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SUPREME COURT
OF THE STATE OF WASHINGTON

No. 50376-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

LESLIE W. ROBBINS AND HARLENE ROBBINS,

RESPONDENTS,

v.

MASON COUNTY TITLE INSURANCE COMPANY; and

RETITLE INSURANCE COMPANY,

PETITIONER.

SUPPLEMENTAL BRIEF OF
MASON COUNTY TITLE INSURANCE COMPANY and
RETITLE INSURANCE COMPANY

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I. INTRODUCTION

Pursuant to RAP 13.7(d), Petitioner Mason County Title Insurance Company (MCTI) submits its supplemental brief.

II. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in imposing a duty to defend where (a) the contract between the parties excludes any duty where there had been a final determination by a court of competent jurisdiction (CP 232); and (b) United States v. State of Washington, 384 F. Supp. 312 (W. D. Wash. (1974); 443 U.S. 658, 675, 99 S. Ct. 3055, (1979); 873 F. Supp. 1422 (W. D. Wash. 1994); 157 F. 3d 630 (9th Cir. 1998)[1] effectively determined all potential issues regarding the Tribal shellfish rights; and therefore (c) re-litigating this issue would be futile.

2. Did the Court of Appeals err in imposing a duty to defend where there were no legal proceedings between Respondents Leslie W. and Harlene Robbins (Robbins) and the Squaxin Island Tribe?

3. Was the Court of Appeals' determination of bad faith proper when the issue was not raised or considered by the trial court

[1] The 1974/1975 decisions are the original fishing rights determination. The 1994/1998 decisions, brought within the same ongoing proceeding, are the application of shellfish rights to the earlier treaty right determination.

and was its determination of that issue contrary to established authority?

4. Where a title policy excludes from coverage easements not disclosed by the public record under the state's recording act, is a treaty right to enter onto an insured's property therefore excluded from coverage?

5. Did the Court of Appeals properly remand for a determination regarding affirmative defenses?

6. Did the Court of Appeals properly determine issues regarding attorney's fees were premature?

7. Do additional policy provisions preclude recovery?

III. STATEMENT OF THE CASE

MCTI relies on the statement of the case submitted in its Petition for Review.

IV. SUPPLEMENTAL ARGUMENT

1. MCTI WAS NOT OBLIGATED TO DEFEND AGAINST AN INSURED CLAIM WHERE THE CLAIM HAD BEEN EFFECTIVELY DETERMINED BY THE FEDERAL COURTS.

U.S. v. Washington, 384 F. Supp. 312 (1974), does not explicitly state the basis for the State of Washington being named a party. It does indicate that the State Department of Fisheries, as a specific

agency, was named in its regulatory capacity. It is implicit that the State of Washington was named in its capacity as a representative of its citizens. The court stated, at p. 329,

> This court is confident the vast majority of the residents of this state, whether of Indian heritage or otherwise, and regardless of personal interest in fishing, are fair, reasonable and law abiding people. They expect that kind of solution to all adjudicated controversies, including those pertaining to treaty right fishing, and they will accept and abide by those decisions even if adverse to interests of their occupation or recreational activities.

To suggest that this litigation was not, effectively, a full and final determination of the tribal shellfish rights is to question an obvious pragmatic reality.

Robbins, after repeated requests by MCTI to indicate what there was to defend, now indicate that MCTI should have determined:

1. whether Robbins' property was in the tribe's usual and accustomed area;
2. that the tribe's rights extend to Manila clams on Robbins' property; and
3. what portion of Robbins' shellfish were naturally occurring.

Robbins never raised these assertions before the trial court despite being challenged to do so and thus there is no response in the

record. CP 17-18, 35. A court should only consider evidence and issues presented to the trial court. Otherwise it denies the responding party the opportunity to offer evidence or argument designed to rebut the contention. Rafel Care Group PLLC v. Defoor, 176 Wash.App. 2010, 308 P.3d 767 (2013). Issues not raised before the trial court are not considered on appeal. State v. Strince, 176 Wash.2d 742, 293 P.3d 1177 (2013).

There was nominal mention in Robbins' reply brief to the Court of Appeals, at pp. 19-20, which did not permit a response as the Court of Appeals did not schedule oral argument. This reinforces the position of MCTI that the finding of bad faith was premature and that, at a minimum, the Court of Appeals should have remanded the issue to the trial court.

As to the first of the above assertions, it has been fully determined. Judge Boldt, the original trial judge in the federal case, specifically found that Hammersley Inlet was within the Squaxin Island Tribe's usual and accustomed area. See Findings of Fact 140 and 141, U.S. v. State of Washington, 384 F. Supp. 312, at 377-378 (1974).

The second issue raised by Robbins follows the reasoning of the first.

As to the third new assertion, Robbins conceded to the Squaxin Island Tribe that its determination as to the nature and extent of the harvestable shellfish on their property was fully correct.

The record shows that in January of 2016, the Squaxin Island Tribe notified Robbins of its right to harvest the shellfish on their property. (CP 234). On December 12, 2015, apparently, Dale Hall, a shellfish grower, on behalf of Robbins, communicated with the Tribe. (CP 234). On January 20, 2016, the Tribe responded to Mr. Hall (CP 234), assessing the status of the shellfish in Robbins' tidelands. Robbins have asserted Mr. Hall thereafter negotiated an agreement with the Tribe. (CP 238). This is not correct. On July 8, 2016, defense was tendered to MCTI. CP 237-238. On July 26, 2016, the tribe notified Robbins of its final determination of the status of the shellfish on Robbins' property (CP 248-242). This letter contradicts the assertion of counsel for Robbins there was a pending negotiated settlement at the time of tender (CP 237-238). The Tribe's letter indicates the Tribe had made a unilateral determination on May 11, 2016. (CP 241) of its rights to the shellfish on Robbins' property, not by way of agreement.

This determination was never questioned and therefore conceded by Robbins, despite the fact they were represented by counsel at the time. CP 225, 241-242.

Therefore, the final new assertion by Robbins is either disingenuous or they failed to mitigate their damages.

2. A TITLE COMPANY HAS NO DUTY TO DEFEND WHERE THERE ARE NO LEGAL PROCEEDINGS BETWEEN AN INSURED AND AN ADVERSE CLAIMANT.

Robbins argue, and the Court of Appeals agreed, that because the policy used the term "demand" in addition to "claim", a duty to defend was triggered by the Squaxin Island Tribe's letter.

The Court of Appeals concluded the letter from the Squaxin Island Tribe constituted a demand under the policy, and therefore triggered the duty to defend.

Case law establishes a duty to defend arises if or when the claimant's allegations in the complaint, if proven, would trigger a duty to defend under the policy. Greer v. Northwestern Nat'l Ins. Co., 109 Wash.2d 191, 743 P.2d 1244 (1987). See also case law submitted in the Petition for Review. (pp 8-9).

Where there is no complaint, the title insurance company has nothing to evaluate.

The totality of the context of the policy language in Sections 1 and 2 of the Conditions and Stipulations of the policy (CP 232) suggests, and case law previously submitted concurs, the demand would be in the context of a lawsuit.

Under the line of cases cited, the duty to defend arises if an aspect of the complaint can invoke coverage. This creates a bright line for a title company's consideration and determination. The holding of the Court of Appeals obscures that bright line. A complaint articulates the factual and legal basis for the claims for an insurer to consider.

If a demand can be something less, then the question arises as to what would constitute a demand? The institution of action in U.S. v. Washington, supra, as to shellfish was against the State of Washington as a surrogate for all tideland owners. The sixteen shellfish growers in that suit were intervenors, not original parties. They certainly considered the lawsuit a demand, and in fact, tendered defense to their insurance carriers.

If so, then the six year statute of limitations has clearly run on Robbins' claim. See further discussion below.

3. THE COURT OF APPEALS ERRED IN DETERMINING MCTI HAD ACTED IN BAD FAITH.

Robbins' Motion for Partial Summary Judgment never asked the court to determine bad faith. The term was incidentally mentioned once on page 10 of its original motion. CP 261. The response of MCTI (CP 37) also indicates MCTI did not perceive Robbins were asking the trial court to consider the issue of bad faith, but pointed out that Robbins would, in any event, have to show the denial of coverage was unreasonable, frivolous, or unfounded, citing to Patnode v. HCC Life Insur. Co., 016 WL 3597778 (USDC, WD, Wash. 2016). There was no such showing.

Robbins' reply briefing never mentions bad faith or affirmative defenses. CP 6-16, 50-60.

In no conclusion to any briefing submitted by Robbins was the trial court asked to consider bad faith or to strike MCTI's affirmative defenses.

Orsi v. Aetna Ins. Co., 41 Wash.App. 233, 703 P.2d 1053 (1985) is instructive. That case held that a motion must state with particularity the grounds and relief sought, and a court may not consider grounds not stated in the motion. In that circumstance, the issue would remain before the trial court. See CR 7(b).

The focus here is obviously on American Best Foods, Inc. v. Alea London, Ltd., 168 Wash. 2d 398, 229 P.3d 693 (2010), where the majority

held, in effect, that a failure to defend when there was a question as to coverage, was, per se, bad faith. The 5-4 opinion cites no precedent for this nor does it explain why this fact-based inquiry is eliminated. Prior case law held that even if incorrect, an insurance company might not have acted in bad faith. Patnode v. HCC Life Ins. Co., 2016 WL 3597778. Kirk v. Mt. Airy Ins. Co., 134 Wash.2d 588, 951 P.2d 1124 (1998). In other words, the duty to defend and bad faith were different standards. Without explanation, the court determined those standards are now one and the same.

The dissent pointed out this contradiction and, at p. 704, indicated the majority was overturning a line of prior cases without "a clear showing that (the) established rule is incorrect and harmful"; citing Riel v. Foodmaker, Inc., 152 Wash.2d 138, 147, 94 P.3d 930 (2004).[2]

4. A TREATY RIGHT TO ENTER UPON AN INSURED TIDELAND IS IN THE NATURE OF AN EASEMENT NOT DISCLOSED BY THE PUBLIC RECORD UNDER THE RECORDING ACT OF THE STATE OF WASHINGTON AND IS EXCLUDED FROM COVERAGE UNDER ROBBINS' TITLE POLICY.

MCTI has previously addressed how the tribal treaty right is not a covered "public record" (general exception 1 under the policy, (CP 231) defined as being recorded under the recording laws which

[2] The concern addressed may be highlighted by Tarasyuk v. Mutual of Enumclaw, 7 Wash.App. 1017 (2019), an unpublished opinion which addresses bad faith and does not even reference American Best Foods, supra.

impart constructive notice (Conditions and Stipulations 4(d)). CP 232.

Robbins continue to cite to Hahn v. Alaska Title Guaranty Co., 557 P. 2d 143 (Alaska 1976), to assert 1 U.S.C. §112 is a statute providing for constructive notice as defined in the policy. However, the statute says nothing of the sort, nor does Hahn apply to it. Hahn interpreted 44 U.S.C. §1507, which contains specific language affirmatively granting constructive notice in the context of Public Land Orders recorded in the Federal Register. 1 U.S.C. § 112, on which Robbins rely, does not grant any such constructive notice, and Hahn is irrelevant to this case. Thus, 1 U.S.C. § 112, does not make the Treaty of Medicine Creek the "public records" under the recording acts as those terms are defined in the policy.

The discussion of Tribal shellfish rights as being akin to a profit a prendre may be somewhat misdirected as it pertains to the exclusion under the policy for easements not a matter of public record.

The Tribal right is unique and so the comparison with other recognized real property interests, while appropriate, can, perhaps, be

confusing and not necessarily transposed easily into common law property interests.

A straightforward way to look at the issue would be: When a policy excludes nonrecorded easements, is the Tribal right an easement in that context? This necessarily requires an answer to the question, what is an easement and does the tribal right fit within that concept?

> "An easement is commonly defined as a nonpossessory interest in land of another." Bruce & Ely, Law of Easements & Licensees in Land, §1.01 (Revised Edition).
>
> "An easement is a right, distinct from ownership, to use in some way the land of another." Olympia v. Palzer, 109 Wa.2d 225, 728 P.2d 135 (1986).
>
> "An easement is a property right separate from ownership that allows the use of another's land without compensation." M.K.K.I., Inc. v. Krueger, 135 Wa.App. 647, 145 P.3d 411 (2006), Hanna v. Margitan, 193 Wash. App. 596, 373, P.3d 300 (2016).

It is interesting to note in U.S. v. State of Washington, 157 F.3d 630 (1998), which is the appeal of the "shellfish" decision, Judge Beezer, in his dissenting opinion (at p. 661), referred to the Tribal right as an "access easement".

Under Louisiana law, an easement conveys the same idea as a servitude. Seilhan, et. al. v. Commonwealth Land Title Insurance Company, 2018 WL 6727069 (2018).

Rights of way have distinctions from easements, yet for title policy coverage purposes, they have been considered to fall within the unrecorded easement exception. Livingston v. Title Ins. Co. of Minnesota., 373 F. Supp. 1185 (E. D. Mo 1974).

The Supreme Court of California, in Gerhard v. Stephens, 68 Cal.2d 864, 442 P.2d 692 (1968), noted that easements and profits a prendre are indistinguishable and stated at p. 880,

> "The term 'easement' is so used (in the Restrictions of Property) as to include within its meaning the special meaning commonly expressed by the term 'profit'."

The Tribal right fits within these definitions.

Every easement has a purpose associated with it. People don't just grant easements. They grant easements to do something in relation to the land.

A profit is an easement, the purpose of which is to take something from the land. That doesn't mean it is not in the form of an easement as anticipated by the insurance contract.

The Restatement (Third) of Property, as cited to previously in the Petition for Review, indicates a profit a prendre is an easement.

Numerous decisions in Washington have adopted portions of the Restatement (Third) of Property. Kim v. Lee, 145 Wash.2d 79, 31 P.3d 665 (2001), Bank of America, N.A. v. Prestance Corp., 160 Wash.2d 560, 160 3d 17 (2007), Columbia Community Bank v. Newman Park, LLC, 177 Wash.2d 566, 304 P.3d 472 (2013), Worden v. Smith, 178 Wash.App. 309, 314 P.3d 1125 (2013).

Most significantly, Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wash. App. 246, 84 P.3d 295 (2004), adopted it as to servitudes.

Individual clauses in an insurance contract must be read in light of the entire contract so as to affect the intention of the parties. Holter v. National Union Fire Ins., 1 Wash.App. 46, 459 P.2d 61 (1969), Ames v. Baker, 68 Wash.2d 713, 415 P.2d 74 (1966).

Construction of a title policy which contradicts the general purpose of the contract is presumed to be unintended by the parties. Campbell v. Ticor Title Insurance Company, 166 Wash.2d 466, 209 P.3d 859 (2009).

Rights regarding real property were and are described to first-year law students as a bundle of sticks. An easement excludes one of those sticks (the right to exclusive possession). Adverse possession can dispossess the entire bundle. The policy herein excludes from coverage an easement not disclosed by the public record and excludes total dispossession by adverse possession not disclosed by the public record. The concept of other encumbrances could fall in between these two extremes. Robbins maintain such an encumbrance, not of record, should be covered, even though its bookends are not.

This is inconsistent with the intent of the policy and the expectations of the parties. This conflict indicates the focus is more properly on what is, or is not shown, by the public record.

The judicial interpretation of a contract is not limited to a review of the four corners of the instrument. The court is to consider the surrounding circumstances and the reasonable objective expectations of the parties. Berg v. Hudesman, 115 Wash.2d 657, 801 P.2d 222 (1990). The focus of the contract should be on what were the reasonable expectations of the parties in having a title company search the public records, as defined by the policy.

Robbins have cited to no statute, case, or other authority supporting the assertion that MCTI should have searched beyond what was recorded with the Mason County Auditor.

5. THE COURT OF APPEALS PROPERLY REMANDED THE ISSUE OF AFFIRMATIVE DEFENSES

Robbins, for the first time, now argue the Court of Appeals should have determined that MCTI had a duty to prove up its affirmative defenses.

A review of the record shows that the term "affirmative defenses" is never mentioned in Robbins' summary judgment motion. The Court of Appeals noted this. Robbins v. Mason County Title Insurance Company, 5 Wash.App. 68, 84-85, 425 P.3d 885 (2018)

Further, in Robbins' brief in response to MCTI's Motion for Summary Judgment (in which they referred to their Motion for Partial Summary Judgment), affirmative defenses are not mentioned. CP 50-61.

Eight days later, Robbins submitted a reply brief. Affirmative defenses are never mentioned. CP 16, 61.

Neither party asked the court to rule on affirmative defenses. CP 16, 61.

The MCTI response to Robbins' motion also indicated that affirmative defenses were still to be considered if the trial court held there was coverage and a duty to defend. CP 35-36. See also CP 24-26.

Where affirmative defenses are pled, if a moving party seeks to have a trial court address these issues, the customary process is to ask the trial court to strike them. See as examples, Oltman v. Holland American Line USA, Inc., 163 Wash.2d 236, 178, P.3d 984 (2008). State of Washington ex re. Quick-Ruben v. Verharen, 136 Wash.2d 888, 969 P.2d 64 (1998). Phillips v. Richmond, 59 Wash.2d 571, 369 P.2d 299 (1962).

At the Summary Judgment hearing, MCTI indicated to the court that if affirmative defenses were at issue to consider, MCTI would ask for time for discovery. This matter was initially filed on November 11, 2016. CP 315. MCTI's Motion for Summary Judgment was filed on December 22, 2016 (CP 274), and Robbins' Motion for Partial Summary Judgment was filed on December 29, 2016 (CP 252). Argument was heard on January 30, 2017. CP 4.

MCTI did make two comments to the trial court regarding its affirmative defenses. First, it indicated the parties had not engaged in significant discovery and were trying to expedite matters to have an

initial determination of coverage. CP 33. However, it did point out that as to the statute of limitations, it had run, citing to Shepard v. Holmes, 185 Wash.App. 730, 345 P.3d 786 (2014), (which held the statute of limitations began to run on a title policy when a party was injured and could apply to a court for relief), and regardless of Robbins' actual knowledge of facts that could be discovered, they were bound by knowledge that could be discovered in the exercise of due diligence.

Second, on the same date, MCTI filed an offer of proof to indicate that in the event the court was inclined to note there was coverage under the language of the policy, MCTI wanted an opportunity to explore, through discovery, issues relating to Robbins actual knowledge, indicating that Robbins had had their tidelands under lease for many years, the lessee's wife was a member and employee of the Squaxin Island Tribe, and that likelihood of Robbins being unaware of the Tribe's right to harvest shellfish was remote. CP 25-26, 33-34.

The summary judgment motions were heard a month and a half after suit was filed. CR 56(f) envisions the request of MCTI. Alaska Nat. Ins. Co. v. Bryan, 125 Wash.App. 24, 40, 104 P.3d 1 (2004), indicates one of the threshold issues is whether a party had "ample

time to conduct the necessary discovery". The party needs to show what it expects to discovery and why it is important. Davis v. Cox, 180 Wash.App. 514, 540, 325 P.3d 255 (2014). MCTI did.

Robbins cite to Young v. Key Pharmaceuticals, Inc., 112 Wash. 2d 216, 770 P.2d 182 (1989), and Labriola v. Pollard Group, Inc., 152 Wash. 2d 828 (2004), that MCTI had a duty to come forward with proof of their affirmative defenses. These cases do not stand for this assertion. These cases indicate it is the burden of the moving party. In this context, Robbins were the moving party.

The declaration of Leslie Robbins (CP 224-251) does not address the affirmative defenses other than a failure to mitigate damages where he admits they failed to do so. CP 225-226.

Jacobsen v. State, 89 Wash.2d 104, 569 P.2d 1152 (1977) is directly on point. In that case, the state had pled two affirmative defenses which the Jacobsens, in their Motion for Summary Judgment, did not address. The court held it was the Jacobsens' duty to present evidence to defeat the affirmative defenses, and having failed to do so, the state had no obligation to present any evidence.

Counsel's recollection is that at the hearing on this matter on January 30, 2017, a request was made that if the issue of the

affirmative defenses was before the court, that the matter be continued to allow for discovery. See CR 56(g). MCTI has had that hearing transcribed and has moved to supplement the record.

In their reply brief to the Court of Appeals at p. 29, Robbins argued, as to the statute of limitations, that it began to run as soon as they had the right to apply to the court for relief, citing O'Neil v. Estate of Murtha, 89 Wash.App. 67, 947 P.2d 1252 (1997), rev. denied, 135 Wash.2d 1003.

However, Robbins assumed the cause of action did not occur until the Tribe made its demand. This is not correct. The cause of action occurs when the policy is breached. Shepard v. Holmes, 185 Wash.App. 730, 345 P.3d 786 (2014). Therefore, the policy, under Robbins' theory, was breached when it was issued, and the statute of limitations for that breach was six years, which has long expired. RCW 4.16.040(1).

6. THE COURT OF APPEALS PROPERLY DETERMINED THE ISSUE OF ATTORNEY'S FEES WAS PREMATURE

Robbins seek attorney's fees. As set forth in the Petition for Review, the Court of Appeals determination of bad faith was substantively and procedurally improper because affirmative defenses were not before the Court of Appeals, and any findings of bad

faith (and attorney's fees) would necessarily have to consider affirmative defenses.

7. ADDITIONAL POLICY PROVISIONS EXCLUDE COVERAGE

While not argued earlier, a reviewing court can affirm a trial court on summary judgment on any basis. Redding v. Virginia Mason Med. Ctr., 75 Wash.App. 424, 878 P.2d 483 (1994). Bavand v. OneWest Bank, 196 Wash.App. 813, 385 P.3d 233 (2016). Robbins have argued, and the Court of Appeals has considered, the matter of the treaty rights as being reservations of rights, not grants of rights. If so, then they are reservations to the original tidelands patents.

General exception, 2, of the policy, provides that reservations in United States Patents are not covered. CP 231.

V. CONCLUSION

The reasonable expectation of the parties is that MCTI would conduct a proper search of the public records under the recording laws of the State of Washington. MCTI did that. Robbins seek to impose liability beyond those reasonable expectations.

The Court of Appeals should be reversed and the decision of the trial court reinstated. Absent that, the matter should be remanded

to the trial court for factual determinations regarding the issues of bad faith and MCTI's affirmative defenses.

Respectfully submitted this 27 of June, 2019.

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