

SC94580

IN THE SUPREME COURT OF MISSOURI

RANDY SPALDING,

Respondent,

vs.

STEWART TITLE GUARANTY COMPANY,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Michael W. Manners

Case No. 1116-CV15009

SUBSTITUTE BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Defendant Stewart Title Guaranty Company (“Stewart Title”) failed to honor the terms of a title insurance policy issued to Spalding Land Company LLC (“SLC”) on or about February 12, 2003, in connection with SLC’s acquisition of 419 acres of land in the City of Lake Winnebago, Missouri. (LF. 009-011; PEx. 5.)¹ SLC bought the land out of a receivership for \$3,605 per acre or a total of \$1,510,000. (PEx. 47, *Appraisal*, at p. 16; RApx: A73.) Plaintiff Randy Spalding (“Spalding”) obtained bank financing for the purchase and personally paid \$600,000 in interest on this loan. (TR. 200:22-25, 201:1-4, 202:3-9, 206:3-15.)

Much of the land is in a federally-designated flood area, greatly limiting the options for development. (PEx. 13; TR. 209:1-7, 210:9-12, 288:18-25.) Yet, SLC, together with its managing member South Winnebago Partners (“SWP”), was able to craft a development plan that made use of this unique topography.² (PEx. 13;

¹ The legal file (“LF”) and trial transcript (“TR”) will be cited by page number (*e.g.*, LF. 176, TR. 592), as will items contained in the appendix (“RApx”) (*e.g.*, RApx: A5). Spalding’s trial exhibits will be cited “PEx” and Stewart Title’s “DEx”.

² SLC originally was formed by Randy Spalding and his wife for the purpose of purchasing this land. (TR. 200:12-21.) After this transaction was completed, South Winnebago Partners joined and became the managing member of SLC. (TR. 203:6-21.)

TR. 202:11-25, 203:1-25, 204:1, 208:5-19, 209:3-14). Under the plan, Lake Winnebago would expand into the flood area to create 154 new lake front lots and 231 traditional lots with lake-access rights. (PEx. 47; RApx: A73; TR. 210:9-12, 391:14-21.) The new lots were valued at an average of \$60,000 (traditional) to \$270,000 (lake front). (PEx. 47, *Valuation*, at p. 34; RApx: A73.)

SLC sought and obtained a development permit from the U.S. Army Corps of Engineers and contracted with Olsson Associates to perform the necessary engineering work. (PEx. 14; TR. 208:5-11, 210:20-25, 211:3-8.) SLC, through SWP, acquired options on surrounding parcels that might be needed for the project. (TR. 339:9-340:9, 558:16-25, 559:1-18, 710:8-14, 730:15-18.) SLC presented the project to the Lake Winnebago Homeowners Association (“HOA”) and the City of Lake Winnebago. (TR. 727:12-14.) Both were very supportive, and the HOA ultimately voted to allow the project to move forward. (TR. 727:15-18; 729:4-730:3.)

A. The Phone Call from Paul Estes

In January 2006, as development progressed, Spalding received a phone call from Paul Estes (“Estes”). (TR. 215:1-7.) Estes claimed he owned a one-acre tract of land in the middle of the floodplain. (TR. 215:1-7.) At first, this did not cause Spalding any concern, because he had received calls from others falsely claiming to own land in this area. (TR. 215:20-216:2.) To be safe, however, Spalding decided to contact Coffelt Land Title (Stewart Title’s issuing agent) about Estes’ claim. (TR. 217:14-21.) Coffelt Land Title advised Spalding to

contact Stewart Title directly. (PEx. 7; TR. 218:10-25.)

As it turned out, both SLC and Estes held deeds showing they owned this one-acre tract. (TR. 669:12-23.) As it also turned out, both SLC and Estes had purchased title insurance from Stewart Title. (PEx. 2, 5, 12; TR. 654:13-17). Accordingly, both SLC and Estes contacted Stewart Title about a possible title defect. (PEx. 8, 9, 10, 14, 15; TR. 219:1-222:4; 654:13-17, 668:20-25)

B. Stewart Title's Response

After receiving notice of a possible title defect, Stewart Title began processing the claim as required by the policy. (TR. 587:1-17, 588:20-25.) From April 2006 until mid-June 2006, Stewart Title conducted an investigation to determine which of its two insureds—SLC or Estes—possessed good title to the one-acre tract. (PEx. 47; RApx: A73; TR. 669:16-672:10.) On June 16, 2006, Stewart Title completed its investigation. (TR. 672:3-10). Stewart Title determined that Estes owned the one-acre tract and SLC did not. *Id.*

Once Stewart Title determined SLC's title was defective, it elected to pay the loss SLC sustained as a result of the defect. (PEx. 29; TR. 94:19-21, 98:14-25, 99:1-25, 100:1-5.) This was in accordance with ¶¶ 6 and 7 of the policy, which provide in pertinent part:

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS;
TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

* * *

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

* * *

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs (b)(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION, EXTENT OF LIABILITY AND COINSURANCE.

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 the 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 or interest as insured subject to the defect, lien or encumbrance insured against by this policy.

* * *

(PEx. 5, ¶¶ 6 & 7.)

In a letter to SLC’s counsel dated March 16, 2007, Stewart Title acknowledged that “[t]he loss under the policy is measured as 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.” (PEx. 21). Stewart Title informed SLC’s attorney that it intended to commission an appraisal to determine this difference and would notify SLC once the appraisal was completed. (PEx. 21).

C. Stewart Title’s Appraisal and the Genesis of the Dispute

Stewart Title retained an independent appraiser, Adamson Appraisal, to calculate the amount of the loss. (TR. 591:1-4, 15-20.) As part of its work, Adamson Appraisal determined the highest and best use of the insured estate. (TR. 602:24-604:12; DEx. 307, at pp. 9, 45-46, 51.) Adamson Appraisal determined the highest and best use of the insured estate was “mixed use development which provides for commercial and residential single/multi-family development.” (TR. 604:10-12; DEx. 307, at p. 45.) Based on this determination,

Adamson Appraisal compared the insured estate with other properties in the area that were sold, listed for sale or under contract, to value the insured estate at \$4,220,000. (TR. 592:10-14; DEx. 307, at pp. 49-64.) It then valued the insured estate, subject to the defect, at \$4,210,000. *Id.* While Adamson Appraisal considered several proposed development projects in arriving at these valuations, it did not consider the proposed lake development SLC and SWP were actively pursuing. (TR. 604: 13-18; DEx. 307, at pp. 28-35.)

On July 3, 2007, Stewart Title sent a letter to SLC's counsel indicating that it completed its appraisal, and that such appraisal "measured the diminution in value at \$10,000." (PEX. 23). Along with this letter, Stewart Title enclosed a check in the amount of \$10,000 to fully resolve the claim. (PEX. 23).

On July 12, 2007, SLC returned Stewart Title's check and indicated that \$10,000 did not adequately compensate SLC for its loss. SLC's attorney wrote:

[W]e do believe that my client's loss is the difference in value of the land as insured, including the one (1) acre at issue, and the value of land excluding the one (1) acre. Without the one (1) acre which is in question, the proposed Lake expansion cannot go forward, and Spalding Land Company LLC will suffer loss in the value of its land far greater than the amount of the insurance policy. With the defect corrected, and the one (1) acre in question included in the Spalding Land Company LLC tract, there would not be a loss to Spalding Land Company. We do not believe that the appraisal provided

accurately values the property with and without the one (1) acre.

(PEx. 24.)

Following this exchange, the parties engaged in back-and-forth discussions to attempt to resolve their differences. SLC suggested that in lieu of paying the loss suffered by SLC as a result of its defective title, Stewart Title simply correct the defect by purchasing the one-acre tract from the Estes. (PEx. 18.) In order to facilitate this approach, Spalding purchased and repeatedly renewed an option to purchase this tract. (TR. 224:1-18.) Stewart Title would not budge, and continued to insist it had elected to pay the loss, and the loss was only \$10,000. (PEx. 23.)

This dispute left the project in limbo. With the dispute unresolved, SLC ceased operations and assigned this claim—along with all the land in question—to Spalding in his personal capacity. (PEx. 41.) On June 9, 2011, Spalding filed the present action. (PEx. 36.) Trial commenced approximately 18 months later, on December 3, 2012.

D. Stewart Title’s Testimony at Trial Regarding its Contractual Obligations

Stewart Title’s corporate representative at trial was Brad Farney (“Farney”). (TR. 44:15-19.) Farney is licensed Kansas attorney who serves as claims counsel for Stewart Title and assisted in handling SLC’s claim. (TR. 89:11-19, 91:6-9.) Farney testified that “[a]n owner’s [title insurance] policy indemnifies an owner of property against actual loss if ... there’s some defect or lien in [the insured estate].” (TR. 90:16-19.) Farney explained that the “insured

estate” is the entire property covered by the policy as reflected on Schedule A, less any exceptions or exclusions within the policy. (TR. 102:4-104:8.) “Actual loss” is the difference in value between the insured estate as insured and the insured estate subject to the defect. (PEx. 21; 124:1-126:3.) Farney explained that “a title insurance policy is a contract of indemnity versus a guaranty. And that’s those are different ideas And a [title insurance] policy is not a guaranty.” (TR. 91:16-92:3.)

Stewart Title also offered testimony from Charity Makela (“Makela”), its Regional Claims Counsel. Makela explained that once Stewart Title elects to pay the loss under the terms of the policy, as it did in this case, it is obligated to take steps to ascertain the amount of loss. (TR. 603:20-25.) Makela explained that Stewart Title fulfilled that obligation by hiring an independent appraisal company, Adamson Appraisal. (TR. 604:1-4.) Makela testified Adamson Appraisal considered the highest and best use of the property, “like a mixed use purpose, commercial development,” but said she suspected it failed to consider the proposed lake development. (TR. 604:5-12.) When asked about this, Makela answered: “I don’t know that Stewart Title had any of this information in its file.” (TR. 106:19-24.)

Stewart Title presented testimony from John Moser (“Moser”), an appraiser retained specifically for the litigation. Stewart Title asked Moser to “estimate the market value of the insured tract, which is the 420.16 acres; and then the value without the 1.25-acre contract owned by Estes.” (TR. 749:17-22.) Like Adamson

Appraisal, Moser began his work by determining the highest and best use of the property. (TR. 758:9-15.) Moser testified that land is always valued at its highest and best use, and it is critical a highest and best use analysis precede the actual valuation. (TR. 784:14-785:7.) Moser acknowledged that highest and best use could include a development plan where the plan might be implemented in the future. (TR. 787:13-16.) Moser did not, however, consider the proposed lake development in performing his work in this case. (TR. 787:17-788:8.) Instead, Moser determined the highest and best use of the property was “[p]urchase for an indeterminate holding period and development with residential and commercial united as demand warrants.” (DEx. 348, at p. 3; RApx: A25; TR.759:14-22.) Moser then compared the property against other properties in the area sold, offered for sale, or leased, to determine the property was worth \$4,100,000 without the defect and \$4,087,800 with the defect. (DEx. 348, at p. 15-17; RApx: A25; TR. 761:14-773:24.)

E. Stewart Title’s Motions for Directed Verdict and JNOV

Stewart Title filed motions for directed verdict and JNOV based on two primary grounds. First, Stewart Title argued the five-year statute of limitations applied to Spalding’s claims, Spalding’s claims accrued (and the statute of limitations began running) when Estes first asserted a claim on the one-acre tract, and the statute of limitations expired more than five years before Spalding filed suit. (LF. 176-82, 262-69.) Second, Stewart Title argued Spalding failed to make a submissible case on damages because its expert witness, Brian Reardon,

improperly considered the proposed lake development in valuing the property with and without the defect. (LF. 186-89, 274-79.) The trial court overruled both motions. (LF. 426.) This appeal followed.

ARGUMENT

A. Spalding's Claim for Breach of the Title Insurance Policy is Not Time Barred

[Responding to Point Relied On No. 1]

Stewart Title contends Spalding's claims in this case accrued in January 2006, when Estes first contacted Spalding about the one-acre tract. As a result, Stewart Title argues Spalding's claims are barred by the five-year statute of limitations period set forth in RSMo. § 516.120(1). This argument is without merit.

Spalding's cause of action did not and could not accrue until Stewart Title breached its contract with SLC. This did not occur until Stewart Title determined SLC's title was defective and then incorrectly calculated the amount of the loss. Up to that point, Stewart Title fulfilled its policy obligations. Spalding had neither a reason nor a right to sue. The statute of limitations did not and could not begin to run.

Moreover, even assuming Spalding's cause of action accrued on January 6, 2006, it would not be barred. Missouri courts have consistently applied the ten-year statute of limitations set forth in RSMo. § 516.110(1) to claims for payment of money under a policy of insurance. The ten-year statute of limitations applies

to the cause of action asserted by Spalding in this case, and Spalding filed his cause of action within the ten-year period.

1. Standard of Review

Stewart Title first raised the statute of limitations issue through its motion for directed verdict, and then later, through its motion for judgment notwithstanding the verdict. The standard of review for denial of these motions is essentially the same. *Balke v. Central Missouri Elec. Coop.*, 966 S.W.2d 15, 20 (Mo. App. 1997)(citations omitted). Judgment may be entered in favor of the defendant only if the plaintiff fails to make a submissible case. *Id.* “In reviewing for a submissible case, [the Court] must accept all evidence and reasonable inferences favorable to the verdict, disregarding contrary evidence.” *Id.* Only when there is no room for reasonable minds to differ as to the ultimate disposition of the case may the defendant prevail on its motion. *Id.*

2. Spalding’s Claims Did Not Accrue Until Stewart Title Breached The Terms Of Its Title Insurance Policy On July 3, 2007

This Court has held that a cause of action accrues once three events occur:

- There is a wrong or technical breach of duty;
- The wrong or technical breach of duty causes damages; and
- The damages become capable of ascertainment.

Powel v. Chaminade College Preparatory, Inc., 197 S.W.3d 576, 582-83 (Mo. banc 2006).

In a breach of contract case, the first of these events—the wrong or

technical breach of duty—occurs upon violation of the contract’s terms. *See Real Estate Investors v. American Design Group, Inc.*, 46 S.W.3d 51, 59 (Mo. App. 2001); *see also Davis v. Laclede Gas, Co.*, 603 S.W.2d 554, 555 (Mo. banc 1980)(contract action accrues upon defendant’s failure to do the thing contracted for); *Superintendent of Ins. v. Livestock Mkt. Ins. Agency, Inc.*, 709 S.W.2d. 897, 903 (Mo. App. 1986) (same). So long as the adverse party is acting in accordance with the contract, there is no wrong; the cause of action cannot accrue and the statute of limitations cannot begin to run. *Id.*; *see also Loeffler v. City of O’Fallon*, 71 S.W.3d 638, 642 (Mo. App. 2002) (statute of limitations “begins to run when the right to sue thereupon arises”) (*citing Ballwin Plaza Corp. v. H.B. Deal Construction Co.*, 462 S.W.2d 687 (Mo. 1971)).

In this case, Stewart Title did not violate the terms of the title insurance policy issued to SLC until July 3, 2007, when it failed to properly calculate the amount of the loss. (PEx. 23.) *See Real Estate Investors*, 46 S.W.3d at 59. Until that point, the evidence is undisputed that Stewart Title acted in accordance with its contractual obligations. Spalding had neither a reason nor a right to bring suit. As a result, the statute of limitations did not and could not run. *See Ballwin Plaza*, 462 S.W.2d at 689-90.

In an effort to avoid this result, Stewart Title relies on two decisions by this Court— *Powel, supra*, and *Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579 (Mo. banc 2013)—to argue that Spalding’s cause of action for breach of contract accrued the moment he learned of potential damages, even if the damages

were not caused by any breach and, indeed, even if there were no breach. *Appellant's Brief*, at pp. 16-22. This argument is based upon a misreading of *Powel* and *Farrow*, and a mischaracterization of Stewart Title's obligations under the title insurance policy at issue.

a. *Powel* and *Farrow* Did Not Displace the Commonsense Rule that a Cause of Action Cannot Accrue Absent a Wrong or Technical Breach of Duty

In *Powel*, a case involving alleged sexual abuse, this Court examined when damages are “capable of ascertainment” within the meaning of R.S.Mo. § 516.100. The plaintiff argued damages were capable of ascertainment when he “subjectively became aware that he suffered damages and that they were caused by ‘the actions of the individuals’ in question and were connected to his psychological injuries.” 197 S.W.3d at 581. In contrast, the defendant argued damages were capable of ascertainment the moment the wrongful act occurred, because that is when the plaintiff could have discovered his injury if he had not repressed his memory of it. *Id.* at 581-82. The Court rejected both arguments in favor of an objective test: damages are “capable of ascertainment” when “a reasonable person would have been put on notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages.” *Id.* at 585.

In articulating this test, the Court did not state or suggest that knowledge of damages—unconnected to any wrongful act—would cause the statute of

limitations to run. On the contrary, it confirmed the plaintiff must be aware of a “potentially *actionable* injury” before a cause of action will accrue. *Id.* at 584 (emphasis added) (citing *Bus. Men’s Assurance Co. of America v. Graham*, 984 S.W.2d 501, 507 (Mo. banc 1999)(“*BMA*”). An injury cannot be actionable if there is no causal connection between the injury and the defendant’s alleged conduct. *See BMA*, 984 S.W.2d at 507 (rejecting the argument that plaintiff’s cause of action for negligent design and installation of marble cladding accrued as soon plaintiff became aware of problems with building where such problems were not associated with defendant’s negligent acts). Only where there has been a wrongful act, and that wrongful act has resulted in damages, does it matter whether the damages are capable of ascertainment. *See Powel*, 197 S.W.3d at 583 (“A third event must also take place before the claim accrues: in addition to a wrongful act, and in addition to resulting damages, the damages must also be capable of ascertainment”).

The case of *Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579 (Mo. banc 2013) is in accord. *Farrow* involved alleged defamatory statements regarding plaintiff’s job performance that ultimately led to her termination. *Id.* at 598-99. The issue was whether plaintiff’s cause of action accrued when plaintiff learned of the statements and took steps to protect herself against an adverse employment action, or when she was terminated more than two years later. *Id.* The Court held plaintiff’s cause of action accrued when she learned of the defamatory statements. *Id.* at 600. It reasoned, “damages are ascertainable ‘when

the fact of damage can be discovered or made known, not when the plaintiff actually discovers injury or wrongful conduct.” *Id.* at 599 (quoting *Klemme v. Best*, 941 S.W.2d 493, 497 (Mo. ban 1997)). This is true even if all possible damages are neither known nor knowable. *Id.* The fact that plaintiff had taken steps to protect herself from the defamatory statements demonstrated her damages were capable of ascertainment at that time, even though the extent of her damages was not fully known. *Id.* at 600.

The Court in *Farrow* did not state or suggest that plaintiff’s cause of action could accrue even if there were no wrongful act. Indeed, the Court’s analysis was premised on the fact that a wrongful act *had* occurred: the plaintiff’s supervisor had made defamatory statements. *Id.* at 598-99. This gave the plaintiff the right to sue for defamation as soon as she discovered or could have discovered that her supervisor’s statements caused her harm.

In this case, the issue is not whether the phone call by Estes alerted or should have alerted Spalding that something might be amiss with the property he acquired. The issue is whether the phone call alerted or should have alerted Spalding to damages caused by Stewart Title’s wrongful act.³ *See Powel*, 197

³ To be clear, it is not necessary for Spalding to have known of the wrongful conduct for the cause of action to accrue, but he must have known—or have been capable of knowing—of damages that were in fact caused by such conduct. *See BMA*, 984 S.W.2d at 507

S.W.3d at 583. Stated another way, the issue is whether the phone call gave Spalding a right to sue Stewart Title. *Id.*; *see also Ballwin Plaza Corp. v. H.B. Deal Const. Co.*, 462 S.W.2d 687 (Mo. 1971) (claim accrues when the right to sue thereupon arises); *Loeffler*, 71 S.W.3d at 642 (same).

b. Estes' Phone Call Did Not Give Spalding a Right to Sue Stewart Title

Stewart Title contends Estes' phone call caused Spalding's cause of action to accrue because it "raised a cloud on SLC's title to the land, which impacted its marketability." *Appellant's Brief*, at p. 17. According to Stewart Title, "Spalding could reasonably ascertain that he had suffered damage at that moment because he (or Stewart) would undoubtedly either have to pay the expenses of a suit to clear title, if that was feasible, or bear the loss or damage arising from the title defect." *Id.* at p. 18.

This argument confounds the issue of whether Spalding was entitled to indemnification under the policy with the issue of whether Spalding was entitled to bring suit against Stewart Title. These are manifestly different inquiries. Even assuming Estes' phone call triggered Stewart Title's duty to indemnify (which it did not⁴), unless and until that duty was breached, Stewart Title was not subject to

⁴ By Stewart Title's logic, anytime anyone asserts a claim of ownership, the property becomes unmarketable and the duty to indemnify is triggered. This interpretation is at odds with the express language of the policy. The policy does

suit.

This distinction was discussed at length in *Stewart Title Guar. Co. v. West*, 676 A.2d 953 (Md. App. 1996). In *West*, the plaintiffs brought suit against Stewart Title for breach of contract because they acquired property with defective title. *Id.* at 957-58. Because the title defect was undisputed, the court entered summary judgment in favor of the plaintiffs, and later, entered an order finding that Stewart Title breached its contractual obligations. *Id.* at 958-59. Stewart Title appealed, arguing that the mere conveyance of defective title did not constitute a breach of the policy. *Id.* at 959-62. The Maryland Court of Appeals agreed and reversed the entry of summary judgment, reasoning:

As we have observed, the court’s decision was based on its conclusion that the Property was unmarketable. We have no quarrel with the circuit court’s ability to decide the title’s marketability in a

not guaranty marketable title. (PEx. 5, at p. 1; TR. 91:16-92:3.) Rather, it “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 [the] policy.” (PEx. 5, ¶ 7.) While one of the matters insured against is “[u]nmarketability of title,” in the absence of “actual monetary loss or damage,” the right to indemnification does not arise. *Id.* The “Exclusions” section of the policy expressly denies coverage for “adverse claims ... resulting in no loss or damage to the insured claimant.” (PEx. 5, at p. 1.)

summary judgment proceeding, because the marketability of title is a question of law for the court. *The issue of marketability, however, is not dispositive of liability in this case. Rather, the issue is whether Stewart Title breached the Policy. As we stated earlier, the mere existence of title defects does not, in and of itself, mean that a title insurer is in breach of the insurance policy, any more than the event of a fire means that the policy insuring against such loss has thereby been breached.* [¶] ... If the court finds that there existed covered defects on the date the Policy was issued, it should then consider (a) whether Stewart Title paid for the Wests' loss within a reasonable time, or (b) whether Stewart Title cured the problems within a reasonable time after receipt of notice of them. If appellant did neither of those, then it breached the Policy.

Id. at 966-67 (citations omitted, emphasis added).

The policy at issue in the instant action gave Stewart Title 30 days to pay or tender payment for the loss after "liability and the extent of the loss or damage has been definitely fixed in accordance with the[] [policy's] Conditions and Stipulations." (PEx. 5, ¶¶ 6(a) & 12(b).) There was no evidence at trial that at the time of Estes' call, "liability and the extent of the loss" were fixed so as to obligate Stewart Title to tender payment. More importantly, there was no evidence at trial that at the time of Estes' call, Stewart Title breached this or any other obligation. On the contrary, Stewart Title's witnesses testified that after learning of Estes'

claim, Stewart Title undertook an investigation to determine liability and the extent of the loss—as it was required to do by the policy—and tendered payment to SLC as soon as it completed its work. (TR. 603:20-604:12.) Stewart Title did not run afoul of any policy provision until July 3, 2007, when it calculated the loss incorrectly.

This last point bears added emphasis. From January 2006 until July 2007, Stewart Title did everything it was supposed to do in handling this claim. It did not ignore the claim, or deny or condition coverage. There literally was no basis for Spalding to complain. Spalding could not bring a cause of action for breach of contract because there had been no breach. *See Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 104 (Mo. banc 2010) (articulating the elements of the claim). Similarly, Spalding could not ask the court to declare his contractual rights because there was no controversy ripe for determination. *See LeBeau v. Commissioners of Franklin County, Missouri*, 422 S.W.3d 284, 290 (Mo. banc 2014)(discussing the requirements for bringing a declaratory judgment action).⁵

⁵ As this Court explained in *LeBeau*, “[a] controversy is ripe if the parties’ dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that presently exists, and to grant specific relief of a conclusive character.” *Id* (citing *Mo. Health Care Ass’n v. Attorney General of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. banc 1997)). A controversy cannot be ripe if there is no presently-existing conflict. *Id.* At least prior to July 2007, there

The facts of this case differ markedly from cases where the insurer is intransigent, such as *Davis v. Stewart Title Guar. Co.*, 726 S.W.2d 839 (Mo. App. 1987). In *Davis*, a potential defect in title was discovered in a parcel of real estate conveyed to the plaintiff. *Id.* at 842. A church had an easement covering the property at issue. *Id.* The plaintiff notified Stewart Title about the defect. *Id.* Stewart Title refused to take steps to cure the defect. *Id.* at 842-43. The plaintiff brought an action for unlawful detainer against the church. *Id.* at 843. The plaintiff owner asked Stewart Title to assume the litigation. *Id.* Stewart Title refused. *Id.* The trial court found in favor of the church. *Id.* Plaintiff sued Stewart Title for breach of contract and vexatious refusal, *id.* at 843-44, which prompted Stewart Title, finally, to bring an action to quiet title. *Id.* at 844. The two suits were consolidated. *Id.* The plaintiff moved the court to dismiss the quiet title action on the ground the issue already had been decided in the unlawful detainer action. *Id.* The court dismissed the quiet title action. *Id.* A jury found in favor of the plaintiff for breach of contract and vexatious refusal. *Id.* Stewart Title appealed, arguing the plaintiff's breach of contract action could not accrue until and unless the quiet title action adjudicated that title was defective (the opposite argument Stewart Title is making in the instant action).⁶ *Id.* at 850. This

was no presently-existing conflict between Spalding and Stewart Title.

⁶ In *Davis*, Stewart Title took the position that “damages do not accrue under the title policy as issued in the absence of a permanent encumbrance proven.” 726

was because one of Stewart Title's options under the policy for handling a claim for defective title was to bring an action to quiet title. *Id.* The Missouri Court of Appeals agreed with the general principle that if Stewart Title were acting in accordance with its obligations under the policy, the plaintiff could not bring suit. *Id.* at 850-51. The court ruled against Stewart Title, however, because Stewart Title failed to bring a quiet title action without undue delay as the policy required. *Id.*

If, as in *Davis*, Stewart Title shirked its contractual obligations when it received notice of Estes' claim, Spalding could have sued right away. There would have been a wrongful act and damages in the form of the costs Spalding had to incur to personally investigate and address the claim. Because Stewart Title did not shirk its contractual obligations, there was neither a wrongful act nor any damages. Because there was neither a wrongful act nor any damages, Spalding's

S.W.2d at 850. In contrast, in the instant action, Stewart Title argues that damages accrue as soon as someone asserts a claim. *Appellant's Brief*, at pp. 21-22. Furthermore, there is an apparent inconsistency between §§ A(2)(b) and A(3) of Stewart Title's brief. On the one hand, Stewart Title argues Spalding suffered damages from the moment he received Estes' call and should have immediately filed suit; on the other hand, Stewart Title argues it was not obligated to pay anything when it learned of the call, but instead had other options for complying with its contractual obligations. *Appellant's Brief*, at pp. 21-22 & 14-15.

claim did not accrue. *Powel*, 197 S.W.3d at 582-83.

Stewart Title cites *Hopmeier v. First American Title Ins. Co.*, 856 S.W.2d 387 (Mo. App. 1993), for the proposition that a defect in title, standing alone, amounts to a breach of the policy. The *Hopmeier* case is unavailing. While there is no doubt that a defect in title could amount to a breach of the policy, this depends upon the particular language of the policy at issue. The policy in *Hopmeier* guaranteed good title, so the policy was breached when the insured discovered he did not possess good title. *Id.* at 388 (“appellants entered into a contract to guarantee title with St. Paul ...”). The policy in the instant action does not guarantee good title, but rather indemnifies the insured against actual loss. (PEx. 5, ¶ 7; TR. 90:16-19.) Therefore, *Hopmeier* has no bearing on this case.

Stewart Title next argues its policy is akin to a contract of indemnity against liability, where a duty to indemnify exists even in the absence of a loss. *Appellant’s Brief*, at pp. 23-25. This argument again confounds the issue of whether Spalding was entitled to indemnification under the policy with the issue of whether Spalding was entitled to bring suit against Stewart Title. Even assuming Stewart Title had a duty to indemnify Spalding when it learned of Estes’ call, unless and until it breached that duty, Spalding’s cause of action did not and could not accrue. *See West*, 676 A.2d at 966-67; *Powel*, 197 S.W.3d at 583; *Keveney*, 304 S.W.3d at 104.

Furthermore, Stewart Title misstates the law regarding contracts of indemnity. Even in the case of a contract that indemnifies against liability, the

mere assertion of a claim against the indemnitee—such as the claim asserted by Estes—will not give rise to a cause of action. Rather, a cause of action cannot accrue “until an indemnitee’s liability has become ‘fixed and established.’” *Burns & McDonnell Engineering Co. v. Torson Construction Co., Inc.*, 834 S.W.2d 755, 758 (Mo. App. 1992) (citations omitted). This means the claim against the indemnitee must be completely resolved. *Id.*; *but see Burlington Northern Railroad Co. v. Chicago & Northwestern Transp. Co.*, 851 S.W.2d 28 (Mo. App. 1993)(“When a contract to indemnify against liability places an additional obligation of performing some act in regard to the subject matter, such as defend against suits, liability becomes fixed immediately upon indemnitor’s neglect to perform the act”). Estes’ claim was not completely resolved until, at the earliest, July 16, 2006, when Stewart Title completed its investigation. (TR. 672:3-10.) Spalding filed suit less than five years later, within the statute of limitations period set forth in RSMo. § 516.120. Thus, even if this case involved a contract of indemnity against liability, Stewart Title could not prevail.

3. The Ten-Year Statute of Limitations Period Governs Spalding’s Claims

Even if Spalding’s cause of action arose when he first learned of a potential title defect (which it did not), his lawsuit against Stewart Title is still timely. Missouri courts have consistently applied the ten-year statute of limitations to suits upon insurance policies. *Johnson v. State Mutual Life Assurance Co.*, 942 F.2d 1260, 1264 (8th Cir. 1991) (citations omitted); *see also Brown v. CRST Malone*,

Inc., No. 4:11CV1527 JCH, 2012 WL 4711450, at *7 n.2 (E.D.Mo. Oct. 3, 2012)(“Under MO.REV.STAT. § 516.110(1), the statute of limitations governing actions against an insurance company under an insurance policy is ten years.”); *Crenshaw v. Great Central Ins. Co.*, 527 S.W.2d 1, 4 (1975) (ten-year statute of limitations applies to an action on an insurance contract); 30 Mo. Prac., Insurance Law & Practice § 5:4 (2 ed.). Although one reported Missouri case applied a five-year limitations period, *see Hopmeier, supra*, this was based upon the agreement of the parties; there was no analysis or determination by the court. In the insurance area, there is nothing Stewart can point to for support that the five-year limitations should apply here.

In attempting to avoid clear Missouri precedent in this area, Stewart Title argues the policy at issue does not contain an unconditional promise to pay because it affords Stewart Title multiple options for resolving actual and purported title defects. *Appellant’s Brief*, at pp. 14-15. While this may be true, by the time of the breach, these options had narrowed to one: Stewart Title elected and promised “[t]o pay or tender payment of the amount of insurance under this policy together with any costs, attorneys’ fees and expenses incurred by the insured claimant” (PEX. 5, ¶ 6(a); TR. 104:9-105:4.) This promise is set forth in black and white in Stewart Title’s policy, and was provable without regard to extrinsic evidence. *Id.* Stewart’s failure to honor this promise was the genesis of this lawsuit. (LF. 026 (“This is a lawsuit against [Stewart Title] for refusing to pay a title insurance claim filed by [SLC]....”); LF. 033, at ¶¶ 37 & 40.) This was the

claim ultimately submitted to the jury. (TR. 842:13-843:6; L.F. 380). This claim is governed by RSMo. § 516.110(1).

Furthermore, notwithstanding the multiple options set forth in the policy, there only was one other option available to Stewart Title to resolve the Estes' claim besides the one it chose.⁷ Instead of paying Spalding, Stewart Title could have paid Estes. (PEX. 5, ¶ 6(b).) As Stewart Title alludes to in its brief, Spalding encouraged Stewart Title to select this option and purchase the Estes' one-acre tract. *See Appellant's Brief*, at p. 14. Yet, this is beside the point. The ten-year statute of limitations period set forth in RSMo. § 516.110(1) is not limited to situations where the promise and the payment are made to the same person. A promise to pay is a promise to pay, and the ten-year limitations period still applies.

Finally, Stewart Title suggests that title insurance policies are unlike other types of insurance policies because they contain conditions on payment. *Appellant's Brief*, at p. 15, n. 3. Yet, conditions are part of *every* insurance policy. For example, in *Edwards v. State Farm Ins. Co.*, 574 S.W.2d 505 (Mo. App. 1978), the insurance policy required the insurer to pay

all sums which the insured * * * shall be legally entitled to recover

⁷ A third option available to Stewart Title was to prosecute an action to clear title. (PEX. 5, ¶ 4.) This option has no applicability in this case or in any case where the title defect is undisputed. This is a matter of logic and common sense. If the title defect is undisputed, Stewart Title could not in good faith litigate the issue.

as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by the accident and arising out of the ownership, maintenance or use of such uninsured motor vehicle provided, for the purposes of this coverage, determination as to whether the insured * * * is legally entitled to recover such damages, and if so, the amount thereof shall be made by agreement between the insured * * * and the company or, if they fail to agree, and the insured so demands, by arbitration.

Id. at 506. This provision contains a litany of conditions (“legally entitled to recover,” “caused by the accident,” “arising out of the ownership”). Notwithstanding this fact, the *Edwards* court held—consistent with longstanding Missouri precedent—that the suit was governed by the ten-year statute of limitations. *Id.*; see also *Johnson*, 942 F.2d at 1264 (Missouri Supreme Court has rejected the argument that the ten-year statute of limitations should be limited only to “promissory notes, bonds and similar instruments that contain, within the four corners of the document, an admitted obligation to pay money”).

B. Spalding Presented a Submissible Case on Damages

[Responding to Point Relied on Nos. 2 and 4]

In the case at bar, Spalding presented evidence of damages through Brian Reardon (“Reardon”), a licensed appraiser with Bliss & Associates. Reardon conducted an appraisal of the land at issue, and determined that without the title defect, it was worth \$5,700,000. This valuation stemmed from a proposed lake

development that was in progress when SLC learned of the title defect. Stewart Title argues that Reardon erred by considering this proposed development. This argument is without merit.

In appraising this property, Reardon was required to consider its highest and best use, not merely its existing use. Reardon properly determined that the property's highest and best use was the proposed lake development. Based on that determination, Reardon properly calculated the property's value, and the damages stemming from the title defect. There was substantial support for Reardon's opinions, and the trial court properly allowed them to be considered by the jury.

1. Standard of Review

Stewart Title challenged Spalding's damages evidence through its motion for directed verdict, and then later, through its motion for judgment notwithstanding the verdict. The standard of review for denial of these motions essentially is the same. *Balke*, 966 S.W.2d at 20 (citations omitted). Judgment may be entered in favor of the defendant only if the plaintiff fails to make a submissible case. *Id.* "In reviewing for a submissible case, [the Court] must accept all evidence and reasonable inferences favorable to the verdict, disregarding contrary evidence." *Id.* Only when there is no room for reasonable minds to differ as to the ultimate disposition of the case may the defendant prevail on its motion. *Id.*

2. Spalding Presented the Proper Measure of Damages

The proper measure of damages in this case is the difference between the

fair market value of the land at issue with and without the title defect. (LF. 276; TR. 102:4-104:8, 124:1-126:3.) *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1, 4-5 (Mo. banc 1975)(measure of insured’s damages is the difference between the value of the entire tract of land insured and the value of that part which remained after severance and loss due to defect in title). Missouri law defines the “fair market value” of land to include the land’s “highest and best use, using generally accepted appraisal practices.” R.S.Mo. § 523.001; *see also* Uniform Standards of Professional Appraisal Practice (“USPAP”), Rule 1.3(b)(“When necessary for credible assignment results in developing a market value opinion, an appraiser must ...develop an opinion of the highest and best use of the real estate.”). The highest and best use of real estate means “[t]he reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported and financially feasible and that results in the highest value.” (DEx. 348, *Glossary*; RApX: A25.) As applied to vacant land such as the land at issue in this case, the highest and best use test requires an appraiser to consider both the existing use of the land as well as all other potential uses of the land. (TR. 568:14-18). Stewart Title’s own expert admitted this point. *Id.*

Stewart Title argues that application of the highest and best use test in this case was impermissible, and allowed Spalding to recover his future lost profits in derogation of the terms of the policy. *Appellant’s Brief*, at pp. 27-29. This argument is disingenuous at best. Before this litigation ensued, when Stewart Title was attempting to resolve this claim in accordance with policy provisions, its

third-party appraiser—Adamson Appraisal—appraised the property at its *highest and best use*. (TR. 602:24-604:12.) Likewise, after this litigation ensued, when Stewart Title was attempting to marshal evidence for trial, its third-party appraiser—John Moser—appraised the property at its *highest and best use*. (DEx. 348, at pp. 3, 13; RApx: A25; TR. 761:10-20, 777:5-20.) During trial, when Stewart Title was attempted to cast doubt on Spalding’s damage figures, its appraisal expert—Bernie Shaner—acknowledged that “[w]hen necessary for credible assignment results in developing a market value opinion, an appraiser must develop an opinion of the *highest and best use* of the real estate.” (TR. 561:13-563:1.) The highest and best use test occupies an entire chapter (Chapter 12) in the treatise, *The Appraisal of Real Estate*, which Shaner referred to as his “Bible.” (TR. 566:14-569:1) It would have been manifest error for any appraiser to value the property without considering its highest and best use. *See Fohn*, 529 S.W.2d at 4-5; *George K. Baum Properties, Inc. v. Columbian Nat. Title Ins. Co.*, 763 S.W.2d 194, 204 (Mo. App. 1988) (an appraiser’s testimony as to the highest and best use of the land is most appropriate for measuring a title insured’s economic damages); *see also Land Clearance for Redevelopment Authority v. Opal Henderson*, 358 S.W.3d 145, 150 (Mo. App. 2012) (in eminent domain context, landowner is entitled to the fair market value of the land at its highest and best use).

It cannot be stated strongly enough: *Not a single witness at trial testified that Spalding’s damages must be calculated based upon the value of the*

property as it was being used at the time of the breach. Every witness who addressed the issue, including three witnesses called by Stewart Title (Charity Makela, John Moser and Bernie Shaner), testified that it was appropriate to consider how the property *could* be used in determining its value. (TR. 561:13-563:1, 604:5-12, 761:10-20, 777:5-20.) The notion that this methodology somehow offends the language of the policy is a fiction crafted by Stewart Title’s lawyers and should be rejected by this Court.⁸

3. In Considering the Highest and Best Use of the Property, Reardon Properly Considered the Proposed Lake Development

Stewart Title’s real complaint is not that Spalding applied the highest and

⁸ Stewart Title also strains the bounds of credulity when it halfheartedly asserts, “the measure of damages set by the Policy is effectively the value of the acre Estes owned (the hole of the donut).” *Appellant’s Brief*, at p. 28. This is contrary to the express language of the policy and the testimony of Stewart Title’s corporate representative, Brad Farney. The measure of damages set by the policy is the diminution in value of the insured estate occasioned by the title defect. (PEX. 5, ¶ 7.) The “insured estate” is the entire property covered by the policy as reflected in Schedule A, less any exceptions or exclusions within the policy. (TR. 102:4-104:8.) To calculate damages, therefore, an appraiser must assess whether and to what extent the entire property diminished in value. (PEX. 21.) It is not enough to simply value the Estes’ one-acre tract, as Stewart Title suggests.

best use test to calculate damages. Stewart Title's real complaint is that Spalding's appraiser, Brian Reardon, arrived at a different conclusion in applying the test than Stewart Title's appraiser, John Moser.

- Reardon concluded the highest and best use of the property without the defect was the proposed lake development, while the highest and best use of the property with the defect was agricultural.
- Moser concluded the highest and best use of the property with or without the defect was "purchase for an indeterminate holding period and development with residential and commercial uses as demand warrants."

(PEx. 47, at pp. 25 & 36; RApx: A73; DEx. 348, at p. 17; RApx: A25; TR. 779-81.)

Both of these conclusions involved a degree of speculation, since they required Reardon and Moser to forecast how the property might be used in future years. At least in the case of Reardon's testimony, however, there was a factual basis to warrant its admission by the trial court. "As a rule questions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility of the opinion, and are properly left to the jury." *St. Charles County v. Olendoff*, 234 S.W.2d 492, 495 (Mo. App. 2007)(quoting *Doe v. McFarlane*, 207 S.W.3d 52, 62 (Mo. App. 2006)). Only where the sources relied by the expert are "so slight as to be fundamentally unsupported" should the opinion be excluded, because testimony with such little weight would not assist the jury.

McFarlane, 207 S.W.3d at 62 (quoting *Wulfinf v. Kansas City Southern Industries, Inc.*, 842 S.W.2d 133, 152 (Mo. App. 1992)).

As of the effective date of Reardon's appraisal (February 2007), development plans had been presented to the City of Lake Winnebago and the Lake Winnebago HOA, and these entities had expressed support for the development. (PEx. 6; PEx. 11; PEx. 47, *Appraisal*, at p. 9; RApx: A73; TR. 417:21-420:25, 665:16-20.) SLC's managing member, SWP, had acquired options on the parcels surrounding the land that might be needed for the development. (TR. 339:9-340:9, 558:15-22, 710:8-14.) The US Army Corps of Engineers was poised to grant a permit for the development (which it ultimately did). (TR. 398:20-399.) As Reardon observed:

[A] preliminary estimate of all development costs had been obtained and a development plan was in place. More importantly, the extensive soft cost requirements necessary for a lake expansion project largely had been completed. The US Army Corps of Engineers issued a joint public notice with the Department of Natural Resources, Water Pollution Control Program in order to collect comments in deciding whether to gran[t] Section 401 Water Quality Certification. This public notice was issued on March 23, 2007, which is after the effective date of this report, but is tangible evidence that [the] permitting process was well along as of the effective date.

(PEx. 47, *Appraisal*, at p. 16; RApx: A73.)

There was no reason to believe, as of 2007, the proposed development could or would not happen absent the title defect. The development was and is a natural fit for the area. A large majority of the land is in the flood plain. (TR. 378:1-6). The flood plain splits the land into three non-contiguous sections. (TR. 380:14-18, 382:1-13) This fact, and the location of the land in proximity to the greater Kansas City metropolitan area, makes it unsuitable for a traditional subdivision development. (TR. 381:16-382:13; PEx. 47, *Appraisal*, at p. 18, *Use*, at p. 25; RApx: A73.) The proposed development, however, would “get utility out of this flood land because it turns that flood land into a lake feature, which causes the real estate immediately around the perimeter to be more valuable....” (TR. 381:5-10.)

Stewart Title makes much of the fact that Spalding testified at trial that going forward, he intends to utilize a different development plan than the plan considered by Reardon. *Appellant’s Brief*, at p. 30. (TR. 329:18-331:19.) This is a red herring. Spalding’s intentions in 2012 have no bearing on what was physically possible, legally permissible, financially feasible and maximally productive in 2007. Spalding’s damages do not depend on what he intends to do with the property now, but rather, on what he could have done in 2007 absent the title defect.

Stewart Title also complains that SLC did not own certain other parcels of land that were to be flooded as part of the proposed development. *Appellant’s*

Brief, at p. 30. This is another red herring. The managing member of SLC, SWP, had acquired options on these parcels. (TR. 339:9-340:9, 558:15-22, 710:8-14.) SWP could have exercised its options and made these parcels available if the development had gone forward. (TR. 340:17-25). Spalding understood these to be costs SWP would separately absorb as part of the project. (TR. 340:4-6.) The fact that SLC did not own the parcels outright did not make the project unfeasible, nor did it impact Reardon's appraisal. (TR. 559:6-11.)

Reardon appraised the 418.91 acres that were acquired by SLC in February 2003. (PEX. 47, *Appraisal*, at pp. 13-16 RApX: A73.) A legal description of the property is included with his report, and this legal description matches the legal description that accompanies the title insurance policy issued by Stewart Title. (PEX. 47, *Appraisal*, at pp. 14-15; RApX: A73; PEX. 5.) Reardon's appraisal considered uninsured property as part of his appraisal only to the extent it was utilized in the proposed development, and only to determine whether the proposed development represented the highest and best use of the insured property. The end goal was to estimate the fair market value of the 418.91 acres that SLC insured with Stewart Title, and that is exactly what Reardon did. (PEX. 47, *Appraisal*, at p. 8, *Damages*, at p. 39; RApX: A73.)

Moreover, unlike the Estes' one-acre tract of land, which is in the middle of the proposed lake, these other parcels are on the fringe of the development. Moving the proposed dam would have eliminated the need for these parcels. (TR. 329:1-13, 722:14-15.) Indeed, this is what Spalding intends to do at this point,

since he is no longer in partnership with SWP. (TR. 329:1-13.) Reardon testified on cross-examination that moving the location of the proposed dam could change his appraisal. (TR. 414:1-10.) Notably, though, Reardon did not testify that moving the location of the dam would change his appraisal, nor that it would alter his opinion that the proposed development represented the highest and best use of the property. *See id.*

Stewart Title criticizes Reardon for assuming the US Army Corps of Engineers would issue a permit for the proposed development. *Appellant Brief*, at p. 30. This criticism is misplaced. There was ample factual support for the assumption that a permit would issue. As Reardon testified:

I went through all the information that had been sent back and forth between the developing entity and the Army Corps of Engineers, looked at the permits that they had talked about and the scope of work, and I understood there was a public notice that had been put out. And it looked like all parties involved assumed that this permit would be granted as of that date.

(TR. 339:2-9.) Reardon also addresses this issue in his report, stating that the public notice “is tangible evidence that [the] permitting process was well along as of the effective date.” (PEx. 47, *Appraisal*, at p. 16; RApx: A73.) Further, it is uncontroverted that a permit ultimately *did* issue for this development. (TR. 333:2-6.)

It bears reiterating that Stewart called two appraisal experts—Bernie Shaner

and John Moser—to challenge Reardon’s opinions at trial. Neither one of them attacked Reardon’s methodology *per se*.⁹ Instead, Shaner challenged certain of the figures Reardon used in his calculation (Shaner opined, among other things, that Reardon should have included higher development costs), while Moser disagreed with Reardon about the highest and best use of the property (Moser opined that the property should be held as vacant land for future development). (TR. 520:22-527:22, 758:23-759:3.) The trial court properly allowed the jury to decide whether to accept Reardon’s opinion or the opinions offered by Stewart Title’s experts. The fact that the jury sided with Reardon does not give Stewart Title any basis for appellate relief. There was ample support for the proposition that the development could and would go forward absent the title defect. Stewart Title’s arguments to the contrary go to the weight and not the admissibility of Reardon’s opinion. *See McFarlane*, 207 S.W.3d at 62.

4. Even if Consideration of the Proposed Lake Development was Improper, There Still is a Basis for the Jury’s Damage Award

Although Brian Reardon calculated Spalding’s losses at \$4,100,000 based on the difference in value between the property as insured and the value of the property subject to the defect, Spalding only was awarded \$1,352,150 at trial. (PEx. 47, at p. 1; RApx: A73; LF. 254.) This is less than the amount of his

⁹ Indeed, Shaner, like Reardon, used a discounted cash flow analysis to evaluate the feasibility of the proposed development. (TR. 574:8-19.)

insurance coverage. (PEx. 5, Schedule A.) It was not necessary for the jury to accept the proposed lake development as the highest and best use of the property to award Spalding this amount.

Stewart Title's appraiser, John Moser, valued the property as insured at \$4,100,000. (DEx. 348, *Executive Summary*; RApx: A25.) Moser predicated this valuation on his finding that the highest and best use of the property was to hold it for future residential and commercial development as demand warrants. *Id.* Moser concluded that even with the defect, this still represented the highest and best use of the property. *Id.* As a result, Moser's valuation did not change much when he accounted for the defect. *Id.* Moser valued the land subject to the defect at \$4,087,800, leaving Spalding with damages of approximately \$12,000. *Id.*

The jury could have accepted Moser's view that the highest and best use of the property as insured was to hold it for future residential and commercial development, but found that the defect made future development impracticable.¹⁰ In that instance, Spalding's damages would be \$2,500,000 (Moser's \$4,100,000

¹⁰ As Reardon explained, the developable land (i.e., the land outside the flood plain) was not contiguous. A lake feature would unite otherwise non-contiguous parcels, allowing the developer to achieve certain economies of scale, and creating demand for developed lots. In the absence of a lake feature, there was no demand for developed lots in that area, and hence no incentive for a developer to undertake the effort and expense of creating them. (TR. 380:19-382:4.)

valuation minus Reardon's \$1,600,000 valuation of the land in its agricultural state). (DEx. 348, *Executive Summary*; RApx: A25; PEx., at p. 1.) This is well in excess of the jury's actual award, and does not rely upon consideration of the proposed lake development.

Stated another way, putting aside the proposed lake development, the jury had before it evidence of the value of the property without the defect in the form of Moser's testimony; Moser testified the property was worth \$4,100,000 if held for future development. Likewise, the jury had before it evidence of the value of the property with the defect in the form of Reardon's testimony; Reardon testified the property was worth \$1,600,000 if used for agriculture purposes. The jury could have reached its damage award simply by subtracting the second number from the first and applying a discount. The proposed lake development is irrelevant to this calculation.

C. The Trial Court Properly Instructed the Jury On Damages

[Responding to Point Relied on No. 3]

Stewart Title contends the trial court erred by giving Spalding's proposed Instruction No. 7. This contention is without merit.

1. Standard of Review

The propriety of jury instructions is a matter of law subject to *de novo* review. *Closson v. Midwest Div. IRHC, LLC*, 257 S.W.3d 619, 625 (Mo. App. 2008). Instructions "shall be given or refused by the court according to the law and the evidence in the case." Rule 70.02(a). The trial court must instruct in

compliance with the Missouri Approved Instructions (MAI) if one exists that is applicable to a particular claim. *Closson*, 257 S.W.3d at 625. The instructions “must be supported by substantial evidence, and [the court of appeals reviews] the evidence and inferences in a light most favorable to the submission of the instruction, disregarding all contrary evidence and inferences.” *Id.* (quoting *Wright v. Barr*, 62 S.W.3d 509, 526 (Mo. App. 2001)) (internal quotations omitted). A jury verdict will not be reversed for instructional error, including the refusal to give an instruction, unless the error was prejudicial. *Stancombe v. Davern*, 298 S.W.3d 1, 7 (Mo. App. 2009).

2. Instruction No. 7. Fairly Instructed the Jury on the Parties’ Agreed Measure of Damages.

Stewart Title challenges the propriety of Instruction No. 7, which provides as follows:

If you find in favor of Plaintiff, you must award Plaintiff such sum as you believe was the difference between the fair market value of the entire insured property at the time the title defect was discovered and the fair market value of the insured property subject to the title defect. In determining the fair market value of the property, you may consider evidence of the value of the property including the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You

may give such evidence the weight and credibility you believe are appropriate under the circumstances. If you find that Plaintiff failed to mitigate damages as submitted in Instruction No. 8, in determining Plaintiff's total damages you must not include those damages that would not have occurred without such failure.

The phrase "fair market value" as used in this instruction means the price that the insured property in question would bring when offered for sale by one willing but not obliged to sell it and when bought by one willing or desirous to purchase it but who is not compelled to do so.

(LF. 245.)

Instruction No. 7 is a modified version of MAI 9.02, the standard damages instruction for eminent domain cases. According to Stewart Title, the trial court erred by giving Instruction No. 7 because it allowed the jury to award Spalding damages based upon the highest and best use of the property rather than how the property existed at the time of the breach. *Appellant's Brief*, at pp. 35-36. Stewart Title argues the language of its policy prohibits consideration of the property's highest and best use. *Id.*

Stewart Title's argument fails for several reasons. First, Stewart Title has interpreted its policy language to **require** consideration of the highest and best use of the property. Each of the appraisers who valued the property on Stewart Title's behalf applied the highest and best use test. (TR. 604:10-12; 758:9-15, 759:10-22.)

One of these appraisers, John Moser, testified on direct examination:

And when I inspected the property, I inspected it from the adjacent roadways and aerial photography. Then after you do that, you need to estimate what the highest and best use is. And that would be legally permissible, physically possible, financially feasible and maximally productive.

(TR. 758:9-15.) Having sponsored this testimony at trial, it is disingenuous for Stewart Title to suggest its policy prohibits this approach.

Second, in *Fohn v. Title Ins. Co. of St. Louis*, 529 S.W.2d 1, 3-5 (1975), this Court held it was appropriate to borrow from the law of eminent domain in measuring an insured's damages under a policy of title insurance. In the eminent domain context, a landowner is entitled to the fair market value of his property at its highest and best use. *City of St. Louis v. Union Quarry & Const. Co.*, 394 S.W.2d 300, 305 (Mo. 1965); *Land Clearance for Redevelopment Authority of St. Louis v. Opal Henderson and Opal T. Henderson Revocable Trust*, 358 S.W.3d 145, 150 (Mo. App. 2012); *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555, 559-60 (Mo. App. 1983). This means "[t]he various possible uses for the land may be considered in determining fair market value, and if a special adaptation 'adds to its value, the owner is entitled to the benefit of it.'" *Henderson*, 358 S.W.3d at 150 (*citations omitted*). Instruction No. 7 is consistent with this statement of the law.

Finally, in *City of St. Louis v. Vasquez*, 341 S.W.2d 839, 843 (Mo. 1961),

this Court specifically approved the use of a jury instruction that defined the fair market value of property with reference to its highest and best use. Several other cases are in accord. *See, e.g., State ex rel. Board of Regents for Central Missouri State College v. Moriarty*, 361 S.W.2d 133, 135 (Mo. App. 1962) (holding it was not error to instruct the jury to determine the fair market value of property with reference to the property's highest and best use); *Missouri Edison Co v. Gamm*, 379 S.W.2d 166, 170 (Mo. App. 1964)(same). Instruction No. 7 is consistent with these cases.

The Court should not be misled by Stewart Title's recitation of purported contrary holdings by courts in other jurisdictions. In *Stewart Title Guar. Co. v. Shelby Real Estate Holdings, LLC*, 83 So. 3d 469, 471 (Ala. 2011), the Alabama Supreme Court ***declined to answer the certified question*** of whether an insured was entitled to recover damages under a title insurance policy for the highest and best use of the property even if the property was not being used in that manner at the time of the loss. *Id.* at 472. While the *Shelby* court did postulate that the language of the policy could be read to restrict the insured's damages, it noted the parties had not addressed this issue in their briefs, and left it to the trial court to examine the issue. *Id.*

Likewise, in *Chicago Title Insurance Co. v. Huntington National Bank*, 719 N.E.2d 955, 960 (Ohio 1999), the Ohio Supreme Court held the insured was not entitled to recover damages based upon the fair market value of the property because use of that measure was unsupported by policy language. In the instant

action, however, Stewart Title has *admitted* its policy requires consideration of the fair market value of the property. (LF. 276; TR. 38:10-18,79:21-80-8.) *Appellant's Brief*, at p. 36. As a result, the *Huntington* court's analysis does not apply here.

In addition to reciting cases from other jurisdictions, Stewart Title attempts to rely on "commentators" for support of its argument that Instruction No. 7 was flawed. *Appellant's Brief*, at p. 35. Stewart Title quotes one treatise for the proposition that "the 'actual loss monetary loss or damage language in the 1992 ALTA policy (which the Stewart Policy here used) 'is most likely intended to restrict the amount of claims ... by making clearer [than earlier ALTA policies] that insurers did not typically intend ... to pay economic and consequential damages.'" *Appellant's Brief*, at p. 35 (citing Barlow, Burke, *Law of Title Insurance* § 7.01, at p. 3¹¹ (3d ed. Supp. 2014)). Yet, the very next sentence of the quoted passage explains: "The insured's response to this language--as such a limitation--is typically that, once the insurer is in breach of the policy by somehow wrongfully refusing to pay the claim, consequential damages are typically available, so long as the loss can be established with reasonably certainty and is not speculative as a matter of law." *Law of Title Insurance* § 7.01, at p. 3.

Moreover, a different commentator has observed that "[while] the risk of development plans succeeding or failing belongs with the investor in real estate[.]

¹¹ Page references are to the version of this document available on Westlaw.

... the risk of loss of the insured's investment due to a title defect belongs with the title insurer." Palomar, Joyce D., *Title Insurance Law* § 10:17 (2014-2015 ed.)(emphasis added). This commentator went on to explain:

[W]here the parties expect at the time of contracting for title insurance that the insured is acquiring the land for development, and the policy insures a fee simple absolute that legally may be used for any purpose, a title defect that aborts the insured's development plans may fairly be said to have caused the loss of the insured's investment. In that case, valuing the land for the use the insured would have made of it but for the title defect seems appropriate.

Id.; see also *Scott v. Chicago Title Ins. Co.*, No. 08CV3899, 2010 WL 3823452, at * (Colo. Dist. Ct. May 3, 2010)("Where, as here, the property at issue was in the process of being developed at the time the defect was discovered, it is proper to consider the value of the property at its highest and best use and take into account the development value of the property").

In sum, as much as Stewart Title would like this Court to hold the language of the policy at issue precludes consideration of the property's highest and best use, the fact remains that Stewart Title's own appraiser considered the highest and best use of the property in attempting to settle this claim. (TR. 602:24-604:12.) This speaks volumes about how the language of the policy can and should be construed. Instruction No 7 accords both with Stewart Title's pre-litigation interpretation of its policy and longstanding Missouri precedent regarding property

valuation. The trial court did not err in giving this instruction.

CONCLUSION

There is a hypocritical aspect to Stewart Title's arguments on appeal that cannot and should not be ignored. In asserting the statute of limitations has expired on Spalding's cause of action for breach of contract, Stewart Title argues the statute began running the moment Spalding learned of a possible problem with the insured property. Yet, Stewart Title argued in the *Davis* case that no cause of action accrued until it had the opportunity to pursue a quiet title action (an argument with which the Missouri Court of Appeals generally agreed). Likewise, in asserting Spalding failed to present a submissible case on damages, Stewart Title argues it was inappropriate to value the property according to its highest and best use. Yet, in handling this claim pre-litigation, Stewart Title's own appraiser valued the property according to its highest and best use (as did Stewart Title's appraisal expert at trial).

There is a disconnect between Stewart Title's words and actions that suggests this defendant is willing to say whatever best suits its interests at the moment, in utter disregard for whatever it said or did in the past. As it considers this appeal, the Court should ask this question:

- If Spalding sued Stewart Title for breach of contract immediately after receiving Estes' phone call, would Stewart Title concede a breach had occurred and Spalding had suffered actionable injury?

The answer is obvious. The Missouri Court of Appeals got it right when it

concluded:

Once Stewart Title determined that SLC's title was defective, it acted consistent with its contractual obligations. It made an election to pay SLC for its "actual monetary loss or damage." This was Stewart Title's right under the policy. It was not until July 3, 2007, when Stewart Title sent a letter to SLC's counsel indicating that it completed its appraisal of the property and included a check for \$10,000 to fully resolve the claim under the title insurance policy that Spalding's claim for breach of contract accrued. The claim for breach of contract did not accrue until Stewart Title allegedly failed or refused to adequately compensate SLC for "the actual monetary loss or damage" as required under the title insurance policy. Until that time, SLC had no reason to sue Stewart Title.

Spalding v. Stewart Title Guar. Co., No. WD76369, 2014 WL 4694716, at *4 (Mo. App. Sept. 23, 2014).

Likewise, the Court should ask:

- If Stewart Title were defending a favorable jury verdict based on the testimony of its appraisal expert, John Moser, would it concede Moser erred by valuing the property according to its highest and best use?

Again the answer is obvious. And again, the Missouri Court of Appeals got it right:

The jury was instructed that, if it found in favor of the Plaintiff, that it had to award “Plaintiff such sum as you believe was the difference between the fair market value of the entire insured property at the time the title defect was discovered and the fair market value of the insured property subject to the title defect.” That indeed was the measure of damages. The instruction merely informed the jury that, in determining the fair market value of the property, the jury could consider “evidence of the value of the property including the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices.” While such language may very well be surplusage and perhaps better left to argument, it is nonetheless an accurate statement of the law.

Id. at *10.

For these reasons and all the reasons set forth herein, the judgment entered by the trial court should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The above and foregoing brief includes the information required by Rule 55.03;
2. The above and foregoing brief complies with the limitations contained in Rule 84.06(b) and Local Rule XLI; and
3. According to the word count function of counsel's word processing software (Microsoft © Word 2011) and excluding those portions of the brief as permitted by Rule 84.06(b) and Local Rule XLI(D), the brief contains 11,838 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2015, the above and foregoing Substitute Brief of Respondent was electronically filed and a copy was served via this Court's CM / ECF system on the following counsel of record:

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