinances. The pre-existing violations of zoning ordinances that require the demolition of a structure on real property is not a future event.

Respondent argues that title companies may learn about issues related to a property in the course of the transaction and it should not be held liable for the knowledge or disclosure of, for instance, terms in the contract between the buyer and the seller or disclosures made by the seller regarding a dilapidated roof. Appellant is not complaining about terms of a contract that they knew about or disclosure that they knew about when they purchased the Property, and they are not seeking a new roof. Again, here, there were present, existing zoning violations that adversely affect the Property that Appellants did not know about, but that Respondent **DID** know about, and those zoning ordinances were a condition or defect that is covered under the Policy.

For the reasons stated above, this Court's records are Public Records under the Policy. Therefore, Respondent had a duty to defend and pay Appellants for their loss and damages arising from the New Melle Lawsuit, and Respondent is not entitled to summary judgment.

## III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANTS AND IN FAVOR OF RESPONDENT BECAUSE THE TRIAL COURT INCORRECTLY APPLIED THE LAW IN FINDING

**THAT THE TITLE POLICY DID NOT COVER THE ORDINANCE VIOLATIONS AND THE NEW MELLE LAWSUIT, IN THAT THE ORDINANICE VIOLATIONS AND NEW MELLE LAWSUIT WERE DEFECTS AND ENCUMBRANCES ON THE PROPERTY'S TITLE.**

**A. Appellants do not Currently Bear the Burden of Proof.**

Respondent argues that Appellants have failed to proof that the New Melle Lawsuit and the zoning ordinance violations were a defect, lien or encumbrance on the Property's Title pursuant to Covered Risk 2 of the Policy. However, Appellants did not file a motion for summary judgment and therefore do not bear the burden of presently facts to support that Respondent's obligations were triggered as a result of events that would fall under Covered Risk 2 claims at this point. Instead, this case is before this Court arising from an appeal of the summary judgment in Respondent's favor. Respondent's motion was exclusively limited to whether Respondent was entitled to judgment in its favor as a matter of law arising from Covered Risk 5 of the Policy because the New Melle Lawsuit was not recorded with the St. Charles County Recorder of Deeds. (D. 45 at p. 5). This was the only argument upon which Respondent sought summary judgment. Therefore, it is Respondent that bears the burden of proving that there is no genuine dispute of material fact and that Respondent is entitled to judgment in its favor as a matter of law pursuant to Rule 74.04.

In response to Respondent's original motion for summary judgment, Appellants argued that Respondent was not entitled to summary judgment because, *inter alia*, Covered Risk 5 is not the only Risk under which Respondent may be held liable.

Respondent's liability can be triggered under provisions found in Covered Risk 2 and Covered Risk 3: the existence of defects and encumbrances on the Property's title (D. 41 at p. 1, "Covered Risks", ¶ 2); Appellants received unmarketable title (D. 41, p. 1., "Covered Risks", ¶ 3); the Property had a defect in or lien or encumbrance upon the title caused by fraud (D. 41, "Covered Risks," at p. 1, Covered Risks, ¶ 2(a)(i); and the property had a defect in Title caused by a *lis pendens* not being properly filed, recorded or indexed in the Public Records (D. 41, p. 1, Covered Risks, ¶ 2(a)vi).

Respondent did not file a second motion for summary judgment seeking summary judgment as a matter of law as to the additional provisions. Therefore, pursuant to Rule 74.04(d), the extent of the trial court's authority was whether Respondent was entitled to a partial summary judgment as to Respondent's liability under Section 5 of the Policy because the New Melle Lawsuit was not recorded in the "Public Records."

If Respondent had properly amended or refiled its motion for summary judgment to include the additional terms of the Policy and asserted uncontested facts in support of the motion, Appellant would have been put on notice of the additional arguments. Appellant could have also conducted discovery to identify facts that would controvert such facts pursuant to Rule 74.04(f). Respondent was deprived of this right when the trial court improperly adjudicated more than just whether Respondent was liable under the Policy under Covered Risk 5 as it applies to "Public Records."

**B. Respondent Fails to Establish that, as a Matter of Law, The New Melle Lawsuit was Not a Lien or Encumbrance on Title or Render Title Unmarketable.**

Respondent offered no uncontroverted material facts that support that the New Melle Lawsuit was not a lien or encumbrance on Property's title. Instead, Respondent relies purely on foreign case law that is inapplicable to this dispute to establish that it is entitled to a judgment as a matter of law.

Respondent cites Somerset Savings Bank v. Chicago Title Insurance Company to support that the New Melle Lawsuit was not a lien or encumbrance as a matter of law. The dispute in Somerset was whether a state statute that required a state agency's consent to build improvements was a lien or encumbrance. Somerset Savings Bank v. Chicago Title Insurance Company, 420 Mass. 422 at 423-24, 649 N.E.2d 1123 (MA. 1995). The plaintiff filed a claim with its title company after the land was purchased and plaintiff began developing the land without obtaining the statutorily mandated consent. Id. at 425-426.

Appellants are not arguing that a statute or a New Melle ordinance governing how Appellants may use their Property was a lien or encumbrance, nor that Appellants were prevented from developing their Property because they violated a statute or ordinance that they did not know about. The Property was encumbered by the New Melle Lawsuit asserting existing zoning ordinance violations and seeking to tear down the violating barn.

Respondent's reliance on the holding in Elysian Investment Group v. Stewart Title Guaranty Co. is also flawed. At issue in Elysian was whether a notice that a commercial building was dilapidated and needed repairs fell under the terms of the title policy. Elysian Investment Group v. Stewart Title Guaranty Co., 105 Cal. App. 4th 315, 317-18,

129 Cal. Rptr. 2d 372 (Cal.App. 2002). The court in Elysian found that "[t]ere is no coverage for physical conditions of property that merely affects land value." Id. at 320. "The Notice…warns that there are physical defects at the property" (id. at 320, 376) and did not create an unmarketable title because "[t]he Notice…provides notice of the physical condition of the property."

This case is not analogous. Appellants are not complaining that they did not know that the barn was dilapidated and likely in violation of any building code, that they had to make repairs to it, or otherwise complaining about the physical condition of the Property.

Respondent also relies on the holding in Bear Fritz Land Co. v Kachemak Bay Title Agency, Inc., which found that a property's wetlands designation was not a defect or encumbrance on the property's title. Bear Fritz Land Co. v Kachemak Bay Title Agency, Inc., 920 P.2d 759, 761 (AK. 1996). Appellants are not complaining that they did not know about a statutory or regulatory restriction on their use of their Property.

Respondent's reliance on the holding in Choate v. Lawyers Title Insurance Corporation is inapplicable because the dispute therein bears no relation to this present dispute. This case relates to a government's decision not to protect the plaintiff's dilapidated property or issue an occupancy permit, and the building burned down. Choate v. Lawyers Title Insurance Corporation, 2016 OK Civ. App. 60, 385 P.2d 670, 673-74 (Co. 1963). While this case presents an odd series of events, there is no nexus with the legal dispute herein.

**C. Respondent Fails to Establish that there is no Genuine Dispute of Material Fact as to Whether the Property's Title had a Defect or Encumbrance.**

Respondent does not identify any undisputed material facts to support or establish that it is entitled to judgment as a matter of law as to whether the Property's title had a defect or encumbrance pursuant to Covered Risk 2 of the Policy. Therefore, Respondent is not entitled to summary judgment and the trial court's summary judgment must be reversed.

## IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANTS AND IN FAVOR OF RESPONDENT BECAUSE THE TRIAL COURT INCORRECTLY APPLIED THE LAW IN FINDING THAT THE TITLE POLICY DID NOT PROVIDE COVERAGE, IN THAT THE TITLE WAS NOT MARKETABLE.

Respondent reiterates its previous arguments that Appellants have failed to prove that the New Melle Lawsuit and the zoning ordinance violations made the Property unmarketable. As discussed above, at this stage in the litigation, Respondent bears the burden of proof, not Appellants. Also, Respondent has not identified any undisputed material facts to support that the Property's title was not marketable. Therefore, the trial court's summary judgment must be reversed.

## V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANTS AND IN FAVOR OF RESPONDENT BECAUSE THE TRIAL COURT INCORRECTLY APPLIED THE LAW IN FINDING THAT THE TITLE POLICY DID NOT PROVIDE COVERAGE, IN THAT THE TITLE WAS DEFECTIVE BECAUSE OF THE FRAUDULENT ACTIVITIES OF THE SELLERS AND THEIR REAL ESTATE AGENT.

Respondent summarily states that the sellers' and their real estate agents' fraudulent activities (hiding the New Melle Lawsuit) did not create a defective title. As previously argued, Respondent's motion for summary judgment did not seek an adjudication on whether the fraudulent activities created a defective title. However, as argued in Appellant's substitute brief, the fraud did create a defective title. Respondent failed to present any undisputed material facts that support that the there was no fraud, nor case law that supports that the fraud did not create a defect in the title. Therefore, the summary judgment must be reversed.

## VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANTS AND IN FAVOR OF RESPONDENT BECAUSE THE TRIAL COURT INCORRECTLY APPLIED THE LAW IN FINDING THAT THE TITLE POLICY DID NOT PROVIDE COVERAGE, IN THAT THE PROPERTY'S TITLE HAD A DEFECT CAUSED BY A DOCUMENT NOT PROPERLY FILED OR RECORDED.

Respondent's original argument for summary judgment was not that the New Melle Lawsuit did not affect the Property's title. Instead, Respondent argued that the City of New Melle's failure to record a *lis pendens* with the St. Charles County Recorder of Deeds excused Respondent from its obligations. Covered Risk 2(a)(vi) explicitly covers this scenario. It adopts a failure to properly record such a document as a condition that falls under the Policy. In response, Respondent suggests that even the recording of the *lis pendens* would not affect the Property's title because the New Melle Lawsuit did not affect the Property's title. However, Respondent's Policy does not support Respondent's

interpretation. As previously argued, Appellants' interest in the Property included the barn thereon, and that interest was clearly threatened by the New Melle Lawsuit. Therefore, Respondent was not and is not entitled to summary judgment.

## CONCLUSION

Respondent must resort to legal gymnastics to support the summary judgment in its favor. Respondent also seeks refuge from its actual knowledge of the New Melle Lawsuit and its obvious adverse effect on Appellants' "occupancy, use or enjoyment" of the Property and the "character, dimensions, or location of any improvement erected" on the Property. Respondent's desire to disclaim its actual knowledge of such defects must not be validated. If Respondent knows about a condition or defect in a property that it insured, Appellants do not know of the condition or defect, and the condition or defect is not excluded or exempted from the insurance policy's coverage, then Respondent must be held to honor its contract and pay Appellants' loss and damages arising therefrom.

Further, Respondent only submitted to the trial court one issue: Whether Covered Risk 5 triggered its obligations if the covered risk is not recorded with the St. Charles County Recorder of Deeds. Respondent failed to establish facts to support that the other terms do not apply. Respondent is also unable to establish that, as matter of law, it is entitled to summary judgment as to the other covered risks.

Therefore, for all of the reasons presented herein, Appellants respectfully pray that this Court reverse the trial court's summary judgment and remand the case back to the trial court for further proceeding.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served on Respondent/Defendant this 22nd day of December, 2023, through the Court's electronic filing system and via email as follows:

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7471, excluding the cover, appendix, and certificates of service and compliance.

*/s/ Daniel T. Batten*