No. 96726-1

SUPREME COURT OF THE STATE OF WASHINGTON

No. II-50376-0

Court of Appeals
DIVISION II
STATE OF WASHINGTON

MASON COUNTY TITLE INSURANCE COMPANY; and

RETITLE INSURANCE COMPANY,

PETITIONER,

v.

LESLIE W. ROBBINS AND HARLENE E. ROBBINS,

RESPONDENTS.

RESPONDENTS LESLIE W. ROBBINS AND HARLENE E. ROBBINSES' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Leslie and Harlene Robbins submit this answer to Retitle Insurance Company's (formerly Mason County Title Insurance Co.'s) (hereinafter, collectively, the "insurer") petition for discretionary review.

Because the insurer presents no argument directed at the grounds for review set forth in RAP 13.4(b), and because the Court of Appeals correctly found that the insurer had breached its duty to defend the Robbinses, the Court should deny the petition for review. But, should the Court accept review, the Court should also accept review of the additional issue designated by the Robbinses below.

II. COUNTERSTATEMENT OF THE ISSUES

1. Has the insurer shown any of the grounds articulated in RAP 13.4(b) that might warrant the Court in accepting review?

Answer: No. The insurer does not even discuss the criteria set forth in RAP 13.4(b), much less show that they have been met.

2. Did the Court of Appeals correctly hold that the insurer had wrongfully refused to defend the Robbinses against Squaxin Island Tribe's claim?

Answer: Yes. Under settled Washington law, as most recently articulated in *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 404 ¶6, 229 P.3d 693 (2010) and *Xia v. Probuilders Specialty Ins.*

Co., 188 Wn.2d 171, 369 P.3d 502 (2017), an insurer takes a "great risk" if it refuses to defend its insured. An insurer must construe all doubt about either the facts or the applicable law in favor of providing a defense to an insured. An insurer must defend unless the matter is clearly not covered by the insurer's policy. Here, the Court of Appeals correctly determined that the insurer breached this standard.

ADDITIONAL ISSUES RAISED BY THE ROBBINSES

3. Did the Court of Appeals err by refusing to dismiss the insurer's affirmative defenses, as to which the Robbinses had moved for summary judgment, and in support of which the insurer had presented no evidence?

Answer: Yes. Before the superior court, the Robbinses filed a motion for summary judgment asking the court to "declare the title insurer must pay the Robbinses for all loss or damage they sustain as a result of the Tribe's claim." CP 252. In response, the insurer had the burden of "proving up" any affirmative defense that would negate such liability. The insurer failed to do this. Therefore, the Court of Appeals should have held that the insurer waived these defenses, rather than remanding to the trial court to provide the insurer a second opportunity to raise them.

4. Are the Robbinses entitled to an award of their reasonable attorney's fees and costs?

Answer: Yes. Under *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), and under RCW 48.15.030(3), because the Robbinses obtained a determination that the insured denied a defense in bad faith, they are entitled to an award of their reasonable attorney's fees and costs.

III. COUNTERSTATEMENT OF THE FACTS

A. Treaty of Medicine Creek.

On December 26, 1854, the United States entered into the Treaty of Medicine Creek with the Squaxin Island and other tribes. CP 64-71. By this treaty, the Squaxin Island Tribe relinquished its aboriginal title to the lands it had historically occupied, but reserved "the right of taking fish at all usual and accustomed places, . . .". *Id.* The United States Congress ratified the treaty, and had it published in the official compilation of United States statutes. 10 Stat. 132. CP 73.

Federal courts have subsequently construed this and similar treaties as reserving to the individual members of the signatory Indian tribes an aboriginal right to go on any land constituting the tribe's usual and accustomed fishing place and take fish and shellfish therefrom. *United States v. Winans*, 198 U.S. 371, 25 S.Court. 662, 49 L.Ed. 1089 (1905) (the treaties "reserve rights . . . to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as

though described therein . . .") (381-82). See also *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998) (CP 141-173) (confirming that reserved right to take fish from usual and accustomed fishing places extends to shellfish).

B. The insurer issues the Robbinses title insurance.

In June, 1978, the insurer issued title insurance to Leslie and Harlene Robbins. CP 228-232.

The policy reads, in pertinent part:

> MASON COUNTY TITLE INSURANCE COMPANY
>
> Title Insurance Building
>
> Shelton, Washington
>
> hereinafter called the Company, a Washington corporation, for valuable consideration, and subject to the conditions and stipulations of this policy, does hereby insure the person or persons named in item 1 of Schedule A, . . . against loss or damage sustained by reason of:
>
> 1. Title to the estate, lien or interest defined in items 3 and 4 of Schedule A being vested, at the date hereof, otherwise than as stated in item 2 of Schedule A; or
>
> 2. Any defect in, or lien or encumbrance on, said title existing at the date hereof, not shown in Schedule B; . . .

CP 229.

Schedule A describes the insured as "Leslie W. Robbins and Harlene E. Robbins, husband and wife." CP 230. It describes the "estate,

lien or interest insured" as being a "fee simple estate."[1] *Id.* It identifies the real estate with respect to which the policy is issued as:

> Tracts three (3) and four (4), Plat of Skookum Point Tracts, including tidelands of the second-class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the above described tracts, as shown on said plat, according to the recorded plat thereof in the office of the Auditor for Mason County, Washington, Volume 4 of Plats, pages 54 and 55. . . .

Id.

The title insurance policy broadly obligates the insurer to defend the Robbinses against any "demand" asserting a right inconsistent with the title as insured:

> CONDITIONS AND STIPULATIONS
>
> 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 232.

The title insurance policy contains a number of general exclusions. One such exclusion excludes coverage for "public or private easements not disclosed by the public records." CP 230.

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[1] Black's Law Dictionary defines "fee simple" as being "the broadest property interest allowed by law . . ." Black's Law Dictionary (9th ed. 2009) at 691. A person who holds in "fee simple" holds free of any encumbrance. *Wingard v. Copeland*, 64 Wash. 214, 218, 116 Pac. 670.

Nothing in the policy of title insurance purports to except tribal fishing rights from the coverage provided by the policy. Compare CP 49 (policies the insurer issued to **other** insureds specifically except "Indian Treaty or aboriginal rights," in contrast to the policy the insurer issued to the Robbinses).

C. The insurer refuses to defend the Robbinses against the tribe's demand that it be allowed to take shellfish from the Robbinses' property pursuant to the Treaty of Medicine Creek.

In July, 2016, the Squaxin Island Tribe claimed that the Robbinses' property constituted part of the tribe's "usual and accustomed fishing places," pursuant to the Treaty of Medicine Creek, and demanded the Robbinses recognize the right of the members of the tribe to come upon the property and remove shellfish. CP 225, 241-42. The Robbinses promptly requested the insurer to defend them against the tribe's demand. CP 225, 236-42. The title insurer refused to defend. CP 225-26, 243-45.

D. The Robbinses sue the insurer based on their wrongful refusal to defend.

The Robbinses sued the insurer. CP 315-345. The parties filed cross motions for summary judgment. CP 252-73, 274-81. The Superior Court entered judgment for the insurer. CP 4-5.

The Robbinses timely appealed. CP 346-49. The Court of Appeals reversed. *Robbins v. Mason County Title Ins. Co.*, 5 Wn.App. 2d 68, 425 P.3d 885 (2018).

The Court of Appeals first articulated the generally applicable legal standard: "A title insurer must defend unless it is clear . . . the claim is not covered by the applicable policy." 5 Wn.App. at 76, ¶18, citing *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 471, 209 P.3d 859 (2009). The Court of Appeals held that the duty to defend is triggered if "the insurance policy "*conceivably covers*" the allegations made against the insured." *Id.*, citing *Campbell; 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).

Analyzing the language of the first paragraph of the policy's conditions and stipulations (quoted above at p. 5), the Court of Appeals held that the policy required the insurer to defend the Robbinses against any "demand" founded upon an "encumbrance." 5 Wn.App. at 76-77, ¶20. The Court of Appeals held that "a demand" included "the assertion of [any] legal or procedural right." 5 Wn.App. at 77, ¶22, citing Black's Law Dictionary at 522 (10th ed. 2014). The Court of Appeals further held that the tribe's claimed right, springing from the Treaty of Medicine Creek was founded upon an "encumbrance" because the tribe's claim, although "adverse to the interests of the landowner, did not conflict with his conveyance of the land in fee." *Id.* at ¶24, citing *Hebb v. Severson*, 32 Wn.2d 159, 167, 201 P.2d 156 (1948). Therefore, the Court of Appeals

held that the insurer had the obligation to defend the Robbinses against the tribe's demand. 5 Wn.App. at 79, ¶28.

The Court of Appeals then analyzed the general exception applicable to "easements." The Court of Appeals noted that the United States Supreme Court had described the treaty as imposing a "servitude" upon each property constituting part of the tribes' normal and accustomed fishing places. *Id.* at 79-80, ¶30 quoting *United States v. Winans*, 198 U.S. 371, 381, 25 S.Court. 662, 49 L.Ed. 1089 (1905). The Court of Appeals observed that "a servitude is a legal device that creates a right or obligation that runs with the land." 5 Wn.App at 80, ¶31 quoting *Lake Limerick Country Club v. Hunt Mfd. Homes, Inc.*, 120 Wn.App. 246, 253, 84 P.3d 295 (2004). The Court of Appeals noted that easements and profits are two distinct types of servitudes. *Id.* The Court of Appeals held that because the tribe was asserting the right to take shellfish, a product of the soil, the tribe's retained aboriginal right was in the nature of a profit, not an easement. *Id.* Because it was at least conceivable the insurer's policy covered the tribe's claim, the Court of Appeals held that the general exception did not excuse the insurer from its obligation to defend. 5 Wn.App. at 81-82, ¶34.

The Court of Appeals then addressed the insurer's bad faith. *Id.* at 82-83, ¶36-40. The Court noted that Washington law directed an insurer

who is uncertain as to its duty to defend to "defend under a reservation of rights while seeking a declaratory judgment that it has no such duty." 5 Wn.App. at 82, ¶38 (citing cases). Because the insurer should have recognized that "its policy exception for easements was at best ambiguous in its application," the Court of Appeals held that the insurer had refused to defend in bad faith. *Id.*

The Court of Appeals further held that where an insurer refuses to defend in bad faith, a court must presume harm. *Id.* at 83, ¶39, citing *Kirk v. Mount Airy Ins. Co.*, 134 Wn.2d 558, 562-63, 951 P.2d 1124 (1998). Therefore, the Court of Appeals held that the insurer was estopped to deny coverage, such that it was liable for all loss caused to the Robbinses arising out of the tribe's assertion of its claimed rights. *Id.*

Finally, the Court of Appeals addressed the affirmative defenses that the insurer had pled in its answer to the Robbins' complaint. 5 Wn.App. at 83-85, ¶41-47. The Court of Appeals held that:

> [T]he Robbins' cross motion for partial summary judgment did not seek summary judgment on any of [the insurer's] affirmative defenses.

5 Wn.App. 84, ¶44. Therefore, the Court of Appeals held that:

> [W]here, as here, the plaintiff does not request summary judgment on a number of affirmative defenses, CR56(e) does not require the defendant to show an issue of fact concerning them.

Id. at ¶46. The Court of Appeals remanded to the Superior Court to permit the insurer to pursue its affirmative defenses "subject to the other holdings in this opinion." 5 Wn.App. 85, ¶47. The Court of Appeals also held that "[b]ecause the merits of [the insurer's] affirmative defenses are not yet decided, any decision on attorney fees and costs is premature." *Id.*, ¶48.

IV. ANALYSIS

A. The policy imposed an extremely broad duty on the insurer to defend the Robbinses. This duty extended to "demands" made prior to the initiation of legal proceedings.

The policy imposed an extremely broad duty on the insurer to defend the Robbinses:

> The company . . . will, at its own expense, defend the insured with respect to all demands . . . 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 232. By its plain language, the insurer's duty to defend extends to "demands" made prior to the initiation of legal proceedings.

In arguing that it need only defend against legal proceedings, the insurer cites to cases involving comprehensive general liability insurance policies, the language of which only requires the insurer to defend against a "suit." *Unigard Ins. Co. v. Leven*, 97 Wn.App. 417, 425, 983 P.2d 115 (1999) (twice internally cited in the insurer's Petition at p. 8) (where policy

only required insurer to defend against "any **suit** against the Insured," insurer had no duty to defend until such suit actually filed) (emphasis added). See also *Alea*, 168 Wn.2d at 403 (tender after "suit" actually filed).

However, Washington courts have also squarely held that where the policy by its language requires an insurer to defend prior to the initiation of a "suit," the insurer must do so. *United Services Auto. Ass'n v. Speed*, 179 Wn.App. 184, 195 ¶18, 317 P.3d 532 (2014) (when insurance policy requires insurer to defend against "claims," insurer must step in and provide the insured with a defense in response to such claims even prior to the institution of formal legal proceedings).

Because the cases relied on by the insurer involve substantially different policy language, they are irrelevant here. The insurer has not established any basis for the Court to accept review of this issue.

B. The Court of Appeals correctly ruled that the general exception for "easements not disclosed by the public record" did not apply.

The Court of Appeals correctly ruled that the general exception for "easements not disclosed by the public record" did not apply.

1. Under *Alea* and *Xia*, the insurer had the burden of clearly establishing that this exclusion applied.

Under settled Washington law, an insurer takes a "great risk" when it refuses to defend its insured. *Xia v. Probuilders Specialty Ins. Co.*, 188

Wn.2d 171, 182, ¶23, 400 P.3d 1234 (2017). An insurer is entitled to refuse to defend only if its policy does not even conceivably cover the claim. *Xia*, 188 Wn.2d at 182, ¶22; *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 404 ¶6, 229 P.3d 693 (2010). In deciding whether to defend, the insurer must give its insured the benefit of any dispute or ambiguity about either the facts, or the applicable law. *Xia*, 182, ¶23; *Alea*, 405, ¶7. If there is such doubt or uncertainty, the insurer must provide a defense, but then may initiate a declaratory judgment action to ask a court to resolve the dispute or uncertainty. *Alea*, 405, ¶7. But an insurer may not simply refuse to defend its insured, and acts in bad faith if it does so. *Alea,* 413, ¶ *20; Xia*, 190, ¶42.

The insurer does not discuss, much less challenge, the Court of Appeals' holding that these standards applied to this case.

2. The exclusion only applies to "easements," and the Court of Appeals correctly ruled that the tribe's aboriginal claim was in the nature of a *profit a prendre*, not an "easement."

Applying these standards, the Court of Appeals correctly held that the general exclusion applicable to "easements not disclosed by the public records" did not unambiguously negate coverage for the Robbinses' claim.

An easement is a right, typically running with the ownership of an adjoining piece of property, to make some use of the property burdened by the easement. *Beebe v. Swerda*, 58 Wn.App. 375, 381, 793 P.2d 442

(1990). A profit, in contrast, is a right, usually held by an individual, to come upon property and carry off its soil, or the products of its soil. 17 Stoebuck and Weaver, Wash. Prac.: Real Estate: Property Law (2004), §2.1 at 80.

Here, the tribe claimed a right—retained by each member of the tribe individually pursuant to the Treaty of Medicine Creek—to come upon the Robbinses' property and carry off shellfish, a product of the property's soil. The Court of Appeals correctly held that the tribe's claim was in the nature of a profit, rather than in the nature of an easement, such that the policy's general exception applicable only to easements conceivably did not apply. 5 Wn.App. at 82, ¶35.

3. Because it was based on rights derived from a federal treaty published in the United States statutes at large, the tribe's claim was also based on a matter "disclosed by the public record."

Because it found that the tribe was asserting rights that were not subject to the general exclusion applicable only to easements, the Court of Appeals did not reach the Robbinses' alternative argument: because the tribe's claim was based on the published Treaty of Medicine Creek, the basis for the tribe's claim was "disclosed by the public record."

Congress had the Treaty of Medicine Creek published in its official compilation of United States statutes. 10 Stat. 132 (CP 73). The effect of the treaty's publication was to provide constructive notice of its terms to

all the world. 1 U.S.C. §113 (CP 73); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) ("[E]veryone is charged with knowledge of the United States Statutes at Large . . .").

Interpreting an identically-worded policy, the Alaska Supreme Court has held that an officially published federal order constitutes a "public record" under the recording laws. *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (1976) (CP 200-204). The insurer can point to no contrary on-point authority.

Under *Alea* and *Xia*, an insurer must defend when it conceivably has the obligation to do so under the language of its policy. The absence of on-point Washington case authority, and the Alaska Supreme Court directly on-point decision in *Hahn*, meant that the insurer conceivably owed the Robbinses an obligation to defend them against the tribe's claim. It therefore owed, and breached, a duty to defend the Robbinses.

C. The Court of Appeals correctly held that the insurer acted in bad faith in refusing to defend.

The Court of Appeals next correctly held that the insurer acted in bad faith in refusing to defend. 5 Wn.App. at 82-83, ¶36-40.[2]

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[2] *Id.* at 82-83, ¶36-40. Misrepresenting the record, the insurer claims that the "Robbins did not ask the trial court to determine that [the insurer] had acted in bad faith." Insurer's Petition, p. 10. The Robbinses moved the Superior Court for a declaration, on summary judgment, that "the title insurer must pay the Robbins for all loss or damage they sustained as a result of the [t]ribe's claim." CP 252. The Robbinses squarely argued that the insurer's refusal to defend occurred in bad faith, and resulted in an estoppel to deny

Washington law unequivocally imposes a duty upon the insurer to provide a defense in any situation where there is any factual or legal doubt about its obligation to do so. *Alea* 168 Wn.2d at 412-13. In both *Alea*, and in *Xia*, this Court held that insurers who fail to recognize this legal standard, and who fail to correctly apply it, act in bad faith as a matter of law. *Alea*, 168 Wn.2d at 413, ¶ 20; *Xia*, 188 Wn.2d at 189, ¶39-41.

The Court of Appeals held that the insurer should have recognized that "its policy exception for easements was at best ambiguous in its application." 5 Wn.App. at 83, ¶40. The Court of Appeals correctly held that the insurer had refused to defend in bad faith as a matter of law.

The insurer asserts that there is a conflict between this Court's decision in *Alea*, and its earlier decision in *Truck Insurance Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). See Insurer's Brief, p. 10. In *Truck*, the court held that an insurer who had failed to provide any meaningful explanation of its refusal to defend its insured acted in bad faith as a matter of law. This constitutes an independent ground for finding bad faith; it is not inconsistent with either the rationale or the holdings of *Alea* and *Xia*. There is no conflict between these cases.

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coverage, leading to this remedy. CP 261-262, 272. See also CP 15-16. The insurer's claim that this issue was not before the Superior Court, and therefore before the Court of Appeals, is wholly without merit.

In sum, the insurer has not established error nor any basis warranting review of the Court of Appeals' analysis of the issue of bad faith.

D. The insurer's failure to defend prejudiced the Robbinses.

Finally, the insurer asserts that the Court of Appeals erred, and the Court should accept review, because "defending would have been "useless"." See Insurer's Brief at p. 7.

The insurer apparently intends to assert by this argument that its failure to defend did not cause harm to the Robbinses. If so, this argument fails for two reasons.

First, where an insurer acting in bad faith refuses to defend its insured, this Court has required that harm be presumed. *Robbins*, 5 Wn.App. at 83, ¶39, citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563, 951 P.2d 1124 (1998).

Second, the insurer's provision of a defense to the Robbinses would certainly have been of benefit to them. An attorney could have assisted the Robbinses in determining: (1) whether the Robbinses' property was in fact part of the tribe's usual and accustomed fishing grounds; (2) whether the tribe's rights extended to Manila clams located on the Robbinses' property; and (3) what portion of the shellfish on the

Robbinses' property were "naturally occurring." See CP 226 (Declaration of Leslie Robbins at ¶14).

The burden was on the insurer, who acted in bad faith, to prove "beyond dispute" that its refusal to provide a defense caused no harm whatsoever to the Robbinses. The insurer failed to take that burden seriously, much less to meet it. The insurer's argument that there "was nothing to defend" does not warrant this Court in accepting review.

ISSUE ON CROSS-REVIEW

E. If it accepts review, the Court should also review the Court of Appeals' refusal to dismiss the insurer's affirmative defenses.

If it accepts review, the Court should also review the Court of Appeals' refusal to dismiss the insurer's affirmative defenses.

A plaintiff may move for summary judgment upon the issue of liability as a matter of law. CR 56(a); CR 56(c) (last sentence) (plaintiff may move, and court may enter, summary judgment on the issue of liability). Nothing in these rules requires a plaintiff to also explicitly ask for dismissal of affirmative defenses inconsistent with liability.

Once the Robbinses moved for summary judgment as to liability, the insurer had the burden of making a prima facie evidentiary showing in support of each of its affirmative defenses to the extent the insurer asserted them as a defense to liability. *Young v. Key Pharmaceuticals, Inc.*, 112

Wn.2d 216, 770 P.2d 182 (1989); *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840-42, 100 P.3d 791 (2004).

Here, the Robbinses squarely moved for summary judgment on liability. They asked the Superior Court to declare that "the title insurer must pay the Robbinses for all loss or damage they sustained as a result of the tribe's claim." CP 252. This obligated the insurer to "prove up" its affirmative defenses addressed to liability.

The Court of Appeals held, incorrectly, that the Robbinses, in moving for summary judgment, had, in addition to the obligation of moving for summary judgment on liability, to explicitly request the Superior Court to dismiss the insurer's affirmative defenses. 5 Wn.App. at 84, ¶46. Nothing in CR 56 imposes such a burden upon a claimant moving for summary judgment on liability. The Court of Appeals cited no case authority in support of, and no rationale for imposing, such a novel and extraordinary requirement. If not reviewed and reversed, the Court of Appeals holding will only serve as a trap for the unwary, needlessly prolonging the resolution of disputes in which there are no genuine issues of fact.

If it accepts review, the Court should also review this issue.

F. The Robbinses are entitled to attorney's fees.

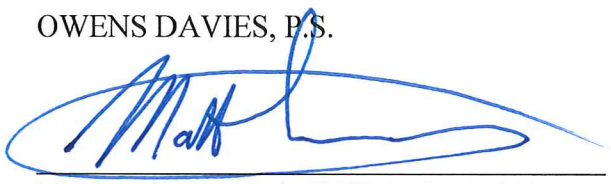
The Robbinses are entitled to an award of their reasonable attorney's fees and costs because they have established that the insurer unreasonably denied coverage. *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37,811 P.2d 673 (1991); RCW 48.30.015(3). The Court should award the Robbinses all the fees and costs they have reasonably incurred to date. At a minimum, the Court should award the fees and costs the Robbinses have reasonably incurred in responding to the insurer's motion for discretionary review. See RAP 18.1(j).

V. CONCLUSION

The Court should deny the insurer's petition for review. However, if it accepts review, the Court should also accept review of the Court of Appeals' refusal to dismiss the insurer's affirmative defenses, and reverse only that portion of the Court of Appeals' decision.

The Court should award the Robbinses the reasonable attorney's fees and costs that they have incurred in this case to date. In the alternative, the Court should at least award the Robbinses the reasonable fees and costs they have incurred in responding to this petition for review.

OWENS DAVIES, P.S.



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I certify that on the 31st day of January, 2019, I caused a true and correct copy of this Answer to be served on the following in the manner indicated below:

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