Supreme Court No. 94444-0

Court of Appeals No. 75097-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD AND MAYA ELEAZER, Husband and Wife,

Appellants/Plaintiffs,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign insurer doing business in Washington; THE TALON GROUP, a domestic Washington corporate entity or partnership, d/b/a Talon Group Escrow and/or Talon Title,

Respondents/Defendants.

PETITION FOR REVIEW

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INTRODUCTION

Title insurance is a guaranty of the accuracy of a company search and record title on a specific property. First American Title Insurance contracted with Edward and Maya Eleazer in 2007 to protect their home from someone else limiting their use of the land, encumbrances and/or if the title is unmarketable. The Eleazers knew about an on-site septic system ("OSS") on their property but did not know about 1993 encumbrances that restricted their use of that OSS on their property. An independent appraisal found $125,000 in property diminution-in-value losses from the undisclosed 1993 encumbrances on the Eleazers' property. First American admits it missed the 1993 encumbrances.

Before closing on the purchase, the Eleazers agreed to agree to an easement in favor of the seller for access to the OSS without knowledge of the 1993 encumbrances, but the sale closed without any agreement and the parties certified that all conditions of the sale had been met. Years later, the Health District found that the 1993 encumbrances restricted the Eleazers' rights to use the OSS on their property, while the seller demanded unreasonable control of the Eleazer's land and the OSS. Can a title insurer use a knowledge based

exclusion to deny coverage when the undisputed evidence shows that the insured did not know about undisclosed encumbrances?

Division One held that a knowledge based exclusion barred coverage because the insureds allegedly allowed or agreed to the risk. ***Eleazers v. First Am. Title Ins. Co.***, Washington State Court of Appeals No. 75097-6-1 (March 27, 2017) (copy attached). Division One reasoned that the insureds knew about the OSS, and further agreed to grant an easement so they allowed or agreed to the covered risk. *Id.* This holding, however, contradicts published Washington law concerning knowledge based exclusions and that damages are questions of fact left for the jury to decide.[1] Whether the Eleazers are harmed financially by the undisclosed 1993 recorded documents—regardless of their knowledge of the OSS—is question of fact that can only be resolved by a jury. Division One also upheld the dismissal of the Eleazers' Insurance Fair Conduct Act (IFCA) claims.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in entering the order of March 24, 2016, denying Plaintiffs' motion for partial summary judgment on

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[1] *C 1031 Properties, Inc. v. First American Title Ins. Co.*, 175 Wn. App. 27, 32-34, 301 P.3d 500 (2013) (citing *Womack v. Von Rardon*, 133 Wn. App. 254, 263, 135 P.3d 542 (2006)).

breaches of contract and insurance coverage, and dismissing their second amended complaint. CP 3.

2. Whether the trial court erred in entering the order of March 24, 2016, granting Defendants' motion for summary judgment and counterclaim for declaratory relief of no insurance coverage. CP 3.

STATEMENT OF THE CASE

A. Overview

The case involves the Insurance Fair Conduct Act ("IFCA") as well as a Title Insurance Policy that First American Title Insurance Company issued to the Eleazers.[2] CP 460, 485-494 (Insurance Policy). Because the insurance company issued the Title Insurance Policy to the Eleazers, First American owes contractual duties, quasi-fiduciary duties, and duties of good faith and fair dealing. CP 324, 460. First American conducts insurance business in Washington, so IFCA and associated insurance regulations apply to its conduct. CP 329.

In the Town of Index in 2007, a property owner named Loyal Nordstrom sold real property to Edward and Maya. CP 454, 460. First American's agent, Talon, handled the real estate transaction by acting

[2] The case also involves a Closing Agreement and Escrow Instructions by Talon that governed the sale of the real property to Edward and Maya Eleazer, but for purposes of this petition, the Eleazers will focus on the breach of contract for the title insurance. CP 452, 456-61.

as the closing and escrow agent for the parties. CP 457, 837. Talon did not disclose the existence of the 1993 recorded documents concerning the OSS. This failure prevented the Eleazers from learning that the real property they were purchasing was actually encumbered by documents recorded against the title in 1993. CP 476. The Eleazers did not learn that their property was encumbered by the 1993 recorded documents until three years after they purchased it. CP 462.

The Eleazers did know that the neighboring Bush House was connected to septic pipes in their own front yard. CP 294, 455-56. During a pre-sale inspection in 2007, the seller's real estate agent told the Eleazers that the front-yard septic system was designed to be large enough for their home's use as well as the Bush House's use, in case their home's current septic system (located in the backyard) ever failed. CP 456. The agent stated that the Eleazers would need to initial a paper that they would be willing to sign an easement—agreeable to both parties—for the pipes in the front yard that were connected to the Bush House. CP 456; 859 (Form 34). This was a pre-sale Form 34 for a proposed easement to "grant access for maintenance of OSS to Bush

House... in the form of a recorded easement agreeable to both parties."[3] CP 456, 859 (Form 34). The parties did not negotiate the terms of an easement prior to closing.[4] The parties closed the real estate transaction. CP 460, 838. Title passed to Edward and Maya and was duly recorded. *Id.* Talon never informed them that their title was encumbered. CP 459.

After buying the property, the Eleazers invested time, money, and energy in renovations. CP 461. But three years later, they discovered the 1993 documents recorded against their title. CP 462. One of the documents is a Declaration of Restrictive Covenants. The

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[3] The Form 34 was "an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175, 94 P.3d 945 (2004). While potentially useful in negotiations, "[a]greements to agree are unenforceable in Washington. *Id.* at 176. This is designed to "avoid trapping parties in surprise contractual obligations." *Id.* at 178. Therefore, "for a contract to form, the parties must objectively manifest their mutual assent" and "the terms assented to must be sufficiently definite." *Id.* at 177-78.

[4] Although the seller and Talon disregarded the Form 34 through their subsequent inaction, Edward and Maya did follow up with Talon before closing, which was appropriate because Talon was the closing agent. CP 459, 838. Edward and Maya asked Talon agents about the Bush House septic system easement issue. *Id.* The Talon agents looked through all the paperwork to see if they had missed anything; they said they did not find anything in the paperwork that mentioned the Bush House septic system. *Id.* In response to the Eleazers' questions, the Talon agents stated they had "no idea" what they were talking about, and that the home and property were theirs after closing because the seller already signed the house and property over to them, and only their signatures were required to complete the transaction. *Id.* Edward and Maya then concluded that there was no need for a septic system easement after all, and that the seller's agent had been mistaken at the pre-sale inspection. *Id.*

previous owner (Ms. Nordstrom, f/k/a McMillan) recorded the Restrictive Covenants in 1993 to encumber both the property purchased in 2007 by Edward and Maya, and a neighboring property known as The Bush House. CP 462. The terms of the Restrictive Covenants:

> do hereby bind said parties and all of their future grantees, assignes [sic] and successors to said covenants for the term hereinafter stated and as follows:
> 1) That all parcels of property as described above are to be considered as one total building lot.
> 2) That I have made application for developmental permit(s) for the construction of a building utilizing the above described lots as a single building lot.
> If the parties hereto, or any of them or their heirs, successors or assigns, shall violate or attempt to violate any of the Covenants herein, it shall be lawful for any minicipal [sic], County, or quasi-judicial agency to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such Covenant and either to prevent him or them from so doing or to recover damages or other dues for such violation."

CP 462-63, 496 (Restrictive Covenants). So the properties are "to be considered one total building lot" and any violation of the Restrictive Covenants can subject the parties to prosecution. This raised serious concerns for Edward and Maya. CP 463, 840.

The other document recorded against their title is a 1993 Snohomish Health District letter to The Bush House. CP 463, 499-500 (Letter). The letter lists conditions by the Health District related to the

failure of the on-site septic system, and an application by The Bush House to build a new septic system across the adjacent property (which Edward and Maya purchased in 2007). CP 499-500.

One Health District condition in the letter is that "All components of onsite sewage facility on separate tax lots from the Bush House Restaurant must be tied to Bushhouse [sic] via recorded easements." CP 500 (Letter at p. 2, ¶ J). This, however, was not done. CP 463. No easement was recorded, either in 1993 or 2007. Instead, in 1993 Ms. Nordstrom filed the Restrictive Covenants. CP 462. When the property was sold to Edward and Maya in 2007, they did not know about the 1993 documents recorded against their title that appeared to provide dominant control of their land to the neighboring Bush House. CP 294, 459.

Receiving notice of the 1993 recorded documents would have allowed the Eleazers to take steps to remedy or remove the encumbrances while the property was under contract in 2007; or to negotiate a new sale price in light of the encumbrances; or to negotiate an easement agreeable to both parties and consistent with the seller's representations on the buyers' ability to use the real property in contrast with the encumbrances; or to reconsider the purchase as provided in the

Real Estate Purchase and Sale Agreement. CP 848, 858. Talon's failure to disclose the 1993 encumbrances deprived the Eleazers of those options. CP 459. This caused them to suffer damages.

B. First American issued the Title Insurance Policy

When the title was recorded, First American issued the title insurance policy to the Eleazers. CP 460, 485-494 (Insurance Policy). It provides for indemnification and defense. CP 485. The policy has been in force: "Your insurance is effective on the Policy Date [May 10, 2007]." CP 485, 488. It protects them against actual losses for covered risks: "This Policy insures You against actual loss, including any costs, attorneys' fees and expenses provided under this Policy, resulting from the Covered Risks set forth below..." CP 460, 485.

> "Covered Risks" include:
> "5. Someone else has a right to limit Your use of the Land; and
> "9. Someone else has as [sic] encumbrance on Your Title."

CP 460, 485.

The insurance policy also promises to defend Edward and Maya against adverse claims: "OUR DUTY TO DEFEND AGAINST LEGAL ACTIONS: We will defend Your Title in any legal actions only as to that part of the action which is based on a Covered Risk." CP 485. So the insurance policy promises to indemnify and defend the Eleazers'

title when "Someone else has a right to limit [their] use of the Land" and when "Someone else has an encumbrance on [their] Title." CP 485.

C. Eleazers incur actual losses from covered risks

During the 2010 to 2011 time period, the septic system to the Eleazers' home failed. (This was the older system in the backyard.) CP 465-66. To correct the problem, they applied to the Snohomish Health District to connect to the newer septic system that existed in their front yard. CP 466. The Health District denied the application. CP 466. The basis for the denial was that the previous owner installed the front-yard septic system on the property (Lots 25-28) for the neighboring Bush House (Lots 29-33), and filed the Declaration of Restrictive Covenants. CP 466, 910 (Denial Letter).

The Health District specifically denied the Eleazers' application to use their own land to repair their own septic system, stating that in light of the Declaration of Restrictive Covenants, "it is not readily clear who has ownership/control of the OSS pressure bed and the immediate area." CP 910. So the Health District found that the Eleazers' did not have clear ownership of their own land due to the Restrictive Covenants. The Health District later threatened them with prosecution for their failing septic system. CP 468. Meanwhile, a prospective new owner of

The Bush House, together with seller Nordstrom, threatened to sue the Eleazers for not giving rights to their own land in favor of The Bush House. CP 463-65.

By this time, the Eleazers tendered their claim to First American. CP 466. While the insurance company initially denied that a covered loss existed, it later reversed course after the Health District denied the application to repair the septic system. *Compare* CP 910 *with* CP 467, 921 ("present circumstances reported by the Eleazers do trigger coverage under their title policy"). The Eleazers' also resubmitted their insurance claims, including claims under Covered Risk No. 5 ("Someone else has a right to limit Your use of the Land") and Covered Risk No. 9 (encumbrance on title). CP 467, 915.

First American responded, acknowledging that the 1993 recorded documents trigger coverage under Covered Risks Nos. 5 and 9:

> Declaration of Restrictive Covenants and the SHD letter recorded in 1993 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 Risks Nos. 5 and 9 in that they limit the location where the Eleazers can install a septic system on their property.

CP 467, 926 (middle ¶). This acknowledgment of coverage required the insurance company to defend, assist, investigate, and provide benefits.

Instead, First American "suggest[ed] a different method for resolving this, although, strictly speaking, it is not an appropriate measure of damages under the title policy." CP 926. First American informed the Eleazers that a diminution-in-value appraisal could involve months of delay. *Id.* Instead of doing the appraisal, First American only offered "to pay the difference between a low-pressure and high-pressure septic system." *Id.* The expensive and smaller, high-pressure septic system was necessary because the Health District denied the application for the Eleazers to use the drain field on their own land. CP 467, 470.

In May of 2013, First American finally retained an appraiser to perform a diminution-in-value report. CP 343. To its appraiser, the insurer stated that "First American has agreed that the 1993 SHD Letter and the Declaration of Restrictive Covenants, both of which are recorded, have the detrimental effect of restricting the locations on the Eleazers' property where they can install a septic system to serve their home." CP 345. The report found $125,000.00 in property diminution-in-value losses. CP 363. The report did not consider other consequential losses or damages, including the expensive high-pressure septic system, as well as the quiet title attorney fees, costs, and expenses, all of which the Eleazers were forced to self-finance because First American did not

defend them. Apart from the August of 2013 appraisal inspection, no one on behalf of First American has ever interviewed, examined, or deposed the Eleazers to assess their losses. CP 295.

D. For 16 months, First American provides no defense, assistance, investigation, or benefits

After First American acknowledged coverage in February of 2012, the Eleazers again requested help in the quiet title dispute. CP 296, 335. The request was for the abstracts of title to the encumbered properties. But First American did not respond. In March of 2012, the Eleazers again requested help, and also requested clarification of coverage. CP 296, 338. First American still did not respond to the request for help and the request for clarification of coverage. This information was important in the defense of the title and in understanding First American's coverage position, but First American Title never responded.

First American conducted no investigation or damages appraisal in 2012. CP 467. First American also provided no defense or assistance to their insureds in the quiet title disputes. CP 467. The time period in which First American acknowledge coverage was February of 2012 through June of 2013. CP 82. This was a period of 16 months. During this time period, First American provided no defense, assistance,

investigation of losses, or payment of losses to the Eleazers. CP 467, 470.

E. After the Eleazers sued First American—and lost the quiet title case—First American withdrew coverage

By the time First American released the appraiser report, however, First American had already "withdrawn coverage." CP 82, 1582. In May of 2013, the Eleazers were forced to sue First American and Talon for First American's lack of action on their behalf. CP 1018. In that same month, the Eleazers lost in the quiet title trial court. CP 280. In June of 2013, First American withdrew coverage, citing both of those events in its letter withdrawing coverage. CP 766. This was 16 months after correctly acknowledging coverage, but taking no action. In its June of 2013 letter withdrawing coverage, First American cited Exclusion 4(a), which provides that "You are not insured against loss, costs, attorneys' fees, and expenses resulting from... Risks... that are created, allowed, or agreed to by You, whether or not they appear in the Public Records." CP 765.

REASONS TO GRANT REVIEW

A. Division One's ruling conflicts with a Division Three published opinion that a knowledge based exclusion is inapplicable without direct knowledge and that title insurance case damages are a question of fact for the jury.

Division One's unpublished ruling conflicts with *C 1031 Properties, Inc. v. First American Title Ins. Co.*, 175 Wn. App. 27, 301 P.3d 500 (2013). In *C 1031 Properties*, Division Three found that even though the insured knew about the existence of power lines on the property, since the insured did not actually know about the recorded easement, a knowledge based exclusion was inapplicable.[5] "The role of the title insurer is to insure title. Title insurance is a guaranty of the accuracy of a company search and record title on a specific property."[6] "By paying consideration to a title insurer for their expert services in uncovering defects in title, it is reasonable for the insured to believe and rely upon the fact that the insurer has discovered any encumbrances recorded in the public record."[7] The Eleazers reasonably relied upon the fact that First American had discovered any encumbrances. The

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[5] *C 1031 Properties, Inc. v. First American Title Ins. Co.*, 175 Wn. App. 27, 32-33, 301 P.3d 500 (2013) (citations omitted).

[6] *C 1031 Properties*, 175 Wn. App. at 33 (citing *Kim v. Lee*, 145 Wn.2d 79, 91-92, 31 P.3d 665 (2001); *Kiniski v. Archway Motel*, 21 Wn. App. 555, 560, 586 P.2d 502 (1978)).

[7] *C 1031 Properties*, 175 Wn. App. at 32 (citing *Kim*, 145 Wn.2d at 91-92).

Eleazers did not submit a claim due to the OSS, so knowledge of the OSS is irrelevant. The Eleazers submitted a claim due to damages arising out of the undisclosed 1993 encumbrances.

In *C 1031 Properties*, Division Three held that in a title insurance case concerning encumbrances, "damages are questions of fact left for the jury to decide unless reasonable minds could not differ."[8] Division One's opinion is in conflict with this fundamental jury question and is in conflict with this Division Three published title insurance case.

The 1993 recorded documents—for which there is undisputed insurance coverage—continue to encumber the Eleazers' title to their home. This was true in 2007, it remains true in 2017, and will remain true indefinitely. First American admitted this when it accepted coverage in February of 2012. CP 926 (middle ¶), CP 345. Division One accepted First American's argument that the Form 34 "agreement to agree" to an easement relieves it from any responsibility pertaining to the undisclosed 1993 recorded documents. It remains a question of fact for just how much the Eleazers are harmed financially by the undisclosed 1993 recorded documents—regardless of the Form 34. This question of fact can only be resolved by a jury.

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[8] *C 1031 Properties*, 175 Wn. App. at 34 (citing *Womack v. Von Rardon*, 133 Wn. App. 254, 263, 135 P.3d 542 (2006)).

If the Eleazers' property is diminished in value as a consequence of the 1993 recorded documents, then this is a covered claim. But First American contends that the 2007 Form 34 "agreement to agree" relieves First American of any obligation to cover the Eleazers' contract claim arising from the 1993 recorded documents—which still restrict the locations on the Eleazers' property where they can install a septic system to serve their home. First American further contends that because of the Form 34 "agreement to agree," the Eleazers do not have any diminution in value. But these contentions are undercut by First American's own property appraiser, who found $125,000 in property diminution-in-value (DIV) damages caused in part by the 1993 recorded documents. CP 363. Another problem with the contentions is that they assume the Bush House, Nordstrom, and the Eleazers can come to an agreement on an easement curing the 1993 recorded documents. But no future easement will undue the past harm caused by the 1993 recorded documents, for which First American provided the insurance.

The extent to which the Eleazers' property is diminished in value as a consequence of the 1993 recorded documents is a question of fact.

B. Division One's ruling is in conflict with published opinions that agreements to agree are unenforceable.

Division One's opinion is in direct conflict with published opinions that agreements to agree are unenforceable. Division One ruled that a knowledge based exclusion applied because the Eleazers allowed or agreed to the risk. This ruling necessarily transformed the Form 34 into an enforceable agreement to agree. This is in conflict with *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175, 94 P.3d 945 (2004). The pre-sale Form 34 was "an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete."[9] The Eleazers in 2007 could have negotiated an easement or walked away from the deal. All Form 34 indicates is a willingness to negotiate further. While potentially useful in the 2007 negotiations, "[a]greements to agree are unenforceable in Washington."[10] Ultimately, "for a contract to form, the parties must objectively manifest their mutual assent" and "the terms assented to must be sufficiently definite."[11] In 2007, the Eleazers were negotiating from a position of power, deciding whether to buy or

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[9] *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175, 94 P.3d 945 (2004).
[10] *Keystone*, 152 Wn.2d at 176.
[11] *Id.* at 177-78.

not to buy the property from an eager seller. The Eleazers did not know that there were any restrictions on their ability to install a septic system to serve their home. If the Eleazers knew about the 1993 recorded documents, they could have incorporated that information into their decision making process.[12] When the sale closed, the seller signed a Certification that "all conditions of the purchase agreement for the above referenced property, including all subsequent addendums, have been met." CP 460, 883 (Certification).

The pre-sale Form 34 does not mean that the Eleazers somehow knew about the 1993 recorded documents or that the restrictions are removed. The Form 34 does not cure the 1993 restrictions. The Form 34 "agreement to agree" does not mean that the Eleazers caused the 1993 restrictions that the insurance claim arises from. Knowledge is power, and First American's failure to find and disclose the 1993 documents meant reduced power causing reduced property value; no prospective buyer will want to purchase the Eleazers' property at full value in light of the 1993 recorded documents.

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[12] Easements come in many different forms setting out key terms such as duration and dominant control. For instance, an agreeable easement to a property owner would ensure that the owners maintain dominant control, can access the OSS, are not responsible for maintenance, and can terminate at any time (for instance if a crack causes sewage to spill onto the lawn and is never fixed). No agreeable easement can exist while the undisclosed 1993 recorded documents encumber the property.

C. Whether IFCA applies when insurers unreasonably deny a claim—even where they properly deny coverage or compensation to their insureds—is an issue of substantial importance to Washington citizens.

Insurers can act in common law bad faith even where they properly deny coverage or compensation to their insureds.[13] But this Court has not addressed whether this extends to the IFCA. "The implied covenant of good faith and fair dealing in the policy requires the insurer to conduct any necessary investigation in a timely fashion and to conduct a reasonable investigation before denying coverage. In the event the insurer fails in either regard, it will have breached the covenant and, therefore, the policy."[14]

IFCA provides for treble damages, attorney fees, and costs for an insurer's unreasonable denial of coverage, unreasonable denial of payment of benefits, or violations of statutes or regulations governing the business of insurance. CP 329. So IFCA provides a remedy for an insurer's unreasonable denial of coverage, as when First American withdrew coverage in June of 2013. IFCA provides a remedy for an insurer's unreasonable denial of payment of benefits, starting in

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[13] *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 277-80, 961 P.2d 933 (1998) (reviewing examples of bad faith liability despite proper claim denial).

[14] *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 281, 961 P.2d 933 (1998).

February of 2012, when First American acknowledged coverage. And IFCA provides a remedy for violations of insurance regulations, when First American failed to defend, assist, investigate, and pay losses, from February of 2012 forward.

Regardless of whether a claim is covered, insurers such as First American are still obligated to investigate the claim and not engage in bad faith conduct that violates IFCA. It is undisputed that, for the initial sixteen months—and all the months since—First American did not investigate or assist its insureds. And it is undisputed that First American never defended them or paid damages. This Court should accept review to determine whether IFCA applies to an insurer—even if they correctly deny coverage—while violating Washington insurance law when it denied coverage, accepted coverage, and then denied coverage again.

D. The Court should also review the remaining issues.

The remaining issues do not independently require this Court to grant review. But the Court should consider them if, as requested, it reverses and remands on any of the above issues.

CONCLUSION

For the reasons stated above, this Court should grant review.

Dated: April 26, 2017

Respectfully submitted,

Sean J. Gamble
Attorney for Appellants Edward and Maya Eleazer
Washington State Bar Association No. 41733

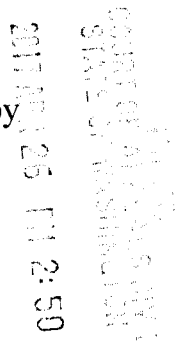
CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2017, the foregoing document was served by emailing a true and correct copy to:

Thomas F. Peterson: tpeterson@sociuslaw.com

Linda McKenzie: lmckenzie@sociuslaw.com

in accordance with the Stipulation re Service by Email signed by the parties.



Nori Skretta

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EDWARD AND MAYA ELEAZER, husband and wife,	)	No. 75097-6-I
	)	DIVISION ONE
Appellants,	)	
v.	)	
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 ENTTITIES 6-10,	)	UNPUBLISHED OPINION
Respondents.	)	FILED: March 27, 2017

SCHINDLER, J. — Edward and Maya Eleazer appeal summary judgment dismissal of their lawsuit against escrow agent The Talon Group and First American Title Insurance Company. We affirm.

Nordstrom Property

Loyal Mary Nordstrom owned two adjoining lots in Index, Washington. A 12-room hotel and restaurant, the Bush House Hotel and Restaurant, was on one lot and a 3-bedroom house was on the other lot.

In 1993, Nordstrom installed a commercial-grade on-site septic system (OSS) for the Bush House in the front yard of the lot with the three-bedroom house. The

Snohomish Health District (SHD) approved the OSS on the condition that "[a]ll components of onsite sewage facility on separate tax lots from the Bush House Restaurant must be tied to Bushhouse [sic] via recorded easements" and that the SHD "conditional approval letter" is "recorded on the property title."

Nordstrom recorded a copy of the SHD conditional approval letter for the OSS. Instead of an easement, Nordstrom recorded a "Declaration of Restrictive Covenants." The May 24, 1993 Declaration of Restrictive Covenants states that the parcels of property "are to be considered as one total building lot."

Purchase and Sale Agreement

In 2007, Edward and Maya Eleazer entered into negotiations with Nordstrom to purchase the three-bedroom house. The Eleazers knew the "front yard contained a septic drain field" for "the neighboring Bush House" and the backyard contained a septic system for the house.

According to Nordstrom, the Eleazers "knew that they needed to grant an OSS easement" for the Bush House. Nordstrom states that after SHD approved the easement, the Declaration of Restrictive Covenants "could be cancelled." In her declaration, Nordstrom states:

> When . . . 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 drain[ ]field.

The Eleazers submitted a residential real estate purchase and sale agreement (REPSA) on February 25, 2007. Because the offer did not address the easement, Nordstrom's listing agent prepared a "Form 34" addendum. The Form 34 addendum to the RESPA states the Eleazers agree to grant an easement for the OSS.

> IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS:
>
> Buyer agrees to grant access for maintenance of OSS to Bush House [Bed & Breakfast]. Access to be granted in the form of a recorded easement agreeable to both parties.

The Talon Group (Talon) acted as escrow agent for the transaction. Talon is a division of First American Title Insurance Company (First American). Neither the Eleazers nor Nordstrom provided a copy of the REPSA Form 34 addendum to Talon or First American. On April 9, 2007, First American issued a commitment for title insurance. The commitment for title insurance does not list the 1993 SHD letter or Declaration of Restrictive Covenants.

On May 8, 2007, the Eleazers signed the "Closing Agreement and Escrow Instructions" (Escrow Instructions). On May 9, Nordstrom conveyed title to the house to the Eleazers by statutory warranty deed. The Eleazers did not enter into an easement for the OSS as agreed in the Form 34. On May 10, First American issued the "Policy of Title Insurance" (Title Policy).

2011 Title Insurance Claim

The Eleazers renovated the house between 2007 and 2010. In 2010, the Eleazers learned about the recorded 1993 SHD letter and restrictive covenants.

Without disclosing that they knew the OSS was located in their front yard or that they had agreed to grant an easement for the OSS, on May 3, 2011, the Eleazers

submitted a claim to First American. The letter to First American states the Eleazers "acquired copies of two recorded documents which they believe affect the marketability of their title." The letter asserts the 1993 recorded documents "make the title unmarketable" and "are, or could be construed to be, encumbrances on the title." The Eleazers requested First American "[i]nitiate legal action to remove the restrictive covenants, and nullify the Snohomish Health District letter."

On July 14, First American Regional Claims Manager and attorney Daryl Lyman denied the claim. The letter from First American states that although the 1993 recorded documents "may perhaps impair the market value of the property," the documents did not make the property unmarketable. "[W]hile the undisclosed declaration of restrictive covenant may constitute an encumbrance on your title," First American was not obligated to indemnify because the Eleazers had "sustained no present loss."

On October 17, the Eleazers' attorney sent First American a lengthy letter challenging the decision to deny the claim. The attorney states that if First American did not agree to a settlement, the Eleazers would file a lawsuit for damages.

In response, First American requested the Eleazers provide a copy of the "Form 17" seller disclosure statement that Nordstrom provided the Eleazers before closing. The letter states, in pertinent part:

> 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.

The Eleazers' attorney sent First American a copy of pages two through five of Form 17. The attorney told First American that although the "questions soliciting information on encumbrances, easements, and restrictive covenants are on page one of the seller disclosure statement," he had "never seen page 1 of this document."

In December 2011, Nordstrom sold the Bush House to Bush House LLC. Sometime between 2010 and late 2011, the backyard septic system for the Eleazers' house failed. The Eleazers submitted an application to connect to the Bush House OSS in their front yard.

On February 3, 2012, SHD sent the Eleazers a letter denying the application because the 1993 Declaration of Restrictive Covenants created uncertainty about "who has ownership/control of the OSS pressure bed and the immediate area." The letter states, in pertinent part:

> Although the Declaration of Restrictive Covenants may just be some sort of cloud on the title of Lots 25 thru 28, it also may be a legal instrument granting dominant control of the existing OSS pressure bed and portions of Lots 25 thru 28 to the property owner of Lots 29 thru 33. Until this situation can be adequately resolved, it is not readily clear who has ownership/control of the OSS pressure bed and the immediate area. As such SHD cannot demonstrate that the requirements contained in WAC 246-272A have been met for permit issuance.

On February 7, the Eleazers informed First American that SHD denied the application to connect to the front yard OSS. The attorney asserts the 1993 restrictive

covenants were an encumbrance on the Eleazers' title and a covered risk under the Title Policy.

First American agreed the 1993 recorded documents constituted a covered risk under the Title Policy. The letter states, in pertinent part:

> The Declaration of Restrictive Covenants and the SHD letter recorded in 1993 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.

The February 22 letter states that under the terms of the policy, First American would pay the Eleazers their actual loss based on the property's diminution in value "caused by the limitation on siting a drain[ ]field to serve the residence." First American notes a "diminution-in-value appraisal can take some time" and offered to pay the difference in price between a lower cost low-pressure septic system and a more expensive high-pressure septic system that could be located in the back yard.

On February 23, the Eleazers' attorney told First American he would "analyze your settlement plan, discuss it with my client, and respond later." The letter also states the Eleazers planned to resolve "issues involving title or possession of real property . . . in Superior Court."

Quiet Title Action

In April, the Eleazers filed a quiet title action against Bush House LLC and SHD. The Eleazers alleged the 1993 SHD letter and restrictive covenants were invalid and Nordstrom breached the statutory warranty deed. Bush House LLC and Nordstrom filed a counterclaim against the Eleazers for breach of the Form 34 addendum agreement to grant an OSS easement.

On cross motions for summary judgment, the trial court dismissed the quiet title action. The court ruled the Eleazers "are in breach of the Form 34 promise to grant an OSS easement to the Bush House." The May 23, 2013 order states the Eleazers had "actual knowledge of the OSS in the front yard of their property" and "contractually promised to grant an OSS easement" before they purchased the property. The order states, in pertinent part:

> **5. Facts That Appear Without Substantial Controversy**
>
> . . . .
>
> 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.

The trial court appointed a special master and ordered the Eleazers to grant and record an OSS easement. The order attached the easement with a detailed legal description. The Eleazers filed an appeal.

In an unpublished opinion, we concluded the court erred in drafting the easement. Eleazer v. Bush House, LLC, 183 Wn. App. 1007, 2014 WL 4198384, at *8. We held the Form 34 addendum imposed an implied duty of good faith on the Eleazers and on remand, if the Eleazers did not make a good faith "offer of easement terms to Nordstrom," Nordstrom could seek damages or rescission. Eleazer, 2014 WL 4198384, at *8.[1]

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[1] We held, in pertinent part:

> If, on remand, the Eleazers fail to make a "good faith" offer, then Nordstrom may seek either damages from the Eleazers or rescission of the REPSA. If the Eleazers do make a good faith offer, however, then Nordstrom must either accept the offer, entice the Eleazers to accept a counteroffer, seek rescission of the REPSA, or forego a remedy.

Eleazer, 2014 WL 4198384, at *8. There is no indication in the record that the Eleazers have made a good faith offer for an easement.

Denial of Coverage

After receiving a copy of the court order in the quiet title action, First American learned for the first time that the Eleazers knew the OSS was located in their front yard and agreed to grant an easement to Nordstrom.

On June 10, First American notified the Eleazers that based on the order in the quiet title action, the exclusion for risks allowed and agreed to by the insured barred coverage.

> It appears from the Court's ruling that the Eleazers expressly agreed to grant an easement to The Bush House for the septic system located in their front yard. Under those circumstances, our preliminary conclusion is that the Eleazers' claim falls within the scope of Exclusion No. 4(a) and is not covered by First American's title policy.

On June 25, First American denied coverage because the "presence of the septic system and The Bush House's right of access . . . are matters that were allowed or agreed to by the Eleazers." First American also notes that the Eleazers did not disclose "material information."

> The Snohomish County Superior Court has ruled that the Eleazers expressly agreed in the REPSA to grant an easement so The Bush House could maintain the septic system located on their property. The Eleazers closed on their purchase knowing that the septic system was located, and would remain, in their front yard; they did not demand before closing that Nordstrom remove the septic system. The presence of the septic system 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) and is not covered by First American's title policy.
>
> . . . .
>
> Moreover, . . . in all the correspondence between the Eleazers and First American over the last two years, they never disclosed their pre-closing knowledge of the septic system in their front yard or the REPSA's provision to grant an easement for access to that system until your June 4, 2013, letter enclosing the Superior Court's order on summary judgment.

> This studied [sic] avoidance of patently material information indicates an intentional effort to mislead First American. Accordingly, the withholding of material information provides an additional ground for denying coverage.

Lawsuit against Talon and First American

The Eleazers filed a lawsuit against the escrow agent Talon and First American. The Eleazers alleged Talon breached the Escrow Instructions and its fiduciary duty by not searching for and disclosing the 1993 SHD letter and restrictive covenants. The Eleazers alleged First American breached the Title Policy and acted in bad faith by denying their claim for "covered losses." The Eleazers also alleged First American violated the Insurance Fair Conduct Act (IFCA), RCW 48.30.010-.015.

First American filed a counterclaim alleging the Eleazers' "claims are not covered by the Title Policy."

Summary Judgment Dismissal of Lawsuit against Talon and First American

Talon and First American filed a motion for summary judgment dismissal of the lawsuit. Talon argued it did not breach the Escrow Instructions or its fiduciary duty because it had no duty to discover and disclose the 1993 SHD letter and restrictive covenants. First American argued there was no loss and the coverage claims were excluded because the Eleazers knew about the OSS, agreed to grant an easement for it, and withheld information.

In support, Talon submitted the declaration of First American Regional Claims Manager Daryl Lyman. Lyman states, "The Form 34 relating to the drainfield easement . . . does not appear anywhere in the Escrow File. That document was never provided to Talon by the Eleazers, Nordstrom, or their agents." First American submitted a number of documents including the commitment for title insurance, the Escrow

Instructions, the Title Policy, numerous letters between First American and the Eleazers, declarations filed by the Eleazers and Nordstrom in the quite title action, and the May 2013 order dismissing the quite title action.

The Eleazers filed a cross motion for summary judgment. The Eleazers argued Talon had a duty under the Escrow Instructions to obtain and provide "a written statement from Ms. Nordstrom regarding the 1993 encumbrances." The Eleazers argued the 1993 SHD letter and restrictive covenants were covered risks under the Title Policy and First American breached the policy by not paying damages.

In support, the Eleazers submitted declarations and a number of documents. The Eleazers admit they knew the Bush House OSS was located in their front yard when they purchased the property. But according to the Eleazers, Nordstrom's real estate agent "told us that the drain field in the bungalow's front yard was designed to be large enough for the bungalow's use as well as the Bush House's use, in case the bungalow's current on-site septic system ever failed." The Eleazers state they "would have expected any easement for our consideration to have been consistent" with the representation that the OSS drain field was large enough to serve both properties. The Eleazers state they asked the escrow agent at closing "about the Bush House septic system easement issue." According to the Eleazers, the "Talon escrow agents looked through all the paperwork 'to see if they had missed anything' " and told the Eleazers they "did not find anything in the paperwork that mentioned the Bush House septic system."

The court granted the motion of Talon and First American and dismissed the lawsuit.

Appeal

The Eleazers contend the court erred in dismissing the lawsuit against Talon and First American on summary judgment.

We review an order of summary judgment dismissal de novo and engage in the same inquiry as the trial court. Kut Suen Lui v. Essex Ins. Co., 185 Wn.2d 703, 709-10, 375 P.3d 596 (2016). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014). We consider all facts and make all reasonable factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted. Allen v. State, 118 Wn.2d 753, 760, 826 P.2d 200 (1992); LaMon v. Butler, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989).

We interpret contracts, including insurance policies, de novo as a matter of law. Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005); Black v. Nat'l Merit Ins. Co., 154 Wn. App. 674, 680, 226 P.3d 175 (2010). A contract "should be construed as a whole and, if reasonably possible, in a way that effectuates all of its provisions." Colo. Structures, Inc. v. Ins. Co. of the W., 161 Wn.2d 577, 588, 167 P.3d 1125 (2007).[2] We give words in a contract an "ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates a contrary intent." 4105 1st Ave. S. Invs., LLC v. Green Depot WA Pac. Coast, LLC, 179 Wn. App. 777,

[2] Footnote omitted.

784, 321 P.3d 254 (2014); Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Dismissal of Claims against Talon

The Eleazers assert that under the Escrow Instructions, Talon had a contractual and fiduciary duty to search for the 1993 restrictive covenants and SHD letter. Talon contends it had no duty to search for the 1993 recorded documents.

The existence of a duty is a question of law we review de novo. Washburn v. City of Fed. Way, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013). The "duty to identify or disclose title defects . . . is owed only in preparing an abstract of title." Centurion Props. III, LLC v. Chicago Title Ins. Co., 186 Wn.2d 58, 69-70, 375 P.3d 651 (2016). The duties and limitations of an escrow agent are defined by the escrow instructions. Centurion Props., 186 Wn.2d at 70; Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d 654, 663, 63 P.3d 125 (2003). An escrow agent has a duty to exercise " 'ordinary skill and diligence, and due or reasonable care.' " Denaxas, 148 Wn.2d at 663[3] (quoting Nat'l Bank of Wash. v. Equity Inv'rs, 81 Wn.2d 886, 910, 506 P.2d 20 (1973)). The escrow agent has a fiduciary duty to " 'conduct the affairs with which [it] is entrusted with scrupulous honesty, skill, and diligence.' " Nat'l Bank, 81 Wn.2d at 910 (quoting 30A C.J.S. ESCROW § 8 (1965)).

The Escrow Instructions direct Talon to obtain a preliminary commitment for title insurance. The Escrow Instructions unequivocally state Talon can "rely on the [preliminary commitment for title insurance] in the performance of its duties" and Talon "shall have no responsibility or liability for any title defects or encumbrances which are

[3] Internal quotation marks omitted.

not disclosed in the [preliminary commitment for title insurance]." The Escrow Instructions state, in pertinent part:

> **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.[4]

The undisputed record establishes the preliminary commitment for title insurance does not include the 1993 restrictive covenants or SHD letter. Under the plain and unambiguous terms of the Escrow Instructions, Talon had "no responsibility or liability for any title defects or encumbrances which are not disclosed in the title report."

The Eleazers also argue the "Title Contingency Addendum" in the REPSA imposed a duty on Talon to search for the 1993 recorded documents. The Title Contingency Addendum states, in pertinent part:

> **Title Contingency.** This Agreement is subject to Buyer's review of a preliminary commitment for title insurance, together with easements, covenants, conditions and restrictions of record, which are to be obtained by Buyer, to determine they are consistent with Buyer's intended use of the Property.[5]

The Title Contingency Addendum imposes no duty on Talon to search for and disclose recorded documents. The addendum clearly states the listed encumbrances "are to be obtained by Buyer."[6] And because the undisputed record also shows neither the Eleazers nor Nordstrom provided the Form 34 addendum to Talon, there was no duty to

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[4] Emphasis added.

[5] Emphasis added.

[6] (Emphasis added.) The Eleazers argue Talon violated its fiduciary duty because it did not include the restrictive covenants and 1993 SHD letter on the statutory warranty deed executed by Nordstrom. But nothing in the Escrow Instructions directs Talon to do so.

obtain verification of the status of the Form 34 easement agreement.[7]

The court did not err in dismissing the claim against Talon for breach of contract or fiduciary duty.

Dismissal of Claims against First American

The Eleazers assert the court erred in concluding their claims are not covered by the Title Policy. First American contends the undisputed record establishes coverage is barred by the policy exclusion for risks allowed or agreed to by the insured.

"The party seeking to establish coverage bears the initial burden of proving coverage under the policy has been triggered." Pleasant v. Regence BlueShield, 181 Wn. App. 252, 261, 325 P.3d 237 (2014); Diamaco, Inc. v. Aetna Cas. & Sur. Co., 97 Wn. App. 335, 337, 983 P.2d 707 (1999). "The insurer bears the burden of establishing an exclusion to coverage." Pleasant, 181 Wn. App. 262; Diamaco, 97 Wn. App. at 337. "We construe any ambiguity in an exclusion against the insurer." Pleasant, 181 Wn. App. 262; McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 733, 837 P.2d 1000 (1992).

The Title Policy insures "against actual loss, including any costs, attorneys' fees and expenses provided under this Policy, resulting from the Covered Risks." The Policy states, in pertinent part:

> **OWNER'S COVERAGE STATEMENT**
> This Policy insures You against actual loss, including any costs, attorneys' fees and expenses provided under this Policy, resulting from the Covered

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[7] The Escrow Instructions state, in pertinent part:

Verification or Existing Encumbrances. The closing agent is instructed to request a written statement from the holder of each existing encumbrances 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.

> Risks set forth below, if the Land is an improved residential lot on which there is located a one-to-four family residence and each Insured named in Schedule A is a Natural Person.

The policy lists a number of "Covered Risks" including "Someone else has a right to limit Your use of the Land," "Someone else has an encumbrance on Your Title," and "Your Title is unmarketable."[8]

First American asserts the Eleazers cannot show an actual loss resulting from a covered risk. The Eleazers argue there are material issues of fact on actual loss and coverage. Even if there are questions of fact on actual loss, the undisputed record establishes coverage is barred under the exclusion for risks allowed or agreed to by the insured. Exclusion 4(a) of the Title Policy states, in pertinent part:

> **EXCLUSIONS**
> . . . You are not insured against loss, costs, attorneys' fees, and expenses resulting from:
> . . . .
> 4. Risks:
> a. that are created, allowed, or agreed to by You, whether or not they appear in the Public Records.

There is no dispute the Eleazers knew the Bush House OSS was located in the front yard before they purchased the property in 2007. There is no dispute the Eleazers

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[8] The policy states, in pertinent part:
COVERED RISKS
The Covered Risks are:
. . . .
5. Someone else has a right to limit Your use of the Land.
. . . .
9. Someone else has an encumbrance on Your Title.
. . . .
26. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.

agreed to grant an easement for the OSS but did not do so. Because the Eleazers allowed or agreed to the risk, exclusion 4(a) bars coverage.[9]

Dismissal of Bad Faith Claim

The Eleazers contend the court erred in dismissing their bad faith claim against First American. Because the exclusion bars coverage, the Eleazers cannot establish bad faith. See Overton v. Consol. 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.").

Dismissal of IFCA Claim

The Eleazers assert material issues of fact preclude dismissal of their IFCA claims. The Eleazers claim First American did not comply with "statutory and regulatory duties" under IFCA. The Eleazers cannot show First American acted unreasonably in denying the claim for coverage. See Ainsworth v. Progressive Cas. Ins. Co., 180 Wn. App. 52, 79, 322 P.3d 6 (2014).[10] And in a recent case, Perez-Crisantos v. State Farm Fire and Casualty Co., No. 92267-5, 2017 WL 448991, at *6-*7 (Wash. Feb. 2, 2017), the Washington Supreme Court held that "IFCA does not create an independent cause of action for regulatory violations."

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[9] We reject the argument that the efficient proximate cause rule requires First American to provide coverage. Because the decision to purchase the property was made after learning about the OSS and the Eleazers agreed to grant an easement, the efficient proximate cause rule does not apply. See Graham v. Pub. Emps. Mut. Ins. Co., 98 Wn.2d 533, 538, 656 P.2d 1077 (1983). Further, we need not address the failure to cooperate provision. But as the undisputed record shows, the Eleazers did not disclose that they knew about the OSS in 2007 or that they agreed to an easement.

[10] RCW 48.30.015(1) states, in pertinent part:

> Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs.

We affirm summary judgment dismissal of the lawsuit against Talon and First American.

WE CONCUR: