

**FILED**

OCT 15 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

No. 308499

Superior Court No. 09 2 01656 3

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

FIRST AMERICAN TITLE INSURANCE COMPANY,  
A Corporation,

Respondent

v.

C 1031 PROPERTIES, INC.,  
A Washington Corporation,

Petitioner.

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY, WASHINGTON

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RESPONDENT'S BRIEF

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## I. INTRODUCTION

This case concerns the challenge by Plaintiff/Petitioner, C 1031 Properties, Inc. (“C 1031”), of the Trial Court’s Order Granting Summary Judgment entered November 8, 2010 (CP 503-05) and subsequent Order of April 24, 2012 Granting Motion to Exclude Testimony of C 1031’s witness and denying in part C 1031’s Order Granting Motion to Exclude and Denying in Part Motion for Discovery and Certification. (CP 826-29).

C 1031’s assignments of error and issues pertaining thereto involve the following findings of the Trial Court:

There are material questions of fact regarding:

- actual monetary loss or damage sustained or incurred by the plaintiff;
- whether or not plaintiff had, or should have had, actual knowledge of recorded easements;
- whether or not actual and/or knowledge that should have been known by the plaintiff would mitigate and/or bar damages.

(Order Granting/Denying Summary Judgment, CP 503-05, Nov. 8, 2010).

Defendant/Respondent, First American Title Insurance Company (“First American”), asserts that the Trial Court erred as a matter of law by granting Plaintiff’s Motion for Partial Summary Judgment, finding:

that First American Title Insurance Company’s title insurance policy insuring plaintiff does not limit and/or exclude coverage for easements that have been recorded and/or are a matter of public record.

*Id.*

The Trial Court's decision imposed liability upon First American without regard for C 1031's knowledge or notice of the power lines and power poles encumbering the subject real property prior to closing the purchase transaction. Such holding is inconsistent with a plain reading of the terms and conditions of the Title Policy, and contrary to the holdings of other jurisdictions addressing this issue.

What's more, the position of C 1031 appears to have changed on appeal. At the time that this case was presented to the Trial Court, there seemed to have been some confusion regarding whether C 1031 had actual knowledge that power lines and power poles were located upon—and thereby encumbered—the subject property.

That issue has been resolved. Todd Whipple of Whipple Consulting Engineers, who was hired by C 1031 to survey the subject property prior to closing the purchase and sale transaction, has testified and confirmed that the survey conducted by Whipple Consulting and approved by C 1031 identified the power lines and power poles on the subject property.

Now, on appeal, C 1031 has clarified its position: “[p]rior to closing, C 1031 Properties saw the power line” and “before closing, C 1031 conducted a survey and the survey showed the power lines on the property.” (Appellant's Opening Br. 4, 11). The issue of whether C 1031

had actual knowledge and/or notice that power lines and power poles encumbered the subject property is a material question of fact that has now been admitted, which defeats C 1031's claims as a matter of law.

## **II. ASSIGNMENT OF ERROR**

### **Assignment of Error**

The Court erred in entering Order Granting Plaintiff's Partial Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment by finding that the title insurance policy issued by First American Title Insurance Company to C 1031 did not exclude from coverage easements of record.

### **ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

#### **Issue No. 1.**

Whether C 1031's admission that it had actual knowledge, prior to closing the purchase and sale transaction, of power lines and power poles located upon—and thereby encumbering—the subject property defeats C 1031's claim of coverage under the Title Policy as a matter of law.

#### **Issue No. 2**

Whether C 1031 has no coverage under the commitment of title and the title insurance policy issued by First American for an encumbrance known by C 1031 but not disclosed in writing by it to First American Title.

**Issue No. 3**

Whether C 1031 has no coverage under the title insurance policy issued by First American for an easement that encumbered the subject property where C 1031 assumed the purported loss.

**Issue No. 4**

Whether C 1031 has no coverage under the title insurance policy issued by First American for an easement encumbering the subject property because the easement resulted in no loss or damage.

**III. STATEMENT OF THE CASE**

**A. Factual Background**

On August 3, 2007, Mr. Douglass, an agent of C 1031, entered into a Purchase and Sale Agreement (“PSA”) with the seller. (Munding Decl. Ex. B, CP 555, 556, 593-594, Oct. 21, 2011). Mr. Douglass is a sophisticated developer who has over 50 years of experience. (Munding Supplemental Decl. Ex. A, CP 236, 237, 246-49, July 19, 2010). The PSA required C 1031 to inspect and accept the subject property. (Munding Decl. Ex. B, CP 555, 556, 593-594, Oct. 21, 2011). Mr. Douglass, on behalf of C 1031, initialed page 2 of the PSA, thereby acknowledging that he not only had sufficient time to inspect the property but also approved of the boundary line location and the physical condition—including “electrical”—of the subject property. (*Id.*; Munding Supplemental Decl.

Ex. A, CP 236, 237, 286-87, July 19, 2010). Mr. Douglass, conducting due diligence on behalf of C 1031, saw a power line on the subject property. (Munding Supplemental Decl. Ex. A, CP 236, 237, 269, July 19, 2010).

On August 10, 2007, First American issued a Preliminary Commitment of Title Insurance (“Preliminary Commitment”) to C 1031. (Munding Decl. Ex. C, CP 555, 556, 596-602, Oct. 21, 2011). This contract contained a notice provision that required C 1031 to notify First American of existing encumbrances that were not shown in Schedule B of the Preliminary Commitment but known to C 1031. (Munding Decl. Ex. C, CP 555, 556, 601, Oct. 21, 2011). C 1031 did not disclose the existence of the power line and power poles it knew encumbered the subject property.

Prior to entering the PSA, C 1031 hired Whipple Consulting Engineers, Inc. (“Whipple Consulting”) to prepare a complete set of plans for the property, including a survey. (Munding Decl. Ex. O, CP 555, 559, 755-63, Oct. 21, 2011; Resp. to Mot. for Discretionary Rev. 4-5; Appellant’s Opening Br. 4). This survey identified the power lines and power poles. (Munding Decl. Ex. O, CP 555, 559, 755-63, Oct. 21, 2011; Resp. to Mot. for Discretionary Rev. 4-5; Appellant’s Opening Br. 4). C 1031 approved these plans and, on September 17, 2007, submitted them to

the City of Spokane Valley for permits. (Resp. to Mot. for Discretionary Rev. 4-5).

On October 12, 2007, Mr. Douglass, on behalf of C 1031, signed an addendum to the PSA, thus acknowledging that he had completed and complied with the necessary due diligence inspection of the subject property. (Munding Decl. Ex. E, CP 81, 83, 109-110, Apr. 12, 2010). On October 17, 2007, Mr. Douglass, on behalf of C 1031, signed a Supplement to Closing Agreement and Escrow Instructions where he agreed that he had sufficient opportunity to inspect the property, locate boundaries, and identify physical conditions of the property—including “electrical.” (Munding Decl. Ex. F, CP 81, 83, 115-120, Apr. 12, 2010). On October 26, 2007, Mr. Douglass, on behalf of C 1031, sent a letter to the seller disclosing that he had completed his due diligence. (Munding Decl. Ex. H, CP 81, 84, 126, Apr. 12, 2010).

On October 31, 2007, First American issued Owner’s Policy of Title Insurance (Title Policy). (Munding Decl. Ex. A, CP 81, 82, 88-95, Apr. 12, 2010). This contract excluded: (1) encumbrances (a) not known by the insurer but (b) known by the insured and (c) not disclosed in writing by the insured to the insurer; (2) encumbrances assumed or agreed to by the insured; and (3) encumbrances that result in no loss or damage to the insured. (Munding Decl. Ex. A, CP 81, 82, 89, Apr. 12, 2010).

Todd Whipple of Whipple Consulting Engineers was hired by C 1031 to survey the subject property prior to closing the purchase and sale transaction of the subject property. (Response to Mot. for Discretionary Rev. 4-5; Appellant's Opening Br. 4). The survey conducted by Whipple Consulting and approved by C 1031 identified the power lines and power poles as located on the subject property. (*Id.*). Indeed, C 1031 concedes now on appeal that “[p]rior to closing, C 1031 Properties saw the power line” and that “before closing, C 1031 conducted a survey and the survey showed the power lines on the property.” (Appellant's Opening Br. 4, 11).

After C 1031 had this survey conducted and, thereafter, closed the purchase and sale transaction of the subject property, it sought to recover under the Title Policy for a utility easement in favor of Washington Water and Power (“Avista”) located on the subject property and First American denied this claim. (Munding Decl. Ex. G-H, CP 555, 557-58, 615-20, Oct. 21, 2011).

**B. Procedural Posture**

On March 31, 2009, C 1031 commenced this lawsuit. C 1031 subsequently amended its Complaint, adding a cause of action for failure to disclose a sewer line easement in favor of Spokane County. (Am. Compl., CP 1-13, May, 15, 2009). C 1031 amended its Complaint a second time to exclude the cause of action involving the sewer line

easement, as C 1031 admitted to notice of the easement. (Second Am. Compl., CP 16-19, July 14, 2009).

On November 8, 2010, Plaintiff's Motion for Summary Judgment (CP 80) and Defendant's Cross-Motion for Summary Judgment (CP 190-91) were before the Trial Court. That court denied First American's Motion for Summary Judgment and granted in part C 1031's Motion for Summary Judgment. (Order Granting/Den. Summ. J., CP 503-05, Nov. 8, 2010). The Trial Court made the following findings:

The Court finds that First American Title Insurance Company's title insurance policy insuring plaintiff does not limit and/or exclude coverage for easements that have been recorded and/or are a matter of public record

There are material questions of fact regarding:

- actual monetary loss or damage sustained or incurred by the plaintiff;
- whether or not plaintiff had, or should have had, actual knowledge of recorded easements;
- whether or not actual and/or knowledge that should have been known by the plaintiff would mitigate and/or bar damages.

*Id.*

On April 24, 2012, the Trial Court granted First American's Motion to Exclude Testimony of Irving Paul, denied in part Plaintiff's Motion for Production of Discovery, and certified both Orders for discretionary review. (Order Granting Mot. to

Exclude and Den. in Part Mot. for Disc. and Certification, CP 826-829, Apr. 24, 2012).

Significantly, at the time that this case was presented before the Trial Court, there seemed to have been some confusion regarding whether C 1031 had actual knowledge that power poles and power lines were located upon—and thereby encumbered—the subject property. *See* Pl’s Reply Opposing Def’s Mot. for Summ. J., CP 212, Apr. 16, 2010 (“Defendant would have the court believe that Mr. Douglass conceded that he had actual knowledge of the power line easement in a letter dated June 17, 2009 [written by counsel for Appellant to First American] (citing to Def’s Mem. in Supp. of Summ. J. Ex M, CP 204, 81, 85, 138, April 12, 2010 (“C 1031 Properties, Inc. thought that that power easement was on the adjoining property owner’s land . . . not on the land that it was purchasing”))); *see also* Pl’s Reply, CP 772-75, Oct. 27, 2011 (“[F]or the purpose of this brief, Plaintiff admits that Plaintiff saw the power line but did not know whether or not it was on the subject property.”).

That issue has been resolved by way of testimony from Todd Whipple of Whipple Consulting Engineers who was hired by C 1031 to survey the subject property prior to closing the purchase and sale transaction, as explained in C 1031’s Response to Motion for Discretionary Review at page four and five. His testimony confirmed that

the survey conducted by Whipple Consulting and approved by C 1031 identified the power lines and power poles on the subject property. (Resp. to Mot. for Discretionary Review 4-5). Now, C 1031 concedes this material question of fact by clarifying to this Court that “[p]rior to closing, C 1031 Properties saw the power line” and that “before closing, C 1031 conducted a survey and the survey showed the power lines on the property.” (Appellant’s Opening Br. 4, 11).

Thus, while C 1031 maintains on appeal that it had no actual knowledge prior to closing that a utility *easement* on the subject property had been *recorded*, C 1031’s briefing leaves no doubt that it did have actual knowledge that *power lines and power poles* were located upon—and thereby *encumbered*—the subject property. The issue of whether C 1031 had actual knowledge and/or notice that power lines and power poles encumbered the subject property is a material question of fact that has now been admitted, which defeats C 1031’s claims as a matter of law.

#### IV. STANDARD OF REVIEW

“When facts are not in dispute and the issue of insurance coverage depends solely on the language of the policy, the interpretation of insurance policy language is a question of law . . . .” *Santos v. Sinclair*, 76 Wn. App. 320, 323, 884 P.2d 941, 943 (1994). “Appellate review of the trial court’s decision is de novo.” *Id.* “[T]he reviewing court engages in

the same inquiry as the trial court and views the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. *Michak v. Transnational Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 22 (2003). Here, the Trial Court’s Order Granting Plaintiff’s Partial Motion for Summary Judgment and Denying Defendant’s Motion for Summary Judgment was based on an interpretation of the Title Policy. (Order Granting/Denying Summ. J., CP 503-05, Nov. 8, 2010). It is subject to de novo review.

The Trial Court’s Order granting First American’s Motion to Exclude Testimony of Irving Paul and its Order denying in part Plaintiff’s Motion for Production of Discovery must be upheld absent a finding of abuse of discretion. *Johnson v. Jones*, 91 Wn. App. 127, 133, 95 P.2d 826, 830 (1998). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds . . . .” *Wash. State Physicians Ins. Exch. Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

## V. ARGUMENT

The Washington State Legislature has defined a “Title Policy” as “any written instrument, contract, or guarantee by means of which title insurance liability is assumed.” RCW 48.29.010(3)(a). It “is ‘insurance against loss or damage resulting from defects or failure of title to a

particular parcel of realty.’” *Farrington Corp. v. Commonwealth Land Title Ins. Co. of Philadelphia*, 86 Wn. App. 399, 403, 936 P.2d 1157 (1997) (quoting BLACK’S LAW DICTIONARY 727 (5<sup>th</sup> ed. 1979)). It is a contract of indemnity under both Washington law and the contract itself. *Sec. Serv., Inc. v. Trans-america Title Ins. Co.*, 20 Wn. App. 664, 669, 583 P.2d 1217 (1978); Munding Decl. Ex. A, CP 81, 82, 88, 90, Apr. 12, 2010 (providing that “[t]his policy is a contract of indemnity”). Ultimately, while First American has agreed to indemnify C 1031 for loss resulting from certain causes insured against under the Title Policy, C 1031 has submitted no compensable claim.

**A. THE TITLE POLICY DOES NOT COVER THE POWER POLES AND POWER LINES ENCUMBERING THE SUBJECT PROPERTY.**

C 1031 does not have coverage for power lines and power poles encumbering the subject property because it has violated the Preliminary Commitment and Title Policy by failing to disclose to First American what it knew and what it should have known: power lines and power poles encumbered the subject property and this encumbrance was an easement. A plain reading of this contract further demonstrates recovery is precluded as C 1031 has assumed or agreed to its purported loss and because it has suffered no loss or damage as contemplated by the plain policy language.

**1. C 1031 violated a condition of the Preliminary Commitment, precluding coverage.**

“A contract is formed when two parties enter into an agreement for valuable consideration.” *Michak v. Transnation Title Ins. Co.*, 108 Wn. App. 412, 419, 31 P.3d 20 (2001), *overruled on other grounds by Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 64 P.3d 22 (2003). A preliminary commitment supported by consideration is a contract. *Id.* “A preliminary commitment is a statement submitted to the potential insured establishing the terms and conditions upon which the title insurer is willing to issue a title policy.” *Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 536, 39 P.3d 984 (2002). It is an “offer[] to issue a title policy *subject to the stated exceptions in the reports.*” RCW 48.29.010(3)(c) (emphasis added).

The legislature has made clear that such “reports are not an abstract of title.” *Id.* Nor are they “a representation of the condition of title.” *Barstad*, 145 Wn.2d at 536, 39 P.3d 984. On the other hand, an abstract of title is “a written representation” that is intended to be relied upon to identify “all conveyances, instruments, or documents that” impact chain of title. RCW 48.29.010(3)(c). No “rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title are applicable to the issuance of any report.” *Id.* Accordingly, title

commitments contain exclusions that “represent aspects of the property that the insurance company will not cover if it issues a title insurance policy.” *Barstad*, 145 Wn.2d at 540, 39 P.3d 984. Significantly, “exceptions and exclusions are not intended to indicate known encumbrances or defects of title.” *Id.*

Here, First American and C 1031 formed an enforceable contract on August 10, 2007, when First American issued the Preliminary Commitment in exchange for a premium. (Munding Decl. Ex. C, CP 555, 556, 596-602, Oct. 21, 2011). The Preliminary Commitment provides:

[i]f any defects, liens, or encumbrances existing at Commitment date are not shown in Schedule B, we may amend Schedule B to show them. If we do amend Schedule B to show these defects, liens, or encumbrances, we shall be liable to you according to Paragraph 4 below *unless you knew of this information and did not tell us about it in writing.*

(Munding Decl., CP 555, 556, 601, Oct. 21, 2011) (emphasis added). The Preliminary Commitment further contained the “[c]ondition” that “[a]ny claim . . . concerning title to the land must be based on this commitment and is subject to its terms.” *Id.*

Mr. Douglass is a sophisticated developer who has over 50 years of experience, and, at all relevant times discussed herein, was the agent of C 1031. (Munding Supplemental Decl. Ex. A, CP 236, 237, 246-49, July 19,

2010). The PSA was finalized on August 3, 2007 and contained the following provision:

The Purchase and Sale agreement is subject to the inspection and acceptance by purchase which shall be made during a due diligence inspection time period . . . .

(Munding Decl. Ex. B, CP 555, 556, 593-594, Apr. 21, 2011). Mr. Douglass initialed page 2 of the PSA agreeing that (1) he had sufficient time to determine the precise boundary location and physical conditions of the property, and that (2) he “approved” of the boundary location and the physical conditions—including “electrical”—of the property. (*Id.*; Munding Supplemental Decl., CP 286-87, July 19, 2010). On October 12, 2007, Mr. Douglass signed an addendum to the PSA that acknowledged that he had completed and complied with the due diligence inspection of the property. (Munding Decl. Ex. E, CP 81, 83, 109-110, Apr. 12, 2010). He testified as to the precise physical conditions observed during this due diligence period: “**I saw a power line.**” (Munding Supplemental Decl., CP 236, 237, 268-69, Apr. 22, 2010).

To be sure, C 1031 had actual knowledge that the power lines and power poles were located on the side of the fence within the subject property. (Munding Supplemental Decl. Ex. A, CP 236, 237, 268-273, July 19, 2010). C 1031 hired Whipple Consulting in July or August of 2007 to prepare a complete set of plans for the subject property. These

plans included a survey. (Munding Decl. Ex. O, CP 555, 559, 755-63, Oct. 21, 2011; Resp. Mot. for Discretionary Rev. 4-5; Appellant's Opening Br. 4-5). On September 17, 2007, Mr. Douglass, as agent of C 1031 approved these plans and submitted them to the City of Spokane Valley for permits. (Resp. to Mot. for Discretionary Rev. 4-5). This survey, prepared for and approved by C 1031, identified the power lines and power poles located on the subject property. (Munding Decl. Ex. O, CP 555, 559, 755-63, Oct. 21, 2011; Resp. Mot. for Discretionary Review 4-5; Appellant's Opening Br. 4).

On October 17, 2007, Mr. Douglass signed and acknowledged the following in the Supplement to Closing Agreement and Escrow Instructions involving the subject property:

[I] have had adequate opportunity to . . . inspect the property and determine the exact location of its boundaries. The location and physical condition of the property and any . . . electrical . . . [is] approved.

(Munding Decl. Ex. F, CP 81, 83, 115-20, Apr. 12, 2010). On October 26, 2007, C 1031 sent sellers a letter disclosing his due diligence. (Munding Decl. Ex. H, CP 81, 84, 126, Apr. 12, 2010).

It is black letter law that a person who, by their own will, signs and acknowledges the existence of facts contained within a contract is charged with knowledge of those facts and will not be heard to argue lack of

knowledge of the content therein. *See Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 86, 912, 506 P.2d 20 (1973); *see, e.g., Michak*, 148 Wn.2d at 798, 64 P.3d 22 (finding that an insured's act of initialing at the bottom of an amendment to a title commitment was sufficient indication of acceptance of the contents therein).

Similarly, here, by signing the Closing Agreement and Escrow Instructions, the Addendum to the PSA, and the PSA itself, C 1031 has knowledge of information contained therein. These documents, together not only with the plans which C 1031 approved and submitted to the Spokane Valley, but also with the testimony of Mr. Douglass himself, establishes as a matter of law that C 1031 knew that power lines and power poles encumbered the subject property. Furthermore, C 1031 has now unequivocally admitted that it had actual knowledge, prior to closing, of power lines and power poles encumbering the subject property. (Appellant's Opening Br. 4, 11). By not disclosing this information in writing to First American, C 1031 violated a condition of the Title Commitment. (Munding Decl., Ex. C, CP 555, 556, 601, Oct. 21, 2011). Accordingly, C 1031 has no coverage under the Title Policy for the power lines and power poles encumbering the subject property.

**2. C 1031's knowledge, prior to closing, of the power lines and power poles excludes coverage for this encumbrance.**

Knowledge is defined by the Title Policy as “[a]ctual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting Title.” (Munding Decl. Ex. A, CP 81, 82, 88-89, Apr. 12, 2010). An encumbrance is “[a] claim or liability that is attached to property or some other right and that may lessen its value . . . [and is] any property right that is not an ownership interest.” BLACKS LAW DICTIONARY 607 (9<sup>th</sup> ed. 2009). ““An easement is a right, distinct from ownership, to use in some way the land of another without compensation.”” *The City of Olympia v. Palzer*, 107 Wn.2d 225, 728 P.2d 135 (1986) (quoting *Kutschinski v. Thomson*, 138 A. 569 (N.J. Ch. 1927)).

The power lines and power poles on the subject property were encumbrances. They were also easements. C 1031 had actual knowledge that the utility poles encumbered the property and knew a utility company had a “right, distinct from [Appellant’s] ownership, to use . . . the land of [Appellant].” *Id.*; see Appellant’s Opening Br. 11 (“C 1031 saw the power lines.”). Accordingly, the exclusion applies and C 1031 has no coverage under the Title Policy for the power lines and power poles encumbering the subject property.

### 3. The meaning of “Knowledge.”

Actual knowledge and constructive knowledge are distinct legal terms: “A person has actual knowledge of a fact when he or she is subjectively aware of its existence.” *Michak*, 108 Wn. App. at 425, 31 P.3d 26, *overruled on other grounds by* 148 Wn.2d 788, 64 P.3d 22. Constructive knowledge is knowledge sufficient to cause a reasonable person to inquire further. *See Fossom Orchards v. Pugsley*, 77 Wn. App. 447, 452, 892, P.2d 1095 (1995). A person is charged with knowledge of all facts that a reasonable inquiry would disclose. *Enter. Timber, Inc. v. Wash. Title Ins. Co.*, 76 Wn.2d 479, 483, 457 P.2d 600, 602 (1969). Nevertheless, under a contract of title insurance, “[a]ctual knowledge might or might not include imputed knowledge . . . .” *Michak*, 108 Wn. App. at 424, 31 P.3d 20, *overruled on other grounds by* 148 Wn.2d 788, 64 P.3d 22; *see, e.g., Enter. Timber, Inc.*, 76 Wn.2d 479, 457 P.2d 600 (holding under the circumstances that a title insurance policy was triggered by constructive knowledge and rejecting an argument that the contract’s exception only applied in the event of the insured’s actual knowledge of title defects). Business experience is an important consideration in determining whether one must be charged with knowledge. *See Miebach v. Colasurdo*, 102 Wn.2d 170, 685 P.2d 1074 (1984).

Other jurisdictions have recognized that a power line is sufficient to put a person on inquiry notice regarding the existence of an easement. *See Markley v. Christen*, 226 S.W. 150, 153 (Tex. Civ. App. 1920) (stating that, generally, “[t]he sight or knowledge of structures, or other visible material objects, such as roads, wires, or poles connected with or on the land, might reasonably suggest some easement, license, or other similar right”). At least one state has, in addition to the terms of the contract, imposed a duty “to make fair disclosure of the facts (of the risks involved) to the insurer.” *Peachtree Mgmt. & Inv. Co., Inc. v. Pioneer Nat. Title Ins. Co.*, 541 F. Supp. 51 (N.D. Ga 1981) (quoting *Bauer v. Mut. of Omaha*, 460 S.W.2d 366, 370 (Tenn. App. 1969)).

In *Michak v Transnation Title Insurance Co.*, where at issue before the Court of Appeals was whether the term “actual knowledge” in the title commitment included “constructive knowledge,” the court found that it did not, reasoning that the insurer gave no indication that “actual knowledge” incorporated “constructive knowledge.” 108 Wn. App. at 424, 31 P.3d 20, *overruled on other grounds by Michak*, 148 Wn.2d 788, 64 P.3d 22. What was missing in *Michak* is present here.

Here, the Title Policy’s definition of “Knowledge” indicates the intent to include constructive knowledge within the definition of Knowledge. (Munding Decl. Ex. A, CP 81, 82, 88-89, Apr. 12, 2010). By

excluding only that constructive knowledge which may be imputed to the insured by way of public record, the definition demonstrates that constructive knowledge may be obtained by the insured in other ways and by the insurer in any way. This interpretation is reasonable because, as a practical matter, the insured should not be expected to know of public records when finding information in public records may have been a reason why the insured purchased the policy in the first place. On the other hand, the insured should be charged with actual knowledge when the insured happens to have subjective awareness of facts regarding the insured property that would lead a reasonable person to inquire further about the existence of an encumbrance, easement, or other matter.

Here, C 1031 concedes it had actual knowledge, prior to closing, of the power lines and power poles encumbering the subject property. Also, C 1031 had actual knowledge and ought to be charged with actual knowledge that this encumbrance was an easement.

In *Somers v. Leiser*, for example, the Court upheld the trial court's ruling that the buyers of real property had constructive knowledge of a sixty-foot easement "including utility services over and across the platted and unplatted tracts" because evidence that the buyers viewed the property before purchasing it, and thereby acquiring actual knowledge of the existence of a graveled roadway, was sufficient to support a conclusion

that a reasonably prudent person would have been prompted to inquire further. 43 Wn.2d 66, 259 P.2d 843 (1954).

As in *Somers*, here, Mr. Douglass, as agent of C 1031, viewed the property prior to closing the transaction. C 1031 also had a survey conducted and submitted preliminary plans to the city of Spokane Valley in preparation for development of the property. (Munding Decl. Ex. O, CP 555, 559, 755-63, Oct. 21, 2011; Resp. to Mot. for Discretionary Rev. 4-5; Appellant's Opening Br. 4). In doing so, C 1031 acquired subjective knowledge that power poles and power lines were located on and across the subject property. Just as knowledge of a graveled roadway was sufficient in *Somers* to impute to a buyer knowledge of an easement so, too, is knowledge of power poles and power lines on the subject property enough to charge C 1031 with knowledge of an easement.

Imputing knowledge to C 1031 is particularly appropriate in light of Mr. Douglass' business acumen. (Munding Supplemental Decl. Ex. A, CP 236, 237, 246-49, July 19, 2010). It is reasonable to expect a sophisticated developer with over 50 years of experience, with knowledge of power poles and power lines on the subject property, to inquire further. C 1031's purported reliance on the Title Policy to disclose all easements and encumbrances, whether recorded or otherwise, is misplaced where the

Washington State Legislature has clarified that a title insurer has no abstractor's duty. RCW 48.29.010(3)(a).

Furthermore, C 1031's interpretation of Knowledge as excluding constructive knowledge is unreasonable because it is inconsistent with the very purpose of the exclusion to which the definition applies. Title Policy exclusion 3(b) is a notice provision. *Dickens v. Stiles*, 81 Wn. App. 670, 675, 916 P.2d 435 (1996) ("The exclusion is akin to a notice requirement" such that "if an insured fails to inform [the insurer] of something the insured knows at the relevant dates, then there is no coverage for that matter."). Its purpose is to cause the insured to inform the insurer of conditions on the property that might impair title. C 1031's interpretation is unreasonable as it is inconsistent with the exclusion's purpose.

#### **4. The plain meaning of the Title Policy controls.**

A plain reading of the Title Policy makes apparent that coverage is excluded if any "[d]effects, liens, encumbrances, adverse claims, or other matters" are *either* not "Known" by First American *or* are not recorded *and, in either event*, the insured *both* has "Knowledge" of it *and* fails to disclose it in writing. (Munding Decl. Ex. A, CP 81, 82, 88-89, Apr. 12, 2010). This interpretation is consistent with the policy when read as a whole.

For example, the definition of Knowledge, read together with Exclusion 3(b) of the Title Policy, clarifies that in instances where an encumbrance such as an easement *is recorded* that the recording does not, without more, amount to knowledge of the insured of the recorded encumbrance. (Munding Decl. Ex. A, CP 81, 82, 88-89, Apr. 12, 2010). Something more than mere recording of the encumbrance is needed to establish that the insured has knowledge of the encumbrance. In other words, the definition of knowledge is consistent with this exclusion and, when read together, contemplates that the exclusion may apply when, as here: the encumbrance, although recorded, is not known to the insurer, is known to the insured by reason other than the fact of its recordation, and the insured fails to inform the insurer in writing.

This is also consistent with the notice provision in the Preliminary Commitment. *See* WASHINGTON REAL PROPERTY DESKBOOK SERIES: REAL ESTATE ESSENTIALS § 14.11(1) (4<sup>th</sup> ed. 2009) (“The Conditions of the commitment require disclosure to the insurer of defects or liens known to the proposed insurer but not shown therein”). Under the Existing Defects condition in the Title Commitment, C 1031 must give written notice to First American of title defects known by the C 1031 but that were not shown in Schedule B of the Title Commitment. (Munding Decl. Ex. C, CP 555, 556, 601, Oct. 21, 2011). Just as this title commitment

condition requires an insured to give notice to the insurer so, too, does the 3(b) exclusion in the Title Policy require the insured to give the insurer notice of an easement or encumbrance known by the insured but not known to the insurer.

C 1031, conversely, dissects the exclusion into a four-part test and interprets the exclusion as requiring satisfaction of each part: a lien or encumbrance under C 1031's interpretation must be (a) not Known to the insurer; and (b) not recorded; and (c) Known to the insured; and (d) not disclosed in writing by the insured to the insurer. This interpretation is unreasonable when read in the context of the purpose of the exclusion. This purpose is simply to provide the insurer with information known by the insured of matters affecting the title to the insured's property. This notice provision would be rendered nearly toothless should it be read to require satisfaction of the foregoing.

In any event, such interpretation is inconsistent with the reasonable expectation of an insured in purchasing title insurance. It is proper to enforce an exclusion where, as here, the expectation of coverage is unreasonable under the circumstances and the policy language is clear. *See, e.g., Farrington Corp.*, 86 Wn. App. at 404, 936 P.2d 1157 (declining to adopt "the reasonable expectations doctrine" where the insured's expectations were unreasonable and the policy simply did not cover the

loss). A person insured under a policy of title insurance cannot reasonably expect to recover for any loss of which they have knowledge. A proper interpretation of this policy precludes the fortuity of recovery for a matter affecting title known by the insured but not by the insurer—this is the reasonable expectation of an insured.

**5. Coverage is excluded because C 1031 “assumed” and “agreed to” its purported loss.**

The Title Policy excludes coverage for “[d]effects, liens, encumbrances, adverse claims, or other matters” that are “created, suffered, **assumed**, or **agreed** to by the Insured Claimant.” (Munding Decl. Ex. A, CP 81, 82, 88-89, Apr. 12, 2010). For this exclusion to apply, “something more than knowledge on the part of the insured is necessary to bar coverage” and the insurer must “establish that the insured agreed to or assumed prior encumbrances.” *Tumwater State Bank v. Commonwealth Land Title Ins. Co.*, 51 Wn. App. 166, 170, 752 P.2d 930 (1988).

Here, this “knowledge plus” requirement is satisfied. C 1031 has conceded to having knowledge of the power lines and power poles on the subject property prior to closing. C 1031’s actions prior to the time First American issued the Title Policy further demonstrate that C 1031 “agreed to or assumed” the power lines and power poles encumbering the subject

property. C 1031 directed and approved of professionally engineered drawings that were ultimately submitted to the City of Spokane Valley on September 19, 2007 for permitting. (Munding Decl. Ex. O, CP 555, 559, 755-63, Oct. 21, 2011; Resp. to Mot. for Discretionary Rev. 4-5; Appellant's Opening Br. 4). These drawings depicted and identified the power lines and power poles on the subject property. (Munding Decl. Ex. O, CP 555, 559, 755-63 Oct. 21, 2011; Resp. to Mot for Discretionary Rev. 4-5; Appellant's Opening Br. 4). Prior to closing, C 1031 conducted the due diligence required by the PSA, at which time Mr. Douglass noticed the power lines and power poles. (Munding Supplemental Decl. Ex. A, CP 236, 237, 269, July 19, 2010). Ultimately, by closing the purchase transaction, C 1031 agreed to accept the encumbrance as part of the purchased property.

**6. Coverage is excluded because the easement resulted in no loss or damage.**

The Title Policy excludes coverage for “[d]effects, liens, encumbrances, adverse claims, or other matters” that “result[] in no loss or damage to the Insured Claimant.” (Munding Decl. Ex. A, CP 81, 82, 88-89, Apr. 12, 2010). Thus, where the insured experiences no loss or no damage, the insured is entitled to no coverage. In any breach of contract action, breach and damages are distinct inquiries. *See, e.g., Gaglidari v.*

*Denny's Rest., Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991) (analyzing, first, breach and, then, damages). Here, the inquiry is, first, one of coverage.

C 1031's position is that First American has not contested damages. (Appellant's Opening Br. 24). But, as C 1031 points out: "First American rejected the claim because it contended that C 1031 suffered no damages." *Id.* In any event, First American requested John T. Sweitzer, of Sweitzer Company, Inc., to analyze the subject property for the purpose of estimating damage, if any, caused by the utility easement on the subject property as of the purchase date, October 18, 2007. (Munding Decl. Ex. L, CP 555, 558, 689-734, Oct. 21, 2011). Under the B-3 Regional Commercial Zone, there must be a 15' rear yard setback from the west property line of the subject property. (*Id.*; Munding Supplemental Decl. Ex. F, CP 236, 238, 385-86, July 19, 2010). This setback reduces the area impacted by the easement from 50' to 35' and from 22,720sf to 15,294sf. (Munding Decl. Ex. L, CP 555, 558, 689-734, Oct. 21, 2011; Munding Supplemental Decl. Ex. F, CP 236, 238, 385-86, July 19, 2010). Thus, only the land encumbered by the easement is impacted and the easement does not affect the value of the property as used for C 1031's purposes of placing on it a Self Storage Facility. *Id.* As C 1031 has suffered no loss or

damage by virtue of the easement, it has no compensable claim under the Title Policy.

Further, the grant of coverage in the Title Policy insures against “loss or damage . . . sustained or incurred by the Insured *by reason of* . . . [a]ny defect in or lien or encumbrance on the Title.” (Munding Decl. Ex. A, CP 81, 82, 88, Apr. 12, 2010 (emphasis added)). C 1031’s loss, if any, was sustained not “by reason of” the easement but, rather, by applicable zoning requirements. (Munding Decl. Ex. L, CP 555, 558, 689-734, Oct. 21, 2011). C 1031’s claim is not covered.

**7. “Loss” or “damage” is not measured by diminution of Market Value caused by an easement and the plain language of the Title Policy precludes coverage.**

If an easement can be removed by payment of money, the measure of damages is “the amount of money required to remove the offending lien or encumbrance.” *Sec. Serv., Inc.*, 20 Wn. App. at 672, 583 P.2d 1217. No directly binding authority under Washington law exists that identifies the measure of damages under a contract of title insurance for a title defect that cannot be removed by paying money. At least some jurisdictions have concluded that the mere existence of a defect in title does not cause “actual loss,” but is rather suffered only when the title defect results in out-of-pocket loss. *See Blessing v. Am. Title & Ins. Co.*, 121 So.2d 455 (Fla. App. 1960). This position is consistent with the nature of Title

Insurance as one of indemnity. *See* RCW 48.29.010; *Sec. Serv., Inc.*, 20 Wn. App. at 669, 583 P.2d 1217. It is also required by the language of the Title Policy itself: “This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.” (Munding Decl. Ex. A, CP 81, 82, 90, Apr. 12, 2010).

In any event, an affidavit from an expert real estate appraiser is not necessary to controvert the Affidavit of Mr. Auble regarding damages because all that is required on summary judgment to create an issue of fact is to set forth specific facts showing no genuine issue for trial. *Michak*, 148 Wn.2d at 794-95. C 1031’s reliance on *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990) is misplaced because that case addressed evidence of the standard of care of a medical professional in a medical malpractice action, not an action involving a claim of coverage under a contract of title insurance. Ultimately, because C 1031 has suffered no loss or damage, it is not entitled to recover under the Title Policy.

**B. C 1031’S ARGUMENT INVOLVING THE CONSUMER PROTECTION ACT AND UNFAIR CLAIMS SETTLEMENT PRACTICES REGULATIONS IS NOT PROPERLY BEFORE THE COURT.**

“On review of an order granting or denying a motion for summary judgment the appellate court will consider only . . . issues called to the

attention of the trial court.” RAP 9.12. Plaintiff did not address any claims under the Consumer Protection Act or the Unfair Claims Settlement Practices Act in its motion for summary judgment. (Pl’s Mem. in Supp. of Mot. for Summ. J., CP 71-79, Jan. 15, 2010). Indeed, the Second Amended Complaint contains no notice of any such claim. (Second Am. Compl., CP 16-19, July 14, 2009). This argument is not properly before the Court.

**C. THE TRIAL COURT PROPERLY LIMITED C 1031’S DISCOVERY.**

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. CR 26(b)(1). “A reviewing court will not disturb the trial court’s determination on the appropriate scope of interrogatory answers unless there has been an abuse of discretion and unless the error is prejudicial.” *Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 777, 275 P.3d 339 (2012). The party challenging the trial court’s ruling has the burden of proof to show the ruling was both an abuse of discretion and prejudicial. *Id.* C 1031 contends that the Trial Court erred in not granting the Motion to Compel Discovery involving such documents as First American’s underwriting manual, underwriting file, claims manual, and claims that were paid and/or rejected in Spokane and Seattle.

Here, C 1031 has not carried its burden to show that the Trial Court abused its discretion or that the ruling was prejudicial. C 1031 merely contends that the Trial Court abused its discretion to the extent that court excluded information that C 1031 believed was relevant. (Appellant's Opening Br. 33). Excluding relevant evidence, however, is not, without more, an abuse of discretion; rather, the rules often *require* the court to exclude relevant evidence. *See, e.g.*, CR 26(b)(1)(B) (providing that the court "shall" limit discovery if it is "unduly burdensome or expensive"). Further, C 1031 merely claims prejudice to the extent that the Order bars it from obtaining certain requested evidence. (Appellant's Opening Br. 33). The Trial Court acted within its discretion and its ruling limiting C 1031's discovery must be affirmed.

**D. THE TRIAL COURT PROPERLY EXCLUDED C 1031'S EXPERT TESTIMONY.**

Under ER 702, an expert may testify "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." C 1031 presents no reason to the Court as to why or how the Trial Court erred in excluding expert testimony. In any event, the Trial Court's decision to exclude C 1031 witness was within its discretion. C 1031's disclosure of the witness was untimely, as its attempt to disclose the expert witness was more than seven

months after the deadline set by the Scheduling Order, and was inadmissible, as the testimony was on matters of law. *See State Farm Ins. V. Emerson*, 102 Wn. 2d 477, 687 P.2d 1139 (1984) (Interpretation of an insurance policy is a question of law for the court).

**E. C 1031 IS NOT ENTITLED TO ATTORNEY’S FEES AND COSTS AT THE TRIAL COURT OR ON APPEAL.**

C 1031 requests attorney’s fees pursuant to the following: Title Policy; RCW 4.84.330; *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007); and *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Under the Title Policy, however, an insured is not entitled to attorney’s fees unless the insured “has suffered loss or damage by reason of matters insured against by this policy.” (Munding Decl. Ex. A, CP 81, 82, 88, 90, Apr. 12, 2010). Because C 1031’s purported loss is not insured against under this Policy, it must not prevail. Accordingly, C 1031 is not entitled to attorney’s fees.

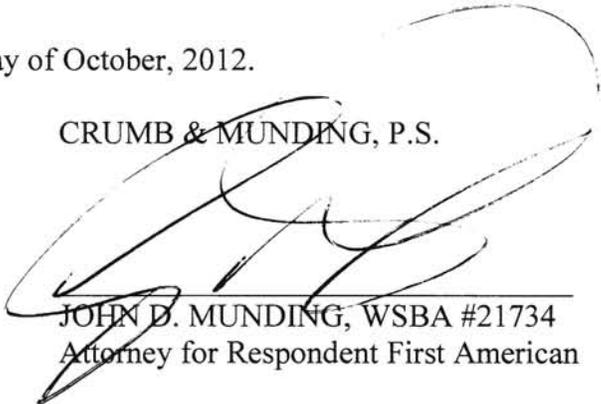
**VI. CONCLUSION**

First American respectfully requests that the Court reverse the Trial Court’s finding that the Title Policy does not limit and/or exclude coverage for easements that have been recorded and/or are a matter of public record. First American respectfully requests that the Court reverse the Trial Court’s finding regarding coverage and grant summary judgment

on this issue in favor of First American. First American respectfully requests that the Court affirm the Trial Court's ruling to the extent that the Trial Court found that C 1031 was not entitled to summary judgment.

Dated this 15th day of October, 2012.

CRUMB & MUNDING, P.S.

A large, stylized handwritten signature in black ink, appearing to read 'J. Munding', is written over the printed name and title below.

JOHN D. MUNDING, WSBA #21734  
Attorney for Respondent First American