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ORIGINAL

No. 65109-9

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

Fisher Broadcasting - Seattle TV LLC, d/b/a KOMO TV,
Respondent,

v.

Squirrels Nest II LLC, Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

Lionel and Celia Heathcote purchased real property the day after a default judgment was entered against the seller in favor of Fisher Broadcasting - Seattle TV LLC. That judgment had not been recorded or indexed in the superior court's execution docket at the time of the sale. Therefore, the Heathcotes, in the exercise of due diligence, could not have known about the judgment and should have taken the property free of Fisher's judgment lien as bona fide purchasers. However, the superior court, in ruling on cross-motions for summary judgment, granted Fisher's motion and held that the Heathcotes took the property subject to Fisher's lien ("Summary Judgment Order").

Fisher relied upon a 1988 Washington Supreme Court case¹ for the proposition that a buyer is deemed to have constructive knowledge of a judgment from the moment it is *entered* – not *recorded* or *docketed*. This 1988 case is inconsistent with a later Washington Supreme Court case² which holds that only the legislature can determine when and how to impart constructive notice. Because no statute states that constructive notice of a judgment lien is imparted by the entry of a judgment, the superior court should not have ruled that the Heathcotes had constructive

¹ Intermediate Credit Bank of Spokane v. O/S Sablefish, 111 Wn.2d 219, 758 P.2d 494 (1988).

² Ellingsen v. Franklin County, 117 Wn.2d 24, 810 P.2d 910 (1991).

notice. In addition, it violates due process of law to impose the fiction of constructive notice when the Heathcotes could not have known about the existence of the judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Summary Judgment Order because a good faith purchaser of real property for value should not be deemed to have constructive notice of, and take property subject to, an unrecorded and undocketed default judgment where the legislature has not enacted a statute imposing the fiction of constructive notice under such circumstances.

2. The trial court erred in entering the Summary Judgment Order because a good faith purchaser of real property for value should not be deemed to have constructive notice of, and take property subject to, an unrecorded and undocketed default judgment where to do so violates due process because the existence of the judgment was not discoverable.

3. The trial court erred in entering the Summary Judgment Order because placing Fisher's lien in a first priority position on the property unjustly enriched Fisher because the seller had no equity in the property when the property was sold to the Heathcotes.

4. The trial court erred in entering the Summary Judgment Order because, as between the Heathcotes and Fisher, the Rule of Comparative Innocence favors quieting title to the

property in favor of the Heathcotes free of Fisher's judgment lien because Fisher could have, but failed to protect itself by recording its judgment.

III. STATEMENT OF THE CASE

On January 27, 2009, Lionel and Celia Heathcote purchased a condominium in Kirkland from Saeed and Nancy Kaley. (CP 183, ¶ 2) They paid \$175,000. (CP 184, ¶ 3) The deed from the Kaleys to the Heathcotes was signed by the Kaleys on January 23 and recorded on January 28, 2009. (CP 43)

A few days after the sale, one of Fisher's attorneys, Matt Hansen, phoned Mrs. Heathcote to claim that she and her husband had to pay a lien of approximately \$100,000 – more than half the value of the condominium. (CP 184, ¶ 6) Unaware of the lien, Mrs. Heathcote became very distraught and called her husband, who was so upset that he came home early from work. (CP 184, ¶ 7)

The Heathcotes later learned that one day before the sale closed -- on January 26, 2009 -- Fisher had obtained a default judgment in the amount of \$102,029.51 against Kaley Design, Inc., and its owner, Saeed Kaley, in King County Superior Court. (CP 30-35)

When the sale closed, the Heathcotes did not and could not have known about the judgment Fisher obtained against the seller just one day earlier. The judgment had not yet been entered into

the superior court's execution docket and would not be until three days after the sale closed. (CP 186, ¶ 3) Nor was Fisher's judgment recorded with the King County Auditor until a month later, on February 26, 2009. (CP 175)

Had the property not been sold to the Heathcotes, Fisher would not have materially benefited from its third-position lien on the condominium. Because of the drop in local real estate values, the two loans secured by the condominium that the Heathcotes were aware of at the time of purchase, exceeded the \$175,000 purchase price. As increasingly happens in such situations, the lender in first approved a "short sale" – it agreed to allow the condominium to be sold for less than the amount owed under the loan. (CP 184, ¶ 4) The second-position lienholder released her lien in return for payment of less than the amount she was owed. (CP 95 and 103-104) Fisher's judgment would have been the third lien on the property. If the Kaleys had not sold the property and Fisher refused to release its judgment, either of the two senior lenders could have foreclosed and, by doing so, eliminate Fisher's subordinate lien. In other words, there was no equity in the condominium to satisfy any portion of Fisher's judgment.

The Heathcotes³ initiated the present lawsuit to quiet title to

³ The Heathcotes later transferred the condominium into an LLC of theirs, Squirrel's Nest II LLC. It is now the named Plaintiff and Appellant in this action. (CP 184, ¶ 5 and CP 152) For ease of reference, the Appellant will be referred to herein as the Heathcotes.

the property in their favor free of Fisher's lien based on the fact that they were bona fide purchasers for value without actual or constructive notice of Fisher's judgment against the sellers and on the fact that to advance the lien to first position on the property would unjustly enrich Fisher.

The parties filed cross-motions for summary judgment requesting that the superior court determine whether the Heathcotes' condominium was subject to Fisher's judgment lien.

The Heathcotes relied upon the Washington Supreme Court's decision in Ellingsen v. Franklin County, 117 Wn.2d 24, 810 P.2d 910 (1991), to argue that because there is no statute providing that the mere entry of a judgment imparts constructive notice, they could not be deemed to have knowledge of the judgment. Moreover, the judgment was not discoverable because it had not been recorded with the county auditor or even entered into the court's execution docket until after the sale closed. Thus, to impose the fiction of constructive knowledge of a judgment whose existence was not discoverable would violate due process.

Fisher relied upon an earlier Washington Supreme Court decision, Intermediate Credit Bank of Spokane v. O/S Sablefish, 111 Wn.2d 219, 758 P.2d 494 (1988), in support of its argument that the Heathcotes had constructive notice of the judgment from the moment it was entered in court regardless of the fact that the Heathcotes did not and could not have known about it.

Despite the fact that the judgment was not available to the public, on cross-motions for summary judgment, the superior court ruled in Fisher's favor and held that the Heathcotes' condominium was subject to Fisher's judgment lien. (CP 234-36)

IV. **ARGUMENT**

A. **Standard of Review**

The trial court's summary judgment ruling is reviewed de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

B. **The Bona Fide Purchaser Doctrine**

The purpose and policy of the bona fide purchaser doctrine is to protect innocent purchasers against loss from secret liens or conveyances not disclosed by any public record nor ascertainable by due diligence. 8 George W. Thompson, Real Property § 4291 (1963).

Under the bona fide or innocent purchaser doctrine, a buyer has a superior interest in property that he or she purchases (1) for value, (2) in good faith, and (3) without actual or constructive notice of another's person's interest in the property. Tomlinson v. Clarke, 118 Wn.2d 498, 500, 825 P.2d 706 (1992).

It is undisputed that the Heathcotes purchased the condominium in good faith for value. It is also undisputed that they had no actual notice of Fisher's judgment against the seller until after they purchased the condominium. The issue raised below

was whether the Heathcotes should be deemed to have had constructive notice of Fisher's default judgment before the condominium was conveyed to them.

C. Inconsistent Supreme Court Decisions On Constructive Notice

1. Introduction and Summary

Whether the Heathcotes' condominium is subject to Fisher's judgment lien could vary depending on whether the lower court follows the Supreme Court's decision in Ellingsen, or its earlier decision in Sablefish. This inconsistency should be resolved by overruling Sablefish.

Under Ellingsen, the Heathcotes are bona fide purchasers, who took title to the property free of Fisher's judgment lien because it was not recorded until after the sale and there is no statute that imposes constructive notice of a judgment merely upon its entry.

Conversely, under Sablefish, a purchaser could be deemed to have constructive notice of a judgment from the moment the judgment is entered in court, despite the lack of statutory authority and the fact that mere filing with the court clerk does not make the judgment publicly available.

2. Under Ellingsen, the Legislature Determines When and How to Impart Constructive Notice

In Ellingsen, the Washington Supreme Court acknowledged that the creation and implementation of constructive notice is

“entirely a creation of statute.” 117 Wn.2d at 27. If the legislature has not expressly provided that the filing of a document with a particular government office or agency imparts constructive notice, then it does not. Id. “The matter of constructive notice from the record is entirely a creation of statute, and no record will operate to give constructive notice unless such effect has been given to it by some statutory provision.” 66 C.J.S. Notice § 13c (cited with approval in Loma Linda Food Co. v. Thomson & Taylor Spice Co., 279 F.2d 522, 525 (C.C.P.A. 1960) (“In the absence of a statutory provision making recordation constructive notice, the fact that an instrument or registration is entered upon a public record has no such effect.”)). In other words, if a statute does not contain language stating that an event imparts notice to the world, then that event cannot trigger constructive notice.

In Ellingsen, the Supreme Court held that a road easement filed in the county engineer’s office did not serve to impart constructive notice. The Court noted that even though recording with the county engineer’s office was required under RCW 36.81.020-.90, “the fact that the statute provides that the county engineer’s office is an office of record does not evidence an intent to provide constructive notice. ‘A record may be a public record for one purpose and not for another.’” Id. at 27 Thus, while the Court appreciated that RCW 36.81.020-.90 helped to maintain a complete history of roads, highways, bridges, and ditches, it could

not be used to impart notice. Id.

The Court noted that “***the statute does not provide that it is intended to give constructive notice. In the absence of such declaration, there is no constructive notice.***” Id. (emphasis added). This rule is followed in other jurisdictions:

Where such [constructive] notice is relied upon it is obligatory that the statute provide that such notice have the effect and be notice to all parties. “***In the absence of such statutory provision, however, it may not, strictly speaking, have such effect.***” 39 Am.Jur. [Notice and Notices] p. 237, § 8. As authority for this statement the author cites decisions from various States and from the Supreme Court of the United States. It seems to us that such a rule is just and proper.

Tucker v. American Aviation and General Insurance Co., 278 S.W.2d 677 (Tenn. 1955) (emphasis added). The U.S. Supreme Court long ago held, “They had a right to rely upon the law of the State, as enacted by its legislature, and were not bound by any constructive notice other than those laws provided. If notice was essential to charge them, actual notice should have been given, at least in the absence of a statute providing some means for constructive notice.” Burck v. Taylor, 152 U.S. 634, 654, 14 S.Ct. 696 (1894).

As recognized in Ellingsen, “When the Legislature intends that a record give constructive notice it can and does so in plain terms.” 117 Wn.2d at 27. For example, the Recording Act, RCW Title 65, creates a system for recording instruments and other legal

documents that affect real property. It expressly protects bona fide purchasers and imparts constructive notice only when a conveyance has been recorded with the county auditor. Unrecorded instruments are “void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration.” RCW 65.08.070.⁴

The purpose of a statute requiring the recording of all conveyances of real property is to protect subsequent judgment creditors, bona fide purchasers, and bona fide mortgagees against the assertion of prior claims to land based upon any recordable but unrecorded instrument. ***Such statutes provide protection for those diligent enough to conduct a search of title records . . .***

66 Am. Jur. 2d, Records and Recording Laws § 82 (2009) (emphasis added).

Similarly, the county auditor is required to file and record copies of final judgments affecting title. RCW 65.04.070. Once recorded, they become part of the official chain of title and impart constructive notice. The legislature has also determined that recorded construction liens provide constructive notice. See RCW 60.04.061; RCW 60.04.091. Under RCW 26.16.095 and .100, the claimed interest of a spouse or domestic partner in real property, if

⁴ An earlier version of this statute provided, "All deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed '***shall be notice to all the world.***'" Ball. Code 4535 (emphasis added).

recorded, provides “notice to all the world” and takes precedence of the claims of a subsequent purchaser.

There are numerous other statutes in which the legislature expressly provided that recording imparts constructive notice. See, e.g., RCW 4.28.320 and RCW 4.28.325 (“From the time of the filing [of a lis pendens with the county auditor] only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby”); RCW 65.08.050 (the recording of a final payment receipt to the U.S. to acquire land shall “impart to third persons and all the world, full notice”); RCW 82.36.100 and RCW 82.36.210 (state tax liens); RCW ch. 60.68 (federal tax liens); RCW 43.20.B.080(7)(c) (DSHS liens against a decedent’s real property).

There is also a statute that imparts constructive notice of jury verdicts the morning after they are entered in the court’s execution docket. RCW 4.64.020(2) provides, in relevant part:

Beginning at eight o'clock a.m. the day after the entry of a verdict as herein provided, ***it shall be notice to all the world*** of the rendition thereof, and any person subsequently acquiring title to or a lien upon the real property of the party or parties against whom the verdict is returned shall be deemed to have acquired such title or lien with notice, and such title or lien shall be subject and inferior to any judgment afterwards entered on the verdict.

(emphasis added.)

In some contexts not involving real property, the legislature has provided that the filing of certain documents with designated

officials (whose records are then publicly available) provides constructive notice. E.g., RCW 16.57.090 (the recording of a document affecting title to a brand “shall be constructive notice to all the world”); RCW 19.77.040 (trademark registration).

In sum, these numerous statutes confirm the observation in Ellingsen that when the legislature intends the filing or recording of a document to give constructive notice, it makes that intent clear within the statute.

There is no statute that provides that the filing or entry of a judgment in superior court gives constructive notice of its existence. Without express statutory language, there is no constructive notice.

In sum, if Ellingsen governs the outcome of this case, then the Heathcotes would not be deemed to have constructive notice of Fisher’s judgment and would be bona fide purchasers who took title free of the judgment lien.⁵

⁵ If the Heathcotes are bona fide purchasers, then their LLC also took the property free of Fisher’s lien. Thus, the fact that the Heathcotes knew about Fisher’s claims at the time of their subsequent transfer of the condominium to their LLC is irrelevant. One who derives his interest in property from or through a bona fide purchaser is entitled to the same protection as the bona fide purchaser. 63 A.L.R. 1362 (1929). The “bona fide purchaser of an estate, for valuable consideration, purges away the equity from the estate in the hands of all persons who may derive title to it.” Id. The Heathcotes’ status as a bona fide purchaser purged the property of Fisher’s lien before the transfer to the LLC. Id.; see also Bernard v. Benson, 58 Wash. 191, 197, 108 P. 439 (1910) (grantee of bona fide purchaser took property free from any lien, regardless of notice to him).

3. Under Sablefish, Constructive Notice is Automatic Upon Entry of a Judgment, Even Absent Statutory Authority

The Ellingsen decision is at odds with the Supreme Court's earlier decision in Sablefish. In that case, the Supreme Court held that the mere entry of a judgment "serves as constructive notice to purchasers that a judgment lien has attached to a judgment debtor's property." 111 Wn.2d at 223. Under the civil rules, entry of a judgment merely requires that it be signed and delivered to the court clerk's central office for filing. Civil Rules 58(a), 58(b), and 78(e), and King County Local Civil Rules 58(a) and 58(b). There is no requirement that the judgment be entered into the execution docket, recorded, or otherwise publicly available.

The ruling in Sablefish was not based on any legislative directive that entry of a judgment imparts constructive notice. The statute cited in Sablefish, RCW 4.56.200, provides that a lien commences on a judgment debtor's property when the judgment is entered or filed with the court, but it is silent on the issue of constructive notice. It is a timing statute, not a notice statute. Indeed, the title of the statute is "**Commencement** of Lien on Real Estate" and the opening sentence reads, "The lien of judgments upon the real estate of the judgment debtor shall **commence** as follows: . . ." (emphasis added). The timing determination is useful to establishing priority relative to other liens and real property interests. While RCW 4.56.200 establishes **when** a lien attaches

to property, there is nothing in the language of RCW 4.56.200 to indicate that the entry or filing of a judgment provides “**notice to the world**” of the judgment. Therefore, bona fide purchasers, such as the Heathcotes, should take the property free of that lien.

As noted above, the Court in Ellingsen recognized that “[w]hen the Legislature intends that a record give constructive notice it can and does so in plain terms.” 117 Wn.2d at 27. The statute discussed in Sablefish and relied upon by Fisher contains no such language.

Despite the lack of statutory authority, Sablefish held that the mere filing of a judgment with the court clerk constituted constructive notice. However, Sablefish was decided before Ellingsen ruled that only the legislature can determine when and how to impart constructive notice. Moreover, in Sablefish, in contrast to the present matter, the court was not addressing a situation where the judgment was not yet entered in the trial court’s execution docket and was therefore not yet publicly available. Indeed, the Sablefish decision specifically noted that the judgment in that case had been entered on the execution docket almost a year before, and thus, was a matter of public record.⁶ Id. at 221.

In Ellingsen, the Court was not presented with the opportunity to comment on or reconcile its earlier decision in

⁶ “The judgment was listed in the district court’s Party Index and its judgment book before the April 1, 1985 purchase date.” Id. at 221.

Sablefish because that case did not involve judgments. This case presents the opportunity to re-evaluate Sablefish in light of Ellingsen.

D. Imparting Constructive Notice Under These Circumstances Violates Due Process

Constructive notice is a legal fiction. “Although constructive notice is treated as actual notice and knowledge for certain purposes, literally, it is neither notice nor knowledge. Constructive notice is information or knowledge of a fact imputed by law to a person (although that person might not actually know the fact). . . .” 58 Am. Jur. 2d Notice § 8 (2009); accord Schoedel v. State Bank of Newburg, 13 N.W.2d 534, 535 (Wis. 1944) (“The term ‘constructive’ is the mere trademark of a fiction.”).

To invoke the legal fiction of constructive notice against the Heathcotes when they had no way of knowing that the property they were purchasing was encumbered by a judgment that exceeded half its value would violate due process. “The opportunity to investigate is the foundation of constructive notice.” Fogle v. General Credit, 122 F.2d 45, 49 (D.C. Cir. 1941); see also City of Seattle v. Stone, 67 Wn.2d 886, 889, 410 P.2d 583 (1966) (statute violated due process when it made a vehicle owner responsible for illegal parking without proof of knowledge that the vehicle was used with the owner’s consent).

In situations where the legislature has imposed constructive

notice, the affected party is able to learn about and protect himself from the adverse claim. In other words, there is an “opportunity to investigate.” Due process requires notice which is actually calculated to inform parties of their rights. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712 (1983). For example, as noted above, the Recording Act provides that the world is deemed to know of all interests affecting title to real property the minute they are filed with the county auditor. See, e.g., RCW 65.08.070. The county auditor has a duty to record the instrument upon payment of the fee, making the information publicly available almost immediately. RCW 65.08.150.

If, however, the document is not recorded, whether by negligence of the auditor or not, it does not impart constructive notice. See 3 Washington Real Property Deskbook, §41.6(5) at 41-18 (3d ed. 1996). Merely depositing the document with the county auditor or clerk does not operate as constructive notice. Richie v. Griffiths, 1 Wn. 429, 433, 25 P. 341 (1890) (“[C]onstructive notice cannot be given by an attempt to comply with the registry laws. And this view we think is supported by right reasoning, and founded on principles of equity and justice.”). The court in Richie found it inequitable to impart constructive notice of a deed where it was not properly indexed:

It would be a policy worth of consideration of the ancient tyrant, who wrote his laws in small characters, and posted them so high that his subjects could not

read them, while, at the same time, he held them accountable for their strict observance. In this connection, we cannot refrain from quoting . . . Barney v. McCarty, [15 Iowa, 510 (1864)], that 'a deed might as well be buried in the earth as in a mass of records, without a clue to its whereabouts.'

1 Wn. at 444-45.

By statute, constructive notice of verdicts is imparted at 8:00 a.m. the day after they are entered in the court's execution docket. RCW 4.64.020(2). Unlike other court documents, which may not be entered into the court's execution docket for several days (CP 186-187), the legislature provided that a verdict must be entered into the execution docket "forthwith." The express requirement in the statute that the verdict first be entered in the court's execution docket before notice is imparted insures that the information is publicly available and discoverable.

In Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950), the U.S. Supreme Court held that it would violate due process under the 14th Amendment of the U.S. Constitution to impose constructive knowledge where the affected party did not have a reasonable opportunity to discover and protect his property rights. The court quoted Justice Oliver Wendell Holmes in an earlier decision: "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." McDonald v. Mabee, 243 U.S. 90, 91, 7 S.Ct. 343 (1917). The U.S. Supreme Court held that to impose constructive knowledge based on publication violated due process:

Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests.

Mullane, 339 U.S. at 320.

Under Sablefish, the world would be deemed to know of a judgment as soon as it is entered (i.e. signed by a judge and then taken to the clerk's central office). See CR 58(a), 58(b), 78(e), LCR 58(a), 58(b)(1). However, before the public even has access to the judgment, the clerk has to enter the judgment in the execution docket. RCW 4.64.030(1); (CP 186-187, ¶¶ 4-5) As the Superior Court's Finance Division Manager explains, until the judgment is entered in SCOMIS, it does not appear on the court's docket and is not available to the public. Id. That step does not happen automatically or instantly. Fisher's judgment, for example, was not entered into SCOMIS until four days after it was signed by a judge. (CP 186, ¶ 3) By then, the condominium had already been conveyed to the Heathcotes. Prior to its becoming a public document, the Heathcotes could not have discovered its existence through the exercise of due diligence. Thus, to impose constructive knowledge based on the filing or entry of a judgment in court under these circumstances would violate due process.⁷

⁷ Although Sablefish is at odds with Ellingsen, if it is not overruled, then on due process grounds, the Court could distinguish it where, as here, the judgment is not yet publicly available. As noted above, in Sablefish, the judgment was publicly available and discoverable when the property was conveyed.

E. The Summary Judgment Order Should be Reversed on Equitable Grounds

There are also two independent, equitable grounds for reversing the trial court.⁸ Even if the Court applies Sablefish and not Ellingsen, and rules that the Heathcotes had constructive notice of Fisher's lien, this court could rule that it would be inequitable to rule in Fisher's favor.

1. Fisher Would Be Unjustly Enriched by Having a Lien in First Position

Imparting constructive knowledge of Fisher's lien and allowing Fisher to hold a first position lien on the Heathcotes' property would unjustly enrich Fisher. Fisher admits that the sale from Kaley to the Heathcotes was a short sale. (See CP 19, ¶ 9) Therefore, there would not have been enough equity in the property to satisfy any part of its judgment lien while the property was in Kaley's hands. If Fisher's judgment lien is deemed to automatically attach to the property the instant it was entered, then when Kaley and Heathcotes closed the purchase they unwittingly conferred a benefit on Fisher by allowing it to jump from a worthless third priority position into first. Fisher has knowledge of the benefit (and seeks to reap it in this litigation). Finally, it would

⁸ The Heathcotes asked the court to quiet title to their condominium in their favor free of Fisher's judgment lien. (CP 171) Whether to quiet title is an equitable decision. Kobza v. Tripp, 105 Wn. App. 90, 95, 18 P.3d 621 (2001); Durrah v. Wright, 115 Wn. App. 634, 648, 63 P.3d 184 (2003).

be inequitable for Fisher to retain that benefit under these circumstances without having paid any value for its judgment lien. Fisher suggests that it may have been paid *something* in exchange for releasing its third-position lien even in a short sale (as was the second position lienholder). (See CP 14) This does not change the fact that Fisher would be unjustly enriched if it were to jump from third to first position and therefore have its \$102,029.51 judgment fully secured.⁹

2. The Rule of Comparative Innocence Favors the Heathcotes

The Rule of Comparative Innocence is an equitable doctrine that helps courts allocate a loss between two parties when one of them created or contributed to the loss or failed to take steps to prevent it. Cunningham v. Norwegian Lutheran Church, 28 Wn.2d 953, 963, 184 P.2d 834 (1947). The Rule provides another independent basis for reversing the superior court's Summary Judgment Order.

The Heathcotes could not have learned of and protected themselves against Fisher's judgment lien. On the other hand, regardless of whether Fisher was **required** to record its judgment

⁹ A related doctrine is equitable subrogation, which precludes a junior lienholder from jumping into a higher priority position when a superior lienholder is paid off. See, e.g., Bank of America v. Prestance Corp., 160 Wn.2d 560, 160 P.3d 17 (2007). Equitable subrogation allows the person paying off the superior lien to step into his shoes, maintaining the same relative positions of the junior lienholder.

to provide constructive notice, it **could have** done so and this entire problem would have been avoided. Instead it waited over a month before doing recording its judgment; by then, the property had already been conveyed to the Heathcotes.

As the court in Richie observed:

The obligation [to record] rests upon the grantee to give the notice required by law. He controls the deed. He can put it on record or not, as he pleases. He has the right and the opportunity to see that the work is done as he directs it to be done, in legal manner. No one else has this opportunity, and if, from any cause, he fails to give notice required by law, the consequences must fall on him. ***It may be a hardship; but, where one of two innocent persons must suffer, the rule is that the misfortune must rest on the person in whose business, and under whose control, it happened, and who had it in his power to avert it.***

1 Wn. at 434 (emphasis added); see also 3 Washington Real Property Deskbook, §41.6(5) at 41-48 (3d ed. 1996).

In Hendricks v. Lake, 12 Wn. App. 15, 23-24, 528 P.2d 491 (1974), the court dismissed a claim based on an unrecorded lease. "We point out that any apparent equity favoring Hendricks over either Forstrom or Palmer disappears in light of the fact that it was Hendricks' failure to record his lease and not Palmer's and Forstrom's failure to make inquiry outside of their chain of title which led to the present litigation." In Cunningham v. Norwegian Lutheran Church, 28 Wn.2d 953, 963, 184 P.2d 834 (1947), the court quieted title in favor of a bona fide purchaser. There the respondent "failed to do as the ordinarily prudent and cautious

individual does . . . Appellant had ample opportunity to protect himself and did nothing. Respondent did everything that could be expected of it.” Id.

It is noteworthy that the application of Rule of Comparative Innocence here will not impose a loss on Fisher, but just preclude it from obtaining a windfall that it would not otherwise have received. The property was worth less than the two loans secured by senior deeds of trust. The two lenders agreed to take less than they were owed in order for the property to be sold to the Heathcotes. Although there was no equity to satisfy any portion of Fisher’s third-priority lien, Fisher now expects to be paid in full. Fisher will still have an enforceable judgment, just one that cannot be executed against the Heathcotes’ condominium.

V. CONCLUSION

The Heathcotes request that the Court reverse the superior court’s Summary Judgment Order, and find that the Heathcotes took title to the condominium free of Fisher’s judgment lien.

Dated this 4th day of June, 2010.

Respectfully submitted,

RIDDELL WILLIAMS P.S.

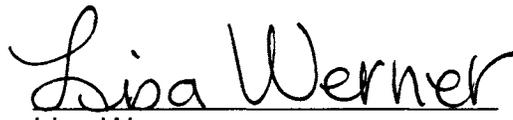
By: 
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CERTIFICATE OF SERVICE

I, Lisa Werner, certify that I am over 18 years of age and a U.S. citizen. I am employed as an executive assistant by the law firm of Riddell Williams P.S. and not a party to the within action. On the date shown below, I caused a true and correct copy of the within BRIEF OF APPELLANT to be served on counsel of record for Respondent via email and hand delivery by a legal messenger service at the following address:

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EXECUTED on June 4, 2010 in Seattle, Washington.


Lisa Werner
Lisa Werner

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