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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' REPLY BRIEF

Jeffrey D. Laveson, WSBA #16351
Linda B. Clapham, WSBA #16735
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
*Attorneys for Appellants, Neil and
Elizabeth Rabinowitz*

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I. INTRODUCTION

Chicago Title completely ignores the applicable law by failing to analyze its duty to defend under the “conceivably covered” standard. While Chicago Title’s analysis may apply to the duty to indemnify, that analysis is not relevant to the “conceivably covered” standard applicable to the duty to defend issue presented. Chicago Title’s failure to address the “conceivably covered” standard is fatal to its opposition.

First, Chicago Title argues it had no duty to defend because its’ insureds Mr. and Mrs. Rabinowitz (“Rabinowitz”) did not own the disputed 10-foot strip and it was therefore not insured under the Title Policy. But, McGonagles’ “express easement” claim *was* a covered claim under the Title Policy – it was covered because it would have confirmed Rabinowitz’ fee simple ownership of the disputed 10-foot strip (“the strip”) and thereby eviscerate Chicago Title’s sole basis for denying a defense. Until the issue of strip ownership was adjudicated in the underlying quiet title action, there was potential or “conceivable” coverage and a corresponding duty to defend.

Second, Chicago Title argues that the subject language, found in both the Rabinowitz’ legal description and in Schedule A of the Title Policy – “LESS the east 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the Sound . . .” conclusively established that Rabinowitz never owned the strip, and that Chicago Title therefore never insured it. However, the “strip ownership” issue was question of fact or a mixed question of fact and law that required consideration of the grantor’s intent. This ownership issue was at the heart of the dispute between McGonagle and Rabinowitz, and it was ultimately

determined in the underlying quiet title action based on the evidence presented – evidence outside of the eight-corners of the Complaint and Title Policy.

That the trial court ultimately (over three years later) decided the strip ownership issue in favor of McGonagle is irrelevant. Until that determination was made, there was potential or “conceivable” coverage and a corresponding duty to defend.

Rabinowitz is entitled to reimbursement for the defense costs that should have been paid by Chicago Title to defend against the McGonagles’ quiet title action, interest on that amount, damages sustained in consequence of Chicago Title’s failure to defend, and *Olympic Steamship*¹ attorney’s fees and costs in this declaratory action.

II. ARGUMENT

“The duty to defend is “one of the main benefits of the insurance contract.” *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124, 1126 (1998).

Chicago Title breached this most important duty and the Rabinowitz’ were left to pay to defend the title to their property – title that was insured by Chicago Title.

A. Chicago Title Makes No Attempt to Analyze its Duty to Defend Under the “Conceivably Covered” Standard.

The most glaring problem with Chicago Title’s response is that it makes no attempt to analyze its duty to defend under the applicable “conceivably covered” legal standard. It does not mention the standard at all. This is fatal to Chicago Title’s position.

¹ *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37811 P.2d 673 (1991).

Chicago Title's analysis is instead improperly based on the ultimate factual determination made in the underlying quiet title action following a bench trial – a determination made after the trial court weighed the evidence and determined that the grantor, who at one time owned both the McGonagle and Rabinowitz properties, intended ownership of the strip to attach to the McGonagle property rather than the Rabinowitz property. Chicago Title denied coverage on April 5, 2011 (CP 6). The decision about who owned the strip was not made until over three years later on July 24, 2014 (CP 156-160). While the trial court's ultimate decision as described in findings of fact and conclusions of law may be relevant to the duty to indemnify, it is not relevant to, and does not address the "conceivably covered" standard applicable to the duty to defend.

The duty to defend is broader than the duty to indemnify. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454, 459-460 (2007). 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). 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 v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 60,, 164 P.3d 454 (2007). "[I]f there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend." *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 411, 229 P.3d 693 (2010).

The insurer must *give the insured the benefit of the doubt* that the covered claim may well prevail. *Id.* The insurer is required 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). Even 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 not be considered to deny a defense – only to trigger the duty. *Truck Ins.*, 147 Wn.2d at 761, 58 P.3d 276.

In contrast, the duty to indemnify hinges on actual coverage under the policy. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). But, this appeal addresses only the duty to defend, which is triggered if the insurance policy *conceivably covers* allegations in the complaint. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 411, 229 P.3d 693 (2010).

In the quiet title Complaint, McGonagle alleges alternative claims. McGonagle first claims fee simple ownership of the strip. Notably, the strip is not mentioned in the legal description in McGonagles’ own deed, so McGonagle asserted this claim on the basis of a “scrivener’s error.”

Alternatively, relying on language found in the Rabinowitz’ legal description: “*LESS the east 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the Sound . . .*”, McGonagle claimed to have an “express easement” to the strip – that is, McGonagle claimed that Rabinowitz owned the strip in fee simple subject to an express easement “*for road use*” in favor of McGonagle.

In analyzing its duty to defend at the time of tender (February 4, 2011) (CP 6) Chicago Title was required to give Rabinowitz the benefit of the doubt concerning strip ownership. It was required to assume that McGonagle might “conceivably” prevail on the “express easement” claim; that such an outcome would recognize Rabinowitz’ ownership of the strip; and that the strip would therefore be part of the property insured by Chicago Title as described in Schedule A of the Title Policy. In other words, had McGonagle prevailed on their “express easement” claim, Chicago Title’s reason for denying coverage would be eviscerated. Chicago Title’s failure to recognize this potential for coverage – this “conceivable coverage” –has always been and still is the flaw in its analysis. Chicago Title’s failure to address or analyze the “conceivably covered” standard is fatal to its opposition to the Rabinowitz’ appeal.

B. Chicago Title Improperly Asserts That the Strip Was Not Part of the Property Insured by Chicago Title.

Chicago Title argues that Rabinowitz never owned the disputed strip of land and it was therefore not part of the property insured by Chicago Title. In so arguing, Chicago Title ignores two of its obligations -- first, its obligation to base its “duty to defend” analysis on the *potential* for coverage. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). Here, that potential existed under McGonagles’ “express easement” claim, as explained above.

Second, Chicago Title ignores its obligation to rely only on the eight corners of the complaint and the Title Policy. How could Chicago Title possibly have concluded that Rabinowitz never owned the disputed strip of land when the

McGonagle Complaint asserts claims in the alternative? Even 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 not be considered to deny a defense – only to trigger the duty. *Truck Ins.*, 147 Wn.2d at 761, 58 P.3d 276.

Ownership of the strip was at the heart of the dispute between McGonagle and Rabinowitz. Both parties claimed ownership of the strip. Ownership of the strip was *the* disputed issue to be decided in the underlying quiet title action. The issue of ownership was not, as wrongly suggested by Chicago Title, undisputed.

C. Strip Ownership Was a Mixed Question of Fact and Law.

Chicago Title itself acknowledges the “factual” component in determining the ownership issue. On page 13 of its *Respondent’s Brief*, Chicago Title explains:

Deeds are construed to give effect to the intentions of the parties, and particular intention is given to the intent of the grantor when discerning the meaning of the entire document. *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 56, 277 P.3d 18 (2012). “The intent of the parties is determined from the language of the deed as a whole, with meaning given to every word if reasonably possible.” *Id.* (internal citations omitted). In *Thompson v. Schlittenhart*, 47 Wn. App. 209, 734 P.2d 48 (1987), the Washington Supreme Court stated that in the construction of a deed, the court’s purposes is to ascertain the parties’ intent, which is to be gathered from the language of the deed if possible, but when necessary by resort to the circumstances surrounding the entire transaction, and may include other deeds made as part of substantially one transaction or a recorded plat referred to in a subsequent deed (emphasis added).

Here, the fact that the disputed strip was included in the Rabinowitz' metes and bounds legal description (subject to the "road use" reservation); and the fact that it was not mentioned in the McGonagles' Deed at all; cast the grantor's intent into some measure of doubt.

The grantor's intent was further cast into doubt by modifying the "*Less the East 10 Feet*" language by adding "*reserved for road for use of the Grantor of the tract immediately adjoining on the South*" This added "reservation" language is often used in describing easements. Moreover, this "reservation" language was unnecessary to effect the fee simple "carve out" urged by Chicago Title. Why was this extra language included by the Grantor? And why did the Grantor fail to include the strip in the legal description of the property owned by McGonagle?

The trial court ultimately ruled – over three years after Chicago Title denied its duty to defend - that fee simple ownership in the strip attached to the McGonagle property subject to an easement in favor of Rabinowitz. While this appeal does not seek to disturb that result – the point to be made is that the grantor's intent was plainly disputed. See *Rabinowitz Opening Brief* at 9 – 10. Until that dispute was resolved in the quiet title action, there was conceivable coverage and a corresponding duty to defend.

D. The Strip is Included in the Legal Description Found in the Deed and Schedule A of the Title Policy.

Chicago Title concedes that the legal description recited in Rabinowitz Deed is identical to that recited in Schedule A of the Title Policy. *Respondent's Brief* at Section B. Chicago Title also concedes that the strip is included in the

metes and bounds description found in the Rabinowitz Deed and Title Policy, subject to the following "reservation" language:

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

Chicago Title argues that this reservation language was intended by the grantor to be a "carve out" that served to divest Rabinowitz of fee simple ownership.

Chicago Title concludes that the strip is therefore a separate parcel of adjoining property that is not owned by Rabinowitz and therefore not insured under the Title Policy.

In reaching these (self-serving) conclusions, Chicago Title implicitly concedes, as it must, the reverse corollary – that *if* Rabinowitz does own the strip in fee simple subject to a road use easement in favor of McGonagle, the strip *is* part of the property insured under the Title Policy.

As discussed above, in evaluating its duty to defend, Chicago Title was obligated – indeed, required – to give Rabinowitz the benefit of the doubt. Under McGonagles' "express easement" claim, the import of this language would reflect an intent by the grantor to convey the strip in fee simple to Rabinowitz' predecessor, reserving to the grantor an express "road use" easement – not the "fee simple carve out" advanced by Chicago Title.

Again – the grantor's intended meaning of this language was the crux of the underlying quiet title action; it was an issue to be decided in the underlying quiet title action after an evidentiary trial; and there was conceivable coverage until this issue was decided in the quiet title action.

E. Under the McGonagle “Express Easement” Claim, the Strip Was Owned by Rabinowitz.

Chicago Title argues that under the McGonagle Complaint, the strip was alleged to be “outside the land” described in the Rabinowitz’ Deed and in Schedule A of the Title Policy. This may be true with respect to the McGonagles’ “scriviner’s error” claim under which McGonagle claimed fee simple ownership of the strip. But, as explained above, under McGonagles’ “express easement” claim the strip of land described in the Rabinowitz’ Deed and Schedule A of the Title Policy vested fee simple ownership in Rabinowitz leaving McGonagle with an express road use easement.

Thus, Chicago Title is mistaken in arguing that “no claim was made [in the McGonagle lawsuit] as to the Rabinowitz’ land as described in their deed,” and mistaken in arguing that “every claim asserted in the McGonagle Lawsuit concerned land not included in the Rabinowitz’ Deed or in the title insurance policy.”² This is simply not true with respect to McGonagles’ express easement claim.

F. Chicago Title Cannot Rely on the Trial Court’s After-the-fact “Ownership” Determination to Justify its Denial of a Defense.

Chicago relies on the trial court’s ultimate “ownership” determination in favor of McGonagle to justify its’ denial of defense. This violates the “conceivably covered” standard – the only standard applicable to the duty to defend determination. The insurer cannot take a “wait and see” approach. The duty to defend arises at the time an action is first brought, and arises when a complaint against the insured, construed liberally, alleges claims that could, if proven, fall within coverage. *Truck Ins.*

² *Respondent’s Brief* at 6.

Exchange v. Vanport Homes, Inc., 147 Wash.2d 751, 760, 58 P.3d 276 (2002). The ultimate outcome of the underlying action is not relevant in applying the “conceivably covered” standard.

G. The Definition of “Land” in the Title Policy is Irrelevant to Determine the Rabinowitz’ Ownership Interest in the Strip.

As discussed above, McGonagles’ “express easement” claim acknowledges Rabinowitz’ ownership of the strip described in the Rabinowitz’ Deed and in Schedule A of the Title Policy, subject to an express road use easement in favor of McGonagle. Chicago Title concedes that the definition of “land” includes “the land described, specifically or by reference in Schedule A.” Thus, the exception relied upon by Chicago Title in the definition to land “beyond the lines of the area specifically described or referred to in Schedule A” is not relevant and does not apply with respect to McGonagles’ “express easement” claim, which concedes the strip described in the Rabinowitz’ legal description and in Schedule A is owned by Rabinowitz. Nor is the “exception” to “abutting easements” relevant to McGonagles’ express easement claim – for the same reason – under McGonagles’ express easement claim, the strip is within (not abutting) the land owned by Rabinowitz.

H. The Duty to Indemnify is Not at Issue.

Chicago Title argues that Rabinowitz “now ask(s) the appellate court to extend their title insurance policy to include Disputed Land [i.e. the strip] despite that land not being described in the Deed or Policy.”³ Again, this is a “duty to indemnify” issue that has no bearing on the “duty to defend” wherein the allegation

³ *Respondent’s Brief* at 11.

of a covered claim (here, the express easement claim) triggers the duty to defend. Rabinowitz is *not* asking the appellate court to divest McGonagle of the strip, nor asking this court to rule that the strip is owned by Rabinowitz. Nor is Rabinowitz asking this Court to change the Title Policy. The salient difference is simply this – until the strip ownership issue was resolved in the underlying quiet title action, Chicago Title had a duty to defend Rabinowitz against a *potentially* covered claim – McGonagles’ express easement claim. The focus of this appeal is limited to the “duty to defend.”

I. Extrinsic Evidence is Not Relevant to the Duty to Defend.

Chicago Title argues that it is “entitled to rely on maps [and] contracts” to deny coverage. But to do so would violate the longstanding rule that requires insurers to 1) limit their “duty to defend” analysis to the eight corners of the Complaint (*see, Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 803, 329 P.3d 59 (2014)); and 2) consider extrinsic evidence (evidence outside the eight corners) that can be used only for the purpose of finding a duty to defend and never for the purpose of denying a defense. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 413, 229 P.3d 693 (2010).

J. Chicago Title Cannot Rely on its Own Legal Conclusions to Deny a Duty to Defend.

Chicago Title impermissibly made a premature determination that the grantor intended strip ownership to vest with the McGonagles’ property, rather than the Rabinowitz’ property, to reach the self-serving conclusion that the strip was not owned

by Rabinowitz and therefore not insured under the Title Policy.⁴ Chicago Title prematurely decided the “grantor’s intent” issue before the question was judicially determined in the quiet title action, giving itself, rather than the insured, the benefit of the doubt as to possible outcomes.

First, 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 evidence – evidence outside the eight corners – presented at trial.⁵

Second, the grantor’s intent could not be determined by Chicago Title “as a matter of law.” 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.

Woo, 161 Wn.2d at 60.

⁴ 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”

⁵ Chicago Title argues, *without citation to the record*, that no extrinsic evidence was presented in the underlying trial. This contradicts the underlying trial court’s Findings of Fact and Conclusions of Law in the quiet title action, which state, at paragraph 11: “[t] he McGonagles and the Rabinowitzes have both presented evidence to the Court that they possess in fee simple the Disputed Road Property”

Just as Farmers Insurance had wrongly done in *Woo*, here, Chicago Title impermissibly decided that as a matter of law McGonagles' first "fee simple" claim was meritorious while ignoring that there would be coverage if McGonagle prevailed on the "express easement" claim.

Importantly, Chicago Title has never argued, nor could it credibly argue, that the McGonagles' 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 McGonagles' own deed made no mention of the strip – a fact conceded in McGonagles' Complaint – actually contradicted Chicago Title's conclusion that the grantor intended fee simple ownership of the strip attach to the McGonagle property rather than the Rabinowitz property. In denying Rabinowitz a defense, Chicago Title selectively ignored this factual allegation, giving itself, rather than Rabinowitz, the benefit of the doubt.

K. The Only Issue on Appeal is the "Duty to Defend."

Chicago Title misstates the issues on appeal when it argues: "the Rabinowitzes' . . . ask the appellate court to extend their title insurance policy to include that Disputed Land [i.e. the strip] despite that land not being described in the Deed or the Title Policy." This argument only further illustrates Chicago Title's wrongful failure to distinguish between the "duty to defend" and the "the duty to indemnify" – two different duties analyzed under two different standards.

Nowhere in their Motion for Summary Judgment in the trial court below or in this appeal does Rabinowitz seek to re-litigate "strip ownership." Rabinowitz did not ask the trial court below, nor does it ask this court to divest ownership in the

strip from McGonagle or vest ownership in Rabinowitz. McGonagle is not even a party to this insurance coverage action. That ship has sailed.

Rather, Rabinowitz simply asks this Court to recognize what Chicago Title has wrongfully failed to recognize – that because McGonagle alleged a claim that was covered under the Title Policy (the McGonagle “express easement” claim), Chicago Title had a duty to defend Rabinowitz until this issue of strip “ownership” was adjudicated in the underlying quiet title action.

L. The Duty to Defend Arises Solely on the Basis of McGonagles’ Express Easement Claim.

The McGonagles’ quiet title action included claims for “easement by title” and “easement by prescription” and “easement by implication.” The potentially covered claim was the “easement by title” (i.e. express easement) claim. Rabinowitz has never claimed coverage under McGonagles’ prescriptive or implied easement claims, as suggested by Chicago Title.

M. Chicago Title Concedes That No Policy Exclusions Apply.

Chicago Title concedes on appeal: “[t]his appeal is not about exclusions, as no exclusions in the title insurance policy have ever been the basis for the denial.” *Respondent’s Brief* at 15. Although Chicago Title refers to “exceptions or exclusions” in its April 5, 2011 denial letter (CP 221) and April 11, 2011 denial letter (CP 119), Chicago Title now appears to retreat from any reliance on “exclusions.”

III. CONCLUSION

Chicago Title’s analysis does not consider the duty to defend under the “conceivably covered” standard. It ignores the McGonagles’ “express easement”

claim – a covered claim. Until the respective strip ownership rights of McGonagle and Rabinowitz were determined in the quiet title action, coverage was “conceivable” and there was a corresponding duty to defend. Mr. and Mrs. Rabinowitz respectfully ask this Court to rule that there was conceivable coverage under the McGonagles’ “express easement” claim and a corresponding “duty to defend.”

Rabinowitz seeks reimbursement of their defense costs – defense costs that Chicago Title was obliged to pay; interest on that amount; other consequential damages arising from Chicago Title’s wrongful denial of a defense; and *Olympic Steamship* fees in pursuing this coverage action.

Respectfully submitted this 28th day of August, 2019.

CARNEY BADLEY SPELLMAN, P.S.



By _____

Jeffrey D. Laveson, WSBA #16351
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

*Attorneys for Plaintiffs, Neil and Elizabeth
Rabinowitz*

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:

Email, e-file and e-serve, to the following:

Attorneys for Defendant - Chicago Title Insurance Agency of Kitsap
County, a Washington Corporation
Henry K. Hamilton
FIDELITY NATIONAL LAW GROUP
701 5th Ave Ste 2710
Seattle WA 98104-7097
Tel: (206) 223-4525
Fax: (877) 655-5280
henry.hamilton@fnf.com

DATED this 28th day of August, 2019.

s/Deborah A. Groth

Deborah A. Groth, Legal Assistant

CARNEY BADLEY SPELLMAN

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