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NO. 64738-5-I

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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DANIEL HERR,

**Appellant,**

v.

ESMAEIL FORGHANI AND JOY FORGHANI, HIS WIFE, AND  
ADDITIONAL PARTIES, PACIFIC NORTHWEST TITLE  
INSURANCE COMPANY AND DEPOSITORS INSURANCE  
COMPANY,

**Respondents.**

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**BRIEF OF RESPONDENT PACIFIC NORTHWEST TITLE  
INSURANCE COMPANY**

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**ORIGINAL**

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## **I. INTRODUCTION**

This action arises out of a dispute between Plaintiff Daniel Herr (“Herr”) and Defendants Esmaeil and Joy Forghani (“Forghani”), who are owners of adjacent property, over the scope of an easement known as “Tract X.” Herr added claims against Defendant Pacific Northwest Title Insurance Company (“PNWT”), alleging that PNWT had a coverage obligation under a title policy it issued to Herr.

PNWT moved for summary judgment to dismiss Herr’s claims against it on the ground that Herr’s claims are not covered under the terms of his title policy. On January 16, 2009, the trial court heard argument on the motion and granted summary judgment in PNWT’s favor. Herr purportedly appeals the entry of that order.

Herr’s claims are not covered under the terms of his title policy, and PNWT respectfully requests that the Court affirm the trial’s court’s order granting summary judgment in its favor.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court did not err in refusing to order PNWT to defend a Counterclaim against Herr.

**B. Issues Pertaining to Assignments of Error**

1. Does PNWT have a duty of defend when there was no Counterclaim filed against Herr? (Assignment of Error 1.)
2. Should attorneys' fees and costs be awarded to Herr against PNWT for refusing to defend, when no duty of defense was triggered by the filing of a claim against Herr? (Assignment of Error 1.)
3. Did the trial court properly grant summary judgment as to any first-party claims when the Tract X easement was excepted from coverage under Herr's title policy and when other coverage exclusions apply to Herr's claim?

**III. STATEMENT OF THE CASE**

**A. Herr's Claims**

This action arises out of a dispute between owners of adjacent property over the scope an easement. On or about December 17, 2007, Herr filed a Complaint for Trespass, Damages and Quiet Title against Forghani. CP 3-5. Herr asserted that "on or about 2005, Defendants changed the nature of the existing residence use to a commercial business use housing six or seven persons in a nursing home setting." CP 4. Herr alleges that Forghani expanded his use of the Tract X easement, and such an expansion made Plaintiff's property unmerchantable. CP 4-5. Herr sought damages and injunctive relief concerning the scope of the Tract X

easement. CP 5.

On or about January 8, 1980, a Short Plat was approved creating Lots 1 and 2. CP 182-84. Short Plat No. 57902 was recorded under King County Auditor No. 8109170624. *Id.* Herr and Forghani now own Lots 1 and 2. As depicted on the Short Plat, Tract X is a 20-foot easement for “ingress, egress, & utilities.” CP 183. The Short Plat also contains the following statement: “Said easements to be maintained, repaired, and/or rebuilt by the owners of the parcels having legal access therefrom and their heirs, assigns or successors, unless and until such roads are improved to King County standards and are dedicated and accepted by King County for maintenance.” *Id.* The Short Plat does not contain any other conditions of use of the Tract X easement. CP 182-84.

On April 9, 2008, Herr filed an Amended Complaint, naming PNWT and Depositors Insurance Company as defendants. CP 13-15. As it relates to PNWT, Herr asserted the following claims:

3.

On or about August 2, 2002, Plaintiff was insured by Pacific Northwest Title under Policy #1093-139498 in the purchase of his residence located at 110 S.W. 122nd Street, Seattle, Washington; the policy was an ALTA owner’s policy insuring Plaintiff in the sum of \$155,000. That policy insures against the interference with the use of Plaintiff’s property as a result of a final Judgment based upon any encroachment of the residential structure or any part thereof onto adjoining lands or onto any

easement shown in Schedule B of the Policy; said policy also insures against loss or damage sustained or incurred by reason of any defect in or encumbrance on the title, unmarketability of the title or lack of a right of access to and from the land; in addition, said policy provides for the payment of costs and attorney's fees and expenses incurred in the defense of the title.

\* \* \* \*

5.

Plaintiff alleges that should Defendant, Forghani [sic], succeed in impressing an expanded implied easement to his property for ingress and egress for commercial use of his property over Plaintiff's land and/or easement, this Court enter judgment against the additional Defendants for sums as represent a diminution or destruction of the merchantability of Plaintiff's property, together with reasonable attorney's fees and costs and expenses herein.

CP 14.

**B. Herr's Title Policy from PNWT**

PNWT issued a title policy to Herr on August 2, 2002. CP 40-51.

This date is defined as the "Date of Policy." CP 40, 44. The policy provides coverage "SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS" of the policy. CP 40.

Herr's title policy contains the following exclusions to coverage for violations of zoning laws:

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1 (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land . . .

CP 40. (Emphasis added.) The title policy further excludes, “[a]ny governmental police power not excluded by (a) above. . . .” (*Id.*)

Herr’s title policy also excludes coverage for post-policy conditions:

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

\* \* \* \*

3. Defects, liens, encumbrances, adverse claims, or other matters:

\* \* \* \*

(d) attaching or created subsequent to Date of Policy. . .

CP 40.

Herr’s title policy also contains the following exceptions from coverage in Schedule B:

This policy does not insure against loss or damage by reason of the following:

\* \* \* \*

2) COVENANTS, CONDITIONS, RESTRICTIONS,  
AND EASEMENTS CONTAINED IN SHORT PLAT,  
COPY ATTACHED:

RECORDED: September 17, 1981  
RECORDING NUMBER: 8109170624.

CP 45-46. (Emphasis added.) As discussed above, Recording Number 8109170624 refers to Short Plat No. 579072, which created Lots 1 and 2, which Herr and Forghani now own. The Short Plat also created Tract X, a 20 foot easement for ingress, egress, and utilities. CP 182-84

As part of Herr's title coverage, he added a Homeowners Endorsement (the "Endorsement"). CP 50-51. The Endorsement does not remove the special exceptions in Schedule B for Tract X. The Endorsement provides,

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

CP 51 (Emphasis added). Nothing in the Endorsement expressly modifies the exceptions in Schedule B. CP 50-51.

#### IV. SUMMARY OF ARGUMENT

Herr seeks to appeal the trial court's alleged failure to require PNWT to defend Herr against Forghani's Counterclaims. However, there

was no counterclaim filed by Forghani. Therefore, the record does not support Herr's appeal of this issue.

As for Herr's first-party claims, the title policy does not provide coverage for Herr's alleged loss and damage. Herr's claims against Forghani arose out of Forghani's alleged change of use of the Tract X easement. These claims are based upon post-policy conditions for which there is no coverage. Herr's policy excludes from coverage any "defects liens, encumbrances, adverse claims, or other matters" that arise "subsequent to the Date of Policy." The Date of Policy is August 2, 2002. Herr alleges that Forghani changed his use in 2005, more than two years after the Date of Policy. Therefore, Herr has no coverage for any loss or damage relating to Forghani's alleged change of use.

Further, the special exceptions to coverage in Schedule B of the title policy unequivocally except from coverage any loss or damage related to easements contained in Short Plat 579072. Tract X is an easement contained in the Short Plat. Thus, there is no coverage for any loss or damage caused to Herr as a result of the trial court's decision on the scope of Tract X. Further, this exception from coverage was not removed by the Endorsement. To the contrary, the Endorsement was "subject to" the terms, conditions, and exclusions of the title policy.

Moreover, there is no coverage under the policy for alleged “spot zoning.” Herr alleges that the Washington Legislature’s passage of RCW 70.128.715(2) amounts to illegal spot zoning. However, Herr’s title policy expressly excludes from coverage any loss or damage which arises from “zoning laws” or any other “governmental policy power.” Therefore, even if there were “spot zoning,” Herr has no coverage for any loss or damaged caused from it.

For all the foregoing reasons, PNWT requests that the Court affirm the trial court’s order granting PNWT’s motion for summary judgment.

## **V. ARGUMENT**

### **A. Standard of Review**

Appellate courts review summary judgment decisions *de novo*, performing the same inquiry as the trial court. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). Summary judgment should be granted if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. CR 56; *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

### **B. Herr’s Assignment of Errors do not Present Reviewable Issues**

Herr’s assignments of error related to PNWT are not reviewable. There is nothing in the record reflecting that Forghani filed a

counterclaim. Therefore, Herr's assignment of error for the trial court's alleged failure to require PNWT to defend the alleged counterclaim cannot be reviewed by this Court.

As it relates to PNWT, Herr frames his assignments of error as follows:

B. Pacific Northwest Title Insurance Co.

No. 1. Should the trial Court have ordered Pacific Northwest to defend the Counterclaim of Forghani against Herr based upon its coverage?

\* \* \*

D. Attorney's Fees & Costs

No. 1. Should attorneys' fees and costs be awarded Herr against both Pacific Northwest and Depositors for refusing to defend?

(Appellant's Br. at 13.)

However, as noted above, Forghani never filed a counterclaim. This is fatal to Herr's assignments of error. *See, e.g., Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 138, 29 P.3d 777 (2001) ("The triggering event [for the duty to defend] is the filing of a complaint alleging covered claims.") Because Forghani never filed a counterclaim, the triggering event for the duty to defend never occurred.

Additionally, because the counterclaim is not in the record, the Court cannot review the assignments of error. 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 insured within the policy’s coverage.” *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 52-53, 164 P.3d 454 (2007) (quotations omitted). Such an analysis requires a comparison of the allegations in the counterclaim to the policy coverage. Because no counterclaim is in the record, this Court has no way of construing the “complaint” to determine whether it alleges covered claims under PNWT’s policy. Herr bears the burden of providing an adequate record for the Court’s review. *State v. Tracy*, 128 Wn. App. 388, 394-95, 115 P.3d 381 (2005) (citations omitted). If he fails to meet this burden, the trial court’s decision stands. *Id.* For the foregoing reasons, PNWT requests that the Court dismiss Herr’s appeal as to PNWT.

**C. The Trial Court Properly Granted Summary Judgment in Favor of PNWT on Herr’s First-Party Claims Under his Title Policy**

PNWT offers the following arguments in support of the trial court’s order granting PNWT’s motion for summary judgment on Herr’s first-party claims, should the Court liberally construe Herr’s brief as an appeal of that ruling.

Construction of an insurance contract is a question of law. *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 472, 209 P.3d 859 (2009). In interpreting an insurance contract, courts look to the intent of

the parties, which is ascertained from the language of the contract. *Id.* “Construction which contradicts the general purpose of the contract or results in hardship or absurdity is presumed to be unintended by the parties.” *Id.* (quoting *Nautilus v. Transamerica Title Ins. Co. of Wash.*, 13 Wn. App. 345, 349, 534 P.2d 1388 (1975)). Further, language in an insurance contract is to be given its ordinary meaning, and courts should read the policy as the average person purchasing insurance would. *Id.* (citing *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 54, 1 P.3d 1167 (2000)).

**1. Defendant Forghani’s Alleged Change in Use of the Tract X Easement is a Post-Policy Condition for Which There is No Coverage**

There is no coverage under Herr’s title policy for Forghani’s alleged change in use of the easement. Forghani’s alleged change of use started after PNWT issued the title policy to Herr. Because it was a post-policy change, there is no coverage.

Title insurance policies insure against prior events, not future events. They insure the condition of title on the date of purchase. If there is some defect in the title not shown in the exceptions, there is generally coverage. However, there is generally no coverage for a title defect arising after the policy is issued. *See, e.g., Campbell*, 166 Wn.2d at 473-75 (holding that there was no coverage under a title policy for an easement

dispute that arose after the date of the policy). Herr's title policy is no different; the "Exclusions from Coverage" provision states:

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorney's fees or expenses which arise by reason of:

\* \* \* \*

3. Defects, liens, encumbrances, adverse claims, or other matters:

\* \* \* \*

(d) attaching or created subsequent to Date of Policy. . .

CP 40. This exclusion is carried forward in the Endorsement, including Section 2(b) which Herr relies upon, and applies to conditions existing "at the Date of Policy." CP 50.

Here, the Date of Policy is August 2, 2002. *Id.* In Herr's Complaint he alleges, "on or about 2005, Defendants changed the nature of the existing residence use to a commercial business use housing six or seven persons in a nursing home setting." CP 4. In other words, the alleged conduct that has or will damage Herr occurred over two years after the Date of Policy. As this condition arose after the Date of Policy, there is no coverage.

**2. Herr's Title's Policy Excludes from Coverage any Loss or Damage Arising from the Tract X Easement**

Herr's owner's policy unambiguously provides coverage "SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE

EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS” of the policy. CP 40. Herr’s policy excepts from coverage any “loss or damage by reason of” the easements contained in the short plat:

This policy does not insure against loss or damage by reason of the following:

\* \* \* \*

2) COVENANTS, CONDITIONS, RESTRICTIONS, AND EASEMENTS CONTAINED IN SHORT PLAT, COPY ATTACHED:

RECORDED: September 17, 1981  
RECORDING NUMBER: 8109170624.

CP 46.

Recording Number 8109170624 refers to Short Plat No. 579072, which created Lots 1 and 2, which Herr and Forghani now own. CP 182-84. As depicted on the Short Plat, Tract X is a 20-foot easement for ingress, egress, and utilities. CP 183. This is the easement that is the subject of Herr’s and Forghani’s dispute. CP 3-5. Under the plain meaning of the language in the policy, there is no coverage for any loss or damage caused to Herr as a result of the Court’s decision on the scope of Tract X. Therefore, the trial court properly granted summary judgment in PNWT’s favor.

**3. The Endorsement is “Subject To” the Exceptions in the Policy**

The Endorsement does not remove the special exceptions in Schedule B for Tract X. Without any support, Herr argues, “Herr paid for and received an endorsement which extends his coverage and does away with the effect of Schedule B exceptions.” (Appellant’s Br. at 27.) This assertion is contrary to the plain terms of the Endorsement. The Endorsement provides,

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

CP 51 (Emphasis added). Nothing in the Endorsement expressly modifies the exceptions in Schedule B. CP 50-51. Therefore, the Schedule B coverage exclusion for Tract X applies.

**4. The Coverage Provisions in the Endorsement are Inapplicable**

Without any argument, Herr cites a portion of Section 2 of the Endorsement, which provides as follows:

2. The Company hereby insures the insured owner against loss or damage which the insured owner shall sustain by reason of:

\* \* \* \*

b. the removal of the residence structure or interference with the use thereof for ordinary residential

purposes as the result of a final Court Order or Judgment, based upon the existence at the Date of Policy of:

(1) any encroachment of the residential structure or any part thereof onto adjoining lands, or onto any easement shown as a special exception in Schedule B of the Policy, or onto any unrecorded subsurface easement;

(2) any violation on the land of enforceable covenants, conditions or restrictions provided that this coverage shall not refer to or include the terms, covenants and conditions contained in any lease, sub-lease or contract of sale referred to in this Policy . . . .

CP 50. Neither subsections 2(b)(1) nor (2) could be a basis for coverage under Herr's policy.

First, subsection 2(b)(1), by its terms, applies to an encroachment of the residential structure on adjoining lands or onto any easement.

"Residential structure" is defined as "the principal dwelling structure located on the land, together with a garage or carport used for storage of noncommercial vehicles" CP 50. Under this definition, the plain meaning of the policy is that PNWT will insure Herr in the event that Herr's "residential structure" is encroaching on adjoining land or on any easements. There has been no allegation of such an encroachment.

Accordingly, this provision cannot support Herr's claim for coverage.

Second, subsection 2(b)(2) is "subject to" the special exceptions contained in Schedule B because it does not "expressly" modify coverage for Tract X. Furthermore, Herr fails to explain what "violation" exists of a covenant, condition, or restriction that would trigger coverage under

subsection 2(b)(2). Presumably, Herr argues that Defendant Forghani's use of the Tract X easement is a violation of some covenant, condition, or restriction. Yet, there is no covenant concerning the use of the easement. The only covenant, condition, or restriction contained in Short Plat No. 579072 is the following: "Said easements to be maintained, repaired, and/or rebuilt by the owners of the parcels having legal access therefrom and their heirs, assigns, or successors . . ." CP 183. However, there is no allegation of any violation of this provision. Therefore, there is no coverage under this provision.

**5. Herr's Title Policy Excludes Coverage for Loss or Damages Resulting from a Zoning Law**

Herr's policy excludes coverage for loss or damages caused from zoning laws. The policy contains the following exclusion related to zoning laws:

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1 (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land . . .

CP 40. (Emphasis added.) The owner's policy further excludes, "[a]ny governmental police power not excluded by (a) above. . . ." *Id.* Under

these zoning exclusions, there is no coverage for any alleged “spot zoning” by Washington State, by virtue of the passage of RCW 70.128.715(2). (Appellant’s Br. at 19-24.)

## VI. CONCLUSION

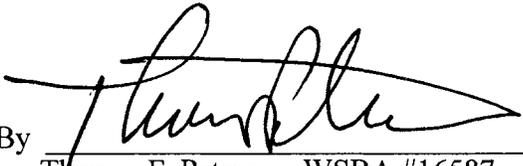
Herr’s assignments of error are not reviewable. There was no counterclaim filed that could raise a duty of defense. The Court should dismiss Herr’s appeal.

Alternately, PNWT requests that the Court affirm the trial court’s order granting PNWT’s motion for summary judgment. First, Herr’s owner’s policy does not insure against post-policy conditions. The title policy insures against conditions as of the “Date of Policy.” The alleged conduct of Defendant Forghani occurred over two years after the issuance of the policy. Therefore, there is no coverage for loss arising from such conduct. Second, Schedule B lists Tract X as a special exception to coverage under the owner’s policy. As Herr’s claim arises out of his dispute over Tract X with Defendant Forghani, there is no coverage. Third, the Endorsement is “subject to” the special exceptions in the policy. Moreover, the provisions Herr cites and relies upon are inapplicable under the facts of this case. Fourth, the policy excludes from coverage any loss or damages resulting from a change in zoning laws. Therefore, there is no coverage for any alleged spot zoning by a state agency. For the foregoing

reasons, the trial court properly granted PNWT's motion for summary judgment.

Respectfully submitted, this 6th day of May, 2009.

SOCIUS LAW GROUP, PLLC

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**VII. CERTIFICATE OF SERVICE**

I certify that on the 6<sup>th</sup> day of May, 2010, I caused a true and correct copy of PACIFIC NORTHWEST TITLE'S RESPONSIVE BRIEF to be served on the following in the manner indicated below:

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