



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**EMPIRE WEST TITLE AGENCY v. HON. DAVID M. TALAMANTE  
/DOS LAND HOLDINGS, LLC  
CV-13-0268-PR**

**PARTIES:**

*Petitioner:* Dos Land Holdings, LLC

*Respondent/  
Real Party in Interest:* Empire West Title Agency, LLC

**FACTS:**

In 2006, David Jemmett wanted to buy some vacant land in Mesa. He discovered a quit claim deed that appeared to abandon a publicly filed 25-foot easement that would be needed to develop a portion of the land. He telephoned Empire West Title Agency to determine the effect of the quit claim deed on the easement.

Empire West told him that the deed would not affect the land's property title, but the sellers told him that the deed was actually a forgery and that they had not, in fact, abandoned the easement. Jemmett's law firm (Chester & Shein) gave Empire West a copy of the deed and asked Empire West to reflect the deed on the property's title.

Jemmett decided not to buy the land, after which a company known as Dos Land Holdings became the buyer. The company's law firm (Chester & Shein) sent a Closing Instructions Letter to Empire West and asked it to make sure that the legal description of the easement would be attached to the conveyance deed. Empire West signed the Closing Instructions Letter and returned it.

Dos Land Holdings alleges that it paid an additional premium to Fidelity (the issuing insurance company for which title-insurance company Empire West acted as the agent) to obtain an access-to-the-easement endorsement stating that, if the deed did not contain the same property description as the easement, then Lawyers Title (now Fidelity) would pay all losses sustained by Dos Land Holdings. But the property description ended up not including the easement, and Dos Land Holdings sued Fidelity and Empire West for breach of contract and breach of the covenant of good faith and fair dealing.

In pre-trial litigation, Empire West argued that Dos Land Holdings should disclose attorney-client communication relevant to Dos Land Holdings's position that Dos Land Holdings had a reasonable expectation that its insurance policy covered the easement; in Empire West's view, Dos Land Holdings already knew that the land would contain no easement, so Dos Land Holdings's expectation that the insurance policy covered the easement was unreasonable.

The trial court disagreed with Empire West, but the Arizona Court of Appeals reversed, holding that Dos Land Holdings impliedly put its attorney-client communications at issue by alleging in its amended complaint that Dos Land Holdings “relied on the Closing Instructions Description and reasonably believed that it was represented in all documents used at the closing based upon Empire’s agreement to accept and comply therewith.” The court of appeals reasoned that, by alleging a breach of contract based on its own “reasonable belief,” Dos Land Holdings “put in issue all information in its possession at the time, including information obtained or imputed to it from any joint venture partners, all of which bear on the reasonableness of its belief that Empire West agreed to provide coverage of the easement.”

In its petition for review in the Arizona Supreme Court, Dos Land Holdings argues that the court of appeals erred because Dos Land Holdings never asserted a claim or defense that necessarily includes counsel-received information or otherwise raised facts that show that its evaluation was informed by its attorneys, and that what it relied on was Empire West’s representations that the company would cover the easement.

In its response, Empire West argues that the court of appeals correctly ordered Dos Land Holdings to disclose its attorney-client communications both because Dos Land Holdings is claiming damages from Dos Land Holdings’s own “reasonable expectation” that the easement would have been covered under the title insurance policy and because Empire West’s breach-of-contract defenses (such as unilateral mistake and mutual mistake) entitle Empire West to the attorney-client communications between Dos Land Holdings and its lawyers.

#### **ISSUES:**

1. Did DOS waive the [attorney-client] privilege by alleging in a contract claim: ‘DOS relied on the Closing Instructions Description and reasonably believed that it was represented in all documents used at the closing based upon Empire’s agreement to accept and comply therewith’?
2. Is the [court of appeals’ modified decision order] overbroad because it orders waiver of the privilege with respect to all communications bearing on DOS’s belief that it had title insurance coverage provided by Fidelity by alleging that DOS reasonably believed the closing documents included the easement description based on its CIL with Empire?

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