

ORAL ARGUMENT - 10/1/96
96-0092
STEWART TITLE V. AIELLO

LAWYER: May it please the court. This case preserves primarily the duty of good faith and fair dealing. As the court knows, the main issue in this case is whether the duty of good faith and fair dealing applies in a judgment/debtor- judgment/creditor situation, that duty that was first announced in Arnold. Perhaps a more fine tuned statement of the main issue in this case ought to be or is whether the judgment in this case created or carried forward that special relationship necessary for the duty of good faith and fair dealing as it did in this court's decision in Aetna v. Marshall. To a slightly lesser degree only because they are dependent upon the court's determination of the good faith issue, there are two other issues involved; and that is whether the substantive law of Moriei applies to this case, a case tried before Moriei; and secondly, the issue of the legal sufficiency of an award of the evidence supporting an award of mental anguish. The latter two issues mental anguish, and Moriei punitive damages application only come into play if there is a breach of the duty of good faith and fair dealing.

The CA essentially held in this case that the instant case was controlled by Aetna v. Marshall. Wherein this court held that a 21.21 insurance code claim did survive an agreed judgment in a worker's compensation case.

The reason this case is not decided by this court's decision in Marshall is that we do not have the critical fact that was present in the Marshall case. That is an express agreement on the part of an insurer to continue to provide insurance coverage and benefits. In Marshall as the court knows that express agreement and promise to provide additional insurance took the form of an agreement to provide future medical coverage. The same future medical coverage that was in existence quite frankly before the agreed judgment. The Marshall case does not apply to this case we submit because there was no obligation agreed to or agreed to by Stewart Title Guaranty Co., or stated in the agreed judgment for Stewart Title to continue to process any claims under the owner's policy of title insurance that had been issued to the Aiello's a number of years before.

The word insurance is not mentioned once in the agreed judgment. The word claim, processing of claim is not mentioned once in the agreed judgment. The only thing mentioned in the agreed judgment as far as an obligation on the part of Stewart Title was concerned was as a purchaser of the Aiello's house. That was their only obligation.

BAKER: What was the nature of the claim the Aiello's allege against Stewart before you settled by the agreed judgment?

LAWYER: The nature of the claim was that an easement...

BAKER: I mean what theories?

LAWYER: The theories that had been announced in the prior proceeding. Your honor I think they were 2121, they were breach of a contract, there were several other theories that...

BAKER: Was there a claim for breach?

LAWYER: I don't think specifically there was but the conduct for which the alleged duty arose in the prior handling of the claim was certainly barred by the judgment. The question here is not is there a breach of a duty in good faith and fair dealing by conduct that predates the judgment, because after all that's what the judgment did. It settled the claim specifically pled and those that could be pled that arose out of those facts. So the question is from April 11, 1988 forward, the date the agreed judgment was signed, was there a) a special relationship that would support a duty of good faith and fair dealing? and b) was there a breach?

BAKER: Well is it a correct statement that the agreed judgment is basically the written memorandum of the agreed settlement between the parties carried out in the form of a judgment to dispose of that litigation?

LAWYER: I wouldn't disagree your honor with that characterization generally of what an agreed judgment is.

BAKER: With mutual obligation to carry out what y'all agreed to do?

LAWYER: I don't disagree with that at all. And that is significant it seems to me because you really have to look at the judgment to see what did we agree to do. What we agreed to do was we agreed to pay \$319,000. They agreed in exchange to deed us the house, and that's really what that judgment said. Those were the obligations. There is another independent award of costs at the very end, which of course is an obligation, but independent of the amount that was purchase money for the house. The CA said that since Stewart was obligated to conduct a closing, that this special relationship of insurer/insured continued.

I challenge the respondent to point out the words in the agreed judgment that requires Stewart Title Guaranty Co. to conduct a closing. They are not there.

ENOCH: But there is a provision that Stewart Title pay \$100 a day for each day it does not close past what the 20th of one day?

LAWYER: One hundred dollars a day until closing papers are signed and funds paid - that's right your honor. But what is important from a Marshal standpoint and that...

PHILLIPS: So what you're saying is as long as you are willing to pay \$100 a day you never

have to have a closing?

LAWYER: No your honor. What I am saying is the closing that is agreed to and contemplated by this judgment is simply this - it's an exchange of a deed for \$319,000. It is very, very easy it seems to me to get into the trap that I see and that is that well this judgment mentions a closing so doesn't that mean that Stewart Title conducts the closing, and if that's so isn't that some continuing obligation? That analysis simply cannot it seems to me stand up under scrutiny. First, nothing in the judgment said Stewart was to conduct a closing. But let's talk about what a closing is. A closing is the culmination of the exchange of what the parties have bargained for. That's all a closing is. You have closings in real estate transactions. You have them in lawsuits. You have them in security transactions. You have them in all sorts of transactions. And all a closing is is one party exchanges what they agreed or they deliver the performance they have agreed to give in exchange for the other.

PHILLIPS: Well what was your obligation at the closing?

LAWYER: Our obligation at the closing was to pay \$319,000.

PHILLIPS: How about these delay damages? When was that to be settled up?

LAWYER: It was to be settled up when it was paid. And I'm not suggesting that it wasn't owed.

PHILLIPS: In your position there could be a closing without you paying any additional damages over and above the \$319,000? It was closed, and that was it, and you had the right to a deed, a legally enforceable right to a deed as of that moment?

LAWYER: Absolutely.

PHILLIPS: And it doesn't matter who the check was paid to, who the right lawyer is or any of that?

LAWYER: It might your honor if there were ever any question about that. The judgment says that the plaintiffs recover judgment against Stewart for \$319,000. The next sentence says: Upon payment of such sum by cashier's check plaintiffs will deed over. That's the closing we are talking about. And it wasn't by cashier's check. It happened to be by check from the constables office because it wasn't done as promptly as it should have been done. And I'm not here to defend Ron Mitchell, the attorney who was handling this. I'm not here to suggest that he shouldn't have moved quicker, shouldn't have gotten the money quicker, but the closing is \$319,000 for a deed.

BAKER: You didn't feel any obligation to tender additional sums of the \$100 a day for instance on a new _____ to pay half, \$319,000 plus?

LAWYER: I would have your honor and I would have handled it differently. I don't know why Mr. Mitchell handled this case the way he did. There is evidence in the record frankly that he...

BAKER: That's what I'm trying to get to. Is it an accurate statement to say that you could carry out your obligations under this agreement just as by merely paying \$319,000 whenever you want to or as Chief Justice suggested you had carried out your duties and you were entitled to a deed? Doesn't by reading the entire order of the judgment require Stewart to not only pay the \$319,000 but if they want to pay on March 21, they give another \$100?

LAWYER: No question that Stewart had an obligation to pay that...

BAKER: Isn't the homeowner entitled to demand performance in its entirety, not piecemeal?

LAWYER: Your honor if the judgment had said you don't get your deed until you pay \$319,000 and \$100 a day for everyday after March 20, because after all your honor March 20 was already 3 weeks prior to the judgment. There was a known amount here. So I think we have to look to what the judgment says and the judgment is very explicit about when the deed was to be delivered.

HECHT: Do you agree that Aetna v. Marshall was rightly decided?

LAWYER: Well I think on the facts of Aetna v Marshall I would tend to I think have more sympathy with the dissent in that case. But we accept Aetna v. Marshall as we obviously must. I can see an argument that if after a judgment there is something that is required to be done under an insurance policy, that you've agreed that since a judgment is in fact an agreed judgment is a party's cumulation of their agreement, I can see that decision, and I can understand it because that speaks to the essence of the duty of good faith and fair dealing. This court said we need this duty because parties are an unequal bargaining position. We need this duty because it is the insurance company that has exclusive control of the claims' handling process and without this duty insureds were left merely at the whim of insurance companies and all they have to do is sue them. All they could do is sue them. So I can see in that Marshall case and it's a long way perhaps of saying that I can see the rationale for that. But in this case there is absolutely not one thing Stewart Title Guaranty Co. was required to do or agreed to do in that agreed judgment under its prior insurance policy whatsoever.

When you look at it what are the settlement papers? What's required by this judgment? It's real easy to talk about generalities. But look at the judgment and see what does the judgment require? If you were to have to sue to enforce the judgment what is it that you could in good faith come to a court and say I'm entitled to. All the Aiello's could do is come to court and say I'm entitled to money - \$319,000 and I give the deed and then \$100 a day. That is all the judgment says they are entitled to.

CORNYN: Are you asking the court to overrule the Marshall case?

LAWYER: No your honor I'm not. I think this case is easily and clearly distinguishable from Marshall. Absolutely.

ABBOTT: In this case the Aiellos could have executed upon whatever damages they were incurring; isn't that correct?

LAWYER: Absolutely and their own second lawyer, Jerry Sadler who testified at the trial, admitted that on the day he was hired, May 20, 1988, he knew he could go down that day and get out a writ of execution. Because it was beyond the 30 days after the judgment.

ABBOTT: In the Marshall case could the plaintiffs have gone out and executed upon the relief they were requesting?

LAWYER: I don't see how. How do you execute for future medical? That's the difference. Because that's the control, that's the whole reason for duty of good faith and fair dealing is the insured has no control. It's the company that has control. And without the duty they may exercise it improperly. I tell you when you go from the day before judgment to the day after a money judgment anyone who does not see a significant 180° shift in control is we think not seeing the true picture. Because on the day before the judgment the Aiellos if they wanted to go to the Sheriff in Harris County and say: Help me get my money from Stewart; the Sheriff would say there is nothing I can do.

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RESPONDENT

HEGGEN: May it please the court. It's kind of sad that an insurance company would come up here and argue that it should be allowed to act in bad faith to its insureds. You start off with a policy of insurance and a claim under a policy of insurance which requires good faith in the execution of it. You take that policy of insurance and you stand in front of a Texas State Judge and say: We promise to honor the obligations in that policy of insurance, which they don't do of course. So the judge then has to say: I order you to honor your promise to honor the policy and the claim under the policy. And Stewart Title would say in that process of being affirmed twice, once by a promise an acknowledgment of the obligation, and again by the court ordering them to honor that promise which they had showed no interest in doing that something is choked off.

GONZALEZ: That's a little overstated is it not counsel. There was not an order. There was a settlement that they agreed to. I mean it was not as to a trial on the merit. It was a settlement entered into?

HEGGEN: That's the promise I am speaking of your honor. When I speak of the order

of the court I am referring to the judgment. Because Stewart Title refused to honor their initial settlement agreement, Roger and Evelyn's attorney at the time, had to go back to the court and make that enforced by a judgement. Now the judgment they would have you to believe doesn't refer to a closing or if it refers to a closing that's just some sort of sick joke or something. That's not true.

The judgment itself incorporates by reference the entire agreement and in that agreement you will see explicitly over and over again Stewart Title's in-house lawyer referring to all the requirements for the closing.

OWEN: A title company when they act as a closer they are not providing insurance are they?

HEGGEN: Not always your honor. They don't have to.

OWEN: Well that wasn't contemplated here was it that they would be providing title insurance?

HEGGEN: They are simply providing the benefits of the policy, that's right your honor. They specifically wanted a different title company. They wanted Chicago Title Co. to hold the closing. They wanted to have two cashier's checks: one for \$279,000 to go through the closing; it was to be \$280,000 but Stewart Title wanted \$1,000 credit to pay for the new title policy. You see executing a new title policy is one of the aspects of the real estate closing.

OWEN: But who was the title policy in favor of?

HEGGEN: It would have been in favor of Stewart Title Co. protecting the Aiello's for any claims that came through that. The title policy is always one step behind in the chain of command basically.

OWEN: But the insured under that policy wasn't the Aiello's?

HEGGEN: The Aiello's to this day remain insureds of Stewart Title Co. A title policy does not evaporate upon payment. It's not like a liability policy. You know we paid all the claims. A title policy protects you for any claims that come through you to whoever inherits title 10 years, 15 years from now.

HECHT: And your position is as long as that relationship continues there is a duty of good faith in that relationship as long as it has to do with those dealings?

HEGGEN: I don't think that's necessary in this case. I think the two factors here is that doubly affirming the obligations under a policy of insurance should not choke off anything. But more importantly I think is the fact that a closing was totally in Stewart Title's control, it was very definitely a requirement under the judgment and under their agreement both because the judgment...

PHILLIPS: What is your definition of a closing?

HEGGEN: Well the Texas Transaction Guide, which Stewart Title refers to says: The term closing is generally understood to refer to that moment when the parties meet in the office of a title company, etc., to execute the necessary instruments, to effect the transfer of title, and disburse the proceeds of the sale. However, the actual closing of a real estate transaction involves more than the formal execution of documents and the transfer of money. By contracting to sell and to purchase real property the respective parties become committed to the performance of certain undertakings and obligations that must occur before the transaction closes and title formerly passes.

CORNYN: Do you contend there is a duty of good faith and fair dealing as between a seller of real estate? Let's say this has just been buyers and sellers of a house. And how is this different.

HEGGEN: This is different in that the closing was to finalize this honoring of the claim. This is all the process of honoring the claim. This is not independent buyers and sellers who come together and do all these things.

CORNYN: The CA held that the evidence that you tried to introduce at trial about prejudgment bad faith was barred by the Doctrine of Res Judicata and yet held that the relationship with insured/insurer continued past the judgment. Don't those seem inherently unreconcilable?

HEGGEN: I don't think so your honor. And the reason is because wherever you pick up the trail it was simply going back to affirming the obligations under the policy. So I think you can accept the obligations of Stewart Title to act in good faith wherever you pick it up along the trail.

CORNYN: But under that theory then you should have been able to introduce evidence of presettlement conduct of bad faith?

HEGGEN: That was always my position your honor. And if the case is remanded I think that certainly is an appropriate consideration to give. Because I think all that evidence very definitely is relevant to consideration of what Stewart Title did.

ENOCH: You have a settlement that's been reduced to judgment on your claim against the title company because there is a defect in the title. That matter is resolved isn't it?

HEGGEN: Apparently it was not your honor. We thought it was but apparently it was not.

ENOCH: That matter was resolved?

HEGGEN: That case, yes your honor, ok I am with you now.

ENOCH: What you have now a matter that's not resolved is simply \$100 a day up to the

point that your clients receive the \$319,000; is that's what's not resolved?

HEGGEN: No your honor. I disagree with that characterization. First of all by operation of law what the judgment actually says is \$319,000 plus interest. Interest is imposed as a matter of law in any judgment. So that much remained unpaid unquestionably.

BAKER: Doesn't the judgment have to award it?

HEGGEN: No your honor, and we cited the cases that hold that.

BAKER: How does the executing officer know what rate to apply, when to start it, and when to stop it if it's not in the judgment?

HEGGEN: These questions are beyond my capacity to answer. I don't know.

BAKER: I think it goes to the question of you just saying it's implied and therefore you get it and that's why they breach?

HEGGEN: As a matter of law it's imposed your honor. Yes. And that's exactly why there should have been a closing and why the good faith of Stewart Title in complying with its agreement to have a closing was required so that there could be a date certain at which these obligations end.

SPECTOR: You mentioned that Chicago Title was perhaps to have a closing. Did your clients deliver the deed to Chicago Title in an anticipation of a closing?

HEGGEN: My clients prepared a deed and is replete with the record their attorneys kept saying: When can we have a closing? Please let us have a closing. Let us know where to go for the closing. And Stewart title refused.

SPECTOR: But could you have instituted some procedure to have it closed?

HEGGEN: Could the Aiellos have?

SPECTOR: By delivering the deed. I mean at a closing you don't even have to be...it's understood that the title company or whoever is conducting the closing will make the transfer of the deed and the money.

HEGGEN: That's true your honor. As a matter of fact the insurance code, Art. 9.53 says there are forms that are required to be used in a closing, which obviously there has to be some formality to a closing. In this case it was doubly important because you had the \$100 a day which could not be fixed until you had the closing. Stewart Title in acting in bad faith ducked that question. Now want to say when we paid part of the principal of a judgment we can ignore the rest

OWEN: When you go to a title company and don't get a title policy but you decide in lieu of a title policy you will take a title opinion. Does the title company owe a duty of good faith and fair dealing to people that come to its offices for the closing?

HEGGEN: If they are simply the office for the closing...for example if Chicago Title held a closing, would they have owed a duty of good faith and fair dealing? I don't know. I don't know what the insurance code imposes with the required forms that they are obligated to do. I don't know the answer to that your honor. But I do know, that in this case, when the Aiello had a policy of insurance, which required good faith, that a judgment enforcing their promises to honor that policy should not have killed off the preexisting duty of good faith.

ENOCH: In returning to my questions, the obligation that is not now resolved is an obligation that was set up by the judgment; is that correct?

HEGGEN: That's correct your honor although there are certainly additional damages.

ENOCH: There's no obligation here under the insuring agreement...the obligation of \$100 a day is not an obligation that's under the insuring agreements; it's an obligation that's under the judgment?

HEGGEN: It's an obligation that Stewart Title voluntarily assumed in wrapping up its obligations under the title policy.

ENOCH: There's a judgment that requires the payment of \$100 a day, the day of the closing, is there not?

HEGGEN: That's correct your honor.

ENOCH: Assuming it doesn't close on whatever that first date was, then...

HEGGEN: The first date would have been March 1 originally.

ENOCH: Is it your position that because Stewart Title is an insurance company, that it has after a judgment's been rendered that imposes its own obligations, that simply because one of the parties to the judgment's insurance company there is a duty of good faith and fair dealing?

HEGGEN: Excellent question. No, I am not saying that at all. However good that might be for the sole of the estate, I'm not saying that at all.

ENOCH: Under what basis does a good faith and fair dealing duty exist for the payment of this \$100 a day until closing?

HEGGEN: First of all we think that having the closing had its own benefits as well. We mentioned that the insurance code requires certain forms that would have set finality. I have a list of 17 different attributes that a closing would have provided.

ENOCH: But that's not duty that was created...according to you the judgment imposes that obligation.

HEGGEN: Well their agreement to honor the policy which was then embodied in the judgment requires that obligation. Yes. It's not just the judgment in this case. They agreed to honor their policy by doing these things. It's not just the judgment here, and I think that your question would any insurance company subject to a judgment have a duty of good faith to pay voluntarily? I don't think we have to address that question because here we have an agreement to honor the policy, reduce a judgment yes, but which retained obligations specifically a closing which the Aiello could not execute on. Stewart Title says you can't make us, we don't have to, this is the two sides of the coin that they want to cash in and have you term it no duty. If the Aiello's cannot make them have a closing, there has to be some duty to pursue that.

ENOCH: So critical to your position is that the insuring agreement between Stewart Title and these buyers has an obligation to have a closing in it and since the judgment also contemplated a closing, that's what created the good faith and fair dealing issue? The title policy does require a closing and so as a result the good faith follows even though there's been a judgment here?

HEGGEN: No your honor. The policy provides several ways by which it could be implemented. Stewart Title chose this particular means. They voluntarily said we want to have a closing. The way we want to execute in the policy is to buy the house from you. And here's how we want to do it, and we will have a closing and at the closing you pro-rate, you assign your taxes, you prorate the insurance, you assign the insurance, you assign leases - the people in possession of the property- all these factors that in good faith should be done when you are transferring a piece of property. In this case they said this is how we want to implement your claim, our policy.

BAKER: Are you arguing that by virtue of the fact that you interpret the judgment to require a closing, that the closing and whatever transpires at that is the basis for the duty of good faith and fair dealing, the closing itself is?

HEGGEN: No your honor.

BAKER: What is then the importance of the closing vis a vis the claim that there is a duty of good faith and fair dealing in carrying out this agreed judgment?

HEGGEN: I think the importance is it makes it exactly analogous to Marshall in that the insurance company retains certain obligations or certain duties that it chose to accept.

BAKER: I'm asking about the duty of good faith and fair dealing, that duty all by itself, whatever it is it's a tort claim.

HEGGEN: Yes your honor.

BAKER: So how does a closing per se give rise to that duty?

HEGGEN: It's not a closing per se. I see your question now. And we are not saying a closing per se. We are saying an obligation whether it's to pay a medical claim, whether it's to have a closing, this is an unusual circumstance.

BAKER: I wholeheartedly agree, and that's why I'm trying to figure out where do you get the fact that your argument basically has been the nature of the closing gives rise to the duty of good faith and fair dealing in this case.

HEGGEN: Perhaps I have been unclear. What my position is I think more precisely is that when an insurance company with the preexisting duty...

BAKER: No, no. As Judge Enoch questioned you you said you settled the issue of their failure to pay under their title policy.

HEGGEN: Your honor it was settled by them promising to honor the policy. So yes your honor it was settled.

BAKER: By what buying the property from your client and paying \$319,000 plus if they delayed sending you the \$319,000 they would pay another \$100 a day.

HEGGEN: They promised to pay \$100 a day until a closing was held and all the papers were signed. That's correct your honor. They retain control. I think this answers your question. They retain control over having that closing happen.

BAKER: But you bargained for \$100 a day by them having control when they were going to give you the \$319,000 didn't you?

HEGGEN: That's correct your honor and here we are almost 8 years later still waiting for that \$100 a day.

PHILLIPS: Was the \$100 a day a contract of adhesion? I mean is this something you didn't have any control over like the terms of an insurance policy?

HEGGEN: That particular provision no your honor.

PHILLIPS: Is there anything else in this judgment that was a one-sided deal that you need the particular protection that the state affords to wards and incompetence and kids? I mean people who really can't bargain for the deal.

HEGGEN: I think that the reason it rests here is because the Aiellos could not execute on this closing. They could not force them to have a closing to have set. Now the \$100 a day is due.

PHILLIPS: You went whole months. I mean both sides it seems to me went months without contacting each other.

HEGGEN: No your honor. The Aiellos, their lawyers dictated phone call after phone call after letter after fax, you know weekly, daily attempts to communicate with Stewart Title.

PHILLIPS: And always told Stewart who the proper lawyer was?

HEGGEN: That's right your honor.

GONZALEZ: I am a little bit confused about the facts of the case with regards to the payment of the \$319,000. When was that paid to the Aiellos?

HEGGEN: The end of June your honor.

GONZALEZ: And the deed was transferred. So we are fighting here about that?

HEGGEN: No your honor there was still an attempt to have a closing to do the leases, the taxes, the insurance.

GONZALEZ: So title has never been transferred to Stewart Title?

HEGGEN: Eventually the title was transferred. Almost 1 year later Mr. Fitch sent to me, by that time I was involved, a letter saying send us the deed. Gee do we trust them? The answer was no. But finally I found the deed and I sent it over to him. And in fact they could not be trusted, not Mr. Fitch, but Stewart Title, because the Aiellos kept getting done for the taxes. The taxes were not transferred. Exactly the kind of thing that you need a closing for to insure that liability, on going liability...

GONZALEZ: The transfer has been made?

HEGGEN: The transfer was made 6-7 years ago. Yes. Of the deed. We don't know if we're protected from further liability because the closing was never held. The Aiellos are still out and uncertainty.

GONZALEZ: You don't any have to appear at a closing. You just sign your papers and get your deed. It's formality.

HEGGEN: It should be yes your honor. It should be a mere formality. And I should simply point out that it's not just the in-house lawyer Mr. Mitchell. Mr. Madison the VP of the company was called to testify and he said I knew everything that was going on, and no I never made any attempt to arrange for a closing. They simply ignored that because the Aiello's couldn't make them do it. And they now come here to this court and ask this court to dignify that.

GONZALEZ: Well getting back to Justice Enoch. I think he said you could have executed on the judgment, that's how you could have forced their hands?.

HEGGEN: Well they did. They sent a sheriff out to get the \$319,000 thinking now we've got their attention. Now we will have a closing. No even that was not enough because by then it's like I guess they angered the crocodile. It simply became vicious at that point and refused ever to take any step to wrap up the obligations, to remove the uncertainty, the liability on the house. Uncertainty remains and they ask this court to dignify it. We ask this court to reject that offer.

CORNYN: A few years before this case the El Paso CA held in Torchia v. Aetna Casualty & Surety that the duty of good faith and fair dealing did not survive the execution of a release. Would you distinguish your case from that?

HEGGEN: First of all there was a release. A release is one of the documents that would have been signed at a closing.

CORNYN: And here there's a judgment. But you said that's different.

HEGGEN: Well in Torchia there was a release in which they say we acknowledge that the underlying claim was doubtful and of certain origin; and therefore, that extinguished the duty of good faith and fair dealing. Essentially it was an admission situation. That didn't happen here. That has never happened here.

CORNYN: So whatever the distinction between a release and a judgment, that's the distinction you make between Torchia and this case? It was a survival of the duty of good faith and fair dealing?

HEGGEN: Certainly. If the Aiello's had signed a release saying our claim was always doubtful, they would not have a bad faith case. Certainly. We also think the distinction is not just the judgment, but the judgment in which the insurance company retains obligations that it uniquely can have performed, which it refuses to do.

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REBUTTAL

LAWYER: Let me just follow-up on that last question on Torchia. It is true, it's factually different in how the dispute came to the court. There is however a very important similarity. In Torchia the insured argued that I will be able to set aside this release I executed, which was followed by a judgment, I ought to be able to set aside this release I executed on the eve of trial because you tricked me and you violated the duty of good faith and fair dealing when you weren't as up front with me as you should have been, or whatever the facts were. But it was the duty of good faith and fair dealing that the insured in Torchia said gave them the right to set aside the release. And the very court, the El Paso court said that can't be; when parties are on the courthouse steps fighting tooth and nail as they said, it can hardly be said that there is this special relationship in which there ought to be a duty of good faith and fair dealing. And so I think there is some similarity there.

I want to say that I'm astounded. A few minutes ago I heard for the very first time ever, ever, the acknowledgment, argument, or statement that it is not the requirement to hold a closing that supports the duty of good faith and fair dealing. Throughout however many years we've been litigating this case, the only way that they've ever been able to argue the duty of good faith and fair dealing, because everybody knows it ought not apply to just a judgment/debtor or judgment/creditor, they're not arguing that, the only way they've ever gotten there is to say you had some insurance kind of a morphous insurance duty to "conduct a closing." There is no requirement that Stewart conduct a closing. But that's the way they've gotten to Marshall. And now today I heard for the first time no, no, when questioned about well what is a closing.

GONZALEZ: A closing is you cutting them a check, they give you a deed. It's simple. And you refuse to do that. For a long time.

LAWYER: There was a dispute about the delivery of the deed. This record isn't quite as painted by counsel. I'm not defending Mr. Mitchell's delay of 2-1/2 months...

GONZALEZ: Not Mr. Mitchell, Stewart Title's contract?

LAWYER: And Stewart Title is bound by that. I absolutely agree with that your honor. Their testimony reflects Mr. Mitchell didn't keep Stewart very well informed about what was going on. But we're bound by that. What this is is a breach of contract case. You're absolutely right. All it was was deed for money. Stewart delayed 2-1/2 months in paying the money. They shouldn't have. The Aiello's delayed 15 months after they got the money in delivering the deed. They shouldn't have. And that's the way this case should have been tried. It was a breach of contract case. I couldn't agree more. Frankly to torture a breach of contract case into a bad faith case is we think not warranted by this case.

I will say one other thing. There was a dispute as to the \$100 a day. There was a dispute as to whether the \$100 a day was intended to be in lieu of interest on the judgment. That's why the

\$100 a day wasn't paid that summer. The record reflects that in September just 2 months after the judgment was paid Stewart cut a check of some \$23,000-24,000, went to the offices of Mr. Sadler, the attorney for the Aiello, and was told that Mr. Sadler was no longer the attorney. Mr. Heggen was now the attorney. Stewart tried to pay that. I just want that to be clear. The picture isn't quite as it was painted. But the bottom line is there is no duty of good faith and fair dealing in a judgment/debtor or judgment/creditor situation even when the judgment/debtor is an insurance company.

There is just no basis to find a special relationship. We respectfully request the court reverse and render as did the first time it was decided by the El Paso court.