Supreme Court No. 99244-4

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 52898-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Neil and Elizabeth Rabinowitz, Husband and Wife,

Appellants,

v.

Chicago Title Insurance Company, a Nebraska State Corporation;
and Fidelity National Title Group, a Delaware State Corporation,

Respondents

PETITION FOR REVIEW

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I. INTRODUCTION

The role of the title insurer is to insure title. *Kim v. Lee*, 145 Wn.2d 79, 91, 31 P.3d 665 (2001). Petitioners Neil and Elizabeth Rabinowitz (collectively "Rabinowitz") are homeowners who seek discretionary review to hold title insurers to the same "duty to defend" standards as other liability insurers. In this case, Rabinowitz was sued by neighboring property owners William and Sara McGonagle (collectively "McGonagle") over a 10-foot strip of land specifically described in Rabinowitz' deed, and in their title policy purchased from Chicago Title. The strip was *not* mentioned at all in McGonagle's deed. Nor did McGonagle have a recorded easement to the 10-foot strip.

In spite of this, McGonagle sued Rabinowitz seeking to acquire title to, or use of, the strip of land that was in Rabinowitz' deed and title policy. McGonagle's quiet title complaint alleged alternative theories – one of which would have unquestionably been covered by Rabinowitz' title policy. Remarkably, Chicago Title refused to defend Rabinowitz *before knowing which of McGonagle's alternate theories would succeed*. Not only did Chicago Title put its own interests ahead of its insured, it impermissibly – and this fact is not in dispute -- looked outside the 8-corners of the Complaint and the Policy to reach this duty to defend decision.

Division II affirmed the trial court decision in favor of Chicago Title, with one judge dissenting. ("the Decision"). In so doing, the Decision impermissibly relied on extrinsic evidence, and on the Court's own prediction of the outcome in the underlying trial court (*McGonagle v. Rabinowitz*) rather than review what the insured was faced with – a Complaint and its insurance policy. For an insured, the benefit of a defense is often times more important than the benefit of indemnity. That is the

case here. Chicago Title was obliged to provide a defense to Rabinowitz against McGonagle's challenge to Rabinowitz' ownership interest in – his title to – the insured property.

It is upon these circumstances that Rabinowitz seeks discretionary review. Title insurers in Washington must be held to the same standards as other liability insurers when faced with a tender of defense for a lawsuit *against their insureds* related to property unquestionably covered by the title policy.

II. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioners Neil and Elizabeth Rabinowitz (collectively "Rabinowitz") ask the Court to accept review of an unpublished Court of Appeals decision filed August 18, 2020 ("Decision"), in the Appendix at A-001 to A-015. Rabinowitz moved to publish (A-016 to A-020) and moved for reconsideration (A-021 to A-049). The Court of Appeals denied Rabinowitz' Motion for Reconsideration on October 21, 2020 (A-50) and denied Rabinowitz' Motion to Publish on November 4, 2020 (A-51).

The Decision affirmed the denial of Rabinowitz' Motion for Partial Summary Judgment against their title insurer, Chicago Title Insurance Co. ("Chicago Title") and the grant of Chicago Title's Motion for Summary Judgment. The Decision held that Chicago Title had no duty to defend Rabinowitz against a quiet title lawsuit brought against Rabinowitz by their neighbors. The Decision included a dissenting opinion.

III. ISSUES PRESENTED FOR REVIEW

1. Whether review should be granted per RAP 13.4(b)(1) because the Court of Appeals decision conflicts with decisions of this Court requiring an insurer to determine its duty to defend only from the 8-corners of the insurance contract and the underlying complaint, including *Expedia Inc. v. Steadfast Insurance Co*., 180 Wn.2d 793, 329 P.3d 59 (2014); *Am. Best Food, Inc. v. Alea London, Ltd*., 168 Wn.2d 398, 229 P.3d 693 (2010); and *Xia v. ProBuilders Specialty Ins. Co*., 188 Wn.2d 171, 400 P.3d 1234 (2017).

2. Whether review should be granted per RAP 13.4(b)(1) because the Court of Appeals decision conflicts with decisions of this Court that prevent an insurer from raising new grounds to support a denial of coverage during the course of litigation that it did not assert in its initial denial, including *Vision One, LLC v. Philadelphia Indemnity Ins. Co*., 174 Wn.2d 501, 276 P.3d 300 (2012).

3. Whether review should be granted per RAP 13.4(b)(1) because the Court of Appeals decision conflicts with decisions of this Court that squarely place the burden of proving the application of an insurance policy exclusion upon the insurer, not the insured, including *Am. Best Food, Inc. v. Alea London, Ltd*., 168 Wn.2d 398, 229 P.3d 693 (2010).

4. Whether review should be granted per RAP 13.4(b)(4) to confirm that the purpose of the description of land in a title insurance policy is for identifying the land covered by the policy and not for the purpose of limiting the insurance protection purchased, consistent with *Shotwell v. Transamerica Title Ins. Co*., 91 Wn.2d 161, 588 P.2d 208 (1978).

IV. STATEMENT OF THE CASE

Rabinowitz purchased title insurance from Chicago Title (CP: 40-69 (Title Policy)) when purchasing their home on Bainbridge Island in 1987. The disputed 10-foot strip claimed by neighbor McGonagle was included within the metes and bounds perimeter of Rabinowitz' legal description, recited in *Schedule A* of the title policy –

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

(CP: 72 - McGonagle Complaint); (CP: 51 - Legal Description in Chicago Title policy); (CP: 95 - Exhibit A of Rabinowitz deed).

A. The Underlying Action – *McGonagle v. Rabinowitz.*

On February 14, 2011, McGonagle filed a quiet title action against Rabinowitz seeking ownership of, or alternatively, an easement to use the 10-foot strip. (CP 71-75). A common grantor had at one time owned both the McGonagle and Rabinowitz parcels. (CP 73 at ¶ 5). Under McGonagle's first legal theory, he asserted that he owned the 10-foot strip in fee simple. Despite the fact that the strip was not mentioned in McGonagle's own deed, he claimed this was a "scrivener's error." Under this theory, Rabinowitz had no ownership interest in the strip.

Alternatively, McGonagle claimed that the *language "**LESS the East 10 feet reserved for road for use of the Grantor"*** was utilized by the common grantor to establish an express easement. McGonagle's express easement claim acknowledged Rabinowitz owned the strip, subject to an easement in favor of McGonagle.

The 10-foot strip was *not* included in the metes and bounds description or otherwise mentioned in McGonagle's legal description. The trial court, after a bench trial, ultimately concluded that McGonagle owned the 10-foot strip in fee simple due to a scrivener's error and that Rabinowitz had no ownership interest in that property. (July 21, 2014) (CP: 153-157).

B. Chicago Title's Denial.

On March 28, 2011, just a month after McGonagle filed his quiet title lawsuit, Rabinowitz tendered defense of that lawsuit to Chicago Title. (CP 76-113). In its April 5, 2011 denial letter, Chicago Title acknowledged that under the insuring agreement, coverage is provided where "Title to the estate or interest described in Schedule A [is] vested otherwise than as stated there." (CP: 115-116). "Schedule A" recites the Rabinowitz' legal description just as it appears on Rabinowitz' deed *(see, CP 121-123)*. Chicago Title wrote:

> The Company takes the position that the "LESS" immediately preceding "the East 10 feet . . ." removes the disputed property from the description of the land insured by the Policy. **Accordingly, the subject matter of the claim does not fall within the insuring provisions of the Policy**.

(CP: 116)(emphasis added). The letter then states:

> Since the Company is taking the position that the East 10 feet was not insured by the Policy any claim for loss of that portion or an easement by prescription or implication over that portion would fall outside the insuring provisions of the Policy without the need for a Schedule B Exception.

Id. Rabinowitz understood that he purchased the entire parcel identified within the metes and bounds description of his Lot, which included the strip, and that the phrase "***LESS the East 10 feet reserved for road for use of the Grantor"*** was at most intended by the grantor to reserve to the grantor a right to use the 10-foot strip for a road. Because there was no recorded easement benefiting McGonagle's parcel, or recorded easement shown as an encumbrance against Rabinowitz' parcel, the intent of the grantor was uncertain. This is why McGonagle had filed alternative claims for fee simple ownership, an express easement, a prescriptive

easement, or an implied easement. The grantor's intent could not be known to either McGonagle or Rabinowitz short of a judicial determination. Nor could it have been known to Chicago Title. Yet the title insurer acted as the judge and jury, unilaterally determining before any judicial adjudication that the language ***"LESS the East 10 feet reserved for road for use of the Grantor"*** acted to divest Rabinowitz of fee simple ownership, *as a matter of law*, leaving the strip outside of the parcel and uninsured by Chicago Title.

In denying coverage, Chicago Title *unilaterally* gave the language ***"LESS the East 10 feet reserved for road for use of the Grantor"*** a self-serving interpretation that prevented coverage, while ignoring McGonagle's express easement claim – a claim that acknowledged Rabinowitz' fee simple ownership interest – a claim that, if proven, eliminated the reason for Chicago Title's denial.

In its' second denial letter, Chicago Title revealed that it had searched facts **outside** of the 8-corners of the Complaint and Policy ***and*** **that it was relying on those facts to deny its duty to defend**:

> ***A review of the chain of title*** *shows that the East 10 feet have been continually excepted from the conveyance of title to the Property, and as such the Company* ***would not have been willing*** *to insure title to such land. Accordingly,* ***the subject matter of the claim*** *does not fall within the insuring provisions of the Policy.*

(CP: 123) (emphasis added). Rabinowitz was left holding the bag to pay substantial out-of-pocket defense costs in a very contentious and expensive lawsuit brought by McGonagle – a Kitsap County attorney.

C. The Present Suit: *Rabinowitz v. Chicago Title*.

After Chicago Title denied coverage, Rabinowitz filed this declaratory action on May 29, 2015 (CP: 4-9). Both parties moved for summary judgment on Chicago Title's duty to defend. (CP: 21-36 and 125-142 - legal memoranda). The trial court denied Rabinowitz' motion and granted Chicago Title's motion without explanation (CP: 350-351). Rabinowitz appealed (CP: 352).

D. Court of Appeals Decision.

Although the Decision accurately sets forth Washington's "duty to defend" law, it did not apply those principals to the facts of this case. The Decision impermissibly allows Chicago Title to rely on facts outside the 8-corners of the Complaint and the Policy to conclude it had no duty to defend. The Decision further compounds the error by adding **the Court's own** "no loss" analysis – to find a duty to defend. The dissenting opinion pointed out these errors.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Review should be granted per RAP 13.4(b)(1) because the Decision conflicts with decisions of this Court requiring an insurer to determine its duty to defend only from the 8-corners of the insurance contract and the underlying complaint, including *Expedia Inc. v. Steadfast Insurance Co.,* 180 Wn.2d 793, 329 P.3d 59 (2014); *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010); and *Xia v. ProBuilders Specialty Ins. Co*., 188 Wn.2d 171, 400 P.3d 1234 (2017).

In Washington, the duty to defend is determined from the "8-corners" of the insurance contract and the underlying complaint. *Expedia Inc. v. Steadfast Insurance Co.,* 180 Wn.2d 793, 329 P.3d 59 (2014); *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010); and *Xia v. ProBuilders Specialty Ins. Co*., 188 Wn.2d 171, 400 P.3d 1234 (2017). It is indisputable that Chicago Title

relied on facts outside the 8-corners of the Complaint and Policy *to deny* its policyholder a defense.

> ***A review of the chain of title*** *shows that the East 10 feet have been continually excepted from the conveyance of title to the Property, and as such the Company* ***would not have been willing*** *to insure title to such land. Accordingly,* ***the subject matter of the claim*** *does not fall within the insuring provisions of the Policy.*

(CP: 123) (emphasis added). "[*T]he* insurer may not rely on facts extrinsic to the complaint to deny the duty to defend — it may do so only to trigger the duty." *Woo v. Fireman's Fund Ins. Co*., 161 Wn. 2d 43, 53–54, 164 P.3d 454, 459 (2007) (internal citations omitted). Further, under well-established Washington law, the "conceivably covered" standard applies to all "duty to defend" determinations. *Woo v. Fireman's Fund Ins. Co.,* 161 Wash.2d 43164 P.3d 454 (2007). By affirming Chicago Title's decision to deny its duty to defend, the Decision impermissibly allows Chicago Title to rely on information outside the 8-corners to deny a defense.

In applying the "conceivably covered" standard and the "8-corners" rule to analyze the duty to defend, the only relevant facts are those *alleged* by McGonagle in his Complaint, even if those facts are untrue. Because McGonagle's deed did not include the strip, and because he had no recorded easement to the strip, he relied on the language in Rabinowitz' deed that stated: *"LESS the East 10 feet reserved for road for use of the Grantor of the tract immediately adjoining on the South"* to assert claims, in the alternative, for (1) fee simple ownership and (2) express easement. (CP: 43).

In alleging this language had alternative possible meanings, McGonagle himself acknowledged an ambiguity in this language. Under Washington law, when

considering the duty to defend, the insured is entitled to all conceivable inferences to find a duty to defend. Both Chicago Title, and the Decision, deprive Rabinowitz of this inference.

The language "*reserved for use of the Grantor of the tract immediately adjoining on the South*" could *conceivably* have been intended by the grantor to establish only an easement, an interpretation consistent with the fact that there was no mention of the strip in McGonagle's own deed, or recorded road easement to benefit McGonagle's parcel. This language could also have *conceivably* been unintended "surplusage" due to a scrivener's error – a plausible interpretation where, as, here, the strip was not mentioned in McGonagle's deed and he had no express easement.

In response to Rabinowitz' request that Chicago Title reconsider its decision, *Chicago Title itself had to look to extrinsic facts – the chain of title – to try to resolve the ambiguity in violation of the 8-corners rule*, and then used this extrinsic evidence *to deny* its defense obligation. Chicago Title wrote to Rabinowitz claiming it would not have insured the title based on what it found in this chain of title. But it should have reviewed the chain of title, and made that decision, before it ever issued the Policy. It was not permitted to do so as an after-thought to justify its denial of a defense to Rabinowitz.

The Decision further compounded this violation of Washington law governing an insurer's duty to defend by affirming the summary judgment decision in favor of Chicago Title. Rabinowitz urges the Court to accept review for this reason.

B. Review should be granted per RAP 13.4(b)(1) because the Court of Appeals decision conflicts with decisions of this Court that prevent an insurer from raising new grounds to support a denial of coverage during the course of litigation that it did not assert in its initial denial, including *Vision One, LLC v. Philadelphia Indemnity Ins. Co.,* 174 Wn.2d 501, 276 P.3d 300 (2012).

Under both Washington law and traditional principles of estoppel, an insurer may not change the basis for avoiding liability after litigation has begun. *See Vision One, LLC, v. Philadelphia Indemnity Ins. Co*., 174 Wn.2d 501, 520-21, 276 P.3d 300 (2012)(coverage must be determined under the policy language Philadelphia relied upon when it denied coverage).[1] This doctrine prevents an insurer from raising new grounds to support a denial of coverage that it did not assert in its initial denial. *Id*. The Decision relies on the "no loss" exclusion – an exclusion that was never raised by Chicago Title in denying coverage. The Decision therefore impermissibly relies on facts and reasons that Chicago Title itself did *not* rely on when denying a defense to its policyholder.

[1] See also, *Karpenski v. Am. Gen. Life Cos., LLC*, 999 F. Supp. 2d 1235, 1245 (W.D. Wash. 2014) (applying the doctrine where defendants failed to raise other grounds for denial "until well after litigation began and they had answered [the p]laintiff's complaint, formally asserting [those grounds] only upon summary judgment"); *Integrated Health Prof'ls. v. Pharmacists Mut. Ins. Co.*, 422 F. Supp. 2d 1223, 1227 (E.D. Wash. 2006) ("In the State of Washington, an insurer may not change its position once an action has been commenced if the insured will suffer prejudice as a result."); *Bosko v. Pitts & Still, Inc.,* 75 Wn.2d 856, 454 P.2d 229, 234 (Wash. 1969) (general rule that if an insurer denies coverage under the policy for one reason, while having knowledge of other grounds for denying liability, it is estopped from later raising the other grounds in an attempt to escape coverage.)

C. Review should be granted per RAP 13.4(b)(1) because the Court of Appeals decision conflicts with decisions of this Court that squarely place the burden of proving the application of an insurance policy exclusion upon the insurer, not the insured, including *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010).

Even if Chicago Title had raised the "no loss" exclusion in its denial –though it did not – it is improper to shift the burden to Rabinowitz to "demonstrate" a loss as the Decision clearly did.

Under the insuring agreement provisions of the Chicago Title Policy, coverage is afforded for "loss or damage, not exceeding the amount of the insurance stated in Schedule A, ***and*** *costs, attorneys' fees and expenses . . . sustained or incurred by the insured . . ."* Thus, a "loss" is not the sole basis for providing coverage. *"Costs, attorneys' fees and expenses"* also trigger coverage. Here, Rabinowitz sought coverage for the costs, attorney fees, and expenses incurred to defend his title – his claim of ownership, against McGonagle's own claim of ownership. Chicago Title has never questioned or disputed this scope of coverage.

By way of a policy *exclusion*, coverage is excluded for *"adverse claims . . . resulting in* ***no loss to the insured claimant*** *. . . ."* It is well established in Washington insurance jurisprudence that it is the insurer who bears the burden to prove the application of an exclusion – not the insured. *American Best Food*, *Inc. v. Alea London, Ltd*., 138 Wn.App. 674, 683, 158 P.3d 119 (2007); aff'd in part, 168 Wn.2d 398, 229 P.3d 693 (2010).

Thus, the Decision contradicts well-established Washington law in holding:

> Even if we agree with the Rabinowitzes that their title vested otherwise than as stated in Schedule A, . . . they [Rabinowitzes] fail to show that they would suffer loss or liability resulting from this claim."

The Decision thus incorrectly places the burden on Rabinowitz – the insured – to establish a "loss" in order to avoid application of the exclusion. Respectfully, the Decision has it backwards.

Moreover, *at the time of its denial on April 5, 2011*, Chicago Title could not know the outcome of McGonagle's quiet title action. It could not know if a loss was "conceivable" based on the *allegations* of the McGonagle Complaint, because McGonagle sought to divest Rabinowitz of the strip's ownership. This *"allegation"* of loss, standing alone, is all that is relevant in analyzing the "loss" issue in the context of a "duty to defend" determination. Rabinowitz is entitled to the benefit of the doubt in the duty to defend analysis – both by Chicago Title and by this Court. *Woo v. Fireman's Fund Ins. Co.,* 161 Wn.2d 43164 P.3d 454 (2007).

As explained by Judge Melnick in his dissent, it was *conceivable* that Rabinowitz owned the disputed property in fee simple, and it was also *conceivable* that Rabinowitz could lose that fee simple interest. Thus, the potential harm is that Rabinowitz, who believed he purchased and owned the disputed portion of property in fee simple, might lose ownership and control of it. Rabinowitz urges the Court to accept discretionary review for these reasons.

D. Review should be granted per RAP 13.4(b)(4) to confirm that the purpose of the description of land in a title insurance policy is for identifying the land covered by the policy and not for the purpose of limiting the insurance protection purchased, consistent with *Shotwell v. Transamerica Title Ins. Co.,* 91 Wn.2d 161, 588 P.2d 208 (1978).

The purpose of the description of land in a title insurance policy is for identifying the land covered by the policy and not for the purpose of limiting the insurance protection purchased. *Shotwell v. Transamerica Title Ins. Co*. 91

Wash.2d 161, 169, 588 P.2d 208 (1978). The Decision impermissibly relies on the legal description to limit coverage, in stating:

> To the extent that the Rabinowitzes believed they had an unencumbered fee simple interest in the disputed property because the strip was not listed as an exception to title in the title report, this construction contradicts the plain language in Schedule A and the deed.

Decision at 11. In his Complaint, even McGonagle alleged the Schedule A language had different potential meanings. McGonagle, himself a lawyer, recognized that the outcome of his case turned on the issue of the grantor's intent – an issue that was a mixed question of law and fact. This issue could not be resolved "as a matter of law" in the context of this appeal any more than it could have been decided on summary judgment in McGonagle's quiet title action, or by Chicago Title based on the allegations of the McGonagle Complaint. Again, as a matter of law, for purposes of evaluating the duty to defend, it must be assumed that Rabinowitz owned the strip in fee simple and it was therefore part of the property covered by the Policy. Rabinowitz urges the Court to accept discretionary review for this additional reason.

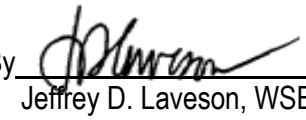
VI. CONCLUSION

According to Chicago Title, a title insurer does nothing more than provide a title search service, with a guarantee that it is accurate. But that is not what the policy says. It insures "marketable title" to the insured property. McGonagle's challenge to Rabinowitz' ownership interest in a portion of the insured property impacted the marketability of the insured property – something Chicago Title has never challenged. Rather, Chicago Title impermissibly decided *in advance of a judicial determination* that Rabinowitz did not own the strip to justify a denial of a

defense, claiming it was not part of the property insured by Chicago Title. Under his express easement claim, McGonagle recognized that Rabinowitz did in fact own the strip. This potential outcome would have overcome Chicago Title's reason for denying coverage; it was "conceivably covered," and Chicago Title had a duty to defend. Title insurers should be held to the same standard as all other liability insurers vis-à-vis the duty to defend. Further, the loss of ownership, or alternatively, the partial loss of control of the strip to an express easement claim, was a sufficient potential "loss" under the title policy. Chicago Title plainly had a duty to defend. The dissenting opinion understood this. Petitioners Neil and Elizabeth Rabinowitz ask the Court to grant review and set the case for argument at the earliest opportunity.

Respectfully submitted this 19th day of November, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Double-click any box to check or uncheck.

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DATED this 19th day of November, 2020.

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Appendix A

Filed
Washington State
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Division Two

August 18, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NEIL RABINOWITZ and ELIZABETH RABINOWITZ, husband and wife, Appellants, v. CHICAGO TITLE INSURANCE COMPANY, a Nebraska State Corporation, Respondent.	No. 52898-3-II UNPUBLISHED OPINION

CRUSER, J. — Neil and Elizabeth Rabinowitz appeal from the trial court's order granting summary judgment in favor of Chicago Title Insurance Company ("Chicago Title") and denying their motion for partial summary judgment. They argue that the trial court erred because Chicago Title had a duty to defend them pursuant to their title insurance policy in a quiet title action filed by their neighbors.

We hold that Chicago Title did not owe the Rabinowitzes a duty to defend because neither claim in the neighbors' complaint alleged facts that, if proven, imposed liability within the policy's coverage.

Accordingly, we affirm.

FACTS

In 1987, the Rabinowitzes purchased their current home on Bainbridge Island. William and Sara McGonagle own the adjacent property. Both properties were once owned by a common

grantor. In 1915, the common grantor deeded the property to one of the Rabinowitzes' predecessors in interest, and the legal description in that deed stated,

> BEG AT A PT 495 FEET W AND 247.5 FT N OF THE SE CORNER OF THE SW OF NE OF SEC 11, TWP 24-2 E, AND RUNNING THE W 880 FEET; TH N 247.5 FEET; THE 880 FEET; TH S 247.5 FEET TO P O B, CONTAINING 5 ACRES *LESS A STRIP OF LAND 10 FEET WIDE ALONG THE E LINE OF SAID TRACT RESERVED FOR A ROAD FOR THE USE OF THE GRANTOR OF THE TRACT IMMEDIATELY ADJOINING ON THE SOUTH.*

Clerk's Papers (CP) at 73 (emphasis added).

The legal description in the Rabinowitzes' deed similarly stated,

> Beginning at a point 495 feet West and 247.5 feet North of the Southeast Corner of the said Southwest quarter of the Northeast quarter, which is the True Point of Beginning; thence West 825 feet, more or less, to the West line of the said Southwest quarter of the Northeast quarter; thence North 247.5 feet, more or less, to the South line of the North 825 feet of the said Southwest quarter of the Northeast quarter; thence East 825 feet, more or less, to a point North of the True Point of Beginning; thence South to the True point of Beginning *LESS the East 10 Feet reserved for road for use of the Granter of the tract immediately adjoining on the South*;

CP at 87 (emphasis added).

Later that year, the common grantor also deeded the McGonagle property to one of their predecessors in interest, but this deed made no mention of the 10-foot strip. The McGonagles' deed likewise did not mention the 10-foot strip, although the strip is essential to accessing the McGonagle property from the public road.

When the Rabinowitzes purchased their home, they purchased a title insurance policy from Chicago Title. Relevant here, the policy provided coverage for loss or damage if the "[t]itle to the estate or interest described in Schedule A . . . vested otherwise than as stated therein." CP at 41. The description of the land covered by the policy in Schedule A was a verbatim copy of the legal description of their property in the deed.

The Rabinowitzes' policy listed exceptions from coverage, including an exception for easements that were not discoverable in public records. Below the list of standard exceptions, the policy also listed two easements as exceptions from coverage, neither of which appeared to refer to the 10-foot strip.

In 2011, the McGonagles filed a quiet title action alleging that they owned the 10-foot strip in fee simple, and although this land was omitted from their own deed, such omission was the result of a "scrivener's error." CP at 74. Under this claim, the Rabinowitzes would have no interest in the disputed property. Alternatively, the McGonagles claimed that they had an easement by "title, prescription or implication," that runs with their property. CP at 74. Under this claim, the Rabinowitzes had a fee simple interest in the disputed property, subject to the McGonagles' easement.

The Rabinowitzes notified Chicago Title regarding the lawsuit, requesting that Chicago Title tender a defense and indemnity coverage. Chicago Title responded by denying the Rabinowitzes' claim. Chicago Title explained that the disputed 10-foot strip was expressly exempted from coverage due to the word "LESS" in the legal description of the property. The Rabinowitzes requested that Chicago Title reconsider its denial of their claim, Chicago Title declined to do so, and it maintained its earlier position that the disputed land was not part of the Rabinowitzes' property covered under the title policy.

Approximately three years later, the trial court decided the dispute regarding the 10-foot strip in the McGonagles' favor. On May 29, 2015, the Rabinowitzes filed this lawsuit against Chicago Title, alleging that Chicago Title breached its contract by failing to defend them and that such failure constituted bad faith, entitling them to reimbursement of the costs sustained in

defending the underlying lawsuit. The Rabinowitzes also claimed that Chicago Title violated the Washington Consumer Protection Act and the Insurance Fair Conduct Act, breached its quasi-fiduciary duty, caused negligent infliction of emotional distress, and owed them coverage by estoppel.

The Rabinowitzes moved for partial summary judgment on the duty to defend claim. Chicago Title responded in kind with its own cross-motion for summary judgment, reasserting the same grounds for its initial denial of the Rabinowitzes' claim. Following oral argument, the trial court denied the Rabinowitzes' motion for partial summary judgment, granted Chicago Title's motion for summary judgment, and dismissed the Rabinowitzes' lawsuit.

The Rabinowitzes appeal.

DISCUSSION

I. STANDARD OF REVIEW

This court reviews a summary judgment order de novo and "engages in the same inquiry as the trial court." *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Construction of an insurance contract is also a question of law that we will review de novo. *Woo*, 161 Wn.2d at 52. We will consider the parties' intent as derived from the plain language of the contract. *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 472, 209 P.3d 859 (2009). A court reads the contract as would an average person. *Id.* at 472. Clear and unambiguous language is given its plain meaning, but ambiguities in an insurance policy will be construed against the drafter. *Robbins v. Mason County Title Insurance Co.*, 195 Wn.2d 618, 626, 462 P.3d 430 (2020).

Coverage exclusions are strictly and narrowly construed. *Campbell*, 166 Wn.2d at 472. In addition, "'[c]onstruction which contradicts the general purpose of the contract or results in hardship or absurdity is presumed to be unintended by the parties.'" *Id.* at 472 (quoting *Nautilus, Inc. v. Transamerica Title Ins. Co. of Wash.*, 13 Wn. App. 345, 349, 534 P.2d 1388 (1975)).

II. DUTY TO DEFEND

A. LEGAL PRINCIPLES

Title insurance is "[a]n agreement to indemnify against loss arising from a defect in title to real property, usu[ally] issued to the buyer of the property by the title company that conducted the title search." *Id.* at 470 (quoting BLACK'S LAW DICTIONARY 819 (8th ed. 2004)). Under RCW 48.01.020, all insurance and insurance transactions in Washington or affecting subjects located in Washington, are governed under Title 48 RCW. Thus, title insurance falls within the scope of Title 48 RCW. *See* ch. 48.29 RCW (pertaining to title insurers); *Campbell*, 166 Wn.2d at 470.

Under RCW 48.01.030, "[t]he business of insurance 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." The duties in this provision inform an insurer's duty to defend, which applies to the title insurance policy in this case. *See Campbell*, 166 Wn.2d at 471.

It is well established that the duty to defend is both different and broader than the duty to indemnify. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010). Whereas "[t]he duty to indemnify exists only if the policy *actually* covers the insured's liability," the duty to defend is triggered if the complaint contains allegations that are "*conceivably cover[ed]*." *Id.* at 404.

"The duty to defend 'arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.'" *Id.* (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 454 (2007)). An insurer must defend if a claim would be covered under any reasonable interpretation of the facts or law. *Id.* at 405. Although the duty to defend is broad, it is not unlimited. *Nat'l Sur. Corp.* v. *Immunex Corp.*, 176 Wn.2d 872, 879, 297 P.3d 688 (2013). The insurer does not owe the insured a duty to defend if it is clear from the face of the complaint that the claims do not fall within the policy. *Robbins*, 195 Wn.2d at 641.

To determine whether the duty to defend exists, the insurer limits its consideration to the four corners of the insurance contract plus the four corners of the underlying complaint, together described as the "'eight corners.'" *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 803, 329 P.3d 59 (2014). An insurer also may not give itself the benefit of the doubt in determining whether a claim is covered, nor may it rely on an equivocal interpretation of the law when denying its duty to defend a claim. *Am. Best Food*, 168 Wn.2d at 413.

If any allegation in a complaint could result in a covered liability, even where the complaint raises other claims that are not covered, the insurer must defend the conceivably covered claim. *Webb v. USAA Cas. Ins. Co.*, 12 Wn. App. 2d 433, 445-46, 457 P.3d 1258 (2020). If it is unclear whether the duty to defend exists, the insurer may defend under a reservation of rights without breaching the contract while the question of coverage is resolved in a separate action. *Am. Best Food*, 168 Wn.2d at 405.

B. ANALYSIS

The Rabinowitzes argue that Chicago Title breached its duty to defend them because the McGonagles' complaint contained an allegation which, if proven, would have triggered coverage. The Rabinowitzes assert that Chicago Title made a self-serving determination when it concluded that the 10-foot strip was not part of their property and that, therefore, any dispute pertaining to this land was not covered under their title policy. The Rabinowitzes contend that Chicago Title effectively concluded that the McGonagles' fee simple claim was meritorious. But the Rabinowitzes argue that in making this conclusion, Chicago Title impermissibly construed ambiguous language in their deed to determine the original grantor's intent. The Rabinowitzes argue that Chicago Title was not entitled to make this determination because it was predicated on extrinsic evidence and it was a disputed material issue in the underlying lawsuit.

In addition, the Rabinowitzes argue that the McGonagles' express easement claim was conceivably covered under their title policy. The Rabinowitzes assert that if the McGonagles had prevailed on this claim, then the Rabinowitzes would have owned the strip in fee simple subject to an easement. Therefore, the Rabinowitzes contend that title to the strip would have "vested otherwise than as stated" in Schedule A, triggering coverage, because Chicago Title asserted that according to Schedule A, they have no interest in the strip at all. Appellants' Opening Br. (Corrected) at 15. The Rabinowitzes also argue that title vested "otherwise than as stated" because this easement was not included in the exceptions to title portion of their title report, although other easements were listed. Appellants' Opening Br. (Corrected) at 2.

On appeal, Chicago Title maintains that it was under no duty to defend the Rabinowitzes in their lawsuit against the McGonagles because it had no duty to defend a claim to land that the

Rabinowitzes never owned and that the title policy explicitly excluded from coverage. Chicago Title denies that there is any room for an ambiguous interpretation of the deed or the legal description in Schedule A. In addition, Chicago Title asserts that the McGonagles' express easement claim pertained to land that the Rabinowitzes never owned, and therefore, it was likewise not covered under the title policy. Chicago Title further contends that even if the easement could be considered part of the Rabinowitzes' property, there was no public record for this easement and the exception to coverage for claims or easements not shown in the public record in the title policy applies. Chicago title concludes that because it can point to a reasonable basis for its denial of coverage, this "reasonable basis" precludes any bad faith claim. Br. of Resp't at 27-28.

We hold that the Rabinowitzes have failed to show that either allegation, *if proven*, was conceivably covered by the title policy. First, the McGonagles' fee simple claim, if proven, would not have been covered because title did not vest "otherwise than as stated" in Schedule A of their title policy. Second, the McGonagles' express easement claim, if proven, would not have resulted in a loss or liability.

1. FEE SIMPLE CLAIM

The McGonagles' fee simple claim is not conceivably covered under the Rabinowitzes' title policy because, if the McGonagles' allegations are considered as proven, the title policy accurately described the disputed land as belonging to the McGonagles and not to the Rabinowitzes. *See Am. Best Food*, 168 Wn.2d at 404.

The McGonagles' complaint recites the legal description from the Rabinowitzes' deed and asserts, as one alternative claim, that this language expressly excludes the designated strip from the Rabinowitzes' property. The McGonagles alleged that when the common grantor deeded their

property to their predecessor in interest, the common grantor failed to include the 10-foot strip referenced in the Rabinowitzes' deed due to a scrivener's error. The McGonagles' allegation relied on the plain language of the Rabinowitzes' deed. Without the language in the Rabinowitzes' deed, the McGonagles would have no basis to claim that omission of the 10-foot strip from their own deed was a scrivener's error.

Consequently, to determine whether the McGonagles' fee simple claim triggers Chicago Title's duty to defend, we consider this claim constructively proven and look to the title policy to see whether this claim results in a loss or liability that is conceivably covered. *Am. Best Food,* 168 Wn.2d at 404. If the McGonagles' fee simple claim is proven, then the Rabinowitz deed expressly excludes the 10-foot strip from the Rabinowitzes' property. Because the legal description in Schedule A contains identical language to the Rabinowitzes' deed, then Schedule A must also be interpreted as excluding the strip. Therefore, title would not vest "otherwise than as stated," because the title policy accurately described the Rabinowitz property, and this claim is not covered. CP at 41.

2. EXPRESS EASEMENT CLAIM

If proven, the McGonagles' express easement allegation does not trigger Chicago Title's duty to defend because the Rabinowitzes would not suffer a loss or liability. The purpose of title insurance is to protect the insured from a loss arising from a defect in the title. *Campbell,* 166 Wn.2d at 470. The title insurer protects against such losses through search and disclosure of any potential encumbrances, defects, liens, adverse claims, or similar issues. *Id.* at 470. The duty to defend is based on the "potential for liability" arising from a loss covered by the insurance policy. *Truck Ins. Exch. v. Vanport Homes, Inc.,* 147 Wn.2d at 760. Therefore, the duty to defend is not

triggered merely when the complaint contains allegations that may conceivably be *proven*. *Am. Best Food*, 168 Wn.2d at 404. Instead, these allegations, if proven, must also result in a loss or liability that is conceivably covered under the insured's policy. *Id.* at 404. In addition, the Rabinowitzes' policy expressly excludes from coverage any "[d]efects, liens, encumbrances, adverse claims, or other matters. . . (c) resulting in no loss or damage to the insured claimant." CP at 42.

Here, the Rabinowitzes argue that the express easement claim is covered because if the McGonagles' express easement claim is considered as proven, they would have a fee simple interest in the strip subject to an express easement as opposed to no interest in the strip at all. The Rabinowitzes claim that this distinction triggers the provision in their policy that provides coverage when "[t]itle to the estate or interest described in Schedule A [is] vested otherwise than as stated therein." Appellants' Opening Br. (Corrected) at 15; CP at 41.[1]

Even if we agree with the Rabinowitzes that their title vested otherwise than as stated in Schedule A, because rather than having no interest in the disputed property, they would have an encumbered fee simple interest subject to the McGonagles' easement, they fail to show that they would suffer loss or liability resulting from this claim. This is so because the only way they could

[1] The Rabinowitzes assert that the express easement claim would be conceivably covered because title to the property would vest otherwise than as stated if they had the strip in fee simple subject to an easement because the alternative interpretation of the same language in Schedule A would be that they have no interest in the strip at all. However, the Rabinowitzes fail to explain how this fact would result in a loss or liability, which is necessary both to trigger the duty to defend and to trigger coverage under the provision of their title policy that they rely on. *Am. Best Food*, 168 Wn.2d at 404. It appears the Rabinowitzes assume that either losing a lawsuit or being named as a defendant in a lawsuit is sufficient to demonstrate a loss or liability, but that is not correct. Rather, the specific loss must be conceivably covered by the Rabinowitzes' title policy, and it would be too expansive to read this title policy as ensuring coverage for all potential property disputes.

suffer a loss is if the interest they had to begin with was greater than the interest they would retain if the McGonagles' express easement claim is proven. But as noted above, the Rabinowitzes did not have a greater interest because either they never owned the land, or alternatively, they would retain the same fee simple interest subject to the McGonagles' easement that they had before the McGonagles brought suit.

To the extent that the Rabinowitzes believed they had an unencumbered fee simple interest in the disputed property because the strip was not listed as an exception to title in the title report, this construction contradicts the plain language in Schedule A and the deed.

The language in an insurance policy is read from the perspective of an average person. *Campbell*, 166 Wn.2d at 472. Language that is clear and unambiguous is given its plain meaning, but ambiguous language is construed against the drafter. *Robbins*, 195 Wn.2d at 626. This court will presume that the parties did not intend to create provisions that result in absurdity and will avoid such constructions. *Campbell*, 166 Wn.2d at 472.

Here, the legal description of the Rabinowitz property, as copied in Schedule A of the title policy, defines the boundaries of the property and includes the phrase, "LESS the East 10 feet reserved for road for use of the Grantor of the tract immediately adjoining on the South." CP at 43. An average person would interpret the capitalized word "LESS" to indicate that the land described thereafter is not included within the boundaries of the property owned in fee simple without any encumbrances. Therefore, interpreting this language as granting the Rabinowitzes' an unencumbered fee simple interest to the 10-foot strip would result in an absurd construction. Because the Rabinowitzes would not face any loss or liability if the McGonagles' express

easement claim was proven as alleged, this claim is not conceivably covered, and Chicago Title did not owe a duty to defend.

ATTORNEY FEES

In their reply brief, the Rabinowitzes state, without discussion, that they are seeking *Olympic Steamship*[2] fees. Fees are not warranted because the Rabinowitzes are not the prevailing party in this appeal. *Selene RMOF II REO Acquisitions II, LLC v. Ward*, 189 Wn.2d 72, 87, n.12, 399 P.3d 1118 (2017). Moreover, the Rabinowitzes would not be entitled to fees even if they had prevailed because their request did not comply with the requirements in RAP 18.1.

CONCLUSION

We hold that Chicago Title did not have a duty to defend the Rabinowitzes in the lawsuit against the McGonagles. We hold that neither the fee simple nor the express easement claims were conceivably covered under the Rabinowitzes' title insurance policy.

Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Cruser, J.

I concur:

Sutton, A.C.J.

[2] Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991).

MELNICK, J. (Dissent) — Because the underlying quiet title action by William and Sara McGonagle against Neil and Elizabeth Rabinowitz could have conceivably affected the Rabinowitzes' interest in property covered by Chicago Title's insurance, I believe Chicago Title had a duty to defend. I respectfully dissent.

Neil and Elizabeth Rabinowitz purchased real property on Bainbridge Island. They also purchased a title insurance policy from Chicago Title. Their accompanying deed contained a legal description of the property. At the end of the description, it said, "Less the East 10 feet reserved for road use of the Grantor of the tract immediately adjoin on the South." Clerk's Papers (CP) at 72.

The deed to the adjoining neighbors' property, owned by the McGonagles, did not include or mention the 10 foot strip of property. A common grantor previously owned both properties. The 10 foot strip allowed access to the McGonagles' property from the public road.

In a quiet title action regarding the 10 foot strip of property, the McGonagles alleged they owned the property in fee simple and that the omission of it from their deed was the result of a scrivener's error. Alternatively the McGonagles argued that they had an easement over the disputed property and that the Rabinowitzes had a fee simple interest in it.

When the Rabinowitzes notified Chicago Title of the quiet title lawsuit and requested that it tender a defense and indemnity coverage, Chicago Title refused. It explained that the disputed strip was expressly exempted from coverage because of the word "less" in the legal description. CP at 6-7. When asked to reconsider, Chicago Title refused, maintaining that the disputed land was not part of the Rabinowitzes' property.

"The duty to defend is broad and if an insurance policy conceivably provides coverage, the insurer must defend or be found to have breached the duty." *Robbins v. Mason County Title Ins. Co.*, 195 Wn.2d 618, 621, 462 P.3d 430 (2020). "When an insurer evaluates whether to defend a lawsuit against its insured, Washington law is clear that the insurer must ask if there is any conceivable way that one or more of the claims asserted in the lawsuit is covered under the applicable policy." *Webb v. USAA Cas. Ins. Co.*, 12 Wn. App. 2d 433, 463, 457 P.3d 1258 (2020).

The duty to defend is broader than the duty to indemnify in the insurance context. *Robbins*, 195 Wn.2d at 626. "An insurance company has the duty to indemnify if the insurance policy *actually* covers the insured, while the duty to defend arises if the insurance policy *conceivably* covers the insured." *Robbins*, 195 Wn.2d at 626-27. "An insurer is relieved of the duty to defend only if the policy clearly does not cover the claim." *Robbins*, 195 Wn.2d at 627. When an insurer is unsure as to whether the duty to defend applies, "'it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend.'" *Robbins*, 195 Wn.2d at 633 (quoting *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002)).

The McGonagles concede that the disputed property is clearly not described in their deed, yet they claim to own it in fee simple. The Rabinowitzes' deed discusses the disputed property; however, a legitimate dispute exists as to the meaning of the legal description.

This dispute is made clearer by the McGonagles' complaint and argument, which demonstrates that the Rabinowitzes' interest, if any, in the disputed property will be affected by the outcome of the quiet title action. Either the Rabinowitzes will own the property in fee simple, subject to an easement, or the Rabinowitzes will have no interest in the property. The issue of who has title to the disputed property is clearly in dispute. Conceivably, the Rabinowitzes own the

property in fee simple, subject to an easement. Conceivably, the Rabinowitzes could lose their fee simple interest in the property. Chicago Title had a duty to defend under *Robbins*.

The majority states that the Rabinowitzes have failed to show any harm. The potential harm is that the Rabinowitzes could conceivably own the property in fee simple, as the McGonagles allege, and lose their ownership rights.

The majority and Chicago Title seem to rely on the trial court's result to decide that Chicago Title had no duty to defend because the trial court ruled in its favor. I believe that is the incorrect test. They ignore the ambiguity in the legal description which could reasonably be interpreted either to entirely exclude the disputed property from the Rabinowitzes' deed or to provide for a fee simple interest in the disputed property, subject to an easement.

In addition, I must note that in its briefing to this court, Chicago Title failed to employ the "conceivably covers" standard and failed to analyze its duty to defend in accord with well settled law. *Robbins*, 195 Wn.2d at 627.

Because the Rabinowitzes have a potential ownership interest in the disputed land and because they have the potential to lose that interest, Chicago Title clearly had a duty to defend. I would reverse the trial court.

Melnick, J.

NO. 52898-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Neil and Elizabeth Rabinowitz, Husband and Wife,

Appellants,

v.

Chicago Title Insurance Company, a Nebraska State Corporation; and Fidelity National Title Group, a Delaware State Corporation,

Respondents

ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT
Honorable Jeffrey P. Bassett

APPELLANTS' MOTION TO PUBLISH

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I. IDENTITY OF MOVING PARTY AND RELIEF REQUESTED

Appellants Neil and Elizabeth Rabinowitz request that this Court publish its August 18, 2020 Decision, per RAP 12.3(d), (e), unless this Court grants their pending Motion For Reconsideration and reverses the trial court's decision as requested in Appellants' briefing.

II. ARGUMENT AND GROUNDS FOR RELIEF

The Decision addresses a common and recurring issue in title insurance disputes in Washington; namely, when does a title insurer owe a duty of defense to a policyholder related to a quiet title action? Thus, it is of broad public interest and importance. RAP 12.3(d)(3), (e)(5). In addition, the Decision contains a dissenting opinion. *State v. Fitzpatrick*, 5 Wn.App. 661, 669, 491 P.2d 262 (1971), *rev. denied*, 80 Wn.2d 1003 (1972). Both are reasons to publish the Court's Decision.

Washington homeowners routinely purchase owners' title insurance policies when buying a home, and 62.8% of Washington residents are homeowners. https://datausa.io/profile/geo/washington/#housing. The Court's Decision determines that a title insurer has no duty to defend its policyholder – a homeowner - who is sued by his neighbor over a legitimate dispute as to the meaning of the legal description covered by the title policy. This is a decision that at least 62.8% of Washington residents will be interested in. The Court's Decision is therefore of broad public interest and importance. RAP 12.3(d)(3), (e)(5).

The Decision should be published for the additional reason that it includes a dissenting opinion. This is one of the reasons set forth by this Division of the Court of Appeals, and accepted by the Supreme Court. *State v. Fitzpatrick*, 5 Wn.App. 661, 669, 491 P.2d 262 (1971), *rev. denied*, 80 Wn.2d. 1003 (1972). The fact that

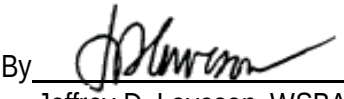
there is disagreement is important. Moreover, the dissenting opinion in this case is not perfunctory. It is a reasoned dissent that applies the same law to the same facts and would decide the case differently than the majority. It should be part of the continuing conversation about title insurers' duty to defend their policyholders in the State of Washington.

III. CONCLUSION

Unless this Court grants Appellants' pending Motion For Reconsideration and reverses the trial court's decision as requested in Appellants' briefing, Appellants request that this Court publish its Decision.

Respectfully submitted this 8th day of September, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Double-click any box to check or uncheck.

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

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DATED this 8th day of September, 2020.

S/ Allie M. Keihn
Allie M. Keihn, Legal Assistant

CARNEY BADLEY SPELLMAN

September 08, 2020 - 3:45 PM

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NO. 52898-3-II

COURT OF APPEALS, DIVISION II
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Neil and Elizabeth Rabinowitz, Husband and Wife,

Appellants,

v.

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Respondents

ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT
Honorable Jeffrey P. Bassett

APPELLANTS' MOTION FOR RECONSIDERATION

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I. IDENTITY OF MOVING PARTY

Appellants Neil and Elizabeth Rabinowitz ("Rabinowitz") move the Court to reconsider its August 18, 2020 Decision per RAP 12.4. A copy of the Decision is in the Appendix.

II. RELIEF REQUESTED

Appellants move for reconsideration of the Decision because it misapprehended certain material facts and in so doing, misapplied the law. The panel should file a new decision finding a duty to defend and reversing the trial court.

III. FACTS RELEVANT TO ARGUMENT

The panel is familiar with the basic facts of the appeal. Rabinowitz was sued by neighbor McGonagle in a quiet title action concerning a 10-foot strip of land mentioned in the Rabinowitz Deed. Both properties were at one time owned by a common grantor. The strip was not mentioned in McGonagle's own Deed. Nor did McGonagle have a recorded easement to the strip. McGonagle argued this was a *scrivener's error* and claimed ownership relying solely on language in the Rabinowitz Deed, challenging Rabinowitz' fee simple ownership of the strip.

The grantor's intent about strip ownership was, under the language in the Rabinowitz Deed, at best ambiguous and was a mixed question of law and fact to be decided by the trial court in McGonagle's quiet title action. Rabinowitz tendered McGonagle's claims to Chicago Title, asking the title insurer to defend Rabinowitzes' fee simple ownership interest in the strip. Chicago Title refused to defend. Though it could not know how the ownership issue would ultimately be resolved in the quiet title action, Chicago Title decided the issue on its own, determining that the grantor intended to convey fee simple ownership to

McGonagle, and that the strip therefore was not part of the property insured under the title policy. **Chicago Title gave no other reason for its denial**.

Under Washington law, in determining its duty to defend, Chicago Title was permitted to review only the McGonagle Complaint (CP: 71-75) and the Policy (CP: 41- 52) – nothing more.

In its first denial letter dated April 5, 2011 (CP: 115-116), Chicago Title referenced Paragraph 5 of Schedule A, and the legal description of the property:

> The Company takes the position that the "LESS" immediately preceding "the East 10 feet . . ." removes the disputed property from the description of the land insured by the Policy. **Accordingly, the subject matter of the claim does not fall within the insuring provisions of the Policy**.

(CP: 116)(emphasis added). The letter then states:

> Since the Company is taking the position that the East 10 feet was not insured by the Policy any claim for loss of that portion or an easement by prescription or implication over that portion would fall outside the insuring provisions of the Policy without the need for a Schedule B Exception.

Id. Nowhere in this letter does Chicago Title assert the "no loss" policy exclusion. Nor was this issue litigated in the McGonagle quiet title action. Nor was it addressed in the declaratory action underlying this appeal.

Rabinowitz asked Chicago Title to reconsider its position. (CP: 118-120), Chicago Title again refused to defend. (CP: 122-123). In its' second letter, Chicago Title revealed that it had searched facts **outside** of the eight-corners of the Complaint and Policy ***and*** **that it was relying on those facts to deny its duty to defend**:

> ***A review of the chain of title*** *shows that the East 10 feet have been continually excepted from the conveyance of title to the*

> *Property, and as such the Company **would not have been willing** to insure title to such land. Accordingly, **the subject matter of the claim** does not fall within the insuring provisions of the Policy.*

(CP: 123) (emphasis added).

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. Under RAP 12.4(c), Reconsideration Should be Granted Where an Appellate Decision Overlooks or Misapprehends Applicable Law or Operative Facts.

RAP 12.4(c) instructs that motions for reconsideration should point to the points of law or fact that the moving party contends the court has "overlooked or misapprehended." This is the standard for modifying or changing the Decision. Both the Court of Appeals[1] and the Supreme Court[2] recognize the underlying goal of the appellate courts as stated in RAP 1.2 and the underlying civil rules' is to get the correct and just decision. *See Keck v. Collins*, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015) (referencing CR 1). We respectfully submit that applies here.

B. The Decision Misapprehends Material Facts in Analyzing the Insurer's Duty to Defend under the "8-Corners" Rule.

The Decision accurately sets forth Washington "duty to defend" law, at pages 5-6.

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[1] *See, e.g., Behnke v. Ahrens*, 172 Wn.App. 281, 294 ¶¶30-31, 294 P.3rd 729 (2012) (discussing grant of reconsideration to consider facts brought to the panel's attention on reconsideration); *State v. Bowen*, 157 Wn.App. 821, 239 P.3d 1114 (2010) (noting the decision was "on reconsideration" and that the prior decision published in the Pacific Reporter was superseded).

[2] *See, e.g., Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 474, 90 P.3d 42 (2004), reversing prior decision at 148 Wn.2d 403, 61 P.3d 309 (2003), after reconsideration and re-argument.

Critical to this Motion for Reconsideration – ***the insurer may not rely on facts extrinsic to the complaint to deny the duty to defend — it may do so only to trigger the duty.***

Here, the Decision impermissibly allows Chicago Title to rely on facts outside the 8-corners of the Complaint and Policy to conclude it had no duty to defend. The Decision further compounds the error by adding **the Court's** own "no loss" analysis – to find no duty to defend. Reconsideration should be granted and the decision of the trial court should be reversed.

C. The Decision Misapprehended the Reasons for Chicago Title's Denial of a Defense.

It is indisputable that Chicago Title relied on facts outside the Complaint and Policy to deny its policyholder a defense.

> ***A review of the chain of title*** *shows that the East 10 feet have been continually excepted from the conveyance of title to the Property, and as such the Company* ***would not have been willing*** *to insure title to such land. Accordingly,* ***the subject matter of the claim*** *does not fall within the insuring provisions of the Policy.*

(CP: 123) (emphasis added). "[***T]he insurer may not rely on facts extrinsic to the complaint to deny the duty to defend — it may do so only to trigger the duty.***" *Woo v. Fireman's Fund Ins. Co.*, 161 Wn. 2d 43, 53–54, 164 P.3d 454, 459 (2007) (internal citations omitted); *see also*, *Robbins v. Mason Cty. Title Ins. Co.*, 195 Wash. 2d 618, 641, 462 P.3d 430, 441 (2020)(internal citations omitted). By affirming Chicago Title's decision to deny its duty to defend, the Court impermissibly allows Chicago Title to rely on information outside the 8-corners to deny a defense.

D. Chicago Title Never Denied Coverage Based on the "No Loss" Exclusion and Cannot Do So Now. Nor Was the "No Loss" issue Considered Below.

Under both Washington law and traditional principles of estoppel, an insurer may not change the basis for avoiding liability after litigation has begun. *See Vision One, LLC, v. Philadelphia Indemnity Ins. Co*., 174 Wn.2d 501, 520-21, 276 P.3d 300 (2012)(coverage must be determined under the policy language Philadelphia relied upon when it denied coverage).[3] This doctrine prevents an insurer from raising new grounds to support a denial of coverage that it did not assert in its initial denial. *Id*. The Decision relies on the "no loss" exclusion – an exclusion that was never raised by Chicago Title in denying coverage. The Decision therefore impermissibly relies on facts and reasons that Chicago Title itself did *not* rely on when denying a defense to its policyholder.

Nor was the "no loss" issue raised or addressed below. It was mentioned by Chicago Title, in passing, and without any analysis, for the first time on appeal.

[3] See also, *Karpenski v. Am. Gen. Life Cos., LLC*, 999 F. Supp. 2d 1235, 1245 (W.D. Wash. 2014) (applying the doctrine where defendants failed to raise other grounds for denial "until well after litigation began and they had answered [the p]laintiff's complaint, formally asserting [those grounds] only upon summary judgment"); *Integrated Health Prof'ls. v. Pharmacists Mut. Ins. Co.*, 422 F. Supp. 2d 1223, 1227 (E.D. Wash. 2006) ("In the State of Washington, an insurer may not change its position once an action has been commenced if the insured will suffer prejudice as a result."); *Bosko v. Pitts & Still, Inc.,* 454 P.2d 229, 234 (Wash. 1969) (general rule that if an insurer denies coverage under the policy for one reason, while having knowledge of other grounds for denying liability, it is estopped from later raising the other grounds in an attempt to escape coverage.)

E. As a Matter of Law, it was never Rabinowitz' Burden to Establish a Loss.

Even if Chicago Title had raised the "No Loss" exclusion in its denial – though it did not – it is improper to shift the burden to Rabinowitz to "demonstrate" a loss.

First – under the insuring agreement provisions of the Policy, coverage is afforded for "loss or damage, not exceeding the amount of the insurance stated in Schedule A, ***and*** *costs, attorneys' fees and expenses . . . sustained or incurred by the insured . . ."* Thus, a "loss" is not the sole basis for coverage. *"Costs, attorneys' fees and expenses"* also trigger coverage. Here, Rabinowitz seeks coverage for the costs, attorney fees, and expenses incurred to defend his title – his claim of strip ownership, against McGonagle's own claim of ownership. Chicago Title has never questioned or disputed this scope of coverage.

By way of a policy *exclusion*, coverage is excluded for *"adverse claims . . . resulting in* ***no loss to the insured claimant*** *. . . ."* It is well established in Washington insurance jurisprudence that it is the insurer who bears the burden to prove the application of an exclusion – not the insured. *American Best Food*, *Inc. v. Alea London, Ltd*., 138 Wn.App. 674, 683, 158 P.3d 119 (2007); aff'd in part, 168 Wn.2d 398, 229 P.3d 693 (2010).

Thus, the Decision contradicts well-established Washington law in holding: *"Even if we agree with the Rabinowitzes that their title vested otherwise than as stated in Schedule A, . . . they [Rabinowitzes] fail to show that they would suffer loss or liability resulting from this claim."* The Decision incorrectly places the burden on Rabinowitz to establish a "loss."

F. McGonagle "Alleged" a Potential "Loss" in His Complaint. This is the Only Fact Relevant to the "No Loss" Issue in Analyzing the Duty to Defend.

First, Chicago Title, *at the time of its denial*, could not know the outcome of McGonagle's quiet title action. It did know a loss was "conceivable" based on the *allegations* of the McGonagle Complaint, because McGonagle sought to divest Rabinowitz of strip ownership. This *"allegation"* of loss, standing alone, is all that is relevant in analyzing the "loss" issue in the context of a "duty to defend" determination. Rabinowitz is entitled to the benefit of the doubt in the duty to defend analysis – both by Chicago and by this Court. *Woo v. Fireman's Fund Ins. Co.,* 161 Wash.2d 43164 P.3d 454 (2007).

Even if Chicago Title had raised the "no loss" exclusion in its denial – though it did not – as explained by Judge Melnick in his dissent, it was conceivable that Rabinowitz owned the strip in fee simple, and it was also conceivable that Rabinowitz could lose that fee simple interest. Thus, the potential harm is that Rabinowitz, who believed he purchased the strip, might lose ownership and control of the strip. This is likely why the "no loss" exclusion was never raised by Chicago Title in its two denials.

G. The Description of Land in a Title Policy Cannot be Used to Limit the Insurance Protection Purchased.

The purpose of the description of land in a title insurance policy is for identifying the land covered by the policy and not for the purpose of limiting the insurance protection purchased. *Shotwell v. Transamerica Title Ins. Co*. 91 Wash.2d 161, 169, 588 P.2d 208 (1978). The Decision impermissibly relies on the legal description to limit coverage, in stating:

> To the extent that the Rabinowitzes believed they had an unencumbered fee simple interest in the disputed property because the strip was not listed as an exception to title in the title report, this construction contradicts the plain language in Schedule A and the deed.

Decision at 11. In his Complaint, even McGonagle alleged the Schedule A language had different potential meanings. McGonagle, himself a lawyer, recognized that the outcome of his case turned on the issue of the grantor's intent – an issue that was a mixed question of law and fact. This issue cannot be resolved "as a matter of law" in the context of this appeal any more than it could have been decided on summary judgment in McGonagle's quiet title action, or by Chicago Title based on the allegations of the McGonagle Complaint. Again, **as a matter of law, for purposes of evaluating the duty to defend, it must be assumed that Rabinowitz owned the strip in fee simple and it was therefore part of the property covered by the Policy.**

H. That the Language in the Rabinowtiz's Deed is Open to Interpretation is the Very Definition of Ambiguous.

In applying the "conceivably covered" standard and the "8-corners" rule to analyze the duty to defend, the only relevant facts are those *alleged* by McGonagle in his Complaint, even if those facts are untrue. Because McGonagle's Deed did not include the strip, and because he had no recorded easement to the strip, he relied on the language in Rabinowitz' Deed that stated: *"LESS the East 10 feet reserved for road for use of the Grantor of the tract immediately adjoining on the South"* to assert the alternative claims of (1) fee simple ownership and (2) express easement. CP at 43.

In alleging that this language gave him either fee simple ownership or alternatively an express easement, McGonagle himself acknowledged an ambiguity in this language. Under Washington law, when considering the duty to defend, the insured is entitled to all conceivable inferences to find a duty to defend. Both Chicago Title, and the Decision, deprive Rabinowitz of this inference.

The language "reserved for use of the Grantor of the tract immediately adjoining on the South" could *conceivably* have been intended by the grantor to establish only an easement – especially where, as here, McGonagle had nothing in his Deed, nor did he have an express easement. This language could also have *conceivably* been unintended "surplusage" due to a scrivener's error – a plausible interpretation where, as, here, the strip was not mentioned in McGonagle's Deed and he had no express easement.

In response to Rabinowitz' request for reconsideration, Chicago Title itself had to look to extrinsic facts – the chain of title – to try to resolve the ambiguity in violation of the 8-corners rule. Chicago Title wrote to Rabinowitz claiming it would not have insured the title based on what it found in this chain of title. But it should have reviewed the chain of title before it issued the Policy. It cannot do so as an after-thought to justify its denial of a defense to Rabinowitz.

In short, the fact that that the language in the Rabinowtiz Deed is open to interpretation is the very definition of ambiguous.

V. CONCLUSION

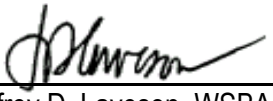
One potential outcome of the quiet title action was an affirmation of Rabinowitz' fee simple ownership. Had this been the case, Chicago Title's sole reason for denying coverage – that the strip was not part of the insured property –

would have been unfounded. That, standing alone, should end the "duty to defend" analysis. For the several reasons discussed above, the "no loss" exclusion is not relevant to this appeal and cannot instruct the Court's analysis of the duty to defend.

Appellants respectfully ask the panel to reconsider the August 18, 2020 Decision and reverse the summary judgment entered by the trial court and remand with instructions consistent with the Court's revised decision.

Respectfully submitted this 8th day of September, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Double-click any box to check or uncheck.

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

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ATTACHMENT 1

Filed
Washington State
Court of Appeals
Division Two

August 18, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NEIL RABINOWITZ and ELIZABETH RABINOWITZ, husband and wife, Appellants, v. CHICAGO TITLE INSURANCE COMPANY, a Nebraska State Corporation, Respondent.	No. 52898-3-II UNPUBLISHED OPINION

CRUSER, J. — Neil and Elizabeth Rabinowitz appeal from the trial court's order granting summary judgment in favor of Chicago Title Insurance Company ("Chicago Title") and denying their motion for partial summary judgment. They argue that the trial court erred because Chicago Title had a duty to defend them pursuant to their title insurance policy in a quiet title action filed by their neighbors.

We hold that Chicago Title did not owe the Rabinowitzes a duty to defend because neither claim in the neighbors' complaint alleged facts that, if proven, imposed liability within the policy's coverage.

Accordingly, we affirm.

FACTS

In 1987, the Rabinowitzes purchased their current home on Bainbridge Island. William and Sara McGonagle own the adjacent property. Both properties were once owned by a common

grantor. In 1915, the common grantor deeded the property to one of the Rabinowitzes' predecessors in interest, and the legal description in that deed stated,

> BEG AT A PT 495 FEET W AND 247.5 FT N OF THE SE CORNER OF THE SW OF NE OF SEC 11, TWP 24-2 E, AND RUNNING THE W 880 FEET; TH N 247.5 FEET; THE 880 FEET; TH S 247.5 FEET TO P O B, CONTAINING 5 ACRES *LESS A STRIP OF LAND 10 FEET WIDE ALONG THE E LINE OF SAID TRACT RESERVED FOR A ROAD FOR THE USE OF THE GRANTOR OF THE TRACT IMMEDIATELY ADJOINING ON THE SOUTH.*

Clerk's Papers (CP) at 73 (emphasis added).

The legal description in the Rabinowitzes' deed similarly stated,

> Beginning at a point 495 feet West and 247.5 feet North of the Southeast Corner of the said Southwest quarter of the Northeast quarter, which is the True Point of Beginning; thence West 825 feet, more or less, to the West line of the said Southwest quarter of the Northeast quarter; thence North 247.5 feet, more or less, to the South line of the North 825 feet of the said Southwest quarter of the Northeast quarter; thence East 825 feet, more or less, to a point North of the True Point of Beginning; thence South to the True point of Beginning *LESS the East 10 Feet reserved for road for use of the Granter of the tract immediately adjoining on the South*;

CP at 87 (emphasis added).

Later that year, the common grantor also deeded the McGonagle property to one of their predecessors in interest, but this deed made no mention of the 10-foot strip. The McGonagles' deed likewise did not mention the 10-foot strip, although the strip is essential to accessing the McGonagle property from the public road.

When the Rabinowitzes purchased their home, they purchased a title insurance policy from Chicago Title. Relevant here, the policy provided coverage for loss or damage if the "[t]itle to the estate or interest described in Schedule A . . . vested otherwise than as stated therein." CP at 41. The description of the land covered by the policy in Schedule A was a verbatim copy of the legal description of their property in the deed.

The Rabinowitzes' policy listed exceptions from coverage, including an exception for easements that were not discoverable in public records. Below the list of standard exceptions, the policy also listed two easements as exceptions from coverage, neither of which appeared to refer to the 10-foot strip.

In 2011, the McGonagles filed a quiet title action alleging that they owned the 10-foot strip in fee simple, and although this land was omitted from their own deed, such omission was the result of a "scrivener's error." CP at 74. Under this claim, the Rabinowitzes would have no interest in the disputed property. Alternatively, the McGonagles claimed that they had an easement by "title, prescription or implication," that runs with their property. CP at 74. Under this claim, the Rabinowitzes had a fee simple interest in the disputed property, subject to the McGonagles' easement.

The Rabinowitzes notified Chicago Title regarding the lawsuit, requesting that Chicago Title tender a defense and indemnity coverage. Chicago Title responded by denying the Rabinowitzes' claim. Chicago Title explained that the disputed 10-foot strip was expressly exempted from coverage due to the word "LESS" in the legal description of the property. The Rabinowitzes requested that Chicago Title reconsider its denial of their claim, Chicago Title declined to do so, and it maintained its earlier position that the disputed land was not part of the Rabinowitzes' property covered under the title policy.

Approximately three years later, the trial court decided the dispute regarding the 10-foot strip in the McGonagles' favor. On May 29, 2015, the Rabinowitzes filed this lawsuit against Chicago Title, alleging that Chicago Title breached its contract by failing to defend them and that such failure constituted bad faith, entitling them to reimbursement of the costs sustained in

defending the underlying lawsuit. The Rabinowitzes also claimed that Chicago Title violated the Washington Consumer Protection Act and the Insurance Fair Conduct Act, breached its quasi-fiduciary duty, caused negligent infliction of emotional distress, and owed them coverage by estoppel.

The Rabinowitzes moved for partial summary judgment on the duty to defend claim. Chicago Title responded in kind with its own cross-motion for summary judgment, reasserting the same grounds for its initial denial of the Rabinowitzes' claim. Following oral argument, the trial court denied the Rabinowitzes' motion for partial summary judgment, granted Chicago Title's motion for summary judgment, and dismissed the Rabinowitzes' lawsuit.

The Rabinowitzes appeal.

DISCUSSION

I. STANDARD OF REVIEW

This court reviews a summary judgment order de novo and "engages in the same inquiry as the trial court." *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Construction of an insurance contract is also a question of law that we will review de novo. *Woo*, 161 Wn.2d at 52. We will consider the parties' intent as derived from the plain language of the contract. *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 472, 209 P.3d 859 (2009). A court reads the contract as would an average person. *Id.* at 472. Clear and unambiguous language is given its plain meaning, but ambiguities in an insurance policy will be construed against the drafter. *Robbins v. Mason County Title Insurance Co.*, 195 Wn.2d 618, 626, 462 P.3d 430 (2020).

Coverage exclusions are strictly and narrowly construed. *Campbell*, 166 Wn.2d at 472. In addition, "'[c]onstruction which contradicts the general purpose of the contract or results in hardship or absurdity is presumed to be unintended by the parties.'" *Id.* at 472 (quoting *Nautilus, Inc. v. Transamerica Title Ins. Co. of Wash.*, 13 Wn. App. 345, 349, 534 P.2d 1388 (1975)).

II. DUTY TO DEFEND

A. LEGAL PRINCIPLES

Title insurance is "[a]n agreement to indemnify against loss arising from a defect in title to real property, usu[ally] issued to the buyer of the property by the title company that conducted the title search." *Id.* at 470 (quoting BLACK'S LAW DICTIONARY 819 (8th ed. 2004)). Under RCW 48.01.020, all insurance and insurance transactions in Washington or affecting subjects located in Washington, are governed under Title 48 RCW. Thus, title insurance falls within the scope of Title 48 RCW. *See* ch. 48.29 RCW (pertaining to title insurers); *Campbell*, 166 Wn.2d at 470.

Under RCW 48.01.030, "[t]he business of insurance 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." The duties in this provision inform an insurer's duty to defend, which applies to the title insurance policy in this case. *See Campbell*, 166 Wn.2d at 471.

It is well established that the duty to defend is both different and broader than the duty to indemnify. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010). Whereas "[t]he duty to indemnify exists only if the policy *actually* covers the insured's liability," the duty to defend is triggered if the complaint contains allegations that are "*conceivably cover[ed]*." *Id.* at 404.

"The duty to defend 'arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.'" *Id.* (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 454 (2007)). An insurer must defend if a claim would be covered under any reasonable interpretation of the facts or law. *Id.* at 405. Although the duty to defend is broad, it is not unlimited. *Nat'l Sur. Corp.* v. *Immunex Corp.*, 176 Wn.2d 872, 879, 297 P.3d 688 (2013). The insurer does not owe the insured a duty to defend if it is clear from the face of the complaint that the claims do not fall within the policy. *Robbins*, 195 Wn.2d at 641.

To determine whether the duty to defend exists, the insurer limits its consideration to the four corners of the insurance contract plus the four corners of the underlying complaint, together described as the "'eight corners.'" *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 803, 329 P.3d 59 (2014). An insurer also may not give itself the benefit of the doubt in determining whether a claim is covered, nor may it rely on an equivocal interpretation of the law when denying its duty to defend a claim. *Am. Best Food*, 168 Wn.2d at 413.

If any allegation in a complaint could result in a covered liability, even where the complaint raises other claims that are not covered, the insurer must defend the conceivably covered claim. *Webb v. USAA Cas. Ins. Co.*, 12 Wn. App. 2d 433, 445-46, 457 P.3d 1258 (2020). If it is unclear whether the duty to defend exists, the insurer may defend under a reservation of rights without breaching the contract while the question of coverage is resolved in a separate action. *Am. Best Food*, 168 Wn.2d at 405.

B. ANALYSIS

The Rabinowitzes argue that Chicago Title breached its duty to defend them because the McGonagles' complaint contained an allegation which, if proven, would have triggered coverage. The Rabinowitzes assert that Chicago Title made a self-serving determination when it concluded that the 10-foot strip was not part of their property and that, therefore, any dispute pertaining to this land was not covered under their title policy. The Rabinowitzes contend that Chicago Title effectively concluded that the McGonagles' fee simple claim was meritorious. But the Rabinowitzes argue that in making this conclusion, Chicago Title impermissibly construed ambiguous language in their deed to determine the original grantor's intent. The Rabinowitzes argue that Chicago Title was not entitled to make this determination because it was predicated on extrinsic evidence and it was a disputed material issue in the underlying lawsuit.

In addition, the Rabinowitzes argue that the McGonagles' express easement claim was conceivably covered under their title policy. The Rabinowitzes assert that if the McGonagles had prevailed on this claim, then the Rabinowitzes would have owned the strip in fee simple subject to an easement. Therefore, the Rabinowitzes contend that title to the strip would have "vested otherwise than as stated" in Schedule A, triggering coverage, because Chicago Title asserted that according to Schedule A, they have no interest in the strip at all. Appellants' Opening Br. (Corrected) at 15. The Rabinowitzes also argue that title vested "otherwise than as stated" because this easement was not included in the exceptions to title portion of their title report, although other easements were listed. Appellants' Opening Br. (Corrected) at 2.

On appeal, Chicago Title maintains that it was under no duty to defend the Rabinowitzes in their lawsuit against the McGonagles because it had no duty to defend a claim to land that the

Rabinowitzes never owned and that the title policy explicitly excluded from coverage. Chicago Title denies that there is any room for an ambiguous interpretation of the deed or the legal description in Schedule A. In addition, Chicago Title asserts that the McGonagles' express easement claim pertained to land that the Rabinowitzes never owned, and therefore, it was likewise not covered under the title policy. Chicago Title further contends that even if the easement could be considered part of the Rabinowitzes' property, there was no public record for this easement and the exception to coverage for claims or easements not shown in the public record in the title policy applies. Chicago title concludes that because it can point to a reasonable basis for its denial of coverage, this "reasonable basis" precludes any bad faith claim. Br. of Resp't at 27-28.

We hold that the Rabinowitzes have failed to show that either allegation, *if proven*, was conceivably covered by the title policy. First, the McGonagles' fee simple claim, if proven, would not have been covered because title did not vest "otherwise than as stated" in Schedule A of their title policy. Second, the McGonagles' express easement claim, if proven, would not have resulted in a loss or liability.

1. FEE SIMPLE CLAIM

The McGonagles' fee simple claim is not conceivably covered under the Rabinowitzes' title policy because, if the McGonagles' allegations are considered as proven, the title policy accurately described the disputed land as belonging to the McGonagles and not to the Rabinowitzes. *See Am. Best Food*, 168 Wn.2d at 404.

The McGonagles' complaint recites the legal description from the Rabinowitzes' deed and asserts, as one alternative claim, that this language expressly excludes the designated strip from the Rabinowitzes' property. The McGonagles alleged that when the common grantor deeded their

property to their predecessor in interest, the common grantor failed to include the 10-foot strip referenced in the Rabinowitzes' deed due to a scrivener's error. The McGonagles' allegation relied on the plain language of the Rabinowitzes' deed. Without the language in the Rabinowitzes' deed, the McGonagles would have no basis to claim that omission of the 10-foot strip from their own deed was a scrivener's error.

Consequently, to determine whether the McGonagles' fee simple claim triggers Chicago Title's duty to defend, we consider this claim constructively proven and look to the title policy to see whether this claim results in a loss or liability that is conceivably covered. *Am. Best Food,* 168 Wn.2d at 404. If the McGonagles' fee simple claim is proven, then the Rabinowitz deed expressly excludes the 10-foot strip from the Rabinowitzes' property. Because the legal description in Schedule A contains identical language to the Rabinowitzes' deed, then Schedule A must also be interpreted as excluding the strip. Therefore, title would not vest "otherwise than as stated," because the title policy accurately described the Rabinowitz property, and this claim is not covered. CP at 41.

2. EXPRESS EASEMENT CLAIM

If proven, the McGonagles' express easement allegation does not trigger Chicago Title's duty to defend because the Rabinowitzes would not suffer a loss or liability. The purpose of title insurance is to protect the insured from a loss arising from a defect in the title. *Campbell,* 166 Wn.2d at 470. The title insurer protects against such losses through search and disclosure of any potential encumbrances, defects, liens, adverse claims, or similar issues. *Id.* at 470. The duty to defend is based on the "potential for liability" arising from a loss covered by the insurance policy. *Truck Ins. Exch. v. Vanport Homes, Inc.,* 147 Wn.2d at 760. Therefore, the duty to defend is not

triggered merely when the complaint contains allegations that may conceivably be *proven*. *Am. Best Food*, 168 Wn.2d at 404. Instead, these allegations, if proven, must also result in a loss or liability that is conceivably covered under the insured's policy. *Id.* at 404. In addition, the Rabinowitzes' policy expressly excludes from coverage any "[d]efects, liens, encumbrances, adverse claims, or other matters. . . (c) resulting in no loss or damage to the insured claimant." CP at 42.

Here, the Rabinowitzes argue that the express easement claim is covered because if the McGonagles' express easement claim is considered as proven, they would have a fee simple interest in the strip subject to an express easement as opposed to no interest in the strip at all. The Rabinowitzes claim that this distinction triggers the provision in their policy that provides coverage when "[t]itle to the estate or interest described in Schedule A [is] vested otherwise than as stated therein." Appellants' Opening Br. (Corrected) at 15; CP at 41.[1]

Even if we agree with the Rabinowitzes that their title vested otherwise than as stated in Schedule A, because rather than having no interest in the disputed property, they would have an encumbered fee simple interest subject to the McGonagles' easement, they fail to show that they would suffer loss or liability resulting from this claim. This is so because the only way they could

[1] The Rabinowitzes assert that the express easement claim would be conceivably covered because title to the property would vest otherwise than as stated if they had the strip in fee simple subject to an easement because the alternative interpretation of the same language in Schedule A would be that they have no interest in the strip at all. However, the Rabinowitzes fail to explain how this fact would result in a loss or liability, which is necessary both to trigger the duty to defend and to trigger coverage under the provision of their title policy that they rely on. *Am. Best Food*, 168 Wn.2d at 404. It appears the Rabinowitzes assume that either losing a lawsuit or being named as a defendant in a lawsuit is sufficient to demonstrate a loss or liability, but that is not correct. Rather, the specific loss must be conceivably covered by the Rabinowitzes' title policy, and it would be too expansive to read this title policy as ensuring coverage for all potential property disputes.

suffer a loss is if the interest they had to begin with was greater than the interest they would retain if the McGonagles' express easement claim is proven. But as noted above, the Rabinowitzes did not have a greater interest because either they never owned the land, or alternatively, they would retain the same fee simple interest subject to the McGonagles' easement that they had before the McGonagles brought suit.

To the extent that the Rabinowitzes believed they had an unencumbered fee simple interest in the disputed property because the strip was not listed as an exception to title in the title report, this construction contradicts the plain language in Schedule A and the deed.

The language in an insurance policy is read from the perspective of an average person. *Campbell*, 166 Wn.2d at 472. Language that is clear and unambiguous is given its plain meaning, but ambiguous language is construed against the drafter. *Robbins*, 195 Wn.2d at 626. This court will presume that the parties did not intend to create provisions that result in absurdity and will avoid such constructions. *Campbell*, 166 Wn.2d at 472.

Here, the legal description of the Rabinowitz property, as copied in Schedule A of the title policy, defines the boundaries of the property and includes the phrase, "LESS the East 10 feet reserved for road for use of the Grantor of the tract immediately adjoining on the South." CP at 43. An average person would interpret the capitalized word "LESS" to indicate that the land described thereafter is not included within the boundaries of the property owned in fee simple without any encumbrances. Therefore, interpreting this language as granting the Rabinowitzes' an unencumbered fee simple interest to the 10-foot strip would result in an absurd construction. Because the Rabinowitzes would not face any loss or liability if the McGonagles' express

easement claim was proven as alleged, this claim is not conceivably covered, and Chicago Title did not owe a duty to defend.

ATTORNEY FEES

In their reply brief, the Rabinowitzes state, without discussion, that they are seeking *Olympic Steamship*[2] fees. Fees are not warranted because the Rabinowitzes are not the prevailing party in this appeal. *Selene RMOF II REO Acquisitions II, LLC v. Ward*, 189 Wn.2d 72, 87, n.12, 399 P.3d 1118 (2017). Moreover, the Rabinowitzes would not be entitled to fees even if they had prevailed because their request did not comply with the requirements in RAP 18.1.

CONCLUSION

We hold that Chicago Title did not have a duty to defend the Rabinowitzes in the lawsuit against the McGonagles. We hold that neither the fee simple nor the express easement claims were conceivably covered under the Rabinowitzes' title insurance policy.

Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Cruser, J.

Cruser, J.

I concur:

Sutton, A.C.J.

Sutton, A.C.J.

[2] Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991).

MELNICK, J. (Dissent) — Because the underlying quiet title action by William and Sara McGonagle against Neil and Elizabeth Rabinowitz could have conceivably affected the Rabinowitzes' interest in property covered by Chicago Title's insurance, I believe Chicago Title had a duty to defend. I respectfully dissent.

Neil and Elizabeth Rabinowitz purchased real property on Bainbridge Island. They also purchased a title insurance policy from Chicago Title. Their accompanying deed contained a legal description of the property. At the end of the description, it said, "Less the East 10 feet reserved for road use of the Grantor of the tract immediately adjoin on the South." Clerk's Papers (CP) at 72.

The deed to the adjoining neighbors' property, owned by the McGonagles, did not include or mention the 10 foot strip of property. A common grantor previously owned both properties. The 10 foot strip allowed access to the McGonagles' property from the public road.

In a quiet title action regarding the 10 foot strip of property, the McGonagles alleged they owned the property in fee simple and that the omission of it from their deed was the result of a scrivener's error. Alternatively the McGonagles argued that they had an easement over the disputed property and that the Rabinowitzes had a fee simple interest in it.

When the Rabinowitzes notified Chicago Title of the quiet title lawsuit and requested that it tender a defense and indemnity coverage, Chicago Title refused. It explained that the disputed strip was expressly exempted from coverage because of the word "less" in the legal description. CP at 6-7. When asked to reconsider, Chicago Title refused, maintaining that the disputed land was not part of the Rabinowitzes' property.

"The duty to defend is broad and if an insurance policy conceivably provides coverage, the insurer must defend or be found to have breached the duty." *Robbins v. Mason County Title Ins. Co.*, 195 Wn.2d 618, 621, 462 P.3d 430 (2020). "When an insurer evaluates whether to defend a lawsuit against its insured, Washington law is clear that the insurer must ask if there is any conceivable way that one or more of the claims asserted in the lawsuit is covered under the applicable policy." *Webb v. USAA Cas. Ins. Co.*, 12 Wn. App. 2d 433, 463, 457 P.3d 1258 (2020).

The duty to defend is broader than the duty to indemnify in the insurance context. *Robbins*, 195 Wn.2d at 626. "An insurance company has the duty to indemnify if the insurance policy *actually* covers the insured, while the duty to defend arises if the insurance policy *conceivably* covers the insured." *Robbins*, 195 Wn.2d at 626-27. "An insurer is relieved of the duty to defend only if the policy clearly does not cover the claim." *Robbins*, 195 Wn.2d at 627. When an insurer is unsure as to whether the duty to defend applies, "'it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend.'" *Robbins*, 195 Wn.2d at 633 (quoting *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002)).

The McGonagles concede that the disputed property is clearly not described in their deed, yet they claim to own it in fee simple. The Rabinowitzes' deed discusses the disputed property; however, a legitimate dispute exists as to the meaning of the legal description.

This dispute is made clearer by the McGonagles' complaint and argument, which demonstrates that the Rabinowitzes' interest, if any, in the disputed property will be affected by the outcome of the quiet title action. Either the Rabinowitzes will own the property in fee simple, subject to an easement, or the Rabinowitzes will have no interest in the property. The issue of who has title to the disputed property is clearly in dispute. Conceivably, the Rabinowitzes own the

property in fee simple, subject to an easement. Conceivably, the Rabinowitzes could lose their fee simple interest in the property. Chicago Title had a duty to defend under *Robbins*.

The majority states that the Rabinowitzes have failed to show any harm. The potential harm is that the Rabinowitzes could conceivably own the property in fee simple, as the McGonagles allege, and lose their ownership rights.

The majority and Chicago Title seem to rely on the trial court's result to decide that Chicago Title had no duty to defend because the trial court ruled in its favor. I believe that is the incorrect test. They ignore the ambiguity in the legal description which could reasonably be interpreted either to entirely exclude the disputed property from the Rabinowitzes' deed or to provide for a fee simple interest in the disputed property, subject to an easement.

In addition, I must note that in its briefing to this court, Chicago Title failed to employ the "conceivably covers" standard and failed to analyze its duty to defend in accord with well settled law. *Robbins*, 195 Wn.2d at 627.

Because the Rabinowitzes have a potential ownership interest in the disputed land and because they have the potential to lose that interest, Chicago Title clearly had a duty to defend. I would reverse the trial court.

Melnick, J.

CARNEY BADLEY SPELLMAN

September 08, 2020 - 3:45 PM

Transmittal Information

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Appellate Court Case Title:	Neil and Elizabeth Rabinowitz, Apps v. Chicago Title Insurance Agency of Kitsap Co., Resp.
Superior Court Case Number:	15-2-01064-8

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Division Two

October 21, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NEIL RABINOWITZ and ELIZABETH RABINOWITZ, husband and wife, Appellants, v. CHICAGO TITLE INSURANCE COMPANY, a Nebraska State Corporation, Respondent.	No. 52898-3-II ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANTS move for reconsideration of the Court's August 18, 2020 unpublished opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Melnick, Sutton, Cruser

FOR THE COURT:

CRUSER, J.

Filed
Washington State
Court of Appeals
Division Two

November 4, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NEIL RABINOWITZ and ELIZABETH RABINOWITZ, husband and wife, Appellants, v. CHICAGO TITLE INSURANCE COMPANY, a Nebraska State Corporation, Respondent.	No. 52898-3-II ORDER DENYING MOTION TO PUBLISH

APPELLANTS move for publication of the Court's August 18, 2020 unpublished opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Melnick, Sutton, Cruser

FOR THE COURT:

CRUSER, J.

CARNEY BADLEY SPELLMAN

November 19, 2020 - 4:11 PM

Filing Petition for Review

Transmittal Information

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