75097-6

NO. 75097-6-I

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

EDWARD AND MAYA ELEAZER, husband and wife,

Appellants/Plaintiffs,

vs.

FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign insurer; THE TALON GROUP, a domestic Washington corporate entity or partnership, d/b/a Talon Group escrow and/or Talon Title; DOE PERSONS 1-5; AND roe entities 6-10,

Respondents/Defendants.

BRIEF OF RESPONDENTS

Thomas F. Peterson, WSBA #16587
SOCIUS LAW GROUP, PLLC
Attorneys for First American Title

Two Union Square
601 Union Street, Suite 4950
Seattle, WA 98101.3951
206.838.9100

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I. INTRODUCTION

This is the second of two cases, and the second appeal, in which the Eleazers have attempted to shift the blame for their knowing and intentional decision to purchase residential real estate that contained a commercial septic drainfield in the front yard. In both cases, the superior court held that the Eleazers' voluntary decision to grant an easement to the seller for the septic drainfield, as part of their contract to purchase the property, was the sole cause of their problems.

In the first case, *Eleazer v. Bush House L.L.C.*, Snohomish County Cause No. 12-2-04022-1, the Eleazers sued the Snohomish Health District, their seller, and the owner of the adjoining property to quiet title to the drainfield despite their agreement "to grant access for maintenance of OSS [onsite septic system] to Bush House B&B. Access granted in the form of a recorded easement agreeable to both parties." (CP 633.) The Snohomish County Superior Court granted summary judgment against the Eleazers holding as follows:

> C. Even if Eleazers did not have actual notice of the SHD Letter and Covenants, they did have actual knowledge of the OSS in the front yard of their property before they purchased.
>
> D. Eleazers contractually promised to grant an OSS easement, which was the direct underlying purpose of the SHD letter and Covenants.
>
> ***
>
> H. Eleazers are in breach of the form 34 promise to grant an OSS easement to the Bush House property.

(CP 755-60.)

The Eleazers appealed that decision. The court of appeals reversed in part but also held that "the Eleazers are not entitled to receive more than they bargained for in the REPSA" and ordered the Eleazers to make a good faith offer of easement terms for the OSS to their seller. *Eleazer v. Bush House, LLC*, No. 70513-0-I, slip op. at 8 (Wn. Ct. App., August 25, 2014.) (unpublished).

Prior to their appeal of the *Bush House* case, the Eleazers also sued First American and Talon, attempting to lay the blame on them for the consequences of having a drainfield in their front yard. In this case, a different Snohomish County superior court judge again entered summary judgment against the Eleazers, holding, in part,

> Here the plaintiffs did know about the existence of the drain field and the septic system for the Bush House and the general location of those encroachments and, more importantly to the Court's view, they had agreed to convey an easement so the Bush House could continue to use the on-site septic system and the drain field.
>
> ***
>
> I agree with the defense characterization that there has been no actual loss from those recorded documents above and beyond the loss that would have been occasioned by the Eleazers' concession to the existence of those facilities and their agreement to convey an easement.

(RP 54, 58.)

The Eleazers acknowledge that their claims in this case arise from two contracts: Their title insurance policy and escrow instructions. Although the Eleazers clothe some of their arguments in concepts that evoke tort law, there is no dispute that this is a contract case in which the terms of the contracts control. First American properly denied coverage

for a number of reasons, in particular because the title policy excludes risks "[t]hat are created, allowed, or agreed to by You, whether or not they appear in the Public Records." (CP 545.) Five judges in two cases have carefully reviewed the facts and circumstances surrounding the Eleazers' claims and all have concluded that the problem the Eleazers complain about was caused by their own agreement to grant an easement for a septic system in their yard. As for the escrow instructions, they define and limit the duties of the escrow agent. The escrow agent's duties do not include duties to search for and disclose documents or advise the parties on the merits of the transaction. Accordingly, the superior court properly dismissed the Eleazers' complaint and that decision should be affirmed.

II. STATEMENT OF THE CASE

A. Factual Background

The Eleazers purchased a residential property in Index, Washington, in May 2007 ("Eleazer Property") from Loyal Mary Nordstrom. (CP 567.) Ms. Nordstrom also owned the adjoining property known as the Bush House, a shuttered 12-room hotel and restaurant. (CP 567-68). Nordstrom initially rejected the Eleazers' entreaties to purchase the Eleazer Property. (CP 581.) She had listed the Bush House along with the residential property for sale together because they had been joined in common ownership since the hotel was first built in 1898. (CP 580-81.) In addition, the onsite septic system ("OSS") for the Bush House included a substantial drainfield located on the residential lot in front of the residence. (CP 580.)

Previously, in 1993, Nordstrom had applied for and received approval from the Snohomish Health District ("SHD") to repair the OSS. (CP 580.) On March 26, 1993, SHD sent a letter to a representative of the Bush House approving the repair with conditions. (CP 605-06.) One of the conditions was that "[a]ll components of onsite sewage facility on separate tax lots from the Bush House Restaurant must be tied to the Bushhouse via recorded easements." (CP 606.) The letter itself was recorded under Snohomish County recording number 9306031288 (the "SHD Letter"). (CP 606-07.) Instead of an easement, Nordstrom proposed a Declaration of Restrictive Covenants which treated both the residential property and the Bush House as one lot for land use purposes. (CP 580.) SHD accepted Nordstrom's proposal and a document entitled Declaration of Restrictive Covenants was recorded on May 24, 1993 under Snohomish County Recording number 9305240656 (the "Covenants"). (CP 609.)

Despite Nordstrom's initial rejection of the Eleazers' request to purchase the residential property, the Eleazers persisted for several months. (CP 613.) According to Nordstrom's real estate agent, during the negotiation process, the Eleazers became intimately familiar with both properties. (CP 613.) He testified that he provided the Eleazers with copies of the 1993 as-built plans for the Bush House OSS prior to their agreement to purchase. (*Id.*) Ms. Nordstrom testified as follows:

> When Ty Chamberlain, my real estate agent in 2007, came to me with the Eleazer offer, the entire idea was that Eleazers would prepare an OSS easement, seek approval of the form of the easement from SHD and then, after the SHD-approved OSS easement was granted and recorded, the Declaration of

> Restrictive Covenants could be cancelled. Eleazers knew the commercial drainfield for the Bush House was in their front yard before they purchased it. They also knew that they needed to grant an OSS easement so the Bush House Hotel and Restaurant could continue to use and maintain that commercial drainfield.

(CP 581; *see also* CP 614.) The Eleazers' original purchase offer did not address the easement, so Nordstrom's real estate agent prepared a "Form 34" addendum ("Form 34") which stated as follows: "Buyer agrees to grant access for maintenance of OSS to Bush House B&B. Access granted in the form of a recorded easement agreeable to both parties." (CP 633.)

The closing of the transaction was handled by Talon, which was then a division of First American. The Eleazers executed the Closing Agreement and Escrow Instructions ("Escrow Instructions") on May 8, 2007. (CP 558-64.) The Escrow Instructions incorporate by reference the parties' Purchase and Sale Agreement and any attachments, amendments or addenda. (CP 558. "Terms of Sale"). Although Talon had a copy of the parties' Residential Real Estate Purchase and Sale Agreement ("REPSA"), neither the Eleazers nor Nordstrom provided a copy of the Form 34 to Talon. (CP 805-06.) The Eleazers contend that they asked the escrow agent at closing about the easement and that the agent reviewed the closing papers and said there was nothing about an easement in them. (CP 838, 936.) The Eleazers, however, did not (1) provide a copy of the Form 34 to the escrow agent at that time; (2) contact Nordstrom regarding the issue; or (3) take any action to perform their contractual obligation to provide an easement. Instead, they sat on their hands and allowed the transaction to close without executing an easement. The Eleazers attempt to explain away their inaction by stating, "Ms.

Nordstrom never presented us with an easement agreement prior to closing, and we closed our purchase on May 10, 2007 without one." (CP 568.)

> The Escrow Instructions provide as follows:
>
> **Title Insurance**. The closing agent is instructed to obtain and forward to the parties a preliminary commitment for title insurance on the property and on any other parcel of real property that will be used to secure payment of any obligation created in the transaction (referred to herein as "the title report"). The closing agent is authorized to rely on the title report in the performance of its duties and shall have no responsibility or liability for any title defects or encumbrances which are not disclosed in the title report.

(CP 558.) The following provisions of the escrow instructions appear under the warning, "MATTERS TO BE COMPLETED BY TITLE BUYER AND SELLER IMPORTANT—READ CAREFULLY."

> The following items must be completed by the parties, outside of escrow, and are not part of the closing agent's duties under these instructions:
>
> **Disclosures, Inspection and Approval of the Property**. . . . The closing agent shall have no liability with respect to the accuracy of any disclosures made, or for the physical condition of the property, or any building improvements, plumbing, heating, cooling, electrical, septic or other systems on the property, and no responsibility to inspect the property, or to otherwise determine or disclose its physical condition, or to determine whether any required disclosures have been made, or whether any required improvements, additions, or repairs have been satisfactorily completed.
>
> ***
>
> **Approvals and Permits**. The parties are advised to consult with their attorneys to determine whether any building, zoning, subdivision, septic system, or other construction or land use permits or approvals will be required, either before or after the closing date. The closing agent shall have no responsibility with respect to any such permit or approval, and shall have no liability arising from the failure of any party to obtain, or from the refusal of any governmental authority to grant, any such permit or approval.

(CP 560.) The Eleazers also signed a separate Certification that states as follows: "We, the undersigned, certify that all conditions of the purchase agreement for the above referenced property, including subsequent addendums, have been met." (CP 636.)

The escrow instructions provide a "Notice to Parties" that a Limited Practice Officer would "select prepare and complete certain documents on forms which have been approved for their use" identified on an attached list. (CP 561.) The attached list identifies numerous forms approved by the Limited Practice Board. On the list, Statutory Warranty Deed and Excise Tax Affidavit Forms are the only documents checked. (CP 562.) There are no Limited Practice Board approved easement forms on the list. (*Id.*) The Notice to Parties also provides as follows:

> THE LIMITED PRACTICE OFFICER IS NOT ACTING AS THE ADVOCATE OR REPRESENTATIVE OF EITHER (OR ANY) OF THE PARTIES.
>
> THE DOCUMENTS PREPARED BY THE LIMITED PRACTICE OFFICER WILL AFFECT THE LEGAL RIGHTS OF THE PARTIES.
>
> THE PARTIES INTERESTS IN THE DOCUMENT MAY DIFFER.
>
> THE PARTIES HAVE THE RIGHT TO BE REPRESENTED BY LAWYERS OF THEIR OWN SELECTION.
>
> THE LIMITED PRACTICE OFFICER CANNOT GIVE LEGAL ADVICE AS TO THE MANNER IN WHICH THE DOCUMENTS AFFECT THE PARTIES.

(CP 561.)

A Supplement to Closing Agreement and Escrow Instructions states that "SELLER HAS APPROVED, SIGNED, AND DEPOSITED THE FOLLOWING DOCUMENTS WITH THE CLOSING AGENT

UNDER THESE INSTRUCTIONS: [X] Statutory Warranty Deed."

Following that, the Eleazers separately initialed the following clause:

> **Conditions of Parties' Agreement Satisfied**. All terms and conditions of the parties' agreement have been met to my satisfaction, or will be met, satisfied, or complied with outside of escrow.

Below that, the Supplement contains the following additional clauses:

> **Title Report Approved**. The Preliminary Commitment of Title Insurance, including the legal description of the property and all attachments, supplements, and endorsements, to that report issued by The Talon Group/Bellevue under order number 1003141, are approved by me and made a part of these instructions by this reference.
>
> ***
>
> BY SIGNING THIS DOCUMENT, THE BUYER FURTHER ACKNOWLEDGES:
>
> **Property Approved**. I have had adequate opportunity to review the seller's written disclosure statement, if any, and to inspect the property and to determine the exact location of its boundaries. The location and physical condition of the property and any buildings, improvements, plumbing, heating, cooling, electrical or septic systems on the property are approved. I understand that all inspections and approvals of the locations and physical condition of the property are my sole responsibility, and are not part of the closing agent's duties and responsibilities. I hereby release and agree to hold the closing agent harmless from any and all claims of liability for loss or damage arising or resulting from any physical condition or defect on the property, or from the location of its boundaries.

(CP 563.)

The Eleazers obtained a title insurance policy from First American ("Title Policy"). (CP 546-55.) Neither the preliminary commitment for title insurance nor the Title Policy itself listed as special exceptions to coverage the recorded SHD Letter or Covenants. (CP 546-55 & 639-48.) The Title

Policy insures against "actual loss" resulting from 29 covered risks, subject to the exceptions and exclusions in the policy. (CP 546.) One such exclusion is as follows:

> 4. Risks:
>
> a. that are created, allowed, or agreed to by You, whether or not they appear in the Public Records.

(CP 553.)

In May 2011, four years after they had purchased their property, the Eleazers submitted a claim to First American through their attorney at the time, Kem Hunter. (CP 121-23.) The Eleazers' claim asserted that they had discovered the two recorded documents concerning the drainfield that were not listed in the Schedule B exceptions to the Title Policy, the SHD Letter and the Covenants. The Eleazers asserted that these recorded documents affected the marketability of their title and constituted an encumbrance on their title. The Eleazers made no mention of their prior knowledge of the Bush House septic drainfield on their property or their own written agreement to grant an easement to the Bush House for the drainfield. (*Id.*)

First American assigned the Eleazers' claim to Daryl Lyman, a Senior Claims Counsel in the company's Seattle Office. (CP 147.) He investigated the Eleazers' claim and concluded that the marketability of their title was not affected by the documents because they did not affect the validity of title to the property, although they might affect the property's value. (CP 149-150.) Mr. Lyman also reasoned that, while the documents might be an encumbrance on the Eleazers' title, they did not result in any actual loss or damage to the Eleazers because the instruments did not restrict

the Eleazers' present use of their property. Accordingly, on July 14, 2011, Mr. Lyman sent a letter to the Eleazers denying their claim. (*Id.*)

On October 18, 2011, Mr. Lyman received an 18-page letter, accompanied by voluminous enclosures, from Mr. Hunter. (CP 154-92.) In addition to disputing Mr. Lyman's coverage analysis, Mr. Hunter's letter also asserted claims for breach of contract and breach of fiduciary duty. These new claims were not based upon the Title Policy issued to the Eleazers. Rather, Mr. Hunter alleged that Talon and First American each had a duty to discover and disclose the recorded documents to the Eleazers before they closed on the purchase of their property. The newly asserted breach-of-contract claim was based on the closing instructions given to Talon. Mr. Hunter also proclaimed the Eleazers' intent to sue First American if it did not accede to their demands. (*Id.*)

Upon receiving this threat of litigation, Mr. Lyman followed his office's usual practice and retained outside counsel to advise the company. (CP 1510-11.) The purpose for hiring an attorney was to obtain a legal analysis of the Eleazers' positions and to advise First American as to its rights and obligations under the Title Policy as well as to assess the newly asserted non-policy claims based on the Escrow Instructions. (*Id.*) On November 1, 2011, Mr. Lyman contacted Ann T. Marshall of Bishop, Marshall & Weibel, P.S., who subsequently responded to the Eleazers' attorney. (*Id.*) Ms. Marshall presented a detailed analysis of the facts and legal issues raised by Mr. Hunter's October 17 letter to explain why the Eleazers' claims under their Title Policy and Escrow Instructions should be

denied. (CP 198-203.) Ms. Marshall also requested that Mr. Hunter provide her with a copy of the completed Seller's Disclosure Statement, also known as "Form 17." Ms. Marshall stated as follows:

> Presumably Ms. Nordstrom provided the Eleazers the required Form 17 pursuant to RCW 64.06.020, which specifically asked, among other things:
>
> > Are there any zoning violations, nonconforming uses, or any unusual restrictions on the property that would affect future construction or remodeling?
> >
> > Are there any covenants, conditions, or restrictions recorded against the property?
>
> At your convenience, please provide me a copy of the completed Form 17. If Ms. Nordstrom disclosed the subject issues to the Eleazers, such disclosure prior to closing would provide for another exception under the policy. Exclusion 4.a. provides that the Eleazers are not insured against loss resulting from risks that are created, allowed, or agreed to, whether or not they appear in the Public Records.

(CP 202-03).

Mr. Hunter responded to Ms. Marshall's request for a copy of the Form 17 on December 29, 2011. (CP 205-13.) He provided copies of pages 2 through 5 of the Form 17. Curiously, Hunter did not provide a copy of page 1, which is the page containing the disclosures quoted above in Ms. Marshall's letter, nor has that page ever been produced to First American. Moreover, Mr. Hunter again neglected to mention that the Eleazers were aware of the drainfield and had agreed to grant an easement to the Bush House for it prior to closing. (*Id.*)

In another letter, dated February 7, 2012, to Ms. Marshall, Mr. Hunter reported that the Eleazers' septic drainfield had failed and SHD had

cited the Covenants as potentially limiting the location where the Eleazers could construct a new drainfield on their property. (CP 215-20.) The Eleazers had been using a septic system located in their back yard to service their house. When it failed, they filed an application with SHD to connect to the Bush House OSS located in the front yard. SHD denied the application because "it is not readily clear who has ownership/control of the OSS pressure bed." (CP 217.) Mr. Hunter requested that First American initiate an appeal of the SHD decision. (CP 216.)

At this time, Ms. Marshall's colleague, Kennard M. Goodman, also began providing legal advice to First American concerning the Eleazers' claims. In a letter dated February 22, 2012, Mr. Goodman provided a detailed analysis of the facts, the claim and the applicable policy provisions. (CP 222-27.) He stated that the "Declaration of Restrictive Covenants have an ambiguous impact on the Eleazers' use of their property; solely for purposes of the present claim, however, First American accepts that they are recorded documents within the scope of Covered Risk Nos. 5 and 9 in that they limit the location where the Eleazers can install a septic system on their property." (CP 227.) Therefore, First American gave the insureds the benefit of the doubt by accepting coverage on the ground that the Eleazers now had a present, actual loss. (*Id.*)

The policy's Conditions provide, among other things:

> 4. OUR CHOICES WHEN WE LEARN OF A CLAIM:
>
> a. After We receive Your notice, or otherwise learn of a claim that is covered by this Policy, Our choices include one or more of the following:

***

(5) End the coverage of this Policy for the claim by paying You Your actual loss resulting from the Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay.

***

b. When we choose the options in paragraphs 4.a. (5), (6) or (7), all Our obligations for the claim end, including Our obligation to defend, or continue to defend, any legal action.

c. Even if We do not think that the Policy covers the claim, We may choose one or more of the options above. By doing so, We do not give up any rights.

(CP 553.) First American exercised its option under Section 4(a)(5) of the Title Policy to pay the Eleazers their actual loss based on the property's diminution in value ("DIV") resulting from the recorded instruments. (CP 227.) In the same letter, First American also offered to settle the claim without a DIV appraisal by paying the additional cost of a high-pressure septic system that could be installed in the Eleazers' back yard. (*Id.*) The Eleazers never responded to the settlement offer (before it was revoked over a year later). (CP 93-288.)

Kem Hunter sent Ken Goodman a couple more letters in early 2012. On February 23, 2012, Hunter wrote, "I will analyze your settlement plan, discuss it with my client, and respond later." (CP 229.) Hunter went on to state that he was proceeding with an appeal of the SHD decision. Then stated, "[w]e acknowledge that you have not authorized this action, nor have you committed to pay any of the legal fees associated with this appeal." (CP 229.) He then requested several abstracts of title, "as a gesture of good faith."

(CP 229.) As explained in depth later, title insurance companies do not provide abstracts of title, they provide title insurance policies, which are quite different. On March 5, 2012, Hunter wrote again stating, "I am continuing to work on a formal response to your letter of February 23," and then requested "clarification" of certain matters that were clearly explained in Goodman's earlier letter. (CP 237-8.) Thereafter, Hunter never responded to First American's settlement offer. In none of these letters did Hunter mention that the Eleazers had all along known about the OSS in their front yard and had agreed to grant Nordstrom an easement for it.

The Eleazers went through three changes of attorneys in 2012 and 2013. (CP 242, 258 & 98.) In an email dated January 29, 2013, Goodman sent a copy of his February 22, 2012 letter (with minor corrections) to the Eleazers' new attorney, Michele McNeill. (CP 245-52.) McNeill also failed to respond to First American's settlement offer. Instead, on February 22, 2013, McNeill sent Goodman an email stating, "I am turning the Eleazers' claims against First American over to another attorney with more experience in bad faith insurance claims than myself. You should be hearing from them in the next couple of weeks." (CP 254.) On March 21, 2013, attorney David I. Goldstein sent a 20-day IFCA notice to the Office of the Insurance Commissioner and a copy to Mr. Goodman. (CP 258.) Although Mr. Goldstein also never responded to First American's settlement offer, Mr. Goodman interpreted the IFCA notice as a rejection of the offer and, on March 26, 2013 sent a letter, with a copy of the coverage acceptance letter, to Mr. Goldstein stating as follows:

> No one representing the Eleazers has ever offered any explanation why they believe First American's analysis is wrong or responded to the proposal based on the differential in septic-system costs. First American is certainly willing to listen to the Eleazers' coverage analysis, but, to date, no one has offered any additional information for the title company to consider.
>
> In light of all the circumstances, First American will move ahead with retaining an independent appraiser to complete a diminution-in-value appraisal of the Eleazers' property. The appraiser will need to visit the Eleazers' property. Can you please let me know whether the appraiser can contact the Eleazers directly to schedule a visit or whether the appointment should be made through your office?

(CP 261.) Mr. Goldstein never responded to Mr. Goodman's letter.

On May 7, 2013, yet another attorney for the Eleazers contacted Mr. Goodman. Sean Gamble sent a letter stating, "[w]e are prepared to work with you to ensure that the Eleazers are covered under the policy and made whole pursuant to Washington law." (CP 98-100.) Gamble included with the letter a "draft" complaint (which he actually filed that day), and a "third and final" IFCA Notice. (CP 101.) Like all of the Eleazers' previous attorneys, Gamble failed to respond to the settlement offer and did not provide any substantive response to First American's coverage analysis. He also did not give permission for an appraiser to visit the Eleazers' property. (CP 98-100.)

On May 20, Goodman provided a detailed and substantive response to Mr. Gamble's letter and included a compendium of the previous correspondence that had been exchanged between First American and the Eleazers' attorneys. (CP 111-267.) On May 21, 2013, Goodman sent a letter to Anthony Gibbons retaining him to do the DIV appraisal but informing him that he had not gotten approval from the Eleazers to do the

appraisal or visit the property and giving him Mr. Gamble's contact information. (CP 269-71.) In none of these subsequent letters or in the Complaint did the Eleazers, or their attorneys, disclose to First American their prior knowledge of the drainfield and their agreement to provide an easement for it. (CP 98-258.)

In June 2013, First American finally learned that the Eleazers actually knew before they bought the Eleazer Property that the Bush House's drainfield was located in their front yard. In a letter dated June 4, 2013, to Mr. Goodman, Sean Gamble sent a copy of the decision on summary judgment motions entered in *Eleazer v. Bush House L.L.C.* (CP 273-81.) In that decision, the Court noted that the Eleazers' purchase contract included their agreement to grant an easement for the Bush House to use and maintain the drainfield. Specifically, the superior court held as follows:

> C. Even if Eleazers did not have actual notice of the SHD Letter and Covenants, they did have actual knowledge of the OSS in the front yard of their property before they purchased.
>
> D. Eleazers contractually promised to grant an OSS easement, which was the direct underlying purpose of the SHD letter and Covenants.

(CP 279 & 759.) Also of significance, the court deleted language from the proposed order that characterized the Covenants as a land use regulation with rights of enforcement against the Eleazers. (*Id.*) Upon further investigation, Goodman discovered the Eleazers' declarations where they admitted: (1) they actually knew the Bush House drainfield was located in their front yard before they closed; and (2) they had agreed to grant an easement for the Bush House to use the drainfield. (CP 568.) Upon learning this information,

First American withdrew its previous acceptance of coverage and again denied coverage on the additional grounds that the Eleazers had allowed or agreed to the risk (Exclusion No. 4(a)) and had failed to cooperate by withholding this material information from First American. (CP 283-88.)

The superior court in *Eleazer v. Bush House L.L.C.*, ordered the Eleazers to perform on their promise expressed in Form 34 to grant an easement to the Bush House. If the Eleazers failed to do so, the order provided that the court would appoint a special master to grant and record such an easement. (CP 275-81 & 755-61.) The court later appointed a special master and an easement was recorded.

The Eleazers appealed the superior court decision. On August 25, 2014, the court of appeals reversed and remanded holding that the superior court erred in transforming a general promise to grant an easement into a detailed easement agreement. *Eleazer v. Bush House*, No. 70513-0-1 slip op. at 1 (Wn. Ct. App., August 25, 2014) (unpublished) (CP 769-90.) However, the court of appeals also held that the Eleazers were nevertheless bound by their Form 34 promise to convey an easement. The court of appeals remanded, directing the Eleazers to make a good faith offer of an easement to Nordstrom and allowing Nordstrom to seek rescission of the REPSA should the Eleazers fail to do so. *Id.* at 16-19. As of this date, the Eleazers and Nordstrom have neither agreed on an easement nor rescinded.

B. Procedural History

Despite the fact that First American had accepted coverage, agreed to pay the Eleazers their full diminution of value as provided under the

terms of the Policy, and offered to settle the claim by paying the differential cost for the installation of a more expensive high-pressure septic system in their back yard, the Eleazers filed their initial Complaint against First American and Talon on May 7, 2013. (CP 1018-25.) In the Complaint, the Eleazers alleged that Talon breached the escrow instructions and its fiduciary duties by failing to search and disclose encumbrances to the Eleazers. (*Id.*) The Eleazers alleged that First American breached the Title Policy and engaged in bad faith by failing to "defend" the Eleazers in a quiet title action that they initiated (without First American's consent) and "ignored plaintiffs' requests for help and assistance before and during the quiet title action." (CP 1022.) After First American learned that the Eleazers had agreed to grant an easement for the OSS and reversed its previous acceptance of coverage, the Eleazers filed their Second Amended Complaint. (CP 1002-09.) The Second Amended Complaint is virtually identical to the Complaint.[1]

Discovery commenced in late 2013 and continued throughout 2014 and 2015. In January 2016, the parties filed cross-motions for summary judgment. Although the Eleazers chose to dramatize certain facts, omit others, and present facts out of temporal sequence, as they do in the Brief

[1] Plaintiff filed an Amended Complaint on May 31, 2013 (before First American denied coverage.) (CP 1010-17.) It differs from the Complaint in that it shows the name of First American, which was inexplicably blacked out in the Complaint and adds an additional paragraph to the prayer for relief, ¶ 68 seeking a declaratory judgment. The Second Amended Complaint is identical to the Amended Complaint except that it removes references to "Talon, LLC" which is a completely unrelated entity.

of Appellant, the parties generally agreed in their summary judgment briefing that the essential material facts are not disputed. (CP 70 & 390.)

At the summary judgment hearing, it was quite clear that Judge Bowden had carefully reviewed the entire record and applicable law. In his oral ruling, the judge held as follows:

> Here the plaintiffs did know about the existence of the drain field and the septic system for the Bush House and the general location of those encroachments and, more importantly to the Court's view, they had agreed to convey an easement so the Bush House could continue to use the on-site septic system and the drain field.
>
> If that easement was going to be too burdensome on the Eleazers, they could walk away prior to closing. If they found it was too burdensome and they couldn't reach agreement after closing this transaction, they still could have sought rescission of this agreement for the same reason that the parties couldn't come to an agreement.
>
> ***
>
> I'm troubled by the circuitous reasoning that by not disclosing for some two years to the title insurance company the fact that the Eleazers knew of the drain field and septic system and had expressly agreed to convey an easement for the continued use of those encroachments by the Bush House that somehow the insurance company is now obligated to provide benefits to them for having misperceived the plaintiffs' knowledge of those facts at the time when they initially accepted coverage.
>
> ***
>
> It is clearly the existence of the drain field and the rights, if any, that the Bush House had to its continued use that diminished the property's value or marketability. The Eleazers were well aware of those facts and had agreed to grant an easement for the continued use of the septic system and drain field. So it is beyond question, in my view, as to how that would not be a risk to which the Eleazers agreed at the time of sale, thus bringing those losses or diminution of value within the express exclusion of section 4A.
>
> ***

> I agree with the defense characterization that there has been no actual loss from those recorded documents above and beyond the loss that would have been occasioned by the Eleazers' concession to the existence of those facilities and their agreement to convey an easement. There was never a claim brought, initially at least, against their title that would warrant a defense of that action, although those claims may have indirectly been asserted in some of the counterclaims.
>
> I've spoken to the value and where the loss of value really arises, and it doesn't have to do with failures on the part of Talon or the insurance company.
>
> ***
>
> I don't find that there is any bad faith in accepting coverage and then denying that coverage when those facts came to light. So, for all of those reasons, I will deny the plaintiffs' motion for partial summary judgment.

(RP 54-59.) On that basis, the superior court entered summary judgment dismissing the Eleazers' Complaint with prejudice and granting First American's counterclaim for declaratory judgment. (CP 1-4.)

III. ARGUMENT

A. First American Properly Denied Coverage.

First American denied the Eleazers claim twice and accepted it once. Initially, First American denied coverage for two reasons: (1) the SHD Letter and Covenants did not render the Eleazer Property unmarketable; and (2) the Eleazers had not incurred any "actual loss" as a result of the recorded SHD Letter and Covenants. Several months later, First American accepted coverage after the Eleazers' attorney reported that SHD rejected their application to connect to the Bush House drainfield because the recorded Covenants created a question regarding ownership and control of the drainfield. Many months later, First American learned for the first time that the Eleazers knew about the

existence of the Bush House drainfield in their front yard and had agreed to grant an easement for it as part of their property purchase. Based upon this new information, First American reversed its interim acceptance of coverage and again denied coverage for two additional reasons: (3) the claimed risk was "created, allowed, or agreed to" by the Eleazers; and (4) the Eleazers failed to cooperate with First American in the handling of the claim by withholding material information relevant to coverage. (CP 283-4 & 286-88.)

1. The Nature of Title Insurance.

a. A title insurance policy is not an abstract of title.

Title policies are not abstracts of title that purport to list everything that has ever been recorded affecting title to a particular property. Abstracts of title are defined by Washington statute as follows:

> "Abstract of title" means a written representation, provided under contract, whether written or oral, intended to be relied upon by the person who has contracted for the receipt of this representation, listing all recorded conveyances, instruments, or documents that, under the laws of the state of Washington, impart constructive notice with respect to the chain of title to the real property described. An abstract of title is not a title policy as defined in this subsection.

RCW 48.29.010(3)(b). Preliminary commitments for title insurance are not abstracts of title either. RCW 48.29.010(3)(c) provides as follows:

> "Preliminary report," "commitment," or "binder" means reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and other matters as may be incorporated by reference. The reports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance

> of an abstract of title applicable to the issuance of any report. The report is not a representation as to the condition of the title to real property, but is a statement of terms and conditions upon which the issuer is willing to issue its title policy, if the offer is accepted.

The Eleazers allege that First American had a duty to disclose the SHD Letter and Covenants to them prior to closing and, if it had, they would not have purchased the property. Since the preliminary commitment issues before closing and the title policy comes after closing, the Eleazers necessarily contend that the preliminary commitment was deficient. But the Washington Supreme Court, relying on RCW 48.29.010, has repeatedly rejected the Eleazers' position, holding that title insurance companies do not have a general duty to search and disclose potential title defects when issuing preliminary commitments. *Centurion Properties III, LLC v. Chicago Title*, No. 91932-1, slip op. at 7. (Wash., July 14, 2016); *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 537-41, 39 P.3d 984, 990-91 (2002). Accordingly, First American had no duty to disclose the SHD Letter and Covenants to the Eleazers.

Because title insurance policies are not abstracts of title, title insurance companies do not have a duty to provide an abstract of title to an insured simply because they request it. Accordingly, when Kem Hunter requested an abstract of title, First American was under no obligation to provide one. Understandably, title insurance companies generally do not provide abstracts of title upon request because, to do so, would expose them to unlimited negligence liability as abstractors of title. Rather, in return for a payment of a premium, they provide policies of title insurance

that are subject to the coverages, exceptions, exclusions and conditions of a contract of title insurance. We know of no law, and the Eleazers have cited none, that requires a title insurance company, in order to comply with its duty of good faith, to provide a free abstract of title upon demand.

b. Title insurance is a contract of indemnity that requires actual loss.

Title insurance is a contract of indemnity that insures the property owner against actual loss. *Securities Serv., Inc. v. Transamerica Title Ins. Co.*, 20 Wn. App. 664, 668-70, 583 P.2d 1218, 1220-1221 (1978). It does not guaranty clear title and it does not obligate the insurer to initiate litigation to clear an alleged encumbrance from title. *Id.* The Title Policy states in the first sentence on page 1, "[t]his Policy insures You against actual loss . . . ." As explained later, neither the SHD Letter nor the Covenants, in and of themselves, cause any actual loss to the Eleazers.

c. First American did not have a duty of defense in this case.

First American did not have a duty to defend the Eleazers because a) there was never a claim brought against the Eleazers' title by anyone at any time for which a defense was required, and b) there was no coverage under the Policy. The Eleazers sued SHD and the Bush House to quiet title. Nordstrom intervened in that action. The Bush House asserted three counterclaims in that action: 1) Interference with Prospective Advantage, 2) Violation of CR 11, and 3) Violation of RCW 4.84.185 (frivolous claim statute). (CP 510-24.) Nordstrom brought a counterclaim for specific enforcement of the real estate contract to grant an easement and for

damages relating to Eleazers' breach of that agreement. (CP 503-06.) SHD did not file a counterclaim and there is no record of it ever seeking to enforce the SHD Letter or Covenants. Accordingly, there was no action against the Eleazers relating to the SHD Letter or Covenants. Moreover, the Eleazers never tendered a claim regarding these counterclaims to First American. Rather, the Eleazers sought First American's assistance in clearing title. A title company does not have a duty to instigate or prosecute litigation to clear title. *Securities Serv.*, 20 Wn. App. at 668-70.

Furthermore, the duty of defense only extends to covered claims. The Policy states on page 1, "We will defend Your Title in any legal action only as to that part of the action which is based on a Covered Risk and which is not excepted or excluded from coverage in this Policy." (CP 546.) First American would not be required to defend in this case because the counterclaims did not implicate covered risks.

2. First American Properly Denied Coverage for Four Independent Reasons.

a. The Eleazers suffered no actual loss due to a covered risk.

Neither the SHD Letter nor the Covenants caused any actual loss to the Eleazers. The SHD letter does not constitute an encumbrance. It is merely a letter approving the Bush House's proposal for repair of its OSS with conditions. (CP 605-06.) One of the conditions is "[a]ll of the components of onsite sewage facility on separate tax lots from the Bush House Restaurant must be tied to Bushhouse via recorded easements." (CP 606.) The SHD Letter is not an easement, nor does it create an

easement. Accordingly, the SHD Letter has no impact on title. Washington courts have repeatedly held that a title company has no duty to create an exception to coverage for a recorded document that does not affect title. The Supreme Court rejected such a claim in *Lombardo v. Pierson*, 121 Wn.2d 577, 582, 852 P.2d 308 (1993). ([Appellant] fails to cite any cases adopting the proposed broad rule that a title company must disclose all recorded documents, regardless of whether they implicate title.); *see also*, *Klickman v. Title Guar. Co of Lewis Cnty.*, 105 Wn.2d 526, 716 P.2d 840 (1986) ("Put simply, the agreement here is not a title defect because it does not affect title.") There is no reason that a title company would set up an exception to coverage for the SHD letter any more than it would specifically call out every one of the potentially thousands of documents recorded in the chain of title to a property.

Likewise, the Covenants do not cause any actual loss to the Eleazers. The operable portion of the Covenants state that "all parcels of property as described above are to be considered as one total building lot." (CP 609.) There has been no enforcement action by SHD, Snohomish County or anyone else regarding the Covenants. In fact, Snohomish County accepted and recorded the deed to the Eleazers and thereafter granted permits to the Eleazers to extensively remodel their house. Even after the Eleazers sued the SHD, Nordstrom, and the Bush House none of those parties counterclaimed to enforce the Covenants. After pursuing the case through judgment in the superior court and an appeal, neither the superior court nor the court of appeals concluded that the SHD Letter or

Covenants had any impact on the Eleazers' title. (CP 755-61 & *Eleazer v. Bush House*, No. 70513-0-1.) The superior court, in fact, specifically deleted such references from the proposed order on summary judgment and held, "Eleazers contractually promised to grant an OSS easement, which was the direct underlying purpose of the SHD letter and Covenants." (CP 759.) Both courts concluded that the Bush House's rights in the OSS arose from the Eleazers' express promise in Form 34 of the REPSA to convey an easement to the Bush House. (CP 759-80; *Eleazer v. Bush House*, *slip op.* at 8.) So as matters stand today, the Eleazers have suffered no loss as a result of the SHD Letter or Covenants. If the Eleazers suffer a loss, it will be because of their promise to convey an easement in Form 34, which was a voluntary act that is expressly excluded from coverage under the Title Policy.

Moreover, a restrictive covenant is unenforceable due to both merger and abandonment if all of the property at issue was owned by one party at the time the covenant was created (or afterward) and, when the property is thereafter separated, nothing is done to encumber the parcel being conveyed with the covenant. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1386 (1994) (restrictive covenants are unenforceable due to merger, release and/or abandonment); *also Schlager v. Bellport*, 118 Wn. App. 536, 76 P.3d 778 (2003) (the doctrine of merger applies to easements, covenants, and equitable servitudes.) Here, there was merger when the Covenants were first created and recorded, as Ms. Nordstrom owned all the subject property at that

time. They were not re-established when the property was sold because Ms. Nordstrom did not expressly reserve them in her deed.

The efficient proximate cause rule has no application in this case. The cases cited by the Eleazers and most, if not all, other reported cases applying the efficient proximate cause rule involve "all risk" homeowners' or builder's insurance policies.[2] The rule provides that "[w]here a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the 'proximate cause' of the entire loss." *Graham*, 98 Wn.2d at 538. "Proximate cause" is defined as that cause "which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which the event would not have occurred." *Id.*

First, the loss at issue in this case was not caused by a "peril" typically insured against by an "all risk" homeowners or builder's insurance policy. Those cases typically involve perils such as mudslides, floods or construction failures. In this case, the Policy insured against "actual loss" incurred because "someone else has a right to limit your use of the Land." (CP 546.) Second and related is that, in this case, it was not someone else that limited the Eleazers' use of their land, it was the Eleazers who did it by signing Form 34. The 1993 SHD Letter and

[2] The Eleazers cite *Vision One, LLC v. Philadelphia Indemnity Ins. Co.*, 174 Wn.2d 501, 276 P.3d 300 (2012); *Villella v. PEMCO*, 106 Wn.2d 806, 725 P.2d 957 (1986) and *Graham v. PEMCO*, 98 Wn.2d 533, 656 P.2d 1077 (1983).

Covenants were not a proximate cause of the loss because the Eleazers, for their own independent reasons, agreed to grant an easement. They were free to not purchase the property if granting an easement for the OSS was unacceptable to them. The SHD Letter and Covenants did not compel the Eleazers to sign Form 34. In other words, Nordstrom's recording of the SHD Letter and Covenants was not a cause that in a "natural and continuous sequence, unbroken by any new, independent cause" limited the Eleazers' use of their land. In fact, both the superior court and the court of appeals held that the Eleazers' independent act of signing Form 34 limited their use of the land, not the SHD Letter and Covenants. (CP 759-80; *Eleazer v. Bush House*, No. 70513-0-1 *slip op.* at 8.) Moreover, had First American set out an exception to coverage in the preliminary commitment for the SHD Letter and Covenants, it is hard to imagine how it would have made any difference. It might have informed the Eleazers of an historical fact that helped explain why the easement was necessary. But the Eleazers would still have been free to walk away from the purchase if they chose not to grant the easement. Accordingly, the SHD Letter and Covenants did not cause any actual loss to the Eleazers and First American properly denied coverage under the Title Policy.

b. <u>The recorded SHD Letter and Covenants do not render the Eleazer Property unmarketable.</u>

"Defects which merely diminish the value of the property, as opposed to defects which adversely affect a clear title to the property, will not render title unmarketable within the meaning and coverage of a policy

insuring against unmarketable title." Joel E. Smith, *Defects affecting marketability of title within meaning of title insurance policy*, 18 A.L.R. 4th 1311 (1982); *see also Dave Robbins Const., LLC v. First Am. Title Co.*, 158 Wn. App. 895, 901, 249 P.3d 625, 627 (2010) (same). There is a marked difference between economic lack of marketability, which courts hold is not covered by title insurance, and title marketability, which is covered by title insurance. *Dave Robbins Const.*, 158 Wn. App. at 901. Economic lack of marketability concerns conditions that affect the use of land, whereas title marketability involves defects affecting legally recognized rights and incidents of ownership. *Id.*

Marketable title "refers to the legal ownership of a property interest so that one having title to a property interest can withstand the assertion of others claiming a right to that ownership. But [such] title to property does not characterize the property itself as valuable, merchantable, or even usable." *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*, 152 F.3d 275, 278 (4th Cir. 1998). Thus, it is widely recognized that the existence of restrictions on development do not render title unmarketable. *Dave Robbins Const.*, 158 Wn. App. at 901 (holding that a historical designation that significantly restricted future development of the property at issue did not render title to the property unmarketable under the operative Title Policy because there were no "defects affecting legally recognized rights and incidents of ownership of [Appellant's] properties."); *see also Hebb v. Severson*, 32 Wn.2d 159, 171, 201 P.2d 156, 162 (1948). In any event, the most potent proof that the

SHD Letter and Covenants do not render the Eleazer Property unmarketable is the fact that the Eleazers themselves bought it knowing that the Bush House OSS was located in the front yard and agreed to grant an easement for it.

Accordingly, even if the Covenants could somehow limit future development, which, as explained above, for multiple reasons they cannot, they would not render title unmarketable. Further, the SHD Letter has no impact on marketability as it has no bearing on title to the Eleazer Property. Accordingly, First American properly denied coverage based upon the Eleazers' claim of unmarketability.

c. The fact that the Eleazers allowed and agreed to permit the Bush House drainfield to remain on their property when they purchased it bars coverage under the Title Policy.

The Title Policy expressly excludes risks "[t]hat are created, allowed, or agreed to by You, whether or not they appear in the Public Records." (CP 553.) The superior court and the court of appeals ruled that the Eleazers expressly agreed in the REPSA Form 34 to grant an easement so that the Bush House could maintain the OSS drainfield located on the Eleazer Property. (CP 759-60; *Eleazer v. Bush House*, No. 70513-0-1 *slip op.* at 8.) The Eleazers closed on their purchase knowing and agreeing that the drainfield was located, and would remain, in their front yard. Further, they did not demand before closing that Nordstrom remove the drainfield. The presence of the drainfield on the Eleazer Property and the Bush House's right of access for maintenance, therefore, are matters that were allowed or agreed to by the Eleazers. Accordingly, the Eleazers' claim

falls within the scope of Exclusion No. 4(a), is not covered by the Policy and was properly denied.

The Eleazers argue that their claim relates to the fact that the SHD Letter and Covenants are recorded on their property title not to the existence of the drainfield, *per se*. But, as stated above, the Title Policy only insures against *actual loss* resulting from a covered risk. It does not guaranty clear title. Accordingly, the Eleazers' claim must be tied to a covered risk that causes them a loss. That loss necessarily is that the drainfield limits the Eleazers' use of their property. As explained above, no one has sought to restrict the Eleazers' use or development of their property based on the SHD Letter or Covenants except as it relates to the Eleazers' desire to take control of the drainfield and use it for their own septic system. The only reason they are prohibited from doing so is because the Eleazers agreed in the REPSA Form 34 to grant an easement to the Bush House for the drainfield when they bought the Eleazer Property. The superior court acknowledged this when it said, "Eleazers contractually promised to grant an OSS easement, which was the direct underlying purpose of the SHD letter and Covenants." (CP 759.)

C 1031 Properties, Inc. v. First American Title Ins. Co., 175 Wn. App. 27, 301 P.3d 500 (2013) has no bearing on this case. *C 1031* involves a different form of title policy and a different exclusion than the one at issue in this case. In *C 1031,* the court held that "knowledge" under the definition section of that policy meant actual 'knowledge of the recorded easement not constructive knowledge. 175 Wn. App. at 33. *C*

1031 is totally inapposite because, in this case, First American did not deny coverage based upon a similar "knowledge" exclusion, such as Policy Exclusion 4(***b***). Rather, First American denied coverage based upon Exclusion 4(***a***), which excludes *risks* "allowed or agreed to" by the insured. The covered risk at issue in this case is that "someone else has the right to limit Your use of the Land." (CP 546.) But the Eleazers knew all about the drainfield and the Bush House's use of it prior to purchasing the property, *allowed* it to remain there, and *agreed* to grant an easement to the Bush House to use and maintain it. Accordingly, First American properly denied coverage under Exclusion 4(a).

d. The Eleazers' failure to cooperate with First American's handling of the claim by withholding material information relevant to coverage bars coverage under the Title Policy.

The Eleazers forfeited whatever rights they had under the Title Policy by withholding material information from First American. Section 5 of the Title Policy Conditions provides as follows:

> a. You must cooperate with Us in handling any claim or legal action and give Us all relevant information.
> b. If you fail or refuse to cooperate with Us, Your coverage will be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend you.

(CP 554.) "Insureds may forfeit their right to recover under an insurance policy if they fail to abide by provisions in the policy requiring them to cooperate with the insurer's investigation of their claim." *Tran v. State Farm Fire and Casualty Co.*, 136 Wn.2d 214, 224, 961 P.2d 358, 363 (1998). "Information is material when it 'concerns a subject relevant and

germane to the insurer's investigation as it was then proceeding' at the time it was made." *Id.*

When the Eleazers first submitted their claim, they did not disclose to First American their prior knowledge of the Bush House OSS in their front yard, that they allowed it to remain on the property, or their agreement to grant an easement for it in connection with their purchase of the property. The Eleazers' attorneys continued to omit that information from subsequent letters to First American. First American specifically requested information from the Eleazers relating directly to the question of what the Eleazers knew about the drainfield prior to closing. In their responsive letters, the Eleazers failed to disclose the facts regarding their prior knowledge of the drainfield and their agreement to allow it to remain. Meanwhile, the Eleazers filed a lawsuit against the Bush House in which they admitted that they had known about the drainfield prior to purchasing the property and had agreed to grant an easement for the Bush House to maintain it. Still the Eleazers made no mention of these facts to First American. Finally, on June 4, 2013, over two years after submitting their claim, the Eleazers inadvertently disclosed this information to attorneys for First American when their new lawyer sent them a copy of the court's Order on Cross-Motions for Summary Judgment. (CP 273-80.)

The information withheld by the Eleazers was "relevant and germane" to First American's investigation. First American specifically requested information regarding the Eleazers' knowledge of the drainfield prior to closing and explained why it was relevant. The Eleazers' breach

of the cooperation clause materially prejudiced First American. "Interference with the insurer's ability to evaluate and investigate a claim may cause actual prejudice." *Tran*, 136 Wn.2d at 228. Here, the Eleazers' withholding of information impaired First American's ability to investigate the claim and caused First American to accept the claim and incur costs and fees under the mistaken belief that the Eleazers had no knowledge of the drainfield prior to closing. The Eleazers' failure to cooperate with First American's investigation of the claim constitutes an additional ground for First American's denial of the claim.

B. Talon Did Not Breach its Escrow Instructions or Fiduciary Duties to the Eleazers.

An escrow agent's duties are defined and limited by its escrow instructions. *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 663, 63 P.3d 125, 129 (2003). Talon did not breach the Escrow Instructions. The role of the escrow agent is to act as a neutral third party to the transaction, in particular to facilitate the transfer of the purchase funds to the seller, pay off monetary encumbrances that the escrow agent is instructed to pay off, and record and deliver the deed. It does not search or insure title. It does not perform due diligence on the property or advise the buyer or the seller on the legal or business merits of the transaction.

1. The Escrow Instructions did not require Talon to Search Title Records and Disclose Title Matters to the Eleazers.

The Escrow Instructions do not impose a duty on the escrow agent to search and disclose recorded documents. On the contrary, the Escrow Instructions specifically state that the escrow agent has no such duty. The

Escrow Instructions state as follows:

> **Title Insurance**. The closing agent is instructed to obtain and forward to the parties a preliminary commitment for title insurance on the property. . . (referred to herein as "the title report"). The closing agent is authorized to rely on the title report in the performance of its duties and shall have no responsibility or liability for any title defects or encumbrances which are not disclosed in the title report.

(CP 558.) Furthermore, the Eleazers provided written assurance to Talon that they had received, reviewed and approved the preliminary commitment for title insurance.

> **Title Report Approved**. The Preliminary Commitment of Title Insurance, including the legal description of the property and all attachments, supplements, and endorsements, to that report, issued by The Talon Group/Bellevue under order number 1003141, are approved by me and made a part of these instructions by this reference.

(CP 563.) Moreover, the escrow agent does not have any duty to advise the parties on the merits of the transaction, inspect the property, or render legal opinions about land use laws or the suitability of the property for the buyer's intended use. The following sections of the Escrow Instructions define the limits of the escrow agent's duties in this regard:

> **Disclosures, Inspection and Approval of the Property**. . . . The closing agent shall have no liability with respect to the accuracy of any disclosures made, or for the physical condition of the property, or any building improvements, plumbing, heating, cooling, electrical, septic or other systems on the property, and no responsibility to inspect the property, or to otherwise determine or disclose its physical condition, or to determine whether any required disclosures have been made, or whether any required improvements, additions, or repairs have been satisfactorily completed.
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> **Approvals and Permits**. The parties are advised to consult with their attorneys to determine whether any building, zoning, subdivision, septic system, or other construction or

> land use permits or approvals will be required, either before or after the closing date. The closing agent shall have no responsibility with respect to any such permit or approval, and shall have no liability arising from the failure of any party to obtain, or from the refusal of any governmental authority to grant, any such permit or approval.
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> **Property Approved**. I have had adequate opportunity to review the seller's written disclosure statement, if any, and to inspect the property and to determine the exact location of its boundaries. The location and physical condition of the property and any buildings, improvements, plumbing, heating, cooling, electrical or septic systems on the property are approved. I understand that all inspections and approvals of the locations and physical condition of the property are my sole responsibility, and are not part of the closing agent's duties and responsibilities. I hereby release and agree to hold the closing agent harmless from any and all claims of liability for loss or damage arising or resulting from any physical condition or defect on the property, or from the location of its boundaries.

(CP 560 & 563.)

Despite the clear and unambiguous terms of the escrow instructions, the Eleazers nevertheless claim that Talon had a duty to search the real property records, find the SHD Letter and Covenants and deliver copies to them. In their brief, the Eleazers imply that this duty arises from the Title Contingency Addendum to the REPSA, which is incorporated by reference in the Escrow Instructions. (Brief of Appellant ("Br. App." at 25.) However, the Title Contingency Addendum imposes no additional duties on the escrow agent. In fact, it does not even mention the escrow agent. (CP 803.) Furthermore, the Eleazers signed a separate Certification that states as follows: "We, the undersigned, certify that all conditions of the purchase agreement for the above referenced property, including subsequent addendums, have been met." (CP 636.)

The Eleazers' also argue that the following provision imposed a duty on Talon to uncover and disclose the Covenants to them:

> **Verification of Existing Encumbrances.** The closing agent is instructed to request a written statement from the holder of each existing encumbrance on the property, verifying its status, terms, balance owing, and if it will not be removed at closing, the requirements that must be met to obtain a waiver of any due-on-sale provision. The closing agent is authorized to rely upon such written statements in the performance of its duties, without liability or responsibility for their accuracy or completeness.

(CP 558.) First, by its terms, this paragraph does not impose any duty on Talon to search and disclose documents recorded against the property. The paragraph does not obligate Talon to perform a title search and it says nothing about disclosing anything to the Eleazers. In addition, the use of terms such as "statement," "holder," "balance owing," and "due-on-sale" demonstrate that the "encumbrances" described in the paragraph are monetary encumbrances such as deeds of trust or liens that the buyer and seller have agreed will be paid off at closing. Accordingly, it instructs Talon to contact parties with monetary encumbrances listed in the commitment in order to perform its duties as set forth in the Escrow Instructions, which is to pay off certain agreed monetary encumbrances.

Second, the Eleazers' contorted interpretation of this paragraph cannot be squared with the rest of the Escrow Instructions. Courts will not disregard language used by the parties. Rather, they will adopt a construction that gives effect to all of the contract's provisions as opposed to one that renders a provision meaningless. *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 588, 167 P.3d 1125, 1131 (2007);

Snohomish Cnty Pub. Transp. Benefit Area Corp. v. FirstGroup America, Inc., 173 Wn.2d 829, 840, 271 P.3d 850, 856 (2012) ("An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used."). The Eleazers' interpretation of the Verification of Existing Encumbrances paragraph is inconsistent with the Title Insurance paragraph that immediately precedes it, quoted above, specifically the following language: "The closing agent is authorized to rely upon the title report in the performance of its duties and shall have no responsibility or liability for any title defects or encumbrances which are not disclosed in the title report." (CP 563.)

Finally, even if the Escrow Instructions did impose an independent duty on Talon to search and disclose recorded documents, the SHD Letter and Covenants, *per se*, are not the cause of their damages. The Eleazers' knowledge of them prior to closing would not have made any difference because they knew that the drainfield was located in their front yard, they knew it belonged to the Bush House, and they agreed to give an easement to the Bush House for it. Furthermore, the SHD letter has no impact on title and the Covenants are unenforceable under the doctrine of merger and no one has sought to enforce them against the Eleazers anyway.

2. Talon Did Not Have a Duty to Maintain Records That the Parties Never Gave to Them.

The duty to "keep adequate records" refers to an escrow agent's duty to maintain its transaction records for six years within the state of

Washington. RCW 48.29.190; WAC 208-680-530. However, nothing in the statutes or regulations require the escrow agent to search and disclose recorded or unrecorded documents or maintain contractual documents that have not been provided to them by the parties to the contract.

The Eleazers fault Talon for not requesting a written statement from Nordstrom about the 1993 SHD Letter and Covenants. But how could Talon request such a statement if neither Nordstrom nor the Eleazers ever mentioned those documents and they were not listed in the preliminary commitment for title insurance? The Eleazers fault Talon because Talon's files did not contain a copy of the Form 34 in which the Eleazers agreed to grant Nordstrom an easement for the OSS. But the evidence in the record establishes that neither the Eleazers nor Nordstrom ever gave Talon a copy of the Form 34. (CP 805-06.) They admit asking the Talon agent about the easement at closing. (Br. App. at 12.) But when the agent went through the file and reported that there was "nothing in the paperwork that mentioned it", the Eleazers did nothing. (Br. App. at 28.) They did not give the agent a copy of Form 34; they did not tell the agent that they had agreed to grant an easement; they did not notify Nordstrom that they had not performed that part of their contract. Instead, they sat on their hands and let the transaction close without an easement. In fact, the Eleazers made affirmative assurances to Talon that all conditions of the sale had been performed. (CP 563, 636.)

3. Talon Did Not Have a Duty to Prepare a Deed that Reserved an Easement when Neither Party Instructed it to do so.[3]

Nothing in the Escrow Instructions directed Talon to prepare a deed that granted an easement or excepted the 1993 SHD Letter or Covenants. The Escrow Instructions state that Talon would prepare a Statutory Warranty deed on the form approved by the Limited Practice Board. However, all of the information for what was to be included in the deed came from the parties themselves or the preliminary commitment for title insurance, which they approved. There was no easement form approved by the Limited Practice Board. (CP 562.) The Escrow Instructions state that "seller has approved, signed, and deposited . . . the Statutory Warranty Deed." (CP 563.) Following that, the Eleazers separately initialed the following clause:

> **Conditions of Parties' Agreement Satisfied**. All terms and conditions of the parties' agreement have been met to my satisfaction, or will be met, satisfied, or complied with outside of escrow.

Below that, the instructions contain the following additional clause:

> **Title Report Approved**. The Preliminary Commitment of Title Insurance, including the legal description of the property and all attachments, supplements, and endorsements, to that report, issued by The Talon Group/Bellevue under order number 1003141, are approved by me and made a part of these instructions by this reference.

Id.) As between the Eleazers and Talon, there is no question that the Eleazers knew about the easement that they had agreed to grant and Talon

[3] This is a new issue raised by the Eleazers for the first time in this appeal and, for that reason alone, the Court should ignore it.

did not. Yet, in an act of blatant hypocrisy, the Eleazers attempt to place blame on Talon for not including a reservation in the parties' deed for an easement they alone knew about.

C. Neither First American Nor Talon Acted in Bad Faith.

The Eleazers repeatedly recite platitudes about the duty of good faith in title insurance and escrow but utterly fail to identify a single act that actually resembles bad faith conduct.[4] The actions they describe not only conform to the Escrow Instructions and Title Policy at issue, but are part of almost any typical escrow or title insurance claim process. They also accuse First American and Talon of bad faith for failing to provide services that are not contemplated by the Escrow Instructions and Title Policy at issue, and also not traditionally provided by escrow companies or title insurers generally. The Eleazers' essentially demand that Talon and First American should have done whatever the Eleazers wanted whenever they wanted it.

1. The Eleazers Fail to Cite any Evidence of Bad Faith.

In their Complaint, the Eleazers recite a number of generic duties of any insurer under any insurance policy at paragraphs 33 through 39 and then recite "industry standards for claims handling" at paragraphs 49 through 56. (CP 1002-09.) However, nowhere in their Complaint do the Eleazers allege a single fact indicating that First American breached any of its duties or industry standards for claims handling.

[4] In fact in numerous places in the Brief of Appellant, the Eleazers cite to their own summary judgment briefs rather than evidence in the record. *See, e.g.,* page 28.

In discovery, First American asked the Eleazers to describe the facts and communications that they contend support their allegations of bad faith and that First American has not complied with industry standards. (CP 793-800.) In response to Interrogatory No. 49, the Eleazers refer to their Complaint, which contains no factual allegations regarding First American's alleged bad faith claims handling. In response to Interrogatory No. 50, the Eleazers recite three-and-one-half pages of objections and then state as follows: "Discovery is ongoing and Plaintiff seek to depose Talon and First American employees with knowledge relevant to claims and defenses in this case." (CP 798.) In other words, Plaintiffs have zero facts or evidence to support their bad faith and IFCA claims. Washington law is clear on this issue:

> If the insured claims that the insurer denied coverage unreasonably in bad faith, then the insured must come forward with evidence that the insurer acted unreasonably. The policyholder has the burden of proof. The insurer is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds.

Smith v. Safeco Ins. Co., 150 Wn.2d 478, 486, 78 P.3d 1274, 1277 (2003); *see also, Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002) ("If the insurer's denial of coverage is based on a reasonable interpretation of the insurance policy, there is no action for bad faith.") First American properly denied the claim and, during the period that it had accepted the claim based upon incomplete disclosure by the Eleazers, First American made an election permitted under the Title Policy. "When an

insurer correctly denies a duty to defend, there can be no bad faith claim based on that denial." *United Services Auto. Ass'n v. Speed*, 179 Wn. App. 184, 203, 317 P.3d 532, 542 (2014).

2. Any Delays Were Caused by the Eleazers' Attorneys' Failure to Communicate With First American, Not Vice-Versa.

Contrary to the Eleazers' bluster, the actual evidence shows that First American was not only responsive to the Eleazers' multiple attorneys, but any gaps in communication were due primarily to the Eleazers' attorneys' own failures. (CP 93-288.)[5] The gap in 2012 was caused by the Eleazers' attorneys' promise to respond to First American's settlement offer, which never came. First American, not the Eleazers, re-started the communication and continued diligently to communicate with the Eleazers until discovering that the Eleazers had agreed to grant an easement for the drainfield, at which time it properly denied coverage. (Id.)

The Eleazers blame First American for the delay in obtaining a DIV appraisal. (Br. App. at 45.) Yet, the delay was caused entirely by the Eleazers' attorneys' unresponsiveness. Even when the Eleazers' fourth attorney, Sean Gamble came on the scene, he refused to respond to the settlement offer or allow a DIV appraisal. His first letter completely ignored the fact that First American had accepted coverage and, instead, accused First American of bad faith and enclosed a "draft" complaint, which he filed that same day. Ken Goodman responded with another detailed 9 page letter

[5] This history also exposes the fallacies of Plaintiffs' laundry-list of inapplicable WAC code violations recited in their brief.

along with 147 pages of exhibits. (CP 111-267.) The letter concluded, "First American is still awaiting instruction on whether an appraiser should contact the Eleazers directly to schedule a property visit. The title company's offer to settle based on the increased cost of constructing a high-pressure septic system also remains open." (CP 119.) The next day, Goodman sent a letter to the appraiser commissioning the appraisal.[6] In that letter, Goodman writes,

> The Eleazers are currently represented by counsel, and we have been unable to obtain any instruction as to whether the appraiser should contact the Eleazers directly or work through their attorney. Accordingly, you should contact the Eleazers' counsel to arrange a site visit.

(CP 271.) When Gamble's next letter revealed that the Eleazers had all along known about and expressly agreed to allow the Bush House OSS to remain in their front yard, First American denied coverage but elected to proceed with the appraisal anyway. (CP 283-88.)

3. First American Thoroughly Investigated the Eleazers' Claims.

First American reviewed and considered all evidence and analysis submitted to them by the Eleazers' attorneys and analyzed the Policy and applicable law before making a determination on coverage. Each letter contained detailed legal and factual analysis. (CP 149-50, 198-203, 222-27.) The first two letters, which denied coverage, invited the Eleazers to submit any additional information that might alter First American's

[6] The draft appraisal came out several months later. Because the appraiser relied upon an instruction letter that predated the discovery of the Eleazers' agreement to grant an easement for the OSS as part of its contract to purchase the property, he assumed that the Eleazers had bought the property without any knowledge of the existence of the OSS. Consequently, the $125,000 DIV figure is based upon an erroneous assumption of critical importance to this case.

coverage determination. (CP 50 & 203.) The second letter specifically requested information regarding what the Eleazers may have known about the septic system and covenants impacting the property. Yet, the Eleazers failed to inform First American of the critical fact that they knew all about the drainfield located in their front yard before purchasing the property and had agreed to grant an easement for it. (CP 202-03.) However, when attorney Kem Hunter informed First American that SHD had denied the Eleazers' application to tie into the Bush House OSS, First American reversed its previous decision and accepted coverage. (CP 222-27.)

Nevertheless, the Eleazers argue that, after First American accepted coverage,

> First American did nothing. It did not respond to requests for assistance and information. It did not conduct an investigation of losses. It did not respond for ten months. In December of 2012, First American's counsel admitted he "dropped the ball."

(Br. App. at 45.) The fact that Ken Goodman graciously accepted some of the responsibility for the gap in communication does not change the fact that none of the Eleazers' three attorneys, Kem Hunter, Michelle McNeill, or David Goldstein, responded to First American's offer of settlement or authorized First American to commence a DIV appraisal of the Eleazer Property, despite the fact that Ken Goodman had forwarded his coverage acceptance letter to all three of them, repeatedly asking for a response. What further investigation would be required after First American accepted coverage? The only thing needed during that period of time was either a response to the settlement offer or permission to enter the Eleazer

property to conduct an appraisal. The only reason that did not happen is because the Eleazers' attorneys "dropped the ball."

There is no duty for title insurers to interview their insureds take statements or provide claim forms. (Br. App. at 46.) These are actions traditionally associated with personal injury or disability-related claims, not claims against title insurance policies. First American made its coverage decisions based on the information provided by the Eleazers' attorneys and the coverage set forth in the Title Policy, so there was no need to communicate directly with the Eleazers. Further, First American has been in communication with the Eleazers' various lawyers from the time the Eleazers filed their claim until the present. In any event, for most of this period in question, First American had accepted coverage and was awaiting a response from the Eleazers' attorneys. [7]

4. Title Insurers Are Not Required to Clear Title.

The Eleazers Title Policy imposes a duty to defend, not an obligation to "clear title". The Eleazers do not appear to be able to accept this, and repeatedly blame First American for failing to "defend" them, (Br. App. at 43.), but they avoid the single most basic fact—*there has been nothing to defend against*—there have been no claims adverse to the Eleazer title.

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[7] The Eleazers go so far as to accuse First American of bad faith for using attorneys to handle their claims. (Br. App. at 43.) Due to the contract-based nature of title insurance, this practice is normal at First American and other title insurance companies. Oddly, the Eleazers' own counsel also seems to advocate that it would be better for an insurance company to deal directly with its insureds rather than through their chosen counsel.

The only lawsuits filed have been this one and *Eleazer v. Bush House, L.L.C.* None of the counterclaims in *Bush House* challenged the Eleazers' title. From the start of that litigation, First American explicitly informed the Eleazers that it did not sanction or agree to pay for the action because First American had elected to pay DIV instead, as is permitted under the Title Policy. The Eleazers' first counsel recognized this when he wrote, "We acknowledge that you have not authorized this action, nor have you committed to paying any of the legal fees or costs associated . . . ." (CP 229.) Moreover, First American was under no obligation to hire counsel for the Eleazers to sue whomever they want to avoid a contract they entered into. Similarly, First American was under no obligation to provide abstracts of title to support such endeavors.

5. The Eleazers' Muddle the Timeline.

Despite the Eleazers' best efforts to confuse the timeline of this case, the factual timeline of relevant events can be easily divided into three phases:

> Phase I (May 2011 – February 2012): First American's claims counsel performed extensive detailed review and analysis and concluded that the claim was not covered by the Title Policy.
>
> Phase II (February 2012 – June 2013): The Eleazers' attorney presented a change in circumstances. First American investigated in light of the new—albeit incomplete—information and, based upon the new information, reversed its earlier decision and accepted coverage. First American elected to pay actual loss under terms of the Title Policy and also tendered an offer of settlement. However, during this entire period, the Eleazers' attorneys failed or refused to respond to the settlement offer or cooperate in paying the claim.

> Phase III (June 2013 – Present): On June 4, 2013, First American learned for the first time that the Eleazers had known about the drainfield all along and had agreed to grant an easement for it. Based upon this new information, First American again denied the claim.

Plaintiffs' papers constantly jump between these three phases as they attempt to muddle the timeline in a deceptive effort to show bad faith. For example, the Eleazers contend,

> First American argued to the trial court that the 1993 encumbrances caused no losses, despite acknowledging in its previous letters that the 1993 encumbrances caused losses. CP 313, 327. This argument does not comply with the statutory duty of honesty.

(Br. App. at 47.) However, by the time First American argued its summary judgment motion, it had discovered the facts previously omitted by the Eleazers: that they had agreed to grant an easement for the Bush House OSS and that the trial court and court of appeals had both determined that such agreement was the sole cause of their alleged problems. However, the letters to which the Eleazers refer were drafted and sent before the Eleazers finally disclosed to First American Form 34 and their agreement to convey an easement.

6. First American Offered the Eleazers Proper Compensation When it Accepted Coverage, and also Offered a Settlement Which Would Have Compensated Them for Their Entire Alleged Loss

When SHD refused to permit the Eleazers to connect to the drainfield, First American exercised its option under the Title Policy to pay the Eleazers their actual damages based on the property's DIV resulting from the recorded instruments and also offered to settle the claim

without a DIV appraisal by paying the additional cost of a septic system that could be installed in the Eleazers' back yard. When making the offer, First American's counsel stated that the DIV appraisal could take a while. Plaintiffs have twisted this good faith offer by calling it a "low-ball settlement," "essentially threatening a delayed appraisal and payment." (Br. App. at 44.) This is gross mischaracterization of a good faith effort to help the Eleazers. At that time, the Eleazers claimed their entire damage was their inability to connect to the drainfield in their front yard, and the increased expense of using their backyard. (CP 215.) First American's counsel offered them the choice of DIV or a settlement offer of full compensation for their alleged loss. This is not evidence of bad faith. Rather, it was a good faith offer to fully compensate the insureds.

D. Plaintiffs Disregard the Statutory Threshold of an IFCA Claim.

In order to maintain an action under IFCA, "[t]he insured must show the insurer unreasonably denied a claim for coverage or that the insurer unreasonably denied payment of benefits." *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 79, 322 P.3d 6, 20 (2014) (citing RCW 48.30.015); *see also Workland & Witherspoon, PLLC v. Evanston Ins. Co.*, 2:14-CV-403-RMP, 2015 WL 6553877, at *8 (E.D. Wn. Oct. 29, 2015) (granting motion to dismiss and finding "that legislative intent and the limited number of Washington State court decisions weigh against recognition of an implied [IFCA] cause of action [based on an alleged violation of WAC 284-30-330]"); *Seaway Properties, LLC v. Fireman's Fund Ins. Co.*, 16 F. Supp. 3d 1240, 1255 (W.D. Wn. 2014) ("This court,

like those before it, holds that IFCA does not create a cause of action solely for violation of Washington's insurance regulations."); *Collazo v. Balboa Ins. Co.*, C13-0892-JCC, 2014 WL 7240523, at *2 (W.D. Wn. Dec. 19, 2014) ("[T]here is no IFCA liability for a stand alone WAC violation."). This issue goes to the heart of this case. Throughout the numerous briefs and voluminous correspondence, Plaintiffs have utterly failed to substantively address the fact that First American reasonably denied their claim based on the clear language of the Title Policy. Instead they cite innocuous facts (that describe almost any title insurance claim process) in support of its IFCA claims. Just as the courts have overwhelmingly done in the past, this Court should reject Plaintiffs' meritless attempt to avoid the threshold requirement that an IFCA claim be based solely on an unreasonable denial of a claim.

IV. CONCLUSION

The superior court saw through the Eleazers' circuitous reasoning, (RP 55), in their attempt to shift the blame and consequences of their own deliberate actions to others. First American and Talon performed in utmost good faith and to the letter and spirit of their contracts with the Eleazers. Accordingly, this Court should affirm the superior court's summary judgment.

Respectfully submitted this 25th day of August, 2016

SOCIUS LAW GROUP, PLLC

By _____
Thomas F. Peterson, WSBA #16587
Attorneys for First American Title

V. CERTIFICATE OF SERVICE

I certify that on the 25th day of August, 2016, I caused a true and correct copy of this Brief of Respondent to be served on the following in the manner indicated below:

James A. Hertz, WSBA No. 3062
Henry G. Jones, WSBA No. 45684
1126 Highland Avenue
Bremerton, WA 98337
(360) 782-4300

☑ U.S. Mail
☐ Facsimile
☐ Legal Messenger
☐ Hand Delivery

Counsel for Appellants

Sean J. Gamble, WSBA No. 41733
51 University Street, Suite 201
Seattle, WA 98101
(206) 501-4446

☐ U.S. Mail
☐ Facsimile
☑ Legal Messenger
☐ Hand Delivery

Counsel for Appellants

Linda McKenzie

Linda McKenzie, Legal Assistant