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Washington State
Court of Appeals
Division Two

August 18, 2020

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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UNPUBLISHED OPINION |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

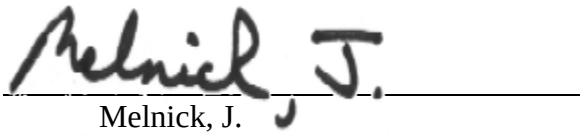
property in fee simple, subject to an easement. Conceivably, the Rabinowitzes could lose their fee simple interest in the property. Chicago Title had a duty to defend under *Robbins*.

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.