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,

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,

Respondents/Defendants.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The decision of the court of appeals below does not conflict with any other opinion of the courts of appeals nor does it present any issue of substantial public interest that has not already been addressed by the Supreme Court. This case involves the application of specific terms in a title insurance policy to unique facts. The court of appeals, in an unpublished opinion that does not warrant Supreme Court review, correctly ruled that an express exclusion precluded coverage.

The Eleazers purchased residential property knowing that there was a large septic drain field in their front yard that serviced the adjoining commercial property. When they purchased, the Eleazers allowed the drain field to remain and specifically agreed to grant an easement for it. The Eleazers submitted a claim to First American without mentioning that they knew about and had agreed to grant an easement for the drain field. First American initially denied coverage, then accepted coverage when the Eleazers claimed that two recorded documents that were not listed as exceptions in the Title Policy precluded them from using the drain field, and finally denied coverage when First American discovered that the Eleazers had known all about the drain field and had agreed to grant an easement for it, a risk specifically excluded under the policy.

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.) 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 drain field located on the residential lot in front of the residence. (CP 580.)

Previously, in 1993, Nordstrom applied for approval from the Snohomish Health District ("SHD") to repair the OSS. (CP 580.) On March 26, 1993, SHD sent a letter to the Bush House approving the repair with conditions ("SHD Letter"). (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.) Instead of an easement, Nordstrom proposed a Declaration of Restrictive Covenants ("Covenants") which treated both the residential property and the Bush House as one lot for land use purposes. (CP 580, 609.) SHD accepted Nordstrom's proposal and the SHD Letter and Covenants were recorded with the county auditor.

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 Escrow Instructions, which incorporated by reference the parties' Real Estate Purchase and Sale Agreement ("REPSA") and any attachments, amendments or addenda. (CP 558.) Although Talon had a copy of the parties' initial 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 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.

(CP 563.) The Eleazers make a point that Nordstrom signed a similar certification but fail to tell the Court that they also certified to Talon that all of the conditions of the agreement had been satisfied.

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 policy exceptions and exclusions. (CP 546.) One such exclusion is as follows:

> 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.

(CP 553.)

The Eleazers submitted a claim to First American through their attorney at the time, Kem Hunter, in May 2011. (CP 121-23.) The Eleazers' asserted that they had discovered the two recorded documents concerning the drain field, 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 did not mention their prior knowledge of the drain field on their property or their own written agreement to grant an easement to the Bush House for the drain field. (*Id.*)

First American assigned the Eleazers' claim to Daryl Lyman, a Senior Claims Counsel in the company's Seattle Office. (CP 147.) Mr. Lyman 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 a letter with voluminous enclosures, from Mr. Hunter. (CP 154-92.) In addition to disputing Mr. Lyman's coverage analysis, Mr. Hunter's letter 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 retained outside counsel on behalf of First American. (CP 1510-11.) 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 letter to explain why the Eleazers' claims under their Title Policy and Escrow Instructions should be denied. (CP 198-203.) Ms. Marshall also requested a copy of the

completed Seller's Disclosure Statement, also known as "Form 17." Ms. Marshall stated:

> 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 by providing copies of pages 2 through 5 of the Form 17. (CP 205-13.) Curiously, Mr. 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 drain field and had agreed to grant an easement to the Bush House for it prior to closing. (*Id.*)

In another letter to Ms. Marshall dated February 7, 2012, 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.) Having not been advised that the Eleazers were aware of the drain field and had agreed to grant an easement to the Bush House, 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.

(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.) 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 other 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.) Mr. 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.) On March 5, 2012, Mr. 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, Mr. Hunter never responded to First American's settlement offer. In none of these letters did Mr. 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, Mr. Goodman sent a copy of his February 22, 2012 letter to the Eleazers' new attorney, Michele McNeill. (CP 245-52.) Ms. McNeill also failed to respond to First American's settlement offer. Instead, she 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.) While 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.) Mr. 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, Mr. 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, Mr. 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.) Accordingly, First American directed the appraiser to provide a DIV opinion based upon the presumed post-purchase discovery of the Bush House drain field in the front yard.[1]

[1] In their Petition for Review, the Eleazers imply that the appraiser found $125,000 diminution in value due to the discovery of the SHC letter and Covenants. Petition for Review at 11. Rather, it was based on the value with and without the drain field which, unbeknownst to First American and the appraiser, the Eleazers had agreed and allowed to remain in their front yard.

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 that 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.)[2] 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, 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 First

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[2] An unpublished opinion has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. GR 14.1. However, an unpublished opinion may be cited to establish relevant facts. *See Regan v. McLachlan*, 163 Wn. App. 171, 174 n.1, 257 P.3d 1122, 1124 (2011); *see also State v. Seek*, 109 Wn. App. 876, 878 n.1, 37 P.3d 339, 340 (2002) ("The general rule is that unpublished opinions may be cited for evidence of facts established in earlier proceedings in the same case involving the same parties. They can also be cited to establish facts in a different case that are relevant to the current case.")

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.)

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 Petition for Review, 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 and ruled 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.
>
> ***
>
> 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.). The court of appeals affirmed. *Eleazer v. First American Title Ins. Co.*, No. 75097-6-I (March 27, 2017).

III. ARGUMENT

A. The Decision of Division One of the Court of Appeals does not Conflict with a Decision of Division Three Regarding the Knowledge Exclusion and Damages.

The decision of the court of appeals in this case does not conflict with any decision of another division of the court of appeals. The Eleazers argue that the opinion conflicts with Division III's decision in *C 1031 Properties, Inc. v. First American Title Ins. Co.*, 175 Wn. App. 27, 301 P.3d 500 (2013). These two cases deal with completely different exclusions in

different policies.[3] The *C 1031* court does not quote the specific exclusion at issue in that case, referring to it only as the "knowledge exclusion" or "knowledge exception." 175 Wn. App. at 31-33. Although the Eleazers' policy is different, it has a knowledge exclusion that is probably similar to the one at issue in *C 1031*. Exclusion 4(b) of the Eleazer policy excludes risks "that are Known to You at the Policy Date, but not to Us, unless they appear in the Public Records at the Policy Date ...." The *C 1031* court ruled that the knowledge exclusion did not apply on the particular facts of that case because the policy defines "knowledge" as "actual knowledge" and C 1031 was found to not have had actual knowledge of the power line easement at issue in that case. *Id.* at 33.

However, First American did not rely upon the knowledge exclusion in denying the Eleazers' claim. It denied coverage based upon Exclusion 4(*a*), which excludes risks "allowed or agreed to" by the insured. This is not a knowledge-based exclusion as the Eleazers suggest. It turns on the insureds overt actions to assume or agree to a risk that might otherwise be insured against by the policy. *See, e.g., Dickens v. Stiles,* 81 Wn. App. 670, 675, 916 P.2d 435 (1996) (overburdening or misuse of an easement is excluded as being created, suffered, assumed or agreed to by the insured claimant); *Tumwater State Bank v. Commonwealth Land Title Ins. Co.*, 51 Wn. App. 166, 170, 752 P.2d 930 (1988) (mere knowledge of a prior

[3] The Eleazers purchased an Eagle Protection Owner's Policy for one-to-four family residences. (CP 547.) C 1031 was a developer that acquired an old drive-in theater to construct storage units. 175 Wn. App. at 29. Accordingly, C 1031 would not have purchased a residential title insurance policy.

encumbrance would not qualify under the "created, suffered, assumed, or agreed to" exclusionary clause unless the insurer also established that the insured agreed to the encumbrance.) 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 drain field 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, *C 1031 Properties,* and the knowledge exclusion that it discusses, has no application to the facts of this case and does not present a conflict.

The court of appeals opinion also does not conflict with *C 1031 Properties* on the issue that "damages are a question of fact." First of all, the court of appeals acknowledged that damages are a question of fact. Slip op. at 15. Nevertheless, it held that, "[e]ven 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." *Id.* Accordingly, there is no conflict between this decision and *C 1031 Properties* on the issue of damages.

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 drain field, *per se*. But, contrary to the opening sentence of the Eleazers' brief, the Title Policy only insures against *actual loss* resulting from a covered risk. (CP 547.) It does not guaranty clear title and it does not obligate the insurer to initiate litigation to clear an alleged encumbrance from title. *Securities Serv., Inc. v. Transamerica Title Ins. Co.*, 20 Wn.

App. 664, 668-70, 583 P.2d 1217, 1220-1221 (1978). Accordingly, the Eleazers' claim must be tied to a covered risk that causes them a loss. That loss necessarily is that the drain field limits the Eleazers' use of their property. No one has sought to restrict the Eleazers' use of their property based on the SHD Letter or Covenants except as it relates to the Eleazers' desire to take control of the drain field 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 drain field when they bought the Eleazer Property. The superior court in the first Eleazer case acknowledged this when it held that the "Eleazers contractually promised to grant an OSS easement, which was the direct underlying purpose of the SHD letter and Covenants." (CP 759.)

In any event, even though the court of appeals in this case declined to affirm on the damage issue, the Eleazers nevertheless suffered no damages due to a covered claim. As stated in *C 1031 Properties*, "damages are questions of fact left for the jury to decide *unless reasonable minds could not differ*." 175 Wn. App. at 34 (emphasis added). Neither the SHD Letter nor the Covenants caused any actual loss to the Eleazers. All of the eight judges in two cases and two appeals have 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; RP 54; *Eleazer v. First American Title Ins. Co.*, No. 75097-6-I, slip op. at 15-16 (March 27, 2017). 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 Policy.

B. The Decision of the Court of Appeals does not Conflict with Other Court of Appeals Decisions Regarding "Agreements to Agree."

The Eleazers' argument that the court of appeals opinion in this case conflicts with decisions on "agreements to agree" is nonsensical because the very same court held that agreements to agree are unenforceable in *Eleazer v. Bush House.* Slip op. at 4. But the court said that case did not involve an agreement to agree.

> Before addressing the propriety of the trial court's order, we pause to clarify that, although our commissioner granted discretionary review of the question whether the provision contained in the Form 34 addendum was an agreement to agree, that is not the appropriate inquiry. The agreement to agree inquiry presupposes that no valid contract otherwise exists, which is not the case here given that the parties entered into a contract and performed nearly all of their obligations thereunder. Given the existence of a substantially-performed contract, the germane inquiry, and the one that we embark upon, is whether the provision contained in the Form 34 addendum was sufficiently certain and definite such that specific performance was an appropriate remedy. In addition, and more specifically, we must determine which contractual obligation is an appropriate subject for a grant of specific performance.

Slip op. at 4. The court went on to hold that the trial court erred by imposing specific easement terms upon the Eleazers. It nevertheless held that the Eleazers were bound by the duty of good faith and fair dealing to make a good faith offer of easement terms to Ms. Nordstrom. *Id.* at 8. Finally, the court held as follows:

> 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.

Id. The Eleazers did not appeal this decision. Accordingly, it has been established, as a matter of law, that 1) Form 34 was not an "agreement to agree" in this context, and 2) that Form 34 required that the Eleazers negotiate an easement or face rescission of the REPSA. In other words, they allowed or agreed to the risk. The SHD letter and the Covenants have absolutely nothing to do with the Eleazers' obligation to perform on its promise in Form 34 in good faith.

C. The Supreme Court Recently Ruled that the IFCA does not Create an Independent Cause of Action for Regulatory Violations when an Insurer Reasonably Denies Coverage.

In their third and final argument for review, the Eleazers attempt to dance around this Court's recent decision in *Perez-Crisantos v. State Farm Fire and Casualty Co.*, 187 Wn.2d 669, 389 P.3d 476 (2017) without directly addressing or even citing it. The reason is that the Eleazers' argument simply cannot be reconciled with that decision. The Eleazers correctly state that insurers can be held in bad faith, under the common law, even if they properly deny coverage. But then they go on to claim that "this court has not addressed whether this extends to the IFCA." Petition for Review at 19. But the undisputed premise of the IFCA as *Perez-Crisantos* recognizes, is that the IFCA creates an independent cause of action for an *unreasonable* denial of an insurance claim. *Id.* at 680. It goes on to hold that the "IFCA does not create an independent cause of action for regulatory

violations." *Id.* at 684. Given the reasoning and analysis of *Perez-Crisantos*, and the plain language of RCW 48.30.015 itself, there is no conceivable way that the statute creates a cause of action where there has been a *reasonable* denial of a claim. The only way to make any sense out of the Eleazers' convoluted argument is to assume that they are asking this court to rule that there is an independent claim for violation of insurance regulations in the absence of an unreasonable denial of the underlying claim, which directly conflicts with the holding of *Perez-Crisantos*.

Having just resolved this issue in February, there is no reason for the Court to revisit it now. For the reasons stated in this brief, and in the appellee's brief and summary judgment motion filed below, First American reasonably denied coverage because, *inter alia*, the Eleazers allowed and agreed to the harm for which they seek coverage, i.e. the legal presence of the Bush House drain field in their front yard.

IV. CONCLUSION

There is no conflict between the court of appeals decision and any other appellate opinion nor any issue of substantial public interest that should be determined by the Supreme Court. The court correctly held in a well-reasoned unpublished opinion that the Title Policy at issue simply did not cover the Eleazers' claim.

Respectfully submitted this 26th day of May, 2017

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V. CERTIFICATE OF SERVICE

I certify that on the 26th day of May, 2017, I caused a true and correct copy of this Respondents' Answer to Petition for Review to be served on the following in the manner indicated below:

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