

No. 75476-9-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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LEROY and JOELLEN KEY

Appellants

v.

CHICAGO TITLE INSURANCE COMPANY,

Respondent.

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INITIAL BRIEF OF APPELLANTS

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## I. INTRODUCTION

This case presents the important question of whether Washington homeowners who purchase their homestead tract that includes a portion of a street that was vacated by operation of law many years before their purchase, which portion, pursuant to clear Washington case law, long ago became part of their purchased tract, are entitled to title insurance coverage that includes that portion of the vacated street; i.e., coverage coextensive with their ownership. Twenty-first-century purchasers of Washington homesteads, which were originally platted in the 19<sup>th</sup> century as tracts adjoining a street that, shortly after platting, was vacated in the 19<sup>th</sup> century, are entitled to rely on clear and long-established Washington case law that holds that the portion of the vacated street to its center line long ago became part of, attached to, and passed by deed of, the purchased homestead. *It ought to be self-evident that such purchasers in 2002, over 100 years after that portion of the vacated street became part of their tracts, have title insurance coverage coextensive with their ownership.*

In 2002, the Plaintiffs-Appellants LeRoy and JoEllen Key (the “Keys”)<sup>1</sup> bought a home in Bellingham on such a tract (originally platted in

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<sup>1</sup> Pursuant to RAP 10.4(e), the Plaintiffs-Appellants LeRoy and JoEllen Key are referred to herein as the “Keys” and the Defendant-Respondent

1889) that, pursuant to Washington case law and beginning in 1895, included ownership to the center line of a street-- the former Lake Street-- that had been vacated in 1895, over 100 years prior to the Keys' purchase. Defendant-Respondent Chicago Title Insurance Company ("CTIC") insured the Keys' title to their purchase.

Astoundingly, however, CTIC has taken the position that when it sold the Keys title insurance on such tract in 2002 its coverage did not include the Keys' portion of long-ago vacated Lake Street, and that it only was insuring the tract as shown on the plat map as recorded in 1889; i.e., CTIC asserts that when it sold its title policy to the Keys in 2002 it only was insuring the *status quo ante* of 1889, over 100 years earlier, without regard to the changes in fact and law that had intervened in those 100 years, including the vacation of Lake Street in 1895.

CTIC, whose business is knowing changes in facts and law that affect title, has taken the remarkable position that it is entitled to rely on the 1889 plat map (which, by the way, CTIC did not bother to include in the policy it sold to the Keys) and ignore both later information that the adjoining former Lake Street had been vacated in 1895 and developments in Washington case law after 1889. Indeed, CTIC has taken the remarkable

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Chicago Title Insurance Company is referred to herein by the acronym "CTIC".

position that the scope of its insuring agreement with the Keys in 2002 was “frozen” to the 1889 plat map, and was not changed by either factual or legal developments occurring in the intervening over 100 years, including a) Washington case law in the early 20<sup>th</sup> century and thereafter that holds that, upon vacation of former Lake Street in 1895 its southern portion to the center line attached to, became part of and passed by deed of the adjoining “Tract 6”, and b) a boundary line adjustment that an adjoining property owner recorded months before CTIC issued its policy and which showed the mid-line of the long-ago vacated Lake Street as the property boundary.

This case presents the opportunity for the Court to clearly state that when a title insurer issues a policy in the State of Washington the scope of coverage is coextensive with the ownership of the insured, including as delineated by Washington case law developed since the recording of the original 19<sup>th</sup> century plat, and that a title insurer is not insuring the status quo ante 100 years earlier based on a static, century-old plat map in disregard of subsequent changes in facts and the law to the detriment of its insureds.

**Summary of procedural history.** After the Keys purchased their property, adjoining property owners (Steven and Marilyn Cudmore) bulldozed and placed a road upon the northern portion of the Keys’

property, including within the Keys' portion of the vacated former Lake Street (i.e., the south half of vacated former Lake Street). As a result, the Keys (utilizing a Bellingham attorney) filed a lawsuit in Whatcom County Superior Court in June 2004 against the Cudmores. After the Keys spent years of attempting to resolve their dispute with the Cudmores, in July 2012, the Cudmores filed a motion for partial summary judgment wherein they requested the Whatcom County Superior Court to enter an Order by which the Cudmores would obtain an easement over the north 25 feet of the Keys' property, which included the south half of former Lake Street.

In August 2012, the Keys' counsel tendered coverage of the Cudmores' claim, including the defense of the Keys, to CTIC. In September 2012 and again in October 2012, CTIC denied coverage and defense.

The Keys filed a coverage action against CTIC in King County Superior Court. In May 2016, the Keys filed their motion for partial summary judgment with the King County Superior Court in which they requested the court find that the Keys' claim for defense and coverage tendered to CTIC was covered by CTIC's policy and that CTIC breached its duty to defend and indemnify the Keys. CP 47-64. CTIC responded by filing its motion for summary judgment. CP 348-371. On June 3, 2016,

the trial court heard oral argument on both parties' motions. The trial court made the observation from the bench that "[t]his case is interesting and difficult." CP 519. The trial court indicated that it was inclined to grant CTIC's motion but that "[i]t does seem in terms of plaintiffs' proposition that the average consumer would not know, and that to purchase insurance that is in effect not covering the entirety of what you're purchasing would seem to put the average consumer in an unfair position." CP 520. The trial court invited supplemental briefing on the issue of whether "the title insurance company (had) any duty to at least make the customer aware of ownership rights in the (vacated) street...." CP 521.

On June 30, 2016 the trial court entered CTIC's proposed Order granting CTIC's motion for summary judgment and denying the Keys' motion for partial summary judgment. CP 526-528.

This appeal by the Keys follows.

## **II. ASSIGNMENTS OF ERROR**

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

1. The trial court erred by denying the Plaintiffs-Keys' motion for partial summary judgment on liability.
2. The trial court erred by granting the Defendant CTIC's motion for summary judgment.

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

1. Was it error for the trial court to refuse to grant Plaintiffs-Keys' motion for partial summary judgment on liability in which the Keys requested the trial court on undisputed facts to find that the Keys' claim for defense and coverage tendered to CTIC was covered by CTIC's policy and that CTIC breached its duty to defend and indemnify the Keys? (Assignment of Error No. 1)
2. Was it error for the trial court to grant Defendant CTIC's motion for summary judgment dismissing the Keys' claims? (Assignment of Error No. 2)

### III. STATEMENT OF THE CASE

#### A. **The Keys purchase their home, and CTIC sells the Keys their title insurance policy.**

In August 2002, the Keys purchased their home and accompanying real estate in Bellingham located on Tract 6, Plat of Sunnyside on Lake Whatcom, with a street address of 3112 Northshore Road, Bellingham, WA 98226. CP 136 (which is the first page of a letter from CTIC's Claims Counsel dated August 29, 2012 in which CTIC acknowledges that "[o]n or about August 22, 2002, LeRoy and JoEllen Key (the 'Insureds') purchased the above-referenced property and that CTIC issued a title policy to them the same day in the amount of \$377,000.00.")<sup>2</sup> *See also* CP 150 (which is

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<sup>2</sup> Such letter from CTIC also is found at CP 339, which is Exhibit ("Ex") 11 to CTIC's counsel's Declaration dated 5/2/16 in support of CTIC's motion for summary judgment). *See also* CP 134 and CP 337, which documents both the Keys and CTIC submitted to the trial court, and which both

the first page of a letter from CTIC's Claims Counsel dated October 1, 2012 in which CTIC acknowledges the same facts.)<sup>3</sup>

The title policy that Defendant CTIC sold to the Keys (policy no. 161746) (the "Policy") is found at CP 105-113 (Ex 5 to the Keys' counsel's Declaration dated 4/8/16 in support of the Keys' motion for partial summary judgment) as well as at CP 304-310 (Ex 6 to CTIC's counsel's Declaration dated 5/2/16 in support of CTIC's motion for summary judgment).

The Policy insured the Keys, among other things:

...against loss or damage... sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title.

CP 107.

Schedule A of the Policy described "[t]he land referred to in this

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contain CTIC's Claims Acknowledgement dated 8/20/12 including CTIC's recognition that the Keys are their insureds under Policy 161746 regarding the Keys' property at 3112 Northshore Road, Bellingham, WA 98226.

<sup>3</sup> See also CP 202 which contains a copy of the statutory warranty deed dated 8/13/02 from the Keys' predecessors to the Keys, which CTIC's counsel submitted to the trial court as Ex 1 to his Declaration dated 4/25/16.

Policy” as “Tract 6, ‘Sunnyside On Lake Whatcom,’ according to the plat thereof, recorded in Volume 1 of plats, page 70....”) CP 111. CTIC *did not* include the 1889 plat map in the Policy.<sup>4</sup> CP 106-113. Nor did CTIC specifically except from coverage in the Policy the former “Lake Street”.  
*Id.*

**B. The Keys’ dispute with the Cudmores.**

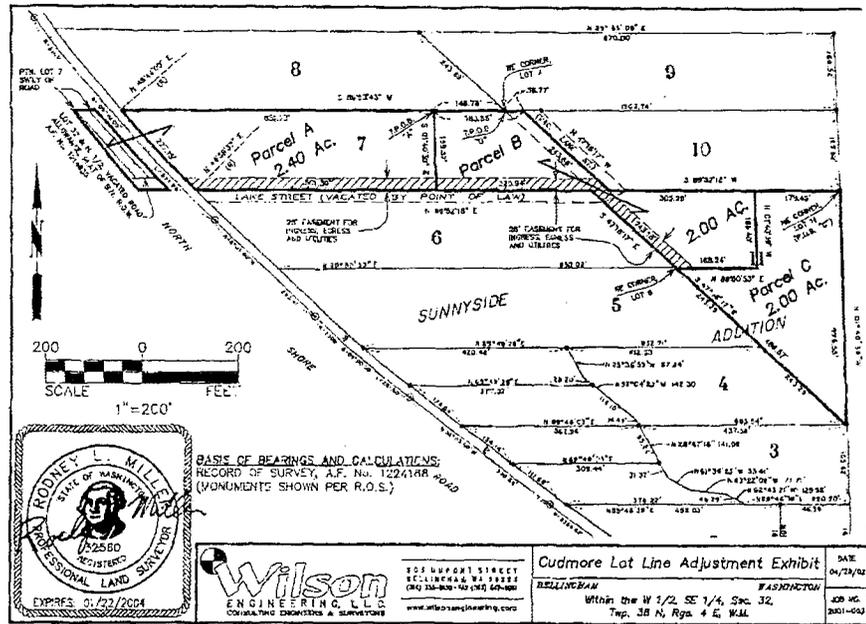
The original 1889 Plat of Sunnyside showed Tracts 7 and 11 which were adjacent to, and north of, Tract 6 (which tract the Keys purchased). CP 73. Such 1889 plat map also showed a “Lake Street” (approximately 50 feet wide) between Tract 6 and Tract 7: i.e., lying to the north of Tract 6 and to the south of Tract 7. CP 73.

Prior to August 2002, Steve and Marilyn Cudmore owned Tracts 7 and 11. *See* CP 77-93, which are documents produced by CTIC from its claims file in this litigation, and which contain a copy of a boundary line adjustment recorded by the Cudmores (by the Cudmores’ surveyor Wilson Engineering) in May 2002. The boundary line adjustment recorded by the Cudmores’ surveyor contained the following diagram (CP 421), which we hope is helpful to the Court in visualizing the relative locations of the

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<sup>4</sup> CTIC attached such 1889 map to its preliminary commitment of title insurance. CP 103. Of course the Policy, not CTIC’s preliminary commitment, is at issue in this case.

subject tracts and the former vacated Lake Street:



The former Lake Street had been vacated by operation of law for over 100 years before the Keys bought Tract 6 (and CTIC issued the Policy to the Keys) in August 2002. Lake Street, dedicated to the public in the Plat of Sunnyside, was vacated as a public right-of-way by operation of law in 1895. In 1890, the Washington legislature passed a law that read as follows: “Any county road, or part thereof, which has heretofore been or may hereafter be authorized, which remains unopened for public use for the space of five years is hereby vacated, and the authority for building the same barred by lapse of time.” Laws of 1890, ch. 19, sec. 32. There is no

factual dispute that Lake Street was not opened for five years after Laws of 1890, ch. 19, sec. 32 was passed in 1890. Therefore, the approximately 50 foot-wide Lake Street was vacated by operation of law in 1895.<sup>5</sup>

In March 2002, 6 months *before* CTIC issued the Policy to the Keys, the Cudmores recorded a lot line adjustment under Whatcom County rec. no. 2020301510. Whatcom County approved such lot line adjustment on March 11, 2002. CP 74-94 (which are documents produced in this litigation by CTIC from its claims file.) The Cudmores' lot line adjustment, recorded in the public records, showed the southerly boundary of the Cudmores' Tract 7 to be the mid-point of vacated former Lake Street. CP 82.

On May 1, 2002, 4 months *before* CTIC issued the Policy, the Cudmores recorded, under rec. no. 2020500112, essentially the same boundary line adjustment that they had recorded in March 2002 for the purpose of correcting a legal description. CP 87. As did the boundary line adjustment recorded by the Cudmores in March 2002 under rec. no.

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<sup>5</sup> There is nothing in the chain of title record regarding the Keys' property that the vacated Lake Street was ever conveyed as a distinct parcel or, prior to the Keys' purchase of Tract 6, that Lake Street was "officially" vacated by, for example, order of a governmental body or a court. See CP 391-408 (which contain deed history documents regarding the Keys' property obtained by the Cudmores' counsel in the Whatcom County Suit) that CTIC produced from its claims file in the matter.)

2020301510, the Cudmores' May 2002 boundary line adjustment (under rec. no. 2020500112) showed the southerly boundary of the Cudmores Tract 7 to be the mid-point of vacated former Lake Street.

After the Keys purchased their property in August 2002, the Cudmores bulldozed and placed a road upon the northern portion of the Keys' property, including within the Keys' portion of the vacated former Lake Street (i.e., within the southern half (southern 25 feet) of former Lake Street), and then refused to relocate the road. CP 68; CP 160-177 (which is the Declaration of the Keys' surveyor Brian Christie, and ¶ 12 thereof); CP 462. As a result, the Keys (utilizing a Bellingham attorney) filed a lawsuit in Whatcom County Superior Court in June 2004 against the Cudmores (the "Whatcom County Suit"). CP 68; and CP 249-254 (which is a copy of the Complaint filed in Whatcom County Superior Court by the Keys' former attorney, and which CTIC submitted to the King County Superior Court here). In their lawsuit, the Keys sought an order of ejectment of the Cudmores from the Keys' property and otherwise sought to quiet title in the Keys' portion of Lake Street in the Keys. CP 68; CP 249-254.

In September 2006, the Keys and the Cudmores participated in mediation and entered into a "Binding Letter of Intent" wherein the Cudmores agreed, among other things, to prepare a New Site Plan ("NSP")

and to relocate the road pursuant to that NSP. CP 68; and CP 214-219, which contains a copy of the “Binding Letter of Intent” submitted by CTIC to the trial court. In the ensuing years, the Cudmores failed to satisfy their obligations under the “Binding Letter of Intent”, despite the Keys’ repeated attempts to persuade the Cudmores to do so. CP 68. Between September 2006 and early 2012, the Whatcom County Suit was essentially suspended while the Keys attempted to persuade the Cudmores to honor their commitments under the “Binding Letter of Intent” or resolve the dispute. *Id.*

In January of 2012, the Whatcom County Superior Court found and ordered that the Keys could proceed with their lawsuit against the Cudmores. CP 114-117 (Order on Plaintiffs’ Motion Finding that Plaintiffs May Proceed with Lawsuit dated January 12, 2012.) On July 2, 2012, the Cudmores filed a motion for partial summary judgment wherein they requested the Whatcom County Superior Court to enter an Order declaring that Lake Street had been and is vacated by operation of law and a) quieting title in the south half of the vacated Lake Street in the Keys, and quieting title in the north half of the vacated Lake Street, adjacent to Parcels A and B, in the Cudmores, respectively; and b) declaring that each

of the parties (the Cudmores, Ramsays<sup>6</sup>, and Keys) has “an easement for ingress and egress over and across Lake Street....” CP 119-126. In other words, as of July 2012 the Cudmores were now attempting to obtain an easement over the north 25 feet of the Keys’ property. As discussed further below, among other things, this attempt by the Cudmores triggered coverage for the Keys under the Policy. Since the Keys’ Tract 6 was approximately 800 feet long, the Cudmores were now attempting to obtain an easement over approximately 20,000 square feet (25 feet x 800 feet), which is approximately 10 percent of the Keys’ property. Moreover, as noted in the pleadings filed by the Keys in opposition to the Cudmores’ motion for partial summary judgment (including in the Declaration of JoEllen Key, CP 461-463, and the Declaration of the Keys’ surveyor, CP 161-177), the north 25 feet of the Keys’ property included their driveway, a portion of their retaining wall near their garage, the Keys trees and shrubbery and other portions of their property that they had exclusively used and maintained. *See also* CP 130 and CP 69.

While the Keys did not object to the Whatcom County Superior Court declaring Lake Street vacated by operation of law, and quieting title

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<sup>6</sup> In 2011, the Cudmores sold “Parcel A” (of former Tract 7) to Dennis and Evelyn Ramsay. CP 69.

in the south 25 feet of Lake Street in the Keys and the north 25 feet of Lake Street in the Cudmores and the Ramsays, the Keys objected to the Cudmores' attempt to obtain a ruling from the court that the Cudmores and the Ramsays were entitled to an easement over the north 25 feet of the Keys' property (i.e., over the south half of the vacated Lake Street right of way). CP 69-70; CP 130.

The Keys' counsel devoted a large effort in July 2012 (on an emergency basis due to the Cudmores' attempt to quickly force their motion for partial summary judgment to decision) to defeat the Cudmores' argument that they and the Ramsays were entitled to a private easement over the north 25 feet of the Keys' property (i.e., over the south half of the vacated Lake Street right of way). CP 70.

On August 3, 2012, the Whatcom County Superior Court issued a ruling in which it (essentially) declared Lake Street vacated by operation of law, and quieted title in the south 25 feet of vacated and former Lake Street in the Keys and the north 25 feet of former Lake Street in the Ramsays and Cudmores, but denied the Cudmores' request for summary judgment that they and the Ramsays were entitled to a private easement over the north 25 feet of the Keys' property (i.e., over the south half of the vacated former Lake Street right of way). CP 70.

In view of the Cudmores' and the Ramsays' attempt in July 2012 to attempt to obtain an easement over the north 25 feet of the Keys' property (i.e., over the south 25 feet of vacated and former Lake Street), on August 10, 2012, the Keys' counsel tendered to CTIC the defense of the Cudmores' and the Ramsays' claim and demanded that CTIC provide coverage to the Keys under the Policy. CP 127-132. On or about 8/29/12, CTIC sent a letter of denial of coverage to the Keys' counsel. CP 135-138. CTIC's 8/29/12 letter contained a number of errors, which the Keys' counsel pointed out to CTIC in his letter dated September 13, 2012. CP 139-148. Nevertheless, CTIC continued to refuse to provide a defense to the Keys and continued to deny coverage. CP 149-155.

After CTIC refused to accept defense and coverage of the Cudmores'/Ramsays' claims against the Plaintiffs Key, the Keys, in April 2013, and in part to avoid further litigation expense and to enable the Keys to sell their house, entered into a settlement agreement with the Cudmores, which included the Keys reluctantly agreeing to grant an easement to the Cudmores over the entirety of vacated and former Lake Street, including the south 25 feet of vacated and former Lake Street; i.e., the northern 25 feet of the Keys' property. CP 70-71 and CP 461-463.

The Keys subsequently served CTIC with a Notice under the Washington Insurance Fair Conduct Act, filed such IFCA Notice with the Washington State Insurance Commissioner CP 156-159, and filed their coverage suit against CTIC in the King County Superior Court. CP 25-28.

A summary of the procedural history of the coverage action in King County Superior Court is set forth *supra*.

#### **IV. SUMMARY OF ARGUMENT**

Clear, long-standing and abundant Washington case law holds that (in the absence of an official vacation), vacation by operation of law of a street previously dedicated to the public results in that portion to the center of the street becoming “attached to”, a “part of”, and passing by deed under a description of, the adjoining property. It is undisputed that in 1895, over 100 years prior to CTIC selling its Policy to the Keys in 2002, what had been platted as “Lake Street” on the 1889 plat was vacated by operation of law. Therefore, after 1895 the Keys and their predecessors by operation of law had title to the mid-point of such vacated former Lake Street and the interest of the Keys insured by CTIC included the south half of such vacated former Lake Street.

Despite this clear Washington case law, and two boundary line adjustments recorded by the Cudmores (the Keys’ neighbors to their north)

that showed that at least the Cudmores were taking the position that their southern boundary included at least to the mid-point of former Lake Street, CTIC failed to except the former Lake Street from coverage and failed to bring to the Keys' attention that their purchased tract might include anything less than what was apparent to the Keys was included in their tract— the south half of former Lake Street, which included the driveway to the Keys' garage.

When the adjoining property owners (the Cudmores) in August 2012 attempted to obtain a court-ordered easement over the south half of vacated former Lake Street (i.e., over the north 25 feet of the Keys' property), CTIC, after being informed of these facts and the law, unreasonably refused to provide a defense to the Keys and refused to provide them coverage.

CTIC's position is essentially this: that the policy of title insurance it sold to the Keys in 2002 insured only Tract 6 as defined in 1889 without regard to the facts and law that developed between 1889 and 2002. The Keys in 2002 certainly were not purchasing a policy to insure them of the *status quo ante* in 1889. Rather, they were purchasing a policy of title insurance to insure them as to the title of their estate as it existed, and was defined, as of 2002 (including as having been defined by operation of law

(both statutory and case law)) in the intervening 113 years since 1889.

Since that portion of the former Lake Street long ago had attached to, become part of, and passed by deed of, the Tract 6 that the Keys purchased in 2002, the premise of the trial court's ruling in this case— that Tract 6 and the south half of former Lake Street were two separate parcels— was erroneous. On this set of undisputed facts, the trial court (1) erred in refusing to grant the Keys' motion for partial summary judgment and enter the Keys' proposed Order finding that CTIC breached the Policy and its duty to defend; and (2) erred by granting CTIC's motion for summary judgment.

## V. DISCUSSION

### A. Standard of Review

#### 1. The trial court's decision on summary judgment is reviewed *de novo*.

The appellate court reviews summary judgment *de novo*. *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 194 (2014) (quoting *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 266 (2008)). The appellate court reviews the evidence in the light most favorable to the nonmoving party. *Becerra Becerra*, 181 Wn.2d at 194. As to CTIC's motion for summary judgment, which the trial court granted, the evidence must be reviewed in a light most favorable to the Keys.

**2. CTIC’s Policy is presumed to include coverage within its terms for all matters not specifically excluded.**

Construction of an insurance contract is a question of law. *Australia Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 765 (2008). A title insurance policy is presumed to include coverage within its terms for all matters that are not specifically excluded. *Denny's Rests., Inc. v. Sec. Union Title Ins. Co.*, 71 Wn. App. 194 (1993). *See also Courchaine v. Commonwealth Land Title Ins. Co.*, 174 Wn. App. 27, 37 (2012)(holding that the duty undertaken by the title insurer in issuing the title policy is not to except every limitation on title. Its duty, instead, is to indemnify against any limitation on title that it does not except).

**3. Ambiguities in the title policy are to be construed against the insurer in favor of the insured, with ambiguous exclusionary or limitations clauses strictly construed against the insurer.**

“It is fundamental that ambiguities in insurance policies must be construed against the insurer and in favor of the insured.” *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 913 (1981). *Accord Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 167 (1978)(holding that any ambiguities in the title policy are construed against the insurer). “Where a provision of a policy of insurance is capable of two meanings, or is fairly susceptible of two constructions, the meaning and construction

most favorable to the insured must be employed, even though the insurer may have intended otherwise.” *Id.* (citing *Witherspoon v. St. Paul Fire & Marine Ins. Co.*, 86 Wn.2d 641, 650 (1976); *Morgan v. Prudential Ins. Co. of America*, 86 Wn.2d 432, 435 (1976); *Glen Falls Ins. Co. v. Vietzke*, 82 Wn.2d 122, 126 (1973); *Ames v. Baker*, 68 Wn.2d 713, 717 (1966)).

Ambiguous exclusionary or limitations clauses in insurance policies are generally construed strictly against the insurer. *Safeco Ins. Co. of America v. Davis*, 44 Wn. App. 161, 164 (1986). *See also McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733 (1992). The rule strictly construing ambiguities in favor of the insured applies with added force to exclusionary clauses which seek to limit policy coverage. Exclusions of coverage will not be extended beyond their “clear and unequivocal” meaning. *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 690 (1994).

**4. The language of CTIC’s Policy must be interpreted as understood by the average consumer.**

The language of CTIC’s insurance contract must be interpreted as it would be understood by the average person purchasing insurance. *Shotwell*, 91 Wn.2d at 168. The court considers the policy as a whole, and gives it a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Australia*

*Unlimited, Inc.*, 147 Wn. App. at 765 (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654 (2000), as amended (Jan. 16, 2001)(quoting *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 427–28 (1998)).

**B. Upon Vacation of Lake Street as a Matter Of Law In 1895, the South Half of Lake Street Became Attached to, Became Part of, and Passed by Deed of, Tract 6 in 1895 and Thereafter.**

Abundant Washington case law holds that, (in the absence of an official vacation), vacation by operation of law of a street previously dedicated to the public results in that portion to the center of the street becoming “attached to” and passing by deed under a description of the abutting property. *See, e.g., Holmquist v. King Cty.*, 182 Wn. App. 200, 212-14 *review denied*, 181 Wn.2d 1029 (2014): “[T]he general rule [is] that, upon the vacation of a street or alley, the land thus relieved of the public easement therein becomes **attached to, and passed by deed under a description of the abutting property.**” *Id.* at 212 (citing *Hagen v. Bolcom Mills*, 74 Wash. 462 (1913)). *Accord Turner v. Davisson*, 47 Wn.2d 375, 276 (1955)(citing *Bradley v. Spokane & Inland Empire RR*, 79 Wash. 455 (1914) and *Lewis v. Seattle*, 174 Wash. 219, 224 (1933))(emphasis supplied).

Moreover, Washington case law **holds that the vacation of a street**

**results in that street becoming “part of” the adjoining property.** In *Norton v. Gross*, 52 Wash. 341, 344 (1909) the question was whether the appellants’ sale to respondents of a residential tract in Tacoma included a strip of land abutting the tract that “had at one time been a part of an alley, but which had been vacated.” In answering the question “yes” in favor of respondents, the Supreme Court in *Norton* stated:

Moreover, as we have said, upon the vacation of the alley the land became the property of the appellants in virtue of their ownership of the abutting property. 1 Ballinger's Ann. Codes & St. § 1269 (Pierce's Code, § 3563); *Burmeister v. Howard*, 1 Wash. T. 207; 27 Am. & Eng. Enc. Law (2d Ed.) 117. **This being true, it attached to and became to all legal intent a part of the property** described in the deed, and passed to the respondents under such conveyance.

*Norton*, 52 Wash. at 344 (emphasis supplied).

Here, upon vacation of Lake Street (by operation of law) in 1895, and per *Norton*, its half south of center line became “part of” Tract 6, and attached to, and passed by deed under a description of, Tract 6. In fact, since Lake Street was never opened, it never existed. In any event, to the extent CTIC argues that it “existed” for a brief period between 1889 and 1895, as of 1895 “Lake Street” ceased to exist. As of 2002, when CTIC issued the Policy to the Keys, there was no “abutting street” to Tract 6. Over 100 years prior to CTIC’s issuance of the Policy in 2002, the south half of Lake Street, in 1895, had attached to and become part of Tract 6 and

had been passed by the deeding of Tract 6 since then.<sup>7</sup>

In sum, the premise of the trial court's decision granting CTIC summary judgment— that Tract 6 and vacated Lake Street were two separate parcels (CP 521-522)— was therefore wrong.

**C. Since the South Half of Lake Street Has Been a Part of Tract 6 Since 1895, It Was Part Of The Interest Insured By CTIC In 2002.**

The definition of “land”, drafted by CTIC and contained in Section 1(d) of the Policy's Conditions and Stipulations, only refers to “the land described or referred to in Schedule A”; Schedule A, in turn, describes the land as “Tract 6 ‘Sunnyside On Lake Whatcom,’ according to the plat thereof, recorded in Volume 1 of plats, page 70...” Since the south half of Lake Street became part of Tract 6 in 1895, it was part of the interest that CTIC insured over 100 years later in 2002.

CTIC's position that the scope of the Keys' insured interest as of 2002 was only coextensive with the plat map recorded in 1889 (i.e., that CTIC in 2002 only was insuring the *status quo ante* as of 1889) is fatally

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<sup>7</sup> The predecessors in interest to the Keys had a vested right in the south half of vacated Lake Street that began upon its vacation by operation of law in 1895. See *Wells v. Miller*, 42 Wn. App. 94 (1985) in which the Court held that, as here, when a street was vacated by operation of law, the predecessors in interest to the owners of adjoining property had a vested right in such vacated street that began upon vacation, which right was susceptible to adverse possession.

flawed and unreasonable for a number of reasons.

First, as noted above, title policies are interpreted as an average person seeking insurance would interpret them, *Shotwell*, 91 Wn.2d at 167, and it is CTIC's duty to indemnify against any limitation on title that it did not specifically except. *Courchaine*, 174 Wn. App. at 37. The Policy, which CTIC drafted and is the contract that is the basis of this lawsuit, *does not* include a copy of the 1889 plat map upon which CTIC relies.<sup>8</sup> The Policy *does not* separately call out or separate, via diagram or otherwise, Lake Street from Tract 6. Nothing in the Policy separately diagrams or delineates Lake Street; i.e., there is nothing in the Policy that shows "the lines of the area described or referred to in Schedule A...." Moreover, the Policy does not specifically except the former Lake Street from coverage.

Thus, there is no reason why the Keys would have understood that the Policy covered anything less than what they reasonably expected would be covered; which is the land they saw when they purchased their homestead, which included the south half of former Lake Street. The doctrine of reasonable expectations applies to title insurance, just as in other insurance contexts (such as auto insurance). *See, e.g., Cherry v. Truck Ins. Exch.*, 77 Wn. App. 557, 565 (1995)(holding that in the auto insurance

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<sup>8</sup>The preliminary commitment of CTIC is not the contract at issue here.

context the reasonable expectations of the insured when contracting for coverage applies.)<sup>9</sup> No reasonable purchaser in the Keys' position in August 2002 would have believed that the Tract 6 they were purchasing did not include the north 25 feet thereof to the mid-point of vacated former Lake Street, which north 25 feet thereof included the driveway and a portion of the retaining wall on the Keys' property. *See* CP 160-177. In the absence of a specific exclusion for coverage of Lake Street, the reasonable (and only) common sense expectation of the Keys was that CTIC was insuring the entire insurable interest of what the Keys were purchasing.

CTIC's argument presumes that the Keys would have been aware at the time they purchased their Policy that 20,000 square feet of their property (consisting of the 25 feet x 800 feet south half of former Lake Street (equal to approximately 10 percent of the Keys' property)), was excluded from policy coverage. The Supreme Court of Washington rejected this argument in *Shotwell*, 91 Wn.2d at 168: "Reviewing the language of the instant policy in light of the foregoing rules, we find it hard

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<sup>9</sup> *See also Summonte v. First Am. Title Ins. Co.*, 180 N.J. Super. 605, 610, 436 A.2d 110, 112 (Ch. Div.), *aff'd sub nom. Summonte v. First Am. Title Ins. Co.*, 184 N.J. Super. 96, 445 A.2d 409 (App. Div. 1981)(holding that title insurance policy provisions, to the extent they need construction, are to be liberally construed in favor of the insured and strictly construed against the insurer, and must be interpreted in a way which fulfills the reasonable expectations of the insured.)

to believe an *average* person purchasing this type of insurance would contemplate that a 40-foot right-of-way extending over his entire property would have been excluded from policy coverage. Had the insurance company intended such an exclusion, it could easily have referred specifically to the 1944 decree known to it *or* legally described the right-of-way pursuant to that decree.” (emphasis in original)

As in *Shotwell*, here CTIC could have specifically excluded the former Lake Street from coverage. It did not. CTIC’s failure to exclude the south half of former Lake Street from coverage is all the more egregious in view of it having been put on notice, months before it issued the Policy, of the Cudmores’ recorded boundary line adjustments to the center line of former Lake Street.

Moreover, CTIC’s denial of coverage rests upon its argument that the scope of its coverage was limited to a numbered tract-- “Tract 6”-- as shown by the 1889 plat map. CTIC, essentially, is attempting to use the description contained in Schedule A of the Policy for the purpose of limiting insurance protection; i.e., as an exclusion. Our Supreme Court in *Shotwell* rejected this argument as well. The court in *Courchaine*, 174 Wn. App. at 40, described the holding in *Shotwell* as follows:

In arriving at its holding, the *Shotwell* court cited, with approval, a Texas decision rejecting an argument that is on all fours with

Commonwealth's argument here. In *San Jacinto Title Guaranty Co. v. Lemmon*, 417 S.W.2d 429, 431 (Tex. Civ. App. 1967), the title insurer argued that because it described the insured land as a numbered lot, “as shown by the map or plat Thereof now of record ... to which reference is here made for all pertinent purposes.” then an easement for a waterline identified on the recorded plat was excluded from the terms of the policy without the need for a specific exception. The Texas court rejected the argument. Our Supreme Court, in *Shotwell*, quoted and adopted its reasoning:

“Unquestionably, the reference in the warranty deed to the recorded map or plat contemplated the purposes of the deed. *The description of the land in the policy was for the purpose of identifying the land covered by the policy and not, as appellant contends, for the purpose of limiting the insurance protection purchased.* In our opinion, this was the clear and unambiguous meaning of the policy. To hold otherwise would, in effect, require appellees, who have purchased title insurance, to be their own insurer in so far as their title to the land, in the respect here under consideration, is concerned. Such a result would not be in keeping with the principal purpose of the policy ... .”

*Shotwell*, 91 Wn.2d at 169-70 (alteration in original) (quoting *Lemmon*, 417 S.W.2d at 431-32); cf. *Denny's Rests., Inc. v. Sec. Union Title Ins. Co.*, 71 Wn. App. 194, 859 P.2d 619 (1993) (finding coverage even where the land covered by the insured's claim was clearly excluded by the policy's description of land because other provisions of the policy reasonably implied coverage).

Again, the duty undertaken by CTIC in issuing the Policy was not to except every limitation on title. Its duty was, instead, to indemnify against any limitation on title that it did not except. *Courchaine*, 174 Wn. App. at 37. And CTIC did not except the former Lake Street.

Nonetheless, CTIC argues that it was entitled to deny coverage

because it made reference in the Policy to Tract 6 as recorded in 1889. That argument unreasonably presupposes that consumers of title insurance, in the middle of closing their home purchase, will, can or should examine plat maps (in this case, an over 100-year-old plat map) in the title record. Clearly, CTIC's position is unworkable, unreasonable and contrary to the law. It is the job of the title insurer, not the consumer, to search and examine the record title; and if the insurer decides there is a need to except from coverage a street that was vacated over 100 years ago, it has the duty to inform the consumer and so except coverage. *See Shotwell v. Transamerica Title Ins. Co.*, 91 Wn. 2d at 165 (holding that a policyholder has a reasonable expectation that he will be specifically informed of title defects revealed by a search even though he has or should have had knowledge of the general nature of the defect.)

Notwithstanding that a) Lake Street ceased to exist no later than 1890, b) the effect of case law decided decades before CTIC issued the Policy was that the south half of Lake Street became part of, attached to, and was deeded by the deed for, Tract 6, and c) Schedule A of the Policy refers to the insurable interest as Tract 6 with nothing in the Policy showing "the lines of the area described or referred to in Schedule A...", CTIC is attempting to write a *post hoc* exclusion of coverage for Lake Street, when

no such exclusion exists in the Policy. “Coverage exclusions ‘are contrary to the fundamental protective purpose of insurance,’ ‘will not be extended beyond their clear and unequivocal meaning,’ and ‘should also be strictly construed against the insurer.’” *Courchaine*, 174 Wn. App. 27, 43 (2012) (quoting *Stuart v. Am. States Ins. Co.*, 134 Wn.2d 814, 818–19 (1998)).

CTIC’s argument that in 2002 it only was insuring Tract 6 as it was defined in 1889 (i.e., that the scope of its insuring agreement was fixed and “frozen” as of 1889) also fails because the Policy’s terms are to be interpreted in light of the facts and law existing *at the time the Policy was issued in 2002*. The effect of the Laws of 1890, ch. 19, sec. 32, which resulted in Lake Street being vacated, and the holdings in *Norton, Turner, et al.* is that the south half of Lake Street, upon its vacation, became part of, attached to, and was passed by the deeding of, Tract 6 *in 1895 and thereafter*.

The primary objective in contract interpretation is to ascertain the mutual intent of the parties at the time they executed the contract. *Int’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282 (2013). There can be no reasonable question that at the time CTIC sold the Keys the Policy in 2002 CTIC was presumed to know the effect of the Laws of 1890, ch. 19, sec. 32, and the subsequent case law that interpreted and

applied such statute. In *Lewis v. City of Seattle*, 174 Wash. 219, 225, (1933), the Supreme Court of Washington, addressing the same statute, held: “[I]n this case we are dealing with a statute which says that, if streets are not opened, they become vacated and the right to open is barred by the lapse of time. **Everyone is presumed to know the law**, and purchasers of other lots in the addition must take notice of the statute.” (emphasis supplied).

If consumers are held to the latter standard of knowledge of the law, then *a fortiori* so is CTIC, whose business is title insurance. As a matter of law, CTIC must be presumed to have known that when it drafted and issued the Policy in 2002, the effect of the relevant statute and the case opinions interpreting its effect, issued decades earlier (e.g., *Norton*), was that the south half of Lake Street long ago had become a part of Tract 6.

The opinion of the California Court of Appeals in *Murray v. Title Ins. & Trust Co.*, 250 Cal.App.2d 248 (1967) is instructive. In that case, the plaintiff homeowners purchased a lot that they thought was bounded by a street to the west and south. Subsequently, the homeowners discovered that the original road south of their lot (Rutherford Street) previously had been abandoned and that neither adjacent roadway nor easement of access existed to the south. Crucial to the result in that opinion (which affirmed

the title insurer's denial of coverage) are facts that do not exist here; *viz.* in *Murray* a specific notation of the abandonment of the street in question (Rutherford) appeared in the original 1888 map that the lot description referenced, and the title insurance policy itself included a map which showed the subject street "under the inscription 'Rutherford Abandoned.'" *Id.* at 252.

*Murray* is instructive for this case, however, because the court there rejected the defendant title company's defense, which is the same that CTIC has asserted here, that its coverage was limited to the specific lot described in the policy and did not extend to "defects in the title to adjoining streets." *Id.* at 251-52.

Specifically, the *Murray* court found that "if plaintiffs were entitled to presume ownership in fee to the center of the streets adjoining their lot, they were likewise entitled to presume title insurance coverage against defects in title coextensive with their presumed ownership." *Id.* at 252. The *Murray* court went on to hold that "a title insurance policy on property bounded by a street necessarily includes within its coverage insurance of the grantee's title to the center of the bounding street" and "[w]here property is conveyed by reference to a map which shows a bounding street of record which in fact has been abandoned, a grantee is again entitled to

rely on the general presumption of his ownership to the center of the street and to presume that a title policy insures his purchase in accordance with the statutory presumption.” *Id.* at 253.

Washington law is clear that “[s]treet dedications carry only an easement and the conveyance of a lot without reservation or exception carries with it the fee to the center of the street subject to the easement.” *Adams v. Skagit County*, 18 Wn. App. 146, 150 (1977)(citing *Bradley v. Spokane & Inland Empire R.R. Co.*, 79 Wash. 455 (1914)). Moreover, as noted *supra*, Washington law also is clear that upon vacation of a street by operation of law, that portion of the former vacated street to center line becomes attached to, a part of, and is conveyed by deed of, the adjoining property. Thus, under the reasoning of *Murray* title insurance extends to the center line of such former vacated street.

**D. CTIC’s Denial of Coverage and Defense Is Unreasonable.**

A number of documents recorded prior to the August 2002 sale of the subject property to the Keys showed that (at least the Cudmores took the position that) the boundary line between the Tract 6 that the Keys were purchasing and the Cudmores’ adjoining tracts was the mid-line of vacated former Lake Street. These include the Cudmore lot line adjustment recorded by Cudmore on 3/11/2002 under Whatcom County rec. no.

2020301510 (p. 6 of 7), which lot line adjustment was approved by Whatcom County on March 11, 2002; and the boundary line adjustment filed by Cudmore on 5/1/2002 under rec. no. 2020500112. *See* CP 76-94. Both sets of documents recorded under Whatcom County rec. nos. 2020301510 and 2020500112 demonstrate that, months before CTIC issued the Policy to the Keys on August 22, 2002, the Cudmores were taking the position that the boundary line between the properties was the middle point (or mid-line) of vacated former Lake Street.

It is CTIC's business to discover and know of the above-referenced recorded documents that show such boundaries. If CTIC had wanted to exclude any portion of vacated former Lake Street from the insured estate, it should have so stated in its Policy it sold to Plaintiffs. It did not.

Although it is unreasonable, in view of the vacation of Lake Street in 1895 and the boundary line adjustment affecting the northern boundary of Tract 6 in early 2002, for CTIC to rely solely on the original 1889 plat map, recorded in Volume 1 of plats, page 70, to argue that Lake Street was not included in the legal description of the Policy, as noted above, Washington law is clear that "[s]treet dedications carry only an easement and the conveyance of a lot without reservation or exception carries with it the fee to the center of the street subject to the easement." *Adams*

*County*, 18 Wn. App. 146, 150 (1977)(citing *Bradley v. Spokane & Inland Empire R.R. Co.*, 79 Wash. 455 (1914)).<sup>10</sup>

Thus, even if one were to rely solely on the original 1889 plat map, recorded in Volume 1 of plats, page 70, to determine whether Lake Street was included in the legal description in the Policy (which reliance, as discussed above, would be unreasonable), Tract 6, as shown on such original 1889 plat map, included with it the fee to the center of Lake Street; i.e., the south 25 feet of Lake Street (which constitutes the north 25 feet of the Key's property). Therefore, the south 25 feet of vacated former Lake Street was part of the insured estate. CTIC's assertion that Lake Street "is land outside of the legal description included in Schedule A of your Policy and Grant Deed" is meritless and unreasonable. *See* CP 144.

In essence, CTIC's position is this: it can issue a title insurance policy in 2002 that references a plat recorded over 113 years earlier in 1889 and limit its insurance to the plat as it existed and was defined in 1889 while ignoring the facts and law that occurred in the intervening 113 years. That position is unreasonable and, frankly, is one that would only be taken

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<sup>10</sup> Washington law is consistent with the weight of authority in other jurisdictions that the fee does not pass by a common-law dedication; the public acquires only an easement in the land designated for its use. *See* 23 Am.Jur.2d, Dedication Sec. 54 (Title and interest transferred—common-law dedication). The legal or equitable title to land is not lost or destroyed by dedication.

by an insurer attempting in bad faith to avoid coverage rather than the “average person purchasing insurance.” The only reasonable position is that CTIC was insuring the plat as it existed, and was defined, at the time the Keys purchased their property in 2002, not as it existed 113 years earlier before the vacation of former Lake Street by operation of law in 1895.

Again, the Court must construe the terms of the Policy from the point of view of the “average person purchasing insurance”. No average person in the Keys’ shoes in 2002 would believe that the title insurance policy they were purchasing insured the plat as it existed and was defined in 1889. Like every other reasonable person, the Keys, of course, believed CTIC was insuring them for title to the plat as it existed and was defined in 2002 when CTIC issued its Policy.

Put another way, the Keys in 2002 certainly were not purchasing a policy to insure them of the *status quo ante* in 1889. Rather, they were purchasing a policy of title insurance to insure them as to the title of their estate as it existed, and was defined, as of 2002 (including as having been defined by operation of law (both statutory and case law)) in the intervening 113 years since 1889.

In its 8/29/12 letter of denial of coverage, page 3, CTIC asserted

that it had been prejudiced by the Key's alleged failure "to provide timely notice of this claim promptly in writing until after an adverse order was entered against the insured via the 2012 Summary Judgment order." CP 135-138. In the letter of Keys' counsel in response dated September 13, 2012 (CP 139-148), the Keys' counsel pointed out why such argument is baseless. No "adverse order" had yet been entered by the Whatcom County Superior Court against the Keys. As the Keys' counsel pointed out, CTIC had stated numerous errors of facts and law in its 8/29/12 denial letter. Among other errors of fact, contrary to CTIC's assertion, the Whatcom County Superior Court had *not* entered an order that an easement existed over Lake Street.

In its 10/1/12 letter (CP 149-155), CTIC acknowledged at least some of its errors, including the latter error. Nevertheless, CTIC continued to refuse to provide a defense and continued to deny coverage. CTIC cannot possibly establish any "prejudice", let alone the actual and substantial prejudice it would be required to establish. *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 139-140 (2001).

**E. As a Matter of Law on Undisputed Facts, Defendant CTIC Breached Its Broad Duty to Defend.**

- 1. CTIC's duty to defend was broader than its duty to indemnify.**

The duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53 (2007). “[T]he duty to defend is different from and broader than the duty to indemnify.” *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404 (2010). An insurer may not put its own interests ahead of its insured’s. *Mut. of Enumclaw Ins. Co. v. T & G Const., Inc.*, 165 Wn.2d 255, 269 (2008) (citing *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 389 (1992)). “To that end, the insurer must defend until it is clear that the claim is not covered. The entitlement to a defense may prove to be of greater benefit to the insured than indemnity.” *Am. Best Food, Inc.*, 168 Wn.2d at 405 (citing *Truck Ins. Exch. V. Vanport Homes, Inc.*, 147 Wn.2d 751, 765 (2002)).

“In Washington, the duty to defend arises upon the filing of a covered complaint, and the duty is not excused by late notice unless the insurer is prejudiced.” *Griffin*, 108 Wn. App. at 139-140. “[E]ven when an insured breaches an insurance contract, the insurer is not relieved of its duty to defend unless it can prove that the late notice resulted in actual and substantial prejudice.” *Id.* at 140 (quoting *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 427 (1999)). The duty to defend is “one of the main benefits of the insurance contract.” *Safeco Ins. Co. of Am.*, 118 Wn.2d at 392 (1992).

“The general rule is that insurers who have reserved the right and duty to defend are obliged to defend any suit which alleges facts wherein, if proven, would render the insurer liable.” *Greer v. Northwestern Nat’l Ins. Co.*, 109 Wn.2d 191, 197 (1987) (quoting *State Farm Ins. Co. v. Emerson*, 102 Wn.2d 477, 486 (1984)).

“The triggering event is the filing of a complaint alleging covered claims: ‘The key consideration in determining whether the duty to defend has been invoked is whether the allegation [in the complaint], if proven true, would render [the insurer] liable to pay out on the policy.’” *Griffin*, 108 Wn. App. at 781 (quoting *Greer v. Northwestern Nat’l Ins. Co.*, 109 Wn.2d 191, 197 (1987)). *See also Truck ins. Exchange*, 147 Wn.2d at 281-82: “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.”

The general rule is that “the duty to defend must be determined only from the complaint.” *Id.* There are two exceptions to this general rule: First, if coverage is not clear from the face of the complaint but may exist, the insurer must investigate the claim and give the insured the benefit of the doubt in determining whether the insurer has an obligation to defend. *Id.* Second, facts outside the complaint may be considered if (a)

the allegations are in conflict with facts known to or readily ascertainable by the insurer or (b) the allegations of the complaint are ambiguous or inadequate. *Id.* (citations and quotes omitted)

Following an insurer's breach, the insured must be put in as good a position as he or she would have been in had the contract not been breached. *Griffin*, 108 Wn. App. at 781 (quoting *Greer*, 109 Wn.2d at 197). "Where the breach is the failure to defend, damages may include 'the amount of expenses, including reasonable attorney fees the insured incurred defending the underlying action[.]'" *Griffin*, 108 Wn. App. at 781 (quoting *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561 (1998)).

**2. The request for relief made by the Cudmores in July 2012 in the Whatcom County Suit triggered coverage under the Policy.**

The CTIC Policy insured the Key's, among other things:

...against loss or damage... sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title.

CP 107.

The claims asserted by the Cudmores against the Keys in July 2012 in the Cudmores' July 2012 motion for partial summary judgment in the

Whatcom County Suit, including their claim for an easement over the north 25 feet of the Keys' property, triggered coverage under each of the above three coverages.<sup>11</sup> (a.) The Cudmores, in essence, were asserting that title to the north 25 feet of the Keys' property was not vested entirely in the Keys as stated in the Policy (but rather was subject to easement rights of the adjoining property owners Ramsays and Cudmores). (b.) The Cudmores' and Ramsays' claim that they were entitled to an easement over the north 25 feet of the Keys' property constituted a defect, encumbrance or other cloud upon the Keys' title. (c.) The Cudmores' and Ramsays' claim of easement rights over the north 25 feet of the Keys' property rendered title to the Keys' property unmarketable, including as evidenced by the (then) recent refusal of potential buyers of the Keys' property to close a purchase of the Keys' property. *See* CP 127-132.

The Keys' counsel promptly notified CTIC of the Cudmores' attempt to obtain an easement over the north 25 feet of the Keys' property and requested that CTIC defend. CP 128. CTIC wrongfully refused. CP 136.

As discussed *supra*, the south half of vacated former Lake Street

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<sup>11</sup> In other words, the Cudmores, after a hiatus of a number of years in the Whatcom County Suit, were as of July 2012 now attempting to obtain an easement over the north 25 feet of the Keys' property.

clearly was part of the estate insured by CTIC when it issued the Policy and insured the Keys in September 2002.

No reasonable title insurer would believe that the Policy it issued to the Keys did not insure the north 25 feet of the Keys' property (that is, the south 25 feet of vacated former Lake Street) to the Keys. Lake Street had been vacated by operation of law over 100 years before CTIC issued its Policy to the Keys.

**F. RAP 18.1: The Plaintiffs Key Are Entitled To Their Reasonable Attorney Fees And Costs Incurred At Both The Trial Court Level And On Review Before The Court Of Appeals.**

Pursuant to RAP 18.1, the Keys request an award of their attorneys' fees and costs incurred at both the trial court level and on review before this Court of Appeals. The Keys are entitled to an award of their fees and costs pursuant to *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn. 2d 37, 52-53 (1991), which held that an insurer that refused to defend or pay the justified action or claim of the insured is required to pay the insured's attorneys' fees.

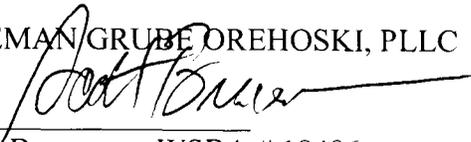
**VI. CONCLUSION**

The trial court's decision granting summary judgment to CTIC and denying the Keys' motion for partial summary judgment is contrary to

Washington law. The Keys respectfully request this Court: (1) reverse the trial court's order granting CTIC's motion for summary judgment; (2) reverse the trial court's order denying the Keys' motion for partial summary judgment; (3) direct the trial court to enter partial summary judgment in favor of the Keys finding that the Keys' claim for defense and coverage tendered to CTIC was covered by CTIC's policy and that CTIC breached its duty to defend and indemnify the Keys; and (4) remand this matter to the trial court for calculation of the Keys' damages and determination of liability under Washington's Insurance Fair Conduct Act (RCW 48.30.015).

Respectfully submitted this 31<sup>st</sup> day of October 2016.

BRENEMAN/GRUBE OREHOSKI, PLLC

  
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Scott C. Breneman, WSBA # 18486

Joseph A. Grube, WSBA #26476

Attorneys for Appellants

## CERTIFICATE OF FILING AND SERVICE

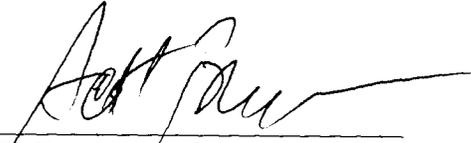
I, Scott C. Breneman, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding, and am competent to be a witness therein. My business address is Breneman Grube Orehoski, PLLC, 1200 Fifth Avenue, Suite 625, Seattle, Washington 98101. On October 31, 2016, I caused the original and one legible, clean, and reproducible copy of the foregoing INITIAL BRIEF OF APPELLANTS to be filed with the Washington Court of Appeals, Division 1, and to be served on the Respondent-Defendant Chicago Title Insurance Company through its counsel of record as follows:

*Via Electronic Mail (via e-service agreement) and  
Legal Messenger*

Henry K. Hamilton  
Fidelity National Law Group  
701 5<sup>th</sup> Avenue, Suite 2710  
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[Henry.Hamilton@fnf.com](mailto:Henry.Hamilton@fnf.com)

Attorney for Respondent-Defendant Chicago Title  
Insurance Company

Dated this 31st day of October 2016.

A handwritten signature in black ink, appearing to read "Scott Breneman", written over a horizontal line.

Scott C. Breneman, WSBA No. 18486  
Attorney for Appellants