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CASE NO: 52898-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NEIL RABINOWTIZ and ELIZABETH
RABINOWITZ, husband and wife,
APPELLANTS

vs

CHICAGO TITLE INSURANCE AGENCY OF KITSAP COUNTY, a
Washington Corporation; 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

**RESPONDENT CHICAGO TITLE INSURANCE COMPANY'S
OPENING BRIEF**

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C. This appeal should be denied because beyond the fact that the policy only covers the property described in the Deed, Chicago Title had no duty to defend the Rabinowitzs on the easement issue because the alleged unrecorded easement is for a piece of land not described in the title policy, and is otherwise not covered.

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I. INTRODUCTION

This appeal is about the Rabinowitzs'¹ unsupported belief that Chicago Title² owed them a duty to defend a claim involving land the Rabinowitzs never owned, involving land that was never insured and is not part of the insurance policy at issue, and the Rabinowitzs' unsupported assertions that Chicago Title acted improperly. There is no dispute that all of the underlying claims concerned land not included in the Rabinowitzs' Deed and not included in the title insurance policy. It does not matter what type of claim was involved - all potential claims involved land outside the Rabinowitzs' Deed and policy. In such a case, there is no duty to defend because the Rabinowitzs did not have a policy insuring the disputed land, and any alleged claim was not covered by the policy. *Kirk v. Mt. Airy Ins. Co.*, 134 Wash.2d 558, 561, 951 P.2d 1124 (1998). The trial court properly granted Chicago Title's Motion for Summary Judgment, and the Rabinowitzs' appeal should be dismissed.

II. NO ASSIGNMENTS OF ERROR

A. No Assignments of Error

¹ Pursuant to RAP 10.4(e), Plaintiffs-Appellants, Neil and Elizabeth Rabinowitz, are referred to the "Rabinowitzs" and Defendant-Respondent, Chicago Title Insurance Company, is referred to as Chicago Title.

² Chicago Title Insurance Company is the only remaining defendant. On September 17, 2015, the court entered a Stipulated Order dismissing defendants Chicago Title Agency of Kitsap County and Fidelity National Title Group. (CP146-147)

Chicago Title does not assign error to any of the following decisions by the trial court:

1. The trial court properly denied the Rabinowitzs' Motion for Partial Summary Judgment on liability.

2. The trial court properly granted Chicago Title's Motion for Summary Judgment and dismissing the lawsuit.

B. Issues Pertaining to the Assignments of Error

1. Whether the trial court followed well-settled Washington law and properly denied the Rabinowitzs' Motion for Partial Summary Judgment because:

a. the underlying claims concerned land the Rabinowitzs did not own;

b. the underlying claims concerned an uninsured adjoining parcel of land;

c. the contract between the parties unambiguously does not insure the land at issue, and all of the Rabinowitzs' claims relate to property they do not own; and

d. the unambiguous title policy specifically contains an exception to the Rabinowitzs' claims, such that even if Schedule A of the policy included the area in dispute, these claims were not covered.

2. Whether the trial court followed well-settled Washington law and granted Chicago Title's Motion for Summary Judgment because:

- a. the underlying claims concerned land the Rabinowitzs did not own;
- b. the underlying claims concerned an uninsured adjoining parcel of land;
- c. the contract between the parties unambiguously does not insure the land at issue, and all of the Rabinowitzs' claims relate to property they do not own;
- d. the unambiguous title policy specifically contains an exception to the Rabinowitzs' claims, such that even if Schedule A of the policy included the area in dispute, these claims were not covered; and
- e. the Rabinowitzs' extra-contractual claims for bad faith, negligence, Consumer Protection Act violations, and statutory insurance violations fail because there is no underlying coverage.

III. STATEMENT OF THE CASE

A. There are two separate and distinct parcels of land involved in this appeal.

At the center of this appeal are two separate parcels of land. (CP 71-75) The first parcel is the land described in the Rabinowitzs' Deed and in their title insurance policy. The second parcel is land outside of the Deed and is not included as land covered by the title insurance policy. Under the Rabinowitzs' unambiguous Deed language, all of the underlying claims relate to the property outside the Deed and only concern

land not described in the title policy or Deed. The Rabinowitzs gloss over this critical fact.

The Rabinowitzs took title to the real property at issue by Statutory Warranty Deed dated September 18, 1987 from Christopher Roth to Neil Rabinowitz and Elizabeth Rabinowitz, recorded with the Kitsap County Auditor on September 28, 1987 and having Kitsap County recording number 8709280046. (CP149-151)

As shown by the Deed, the first parcel of land is described as follows:

That part of the Southwest quarter of the Northeast quarter of Section 11, Township 24 North, Range 2 East, W.M. in Kitsap County, Washington described as follows:

...
LESS the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South ...

This is the parcel of land that Chicago Title underwrote a title policy for. The legal description contained in the Rabinowitzs' Deed expressly removes the second parcel of land from the Rabinowitzs' Deed by stating "LESS the East 10 feet reserved for road for use of the Grantor ..."

The second parcel of land is this removed property – "the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South ..." (the "Disputed Land"). The Deed language shows the Rabinowitzs never owned the second parcel.

B. The Rabinowitzs' title insurance policy describes the insured land exactly as contained in the Deed.

This appeal involves a contract, which contract contains specific and clear language. In September 1987, Chicago Title underwrote a 1970 American Land Title Association Owner's Policy Form B-1970 title insurance policy, number 48 0002 04 005078, in the amount of \$109,600 ("the Policy"). (CP 41-48) The one-time premium paid for the Policy in 1987 was \$520. The Rabinowitzs' title insurance states:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs and attorneys' fees and expenses which the Company may become obligated to pay hereunder, 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. Lack of a right of access to and from the land; or*
- 4. Unmarketability of the title.*

Paragraph 1(d) of the contract's Conditions and Stipulations, defines the insured land as:

(d) "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; however, **the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or**

waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(emphasis added).

While the Policy was a standard form, the legal description of the insured land was specific to this Policy. Paragraph 5 of Schedule A of the title insurance policy states:

The land referred to in this Policy is described as follows:

That part of the Southwest quarter of the Northeast quarter of Section 11, Township 24 North, Range 2 East, W.M. in Kitsap County, Washington described as follows:

...

LESS the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South

...

(emphasis added).

Schedule A says nothing about insuring any rights the Rabinowitzs may have in other property, including any adjoining land. As a matter of basic contract law, the policy only insured the property identified in Schedule A. Schedule A does not include the Disputed Land.

C. The 2011 *McGonagle* lawsuit solely involved land expressly removed from the Rabinowitzs' Deed and outside the land described in the title policy.

The Complaint in *William S. McGonagle and Sara L. McGonagle v. Neil Rabinowitz and Elizabeth Rabinowitz, et al*, Kitsap County Superior Court case no. 11-2-00385-1 (“McGonagle Lawsuit”), offered as part of the Rabinowitzs’ underlying trial court Motion, correct identifies

the Rabinowitzs' land and states that the dispute was over land specifically removed from the Rabinowitzs' Deed a/k/a "The East Ten Feet..." Paragraph 2 of the McGonagle Complaint accurately identifies the Rabinowitzs' land. As shown by paragraph 3, the McGonagles then asserted a claim solely concerning the Disputed Land (referred in the McGonagle Complaint as the "Subject Property"). No claim was made as to the Rabinowitzs' land as described in their Deed. The McGonagles filed the Complaint because the Rabinowitzs were blocking the McGonagles' use of the Disputed Land. (McGonagle Complaint, Paragraph 9). Stated differently, every claim asserted in the McGonagle Lawsuit concerned land not included in the Rabinowitzs' Deed or in the title insurance policy. (CP 71-75)

D. The *McGonagle* court expressly ruled that the land at issue was removed from the Rabinowitzs' Deed.

The Rabinowitzs fully recognize and do not challenge that the Findings of Fact and Conclusions of Law entered in the McGonagle Lawsuit on July 21, 2014, confirmed the Deed's plain language and expressly found the Rabinowitzs never owned the Disputed Land and it was not part of the Rabinowitzs' Deed. (CP 153-157) The court ruled in its Conclusions of Law ("Conclusions") as follows:

3. The Court concludes that whenever the words "less" or "except" are used in deeds; the general meaning is to exclude a portion of the property from the grant. In this case, the Court concludes the Rabinowitz Property did not include the 10-foot-wide Disputed Road Property just east of the Rabinowitz Property.

4. The Court further finds that the use of the word ‘less’ before the legally-described Disputed Road Strip in the Rabinowitz Deed means that the Disputed Road property was specifically excluded from the Rabinowitz Deed and is not a fee simple road belonging to the Rabinowitzes by use of the word ‘reserved.’

5. First, the disputed road strip must be apart (sic) of the McGonagle’s property because the Disputed Road Property is not included in the Rabinowitz Deed due to the word “less.’

6. Leaving the Disputed Road Property out of the Rabinowitz Deed was not a grant to the grantor himself, Petterson. But instead runs with the land and remains part of the McGonagle Property that Petterson had yet to convey.

(CP 155-156)

The court in the McGonagle Lawsuit applied common sense and found there was no confusion by the use of “Less” and that the Disputed Land was never part of the Rabinowitzs’ Deed. (CP 153-157). The court instead focused on which party had the better claim to adverse possession of this Disputed Land.

E. The Rabinowitzs’ title policy claim only involved land outside the Deed and title policy.

The Rabinowitzs’ March 28, 2011 claim submittal to Chicago Title highlighted that they were solely making a title claim based on the McGonagle Lawsuit dispute concerning an unrecorded easement across land specifically excluded in the Rabinowitzs’ Deed a/k/a “The East Ten Feet...” (CP 77-78)

Chicago Title timely and properly acknowledged the claim on March 31, 2011, and, after investigation, timely and properly responded in writing to the Rabinowitz' counsel on April 5, 2011. (CP 115-116) Chicago Title's response reviewed the Rabinowitzs' Deed and policy language and advised the Rabinowitzs that the dispute concerned land they did not own because it was outside their Deed. Chicago Title also reminded the Rabinowitzs that the land was not part of the insured parcel, and therefore there was no insurance. (CP 115-116) As an aside, the letter also pointed out that that even if there was a covered claim, it would be denied under a Schedule B exception because the allegations related to a claim of an unrecorded easement. However, Chicago Title noted that since the claim was for land not owned by the Rabinowitzs or part of the Rabinowitzs' policy, Chicago Title did not need to further address that exception. (CP 116)

The Rabinowitz' counsel wrote a response letter dated April 11, 2011, which letter failed to address the underlying critical central fact that "Less" means "Less." (CP 118-120)

Chicago Title again timely and properly replied in writing to the Rabinowitz' counsel on April 29, 2011, which reply again reviewed the Rabinowitzs' Deed and policy language and advised the Rabinowitzs that the dispute with their neighbor concerned land outside their Deed and title insurance policy. (CP 122-123)

F. The trial court grants Chicago Title’s Motion for Summary Judgment.

The Rabinowitzs then filed their lawsuit against Chicago Title on May 29, 2015. (CP 1-13)

On October 29, 2018, Chicago Title filed a Motion to Dismiss under CR 41(b)(1) based on the Rabinowitzs’ failure to take any action in this lawsuit. (CP 128) In response, the Rabinowitzs filed their Motion for Partial Summary Judgment, and Chicago Title filed a cross-motion for summary judgment.

On December 18, 2018, the trial court denied the Rabinowitzs’ motion, granted Chicago Title’s motion, and dismissed the Rabinowitzs’ lawsuit with prejudice. (CP 350-51)

IV. SUMMARY OF ARGUMENT

In this appeal, the Rabinowitzs wish to fundamentally alter Washington law so that a contract does not mean what it says, but has the Rabinowitz’s subjective interpretation that is contrary to plain language, Washington law, and common sense. The documents at issue—the Rabinowitzs’ Deed to their property and their title insurance policy—are not ambiguous and are not subject to change simply to suit the Rabinowitzs’ desire to obtain title to land they do not own.

This issue presented in the appeal is singularly about the land described in the Deed and Policy:

The Southwest quarter of the Northeast quarter of Section 11, Township 24 North, Range 2 East, W.M. in Kitsap County, Washington described as follows:

...

LESS the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South ...

(emphasis added)

In this appeal, the Rabinowitzs lost their attempt to obtain title to the Disputed Land in the McGonagle Lawsuit, and now ask the appellate court to extend their title insurance policy to include that Disputed Land despite that land not being described in the Deed or the Policy. The Rabinowitzs' position is legally unsupported. Paragraph 1(d) of the policy's Conditions and Stipulations, defines the insured land as:

(d) "land": the land described or referred to in Schedule A, and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways ...

Schedule A of the policy describes the land as follows:

The Southwest quarter of the Northeast quarter of Section 11, Township 24 North, Range 2 East, W.M. in Kitsap County, Washington described as follows:

...

LESS the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South ...

(emphasis added)

There is nothing confusing or unclear as to the land at issue. Similarly, there is nothing astounding about Chicago Title denying a request to defend a lawsuit not involving insured land. As a matter of basic

contract law, the policy only insured the property identified in Schedule A and not any interest in other property. As the trial court implicitly ruled in granting summary judgment, Chicago Title is entitled to rely on maps, contracts and Washington law. The Rabinowitzs' appeal should be dismissed.

V. ARGUMENT

- A. This appeal should be denied because there is no duty to defend a claim for a piece of land the Rabinowitzs have never owned; and are barred under the court's ruling in the McGonagle Lawsuit.

The Rabinowitzs' Deed granting title to the land at issue describes the land as that portion of:

The Southwest quarter of the Northeast quarter of Section 11, Township 24 North, Range 2 East, W.M. in Kitsap County, Washington described as follows:

...

LESS the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South ...

(emphasis added)

The Rabinowitzs' lawsuit and their Motion are entirely based on the false idea that they own the Disputed Land. The Rabinowitzs never owned the land at issue, which is described as "the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South." This is why Chicago Title denied coverage: the unambiguous language in the Deed. The underlying lawsuit on appeal is about the Deed language and the fact that the real property at issue is not part of the Deed. The basis for Chicago Title's denial of the tender of defense of the

McGonagle Lawsuit returns to the basic fact that it concerned land that the Rabinowitzs have never owned and that was not insured.

When determining the intent of the parties to a deed, courts read the deed as a whole, and give the words of conveyance their ordinary meaning. *Hoglund v. Omak Wood Prod., Inc.*, 81 Wash. App. 501, 504, 914 P.2d 1197 (1996). In *Merriam-Webster's* dictionary (11th ed.), when used as a preposition, "Less" is defined as meaning "diminished by or minus."

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.

In *Studebaker v. Beek*, 83 Wash. 260, 145 Pac. 225 (1915), the Washington Supreme Court discussed a legal description in a deed where a strip of land was reserved and excepted from a parcel previously conveyed by the grantor for use by a railroad. The grantee of this property sued to quiet title, claiming they owned the excepted strip of land. The court held that the language in the deed that specifically excepted the strip of land for use for a railroad right-of-way has to be given the meaning that it was intended, namely, to reserve the strip to the original grantor, who then granted it to another grantee (the railroad). *Id.* at 27-28. A later case, *Roeder Company v. Burlington Northern Railroad*, 105 Wn.2d 269, 714 P.2d 1170 (1986), followed the *Studebaker* ruling and upheld reservation language when a railroad granted land to another but reserved a strip of land for railroad purposes. In particular, the Court in *Roeder Company, supra*, found that the words “reserved for railroad” were specifically identified on a plat map with a legal description to preserve the fee simple interest in the 80-foot strip for the railroad. The trial court properly evaluated the evidence to determine that the grantor’s intent was to reserve the fee simple interest for the railroad in the strip of land excepted/reserved from the deed. 105 Wn.2d at 274-75.

Here, the plain language of the Rabinowitzs' deed does not include the East 10 feet by saying "less the east ten feet reserved for road." Had the grantor intended to grant fee ownership of the entire section, this language would have been omitted. The Rabinowitzs assert that this

language could be interpreted to have granted fee ownership while reserving an easement. However, the language used in reserving an easement is usually "reserving an easement for benefit of grantor." "Less" is used to remove fee title entirely, and the McGonagle court correctly noted that this is a matter of plain language and "common sense." In the underlying litigation, the Rabinowitzs did not produce evidence about the grantor's intent. The fact that the Rabinowitzs make an interpretation that is contrary to plain language and common sense does not create an ambiguity, and the "less" language is not subject to reasonable dispute.

Contrary to the Rabinowitzs' statements in their Opening Brief, this appeal is not about exclusions, as no exclusions in the title insurance policy have ever been the basis of the denial. As discussed above, the appeal is about what land the Rabinowitzs own. The Rabinowitzs misstate the basis for their claim and conflate policy interpretation with Deed language. The Rabinowitzs' dispute with their neighbors solely relates to additional real property not included in their Deed. The appeal is therefore without legal basis, as it is abundantly clear is that the "East 10 Feet" has always been removed from their Deed and was never part not part of their property.

It was not just Chicago Title who found the Deed language clear and unambiguous, so did the trial court in the McGonagle Lawsuit. This lawsuit is an attempt to re-litigate the McGonagle Lawsuit, which concerned the Rabinowitzs' false claim to the Disputed Land. As the court

in the McGonagle Lawsuit previously confirmed, the Rabinowitzs do not own the land in dispute, and never did. The Rabinowitzs are now attempting to have this Court revise the McGonagle court's well-reasoned and unchallenged decision, and re-write the Rabinowitzs' Deed so that they can then make a title insurance claim for the Disputed Land. The Rabinowitzs made no attempt to appeal or request reconsideration of the McGonagle court's conclusions, and have thereby acknowledged the correctness and finality of the result. The Rabinowitzs' claims are barred under the doctrine of collateral estoppel or issue preclusion. *See, Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wash. 2d 299, 306–07, 96 P.3d 957 (2004) (“collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation.”) The Findings of Fact and Conclusions of Law entered on July 24, 2014, in the McGonagle Lawsuit expressly found the Rabinowitzs never owned the disputed area and it was not part of the Rabinowitzs' Deed – the exact reason Chicago Title denied coverage. The Rabinowitzs disagree with the McGonagle court's decision, and now wish to obtain a different result in a different court. Their claims are without merit.

- B. This appeal should be denied because there is no duty to defend a claim for a piece of land not described in the title policy; and otherwise not covered.

The Rabinowitzs' case is not only based on the false assertion that the Rabinowitzs' own property not included in their Deed, but also that the

title insurance policy covers land not described in the title policy. The title policy does not insure the Rabinowitzs' title to any land not included in their Deed. The Rabinowitzs quickly gloss over this important point and incorrectly assert that obtaining a grant of title to a specific piece of land somehow then automatically adds other land expressly removed from that grant. This is incorrect and violates basic real property and title law.

The title policy unambiguously states that Chicago Title only insured certain specific land, and did not insure anything beyond that described land. This lawsuit arises out of land specifically not included in the Deed and not included in the title policy. In addition to wanting to relitigate the McGonagle Lawsuit to re-write their Deed, the Rabinowitzs are also now attempting to have this Court re-write the Rabinowitzs' title insurance policy to insure title to land that they have never owned and that is not insured, in order to then make a claim for the Disputed Land.

This case involves a contract, which contract contains specific language. The policy itself identifies what is exactly insured:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, 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;*
4. *Lack of a right of access to and from the land.*

Paragraph 1(d) of the contract's Conditions and Stipulations, defines the insured land as:

(d) "land": the land described or referred to in Schedule A, and improvements affixed thereto which by law constitute real property. **The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways.** but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(emphasis added). As a matter of basic contract law, the policy only insured the property identified in Schedule A, and not any interest in an adjoining parcel.

Paragraph 5 of Schedule A of the title insurance policy states:

The land referred to in this Policy is described as follows:

That part of the Southwest quarter of the Northeast quarter of Section 11, Township 24 North, Range 2 East, W.M. in Kitsap County, Washington described as follows:

...

LESS the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South

...

(emphasis added).

There is no dispute over the land whose title is insured in the policy. Further, there is no dispute that the Rabinowitzs' claim solely concerns the "East 10 Feet." The title policy does not insure any land not specifically identified and which the Rabinowitzs did not own. Because the Disputed Land is solely outside of the property described in the Deed, the policy coverage is not invoked. What is abundantly clear is that the Disputed Land is removed from the grant of their Deed, and any related title insurance policy claim regarding the Disputed Land cannot be covered by the Policy. The Rabinowitzs do not present a covered claim and their claim was properly denied. Chicago Title is entitled to have the Rabinowitzs' appeal dismissed.

- C. This appeal should be denied because beyond the fact that the policy only covers the property described in the Deed, Chicago Title had no duty to defend the Rabinowitzs on the easement issue because the alleged unrecorded easement is for a piece of land not described in the title policy, and is otherwise not covered.

The question of easements is not at issue because the Rabinowitzs' Deed and Policy do not create any interest in the real property in dispute, so it does not matter if the McGonagles asserted a claim to an easement over the Disputed Land. Ignoring this, the Rabinowitzs pin their hopes on an ancillary response regarding easements. The Rabinowitzs' claim regarding an easement is at best confused. The McGonagle Lawsuit solely focused on the East 10 feet of the land, which the Rabinowitzs' Deed removed from their title and which was not insured. The fact that the

Disputed Land is entirely outside of the Deed and Policy is enough to dismiss this appeal, and the Court need not reach this red herring.

Regardless, as an additional explanation as to why there was no duty to defend here, Chicago Title's coverage correspondence correctly explained that Exception 3 in Schedule B similarly precludes the Rabinowitzs' claim. Schedule B of the Policy provides:

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

GENERAL EXCEPTIONS

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

There is no evidence that a recorded easement exists here regarding the Rabinowitzs' land. By definition, the McGonagles' claims for prescriptive and implied easements are necessarily not reflected in the public record. As such, there is also no basis to establish coverage. The trial court properly dismissed the lawsuit because all issues involved claims outside the boundaries to the insured land.

D. Chicago Title had no Duty to Defend claims for potential title issues outside the boundaries of the described land.

Any discussion must begin with an examination of the nature of title insurance. The role of the title insurer is to insure title. *Kim v. Lee*, 145 Wn.2d 79, 91, 31 P.3d 665 (2001). The "title" to real estate is defined as the "right to or ownership in land," including the instruments of

conveyance that evidence the transfer of that ownership. *See Black's Law Dictionary*, Revised Fourth Edition, p. 1655 (citations omitted).

The title insurance policy is a reflection of the accuracy of a title company's search of the record title on a specific property, here the property described in the policy. *Kiniski v. Archway Motel*, 21 Wash. App. 555, 560, 586 P.2d 502 (1978); *C 1031 Properties, Inc. v. First Am. Title Ins. Co.*, 175 Wash. App. 27, 32, 301 P.3d 500, 502 (2013). Both parties to this lawsuit agree that the Rabinowitzs' claims solely concern the "East 10 Feet" not included in the Deed. The Policy's plain language cannot be disregarded. *Davis v. North American Accident Ins. Co.*, 42 Wash.2d 291 (1953). Nor in such a situation is there room for construction. *Morgan v. Prudential Ins. Co. of America*, 86 Wn.2d 432 (1976). The Rabinowitzs' Policy does not insure any property other than that described in the Deed and related Policy. There is no ambiguity and there is no legal basis for unilaterally adding another piece of real property to the insured property. The Rabinowitzs do not present a covered claim and their claim was properly denied. Chicago Title is entitled to have the Rabinowitzs' contract claims dismissed.

The Policy is one of indemnity against specific defects in or unmarketability of title, or liens, or encumbrances as to the insured parcel only. *Sec. Serv., Inc. v. Transamerica Title Ins. Co.*, 20 Wash. App. 664, 669-70, 583 P.2d 1217 (1978). Since the contract is primarily one of indemnity, and any obligation of defense hinges on whether indemnity

may exist, plaintiffs must show a potential for loss arising out of a claim as to the specific insured parcel of land. Here, there is nothing before the court, and there are no facts showing any issue with the title to the land described in the Deed and in the Policy. In fact, the opposite is true. The Rabinowitzs' claim is without basis and must be dismissed.

A title insurance company searching the index has a right to rely upon the index and recorded documents and is not bound to search the record outside the chain of title of the property presently being conveyed. *Dickson v. Kates*, 132 Wash. App. 724, 737, 133 P.3d 498, *as amended* (2006). A title company may rely upon the record chain of title, and is not bound to go outside the record. *Burr v. Dyer*, 60 Wash. 603, 606, 111 P. 866 (1910), *on reh'g*, 63 Wash. 696, 115 P. 512 (1911). The Rabinowitzs fail to show any issue with the chain-of-title to their land. Chicago Title is entitled to have this appeal dismissed because all issues involved claims outside the boundaries to the insured land. A title insurance company cannot insure matters not recorded, and does not insure matters affecting land not specifically identified as the insured land.

- E. The Rabinowitzs' appeal should be dismissed because the policy is not ambiguous and there is no room for interpretation creating a duty to defend.

Chicago Title has no obligation to pay for the Rabinowitzs' fees because they were incurred to address a non-covered claim involving property they did not own. The Rabinowitzs recognize that title insurance policies are interpreted under the general rules applicable to all contracts.

See, Santos v. Sinclair, 76 Wn. App. 320, 325 (1994). While ambiguities in insurance contracts are generally construed in favor of an insured, an equally important part of that rule is that plain language is not to be disregarded. *Davis v. North American Accident Ins. Co.*, 42 Wash.2d 291, 254 P.2d 722 (1953). When language is clear, there is no room for construction. *Morgan v. Prudential Ins. Co. of America*, 86 Wn.2d 432, 545 P.2d 1193 (1976).

Interpretation of an insurance contract is a question of law. *Bushnell v. Medico Ins. Co.*, 159 Wash. App. 874, 881, 246 P.3d 856, *review denied*, 172 Wash.2d 1005, 257 P.3d 665 (2011). “If a policy is clear and unambiguous, the court must enforce it as written.” *Bushnell*, 159 Wash. App. at 882. In such circumstances, the court may not modify the contract or “create ambiguity where none exists.” *Bushnell*, 159 Wash. App. at 882; *Mount Zion Lutheran Church v. Church Mut. Ins. Co.*, ___ Wn. App. 2d ____, 442 P.3d 22, 25 (2019).

Here, the title policy unambiguously only covered the described property. Both the Rabinowitzs’ Deed and their Policy describe land which does not include the Disputed Property. There is no ambiguity and there is no room for construction to unilaterally add another piece of real property to the Deed or the title policy.

It is undisputed that the only insured parcel was as defined in the Deed and the title policy. The boundaries of that real property are not ambiguous and are readily determinable. In such a situation, “if a person

of ordinary intelligence and understanding can successfully use the description (given) in an attempt to locate and identify the particular property sought to be (foreclosed, then) the description answers its purpose and must be held sufficient. *Asotin County Port Dist. v. Clarkston Community Corp.*, 2 Wash. App. 1007, 1010, 472 P.2d 554 (1970). There is no evidence of any claim with respect to the specifically defined insured parcel. Nor is there any evidence that the described land is not readily identifiable.

F. The Rabinowitzs' appeal should be dismissed because the Deed is not ambiguous and there is no room for interpretation.

Simply claiming an issue of fact is not enough to defeat Summary Judgment. Civil Rule 56(e). Similarly, reviewing an unambiguous Deed does not involve an issue of fact precluding Summary Judgment, without presenting some evidence. A court determines the intent of the parties from the language of the deed as a whole, and it has long been the rule that, where the plain language of a deed is unambiguous, there is no factual question, extrinsic evidence will not be considered, and the deed will be enforced as written. *Sunnyside Valley*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). As stated by the court in *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wash. App. 56, 64–66, 277 P.3d 18 (2012), “this rule is a practical consequence of the permanent nature of real property—unlike a contract for personal services or a sale of goods, the legal effect of a deed will outlast the lifetimes of both grantor

and grantee, ensuring that evidence of the circumstances surrounding the transfer will become both increasingly unreliable and increasingly unobtainable with the passage of time. Accordingly, the language of the written instrument is the best evidence of the intent of the original parties to a deed.” That is why unless there is a dispute on material historical facts, Summary Judgment in Deed interpretation is appropriate. *See, Hanson Indus., Inc. v. Cty. of Spokane*, 114 Wash. App. 523, 527, 58 P.3d 910 (2002). The Rabinowitzs failed to put forth any evidence that their Deed is ambiguous and that there is a factual question, other than to claim “Less” does not mean “Less.” Regardless, the title insurance policy remains clear and a court is not permitted to expand the policy.

G. Chicago Title acted in good faith because all claims concerned land the Rabinowitzs did not own and involved land not included in the title policy.

The Rabinowitzs’ fail to put forth any evidence that Chicago Title did anything inappropriate, and solely assert that Chicago Title failed to defend them as to a claim on land outside the boundaries of the Rabinowitzs’ property. An insurer may be liable in damages for the tort of bad faith if it fails to follow the terms of its insurance contract. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 393–94, 823 P.2d 499 (1992). In order to establish bad faith, the Rabinowitzs must show that Chicago Title committed a breach that was “unreasonable, frivolous, or unfounded.” *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998). In *Kirk*, the Washington Supreme Court instructed lower courts that an

insured does not have a bad faith claim when the insurer denies coverage or fails to provide a defense based upon a reasonable interpretation of the insurance policy. *Kirk*, 134 Wn.2d at 560, 951 P.2d 1124 (citing *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988)). Here, the basis for denying the claim was extremely reasonable and just – the land at issue was objectively and readily determined to be outside the boundaries of the Rabinowitzs' land.

If the insured fails to show the insurer acted in bad faith, then there is no presumption of harm or coverage by estoppel. *Holly Mountain Res., Ltd. v. Westport Ins. Corp.*, 130 Wash. App. 635, 650, 104 P.3d 725 (2005) *abrogated by Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 297 P.3d 688 (2013).

As discussed in *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 878-79, 297 P.3d (2013), the insurer's duty to defend is separate from, and substantially broader than, its duty to indemnify. The duty to indemnify applies to claims that are actually covered, while 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. *Id.* Chicago Title does not dispute this. However, here it is undisputed that there are no claims against the property described in the Deed and the policy. There is no duty to defend if there are no claims potentially covered.

To maintain their action, the Rabinowitzs must first prove that the claim was covered, and that Chicago Title acted unreasonably in denying the covered claim. If Chicago Title can point to a reasonable basis for its action, that reasonable basis is a complete defense to any bad faith claim by an insured. *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 917, 792 P.2d 520 (1990); *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wash. App. 383, 411, 161 P.3d 406 (2007). *See also, Shields v. Enterprise Leasing Co.*, 139 Wn. App. 664, 676, 161 P.3d 1068 (2007) (“[A] reasonable basis for denial of an insured's claim constitutes a complete defense to any claim that the insurer acted in bad faith or in violation of the Consumer Protection Act.”); *Ki Sin Kim v. Allstate Ins. Co., Inc.*, 153 Wn. App. 339, 356 n. 3, 223 P.3d 1180 (2009) (“Reasonableness of an insurer's actions is a complete defense to any bad faith claim by an insured.”); *Shields v. Enterprise Leasing Co.*, 139 Wn. App. 664, 676, 161 P.3d 1068 (2007) (“[A] reasonable basis for denial of an insured's claim constitutes a complete defense to any claim that the insurer acted in bad faith or in violation of the Consumer Protection Act.”). A title claim involving uninsured land is an absolute defense and a very reasonable basis for denying the Rabinowitzs’ claim. An insurance company is not required to pay claims which are not covered by the contract or take other actions inconsistent with the contract. *Coventry Associates v. Am. States Ins. Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998). As long as the insurance company acts with honesty, bases its

decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith or CPA claim against its insurer, even if the insurer makes a mistake. *Id.* Chicago Title properly and timely investigated the Rabinowitzs' claim, its denial was appropriate, and there is no basis to support finding a duty to defend a lawsuit not involving the Rabinowitzs' land.

H. Chicago Title's title policy is not like contracts of adhesion.

The Rabinowitzs imply that the policy is ambiguous and requires the court to re-write it to provide them with coverage they never purchased and interpret the Policy's provisions against Chicago Title. Many insurance policies are construed against the insurance company because the company drafted the language. However, that principle does not apply to title insurance policies that were written jointly by insurers and their customers. The policy issued to plaintiff is a standard form American Land Title Association owner's policy of title insurance. The history of that standard form title insurance policy shows that it was not drafted by Chicago. As a result, the normal insurance contract rules do not apply. *See, BB Syndication Services, Inc. v. First American Title Ins. Co.*, 780 F.3d 825 (7th Cir. 2015), fn. 4. (CP 159-171) There are no ambiguities in the Policy. The Policy clearly identifies the insured land, and does not provide any title coverage for other land. Chicago Title is entitled to have this appeal dismissed.

- I. Chicago Title is entitled to have this appeal dismissed because the Rabinowitzs' underlying claim is without basis.

It is clear that neither the Deed, nor the title policy included the disputed land. A defendant can move for summary judgment by simply showing that there is an absence of evidence to support the plaintiff's case. *Guile v. Ballard Comty. Hosp.*, 70 Wn. App. 18, 21-22, 851 P.2d 689 (1993). The purpose behind the summary judgment motion is to avoid unnecessary trials where no genuine issue as to a material fact exists. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d at 226. Here, Chicago Title's Cross-Motion for Summary Judgment was properly granted because there are no material issues of fact regarding any issue. The real property that is the basis for the Rabinowitzs' claim is not part of their Deed as a matter of law, and the Rabinowitzs never owned the Disputed Land that was the subject of the McGonagle Lawsuit. The title insurance policy never included the Disputed Land as part of the land insured under the title policy either. Chicago Title is entitled to have this appeal dismissed.

VI. CONCLUSION

This court should dismiss this appeal and affirm the trial court's ruling. The trial court followed well-settled Washington law, properly granted Chicago Title's Motion for Summary Judgment and properly denied the Rabinowitzs' Motion for Partial Summary Judgment. The trial court correctly found that the uncontroverted facts showed that the

Rabinowitzs' claims concerned a separate and uninsured parcel of land; that the unambiguous title policy specifically contained exceptions for the Rabinowitzs claims, such that even if Schedule A of the policy included the Disputed Land, the McGonagles' prescriptive and implied easement allegations would not be covered; the Rabinowitzs' extra-contractual claims failed; and that the uncontroverted evidence presented was that Chicago Title at all times acted in good faith and consistent with its duties.

Dated this 19th day of July, 2019.

s/Henry K. Hamilton
Henry K. Hamilton, WSBA #16301
Fidelity National Law Group
Attorney for respondent Chicago Title
Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on the date given below I caused to be served the foregoing document entitled **RESPONDENT’S OPENING BRIEF** on the following individuals in the manner indicated:

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DATED: July 19, 2019.

s/Sasannah Dolan-Williams
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