

No. 96726-1

No. II-50376-0

Court of Appeals
DIVISION II
STATE OF WASHINGTON

LESLIE W. ROBBINS AND HARLENE ROBBINS,

APPELLANTS,

v.

MASON COUNTY TITLE INSURANCE COMPANY; and

RETITLE INSURANCE COMPANY,

RESPONDENTS.

**RESPONDENT MASON COUNTY TITLE INSURANCE COMPANY'S
and RETITLE INSURANCE COMPANY'S
OPENING BRIEF**

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I. INTRODUCTION

Mason County Title Insurance Company, now REtitle Insurance Company, (hereinafter collectively referred to as Mason County Title for purposes of convenience) are the defendants and respondents herein.

Leslie Robbins and Harlene Robbins, hereinafter referred to as the Robbins, purchased two waterfront parcels in Mason County in 1978 but now own only one. They purchased title insurance from the Mason County Title Insurance Company (CP 224, 228-232).

In 2016, the Robbins anticipated entering into a shellfish lease with a private grower and submitted a harvest plan to the Squaxin Island Tribe in recognition that the tribe had a right to 50% of the naturally occurring shellfish on their tidelands (CP 225, 234). The Squaxin Island Tribe responded confirming its treaty rights (CP 234-235).

Thereafter, the Robbins tendered "defense" of the Squaxin Island Tribe's response, to Mason County Title (CP 225, 236-238, 246-250). In the tender, the Robbins never indicated what there was to defend or what action they envisioned Mason County Title should take

(CP 236-238). In fact, all issues between the Tribe and the Robbins were fully determined in *United States v. State of Washington* in 1998, citations below.

Mason County Title responded and declined (CP 243-245).

During this process, the Robbins never submitted a claim for damages or indemnification to Mason County Title.

The Robbins then filed this action in Mason County Superior Court (CP 315-345).

Mason County Title filed a Motion for Summary Judgment (CP 274-275, 22-23, 24-26, 292-299), and the Robbins filed a Cross-Motion for Partial Summary Judgment (CP 252-273). The trial court, in granting Mason County Title's Motion and denying that of the Robbins, held:

1. The title policy excluded from coverage easements not disclosed by the public record under the recording acts imparting constructive notice with respect to real estate.

2. The tribal right, in regard to the Robbins' claim, is a profit a prendre, which is a form of easement.

3. The Treaty of Medicine Creek is found in the federal statutes, which are not recording acts imparting constructive notice with respect to real estate in the State of Washington.

The Robbins, in asking this court to reverse the trial court, are indicating that in doing so, the only issue left to be considered is damages, plus the assessment of costs and attorney's fees. This ignores that Mason County Title has asserted the following affirmative defenses that the trial court has yet to even consider:

Statute of Limitations

Laches

Waiver

Failure to mitigate damages

Failure to state a claim

Election of alternative remedies (CP 300-314)

II. ANSWERS TO ASSIGNMENTS OF ERROR

The trial court properly determined, as a matter of law, in granting Mason County Title's Summary Judgment motion and denying the cross motion of Robbins for partial Summary Judgment, that there was no coverage under the policy of title insurance.

III. RESPONSE TO ISSUES PERTAINING TO ROBBINS'

ASSIGNMENTS OF ERROR

1. Mason County Title was not required to act in response to the Robbins' demand to "defend" against the Squaxin Island Tribe.

a. A title company has no duty to act when there is no coverage.

b. There was nothing to defend, the tribal rights having been fully adjudicated in federal court in 1998.

c. A party to a contract is not required to perform a useless act.

2. Tribal shellfish rights are easement rights not disclosed by the public record under the recording acts of the State of Washington for real estate. The language of the title policy is straightforward.

3. While not reached by the trial court, this court may affirm on any basis supported by the record. *Wendle v. Farrow*,

102 Wash. 2d 380, 686 P. 2d 480 (1984). Mason County Title has asserted several affirmative defenses, including the statute of limitations, laches, waiver and failure to mitigate damages. *United States v. State of Washington*, has been ongoing for over forty years, the first decision being found at 384 F. Supp. 312 (W.D. Wash. 1974); aff'd in substantive part, 443 U.S. 658, 99 S. Ct. 3055, (1979). Shellfish rights were determined within the action at 873 F. Supp. 1422 (W. D. Wash. 1994); aff'd in part, rev'd in part, 157 F. 3d 630 (9th Cir. 1998).

IV. STATEMENT OF THE CASE

The Robbins' opening brief goes into significant discussion regarding the Treaty history between Washington Tribes and the United States, which, while only tangentially relevant to the case at hand, will not be repeated here.

Of more direct application is the determination, regarding shellfish rights, *United States v. State of Washington*, id.

In sum, the issue of tribal shellfish rights has been long determined and is a foregone conclusion.

Of more import is the procedural history of the parties.

In 1978, the Mason County Title Insurance Company issued a title policy to the Plaintiffs as to Tracts three and four of the Plat of Skookum Point Tracts as recorded in vol. 4 of plats, pages 54 & 55, records of Mason County (CP 228-232).

The Plaintiffs no longer own the tidelands adjacent to Tract three (CP 224).

The pertinent provisions of the policy are discussed below:

MCTI agreed to insure title to the tidelands "formerly owned by the State of Washington" as to:

2. Any defect in, or lien or encumbrance on, said title existing at the date hereof, not shown in Schedule B;

The policy was, and is, subject to the following general exemptions (emphasis added) not insured against:

1. Encroachments or questions of location, boundary and area, which an accurate survey may disclose; public or private easements not disclosed by the public records; rights or claims of persons in possession, or claiming to be in possession, not disclosed by the public records; material or labor liens or liens under the Workmen's Compensation Act not disclosed by public records; water rights or matters relating thereto; any service, installation or construction charges for sewer, water or electricity.

The policy is further subject to the following conditions and stipulations:

4. The following terms when used in this policy mean: (a) "named insured": the persons and corporations named as

insured in Schedule A of this policy; (b) "the insured": and such named insured together with (1) each successor in ownership of any indebtedness secured by any mortgage shown in Item 3 of Schedule A, (2) any owner or successor in ownership of any such indebtedness who acquires title to the real estate described in Item 4 of Schedule A, or any part thereof, by lawful means in satisfaction of said indebtedness or any part thereof, (3) any government agency or instrumentality which insures or guarantees said indebtedness or any part thereof, and (4) any person or corporation deriving an estate or interest in said real estate as an heir or devisee of a named insured or by reason of the dissolution, merger, or consolidation of a corporate named insured; (c)"date hereof": the exact day, hour and minute specified in Schedule A; (d) "public records": records which, under the recording laws, impart constructive notice with respect to said real estate; (e)"home office": the office of the Company at the address shown herein; (f) "mortgage" mortgage, deed of trust, trust deed, or other security instrument described in Schedule A. (CP 228-234).

Since as far back as at least 2005, the Robbins have been conducting commercial shellfish operations on their property (CP 225). There is no record of them notifying the Squaxin Island Tribe as required by the federal shellfish decision noted above.

In late 2015, they did notify the tribe (CP 225).

In July, 2016, they tendered defense to Mason County Title without indicating what there was to defend (CP 236-238), nor was a claim submitted by the Robbins for indemnification (CP 245).

An exchange of letters occurred resulting in Mason County Title declining the tender (CP 237-238, 240, 244-245, 247-250).

The record does not show the Robbins did anything to defend against whatever it was they were attempting to tender to Mason County Title.

This lawsuit was filed shortly thereafter (CP 315-345).

It should be noted that throughout all the correspondence and pleadings, despite being challenged to do so, the Robbins have never indicated what it expected Mason County Title to do even if it had accepted the tender (CP 17-18).

The Treaty rights of the Squaxin Island Tribe were fully determined and are, legally, a verity.

V. STANDARD OF REVIEW

Mason County Title agrees that review herein is de novo. As to the Mason County Title's Summary Judgment Motion, the court should consider all facts and references to be drawn from these facts in favor of the Robbins as per the Robbins' brief, page 18. In considering the Robbins Motion for Partial Summary Judgment, Mason County Title is entitled to the same deference.

VI. ARGUMENT

A. Duty to Defend

The Plaintiffs wish to frame this case as concerning a duty to defend. This ignores the facts and conflates the independent contractual duties to defend against litigation concerning covered title defects with the duty to indemnify for loss due to covered title defects.

The other claims under the allegations of the Complaint, are all predicated upon the title policy being applicable to the defect alleged in the Complaint. See *Campbell v. Ticor Title Insurance Company*, 166 Wash. 2d 466, 209 P. 3d 859 (2009), which provides where there is no coverage, there is no duty to defend.

1. There Is Nothing To Defend Against.

Plaintiffs' reliance on *American Best Foods, Inc. v Alea London, Ltd.*, 168 Wash. 2d 398, 229 P. 3d 693 (Wash. 2010), is misguided and irrelevant because there is nothing to defend against here. Nor have the Robbins suggested what, if anything, Mason County Title could or should have done, since the issues between Robbins and the Squaxin Island Tribe were fully determined in the 1990s. The argument of the Robbins is illusory. Mason County Title is not required to perform a useless act. *University Properties, Inc. v. Moss*, 63 Wash. 2d 619, 388 P. 2d 543 (1964). Additionally, even in the event the Plaintiffs were defendants in litigation, which they are not, the clear holding in

Campbell v. Ticor Title Insurance Company, 166 Wash. 2d 466, 209 P. 3d 859 (2009), states that in the absence of coverage, the insurer owes no duty to defend. Rather, this case, subject to the pled affirmative defenses, is solely about the Defendant's duty to indemnify the Plaintiffs for covered title defects if a claim is submitted, which, in turn, solely depends on whether the Tribe's purported right to come onto the Plaintiffs' property is a covered title defect. (Discussed fully at Section B, starting at page 6 below.)

The Robbins' Complaint, itself, is an acknowledgment the issue here is one of coverage. The Robbins' Complaint alleges in relevant part:

- A. The breach of the duty to defend occurred in bad faith
- B. Citing *Olympic Steamship Co., Inc. v. Centennial Ins. Co., et al.*, 117 Wn. 2d 37, 811 P. 2d 673 (1991), that if the insured prevails in an action to determine coverage, the insured is entitled to recover attorney's fees (CP, p. 9-10).
- C. Asserting a claim under the Washington Insurance Fair Conduct Act, RCW 48.30.015.

As to each, Mason County Title would point out:

A. Citing from the Robbins' Motion for Summary Judgment, bad faith occurs when:

An insurer acts in bad faith if its breach of duty to defend was unreasonable, frivolous or unfounded, citing *Truck Ins. Exch. v. Vanport Howes, Inc.*, 147 Wash. 2d 751, 58 P. 3d 276 (2002).

The Robbins seem to assert in this appeal, that if there is a scintilla of doubt as to coverage, Mason County Title is liable. Under the Robbins' own authority submitted to the trial court, that is not the standard.

Insurance policies are to be governed by contract law and are to be given fair, reasonable and sensible construction consistent with the objective and intent of the parties. *Teague Motor Co., Inc. v. Federated Service Ins. Co.*, 73 Wash. App. 479, 869 P. 2d 1130 (1994). It must be construed to effectuate its purposes, *Anderson Middleton Lumber Co. v. Lumberman: Mut. Cas. Co.*, 53 Wash. 2d 404, 333 P. 2d 938 (1959), and construed as a whole, *Emter v. Columbia Health Services*, 63 Wash. App. 378, 819 P. 2d 378 (1991), rev. denied 119 Wash. 2d 2005. The background facts are to be considered. *Ames v. Barker*, 68 Wash. 2d 713, 415 P. 2d 74 (1996). It must be construed according to the entirety of its terms. RCW 48.18.520.

B. *Olympic Steamship* provides that an insured is entitled to recover attorney's fees:

1. If an insurer improperly refuses to defend a claim, or
2. If an insurer improperly denies a claim.

As to the first, there was nothing to defend. As to the second, no claim has been made.

While it is true that Mason County Title believes there is no coverage, had a claim been properly submitted, Mason County Title could have chosen to simply pay the claim.

The face value of the policy is \$89,000. Were a claim to have been submitted, it would have been the diminution in value of the property in proportion to the policy limits (CP 232).

In other words, if the Robbins uplands were worth \$350,000, and the tidelands worth \$50,000, and a determination made that the value of the tidelands was diminished 25% by the tribal right; that would be 3.1257% of the total value of the property. Therefore in that event, the claim would properly be for 3.1257% of \$89,000, or \$2,781.87.

Mason County Title could well have decided to pay the claim had one been made.

Mason County Title has not denied a claim. No claim for indemnification was ever made. The Robbins were specifically told they needed to file a claim in order for it to be considered (CP 245).

The title policy provides the insured, in order to make a claim under the policy, must provide,

“A supplement in writing of any loss or damage, for which it claims the Company is liable, shall be furnished to the Company at its home office within 60 days after such loss or damage shall have been ascertained.”
(CP 23)

C. No cause of action exists under WIFCA. *Peres-Crisantos v. State Farm Fire & Casualty Company*, 187 Wash. 2d 669, 389 P. 3d 476 (2017).

2. Robbins Improperly Asserts The Effect of Extrinsic Evidence of Policy Language Subsequent to The Issuance of Their Policy.

Robbins refers to more recent policy language for this court's consideration. Before the trial court, they sought to introduce extrinsic evidence in the form of language from policies issued subsequent to the policy to assert there is an ambiguity in their own policy (CP 46-48), to which Mason County Title objected (CP 19-20). Their conclusion is unsupported by law or by fact.

Title policies are subject to the same construction analysis as other contracts. See *Denny's Restaurants, Inc. v Security Union Title Insurance Company*, 71 Wash. App. 194, 859 P. 2d 619 (1993), (holding that *Berg v. Hudesman*, 115 Wash. 2d 657, 801 P. 2d 222 (1990), applies to the construction of title insurance policies).

A court may not revise a contract's terms under the guise of construing it. *International Marine Underwriters v. ABCD Marine, LLC* 179 Wash. 2d 274, 313 P. 3d 395, 402 (Wash. 2013). Under the foregoing cases, extrinsic evidence is not admissible to contradict or supplement a completely integrated contract. While extrinsic evidence may be used to interpret an existing contract term, it may not be used to establish an interpretation outside the contract terms.

Extrinsic evidence is not admissible if the contract is a complete expression of the parties' agreement. See discussion in *Denny's Restaurants, supra.* at 201-202. *Denny's Restaurants, supra.* points out the distinction between contract interpretation and contract construction. Contract *construction* is a question of law, and extrinsic evidence is not allowed. Contract *interpretation* is a question of fact, and extrinsic evidence can be submitted to show ". . . the objective manifestations of the parties' intent." *Denny's Restaurants,*

supra, at 201. There are no ambiguous terms here. There were no “objective manifestations” between the parties. They never discussed the policy (CP 22-23). Additionally, even if applicable in this case, any extrinsic evidence sought to be considered must be contemporaneous with the formation of the contract. The Plaintiffs ask this court to consider extrinsic evidence from fourteen years after the title policy was issued.

Additionally, the fact that future contracts between other insurers and third parties contain different terms affords no inference that the terms of the present contract were ambiguous in fact, and in the case of an ambiguous term, is not an indication of its meaning. See *Pastor v. State Farm Mutual Automobile Insurance Co.* 487 F. 3d 1042, 1045 (7th Cir. 2007) (subsequent auto insurance contract revision defining “day” as 24 hours does not amount to a “confession” that plaintiff’s interpretation of original contract is correct): Accord, *Hickman v. GEM Ins. Co.*, 299 F. 3d 1208, 1214 (10th Cir. 2002) (subsequent revisions to reimbursement provisions not an indication of original terms). To use a “revision in a contract to argue the meaning of the original version would . . . discourage [e] efforts to

clarify contractual obligations, thus perpetuating any confusion caused by unclarified language in the contract.” *Id.*

The contract of title insurance in this case is completely integrated. The Plaintiffs have not claimed otherwise. (See Declaration of David Bayley, filed January 19, 2017 (CP 22-23).) Rather, the Plaintiffs argue that because Mason County Title Insurance Company and other title insurance companies included different language in future contracts with third parties, the terms of their contract should be disregarded and replaced by the subsequent language. Plaintiffs provide no legal or factual basis to support that contention.

B. Tribal Treaty Shellfish Rights Are Easement Rights Not Disclosed By the Public Record Under the Recording Acts

The Plaintiffs argue the right of the Tribe to come onto their land is not an easement, but a profit a prendre (suggesting the two concepts are distinctly different).

The Tribal right is not covered by the policy. (see below) Thus, the Defendant owes no contractual obligation of indemnity or of defense to the Plaintiffs.

It should be noted the Robbins indicate that the treaty rights are rights of the Tribal members. This is not correct.

A treaty is “a contract between two sovereign nations.” *United States v. Washington*, 443 U.S. at 675. A review of the federal decisions above cited will confirm that the rights to take shellfish are a Tribal right, only to be exercised by Tribal members under the authority of the Tribe.

1. Robbins Unnecessarily Confuses Easement v. Profit a Prendre.

A profit a prendre is a form of easement. Profits a prendre are, in fact, referred to as an “easement with a profit.” See *Alexander Dawson, Inc. v. Fling*, 155 Colo. 599, 601, 396 P. 2d 599 (1964). *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*, 184 Wis. 2d 572, 583, 516, N.W. 2d 410 (1994), (citing the Restatement of Property), indicates there is no legal distinction between an easement and a profit, and that the term, “easement”, includes a profit.

The Restatement (Third) of Property (Servitudes), § 1.2, defines the terms easement and profit a prendre as follows:

(1) An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.

(2) A profit a prendre is an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other

substances from land in the possession of another. It is referred to as a "profit" in this Restatement.

Restatement (Third) of Property (Servitudes) § 1.2 (2000).

There are numerous forms of easement:

- Affirmative easement
- Appurtenant easement
- Apparent easement
- Continuing easement
- Easement by prescription
- Easement in gross
- Access easement
- Easement of convenience
- Easement of Necessity
- Equitable easement
- Implied easement
- Intermittent easement
- Negative easement
- Public easement
- Quasi easement
- Reciprocal negative easement
- Right of way
- Security easement
- View easement
- and so on.

The fact there may be distinctions between various forms of easements does not mean they are not easements.

The Plaintiffs cite to no language that says a profit a prendre is not an easement. Rather, they cite to language they suggest vaguely implies a profit is not an easement.

The recording law in the State of Washington in effect at the time of the issuance of the policy for real property instruments was enacted by Laws of 1927, Chapter 278.

In conducting a search of the record title to any particular tract of land, a title insurance company must search the real property records which are managed by the county auditor where the land is situated. The title that was “insured” under the Policy was itself derived from the public records, as defined above, not simply any public record, but only those which impart constructive notice “under the recording laws”.

Chapter 278, § 1 (3) defines “conveyance” to include “every written instrument” . . . “by which the title to any real property may be affected,”.

The title that was “insured” under the Policy was itself derived from the public land records of the Mason County Auditor, as defined above, not simply any public record, but only those records that impart constructive notice “under the recording laws” of the State of Washington.

Chapter 278, § 2 provides that a conveyance may be recorded “in the office of the recording officer of the county where the property

is situated”, and that “Every such conveyance not so recorded is void as against any subsequent purchaser.”, and for the “conveyance” to include “every written instrument...by which the title to any real property may be affected.”

The Plaintiffs claim, herein, that the Squaxin Island Tribe is now demanding access to their tideland in the exercise of rights under the Treaty of Medicine Creek.

While the parties have disputed the nature and effect of what the claim of the Squaxin Island Tribe constitutes, for purposes of this motion, the Plaintiffs claim there is a defect in their title and constructive notice was given therewith. See section 15 of the Complaint (CP 317).

The treaty is found in the federal statutes at 10 Stat.1132. The

Plaintiffs do not allege it is found in any other official record. In particular, they do not allege it is recorded “under the recording laws” for the State of Washington for real property instruments. In fact, it is not (CP 292-293).

Plaintiffs seek to avoid this language in the policy by alleging the effect of 1 U.S.C. § 112. That act provides that the Archivist of the United States is to compile and publish the United States Statutes at

large, which for purposes of this action, is acknowledged the treaty was. The statute then goes on to say that such compilation is legal evidence of their existence.

The statute has no connection to “recording laws” for real property documents in the State of Washington. See *David Robbins Construction, LLC v. First American Title Company*, 158 Wash. App. 895, 249 P. 3d 625 (2010), *Security Service Federal Credit Union v. First American Title Company*, 2012 WL 5954815 (US Dist. Ct., Ca. 2012), *Murphy v. City of Seattle*, 32 Wash. App. 386, 647 P. 2d 540 (1982).

As stated in *Ellingsen v. Franklin County*, 117 Wash. 2d 24, 810 P.2d 910 (1991),

“Under the County’s theory all records of these multiple, scattered public offices would impart constructive notice of everything contained in those records because, like the engineer’s office, those are public records in public offices. . . . To import constructive notice from every piece of paper or computer file in every government office, from the smallest hamlet to the largest state agency, would wreak havoc with the title system. As a matter of fact, it would render impossible a meaningful title search.”

Plaintiffs rely on *Hahn v. Alaska Title Guaranty Co.*, 557 P. 2d 143 (Alaska 1976), to conclude that, 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 Plaintiffs rely, does not grant any such constructive notice, and *Hahn* is irrelevant to this case. Thus, 1 U.S.C. § 112, does not rope the Treaty of Medicine Creek into the “public records” under the recording acts as those terms are defined in the Policy.

C. Title Company Obligations

A short review of what is required and expected of title companies to do business in the State of Washington is instructive to put this entire discussion in context. While there are policy considerations on protecting insureds in the liability context, there are also policy considerations in the context of title policies which are not really insurance policies, but policies of indemnification. Title companies determine charges based upon the reasonable expectation of risk based upon what is expected of them through their search of indexes of land records found in the county auditor’s office and the superior court of the State of Washington for that county where the land is situated.

The State of Washington statutorily sets forth the expectations it has of title companies. Under RCW 48.29.010, in order to have a certificate of authority to conduct business, a title company must maintain a complete set of tract indexes of the county in which it does business.

WAC 284-16-020 defines a complete set of tract indexes:

Title Insurers—Defining “complete set of tract indexes.”

(1) The phrase “complete set of tract indexes,” as used in RCW **48.29.020** and **48.29.040**, is defined to mean a set of indexes from which the record ownership and condition of title to all land within the particular county can be traced and ascertained, such set of indexes to be complete from the inception of title from the United States of America.

(2) The basic component parts of such a set of indexes are:

(a) An index or indexes in which the reference is to geographic subdivisions of land, classified according to legal description (as distinguished from an index or indexes in which the reference is to the name of the title holder, commonly called a grantor-grantee index) wherein notations of or references to:

(i) All filed or recorded instruments affecting title to particularly described parcels of real property and which impart constructive notice under the recording laws; and

(ii) All judicial proceedings in the particular county affecting title to particularly described parcels of real property are posted, filed, entered or otherwise included in that part of the indexing system which designates the particular parcel of real property; provided, no reference need be made in such index to any judicial proceeding which is referred to or noted in the name index defined in subparagraph (b) below.

(b) A name index or indexes wherein notations of or references to all instruments, proceedings and other matters of record in the particular county which affect or may affect title to all real

property (as distinguished from particularly described parcels of real property) of the person, partnership, corporation or other entity named therein and affected thereby, are posted, filed, entered or otherwise included in that part of the indexing system which designates that name.

(3) The indexes prescribed in numbered subsections (2) above, may be maintained in bound books, loose-leaf books, jackets or folders, on card files, or in any other form or system, whether manual, mechanical, electronic or otherwise; or in any combination of such forms or systems.

(4) The extent to which the prescribed indexes shall be subdivided or defined is dependent upon all relevant circumstances. The population of the particular county, the extent to which land within the particular county has been subdivided and passed into separate ownerships, and all other factors which are reasonably related to the purpose of the statutory requirement, are entitled to consideration in such determination.

While presented in a different context, *Smith v. Lamping*, 27 Wash. 624, 68 P. 195 (1902), and *Fidelity Title Company v. State of Washington Department of Revenue*, 49 Wash. App. 662, 745 P. 2d, 530 (1987) are consistent.

The term "recording acts" is defined as:

"Statutes enacted in the several states relating to the official recording of deeds, mortgages, bills of sale, chattel mortgages, etc. and the effect of such records as notice to creditors, purchasers, encumbrances, and others interested."

Black's Law Dictionary online, 2nd edition

The recording acts of the State of Washington are found under various statutes, principally at RCW Chapter 65.08 et. seq.

The Robbins have not cited to any Washington recording act that would have indicated the treaty was a part of those records that Mason County Title had an obligation to notify them of.

Title insurance does not purport to guarantee against all potential defects or encumbrances, and there is no reasonable expectation. As examples, it does not protect against prescriptive rights or restrictions on the use of a parcel. A title policy is not an end all for a purchaser's due diligence. It is just a part of the process.

The reasonable expectation in purchasing a title policy is to have a search conducted of the county auditor's records and judgment indexes. This is expressed in the statutes relating to what title companies are required to do. The Robbins' expectations, as expressed in this action, are significantly more than the expectations of the State of Washington. If there should be a greater expectation from what the law expects, it should be done legislatively and prospectively, so that title insurance companies can charge accordingly.

Plaintiffs continue to argue that a profit a prendre is not an easement, yet acknowledge the rights granted to the Squaxin Island Tribe allows its members to come onto the Robbins property. They

acknowledge it as a use right, not a possessory right. A use right is an easement.

Kahama VI, LLC v. HJH, LLC, 2016 WL 7104175 (US Dist. Ct., M. D. Florida 2016), presents as strong an analogy to the present case as can be found.

In that case, a developer bought a parcel of beachfront property in Florida. Among other issues, the developer therein claimed that a public right to use the beach it had acquired, in part, had not been disclosed in the title report. This public right of access had been recognized by case law, and restricted the use of the acquired property.

The holding of the court was that the case law of the State of Florida was not a part of the chain of record title of the property, and there was no coverage. The court also expressed that title insurance is designed to ensure against “defects in the record titles”, and the title company is only guaranteeing that their search of “the record chain of title is accurate.” (See Section 6 of the opinion).

Consistent with the *Khama* holding, in the present case:

1. The search of the recorded chain of title on June 12, 1978, was accurate.

2. Based on the accurate search, there is no defect in the “record title”;
3. The rights asserted by the Tribe are “outside the property’s chain of title”.

The Plaintiffs do not assert that any of the foregoing is not fully true and correct.

D. Affirmative Defenses Of Statute of Limitations, Laches, Waiver And Failure To Mitigate Damages

Mason County Title has asserted affirmative defenses which have yet to be considered.

1. Statute of Limitations

As noted previously, the current tribal treaty rights litigation has been going on since the early 1970s. That portion of that litigation relating to shellfish rights has been on-going since 1994, decided in 1998 by the federal appeals court, with a settlement reached with all parties in 2002 and amended in 2007. The Robbins, who have been farming shellfish for many years, at least since 2005 (CP 225-226) claim to have been unaware of tribal claims for all that time.

While this claim seems somewhat remarkable, it may not be necessary to consider in that the Robbins have, by their own admission, been on constructive notice of the Tribal rights, at p. 7 of the Robbins opening brief, in incorrectly attempting to apply constructive notice to Mason County Title. In that context, it is obviously distinguishable since the policy language relates to constructive notices under the recording acts, not simply constructive notice. However, in the context of constructive notice unrelated to the recording acts, the Robbins have, for the purposes of the affirmative defenses of the statute of limitations, laches and waiver, acknowledged they were on constructive notice of the Squaxin Island Tribe Treaty rights by citing to 1 U. S. C. § 113, and *Federal Crop Ins. Comp. v Merrill*, 68 S. Ct. 1, 332 U.S. 380, at 384-85 (1947).

The obligation of the title insurer rests on contract. *Douglas v. Title Trust Co.*, 80 Wash. 71, 141 P. 177 (1914). As such, the statute of limitation begins to run when the title policy is issued. *St. Paul Fire & Marine Ins. Co. v. Crittenden Abstract & Title Co.*, 255 Ark. 706, 502 S.W. 2d 100 (1973), and cases cited therein. Pursuant to RCW 4.16.040, that period is six years. In accord, 1 *Am. Jur. 2d Abstracts of Title* § 36.

2. Laches

Laches is:

(1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay. None of these elements alone raises the defense if laches. Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them. *Lopp v. Peninsula School Dist. No. 401*, 90 Wash. 2d 754, 585 P. 2d 801 (1978).

Under section 3 of the Conditions of Stipulation of the title policy, it is provided:

“When the Company shall have paid a claim hereunder it shall be subrogated to all rights and remedies which the insured may have against any person or property with respect to such claim, or would have if this policy had not been issued, and the insured shall transfer all such rights to the Company.” (CP 232)

Mason County Title should have the opportunity to show that the property was acquired by way of statutory warranty deed, and that for various reasons, it has been prejudiced in asserting its rights under the policy provision set forth above because of the Robbins delay.

Finally, as noted previously, while the Robbins request to defend against the Squaxin Island Tribe, they never made a pre-filing demand for payment of damages under the policy.

The Robbins acknowledged in 2005 they were raising shellfish commercially (CP 225). Under the above cited decisions, the Squaxin

Island Tribe was entitled to 50% of the naturally occurring shellfish, but none of any enhancement. The Robbins were required to notify the Tribe *at that time* so that the tribe could ascertain the level of naturally occurring shellfish.

Since that was not done until 2016, there is no ability to go back to 2005 to determine what, if any, shellfish were naturally present. Therefore, because of the Robbins failure to comply with the legal obligations under the federal court decisions, it is impossible to determine to what extent, if at all, the Robbins have been harmed, and therefore, Mason County Title has been prejudiced. This is particularly true given the measure of damages, proportionate diminution in value (CP 232), is difficult to determine even in the presence of accurate information.

3. Waiver

Waiver is the intentional and voluntary relinquishment of a known right and can be inferred from the circumstances. *Pellino v. Brink's, Inc*, 164 Wash. App. 668, 267 P. 3d 383 (2011).

Mason County Title should be entitled to prove the defense of waiver.

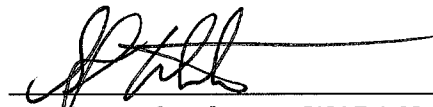
4. Failure To Mitigate Damages

Mason County Title has also asserted Failure to Mitigate Damages as an affirmative defense. The foregoing suggests there is substance to that defense, and Mason County Title should have the opportunity to prove that.

VII. CONCLUSION

Mason County Title asks this court to affirm the trial court. In the event this court reverses the grant of summary judgment to Mason County Title, it should remand for purposes of consideration of the Robbins motion for Partial Summary Judgment and Mason County Title's affirmative defenses.

WHITEHOUSE & NICHOLS, LLP

A handwritten signature in black ink, appearing to read 'S. Whitehouse', is written over a horizontal line.

Stephen Whitehouse, WABA No. 6818
Attorney for Respondent Mason County
Title Insurance Company and Retitle
Insurance Company

WHITEHOUSE & NICHOLS, LLP

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