NO. 98062-4

IN THE WASHINGTON STATE SUPREME COURT

COA No. 77769-6-I

JEFFREY HALEY, an individual,

Appellant,

v.

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

Respondents.

FIRST AMERICAN TITLE INSURANCE COMPANY'S ANSWER TO HALEY'S PETITION FOR REVIEW

Thomas F. Peterson, WSBA #16587
SOCIUS LAW GROUP, PLLC
Attorneys for First American Title Insurance Company
One Union Square
600 University St., Suite 2510
Seattle, WA 98101
tpeterson@sociuslaw.com
206.838.9100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SECONDARY AUTHORITY

I. INTRODUCTION

Petitioner Jeffrey Haley ("Haley") improperly seeks review on the merits of a well-reasoned Opinion that follows settled precedent. Haley's petition fails because it does not identify a conflict between the Opinion below and any decision of this Court or a published decision of the Court of Appeals. Additionally, as supported by the trial court's decision on summary judgment and the twice-considered Opinion of the Court of Appeals,[1] Respondent First American Title Insurance Company ("First American") properly denied Haley's tender of defense (and indemnity) because the allegations in the counterclaim in *Haley v. Pugh* fall outside the boundaries of coverage under the title policy. John Pugh's alteration of the easement area to preclude vehicle and pedestrian access would have been readily disclosed by a survey and was plainly visible to Haley at the time he purchased the property. These facts were apparent on the face of the counterclaim and were the bases of First American's denial of coverage. For these reasons, the Court of Appeals properly affirmed the Superior Court's dismissal of Haley's claims against First American on summary judgment. Accordingly, this Court should decline Haley's Petition for Review.

[1] The Court of Appeals granted a motion for reconsideration of its original decision and left the holdings of the decision unaltered.

II. STATEMENT OF THE ISSUE

Whether the Court should deny Petitioner Haley's request for review because the Court of Appeals' published decision does not conflict with any previous Supreme Court or Court of Appeals decision.

III. STATEMENT OF THE CASE

In March 2001, John Pugh ("Pugh") purchased a waterfront home described as Lot D of Mercer Island Short Plat MI-78-4-018. CP 451. In May of 2001, Pugh purchased a vacant tract of land adjacent to the subject short plat known as Tract A of the Plat of Dawn Terrace ("Tract A"). CP 453. Within Tract A is a strip of property measuring approximately 10 feet by 140 feet, which is identified on the Plat of Dawn Terrace as an "easement for utilities and vehicular and pedestrian ingress, egress, and right-of-way as recorded under recording number 7903010712" (the "Easement" and "Easement Area"). CP 401-02, 448, 457. The Easement benefits a few properties in the immediate area including Lot B of Mercer Island Short Plat MI-78-4-018 (now known as the "Haley Property"). CP 401, 433. While the Easement is necessary for access to the other properties, it is not necessary for access to the Haley Property, which directly abuts Butterworth Road. CP 441.

Shortly after purchasing Tract A, Pugh approached his neighbors, including Kathleen Hume ("Hume"), then owner of the Haley Property,

with a proposal to daylight a piped stream underneath Tract A and install significant landscape improvements on Tract A, including within the Easement Area. CP 433. Hume approved the plan knowing that it would be an abandonment of her easement rights for pedestrian and vehicular ingress, egress, and right-of-way. CP 434. Hume viewed the improvements as a benefit to her property because it routed traffic away from her driveway onto a new driveway on the other side of the Easement Area and provided an attractive landscaped area next to her property. *Id*. Previously, neighbors routinely cut across her driveway to access the Easement Area, which contained a paved road adjacent to her property. *Id*. Pugh applied to the City of Mercer Island for a permit to daylight the stream and create a wetland buffer around it on Tract A. CP 448, 465-466. The city approved the permit and Pugh undertook the improvements and landscaping of Tract A, including the Easement Area, in the manner approved by the city. *Id.* All of this had long-since been completed by 2005 when Haley came along seeking to purchase Hume's property. CP 448, 571-76.

Appellant, and his ex-wife Terrin Haley, purchased the Haley Property from Hume on May 11, 2005. CP 432, 437. At the time of their purchase, the fully landscaped 10-foot wide strip of land adjacent to their driveway, including a stream, large and small rocks, trees and shrubbery,

and a large rock structure housing mailboxes was plainly visible. CP 448, 582.

Haley made no public mention of the improvements or the Easement for nearly seven years until early 2012, when he sent an email to Pugh threatening to build a bridge over the stream and park cars on Pugh's driveway. CP 448, 886. He also stated, "[a]s we are cleaning up such issues, would you like to extinguish the easement?" CP 886. Throughout the spring, Haley continued his threats to park cars in Pugh's garden on Tract A unless Pugh negotiated with Haley for a termination of the Easement. CP 887-91. According to Haley, Pugh refused, stating that the Easement had been abandoned or extinguished by adverse possession. CP 381. Several lawsuits and years of litigation ensued. *See Haley v. Pugh*, No. 12-2-23528-7 SEA (King Co. Sup. Ct.).[2]

On July 11, 2012, Haley sued Pugh asserting numerous claims relating to Haley's alleged rights to the Easement Area. CP 291-99. On July 25, Pugh filed his Answer, Affirmative Defenses and Counterclaim to Plaintiff's First Amended Complaint. CP 583-86. On September 6, 2012, Pugh filed Defendant Pugh's Motion for Summary Judgment Dismissing Plaintiff's First Amended Complaint and Terminating Easement. CP 148-

[2] *See also Haley v. City of Mercer Island*, No. 12-2-37345-1 SEA (King Co. Sup. Ct.); *MJD Properties, LLC v. Haley*, No. 12-2-23266-1 SEA (King Co. Sup. Ct.).

150. Haley cross-moved for summary judgment seeking dismissal of Pugh's counterclaim for quiet title to the Easement Area. *Haley v. Pugh*, No. 12-2-23528-7 SEA (King Co. Sup. Ct.). On October 5, 2012, the court granted Pugh's motion for summary judgment and denied Haley's cross-motion. CP 664. Haley filed a motion for reconsideration. CP 309. In response, Pugh filed the Declaration of Kathleen Hume on November 16, 2012. CP 432. In her declaration, Hume testified that she had consented to the improvements to the Easement Area and was aware that the improvements were an abandonment of her easement rights. CP 434.

On November 26, 2012, 51 days after the court had granted Pugh's motion for summary judgment and three days before a reply brief was due on Haley's motion for reconsideration, Haley emailed a claim to First American. CP 580-90. Pacific Northwest Title Insurance Company, which was subsequently acquired by First American, had provided a Policy of Title Insurance (the "Policy") to Haley in connection with his 2005 purchase of the Haley Property. CP 592-602. In his email and accompanying letter, Haley tendered to First American defense against Pugh's counterclaim that the Easement had been extinguished or abandoned.[3] CP 580-90. Haley's transmittal letter states as follows:

[3] In addition, Haley claimed coverage for a separate lawsuit brought by Pugh that sought to quiet title to a utility easement over the Haley Property. The latter claim is not an issue in this lawsuit.

"Within the easement area, Pugh built a mailbox support structure, planted bushes and, and (sic) dug a ditch lined with rocks to channel a stream. When I told Pugh that I wanted to begin using the easement, he replied that the easement was abandoned or extinguished by adverse possession." CP 582. Haley's letter also included a copy of Pugh's Answer, Affirmative Defenses and Counterclaim to Plaintiff's First Amended Complaint ("Counterclaim"). The Counterclaim alleges, in part, as follows:

> At the time he acquired title to his property, the easement area described in Exhibit A hereto consisting of approximately 10' by 140' had been altered in such a manner as to defeat and render impossible the intended use of the easement. Specifically, through a process approved by the City of Mercer Island, a submerged water course pipe below the surface of the easement area had been eliminated and a natural water course permitted over the entirety of the easement area. A notice of decision allowing the alteration of the water course channel and re-landscaping/site restoration within the water course corridor was approved by the City of Mercer Island by a Notice of Decision dated September 17, 2001. Notice issued to appropriate landowners and other interested persons regarding the proposed action. Approval of the alteration of the easement area was fully assented to by plaintiff/counterclaim defendant Haley's predecessor in interest.
>
> ***
>
> The alteration was completed in early 2002. Plaintiff/counterclaim defendant Haley took possession of Parcel B in 2005. Until recently, Haley never challenged the altered use of the easement area.
>
> ***
>
> The 1979 easement has been effectively abandoned and extinguished for its stated purpose of vehicular and pedestrian ingress, egress and right of way.

CP 585-86.

On November 28, 2012, First American sent an email and a letter to Haley acknowledging receipt of the claim. CP 604-05. That same day, William Reetz of First American spoke with Haley twice on the telephone. CP 607. In the first call, Reetz advised Haley that he would review the claim. In the second call, he told Haley that First American was not in a position to make a coverage decision at that time but that Haley could inform the court that he had tendered a claim and the title insurance company was investigating. *Id.* Thereafter, Reetz investigated the claim by reviewing the Haley letter, the Policy, the pleadings and papers filed in the lawsuit, and performing legal research. In a December 5, 2012 telephone call, Reetz informed Haley that First American would not accept the tender. *Id.* On December 12, 2012, Reetz sent a letter to Haley formally denying the claim. The letter refers only to the allegations in the Counterclaim and the terms of the Policy. After noting that the alteration of the easement area had been formally approved by the City of Mercer Island, he cited three Policy provisions in support of his denial of coverage and the tender of defense: 1) that the easement area was not part of the "Land" defined in the policy; 2) that the claim was excluded by Policy General Exception 3, which excludes "matters which would be disclosed by an accurate survey or inspection of the premises;" and finally, 3) that the claim, tendered after summary judgment had been entered, was not timely as provided in Policy Condition 3. CP 593, 611. In his discussion regarding the denial for the first two reasons, Reetz referred only to the

language of the Counterclaim and the Policy. CP 609-11. He did not reference any other source of information. Regarding the denial for the third reason (late tender), Reetz referred to the counterclaim, the timing of various pleadings and motions filed in *Haley v. Pugh*, Haley's tender letter, and his conversations with Haley. CP 611.

Haley disputed First American's decision in a lengthy letter dated December 17, 2012. CP 613-17. On January 20, 2013, Warren A. Robinson of First American responded to Haley's letter again denying the claim stating that "the defendant asserts that certain circumstances have rendered the purposes of the grant of the easement impossible to use." CP 619.[4]

---

[4] Robinson then goes on to reiterate the three bases for denial set forth previously in the Reetz letter and added the following additional bases for denial:

1) Schedule B Exception paragraph 1: "Rights or claims of parties in possession not shown by the public records."
2) Exclusion from Coverage 3(b):
"Defects, liens and encumbrances, adverse claims, or other matters…not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy."
3) Exclusion 3(c), "resulting in no loss or damage to the insured claimant."
4) Exclusion 3(d), matters "attaching or created subsequent to Date of Policy."
5) Exclusion 1(a):
"Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

CP 592, 596.

On February 15, 2013, after considering Haley's motion for reconsideration, the superior court entered an order on summary judgment holding as follows:

> Any rights of plaintiff pursuant to the 1979 Declaration of Easement recorded under King County Recording No. 7903010712 are terminated and abandoned as to any use of the easement area (Exhibit A to Declaration of Easement) which is inconsistent with the use of the easement area as a watercourse corridor permitted by the City of Mercer Island Planning Commission, Project No. CAO 01-002 and SHL 01-019. Specifically, all easement rights are terminated and abandoned except for easement rights to utility, sewage and drainage to the extent said utilities serve plaintiff's property in the easement area.

Haley v. Pugh, 12-2-23528-7 SEA (King Co. Sup. Ct.) (Summary Judgment, Feb. 15, 2013); CP 624-26. Haley appealed and the Court of Appeals affirmed in *Haley v. Pugh*, No. 70649–7–I (Wn. Ct. App., Oct. 27, 2014) (unpublished); CP 628-31.[5] As an appeal of a summary judgment, the Court of Appeals reviewed the case *de novo*. The court concluded, as did the superior court, that Pugh consulted with Hume and that she "fully consented" to the daylighting of the stream knowing that the improvements would be inconsistent with her surface easement rights. *Id*. at 2. Accordingly, the court held as follows: "In view of the uncontroverted evidence that Hume abandoned the easement rights that Haley attempts to

[5] 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)

assert, we conclude the trial court correctly limited the easement on summary judgment." *Id*. at 3.

On November 21, 2016 counsel for Haley sent a letter to First American containing a notice of claim under RCW 48.30.015, the Insurance Fair Conduct Act. The letter provided no new facts or information regarding the claim that First American had twice denied and it did not request a response. CP 633-38. Nevertheless, First American sent two letters to Haley's counsel acknowledging the letter and informing him that it had been assigned for review. CP 640-41. On December 21, 2016, Haley commenced this action. CP 14-22.

First American filed its Answer to Complaint, Affirmative Defenses, and Counterclaim on February 10, 2017. CP 49-62. For its counterclaim, First American sought a declaratory judgment that it had no duty of defense or indemnity to Haley under the Policy. CP 60. Hume and Haley filed cross-motions for summary judgment. CP 101-21, 369-78. On October 6, 2017, First American filed its motion for summary judgment against Haley seeking a judgment on its counterclaim and dismissal of Haley's complaint. CP 410-24. Haley did not file a cross-motion for summary judgment against First American. His opposition brief focused solely on rebutting First American's arguments for denial of coverage and made no mention whatsoever of an insurer's enhanced responsibilities in considering a tender of defense or the issue of bad faith, which he raised for the first time in his appeal. CP 912-24. The superior court heard oral argument on November 3, 2017 and, after taking the matter under

advisement, rendered summary judgment in favor of First American on November 6, 2017. CP 967-70. Haley timely appealed.

Division I of the Washington Court of Appeals ruled in favor of First American, stating: "Because general exception 3 to Haley's title insurance policy applied and indicated that First American did not have a duty to defend Haley, the trial court did not err in granting First American's motion for summary judgment." Slip Op. at 15. On September 30, 2019, Haley filed a Motion for Reconsideration. Petition for Review ("PFR") App. 20 – 41. After First American filed its Answer to the Motion, and after Haley filed his Reply, on December 9, 2019, the Court of Appeals denied Haley's Motion for Reconsideration. On January 8, 2020, Haley petitioned this Court for review.

IV. ARGUMENT

A. The Court Should Deny Petitioner Haley's Request for Review Because the Court of Appeals' Decision does not Conflict with any Previous Supreme Court Decision.

The Court should deny Petitioner Haley's request for review because Haley fails to establish any of the limited considerations governing the acceptance of review in the Rules of Appellate Procedure ("RAP"). To obtain this Court's review, Haley must show that the Court of Appeals' decision conflicts with a decision of this Court or with a published Court of Appeals decision, or that it raises a significant constitutional question or an issue of substantial public interest. RAP 13.4(b).

With respect to the issues that relate to Respondent First American, Haley invokes RAP 13.4(b)(1) and (2) to argue that the Court of Appeals decision conflicts both with decisions of the Supreme Court and Court of Appeals.[6] PFR 16.

Haley makes three arguments as to why the Supreme Court should grant review; none of which truly discuss the ostensible reasons review should be granted under RAP 13.4. Rather, Haley's petition simply recycles the same substantive issues argued below. He does little more than pay lip service to RAP 13.4(1) and (2) before rehashing the same settled principles that have now been considered once by the trial court, and twice by the Court of Appeals.

For instance, Haley cites three Supreme Court cases as those with which the Court of Appeals decision purportedly conflicts: *Expedia Inc. v. Steadfast Ins. Co.,* 180 Wn.2d 793, 329 P.3d 59 (2014); *Am. Best Food, Inc. v. Alea London, Ltd.,* 168 Wn.2d 398, 229 P.3d 693 (2010); and *Xia v. ProBuilders Specialty Ins. Co.,* 188 Wn.2d 171, 400 P.3d 1234 (2017). Haley cites these decisions for the proposition that a title insurer cannot

[6] Haley's Petition for Review invokes both RAP 13.4(b)(1) *and* (2), ostensibly indicating that Haley believes the Court of Appeals decision below conflicts with Supreme Court decisions *and* previously published Court of Appeals decisions. Curiously however, Haley subsequently only lists three cases – all of which were decided by the Supreme Court. Haley does not appear to address any published cases from the Court of Appeals that conflict with the decision below.

look beyond the "eight corners" of the insurance contract and underlying complaint when determining its duty to defend.[7] PFR 17-18. But Haley does not explain why these cases conflict with the decision below.

The reason for the lack of explanation is that these cases do not conflict with the Court of Appeals decision below. To the contrary, the court below cited two of the three cases in its decision, and did so to reiterate the same proposition that Haley asserts: that a title insurer's duty to defend is determined by the "eight corners" of the insurance contract and the underlying complaint. It is evident from Haley's Petition for Review that there is no true conflict of law between the decision below and that of the Supreme Court or any previously published case of the Court of Appeals. Instead, Haley merely raises the specter of such a conflict in the hopes that this Court will disagree with the sound judgment of the lower courts on the merits of this particular case.

B. First American Properly Denied Haley's Tender of Defense.

Despite Haley's claims, the Court of Appeals decision below correctly decided that First American properly denied Haley's tender of defense based on the eight corners of his insurance policy and Pugh's

[7] It should be noted, as it was at the Court of Appeals, that Haley did not raise the issues of bad faith or duty to defend at the trial court. First American argued that the Court of Appeals should not consider arguments raised for the first time on appeal under RAP 2.5(a). The Court of Appeals did not address this issue but First American nonetheless preserves the issue for the Court's consideration of Haley's Petition for Review.

counterclaim. Although First American properly denied Haley's claims based on a number of Policy provisions, the Court of Appeals discussed only "General Exception 3" of the Policy, finding it dispositive of the issue. Slip Op. at 15.

As an initial matter, it is useful to note that the nature of title insurance generally does not cover matters that might affect title that are not recorded in the public records, such as encroachments and adverse possession claims, unless additional policy endorsements are purchased to cover those matters. *See generally*, William B. Stoebuck and John W. Weaver, *Wash. Prac., Real Estate,* § 14.16 (2d Ed., 2019 Update). This concept is incorporated in many of the Policy exceptions and exclusions, including General Exception 3:

> This policy does not insure against loss or damage by reason of the following:
>
> ***
>
> Encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey or inspection of the premises.

CP 596. Pugh's counterclaim against Haley unambiguously describes the Easement Area as having "been altered in such a manner as to defeat and render impossible the intended use of the easement." CP 585. Accepting this allegation as true, General Exception 3 bars coverage.

The opinion below references the minimum ALTA/NSPS survey requirements and concludes that "[t]hese minimum ALTA/NSPS

requirements confirm that if Haley had conducted a survey in 2005, it would have disclosed that the easement area was exclusively possessed by someone other than Hume." Slip Op. at 14.

In his Petition, Haley challenges any potential survey results as facts outside the policy and counterclaim. PFR 18-19 However, Haley repeats a crucial admission that acknowledges the correctness of the Opinion: "A survey would have done nothing more than show Haley what he could see for himself." PFR 12. Precisely. Not only would Pugh's possession be disclosed by an accurate survey but, by Haley's own admission, it was a "matter which would be disclosed by an … inspection of the premises." Policy General Exception 3, CP 596. The Opinion below was on point when it stated:

> Following the ALTA/NSPS standard, the survey would have noted the evidence of Pugh's possession, noted that the easement was not observable at the time the survey was made, noted that there was evidence of use by someone other than Hume, **and noted that there was a stream in the middle of the easement area**.

Slip Op. at 14 (emphasis added.) The Opinion describes what would have been disclosed by a survey, but the same analysis applies to what Haley could readily observe. It is not disputed (indeed, it would be difficult to miss) that there is a stream that runs through the middle of the Easement. One need not go beyond the four corners of Pugh's counterclaim to know that this fact is essential to Pugh's claim against Haley for which Haley sought coverage and defense by First American. CP 585; Slip Op. at 15.

Haley also mistakenly believes that the dispositive issue is whether he owned the easement, as opposed to how he used it. PFR 17. This misses the point. The sole question at issue in General Exception 3 is whether the easement area had "been altered in such a manner as to defeat and render impossible the intended **use** of the easement." Counterclaim, CP 585 (emphasis added). As Judge Andrus pointed out in oral argument, General Exception 3 also references "encroachments." Encroachments, by definition, are not claims of ownership.[8] They are claims of possession in contradiction of the true owner's ownership. Yet, General Exception 3 also precludes claims relating to encroachments "which would be disclosed by an accurate survey or inspection of the premises." Thus, General Exception 3 does not address ownership, rather it deals with possession and use.

Haley cites *Nautilus, Inc. v. Transamerica Title Ins. Co. of Wash.*, 13 Wn. App. 345, 534 P.2d 1388 (1975) to argue that a survey would not disclose ownership. PFR 17. But again, the issue is not about ownership, and the Opinion below was correct when it stated,

> In *Nautilus*, however, the dispute was over who owned the land between the ordinary high water mark and the meander line of a river. The court determined that because this was a legal question about the interpretation of a deed, a survey would not answer it. *Nautilus*, 13 Wn. App. at 349. Here, however, the dispute was not over who owned the easement area but what the easement area's condition was when Haley purchased Lot B. A survey would be able to determine that the condition of the easement area indicated that Pugh – or

[8] Miriam-Webster defines "encroachment" as "something (as a structure) that encroaches on another's land."

> at least someone other than Hume – was in exclusive possession of the area.

Slip Op. at 15.

The title policy at issue spells out in plain language what is insured and what is not. An encroachment that would be disclosed by a survey or one that "Haley could see for himself," is not covered by the policy. The exceptions, which are based upon the essential nature of title insurance, cannot simply be ignored. Haley chose not to purchase the additional coverage. Accordingly, as once stated by this Court:

> A survey consistent with the deed would have established that a question of boundary or area existed. [Insured] chose not to purchase coverage for such questions. Under the clear language of the "accurate survey" exception, there was no coverage for this dispute. [Citation omitted.] [Title company] had no duty to defend [insured].

Bernhard v. Reischman, 33 Wn. App. 569, 579, 658 P.2d 2 (1983).

C. If the Court Were to Accept Review, it Should Consider Each and Every Other Policy Exception, Exclusion, and Condition Raised by First American in its Motion for Summary Judgment and at the Court of Appeals

Having determined that it was appropriate to affirm the superior court on the applicability of General Exception 3, the Opinion below found it unnecessary to determine whether any of the other Policy exceptions, exclusions, or conditions apply. Slip Op. at 15. While First American will not reargue each of those other Policy defenses here, we do wish to draw the Court's attention to them to preserve them should review be granted.

1. General Exception 1. Of particular note, is General Exception 1. It provides as follows:

> This policy does not insure against loss or damage by reason of the following:
>
> GENERAL EXCEPTIONS:
>
> 1. Rights or claims of parties in possession not shown by the public records.

CP 596. According to the unambiguous allegations in the Counterclaim, in May 2005, when plaintiff purchased the Subject Property, Pugh was in possession of the easement area pursuant to a claim of right based upon plaintiff's predecessor's assent in 2001. CP 585-86. Haley acknowledges the undisputed fact that, in 2005 when he purchased the Haley Property, there was nothing in the public records that extinguished the easement. CP 914-15.

2. Exclusion 3. Haley admits in his Motion that what would be shown on an ALTA/NSPS survey "is nothing more than evidence of what Haley could see for himself when he purchased the property." This acknowledges that he had actual knowledge of Pugh's use and possession of the easement area. This knowledge is particularly pertinent to the first two sections of Exclusion 3, which provide as follows:

> Defects, liens, encumbrances, adverse claims or other matters:
>
> (a) created, suffered, assumed or agreed to by the insured claimant;
>
> (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

3. Exclusion 1(a). Pugh alleges in his Counterclaim that his possession and use of the Easement area for a watercourse, which is

inconsistent with use of the area for parking or pedestrian and vehicular access, was duly permitted by the City of Mercer Island. CP 585. The standard buffer for a restored watercourse at the time was 25 feet from the center of the water course. Mercer Island Code § 19.07.070 (2005) (amended 2019 at 19.07.180). Haley's desire to put parking spaces in the Easement Area, would inevitably encroach on the wetland buffer and would not be permissible under Mercer Island land use ordinances and the Notice of Decision. *Id*. Because the City of Mercer Island's approved use of the Easement Area precludes Haley's use of it for vehicular and pedestrian access and parking, causing a loss of easement rights, it is excluded from coverage under Policy Exclusion 1(a).

4. Policy Conditions and Stipulations Section 3. This section requires prompt notification of a claim. Haley notified First American of Pugh's counterclaim 51 days after he had lost against Pugh's motion for summary judgment and three days before Haley's **reply** brief was due on his motion for reconsideration. Haley relies on hindsight to argue that extensions were granted and a final order was entered later. But, at the time Haley tendered his claim, First American reasonably concluded that it was too late to take any effective action and denied the claim, in part, on that basis.

D. Attorney's Fees RAP 18

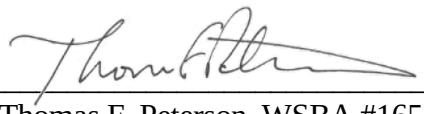
Pursuant to RAP 18, First American requests an award of fees and costs if the Court denies Haley's Petition for Review. Otherwise, First American preserves its request should the Court remand the case.

V. CONCLUSION

There is no conflict with Court precedent here, merely a failure of the Petitioner to grasp the plain meaning of the applicable Policy provisions. Haley fails to identify any conflict between the Opinion below, and any decision of this Court or the Court of Appeals. Further, the Court of Appeals decision correctly decided that First American properly denied Haley's tender of defense based on the eight corners of the Policy and Pugh's counterclaim. As such, First American respectfully requests that the Court deny Haley's Petition for Review.

Submitted this 7th day of February, 2020.

SOCIUS LAW GROUP, PLLC

By 

Thomas F. Peterson, WSBA #16587
Kevin Eggers, WSBA #53127
Attorneys for Respondent First American
Title Insurance Company

V. CERTIFICATE OF SERVICE

I certify that on the 7th day of February 2020, I caused a true and correct copy of this First American Title Insurance Company's Answer to Haley's Petition for Review to be served on the following in the manner indicated below:

Gregory M. Miller	☒	U.S. Mail
Linda B. Clapham	☒	Electronic Mail
John R. Welch	☐	Legal Messenger
CARNEY BADLEY SPELLMAN P.S.	☐	Hand Delivery
701 Fifth Avenue, Suite 3600		
Seattle, WA 98104		

Eileen I. McKillop	☒	U.S. Mail
SELMAN BREITMAN, LLP	☒	Electronic Mail
600 University Street, Suite 1800	☐	Legal Messenger
Seattle, WA 98101	☐	Hand Delivery

/s/ Linda McKenzie
Linda McKenzie,
Legal Assistant

SOCIUS LAW GROUP, PLLC

February 07, 2020 - 4:21 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98062-4
Appellate Court Case Title:	Jeffrey Haley v. Kathleen Hume, et ano.

The following documents have been uploaded:

- 980624_Answer_Reply_20200207161400SC225524_8836.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was First American Titles Answer to Haleys Petition for Review.pdf

A copy of the uploaded files will be sent to:

- clapham@carneylaw.com
- dcampbell@selmanlaw.com
- emckillop@selmanlaw.com
- miller@carneylaw.com
- welch@carneylaw.com

Comments:

Sender Name: Linda McKenzie - Email: lmckenzie@sociuslaw.com
Filing on Behalf of: Thomas Francis Peterson - Email: tpeterson@sociuslaw.com (Alternate Email: lmckenzie@sociuslaw.com)

Address:
601 Union Street
Suite 4950
Seattle, WA, 98101
Phone: (206) 838-9153

Note: The Filing Id is 20200207161400SC225524