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

65251-6-I

NORCON BUILDERS, LLC, a Washington limited liability company,
Plaintiff,

v.

LIBERTY CAPITAL STARPOINT EQUITY FUND, et al.,
Defendants/Respondents; GMP Homes VG, LLC, et al., Defendants,

and

RYAN K. JOSWICK and STEPHANIE C. JOSWICK, husband and wife,
et al.,

Third-Party Plaintiffs/Appellants,

vs.

NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation,
Third-Party Defendant

APPEALED FROM KING COUNTY SUPERIOR COURT
THE HONORABLE JULIE SPECTOR

CORRECTED RESPONDENTS' BRIEF

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APPENDICES

APPENDIX A: This concluding substantive portion of Respondents' brief quotes the challenges to aspects of twelve Findings of Fact made by Appellants' Assignment of Error No. 3 and sets forth supporting substantial evidence and related argument.

APPENDIX B: Highlighted excerpts of FFs 22-24, 31 and 33 and Conclusion 6 (de facto finding)CP 1842-1857

APPENDIX C: Exhibit 246

APPENDIX D: Exhibit 247 (while not admitted below, Respondent Liberty argues, for reasons developed in §§ I.B and IV.G of its brief, that these exhibit must be deemed admitted into the record for purposes of this appeal).

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I. SUMMARY INTRODUCTION AND THE TITLE INSURANCE ISSUE

The basic facts (as opposed to the legal conclusions which they dictate) are essentially undisputed. While the appellant Unit Owners' brief (the "**UO Brief**") assigns error to aspects of thirteen of sixty one Findings of Fact ("**FF**"), its supporting analysis is almost non-existent or "pro forma," i.e., bereft of any attempt to show a lack of substantial evidence and entailing only legal argument.¹ (Substantial evidence support for the challenged FFs is set forth in **Appendix A.**) By contrast, this brief relies almost entirely on *unchallenged* FFs which are legally treated as verities on appeal. See, e.g., *Sorenson v. Pyeatt*, 158 Wn.2d 523, 528 (note 3), 146 P.3d 1172 (2006). The trial court's FFs and Conclusions of Law ("**Conclusions**"), found at CP 1837-1860, are attached as Appendix C to the UO Brief. **Except as otherwise specially indicated, all FFs cited to in this brief are *unchallenged*.**

A. This Case/Appeal Presents a Straightforward Issue: Who Should Pay for First American Title Insurance Company's Errors and Omissions in Connection with Five Sales?

Developer GMP Homes borrowed \$26 million from Frontier Bank for financing and hired contractor Norcon to build the Starpoint Condominiums. FF 1-2, 5, 10. To finish construction, GMP borrowed \$1.9 million more from Liberty. FF 3-4, 11. Having sold most (including the Unit Owners' five units) but not all of 98 condominium units, GMP

¹ The only significant exception is the UO Brief's attack on FF 61 (in § III.F at pages 54-56) to which this brief responds in § IV.G.

went bankrupt. FF 1, 7, 59. Frontier, Norcon, and Liberty were each left unpaid (wholly in Liberty's case) in the wake of GMP's insolvency. FF 5, 19, 49, 60.

The sole security for payment of Liberty's loan was the same collateral available to Frontier and Norcon: a claim against the project property and units. The pertinent priority of creditors, subject to the exception giving rise to this litigation, was as follows: **first-place priority**, Frontier Bank as primary lender with a claim against all *unsold* units (it having a partial deed released on each sold unit) (FF 2); **second-place priority**, Norcon by virtue of its mechanics' lien, with a claim against all units, sold or unsold (FF 5, 49, 56, 60); and **third place priority**, Liberty, secondary lender with a claim against all unsold units. FF 3-4, 12-13, 59-60.

The only exception to the above-described order of creditors involved the Unit Owners' five purchased units. In every other sale, it is undisputed that First American *requested and obtained* the agreement of both Frontier and Liberty to a partial reconveyance of their respective deeds of trust prior to each unit's sale. As to sales of the Unit Owners' five units, however, while escrow agent First American secured Frontier's agreement to partially reconvey, *it neglected to either ask for, or to obtain, Liberty's written agreement to reconvey prior to the Unit Owners' sale closings, and Liberty never made either an oral or written promise to reconvey as to those sales.* FF 26-33, 36-37, 52-53, 55, 59 (*see also* unchallenged conclusion 6 which has equivalent de facto findings).

Indeed, it was nearly a year following the Unit Owners' purchases before Liberty "realized" that they had closed without its approval. FF 45.

This singular situation arose because the Unit Owners' escrow agent First American deviated, unilaterally and without notice to Liberty, from the "course of conduct" (to adopt the UO Brief's preferred term) that First American had earlier proposed/instituted and in which Liberty Capital acquiesced. That "course of conduct" was "consistently" (to again adopt the UO Brief's preferred term) and unvaryingly followed by the two parties, *except as to the Unit Owners' five purchases*, from the mid-2007 start of sales until First American, *again unilaterally*, instituted a "revised approach" when it "began [in January 2008] requiring all the parties, including Liberty Capital, to sign requests for reconveyance 'up front instead of after the fact.'" UO Brief, p. 26; *see also* FF 35.

The parties' consistent "course of conduct" throughout 2007 involved four steps. Liberty Capital agreed to partially reconvey its deed of trust as against individual condominium units where (1) *prior to sale closing* (2) First American requested in writing Liberty's approval of the sale and provided Liberty with a written HUD statement indicating the proposed disposition of sale proceeds, (3) which disposition Liberty either conditionally or unconditionally (or, alternatively, not at all)² approved (4) *in writing* by a confirmatory email *sent prior to sale closing*. This is the "**4-Step Approval Process**" that is reflected in *unchallenged* FF 23, 31-

² There were times Liberty said it "will not allow that sale to go through, it's too low, we don't agree with the proceeds, that kind of stuff." RP: 1/13/10 at 87:16-88:11.

33, and 53, and Conclusion 6 and in partially challenged (but not in this respect [see § IV.C.5 and Appendix A]) FF 22 & 24. Highlighted excerpts of these findings—perhaps the most critical and effectively dispositive in this appeal—are attached as **Appendix B**.

First American's failure to follow the 4-Step Approval Process as to the Unit Owners' purchases (apparently due to staff overwork and/or inexperience [FF 33]) meant that it did not obtain Liberty's agreement to reconvey (FF 33, 53) so that the resulting priorities (after Liberty paid off Frontier's remaining unpaid loan [FF 60]) were: (1) Norcon, the contractor lien claimant, (2) Liberty, and (3) the mortgage lenders who financed the Unit Owners' purchases. This left the rights of the appellant Unit Owners in fourth place. This priority remains unchanged today, except that First American paid to obtain a release of the Unit Owners' Condominiums units from the Norcon lien.³ **Thus, the current priority of secured creditors as to the Unit Owners' condominiums is: (1) Liberty, (2) lenders who financed the Unit Owners' purchases, and (3) the appellant Unit Owners. FF 56, 59.**

When First American neglected to follow its own 4-Step Approval Process for release of Liberty's deed of trust, the practical result was that the five Unit Owners (alone among 88 unit purchasers) became liable to having their units subjected to a foreclosure sale instituted by the unpaid project lender, i.e., Liberty. (Most purchasers also faced exposure to the

³ The payment sum was confirmed in Ex. 146, ¶1, and the release appears in Ex. 147.

Norcon lien claim, but most units have since been released.)

Consequently, the straightforward essential issue involved in this appeal—as somewhat self-servingly stated in the UO Brief at page 5—is as follows:

[W]ho should bear the risk of losing title to or the security interest in real property arising from technical processing errors by a non-party escrow agent in the closing of the purchases of condominium units sold during the development of a condominium project?⁴

B. The “Elephant in the Living Room”

The Unit Owners’ above quoted issue-statement is accurate but incomplete. The genesis of this lawsuit certainly involves “technical processing errors by a non-party escrow agent” but there is more to it than that. The UO Brief assiduously seeks to exclude any consideration of the Unit Owners’ title insurance. *See, e.g.,* note 3 at page 8: “As used in this brief, the abbreviated ‘First American’ refers only to First American Title Insurance Company acting in its capacity as the escrow agent for the Starpoint Condominium transactions.” The UO Brief goes so far as to assert at page 32, **incorrectly**, that:

No evidence was admitted regarding insurance policies or coverage or any other assumption by First American Title Insurance Company, acting in its capacity as the Unit Owners’ insurer, for responsibility for the Norcon lien or the Frontier loan.

Note 19: The only proposed evidence that related to this

⁴ (Emphasis added.)

subject matter was Exhibit 247. Exhibit 247 was not admitted.⁵

Yet, copies of the five policies of title insurance issued by First American in 2007, including policy numbers and amounts, and lists of exceptions to coverage *including neither the Norcon lien nor Liberty loan*, are included in Exhibits 219,⁶ 220,⁷ 221,⁸ 222,⁹ and 226.¹⁰ These exhibits were admitted unreservedly without objection. CP 1831-32. Ironically, they were admitted into evidence by the Unit Owners as part of their own ER 409 submission.¹¹

The UO Brief, at pages 31-32, notes that the Unit Owners nonetheless moved in limine “to exclude evidence that the Unit Owners had title insurance with First American Title Insurance Company”. Their

⁵ (Emphasis added.)

⁶ Page 1 of the issued policy (# 823143, employing 6/17/06 “Form No. 1402.06”) is page FA_000188. The policy amount is on the following page, and policy exceptions are listed on the immediately following pages. Pages 2-4 of said standard Form No. 1402.06 are missing from this exhibit but are included in Exhibit 226.

⁷ Page 1 of the issued policy (# 832853, employing 6/17/06 “Form No. 1402.06”) is page FA_000238, the policy amount is on the following page, and policy exceptions are listed on immediately following pages. Pages 2-4 of said standard form No. 1402.06 are included in Exhibit 226.

⁸ Page 1 of the issued policy (# 1051807, employing 6/17/06 “Form No. 1402.06”) is page FA_000163, the policy amount is on the following page, and policy exceptions are listed on immediately following pages. Pages 2-4 of said standard form No. 1406.06 are included in Exhibit 226.

⁹ Page 1 of the issued policy (# 1089403, employing 6/17/06 “Form No. 1402.06”) is page FA_00213, the policy amount is on the following page, and policy exceptions are listed on immediately following pages. Pages 2-4 of said standard form No. 1406.06 are included in Exhibit 226.

¹⁰ Pages 1-4 of the complete issued policy (# 843884, employing 6/17/06 “Form No. 1402.06), with attached sheets showing policy amount and exceptions, commence with the fourteenth page of the exhibit.

¹¹ As trial began on 1/11/10, the Unit Owners-offered Exhibit Nos. 219-22 and 226 were admitted (CP 1831-32) at the same time that their counsel was **incorrectly** advising the Court that the “policies issued, purchased and issued are not before the Court.” RP: Trial 1/11/10 at 46:8-9.

motion attempted to invoke the “collateral source” rule and ER 411’s bar against evidence of insurance to prove negligence. CP 443-47. The parties’ argument focused particularly on two Liberty-proposed exhibits: Nos. 246 and 247¹², each discussed below and copies attached, respectively, as **Appendices C-D**.

To summarize, in Exhibit 246 First American counsel John Ludlow advised Liberty’s counsel that the title company had unreservedly accepted the defense of Liberty’s claims against its five insured Unit Owners. In Exhibit 247 (p. 3), an email sent on the eve of Liberty’s threatened foreclosure sale and describing itself as an ER 408-protected communication (although it referred to no offer of settlement), Mr. Ludlow requested Liberty’s loan balance so that First American could prepare to bid that amount at the foreclosure sale.

Responding to the Unit Owners’ motion to exclude No. 247, Liberty argued that it “would allow a fraud on the court if they’re allowed to [argue] that these poor homeowners are about to be kicked out on the street [as the Unit Owner’s trial brief argued]¹³ when [Liberty] can show by a preponderance that nothing of the sort will occur”¹⁴ because (1) they have title insurance, (2) First American has accepted their defense without

¹² As discussed immediately below, Exhibit 247 was not admitted into evidence but must, on grounds of judicial estoppel and otherwise, be deemed as part of the record for purposes of this appeal, especially given that the exhibit was excluded only if the Unit Owners refrained from making the argument that they now assert on appeal.

¹³ The Unit Owners “are faced with the loss of their real properties and their homes.” CP 468, ll. 4-6.

¹⁴ RP: 1/11/10 at 55:20-24.

reservation, and (3) was prepared to bid in at the [last-minute enjoined] foreclosure sale the “entire amount of the Liberty Capital loan.” RP: 1/11/10 at 54:3-57:19.

The Order partially granting the UO Owners’ motion pertinently stated:

6. Counsel for Liberty Capital, and its witnesses and representatives, shall be precluded from referring to or presenting any evidence or arguments regarding title insurance on the Applicants’ units for any purpose [the following was interlined by the court] except possible witness’ bias **unless an issue is raised as to Applicants’ losing their homes.**

CP 480:6-12 (emphasis added).

Consistent with this ruling, the trial court later admitted Exhibit 246 (referencing First American’s unreserved acceptance of the Unit Owners’ defense) for the limited purpose of evidencing potential bias of First American’s witnesses. RP 1/13/10 at 64: 16-25; CP 1833. Exhibit 247 evidenced that First American was preparing to bid the balance of Liberty’s unpaid loan at its foreclosure sale, the action that the UO Brief now asserts would have been such “patently foolish conduct” and “economically irresponsible behavior” so “ignor[ing] economic realities to the point of absurdity” *that First American would never have committed such folly.*¹⁵ The reason for such hyperbolic rhetoric is to be found in Exhibit 247’s obviously powerful contrary evidence that **First American would have paid to keep the Unit Owners in their homes, thereby**

¹⁵ UO Brief, pp. 55-56.

defending the title that First American had insured.¹⁶

The exclusion of Exhibit 247 was conditional. As stated in the written order granting the Unit Owners' in limine motion, the title insurance evidence exclusion applied "unless an issue is raised as to Applicants' losing their homes."¹⁷ Thus, the trial court ruled, *if* the Unit Owners were to "raise" that issue, the result would be different. This is further reflected in the following colloquy:

MR. OLES: May I ask one clarifying question?

THE COURT: On the title insurance?

MR. OLES: Yes, your honor. If – will the applicants be allowed to make the argument that they're going to lose their homes? And if so are we allowed to offer our exhibit [247] in

¹⁶ In Exhibit 247, addressed to counsel for both Liberty and its trustee conducting its foreclosure sale, Mr. Ludlow pertinently states:

Preliminary Injunction this Friday, First American Title Insurance Company ("First American") wants to be ready to bid at the 3:00 p.m. Trustee's Sale if Judge Shaffer refuses to enjoin the Sale. To that end, First American wants to know whether NWTS will accept First American's pre-sale wire transfer of Liberty Capital's credit bid (for all sums owed on its Note and Deed of Trust), and First American's agreement to pay any surplus, if there is competitive bidding, by a second wire transfer within 24 hours of the Sale. Also, First American needs to know whether NWTS intends to conduct the Trustee's Sale in Parcels or in bulk. If the Sale is conducted in parcels, First American needs to know the credit bids allocated to each unit (all 20 units). If the sale is conducted in bulk, First American wants to know the amount of Liberty Capital's opening credit bid and the total amount owed on its Note and Deed of Trust (including an accounting of its loan balance, showing principal advances, accruing interest, late charges fees and costs). Please provide the foregoing information ASAP, in no event later than 3:00 tomorrow afternoon. ... The contents of this email are protected by ER 408.

(Emphasis added.)

¹⁷ (Emphasis added.)

response to that?

THE COURT: That's the thing. If they open that door, then I guess you get to rebut that.

MR. OLES: Because they have opened it in their trial brief.

THE COURT: It's there. You read from it. I read it over the weekend. And I just have to see how that comes in, that's why I'm kind of in this quandary of, well, if they open that door you get to rebut it.

MR. OLES: Thank you.

RP: 1/11/10 at 68:9-23 (emphasis added).

In order to keep Exhibit 247 (and other Liberty evidence of title insurance) out of evidence, and to limit the admissibility of Exhibit 246, the Unit Owners complied with the trial court's ruling by abandoning any further argument at trial that they were at risk of losing their units and homes. This is evidenced in the following colloquy between the Unit Owners' counsel and the trial court. Liberty's counsel was concerned, before the only Unit Owner to testify was released, that the "losing their homes" argument not be subsequently raised. RP: 1/13/10 at 63:12-64:15. First American's counsel emphasized that it had foresworn that argument:

MR. GRAHAM: I apologize for interrupting earlier. The order on the question of insurance was granted except for possible witness bias.

THE COURT: Right.

MR. GRAHAM: And unless an issue is raised as to applicants losing their homes, and that hasn't happened. So I just want to remind the Court.

THE COURT: Thank you very much, Mr. Graham.

RP: 1/13/10 at 64:16-25.¹⁸ Liberty's counsel responded: "Provided that the other side does not attempt to raise some argument about the applicant homeowners losing their homes, then she [Unit Owner Erin Naumann] may be released. I do point out that argument is raised in the trial brief, which is why we're being sensitive to it." RP: 1/13/10 at 65:15-24.¹⁹

Now, however, on appeal, they offer a Brief that asserts precisely the proscribed argument:

The third element of equitable estoppel requires a showing of injury to the Unit Owners. If Liberty Capital is permitted to repudiate its course of conduct on which the United Owners relied and to foreclose on the Unit Owners' real property, the Unit Owners will lose title to their property.²⁰

The Unit Owners stand to lose title they reasonably believed was theirs free and clear at the time they purchased their units, and their lenders have lost the first-priority position they reasonably believed they had when they financed Unit Owners' purchases.²¹

By arguing that the Unit Owners "stand to" and "will lose title to their property" absent reversal, the UO Brief makes the argument that the trial court ordered (CP 480) would allow Liberty "to rebut" by admitting Exhibit 247 (and other proof of title insurance, including an unqualified admission of Exhibit 246). RP: 1/11/10 at 68:9-23. Having made that argument on appeal and thereby "open[ed] that door, [Liberty] gets to

¹⁸ (Emphasis added.)

¹⁹ (Emphasis added.)

²⁰ UO Brief, p. 47 (emphasis added).

²¹ UO Brief, p. 49 (emphasis added).

rebut it.” *Id.* Exhibit Nos. 246 and 247 must thus both be deemed admitted under fundamental principles of judicial estoppel (*see, e.g., Holst v. Fireside Realty, Inc.*, 89 Wn. App. 245, 259, 948 P.2d 858 (1997) [“that doctrine prevents a party from taking a factual position that is inconsistent with his or her factual position in previous litigation”])²² and the “doctrine” of “Preclusion of Inconsistent Positions” (“the rule of preclusion of inconsistent positions prevents a person from making assertions of fact inconsistent with a position that person previously took in litigation”).²³ The Unit Owners cannot properly exclude evidence at trial by promising not to assert that they faced “losing their homes” and then reassert that very argument on appeal while continuing to insist that evidence of First American’s title insurance should be limited or excluded.

This is, moreover, not a minor but a potentially dispositive issue: the UO Brief’s primary argument for reversal is equitable estoppel, and successful proof of the third required element of proof (“injury”) is essential to establish that defense. Exhibits 246-47 (as well as Exhibits 219-222 and 226) establish that the Unit Owners have title insurance that will protect their title in the nonjudicial foreclosure that will proceed if and when the trial court judgment is affirmed.

In short, the “elephant in the living room” is the significant fact of the Unit Owners’ title insurance – a coverage by which First

²² (Note and citations omitted.)

²³ 14 Lewis H. Orland & Karl B. Tegland, WASHINGTON PRACTICE: TRIAL PRACTICE, CIVIL, § 382 “Related Doctrines—Preclusion of Inconsistent Positions” (5th ed. 1996) at 778.

American will bear the liability arising from its own failure to obtain the same written consents to closing that it obtained from Liberty on the other unit sales in 2007. Such proof defeats the “damage” element of the Unit Owners’ primary “equitable estoppel” argument, and it also negates their fallback “equitable subrogation” argument. The reason for this is well summarized in *Coy v. Raabe*, 69 Wn.2d 346, 351, 418 P.2d 728 (1966):

It would be a gross misapplication of the doctrine of subrogation were we to hold that its cloak settled automatically upon one who has simply made a mistake, when Intervenor’s relationship is governed by the law of contracts. Further, it is difficult to think of a situation in which a title insurance company could not claim unjust enrichment as to someone who might inadvertently benefit by their negligence. Either they insure or they don’t. It is not the province of the court to relieve a title insurance company of its contractual obligation. Intervenor has not cited us authority to the contrary.²⁴

See also *Kim v. Lee*, 145 Wn.2d 79, 91-92, 43 P.3d 1222 (2001) (“In this case, legal remedies and equities suggest that the loss should fall on the title company rather than the innocent judgment creditor. As in *Coy*, this case was precipitated by the title company’s negligence and failure to acknowledge the lien.”).

At the heart of this appeal, title insurer First American continues its effort to shift the loss arising from its errors and omissions, for which it is contractually responsible vis-à-vis the Unit Owners, to Liberty, a party that was “inadvertently benefit[ted] by [First American’s] negligence” (*see*

²⁴ (Emphasis added.)

Hu Hyun Kim, supra, 145 Wn.2d 90-91). But any such benefit does not relieve First American of its legal responsibility to insure the Unit Owners against Liberty's still-in-place prior recorded deed of trust which First American's title policy represented as having been removed. Nor does it justify a gutting of the Washington Recording Act and its foundational principle of priority based on 'first-in-time is first-in-priority'. See *Kim, supra*, 145 Wn.2d at 86, 90-91. After all, "either [title insurance companies] insure or they do not" (*id.*, at 91). *Coy* and *Kim* establish that they do.

In short, First American cannot legally "get off the hook" by stripping Liberty Capital of its deed of trust (which it never reconveyed or promised to reconvey as to the Unit Owners' five units [FF 33, 53]) so as to shift the cost of the escrow agent/insurer's errors and omissions to Liberty.

II. COUNTER-STATEMENT OF ISSUES

The Unit Owners' "STATEMENT OF ISSUES" poses two issues in a "stack-the-deck" fashion to summarize their arguments. They ask "did the trial court err" based on incorrect, self-serving and critically incomplete characterizations of the underlying facts that have been massaged to support an affirmative answer. For its part, Liberty states the issues more neutrally as follows:

1. To such ever extent as Assignment of Error No. 3 has been sufficiently supported in the UO Brief's "Argument" section, including references to the record, so as to justify a consideration *on the merits*, is there substantial evidence to

support FF Nos. 15, 21-22, 24-25, 34, 39-40, 44, 46-48, and 61, in the aspects challenged by the UO Brief?

2. Should Liberty's deed of trust's current first place²⁵ record priority be extinguished in favor of the junior record priority of the Unit Owners' lenders' deeds of trust, and the Unit Owners' third place priority record title?

a. Are the three required elements of equitable estoppel each present?

i. Did Liberty utter or commit an inconsistent "admission, statement or act," occurring at or before the alleged act of reliance, i.e., **before the Unit Owners' August/September 2007 unit purchases?**

ii. Did the Unit Owners "**reasonably rely**" upon that an "admission, statement or act" of Liberty in consummating their August/September 2007 purchases?

iii. Did (or will) the Unit Owners' suffer **injury** if Liberty is allowed to act inconsistently with any such "admission, statement or act"?

b. Additionally and/or alternatively, are the required elements of unjust enrichment/constructive trust established?

3. Should the Unit Owners, and their lenders, be equitably subrogated to the secured rights formerly held by primary lender Frontier to the extent that GMP used \$1.2 million from their purchase-price payments to pay down Frontier's loan, when:

a. The Unit Owners and their individual mortgage lenders paid their purchase-prices *to seller GMP* (and never made **any** direct payment to Frontier) and, after GMP in turn paid Frontier, the balance of Frontier's loan remained unpaid.

b. Liberty later **did pay** \$1.1 million directly to Frontier, **fully paying** off the remainder of its loan balance.

²⁵ First American has paid, on the Unit Owners' behalf, for a release of their units from the Norcon lien. See Exs. 146 & 147.

c. Granting equitable subrogation to Unit Owners would impermissibly prejudice previously secured creditors like Liberty whose rights were junior to Frontier.

III. SUPPLEMENTAL AND COUNTER-STATEMENT OF FACTS

This section relies almost exclusively upon unchallenged established-as-verities FFs. We are cognizant of RAP 10.3(a)(5)'s injunction that a "fair statement of the facts" should be "without argument." Here, however, because below-cited unchallenged FFs so directly rebut the contrary "facts" alleged in the UO Brief's Statement of Facts, a simple recitation of the incontrovertibly established facts may at times seem "argumentative."

A. The 4-Step Approval Process "Course of Conduct"

While the UO Brief's Fact Statement refers to a "consistent course of conduct" for approving sales that "required Liberty to accept zero consideration in exchange for a request for partial reconveyance of its deed of trust" (heading II.A.2 at page 14), it fails to specify the steps of that alleged process. As earlier noted, unchallenged FF 23, 31-33 and Conclusion 6 (de facto finding), as well as unchallenged (in this aspect)²⁶ FF 22 and 24, establish that the actual course of conduct entailed four steps as follows: Liberty agreed to partially reconvey as to the sale of individual units for which (1) *prior to sale closing* (2) First American requested in writing Liberty's approval of the sale and provided Liberty

²⁶ The UO's briefs assigns error to FF 22 and 24 solely to the extent that they found that First American acted as "agent" for the Unit Owners. UO Brief, p. 2. This challenge in responded to in following § IV.C.5.

with a written HUD statement indicating the proposed disposition of sale proceeds, (3) which disposition Liberty either conditionally or unconditionally (or, alternatively, not at all) approved (4) *in writing* by a confirmatory email *sent prior to sale closing*. Because the nature of that process is central to this appeal, highlighted excerpts of FF 22-24, 31 and 33, and Conclusion 6, are attached as **Appendix B**.

B. Liberty Never Promised to Partially Reconvey as to the Unit Owners' Sales and at All Times Retained (and Retains) an Unlimited Right to Say "No" to Any Reconveyance Request Made at Any Time in Any Manner by Any Party.

"There was no testimony or other evidence at trial of any agreement (written or oral) under which Liberty Capital promised to reconvey its deed of trust on any of the five disputed units." FF 33. Nor did First American rely on any such never-made promises: its closing agent (Ms. Warthan) in her testimony "did not claim to have relied on any oral agreements to reconvey Liberty's deed of trust."²⁷

Consequently, having never promised or agreed to reconvey its deed on the five disputed units, Liberty remained (and remains) free to say "no" to any reconveyance request, whether made by First American in compliance with the 4-Step Approval Process or

²⁷ This de facto finding is in unchallenged Conclusion 6. The referenced testimony of Ms. Warthan ("the only person in direct communication with Liberty Capital during the period of the disputed closings" [Conclusion 6]) is at RP: Trial 1/25/10 at 10: 11-16 (Ms. Warthan did not allege reliance on pre-closing oral assurances and insisted that she received Liberty's written consent prior to each closing. Ms. Warthan's only memory of a pre-closing conversation with Liberty included an agreement by which Liberty would confirm that it would receive a "zero payoff prior to each closing". Trial 1/25/10 at 18: 8-16.

otherwise, or by anyone else.²⁸ As a secured creditor on record, Liberty was entitled to make its own decision on any request for partial reconveyance, and was entitled to consider its own best interests in the collateral pledged by GMP. *See Kim, supra*, 145 Wn.2d 86, 90-91.

C. While Liberty's David Dammarell Could Not Say whether Liberty Would Have Said "No" Had It Been Asked to Reconvey in August/September 2007, It Did Say "No" When It Was Asked to Do So (by a Bulk Reconveyance Request) under More Adverse Circumstances a Year Later.

The UO Brief's Statement of Facts notes correctly, at pages 17-21, that David Dammarell could not, when asked to so speculate, testify that, had Liberty been asked by First American in August/September 2007 *to approve a zero-payment reconveyance as to the Unit Owners' units before they closed*, "Liberty would have refused to consent" (p. 18). But neither could he testify that he *would have* approved, and he indicated aspects in which he questioned First American's proposed disbursements of purchase proceeds. FF 41-42. Instead, he testified that "I may have signed off, but I don't know. I wasn't given the opportunity". RP: 1/14/10 at 69:15-20.

First American first asked Liberty to reconvey as to the Unit

²⁸ The Liberty-GMP loan agreement allowed the first 75 units to close without Liberty's review or approval of the sale terms, "[p]rovided Borrower is not in default ... and the obligation in favor of Frontier Bank is being reduced at a rate that will amortize such indebtedness over the course of the first seventy five (75) Condominium Unit closing." Exhibit 107, p. 1. "It was undisputed that GMP defaulted under its 2006 Loan Agreement. GMP failed to pay its loan by July 2007. ... GMP therefore failed to meet key conditions under which Liberty Capital initially agreed to reconvey its deed of trust against the first 75 units." FF 19. **Thus, prior to the Unit Owners' August/September 2007 sales, GMP was in default and Liberty had no obligation to anyone to consent to a partial release of its deed of trust except on terms satisfactory to itself.** In sum, it is all Liberty's fault!

Owners' units a year following their 2007 purchases by its July and September 2008 requests for a bulk reconveyance as to all 88 then sold units. Ex. 238. The "earliest time" that Liberty "realize[d]" that there had been five "unapproved" closings was "in October 2008," more than a year later. FF 45. That knowledge came when, after First American's request for a bulk reconveyance, Liberty reviewed its files and identified the units for which no consent had been given. First American confirmed that it—like Liberty—"could not find any written [Liberty] approval to close" on the five disputed units (FF 53).

The circumstances in which Liberty was belatedly asked to reconvey as to the five units, in the summer/fall of 2008, had deteriorated considerably, in terms of Liberty's prospects for being repaid, from those existing when the Unit Owners' sales closed in August/September 2007, and Liberty was "prejudiced in several ways" by the year-delayed request. *See* FF 44 and 46 (which the UO Brief challenges but which are supported by substantial evidence developed in **Appendix A**). For example, as FF 39 states, "Liberty presented un rebutted evidence that had it received earlier notice of the higher number of units being sold (and the consequent reduction in its loan collateral)," it could "have gone to [GMP] and demanded additional collateral" which GMP had "available as late as January 2008". While FF 39 is also challenged, it is supported by substantial evidence, as are FF 44 and 46. *See* Appendix A. Also, while the Liberty-GMP loan agreement (Ex. 107) contemplated that the first 75 unit sales would be sufficient to pay off the Frontier loan, leaving

proceeds from the final 23 sales available to pay Liberty, Liberty had now learned, a year following the Unit Owners' sale, that there had been 88 closed sales, rather than 83, thus reducing its "margin of safety" so that there were only ten units left unsold, not fifteen.

In any case, **Liberty said "no" to First American's request as to the Unit Owners' condominiums.** As stated in FF 54:

54. Liberty Capital consistently maintained that it had never approved a deed reconveyance on the five disputed units. On November 11, 2008, Liberty Capital therefore asked First American to purchase its note.

The [zero payoff] email system was started by First American with the very first closing. Brianna [Warthan] may have been too busy, overworked, or perhaps this is an example of why she is not longer with First American.

First American's negligence is absolutely clear with regard to the 10 units.²⁹ Given the sales prices of these units, it makes sense for First American to accept our offer, purchase our note and proceed with the foreclosure to maximize the recovery to First American.

D. Following the August/September 2007 Unit Owners' Purchases, Liberty Did Not "Still Need to Review the Financial Terms of the Sales" or "to Make Any Effort" to Determine If Those Closings Had Occurred without Its Approval.

The UO Brief's Statement of Facts' § II.A.5 asserts that, following closing of the Unit Owners' sales in mid-2007, Liberty "still needed to review the financial terms of the sales" (section heading, p. 22) and faults Liberty for "not mak[ing] *any* effort to compare any of these reports (from

²⁹ Initially, Liberty mistakenly believed that ten, rather than five, units had been sold without its approval.

GMP and the realtor, as well as from First American [as to which sales had closed]) to confirm that its *own* records were complete and accurate” (pp. 24-25).

Liberty had no duty or “need” to search for possible evidence that First American was failing to request and obtain the usual approvals. Liberty was entitled to assume that the escrow agent was doing its job on behalf of GMP and the purchasers who were paying and “relying” (UO Brief, pp. 21-22) upon the escrow agent to clear title before closing units. The “worst thing” that could happen from the standpoint of First American, but which was actually an “inadvertent benefit” (*Coy, supra*, 69 Wn.2d 351) from Liberty’s standpoint (as the trial court recognized (RP:1/14/10 at 68:9-24)), was that the Unit Owners could acquire claims under their title insurance if First American failed properly to clear title. And that is what did happen when First American allowed the Unit Owners’ sales to close without obtaining Liberty’s approval (FF 27-30, 52-53), thereby allowing Liberty’s deed of trust to remain in place as the senior encumbrance against those units (FF 59).

E. To Preserve Its Ability to Compel Repayment of the Loan Secured by Its Third-Place Priority Deed of Trust, Liberty Had to Pay Off the First-Place Frontier Loan and to Purchase the Second-Place Norcon Lien/Judgment.

Lest its deed of trust be extinguished by the foreclosure efforts of its two senior encumbrancers, Liberty was “left to deal with the Frontier loan, the Norcon loan and any excess value in the unsold units”—which is how challenged FF 61 (which is supported by substantial evidence [*see* §

IV.G *infra*) describes the situation that First American would have faced had it purchased, as requested, GMP's note from Liberty.

To protect itself against Frontier's superior priority, Liberty borrowed money to pay off the \$1.9 million balance of the Frontier loan in August 2009,³⁰ thereby acquiring its present senior priority. FF 60.

On 9/18/08, Norcon obtained a \$821,270.39 default judgment against GMP. Ex. 116 (CP 76-78). Title insurer First American later paid \$670,000 to Norcon to release its lien as against 72 sold units (including the Unit Owners'). Ex. 146. After crediting that and other payments received, a 3/18/10 \$174,870.72 Amended and Superseding lien foreclosure judgment was entered on the Norcon lien. CP 1870-75. In order to protect its position, a Liberty affiliate negotiated a purchase of the Norcon lien/judgment position, and the judgment is in Liberty's name as Norcon's successor-in-interest. FF 56, Ex. 114 at ¶¶ 3.1 & 3.3. The UO Brief's note 18 at page 29 abandons its earlier noticed appeal from the Norcon/Liberty lien foreclosure judgment.

IV. ARGUMENT

A. Standard of Review

To whatever extent (which Liberty contends is very limited) that the UO Brief's assigned error to FFs has been sufficiently supported by required argument and record citation to justify consideration on the merits (*see, e.g., Coiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801,

³⁰ Liberty's undisputed payments to Frontier are listed in Ex. 253, and the last payment is also shown at the lower left corner of p. 2 in Ex. 255.

809, 828 P.2d 49 (1992), the review standard is whether substantial evidence supports those findings. *See Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1990).

To the extent that the challenged FFs are supported by substantial evidence, and considering the forty-eight unchallenged FFs that are established as verities, the Court must decide “whether those findings of fact support the trial court’s conclusions of law.” *Id.*

B. Argument Summary

The UO Brief makes three principal arguments for reversal. **First**, it contends that Liberty’s deed of trust should be *extinguished* under the doctrine of equitable estoppel. **Second**, it requests *extinguishment* on the basis of unjust enrichment/constructive trust. And **third**, it alternatively asks that the Unit Owners and their lenders be *equitably subrogated* to take priority over Liberty’s deed of trust because GMP used their purchase price payments to pay down Frontier’s senior loan. None of these arguments have merit, and it is frankly surprising that they are seriously asserted by counsel retained and paid, on the Unit Owners’ behalf, by a preeminent national title insurer (*see below*).

First American’s web page proclaims:

For more than 120 years, First American has been committed to providing quality information backed by a guarantee of integrity and a confidence that First American would be there to stand behind its word. This commitment has given our policyholders the peace of mind they need to complete their valuable transactions.

A number of independent agencies regularly perform rigorous quantitative analysis in order to assign financial strength ratings to First American. These ratings stand as a testament to the leadership position First American Title holds among its peers. As the title insurance industry's largest single brand name, with a history that can be traced back to the 1880's, First American Title knows that with leadership comes responsibility. We believe our ratings portfolio supports that leadership position. You can rest assured that First American Title has the financial strength to be entrusted with your most important investments.³¹

Notwithstanding such self-proclaimed industry "leadership position," the counsel provided by First American make arguments supported by extraordinary legal propositions that, if adopted, would gut the Recording Act's fundamental "first-in-time is first-in-priority" principle. *See, e.g., Kim, supra*, 145 Wn.2d 86, 90-91. Ironically, they would also tend to reduce or even eliminate the need for the escrow and title insurance services that First American sold on the Starpoint project. The size and importance of the business built on assuring proper documentation for clearing title is reflected in First American's report that it earned \$3.9 billion in 2009.³²

1. Equitable Estoppel

The elements of equitable estoppel are: "(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act,

³¹ *See* <http://title.firstam.com/about/company-information/financial-strength-ratings.html> (emphasis added).

³² The Court may take judicial notice of First American Financial Corporation's "COMBINED STATEMENTS OF INCOME (LOSS)" at <http://local.firstam.com/ncs/>.

statement or admission.” ... Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie. Equitable estoppel must be shown “by clear, cogent, and convincing evidence.”

Lybbert v. Grant County, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000) (internal citations omitted, emphasis added). **None of these three elements are even remotely present here, let alone established by the required “clear, cogent and convincing evidence.”**

The first and second elements are *temporally related*, i.e., the act inducing reliance must occur *at or before the time the reliance occurs*. That is, the “conduct relied upon to raise the estoppel must have been concurrent with or anterior to the action which they are alleged to have influenced.” *Elemonte Inv. Co. v. Schaeffer Bros. Logging Co.*, 192 Wash. 1, 33, 72 P.2d 311 (1937) (emphasis added, citation omitted). Or, in other words, “equitable estoppel must be based upon a representation of **existing or past facts**”. *Honey v. Davis*, 78 Wn. App. 279, 286, 896 P.2d 1303 (1995), *reversed on other grounds*, 131 Wn.2d 212, 930 P.2d 1342 (1996).³³ As reflected in *Sorenson v. Pyeatt*, 158 Wn.2d 523, 541, 146 P.3d 1172 (2006), a case heavily relied upon in the UO Brief (and which in turn relies in part on the above-cited *Elemonte* opinion), there must be a “nexus”, i.e., a cause-effect relationship, between the inconsistent “admission, statement or act” which **has occurred simultaneously with or prior to the detrimental reliance which it is asserted to have induced.**

³³ (Citation omitted, emphasis added.)

To invoke equitable estoppel, the Unit Owners must show that they or their escrow agent reasonably relied on a representation made *before* they closed the purchases of their units. Here, instead—as in *Sorenson*—the required “nexus” is absent and there is a temporal “disconnect” (*id.* at 541-42 and *see* following § IV.D.1) between the alleged inconsistent conduct and the action taken in reliance. **It was consequently critical for the Unit Owners to prove that their claimed detrimental reliance occurred in August and September 2007 when they bought their units** (FF 6). As the UO Brief states at page 11:

They never would have bought their units had they known that Liberty had positioned itself so that it could take advantage of a technical failure to transmit closing documents, and claim the right to a paramount deed of trust after accepting the benefit of those purchases’ contribution to the paydown of the Frontier loan.³⁴

So, what inconsistent “admission, act, or statement” was Liberty guilty of **as of the August/September 2007 sales closing dates of the Unit Owners’ units?** The answer is: **absolutely none.** Liberty had given no approval for First American’s draft HUD Settlement Statements for those sales because it had not received them. FF 26-30, 32, 52-53. Liberty also knew *nothing* about those five sales because no one had contacted it to discuss/approve them. *Id.* Instead, Liberty had acquiesced in First American’s proposed above-described 4 Step Approval Process. FF 22 (unchallenged in this aspect); *see* also FF 35. Rather than following

³⁴ (Emphasis added.)

that process/course of conduct, however, First American unilaterally and without notice to Liberty disregarded it on five closings. FF 26-30, 32, and 52-53. For no reason other than its own errors and omissions (and/or, more charitably, staff inexperience and overwork [FF 32]), First American closed the Unit Owners' sales without either requesting or obtaining Liberty's promise to reconvey. *See* FF 26-33, 52-53, and Conclusion 6.

Thus, there was no August/September 2007 Liberty "admission, act, or statement" *of any sort*, let alone one upon which the Unit Owners' could (or did) rely upon in making their purchases. (The UO Brief's extensive arguments about Liberty's failure to discover First American's errors/omissions relate entirely to the time periods *after* the closings and are therefore legally irrelevant and also untenable {*see* prior § III.D and following §§ IV.D.2 and 4-6.}) Therefore, neither elements 1 or 2 are present. Rather, as their own brief correctly states at pages 21-22: "The Unit Owners relied on First American to clear the Liberty Capital deed of trust against title to their respective properties."³⁵ And, fortunately, their title insurance (Exh. 219-22, 226 and 246-47) protects them from loss and negates the third required "injury" element.

Finally, we note another reason—that is most pertinent to First American's line of business—there is no estoppel. As the *Lybbert* court stated, "[w]here both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie." 114 Wn.2d 35. The Unit

³⁵ (Emphasis added.)

Owners had actual knowledge of Liberty's deed of trust (*see* their preliminary title reports in Exhibit Nos. 219-222 and 226), and, in any case, because "it was of record [they] were thereby charged with knowledge" (*Elmonte, supra*, 192 Wash. 28) of the encumbrance both pre- and post-sale. Thus, because "both parties [had] knowledge of the underlying facts," i.e., that Liberty's deed of trust was not reconveyed as part of the Unit Owners' sales, "estoppel cannot lie." *Lybbert*, at 35. As stated in *Elmonte*: "The public record afforded to respondent an available means of information as to appellant's title, and not having taken advantage of it, respondent cannot claim an estoppel against appellant, who merely failed to furnish such information." 192 Wash. 28.

If the Unit Owners' contrary argument is adopted, then the Recording Act's "first-in-time is first-in-priority" principle (*see Kim, supra*, 145 Wn.2d 86, 90-91), which underlies the basic demand for First American's services/policies, would crumble.

2. Unjust Enrichment/Constructive Trust

The UO Brief's second argument for extinguishing Liberty's deed of trust is summarized in a heading at page 48:

Liberty Capital's retention of both the right to foreclose on the Unit Owners' units and the \$1.2 million benefit from the Unit Owners' pay down on Frontier's debt results in unjust enrichment and the court should impose a constructive trust to prevent this injustice.

By this logic, every time someone buys a condominium unit, so long as his purchase price is fully used by the seller to pay down a primary

lender with first-place record priority, the purchaser and his mortgage lender have bestowed a corresponding “benefit” on any secondary lender, so that the secondary lender’s deed of trust is what the UO Brief calls “leapfrogged” (i.e. subordinated) by means of a “constructive trust” in favor of the purchaser and its lender.

So, let us illustrate with a hypothetical (which, by the way, is parallel in principle to the present case) exactly how the appellants’ theory would work. **Developer** borrows \$1 million to build three condominiums from **Lender No. 1 with First-Place Record Priority**. To finish construction, he borrows \$500,000 more from **Lender No. 2 with Second-Place Record Priority**. Before the units are completed, the condominium market crashes so that, upon completion, Developer is able to sell the three units to **Purchaser** for only \$1 million. Purchaser pays \$200,000 down and borrows \$800,000 from **Lender No. 3**. Developer uses the \$1 million received to pay off Lender No. 1, but goes bankrupt because he cannot pay Lender No. 2. Lender No. 2, being out-of-pocket \$500,000, has somehow received a \$1 million “benefit” by virtue of the Purchaser’s, and Lender No. 3’s, payments to Developer. Consequently, a “constructive trust” of \$1 million is to be awarded Purchaser and Lender No. 3, on the theory of avoiding “unjust enrichment” of Lender No. 2, and to that extent, Lender No. 2’s unreconveyed deed of trust is negated.

In short, Lender No. 1 is fully paid while Purchaser and Lender No. 3 receive first-place record priority to the extent of \$1 million paid, and Lender No. 2 gets—**nothing, its second-place record priority**

notwithstanding. (Actually, by the UO Brief's "unjust enrichment/constructive trust" logic, unpaid Lender No. 2 should be required to pay \$500,000 to Purchaser and Lender No. 3 to reimburse them for the "benefit" received by Lender No. 2 in excess of its secured principal debt.) This argument and its logic are simply as absurd as they are revealed to be by this illustration. Under the Unit Owners' theory, third place lenders and their borrowers should leap ahead of second-place lenders without paying a dollar to them. **Unsurprisingly, the UO Brief cites no case from any jurisdiction imposing a "constructive trust" in a similar fact pattern on any theory – including "unjust enrichment."**

If the UO Brief's logic is upheld: (1) the Recording Act's fundamental "first-in-time is first-in-priority" principle will be negated; (2) there will be little if any reason for an escrow agent to request or obtain partial reconveyances from a second-tier lender like Liberty because the insured purchasers would automatically leapfrog into priority over all creditors with security interests below the primary lender who receives the proceeds from closing; and (3), if purchasers can thereby effectively acquire first priority secured rights against their own properties, there will be substantially reduced need for unit purchasers to pay for escrow services or title policies from companies like First American.

3. Equitable Subrogation

Two elements required for equitable subordination are identified in

Bank of America, N.A. v. Prestance Corp., 160 Wn.2d 560, 160 P.3d 17 (2007), both of which are helpfully quoted by the UO Brief. The first is that this remedy is available only in the following case: “If D fully discharges B’s debt, **then** equitable subrogation substitutes D for B.” 160 Wn.2d 564 (emphasis added). **Here, Liberty “fully discharged” Frontier’s debt**, while the Unit Owners discharged none of it (rather, the entity to which they paid their purchase prices, GMP, paid part of Frontier’s debt until GMP defaulted).

The second required element of equitable subrogation is that the remedy is applied **only** “where there is no material prejudice to junior interests.” *Id.*, at 581. Here, the Unit Owners would impermissibly apply the doctrine to prejudice an interest junior to Frontier, i.e., Liberty’s, which is under the Recording Act superior to the Unit Owners’ and their own secured lenders’ (*see Kim, supra*, 145 Wn.2d 86, 90-91).

Applying these two factors: (1) Liberty *is* equitably subrogated to Frontier’s lien position by directly paying Frontier’s loan and (2) the Unit Owners are not.

4. The UO Briefs’ Challenges to Aspects of Thirteen FFs.

In addition to its three principal arguments, the Unit Owners’ Assignment of Error No. 3 challenges aspects of FFs 15, 21-22, 24-25, 34, 39-40, 44, 46-48, and 61. Yet, nowhere in the UO Brief—with the exception of FF 61 and with respect to First American’s “agency” status—is there any separate argument to explain why or how these FFs lack

substantial evidence support. This is all the more striking because eleven of these thirteen findings *themselves cite (and many of them quite extensively) to the evidence upon which they are based*. The UO Brief, however, simply ignores all this evidence, never acknowledging even its existence, let alone attempting to establish its inadequacy.

Assignments of error that are not supported by argument are deemed abandoned. *See, e.g.: Coiche Canyon Conservancy, supra*, 108 Wn.2d 809; *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 61, 837 P.2d 618 (1992). This is more than a technical rule—it is unjust to require Liberty to guess how or in what respects the Unit Owners deem the trial record evidence to be insufficient. Liberty primarily asserts that, with the two exceptions stated below, Assignment of Error No. 3 is insufficiently supported to argument and record citation to just consideration on the merits by the Court. Alternatively, in this difficult posture, our response is as follows. Attached **Appendix A** quotes the FF challenges made by Error Assignment No. 3 (other than FF 61) and cites supporting substantial evidence. In the body of this brief, Liberty addresses separately (1) FF 61 in § IV.G and (2) the issue of First American’s “agent” status, which is pertinent to challenged FFs 22, 24, and 48, in § IV.C.4.

C. The UO Brief’s Ad Hominem Attacks, Strawmen/Red Herrings, Appeals to Sympathy, and Obfuscations

The UO Brief is regrettably infested with distracting and potentially prejudicial irrelevancies that we preliminarily address.

1. Whether Liberty Is a “Hard Money Lender” That is

Somehow Less “Innocent” Than the Unit Owners.

The UO Brief repeatedly characterizes Liberty as a “hard money lender” and urges that this Court should “balance the equities” between such a party “attempting to exploit a gap in closing documentation” as compared to “the five innocent condominium unit owners” (pp. 5, 54)

While Liberty thinks it is more fairly described as a small family-owned investment company (RP: 1/12/10 at 67:3-10) that has “shut down” because of the delay to collecting its GMP debt (RP: 1/14/10 at 68:9-69:20), it agrees that the Unit Owners are “innocent” insofar as they “relied” on First American to clear title to their units (UO Brief, pp. 21-22), albeit with the offsetting benefit of title insurance coverage that has accepted their defense. But in any case, Liberty and the Unit Owners are both entitled to equal justice, nothing more nor less.

2. Liberty Had No Need or Duty to Sue First American.

In their Brief, the Unit Owners complain that they were compelled at trial to move “to exclude any evidence of any non-party fault [by non-party First American] as Liberty Capital had not pled this defense as required by CR 8(c)” (p. 31), and further faults Liberty for “insinuat[ing] that First American had been negligent ... though Liberty never exercised its right to bring a negligence claim against First American or otherwise make it a party to the lawsuit” (pp. 44-45 and note 23).

As Liberty responded below, CR 8(c) is irrelevant: the pleadings reflect (as the UO Brief recognizes) that Liberty did not assert damages or seek a judgment against First American. More nearly the reverse—

Liberty has “inadvertently benefit[ed] by [First American’s] negligence.” *Coy, supra*, 69 Wn.2d 351. More to the point, **Liberty is not required to sue First American.** Rather, it seeks only to foreclose its now first-place recorded security interest against the five disputed units, and—in defending itself against *the Unit Owners’ affirmative defense of equitable estoppel* Liberty is entitled to prove (inter alia) that no such defense is tenable in part because their First American title insurance defeats the required third element of resulting injury. First American also placed itself at the center of the trial when the Unit Owners relied almost entirely on testimony from the escrow officers trying to argue that Liberty somehow agreed to reconvey its deed of trust on the five disputed units.

3. The UO’s Brief’s Euphemisms Attempt to Downplay First American’s Negligence.

The variety of ways in which the UO Brief struggles to avoid referring to First American’s errors and omissions without using those words, or their synonym “negligence,” is striking. Thus, it refers to First American’s “technical processing errors” (p. 5), “documentary transmittal lapses” (p. 10), “a technical failure to transmit closing documents” (p. 11), “an imperfect closing process” and “oversight” (p. 43), “did not effect the transmittal of its established email inquiry regarding zero payoff to Liberty” (p. 19) “technical oversights” (p. 46), consummating in—and here’s the real problem—“a technically unsatisfied deed of trust,” (p. 47). But, whatever you call it, the bottom line is the same: First American did not do the job it was hired to do for GMP and the purchaser Unit Owners,

and Liberty was consequently deprived of its opportunity to approve all the sales before closing. As challenged FF 44 stated, this “prejudiced [Liberty] several ways.” See prior § III.C and substantial evidence support in Appendix A.

4. The UP Brief’s Overarching “It Is All Liberty’s Fault” Defense!

The rhetorical flip side of the UO Brief’s “sugarcoating” of First American’s errors and omissions is its endlessly repeated assertions that the problem was all **Liberty’s fault!** Thus, it is alleged that Liberty: “failed to exercise any diligence by failing to monitor a stream of reports” (p. 10); “made no effort to question or corroborate” or “to determine if its owner records matched this information” (p. 23); “fail[ed] to speak up” (p. 40); neglected “numerous opportunities to engage in some sort of due diligence” (p. 42); and—most damningly—“failed to exercise the most minimal due diligence” (p. 56) in aid of its “deliberate and wrongful exploitation of technical oversights” (p. 57) in an effort to be repaid the money it loaned to GMP at a time long before the Unit Owners purchased their units, and which funds provided the wherewithal to finish their construction. The epitome of this argument is at page 46-47: “[T]he equities lie with the Unit Owners because Liberty Capital **facilitated the process that allowed First American to omit transferring five of the sixty-seven HUD statements to Liberty in 2007.**”³⁶ Note how preposterous this statement is: Liberty, because it acquiesced in a 4-Step Approval Process

³⁶ (Emphasis added.)

instituted/requested by First American, **thereby “facilitated the process” by which First American unilaterally, and without notice to Liberty, abrogated that process. In sum, it is all Liberty’s fault!**

But it was First American that was hired and paid by GMP and the Unit Owners to perform this task on each closing, **not Liberty**, and it was because of First American’s negligence, **not Liberty’s**, that Liberty’s deed of trust remains “technically unsatisfied” (p. 47), i.e., **entirely unsatisfied.**

5. If First American’s Knowledge Is Imputed to “All Parties,” the Pertinent Knowledge Is that Liberty Never Agreed to Release Its Deed of Trust.

The UO Brief argues at page 45 that it was “agent to all parties to the escrow”. But even if First American was an agent of Liberty as well as for the parties to the sale and escrow agreements, that does not avail the Unit Owners. The UO Brief’s argument seems to be that whatever First American knew is also chargeable to Liberty. Under that principle, however, what everybody then “knew” was that First American failed to follow the 4-Step Approval Process, as a result of which, as established by unchallenged FF 33, Liberty never promised or agreed to reconvey its deed of trust as to the Unit Owners’ units. Absent such promise or agreement, Liberty’s deed of trust retains its undiminished first-place record priority. FF 59.

6. First American Committed No “Unauthorized Acts” vis-à-vis Liberty Which It “Was Required to Promptly Repudiate” or Be Deemed to Have “Ratified” them.

The UO Brief seems to argue, at pages 46-47, that when Liberty

knew (or, at best, *should* have known of) of the sale of the five units having closed without its approval, this was somehow an “unauthorized action” by its “principal” First American which it was required to “promptly repudiate ... or it is deemed to have ratified the act.” But it was not an “unauthorized action” (at least vis-à-vis Liberty) for First American to close a sale of units to the Unit Owners (whose titles it had insured) without requesting or obtaining Liberty’s agreement to reconvey its deed of trust as to those units. Rather, as far as Liberty was concerned, the Unit Owners and First American were free to buy their units subject to Liberty’s recorded deed of trust. And further, the only act Liberty has “ratified”—or is required to ratify—is that its deed of trust remains in place unless and until it agrees to release it, which it has neither done nor promised to do as to the Unit Owners’ units (FF 33).

7. As Between Liberty Capital and the Unit Owners, “Two Innocent Persons,” the Ones Which Should Bear the Consequences of the “Wrongful Act” of First American, Are the Unit Owners.

The UO Brief at pages 46-47 invokes the principle that “when two innocent persons suffer from the wrongful act of a third, equitable principles dictate that the loss should be borne by the person who put the wrongdoer in a position of trust and confidence and enabled him to perpetrate the wrong.” Here, it was GMP and the purchasers who hired First American to provide escrow services that First American “botched.” Under the invoked principle, the Unit Owners’ should bear the resulting loss vis-à-vis Liberty. Fortunately, they have title insurance.

D. The Court Did Not Err in Failing to Extinguish Liberty’s Deed of Trust on the Basis of Equitable Estoppel.

1. *Sorenson v. Pyeatt* Undercuts the Unit Owners’ Equitable Estoppel Argument by Indicating the Absence of Element No. 2: Reasonable Reliance.

The UO Brief at page 37 correctly notes that *Sorenson, supra*, 158 Wn.2d 538-39, identifies the three required equitable estoppel elements. Typically, the Unit Owners ignore the case’s facts (the hallmark of the UO Brief’s legal analysis is to cite cases for broad propositions without any detailed consideration of their facts). A brief consideration of *Sorenson* highlights two deficiencies in the Unit Owners’ equitable estoppel argument.

a. There Is No “Reasonable Reliance.”

Carole Sorenson in the 1980s collaborated with Ken Pyeatt, by accepting transfers of an interest in Whatcom County real property, “for the purpose of keeping title out of Ken Pyeatt’s name” so as to conceal his continuing interest in the property from his creditors. 158 Wn.2d 528. In 1990, however, “Pyeatt conveyed the interest to Sorenson by a quitclaim deed.” *Id.* This time, Ms. Sorenson was the intended beneficial owner of the property. Subsequently, “[w]ithout Carole Sorenson’s knowledge or consent,” the Pyeatts fraudulently recorded quitclaim deeds in their favor and borrowed hundreds of thousands of dollars from lenders who took deeds of trust against the property. *Id.* at 529.

Learning of these events, Ms. Sorenson successfully sued to quiet title. The lenders sought reversal on the basis of equitable estoppel:

Based on this theory, the Lenders assert that Carole Sorenson's "culpability" in serving as Ken Pyeatt's "straw person" in the scheme to keep his property out of the reach of creditors precludes her from the challenging the validity of the Lenders' deeds of trust. The Lenders also argue that Sorenson was culpably negligent in failing to monitor title to the Lummi property and, thus, she helped to facilitate the Pyeatts' fraud. As a result, they argue that her silence as to the Pyeatts' activities estops her from claiming legal title to the property.

158 Wn.2d at 539. Note the similarities to the Unit Owners' "it is all Liberty's fault" defense.

The appellate court held that "the reliance requirement is not met." *Id.* at 540. It emphasized that it is "essential to an equitable estoppel that the person asserting the estoppel changed his position in reliance upon the representations or conduct of the party sought to be estopped." *Id.*³⁷ The court further stated:

Here, the record does not support the Lenders' assertion that Sorenson's actions either induced them to provide Barbara Pyeatt with loans or that Sorenson anticipated that this group of Lenders would take the actions they did. This is because Sorenson was neither aware of nor did she sanction Barbara Pyeatt's forgery of the deeds. The record shows, rather, that Carole Sorenson became aware of the fraudulent activities of Barbara Pyeatt only when she read a notice of a trustee's sale published in the local newspaper.

...

The record does not establish a **nexus** between Sorenson's prior inequitable conduct and the Lenders' alleged financial harm in this case.³⁸

So here, the "reliance element is not met" because Liberty "was

³⁷ (Emphasis added.)

³⁸ 158 Wn.2d at 541 (emphasis added).

neither aware of nor did [it] sanction” First American’s abrogating its 4-Step Approval Process and closing the Unit Owners’ sales without either requesting, or obtaining, actual or a promise of partial reconveyance from Liberty. FF 26-33, 45, 52-53. Consequently, it is true—as the UO Brief states at page 22—that the “Unit Owners relied on First American to clear the Liberty Capital Deed of Trust”³⁹ at a time when Liberty was unaware even that those sales were occurring (FF 45), so that is **untrue** that they could have relied upon any action or promise of Liberty in making their August/September 2007 purchases.

Perhaps most fatally undermining to the UO’s Brief’s reliance argument is the following de facto express fact finding, in unchallenged Conclusion No. 6, of a lack of “reliance”:

Ms. Warthan, the only person in direct communication with Liberty Capital during the period of the disputed closings, **did not claim to have relied** on any oral agreements to reconvey Liberty’s deed of trust; instead, she acknowledged that she needed Liberty’s *written* approval for each closing and insisted that she must have had such approval back in 2007.⁴⁰

Supporting testimony appears in Trial 1/25/10 at 18:8-16, 23:11-16, 67:1-13. The closing agent’s testimony that she needed Liberty’s written consent to each closing is particularly significant. At trial, the Unit Owners made **two primary arguments**. **Argument No. 1** was that Liberty *had in fact* provided express written approval prior to each closing, albeit First American could not find such approvals for the five

³⁹ (Emphasis added.)

⁴⁰ (All emphasis added except for italicized word “written”.)

disputed units. *See* FFs 32⁴¹ and 53 (it was just an “amazing coincidence” that neither Liberty nor First American could find them).⁴² **Argument No. 2** was that, in any case, there was a “course of conduct” *upon which First American relied* by which, even if Liberty had not provided such written approvals, Liberty was obliged to provide (and/or was estopped to withhold) its partial reconveyance after the closings.

The court made unchallenged FFs rejecting argument No. 1, i.e., it found that Liberty’s pre-closing written approval of the Unit Owners’ five sales was neither sought nor provided. FF 26-29, 32-33, 52-53. And, as concerns argument No. 2, **First American’s own witnesses emphatically denied that she could/would ever close without written approval, insisting that they needed those written approvals of both the sale, and the disbursements, i.e., they needed to comply with their 4-Step Approval Process, in order to close sales. In other words, First American never “relied” (Conclusion 6) upon a “course of conduct” where approval would be “other than in writing and on a unit-by-unit basis” (FF 33).** *See* also unchallenged FFs 31-33.

In short, unchallenged and established-as-verities FFs negate both Arguments 1 and 2.

b. The Unit Owners’ Have an “Adequate Remedy at

⁴¹ “It was only at trial when Ms. Schroeder and Ms. Warthan attempted to argue that First American would never have made the mistake of closing without written consent from Liberty Capital.” FF 32, final sentence.

⁴² “Under the Applicants’ theory at trial, both Liberty Capital and First American coincidentally lost the approving emails on the same five out of 88 closings.” FF 53, fourth sentence (emphasis added).

Law.”

Sorenson further holds “it is a fundamental maxim that equity will not intervene where there is an adequate remedy at law”. *Id.* at 543 (citations omitted). The lenders in that case had such a remedy in their ability to sue the Pyeatts: while “they will likely never be accorded full relief for their losses”, “[e]ven so, the remedy at law is valid, although the likelihood of full payment is small.” *Id.* at 544. Here, the Unit Owners have a remedy at law against escrow agent/insurer First American whose contract breach/negligence gave rise to their problem.

2. Element No. 3 of “Injury” Is Absent.

The Unit Owners’ “adequate remedy at law” also negates the resulting “injury” element of an equitable estoppel claim.

3. Liberty’s “Course of Conduct from July 2007 Through October 2008” Is Not “Inconsistent With Its Present Claim to an Existing Deed of Trust”, i.e., Element No. 1 of Inconsistent “Conduct, Acts, or Statements” Is Absent.

The UO Brief at pages 37-43 argues that Liberty’s “Course of Conduct From July 2007 Through October 2008 Is Inconsistent With Its Present Claim” (argument heading, p. 36), thereby fulfilling the first requirement of inconsistent “conduct, acts or statements.” This argument is meritless. **The party guilty of “inconsistent conducts, acts or statements” is First American which unilaterally abrogated the 4-Step Approval Process as to the Unit Owners’ sales.** Liberty has “ratified” nothing except that its deed of trust remains in place unless and until it agrees to partially reconvey it, whether pursuant to a request in accordance

with the 4-Step Approval Process or otherwise. Unchallenged FF 33 establishes that Liberty never made any such agreement in writing or verbally as to the five disputed condominiums.

The UO Brief faults Liberty for its “silence” in the aftermath of First American’s August/September 2007 missteps, but **Liberty had no duty to speak of (let alone to earlier discover) First American’s errors and omissions vis-à-vis its insureds.** What was Liberty duty-bound to say, and to whom? Was it supposed to say to First American: “oh, by the way, you failed to tell us that a year ago you closed five sales without consulting us in accordance with the 4-Step Approval Process”? But, **that is precisely what Liberty most emphatically did when it first “realized” the existence of the non-approved sales in October 2008.** FF 45,54. Here, as in *Peckham v. Milroy*, 104 Wn.2d 887, 892-93, 17 P.3d 1256 (2001), when Liberty finally learned of First American’s errors and omission—known to First American from day one—Liberty “made no statements and took no actions inconsistent with [its] current position.” *Id.*, at 892.

The UO Brief’s confusions are well illustrated by the following at page 41: “If Liberty Capital were concerned about protecting its interest in its deed of trust . . .,” it should have done so before it lent GMP another \$400,000 in October 2007. Rather, Liberty’s deed of trust remained unimpaired and on record, as a result of the five unapproved closings of which it would learn only the following summer (FF 45), so Liberty had no “need”—let alone duty—to perform “due diligence” in that (or any)

respect.

The UO Brief's argument here basically reduces to this: because Liberty in fact agreed to reconvey its deed of trust with respect to other units when First American so requested, First American should now be able to compel Liberty's consent after-the-fact. It is First American and the Unit Owners who are being inconsistent: they implicitly concede that Liberty can say "no" if they ask before closing, but if they choose not to ask until long after the closings, then they argue that Liberty must say "yes." This is preposterous as well as being inconsistent.

An analogy may illustrate. A rich uncle every Christmas, when asked, gives his nephew \$10,000. One year, the nephew forgets to ask and, the following July (following a market crash that has reduced the uncle's fortune) asks belatedly for the \$10,000. The nephew responds to the uncle's refusal by arguing that he is "equitably estopped" by prior inconsistent conduct from saying "no." That is the underlying position upon which the UO Brief rests much of its appeal.

E. Liberty Capital Has Not Been Unjustly Enriched and There Is No Basis for Imposing a Constructive Trust.

All three required elements are absent.

1. "The defendant receives a benefit."⁴³

When the Unit Owners bought their condominiums from GMP, two parties directly benefitted, i.e., the willing buyer and the willing seller. Other parties, in a potentially endless chain, "benefitted" incidentally and

⁴³ *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

indirectly. Obviously among them was Frontier Bank to which GMP paid \$1.2 million of the purchase prices GMP received. (Frontier also received the benefit of the \$1.1 million paid to it when Liberty fully paid its loan, becoming equitably subrogated thereto [*see* following § IV.F]).

If, however, Liberty is to be deemed a “benefitted” party for purposes of unjust enrichment, absurd results follow as discussed in prior § IV.B.2 (e.g., Lender No. 2 ends up being repaid nothing and instead actually owes the later/junior priority purchaser payment by way of a “constructive trust” for the amount by which the money that seller paid to Lender No. 1 exceeded Lender No. 2’s loan amount).

In short, Liberty received no “benefit” that can be the basis for establishing “unjust enrichment.”

2. “The received benefit is at the plaintiff’s expense”⁴⁴

If closing a purchase without obtaining a partial reconveyance of the secondary lender’s deed of trust “benefits” the secondary lender “at the expense” of the condominium purchaser and its lender, then all the same absurd consequences described in § IV.B.2 come into play.

3. “The circumstances make it unjust for the defendant to retain the benefit without payment.”⁴⁵

This legally required element of proof reveals perhaps the most glaring deficiency in an “unjust enrichment” theory. It cannot possibly be “unjust” for a secondary lender with a superior deed of trust record

⁴⁴ *Young, supra*, 164 Wn.2d at 484.

⁴⁵ *Young, supra*, 164 Wn.2d at 484-85).

priority, who has neither been asked nor agreed to release that security, to be deprived of its rights for **no better reason that that money paid to the primary lender is greater than the amount of debt owed to the secondary lender.** See e.g., *Kim, supra*, 145 Wn.2d 86, 90-91.

Under the result urged by appellants, one can expect that there will no longer be any secondary lenders.

4. In Short, There Has Been No “Unjust Enrichment” of Liberty, But Such Is Sought by the Unit Owners (and First American).

It is perverse that the UO Brief, at page 49, *accuses Liberty* of trying to “leapfrog from the junior lien position into the senior lienholder position (ahead of the Unit Owners’ lenders)”. This is nonsense. Liberty initially had the junior lender priority position vis-à-vis Frontier, but acquired its senior position by equitable subrogation when it (unlike the Unit Owners) fully paid the Frontier loan (and after Liberty’s affiliate also had to pay off the Norcon lien) . However, as to the Unit Owners and their own lenders, **Liberty has always had (and retains) superior priority.** It is thus the Unit Owners and their lenders (or, more accurately, First American) which seek unjust enrichment by “leapfrogging” themselves into Frontier’s senior position *against the very party, Liberty, who is entitled thereto by virtue of its having paid off Frontier.*

5. No Evidence, Rather than “Clear, Cogent and Convincing Evidence,” Supports the UO Brief’s “Brand New”/First-Time-on-Appeal Argument for a “Constructive Trust.”

One will review the UO’s Trial Brief (CP 1709-78) and entire

record below in vain seeking any reference to a “constructive trust.” Impermissibly, this theory is raised for the first time on appeal. See *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1998). In any event, the very authorities relied upon by the Unit Owners negate their argument. For example, they concede that absent fraud, misrepresentation, or bad faith, there must at least be “unjust[] enrich[ment]”, citing *Baker v. Leonard*, 120 Wn.2d 538, 547-48, 843 P.2d 1050 (1993). As above developed, there is none here.

The vacuity of this argument is indicated by its imprecision: nowhere does the UO Brief identify *precisely what should be subjected to a constructive trust in favor of the UO Owners and their lenders*. Is it upon \$1.2 million of Frontier’s debt paid by GMP from the sales of the five units at issue? Does it include the more than \$1 million that Liberty paid to remove the balance of Frontier’s loan, including almost \$900,000 paid after this litigation began (Ex. 253)? If a constructive trust arises from paying Frontier, it is Liberty rather than the Unit Owners that has a valid equitable subrogation claim to the Frontier priority position (*see following section*). Can it really be that condominium purchasers have a constructive trust, to the extent of their paid purchase prices, upon the debts owed by their seller to third party lenders? There was no evidence at trial that the Unit Owners understood or believed that they were purchasing a promissory note or deed of trust held by Frontier Bank. This is a novel theory created by an insurance company’s creative lawyers.

F. THE COURT DID NOT ERR IN DENYING THE UNIT OWNERS' EQUITABLE SUBROGATION CLAIM.

Prior § IV.B.3 develops that equitable subrogation requires that: (1) the subrogated party must “fully discharge,” i.e, pay off, the debt which is secured by the priority position to which the payer will be subrogated; and (2) there must be “no material prejudice to junior lenders”. *Prestance, supra*, 160 Wn.2d 564, 581. Other authorities so confirm.

1. Liberty, Not the Unit Owners, “Fully Discharged” the Frontier Loan.

Subrogation is an equitable doctrine. As the doctrine applies in mortgage law, it basically states that a person who has an interest in land subject to a mortgage has a right to pay off the secured debt to protect his own interest. If he does so, he will become subrogated to the rights under that mortgage, i.e., will become the holder of the mortgage and the indebtedness it secures.

...

Any junior mortgagee or junior lienor may, with or without consent of other junior pay off a senior mortgage holder and thereby become subrogated to the senior mortgage.

....

17 William B. Stoebuck & John W. Weaver, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW, § 18.33 “Subrogation” (2nd ed. 2004), at 367-68 (emphasis added.)

Thus, in “order for the doctrine of equitable subrogation to apply, the loan must be considered a refinance” and that requires a “pay off [of] existing debts”. *See Kim, supra*, 145 Wn.2d 87.⁴⁶ Consequently, as stated

⁴⁶ (Emphasis added, citations omitted.)

in *Prestance, supra*, a refinance case, there must be a “full discharge” by the junior lienor of the senior priority debt position to which it seeks to be subrogated. 160 Wn.2d 564. *Credit Bureau Corp. v. Beckstead*, 63 Wn.2d 183, 185 and 187, 835 P.2d 864 (1963), a case cited by the UO Brief at page 53, so illustrates (title company paid funds **to fully pay judgment** and took assignment, and subrogee must “cause the senior encumbrance to be discharged”).

Liberty fully paid the Frontier loan and the Unit Owners did not, so it is Liberty that is equitably subrogated to Frontier’s position. The UO Brief cites no case from any jurisdiction anywhere where equitable subrogation has been applied so as to give a condominium purchaser a senior priority position, over a first-in-time recorded interest of a secondary lender, simply by virtue of the purchaser’s having paid its price to a seller developer who used those funds in turn to pay down, but not to pay off, the seller’s debt to the senior lender with a first priority position.

2. The Unit Owners’ Requested Equitable Subrogation Would Impermissibly Prejudice Liberty.

“Equitable subrogation should never be allowed if a junior interest is materially prejudiced”. *Prestance*, 160 Wn.2d at 572.⁴⁷ But the Unit Owners would equitably subrogate to its lenders and themselves (both being later-in-time and priority than Liberty) Frontier’s senior priority position, extinguishing Liberty’s formerly junior (to Frontier) priority.

⁴⁷ (Emphasis added (citations omitted).)

This is the very definition of “prejudice,” particularly when it is Liberty that has paid and fully discharged the Frontier loan.

The UO Brief’s equitable subrogation argument is devoid of merit, bordering on frivolous.

G. FF 61 Is Supported by Substantial Evidence.

Assignment of Error No. 3 challenges FF 61’s:

Finding that but for the delayed foreclosure Liberty Capital’s loan to GMP would have been paid in full in June 2009 and First American, in its capacity as insurer, would have been responsible for the Norcon lien and the Frontier loan, and repeating the damages finding recited in [FF] 15.

The UO Brief argues, in III.F at pages 54-56, that FF 61 “Lacks Any Evidentiary Support and Explains How the Trial Court Reached the Wrong Result in This Case” (argument heading at p. 54). Yet, the full extent of the Unit Owners’ canvassing of the pertinent record evidence, be it “substantial” or not, is to assert at page 54 that:

This finding assumes that First American would have paid off Liberty Capital’s loan in full in June 2009 rather than let its insureds, the Unit Owners’ lose their properties. The trial court, however, does not cite any evidence in support of this assumption masquerading as a factual finding, for its own rulings regarding insurance coverage and damages precluded it from admitting any such evidence. Finding of Fact No. 61 should be reversed for lack of any evidence in the record to support it.⁴⁸

The factual predicate underlying the Unit Owners’ argument is, as developed in prior § I.B, wrong: **there is evidence in the record of title**

⁴⁸ (Underscored emphasis added.)

insurance (i.e., the policies themselves, Exs. 219-22 and 226) as admitted by the Unit Owners for all purposes without objection. Further, note the critical first three words of FF 61: “It was undisputed that, but for the delayed foreclosure, Liberty Capital’s loan would have been paid in full in June,” (Emphasis added.) And, of course, the reason it *was undisputed* is that, if the Unit Owners had contrarily contended, Exhibit 247 (**Appendix C** hereto)—in which First American expressly indicated its intent to bid in “all sums owed” and the “total owed on” Liberty’s deed of trust including “principal advances, accruing interest, late charges fees and costs”—would have been admitted. Even without Ex. 247, the trial court could reasonably infer from Ex. 246 that First American would bid at any foreclosure sale to protect its insured purchasers against damages arising from First American’s errors and omissions as their escrow agent.

The current posture of this case/appeal, as is also developed in § I.B, is that under the doctrines of judicial estoppel and preclusion of inconsistent positions, Exhibit 247 must be deemed part of the record. That is because the Unit Owners’ Brief has “opened the door” to its admission by making precisely the “we will lose our homes” argument that the trial court ruled would prompt such admission. Manifestly, Ex. 247 reinforces Ex. 246 in supporting FF 61 in the aspect challenged.

There is more. Unit Owner Erin Naumann testified that she had never been asked to approve the October 2009 mediation settlement (Ex. 146) under which First American paid \$670,000 on behalf of the Starpoint

homeowners. RP: 1/13/10 at 65:1-6. Counsel for the Unit Owners stipulated that all such owners would testify similarly. RP: 1/13/10 at 97-99. This evidence that First American completely took over the case reinforces the trial court's FF 61 to the effect that First American would have protected the Unit Owners by bidding Liberty's loan balance if Liberty were allowed to proceed with its foreclosure sale.

If Liberty had been allowed to proceed with its scheduled June 2009 nonjudicial foreclosure or if at a sale following an affirmance, First American allowed the Unit Owners to lose their homes by declining to bid in the full \$3 million-plus loan balance that Liberty would bid (FF 15, a challenged FF that is supported by substantial evidence [*see Appendix A*]), First American could reasonably expect to face a bad faith/negligence lawsuit by the Unit Owners whose defense was completely taken over by the escrow agent/insurer herein.

As reflected in Ex. 246, First American has already accepted without reservation a tender of the Unit Owners' defense against Liberty's foreclosure efforts. Ms. Naumann's testimony confirms that First American essentially took over the Unit Owners' position and even entered into a major settlement (of the Norcon lien) without their consent. In these circumstances, there was "evidence of sufficient quantity to persuade a fair minded rational person" (*King County v. Boundary Review Board*, 122 Wn.2d 645, 675, 860 P.2d 1024 (1993)) that First American would have protected its insured purchasers by bidding up to the balance of Liberty's unpaid loan to avoid the foreclosure sale that will move

forward if the trial court's decision is affirmed. In short, FF 61 is supported by substantial evidence. As to the challenged amount of Liberty's debt, *see* Appendix A's discussion of FF 15.

V. CONCLUSION

Unchallenged established-as-verities FFs amply support the trial court's Conclusions and judgment, and the UO Brief's contrary legal arguments are without merit. FF 61 is supported by substantial evidence, as are FF 22, 24 and 48's findings as to First American's having acted as an "agent" for the Unit Owners. To any extent that the UO Brief has otherwise sufficiently supported, by argument and citation to the record, Assignment of Error No. 3's challenge to FFs so as to justify a consideration on the merits, substantial evidence supporting those FFs is set forth in the following **Appendix A** (which should thus be deemed to be a substantive part of Respondents' brief and included in its page count).

APPENDIX A

Error Assignment 3 challenges FF 15's "Finding the unpaid balance of Liberty's loan to GMP as of January 8, 2010." **Substantial supporting evidence is in: Ex 255; RP 1/25/10 at 169:10-173:20.**

Error Assignment 3 challenges FF 21's "Finding Liberty Capital insisted on reviewing and approving the financial terms of each sale giving rise to a particular reconveyance request." **Substantial supporting evidence is in: Ex. 244 (in which David Dammarell states that "I . . .**

have to sign every HUD to release for recording”); RP 1/13/10 at 145:11-146:1; RP 1/25/10 at 194:9-196:3.

Error Assignment 3 challenges FF 22’s “Finding that First American acted as the Unit Owners’ agent.” **Substantial evidence supporting this Finding of Fact is in: RP 1/11/10 at 44:25-45:1, 60:18-19 (the Unit Owners’ own counsel states that “under Washington Law the escrow person is an agent for all parties in the escrow.”). The Unit Owners’ own brief concedes at page 45 that “First American acted as their agent in the closing process”.⁴⁹**

Error Assignment 3 challenges FF 24’s “Finding that First American acted as an agent for the Unit Owners when Liberty Capital and First American established a repetitive course of dealing for written confirmation of Liberty Capital’s approval of the transaction.” **Substantial supporting evidence is in: RP 1/13/10 at 28:5-29:19, 150:22-154:12; RP 1/14/10 at 7:4-9:5; RP 1/14/10 at 24:8-25:10, 94:3-95:1; RP 1/21/10 at 55:9-57:6; RP 1/25/10 at 22:1-23:4, 67:1-13, 185:5-25. (See also above discussion of FF 22 and its note 1.)**

Error Assignment 3 challenges FF 25’s “Finding that Liberty Capital ‘insisted’ on receiving a ‘zero payoff’ e-mail request for partial

⁴⁹ The context of this concession is as follows: “While the Unit Owners agree that First American acted as their escrow agent in the closing process, the Unit Owners object to the findings to the extent they imply that First American was their exclusive agent because such conclusion is erroneous.” (Emphasis added.) But, the trial court’s findings nowhere “imply,” let alone state, that First American was the Unit Owners’ agent “exclusively”.

reconveyance and signing off on each unit sale to release the deed of trust for recording and referencing Ex. 224 to suggest Liberty Capital had to sign every HUD statement as part of the closing process.” **Substantial supporting evidence is in: Ex. 244 (in which David Dammarell states that “I . . . have to sign every HUD to release for recording.”); RP 1/13/10 at 145:11-146:1.**

Error Assignment 3 challenges FF 34’s “Finding that “First American’s insistence on separate written approvals for each unit closing contradicts any assertion that First American believed that it had some kind of omnibus agreement by Liberty [Capital] to release its deed of trust on multiple units.” **Substantial supporting evidence supporting in: RP 1/13/10 at 28:5-29:19, 145:11-146:1, 150:22-154:12; RP 1/14/10 at 30:8-32:16; RP 1/14/10 at 46:11-17, 66:9-67:5, 132:6-133:2. The Unit Owners could never produce the alleged agreement. RP 1/25/10 at 44:18 to 45:2**

Error Assignment 3 challenges FF 39’s “Finding that Liberty Capital suffered prejudice from not having the opportunity to approve the Unit Owners’ individual sales; that had Liberty Capital ‘received earlier notice of the higher number of units being sold (and the consequent reduction in its loan collateral)’ it could have demanded additional collateral that was available ‘as late as January 2008.’” **Substantial supporting evidence is in: RP 1/14/10 at 41:12-43:11, 78:4-14.**

Error Assignment 3 challenges FF 40’s “Finding that Liberty Capital was deprived of the opportunity to make ‘such changes’ as

rejecting the sale of the Unit Owners' units." **Substantial supporting evidence is in: Ex. 160; RP 1/14/10 at 25:15-29:24.**

Error Assignment 3 challenges FF 44's "Finding that Liberty Capital was 'prejudiced in several ways' by not having the opportunity to review the Unit Owners' settlement statements before closing." **Substantial supporting evidence is in: Ex. 160; RP 1/14/10 at 25:15-29:24, 77:18- 82:18; RP 1/25/10 at 175:6-181:3.**

Error Assignment 3 challenges FF 46's "Finding that even if Liberty Capital had discerned the four sales that had closed without its express consent in August 2007, 'there was little that Liberty Capital could have done about it.'" **Substantial supporting evidence is in: RP1/14/10 at 23:12-24:7, 33:22-37:5, 40:11-23.**

Error Assignment 3 challenges FF 47's "Finding that Liberty Capital never promised to give a written reconveyance to First American or the Unit Owners." **Substantial supporting evidence is in: RP 1/13/10 at 87:16-88:20, 89:13-91:11, 137:12-22; RP 1/25/10 at 186:1-189:21. It is also significant that the Unit Owners *do not* challenge FF 33 which pertinently states (as a verity on appeal) that "There was no testimony or other evidence at trial of any agreement (written or oral) under which Liberty Capital promised to reconvey its deed of trust on any of the five disputed units." (Emphasis added.)**

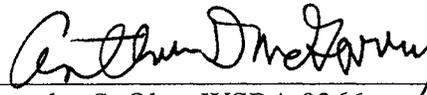
Error Assignment 3 challenges FF 48's "Finding that First American, acting as the Unit Owners' agent, never asked Liberty Capital to reconvey its deed of trust against the Unit Owners' units." (Emphasis

added.) Applicants appear to be “playing [subtle word] games” here. They *do not* challenge FF 26-30 and 53 which establish that First American *neither asked for nor received Liberty’s agreement to partially release the Unit Owners’ five units*. Apparently, the above emphasized language in the objection is intended to argue that, when it failed to ask Liberty to reconvey, First American did not so fail while acting as an *exclusive agent for the Unit Owners*. In any case, substantial supporting evidence (in addition to that cited above in support of challenged FFs 22 and 24) is in: RP 1/11/10 at 44:25-45:1, 60:18-19 (the Unit Owners’ counsel states that “under Washington Law the escrow person is an agent for all parties in the escrow.”).

Error Assignment 3 challenges FF 61 and the UO Brief actually devotes a section of its brief to developing that challenge. This challenge is consequently addressed in the body of the respondents’ brief in § IV.G.

DATED this 27th day of July, 2010.

OLES MORRISON RINKER & BAKER LLP

By 

Douglas S. Oles, WSBA 9366
Arthur D. McGarry, WSBA 4808
Attorneys for Respondents

4845-5490-2279, v. 1

APPENDIX B

APPENDIX B

FF 22. Beginning with the first Starpoint unit sale on or about July 30, 2007, the Applicant's escrow agent (First American Title Insurance Co.) implemented a standard practice for securing Liberty Capital's approval for each unit sale: First American's closing agent, Brianna Warthan, asked Liberty Capital's David Dammarell to "email or fax me a notice that you're collecting \$0.00 for this payoff." (Ex. 223)

FF 23. Ms. Warthan set up the system so that there would be a separate email request (with an escrow number in the subject line) for each unit closing. At trial and in her Declaration of June 10, 2009, Ms. Warthan acknowledged that she needed lender "approval on each closing". (Ex. 244 at par. 7).

FF 24. Liberty Capital and First American (acting for the homeowners) established a repetitive course of dealing over the months when Starpoint units were sold. Throughout the period when the five disputed units were sold (8/13/07 to 9/14/07, as summarized on Ex. 168), the Applicants' escrow agent at First American was Brianna Warthan. She stated in her sworn declaration that she not only needed Liberty Capital's approval on each closing; she also needed to confirm that Liberty was in agreement regarding how she would distribute the sale proceeds from each closing (Ex. 244 at par. 7). At trial, Ms. Warthan confirmed that under what she understood to be an agreed procedure, she would not close any unit sale without first obtaining Liberty Capital's written approval....

FF 31. Brianna Warthan, First American's closing agent for all five of the disputed sales, testified that she only earned her "own desk" in the second half of 2006, the same time frame when she was assigned to handle the Starpoint condominium closings. Ms. Warthan's supervisor and branch manager, Suzanne Schroeder, testified to having trained Ms. Warthan to require written lender approvals before closing on the units and to retaining copies in First American's file of all such consents.... Ms. Schroeder expressed her belief that Ms. Warthan would not close a transaction if she didn't have lender consents in hand, and she acknowledged her deposition testimony to the effect that such consents should have been in writing (Dep. 12:18 to 13:13)....

FF 33. There was no testimony or other evidence at trial of any agreement (written or oral) under which Liberty Capital promised to reconvey its deed of trust on any of the five disputed units. Brianna Warthan testified to an undocumented telephone conversation in which she recalled that David Dammarell stated that Liberty Capital would not claim any cash proceeds from closings of Starpoint units until Frontier Bank's senior loan was paid off, but she never testified that Liberty agreed to reconvey its deed of trust other than in writing and on a unit-by-unit basis.

Conclusion 6. ...Ms. Warthan, the only person in direct communication with Liberty Capital during the period of the disputed closings, did not claim to have relied on any oral agreements to reconvey Liberty's deed of trust; instead, she acknowledged that she needed Liberty's *written* approval for each closing and insisted that she must have had such approvals back in 2007.¹

4847-9862-8615, v. 1

¹ (all underscored emphasis supplied.)

APPENDIX C

HB
HANSON BAKER
ATTORNEYS

OLES MORRISON
RINKER & BAKER LLP

JUL 06 2009

John E. Hanson, Retired

John M. Baker (1945-2001)

Magnus Andersson

Joseph C. Calmes

Andrée R. Chicha

Date: _____
Copies Distributed to: Betty L. Drumheller

DSO Timothy J. Graham

client John T. Ludlow

_____ Rachel L. Merrill

_____ Phillip B. Navarro

12048-0002 Joshua Rosenstein

_____ Linda M. Youngs

June 30, 2009

SENT VIA EMAIL ATTACHMENT,
ORIGINAL MAILED

Mr. Douglas Oles
OLES MORRISON RINKER & BAKER
701 Pike Street, Suite 1700
Seattle, Washington 98101

Re: Liberty Capital Bridge LLC/Starpoint Condominium Foreclosure

Dear Mr. Oles:

Pursuant to our earlier conversations, this letter confirms and stipulates that all ten of the Applicants have tendered defense of the Norcon lawsuit to First American Title Insurance Company ("First American") and that First American has accepted their tenders without a reservation of rights. This letter also confirms that, although the Applicants have not separately tendered to First American defense of Liberty Capital's non-judicial foreclosure, First American considers the foreclosure to be a title insured claim and is defending the Applicants in Liberty Capital's foreclosure. With this stipulation I understand that you will not require that the Applicants provide any documents tendering their claims to First American.

As we have said all along, the Applicants contend that the foregoing stipulated facts are irrelevant and inadmissible in the pending lawsuit and expect to re-note the Motion to Strike which Judge Shaffer declined to hear on June 19th.

Very truly yours,

HANSON BAKER LUDLOW
DRUMHELLER P.S.

John T. Ludlow

JTL:jtl

Appendix C
Page 1 of 1

EXHIBIT B
Page 1 of 1 Pages

DEFENDANT
EXHIBIT NO. 246
ADMITTED
JUL 22 2009 11:33 AM

Hanson Baker Ludlow Drumheller P.S.

APPENDIX D

Douglas S. Oles

From: Elliott Severson [elliott@libertybridge.com]
Sent: Wednesday, October 21, 2009 12:45 PM
To: Douglas S. Oles
Subject: FW: Liberty Capital's Trustee's Sale on Starpoint Condominium Units 12048.0002

Doug,

The e-mail below from John confirms that they would have paid the Liberty note had they lost.

Elliott Severson
Principal
Liberty Capital

Ph: (425) 828-0400
Fax: (425) 484-2001
Cell: (206) 595-5746

From: Wendy Walter [mailto:wwalter@rcolegal.com]
Sent: Wednesday, 17 June 2009 02:45 PM
To: Elliott Severson
Cc: Douglas S. Oles; David Dammarell
Subject: RE: Liberty Capital's Trustee's Sale on Starpoint Condominium Units 12048.0002

Yes, Nanci Lambert is going to contact John's office.

From: Elliott Severson [mailto:elliott@libertybridge.com]
Sent: Wednesday, June 17, 2009 2:22 PM
To: Wendy Walter
Cc: Douglas S. Oles; David Dammarell
Subject: RE: Liberty Capital's Trustee's Sale on Starpoint Condominium Units 12048.0002

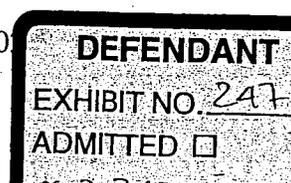
Is someone going to send the summary sheet to John Ludlow?

Elliott Severson
Principal
Liberty Capital

Ph: (425) 828-0400
Fax: (425) 484-2001
Cell: (206) 595-5746

From: Wendy Walter [mailto:wwalter@rcolegal.com]
Sent: Wednesday, June 17, 2009 2:06 PM
To: Elliott Severson
Cc: Douglas S. Oles; David Dammarell
Subject: RE: Liberty Capital's Trustee's Sale on Starpoint Condominium Units 12048.0002

Appendix D
Page 1 of 3



We can confirm that it will reduce the risk of error substantially if the units are sold in bulk. I will pass along this information to Nanci Lambert and let her know that you will be confirming the bid after Friday's hearing.

From: Elliott Severson [mailto:elliott@libertybridge.com]
Sent: Wednesday, June 17, 2009 1:35 PM
To: Wendy Walter
Cc: Douglas S. Oles; David Dammarell
Subject: FW: Liberty Capital's Trustee's Sale on Starpoint Condominium Units 12048.0002

Wendy,

Attached is a spreadsheet that details the total amount owed as of June 19, 2009. Because of the Frontier DOT and the Norcon lien, we believe that the only plausible way is to sell the units in bulk. We will determine the exact amount of our bid after the hearing on Friday, but anticipate that we will bid the entire amount of the debt owed.

Please confirm that you agree that this should be a bulk bid.

Please give me a call if you have any questions.

Thank you,

Elliott Severson
Principal
Liberty Capital

Ph: (425) 828-0400
Fax: (425) 484-2001
Cell: (206) 595-5746

From: Douglas S. Oles [mailto:Oles@OLES.com]
Sent: Tuesday, June 16, 2009 12:15 PM
To: Elliott Severson; David Dammarell
Subject: Liberty Capital's Trustee's Sale on Starpoint Condominium Units 12048.0002

Perhaps you can assist me in answering these questions. Also, I would encourage NW Trustee Services to submit its response either through its own attorney or through my office.

Doug Oles

From: John Ludlow [mailto:jludlow@hansonbaker.com]
Sent: Tuesday, June 16, 2009 12:09 PM
To: Wendy Walter; Douglas S. Oles
Cc: dfennel@rcolegal.com; lolsen@rcolegal.com
Subject: Liberty Capital's Trustee's Sale on Starpoint Condominium Units

Wendy and Doug,

Although my ten clients (the "Applicants") and I expect to prevail in our Motion for

Preliminary Injunction this Friday, First American Title Insurance Company ("First American") wants to be ready to bid at the 3:00 p.m. Trustee's Sale if Judge Shaffer refuses to enjoin the Sale. To that end, First American wants to know whether NWTs will accept First American's pre-sale wire transfer of Liberty Capital's credit bid (for all sums owed on its Note and Deed of Trust), and First American's agreement to pay any surplus, if there is competitive bidding, by a second wire transfer within 24 hours of the Sale. Also, First American needs to know whether NWTs intends to conduct the Trustee' Sale in parcels or in bulk. If the Sale is conducted in parcels, First American needs to know the credit bids allocated to each unit (all 20 units). If the Sale is conducted in bulk, First American wants to know the amount of Liberty Capital's opening credit bid and the total amount owed on its Note and Deed of Trust (including an accounting of its loan balance, showing principal advances, accruing interest, late charges, fees and costs). Please provide the foregoing information ASAP, in no event later than 3:00 tomorrow afternoon. Given the dollar amounts involved, and the complexities of this foreclosure, First American cannot wait to get this information the day before the Sale.

Thank you for your prompt attention to this request.

The contents of this email are protected by ER 408.

Sincerely,

John Ludlow

HANSON BAKER LUDLOW DRUMHELLER PS

Attorneys

2229 - 112th Avenue NE, Ste. 200

Bellevue, WA 98004

(425) 454-3374 - tel

(425) 454-0087 - fax

jludlow@hansonbaker.com

www.hansonbaker.com

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Version: 8.5.339 / Virus Database: 270.12.70/2177 - Release Date: 06/16/09 21:23:00

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Version: 8.5.339 / Virus Database: 270.12.76/2183 - Release Date: 06/17/09 05:53:00