

INFORMAL DOCKETING STATEMENT (CIVIL)

1. What order(s) of the trial court are you appealing?
 - 1) Order Granting Defendant's Motion for Summary Judgment
 - 2) Order Denying Plaintiff's Motion for Reconsideration
2. What is the date that is file-stamped on the order(s)?
 - 1) May 24, 2019
 - 2) Sept 3, 2019
3. Did you file a notice of appeal in the district court? Yes X No _____ *(If the answer is yes, please state which District Court and the date that is file-stamped on the notice of appeal)*

Thirteenth Judicial District Court, Valencia County, Sept 23, 2019
4. Please state why the Plaintiff(s) sued the Defendant(s).

Defendant *Stewart Title Guaranty Co* was paid to verify and certify a title as clear and to issue a title insurance policy. Plaintiff later discovered the title was defective at the time Defendant certified it, thereby creating a liability at that time. Defendant denied the claim *twice*.

5. Do you think the trial court made any mistakes? Yes X No _____

1) The Judge granted a Summary Judgment motion contrary to *Rule 1-056 NMRA* because she did not apply the law properly to the facts. Plaintiff cited authorities and none say that title insurance is any different from any other type of insurance policy. All insurance policies, including title insurance policies, have the attribute of either *claims-made* or *occurrence*, which determines whether the insurer's duty to indemnify created by the occurrence of a covered event survives the termination of that policy. The title insurance policy in question is silent regarding which type of policy it is, creating an ambiguity. Defendant claimed, unsupported by any authority at all, that his title insurance policy is not an insurance policy at all, and does not have these attributes because it is an indemnity contract. But his own policy directly contradicts his claim because his policy literally says it is a "policy of title insurance" (Defendant's filing on Dec 12, 2018, Exhibit 2A). Furthermore, a title insurance policy, like all insurance policies, *is* an indemnity contract. See *Guest v. Allstate Ins Co* 2009-NMCA-037 "... an insurance contract is one type of indemnity contract." And NMSA 1978 59A-30-3 ¶ H says "*title insurance policy* or *policy* means a contract indemnifying against loss or damage arising from any of the following that exist on or before the effective date of the policy". These authorities do *not* substantiate Defendant's claim that title insurance lacks the attributes of

claims made or occurrence that all insurance policies have. Defendant further claims, again without any legal justification, all liability terminates with policy termination. But the burden of citing authorities to justify the claim that title insurance policy is different from all other commercial indemnity insurance policies and lacks these attributes is on the Defendant but he has failed to provide any explanation. Lacking any authorities, Defendant's argument is based merely on biased wishful thinking instead of sound legal reasoning. The type of policy, the ambiguity of the policy, and reasonable expectations of the insured, are all facts in dispute rendering the Court's granting of a Summary Judgment inappropriate and contrary to *Rule 1-056 NMRA*.

2) The policy is silent on the issue of insurer's duty to indemnify surviving the policy termination and thus is an ambiguity in the policy which must be assumed to be in Plaintiff's favor. By granting Defendant's Motion for Summary Judgment, the Judge incorrectly construed the ambiguity in Defendant's favor.

3) The Court's ruling was contrary to the principle of *Reasonable Expectation* of the insured. Plaintiff had a reasonable expectation that if Stewart Title cleared the title and issued a title insurance policy, by buying insurance, Plaintiff, as the real party in interest, would be made whole if the title were to be discovered to be unmarketable in the future (*NMSA 1978 59A-30-3 ¶ H3*). Stewart Title holds itself out as an expert in title matters, and Plaintiff paid and expected Stewart Title to stand behind their title search and policy of insurance. Any technical termination of policy *coverage* does not affect the *liability for damages* present at the time the policy was issued, but not discovered until later as is often the case with titles. In this case, Plaintiff did not find the problem until much later because Plaintiff relied on the reputation of Stewart Title to his detriment.

4) The Judge made her decision *twice* without ever addressing the type-of-policy issue, which should have been the legal basis for her decision. The policy should be assumed to be an *occurrence* policy in favor of the insured because insureds are lulled into a sense of security and thus have no reason to do another title search upon receipt of the title search and policy of insurance.

5) The Judge accepted Defendant's arguments and rejected Plaintiff's arguments without properly determining and stating the questions of law and contract construction before the Court. The Summary Judgment Motion granted by the Court did not present any legal basis to justify Defendant's claim that title insurance does not have the *claims made* or *occurrence* attribute.

6) The question of whether the policy terminated or not is a distraction from the issue that Stewart Title cleared an unmarketable title in 2001, thereby at that time, causing damage to the Plaintiff as the real party in interest, even if there were no title insurance policy. Plaintiff has brought that fact to the Court a number of times to no avail as the Court continues to myopically focus on whether the Defendant is liable for damages to the Plaintiff due to Defendant's claim that the insurance policy *coverage* terminated in 2006. But the *liability* for the damage to Plaintiff still exists today because Stewart Title did not do the job for which they were paid and are required by law to do, as evidenced by the fact of how easily and quickly the problem was found in minutes by a non-professional. See Plaintiff's *Testimony for Hearing on Feb 13, 2019*, Exhibit A. Defendant's filings contradict their own policy which explicitly says that the policy covers the "unmarketability of the title". See *Stewart Title's Motion for Summary Judgment*, Dec 12, 2018, Exhibit 2A.

6. For each mistake listed in Question 5, using the same numerical order, please describe how you told the trial court it made a mistake.

1 and 2) Plaintiff submitted pleadings addressing this issue (June 20, 2019 page 2, and July 15, 2019 page 1,2) and appeared in person in hearings on this issue on May 9, 2019 (transcript page TR-18), and again on August 29, 2019 (transcript page TR-7).

3) Plaintiff addressed this issue in his filing on June 20, 2019 on page 4. and again in the hearing on August 29, 2019, testimony page TR-9.

4 and 5) Plaintiff requested Findings of Fact and Conclusions of Law *twice* (June 12, 2019 and Sept 9, 2019) to which the Judge did not respond. Plaintiff even quoted the law (*Rule 1-056C NMRA*) on Aug 29, 2019 (transcript page TR-19). Plaintiff also submitted a proposed order after that same hearing that included a section for the Judge to insert the legal basis for her decision, but she did not do so. In addition, after the Judge rendered her decision at the last hearing, Plaintiff requested to be able to speak to ask her to explain the legal basis for her decision, but she denied the request.

6) The Court was notified in the original complaint filed Sept 18, 2018, in the hearing of Feb 13, 2019 (in Plaintiff's testimony filed on the same date),

in Plaintiff's filings *Plaintiff's Objection to the Defendant's Motion* and *Amended Civil Complaint* both filed March 11, 2019, and in *Plaintiff's Additional Reply* filed April 3, 2019, in *Plaintiff's Reply* filed July 15, 2019, and in the Hearing on Aug 28, 2019.

7. Do you know of any case law, statutes, rules, constitutional provisions, or other legal authority that would support your claim that the trial court made mistakes? Yes X No . If you answered yes, please list those authorities below along with a short explanation of what you think the case, statute, or other legal authority means.

1 and 2) Plaintiff has extensively searched NM insurance statutes and rules (*NMSA 1978 §§ 59A-1-1 through -18* and *NMSA 1978 §§ 59A-30A-1 through -18*), and federal and NM state case law, and none say anything about title insurance being different from any other type of commercial liability insurance in the matter of this dispute. The NM Office of Superintendent of Insurance (OSI), the state insurance regulator, in their regulation *Title Insurance §§ 13.14.1 through 13.14.19 NMAC (10/31/1996)* also says nothing about title insurance being any different than any other type of insurance in this regard. Windt's *Insurance Claims and Disputes*, a leading treatise for all issues related to all kinds of insurance, has no references

concerning this issue. Extrinsic evidence, like Windt's treatise, may be used to determine that title insurance is no different than any other kind of insurance for the purpose of this case. *Mark V Inc v Mellekas* 114 N.M. 778 Supreme Court and *Ponder v. State Farm Mutual* 2000-NMSC-033 ¶ 13.

3) Case law requires contracts to be interpreted based on "reasonable expectations of the insured". *United Nuclear v. Allstate* 2012-NMSC-032 ¶ 11 See also *Rummel v. St. Paul Surplus Lines* 1997-NMSC-041 ¶ 22 and *Phoenix Indemnity Insurance v. Pulis* 2000-NMSC-023 ¶ 23 and *Western Commerce Bank v. Reliance Insurance* 105 N.M. 346 Supreme Court and *Horne v. United States Fidelity & Guaranty Co.*, 109 N.M. 786, 791 P.2d 61 (1990) and *Safeco Insurance Co. of America v. McKenna*, 90 N.M. 516, 565 P.2d 1033 (1977). And *Bogle Farms, Inc. v. Baca*, 1996-NMSC-051 1996 said "The case-by-case rule adopted in *Burris* is based on the principle that in contract cases the role of the court is to give effect to the intention of the contracting parties" and *Sharpe v. Smith*, 68 N.M. 253, 360 P.2d 917 (1961) - Supreme Court said "We find the weight of modern decisions holding that the intention of the grantor [analogous to the insurance policy writer], as gathered from the four corners of the deed, is the pole star of construction, and that all parts of the deed must be examined together, for the purpose of ascertaining the intention."

4 and 5) *NMSA 1978 § 1-056(C)* requires that the order contain the legal basis for the decision.

6) *NMSA 1978 59A-30-11 ¶ A* requires the title insurance company to do a “reasonable search and examination of the title”. See also *Ruiz v. Garcia*, 850 P. 2d 972 - NM: Supreme Court 1993 and *Cottonwood Enterprises v. McAlpin*, 810 P. 2d 812 - NM: Supreme Court 1991. And *Rule 1-056C NMRA* governs the rights of the Real Party in Interest.

8. In addition to the mistakes you listed above, are there any other reasons why you are appealing? Yes X No If you answered yes, please tell us your other reasons for appealing and describe how you told the trial court it made a mistake.

The core issues of whether title insurance policies have the attributes of *claims-made* or *occurrence*, and whether this policy is a *claims-made* or an *occurrence* policy, and whether Defendant has liability directly from their improper actions that damaged the Plaintiff, are all unresolved questions and must be brought to trial for resolution. There appears to be no case law that has established any precedents in this matter of insurance, so it is imperative that a precedent-setting case such as this be decided properly in a trial with public and sound legal reasoning. The declaratory judgment in this case was

based on one party's biased wishful thinking devoid of any authorities and any legal reasoning. In spite of the unresolved ambiguities, the judge gave no explanation as to the legal basis for her decision, ignoring numerous requests. Future similar cases will look to this case for guidance so this case must be decided correctly, with a clearly and explicitly stated legal basis. The law and the Courts are supposed to enhance and enforce justice, instead of in this case providing a fig leaf behind which big companies can hide to avoid responsibility for damage to their clients due to negligence or fraud.

9. What action do you want the Court of Appeals to take?

- 1) Clarify the law regarding title insurance policies.
- 2) Reverse the denial of Plaintiff's Motion for Reconsideration
- 3) Reverse the granting of Defendant's Motion for Summary Judgment
- 4) Require the Judge to explain the legal basis for her decisions

These actions will allow the contract construction in dispute to be properly adjudicated with an explicitly stated sound legal basis.

10. Were all of the proceedings in the trial court tape recorded? Yes ____
No X _____. If you answered no, please tell us which hearings or which days of the trial were not tape recorded.

Neither of the hearings on this issue (May 9, 2019 and Aug 29, 2019) were audio or video recorded, but written transcripts are available from the court reporter.

11. Have you filed any other appeals related to this case? Yes _____
No X. If you answered yes, please tell us the names and case numbers for those appeals.

12. Do you know if anyone else involved in this case has filed an appeal related to this case? Yes ____ No X

Sign your name: _____

Be sure you attach an affidavit of service.

Be sure to pay the filing fee or file an Application and Order for Free Process.

AFFIDAVIT OF SERVICE FOR INFORMAL DOCKETING STATEMENT
(CIVIL)

____ Paul Kinzelman _____ (*your full name*), being duly sworn upon his or her oath or affirmation, hereby declares under penalty of perjury that he MAILED the foregoing docketing statement to the following people or entities at the addresses indicated on this 21st day of October, 2019.

The following spaces are for the names and addresses of the people you are required to mail or deliver the docketing statement to. You must fill them all in. The district court clerk or the judge's secretary may be able to help you with these names and addresses.

____ District Court Clerk _____

____ PO Box 1089 _____ (*street or P.O. address of district court clerk*)

____ Los Lunas NM 87031 _____ (*city, state, and zip code of district court clerk*)

____ Judge Cindy Mercer _____ (*name of the trial judge*)

____ PO Box 1089 _____ (*street or P.O. address of the trial judge*)

____ Los Lunas NM 87031 _____ (*city, state and zip code of trial judge*)

____ Moses, Dunn, Farmer, & Tuthill, PC _____ (*name of opposing counsel*)

____ PO Box 27047 _____ (*street or P.O. address of opposing counsel*)

____ Albuquerque NM 87125 _____ (*city, state and zip code of opposing counsel*)

____ Margo Gurule _____ (*name of the court reporter or monitor*)

____ PO Box 1089 _____ (*street or P.O. address of court reporter or monitor*)

____ Los Lunas NM 87031 _____ (*city, state and zip code of court reporter or monitor*)

(Sign your name in front of a Notary Public) -

Subscribed and sworn to before me this 21st day of October, 2019.

_____ Notary Public

My commission expires:
