

NO. 66319-4-I

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

THE NEWPORT YACHT BASIN ASSOCIATION OF
CONDOMINIUM OWNERS, an unincorporated condominium
association; SUPREME NORTHWEST, INC., a Washington
corporation d/b/a SEATTLE BOAT NEWPORT; SEATTLE MARINE
MANAGEMENT COMPANY, LLC, a Washington limited liability
company; BRIDGES INVESTMENT GROUP, LLC, a Washington
limited liability company; and DOUGLAS BURBRIDGE and
MARGIE BURBRIDGE, husband and wife, and their marital
community,

Respondents,

v.

JOHN and CAROL RADOVICH,

Appellants.

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COURT OF APPEALS
STATE OF WASHINGTON
FILED


RESPONSE BRIEF OF RESPONDENTS BRIDGES INVESTMENT
GROUP, LLC and DOUGLAS BURBRIDGE and MARGIE
BURBRIDGE

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I. INTRODUCTION

This case arises out of John Radovich's attempt to convey the same property twice. Via the 1980 Quit Claim Deed, Radovich purported to convey to the Newport Yacht Basin Association of Condominium Owners ("NYBA") his half interest in three strips of property surrounding the marina that were part of the larger Commercial Parcel used as a boat repair facility. Then, in 2004 as part of the sale of his half interest in the Commercial Parcel to Douglas and Margie Burbridge and Bridges Investment Group (collectively, "Burbridge/Bridges") who operated the boat repair facility on the Commercial Parcel, he again transferred his half interest in these three strips.

Radovich never disclosed the 1980 Quit Claim Deed to Burbridge/Bridges when he conveyed the property to them in 2004 via Statutory Warranty Deed. However, when Seattle Marine Management Company ("Seattle Marine"), who purchased the Commercial Parcel in 2007, proceeded with its plans to develop the property, the NYBA suddenly found the deed and, under the leadership of Radovich, used it to oppose Seattle Marine's development. This land use dispute headed by Radovich, led to

Burbridge/Bridges becoming a party to the litigation that is the subject of this appeal.

After intensive litigation and a trial, the court declared the Quit Claim Deed invalid, quieted title to the three strips in favor of Seattle Marine, and awarded fees to Burbridge/Bridges under three independent theories. In his appeal, Radovich challenges the award of fees, the denial of his motion for summary judgment and the granting of Burbridge/Bridges' motion for summary judgment, which stated that if the Quit Claim Deed is valid, Radovich breached the 2004 Statutory Warranty Deed and related purchase and sale agreement ("P&SA") since he would have failed to convey the entire Commercial Parcel as described in the deed and P&SA.

Radovich's appeal should be denied and the trial court's orders and award of fees affirmed. Radovich's appeal of the award of attorney fees is premised on two unsupportable themes: (1) that the summary judgment rulings meant that the *only* way that he could be liable for anything was if the Quit Claim Deed is declared valid; and (2) that the law somehow applies differently because an insurance company paid the bills. These theories fail. The summary judgment order merely established that Radovich would be liable for damages if the Quit Claim Deed were valid. It said

nothing about attorney fees and nothing about Radovich's contractual and common law obligations. Further, the proposition that the availability of insurance alters these obligations is meritless. The law is clear that insurance and an insurance company's contractual subrogation rights do not alter the merits of a case.

Radovich also presents no valid basis for challenging the summary judgment orders. The orders were properly entered. It is undisputed that the 2004 Statutory Warranty Deed purports to convey the entire Commercial Parcel, including the three strips, to Burbridge/Bridges. If the Quit Claim Deed is valid, Radovich breached the Statutory Warranty Deed by failing to convey the entire Commercial Parcel. Although the Quit Claim Deed is not valid, the trial court properly fixed Radovich's liability on summary judgment and held that if after trial, the Quit Claim Deed was upheld, Radovich would be liable for Burbridge/Bridges' damages.

Radovich suggests, without any legal authority, that the transfer of the Commercial Parcel to Seattle Marine extinguished all of his obligations under the Statutory Warranty Deed. However, if the Quit Claim Deed is valid, he breached the Statutory Warranty Deed upon signing. The subsequent transfer doesn't change that.

He also argues that Burbridge/Bridges could not be liable under the 2007 Bargain and Sale Deed that they provided to Seattle Marine, so there could be no damages against him. This ignores the fact that regardless of what additional warranties were or were not provided in the Bargain and Sale Deed, Burbridge/Bridges purported to convey the entire Commercial Parcel to Seattle Marine and promised to warrant and defend title to that parcel. If the Quit Claim Deed is valid, they, like Radovich, failed to accomplish the transfer of title to the described land.

Finally, Radovich asserts that conveyance of a half interest rather than a whole interest changes his obligations under the Statutory Warranty Deed. This argument is premised on the fact that because Burbridge/Bridges already owned the other half interest in the Commercial Parcel, they should have known about the Quit Claim Deed. However, knowledge is irrelevant. Whether or not Burbridge/Bridges knew or should have known about the Quit Claim Deed, they contracted with Radovich to purchase a half interest in the entire Commercial Parcel and Radovich purported to convey a half interest in the entire Commercial Parcel via the Statutory Warranty Deed. Even if Burbridge/Bridges had previously acquired defective title to the other half from Radovich's former co-

owner, Russell and Constance Keyes (“Keyes”), Radovich is not absolved of his obligations.

Radovich’s appeal should be denied and the trial court’s summary judgment order and attorney fee award affirmed.

II. STATEMENT OF THE CASE

The factual background of this case has been thoroughly discussed by the other parties to this lawsuit including the NYBA, Radovich and Seattle Marine. Burbridge/Bridges hereby adopts and incorporates the factual summary provided by Seattle Marine in Appeal No. 66318-6-I.

III. ARGUMENT

A. Standard of Review.

Radovich insists that the Court review the trial court’s orders de novo. While de novo review is appropriate for the granting and denial of summary judgment motions, the Court should review the award of fees for abuse of discretion. Cornish College of the Arts v. 1000 Virginia Ltd. Partnership, 158 Wn. App. 203, 231, 242 P.3d 1, 16 (2010) citing Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009) (“An attorney fee award made pursuant to a contract may be reversed only if the trial court

manifestly abused its discretion.”). Radovich has not demonstrated that the trial court abused its discretion in entering the fee award.

B. Burbridge/Bridges was Properly Awarded Fees Under Three Independent Theories.¹

1. The 2004 P&SA Requires Radovich to Indemnify Burbridge for Attorneys’ Fees and Costs Incurred in this Litigation.

The plain terms of the indemnification provision require Radovich to indemnify the Burbridge/Bridges for any and all claims arising in respect to the Commercial Parcel. Section 10.2 of the 2004 P&SA between the Burbridges and Radovich reads:

Seller [Radovich] hereby agrees to indemnify and hold Purchaser [Burbridge/Bridges] harmless from: (a) any damage or deficiency due to breach of warranty, misrepresentation or nonfulfillment of any agreement on the part of Seller under this Agreement; (b) any and all liabilities or claims, whether accrued, absolute, contingent or otherwise, arising in respect of the Property which relate to any period prior to the closing; and (c) all actions, suits, proceedings, demands, assessments, judgments, costs and expenses connected with the foregoing, including reasonable attorneys’ fees. The foregoing indemnification obligation of Seller shall survive the closing.

CP 719-731 (emphasis added). This is a broad indemnification provision that covers the costs and fees incurred on behalf of Burbridge/Bridges in this lawsuit.

¹ CP 2129-2133.

The NYBA's claims to ownership of parts of the Commercial Parcel constitute "claims arising in respect to the Property" under this indemnity provision. The NYBA's claims relate to events "prior to the closing" of the P&SA, including the execution of the Quit Claim Deed in 1980. The indemnity provision is not conditioned upon Burbridge/Bridges prevailing or losing the claims brought by third parties regarding title to the Commercial Parcel. Thus, for purposes of this provision, it is immaterial whether or not the NYBA's claims ultimately prevailed. See MacLean Townhomes, LLC v. America 1st Roofing & Builders, 133 Wn. App. 828, 831 and 834, 138 P.3d 155 (2006) (indemnity provisions are to be construed according to the fundamental rules of contract construction; "any and all claims" is to be given its ordinary meaning, which is broad and includes all types of claims).

Radovich overstates the language in Nunez v. American Bldg. Maintenance Co. West, 144 Wn. App. 345, 351, 190 P.3d 56 (2008) (Radovich Brief at 44). In Nunez, the indemnity provision was limited to circumstances that were not proven, namely, "control" over the area of the accident. Nunez merely holds that the court should interpret and apply the language of an indemnification provision. In Nunez, the indemnification provision contained

limiting language that precluded recovery. Here, there are no relevant limitations. This lawsuit falls within the scope of the indemnity provision because it involved "claims against the property."

The trial court did not abuse its discretion in awarding attorneys' fees and costs pursuant to the plain language of the indemnity provision.

2. The 2004 P&SA Requires Radovich to Pay Fees to Burbridge/Bridges as the Prevailing Party.

Attorneys' fees were also properly awarded to the Burbridge/Bridges under Section 19.3 of the P&SA, which provides:

Legal Action. In the event any action or proceeding is brought by either party against the other related to this Agreement, the substantially prevailing party shall be entitled to recover from the other party its costs, including but not limited to reasonable attorneys' fees, incurred in such action or proceeding, including any appeal, which amounts shall be included in any judgment entered in such action or proceeding . . .

CP 719-731 (emphasis added). Burbridge/Bridges were the prevailing parties in the disputes that they had directly with Radovich. They brought claims against Radovich under the P&SA and Statutory Warranty Deed and they prevailed against Radovich on summary judgment by defeating his motion and winning theirs.

In the fall of 2009, Radovich brought a motion for summary judgment, seeking to dismiss Burbridge/Bridges's claims on several grounds, including (1) Burbridge/Bridges no longer owned the Commercial Parcel, (2) Burbridge/Bridges had no liability to Seattle Marine and therefore there was no liability for Radovich; and (3) the modification of the Statutory Warranty Deed by the title company at Radovich's request relieved Radovich of liability. CP 127-148. After extensive briefing and oral argument, the trial court denied this motion. CP 639-641.

In the spring of 2010, Burbridge/Bridges brought a motion for summary judgment based upon the P&SA, the 2004 Statutory Warranty Deed and Radovich's deposition testimony. CP 658-669. They sought a determination as a matter of law that Radovich had breached the P&SA and 2004 Statutory Warranty Deed if the Quit Claim Deed is valid. Radovich vigorously opposed this motion. CP 962-983. The court granted summary judgment to Burbridge/Bridges. CP 1314-1317.

Burbridge/Bridges were also the prevailing party in the indirect disputes that they had with Radovich. Burbridge/Bridges contend in this lawsuit that the Quit Claim Deed is invalid and/or not enforceable on several grounds. Through his relationships with the

NYBA, Radovich asserted the validity and enforceability of the Quit Claim as means to stop Seattle Marine's development. The Court found the Quit Claim Deed to be invalid and unenforceable. Therefore, Burbridge/Bridges prevailed on this issue as well and were properly awarded fees.

3. The ABC Rule Requires Radovich to Pay Fees to Burbridge/Bridges Since He is Responsible for Their Involvement in this Lawsuit.

Finally, the trial court properly awarded attorneys' fees and costs to Burbridge/Bridges under the ABC Rule, one of the widely-recognized equitable grounds that Washington courts use to award fees where no specific contract or statute provides for fees. Under this theory, "where the acts or omissions of a party to an agreement or event have exposed one to litigation by third persons-that is, to suit by third persons not connected with the initial transaction or event-the allowance of attorney's fees may be a proper element of consequential damages." Armstrong Const. Co. v. Thomson, 64 Wn.2d 191, 195, 390 P.2d 976 (1964). "When the natural and proximate consequences of a wrongful act of A involve B in litigation with others, B may as a general rule recover damages from A for reasonable expenses incurred in that litigation, including

attorney's fees." Dauphin v. Smith, 42 Wn. App. 491, 494, 713 P.2d 116 (1986).

Radovich's attempt to convey the same property twice is at the core of this lawsuit. It was his acts that led to this litigation. Contrary to Radovich's assertion, the Findings of Fact and the evidence submitted at trial support this conclusion. CP 1578-1608. Burbridge/Bridges established that Radovich executed the Quit Claim Deed, that he forgot about it for 30 years, that he did not tell Burbridge/Bridges about the Quit Claim Deed, and that he exercised his control over the NYBA to put in place a Board that would be hostile to Seattle Marine's development. See Findings of Fact and Conclusions of Law 1.23, 1.26, 1.28, 1.30, 1.51, 1.52 and 1.53 (CP 1584-86, 1592).² In sum, Radovich's actions undisputedly caused Burbridge/Bridges to be embroiled in this litigation. The trial court did not abuse its discretion in awarding attorneys' fees and costs even though it found the Quit Claim Deed invalid.

² Radovich insists that his misdeeds should not have been considered because they were not pled in the Fourth Party Complaint. Washington requires notice pleading only, and pleadings are deemed to conform to the evidence presented in the case. CR 15. Ample evidence establishing Radovich's responsibility for this litigation was presented during trial, as reflected in the court's findings of fact.

C. **The Invalidity of the Quit Claim Deed Does Not Relieve Radovich of Liability for Burbridge/Bridges' Fees.**

1. Award of Fees under ABC Rule and P&SA was Not Dependent on a Breach of the Statutory Warranty Deed.

Radovich argues at length that because the Quit Claim Deed was found invalid, he did not breach the 2004 Statutory Warranty Deed and therefore cannot be liable for attorneys' fees and costs. Radovich's argument is shortsighted and was properly rejected because he completely ignores that attorneys' fees were awarded to Burbridge/Bridges on the three different theories described above, none of which were dependent on the outcome of the quiet title action.

Even though the Quit Claim Deed was declared invalid and the attorneys' fees cannot be awarded for breach of the warranty to defend, the ABC Rule still applies. The fact remains that but for Radovich attempting to convey the same property twice, this litigation would have never occurred. Where the "grantor bears some responsibility for the litigation between the grantee and a third party," the grantor is liable for fees and costs. See, e.g., Bloom v. Hendricks, 111 N.M. 250, 255, 804 P.2d 1069 (N.M. 1991). For example, grantees are permitted to recover fees and costs when they successfully defend title where the litigation was caused by the

“grantor’s negligence.” Id. citing McDonald v. Delhi Sav. Bank, 440 N.W.2d 839 (Iowa 1989); see also Kendall v. Lowther, 356 N.W.2d 181 (Iowa 1984) (awarding fees to the grantee where the grantor was negligent in failing to procure a proper survey and deed description, which led to a boundary dispute).

An award of attorneys’ fees is also appropriate regardless of whether the defense was successful when “the wrongful act of the [grantor] thrusts the [grantee] into litigation with a third person.” Bloom, 111 N.M. 250, 255 citing First Fiduciary Corp. v. Blanco, 276 N.W.2d 30, 34 (Minn. 1979) (bona fide purchasers can recover fees and costs against grantors where grantors had obtained property from incompetent parents; even though bona fide purchasers successfully defended title, fees and costs are appropriate because a wrongful act, the grantor taking advantage of their parents, thrust bona fide purchasers into litigation).

The court in Bloom explained the rationale why attorneys’ fees should be awarded regardless of whether the encumbrance turned out to be invalid: “Where demand to defend has been made of a grantor who bears responsibility or had knowledge, the grantor should pay for the costs of defense, regardless of whether defense of the title is successful, because the grantor has substantiated the

adverse claim or could have expected the risk of the potential claim from his warranty covenants.” Bloom, 111 N.M. 256.

The circumstances surrounding this case satisfy the criteria for application of the ABC Rule.

Further, Radovich’s liability for fees under the P&SA’s indemnification provision was dependent only upon whether the lawsuit involved the property, not on the outcome of the lawsuit.

2. The Fourth Party Complaint Did Not Condition Liability for Fees on Liability Under the Statutory Warranty Deed.

Radovich insists that Burbridge/Bridges only requested fees in the event that the Quit Claim Deed is valid. This is not true. In paragraph 16 of the Fourth-Party Complaint, Burbridge/Bridges specifically states that Radovich is required to indemnify them for any breach of or any lawsuit involving the sale of the Commercial Parcel. The complaint reads, “Section 10.2 of that Agreement requires Radovich to indemnify the Burbridges for any breach of warranty **and for any lawsuits related to this transaction** and brought against the Burbridges.” CP 74-75 (emphasis added). Further, in their prayer for relief, Burbridge/Bridges asks for an “Award of attorney fees and legal costs to the fullest extent

permitted by law and contract.” CP 78. Burbridge/Bridges properly asked for and properly received attorney fees.

3. The Order Granting Burbridge/Bridges’ Motion for Summary Judgment Did Not Limit Liability for Fees.

Contrary to the plain language of the trial court summary judgment order (CP 1314-1317), Radovich baldly asserts that he can be liable to Burbridge/Burbridge/Bridges *only* if the Quit Claim Deed is valid. This argument is incorrectly premised on a misreading of the court’s order. While the Order did provide that Radovich would be responsible for fees if the Quit Claim Deed is valid, it did not say that was the only avenue through which Radovich would find himself responsible for fees. It did not release Radovich from other potential liability arising out of a breach of his contractual common law or statutory obligations.

D. **Insurance is Irrelevant to the Award of Fees.**

1. Radovich’s Liability for Attorneys’ Fees is Not Eliminated Simply Because Burbridge/Bridges, like Any Other Purchaser, Had Title Insurance.

Radovich argues that fees should not be awarded because Pacific Northwest Title Insurance Company, Inc. (“PNWT”) ran a title search and is contractually obligated to provide for Burbridge/Bridges’ defense. However, a seller is not absolved of his obligations to convey fee title to the land described in a statutory

warranty deed, or of his contractual and common law obligations to pay fees, if a title company does not reveal his potential liability.³

PNWT had no duty to or ability to dictate to Radovich what land to convey via statutory warranty deed or what provisions to put in the purchase and sale agreement. Radovich's contractual duties bind him regardless of whether or not title is insured.

In addition, the fact that the injured party can recover from another source does not alter obligations. If Radovich's argument had merit, then wrongdoers would always escape contractual and tort liabilities by asserting that the innocent parties' insurance companies should make them whole for their losses. Radovich cannot avoid liability here because of the existence of title insurance any more than a tortfeasor in a personal injury case can avoid paying damages where the victim has medical insurance. As stated in American Jurisprudence:

The "collateral-source rule" provides that if an injured party received some compensation for injuries from a source wholly independent of the tortfeasor, ***such payment should not be deducted from the***

³ Radovich also dwells on the fact that PNWT later re-recorded the deeds to disclose the Quit Claim Deed. This is irrelevant and does not alter Radovich's obligations in any way. Moreover, Radovich fails to disclose why PNWT re-recorded the deeds. In the summer of 2009 Radovich called PNWT numerous times insisting that they re-record his 2004 Statutory Warranty Deed and except the Quit Claim Deed. CP 491-521. It was at his direction alone that the legal description was altered. CP 493.

damages which the plaintiff would otherwise collect from the tortfeasor. Receipt of funds from a collateral source lessens the financial losses that a plaintiff would otherwise suffer. Thus, if the only goal of tort law were to compensate the plaintiff for losses, evidence of these benefits would be admitted to reduce the total damages assessed against the defendant. However, reducing recovery by the amount of the benefits received by the plaintiff **would grant a windfall to the defendant** by allowing a credit for the reasonable value of those benefits. Such credit would result in the benefits being effectively directed to the tortfeasor and from the intended party—the injured plaintiff. If there is a windfall, it is considered more just that the injured person profit rather than grant the wrongdoer relief from full responsibility for the wrongdoing. Thus, courts, under the collateral-source rule, generally hold that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer do not diminish the damages otherwise recoverable from the wrongdoer.

22 Am. Jur. 2d Damages § 392 (November 2010) (citations omitted, emphasis added); see also Ciminski v. SCI Corp., 90 Wn.2d 802, 804, 585 P.2d 1182 (1978). See also Criez v. Sunset Motor Co., 123 Wash. 604, 607, 213 P. 7 (1923) (“It is the settled law of this state that it is no defense to an action against a wrongdoer that the party seeking recovery was insured against the loss and had recovered the amount of the loss, or some part thereof, from the insurance company.”). The courts have rejected similar arguments when made by sellers defending claims by

insured buyers for breach of statutory warranties. E.g., Transamerica Title Insurance Co. v. Johnson, 103 Wn.2d 409, 415, 693 P.2d 697 (1985).

Thus, the law is well-settled that the fact that a party is insured is generally inadmissible because it is irrelevant, prejudicial, or both. See ER 403, ER 411, and WPI 2.13 (“Whether a party does or does not have insurance has no bearing on any issue you must decide.”); 5A Washington Practice, Evidence § 411. Radovich agreed to indemnify Burbridge/Bridges for fees and costs associated with any lawsuit involving the Commercial Parcel; he agreed to pay fees if Burbridge/Bridges was the prevailing party in any lawsuit with him regarding the Commercial Parcel; and he is required under equitable principals to pay for litigation between Seattle Marine and Burbridge/Bridges that his actions brought about. Insurance does not change these facts. Simply put, the law does not apply differently to those who have insurance.

2. This Lawsuit Does Not Involve Equitable Subrogation and Thus, Kim v. Lee is Inappropriate.

Radovich conflates equitable subrogation with contractual subrogation and mistakenly asks that the court exercise discretion and refuse to apply an equitable defense. However, no equitable

defense is asserted here. If PNWT is reimbursed for its expenses incurred in defending Burbridge/Bridges, it will be through the rights afforded to it by its contract with Burbridge/Bridges. As recognized by the Washington Supreme Court in Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 191 P.3d 866 (2008), there are two types of subrogation, equitable and contractual:

“Subrogation” is the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy. Subrogation has two distinct types: conventional subrogation, which arises by contract, and equitable subrogation, which arises by operation of law.

Because conventional subrogation can arise only by agreement, some jurisdictions have found it to be synonymous with assignment. ***An insurer entitled to subrogation “stands in the shoes” of the insured and is entitled to the same rights and subject to the same defenses as the insured.***

Id. at 423-424 (emphasis added) (internal citations omitted).

In this case, PNWT agreed to and is contractually obligated to cover Burbridge/Bridges’ losses and expenses associated with title defect claims. In turn, Burbridge/Bridges agreed to cooperate to minimize any losses and expenses either as parties to the lawsuit or by assignment of their claims to the insurance company.

Under the later circumstance, where the insurance company steps into the shoes of its insured, the insurance company is bringing a subrogation claim and the insurer has no greater or lesser rights than its insured would. Id.; see also Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., 119 Wn.2d 334, 341, 831 P.2d 724 (1992) and Millican of Wash., Inc. v. Wienker Carpet Serv., Inc., 44 Wn. App. 409, 414, 722 P.2d 861 (1986). The defenses asserted against the subrogated claim are the same as those that would be asserted against the insured. Id.

Equitable subrogation, addressed in Kim v. Lee, 145 Wn.2d 79, 31 P.3d 665 (2001), is not at issue here. In Kim a title company, who, unlike here, was a party to the action, attempted to use equitable subrogation to step into the shoes of a prior mortgagee in order to achieve priority over a judgment lien that was entered before the insured deed was recorded. Priority is not at issue in this case. No one is attempting to assume the position of a prior lender or lienholder. Equitable subrogation and the Kim case are inapplicable.⁴

⁴ Regardless, the validity of Kim is highly questionable after Bank of Am. v. Prestance Corp., 160 Wn.2d 560, 160 P.3d 17 (2007). In the latter case, the Court reversed positions on several issues, concluding that actual or constructive knowledge of an intervening lien is irrelevant in determining whether to apply equitable subrogation. The Court also discussed the policy rational behind

Therefore, the existence of insurance has no bearing on the merits of the case.

E. The Court Did Not Error in Awarding Fees Without an Evidentiary Hearing.

Radovich also complains that the trial court awarded fees without an evidentiary hearing. However, whether to hold an evidentiary hearing is entirely within the trial court's discretion. Cf. State v. Kilgore, 147 Wn.2d 288, 295, 53 P.3d 974 (2002) ("The decision whether or not to conduct [an evidentiary] hearing ... should be left to the sound discretion of the trial court."); see also City of Blaine v. Feldstein, 129 Wn. App. 73, 76, 117 P.3d 1169 (2005) (It is within the trial court's discretion to determine whether there are factual and credibility issues requiring a testimonial hearing.).

Here, the order awarding fees reveals that the trial court carefully reviewed the invoices for fees and determined based on the lodestar method that the fees were reasonable. CP 2129-2133 and CP 1764-1829. The trial court heard and ruled on the

applying equitable subrogation, which includes the fact that by allowing equitable subrogation insurance premiums will be lower. Therefore, the Court's hostility in Kim to insurance companies and its focus on the fact that the insurance company had constructive knowledge of the lien is no longer supportable. After Prestance, the rationale applied in Kim cannot be relied upon. The Court's intention to veer away from Kim is further supported by the fact that the majority in Prestance was authored by Justice Sanders who authored the dissent in Kim.

numerous motions filed in this case and presided over the lengthy trial. Therefore, the trial court was well aware of the complexity of the case and the legal work necessary to present and defend the claims. Radovich did not present any evidence that either the rates or the amount of time spent by Burbridge/Bridges' attorneys was unreasonable. The trial court's decision not to conduct a hearing does not present a basis for reversing the award of fees.

F. The Summary Judgment Orders Were Properly Decided.

1. **The Subsequent Sale of the Commercial Parcel Does Not Extinguish Radovich's Liability Under a Deed.**

Radovich argues that he could not have breached his 2004 Statutory Warranty Deed to Burbridge/Bridges because Burbridge/Bridges no longer owns the property conveyed by the deed, having sold it to Seattle Marine. However, he cites no law that supports this proposition and it makes no legal sense.

The warranties conveyed by a Statutory Warranty Deed are not limited or terminated by subsequent transactions. Under RCW 64.04.030, every Statutory Warranty Deed governed by Washington law provides four warranties made by the grantor to the grantee: to convey an indefeasible estate in fee simple, free from encumbrances, to guaranty peaceful possession, and to defend title. These warranties are not qualified nor dependent

upon the grantee continuing to own the property. To the contrary, the statute explicitly provides that the warranties extend beyond the grantee to his “heirs and assigns” and “against all persons who may lawfully claim the same [property].” RCW 64.04.030. If the Quit Claim Deed is valid, then Radovich breached his Statutory Warranty Deed on the day he executed it. 18 Washington Practice, § 14.2. The later sale of the property is irrelevant.

The only law cited by Radovich to advance his theory that he can escape liability through the subsequent sale of the property is a general statement from a 1912 Washington case that: “A contract on the other hand, can be enforced only against those party to it.” McIntry v. Johnson, 66 Wn. 567 (1912). (Radovich Brief at 24). This principle is inapplicable because no party in this case is suing another party based upon a contract to which they are not a party. Seattle Marine sued Burbridge/Bridges based upon a March 8, 2007 Real Estate Purchase and Sale Agreement (“REPSA”) and the related 2007 Bargain and Sale Deed (CP 690-696) to which Seattle Marine and Burbridge/Bridges were both parties. See Claims 1 and 2 of Third-Party Complaint, CP 48-49. Among other things, Seattle Marine claimed that, if the Court determines that the Quit Claim Deed is valid and transferred a portion of the

Commercial Parcel to the NYBA, then Burbridge/Bridges breached the REPSA and the related 2007 Bargain and Sale Deed, both of which warranted fee title. CP 39-53. In turn, Burbridge/Bridges is suing Radovich based upon 2004 P&SA (CP 719-731) and the related 2004 Statutory Warranty Deed (CP 1015-1021).

Burbridge/Bridges and Radovich were parties to both agreements. Burbridge/Bridges claims that if the Quit Claim Deed is valid, then Radovich breached the P&SA and 2004 Statutory Warranty Deed, both of which warranted fee title to the entire Commercial Parcel. Therefore, each party in this case brings claims based upon contracts to which they were parties.

Contrary to Radovich's rhetoric, Burbridge/Bridges is not seeking to make Radovich liable for Burbridge/Bridges' own errors. Burbridge/Bridges is suing Radovich for breach of his P&SA and 2004 Statutory Warranty Deed, by which he warranted fee title free of encumbrances, and for failure to defend Burbridge/Bridges against "all persons who may lawfully claim the same" if the Quit Claim Deed is valid. See RCW 64.04.030. Radovich created the defect in title when he attempted to convey a portion of the Commercial Parcel both to the NYBA by the Quit Claim Deed, and to Burbridge/Bridges through the Statutory Warranty Deed. As the

creator of the defect in fee title, he bears responsibility for the harm caused by that defect. Wrongdoers do not escape responsibility simply because the party whom they initially harmed passed the same defective property on to another victim.

2. If the Quit Claim Deed Is Valid, Burbridge/Bridges Is Liable Under the Bargain and Sale Deed.

Radovich argues that he could not be liable to Burbridge/Bridges because Burbridge/Bridges is not liable to Seattle Marine. In particular, he asserts that the 2007 Bargain and Sale Deed, to which he was not even a party, did not provide any warranties of title. However, this interpretation contrary to the intentions of the actual parties to these transactions, the language of the deeds and agreements, and Washington law.

In the 2007 Bargain and Sale Deed and the related REPSA, Bridges promised and warranted that it would convey and defend fee title to the property described.⁵ CP 690-696. The property described was the entire Commercial Parcel. Nothing in the 2007

⁵ Radovich points out that Burbridge/Bridges filed and withdrew a motion for summary judgment. A superficial review reveals that Burbridge/Bridges did not adopt any of the arguments made by Radovich against liability, but merely requested that if the Court granted Radovich's motion for summary judgment, it also dismiss claims brought against them. CP 110-114. Regardless, the motion was withdrawn and is therefore irrelevant to this appeal.

Bargain and Sale Deed or the statute governing such deeds changes these warranties or limits the promises made.

First Radovich claims that the statute governing bargain and sale deeds limits the warranty of fee title to **encumbrances created by the grantor** while the grantor owned the property, relying on excerpts from Washington Practice. However, in drafting the quoted language for Washington Practice, Professor Stoebuck recognized that there was no Washington authority on this point. He cites to a case, Central Life Assur. Soc. v. Impelmans, 13 Wn.2d 632, 126 P.2d 757 (1942), which discusses the limitations contained in a “special warranty deed.” The limitations can include limiting the warranty to encumbrances created by the grantor. However, Professor Stoebuck cautioned that, while “special warranty deeds” can be crafted to narrowly tailor warranties, Washington courts have not equated special warranty deeds with bargain and sale deeds. 18 Wash.Prac. at §14.2 FN7. Therefore, it is improper to assume that the 2007 Bargain and Sale Deed is governed by the limitations of a “special warranty deed.”

Moreover, the Quit Claim Deed is not an “encumbrance,” like a lien or an easement. It is a conveyance of a portion of the property. If the Quit Claim Deed is valid, Burbridge/Bridges did not

merely fail to disclose an encumbrance, it failed to convey the property described, which constitutes a breach of the 2007 Bargain and Sale Deed.

Contrary to Radovich's assertions, the bargain and sale deed statute actually provides a warranty of fee simple title by default. RCW 64.04.040 provides as follows:

Bargain and sale deeds for conveyance of land may be substantially in the following form without express covenants:

The grantor (here insert name or names and place of residence) for and in consideration of (here insert consideration) in hand paid, bargains, sells, and conveys to (here insert the grantee's name or names) the following described real estate (here insert description) situated in the county of . . . , State of Washington. Dated this . . . day of . . . 19

Every deed in substance in the above form when otherwise duly executed, shall convey to the grantee, his heirs or assigns an estate of inheritance in fee simple, and shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit: that the grantor was seized of an indefeasible estate in fee simple, free from encumbrances, done or suffered from the grantor, except the rents and services that may be reserved, and also for quiet enjoyment against the fee grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators and assigns may recover in any action for breaches

as if such conveyances were expressly inserted.

The statute makes clear that the language “bargains, sells and conveys” provides a conveyance of a fee simple interest. This language was in the Bargain and Sale Deed conveyed by Burbridge/Bridges.

The Bargain and Sale Deed provides that Burbridge/Bridges “**bargains, sells, conveys and confirms**” to Seattle Marine, two parcels, one of which is undisputedly described as the entire Commercial Parcel. CP 690-696. Therefore, by the language of the Bargain and Sale Deed, Burbridge/Bridges promised to transfer the entire Commercial Parcel. If the Quit Claim Deed is valid, then Burbridge/Bridges has failed to “bargain, sell, convey and confirm” to Seattle Marine the entire Commercial Parcel.

The 2007 Bargain and Sale Deed also states that Burbridge/Bridges as grantor “will forever warrant and defend the said described real estate.” The legal description for the “said described real estate” is the entire Commercial Parcel, including that part which was purportedly conveyed earlier by the Quit Claim Deed. This warranty makes no sense if, as Radovich claims, there is no warranty of title.

In addition, section 5.1 of the REPSA between Burbridge/Bridges as sellers, and Seattle Marine as the purchaser, provides as follows:

At closing, Seller shall convey to Purchaser fee simple title to the Real Property . . . by duly executed and acknowledged Bargain and Sale Deed . . . free and clear of all defects and encumbrances

The REPSA reflects Burbridge/Bridges' intent to warrant fee title to Seattle Marine. The Bargain and Sale Deed was executed in order to comply with the REPSA and to fulfill the promise to convey fee title to the entire Commercial Parcel, and reinforces the intent to convey fee title through that deed. Thus, the plain language of the REPSA and Bargain and Sale Deed contradict Radovich's assertion that Burbridge/Bridges is not liable to Seattle Marine because it did not covenant to convey title to the entire Commercial Parcel.

Radovich next looks at the language in the 2007 Bargain and Sale Deed and incorrectly concludes that the language warranting to defend against *claims arising "by, through or under"* Burbridge/Bridges allows it to escape liability. However, the "through or under" language only qualifies the covenant to defend title. It does not limit the promised conveyance of the entire

Commercial Parcel. Moreover, the “claims” asserted by NYBA and Seattle Marine regarding the Quit Claim Deed are asserted “through” Burbridge/Bridges: NYBA seeks to enforce the Quit Claim Deed. In turn, Seattle Marine passes through NYBA’s claims to Burbridge/Bridges, asserting that they are liable if the Quit Claim Deed is valid. In turn, they pass through the same claim against Radovich.

Further, the Bargain and Sale Deed states that it is “subject to the exceptions set forth on Schedule A attached” to the deed. Schedule A contains a long list of Permitted Exceptions. The vast majority of these exceptions were encumbrances created before Burbridge/Bridges owned the Commercial Parcel. If, as Radovich argues, the Bargain and Sale Deed did not warrant fee title and only warranted against encumbrances and defects arising during Burbridge/Bridges’ ownership of the property, there would be no need for the specific exceptions in Schedule A.

Nothing in the statute governing bargain and sale deeds or the language in the 2007 Bargain and Sale Deed relieves a grantor from liability for failing to convey fee simple title. If the Quit Claim Deed is valid, Burbridge/Bridges would be liable to Seattle Marine and would be entitled to recover those damages from Radovich.

Therefore, the trial court's denial of Radovich's motion for summary judgment and granting of Burbridge/Bridges' motion for summary judgment was proper.

Importantly, even if Burbridge/Bridges did not warrant fee title to Seattle Marine under the Bargain and Sale Deed (which it did), the award of attorney fees would not be affected. As described above, Burbridge/Bridges was awarded fees based on two contractual provisions and the common law ABC Rule. Thus, the award of fees was not dependent upon a breach of the Statutory Warranty Deed.

3. Conveyance of Half Interest Rather than a Whole Interest Does Not Affect Contractual Liability.

Radovich also argues that summary judgment was inappropriate and that he could never be liable under the Statutory Warranty Deed because Burbridge/Bridges already owned a half interest in the Commercial Parcel. While a single parcel of property can only have one true legal description, and while co-tenants must hold an interest in the same property, contractual obligations are unaffected by these principles. The fact that Keyes may have breached the warranties in his deed and obligations in his purchase and sale agreement with Burbridge/Bridges when he sold his half

interest in the Commercial Parcel, has no impact Radovich's liability. It is undisputed that in the P&SA and Statutory Warranty Deed, Radovich assumed the obligation to convey fee title to a half interest in the entire Commercial Parcel. If the Quit Claim Deed is valid, he did not fulfill that obligation and is liable for damages.

In a puzzling attempt to support his argument that Burbridge/Bridges' ownership of a half interest relieves him of any responsibility, Radovich quotes from an over 100 year old case, Cedar Canyon Consolidated Mining Co. v. W.J. Yarwood, 27 Wash. 271, 281-82, 67 P. 749 (1902), stating that "[a] co-tenant will not be permitted to question the common title upon a contest between him and his co-tenants." Id. at 282 (citing Bornheimer v. Baldwin, 42 Cal. 27, 34 (Cal. 1871); Olney v. Sawyer, 54 Cal. 379, 384 (Cal. 1880)). However, review of Bornheimer and Olney demonstrate that this statement means only that a party cannot assert sole control over property if they have entered and remained in possession as a tenant in common. Bornheimer, 42 Cal. at 34 (rejecting Defendant's attempt to invalidate tenancy in common where Defendant and Plaintiff had executed agreement to hold lands as tenants in common and had taken possession thereof); Olney, 54 Cal. at 384 (agreeing with rule in Bornheimer). There is

absolutely no discussion in Cedar Canyon about a party attempting to invalidate their own title as Radovich argues. See Cedar Canyon, 271 Wash. at 281-82. Cedar Canyon is inapplicable to the present matter.

Radovich also insists that Burbridge/Bridges knew about the Quit Claim Deed and therefore argues that he could not be liable for breach of the P&SA and Statutory Warranty Deed. This argument has no merit. First, Burbridge/Bridges did not know about the Quit Claim Deed. Radovich cites to an April 8, 1981 letter from Mr. Burbridge to Keyes and Radovich discussing possible lease terms. Mr. Burbridge indicates that the recent lease proposal “does not include the entire area” as was shown in a prior proposal. CP 1047. There is absolutely no evidence that this was a reference to the Quit Claim Deed or even that Mr. Burbridge was referring to the area described in the Quit Claim Deed. Radovich also cites to a 1987 letter from an attorney for the NYBA, in which she states that one of Burbridge/Bridges’ buildings is on NYBA property. CP 1031-32. The referenced property has always been encumbered by easements in favor of the NYBA. As even the NYBA former president of the NYBA and land use planner by trade, Kyle Anderson explained, people often use ownership terms when

speaking of easements. As Mr. Burbridge explained, he always thought he was leasing and then owning the entire Commercial Parcel, which he knew was encumbered by easements. CP 527-528. He vaguely recalls the 1987 letter and assumed the letter referred to one of his buildings being on the NYBA easement. CP 528-529. Mr. Burbridge clearly testified that he did not know about the Quit Claim Deed.

Regardless, even if Burbridge/Bridges had known about the Quit Claim Deed, Radovich would still be liable to Burbridge/Bridges for breach of the Statutory Warranty Deed and P&SA if the Quit Claim Deed is valid because a grantee's knowledge of a defect does not eliminate a grantor's liability for that defect. Fagan v. Walters, 115 Wn. 454, 197 P. 635 (1921) ("It is a well-settled rule that knowledge by the grantee at the time of the conveyance of the existence of an encumbrance on the land or a defect in the grantor's title does not control the force and effect of the express covenants in the deed, or affect the question of breach.") (quoting 8 Am. & Eng. Enc. of Law. (2d Ed.) 86; see also Williams v. Hewitt, 57 Wn. 62, 106 P. 496 (1910); Foley v. Smith, 14 Wn.App. 285, 539 P.2d 874 (1975); and Mastro v. Kumakichi Corp., 90 Wn. App. 157, 951 P.2d 817 (1998). Radovich is bound

by his warranties regardless of whether Burbridge/Bridges, Seattle Marine or the title company knew about or should have discovered the Quit Claim Deed before Burbridge/Bridges's sale of the Commercial Parcel.

In addition, even if Burbridge/Bridges did not warrant fee title to Seattle Marine under the Bargain and Sale Deed (which it did), the award of attorney fees would not be affected. As described above, Burbridge/Bridges was awarded fees based on two contractual provisions and the common law ABC Rule. Thus, the award of fees was not dependent upon a breach of the Statutory Warranty Deed.

G. Burbridge/Bridges Should be Awarded Fees for this Appeal.

As discussed above, Burbridge/Bridges are entitled to fees and costs incurred below and on appeal under the P&SA's indemnity and prevailing party provisions for lawsuits relating to Radovich's sale of the Commercial Parcel. He is also liable under the common law ABC Rule because Radovich is responsible for Burbridge/Bridges' involvement in this lawsuit. Therefore, in addition to affirming the trial court's award of fees

Burbridge/Bridges requests an additional award of fees and costs incurred in this appeal.

IV. CONCLUSION

The trial court did not abuse its discretion in awarding fees and costs to Burbridge/Bridges under three independent theories. This court does not even need to address Radovich's appeal of the summary judgment orders because they do not affect the outcome of the merits of the case or the award of attorney fees. However, Burbridge/Bridges was entitled to summary judgment holding Radovich liable for breach of the P&SA and Statutory Warranty Deed if the Quit Claim Deed is valid.

The trial court's judgment and order should be affirmed.

Dated this 15th day of June, 2011.

Respectfully submitted,

RIDDELL WILLIAMS P.S.

By: 

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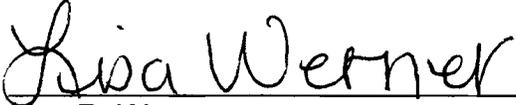
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Executed this 15th day of June, 2011 at Seattle, Washington.


Lisa R. Werner