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CERTIFICATION FROM THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

IN

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

Plaintiffs-Appellants-Cross Appellees,

v.

CHICAGO TITLE INSURANCE COMPANY,

Defendant-Appellee-Cross Appellant.

Ninth Circuit Nos. 13-35692 & 13-35725

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**PLAINTIFFS' REPLY BRIEF**

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## INTRODUCTION

Chicago Title's brief mischaracterizes Plaintiffs' claim and the law of this Court. Chicago Title's primary argument is that this case is controlled by this Court's decision in *Barstad v. Stewart Title Guar. Co. Inc.*, 145 Wn.2d 528, 39 P.3d 984 (2002). But as the Ninth Circuit explained in its Order Re Certification, *Barstad* "does not prove that title companies have blanket immunity from tort liability." Order Re Certification at 10 (*citing Barstad*, 145 Wn.2d at 536, 39 P.3d at 988). Chicago Title's argument regarding *Barstad*'s applicability is also belied by its own concession that "[t]here is no reported Washington case with claims or facts identical to ours." Chicago Title Br. at 1.

The facts of this case are critical to the question certified by the Ninth Circuit. The proper analysis of duty "is always to be determined on the *facts of each case* upon mixed considerations of logic, common sense, justice, policy, and precedent." *King v. Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228, 235 (1976) (emphasis added) (cited in Plaintiffs' Opening Br. at 13). This case is not about whether there is a "general duty to disclose title defects in preliminary commitments," which was the sole issue before this Court in *Barstad*. *See Barstad*, 145 Wn.2d at 541, 39 P.3d at 991. Nor is this a case where "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,” as argued by Chicago Title. *See* Chicago Title Br. at 8. Chicago Title was not a mere “delivery” service, nor is that the basis for Plaintiffs’ claim. While title insurance companies may not always be tasked with exercise of their professional skill and judgment, Chicago Title was so instructed in this case. Plaintiffs’ claim is based upon the negligent exercise of that skill and judgment.

The specific facts which give rise to a duty of reasonable care in this case are:

- (1) Chicago Title was instructed by its customer to record the first of four liens only if Chicago Title could insure it as a “valid second lien” (ER 58);
- (2) Chicago Title’s customer specifically provided Chicago Title with the documents it needed to determine the validity of all four liens that Chicago Title recorded (ER 510);
- (3) Chicago Title knew from those documents that none of the liens were valid (ER 13);
- (4) Chicago Title knew that recording the invalid liens would cause harm to Plaintiffs (ER 13, 513-17); and
- (5) Chicago Title has stipulated that it was careless in recording the four invalid liens (ER 5).

These facts make this case factually very similar to the California Court of Appeals decision in *Seeley v. Seymour*, 190 Cal. App. 3d 844, 237 Cal. Rptr. 282 (1987), where the Court “concluded emphatically that the title company defendant did owe a duty of care to a third party to

refrain from negligent recording of title documents.” Order Re Certification at 10. The duty of care recognized in *Seeley* was not found to be inconsistent with California’s corresponding holding, similar to *Barstad*, that “title insurance companies have no general disclosure duty in preliminary commitments.” *Barstad*, 145 Wn.2d at 541, 39 P.3d at 991 (citing *Lawrence v. Chi. Title Ins. Co.*, 192 Cal. App. 3d 70, 76, 237 Cal. Rptr. 264 (1987)). Based on these facts, applying the relevant considerations of logic, common sense, justice, policy and precedent, and following *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010), this Court should find that Chicago Title had a duty of care to avoid recording legal instruments that it knew to be invalid.

## ARGUMENT

### **A. Chicago Title’s Focus on “Underwriting” Mischaracterizes Plaintiffs’ Claim and the Question Certified to this Court by the Ninth Circuit.**

Chicago Title’s first argument is to twist Plaintiffs’ claim, contending that “Plaintiffs’ argument, stripped to its essence, is that Chicago Title made an underwriting mistake.” Chicago Title Br. 15. This misrepresents both the claim made in this suit and the question certified to this Court. First, as a factual matter, Chicago Title’s argument is simply

wrong.<sup>1</sup> This case concerns recording, not underwriting. It is entirely irrelevant to Plaintiffs' claim what internal process Chicago Title went through in preparing its offer to sell an insurance policy to a customer, *i.e.*, the underwriting process.

Plaintiffs' claim is exclusively focused on Chicago Title's actions and inactions in connection with the *recording* of four invalid liens—the act of presenting documents to the county auditor for entry in the public land title records, through which a property owner's real estate title becomes encumbered (or clouded) by recorded instruments. Recording is an act that occurs after underwriting, or, in many cases, without any underwriting (*e.g.*, an “accommodation recording”). Chicago Title's negligent act was recording liens it knew to be invalid, an act that is separate and distinct from underwriting an insurance policy. The fact that Chicago Title was tasked by its client with determining the validity of the liens as a precondition to *recording* does not transform its negligence into an “underwriting error.”

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<sup>1</sup> In addition, Chicago Title's strategy is to bombard the Court with disputed factual assertions that are irrelevant to the duty issue before the Court. *See, e.g.*, Chicago Title Br. at 4-8. Factual issues concerning the disputes between Mr. Henry and Mr. Hazelrigg are disputed, and cannot be credited at this stage of the proceedings, where summary judgment was entered before the close of discovery and before trial. In addition, Chicago Title's factual allegations relate to issues such as proximate cause and contributory negligence and are completely irrelevant to the duty question that is the sole issue before this Court.

Second, Chicago Title's "underwriting error" argument fundamentally distorts the question certified to this Court, which is: "Does a title company owe a duty of care to third parties in the recording of legal instruments?" Order Re Certification at 3. The certified question focuses squarely on the duty relating to the "recording of legal instruments," with no reference anywhere to "underwriting." The question presented here is the same as in the "two cases to address whether title companies owe a duty of care to third parties." Order Re Certification at 10 (*citing Seeley v. Seymour*, 190 Cal. App. 3d 844, 237 Cal. Rptr. 282 (1987) and *Luce v. State Title Agency, Inc.*, 190 Ariz. 500, 950 P.2d 159 (1997)). Those cases squarely presented the California and Arizona Courts of Appeals with the question of whether a duty of care to third parties existed for negligent *recording* by a title company. And while those two jurisdictions reached different conclusions, neither court made any reference to "underwriting" in its opinion. The issue concerned the duty owed to third parties in *recording* instruments, the same issue certified to this Court. *See Seeley*, 190 Cal. App. 3d at 855-56, *Luce*, 950 P.2d at 161.

In short, Chicago Title's arguments about the duties owed "in connection with underwriting or the preliminary commitment" are irrelevant. *See Chicago Title Br.* at 17 (heading 1).

**B. Washington Precedent Supports the Existence of a Duty.**

Premised upon its mischaracterization of this action as a claim for negligent underwriting, Chicago Title argues that *Barstad* is dispositive. Chicago Title Br. at 17-24. That argument is wrong, not only because it is based on a false premise, but also because *Barstad* is inapposite.

*Barstad* addressed a narrow and discrete question—whether “title insurance companies have [a] general duty to disclose potential or known title defects in preliminary title commitments.” *Barstad*, 145 Wn.2d at 529, 39 P.3d at 985. As the Ninth Circuit recognized in its Order Re Certification: “That tort duties do not attach when a title company issues a ‘statement submitted to the potential insured establishing the terms and conditions upon which the title insurer is willing to issue a title policy’ does not prove that title companies have blanket immunity from tort liability.” Order Re Certification at 10 (*quoting Barstad*, 145 Wn.2d at 536, 39 P.3d at 988).

The *Barstad* opinion highlights the narrow scope of this Court’s holding. First, this Court made clear that its holding regarding the title company’s duties was specific to the features of a preliminary title commitment, as compared with an “abstract of title.” This Court held that the former “is *not* a representation of the condition of title,” while the latter is “intended to be relied upon by the person who has contracted for

the receipt of such representation.” *Barstad*, 145 Wn.2d at 536, 39 P.3d at 988. The *Barstad* focuses explicitly on the unique features of preliminary title commitments. Chicago Title improperly asks this Court to extrapolate the specific holding there to the entirely distinct circumstance of the *recording* of invalid liens.

This Court held in *Barstad* that “title insurance companies have *no general duty to disclose* potential or known title defects in preliminary title commitments.” *Barstad*, 145 Wn.2d at 529, 39 P.3d at 985 (emphasis added). But that is not the question here. Plaintiffs do not argue that Chicago Title had a “general duty to disclose” “title defects,” but rather that Chicago Title was specifically instructed to record valid liens – and only valid liens. Chicago Title’s instructions, and its *affirmative actions* in connection with its engagement, give rise to a duty in tort, given the obvious and known risks to the landowner.

The Ninth Circuit recognized as much, distinguishing *Barstad*, because “[c]onsiderations of ‘logic, common sense, justice, policy, and precedent’ may counsel for more expansive liability when a title company actually *acts on behalf of a client*.”” Order Re Certification at 10 (*quoting Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158, 1164 (2001)) (emphasis added). This case, and the question certified to this Court, concern an *affirmative act* by Chicago Title on

behalf of its customer—“the recording of legal instruments” (Order Re Certification at 11), not the issuance of a title insurance policy. *Barstad* is inapposite.

While Chicago Title tries to extrapolate from *Barstad* a rule that a title company *never* has any legal duties other than its contractual duties to its insured, this Court foreclosed that argument in *Barstad*. This Court recognized that when a title company creates an abstract of title for a customer, and knows that a third party will rely on the abstract, the title company has a duty of care to the third party. *Barstad* 145 Wn.2d at 539, 39 P.3d at 990 n.14 (citing *Anderson v. Spriestersbach*, 69 Wash. 393, 394, 125 P. 166 (1912)) (“Where abstractor knew that person to whom he delivers abstract at owner's expense will rely upon it in making trade or purchase, he is liable in damages for any loss resulting from material error or omission.”).

Chicago Title's incorrect reading of *Barstad* ignores the fact that Washington courts have long recognized tort duties and other non-contractual duties by title companies. See, e.g., *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 663, 63 P.3d 125, 129 (2003) (*en banc*) (holding that title companies have a duty to exercise reasonable care in carrying out their instructions); *Walker v. Transamerica Title Ins. Co.*, 65 Wn. App. 399, 828 P.2d 621 (1992) (assuming, without deciding,

that a claim exists against a title company for negligently recording a deed of trust without the required legal description of the property)<sup>2</sup>; *Leslie v. Fidelity Nat. Title Ins. Co.*, 598 F. Supp. 2d 1176 (W.D. Wash. 2009) (recognizing common-law claims against a title company for unjust enrichment, money-had-and-received and implied contract); *Kim v. Lee*, 145 Wn.2d 79, 91, 31 P.3d 665, 671 (2001) (denying a claim for equitable subrogation because the title company was “negligent” in insuring title)<sup>3</sup>; and *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 540 n.14, 39 P.3d 984, 990 n.14 (2002) (“[W]e have long recognized the potential disclosure duty associated with an abstract of title”) (citation omitted).

Finally, it is not true that a finding of a duty here “will likely have overruled *Barstad* and undone the legislative scheme that *Barstad* relied on.” Chicago Title Br. at 23. The corresponding decisions in California make this clear. Like Washington State, California is among those states which has held “that there is no general duty to disclose title defects in

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<sup>2</sup> Plaintiffs correctly noted in their opening brief that the *Walker* court assumed, but did not decide, that the title company had a duty to avoid negligently recording an invalid instrument. Plaintiffs’ Opening Br. at 20. Chicago Title attempts to distinguish *Walker* as involving a “facially” invalid document. There is no reason in logic or justice why a title company should escape liability for *knowingly* recording an invalid instrument, as in this case, merely because the defect was not apparent on the face of the instrument.

<sup>3</sup> The facts of *Kim* are different this case, but the basis for this Court’s decision applies here. In *Kim*, this Court held that the title company should be liable for “its own negligence” in issuing a title policy, given its “complete disregard” for an intervening lien that was known to the title company. *Kim*, 145 Wn.2d at 92, 31 P.3d at 671.

preliminary commitments.” *Barstad*, 145 Wn.2d at 541, 39 P.3d at 991. As observed by this Court, “California is notable because it enacted a statute similar to RCW 48.29.010 clarifying the duties associated with preliminary commitments.” *Id.* Nonetheless, the California Court of Appeals also recognized, in *Seeley*, that a title company *did* owe a duty of care in the *recording* of a document. *Seeley*, 190 Cal. App. 3d at 860-62, 237 Cal. Rptr. at 290-92. The fact that these legal principles co-exist in California undermines Chicago Title’s argument that *Barstad* will be effectively reversed if a duty of care is recognized here.

Finally, Chicago Title provides no factual support for its apocalyptic predictions. It has presented no evidence for its claim that the real estate recording system will be dramatically transformed if this Court finds the existence of a duty under the specific facts of this case.

**C. This Court Should Follow California’s Decision in *Seeley* and the Dissent in *Luce*.**

As the Ninth Circuit correctly observed, the *Seeley* Court “concluded emphatically that the title company defendant did owe a duty of care to a third party to refrain from negligent recording of title documents.” Order Re Certification at 10 (*citing Seeley*, 237 Cal. Rptr at 291-92). The same rule should apply under Washington law, based on the facts of this case. Weighing “considerations of logic, common sense,

justice, policy, and precedent,” *see Affiliated FM Ins. Co.*, 170 Wn.2d at 449, 243 P.3d at 526 (internal quotation omitted), leads to the same conclusion that: “As institutions charged with the public trust, it is important that [title companies] be held accountable when their negligent acts result in economic harm to individual property interests.” *Seeley*, 190 Cal. App. 3d at 862, 237 Cal. Rptr. at 292.

Chicago Title fails to distinguish *Seeley* in any meaningful way. First, Chicago Title argues that *Seeley* concerned the negligent recording of a “facially” non-recordable document. Chicago Title Br. at 31-32. This distinction is irrelevant to the legal principle underlying the *Seeley* Court’s decision. The decision in *Seeley* is based on the title company’s failure to follow its instructions, which were to review documents for facial recordability. Chicago Title’s instructions were to record only valid liens. Both title companies violated their instructions. And as the dissent in *Luce* observed, “the fact that the recorded deed of trust was facially valid only increases the likelihood that its recording would eventually harm Appellants.” *Luce*, 190 Ariz. at 504, 950 P.2d at 163 (Gerber, J., *dissenting*).

Chicago Title’s speculation that recognizing a duty of care would result in delayed and defective recordings, and would increase title insurance premiums (*see* Chicago Title Br. at 39-41), is essentially the

same argument that this Court rejected in *Affiliated FM*. This Court held such concerns “are overstated and can be addressed through conventional concepts of the measure and scope of a duty of care.” *Affiliated FM*, 170 Wn.2d at 453. In this respect, the scope of the duty need not extend to run-of-the-mill accommodation recordings. Each case is different. The issue in this case is whether a title company had a duty to avoid recording liens it knew to be invalid, where it also knew that the property owner would be harmed by the recordings and where it was instructed to determine validity before recording any of the liens.

Second, the “special relationship” that Chicago Title states existed between the County and the title company in *Seeley* is not a meaningful distinction. In this case, the “relationship” between Chicago Title and its customer included instructions that Chicago determine validity before recording the first of four liens. In both cases, the nature of the “relationship” imposed a duty upon the title company to exercise its professional judgment in deciding whether or not to record.

The *Seeley* opinion shows that Chicago Title places undo emphasis on the details of that case, while ignoring the broader legal principles involved. The Court found that the title company should be held accountable because it was “[a]n institution[] charged with the public trust,” not merely because of the specific terms of its contract with the

County. *Seeley*, 190 Cal. App. 3d at 862, 237 Cal. Rptr. at 292. The Court found that such a public trust exists because “[t]itle companies participate in the vast majority of real estate transactions in this state.” *Id.*

Third, Chicago Title incorrectly argues that “*Seeley* relied on a standard for imposing a tort duty to third parties that Washington does not follow.” Chicago Title Br. at 35, citing *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994); *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561, 311 P.3d 1 (2013) and *Dewar v. Smith*, 185 Wn. App. 544, 342 P.3d 328 (2015). The legal and accounting malpractice cases cited by Chicago Title for the “intended beneficiary” standard clearly do not foreclose tort liability in a case involving injury to property interests, as shown by *Affiliated FM*. This Court “h[e]ld that the scope of an engineer’s duty of care extends to the persons who hold a legally protected interest in the damaged property[,]” not because such persons were intended beneficiaries of any contract. *Affiliated FM*, 170 Wn.2d at 458, 243 P.3d at 530; see *Phillips v. Kaiser Aluminum & Chemical Corp.*, 74 Wn. App. 741, 875 P.2d 1228 (1994) (duty of care to employee of independent contractor arose from right to control how work was done).

The *Affiliated FM* standard logically applies to a title company with knowledge that a lien is invalid: the scope of its duty of care extends to persons (like Plaintiffs) who hold a legally protected interest in the

encumbered property, where the title company knew that they would be injured by the title company's "careless" recording of an invalid instrument on title.

Finally, Chicago Title offers no policy reason why this Court should adopt the Arizona Court of Appeals' decision in *Luce*. See Chicago Title Br. at 30-32. *Seeley* and *Affiliated FM* both provide sound policy reasons for rejecting the *Luce* majority's holding. Chicago Title argues that *Luce* is based on facts more similar to this case than those in *Seeley*, but that is not accurate. The title company in *Luce* "gratuitously" recorded a deed of trust, without any contract or instructions that required it to review the deed for validity. *Luce*, 190 Ariz. at 501-03, 950 P.2d at 160-62. The title company in *Luce* performed a purely ministerial act not involving the exercise of any professional skill or judgment.<sup>4</sup> That was not the case in *Seeley* (where the title company contractually agreed to record only facially valid liens) or here (where Chicago Title was instructed to record only if the liens were valid).

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<sup>4</sup> Plaintiffs have never argued that the scope of the duty extends to every "ministerial process of delivering an instrument to the recorder's office." See Chicago Title Br. at 34-35.

**D. Chicago Title's Arguments of Logic, Common Sense, Public Policy, and Justice Are Wrong and Unsupported.**

**1. Chicago Title Accepted a Duty to Determine the Validity of Centrum's Liens.**

Chicago Title argues that its customer (Centrum) simply wanted title insurance, and was not concerned with the validity of the liens that Chicago Title recorded on CPIII's title. *See* Chicago Title Br. 35-36. That argument is belied by the evidence. Chicago Title's written instructions state that Chicago Title could record only if the initial lien could be insured as a "valid" second lien.<sup>5</sup> Centrum employee Elizabeth Baker, the person who wrote the instructions to Chicago Title, testified under oath that Centrum was relying on Chicago Title to determine whether the lien was valid:

Q. And in that letter, you authorize Chicago Title to record the deed of trust for \$10 million dated July 5 as soon as they are irrevocably committed to insure that mortgage as a valid second lien against the leasehold property?

A. Correct

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<sup>5</sup> These instructions were:

*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 (emphasis added); *see also* Chicago Title Br. at 35.

Q. And were you relying upon Chicago Title to insure that the lien against the Battelle property was a valid lien?

A. Yes.

Q. That it was not in violation of any existing encumbrances against the property?

A. Correct.

ER 523-24. It is clear from Ms. Baker's testimony that Centrum fully expected Chicago Title to review the documents provided by Centrum, and to determine that the liens would "not constitute a violation of the GE loan agreement," as a pre-condition to recording them. ER 524.<sup>6</sup>

All of Chicago Title's arguments that it owed no duty to Plaintiffs rely upon the same fundamentally flawed assumptions previously addressed. *See* Chicago Title Br. at 37-39. The evidence shows that Centrum *did rely* on Chicago Title to determine the validity of the liens as a condition to recording; that the duty at issue concerns the *recording* of the liens, and not underwriting or disclosures in a preliminary commitment; and that a duty of care to Plaintiffs is properly found under *Affiliated FM* and the reasoning in *Seeley*.

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<sup>6</sup> To the extent Chicago Title raises a factual dispute regarding Centrum's instructions, that dispute must be resolved by the trier of fact under Fed. R. Civ. P. 56. The question for this Court is, based upon the pleadings and the admissible evidence in the record: "Does a title company owe a duty of care to third parties in the recording of legal instruments?" *See* Order Re Certification at 3.

## **2. Chicago Title's Public Policy Arguments Are Misplaced.**

Chicago Title argues that, from a public policy perspective, recognizing a duty of care under the facts of this case would impose undue burdens upon the title industry as a whole, and would result in delayed or improper filings by individuals who do not know how to record title documents. The irony of this argument should not be overlooked. Chicago Title argues that lay persons should be discouraged from recording title instruments, because they lack the requisite skill and knowledge, but trained professionals, like Chicago Title, should be allowed to carelessly record instruments they know to be invalid, protected by immunity from tort liability to injured property owners.

Chicago Title first argues that it would impose a substantial burden on title companies if they were required to identify “non-facial” defects in instruments that their customers ask them to record. Chicago Title Br. 39-40. There is no actual evidence in the record to show whether such a “burden” would have any significant impact on title industry. Moreover, the hypothetical question posed by Chicago Title does not reflect the specific facts of this case, where Chicago Title was asked to determine validity, and knew that the liens were invalid. Further, this Court has held that “economic concerns about liability run amok are overstated and can

be addressed through conventional concepts of the measure and scope of a duty of care.” *Affiliated FM*, 170 Wn.2d at 453, 243 P.3d at 528.

Chicago Title’s burden argument could apply only to low-cost “accommodation” recordings, where the title company is not charging a premium for issuing an insurance policy and does not undertake to assess the validity of the instrument it agrees to record. Recognizing a duty under the specific facts of this case does not need to extend to such recordings, standing alone.<sup>7</sup> What is critical here is that Chicago Title voluntarily accepted the instructions it received from its customer. Those instructions required Chicago Title to determine validity as a condition to recording the first lien, and provided Chicago Title with the knowledge that all four liens were invalid. ER 58, 523-24.<sup>8</sup>

Chicago Title could have rejected those instructions, and explained to Centrum that Chicago Title only looks for “facial” defects, but Chicago Title clearly wanted the insurance premium that would be generated by

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<sup>7</sup> Even if it did, case law shows that title companies have a “standard practice” of using indemnity agreements to protect themselves from liability when they perform low-cost accommodation recordings. *See Rooz v. Kimmel*, 55 Cal. App. 4th. 573, 590, 64 Cal. Rptr. 2d 177, 188 (1997) (finding a “standard practice throughout the industry” that title companies are “generally unwilling to carry out and perform accommodation recordings” and willing to do so “only if the party requesting the recording agrees to sign [an] indemnity and hold harmless agreement”).

<sup>8</sup> Despite having received the necessary documents, and “conceding” that Chicago Title could be charged with knowledge of what they contained, the manager of the Benton County office of Chicago Title testified that no one actually analyzed whether or not the placement of the liens would be contrary to the GECC Deed of Trust. ER 511.

issuing a title insurance policy to Centrum. Chicago Title should not be heard to complain about a burden that it voluntarily accepted as part of its normal, profit-generating business practice.

Further, the burden accepted by Chicago Title was not great. Chicago Title merely needed to review the CPIII Operating Agreement that Centrum had provided to Chicago Title in connection with recording the first junior lien. ER 510, 382 (CPIII Operating Agreement ¶6.3(a)(1)). The duty in this case is based upon knowledge that Chicago Title had, or is deemed to have had, from documents that Chicago Title received from its customer for purpose of determining validity. *See Denaxas*, 148 Wn.2d at 667, 63 P.3d at 131 (“If a person exercising reasonable care could have known a fact, he or she is deemed to have had knowledge of that fact”) (citations omitted).<sup>9</sup>

There is no basis for Chicago Title’s argument that recognizing a duty under the specific facts of this case would also charge it with “knowledge” based on “what is in title plats, escrow files, title files, and the public record,” and from “what the title officer could have learned by

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<sup>9</sup> Chicago Title “conceded” for purposes of summary judgment that it “could be charged with *actual* knowledge of these documents when it later recorded the liens.” ER 13 (emphasis added). Chicago Title is now attempting to take back its concession, arguing that its knowledge of the documents was “constructive” but not “actual.” Chicago Title Brief at 3. The distinction Chicago Title attempts to draw is meaningless under Washington law, as shown by *Denaxas*.

interviewing lenders, buyers and sellers and by inspecting the property.”  
*See* Chicago Title Br. at 42. That is not what is alleged in this case.

Chicago Title next argues (without citation to any evidence) that there would be a “temporal gap” if title companies were required to exercise reasonable care to avoid recording invalid instruments. Like Chicago Title’s other policy arguments, this one ignores the facts of this case. Chicago Title’s customer, Centrum, was clearly willing to accept a delay while Chicago Title determined whether the liens were valid. ER 58; 523-24. There is nothing in Centrum’s instructions to indicate that the liens had to be filed immediately. *Id.* Centrum’s written instructions and Ms. Baker’s testimony reflect Centrum’s knowledge that Chicago Title would need to do some work to determine if the liens could be recorded. *Id.*

In addition to the total lack of evidence to support its “delay” argument, Chicago Title’s public policy argument – that granting title companies blanket immunity for negligent recording is a small price to pay to ensure speedy recordings – should be rejected. Public policy should not elevate a desire for prompt recording above all other legitimate interests. Public policy should also encourage proper and accurate recordings, and discourage careless recordings. Chicago Title’s arguments encourage exactly the opposite.

Indeed, it is Chicago Title's position that raises public policy red flags. Chicago Title argues that as long as it satisfies its customer's interests by issuing a policy of title insurance (which, not coincidentally, is one way Chicago Title makes money), and by presenting "facially valid" instruments to the Recorder's Office, there is no reason why Chicago Title should care, nor does it have any duty to care, if those instruments are actually valid. More to the point, Chicago Title argues that actual knowledge of invalidity imposes no duty of care on a title company. Chicago Title seeks a type of immunity for knowingly causing injury that no other professional doing business in Washington enjoys.

Perhaps the most striking aspect of Chicago Title's argument is its complete disregard for the legitimate interest of property owners in having their titles remain free of invalid liens. Chicago Title fails to recognize that turning a blind eye to known defects, while protecting its customers from loss through insurance, has the effect of facilitating improper, and even fraudulent, recordings. Under Chicago Title's theory, neither the customer nor the title company needs to be concerned about unlawful recordings. The customer does not need to be concerned, because it receives title insurance. The title company does not need to be concerned,

because, according to Chicago Title, it should enjoy blanket immunity from tort liability to the injured property owner.<sup>10</sup>

The argument made by Chicago Title in this case—that it can be liable only to its customer—was rejected by this Court in *Affiliated FM*. See *Affiliated FM*, 170 Wn.2d at 446, 243 P.3d at 524 (“... we understand that [the concession operator] was not a party to the contract”) and 170 Wn.2d at 460, 243 P.3d at 531 (“... [the engineer’s] duty of care extended to [the concession operator] as holder of the property interests in using and possessing the Seattle Monorail ...”). Chicago Title’s arguments run directly contrary to the important policy interest expressed in *Seeley*—that “[a]s institutions charged with the public trust, it is important that [title companies] be held accountable when their negligent acts result in economic harm to individual property interests.” *Seeley*, 190 Cal. App. 3d at 862, 237 Cal. Rptr. at 292.<sup>11</sup>

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<sup>10</sup> Chicago Title argues that “no title company would knowingly agree to insure an invalid instrument” (Chicago Title Brief at 36), because the title company would lose money paying insurance claims made by its customers. But again, this argument simply ignores the loss suffered by the *uninsured*, third-party property owner. Chicago Title did not use any insurance proceeds to pay for the injury it caused to Plaintiffs. And there is no evidence that Chicago Title ever paid Centrum, either.

<sup>11</sup> *Seeley* has remained good law in California for over 25 years without any of the parade of horrors identified by Chicago Title. Chicago Title does not point to any cases from California narrowing *Seeley*’s scope as it applies to the *recordation* of documents. The only case it cites concerned “polic[ing] the activities of the trustee who sold trust property in violation of the trust agreement.” Chicago Title Br. at 44 (discussing *Vourmas v. Fidelity Nat’l Title Ins. Co.*, 73 Cal. App. 4<sup>th</sup> 668, 676, 86 Cal. Rptr. 2d 490, 496 (1999)).

**3. Washington Has Adopted A System of Justice that Provides for Apportionment of Fault Among Tortfeasors And Does Not Immunize Any Tortfeasor.**

At the beginning (pp. 4-8) and end (pp. 44-47) of its brief, Chicago Title argues that Plaintiffs or non-parties are primarily responsible for the invalid liens that Chicago Title recorded on CPIII's title, and, therefore, this Court should find that Chicago Title had no duty of care to avoid knowingly recording invalid liens. For example, Chicago Title speculates that Michael Henry would have approved the liens if he had known about them, and that other entities were in a better position to "police the transactions" that preceded Chicago Title's admittedly "careless" act of recording invalid liens. These arguments are wrong for many reasons.

First, the "facts" alleged by Chicago Title are all disputed. *See, e.g.,* Declaration of Michael E. Henry in Opposition to Chicago Title's Motion for Summary Judgment. ER 357-370. It is important to recall the procedural posture of this case. The U.S. District Court dismissed Plaintiffs' claims on summary judgment before the completion of discovery and before trial. To the extent Chicago Title's disputed factual assertions have any relevance, they will need to be heard and decided by the fact finder at trial.<sup>12</sup>

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<sup>12</sup> The limited and disputed factual record is the result of Chicago Title's choice to raise the duty issue early in the case. Chicago Title could have raised the duty issue by motion

Second, under Washington law there can be more than one cause of an injury, and multiple “at-fault” entities can share liability to the injured plaintiff. See Washington Tort Reform Act, RCWA 4.22.005, *et seq.*, 7.72.010, *et seq.*; see *Mason v. Bitton*, 85 Wn.2d 321, 326, 534 P.2d 1360, 1363-64 (1975). Under this system, proving that someone else is at fault does not negate the duty element of a tort claim. *Id.* At best, Chicago Title’s argument is a claim that other parties or non-parties are also responsible for a proportionate share of the total liability to Plaintiffs. See *Tegman v. Accident & Medical Investigations Inc.*, 150 Wn.2d 102, 108-09, 75 P.3d 497, 499-500 (2003).

As shown by the Tort Reform Act, and the caselaw construing it, the legislature and appellate courts of Washington State have already decided that justice is not served by determining who is “more” or “most” at fault for an injury, and then immunizing others who contributed to that injury. All at-fault entities share liability. Chicago Title’s unproven allegations regarding the actions of Plaintiffs and non-parties are irrelevant to the duty question before the Court.

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to the District Court after all of the evidence was presented at trial, or, at the earliest, after discovery was completed. Plaintiffs moved the District Court under Fed. R. Civ. P. 56(d) to defer ruling on the duty issue until after discovery was complete, but the District Court denied that motion. In any event, none of the factual disputes prevent this Court from finding that a duty of care exists.

## CONCLUSION

Considerations of logic, common sense, justice, policy and precedent dictate that Chicago Title be held to a duty of care to avoid carelessly recording liens that Chicago Title knew to be prohibited. Plaintiffs respectfully request that the Court affirmatively answer the question certified by the Ninth Circuit, and hold, based on the specific facts of this case, that a title company owes a duty of care to third parties—here Plaintiffs Centurion Properties III, LLC and SMI Group XIV, LLC—in the recording of legal instruments.

Respectfully submitted this 13<sup>th</sup> day of November, 2015.

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**CERTIFICATE OF SERVICE**

I certify that I caused a true and correct copy of the foregoing Plaintiffs' Reply Brief to be served this day, November 13, 2015, on counsel for Defendant/Appellee/Cross-Appellant Chicago Title Insurance Company by email, as agreed by counsel for the parties, as follows:

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Attached for filing please find Plaintiff's Reply Brief for the following matter:

**Case Name:** CENTURION PROPERTIES III, LLC and SMI GROUP XIV, LLC v. CHICAGO TITLE INSURANCE COMPANY

**Case Number:** Supreme Court No. 91932-1

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Please let me know if you need anything further. Thank you.

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