

**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**

---

**APPELLANT'S SUBSTITUTE REPLY BRIEF**

---

**LATHROP & GAGE LLP**

John T. Coghlan (36361)  
R. Kent Sellers (29005)  
Justin Nichols (56920)  
2345 Grand Boulevard, Suite 2200  
Kansas City, Missouri 64108-2618  
Tel: (816) 292-2000  
Fax: (816) 292-2001  
jcoghlan@lathropgage.com  
ksellers@lathropgage.com  
jnichols@lathropgage.com

**JACKSON WALKER LLP**

John A. Koepke (27438)  
901 Main Street, Suite 6000  
Dallas, Texas 75202  
Tel: (214) 953-6005  
Fax: (214) 953-5822  
jkoepke@jw.com

**Attorneys for Appellant  
Stewart Title Guaranty Co.**

## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	1
ARGUMENT.....	3
A.    Spalding’s Claim for Breach of the Title Insurance Policy is Time-Barred. ....	3
1.    The Five-Year Limitations Period of § 516.120(1) Applies. ....	5
2.    Spalding’s Claim Accrued When Estes Asserted He Owned His Acre.....	8
B.    Spalding Failed to Present a Submissible Case on Damages.....	16
1.    Spalding Failed to Present a Proper Measure of Damages. ....	16
2.    Spalding Failed to Prove Damages With Reasonable Certainty.....	20
C.    The Trial Court Failed to Properly Instruct the Jury on Damages.....	22
CONCLUSION .....	23
CERTIFICATE OF COMPLIANCE .....	25
CERTIFICATE OF SERVICE.....	26

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Johnson v. State Mut. Life Assur. Co.,</i>	
942 F.2d 1260 (8th Cir. 1991) .....	6, 8
<b>Other Cases</b>	
<i>Burlington Northern Railroad Co. v. Chicago &amp; Northwestern Transp. Co.,</i>	
851 S.W.2d 28 (Mo. App. W.D. 1993).....	12
<i>Davis v. Stewart Title Guaranty Co.,</i>	
726 S.W.2d 839 (Mo. App. W.D. 1987).....	15
<i>Farrow v. St. Francis Med. Ctr.,</i>	
407 S.W.3d 579 (Mo. banc 2013).....	9, 10, 14
<i>Hopmeier v. First American Title Inc. Co.,</i>	
856 S.W.2d 387 (Mo. App. E.D. 1993) .....	9, 12, 15
<i>Moberly v. Leonard,</i>	
339 Mo. 791, 99 S.W.2d 58 (1936) .....	11, 14
<i>Powel v. Chaminade Coll. Preparatory, Inc.,</i>	
197 S.W.3d 576 (Mo. banc 2006).....	9
<i>Rolwing v. Nestle Holdings, Inc.,</i>	
437 S.W.3d 180 (Mo. banc 2014).....	5

*Ryan v. Spiegelhalter*,  
64 S.W.3d 302 (Mo. banc 2002)..... 10

*Stewart Title Guaranty Co. v. West*,  
676 A.2d 953 (Md. App. 1996)..... 13, 14, 15

*Stilton v. Kansas City*,  
446 S.W.2d 129 (Mo. 1969) ..... 7

*White v. Pruiett*,  
39 S.W.3d 857 (Mo. App. W.D. 2001)..... 20

**Other Statutes**

RSMo § 516.110(1)..... 1, 5, 6, 7

RSMo § 516.120(1)..... 5

## INTRODUCTION AND SUMMARY

Respondent Randy Spalding's Substitute Brief fails to refute the showing in Stewart's Substitute Brief that the trial court's judgment should be reversed.

As to the limitations issue, Spalding's claim that the ten-year limitations period applies here does not withstand scrutiny. The Policy gave Stewart various options to address the title defect caused by Estes' ownership of his acre, and those options do not all involve the payment of money. This means that Spalding's claim was not a claim on a written contract "for the payment of money" and that the ten-year limitations period of RSMo § 516.110(1) does not apply. Spalding's citation to cases involving insurance policies that do not give insurers similar options to address covered matters is thus misplaced. Spalding's reliance on extrinsic evidence to show that Stewart chose to pay money to comply with its contractual obligations only confirms that his claim is not a claim on a written contract "for the payment of money."

Similarly, Spalding's accrual argument confuses when he had a right to sue (*i.e.*, when his claim accrued for limitations purposes) with when he had a reason to sue (*i.e.*, when he decided to file this case) and whether he would ultimately prevail on his claim for damages, which are not the correct inquiries. A claim accrues when damages are capable of ascertainment, and this occurred when Estes asserted he owned his acre. Estes' call made damages arising from SLC's defective title capable of ascertainment, given the need to (a) pay the expenses of a suit to clear title or (b) bear the loss or damage arising from the title defect. Spalding's arguments focusing on different concepts, irrelevant Policy provisions, and cases that do not even discuss limitations issues are inapposite.

As to the measure-of-damages issue, Spalding claims the only issue is whether it was proper to use a “highest and best use” analysis. But that claim merely attempts to disguise the impermissible calculation “switch” employed by Spalding’s expert, Brian Reardon. That switch, however, exposes the fatal flaw in his methodology and shows that Spalding’s evidence measured something different from the Policy’s agreed-upon measure of damages.

The correct calculation of damages under the Policy is “actual monetary loss or damage sustained or incurred” because of SLC’s *loss of title* to the Estes acre, measured by comparing (a) the value of the vacant land insured by the Policy (*i.e.*, with the Estes acre) under its highest and best use, to (b) the value of the vacant land without the Estes acre under its highest and best use with the same highest and best use. Spalding’s expert did something different. He (a) valued the vacant land insured by the Policy under a prospective future highest and best use as if it had been completely developed into a lakefront real estate project but then (b) valued the land subject to the defect caused by Estes’ ownership of his acre—*i.e.*, the remaining insured land—with a *completely different* highest and best use—use *as agricultural land*. (PEx:47 at Appraisal, p.1 & 26-38; DApx:A21-38).

Reardon was not *consistent* in his method of valuing the property with and without the defect. As explained below, his switch between (a) valuing the land without any defect as if it were developed into a successful completed lakefront commercial and residential real estate project and (b) valuing the land with the defect as if it remained undeveloped agricultural land shows that Spalding’s evidence did not calculate the

agreed-upon measure of damages—“actual monetary loss or damage sustained or incurred” because of a *title defect*. Spalding’s evidence only measured *future lost profits from a prospective real estate development*. That, however, is not the agreed-upon measure of damages set out in Condition 7 of the Policy. Spalding’s failure to present evidence of the proper measure of damages requires reversal of the judgment.

As to the failure-to-prove-damages-with-reasonable-certainty issue, Spalding does not rebut the facts Stewart presented showing that—even apart from the failure to present a proper measure of damages—Reardon’s opinion is not supported by facts in evidence.

Finally, as to the erroneous-jury-charge issue, Spalding fails to rebut Stewart’s showing that the jury instruction on damages impermissibly re-wrote the parties’ contract and allowed Spalding to recover lost profits, which are not recoverable under the Policy. Nor does he even attempt to address the showing of prejudice from this charge error.

## ARGUMENT

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

Spalding’s arguments on the limitations issue fail to account for the nature of title insurance, which is fundamentally different from other forms of insurance such as life, health or property/casualty. This failure infects the Substitute Response’s discussion of both the applicable statute of limitations and the date of accrual of Spalding’s claim. It is therefore appropriate to first review some of the essential features of title insurance.

Unlike many other forms of insurance which cover *future* risks over a specified policy period, title insurance is *retrospective*. An owner’s policy of title insurance insures a specified estate in specified property in the named insured as of the date of the policy.

In other words, such a policy promises to address—in various ways set out in the policy—title defects or other covered matters that attach to the insured land *before* the policy date. Here, Stewart’s Policy insured a fee simple estate in SLC that included the Estes acre as of the “Date of the Policy: February 12, 2003.” (PEx:5, p. 5; DApx:A14).

Whether the five-year or ten-year statute of limitations applies turns on what Stewart promised to do under the Policy. Many types of insurance policies promise only to pay money, but title insurance typically gives the insurer various remedial options because title defects can often be cured by means other than the payment of money, such as procuring additional title documents, litigating title, or purchasing additional property rights. Here, the Policy gave Stewart various options to address the title defect, only one of which involved the payment of money to the insured. *See* App. Sub. Br. at 2-4 (explaining same). The array of options available to a title insurer makes title insurance fundamentally different from the promises to pay money found in policies of life, property or casualty insurance, so cases discussing the applicable limitations period for those types of policies are inapposite. As discussed below, the special ten-year limitations period applicable to written contracts to pay money is thus inapplicable, and the five-year limitations period that is generally applicable to breach of contract claims applies.

The retrospective nature of title insurance also helps explain the proper analysis of the accrual issue. The Policy insured a fee simple estate in SLC that included the Estes acre as of the “Date of the Policy,” but it turns out that SLC did not, in fact, have title to the Estes acre as of that time. Because SLC did not have title to all of the insured land, a claim under the Policy could arise, so the question becomes when such a claim accrues.

Missouri law provides a ready answer: Such a claim accrues when loss or damage becomes reasonably capable of ascertainment. Here, this occurred when Estes called. As shown below, the five-year limitations period of RSMo § 516.120(1) applies to Spalding's breach of the Policy claim, and his claim is untimely under that statute.

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

Spalding does not deny the fact that the Policy is a contract and that RSMo § 516.120(1) provides that actions on contracts must be brought within five years. Spalding also does not deny this Court's holding that the ten-year limitations period of § 516.110(1) 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). Spalding only attempts to argue that a claim for breach of Stewart's title insurance policy is an action on a contract "for the payment of money" as that phrase is used in § 516.110(1). His argument does not withstand analysis.

Preliminarily, Spalding ignores this Court's holdings regarding the appropriate statute of limitations analysis that were discussed in Stewart's Substitute Brief. Those cases state that, even if a plaintiff shows that a written contract has been breached, if the 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. *See* App. Sub. Br. at 12-14.

Instead, Spalding first suggests that the ten-year limitations period applies to all suits on insurance policies. *See* Resp. Sub. Br. at 23-24. But 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 cases Spalding cites concern life insurance (*Johnson*), workers' compensation insurance (*Brown*), and uninsured motorist insurance (*Crenshaw*). *See id.* It may be that claims for breach of those sorts of insurance policies are claims "upon a writing . . . for the payment of money." But neither law nor logic compel the same result for different types of insurance policies. The terms of each policy must be examined to determine its proper classification for limitations purposes—*i.e.*, whether a claim for breach of the policy is a claim "upon a writing . . . for the payment of money." None of the cases Spalding cites address a title insurance policy or a situation where an insurer, *at its own option*, may comply with its coverage obligations by electing responses other than the payment of money.

As Stewart showed in its Substitute Brief, the Policy gives Stewart various options to comply with its contractual obligations, and not all of those options entail paying money. The options built into Stewart's Policy show that it does not contain an unconditional promise to pay, as RSMo § 516.110(1) requires. Spalding's pleadings and proof also recognized this fact. Spalding did not simply show that he had a Policy from Stewart, that Estes owned some of the land insured under that Policy, and that Stewart had not paid damages. Spalding had to—and did—prove with extrinsic evidence that Stewart neither sued to establish title nor paid or traded with Estes for his acre. *See App. Sub. Br.* at 5-6 (noting that Spalding showed at trial that Stewart did not buy Estes' acre for SLC). The fact that Spalding had to make those showings with extrinsic evidence shows that Spalding's claim was not a claim "upon a writing . . . for the payment of money." The Stewart Policy—like title insurance policies generally—gave Stewart

options as to how to respond, not all of which entail paying the insured. It necessarily follows that a claim for breach of the Policy is not a claim “upon a *writing . . . for the payment of money.*”

Spalding attempts to escape this conclusion by arguing that Stewart’s ultimate election to offer to pay SLC money under the Policy somehow changes the character of the Policy and his claim. *See* Resp. Sub. Br. at 24-25. It does not. This Court has explained that § 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.” *Stilton v. Kansas City*, 446 S.W.2d 129, 132 (Mo.1969) (emphasis added). Here, Spalding had to—and did—turn to extrinsic evidence to prove that Stewart did not sue to establish title to Estes’ acre or pay or trade with Estes for his acre and, thus, that Stewart had an obligation to pay. Indeed the Substitute Response itself cites extrinsic evidence (a letter) to explain that Stewart “*elected to pay the loss SLC sustained as a result of the defect.*” Resp. Sub. Br. at 3. Because Spalding had to—and did—turn to extrinsic evidence to prove the existence of an obligation to pay money, this Court should conclude that the Policy itself does not set out an unconditional promise to pay money and that Spalding’s claim was not an action “upon a *writing . . . for the payment of money.*” RSMo § 516.110(1).

Finally, Spalding’s analogy to the conditions that appear in uninsured motorist policies is flawed. *See* Resp. Sub. Br. at 25-26. Such policies promise to *pay* the insured for covered damages caused by an uninsured motorist. Spalding’s observation that the obligation to pay under such policies only applies, for example, to matters “caused by the

accident” does not change the analysis. Such a condition is simply a triggering event, and it is the equivalent of the requirement in a life insurance policy that obligates a plaintiff to show that a “defendant’s written promise to pay has matured.” *Johnson v. State Mut. Life Assur. Co.*, 942 F.2d 1260, 1265 (8th Cir. 1991). All insurance policies have triggering events that condition coverage. Once an insured under an uninsured motorist policy shows she has suffered bodily injury caused by an accident involving an uninsured driver, the unconditional promise to pay is triggered. A policy that promises to address covered title issues in various ways (not all of which involve payment of money) is not the same. Once its duties under the Policy to respond to a covered title issue were triggered, Stewart did not have an unconditional promise to pay money. Because there was no unconditional promise to pay, the ten-year limitations period does not apply.

**2. Spalding’s Claim Accrued When Estes Asserted He Owned His Acre.**

In its Substitute Brief, Stewart showed that its Policy insured SLC against loss or damage sustained or incurred because of, among other things, unmarketability of title, and that 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. Moreover, Spalding does not dispute the fact that he realized 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). Nor does he dispute the fact that he then contacted Coffelt Land Title; that by March 21, 2006, Coffelt Land Title acknowledged the claim and directed Spalding to Stewart, (*Id.*; T:218; PEx:7); and that SLC then made a claim with Stewart on the Policy. (T:219, 261-62; PEx:15; DEx:501).

The necessary conclusion is that Spalding’s claim accrued under the Policy once Estes called because then Spalding (or Stewart) would have to pay the expenses of a suit to clear title or bear the loss or damage arising from the title defect. *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 599 (Mo. banc 2013) (a claim accrues 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”). The fact that the character (legal expenses or damages for loss) or the amount of damages required further development did not stop Spalding’s claim from accruing. He had “notice of a problem.” *Powel v. Chaminade Coll. Preparatory, Inc.*, 197 S.W.3d 576, 582-83 (Mo. banc 2006). In fact, in March of 2006 he told SWP—in words mirroring the language of *Powel*—“we’ve got a problem.” (T:216-17).

In its Substitute Brief, Stewart also showed that this analysis is precisely how the accrual analysis was handled by the only other Missouri court to address title insurance claim accrual. *Hopmeier v. First American Title Inc. Co.*, 856 S.W.2d 387, 389 (Mo. App. E.D. 1993). And as the *Hopmeier* court held, the accrual of the claim occurred when the plaintiff became aware of the *fact* of damage—here, in January 2006.

Spalding argues his claim did not accrue until July 2007, when Stewart offered what Spalding thought was inadequate compensation under Condition 7. Spalding says that, before that time, he had no right to sue. *See* Resp. Sub. Br. at 10, 12 & 19. However, he confuses when he had a right to sue (*i.e.*, when his claim accrued for limitations purposes) with when he had a reason to sue (*i.e.*, when he decided to file this case) and whether he would ultimately prevail on the merits, which are not the correct inquiries.

Spalding overlooks the fact that Estes' assertion that he owned his acre itself made damages arising from SLC's defective title capable of ascertainment due to the cloud on title and the resulting need to pay the expenses of a suit to clear title or bear the loss or damage arising from the title defect. SLC's resulting notice to Stewart about the claim immediately triggered Stewart's obligation to file suit to clear title within a reasonable time, purchase or trade for the Estes acre, or compensate SLC according to the agreed-upon measure set out in the Policy. Contrary to Spalding's suggestion, SLC *could* have sued Stewart to specifically enforce its rights under the Policy then, so SLC's claims had necessarily accrued. *Ryan v. Spiegelhalter*, 64 S.W.3d 302, 309-10 (Mo. banc 2002) (in installment land sale case, buyer's "right to sue commenced when she had a right to specifically enforce the contract . . . or when the contract was breached, whichever is earlier"). For example, he could have asserted a claim for specific performance at any point between January 2006 and July 2007 if he thought Stewart was not complying with its contractual obligations. Spalding's choice not to do so does not show that no claim had accrued then.

Spalding's argument that he must have been able to prove that Stewart breached before his claim accrued confuses separate concepts. When a plaintiff's breach of contract claim fails because he does not prove breach, courts do not say that his claim never accrued for limitations purposes in the first place. This Court's accrual cases thus correctly focus on ascertainment of harm. *See Farrow*, 407 S.W.3d 599. In the context of this case and the type of contract at issue—a title insurance policy—the accrual analysis

focuses on when it became ascertainable that the insured had suffered the harm against which the Policy was designed to insure. This occurred when Estes asserted his claim.

This Court's cases confirm this analysis. Spalding's claim accrued when Estes called because that was the point at which it was capable of ascertainment that the insured (SLC) had "suffered the loss or damage against which he was to be saved harmless." *Moberly v. Leonard*, 339 Mo. 791, 99 S.W.2d 58, 63 (1936) (explaining when claims under contracts of indemnity for liability accrue). Although the analogy to generic contracts of indemnity for liability is inexact, it shows that Spalding's claim accrued when Estes asserted he owned his acre. Once Estes called, it was capable of ascertainment that SLC suffered a loss or damage due to a title issue because there was a cloud on the title—the title to the Estes acre was unmarketable. Either SLC (or Stewart) faced the prospect of legal expenses or damages arising from loss of title to land covered by the Policy. The "loss or damage against which [SLC] was to be saved harmless," *id.*, was ascertainable.

Spalding attempts to distinguish this analogy to *Moberly* by observing that this Court held in that case that a claim under a generic contract of indemnity for liability only accrues once the indemnitee's "liability becomes fixed and established." Resp. Sub. Br. at 22-23 (citing *Moberly*, 99 S.W.2d at 63). That observation, however, only explains why the analogy to a generic contract of indemnity for liability is inexact. In such a contract, the indemnitor promises to pay an indemnitee's liabilities once those liabilities are established, even if the indemnitee has not paid such a liability itself. Under the Policy, Stewart promised to do more; it promised to "insure[ SLC] against loss or damage . . .

sustained or incurred” by pursuing or defending claims against the insured title or compensating the insured for loss. (PEx:5, p.1; DApX:A10). Because SLC had sustained or incurred loss or damage from the unmarketability of its title to the Estes acre and that became ascertainable when Estes called, a claim on the title insurance policy accrued then. Spalding’s citation to *Burlington Northern Railroad Co. v. Chicago & Northwestern Transp. Co.*, 851 S.W.2d 28 (Mo. App. W.D. 1993), supports this point. *See* Resp. Sub. Br. at 23. There, the court noted that a claim on an indemnity-against-liability contract that requires the indemnitor to defend claims or suits accrues before an indemnitee’s liability is established. *Burlington Northern*, 851 S.W.2d at 32. Here, the Policy’s promise to “insure[ SLC] against loss or damage . . . sustained or incurred” because of “[u]nmarketability of the title” coupled with the effect of Estes’ call to Spalding (which made the fact of loss or damages—either legal expenses or damages for loss of title—ascertainable) shows that Spalding’s claim accrued when Estes called. Spalding’s claims did not accrue when Spalding disagreed with the amount of compensation offered for the diminution in value for the loss of the Estes acre. The *Hopmeier* court reached the same conclusion. *Hopmeier*, 856 S.W.2d at 389. This Court should too.

Spalding suggests there is a flaw in Stewart’s “logic [holding that] anytime anyone asserts a claim of ownership [adverse to the title as insured], the property becomes unmarketable and” a claim thus accrues. He claims that reasoning is “at odds with” the language of the Policy. *See* Resp. Sub. Br. at 16-17 n.4. It is Spalding, however, who misreads the Policy. The first page of the Policy explains that it “insures [SLC] against

loss or damage . . . sustained or incurred” because of “[u]nmarketability of the title.” This insurance provides coverage as of a specified date and time, and is retrospective in nature, covering all matters which attached before the date and time of issuance of the Policy. The Policy then gives Stewart options for addressing a covered matter. *See* App. Sub. Br. at 2-4 (explaining same). Once an adverse claim such as Estes’ is made and creates a cloud on title, Stewart has a duty to respond. A claim to enforce that duty accrues because the insured has suffered an ascertainable loss or damage covered by the Policy—the insured (or Stewart) would either have to pay legal expenses to resolve the matter or bear the damages from loss of title to insured land. Spalding’s argument is flawed because it assumes that an adverse claim by another land owner (such as Estes) does not give rise to loss or damages. As shown above, it does. Thus, Spalding’s citation to Policy provisions that, for example, exclude coverage for matters that *do not* cause loss or damage (such as an insured’s own discovery of a previously-extinguished easement) does not change the proper accrual analysis of a competing claim of ownership made by another land owner that *does* cause loss or damage to be reasonably ascertainable.

The remaining arguments in Spalding’s Brief are also meritless:

First, Spalding attempts to analogize this case to *Stewart Title Guaranty Co. v. West*, 676 A.2d 953 (Md. App. 1996), *see* Resp. Sub. Br. at 17-18, but that case has nothing to do with the accrual of an action on a title insurance policy for limitations purposes. In *West*, the plaintiffs sued Stewart for breach of a title insurance policy. The trial court entered summary judgment against Stewart and awarded damages without finding that Stewart had breached the policy (the court only concluded that the plaintiffs’

title was unmarketable because the land was landlocked). *Id.* at 959-60. When Stewart appealed, the court of appeals held that the entry of summary judgment against Stewart was improper because other issues had to be adjudicated. *Id.* at 966. The court of appeals did not address when a claim on a title insurance policy accrues. The passage from *West Spalding* quotes with emphasis only discusses the showing a plaintiff must make in order to ultimately secure a judgment. That is a different issue from when a claim accrues for statute of limitations purposes. In the context of this case, accrual occurs when an insured is “put on notice that an injury and substantial damages may have occurred,” *Farrow*, 407 S.W.3d at 599. This turns on when the insured “suffered the loss or damage against which he was to be saved harmless,” *Moberly*, 99 S.W.2d at 63, which consists of sustaining legal expenses or damages from an adverse claim. That occurred when Estes called.

Second, Spalding mistakenly relies on Condition 12(b) of the Policy, which states that Stewart must pay the loss or damages within 30 days of the date that “liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations.” (PEX:5, p.3; DAPX:A12); *see* Resp. Sub. Br. at 18-19. But the test under Missouri law is not when “the extent of loss or damage has been definitely fixed”; it is when the fact of damages are capable of ascertainment. *See Farrow*, 407 S.W. 3d at 599. Again, Spalding does not focus on accrual of an insured’s claim on the Policy. He wrongly focuses on situations in which Stewart may be in breach for failing to tender payment. However, Stewart’s promise under the Policy as a whole is to “insure[ SLC] against loss or damage . . . sustained or incurred” by title issues. Because SLC

sustained or incurred loss or damage from the cloud on title to the Estes acre that became reasonably ascertainable as soon as Estes called, it follows that Spalding's claim on the title insurance policy accrued then.

Third, Spalding's attempt to analogize this case to *Davis v. Stewart Title Guaranty Co.*, 726 S.W.2d 839 (Mo. App. W.D. 1987), is also unhelpful. See Resp. Sub. Br. at 20-21. The *Davis* case is similar to the *West* case discussed above. Neither case concerns accrual of an action on a title insurance policy. In *Davis*, the trial court dismissed a quiet title action that Stewart brought in the name of the insured on the grounds that the insured's prior unlawful detainer suit against an adjacent landowner (a church) already determined that there was a defect in the insured's title to his land. But when the finding of a title defect from the unlawful detainer suit was reversed, *see id.* at 844, Stewart argued that the insured's claim for *money damages* failed because there had been no final adjudication that there was a proven title defect. *Id.* at 850. The court rejected that argument because the underlying facts still showed that there was an issue as to marketability of the title which justified an award of damages. *Id.* at 850-51. But just as in *West*, the *Davis* court did not address when a claim on a title insurance policy accrues for limitations purposes. Contrary to his suggestion, *Davis* does not hold that Spalding's claim only accrued when he disagreed with the compensation offered for the diminution in value to SLC's land caused by Estes' ownership of his acre.

Finally, Spalding says that *Hopmeier* is distinguishable, but he does not rebut Stewart's explanation in its Substitute Brief of the reasons why Spalding's supposed distinctions are misplaced and why the failure to follow the *Hopmeier* analysis leads to

absurd results. *See* App. Sub. Br. at 20-23 (explaining same). This Court should find that Spalding’s claim accrued when Estes asserted that he owned his acre.

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

In its Substitute Brief, Stewart showed 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 the evidence. Spalding has not rebutted either showing.

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

The Policy insured “against *actual monetary loss or damage* sustained or incurred” because of a *covered title issue*, 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 expert, Reardon, failed to offer evidence of this measure. As noted above, Reardon calculated damages by (a) valuing the vacant 418.91 acres insured by the Policy under a prospective future highest and best use *as if it had been completely developed into a lakefront real estate project* but (b) valuing the land subject to the defect caused by Estes’ ownership of his acre—*i.e.*, the 417.91 remaining acres—with a *completely different* use—a highest and best use *as agricultural land*. (PEx:47, Appraisal, p.1 & 26-38; DApx:A21-38). Reardon calculated the value of the 418.91 acres developed into a successful real estate project by taking the present value of his assessment of the

profit that could be derived from developing the land and selling commercial and residential lakefront lots over the next 14 years, and he reached a figure of \$5,700,000. He found the value of the 417.91 acres valued as agricultural land to be \$1,600,000, and he said Spalding's damages were the difference. (*Id.*).

Reardon's failure to be consistent in his assumption of the property's highest and best use with and without the defect shows that he did not measure "actual monetary loss or damage sustained or incurred" *because of a title defect*, but something different. His inconsistency shows he actually measured *future lost profits from a prospective real estate development*. That, however, is not the agreed-upon measure of damages set out in Condition 7 of the Policy. A brief explanation shows why this is so.

Condition 7 provides that to measure "actual" damage to insured land caused by a covered title issue, one must measure "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. (PEx:5, p.3; DApx:A12). In order to properly measure that difference, an appraiser must value the land—and may do so using a highest and best use analysis, if circumstances justify it—but in order to measure the *actual* damage caused by loss of title to part of the insured land, the appraiser must use a consistent methodology. Stewart's expert, John Moser did so. He (a) valued the vacant land insured by the Policy (*i.e.*, with the Estes acre) under its highest and best use with the land used as "future residential and commercial development, contingent upon demand for development in the area," (DEx:348, p.3; RApx:A30), and then (b) valued the vacant land without the Estes

acre under its highest and best use with the land *also* used as a “future residential and commercial development, contingent upon demand for development in the area.” (*Id.*).

If an appraiser values land without a defect under one highest and best use, but then values that land subject to the defect under a *different* highest and best use, the appraiser *is simply measuring the value of the preferred highest and best use*, and *not* the actual damage caused by loss of title to part of the insured land. This is the fundamental defect in Spalding’s evidence. Spalding’s expert failed to calculate the “actual monetary loss or damage” sustained because of the title defect. By valuing the land without a defect *as if it had been developed* into a lakefront real estate project, valuing the land with the defect *as agricultural land*, and calculating the difference, Spalding only offered evidence of *future lost profits from a prospective real estate development*. That is not the proper measure under Stewart’s title insurance policy.

No Missouri case holds that title insurance policies insure the success of planned developments. Policies such as Stewart’s only offer indemnity for actual losses arising from title defects. In this case, future lost profits are not the measure of damages because when the Estes issue arose (which the parties and Jury Instruction No. 7 agree is the relevant time), SLC had not actually lost anything other than an acre of agricultural land. In the words of the Policy, Spalding’s evidence did not measure the “actual monetary loss or damage sustained or incurred” because of the loss of title to the Estes acre because there was no comparison of the “value of the insured estate” “as insured” (*i.e.*, the value of the insured agricultural land (under its highest and best use) 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 (under its highest and best use) minus the Estes acre—the hole in the proverbial donut). Spalding’s evidence failed to calculate damages under the agreed-upon limitation of damages set out in the Policy. This failure to measure damages properly requires reversal of the judgment.

Spalding’s attempts to ignore Stewart’s argument and disguise the impermissible lost profits calculation “switch” in his evidence do not withstand analysis.

Spalding first accuses Stewart of arguing that “application of the highest and best use test in this case was impermissible.” Resp. Sub. Br. at 28. But Stewart did not make any such argument. It has only observed that the *switch* between different highest and best uses shows that there was no measurement of what Condition 7 required to be measured.

The assertion that Stewart has said that any valuation must be based on “the value of the property as it was being used” is likewise misplaced. *Id.* at 29-30. If the highest and best use of the insured agricultural land is to develop it into commercial and residential uses, an appraiser may assume that it will be used that way. The point is simply that in order to measure the effect of a title defect, an appraisal must be consistent, and Spalding’s evidence was not.

Spalding also wrongly claims that it “strains the bounds of credulity” to note the measure of damages set out by the Policy is effectively the value of the Estes acre. *Id.* at 30 n.4. The flaw in this assertion is that it incorrectly presupposes that it is proper to include future lost profits from a real estate development in the calculation of damages under the Policy. It is not. When the measure of damages is done correctly, the measure

required by Condition 7 is the value of the Estes acre—*i.e.*, what SLC thought it had title to, but did not.

Finally, Spalding cannot justify the judgment by combining (a) Moser’s valuation of the land without a defect under a highest and best use as “future residential and commercial development, contingent upon demand for development in the area,” (DEx:348, p.3; RApx:A30), and (b) Reardon’s valuation of the land “in its agricultural state.” *See* Resp. Sub. Br. at 37-38. This suggestion suffers from the same defect as Spalding’s damages evidence generally. It wrongly measures future lost profits from a successful real estate development instead of actual loss or damage from a title defect, as Condition 7 requires.

Spalding wholly failed to offer evidence of a proper measure of damages. That failure means that Spalding failed to make a submissible case of damages. This is an essential element of a claim for breach of a contract. The trial court should thus 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).

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

Separate from the methodological defect in Reardon’s opinion, Spalding failed to prove damages with reasonable certainty because Reardon failed to support his opinion with facts in evidence. For example:

- Reardon appraised the land needed for “the 2007 Plan,” but the land insured by the Policy is only a portion of the 2007 Plan, and Reardon’s own appraisal

admitted that any “proration or division of the total into fractional interests would invalidate the value conclusions.” (PEx:47, p.7). Under the terms of his own appraisal, Reardon’s valuation of the insured land is thus invalid. Spalding claims Reardon only appraised the 418.91 acres insured by the Policy, *see* Resp. Sub. Br. at 34, but the record shows that Reardon actually appraised a tract larger than the 418.91 acres and mistakenly thought that that larger tract was the insured land. (T:328-31; 339-40; 405-10; PEx:47, p.21; DEx:352; DEx:361). The invalidity of Reardon’s valuation of the insured land remains.

- Reardon 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). That assumption was baseless. Spalding claims that the Army Corps of Engineers ultimately issued a permit for certain construction, *see* Resp. Sub. Br. at 32 & 35, but that was not until April of 2009, more than two years after the valuation date in the appraisal. (T:708-09). Likewise, approvals of the City of Lake Winnebago and a local homeowner association did not exist as of the date of Reardon’s valuation. (T:332-35).

These defects in Reardon’s opinion show that Spalding failed to prove damages with reasonable certainty and thus make out a submissible case of damages. Pursuant to Point Relied on 2(b), the trial court should have granted Stewart’s motion for directed verdict and JNOV. Alternatively, pursuant to Point Relied on 4, these defects show that the trial court erred when it admitted that evidence and denied the motion for new trial.

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

In Instruction No. 7, the circuit court told the jury 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:9) (emphasis added). But the instruction to consider uses to which the property “may be applied or adapted” departed from the limitation of damages set out in the Policy. Instruction No. 7 effectively rewrote the parties’ contract and allowed Spalding to recover potential future lost profits, instead of any “actual monetary loss or damage” caused by a title defect, as the parties agreed.

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 that estate or interest subject to the title defect. (PEX:5, p.3; DApX:A12) (emphasis added).

The instruction to consider the “highest and best” use “to which the property reasonably may be applied or adapted” allowed Spalding to recover the value of potential future lost profits. Indeed, Instruction No. 7 departed from the parties’ agreed-upon limitation on damages and 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. The damages instruction did not merely instruct the jury that it could consider the highest and best use value of the insured agricultural land without any defects in title and compare that to the highest and best use value of the insured

agricultural land with the Estes-acre defect. The instruction went beyond the damages limitation the parties agreed to in Condition 7 of the Policy. The Instruction allowed the Jury to use a different measurement to calculate damages from a title defect.

Spalding cannot escape the effects of the error he created when he sought and received an instruction that allowed an impermissible damages calculation, even after the trial judge offered him a “last chance to pull me out of the pit of reversible error.” (T:183-84). He does not distinguish the Alabama and Ohio supreme court cases that show that term “actual monetary loss or damage” used in Condition 7 does not include future lost profits. *See* Resp. Sub. Br. at 42. Moreover, his attempt to rely on other commentators is misplaced because the passages he cites do not address the meaning of the limitation on damages set out in the Policy here, or justify an award of lost profits as opposed to a properly-calculated measure of damages from a title defect.

Finally, Spalding does not even attempt to rebut Stewart’s showing that it suffered prejudice from the charge error. If judgment is not rendered for Stewart, the erroneous jury instruction set out in Instruction No. 7 requires a new trial to be held.

### **CONCLUSION**

The judgment should be reversed and judgment entered in Stewart’s favor. Alternatively, the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

JACKSON WALKER LLP

By: */s/ Justin Nichols*

---

John A. Koepke MO # 27438  
901 Main Street, Suite 6000  
Dallas, TX 75202  
Telephone: (214) 953-6000  
Telecopier: (214) 953-5822  
jkoepke@jw.com

LATHROP & GAGE LLP

John T. Coghlan MO # 36361  
R. Kent Sellers MO # 29005  
Justin Nichols MO # 56920  
2345 Grand Boulevard, Ste. 2200  
Kansas City, MO 64108  
Telephone: (816) 292-2000  
Telecopier: (816) 292-2001  
jcoghlan@lathropgage.com  
ksellers@lathropgage.com  
jnichols@lathropgage.com

*Attorneys for Stewart Title Guaranty Co.*

## 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 7,115 words.

/s/ Justin Nichols

Attorney for Appellant  
Stewart Title Guaranty Co.

### CERTIFICATE OF SERVICE

This is to certify that, on this 12th day of March, 2015, this Appellant's Substitute Reply Brief, together with the Certificate of Compliance and this Certificate of Service, 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:

David Marcus  
Bartle & Marcus LLC  
1100 Main St., Suite 2730  
Kansas City, MO 64105  
dmarcus@bmlawkc.com

Attorneys for Respondent Randy Spalding

/s/ Justin Nichols

Attorney for Appellant  
Stewart Title Guaranty Co.