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Supreme Court No. 1034245

THE SUPREME COURT OF THE STATE OF WASHINGTON

HIGH DEFINITION HOMES, LLC,

Appellant,

v.

STEWART TITLE GUARANTY COMPANY,

Respondent.

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

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I. INTRODUCTION

In 2021, Appellant High Definition Homes, LLC ("HDH") contracted to buy property in Centralia, which it subjectively understood to be comprised of two separate lots. Prior to closing, the sellers of the property merged it into a single legal lot—constituting all of the same land—through an adjustment of the boundary lines publicly recorded with the Lewis County Auditor's Office (the "Lot Consolidation").

As part of its purchase, HDH obtained a title insurance policy (the "Policy") underwritten by Respondent Stewart Title Guaranty Company ("STGC"). The Policy insured that HDH would receive fee simple title to the land in question. The Policy expressly excluded from coverage, however, certain general losses, as well as any loss arising from five specific items listed on "Schedule B." Four of those Schedule B exclusions—including the Lot Consolidation—were publicly recorded documents, which the Policy identified by their precise file number in the Lewis County Auditor's Office.

HDH bought the Policy and proceeded to close on the property but alleges that it was unaware of the Lot Consolidation, which prevented it from developing and selling the property as quickly and profitably as it had planned. When HDH sought coverage for those losses under the policy, STGC denied its claim, and HDH filed suit.

The trial court granted STGC judgment on the pleadings. It determined that, even taking HDH's factual allegations as true, its claims that STGC wrongly denied coverage were fatally flawed for two reasons. First, the trial court ruled the nature of HDH's asserted loss—the combination of two legal lots into one—was not a defect in title against which the Policy insured. Second, the trial court concluded that even if STGC *had* agreed to insure HDH against such losses, the Policy expressly and specifically excluded any loss arising out of the Lot Consolidation.

HDH then sought reconsideration, arguing—for the first time—that even if the Lot Consolidation was excluded from coverage (whether as a general matter or based on the Schedule B exclusions) the fact that STGC did not provide HDH with a copy of the recorded Lot Consolidation—but instead referred to it by the auditor's file number—rendered the contract procedurally unconscionable. The trial court rejected that argument, as well as the others HDH advanced, and entered judgment.

On appeal, Division Two found HDH's arguments equally unavailing and affirmed in a unanimous, unpublished opinion. With respect to procedural unconscionability—the sole issue on which HDH now seeks discretionary review—the Court of Appeals rejected HDH's argument that it "lacked meaningful choice" in deciding whether to purchase the Policy. On the contrary, the panel concluded, the Policy

correctly identified the land HDH contracted to purchase, and clearly put it on notice that a handful "a brief and detailed list" of publicly recorded documents might affect the scope of coverage. As such, the panel concluded, HDH was adequately apprised of the scope and limitations on the coverage it was purchasing and had failed to demonstrate that any portion of the Policy was procedurally unconscionable.

In seeking discretionary review, HDH does little more than repeat the same arguments that have now been rejected by two separate courts. Though it argues that the Court of Appeals' unpublished opinion is "wholly inconsistent with this Court's prior decisions," HDH nowhere identifies any precedent sufficiently analogous to control the outcome of this dispute, but rather largely criticizes the panel's *application* of settled legal principles to the facts at hand. And in service of those arguments, HDH blatantly misconstrues the Court of Appeals' reasoning and continues to mischaracterize both the law and the factual record, as it did below. In short, HDH's petition for review amounts to a motion for reconsideration of the Court of Appeals' decision, and it has entirely failed to show why discretionary review is warranted under RAP 13.4.

II. RESTATEMENT OF ISSUES

STGC restates the issues on appeal as follows:

> Washington courts have long held that a party cannot be held to a contract provision as to which it "lacked meaningful choice," including where a provision is hidden or obfuscated. Here, the Court of Appeals rejected HDH's argument that Special Exception No. 5 was procedurally unconscionable, applying settled law in holding that the Lot Consolidation—a publicly-recorded document described in the Policy and identified by auditor's file number—was reasonably available to HDH if it wished to investigate the effect that exclusion had on the Policy. Has HDH identified any precedent of this Court with which the Court of Appeals' decision directly conflicts, or shown that its ruling is a matter of substantial public interest?

III. RESTATEMENT OF THE CASE

STGC is an insurance company that underwrites policies of title insurance sold and issued through various limited agents. CP 1. HDH is a Washington limited liability company that builds and sells homes in western Washington. *Id.* According to HDH's Complaint, in early 2021 it contracted with third parties to purchase land in Centralia. CP 2. HDH claims it understood the land to be comprised of "two separate legal tracts," but later discovered the sellers had merged them into a single lot via a boundary line adjustment, reflected in the Lot Consolidation—a survey of the pre- and post-adjustment boundaries, recorded by the Lewis County Auditor under file number 3535886. CP 2–3, 103.

As part of the transaction, HDH purchased a title insurance policy underwritten by STGC. CP 2, 28–39. By its terms, the Policy insured HDH against "loss or damage" incurred "by reason of" certain "covered risks," including from "[t]itle being vested other than as stated in Schedule A." CP 28. Schedule A identified the relevant title as a "fee simple" interest in certain land, which was in turn legally described in the attached Exhibit A. CP 33–34. Schedule B expressly excluded coverage for losses arising out of certain general and specific matters. CP 29, 35–36. One such specific exclusion—Special Exception No. 5—provided that the Policy did not "insure against loss or damage by reasons of" any "matters disclosed by a record of survey [r]ecorded October 30, 2020 [under Lewis County] Auditor's No. 3535886." *Id.* This was the recording number assigned to the Lot Consolidation. *See* CP 103.

HDH alleges it discovered the Lot Consolidation only after closing and it was forced to incur certain costs to re-divide the property into two separate lots. CP 3; *see also* CP 48. HDH thereafter asserted a claim under the Policy for payment of those costs. CP 3. STGC denied HDH's claim because (i) the Lot Consolidation is not a "covered risk" under the Policy, and (ii) even insofar as the Lot Consolidation was covered, it was excluded from coverage by Special Exception 5. CP 3; CP 7–12. More than a year later, HDH brought suit, alleging that STGC breached the

contract by denying coverage under the Policy, and that STGC acted unreasonably and in bad faith by doing so. CP 1–6.

In the trial court, STGC moved for judgment on the pleadings, asserting that HDH's claims each failed as a matter of law. CP 14–24. The trial court orally granted STGC's motion, holding both that HDH's alleged losses were not within the scope of the Policy's coverage and, even if they were, such losses were expressly excluded from coverage by Special Exception No. 5. VRP 3–5. HDH moved for reconsideration of this oral ruling; the trial court denied that motion and entered judgment. CP 123–35, 150, 157–58. HDH appealed. CP 151–52.

In an unpublished decision filed August 6, 2024, the Court of Appeals affirmed. *See* Appellant's App. D ("Slip Op."). The panel rejected HDH's argument that the Policy's description of the property was somehow erroneous and concluded that Special Exception No. 5 clearly excluded the Lot Consolidation from the scope of coverage. *See* Slip Op. at 13–18. Noting that unlike a "multi-page laundry list filled with dense, boilerplate language," the panel observed that Schedule B clearly identified a total of five special coverage exceptions and explicitly identified the relevant documents by auditor's recording number. *Id.* Because the Policy clearly put HDH on notice that those documents effected the scope of coverage and gave it an opportunity to investigate

further, the Court of Appeals ruled that HDH failed to demonstrate how enforcing that exclusion would be unconscionable. *Id.*

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals correctly applied settled law and rejected HDH's argument that enforcement of Special Exception No. 5 would be unconscionable. HDH does not contend the Court of Appeals' decision conflicts with any *specific* precedent from this Court—much less that the facts of this case present an issue of "substantial public interest"—but merely argues that the Court of Appeals "lost sight of [the] key question" of whether a "party affected by [a contractual] provision was deprived of a meaningful choice whether to assent to it." Pet. at 14–15. Yet as set forth below, the panel squarely addressed—and roundly rejected—that precise argument, drawing on the plain language of the Policy and decades of precedent. Other than to quibble with the *outcome* of that analysis, HDH fails to articulate why this Court should accept review under the established criteria of RAP 13.4(b), and its petition should be denied.

A. HDH has not established that the Court of Appeals' unpublished decision conflicts with established law.

HDH primarily contends discretionary review is warranted because the Court of Appeals' unpublished decision is "wholly inconsistent with this Court's prior decisions" on the doctrine of procedural unconscionability. HDH does not contend, however, that the facts of this

case are analogous to any specific precedent, but rather inexplicably suggests that the panel erred by "never once" addressing its claim that STGC failed to "meaningfully inform[]" it that the property had been combined into a single lot. *See* Pet. at 14–15. Contrary to HDH's arguments, the panel *directly* engaged with that argument, addressing what it accurately identified as the "crux" of procedural unconscionability: whether HDH "lacked meaningful choice" in deciding whether to enter the contract. *See* Slip Op. at 17 (citing *Mattignly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 388–89, 238 P.3d 505 (2010)).

1. The Policy's legal description was neither inaccurate nor misleading.

The Court of Appeals first rejected HDH's argument that the Policy's legal description was somehow erroneous. Slip Op. at 17–18. Indeed, the "correct" description HDH contends should have been used makes clear that the property could be described in at least two ways:

> Parcel A of city of Centralia Boundary Line Adjustment/Lot Consolidation No, 2020 0181, records of Lewis County, Washington.
>
> ***Also described as*** Tract A and Tract B of City of Centralia Boundary Line Adjustment BLA-2017 0036 as recorded in Book 3 of Boundary Line Adjustment Maps at page 192 under Auditor's File number 3462824, records of Lewis County, Washington.

See CP 2–3 (emphasis added). While "not identical" to the description set forth in the Lot Consolidation, the panel noted, the latter description set forth in Schedule A of the Policy is largely the same. Slip Op. at 17–18.

And as the panel correctly noted, this Court long ago held that the function of a legal description in a title insurance policy is "identifying the land covered by the policy and *not . . . for the purpose of limiting the insurance protection purchased.*" *Id.* (citing *Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 169, 588 P.2d 208 (1978) (emphasis added)). Thus, as the panel correctly determined, HDH has failed to articulate how the use of a modestly differing legal description was "substantially misleading," much less as to "deprive[] [it] of meaningful choice" in determining whether to purchase the Policy. Pet. at 18–19.

2. The Lot Consolidation was explicitly incorporated by reference and reasonably available to HDH.

The Court of Appeals also correctly rejected HDH's argument that the Policy's description of the Lot Consolidation in the Schedule B "deprived [it] of meaningful choice." Pet. at 19–23. As the panel explained, Schedule B "was not a multi-page laundry list filled with dense, boilerplate language" but rather set forth only five special exceptions and "explicitly listed specific survey documents" that were "clearly identified by recording date and auditor's recording number." Slip Op. at 18. "Even if HDH did not know the content of those documents," the panel concluded, "it was aware that those documents affected coverage under the policy" and thus enforcement of those contract provisions would not be procedurally unconscionable. *Id.*

HDH argues this ruling conflicts with this Court's ruling in *Burnett v. Pagliacci Pizza, Inc*., in which it held an employee was deprived of meaningful choice when he consented to arbitrate disputes with his employer. 196 Wn. 2d 38, 56–57 (2020). The contract provision in *Burnett*, however, was in a private employee handbook incorporated by reference and only made available to the employee *after* he entered into the contract. *Id.* By contrast here, as the panel noted, Schedule B explicitly referred to the Lot Consolidation: a publicly recorded document specifically identified by auditor's file number and recording date. Slip Op. at 18. Thus, "[e]ven if HDH did not know the content of those documents, it was aware that those documents affected coverage under the policy" and had all the information necessary to access and review them. *Id.* Under these facts, *Burnett* simply has no application—as the Court of Appeals correctly held, the Lot Consolidation was explicitly incorporated by reference into Schedule B, forming a part of the contract, and was "reasonably available" for HDH to review, if it wished to investigate further. Slip Op. at 14 (citing *Mattingly*, 157 Wn. App. at 392).

In assigning error to that conclusion, HDH strains mightily to deflect from its own lack of due diligence, arguing that permitting such incorporation by reference would make policies of title insurance less "convenien[t]" to the insured and render coverage "illusory" by charging

the insured with "constructive knowledge" of recorded documents. *See* Pet. at 22–24. These strawmen arguments blatantly misconstrue the panel's holding, which turned not on the fact that the Lot Consolidation was *recorded*—and thus available to the public at large—but that it was identified in the Policy *by its recording information*, giving HDH both actual notice that certain matters might effect the scope of coverage *and* the means to easily access those documents. Slip Op. at 14. Particularly given that Schedule B set forth only five such special exceptions, the panel noted, HDH's argument that incorporation by reference was procedurally unconscionable fails as a matter of law. *Id*. at 14, 18.

In short, HDH has—from the outset of this case—endeavored to shift the consequences of its own recklessness onto STGC. Allowing HDH to escape the application of a valid contractual term simply because it chose not to conduct even a cursory investigation of its impact on the Policy would be blatantly unfair and fly in the face of Washington law. *See Nat'l Bank of Wash. v. Equity Inv'rs*, 81 Wn.2d 886, 913, 506 P.2d 20 (1973) ("The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs."); *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987) (*Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 799, 64 P.3d 22 (2003) ("It is a general rule that a party to a contract which he has

voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." (citation omitted)).

3. The Policy accurately described the Lot Consolidation.

Finally, HDH argues the Policy's description of the Lot Consolidation as a "record of survey" was tantamount to a fraudulent misrepresentation, rendering the incorporation of that instrument procedurally unconscionable. Pet. at 24–30. As an initial matter, HDH concedes that this Court has never held the description of a document could render its incorporation unconscionable—acknowledging that there is no conflict of law that could merit discretionary review—and suggests the Court should accept review in order to announce such a rule. *Id.* But even setting aside the fact that HDH never made this pitch to the Court of Appeals, this Court should have little difficulty rejecting that invitation, as HDH's argument finds no support either in the legal or evidentiary authority on which it purports to rely.

As before both the trial and appellate court, HDH's argument—that the Lot Consolidation cannot be accurately described as a "record of survey"—rests on the blatantly false premise that Washington law attributes a precise legal definition to that term. Pet. at 26–27. By HDH's telling, a record of survey can only "monument and depict *existing* land boundaries." *See* Pet. at 26. Indeed, in its opening brief below, HDH

purported to quote directly from a statute defining the term, and argued that any instrument which did not meet that criteria could not, as a matter of law, be defined as a record of survey. *See* Appellant's Opening Brief at 35 ("Washington law defines a "record of survey" as . . ..). HDH's brief, however, attributed that language to a statute that does not exist, while the provision to which it presumably referred—RCW 58.09.030—requires only that any "map, plat, report, description, or other document issued by a licensed land surveyor" comply with certain technical requirements of the Land Surveying Act. *See, e.g.*, RCW 58.09.050.

More importantly, the term "survey" (which *is* defined) simply means the act of locating the "exterior boundary or boundaries common to two or more ownerships." RCW 58.09.020(3). Accordingly, a "record of survey" is simply that—a record of where a surveyor locates the exterior boundaries of two or more properties and, if publicly recorded, formatted in accordance with the Survey Recording Act. RCW 59.09.030.

In this case, the Lot Consolidation is indisputably a "record of a survey"—it depicts the "exterior boundaries" of the land HDH contracted to purchase, both before and after the City of Centralia approved their consolidation into a single lot. *See* CP 103. This makes sense, given that to affect an adjustment of the boundary line between properties, the Centralia Municipal Code expressly requires a "*property survey* prepared by a

licensed land surveyor" that "identif[ies] the *exterior boundaries of all properties involved* in the adjustment" and "identif[ies] the receiving parcel as a single parcel." Centralia Municipal Code § 19.20.020(A), (B) (emphasis added). Indeed, the Lot Consolidation *identifies itself* as a "map [that] correctly represents *a survey made . . . in conformance with the requirements of the Survey Recording Act.*" CP 103 (Surveyor's Certificate) (emphasis added).

In short, HDH's argument that Schedule B "positively misled" it as to the nature of the Lot Consolidation (or as it argued to the Court of Appeals, that Special Exception No. 5 describes "a document that literally does not exist") strains the bounds of credibility. Given that the document is—literally—a *record* of a *survey*, it is difficult to imagine how it could be more accurately described in any other way. *See* Slip Op. at 15–16. Both the trial court and Court of Appeals rightly concluded that Special Exception No. 5 excepted the Lot Consolidation from the scope of coverage, and HDH has again utterly failed to demonstrate that it was somehow deprived of "meaningful choice." Pet. at 27.

B. HDH has not established that this case involves an issue of substantial public interest.

HDH also suggests, almost in passing, that the Court of Appeals' decision represents a matter of "substantial public interest" so as to warrant discretionary review. *See* Pet. at 14, 31. As set forth above,

however, the Court of Appeals' unpublished opinion constitutes a straightforward application of existing Washington precedent, and HDH's invitation to create new law in the realm of procedural unconscionability rests on the thoroughly flawed premise that the Policy's description of the Lot Consolidation as a "record of survey" was somehow erroneous. HDH did not move the Court of Appeals to publish its decision, and—given the private, fact-specific nature of the dispute at hand—that opinion is unlikely to have significant bearing on future disputes. *See In re Personal Restraint of Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016) ("A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue.").

In short, HDH has identified no "sweeping implication of the Court of Appeals decision," or otherwise articulated any basis justifying this Court to grant review under RAP 13.4(b)(4). *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005).

V. CONCLUSION

HDH's petition for review primarily serves as a forum for it to repeat the arguments it made to the trial court and Court of Appeals. It fails to make a case that this unpublished decision conflicts with existing case law, and likewise fails to enumerate a valid basis for review on public

interest grounds. The Court of Appeals correctly determined that HDH's factual allegations are insufficient to state a claim for relief and made a straightforward application of settled law in doing so. This case does not warrant discretionary review, and HDH's petition should be denied.

DATED this 30th day of September, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b), the undersigned certifies that the foregoing motion contains 3,556 words, exclusive of the words contained in the title sheet, the certificates of compliance and service, and the signature blocks. In calculating such number, the undersigned has relied upon the word count calculation of the word processing software used to create the motion.

DATED this 30th day of September, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Hether A. Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 30th day of September, 2024, a copy of the foregoing **RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW** was delivered via first class United States Mail, postage prepaid, to the following person(s):

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