

NO. A10-1483

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State of Minnesota  
In Supreme Court

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Mattson Ridge, LLC,

*Respondent,*

v.

Clear Rock Title, LLP, and  
Ticor Title Insurance Co.,

*Appellants.*

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**APPELLANTS' BRIEF AND ADDENDUM**

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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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## STATEMENT OF THE ISSUES

1. A legal description in a deed that sets a boundary line or corner by reference to land owned by an adjoiner and identifies the adjoining owner by name, is a practice that has been recognized since American Colonial days. Here, the district court concluded and the Court of Appeals affirmed that the legal description in a deed was ambiguous simply because it—in part—described two acres carved out of a larger parcel by reference to an adjoining owner. The Court of Appeals affirmed the district court and held that the reference to “Charles Magnuson’s place” in the carve-out from a large, 80-acre parcel was ambiguous because it is susceptible to various meanings. The Court of Appeals did not find that there was more than one Charles Magnuson who had owned the property next door, or that Charles Magnuson owned more than one “place” in Sunrise City. Rather, it held simply that the reference to Magnuson alone rendered the legal description for the property at issue “ambiguous” as a matter of law, and that this “ambiguity” by extension rendered the title to the entire parcel of land unmarketable. The court ignored the other elements in the same legal description of the property that were more than adequate to determine the boundary of the two acres carved out of the parcel. Should this Court reverse the Court of Appeals’ erroneous conclusion of law?

### Most Apposite Authority

*Hedderly v. Johnson*, 44 N.W. 527 (Minn. 1890)

*Howe v. Coates*, 107 N.W. 397 (Minn. 1906)

*Target Stores, Inc. v. Twin Plaza Co.*, 153 N.W.2d 832 (Minn. 1967)

2. Under Mattson Ridge's title insurance policy, Ticor agreed to insure against actual loss incurred by Mattson Ridge in the event that the title to the insured parcel was unmarketable. The district court concluded that the reference to "Charles Magnuson's Place" in describing the northwest boundary of the Property was sufficient to render title to the entire large tract of land unmarketable. The district court and the Court of Appeals held that, because Ticor was required to pay to clarify the legal description, but was not the party who clarified the description, Ticor breached the policy, thereby entitling Mattson Ridge to \$1.9 million in "lost profits." Does a title insurer have an affirmative duty to bring a lawsuit to have an order entered changing the historical legal description for a Torrens-certified parcel of land, which description has been used in prior deeds, because the insured or another title insurer suggests that the legal description may be unclear, even though a surveyor is able to identify the boundary line and no other party has disputed the location of the boundary line or the accuracy of the legal description?

**Most Apposite Authority**

*Fairchild v. Marshall*, 43 N.W. 563 (Minn. 1889)

*Target Stores, Inc. v. Twin Plaza Co.*, 153 N.W.2d 832 (Minn. 1967)

*Howe v. Coates*, 107 N.W. 397 (1906)

*Hedderly v. Johnson*, 44 N.W. 527 (Minn. 1890)

3. The title insurance policy issued to Mattson Ridge indemnifies it against "actual monetary losses" incurred if the title to the insured property is defective or attacked. In July of 2007, Mattson Ridge had the legal description for the Property

modified through the Torrens registration process by removing antiquated references to “Charles Magnuson’s Place” and the distance of “30 rods.” The new legal description identified the same boundary line but by reference to the adjoining streets, using their current names. Mattson Ridge incurred legal bills of about \$14,000 for the Torrens action. The Torrens registration was changed while the purchase contract with Thompson Builders was in force. Well after the change in the legal description, a second amendment to the Purchase Agreement was executed. Subsequently, Mattson Ridge released Thompson Builders from that amended contract due to the deteriorating real estate market. At trial Mattson Ridge sought, among others, consequential damages in the form of “lost profits” on the cancelled sale. Based on the sale price in the purchase contract with Thompson Builders, the Court of Appeals awarded Mattson Ridge \$1,900,000 as the “diminution in value” of the Property due to the reference to Charles Magnuson’s place that had been removed from the legal description in 2007. Did Ticor owe Mattson Ridge for a loss due to the Charles Magnuson place reference in the deed, even after that reference was removed by a court order modifying the legal description?

**Most Apposite Authority**

*Hedderly v. Johnson*, 44 N.W. 527 (Minn. 1890)

*Olson v. Rugloski*, 277 N.W.2d 385, 387 (Minn. 1979)

*Independent Grocery Co. v. Sun Insurance Co.*, 178 N.W. 582 (Minn. 1920)

*Short v. Dairyland Ins. Co.*, 334 N.W.2d 384 (Minn. 1983)

## STATEMENT OF THE CASE

Appellant Ticor Title Insurance Company (“Ticor Title”), through its policy-issuing agent, Appellant Clear Rock Title, LLP (“Clear Rock Title”) (together, “Ticor”) issued a title insurance policy to Respondent Mattson Ridge, LLC (“Mattson Ridge”) insuring title to approximately 80 acres located in Chisago County, Minnesota. This parcel consisted of land lying north of Stacy Trail and east of Ivywood Trail, both of which are public roads (the “Property”).

Mattson Ridge paid \$1,286,000 for the Property. A month later in October 2005, Mattson Ridge signed a contract to sell the Property to Thompson Builders and Contractors (“Thompson Builders”) for \$2,900,000, almost 225% of what it had paid the month prior. No improvements were made to the raw land in that month. Thompson Builders sought a title commitment for the Property from a different title insurer, which declined to issue a policy because it claimed that the legal description appeared to be ambiguous, with regard to the northwest boundary, and called for a survey of the property. Mattson Ridge tendered this as a claim to Ticor, which declined to pay to modify the legal description. In 2007, Mattson Ridge obtained a court order modifying the legal description. Mattson Ridge subsequently released Thompson from the purchase contract in 2008, at the nadir of the real estate development market.

Mattson Ridge sued for a declaratory judgment that Ticor should have been required to “defend” the title and pay a loss, and for breach of contract. On March 20, 2008, the district court entered summary judgment for Mattson Ridge, finding that the legal description was ambiguous, making title unmarketable, and held that this was a

matter covered by the Policy. On December 9-11, 2009, the district court conducted a bench trial on the issue of damages. The district court issued Findings of Fact, Conclusions of Law, and Order for Judgment granting Mattson Ridge a money judgment in the amount of \$1,297,169.00. Ticor moved for a new trial or, in the alternative, amended findings of fact and conclusions of law arguing that the district court had erred in its calculation of losses under the Policy. By Order dated June 25, 2010, the district court denied that motion.

The parties cross appealed to the Minnesota Court of Appeals. Ticor sought review of the determination that the Property description was ambiguous and gave rise to an unmarketable title. Ticor also challenged the district court's calculation of loss under the Policy. Mattson Ridge sought review of the district court's refusal to grant consequential damages including, but not limited to, alleged lost profits resulting from the unconsummated Purchase Agreement with Thompson Builders. The Court of Appeals affirmed the district court's award of summary judgment as to the legal description, marketability of title, and policy coverage. The Court of Appeals further concluded that Ticor's denial of coverage to clarify the legal description in the insured's deed entitled the insured to "consequential" damages of \$1.9 million, well beyond the scope of loss payable under the policy.

Ticor filed a Petition for Review with this Court seeking review of the errors of the district court and Court of Appeals, the consequences of which are significant and far reaching. This Court granted review on August 24, 2011.

## STATEMENT OF THE FACTS

In September 2005, Mattson Ridge purchased the Property, undeveloped farmland located in Chisago City, Minnesota, from Harold and Judith Shoberg (together, the “Shobergs”) pursuant to a warranty deed. (Tr. Ex. 8) The purchase price Mattson Ridge paid was \$1,286,000. (Tr. Ex. 1)

The warranty deed conveying the Property from the Shobergs to Mattson Ridge contained the following legal description of the Property:

The North  $\frac{1}{2}$  of the Northwest  $\frac{1}{4}$  of Section 25, Township 34, Range 21, Chisago County, Minnesota, excepting however, two acres, more or less, in the Northwest corner of the Northwest  $\frac{1}{4}$  of Northwest  $\frac{1}{4}$  of said Section 25, described as follows: Commencing at the Northwest corner of said Section 25; thence South 30 rods to the intersection of road leading from the county road at or near Charles Magnuson’s place in Sunrise City; thence along the center of the road to where said road crosses the section line; thence along the North line of said Section, 24 rods to the Northwest corner of said Northwest  $\frac{1}{4}$  of Northwest  $\frac{1}{4}$  or to the place of beginning.

Excepting therefrom, all that part of the Northwest  $\frac{1}{4}$  of Northwest  $\frac{1}{4}$ , Section 25, Township 34, Range 21, Chisago County, Minnesota, which lies Southerly of State Aid Road No. 19 and Easterly of State Aid Road No. 80.

Chisago City, Minnesota

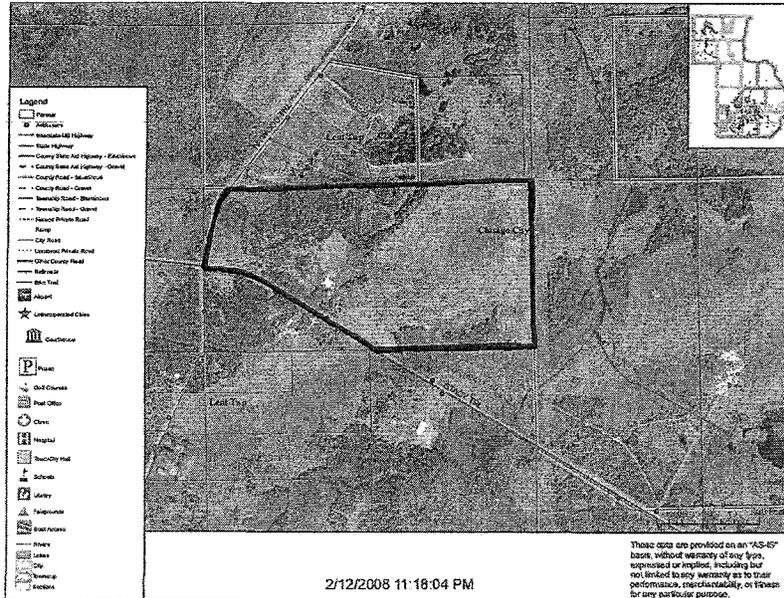
(ADD-61.)<sup>1</sup>

The Property is most of the North half of the Northwest quarter of Section 25 in Township 34, Range 21 East. (ADD-61.) The North half of a government-surveyed quarter-section is 80 acres. Several maps and images of the Property are contained in the

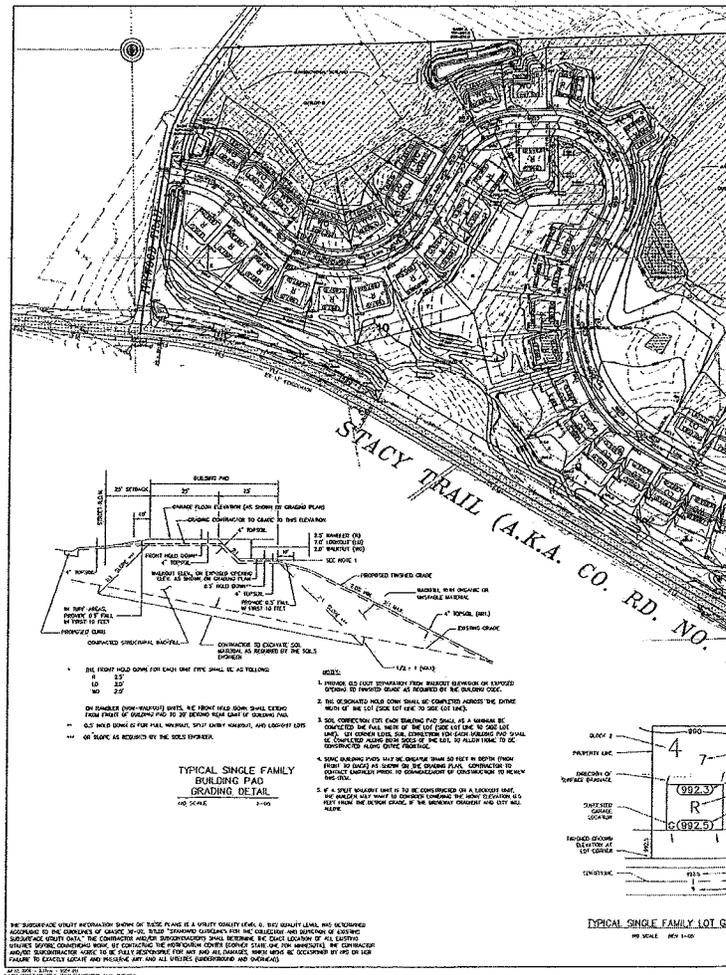
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<sup>1</sup> “ADD” refers to the Appellants’ Addendum.

trial record. (E.g., Tr. Exs. 43, 44, 45, 46, 47.) The Property is shown here bordered in black in a satellite view that depicts the surrounding area:



(ADD-57.) This rectangular quarter-section has three parts: the Property (shown above outlined in black) and two parcels that are carved off or “excepted” from the quarter-section: (1) the land lying south of Stacy Trail; and (2) a two-acre parcel in the Northwest corner of the Property lying east of Ivywood Trail. (ADD-61.) The source of this litigation is the boundary line on the northwest side which separates the Property from the triangular piece of land that is bounded along the north and west by the quarter-section line and along the east by Ivywood Trail as reflected in the plat map below.



(Tr. Ex. 44.) Thompson’s surveyor was able to prepare the detailed plat map, which clearly reflects the boundary line from the old Property description. (Tr. Ex. 44; Tr. T. at 249.)

On October 22, 2005, Mattson Ridge entered into a purchase agreement (the “Purchase Agreement”) to sell the Property to Thompson Builders and Contractors, Inc. (“Thompson”) for \$2.9 million, almost 225% of its own purchase price a month earlier. (A.A.-106.) The Purchase Agreement provided that Mattson Ridge, as seller, was

required to use its best efforts to provide marketable title by the date of closing. (A.A.-108.) If Mattson Ridge was not able to provide marketable title by that date, it had 30 additional days to do so. (A.A.-108.) If Mattson Ridge was still not able to provide marketable title, either party could cancel the Purchase Agreement, at which point Mattson Ridge was required to refund \$20,000, the earnest money which Thompson had paid. (A.A.-108.) The date set by the Purchase Agreement for closing was May 30, 2006. (A.A.-112.)

Clear Rock Title issued a Tigor Policy of Title Insurance (the "Policy") dated November 30, 2005 in favor of Mattson Ridge with respect to the Property. (ADD-57.) The Policy insured against loss or damage due to a defect, lien or encumbrance on title, including defects that would render title unmarketable, subject to the exclusions from coverage, the exceptions from coverage contained in Schedule B (ADD-62), and the conditions and stipulations (ADD-57).

In May 2006, Commercial Partners Title, LLC, the title company chosen by Thompson, the potential purchaser, issued a title commitment that said, "[t]he legal description [of the Property] appears ambiguous and should be surveyed and reformed. An exchange of quit claim deeds with adjacent property owners may be required." (A.A.-120.) Around this same time, Thompson and Mattson Ridge agreed to extend the closing date on the Property to August 31, 2006, to allow Thompson enough time to obtain final plat approval. (Tr. Ex. 19.)

Thompson had a survey prepared for the Property, in the form of a proposed subdivision plat. (Tr. Ex. 44; Tr. T. at 249.) The proposed plat described the boundaries

of the Property, including the boundaries along the two public roads: Ivywood Trail, running north-northeast along the western boundary and Stacy Trail (a.k.a. County Road No. 19), running west-southwest along the southern boundary. (Tr. Ex. 44.) The subdivision plat was prepared in 2006, before the legal description was changed by way of a registration action as the Property was Torrens property. (Tr. Ex. 44.)

On August 7, 2006, Mattson Ridge's counsel sent a letter to Appellant Clear Rock Title, LLC, the title agent for Ticor Title, asking that it pay to modify the Torrens description as demanded by Thompson's title company. (A.A.-60.) Mattson's counsel explained that, in order to meet the closing date set by the Thompson contract, Mattson Ridge was "continuing the process of moving forward with the correction of the ambiguous legal description to this Property irrespective of [Ticor's] position on this problem." (A.A.-60.) In October 2006, Ticor declined to pay to have the legal description changed, and stated that in its opinion the legal description contained in the deed to Mattson Ridge adequately described the land it owns. (A.A.-128.)

On June 25, 2007, Mattson Ridge and Thompson signed an amendment to the Purchase Agreement (the "Amendment"), which reduced the purchase price from \$2.9 million to \$2.6 million, and which deleted the contingency contained in the Purchase Agreement that required Thompson obtain final plat approval for 135 homes. (A.A.-145.)

On July 16, 2007—less than 30 days after Mattson Ridge and Thompson signed the Amendment, and while the purchase contract was in full force—the Chisago County Court entered an order and decree of registration changing the legal description by

eliminating the reference to the adjoining land as “Charles Magnuson’s place.” (A.A.-.) The modified legal describes the excepted parcel in the northwest corner merely by reference to the two adjoining public streets, using their current names: “lying Easterly of the centerline of Ivywood Trail and lying Northerly of the centerline of Stacy Trail (also known as County Road 19).” (A.A.-131.)

A few weeks later, Thompson’s title company issued a new title commitment, effective July 31, that removed the requirement to modify the legal description. Thompson’s title company thus committed to insure the title without any exception for a defect in the title. (Tr. Ex. 42.) Also in July 2007, Thompson obtained another loan commitment letter from its bank to finance its purchase and development of the Property. (Tr. Ex. 82.) The new loan commitment offered financing terms that were not as favorable as those offered in December and required a larger upfront cash commitment from Thompson. (Tr. T. at 300.) Thompson never received final plat approval for its 135-lot subdivision. Based on this, and the fact that Thompson recognized the residential real estate was in decline, Thompson decided to walk away from the Purchase Agreement. (Tr. T. at 300, 327.) The Court of Appeals noted that “[t]he demand for undeveloped residential property in the area peaked in mid-2005 and 2006 and declined in 2007.” (ADD-3 n.1.)

Mattson Ridge decided not to enforce the Purchase Agreement against Thompson. (Tr. T. at 171.) Thompson did not seek to recover from Mattson Ridge its \$400,000 in subdivision improvements made to the Property that it had allegedly incurred from the time it signed the Purchase Agreement in September 2005 until the time it decided to

walk away in July 2007. (Tr. T. at 167, 310.) Rather than enforce the contract, Mattson Ridge commenced this action against Ticor to recover its “lost profits” related to the failure by Thompson to complete purchase of the Property.

### SUMMARY OF ARGUMENT

A reference to land of an adjoining owner in the description of real property, such as the reference to Charles Magnuson’s property in the description of this parcel, does not render the legal description ambiguous. The district court and the Court of Appeals erred by so concluding. In fact, a “call to an adjoiner” in a legal description is an established and prudent practice in creating a parcel description, because it confirms that the distance called (in this case, 30 rods) is also the common boundary with the neighbor. If the distance is slightly off, the call to the boundary line with the adjoiner trumps the distance so that there is no gap or overlap between the two parcel descriptions.

The Mattson Ridge Property is an 80-acre quarter-section tract exclusive of land lying east and south of two public roads. The excepted land in the northeast corner, west of Ivywood Trail is a two-acre parcel that is described in the former legal description in part as “30 rods<sup>2</sup> to the intersection of road leading from the county road . . . ,” then along the public road to the section line and back to the point of beginning. In the Torrens action, the court modernized and simplified the legal description by deleting the references to the adjoiner and to the distance and substituting language so the description of the Property included all of the Northeast quarter of the Northwest quarter of Section

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<sup>2</sup> A “rod” is defined as “[a] linear measure equal to 5.5 yards or 16.5 feet.” American Heritage Dictionary 1562 (3d ed. 1992). Thus, thirty rods equals 495 feet.

25, and that part of the Northwest quarter of the Northwest quarter “lying Easterly of the centerline of Ivywood Trail and lying Northerly of the centerline of Stacy Trail (also known as County Road 19).”

References to adjoining owners likely appear in thousands of property descriptions. Every purchaser of real estate described by use of a reference to an adjoiner now has authority, following the Court of Appeals decision, to claim that the title to the property is unmarketable, giving an easy but completely groundless basis to reject title and escape a purchase contract or requiring sellers to incur unnecessary expense to clear title to property whose boundaries can be readily located. Despite assertions to the contrary, the district court and the Court of Appeals have created a bright line rule that has rendered countless numbers of other property descriptions potentially ambiguous, which would result in needless litigation. To prevent these consequences, the district court and the Court of Appeals must be reversed.

Title to the Property was not unmarketable, and Ticor as the insurer did not have an obligation to pay to clarify the legal description in the deed from the Shobergs to Mattson Ridge. Under the law created by the Court of Appeals, title insurers now have an affirmative duty to pay for lawsuits to clarify the descriptions of thousands of parcels of land in this State, and the only way for them to avoid such infinite liability is to refuse to insure title until a seller incurs the expense to remove any reference to the land of an adjoining owner from the existing, historical description of the land. The conclusion is erroneous and must be reversed in light of a potential tsunami of litigation.

The Court of Appeals also erred by holding that, because Ticor refused to pay to clarify Mattson Ridge's deeded legal description, it breached the Policy and is thus liable for a "loss" in excess of the policy limits. The court wrongly construed *Olson v. Rugloski*, 277 N.W.2d 385 (Minn. 1979), as meaning that any breach of an insurance contract by the insurer negates all of the policy's terms, including the cap on liability of the policy limits. The Court of Appeals wrongly concluded that, "[u]nder the *Olson* holding . . . , Mattson may recover its lost profit damages from Ticor." (ADD-13.) Further, the award of lost-profit damages in this case is clearly erroneous as Mattson Ridge's lost profits were not attributable to the purported defect; instead the failed sale, which was terminated *after* the Property description was modified, reflected changed market conditions unrelated to the property description.

By awarding Mattson Ridge its lost profits as a loss under a title insurance policy, the Court of Appeals conferred upon Mattson Ridge a windfall in the form of a monetary award far in excess of its purchase price or the insurance coverage it purchased, despite the fact that it still owns the Property and its title has no defect. Moreover, the Court of Appeals has transformed the title insurer into the guarantor of a purchase agreement, regardless of the speculative nature of the value of such agreement. This expansion of compensable losses under the Policy to include speculative lost profits while permitting Mattson Ridge to retain the Property is an error of law. Because the proper calculation is the actual loss that Mattson Ridge incurred—the amount expended to modify the property description—the Court of Appeals and the district court decisions must be reversed.

## STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court determines whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). On appeal, this Court views the record in the light most favorable to the party against whom the district court granted summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). This Court does not give deference to a district court's conclusions of law, which are reviewed *de novo*. *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000); *Kornberg v. Kornberg*, 542 N.W.2d 379, 384 (Minn. 1996). Issues of contract interpretation and whether a contract is ambiguous are also matters of law that are subject to *de novo* review. *Mut. Serv. Cas. Ins. Co. v. West Bend Mut. Ins. Co.*, 599 N.W.2d 585, 587 (Minn. Ct. App. 1999); *Employers Liab. Assurance Corp. v. Morse*, 111 N.W.2d 620, 624 (Minn. 1961).

“Ordinarily, the decision to grant a new trial does lie within the sound discretion of the trial court and will not be disturbed absent a clear abuse of that discretion.” *Halla Nursery v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). Where the district court exercised no discretion but instead based its order upon an error of law, however, a *de novo* standard of review applies. *Id.*; *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 311 (Minn. 2003); *see also Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984) (noting that a district court's decision on a purely legal issue is independently reviewed).

## ARGUMENT

### **I. THE LOWER COURTS ERRED BY CONCLUDING AS A MATTER OF LAW THAT A REFERENCE TO ADJACENT PROPERTY RENDERED THE PROPERTY DESCRIPTION AMBIGUOUS.**

The lower courts first erred when they determined that the reference to Charles Magnuson's place in the Mattson Ridge deed made the legal description ambiguous. The district court reached this erroneous conclusion in its Order granting summary judgment dated March 20, 2008. The Court of Appeals affirmed the district court's ruling. These conclusions were not based on either fact or law, and must be reversed.

Mattson Ridge attacks its own title, which has not been disputed by a neighbor or any other person. No party has ever contended an interest in or a right to the Property purchased by Mattson Ridge. The defect Mattson Ridge asserts was raised by a title examiner working for a competitor of Ticor Title. More than 100 years ago, this Court noted that "a doubt may be suggested or question raised as to most titles[.]" *Hedderly v. Johnson*, 44 N.W. 527, 528 (Minn. 1890). In *Hedderly*, this Court held that a claimed defect does not make title unmarketable unless there is a reasonable doubt as to [the title's] validity." *Id.* Where, however, the claimed defect in a property's title can be resolved by applying established rules for the interpretation of conveyances, there is no such reasonable doubt:

[W]e can at least say that the doubt suggested must raise a question of law that is fairly debatable,-one upon which the judicial mind would hesitate before deciding it. If it depend on the construction of an act of the legislature or of a written instrument, and the construction is readily arrived at by the application of the well-known rules of interpretation, it ought not to be regarded as making the title doubtful.

*Id.* The determination of whether a written instrument such as a contract or title to land is ambiguous as a matter of law requires that a court give the language its plain and ordinary meaning. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.* 530 N.W.2d 539, 543 (Minn. 1995).

Here, the district court concluded, without elaboration, that the reference to an adjoining's (Charles Magnuson's) property in the legal description was "reasonably susceptible of more than one interpretation based on its language alone." (ADD-54.) For its part, Mattson Ridge relied exclusively on the reference to Mr. Magnuson's property as the sole source of the claimed ambiguity in the property description. (*See* S.J. Hr'g Tr. at 3.) In support of this conclusion, Mattson Ridge advanced a litany of speculative doubts as to the possible interpretations of the legal description of the Property. Mattson Ridge argued before the district court that three contingencies could arise that could "at any moment" render the Property description "completely meaningless." (A.A.-166.) Mattson Ridge speculated about the transfer of ownership after Mr. Magnuson's death (A.A.-166), the loss of his property through foreclosure (*id.*), and Mr. Magnuson's relocation to a new residence within Sunrise City (A.A.-167). (*See also* S.J. Hr'g Tr. at 3-4. ("[S]imply put, who is Charles Magnuson, where is his place and will he continue to be in that place forever."))

Before the Court of Appeals, Mattson Ridge proposed additional hypothetical doubts that were suggested by the reference to Mr. Magnuson's property. (Resp. App. Br. at 30.) For example, Mattson Ridge suggested perhaps "Charles Magnuson's Place" is the name of a local business, such as a bar or restaurant. (*Id.*) Or perhaps it refers to

some “farmland where he may have worked[.]” (*Id.*) For its part, the Court of Appeals gave credence to Mattson Ridge’s speculations and focused on the term “place” as the source for the ambiguity. (ADD-7.) The Court of Appeals concluded that a “‘place’ could be a workplace, a farm, or a residence.” (*Id.*)

These contingencies are speculative flights of fancy that do not create the requisite facial ambiguity necessary for a legal conclusion that the title was unmarketable. The Court of Appeals erred in accepting Mattson Ridge’s speculations about the claimed defect in its own title, rather than using established rules of deed interpretation to analyze the claimed defect, as directed by this Court in *Hedderly v. Johnson*.

In reconciling the elements of a real estate description, both surveyors and courts are “obligated to consider any and all evidence.” Walter G. Robillard & Lane J. Bouman, *Clark on Surveying and Boundaries* (7th ed.) § 14.21, at 396 (hereinafter, “*Clark*”). If the elements conflict, neither the court nor the surveyor is free to “pick and choose” the element on which it prefers to rely. Rather, the elements each have a ranking of importance, known as the “order of control,” which is recited in *Clark* as follows:

1. Lines actually run in the field;
2. Natural monuments;
3. Artificial monuments;
4. Adjoiners;
5. Courses;
6. Distances;
7. Area or quantity

*Id.*<sup>3</sup>

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<sup>3</sup> The order of control as recited in *Clark* is derived from *United States v. Redondo Development Co.*, 254 F. 656 (8th 1918). *Clark* explains the order of control this way:

A recent Maine decision clarified the approach. The court stated, that when using these calls, the boundaries in question were to be located in reference

The first rule the lower courts ignored is that a call to the land of an adjoiner is an accepted and prudent method for describing land. The leading treatise on survey method says:

Many times parcels of land are described with reference to adjoining landowners or adjoining estates. . . . *Such a deed is not void for uncertainty of description. Reference to calls for the adjoining parcel gives the deed an added degree of certainty in the title.*

*Clark* § 18.07, at 606 (emphasis in original).

Minnesota has always respected the rule that a call to an adjoiner sets the boundary line, as does every other state. *St. Paul Land Co. v. Dayton*, 43 N.W. 782, 782 (Minn. 1889) (“The reference to ownership identifies the lots intended.”); *see also*, *Marshall v. Soffer*, 756 A.2d 284, 288 (Conn. Ct. App. 2000) (“Adjacent land may be a monument if the boundary of it is fixed.”); *Owens v. Haurert*, 739 N.E.2d 5, 10 (Ohio Ct. App. 2000); *Kinney v. Central Maine Power Co.*, 403 A.2d 346 (Me. 1979) (noting that adjoining property is accorded the dignity of a monument if its location at time operative deed took effect is ascertainable); *Kennett Corp. v. Pondwood, Inc.*, 226 A.2d 783, 786 (1967) (“Where land is described by reference to an abutting land and the abutting lines can be accurately determined, the line of the adjacent tract becomes a monument.”) (citing 6 *Thompson on Real Property* § 3032 at 500).

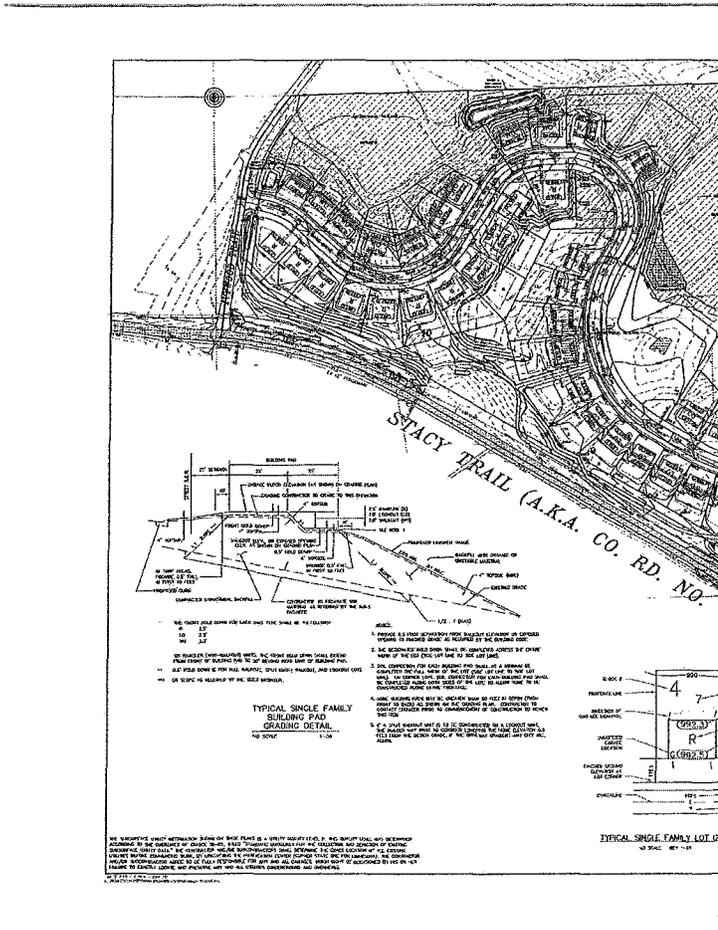
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to the elements called for in the deed, in descending order commencing with monuments called for, courses, distances, and, finally, quantity. This opinion states that the surveyor should not select an element called for at will, but rather, he should first look for the evidence of the highest elements and then progress through the other called-for boundary.

*Clark* § 2.04, at 28 (citing *Conray v. Perkins*, 464 A.2d 972 (Me. 1983)).

The disputed call in the Mattson Ridge legal description contained a distance (30 rods), a call to a monument (the road), and a call to an adjoining owner (Charles Magnuson's place). As *Clark* explains, a call to an adjoiner is a respected element of the description, and controls over a conflicting distance recited in the same deed call. In the Mattson Ridge description, the call to the public road, an artificial monument, had precedence over either the call to the adjoiner or the distance. In the Torrens order, the district court thus modified the legal description simply to call to the public road. The original reference in the deed to "Charles Magnuson's place" gave "an added degree of certainty" to the description of the land carved out. It was an additional means to identify the property boundary, which is the public road.

In 2006, before the Property description was modified, Thompson Builders, through its surveyor (Tr. T. at 249), was able to prepare an overall final grading plan (Tr. Ex. 44; Tr. T. at 252), a lighting plan for the Property (Tr. Ex. 47; Tr. T. at 252-3), a construction plan (Tr. T. at 253-4), an environmental site assessment (Tr. Ex. 43; Tr. T. at 260-1), and a sales plan based on the final plat (Tr. Ex. 46; Tr. T. at 251), each of which was approved by Chisago City. Moreover, these documents use various forms of maps and images for the property that show that the boundaries of the parcel, including the western boundary from which the two-acre section was excepted. (*E.g.*, Tr. Exs. 43, 44, 46.) The purported ambiguity of the property description did not, for example, prevent Thompson builders from preparing an extremely detailed map for its final grading plan.



(Tr. Ex. 44.)

The lower courts erred by speculating about what land was formerly owned by Charles Magnuson, rather than reconciling the elements of the legal description. A call to an adjoiner is always a reference to a person who is the owner of adjoining land. If the legal description was created a hundred years ago and has remained unchanged since it was created, the person will now be dead. The lower courts were not at liberty to merely speculate about Magnuson’s whereabouts and then pronounce the Mattson Ridge description “ambiguous.” If Magnuson once owned the land on the other side of the road from the Property, the reference to his “place” was consistent with the call to the road. If

Magnuson did not own the land across the street, the reference to his “Place” could easily be disregarded in favor of the call to the road itself.

The rhetorical questions that Mattson Ridge has raised regarding Mr. Magnuson and his “place,” both at the district court and on appeal, regarding the legal description of the Property are not reasonable doubts as to the plain and ordinary language of the legal description. Without such facial ambiguity, the district court’s conclusion upheld by the Court of Appeals that Ticor was liable to Mattson Ridge fails and should be reversed.

## **II. SPECULATION REGARDING POSSIBLE AMBIGUITY OF THE PROPERTY DESCRIPTION DOES NOT SUPPORT A CONCLUSION THAT THE TITLE WAS UNMARKETABLE.**

Both the district court and the Court of Appeals concluded that because the property description was allegedly ambiguous, the title was unmarketable as a matter of law. Such a conclusion does not comport with the law of marketability of title. Accordingly, the district court’s entry of summary judgment for Mattson Ridge should be reversed.

To be marketable, a title must be free from reasonable doubt. *Fairchild v. Marshall*, 43 N.W. 563, 564 (Minn. 1889). Marketable title is one that “a prudent person with full knowledge of the facts would be willing to accept.” *Target Stores, Inc. v. Twin Plaza Co.*, 153 N.W.2d 832, 843 (Minn. 1967). “[A] title is not unmarketable when no question of fact is involved, but only one of law arising exclusively upon the construction of a record muniment of title and all the parties in interest are before the court, so that its decision will be a final determination of the matter.” *Howe v. Coates*, 107 N.W. 397, 402 (1906). Claims that a title is unmarketable must be founded on reasonable doubts, not

mere speculation. *Hedderly v. Johnson*, 44 N.W. 527, 527-28 (Minn. 1890) (“The term ‘reasonable doubt’ is always used in this connection, because, as a doubt might be suggested or question raised as to most titles, it would go far to do away with the remedy by specific performance if a mere doubt raised, without regard to its character, were permitted to defeat the action.”).

This Court has repeatedly held, for more than 100 years, that the court’s job, when presented with a real estate description that could be unclear, or as to which two neighbors have a dispute, is to discern the intent of the drafter and resolve the dispute by reconciling the elements of the legal description, not to throw up its hands and declare the description “ambiguous.” “Any description which distinctly points out the land in such a way as to leave no room for mistake as to what property is intended is sufficient, and evidence of extrinsic facts is admissible to apply the description and identify the land.” *Nat’l Bond & Sec. Co. v. Board of Comm’rs of Hennepin County*, 97 N.W. 413, 415 (Minn. 1903) (rejecting the cases cited by the plaintiff “the description was inherently defective and described no particular land”); *see also Triple B&G, Inc. v. City of Fairmont*, 494 N.W.2d 49, 54 (Minn. 1992) (“The statute of frauds should not be applied in a rigid manner when the property description used . . . provides an adequate guide to locate and identify the property in the light of the surrounding circumstances and in light of facts of which a court can take judicial notice.”); *City of North Mankato v. Carlstrom*, 2 N.W.2d 130, 133 (Minn. 1942) (“[A] deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed.”)

(quotation omitted). Here, the district court has applied a *de jure* rule that a single reference to adjacent property by the name of the adjoining landowner in a description can render otherwise marketable title unmarketable.

The Policy defines “unmarketability of the title as:

an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be release from the obligation to purchase by virtue of a contraction condition requiring the delivery of marketable title.

(ADD-58.)<sup>4</sup> No party has stepped forward to attack Mattson Ridge’s title or claim an interest in the Property. When the district court entered the Torrens order, it did not vest or divest title to any part of the land whose title was insured by the Policy. The lower courts reached the legal conclusion that the description of the Property was ambiguous and this was apparent facially based on the description of the Property, specifically the reference to Charles Magunuson’s Place. This is incorrect as a matter of law. The lower courts’ conclusion creates a bright-line rule that all references to adjoiningers are *per se*

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<sup>4</sup> This provision was recently interpreted by the California Court of Appeal in *Dollinger Deanza Associates v. Chicago Title Insurance Co.*, No. H035576, 2011 WL 4005915 (Cal. Ct. App. Sept. 9, 2011). (A copy of the opinion is provided at A.A.-289.) The Court of Appeal agreed with the insurer that while “the notice of merger at issue in this case may impact [the plaintiff’s] ability to *market* parcel seven, the notice of merger has no affect on [the plaintiff’s] *title* to parcel seven.” *Dollinger*, 2011 WL 4005915, at \*13. The court rejected the plaintiff’s argument that because, as here, the policy’s definition of “unmarketability” included “an *alleged* or *apparent* matter affecting the title to the land,” coverage should be available because the prospective buyer “believed that the notice of merger affected the title to parcel seven and withdrew from the purchase agreement.” *Id.* The court concluded that “[t]he allegation that a notice of merger was recorded does not constitute an alleged or apparent matter affecting the title to land, since a notice of merger does not represent a *third person’s claim to an interest in the property or otherwise cast doubt on who owns the property.*” *Id.* (citations omitted) (emphasis added).

ambiguous thereby rendering any title containing such references unmarketable. Such a legal conclusion is contrary to established law regarding property descriptions.

The Court of Appeals dismissed the ramifications of its holdings by mere sophistry. No bright-line rule was created, the Court of Appeals reasoned, because the analysis relies on “whether a potential purchaser . . . could reasonably have been deterred from purchasing this property because of the defect in title caused by the ambiguity.” (ADD-7-8) But this is a distinction without a difference. Under the Court of Appeals’ holding, any title that contains a property description which references an adjoining property owner is potentially unmarketable. A significant consequence of this holding is that any reference to an adjoining property owner in a property description will give rise automatically to ambiguity and unmarketability of title whenever, as here, it is lucrative for a party to do so.

Without *reasonable doubts* as to the state of the title of the Property, the title cannot be held unmarketable as a matter of law. Without a conclusion of unmarketability, Ticor had no duty to indemnify Mattson Ridge. Because the lower courts erroneously concluded that Ticor was liable to Mattson Ridge for the purported defect, summary judgment was granted improperly. This Court, therefore, should reverse the district court and enter summary judgment for Ticor.

### **III. MATTSON RIDGE’S COMPENSABLE LOSS IS AT MOST THE COST TO CURE THE PURPORTED DEFECT.**

The district court correctly ruled that the plain language of the insurance policy barred Mattson Ridge from recovering as a loss under the policy the profit from its sale

contract. But the district court was wrong in using the diminution of value of the Property due to market factors as the basis for determining damages. In doing so, the district court awarded Mattson Ridge a significant windfall despite the fact that Mattson Ridge retains the Property. The Court of Appeals erred by reversing the district court's ruling, and its holding that Ticor Title was required to pay more than the policy limits, as "consequential damages" for its refusal to modify the legal description of the Property. The Court of Appeals awarded Mattson Ridge \$1,911,169 on its policy of \$1,286,000. Included in that calculation are the "\$1,900,000 decrease in the property's value [and] \$11,169 to cure the title defect[.]" (ADD-11.) Again, the Court of Appeals improperly determined that the \$1,900,000 decrease in the Property value was caused by Ticor's failure to modify the description. This is neither supported in fact or law as the cause of this lost profit was Thompson unwillingness to perform on the contract it had to purchase the Property in light of the economic downturn.

Both courts' holdings were erroneous and should be reversed. Accordingly, this Court should reverse any award to Mattson Ridge that exceeds the cost spent to cure the purported defect and modify the title.

**1. The Policy States the Measure of Loss as "Actual Monetary Loss."**

Any analysis of loss under the policy should begin with the policy itself. "An insurance policy is a contract, the terms of which determine the rights and obligations of the contracting parties." *Olson v. Rugloski*, 277 N.W.2d 385, 387 (Minn. 1979). When reviewing an insurance policy an appellate court's function is to ascertain and give effect to the intentions of the parties. *Kabanuk Diversified Invs., Inc. v. Credit Gen. Ins. Co.*,

553 N.W.2d 65, 70 (Minn. Ct. App. 1996). A reviewing court will accord unambiguous language in an insurance policy its plain and ordinary meaning. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995). “Moreover, a court ‘must not create an ambiguity where none exists in order to afford coverage to the insured.’” *Amos ex rel. Amos v. Campbell*, 593 N.W.2d 263, 266 (Minn. Ct. App. 1999) (quoting *Progressive Cas. Ins. Co. v. Metcalf*, 501 N.W.2d 690, 692 (Minn. Ct. App. 1993)).

“The primary right of a purchaser of a contract of insurance is the right to payment when a loss signals the insurer’s liability within the limits of the policy of insurance.” *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387 (Minn. 1983) (citation omitted).

Here, Paragraph 7 of the Conditions and Stipulations of the Policy states:

7. This policy is a contract of indemnity against *actual monetary loss or damage* sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy *shall not exceed* the least of:

- (i) the Amount of insurance stated in Schedule A; or,
- (ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate subject to the defect, lien, or encumbrance insured against by this policy.

(ADD-59.) (Emphasis added.) In addition, the Covered Risks of the Policy says that it indemnifies the insured “against loss or damage, *not exceeding the amount of insurance stated in Schedule A*, sustained or incurred” due to a defect in title. (ADD-57.)

(Emphasis Added.) In fact, the Policy permits Ticor Title to pay policy limits and walk away from all of its duties, including defense of the insured in litigation. (ADD-59.)

Paragraph 6(a)(i) of the Policy permits Ticor Title to “pay or tender payment of the

amount of insurance [to the insured, upon which] all liability and obligations to the insured under this policy, other than the duty to make the payment required, shall terminate . . . .” (ADD-59.) Paragraph 15 states that the policy is the entire contract between the parties, and any claim of loss “shall be restricted to this policy. (ADD-60.) Thus, by its express terms, the compensable loss recoverable under the policy is limited to Mattson Ridge’s “actual monetary loss.”

**2. There Is No Loss Under the Policy Where the Legal Description Is Modified and the Parties to the Purchase Agreement Ratify That Agreement by Amendment.**

The facts here established that there was no loss attributable to the original legal description. Title insurance is a contract of indemnity, not a guaranty or warranty of the state of title and such insurance provides reimbursement for actual loss only. *Gibraltar Sav. v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203, 1205 (8th Cir. 1990) (noting that title insurance “provides reimbursement for actual loss only”) (citing *Diversified Mortg. Inv. v. United States Life Title Ins. Co. of New York*, 544 F.2d 571, 575 n.2 (2d Cir.1976)). See also, *Falmouth Natl. Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058, 1062 (1st Cir. 1990) (“[T]itle insurance is a contract of indemnity, not guarantee.”); *Schwartz v. Stewart Title Guar. Co.*, 731 N.E.2d 1159, 1167 (Ohio Ct. App. 1999) (“[T]itle insurance is a contract of indemnity, not a guaranty of the state of title[.]”); *Chicago Title Ins. Co. v. McDaniel*, 875 S.W.2d 310, 311 (Tex. 1994) (“A title insurance policy is a contract of indemnity. In other words, the only duty imposed by a title insurance policy is the duty to indemnify the insured against losses caused by defects in title.” (citation omitted)). The difference between indemnity and guaranty contracts is that a contract of

indemnity “does not guarantee the state of the title, but rather agrees to indemnify the insured for any loss.” *Schwartz*, 731 N.E.2d at 1167. Moreover, “[t]he kind of loss contemplated by such policy is that loss or damage sustained when, ‘because of a defect in the title, the insured was bound to pay something to make it good.’” *Id.* at 1168 (quoting *Grunberger v. Iseon*, 429 N.Y.S.2d 209, 211 (N.Y. App. Div. 1980)); *Darbonne v. Goldberger*, 821 N.Y.S.2d 94 (N.Y. App. Div. 2006).

On June 25, 2007, Mattson Ridge and Thompson signed the Amendment to the Purchase Agreement. (Tr. Ex. 11.) The Amendment reduced the purchase price from \$2.9 million to \$2.6 million, and deleted the contingency contained in the Purchase Agreement that required Thompson to obtain final plat approval for 135 homes. (*Id.*)

On July 16, 2007—less than 30 days after Mattson Ridge and Thompson signed the Amendment—the Chisago County Court entered an order and decree of registration changing the legal description by eliminating the reference to the adjoining land as “Charles Magnuson’s place.” (Tr. Ex. 41.) The modified legal description now reads:

The Northeast Quarter (NE ¼) of the Northwest Quarter of Section 25, Township 34 North, Range 21 West, Chisago County, Minnesota and that part of the Northwest Quarter of said section 25 lying Easterly of the Centerline of Ivywood Trail and lying Northerly of the Centerline of Stacy Trail (also known as County Road No. 19).

Subject to and together with any valid easements, restrictions, and reservations.

(Tr. Ex. 41.)

On July 31, 2007, any remaining concern relating to the original description was resolved when Commonwealth Land Title Insurance Company issued a title commitment

for the Property and included the new description. (Tr. Ex. 42.) Thompson's title company thus committed to insure the title *without any exception for a defect in the title*. (Tr. Ex. 42.) Earlier that week, Scott Thompson had agreed to and accepted proposed financing terms for a loan of approximately \$6,945,600 from Bank Mutual. (Tr. Ex. 82.)

On January 18, 2008, Mattson Ridge and Thompson Builders entered into the Second Amendment to the Purchase Agreement (the "Second Amendment"). (ADD-67.) The purpose of the Second Amendment was to quiet "noise being made" by Thompson Builders regarding its costs and its likely inability to close on the sale. (Tr. T. at 78.) The Second Amendment notes that Thompson Builders "raised an objection to [Mattson Ridge's] title to the property relating to its legal description and therefore [Mattson Ridge] *commenced and completed* a title registration proceeding" to change the legal description of the Property. (ADD-67.) (Emphasis added.) The Second Amendment references both the Old Legal Description (ADD-70), which includes the reference to "the road at or near Charles Magnuson's Place" and the New Legal Description (ADD-71), which replaces the intersecting road reference with the road names (Stacy Trail and Ivywood Trail).

The Second Amendment provides the same purchase price as the Amendment (\$2,600,000). (ADD-67.) The Second Amendment also extended the closing to May 31, 2008. (ADD-67.) Importantly, Thompson Builders agreed to waive all contingencies, with the exception of financing, which included any "objections to title" arising after July 31, 2007. (ADD-67-8.) Mattson Ridge was entitled to continue to market the Property to locate other buyers in its "absolute and sole discretion." (ADD-68.) Ultimately, the sale

to Thompson did not take place because of financing concerns, not anything to do with the legal description. Scott Thompson testified at trial that Thompson Builders did not close on the Second Amendment because Thompson Builders “could not secure acceptable financing.” (Tr. T. at 303.)

In addition, Paragraph 9(a) of the Policy states that

If the Company establishes the title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(ADD-59.) At trial Mattson Ridge stipulated and agreed that if Ticor had accepted tender of Mattson Ridge’s title insurance policy, “neither Clear Rock [nor] Ticor could have commenced and prosecuted a title registration proceeding to cure the defect any faster than Mattson Ridge . . . commenced and prosecuted such action on its own.” (Tr. T. at 135.) The Court of Appeals wrongly rejected Ticor’s argument that, under the circumstances here, Paragraph 9 should apply as a limitation on loss. The defect was cured and Mattson Ridge concedes that Ticor could not have prosecuted the action to modify the Property description any faster. Once the title registration action was completed, Ticor’s liability was limited to the cost to cure the defect under the terms of the Policy.

Thus, the facts do not support the conclusion that there was a loss under the Policy that was attributable to the former legal description of the Property. Mattson Ridge and Thompson Builders executed the Second Amendment for a purchase price of \$2,600,000.

The closing date was delayed until May, 2008. Meanwhile, Mattson Ridge was free to market the Property to other interested buyers. When push came to shove, Thompson Builders walked away from the Purchase Agreement not because of the old legal description that had been modified, but because market conditions had changed making development of the Property a riskier and more expensive venture.

Thompson Builders walked away from the Purchase Agreement long after the legal description had been changed. Breach of the Purchase Agreement by Thompson Builders is not a loss under the Policy. To hold otherwise is to make Ticor the guarantor of the Mattson Ridge-Thompson Builders Purchase Agreement, which it was not. Any damages arising from Thompson Builders' breach is not attributable to the reference to "Charles Magnuson's Place" in the former legal description of the Property, which was subsequently reformed, and therefore does not constitute a loss under the terms of the Policy. Accordingly, Mattson Ridge is not entitled to indemnity of its "lost profits" on the breach of the Purchase Agreement by Thompson Builders.

**3. The Maximum Loss Under the Policy Is the Cost to Cure the Purported Defect.**

In most cases, loss under a title insurance policy is measured as the difference in the value of the property subject to the defect in title and without the defect in title. This is commonly referenced as "with-and-without" calculation for establishing a loss. For example, in *First Am. Bank v. First Am. Transp. Title Insurance Co.*, 585 F.3d 833 (5th Cir. 2009), the Fifth Circuit Court of Appeals was required to interpret the same language as contained Section 7 of the policy at issue here. *First Am.*, 585 F.3d at 836. The Fifth

Circuit held that the insured's damages were limited to the difference between "the value of the Title as insured and the value of the Title subject to the defect, lien, or encumbrance insured against by this policy."

When there is a title defect that can be removed, loss under a title insurance policy is measured as the cost to remove the title defect. *Aboussie v. Chicago Title Ins. Co.*, 949 S.W.2d 207, 209 (Mo. Ct. App. 1997). This is termed the "cost-to-cure method" for establishing the loss amount. In *Aboussie*, for example, the court held:

Recovery is generally limited to the amount necessary to remove the title defect or the difference between the fair market value of the property conveyed and its fair market value had it been as described in the title policy. . . . [T]he measure of damages is the same—*i.e.*, the difference in fair market value or the cost of restoring title, whichever is less, up to the limits of the policy.

*Id.* (citations omitted). When a title defect can be cured, loss is limited to the lesser of the cost to cure or the with-and-without calculation. Otherwise, the insured would obtain a windfall by collecting from the insurer more than it cost to fix title, and pocketing the difference. As one court recognized:

[I]f the property owner can be made whole by curing the defect, and this cost is less than the diminished value, the cure approach should be used. Using a higher measure would result in unjust enrichment, for the property owner could spend part of the award curing the defect and retain the rest of the award.

*Breck v. Moore*, 910 P.2d 599 (Alaska 1996).

Neither the Court of Appeals nor the district court followed the "cost-to-cure" method, which would have capped Mattson Ridge's losses at about \$14,000. Further, the lower courts have improperly applied the "with-or-without" calculation. The effect of

these errors is stark and significant. Rather than sue Thompson Builders for failing to perform on the Purchase Agreement, Mattson Ridge has sued Ticor seeking to be indemnified for the diminution in value of the Property because of market conditions. Mattson Ridge wants to be rewarded for its “lost profits” on the failed sale, all while retaining possession of the entire parcel of land with clean title. Mattson Ridge has not been divested of a single square foot of the Property. Under the awards of the lower courts, Mattson Ridge stands to reap a windfall in excess of \$1,900,000. The calculation of loss under the Policy put forward by both lower courts rewards abuse, fraud, and collusion while creating a requirement for all title insurers to demand removal of any possible ambiguity before insuring the title.

The effect of the lower courts’ analysis will be significant and far reaching if not reversed. The correct measure of loss, if any, is the cost to remove the purported defect of title and no more.

**4. Loss Under the Policy Cannot Exceed the Policy Limits.**

By concluding that Ticor breached the Policy thereby removing the Policy amount as the limit on loss, the Court of Appeals has expanded coverage under the Policy and created coverage where none exists. It is axiomatic that “[t]he doctrine of estoppel may not be used to enlarge the coverage of an insurance policy. *Shannon v. Great Am. Ins. Co.*, 276 N.W.2d 77, 78 (Minn. 1979). “[I]t would be wholly improper to impose coverage liability upon an insurer for a risk not specifically undertaken and for which no consideration has been paid.” *Id.*

The plain, unambiguous language of the policy caps compensable losses at the amount of the policy. (ADD-59.) Despite this express language of the parties' intent, the Court of Appeals found that Ticor had breached a duty to modify the Property description. By doing so, according to the Court of Appeals, Ticor breached the Policy and was no longer entitled to rely on the limitation-of-coverage provision. The Court of Appeals, therefore, expanded Mattson Ridge's coverage under the Policy to include additional risk—in the form of Mattson Ridge's "lost profits"—that was not specifically undertaken by Ticor when it issued the Policy.

The language of the policy limits Mattson Ridge's compensable losses to actual monetary losses, excludes consequential damages, and limits total coverage of loss to the amount of the Policy. To do otherwise is to impose a greater burden of risk on insurers and to rewrite the law governing insurance generally, and title insurance specifically. The Court of Appeals error is barred by *Shannon* and should be reversed.

**5. Mattson Ridge's "Lost Profits" Are Not a Compensable Loss Under the Policy.**

The Court of Appeals calculation of loss under the Policy is also erroneous as a matter of law because it transformed the title insurance policy into a guaranty of Mattson Ridge's Purchase Agreement with Thompson. By granting a monetary award in excess of the amount to which Mattson Ridge was entitled under the policy, the district court made a reversible error, which this Court should correct. A plain language interpretation of the policy indicates that the parties did not intend for consequential damages to be covered by the policy, and that liability would be limited to the amount of the policy.

The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the entire contract. *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). When a contract is unambiguous, construction of the contract is a question of law. *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. Ct. App. 2003). When a contract is unambiguous, courts will not rewrite, modify, or limit its effect. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364-65 (Minn. 2009).

Minnesota courts distinguish between direct and consequential damages while deferring to the contract language. *Kleven v. Geigy Agric. Chems.*, 227 N.W.2d 566, 569 (Minn. 1975). “Direct damages” arise from the breach itself. *Id.* On the other hand, “consequential damages” are defined as those that “do not arise directly according to the usual course of things from the breach of the contract itself, but are rather those which are the consequence of special circumstances known to or reasonably supposed to have been contemplated by the parties when the contract was made.” *Id.* (quoting *Despatch Oven Co. v. Rauenhorst*, 40 N.W.2d 73, 79 (1949)). Moreover, this Court has routinely held that “in the absence of specific statutory provision therefor, that extra-contract damages are not recoverable for breach of contract except in exceptional cases where the breach is accompanied by an independent tort.” *Haagenson v. Nat'l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652 (Minn. 1979).

The ruling by the Court of Appeals must be analyzed in the light of the Policy provisions that cover loss. The district court found that Mattson Ridge's additional categories of damages, including its claim for lost profits, attorneys' fees, and costs

associated with a mechanic's lien, were consequential damages. Thus, these additional categories of damages were neither the direct result of any purported breach, nor within the contemplation of the parties at the time the policy was executed. Mattson Ridge has not challenged this factual finding. Instead, Mattson seeks recovery for consequential damages that are clearly not covered by the policy, a contract which limits damages to *actual losses*.

Mattson Ridge's arguments notwithstanding, courts that have addressed the issue generally agree that title insurance policies that limit liability to "actual loss" do not allow the insured to also recover consequential damages. *See e.g., First Am. Bank v. First Am. Transp. Title Insurance Co.*, 585 F.3d 833 (5th Cir. 2009); *Miller v. Ticor Title Ins. Co.*, 93 P.3d 88 (Ore. Ct. App. 2004); *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 764 P.2d 423 (Id. 1988). For example, in *First American*, the Fifth Circuit held that the policy did not allow for the recovery of consequential damages. *Id.* at 838. The Fifth Circuit noted that the policy at issue insured against "actual loss or damage" and construed the term to exclude "consequential loss" or "consequential damages." *Id.*

Section 7 of the Policy provides that the "policy is a contract of indemnity against *actual monetary loss or damages sustained or incurred by the insured claimant* who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described." (ADD-59.) (Emphasis added.) Here, Mattson Ridge's losses are limited to the costs Mattson Ridge reasonably and necessarily incurred to modify the Property description to remove the reference to an adjoiner, "Charles Magnuson's Place." Mattson Ridge is not entitled to recover any additional damages,

including the lost profits from the sale to Thompson, that were incurred because Thompson withdrew from the Purchase Agreement well after the legal description was modified.

Mattson Ridge did not present any evidence attributing any of the alleged decrease in the market value of the Property to the now-corrected defect. Rather, Mattson Ridge conceded that the decrease in the value of the Property was due to a general downturn in the market for residential development property. Accordingly, pursuant to the formula set forth in section 7, the result of subpart (2) – the “difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien, or encumbrance insured against by this policy” – is \$0.

Furthermore, the facts here do not support the district court’s incorrect conclusions of law regarding the damages arising from the purported defect. The order amending the property description was issued on July 16, 2007. (Tr. Ex. 41.) On January 18, 2008—more than six months after the purported defect was corrected—Mattson Ridge and Thompson entered into a Second Amendment to the Purchase Agreement, which extended the closing date until May 31, 2008. (Tr. Ex. 13.) The purchase price was listed as \$2,600,000.00 on the Second Amendment. Thus, despite having corrected the purported defect, Mattson Ridge and Thompson continued to negotiate for sale of the Property and established the value of the property to be \$2,600,000.00 in January 2008. The loss of any expectancy arising from the sale occurred more than five months after the property description had been changed. Damages arising from the loss of the sale, therefore, cannot be attributable to any purported defect because *it had long since been*

*cured*. Nevertheless, the district court awarded lost value of the property arising from the purported defect despite the change in the property description which cured the alleged ambiguity, negotiation of an amendment to the purchase agreement, issuance of a title commitment with no exceptions to title, and confirmation of financing for purchase of the Property. The conclusion that the loss of value to the property is attributable to any failure to cure the purported defect or ambiguity is not based on fact or law and should be reversed.

By allowing Mattson to recover these additional damages, the lower courts rewrote the parties' agreement and transformed it from an indemnity agreement to a guaranty for the sale under the Purchase Agreement. Mattson Ridge did not suffer any actual loss that remains uncompensated. Here, the defect insured against—a purportedly ambiguous legal description giving rise to an unmarketable title—was corrected. The title as corrected is indisputably marketable. Mattson owns the subject Property and has marketable title. Therefore, there is no loss as defined by the Policy.

Without any uncompensated loss, Mattson Ridge is not entitled to recoup the speculative lost profits from its unconsummated sale of the Property. Accordingly, the Court of Appeals' calculation of damages in excess of the policy limit should be rejected in favor of entry of judgment for the actual cost of removing the purported defect.

**6. *Olson* Does Not Change the Terms of the Policy, Was Misconstrued, and Applied Too Broadly.**

At the heart of the Court of Appeals conclusion that the policy limits do not apply and that Mattson Ridge was entitled to an award of consequential damages is its assertion

that this Court's holding in *Olson* should be vastly expanded beyond its limited holding and applied here without regard to the parties' intent as expressed by the plain language of the policy. *Olson* does not eliminate a plain-language analysis; nor does it stand for the proposition that title insurers cannot exclude consequential damages from liability or limit total damages under the terms of the policy. This conclusion by the Court of Appeals is, therefore, flawed and should be rejected.

As a threshold matter, it is necessary to understand the nature of the holding of *Olson*, an automobile and casualty insurance case, and how Minnesota courts have applied it. The plaintiff in *Olson* sued his insurance agents and insurance company for failing to raise his fire-insurance-policy limits as directed and for unreasonably delaying payment of an undisputed amount following a loss under the policy. *Olson*, 277 N.W. at 386-7. The district court found that the insurer "willfully, wantonly, and maliciously refused" to pay Olson an undisputed amount due under the policy. *Id.* at 387. The insurer appealed to determine whether the insurer was "liable for any damages caused by the delay in paying the undisputed proceeds of the insurance policy." *Id.*

As a preamble to its holding the court stated:

The insurer is obligated to pay when the insured suffers a loss covered by the policy. When the insurer refuses to pay or unreasonably delays payment of an undisputed amount, it breaches the contract and is liable for the loss that naturally and proximately flows from the breach.

*Id.* at 387-8. The court went on to hold that

Lost profits may be recovered if they are a natural and proximate result of the breach and are proved with reasonable, although not absolute, certainty. To the extent that our opinion in *Independent Grocery Co. v. Sun Insurance Co.*, 146 Minn. 214, 178 N.W. 582 (1920), holds that an insured is limited

to recovering only the amount of the policy plus interest, it is hereby overruled.

*Id.* at 388 (citation omitted). The analysis then turns on the holding of *Independent Grocery* and what effect *Olson* had on that holding.

Like *Olson*, the parties in *Independent Grocery* reached an agreement as to the amount of the insurer's liability, but the insurer delayed and refused to pay the agreed-upon amount. *Ind. Grocery*, 146 Minn. at 215, 178 N.W. at 582. The insured alleged that, as a consequence of this delay, it lost business and goodwill for which the insurer should be liable. *Id.* at 216, 178 N.W. at 582-3. The question presented, as characterized by the court, was "whether the willful and malicious delay by defendants in the adjustment and payment of the insurance loss, the amount of which was paid before the commencement of this action, entitles plaintiffs to damages in the respects stated in the complaint." *Id.* at 216-7, 178 N.W. at 583. The court concluded that the facts as presented "furnish[ed] no basis for the recovery of damages, for as to the breach of the contract, whether malicious or not, plaintiffs' recovery, within the rule stated, must be limited to the amount of the legal liability under the policy with interest." *Id.* at 217, 178 N.W. at 583. Thus, by overruling its holding in *Independent Grocery*, this Court allowed recovery for those previously barred damages that arise "naturally and proximately from the breach, or such as may be reasonably supposed to have been in the contemplation of the parties at the time the contract was entered into," *id.*, where "the insurer refuses to pay or unreasonably delays payment of an undisputed amount," *Olson*, 277 N.W.2d at 387-8, regardless of the amount of the policy.

Read in this light, *Olson* provides no guidance here. There have been no allegations that Ticor has refused to pay or unreasonably delayed payment of an undisputed amount. Neither *Olson* nor *Independent Grocery* involved title insurance or the policy language at issue here. *Id.* at 386-7; *Ind. Grocery*, 178 N.W. at 215. *Cf. First Am.*, 585 F.3d at 836. Indeed, neither case addressed any relevant policy language whatsoever. Nor did either case establish a rule against using the plain, unambiguous, and unchallenged language of an insurance policy to determine damages in those circumstances where the insurer has not unreasonably delayed the payment of undisputed amount. Finally, neither case opened the door to consequential damages.

Mattson Ridge has not and cannot cite any Minnesota case that has applied the holding of *Olson* to a title insurance policy in the manner it proposes here. Instead, Mattson Ridge asserts that its broad reading of the otherwise narrow holding of *Olson* serves public policy interests. In support of this argument, Mattson Ridge quotes extensively from a case from the United States District Court for the Southern District of Indiana, *Lee v. The Home Indemnity Co.*, No. IP-93-132, 1994 WL 16495091 (S.D. Ind. Dec. 15, 1994). The dicta cited by Mattson Ridge applies Indiana law to the denial of a motion for summary judgment that the court characterized as involving “delayed payment.” *Lee*, 1994 WL 16495091, at \* 4 (quoting *Ind. Ins. Co. v. Plummer Power Mower & Tool Rental, Inc.*, 590 N.E.2d 1085, 1092 (Ind. Ct. App. 1992)). Thus, its application to the facts at hand is suspect. Moreover, research indicates that *Lee* has not been cited as authority by any other court, including those in Minnesota.

Here, the Court of Appeals has rewritten the law of title insurance to provide unlimited recovery for insureds. Because the misreading of *Olson* advocated by Mattson Ridge is not supported by that case's holding, the Court of Appeals' application of *Olson* should be rejected.

**7. Even if The Court of Appeals is Correct in Its Determination of Damages, The Policy Provision relating to Coinsurance Serves to Limit Mattson Ridge's Compensable Losses.**

Another collateral consequence of the Court of Appeals decision to ignore the policy limits and award consequential damages is that the Policy contains a coinsurance provision, which serves to limit Mattson Ridge's compensable losses. The Policy states that, if the insured deliberately insures for less than the value of the property, the insurer is required to pay only the pro rata share of the insured's actual monetary loss caused by a defect in the title. (ADD-59.) The Mattson Ridge policy was for \$1,286,000.

The Court of Appeals has determined that the loss award to Mattson Ridge is to be based on a contract signed one month after the Policy issued. The loss awarded is based on the contract to sell to Thompson for \$2,900,000. If the Court of Appeals rationale is adopted, then Mattson Ridge grossly understated and insured the value of the Property on that Policy. The policy amount is only 44% of the \$2,900,000 sale price to Thompson which the court used to calculate the policy loss. Accepting the lower courts' findings as to the value of the Property as set by the Thompson contract amount of \$2,900,000, any loss payable by Ticor Title should be only 44% of the total, because Mattson Ridge grossly underinsured the Property by obtaining a policy for only 44% of the Property's claimed value.

## CONCLUSION

Ticor asks this Court to reverse the lower courts' conclusions of law regarding ambiguity of the description, the marketability of title to the Property and the calculation of loss under the Policy. Both the district court and the court of appeals erred by concluding as a matter of law that the reference to an adjoiner rendered the title description ambiguous and the Property—whose boundaries were known and undisputed— unmarketable. The court of appeals further erred by applying inapposite law to title insurance policies, ignoring the limits of that policy, and awarding Mattson Ridge its speculative lost profits. Mattson Ridge's losses under the Policy at the time of the trial were \$0 and any award in excess of that amount constitutes a windfall on a speculative Purchase Agreement amended after the property description was modified and any ambiguity or defect corrected. Accordingly, the district court's conclusions should be reversed.

Dated: September 23, 2011

Respectfully submitted,

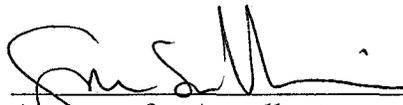
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**CERTIFICATION AS TO WORD COUNT**

In accordance with Rule of Civil Appellate Procedure 132.01, the undersigned hereby certifies that this brief contains 12,804 words, exclusive of the table of contents, table of citations, and appendix, and that the brief complies with the typeface requirements of that rule. The word count calculation was performed using the word count feature on Microsoft Office Word 2007.

  
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Attorney for Appellants