DA 20-0257

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 152

TONY C. PHIPPS and MINDY L. PHIPPS,

Plaintiffs and Appellants,

v.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY; SECURITY TITLE ABSTRACT COMPANY; and JOHN DOES I-V,

Defendants and Appellees.

APPEAL FROM: District Court of the Sixteenth Judicial District,
In and For the County of Garfield, Cause No. DV-19-8
Honorable Michael B. Hayworth, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Martha Sheehy, Sheehy Law Firm, Billings, Montana

Randall G. Nelson, Nelson Law Firm, P.C., Billings, Montana

For Appellees:

Charles E. Hansberry, Jenny M. Jourdonnais, Brian T. Geer, Hansberry & Jourdonnais, PLLC, Missoula, Montana

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Submitted on Briefs: January 6, 2021

Decided: June 22, 2021

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Tony C. Phipps and Mindy L. Phipps (the Phipps), appeal from a summary judgment order entered by the Sixteenth Judicial District Court, Garfield County, in favor of Old Republic National Title Insurance Company (Old Republic) and Security Title and Abstract Company (Security) (collectively, the Defendants), upon the parties' stipulated "threshold legal issue" regarding the Defendants' duty to Phipps.

¶2 We affirm, and address the issue:

> *Did the District Court err by determining the Defendants did not owe a legal duty arising out their issuance of a preliminary title commitment?*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 The Phipps acquired parcels of real property (the Property), used for ranching, through two separate transactions in 2008 and 2016. The Property is physically accessible by traversing Ingomar Road, a north-south roadway connecting MT200 and U.S. 12, to Gregg Road, and then proceeding east. While the Property is physically accessible, the legal accessibility was uncertain due to the apparent lack or insufficiency of Garfield County public records establishing Ingomar Road and Gregg Road as public roadways. This uncertainty was reflected in the title insurance policies issued when Phipps purchased the parcels constituting the Property, as both policies contained exceptions for established legal access.

¶4 In March 2017, the Phipps entered into a buy-sell agreement to sell the Property to Theodore and Elizabeth Wright (the Wrights). Pursuant to the agreement, the Phipps were to provide the Wrights with a title insurance policy insuring the buyer, upon the condition

of the Wrights' approval of a preliminary title commitment. Phipps ordered a title commitment from Security, and its underwriter Old Republic. Security title examiner Mitch Gundlach researched and examined the title status of the Property by drawing a map of the Property, searching public records with the Garfield County Clerk and Recorder, and examining prior title policies for tract indexes and exceptions. Gundlach's review included the county miscellaneous books, deed book, and mortgage book, but did include road books, because they are not indexed or otherwise recorded by the Clerk and Recorder, making their review difficult or unfeasible, and are not part of a standard title search.

¶5 The preliminary commitment issued by the Defendants offered to insure the Wrights, but listed several exceptions to, or exclusions from, coverage that would be included under a later-issued title policy, including an exception for legal access to the Property.[1] The preliminary commitment also explained that it was "a contract to issue one or more title insurance policies and is not an abstract of title or a report of the condition of title."

¶6 The Wrights did not approve several of the exceptions to coverage in the preliminary commitment and the deal initially fell through, but the parties continued to negotiate for a second deal. On May 5, 2017, Gundlach learned the Garfield County Commissioners were in the process of adopting a resolution to declare Ingomar and Gregg roads to be public

[1] There was also a standard exception, stated in all Old Republic commitments, for "facts that would be disclosed by an accurate and complete land survey of the land, and that are not shown in the public records."

roadways. However, that process would not be completed by the deadline set by the Phipps and Wrights. The Phipps were able to resolve some of Wrights' concerns with the coverage exceptions, including obtaining more positive language regarding the legal accessibility exception,[2] but were unable to wholly resolve it, since the commissioners' proposed resolution was not yet adopted. Consequently, the Wrights remained unsatisfied and walked away from the deal, requesting the Phipps return their earnest money of $150,000. The Phipps resisted, and the Wrights initiated suit. The Wrights ultimately prevailed on their claim and their earnest money was returned.

¶7 On June 5, 2017, after the Wrights' action was initiated but prior to its judgment, the Garfield County Commissioners adopted a resolution declaring Ingomar and Gregg Roads to be public roadways. On June 15, 2017, the Defendants issued a revised preliminary commitment that did not contain an exception for legal access. However, by then the parties' relationship had soured, and they did not enter further sales negotiations.

¶8 There are two documents of record the Phipps believed would have established Ingomar and Gregg Roads as public roadways, a 1912 document and a 1914 document, both of which could have been discovered through a page-by-page search of the Garfield County and Dawson County road books. The 1912 Garfield County document, which would have been discovered only by a search of the Garfield County road book, was provided to Gundlach by Phipps prior to issuance of the preliminary commitment.

[2] The revised exception stated, "[a]ccess, if any, is by way of Ingomar Road and Gregg Road, subject to any terms, conditions, and provisions of said roads."

However, Gundlach, in consultation with Old Republic's underwriter, determined it did not sufficiently establish that the roadways were public. The 1914 document, from Dawson County, was provided to Gundlach by Phipps about a year after the transaction terminated. The record does not indicate how the document was located. However, Defendants agree that the 1914 document describes a legal access for Phipps' property by way of the existing roadways.

¶9 In July 2019, the Phipps filed this action, alleging negligence, professional negligence, and negligent misrepresentation by the Defendants when conducting the title examination. In December 2019, the parties filed a Joint Motion to Stay Litigation Pending Ruling on Threshold Legal Issue, which the District Court granted. In April 2020, the District Court entered its "Order on Threshold Legal Issue," which it stated as whether the Defendants owed Phipps, as sellers, "any legal duty, and the scope of that duty, in issuing a preliminary commitment under the Montana Title Insurance Act." Citing the statutes governing the issuance of a title insurance *policy*, the District Court reasoned that these provisions "do not impose a duty with respect to the offer of title insurance" in a preliminary commitment, thus foreclosing the Phipps' claims. The Phipps appeal.

STANDARD OF REVIEW

¶10 We review a grant of summary judgment de novo, applying the same M. R. Civ. P. 56(c) criteria used by the District Court. *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2019 MT 213, ¶ 18, 397 Mont. 161, 451 P.3d 493 (citing *N. Cheyenne Tribe v. Mont. Dep't of Envtl. Quality*, 2010 MT 111, ¶ 18, 356 Mont. 296, 234 P.3d 51). Summary

Judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mont. Envtl. Info. Ctr.*, ¶ 18 (citing *N. Cheyenne Tribe*, ¶ 18). The existence of a legal duty is a question of law also subject to de novo review. *Jackson v. Dep't of Family Servs.*, 1998 MT 46, 287 Mont. 473, 956 P.2d 35. We review the District Court's interpretation and application of a statute de novo. *Dick Irvin Inc. v. State*, 2013 MT 272, ¶ 18, 372 Mont. 58, 310 P.3d 524.

DISCUSSION

¶11 Title insurance began in America in 1876, when the first title insurance company received its franchise in Philadelphia. Quintin Johnstone, *Title Insurance*, 66(4) Yale L.J. 492, 492 n.1 (1957). The increasing volume and complexity of modern real estate transactions necessitated a system of title assurance to reduce the risk of title loss, and title insurance has become a staple of land transactions, now a billion dollar industry nationally, including $53,389,094 in premiums being paid in Montana during 2018 alone.[3]

¶12 Unique in the insurance field, the purpose of title insurance extends beyond merely securing coverage for risk, and into the identification of risk. Johnstone, *supra*, at 494. Title insurance applicants are often, as a practical matter, "more interested in what the company examination of the title discloses[,]" than actually obtaining insurance coverage. Johnstone, *supra*, at 494. Indeed, "perhaps the primary characteristic of title insurance" is not indemnity, but obtaining the services of experts in title matters to conduct a title search

[3] *2018 Title Insurance Industry Data Book*, American Land Title Association, https://perma.cc/V5K6-VU96.

and identify potential issues regarding a property's title. 11A Lee R. Russ, *Couch on Insurance* § 159:10, 29-30 (3d ed. 1995). Of course, indemnity also plays a critical role.

¶13 The Phipps' claims are not based upon a policy of title insurance, but rather upon alleged acts or omissions in the preparation of the preliminary commitment. As the District Court summarized, quoting Phipps' pleadings, "Plaintiffs contend that Defendants owed them a legal duty vis-à-vis the Commitment and that '[h]ad Defendants done a reasonably diligent investigation, such as reviewing the county road books, or visiting the access road, the evidence for accessibility would have given a greater comfort level to underwriters.'" On appeal, Phipps argue the District Court erred by concluding that the title insurance statutes "do not impose a duty with respect to the offer of title insurance," i.e., the preliminary commitment.

¶14 The title insurance commitment, or "preliminary report," § 33-25-105(7), MCA, is not a title insurance policy. The commitment is merely "an offer to issue a title insurance policy[,]" § 33-25-105(7), MCA, subject to the terms stated in the commitment. While a commitment may present as a report on the status of a property's title, as a matter of law, it "does not constitute a representation as to the condition of title to real property," § 33-25-111(2), MCA, and "is not an abstract of title." Section 33-25-111(2), MCA.

¶15 We also note, albeit not directly at issue here, that neither is a title insurance *policy* "an abstract of title or a representation as to the condition of title to the stated property." Section 33-25-111(1), MCA. Rather, the policy is a contract under which a title insurer insures or indemnifies the insured against specifically enumerated losses or damage.

Section 33-25-105(12), MCA. In contrast, an abstract of title is a compilation of "all recorded conveyances, instruments, or documents which, under the laws of this state, impart constructive notice regarding the chain of title to real property[.]" Section 33-25-105(1), MCA.

¶16 Prior to the Legislature's enactment of the Montana Title Insurance Act (MTIA or Act) in 1985, Montana's seminal case on preliminary commitment liability was *Malinak v. Safeco Title Ins. Co.*, 203 Mont. 69, 661 P.2d 12 (1983). *Malinak* imposed "a duty on the part of the title insurer when it issues a title commitment which later forms the basis for a title insurance policy, particularly where the seller relies on the title commitment, to base its title commitment and report upon a reasonably diligent title search of the public records." *Malinak*, 203 Mont. at 76, 661 P.2d at 16. Malinak sold real property to Novy upon a Safeco title policy that insured title on the basis of a preliminary commitment issued for a previous potential buyer, which had removed a title exception for timber reservations in a date down endorsement.[4] *Malinak*, 203 Mont. at 71-73, 661 P.2d at 13-14. The timber reservations turned out to be valid and were exercised, leading to litigation between Malinak and Safeco after Safeco paid Novy the value of the timber rights. *Malinak*, 203 Mont. at 72-73, 661 P.2d at 14. Despite a statement in the commitment that the title company's examination of the public record was "made wholly for determining the insurability of the title to said land and not for reporting on the condition of the record[,]"

[4] A "date down endorsement," as in "updated" or "brought down to date," references a re-issued commitment covering developments that have occurred since the initial issuance. *See* Barlow Burke, *Law of Title Insurance* § 10.01, 10-3 (3d ed. 2004).

the Court, relying on *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975), held:

> It is within the expectations of the parties, the seller ordering the title commitment and the title insurer inspecting the public records, that the title commitment will accurately reflect the insurability of the title, or the condition of the public record, as the case may be, with respect to that title. We find a duty on the part of the title insurer when it issues a title commitment which later forms the basis for a title insurance policy, particularly where the seller relies on the title commitment, to base its title commitment and report upon a reasonably diligent title search of the public records. A breach of that duty would constitute negligence.

Malinak, 203 Mont. at 76, 661 P.2d at 15-16.[5]

¶17 As explained above, the Legislature's enactment of the MTIA during the subsequent legislative session after *Malinak* expressly differentiated both preliminary commitments and title policies from abstracts of title—commitments and policies are not "representation[s] as to the condition of title to real property." Section 33-25-111(2), MCA. Critically here, the Act also provided that "[t]he rights, duties, and liabilities applicable to the preparation and issuance of an abstract of title are *not applicable to the issuance of a preliminary report.*" Section 33-25-111(2), MCA (emphasis added). This provision stands in direct contradiction to our declaration in *Malinak* that, when issuing a preliminary commitment, "the insurer serves as an abstractor of title[,]" which includes the

[5] Chief Justice Haswell, joined by Justice Weber, dissented, stating they "strenuously dissent from the holding that title insurance companies have a duty to conduct a diligent search for title defects when they issue a commitment to insure a land title, that the seller has a right to rely thereon to that extent, and that an action for damages lies in favor of the seller for breach of that duty. . . . The purpose of a title search by a title insurance company is to determine the insurability of a land title, not defects of record therein." *Malinak*, 203 Mont. at 77-78, 661 P.2d at 16 (Haswell, CJ, dissenting).

duty to "list all matters of public record regarding the subject property[.]" *Malinak*, 203 Mont. at 75, 661 P.2d at 15.

¶18 The Defendants argue our common law holding in *Malinak* was abrogated by passage of the Act in 1985, particularly by its elimination of "abstractor duties" from the preparation of a preliminary commitment. Section 33-25-111(2), MCA. Defendants cite to legislative enactment of title insurance acts crafted from the same model act in sister jurisdictions, and decisions thereafter illustrating that the legislative enactments canceled abstractor duties previously imposed upon the issuance of preliminary commitments. *See* Ariz. Rev. Stat. § 20-1562; Cal. Ins. Code §§ 12340.2, 12340.10, 12340.11; Wash. Rev. Code Ann. § 48.29.010(f). In California, appellate decisions have held that "the enactment of [California's Title Insurance Act] was a direct legislative reaction to judicial decisions such as *Jarchow*"—a case upon which we relied in *Malinak*—that imposed abstractor liability upon issuance of a preliminary report. *Southland Title Corp. v. Superior Court*, 231 Cal. App. 3d 530, 536 n.4, 282 Cal. Rptr. 425, 428 n.4 (1991); *see also Jarchow*, 48 Cal. App. 3d at 938-39, 122 Cal. Rptr. At 485; *Malinak*, 203 Mont. at 75, 661 P.2d at 15.[6]

¶19 Phipps argue our decision in *Harpole v. Powell Cnty. Title Co.*, 2013 MT 257, 371 Mont. 543, 309 P.3d 34, applied and essentially revived *Malinak*, at least to the degree that title insurers have a duty to conduct a reasonably diligent search. In *Harpole*, a

[6] The District Court also noted that *Jarchow* "conflated the duty imposed on an abstractor with that to be imposed with respect to a preliminary title report: 'In rendering the first service [presenting a buyer with a preliminary title report], the insurer serves as an abstractor of title [] and must list all matters of public record regarding the subject property[.]' [*Jarchow*, 48 Cal. App. 3d at 938, 122 Cal. Rptr. at 485 (1975).]"

property seller sued the title insurer after an initial agreement to sell property fell through due to an exception for legal accessibility in the title insurance preliminary commitment. *Harpole*, ¶ 10. We noted that, as agreed "by all parties," *Malinak*'s holding that required "a reasonably diligent title search of the public records" articulated the applicable duty for the case, and the question was whether the duty was met. *Harpole*, ¶ 22. We resolved the case on a determination that, because the only evidence in support of the subject roadway being public was not "public record[,]" this information fell outside the scope of a "reasonably diligent search[,]" and the title company was not subject to liability. *Harpole*, ¶¶ 24-25. We concluded that "[i]t would be wholly unrealistic to require the expenditure of hundreds of hours and travel to four cities in order for a search of records to be deemed a 'reasonably diligent search.'" *Harpole*, ¶ 25. This is precisely the basis of the Phipps' claims against Security and Old Republic: they want to argue the record search conducted by the Defendants was inadequate, based on *Malinak*. However, given the parties' mutual reliance on *Malinak* in *Harpole*, our attention was not drawn to the issue of *Malinak*'s ongoing validity, and thus it was not necessary for the Court to reach it, consistent with principles of judicial restraint. *See Harpole*, ¶ 26. That issue is unavoidable here.

¶20 In Montana, the common law is the rule of decision "so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or statutes of Montana[.]" *Haker v. Sw. R.R.*, 176 Mont. 364, 368-69, 578 P.2d 724, 727 (1978). The common law "does not control . . . where the law is declared by statute." *Haker*, 176 Mont. at 369, 578 P.2d at 727; *see also* § 1-1-108, MCA ("In this state there is no common law

in any case where the law is declared by statute."). However, enactment of a statute does not necessarily result in field preemption of the common law, and "a statute is not presumed to work any change in the rules of the common law beyond what is expressed in its provisions or fairly implied in them in order to give them full operation." *Haker*, 176 Mont. at 369, 578 P.2d at 727.

¶21 We need not finally determine the scope of the Legislature's alteration of the common law for resolution of this case, as it is clear that enactment of the MTIA removed the common law ground for the particular claims Phipps has made herein, based upon the preliminary commitment. The Legislature expressly abrogated the central holding of *Malinak*—that the issuer of a preliminary commitment is held to the same duties as an abstractor—when it enacted definitions for preliminary report, title insurance policy, and abstract of title, and provided that "[a] preliminary report is not an abstract of title [and] [t]he rights, duties, and liabilities applicable to the preparation and issuance of an abstract of title are not applicable to the issuance of a preliminary report." Section 33-25-111(2), MCA. Of note is the timing of the legislation, coming during the subsequent legislative session after the decision. To the extent that it conflicts with the Act by imposing duties upon issuance of a preliminary commitment that are a part of abstracting, *Malinak* has been legislatively overruled.

¶22 Part 2 of the Act, "Powers and Duties of Title Insurers[,]" imposes a number of duties upon title insurers. Pertinent here is § 33-25-214, MCA, which provides that "[a] title insurer may not issue a title insurance *policy* unless it, its title insurance producer, or

an approved attorney has conducted a reasonable search and examination of the title and made a determination of insurability of title in accordance with sound underwriting practices." Section 33-25-214(1), MCA (emphasis added). This provision is consistent with § 33-25-111(1), MCA, which does *not* exclude such duties regarding the issuance of a "title insurance policy," and likewise consistent with § 33-25-111(2), MCA, which *does* exclude such duties regarding the issuance of a "preliminary report." These provisions make clear that the duty to conduct a reasonable search is imposed upon the issuance of a policy, but expressly exempted from the issuance of a preliminary commitment.

¶23 Further, as Defendants argue, even if the road documents identified by Phipps had been timely located, and had established legal access, the MTIA does not impose a duty upon the Defendants to unconditionally insure the right of access for the Wrights. Rather, Defendants remained free to determine on what basis to "offer to issue a title insurance policy[.]" Section 33-25-105(7), MCA. As the District Court reasoned, the provisions of the MTIA "do not impose a duty with respect to the offer of title insurance." The Phipps seem to concede this point, as they allege that "[h]ad Defendants done a reasonably diligent investigation, such as reviewing the county road books, or visiting the access road, the evidence for accessibility *would have given a greater comfort level to underwriters*." (Emphasis added.) Greater comfort notwithstanding, Defendants would not have been duty-bound to insure for legal access.

¶24 The Phipps' argument regarding the practical importance of the preliminary commitment to real estate transactions is well taken, but we cannot impose duties upon that

process as a matter of common law when the Legislature has acted otherwise. The claims made herein by the Phipps cannot be sustained, and the District Court correctly entered summary judgment.

¶25 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR