STATE OF MICHIGAN

COURT OF APPEALS

BANK OF AMERICA, NA,

Plaintiff-Appellant,

v

FIRST AMERICAN TITLE INSURANCE COMPANY, PATRIOT TITLE AGENCY, KIRK D. SCHIEB, WESTMINSTER ABSTRACT COMPANY, WESTMINSTER TITLE AGENCY, INC, PRIME FINANCIAL GROUP, INC, VALENTINO M. TRABUCCHI, PAMELA S. NOTTURNO, f/k/a, PAMELA S. SIIRA, DOUGLAS K. SMITH, JOSHUA J. GRIGGS, STATE VALUE APPRAISALS, LLC, NATHAN B. HOGAN, and CHRISTINE D. MAYS,

Defendants-Appellees,

and

FRED MATSON, MICHAEL LYNETT, JO KAY JAMES, and PAUL SMITH,

Defendants.

UNPUBLISHED
March 27, 2014

No. 307756
Oakland Circuit Court
LC No. 2010-112606-CK

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Plaintiff Bank of America alleges that it lost $7,000,000 on four mortgage loans it made in fraudulent property flipping transactions involving straw borrowers and artificially inflated property evaluations. Plaintiff appeals by right the trial court's order entered December 15, 2011, granting summary disposition to defendants Westminster Abstract Company (Westminster) and First American Title Company (First American). We affirm as to defendant Westminster and affirm in part and reverse in part as to defendant First American.

I. FACTUAL BACKGROUND

Plaintiff alleges that it lost $7,000,000 on loans secured by four mortgages in what plaintiff describes as a fraudulent property flipping scheme involving multiple straw borrowers and artificially inflated property evaluations. Two of the mortgage loan transactions were closed by defendant Westminster and two of were closed by defendant Patriot Title Agency (Patriot). In each transaction, defendant First American issued title insurance. The loans, with the nominal borrowers and property addresses, are listed in the next chart.

Borrower	**Address**	**Loan Amount**	**Closing Agent**
Fred Matson	13232 Enid Blvd	$3,575,000	Westminster
Jo Kay James	1890 Heron Ridge Court	$2,800,000	Westminster
Paul Smith	1766 Golf Ridge Drive	$1,500,000	Patriot
Michael Lynett	1550 Kirkway Road	$1,500,000	Patriot

Plaintiff provided the closing agents with specific closing instructions for each transaction, which it contends were not followed. Plaintiff also contends it is entitled to indemnity from First American under its closing protection letter (CPL) issued in each transaction to secure the use of its title insurance based on the fraud or dishonesty of closing agents Westminster and Patriot. The first paragraph of each CPL First American wrote plaintiff regarding each transaction reads:

> When title insurance of First American Title Insurance Company is specified for your protection or the protection of a purchase from you in connection with closings of real estate transactions on land located in the state of Michigan in which you are to be the seller or purchaser of an interest in the land or a lender secured by a mortgage (including any other security instrument) of an interest in land, the Company, subject to the Conditions and Exclusions set forth below, *hereby agrees to reimburse you for actual loss incurred by you in connection with such closing* when conducted by the Issuing Agent (an agent authorized to issue title insurance for the company), referenced herein and *when such loss arises out of*:
>
> 1. Failure of the Issuing Agent to comply with your written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instruments require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you, or
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> 2. *Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings*. [Emphasis added.]

Plaintiff states it provided 65% to 70% of the sales price for the properties based on inflated property evaluations and was not informed of multiple flips and straw men underlying each transaction. Shortly after each of the loans closed, the borrowers defaulted, and plaintiff

initiated foreclosure proceedings. Plaintiff then discovered the mortgage fraud scheme. Plaintiff asserts that after the foreclosed properties were sold, its losses totaled approximately $7,000,000.

Plaintiff brought this action asserting claims against Patriot and Westminster for breach of plaintiff's closing instructions and negligent misrepresentation.[1] Plaintiff asserted claims against First American for breach of the CPLs. Plaintiff also asserted claims against the mortgage broker that initiated the four mortgage loan applications, The Prime Financial Group (Prime) and Patriot's principal, Kirk D. Schieb. In addition, plaintiff named appraisers it asserts provided fraudulent appraisals: Pamela S. Notturno, Douglas K. Smith, Joshua J. Griggs, Nathan B. Hogan, and Christine D. Mays. Only Westminster and First American defended plaintiff's claims; the other defendants were either defaulted or the claims were dismissed, permitting plaintiff to appeal by right the trial court's grant of summary disposition to defendants.[2]

After discovery that included the deposition of Jennifer Kojs, the closing agent for Patriot who repeatedly refused to answer on the basis of the Fifth Amendment, Westminster and First American each filed motions for summary disposition. Plaintiff responded and asserted that it, rather than defendants, was entitled to summary disposition under MCR 2.116(I)(2), at least as to the transactions closed by Patriot. The trial court issued an opinion and order on September 22, 2011, granting summary disposition to defendants Westminster and First American under MCR 2.116(C)(10). The trial court denied plaintiff's motion for reconsideration on November 22, 2011. Subsequently, the parties stipulated to dismiss without prejudice the remaining pending claims, and the trial court entered a final order closing the case on December 5, 2011. Plaintiff then brought this appeal by right.

Westminster argued in the trial court and argues on appeal that plaintiff was a victim of fraud, but the fraud was perpetrated by Patriot and others (appraisers) who have been defaulted or dismissed from the case. Also, Westminster asserts that plaintiff's loss is attributed to its own negligent underwriting practice of issuing "stated income" loans, i.e., by failing to verify fraudulently overstated income and inflated appraisals in loan applications. In essence, Westminster acknowledges that fraud occurred but that with respect to the two closings it handled, the deposition testimony and the documentary record demonstrate that it complied with plaintiff's closing instructions and properly distributed funds at closing. Westminster's theory of the case is that the fraud that plaintiff alleges related to issues that were the fundamental responsibility of plaintiff as the mortgage lender: verifying the value of the underlying property and the qualifications of the mortgage-loan applicant.

Similarly, First American argued below and argues on appeal that plaintiff is responsible for its own inadequate business practices of failing to carefully scrutinize loan applications to determine whether borrowers were providing falsified financial information. It is undisputed that plaintiff made "stated income" loans—based its decision to lend money only on the

[1] Plaintiff subsequently voluntarily dismissed its claims of negligent misrepresentation.

[2] Plaintiff's original application for leave to appeal was dismissed on the parties' stipulation. Unpublished order of the Court of Appeals entered on December 27, 2011 (Docket No. 307631).

borrowers' credit scores and did not verify the income stated on the borrowers' loan application. With respect to the limited indemnification agreement in its closing letters, First American contends it applies only to a closing agent's fraudulent mishandling of a lender's funds or documents at the closing of a real estate transaction or the closing agent's failure to comply with the lender's closing instructions that are related to the status of the property's title and the lender's secured interest in the real estate. First American asserts that the indemnification agreement does not apply to plaintiff's generalized claims of fraud in this case, citing *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63; 761 NW2d 832 (2008).

First American also asserts that mortgage broker, Prime, submitted the fraudulent loan applications to plaintiff and that "the loans were closed by independent title policy issuing agents authorized to issue First American title insurance policies." According to First American, "Westminster is, and Patriot Title was, one of First American's many independent, nonexclusive agents authorized to issue title insurance commitments and policies insured by First American" under an agency agreement providing the agents' authority was limited to issuing title insurance policies and commitments. Thus, First American contends that Westminster and Patriot were not acting as its agent while performing closing services. But First American issued closing protection letters (CPLs) to plaintiff that promise to indemnify the lender for specific and limited types of loss. Thus, First American agreed to reimburse plaintiff for its "actual loss" incurred in connection with the closings but only when the loss "arises out of" one or more of the events described in subparagraphs 1 or 2 of the CPL.

First American argued in support of its motion for summary disposition that under a narrow reading of its CPLs, it was not required to indemnify plaintiff because (1) there was no evidence that Westminster or Patriot failed to comply with plaintiff's closing instructions that related to the status of title to real property or the validity, enforceability and priority of the mortgage plaintiff received; (2) there was no evidence that Westminster or Patriot committed fraud or dishonesty in the handling of plaintiff's funds or the handling of plaintiff's documents in connection with any of the closings, and (3) plaintiff received the benefit of its bargain—a valid first lien and an enforceable note from a borrower—so plaintiff did not suffer an "actual loss" that was covered by the CPL. First American alternatively argued that under the full credit bid rule, plaintiff's actual losses were at most only $450,000.

First American's theory of the case was that the fraud or dishonesty provision of the CPLs did not provide for indemnification where all payees of plaintiff's loan were disclosed on HUD-1 forms[3] or did not apply to HUD-1s because they are not plaintiff's documents and because plaintiff obtained a valid, first mortgage lien on each of the properties. The trial court accepted First American's theory of the case and granted summary disposition to defendants opining in an order dated September 22, 2011:

[3] A HUD-1 settlement statement is a standard form prescribed by the Secretary of Housing and Urban Development. It must be completed in all transactions involving federally related mortgage loans that include a statement of all settlement costs charged to the buyer and the seller. See 12 USC 2603; 17 Am Jur 2d, Consumer and Borrower Protection § 229.

> The Court finds that pursuant to the Court of Appeals decision in *New Freedom Mortgage* v *Globe Mortgage*, 281 Mich App 63 (2008), there was no breach of contract by Defendant Westminster and Defendant First American has no obligation to indemnify Plaintiff for any alleged violations of the closing instructions because those allegations do not relate to the status of title to the properties or to the priority of Plaintiff's liens. In addition, the Court finds that Plaintiff has failed to establish any basis for liability under section 2 of the CPL. Plaintiff has failed to present any evidence of concealed disbursements, shortages or unpaid prior lien holders. The Court of Appeals in *New Freedom* specifically found that any misrepresentation on the HUD-l settlement statement is not fraud in the handling of the lender's document.

As noted, the trial court denied plaintiff's motion for reconsideration on November 22, 2011. Subsequently, after dismissing without prejudice the remaining pending claims, the trial court entered a final order closing the case on December 5, 2011. Plaintiff appeals by right.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The trial court in deciding the motion must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The motion may be granted where "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, 469 Mich at 183. A material fact issue exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

We also review de novo the proper interpretation of a contract as a question of law. *Archambo v Lawyers Title Insurance Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). An indemnity contract is construed in the same fashion as any other contract. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1998). The main goal of contract interpretation is to enforce the parties' intent as expressed in their written agreement. *Id*. at 603-604; *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). An unambiguous indemnity contract, like any other contract, must be enforced according to its terms. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005). If the contract is ambiguous, the fact-finder must determine the parties' intent. *Id*. Whether contract language is ambiguous, requiring resolution by the fact-finder, is a question of law we review de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 480; 663 NW2d 447 (2003). A contract is ambiguous if it permits two or more reasonable interpretations, or if one provision cannot be reconciled with another. *Woodington v Shokoohi*, 288 Mich App 352, 374, 792 NW2d 63 (2010). So, where a contract is subject to two reasonable interpretations, the facts must be developed, and summary disposition is inappropriate. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

III. FIRST AMERICAN LIABILITY REGARDING PATRIOT CLOSINGS

A. THE PARTIES' ARGUMENTS

Plaintiff argues that although the trial court ruled that First American had not breached ¶ 1 of the CPL, plaintiff only relied on ¶ 2 of the CPL, the fraud or dishonesty provision. Plaintiff asserts that the trial court erred by reading *New Freedom* as limiting ¶ 2 of the CPL to concealed "disbursements, shortages, or unpaid prior lien holders," and also ruling that "misrepresentation on the HUD-1 settlement statement is not fraud" under ¶ 2 of the CPL. Plaintiff argues that ¶ 2 of a CPL applies where the entire transaction is a fraudulent scheme, and the lender does not receive the benefit of its bargain of a bona fide borrower willing to pay the loan, citing among other authority, *First Am Title Ins Co v Vision Mortgage Corp, Inc*, 298 NJ Super 138, 143-144; 689 A2d 154 (1997) (a lender suffers an actual loss even though it obtains a first lien where through fraud or dishonesty it does not receive the three remedies it bargains for in a bona fide transaction: payment, foreclosure and recovery of any deficiency). Here, plaintiff contends the purported borrowers were individuals with no intention of ever making any payments on the loans for which they applied, and that Patriot misled plaintiff into believing the transactions were legitimate.

Plaintiff also argues that *New Freedom* is distinguished from the present case because direct and circumstantial evidence supports that the closing agents here were aware of borrower misrepresentations in documents submitted to plaintiff and that plaintiff's funds were distributed as part of fraudulent schemes. Plaintiff points to evidence that First American accused Patriot, its owners and employee Kojs in a different lawsuit of perpetrating fraudulent schemes identical to those at issue here. Plaintiff contends that First American cannot rebut the evidence of fraud and dishonesty by Patriot because its closer, Kojs, asserted the Fifth Amendment during her deposition. Because Kojs refused to testify, plaintiff argues it is entitled to an adverse inference against First American. Plaintiff argues, the adverse inference drawn from Kojs's refusal to testify is properly imputed to First American. Plaintiff also points to First American's 2004 underwriting alert that double escrow transactions suggest fraud. Plaintiff further notes plaintiff's expert's report: he would conclude that the four transactions at issue presented circumstances (undisclosed property flips, no down payments, disbursements to parties without liens on the property, and failing to disclose the properties would not be occupied by borrowers) that indicated fraud and dishonesty of the closing agents covered under ¶ 2 of the CPLs.

First American argues that the trial court correctly granted First American summary disposition because the plain language of the CPLs and the holding of *New Freedom* preclude plaintiff's claims for indemnity. First American contends that the CPL provides narrow protections; it does not protect a lender with respect to the integrity of the real estate transaction as a whole. The CPL only protects a lender from an agent fraudulently or dishonestly handling the lender's funds or the lender's documents. Here, because there is no evidence that the closing agents mishandled plaintiff's funds or documents, First American cannot be liable under ¶ 2 of the CPLs. All prior liens on the property were paid, and plaintiff received a first priority mortgage lien. Thus, the trial court correctly reached the same conclusion as the Court in *New Freedom* regarding plaintiff's indemnity claim under the CPL. Also, the trial court correctly ruled that under *New Freedom*, fraud with respect the HUD-1 forms does not come within ¶ 2 of the CPL because the HUD-1 forms were not plaintiff's documents.

First American also argues that judicial estoppel cannot be applied with respect to its claims in another case First American brought against Patriot. That an identical fraud is involved in the other case is speculation. Furthermore, First American argues that plaintiff has not shown the necessary elements of judicial estoppel: (1) that First American's prior position was successful and (2) that First American's position in the other case is "wholly inconsistent" with its position in this case.

Additionally, First American argues that no adverse inference arises from Kojs' refusal to testify because an adverse inference is proper only "when they refuse to testify in response to probative evidence offered against them." *Phillips v Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995). First American asserts that Kojs was not confronted with evidence against her but was only asked questions that assumed a fraud scheme existed, and she was aware of it. Further, even if an adverse inverse were permitted, it could not be imputed to First American because Kojs was not acting as First American's agent when performing closing tasks; she was only First American's agent when issuing title commitments or title insurance.

Regarding plaintiff's expert, First American contends that plaintiff never presented a proper foundation for expert testimony, and the trial court never qualified the proposed witness as an expert or determined whether the witness's testimony would be admissible. Consequently, First American argues that the report of plaintiff's proposed expert can be given no weight.

Finally, First American asserts that even if plaintiff's claims were valid, they are limited by the full credit bid rule. See *New Freedom*, 281 Mich App at 68. Because plaintiff received an asset that it valued as at least equal to its debt, First American contends that plaintiff has suffered no damages as a matter of law. Thus, because plaintiff's foreclosure bid exceeded the debt from the Kirkway and Enid properties, plaintiff suffered no damages. Similarly, First American argues that because plaintiff's foreclosure bids for the Heron Ridge and Golf Ridge properties were less than what it was owed, plaintiff's damages are limited to the difference between the debt and the credit bid.

B. PROLOGUE

The prime determiner of the outcome of this case is this Court's decision in *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63; 761 NW2d 832 (2008), which interpreted a closing protection letter (CPL) nearly identical to the ones at issue in these closings. We read *New Freedom* as extending the full credit bid rule to indemnity claims under CPLs. MCL 600.3280 limits the rule to deficiency claims after foreclosure by advertisement of property against "the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon." First American, Westminster, and Patriot are not a "person liable" on the secured debt. It may be argued that because plaintiff asserts a liability claim that does not arise directly from liability on the underlying debt, the full credit bid rule does not apply. Notwithstanding, *New Freedom* is controlling precedent, MCR 7.215(C)(2), and we must follow it until it is "reversed or modified by the Supreme Court or by a special panel of the Court of Appeals." MCR 7.215(C)(1).

C. ANALYSIS

Regarding the Patriot closings, we reverse the trial court as to the Golf Ridge closing because there is evidence creating a genuine question of fact that Patriot knew of or knowingly participated in the undisputed fraudulent scheme, and plaintiff's claims are not barred by the full credit bid rule. Regarding the 1550 Kirkway Road closing, although there is evidence creating a question fact that Patriot engaged in "fraud or dishonesty" within the meaning ¶ 2 of the CPL, we again hold that plaintiff's claim regarding this closing is barred by the full credit bid rule. See *New Freedom*, 281 Mich App at 68, 74-76. This Court will affirm the trial court's decision if it reaches the correct result, even if it does so for the wrong reason. *Burise v City of Pontiac*, 282 Mich App 646, 652 n 3; 766 NW2d 311 (2009).

It is undisputed that plaintiff lost millions of dollars on the four mortgage loans at issue in this case based on a fraudulent scheme involving straw borrowers, inflated incomes and appraisal, and other misrepresentations. Furthermore, there is no dispute that Patriot was an agent of First American authorized to issue its title insurance policies, i.e., an "issuing agent" under the CPLs at issue, and that plaintiff was a lender secured by a mortgage at a closing conducted by First American's "issuing agent." Plaintiff asserts First American must indemnify it for its "actual losses"—the amount of its loan plus expenses of foreclosure, less proceeds from the sale of the foreclosed properties—under the CPL First American issued to plaintiff regarding the Patriot closings. Plaintiff has abandoned its original claim that liability existed under ¶ 1 of the CPL because Patriot failed to follow plaintiff's closing instructions. Instead, plaintiff relies on ¶ 2 of the CPL, asserting that its "actual loss . . . arises out of . . . [f]raud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings."

"A closing protection letter is an indemnity agreement, not an insurance policy." *JP Morgan Chase Bank, NA v First Am Title Ins Co*, 795 F Supp 2d 624, 628 (ED Mich, 2011). A CPL is issued by a title insurance underwriter to verify its agent's authority "'to issue the underwriter's policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agent's errors or dishonesty with escrow or closing funds.'" *New Freedom*, 281 Mich App at 80, quoting 2 Palomar, Title Ins Law, § 20:11. It is an inducement the underwriter extends to the parties of a real estate transaction to encourage them to use the underwriter's product. And as such, it is a contract supported by consideration independent of the title insurance policy on which a breach of contract may be maintained. *Id.*; *JP Morgan Chase Bank*, 795 F Supp 2d at 629-630.

An indemnity contract is construed in the same fashion as any other contract and must be enforced according to its plain terms. *Badiee*, 265 Mich App at 351; *Zurich Ins Co*, 226 Mich App at 603-604. Unless otherwise defined, the words used in an indemnity contract must be given their plain and ordinary meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003)("we examine the language in the contract, giving it its ordinary and plain meaning"); *New Freedom*, 281 Mich App at 78 ("we glean the parties' intent from the plain language of the contract"); *Meagher*, 222 Mich App at 722 ("The language of a contract should be given its ordinary and plain meaning."). Furthermore, contracts must be read as a whole, "giving harmonious effect, if possible, to each word and phrase." *Wilkie*, 469 Mich at 50, n 11.

Plaintiff rests its claim for indemnity on ¶ 2 of the CPL, the plain terms of which require plaintiff to establish "fraud or dishonesty" by Patriot (or Westminster). These two terms are quite broad. The common meaning of "dishonesty" is the opposite of "honesty;" it is "a

disposition to lie, cheat, or steal" or a "dishonest act; fraud." *Random House Webster's College Dictionary* (1992), p 385.[4] Our Supreme Court in *General Electric Credit Corp v Wolverine Ins Co*, 420 Mich 176, 179, 188; 362 NW2d 595 (1984), discussed the "natural, common, ordinary, and primarily understood meaning" of the word "fraud," as used in MCL 257.248 requiring a surety bond of motor vehicle dealers providing indemnification of certain persons for loss "caused through fraud, cheating, or misrepresentation in the conduct of the vehicle business." The Court noted that the "natural, common, and ordinarily understood definition of the word 'fraud' embraces both actual and constructive fraud." *General Electric Credit Corp*, 420 Mich at 188. Thus, the plain meaning of "fraud" includes "both actual fraud—an intentional perversion of the truth—and constructive fraud—an act of deception or a misrepresentation without an evil intent." *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 101 n 2; 666 NW2d 623 (2003) (Young, J., *concurring*). Fraud may also be committed by suppressing facts—silent fraud—where circumstances establish a legal duty to make full disclosure. *Id*., citing *Hord v Environmental Research Institute of Michigan* (*After Remand*), 463 Mich 399, 412; 617 NW2d 543 (2000). Such a duty of full disclosure may arise when a party has expressed to another "some particularized concern or made a direct inquiry." *M&D, Inc v McConkey*, 231 Mich App 22, 29; 585 NW2d 33 (1998). "[I]n order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure." *Id*. at 31.

In addition to showing "fraud or dishonesty" of the issuing agents, plaintiff must show that the fraud or dishonesty related to "handling your funds or documents in connection with such closings" to establish liability under ¶ 2 of the CPL. The *New Freedom* Court read the word "documents" in ¶ 2 of the CPL as being modified by the word "your." *New Freedom*, 281 Mich App at 83. Specifically, in holding that ¶ 2 of the CPL in that case was not violated, the *New Freedom* Court noted that although the issuing agent was responsible for "discrepancies in the HUD-1 settlement statement and the attachment to the HUD-1 settlement statement was falsely attested, these documents did not belong to plaintiff." *Id*. Consequently, the trial court in the present case did not err by ruling that under *New Freedom* any misrepresentation on the HUD-l settlement statement, by itself, will not support liability under ¶ 2 of the CPL because the HUD-l settlement statement is not a document "that belonged to plaintiff."[5] *Id*.

But regardless of the ownership of the documents involved, ¶ 2 of the CPL also applies to "fraud or dishonesty of the Issuing Agent handling your [plaintiff's] funds . . . in connection with such closings." Consequently, liability under ¶ 2 of the CPL is implicated when the HUD-1 settlement statement records disbursements of funds of the addressee of the CPL (plaintiff), as

[4] A dictionary may be consulted to determine the plain and ordinary meaning of undefined words used in a contract. *In re Kostin Estate*, 278 Mich App 47, 54; 748 NW2d 583 (2008).

[5] We believe that *New Freedom* misreads the word "your" as modifying "documents" rather than only "funds." We would read ¶ 2 of the CPL as requiring that the alleged "fraud or dishonesty" must relate either to the funds advanced by the lender or any "documents in connection with such closings." But we must follow *New Freedom* until it is "reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals." MCR 7.215(C)(1).

part of a fraudulent scheme of which the issuing agent is either actively participating or is aware of but failed to disclose. In other words, an issuing agent may fraudulently or dishonestly handle a lender's funds even when all disbursements are accounted for in the HUD-1 settlement statement and where there are technically no "concealed disbursements, shortages or unpaid prior lien holders." Here, plaintiff alleges a fraudulent scheme involving straw borrowers who made false statements in loan applications and documents at the closings stating that they would occupy the secured property as their primary residence. In *New Freedom*, the plaintiff also contended that the borrower made false statements that she would occupy the premises as her primary residence. *New Freedom*, 281 Mich App at 82-83. The defendant in *New Freedom*, however, was not liable under ¶ 2 of the CPL because the plaintiff "presented no evidence that [the issuing agent] was aware at closing that [the borrower] did not intend to occupy the property."

We conclude that plaintiff produced sufficient evidence to raise a genuine question of fact as to whether the issuing agent, Patriot, through its employee Kojs, possessed knowledge of the fraudulent scheme or was an active participant. Although First American correctly disputes that judicial estoppel applies,[6] we find that plaintiff is entitled to an adverse inference that Patriot was an active participant or had knowledge of the fraudulent scheme based on Kojs' assertion of her Fifth Amendment privilege. "In a civil case, a party's invocation of the [Fifth Amendment] privilege against compulsory self-incrimination gives rise to a legitimate inference that the witness was engaged in criminal activity." *Davis v Mutual Life Ins Co*, 6 F3d 367, 384 (CA 6, 1993); see also See *Baxter v Palmigiano*, 425 US 308, 318; 96 S Ct 1551; 47 L Ed 2d 810 (1976)("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"). We find that First American's parsing of this principle, citing *Phillips*, 213 Mich App at 400, is unpersuasive. Plaintiff possessed ample evidence of fraud when it questioned Kojs regarding the closings at issue, and, regardless of the form of the questions, Kojs pleaded the Fifth Amendment. Kojs' silence in the face of accusation—while generally not admissible in a criminal prosecution—is in a civil case "'evidence of the most persuasive character.'" *Baxter*, 425 US at 319 (citation omitted). Consequently, plaintiff is entitled to an adverse inference that Patriot through Kojs was an active participant in the two fraudulent real estate transactions that Patriot closed. *Baxter*, 425 US at 318-319; *Davis*, 6 F3d at 384.

First American also argues that even if an adverse inference arises from Kojs' assertion of her right to remain silent under the Fifth Amendment, it cannot be imputed to First American

[6] Under the doctrine of judicial estoppel, "'a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.'" *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994), quoting *Lichon v American Univ Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990). For the doctrine to apply, a party's claims in the two cases "must be wholly inconsistent." *Id*. at 510. First American's position in this case—that Patriot did not act fraudulently or dishonestly—is not "wholly inconsistent" with First American's position in other litigation concerning different transactions that Patriot engaged in fraudulent activity.

because Kojs was not acting as First American's agent when performing real estate closing services. Rather, First American asserts Kojs could only act as agent when issuing title insurance commitments or title insurance policies. This argument is misplaced. First American's potential liability is not based on a principal's liability for its agent's actions under the theory of respondeat superior; it is based on its contract under the CPL to indemnify plaintiff for actual losses arising out of Patriot's (through Kojs) fraudulent or dishonest acts while acting as both the issuing agent of First American's title insurance and also performing closing services.

Plaintiff also presented evidence from which Patriot's knowledge of the fraud can be inferred in the form of an admission by First American that the closings like those at issue suggest fraudulent activity. Specifically, in underwriting alerts sent to its issuing agents, First American warned that double escrow situations like those at issue here "suggest fraud—either against the initial seller, the ultimate buyer, or the lender to the ultimate buyer." While First American's underwriting alerts about double escrow transactions do not prove that Patriot acted fraudulently or dishonestly here, the alerts are evidence from which it may be inferred that Patriot had reason to know that the transactions were fraudulent. In addition, plaintiff presented the report of a proposed expert that indicated the expert would opine that the four transactions at issue presented circumstances that indicated fraud or dishonesty on the part of the closing agents, including undisclosed property flips, no down payments, disbursements to parties without liens on the property, and failure to disclose that the borrowers would not be occupying the properties. Taken together, plaintiff's proposed expert testimony and First American's underwriting alert would provide significant evidence from which to infer that the closing agents in this case knew or should have known the transactions at issue were fraudulent.

First American argues that the proposed expert testimony should not be considered because the trial court never qualified the proposed witness as an expert or determined whether the witness's testimony would be admissible. Also, First American contends the proposed expert's report strays beyond his proposed expertise. If the trial court determines that technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify regarding the expertise by opinion or otherwise, if the testimony is based on sufficient facts and the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. MRE 702; *Phillips*, 213 Mich App at 401. It is within the discretion of the trial court to recognize the qualifications of a witness as an expert and also to admit proposed expert testimony. *Surman v Surman*, 277 Mich App 287, 304-305; 745 NW2d 802 (2007). Here, the trial court has not ruled on the proposed expert's qualifications or on the admissibility of the expert's proposed testimony. But the proposed expert's report indicates he may have the requisite education, training, and experience regarding the specialized area of real estate closings and title insurance, such that his specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. To the extent the proposed expert's report summarizes testimony that would be admissible at trial, it may be considered on a motion for summary disposition. MCR 2.116(G)(6); *Maiden*, 461 Mich at 123-124 n 6.

Based on the foregoing, we conclude that plaintiff presented sufficient evidence that it suffered actual losses as result of Patriot's "fraud or dishonesty . . . handling [plaintiff's] funds . . . in connection with such closings." Although this conclusion would normally warrant

reversing the trial court, it is appropriate to first consider the parties' arguments regarding the full credit bid rule even though the trial court did not address the issue. This Court will affirm the trial court's decision if it reaches the correct result, even if it does so for the wrong reason. *Burise*, 282 Mich App at 652 n 3. First American argues that under *New Freedom*, even if plaintiff's CPL claims were valid, they are limited by the full credit bid rule. Because plaintiff foreclosed on the properties and purchased them at a sheriff's sale for an amount nearly equal to or greater than the debt, First American asserts that plaintiff has not suffered "actual damages" or that damages plaintiff's damages are much less than claimed. With respect to the Patriot closings, we note that plaintiff's credit bid exceeded the debt on the Kirkway Road property, and its credit bid loss on the Golf Ridge property was $334,834 less than the debt on that property. Plaintiff argues that the *New Freedom* Court concluded that liability was not triggered in that case under the CPL without applying the full credit bid rule and that there is no authority for extending the full credit bid rule to liability under a CPL.

We agree with plaintiff that the *New Freedom* Court does not specifically discuss the application of the full credit bid rule while concluding that under the facts of that case no liability existed under the CPL. *New Freedom*, 281 Mich App at 79-84. But in light of the trial court's ruling in that case regarding the plaintiff's CPL claims and the holding of this Court affirming the trial court's ruling, we conclude that *New Freedom* upheld the application of the full credit bid rule to claims for indemnity under a CPL. The Court explained the rule as follows:

> When a lender bids at a foreclosure sale, it is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it. If this credit bid is equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure, this is known as a "full credit bid." When a mortgagee makes a full credit bid, the mortgage debt is satisfied, and the mortgage is extinguished. [*New Freedom*, 281 Mich App at 68 (citations omitted.]

In *New Freedom*, the plaintiff purchased and funded two mortgage loans originated by Globe Mortgage Corporation (Globe). Commonwealth Land Title Insurance Company (Commonwealth) issued title insurance policies and CPLs to the plaintiff in connection with real estate closings in each loan; Kissner Title & Escrow Services, Inc. (Kissner), was Commonwealth's issuing agent and the closing escrow agent for each transaction. Plaintiff assigned each loan to Impac Funding Corporation (IFC). When the loans went bad, IFC foreclosed and sold the properties but was indemnified by the plaintiff under their agreement. *New Freedom*, 281 Mich App at 65-66. The plaintiff then "sought reimbursement for the amounts it paid IFC, alleging that Globe violated the loan purchase agreement and Commonwealth violated its closing protection letters." *Id* at 67. The plaintiff contended among other claims that "its loss resulted from the fraudulent or dishonest acts or omissions of Kissner." *Id*. The trial court agreed and held that "Commonwealth, through Kissner, had violated the closing protection letter regarding [one of the] loan[s]." But the trial court also reasoned with respect to Commonwealth's liability under the CPL that the "plaintiff had suffered no damages because IFC had tendered a 'full credit bid,' which satisfied the debt." *Id*.

On the plaintiff's appeal in *New Freedom*, this Court affirmed the trial court's ruling regarding the full credit bid rule, before it even discussed the specifics of the plaintiff's CPL claims. The Court opined: "Plaintiff argues that the trial court erred in granting Globe,

Commonwealth, and Chastain summary disposition in reliance on the full credit bid rule, which dictated that plaintiff had suffered no damages. We disagree." *Id*. at 68. The Court discussed the full credit bid rule at length, noting that damages were an essential element of any of the plaintiff's claims for fraud, misrepresentation, breach of contract, and negligence. *Id*. at 69-70. Further, the Court reasoned that the full credit bid rule prevents a mortgagee from obtaining double recovery and, therefore, the Court concluded that "the trial court properly applied the full credit bid rule to bar [the] plaintiff's claims against Globe, *Commonwealth*, and Chastain, and did not err by granting summary disposition." *Id*. at 74-75(emphasis added). So, before even discussing the merits of the plaintiff's CPL claims, the *New Freedom* Court held that the trial court had properly applied the full credit bid rule to bar to the plaintiff's claims under the CPL against Commonwealth.

Furthermore, the *New Freedom* Court made clear it applied the full credit bid rule to claims outside of direct claims for liability on the underlying mortgage debt when the Court applied the rule to the plaintiff's claim for indemnity under its loan purchase agreement with Globe. "Plaintiff also argues that the trial court erred by applying the full credit bid rule to prevent recovery under the loan purchase agreement between plaintiff and Globe. We disagree." *New Freedom*, 281 Mich App at 75. The plaintiff sought to assign blame for the bad loans to Globe's loan officer, Marco Welch, contending that "[t]he loan purchase agreement require[d] Globe to indemnify [the] plaintiff for any losses or damages arising out of any act or omission of Globe's employees or agents." *Id*. at 76. But the Court held that the full credit bid rule barred the plaintiff's claim because it "did not incur any damages." *Id*. Specifically, the Court noted that although the plaintiff claimed it had suffered "'actual damages,' these damages were a direct result of IFC's full credit bid and there is no evidence that IFC's decision to make the full credit bid arose out of Welch's acts or omissions." *Id*. The Court reasoned that "the full credit bid rule overrides the indemnity provision because a mortgagee purchases subject to the condition of the property, and a lender who makes a full credit bid stands 'in the same position as any other purchaser.'" *Id*. at 76-77, quoting *Pulleyblank v Cape*, 179 Mich App 690, 694; 446 NW2d 345 (1989), and citing *Janower v FM Sibley Lumber Co*, 245 Mich 571, 573; 222 NW 736 (1929).

To summarize, in Part III of its opinion, the Court affirmed the trial court's application of the full credit bid rule to bar to the plaintiff's claims under the CPL against Commonwealth, the title insurance and CPL issuer. *New Freedom*, 281 Mich App at 68-75. Furthermore, the Court applied the full credit bid rule to bar the plaintiff's claim for indemnity under its loan purchase agreement with Globe. *Id*. at 75-77. Consequently, despite the Court's failure to mention the full credit bid rule in its specific discussion regarding liability under the CPL in part V of its opinion, *id*. at 79-84, under the facts of that case, the Court had already held that the full credit bid rule does apply to claims asserted by a lender under a CPL after the lender has foreclosed and purchased the property with a full credit bid at a foreclosure sale.

Based on the preceding analysis, we affirm in part and reverse in part the trial court regarding the Patriot closings. Although plaintiff produced evidence to create a question fact that Patriot engaged in "fraud or dishonesty" within the meaning ¶ 2 of the CPL, plaintiff's claim regarding the closing of 1550 Kirkway Road is barred by the full credit bid rule. This Court will affirm the trial court when it reaches the correct result, even if it does so for the wrong reason. *Burise*, 282 Mich App at 652 n 3. We reverse and remand for further proceedings with respect to plaintiff's claims regarding the Golf Ridge property.

IV. FIRST AMERICAN LIABILITY REGARDING WESTMINSTER CLOSINGS

A. THE PARTIES' ARGUMENTS

Plaintiff argues that with respect to 1980 Heron Ridge, plaintiff's borrower, James, testified everyone at the closing knew she was purchasing the home as an investment—that she did not intend to use the property as her primary residence. Westminster also did not disclose either a second mortgage or that some funds for this closing were received from Patriot Title.

Regarding 13232 Enid, plaintiff contends that Westminster did not fully disclose, in writing, the fraudulent double escrow flip. Westminster knew that the borrower did not provide any down payment and had reason to know that the borrower would not occupy the property.

Westminster argues that the trial court properly granted defendants summary disposition because it properly disbursed plaintiff's funds and complied with plaintiff's closing instructions. While Prime perpetrated fraud in all four loan applications, as did Patriot, plaintiff is the victim of its own negligent underwriting practices by issuing "stated income" loans and failing to verify information submitted in the loan applications. Further, although Westminster has a contractual obligation to indemnify First American for losses it must pay under the CPL, Westminster has no contractual obligation directly to plaintiff under the CPL. Plaintiff has no claim against First American, who in turn has no claim for indemnity from Westminster. The trial court properly followed *New Freedom*, 281 Mich App 63, and dismissed plaintiff's CPL claims. Last, Westminster argues that plaintiff has no independent contract claims against it.

Moreover, Westminster argues, the trial court could be affirmed on the alternative ground of the full credit bid rule. Plaintiff made a full credit bids for both the Enid Boulevard and Heron Ridge properties. When a lender makes a successful full credit bid, the mortgage is deemed satisfied; therefore, plaintiff has suffered no loss.

B. ANALYSIS

We find that plaintiff failed to produce sufficient evidence to create a question of fact whether Westminster knew of or participated in the underlying fraud; consequently, the trial court properly granted First American and Westminster summary disposition.

Plaintiff argues it presented evidence of Westminster's knowledge of the underlying fraud in James' testimony that she believed that everyone at the Heron Ridge closing understood that she would not be occupying the premises, i.e., that she was making a short term investment. But James acknowledged signing numerous statements at the closing not even knowing what they said. Among these documents James signed was an "estoppel certificate" that verified she would be occupying the premises as her principal residence. James also signed an affidavit of homeowner's principal residency [tax] exemption, which she acknowledged signing without knowing its content and which proclaimed that the Heron Ridge property would be her principal residence. In other words, the objective evidence does not support James' subjective belief that everyone at the closing was aware that she did not intend to occupy the property as her residence.

There is even less evidence that Westminster was aware of any fraud with respect to the closing of 13232 Enid Boulevard. Indeed, the evidence shows that Westminster employees kept

plaintiff's representative, Kwannah Clifton, informed of the changes to the HUD-1, and Clifton approved the transaction. There is simply no evidence that Westminster was aware of or a knowing participant in the underlying fraud being perpetrated on plaintiff. Thus, there is no basis to impose liability on First American under ¶ 2 of the CPL because of "fraud or dishonesty" by Westminster in "handling [plaintiff's] funds . . . in connection with such closings." *New Freedom*, 281 Mich App 83-84.

We therefore affirm the trial court regarding the Westminster closings. Plaintiff failed to produce sufficient evidence to create a question fact that Westminster engaged in "fraud or dishonesty" within the meaning ¶ 2 of the CPL regarding the two closings at issue.

V. PLAINTIFF'S CONTRACT CLAIMS AGAINST WESTMINSTER

A. THE PARTIES' ARGUMENTS

Plaintiff argues that a lender's closing instructions constitute a valid contract. See *Plaza Home Mortgage, Inc v North American Title Co, Inc*, 184 Cal App 4th 130, 138-139; 109 Cal Rptr 3d 9 (2010). The trial court gave no reason for dismissing plaintiff's breach of contract claim against Westminster for violating plaintiff's closing instructions. Plaintiff argues that the trial court erred by granting summary disposition to Westminster on its claim that Westminster breached the closing-instruction contract because there is evidence supporting the claim.

Westminster argues that its duty to comply with plaintiff's closing instructions is limited by § 1(a) of the CPL to "the extent they relate to (a) the status of the title [to the property] or the validity, enforceability and priority of [plaintiff's] mortgage . . . or (b) the obtaining of any other document, specifically required by [plaintiff] . . . or (c) the collection and payments of funds due [plaintiff]." Here, Westminster asserts plaintiff's claims are unclear and that any discrepancies in the HUD-1 forms regarding payees other than plaintiff do not create liability for violating the closing instructions, citing *New Freedom*, 281 Mich App 83. California law plaintiff cites does not control over *New Freedom*.

Moreover, Westminster argues, even if plaintiff could directly sue Westminster for violating the closing instructions, any failure of Westminster to follow them did not cause plaintiff's damages. The alleged breach did not affect whether plaintiff would have become a mortgage lender because plaintiff was the victim of mortgage fraud that was perpetrated by others before Westminster was even involved, and Westminster had nothing to do with the fraud. Westminster asserts plaintiff has only itself to blame by permitting the fraud to occur with its loose underwriting standard of making "stated income" loans. Plaintiff simply presented no proof a different outcome would have ensued had Westminster disclosed payees that allegedly went undisclosed. The trial court properly dismissed plaintiff's claims against Westminster.

B. ANALYSIS

We conclude that to the extent a separate contract existed between Westminster and plaintiff that required Westminster to follow plaintiff's closing instructions, the contract was modified and limited by the CPL to which the parties manifested their assent by proceeding with the closing. Plaintiff has explicitly abandoned any claim that Westminster violated the closing instructions within the limitations of ¶ 1 of the CPL.

To the extent that a separate contract claim against Westminster survives plaintiff's abandonment of its claims under ¶ 1 of the CPL, we find plaintiff has not established a causal link between Westminster's alleged violations of the closing instructions and plaintiff's claimed damages. "Damages are an element of a breach of contract action." *New Freedom*, 281 Mich App 69, citing *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003) and *Shippey v Madison Dist Pub Schools*, 55 Mich App 663, 668; 223 NW2d 116 (1974). As in other civil actions, a plaintiff alleging breach of contract must establish a causal link between the alleged breach and the plaintiff's damages. *Krol*, 256 Mich App at 512; *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 679; 591 NW2d 438 (1998). Plaintiff did not provide evidentiary support for its claim that plaintiff would not have made the bad loans had Westminster handled the closing in a different fashion. Rather, the evidence indicates the opposite, especially with respect to the closing of the Enid Boulevard property where plaintiff's representative approved last-minute changes to the HUD-1 settlement statement. Thus, plaintiff's own deficient underwriting policies and fraud committed by others, not Westminster's actions as closing agent, caused plaintiff's losses.

Finally, with respect to 13232 Enid Boulevard, we hold that the full credit bid rule establishes that plaintiff sustained no damages with respect to that property. *New Freedom*, 281 Mich App 76 ("the full credit bid rule bars recovery because plaintiff did not incur any damages").

VI. CONCLUSION

With respect to the Patriot closings, we reverse the trial court as to the Golf Ridge closing because there is evidence creating a genuine question of fact that Patriot knew of or had participated in the undisputed fraudulent scheme, and plaintiff's claims are not barred by the full credit bid rule. Regarding the Kirkway Road closing, although there is evidence creating a question fact that Patriot engaged in "fraud or dishonesty" within the meaning ¶ 2 of the CPL, we find that plaintiff's claim is barred by the full credit bid rule.

We affirm the trial court regarding the Westminster closings. Plaintiff failed to produce sufficient evidence to create a question fact that Westminster engaged in "fraud or dishonesty" within the meaning ¶ 2 of the CPL regarding the two closings at issue.

We affirm the trial's court's grant of summary disposition regarding plaintiff's separate contract claims against Westminster because plaintiff abandoned its claims under ¶ 1 of the CPL and failed to establish a causal link between the alleged breach and its damages.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Riordan