IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-22-0486

GILBERT R. JOHNSTON and JUDITH A. JOHNSTON, husband and wife; STEPHEN R. GIBBS; SCOTT SHONE; DONALD S. SMITH and BRENDA J. SMITH, husband and wife as trustees of the Donald S. Smith and Brenda J. Smith AB Living Trust; RACHELLE AMBER McCRACKEN; MICHAEL ALLEN McCRACKEN; SEAN JUSTIN SMITH; GERALD B. WOODAHL and SUSAN A. WOODAHL, husband and wife; JEFFREY M. HOLLENBACK; JIM S. FERGUSON; ERIC W. SMART and STEPHANIE NICOLE SMART, husband and wife; NANCY CORDIAL; EDS INVESTMENTS, LLC an Arizona limited liability company; NEWS DEVELOPMENT, LLC a Montana limited liability company; and JCO PROPERTIES, LLC, a Montana limited liability company,

Plaintiffs/Appellant

v.

FIRST AMERICAN TITLE COMPANY

Defendant/Appellee

APPELLANTS' OPENING BRIEF

On appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV-14-570; Honorable Jason Marks

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the District Court err in granting summary judgement to First American Title Company on Plaintiffs' Breach of Contract Claim where First American Title Company received and retained premiums thereby waiving its right to rescind the title insurance contracts?

STATEMENT OF THE CASE

This action was commenced before the Montana Fourth Judicial District Court, Missoula County (the "District Court") on May 23, 2014, when twenty-one (21) claimants filed a Complaint against First American Title Insurance Company ("First American") and First American Title Company ("FATCO"), asserting various claims relating to the failed Gleneagle subdivision. The case was effectively stayed by agreement of the parties until August 29, 2018 while a related case was litigated and resolved.

On May 21, 2019, the claimants filed a Third Amended Complaint (R@42)[1], which alleged twelve (12) causes of action against both First American[2] and FATCO. All twenty-one (21) of the original claimants alleged eight identical tort claims. However, ten (10) of the claimants (the "Contract Plaintiffs")[3] alleged four

[1] Citations to the Record (R@##) refers to the Register of Actions referencing the District Court's Docket Numbers.

[2] Plaintiffs settled with First American and, as such, First American is not involved in this Appeal.

[3] The Plaintiffs who are parties to this Appeal are: Gilbert R. Johnston, Judith A. Johnston, Eric W. Smart, Stephanie Nicole Smart, Stephen R. Gibbs, Gerald B. Woodahl, Susan A. Woodahl, Jeffrey M. Hollenback, EDS Investments, LLC, and News Development, LLC.

additional claims, one of which was a claim for breach of contract. The Contract Plaintiffs' breach of contract claim is the subject of this appeal. Contract Plaintiffs' breach of contract claim is premised upon undisputed facts that: Contracts Plaintiffs purchased property with a commitment that FATCO would issue title insurance policies; FATCO accepted and retained insurance premiums for such policies; FATCO never delivered title insurance policies that were paid for; and FATCO now denies insurance coverage under the title insurance policies that should have been delivered.

The District Court granted summary judgment on all of the claims asserted in the Third Amended Complaint, with the sole exception of Contract Plaintiffs' breach of contract claim. (R@215 and 316). The District Court concluded that the tort claims were barred by the statute of limitations. The District Court's orders granting summary judgment to the tort claims are not at issue in this appeal.

On March 28, 2022, Contract Plaintiffs and FATCO filed competing motions relating to the determination of the breach of contract claim. Contract Plaintiffs filed their Motion for Determination of Recoverable Damages (R@346) and Motions in *Limine* Relating to the Breach of Contract Claim (R@343), while FATCO filed their Brief Re: Non-Recoverable Damages (R@332).

On June 1, 2022, the District Court held oral argument on the competing motions. During oral argument, the parties stipulated that the competing motions

should be treated as cross-motions for summary judgment. At the conclusion of oral argument, the presiding judge, Hon. Judge Jason Marks, requested supplemental briefing to address the specific issue of what obligations FATCO had to rescind where conditions were not met. (R@370 and 371).

After the supplemental briefing was filed, on July 5, 2022, the District Court issued its *Order Granting Defendant's Motion for Summary Judgment* (the "Order") (R@372) (Appendix ("Appx.") 1). The Order denied Contract Plaintiffs' request for summary judgment and granted FATCO's motion for summary judgment. The Court held that FATCO's contractual obligations automatically terminated under the plain language of the title commitments. The District Court did not address the doctrine of waiver. It is from this Order that this appeal is taken.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. Origin of the Gleneagle Subdivision and Early Development Efforts.

Missoula County approved the original Gleneagle subdivision on or about February 6, 1985. As originally platted, the Gleneagle subdivision consisted of 94 lots on approximately 73 acres. (R@290, Exh. 1) (Appx. 2)

On October 9, 1997, Ken Knie ("Knie"), Grant Creek Heights, Inc.[4] and Mark Denton ("Denton"), as the developers of the Gleneagle subdivision, filed a

[4] Grant Creek Heights, Inc. was an entity owned and controlled by Knie.

Complaint against Missoula County and its Commissioners in the Montana Fourth Judicial District Court, Missoula County (the "1997 Litigation"). (R@290, Exh. 2). On November 10, 1999, the 1997 Litigation was resolved by a Settlement Agreement (the "1999 Agreement") between Knie and his related entities, Missoula County, and Denton. (R@290, Exh. 3). The key provisions of the 1999 Agreement were that Knie would reacquire his property from Missoula County, but Knie agreed to have 67 lots (the "Lots") reconfigured into 25 larger parcels (the "Parcels"[5]) for the purpose of reducing density in the subdivision. The 1999 Agreement attached a hand-drawn diagram, modifying the filed plat to depict the 25 Parcels. (R@290, Exh. 5) (Appx. 3). The Parcels were made up of Lots (in some cases, half of Lots) and common area. A plat depicting the larger Parcels was never recorded with the Missoula County Clerk and Recorder. (R@37, ¶ 30).

B. *FATCO's Knowledge and Involvement with the Gleneagle Subdivision*.

FATCO obtained a copy of the 1999 Agreement no later than November 27, 2000. On that date, counsel for Knie, provided the 1999 Agreement to FATCO, which attached the hand-drawn diagram reconfiguring the Gleneagle subdivision from 67 Lots into 25 Parcels. (R@290, Exh. 4). Therefore, no later than November 27, 2000, FATCO knew of the reconfiguration of the Gleneagle subdivision. *Id*.

On July 17, 2001, FATCO wrote to an agent for Harp Engineering/Touch

[5] At times, the Parcels have also been referred to as "Tracts".

America referencing the 1999 Agreement. (R@290, Exh. 8). The letter demonstrated FATCO's understanding that the 1999 Agreement was a binding agreement that dictated how properties in the Glenegle subdivision were to be sold:

> *[T]he Agreement is a binding Agreement that dictates how and when the property will be utilized*…it is my understanding, Ken [Knie], through his companies are responsible for the development and sale of the parcels. *As the parcels are sold pursuant to this Agreement*, a deed in escrow is released from Missoula County to Grant Creek and the remainder sale documents are recorded.

(*Id*.) (emphasis added).

C. *Contract Plaintiffs' Buy/Sell Agreements for the Purchase of their Properties and the Issuance of Preliminary Title Commitments*.

In July 2006, each Contract Plaintiff entered into an Offer to Purchase (a "Buy/Sell") for the purchase of a Parcel in the Gleneagle subdivision. (R@290, Exh. 9). The Buy/Sell Agreements noted, among other things, the identity of the Parcel to be purchased and the purchase price. Each Buy/Sell was also made subject to the condition that "Seller to furnish title insurance." *Id*.

In the case of each Contract Plaintiff, FATCO initially issued a Commitment for Title Insurance identifying the land to be insured as the original "Lots" (the "Preliminary Commitments") identified in the filed plat. (R@343, Exhs. 19-27). The Preliminary Commitments were labeled on Schedule A as a "First Commitment"[6]. *Id*. The Preliminary Commitments, the Purchase Price/Policy

[6] The one exception is the Preliminary Commitment made to News Development, LLC. For

Amount[7] and the dates that they were delivered to Contract Plaintiffs, are identified in the table below:

Contract Plaintiff	Order No.	Lots	Date of Delivery of Preliminary Commitment	Purchase Price/Policy Amount
News Development	172835-M[8]	75	July 18, 2006	$250,000.00
News Development		95, 96		
Smart	172845-M	94	July 18, 2006	$125,000.00
Johnston	173000-M	56, 57	July 18, 2006	$125,000.00
Johnston (IRA)	172842-M	58,59, 60, 61	July 25, 2006	$125,000.00
Gibbs	172793-M	62, 63, 64	July 20, 2006	$100,000.00
Woodahl	172822-M	89, 90	July 25, 2006	$100,000.00
Woodahl	172804-M	81,82, 83	July 25, 2006	$125,000.00
Hollenback	173755-M	71, 72	July 20, 2006	$135,000.00
EDS Investments	172829-M	79, 80, 97	July 31, 2006	$165,000.00

Id.

Each of the Preliminary Commitments provide for a "Commitment Date" upon which FATCO is making a commitment to provide title insurance, subject to

reasons unknown, the Preliminary Commitment is identified as the "Second Commitment," while the Pro Forma Commitment, discussed later, was identified as the "First Commitment." However, the evidence establishes that the Preliminary Commitment was delivered to News Development on July 18, 2006, and the Pro Forma Commitment was delivered on August 10, 2006.

[7] The Contract Plaintiffs' Purchase Price for their properties was also the Policy Amount under the title commitments issued by FATCO.

[8] Both of News Development, LLC's transactions were combined into a single Preliminary Commitment.

certain conditions and requirements, to a "Proposed Insured" in the "Policy Amount" identified. *Id*. As consideration for the title insurance policy to be provided, FATCO would receive a "Premium Amount." *Id*.

D. FATCO's Issuance of Pro Forma Commitments to Contract Plaintiffs.

Following the issuance of the Preliminary Commitments, FATCO updated and issued a Commitment for Title Insurance to each of the Contract Plaintiffs identifying the land to be insured as "Parcels" (the "Pro Forma Commitments"). (R@343, Exhs. 28-36). The Pro Forma Commitments were labeled on Schedule A as a "Pro Forma Commitment"[9]. *Id*. The Pro Forma Commitments, and the dates that they were delivered to Contract Plaintiffs, are identified in the table below:

Contract Plaintiff	Order No.	Parcel	Date of Delivery of Pro Forma Commitment	Purchase Price/Policy Amount
News Development	172835-M	15	August 10, 2006	$250,000.00
News Development		19		
Smart	172845-M	20	August 8, 2006	$125,000.00
Johnston	173000-M	10	August 10, 2006	$125,000.00
Johnston (IRA)	172842-M	11	August 11, 2006	$125,000.00
Gibbs	172793-	24	August 11, 2006	$100,000.00

[9] Again, the one exception relates to News Development. As noted above, the Pro Forma Commitment is identified as the "First Commitment" even though it was delivered *after* the Preliminary Commitment and was properly identified in Fax Cover Sheet sent by FATCO as the "Pro Forma Commitment for File #172835-M (Tri-Corp)."

	M			
Woodahl	172822-M	22	August 11, 2006	$100,000.00
Woodahl	172804-M	23	August 11, 2006	$125,000.00
Hollenback	173755-M	14	August 11, 2006	$135,000.00
EDS Investments	172829-M	18	August 14, 2006	$165,000.00

(R@343). Each Contract Plaintiff received an updated Pro Forma Commitment ***after*** they received their Preliminary Commitment. The Pro Forma Commitments were the final commitments issued to the Contract Plaintiffs prior to closing. *Id*.

The title page of each Pro Forma Commitment contains the following language:

COMMITMENT FOR TITLE INSURANCE
Issued by
FIRST AMERICAN TITLE INSURANCE COMPANY
Agreement to Issue Policy

> We agree to issue a policy to you according to the terms of this Commitment.
>
> When we show the policy amount and your name as proposed insured in Schedule A, this Commitment becomes effective as of the Commitment Date shown in Schedule A.
>
> If the Requirements shown in this Commitment have not been met within six months after the Commitment Date, our obligation under this Commitment will end. Also, our obligation under this Commitment will end when the Policy is issued and then our obligation to you will be under the Policy.

(R@343, Exhs. 28-36). Each of the Pro Forma Commitments was countersigned by a representative of FATCO. *Id*.

The Pro Forma Commitments identify the same "Proposed Insured," the "Policy Amount," and "Premium Amount" as those provided in each of the Preliminary Commitments. (R@343, Exhs. 28-36). The title page for each Pro Forma Commitment is the same as the title page of each Preliminary Commitment.

The first difference between the Pro Forma Commitments and Preliminary Commitments was the identification of the land referred to in such commitments. (R@343). Each Pro Forma Commitment pledges title insurance to an unspecified "Parcel _____" instead of a "Lot" as identified in the Preliminary Commitments. Specifically, the Pro Forma Commitments reflect FATCO's contractual commitment to provide title insurance to the Contract Plaintiffs on the following legal descriptions:

> **<u>News Development, LLC (Parcels 15 and 19)</u>.**
>
> Parcel ____ of Retracement Certificate of Survey No. ___ being Lot 75 and a portion of Lot 74 as set out on Easement Exhibit A in Book 680 of Micro Records at page 1569, of Gleneagle at Grantland Addition, a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof.
>
> Parcel _____ of Retracement Certificate of Survey No. ___ being Lots 95 and 96 and a portion of Common Area as set out on Easement Exhibit in Book 780 of Micro Records at page 1464, of Gleneagle at Grantland Addition, a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof.

(R@343, Exh. 28)

Eric W. and Stephanie Nicole Smart (Parcel 20).

Parcel ____ of Retracement Certificate of Survey No. ___ being Lot 94 and a portion of common area adjacent to said Lot 94 of Gleneagle at Grantland Addition, a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof.

(R@343, Exh. 29).

Gilbert R. and Judith A. Johnston (Parcels 10 and 11).

Parcel _____ of Retracement Certificate of Survey No.____ being Lots 56 and 57 Grantland Addition, a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof.

Parcel ____ of Retracement Certificate of Survey No. ___ being Lots 58, 59, 60 and a portion of Lot 61 as set out in Easement Exhibit recorded in Book 677 of Micro Records at page 98 of Gleneagle at Grantland Addition, a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof.

(R@343, Exhs. 30 and 31).

Stephen R. Gibbs (Parcel 24).

Parcel ____ of Retracement Certificate of Survey No. ___, being Lots 62, 63 and 64 and a portion of Common Area adjacent to said Lots 62, 63 and 64 of Gleneagle at Grantland Addition, a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof as set out in Exclusive Access Easement Exhibit A recorded in Book 658 of Micro Records at page 404.

(R@343, Exh. 32).

Gerald B. and Susan A. Woodahl (Parcels 22 and 23).

Parcel ____ of Retracement Certificate of Survey No. ___ being Lots 89 and a portion of Lot 90 as set out in Easement Exhibit A recorded in Book ____ Micro Records at page ___ also a portion of common area adjacent to said Lot 89 and portion 90 as set out in Book ___ of Micro Records at page ___ of Gleneagle at Grantland Addition, a platted

subdivision in Missoula County, Montana, according to the official recorded plat thereof.

Parcel ____ of Retracement Certificate of Survey No. ___ being Lots 81, 82 and 83 and a portion of common area adjacent to said Lots 81, 82 and 83 as set out in Exclusive Access Easement Exhibit recorded in Book 656 of Micro Records at page 624 of Gleneagle at Grantland Addition, a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof.

(R@343, Exhs. 33 and 34).

Jeffrey M. Hollenback (Parcel 14).

Parcel ____ of Retracement Certificate of Survey No. ____ being Lots 71 and 72 and portions of Lot 70 and 73 as set out in easement exhibits recorded in Book 678 of Micro Records at page 233 and a portion of common area adjacent to said Lots 70, 71, 72 and 73 as set out in Exclusive Access Easement recorded in Book 678 of Micro Records at page 232 of Gleneagle at Grantland Addition, a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof.

(R@343, Exh. 35).

EDS Investments, LLC (Parcel 18).

Parcel ____ of Retracement Certificate of Survey No. ____ being Lot 79, 80, and 97 and a portion of Lot 78 as set out in Exclusive Access Easement recorded in Book 779 of Micro Records at page 1159 and a portion of common area adjacent to said Lot 79, 80, and 97 and that portion of Lot 78 of Gleneagle at Grantland Addition, as set out in Book ____ in Micro Records at page ____ a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof.

(R@343, Exh. 36).

The second difference between the Preliminary Commitments and the Pro Forma Commitments was the inclusion of additional requirements on Schedule B in the Pro Forma Commitments. As relevant to this appeal, the Pro Forma

Commitments identify an additional requirement that FATCO receive "a copy of the recorded retracement survey" (hereinafter, the "Requirement"). *Id*. It is this Requirement that FATCO relies on in denying title insurance coverage to Contract Plaintiffs.

E. *The Closings of Each of the Contract Plaintiffs' Transactions*.

Following the issuance of the Pro Forma Commitments, each of the Contract Plaintiffs closed on the purchase of their respective properties. *Id*. The transactions closed on or after the date the Contract Plaintiffs received their Pro Forma Commitment. *Id*. The dates of the closings in relation to Plaintiffs' receipt of the Pro Forma Commitments are identified in the following table:

Contract Plaintiff	Order No.	Parcel	Date of Delivery of Pro Forma Commitment	Date of Closing of Transaction
News Development	172835-M	15	August 10, 2006	August 11, 2006
News Development		19		
Smart	172845-M	20	August 8, 2006	August 11, 2006
Johnston	173000-M	10	August 10, 2006	August 11, 2006
Johnston (IRA)	172842-M	11	August 11, 2006	August 11, 2006
Gibbs	172793-M	24	August 11, 2006	August 11, 2006
Woodahl	172822-M	22	August 11, 2006	August 14, 2006
Woodahl	172804-M	23	August 11,	August 14,

			2006	2006
Hollenback	173755-M	14	August 11, 2006	August 14, 2006
EDS Investments	172829-M	18	August 14, 2006	Sept. 6, 2006.

Id.

FATCO accepted the "Premium Amount" identified in the Pro Forma Commitments at each of the closings. Each premium was paid from the Contract Plaintiffs' purchase proceeds delivered at closing. In total, FATCO accepted $2,636.00 in premium payments from Contract Plaintiffs as consideration for the title insurance they were to receive, and was to issue title insurance policies naming the Contract Plaintiffs as Insureds with Policy Amounts that aggregate to $1,250,000. (R@347, Exhs. 19-27). Notwithstanding FATCO's agreement to insure "Parcels" as identified in the Pro Forma Commitments, FATCO recorded Warranty Deeds that referenced "Lots"—not "Parcels"—with the Missoula County Clerk and Recorder. (R@343, Exhs. 55-63).

Despite closing on the sale of Lots, FATCO was internally tracking the transactions as sales of Parcels. (R@139, Exh. 9, p. 1).

F. *Contract Plaintiffs Make a Claim on the Title Insurance Policy that They Would Discover Was Never Issued*.

In 2013, it became apparent to Contract Plaintiffs that Knie would not be able to complete the subdivision when his personal bankruptcy was converted to a liquidation, under Chapter 7 of the Bankruptcy Code. (R@290, p.8). On May 14,

2013, Plaintiffs, through counsel, wrote to First American for the purpose of requesting copies of all documents related to the closings of their transactions. (R@347, Exh. 40). The May 14, 2013 letter specifically noted Contract Plaintiffs' belief that "First American Title issued a title policy with respect to each transaction." *Id*. However, no title insurance policy was ever delivered to any of the Contract Plaintiffs. (R@347, Exh. 64). The Contract Plaintiffs did not know title insurance policies had not been issued until they retained counsel. (R@290, Exhs. 13-19, ¶¶ 13-16).

On January 23, 2014, Contract Plaintiffs tendered claims to FATCO and First American to "to seek benefits under the terms of each of the separate title insurance policies" they paid for and were supposed to have received. (R@343, Exh. 41). FATCO has never returned the Premium Amount to any of the Contract Plaintiffs in the fifteen years since the Pro Forma Commitments expired. (R@343).

Contract Plaintiffs had spent a collective $1,250,000.00 on inaccessible Lots within a failed subdivision. (R@347). Contract Plaintiffs received title to "Lots" that does not reflect the land described in the Pro Forma Commitments (i.e. the Parcels the Contract Plaintiffs desired to purchase). *Id*. Therefore, Contract Plaintiffs have claims against the title insurance they paid for, as described under the Pro Forma Commitments.

////

G. *FATCO Knew that the Transactions Were Likely to Fail*.

On May 23, 2014, Contract Plaintiffs commenced this lawsuit against FATCO and First American[10]. (R@1). Contract Plaintiffs now know that FATCO disregarded its own internal policies in allowing the transactions to close and, further, FATCO anticipated the failure of the transactions. Donna Dietz ("Dietz"), who was employed by FATCO for approximately 24 years and advanced to the position of Senior Title Officer, initially worked on each of the subject transactions before retiring. (R@289, ¶ 1). Dietz became so concerned with the transactions, she required her then-boss, Robert Sewell, to initial the transactions "so it wouldn't come back and bite me." (R@352, Exh. 1, 141:15-142:21; 158:8-19). According to Dietz, FATCO violated its internal policies in allowing the closings to proceed where not all Requirements set forth in the Pro Forma Commitment had been satisfied. (R@289, ¶¶ 13-14).

Dietz further noted her anticipation, along with others at FATCO, that the transactions were bound to fail:

> I don't know if I should say this on the record or not, but there was always a comment, a joke, because it was one of those complicated, strange files that you never—normally don't get in an office. But there was always a joke that went between Mike Kleese and I that if something hits the fan on this order, I'm retiring before you are so—(laughter).

[10] The claims against First American were resolved through a settlement and dismissed.

(R@290, Exh. 28, 157:2-17). In fact, Dietz specifically recalls a discussion with a co-worker where it was discussed that FATCO "would be lucky if it did not get sued as a result of the transaction[s]." (R@289, ¶ 21).

Cindy Guanell ("Guanell"), First American's Regional Underwriter Director for the Pacific Northwest Region, provided further insight into the transactions. (R@290, Exh. 29). Guanell explained that when a premium has been collected, FATCO is obligated to either issue the title insurance policy or, if requirements are not met, refund the premium to the customer. (R@290, Exh. 29, 89:11-90:1). Alternatively, FATCO has the option to renew a title commitment every six months, which FATCO could continue to do indefinitely. (R@290, Exh. 29, 92:6-12).

FATCO did not issue any title insurance policies to the Contract Plaintiffs, did not refund the premiums to the Contract Plaintiffs, and did not once renew a title commitment.

STATEMENT OF STANDARD OF REVIEW

The Supreme Court reviews *de novo* a district court's grant of summary judgment. *Modroo v. Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶ 19, 345 Mont. 262, 191 P.3d 389. "A *de novo* review affords no deference to the district court's decision and [this Court must] independently reviews the record, using the same criteria used by the district court." *Siebken v. Voderberg*, 2012 MT 291, ¶¶ 16, 20, 367 Mont. 344, 291 P.3d 572. Thus, the Court must view the evidence in the light

most favorable to the party opposing summary judgment and draw all reasonable inferences in favor of the party opposing summary judgment. *Modroo*, ¶ 19.

SUMMARY OF ARGUMENT

The District Court erred in granting summary judgment to FATCO on Contract Plaintiffs' breach of contract claims. The Requirement within the Pro Forma Commitments was a condition precedent to contract performance. If a condition precedent to contract performance is not fulfilled, the non-breaching party has the option of *either* seeking rescission or specific performance. Thus, upon the failure to satisfy a condition of the Pro Forma Commitments, FATCO had the right and opportunity, 16 years ago, to rescind its contractual obligations or seek specific performance.

Instead of seeking rescission or specific performance at that time, FATCO retained Plaintiffs' premiums and did nothing. The District Court erroneously held that FATCO could avoid its contractual obligations to provide title insurance by relying on unsatisfied conditions, 15 years prior, to deny coverage and retain the premium. The District Court further erred by not addressing the doctrine of waiver. The law is clear that when an insurer has knowledge of facts which would justify a rescission of the insurance contract at the time it is issued, but takes no steps to rescind it, the insurer waives the right to later insist upon those facts in avoiding its obligations.

Where FATCO waived the right to rescind the Pro Forma Commitments, it must honor those contractual commitments in providing title insurance to Plaintiffs[11]. Accordingly, the District Court erred in granting summary judgment in deciding that FATCO did not breach their contracts with Plaintiffs and relieving them of their contractual obligations. It also erred when it did not grant partial summary judgment to the Contract Plaintiffs under these facts.

ARGUMENT

I. The District Court Erred in Granting FATCO Summary Judgment on Contract Plaintiffs' Breach of Contract Claim.

A. The Pro Forma Commitments are Enforceable Contracts.

A commitment for title insurance is an offer by the insurer to the insured. The Montana Title Insurance Act (the "Act") specifically defines a preliminary report, which includes a commitment, as an offer:

> "Preliminary Report" means an offer to issue a title insurance policy subject to any exceptions stated in the report or other matters that may be incorporated by reference therein. *Preliminary report includes a commitment* or binder.

M.C.A. § 33-25-105(7) (emphasis added). While distinguishing a commitment from an abstract, the Act reiterates that a commitment is an offer:

[11] The District Court's Order asserts, "Remaining Plaintiffs argue that they are entitled to damages in for the form of restoration of the premiums they paid to FATCO under the Commitments." (Appx. 1, p.6). The District Court is mistaken. Contract Plaintiffs have never sought the return of the premiums. Rather, they request that FATCO be required to honor its contractual obligations under the Pro Forma Commitments in providing title insurance. (R@347).

> *A preliminary report* does not constitute a representation as to the condition of title to real property, but *constitutes a statement of the terms and conditions upon which the issuer is willing to issue its title insurance policy*.

M.C.A. § 33-25-111 (emphasis added).

Consistent with the Act, FATCO delivered to each Contract Plaintiff a Pro Forma Commitment representing a commitment to issue title insurance to the properties specifically identified. FATCO received premiums as consideration for the title insurance it was committing to provide to each of the Contract Plaintiffs. As the District Court correctly determined, FATCO's receipt of consideration, in the form of premiums, satisfied the final essential element in the formation of an enforceable contract under § 28-2-102, M.C.A. (Appx. 1, pp. 8-9). Thus, FATCO's receipt of the premiums transformed the Pro Forma Commitments from mere offers to binding contracts. (Appx. 1, p. 9).

As binding contracts, FATCO and Contract Plaintiffs were required to either fulfill their obligations under the terms of the contracts or extinguish such obligations in a manner permitted under Montana law.

B. <u>If a Condition Precedent to Contract Performance is Not Satisfied, FATCO Was Required to Either Seek Rescission or Specific Performance</u>.

The Pro Forma Commitments were subject to certain requirements, including FATCO's receipt of insurance premiums and obtaining a "copy of the recorded retracement survey." (R@343, Exhs. 28-36). The Pro Forma Commitments further

noted, "If the Requirements shown in this Commitment have not been met within six months after the Commitment Date, our obligation under this Commitment will end." *Id*.

A contract condition is the subsequent occurrence of a specific uncertain act, event, or circumstance. § 28-1-401, M.C.A. "In the law of contracts, conditions may relate to the existence of contracts or to the duty of immediate performance under them. Thus, there may be conditions to the formation of a contract, or conditions to the performance of a contract." *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls*, 2008 MT 175, ¶ 22, 343 Mont. 392, 185 P.3d 332 (citing Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* vol. 13, § 38:4, 375 (4th ed., West 2000)). A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. § 28-1-408, M.C.A.

A condition precedent to contract performance is a specific post-formation act or forbearance by a promisor, the occurrence of which the reciprocal performance or forbearance of the other party depends. §§ 28-1-403, 404, and 406, M.C.A.; *Davidson v. Barstad*, 2019 MT 48, ¶ 20, 395 Mont. 1, 435 P.3d 640. The failure or non-satisfaction of a condition precedent to performance generally constitutes a breach of an enforceable contract promise subject to remedy as a material or non-material breach of the contract. *Davidson*, ¶ 21; *Estate of Gleason v. Cent. United Life Ins. Co.*, 2015 MT 140, ¶ 35, 379 Mont. 219, 350 P.3d 349.

Upon a material breach of a contract, the non-breaching party has the option of *either* rescinding the contract without requirement for further performance or, alternatively, enforcing the contract at law or in equity. *Davidson*, ¶ 22 (emphasis added). Conversely, a non-material breach does not give the non-breaching party the option of rescission but merely entitles the party to enforce the contract at law or in equity. *Id*.

The Requirement contained within each Pro Forma Commitment constitutes a condition precedent to performance. The District Court correctly held that non-satisfaction of a condition precedent to performance constitutes a breach of contract, allowing "the non-breaching party to either seek rescission or specific performance." (Appx. 1, p. 5 (citing *Davidson*, ¶¶ 21-22)). Despite recognizing that FATCO's options were limited to either seeking rescission or specific performance, the District Court improperly held that the non-satisfaction of the condition precedent automatically terminated FATCO's obligations under the Pro Forma Commitments. In effect, the District Court permitted FATCO to retain Contract Plaintiffs' premiums, remain silent as to the unmet condition, and then rely on the unmet condition to deny insurance coverage 15 years later.

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C. FATCO Waived Its Right to Rescind its Contractual Obligations When It Retained Contract Plaintiffs' Premiums and, Therefore, is Precluded from Relying on the Unsatisfied Requirement to Avoid Issuing Title Insurance.

Where FATCO was entitled to rescind its contractual commitments but failed to do so promptly, FATCO is deemed to have waived such rights. To accomplish a non-consensual rescission, the rescinding party "shall rescind *promptly* upon discovering the facts that entitle the party to rescind . . . . [and][t]he rescinding party *shall restore to the other party everything of value* that the rescinding party has received from the other party . . . or shall offer to restore everything of value . . . ." § 28-2-1713, M.C.A. (emphasis added).

Waiver is "a voluntary and intentional relinquishment of a known right, claim or privilege which may be proved by express declarations or by a course of acts and conduct so as to induce the belief that the intention and purpose was to waive." *Idaho Asphalt Supply v. State*, 1999 MT 291, ¶ 19, 297 Mont. 66, 991 P.2d 434; *see also*, *Thiel v. Johnson*, 219 Mont. 271, 274, 711 P.2d 829, 831 (1985). As this Court previously explained:

> In a basic sense, the concept of 'waiver' as an excuse for nonperformance is an equitable doctrine, designed to prevent the waiving party from lulling another into a belief that strict compliance with a contractual duty will not be required, and then either suing for noncompliance or demanding compliance for the purpose of avoiding the transaction.

Masters Group Int'l, Inc. v. Comerica Bank, 2015 MT 192, ¶ 81, 380 Mont. 1, 352 P.3d 1101 (quoting Samuel Williston & Richard A. Lord, 13 *Williston on Contracts* § 39.15, at 564 (4th ed. 2000)).

"A condition may, of course be waived by the party for whose benefit it is made." *Wendy's of Montana v. Larsen*, 196 Mont. 525, 529, 640 P.2d 464, 467 (1982); see also, *Jones v. United States*, 96 U.S. 24, 28, 24 L. Ed. 644, 13 S. Ct. 524 (1877) ("Conditions precedent may doubtless by waived by the party in whose favor they are made."). A party entitled to performance of a condition precedent may waive the condition either expressly or by their actions. *Fed. Sur. Co. v. Basin Constr. Co.*, 91 Mont. 114, 5 P.2d 775 (1931); *Reilly v. Maw*, 146 Mont. 145, 405, P.2d 440 (1965).

It is well-established that the doctrine of waiver applies in the context of insurance:

> The general rule is that if an insurer, with knowledge of circumstances entitling it to avoid a policy, by its conduct recognizes its validity or induces the insured to believe that his policy is in force, or does acts inconsistent with an intention upon a forfeiture, it waives such ground of forfeiture and is barred from future reliance on the forfeiting ground.

Appleman on Insurance Law & Practice 2d, § 61.4. "Since insurance companies are held to a broader legal responsibility than are parties to purely private contracts, having solicited and obtained an application for insurance, and having received payment of a premium, they are bound to either furnish indemnity or decline to do

so within a reasonable time." *Appleman on Insurance Law and Practice*, § 7216. The Court in *Stark v. Pioneer Cas. Co.*, 139 Cal. App. 577, 34 P.2d 731(1934), explained the purpose for requiring an insurer to make a prompt decision:

> An insurance company having solicited and obtained applications for insurance and having received payment of the fees or premiums exacted, they are bound either to furnish the indemnity the state has authorized them to furnish or decline to do so within such reasonable time as will enable them to act intelligently and advisedly thereon.

Stark, 139 Cal. App. at 580, 34 P.2d at 732 (internal citations omitted).

"The insurer's retention of a premium paid by the applicant may constitute ratification of an agent's voidable act." *Appleman* on *Insurance Law and Practice,* § 7134.

> [A]n insurer is not authorized to retain a premium if the application is not accepted. Receipt of the premium and its retention, or the mode of its application may be sufficient to show an approval of the risk.

Appleman on Insurance Law and Practice, § 7121 (citing *Reck v. Prudential Ins. Co. of America*, 116 N.J.L. 444 (N.J. 1946).

In Montana, an insurer cannot deny coverage where the insured has paid the premium, and the insurer has accepted the premium and failed to notify the insured of any defect in the policy—even a defect caused by the fault of the insured. *McLane v. Farmers Ins. Exchange*, 150 Mont. 116, 432 P.2d 98 (1967) (overruled on other grounds). In *McLane*, the plaintiff was in an automobile collision and sued the other driver's insurance company to recover on the other driver's policy, which had been

issued approximately two weeks prior to the accident. *McLane*, 150 Mont. at 117, 432 P.2d at 99. The insurer's efforts to deny coverage because the insured had lied on his insurance application were rejected by this Court. *McLane*, 150 Mont. at 117-118, 432 P.2d at 99.

This Court held that the insurance company could not deny coverage because it had knowledge of the misrepresentations in the application on June 17, 1964, but subsequently accepted premium payments on June 18 and 23, 1964. *McLane*, 150 Mont. at 117, 432 P.2d at 99 (citations omitted). The insurer had failed to rescind the insurance contract promptly upon discovery of the falsehoods. Relying on Montana's rescission statute, now § 28-2-1713, M.C.A., this Court stated, "The defendant had a right to a reasonable time in which to investigate the application and upon discovering the facts entitling him to rescind he was required to promptly rescind." *McLane*, 150 Mont. at 118, 432 P.2d at 99 (emphasis added). This Court further noted, "Once there has been a waiver it could not be revoked as to Plaintiff without his consent." *McLane*, 150 Mont. at 120, 432 P.2d at 100.

Consistent with Montana law, other states have similarly concluded that an insurer waives its right to deny coverage when the insurer acted, with knowledge of circumstances that would entitle it to void the policy, in such a way as to recognize the insurance contract as in force. *McCollum v. Continental Cas. Co.*, 151 Ariz. 492, 728 P.2d 1242, 1245 (Ariz. Ct. App. 1986) ("When an insurer has knowledge of

facts allegedly justifying a denial of coverage or the forfeiture of a policy previously issued, an unequivocal act that recognizes the continued existence of the policy or an act wholly inconsistent with a prior denial of coverage constitutes a waiver thereof."); *Johnson v. Life Ins. Co.*, 52 So. 2d 813, 815 (Fla. 1951) ("It is equally well settled in insurance law that, when an insurer has knowledge of the existence of facts justifying a forfeiture of the policy, any unequivocal act which recognizes the continued existence of the policy or which is wholly inconsistent with a forfeiture, will constitute a waiver thereof.").

Likewise, Courts have routinely held that an insurer waives the right to deny coverage when the insurer accepts or retains premiums after discovering facts that would justify rescission of the policy. See, e.g., *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618, 620 (Neb. 1982) ("'Insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness[.]") (citation omitted); *Indus. Indem. Co. v. U.S. Fid. & Guar. Companies*, 93 Idaho 59, 454 P.2d 956, 960 (Id. Sup. Ct. 1969) (When "an insurer company has knowledge of facts which would justify a rescission of the policy at the time the policy is issued, but takes no steps to rescind it, the company waives the right later to insist upon those facts in avoidance of the policy."); *Commercial Ins. Co. of Newark v. Burnquist*, 105 F. Supp. 920

(N.D. Iowa 1952) (holding insurance company may not deny coverage where it mailed premium notice to insured after discovering the insured did not satisfy a condition precedent to the issuance of insurance); *McCollum*, 728 P.2d at 1245 (holding insurance company waived right to rescind when it had learned of fact justifying rescission but "retained and continued to accept premiums" from insured.)

Here, as in *McLane*, FATCO had a right within a reasonable time to investigate the Requirement set forth in the Pro Forma Commitments, and upon discovering facts entitling it to rescind FATCO "was required to promptly rescind." *McLane*, 150 Mont. at 118, 432 P.2d at 99. The Pro Forma Commitments clearly state, "[i]f the Requirements shown in this Commitment have not been met within six months after the Commitment Date, our obligation will end." (R@343, Exhs. 28-36). Therefore, upon expiration of the six-month period without receiving "copies of a retracement survey," FATCO had the facts entitling it to rescind, and was required to do so promptly. FATCO's retention of the premiums after having facts entitling it to rescind is an unequivocal act of recognition of the continued existence of the title insurance policies paid for through Contract Plaintiffs' closing proceeds. FATCO waived its entitlement to rely on the unsatisfied conditions to avoid its obligations 15 years later.

If FATCO had rescinded the Pro Forma Commitments promptly when it had the opportunity to do so, it would have allowed the Contract Plaintiffs to act

"intelligently and advisedly thereon." *Stark*, 139 Cal. App. at 580, 34 P.2d at 732. With knowledge that they would not receive title insurance, Contract Plaintiffs could have taken action to protect themselves. Contract Plaintiffs could have made efforts to ensure that the recorded retracement survey was recorded or commenced a rescission of their purchases with Knie. Contract Plaintiffs were deprived of this opportunity because FATCO failed to rescind promptly, as the law requires.

FATCO waived its right to rescind its obligations under the Pro Forma Commitments when it retained Contract Plaintiffs' premiums. The District Court erred in disregarding the doctrine of waiver.

D. Even if the Plain Language of the Pro Forma Commitments Provides for the Automatic Termination of FATCO's Obligations Without Restoration of the Premiums, It Would Violate Montana Public Policy and Is Not Permitted.

Generally, if a contract's terms are clear and unambiguous, the contract language will be enforced. *Youngblood v. Am. States Ins. Co.*, 262 Mont. 391, 395, 866 P.2d 203, 205 (1993). The exception to the application of an unambiguous contract term is "if that term violates public policy or its against good morals." *Youngblood*, 262 Mont. at 395, 866 P.2d at 205; *Swanson v. Hartford Ins. Co.*, 2002 MT 81, ¶ 32, 309 Mont. 269, 46 P.3d 584. After construing the language of the contract itself, the Court next looks at whether, in light of this construction, the insurance contract violates public policy. *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 15, 356 Mont. 417, 234 P.3d 79.

Public policy is that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against public good. *First Bank (N.A.)-Billings v. Transamerica Ins. Co.*, 209 Mont. 93, 96, 679 P.2d 1217, 1219 (1984). In Montana, the public policy of the state is expressed, in part, through its legislative enactments. *Trammel v. Brotherhood of Locomotive Firemen and Enginemen*, 126 Mont. 400, 409, 253 P.2d 329, 334 (1953).

Here, Judge Marks held that FATCO was entitled to retain Contract Plaintiffs' premiums and deny coverage because "nothing in the plain language of the Commitments provided for the restoration of the premiums to the Remaining Plaintiffs upon the termination of First American's/FATCO's obligations—or for reimbursement of any kind in the event Defendants' obligations ended." (Appx. 1, p. 12). However, as Montana law makes clear, the fact that the language of the Pro Forma Commitments is unambiguous does not end the analysis. The District Court failed to take the next step of determining whether the Pro Forma Commitments' unambiguous terms, in light of that construction, would result in a violation of public policy. *Monroe*, ¶ 15.

The acceptance of an insurance premium without providing insurance is illegal under Montana law.

> **Illegal dealing in premiums—improper charges for insurance.** (1) A person may not willfully collect any sum as a premium or charge for insurance that is not then provided or is not in due course to be

> provided, subject to acceptance of the risk of the insurer, by an insurance policy issued by an insurer as authorized by this code.

M.C.A.§ 33-18-212(1). Therefore, FATCO's acceptance of insurance premiums in each of the ten transactions without then providing title insurance was clearly a violation of Montana public policy.

The District Court further erred in minimizing FATCO's wrongful actions by suggesting that the premiums retained were merely "nominal" and further claiming that Plaintiffs "actually benefitted under the Commitment by getting a six-month window to provide FATCO with the retracement survey[.]" The District Court's reasoning is fundamentally flawed. First, under § 33-18-212, M.C.A., the collection of "any sum" for insurance that is not then provided is a violation of Montana law. Thus, it was improper for the District Court to consider the extent of FATCO's wrong in considering whether FATCO's actions were a violation of public policy. Second, the District Court's suggestion that Contract Plaintiffs somehow benefitted from the six-month window in which they could have obtained the retracement survey is entirely misplaced. If Contract Plaintiffs had known that their ability to obtain title insurance was uncertain, the Contract Plaintiffs would not have closed their transactions. The evidence establishes that FATCO violated its own internal policies in closing Contract Plaintiffs' transactions while there were unsatisfied Requirements. (R@289, ¶¶ 13-14). If FATCO had complied with its own internal policies, Contract Plaintiffs would not have collectively spent $1,250,000 on

inaccessible Lots in a failed subdivision and FATCO would not have claims against ten title insurance policies that it committed to provide.

FATCO's actions were in direct violation of Montana law. If the plain language of the Pro Forma Commitments can be interpreted to provide for the automatic termination of FATCO's contractual obligations without restoration of Contract Plaintiffs' premiums, the application of such terms is in violation of Montana public policy and is not permitted. The District Court erred in granting summary judgment to FATCO.

CONCLUSION

This case is unique. Nevertheless, the insurance contract principles at issue are important to all Montanans. Contract Plaintiffs paid $1,250,000 to buy Parcels, with the understanding and assurances that they would receive title insurance to protect the property they were purchasing. As the title agent, FATCO issued Pro Forma Commitments describing the Parcels that they were willing to insure, under the terms they were willing to accept. While the Pro Forma Commitments identified conditions precedent to performance, FATCO proceeded forward with closing of the transactions knowing that not all Requirements had been satisfied and in direct violation of its own policies. Even after closing, FATCO could have renewed the title commitments every six months until the Requirements were satisfied or simply terminated its obligations by returning the premiums to the Contract Plaintiffs.

FATCO did nothing. FATCO retained the premiums and never issued title insurance policies. Now, FATCO wants to rely on these same unsatisfied Requirements, 15 years later, to avoid their contractual obligations, while retaining the benefit of Contract Plaintiffs' consideration.

The Court should reverse the District Court's decision expressed in the July 5, 2022 Order and remand the action for trial on the merits. The District Court erred in granting FATCO summary judgment on Contract Plaintiffs' breach of contract claim where FATCO accepted Contract Plaintiffs' insurance premiums, but never delivered insurance policies. FATCO waived its right to rely on the unmet conditions to avoid its contractual obligations when it failed to rescind promptly, as required by § 28-2-1713, M.C.A.

Additionally, the Court should remand this case to the District Court with instructions that it grant partial summary judgment in favor of Contract Plaintiffs on their breach of contract claims where there are no genuine issues of material fact and they are entitled to summary judgment as a matter of law.

Dated this 5th day of December 2022.

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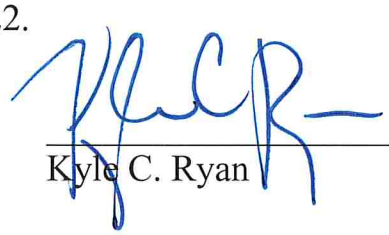
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that Appellants' Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word, is not more than 10,000 word excluding Certificate of Compliance.

Dated this 5th day of December 2022.



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