



**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

IDENTITY OF RESPONDENT ..... 1

COURT OF APPEALS DECISION..... 1

ISSUES PRESENTED FOR REVIEW..... 1

    A. Whether Petitioners have established grounds for discretionary review under RAP 13.4 where the lower courts’ decisions were based on well-established Washington law and the Petitioners’ argument requires this court to rewrite the complaint in the underlying action. .... 1

    B. Whether title insurance exceptions and exclusions triggered by a broad reading of the third-party complaint against the insureds relieve insurer of its duty to defend against the adverse claims?..... 1

STATEMENT OF THE CASE ..... 2

ARGUMENT WHY REVIEW SHOULD BE DENIED ..... 3

    A. The Trial Court and the Court of Appeals Decisions were Based on Well-Established Washington Law and Petitioner’s Request for Review is Not Warranted Under RAP 13.4(b). .... 4

    B. There is no duty to defend against claims expressly excepted and excluded under the applicable title insurance policy. .... 5

        1. An easement that expressly burdens property other than that covered by the Policy is not an easement “disclosed by the public records.” ..... 6

        2. Claims related to the boundary issue revealed by a post-policy survey are expressly excluded by the Policy..... 7

        3. Reformation of an existing easement so that it burdens Petitioners’ Lot instead of an adjacent lot is a defect, encumbrance, adverse claim or other matter” attaching or created post-policy..... 9

CONCLUSION ..... 10

**TABLE OF AUTHORITIES**

**Cases**

*Baugh Construction Co. v. Mission Ins. Co.*, 836 F.2d 1164, 1168 (9th Cir. 1988) ..... 10

*Dickins v. Stiles*, 81 Wn.App. 670, 672-73, 916 P.2d 435, 437 (1996) (emphasis added) ..... 5, 8

*Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 1 P.3d 1167 (2000)..... 4

*Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998)..... 5

**Statutes**

RCW § 65.04.045(f) ..... 7

### **IDENTITY OF RESPONDENT**

Ticor Title Insurance Company (“Ticor”) is a California corporation registered with the Washington State Office of the Insurance Commissioner.

### **COURT OF APPEALS DECISION**

The Court of Appeals affirmed the trial court’s summary dismissal of the complaint in its unpublished opinion entered on June 26, 2007. On July 12, 2007, Dale Campbell and Tina Fereira (“Petitioners”) moved the Court of Appeals for reconsideration. On August 23, 2007, more than twenty days after the opinion was entered, Petitioners moved the Court of Appeals to publish the June 26, 2007, opinion. After filing their motion to publish, Petitioners requested a retroactive extension be applied to their untimely motion to publish. The Court of Appeals denied Petitioners’ motion for reconsideration. Petitioners’ extension request for the filing of their motion to publish was denied on October 18, 2007.

### **ISSUES PRESENTED FOR REVIEW**

- A. Whether Petitioners have established grounds for discretionary review under RAP 13.4 where the lower court’s decision was based on well-established Washington law and the Petitioners’ argument requires this court to rewrite the complaint in the underlying action.
- B. Whether title insurance exceptions and exclusions triggered by a broad reading of the third-party complaint against the insureds relieve insurer of its duty to defend against the adverse claims?

### STATEMENT OF THE CASE

On or about March 14, 2001, Plaintiffs/Appellants/Petitioners Dale Campbell and Tina Feriera purchased a Standard Title Insurance Policy from Ticor for real property in Stevens County described as Lot A. CP at 58. Over a year later, a survey of an adjacent lot revealed a boundary discrepancy. CP at 17, ¶ 6.6. In late 2004 or early 2005, Jerry Edwards purchased property in Stevens County described as Lot C. CP at 9, ¶ 1.13. Mr. Edwards' property is benefited by a pedestrian easement that expressly describes Lot B as the burdened property. CP 40. On or about November 15, 2005, Jerry Edwards filed a complaint in Stevens County seeking, in part, reformation of the pedestrian easement such that the easement, as reformed, would burden Lot A (the Petitioners' Lot) instead of Lot B (as written). CP at 6-19. In filing his Complaint, Mr. Edwards relied on the boundary discrepancy revealed in the 2002 survey. CP at 17, ¶¶ 6.6-6.7. Petitioners were named as defendants in the Edwards' Complaint. CP at 7, ¶¶ 1.5, 1.6.

Petitioners' tendered the claim to Ticor and Ticor denied that it had a duty to defend based upon express exceptions and exclusions in the Title Policy applicable from a broad reading of the Edwards' Complaint. CP at 65. In pertinent part, the Standard (not extended) Policy obtained by Petitioners expressly provides that Ticor "does not insure against loss or damage (and the company will not pay costs, attorney's fees or expenses) which arise by reason of . . . C) easements, prescriptive rights, rights of

way, streets, roads, alleys or highways not disclosed by the public record.” CP 59, ¶ C; CP 65-66. Also excepted are “[e]ncroachments and questions of location, boundary and area disclosed only by inspection of the premises or by survey.” CP 59, ¶ B. Further, the Policy expressly excludes “[d]efeats, liens, encumbrances, adverse claims or other matters. . . (b) attaching or created subsequent to the date of the policy.” CP 55, ¶3(d); CP 66.

### ARGUMENT

Under the Policy, Ticor had no duty to defend Petitioners against a post-policy attempt to reform an existing easement burdening another parcel to burden the Petitioners’ Lot. First, the easement recorded against another lot (Lot B) was not disclosed by the public records as an instrument implicating the Petitioners’ Lot (Lot A) by the terms of the Policy. Second, reforming an existing easement to burden the insured Lot post-policy is an encumbrance attaching or created subsequent to the Date of Policy and thus excluded. *See* CP at 55. Third, the discrepancy between the legal descriptions and the location of the pedestrian easement across Lot B were revealed by a post-policy survey and the Policy expressly excepts “[e]ncroachments and questions of location, boundary and area disclosed only by inspection of the premises or by survey.” CP 59, ¶ B.

In Washington, it is well-established that a title insurer has no duty to defend claims that are not covered by the policy. Petitioners' request for discretionary review should be denied.

**A. The Trial Court and the Court of Appeals Decisions were Based on Well-Established Washington Law and Petitioner's Request for Review is Not Warranted Under RAP 13.4(b).**

The parties agree on the applicable legal standards, however, they disagree when actually applying those standards to the undisputed facts. For example, under Petitioners' theory an insurer has a duty to defend until a trial on the merits on the underlying action is completed. *See* Petition, p. 9 (arguing that the "court in the Edwards action might rule" on issues not alleged by Edwards, thus, Ticor could not make a determination on its duty to defend from the Complaint). This is simply not the law in Washington. *See Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 1 P.3d 1167 (2000) (affirming the grant of summary judgment to the insurer based on a policy exclusion clearly and unambiguously barring coverage, thus the duty to defend was never triggered). The Petitioners' argument would require this Court to rewrite the Edwards' Complaint to trigger coverage under the Policy and is contrary to the authority cited by both parties that the duty to defend arises if a complaint against the insureds "alleges facts which, if proved, would render the insurer [Ticor]

liable for indemnification of the insured [Petitioners].” *Dickins v. Stiles*, 81 Wn.App. 670, 672-73, 916 P.2d 435, 437 (1996).

**B. There is no duty to defend against claims expressly excepted and excluded by the Policy.**

The parties agree that “an insurer has no duty to defend claims that are not covered by the policy.” *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998); Petition, p. 4. The parties further agree on the allegations of the Complaint filed against Petitioners by third-party Edwards. *See* Petition, p. 2 (admitting the “legal description contained in the ‘Declaration of Pedestrian Easement’ states that Lot C [the Edwards’ Lot] is granted an easement over ‘Lot B’ [the Gromo Lot]” and the Complaint alleges that an error in drafting resulted in the incorrect lot being described). However, Petitioners then criticize the Court of Appeals claiming that its opinion was predicated solely upon the relief sought in the Edwards’ Complaint. Petitioner cites no authority that consideration of the relief sought is error and further fails to address factual allegations made by Mr. Edwards that clearly remove the claims from the Policy. For example, allegations in the Edwards’ Complaint include the following:

- Edwards agreed to purchase real property in Deer Lake, Washington described as “Parcel C of Amended Short Plat No. ASP 28-79, located in Section 1, Township 30 North, Range 41, East W.M., in Stevens County. . . .” CP at 9, ¶ 1.13.

- This property was benefited by a pedestrian easement across a portion of “Section 1, Township 30 North, Range 41 East, W.M., in Stevens County Washington designated as Lot B of Amended Short Plat No. ASP 28-79. . . .” CP at 9-10, ¶ 1.14; CP 40.
- Petitioner Campbell became aware of a problem with the legal description of the easement from a post-policy survey of the properties. CP at 10, ¶ 1.17; CP 17, ¶¶ 6.6-6.7.
- The original grantor of the Petitioners’ property and the adjacent property “erred in drafting the legal descriptions” and the same should be “corrected and reformed. . . .” CP at 17, ¶ 6.9.

Assuming these allegations are true, the claims asserted by Mr. Edwards are excepted and excluded by the Policy as discussed below.

1. An easement that expressly burdens property other than that covered by the Policy is not an easement “disclosed by the public records.”

Petitioners’ argue that because the easement burdening an adjoining lot was recorded, claims to reform that easement to burden Petitioners’ lot are “disclosed by the public records.” *See* Petition, p. 8. Such an argument can only be made by disregarding the Policy itself. As written, the Policy only applies to “Lot(s) A of Amended Short Plat No. ASP 28-79, located in Section 1, Township 30 North, Range 41, East, W.M., in Stevens County, Washington. . . .” CP at 58. The Policy defines “public records” as “records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters

relating to real property to purchasers for value and without knowledge.” CP 55. There is no dispute that the easement does not describe the property covered by the Policy. *Compare* CP at 40 *with* CP at 58. Further, the parties cannot dispute that Washington law requires that recorded instruments contain a legal description of the property conveyed or encumbered. RCW § 65.04.045(f). Nonetheless, Petitioners urge a departure from this well-established Washington rule and the adoption of a new rule that any recorded document (describing any property) must be expressly called out in the title insurance policy to be excluded or exempted.

Despite the policy exceptions and exclusions applied by the trial court and court of appeals, Petitioners fail to address the Policy provision excepting “[e]ncroachments and questions of location, boundary and area disclosed only by inspection of the premises or by survey” (CP 59, ¶ B) and “[d]efeats, liens, encumbrances, adverse claims or other matters. . . (b) attaching or created subsequent to the date of the policy.” CP 55, ¶3(d); CP 66. These Policy provisions provide independent grounds to affirm the Court of Appeals.

2. Claims related to the boundary issue revealed by a post-policy survey are expressly excluded by the Policy.

Based on Mr. Edwards’ allegations, a question about whether the easement, as written, burdened the proper property first arose after Ramer and Associates conducted a survey in 2002. CP at 17, ¶ 6.6. This survey

was recorded on June 4, 2002. CP at 17, ¶¶ 6.6, 6.7. The date of the Title Insurance Policy was March 14, 2001 – over a year before the survey. CP at 15. Under the Policy’s Schedule B, there is no duty to defend against “[e]ncroachments and questions of location, boundary and area disclosed only by inspection of the premises or by survey.” CP at 59<sup>1</sup> (emphasis added).

Petitioners’ Policy provided only standard (not extended) coverage. *See Dickins v. Stiles*, 81 Wn.App. 670, 672-73, 916 P.2d 435, 437 (1996). Under such a policy a Schedule B contains standard exceptions including exceptions for off-record defects. *Id.*; CP at 59. Extended coverage policies omit the standard Schedule B exceptions. *Id.* Petitioners cannot now obtain extended coverage—something they did not bargain for. *See* Schedule B, CP at 59 (Ticor “does not insure against loss or damage (and the Company will not pay costs, attorneys’ fees or expenses) which arise by reason of . . . [e]asements, prescriptive rights,

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<sup>1</sup> Schedule B of the policy provides:

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys’ fees or expenses) which arise by reason of:

GENERAL EXCEPTIONS:

. . . B. Encroachments and questions of location, boundary and area disclosed only by inspection of the premises or by survey.

rights-of-way, streets, roads, alleys or highways not disclosed by the public records” or “[e]ncroachments and questions of location, boundary and area disclosed only by inspection of the premises or by survey.”)

3. Reformation of an existing easement so that it burdens Petitioners’ Lot instead of an adjacent lot is a defect, encumbrance, adverse claim or other matter” attaching or created post-policy.

Post-policy reformation does not trigger a duty to defend because the encumbrance necessarily is created or would attach after the date of the Policy. *See* CP at 55<sup>2</sup>. Edwards’ Complaint against Petitioners does not assert that a recorded document affects the Petitioners’ property, instead it seeks reformation to have an existing instrument rewritten based on a claimed “mistake” in the drafting of the previous legal description. There is no dispute that at the time the Policy was issued the easement in question described the burdened property as a parcel other than the Petitioners’ parcel. The Standard Title Insurance Policy purchased by

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<sup>2</sup> Policy Exclusions from Coverage providing:

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

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

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

Petitioners expressly excepts and excludes such claims.

On its face the Edwards' Complaint, assuming the allegations thereof are proved, states facts that fall clearly within multiple policy exclusions and exceptions. Therefore, by the plain language of the policy, the company will not pay fees or costs incurred in defending against such claims. *See Baugh Construction Co. v. Mission Ins. Co.*, 836 F.2d 1164, 1168 (9th Cir. 1988) (interpreting Washington Law and noting that "[i]f, however, the allegations assert a claim that is not covered by the policy or bring the claim clearly within a policy exclusion, there is no duty to defend").

#### CONCLUSION

Given the express provisions of the Standard Policy at issue and a broad reading of the third-party complaint against the insureds there is no duty to defend and Petitioners' request for review should be denied.

DATED this 17th day of January, 2008.

Respectfully submitted,

KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP

By   
Brooke Castle Kuhl, WSBA #35727  
Attorneys for Respondent  
Ticor Title Insurance Company