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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Neil and Elizabeth Rabinowitz, Husband and Wife,

Appellants,

v.

Chicago Title Insurance Company, a Nebraska State Corporation;
and Fidelity National Title Group, a Delaware State Corporation,

Respondents

ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT
Honorable Jeffrey P. Bassett

APPELLANTS' OPENING BRIEF (CORRECTED)

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I. INTRODUCTION

Appellants Neil and Elizabeth Rabinowitz (“Rabinowitz”) seek a legal determination that their title insurer (“Chicago Title”) had a duty to defend them against a quiet title lawsuit brought by their neighbors William and Sara McGonagle (“McGonagle”). The “duty to defend” determination is made by the Court as a matter of law. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d at 411. This question of law is reviewed *de novo* on appeal. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007); *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d at 404.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Rabinowitz’ summary judgment motion on the duty to defend issue.

2. The trial court erred in granting Chicago Title’s motion to dismiss the case. CP 350-51.

III. ISSUE ON APPEAL

1. Did Chicago Title have a duty to defend their insureds (Rabinowitz) against the quiet title action filed by their neighbors, McGonagle?

IV. SUMMARY

This declaratory judgment action addresses Chicago Title’s duty to defend Rabinowitz against a quiet title action filed by their neighbor McGonagle. Rabinowitz purchased title insurance from Chicago Title in 1987 when purchasing their home in Kitsap County. Twenty-four years later, in 2011, McGonagle filed a

quiet title action asserting rights to a 10-foot strip of land referenced in the Rabinowitz' deed (the "strip").¹

The McGonagle property and the Rabinowitz property are contiguous parcels previously owned by a common grantor. McGonagle asserted alternative claims under alternative theories in seeking rights to the strip.² First, McGonagle alleged that even though the strip *was not mentioned* in McGonagle's own deed this was a scrivener's error and that the common grantor intended to convey the strip to McGonagle's predecessor. Alternatively, McGonagle alleged Rabinowitz owned the strip in fee simple subject to an express easement in favor of McGonagle. It is this second "*express easement*" claim that was "conceivably covered" under the title policy and triggered Chicago Title's duty to defend.

In the trial court proceedings below, Chicago Title never challenged that McGonagle's second "*express easement*" claim, had it prevailed in the quiet title action, was covered under the title policy. Had the second claim been successful, Rabinowitz' ownership in the strip would have been conclusively established and subject to an express easement – and because that easement was not listed in the Rabinowitz' title report as an "exception" to title, title to the strip would have vested "otherwise than as stated" and would therefore have been covered under the title policy. Until the grantors' intent was determined in McGonagle's quiet title

¹ This legal description, taken from the Rabinowitz' recorded deed, is set forth in Schedule A of the title policy.

² The strip of land was described in the Rabinowitz legal description as follows:

" . . . LESS the East 10 feet reserved for road for use of the Grantor of the tract immediately adjoining on the South . . . "

action, coverage was conceivable under the title policy and there was a corresponding duty to defend.

Under Washington law, the insurer has a duty to defend if one of the claims alleged in the Complaint against the insured is *conceivably covered*. This determination must be made based on the “eight corners” of the Complaint and the insurance policy. Extrinsic evidence *cannot* be considered to deny a defense.

Chicago Title could not know by reading the “eight corners” of the McGonagle Complaint and the title policy which of the competing alternatives was intended by the grantor. **Until that question of fact was judicially resolved in the quiet title action, there was *conceivable coverage* and a corresponding duty to defend Rabinowitz under Washington’s *conceivably covered* standard.** Chicago Title was wrong to deny a defense.

V. FACTUAL BACKGROUND

Rabinowitz purchased a home on Bainbridge Island in 1987. Rabinowitz contemporaneously purchased title insurance from defendant Chicago Title to insure title to the property. CP 40-69. (Title Policy). The legal description – recited in Schedule A of the title policy – included the following language to describe a 10-foot strip of land:

. . . *LESS the East 10 feet reserved for road for use of the Grantor of the tract immediately adjoining on the South . . .*

The common grantor’s intended meaning of this language was the focus of McGonagle’s quiet title action. CP 71-75. (McGonagle Complaint).

A. The Underlying Action

On February 14, 2011, McGonagle filed a quiet title action against Rabinowitz. CP 71-75. Alleging alternative claims and theories, McGonagle asserted either an ownership interest, or alternatively, an easement interest, in the strip located within and along the eastern 10 feet of the Rabinowitz property. The strip was included within the metes and bounds perimeter of the Rabinowitz legal description and further referenced in the Rabinowitz' legal description as follows:

. . . LESS the East 10 feet reserved for road for use of the Grantor of the tract immediately adjoining on the South . . .

CP 72 at ¶ 2. A common grantor had at one time owned both properties. CP 73 at ¶ 5. The strip was *not* included in the metes and bounds description or otherwise mentioned in McGonagle's legal description. McGonagle recognized this undisputed fact but claimed this was a scrivener's error on the part of the common grantor. CP 72-73 at ¶ 6.

Under the first claim, McGonagle alleged the reference to the strip *in Rabinowitz' legal description* was evidence of the common grantor's intent to convey ownership of the strip to McGonagle's predecessor. This would leave Rabinowitz with no interest in the strip at all. Under the second alternative claim, McGonagle alleged the grantor intended to convey ownership of the strip to Rabinowitz's predecessor, subject to an **express easement** that would allow McGonagle use of the strip for a road.³

³ McGonagle also asserted a third claim alleging a prescriptive easement – a claim admittedly not covered under the title policy – it therefore need not be further considered.

B. Chicago Title's Denial.

On March 28, 2011, Rabinowitz tendered defense of the McGonagle quiet title lawsuit to Chicago Title under the title insurance policy Rabinowitz had purchased from Chicago Title. CP 76-113. (Claim Submittal). In an April 5, 2011 letter, Chicago Title denied the tender (CP 114-116). Chicago Title denied the requested defense a second time on April 29, 2011 (CP 121-123) in response to Rabinowitz' request for reconsideration (CP 117-120). Rabinowitz was left holding the bag to pay out-of-pocket to defend a very contentious and expensive lawsuit.

1. The Insuring Agreement

In its denial letter of April 5, 2011, Chicago Title acknowledged that under the insuring agreement, coverage is provided under the Policy where "*Title to the estate or interest described in Schedule A [is] vested otherwise than as stated there.*" "Schedule A" recites the Rabinowitz' legal description just as it appears on their deed. CP 121-123.

McGonagle alleged the language in the Rabinowitz' legal description describing the strip was evidence of McGonagle's ownership of the strip, or alternatively, evidence of an *express easement* that would allow McGonagle to use the strip for a road. In denying coverage, Chicago Title *unilaterally determined* the grantor's intent was to convey ownership in the strip to McGonagle's predecessor rather than to Rabinowitz' predecessor; and thereby concluded that Rabinowitz' title "'vested . . . as stated' in Schedule A" and that there was therefore no coverage. In so doing, Chicago Title plainly ignored McGonagle's second "*express easement*" claim – a claim covered under the title policy.

2. Chicago Title Policy *Exception 3*

In its denial letter, Chicago Title *also* purported to invoke “Exception 3” of the title policy to deny coverage, stating:

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

3. Easements or claims of easements not shown by the public record.

VI. LEGAL AUTHORITY

A. Standard of Review

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Summary judgment is appropriate when no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c).

Statements of ultimate fact and conclusory statements of fact will not defeat a summary judgment motion. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359–60, 753 P.2d 517 (1988). Nor may a party opposing a motion for summary judgment rely on speculation, on argumentative assertions that unresolved factual issues remain, or on having affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The opposing party must set forth specific facts rebutting the moving parties' contentions and disclose that a genuine issue as to a material fact exists. *Seven Gables*, 106 Wn.2d at 13, 721 P.2d 1.

2. Policy exclusions are construed against the Insurer.

Because the purpose of insurance is to insure, exclusionary clauses are

construed against the insurer with special strictness. *Tewell, Thorpe & Findlay, Inc. v. Cont'l Cas. Co.*, 64 Wn.App. 571, 575, 825 P.2d 724 (1992). The insurer bears the burden of proving the applicability of an exclusionary clause. See, e.g., *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn. 2d at 406 (2010). Exception 3, on which Chicago Title relied in part to deny coverage, was such an exclusion.

B. The Duty to Defend under Washington Law.

The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy. *Griffin v. Allstate Ins. Co.*, 108 Wn.App. 133, 138, 29 P.3d 777, reconsid. granted (on other grounds) 36 P.3d 552 (2001); *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992); *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 390, 715 P.2d 1133 (1986); THOMAS V. HARRIS, WASHINGTON INSURANCE LAW § 11.1, at 11–1, 11–2 (2d ed.2006).

The rule regarding the duty to defend is well settled in Washington and is broader than the duty to indemnify. *Woo*, 161 Wn.2d at 459-460; *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). The duty to defend arises at the time an action is first brought, and is based on *potential* coverage. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (emphasis added).

Upon receipt of a complaint against its insured the insurer must utilize the “eight corners” rule to determine whether, on the face of the complaint and the insurance policy, there is an *issue of fact or law* that could conceivably result in coverage under the policy. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 803, 329 P.3d 59 (2014); see also *Woo*, 161 Wn.2d at 53, 164 P.3d 454. “[I]f

there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend.” *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d at 413.

There are two exceptions to the “eight corners” rule; both exceptions favor the insured. *Truck Ins.*, 147 Wn.2d at 761, 58 P.3d 276. First, if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer *must* investigate and *give the insured the benefit of the doubt* that the insurer has a duty to defend. *Id.* Notice pleading rules, which require only a short and plain statement of the claim showing that the pleader is entitled to relief, impose a significant burden on the insurer to determine if there are any facts in the pleadings that could *conceivably* give rise to a duty to defend. *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wn.App. 290, 294-95, 612 P.2d 456 (1980). Second, if the allegations in the complaint “conflict with facts known to or readily ascertainable by the insurer,” or if “the allegations ... are ambiguous or inadequate,” facts outside the complaint may be considered. *Truck Ins.*, 147 Wn.2d at 761, 58 P.3d 276. However, *the insurer may not rely on facts extrinsic to the complaint to deny a defense — it may do so only to trigger the duty. Id.*

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.” An insurer is not relieved of its duty to defend unless the claim alleged in the complaint is “clearly not covered by the policy.” *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998). Moreover, if a complaint is ambiguous, a court will construe it liberally in favor of “triggering the insurer's duty to defend.” *Id.* (citing *R.A. Hanson*, 26 Wn.App. at

295). In contrast, the duty to indemnify “hinges on the insured's actual liability to the claimant and actual coverage under the policy.” *Hayden*, 141 Wn.2d at 64, 1 P.3d 1167 (emphasis added). In sum, the duty to defend is triggered if the insurance policy **conceivably covers** the allegations in the complaint. In Washington, this “duty to defend” determination is made by the Court as a matter of law. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 411, 229 P.3d 693 (2010).

If the insurer is uncertain of its duty to defend, it may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend. *Truck Ins.*, 147 Wn.2d at 761, 58 P.3d 276. Although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights and seeking a declaratory judgment, the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach. *Id.*

The duty to defend also includes the duty to appeal. *Truck Ins. Exch. of Farmers Ins. Group v. Century Indem. Co.*, 76 Wn.App. 527, 532, 887 P.2d 455, 459 (1995).

C. The Grantor’s Intent is a Question of Fact.

The intent of a grantor of land is a question of fact. This has been the law in Washington for over a century. See, *Showalter v. Spangle*, 93 Wash. 326, 331, 160 Pac. 1042 (1916) (The question of intention is a question of fact to be determined by the attending facts and circumstances). Deed construction is a factual question to determine the intent of the parties', with the court then applying the rules of law to determine the legal consequences of that intent. *Niemann v.*

Vaughn Cmty. Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005); *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.* 168 Wn.App. 562, 77 P.3d 18 (2012); *Pelly v. Panasyuk*, 2 Wn.App.2d 848, 413 P. 3d 619 (2018) (Interpretation of a deed is a mixed question of fact and law – what the parties intended is a question of fact, and the legal consequence of that intent is a question of law).

Where ambiguity exists in a deed, extrinsic evidence may be considered in ascertaining the intentions of the parties. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). In such a situation, courts must consider the circumstances of the transaction and the subsequent conduct of the parties in determining their intent at the time the deed was executed. *King County v. Hanson Inv. Co.*, 34 Wn.2d 112, 126, 208 P.2d 113 (1949). Where doubt remains as to the parties' intent, in general, "a deed will be construed against the grantor." *Ray v. King County*, 120 Wn.App. 564, 587 n. 67, 86 P.3d 183 (2004).

VII. DISCUSSION

A. The facts material to the "duty to defend" issue are undisputed.

Under the "eight corners" rule, the insurer must look *only* to the allegations of the underlying Complaint and the policy to deny coverage. Here, there can be no dispute about the allegations included in McGonagle's Complaint or the title policy language relevant to this duty to defend analysis. The factual and legal allegations in the McGonagle Complaint speak for themselves, and the specific policy provisions relied upon by Chicago Title to deny coverage are plainly stated in Chicago Title's denial letters. Nor is there any dispute that McGonagle's own legal description made no mention of the strip – as conceded by McGonagle in the

Complaint itself. These material facts are included within the “eight corners” of the McGonagle Complaint and the title policy issued to Rabinowitz and are undisputed.

B. Exception 3 did not apply to McGonagle’s first “*fee simple*” claim.

To deny coverage Chicago Title invoked policy “Exception 3”, which states:

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

3. Easements or claims of easements not shown by the public record.

McGonagle first claimed that the language “***LESS the East 10 feet reserved for road for use of the Grantor of the tract immediately adjoining on the South***” was intended by the grantor to give fee simple ownership of the strip to McGonagle’s predecessor.

Exception 3, on its face, applies only to 1) easement claims, 2) not shown by the public record. Neither of these criteria apply to McGonagle’s “***fee simple***” claim. Under this first theory, McGonagle was asserting ***fee simple*** ownership in the strip – not an easement right. As such, Exception 3 did not come into play and was inapplicable.

Nor did the second criteria of Exception 3 apply to the first claim, because the language under which McGonagle was asserting a ***fee simple*** right was “shown by the public record” – that is, it appeared in Rabinowitz’ legal description, as set forth in Schedule A of the title insurance policy.

C. Exception 3 did not apply to McGonagle's second "express easement" claim.

Again – it is undisputed that in asserting the second, alternative **express easement** claim, McGonagle relied on language included in Rabinowitz' deed, as shown on Schedule A of the title insurance policy. It is undisputed that this language was "shown by the public records." As such, the second criteria of Exception 3 did not apply, and Exception 3 was therefore inapplicable to the McGonagle's **express easement** claim.⁴

D. The role of the title insurer is to insure title.

The role of the title insurer is to insure title. *Kim v. Lee*, 145 Wn.2d 79, 91, 31 P.2d 665 (2001). This insurance derives from the insuring clause, which provides title insurance to Rabinowitz if "**Title to the estate or interest described in Schedule A [is] . . . vested otherwise than as stated there.**" Chicago Title acknowledges this in its April 5, 2011 denial letter. CP 114-116.

E. Chicago Title impermissibly relied upon its own interpretation of the law to deny a defense.

McGonagle challenged Rabinowitz' legal interest in the strip claiming Rabinowitz had no interest at all, *or alternatively*, that Rabinowitz owned the strip in **fee simple** subject to an express easement benefitting McGonagle's property. Rather than defend the claim under a reservation of its rights, Chicago Title impermissibly made a self-serving determination that Rabinowitz had no ownership interest in the strip and thereby concluded that title had vested "as shown" on Schedule A. In other words, Chicago Title decided the "grantor's intent"

⁴ Exception 3 precluded coverage for McGonagle's third alternative claim for a prescriptive easement.

question that was to be judicially determined in the quiet title action, and did so before the question was judicially determined.

Chicago Title could not have made this factual determination based on the eight-corners of the McGonagle Complaint and title policy. The grantor's intent was a disputed question of fact for the trier of fact to decide in the quiet title action based on the extrinsic evidence presented at trial.⁵ The grantor's intent could not be determined by Chicago Title "as a matter of law" any more than it could be summarily decided by the trial court in the underlying quiet title action "as a matter of law." Chicago Title impermissibly relied on its own interpretation of the legal description to deny a defense.

Specifically, in its denial letters to the Rabinowitz' (CP 114-116, 117-120) Chicago Title applies its own legal conclusions about the grantor's intended use of the language "**... LESS the East 10 feet reserved for road for use of the Grantor of the tract immediately adjoining on the South . . .**" This approach is not permitted under Washington law. As explained by the Washington Supreme Court in *Woo*:

Fireman's is essentially arguing that an insurer may rely on its own interpretation of case law to determine that its policy does not cover the allegations in the complaint and, as a result, it has no duty to defend the insured. However, the duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint. Here, Fireman's did the opposite — it relied on an equivocal interpretation of case law to give itself the benefit of the doubt rather than its insured.

⁵ Nor was such extrinsic evidence even available to Chicago Title at the time it denied coverage. Indeed, Chicago Title denied coverage within a week without any investigation whatsoever.

Woo, 161 Wn.2d at 60.

Just as Farmers Insurance had wrongly done in *Woo*, here too, Chicago Title decided that as a matter of law McGonagle's first "fee simple" claim was meritorious, wholly ignoring that there would be coverage if McGonagle prevailed on the second "express easement" claim. Chicago Title impermissibly presumed that the McGonagle's "fee simple" claim (which presented a question of fact about the grantor's intent) would prevail in the underlying trial.⁶ The *Woo* Court concluded:

the duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint. Here, Fireman's did the opposite — it relied on an equivocal interpretation of case law to give itself the benefit of the doubt rather than its insured.

Woo, 161 Wn.2d at 60.

Importantly, Chicago Title has *never* argued, nor could it credibly argue, that the McGonagle's second *express easement* claim was not covered. Instead, as in *Alea* and *Woo*, Chicago Title impermissibly relied on its own interpretation of the legal description to deny coverage.

The fact that McGonagle's own deed made no mention of the strip — a fact conceded in McGonagle's Complaint — actually *contradicted* Chicago Title's self-serving conclusion that the grantor intended to convey the strip to McGonagle's predecessor rather than to Rabinowitz' predecessor. Chicago Title "selectively" ignored this factual allegation in McGonagle's Complaint.

⁶ In the Complaint, McGonagle recognized their own deed did not include the disputed strip of land. This uncertain viability of McGonagle's "fee simple" claim, and explains why McGonagle alternatively claimed an easement over land owned by Rabinowitz.

F. There was conceivable coverage under the insuring agreement of the title policy for McGonagle's second "express easement" claim.

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." If McGonagle had prevailed on the second (alternative) **express easement** claim, the Rabinowitz' title would have "vested otherwise than as stated." That is, Rabinowitz would have owned the strip in **fee simple** subject to an easement, rather than vesting **no title at all** as urged by Chicago Title. Until the underlying trial court determined what interest in the strip, if any, vested in Rabinowitz vs. McGonagle, there was *conceivable coverage* for McGonagle's second **express easement** claim, and a corresponding duty to defend Rabinowitz until that determination was judicially determined in the quiet title action. In denying coverage, Chicago Title simply chose to ignore the McGonagle's **express easement** claim.

G. The "duty to defend" is one of the principal benefits of insurance.

An insurer's duty to defend is "one of the principal benefits of the liability insurance policy." *Woo*, 161 Wn.2d at 53-54. "The entitlement to a defense may prove to be of greater benefit to the insured than indemnity." *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d at 405.

H. The duty to defend provisions of the title policy requires an *immediate* defense where a lawsuit includes a potentially covered claim.

It is undisputed that the title policy Chicago Title issued to the Rabinowitz' includes the following duty to defend provision:

(a) The Company, at its own cost and ***without undue delay, shall provide for the defense of an insured in all litigation***

consisting of actions or proceedings commenced against such insured . . . in an action to enforce . . . [an] interest in said land, to the extent that such litigation is founded upon . . . [any] other matter insured against by this policy.

CP 47 at page 7, paragraph 3(a)).

Under this “without undue delay” language, Chicago title had an *immediate* duty to defend the Rabinowitz’. It was impermissible for Chicago to take a “wait and see” approach. Again – because the McGonagle’s second “express easement” claim was a covered claim, there coverage was conceivable until the underlying trial court in the quiet title litigation determined who owned the strip of land.

I. This appeal is strictly limited to the “duty to defend” issue.

1. Rabinowitz need not prove actual ownership of the strip – this is not in any way relevant to the “duty to defend” issue presented.

Rabinowitz has no burden to prove actual ownership of the strip. Indeed, this “ownership” challenge was precisely the issue presented in the underlying litigation. While the outcome of that challenge was relevant to the duty to indemnify, under the “eight corners” rule and the “conceivably covered” standard, actual ownership was not relevant to Chicago Title’s duty to defend. Had McGonagle prevailed on the second, alternative “express easement” claim, this would have been a covered claim under the title policy because title to the strip would have vested “otherwise than as stated” in Schedule A. Until the grantors’ intent was judicially determined in the quiet title action, coverage was conceivable and there was a corresponding duty to defend.

2. Chicago Title's duty to defend applied to all claims because a covered claim was included by McGonagle.

In *Prudential Prop. and Cas. Ins. Co. v. Lawrence*, 45 Wn.App. 111, 724 P.2d 418 (1986), the court ruled that when there is no reasonable means of prorating costs of defending covered claims and uncovered claims, the insurer is liable for the entire cost of defense. *Prudential*, 45 Wn.App. at 121, 724 P.2d 418 (citing *Nat'l Steel Constr. v. Nat'l Fire Ins. Co.*, 14 Wn.App. 573, 576, 543 P.2d 642 (1975); *Waite v. Aetna Cas. & Sur. Co.*, 77 Wn.2d 850, 856, 467 P.2d 847 (1970)). When the insurer wrongfully refuses to defend and there is no reasonable means of prorating costs of defense between those items that are covered and those that are not covered, the insurer is liable for the entire cost of defense. *National Steel Constr. Co. v. National Union Fire Ins. Co.*, 14 Wn.App. 573, 576, 543 P.2d 642 (1975); *Waite v. Aetna Cas. & Sur. Co.*, 77 Wn.2d 850, 856, 467 P.2d 847 (1970).

Because the McGonagle's second claim was covered, and because there is no reasonable means of prorating the costs of defending the second "covered" claim vis-à-vis McGonagle's other claims, Chicago Title is liable for all defense costs.

VIII. CONCLUSION

The key consideration in determining whether the duty to defend has been invoked is whether [an] allegation, if proven true, would render [the insurer] liable to pay out on the policy. ***It is not the other way around.***

Farmers Ins. Co. v. Romas, 88 Wn.App. 801, 808, 947 P.2d 754 (1997)(emphasis added). "[I]f there is any reasonable interpretation of *the facts or the law* that could result in coverage, the insurer must defend." *Am. Best, Inc. v. Alea London, Ltd.*, 168 Wn.2d at 413.

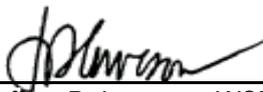
Had McGonagle prevailed on the second claim, this was a covered claim under the title policy. Until the grantors' intent was determined and this issue was decided in the underlying quiet title litigation, coverage was conceivable and there was a corresponding duty to defend.

Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination.

Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 561, 951 P.2d 1124 (1998). Chicago Title was wrong to deny its duty under the title policy to defend Rabinowitz. The trial court erred in denying Rabinowitz' motion on the "duty to defend" issue, and correspondingly erred in granting Chicago Title's motion to dismiss this action.

Respectfully submitted this 4th day of June, 2019.

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By 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 4th day of June, 2019.

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