

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 23, 2015, 4:08 pm
BY RONALD R. CARPENTER
CLERK

E

NO. 91932-1

h/h

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CENTURION PROPERTIES III, LLC,
and SMI GROUP XIV, LLC,

Plaintiffs-Appellants,

v.

CHICAGO TITLE INSURANCE COMPANY,

Defendant-Respondent.

Certification from the United States
Court of Appeals for the Ninth Circuit No. 13-35692

BRIEF OF RESPONDENT (DEFENDANT)

Stephen J. Sirianni, WSBA #6957
Ann E. Merryfield, WSBA #14456
SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
999 Third Avenue, Suite 3650
Seattle, WA 98104
Tel.: (206) 223-0303
Email: steve@sylaw.com
ann@sylaw.com

*Attorneys for Defendant/Respondent
Chicago Title Insurance Co.*



ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

Table of Contents

I.	INTRODUCTION	1
I.	STATEMENT OF THE CASE	4
A.	The plaintiffs	4
B.	The November 2006 transaction	4
C.	Mr. Henry’s acquiescence to Mr. Hazelrigg’s demands	6
D.	The July 2007 transaction	8
E.	Subsequent transactions	9
F.	Default, litigation and bankruptcy	10
G.	Summary judgment, appeal, and certification	12
II.	ARGUMENT	13
A.	The existence and scope of duty are legal questions that are governed by the same considerations.	13
B.	The “recording negligence” alleged by plaintiffs has nothing to do with recording; it has everything to do with underwriting and the preliminary commitment.....	14
C.	Precedent – Washington law.....	17
1.	Under settled Washington law, title companies owe no tort duty to their customers, much less to third parties, in connection with underwriting or the preliminary commitment.....	17
a.	Overview of the title process	17
b.	The <i>Barstad</i> decision	19

c.	Plaintiffs’ unsuccessful treatment of <i>Barstad</i>	21
2.	The proposed duty is contrary to established Washington slander of title law.....	24
3.	The Washington title insurance cases cited by plaintiffs are inapposite.....	25
4.	The Washington professional liability cases cited by plaintiffs are inapposite.	27
D.	Precedent – Out-of-state cases	30
1.	Overview.....	30
2.	This Court should follow <i>Luce</i>	30
3.	California’s <i>Seeley</i> is based on facts not present here, and should not be followed.	32
E.	Logic and common sense.....	35
1.	Lender Centrum’s instruction to Chicago Title did not create a duty to determine the validity of Centrum’s lien.	35
2.	Lender Centrum’s reliance, if any, on Chicago Title’s “professional judgment” did not create a duty to plaintiffs.	37
F.	Public policy	39
1.	Creating a duty to third parties in recording will undermine the State’s interest in prompt recording and title stability.....	39
2.	Creating a duty to third parties in recording will undermine the State’s interests in maintaining reasonable title insurance premiums.	40

3.	The duty advocated by plaintiffs cannot be limited, and will be unworkable.	41
G.	Justice will not be served by requiring title companies to police the parties' transactions.....	44
III.	CONCLUSION.....	47

Table of Authorities

Cases

<i>100 Investment Ltd. P'ship v. Columbia Town Center Title Co.</i> , 430 Md. 197, 60 A.3d 1 (2013)	22
<i>Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.</i> , 170 Wn.2d 442, 243 P.3d 521, 527 (2010)	13, 27, 28
<i>Bank of America v. Prestance Corp.</i> , 160 Wn.2d 560, 160 P.3d 17 (2007)	26, 40
<i>Barstad v. Stewart Title Guar. Co., Inc.</i> , 145 Wn.2d 528, 39 P.3d 984 (2002)	passim
<i>Bohn v. Cody</i> , 119 Wn.2d 357, 832 P.2d 71 (1992)	28
<i>Bonner v. Chicago Title Ins. Co.</i> , 194 Mich. App. 462, 487 N.W.2d 807 (1992)	38
<i>Brown v. Safeway Stores, Inc.</i> , 94 Wn.2d 359, 617 P.2d 704 (1980)	24
<i>Centennial Dev. Group, LLC v. Lawyers Title Ins. Corp.</i> , 233 Ariz. 147, 310 P.3d 23 (Ariz. App. 2013)	21
<i>Countrywide Home Loans Inc. v. U.S.</i> , 2005 WL 1355440 (E.D. Cal. 2005)	44
<i>Countrywide Home Loans, Inc. v. United States</i> , 2007 U.S. Dist. LEXIS 1625 (E.D. Cal. 2007)	44
<i>Courchaine v. Commonwealth Land Title Ins. Co.</i> , 174 Wn. App. 27, 296 P.3d 913 (2012)	19, 21
<i>Dave Robbins Constr., LLC v. First American Title Co.</i> , 158 Wn. App. 895, 249 P.3d 625 (2010)	21
<i>Dewar v. Smith</i> , 185 Wn. App. 544, 342 P.3d 328 (2015)	29

<i>ESCA Corp. v. KPMG Peat Marwick,</i> 135 Wn.2d 820, 959 P.2d 651 (1998).....	28, 37
<i>Fidelity Title Co. v. State of Wash. Dep't of Revenue,</i> 49 Wn. App. 662, 745 P.2d 530 (1987).....	31
<i>Hu v. Lowbet Realty Corp.,</i> 38 Misc.3d 589, 956 N.Y.S.2d 400 (2012).....	38
<i>Kim v. Lee,</i> 145 Wn.2d 79, 31 P.3d 665 (2001).....	25, 26
<i>Kirkland v. American Title Ins. Co.,</i> 692 F. Supp. 153 (E.D.N.Y. 1988).....	38
<i>Klickman v. Title Guar. Co. of Lewis County,</i> 105 Wn.2d 526, 716 P.2d 840 (1986).....	22
<i>Lee v. Fidelity Nat'l Title Ins. Co.,</i> 188 Cal. App. 4th 583, 115 Cal. Rptr. 3d 748 (Cal. App. 2010).....	22
<i>Luce v. State Title Agency,</i> 190 Ariz. 500, 950 P.2d 159 (Ariz. App. 1997).....	30, 31, 32, 33
<i>Michak v. Transnation Title Ins. Co.,</i> 148 Wn.2d 788, 64 P.3d 22 (2003).....	21
<i>Phillips v. Kaiser Aluminum & Chemical Corp.,</i> 74 Wn. App. 741, 875 P.2d 1228 (1994).....	28
<i>Roos v. Kimmel,</i> 55 Cal. App. 4th 573 (1997).....	15
<i>Schaaf v. Highfield,</i> 127 Wn.2d 17, 896 P.2d 665 (Wash. 1995).....	28
<i>Seeley v. Seymour,</i> 190 Cal. App.3d 844, 237 Cal. Rptr. 282 (Cal. App. 1987).....	passim
<i>Stewart Title Guar. Co. v. Sterling Sav. Bank,</i> 178 Wn.2d 561, 311 P.3d 1 (2013).....	29

<i>Transamerica Title Ins. Co. v. Johnson</i> , 103 Wn.2d 409, 693 P.2d 697 (1985).....	25
<i>Trask v. Butler</i> , 123 Wn.2d 835, 872 P.2d 1080 (1994).....	29, 35
<i>Vournas v. Fidelity Nat'l Title Ins. Co.</i> , 73 Cal. App. 4th 668, 86 Cal. Rptr. 2d 490 (1999).....	44
<i>Walker v. Anderson-Oliver Title Ins. Agency, Inc.</i> , 2013 UT App. 202, 309 P.3d 267 (UT App. 2013)	38
<i>Walker v. Transamerica Title Ins. Co., Inc.</i> , 65 Wn. App. 399, 828 P.2d 621 (1992).....	26, 27
<i>Webb v. Neuroeduc. Inc., P.C.</i> , 121 Wn. App. 336, 88 P.3d 417 (2004).....	28
<i>White v. Western Title Ins. Co.</i> , 40 Cal. 3d 870, 221 Cal. Rptr. 509, 710 P.2d 309 (Cal. 1985).....	22
<i>Zabka v. Bank of America Corp.</i> , 131 Wn. App. 167, 127 P.3d 722 (2005).....	45

Statutes

RCW 48.29.010	passim
RCW 48.29.010(b).....	19
RCW 48.29.010(c).....	17, 18, 19, 23
RCW 65.08.070	39
RCW 7.70.030	28

Treatises

18 William R. Stoebuck and John W. Weaver, WASH. PRACTICE: REAL ESTATE TRANSACTIONS, § 14.17 (2d ed. 2004)	18
--	----

I Wash. State Bar Ass'n WASHINGTON REAL PROPERTY
DESKBOOK (4th ed. 2009 and Supp. 2014) 18, 34, 43

I. INTRODUCTION

The Federal District Court granted summary judgment to Defendant/Respondent Chicago Title. It ruled that as a matter of law, a title company owes no duty of care to third parties such as plaintiffs in connection with presentation of instruments for recording. The District Court got it right.

The Ninth Circuit certified the duty question to this Court. It did so because it found no Washington case directly on point. The Ninth Circuit was correct in one respect. There is no reported Washington case with claims or facts identical to ours. The Ninth Circuit was mistaken, however, in concluding that there is no controlling Washington case law. The Ninth Circuit misunderstood the holding and effect of *Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 39 P.3d 984 (2002), which controls this case and which plaintiffs do not as much as mention in their opening brief.

This is not a case in which there was an ineffective recording. Chicago Title presented facially valid instruments for recording. It did so in a timely fashion and in the correct office. This case is simply a back-door attack on long-established rules, set down in *Barstad*. That is because any error, in this case, was made at the pre-commitment underwriting stage. Under *Barstad*, such errors do not engender tort liability to the insured, much less to anyone else.

Plaintiffs' brief emphasizes three inapplicable items. *First*, Chicago Title has "admitted" negligence for purposes of the summary judgment motion only. The issue here, however, is not whether Chicago Title was negligent, but whether, and to whom, it owed a duty. Chicago Title "conceded" negligence in order to focus the Court's attention on duty, which is different than whether defendant made a mistake.

Second, plaintiffs note that lender Centrum Financial, Chicago Title's actual customer, instructed it to record when it was committed to insuring lender Centrum with a valid second lien. From this, plaintiffs argue that Chicago Title owed them, non-parties, a duty of care. That argument is question-begging. The issue is whether Chicago Title owes a duty to *third parties* such as plaintiffs. Any duty it undertook to a customer such as lender Centrum is beside the point.

Moreover, the instruction does not demand a guarantee that the second lien is valid. It merely requires that once the title company has agreed to issue an insurance policy that indemnifies against loss caused by invalidity, it should record lender Centrum's deed of trust. As shown below, indemnifying against loss is different than guaranteeing that the loss will never occur.

Third, plaintiffs emphasize Chicago Title's alleged knowledge that the instruments in question were signed by an individual who lacked

authority. Chicago Title conceded, for purposes of summary judgment, that it had access to information – contained in three documents totaling over 100 pages – that it did not compare and analyze. ER 588. Nothing in this record, however, indicates that Chicago Title had *actual* knowledge of invalidity. Had Chicago Title actually known the lien was invalid, it would never have committed to insure in the first place. Any “knowledge” is constructive, imparted by documents that were in Chicago Title’s possession.

Title companies arguably have constructive “knowledge” of every document in their possession, and thus of most defects in the chain of title. Plaintiffs’ theory would make title companies liable to third parties for all such defects to the extent not specifically excepted from coverage.

The public interest will not be advanced by overturning settled law and upsetting settled expectations. This case does not involve the risk of physical injury to third parties or some special relationship to which Chicago Title was a party. This is a case in which the plaintiffs were in a position to protect themselves. In fact, plaintiffs’ sole owner *cooperated* with the allegedly unauthorized signatory to violate provisions of the very agreements that plaintiffs now claim Chicago Title should have known established lack of signing authority. It should not be the title company’s

duty to police contractual agreements among parties that the parties themselves fail to respect.

An affirmative answer to the certified question would destabilize land titles, causing title companies to: (a) decline to record, or (b) delay recording in order to re-check the condition of title. At the very least, such an outcome would drive up the title insurance premiums charged to the public and invite destabilizing gap recordings.

The answer to the certified question should be “No.”

I. STATEMENT OF THE CASE

A. The plaintiffs

Plaintiffs are Centurion Properties III, LLC (“CPIII”) and SMI Group XIV, LLC (“SMI”). At the time of the alleged wrongdoing, SMI was a 10 percent minority member of CPIII. ER 287, ¶3.9.¹ SMI is now the sole member of CPIII. SMI is and has always been entirely owned by Michael Henry. ER 284, ¶3.3. Thus, CPIII is now – through SMI – 100 percent owned and controlled by Mr. Henry.

B. The November 2006 transaction

In 2006, Mr. Henry also owned Sigma Management, Inc. Sigma had a lucrative contract to manage the large commercial complex occupied

¹ Most of the facts recited in subsections A-C are from plaintiffs’ original Complaint, verified by Mr. Henry, filed in Benton County Superior Court (ER 278-306), and from Mr. Henry’s deposition testimony.

by the Battelle Institute in Richland (“the Property”). However, the Property’s leasehold owner was planning to sell it. Mr. Henry had to buy the leasehold interest to protect Sigma’s contract and his income stream. ER 284-86, ¶¶3.4-3.6.

Mr. Henry sought financing from General Electric Credit Corp. (“GECC”) but needed an additional investor. ER 233. He found Thomas R. Hazelrigg III. ER 233-35; ER 286, ¶3.7. Together, they formed plaintiff CPIII, the purchasing entity.

Mr. Hazelrigg and Mr. Henry agreed that: (a) 90 percent of CPIII was owned by individuals and entities controlled by Mr. Hazelrigg; and (b) 10 percent was owned by Mr. Henry’s wholly owned entity, plaintiff SMI. ER 287, ¶3.9.

GECC lent CPIII purchase money of about \$70 million, secured by a senior lien on the Property. ER 187, ¶26. Neither Mr. Henry nor SMI contributed any cash to the purchase, which closed in November 2006. ER 286, ¶¶3.7, 3.8.

Non-party Centurion Management (“CMIII”) was the managing member of plaintiff CPIII. CMIII originally owned 78 percent of CPIII. ER 287, ¶3.9. CMIII was owned by Aaron Hazelrigg, Tom Hazelrigg’s son. *Id.* Aaron Hazelrigg signed the November 2006 loan instruments with

GECC. He did so as the managing member of CMIII and the authorized principal of CPIII. ER 458, 495, 381.

Chicago Title escrowed the 2006 CPIII purchase. It insured CPIII's title and GECC's deed of trust lien. ER 46, ¶¶3-4, 474. Plaintiffs do not claim Chicago Title erred while performing its escrow or insuring functions. No one has made a claim under either 2006 title policy. *Id.*

C. Mr. Henry's acquiescence to Mr. Hazelrigg's demands

Soon after the 2006 closing, Mr. Hazelrigg began demanding that CPIII's funds be diverted to him. ER 289, ¶3.12. Mr. Henry knew that this would violate both CPIII's loan agreement with GECC (ER 412-72) ("GECC Loan Agreement") and the "CPIII Operating Agreement" (ER 379-411). He nonetheless did as Mr. Hazelrigg instructed. In particular, and as plaintiffs admit in their original verified Complaint:

(1) In January 2007, "against [his] will," Mr. Henry approved Mr. Hazelrigg's demand for over \$3 million of CPIII's money. Mr. Henry disbursed the \$3 million to Mr. Hazelrigg knowing that he was violating the GECC Loan Agreement. ER 289, ¶3.12; ER 243-44.

(2) In March 2008, Mr. Hazelrigg demanded that Mr. Henry sign a "Consent by Members" of CPIII backdated to January 1, 2007, well before all of the transactions and recordings that plaintiffs and Mr. Henry now attack. The Consent (ER 276) gave Mr. Hazelrigg authority to:

(a) bind CPIII “for the purpose of refinancing or financing any loans encumbering [CPIII’s] property”; and (b) “execute ... and deliver any and all documents incident to any mortgage or encumbrance.” ER 276; ER 293-94, ¶3.23.

Mr. Henry signed the Consent even though: (a) he admittedly did not trust Mr. Hazelrigg; (b) the Consent was backdated; (c) he believed it incorrectly showed Mr. Hazelrigg as an owner of CMIII; and (d) he believed it violated CPIII’s Operating Agreement and had not been approved by GECC. ER 252-57; ER 266-67; ER 293-94, ¶¶3.22-3.23.

(3) In mid-2009, before Mr. Henry took over management of plaintiff CPIII, Mr. Hazelrigg demanded that CPIII pay him \$50,000 a month. Mr. Henry agreed. As he told Mr. Hazelrigg, “I will do what you ask as always.” ER 264-65.

It is against this backdrop of Mr. Henry’s collaboration with and rubber-stamping of the Hazelriggs’ misconduct from January 2007 to mid-2009 that we describe the 2007-2008 transactions and recordings that were caused by the Hazelriggs’ conduct, but for which plaintiffs now seek to hold Chicago Title responsible.

Plaintiffs complain that five instruments (“Instruments”): (a) were executed by one of the Hazelriggs in violation of the CPIII Operating Agreement and the GECC Loan Agreement; and (b) created apparent liens

on CPIII's Property, allegedly preventing CPIII from refinancing the GECC debt. Chicago Title had nothing to do with negotiating or preparing those Instruments. ER 47, ¶¶6-7. Chicago Title is said to be liable for millions of dollars of alleged loss caused by the Instruments simply because it delivered four of the five to the County for recording.

D. The July 2007 transaction

On July 10, 2007, Aaron Hazelrigg signed the first Instrument, a junior deed of trust to lender Centrum. ER 78-97. Plaintiffs claim it was unauthorized, although Aaron Hazelrigg signed in his capacity as managing member of CMIII, which was the managing member of CPIII. ER 97. (Aaron Hazelrigg warranted, on behalf of CPIII, that CPIII "has the full right, power and authority to execute and deliver this ... Deed of Trust") ER 88.

Chicago Title did not act as escrow. Centrum did its own disbursements. ER 40, ¶6. Chicago Title's sole functions were to: (a) issue a policy of title insurance to Centrum as committed; and (b) record Centrum's Deed of Trust. ER 47. Plaintiffs have made no claim based on the policy issued to lender Centrum.

There is no evidence that anybody at Chicago Title who worked on the relevant transactions actually knew of the ostensible lack of authority. The evidence only establishes that as of July 2007 when the first Instrument

was recorded, the CPIII Operating Agreement (ER 380-411), the GECC Loan Agreement (ER 413-72), and the GE Deed of Trust (ER 474-97) were in Chicago Title's files, and Chicago Title had access to that information.

As instructed, Chicago Title presented Centrum's July 2007 Deed of Trust for recording and issued a lender's title insurance policy to Centrum. ER 40, ¶¶5-6; ER 47, ¶¶5-7. Chicago Title received no instructions or compensation from plaintiffs regarding the July 2007 transaction. ER 47, ¶5. Chicago Title's only customer in the July transaction was lender Centrum.

E. Subsequent transactions

Chicago Title recorded two additional Deeds of Trust and one Memorandum of Agreement on March 10, November 5, and November 6, 2008. ER 41, ¶¶8-9; ER 48-49, ¶¶11-13. Those recordings were purely accommodations to lender Centrum, the requesting party. ER 48, ¶12. Chicago Title issued no commitments or policies, did not examine the conditions of title, and performed no escrow functions. ER 47-48, ¶¶8-10. Chicago Title's sole remuneration from Centrum for the three

accommodation recordings was reimbursement of the \$52, \$63 and \$46 recording fees charged by the County Auditor. ER 48, ¶11.²

F. Default, litigation and bankruptcy

On September 30, 2009, GECC notified CPIII that it was in default under the GECC Loan Agreement because: (a) junior liens had been filed against the Property; (b) CPIII had incurred prohibited additional debt; (c) CPIII had been administratively dissolved by the State of Washington; and (d) CMIII had also been administratively dissolved and replaced as managing member of CPIII without GECC's prior written consent. ER 533-36. Thus, the presence of junior liens was only one of several defaults of which GECC complained. Although GECC "reserved its rights to" impose default interest or accelerate the loan, it took no such action at that time. ER 535.

On November 9, 2009, Mr. Henry, as sole member of SMI, formally took control of CPIII from the Hazelriggs. ER 538-43. He applied to a prospective lender to refinance the GECC loan. ER 659-76. The GECC loan matured on November 30, 2009. Mr. Henry did not obtain a refinancing commitment before that date. ER 422, 608.

² Non-party First American Title, through its agent Frontier Title, recorded another Deed of Trust on behalf of Centrum on April 7, 2008. ER 48, ¶10; ER 49, ¶13; ER 120-39. Chicago Title had nothing to do with that Deed of Trust or its recording.

On January 6, 2010, GECC declared that CPIII was in default for not paying its debt when due. ER 608. The Notice of Default said nothing about unauthorized liens. *Id.* GECC commenced foreclosure. ER 201, ¶¶67. Centrum also began foreclosure, but did so under its April 2008 Deed of Trust recorded by non-party First American Title. ER 200, ¶¶65; ER 48, ¶10.

On February 4, 2010, plaintiffs filed suit in Benton County Superior Court (“Benton County Action”) against numerous defendants, including Tom Hazelrigg, Aaron Hazelrigg, Centrum and others. Plaintiffs did not sue Chicago Title. ER 278. Plaintiffs alleged that the named defendants misappropriated funds from CPIII, improperly transferred ownership of CPIII, and improperly and secretly placed liens, *i.e.*, the Instruments, on CPIII’s property. ER 294-96. Plaintiffs sought, among other things, to: (a) enjoin foreclosure of the allegedly unauthorized liens; and (b) quiet title by voiding the Instruments that allegedly created those liens. ER 303-05.

On July 9, 2010, CPIII filed for Chapter 11 bankruptcy. On July 28, 2010, plaintiffs removed the Benton County Action to the Federal District Court for the Eastern District of Washington. ER 840. The lawsuit was referred to the bankruptcy court as an adversary action (“Adversary Proceeding”). ER 833. The Adversary Proceeding involved, among other things, a complex dispute over who owned and controlled CPIII. ER 180-81, ¶¶8-9; ER 217-18, ¶¶142-48; ER 309-12.

On April 14, 2011, plaintiffs amended their Complaint in the Adversary Proceeding to assert one claim, for negligent recording, against Chicago Title. ER 218-20. Plaintiffs base their negligence claim on Chicago Title's possession of three documents generated for the flawless 2006 transaction: (1) the CPIII Operating Agreement, ER 380-411 (allegedly received again in connection with the July 2007 transaction); (2) the GECC Loan Agreement, ER 413-72; and (3) the GECC Deed of Trust, ER 474-97 (collectively, the "GE Agreements"). Only the last was recorded in the public records.

CPIII's reorganization plan was confirmed. Plaintiffs' claims against the Hazelriggs, Centrum, and others were settled. CPIII did not need to resolve its claim against Chicago Title in order to obtain confirmation; Chicago Title remained as the only defendant.

As a result of the settlement and confirmed plan: (a) Mr. Henry's SMI obtained 100 percent ownership of CPIII; (b) the Instruments were removed from the public record; and (c) the GECC loan was refinanced. ER 369, ¶25. The parties settled before any court determined whether the Instruments were actually invalid.

G. Summary judgment, appeal, and certification

The negligence claim against Chicago Title was sent back to Federal District Court. Chicago Title moved to dismiss because: (a) it owed

plaintiffs no duty when it recorded; and (b) Chicago Title did not cause plaintiffs' alleged damage. The District Court granted summary judgment, holding that Chicago Title had no duty to the non-customer plaintiffs. ER 1-18. In so doing, it noted that plaintiffs did not claim any special relationship with Chicago Title. ER 8. It found no Washington precedent supporting the existence of a duty under the facts presented. ER 9. It dismissed the case without deciding the causation issue. Plaintiffs appealed to the Ninth Circuit, which certified, to this Court, the question: "Does a title company owe a duty of care to third parties in the recording of legal instruments?"

II. ARGUMENT

A. **The existence and scope of duty are legal questions that are governed by the same considerations.**

Chicago Title agrees that in determining whether a defendant owes a duty in tort, the Court should consider precedent, logic, common sense, policy, and justice, as applied to the facts of the case. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010).

Those same considerations determine the duty's scope. *Id.*, 170 Wn.2d at 455 (the reasons for recognizing that a class of people are within the scope of duty are often "the same reasons for recognizing a duty of care in the first instance"). Both the existence and scope of duty are questions of law for the Court to decide. *Id.* These considerations should lead the

Court here to conclude that Chicago Title did not owe a duty to plaintiffs, and more generally, that a title company owes no duty to third parties when it delivers facially valid documents for recording. Because the existence and scope of duty are both questions of law to be decided by applying the same considerations, plaintiffs' concern over improper combination of those issues is misplaced.

B. The "recording negligence" alleged by plaintiffs has nothing to do with recording; it has everything to do with underwriting and the preliminary commitment.

Plaintiffs complain that Chicago Title recorded four Instruments that were signed by one of the Hazelriggs, who lacked authority to do so. Plaintiffs do not claim, nor could they, that Chicago Title is liable for escrow negligence. Chicago Title was not the escrow agent for any of the four Instruments that it recorded. Three of the recordings were mere accommodations; Chicago Title was not asked to, and did not, serve as escrow or issue preliminary title commitments or title insurance policies. The fourth, in June 2007, involved an escrow conducted by lender Centrum itself. ER 40, ¶6.

Plaintiffs do not claim, nor could they, that Chicago Title negligently issued a preliminary commitment to them. Chicago Title issued no commitment and no policy to plaintiffs in connection with any of the four Instruments.

Plaintiffs' sole claim is that Chicago Title is liable for negligent recording. Of what does that alleged negligence consist? The recordings themselves were flawless. Here, Chicago Title presented the Instruments for recording in the correct county. The Instruments were properly recordable on their faces. The signatures on those Instruments were acknowledged. Each Instrument bore a legal description. Chicago Title did not delay recording, which could have allowed another claimant to file before the Instruments were recorded. *Compare, e.g., Rooz v. Kimmel*, 55 Cal. App. 4th 573 (1997) (title company sued when it delayed recording a deed of trust, causing holder's lien to be junior to the lien of claimant that filed during the gap). There was nothing defective about the recording process, and plaintiffs do not claim otherwise.

Plaintiffs' argument, stripped to its essence, is that Chicago Title made an underwriting mistake: It committed to issue the July 2007 Centrum lender's policy without sufficient investigation of the signatories' authority. Plaintiffs do not make a direct attack based on the alleged underwriting error. Instead, they couch their indirect attack on that underwriting process in terms of "negligent recording."

What should Chicago Title have done to avoid "negligent recording"? It could have delayed the July 2007 recording and duplicated its underwriting process, repeating all of the examination steps performed

prior to the earlier (pre-commitment, pre-closing) issuance of the preliminary commitment. Of course, that takes resources which increase costs. It also creates a temporal gap between: (1) closing and disbursement of loan funds; and (2) recording the deed of trust that secures the lender's right to repayment. If recording is delayed to reconfirm the results of the underwriting that was done before the preliminary commitment issued, real estate transfers will be destabilized and lien priorities lost to competing claimants who record during the delay between closing and recording. In any event, if the way to avoid the "negligence" of which plaintiffs complain is to re-underwrite, that shows that plaintiffs' attack is not on the recording process, but on the underwriting process.

Plaintiffs may reply that there is no need to delay recording to do another title search; the title company should do it correctly the first time, *i.e.*, when it does its initial underwriting prior to issuance of the commitment. Such an answer merely highlights the central flaw in plaintiffs' argument. It assumes that this case is really about whether title companies have the duty in tort to uncover and list all title defects (such as lack of authority) on the preliminary commitment. As discussed in the next section, this Court has already answered that question in the negative.

With respect to the three Instruments recorded as an accommodation to lender Centrum, plaintiffs have no basis for claiming a duty. The only

instruction Chicago Title received was a recording request from its customer, lender Centrum. Chicago Title made no error when it properly delivered the Instruments to the recorder's office. It was not asked to issue a commitment or insure, and it did not do so. Thus, it had no reason to consult the documents in its files or title plant before delivering the Instruments for recording.

C. Precedent – Washington law

- 1. Under settled Washington law, title companies owe no tort duty to their customers, much less to third parties, in connection with underwriting or the preliminary commitment.**

a. Overview of the title process

Lenders will seldom make a secured loan, and buyers will seldom purchase, without assurance that a title company will issue them a policy of title insurance. The customer needs to know, before closing its transaction, what title defects the policy will not cover. Thus, well before closing and recording, the title company supplies the customer with a “preliminary commitment.” A commitment is just that: a title company's contractual promise to issue a policy of title insurance insuring against some defects in title, but not others. RCW 48.29.010(c); *Barstad, below*.

To prepare the commitment, the title company conducts a risk assessment. That assessment may consist, generally, of searching relevant real estate records for preexisting liens and encumbrances, and analyzing

other possible sources of title defects. Risk assessment (sometimes referred to as the “title search”) is an underwriting process designed to help title companies determine which title risks to assume and indemnify against and which to omit from coverage. *See* I Wash. State Bar Ass’n WASHINGTON REAL PROPERTY DESKBOOK (4th ed. 2009 and Supp. 2014), ¶14.7.

Failure to except a title defect on a preliminary commitment can occur due to the type of mistake alleged here. It can also occur due to the title company’s deliberate decision, during the underwriting process, to assume and “insure around” the risk posed by a known title defect. That is the nature of underwriting. Some risks are deemed acceptable, and others are not. 18 William R. Stoebuck and John W. Weaver, WASH. PRACTICE: REAL ESTATE TRANSACTIONS, § 14.17 at 174 (2d ed. 2004).

Thus, title companies do not guarantee that there are no title defects other than those set forth in the commitment or policy itself. The title commitment is an offer to issue a title policy under the terms and conditions provided in the commitment. It is not a representation of the condition of title. RCW 48.29.010(c).³ It is not an “abstract” of title, *i.e.*, a representation or guarantee that there are no title defects except as listed in

³ The same is true of life and casualty policies. Thus, the life insurer that fails to take exception for a known pre-existing health condition is not guaranteeing that that condition does not exist. It is simply assuming the risk of loss in the event that the pre-existing condition causes the insured-against event – death.

the abstract itself. The Legislature has made this clear. *Compare* RCW 48.29.010(b) (defining abstract of title) with RCW 48.29.010(c) (defining preliminary commitment).

If a party desires a representation on which it can rely as to the status of title, it needs to order (and pay for) an abstract. *Barstad, below*. Lender Centrum did not order an abstract. It, like most customers, ordered a preliminary commitment and a policy.

The policy itself is issued after the sale or loan closes and the relevant title instruments (*e.g.*, deed or deed of trust) are recorded. *See, e.g.*, ER 62 (Centrum's policy references the County recording number). In the policy, the title company agrees to indemnify the insured from loss caused by title defects that are not excluded or excepted from coverage. A title insurance policy is a contract of indemnity, not an abstract (RCW 48.29.010(b)) and not a guarantee of validity. *See Courchaine v. Commonwealth Land Title Ins. Co., above*, 174 Wn. App. 27, 35, 37, 296 P.3d 913 (2012).

b. The Barstad decision

Barstad v. Stewart Title Guar. Co., Inc., 145 Wn.2d 528, 534, 39 P.3d 984 (2002), confirmed the foregoing. There, the defendant title company failed, in the preliminary commitment, to advise its insured lenders of defects of which the title company was aware, including: (a) lack

of platting and subdivision for the collateral; (b) a potential lien priority conflict among the insureds; and (c) problems with the proposed division of loan proceeds. Plaintiff lenders sought damage in tort, claiming that the title company was negligent.

This Court unanimously held that: (1) a commitment is only an offer to the proposed insured to issue a title insurance policy under specifically stated conditions (*id.*, 145 Wn.2d at 536); (2) the title company's underwriting/title examination is for the title company's benefit (not the customer's) in determining the scope of the policy to be offered (*id.* at 540); (3) title insurers have no duty to customers to disclose defects that were or should have been unearthed during the underwriting/title examination (*id.* at 541); (4) common industry practice is consistent with the proposition that no duty exists (*id.* at 541); and (5) the 1997 amendments to RCW 48.29.010, clarifying that no such duty exists, applied retroactively because that has always been the law in Washington (*id.* at 541). The holding that a title company had no tort duty to its insured when it underwrote or committed to

insure title is consistent with the law in the majority of states in the Ninth Circuit (*id.* at 541).⁴

Since *Barstad* was decided, Washington courts have consistently refused to transform a title commitment into an abstract or guarantee of title, or to impose duties on title companies that exist neither by statute nor contract. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 799, n.6, 64 P.3d 22 (2003) (reversing appellate court decision that effectively transformed a preliminary commitment into an abstract of title); *Courchaine v. Commonwealth Land Title Ins. Co.*, *above*, 174 Wn. App. at 38 (title company had no duty to except an encumbrance from a policy); *Dave Robbins Constr., LLC v. First American Title Co.*, 158 Wn. App. 895, 899-900, 249 P.3d 625, 627 (2010) (purpose of title company's underwriting was to determine scope of title policy it would issue; as a matter of law, there was no duty to disclose to proposed insured).

c. Plaintiffs' unsuccessful treatment of Barstad

In the Federal District Court proceedings, plaintiffs attempted to distinguish *Barstad* by claiming this case is not about a preliminary

⁴ *Barstad* cited California, Oregon, Idaho, and Nevada cases holding that a title insurer has no duty in tort when it searches title in preparation to issuing a preliminary commitment. *Barstad*, 145 Wn.2d at 541. Since *Barstad* was decided, Arizona has joined that list. *Centennial Dev. Group, LLC v. Lawyers Title Ins. Corp.*, 233 Ariz. 147, 310 P.3d 23 (Ariz. App. 2013).

commitment.⁵ In so arguing, they ignore that Chicago Title's error – if any – was in failing to carefully review documents in its possession when it committed to insure Centrum's July 2007 deed of trust. But Chicago Title had no duty to anyone to identify defects in the validity of title it was insuring. Its only duties were to issue a policy of title insurance consistent with its commitment, and to indemnify its insured in the event of a covered loss. Not even the insured has a tort claim against a title insurer for faulty underwriting or for failing to list all title defects on the preliminary commitment. If an insured such as Centrum has no such claim, uninsured entities such as plaintiffs *a fortiori* do not. *See, e.g., Klickman v. Title Guar. Co. of Lewis County*, 105 Wn.2d 526, 529, 716 P.2d 840 (1986) (even before *Barstad*, a title company had no duty to non-insured seller to disclose recorded instrument).

In short, this Court has slammed the front door on the argument that title insurance underwriting generates a tort duty to anyone – insureds or

⁵ Curiously, while arguing this case is not about a commitment, plaintiffs rely on cases involving a title insurer's duty when it negligently fails to list a defect on the preliminary commitment. Those cases are contrary to Washington law. *See 100 Investment Ltd. P'ship v. Columbia Town Center Title Co.*, 430 Md. 197, 60 A.3d 1 (2013) (Maryland law, unlike Washington law, imposes a tort duty on a title insurer to its customer when searching title and issuing a title commitment); *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 221 Cal. Rptr. 509, 710 P.2d 309 (Cal. 1985) (a title company had a tort-based duty to disclose all title defects in the preliminary commitment). *White* was subsequently abrogated by a California statute providing, as does a Washington statute, that a title commitment is not a representation of the status of title. *See Lee v. Fidelity Nat'l Title Ins. Co.*, 188 Cal. App. 4th 583, 596, 115 Cal. Rptr. 3d 748, 757 (Cal. App. 2010) (title insurer cannot be held liable for negligence in connection with a preliminary commitment).

third parties who, like plaintiffs, had not engaged the title company's services. Plaintiffs, finding the front door locked, now seek entrance through the back. If plaintiffs gain entrance – if the Court holds that title companies have a duty to third parties when recording facially valid documents – this Court will likely have overruled *Barstad* and undone the legislative scheme that *Barstad* relied on. If *Barstad* is so overruled, title company exposure will materially increase. Title companies will lose the protections afforded by policy limits and conditions, not just in connection with recording, but in connection with the entire underwriting process. Title companies will become “abstractors,” and will be held responsible for failure to list all title defects in the preliminary commitment. Such an outcome will not only drive title insurance premiums sky high, it may force title companies to abdicate their role in the recording process.

More fundamentally, overruling *Barstad* would fly in the face of legislation (RCW 48.29.010(c)) establishing that title companies are *not* subject to tort liability in connection with their underwriting function and the issuance of preliminary commitments. The Legislature has spoken authoritatively on this subject. To overrule *Barstad* would be to void legislation that has no constitutional infirmity and that is based on policy considerations already balanced by another branch of state government.

Alternatively, if this Court imposes a recording duty on third parties but does not overrule *Barstad*, the law of title insurance will become incoherent. If *Barstad* survives, title companies will have no tort duty to their own insureds to avoid mistakes in the underwriting process and the drafting of preliminary commitments. However, noncustomer third parties will have tort claims against the title company for errors it makes in the underwriting/examination process and in listing of title defects in preliminary commitments. Title companies will owe a greater duty to noncustomers than to the customers with whom they have a relationship. This result does not commend itself to public policy or common sense.

2. The proposed duty is contrary to established Washington slander of title law.

Well before *Barstad* was decided, this Court had established the general rule governing wrongful recording. The wrongful filing of a document is the essence of slander of title. However, to prove slander of title, a plaintiff must show that the defendant recorded maliciously. All that plaintiffs plead here is negligence. There is no evidence of malice. Negligent recording is not sufficient to state a claim. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375, 617 P.2d 704 (1980). Plaintiffs' proposed duty would impose a new negligence standard for wrongful recording applicable only to title companies, and is contrary to Washington precedent.

3. The Washington title insurance cases cited by plaintiffs are inapposite.

Plaintiffs argue that the Washington cases limiting a title company's tort liability do not apply here. Assuming that plaintiffs are correct, they still must demonstrate the existence of a duty to them. The mere fact that Chicago Title was "negligent" does not create a duty. "Negligence in the air, so to speak, will not do." *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697, 700 (1985) (quoting W. Prosser, TORTS, §53 at 331 (3d ed. 1964) (title insurer owed no duty to non-insured seller). Plaintiffs claim a duty can be found from ordinary tort principles but fail to identify those principles.

Plaintiffs cite *Kim v. Lee*, 145 Wn.2d 79, 31 P.3d 665 (2001), for the proposition that title companies have a duty of care when performing title searches. In *Kim*, the court for the first time considered whether takeout lenders could use equitable subrogation to protect the anticipated priority of their liens. The court declined to apply subrogation. It reasoned that the new loan terms to the lender seeking subrogation would prejudice the intervening lien holders who resisted subrogation. *Id.*, 145 Wn.2d at 90. The court also held that the lender seeking subrogation (or its title insurer) had "actual notice" of the intervening lien because it was of record.

In *dicta*, the court remarked that a title insurer that misses the intervening lien and insures the new lender in first lien position should not be allowed to avoid its *contractual obligation* under the insurance contract to indemnify the insured lender. *Id.* at 91. At most, *Kim* supports the position that a title insurer is liable to its insured under its contract of title insurance. Here, however, that contract was with lender Centrum, not plaintiffs. Centrum is not suing Chicago Title. *Kim* provides no support for plaintiffs' theory that title insurers are liable in tort to anyone, especially those who are not its insureds.

In any event, *Kim* was largely eviscerated in *Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007). This Court held that a refinance lender's actual or constructive knowledge of intervening liens does not automatically preclude equitable subrogation. *Id.*, 160 Wn.2d at 567. The Court emphasized the public policy of saving "billions of dollars by reducing title insurance premiums." *Id.* at 580-81. The "actual knowledge" of the subsequent lender imputed from the "actual knowledge" of its title insurer no longer prevents equitable subrogation, much less create a duty in tort to non-insureds.

Plaintiffs cite *Walker v. Transamerica Title Ins. Co., Inc.*, 65 Wn. App. 399, 828 P.2d 621 (1992), for the proposition that "negligence has been recognized in Washington even when the recording was done as an

accommodation or ‘courtesy.’” Pls.’ Br. at 20. *First*, the case turned on lack of proximate cause. For purposes of summary judgment, the title company asked the court to assume all other elements of the cause of action, including duty. *Id.*, 69 Wn. App. at 402.

Second, even had there been a holding on duty, the case is factually distinguishable. The title company was “negligent” because it recorded an instrument on behalf of its own insured that was facially invalid. The instrument lacked a property description. The title company erred in carrying out its ministerial recording function. Plaintiffs here make no such claim.

4. The Washington professional liability cases cited by plaintiffs are inapposite.

Unable to find any tort duty in Washington title cases, plaintiffs turn to negligence cases involving other professions. In each case, a duty was imposed for reasons not present here. Plaintiffs rely on *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, *above*. There, the court extended an engineer’s tort duty to a non-client because of the risk of personal or physical injury inherent in the engineer’s work. 170 Wn.2d at 452 (“An interest we must consider is the safety of persons and property from physical injury, an interest that the law of torts protects vigorously ...”) and *id.* at

456. *Affiliated FM* does not support extension of a duty to plaintiffs in this case, where there was no personal safety risk.⁶

Plaintiffs also cite *Webb v. Neuroeduc. Inc., P.C.*, 121 Wn. App. 336, 346, 88 P.3d 417 (2004), holding that a mental health professional had a tort duty to her patient's parent. That duty was founded in statute, RCW 7.70.030. No Washington statute suggests that a title insurer has a duty to non-customers when it issues a title policy or records the insured instrument. The relevant statute here makes clear no such duty is owed anyone, not even to customers. RCW 48.29.010.

The attorney, accountant, and appraiser cases plaintiffs cite are all negligent misrepresentation cases. Plaintiffs have not made a claim for negligent misrepresentation, nor could they. They allege no reliance on Chicago Title. To the contrary, they claim that Mr. Hazelrigg deceived them by not informing them of the transactions or Instruments until after the recordings. ER 294, ¶3.24.⁷

⁶ Plaintiffs also cite *Phillips v. Kaiser Aluminum & Chemical Corp.*, 74 Wn. App. 741, 875 P.2d 1228 (1994), a personal injury action which imposed a duty on an employer for insuring the safety of independent contractors over whom it retains control. It was not a professional negligence case, and involved a threat to human safety.

⁷ See *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (Wash. 1995) (purchaser had no cause of action for negligent misrepresentation against appraiser whose report was defective, because purchaser did not rely on it); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 832, 959 P.2d 651 (1998) (in a negligent misrepresentation claim brought by non-client bank, accountant was not liable for error in draft audit because bank did not justifiably rely on it); *Bohm v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992) (attorney had duty not to mislead unrepresented third party with whom he was dealing).

In *Dewar v. Smith*, 185 Wn. App. 544, 342 P.3d 328 (2015), the court found an accountant owed a duty to a third party because he was the intended beneficiary of the client's tax refund that the accountant prepared. This Court has made clear, however, that a professional owes no duty to a non-client unless there was an intent to benefit the non-client. *Trask v. Butler*, 123 Wn.2d 835, 843, 872 P.2d 1080 (1994) (the threshold question is whether the plaintiff was intended to benefit; "no further inquiry need be made unless such an intent exists.").

Recently, this Court confirmed that a third party must be an intended, not an incidental, beneficiary of a professional's actions. *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561, 567, 311 P.3d 1 (2013) (non-client must show it was intended beneficiary of the attorney's advice, not simply that its interests might be affected or that the client and non-client's interests were aligned).

Plaintiffs do not claim they were intended beneficiaries of: (a) lender Centrum's instruction; (b) the commitment issued to lender Centrum; (c) the title policy issued to lender Centrum; or (d) the recording done at lender Centrum's request. Even if such claims were made, there is no evidence to support them. To the contrary, plaintiffs take the position that lender Centrum was conspiring with the Hazelriggs to misappropriate plaintiffs' assets (rather than to benefit plaintiffs) by creating, signing and

recording the Instruments in question. ER 294-97, ¶¶3.24-3.28; ER 303, ¶¶5.1-5.2. Under “ordinary tort principles,” no duty of care extended to plaintiffs.

D. Precedent – Out-of-state cases

1. Overview

The Ninth Circuit cited two non-Washington cases – *Luce v. State Title Agency*, 190 Ariz. 500, 950 P.2d 159 (Ariz. App. 1997), and *Seeley v. Seymour*, 190 Cal. App.3d 844, 237 Cal. Rptr. 282 (Cal. App. 1987) – that address a title company’s duty to third parties when it delivers an instrument for recording. If this Court finds that the holding in *Barstad* does not answer the question certified, it should follow the holding in *Luce*. That case involved facts virtually identical to ours.

2. This Court should follow *Luce*.

In *Luce*, the appellant limited partner, like plaintiffs here, alleged that a general partner signed a deed of trust even though the partnership agreement did not authorize him to do so. The lender, like Centrum, sent a letter to the title company requesting a title policy insuring its lien and directing the title company to record the deed of trust. Like Chicago Title, the title company in *Luce* prepared a title commitment, provided a lender’s title insurance policy, and recorded. The title company acknowledged that it reviewed the partnership agreement that limited the general partner’s

authority. The trial court thus inferred that the title company had knowledge of the limitation. *Luce*, 950 P.2d at 160.

The limited partner sued, claiming the title company owed it a duty based either on its review of the partnership agreement or its recording of the deed of trust. The court affirmed summary dismissal. It distinguished cases imposing a tort duty to third parties because, as here, the title company had no “special relationship” with the injured plaintiff and no control over the general partner’s operation of the partnership. *Id.* at 162.

Plaintiffs fail to distinguish *Luce*. See Pls.’ Br. at 23, n.4. **First**, they argue the title company in *Luce* was “not instructed to determine the validity of the lien.” Neither was Chicago Title. See *below* at 36-37. The title companies here and in *Luce* were instructed to record and issue a policy. There is no difference.

Second, plaintiffs argue that no title insurance policy was issued in *Luce*. They are incorrect. “[The title company] prepared a preliminary title report, [and] provided a lender’s policy of title insurance” *Luce*, 950 P.2d at 160.⁸

⁸ Plaintiffs may be trying to distinguish *Luce* because there, the defendant title company was an independent agent of a national title insurer, while the alleged tort here occurred at a Chicago Title branch office. That is a distinction without a difference. See *Fidelity Title Co. v. State of Wash. Dep’t of Revenue*, 49 Wn. App. 662, 664, 745 P.2d 530 (1987) (the “branch office of a title insurer ... does exactly the same work as an independent company and produces the same product”).

Third, plaintiffs claim the title company in *Luce* did not have knowledge of the prohibition against junior liens. Yet in *Luce*, just as in our case, the title company possessed (and in *Luce*, reviewed) the agreement that prohibited the lien. The trial court inferred actual knowledge of all its provisions. *Id.* at 160.

Fourth, plaintiffs attempt to distinguish *Luce* because there, the title company had no contractual relationship with anyone. The title company in *Luce*, however, had as much of a contract with the lender as Chicago Title did with lender Centrum. In both cases, the lender ordered a preliminary commitment and instructed the title company to record the deed of trust and issue the policy. *Id.* at 160. In neither case did the third-party plaintiff have a contractual relationship with the title company. In any event, the *Luce* court's decision did not turn on the absence of a contract; it held that "[e]ven if a contractual relationship did exist regarding the recordation," there was no duty. *Id.* at 162.

3. California's *Seeley* is based on facts not present here, and should not be followed.

Plaintiffs rely on *Seeley v. Seymour*, *above*. In that case, a scoundrel prepared a Memorandum of Lease. Intending to prevent plaintiff from selling the property, he asked the title company to record. The Memorandum was facially invalid because it lacked the owner's signature.

The title company was liable for “negligent recordation of a *non-recordable* document.” *Id.*, 237 Cal. Rptr. at 290 (emphasis added). *Seeley* falls into that small group of cases where the title company made a mistake in the ministerial act of recording. Unlike our case, *Seeley* did not hinge on an underwriting error that preceded recording.⁹

Moreover, the holding in *Seeley* was based on a special relationship not present here. The title company had agreed with the County to verify all documents for facial validity before presenting them at a “special location.” *Id.* at 291, n.7. The title company’s special relationship with the recording office created a “duty to inspect the instrument for recordability before presenting it to the recorder for special recordation under the circumstances presented here.” *Id.* at 292. In our case, there was no agreement between Chicago Title and Benton County or anyone else suggesting that Chicago Title was giving its “seal of approval” to the Instruments it delivered for recording.

The court in *Luce* considered *Seeley* and distinguished it on the same grounds. *Luce*, 950 P.2d at 162. Plaintiffs incorrectly argue these distinctions do not matter. *First*, they claim that the contract with the county recording office in *Seeley* is analogous to the lender Centrum’s instruction

⁹ The question certified here is not limited to non-recordable documents. An affirmative answer would apply to all documents a title company presents for recording.

to record. There is no similarity. The contract in *Seeley* imposed unique duties on the title company. The instruction to record after committing to insure the lien as valid, or in whatever condition the proposed insured requests, is common. It is routinely used by insureds to make sure an acceptable policy issues. *See* I WASH. REAL PROP. DESKBOOK, *above*, §14.12 at 14-18 (the “best way” for an insured to know that a policy will be issued when a transaction closes is to send the document to a title company for recording with “express written instructions to record only when the company is in a position to insure title in a manner satisfactory to the proposed insured”).

Second, plaintiffs incorrectly claim that the title company’s “actual knowledge” – in this case possession of documents other than the Instruments recorded which, if carefully analyzed, would reveal a potential lack of authority – is equivalent to presenting a facially void document. However, the invalidity of a facially void instrument can be identified by going no further than the document itself. No examination of other instruments is needed to know that a legal description or signature is missing. Conversely, to uncover non-facial defects, a title company must commit significant resources to reviewing all the documents in its files and title plant and making other inquiries. That is not a task a title company

would ordinarily undertake during the ministerial process of delivering an instrument to the recorder's office. ER 49, ¶¶14-15.

Third, *Seeley* relied on a standard for imposing a tort duty to third parties that Washington does not follow. *Seeley* held that the transaction need only "affect" the plaintiff. *Seeley*, 237 Cal. Rptr. at 291. Washington has rejected that standard, requiring instead that the plaintiff be an *intended beneficiary* of the transaction. *Trask v. Butler*, 123 Wn.2d at 843 (*see above* at 29). *Seeley* does not apply.

E. Logic and common sense

1. Lender Centrum's instruction to Chicago Title did not create a duty to determine the validity of Centrum's lien.

The instruction on which plaintiffs rely reads in full:

You may record the leasehold [Deed of Trust], *provided you are irrevocably committed to insure the enclosed Mortgage*, on a mortgagee's extended basis with coverage of \$10,000,000, as a valid SECOND lien against the leasehold property *which is the subject of the commitment for title insurance issued under the referenced file number*, subject only to the matters set forth therein.

ER 58 (bold italics added; caps in original).

First, assuming that this instruction created some kind of duty, the duty was to the author of the instruction, lender Centrum. Plaintiffs' argument that the instruction from lender-customer Centrum created a duty to them is question-begging. The *issue* is whether Chicago Title owed a

duty to third parties such as plaintiffs. Any duty it undertook to a customer such as lender Centrum is beside the point.

Second, this instruction only required that Chicago Title record once it had committed to issue a policy insuring the validity and priority of Centrum's lien. The focus was on Chicago Title's commitment to insure. Centrum did not instruct Chicago Title to determine or guarantee that the lien was, in fact, valid. What counted for Centrum was that Chicago Title was willing to insure the validity and priority of Centrum's lien. ER 40, ¶5.

Third, the inclusion of the word "valid" added nothing to the instruction. Then-current ALTA forms, including the policy form issued to lender Centrum, automatically insured against "[t]he invalidity or unenforceability of the lien of the Insured mortgage upon the title." ER 60. The term "valid" in the instruction was surplusage.

In any event, no title company would knowingly agree to insure an invalid instrument. That would be like a casualty company agreeing to insure against a loss that it knew had already occurred. No instruction to determine lien validity is ever needed. What counts, and what protects the proposed insured, is an instruction to record only when the title company is committed to insuring in accordance with the terms of its preliminary commitment.

2. Lender Centrum's reliance, if any, on Chicago Title's "professional judgment" did not create a duty to plaintiffs.

Plaintiffs argue that Chicago Title had a duty to them because Chicago Title's customer, lender Centrum, was relying on its "professional judgment." Pls.' Br. at 2. The argument breaks down at every step.

First, Centrum did not ask Chicago Title to "determine" that the lien was valid. It asked Chicago Title to issue a title policy insuring it in second lien position, and to record once it was committed to insure. The lien was insured as valid, and the deed was recorded. Centrum's concern was in obtaining title insurance, not in determining the validity of the lien. ER 40, ¶¶5, 7.

Second, even if Centrum had relied on Chicago Title to determine the validity of the lien, the question is whether non-party plaintiffs have any rights against Chicago Title. Plaintiffs do not explain how the latter follows from the former.

Third, any reliance by lender Centrum would not have been justified and could not form the basis of a duty to the non-party plaintiffs. *See ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 832, 959 P.2d 651 (1998) (accountant owed no duty of care to bank which did not justifiably rely on accountant's draft report in making loan). Centrum did not seek, or pay for, an abstract of title. It asked only for a title policy consistent with a

commitment. Under *Barstad*, Chicago Title owed no tort duty to Centrum, its customer, to exercise its professional judgment in determining the validity of the lien. Any exercise of professional judgment was for Chicago Title's own benefit for the purpose of determining the scope of the policy it would issue to Centrum. *Barstad, above*, at 540. Its duties to its customer were to issue a policy and record the deed of trust – duties it fulfilled.

Fourth, since Chicago Title had no duty to its customer to exercise its professional judgment in determining whether or how to insure, it cannot have had such a duty to plaintiffs. A title insurer's "mistake" in deciding to insure does not render it liable to third parties. *See, e.g., Kirkland v. American Title Ins. Co.*, 692 F. Supp. 153, 157 (E.D.N.Y. 1988) (title company negligently insured strip of property owned by insured's neighbor; it had no tort duty to neighbor for damages caused by cloud on title); *Hu v. Lowbet Realty Corp.*, 38 Misc.3d 589, 956 N.Y.S.2d 400, 407 (2012) (title company insured buyer's title without discovering corporate seller's lack of authority to sell; title company owed no duty to non-insured owner/seller); *Walker v. Anderson-Oliver Title Ins. Agency, Inc.*, 2013 UT App. 202, 309 P.3d 267, 275 (UT App. 2013) (title company had no duty to neighbor for failing to except neighbor's easement on insured's title policy, even though title company had actual knowledge of the easement); *Bonner v. Chicago Title Ins. Co.*, 194 Mich. App. 462, 487 N.W.2d 807, 810 (1992) (although

state law imposed tort duty of care to insured, title company owed no such duty to insured's neighbors; neighbors could not recover, from title company, legal fees incurred in successful lawsuit against insured whose easement across the neighbors' property the title company had negligently insured).

F. Public policy

1. Creating a duty to third parties in recording will undermine the State's interest in prompt recording and title stability.

A tort of "negligent recording" of a facially non-defective instrument would have a chilling effect on recording. Frequently, the task of recording instruments falls on the title companies. If a more exacting recording duty were imposed on title companies, they could: (a) refuse to record; and (b) decline to insure against competing recordings made during any gap between disbursement of funds and recording the relevant instrument. This would place the task of recording on the parties themselves. The parties would likely not be familiar with the mechanics or importance of recording, resulting in delayed, improper or omitted recordings, thus undermining the goals of the Recording Act, RCW 65.08.070.

Alternately, if title companies chose to deliver the document for recording, they would be forced to conduct an in-depth title search before

recording. This would create a larger temporal gap between disbursement of funds and recording. However, it is critical that recording occur as close to the time of closing, (*i.e.*, to the point at which the lender or buyer disbursed funds) as possible. The longer the gap between fund disbursement and recording, the greater the chance that an intervening claimant will record a competing instrument (*e.g.*, a judgment or deed of trust) that would take priority.

The stability of land titles depends on recording immediately upon closing. There is no time for a second title check just prior to recording. That is why the recording function is ministerial. It cannot be the recording clerk's duty to examine the status of title.

2. Creating a duty to third parties in recording will undermine the State's interests in maintaining reasonable title insurance premiums.

This Court recently recognized the importance of maintaining reasonable title insurance premiums. *See Bank of America v. Prestance Corp.* 160 Wn.2d at 580, *above* at 26. The duty plaintiffs seek to impose could require a title company, every time it records a document that it has committed to insure, to assume the duties and liabilities of an abstractor. That duty would extend to insureds and non-insureds alike, eviscerating protections now afforded by policy limits and other contractual limits on coverage – limits that do not apply to tort damages. Imposing such a duty

would expose the title companies to liability to anyone claiming an interest in the real estate in question. This would unravel the established title insurance rate structure, which is based on longstanding recognition that a title insurer does not serve as an abstractor/guarantor unless an abstract is ordered and paid for.

Moreover, any rule which causes delay in real estate closings creates substantial risk to the title company, which can be sued by either party to the transaction (lender/borrower or buyer/seller) for loss of the deal.

For example, a delayed closing may cause a loan commitment to expire or a purchase and sale agreement to expire. This would allow the lender, in the first instance, and the buyer or seller, in the second, to end the transaction. To the extent that the title company caused the delay by re-underwriting prior to recording, the title company would face exposure to claims by the jilted party.

3. The duty advocated by plaintiffs cannot be limited, and will be unworkable.

Plaintiffs argue that this case is in some way unique and extreme, and that imposition of a duty here would not impose substantial new burdens on title companies. But if the rule plaintiffs urge applies to these facts, it would apply every time a title company issues a policy and records an insured instrument that failed to identify a title defect of any kind. It is

noteworthy that the Ninth Circuit did not limit the certified question only to this set of facts.

(a) Plaintiffs claim that the duty can be limited to cases where the title company “knew” that the junior liens were prohibited. But Chicago Title’s “knowledge” was based on its possession of relevant documents, and its review of them in connection with the 2006 transaction.

Chicago Title’s knowledge in this case is no different than that of every title company whose title plant and transaction files include documents that impart constructive knowledge. Title companies can always be said to have knowledge – constructive or inquiry – of: (1) what is in title plants, escrow files, title files and the public record; and (2) what the title officer could have learned by interviewing lenders, buyers and sellers and by inspecting the property. Limiting a tort duty to situations in which the title company has “knowledge” is no limitation at all.

(b) Plaintiffs claim Chicago Title “knew” that recording the liens could cause plaintiffs harm. Such “knowledge” is no different than the general knowledge of all title officers that the recording of liens affects property rights.

(c) Plaintiffs claim Chicago Title was instructed to “determine validity” before recording. That is a misreading of the instruction. Every title policy insures an interest as “valid.” The instruction here was not

unusual or unique. See I WASH. REAL PROP. DESKBOOK at §14.12. See discussion at p. 34, *above*. Limiting the title company's tort duty to cases in which it receives standard instructions is not a significant limitation.

(d) Plaintiffs claim this case is unique because Chicago Title conceded "carelessness" for purposes of the summary judgment motion. They claim that Chicago Title did not review documents to identify possible lack of authority when it prepared to insure title in July 2007. However, in almost every case where a title company could be sued for negligence, it is because the title company did not identify some type of title defect. A rule making title companies liable to their insureds and/or third parties for *any* failure to identify a title defect during the underwriting/title examination process is no limitation on liability. It would be a radical expansion of title company exposure, and would impose a tort duty that would eviscerate RCW 48.29.010 and *Barstad*.

Plaintiffs argue that California's title industry has not suffered even though *Seeley* recognized a tort duty to third parties when a title company records. Pls.' Br. at 27. But the tort duty there was limited to the negligent recording of a facially invalid document when a title company had a special relationship with the county recorder. Neither fact is present here. See discussion at 33-34, *above*.

California courts have not extended *Seeley* beyond its facts. *Vournas v. Fidelity Nat'l Title Ins. Co.*, 73 Cal. App. 4th 668, 676, 86 Cal. Rptr. 2d 490 (1999) (holding *Seeley* inapplicable; when insuring title, title company owed trust beneficiaries no duty to police the activities of the trustee who sold trust property in violation of the trust agreement).¹⁰

G. Justice will not be served by requiring title companies to police the parties' transactions.

Plaintiffs argue that justice compels a court to favor an “innocent” party over a negligent professional. Plaintiffs’ argument assumes that a title company – which is asked only to insure title and record instruments – has knowledge of the transaction that is superior to the knowledge of the parties that negotiated and signed the documents. As the District Court observed, title insurers do not cause an instrument to exist. ER 15. There is no evidence that Chicago Title was involved in the negotiation or creation of the Instruments or in the debt they were to secure. It merely delivered those Instruments, already fully executed, to the recorder’s office.

¹⁰ The only case plaintiffs cite that relied on *Seeley*'s holding on negligent recording is *Countrywide Home Loans Inc. v. U.S.*, 2005 WL 1355440 (E.D. Cal. 2005). The court there declined to grant a 12(b)(6) motion by a title company that recorded an allegedly unauthorized lien reconveyance. However, that court later granted summary judgment in the title company’s favor, holding as a matter of law that it was not liable for the recording. *Countrywide Home Loans, Inc. v. United States*, 2007 U.S. Dist. LEXIS 1625, *64 (E.D. Cal. 2007).

As a matter of justice, a title company should not be thrust into the position of policing a party's transactions when the party itself is in a better position to do so. *Zabka v. Bank of America Corp.*, 131 Wn. App. 167, 173, 127 P.3d 722, 725 (2005) (bank was negligent, but owed no duty of care to plaintiffs who could have taken steps to avoid fraud by bank's customer; dismissal affirmed). It cannot be the title company's duty to reconcile arguably conflicting provisions in underlying corporate or loan documents. That is a job for the parties themselves, or their attorneys.

Plaintiffs, which were owned by a sophisticated businessman, were far from innocent. ER 283-84, ¶3.2 Through their principal Mr. Henry, plaintiffs were in the best position to avoid the misuse of corporate assets and credit of which they now complain. Plaintiffs claim that Chicago Title ignored prohibitions in the GE Agreements. Yet Mr. Henry has admitted that he was aware of and complicit in Tom Hazelrigg's violations of those very Agreements as early as January 2007, well before recording the first Centrum Deed of Trust in July 2007.

Mr. Henry claims his complicity was a result of his lack of power as the minority owner. However, plaintiffs' original complaint, verified by Mr. Henry, identifies another reason for his complicity: "Hazelrigg threatened to fire Sigma as the management company unless Henry gave him the money." Accordingly, *to protect the Sigma contract*, and since

Henry did not have the ability under the CPIII Operating Agreement to control CPIII's actions, he "reluctantly allowed Hazelrigg" to withdraw funds in violation of the CPIII Operating Agreement. ER 289, ¶3.13 (emphasis added).

Mr. Henry was aware of Hazelrigg's various violations of the GE Agreements. Yet there is no evidence that he availed himself of the dispute resolution provisions in the CPIII Operating Agreement (ER 401-02, ¶33), or otherwise attempted to notify those who dealt with CPIII of the violations. In fact, in 2008, Mr. Henry gave Hazelrigg complete authority to mortgage the Property, knowing that Hazelrigg had previously acted in violation of the GE Agreements. ER 252-57; ER 266-67; ER 276; ER 293-94, ¶¶3.22-3.23.

Plaintiffs now claim that it was Chicago Title's duty to save plaintiffs from a deal that was tainted from the start. Yet there is no evidence that Chicago Title was ever aware of any of this taint, or of the disputes between Mr. Henry and the Hazelriggs. Under plaintiffs' theory, Chicago Title had a duty to do what plaintiffs admit they did not do for themselves: stop the Hazelriggs from acting in violation of the GE Agreements. As a matter of justice, Chicago Title should not bear the risk that the Hazelriggs would breach Agreements that Mr. Henry had signed

(and to which Chicago Title was not party), when Mr. Henry knew of and facilitated the Hazelriggs' breaches of those Agreements.

If title companies are forced to bear this risk, the result will be increased title premiums that all consumers will be forced to pay. It would be unjust for consumers to be forced to bear the cost of policing transactions that the parties themselves should monitor and control.

III. CONCLUSION

For all the reasons stated above, the certified question should be answered: "No."

DATED: October 23, 2015.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER



Stephen J. Sirianni (WSBA #6957)
Ann E. Merryfield (WSBA #14456)
Attorneys for Defendant/Respondent
Chicago Title Insurance Company

Certificate of Service

I certify, under penalty of perjury pursuant to the laws of the United States and the State of Washington, that on October 23, 2015, a true copy of the foregoing BRIEF OF RESPONDENT was served by email upon counsel for Plaintiffs/Appellants as indicated below:

Timothy J. Droske
DORSEY & WHITNEY, LLP
50 South 6th Street, Suite 1500
Minneapolis, MN 55402
Email: droske.tim@dorsey.com

Peter S. Ehrlichman
DORSEY & WHITNEY, LLP
701 Fifth Avenue, Suite 6100
Seattle, WA 98104
Email: ehrichman.peter@dorsey.com

Todd S. Fairchild
DORSEY & WHITNEY, LLP
701 Fifth Avenue, Suite 6100
Seattle, WA 98104
Email: fairchild.todd@dorsey.com

Steven J. Wells
DORSEY & WHITNEY, LLP
50 South 6th Street, Suite 1500
Minneapolis, MN 55402
Email: wells.steve@dorsey.com

DATED: October 23, 2015, at Seattle, Washington.



Stephen J. Sirianni (WSBA #6957)

OFFICE RECEPTIONIST, CLERK

To: Jean Fallow
Cc: Timothy J. Droske; Peter S. Ehrlichman; Todd S. Fairchild; Steven J. Wells; Steve Sirianni; Ann Merryfield
Subject: RE: Centurion Properties III, et al. v. Chicago Title Ins. Co. (No. 91932-1) - Brief of Respondent

Received on 10-23-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jean Fallow [mailto:Jean@sylaw.com]
Sent: Friday, October 23, 2015 4:08 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Timothy J. Droske <droske.tim@dorsey.com>; Peter S. Ehrlichman <ehrlichman.peter@dorsey.com>; Todd S. Fairchild <fairchild.todd@dorsey.com>; Steven J. Wells <wells.steve@dorsey.com>; Steve Sirianni <Steve@sylaw.com>; Ann Merryfield <Ann@sylaw.com>
Subject: Centurion Properties III, et al. v. Chicago Title Ins. Co. (No. 91932-1) - Brief of Respondent

TO: Clerk of the Washington Supreme Court
FROM: Stephen J. Sirianni and Ann Merryfield, Attorneys for Defendant/Respondent Chicago Title Ins. Co.
RE: *Centurion Properties III, et al. v. Chicago Title Ins. Co.* (No. 91932-1)

Attached for filing in this matter is the Brief of Respondent. Thank you.

Stephen J. Sirianni (WSBA #6957)
Ann E. Merryfield (WSBA #14456)
SIRIANNI YOUTZ SPOONEMORE HAMBURGER
999 Third Avenue, Suite 3650
Seattle, WA 98104
Tel. (206) 223-0303
Fax (206) 223-0246
steve@sylaw.com
ann@sylaw.com

Sent by: Jean Fallow, Legal Secretary