

No. II-50376-0

Court of Appeals  
DIVISION II  
STATE OF WASHINGTON

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LESLIE W. ROBBINS AND HARLENE E. ROBBINS,

APPELLANT,

v.

MASON COUNTY TITLE INSURANCE COMPANY; and

RETTITLE INSURANCE COMPANY,

RESPONDENTS.

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**APPELLANTS LESLIE W. ROBBINS AND HARLENE E. ROBBINS'**  
**REPLY BRIEF**

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## **I. INTRODUCTION**

Leslie W. and Harlene E. Robbins submit this reply brief.

## **II. SUMMARY**

In 1977, Leslie W. and Harlene E. Robbins purchased a title insurance policy insuring their property, including tidelands, located in Mason County. CP 229-32. By issuing the policy, the title insurer assumed an extraordinarily broad duty to defend the Robbins against any claim by a third party asserting an interest in the Robbins' property inconsistent with the fee simple interest the policy insured. CP 232.

Up through 2015, the Robbins entered into contracts granting to private commercial shellfish harvesters the right to harvest shellfish located on their tidelands. CP 224-25. The Squaxin Island Tribe never asserted any right or claim to the shellfish being harvested, or the proceeds thereof. *Id.*

In 2015, the Robbins leased the right to take shellfish from their property to a new commercial shellfish harvester. CP 225. In July 2016, the Squaxin Island Tribe notified the Robbins that the Tribe asserted the right, pursuant to the 1854 Treaty of Medicine Creek published in Congress's official book of statutes, to come upon the Robbins' property and harvest shellfish therefrom. CP 225; 241-42. The Robbins promptly notified their title insurer of the Tribe's claim, and requested their title insurer to provide counsel to assist them in responding to it. CP 240.

In deciding whether to defend, Washington law imposes on insurers, including title insurers, the duty to construe any doubt or ambiguity about either the facts or the applicable law in favor of providing a defense. *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 229 P.3d 693 (2010) (hereinafter "*Alea*"); *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 369 P.3d 502 (2017) (hereinafter "*Xia*"). An insurer acts in bad faith if it fails to resolve any doubt about either the facts or the law in favor of providing a defense. *Id.*

In response to the Robbins' tender, the insurer did exactly what Washington law forbids. Putting its own interest above that of the Robbins, the insurer construed significant doubt about its duty to defend in its own favor. The insurer rejected the Robbins' tender based on a general exception applicable to any "easement not disclosed by the public records." CP 244-45.

Applying the standard articulated by the Washington Supreme Court in *Alea* and in *Xia*, this Court should not actually address and resolve the issue of whether the general exception relied on by the insurer actually applies to these facts. Under *Alea* and *Xia*, the Court should address only whether there was any reasonable doubt that the general exception applied.

Under the unique set of facts presented, the insurer has not pointed to clear legal authority showing that the general exception applies. First, the

insurer's policy does not permit it to deny a defense based on the vague language of any general exception. Second, the Tribe's claim is not to an "easement." Finally, because the treaty on which the Tribe relies is published in Congress's official book of statutes, the basis for the Tribe's claim is "disclosed by the public records."

Faced with doubt about each of these issues, pursuant to *Alea* and *Xia*, the insurer had the duty to defend. But the insurer, acting in breach of the duty imposed on it under *Alea* and *Xia*, refused to defend.

Following *Alea* and *Xia*, the Court should hold that the title insurer wrongfully, unreasonably, and in bad faith breached its duty to defend the Robbins. The Court should award the Robbins their reasonable attorneys' fees under *Olympic Steamship* and/or the Washington Insurance Fair Conduct Act. And, the Court should remand to the Superior Court to permit the Robbins to quantify their damages.

### III. ANALYSIS

A. This case presents the issue of whether the insurer breached its duty to defend.

This is a duty to defend case. The title insurer issued the Robbins a policy of title insurance that obligated the title insurer to defend the Robbins:

The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance, or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein; . . .

CP 232.

By letter dated July 26, 2016, the Squaxin Island Tribe demanded that the Robbins allow them to come upon and take shellfish from the Robbins' property, based on the Tribe's claim it possessed this right pursuant to the 1854 Treaty of Medicine Creek. CP 241. The Robbins promptly tendered a demand to the title insurer for defense against the Tribe's demand and claim. CP 240.

The Tribe's demand and claim was inconsistent with the fee simple interest the title insurance policy insured. The Tribe's demand and claim was based upon the 1854 Treaty of Medicine Creek, and thus was a right that "claimed to have existed prior to the date" which the title insurer issued its policy to the Robbins in 1977. Finally, the Tribe's demand and claim is not



set forth or specifically excepted in the policy. The policy therefore obligated the title insurer to defend the Robbins against the Tribe's demand and claim.

In refusing to defend, the insurer relied upon a general exception set forth in the fine print of its policy applicable to "easements not disclosed by the public records." CP 231. The Robbins assert that the insurer was not entitled to refuse to defend based on this general exception. Thus, this case squarely presents the issue of whether the title insurer breached its duty to defend.

B. In determining whether to provide a defense, the insurer should have construed all doubts, either factual or legal, in favor of providing a defense.

In determining whether to provide a defense, the insurer should have construed all doubts, either factual or legal, in favor of providing a defense.

The Washington Supreme Court's decisions in *Alea* and *Xia* control on this issue. Pursuant to these cases, an insurer must defend if the policy conceivably covers the claim. *Alea*, 168 Wn.2d at 404 ¶6; *Xia*, 188 Wn.2d at 182, ¶22. If "there is any reasonable interpretation of the facts **or the law** that could result in coverage, the insurer must defend." *Alea*, 168 Wn.2d at 405 ¶7; *Xia*, 188 Wn.2d at 182, ¶23 (emphasis added). An insurer may not "rely on its own interpretation of case law to

determine its policy does not cover the allegations in the complaint and, as a result, [assert that] it has no duty to defend the insured.” *Alea*, 168 Wn.2d at 412, ¶18. “An insurer takes **a great risk** when it outright refuses to defend on the basis that there is no reasonable interpretation of the facts or the law that could result in coverage.” *Xia*, 188 Wn.2d at 182, ¶23 (emphasis added).

*Alea* and *Xia* do not leave an insurer who must provide a defense based on doubtful or equivocal facts or law without a remedy. An insurer must first defend, doing so under a reservation of rights. Once it defends, the insurer may then bring a declaratory judgment action, in order to permit the Court to address and resolve the doubtful or equivocal facts or law, and thus resolve whether the insurer has a duty to defend. *Alea*, 168 Wn.2d at 408, ¶12.

But pursuant to *Alea* and *Xia*, when there is any uncertainty about its right to do so either under the facts or the law, an insurer may not simply refuse to defend. And an insurer who does so refuse to defend wrongfully, unreasonably, and in bad faith, breaches its duty to its insured. *Alea*, 168 Wn.2d at 412-13, ¶19-20; *Xia*, 188 Wn.2d at 189, ¶39; 190, ¶41.

*Alea* and *Xia* squarely preclude an insurer from doing that which the title insurer is doing here: outright deny a defense based on a general

exception whose applicability is subject to *bona fide* dispute, and, when sued, then assert that a court should address the *bona fide* dispute and resolve that dispute in its favor, to retroactively justify its refusal to defend.

Instead, under *Alea* and *Xia*, the insurer here was obligated in the first instance to resolve any doubt or uncertainty in favor of defending the Robbins. By failing to do so, the insurer breached its duty to the Robbins.

C. Because there was a *bona fide* legal dispute about the applicability of the general exception, the insurer should have provided a defense.

There are three separate reasons why the insurer had no right to rely on the general exception applicable to “easements not disclosed by the public records.” First, the title policy does not permit the title insurer to refuse to defend based on the claimed applicability of any general exception. Second, the general exception the insurer asserted applies only to “easements” and the Tribe did not assert an “easement.” Third, the Tribe’s claim was based on rights derived from a treaty which Congress ratified and published in its official book of statutes, such that the Tribe’s claim was based on rights “disclosed by the public records.” Because there were these three separate *bona fide* disputes about the applicability of the general exception, the insurer was not entitled to deny a defense based on it.

1. The title policy does not permit the title insurer to refuse to defend based on the claimed applicability of any general exception.

First, the title policy does not permit the title insurer to refuse to defend based on the claimed applicability of any general exception.

The title insurer assumed an extremely broad duty to defend:

The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance, or defect claimed to have existed prior to the date hereof and which are not set forth or excepted herein; . .

CP 232.

The last phrase quoted provides that the title insurer shall defend all claims asserted against the insured's title except those that are "set forth or excepted herein." The phrase "set forth" is clear. It plainly refers only to matters *specifically* set forth in the policy.

However, the phrase "or excepted herein" is less than clear. It does not clearly describe whether it only refers to matters *specifically* excepted in Schedule B [entitled "Special Exceptions"], CP 230-31, or whether it encompasses the broad and vague general exceptions included in the fine print of the policy.

An ambiguity in an insurance policy is construed in favor of providing coverage, and against the insurer who drafted its language. *Alea*, 168 Wn.2d at 406 ¶9; *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d

793, 329 P.3d 59 (2014). Because the phrase “excepted herein” is ambiguous, the Court should construe this ambiguity in favor of the Robbins, such that the policy does not permit the insurer to refuse to defend based on the claimed applicability of a general exception.

The Robbins made this argument to the trial court. CP 263-64. The title insurer did not respond to it. CP 27-37. The Robbins made this argument in their opening brief to this Court. See Opening Brief, p. 29-31. The insurer has again failed to respond.

The insurer’s failure to respond should be construed as an admission that the Robbins’ argument is correct. Therefore, the Court should find that there is a genuine dispute about whether the insurer was entitled to refuse to defend the Robbins based on *any* general exception, without even reaching the issues concerning the particular general exception on which the insurer relies.

2. The general exception applies only to “easements.” The Tribe did not assert that it held an easement. And the aboriginal right the Tribe asserts is not analogous to an easement. Therefore, the general exception does not apply.

The general exception asserted by the insurer applies only to “easements.” It does not apply to other forms of servitudes. The Tribe did not assert it held an easement. The rights the Tribe claimed are not those

typically associated with an easement. Therefore, the general exception does not apply.

The title insurer refused to provide the Robbins a defense based on a general exception applicable to “easements not disclosed by the public records.” CP 244. Thus, for the general exception to apply, the title insurer must show that the Tribe was claiming an “easement.”

This Court has squarely addressed the issue of what constitutes an easement, and an easement’s relation to other forms of servitudes, in *Lake Limerick Country Club Ass’n v. Hunt Mfd. Homes*, 120 Wn. App. 246, 84 P.3d 295 (2004). In that case, the Court held that an easement is one of three forms of servitudes under Washington law, the other forms being covenants and *profits a prendre*. 120 Wn.App. at 253.

Washington law defines an easement as a right, normally associated with the ownership of an adjoining parcel of property, to use the property burdened by the easement for a special purpose not inconsistent with a general property right in the owner. *Beebe v. Swerda*, 58 Wn. App. 375, 381, 793 P.2d 442 (1990). In contrast, Washington law defines a “*profit a prendre*” as “the right . . . to remove some substance from the land.” 17 Stoebuck and Weaver, Wash. Prac.: Real Estate: Property Law, §2.1 at 80 (2004).

Here, the Squaxin Island Tribe asserted an aboriginal right retained under the 1854 Treaty of Medicine Creek to come upon property which at the time of the treaty constituted its normal and accustomed fishing places to harvest fish and shellfish. CP 241. See also *U.S. v. Winans*, 198 U.S. 371, 381-82 (1905) (describing treaty as reserving rights “in the nature of servitude”); *U.S. v. State of Washington*, 157 F.3d 630, 9th Cir. (1998), (*idem*). Neither the federal courts, nor the Tribe, have ever characterized the right the Tribe is asserting as being an “easement.”

Under Washington law, an easement right is typically associated with the ownership of a specific parcel of nearby property, and passes with the ownership of that property. *Beebe* 58 Wn.App. at 381. Here, the United States Supreme Court has held that the aboriginal right reserved by the Treaty is **not** associated with the ownership of property, but belongs “to every individual Indian, as though named therein.” *U.S. v. Winans*, 198 U.S. at 381 (CP 85). Compare Insurer’s Brief, pg. 17.

Moreover, the Tribe does not assert an easement right merely to use the Robbins’ property. Instead, it asserts the distinctively more burdensome right of coming onto the property, harvesting the shellfish growing in the soil of the property, and carrying those shellfish off the property. CP 241. Again, the aboriginal right the Tribe asserts is like a *profit a prendre*, and not like an “easement.”

In sum, the Tribe has never asserted that it possesses an "easement." The federal courts have not described the Tribe's right as being an "easement." And, the rights the Tribe claims are more like a *profit a prendre* than an "easement." Because the general exception applies only to easements, and not to *profits a prendre*, it does not apply here.

In response, the title insurer cites the Restatement of Servitudes. Insurer's Brief, p. 17-18. In doing so, the title insurer simply ignores the fact (as the Robbins pointed out at page 37 of their Opening Brief), that the Restatement authors themselves acknowledge that American courts have not accepted their proposal to conflate the terms "easement" and "profit." Restatement Third of Property (Servitudes), § 1-2, comment e. at p. 15-16 (2000).

The title insurer also cites to two out-of-state cases, the holding of each of which actually support the Robbins' analysis. *Alexander Dawson, Inc. v. Fling*, 155 Colo. 599, 601, 396 P.2d 599 (1964) (because defendants were only granted easement rights to boat and swim, defendants were not entitled to take fish, which would be a right consistent only with a *profit a prendre*); *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*, 184 Wis. 2d 572, 583, 516 N.W. 2d 410 (1994) (construing unique state statute that required claims to property ownership but not "easements or covenants," to be based on recorded instrument, Wisconsin Supreme Court holds that



*profit a prendre* is a form of servitude like an easement or covenant, rather than an outright ownership interest, for purposes of said statute).

Under *Alea* and *Xia*, the title insurer was entitled to deny the Robbins a defense only if there were absolutely no doubt or uncertainty about whether the retained aboriginal right asserted by the Tribe to come upon the Robbins' property and harvest shellfish constituted an "easement" within the meaning of the general exception contained in the title insurer's policy. The insurer is miles away from showing this. For this second separate, independent reason, the Court should hold that the insurer's right to assert the general exception applicable only to easements was doubtful, to say the least.

3. The Tribe's claim was based on rights derived from a treaty which Congress ratified and published in its official book of statutes. Therefore, the Tribe's claim was based on treaty rights of public record.

Finally, the general exception asserted by the insurer applies only to easements "not disclosed by the public records." The Tribe's claim was based on rights derived from a treaty which Congress ratified and published in its official book of statutes. Therefore, the Tribe's claim was based on treaty rights "disclosed by the public records."

Here, the Tribe's claim is based on rights set out in the 1854 Treaty at Medicine Creek. CP 241. Congress ratified and published the treaty in its official book of statutes. 10 Stat. 1132. See CP 65-71.

The effect of publication of the treaty in the federal statute book is to give notice of the Treaty and its terms to all the world. 1 U.S.C. §113. See CP 73. See also *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) (“[E]veryone is charged with knowledge of the United States Statutes at Large . . .”). The Treaty therefore creates rights “disclosed by the public records.”

In response, the title insurer points to the definition of “public records” buried in the fine print of its title insurance policy. This definition defines “public records” as “records which, under the recording laws, impart constructive notice with respect to real estate.” CP 232.

The insurer argues that this definition refers only to the “recording laws of the State of Washington.” The title insurer then argues that since 1 U.S.C § 113 is a federal, and not a state statute, Congress’s publication of this treaty in its official book of statutes does not qualify as giving constructive notice under the State of Washington’s recording laws. Insurer’s Brief, p. 20.

As the Robbins pointed out in their Opening Brief, the Alaska Supreme Court, in the only case either party has identified squarely addressing this issue, rejected precisely this argument. *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (1976). See CP 200-204. In interpreting language identical to that used in the Robbins' policy, the Alaska Supreme

Court held that the policy's reference to "recording laws" was not defined or limited, so that it should be construed as referring to all laws, state or federal, enacted for the purpose of charging those affected with constructive notice. *Hahn*, 557 P.2d at 145-46.

The title insurer attempts to distinguish *Hahn* because it addressed 44 U.S.C. § 1507, not 1 U.S.C. § 113. Insurer's Brief at 20-22. 44 USC § 1507, as quoted in *Hahn*, provides, in pertinent part, that the "filing of a document [in the federal register] is sufficient to give notice of the contents of the document to a person subject to or affected by it." *Hahn*, 557 P.2d at 145. In this respect it is similar, not different from, 1 U.S.C. § 113. Just as under 1 U.S.C. § 113 all persons are charged with knowledge of the contents of the United States Statutes of Large, see *Fed. Crop. Ins. Corp. v. Merrill*, 332 U.S. at 384-85, so, under 44 U.S.C. §1507, all persons are charged with notice of the contents of matters published in the Federal Register.

Under *Alea* and *Xia*, the title insurer was entitled to refuse to defend the Robbins against the Tribe's claim on account of the general exception contained in its policy for "easements . . . not disclosed by the public records" only if there was no doubt or uncertainty about whether the Treaty pursuant to which the Tribe claimed was "disclosed by the public records." The insurer, once again, is miles away from showing this. Under *Alea* and

*Xia*, because the issue is doubtful, the insurer therefore breached its duty to defend.

D. The insurer acted in bad faith by failing to provide the Robbins with a defense, such that the Robbins are entitled to coverage by estoppel.

Next, the Court should hold that the insurer's refusal to defend occurred wrongfully, unreasonably, and in bad faith, such that the Robbins are entitled to coverage by estoppel.

The Washington Supreme Court decision in *Alea* and *Xia* dispose of this issue. In both *Alea* and *Xia*, the insurance company did not follow Washington law in determining its duty to defend by resolving any doubt in favor of defending. Instead, resolving doubts about its duty in its own favor, the insurer made the unilateral decision simply to refuse to defend the insureds. In both *Alea* and *Xia*, the Court held that an insurer who refused to provide a defense to its insured when its right under the law to do so was anything short of crystal clear, had in bad faith breached its duty to defend. *Alea*, 168 Wn.2d at 413, ¶20; *Xia*, 188 Wn.2d at 189, ¶39; 140, ¶41.

The title insurer here has engaged in exactly the same sort of conduct that resulted in a finding of wrongful, unreasonable, bad faith conduct in *Alea* and *Xia*. In addressing its obligation to defend the Robbins, the insurer did not apply the test required by Washington law. Faced with considerable doubt and uncertainty about its right to refuse to defend based on the general

exception, the insurer instead relied on its own self-serving interpretation of the law to determine that its policy did not cover the Tribe's demand and claim. The insurer thereby wrongfully put its own interest ahead of the interest of its insured. The insurer did exactly what *Alea* and *Xia* prohibit.

The Washington Supreme Court has squarely held that an insurer's bad faith refusal to defend warrants the imposition of the remedy of coverage by estoppel. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563-65, 951 P.2d 1124 (1998). The Court here should likewise hold that because the title insurer's refusal to defend occurred in bad faith, the Robbins are entitled to this remedy.

The Court should hold that the insurer wrongfully, unreasonably, and in bad faith breached its duty to defend the Robbins against the Tribe's demand and claim. It should hold the Robbins are consequently entitled to coverage by estoppel pursuant to which the Robbins are entitled to: (1) all monetary loss they have sustained as a result of the Tribe's claimed right to harvest shellfish from their property and (2) reasonable attorney's fees and costs, both pursuant to the rule articulated by the Washington Supreme Court in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), and pursuant to the Washington Insurance Fair Conduct Act.

E. The insurer has not met its burden of rebutting the presumption that its refusal to defend the Robbins harmed them.

The title insurer had the duty to defend the Robbins against the Tribe's demand and claim. The title insurer in bad faith breached this duty. And the title insurer has failed to rebut the presumption that its breach harmed the Robbins.

Where an insurer, in bad faith, breaches its duty to defend its insured, a presumption arises that the breach harmed the insured. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389-90 (1992); *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d at 562-63; *Mutual of Enumclaw v. Dan Paulson Construction*, 161 Wn.2d 903, 920-21, ¶32-34, 169 P.3d 1 (2007).

The Washington Supreme Court has imposed a presumption of harm because the Court recognizes that an insured denied a defense would otherwise face the almost impossible task of proving what would have happened had the insurer actually provided an attorney to defend the insured. See, e.g., *Mutual Of Enumclaw*, 161 Wn.2d at 921-22, ¶36-37. When the insurer's bad faith conduct gives rise to the difficult problem of proving causation, the Washington Supreme Court has repeatedly ruled that harm should be presumed. *Id.* The insurer, whose wrongful denial caused the breach, should be charged with the burden of overcoming this presumption. *Id.*

In *Mutual of Enumclaw*, the Court held that an insurer faces “an almost impossible burden” of proof in order to overcome this presumption. 161 Wn.2d at 921 ¶ §36. Only in the extremely unusual case where an insurer can definitively establish, as a matter of fact, that its bad faith refusal to provide a defense did not cause any harm to the insured will it be held to satisfy this “almost impossible burden.” *Id.*

Here, Mr. Robbins submitted a declaration to the trial court in which he explained how the insurer’s refusal to provide the Robbins with an attorney had harmed the Robbins:

Had the title insurer responded to our request for a defense against the Squaxin Island Tribe’s claim by providing us with counsel, we may have been successfully able to assert defenses to the Squaxin Island Tribe’s claim, or at least negotiated with them in order to minimize the amount of shellfish that the Tribe will be taking from our property. For example, Mr. Hall [the commercial shellfish harvester to whom the Robbins had most recently leased the right to harvest shellfish from their tide lands] asserted that there was a basis for asserting that there was not a naturally existing bed of manila clams on our property which would mean that the Tribe is not entitled to harvest such clams from our property . See Exhibit C.

However, because the title insurer refused to provide us with an attorney to defend us against the Squaxin Island Tribe’s claim, and because my wife and I are of limited means, we determined that we could not afford an attorney at our own expense to pursue these issues. Instead, we simply agreed to permit the Tribe to harvest shellfish in amounts to which the Tribe has asserted it is entitled.

CP 226 (Declaration of Leslie W. (“Bill”) Robbins, ¶14-15).

Despite this uncontradicted testimony, the title insurer suggests at several points in its brief that its bad faith refusal to defend the Robbins did not cause the Robbins harm. For example, the title insurer asserts that because “the federal courts have fully adjudicated the Tribe’s rights in 1998,” there was “nothing to defend.” Insurer's Brief, p. 4, 9-10.

But the Robbins were not party to the Rafeedie decision. CP 143. Therefore, that decision cannot conclusively have bound them. And, in any event, that decision did not purport to address matters particular to the Tribe’s claim against the Robbins’ property, such as whether the Robbins’ property is part of the Tribe’s “usual and accustomed fishing grounds” to which the Tribe’s rights attached pursuant to the Treaty, whether the shellfish on the Robbins property were part of a “naturally occurring shellfish bed,” the number of “naturally occurring” shellfish that actually existed on the Robbins’ property, or other matters which might constitute a defense to the Tribe’s claim and/or reduce the quantity of shellfish the Tribe might be entitled to take from the Robbins’ property.

Similarly, the insurer asserts that the Robbins “never indicated what there was to defend or what action they envisioned Mason County Title should take.” Insurer’s Brief, p. 1. The Robbins, in their July 8, 2016 letter advised the title insurer exactly what it expected the title insurer to do. The Robbins demanded that the insurer provide counsel to assist them in



responding to the Tribe's claim, so that the Robbins could explore and assert these defenses. CP 238.

Finally, the insurer claims that the Robbins responded to the Tribe's claim by "recognizing" its validity. Insurer's Brief, p. 3. The Court should reject this claim. As Mr. Robbins's declaration makes clear, the Robbins "recognized" the Tribe's claim only because the insurer in bad faith breached its duty to provide them with counsel, and because the Robbins are of limited means and hence are unable to pay for their own counsel.<sup>1</sup> It is the insurer's bad faith breach of its duty to defend which prejudiced the Robbins, not the other way around.

If the title insurer had been serious about attempting to meet the "almost impossible burden" of showing that its bad faith breach of the duty to defend had not harmed the Robbins, the insurer had the burden of putting evidence into the record supporting that claim. The insurer did not submit any such evidence. Therefore, the Court should hold that the insurer has not overcome the presumption of harm arising from its bad faith refusal to defend.

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<sup>1</sup> The Robbins' present counsel is handling this matter on a contingent fee basis.

F. Because the insurer failed to prove up or argue its affirmative defenses to the trial court, the insurer cannot now assert them as a defense to its liability for its bad faith breach of its duty to defend the Robbins.

Finally, because the insurer failed to prove up or argue its affirmative defenses to the trial court, the insurer cannot now assert them as a defense to its liability for its bad faith breach of its duty to defend the Robbins.

Recognizing the likelihood that the Court will determine that the insurer breached its duty to defend the Robbins, and is therefore estopped from denying coverage, the insurer points out that it pled several affirmative defenses which “the trial court has yet to even consider.” Insurer’s Brief, Page 3, 27-30.

The Robbins moved for summary judgment asserting that the title insurer “owed, and breached, a duty to defend” the Robbins. CP 252. In responding to this motion, the title insurer had the burden of “setting forth specific facts showing that there is a genuine issue for trial.” CR 56(e). To the extent the title insurer asserted any affirmative defense to the Robbins’ claim that it breached the duty to defend, the insurer had the burden of proving up sufficient facts to establish its affirmative defenses. *Labriola v. Pollard Group, Inc.*, 152 Wash.2d 828, 842, 100 P.3d 791 (2004).

The insurer utterly failed to do this. It submitted no legal argument in support of, and has pointed to no evidence in the record substantiating, any of its affirmative defenses.

In particular, the insurer's assertion that the Robbins' claim is barred by the statute of limitations is plainly incorrect. The statute of limitations applicable to a claim of breach of a duty to defend assumed as part of a written insurance contract is six years. RCW 4.16.040(1); *Castle & Cooke v. The Great American Ins. Co.*, 42 Wn. App. 508, 512, 711 P.2d 1108 (1986). The Robbins' cause of action accrued, and therefore started the running of the six-year statute, when the Robbins had the right to apply to a court for relief. *O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 69-70, 947 P.2d 1252 (1997).

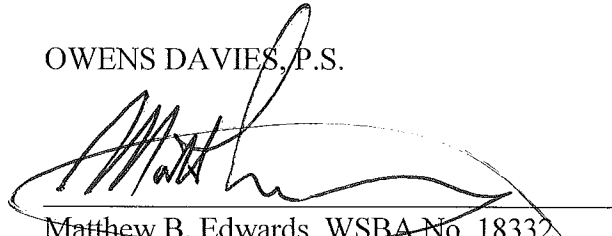
Here, the Robbins' cause of action against the insurer did not accrue until the Tribe made its demand and claim, the Robbins requested a defense, and the insurer, in August 2016, refused to defend. CP 244-45. The Robbins filed suit in November 2016, two months later. CP 315.

The insurer has therefore not carried its burden of showing the Robbins' action is barred by the statute of limitations. And it presented no evidence, and no substantial argument, establishing its other affirmative defenses. Therefore, the insurer did not satisfy its burden of "proving up" these defenses.

#### IV. CONCLUSION

This Court should reverse the trial court's grant of summary judgment to the title insurer. Employing the standard set forth in *Alea* and *Xia*, this Court should hold the Robbins are entitled to a summary judgment determining that the insurer, acting wrongfully, unreasonably, and in bad faith, breached its duty to defend the Robbins against the Tribe's demand and claim. It should hold that the Robbins are entitled to the remedy of coverage by estoppel. It should award the Robbins their reasonable attorney's fees and costs. And it should remand to the Superior Court in order to permit the Robbins to quantify the amount of loss that they have sustained as a result of the Tribe's claim, and to permit the Superior Court to consider awarding damages and remedies as provided for under the Insurance Fair Conduct Act.

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