Supreme Court No. 1039026

SUPREME COURT
OF THE STATE OF WASHINGTON

FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Petitioner,

v.

JAMES W. CHERBERG and NAN CHOT CHERBERG, husband and wife,

Respondents.

ANSWER TO PETITION FOR REVIEW

Linda B. Clapham, WSBA # 16735
Jeffrey D. Laveson, WSBA # 16351
Jason W. Anderson, WSBA # 30512
CARNEY BADLEY SPELLMAN, PS
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104
(206) 622-8020

Attorneys for Respondents James W. Cherberg and Nan Chot Cherberg

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Page(s)

Federal Cases

Constitutional Provisions, Statutes and Court Rules

I. INTRODUCTION

Summary judgment is meant to decide legal questions based on undisputed material facts—not to weigh competing evidence and decide disputed facts, as the trial court did here. Division One's unpublished decision presents no issues of broad public import and binds only the parties. *See* GR 14.1. Nor does it conflict with any published Washington decisions. Review is unwarranted under either RAP 13.4(b)(1) or (2). This Court should deny Fidelity National Title Insurance Company's petition for review.

II. COUNTERSTATEMENT OF ISSUE

Division One correctly applied the summary-judgment standard when it reversed, recognizing that the trial court had 1) impermissibly weighed competing facts and 2) failed to construe the facts and reasonable inferences favorably to the nonmoving party. Is review thus unwarranted?

III. RESTATEMENT OF THE CASE

Fidelity disregards the Cherbergs' competing evidence and proffers inferences that favor itself.

Fidelity admits it "missed" the Exclusive Easements when it insured title. It has never presented evidence nor argued that the Cherbergs knew that the single easement referred to in the purchase-and-sale agreement ("PSA") was an exclusive-use easement that prevented their use of their waterfront, thus significantly reducing the value of their property, or that they knew *two* easements had been recorded before closing.

Fidelity instead argues that the Cherbergs bargained for a landscape easement that would impact their plan to build a dock. The Cherbergs prevailed in their litigation against the sellers and neighbors, the Griffiths, over this impact. Yet Fidelity continues to ignore the Cherbergs' significant loss of use and resulting loss of property value.

A. Unbeknownst to the Cherbergs, the sellers recorded two exclusive-use easements before listing their adjacent property for sale.

Before listing the insured property for sale, the Griffiths recorded two exclusive-use easements "burdening" it: an Exclusive-Use Landscape Easement and an Exclusive-Use Dock-Use Easement. CP 304–14 (landscape); 316–26 (dock). Fidelity missed both easements when issuing the preliminary title commitment and again failed to identify them as "exceptions" to coverage in the title policy issued at closing. CP 273–85, 287–302. Fidelity admits it insured title to the property unencumbered by these easements.

An addendum to the PSA, drafted by the joint real-estate agent Kris Robbs, referenced a single *"easement which is in place regarding the landscape"* that may need to be changed to allow the Cherbergs to obtain a dock permit. CP 342. The Cherbergs and their attorney Charlie Klinge relied on Fidelity's preliminary title report, which

showed neither recorded easement. *See* CP 491, 493, 495. Both believed the easement specifics were to be the subject of negotiation after closing. CP 491–95.

In August 2012, Klinge discovered for the first time the two recorded easements—missed by Fidelity—that were recorded in May 2012 before closing. CP 491.

B. Fidelity accepted the Cherbergs' claim under their title-insurance policy and confirmed coverage.

The Cherbergs tendered a claim to Fidelity seeking damages resulting from the two easements it had missed. CP 350. Fidelity asked Klinge for the PSA and for "any other disclosures or information made by the Griffiths regarding the dock use easement and landscape easement recorded in May 2012." CP 356.

Klinge provided the PSA and advised Fidelity that the Griffiths never disclosed the two recorded easements. CP 362–63, attaching 364–82. He explained that, before closing, the Cherbergs had asked Robbs for a "Form 17"

(Seller's Disclosure Form), which might have disclosed information about the easements, but were told "none was required because the sellers did not live in the house." CP 362. Nor had the Cherbergs ever met or spoke with the Griffiths before closing. CP 652–53.

Klinge advised Fidelity that the Cherbergs were continuing to investigate the restrictions imposed by the easements. CP 362–63. Klinge noted the Cherbergs' obligation to cooperate with Fidelity and provided the requested documents to meet that obligation. CP 363.

Fidelity's second claim-investigation letter asked Klinge to "confirm" that the Cherbergs understood that "the landscape and dock easement referred to in the addendum are distinct from the recorded easements." CP 384. When Klinge sought clarification of this vague and confusing inquiry (CP 386–87), Fidelity responded by asking whether the 2012 landscape and dock-use

easements were distinct from the easement mentioned in the Griffiths' PSA addendum. CP 389.

Klinge responded *at length*. CP 392–93. Critically, he reiterated that the Cherbergs did not know about the *recorded* landscape and dock easements before closing because those easements did not appear on the title report:

> At the time of the Purchase and Sale Agreement, the Cherbergs were not aware of the previously recorded Easements that were not disclosed in the title report.
>
> . . .
>
> The Cherbergs were not provided copies of the Griffith Landscape Easement . . . or the Griffith Dock Easement . . . prior to closing, nor did the Fidelity title report provide reference thereto. Rather, Fidelity's title report represented that no such easements were recorded on title.

CP 393.

Fidelity then confirmed coverage subject to a reservation, stating in relevant part: "[T]he Company has determined the claim is afforded coverage subject to the terms and conditions of the above Policy and the below reservation of rights." CP 395. Fidelity did *not* reserve

rights under Exclusion 3(a)—an exclusion for matters "created, suffered, assumed, or agreed to" by the insured claimant. CP 289.

C. Rather than indemnify the Cherbergs' for their loss, Fidelity elected to sue the Griffiths in an attempt to extinguish the easements it had missed.

Fidelity concedes it "missed" the easements, but rather than indemnify the Cherbergs for their obvious loss[1] it retained the Frey Buck law firm to file a quiet-title action against the neighbors—the Griffiths—to attempt to extinguish the easements. CP 399–402. Fidelity then notified the Cherbergs it had retained Frey Buck "to assist with the further resolution of this matter." CP 404.

[1] *See* Condition 8 of policy, CP 297: "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."

D. The Cherbergs affirmed their indemnity claim against Fidelity before Fidelity pursued litigation against the neigbors.

Before the suit was filed against the Griffiths, the Cherbergs and the Griffiths participated in mediation to address the "dock impacts." In a pre-mediation letter, Klinge reminded Fidelity of the diminution-in-value impact that would still need to be addressed. CP 423–25.

Just before the mediation, Frey Buck advised Fidelity that Robbs was "apparently going to lie for the Griffiths and claim that she disclosed the easements" and argue that the addendum should have prompted the Cherbergs to "look[] into whether there was a written easement." CP 427. Of course, the Cherbergs did look into "whether there was a written easement" by purchasing title insurance from Fidelity and retaining counsel (Klinge) to review the title report. The Cherbergs and their attorney relied on the title report to confirm that the easement mentioned in the PSA was not yet recorded.

The mediation was unsuccessful. Before filing the lawsuit against Griffiths, Frey Buck sent Fidelity a comprehensive case evaluation. CP 441–52. It again listed the proposed causes of action to be lodged against the Griffiths and their anticipated defenses. It noted that Griffiths' first anticipated defense will be that

> they did disclose the easements, they were of record, and even if they did not expressly disclose, there was mention of a landscape easement so Cherbergs should have investigated and would have found both.

Id. at 447. Fidelity authorized Frey Buck to proceed with the planned litigation against Griffiths. CP 437.

Just as Frey Buck predicted, the Griffiths denied any misrepresentation, arguing that the easements were recorded. The Griffiths also lodged a counterclaim to quiet title to the easements they had recorded before closing. CP 514–38.

E. The trial court dismissed the Cherbergs' quiet title action.

Frey Buck notified Fidelity it would not be seeking summary judgment on the Cherbergs' affirmative claims of quiet title and negligent misrepresentation because "the parties' deposition testimony makes it clear *there will be questions of fact as to the lack of disclosure*." CP 463 (emphasis added).

The Griffiths, however, moved for partial summary judgment to dismiss the Cherbergs' negligent-misrepresentation claim. The trial court granted their motion, concluding that the Cherbergs were on notice of the easements because the easements were recorded and mentioned by Robbs. CP 467–68. Notably, the court did *not* rule that the Cherbergs had ever seen the easements or knew of the easements' "exclusivity" terms or that they had already been recorded.

The trial court also ruled in favor of the Cherbergs, on their breach of contract claim—a claim calculated to

address the "dock impacts" of the easements Fidelity had missed. CP 473. The trial court ordered specific performance by the Griffiths, and the Griffiths appealed.

F. Fidelity denied coverage based on Exclusion 3(a).

Following the summary-judgment ruling, Fidelity withdrew its defense and denied coverage under Exclusion 3(a). CP 484–85. Frey Buck queried incredulously: "Fidelity is not paying any costs to defend an appeal by the Griffiths even though we won on that issue?" CP 487. Fidelity responded: "Correct." *Id.*

Fidelity was now refusing to defend the Cherbergs against Griffiths' appeal of the breach-of-contract claim Fidelity itself had authorized and pursued in the litigation it commenced.

G. The Cherbergs were left bare to complete the litigation against their neighbors.

When Fidelity denied coverage and withdrew its defense, the Cherbergs were irretrievably enmeshed in

litigation with the Griffiths. They were forced to defend themselves, at great expense.

Addressing the Griffiths' "specific performance" appeal, Division One found there were questions of fact and remanded for trial. *Cherberg v. Griffith* ("*Cherberg I*"), No. 75276-6-I, 2017 WL 5569211 (Wash. Ct. App. 2017) (unpublished).

Post-appeal, the Cherbergs once again tendered to Fidelity seeking a defense for the upcoming trial and indemnity for the diminution in property value suffered because of the "missed" easements. CP 540, 542, 544–47. Fidelity persisted in its refusal to defend or indemnify. CP 549–50.

On remand, the Cherbergs prevailed against the Griffiths in a bench trial. CP 556–74. The trial court made factual findings that wholly undermined the factual basis for Fidelity's late coverage denial.

> 1:19: During the pre-close period, the Cherbergs obtained a preliminary title report that did not

> identify the exclusive easements recorded by the Griffiths prior to listing the property.
>
> 1.20: Kris Robbs advised the Griffiths, via email, that "the easement" did not appear on the title report and that needed to be resolved. There was no action taken and there is no credible evidence that the same information was given to the Cherbergs.
>
> 1.21: Neither the Exclusive Dock Easement nor the Exclusive Landscape Easement were identified in the final Title Policy issued to the Cherbergs.
>
> * * *
>
> 1.25: At no time during the negotiations did the Griffiths or Ms. Robbs provide the Cherbergs with copies of the Exclusive Dock Easement and the Exclusive Landscape Easement.
>
> * * *
>
> 1.52: Kris Robbs' testimony was not credible or helpful to the Court. * * *

Id. at 559–60, 563. In short, the court rejected as incorrect and unreliable the very facts Fidelity had relied upon to deny coverage.

The Griffiths again appealed and lost. *Cherberg v. Griffith* ("*Cherberg II*"), No. 81482-6-I, 2021 WL 4261550 (Wash. Ct. App. 2021) (unpublished); *review denied*, 198 Wn.2d 1042 (2022).

H. The King County Assessor decreased its valuation of the Cherbergs' property based on the two exclusive-use easements Fidelity had missed.

Starting in the 2020 assessment year, the King County Assessor reduced the Cherbergs' property value by $929,000 to account for the negative impact of the two easements. *Id.* Before that adjustment, the Cherbergs had paid property taxes on a higher value—for waterfront they had no right to access, use or enjoy. CP 576–77.

The Cherbergs once again tendered this claim to Fidelity seeking indemnity for their diminution in property value loss. CP 576–77. Fidelity again refused to pay the loss. CP 579–80.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Division One correctly applied summary judgment standards to competing evidence on Fidelity's motion for summary judgment.

1. The trial court impermissibly weighed competing evidence.

Summary judgment is meant to determine whether a genuine issue of material fact exists—not to decide questions of fact. Decision at *6. In deciding a motion for summary judgment, the trial court must construe all facts and inferences in favor of the nonmoving party, here the Cherbergs. *Id.*

The trial court impermissibly decided disputed fact questions and entered findings as part of its summary-judgment ruling. CP 2347—2357; *see* CR 56(d) (identifying the limited circumstances where a trial court may enter findings of fact on summary judgment); *Lundquist v. Seattle School Dist. No. 1*, No. 85589-1-I, 2025 WL 445407 *3 (Wash. Ct. App., Feb. 10, 2025)(unpublished)("If the

trial court makes findings of fact without satisfying CR 56(d), the findings are nullities."). By doing so, the trial court impermissibly weighed the competing evidence presented on summary judgment. *See Haley v. Amazon.com Services, LLC*, 25 Wn. App. 2d 207, 217, 522 P.3d 80 (2022) ("On summary judgment, the trial court may not weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact.").

Division One correctly reversed the trial court and concluded that Fidelity did not carry its burden of proof because "reasonable minds could differ on the facts concerning the Cherbergs' alleged knowledge of the Exclusive Easements and, in turn, their cooperation with Fidelity's investigation." Decision at *8; *see Asphy v. State*, 31 Wn. App. 2d 605, 630, 552 P.3d 325 (2024) ("When the evidence at summary judgment is susceptible to competing reasonable inferences, some supporting liability and others

not, a fact question is presented that a jury must determine.").

Fidelity's petition seeks review of the Decision without even discussing the facts the Cherbergs presented about what they knew, when they knew it, and what remained unknown until after they purchased the property. These competing facts must be tried to a jury, and review should be denied for this reason alone.

2. The Decision recognized that Fidelity has no proof to support its two defenses to coverage.

To prove both its Exclusion 3(a) and cooperation defenses, Fidelity relies on two sources of documents.

First, Fidelity relies on "pre-closing" documents that consist of handwritten notes by Mr. Cherberg to himself that are vague and say nothing about an existing recorded exclusive-use easement. CP 1019–33. Fidelity takes great liberty in (impermissibly) construing these notes in its own favor. In addition, Fidelity relies on a single pre-closing

email between Mr. Cherberg and his lawyer, Klinge. CP 1035.[2] This email says nothing about an existing recorded exclusive-use easement. Instead, it speaks about a "new easement" to be disclosed by the Griffiths, as it relates to the placement of the Cherbergs' planned dock.

Second, Fidelity relies on three *post-closing* emails between Mr. Cherberg and Klinge. Klinge had no obligation to produce these attorney–client privileged emails to Fidelity during its investigation. (RP 131: "To be clear, the Court is not finding the [Cherbergs] were required to provide attorney–client communications to Fidelity"). Moreover, these post-closing communications do not support Fidelity's defenses. Mr. Cherberg wrote that he was "venting" his "impatience and ire" with the

[2] Fidelity persists in citing the same email multiple times, as it did in its trial court briefing and again in its appellate briefing, to make it appear as though Cherberg and Klinge had several communications before closing. They did not. *See* Appendix A to Appellant's Opening Brief for the multiple instances in the record of the same email cited by Fidelity.

Griffiths, CP 1081; and Mr. Cherberg and Klinge discuss how to best negotiate with the recalcitrant neighbor. CP 1078–79, 1081–83. These discussions occurred three months before the Cherbergs' tender to Fidelity. The one privileged email discussion sent after the Cherbergs tendered to Fidelity can best be described as a discussion between an attorney and his client about how to carefully respond to an inquiry when they know the insurance company will use whatever they say against them, as Fidelity has done here. CP 1092.

As to both the "pre-closing" email and handwritten notes, and the "post-closing" conversations between Cherberg and Klinge, the Decision correctly acknowledges that "Fidelity essentially asks [the court] to "weigh" that evidence and "the likelihood that the evidence will prove true" against the evidence that someone may have told [the Cherbergs] more details about the Exclusive Easements."

Decision at *9. Such weighing is impermissible on summary judgment. *Asphy*, 31 Wn. App. 2d at 630.

B. The Decision properly applied the standards set forth in *Tran* and *Georgian House* for determining whether an insured has "substantially complied" with an insurer's request for information.

Fidelity asserts that the Decision conflicts with *Tran v. State Farm Fire & Casualty*, 136 Wn.2d 214, 961 P.2d 358 (1998), and *Georgian House of Interiors v. Glens Falls Insurance*, 21 Wn.2d 470, 151 P.2d 598 (1944), by recalibrating the "substantial compliance" duty of an insured to cooperate with its' insurer's request for information and permitting an insured to pick and choose what it provides. It did neither and review is not merited under RAP 13.4(b)(1).

1. The Decision is consistent with *Tran* and *Georgian House*

Division One recognized that, under *Tran*, to determine whether the Cherbergs' substantially complied with Fidelity's requests, it must first look to the policy

language. Decision at *8. The policy's Condition 6(b) is similar to the policy language in *Tran* and broadly states that an insured may be required "to produce for examination, inspection and copying…*all* records…that reasonably pertain to the loss or damage." *Id.*

Tran involved a claim for theft coverage where the insured appeared for an examination under oath but *refused* to answer many of the questions posed and *refused* to provide financial records when specifically requested by the insurer. And *Georgian House* involved a fire-insurance claim where the insured not only *refused* to submit to an EUO, but also *refused* to respond to the insurer's request for specific books and records in support of his claim of loss and wrote to the insurer that "he could not see what would be gained by complying with the request." *Id.* at 493; *see also Pilgrim v. State Farm Fire & Cas. Ins. Co.*, 89 Wn. App. 712, 717, 950 P.2d 479 (1997) (burglary claim, insured *refused* to provide requested financial documents); *U.S.*

Fire Ins. Co. v. Icicle Seafoods, Inc., 572 F. Supp. 3d 1047, 1061 (W.D. Wash. 2021) (lost-profits claim under a marine insurance policy, insured *refused* insurer's request for specific documents, records and written itemization of expenses). In contrast to these cases, here, the Cherbergs did not refuse anything requested by Fidelity.

Instead of departing from *Tran's* "substantial compliance" standard, the Decision relies on *Tran* and *Georgian House* to hold that Fidelity cannot meet its burden of proving there are no questions of fact about whether the Cherbergs failed to "substantially comply" with Fidelity's request for material information for three reasons.

First, none of the documents that Fidelity alleges the Cherbergs should have provided reference the *exclusivity* feature of *two* easements, and a reasonable jury could find that Fidelity's evidence "does not establish that the Cherbergs had knowledge of such sweeping limitations on

their new property;" and the Cherbergs' response that they did not know of two *recorded* exclusive-use easements prior to closing was consistent with their duty to cooperate. Decision at *8.

Second, Fidelity ignores the Cherbergs' evidence supporting their claim that they were ignorant of the Exclusive Easements. As Division One concluded, whether Mr. Cherberg is credible is not pertinent to a summary-judgment motion.

Finally, Division One held that Fidelity had not met its burden because the Cherbergs did in fact respond to Fidelity's two requests for information. Fidelity would have the Court weigh the content and veracity of these responses and determine whether the Cherbergs should have provided more. Contrary to Fidelity's argument, the Decision does not create a new standard to analyze "substantial compliance" with an insurer's investigation.

Instead, it is entirely consistent with *Tran* and *Georgian House*.

C. Nothing about the Decision conflicts with *Tran's* holding that the insurer has the burden to prove actual prejudice. Fidelity simply did not meet its burden.

1. Fidelity alleges, but does not explain, how any of the documents it alleges the Cherbergs should have provided earlier could have changed its decision to accept coverage.

Fidelity alleges that it suffered actual prejudice because it was deprived of "an opportunity to fully investigate [the Cherbergs'] claim, promptly invoke or reserve Exclusion 3(a), or outright deny coverage" because the Cherbergs did not provide the pre-closing and post-closing documents discussed, *supra*. Petition at 26–29. Hindsight is 20/20. The problem is that Fidelity has never explained why it was prevented from fully investigating, why it did not initially invoke Exclusion 3(a) based on the PSA addendum the Cherbergs provided to Fidelity, or on what basis Fidelity could have reasonably denied coverage

if it had the documents earlier. Division One correctly rejected Fidelity's unsupported allegation of actual prejudice and held that "reasonable minds could differ as to whether the Cherbergs' alleged failure to disclose impeded Fidelity's ability to investigate or complete its investigation." Decision at *10.

Further, and contrary to Fidelity's assertion, the Decision does not rely on *C 1031 Properties v. First American Title Insurance Co.*, 175 Wn. App. 27, 301 P.3d 500 (2013), to conclude that Fidelity failed to meet its burden of proving it had been actually prejudiced. *C 1031 Properties* held that "[b]y paying consideration to a title insurer for their expert services in uncovering defects in title, it is reasonable for the insured to believe and rely upon the fact that the insurer has discovered any encumbrances recorded in the public record." *C 1031 Props.*, 175 Wn. App. at 32. The Decision acknowledged this holding and noted that a reasonable juror could

conclude the Cherbergs' failure to provide their handwritten notes "did nothing to impact" Fidelity's investigation. But *C 1031 Properties* was not the basis for Division One's conclusion that Fidelity had failed to meet its burden of proving it was actually prejudiced. It was Fidelity's own failure of proof.

2. The Decision does not rely on *Barstad* for its conclusion that Fidelity failed to meet its burden of proving actual prejudice.

Fidelity also loosely asserts that the Decision conflicts with *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 39 P.3d 984 (2002). It does not. The Decision is not based on a title company's obligations in issuing a commitment for title. Instead, Division One acknowledged that by purchasing title insurance, it was reasonable for the Cherbergs to rely on Fidelity's obligation to discover any recorded encumbrances, independent of any disclosures by the Cherbergs. Decision *10. Indeed, Fidelity has never

tried to explain how or why it made this terrible mistake on the Cherbergs' title commitment and policy.

D. Fidelity has no evidence whatsoever to show that the Cherbergs had "something more than knowledge" of a vague reference to a single easement in the PSA to invoke Exclusion 3(a). For this reason, the Decision is entirely consistent with *Tumwater*.

Fidelity relied on *Tumwater State Bank v. Commonwealth Land Title Insurance of Philadelphia*, 51 Wn. App. 166, 752 P.2d 930 (1988), and Exclusion 3(a) to deny coverage after defending the Cherbergs for over two years in litigation initiated by Fidelity against their neighbors and before that litigation was completed. CP 482–85. In its denial letter, Fidelity accused the Cherbergs of knowing about the exclusive-use landscape easement

and its impact prior to purchasing their property. *Id.*[3] Neither is correct.

In *Tumwater*, the title insurer argued that the insured mortgage lender "assumed or agreed to" preexisting encumbrances because it was aware of prior existing liens on the property at the time it made a loan. The court held that the insurer failed to establish that the exclusion applied because there was no indication the insured had agreed that its mortgage would occupy a secondary position to preexisting liens and "*something more than knowledge* on the part of the insured is necessary to bar coverage." *Id.* at 170 (emphasis added). The court also held that "an insured's knowledge of record defects or negligence in failing to discover them does not bar coverage" under 3(a). *Id.*

---

[3] Fidelity's conclusion was based on incorrect and disputed facts. There were several other problems with what Fidelity did, but those problems relate to the Cherbergs' claims for bad faith and will not be discussed here.

Nothing about the Decision is contrary to *Tumwater,* which requires that before Fidelity may deny coverage based on Exclusion 3(a), it must have proof that the Cherbergs had something more than a vague understanding of a landscape easement referenced in the PSA that Robbs explained meant: "He maintains this. You maintain that." CP 498. Here, the Cherbergs were entitled to rely on the title report to confirm the easement mentioned in the PSA had not been recorded. *C 1031 Props.*, 175 Wn. App. at 32. Nor is there a shred of evidence that the Cherbergs had pre-closing knowledge they were exclusive-use easements.

E. The Decision does not conflict with *Young*.

Finally, Fidelity suggests that footnote 8 of the Decision conflicts with *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), because the Cherbergs failed to present evidence to support each of their damages claims on summary judgment. While the

parties disagree over the amount of the diminution in value, there can be no credible dispute that the Cherbergs' have suffered damage because of Fidelity's mistake and that the Cherbergs presented evidence of those damages. *See, e.g.*, CP 677–718 (Cherbergs' expert appraisal report); CP 658–75 (Fidelity's expert appraisal report agreeing that the Cherbergs have incurred diminution in property value damages.) Division One correctly noted in footnote 8 that the Cherbergs undisputedly offered sufficient evidence under CR 56 of the *fact* of various forms of loss or damage and the *amount* of those damages will be determined by a jury.

V. CONCLUSION

The Cherbergs respectfully ask this Court to deny Fidelity's petition for review and allow them their day in court without further delay.

This document contains 4,382 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully Submitted: April 25, 2025.

CARNEY BADLEY SPELLMAN, PS

By */s/ Linda B. Clapham*
Linda B. Clapham, WSBA No. 16735
Jeffrey D. Laveson, WSBA No. 16351
Jason W. Anderson, WSBA No. 30512
Attorneys for Respondents James W. Cherberg and Nan Chot Cherberg

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ E-file, e-serve and email, to the following:

ATTORNEY FOR DEFENDANT FIDELITY NATIONAL TITLE INS. CO.
Paul J. Lawrence, WSBA No. 13557
Noe Merfeld, WSBA No. 56876
Jacob A. Zuniga, WSBA No. 48458
Matthew J. Segal, WSBA No. 29797
PACIFICA LAW GROUP, LLP
401 Union St., Suite 1600
Seattle, WA 98101
Tel: 206-245-1700
Fax: 206-245-1750
Paul.Lawrence@pacificalawgroup.com
jacob.zuniga@pacificalawgroup.com
noe.merfeld@pacificalawgroup.com
matt.segal@pacificalawgroup.com

DATED this 25th day of April, 2025.

S/ Allie M. Keihn
Allie M. Keihn, Legal Assistant

From:	OFFICE RECEPTIONIST, CLERK
To:	Allie Keihn
Cc:	Linda B. Clapham; Jeffrey D. Laveson; Jason W. Anderson; "noe.merfeld@pacificalawgroup.com"; "matt.segal@pacificalawgroup.com"; "jacob.zuniga@pacificalawgroup.com"; "Paul.Lawrence@pacificalawgroup.com"; Dawn.Taylor@pacificalawgroup.com
Subject:	RE: Cherberg v. Fidelity / Supreme Court Case No. 1039026 / Answer to Petition for Review
Date:	Friday, April 25, 2025 1:45:00 PM
Attachments:	image002.png

Received 4-25-25

Supreme Court Clerk's Office

From: Allie Keihn <keihn@carneylaw.com>
Sent: Friday, April 25, 2025 1:43 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Linda B. Clapham <Clapham@carneylaw.com>; Jeffrey D. Laveson <Laveson@carneylaw.com>; Jason W. Anderson <Anderson@carneylaw.com>; Allie Keihn <keihn@carneylaw.com>; 'noe.merfeld@pacificalawgroup.com' <noe.merfeld@pacificalawgroup.com>; 'matt.segal@pacificalawgroup.com' <matt.segal@pacificalawgroup.com>; 'jacob.zuniga@pacificalawgroup.com' <jacob.zuniga@pacificalawgroup.com>; 'Paul.Lawrence@pacificalawgroup.com' <Paul.Lawrence@pacificalawgroup.com>; Dawn.Taylor@pacificalawgroup.com
Subject: Cherberg v. Fidelity / Supreme Court Case No. 1039026 / Answer to Petition for Review

Dear Clerk of Court,

Due to the Court's website being down I am email filing the *Answer to Petition for Review*, for the above referenced case.

All counsel is cc'ed.

Please let me know if you need anything else.

Sincerely,

Allie Keihn, (she/her) Legal Assistant/Paralegal
Main (206) 622-8020 | D (206) 607-4155
keihn@carneylaw.com
www.carneybadleyspellman.com

Legal Assistant/Paralegal to Jeff Laveson, Linda Clapham, Isaac Prevost & Rory Cosgrove