

RECEIVED

NOV 20 2006

In the Office of the Clerk of Court
Washington Court of Appeals, Division Three

80999-2

No. 253279

By _____

**COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION III**

DALE CAMPBELL and TINA FERIERA,
Plaintiffs/Appellants

v.

TICOR TITLE INSURANCE COMPANY,
Defendant/Respondent

Appeal from the Superior Court for Stevens County
The Honorable Rebecca Baker, Judge

RESPONDENTS' BRIEF

Peter G. Scott
Brooke Castle Kuhl
PRESTON GATES & ELLIS LLP
601 S. Riverside Ste. 1400
Spokane, WA 99201
(509) 624-2100
Attorneys for Respondent

TABLE OF CONTENTS

I. RESPONSE TO PLAINTIFFS' ASSIGNMENT OF ERROR..... 1

II. STATEMENT OF THE CASE2

 A. Statement of Facts 2

 B. Procedural History..... 3

III. STANDARD OF REVIEW..... 4

IV. ARGUMENT..... 5

 A. Ticor Had No Duty to Defend Campbell and Feriera Against Claims Seeking Post-Policy Reformation of Instruments Affecting Property Other Than the Insured Parcel5

 B. Ticor Had No Duty To Defend Against A Potential Boundary Issue Disclosed By A Survey Conducted After The Policy Was Issued.....9

 C. Whether Or Not Ticor Had A Duty To Defend, It Acted In Good Faith In Denying Coverage Based On The Express Exceptions And Exclusion Language of The Title Insurance Policy..... 10

 D. Is Ticor Entitled To Recover Its Attorney Fees And Costs On Appeal Pursuant To RAP 18.9? 11

V. CONCLUSION 12

TABLE OF AUTHORITIES

Washington Cases:

<i>Baugh Construction Co. v. Mission Ins. Co.</i> , 836 F.2d 1164 (9th Cir.1988)	10
<i>Berg v. Ting</i> , 125 Wn.2d 544, 886 P.2d 564 (1995).....	6
<i>Bosley v. American Motorists Ins. Co.</i> , 66 Wn. App. 698, 832 P.2d 1348 (1992).....	5
<i>Hayden v. Mutual of Enumclaw Ins. Co.</i> , 141 Wn.2d 55, 1 P.3d 1167 (2000).....	11
<i>Kirk v. Mt. Airy Ins. Co.</i> , 134 Wn.2d 558, 951 P.2d 1124 (1998).....	5, 10, 11
<i>Mahoney v. Shinpoch</i> , 107 Wn.2d 679, 732 P.2d 510 (1987).....	12
<i>Overton v. Consolidated Ins. Co.</i> , 145 Wn.2d 417, 38 P.3d 322 (2002).....	4, 5, 10, 11
<i>Overton v. Consolidated Ins. Co.</i> , 101 Wn. App. 651, 6 P.3d 1178 (2000).....	5
<i>Torgerson v. North Pacific Ins. Co.</i> , 109 Wn.App. 131, 34 P.3d 830 (2001).....	4

Statutes:

RCW 65.04.045(f)	6
RCW 65.08.070	7

Court Rules:

Civil Rule 56(c)4
Rules of Appellate Procedure 18.912

I. RESPONSE TO APPELLANTS' ASSIGNMENT OF ERROR

Ticor restates the issues raised by Appellants as follows:

ISSUES PRESENTED

- A. Whether An Insurer Has A Duty To Defend Under A Standard Title Insurance Policy Against A Post-Policy Claim Seeking Reformation Of A Recorded Easement Clearly And Unequivocally Burdening A Parcel Other Than The Insured Property?**
- B. Whether An Insurer Has A Duty To Defend Under A Standard Title Insurance Policy Against A Potential Boundary Issue Disclosed By A Survey Conducted After The Policy Was Issued?**
- C. Whether An Insurer Breaches Its Obligation To Defend And Acts In Bad Faith When It Denies Coverage Based On Express Policy Exceptions And Exclusions After Review Of The Claims Against The Insured?**
- D. Whether Ticor Is Entitled To Recovery Of Its Attorney's Fees And Costs On Appeal Pursuant To Washington Rules Of Appellate Procedure 18.9?**

II. STATEMENT OF THE CASE

A. **Statement of Facts**

Plaintiffs/Appellants Dale Campbell and Tina Feriera own real property in Stevens County described as Lot A. CP at 58. Ticor Title Insurance Company (Ticor) issued a Title Insurance Policy dated March 14, 2001; for this property. CP at 58. In late 2004 or early 2005, Jerry Edwards purchased property in Stevens County described as Lot C. CP at 9. Mr. Edwards' property is benefited by a pedestrian easement that expressly describes Lot B as the servient property. CP 40; *see also*, Appellants' Brief at p. 3 (admitting that "[t]he legal description contained in the 'Declaration of Pedestrian Easement' places [the] easement . . . on 'Lot B,' which is owned by the Gromo Family Trust (Gromos))." On or about November 15, 2005, Jerry Edwards filed a complaint in Stevens County seeking, in part, reformation of the pedestrian easement such that the easement, as reformed, would burden Lot A (the Campbell/Feriera Lot) instead of Lot B. CP at 6-19. Campbell and Feriera were named as defendants in the Edwards' Complaint. CP at 6-19.

On or about June 4, 2002, Ramer and Associates surveyed the property adjacent to the Campbell property. CP at 17, ¶ 6.6. According to the allegations made by Edwards, this survey put the parties to the Edwards' action on notice of a boundary issue between the Campbell/Feriera property and the adjacent lot owned by Gromos. CP at 17, ¶ 6.6. Based on this survey, Edwards seeks reformation.

Appellants' tendered the claim to Ticor and Ticor denied coverage based upon express exceptions and exclusions in the Title Policy. CP at 65.

B. Procedural History

Ticor denied Appellants' claim for coverage in January of 2006. CP at 65-66. In March of 2006, Campbell and Feriera filed this action against Ticor alleging that Ticor had wrongfully denied coverage breaching its duty of good faith and violating Washington's Consumer Protection Act. CP at 1-4. In late March 2006, Campbell and Feriera moved for summary judgment on all their claims. CP at 67. Ticor responded and cross-moved for summary judgment based on the express exceptions and exclusions contained in the Policy issued to Campbell and Feriera. CP at 86. Counsel for both parties argued their respective motions for summary judgment on April 18, 2006. Tr. at p. 1-2. The Trial Court denied Appellants' Motion for Summary Judgment and granted Ticor's Cross-Motion. Tr. at 19-21; CP at 95-98. Appellants' moved for reconsideration and the trial court entered its Memorandum Decision Denying Reconsideration on June 15, 2006. CP at 104-109. Appellants appealed from the Trial Court's May 2, 2006, Order Granting Ticor's Motion for Summary Judgment and the Trial Court's June 16, 2006, Order Denying Reconsideration. CP at 111.

III. STANDARD OF REVIEW

Summary judgment is proper when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g., Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 429, 38 P.3d 322, 325 (2001); *see also, Torgerson v. North Pacific Ins. Co.*, 109 Wn. App. 131, 136, 34 P.3d 830, 832 (2001); CR 56(c). When reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the trial court. *Torgerson*, 109 Wn. App. at 137.

Interpretation of insurance policies is a question of law, in which the policy is construed as a whole and each clause is given force and effect. *Overton*, 145 Wn.2d at 424; *Torgerson*, 109 Wn. App. at 137 (“Interpretation of an insurance contract is a matter of law which this Court will review *de novo*.”) The terms of a policy should be given a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Overton*, 145 Wn.2d at 424.

IV. ARGUMENT

A. **Ticor Had No Duty to Defend Campbell and Feriera Against Claims Seeking Post-Policy Reformation of Instruments Currently Affecting Property Other Than the Insured Parcel.**

The duty to defend arises whenever a lawsuit is filed against the insured alleging facts and circumstances arguably covered by the policy. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124, 1125 (1998); *Bosley v. American Motorists Ins. Co.*, 66 Wn. App. 698, 701, 832 P.2d 1348 (1992) (“The duty of an insurer to defend an action brought against an insured policyholder arises when the complaint is filed and the allegations of the complaint could, if proved, impose liability upon the insured within the coverage of the policy.”) Although an insurer has a broad duty to defend, alleged claims which are clearly not covered by the policy relieve the insurer of its duty. *Kirk*, 134 Wn.2d at 561. Campbell and Feriera bear the burden of establishing that the loss suffered is one covered by the policy. *See Overton v. Consolidated Ins. Co.*, 101 Wn. App. 651, 660, 6 P.3d 1178 (2000) aff’d in part revs’d in part, on other grounds, by *Overton*, 145 Wn.2d 417.

Ticor had no duty to defend Campbell and Feriera against a post-policy attempt to reform an existing easement burdening another parcel to burden the Campbell and Feriera Lot based on the Policy’s express

exclusions from coverage and its Schedule B general exceptions. First, the easement recorded against the Gromo Lot was not disclosed by the public records against the Campbell/Feriera Lot per the terms of the Policy. Second, reforming an existing easement to burden the insured Lot is an encumbrance attaching or created subsequent to the Date of Policy. *See* CP at 55.

An easement describing the burdened property as other than that insured is not disclosed by public record pursuant to the policy. Appellants allege that “[t]he policy does not require that the public record clearly identify the easement . . . as creating a right in the subject property.” Appellants’ Brief at p. 10. Such a strained interpretation of the Policy is unnecessary and unfounded. The Policy defines “public records” as “records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge.” CP at 55, Conditions and Stipulations 1(f). Washington statutes and legislative history recognize the vital importance of being able to determine the exact legal description from the record and require that an instrument presented for recording contain a legal description of the property conveyed or encumbered. *See* RCW 65.04.045(f); *see also, Berg v. Ting*, 125 Wn.2d 544, 553, 886 P.2d 564 (1995) (noting that Washington Courts have

recognized that the legislative purpose in enacting RCW 65.08.070 was “to give greater stability to land titles, by authorizing prospective purchasers or encumbrancers to rely upon the title *as disclosed by the record.*”) Schedule B of the policy provides:

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys’ fees or expenses) which arise by reason of:

GENERAL EXCEPTIONS:

... C. Easements, prescriptive rights, rights-of-way, streets, roads, alleys or highways not disclosed by the public records.

CP at 59.

It is undisputed that the easement recorded against the Gromo Lot does not describe the Campbell/Feriera property and thus is not an easement against the Campbell/Feriera property disclosed by public records. Ticor had no duty to defend based on this exception.

Post-policy reformation does not trigger a duty to defend because the encumbrance necessarily is created or would attach after the date of the Policy. *See* CP at 55¹. Edwards’ Complaint against Campbell and

¹ Policy Exclusions from Coverage providing:

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys’ fees or expenses which arise by reason of . . .

3. Defects, liens, encumbrances, adverse claims or

Feriera does not assert that a recorded document affects the Campbell property, but seeks to have a recorded document reformed to burden the Campbell/Feriera property. There is no dispute that at the time the policy was issued the easement in question described the burdened property as a parcel other than the Campbell/Feriera parcel. The Standard Title Insurance Policy purchased by Campbell/Feriera expressly excepts and excludes such an occurrence from coverage.

Assuming the allegations presented in Mr. Edwards' Complaint are true, the pedestrian easement as currently recorded does not burden the Appellants' property. CP at 10, ¶ 1.16.² For this reason, Mr. Edwards is seeking a court order reforming the existing easement so that it would, as amended, burden the Appellants' property.³ In their brief Appellants misconstrue the issue in dispute contending that their claim was denied because the Complaint against them was filed after the policy was issued.

other matters . . .
(d) attaching or created subsequent to Date of
Policy. . . .”

² The policy, by its terms, insures only “Lot(s) A of Amended Short Plat No. ASP 28-79” CP at 58. The pedestrian easement at issue is excluded from coverage as an easement or right-of-way not disclosed by the public records against the insured lot. CP at 59.

³ Tigor does not pay “loss or damage, costs, attorneys’ fees or expenses which arise by reason of . . . 3. Defects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to Date of

See Appellants' Brief at p. 1-2, ¶ b. This is simply incorrect. The claim was denied because on the date the policy was issued there was not a recorded easement benefiting the Edwards' property and burdening the Campbell/Feriera property – for this very reason Edwards filed his complaint seeking reformation. Here, the Edwards' Complaint seeks to create an easement across the Campbell/Feriera property and is asking that the existing easement burdening another parcel be reformed to burden the Campbell/Feriera lot. Under the Standard Title Insurance Policy at issue here, there is no duty to defend against such a claim.

B. Ticor Had No Duty To Defend Against A Potential Boundary Issue Disclosed By A Survey Conducted After The Policy Was Issued

Based on Mr. Edwards' allegations, a question about whether the easement, as written, burdened the proper property first arose after Ramer and Associates conducted a survey in 2002. CP at 17, ¶ 6.6. This survey was recorded on June 4, 2002. CP at 17, ¶¶ 6.6, 6.7. The date of the Title Insurance Policy was March 14, 2001 – over a year before the survey. CP at 15. Under the Policy's Schedule B, there is no duty to defend against “[e]ncroachments and questions of location, boundary and area disclosed only by inspection of the premises or by survey.” CP at 59⁴ (emphasis Policy” CP at 55.

⁴ Schedule B of the policy provides:

added).

On its face the Edwards' Complaint, assuming such allegations are proved, states facts that fall clearly within multiple policy exclusions and exceptions. Therefore, by the plain language of the policy, the company will not pay fees or costs incurred in defending against such claims. See *Baugh Construction Co. v. Mission Ins. Co.*, 836 F.2d 1164, 1168 (9th Cir. 1988) (interpreting Washington Law and noting that "[i]f, however, the allegations assert a claim that is not covered by the policy or bring the claim clearly within a policy exclusion, there is no duty to defend").

C. Whether Or Not Ticor Had A Duty To Defend, It Acted In Good Faith In Denying Coverage Based On The Express Exceptions and Exclusion Language of The Title Insurance policy.

To succeed on their claim of bad faith, the insured must show the insurer's breach of the insurance contract was "unreasonable, frivolous, or unfounded." See *Overton*, 145 Wn.2d at 433 quoting *Kirk*, 134 Wn.2d at 560. Claims of bad faith are not easy to establish and an insured has a

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

GENERAL EXCEPTIONS:

... B. Encroachments and questions of location, boundary and area disclosed only by inspection of the premises or by survey.

heavy burden to meet. *Overton*, 145 Wn.2d at 433. If the insurer's denial of coverage is based on a reasonable interpretation of the insurance policy, there is no action for bad faith. *Id.*; *see also*, *Kirk*, 134 Wn.2d at 560.

Under the Consumer Protection Act (CPA), individuals are vested with a private cause of action against insurers for unfair or deceptive practices. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63, 1 P.3d 1167, 1171 (2000). Individuals bringing such actions must show (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) that impacts the public interest; (4) which causes injury to the party in his business or property; and (5) which injury is causally linked to the unfair or deceptive act. *Id.* However, a denial of coverage does not constitute an unfair or deceptive act or practice as long as it is based on reasonable conduct of the insurer. *Overton*, 145 Wn.2d at 434.

Ticor denied coverage based on the express exceptions and exclusions contained in the Policy. Appellants' claims for bad faith and violation of the Consumer Protection Act were properly dismissed on summary judgment.

D. Is Ticor Entitled To Recover Its Attorney Fees And Costs On Appeal Pursuant To RAP 18.9?

The rules of appellate procedure permit an award of attorney fees to a prevailing respondent in an appeal made without merit. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). An award of attorney fees pursuant to this rule is warranted when there "are no

debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.” *Id.* Pursuant to RAP 18.9, Ticor requests an award of its attorney fees and costs incurred on appeal.

V. CONCLUSION

Appellants are asking this Court to determine that title insurance insures not only against what is in the applicable documents or instruments, but also against any contrary intent, not reflected in the document, held by one executing such document. The policy purchased by Appellants’ does not insure against such risk. For the foregoing reasons the trial court’s grant of summary judgment in favor of Ticor and its denial of Appellants’ motion for reconsideration should be affirmed.

DATED this 20th day of November, 2006.

Respectfully submitted,

PRESTON GATES & ELLIS LLP

By Brooke Castle Kuhl

Peter G. Scott, WSBA #31712

Brooke Castle Kuhl, WSBA #35727

Attorneys for Defendant/Respondent

Ticor Title Insurance Company

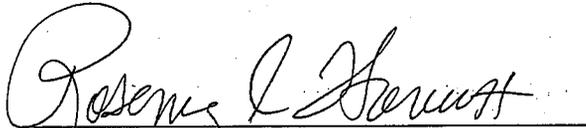
CERTIFICATE OF SERVICE

On this 20th day of November, 2006, a true and correct copy of the foregoing RESPONDENT'S BRIEF was served via U.S. Mail, postage prepaid, addressed as follows:

Mr. Richard D. Wall
Attorney at Law
423 W. First Avenue, #220
Spokane, WA 99201
Attorneys for Plaintiff/Appellant

The original and one copy of the foregoing was filed with:

Court of Appeals, Division III
500 North Cedar
P.O. Box 2159
Spokane, WA 99210



Rosemary Harnett

K:\47571\00100\XRHXRH_P24VI