Supreme Court No. 99244-4

SUPREME COURT OF THE STATE OF WASHINGTON

CASE NO: 52898-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NEIL RABINOWITZ and ELIZABETH RABINOWITZ, husband and wife,
APPELLANTS

vs

CHICAGO TITLE INSURANCE AGENCY OF KITSAP COUNTY, a Washington Corporation; CHICAGO TITLE INSURANCE COMPANY, a Nebraska State Corporation; and FIDELITY NATIONAL TITLE GROUP, a Delaware State Corporation,
RESPONDENT.

ANSWER TO PETITION

HENRY K. HAMILTON, WSBA #16301
Fidelity National Law Group
701 – 5th Avenue, Suite 2710
Seattle, WA 98104
(206) 224-6001
Henry.Hamilton@fnf.com
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

COURT RULES

I. INTRODUCTION

This Petition for Review is about the Rabinowitzs'[1] unsupported belief that Chicago Title owed them a duty to defend a claim outside the boundaries of and not involving land the Rabinowitzs owned, and involving land that was never a part of the title insurance policy at issue. The Rabinowitzs' Petition for Review should be denied because they fail to present any evidence of error.

The Rabinowitzs' Petition misrepresents both Deed and title policy language by alluding to the 10-foot strip of land as being described in the policy, but they fail to advise this Court that the description was to expressly describe this strip as **not** a part of the legal description. Contrary to their assertion, the Deed and the title insurance policy did not include the land that was the subject of the underlying lawsuit. By very clear language in both the Deed and the title policy, the 10-foot strip of land was unquestionably not part of the Rabinowitzs' property. There is nothing remarkable about a title insurance company refusing to defend a claim concerning land outside the land described in the policy.

A review of the "eight corners" of the title insurance contract and the underlying Complaint conclusively shows there was no duty to defend because every potential alleged claim involved a 10-foot strip of land not a

---

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

part of the Rabinowitzs' Deed and outside the insured land described in the title policy. It does not matter what theories the Rabinowitzs had about why they may have had a superior claim to the 10-foot strip from their neighbors: they all concerned land outside of the title insurance policy. As such, there can never be coverage or a duty to defend. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wash.2d 793, 803 (2014); *Kirk v. Mt. Airy Ins. Co.*, 134 Wash.2d 558, 561, 951 P.2d 1124 (1998). In evaluating this claim and then repeatedly explaining why the dispute with their neighbors all involved land outside the policy, the record shows Chicago Title did not look outside the "eight corners" of the policy and Complaint, and did not elevate its own interests in denying the claim. To the contrary, Chicago Title over-explained why the Rabinowitzs never owned the land and why the land was not included in the title insurance policy.

The Court of Appeals properly affirmed the trial court's dismissal of the lawsuit, finding that the 10-foot strip of land that is at the heart of the Rabinowitzs' Petition is expressly not part of the land described in their Deed, and is similarly expressly not part of the land described in the title insurance policy. This Petition should be denied.

II. IDENTITY OF RESPONDENT

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

Company was the only remaining defendant at the trial court level when the court entered summary judgment, and is the only respondent.

III. RESPONSE TO ISSUES PRESENTED FOR REVIEW

1. This Petition should be denied under RAP 13.4(b)(1) because the Court of Appeals decision does not conflict with decisions of this Court. The Court of Appeals correctly applied Washington law in finding that the "eight corners" of the insurance contract and the underlying complaint conclusively showed there was no duty to defend because all issues involved a 10-foot strip of land not a part of the Rabinowitzs' Deed and not included within the land described in the title policy. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wash.2d 793, 803 (2014).

2. This Petition should be denied under RAP 13.4(b)(1) because the Court of Appeals decision does not conflict with decisions of this Court. Chicago Title did not raise new grounds to support denial of coverage during litigation. The Court of Appeals correctly recognized that the 10-foot strip of land was not part of the Deed and not part of the land described in the title insurance policy. The Court of Appeals also properly evaluated the Rabinowitzs' claims in relying on this Court's holding in *Am. Best Food, Inc. v. Alea London, Ltd.,* 168 Wash.2d 398, 404, 229 P.3d 693 (2010). *Vision One, LLC v. Philadelphia Indem. Ins. Co.,* 174 Wash. 2d 501, 276 P.3d 300 (2012), does not apply.

3. This Petition should be denied under RAP 13.4(b)(1) because the Court of Appeals decision does not conflict with decisions of this Court. The Court of Appeals did not place the burden on the insureds to show a loss, but correctly recognized there could be no conceivable loss because all claims concerned a 10-foot strip of land not part of the Deed and not part of the land described in the title insurance policy. An insurance policy is a contract and must be interpreted as such. *Washington Pub. Util. Dists.' Utils. Sys. v. Pub. Util. Sys. No. 1*, 112 Wash.2d 1, 10, 771 P.2d 701 (1989); *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wash.2d 398, 404, 229 P.3d 693 (2010)

4. This Petition should be denied under RAP 13.4(b)(4) because this Petition fails does not concern a matter of substantial public interest, and the Rabinowitzs fail to identify

any reason to suggest it does. Further, the Court of Appeals decision does not conflict with decisions of this Court. The Court of Appeals correctly recognized that the legal description in the Deed and in the title insurance policy controlled over the Rabinowitzs' subjective belief. *Shotwell v. Transameric Title Ins. Co.*, 91 Wash.2d 161, 588 P.2d 208 (1978).

IV. STATEMENT OF THE CASE

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

At the center of this case are two separate parcels of land. (CP 71-75) On September 18, 1987, the Rabinowitzs took title to their land by Statutory Warranty Deed. (CP149-151) The Deed describes the Rabinowitzs' land as follows:

> That part of the Southwest quarter of the Northeast quarter of Section 11, Township 24 North, Range 2 East, W.M. in Kitsap County, Washington described as follows:
> ...
> **LESS the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South**
> ...

(emphasis added).

The first parcel is the land described in the Rabinowitzs' Deed and in their title insurance policy. The second parcel is the 10-foot strip of land outside of the Deed and is not included as land covered by the title insurance policy. The Deed language shows the Rabinowitzs never owned the second parcel. Under the Rabinowitzs' unambiguous Deed language, all of the underlying claims relate to the property outside the Deed and only concern land not described in the title policy or Deed. The Rabinowitzs gloss over this critical fact.

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

This appeal involves a contract, which contract contains specific and clear language. The Rabinowitzs' title insurance policy provides that it covers claims concerning the land described in Schedule A of the policy.

Schedule A of the title insurance policy states:

> **The land referred to in this Policy is described as follows:**
>
> That part of the Southwest quarter of the Northeast quarter of Section 11, Township 24 North, Range 2 East, W.M. in Kitsap County, Washington described as follows:
> ...
>
> **LESS the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South**
> ...

(emphasis added).

Schedule A says nothing about insuring any rights the Rabinowitzs may have in other property, including any adjoining land. As a matter of basic contract law, the policy only insured the property identified in Schedule A. Schedule A does not include the 10-foot strip of land.

C. The 2011 *McGonagle* lawsuit solely involved land expressly not in the Rabinowitzs' Deed and outside the land described in the title policy.

The Complaint in *William S. McGonagle and Sara L. McGonagle v. Neil Rabinowitz and Elizabeth Rabinowitz, et al,* Kitsap County Superior Court case no. 11-2-00385-1 ("McGonagle Lawsuit"), correctly identifies the Rabinowitzs' land and states that the dispute was over land specifically not in the Rabinowitzs' Deed a/k/a "The East Ten Feet..."

Importantly, neither the McGonagles nor the Rabinowitzs had deeded title to the 10-foot strip due to an apparent oversight in two 1915 deeds. The dispute was entirely about which party had a superior equitable claim to the 10-foot strip because neither had any deeded interest in it. The McGonagles then asserted a claim solely concerning a 10-foot strip of land expressly not a part of the Rabinowitzs' deed or included in the title insurance policy. No claim was made as to the Rabinowitzs' land as described in their Deed or their policy. Stated differently, every claim asserted in the McGonagle Lawsuit concerned land not identified in the title insurance policy or included in the Rabinowitzs' Deed. (CP 71-75)

D. The Rabinowitzs' title policy claim only involved land outside the Deed and title policy.

The Rabinowitzs' March 28, 2011 claim submittal to Chicago Title highlighted that they were making a title claim solely involving land specifically excluded in the Rabinowitzs' Deed a/k/a "The East Ten Feet..." (CP 77-78)

Chicago Title timely and properly responded in writing on April 5, 2011. (CP 115-116) Chicago Title's response reviewed the Rabinowitzs' Deed and policy language and advised the Rabinowitzs that the dispute concerned land they did not own and not part of the insured parcel, and therefore there was no insurance. (CP 115-116)

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

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

E. The trial court grants Chicago Title's Motion for Summary Judgment.

On December 18, 2018, the trial court granted Chicago Title's Motion for Summary Judgment and dismissed the Rabinowitzs' lawsuit with prejudice. (CP 350-51)

F. Court of Appeals Decision

The Court of Appeals correctly applied Washington law in finding that the "eight corners" of the insurance contract and the underlying complaint conclusively showed there is no duty to defend because all issues involved a 10-foot strip of land not a part of the Rabinowitzs' Deed and not included within the land described in the title policy. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wash.2d 793, 803 (2014).

V. ARGUMENT WHY REVIEW SHOULD BE REJECTED

A. This Petition should be denied under RAP 13.4(b)(1) because the Court of Appeals correctly applied Washington law in finding that the "eight corners" of the insurance contract and the underlying complaint conclusively showed there is no duty

> to defend because all issues involved a 10-foot strip of land not a part of the Rabinowitzs' Deed and not included within the land described in the title policy. *Expedia, Inc. v. Steadfast Ins. Co., 180 Wash.2d 793, 803 (2014).*
>
> The Rabinowitzs' Deed granting title describes the land as:
>
> The Southwest quarter of the Northeast quarter of Section 11, Township 24 North, Range 2 East, W.M. in Kitsap County, Washington described as follows:
>
> ...
>
> LESS the East 10 Feet reserved for road for use of the Grantor of the tract immediately adjoining to the South ...

(emphasis added)

This is the same description of the land covered under the title insurance policy. The undisputed facts are that the Rabinowitzs' claims and the underlying McGonagle lawsuit all involve land not in the Rabinowitzs' Deed and not included in the land described in the title insurance policy - the disputed 10-foot strip to the east of their property. Reviewing the "eight corners" of the insurance contract and the underlying Complaint conclusively shows there is no duty to defend because all issues involved a 10-foot strip of land not a part of the Rabinowitzs' Deed and not included within the land described in the title policy. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wash.2d 793, 803 (2014). The basis for Chicago Title's denial of the tender of defense of the McGonagle Lawsuit returns to the basic fact that it concerned land that the Rabinowitzs have never

owned and that was not insured.[2] There is no conceivable basis for coverage.

In evaluating the policy and the Complaint to determine coverage, the court must interpret title insurance policies under the general rules applicable to all contracts. *See, Washington Pub. Util. Dists.' Utils. Sys. v. Pub. Util. Sys. No. 1,* 112 Wash.2d 1, 10, 771 P.2d 701 (1989). An equally important rule is that plain language is not to be disregarded. *Davis v. North American Accident Ins. Co.*, 42 Wash.2d 291, 254 P.2d 722 (1953). When language is clear, there is no room for construction. *Morgan v. Prudential Ins. Co. of America*, 86 Wash.2d 432, 545 P.2d 1193 (1976). If a policy is clear and unambiguous, the court must enforce it as written and not create ambiguity where none exists. *Quadrant Corp. v. Am. States Ins. Co.,* 154 Wash.2d 165, 171, 110 P.3d 733 (2005). Here, the Court of Appeals correctly applied Washington law in finding that the "eight corners" of the insurance contract and the underlying Complaint conclusively showed there is no duty to defend because all issues involved a 10-foot strip of land not a part of the Rabinowitzs' Deed and not included within the land described in the title policy. This Petition should be denied.

B. This Petition should be denied under RAP 13.4(b)(1) because the Court of Appeals decision does not conflict with decisions of this Court. Chicago Title did not raise new grounds

---

[2] In *Merriam-Webster's* dictionary (11th ed.), when used as a preposition, "Less" is defined as meaning "diminished by or minus."

to support denial of coverage during litigation. The Court of Appeals correctly recognized that the 10-foot strip of land was not part of the Deed and not part of the land described in the title insurance policy. The Court of Appeals also properly evaluated the Rabinowitzs' claims in relying on this Court's holding in *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010). *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wash. 2d 501, 276 P.3d 300 (2012), does not apply.

The Rabinowitzs second alleged basis for review is an improper fabrication of Chicago Title's position, and concerns the Court of Appeals own "no loss" analysis.[3] In confirming that the Rabinowitzs' lacked a valid claim, the Court of Appeals properly cited this court's holding in *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010), where this court stated "allegations, if proven, must also result in a loss or liability that is conceivably covered under the insured's policy." This was the Court of Appeals' own discussion. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wash. 2d 501, 276 P.3d 300 (2012), is completely inapposite because there is no evidence that Chicago Title has ever changed its position by adding additional reasons later for denying coverage. The Rabinowitzs' argument is simply an attempt to confuse.

The Court of Appeals' ruling was based on its reviewing Chicago Title's actions under the "eight corners" analysis. To the extent the court went further, that is the Court of Appeals' right. On appeal, a court "may affirm the [lower] court on any grounds established by the pleadings and

[3] Petition at 7.

supported by the record." *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wash.2d 751, 766, 58 P.3d 276 (2002). Alternatively, the Court of Appeals' analysis could be considered dicta. *In re Marriage of Rideout,* 150 Wash.2d 337, 358, 77 P.3d 1174 (2003); *Ruse v. Dep't of Labor & Indus.*, 138 Wash.2d 1, 8–9, 977 P.2d 570 (1999). The Rabinowitzs' argument that Chicago Title changed its position is entirely without basis. This Petition should be rejected.

C. This Petition should be denied under RAP 13.4(b)(1) because the Court of Appeals decision does not conflict with decisions of this Court. The Court of Appeals did not place the burden on the insureds to show a loss, but correctly recognized there could be no conceivable loss because all claims concerned a 10-foot strip of land not part of the Deed and not part of the land described in the title insurance policy. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wash.2d 398, 404, 229 P.3d 693 (2010).

The Rabinowitzs incorrectly interpret the Court of Appeals' ruling. The issue is not proving an alleged loss, the issue is that all claims concerned land not in the Deed and not part of the land described in the title insurance policy. Lost in the Rabinowitzs' discussion is the fact that any loss must be tethered to the land described in the policy. The Rabinowitzs may own other land or have equitable claims to other land, but those other holdings are not part of the Deed and not part of the land described in the title policy. The Court of Appeals correctly applied Washington law in reciting that although the duty to defend is broad, it is not unlimited. *Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wash.2d 872, 879, 297 P.3d 688 (2013). Chicago Title does not owe the Rabinowitzs a duty

to defend if it is clear from the face of the complaint that the allegations do not fall within the policy. *Robbins v. Mason County Title Insurance Co.*, 195 Wash.2d 618, 641, 462 P.3d 430 (2020). Here, all claims concerned land not described in the title insurance policy and outside the Deed.

Whether the Rabinowitzs conceivably own other land is a red herring and is not relevant. This case is singularly about the land described in the title insurance policy. As a matter of basic contract law, the policy only insured the property identified in Schedule A, and not any interest in an adjoining property. There is no credible dispute over what land was described in the title insurance policy. The policy's plain language cannot be disregarded. *Davis v. North American Accident Ins. Co.*, 42 Wash.2d 291 (1953). Nor in such a situation is there room for construction. *Morgan v. Prudential Ins. Co. of America*, 86 Wash.2d 432 (1976). There is no ambiguity and there is no legal basis for unilaterally adding another piece of real property to the insured parcel. Here, the dispute between the Rabinowitzs and the McGonagles concerned which party had a superior claim to a 10-foot strip to which neither had deeded title. Regardless of the merits of their arguments or which party prevailed in that dispute, it concerned land not in the Rabinowitzs' Deed and not part of the land described in the title insurance policy, and therefore the Court of Appeals correctly concluded that it is impossible to have a loss under the policy and raise the duty to defend. This Petition should be rejected.

D. Review should be denied under RAP 13.4(b)(4) because this Petition does not concern a matter of substantial public interest, and the Rabinowitzs fail to identify any reason to suggest it does. Further, the Court of Appeals decision does not conflict with decisions of this Court. The Court of Appeals correctly recognized that the legal description in the Deed and in the title insurance policy controlled over the Rabinowitzs' subjective belief. *Shotwell v. Transameric Title Ins. Co.*, 91 Wash.2d 161, 588 P.2d 208 (1978).

The Rabinowitzs fail to show how their Petition involves a substantial public interest that requires review under RAP 13.4(b)(4). Even more compelling, beyond being devoid of any explanation the Petition lacks any statement even mentioning a substantial public interest. The Rabinowitzs' claims are unsupported, without basis and this Petition should be summarily rejected.

The Rabinowitzs also misapply *Shotwell v. Transamerica Title Ins. Co.*, 91 Wash. 2d 161, 169, 588 P.2d 208, 213 (1978). Unlike *Shotwell*, this is not a situation where the title search overlooked interests, which were a matter of public record. Here, the Court of Appeals and Chicago Title properly reviewed the legal description of the land in the policy for the express purpose of identifying the land covered by the policy, and not for any other limiting purpose. The title insurance policy is a reflection of the accuracy of a title company's search of the record title on a specific property, here the property described in the policy. *Kiniski v. Archway Motel*, 21 Wash. App. 555, 560, 586 P.2d 502 (1978); *C 1031 Properties, Inc. v. First Am. Title Ins. Co.*, 175 Wash. App. 27, 32, 301 P.3d 500, 502 (2013). Both parties to this lawsuit agree that the Rabinowitzs' claims

solely concern the "East 10 Feet" not included in the Deed. The Rabinowitzs' Policy does not insure any property other than that described in the Deed and related Policy. There is no ambiguity and there is no legal basis for unilaterally adding another piece of real property to the insured property. The Rabinowitzs never presented a claim as to the land described in the title policy.

The Policy is one of indemnity against specific defects in or unmarketability of title, or liens, or encumbrances as to the land described in the title policy only. *Sec. Serv., Inc. v. Transamerica Title Ins. Co.*, 20 Wash. App. 664, 669-70, 583 P.2d 1217 (1978). Any obligation of defense hinges on whether a claim is against the specific insured parcel of land. Here, there is nothing before the court, and there are no facts showing any issue with the title to the land described in the Deed and in the title insurance policy. In fact, the opposite is true.

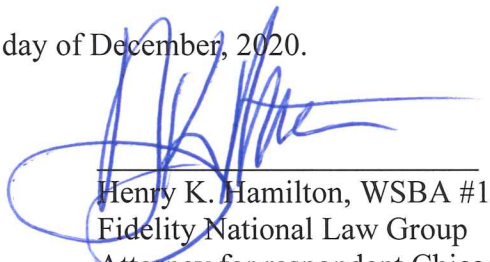
The Rabinowitzs' claims are unsupported, without basis and this Petition should be summarily rejected.

VI. CONCLUSION

The Rabinowitzs misrepresent Chicago Title's position and the Court of Appeals' ruling. The Court of Appeals correctly found that the uncontroverted facts showed that the Rabinowitzs' claims concerned land not described in the title insurance policy and not in their Deed. Correctly applying this Court's rulings, the Court of Appeals reviewed the eight corners of the policy and the underlying Complaint and conclusively

found that all of the land at issue in the McGonagle Complaint was not the land described in the title policy or the Deed. As such, it is simply not conceivable to have a covered claim and there can be no duty to defend. Nor is there any substantial public interest that requires further review. The Rabinowitzs fail to show any error, or why this Court should grant this Petition. This Court should simply deny this Petition.

Dated this 21st day of December, 2020.



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

FIDELITY NATIONAL LAW GROUP

December 21, 2020 - 4:25 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99244-4
Appellate Court Case Title:	Neil and Elizabeth Rabinowitz v. Chicago Title Insurance Company
Superior Court Case Number:	15-2-01064-8

The following documents have been uploaded:

- 992444_Answer_Reply_20201221162235SC378341_7378.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 20201221 CT Answer to Petition.pdf

A copy of the uploaded files will be sent to:

- Lindsay.Holzworth@fnf.com
- clapham@carneylaw.com
- laveson@carneylaw.com

Comments:

Sender Name: Henry Hamilton - Email: henry.hamilton@fnf.com
Address:
701 5TH AVE STE 2710
SEATTLE, WA, 98104-7054
Phone: 206-223-4525 - Extension 101

Note: The Filing Id is 20201221162235SC378341