

NO. 66319-4-1

COURT OF APPEALS, DIVISION ONE  
STATE OF WASHINGTON

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THE NEWPORT YACHT BASIN ASSOCIATION OF  
CONDOMINIUM OWNERS, an unincorporated condominium  
association,

Respondent,

v.

SUPREME NORTHWEST, INC., a Washington corporation d/b/a  
SEATTLE BOAT NEWPORT, and SEATTLE MARINE  
MANAGEMENT COMPANY, LLC, a Washington limited liability  
company,

and

BRIDGES INVESTMENT GROUP, LLC, a Washington limited  
liability company, and DOUGLAS BURBRIDGE and MARGIE  
BURBRIDGE, husband and wife, and their marital community,

Additional respondents,

v.

JOHN and CAROL RADOVICH,

Appellants.

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REPLY BRIEF OF APPELLANTS JOHN AND CAROL RADOVICH

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## I. INTRODUCTION <sup>1</sup>

This brief replies to the Brief of Respondents Burbridge/Bridges. The Burbridge/Bridges raise several legal issues; each is responded to herein.

The Burbridge/Bridges also fix on two themes: one unsupported by the record and the second irrelevant to these proceedings.

First, in an apparent attempt to fix blame on Radovich, Burbridge/Bridges makes several statements in their brief that claim Radovich controls the Newport Yacht Basin Association (NYBA) and is manipulating it to bring an action against Seattle Marine. See Burbridge/Bridges brief at page 1 (“the NYBA suddenly found the deed, and under the leadership of Radovich, used it to oppose Seattle Marine’s development.”); at page 9 (“through his relationships with the NYBA, Radovich asserted the validity and enforceability of the Quit Claim Deed as means to stop Seattle Marine’s development[.]”); at page 11 (“[a]mple evidence establishing Radovich[‘s] responsibility for this litigation was presented during trial, as reflected in the court’s findings of fact.”)

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<sup>1</sup> Appellants will employ the same abbreviations of parties and documents as identified in Appendix A to their Opening Brief.

However, in each case, there are no citations to the record in support of these claims.<sup>2</sup> These statements are simply untrue and should not be considered; argument stated in briefing must be supported by “relevant parts of the record.” RAP 10.3(a)(3) and (6).

Second, Burbridge/Bridges claim that the cause of this litigation is that Radovich conveyed the same property twice; once in the 1980 Quit Claim Deed (CP 998-999) and second in the 2004 statutory warranty deed (CP 1007-1013). It is the case that the property conveyed in the 1980 Quit Claim Deed is also included in the 2004 statutory warranty deed. However, the simple fact is that during the nearly 25 year interval between the deeds Mr. Radovich simply forgot that he had signed the quit claim deed dated July 23, 1980. See Mr. Radovich’s Declaration at CP 1124-26. As Mr. Radovich stated, the 1980 transfer was:

not a significant transaction because the easements were already encumbered and used by the condominium association for access, parking, utilities and drainage.

CP 1125. See his deposition at CP 702-704. It is no wonder that Mr. Radovich did not recall given the additional factors reflected in

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<sup>2</sup> At page 11 of its brief, Burbridge/Bridges claims that certain findings establish its claim that Radovich controlled the actions of NYBA. As even a cursory review of these findings indicates, there is no support that it was Radovich that thrust NYBA into this litigation. These findings are discussed at Section 4.3 of this brief.

the findings of the court, including the following: a) no consideration was paid to him by NYBA (CP 1585); b) there was no purchase and sale agreement for the transaction (CP 1586); c) he continued to pay taxes on the property (CP 1585); d) the quit claim deed was for three small parcels of property that were already subject to the ingress, egress and parking uses for NYBA (CP 998-999); and e) that the trial found the deed “was not intended to convey fee simple title to the property described therein” (CP 1586).<sup>3</sup>

All of the foregoing is an attempt to shift blame from Burbridge/Bridges' title company, who completely failed to find the duly and properly recorded 1980 Quit Claim Deed. See Finding 1.39 (CP 1589) and Conclusion 2.5 (Seattle Marine's “reputable title insurance company failed to mention or reference the Quit Claim Deed.”)(CP 1595). There is no explanation why PNWTIC missed this recorded document (twice, as it turns out). Indeed, when this error was brought to their attention, the title company added the 1980 Quit Claim Deed as an exclusion to the deeds from both Keyes and Radovich. CP 195-198, 200-207.

The fault for errors made in not locating the recorded

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<sup>3</sup> To appreciate how long ago the Quit Claim Deed was signed (July 1980), Dixy Lee Ray was Governor of Washington, Jimmy Carter was President and Barack Obama was 18 years old.

document should remain on PNWTIC, not on Radovich.

**II. THE COURT SHOULD NOT CONSIDER THE  
ATTEMPTED INCLUSION OF THE STATEMENT OF  
FACTS FROM ANOTHER CASE.**

The "Statement of the Case" provided by Burbridge/Bridges  
(at page 5 of their brief) states that:

Burbridge/Bridges hereby adopts and  
incorporates the factual summary provided by Seattle  
Marine in Appeal No. 66318-6-I.

The Court should not consider any briefs filed in Cause No.  
66318-6-I for the following reasons.

First, a motion to consolidate the present appeal with that of  
the appeal in Case No. 66318-6-I was filed by Burbridge/Bridges on  
April 1, 2011. This motion was vigorously opposed by both  
Radovich and NYBA (the appellant in Case No. 66318-6-I). See  
Radovich Opposition to Motion filed on April 15, 2011. This  
opposition was based on differing issues on appeal, on the fact that  
this appeal was from a summary judgment order, and that the  
decision in Case No. 66318-6-I came after a full trial. On April 20,  
2011, Commissioner Verellen denied the motion to consolidate.

Second, the record on review in Case No. 66318-6-I is  
completely different from the record in this appeal. A Designation of  
Clerk's Papers was filed by Radovich on February 24, 2011

designating certain portions of the record. On March 3, 2011, a "Notice of Intention Not to Prepare a Verbatim Report of Proceedings (RAP 9.2(a))" was filed by Radovich. No designation of additional Clerk's Papers was filed by Burbridge/Bridges and there was no attempt to file any verbatim transcripts. The appeal record in Case No. 66318-6-I does contain references to a verbatim record and to a whole different set of Clerk's Papers, neither of which is part of the record here.

Based on the foregoing, the Court should not consider or rely on any briefs, transcripts or Clerk's Papers filed in any other appeal, including those in Case No. 66318-6-I.

**III. THE COURT SHOULD ONLY CONSIDER FACTUAL REFERENCES THAT ARE SUPPORTED BY REFERENCES TO THE RECORD.**

As described above, Burbridge/Bridges have not provided a Statement of the Case conforming to the Rules of Appellate Procedure. It is true that a Statement of the Case is not required in a respondent's brief. RAP 10.3(b) ("A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner.") However, the citation to a completely different record, and a description of the case from a brief in another appeal, is not permissible.

Instead of providing a Statement of the Case, the first five pages of Burbridge/Bridges' brief is an "introduction" to the remainder of the brief, but it contains no references to the record. Under the rules (RAP 10.3(a)(3)), though an introduction does not require citation to "the record of authority," statements made in argument must provide "references to relevant parts of the record."

As noted in Section I of this brief, there are several references in the respondent's brief to supposed statements and actions by Radovich. However, because those references lack support in the record they should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992) (argument unsupported by citation to the record or authority will not be considered); RAP 10.3(a)(6).

#### **IV. ARGUMENT**

For the convenience of the Court, appellant Radovich will respond to the arguments of Burbridge/Bridges in the same order as presented in their Response Brief. In each case, the Court is referenced to Radovich's opening brief where the corresponding argument is found.

##### **4.1 Standard of Review**

As discussed at pages 5-6 of their brief, Burbridge/Bridges

agrees with Radovich that this Court reviews summary judgment rulings on a *de novo* standard. See Radovich Opening brief at 21-22. However, Burbridge/Bridges incorrectly states the standard of review for the award of attorney fees.

Under Washington authority the review of an attorney fee award includes a consideration of multiple factors, including the following:

when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.

*Noble v. Safe Harbor Family Preservation Trust*, 167 Wn. 2d 11, 17, 216 P.3d 1007, 1010 (2009) (emphasis supplied).

Further, because requests for subrogation as claimed by Burbridge/Bridges are based in equity, " '[T]he question of whether equitable relief is appropriate is a question of law,' and like all issues of law ... review is *de novo*." *Bank of Am., N.A. v. Prestance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007) (citation omitted) (quoting *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005)).

As will be set forth below, the trial court made multiple errors of law and its rulings were based on other untenable grounds such that its award of attorney fees to Burbridge/Bridges should be

reversed.

#### **4.2 Radovich Is Not Liable to Burbridge/ Bridges under the Indemnity Clause of the PSA.**

At pages 6-8 of its brief, Burbridge/Bridges assert that Radovich is liable to them under Section 10.2 of the 2004 PSA. At pages 43-46 of his opening brief, Radovich demonstrated that this provision, and the attorney fees section, do not apply because the dispute is between Burbridge/Bridges and Seattle Marine for an independent, separate transaction. This dispute was caused by the failure of Burbridge/Bridges own title company to pick up the old 1980 Quit Claim Deed, not by actions of Radovich.

Burbridge/Bridges claim that Radovich "overstated" the language in *Nunez v. American Bldg. Maintenance Co. West*, 144 Wn. App. 345, 352, 190 P.3d 56 (2008). Brief at 7. To the contrary, a closer look at *Nunez* shows strong support for the Radovich position. *Nunez* makes clear that "[t]he focus of indemnification clauses is on causation, not on negligence." 144 Wn.App. at 351. Thus did an action of the asserted indemnitor (Radovich) cause or create the circumstance regarding indemnity?

In *Nunez*, the court said:

But triggering the indemnification clause depends on control of the circumstances giving rise to Nunez's injury and her resultant lawsuit.

*Id.* at 352.

These legal standards are perfectly applicable here.

Radovich was not the cause of Burbridge/Bridges' contract dispute with Seattle Marine; the cause was the new contract between those parties (three years later), in which Radovich had no control.

Accordingly, Radovich cannot be required to indemnify Burbridge/Bridges.

#### **4.3 The “ABC Rule” Does Not Apply Here; Radovich Did Not Expose Burbridge/Bridges to Litigation.**

At pages 10-14, Burbridge/Bridges claim the so-called “ABC Rule” entitles them to recovery of attorney fees against Radovich. Under the rule, if a “wrongful act” of a party involves another in litigation with yet a third party, the wrongdoer may be liable for litigation expenses.

However, the factual underpinnings for application of this rule simply don't exist. Though Burbridge/Bridges claim that it was Radovich's “acts that lead to this litigation” and that his actions “undisputedly caused Burbridge/Bridges to be embroiled in this litigation” (Brief at 11), there are no references to the factual record to support these claims. Burbridge/Bridges refer to several Findings of Fact that they claim support their position at page 11 of their brief. However, the first of these findings only referenced the

execution of the 1980 Quit Claim Deed (Nos. 1.23, 1.26, 1.28 and 1.30 at CP 1584-86). The remaining findings discuss the land use dispute that followed the announcement of Seattle Marine's building plans.<sup>4</sup> None of these findings make reference to the initiation of the current dispute, which concerns property ownership, not land use permitting.

As will be discussed in more detail in Section 4.5 of this brief below, Radovich specially protected Burbridge/Bridges from any title problem by buying them a comprehensive title policy. See Section 6.3 of the PSA: "Seller (Radovich) shall deliver to Purchaser (Burbridge/Bridges) as soon after the closing date as practical an ALTA standard form owner's coverage policy of title insurance. . . ." CP 720. "Title insurance is a guaranty of the accuracy of a company search and record title on a specific property." *Kiniski v. Archway Motel, Inc.*, 21 Wn.App. 555, 560, 586 P.2d 502 (1978).

At pages 12-13, Burbridge/Bridges cites several out of state cases that would extend the ABC Rules beyond the parameters that exist in Washington. This generalized "some responsibility"

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<sup>4</sup> As Radovich pointed out in his opening brief, the dispute over the zoning issues could not be considered "wrongful" as Radovich and others are entitled to make their views on land use matters known to local government decision-makers. See Radovich Opening Brief at 41-42.

doctrine finds no basis in Washington caselaw. Washington law is that no attorney fees are recoverable in an action between grantor and grantee:

The statute, RCW 64.04.030, requires grantors to defend title; it does not provide attorney fees to grantees who bring suit.

*Mellor v. Chamberlin*, 100 Wn. 2d 643, 649, 673 P.2d 610 (1983).

This a corollary to the rule as described by Professor Stoebuck that no recovery of fees is appropriate in any event unless superior title is established:

It is axiomatic that a grantee may not recover from the grantor on any of the covenants, including the covenant to defend, unless it is somehow established that the third person who claims a superior right has it. This is simply another way of saying that the grantor is liable only if there is in fact a breach of a covenant.

18 Washington Practice § 14.4.

In summary, Burbridge/Bridges “made their own bed.” They made a new and separate transaction with Seattle Marine by Bargain and Sale Deed, which resulted in Burbridge/Bridges’ title insurer failing (again) to locate and disclose the duly recorded 1980 Quit Claim Deed. Neither Burbridge/Bridges nor the title insurer can hold Radovich responsible for their errors.

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**4.4 The “Collateral Source Rule” Does Not Apply Here; Burbridge/Bridges Cannot Ignore the Fact That PNWTIC Has Fully Paid Their Attorney Fees.**

It is uncontested here that Burbridge/Bridges paid not a single dime of their attorney fees in this case; their fees were paid by PNWTIC under its title policy (bought by Radovich for them). See Opening Brief at page 20; CP 2168.

Nonetheless, PNWTIC, attempting to step into the shoes of Burbridge/Bridges, asserts that it should recover these fees from Radovich under the “collateral source rule.” See Brief at pages 15-18. This rule is wholly inapplicable here.

The Collateral Source rule comes from tort principles; its purpose is to protect injured parties:

The rule comes from tort principles as a means of ensuring that a fact finder will not reduce a defendant's liability because the claimant received money from other sources, such as insurance carriers. *Id.* See also *Mahler*, 135 Wn. 2d at 412 n. 4, 957 P.2d 632, 966 P.2d 305. RCW 7.70.080.

*Diaz v. State, University of Washington*, 251 P.3d 249, 251 (2011).

However, Washington law makes clear that the collateral source rule only applies to sources of recovery that are independent of the party sought to be charged. As indicated in *Diaz*:

The collateral source rule is an evidentiary principle

that enables an injured party to recover compensatory damages from a tortfeasor without regard to payments the injured party received from a source independent of a tortfeasor. *Mazon v. Krafchick*, 158 Wn. 2d 440, 452, 144 P.3d 1168 (2006).

*Diaz v. State, University of Washington*, 251 P.3d 249, 251 (2011)

(emphasis supplied). However, in this case the title insurance at issue was actually purchased by Radovich for the benefit of Burbridge/Bridges. See discussion at Section 4.3 of this brief.

Another reason why the collateral source rule does not apply is that the rule concerns payment of damages, while this case involves only attorney fees. The title company here paid no damages to anyone because the trial court determined that the 1980 Quit Claim Deed was not a valid conveyance. However, Burbridge/Bridges claims that the title company was “contractually obligated to provide for Burbridge/Bridges’ defense.” Brief at 15. Burbridge/Bridges does not cite to the insurance contract and that contract is not a part of the record.<sup>5</sup>

Because no claim was paid, the case of *Transamerica Title Insurance Company v. Johnson*, 103 Wn.2d 409, 693 P.2d 697 (1985), cited by Burbridge/Bridges at page 18 of its brief, does not

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<sup>5</sup> Radovich requested that the contract be provided as a part of discovery, but it was not produced by Burbridge/Bridges. See CP 2159 (Request for Production 2).

apply here. There, the title company paid an outstanding sewer assessment lien and then commenced an action against the seller. 103 Wn.2d at 410. The court referenced the subrogation clause of the insurance contract in reaching its decision at page 411, but that clause provided no right to recover attorney fees in absence of the payment of a claim. Because that case dealt with payment of a claim, under a distinct provision of a title policy, it is inapplicable to the current facts, with no claim paid by the insurer and the recovery sought only for attorney fees.<sup>6</sup>

The "collateral source rule" does not apply here because the insurance contract was purchased by Radovich for Burbridge/Bridges and is thus not an independent third party policy.

#### **4.5 Subrogation Principles Do Not Permit the Pacific Northwest Title Insurance Company to Recover Attorney Fees Against Radovich**

In his opening brief, Radovich cited contemporary caselaw that held that a negligent title insurer will not be permitted to escape its contractual obligations to insure accurate title. See Opening Brief at pages 46-48. In response, Burbridge/Bridges (in reality PNWTIC) claim that the current case involves contractual

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<sup>6</sup> Washington courts distinguish between the duty of a title insurer to deny a claim and the duty to defend. See *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 471, 209 P.3d 859 (2009).

versus equitable subrogation and thus cases such as *Kim v. Lee*, 145 Wn.2d 79, 31 P.3rd 665 (2001) do not apply. Brief at 18-21.

The underpinning for Burbridge/Bridge's claim is contract principles; Burbridge/Bridges claim that "PNWTIC agreed to and is contractually obligated to cover Burbridge/Bridges' losses and expenses associated with title defect claims" and that Burbridge/Bridges "agreed to cooperate to minimize any losses and expenses. . ." Brief at 19. However, these statements come without any citation to any insurance contract nor to the record. Thus cases cited by Burbridge/Bridges at page 20 of their brief, where the insurance company "steps into the shoes of the insured" are inapplicable; Burbridge/Bridges cannot claim contract subrogation without a contract to back it up.

Nor is there any real difference between contractual and equitable subrogation. In *Transamerica Title Insurance Company v. Johnson*, 103 Wn.2d 409, 693 P.2d 697 (1985), error was claimed when the trial court refused "to consider equitable defenses to a contractual subrogation claim." 103 Wn.2d at 417.

The court concluded that:

We hold that whether arising by operation of law or under contract, subrogation is an equitable remedy subject to equitable defenses.

*Id.*

In any event, there are significant factual and equitable differences between this case and *Transamerica*. In *Transamerica*, the issue regarded the payment of sewer assessments. The seller knew about the sewer assessments; indeed, the listing agreement provided that the buyer was to assume them. 103 Wn.2d at 698. However, in an apparent attempt to hide the existence of this encumbrance, the seller changed the listing agreement to delete this requirement. 103 Wn.2d at 699. The Court rejected the seller's attempt to escape liability for these assessments. In contrast, the present case involves a deed which was some 24 years old and which Mr. Radovich had simply, and understandably, forgotten. See Section I of this brief. The facts of this case are devoid of attempts to conceal the deed or mislead anyone.

Nothing found in *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn. 2d 411, 415, 191 P.3d 866, 870 (2008) as cited by Burbridge/Bridges at page 19 of its brief, changes the foregoing. That case involved a matter of equitable subrogation between two insurance companies, not a claim by an insurance company against a third party. 164 Wn.2d at 419. Indeed, the Court refused to decide whether conventional subrogation and equitable

subrogation were equivalent. *Id.* at 424. Again, since there is no contract language before the Court, it cannot determine whether contractual subrogation even applies.

Lastly, Burbridge/Bridges claims that *Kim v. Lee, supra*, does not apply because it is an equitable subrogation case.<sup>7</sup> However, the court in *Kim*, and in *Coy v. Raabe*, 69 Wn.2d, 418 P.2d 728 (1966), specifically referenced that the parties were governed by the law of contracts. As the court said in *Coy*, a title insurer is "engaged in giving those expert opinions (on title matters) for a consideration" (69 Wn.2d at 350) and "Intervenor's (the title company) relationship is governed by the law of contracts." (*Id.* at 351). The court held that the subrogation is "a purely equitable doctrine." *Id.* at 350. As such, the court held that "cloak" of subrogation will not fall "automatically upon one who has simply made a mistake, when it is a commercial transaction involving a consideration." *Id.* at 351. Rather, the court held that: "It is not the province of the court to relieve a title insurance company of its

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<sup>7</sup> In a footnote at page 20, Burbridge/Bridges argues that "the validity of *Kim* is highly questionable after *Bank of Am. v. Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007)." Indeed in *Prestance* the Court of Appeals had found that the *Kim* case was "dispositive." 160 Wn.2d at 564. But the Supreme Court disagreed, noting that the *Kim* case involved right of a title insurer, while that case concerned a refinancing mortgagee, not a title insurer. *Id.* The Supreme Court did not limit or restrict *Kim* in the *Prestance* case.

contractual obligation." *Id.*

Applied here, a simple, but understandable mistake was made by Radovich in his failure to recall a 25 year old deed. Radovich, however, purchased for Burbridge/Bridges a title insurance policy to cover issues of title defects, which policy (apparently) called for payment of any costs of defense for Burbridge/Bridges. As in *Coy*, the court should not relieve the title company of this responsibility by allowing subrogation against Radovich.

**4.6 Having Sold the Commercial Parcel, and Entered into a New Transaction with Seattle Marine, Burbridge/ Bridges No Longer Has a Claim Against Radovich.**

In his opening brief, Radovich demonstrated that Burbridge/Bridges have no claims against him because the entirety of the property was conveyed to a new grantee, Seattle Marine, under a new contract. See pages 22-25. In its brief (pages 22-25), Burbridge/Bridges claim that deed covenants can be enforced by them even though they no longer own the property. This position defies common sense and the facts of this case.

First, Burbridge/Bridges claim that the warranties extend to the assigns of the original grantee and can continue to be enforced by them. Brief at 23. Whether or not that is true, the subsequent

grantee here, Seattle Marine, does not claim Radovich violated any deed covenants; Seattle Marine's only claims are against Burbridge/Bridges. CP 39-51.<sup>8</sup> There is not a word in Seattle Marine's Third Party Complaint (CP 39-51) about obligations that run from Radovich (or Keyes).<sup>9</sup> The entire basis for Seattle Marine's claims were contracts, deeds and communications between it and Burbridge/Bridges. Burbridge/Bridges cannot hold Radovich responsible for its own errors.

**4.7 Burbridge/Bridges Were Never Liable to Seattle Marine on the 1980 Quit Claim Deed Because their Specially Drafted Bargain and Sale Deed Excluded Such Liability.**

At pages 25-31 of his opening brief, Radovich described how Burbridge/Bridges and Seattle Marine agreed upon a very restrictive Bargain and Sale Deed to transfer title. That hand crafted language expressly "excludes all covenants arising or to arise by statutory or other implication." CP 188. Because of these limitations, Burbridge/Bridges had no liability to Seattle Marine and

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<sup>8</sup> The caption on the Burbridge/Bridges brief is inaccurate as it lists all parties as opposing Radovich. As the court knows from the briefing, this appeal is between only Radovich and Burbridge/Bridges.

<sup>9</sup> Though Seattle Marine and Burbridge/Bridges were nominally adversaries based on the Third Party Complaint, in fact, counsel for Burbridge/Bridges and Seattle Marine were "coordinating" efforts between themselves and Pacific Northwest Title, who was paying for representation of both parties. See CP 234-235.

thus no liability to pass through to Radovich.

Burbridge/Bridges never does explain why the bargain and sale deed was used instead of the more common statutory warranty deed, or the purpose served by the special deed language. However, it is obvious that this language was to assure that Burbridge/Bridges would not assume responsibility for old encumbrances and conveyances by limiting the covenants to only persons claiming through the grantor Burbridge/Bridges. *Id.* This purpose is confirmed by Professor Stoebuck's discussion of bargain and sale deeds:

Moreover, the covenants of the bargain and sale deed are only against title defects incurred by the grantor, not against defects that existed on the land when the grantor took title. As Washington has recognized, a deed that contains covenants against only defects incurred by the grantor is sometimes called a "special warranty deed." FN.7.

18 Washington Practice § 14.2. Professor Stoebuck's Footnote 7 discusses the same case cited by Radovich in his opening brief at page 28:

See the discussion in *Central Life Assur. Soc. v. Impelmans*, 13 Wn.2d 632, 126 P.2d 757 (1942). However, the court did not say that the deed form contained in RCWA 64.04.040 is a "special warranty deed."

Indeed, the bargain and sale deed statute specifically

allows the modification of bargain and sale deed language to fit individual circumstances. See Radovich Opening Brief at page 28 and RCW 64.04.040. Though stripped of its statutory covenants, and those that arise "by other implication," Seattle Marine accepted the deed, apparently satisfied that, notwithstanding the lack of any deed covenants, it could rely on title insurance for its protection.

Abandoning this deed language, Burbridge/Bridges now argues that this special deed language has no effect on their covenants and liability to Seattle Marine. Brief at 29. While this position seems against Burbridge/Bridges' best interests, at this stage of the proceedings, it is the only way for the title company to make its claim for fees.

The irony is that Burbridge/Bridges' lawyers did a fine job of protecting their client. The handcrafted language avoids "all covenants" except those created by Burbridge/Bridges. See Radovich Opening Brief at pages 28-29. The Burbridge/Bridges' brief attempts to create word games between a "bargain and sale deed" and a "special warranty deed" criticizing the *Central Life Assur.* case, *supra*, and other pertinent Washington authority, though, as discussed above, there is no difference.

But, call it what you may, the intent of the deed was to

severely limit deed covenants. Burbridge/Bridges made certain its conveyance to Seattle Marine had no covenants and cannot now claim they had liability to Seattle Marine borne out of a desire to make Radovich pay for the title company's attorney fees.

#### **4.8 Burbridge/Bridges Should Not Be Permitted to Challenge the Common Title.**

At pages 31-35 of its opening brief, Radovich demonstrated that Burbridge/Bridges, the long time co-tenant with Radovich in the property, is not permitted to challenge the common title between the parties. In its response at pages 31-35 of its brief, Burbridge/Bridges claims that they can assert claims against Radovich even though the title Burbridge/Bridges had was already encumbered with the 1980 Quit Claim Deed.<sup>10</sup>

As described in their opening brief, Burbridge/Bridges had acquired a one-half interest from the Keyes in the commercial parcel by contract in 1983 (CP 1034) and finally by deed in 1991 (CP 1001). The deed from Keyes to Burbridge in 1991 also failed to exempt the 1980 Quit Claim Deed, though in 2008, after PNWTIC discovered its title search error, it rerecorded Keyes' 1991 deed to Burbridge to include the 1980 Quit Claim Deed among its

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<sup>10</sup> Burbridge/Bridges admitted that the deed from Keyes that gave them their one-half interest in the property also failed to exempt the 1980 Quit Claim Deed. CP 1529-31.

exceptions. CP 195-198. Originally Burbridge/Bridges suit included Keyes but Keyes was later dropped. CP 1329.

Thus the relationship between the parties was not the usual arms-length vendor/purchaser situation, rather it was a unification of title between two tenants in common. Burbridge/Bridges cannot ignore the fact that the title they held prior to the unification also failed to exempt the 1980 Quit Claim Deed.

#### **4.9 Attorney Fees Should Be Awarded to Radovich, Not to Burbridge/Bridges.**

At pages 48-49 of his Opening Brief, Radovich requested that attorney fees both on appeal and at trial be awarded to him. Burbridge/Bridges does not respond to these assertions, other than to claim their own entitlement to attorneys fees. Brief at 35-36.

In this brief, Radovich has demonstrated that each of the claimed bases for an award of attorney fees lacks legal or factual basis. The PSA between the parties makes specific provision for the payment of attorney fees under Paragraph 19.3 (CP 728) "in the event that any action or proceeding is brought by either party against the other related to this Agreement, the substantially prevailing party shall be entitled . . . to costs and reasonable attorneys fees." Burbridge/Bridges cannot be considered as prevailing parties in this case; instead Radovich should be

considered the substantially prevailing party for the reasons stated herein. As such, fees should be awarded at both trial and on appeal to Radovich.

## **V. CONCLUSION**

PNWTIC failed on two separate occasions to locate a recorded quit claim deed, though they contracted to search title and identify all conveyances on the commercial parcel. The title company issued a title policy, with an apparent responsibility to defend their insured. PNWTIC now wants Radovich, the party that purchased this insurance policy, to pay their attorney fees. This court should reject that request.

At the outset, the linchpin of the attorney fees claim, that the 1980 Quit Claim Deed was a title defect, has been dismissed and that deed held invalid after a trial between the interested parties.

But Radovich has shown that he was not liable to Burbridge/Bridges on any "pass through" liability from Seattle Marine. Burbridge/Bridges made a new transaction with Seattle Marine, without any input or involvement from Radovich, and secured new title research and a new title policy. That transaction included a bargain and sale deed which expressly excluded any liability of Burbridge/Bridges for past transactions, including the

1980 Quit Claim Deed. For these reasons, Radovich is not liable under indemnity and attorney fee clauses of the contract.

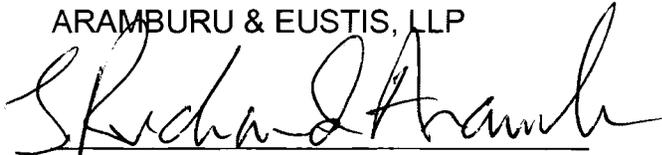
In fact, Burbridge/Bridges have not paid any attorney fees because they were paid by PNWTIC under the title insurance policy that was purchased by Radovich.

In the end, this case is about a negligent title insurer that wants to get its attorney fees back through subrogation. But that insurer accepted a premium from Mr. Radovich to research title and issue a policy of insurance to cover his sale to Burbridge/Bridges. That title insurer also agreed, if they made mistakes, to make good by defending their insured. That insurer cannot now ask others to pay attorney fees that are their own obligation.

The trial court's ruling that the Radoviches should pay attorney fees should be reversed and Radovich should recover its fees at trial and on appeal.

Respectfully submitted,

ARAMBURU & EUSTIS, LLP

A handwritten signature in black ink, appearing to read "J. Richard Aramburu", written over a horizontal line.

J. Richard Aramburu, WSBA #466

Attorney for John and Carol Radovich

NO. 66319-4-I

COURT OF APPEALS, DIVISION ONE  
STATE OF WASHINGTON

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THE NEWPORT YACHT BASIN ASSOCIATION OF  
CONDOMINIUM OWNERS, an unincorporated condominium  
association,

Respondent,

v.

SUPREME NORTHWEST, INC., a Washington corporation d/b/a  
SEATTLE BOAT NEWPORT, and SEATTLE MARINE  
MANAGEMENT COMPANY, LLC, a Washington limited liability  
company,

and

BRIDGES INVESTMENT GROUP, LLC, a Washington limited  
liability company, and DOUGLAS BURBRIDGE and MARGIE  
BURBRIDGE, husband and wife, and their marital community,

Additional respondents,

v.

JOHN and CAROL RADOVICH,

Appellants.

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DECLARATION OF SERVICE  
for REPLY BRIEF OF APPELLANTS RADOVICH

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STATE OF WASHINGTON  
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## DECLARATION OF SERVICE

The undersigned declares as follows:

I am an employee in the law office of J. Richard Aramburu over the age of 18 years and competent to be a witness herein. On the date below written, a copy of the foregoing REPLY and this declaration were served on counsel of record herein by email, addressed as follows, with hard copies placed in the U.S. mail or with messengers:

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I declare under the penalty of perjury under the laws of the  
State of Washington that the foregoing is true to the best of my  
knowledge and belief.

Dated at Seattle, Washington this 18<sup>th</sup> day of July,  
2011.

  
\_\_\_\_\_  
Carol Cohoe