

DA 24-0127

IN THE SUPREME COURT OF THE STATE OF MONTANA

2025 MT 29

ROGER and THERESE HUTCHINSON,

Plaintiffs, Counter-Defendants,
and Appellants,

v.

OLD REPUBLIC NATIONAL TITLE
INSURANCE COMPANY and JOHN HOLT,

Defendants, Counter-Claimants,
and Appellees.

APPEAL FROM: District Court of the Fifth Judicial District,
In and For the County of Madison, Cause No. DV-22-107
Honorable Molly Owen, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Lawrence E. Henke, David L. Vicevich, Vicevich Law, Butte,
Montana

For Appellees:

Charles E. Hansberry, Jenny M. Jourdonnais, Hansberry &
Jourdonnais, PLLC, Missoula, Montana

Submitted on Briefs: October 23, 2024
Decided: February 11, 2025

Filed:



Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Roger and Therese Hutchinson (Hutchinsons) appeal from the judgment entered by the Fifth Judicial District Court in favor of Old Republic National Title Insurance Company (Old Republic) on their claim that Old Republic was obligated to defend counterclaims made against Hutchinsons in underlying litigation that was initiated by them.

¶2 We address the following issue on appeal:

Did the District Court err by concluding the insurer did not have a duty to defend the insured against counterclaims made in the underlying lawsuit?

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 In August 2016, Hutchinsons purchased rural property located in Madison County, Montana (“Land” or “Property”). An Easement Deed, recorded May 6, 1999 (the “Easement”), granted the Property’s then-owners and their successors-in-interest the use and enjoyment of an existing private road, commonly known as Deer Trail, which crosses adjoining property now owned by Nugget Creek Ranch, LLC (Nugget Creek), to access the Property.

¶4 In conjunction with their purchase, Hutchinsons obtained an owner’s title insurance policy (Policy) from Old Republic through its agent, First American Title Company. The Policy provided coverage, on the date of the Policy, for title defects and other defined losses, including those caused by, as relevant here:

4. No right of access to and from the Land
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

- (a) the occupancy, use, or enjoyment of the Land;
 - (b) the character, dimensions, or location of any improvement erected on the Land;
 - (c) the subdivision of land; or
 - (d) environmental protection
 - if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
9. Title being vested other than as stated in Schedule A or being defective
 - (a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer. . .
10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer. . .

The Policy provided that Old Republic would “provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy.” Similarly, the Policy explained that it would not cover defense costs for “causes of action that allege matters not insured against by this policy.” The Policy stated exclusions from coverage, including, and pertinent here: title defects, liens, encumbrances, adverse claims and other matters 1) “created, suffered, assumed, or agreed to” by the insureds; or 2) “attaching or created subsequent to [the] Date of Policy”; and also stated exceptions from coverage for 1) any fact or claim that is “not shown by the public records but which could be ascertained by an inspection of said land”; 2) any encroachment or adverse circumstance affecting the title, including “shortage in area, or

any other facts that would be disclosed by an accurate and complete land survey”; and
3) the “Provisions in Easement Deed, recorded May 6, 1999,” which, as noted above, is referred to herein as the “Easement.”

¶5 In the several years following, disputes arose between Hutchinsons and Nugget Creek regarding the existence and use of gates along Deer Trail. In September 2020, four years after the purchase, Hutchinsons filed a Complaint in the District Court against Nugget Creek and its member, Mark Miller (the “Underlying Action”). Hutchinsons alleged that Nugget Creek had denied them the ability to install electric openers on three gates running across the Easement, refused to install cattle guards, and thus denied to Hutchinsons the right “to control the type of gate used for ingress and egress by way of the easement.” Nugget Creek answered, asserting counterclaims for declaratory judgment, trespass, nuisance, negligence, slander and defamation, vexatious litigation, and reverse adverse possession. Nugget Creek conceded that Hutchinsons enjoyed the benefit of the Easement but asserted their access rights had not been restricted by the gates on the road. Alleging that Hutchinsons had unlawfully removed a gate, installed a replacement gate, refused to close gates, and made various demands about the gates, Nugget Creek asserted that it had “no obligation to allow [Hutchinsons] to dictate or control the ‘type of gate used for ingress and egress by way of the easement,’” quoting Hutchinsons’ Complaint. Nugget Creek alleged Hutchinsons had engaged in conduct that overburdened the servient estate and was incompatible with their Easement, and thus their Easement had been “extinguished.” Nugget Creek further pled a claim for “reverse adverse possession for the placement and use of the gates.”

¶6 Hutchinsons moved for dismissal of Nugget Creek’s reverse adverse possession counterclaim. In May 2021, the District Court granted Hutchinsons’ motion and dismissed that count for failure to state a claim.

¶7 Thereafter, in March 2022, Hutchinsons tendered a demand to Old Republic for defense against Nugget Creek’s counterclaims, seeking indemnity under the Policy. Old Republic’s Claims Manager, John Holt,¹ denied coverage for the claim in a letter dated March 14, 2022, stating:

[P]rovisions in the easement deed in question were excepted from coverage. . . . The policy does not cover tort matters and alleged actions taken by the Insured. In reviewing the Insured’s Complaint and the answers and counterclaims it seems clear that the easement in question as a means for ingress and egress to the insured land is not disputed. . . . What is alleged in the Complaint and the answer and counterclaims is a dispute between the Insureds and the defendants regarding the gates across the easement. The Insured wants automatic gates and cattle guards and the defendants don’t. Actions allegedly taken by the Insured have resulted in the counterclaims alleging numerous tort actions that are not covered by the policy. . . . [The claim of] extinguishment that is sought is based on the Insured’s alleged actions of removing one of the gates and refusing to keep the gates closed causing issues with the defendants cattle. . . . These are post policy actions created or agreed to by the Insured and excluded from coverage. . . . In conclusion, Old Republic denies the claim inclusive of the tender of defense to the counterclaims and the request for reimbursement of attorney fees and costs as the allegations in the counterclaims are noncovered matters or matters excepted or excluded from coverage.

Despite Holt’s explanation, Hutchinsons re-tendered their demand for defense and indemnity on November 2, 2022, but did not submit additional pleadings, allegations, or

¹ John Holt serves as the Vice President and Rocky Mountain Claims Manager for Old Republic. Old Republic is a wholly-owned subsidiary of Old Republic International Corporation. The District Court determined Holt was acting within the course and scope of his duties and responsibilities as an employee of Old Republic at all times relevant to this proceeding and could not be held personally liable in this matter, and that ruling is not challenged on appeal.

supplemental material.² Old Republic again denied the defense. Old Republic monitored the litigation and assessed whether the pre-trial order raised any additional claims or facts that could implicate coverage, and concluded it did not.

¶8 In December 2022, Appellants filed the instant lawsuit against Old Republic and Holt, asserting claims for breach of contract and unfair claim settlement practices arising from Old Republic’s denial of defense. Appellees answered and, in counterclaim, requested a declaration that there was no duty to defend Hutchinsons under the Policy. The Underlying Action settled in June of 2023, with Hutchinsons accepting a restated grant of easement over the existing roadway, agreeing to pay \$25,000 to Nugget Creek, and promising not to interfere with Nugget Creek’s use of gates on the Easement.

¶9 Both parties moved for summary judgment. Reasoning that the material facts were not in dispute, the District Court denied Hutchinsons’ motion and granted Old Republic’s motion. The District Court determined Old Republic did not have a duty to defend in the Underlying Action because the Policy clearly excepted disputes arising from the Easement and also excluded coverage for issues and conduct occurring after the Policy’s effective date. Specifically, the District Court reasoned:

Title coverage is invoked if there was no right of access to the insured land on the policy date. . . . Here, the issues and conduct occurred after the title policy date. Nugget Creek’s tortious claims were not covered by the title policy because the title policy provides legal title up to the date

² Hutchinsons’ appellate briefing states that they submitted “additional facts and evidence adduced in the interim” with their second demand to Old Republic to provide a defense. The record includes a response from Old Republic to Hutchinsons’ counsel on November 8, 2022, in which Holt states, “[t]he materials we received look identical to the materials previously submitted” No other evidence in the record supports the statement that supplemental materials were provided to Old Republic that might bolster a claim to provide a defense.

retrospectively. The title policy does not continue prospectively. Nugget Creek never alleged that the Plaintiffs did not have title to their land, nor did Nugget Creek argue that the Plaintiffs could not ingress or egress on [the Easement]. Nugget Creek’s claims related to the gates and Plaintiff’s conduct, all of which were outside of the title policy either due to the date or by the tortious nature of the claims. Thus, none of the claims or facts triggered any of the covered risks in the title policy, which would have required the Defendants to defend. . . . Therefore, the Defendants did not have a duty to defend and are not liable to the Plaintiffs for any costs they accrued in the underlying action.

Hutchinsons appeal.

STANDARD OF REVIEW

¶10 We review rulings on summary judgment de novo, applying the same criteria as the district court under Rule 56 of the Montana Rules of Civil Procedure. *TCF Enters., Inc. v. Rames, Inc.*, 2024 MT 38, ¶ 14, 415 Mont. 306, 544 P.3d 206. Summary judgment is appropriate when the moving party establishes “both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law.” *Gardiner-Park Cnty. Water & Sewer Dist. v. Knight*, 2024 MT 121, ¶ 13, 417 Mont. 1, 549 P.3d 1151. A court views facts in the light most favorable to the non-moving party. *D.A. Davidson & Co. v. Slaybaugh*, 2024 MT 264, ¶ 12, 418 Mont. 531, 558 P.3d 1100. “A genuine issue of material fact is a fact materially inconsistent with proof of an essential element of a claim or defense at issue.” *Cordero v. Mont. State Univ.*, 2024 MT 167, ¶ 9, 417 Mont. 385, 553 P.3d 422. If the moving party satisfies its burden, the burden shifts to the non-moving party to prove, by more than a mere denial and speculation, that a genuine issue does exist. *Brishka v. State*, 2021 MT 129, ¶ 9, 404 Mont. 228, 487 P.3d 771. If the district court finds no genuine issues of material fact exist, the court must determine whether the moving party

is entitled to judgment as a matter of law. *Brishka*, ¶ 9 (citing *Borges v. Missoula Cty. Sheriff's Office*, 2018 MT 14, ¶ 16, 390 Mont. 161, 415 P.3d 976). When faced with cross-motions for summary judgment, a district court, and an appellate court on review, must “evaluate each party’s motion on its own merits.” *Kilby Butte Colony, Inc. v. State Farm Mut. Auto Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, 403 P.3d 664. We review a district court’s conclusions of law for correctness. *Hudson v. Irwin*, 2018 MT 8, ¶ 12, 390 Mont. 138, 408 P.3d 1283.

DISCUSSION

¶11 Hutchinsons face a daunting task on appeal in challenging the ruling entered by the District Court, which denied their claims related to the duty to defend on multiple grounds under multiple coverage exemptions and exclusions stated in the Policy. Hutchinsons’ appeal is well-argued and extensively analyzes the Policy’s coverage provisions, but it does not undermine the District Court’s multiple bases for denying their claims, particularly the applicable exceptions to coverage.

¶12 The duty to defend arises when an insured “sets forth facts which represent a risk covered by the terms of an insurance policy.” *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶ 20, 321 Mont. 99, 90 P.3d 381 (citing *Lindsay Drill & Cont. v. U.S. Fid. & Guar. Co.*, 208 Mont. 91, 94, 676 P.2d 203, 205 (1984); *Graber v. State Farm*, 244 Mont. 265, 270, 797 P.2d 214, 217 (1990) (“[t]he general rule is that the insurer has a duty to defend when a complaint filed against its insured sets forth facts which bring the event within the policy provisions”)). “The insured bears the initial burden ‘to establish that the claim falls within the basic scope of coverage.’” *Farmers Ins. Exch. v. Wessel*,

2020 MT 319, ¶ 14, 402 Mont. 348, 477 P.3d 1101 (quoting *Fire Ins. Exch. v. Weitzel*, 2016 MT 113, ¶ 12, 383 Mont. 364, 371 P.3d 457). An insurer’s duty to defend is separate from its duty to indemnify under the same policy. *Staples*, ¶ 21. “The duty to indemnify is narrower than the duty to defend and arises ‘only if coverage under the policy is actually established.’” *Wessel*, ¶ 23 (quoting *State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 26, 372 Mont. 191, 312 P.3d 403). So, “when there is no duty to defend there cannot be a duty to indemnify.” *Wessel*, ¶ 2. Insurance policy terms are construed against the insurer and in favor of the insured according to rules of contract law. *Travelers Cas. & Sur. Co. v. Ribi Immunochem Res.*, 2005 MT 50, ¶ 17, 326 Mont. 174, 108 P.3d 469. “When a court compares allegations of liability advanced in a complaint with policy language to determine whether the insurer’s obligation to defend was ‘triggered,’ a court must liberally construe allegations in a complaint so that all doubts about the meaning of the allegations are resolved in favor of finding that the obligation to defend was activated.” *Staples*, ¶ 22. Yet, courts are to give “words used in an insurance contract their usual meaning,” and “not ‘seize upon certain and definite covenants expressed in plain English with violent hands, [distorting] them so as to include a risk clearly excluded by the insurance contract.’” *Travelers*, ¶ 17 (citing *Johnson v. Equitable Fire & Marine Ins. Co.*, 142 Mont. 128, 131, 381 P.2d 778, 779 (1963)). Thus, insurers have a duty to defend unless there exists an “unequivocal demonstration that the claim against an insured does not fall within the insurance policy’s coverage.” *Staples*, ¶ 22 (citing *Insured Titles, Inc. v. McDonald*, 275 Mont. 111, 116, 911 P.2d 209, 212 (1996)).

¶13 The Policy states that it “does not insure against loss or damage, and the Company will not pay costs, attorneys’ fees, or expenses that arise by reason of . . . [p]rovisions in [the] Easement Deed, recorded May 6, 1999,” which we refer to herein as the Easement. The District Court reasoned that “[t]he exception of a recorded instrument is sufficient to remove coverage for all disputes concerning the recorded instrument,” citing foreign authority, but the initial point to be made here is that Nugget Creek’s counterclaims did not challenge the Easement’s granting of rights to Hutchinsons to use Deer Trail.³ Rather, the counterclaims acknowledged Hutchinsons’ access right under the Easement. Nugget Creek alleged that Hutchinsons had engaged in actions, subsequent to their purchase of the Property, of unilaterally removing gates and installing others, and contended Hutchinsons could not “dictate or control” the type of gating necessary for their “ingress and egress by way of the easement.” Hutchinsons note that Nugget Creek’s counterclaims also alleged reverse adverse possession and “extinguishment” of the Easement. However, the reverse adverse possession claim was dismissed by the District Court for failure to state a claim prior to Hutchinsons’ request for Old Republic to provide a defense and, as Hutchinsons conveniently omit from their argument, the extinguishment claim was premised entirely on their alleged post-purchase tortious conduct regarding the gates, which Nugget Creek alleged was incompatible with rights under the Easement. Nugget Creek made no

³ About this coverage exception for the Easement, Hutchinsons argue that “[i]t only precludes defending what is already ‘in’ the document and not enforcing what is ‘in’ the document against outside, external challenges to covered risks.” Hutchinsons cite no authority for this argument, and it appears to “slice the salami pretty thin.” However, given our resolution of the issue herein, we need not address the argument further.

allegations that there were any defects in title or that Hutchinsons had not properly acquired the right to access their property by way of the Easement. Even without regard to the coverage exception for the Easement, the Policy does not provide coverage against allegations that the insured has interfered with the property rights of others, or subsequently acted in a way that extinguished the rights they originally obtained. The Policy does not cover torts, and the Policy exclusions included title defects or “other matters . . . created, suffered, assumed, or agreed to by the Insured Claimants.”

¶14 Hutchinsons’ coverage arguments essentially ignore a separate basis for the District Court’s denial of their duty-to-defend claims—that the Policy’s coverage was effective, by its express terms, on the “Date of Policy,” so that Hutchinsons’ title was insured at the time of their closing on the Property, retrospectively protecting them against prior title problems. Only two of the “Covered Risks” provided prospective protection, as explicitly discussed by the Policy, those being Covered Risks 9 and 10 for title defects arising from a court order, encumbrance or avoidance involving a fraudulent transfer or other defect created subsequent to the Date of Policy and prior to the transfer vesting the interest in the insured. The Policy otherwise expressly excluded matters “attaching or created subsequent to [the] Date of Policy,” thus temporally excluding from coverage all of the counterclaims’ allegations against Hutchinsons regarding their subsequent actions concerning the gates.

¶15 Hutchinsons moved the District Court for summary judgment on their claims, arguing there was not a conflict in material facts. On appeal, they contend that questions of fact remain, but resolution of none of the asserted conflicts moves their claims outside

the controlling exceptions to coverage in the Policy, and thus we agree that summary judgment was not precluded thereby.

¶16 Insurers have a duty to defend unless it is unequivocal that the claim against an insured does not fall within their policy's coverage. *Staples*, ¶ 22. Hutchinsons correctly note that we have cautioned insurers to defend a claim while seeking a coverage declaration, and that when failing to do so, an insurer may expose itself "to great risk." *J & C Moodie Props., LLC v. Deck*, 2016 MT 301, ¶ 28, 385 Mont. 382, 384 P.3d 466. However, the District Court concluded that Old Republic unequivocally demonstrated a lack of coverage here, and we agree.

¶17 Hutchinsons' reasonable expectation argument is a new theory on appeal and, in any event, does not undermine the application of the clear provisions of the Policy.⁴

¶18 Affirmed.

/S/ JIM RICE

We Concur:

/S/ BETH BAKER

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ INGRID GUSTAFSON

⁴ The District Court rejected Hutchinsons' claim premised upon the amount of acreage of the Land, which arose as a factual issue in the Underlying Action, based upon application of another Policy exclusion. Hutchinsons do not formulate an appellate argument or otherwise challenge the District Court's ruling on that issue, and we do not address it. Old Republic also argues that the Easement interest itself was not included as part of the Land insured by the Policy, but resolution of that argument is not necessary here, and we do not address it.