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.

FLYING S TITLE & ESCROW, INC. f/k/a FIRST AMERICAN TITLE COMPANY

Defendant/Appellee

APPELLANTS' PETITION FOR REHEARING

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

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INTRODUCTION

Appellants Gilbert and Judith Johnston *et al*. (collectively "Appellants") respectfully request rehearing on this Court's February 27, 2024 Opinion, which turns on the mistaken fact that Appellee Flying S Title & Escrow, Inc. ("Flying S") issued title insurance on *lots* in fulfilling its contractual obligations. *See Gilbert R. Johnston et al. v. Flying S Title & Escrow, Inc., f/k/a First American Title Company*, 2024 MT 39, 2024 Mont. LEXIS 194, (Mont. Sup. Ct. Feb. 27, 2024) ("Opinion"). However, it is undisputed that Flying S **did not** issue title insurance to Appellants on either *lots* or *parcels*. Said differently, Flying S **did not issue title insurance of any kind** to Appellants. Accordingly, Appellants' petition qualifies for rehearing under Mont. R. App. P. 20(1)(a)(ii) because this Court's Opinion "overlooked some fact material to the decision[.]".

BACKGROUND

In its Opinion, this Court held that there was no breach of contract as it concluded that Flying S had issued Lot Policies to the Appellants. The Court found, "Flying S…provided, as it agreed, title insurance for the transaction completed by Appellants to purchase the lots." Opinion, ¶ 22. The Opinion stated:

> In reasoning that the Pro Forma documents were supported by the consideration of the paid premiums, the District Court overlooked that those premiums had been paid for something else—a "live" transaction for which Flying S, as it had offered, provided insurance for Appellants' title to the lots…Thus, a contract between appellants and Flying S was

> indeed formed—but for the purpose of insuring the lots, for which Flying S has never denied coverage.

Opinion, ¶ 19. Likewise, consistent with this misunderstanding, the Opinion further noted:

> While the parties focus their arguments on whether the Pro Forma documents constituted a formed contract for insurance on the parcels or merely an offer to issue insurance for the parcels upon the satisfaction of conditions, largely overlooked by the parties' arguments is the record history of their interactions, which include, the completion of a title-insured transaction, supported by consideration, involving the *lots*.

Opinion, ¶ 18.

The Opinion relies on the misconception that Appellants had received title insurance on the lots as the basis for its decision to affirm the District Court's decision granting summary judgment to Flying S. However, the Court's Opinion overlooked a critical fact material to the decision: Appellants did not obtain title insurance for either lots or parcels from Flying S.

DISCUSSION

A. It is Undisputed that Appellants Did Not Receive Title Insurance to Either Lots or Parcels.

The Court's Opinion is premised on the conclusion that Flying S issued title insurance to the lots and, therefore, Appellants received the benefit of their bargain. Respectfully, the Court is mistaken. It is **undisputed** Appellants did not receive title insurance to either *lots* or *parcels*. Flying S acknowledges this fact in their Response Brief. The heading to Subsection (D) to their Factual Background is entitled, "The

Dismissed Plaintiffs, But Not the Appellants, Received the Lot Policy for Which the Premium Was Paid." Appellee's Resp. Brf., p.14. In another instance, Flying S plainly acknowledges, "[w]hile the Dismissed Plaintiffs received [title insurance policies to the lots], Appellants did not." *Id*. Flying S even argued that the question of whether a policy was issued is irrelevant in acknowledging that no policy was issued to Appellants. Resp. Brf., p. 14, fn. 9.

The Court's confusion can be attributed to the arguments advanced by Flying S in their Response Brief. Flying S claimed, "there is no legitimate dispute that the premium paid at closing on the Lots was for the policy offered in the Lot Commitments[.]" Rsp. Brf., p. 38-39. However, as Flying S is aware, this is not accurate. If the premiums were paid for the policy offered in the Lot Commitments, Flying S would have issued Lot Policies as there were no unmet Requirements[1] under the Lot Commitments[2]. Despite there being no unsatisfied Requirements to the Lot Commitments, no title insurance was ever issued to Plaintiffs.

There was a subset of claimants—not Appellants—in the underlying litigation that did receive Lot Policies. Breach of contract claims were not pursued by these

[1] The term "Requirements" refers to the terms and conditions listed in Schedule B, Section 1 of each title insurance commitment.

[2] Flying S acknowledges that all Requirements had been fulfilled under the Lots Commitments. Resp. Brf., p. 37 ("These events fulfilled the requirements in the Lot Commitments[.]")

Dismissed Plaintiffs[3]. It follows that if Appellants had received title insurance on the Lots, like the Dismissed Plaintiffs, they would not have pursued breach of contract claims because they would have received the benefit of their bargain. Appellants pursued breach of contract claims because they paid premiums to Flying S and never received title insurance to either lots or parcels.

B. The Court's Analysis is Based on the Misapprehension of a Critical Fact.

The misconception that Appellants received a Lot Policy resulted in a flawed analysis within the Court's Opinion. Indeed, while the Court acknowledges title insurance commitments, or "preliminary reports," are offers to issue title insurance, the Court's misunderstanding of the facts prevents the appropriate analysis. M.C.A. § 33-25-105(7). As the Court reasoned:

> While the parties focus their arguments on whether the Pro Forma documents constituted a formed contract for insurance on the parcels or merely an offer to issue insurance for the parcels upon the satisfaction of conditions, largely overlooked by the parties' arguments is the record history of their interactions, which include, the completion of a title-insured transaction, supported by consideration, involving the *lots*.

Opinion, ¶ 18 (emphasis in original). Thus, from the very outset, the analysis was shaped by the inaccuracy that Flying S had issued Lot Policies. Consequently, the Opinion focuses on facts and issues that are otherwise immaterial, while disregarding other facts and issues critical to the proper analysis.

[3] This subset of Plaintiffs is referred to as the "Dismissed Plaintiffs" by Flying S in their Response Brief. Resp. Brf., p. 14-15. For the sake of clarity, Appellants adopt Flying S' title for this subset of Plaintiffs and refer to them as the "Dismissed Plaintiffs."

The Court did not consider the timing of the offers extended by Flying S. Where both the Lot Commitments and Pro Forma Commitments[4] represent offers of title insurance, the sequence of delivery is critically important. As a matter of law, a new offer communicated prior to valid acceptance of a previous offer extinguishes and replaces the previous one. *Distefano v. Hall*, 263 Cal. App. 2d 380, 385, 69 Cal. Rptr. 691, 695 (1968) (citing 1 Corbin on Contracts (rev. ed. 1993) § 2.20, p. 229). Here, in each case, the Pro Forma Commitment was delivered *after* the Lot Commitments. Opening Brf., pp. 6-8. Therefore, as a matter of law, the Pro Forma Commitments were the only offers that could have been accepted.

Because of the erroneous belief that Lot Policies were issued, the Opinion does not address the effect of Flying S' failure to rescind the Pro Forma Commitments. There is no dispute Flying S' commitment to insure the parcels was subject to the Requirements as provided in the Pro Forma Commitments. Opinion, ¶ 20. The Requirements are conditions precedent to contract performance. *Davidson v. Barstad*, 2019 MT 48, ¶ 20, 395 Mont. 1, 435 P.3d 640. Therefore, Flying S' obligation to provide title insurance under the Pro Forma Commitments did not arise until the Requirements were discharged, whether by satisfaction or waiver.

[4] The Opinion refers to the "Pro Forma *documents*." However, the Pro Forma Commitments are the only Pro Forma document with any legal effect. By definition, the Pro Forma Commitments are an "offer to issue title insurance" providing "the terms and conditions upon which the issuer is willing to issue its title insurance policy." M.C.A. §§ 33-25-105(7) and 111. The Pro Forma Policies merely serve as examples of what future policies would look like.

Waiver is a voluntary and intentional relinquishment of a known right, claim or privilege. *Idaho Asphalt Supply v. State*, 1999 MT 291, ¶ 19, 297 Mont. 66, 991 P.2d 434. "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). A party entitled to performance of a condition precedent may waive the condition either expressly or by their actions. *Reilly v. Maw*, 146 Mont. 145, 405 P.2d 440 (1965). 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, but 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. Specifically, an "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.

It is undisputed that the Requirements to the Pro Forma Commitments were not satisfied. However, it is also undisputed that Flying S held the right to rescind its obligations under the Pro Forma Commitments and return Appellants' premiums. It did nothing. Flying S retained the premiums, never issued title insurance of any kind, and 15 years later relies on the unsatisfied Requirements to argue it has the right to retain the premium but has no obligation to insure. Flying S waived any argument that the Requirements are unsatisfied when it retained Appellants'

premiums. The Court never reaches this analysis because of its misconception that Flying S fulfilled its obligations by issuing Lot Policies to Appellants and therefore had a right to keep the premium.

The Opinion's review of the record was guided by the false impression Appellants received Lot Policies. For instance, the Opinion indicates Appellants each paid premiums quoted in the Lot Commitments. Opinion, ¶ 19. This assertion fails to recognize that the premium amounts for the Lot Commitments and the Pro Forma Commitments were the same for each Appellant. Moreover, the Opinion gives undue weight to the fact that Appellants' counsel, Gerald Steinbrenner, indicated in a post-closing letter that "we can obtain title insurance" for the "future tract." Opinion, ¶ 19. Mr. Steinbrenner's statement merely acknowledges that the physical Pro Forma Policies will describe the parcels when issued. Indeed, as Mr. Streinbrenner explained:

> Before August 9, 2006, I also had a conversation with [Flying S]. As reflected in the draft letter, I was led to believe that the title company would grant title insurance with respect to the tracts (as opposed to Lots) so that the transactions could close. From my review of this letter, it is consistent with my understanding that while there was a recognition that an amended plat would need to be recorded, <u>it was my understanding that title insurance would be issued at closing</u> for each of my clients. If I had not believed this to be true, I would have advised my clients not to close any of the transactions.

(R@292, Exh. 20, ¶ 11) (emphasis added). Thus, it was the expectation of Appellants and their counsel that they were insured as to the *parcels* at closing, with the recognition that the Pro Forma Policies would be provided later.

The Opinion suggests that rescission of the Pro Forma Commitments was not necessary as there was not a contract to rescind. Opinion, ¶ 21. The Opinion further states that Flying S was not unjustly enriched as title insurance was provided to the lots. Recognizing that the Court's analysis is predicated on the mistaken fact that Appellants had received title insurance for the lots, these conclusions are in error. Flying S was paid a premium to provide title insurance. It provided none. Flying S committed to provide title insurance for the parcels. If this could not occur, they could not retain the premium and not issue title insurance. When Flying S made the decision to retain the premium, it waived the right to claim that no title insurance policy exists. Certainly, Flying S cannot retain the premium and provide no insurance without this Court concluding that it has been unjustly enriched. The law in Montana can never support Flying S' position that an insurer can accept and retain a premium, yet tell its insured that there is no insurance. Indeed, the collection of a premium for insurance that is not then provided is illegal under Montana law. M.C.A. § 33-18-212(1):

> **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 by the insurer, by an insurance policy issued by an insurer as authorized by this code.

Having accepted the premium, Flying S must now accept the risk it was to insure to the full policy amount set forth in each policy. The Opinion suggests Flying S could not have agreed to insure the parcels. However, that is precisely what Flying S did. "Whether the [party to the contract] made a good or bad bargain is of no concern to the court." *Hein v. Fox*, 126 Mont. 514, 521, 254, P.2d 1076, 1080 (1953). As a "title insurance producer," Flying S held authority to "determine the insurability" and "issue policies of the title insurer." M.C.A. § 33-25-105(13)(a)(iii) and (iv). Under this authority, Flying S issued Pro Forma Commitments providing "the terms and conditions upon which the issuer is willing to issue its title insurance policy." M.C.A. § 33-25-111. Thus, to the extent an offer was extended to insure something that did not yet exist, it was because Flying S decided what to insure. Flying S could have avoided its obligations under the Pro Forma Commitments by not charging the premium amounts at closing, or if charged, by simply returning Appellants' premiums and rescinding the transaction. What Flying S, or any other insurer, cannot do is accept premiums and assert that there was no insurance.

Flying S consistently suggests to this Court that it intended to insure the lots. If true, recognizing all Requirements had been satisfied, why were Appellants not provided title insurance on the lots? The reason is that all parties expected title insurance policies to be issued on the parcels.

CONCLUSION

The Court's Opinion is premised on the mistaken fact that Flying S issued title insurance to the lots and, therefore, Appellants received the benefit of their bargain. The misapprehension of this critical fact pervades the entire decision. Accordingly, this Court's Opinion "overlooked some fact material to the decision[,] and Appellants' petition qualifies for rehearing under Mont. R. App. P. 20(1)(a)(ii).

Dated this 13th day of March 2024.

/s/ David B. Cotner
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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 2,500 words excluding the Certificate of Compliance.

Dated this 13th day of March 2024.

/s/ David B. Cotner
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CERTIFICATE OF SERVICE

I, David Brian Cotner, hereby certify that I have served true and accurate copies of the foregoing Petition - Rehearing to the following on 03-13-2024:

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