

No. 253279-III

80999-2

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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DALE CAMPBELL and TINA FERIERA, Appellants

v.

TICOR TITLE INSURANCE COMPANY, Respondents

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BRIEF OF APPELLANT

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RICHARD D. WALL  
Attorney for Appellant

423 W. First Avenue, Suite #250  
Spokane, WA 99201-3700  
(509) 747-5646  
WSBA #16581

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a. Whether a title insurance company breaches its obligation to defend and acts in bad faith towards its insured when it refuses to defend its insured against claims based upon a recorded Declaration of Easement on the grounds that the easement, although properly recorded in the county wherein the property is situated, was not “disclosed by the public record.”

b. Whether a title insurance company breaches its obligation to defend and acts in bad faith toward its insured when it refuses to defend its insured against claims based upon a recorded Declaration of Easement on the grounds that, although the Declaration of Easement was recorded prior to the issuance of the policy, the claims against the insured attached or were created “subsequent to the date of the policy” because the lawsuit against the insured was not filed until after the effective date of the policy.

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## I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred by Denying Plaintiffs' Motion for Summary Judgment and Granting Defendant's Cross-Motion for Summary Judgment as to Plaintiff's Claims for Failure to Defend, Bad Faith, Violation of Washington's Consumer Protection Act, and Failure to Indemnify.

### ISSUES:

- a. Whether a title insurance company breaches its obligation to defend and acts in bad faith towards its insured when it refuses to defend its insured against claims based upon a recorded Declaration of Easement on the grounds that the easement, although properly recorded in the county wherein the property is situated, was not "disclosed by the public record."
- b. Whether a title insurance company breaches its obligation to defend and acts in bad faith toward its insured when it refuses to defend its insured against claims based upon a recorded Declaration of Easement on the grounds that, although the Declaration of Easement was recorded prior to the issuance of the policy, the claims against the insured attached or were created

“subsequent to the date of the policy” because the lawsuit against the insured was not filed until after the effective date of the policy.

## II. STATEMENT OF THE CASE

On or about March 14, 2001, Dale Campbell and Tina Feriera (“Campbell-Feriera”) purchased from Respondent Ticor Title Insurance Company (“Ticor”) policy Number 48 1005 106 7777 (Exhibit B to the Complaint) insuring title to certain real property located in Stevens County, Washington. CP 54. The policy provided insurance against “loss or damage, not exceeding the amount of insurance stated in Schedule A, sustained or incurred by the insured by reason of: 1. Title to the estate or interest described in Schedule A being vested other than as stated therein; 2. Any defect in or lien or encumbrance on the title; 3. Unmarketability of the title. 4. Lack of a right of access to and from the land.” CP 54. The coverage portion of the policy further states that Ticor would pay “the costs, attorney’s fees and expenses incurred in defense of the title, as insured.” CP 54.

In October, 2005, Campbell-Feriera were served with a Summons and Complaint filed in Spokane County, Washington, by Jerry Edwards (“Edwards”), the owner of property adjacent to the Campbell-Feriera property. CP 6. In the Complaint, Edwards claimed a legal right to enter

onto and cross over the Campbell-Feriera property in order to gain access to Loon Lake. That claim was based upon a "Declaration of Pedestrian Easement" recorded on December 5, 1996 under Stevens County Auditor's Number 9612935. CP 40. The Summons and Complaint were later refiled in Stevens County, Washington.

The legal description contained in the "Declaration of Pedestrian Easement" places an easement for purposes of accessing an existing dock on Deer Lake on "Lot B," which is owned by the Gromo Family Trust ("Gromos"). CP 40. The Gromo house lies immediately to the South of the Campbell-Feriera property. Edwards alleged in his complaint that Frank and Rita Vickery ("Vickerys"), who were the original grantors of the Edwards property (Lot C), the Gromos property (Lot B), and the Campbell-Feriera property (Lot A), had intended to place the pedestrian easement so that it would lie between the Campbell-Feriera house and the house immediately to the South, the Gromos house. CP 16. Edwards further alleged that Mr. Vickery erred in drafting the Declaration of Pedestrian Easement so that South boundary line of the Campbell-Feriera property actually ran through the Gromos house and also across the easement, preventing access to the lake over the described easement. CP 17. Edwards requested that the Gromos and Campbell-Feriera deeds be reformed "to reflect the true intention of the Vickerys as the original

grantor.” CP 17. Although the complaint did not specify precisely how the Gromo and Campbell-Feriera deeds were to be reformed, it is clear from the allegation of the complaint that Edwards is seeking access over property that now belongs to Campbell-Feriera.

Campbell-Feriera notified Ticor of the Edwards lawsuit. On January 20, 2006, Ticor responded to the Notice of Claim by letter to Plaintiff’s attorney. CP 65. In the letter, Ticor denied coverage and also denied any duty to defend. Ticor stated in its letter that the claims set forth in the Edwards Complaint were exempted from coverage by a provision in the policy excluding coverage for “easements, prescriptive rights, rights of way, streets, roads, alleys or highways not disclosed by public record.” According to Ticor’s letter, “[i]t is uncontroverted that on the date that Ticor’s title policy was issued to Ms. Ferreira and Mr. Campbell, there was no easement of record across their property in favor of Lot C [the Edwards property].” CP 66.

As an additional basis for denying coverage and Campbell-Ferreira’s tender of defense, Ticor stated that coverage was excluded pursuant to a provision excepting defects, liens, encumbrances, adverse claims, or other matters “attaching or created subsequent to the date of policy.” CP 66. Ticor asserted that, even if Mr. Edwards is successful in his efforts to reform the existing grant of easement to encumber the

Campbell/Fereira(sic) property, it will be a matter which attached or was created subsequent to the date of the policy.” CP 66.

Campbell-Feriera moved for summary judgment on its claims for failure to defend, bad faith, violation of Washington’s Consumer Protection Act, and failure to indemnify. CP 67. Ticor cross-moved for Summary Judgment on all claims. CP 86. The trial court denied Campbell-Feriera’s motion for summary judgment and granted Ticor’s cross-motion for summary judgment. CP 95. Campbell-Feriera’s motion for reconsideration was denied. CP 104. Campbell-Feriera timely appealed to this court. CP 111.

### III. STANDARD OF REVIEW ON SUMMARY JUDGMENT

Review on summary judgment is de novo. The appellate court engages in the same inquiry as the trial court. Summary judgment is appropriate only if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach only one conclusion. *Trimble v. Washington State University*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). If the moving party submits adequate affidavits demonstrating the

absence of a material fact, the moving party may not rely solely on speculation or argumentative assertions, but must set forth specific facts to rebut the moving party's contentions. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

#### IV. ARGUMENT

1. Ticor's Stated Reasons for Denying Coverage are Untenable in Light of the Facts Known to Ticor and Demonstrate That Ticor Acted in Bad Faith Toward its Insured.

a. **Ticor's Refusal to defend on the Grounds that the "Declaration of Pedestrian Easement" was not "disclosed of record" is based upon an Unreasonable Interpretation of the Policy Language and Constitutes Bad Faith.**

Under Washington law, an insurer's duty to defend is separate from and broader than the duty to indemnify. *Hayden v. Mutual of Enumclaw Insurance Company*, 141 Wn. 2d 55, 64, 1 P.3d 1167 (2000). The duty to defend arises whenever a complaint made against the insured contains any factual allegations that might render the insurer liable to the insured under the policy. *Id.* The complaint must be liberally construed and the insurer must defend if the claim is potentially covered under the

policy. *Bosely v. American Motorists Insurance Company*, 66 An. App. 698, 701 P.2d 148 (1992). In other words, if the complaint is subject to any reasonable interpretation that would give rise to coverage, the insurer must defend. *See, Anthony v. Stiles*, 81 Wn. App. 670, 673, 916 P.2d 435 (1996).

The insurer's duty to defend is excused only if a complaint alleges liability that clearly is not covered by the policy or that unequivocally falls within an exclusion contained in the policy. *Overson v. Consolidated Insurance Company*, 101 Wn. App. 651 659 (2000). To determine if a duty to defend exists, the court should examine the policy to see if the allegations of the complaint give rise to a claim that is "conceivably covered" and whether an exclusion "clearly and unambiguously" bars coverage. *Hayden v. Mutual of Enumclaw* at 64.

The duty to defend is one of the main benefits of the insurance contract. The duty arises at the time the action is first brought, and is based on the potential for liability. 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.' Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its duty to defend. If the complaint is ambiguous it will be liberally construed in favor of triggering the insurer's duty to defend.

*Truck Insurance Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751,760, 58 P.3d 276 (2002)(citations omitted).

The determination of whether a complaint gives rise to the duty to defend is made solely with reference to the allegations contained in the complaint itself. *Holly Mt. Resources, Ltd. v. Westport Ins. Corp.*, 130 Wn. App. 635, 647, 104 P.3d 725 (2005). There are two exceptions to that general rule: (1) if coverage is not clear from the face of the complaint must may exist, the insurer must investigate the claim and give the insured the benefit of any doubt as to whether there is a duty to defend, and (2) the insurer may consider facts outside the complaint if the alleged facts are in conflict with known facts or the allegations in the complaint are ambiguous. *Id.* at 647-48.

Even when the obligation to defend is in doubt, the insurer may not, consistent with its obligation to act in good faith, abandon its insured and allow the insured to incur substantial legal costs while waiting for an indemnity determination. *Id.* at 761. Instead, the insurer must defend its insured, but may do so under a reservation of rights. *Id.*; *See also, Kirk v. Mt. Airy Ins. Company*, 134 Wn. 2d 558, 563, n. 3, 951 P.2d 1124 (1998).

Here, Tigor does not contend that the complaint against Campbell-Feriera does not allege facts that could result in a covered liability under the coverage portion of its policy. Rather, Tigor contends that any potential liability from the Edwards lawsuit is excluded from coverage

under Schedule B, paragraph C of its policy. That paragraph excludes from coverage, any loss or damage which arise by reason of “[e]asements, prescriptive rights, rights-of-way, streets, roads, alleys or highways not disclosed by public records.”

It is not disputed that the “Declaration of Pedestrian Easement” was properly filed and recorded with the Stevens County Auditor prior to the issuance of the Campbell-Feriera policy. Ticor contends, however, that the “Declaration of Pedestrian Easement” was not “disclosed by public records” because the easement states that it crosses over Lot B, the Gromos property, not Lot A, the Campbell-Feriera property.

The word “disclose” is defined as “to expose to view” or “to make public.” *Merriam-Webster Online, www.m-w.com/dictionary.htm*. The fact that the “Declaration of Pedestrian Easement” had been properly recorded in the official property records of the county where the property is situated establishes beyond any doubt that it was “exposed to view” and “made known to the public.” The “Declaration of Pedestrian Easement” certainly was not hidden from view or otherwise kept from the public or from public inspection. In fact, Ticor does not claim that the “Declaration of Pedestrian Easement” could not be found by searching the public records or that Ticor was not aware of its existence prior to issuing its policy.

Nevertheless, Ticor argues that the “Declaration of Pedestrian Easement” was not “disclosed” because it does not state on its face that the described easement burdens the Campbell-Feriera property. Ticor confuses disclosure of the recorded easement itself with disclosure of the legal effect of the recorded easement, and by doing so, reads into its policy a provision that is not contained within the policy language.

The clear and unequivocal language of the policy provides that all easements, prescriptive rights, rights-of-way, streets, roads, alleys or highways that are disclosed by the public record are covered. Therefore, any claim based upon a properly recorded easement, prescriptive right, right-of-way, street, road, alley or highway, is a claim that Ticor has a duty to defend. The policy does not require that the public record clearly identify the easement, prescriptive right, right-of-way, street, road, alley or highway as creating a right in the subject property. If that is what Ticor wanted to require as a prerequisite to liability and the duty to defend, it could have easily written such language into its policy. It did not do so.

Under Ticor’s reading of its policy, liability and the duty to defend would arise only when a claim is made based upon a recorded document that clearly states the intent to create a legal right in the subject property. The language of the policy is not so limited, however. In fact, the only reasonable interpretation that can be placed on the phrase “not disclosed

by the public record” is that the exclusion applies only to claims of right or interest in the subject property not based upon any recorded document or instrument. The reasonable expectation of the insured, based upon the clear language of the policy, is that Ticor will defend against any claims arising out of an instrument or document that is properly made a part of the county records prior to the issuance of the policy. Indeed, that is exactly what Ticor’s policy purports to guarantee; i.e., that there are no recorded defects, liens or encumbrances upon the subject property other than those specifically identified in the policy as special exceptions.

The phrase “disclosed by the public record” is not ambiguous or subject to different reasonable interpretations. However, even if that phrase could be characterized as ambiguous in some way, Ticor was still under a duty to give its insured the benefit of any reasonable interpretation of the complaint and the policy in favor of finding coverage. Instead, Ticor consciously chose to apply an unreasonable and restrictive meaning to the language of its policy in order to avoid its duty to defend. In doing so, Ticor clearly breached its obligations to defend and to act in good faith toward its insured.

**b. Ticor’s Claim that any Defect, Lien or Encumbrance  
that may be Established by the Edwards Lawsuit will be a Matter**

**which Attaches Subsequent to the Date of the Policy is Absurd and not Based Upon any Reasonable Argument of Law or Fact.**

Ticor's second basis for refusing to defend against the Edwards lawsuit is that any rights asserted against the Campbell-Feriera property by Edwards are rights that will attach or be created subsequent to the date of the policy. However, the only rights asserted in the complaint filed by Edwards are those based upon the "Declaration of Pedestrian Easement," which was recorded in December 1996. The effective date of the policy is March 14, 2001, more than five years after the "Declaration of Pedestrian Easement" was recorded. Other than Edwards' ownership of Lot C, the complaint against Campbell-Feriera alleges no facts that arose after the effective date of the policy.

Nevertheless, Ticor claims that, because Edwards seeks relief in the form of reformation of the "Declaration of Pedestrian Easement" or the Campbell-Feriera deed, any burden upon the Campbell-Feriera property will not actually come into existence until judgment is entered in favor of Edwards and against Campbell-Feriera. The absurdity of Ticor's position is obvious. Under Ticor's reasoning, Ticor would never be required to defend an action against one of its insureds because in every such case, a judgment recognizing the plaintiff's claims will necessary will be entered sometime after the effective date of the policy.

The duty to defend does not depend on the nature of the relief sought. Whether there is a duty to defend depends solely on the facts alleged in the complaint and whether such facts, if proved, could conceivably result in a covered loss. Because Edwards alleged no facts arising after the issuance of the policy as a basis for his claims against Campbell-Feriera, other than his current ownership of Lot C, his request for reformation of the "Declaration of Pedestrian Easement" and the Campbell-Feriera deed are clearly based upon rights that arose and attached to the subject property prior to the issuance of the policy. Ticor's completely unreasonable and untenable assertions to the contrary further demonstrate that Ticor has acted in bad faith.

2. Because Ticor has Clearly Acted in Bad Faith Toward Campbell-Feriera, Ticor's Refusal to Defend is a Violation of Washington's Consumer Protection Act and Ticor is Estopped from Denying Coverage.

Where the obligation to defend is in doubt, the insurer may not simply abandon its insured and allow the insured to incur substantial legal costs while waiting for an indemnity determination. *Truck Insurance Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751,761, 58 P.3d 276 (2002). If the insurer is uncertain of its obligation to defend, it may defend under a

reservation of rights and seek a declaratory judgment that it has no duty to defend. *Id.*

Furthermore, where an insurer in bad faith refuses or fails to defend, the insurer is estopped from denying coverage. *Id.* at 759. Where an insurer has a duty to defend and refuses to defend, the insurer is bound by the decision of the trier of fact regarding issues necessarily decided in the litigation. *Id.*

Under RCW 48.01.030, insurers have a duty to act in good faith. The insurer's duty of good faith is based upon a fiduciary relationship between the insurer and its insured. *Overton v. Consolidated Ins. Co.* at 660. The duty to act in good faith is broad and may be breached by conduct short of intentional bad faith or fraud. *Anderson v. State Farm Mutual Insurance Company*, 101 Wn. App.323, 329 2 P.3d 1029 (2000). An insurer acts in bad faith when it overemphasizes its own interest in dealing with a claim by its insured. *Id.*

An insurer's bad faith breach of a duty to defend is per se an unfair and deceptive act or practice in violation of Washington's Consumer Protection Act (WCPA) under RCW 19.86.020. *Overton v. Consolidated Insurance*, at 661. Claims alleging unfair insurance practices satisfy the public interest element of the WCPA because Washington State law declares that "the business of insurance is one affected by the public

interest.” *Anderson v. State Farm Mutual Insurance Company*, at 330, citing RCW 48.01.030.

Here, Tigor has clearly acted in bad faith toward its insureds by placing its own interests ahead of the interests of Campbell-Feriera. By doing so, Tigor has denied Campbell-Feriera one of the most important benefits of the insurance they purchased. Campbell-Feriera have been forced to defend against the claim by Edwards at their own peril and expense. At the same time, Campbell-Feriera have been forced to institute and maintain the present action against Tigor in order to obtain the protection they paid for when they purchased the policy from Tigor, thereby incurring additional costs and attorney fees.

Even if Tigor was uncertain as to whether it would ultimately be liable to indemnify Campbell-Feriera for any loss or damage arising out of the Edwards lawsuit, its obligation upon receipt of the Notice of Claim, was to defend its insureds, even if Tigor believed the claims had little or no merit. Tigor could have done so under a reservation of rights in order to protect its legitimate interests. Instead, Tigor simply refused fulfill its clear obligation to defend. By choosing to protect its own interests and ignoring the interest of its insureds, Tigor committed an unfair business practice in violation of Washington’s Consumer Protection Act. In addition, because Tigor has clearly acted in bad faith by placing its own

interests ahead of the interests of Campbell-Feriera, Ticor is now prohibited from denying coverage under the liability portion of its policy.

V. CONCLUSION

Based upon the foregoing, this court should reverse the judgment of the trial court and remand this case for entry of judgment in favor of Appellants as to all claims.

Respectfully submitted this 7<sup>th</sup> day of September, 2006.

  
Richard D. Wall, WSBA# 16581  
Attorney for Appellants

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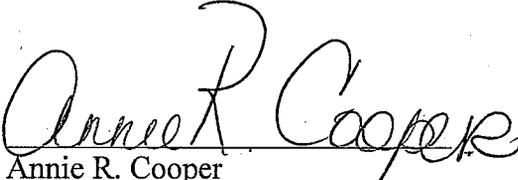
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In the Office of the Clerk of Court  
Washington Court of Appeals, Division Three  
By \_\_\_\_\_

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7<sup>th</sup> day of September 2006, a true and correct copy of the foregoing BRIEF OF APPELLANT was mailed via U.S. mail, first-class, postage prepaid, to the following:

Brooke Kuhl  
Preston Gates & Ellis LLP  
601 West Riverside Avenue, Suite 1400  
Spokane, WA 99201-0628

  
Annie R. Cooper