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SUPREME COURT  
STATE OF WASHINGTON  
6/28/2019 2:45 PM  
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No. 96726-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

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MASON COUNTY TITLE INSURANCE COMPANY;  
and RETITLE INSURANCE COMPANY,

Petitioner,

v.

LESLIE W. ROBBINS AND HARLENE E. ROBBINS,

Respondents.

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**SUPPLEMENTAL BRIEF**

**OF**

**LESLIE W. ROBBINS AND HARLENE E. ROBBINS**

---

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## **I. INTRODUCTION**

Leslie W. and Harlene E. Robbins submit this supplemental brief.

This Court should affirm the Court of Appeals' decision that ReTitle Insurance Company, formerly Mason County Title Insurance Company (hereinafter "the insurer"), breached its duty to defend the Robbinses against the Squaxin Island Tribe's demand that the Robbinses recognize the tribe's right to harvest shellfish from the Robbinses' property. In addition, because the Robbinses moved for summary judgment on liability, and because the insurer failed to prove up any affirmative defenses to liability, this Court should hold that the insurer may no longer assert those affirmative defenses. Finally, this Court should award the Robbinses their attorney's fees and costs.

## **II. ASSIGNMENT OF ERROR**

The Robbinses moved for a summary judgment on the issue of liability. In response, the insurer did not attempt to prove up the elements of any of the affirmative defenses it had pled to liability. Did the Court of Appeals err in holding that the insurer still had the right to raise these defenses?

Short Answer: Yes.

### III. FACTS

A. Title policy imposes duty to defend.

In June, 1978, the insurer issued the Robbinses a policy of title insurance. The policy insured Leslie W. Robbins and Harlene E. Robbins against any defect, lien or encumbrance in their "fee simple estate" in property, including tidelands, located in Mason County. CP 229-32 (Appendix A).

The policy broadly obligates the insurer to defend the Robbins against any "demand" asserting a right inconsistent with the title as insured:

1. The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein; . . .

CP 232.

The title insurer had issued other insureds policies that explicitly excluded claims based on "Indian Treaty or aboriginal rights." CP 49. However, nothing in the policy issued the Robbinses mentions or purports to exclude such claims. CP 229-32.

The Robbinses for many years entered into contracts whereby they leased the right to harvest shellfish from their property to private commercial shellfish harvesters, in exchange for which they received payment from said shellfish harvesters. CP 224-25. The Robbinses again entered into such a contract with a shellfish harvester in 2016. CP 225.

B. Tribe's demand.

In July, 2016, the Squaxin Island Tribe demanded the Robbinses recognize the tribe's claimed right, pursuant to the 1854 Treaty of Medicine Creek, to come on the Robbinses' property and harvest shellfish. Treaty: 10 Stat. 1132 (CP 65-71) (Appendix B); Tribe's demand: CP 241-42.

C. Insurer refuses to defend.

The Robbinses promptly notified their title insurer of the tribe's demand and requested that the title insurer defend them. CP 236-42. The title insurer refused to do so. CP 243-45.

D. Lawsuit.

The Robbinses filed a lawsuit against the title insurer in Mason County Superior Court, alleging that the insurer had breached its duty to defend the Robbinses against the tribe's demand. CP 315-45. On cross-motions for summary judgment, the trial court entered judgment in favor of the insurer. CP 4-5. The Robbinses timely appealed. CP 346-49.

E. Court of Appeals: insurer breached duty to defend in bad faith.

The Court of Appeals reversed the Superior Court's decision, holding that the title insurer had breached its duty to defend the Robbinses, and had done so in bad faith. *Robbins v. Mason County Title*, 5 Wn.App. 2d 68, 425 P.3d 885 (2018).

The Court of Appeals first articulated the generally applicable legal standard: A title insurer must defend if its policy "*conceivably covers*" the allegations made against its insured. 5 Wn.App. 2d at 76, ¶18, citing *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 471, 209 P.3d 859 (2009); *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010); *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007) (italics in original).

The Court of Appeals noted that the insurer had expressly agreed to defend the Robbinses against "all **demands** . . . founded upon a claim of encumbrance." 5 Wn.App. 2d at 76, ¶20 (emphasis added). The Court of Appeals held that the tribe's demand that the Robbinses recognize the tribe's right, pursuant to the Treaty of Medicine Creek, to come upon the Robbinses' property and take shellfish, constituted such a "demand." *Id.* at 77, ¶22. The Court of Appeals further held that the tribe claimed an "encumbrance," inasmuch as the tribe-claimed right was a "burden upon the land depreciative of its value, . . . which though adverse to the interests of the landowner, does not conflict with his conveyance of the land in fee." *Id.* at 77, ¶24 (quoting *Hebb v. Severson*, 32 Wn.2d 159, 167, 201 P. 2d 156 (1948)).

Next, the Court of Appeals analyzed and rejected the insurer's claim that a general exception in its policy for "public or private **easements** not disclosed by the public records" applied to negate coverage. *Id.* at 79-82, ¶29-

35 (emphasis added). Because the tribe asserted an aboriginal right on the part of individual tribal members to come upon and harvest shellfish from the property, the Court of Appeals held that the tribe's asserted right resembled a *profit a prendre* rather than an easement. *Id.* at 81, ¶34. The Court of Appeals therefore concluded the general exception did not apply, such that "the policy conceivably provides coverage." *Id.* at 82, ¶35, citing *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 229 P.3d 693 (2010). Therefore, the Court of Appeals held that the insurer should have defended the Robbinses against the tribe's demand. *Id.*

The Court of Appeals then held that the insurer had breached its duty to defend in bad faith, such that it was estopped from denying coverage. 5 Wn.App. 2d at 82-83, ¶36-39. The Court of Appeals held that, under Washington law, when an insurer's policy "conceivably covers" a claim, the insurer must provide a defense under a reservation of rights, while (if it wishes) seeking a declaratory judgment as to whether the insurer in fact it owes a duty to defend. *Id.* at 82, ¶37-38. Because the insurer did not follow this mandated procedure, the Court of Appeals held that the insurer acted unreasonably and in bad faith. *Id.* at 83, ¶40. Following *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 951 P.2d 1124 (1998), the court presumed harm. *Id.* Therefore, the Court of Appeals held that the insurer, having acted

unreasonably and in bad faith in refusing to defend, was estopped from denying coverage. *Id.*

Finally, the Court of Appeals addressed the affirmative defenses<sup>1</sup> that had been pled by the insurer. Ignoring the fact that the Robbinses had explicitly moved the superior court for the entry of a judgment finally determining that the insurer "must pay the Robbins for all loss or damage they sustain as a result of the Tribe's claim" (CP 252), the Court of Appeals incorrectly ruled that the Robbinses "did not seek summary judgment on any of [the insurer's] affirmative defenses." 5 Wn.App. 2d at 84, ¶44. Therefore, the Court of Appeals held that the insurer's "affirmative defenses are yet to be decided." *Id.* at 85, ¶47. The Court of Appeals accordingly denied the Robbinses' request for attorney's fees. *Id.* at 85, ¶48.

#### IV. ANALYSIS

A. The policy imposed an extremely broad duty on the insurer to defend the Robbinses. This duty extended to "demands" made prior to the initiation of legal proceedings.

The policy imposed an extremely broad duty on the insurer to defend the Robbinses:

The company . . . will, at its own expense, defend the insured with respect to **all demands** . . . founded upon a claim of title, encumbrance or defect which existed or is claimed to have

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<sup>1</sup> In its answer, the insurer had recited a laundry list of affirmative defenses, including (a) statute of limitations; (b) laches; (c) waiver; (d) failure to mitigate damages; (e) failure to submit proof of loss; (f) failure to state a claim; (g) failure to state a cause of action; (h) election of alternative remedies; and (i) plaintiffs have suffered no damages. CP 303.

existed prior to the date hereof and is not set forth or excepted herein; . . .

CP 232 (emphasis added). By its plain language, the insurer's duty to defend extends to "demands" made prior to the initiation of legal proceedings.

In arguing that it need only defend against legal proceedings, the insurer cites to cases involving comprehensive general liability insurance policies, the language of which only requires the insurer to defend against a "suit." See, e.g., *Unigard Ins. Co. v. Leven*, 97 Wn.App. 417, 425, 983 P.2d 115 (1999) (cited in the insurer's Petition for Review at p. 8) (where policy only required insurer to defend against "any **suit** against the Insured," insurer had no duty to defend until such **suit** actually filed) (emphasis added). See also *American Best Food*, 168 Wn.2d at 403 (tender after "suit" actually filed).

However, Washington courts have squarely held that where the policy by its plain language requires an insurer to defend prior to the initiation of a "suit," the insurer must do so. *United Services Auto. Ass'n v. Speed*, 179 Wn.App. 184, 195 ¶18, 317 P.3d 532 (2014) (when insurance policy requires insurer to defend against "claims," insurer must step in and provide the insured with a defense in response to such a claim even prior to the formal initiation of legal proceedings).

Because the cases relied on by the insurer involve substantially different policy language, they are irrelevant here. Under the clear language

of the Robbinses' policy, the insurer had the duty to defend the Robbinses against the tribe's demand.

B. An attorney would have materially assisted the Robbinses in responding to the tribe's demand.

The insurer also argues that its failure to defend should be excused because there was nothing for an attorney to do. See Insurer's Supplemental Brief, p. 2-6. This is absurd. An attorney could have assisted the Robbinses in responding to the tribe's demand.

The Robbinses squarely explained to the trial court<sup>2</sup> how the insurer's provision of an attorney in response to their demand for a defense would have assisted them:

Had the title insurer responded to our request for a defense against the Squaxin Island Tribe's claim by providing us with counsel, we may have been successfully able to assert defenses to the Squaxin Island Tribe's claim, or at least negotiated with them in order to minimize the amount of shellfish that the Tribe will be taking from our property. For example, Mr. Hall [the commercial shellfish harvester to whom the Robbins had most recently leased the right to harvest shellfish from their tide lands] asserted that there was a basis for asserting that there was not a naturally existing bed of manila clams on our property which would mean that the Tribe is not entitled to harvest such clams from our property . See Exhibit C.

However, because the title insurer refused to provide us with an attorney to defend us against the Squaxin Island Tribe's claim, and because my wife and I are of limited means, we determined that we could not afford an attorney at our own expense to pursue these issues. Instead, we simply agreed to

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<sup>2</sup> Contrary to the insurer's representation to this Court, see Supplemental Brief at p. 3-4, the Robbinses squarely raised this issue before the trial court.

permit the Tribe to harvest shellfish in amounts to which the Tribe has asserted it is entitled.

CP 226 (Declaration of Leslie W. ("Bill") Robbins, ¶14-15).

What the insurer is really attempting to assert is that its failure to provide the Robbinses with counsel did not harm them. As this Court has recognized, when an insurer unreasonably/in bad faith refuses to defend its insured, harm is presumed. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 562-63, 951 P.2d 1124 (1998). An insurer faces "an almost impossible burden" to establish otherwise. *Mutual of Enumclaw v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 921 ¶36, 169 P.3d 1 (2007). Having completely failed to respond to the Robbinses' explanation of how an attorney would have assisted them in responding to the tribe's demand, the insurer plainly has not met this "almost impossible burden."

The insurer had a duty to defend the Robbinses in response to the tribe's demand. The insurer cannot justify its failure to do so based on the wholly-unsupported claim that the provision of defense counsel would have been of no assistance to the Robbinses.

C. The Court of Appeals correctly held that the general exception for "easements not disclosed by the public records" did not apply.

The Court of Appeals correctly held that the general exception for "easements not disclosed by the public records" did not apply.

The insurer had the burden of establishing that its policy did not conceivably cover the Robbinses against the tribe's demand. The insurer did not meet that burden.

1. Under *American Best Food*, the insurer had the burden of establishing that the policy did not *conceivably cover* the Robbinses against the tribe's demand.

An insurer takes a "great risk" when it refuses to defend its insured. *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 182, ¶23, 400 P.3d 1234 (2017). An insurer is entitled to refuse to defend only if its policy does not conceivably cover a claim. *Xia*, 188 Wn.2d at 182, ¶22; *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 404 ¶6, 229 P.3d 693 (2010).

In deciding whether to defend, the insurer must give its insured the benefit of any dispute or ambiguity about either the facts or the applicable law. *Xia*, 182, ¶23; *American Best Food*, 405, ¶7. If the policy conceivably covers the claim, the insurer must provide a defense; but it then may initiate a declaratory judgment action to ask a court to resolve the dispute or uncertainty. *American Best Food*, 405, ¶7. But as long as the policy conceivably covers the claim, an insurer may not refuse to defend its insured, and acts in bad faith as a matter of law if it does so. *American Best Food*, 413, ¶ 20; *Xia*, 190, ¶42.

The insurer has not challenged the Court of Appeals' holding that these standards applied to this case.

2. The title policy conceivably covered the Robbinses against the tribe's demand.

First, the tribe was not claiming an "easement." Second, the basis for the tribe's claim was the Treaty of Medicine Creek, a matter "disclosed by the public records."

a. The general exception only applies to "easements," and the Court of Appeals correctly ruled that the tribe's aboriginal claim was in the nature of a *profit a prendre*, not an "easement."

The Court of Appeals correctly held that the general exclusion applicable to "easements" did not negate coverage for the Robbinses' claim.

"A servitude is a legal device that creates a right or obligation that runs with the land." *Lake Limerick Country Club Ass'n v. Hunt Mfd. Homes, Inc.*, 120 Wn.App. 246, 253, 84 P.3d 295 (2004); see also Black's Law Dictionary at 1577 (defining "servitude" as "an encumbrance consisting in a right to the limited use of a piece of land or other immovable property without the possession of it," and noting that servitudes include easements, licenses, profits, and real covenants). Easements and *profits a prendre* are two different forms of servitude. *Id.*

An easement is a right, typically running with the ownership of an adjoining piece of property, to make some use of the property burdened by the easement. *Beebe v. Swerda*, 58 Wn.App. 375, 381, 793 P.2d 442 (1990). A *profit a prendre*, in contrast, is a right, usually held by an individual, to come

upon property and carry off its soil, or the products of its soil. 17 Stoebuck and Weaver, Wash. Prac.: Real Estate: Property Law (2004), §2.1 at 80.

Here, the general exception applied only to easements. CP 232. The policy did not define this term. *Id.* The policy therefore had to be strictly construed against the insurer as applying to easements only, and not to other forms of servitude. *Robbins*, 5 Wn.App. 2d at 81-12, ¶ 34.

The tribe claimed a right—retained by each member of the tribe individually pursuant to the Treaty of Medicine Creek—to come upon the Robbinses' property and carry off shellfish, a product of the property's soil. The Court of Appeals correctly held that the tribe's claim was in the nature of a *profit a prendre*, rather than in the nature of an easement. 5 Wn.App. 2d at 81-82, ¶34. Therefore, the policy's general exception conceivably did not apply, such that the insurer should have defended the Robbinses against the tribe's demand. See 5 Wn.App. 2d at 82, ¶35.

b. Because it was based on rights derived from a federal treaty published in the United States statutes at large, the tribe's claim was also based on a matter "disclosed by the public record."

Because it found that the tribe was asserting rights that were not subject to the general exclusion applicable only to easements, the Court of Appeals did not reach the Robbinses' alternative argument. See Robbins, 5 Wn.App. 2d at 79, ¶29. The general exception only applied to easements "not disclosed by the public records." CP 232. Because the tribe's claim was based

on a treaty adopted and published by Congress, the basis for the tribe's claim was "disclosed by the public records."

After Congress ratified the Treaty of Medicine Creek, Congress had the Treaty published in its official compilation of United States Statutes at large. 10 Stat. 1132 (CP 65-71) (Appendix B). The effect of the treaty's publication was to provide constructive notice of the Treaty's terms to all the world. 1 U.S.C. §113 (CP 73) (Appendix C); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) ("[E]veryone is charged with knowledge of the United States Statutes at Large . . ."),

The Alaska Supreme Court has held that an officially published federal order that provides constructive notice constitutes a "public record" under the recording laws for purposes of an identically-worded title policy. *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (1976) (CP 200-204). The insurer can point to no contrary on-point case.

Under *American Best Food* and *Xia*, an insurer must resolve all doubts about the law in the insured's favor, and must defend as long as its policy *conceivably provides* coverage. In light of the Alaska Supreme Court's directly on-point decision in *Hahn*, the insurer's policy conceivably covered the Robbinses against the tribe's demand. Therefore, the insurer should have defended the Robbinses against the tribe's demand. For this second, separate and independent reason, the insurer breached its duty to defend the Robbinses.

D. The Court of Appeals correctly held that the insurer acted in bad faith in refusing to defend.

The Court of Appeals next correctly held that the insurer acted in bad faith in refusing to defend. 5 Wn.App. 2d at 82-83, ¶36-40.<sup>3</sup>

Washington law unequivocally imposes a duty upon the insurer to provide a defense in any situation where the policy conceivably covers a claim. *American Best Food*, 168 Wn.2d at 412-13. In both *American Best Food*, and in *Xia*, this Court held that insurers who fail to recognize or fail to correctly apply this legal standard act in bad faith as a matter of law. *American Best Food*, 168 Wn.2d at 413, ¶ 20; *Xia*, 188 Wn.2d at 189, ¶39-41.

Here, the Court of Appeals held that the insurer should have recognized that "its policy exception for easements was at best ambiguous in its application." 5 Wn.App. 2d at 83, ¶40. The Court of Appeals therefore correctly held that the insurer had refused to defend in bad faith as a matter of law.

In its Petition for Review, the insurer has asserted that there is a conflict between this Court's decision in *American Best Food*, and this Court's

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<sup>3</sup> The insurer claims that the "Robbins did not ask the trial court to determine that [the insurer] had acted in bad faith." Insurer's Petition, p. 10. The Robbinses moved the Superior Court for a declaration, on summary judgment, that "the title insurer must pay the Robbins for all loss or damage they sustained as a result of the [t]ribe's claim." CP 252. The Robbinses squarely argued that the insurer's refusal to defend was unreasonable, occurred in bad faith, and resulted in an estoppel to deny coverage. CP 261-262, 272. See also CP 15-16. The insurer's claim that the Robbinses did not raise this issue before the Superior Court, and also before the Court of Appeals, is wholly without merit.

earlier decision in *Truck Insurance Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). There is no conflict.

In *Truck*, this Court held that an insurer who had failed to provide any meaningful explanation of its refusal to defend its insured acted in bad faith as a matter of law. *Truck* thus addressed an independent ground for finding bad faith. *Truck* is not inconsistent with either the rationale or the holding of *American Best Food*.

Finally, the Court of Appeals correctly held the insurer's bad faith refusal to defend prejudiced the Robbinses. Where an insurer acting in bad faith refuses to defend its insured, this Court has required that harm be presumed. *Robbins*, 5 Wn.App. 2d at 83, ¶39, citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563, 951 P.2d 1124 (1998).

Here, the insurer's provision of a defense to the Robbinses would certainly have been of benefit to them. For example, an attorney could have assisted the Robbinses in determining: (1) whether the Robbinses' property was in fact part of the tribe's usual and accustomed fishing grounds; (2) whether the tribe's rights extended to Manila clams located on the Robbinses' property; and (3) what portion of the shellfish on the Robbinses' property were "naturally occurring." See CP 226 (Declaration of Leslie Robbins at ¶14).

The burden was on the insurer, who acted in bad faith, to prove "beyond dispute" that its refusal to provide a defense caused no harm

whatsoever to the Robbinses. *Kirk*, 134 Wn.2d at 563-65. The insurer failed to take that burden seriously, much less to meet it. The Court of Appeals correctly held that the insurer's bad faith refusal to defend harmed the Robbinses, such that the insurer is now estopped to deny coverage. 5 Wn.App. 2d at 83, ¶17.

In sum, this Court should affirm the Court of Appeals' well-reasoned decision that the title insurer acted in bad faith in refusing to defend the Robbinses, such that the insurer is estopped to deny coverage.

E. Because the Robbinses moved for summary judgment as to liability, the insurer had the burden, but failed, to show that there was a genuine issue of material fact with respect to its affirmative defenses to liability.

The Court of Appeals, however, erred in holding that the insurer still could assert affirmative defenses. See 5 Wn.App. 2d at 83-85, ¶41-47. Because the Robbinses moved for summary judgment as to liability, the insurer had the burden, but failed, to show that there was a genuine issue of material fact with respect to its affirmative defenses to liability.

A plaintiff may move for summary judgment upon the issue of liability as a matter of law. CR 56(a); CR 56(c) (last sentence) (plaintiff may move for, and court may enter, summary judgment on the issue of liability). Nothing in these rules requires a plaintiff to also explicitly ask for dismissal of affirmative defenses pled as a defense to liability.

Here, the Robbinses squarely moved for summary judgment on liability. They asked the Superior Court to declare that "the title insurer must pay the Robbinses for all loss or damage they sustained as a result of the tribe's claim." CP 252.

Once the Robbinses moved for summary judgment as to liability, the insurer had the burden of establishing why the Court should not hold it liable. This included the burden of producing evidence supporting each element of each of its affirmative defenses—on which it had the burden of proof—to the extent the insurer asserted them as a defense to liability. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840-42, 100 P.3d 791 (2004). The insurer failed to do this.

The Court of Appeals held that the Robbinses, in moving for summary judgment, had, in addition to asserting they were entitled to summary judgment on liability, to also explicitly request the Superior Court to dismiss the insurer's affirmative defenses. 5 Wn.App. 2d at 84, ¶46. Nothing in CR 56 imposes such a burden upon a claimant moving for summary judgment on liability. The Court of Appeals cited no case authority in support of, and offered no rationale for imposing, such a novel and extraordinary requirement. If not reversed, the Court of Appeals holding will only serve as a trap for the

unwary, needlessly prolonging the resolution of disputes in which there are no genuine issues of fact.

The Court should reverse the Court of Appeals decision on this issue. It should hold that the Robbinses have established the insurer's bad faith liability, and the insurer, by failing to prove up its affirmative defenses in response to the Robbinses' motion for summary judgment on liability, lost them.

F. The Robbinses are entitled to attorney's fees and costs.

Finally, the Court should award the Robbinses their reasonable attorney's fees and costs. The Robbinses are entitled to an award of the reasonable fees and costs in this coverage case under *Olympic Steamship* and because they have established that the insurer unreasonably denied coverage within the meaning of the Insurance Fair Conduct Act. *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991); RCW 48.30.015(3).

## V. CONCLUSION

As long as its policy conceivably covered the demand made against the Robbinses by the tribe, the insurer had the duty to defend the Robbinses against that demand.

The general exception for "easements disclosed by the public records" does not negate coverage. First, the tribe was not asserting rights in the nature

of an easement. Second, the tribe's claim was based on a federal treaty of public record.

The Court of Appeals decision holding that the insurer breached its duty to defend the Robbinses, did so unreasonably and in bad faith, and is therefore estopped to deny coverage, should be affirmed.

Because the Robbinses moved for summary judgment on liability, the insurer had the burden of submitting evidence in support of each element of each of its affirmative defenses it had pled as a defense to such liability. The insurer did not submit such evidence. Therefore, this Court should reverse the Court of Appeals decision that the insurer could still raise affirmative defenses to liability.

Both pursuant to *Olympic Steamship*, and under the Insurance Fair Conduct Act, the Court should award the Robbinses their reasonable attorney's fees and costs.

OWENS DAVIES, P.S.



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Matthew B. Edwards, WSBA No. 18332  
Attorney for Respondents Leslie W. Robbins  
and Harlene E. Robbins

V. APPENDIX

A	Title Insurance Policy	CP 229-232
B	Treaty of Medicine Creek, 10 Stat. 1132	CP 65-71
C	1 U.S.C. §113	CP 73
D	<i>Robbins v. Mason County Title</i> 5 Wn.App. 2d 68, 425 P.3d 885 (2018)	

# **APPENDIX A**

**Title Insurance Policy  
CP 229-232**

POLICY OF TITLE INSURANCE

5747

MASON COUNTY TITLE INSURANCE COMPANY

Title Insurance Building  
Shelton, Washington

hereinafter called the Company, a Washington corporation, for valuable consideration, and subject to the conditions and stipulations of this policy, does hereby insure the person or persons named in item 1 of Schedule A, together with the persons and corporations included in the definition of "the insured" as set forth in the conditions and stipulations, against loss or damage sustained by reason of:

- 1. Title to the estate, lien or interest defined in items 3 and 4 of Schedule A being vested, at the date hereof, otherwise than as stated in item 2 of Schedule A; or
- 2. Any defect in, or lien or encumbrance on, said title existing at the date hereof, not shown in Schedule B; or
- 3. Any defect in the execution of any instrument shown in item 3 of Schedule A, or priority, at the date hereof, over any such instrument, of any lien or encumbrance not shown in Schedule B;

provided, however, the Company shall not be liable for any loss, damage or expense resulting from the refusal of any person to enter into, or perform, any contract respecting the estate, lien or interest insured.

The total liability is limited to the amount shown in Schedule A, exclusive of costs incurred by the Company as an incident to defense or settlement of claims hereunder.

*In witness whereof*, MASON COUNTY TITLE INSURANCE COMPANY has caused this policy to be authenticated by the facsimile signature of its President, but this policy is not valid unless attested by the Secretary or an Assistant Secretary.

MASON COUNTY TITLE INSURANCE COMPANY

By *[Signature]*

President

Attest:

*[Signature]*  
Assistant Secretary

EXHIBIT

A

SCHEDULE A

), 42134  
DATE JUNE 12, 1978 at 8:00 A.M.

AMOUNT \$ 89,000.00  
PREMIUM \$ 351.00

1. INSURED

LESLIE W. ROBBINS and HARLENE E. ROBBINS, husband and wife.

2. TITLE TO THE ESTATE, LIEN OR INTEREST INSURED BY THIS POLICY IS VESTED IN  
ELMER RANDALL IRWIN, as his sole and separate estate.

3. ESTATE, LIEN OR INTEREST INSURED  
FEE SIMPLE ESTATE.

4. DESCRIPTION OF THE REAL ESTATE WITH RESPECT TO WHICH THIS POLICY IS ISSUED

IN MASON COUNTY, WASHINGTON.

Tracts three (3) and four (4), Plat of Skookum Point Tracts, including tidelands of the second-class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the above described tracts, as shown on said plat, according to the recorded plat thereof in the office of the Auditor for Mason County, Washington, Volume 4 of Plats, pages 54 and 55.

TOGETHER WITH a perpetual non-exclusive easement for road purposes only, over, along and across the East ten (10) feet of the South 543.04 feet of Tract two (2), Plat of Skookum Point Tracts, according to the recorded plat thereof.

SCHEDULE B

DEFECTS, LIENS, ENCUMBRANCES AND OTHER MATTERS AGAINST WHICH THE COMPANY DOES NOT INSURE:  
SPECIAL EXCEPTIONS

1. Real Estate Taxes levied for the last half of the year 1978, unpaid; original amount for said last half - \$409.63. Tray 26, page 819.
2. The within described tidelands of the second-class being subject to statutory provisions, provisions of Chapter 312 of the Session Laws of 1927, and the provisions, exceptions and reservations as expressed in the deeds from the State of Washington under which title to said tidelands is claimed, recorded in Volume 110 of Deeds, page 58, and Volume 110 of Deeds, page 467, records of Mason County, Washington, wherein the grantor saves, excepts and reserves all oils, gases, coal, ores, minerals and fossils together with the right to enter upon said lands for the

For value received, Pioneer National Title Insurance Company, a California corporation, hereby reinstates the foregoing contract of insurance.  
BY: *[Signature]*  
John S. Williamson, Vice Pr.

no rights shall be exercised under this reservation until provision has been made by the State, its successors or assigns, for full payment of all damages sustained by the owner by reason of such entering; and the right of the State of Washington, or any grantee or lessee thereof, to acquire the right-of-way over said second class tidelands for lumbering and/or logging railroads, private railroads, skid roads, flumes, water courses or other easements for the purpose of and to be used in the transportation and moving of timber, stone, minerals or other products from other lands, upon paying reasonable compensation.

3. Any prohibition or limitation on the use, occupancy or improvement of the land resulting from the rights of the public or riparian owners to use any waters which may cover the land.
4. The within described tidelands being subject to the terms and conditions of Release and Agreement of Settlement from Clarence H. Shively and Edna R. Shively, his wife, to the Rainier Pulp and Paper Company, a corporation, (now Rayonier Incorporated, a corporation), dated May 5, 1931, recorded May 18, 1931, in Volume 55 of Deeds, page 483, under Auditor's File No. 66962, releasing said corporation from all claims for damages, etc.; reference being hereby made to the record of said instrument for a particular statement of the terms and conditions thereof.
5. As to Tract three (3): Subject to perpetual non-exclusive easement for road purposes only, over, along and across the West ten (10) feet of the South 543.04 feet thereof.
6. Contract of Sale, Elmer Randall Irwin, vendor, to Leslie W. Robbins and Harlene E. Robbins, husband and wife, vendees, recorded June 9, 1978, on Reel 189, Frame 918, under Auditor's File No. 345711; said contract providing for the sale and purchase of the within described real estate upon the terms and conditions set forth in said contract; Real Estate Excise Tax paid, Receipt No. 57910.
7. NONE.

#### GENERAL EXCEPTIONS

1. Encroachments or questions of location, boundary and area, which an accurate survey may disclose; public or private easements not disclosed by the public records; rights or claims of persons in possession, or claiming to be in possession, not disclosed by the public records; material or labor liens or liens under the Workmen's Compensation Act not disclosed by the public records; water rights or matters relating thereto; any service, installation or construction charges for sewer, water or electricity.
2. Exceptions and reservations in United States Patents; right of use, control or regulation by the United States of America in the exercise of powers over navigation; limitation by law or governmental regulation with respect to subdivision, use, enjoyment or occupancy; defects, liens, encumbrances, or other matters created or suffered by the insured; rights or claims based upon instruments or upon facts not disclosed by the public records but of which rights, claims, instruments or facts the insured has knowledge.
3. General taxes not now payable; matters relating to special assessments and special levies, if any, preceding the same becoming a lien
4. Consumer credit protection, truth-in-lending, or similar law, or the failure to comply with said law or laws.

CONDITIONS AND STIPULATIONS

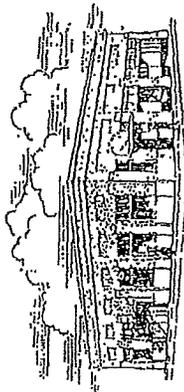
1. The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted hereinafter reserving, however, the option at any time of settling the claim or paying the amount of this policy in full. In case any such demand shall be asserted or any such legal proceedings shall be instituted the insured shall at once give notice thereof in writing to the Company at its home office and, if the insured is a party to such legal proceedings, secure to the Company, within ten days after service of first process upon the insured, the right to defend such legal proceedings in the name of the insured so far as necessary to protect the insured, and the insured shall render all reasonable assistance in such defense. If such notice shall not be given, or the right to defend secured, as above provided, then all liability of the Company with regard to the subject matter of such demand or legal proceedings, and any expense incident thereto, shall terminate; provided, however, that failure to give such notice shall in no case prejudice the claim of the insured unless the Company shall be actually prejudiced by such failure and then only to the extent of such prejudice.

2. In the event of final judicial determination by a court of competent jurisdiction, under which the estate, lien or interest insured is defeated or impaired by reason of any adverse interest, lien or encumbrance not set forth or excepted herein, claim may be made as herein provided. A statement in writing of any loss or damage, for which it is claimed the Company is liable, shall be furnished to the Company at its home office within sixty days after such loss or damage shall have been ascertained. No right of action shall accrue with respect thereto until thirty days after such statement shall have been furnished and no recovery shall be had unless an action shall have been commenced thereon within one year after the expiration of said thirty days. Any rights or defenses of the Company against a named insured shall be equally available against any person or corporation who shall become an insured hereunder as successor of such named insured,

3. The Company may at any time pay this policy in full, whereupon all liability of the Company shall terminate. Every payment made by the Company, exclusive of costs incurred by the Company as an incident to defense or settlement of claims hereunder, shall reduce the liability of the Company by the amount paid. The liability of the Company shall in no case exceed the actual loss of the insured and costs which the Company is obligated to pay. When the Company shall have paid a claim hereunder it shall be subrogated to all rights and remedies which the insured may have against any person or property with respect to such claim, or would have if this policy had not been issued, and the insured shall transfer all such rights to the Company. If the payment made by the Company does not cover the loss of the insured, such subrogation shall be proportionate. Whenever the Company shall be obligated to pay a claim under the terms of this policy by reason of a defect in the title to a portion of the area described herein, liability shall be limited to the proportion of the face amount of this policy which the value of the defective portion bears to the value of the whole at the time of the discovery of the defect, unless liability is otherwise specifically segregated herein. If this policy insures the lien of a mortgage, and claim is made hereunder, the Company may pay the entire indebtedness and thereupon the insured shall assign to the Company the mortgage and the indebtedness secured thereby, with all instruments evidencing or securing the same, and shall convey to the Company any property acquired in full or partial satisfaction of the indebtedness, and all liability of the Company shall thereupon terminate. If a policy insuring the lien of a mortgage is issued simultaneously with this policy and for simultaneous issue premium as provided in rate schedule, any payment by the Company on said mortgage policy with respect to the real estate described in Schedule A hereof shall reduce pro tanto the liability under this policy. All actions or proceedings against the Company must be based on the provisions of this policy. Any other action or actions or rights of action that the insured may have or may bring against the Company with respect to services rendered in connection with the issuance of this policy, are merged herein and shall be enforceable only under the terms, conditions and limitations of this policy.

4. The following terms when used in this policy mean: (a) "named insured": the persons and corporations named as insured in Schedule A of this policy; (b) "the insured": such named insured together with (1) each successor in ownership of any indebtedness secured by any mortgage shown in Item 3 of Schedule A, (2) any owner or successor in ownership of any such indebtedness who acquires title to the real estate described in Item 4 of Schedule A, or any part thereof, by lawful means in satisfaction of said indebtedness or any part thereof, (3) any governmental agency or instrumentality which insures or guarantees said indebtedness or any part thereof, and (4) any person or corporation deriving an estate or interest in said real estate as an heir or devisee of a named insured or by reason of the dissolution, merger, or consolidation of a corporate named insured; (c) "date hereof": the exact day, hour and minute specified in Schedule A; (d) "public records": records which, under the recording laws, impart constructive notice with respect to said real estate; (e) "home office": the office of the Company at the address shown herein; (f) "mortgage": mortgage, deed of trust, trust deed, or other security instrument described in Schedule A.

MASON COUNTY  
TITLE  
INSURANCE  
COMPANY



TITLE INSURANCE  
BUILDING  
SHELTON, WASHINGTON

# **APPENDIX B**

**Treaty of Medicine Creek, 10 Stat. 1132  
CP 65-71**

BY AUTHORITY OF CONGRESS.

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THE

Statutes at Large and Treaties

OF THE

UNITED STATES OF AMERICA.

FROM

DECEMBER 1, 1851, TO MARCH 3, 1855,

Arranged in Chronological Order;

WITH

REFERENCES TO THE MATTER OF EACH ACT AND TO THE  
SUBSEQUENT ACTS ON THE SAME SUBJECT.

EDITED BY

GEORGE MINOT, ESQ.,

COUNSELLOR AT LAW.

The rights and interest of the United States in the stereotype plates from which this work is printed are hereby recognized, acknowledged, and declared by the publishers, according to the provisions of the joint resolution of Congress, passed March 3, 1845.

VOL. X.

BOSTON:

LITTLE, BROWN AND COMPANY.

1855.

## FRANKLIN PIERCE,

Dec. 26, 1854.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Title. WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth-day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

Cession to  
United States.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence north-easterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

Reservation for  
said tribes.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be

set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

Removal there-  
to.Roads may be  
constructed.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

Rights to fish.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Payments for  
said cession.

How applied.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Expense of re-  
moval, &c.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

Removal from  
said reservation.

Ante, p. 1044.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Annuities not  
to be taken for  
debts.

Stipulations respecting conduct of Indians.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Intemperance.

ARTICLE IX: The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and, therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Schools, shops, &c.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employées, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

Slaves to be freed.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

Trade out of the limits of the U. S. forbidden.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

Foreign Indians not to reside on reservation.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Treaty, when to take effect.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L. S.]

*Governor and Superintendent Territory of Washington.*

QUI-EE-METL,  
SNO-HO-DUMSET,  
LESH-HIGH,

his x mark. [L. S.]  
his x mark. [L. S.]  
his x mark. [L. S.]

SLIP-O-ELM,	his x mark.	[L. S.]
KWI-ATS,	his x mark.	[L. S.]
STEE-HIGH,	his x mark.	[L. S.]
DI-A-KEH,	his x mark.	[L. S.]
HI-TEN,	his x mark.	[L. S.]
SQUA-TA-HUN,	his x mark.	[L. S.]
KAHK-TSE-MIN,	his x mark.	[L. S.]
SONAN-O-YUTL,	his x mark.	[L. S.]
KL-TEHP,	his x mark.	[L. S.]
SAHL-KO-MIN,	his x mark.	[L. S.]
T'BET-STE-HEH-BIT,	his x mark.	[L. S.]
TCHA-HOOS-TAN,	his x mark.	[L. S.]
KE-CHA-HAT,	his x mark.	[L. S.]
SPEE-PEH,	his x mark.	[L. S.]
SWE-YAH-TUM,	his x mark.	[L. S.]
CHAH-ACHSH,	his x mark.	[L. S.]
PICH-KEHD,	his x mark.	[L. S.]
S'KLAH-O-SUM,	his x mark.	[L. S.]
SAH-LE-TATL,	his x mark.	[L. S.]
SEE-LUP,	his x mark.	[L. S.]
E-LA-KAH-KA,	his x mark.	[L. S.]
SLUG-YEH,	his x mark.	[L. S.]
HI-NUK,	his x mark.	[L. S.]
MA-MO-NISH,	his x mark.	[L. S.]
CHEELS,	his x mark.	[L. S.]
KNUTCANU,	his x mark.	[L. S.]
BATS-TA-KOBE,	his x mark.	[L. S.]
WIN-NE-YA,	his x mark.	[L. S.]
KLO-OUT,	his x mark.	[L. S.]
SE-UCH-KA-NAM,	his x mark.	[L. S.]
SKE-MAH-HAN,	his x mark.	[L. S.]
WUTS-UN-A-PUM,	his x mark.	[L. S.]
QUUTS-A-TADM,	his x mark.	[L. S.]
QUUT-A-HEH-MTSN,	his x mark.	[L. S.]
YAH-LEH-CHN,	his x mark.	[L. S.]
TO-LAHL-KUT,	his x mark.	[L. S.]
YUL-LOUT,	his x mark.	[L. S.]
SEE-AHTS-OOT-SOOT,	his x mark.	[L. S.]
YE-TAHKO,	his x mark.	[L. S.]
WE-PO-IT-EE,	his x mark.	[L. S.]
KAH-SLD,	his x mark.	[L. S.]
LA'H-HOM-KAN,	his x mark.	[L. S.]
PAH-HOW-AT-ISH,	his x mark.	[L. S.]
SWE-YEHM,	his x mark.	[L. S.]
SAH-HWILL,	his x mark.	[L. S.]
SE-KWAHT,	his x mark.	[L. S.]
KAH-HUM-KLT,	his x mark.	[L. S.]
YAH-KWO-BAH,	his x mark.	[L. S.]
WUT-SAH-LE-WUN,	his x mark.	[L. S.]
SAH-BA-HAT,	his x mark.	[L. S.]
TEL-E-KISH,	his x mark.	[L. S.]
SWE-KEH-NAM,	his x mark.	[L. S.]
SIT-OO-AH,	his x mark.	[L. S.]
KO-QUEL-A-CUT,	his x mark.	[L. S.]
JACK,	his x mark.	[L. S.]
KEH-KISE-BE-LO,	his x mark.	[L. S.]
GO-YEH-HN,	his x mark.	[L. S.]

SAH-PUTSH,  
WILLIAM,

his x mark. [L. S.]  
his x mark. [L. S.]

Executed in the presence of us : —

M. T. SIMMONS,  
*Indian Agent.*

JAMES DOTY,  
*Secretary of the Commission.*

C. H. MASON,  
*Secretary Washington Territory.*

W. A. SLAUGHTER,  
*1st Lieut. 4th Infantry.*

JAMES MCALISTER,  
E. GIDDINGS, jr.,  
GEORGE SHAZER,  
HENRY D. COCK,  
S. S. FORD, jr.,  
JOHN W. MCALISTER,  
CLOVINGTON CUSHMAN,  
PETER ANDERSON,  
SAMUEL KLADY,  
W. H. PULLEN,  
P. O. HOUGH,  
E. R. TYERALL,  
GEORGE GIBBS,  
BENJ. F. SHAW, *Interpreter,*  
HAZARD STEVENS.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit : —

“ IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,  
“ March 3, 1855.

Consent of  
Senate.

“ Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, thistwenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Hom-amish, Steth-chass, T'Peeksin, Squi-aihl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

“ Attest :

ASBURY DICKINS,  
“ Secretary.”

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

TREATY WITH NISQUALLYS, &c. DEC. 26, 1854.

1137.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

[L. s.] Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

By the President:

W. L. MARCY, *Secretary of State.*

VOL. X. TREAT.—143

# APPENDIX C

1 U.S.C. §113  
CP 73

was within zone of interests sought to be protected by Act, which was meant to mediate between foreign relations powers of Congress and the President. *Lee v. U.S. Air Force*, C.A.10 (N.M.) 2004, 354 F.3d 1229. United States ⇨ 28

**§ 113. "Little and Brown's" edition of laws and treaties; slip laws; Treaties and Other International Acts Series; admissibility in evidence**

The edition of the laws and treaties of the United States, published by Little and Brown, and the publications in slip or pamphlet form of the laws of the United States issued under the authority of the Archivist of the United States, and the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence of the several public and private Acts of Congress, and of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.

(July 30, 1947, c. 388, 61 Stat. 636; July 8, 1966, Pub.L. 89-497, § 1, 80 Stat. 271; Oct. 19, 1984, Pub.L. 98-497, Title I, § 107(d), 98 Stat. 2291.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**

1947 Acts. House Report No. 251, see 1947 U.S. Code Cong. Service, p. 1511.

1966 Acts. Senate Report No. 1310, see 1966 U.S. Code Cong. and Adm. News, p. 2473.

1984 Acts. Senate Report No. 98-373 and House Conference Report No. 98-1124, see 1984 U.S. Code Cong. and Adm. News, p. 3865.

**Amendments**

1984 Amendments. Pub.L. 98-497 substituted "Archivist of the United States" for "Administrator of General Services".

1966 Amendments. Pub.L. 89-497 made slip laws and the Treaties and Other International Acts Series competent legal evidence of the several acts of Congress and the treaties and other international agreements contained therein.

**Effective and Applicability Provisions**

1984 Acts. Amendment by Pub.L. 98-497 effective April 1, 1985, see section 301 of Pub.L. 98-497, set out as a note under section 2102 of Title 44, Public Printing and Documents.

**LIBRARY REFERENCES**

**American Digest System**

Evidence ⇨ 39.

Treaties ⇨ 7, 8.

Key Number System Topic Nos. 157, 385.

**Research References**

**ALR Library**

17 ALR, Fed. 725, Criminal Jurisdiction of Courts of Foreign Nations Over American Armed Forces Stationed Abroad.

**Encyclopedias**

29A Am. Jur. 2d Evidence § 1199, Presumptions Under State or Federal Acts.

# APPENDIX D

*Robbins v. Mason County Title*  
5 Wn.App. 2d 68, 425 P.3d 885 (2018)

[No. 50376-0-II. Division Two. August 28, 2018.]

LESLIE W. ROBBINS ET AL., *Appellants*, v. MASON COUNTY TITLE INSURANCE COMPANY ET AL., *Respondents*.

- [1] **Vendor and Purchaser — Title — Title Insurance — Construction of Policy — Ambiguities.** An ambiguity in a title insurance policy is interpreted in favor of the insured.
- [2] **Vendor and Purchaser — Title — Title Insurance — Construction of Policy — Plain Language.** The language of a title insurance policy is given its plain meaning. Clear and unambiguous policy language must be given effect in accordance with its plain meaning and may not be construed by a court.
- [3] **Vendor and Purchaser — Title — Title Insurance — Construction of Policy — Average Purchaser.** A court must read a title insurance policy as it would be read by the average person purchasing the policy.
- [4] **Vendor and Purchaser — Title — Title Insurance — Construction of Policy — Considered as a Whole.** A court construes a title insurance policy as a whole so that every clause is given force and effect.
- [5] **Vendor and Purchaser — Title — Title Insurance — Duty To Defend — Determination.** Whether a title insurer has a duty to defend its insured in a particular situation is informed by the insurer's duties enumerated in RCW 48.01.030 to act in good faith, to abstain from deception, and to practice honesty and equity in all insurance matters.
- [6] **Vendor and Purchaser — Title — Title Insurance — Duty To Defend — Duty To Indemnify — Distinction.** A title insurer's duty to defend is broader than its duty to indemnify. The duty to defend is triggered if the insurance policy conceivably covers the allegations made against the insured. The duty to indemnify exists only if the policy actually covers the insured's liability.
- [7] **Vendor and Purchaser — Title — Title Insurance — Duty To Defend — Test.** A title insurer must defend an insured against a claim unless it is clear on the face of the claim that the policy does not provide coverage. If it is not clear whether the policy provides coverage but coverage could exist, the insurer must investigate and must give the insured the benefit of the doubt on the duty to defend. If the policy conceivable covers the allegations made in the claim, the insurer must provide a defense.
- [8] **Vendor and Purchaser — Title — Title Insurance — Scope — Policy Language — Meaning of Terms.** For purposes of a title insurance policy that obligates the insurer to defend the insured

“with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein,” a “demand” is the assertion of a legal or procedural right; “title” is legal evidence of a person's ownership rights in property or an instrument (such as a deed) that constitutes such evidence; an “encumbrance” is a burden on land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with the landowner's conveyance of the land in fee; and “existed” means to have come into being.

- [9] **Vendor and Purchaser — Title — Title Insurance — Scope — Encumbrances — Indian Treaty Right — Shellfish Harvesting.** An Indian tribe's assertion of a treaty right to harvest shellfish constitutes a demand founded on a claim of encumbrance arising before the date of inception of a policy of title insurance for purposes of a policy provision that obligates the insurer to defend the insured “with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein.”
- [10] **Property — Servitude — Easement — Profit à Prendre — Distinguishing Characteristics.** An easement and a profit à prendre are distinct types of servitudes, or legal devices, that create a right or obligation that runs with the land. An “easement” is a right to enter and use property for some specified purpose. A “profit à prendre” is the right to sever and to remove some substance from the land.
- [11] **Vendor and Purchaser — Title — Title Insurance — Exclusions — Easements Undisclosed by Public Records — Profit à Prendre — Indian Shellfish Harvesting Treaty Right.** An Indian tribe's treaty right to harvest shellfish is in the nature of a profit à prendre and, as such, is not encompassed by a title insurance policy exclusion for “public or private easements not disclosed by the public records.”
- [12] **Insurance — Duty To Defend — Breach — Insurer's Bad Faith — In General.** An insurer's unreasonable, frivolous, or unfounded breach of its duty to defend an insured constitutes an act of bad faith.
- [13] **Insurance — Duty To Defend — Determination — Benefit of Doubt.** An insurer must give an insured the benefit of the doubt when evaluating whether the insured's policy provides coverage that would give rise to a duty to defend in a particular instance.
- [14] **Insurance — Duty To Defend — Reservation of Rights — Purpose and Effect.** If an insurer is uncertain of its duty to defend an insured, it may defend under a reservation of rights while seeking

a declaratory judgment on whether it has such a duty. A reservation of rights is a means by which an insurer may avoid breaching its duty to defend while seeking to avoid waiver and estoppel. If an insurer takes this course of action, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay.

- [15] **Insurance — Duty To Defend — Breach — Insurer's Bad Faith — Harm to Insured — Presumption.** An insurer's bad faith breach of its duty to defend an insured raises a presumption that the insured has been harmed by the breach.
- [16] **Insurance — Duty To Defend — Breach — Insurer's Bad Faith — Effect — Estoppel.** An insurer that in bad faith fails to defend an insured is estopped from denying coverage and will be liable for the cost of any defense mounted by the insured.
- [17] **Vendor and Purchaser — Title — Title Insurance — Exclusions — Construction.** Exclusions in a title insurance policy are strictly and narrowly construed.
- [18] **Judgment — Summary Judgment — Scope of Relief — Affirmative Defenses Not Encompassed by Motion for Summary Judgment.** When a plaintiff's motion for summary judgment does not request summary judgment on affirmative defenses pleaded by the defendant, the affirmative defenses remain at issue if the motion is granted.
- [19] **Insurance — Claim for Loss — Denial of Coverage — Right of Action — Insurance Fair Conduct Act — Attorney Fees — Unresolved Action.** An insured who receives a favorable appellate ruling on a question of policy coverage is not immediately entitled to an award of attorney fees under RCW 48.30.015(3) of the Insurance Fair Conduct Act if the case is remanded for further trial proceedings to determine whether the policy covers the insured's loss.
- [20] **Insurance — Expenses of Insured — Insured's Action To Obtain Benefit of Policy — Unresolved Action.** An insured who receives a favorable appellate ruling on a question of policy coverage is not immediately entitled to an award of attorney fees on the ground of being compelled to assume the burden of legal action to obtain the full benefit of the insurance contract if the case is remanded for further trial proceedings to determine whether the policy covers the insured's loss.

BJORGEN, J., delivered the opinion for a unanimous court.

**Nature of Action:** Property owners claimed that their title insurance policy obligated the insurer to defend them against an Indian tribe's claim to a treaty shellfish harvesting right.

**Superior Court:** The Superior Court for Mason County, No. 16-2-00686-1, Toni A. Sheldon, J., on May 8, 2017, entered a summary judgment in favor of the insurer, dismissing all of the plaintiffs' claims.

**Court of Appeals:** Holding that the policy obligated the insurer to defend the plaintiffs against the tribal shellfish claim, that the insurer's failure to provide a defense constituted bad faith, and that the insurer was estopped from denying coverage, but that affirmative defenses pleaded by the insurer remained at issue, the court *reverses* the judgment and *remands* the case for further proceedings.

*Matthew B. Edwards* (of *Owens Davies PS*), for appellants.  
*Stephen T. Whitehouse*, for respondents.

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#### LexisNexis® Research References

LexisNexis Practice Guide: Washington Insurance Litigation  
Washington Insurance Law (3d ed.) (Matthew Bender)  
Washington Rules of Court Annotated (LexisNexis ed.)  
Annotated Revised Code of Washington by LexisNexis

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¶1 BJORGEN, J. — Leslie W. Robbins and Harlene E. Robbins appeal from an order granting the motion for summary judgment by Mason County Title Insurance Company (MCTI)<sup>1</sup> and denying the Robbinses' cross motion for partial summary judgment.

¶2 The Robbinses assert that the terms of their title insurance policy obligated MCTI to defend against a claim by the Squaxin Island Tribe (Tribe) that the 1854 Treaty of Medicine Creek<sup>2</sup> (Treaty) gave it the right to take shellfish on the Robbinses' tidelands. The Robbinses also argue that

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<sup>1</sup> MCTI, at the time this action arose, was known as Retitle Insurance Company.

<sup>2</sup> 10 Stat. 1132.

because MCTI unreasonably breached its duty to defend, the company acted in bad faith as a matter of law and should be estopped from denying coverage. The Robbinses also request us to award them attorney fees and costs incurred both in the superior court and in this appeal.

¶3 MCTI asserts that the Robbinses' policy did not afford coverage and that it was under no duty to defend. MCTI also claims there was nothing to defend against since the underlying issues between the Robbinses and the Tribe were already determined by litigation concerning the scope of tribal shellfish rights. MCTI further argues that the general exception<sup>3</sup> for "public or private easements not disclosed by the public records" applies to the Robbinses' claim. Finally, MCTI argues it pled several affirmative defenses that the superior court has yet to consider.

¶4 We hold that MCTI owed a duty to defend under the policy, its failure to do so constituted bad faith, and MCTI is estopped from denying coverage. We remand to the superior court to consider the merits of MCTI's affirmative defenses. Because those defenses remain to be decided, any decision on attorney fees and costs is premature.

¶5 Accordingly, we reverse and remand.

#### FACTS

¶6 In 1978, the Robbinses purchased two tracts of land, which included tidelands formerly owned by the State of Washington. The Robbinses also purchased a policy of title insurance from MCTI, dated June 12, 1978, which provides that MCTI would insure the Robbinses "against loss or damage sustained by reason of: . . . [a]ny defect in, or lien or encumbrance on, said title existing at the date [t]hereof." Clerk's Papers (CP) at 228-32. More specifically, the policy states, in pertinent part:

<sup>3</sup> We refer to the policy exclusions as "exceptions" because that is the terminology used in the contract.

1. The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein.

CP at 232. The policy contains several general exceptions, including "public or private easements not disclosed by the public records." CP at 231. The policy defines "public records" as "records which, under the recording laws, impart constructive notice with respect to said real estate." CP at 232.

¶7 After purchasing the property, the Robbinses entered into contracts with a number of commercial shellfish harvesters. One of the harvesters notified the Tribe of his intent to harvest shellfish on the Robbinses' property. The Tribe sent the harvester a letter requesting more information, disagreeing with the harvester's opinion that the Robbinses' clam bed was not natural, and referring to its rights under the "Shellfish Implementation Plan," adopted to implement *United States v. Washington*, 898 F. Supp. 1453 (W.D. Wash. 1995), *aff'd in part*, 135 F.3d 618 (9th Cir. 1998).

¶8 The Robbinses subsequently became aware of the Tribe's desire to harvest shellfish on their tidelands and tendered a claim to MCTI on July 8, 2016, for defense against the Tribe's asserted right. On July 26, the Tribe sent the Robbinses a certified letter outlining its plan to harvest shellfish on their tidelands in accordance with *Washington* and the Shellfish Implementation Plan. The Tribe based this claim on its rights under the Treaty and *Washington* to take 50 percent of the harvestable shellfish biomass within its usual and accustomed grounds and stations. On August 9, MCTI sent the Robbinses a letter that declined any duty to defend the Tribe's claim on the Robbinses behalf; the letter advised, among other things, that there was no coverage under their policy for the Tribe's claim.

¶9 The Robbinses filed a complaint against MCTI for damages caused by its claimed improper refusal to defend and requesting that MCTI be estopped from denying coverage. MCTI filed its answer and affirmative defenses, which included the statute of limitations, laches, waiver, failure to mitigate damages, failure to submit proof of loss, failure to state a claim, failure to state a cause of action, election of alternative remedies, and a claim that plaintiffs have suffered no damages.

¶10 MCTI filed a motion for summary judgment, arguing that because the Robbinses' policy did not afford coverage for the Tribe's asserted treaty right, there was no duty to defend. MCTI's motion for summary judgment did not argue any of the affirmative defenses set forth in its answer, but only addressed coverage.

¶11 The Robbinses then filed a cross motion for partial summary judgment. The Robbinses argued that their policy afforded coverage, no general exceptions applied, and MCTI had a duty to defend against the Tribe's claim to harvest shellfish on their tidelands. The Robbinses' cross motion for partial summary judgment did not request summary judgment on any of MCTI's affirmative defenses. In its response to the Robbinses' cross motion for partial summary judgment MCTI argued, among other matters, that its motion for summary judgment only sought to determine the issue of coverage, its affirmative defenses are to some degree based in fact, and it had not had the opportunity to conduct discovery, in particular on the defenses of statute of limitations, laches, waiver, and mitigation of damages.

¶12 The superior court granted MCTI's motion for summary judgment and denied the Robbinses' motion for partial summary judgment. As part of its order, the superior court dismissed all of the Robbinses' claims with prejudice.

¶13 The Robbinses appeal.

## ANALYSIS

### I. SUMMARY JUDGMENT

¶14 The Robbinses argue the superior court erred when it granted MCTI's motion for summary judgment and denied their cross motion for partial summary judgment. We agree.

#### A. Standard of Review and Legal Principles

¶15 We review an order for summary judgment de novo, engaging in the same inquiry as the superior court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Fahn v. Cowlitz County*, 93 Wn.2d 368, 373, 610 P.2d 857 (1980).

[1-4] ¶16 Ambiguities in insurance policies are to be interpreted in favor of the insured. *Holden v. Farmers Ins. Co. of Wash.*, 169 Wn.2d 750, 756, 239 P.3d 344 (2010). Language in an insurance contract is to be given its plain meaning, and courts should read the policy as the average person purchasing insurance would. *Id.* Language that is clear and unambiguous must be given effect in accordance with its plain meaning and may not be construed by the courts. *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 696, 335 P.3d 416 (2014). When interpreting language of an insurance contract, we construe the entire contract together for the purpose of giving force and effect to each clause. *Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 710, 375 P.3d 596 (2016).

[5] ¶17 Since Title 48 RCW governs the business of title insurance, it "is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters." *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466,

471, 209 P.3d 859 (2009) (quoting RCW 48.01.030). These duties help inform an insurer's duty to defend. *Id.*

[6, 7] ¶18 The duty to defend "is broader than the duty to indemnify." *Id.* If the insurance policy *conceivably covers* the allegations in the complaint, the duty to defend is triggered; yet, the duty to indemnify exists only if the policy *actually covers* the insured's liability. *Id.*; see also *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010); *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007). A title insurer must defend unless it is clear from the face of the complaint that the claim is not covered by the applicable policy. *Campbell*, 166 Wn.2d at 471. "[I]f 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.* (alteration in original) (quoting *Woo*, 161 Wn.2d at 53).

### B. Duty To Defend

¶19 The Robbinses argue that MCTI had a duty to defend. MCTI argues that where there is no coverage, there is no duty to defend, and that the Robbinses' policy did not afford coverage. We agree with the Robbinses that MCTI had a duty to defend because the policy *conceivably covers* the allegations in the complaint.

[8, 9] ¶20 Their policy states, in pertinent part:

1. The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein.

CP at 232. There is no dispute that the Robbinses are the named "insured" under the policy. We note also that the record contains no evidence the Tribe commenced any "legal proceedings" against the Robbinses and that this fact is likewise undisputed. Thus, our initial inquiry involves whether

the Tribe's assertion of its right to harvest shellfish constituted a "demand" "founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to" June 12, 1978, the date the Robbinses' policy issued. CP at 230.

¶21 The Robbinses' policy does not define "demand," "title," "encumbrance" or "exist." Accordingly, we must give effect to language that is clear and unambiguous in keeping with its plain meaning. *O.S.T. ex rel. G.T.*, 181 Wn.2d at 696. We may not construe clear and unambiguous contract terms. *Id.*

¶22 A "demand" is commonly defined to be "[t]he assertion of a legal or procedural right." BLACK'S LAW DICTIONARY 522 (10th ed. 2014). The Tribe clearly asserted its legal rights under *Washington* in its notification and plan to harvest shellfish on the Robbinses' tidelands. Therefore, the Tribe made a "demand" as contemplated by the plain meaning of the policy.

¶23 "Title" is commonly defined as "[l]egal evidence of a person's ownership rights in property; an instrument (such as a deed) that constitutes such evidence." *Id.* at 1712. The Tribe has not founded its demand on a claim of title to the Robbinses' property, as it is commonly understood. Nor does it claim to have possession or custody of the shellfish on the Robbinses' property, or an instrument, such as a deed, giving it ownership of the tidelands.

¶24 Our Supreme Court has defined an "encumbrance" as "a burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee." *Hebb v. Severson*, 32 Wn.2d 159, 167, 201 P.2d 156 (1948). Based on this definition, the Tribe's demand can be commonly understood as founded on an encumbrance: the Tribe's treaty rights are adverse to the interest of the Robbinses but do not conflict with their right of conveyance.

¶25 “Exist” has many definitions, but we can fairly define it as “com[ing] into being.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 796 (1966). The Robbinses argue the right to harvest shellfish came into being when the Treaty was signed and subsequently ratified by the president and senate of the United States.

¶26 The Treaty established the Tribes’ right to take fish at usual and accustomed places. On September 2, 1993, the United States District Court for the Western District of Washington ruled that “shellfish” are “fish” within the meaning of the treaties. *United States v. Washington*, 873 F. Supp. 1422, 1427 (W.D. Wash. 1994) (*Washington I*), *aff’d in part, reversed in part*, 135 F.3d 618. On appeal, the Ninth Circuit affirmed, in part, the district court’s interpretation in *United States v. Washington*, 157 F.3d 630, 638-39 (9th Cir. 1998) (*Washington IV*). The Ninth Circuit held, among other matters, that various treaties granted several tribes a right to take shellfish that was coextensive with their right to take fish except as expressly limited by the “Shellfish Proviso.” The Shellfish Proviso prohibited tribes from taking shellfish “‘from any beds staked or cultivated by citizens,’” and excluded tribes from artificial shellfish beds created by private citizens. *Id.*

¶27 Courts have made clear that Indian treaties should not be viewed as grants of rights to the Indians, but as grants of rights from the Indians to the United States. *Washington I*, 873 F. Supp. at 1428-29; *see also United States v. Washington*, 19 F. Supp. 3d 1126, 1129 (W.D. Wash. 1994) (“Any rights which were not granted by the Indians to the United States were reserved by the Indians because the Indians already possessed them.”); *State v. Buchanan*, 138 Wn.2d 186, 199-200, 202-03, 978 P.2d 1070 (1999). Relevant to the instant appeal, the Ninth Circuit has reasoned:

“At [Treaty] time, . . . the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title. . . . The fact that some species were not taken before treaty time—either because they were inaccessible or the In-

dians chose not to take them—does not mean that their *right* to take such fish was limited. Because the ‘right of taking fish’ must be read as a reservation of the Indians’ pre-existing rights, and because the right to take *any* species, without limit, pre-existed the Stevens Treaties, the Court must read the ‘right of taking fish’ without any species limitation.”

*Washington IV*, 157 F.3d at 644 (alterations in original) (quoting *Washington I*, 873 F. Supp. at 1430).

¶28 The Treaty was signed on December 26, 1854, ratified on March 3, 1855, and “proclaimed” on April 10, 1855. *State v. Courville*, 36 Wn. App. 615, 618, 676 P.2d 1011 (1983). MCTI issued the Robbinses their title policy on June 12, 1978. Thus, the Tribe’s claim of a right to take shellfish from the Robbinses’ tidelands is a demand founded on a claim of encumbrance arising before the date of inception of the policy. Section 1 of the conditions and stipulations of the Robbinses’ policy, set out above, conceivably provides coverage for such a demand. Therefore, under *Campbell, American Best Food*, and *Woo*, we must examine the policy’s exceptions to determine whether any exception excludes coverage of the Robbinses’ claims, thus negating the duty to defend.

### C. General Exceptions

[10, 11] ¶29 The Robbinses argue that the general exception for “public or private easements not disclosed by the public records” does not apply. Appellants’ Opening Br. at 31-45. We agree with the Robbinses that under *Washington* law, the Tribe’s treaty rights are not easements and that therefore the general exception does not apply. Consequently, we need not reach whether it is conceivable to argue the Tribe’s treaty rights were “disclosed by the public records.”

¶30 The United States Supreme Court has held that the Stevens Treaties “imposed a servitude” on land. *United States v. Winans*, 198 U.S. 371, 381, 25 S. Ct. 662, 49 L. Ed. 1089 (1905). The Treaty, *Winans* held, “was not a grant of

rights to the Indians, but a grant of right from them—a reservation of those not granted.” 198 U.S. at 381.

¶31 “A servitude is a legal device that creates a right or obligation that runs with the land.” *Lake Limerick Country Club v. Hunt Mfd. Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295 (2004).<sup>4</sup> “A servitude can be, among other things, an easement, profit, or covenant.” *Id.* at 253. Therefore, easements and profits are two distinct types of servitudes. An “easement” “is a right to enter and use property for some specified purpose.” *Affil. FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 458, 243 P.3d 521 (2010). On the other hand, “[a] cousin of easements, a profit à prendre [sic], ‘is the right to sever and to remove some substance from the land.’” *Id.* (quoting 17 WILLIAM B. STOEBCUK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 2.1, at 80 (2d ed. 2004)). For example, a holder of a profit typically has rights to natural resources such as “‘minerals, gravel, or timber.’” *Id.* (quoting 17 STOEBCUK & WEAVER, § 2.1 at 80). The nuances of a profit à prendre are illustrated by its definition in *Black’s Law Dictionary*:

“A profit à prendre has been described as ‘a right to take something off another person’s land.’ This is too wide; the thing taken must be something taken out of the soil, i.e., it must be either the soil, the natural produce thereof, or the wild animals existing on it; and the thing taken must at the time of taking be susceptible of ownership. A right to ‘hawk, hunt, fish, and fowl’ may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned. But a right to take water from a spring or a pump, or the right to water cattle at a pond, may be an easement but cannot be a profit; for the water, when taken, was not owned by anyone nor was it part of the soil.”

<sup>4</sup> See also “servitude” in *Black’s Law Dictionary* at 1577:

1. An encumbrance consisting in a right to the limited use of a piece of land or other immovable property without the possession of it; a charge or burden on an estate for another’s benefit <the easement by necessity is an equitable servitude>. • Servitudes include easements, irrevocable licenses, profits, and real covenants.

BLACK’S LAW DICTIONARY at 1404 (quoting ROBERT E. MEGARRY & M.P. THOMPSON, A MANUAL OF THE LAW OF REAL PROPERTY 375-76 (6th ed. 1993)).

¶32 The Robbinses argue that the Tribe’s treaty rights are not easements, but rather are a sui generis aboriginal right and cannot readily be classified under English common law. They argue also that the treaty rights are a form of servitude more closely analogous to a profit à prendre than an easement and, thus, should not be swept into the current of the general exception, which specifies easements.

¶33 MCTI counters that we should construe tribal shellfish rights as easements. MCTI claims a profit à prendre is a form of easement and although there may be distinctions among various forms of easements, that does not mean they are not still easements. MCTI cites a definition contained in the *Restatement (Third) of Property* to argue that “[a] profit à prendre is an easement that confers the right to enter and remove timber, mineral, oil, gas, game, or other substance from the land in possession of another.” Resp’t’s Opening Br. at 17-18 (emphasis added) (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2 (AM. LAW INST. 2000)).

¶34 The Tribe’s treaty “right of taking fish, at all usual and accustomed grounds and stations,” which includes the right to take shellfish, inescapably entails the right to come onto the Robbinses tidelands and harvest shellfish from the seabed. This right is akin to a profit à prendre, although the right of access by itself is more like an easement. As stated, an easement and a profit à prendre are distinctly different categories of servitudes, nuanced and definable. Because the policy does not define the term “easement,” it is at best ambiguous as applied to the Tribe’s right. Because ambiguities in insurance policies are to be interpreted in favor of the insured, *Holden*, 169 Wn.2d at 756, and because we “strictly and narrowly construe insurance policy exclusions,” *Campbell*, 166 Wn.2d at 472, we hold that the Tribe’s treaty right to harvest shellfish more closely resembles a

profit à prendre rather than an easement and, therefore, the general exception does not apply.

¶35 Because the policy conceivably provides coverage and because no general exceptions apply, we hold MCTI owed the Robbinses a duty to defend. Consequently, the superior court erred when it granted MCTI's motion for summary judgment and denied the Robbinses' cross motion for partial summary judgment.

## II. BAD FAITH

¶36 The Robbinses argue that because MCTI unreasonably breached its duty to defend, it acted in bad faith as a matter of law and, therefore, should be estopped from denying coverage. We agree.

[12, 13] ¶37 An insurer acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded. *Am. Best Food*, 168 Wn.2d at 412. The insured does not establish bad faith, however, when the insurer denies coverage or fails to provide a defense based on a reasonable interpretation of the insurance policy. *Kirk v. Mount Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998). The duty to defend requires an insurer to give the insured the benefit of the doubt when evaluating whether the insurance policy provides coverage. *Am. Best Food*, 168 Wn.2d at 412-13; *Campbell*, 166 Wn.2d at 471; *Woo*, 161 Wn.2d at 53.

[14] ¶38 If an insurer is uncertain as to its duty to defend, it may defend under a reservation of rights while seeking a declaratory judgment that it has no such duty. See, e.g., *Kirk*, 134 Wn.2d at 563 n.3; *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002); *Woo*, 161 Wn.2d at 54; *Campbell*, 166 Wn.2d at 471; *Am. Best Food*, 168 Wn.2d at 405. "A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel." *Truck*, 147 Wn.2d at 761. "When that course of action is taken, the insured receives the defense promised and, if coverage is

found not to exist, the insurer will not be obligated to pay.' " *Id.* (quoting *Kirk*, 134 Wn.2d at 563 n.3).

[15, 16] ¶39 If we conclude that the insurer breached the duty to defend in bad faith, we presume harm from the insurer's actions. *Kirk*, 134 Wn.2d at 562-63. In that event, we hold the insurer liable for the cost of any defense and estop the insurer from asserting that there is no coverage. *Id.* at 563-65.

[17] ¶40 MCTI did not defend under a reservation of rights while seeking a declaratory judgment as to coverage under the Robbinses' policy. Instead, MCTI denied coverage even though, as shown above, its policy exception for easements was at best ambiguous in its application. Because ambiguities in insurance policies are to be interpreted in favor of the insured, *Holden*, 169 Wn.2d at 756, and policy exclusions are to be strictly and narrowly construed, *Campbell*, 166 Wn.2d at 472, MCTI acted unreasonably in denying a defense. See *Am. Best Food*, 168 Wn.2d at 413. Thus, we hold MCTI acted in bad faith as a matter of law. See *id.* Under *Kirk*, 134 Wn.2d at 562, 563-65, we presume harm to the Robbinses and hold that MCTI is estopped from denying the Robbinses coverage under the title insurance policy subject to the remaining question of affirmative defenses.

## III. AFFIRMATIVE DEFENSES

¶41 MCTI argues that it should be given the opportunity to argue the affirmative defenses it pled in its answer. We agree.

¶42 CR 56(e) provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

¶43 In their reply brief, the Robbinses argue that because MCTI failed to prove up or argue its affirmative defenses to the superior court, it cannot now assert them as a defense to its liability for its bad faith breach of its duty to defend. The Robbinses cite CR 56(e) and *Labriola v. Pollard Group Inc.*, 152 Wn.2d 828, 840-42, 100 P.3d 791 (2004), for the proposition that MCTI had the burden of setting forth specific facts showing that there is a genuine issue for trial.

¶44 In its answer, MCTI pled several affirmative defenses. The Robbinses' cross motion for partial summary judgment did not seek summary judgment on any of MCTI's affirmative defenses. In its response to the Robbinses' cross motion, however, MCTI argued, among other matters, that its affirmative defenses are to some degree based in fact and it had not had the opportunity to conduct discovery, in particular, on the defenses of statute of limitations, laches, waiver, and mitigation of damages.

¶45 The Robbinses' cross motion for summary judgment asserted that that their policy afforded coverage, no general exceptions applied, and MCTI had a duty to defend. Their cross motion did not request summary judgment on any of MCTI's affirmative defenses. Nevertheless, MCTI responded in part by noting its affirmative defenses and stating that it had not had the opportunity to conduct needed discovery on them.

[18] ¶46 CR 56(e), set out above, by its terms requires a party opposing summary judgment to set forth specific facts showing there is an issue for trial in opposition to the motion that was made. Where, as here, the plaintiff does not request summary judgment on a number of affirmative defenses, CR 56(e) does not require the defendant to show an issue of fact concerning them. Similarly, *Labriola* does not require the party opposing a summary judgment motion to set forth facts about an issue that was not raised by the motion. In that case, the party opposing summary judgment failed to bring forth sufficient facts to substantiate its counterclaims, which the trial court in fact had dismissed.

*Labriola*, 152 Wn.2d at 840-42. The Robbinses, in contrast, did not even request summary judgment on MCTI's affirmative defenses.

¶47 For these reasons, MCTI's affirmative defenses are yet to be decided. We remand for the superior court to consider them, subject to the other holdings in this opinion.

#### IV. ATTORNEY FEES

[19, 20] ¶48 The Robbinses request attorney fees and costs incurred both in the superior court and on appeal. They base these requests on RCW 48.30.015(3), part of the Insurance Fair Conduct Act, and on *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 51-53, 811 P.2d 673 (1991). Because the merits of MCTI's affirmative defenses are not yet decided, any decision on attorney fees and costs is premature.

#### CONCLUSION

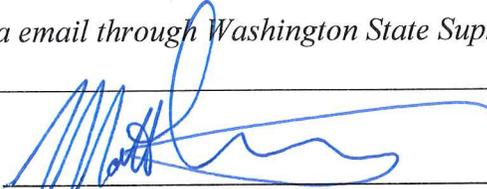
¶49 We reverse the superior court's order granting MCTI's motion for summary judgment and denying the Robbinses' cross motion for partial summary judgment. We hold that MCTI owed a duty to defend under the policy, its failure to do so constituted bad faith, and MCTI is estopped from denying coverage. We decline to rule on the request for attorney fees and costs, and we remand to the superior court to consider the merits of MCTI's affirmative defenses.

WORSWICK and SUTTON, JJ., concur.

I certify that on the 28<sup>th</sup> day of June, 2019, I caused a true and correct copy of *Supplemental Brief of Leslie W. Robbins and Harlene E. Robbins* to be served in the manner indicated below:

Stephen Whitehouse, WSBA #6818  
Whitehouse & Nichols, LLP

*via email through Washington State Supreme Court's upload portal*

By:   
Matthew B. Edwards

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**Appellate Court Case Number:** 96726-1  
**Appellate Court Case Title:** Leslie and Harlene Robbins v. Mason County Title, et al.  
**Superior Court Case Number:** 16-2-00686-1

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