9-3-2013

DAFCO v. Stewart Title Guaranty Co Appellant's Brief Dckt. 40738

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAFCO LLC.,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
STEWART TITLE GUARANTY COMPANY and AMERITITLE, INC.,	)
	)
Defendants.	)

Supreme Court No. 40738

APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
for Bonneville County

Honorable Dane H. Watkins, District Judge, presiding

Stephen D. Hall and Nathan M. Olsen
Residing at Idaho Falls, Idaho, for Appellant

Michael T. Spink and Richard T. Andrus
Residing at Boise, Idaho, for Respondents

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STATEMENT OF THE CASE

Nature of the Case

This case arises out of the same series of transactions described in *New Phase Investments v. Jarvis*, 153 Idaho 207, 280 P.3d 710 (2012), in which this Court held that a deed not signed by both spouses was potentially voidable, but not void, under Idaho Code § 32-912. In this case, the lender, Snake River Funding, Inc., and its assignee, DAFCO LLC, (collectively "the Lenders") sued Stewart Title Guaranty Company and Ameritite, Inc. (collectively "the Title Companies") claiming damages from Stewart Title resulting from breaches of the title policy and against Ameritite resulting from breaches of the escrow agreement. DAFCO also sought to add claims for negligence and for breach of the duty of good faith and fair dealing against the Title Companies, and to add a breach of warranty claim against Snake River Funding under its assignment.

Course of Proceedings and Disposition Below

On January 15, 2010, the Lenders filed their verified complaint against Stewart Title in this cause.[1] (Shortly thereafter the foreclosure action in *New Phase Investments, supra,* was commenced.[2] The Lenders filed a first Amended Complaint on April 29, 2010,[3] clarifying the claims against Stewart Guaranty.

On September 21, 2010, the Lenders moved for summary judgment.[4] This motion was denied by the trial court in January 2011 on the grounds that, although the trial court in *New Phase Investments* had invalidated the Jarvis's deed because it had not been signed by both spouses,

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[1] R., p. 12.

[2] *See* Supreme Court Repository, Bonneville County Case CV-2010-651.

[3] R., p. 22.

[4] R., p. 93.

Stewart Title had appealed that decision and the appeal was still pending.[5] Because of the pending appeal the trial court determined that the Lenders' claims were not ripe. Nevertheless, the court refused to dismiss the case, as requested by Stewart Title, and on March 24, 2011, it vacated all hearing and trial dates pending a decision on the appeal in *New Phase Investments*.[6]

In the meantime, the Lenders filed a Second Amended Complaint on March 11, 2011, adding a claim against Ameritite, Inc., which had acted as the escrow agent in the closing of the loan by the Lenders to Jarvis.[7]

At that point all proceedings in this case effectively ceased until the decision of this court in *New Phase Investments* was received in late June 2012.[8] No answer to the second amended complaint was filed by Ameritite. No discovery was conducted. Everybody awaited the outcome of the appeal.[9]

Following receipt of that opinion, counsel for the Lenders withdrew because of a conflict of interest between his clients.[10] New counsel appeared for DAFCO by Substitution of Counsel August 21, 2012. Because of the substitution and because no action had been taken on the new claims and defendant added by the Second Amended Complaint, the case was essentially starting afresh. As expressed by counsel for the Title Companies at a status conference, "we're starting at ground zero on all of that."[11]

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[5] R., pp. 357, 368–369.

[6] R., pp. 460–461.

[7] R., p. 426.

[8] R., p. ii.

[9] Tr., p. 22, L. 19 – p. 23, L. 6; p. 30, Ll. 9–24.

[10] R., p. 464, 466; Tr., p. 18, Ll. 14–21.

[11] Tr., p. 23, Ll. 5–6.

Snake River Funding moved to dismiss itself as a party plaintiff on September 20, 2012, and that motion was granted December 4, 2012.[12]

Stewart Title and Ameritite moved for summary judgment October 12, 2012.[13] DAFCO moved to file a Third Amended Complaint December 6, 2012.[14]

These motions, along with ancillary motions to strike and to continue, were argued December 12, 2012. At the hearing the trial court, considering all of the briefs and affidavits, ruled from the bench. It granted both motions for summary judgment and denied the plaintiff's motion to amend the complaint.[15] An order to that effect and final judgment were entered December 24, 2012.[16]

This appeal ensued 42 days later on February 4, 2013, when DAFCO filed its Notice of Appeal.[17]

Statement of Facts

The background to this dispute is most concisely stated in this Court's opinion in *New Phase Investments:*

> Joshua and Rebecca Jarvis were married on June 30, 2006, and remained married throughout the proceedings below. Joshua acquired a piece of real property in Idaho Falls (the "Property") on March 7, 2008. Although the warranty deed conveyed the Property to Joshua as "a married man dealing with his sole and separate property," the parties do not dispute that it was community property. Joshua planned to build a spec home on the Property and, in furtherance of that end, obtained several construction loans using the Property as collateral.
>
> On March 13, 2008, Joshua executed a deed of trust in favor of Snake River Funding, Inc. to secure the amount of $268,000, and that deed was later assigned to DAFCO, LLC. The deed of trust was recorded in Bonneville County on March 18,

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[12] R., pp. 468, 580.

[13] R, pp. 471, 473.

[14] R., p. 582.

[15] Tr., pp. 42–93

[16] R., pp. 689–693.

[17] R., p. 694.

> 2008. It is undisputed that Rebecca did not join in the execution of this first-recorded trust deed. On April 3, 2008, Joshua obtained a $42,000 loan secured by another deed of trust executed in favor of New Phase Investments, LLC, again without Rebecca's signature.
>
> Although Joshua defaulted on those obligations in the summer of 2008, New Phase agreed to loan him additional money secured by new deeds of trust. Joshua and Rebecca, acting together, executed two deeds of trust in favor of New Phase on October 28, 2008, as well as a third deed of trust on November 3, 2008. The trust deeds secured amounts of $42,000, $63,600, and $140,000, respectively, and were recorded in Bonneville County on their dates of execution.[18]

Amerititle was the escrow agent that closed the loan transaction between Jarvis and Snake River Funding.[19] The transaction involved several issues, as set forth in the closing instructions prepared by Amerititle. First, Amerititle recognized in the closing instructions that the closing would involve two steps. The first step was to execute the documents that created a loan from Snake River Funding to Mr. Jarvis. The second step was to execute the documents that assigned Snake River Funding's interest in the loan to DAFCO. In other words, from the outset DAFCO was the real party in interest in this transaction and closing. That was patently obvious to all. The Closing Instructions from Snake River Funding and Jarvis to Amerititle state: "Please prepare the: Promissory Note, Deed of Trust, *Assignment of Deed of Trust from Snake River Funding, Inc. to D.A.F.C.O. LLC* . . . And any other necessary documents."[20]

As to the vesting, and specifically the parties to the transaction, the Closing Instructions followed the Commitment for Title Insurance issued by Amerititle. In particular, the Commitment for Title Insurance issued prior to Closing provided that title was vested in "Josh M. Jarvis, a married man dealing with his sole and separate property."[21] The same Commitment for Title Insurance

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[18] *New Phase Investments v. Jarvis,* 153 Idaho at 208–209, 280 P.3d at 711–712

[19] R., p. 502, ¶ 9 (Affidavit of Megan Ker).

[20] R., p. 508 (Exhibit A to Affidavit of Megan Ker)

[21] R., p. 434 ¶ 4 (Exhibit A to verified Second Amended Complaint)

contained the following requirement: "5. We will require the spouse of the vestee named herein join in any conveyance and/or encumbrance to satisfy Homestead Exemptions limitations and Community Property presumption."[22] Presumably, this would have been one of the "other necessary documents" referenced in the Closing Instructions, as set forth above.

Under the Closing Instructions, Ameritite was not authorized to close the transaction until it "has received *all properly executed documents.*"[23] The parties were entitled to assume that the properly executed documents would include the signature of Mrs. Jarvis on the conveyance or encumbrance, as set out in the Commitment for Title Insurance.

At the closing, however, Ameritite did not obtain the signature of Mrs. Jarvis, either on the Deed of Trust or on another instrument in which she disclaiming any interest in the property. Indeed, that failure was at the heart of the litigation in *New Phase Investments*, as it is in this case.

In short, Ameritile was the escrow or closing agent that improperly prepared documents showing that title was vested in Joshua Jarvis as his sole and separate property instead of as his community property. It prepared a deed of trust without including a signature by Mrs. Jarvis. It prepared the closing instructions and "other necessary documents" presented to the parties to sign at the closing of the loan in question. And as is ubiquitous in such transactions, the parties relied on Ameritite, as the expert that had studied the title and knew what was necessary to get the title and the documents right at closing so that the loan could be insured without any cloud or encumbrance other than those listed on the title commitment and, ultimately, on the title insurance policy. Those failures led to the deed of trust being voidable and thus potentially void, which allowed *New Phase Investments* to feel secure in taking subsequently executed and recorded deeds of trust and asserting a first priority lien.

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[22] R., p. 435 (Exhibit A to verified Second Amended Complaint)

[23] R., p. 509, L. 1 (Exhibit A to Affidavit of Megan Ker)

Insofar as the ultimate issuance of a title policy, however, Ameritite was acting only as the agent for Stewart Title Guaranty, which actually issued the title policy ("Policy").[24] The title policy followed the state of the title reported in the Commitment for Title Insurance issued by Ameritite. Notably, the Policy defines "Insured" not only to include "Snake River Funding, Inc., an Idaho corporation," (the insured listed in Schedule A), but also ". . . each successor in ownership of the indebtedness."[25] Under this provision DAFCO, as a successor owner of the indebtedness from Jarvis, is also an insured under the Policy.

As noted in *New Phase Investments*, Jarvis defaulted on the loans from DAFCO in the summer of 2008. DAFCO has never been paid any monies due and payable under the loan to Jarvis.[26] Of course, because of the new deeds of trust issued by Jarvis and his wife to New Phase Investments (closed, it should be noted, by Ameritite), a straightforward foreclosure was not possible. Rather than foreclose on a deed that was either void or voidable, pursuant to the general understanding prior to the Supreme Court's decision in *New Phase Investments*, on November 28, 2008, DAFCO and Snake River Funding provided a Notice of Claim to Stewart Title for payment under the policy.[27] Demands for payment were also made to Stewart Title on August 31, 2009, and on December 23, 2009.[28] The principals of DAFCO and of Snake River Funding, Inc., both testified that they never requested or authorized the hiring of counsel to pursue their interests under the deed of trust or to represent their interests in any other way. Instead, they consistently requested that Stewart Title pay

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[24] R., pp. 438–450 (Exhibit B to verified Second Amended Complaint), p. 429 ¶¶ 18–19

[25] R, p. 447, ¶ 1(e)(1)(A) (Exhibit B to verified Second Amended Complaint)

[26] R., p. 342, ¶ 7 (Affidavit of David Patterson)

[27] R., p. 430, ¶ 24; cf. R., p. 512, ¶ 16, and pp. 521–523.

[28] R., p. 430, ¶ 25.

the damages they sustained as a result of the defect in title against which Stewart Title had insured them.[29]

Instead of paying DAFCO under the Policy, Stewart Title retained counsel to represent DAFCO and Snake River Funding in an effort to remedy or "establish" the title. The Policy gives Stewart Title the right, in addition to the options contained in paragraph 7 set out below, to institute and pursue action to "establish the Title or the lien of the Insured Mortgage, as insured," including the right to appeal any adverse judgment or order."[30] In paragraph 7, Stewart Title also is given options to pay or tender payment of the "Amount of Insurance," to "Purchase the Indebtedness," or to pay or otherwise settle with the Insured or parties other than the Insured.[31] There appears to be no other provision in the Policy that deals with the interaction of these several different options.

Despite the timely hiring of counsel by Stewart Title, for various reasons, including two bankruptcies' by Jarvis, suit to "establish the title, as insured," was not initiated until shortly after the filing of this suit in February 2010, a delay of well over a year from the Notice of Claim. That litigation occupied nearly 2½ years, resulting in a delay of approximately four years after Jarvis's default to clear up the mess created by Amerititle's errors at closing.

During that four years interest continued to accrue on the note. Instead of having a relatively expeditious and routine non-judicial foreclosure, litigation took about 12 times that long, and 12 times the interest accrued, seriously eroding the relative value of the security for the loan. Moreover, as is well known to virtually every adult in this country, during that time period from mid-2008 until mid-2012, the real estate market nationwide, especially the residential real estate market, took a serious beating, also dramatically reducing the value of DAFCO's security.

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[29] R., pp. 341–342, 343A (Affidavit of David Patterson, Affidavit of Darin Hebdon (Second)

[30] R., p. 448, ¶ 5(b)(c)

[31] R., p. 448, ¶ 7(a)(b)

ISSUES PRESENTED ON APPEAL

1. The Rules of Civil Procedure require that leave to amend be freely given when justice so requires. The court refused to allow an amendment to restate claims against Amerititle and Stewart Title in light the *New Phase Investments* decision because of the age of the case. Did the court abuse its discretion when it was necessary to wait for the decision in *New Phase Investments* before proceeding?

2. Idaho law allows a court to deny leave to amend a complaint when the amended pleading does not set out a valid claim. Idaho law recognizes negligence claims against insurance companies, including bad faith claims. DAFCO asserted negligence and bad faith claims against the title companies. Did the trial court abuse its discretion by denying leave to amend on the ground that the claims asserted lacked merit?

3. The covenant of good faith and fair dealing is part of insurance contracts in Idaho, having the object to see that the insured gets what he bargains for. Stewart Title chose to litigate title for several years rather than to promptly pay DAFCO its damages under the policy, allowing the value of DAFCO's security to seriously erode. Was that choice a breach of the contractual duty of good faith and fair dealing in the Policy?

3. Privity of contract includes not only original parties but assignees of parties and third party beneficiaries. The Closing Instructions between Snake River Funding and Amerititle contemplated an immediate assignment of the loan to DAFCO, which actually occurred. Was it improper to deny summary judgment to DAFCO against Amerititle for lack of privity?

ATTORNEY FEES ON APPEAL

DAFCO seeks its attorney fees on appeal pursuant to Idaho Code § 12-120(3) (commercial transaction).

ARGUMENT

I.

THE TRIAL COURT IMPROPERLY RELIED ON UNSPECIFIED PREJUDICE AND IMPROPER ANALYSIS OF THE MERITS OF THE CLAIMS TO BE ADDED IN DENYING THE MOTION TO AMEND, RESULTING IN AN ABUSE OF DISCRETION.

A. The Standard of Review Is Abuse of Discretion.

In *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 27 (Idaho 1997) the Idaho Surpeme Court explained the long-standing rules of the Court regarding decisions to grant or to refuse permission to amend a complaint. It stated:

> the decision to grant or refuse permission to amend a complaint is left to the sound discretion of the trial court when a party proposes to amend its complaint after a responsive pleading is served. I.R.C.P. 15(a); *Jones v. Watson*, 98 Idaho 606, 570 P.2d 284 (1977). We also recognize that this Court has determined that a trial court properly refuses permission to amend a complaint when the record contains no allegations that, if proven, would entitle the party to the relief claimed. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 804 P.2d 900 (1991). Nonetheless, as this Court indicated in *Wickstrom v. North Idaho College*, 111 Idaho 450, 725 P.2d 155 (1986), in the interest of justice, district courts should favor liberal grants of leave to amend a complaint.

When reviewing an exercise of discretion, a court on appeal conducts a three-tiered inquiry. The lower court must have (1) correctly perceived the issue as one of discretion, (2) acted within the outer boundaries of its discretion and consistently with legal standards applicable to specific choices available to it, and (3) reached its conclusion by an exercise of reason. *Dunagan v. Dunagan*, 147 Idaho 599, 213 P.3d 384 (2009).

Regarding the second tier of the inquiry, some of the legal standards applicable are set forth in *Hines v. Hines, supra*. The most basic of these legal standards is that district courts should favor liberal grants of leave to amend a complaint. *Hines, supra.* This requirement is set forth explicitly in I.R.C.P. 15(a) as follows: "[L]eave shall be freely given when justice so requires."

B. The Trial Court Placed Undue Weight on the Age of the Case, Considering the Delay Occasioned by the Need to Await a Decision on the Appeal in *New Phase Investments.*

At least twice in its oral ruling on the motions before it at the hearing held December 12, 2012, the Court emphasized how long this case had been pending, and its concern about the time guidelines imposed on trial courts by the Supreme Court.

> So there's an extended history on this case, and it appears that the parties in some regard may have been idle awaiting the decision, but nonetheless this is a case that has been pending since 2010 early. And so when we reach trial, it will have been a number of years, which far exceeds the time standards that are imposed upon this Court for resolution. And there are those cases that have taken this kind of time, but you look at the nature of the cases to make a determination as to whether or not it has been diligently pursued.

Tr., p. 77, L. 25 – p. 78, L. 9.

> The Court in its view and the pressures it feels from its case management and calendar and the guidelines set forth by the Supreme Court that it can't go backwards.

Tr., p. 83, Ll. 17–20

Based on that and, frankly, it appears on nothing else, the trial court determined that it would be prejudicial to allow an amendment of the complaint. "And the Court finds that *any prejudice* in this case would exceed any justification to allow the amendment." Tr., p. 83, Ll. 20–22.

The Court never states what the prejudice to the defendants actually would be if there were an amendment, other than an unspecified amount of time. The court was obviously concerned with additional delay, but it never discussed how short or how long the delay would be, or what the practical or legal consequences of that delay would be on the defendants. The trial court mentions the New Phase Investment case and the need to wait for a decision, but once that decision was made, was unwilling to discount the time lost during that wait and was unwilling to even consider the effect that decision had on the posture of this case.

Remarkably, the trial court was willing to allow Stewart Title a period of four years to sort out the title to the property, finding that it had proceeded "diligently," even though the prejudice to

DAFCO in the erosion of its security as interest on the note grew and property values fell. At the same time it was unwilling to allow DAFCO, who had newly involved counsel because of a conflict of interest of its prior counsel, even a short delay to put its claims in line with the new legal realities after the Court's surprising decision in *New Phase Investments.*

The failure to address the specific prejudice to be experienced by Amerititle (which did not even file an answer to the Second Amended Complaint until after the decision in *New Phase Investments*) or to Stewart Title, was a violation of the third tier of the inquiry conducted by this Court on appeal. The prejudice focused on by the trial court seems to be exclusively the prejudice to the trial court because of the application of the Supreme Court guidelines on the resolution of cases, not on the prejudice or interests of justice of the parties.

C. **The Newly Stated Claims are Meritorious.**

The trial court's oral ruling on the motions for summary judgment and on the motion to amend the complaint were intentionally woven together. As such, the trial court made it difficult, and perhaps impossible, to understand when the court was talking about the merit of the pending claims that were the subject of the summary judgment motions, or the proposed new claims that were the subject of the motion to amend. In fact, however, there was actually no discussion or apparent consideration by the court of the merits of the new claims raised in the proposed amended complaint. Still, though, the court said that the claims had, in essence, no legal merit. This confusion, failure to address the merits of the new claims themselves instead of the claims set forth in the second amended complaint, is also a violation of the third tier of inquiry under the abuse of discretion standard, which requires that the result be reached as a result of an exercise of reason.

The claims pending under the Second Amended Complaint, which were the subject of the summary judgment motions, were purely contractual claims under the Policy (against Stewart Title) and the Closing Instructions (against Amerititle). In contrast, the claims to be added under the

proposed Third Amended Complaint were: (1) a claim for negligence (tort), including negligence per se, against Amerititle and Stewart Title in the manner that it closed the transaction between Jarvis and the Lenders; (2) claims for negligence and for bad faith (both tort claims) arising from the manner in which Stewart Title responded to and handled the claim filed by DAFCO under the Policy; and (3) a claim for breach of warranty against Snake River Funding.

(Snake River Funding did not even appear at the hearing, presumably because the hearing scheduled on the motion to amend was scheduled for the following week. The trial court, without notice to anyone, including Snake River Funding, accelerated hearing of the motion to amend and considered it together with the motions for summary judgment.)

In any event, there is good authority for all of the claims DAFCO sought to add against the defendants.

1. *The Negligence Claims against Amerititle and Stewart Title Have Legal Merit.*

Idaho law has long allowed negligence and the standard of care to be established by showing a violation of the applicable laws and regulations that conclusively establish the first two elements of a cause of action (both duty and breach).[32] Idaho has also held that, notwithstanding available administrative relief, injured parties are not precluded from bringing a private cause of action in reliance on standards set forth in the insurance statutes and regulations, even going so far as to state that the "statutory scheme to regulate the insurance industry fails to provide sufficient incentive" alone to prevent wrongs, therefore allowing private claims to be based on such statutes (such as bad faith or negligence.)[33]

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[32] *O'Guin v. Bingham County*, 142 Idaho 49, 52 122 P.3d 308, 311 (2005).

[33] *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, fn 3 730 P.2d 1014, fn 3 (1986)

Courts have made it clear that escrow duties are fiduciary in nature, and that in addition to its contractual obligations, an escrow agent is also liable for its negligent acts.[34] In addition to these common law duties, there are statutory and regulatory duties as set forth for escrow agents under the Idaho Escrow Act[35] and for companies governed under the Idaho Department of Insurance and under those statutes[36] and the related regulations.[37] In addition, in Idaho, the statutes and regulations regarding insurance are incorporated into and/or are to be consistent with the agreements with the insured.[38]

The Lenders' amended complaint simply alleges these well-founded duties and principles in the setting forth claims of negligence and per se negligence as it pertained to Amerititle's and Stewart Title's conduct as licensed title insurance and escrow agents in Idaho. In those role, Amerititle and Stewart Title had a duty to comply with statutes and regulations governing escrow duties and the issuance of title policies, including regulations issued by the Idaho Department of Insurance. The violation of those regulations constitutes negligence per se.

The provisions that the title company defendants allegedly violated include failing to conduct the necessary investigation prior to the issuance of an insurance policy to determine if there has been proper execution, acknowledgment, and delivery of any conveyances, mortgage papers, and other

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[34] *See All American Realty* at 1357-58, 230-231.

[35] Idaho Code § 30-901 *et seq.*

[36] Idaho Code § 41-101 *et seq.*

[37] IDAPA 18.01.25

[38] *See, e.g., Hansen v. State Farm Mut. Auto. Ins. Co.,* 735 P.2d 974, 980-81 (Idaho 1987) ; *Howard v. Blue Cross of Idaho Health Service, Inc.,* 757 P.2d 1204, 1207 (Idaho App. 1987). *Hoffman v. SV Co.*, 628 P.2d 218, 221 (Idaho 1981).

title instruments necessary for the issuance of a policy[39] and failing to complete a transaction in accordance with the written instructions.[40]

These claims have merit, since Ameritite failed to follow its own written instructions by obtaining Mrs. Jarvis's signature on the Deed of Trust, and since Stewart Title failed to ensure that the documents had been properly executed prior to issuing a policy.

2. *The Breach of Warranty Claim against Snake River Funding Has Legal Merit.*

The conflict of interest that led to the withdrawal of plaintiff's initial, joint counsel, was a claim for breach of warranty by DAFCO against Snake River Funding. That claim seeks to enforce the Corporate Warranty given by Snake River Funding to DAFCO, in which it agreed to indemnify DAFCO's interest in the subject property and to hold DAFCO harmless against all threats to DAFCO's interest in the property.

This claim clearly has merit both factually and legally. It is undisputed that the Corporate Warranty exists and protected DAFCO. If it did not exist and have potential merit, there would have been no conflict of interest requiring initial counsel to recuse himself.

DAFCO's attempt to amend the complaint to add such claim was timely given the fact that it was sought shortly after the conflict of interest between the two parties had been resolved, separate counsel had been appointed, and new counsel had an opportunity to review the voluminous discovery received from prior counsel.

The trial court erred in not even addressing this particular claim whatsoever in his ruling denying DAFCO's motion to amend the complaint. It is apparent from the record that the court was anxious to resolve this case without any further deliberations or proceedings, and notwithstanding

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[39] IDAPA 18.01.25.005.01.d

[40] IDAPA 18.01.25.011.01

the fact that Snake River Funding's counsel was not present at the hearing (because the hearing scheduled on the Motion to Amend was actually scheduled one week in the future).

3. *The Breach of the Covenant of Good Faith and Fair Dealing Contractual and Tort Claim have Merit.*

DAFCO's Second Amended Complaint included claims for breach of contract against both Amerititle (under the Escrow Agreement) and Stewart Title (under the title policy). However, after the Supreme Court issued its decision under *New Phase Investments,* a bad faith tort claim against Stewart Title also became ripe, which provided the basis for adding such claim to DAFCO's Third Amended Complaint.

Title policies are "are contracts between insured and their insurers" and should be interpreted and treated as such under law.[41] Stewart Title is an entity that is governed by the insurance statutes and regulations, which make it subject to the strict fiduciary requirements, that is, the "special relationship between the insurer and insured," the violation of which gives rise to a bad faith claim.[42] This type of bad faith claim, or breach of the covenant of good faith and fair dealing, is a tort, the violation of which can result in damages beyond contract damages.[43]

Citing the special or fiduciary relationship that exists between the insurer and its insured, the elements of a bad faith claim against an insurer were laid out in *Robinson v. State Farm Mut. Auto. Ins. Co.*[44] A bad faith claim lies against an insurer when: (1) the insurer intentionally and unreasonably denies or withholds payment; 2) the claim is not fairly debatable; 3) the denial or failure to pay is not the result of a good faith mistake; and 4) the resulting harm is not fully compensable by contract damages. An insurer's failure to timely respond to and defend its insured

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[41] *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 11–12, 43 P.3d 768, 773 (2002)

[42] *White v. Unigard Mut. Ins. Co.* 112 Idaho 94, 730 P.2d 1014 (1986)

[43] *Id.*

[44] 137 Idaho 173, 176 (Idaho 2002)

is a classic example of bad faith conduct.[45] In addition, the standards set forth in the Unfair Claims Settlement Practices Act (UCSPA)[46] can also serve as a basis for bad faith.[47]

The UCSPA prohibits, among other things:

- "failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;" UCSPA Sec. (2)
- "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;" *Id.* at Sec. (6), and
- "failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy." *Id.* Sec. (13)

In addition, title insurers who also conduct escrow services may also be liable for bad faith in the providing of its escrow services, which may include a failure of the escrow officer "to act with scrupulous honesty, skill, and diligence."[48] Specific examples of actions that constitute bad faith by an escrow agent may include a failure of "properly preparing the documents necessary for the transaction to take place."[49]

In some significant ways, the instant case mirrors key facts and holdings in *Weinstein v. Prudential Prop. & Cas. Ins. Co.*[50]. In *Weinstein*, after experiencing injuries from an automobile

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[45] *See Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 314 (Idaho 2010)

[46] Idaho Code 41-1329 et seq.

[47] *White v. Unigard Mut. Ins. Co., supra*, 112 Idaho at fn 3, 730 P.2d at fn 3

[48] *Baker v. First Am. Title Ins. Co.*, 2009 Ariz. App. LEXIS 823, 17–18 (Ariz. Ct. App. Oct. 27, 2009)

[49] *See Ansonia Realty Co. v. Ansonia Associates*, 142 A.D.2d 514 (N.Y. App. Div. 1st Dep't 1988)

[50] *Weinstein v. Prudential Property and Cas. Ins. Co*, 149 Idaho 299, 233 P.3d 1221 (2010)

accident, the insured filed a claim under the uninsured motorist provisions of its policy with Liberty Mutual. Even though the insurer immediately determined that the uninsured motorist was at fault in the accident and that the insured was covered under the policy, rather than pay the insured's medical bills it instead decided to treat the insured the same way it would treat the other party at fault, that is, but not paying anything under the uninsured motorist provisions of the policy until it was ready to settle all claims under the UM policy.[51] In other words, the insurer believed that it needed to pay any medical bills incurred by its insured until it had all medical bills and other damages before it. This resulted in significant delays in the payment of the insured's medical bills, which had devastating consequences on the insured.[52]

The *Weinstein* court held that the insurer's approach and conduct, which resulted in the substantial delays, constituted not only a contractual breach of the covenant of good faith and fair dealing, but a bad faith tort as well.[53] The Court held that, once the insurer made the determination that the uninsured was at fault, it should have simply paid the medical bills as they were submitted. Failing to pay costs as they were incurred was not performing the contract within a reasonable time, as required under the covenant of good faith and fair dealing.[54] The Court further held that such conduct constituted an "intentional and unreasonable delay in payment" that proved the tort of bad faith.[55] By so ruling, the Court soundly rejected the insurer's position that "it was not required to make payments under the UM coverage until the entire UM claim was settled, even if liability and the medical bills were undisputed."[56]

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[51] *Id.* at 317–318, 233 P.3d at 1239–1240

[52] *Id.* at 308, 233 P.3d at 1230.

[53] *Id.* 316–317, 233 P.3d at 1238–1239

[54] *Id.* at 318, 233 P.3d at 1240

[55] *Id.*

[56] *Id.* at 319, 233 P.3d at 1241

In this case, DAFCO is in a situation very similar to the insured in *Weinstein.* Stewart Title has made an election under the Policy that takes the long way around a solution to its problem. Instead of being promptly paid for its damages under the policy, it was forced to endure years of litigation while the value of its security erodes while Stewart Title pursues one of its alternatives under the policy, an alternative that is vastly superior from Stewart Title's perspective, but has disastrous consequences for DAFCO. Stewart Title is likewise in a situation quite analogous to Liberty Mutual in *Weinstein.* It determined that seeking a determination of whether a voidable deed was actually void or not satisfied its duties to DAFCO under the policy, ignoring its fiduciary duties as the insurer. Stewart Title had an obligation to defend DAFCO under the policy anyway. Stewart Title thus had little incentive to just pay the policy and take an assignment of the note and deed of trust, even if it was a four year process with an uncertain outcome.

DAFCO is simply alleging that, rather than subjecting DAFCO to this delay and the consequences attendant thereto (loss of income, use of money, security), that because the title was at the very least seriously clouded, Stewart Title should have simply paid the claim as one of the options under the Title Policy, taken an assignment of the insured mortgage and deed of trust, and then pursued whatever mitigation it desired on its own behalf. Instead, it put its economic interests ahead of those of its insured, a breach of the duty of good faith and fair dealing. In other words, the fiduciary duty inherent in the relationship between insurer and insured requires that Stewart Title not simply choose the option that best benefits its own self, to the detriment of its insured. To do so constitutes bad faith.

It was error for the trial court, in essence, to summarily dismiss this meritorious claim.

II.

THE ACTIONS OF STEWART TITLE VIOLATED THE CONTRACTUAL DUTY OF GOOD FAITH AND FAIR DEALING. THE GRANT OF SUMMARY JUDGMENT WAS IMPROPER.

A. The Standard of Review is *De Novo* Review.

The Idaho Supreme Court quite recently reiterated the oft-cited standards to be applied on appeal of an order granting summary judgment to the moving party. In *AED, Inc. v. KDC Investments*,[57] writing for a unanimous court, Justice Horton explained:

> This Court exercises de novo review of a grant of summary judgment and the "standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Stonebrook Const., LLC v. Chase Home Fin., LLC*, 152 Idaho 927, 929, 277 P.3d 374, 376 (2012) (quoting *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 394, 224 P.3d 458, 461 (2008)). Summary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When applying this standard, this Court construes disputed facts "in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." *Curlee*, 148 Idaho at 394, 224 P.3d at 461. Where "the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review." *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006) (citing *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002)). However, to survive summary judgment, "an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(c). Therefore, "the nonmoving party must submit more than just conclusory assertions that an issue of material fact exists . . . ." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005) (citing *Northwest Bec–Corp. v. Home Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002)). "A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Id.*[58]

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[57] *AED, Inc. v. KDC Investments*, ___ Idaho ___, ___ P.3d ___, 13.16 ISCR 10 (2013 Opinion 88, August 15, 2013)

[58] *Id.*, 13.16 ISCR at 12–13; Slip Op. 3–4.

B. There Were At Least Issues of Material Fact that Preclude the Entry of Summary Judgment.

In considering the claims against Stewart Title, the trial court completely ignored the holding in *Weinstein v. Prudential* that a breach of the duty of good faith and fair dealing, that is, bad faith, constitutes both a breach of contract and a tort. As the court stated,

> Although the tort of bad faith is not a breach of contract claim, to find that Liberty Mutual committed bad faith in handling the UM provision, there must also have been a duty under the contract that was breached. [Citation omitted.] Thus, both the breach of contract claim and the bad faith claim depend upon the provisions of the insurance policy.[59]

The Policy contains several options in the event of a claim, as well as several obligations. Stewart Title has the obligation to defend against any claim that impugns DAFCO's title, as insured. It may also institute action to establish the title. It may pay on the policy to DAFCO. It may purchase DAFCO's indebtedness. It may settle with the third parties. It could settle with DAFCO.[60]

Even though the policy requires payment to be made within 30 days of the time that "liability and the extent of loss or damage have been definitively fixed,"[61] there is no overall time frame in the Policy within which a claim must be resolved. Absent such a contractual time frame, by law the contract is deemed to require performance within a reasonable time.[62] What is a "reasonable time" in this context depends upon the nature fo the required act, the parties' situations, and circumstances surrounding the performance.[63] This kind of determination is ultimately a question for the trier of fact, and in the situation of summary judgment, as stated above, the court must construe all disputed facts in favor of the non-moving party, and all reasonable inferences that can be drawn from the

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[59] *Weinstein, supra*, 149 Idaho at 315, 233 P.3d at 1237

[60] R., p. 448, ¶¶ 5, 7

[61] R., p. 449, ¶ 11

[62] *Obray v. Mitchell*, 98 Idaho 533, 567 P.2d 1284 (1977)

[63] *Culp v. Tri-County Tractor, Inc.*, 112 Idaho 894, 736 P.2d 1348 (Ct. App. 1987)

record are drawn in favor of the non-moving party. In simpler terms, what is reasonable is essentially no less a jury question than how much a personal injury claim is worth. It requires more than mere affidavits to determine appropriately.

The trial court emphasized that the only timeliness duty of the insurer, when it has opted to pursue litigation, is to pursue it "diligently." However, there are more duties inherent in the policy than merely defending the insured and establishing title. There is the overarching duty of indemnifying the insured against actual monetary loss or damage he sustains.[64] And that needs to happen within a reasonable time. The insurer cannot take forever to "definitively fix" "the extent of loss or damage." Whether or not it did so in this case is, inherently, a question of fact, independent of the obligation to pursue litigation diligently.

While the litigation was ongoing, Snake River Funding and DAFCO were consistently objecting to the ongoing litigation and were requesting that they be paid their damages under the policy. Stewart Title ignored those requests, and continued to litigate. Whether or not it was reasonable to do so, whether or not it fulfilled its duty to act in good faith and to deal fairly with the insured, is a question for the trier of fact.

For that reason, the court's focus on diligent litigation efforts to the exclusion of the overall reasonableness of the time taken to fix the extent of monetary loss was error, and summary judgment should not have been granted.

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[64] R., p. 449, ¶ 8.

III.

DAFCO Is Either in Privity With Amerititle or Was a Third Party Beneficiary of the Closing Agreements. Dismissal of Claims Against Amerititle for Lack of Privity Was Error.

It is clear from a reading of the court's oral ruling on the summary judgment motions that the basis for the court's holding on Amerititle's motion for summary judgment was lack of privity, an argument that Amerititle raised in its reply brief filed only one day before the hearing on the motion. The court thus lacked complete briefing on that issue, and it its efforts to bring this matter to a conclusion overlooked the current status of the law regarding privity defenses.

As long ago as 1990, as general a treatise on the law as Blacks Law Dictionary was able to say, about the concept of privity:

> However, the absence of privity as a defense in actions for damages in contract and tort actions is generally no longer viable with the enactment of warranty statutes (*see e.g.*, U.C.C. § 2-318 below), acceptance by states of the doctrine of strict liability *(q.v.)* and court decisions (*e.g.* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050) which have extended the right to sue for injuries or damages to third party beneficiaries, and even innocent bystanders (Elmore v. American Motors Corp., 70 Cal.2d 578, 75 Cal.Rptr. 652, 451 P.2d 84).[65]

As implied above, the title policy and closing process for real estate transactions has, at its hub, the local title company. Amerititle was at the hub of this transaction. It issued the commitment for title insurance. It prepared many of the essential documents for this transaction, including the deed of trust, the note, the assignment of the deed of trust to DAFCO, and the closing instructions. It even acted as agent for Stewart Title in issuing the title policy in accordance with its title commitment and the closing documents.

Amerititle was fully aware that DAFCO was to be assigned the deed of trust and note. It was aware that DAFCO funded the loan transaction, and that Snake River Funding was acting in the role

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[65] BLACK'S LAW DICTIONARY (Sixth Ed. 1990), p. 1199.

of a loan broker rather than a lender. It was familiar with the Stewart Title standard policy that would make DAFCO an insured under the Policy once it was assigned the obligation from Jarvis. In other words, it was clear that Snake River Funding was always just a conduit, not the real party in interest on the lender's side of this transaction. The ultimate assignee, and the ultimate beneficiary of all of the rights under the contracts and the actions undertaken by Ameritítle, would be DAFCO.

In that context, there is at the very least a question of fact as to whether there was privity of contract between Ameritítle and DAFCO as to the closing escrow agreements, including the Closing Instructions. There is likewise at the very least a question of fact as to whether DAFCO was an intended beneficiary of those agreements, or whether Snake River Funding was, in effect, acting as the agent for DAFCO in appearing at the closing and executing the documents.

The court's failure to examine all of these additional arguments, possibly excused by the late point in the briefing process in which this issue was raised, was error.

The trial court also erroneously found that Ameritítle was acting as nothing more than a "scrivener" in the closing. Nothing could be further from the truth.

The escrow agent's strict obligations under the escrow agreement are explained in *All American Realty, Inc. v. Sweet*, 107 Idaho 229, 229; 687 P.2d 1356, 1357 (1984) (citing Am Jur.2d Escrow 16).

> Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. He is held to strict compliance with the terms of the escrow agreement; and he may not perform any acts with reference to handling the deposit, or its disposal, which are not authorized by the contract of deposit.

Id.

In addition, as set forth in detail above, there are numerous statutory and regulatory requirements that bind an escrow agent to perform more than merely scrivener's duties. The escrow is essentially, in effect, a form of fiduciary with responsibilities to both parties to ensure that the

terms of the escrow are faithfully performed, including, for example, in this case, the duty to obtain signatures of "non-parties" such as Rebecca Jarvis, who's interest might cloud the title being conveyed, and which they were instructed to do and agreed to do as part of the Closing Instructions.

For those reasons, granting summary judgment to Amerititle was error.

IV.

DAFCO Should Be Awarded Attorney Fees on Appeal

Idaho Code § 12-120(3) entitles a prevailing party, including on appeal, when the gravamen of the claim arises from a commercial transaction. The transaction in question is clearly a commercial transaction. For the reasons set forth above, DAFCO asserts that it should be the prevailing party in this appeal. Attorney fees on appeal should be awarded to DAFCO.

CONCLUSION

For all the foregoing reasons, the decision of the trial court denying DAFCO the ability to file its Third Amended Complaint and granting the title companies' motions for summary judgment should be REVERSED and remanded to the trial court for further proceedings.

DATED this 30th day of August, 2013.

PETERSEN MOSS HALL & OLSEN

Stephen D. Hall

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 30th day of August, 2013, I served two true and correct copies of the foregoing document on the persons listed below by first class mail, with the correct postage thereon.

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