
State of Minnesota
In Court of Appeals

EVELYN I. RECHTZIGEL TRUST, by its Trustees
FRANK RECHTZIGEL AND GENE RECHTZIGEL,
Appellants,

vs.

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK,
AND PULTE TITLE AGENCY OF MINNESOTA, L.L.C.,
Respondents.

RESPONDENTS FIDELITY NATIONAL TITLE INSURANCE CO. OF NEW YORK
AND PULTE TITLE AGENCY OF MINNESOTA, L.L.C.'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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I. STATEMENT OF ISSUES PRESENTED

A. Did The District Court Err By Determining Appellant's Loss Was Not Covered Pursuant To Either The 1987 Alta Policy Or The 1992 Alta Policy?

Holding Below: The District Court held that Appellant's loss was not covered under either policy and awarded summary judgment in favor of Fidelity National Title Insurance Company of New York and Pulte Title Agency of Minnesota, LLC.

Most Apposite Cases.

American Family Ins. Co. v. Walser, 628 N.W.2d 605 (Minn. 2001)

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Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997)

Most Apposite Statutes:

11 U.S.C. § 547 (2000)

B. Did The District Court Err In Dismissing Appellant's Negligent Misrepresentation Claim?

Holding Below: The District Court held that Appellant could not show that a misrepresentation occurred, could not show causation and that Appellant's reliance would have been unreasonable as a matter of law.

Most Apposite Cases:

Bonhiver v. Graff, 311 Minn. 111, 248 N.W.2d 291 (1976)

Smith v. Brutger Cos., 569 N.W.2d 408 (Minn. 1997)

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C. Did The District Court Err By Dismissing Appellant's Duty To Defend Claim?

Holding Below: The District Court compared the insuring clauses of both policies to the language in the Preference Action Complaint and held that the Preference Action Complaint did not seek an interest in the insured title and therefore the allegations in the Preference Action were not “arguably covered” by either policy.

Most Apposite Cases:

Ross v. Briggs and Morgan, 540 N.W.2d 843 (Minn. 1995)

Franklin v. Western National Mutual Insurance Company, 574 N.W.2d 405 (Minn. 1998)

Garvis v. Employers Mut. Cas. Co., 497 N.W.2d 254 (Minn. 1993)

Reinsurance Ass'n of Minn. V. Timmer, 641 N.W.2d 302 (Minn. Ct. App. 2002)

Most Apposite Statutes:

11 U.S.C. § 547 (2000).

II. STANDARD OF REVIEW

On appeal from summary judgment, we review whether there are any genuine issues of material fact and whether the district court erred in its application of the law. We view the evidence in the light most favorable to the party against whom summary judgment was granted. We review *de novo* whether a genuine issue of material fact exists. We also review *de novo* whether the district court erred in its application of the law.

STAR Centers, Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 76-77 (Minn. 2002)

(citations omitted). “Interpretation of an insurance policy and application of the policy to the facts in a case are questions of law that we review *de novo*.” American Family Ins. Co. v. Walser, 628 N.W.2d 605, 609 (Minn. 2001).

Here, the material facts are not in dispute and therefore the only question facing the Court is “whether the [D]istrict [C]ourt erred in its application of the law.” STAR, 644 N.W.2d at 76-77).

III. STATEMENTS OF THE CASE AND FACTS

A. Statement of the Case

This is an appeal from the Honorable Richard G. Spicer’s Summary Judgment dismissing Appellant Evelyn I. Rechtzigel Trust, by its Trustees Frank Rechtzigel and Gene Rechtzigel’s (“Appellant”) claims in their entirety. Appellant initiated this action in the Dakota County District Court on February 29, 2005. Appellant’s Complaint sought relief for (1) breach of contract; (2) negligent misrepresentation; (3) illusory contract; and (4) bad faith.

Judge Spicer heard cross-motions for Summary Judgment on December 27, 2006 and granted Defendant Fidelity National Title Insurance Company’s (“Fidelity”) and Defendant Pulte Title Agency of Minnesota, LLC’s (“Pulte”) Motion for Summary Judgment on January 23, 2007.

IV. STATEMENT OF THE FACTS

A. Appellant’s 1031 Exchange

In 1999, Appellant decided to participate in a like-kind exchange to dispose of certain real property in Dakota County, Minnesota. AA-61. Appellant sold the Dakota County property to a national developer and utilized Pulte to close. AA-61. Appellant chose Like-Kind Exchange Services, Inc. (“LK”), a qualified intermediary exchange company pursuant to 26 U.S.C. § 1031, to act as intermediary. AA-60; RA-4, para. 15.

Appellant directed Pulte to transfer the sale proceeds of approximately \$602,424.26 (the "Proceeds") to LK. RA-5, para. 19. LK held the Proceeds in its co-mingled general account with Charles Schwab & Co. AA-162. Neither Pulte nor Fidelity chose LK as the exchange intermediary or ordered the Proceeds to be transferred to LK. AA-60.

Appellant identified roughly three hundred and fourteen (314) acres of bare farmland in Jackson County, Minnesota to purchase as the second half of the section 1031 like-kind exchange (the "Replacement Property"). AA-134 to AA-135. On January 20, 2000, Appellant entered into a purchase agreement with certain members of the Stroup-Breiholz-Kirchner family ("Stroup") for purchase of the Replacement Property (the "Purchase Agreement"). AA-134 to AA-135; RA-2. On the same date, Stroup executed a Warranty Deed transferring the Replacement Property title directly to Appellant apparently held in escrow until the March 8, 2000 closing. RA-105. On or about February 15, 2000, Appellant directed LK to transfer approximately \$600,000.00 of the Proceeds to Pulte so that Pulte could close Appellant's purchase of the Replacement Property from Stroup. RA-2, para. 6. In addition, Appellant instructed LK to release the balance of the Proceeds, \$2,424.76 to Appellant. RA-5, para. 19.

B. Application For Title Insurance Policy

To protect title to the Replacement Property, Appellant applied for and received a Fidelity National Title Insurance title policy specifically requesting a policy entitled "Owner's Policy of Title Insurance" on February 28, 2000. AA-77; RA-18. The application for title insurance requested a standard owner's policy with no exceptions or exclusions removed and no endorsement requests. RA-18. The title policy purchase

price was \$1,032,50. RA-18. Appellant received a title Commitment (not a policy of title insurance) erroneously identifying ALTA Residential Owner's Policy – 1987 as the pending policy and varying from the policy Appellant applied for, paid for and received. AA-137. The ALTA Residential Owner's Policy – 1987 "applies only to a one-to-four residential lot or condominium unit." AA-143. It was undisputed that Appellant's property was neither of these. AA-71.

Appellant alleged below that it specifically requested a section 1031 tailored policy from Pulte, however, Pulte only issued Fidelity Title Policies and it is undisputed that Fidelity does not have a 1031 like-kind exchange tailored policy. AA-97. Pulte and Appellant were sophisticated equals negotiating an arm's length transaction. Pulte did not act as Appellant's insurance broker, Appellant was represented by counsel during the section 1031 exchange and had other consultants providing guidance in relation to the like-kind exchange:

Q: Did Mr. Grzybek advise you with respect to the 1031 Exchange in any capacity?

A: Yes.

Q: And how? Explain how he advised you. How did you utilize his advice?

A: He was – he was used as a private consultant.

Q: As a private consultant?

A: Yeah.

AA-59.

....

Q: Do you remember the question? Was Mr. Grzybek involved in your decision to do a Like-Kind Exchange, or was that your decision alone?

MR. MOHRMAN: Same objection. Vague as to "involved."

THE WITNESS: It's what you mean by "involved" that I'm not sure of.

BY MR. SUND:

Q: Did he consult you in any capacity about the prospect of doing a 1031, the advantages or the disadvantages?

MR. MOHRMAN: You know, I'm going to object to it as vague again with regard to "consult." Why don't you ask him whether he talked to Mr. Grzybek at all about this. That's a straight-forward question.

MR. SUND: Well, I think "consult" is, too. Did he consult --

MR. MOHRMAN: "Consult" actually isn't. "Consult" means that he was a consultant and was providing advice. My suggestion is you ask him if he talked, and then you get the answer from him, and then you can probe further as to whether there was conversation.

MR. SUND: Well, I'll ask my question first.

MR. MOHRMAN: It was just a recommendation.

BY MR. SUND:

Q: Going back to my question, did he consult you in any capacity?

MR. MOHRMAN: Vague as to "consult."

THE WITNESS: We talked about it.

BY MR. SUND:

Q: What did you talk about?

A: We talked about how we need to carry out the 1031 Exchange pertaining to the Purchase Agreement as Pulte had promised to help us structure it and carry it out.

AA-64.

Importantly, it was undisputed that Fidelity does not have a title policy tailored for like-kind exchanges:

Q: Okay. Does Fidelity have any type of title insurance policy that it issues with respect to land transactions that involve a like-kind exchange?

A: No.

Q: Have you ever participated in any discussions at Fidelity related to like-kind exchanges?

A: Yes.

Q: Can you tell me about those discussions?

A: Well, I can't remember any particular ones as I sit here. I have just done some reading on them, I get calls sometimes where a 1031 is involved, but mainly discussions that involved just talking about what they are.

Q: Okay. Is there anything different that you've done with respect to the issuance of title insurance policies involving like-kind exchanges?

A: No.

Q: So you've never had any discussions along those lines at all internally at Fidelity or with anybody else?

A: Not in terms of the title insurance, no.

AA-97.

Completion of the 1031 Exchange.

On February 28, 2000, Appellant and LK entered into the Phase 4 Delayed Exchange & Assignment Agreement (the "Phase 4 Agreement"). AA-129 to AA-131.

The Phase 4 Agreement apparently helped ensure favorable tax treatment for Appellant.

AA-129 to AA-131. In pertinent part, the Phase 4 Agreement provides as follows:

This Agreement is entered into February 28, 2000, by and between Frank H. Rechtzigel and Gene A. Rechtzigel, Trustees of the Evelyn I. Rechtzigel Trust Agreement dated November 16, 1982, hereinafter "Exchangor". . . .

The terms and conditions set forth herein shall constitute both an agreement between the parties hereto and supplemental closing instructions for Pulte Title Agency of Minnesota,

L.L.C., hereinafter “Escrow Holder” for the transfer of the replacement property to Exchangor

The parties agree that the obligation to make any deed transfer provided for herein may be fulfilled by the party obligated to make the transfer conveying title to the property directly to the intended transferee. . . .

Seller shall execute the deed *in favor of Exchangor*

AA-129 to AA-131 (emphasis added).

Interestingly, the Phase 4 Agreement does not mention assignment of the January 20, 2000 Deed that had already been executed in favor of Appellant. AA-129 to AA-131. Clearly the Phase 4 Agreement had no bearing on the ownership of the Replacement Property. On or about March 8, 2000, Stroup’s January 20, 2000 Warranty Deed transferring the Replacement Property title *directly*¹ to Appellant was delivered to Appellant. RA-2, para. 7; RA-105. Title did not pass through LK or any other party. RA-2, para. 7; RA-105. Also on or about March 8, 2000, Fidelity issued Owner’s Policy of Title Insurance #5312-802094 (the “Policy”) to Appellant. RA-4, para. 12; RA-20. On or about March 15, 2000, LK released the balance of the Proceeds (\$2,424.76) to Appellant completing the exchange. RA-5, para. 19; RA-17.

Appellant now claims that it was entitled to a 1987 ALTA Title Insurance Policy rather than the 1992 ALTA Title Insurance Policy that it applied for, paid for, received, sought coverage under and did not dispute for nearly six (6) years.

¹ Appellant constantly mischaracterizes the nature of this transaction and blatantly ignores the January 20, 2000 Deed on its page 18 flow chart.

C. The 1992 Alta Policy

The 1992 ALTA Policy provides title insurance for the following specifically defined risks:

(a) Owners Policy of Title Insurance

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK, a New York Corporation, herein called the Company, insures as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, sustained or incurred by the Insured by reason of:

- (i) *Title to the estate* or interest described in Schedule A being vested other than as stated therein;
- (ii) Any defect in or lien or encumbrance *on the title*;
- (iii) Unmarketability of *the title*;
- (iv) Lack of a right of access to and from *the land*.

AA-151 to AA-157 (emphasis added).

Paragraph 1 (d) of the 1992 Policy defines "Land" as "the land described or referred to in Schedule A, and improvements affixed thereto which may by law constitute real property." AA-152. Schedule A of the Policy identifies the Replacement Property. AA-153. As with all insurance policies, the Policy contains various "exclusions" located after the subheading "Exclusions from Coverage." AA-152. The relevant exclusionary language reads as follows:

The following matters are expressly excluded from coverage of this policy and the Company will not pay loss or damage, costs, attorney fees or expenses which arise by reason of:

1. Defects, liens, encumbrances, adverse claims or other matters:
 - (a) Created, suffered, assumed or agreed to by the insured claimant;

2. Any claim which arises out of the transaction vesting in the insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditor's rights laws, that is based on:
 - (i) The transaction creating the estate or interest insured by this policy deemed a fraudulent conveyance or fraudulent transfer; or
 - (ii) The transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preference results from the failure
 - (a) to timely record the instrument of transfer; or
 - (b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

AA-152.

D. The 1987 Alta Policy

Roughly six (6) years after receiving the 1992 ALTA Policy, Appellant, for the first time, claimed it was issued the wrong policy. The 1987 ALTA Policy again only covers loss or damage affecting the title:

The Policy insures you against certain risks *to your land title*. These risks are listed on page two of the Policy

* * * *

This Policy *insures your title to the land* described in Schedule A – if that land is a one-to-four family residential lot or condominium unit².

* * * *

This Policy covers the following *title risks*, if they *affect your title* on the Policy Date.

1. Someone else owns an interest *in your title*.
2. A document is not properly signed, sealed, acknowledged, or delivered.
3. Forgery, fraud, duress, incompetency, incapacity or impersonation.
4. Defective recording of any document.
5. You do not have any legal right of access to and from the land.
6. There are restrictive covenants limiting your use of the land.
7. There is a lien *on your title* because of:
 - a mortgage or deed of trust
 - a judgment, tax, or special assessment
 - a charge by a homeowner's or condominium association
8. There are liens *on your title*, arising now or later, for labor and material furnished before the Policy Date – unless you agreed to pay for the labor and material.
9. Others have rights arising out of leases, contracts, or options.
10. Someone else has an easement on your land.
11. *Your title* is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease or to make a mortgage loan.

² Again, it is undisputed that the Replacement Property is not a one-to-four family residential lot or condominium unit and although the Commitment erroneously denoted a 1987 ALTA Policy, Fidelity issued the correct policy to Appellant, the 1992 ALTA Policy. Regardless, neither policy provides coverage for Appellant's loss.

12. You are forced to remove your existing structure – other than a boundary wall or fence – because:
 - It extends on to adjoining land or on to any easement
 - It violate a restriction shown in Schedule B
 - It violates an existing zoning law
13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.
14. Other defects, liens, or encumbrances.

AA-142 to AA-146.³

As with the 1992 ALTA Policy, the 1987 ALTA Policy excludes:

1. Title Risks:
 - That are created, allowed, or agreed to by you
 - That are known to you, but not to us, on the Policy Date – unless they appeared in the public records
 - That result in no loss to you
 - That first affect your title after the Policy Date – this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks.

AA-145.

E. LK's Bankruptcy

On April 25, 2000, LK filed for Chapter 7 bankruptcy relief in the United States Bankruptcy Court for the District of Minnesota, Case No. 00-31924. AA-162, para. 4.

³ Pages 147-150 of Appellant's Appendix are not part of the standard form 1987 ALTA Owner's Policy. Instead, they are an "Expanded Coverage Residential Loan Policy" from a 2001 ALTA Form. To the extent Appellant relies on any language in A-147-150, Appellant never requested such a policy and this issue was not raised before the District Court and is therefore not properly before this Court. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) ("reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it'") (citation omitted).

On or about September 12, 2000, LK's bankruptcy trustee ("Trustee") notified Appellant of an "intended litigation and settlement" meeting in relation to LK's payments of \$602,424.76 to, or for the benefit of Appellant. AA-158. This letter identified "[p]ayments totaling \$602,424.76 were made to your company/you by the Debtor within the Preference Period." AA-159. The September 12, 2000 letter did not identify the Replacement Property, allege that LK's Bankruptcy Estate had any interest in the Replacement Property or make any claim that Stroup's conveyance of the Replacement Property to Appellant constituted a preferential transfer. AA-158 to AA-160.

On or about November 8, 2000, the Trustee filed a "Complaint for Recovery of a Preference" in Bankruptcy Court against Appellant for recovery of the \$602,424.76 LK transferred to, or for the benefit of Appellant ("Preference Action"). AA-161 to AA-164. The Preference Action asserted that the \$602,424.76 transferred from LK to or for the benefit of Appellant was a preferential transfer. AA-161 to AA-164. The Trustee did not allege that Stroup's transfer of the Replacement Property to Appellant was a preferential transfer. AA-161 to AA-164. Nor did the Trustee assert any interest in the Replacement Property:

15. Within 90 days prior to the filing of the petition for relief described in paragraph 2, the Debtor transferred to or for the benefit of the [Appellant] the sum of \$602,424.76.
16. This transfer was made for or on account of an antecedent debt.
17. The payments were made by the Debtor to the [Appellant] on February 15, 2000, through a wire transfer from the Schwab Account; and by check on March 15, 2000

18. The Debtor transferred \$602,424.76 while insolvent.
19. The transfer, if not avoided, will enable the [Appellant] to recover more than it would receive as a creditor if (a) the transfer had not been made, and (b) the [Appellant] received payment of the debt to the extent provided by the provisions of the Bankruptcy Code.
20. Pursuant to 11 U.S.C. §§ 550 and 551, the Trustee may recover, for the benefit of the estate, the property or the value of the property transfer [sic] to the [Appellant].

WHEREFORE, the Trustee *demands judgment against the [Appellant] in the amount of \$602,424 76* plus all reasonable and allowable costs, prejudgment interest, expenses and attorneys' fees and such other relief as is just and equitable.

AA163 to AA-164 (emphasis added).

Clearly, the Trustee sought to recover the cash LK transferred. Not surprisingly, the Preference Action led to no *lis pendens*, lien, encumbrance or any other document affecting the Replacement Property title. Indeed, Appellant owns the Replacement Property free and clear today:

Q: Okay. In any case, part of it is leased, and then the part that's not leased that you bought pursuant to this Settlement Statement that were talking about, are you farming the rest of it?

A: No I already told you when we started. We're renting land out.

Q: Yeah, but you just said now you're only renting out part of the land that we're talking about here in Heron Lake.

A: We're renting out what we still own.

Q: Okay. Of this purchase here in Heron Lake?

A: What we own, we're renting out.

AA-71.

F. Tender and Denial of Title Claim

On or about October 13, 2000, Appellant wrote Fidelity requesting coverage under the 1992 ALTA Policy. RA-36. On November 20, 2000, Fidelity responded to counsel's letter acknowledging receipt of the tender. RA-37. On November 27, 2000, Fidelity, through its claim representative Kurtis Stammich ("Stammich"), denied the claim through a letter to Appellant's counsel. AA-185 to AA-186. Fidelity denied the claim under Exclusion Clause 3(a), which excludes coverage and/or precludes claims based on defects or adverse claims "created, suffered, assumed or agreed to by the Insured Claimant." AA-185 to AA-186.

On December 21, 2000, Appellant's counsel again wrote to Fidelity, requesting reconsideration of Appellant's tender of claim and defense in the Preference Action. AA-172 to AA-173. On May 8, 2001, Stammich sent a second letter to Appellant's counsel again denying the claim on the same grounds identified in its initial response dated November 27, 2000. AA-185 to AA-186; RA-42 to RA-43. Fidelity also denied coverage pursuant to ¶ 4(ii) of the Policy, which specifically applies to title defects arising from bankruptcy. AA-185 to AA-186; RA-42 to RA-43. This clause states in relevant part:

The following matters are expressly excluded from coverage of this policy and the Company will not pay loss or damage, costs, attorney fees or expenses which arise by reason of:

(4) Any claim which arises out of the transaction vesting in the insured the estate or interest insured by this

policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditor's rights laws, that is based on:

- (iii) The transaction creating the estate or interest insured by this policy being deemed a preferential transfer

AA-152.

Appellant's counsel sent yet another letter dated May 16, 2001, addressed to Stammich asking for reconsideration. AA-174 to AA-175. On June 7, 2001, Fidelity, through its Senior Claims Counsel, L. Wally Zbilut ("Zbilut"), again denied Appellant's request for coverage under the Policy, both in terms of the alleged damages and duty to defend, based on the insuring clauses of Appellant's title policy and the reasons set forth in Fidelity's letters dated November 27, 2000, and May 8, 2001. AA-187 to AA-193. Zbilut concluded that: "based upon the insuring clauses and definition of land and the Exclusions from Coverage 3(a) and 4, the Company denies your tender of claim for coverage and based upon the matters of the Complaint, denies your tender for defense." AA-187 to AA-193. Appellant's counsel sent two more follow-up letters to Fidelity dated September 10 and September 21, 2001, both of which sought reconsideration of Fidelity's consistent denial of coverage. AA-181 to AA-183. On or about September 26, 2001, Zbilut again denied Appellant's tender of defense after closely analyzing the allegations of the Preference Action and the language in the policy. AA-194.

G. Appellant's Damage

Appellant settled the Preference Action with the Trustee in the amount of \$102,412.20. AA-167 to AA-169. On October 19, 2001, Appellant's counsel sent Zbilut

one last letter informing Fidelity that Appellant settled the Preference Action for \$102,412.20, which, according to Appellant's counsel, was made under duress as a result of Fidelity's refusal to provide a defense to Appellant under the Policy. AA-184. Additionally, Appellant's Counsel stated "[i]f you notify my clients prior to the November 5, 2001 deadline that you have changed your position and will provide a defense, my clients will opt out of the settlement, pursue their defenses vigorously and prevail." AA-184.

On November 6, 2001, the Bankruptcy Court finalized Appellant's agreed upon compromise of \$102,412.20. RA-6, para. 26. Eventually, this lawsuit followed. RA-1 to RA-14.

V. ARGUMENT

A. **The District Court Correctly Determined that Neither Policy Covered Appellant's Loss because Appellant's Rights to the Replacement Property Were Never in Doubt.**

"Interpretation of an insurance policy and application of the policy to the facts in a case are questions of law that we review *de novo*." American Family Ins. Co. v. Walser, 628 N.W.2d 605, 609 (Minn. 2001). "The purpose of title insurance is to protect a buyer of real estate from any damage or loss *arising through defects clouding his title*." Camp v. Commonwealth Land Title Ins. Co., 787 F.2d 1258, 1261 (8th Cir. 1986) (emphasis added). "General principles of contract interpretation apply to insurance policies. When insurance policy language is clear and unambiguous, the language used must be given its usual and accepted meaning." Lobeck v. State Farm Mut. Auto. Ins. Co., 582 N.W.2d 246, 249 (Minn. 1998) (quotations and citations omitted); see also Simon v. Milwaukee

Auto. Mut. Ins. Co., 262 Minn. 378, 391, 115 N.W.2d 40, 49 (1962) (“[w]here the insurance contract is unambiguous, the language used must be given its ordinary and usual meaning the same as any other contract, and we have no more right to redraft an insurance contract under the guise of strict construction to reach a result that we would prefer than we have to redraft any other contract. . . .an insurance policy is still a contract, and where its provisions are unambiguous the courts have no right to thrust upon the insurer a risk that it did not accept and for which it was not paid a premium”).

In construing policy provisions, “the intent of the parties is to be ascertained, not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the insurance contract as a whole.” State Farm Mut. Auto. Ins. Co. v. Tennessee Farmers Mut. Ins. Co., 645 N.W.2d 169, 175 (Minn. Ct. App. 2002).

1. The Insuring Clauses are not Ambiguous and do not Cover Pure Financial Loss.

“The initial burden of demonstrating coverage rests with the insured; the burden of establishing the applicability of exclusions rests with the insurer.” Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 736 (Minn. 1997). “[A]s part of the insured’s initial burden, the essential terms and conditions of coverage must be proved.” Domtar, 563 N.W.2d at 736. “In interpreting the language of the policy, this court must determine as a matter of law whether the language is ambiguous.” Illinois Farmers Ins. Co. v. Coppa, 494 N.W.2d 503, 506 (Minn. Ct. App. 1993). “An ambiguity exists if the language of the policy is reasonably susceptible to more than one interpretation.” Id.

“However, a court should avoid reading an ambiguity into a contract in order to provide coverage if the plain language is clear.” Id.

Here, there was no argument below and no decision by the District Court that the language of either policy was ambiguous. Thus, “the language used must be given its usual and accepted meaning.” Lobeck, 582 N.W.2d at 249; see Thiele, 425 N.W.2d at 582 (“reviewing court must generally consider ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it’”) (citation omitted).

The Court’s interpretation of an insurance policy begins with the insuring clauses. See Witcher Const. Co. v. Saint Paul Fire and Marine Ins. Co., 550 N.W.2d 1, 5 (Minn. Ct. App. 1996) (“[e]ven if Witcher succeeded in establishing coverage under the main insuring clause, we would still need to interpret the effect of the policy’s exclusion”).⁴

Here, the insuring clauses are unambiguous and their clear and accepted meaning does not provide coverage for purely financial risks that do not interfere with an owner’s

⁴ See also, Rios v. Scottsdale Ins. Co., 119 Cal.App.4th 1020, 1025, 15 Cal.Rptr.3d 18, 22 (Cal. Ct. App. 2004) (“[w]hen an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded”); Miller v. Triad Adoption and Counseling Services, Inc., 133 N.M. 544, 551-52, 65 P.3d 1099, 1106-07 (N.M. Ct. App. 2003) (“[w]e need not reach these issues because we have determined that the July 28, 2000, complaint and the known facts do not bring the July 28, 2000, claim within the coverage stated in the insuring clause of the policy. Therefore, the exclusionary clause need not be invoked or interpreted”); Elysian Investment Group v. Stewart Title Guaranty Co., 105 Cal.App.4th 315, 320, 129 Cal.Rptr.2d 372, 376 (Cal. Ct. App. 2002) (“[t]he insuring clauses of an insurance policy define and limit coverage”); Hendrickson v. Zurich American Ins. Co. of Illinois, 72 Cal.App.4th 1084, 1089, 85 Cal.Rptr.2d 622, 625 (Cal. Ct. App. 1999) (“[o]ur interpretation of the subject policies requires that we first examine the insuring clauses”).

right to the insured property. The terms of the 1992 ALTA Insuring Clauses clearly provide coverage for only issues affecting title or rights to access the property. See Section III. C., *supra*. The 1987 ALTA Policy is equally unambiguous and again only covers loss or damage affecting the title or rights to access the property. See Section III. D., *supra*.

The District Court noted that “nowhere does either policy state that it covers risks related to being sued for a money judgment. Rather, the common theme throughout both policies is that coverage is extended only to risks related to title. In other words, if the underlying ‘defect’ does not affect [Appellant’s] title in the property, then the defect is not covered.” (A-3) On appeal, Appellant argues that a money judgment would trigger title insurance coverage and a duty to defend: “[h]ad the Bankruptcy Complaint been challenged and the outcome was still against the Trust, any final disposition of the court would have resulted in a threat⁵, lien, or encumbrance on the Trust’s property.” (Brief of Appellant, p. 12) If such broad coverage existed, any judgment against the Appellants would trigger title insurance coverage from a title insurance policy that only cost \$1,032.50. Obviously, this is incorrect. See Camp, 787 F.2d at 1261 (“[t]he purpose of title insurance is to protect a buyer of real estate from any damage or loss arising through defects clouding his title”). Although both policies provide coverage for unknown liens

⁵ Throughout Appellant’s Brief, Appellant uses the word “threat” as if some clause in the insuring language covered “threats” to title. Appellant failed to argue that either the 1987 ALTA Policy or the 1992 ALTA Policy covered “threats” to title at District Court and has waived the issue for Appeal. Thiele, 425 N.W.2d at 582 (“reviewing court must generally consider ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it’”) (citation omitted).

against the insured property, such liens are covered only if (1) they are unknown to the insured at the Policy Date and (2) they were enforceable *before* the Policy Date (with the exception of covered Mechanic's Liens). Here, the Policy Date is March 8, 2000 at 10:01 a.m., the time Appellant closed its purchase of the Replacement Property. LK filed for Bankruptcy protection on April 25, 2000. Thus, it is impossible that any Bankruptcy Court judgment would have been enforceable before the Policy Date.

The usual and accepted meaning of the language found in both the 1987 ALTA Policy and the 1992 ALTA Policy creates coverage *only* for loss or damage by reason of the listed title problems or lack of access rights to and from the Replacement Property and nothing else. See In Re Biloxi Casino Belle Inc., 368 F.3d 491, 499 (Miss. 2004) (“[f]rom the insuring clauses to the exclusions to Schedule A, the policy is replete with references to ‘land’ and ‘real property.’ But those same provisions contain no references to ‘chattels,’ ‘goods,’ ‘movables,’ ‘personality,’ or ‘personal property.’ The only impression an objective reader of the policy can come away with is that the document is firmly tied to *terra firma*”).¹ The 1992 ALTA Policy and Commitment are appropriately entitled “Owner’s Policy of *Title* Insurance” (emphasis added) indicating coverage for title risks, not pure financial risks associated with a transaction that do not affect title and certainly not risks associated with the financial stability of a 1031 Intermediary. See Biloxi, 368 F.3d at 499. (“[t]he only impression an objective reader of the policy can come away with is that the document is firmly tied to *terra firma*”); Simon, 262 Minn. 378 at 391, 115 N.W.2d at 49 (“courts have no right to thrust upon the insurer a risk that it did not accept and for which it was not paid a premium”); Camp, 787 F.2d at 1261

("[t]he purpose of title insurance is to protect a buyer of real estate from any damage or loss arising through defects clouding his title").

It is undisputed that Appellant's loss or damage is the amount for which it settled the Preference Action.⁶ In order for the Preference Action to potentially trigger coverage under either policy, it would have to affect the title in one of the following ways: (1) cause title to the Replacement Property to vest other than as stated in Policy; (2) constitute a defect on the Replacement Property; (3) constitute a pre Effective Date lien on the Replacement Property; (4) constitute a pre Effective Date encumbrance on the Replacement Property; (5) make the Replacement Property unmarketable; or (6) affect Appellant's rights of access to and from the Replacement Property.

Notably absent from Appellant's Brief is a detailed analysis of coverage provisions in either the 1987 ALTA Policy or the 1992 ALTA Policy showing the Court where initial coverage emanates. See Domtar, 563 N.W.2d at 736 ("[t]he initial burden of demonstrating coverage rests with the insured"). Other than a minor reference to the 1987 ALTA Policy, Appellant spends the majority of its brief explaining a 1031 exchange, federal bankruptcy law and arguing what the Bankruptcy Trustee "could-have

⁶ This loss arose from Appellant's unfortunate choice of an insolvent exchange intermediary, a financial risk Appellant assumed before it sought a title policy with Fidelity. Appellant asks this Court to construe unambiguous Insuring Clauses so broadly that if Appellant were hypothetically robbed on the way to the closing, the robbery would trigger coverage. In other words, Appellant seeks coverage for *every* risk that Appellant faced in purchasing the Replacement Property, not just risks affecting title. However, since the Preference Action never challenged the title or Appellant's access to and from the land, there simply is no coverage and the District Court properly dismissed Appellant's claims for coverage and duty to defend. See Camp, 787 F.2d at 1261 ("[t]he purpose of title insurance is to protect a buyer of real estate from any damage or loss arising through defects clouding his title").

and should-have” alleged in the Preference Action Complaint. After convincing itself that the Trustee could have pursued the Replacement Property, Appellant then argues that LK did in fact have title to the Replacement Property. Appellant made the same arguments to the District Court and the District Court properly looked to the January 20, 2000 Deed transferring the Replacement Property title *directly* from Stroup to Appellant. AA-3 to AA-4. (“[a]n examination of the deed conveying the Replacement Property reveals that the transfer of the property was actually between Stoup [sic] and the Plaintiff directly, and did not involve Like Kind either as grantor or grantee. Hence, it would appear as though the bankruptcy trustee could not have targeted the transfer of the Replacement Property in the Preference Action because the debtor (Like Kind) was not a party to the transfer”).

Although Appellant disputes the legal effect of the Phase 4 Agreement, the underlying facts of Stroup’s transfer of title are not in dispute. Thus, the District Court properly granted Fidelity and Pulte’s motions for summary judgment. Page 18 of Appellant’s Brief contains a chart that completely ignores the January 20, 2000 Deed transferring title from Stroup *directly* to Appellant and the unequivocal language of the Phase 4 Agreement requiring title to be transferred from Stroup directly to Appellant.

2. The Bankruptcy Trustee Targeted Cash Transfers.

The Preference Action Complaint undeniably pursued the cash transfers in the 1031 exchange, not the Replacement Property itself:

15. Within 90 days prior to the filing of the petition for relief described in paragraph 2, the Debtor transferred to or for the benefit of the [Appellant] *the sum of \$602,424.76.*

16. This transfer was made for or on account of an antecedent debt.
17. *The payments* were made by the Debtor to the [Appellant] on February 15, 2000, through a wire transfer from the Schwab Account; and by check on March 15, 2000. . . .
18. The Debtor *transferred \$602,424.76* while insolvent.
19. *The transfer*, if not avoided, will enable the [Appellant] to recover more than it would receive as a creditor if (a) the transfer had not been made, and (b) the [Appellant] received payment of the debt to the extent provided by the provisions of the Bankruptcy Code.
20. Pursuant to 11 U.S.C. §§ 550 and 551, the Trustee may recover, for the benefit of the estate, the property or the value of the property transfer [sic] to the [Appellant].

WHEREFORE, the Trustee *demands judgment against the [Appellant] in the amount of \$602,424 76* plus all reasonable and allowable costs, prejudgment interest, expenses and attorneys' fees and such other relief as is just and equitable.

AA-163 to AA-164 (emphasis added).

As the District Court held, there is no mention of the Replacement Property in the Preference Action Complaint, no *lis pendens*, lien, encumbrance, levy, judgment⁷ or anything else recorded against Appellant's title as a result of the Preference Action. Moreover, it can hardly be disputed that LK never held title to the Replacement Property⁸

⁷ A post Policy Effective Date Judgment is not a covered risk. See Section III, D. *supra* (“[i]n addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys’ fees, and expenses resulting from . . . Title Risks . . . [t]hat first affect your title after the Policy Date”). Covered Judgment Risks include pre-effective date judgments that for some reason are unknown to an insured. See Id.

⁸ Plaintiff's Complaint alleged that “[o]n or about March 8, 2000, Gene Rechtzigel and Frank Rechtzigel, as trustees for the Evelyn I. Rechtzigel Trust, took title to certain property in Jackson County, Minnesota. The land was conveyed from members of the Stroup-Breiholz-Kirchner family, all of whom had interests in the land from a

and therefore the Preference Action could not affect its title. Appellant twists the facts of this case and the language of the Preference Action Complaint beyond credulity. The most glaring defect is Appellant's suggestion that "[t]he bankruptcy trustee sued the Trust because the one thing⁹ the debtor, LKE, transferred to the Trust was a property title." (Brief of Appellant, p. 12.) Curiously, the Preference Action Complaint sought \$602,424.76 in cash while it is undisputed that the value of the Replacement Property was \$589,864.82 when Stroup transferred it *directly* to Appellant. AA-137. If indeed the Preference Action Complaint sought the Replacement Property, would not the demand for judgment seek \$589,864.82 instead of \$602,424.76? Appellant cannot explain this discrepancy.

The Preference Action simply did not put Appellant's title in jeopardy or affect Appellant's rights of access to or from the Replacement Property; both are still clear and vested in Appellant's name and therefore the District Court correctly decided that Appellant's alleged loss did not trigger coverage pursuant to either Policy.

common set of ancestors whom they had in common." (RA-2)

⁹ Appellant blatantly misstates the truth because it is undisputed that LK transferred \$2,424.76 directly to Appellant in cash on March 15, 2000, well within the preference period. (A-166)

a) *Although the Issue is Irrelevant,¹⁰ LK Never Held an “Interest” in the Replacement Property.*

Appellant argues that “[t]he Trust assigned ‘all rights, title, and interest’ of the replacement property to LKE” to support the proposition that LK had an interest in the Replacement Property, transferred that interest to Appellant within the preference period and the Trustee sought to unwind such transfer. (Brief of Appellant, p. 15) Appellant is factually incorrect because Appellant did not own all “rights, title and interest” in the Replacement Property at the time Appellant and LK entered the Phase 4 Agreement, February 28, 2000. What Appellant means to say is that Appellant transferred to LK “all rights, title, and interest in and to that certain Purchase and Sale Agreement” relating to the Replacement Property. AA-130. However, by the time the parties executed the Purchase Agreement, Stroup had already executed a deed in favor of Appellant and the Phase 4 Agreement curiously does not refer to the January 20, 2000 Deed. Moreover, even if we restate Appellant’s argument to reflect reality, an analysis of the Phase 4 Agreement shows that LK never held a right, title or interest in the Replacement Property itself.

b) *LK Never Held Legal Title to the Replacement Property.*

Legal title is defined as “[o]ne cognizable or enforceable in a court of law, or one which is complete and perfect so far as regards the apparent right of ownership and possession, but which carries no beneficial interest in the property, another person being

¹⁰ What interest LK had in the Replacement Property is irrelevant because the Court’s analysis is limited to the claims pursued by the Trustee, not what it could have targeted. Timmer, 641 N.W.2d at 311 (holding Minnesota courts cannot “determine coverage on the basis of claims that could have been made (for example, are suggested by the fact pattern) but were not”).

equitably entitled thereto; in either case, the antithesis of ‘equitable title.’” BLACK’S LAW DICTIONARY, 897 (6th Ed. 1990). The Phase 4 Agreement unambiguously provides that the Replacement Property legal title will be transferred directly from Stroup to Appellant: “title to the replacement property *shall be conveyed directly from Seller to Exchangor . . . Seller shall execute the deed in favor of Exchangor.*” AA-130 (emphasis added).

By analogy, legal title remains in a contract for deed vendor until all terms of the contract-for-deed have been satisfied and the vendor deeds the legal title to the vendee. Wells Fargo Home Mortg., Inc. v. Chojnacki, 668 N.W.2d 1, 3 (Minn. Ct. App.2003) (“[b]efore she paid a portion of the funds from the mortgage loan to the seller and satisfied the contract for deed, legal title remained in the seller, and the buyer had only equitable title”) (citation omitted). Here, Stroup transferred “equitable title” to Appellant with the Purchase Agreement but retained “legal title” to the Replacement Property until it delivered the January 20, 2000 Deed transferring it to Appellant. Thus, at no point did LK have “legal title” to the Replacement Property.

Appellant’s word games are nothing more than an illusion. Appellant quotes State v. Grimes, 46 P.3d 801 (Wash. Ct. App. 2002) to support its proposition that LK held legal title to the Replacement Property. (Brief of Appellant, p. 16.) The issue in Grimes was whether Grimes held legal title to the exchange funds, not the underlying real property. Id at 805 (“Grimes argues that he did not exert ‘unauthorized control’ over the section 1031 exchange funds because he obtained full title to them”). Even so, the Grimes Court held that although Grimes had possession of the funds and legal title, he

did not own a “real interest” in the exchange funds. Id. at 806 (“Grimes’ assertion that he had full control over the property under section 1031 law is erroneous”). Here, of course, no one disputes that LK held the exchange funds and it follows that LK had “legal title” to the exchange funds as bare as that legal title may have been. See id. However, Appellant twists Grimes and the factual record here to argue “[t]he legal reality embodies the assigned transfers of title to LKE of the relinquished and replacement properties involved in the § 1031 transaction.” (Brief of Appellant, p. 16) Since title to the underlying real estate was never at issue in Grimes, Appellant’s reliance thereon is misplaced and deceptive. Grimes is applicable for one purpose, to show that Appellant should have defended the Preference Action more vigorously as it suggested in its October 19, 2001 Letter and avoided a loss altogether. AA-184.

Even if Stroup would have transferred legal title of the Replacement Property to LK, LK’s interest would have been a “bare legal title” inescapably subject to divestment and LK’s Bankruptcy Trustee would not have been able to recover it in the Preference Action. See Nation-Wide Exchange Services¹¹, Inc. v. Miller & Holmes, Inc., 291 B.R. 131, 136, 153 (Bankr.. D. Minn. 2003) (“the Trustee held a very thin legal right in the Hudson property-bare legal title-and this right was severely and inescapably limited by M & H’s enforceable expectations under the Phase 2 Agreement . . . [t]he issue is an odd one, unprecedented in the experience of the undersigned. Resolving it requires reference

¹¹ Behind both Nation-Wide Exchange Services, Inc. and LK, lies one John Davies who has subsequently been convicted on federal charges in relation to his use of the Charles Schwab account where Appellant’s Preferential Transfers originated. See Nation-Wide, 291 B.R. at 136 (“[a]long with Davies and several of his other business entities, the Debtor filed a voluntary petition under Chapter 7 on April 25, 2000”).

to some of the more basic principles of bankruptcy law. That analysis shows the Trustee to be quite unfounded, and M & H to be entitled to the relief it requests immediately”).

Nation-Wide involved a transaction similar to the underlying transactions in this matter. There, M & H participated in a section 1031 delayed exchange with contractual arrangements similar to Appellant’s. One significant difference between the two is that Nation-Wide actually took legal title to the replacement property at issue, apparently by deed, and held legal title on April 25, 2000, when the exchange intermediary, Nation-Wide, filed for Bankruptcy relief. Nation-Wide, 291 B.R. at 136-37 (“[a]s intermediary and assignee from M & H, the Debtor was to receive title to the Hudson property, and to retain it until the construction was complete ‘and the property was ready to transfer to’ M & H”). Here, of course, LK never took legal title to the Property because the January 20, 2000 Deed transferred legal title from Stroup directly to Appellant. Thus, LK’s purported interest in the Replacement Property, if it can be considered an interest at all, was far weaker than Nation-Wide’s interest in the Hudson Property, an interest the Nation-Wide Court noted was “a very thin legal title . . . severely and inescapably limited by M & H’s enforceable expectations under the Phase 2 Agreement.” Nation-Wide, 291 B.R. at 136.

M & H sought and obtained a remedy the court equated with specific performance forcing the Trustee to deed title to the Hudson Property to M & H. Nation-Wide, 291 B.R. at 154 (“[t]here was, and literally is, nothing for the Trustee to do but perform the Debtor’s duty: execute a deed to M & H, transferring full record title to it”). Likewise, even if LK would have held legal title at some point, the Trustee could not have avoided

the transfer. In other words, if the Trustee in Nation-Wide could not preserve legal title to replacement property for the benefit of the Bankruptcy Estate, neither could LK's Trustee avoid LK's transfer of the Replacement Property for the benefit of LK's Bankruptcy Estate. See Id. Accordingly, even if Stroup had transferred the Replacement Property's legal title through LK, Appellant could not have been forced to divest its interest, or the value of its interest, to LK's Bankruptcy Estate. See Id. Ultimately, there would have been no covered loss under either the 1987 ALTA Policy or the 1992 ALTA Policy.

c) *LK Never Held Equitable Title to the Replacement Property.*

The defining characteristic of an equitable owner is the right to force legal title to vest in the name of that individual. See BLACK'S LAW DICTIONARY, 1486 (6th Ed. 1990) (“[a] right in the party to whom it belongs to have the legal title transferred to him”); see also Tollefson Development, Inc. v. McCarthy, 668 N.W.2d 701 (Minn. Ct. App. 2003) (“partition can be maintained by an equitable title holder only if the individual's ‘equity is complete and entitles him to demand a conveyance of the legal title’”) (citing Hargis v. Wedge, 195 Okla. 493, 159 P.2d 553, 554 (1945)).

Here, LK never had the right to obtain legal title to the Replacement Property because the Phase 4 Agreement unambiguously required legal title to transfer from Stroup directly to Appellant and by the time the parties executed the Phase 4 Agreement, Stroup had already executed a deed transferring the Replacement Property directly to Appellant. The only result LK could ever hope for in an action to enforce the Phase 4 Agreement is to have a court force Stroup to convey the Replacement Property title

directly to Appellant. Stated another way, the Phase 4 Agreement did not give LK equitable title because LK never obtained the right to obtain legal title. Thus, the District Court correctly decided that “[Appellant’s] title was never in jeopardy because it was not sought in the Preference Action” and that therefore there is no “coverage under either version of the title insurance policy.” AA-4. Accordingly, the District Court’s decision should be affirmed.

B. The District Court Properly Dismissed the Negligent Misrepresentation Claim Because Appellant Failed to Show Breach of Duty, Causation or Justifiable Reliance.

The elements of negligent misrepresentation are: (1) supplying false information to another for the guidance of the other in a business transaction; (2) by one having a pecuniary interest; (3) made without due care or competence in obtaining or communicating the information; (4) said false information was justifiably relied on by the other; and (5) causes pecuniary loss to the other. See Bonhiver v. Graff, 311 Minn. 111, 122, 248 N.W.2d 291, 298-99 (1976).

1. It Was Undisputed that Neither Pulte nor Fidelity Provided False Information for Appellant’s Guidance.

The District Court properly dismissed Appellant’s negligent misrepresentation claim because it was undisputed that neither Pulte nor Fidelity ever represented that either policy “would cover anything that could go wrong in a 1031 exchange.” A-5. Moreover, “neither the written request for a title insurance policy, nor the policy ultimately issued – be it the 1987 or 1992 policy – makes any reference to coverage for a 1031 exchange.” AA-5. Thus, without a misrepresentation, there is no negligent misrepresentation. See Smith v. Brutger cos., 569 N.W.2d 408, 413 (Minn. 1997) (holding essential elements of

negligent misrepresentation include negligently giving false information); Bonhiver, 311 Minn. at 122, 248 N.W.2d at 298-99 (holding necessary element of claim for negligent misrepresentation is supplying false information to another for the guidance of the other in a business transaction).

Furthermore, the District Court properly held that “neither Pulte nor Fidelity was [Appellant’s] insurance broker.” AA-5. Pulte only issued Fidelity Title Policies and it is undisputed that Fidelity does not have a 1031 like-kind exchange tailored policy. Furthermore, it was undisputed that Appellant was represented by counsel during the transaction and had other consultants providing guidance in relation to the like-kind exchange. See Section III. B, *supra*. Thus, neither Pulte nor Fidelity owed Appellant a duty and therefore the District Court properly dismissed Appellant’s negligent misrepresentation claim. See Safeco Ins. Co. of America v. Dain Bosworth Inc., 531 N.W.2d 867, 871 (Minn. Ct. App. 1995) (“[d]ecause Dain was selling a deal to Safeco, and not supplying information for the guidance of Safeco, and because they were sophisticated equals negotiating a commercial transaction, Dain did not owe Safeco a duty for purposes of a negligent misrepresentation tort threshold”).

2. The District Court Properly Determined that Appellant’s Alleged Damages were Not Caused by a Representation made by Pulte or Fidelity.

Appellant failed to show causation because Fidelity does not even have a policy that would provide coverage for the losses Appellant allegedly incurred. AA-100. By analogy, the Minnesota Supreme Court and the Minnesota Court of Appeals have held that an insurance broker’s failure to give notice to the insured that insurance for a specific

risk is not included in a given policy or even insurable, is irrelevant if another policy covering that risk is unavailable. See Backus v. Ames, 79 Minn. 145, 149, 81 N.W. 766, 767 (1900) (“[n]or was it error for the court to instruct the jury, in effect, that any failure of Ames to give the notice would be immaterial, if, as a matter of fact, the plaintiff would have been unable to have placed the insurance, even if notice had been given. The failure to give the notice, in such a case, would not be the proximate cause of the plaintiff’s damages; hence it would be immaterial”); Melin v. Johnson, 387 N.W.2d 230, 233 (Minn. Ct. App. 1986) (“[h]owever, failure to give notice is immaterial if, as a matter of fact, the plaintiff would have been unable to have placed the insurance, even if notice had been given. The failure to give the notice, in such a case, would not be the proximate cause of the plaintiff’s damages; hence it would be immaterial”) (citing Backus).

Here, Appellant alleged that “Pulte failed to offer for sale the correct type of title insurance policy to the Rechtzigel Trust” (RA-8), and “[u]pon information and belief, Fidelity and Pulte offer for sale title insurance policies that are specifically drafted for the type of risks encountered in a like-kind exchange.” RA-8. However, Appellant presented no evidence to the District Court that such a policy exists. In fact, it was undisputed that Fidelity does not have a title policy to cover like-kind exchanges:

Q: Okay. Does Fidelity have any type of title insurance policy that it issues with respect to land transactions that involve a like-kind exchange?

A: No.

AA-93.

Since there is nothing in the record that shows Pulte offers a title policy covering Appellant’s loss, the District Court properly determined that Appellant’s negligent

misrepresentation claim failed as a matter of law. See Melin, 387 N.W.2d at 233 (“[t]o the contrary, uncontradicted testimony of two expert witnesses indicates other coverage was not available, or would have been difficult to obtain . . . [thus] Johnson’s negligence in failing to fully inform Melin was not the proximate cause of Melin’s damages”).

3. Even if Pulte or Fidelity would have made Oral Representations to Appellant, Appellant’s Reliance Would Not Have Been Reasonable.

“Whether reliance is justifiable becomes a question of law if there is no evidence supporting a contrary conclusion.” Greuling v. Wells Fargo Home Mortgage, Inc., 690 N.W.2d 757, 760 (Minn. Ct. App. 2005) (citation omitted). Where an insurance policy unambiguously excludes coverage of a particular event, reliance upon a contrary oral representation as a matter of law is unreasonable. Employers Mutual Casualty Company v. Wendeland & Utz, Ltd., 351 F.3d 890, 896 (8th Cir. 2003) (citing Anderson v. Minnesota Ins. Guar. Ass’n, 534 N.W.2d 706, 709 (Minn. 1995) (“[h]aving previously concluded that the pollution exclusion clause is clear and unambiguous, we now conclude that reliance on any explanations contrary to the unambiguous meaning of the policy language is, as a matter of law, unreasonable”).

Appellant claimed it requested a title policy from Pulte’s agent that would cover anything that could go wrong in a 1031 exchange – yet Appellant failed to identify whether any representation at all was even made by Pulte’s agent in response to this request, stating that Appellant “assumed” it was given a policy that would cover the exchange. AA-73. Appellant’s written request for a title policy conspicuously contains no reference to coverage for a 1031 exchange. RA-18. Neither the 1992 ALTA Policy or the 1987 ALTA Policy states that a 1031 exchange was in any way covered. AA-142 to

AA-146; AA-151 to AA-157. The event that actually precipitated Appellant's loss – the Preference Action stemming from LK's bankruptcy – is specifically excluded from coverage by the 1992 ALTA Policy's plain language. AA-152. The record is completely devoid of any request by Appellant seeking coverage for bankruptcy filings that cause preference actions. Accordingly, even if the factual record were twisted so far as to suggest *any* oral representation was made by Pulte regarding coverage for 1031 exchanges, Appellant's reliance on these representations would be unreasonable as a matter of law. See Anderson, 534 N.W.2d at 709 (“[h]aving previously concluded that the pollution exclusion clause is clear and unambiguous, we now conclude that reliance on any explanations contrary to the unambiguous meaning of the policy language is, as a matter of law, unreasonable”).

Accordingly, because Appellant could not show a misrepresentation, causation or justifiable reliance, the District Court properly dismissed Appellant's Negligent Misrepresentation claim and its decision should be affirmed.

C. The District Court Properly Dismissed Appellant's Duty to Defend Claim because the Preference Action Complaint did not Arguably Affect the Replacement Property Title.

Fidelity's duty to defend never vested because the Preference Action Complaint never alleged facts or causes of action that constitute an “arguably covered” claim. “[D]etermining whether the insurer had a duty to defend requires the comparison of the allegations in the complaint and amended complaint in the underlying action with the relevant language in the commercial general liability policy.” Ross v. Briggs and Morgan, 540 N.W.2d 843, 847 (Minn. 1995). “An insurer may ordinarily determine

whether a cause of action includes an ‘arguably covered’ claim by comparing the wording of the policy to the allegations of the underlying complaint.” Franklin v. Western National Mutual Insurance Company, 574 N.W.2d 405, 407 (Minn. 1998). “It must be kept in mind that we are not dealing with whether the complaint alleges a viable cause of action but *whether the complaint alleges facts giving rise to an insurer’s duty to defend* and indemnify (which includes a duty to defend groundless claims).” Garvis v. Employers Mut. Cas. Co., 497 N.W.2d 254, 258 fn4 (Minn. 1993); see also Lawyers Title Insurance Corp. v. JDC (America) Corp., 52 F.3d 1575, 1580-81 (11th Cir. 1995) (“the duty to defend is broader than the duty to indemnify in the sense that the insurer must defend even if facts alleged are actually untrue or legal theories unsound”). Minnesota Courts cannot “determine coverage on the basis of claims that could have been made (for example, are suggested by the fact pattern) but were not¹².” Reinsurance Ass’n of Minn. V. Timmer, 641 N.W.2d 302, 311 (Minn. Ct. App. 2002). “For purposes of determining *arguable coverage*, we will limit ourselves to the causes of action alleged in the complaint.” Id. (Emphasis added.)

¹² Appellant’s reliance on Tshchimperle v. Aetna Cas. & Sur. Co., 529 N.W.2d 421, 424 (Minn. Ct. App. 1995) for the argument that “courts may look beyond the complaint and to extrinsic facts to establish the existence or nonexistence of that duty” is unpersuasive. (Appellant’s Brief, p. 40). Appellant offered Fidelity no extrinsic facts to supplement the allegations in the Preference Action and create an “arguably covered” claim. On appeal, there are no facts in the record that would suggest a claim against the Replacement Property title. One might expect a Notice of *Lis Pendens* or other document recorded against the real property or a letter from the Trustee identifying the transfer of the Replacement Property title. See Minn. Stat. § 557.02. Here, there are none. Although Appellant claimed it was providing facts to Fidelity that showed the Preference Action was an “arguably covered” claim, an analysis of Appellant’s letters to Fidelity reveal no such facts, only legal conjecture. AA-170 to AA-184.

Here, it cannot reasonably be claimed that the Preference Action Complaint states a cause of action to avoid Stroup's transfer of the Replacement Property directly to Appellant. The Preference Action Complaint does not so much as describe or identify the Replacement Property and alleges no facts that even remotely imply damage or loss relative to the Replacement Property title. Appellant's entire case turns on disputing what the Trustee meant when she used the word "property" in paragraph 20 of the Preference Action Complaint. A review of the Preference Action Complaint, the September 12, 2000 letter from the Trustee and 11 U.S.C. § 547 (2000) clearly shows that the Trustee targeted the \$602,424.76 cash transferred from LK to or for the benefit of Appellant. Appellant cannot avoid the language employed by the Trustee and the undisputed facts clearly show that the Preference Action Complaint did not allege a cause of action that affected title to the Replacement Property Title.

Accordingly, the factual and legal allegations of the Preference Action are not "arguably covered" by either Policy because it did not allege facts or legal theories that, even though untrue or unsound, trigger coverage. JDC, 52 F.3d at 1580-81 ("the duty to defend is broader than the duty to indemnify in the sense that the insurer must defend even if facts alleged are actually untrue or legal theories unsound").

If the Preference Action Complaint alleged that LK transferred the Replacement Property Title to Appellant, alleged that LK's Bankruptcy Estate had a lien on the Replacement Property or the Trustee attempted to void the transfer of the Replacement Property to Appellant, then the Preference Action Complaint would "arguably" be covered by the Policy. Since it is absolutely clear that the Preference Action Complaint

does not allege LK transferred the Replacement Property Title, that LK's Bankruptcy Estate had a lien on the Replacement Property and does not attempt to void the transfer of the Replacement Property to Appellant, Appellant's loss is simply not "arguably" covered by the Policy. Therefore, the District Court properly dismissed Appellant's duty to defend cause of action and its decision should be affirmed in its entirety.

VI. CONCLUSION

In conclusion, the District Court properly concluded that neither the 1987 ALTA Policy nor the 1992 ALTA Policy even arguably covered Appellant's loss. It also properly concluded that Appellant's negligent misrepresentation claim should be dismissed as a matter of law. Accordingly, the District Court's decision should be affirmed in its entirety.

Respectfully submitted this 18th day of June, 2007.

MORRISON FENSKE & SUND, P.A.

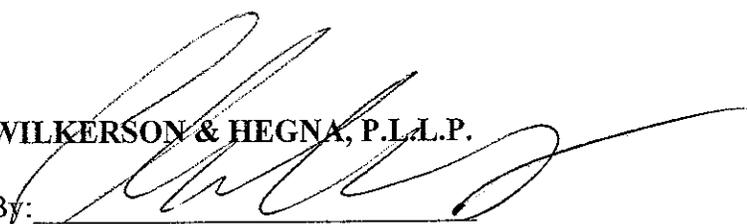
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