

**SC94580**

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**IN THE SUPREME COURT OF MISSOURI**

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**RANDY SPALDING,**

**Respondent,**

**vs.**

**STEWART TITLE GUARANTY COMPANY,**

**Appellant.**

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

**Case No. 1116-CV15009**

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**SUBSTITUTE BRIEF OF APPELLANT**

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## JURISDICTIONAL STATEMENT

- On December 6, 2012, following a four-day jury trial in this action for breach of a policy of title insurance and for vexatious refusal to pay under RSMo § 375.420, the Circuit Court entered judgment for Plaintiff Randy Spalding (“Spalding”) for \$1,352,150, consisting of \$1,100,000 on the breach of the title insurance policy claim, a penalty amount of \$171,150, and attorney’s fees of \$81,000. (LF:252-55).<sup>1</sup>
- On January 4, 2013, Defendant Stewart Title Guaranty Company (“Stewart”) filed post-judgment motions. (LF:256-386).
- On April 2, 2013, the trial court granted Stewart’s motion to amend the judgment and entered an amended judgment reducing the penalty to \$110,150, thus reducing the total amount of the judgment to \$1,291,150. (LF:412, 413-416; DApx:A1).
- On April 16, 2013, Stewart renewed its motions for judgment n.o.v. and new trial. (LF:417-25).
- On April 18, 2013, the Circuit Court denied those motions. (LF:426).
- On April 26, 2013, Stewart filed its notice of appeal. (LF:7, 427-28).
- On September 23, 2014, the Court of Appeals for the Western District filed its opinion on Stewart’s appeal. (DApx:A39).

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<sup>1</sup> The legal file (“LF”) and trial transcript (“T”) will be cited by page number (*e.g.*, LF:250, T:284), as will items contained in the appendix (“DApx”) (*e.g.*, DApx:A10). Spalding’s trial exhibits will be cited “PEX” and Stewart’s “DEX” (*e.g.*, PEX:5, DEX:324).

- On October 7, 2014, Stewart filed an Application for Transfer in the Court of Appeals. The Court of Appeals denied that Application on October 28, 2014.
- On November 10, 2014, Stewart filed an Application for Transfer in this Court, and on December 23, 2014, this Court sustained that Application.

This Court has jurisdiction over this matter under Article V, section 10 of the Missouri Constitution, as this Court has ordered that this case be transferred to this Court after the opinion of the Court of Appeals.

### **STATEMENT OF FACTS**

In early 2003, Plaintiff Randy Spalding (“Spalding”) signed a contract to buy 418.91 acres of agricultural land in the city of Lake Winnebago for approximately \$1,500,000—about \$3,600 per acre. (T:196, 199-200). Spalding formed Spalding Land Company (“SLC”) to formally purchase and take title to the land. (T:200-01). When SLC purchased the land in February of 2003, Defendant Stewart Title Guaranty Company (“Stewart”) issued an owner’s Policy of Title Insurance to SLC with a maximum “Amount of Insurance” of \$1,700,000. (PEx:5, pp.1 & 5; DApX:A10 & A14).

#### **A. The Policy of Title Insurance.**

Subject to its Conditions, the Policy insured SLC “against loss or damage . . . sustained or incurred” by, among other things, “[t]itle to [SLC’s land] being vested other than as stated” in the Policy or “[u]nmarketability of the title.” (PEX:5, p.1; DApX:A10).

Under its Policy, Stewart has different ways to respond if a covered matter arises:

- First, under Condition 4, Stewart can prosecute or defend an action to establish the insured’s title. (*Id.* at p.2). Specifically, under the terms of the Policy,

Stewart has “the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured . . . .” (*Id.*) (Condition 4(b)). If a covered matter arises through a lawsuit initiated by a third party who asserts a claim against the insured’s title, Condition 4 provides that Stewart would, subject to other Conditions, defend such an action. Specifically, the Policy explains that, upon written request, but subject to the options set out in Condition 6, Stewart would “provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured . . . .” (Condition 4(a)). As explained below, this latter situation did not occur here.

- Second, under Condition 6, Stewart can pay a third party to settle the claim or pay the insured, up to the full “Amount of Insurance” provided by the Policy. (*Id.*) (Condition 6(a)-(b)). In the words of the Policy, Condition 6 gives Stewart the “additional options” to either “pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy . . . .” (Condition 6(b)(ii)), or “pay or otherwise settle with the insured claimant the loss or damage provided for under this policy . . . .” (Condition 6(b)(i)), or—if the threshold is reached—“pay or tender the amount of insurance under this policy. . . .” (Condition 6(a)).

When Stewart makes an election under Condition 6 to pay an insured to resolve a claim, Condition 7 sets out the contractually-agreed-upon measure of the loss or damage caused by a title issue. When Condition 7 applies, the Policy explains that it operates as “a contract of indemnity against actual monetary loss or damage sustained or incurred” because of a covered title issue, calculated as the lesser of the “Amount of Insurance” or

“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.” (*Id.* at p.3) (Condition 7).<sup>2</sup>

In sum, when an insured presents Stewart with a claim raising a covered matter, Stewart must address the loss or damage caused by the title issue, but may do so by either prosecuting (or defending) an action to clear (or defend) title to the insured land, or paying or otherwise settling with either an insured or a third party so as to resolve the claim, or paying the full amount of insurance to the insured.

**B. The Discovery of the Title Defect in 2006 and the Filing of This Suit in 2011.**

The land SLC purchased is agricultural land near the Lake Winnebago dam. For approximately two years after SLC’s purchase of the 418.91 acres, Spalding spoke with various people about developing it. (T:198-202). In 2005, SLC began working with South Winnebago Partners (“SWP”) on plans to relocate the dam in order to change the lake’s shore-line and then develop a commercial and residential real estate project on the shores of the newly-configured lake. (T:202-04, 208-10; PEx:13). SWP ultimately became a member and the manager of SLC. (T:203-05, 692-94; PEx:16; DEx:324).

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<sup>2</sup> As the “ALTA Owner’s Policy – 10-17-92” footer on the Policy reveals, Stewart adopted a 1992 form owner’s policy promulgated by the American Land Title Association. (PEx:5, p.1; DApx:A10). *See* American Land Title Association, *Title Insurance Overview* 12 (explaining the promulgation of form policies) (available at <http://www.alta.org/about/TitleInsuranceOverview.pdf>) (visited Jan. 21, 2015).

However, in January of 2006, Paul Estes called Spalding and said that he (Estes) owned a one-acre tract within what SLC thought was its land. (T:215). Spalding realized that Estes' claim could preclude SLC's development plans and by March of 2006 told SWP "we've got a problem." (T:215-17, 259-60, 351). Spalding contacted Coffelt Land Title, the Stewart issuing agent that had delivered the Policy. (*Id.*). By March 21, 2006, Coffelt Land Title acknowledged the claim and directed Spalding to Stewart. (T:218; PEx:7). SLC then made a claim on the Policy. (T:219, 261-62; PEx:15; DEx:501).

Between April and mid-June of 2006, Stewart investigated SLC's and Estes' competing claims to ownership of the acre. On June 16, 2006, Stewart informed SLC that it had determined that Estes owned the tract and that SLC did not. (T:669-72).

SLC initially wanted Stewart to purchase Estes' acre. In February of 2007, SLC told Stewart that Estes would sell his acre for \$387,000 and demanded that Stewart fund a purchase for that amount to settle the claim. (PEx:18). Stewart did not do so. (PEx:19). About that time, SLC offered Estes \$50,000 for his acre, but Estes declined. (T:285-86; DEx:364). In their discussions, Spalding reminded Estes that Estes had only paid \$5,000 for the acre when he purchased it. (*Id.*).

In March of 2007, Stewart explained to SLC that, as applied to this case, the measure of damage set out in Condition 7 "would be the difference in value between the property with the 1 acre tract owned by Estes and the value of the property without that 1 acre tract," and Stewart thus commissioned an appraisal. (PEx:21). On July 3, 2007, Stewart informed SLC that the appraisal calculated the diminution in value to be \$10,000, and Stewart tendered a check for that amount to resolve the claim. (PEx:23).

In May of 2008, SLC signed an option to purchase Estes' acre for \$335,000 and again demanded that Stewart fund that amount. (PEx:28). Stewart again declined, noting that it had elected to pay the loss as measured under Condition 7 rather than purchase the Estes acre, but Stewart offered to pay SLC \$15,000 to resolve the claim. (PEx:29).

Spalding then waited until June 9, 2011 to file this suit, (T:231-33; PEx:40; LF:1), perhaps because of separate issues with SWP. Indeed, in late 2010 or early 2011, Spalding sued SWP and SLC. (T:319-20). As a part of the settlement of that suit, SLC conveyed the 418.91-acre tract back to Spalding through a quitclaim deed dated August 31, 2011. (T:320-22; DEx:320). Spalding did not accept an assignment of SLC's claim under the Policy until October of 2012. (T:231-34; PEx:40).

**C. Spalding's Damage Expert's Testimony Regarding Lost Profits.**

At trial, the Circuit Court overruled Stewart's objections and allowed Spalding's damages expert—Brian Reardon—to testify to his damages calculation. Reardon stated that, although no construction on the property had begun and it remained undeveloped agricultural land, the value of the 418.91 acres insured by the Policy as of February 15, 2007 was \$5,700,000. (PEx:47 at Appraisal, p.1). (As noted above, SLC had purchased the property in February of 2003 for \$1,500,000. (T:196, 199-200).) Reardon reached his \$5.7 million figure by calculating the land's worth under its prospective future highest and best use *as if it had been developed into a lakefront real estate project*. He did so by taking the present value of his estimate of the profit that could be derived from developing the land and selling commercial and residential lakefront lots for the next 14 years. (PEx:47 at Appraisal, pp.1 & 26-35) (DApx:A20 & A25-24). He then valued the

land subject to the defect caused by Estes' ownership of his one acre—*i.e.*, the 417.91 remaining acres—and arrived at a figure of \$1,600,000. But he reached that sum by calculating the land's worth under its highest and best use *as agricultural land*. (*Id.* at pp.36 & 38) (DApx:A35 & A37). Reardon said the damages were the difference between those two values—\$4,100,000. (*Id.* at p.39) (DApx:A38).

Other deficiencies marked Reardon's testimony. He based his calculation of damages as of February 2007 on a development plan that the parties have called the "2007 Plan." (T:451). But that Plan included land that was both not insured by the Policy and not owned by Spalding, SLC, or SWP. (T:328-31; 339-40; 405-10; PEx:47 at p.21; DEx:352; DEx:361). Moreover, Spalding explained at trial that, as he was no longer partners with SWP, he did not intend to pursue the 2007 Plan, but instead to proceed under a smaller 2006 development plan, which Reardon had never seen. (T:208-09, 327-31, 449-50; PEx:11; PEx:13; DEx:361). Reardon's testimony about the 2007 Plan was also based on other assumptions unsupported by facts. For example, he assumed that, as of February 2007, any required governmental permits for construction had been received and construction could begin. (T:391-95; PEx:34, p.34). No such permits existed at the time. Indeed, SWP had only applied for an Army Corps of Engineers permit in January 2007, and Spalding admitted that it "takes a long period of time to get a permit." (T:332-33; DEx:330). The 2007 Plan also required the approval of the City of Lake Winnebago and the consent of a local homeowners association ("HOA") because some of its land would have to be acquired and flooded. (T:421). But as of February 2007, the City and the HOA had not approved the 2007 Plan either. (T:334-335).

**D. The Jury Instructions and the Jury’s Verdict.**

As noted, Condition 7 of the Policy explained that Stewart insured “against *actual monetary loss or damage* sustained or incurred” by covered matters and, as relevant here, defined the calculation of any such damages to be the difference between the value of the insured estate as insured and the value of that estate with the defect. (PEx:5, p.3; DApx:A12) (emphasis added). However, also over Stewart’s objections, the trial court instructed the jury that it “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.*” (LF:245; DApx:A9) (emphasis added).

The jury returned a verdict awarding Spalding \$1,100,000 on his claim for breach of the Policy, with additional amounts for a penalty and attorney’s fees. (T:909-910).

**POINTS RELIED ON**

1. The trial court erred in denying Stewart’s motions for directed verdict and judgment n.o.v. on Spalding’s claim for breach of the Policy, because that claim is time-barred, in that (a) the five-year limitations period of RSMo § 516.120 applies—not the ten-year limitations period of RSMo § 516.110—since the claim is for breach of contract and not for breach of a promise to pay money, and (b) the claim accrued when the insured learned that there was an issue with title to the land it thought it owned outright, which was more than five years before this suit was filed.

*Sam Kraus Co. v. State Hwy. Comm.*, 416 S.W.2d 639 (Mo. 1967).

*Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579 (Mo. banc 2013).

*Hopmeier v. First American Title Inc. Co.*, 856 S.W.2d 387 (Mo. App. E.D. 1993).

RSMo § 516.100.

RSMo § 515.120.

2. The trial court erred in denying Stewart's motions for directed verdict and JNOV on Spalding's claim on the Policy, because Spalding failed to present a submissible case on damages, in that (a) Spalding failed to present a proper measure of damages since the Policy insured against "actual monetary loss or damage" caused by a title defect and Spalding only presented evidence of future lost profits, and (b) Spalding failed to prove damages with reasonable certainty, since his expert based his opinion on facts contrary to Spalding's evidence on (i) the land insured by the Policy and (ii) the scope of Spalding's plan and his ability to begin construction.

*Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224 (Mo. banc 1994).

*Essex Contr., Inc. v. Jefferson County*, 277 S.W.3d 647 (Mo. banc 2009).

*Myers v. Bi-State Development Agency*, 567 S.W.2d 638 (Mo. banc 1978).

3. The trial court erred in giving the jury Instruction No. 7 and in denying Stewart's motion for new trial based on that instruction, because it improperly told the jury to measure damages by considering uses of the insured property to which it may be "applied or adapted," in that (a) such a consideration, which was derived from recent changes to eminent domain law, does not apply in the context of a suit on a policy of title insurance that defines the measure of damages and (b) the inclusion of that Instruction in the charge effectively rewrote the parties' contractually-agreed-upon damages measure.

*Purcell Tire & Rub.Co. v. Exec. Beechcraft, Inc.*, 59 S.W.3d 505 (Mo. banc 2001).

*Stewart Title Gty. Co. v. Shelby Realty Holdings*, 83 So. 3d 469 (Ala. 2011).

4. The trial court erred in admitting the opinions of Spalding’s expert witness and denying Stewart’s motion for new trial, because those opinions were not supported by facts in evidence, in that the expert purported to establish a value of the insured land based on assumptions contrary to facts in evidence.

*McGuire v. Seltsam*, 138 S.W.3d 718 (Mo. banc 2004).

5. If this Court reverses or vacates the judgment on Spalding’s breach of the Policy claim, then the trial court erred in failing to grant Stewart’s motions for directed verdict and judgment n.o.v. on Spalding’s vexatious refusal claim, because such a claim is derivative of a claim for breach of an insurance policy and cannot stand in the absence of a judgment against an insurer on a claim for breach of a policy.

*Fischer v. First American Title Ins. Co.*, 388 S.W.3d 181 (Mo. App. W.D. 2012).

*Calvert v. Safeco Ins. Co.*, 660 S.W.2d 265 (Mo. App. W.D. 1983)

## ARGUMENT

### A. Spalding’s Claim for Breach of the Title Insurance Policy is Time-Barred.

**Point Relied On:** *The trial court erred in denying Stewart’s motions for directed verdict and judgment n.o.v. on Spalding’s claim for breach of the Policy, because that claim is time-barred, in that (a) the five-year limitations period of RSMo § 516.120 applies—not the ten-year limitations period of RSMo § 516.110—since the claim is for breach of contract and not for breach of a promise to pay money, and (b) the claim accrued when the insured learned that there was an issue with title to the land it thought it owned outright, which was more than five years before this suit was filed.*

In the trial court, Stewart showed that (a) the five-year limitations period of RSMo § 516.120(1) applies to Spalding's claim for breach of the Policy and (b) that claim is time-barred because it accrued in January of 2006, when Estes asserted his claim or, at the latest, in March of 2006, when Spalding admitted there was a "problem" and contacted Stewart. Both dates were more than five years before June 9, 2011, when this suit was filed. However, the trial court denied Stewart's motions for directed verdict and JNOV based on limitations. (LF:96, 169, 256, 417, 426; T:455-56, 802-06, 818).

**1. Standard of Review.**

A party that asserts a claim is time-barred bears the burden of proving that the action was not timely filed. *Ryan v. Spiegelhalter*, 64 S.W.3d 302, 310 (Mo. banc 2002). In such a case, this Court "must determine whether the moving party proved the affirmative defense as a matter of law." *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 95 (Mo. banc 2010). A trial court errs in denying a directed verdict or JNOV if "there are no factual issues remaining for the jury to decide." *Id.*

**2. The Five-Year Limitations Period of § 516.120(1) Applies.**

The Policy is a contract, and RSMo § 516.120(1) provides that actions on contracts must be brought within five years. (DAPx:A7). Spalding has argued that the ten-year limitations period of § 516.110(1) applies. However, that limitations period is an "exception" which only applies to "actions upon a written contract . . . for the payment of money or property," *Rolwing v. Nestle Holdings, Inc.*, 437 S.W.3d 180, 182-83 & n.2 (Mo. banc 2014), and Spalding's claim for breach of the Policy is not such a claim.

a. The Ten-Year Limitations Period of § 516.110(1) Only Applies to Contracts With an Unconditional Promise to Pay Money or Property.

RSMo § 516.110(1) states that a ten-year limitations provision applies to an action “upon a writing, whether sealed or unsealed, for the payment of money or property.” (DAPx:A6). The text of that law shows that, for it to apply, a claim must be based on a writing that *itself contains an unconditional promise* to pay money or property. Thus, once a plaintiff shows that a written contract has been breached, if his or her right to collect money or property still must be proved by extrinsic evidence, then there is no unconditional promise to pay in the writing itself, and the ten-year limitations period does not apply. This is because, once a plaintiff has shown that there is a contract and it has been breached, a claim that *still* requires extrinsic evidence to show there is an obligation to pay money or property is, by definition, not an action on a “*writing. . . for the payment of money or property.*” RSMo § 516.110(1) (emphasis added).

This Court’s case law confirms the meaning of the statutory text. In *Sam Kraus Co. v. State Hwy. Comm.*, 416 S.W.2d 639 (Mo. 1967), this Court approved language from a prior case that held that the ten-year limitations period for written promises to pay did not apply to a breach of contract claim where the claim “was not based upon an *absolute and fixed liability* of defendant evidenced by a writing to pay money.” *Id.* at 641 (citation omitted; emphasis added). Similarly, in *Stilton v. Kansas City*, 446 S.W.2d 129 (Mo. 1969), this Court held that the ten-year limitations period of § 516.110(1) does not apply where “proof of extrinsic facts would be required to establish both *the existence of the obligation* as well as the amount of the loss.” *Id.* at 132 (emphasis added).

To be sure, this Court has explained that a written contract for the payment of money need not set out the precise amount a defendant owes, and a plaintiff may introduce extrinsic evidence to show that it has performed and that there has been a breach by the defendant—*i.e.*, a failure to pay the money that was promised in the writing. But the case law does not retreat from the qualification that, once there is evidence of a contract and a breach, any claim that requires extrinsic evidence to prove that there is an obligation to pay money or property is not a claim to which the ten-year limitations provision of § 516.110(1) applies.

Hence, in *Hughes Development Co. v. Omega Realty Co.*, 951 S.W.2d 615 (Mo. banc 1997), which addressed a written contract in which the defendant “agreed to pay [plaintiff] a percentage of the management fees,” *id.* at 617, this Court held that the ten-year limitations period of § 516.110(1) governed because that statute applied to a “breach of contract action in which a plaintiff seeks a judgment from the defendant for the payment of money the defendant agreed to pay in a written contract.” *Id.* The Court rejected the suggestion that, for the ten-year limitations period to apply, the contract itself had to also set out the precise “amount the defendant owes.” *Id.* Instead, “extrinsic evidence” could prove that fact. *Id.* But nothing in the Court’s opinion departed from the requirement that, once evidence shows that the plaintiff performed and there was a breach by the defendant, the writing itself must impose the unconditional promise to pay.

In *Community Title Co. v. Stewart Title Guaranty Co.*, 977 S.W.2d 501 (Mo. banc 1998), this Court confronted a similar contract, which required Stewart to pay Community Title 20% of the receipts Stewart received from agents that Community Title

was to recruit. *Id.* at 501. The Court explained that “once it is shown that the writing is for the payment of money and that the writing contains a promise to pay money, the exact amount to be paid or other detail of the obligation may be shown by extrinsic evidence—but not the promise itself.” *Id.* at 502. But again, nothing changed the requirement of § 516.110(1) that, once evidence shows there was a breach, the writing must contain the unconditional promise to pay—*i.e.*, what this Court called the “promise itself.” *Id.*

And in *Rolwing*, this Court confirmed § 516.110(1)’s requirement that claims subject to the ten-year limitations period must be “actions upon a written contract . . . for the payment of money or property.” *Rolwing*, 437 S.W.3d at 182. There, the Court held that the ten-year limitations period did not apply to an action that alleged a breach of contract, but only sought lost interest “not based on a promise in the contract.” *Id.* at 183.

The rule is plain: if a written contract sets out an unconditional promise to pay money or property, the ten-year limitations period of § 516.110(1) applies. If not, the generally-applicable five-year period of § 516.120(1) for breaches of contract applies. *See also Johnson v. State Mut. Life Assur. Co.*, 942 F.2d 1260, 1265 (8th Cir. 1991) (holding that § 516.110(1) does not apply if “any right to the payment of money must be proved by extrinsic evidence of breach of contract,” apart from a mere showing of “performance on the part of the plaintiff and a breach on the part of the defendant”).

b. The Policy Does Not Contain an Unconditional Promise to Pay.

Here, § 516.120(1) applies to Spalding’s claim for breach of Stewart’s Policy because the Policy does not contain an unconditional promise to pay money or property. The reason is simple: the Policy is not a contract for the payment of money. Instead, it

“insures . . . against loss or damage” incurred by reason of certain issues affecting the insured’s title, (PEx:5, at p.1; DApx:A10), and—importantly—allows Stewart, *at its own option*, to comply with that obligation by *either* (a) prosecuting (or defending) an action to clear (or defend) title to the insured land, (*id.* at Condition 4(a)-(b) (DApx:A11)), *or* (b) electing the “additional option” of paying or otherwise settling with either an insured or a third party in order to resolve a claim, or paying out the full amount of insurance. (*Id.* at Condition 6(a)-(b) (DApx:A11)).<sup>3</sup>

Once Paul Estes claimed he owned a one-acre tract within the land insured by the Policy and Stewart received notice of the claim, Stewart had to respond, but had various options to do so. Any claim for money damages for breach of the Policy would need to rely on extrinsic evidence to show which course of action Stewart followed. But the need to resort to such extrinsic evidence shows that the Policy was not a “writing . . . for the payment of money or property” and that the ten-year limitations period of § 516.110(a) does not apply. The five-year limitations period of § 516.120(1) for “actions upon contracts, obligations or liabilities” in general applies to a claim for breach of the Policy.

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<sup>3</sup> Because they contain such conditions and give insurers such options, title insurance policies are unlike other types of insurance policies, which may more closely resemble a “writing . . . for the payment of money.” Thus, even if claims on some types of insurance policies may be claims for the payment of money, it does not follow that claims on all insurance policies must be classified the same way. The terms of each contract must be examined to determine its proper classification for limitations purposes.

c. Spalding's Pleadings and Proof Recognized That His Claim Was For Breach of Contract and Not For Payment of Money.

Spalding's pleadings and proof also recognized that his claim was for breach of contract and not for payment of money. Spalding's pleadings asserted a claim for "Breach of Contract/Vexatious Refusal." (LF:30). He alleged Stewart "failed and refused to *cure* the title defect *or* to properly *compensate* Spalding Land Company for the diminished value of the Insured Property." (LF:29 ¶ 30) (emphasis added). He also proved with extrinsic evidence that Stewart did not sue to establish title or pay or trade with Estes for his acre. *See supra* at 5-6 (noting that Spalding showed at trial that Stewart did not buy Estes' acre for SLC, but offered the diminution in value calculated by an appraisal). Spalding also submitted a breach of contract claim using MAI 26.02. (LF:234; DApx:A8). Given that Spalding pleaded and proved a breach of contract claim and that Stewart raised its limitations defense throughout this case, Spalding should not be allowed to now say that his claim was for breach of a promise to pay. *Cf. Rolwing*, 437 S.W.3d at 183 (ten-year limitations period did not apply to action that alleged breach of contract, but sought money not based on a promise in the contract).

**3. Spalding's Claim Accrued When Estes Asserted He Owned His Acre.**

As noted above, after Estes called Spalding in January of 2006 to assert his claim, (T:215), Spalding realized that that claim could preclude SLC's development plans and, by March of 2006, told SWP "we've got a problem." (T:215-17, 259-60, 351). By March 21, 2006, Spalding contacted Stewart's issuing agent, Coffelt Land Title, which acknowledged the claim and directed Spalding to Stewart. (T:218; PEx:7). SLC then

made a claim on the Policy. (T:219, 261-62; PEx:15; DEx:501). However, Spalding waited more than five years—until June 9, 2011—to file this suit.

An analysis of Missouri law shows that, as a matter of law, Spalding’s claim accrued in January of 2006, when Estes claimed he owned an acre tract in the middle of the land insured by the Policy. At the very latest, Spalding’s claim accrued in March of 2006, when he admitted there was a “problem” and asserted a claim on the Policy. Because either date was more than five years before Spalding commenced this suit, his claim is time-barred.

Except in certain situations not at issue here, a claim accrues “when the damage resulting therefrom is sustained and is capable of ascertainment . . . .” RSMo § 516.100 (DApx:A5). This test is met 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 damages.” *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 599 (Mo. banc 2013). Damages are ascertainable when, under an “objective test,” “the fact of damage can be discovered or made known.” *Id.* Or, as this Court has also put it, limitations begins to run when there is “notice of a problem,” or “notice of a potentially actionable injury.” *Powel v. Chaminade Coll. Preparatory, Inc.*, 197 S.W.3d 576, 582-83 (Mo. banc 2006).

Here, the Policy insured SLC against loss or damage sustained or incurred because of, among other things, unmarketability of title. (PEx:5, p.1; DApx:A10). Estes’ ownership claim in January of 2006 raised a cloud on SLC’s title to the land, which impaired its marketability, as SLC could not have sold or mortgaged its land to a third

party.<sup>4</sup> 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. The fact that the precise character (costs of a suit or damages for loss) or the precise amount of either required further development did not stop Spalding's claim from accruing. Spalding had "notice of a problem," or "notice of a potentially actionable injury." *Powel*, 197 S.W.3d at 582-83; *see also id.* at 589 ("A cause of action accrues when a party *can first ascertain the fact of damage*, even though he may not know the extent of the damage.") (Wolff, C.J., concurring) (emphasis added). In fact, in March of 2006 he told SWP—in words mirroring the language of *Powel*—"we've got a problem." (T:216-17).

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<sup>4</sup> A marketable title is one which not only enables the holder to hold the land, but to hold it in peace, and if there is a wish to sell, "to be reasonably sure that no flaw or doubt will come up to disturb its marketable value." *McConnell v. Deal*, 296 Mo. 275, 246 S.W. 594, 598 (1922) (citation omitted). A title which is doubtful and suggests the need of litigation to perfect it—so that an informed and prudent person otherwise willing to pay full value will not undertake to purchase—is not marketable. *Patzman v. Howey*, 340 Mo. 11, 100 S.W.2d 851, 857 (1936). Estes' ownership claim in January of 2006 raised a cloud on SLC's title to the land and effectively prevented SLC from, among other things, selling the land at that time because SLC could not honestly have given a warranty deed (*i.e.*, a deed warranting clear title) to a buyer.

Consistent with this analysis, Missouri courts have held that a claim on a title insurance policy accrues when an insured learns that there is an issue with the title to land the insured thinks he owns outright. *Hopmeier v. First American Title Inc. Co.*, 856 S.W.2d 387, 389 (Mo. App. E.D. 1993). There, a First American Title representative contacted insureds under a title insurance policy on February 5, 1986 in order to discuss a discrepancy in the description of their land that an attorney had found. The discrepancy was between a letter report and the warranty deed that conveyed the land to the insureds. *Id.* at 388. The title insurance company representative had been “unable to confirm or disprove any error” because he could not locate the property’s abstract. *Id.* Later, on March 18, 1986, the representative suggested that the property description in the insureds’ deed be changed and that the deed be re-recorded. *Id.* The insureds ultimately sued the title insurer on March 6, 1991, more than five years after the title insurer representative contacted the insureds to investigate the property description, but less than five years after the representative suggested obtaining a corrected deed. The court held that the claim was time-barred under the five year statute of limitations.

The *Hopmeier* court explained that the insureds’ claim accrued when they were contacted by the title insurer’s representative concerning an investigation of the property description. *Id.* at 389. At that point, the insureds knew that there was an issue with the title to “land they thought they owned outright.” *Id.* The court rejected the insureds’ argument that their claim did not accrue until the title insurer admitted that the insureds’ deed needed correction. *Id.* (“The fact that [the title insurer] did not admit the error until March 18, 1986, is irrelevant.”). The court also rejected the insureds’ assertion that their

claim did not accrue when they first learned of the unexplained discrepancy, because the necessary result was that their claim would not accrue until the insurer's efforts to settle the matter failed. *Id.* (noting that, under the insureds' position, "no suit would ever accrue until all possibility of settlement expired."). As the court succinctly put it, that "is simply not the way the system works." *Id.* at 389-90.

Just as the Hopmeiers' claim on their policy accrued when they learned there was a discrepancy between a letter report and the warranty deed that conveyed their land, Spalding's claim under the Stewart Policy accrued in January of 2006, when Estes called Spalding and asserted he owned a one-acre tract within the insured land, or at the latest, when Spalding admitted there was a "problem" and first attempted to assert a claim on the Policy. By then, Spalding admitted he had "notice of a problem," *Powel*, 197 S.W.3d at 582-83, and he thus had "notice of a potentially actionable injury." *Id.*; *see also Hopmeier*, 856 S.W.2d at 389 ("[T]he phrase 'capable of ascertainment' refers to the fact of damage, and does not mandate knowledge of the precise amount.").

For two separate reasons, Spalding cannot distinguish *Hopmeier* (in a way that the Court of Appeals repeated) by claiming that it involved a title insurance policy that "guaranteed" title. *See* Ct. App. Slip Op. at 9 n.3 (DAPx:A47).

First, even if the policy in the *Hopmeier* case had "guaranteed" title, the accrual analysis would be the same in this case and that one. Once Spalding learned of Estes' assertion, a claim under the Policy accrued because Spalding could ascertain that there was some damage due to a title issue. Either he (or Stewart) faced the prospect of incurring costs (*e.g.*, the expense of a suit to clear title, if that was feasible) or damages

covered by the Policy. The fact that the exact dollar figure for either option was not known is of no consequence. The accrual analysis for a title insurance policy that formally “guarantees” title would be the same. This is because, even if there is a “guaranty” of title, the key contractual duty of the insurer to *respond* by attempting to cure the issue or paying for the loss is the same. Whether a title policy guarantees good title is thus irrelevant to the accrual analysis.

Second, there is no suggestion that the *Hopmeier* court was attempting to quote or describe the contents of the policy involved in that case, or that the policy was any different from modern title insurance policies generally, which promise to respond to title issues that arise. *See supra*. A title insurance policy’s indemnity for title issues is sometimes colloquially called guaranteeing title, but such a characterization is inexact, because the only “guaranty” that modern title insurance policies have is a promise to respond by attempting to clear title or to pay or trade to resolve a title issue. *Id.*

Spalding erroneously suggests (in reasoning the Court of Appeals also adopted) that his breach of contract claim did not accrue until Stewart allegedly failed to properly calculate the loss under Condition 7 of the Policy and “only” offered SLC \$10,000 pursuant to an appraisal of the diminution in value caused by the title defect. Spalding’s argument that, before that time, Stewart acted consistent with its contractual obligations is a point that simply ignores this Court’s instruction in *Farrow* and *Powel* that the relevant inquiry is to ask when damages are sustained and ascertainable.

Such an argument overlooks the fact that Estes’ assertion that he owned his acre itself caused SLC to suffer damages under the Policy. As noted, as of that time, its title

was unmarketable, and it (or Stewart) would 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. SLC's notification to Stewart about the claim immediately triggered Stewart's obligation to file suit within a reasonable time to clear title, purchase or trade for the Estes acre for SLC's benefit, or compensate SLC according to the agreed-upon measure set out in the Policy. To this end, at that point, SLC could have sued Stewart to specifically enforce its rights under the Policy, so SLC's claims had necessarily accrued. *See Ryan v. Spiegelhalter*, 64 S.W.3d 302, 309-10 (Mo. banc 2002) (in case involving installment land sale contract, buyer's "right to sue commenced when she had a right to specifically enforce the contract and compel delivery of a deed from the [seller, which occurred when the buyer made her last installment payment] or when the contract was breached [which occurred when the seller delivered the deed to another party], whichever is earlier").

Any argument that a claim did not accrue until Stewart offered to pay \$10,000 also creates an illogical rule. Under that reasoning, if Stewart had ignored SLC's notice of Estes' claim and never offered to pay the loss, then insofar as the law of accrual of contract claims is concerned, SLC's claim would never have accrued.

The absurdity of such a rule explains why Spalding and the Court of Appeals, *see* Ct. App. Slip Op. at 8 (DAPx:A46), put misplaced reliance on *Loeffler v. City of O'Fallon*, 71 S.W.3d 638 (Mo. App. E.D. 2002). In *Loeffler*, the Eastern District held that a homeowner's claim based on a contract with a city that required the city to fix damage to her property caused by a construction project did not accrue when she noticed the damage or when she obtained a bid to fix it herself, but only when the city later

denied her demand to fix the damage. *Id.* at 641-42. The dated reasoning of *Loeffler* does not survive the more recent *Farrow* and *Powel* decisions, which instruct courts to focus on when a claimant learns that a harm has been sustained and damages are ascertainable, even if they cannot be calculated. Under *Farrow* and *Powel*, Loeffler’s claim accrued when she noticed her property was damaged, not when she—years later—chose to demand remediation, or when the city then rejected the demand.

Finally, Spalding cannot turn to cases involving generic indemnification agreements to support his argument that his claim is timely. Spalding has argued (in reasoning the Court of Appeals echoed) that this case is analogous to a situation involving a contract of indemnity against loss. *See* Ct. App. Slip Op. at 9 (citing *Burns & McDonnell Eng’g Co. v. Torson Constr. Co., Inc.*, 834 S.W.2d 755 (Mo. App. W.D. 1992)) (DAPx:A47). In such a case, a claim does not accrue until an indemnitee sustains an “actual loss,” and Spalding has claimed he did not sustain an “actual loss” until either June 16, 2006 (when Stewart informed SLC that Estes owned his acre) or July 3, 2007 (when Stewart offered \$10,000). This reasoning is flawed because it wrongly attempts to analogize the Policy to a contract that merely provides indemnity against loss.

As this Court has noted, “[t]here are two kinds of indemnity contracts; indemnity against liability, and indemnity against loss.” *Moberly v. Leonard*, 339 Mo. 791, 99 S.W.2d 58, 63 (1936). “Where the indemnity is against liability, the cause of action is complete and the indemnitee may recover upon the contract as soon as his liability has become fixed and established even though he has sustained no actual loss or damage at the time he seeks to recover.” *Id.* (citation omitted). In other words, “where the contract is

not a mere contract to indemnify and save harmless, but a contract to save from a legal liability or claim, the legal liability incurred and not the actual damage sustained is the measure of damage. There is a breach of the covenant and the indemnitee's right of recovery accrues as soon as he has suffered the loss or damage against which he was to be saved harmless." *Id.* (citation omitted). However, "where the contract is strictly one of indemnity . . . against loss or damages, the indemnitee cannot recover until he has . . . suffered an actual loss or damage against which the covenant runs." *Id.* (citation omitted). In such a case, "a promisor who has undertaken merely to indemnify against damage is liable only when actual payment has been made by the promisee, or damage suffered by him; and then only to the extent of such payment or damage." *Id.* (citation omitted).

Here, the Policy did not merely promise to indemnify SLC against "loss" as that term is used in *Moberly*. The Policy promised that Stewart would remedy covered title issues that arose either by prosecuting or defending a suit to clear title or by settling or paying the claim, and—significantly—the Policy also provided that Stewart would pay any costs, attorneys' fees and expenses that the insured otherwise would have incurred in prosecuting or defending claims concerning a covered matter. (PEX:5, p.2; DAPX:A11) (Conditions 4 & 6). The Policy is thus not—as Spalding and the Court of Appeals have mistakenly claimed—a contract of indemnity merely for loss as *Moberly* uses the term. It is more akin (yet in other ways still distinct from) a contract of indemnity for liability under the *Moberly* analysis. If the *Moberly* rubric applies at all in this case, the rule that "the indemnitee's right of recovery accrues as soon as he has suffered the loss or damage against which he was to be saved harmless" applies. *Moberly*, 99 S.W.2d at 63. Here, this

occurred when Estes asserted he owned his acre. SLC immediately suffered loss or damage due to a title issue; its title was unmarketable, and either SLC (or Stewart) faced the prospect of incurring costs (*e.g.*, the expense of a suit to clear title, if that was feasible) or damages covered by the Policy. The “loss or damage against which [SLC] was to be saved harmless,” *id.*, had occurred.

Spalding’s claim for breach of the Policy accrued when Estes asserted he owned an acre within the insured tract. Because it accrued more than five years before he commenced this suit, this claim is time-barred, and this Court should reverse the trial court’s judgment and render judgment that Spalding take nothing.

**B. Spalding Failed to Present a Submissible Case on Damages.**

**Point Relied On:** *The trial court erred in denying Stewart’s motions for directed verdict and JNOV on Spalding’s claim on the Policy, because Spalding failed to present a submissible case on damages, in that (a) Spalding failed to present a proper measure of damages since the Policy insured against “actual monetary loss or damage” caused by a title defect and Spalding only presented evidence of future lost profits, and (b) Spalding failed to prove damages with reasonable certainty, since his expert based his opinion on facts contrary to Spalding’s evidence on (i) the land insured by the Policy and (ii) the scope of Spalding’s plan and his ability to begin construction.*

At trial, Spalding relied on his expert witness on damages to prove damages, (T:284, 332), but that witness did not even attempt to establish damages attributable to the *title defect* in the insured property; instead, the expert attempted to prove *future lost profits* from a planned real estate development. But future lost profits is not the

contractually-agreed-upon measure of damages set out in the Policy. Spalding also failed to prove damages with reasonable certainty because his expert failed to support his opinion with facts in evidence. Nonetheless, the trial court denied the motions directed verdict and JNOV based on Spalding's defective damages evidence. (LF:98, 171, 187-89, 256-59, 274-79, 417-26; T:809-10, 818).

**1. Standard of Review.**

“The standard of review of the denial of a JNOV is essentially the same as the overruling of a motion for directed verdict.” *Western Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 14 (Mo. banc 2012). “A case may not be submitted unless each and every fact essential to liability is predicated on legal and substantial evidence.” *Id.* (internal quotation omitted). In evaluating the sufficiency of the evidence to support a verdict, “an appellate court views the evidence in the light most favorable to the verdict and the plaintiff is given the benefit of all reasonable inferences.” *Id.*

**2. Spalding Failed to Present a Proper Measure of Damages.**

The appropriate measure of damages is a question of law. *See Boten v. Brecklein*, 452 S.W.2d 86, 93 (Mo. banc 1970). Here, the Policy set out a contractually-agreed-upon measure of loss or damage that would apply when there was to be a payment to an insured for a defect in an insured's title. The Policy insured “against *actual monetary loss or damage sustained or incurred*” because of a covered matter, measured by “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:5, p.3; DAPX:A12) (Condition 7) (emphasis added).

Spalding's damages evidence failed to adhere to this measure. His damages expert, Brian Reardon, valued the 418.91 acres insured by the Policy at \$5,700,000. (PEx:47 at Appraisal p.1). Reardon reached that figure by purporting to calculate the land's worth under its highest and best use *as if it had been developed into a lakefront properties project*. (*Id.* at pp.1 & 35) (DApx:A20 & A34). (As noted below, there are defects in that effort, but those defects can be put aside for the moment.) He then valued the land subject to the title defect caused by Estes' ownership of his acre—*i.e.*, the 417.91 remaining acres—at \$1,600,000. (*Id.* at p.38). But he reached that figure by calculating its worth under its highest and best use *as agricultural land*. (*Id.* at p.36) (DApx:A35). Reardon said the damages were the difference between those two values—\$4,100,000. (*Id.* at p.39) (DApx:A38). Acknowledging that that calculation exceeded the policy limits, Spalding asked the jury to award him the amount of insurance under the Policy—*i.e.*, \$1.7 million. He offered no other evidence to justify the jury's award. (T:234, 284).

Reardon's methodology failed to adhere to the measure of damages required by the Policy and thus failed to offer a submissible case of damages because Condition 7 only provided indemnity for "actual monetary loss or damage sustained or incurred" as set out in the Condition. A fundamental postulate of title insurance policies is that they do not insure the success of planned developments; they only offer indemnity for actual losses arising from title defects. *Brown's Tie & Lumber Co. v. Chicago Title Co.*, 764 P.2d 423, 429 (Idaho 1988) (noting that, under title insurance policies, "business success is not what has been insured, only the title" to the insured estate); *see also infra* at 35. But, by valuing the insured 418.91 acres as a successful real estate development in the

future and then comparing that value to the remaining 417.91 acres valued as agricultural land, Reardon impermissibly valued future lost profits. He was wrong to do so because, when the Estes issue arose (which the parties and Jury Instruction No. 7 agree is the relevant time), the insured had not actually lost anything other than an acre of agricultural land. In the words of the Policy, Reardon did not measure the “actual monetary loss or damage sustained or incurred” because of the loss of title to the Estes acre. He did not compare the “value of the insured estate” “as insured” (*i.e.*, the value of the insured agricultural land without any defects in title) to the “value of the insured estate” “subject to the defect” (*i.e.*, the value of the insured agricultural land with a hole in the proverbial donut). Here, the measure of damages set out by the Policy is effectively the value of the acre Estes owned (the hole of the donut).<sup>5</sup> Reardon offered no evidence of that value.<sup>6</sup>

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<sup>5</sup> Because Estes owned one acre within the insured tract and SLC wished to assemble a large, contiguous area, it may be that Estes could command a higher price for his land than he could if no developer was in the picture, but that fact still does not justify the methodology Reardon employed and Spalding relied on for his damages evidence.

<sup>6</sup> It is no answer to observe that Estes supposedly offered to sell his acre for \$387,000, which Spalding wanted Stewart to pay, or that Spalding signed an option to purchase the acre for \$335,000, and again wanted Stewart to pay. (PEx:18 & 28). In neither case was there a buyer actually willing to pay that amount. The analysis is the same for Spalding’s offer to purchase the acre for \$50,000. (T:285-86; DEx:364). In that case, there was no seller—Estes—willing to sell for that amount.

Reardon's failure to offer evidence of the contractual measure of damages means that Spalding failed to make a submissible case of damages, which is an essential element of a claim for breach of a contract. *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. banc 2010). The trial court should thus have granted Stewart's motion for directed verdict and JNOV. *Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224, 225 (Mo. banc 1994) ("To make a submissible case a plaintiff must present substantial evidence to support each element of her claim.").

As discussed below, the Policy's definition of the measure of damages as "actual monetary loss or damage sustained or incurred" as set out in Condition 7 represents the parties' contractual agreement on measure of damages. The trial court's failure to grant Stewart a directed verdict or judgment n.o.v. allowed Spalding to re-write the parties' contractual damage limitations and to recover damages beyond what the contract provides. That is not allowed. This Court should thus reverse the trial court's judgment and render judgment that Spalding take nothing.

### **3. Spalding Failed to Prove Damages With Reasonable Certainty.**

Spalding also failed to prove damages with reasonable certainty because Reardon failed to support his opinion with facts in evidence.

A plaintiff has "the burden of proving the existence and amount of damages within a reasonable certainty." *Essex Contr., Inc. v. Jefferson County*, 277 S.W.3d 647, 655 (Mo. banc 2009). When a plaintiff relies on expert opinion testimony, that testimony must be based on facts in evidence. *Myers v. Bi-State Development Agency*, 567 S.W.2d 638, 642 (Mo. banc 1978). Whether an expert's opinion is supported by facts in evidence

is a question of law, which is reviewed *de novo*. *Atcheson v. Braniff Int'l Airways*, 327 S.W.2d 112, 117 (Mo. 1959).

Here, Spalding wholly failed to make a submissible case of damages because Reardon evaluated the 2007 Plan, but that Plan included land that was not insured by the Policy and not owned by Spalding, SLC, or SWP. (T:328-31; 339-40; 405-10; PEx:47, p.21; DEx:352; DEx:361). Reardon's testimony failed to make a submissible case because his appraisal valued the land included in the 2007 Plan, but the insured land is only a subset of that land, (*id.*), and Reardon admitted that "any proration or division of the total into fractional interests would invalidate the value conclusions." (PEx:47, p.7). Moreover, Spalding was no longer partners with SWP, and he did not intend to pursue the 2007 Plan, but only proceed under a smaller 2006 plan, which Reardon had never seen. (T:208-09, 327-31, 449-50; PEx:11; PEx:13; DEx:361). An expert who bases a damages estimate arising from a title defect on insured land on flawed assumptions—such as calculating damages based on a Plan (a) that includes land that was not insured or owned and (b) that the claimant did not intend to pursue—fails to base his estimate on facts in evidence and thus fails to prove damages with reasonable certainty.

Reardon also failed to support Spalding's damages proof with reasonable certainty for other reasons. He improperly assumed that, as of the date of his analysis, any required governmental permits for construction had been received and construction could begin then. (T:391-95; PEx:34, p.34). No such permits existed. SWP had only applied for an Army Corps of Engineers permit in January 2007, and Spalding admitted that it "takes a long period of time to get a permit." (T:332-33; DEx:330). The 2007 Plan also required

the approval of the City of Lake Winnebago and a local HOA because some of its land would have to be acquired and flooded. (T:421). But as of February 2007, the City and the HOA had not approved the 2007 Plan either. (T:334-335).

The defects in Reardon's opinion show that Spalding failed to prove damages with reasonable certainty and thus make out a submissible case of damages. Spalding's failure to make out a submissible case of damages shows that the trial court should have granted Stewart's motion for directed verdict and JNOV. *See White v. Pruiett*, 39 S.W.3d 857, 863-64 (Mo. App. W.D. 2001) (affirming directed verdict on unjust enrichment claim where plaintiff failed to prove damages with reasonable certainty). This Court should thus reverse the judgment and enter judgment that Spalding take nothing.

**C. The Trial Court Failed to Properly Instruct the Jury on Damages.**

**Point Relied On:** *The trial court erred in giving the jury Instruction No. 7 and in denying Stewart's motion for new trial based on that instruction, because it improperly told the jury to measure damages by considering uses of the insured property to which it may be "applied or adapted," in that (a) such a consideration, which was derived from recent changes to eminent domain law, does not apply in the context of a suit on a policy of title insurance that defines the measure of damages and (b) the inclusion of that Instruction in the charge effectively rewrote the parties' contractually-agreed-upon damages measure.*

Under Condition 7 of the Policy, the parties agreed that, where Stewart pays an insured to resolve a claim, the Policy operates as "a contract of indemnity against *actual monetary loss or damage* sustained or incurred" because of a covered title issue,

calculated as the lesser of the “Amount of Insurance” or “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:5, p.3; DApx:A12) (emphasis added). The trial court, however, instructed the jury that it “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.*” (LF:245; DApx:A9) (emphasis added). Stewart timely objected, (T:182-83, 826-27), and renewed its objection in its motion for new trial. (LF:283-85, 293-95, 422-24, 426). If judgment is not rendered for Stewart, a new trial should be ordered because the jury instructions were flawed.

**1. Standard of Review.**

Whether a jury was instructed properly is a question of law reviewed de novo. *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 376 (Mo. banc 2014). A court will reverse for instructional error if it resulted in prejudice that materially affects the merits of the action. *Id.* This typically requires a showing that the instruction misdirected, misled, or confused the jury, resulting in prejudice. *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 90-91 (Mo. banc 2010). But in a case of instructional error regarding damages where the jury awarded damages to the plaintiff, “it cannot be said that the defendant was not prejudiced.” *Kauzlarich v. Atchison, Topeka & Santa Fe Ry.*, 910 S.W.2d 254, 258 (Mo. banc 1995).

**2. The Policy Set Out the Parties’ Agreed Measure of Damages.**

A fundamental tenet of contract law is that parties are generally free to set out the duties they owe one another through the terms of the contracts to which they agree.

*Brown v. Weare*, 348 Mo. 135, 152 S.W.2d 649, 653-54 (1941) (“It is the policy of the law . . . [to] refrain[] from interference with the freedom of contract suffer the parties to exercise freely their judgment and will in consummating agreements and determine for themselves the benefits derived from their bargains.”) (citation omitted). As a part of this freedom to contract, parties may—so long as some other law does not prohibit it—set out an agreed-upon measure of damages and even limit the amount or categories of damages that might otherwise be available. *Purcell Tire & Rubber Co. v. Exec. Beechcraft, Inc.*, 59 S.W.3d 505, 508 (Mo. banc 2001) (“Sophisticated parties have freedom of contract—even to make a bad bargain, or to relinquish fundamental rights [and] contractually limit future remedies.”) (citations omitted).

Here, Condition 7 of the Policy explained that the damages that an insured could recover because of a covered title issue would be the “*actual monetary loss or damage sustained or incurred*” because of a covered title issue, calculated as the lesser of the “Amount of Insurance” or “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:5, p.3; DApx:A12) (emphasis added). The parties’ agreement on the measure of damages sets out what is available in an action for breach of the Policy, and the only permissible damages instruction is an instruction that set out that measure.

### **3. Instruction No. 7 Impermissibly Changed the Measure of Damages.**

However, at Spalding’s request, the trial court gave Instruction No. 7, which told the jury to measure damages by considering the “highest and best” use of the insured

property to which it may reasonably be “applied or adapted.” (LF:245; DApx:A9). In full, Instruction No. 7 reads 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.

(*Id.*) (emphasis added).

The instruction to consider the “highest and best” use “to which the property reasonably may be applied or adapted” departed from the definition and limitation on

damages to which the parties contractually agreed in the Policy. Such a consideration does not apply in the context of a suit on a policy of title insurance that defines the measure of damages to be limited to “actual monetary loss or damage” under the formula set out in Condition 7.

Courts have recognized that the term “actual monetary loss or damage” does not include future lost profits or a damages measure that looks to a future use or status of the insured property. *See, e.g., Stewart Title Guaranty Co. v. Shelby Realty Holdings, LLC*, 83 So. 3d 469, 471 (Ala. 2011) (observing that “the term ‘actual monetary loss’ could be deemed to restrict damages to those based on the *real, current status of the property* as it was being used at the time the defect in title was discovered”) (emphasis added); *Chicago Title Ins. Co. v. Huntington Nat'l Bank*, 719 N.E.2d 955, 960 (Ohio 1999) (discussing the use of the phrase “actual loss” in a lender’s title insurance policy and noting that “[t]he word ‘actual’ means something that exists in fact or reality” and that “‘actual’ is not merely possible, but real,” and concluding that “the parties intended for an insured’s loss ... to be a real loss, one based on fact, not speculation or *possibility*”) (emphasis added). Commentators have similarly observed that the “actual 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.” Barlow Burke, *Law of Title Insurance* § 7.01, at p. 7-8.1 (3d ed. Supp. 2014).

Because the parties agreed that the damages an insured could recover because of a covered title issue would be the “actual monetary loss or damage sustained or incurred”

as calculated under Condition 7, (PEx:5, p.3; DApx:A12), the inclusion of Instruction No. 7 in the charge and its direction to the jury to consider the “highest and best” use of the insured property to which it “may be applied or adapted,” (LF:245; DApx:A9), impermissibly rewrote the parties’ contractually-agreed-upon damages measure and allowed Spalding to recover the value of potential future lost profits. Indeed, Instruction No. 7 effectively instructed the jury to base a damages award on Reardon’s valuation of a successful future land development. That was an error that prejudiced Stewart.

Spalding’s overreaching in Instruction No. 7 is evident. The first element of the breach of contract instruction he submitted in Instruction No. 5 noted the correct issue. It asked whether Stewart paid SLC the difference between the fair market value of the insured property with and without the Estes tract. (LF:234; DApx:A8). But when it came to submitting a damages question, Spalding sought and received an instruction that sought a different, and higher, damages award, even after the trial judge offered Spalding a “last chance to pull me out of the pit of reversible error.” (T:183-84).

In other breach of contract suits, Missouri appellate courts have reversed trial court judgments where the trial court permitted the jury to consider a measure of damages that the parties’ contract eliminated. For example, in *World Enterprises, Inc. v. Midcoast Aviation Services, Inc.*, 713 S.W.2d 606 (Mo. App. E.D. 1986), a state court of appeals confronted a case involving a claim for breach of a contract to repair an airplane in which the trial court allowed the jury to award damages for loss of use over the defendant’s objection that the parties’ contract prohibited an award of such damages. Agreeing with the defendant, the court of appeals reversed the trial court’s judgment because the

damage limitation provision in the parties' agreement prohibited the award of loss of use damages. *Id.* at 608-11. This Court should likewise reverse the trial court's judgment.

The Court of Appeals attempted to justify the reformulation of the contractual limitation on damages that the trial court used in Instruction No. 7 by claiming that it was accurate, although it "may very well [have been] surplusage." Ct. App. Slip Op. at 18 (DAPx:A56). But directing the jury to compensate Spalding for lost profits based on a *future* development fundamentally changed the limitation of damages agreed upon in the Policy (and every other Missouri title insurance policy that uses an ALTA form with similar language), which only provides indemnity for actual losses.

Spalding has attempted to justify the error in the jury instructions by claiming that the Circuit Court permissibly borrowed the 2012 MAI for condemnation cases, because this Court allowed the use of the 1970's version of that MAI (which did not have the "highest and best use to which the property reasonably may be applied or adapted" language) in an earlier title insurance case. *Fohn v. Title Ins. Corp.*, 529 S.W.2d 1 (Mo. banc 1975). The Court of Appeals also adopted that argument, *see* Ct. App. Slip Op. at 18-20 (DAPx:A56-58), but such an argument is misplaced.

The *Fohn* court only used the condemnation case MAI because the title insurance policy at issue there did not define and limit the measure of damages as Stewart's Policy does. In *Fohn*, the policy insured the owners "against 'loss or damage' which they 'shall sustain by reason of '[any] defect in . . . the title' to the property." *Fohn*, 529 S.W.2d at 2 (alterations in original). Lacking further direction from the policy or from case law on how to define this measure of damages, this Court turned to the condemnation case MAI,

which instructed the fact-finder to measure “the difference between the fair market value of . . . [the] whole property immediately before the taking . . . and the value of . . . [the] remaining property immediately after such taking. . . .” *Id.* at 8 (alterations in original).

Here, however, the situation is quite different. First, Stewart’s Policy expressly defined the measure of damages, and the trial court thus had no reason to turn to other sources. Second, there was *especially* no reason to turn to the *current* version of the MAI for condemnation cases, because it contains recently-added language—*i.e.*, the “highest and best use to which the property reasonably may be applied or adapted” language—that was not in the 1970’s MAI and that fundamentally changes the measure of damages.<sup>7</sup>

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<sup>7</sup> This text was added to the current version of MAI No. 9.02 after the Legislature amended the eminent domain laws in 2006. Those amendments addressed competing viewpoints about how generous condemnation awards should be after the *Kelo v. City of New London*, 545 U.S. 469 (2005), decision, and the new law made awards for certain takings for public use more generous than the constitutional minimum. *See* D. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 Mo. L. Rev. 721, 743-47 (2006); *St. Louis County v. River Bend Estates Homeowners’ Ass’n*, 408 S.W.3d 116, 135-38 (Mo. banc. 2013). The Legislature required courts to instruct juries in condemnation actions on a definition of fair market value that included the “reasonably may be applied or adapted” language. RSMo § 523.060.2; MAI 9.02 [2012 Revisions], Notes on Use ¶ 3. In cases like this one, in which the parties set out an agreed-upon measure of damages, a trial court’s use of the new MAI 9.02 is facially improper.

Because Instruction No. 7 impermissibly rewrote the parties' contractually-agreed-upon damages measure, the trial court erred when it submitted that Instruction.

**4. The Trial Court's Use of Instruction No. 7 Prejudiced Stewart.**

As noted above, in cases in which there is an erroneous instruction regarding damages where the jury did award damages, "it cannot be said that the defendant was not prejudiced." *Kauzlarich*, 910 S.W.2d at 258. Here, Instruction No. 7 prejudiced Stewart in several ways: it misstated the measure of damages, misled and confused the jury, and permitted Spalding to recover damages for future profits from a speculative and nonexistent commercial and residential lake development.

The Policy limited damages to "actual monetary loss or damage" measured by the difference in value of the property *as insured* with and without the defect. (PEx:5, p.3; DApx:A12). Instruction No. 7 sowed the seeds of confusion in jurors' minds by equating the proper measure of damages with a "highest and best" use to which "the property reasonably may be applied or adapted" (LF:245; DApx:A9), thereby inviting jurors to treat the imaginary as "actual" and to monetize improvements never built and income never earned. As noted above, Instruction No. 7 gave credence to Reardon's testimony and permitted Spalding to transform a contract of indemnity against "actual monetary loss" into a policy insuring lost profits from a future development. Spalding took advantage of this error in closing. (T:863) (closing argument by Spalding that the ability to develop the real estate project is "the whole case"); (T:900-01) (closing argument by Spalding stating that the jury instructions require evaluation of the insured property as if it was developed); *see also* (T: 850-52 (closing argument attacking Stewart's evidence for

deficient analysis of highest and best use); 893-95 (similarly attacking Stewart's evidence)). Spalding's trial presentation was also built on his erroneous damages argument and prejudiced Stewart. (T:374-76 (highest and best use equated with "the greatest return, the greatest profit"), 386-87 (same), 433 ("highest and best use ... inherently incorporates ... the anticipation of future benefits"), 567-69 (cross-examination on highest and best use), 779-81 (same), 784-92 (same)).

The erroneous instruction authorized an award of damages not permitted by Policy, and the verdict shows that the jury made such an award, all to the prejudice of Stewart. Because that damages instruction was erroneous, a new trial is required.

**D. The Trial Court Erred When it Admitted Spalding's Expert's Testimony.**

**Point Relied On:** *The trial court erred in admitting the opinions of Spalding's expert witness and denying Stewart's motion for new trial, because those opinions were not supported by facts in evidence, in that the expert purported to establish a value of the insured land based on assumptions contrary to facts in evidence.*

**1. Standard of Review.**

As stated above, a plaintiff has "the burden of proving the existence and amount of damages within a reasonable certainty." *Essex Contr., Inc.*, 277 S.W.3d at 655. When a plaintiff relies on expert opinion testimony, that testimony must be based on facts in evidence. *Myers*, 567 S.W.2d at 642. Whether an expert's opinion is supported by facts in evidence is reviewed *de novo*. *Atcheson*, 327 S.W.2d at 117. Additionally, expert "opinions based upon assumptions not supported in the evidence should not be admitted into evidence." *McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo. banc 2004) (reversing for

erroneous admission of expert opinion without factual support in medical records and therefore not reasonably reliable); *see also Hobbs v. Harken*, 969 S.W.2d 318 (Mo. App. W.D. 1998) (Stith, J.) (reversing and remanding for new trial because of the erroneous admission of an economist's testimony on the amount of lost future earnings which was based on hypothetical or unproven facts).

## **2. The Admission of Reardon's Testimony Requires a New Trial.**

The trial court erred when it admitted Reardon's opinion evidence on damages over Stewart's objection. As has been noted, Reardon evaluated the 2007 Plan, but it was based on land that was not insured by the Policy and that neither Spalding, SLC, or SWP owned. (T:328-31; 339-40; PEx:47 at p.21; DEx:352; DEx:361). And, as Spalding was no longer partners with SLC, he did not intend to pursue the 2007 Plan, but instead said he would proceed under a smaller 2006 development plan, which Reardon had never seen. (T:208-09, 327-31, 449-50; PEx:11; PEx:13; DEx:361). Reardon also failed to base his estimate on facts in evidence because he improperly assumed that, as of the date of his analysis, any required governmental permits for construction had been received and construction could begin then. (T:391-95; PEx:34, p.34). No such permits existed. SWP had only applied for an Army Corps of Engineers permit in January 2007, and Spalding admitted that it "takes a long period of time to get a permit." (T:332-33; DEx:330). The 2007 Plan also required the approval of the City of Lake Winnebago and a local HOA because some of its land would have to be acquired and flooded. (T:421). But as of February 2007, the City and the HOA had not approved the 2007 Plan either. (T:334-335).

The admission of such unfounded opinions over Stewart's trial objections, (T:373-74), and renewed objections in its motion for new trial (LF:283-93, 422-26), prejudiced Stewart. Reardon provided the only evidence Spalding offered on the existence and amount of damages. (T:284, 332). Although that testimony was so defective it failed to present a submissible case on damages and a reversal for rendition of judgment in Stewart's favor is the proper course, *see supra*, to the extent the Court disagrees, it should still find that the trial court erred when it admitted Reardon's testimony, as that testimony had a reasonable tendency to influence the jury's verdict. Under these circumstances, this Court should reverse the judgment and remand for a new trial. *McGuire*, 138 S.W.3d at 722 (prejudice exists when "the erroneously admitted evidence had *any reasonable tendency* to influence the verdict of the jury") (emphasis added).

**E. This Court Should Reverse the Judgment on the Vexatious Refusal Claim.**

**Point Relied On:** *If this Court reverses or vacates the judgment on Spalding's breach of the Policy claim, then the trial court erred in failing to grant Stewart's motions for directed verdict and judgment n.o.v. on Spalding's vexatious refusal claim, because such a claim is derivative of a claim for breach of an insurance policy and cannot stand in the absence of a judgment against an insurer on a claim for breach of a policy.*

**1. Standard of Review.**

Whether a vexatious refusal claim is maintainable is a question of law reviewed *de novo*. *Calvert v. Safeco Ins. Co.*, 660 S.W.2d 265, 269 (Mo. App. W.D. 1983).

**2. Reversal of the Judgment on the Breach of Policy Claim Requires  
The Judgment on the Vexatious Refusal to Pay Claim to be Reversed.**

As Stewart has argued, (LF:280, 420), there can be no recovery for vexatious refusal where there has been no judgment for a plaintiff on a claim for breach of an insurance policy. *Fischer v. First American Title Ins. Co.*, 388 S.W.3d 181, 184, 192 (Mo. App. W.D. 2012). If this Court reverses or vacates the judgment on Spalding's breach of the Policy claim, then the trial court erred in failing to grant Stewart's motions for directed verdict and JNOV on Spalding's vexatious refusal claim, because such a claim is derivative of a claim for breach of an insurance policy and cannot stand in the absence of a judgment against an insurer on a claim for breach of a policy.

**CONCLUSION**

For the reasons stated above, Stewart requests that the judgment be reversed and judgment entered in its favor, or that the judgment be reversed and the case remanded for a new trial.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief includes the information required by Rule 55.03;
2. This brief complies with the limitations contained in Rule 84.06(b); and
3. According to the word count function of counsel's word processing software (Microsoft® Word 2010) and excluding those portions of the brief as permitted by Rule 84.06(b), the brief contains 12,591 words.

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## CERTIFICATE OF SERVICE

This is to certify that, on this 28th day of January, 2015, this Substitute Brief of Appellant, together with the Certificate of Compliance, this Certificate of Service and the Appendix, was electronically filed and served by the ECF Court filing system on the below named counsel, who has registered with Missouri's electronic filing system:

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