Supreme Court No. 96726-1

SUPREME CORT
OF THE STATE OF WASHINGTON

No. 50376-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

LESLIE W. ROBBINS AND HARLENE ROBBINS,

RESPONDENTS,

v.

MASON COUNTY TITLE INSURANCE COMPANY; and

RETITLE INSURANCE COMPANY,

PETITIONER.

MASON COUNTY TITLE INSURANCE COMPANY'S and RETITLE INSURANCE COMPANY'S PETITION FOR DISCRETIONARY REVIEW TO WASHINGTON STATE SUPREME COURT

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TABLE OF CONTENTS

AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

I. IDENTITY OF PETITIONER

The petitioner here is Mason County Title Insurance Company, now Retitle Insurance Company.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks discretionary review by the Washington State Supreme Court of a decision of the Washington State Court of Appeals, Division II, filed August 28, 2018. Robbins v. Mason County Title Insurance Company, 5 Wash. App. 2d 68, 425 P.3d 885 (2018), reconsideration denied, December 12, 2018. Copies appended.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in imposing a duty to defend where (a) the contract between the parties excludes any duty where there had been a final determination by a court of competent jurisdiction (CP 232); and (b) United States v. State of Washington, 384 F. Supp. 312 (W. D. Wash. (1974); 443 U.S. 658, 675, 99 S. Ct. 3055, (1979); 873 F. Supp. 1422 (W. D. Wash.

1994); 157 F. 3d 630 (9th Cir. 1998)[1] effectively determined all potential issues; and therefore (c) re-litigating this issue would be futile.

2. Did the Court of Appeals err in imposing a duty to defend where there were no legal proceedings between the insured and the adverse claimant?

3. Was the Court of Appeals consideration of the issue of bad faith proper when the issue was not raised before the trial court, was not considered by the trial court, and was the Court of Appeals determination contrary to established authority?

4. Where a title policy excludes from coverage easements not disclosed by the public record, is a treaty right to enter onto an insured's property therefore excluded from coverage?

    i. The Court of Appeals Holding Is Inconsistent With The Statutory Framework Regarding Public Records And Recorded Documents.

    ii. The Court of Appeals Erred In The Plain And Unambiguous Language of The Contract.

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[1] The 1974/1975 decisions are the original fishing rights determination. The 1994/1998 decisions, brought within the same ongoing proceeding, is the application of shellfish rights to the earlier treaty right determination.

IV. STATEMENT OF THE CASE

In 1978, the Mason County Title Insurance Company (MCTI) issued a title policy to Leslie and Harlene Robbins (hereinafter Robbins) as to Tracts Three and Four of the Plat of Skookum Point Tracts as recorded in vol. 4 of plats, pages 54 & 55, records of Mason County (CP 228-232).

MCTI agreed to insure title to the tidelands as to:

> 2. Any defect in, or lien or encumbrance on, said title existing at the date hereof, not shown in Schedule B; (CP 229)

The policy was, and is, subject to the following general exception (emphasis added) not insured against:

> 1. Encroachments or questions of location, boundary and area, which an accurate survey may disclose; public or private easements not disclosed by the public records; rights or claims of persons in possession, or claiming to be in possession, not disclosed by the public records; material or labor liens or liens under the Workmen's Compensation Act not disclosed by public records; water rights or matters relating thereto; any service, installation or construction charges for sewer, water or electricity. (CP 231)

The policy is further subject to the following Conditions and Stipulations:

> 4. The following terms when used in this policy mean: (d) "public records": records which, under the recording laws, impart constructive notice with respect to said real estate; (CP 232).

Section 2 of the Conditions and Stipulations of the policy further provide as follows:

> 2. In the event of a final judicial determination by a court of competent jurisdiction, under which the estate, lien or interest insured is defeated or impaired by reason of any adverse interest, lien or encumbrance not set for or excepted herein, claim may be made as herein provided. A statement in writing of any loss or damage, for which it is claimed the Company is liable, shall be furnished to the Company at its home office within sixty days after such loss or damage shall have been asserted. (CP 232).

As far back as 2005, Robbins have been conducting commercial shellfish operations on their property. (CP 224-225).

In 2015, the Squaxin Island Tribe communicated with Robbins about its right to one-half of the naturally occurring harvest. (CP 225, 241-242).

In July, 2016, Robbins tendered defense of what they perceived was a claim to MCTI.

MCTI declined the tender and provided analysis to Robbins. (CP 237-238, 240, 244-245, 247-250). There is a response to the last letter from Robbins which counsel Robbins did not make a part of the record. Robbins have never asserted that the response was not in compliance with regulations requiring a timely investigation and response.

Robbins have never indicated what it expected MCTI to do since the Squaxin Island Tribe right to harvest the shellfish under the Treaty of Medicine Creek was fully determined by the Federal Courts in the cause cited above and in footnote 1. (CP 237-250)

The record does not show Robbins did anything to defend against the claim of the Squaxin Island Tribe and they never disputed the tribe's treaty right claim.

MCTI told Robbins they should make a claim under the policy. (CP 245) Robbins failed to do so. The Conditions and Stipulations of the policy, at section 1, provide MCTI has the option to pay the claim rather than defend (CP 232).

This lawsuit was filed shortly thereafter, Robbins claiming there was coverage and that MCTI was obliged to defend against the tribe's claim (CP 315-345).

On cross motions for summary judgment, the Mason County Superior Court held that the Squaxin Island Tribe's treaty right was in the nature of a *profit a prendre*, a form of easement. It was not disclosed by the public record, under the recording laws which impart constructive notice thereof. The court held it was excluded from coverage under general exceptions of the policy and considering the

definition of public records under Section 4(d), of the Conditions and Stipulations of the policy. The trial court never addressed the issue of bad faith given its ruling. (CP 4-5, 232).

The Court of Appeals reversed, without oral argument, holding that a *profit a prendre* was not an easement, and therefore there was a duty to defend. The Court of Appeals further determined that MCTI had acted in bad faith. The Court of Appeals remanded for determination of MCTI's affirmative defenses.

A Motion for Reconsideration was filed and denied.

Throughout this matter before the Superior Court and briefing to the Court of Appeals, despite being challenged to do so, Robbins have never indicated what they expected MCTI to do even if it had accepted the tender (CP 17-18). The Court of Appeals similarly did not address this inquiry. Robbins, supra.

V. ARGUMENT

1. MCTI WAS NOT OBLIGATED TO DEFEND AGAINST AN INSURED CLAIM WHERE THE CLAIM HAD BEEN EFFECTIVELY DETERMINED BY THE FEDERAL COURTS.

The circumstances of this case are unique. While Robbins were not a party to United States v. State of Washington, supra, that case conclusively determined the rights of the Squaxin Island Tribe to an

equal share of naturally occurring shellfish for all practical purposes. Filing an action challenging that decisions on Robbins' behalf would have been frivolous.

Under the terms of the policy, where the rights between the insured and the adverse claimant have been determined by a court of competent jurisdiction, the remedy of the insured is to submit a claim. (CP 232). Robbins were told to do so, and they refused. (CP 245). Under Section 2 of the Conditions and Stipulations of the parties, they had 60 days after the loss or damage was ascertained to submit a claim. (CP 232).

Apart from the policy provisions, the law does not require a party to perform a useless act. University Properties, Inc. v. Moss, 63 Wash. 2d 619, 388 P. 2d 543 (1964).

2. A TITLE COMPANY HAS NO DUTY TO DEFEND WHERE THERE ARE NO LEGAL PROCEEDINGS BETWEEN AN INSURED AND AN ADVERSE CLAIMANT.

It is the practice within the title insurance industry to defend a matter, if there is a duty, upon the commencement of legal proceedings within which an adverse claim is made to an interest of an insured which is covered under the policy of insurance.

This practice is consistent with the holding in Woo v. Fireman's Fund Ins. Co, 161 Wash.2d 43, 164 P.2d 454 (2007) which held:

> "The rule regarding the duty to defend is well settled in Washington and is broader than the duty to indemnify. Hayden v. Mut of Enumclaw Ins. Co., 141 Wash.2d 55, 64, 1 P. 3d 1167 (2000). The duty to defend "arises at the time an action is first brought, and is based on *the potential for liability.*" Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wash.2d 751, 760, 58 P.3d 276 (2002) (emphasis added). An insurer has a duty to defend " 'when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insurance within the policy's coverage.' " *Id.* (quoting Unigard Ins. Co. v. Leven, 97 Wash. App. 417, 425, 983, P.2d 115 (1999))."

Quoting from Truck Ins. Exchange v. Vanport Homes, Inc., 147 Wash. 2d 751, 760, 58 P.3d 276 (2002):

> "The duty to defend arises at the time an action is first brought, and is based on the potential for liability. See Holland Am. Ins. Co. v. Nat'l Indem. Co., 75 Wash.2d 909, 911-12, 454 P.2d 383 (1969). The duty to defend "arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." Unigard Ins. Co. v. Leven, 97 Wash.App. 417, 425, 983 P.2d 1155 (1999).

Quoting from American Best Food, Inc. v. Alea London, Ltd., 168, Wash.2d 398, 229, P.3d 693 (2010):

> "Alea's duty to defend arose when Dorsey brought suit against Cafe Arizona..."

"The duty to defend means, of course, to pay attorneys fees and other costs of litigation or to provide for these services." WILLIAM B.

STOEBUCK & JOHN W. WEAVER, 18 WASHINGTON PRACTICE: REAL ESTATE, § 14.20. See also Section 14.19 thereof.

The effect of the Court of Appeals ruling is to completely change the burden on all insurance companies, including title companies, doing business in the State of Washington, regarding the duty to defend without providing any guidance as to what a title company might be obligated to do, or when they should do it.

Under existing law and procedures, a bright line is created when, within the pleadings of claims in a law suit, the insured's interest could be adversely impacted.

Under the Court of Appeals decision, no such bright line is created. There is no indication of what a title company is expected to do.

No Washington case provides for a duty to defend prior to a law suit being filed, nor have Robbins cited to any authority.

Given the potential adverse consequences of violating the duty to defend, the decision of the Court of Appeals places title companies in a very precarious position. If left to stand, this decision will have an economic impact, passed on to consumers, increasing the cost of insurance.

3. THE COURT OF APPEALS ERRED IN DETERMINING MCTI HAD ACTED IN BAD FAITH.

The trial court never reached the issue of bad faith and it should not have been considered by the Court of Appeals. If anything, the issue should have been remanded to the trial court for full consideration.

The actual Motion for Summary Judgment filed by Robbins did not ask for the trial court to determine that MCTI had acted in bad faith (CP 525). There was a brief reference in their argument (CP 261). MCTI indicated to the trial court it did not see the issue as being before the court (CP 37).

The Court of Appeals held that MCTI's failure to defend was per se unreasonable, and therefore in bad faith, because the policy, construed in Robbins favor, was ambiguous, citing American Best Food, Inc. v. Alea London, Ltd., 168, Wash.2d 398, 229, P.3d 693 (2010).

A conflict exists between Alea, supra., and Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wash.2d 751, 760, 58 P.3d 276 (2002), both narrow majority opinions, which this court should resolve.

In Truck, supra., the court did not hold a failure to defend was per se unreasonable where a policy was ambiguous. Rather, that court

determined the insurer's conduct was unreasonable because it failed to "promptly provide a reasonable explanation for the denial of a claim. WAC 284-30-330(13)." Truck, supra., at 764, which is not an issue Robbins have raised. In other words, there was an evaluation of how the insurer processed the claim and determined the insurers violated a specific regulation, which was then a per se violation of Washington's Consumer Protection Act.

In Alea, supra., the court indicated that bad faith still required a finding that an insurer's failure to defend was unreasonable, frivolous or unfounded, yet then, determined without citation to any precedent, that a failure to defend where there was any possibility of coverage was, per se, bad faith. Alea, supra., at 412-413. The effect of this holding, as applied in the present case by the Court of Appeals, is to eliminate any need for a factual finding that an insurer's act in not defending was unreasonable, frivolous or unfounded.

One writer, post Alea, citing to Sharbono v. Universal Ins. Co., 139 Wash.2d 383, 161 P.3d 406(2007), rev. denied, 163 Wash.2d 1055, 187 P.3d 752 (2008), has expressed that even in light of Alea, bad faith is a question of fact as to whether "reasonable minds can

reach but one conclusion." Harris, Washington Insurance Law, Third Edition § 7.01.

Bad faith has always been an issue of fact and the burden of proof is on the insured. In the context of the present case, all facts and inferences are to be viewed in a light most favorable to MCTI, which is exactly the opposite of what the Court of Appeals did. When reasonable minds can differ, a trial is required. Smith v. Safeco Ins. Co., 150 Wash. 2d 478, 78 P.3d 1274 (2003). The determination by the Mason Superior Court would seem to indicate that reasonable minds could differ as to coverage.

Finally, where affirmative defenses are still at issue, any finding of bad faith is premature given if any of the affirmative defenses are established in the trial court, there is no duty to defend and therefore there can be no bad faith.

4. A TREATY RIGHT TO ENTER UPON AN INSURED TIDELAND IS IN THE NATURE OF AN EASEMENT NOT DISCLOSED BY THE PUBLIC RECORD UNDER THE RECORDINGS ACTS AND IS EXCLUDED FROM COVERAGE UNDER ROBBINS' TITLE POLICY.

The title policy excludes from coverage easements not disclosed by the public record under the recording laws of the State of Washington.

i. The Court Of Appeals Holding Is Inconsistent With The Statutory Framework Regarding Public Records And Recorded Documents.

The Court of Appeals focused on the effect of the treaty right as to whether or not these rights are an easement. The Court erroneously declined to address the "recording law" portion of the analysis which is necessary to define the exclusion.

The expectation is that title insurance companies will examine documents which are recorded with the respective county auditors and Superior Court Judgment indexes and insure title, or except from that coverage, interests that it does or does not find. As described below, there is no authority for the expectation that a title company will search beyond those records.

The policy not only excluded from coverage easements not disclosed by the public record "but any right or claim of persons in possession, or claiming to be in possession, not disclosed by the public record." (CP 232). This confirms that the focus of the coverage, or lack of coverage, is what exists in the public record, under the recording laws which impart constructive notice.

The Treaty of Medicine Creek, signed in 1854, a treaty between the United States and various tribes, is no such document. The treaty

is found only in the federal statutes at 10 Stat.1132. It is not found in any other official record. Robbins never alleged it is recorded "under the recording laws" for the State of Washington for real property instruments. In fact, it is not (CP 292-293).

Robbins sought to avoid this language in the policy by alleging the effect of 1 U.S.C. § 112. That act provides that the Archivist of the United States is to compile and publish the United States Statutes at large. The treaty is a statute. 1 U.S.C. § 112 goes on to say that such compilation is legal evidence of their existence, and nothing more.

The federal statute has no connection to "recording laws" for real property documents in the State of Washington. See David Robbins Construction, LLC v. First American Title Company, 158 Wash. App. 895, 249 P. 3d 625 (2010), Security Service Federal Credit Union v. First American Title Company, 2012 WL 5954815 (US Dist. Ct., Ca. 2012), Murphy v. City of Seattle, 32 Wash. App. 386, 647 P. 2d 540 (1982).

As stated in Ellingsen v. Franklin County, 117 Wash. 2d 24, 810 P.2d 910 (1991),

> "Under the County's theory all records of these multiple, scattered public offices would impart constructive notice of everything contained in those records because, like the engineer's office, those are public records in public offices...To

> import constructive notice from every piece of paper or computer file in every government office, from the smallest hamlet to the largest state agency, would wreak havoc with the title system. As a matter of fact, it would render impossible a meaningful title search."

The State of Washington statutorily sets forth the strict expectations it has of title companies. Under RCW 48.29.010, in order to have a certificate of authority to conduct business, a title company must maintain a complete set of tract indexes of the county in which it does business. WAC 284-16-030 defines a complete set of tract indexes. See Appendences. Federal statutes are not included.

While presented in a different context, Smith v. Lamping, 27 Wash. 624, 68 P. 195 (1902), and Fidelity Title Company v. State of Washington Department of Revenue, 49 Wash. App. 662, 745 P. 2d, 530 (1987) are consistent with what is required of a title company.

The term "recording acts" is defined as:

> "Statutes enacted in the several states relating to the official recording of deeds, mortgages, bills of sale, chattel mortgages, etc. and the effect of such records as notice to creditors, purchasers, encumbrances, and others interested."
>
> BLACK'S LAW DICTIONARY *online*, 2nd edition

The recording acts of the State of Washington are found under various statutes, principally at RCW Chapter 65.08 et. seq. There is no

statute or case law in Washington that requires them to search beyond those recordings they are required to maintain.

See also WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE, § 14.16-14.19.

Kahama VI, LLC v. HJH, LLC, 2016 WL 7104175 (US Dist. Ct., M.D. Florida 2016), presents as strong an analogy to the present case as can be found. In Kahama, a developer bought a parcel of beachfront property in Florida. The developer claimed that a public right to use the beach it had acquired, in part, had not been disclosed in the title report. This public right of access had been recognized by case law.

The holding of the court was that the case law of the State of Florida was not a part of the record title of the property, and denied coverage. The court expressed that title insurance is designed to ensure against "defects in the record titles", and the title company is only guaranteeing that their search of "the record chain of title is accurate" (See Section 6 of the opinion), which is what MCTI properly did.

ii. The Court Of Appeals Erred In Construing The Plain And Unambiguous Language Of The Contract.

The Court of Appeals focused on whether the tribal right was an easement excluded under the policy.

The court determined that the term easement was ambiguous and must be construed against MCTI. While this may be a correct view of the law as it relates to some provisions of insurance policies, this is not the case when words have specific legal meaning. Words with legal meanings, such as "easement", are to be interpreted according to how the law interprets them. Bernard v. Reishman, 33 Wash. App. 569, 658 P.2d 2 (1983). Ambiguity is simply not an issue to consider in this context, even if the interpretation is favorable to the insurer. WILLIAM B. STOEBUCK & JOHN W. WEAVER, 18 WASHINGTON PRACTICE: § 14.20

Title policies are subject to the same construction analysis as other contracts. See Denny's Restaurants, Inc. v. Security Union Title Insurances Company, 71 Wash. App. 194, 859 P. 2d 619 (1993), (holding that Berg v. Hudesman, 115 Wash. 2d 657, 801 P. 2d 222 (1990), applies to the construction of title insurances polices).

A court may not revise a contract's terms under the guise of construing it. International Marine Underwriters v. ABCD Marine, LLC., 179 Wash. 2d 274, 313 P. 3d 395 (2013).

Title policies must be examined as a whole, considering the object of the contract. Polygon Northwest Co. v. American Nat. Fire

Insurance. Co., 143 Wash. App. 753, 189 P.3d 777 (2008), rev. denied 164 Wash. 2d 1033. In reviewing the forgoing case, in interpreting Washington law, the District Court for the Western District of Washington noted that individual words in policies should not be read in isolation but rather viewed in the surrounding context of the policy. Ohio Casualty Ins. Co. v. Chugech Support Services, Inc., 2011 WL 4712234. That context is the expectation of what the State of Washington requires of title companies.

The Court of Appeals, quoting from Affil. FM Ins. Co. v. LTK Consulting Services, Inc., 170 Wash.2d 442, 455, 243 P.3d 521 (2010), commented an easement is "(a) cousins of easements, a *profit a prendre* (sic), " is a right to severe and remove some substance from the land." (quoting 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASH. PRACTICE: REAL ESTATE, § 2.1 Property Law at 80 (2d ed. 2004)).

There is no citation in the briefing of Robbins or in the decision of the Court of Appeals that a *profit a prendre* is not a form of easement.

A *profit a prendre* is a form of easement. Profits a prendre are, in fact, referred to as an "easement with a profit." See Alexander Dawson, Inc. v. Fling, 155 Colo. 599, 601, 396 P. 2d 599 (1964).

Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong, 184 Wis. 2d 572, 583, 516 N.W. 2d 410 (1994), (citing the Restatement of Property), indicates there is no legal distinction between an easement and a profit, and that the term, "easement", includes a profit.

The Restatement (Third) of Property (Servitudes), § 1.2, defines the terms easement and *profit a prendre* as follows:

> (2) A *profit a prendre* is an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another. It is referred to as a "profit" in this Restatement. Restatement (Third) of Property (Servitudes) § 1.2 (2000).

The fact there may be distinctions between various forms of easements does not mean they are not easements.

VI. CONCLUSION

This court should grant review to address:

1. Whether a title company, or any insurance company for that matter, is obligated to defend a claim where the rights between the insured and the adverse claimant are fully determined.
2. Whether a title company had a duty to defend where no legal proceedings were commenced between the insured and the adverse claimant particularly when the insured conceded the adverse claim was valid.

3. Whether a title company is strictly liable for bad faith when it does not defend, without the court considering as to whether its acts were unreasonable, frivolous, or unfounded.
4. Whether a tribal treaty right to enter upon land is an easement not disclosed by the public recording under the recording acts, or is otherwise an interest a title company should be expected to insure against.

The impact of the Court of Appeals decision is of substantial public interest, not only because it is contrary to existing precedent, but has an enormous impact within the title insurance industry in the State of Washington. As of 2017, the Department of Revenue reports there are 3,102,004 real property tax parcels in the State of Washington. Department of Revenue website, Property Tax Publications, Property Tax Statistics. It is fair to conclude that the vast majority of these parcels have title insurance.

Respectfully submitted this 9 of January, 2019.

WHITEHOUSE & NICHOLS, LLP

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Attorney for Petitioner Mason County Title Insurance Company and Retitle Insurance Company

APPENDIX

A

Filed
Washington State
Court of Appeals
Division Two

December 12, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LESLIE W. and HARLENE E. ROBBINS, husband and wife, Appellants, v. MASON COUNTY TITLE INSURANCE COMPANY; and RETITLE INSURANCE COMPANY, Respondents.	No. 50376-0-II ORDER DENYING MOTION FOR RECONSIDERATION

Mason County Title has filed a motion for reconsideration of the opinion that was filed on August 28, 2018. After review, it is hereby

ORDERED that the motion for reconsideration is denied.

Jjs.: Bjorgen, Worswick, Sutton

FOR THE COURT:

Bjorgen, J.

B

Filed
Washington State
Court of Appeals
Division Two

August 28, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LESLIE W. and HARLENE E. ROBBINS, husband and wife, Appellants, v. MASON COUNTY TITLE INSURANCE COMPANY; and RETITLE INSURANCE COMPANY, Respondents.	No. 50376-0-II PUBLISHED OPINION

BJORGEN, J. — Leslie W. Robbins and Harlene E. Robbins appeal from an order granting the motion for summary judgment by Mason County Title Insurance Company (MCTI)[1] and denying the Robbinses' cross-motion for partial summary judgment.

The Robbinses assert that the terms of their title insurance policy obligated MCTI to defend against a claim by the Squaxin Island Tribe (Tribe) that the 1854 Treaty of Medicine Creek[2] (Treaty) gave it the right to take shellfish on the Robbinses' tidelands. The Robbinses also argue that because MCTI unreasonably breached its duty to defend, the company acted in bad faith as a matter of law and should be estopped from denying coverage. The Robbinses also request us to award them attorney fees and costs incurred both in the superior court and in this appeal.

MCTI asserts that the Robbinses' policy did not afford coverage and that it was under no duty to defend. MCTI also claims there was nothing to defend against, since the underlying

[1] MCTI, at the time this action arose, was known as Retitle Insurance Company.

[2] 10 Stat. 1132, 1854 WL 9477.

issues between the Robbinses and the Tribe were already determined by litigation concerning the scope of tribal shellfish rights. MCTI further argues that the general exception[3] for "public or private easements not disclosed by the public records" applies to the Robbinses' claim. Finally, MCTI argues it pled several affirmative defenses that the superior court has yet to consider.

We hold that MCTI owed a duty to defend under the policy, its failure to do so constituted bad faith, and MCTI is estopped from denying coverage. We remand to the superior court to consider the merits of MCTI's affirmative defenses. Because those defenses remain to be decided, any decision on attorney fees and costs is premature.

Accordingly, we reverse and remand.

FACTS

In 1978, the Robbinses purchased two tracts of land, which included tidelands formerly owned by the state of Washington. The Robbinses also purchased a policy of title insurance from MCTI dated June 12, 1978, which provides that MCTI would insure the Robbinses "against loss or damage sustained by reason of: . . . [a]ny defect in, or lien or encumbrance on, said title existing at the date [t]hereof." Clerk's Papers (CP) at 228-32. More specifically, the policy states, in pertinent part:

> 1. The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein.

CP at 232. The policy contains several general exceptions, including "public or private easements not disclosed by the public records." CP at 231. The policy defines "public records"

[3] We refer to the policy exclusions as "exceptions" because that is the terminology used in the contract.

as "records which, under the recording laws, impart constructive notice with respect to said real estate." CP at 232.

After purchasing the property, the Robbinses entered into contracts with a number of commercial shellfish harvesters. One of the harvesters notified the Tribe of his intent to harvest shellfish on the Robbinses' property. The Tribe sent the harvester a letter requesting more information, disagreeing with the harvester's opinion that the Robbinses' clam bed was not natural, and referring to its rights under the Shellfish Implementation Plan, adopted to implement *United States v. State of Washington*, 898 F. Supp. 1453 (W.D. Wash. 1995), *aff'd in part*, 135 F.3d 618 (9th Cir. 1998).

The Robbinses subsequently became aware of the Tribe's desire to harvest shellfish on their tidelands and tendered a claim to MCTI on July 8, 2016, for defense against the Tribe's asserted right. On July 26, the Tribe sent the Robbinses a certified letter outlining its plan to harvest shellfish on their tidelands in accordance with *United States v. Washington* and the Shellfish Implementation Plan. The Tribe based this claim on its rights under the Treaty and *United States v. Washington* to take 50 percent of the harvestable shellfish biomass within its usual and accustomed grounds and stations. On August 9, MCTI sent the Robbinses a letter that declined any duty to defend the Tribe's claim on the Robbinses behalf; the letter advised, among other things, that there was no coverage under their policy for the Tribe's claim.

The Robbinses filed a complaint against MCTI for damages caused by its claimed improper refusal to defend and requesting that MCTI be estopped from denying coverage. MCTI filed its answer and affirmative defenses, which included the statute of limitations, laches, waiver, failure to mitigate damages, failure to submit proof of loss, failure to state a claim,

failure to state a cause of action, election of alternative remedies, and a claim that plaintiffs have suffered no damages.

MCTI filed a motion for summary judgment, arguing that because the Robbinses' policy did not afford coverage for the Tribe's asserted Treaty right, there was no duty to defend. MCTI's motion for summary judgment did not argue any of the affirmative defenses set forth in its answer, but only addressed coverage.

The Robbinses then filed a cross-motion for partial summary judgment. The Robbinses argued that their policy afforded coverage, no general exceptions applied, and MCTI had a duty to defend against the Tribe's claim to harvest shellfish on their tidelands. The Robbinses' cross-motion for partial summary judgment did not request summary judgment on any of MCTI's affirmative defenses. In its response to the Robbinses' cross-motion for partial summary judgment MCTI argued, among other matters, that its motion for summary judgment only sought to determine the issue of coverage, its affirmative defenses are to some degree based in fact, and it had not had the opportunity to conduct discovery, in particular on the defenses of statute of limitations, laches, waiver, and mitigation of damages.

The superior court granted MCTI's motion for summary judgment and denied the Robbinses' motion for partial summary judgment. As part of its order, the superior court dismissed all of the Robbinses' claims with prejudice.

The Robbinses appeal.

ANALYSIS

I. SUMMARY JUDGMENT

The Robbinses argue the superior court erred when it granted MCTI's motion for summary judgment and denied their cross-motion for partial summary judgment. We agree.

A. Standard of Review and Legal Principles

We review an order for summary judgment de novo, engaging in the same inquiry as the superior court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Fahn v. Cowlitz County*, 93 Wn.2d 368, 373, 610 P.2d 857 (1980).

Ambiguities in insurance policies are to be interpreted in favor of the insured. *Holden v. Farmers Ins. Co. of Wash.*, 169 Wn.2d 750, 756, 239 P.3d 344 (2010). Language in an insurance contract is to be given its plain meaning, and courts should read the policy as the average person purchasing insurance would. *Id.* Language that is clear and unambiguous must be given effect in accordance with its plain meaning and may not be construed by the courts. *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 696, 335 P.3d 416 (2014). When interpreting language of an insurance contract, we construe the entire contract together for the purpose of giving force and effect to each clause. *Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 710, 375 P.3d 596, *as amended on denial of reconsideration*, (Aug. 15, 2016).

Since Title 48 RCW governs the business of title insurance, it "'is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.'" *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 471, 209 P.3d 859 (2009) (quoting RCW 48.01.030). These duties help inform an insurer's duty to defend. *Id.*

The duty to defend "is broader than the duty to indemnify." *Id.* If the insurance policy *conceivably covers* the allegations in the complaint, the duty to defend is triggered; yet, the duty to indemnify only exists if the policy *actually covers* the insured's liability. *Id.*; *see also Am.*

Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 404, 229 P.3d 693 (2010); *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007). A title insurer must defend unless it is clear from the face of the complaint that the claim is not covered by the applicable policy. *Campbell*, 166 Wn.2d at 471. "'If it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer *must* investigate and give the insured the benefit of the doubt that the insurer has a duty to defend.'" *Id.* (internal alteration omitted) (quoting *Woo*, 161 Wn.2d at 53).

B. Duty to Defend

The Robbinses argue that MCTI had a duty to defend. MCTI argues that where there is no coverage, there is no duty to defend and that the Robbinses' policy did not afford coverage. We agree with the Robbinses that MCTI had a duty to defend because the policy conceivably covers the allegations in the complaint.

Their policy states, in pertinent part:

> 1. The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein.

CP at 232. There is no dispute that the Robbinses are the named "insured" under the policy. We note also that the record contains no evidence the Tribe commenced any "legal proceedings" against the Robbinses and that this fact is likewise undisputed. Thus, our initial inquiry involves whether the Tribe's assertion of its right to harvest shellfish constituted a "demand" "founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to" June 12, 1978, the date the Robbinses' policy issued. CP at 230.

The Robbinses' policy does not define "demand," "title," "encumbrance" or "exist." Accordingly, we must give effect to language which is clear and unambiguous in keeping with its plain meaning. *O.S.T. ex rel. G.T.*, 181 Wn.2d at 696. We may not construe clear and unambiguous contract terms. *Id.*

A "demand" is commonly defined to be "[t]he assertion of a legal or procedural right." BLACK'S LAW DICTIONARY 522 (10th ed. 2014). The Tribe clearly asserted its legal rights under *United States v. State of Washington* in its notification and plan to harvest shellfish on the Robbinses' tidelands. Therefore, the Tribe made a "demand" as contemplated by the plain meaning of the policy.

"Title" is commonly defined as, "[l]egal evidence of a person's ownership rights in property; an instrument (such as a deed) that constitutes such evidence." BLACK'S LAW DICTIONARY 1712 (10th ed. 2014). The Tribe has not founded its demand on a claim of title to the Robbinses' property, as it is commonly understood. Nor does it claim to have possession or custody of the shellfish on the Robbinses' property, or an instrument, such as a deed, giving it ownership of the tidelands.

Our Supreme Court has defined an "encumbrance" as "a burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee." *Hebb v. Severson*, 32 Wn.2d 159, 167, 201 P.2d 156 (1948). Based on this definition, the Tribe's demand can be commonly understood as founded on an encumbrance: the Tribe's treaty rights are adverse to the interest of the Robbinses, but do not conflict with their right of conveyance.

"Exist" has many definitions, but we can fairly define it as "coming into being." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 796 (1966). The Robbinses argue the right

to harvest shellfish came into being when the Treaty was signed and subsequently ratified by the President and Senate of the United States.

The Treaty established the Tribes' right to take fish at usual and accustomed places. On September 2, 1993, the United States District Court for the Western District of Washington ruled that "shellfish" are "fish," within the meaning of the Treaties. *United States v. State of Washington*, 873 F. Supp. 1422, 1427 (W.D. Wash. 1994), *aff'd in part, reversed in part*, 135 F.3d 618 (1998). On appeal, the Ninth Circuit affirmed, in part, the district court's interpretation in *United States v. State of Washington*, 157 F.3d 630, 638-39 (9th Cir. 1998). The Ninth Circuit held, among other matters, that various treaties granted several tribes a right to take shellfish that was coextensive with their right to take fish except as expressly limited by the Shellfish Proviso. The Shellfish Proviso prohibited tribes from taking shellfish "from any beds staked or cultivated by citizens," and excluded tribes from artificial shellfish beds created by private citizens. *Id.*

Courts have made clear that Indian treaties should not be viewed as grants of rights to the Indians, but as grants of rights from the Indians to the United States. *United States*, 873 F. Supp. at 1428-29; *see also United States v. State of Washington*, 19 F. Supp. 3d 1126, 1129 (W.D. Wash. 1994) ("Any rights which were not granted by the Indians to the United States were reserved by the Indians because the Indians already possessed them."); *State v. Buchanan*, 138 Wn.2d 186, 199-200, 202-03, 978 P.2d 1070 (1999). Relevant to the instant appeal, the Ninth Circuit has reasoned:

> "At [Treaty] time, . . . the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title. . . . The fact that some species were not taken before treaty time-either because they were inaccessible or the Indians chose not to take them-does not mean that their *right* to take such fish was limited. Because the 'right of taking fish' must be read as a reservation of the Indians' pre-existing rights, and because the right to take *any* species, without limit, pre-existed the Stevens Treaties, the Court must read the 'right of taking fish' without any species limitation."

United States, 157 F.3d at 644 (alterations in original) (quoting *United States*, 873 F. Supp. at 1430).

The Treaty was signed on December 26, 1854, ratified on March 3, 1855, and "proclaimed" on April 10, 1855. *State v. Courville*, 36 Wn. App. 615, 618, 676 P.2d 1011 (1983). MCTI issued the Robbinses their title policy on June 12, 1978. Thus, the Tribe's claim of a right to take shellfish from the Robbinses' tidelands is a demand founded on a claim of encumbrance arising before the date of inception of the policy. Section 1 of the conditions and stipulations of the Robbinses' policy, set out above, conceivably provides coverage for such a demand. Therefore, under *Campbell*, *American Best Food*, and *Woo*, we must examine the policy's exceptions to determine whether any exception excludes coverage of the Robbinses' claims, thus negating the duty to defend.

C. General Exceptions

The Robbinses argue that the general exception for "public or private easements not disclosed by the public records" does not apply. Br. of Appellant at 31-45. We agree with the Robbinses that, under Washington law, the Tribe's treaty rights are not easements and that therefore the general exception does not apply. Consequently, we need not reach whether it is conceivable to argue the Tribe's treaty rights were "disclosed by the public records."

The United States Supreme Court has held that the Stevens Treaties "imposed a servitude" on land. *United States v. Winans*, 198 U.S. 371, 381, 25 S. Ct. 662, 49 L. Ed. 1089 (1905). The Treaty, *Winans* held, "was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted." 198 U.S. at 381.

"A servitude is a legal device that creates a right or obligation that runs with the land." *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295

(2004).[4] "A servitude can be, among other things, an easement, profit, or covenant." *Id.* at 298-99. Therefore, easements and profits are two distinct types of servitudes. An easement "is a right to enter and use property for some specified purpose." *Affil. FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 458, 243 P.3d 521 (2010). On the other hand, "[a] cousin of easements, a profit a prendré [sic], 'is the right to sever and to remove some substance from the land.'" *Id.* (quoting 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE, § 2.1 Property Law at 80 (2d ed. 2004)). For example, a holder of a profit typically has rights to natural resources such as "'minerals, gravel, or timber.'" *Id.* (quoting 17 WASHINGTON PRACTICE: REAL ESTATE, § 2.1 at 80). The nuances of a profit à prendre are illustrated by its definition in *Black's Law Dictionary*:

> "A profit à prendre has been described as 'a right to take something off another person's land.' This is too wide; the thing taken must be something taken out of the soil, i.e., it must be either the soil, the natural produce thereof, or the wild animals existing on it; and the thing taken must at the time of taking be susceptible of ownership. A right to 'hawk, hunt, fish, and fowl' may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned. But a right to take water from a spring or a pump, or the right to water cattle at a pond, may be an easement but cannot be a profit; for the water, when taken, was not owned by anyone nor was it part of the soil."

BLACK'S LAW DICTIONARY 1404 (10th ed. 2014) (quoting ROBERT E. MEGARRY & M.P. THOMPSON, A MANUAL OF THE LAW OF REAL PROPERTY, at 375-76 (6th ed. 1993)).

The Robbinses argue that the Tribe's treaty rights are not easements, but rather are a sui generis aboriginal right and cannot readily be classified under English common law. They argue also that the treaty rights are a form of servitude more closely analogous to a profit à prendre

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[4] *See also* "servitude" in *Black's Law Dictionary* 1577 (10th ed. 2014):

> 1. An encumbrance consisting in a right to the limited use of a piece of land or other immovable property without the possession of it; a charge or burden on an estate for another's benefit <the easement by necessity is an equitable servitude>. • Servitudes include easements, irrevocable licenses, profits, and real covenants.

than an easement and, thus, should not be swept into the current of the general exception, which specifies easements.

MCTI counters that we should construe tribal shellfish rights as easements. MCTI claims a profit à prendre is a form of easement and although there may be distinctions among various forms of easements, that does not mean they are not still easements. MCTI cites a definition contained in the *Restatement (Third) of Property* to argue that "'[a] profit a prendre *is an easement* that confers the right to enter and remove timber, mineral, oil, gas, game, or other substance from the land in possession of another.'" Br. of Resp't at 17-18 (emphasis added) (quoting RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2 (2000)).

The Tribe's treaty "right of taking fish, at all usual and accustomed grounds and stations," which includes the right to take shellfish, inescapably entails the right to come onto the Robbinses tidelands and harvest shellfish from the seabed. This right is akin to a profit à prendre, although the right of access by itself is more like an easement. As stated, an easement and a profit à prendre are distinctly different categories of servitudes, nuanced and definable. Because the policy does not define the term "easement," it is at best ambiguous as applied to the Tribe's right. Because ambiguities in insurance policies are to be interpreted in favor of the insured, *Holden*, 169 Wn.2d at 756, and because we "strictly and narrowly construe insurance policy exclusions," *Campbell*, 166 Wn.2d at 472, we hold that the Tribe's treaty right to harvest shellfish more closely resembles a profit à prendre rather than an easement and, therefore, the general exception does not apply.

Because the policy conceivably provides coverage, and because no general exceptions apply, we hold MCTI owed the Robbinses a duty to defend. Consequently, the superior court

erred when it granted MCTI's motion for summary judgment and denied the Robbinses' cross-motion for partial summary judgment.

II. BAD FAITH

The Robbinses argue that because MCTI unreasonably breached its duty to defend, it acted in bad faith as a matter of law and, therefore, should be estopped from denying coverage. We agree.

An insurer acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded. *Am. Best Food*, 168 Wn.2d at 412. The insured does not establish bad faith, however, when the insurer denies coverage or fails to provide a defense based on a reasonable interpretation of the insurance policy. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998). The duty to defend requires an insurer to give the insured the benefit of the doubt when evaluating whether the insurance policy provides coverage. *Am. Best Food*, 168 Wn.2d at 412-13; *Campbell*, 166 Wn.2d at 471; *Woo*, 161 Wn.2d at 53.

If an insurer is uncertain as to its duty to defend, it may defend under a reservation of rights while seeking a declaratory judgment that it has no such duty. *See, e.g.*, *Kirk*, 134 Wn.2d at 563 n.3; *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002); *Woo*, 161 Wn.2d at 54; *Campbell*, 166 Wn.2d at 471; *Am. Best Food*, 168 Wn.2d at 405. "A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel." *Truck*, 147 Wn.2d at 761. "'When that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay.'" *Id.* (quoting *Kirk*, 134 Wn.2d at 563 n.3).

If we conclude that the insurer breached the duty to defend in bad faith, we presume harm from the insurer's actions. *Kirk*, 134 Wn.2d at 562-63. In that event, we hold the insurer liable

for the cost of any defense and estop the insurer from asserting that there is no coverage. *Id.* at 563-65.

MCTI did not defend under a reservation of rights while seeking a declaratory judgment as to coverage under the Robbinses' policy. Instead, MCTI denied coverage even though, as shown above, its policy exception for easements was at best ambiguous in its application. Because ambiguities in insurance policies are to be interpreted in favor of the insured, *Holden*, 169 Wn.2d at 756, and policy exclusions are to be strictly and narrowly construed, *Campbell*, 166 Wn.2d at 472, MCTI acted unreasonably in denying a defense. *See Am. Best Food*, 168 Wn.2d at 413. Thus, we hold MCTI acted in bad faith as a matter of law. *See id.* Under *Kirk*, 134 Wn.2d at 562, 563-65, we presume harm to the Robbinses and hold that MCTI is estopped from denying the Robbinses coverage under the title insurance policy subject to the remaining question of affirmative defenses.

III. AFFIRMATIVE DEFENSES

MCTI argues that it should be given the opportunity to argue the affirmative defenses it pled in its answer. We agree.

CR 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

In their reply brief, the Robbinses argue that because MCTI failed to prove up or argue its affirmative defenses to the superior court, it cannot now assert them as a defense to its liability for its bad faith breach of its duty to defend. The Robbinses cite CR 56(e) and *Labriola v. Pollard Group., Inc.*, 152 Wn.2d 828, 840-42, 100 P.3d 791 (2004), for the proposition that MCTI had the burden of setting forth specific facts showing that there is a genuine issue for trial.

In its answer, MCTI pled several affirmative defenses. The Robbinses' cross-motion for partial summary judgment did not seek summary judgment on any of MCTI's affirmative defenses. In its response to the Robbinses' cross-motion, however, MCTI argued, among other matters, that its affirmative defenses are to some degree based in fact and it had not had the opportunity to conduct discovery, in particular, on the defenses of statute of limitations, laches, waiver, and mitigation of damages.

The Robbinses' cross-motion for summary judgment asserted that that their policy afforded coverage, no general exceptions applied, and MCTI had a duty to defend. Their cross-motion did not request summary judgment on any of MCTI's affirmative defenses. Nevertheless, MCTI responded in part by noting its affirmative defenses and stating that it had not had the opportunity to conduct needed discovery on them.

CR 56(e), set out above, by its terms requires a party opposing summary judgment to set forth specific facts showing there is an issue for trial in opposition to the motion that was made. Where, as here, the plaintiff does not request summary judgment on a number of affirmative defenses, CR 56(e) does not require the defendant to show an issue of fact concerning them. Similarly, *Labriola* does not require the party opposing a summary judgment motion to set forth facts about an issue that was not raised by the motion. In that case, the party opposing summary judgment failed to bring forth sufficient facts to substantiate its counterclaims, which the trial court in fact had dismissed. *Labriola,* 152 Wn.2d at 840-42. The Robbinses, in contrast, did not even request summary judgment on MCTI's affirmative defenses.

For these reasons, MCTI's affirmative defenses are yet to be decided. We remand for the superior court to consider them, subject to the other holdings in this opinion.

IV. ATTORNEY FEES

The Robbinses request attorney fees and costs incurred both in the superior court and on appeal. They base these requests on RCW 48.30.015(3), part of the Insurance Fair Conduct Act, and on *Olympic Steamship Company, v. Centennial Insurance Company*, 117 Wn.2d 37, 51-53, 811 P.2d 673 (1991). Because the merits of MCTI's affirmative defenses are not yet decided, any decision on attorney fees and costs is premature.

CONCLUSION

We reverse the superior court's order granting MCTI's motion for summary judgment and denying the Robbinses' cross-motion for partial summary judgment. We hold that MCTI owed a duty to defend under the policy, its failure to do so constituted bad faith, and MCTI is estopped from denying coverage. We decline to rule on the request for attorney fees and costs, and we remand to the superior court to consider the merits of MCTI's affirmative defenses.

Bjorgen, J.

We concur:

Worswick, P.J.

Sutton, J.

C

WAC 284-16-030

Title Insurers-Defining "complete set of tract indexes."

(1) The phrase "complete set of tract indexes," as used in RCW **48.29.020** and **48.29.040**, is defined to mean a set of indexes from which the record ownership and condition of title to all land within the particular county can be traced and ascertained, such set of indexes to be complete from the inception of title from the United States of America.

(2) The basic component parts of such a set of indexes are:

(a) An index or indexes in which the reference is to geographic subdivisions of land, classified according to legal description (as distinguished from an index or indexes in which the reference is to the name of the title holder, commonly called a grantor-grantee index) wherein notations of or references to:

(i) All filed or recorded instruments affecting title to particularly described parcels of real property and which impart constructive notice under the recording laws; and

(ii) All judicial proceedings in the particular county affecting title to particularly described parcels of real property are posted, filed, entered or otherwise included in that part of the indexing system which designates the particular parcel of real property; provided, no reference need be made in such index to any judicial proceeding which is referred to or noted in the name index defined in subparagraph (b) below.

(b) A name index or indexes wherein notations of or references to all instruments, proceedings and other matters of record in the particular county which affect or may affect title to all real property (as distinguished from particularly described parcels of real property) of the person, partnership, corporation or other entity named therein and affected thereby are posted filed entered or otherwise included in that part of the indexing system which designates that name.

(3) The indexes prescribed in numbered subsections (2) above, may be maintained in bound books, loose-leaf books, jackets or folders, on card files, or in any other form or system, whether manual, mechanical, electronic or otherwise; or in any combination of such forms or systems.

(4) The extent to which the prescribed indexes shall be subdivided or defined is dependent upon all relevant circumstances. The population of the particular county, the extent to which land within the particular county has been subdivided and passed into separate ownerships, and all other factors which are reasonably related to the purpose of the statutory requirement, are entitled to consideration in such determination.

WHITEHOUSE & NICHOLS, LLP

January 09, 2019 - 2:18 PM

Filing Petition for Review

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