No. 98062-4

IN THE WASHINGTON STATE SUPREME COURT

COA No. No. 77769-6-I

JEFFREY HALEY, an individual,

Appellant,

v.

KATHLEEN HUME, an individual; and FIRST AMERICAN TITLE INSURANCE COMPANY, formally known as Pacific Northwest Title Company,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Julie Spector

JEFF HALEY'S PETITION FOR REVIEW (corrected)

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I. INTRODUCTION

Division I's published opinion misapplies easement law, contrary to its own recent decision in *Rowe v. Klein* and to this Court's decisions in *Thompson v. Smith* and *McDonald v. Ward*,[1] among others. It ignores the basic principle that does not require the holder's use to maintain the right to an easement, though here Petitioner *did* make use of the easement. By affirming dismissal on statute of limitation grounds, the Decision functionally excised from statutory warranty deeds the meaning of future warranties of quiet enjoyment and the seller's duty to defend, which warranties are not triggered until breaches, which typically occur after the sale, as *Rowe v. Klein* just made clear. By refusing to apply the discovery rule, the Decision prevents recovery for an injured buyer from a seller's ***admitted***, hidden breach of present warranties. Here, four years before the sale, the seller abandoned the easement sold to the buyer in 2005, but did not disclose the "abandonment" to the buyer at the time of sale. The abandonment was never publically recorded. It was hidden and undisclosed to the buyer until litigation ensued

[1] *Rowe v. Klein*, 2 Wn.App.2d 326, 409 P.3d 1152 (2018); *Thompson v. Smith*, 59 Wn.2d 397, 367 P.2d 798 (1962); *McDonald v. Ward*, 99 Wash. 354, 169 P. 851 (1918).

between the buyer and the servient estate holder in 2012. Yet the discovery rule was not applied, denying him any recovery.

In short, even though the seller admitted breaching the statutory warranty deed by not disclosing the "abandonment" of the easement in 2001 when she sold it in 2005; and even though there was nothing to put the buyer on notice of the seller's abandonment during his use of it from 2005 to 2012, the six-year statute of limitation was applied from the date of the 2005 sale to deny the buyer any relief against the seller for her ***admitted*** breach of the warranty deed. Review should be granted to demonstrate that there can be several paths to relief for an injured buyer, including use of the discovery rule when the breach was hidden and not apparent.

The Decision also affirmed dismissal of the buyer's claim against his title insurer for denying him a defense from a quiet title counterclaim in the 2012 litigation over the easement. The Decision conflicts with this Court's decisions by allowing the title insurer to look ***beyond*** the "eight corners" of the counterclaim and policy to determine its duty to defend. Review should be granted to insure that title insurance companies are bound by, and must comply with, the same rules as other insurers in determining their duty to defend.

II. IDENTITY OF PETITIONER & DECISION BELOW

Petitioner Jeff Haley asks this Court to accept review of the published Court of Appeals decision filed September 9, 2019 ("Decision"), in the Appendix at A-1 to A-19. The panel denied Haley's motion for reconsideration on December 9, 2019 after calling for an answer and reply. *See* A-20-41 (reconsideration motion); A-42-61 (Haley's reply); App. A-62 (order).

The Decision affirmed the summary judgment dismissing Haley's claim against the seller Kathleen Hume ("Hume" or "Seller") for breach of the warranties in the statutory warranty deed for residential real property, and affirmed dismissal of Haley's claim against his title insurer First American Title Insurance Company ("First American") for breach of its duty to defend Haley in the underlying litigation over the easement and bad faith.

III. ISSUES PRESENTED FOR REVIEW

1. Whether review should be granted per RAP 13.4(b)(1) & (2) because the Court of Appeals decision conflicts with our settled law of easements, including McDonald v. Ward, Thompson v. Smith, and Rowe v. Klein, that "mere nonuse" does not extinguish an easement, and that an "ousting" on part of an easement does not extinguish the remainder?

2. Whether review should be granted per RAP 13.4(b)(4) to confirm the discovery rule applies to the statute of limitations for a breach of warranty claim on a statutory warranty deed where the nature of the breach: 1) is not disclosed at the time of the real property sale; 2) is not readily apparent to the buyer; and 3) the buyer was not put on inquiry notice of the breach, consistent with *1000 Virginia Ltd. Partn. v. Vertec Corp.,* and *Stewart v. Coldwell Banker Comm. Group, Inc.*?

3. Whether review should be granted per RAP 13.4(b)(1) because the published Court of Appeals decision conflicts with decisions of this Court requiring an insurer to determine its duty to defend only from the eight corners of the insurance contract and the underlying complaint, including *Expedia Inc. v. Steadfast Ins. Co.*, *Am. Best Food, Inc. v. Alea London, Ltd*, and *Xia v. ProBuilders Specialty Ins. Co.*?

IV. STATEMENT OF THE CASE

A. Facts re Easement and Statutory Warranty Deed Issues.[2]

1. The underlying *Haley v. Pugh* litigation.

When Haley bought his home in 2005 from Hume the purchase included an easement. He used the easement area continuously from the date of purchase in 2005. A dispute arose in early 2012 between the Haley and the third-party neighbor, Pugh, over use of the easement area when Haley indicated he wanted to

[2] The following summarizes what is set out in more detail on Haley's Opening Brief, pp. 5-15 (easement issue) and 34-37 (title insurance issue), and Haley's Consolidated Reply, pp. 2-5 (correcting misstatements of facts by respondents). As noted in the reconsideration briefing below, the Decision does not accurately state the extent of Haley's use of the easement area. *See* App. A-23 to A-25 and A-26 to A-29 (Decision truncated scope of easement and its use by Haley in its analysis and precludes a wronged buyer from effective relief where the breach is hidden).

use a part of it for parking, as he was entitled to do per the recorded easement. Although Pugh claimed the easement no longer existed because it had been abandoned or extinguished, there was no documentary evidence of any such abandonment or extinguishment, and the recorded easement was still of record.

In July 2012, Haley sued Pugh to protect against any potential loss of property rights by adverse possession. Pugh counterclaimed to quiet title to the easement in him. To establish the easement was abandoned on summary judgment, Pugh submitted a declaration on reply from Seller Hume in mid-November, 2012, in which she swore she had abandoned the easement in 2001. But any "abandonment" was never recorded, made public, or disclosed until the 2012 declaration. Haley immediately tendered to First American on receipt of Hume's declaration. First American denied it had a duty to defend Haley's recorded title to the easement. Haley sent a detailed response to the denial to First American, to no avail. *See* CP 613-617, pp. A-59 to A-63. Title was then quieted in Pugh in February 2013 and Haley's appeal was denied in 2014. The timeline of the *Pugh* litigation is in the appendix at A-63.

2. The present suit: *Haley v. Hume & First American*.

After Haley's appeal was denied, foreclosing relief from Pugh, he brought this action against Hume for breach of her statutory warranty deed, and against First American for its failure to defend him against Pugh's counterclaim. The trial court dismissed Haley's claims under the statutory warranty deed as beyond the statute of limitations, stating in its oral decision that the discovery rule cannot apply to an action on the underlying real estate sales contract ("REPSA"). *See* Opening Brief, pp. 15-16 (summary judgment hearing). This ignored the fact that Haley's claim was brought solely on the statutory warranty deed, not the REPSA. *See* Opening Brief, pp. 7-8 (Haley's complaint). The trial court also dismissed the claim against First American, also without elaboration.

3. Court of Appeals Published Decision.

Division One's published Decision misunderstood the scope of the easement and Haley's continuous use of it for years as established in the record with a result that is contrary to the settled law of easements and to the duties of insurers. The Decision effectively immunizes a seller from accountability when failing to disclose the nature of the real estate rights sold, leaving a blameless

buyer with no remedy against the seller. The Decision also conflicts with a basic tenet of insurance law which permits an insurer to look ***only*** to the "eight corners" of a complaint and the policy in determining its duty to defend.

B. Facts re Title Insurance Issue: the Decision Releases Title Insurance Companies From Being Bound By and Having to Comply With the Same Rules as Other Insurers in Determining Their Duty to Defend.

Haley tendered a claim *for defense* to First American by letter attaching a copy of the counterclaim of Pugh alleging, generally:

> The 1979 easement has been effectively abandoned and extinguished for its stated purpose of vehicular and pedestrian ingress, egress and right of way. Defendant/Counterclaim plaintiff John F. Pugh seeks an order quieting title in the 1979 easement area declaring all rights granted plaintiff/counter-defendant Haley in and to the easement area extinguished, terminated and abandoned as a matter of law.

CP 847-850; CP 580-582.

First American denied its duty to defend, CP 609-611, citing to and relying upon facts not found in the Pugh counterclaim. First American first cited to Paragraph III of Pugh's counterclaim describing a Notice of Decision by the City of Mercer Island approving an alteration of the easement area (CP 609-610), but did not tie that claim by Pugh to any basis for denial of its duty to

defend. Second, First American incorrectly relied on the definition of "land" in the title policy to conclude that the easement is not specifically insured, ignoring the fact that the easement *is* specifically recorded and *is* insured by First American - a fact First American later conceded in its briefing. CP 421. Third, First American concluded that the "alteration in the use of the easement area" claimed by Pugh would have been disclosed by inspection of the premises. CP 610. How could First American possibly know if Haley's ownership and title to the easement area was affected by Pugh's claimed alteration to the easement without impermissibly relying on information outside the counterclaim of Pugh?

Haley responded to First American by detailed letter with an explanation of why First American was incorrect and why it should provide a defense. CP 613-617. First American responded by letter affirming its denial of its duty to defend. CP 620-622. In addition to the reasons given in its initial denial letter, First American added *more* facts outside of the Pugh counterclaim to justify its denial: the declaration of Hume and two declarations submitted by George Steier, the Principal Planner for the City of Mercer Island Development Services Group. CP 620.

The trial court entered summary judgment quieting title in Pugh to the surface area of the easement; CP 855-857; and Haley was forced to provide his own defense against Pugh's claims and to pursue, without the benefit of his title insurer, his breach of warranty claims against Hume.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Review should be granted per RAP 13.4(b)(1), and (2) because the Decision conflicts with this Court's decisions in *McDonald v. Ward* and *Thompson v. Smith*, and the Court of Appeals' published decision in *Rowe v. Klein*, among others.

1. Review should be accepted and the Court of Appeals reversed to insure the settled law of easements and warranty deeds is given effect.

Washington follows the majority view that the "mere nonuse" of an easement does not terminate or diminish the easement holder's right to use of the easement. *Thompson v. Smith,* 59 Wn.2d 397, 407-409, 367 P.2d 798 (1962), paraphrasing *Netherlands American Mortgage Bank v. Eastern Railway & Lumber Co.,* 142 Wash. 204, 252 P. 916 (1927) ("mere nonuse" does not extinguish an easement, no matter how long, but does permit the servient estate holder to use the encumbered parcel until such use), and citing out of state cases

and treatises dating to 1899. *See* Opening Brief, pp. 17-20 (discussing Washington law of easements).

These are important principles because, under the law of easements, without clear notice at the time of conveyance that Hume had abandoned or extinguished her easement, whatever use or non-use she made of the easement did not affect the easement rights she was transferring to Haley. By statute, when Hume sold Haley the property with the statutory warranty deed in 2005, Hume made five separate covenants to Haley at conveyance: that she was seized of an estate in fee simple; that she had a good right to convey that estate; that title was free of encumbrances; that Haley would have quiet possession; and that she would defend his title. RCW 64.04.030. *See* Opening Brief, p. 20-22.

In 2012, however, Hume stated by declaration that she had abandoned her easement rights in 2001, four years before she sold those same easement rights to Haley, thus ***admitting*** she breached those covenants as to the easement. Haley, understandably, wanted to either get what he paid for – the easement – or get compensated for getting less than was represented at conveyance. When he lost

the quiet title action with Pugh based on Hume's declaration, Haley's recourse was against Hume as the seller to be made whole.

Hume's defense was, in part, that Haley had to be on notice that the easement was abandoned because Pugh "possessed" it by the change in the terrain between 2001 and 2005, essentially claiming an "ouster" which terminated the entire easement. The Decision accepted this argument and therefore erred because, even if Hume could claim an "ouster" based on changed landscape (changes predating the purchase so that Haley was not aware of them), it was at most a ***partial*** ouster given the undisputed evidence Haley continuously used the easement area since his 2005 purchase, and both *McDonald* and *Rowe v. Klein* recognized that the part of an easement which the holder could still use was not extinguished by an ouster of another portion.[3]

The Decision muddies the current state of the law with a published decision that is at odds with what easement law and warranty deed law has been in Washington for over a century.

[3] *See McDonald*, 99 Wash. at 358-359 (buyer's action on warranty of title accrues from the date of eviction but does not extend to the portion from which buyer was constructively evicted by railroad right of way); *Rowe,* 2 Wn.App.2d at 338-341 (to same effect).

As pointed out in Haley's reconsideration papers, the Decision's analysis ignores settled law that mere non-use does not extinguish an easement (*e.g., Thompson v. Smith*) and the undisputed facts that Haley ***was*** using the easement area such that present and future use was not precluded, there was no total "ouster" from the easement, and there could be no "notice" of a breach by Hume that would trigger Haley's requirement to take legal action. *See* Appendix, pp. A-23-25; A-28-29; A-46-49.

2. Review should be granted and the Court of Appeals reversed because it cannot overrule this Court.

Moreover, the Decision in effect overrules the controlling and binding authority of *McDonald v. Ward*, which held:

> Appellant having been evicted by the assertion of a superior title, respondent is bound on his covenant of warranty, and, the action having been begun within the period of limitation after the eviction, he is entitled to recover.

McDonald, 99 Wash. at 358 (reversing to require relief for evictee).

Here Haley was "evicted" by the 2014 superior court order quieting title for the entire easement in Pugh. Just as the respondent in *McDonald* was responsible under the general warranty of title on an action begun "within the period of limitation after the eviction," so Hume is also responsible under her statutory warranty deed since

Haley's suit was filed well within the six year limitation period following his eviction in 2014. The Decision's failure to recognize Haley's warranty claim against Hume is thus directly contrary to *McDonald* and, in effect, overrules it, which the Court of Appeals cannot do. Instead, the Decision declared Haley was on notice the easement was extinguished when that could not have been the case given his continuous use since 2005 and the settled law of easements. The Decision consequently misapplied the law to what are the operative facts. The result of the published Decision is that the settled law that a servient estate (Pugh) can occupy an easement area without causing abandonment of the easement is effectively overruled, minimally where the occupation was allegedly "obvious", despite its continuous use by the dominant estate, *i.e.,* Haley.

The Court of Appeals does not have authority to overrule Supreme Court precedent. *1000 Virginia Ltd. P'ship v. Vertecs Corp*., 158 Wn.2d 566, 578, 146 P.3d 423 (2006). Instead, the Decision should have adhered to *McDonald* and *Thompson* and noted it felt that the old rule was no longer appropriate in the current

time, in order for the Supreme Court to look at it properly, a settled practice.[4]

B. Review should be granted per RAP 13.4(b)(4) to confirm that the discovery rule applies to allow relief for a buyer where the breach of a statutory warranty deed's warranties is hidden and not readily apparent or discoverable by the buyer, consistent with *1000 Virginia Ltd. Partnership v. Vertec Corp., Stewart v. Coldwell Banker Comm. Group, Inc.*

The discovery rule was first applied to statutes of limitation in this state in tort cases, beginning with the medical malpractice case of *Ruth v. Dight,* 75 Wn.2d 660, 453 P.2d 631 (1969). The Court has since expanded its application not only to other tort cases, but also to "construction contract cases involving latent defects that the plaintiff would be unable to detect at the time of breach" as a "logical and desireable expansion of the discovery rule." *1000 Virginia Ltd., supra*, 158 Wn.2d at 578-579. This Court held the discovery rule should be applied as part of the common law goal "to provide a remedy for every genuine wrong", finding it appropriate in

[4] *See, e.g., Keene v. Edie,* 80 Wn. App. 312, 314-318, 907 P.2d 1217 (1995), *overruled*, 131 Wn.2d 822, 935 P.2d 588 (1997) (Court of Appeals held it was bound by the rule that community real property is not subject to execution for a separate tort judgment stated in *Brotton v. Langert,* 1 Wash. 73, 23 P. 688 (1890), laying the groundwork for the Supreme Court to overrule *Brotton* at 131 Wn.2d 822, 830-834, 935 P.2d 588 (1997) so that tortfeasors are not immunized nor victims denied a remedy, as Haley has been here).

construction contract cases where the plaintiff "may have no way of knowing the facts that show that the construction contract was breached…" *Id.,* at 579. The Court pointed out that "it is more equitable to place the burden of loss on the party best able to prevent it, *i.e.,* the contracting party who could avoid breaching the contract." *Id.,* at 580.

All these points apply to Haley's case and show that the discovery rule should apply to allow him relief under the statutory warranty deed's present as well as future warranties. *See* Opening Brief, pp. 20-33 (discussing the five warranties and their breach in this case); Reply Brief, pp. 13-15 (discussing discovery rule).

Both the Court of Appeals and this Court have applied the discovery rule in actions for breach of the implied warranty of habitability, an implied-at-law term in a contract for the sale of a home. *See Stuart v. Coldwell Banker Commercial Group, Inc.,* 109 Wn.2d 406, 745 P.2d 1284 (1987); *Virgil v. Spokane County,* 42 Wn. App. 796, 714 P.2d 692 (1986). There is no principled basis to apply the discovery rule to claims based on an implied contract term for habitability but not to claims on an implied contract term in the statutory warranty deed. Review should be granted to clarify this

point, correct the trial court and Court of Appeals, and provide relief to Haley, who had no basis to proceed on such a claim until Hume's declaration seven years after the conveyance.

C. Review Should be Granted Per RAP 13.4(b)(1) and (2) Because the Published Decision Conflicts With *Expedia Inc. v. Steadfast Ins. Co.*, *Am. Best Food, Inc. v. Alea London, Ltd.*, and *Xia v. ProBuilders Specialty Ins. Co.* The Decision Violated the Rules of Summary Judgment and Permitted First American to Look Beyond the "Eight-Corners" to Determine Its Duty to Defend Haley.

The Court of Appeals affirmed the trial court's summary judgment ruling in favor of First American solely on the basis of the survey exception (Exception 3 in the policy):

> This policy does not insure against loss or damage by reason of . . . other matters which would be disclosed by an accurate survey or inspection of the premises.

The Court of Appeals held that if Haley had a survey conducted when he purchased his property in 2005, "it would have disclosed that the easement area was exclusively possessed by someone other than Hume" and "would have disclosed the recorded easement benefitting Haley's property." Slip Op. at 14, p. A-14. The Decision states further, in what is nothing but rank speculation, that a survey would have indicated that the condition of the easement area in 2005 was inconsistent with the use of the easement that

Haley believed he was acquiring. Slip Op. at 14. There are three basic problems with this part of the Decision, which merit review.

First, the issue with regard to the easement is *not* how the area was being used in 2005. The issue for the title company was whether Haley owned the easement – he did based on the fact that the easement was recorded and First American provided title insurance for that easement. A survey would have done nothing more than show what Haley could see for himself. It would have had no bearing on whether he owned the easement over that land which belonged to Pugh, since it is the nature of an easement right that it sits on the land of another person. *See Nautilus, Inc. v. Transamerica Title Ins. Co. of Wash.*, 13 Wn.App. 345, 534 P.2d 1388 (1975)(dispute over who owned the land will not be answered by a survey). A survey would have been irrelevant.

Second, the Court of Appeals utilized facts outside of the "eight corners" to reach its decision. There is no question that First American relied on facts outside the "eight-corners" when it denied its duty to defend Haley. It is axiomatic under Washington jurisprudence that an insurer's duty to defend is one of the principal benefits of a liability insurance policy. *United Servs. Auto. Ass'n v.*

Speed, 179 Wn. App. 184, 317 P.3d 532 (2014). An insurer must determine its duty from the eight corners of the insurance contract and the underlying complaint. *Expedia Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 329 P.3d 59 (2014). An insurer may ***not*** use facts ***outside*** the complaint to deny a defense, as First American did here. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404-405, 413, 229 P.3d 693 (2010). And, a wrongful failure to defend is bad faith as a matter of law. *Xia v. ProBuilders Specialty Ins. Co.*, RRG, 188 Wn.2d 171, 400 P.3d 1234 (2017).

Third, this "analysis" in the Decision is pure speculation about what a survey "would have shown" which is not beyond dispute and which therefore cannot be a proper basis for a summary judgment ruling. No such survey is in the record. How can an appellate court speculate on what a non-existent survey that is not in the record would have shown as a means of dismissing a claim on summary judgment consistent with Civil Rule 56?

The Decision ignored these basic rules. Not only did it rely on supposed facts ***outside*** the policy ***and outside*** the Pugh counterclaim (the eight-corners), it used those non-existent facts to ***speculate*** on summary judgment that had a survey been conducted in

accordance with ALTA/NSPS requirements, such survey would have "disclosed that the easement area was exclusively possessed by someone other than Hume."[5]

But the issue was not how the easement area was being *used* in 2005. The issue for the title company in 2005 was whether Haley *owned* the easement right over that land. A survey would have done nothing more than show what Haley could see for himself – it would have had no bearing on whether he *owned* the easement right on that northern strip of land. If anything, it would have shown the existing easement that had never been extinguished in the public records.

The Court of Appeals misapplied the principles of insurance law by relying on facts outside the "eight-corners" of the Pugh counterclaim and the title policy. It also violated the basic tenet of summary judgment that requires the facts supporting the judgment be undisputed and be in the record. CR 56(c). Review should be

[5] Moreover, this "outside look" would not have shown what the Decision claims it would, since it only shows the boundaries, but not the use within those boundaries. Haley made continual use of the easement area from the day he purchased the property until the superior court's final order in the *Pugh* litigation. Under these undisputed facts, the Decision's claim that the ALTA/NSPS survey would have "disclosed that the easement was exclusively possessed by someone other than Hume" is just plain incorrect.

granted as this published decision conflicts with settled Washington law and must not be allowed to mislead future litigants or courts.

VI. CONCLUSION

Petitioner Jeff Haley asks this Court to grant review and set the case for argument at the earliest opportunity.

Dated this 13th day of January, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By _____
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 13th day of January, 2020.

Elizabeth C. Fuhrmann, PLS, Legal Assistant/Paralegal to Gregory M. Miller

APPENDIX A

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9/9/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY HALEY, an individual, Appellant, v. KATHLEEN HUME, an individual; and FIRST AMERICAN TITLE INSURANCE COMPANY, formerly known as Pacific Northwest Title Company, Respondent.	No. 77769-6-I DIVISION ONE PUBLISHED OPINION FILED: September 9, 2019

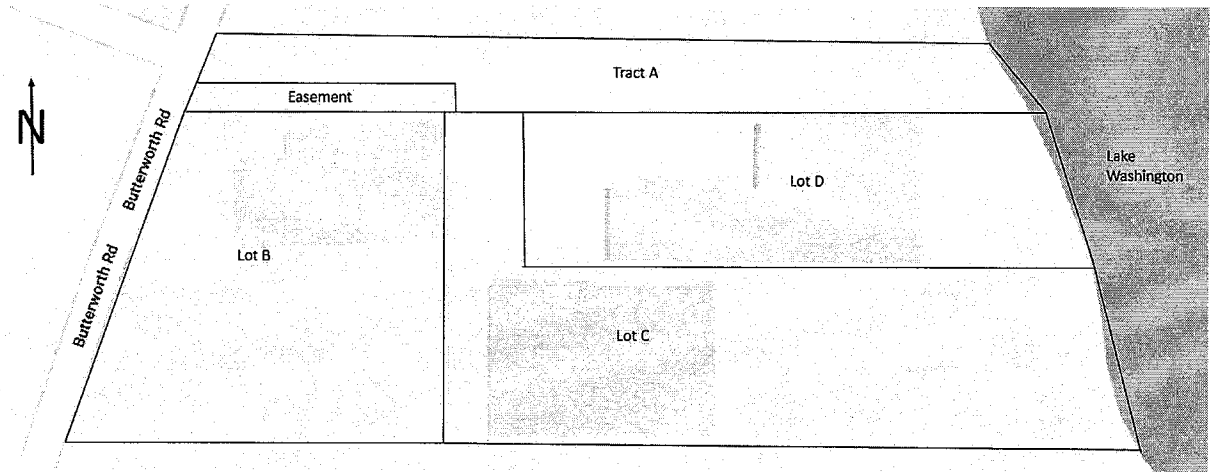
MANN, A.C.J. — Jeffrey Haley appeals the trial court's summary judgment dismissal of his claim that Kathleen Hume violated their statutory warranty deed by abandoning an easement prior to selling her property to Haley. Haley also appeals the trial court's summary judgment dismissal of his claim against First American Title Insurance Company (First American) for failing to defend.

Because the statute of limitations has run on Haley's warranty claims, the trial court correctly dismissed Haley's claims against Hume. Because general exception 3 in the title insurance policy applies, the trial court also correctly dismissed Haley's claims

against First American. Finally, the trial court did not err in denying Hume's motion for an award of attorney fees and sanctions. We affirm.

I.

This case concerns Lot B of Mercer Island Short Plat No. MI-78-4-018, and an easement located on the adjacent open space Tract A. At issue is the 2005 sale of Lot B by Hume to Haley, and specifically whether Haley purchased the right to ingress, egress, and park, on the easement in Tract A. The following is a not-to-scale representation of the properties at issue.



In 1979, the owner of Tract A granted a 10-foot-wide and 140-foot long easement along the southern edge of Tract A to the owners of Lot B for utilities, vehicular and pedestrian ingress and egress, and parking. The easement was necessary to provide access over a paved road on Tract A to Lots C and D. Persons accessing Lots C and D would cut across the Lot B driveway and proceed on the paved access road on Tract A to reach their properties.

On September 6, 2000, Hume purchased Lot B. In 2001, John Pugh purchased Lot D and Tract A. In 2001, Pugh applied for a variance and permit from the City of Mercer Island to remove approximately 95 linear feet of the underground culvert on

Tract A and expose, or daylight, that portion of the stream connecting to Lake Washington. The application also sought to remove the entire access driveway in the easement area on Tract A and to install a new driveway access serving Lots C and D on the north side of Tract A. The new driveway was located outside of the required 75-foot stream setback and included a bridge over the open stream. The plans included significant landscaping improvements, shade trees, and an 18-inch high rockery along the sides of the stream channel.

At the same time, Pugh approached Hume with his proposed plan for improvements on Tract A. Hume agreed to Pugh's plan because it eliminated the need for vehicles and pedestrians to cut across her driveway. Hume also believed that Pugh's plan created additional privacy and safety to her property, was a visual improvement, and added value to her home. Hume agreed to abandon a portion of the easement in Tract A.

After the City of Mercer Island approved Pugh's variance and permit, he removed the paved access road on Tract A, opened the culvert to create an open stream with an 18-inch high rockery along the sides of the channel, and planted trees and other landscaping. The opening of the stream corridor and the removal of the previous access road in the easement area made it impossible for vehicles or pedestrians to use the easement area for ingress, egress, or parking. Hume conceded that after 2001, no surface use of the easement was possible and she abandoned any claim of easement rights in Tract A with the exception of easement rights for underground utilities serving Lot B. All of the improvements to the stream and Tract A were completed in late 2003 and early 2004.

In 2005, Haley purchased Lot B by statutory warranty deed from Hume. In connection with the purchase, Haley obtained a title insurance policy from Pacific Northwest Title Insurance Company, Inc., the predecessor of First American.[1]

In 2012, Haley discovered the original easement on Tract A. Haley asked Pugh for permission to build a pedestrian bridge over the steam and widen his driveway into the easement area for additional parking. Pugh refused this request and informed Haley that Hume had previously abandoned the easement. Haley filed suit against Pugh, and Pugh counterclaimed against Haley to quiet title to the easement. During litigation, Pugh submitted a declaration from Hume that admitted she had consented to the improvements to the easement area and was aware that the improvements were an abandonment of her easement rights.

The trial court granted summary judgment in favor of Pugh declaring that Hume abandoned the easement except the rights to utility, sewage, and drainage to the extent those utilities served Haley's property. This court affirmed the trial court in an unpublished decision. Haley v. Pugh, No. 70649-7-I (Wash. Ct. App. Oct. 27, 2014) (unpublished), http://www.courts.wa.gov/opinions/pdf/706497.pdf.

On November 26, 2012, prior to the trial court's final decision on summary judgment, Haley tendered his defense to First American. First American rejected Haley's tender of defense.

On December 21, 2016, Haley filed suit against Hume and First American. Haley asserted that by abandoning the easement Hume violated the statutory warranties included in their deed. Haley also asserted that First American acted in bad

[1] Which was later acquired by First American Title Insurance Company.

faith when it denied Haley's tender of defense, and that First American's conduct amounted to a breach of the Consumer Protection Act, ch. 19.86 RCW. First American filed a counterclaim against Haley seeking a declaratory judgment that it owed no duty to defend Haley.

In October 2017, each party moved for summary judgment. Hume also requested her attorney fees and costs and asked the court to sanction Haley under CR 11 and RCW 4.84.185. On November 3, 2017, the trial court denied Haley's motion, granted Hume's motion, and denied Hume's request for attorney fees and costs. On November 6, 2017, the trial court granted First American's motion and dismissed the case. Haley appeals both orders.

II.

Haley first contends that the trial court erred in dismissing Haley's claims against Hume for her breach of present and future warranties. We disagree.

We review summary judgment decisions de novo and engage in the same inquiry as the trial court. Mastro v. Kumakichi Corp., 90 Wn. App. 157, 162, 951 P.2d 817 (1998). "Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Mastro, 90 Wn. App. at 157 (citing CR 56(c)). "All facts and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party." Post v. City of Tacoma, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

A.

A statutory warranty deed provides five guarantees against title defects:

> (1) that the grantor was seised of an estate in fee simple (warranty of seisin); (2) that he had a good right to convey that estate (warranty of right to convey); (3) that title was free of encumbrances (warranty against

> encumbrances); (4) that the grantee, his heirs and assigns, will have quiet possession (warranty of quiet possession); and (5) that the grantor will defend the grantee's title (warranty to defend).

Mastro, 90 Wn. App. at 162 (quoting 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 7.2, at 447 (1995)). The warranties of seisin, the right to convey, and against encumbrances, are present covenants. Present covenants are breached, if at all, at the time of conveyance. Double L. Properties, Inc. v. Crandall, 51 Wn. App. 149, 152, 751 P.2d 1208 (1988). The warranties of quiet enjoyment and to defend are future covenants. "These covenants are generally breached after conveyance, when a third party asserts a claim to the property." Rowe v. Klein, 2 Wn. App. 2d 326, 329, 409 P.3d 1152 (2018).[2] The statute of limitations for an action based on contract or written agreement, including breach of a statutory warranty deed, is six years. RCW 4.16.040(1); Erickson v. Chase, 156 Wn. App. 151, 231 P.3d 1261 (2010); Whatcom Timber Co. v. Wright, 102 Wash. 566, 568, 173 P. 724 (1918).

B.

We first address Haley's claim that Hume breached the present covenants. Haley does not dispute that more than six years have elapsed since the 2005 warranty deed conveyance. Haley instead argues that the discovery rule should apply. The discovery rule is "a rule for determining when a cause of action accrues and the statute of limitations commences to run." 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 587, 146 P.3d 423 (2006). Haley argues that because Hume concealed the

[2] Initially, Hume asserts that statutory warranties do not apply to easements because easements are only usufructuary rights: "[a]lthough the dominate estate has a right to use the servient estate, the land remains the property of the servient estate." Kave v. McIntosh Ridge Primary Road Ass'n, 198 Wn. App. 812, 825, 394 P.3d 446 (2017). It is unnecessary for us to decide this issue because even if we assume that statutory warranties can apply to easements, all of Haley's statutory warranty claims were properly dismissed on different grounds.

fact that she abandoned the easement until 2012, it was impossible for him to know that she violated the present statutory warranties and therefore the statute of limitations should not begin to run against him until 2012.

We recently rejected a similar argument in Rowe v. Klein, 2 Wn. App. 2d 326, 409 P.3d 1152 (2018). Jeffrey and Rebecca Rowe (Rowe) bought property from Trent and Melissa Adams (Adams) via a statutory warranty deed in 1998. The Adams/Rowe property was adjacent to and south of property owned by Joel Klein. Klein contended that he had maintained the northern 10 feet of the Adams/Rowe property from 1974 to 1984 and thus had adversely possessed the property prior to Rowe's purchase from Adams. In 2014, the Rowe sued Klein for ejectment and Klein counterclaimed for adverse possession. The trial court granted Klein's motion for summary judgment and quieted title to the 10 foot strip of property in Klein. Rowe, 2 Wn. App. 2d at 330-31.

Six years and three months after Rowe bought the property he sued Adams for breach of warranties and covenants. Id. While the six-year statute of limitations had run, Rowe argued that because Klein's possession at the time of conveyance was not evident, his possession was not disturbed until Klein brought his claim for adverse possession in 2014. Id. at 334-35. We disagreed, concluding instead that regardless of whether Klein's occupation was apparent in 2014, because Klein had adversely possessed the property from 1974 to 1984, Adams did not have complete legal title to the property in 2014. Id. Consequently, the warranty of seisin was breached at conveyance and the six-year statute of limitation began to run at conveyance. Id.

Similarly here, Haley is arguing that the statute of limitations should not have run on his present statutory warranty claims because Hume's abandonment of the

easement was not evident at the time of conveyance. But, just as in Rowe, because Hume had abandoned her right to the easement, she did not have legal title to the easement when she conveyed Lot B to Haley. As with Rowe, the present warranties were breached at conveyance. See 2 Wn. App. 2d at 335. Since Haley did not file suit against Hume until 11 years later, his claims are time barred. RCW 4.16.040(1).

C.

We next address Haley's claim for breach of the future warranty of quiet possession. The warranty of quiet possession "'warrants to the grantee, his or her heirs and assigns, the quiet and peaceable possession' of the property conveyed." Rowe, 2 Wn. App. 2d at 335. The warranty guarantees the grantee "shall not, by force of paramount title, be evicted from the land or deprived of its possession. Foley v. Smith, 14 Wn. App. 285, 290-91, 539 P.2d 874 (1975). The warranty of quiet possession is "breached when the buyer of land is actually or constructively evicted by one who holds a paramount title that existed at the time of the conveyance." Rowe, 2 Wn. App. 2d at 336. "Where a third party with superior title is in possession at the time of conveyance so that the buyer cannot take possession, the buyer is constructively evicted at conveyance." Rowe, 2 Wn. App. 2d at 336.

The dispositive question is whether, when Hume conveyed Lot B to Haley, Pugh already possessed the disputed easement area such that Haley was unable to take possession. If so, then Haley was constructively evicted at conveyance and the statute of limitations began to run at conveyance. Rowe, 2 Wn. App. 2d at 338.

In Rowe, the court determined that Klein had adversely possessed the disputed strip of land by his use from 1974 to 1984, thereby triggering claims for present

warranties at conveyance. We considered it a different question, however, when addressing the future warranty of quiet possession. We instead focused on whether Klein's use of the property at the time of possession would put a reasonable person on notice of Klein's claim. Rowe, 2 Wn. App. 2d at 339. We concluded that Rowe was on notice as to the area where Klein's greenhouse intruded into the disputed strip. We further concluded, however, that Rowe was not on notice of Klein's constructed possession of the remainder of the strip. Thus, the statute of limitations for Rowe's claim for breach of the warranty of quiet possession did not start to run until Klein sued for adverse possession.

In McDonald v. Ward, 99 Wash. 354, 169 P. 851 (1901), the court considered a buyer's claim against the seller for breach of the warranty of possession. There, the buyer purchased property that included a railroad. The buyer farmed all of the land except for a 20-foot strip adjacent to the railroad line. Id. at 354-55. After the railroad claimed superior title a strip of land 200-feet wide, the buyer brought an action against the seller. The McDonald court held that the buyer was on constructive notice of the railroad's claim of a 40-foot wide strip between the railroad track and a line of telegraph poles running parallel to the track because the telegraph line was incidental to the track and thus readily apparent to a reasonable person that the railroad occupied the area between the track and telegraph. McDonald, 99 Wash. at 358-59. Consequently, the statute of limitations for the 40-foot wide strip began to run at the conveyance. Because there was no similar indication of the railroad's superior claim to the remaining area, however, the McDonald court concluded that the buyer's claim against the seller

for the remaining strip of land commenced to run at the time the railroad brought its action to oust the buyer. Id.

Here, while Haley claims to have used the easement area by maintaining a small hedge and landscaping between the stream and his driveway, there was no evidence that at the time of Haley's 2005 purchase from Hume, the easement area was usable for ingress, egress, or parking. To the contrary, north of the small hedge the land drops steeply to the newly daylighted stream. As with the greenhouse area in Rowe, and the strip of land between the railroad track and telegraph lines in McDonald, a reasonable person would have been on notice that the easement area was not usable for its intended purpose.[3] Because Pugh already possessed the disputed easement area such that Haley was unable to take possession, Haley was constructively evicted at conveyance and the statute of limitations began to run at conveyance.

D.

Haley also alleges that Hume violated the warranty to defend. "The warranty to defend is a future covenant that no lawful, outstanding claims against the property exist." Mastro, 90 Wn. App. at 164. Before the buyer can recover under this warranty, the buyer "must make an effective 'tender of defense' to the [seller]." Mastro, 90 Wn. App. at 164 (quoting Double L Props., Inc., 51 Wn. App. at 156.)

> An effective tender has four elements. It must
>
> notify the [seller] that: (1) there is a pending action; (2) if liability is found, the [buyer] will look to the [seller] for indemnity; (3) the notice constitutes formal tender of the right to defend the action; and (4) if the [seller] refuses

[3] Hume also points out that development adjacent to the daylighted stream would be prohibited by Mercer Island. It appears that Mercer Island requires a standard buffer of 25 feet for streams restored or created from the opening of a previously piped watercourse. Mercer Island Municipal Code 19.07.070.

> to defend, it will be bound to factual determinations in the original action in subsequent litigation between the [buyer] and [seller].

Erickson, 156 Wn. App. at 158 (quoting Mastro, 90 Wn. App. at 164-65). The seller must then "refuse this tender to breach the warranty to defend." Erickson, 156 Wn. App. at 158.

While Haley v. Pugh was pending before the trial court, Haley sent Hume two e-mails. Haley concedes that these e-mails did not comply with the detailed formalities of tendering a defense but asserts that detailed formalities in the tender would have been futile and therefore were unnecessary. But Haley offers no support for the proposition that when a party believes formally tendering a defense would be futile, that party is relieved from the burden of doing so. To the contrary, this court has been unequivocal when stating the requirement to properly tender defense. See Mastro, 90 Wn. App. at 165 ("Mastro's letter clearly and unambiguously me[t] the criteria."). See also Edmonson v. Popchoi, 172 Wn.2d 272, 279, 256 P.3d 1223 (2011) ("we hold that the warranty to defend means that, upon proper tender, a grantor is obligated to defend in good faith and is liable for a breach of that duty.") (Emphasis added).

For the duty to defend to be breached, the buyer must first tender a formal defense that meets the Mastro requirements. 90 Wn. App. at 165. Haley's e-mails to Hume did not meet these formal requirements and therefore the trial court did not err in granting Hume's motion for summary judgment.[4]

[4] For the first time in his reply brief, Haley also argues that Hume violated her duty of good faith and fair dealing. Haley has waived this argument. See Brown v. Vail, 169 Wn.2d 318, 336 n.11, 237 P.3d 263 (2010) ("a party that offers no argument in its opening brief on a claimed assignment of error waives the assignment."); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("an issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

III.

Haley next contends that the trial court erred by dismissing Haley's claims for breach of duty to defend and bad faith against First American. We disagree.

A.

Standard liability insurance policies impose two distinct duties on insurance companies: "the duty to defend the insured against lawsuits or claims and the duty to indemnify the insured against any settlements of judgments." United Services Auto. Ass'n v. Speed, 179 Wn. App. 184, 194, 317 P.3d 532 (2014). "[T]he duty to defend is different from and broader than the duty to indemnify." Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 404, 229 P.3d 693 (2010).

"The duty to indemnify only exists if the policy actually covers the insured's liability. The duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint." Am. Best Food, 168 Wn.2d at 404 (citing Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 53, 164 P.3d 454 (2007)). "The duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." Am. Best Food, 168 Wn.2d at 404 (internal citation omitted). The insurer "must defend until it is clear that the claim is not covered." Am. Best Food, 168 Wn.2d at 405.

"The duty to defend generally is determined from the 'eight corners' of the insurance contract and the underlying complaint." Expedia Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, 803, 329 P.3d 59 (2014). There are two exceptions to the eight corners rule. "First, if coverage is not clear from the face of the complaint but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt."

Expedia, 180 Wn.2d at 803. "Second, if the allegations in the complaint conflict with facts known to the insurer or if the allegations are ambiguous, facts outside the complaint may be considered." Expedia, 180 Wn.2d at 803-04. But "extrinsic facts may only be used to trigger the duty to defend; the insurer may not rely on such facts to deny its defense duty." Expedia, 180 Wn.2d at 804. While the insurer is allowed to "investigate the facts and dispute the insured's interpretation of the law . . . if there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend." Am. Best Food, 168 Wn.2d at 405.

B.

First American properly rejected Haley's tender of defense because general exception 3 in its title policy applied to the Pugh v. Haley dispute. We "interpret insurance policy provisions as a matter of law[,]" and construe exclusionary clauses most strictly against the insurer. Am. Best Food, 168 Wn.2d at 404, 406.

General exception 3 states that "[t]his policy does not insure against loss or damage by reason of . . . other matters which would be disclosed by an accurate survey or inspection of the premises." The American Land Title Association and National Society of Professional Surveyors (ALTA/NSPS) publishes the minimum standard detail requirements for land title surveys.[5] The 2005 edition provided that "[t]he survey shall be performed on the ground and the plat or map of a [survey] shall contain[:]"

> (f) the character of any and all evidence of possession shall be stated and the location of such evidence carefully given in relation to both the measured boundary lines and those established by the record . . . .
>
> (h) All easements evidenced by Record Documents which have been delivered to the surveyor shall be shown . . . If such an easement cannot

[5] See NAT'L SOC. OF PROF. SURVEYORS, ALTA/NSPS STANDARDS (2016), https://nsps.us.com/page/ALTANSPSStandards. This information was presented to the trial court.

> be located, a note to this effect shall be included. Observable evidence of easement and/or servitudes of all kinds . . . on adjoining properties if they appear to affect the surveyed property, shall be located and noted. If the surveyor has knowledge of any such easement and/or servitudes, not observable at the time the present survey is made, such lack of observable evidence shall be noted.
>
> . . . .
>
> (j) Where there is evidence of use by other than the occupants of the property, the surveyor must so indicate . . .
>
> (l) Ponds, lakes, springs, or rivers bordering on or running through the premises being surveyed shall be shown.

These minimum ALTA/NSPS requirements confirm that if Haley had conducted a survey in 2005, it would have disclosed that the easement area was exclusively possessed by someone other than Hume. The survey would have disclosed the recorded easement benefitting Haley's property. Following the ALTA/NSPS standard, the survey would have noted the evidence of Pugh's possession, noted that the easement was not observable at the time the survey was made, noted that there was evidence of use by someone other than Hume, and noted that there was a stream in the middle of the easement area. All of these would have indicated that the condition of the easement area in 2005 was inconsistent with the use of the easement that Haley believed he was acquiring. As such, a survey would have disclosed the loss that Haley now asserts.

Haley argues that First American violated the eight corners rule in rejecting his defense under general exception 3. This is so, he contends, because First American relied on information outside the complaint and policy. But in his counterclaim, Pugh asserted that "[a]t the time [Haley] acquired title to his property, the easement area . . . had been altered in such a manner as to defeat and render impossible the intended use of the easement." If true, then an accurate inspection would have

identified the fact that there was a recorded easement on Tract A benefitting Lot B, that the condition of the easement area made the use of that easement impossible, and that Pugh was in exclusive possession of the easement area. Therefore, First American did not rely on information outside of the eight corners in rejecting Haley's tender of defense under general exception 3.

Haley further argues that under Nautilus, Inc. v. Transamerica Title Ins. Co. of Wash., 13 Wn. App. 345, 534 P.2d 1388 (1975), general exception 3 does not apply. In Nautilus, however, the dispute was over who owned the land between the ordinary high water mark and the meander line of a river. The court determined that because this was a legal question about the interpretation of a deed, a survey would not answer it. Nautilus, 13 Wn. App. at 349. Here, however, the dispute was not over who owned the easement area but what the easement area's condition was when Haley purchased Lot B. A survey would be able to determine that the condition of the easement area indicated that Pugh—or at least someone other than Hume—was in exclusive possession of the area.

If "it is clear from the face of the complaint that the policy does not provide coverage" then there is no duty to defend. Speed, 179 Wn. App. at 196 (citing Woo, 161 Wn.2d at 404). Because general exception 3 to Haley's title insurance policy applied and indicated that First American did not have a duty to defend Haley, the trial court did not err in granting First American's motion for summary judgment. Therefore, we find it unnecessary to determine whether any of the other policy exceptions or exclusions also apply, or whether Haley's tendered his defense to First American in a timely manner.

IV.

Hume cross appeals and argues that the trial court erred in denying the requests for an award of attorney fees under either the residential purchase and sale agreement, or alternatively, under CR 11 and RCW 4.84.185. We disagree.

A.

The residential real estate purchase and sale agreement between Haley and Hume provides that "[i]f Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses." Hume asked the trial court to award her reasonable attorney fees and costs under this provision of the purchase and sale agreement. The trial court correctly denied Hume's request for attorney fees and costs because the purchase and sale agreement merged with the statutory warranty deed upon closing.

In Brown v. Johnson, the buyer sued the seller of a home for misrepresentation. 109 Wn. App. 56, 34 P.3d 1233 (2001). This court reversed the trial court's "refusal to award attorney fees based on the parties' purchase and sale agreement" over the seller's argument that the purchase and sale agreement merged with the deed upon transfer. Brown, 109 Wn. App. at 57, 59. Under the merger doctrine, upon closing "the terms of a real estate purchase and sale agreement merge into a deed" but the doctrine "has its exceptions." Brown, 109 Wn. App. at 59-60. "The rule . . . does not apply where terms of a purchase and sale agreement are not contained in or performed by the execution and delivery of the deed, are not inconsistent with the deed, and are independent of the obligation to convey." Brown, 109 Wn. App. at 60. In Brown, the court determined that the merger doctrine did not apply because the action did "not

relate to title or any other terms contained in the deed and therefore [fell] within the doctrine's exceptions." 109 Wn. App. at 60.

To the contrary, here, Haley tied his claims directly to the deed and not the purchase and sale agreement. Therefore, upon closing the purchase and sale agreement merged with the deed. As that deed does not include a provision relating to attorney fees, the trial court did not err in denying Hume's motion. [6]

Hume disagrees with this conclusion and argues that while Haley's other claims were based on the deed, his allegation that Hume violated her duty of good faith and fair dealing must have been based on the purchase and sale agreement. Hume offers no support for this claim other than the fact that Haley's attorney mentioned the purchase and sale agreement once during oral argument, and that Haley asserted separate causes of action for the breach of good faith and fair dealing and the breach of the statutory warranties. But "[t]here is in every contract an implied duty of good faith and fair dealing," Badgett v. Security State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991),[7] and Hume has not shown how Haley's claims were based on the implied duty of good faith and fair dealing in the purchase and sale agreement and not the implied duty of good faith and fair dealing in the deed.

B.

Hume also argues that the trial court erred in denying her motion for attorney fees under CR 11 and RCW 4.84.185. CR 11 requires attorneys to sign "[e]very

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[6] Hume also cites to an unpublished Division Three opinion Kloster v. Roberts, No. 30546-5-III (Wash. Ct. App. Feb. 6, 2014) (unpublished), http://www.courts.wa.gov/opinions/pdf/305465.unp.pdf. But the court in Kloster simply analogized to Brown and determined that "[t]he Kloster's misrepresentation and concealment claims" arose out of the purchase and sale agreement. Kloster, slip op. at 44. Therefore, Kloster does not support Hume's argument for the same reason Brown does not support Hume's argument.

[7] Including in a statutory warranty deed. See Edmonson, 172 Wn.2d at 280.

pleading, motion, and legal memorandum" as a certification that the filing "is well grounded in fact; . . . is warranted by existing law or a good faith argument for the extension . . . of existing law; . . . [and] is not interposed for any improper purpose." RCW 4.84.185 allows a court to award the prevailing party its attorney fees and costs upon a finding that "the action. . . was frivolous and advanced without reasonable cause."

"The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system." Bryant v. Joseph Tree Inc., 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). Similarly, the purpose of RCW 4.84.185 is to "discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases." Biggs v. Vail, 119 Wn.2d 129, 137, 830 P.2d 350 (1992). But the rule "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Bryant, 119 Wn.2d at 219 (specific to CR 11). "Complaints which are grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law are not [frivolous or] baseless claims." Bryant, 119 Wn.2d at 219-20.

Haley's suit was not frivolous or baseless but instead was a good faith argument for the extension of existing law. The discovery rule is a doctrine of existing law that allows a statute of limitations to be tolled upon certain occurrences. See 1000 Virginia, 158 Wn.2d at 566. Haley made a good faith argument to the trial court that the discovery rule should be extended to statutory warranty deeds. That the trial court ultimately rejected that argument does not mean it was frivolous or baseless. As such, the trial court did not err in denying Hume's motion for attorney fees and costs.

V.

Finally, Hume requests her attorney fees on appeal pursuant to RAP 18.1, CR 11, and RCW 4.84.185. RAP 18.1 allows this court to award fees "[i]f applicable law grants" such a right. However, since neither CR 11 nor RCW 4.84.185 grant Hume the right to recover her fees, we deny her request.

Haley also requests his fees on appeal pursuant to RAP 18.1, CR 11, and RAP 18.9 for having to respond to Hume's cross appeal. But Hume also made a good faith argument in advancing her concerns about the validity of Haley's suit. Requesting her attorney fees was neither baseless nor frivolous.

We affirm.

Mann, ACT

WE CONCUR:

Andrus, J.

Leach, J.

No. 77769-6

WASHINGTON STATE COURT OF APPEALS, DIVISION I

JEFFREY HALEY, an individual,

Appellant,

v.

KATHLEEN HUME, an individual; and FIRST AMERICAN TITLE INSURANCE COMPANY, formally known as Pacific Northwest Title Company,

Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Julie Spector

JEFF HALEY'S MOTION FOR RECONSIDERATION

Gregory M. Miller, WSBA No. 14459
Linda B. Clapham, WSBA No. 16735
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I. MOVING PARTY

Appellant Jeff Haley asks the Court to reconsider its September 9, 2019, Decision per RAP 12.4. A copy of the Decision is in the appendix.

II. RELIEF REQUESTED

Jeff Haley asks the Court to reconsider its Decision because it overlooked material facts in the record and so misapplied the law. The panel should file a new decision which reverses the trial court.

Alternatively, and with respect, Mr. Haley suggests that if the Court adheres to the Decision as written, that it un-publish it because it is contrary to the settled law as to easements and as to the duties of insurers, effectively overruling or ignoring controlling law. This inconsistency and conflict with settled law will cause difficulty and confusion in future cases involving both statutory warranty deed warranties and title insurance such that the Decision should not be published to avoid that problem.

III. FACTS RELEVANT TO ARGUMENT

The panel is familiar with the basic facts of the appeal, so the pertinent facts are incorporated into the argument, with one exception as to the scope of the easement itself.

The Decision truncated the scope of the easement, citing only ingress, egress, and parking. The Decision ignores what Haley quoted at

page 12 in his opening brief, that the recorded Declaration of Easement includes "vehicular **and pedestrian** ingress, egress, **and right of way**".

> 1. Grantor hereby grants, conveys, and assigns to Grantee easements, in perpetuity, over, under, and across the Servient Estate in favor of the Dominant Estate for purposes of utilities and vehicular and **pedestrian** ingress, egress **and right-of-way** including such commercial vehicles as are customary for residential purpores and such vehicles as may be required in the construction of dwellings and improvements on the Dominant Estate **and for parking of vehicles of visitors** to the Dominant Estate.

CP 401 (emphasis added). A copy of the recorded Declaration of Easement is attached hereto in the Appendix.

The Decision also ignores that the parking for occasional visitors to the dominant estate – Haley's property – could be accommodated next to and in conjunction with Haley's driveway without interfering with the stream, so long as the shrubs were removed or moved and grass put in. *See* Oral Argument Exhibit, CP 139. The Decision therefore, misapprehends the facts when it states that, as a matter of law, the easement could not be used, because there is undisputed evidence to the contrary. This makes summary judgment improper.

Under the rules for summary judgment, the record must be analyzed with all facts construed in Haley's favor. CR 56(c). This means that, at minimum, Haley could have used the easement for some of the specified pedestrian and parking purposes stated in the Declaration of Easement, as his declarations demonstrate that he did. *See* CP 925-928.

But because it misapprehended these basic facts, the Decision did not analyze Haley's claims and rights from the factual predicate that there were genuine uses available to Haley, and so misapplied or effectively overruled the applicable law that mere non-use does not extinguish an easement such that Haley could not have been "on notice" the easement was extinguished when he bought the property in 2005 and used the easement area until the court ruling in 2013.

Moreover, because there is no dispute that Haley had uses of the easement he historically exercised since acquiring the property in 2005 and could continue to exercise those uses in the future absent the 2013 decision, summary judgment should have been entered in Haley's favor on his rights under the easement, leaving only damages to be determined at a hearing for the taking of his valuable property right.

IV. GROUNDS FOR RELIEF & ARGUMENT

A. Pursuant to RAP 12.4(c), Reconsideration Should Be Granted Where An Appellate Decision Overlooks Or Misapprehends Applicable Law Or Operative Facts

RAP 12.4(c) instructs that motions for reconsideration should point to the "points of law or fact which the moving party contends the court has overlooked or misapprehended" and thus states the standard for modifying or changing the initial decision. Our appellate courts grant reconsideration

where warranted, both the Court of Appeals[1], and the Supreme Court[2], recognizing the underlying goal of the appellate courts stated in RAP 1.2, and the underlying civil rules aimed to get the correct and just decision. *See Keck v. Collins*, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015) (referencing CR 1). With respect, that applies here.

B. The Decision's Misunderstanding Of The Scope Of The Easement And Of Haley's Historic And Potential Use Of The Easement Resulted In An Erroneous Application Of The Law Of Easements And Of *Rowe v. Klein* And *McDonald v. Ward* As To The Time For Suing Under The Future Warranties Of Statutory Warranty Deeds To Preclude A Wronged Buyer Like Haley From Any Relief, Contrary To Settled Washington Law. With Respect, The Decision Creates An Unintended Catch-22 That Conflicts With Settled Law That Insures Relief For Injured Parties Who Don't Sleep On Their Rights.

With respect, Haley takes issue with the Decision's application of *Rowe v. Klein* and of *McDonald v. Ward*[3] and suggests that a corrected view of the relevant facts as noted *supra* – including both the actual scope of the easement and the historic and potential uses which Haley could actually use the easement – would result in a different application of those

[1] *See, e.g., Behnke v. Ahrens*, 172 Wn.App. 281, 294 ¶¶30-31, 294 P.3d 729 (2012) (discussing grant of reconsideration to consider facts and brought to the panel's attention on reconsideration); *State v. Bowen*, 157 Wn.App. 821, 239 P.3d 1114 (2010) (noting the decision was "on reconsideration" and that the prior decision published in the Pacific Reporter was superseded).

[2] *See, e.g., Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 474, 90 P.3d 42 (2004), reversing prior decision at 148 Wn.2d 403, 61 P.3d 309 (2003), after reconsideration and re-argument.

[3] *Rowe v. Klein*, 2 Wn.App.2d 326, 409 P.3d 1152 (2018); *McDonald v. Ward*, 99 Wash. 354, 169 P. 851 (1918).

decisions. The Decision's analysis of *Rowe* as to the future warranties at pp. 7-9 amounts to a classic Catch-22 that leaves a victim of concealment or misrepresentation with no avenue of relief. That is at odds with fundamental judicial principles explained in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) that where there is a right, there is a remedy. *See Putman v. Wenatchee Valley Medical Center, P.S.,* 166 Wn.2d 974, 979, 216 P.3d 374 (2009).[4] *Accord, Freehe v. Freehe,* 81 Wn.2d 183, 192, 500 P.2d 771 (1972) ("absent express statutory provision, or compelling public policy, the law should not immunize tortfeasors or deny remedy to their victims."). Haley argued these principles at pp. 27-30 of his Opening Brief and pp. 13-15 of his Reply Brief.

Foreclosing Haley from any potential relief, as the Decision does, is also at odds with principles dating to early statehood that "fraud concealed tolls the running of every statute of limitations till its discovery and that courts of equity are always open for relief against fraud." *Denny-Renton Clay & Coal Co. v. Sartori,* 87 Wash. 545, 553, 151 P. 1088 (1915). Unfortunately, the Decision's analysis of the application of *Rowe*

[4] The Court in *Putnam* quoted *Marbury v. Madison*:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803).

overlooked the policy arguments based on these principles[5] which means a victim such as Haley is left without any potential relief and for no good policy reason, contrary to *Putnam, Freehe, Denny-Renton Clay & Coal Co*. and *Marbury v. Madison,* among a host of other cases.

As for the *McDonald* case, the Decision's analysis turned on disputed facts – whether, *in fact*, Haley was put on constructive notice of Pugh's claim for the entire easement area up to the edge of the stream. This seems to turn on how the area, in fact, appeared and presented to Haley, as described on page 10 of the Decision. But the undisputed evidence is that Haley did use that part of the easement area from the time of purchase. Haley testified how it appeared and how he used and cared for it continuously from the time he bought the property in 2005. *See* CP 925-928, esp. ¶ 2 ("I used the easement area for pedestrian purposes" from the time he bought the property in 2005).

An appellate decision cannot contradict this uncontroverted evidence on summary judgment with its view of how the property could or could not be used, both as a matter of law where all facts have to be construed in Haley's favor (CR 56(c)), and as a matter of logic. An

[5] Haley argued "Without the discovery rule, Haley would have no remedy against the seller who admittedly failed to disclose to him at the time of sale, or record for the public, that she had abandoned the recorded easement rights that ran with the property she was selling." Haley OB, pp. 29-30.

appellate decision cannot determine after the fact from a paper record how Haley did or did not use his property and the easement, nor that Haley could not as a matter of fact be able to continue using the property as he had since 2005 if the easement not been extinguished in 2013, nor that he could potentially expand his use of the easement under its terms, even taking into account the limits the stream might require – a fact question.

It should be recalled that at the argument, Judge Mann was in agreement with the settled law of easements that Haley could use that area, could potentially even cover the stream (perhaps partially with a foot-bridge), and make good use of most of, if not the entire easement area, citing the settled principle that an unused easement did not negate its existence.[6] Despite the point made in footnote 3 which discussed the Mercer Island Code 25-foot buffer for restored streams, that buffer would not in future prevent Haley's pedestrian and parking uses, and in fact did not prevent many uses from 2005 to 2013.

[6] For instance, Judge Mann put it to Hume's counsel that "Our case law is very clear that you don't abandon an easement by non-use. So – if he's got an easement that's for drive - - , for ingress, egress, parking that has not been, … it doesn't go away by pure non-use." He argued with counsel about how Haley could possibly be on notice of the abandonment when the change was not recorded and the insurance policy requires "actual notice", a rhetorical question which did not get answered.

C. Reconsideration Is Appropriate Because The Court Of Appeals Cannot Overrule Supreme Court Decisions.

The Decision in effect overrules binding authority, particularly *McDonald v. Ward.* As just noted, in argument Judge Mann raised to Hume's counsel the settled law argued by Haley that non-use does not extinguish an easement, and that there are many uses consistent with the easement which Mr. Haley not only had enjoyed up to 2013 and the trial court judgment in the *Haley v. Pugh* suit, points to which Hume's counsel had no response. But the Decision overlooks these points, declaring Haley was on notice the easement was extinguished when that could not have been the case given his continuous use since 2005, and, as a consequence, misapprehended how the law correctly applied to what are the operative facts. Instead, the settled law that a servient estate can occupy an easement area without causing abandonment of the easement is now effectively overruled by the Decision, minimally where the occupation was allegedly "obvious" despite its continuous use by the Dominant Estate.

The problem is, the Court of Appeals does not have authority to overrule Supreme Court precedent. *Buck Mountain Owner's Ass'n v.*

Prestwich, 174 Wn.App. 702, 716, 308 P.3d 644, (2013).[7] Instead, the Decision should have adhered to the Supreme Court decision and noted what it felt was the conundrum, or that the old rule was no longer appropriate in the current time, in order for the Supreme Court to look at it properly, a settled practice. *See, e.g., Keene v. Edie,* 80 Wn. App. 312, 314-318, 907 P.2d 1217 (1995), *overruled*, 131 Wn.2d 822, 935 P.2d 588 (1997);[8] *In re Estate of Borghi,* 141 Wn. App. 294, 169 P.2d 847 (2007), *affirmed*, 167 Wn.2d 480, 219 P.3d 932 (2009).[9]

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[7] As the *Buck Mountain* decision noted: "We are bound by the decisions of our state Supreme Court and err when we fail to follow it. *1000 Virginia Ltd. P'ship v. Vertecs Corp*., 158 Wn.2d 566, 578, 146 P.3d 423 (2006)." *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn.App. at 716.

[8] In *Keene v. Edie,* this Court held it was bound by the s rule that community real property is not subject to execution for a separate tort judgment laid down in *Brotton v. Langert,* 1 Wash. 73, 23 P. 688 (1890). This established the groundwork for the Supreme Court to overrule *Brotton* at 131 Wn.2d 822, 830-834, 935 P.2d 588 (1997), as inconsistent with the revised understanding of community property principles (the rejection in 1930 of the erroneous notion that the marital community "was a distinct legal entity") and basic equitable principles, including that tortfeasors should not be immunized and victims denied a remedy.

[9] In *Estate of Borghi*, this Court indicated that two cases had reached opposite results on the issue of what proof was required to show that separate property was converted to community property. One case was a Supreme Court decision from 1914, *In re Estate of Deschamps,* 77 Wash. 514, 137 P. 1009 (1914), while the newer case from 1993 was from the Court of Appeals, *In re Marriage of Hurd*, 69 Wn.App. 388, 48 P.2d 185 (1993). *See* 141 Wn.App. at 298-302. Despite what the panel believed was the better rule under *Hurd*, Judge Appelwick noted that "We are constrained by the binding precedent set by *Deschamps*", and had to hold that the "better reasoned" decision in *Hurd* was improperly decided. 141 Wn.App. at 301-302. The Supreme Court granted review and, much to Judge Appelwick's surprise (and chagrin), affirmed the older *Deschamps* decision by a fractured court, 4-1-4, rather than adopt the simpler rule in *Hurd*. *See In re Eestate of Borghi*, 167 Wn.2d 480, 219 P.2d 932 (2009).

D. Haley *Did* Cite Cases On Futility Of Tender In His Argument On The Present Warranty Of Duty To Defend – Dismissal Should Be Reconsidered.

On the present warranty for the duty to defend, the Decision says that Haley did not cite any case that there is no need to make a full, formal tender when it would be future. While it is true no such case on futility was cited in the context of a statutory warranty deed's future warranty to defend, there was no such "purple cow" case and, necessarily, some case must always be the first such case. But that does not mean that the Decision properly dismisses the argument when Haley ***did*** invoke the general principle of futile demand letters on insurers. *See Moratti ex rel. Tarutis v. Farmers Ins. Co. of Wa.,,* 162 Wn. App. 495, 254 P.3d 939 (2011) (no obligation to send futile demand letter to insurer), citing *Willener v. Sweeting,* 107 Wn.2d 388, 395, 730 P.2d 45 (1986). *See* Opening Brief, p. 26, n.11. The Decision's analysis overlooks the two cases Haley cited that there is no need to send a futile demand letter.

This case should be decided to show that those basic principles of futility can – and here do – apply in the context of a statutory warranty deed's future warranty to defend given the concealment and misrepresentation, and when juxtaposed against not otherwise getting relief. The futility principle should be decided in Haley's favor given the other factors and the hidden nature of the abandonment.

E. Haley Properly Argued Good Faith In The Opening Brief Facts And In Response To Hume's Response Arguments.

Footnote 4 says that it won't address Hume's duty of good faith because it was not raised in the opening brief; except the assertions of violation of good faith ***was*** detailed in the recited parts of the complaint, and were in fact argued in the reply brief in response to Hume's argument in her brief – which makes them properly before the Court. After all, the point of the intermediate appellate court is to correctly decide the case based on the facts before it, RAP 1.2, which is what the Decision should have, but did not do, because it overlooked the fact of how the issue of good faith was addressed – fully by both parties, thus ripe for decision.

F. The Decision Misapprehended The Record For Purposes of Applying the "8-Corners Rule" For An Insurer's Duty To Defend.

The Decision accurately set forth the law governing an insurance company's duties upon receipt of a tender of defense. The insurer must determine its duty from the eight corners of the insurance contract and the underlying complaint. *Expedia Inc. v. Steadfast Ins. Co.*, 180 Wn. 2d 793, 803, 329 P.3d 59 (2014). The Decision then acknowledged that there are two exceptions to this rule, but did not hold that either of these exceptions applied to these circumstances. The Decision also recognized that policy exclusions are strictly construed against the insurer.

The Decision effectively ignores each of the above black letter rules of insurance coverage. The Decision relies on facts outside the policy and the complaint to conclude that a survey would have "disclosed that the easement area was exclusively possessed by someone other than Hume." Relying on standards put forth by the National Society for Professional Surveyors, the Court concludes that a survey "would have revealed there was evidence of use by someone other than Hume, and noted that there was a stream in the middle of the easement area."

But this is nothing more than evidence of what Jeff Haley *could see for himself* when he purchased the property. And what he could see for himself, and what a survey would show, had no bearing on whether he **owned** the easement.

Stated another way, what he could see for himself when he purchased his property did not defeat Jeff Haley's title to, or ownership of, or intended use of, the easement area. It simply does not follow that a survey would have revealed that Pugh was in exclusive possession of the easement area. The Decision hardly 'strictly construed" the survey exclusion against the insurer. Because the Decision misapplied the principles of insurance law, with respect, the panel should grant reconsideration.

The Decision also misapprehended the substance of the underlying dispute between Haley and his neighbor Pugh when it noted this "dispute was not over who owned the easement area but what the easement area's condition was when Haley purchased Lot B." Decision, p. 15. But, with respect – of course the underlying dispute was over who owned the easement – and whether it still existed. Haley's complaint against Pugh was most certainly about who owned the easement area – this is why he brought the action to avoid any argument of adverse possession. Pugh may have – and did – defend with facts to show what the easement area's condition looked like at the time Haley purchased his property to support Pugh's argument that Haley should have had no expectation of ownership of the easement – but to say that the dispute was not over who owned the easement is incorrect.

As a result of the Decision's misapprehension of the substance of this dispute, the Decision misapplied *Nautilus, Inc. v. Transamerica Title Ins. Co. of Wash.*, 13 Wn.App. 345, 534 P.2d 1388 (1975). *Nautilus* is directly on point here. Just as in *Nautilus* where the dispute was over who owned the land between the high water mark and the meander line of a river, the dispute between Haley and Pugh squarely presented the legal question of who owned the easement area. No survey would answer this question. And the title company should have defended Jeff Haley against

the title it insured. Otherwise, what is the point of paying for, and having, title insurance?

V. CONCLUSION

Appellant Jeff Haley respectfully asks the panel to reconsider the September 9, 2019, Decision and reverse the summary judgment entered by the trial court. Alternatively, if the panel decides to adhere to the Decision, Haley requests that such ultimate decision not be published, for the reasons stated above.

Respectfully submitted this 30th day of September, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Gregory M. Miller, WSBA No. 14459
Linda B. Clapham, WSBA No. 16735
John R. Welch, WSBA No. 26649

Attorneys for Appellant Jeffrey Haley

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Eileen I. McKillop Selman Breitman, LLP 600 University St, Ste. 1800 Seattle, WA 98101-4129 emckillop@selmanlaw.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal
Thomas F. Peterson Socius Law Group, PLLC 601 Union St, Ste 4950 Seattle, WA 98101 tpeterson@sociuslaw.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal

DATED this 30th day of September, 2019.

Elizabeth C. Fuhrmann, PLS, Legal Assistant/Paralegal to Gregory M. Miller

Copy of the September 9, 2019 Decision is at A-1 to A-19

7903010712

DECLARATION OF EASEMENT

THIS DECLARATION OF EASEMENT, executed and delivered this 27th day of February, 1979, by BYRON M. EMERY, a single man, individually and as general partner of Dawn Terrace, a Washington limited partnership (hereinafter referred to as "Grantor").

RECITALS

A. Grantor is the record owner, in fee simple, of certain real property situated in Mercer Island, King County, State of Washington, legally described as appears on Exhibit A, attached hereto, herein incorporated by this reference, and hereinafter referred to as the "Servient Estate".

B. Grantor is the general partner of Dawn Terrace, a Washington limited partnership, which has some right, title, and interest in and to the Servient Estate.

C. Amos L. Wood, Jr. and Elaine Ines Wood, his wife (hereinafter referred to as "Grantee"), are the fee owners of certain real property situated in Mercer Island, King County, State of Washington, legally described as appears on Exhibit B, attached hereto, herein incorporated by this reference, and hereinafter referred to as the "Dominant Estate".

D. Grantee desires and Grantor is willing to grant easements under, over, and across the Servient Estate in favor of the Dominant Estate.

NOW, THEREFORE, in consideration of the premises and One and No/100 ($1.00) Dollars, the receipt of which is hereby acknowledged, Grantor agrees and covenants as follows:

1. Grantor hereby grants, conveys, and assigns to Grantee easements, in perpetuity, over, under, and across the Servient Estate in favor of the Dominant Estate for purposes of utilities and vehicular and pedestrian ingress, egress and right-of-way including such commercial vehicles as are customary for residential purposes and such vehicles as may be required in the construction of dwellings and improvements on the Dominant Estate and for parking of vehicles of visitors to the Dominant Estate.

2. The easements granted herein shall be appurtenant to and run with the land and shall be binding upon and inure to the benefit of the heirs, successors, and assigns of Grantor and Grantee.

3. The contemporaneous or future subdivision of the Dominant Estate is contemplated by Grantee and shall not constitute an excessive use of the easements granted herein.

4. Grantor as general partner of Dawn Terrace has the requisite power and authority to execute this Declaration of Easement and the easements granted herein shall be enforceable against Dawn Terrace.

EXECUTED the date and year first above written.

Byron M Emery

BYRON M. EMERY, a single man, individually and as general partner of Dawn Terrace, a Washington limited partnership

1% EXCISE TAX NOT REQUIRED
King Co. Records Division
By ..., Deputy

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

On this 27th day of February, 1979, before me, a Notary Public in and for the State of Washington, personally appeared BYRON M. EMERY, a single man, individually and as general partner of Dawn Terrace, a Washington Limited partnership, that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said limited partnership, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year first above written.

Notary Public in and for the State of Washington, residing at Seattle, Wn.

7903010712

EXHIBIT A

A strip of land 10' wide and approximately 140' long being a portion of Tract A, Dawn Terrace as recorded in Volume 94 of Plats, pages 16 and 17, records of King County, Washington lying within the following described line: Beginning at the southwesterly corner of said Tract A, said corner also being the intersection of the line designated as "EASTERLY END OF PRIVATE ROAD AND UTILITY TRACT" on said plat with the easterly extension of the south line of Government Lot 1, Section 19, Township 24 North, Range 5 East, W.M.; thence S 88° 24' 56" E along the south line of said Tract A for a distance of 147.82 feet thence N 1° 35' 04" E 10.00 feet; thence N 88° 24' 56" W along a line parallel to said south line of Tract A; 139' more or less to its intersection with the westerly line of said Tract A; thence south-southwesterly along said westerly line to the point of beginning.

7903010712

CARNEY BADLEY SPELLMAN

September 30, 2019 - 3:03 PM

Transmittal Information

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Appellate Court Case Number:	77769-6
Appellate Court Case Title:	Jeffrey Haley, App/Cross-Resp v. Kathleen Hume, et ano., Resps/Cross-App

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No. 77769-6-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

JEFFREY HALEY, an individual,

Appellant,

v.

KATHLEEN HUME, an individual; and FIRST AMERICAN TITLE INSURANCE COMPANY, formally known as Pacific Northwest Title Company,

Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Julie Spector

JEFF HALEY'S REPLY RE MOTION FOR RECONSIDERATION

Gregory M. Miller, WSBA No. 14459
Linda B. Clapham, WSBA No. 16735
John R. Welch, WSBA No. 26649

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Attorneys for Appellant/Plaintiff Jeffrey Haley

TABLE OF CONTENTS

I. REPLY ARGUMENT TO HUME'S ANSWER:

A. Hume's Answer inaccurately states the facts to mistakenly conflate the relevant time-frame of Haley's knowledge of the condition and use of the easement area from the time he bought the property in 2005 with the time in 2002 when Pugh changed the easement area to daylight the stream.

Straightening out the error Hume makes in her Answering arguments underscores why reconsideration should be granted and the trial court reversed. Hume's Answer claims that the core issue is whether all of Pugh's "actions on the easement" somehow put Haley on constructive notice that the area and its use had been changed, stating it as though Haley lived through or watched the change to the easement area. That's wrong. Those 2002 "actions" pre-date Haley's ownership and knowledge. They are irrelevant to his knowledge of, or notice to him of the easement status in 2005.

Haley never saw the easement area in its original condition because he bought in 2005, years after it was changed. He thus did not see or live through the changes the Hume Answer describes. Yet Hume asserts that Haley necessarily had knowledge or notice of all Pugh's "actions" and "changes" to the easement area. This is an inaccurate statement of the facts and circumstances.

The time-frame is important. It also is undisputed. Haley bought his property in 2005, *three years after* Pugh had "changed" the easement area. Haley used and enjoyed his property – including the easement area – entirely in its changed state.

Hume's Answer also inaccurately refuses to recognize the amount of use Haley had – pedestrian uses beyond "trimming" hedges – though that also is beside the point for this issue. As established at oral argument and in the settled law of easements, Haley could have used the easement area right up to the stream, if not also a nice foot-bridge over it, but he did not have to in order to maintain his easement right since mere nonuse does not extinguish an easement.[1] Rather, for abandonment, the nonuse "must be accompanied with the express or implied intention of abandonment," *Heg v. Aldredge,* 157 Wn.2d 154, 161, 137 P.3d 9 (2006), *which did not occur to Haley's knowledge* until Pugh submitted Ms. Hume's declaration in the underlying Pugh litigation. *See* CP 613-617 (Haley 12/17/12 letter to First American objecting to denial of

[1] *Cole v. Laverty,* 112 Wn. App. 180, 185-187, 49 P.3d 924 (2002) (discussed at OB p. 6 fn.2); *Thompson v. Smith,* 59 Wn.2d 397, 407-409, 367 P.2d 798 (1962), discussed at OB p. 19. *See* OB pp. 17-20 re easement law; Reply Brief, pp. 10-11, discussing nonuse.

coverage, giving sequence of events copy attached); Reply Brief, pp. 10-11 (summarizing facts and the law).

Hume's Answer ignores the case law on non-use, which is fatal to her response because that law controls ***when*** Haley could have had notice of abandonment for purposes of triggering the six-year statute of limitations on the future warranties. Under the undisputed facts and law of easements, the earliest Hume can claim Haley had notice of abandonment for purposes of triggering the statute of limitations for the future warranties was November, 2012. *See* CP 615. The Court should reconsider the decision and hold that Haley's claim for breach of the future warranties was triggered in 2012, making his suit timely and requiring reversal of dismissal.

B. Hume's assertion that Haley's "constructive eviction" from the easement area was "readily apparent" is contrary to Haley's undisputed description of the easement area at the time of his purchase in 2005, is contrary to the law of adverse possession, and at most creates a dispute of fact.

Based on the same predicate that Haley somehow witnessed the change to the easement area years before he moved there, Hume tries to gloss over the fact the "constructive eviction" was not "readily apparent" to Haley and that Haley was not put on notice of a

superior claim by Pugh. Hume's argument in fact tries to assert adverse possession on behalf of Pugh by another name. But adverse possession could not apply, most simply because the 10-year requirement was not met when Haley sued Pugh in 2012. *See* CP 613-615 (Haley's 2012 letter to First American discussing adverse possession). As for being "evicted" from the easement area, as pointed out in Haley's Reconsideration Motion, Haley ***did*** use the easement area, he was not, as a matter of undisputed fact, "evicted". Limits on Haley's use only go to the amount of his damages based on the scope of useable easement given the stream.

Interestingly, Hume's summary at page 3 of *Rowe v. Klein's* facts on the remaining portion of land in that case,[2] shows why *Rowe* supports Haley's case and why reconsideration should be granted and a ruling of summary judgment made in favor of Haley.

For the time period after Haley bought the property in 2005, there is no dispute about what Haley did or could do on the property, or what Pugh did to the easement area to show his assertion over it –

[2] Hume summarized *Rowe*: "As to the remainder of the land, this court found that the occasional inspection of the leach filed [sic], the parked car, patches of law would not put a reasonable person on notice of another party's superior claim." Hume Answer p. 3.

nothing. Nor is there a dispute about the timing of when Pugh changed the easement area – 2002-2003. Thus, here, Pugh did ***less*** than was done in *Rowe*, *which this Court found was inadequate to establish a "superior claim"*. Under Hume's own proffered test, Pugh gave no notice of his "use", nor eviction of all other persons for any of the land south of the stream to establish his "superior claim" to the easement area. *Rowe* supports reconsideration.

Moreover, Hume does not address Haley's argument at pages 4-6 that the Decision incorrectly forecloses Haley from any relief in these circumstances where he was not given notice of Hume's alleged abandonment, thereby creating a Catch-22 situation.

C. Hume's Answer as to futility misses the point.

Hume's Answer simply cites existing case law on the tender requirement of the duty to defend under a statutory warranty deed without addressing the unique circumstances here where the grantor of the deed, who has the duty to defend, has already taken a legal position contrary to deed holder Haley, is already adverse to him in the litigation when he first gets notice of the breach, and therefore is structurally unable to "defend" him against herself. Haley's Reconsideration Motion specifically pointed out that there is no

current case on futility as to the duty to defend in a statutory warranty deed that is directly on point but that, based on application of the futility principle in similar insurance duty to tender contexts, it should be applied here to give an exception to that requirement in order to insure an avenue of relief. *See* Reply Brief, pp. 10-13.

II. REPLY TO FIRST AMERICAN'S ANSWER.

A. First American's Answer Relies – *Still* – on Facts Outside of the Complaint and the Policy to Justify its Denial of a Defense to Haley.

Despite the clear requirement that an insurer is to consider *only* the complaint (here the counterclaim) and the policy in determining its duty to defend, First American's ("FA") arguments in answer to Haley's motion for reconsideration cite to and depend upon consideration of facts *beyond Pugh's counterclaim*. (*E.g.*, pp. 2-3 of FA's Answer). Moreover, FA cites no authority for its gratuitous recitation about "the nature of" title insurance. All that policyholders know is that the role of the title insurer is to insure title. *Kim v. Lee*, 145 Wn.2d 79, 91, (2001). By paying consideration to FA, it is reasonable for Haley to rely upon the fact that FA would defend the title Haley paid FA to insure. FA continues to conflate its duty to defend with its duty to indemnify.

The only issue here is Haley's request that FA fulfill its duty of defense – as it turns out, one of the most important aspects of this title policy.

B. The only case cited by First American in support of its arguments – *Bernard v. Reishmann* – makes Haley's point: a survey would not show *use*, only boundaries; but boundaries were never an issue in this case, so this asserted exception is inapplicable as a matter of law.

FA's Answer is striking for its almost complete lack of citation to legal authority to support its argument against Haley's position on Exception 3 in the policy ("the survey exception"), save for one case: *Bernard v. Reishmann*, 33 Wn.App. 569, 658 P.2d 2 (1983). But that case, in fact, supports *Haley's* argument that a survey would have not made a difference thus making the survey exception inapplicable. *Bernard* holds, consistent with *Nautilus, Inc. v. Transamerica Title Ins. Co. of Wash.,* 13 Wn.App. 345, 534 P.2d 1388 (1975), in relevant part, that a survey would have established the property boundaries. Here the question has never been about the boundaries of the easement. No one disputes where the easement is or what portion of the land it encompasses. The dispute here – which a survey would decidedly *not* resolve – is who

owns the easement. First American is confused, in any event; arguing that Pugh's counterclaim, on its face, relates to use not ownership. But the survey exception in the policy relates to boundaries, not use! The survey exception does not apply and Haley requests that the Court reconsider its decision to apply it to the facts of this case in order to relieve FA from its duty to defend Haley.

C. First American improperly includes new authorities and significant additional arguments on policy exclusions. These arguments and authorities should be excluded.

Haley's motion for reconsideration is limited in scope. FA's Answer strays far outside the lines and includes five pages of additional argument and new authorities not previously cited. For this reason, Haley requests that the Court exclude or refuse to consider pages 10-15 of First American's Answer. Haley responds briefly below in the limited pages permitted by the Court for this Reply to FA's Answer.

1. General Exception 1.

FA belatedly relied upon this General Exception to deny its duty to defend. It does not apply. General Exception 1 excludes coverage for: "a right or claim of a party in possession not shown by

the public records." In its Answer, FA once again impermissibly refers to facts outside of Pugh's counterclaim. In his counterclaim, Pugh claimed that the Recorded Easement had been "effectively abandoned" because "the use of the easement area had been altered since it was created." There was no law at the time FA denied its duty to defend that would permit an easement of record to be abandoned. And the counterclaim is unclear about who allegedly abandoned the easement. It does not mention Hume and it was certainly not Haley, who had been using and maintaining the easement area for the previous seven years. In addition, when Exception 1 is construed against FA with special strictness, as it must be, *Tewell, Thorpe & Findlay, Inc., P.S. v. Continental Cas.Co.*, 64 Wn.App. 571825 P.2d 574, 575 (1999)("Because the purpose of insurance is to insure, exclusionary clauses are construed against the insurer with special strictness."), then it does not apply. Exception 1 precludes coverage where there is loss or damage to the insured (Haley) – *when their possession claim is not recorded*. Haley's claim of possession to the easement was plainly recorded.

2. Exclusions 3 and 1(a).

There are no facts in Pugh's counterclaim to support FA's

reliance on either Exclusion 3 or 1(a). Instead, FA continues to impermissibly rely on facts gleaned from declarations filed in the underlying *Haley v. Pugh* case. This cannot be condoned. Moreover, FA did not rely on these exclusions when it denied its duty to defend. Neither of these exclusions apply here.

3. Late Notice.

There was no late notice to FA. And FA does not even attempt to make the required showing of actual and substantial prejudice in order to raise this defense. *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 417-18, 191 P.3d 866 (2008).

4. Haley Has Not "Waived" Any Arguments.

FA's arguments in its Answer simply reiterate what it argued to the Court. Haley relies upon the thorough arguments and authorities set forth in his Consolidated Reply Brief at pp. 41-44.

III. CONCLUSION

Appellant Jeff Haley respectfully asks the Court to reconsider its September 9, 2019, Decision and either withdraw it and issue a new decision reversing the trial court, or withdraw any affirmance from publication.

Respectfully submitted this 29th day of October, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Gregory M. Miller, WSBA No. 14459
Linda B. Clapham, WSBA No. 16735
John R. Welch, WSBA No. 26649

Attorneys for Appellant Jeffrey Haley

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Eileen I. McKillop Selman Breitman, LLP 600 University St, Ste. 1800 Seattle, WA 98101-4129 emckillop@selmanlaw.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal
Thomas F. Peterson Socius Law Group, PLLC 601 Union St, Ste 4950 Seattle, WA 98101 tpeterson@sociuslaw.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ email ☒ Other – via Portal

DATED this 29th day of October, 2019.

Elizabeth C. Fuhrmann, PLS, Legal Assistant/Paralegal to Gregory M. Miller

Jeffrey T. Haley
5220 Butterworth Rd
Mercer Island, WA, 98040
W: 425 451 9876 x11
Cell: 206 919 1798
e-mail: JeffHaley49@gmail.com

December 17, 2012

First American Title Insurance Company (FATIC)
attn: Bill Reetz
818 Stewart Street
Seattle, WA 98101

Re: Response to denial of tendered defense
to claims by Pugh against my property title of record in **12-2-23528-7 SEA**
ALTA Owner's Policy # **1093-224838**
Property Location: address above
Opposing Parties: John F. Pugh, his controlled LLC: MJD Properties LLC,
his partner in MJD: Mike Alfieri, his contractee: Sunstream Corporation
Opposing counsel: Frank Siderius of Siderius Lonergan

Mr. Reetz:

By letter dated December 12, 2012, FATIC declined acceptance of the defense of the claim specified above. This letter refutes FATIC's asserted grounds for denial of coverage of the claim in Haley v. Pugh. It does not address the other case.

1. Background.

I have a recorded easement on property owned John Pugh 10 feet wide by about 140 feet long along one edge of my residential property for pedestrian uses and parking of vehicles of visitors. No demand to open the easement for use by an owner of my property has ever been made. Within the easement area, Pugh built a mailbox support structure, planted bushes and, and dug a ditch lined with rocks to channel a stream. When I told Pugh that I wanted to begin using the easement, he replied that the easement was abandoned or extinguished by adverse possession.

I promptly filed suit for declaratory judgment to ensure that no more time would accrue on the adverse possession claim. John Pugh stated his claims of abandonment and adverse possession in counterclaims and then filed a motion for summary judgment. Three hearings on the motion have been held. The judge has asked for more declarations and more briefing, has delayed his decision until a deposition of Kathy Hume can be taken in January. The judge has scheduled the next hearing for February 15.

On the easement issue, Defendant Pugh's counterclaim stated: "Defendant/counterclaim plaintiff John F. Pugh seeks an order quieting title in the 1979 easement area declaring all rights granted plaintiff/counterdefendant Haley in and to the easement area extinguished, terminated, and abandoned as a matter of law." It was not a claim for a partial termination of the easement. In his request for summary judgment, Pugh sought a declaration that the entire easement interest was

abandoned. His proposed order sought a declaration that "all rights and obligations thereunder, be and the same, are hereby terminated and extinguished."

This claim by Pugh was frivolous. There was no legal ground to grant it because my property has been using the easement area for utilities since 1989. In response to the motion, I prepared a declaration and a brief which clearly showed that Pugh was not entitled to the relief requested. I was quite surprised when the court began an analysis of a possible partial termination of the easement rights, which Pugh had not requested, and then ruled that it would enter an order of partial termination. Because the issue of partial termination was not raised in the papers filed by Pugh, I hadn't researched it or briefed it or addressed it with a declaration.

Following that ruling, I conducted extensive legal research on the correct analysis in a case like this and presented it to the judge. The judge reopened the issue for further evidence and briefing. The judge has not yet made any substantive ruling in the case.

The correct law to be applied is clearly articulated in the cases of *Cole v. Laverty*, 112 Wn. App. 180, 184, 49 P.3d 924 (2002) and *Heg v. Alldredge*, 157 Wn.2d 154, 161, 137 P.3d 9 (2006). The *Cole* case presents the analysis for a claim that a recorded easement has been lost by adverse possession (actions of the servient estate owner). The *Heg* case presents the analysis for a claim that a recorded easement has been lost by abandonment (actions of the dominant estate owner).

The two analyses are different. In the abandonment analysis, the focus is on actions of the easement holder that show intent to abandon the easement. For adverse possession, the focus is on actions of the servient estate owner that might have given notice of a hostile intent to adversely take away the easement.

2. The time period for extinguishment of an easement by adverse possession has not been met.

For extinguishment of an easement by adverse possession, the *Cole* court stated:

> "To establish adverse possession, the claimant must show use that was open, notorious, continuous, uninterrupted, and adverse to the property owner for the prescriptive period of 10 years. RCW 7.28.010. . . ..
>
> "to start the prescriptive period, the adverse use of the easement must be clearly hostile to the dominant estate's interest in order to put the dominant estate owner on notice." p.184. . . ..
>
> "Hostile use is difficult to prove. The servient estate owner has the right to use his or her land for any purpose that does not interfere with enjoyment of the easement. *Beebe*, 58 Wn. App. at 384. Proper use by the servient estate owner is generally a question of fact that depends largely on the extent and mode of the use. *Thompson v. Smith*, 59 Wn.2d 397, 408, 367 P.2d 798 (1962). If the dominant estate has established use of an easement right of way, obstruction of that use clearly interferes with the proper enjoyment of the easement. However, if an easement has been created but has not yet been used by the dominant estate, adverse use by the servient estate is more difficult to prove. *See, e.g., Beebe*, 58 Wn. App. at 383-84; *City of Edmonds v. Williams*, 54 Wn. App. 632, 636, 774 P.2d 1241 (1989).

> "Mere nonuse, no matter how long, will not extinguish an easement. *Thompson*, 59 Wn.2d at 407. During the period of nonuse, the servient estate may use the land subject to the easement in any way that does not permanently interfere with the easement's future use. *Id.; Edmonds*, 54 Wn. App. at 636. For example, if an easement has been created and no occasion has arisen for its use, the owner of the servient estate may fence the land and that use will not be considered adverse until (1) the need for the right of way arises, (2) the owner of the dominant estate demands that the easement be opened, and (3) the owner of the servient estate refuses to do so. *Id.* at 636-37.

In the Cole case, the fence, locked gates, and bathtub planters blocking the way did not constitute permanent obstructions that would otherwise put Mr. Cole's predecessors on notice that the servient estate holder was asserting hostile, exclusive interest over the easement. p.186.

In the case before the court, the burden of proof is on Pugh. As this is a summary judgment proceeding, the court must accept as true the asserted fact that the dominant estate holder (myself) did not demand that the easement be opened until January 2012. And Pugh has not offered any evidence that a prior owner of my property made such a demand. The court must also accept as true the asserted fact that, before January 2012, neither I nor a prior owner of my property made any use of the easement area for parking of vehicles or made any improvements such as removing bushes to facilitate use of the easement area.

Thus, Pugh has not met his burden of proof to show hostile adverse possession for any longer time than six months before suit was filed.

Furthermore, according to his own sworn testimony at paragraph 6 of his declaration, Pugh did not place any obstacles within the easement area until 2003 and 2004, which is less than ten years before this action was filed. The law in Washington is clear that the required period of hostile use to extinguish an easement is 10 years, not 7. *Cole* at 184; *See also, Franklund v. Olson* No. 29336-0-III, Court of Appeals, Division Three, June 19, 2012, Wn. App. LEXIS 1432.

3. Prior to November 16, there was no evidence of intent to abandon.

For abandonment, the analysis was well summarized by the Court of Appeals in *Schleiger v. Yaunkunks*, 156 Wash. App. 1034 at ¶20 (2010) as follows:

> "An easement owner "may anticipate future needs" and nonuse of the easement does not by itself constitute abandonment. *Neitzel v. Spokane Int'l Ry. Co.*, 80 Wash. 30, 34, 141 P. 186 (1914). In order to constitute abandonment, the nonuse " 'must be accompanied with the express or implied intention of abandonment.' " *Heg v. Alldredge, 157 Wn.2d 154, 161, 137 P.3d 9 (2006)* (internal quotation marks omitted) (quoting *Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co.*, 142 Wash. 204, 210, 252 P. 916 (1927)). Acts evidencing abandonment must be "unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg*, 157 Wn.2d at 161. In *Heg*, the court held that "mere nonuse of a recorded easement coupled with the use of alternate routes of ingress and egress does not, by itself, support a finding of abandonment." 157 Wn.2d at 156.

The burden of proof on this issue is on Pugh and, prior to November 16, 2012 when he filed a declaration of Kathy Hume, the prior owner of my property, he had presented no evidence of intent to abandon any part of the easement. The only evidence previously offered by Pugh was a claim

that Hume voiced no objection to Pugh when modifications to the easement area were made. The *Heg* case and subsequent cases show that silence when barriers are erected is not enough to infer intent to abandon a recorded easement. In *Heg*, a road cut created a 4-6 foot high barrier to use of the easement. p. 162. The servient owner improved the easement area and incorporated it into their yard. p. 166. The recorded easement was unused for 44 years. These facts were not enough to show intent to abandon. *See also, Schleiger,* in which the easement was held not abandoned where the dominant owner did not object to the servient owner's construction of a driveway and a fence inconsistent with the easement.

4. Taking a deposition of Ms. Hume will be crucial.

The declaration of Hume is ambiguous. If it is not favorably clarified by a deposition of Ms. Hume in January, the chances of success in this dispute may be irreparably harmed. This is the first critical event in the case. The court has not yet made any rulings that prejudice the outcome of this case. If the case is lost over the testimony of Ms. Hume, I will have a claim against FATIC and Ms. Hume and FATIC will have a claim over against Ms. Hume.

When I bought my property from Ms. Hume, she sold it to me with a warranty deed. This means that she warranted that she had not transferred to someone else any of her property rights as shown in the title records without updating the title records.

Pugh's lawyer is claiming that the declaration she signed means that, without saying so in writing, she intentionally gave to John Pugh some of her property rights under the 1979 easement. If this is true, it would be a breach of her warranty made to me when she sold the property, and she would be liable to pay me for the value of the rights she gave to Pugh.

I think it is very unlikely that Ms. Hume intended to give such rights to Pugh. If she had intended to do so, she would have done so in writing so that she would not be liable for breach of warranty when selling the property. Nothing in her signed declaration needs to be retracted – it merely needs to be clarified so that Frank Siderius cannot make the claim he is making which, if true, would mean she and FATIC are liable to me.

5. Prior to November 16, there was no good reason to invoke title insurance.

If Pugh were to win on a theory that I have not been diligent in defending my property and he has taken the easement by adverse possession, this would not be covered by title insurance because it was not a defect in title on the day I bought the property. Prior to November 16, Pugh's alternate theory of abandonment by the prior owner was frivolous because there was no chance that the prior owner, if intelligent or legally advised, would agree to say she gave the easement to Pugh because that would create legal liability for the prior owner. Thus, prior to November 16, the chances of Pugh winning on a theory that would be covered by title insurance were so small, and the effort necessary to win the issue was so small, that it was not worth the trouble to tender the defense.

But now the unimaginable has happened. Pugh has duped Kathy Hume into signing a declaration that, if not countered, will allow Pugh to win and will create liability by Hume for the value of the easement. Now there is a good reason to tender the case for insurance defense. It is critical that we have expert legal help to take a deposition of Hume in January. If that legal help is not provided by FATIC, FATIC's liability to me will be compounded.

6. The easement is specifically insured. In drafting the analysis in your letter, it appears you to failed to examine the short plat document. The insurance policy states that the insurance does not extend to "any property beyond the lines of the area described or referred to in Schedule A". Schedule A specifies "Lot B" of a short plat. A copy of the relevant part of that short plat is enclosed. The "lines" shown on the short plat include the 10 foot wide easement that is in dispute. Because the insurance policy specifies what is covered by reference to the short plat and the short plat shows the property lines of the easement as part of the property rights of Lot B, the insurance specifically covers that easement.

7. The exception of Schedule B paragraph 3 does not apply. That paragraph excepts from coverage "matters which would be disclosed by . . . inspection of the premises." In this case, because no demand to open the easement had ever been made (see above analysis), the fact that there were bushes, rocks, and mailboxes within the easement area did not create an encroachment that would be disclosed by inspection. It is to be expected that, until the dominant estate demands opening of the easement, the servient estate owner will put such objects in the easement area and this does not diminish the validity of the easement.

8. Notice of the claim was adequately prompt under state law. As you know, the case law provides that a defense must be provided despite notice being less prompt that the insurance carrier would like. In this case, given the facts recited above, a court will require that FATIC provide the demanded defense.

9. An order of summary judgment has not been entered. Your reading of the record is incorrect. The judge merely ruled that he was inclined to enter a summary judgment of partial termination of the easement. The matter is still entirely open. But the matter will be greatly prejudiced if I do not have counsel to represent me before the deposition of Kathy Hume must be taken in January.

Please promptly appoint counsel to represent me in these matters and have that counsel contact me asap.

Sincerely,

Jeffrey T. Haley

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY HALEY, an individual, Appellant, v. KATHLEEN HUME, an individual; and FIRST AMERICAN TITLE INSURANCE COMPANY, formerly known as Pacific Northwest Title Company, Respondent.	)	No. 77769-6-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Jeffrey Haley filed a motion to reconsider the court's opinion filed on September 9, 2019. Respondents Kathleen Hume and First American Title Insurance Company have filed answers. Appellant has filed a reply. The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, A.C.J.

APPENDIX A

Time Line for *Haley v. Pugh,* King County Superior Court No. 12-2-23528-7 SEA

7/19/12	Haley files First Amended Complaint against Pugh (CP 295-299)
7/25/12	Pugh files counterclaim against Haley (CP 847-850)
9/6/12	Pugh files Motion for Summary Judgment (*See* CP 148-150)
10/5/12	Oral Argument – Court verbally grants "partial termination" of easement and denies Haley's motion (CP 578; *see also* CP 614)
10/15/12	Haley files Motion for Reconsideration (CP 309)
10/19/12	2nd Hearing on Pugh's Motion for Summary Judgment (*See* CP 309)
11/16/12	Pugh Responds to Haley's Motion for Reconsideration and files declaration of Hume (CP 672-675)
11/26/12	Haley tenders defense of Pugh counterclaim to First American, informing them the case is in process, a hearing had been held, and the "judge has asked for more declarations and more briefing, which must be prepared without delay." (CP 580- 582)
11/28/12	First American acknowledges claim (CP 604-605)
12/12/12	First American denies coverage (CP 609-611)
12/13/12	3rd Hearing noted on Pugh's Motion for Summary Judgment (*See* CP 309)
12/17/12	Haley disputes denial of coverage (CP 613-617), informing First American that "three hearings have been held," that the judge "has delayed his decision until a deposition of Kathy Hume can be taken in January," and scheduled the next hearing for February 15, 2013. (CP 613)
1/13	Deposition of Kathleen Hume in January. (*See* CP 613 & 309-310)
1/20/13	First American confirms denial of coverage (CP 619-622)
2/15/13	Order on Pugh's Motion for Summary Judgment entered (CP 309-311). This Order indicates that the summary judgment motions came on for hearing before the Court *four* times: October 5, 2012, October19, 2012, December 13, 2012, and February 15, 2013.

CARNEY BADLEY SPELLMAN

January 13, 2020 - 5:11 PM

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