

No. 70513-0-I

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IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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EDWARD J. ELEAZER and MAYA E. ELEAZER,  
Husband and Wife and Their Marital Community,  
*Appellants,*

v.

BUSH HOUSE, L.L.C., A Washington Limited Liability Company, Its  
Successors and Assigns; SNOHOMISH HEALTH DISTRICT, a  
Municipal Corporation of the State of Washington; and LOYAL MARY  
NORDSTROM, an Individual,  
*Respondents.*

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ON REVIEW FROM  
SNOHOMISH COUNTY SUPERIOR COURT

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**APPELLANTS' CORRECTED REPLY BRIEF**

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## REPLY ARGUMENT

### I. THE RULE AGAINST ENFORCEMENT OF AN “AGREEMENT TO AGREE” DOES APPLY HERE

#### A. This court has been properly presented the issue of whether Form 34 was a preliminary agreement to agree or too vague and incomplete to be enforceable

RAP 2.5(a) provides that “[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” As the Supreme Court recognizes, “the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority.” *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 291, 840 P.2d 860, 885 (1992). This standard was met in this case, despite BHLLC’s apparent assertion that the trial court was not properly presented with the issue of whether Form 34 was unenforceable. (*See* Resp’ts BHLLC’s Resp. to Appellant Eleazers’ Br. at 28–29.)

At the summary-judgment stage below, the Eleazers stated the issue as follows:

In the alternative, even if the court finds that the Form 34 did not merge with the deed, whether Defendants [BHLLC and Nordstrom] are not entitled to specific performance because Form 34 does not specify the essential terms of the easement and leaves such terms to be agreed upon as the result of a future negotiation?

(CP 359 ¶ 5.) In the argument section of the brief, moreover, the Eleazers cited *Keys v. Kitten*, 21 Wn.2d 504, 151 P.2d 989 (1944) and *Settlerlund v.*

*Firestone*, 104 Wn.2d 24, 700 P.2d 745 (1985). (See CP 366–67.) Both *Keys* and *Settlerlund* are pillars in the line of cases concerning the unenforceability of preliminary agreements with vague and incomplete terms, with each case discussing the basic governing principles. See *Settlerlund*, 104 Wn.2d at 25–27; *Keys*, 21 Wn.2d at 519–21. (And not coincidentally, both *Keys* and *Settlerlund* are cited extensively in the Eleazers’ opening merits brief here. (See, e.g., Appellants’ Br. at 18, 22, 27–28.)) Relying specifically on these cases, the Eleazers’ brief to the trial court discussed the rule against enforcing “preliminary agreements” with vague and missing essential terms. (See CP 366–67.) The brief characterized Form 34 as such an unenforceable agreement because, among other reasons, it did not define “maintenance,” did not state that BHLLC could use the Eleazers’ backyard as a reserve area, and did not discuss indemnification. (See CP 367.) Based in part on this argument, the Eleazers requested that title be quieted in their favor and asked also for an “order that [BHLLC] and its successors and assigns be forever barred from asserting any right, title, estate, lien or interest in or to the Eleazer property.” (CP 372.) The issue was sufficiently presented to the trial court.

The Eleazers, by citing more legal authority to this court and expanding the discussion of their argument, have acted consistently with accepted

appellate practice. *See Walla Walla County Fire Protection Dist. No. 5 v. Wash. Auto Carriage, Inc.*, 50 Wn. App. 355, 358 n.1, 745 P.2d 1332, 1334 (1987) (“There is no rule preventing an appellate court from considering case law not presented at the trial court level.”). Even when a party fails to cite “the crucial case law and treatises” to the trial court—which is not a problem here—an issue is preserved for appellate review if at least the “basic reasoning” is presented below. *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 872, 751 P.2d 329, 330 (1988). Indeed, the Court of Appeals should *expect* that the parties conduct additional legal research and refine their arguments. BHLLC thus argues incorrectly that RAP 2.5(a) bars review of the enforceability of Form 34.

Not only does BHLLC’s argument miss the mark, but it also comes too late. RAP 2.5(a) allows, but does not require, this court to “refuse to review” an issue. But this court already accepted review of this issue under RAP 2.3(b)(2). BHLLC appears to challenge the Commissioner’s decision to accept review. (*See* Resp’ts BHLLC’s Resp. to Appellant Eleazers’ Br. at 28–29.) But BHLLC’s objection to the Commissioner’s decision was due 30 days after the ruling—a deadline that has long since passed—and may be presented only in a motion to modify, not a merits brief under Title 10 RAP. *See* RAP 17.7.

In short, BHLLC's meritless procedural argument does not save BHLLC from the law that defeats its substantive position.

**B. The trial court lacked a legal basis for imposing a duty to negotiate and then easement terms on the parties**

There was no basis in law or fact for the trial court to enforce the preliminary agreement in Form 34 concerning an easement. BHLLC does not dispute the rule that “[a]greements to agree are unenforceable in Washington.” *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945, 948 (2004). And BHLLC does not dispute the three foundational principles underlying that rule. First, under “the objective manifestation test for contracts,” a contract forms only if the parties mutually and objectively show their intent to be bound to the terms of an agreement. *Keystone*, 152 Wn.2d at 177, 179. Second, the terms of the agreement “must be sufficiently definite.” *Keystone*, 152 Wn.2d at 179 (citing *Sandeman*, 50 Wn.2d at 541). Third, the agreement must be complete in all of the material and essential terms concerning the subject matter, without any future meeting of the minds required. *E.g., Keys v. Klitten*, 21 Wn.2d 504, 519, 151 P.2d 989 (1944). These principles guard against the danger of “trapping parties in surprise contractual obligations.” *Keystone*, 152 Wn.2d at 178 (quoting *Teachers Ins. & Annuity Ass’n v. Tribune Co.*, 670 F.Supp. 491, 497 (S.D.N.Y.1987)).

The language of Form 34, and the subsequent conduct of the parties, confirms that the intent of the parties was limited to a formal and express easement. Although Form 34 stated that “Buyer agrees to grant access for maintenance of OSS [on-site sewer system] to Bush House,” the second sentence was key: “Access to be granted in the form of a recorded easement agreeable to both parties.” (CP 679.) By these words, the parties objectively manifested the intent in 2007 to agree to a future agreement only for an (1) express easement (2) duly recorded (3) and with terms that *both* parties agreed upon. Given this intent of the parties, BHLLC’s discussion of implied easements and terms supplied by common law is totally inapposite. (*See* Resp’ts BHLLC’s Resp. to Appellant Eleazers’ Br. at 29–46.) Neither party manifested a willingness to be bound to a contract with open or incomplete terms that would be filled in or supplied by implied rules or background principles of property law.

Further, BHLLC’s proposed reliance on “custom and usage” to supply missing terms has already been foreclosed by the Supreme Court:

Business practice and custom may be used in the implication process as well as in the interpretation of existing contracts, but its role is not to fill in all the essential terms of an incomplete agreement. The alleged implied-in-fact contract before us is complete only in one sense: the agreed-upon price. To imply the remaining essentials by way of custom and usage would violate the elementary principle that the court will not make a contract for the parties.

*Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 521–22, 408 P.2d 382, 386 (1965).

**C. The distinction suggested by BHLLC would create new exceptions to the rule that are unsupportable, inapplicable, and unwise**

BHLLC’s response brief is not entirely clear on this point, but it appears to assert that the rule against enforcing preliminary agreements to agree does not apply to Form 34 because it was an addendum to a larger contract. (*See* Resp’t BHLLC’s Resp. to Appellant Eleazers’ Br. at 30–34.) If this is in fact BHLLC’s argument, then it rests on the premise that an otherwise-unenforceable provision within a broader contract must be enforced. Such a premise would be novel, as the precedents offer no support for it. Consider *P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 289 P.3d 638 (2012), for example. The Court held a missing addendum to a contract that was underway did not render the contract unenforceable. *Id.* at 209. (The addendum was missing but was supposed to have contained data to assist with calculation of the price. *Id.* at 201–02.) The reason for the Court’s holding, however, had nothing to do with fact that the addendum was part of a contract that had already been partially executed. Instead, the Court held “[a]ll material terms were agreed to by the parties here,” because the body of the contract provided a mathematical formula that could

be used to determine the price. *Id.* at 209–10. Here, the respondents have not cited any part of the purchase-and-sale agreement that would allow an analogously mathematical computation of the terms of an easement.

The appellate courts have cautioned that “our role is not that of contract maker; we merely give legal effect to bargained-for contractual relations.” *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 519, 408 P.2d 382, 385 (1965). Respondent Bush House, LLC (BHLLC), however, re-extends its invitation to this court to take on the role of drafting an easement for the parties. There is no logical reason for the courts taking on this role when the preliminary agreement to agree is part of a larger contract that has already been partially executed. The same reasons for holding agreements to agree unenforceable remain equally valid: The parties’ intent should control, the parties should not be subjected to surprise, and the courts do not become suddenly adept at filling in missing terms for the parties. Form 34 is not an enforceable agreement.

Even if it were a contract to negotiate within an otherwise enforceable contract, the parties discharged whatever duty they had to negotiate further. Before closing on May 10, 2007, Nordstrom and her representatives failed to follow up on the suggested easement, never presenting the Eleazers with a proposed form of easement, or even mentioning the topic

at all. (CP 335 ¶¶ 4–6, 673 ¶¶ 5–7.) Following closing, the Bush House property remained unsold, and the Eleazers heard nothing from Nordstrom or her associates about an easement for three years. After peaceably owning their home for three years, they were approached about an easement first by Blair Corson, the current owner of BHLLC. (CP 335–36 ¶¶6–7, 673 ¶ 7.) The law should not require a duty to negotiate to last interminably. Nordstrom—and BHLLC as her successor—must bear responsibility for their own failure to pursue negotiations.

## **II. THE PRELIMINARY AGREEMENT MERGED INTO THE DEED**

BHLLC’s discussion of the “factors” governing the merger-by-deed doctrine is flawed. For example, BHLLC asserts, “The buyer cannot properly assert merger against the seller.” (Resp’t BHLLC’s Resp. Br. at 21.) But the authority that BHLLC relies upon says no such thing. In reality, Professor Stoebuck writes in *Washington Practice* that the party who complains of a difference between the sales contract and the deed, “who is usually the grantee, will be met by the doctrine of merger.” 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate Transactions* § 14.2 (2d ed. & Westlaw Update May 2013). By implication, although the party who “usually” will invoke the doctrine of merger is the

grantor, nothing in Professor Stoebuck's treatise says that the grantee may not. BHLLC misconstrues the relevant legal authority.

Elsewhere, BHLLC conflates the merger-of-estates doctrine with the merger-by-deed doctrine. (Resp't BHLLC's Resp. Br. at 12-14.) These are distinct doctrines. A "merger of estates" is a situation where "one person, who already holds an estate in land, later acquires the immediately preceding or following estate." 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate Transactions* § 6.87 (2d ed. & Westlaw Update May 2013). For instance, a lessee may purchase the leased property from the owner. In that event, "[t]he 'smaller' estate merges into the 'larger' one, so that the holder now has one estate that is the combination of the two and not two separate estates." *Id.* Thus, BHLLC's invocation of merger-of-estate authority confuses rather than clarifies.

BHLLC also misconstrues the cases it relies upon. In *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007) (per curiam), the Supreme Court did hold that the merger-by-deed doctrine did not apply. But contrary to BHLLC's characterization of the case, the Court did not cite an "exception" to the doctrine. (Resp't BHLLC's Resp. Br. at 17.) Rather, the Court held merger did not apply because the complaining party was claiming the tort of negligent misrepresentation, not a breach-of-contract claim

under which the merger doctrine would determine whether the sales contract or the deed was the contract. *See Ross*, 162 Wn.2d at 499.

In short, BHLLC's analysis is not reliable. And, more crucially, it fails to explain why the merger-by-deed doctrine should not operate. Given the exception that BHLLC relies upon, Form 34 would have to be both "independent of the obligation to convey" and "not inconsistent with the deed." *Barber v. Peringer*, 75 Wn. App. 248, 252, 877 P.2d 223 (1994) (citation omitted). As suggested in *Dunseath v. Hallauer*, 41 Wn.2d 895, 253 P.2d 408, 411 (1953), the obligation to convey is centrally concerned with the acts "required to assure the vendee the character of title stipulated for." *Id.* at 899 (quoting 84 A.L.R. 1008, 1018). The existence of an easement is centrally related to the character of the title. Indeed, this court has already held that "an alleged agreement to convey an easement" is "central, not collateral, to the agreement to convey." *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 424, 843 P.2d 545 (1993).

Form 34 related to a requirement that an easement encumber the property that the Eleazers hoped to buy. (*See* CP 679.) Form 34 suggested that, if the parties came to an agreement on the form of an easement, the property would be encumbered with an easement. (*See id.*) But the deed contained assurances that there was *no* encumbrance. By operation of law,

the deed warranted that the property was free “from all encumbrances.” RCW 64.04.030(2). The deed even went one step further, assuring that title was “marketable,” with the exception of some “easements and encroachments,” but only those “not materially affecting the value of or unduly interfering with grantee’s reasonable use of the property.” (CP 665.) A title is not “marketable” if there are “facts which cast legal doubt upon the title” to the point that “the person holding it may be exposed to reasonable probability of litigation.” *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 848, 786 P.2d 285, 297 (1990). As this discussion shows, Form 34 conflicted with the provisions of the deed. The title could not be simultaneously encumbered by the agreement in Form 34 and warranted by the covenants in the deed. The doctrine of merger applies.

### **III. THE COUNTERCLAIMS OF BUSH HOUSE, LLC SHOULD HAVE BEEN DISMISSED**

#### **A. BHLLC failed to defend its counterclaims in its response, violating RAP 10.3(b) and all but conceding their deficiency in light of the burden to show a genuine issue of material fact**

The Eleazers’ opening brief raised the issue “[w]hether a failure of proof should have compelled the trial court to dismiss the counterclaims under CR 11, RCW 4.84.185, RCW 4.24.350, and the common law regarding intentional interference with a business expectancy.” (Appellants’ Br. at 7.) And the Eleazers’ opening brief argued why the trial court was

wrong to permit those counterclaims to withstand summary judgment. (See Appellants' Br. 42-47.) BHLLC's brief, however, despite spanning 50 pages, failed to manage a single response to the arguments concerning this issue. (See Resp'ts BHLLC's Resp. to Appellant Eleazers' Br. at 1-50.) That failure should doom BHLLC's already-meritless counterclaims.

The response brief of a respondent must address the relevant issues raised in the appellant's opening brief. See RAP 10.3(b) (stating that the response brief "should ... answer the brief of appellant"); RAP 1.2(a) (defining "should" to mean "an act a party or counsel for a party is under an obligation to perform"). To be sure, a respondent's failure to offer a response argument does not preclude the court from examining the record and deploying its own knowledge of the law. *Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 229, 905 P.2d 1220 (1995). But it is telling that BHLLC chose to not come forward with citations of the record or legal authority supporting the counterclaims. (See Resp'ts BHLLC's Resp. to Appellant Eleazers' Br. at 1-50.) Surely BHLLC would have done so if there were merit to continuing to defend the trial court's decision.

And given the standard of review, BHLLC was required to support its counterclaims. At the trial court below, the Eleazers moved for summary judgment on BHLLC's counterclaims. (CP at 687, 689-95.) "The stand-

ard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002) (citation omitted). “In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989) (citation omitted). After the moving party carries that burden, “the nonmoving party must set out specific facts sufficiently rebutting the moving party’s contentions and disclosing the existence of a material issue of fact.” *Heath v. Uraga*, 106 Wn. App. 506, 513, 24 P.3d 413 (2001). “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Young*, 112 Wn.2d at 226 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)). The nonmoving party must show a quantum of evidence sufficient “to support a verdict in favor of the nonmoving party.” 14A Karl B. Tegland, *Washington Practice: Civil Procedure* (2d ed. & Westlaw Update Aug. 2013). If the facts are such that “reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is appropriate.” *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65–66, 837 P.2d 618, 623 (1992).

By choosing to not set forth any facts on review, BHLLC fails to meet its burden of showing there is a genuine issue of material fact for trial. Even when a party *does* set out specific facts in a brief, unlike what BHLLC has done here, that party must still support its factual assertions with citations of the record. *See, e.g., State v. Hensler*, 109 Wn.2d 357, 359, 745 P.2d 34 (1987) (castigating a party because their “statement of facts does not contain a single reference to the record,” and warning that “[i]mposition of sanctions or nonconsideration of the claimed error should be no surprise to lawyers who fail to comply”); *Hurlbert v. Gordon*, 64 Wn. App. 386, 400–401, 824 P.2d 1238 (1992) (stating that “‘laissez-faire’ legal briefing,” such as where “factual statements made in the argument section of the brief were made without reference to the record,” is sanctionable). If the failure to provide references to the record may warrant the court’s refusal to consider a party’s argument where the brief does state facts, then it must follow that this same failure nullifies the party’s argument where the brief is silent on the facts. In short, by forcing the court to hunt through a 719-page record, BHLLC cannot show there is a genuine issue of material fact.

BHLLC purports to incorporate by reference its briefing to the Court Commissioner on its counterclaims. (Resp’ts BHLLC’s Resp. to Appel-

lant Eleazers' Br. at 1.) BHLLC's response brief met the limit of 50 pages established in RAP 10.4(b). (*See* Resp'ts BHLLC's Resp. to Appellant Eleazers' Br. at 1-50.) BHLLC cannot circumvent that limitation by referencing a brief that responded to a motion for discretionary review. There is a practical reason for disallowing BHLLC's end-around too: If parties were allowed to elongate their Title 10 RAP briefs by incorporating by reference the briefs submitted for motions practice under Title 17 RAP, the briefs be rooted in different factual records. At the merits stage, the record is developed in accordance with Title 9 RAP. A motion for discretionary review, by contrast, is decided based on an appendix prepared by the moving party in accordance with RAP 17.3(b)(8). BHLLC cannot incorporate its prior briefing by reference because that briefing does not cite the right record.

Nordstrom's response brief does not discharge BHLLC's unfulfilled obligation. In support of BHLLC's counterclaims, Nordstrom offers some arguments and a few citations of the record. (*See* Br. of Resp't Nordstrom 26-34.) But it was BHLLC, not Nordstrom, that made these counterclaims against the Eleazers below. (CP 403-06.) Nordstrom made a different counterclaim against the Eleazers for breach of contract. (CP 376-81, 598-601.) Of course, under RAP 10.1(g), "in a case with more than one party to a side, a party may ... file a separate brief and adopt by reference any part

of the brief of another.” But nowhere in its brief does BHLLC adopt Nordstrom’s arguments regarding BHLLC’s counterclaims. (*See* Resp’ts BHLLC’s Resp. to Appellant Eleazers’ Br. at 1–50.) Moreover, it would have been improper to use RAP 10.1(g) in that fashion. *See C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 728 n.18, 985 P.2d 262, 277 (1999) (“RAP 10.1(g) is intended to facilitate shared briefing related to shared issues. The rule does not allow what essentially amounts to amicus argument relating to another party’s case on an issue not shared in common.”).

**B. BHLLC’s counterclaims were procedurally and substantively flawed**

BHLLC’s response brief fails to address the many fundamental flaws in its request for CR 11 sanctions. The procedural flaws in BHLLC’s request warrant particular discussion. CR 11 does not create a freestanding legal claim that may be alleged in a pleading and proven at trial. Instead, by the terms of the rule, sanctions may be requested only “upon motion” or “upon [the court’s] own initiative.” CR 11(a). Yet BHLLC invoked CR 11 as a “counterclaim” filed with its answer. (CP 404–05.) To this date, BHLLC still has not filed the motion required under CR 11(a); it was the Eleazers who brought the issue to the trial court’s attention by seeking the dismissal of the CR 11 “counterclaim” in their motion for partial summary

judgment. (CP 687, 691-92.) BHLLC merely opposed dismissal of the “counterclaim” and asked that it be set for trial; BHLLC failed to request CR 11 sanctions in its own motion for partial summary judgment. (CP 457-475, 594.) As the Supreme Court has admonished, “requests for sanctions should not turn into satellite litigation.” *Wash. State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054, 1085 (1993). But satellite litigation is what BHLLC sought.

BHLLC’s “counterclaim” also violated the requirement that a party asking for sanctions under CR 11 “give notice to the court and the offending party *promptly* upon discovering a basis for doing so.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099, 1107 (1992) (emphasis added). BHLLC’s “counterclaim” under CR 11 centered almost entirely on (1) the Eleazers’ pre-litigation decision not to accept the settlement proposal of Nordstrom in 2010, and (2) the silence of the original complaint on facts that BHLLC believed important to its perspective on the case. (CP 404-405, 594.) But BHLLC’s “counterclaim” was not filed until eleven months after the Eleazers’ original complaint. (*Compare* CP 404-405, *with* CP 708-721.) BHLLC was too dilatory in invoking CR 11. BHLLC’s response failed utterly to explain these procedural irregularities.

If Nordstrom's argument is considered at all, it appears to allege that the Eleazers wrongfully failed to allege facts in their complaint that favored the defendants' perspective. But again, Washington is a notice-pleading state, and CR 11 does not impose an affirmative duty to plead facts or even to be correct in the facts that *are* alleged. The allegations need only to be "well grounded in fact," CR 11(a)(1), which they were.

Nordstrom also offers a jury argument, not factually substantiated proof, that the Eleazers filed their quiet-title action in bad faith. Nordstrom cites no authority for the proposition that the Eleazers were under a legal duty to negotiate a settlement with the other parties, no matter how disagreeable the settlement terms might have been to the Eleazers. Nordstrom does not cite any reference in the record substantiating its assertion that this litigation is the reason the dilapidated Bush House (which had been closed for years before the Eleazers bought their home) remains closed. Neither Nordstrom nor BHLLC disputes the Eleazers' declaration that Blair Corson, the current owner of BHLLC, "demanded, in a hostile and belligerent fashion, that we grant Bush House an easement." (CP 335-36 ¶¶6-7, 673 ¶ 7.) In short, Nordstrom fails to establish that it was bad faith for the Eleazers, after living peaceably in their home for three years

without any mention of an easement, to seek the protection of the courts in filing a quiet title action.

#### **IV. NORDSTROM AND BHLIC FAILED TO SHOW THEY HAD A RIGHT TO CLAIM EQUITABLE RELIEF**

Nordstrom's discussion of the criteria for when equitable relief should be granted fails to establish the inadequacy of a legal remedy. (*See Br. of Resp't Nordstrom* at 4–7.) She argues that “there is no amount of money which alone will place Ms. Nordstrom in the position she would have been in....” (*Id.* at 7.) But that is not the test. Specific performance is available only if “there is no adequate remedy at law.” *Crafts v. Pitts*, 161 Wn.2d 16, 162 P.3d 382 (2007). Because Nordstrom no longer holds an ownership interest in the Bush House property, having sold it (CP 646 ¶ 9, 649–652), whatever unique value there is in the Bush House property is irrelevant to her interests. If Nordstrom is entitled a remedy, it is only for damages at law for the purported breach of Form 34.

Nordstrom also failed to explain why her lack of an ownership interest in the Bush House property “is not relevant,” as she asserts. (*Br. of Resp't Nordstrom* at 10.) Of course it is relevant, and Nordstrom's failure to cite legal authority for its argument speaks volumes. The Eleazers are not aware of any legal authority holding that a person without an owner-

ship interest in real property has standing to sue to create an easement benefitting that property.

BHLLC, for its part, failed to defend its claimed right as a third party to enforce Form 34, to which it was not a party. BHLLC's response brief again did not "answer the brief of appellant." RAP 10.3(b). Instead, BHLLC again left it to Nordstrom to advocate for the rights of BHLLC. (*See* Br. of Resp't Nordstrom at 10–17.) If the court wishes, therefore, it may ignore that briefing. *See C.J.C.*, 138 Wn.2d at 728 n.18.

But if the court does consider Nordstrom's arguments on behalf of BHLLC, the court must reject them. Nordstrom does correctly concede that, "as a matter of strict contract law ... Bush House [BHLLC] is not a third-party beneficiary to the Real Estate Purchase and Sale Agreement here at issue." (Br. of Resp't Nordstrom at 11.) But Nordstrom incorrectly concludes that Form 34 constituted a properly enforceable real covenant running with the land. (*See id.* at 11–17.) As is already established, Form 34 is not enforceable, and thus the first element of a running real covenant is not met. *See Leighton v. Leonard*, 22 Wn. App. 136, 139, 589 P.2d 279 (1978) ("[T]he covenants must have been enforceable between the original parties, such enforceability being a question of contract ....").

Further, nothing indicates that the third element is satisfied, namely that “the covenanting parties must have intended to bind their successors-in-interest.” *Id.* In *Leighton*, the record included testimony from one of the original covenanting parties that the parties intended to bind their successors-in-interest. 22 Wn. App. at 140. Here, by contrast, neither BHLLC nor Nordstrom produced evidence of such intent. (*See* CP 1-719.)

#### **V. THE BREACH-OF-WARRANTY-DEED CLAIM REMAINS VALID**

It is not entirely clear why Nordstrom is arguing that the Declaration of Restrictive Covenants and the Snohomish Health District (SHD)’s letter are public land-use regulations, as opposed to a private encumbrance. (*See* Br. of Resp’t at 18–21.) But it appears to be related to the Eleazers’ argument that those documents could be the basis for their claim against Nordstrom for breach of the statutory warranty deed. (*See* Appellants’ Br. at 42.) It is true that “Washington does not regard governmental land-use regulations, such as zoning and building regulations, as encumbrances, even if there is an existing violation, since such regulations are not clouds on the title itself.” 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate Transactions* § 14.3 (2d ed. & Westlaw Update May 2013).

The recorded covenant, however, is not a governmental land-use regulation. If it were, presumably the SHD would believe it had the power to determine its legal effect. But it has not claimed that power. In fact, in a letter from the SHD to the Eleazers dated February 3, 2012, the SHD explained that the Declaration of Restrictive Covenants “may just be some sort of cloud on the title of [the Eleazers’ lots],” or “it may also be a legal instrument granting dominate (sic) control of the existing OSS pressure bed and portions of [the Eleazers’ lots] to the property owner of [the Bush House lots].” (CP 670.) Although the SHD retains the power to enforce the Snohomish Sanitary Code, it has not—and it could not have—asserted the power to adjudicate the meaning of the declaration of restrictive covenants. That is because the document creates a *private* encumbrance on property. (See CP 618.) Conspicuously, Nordstrom does not cite any legal authority for the proposition that a privately recorded covenant may be a governmental regulation that falls outside the covenants in the statutory warranty deed. (See Br. of Resp’t at 18–21.)

Alternatively, Nordstrom appears to argue that the Eleazers’ knowledge of the encumbrances obviates their claim for breach of the statutory warranty deed. (See Br. of Resp’t at 23–25.) That argument is flawed for two reasons. First, as conclusively established in the record, the

Eleazers did not have actual knowledge of a formally recorded covenant, as opposed to the mere existence of an unused septic system attached to a dilapidated and nonoperational bed-and-breakfast. The Eleazers have declared they did not know at closing about the declaration of restrictive covenants. (CP 476 ¶ 2, 659, 673 ¶ 5.) Further, Nordstrom did not disclose these documents or the substance of their contents, and the recorded documents did not appear on the Commitment for Title Insurance from the Eleazers' title company. (CP 476 ¶ 2, 480–490, 656–57, 665–68, 673 ¶ 5.) Second, and more importantly, “At least since 1901, Washington courts have followed the rule that a grantee does not waive the covenants of a deed by having knowledge of a defect.” *Edmonson v. Popchoi*, 172 Wn.2d 272, 283, 256 P.3d 1223, 1229 (2011). A deed’s covenants “warrant against known as well as unknown defects, and grantees with knowledge of an encumbrance have the right to rely on the covenants in the deed for their protection.” *Foley v. Smith*, 14 Wn. App. 285, 292, 539 P.2d 874 (1975). Thus, the Eleazers’ claim for breach of the warranty deed should be remanded for trial.

## CONCLUSION

The trial court should be reversed with instructions on remand to:

- Vacate its partial summary-judgment order.

- Dismiss the counterclaims with prejudice.
- Quiet title in favor of the Eleazers, nullifying all easements and covenants that encumber the property.
- Set the Eleazers' breach-of-statutory-warranty-deed claim for trial.

DATE: January 23, 2014

Respectfully submitted,



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*Attorney for Appellants*

IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

EDWARD J. ELEAZER and  
MAYA E. ELEAZER, husband  
and wife and their marital  
community,

Appellants,

v.

BUSH HOUSE, L.L.C., a  
Washington limited liability  
company, its successors and  
assigns; and SNOHOMISH  
HEALTH DISTRICT, a  
municipal corporation of the State  
of Washington; and LOYAL  
MARY NORDSTROM, an  
individual,

Respondents.

Case No. 70513-0-I

CERTIFICATE OF  
SERVICE

COURT OF APPEALS, DIVISION I  
 STATE OF WASHINGTON  
 2014 JAN 24 PM 4:52

I certify that today I caused a copy of

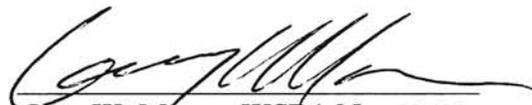
- Appellants' *Praecipe re: Appellants' Reply Brief* and the exhibit attached to it

to be served on the following people in the manner indicated below:

Gary Brandstetter PO Box 1331 Snohomish, WA 98291 gary@brandstetterlaw.com. <i>Attorney for Bush House, L.L.C.</i>	<input type="checkbox"/> U.S. mail, first-class postage prepaid <input type="checkbox"/> Hand delivery <input type="checkbox"/> By legal messenger <input checked="" type="checkbox"/> By email, per prior consent
Steven Uberti Shipman Uberti, PS 3631 Colby Ave Everett, WA 98201 <i>Attorney for Snohomish Health District</i>	<input type="checkbox"/> U.S. mail, first-class postage prepaid <input type="checkbox"/> Hand delivery <input type="checkbox"/> By legal messenger <input checked="" type="checkbox"/> By email, per prior consent
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John Weston, Jr. Weston & Associates 19502 48th Ave W #1 Lynnwood, WA 98036 westonassociates@msn.com <i>Attorney for Loyal Nordstrom</i>	<input type="checkbox"/> U.S. mail, first-class postage prepaid <input type="checkbox"/> Hand delivery <input type="checkbox"/> By legal messenger <input checked="" type="checkbox"/> By email, per prior consent

DATE: January 24, 2014



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