

No. 74976-5-I

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

WYNDEN HOLMAN and JAMIE HOLMAN,

Appellants,

v.

THOMAS DUTCHER and DIANE DUTCHER,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case arises out of two liens recorded by Appellant against property owned by his brother and Respondents, as security for money owed for services rendered on said property. Over a year after selling the property, Respondents took umbrage with having paid Appellant funds out of the sale proceeds as a result of the liens, and then filed suit claiming slander of title, violations of the Consumer Protection Act, and unjust enrichment.

Appellant Wynden Holman (individually, "Appellant") was formerly related to the Respondents by marriage; Appellant's brother Darin Holman ("Darin") was married to Respondent Thomas Dutcher's (individually, "Tom") daughter Kristen McKenzie f/k/a Holman ("Kristen"). Both Appellant and Tom loaned money, services, and time to Darin and in return, he offered both men a security interest in the real property commonly known as 4704 Pacific Highway, Bellingham, Washington (the "Property"). Darin instructed Appellant to file a lien for services rendered on the Property and Tom was given a warranty deed, which was to be recorded in the event that Darin and Kristen failed to repay large sums of money Tom had lent to them.

In 2013, when the Property was listed for sale by Darin, Tom recorded his warranty deed to secure his interest in the Property. Appellant recorded a "Claim of Lien" form, which he had previously recorded in 2012, in order to secure the lien that Darin had promised him. Thereafter, Tom, along with his son-in-law Jim Bacus, negotiated a short pay-off of \$11,550.00 from the proceeds of sale to be applied to Appellant's 2012 lien. Appellant then voluntarily released both liens against the Property. Nearly two years after the transaction had closed Tom initiated this lawsuit against Appellant to recoup the \$11,550.00, with claims for

slander of title, unjust enrichment, and violation of the Consumer Protection Act, RCW 19.86 *et seq.*

At the trial court, Appellant moved for partial summary judgment and Respondents moved for summary judgment on all claims. The trial court ruled in favor of the Respondents and granted them summary judgment on all three of their claims, including awarding special damages for slander of tile and trebling those damages pursuant RCW 19.86.090. Appellant has appealed the dismissal of his summary judgment motion as well as the trial court granting Respondents' motion.

Appellant's actions do not amount to slander of title because Respondents have failed to prove by clear, cogent and convincing evidence that all of the elements of this claim are present, and because, as a matter of law, the lien never went to "defeating title" of the Property. Further, none of these private incidences between family members amounts to a violation of the Consumer Protection Act, RCW 19.86, as they were not committed in trade or commerce, nor was the public interest impacted. The Appellant was not unjustly enriched by accepting a short payoff of an amount owed to him for actual services rendered on the property which improved its value.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that Respondents presented sufficient evidence on their slander of title claim to meet the required burden of proof of “clear, cogent, and convincing evidence”.
2. The trial court erred in finding that a monetary lien “goes to defeat title” as a matter of law, for purposes of proving the fifth element of Respondents’ slander of title claim.
3. The trial court erred in awarding attorneys’ fees as “special damages” for slander of title even though the fees were not incurred to “remove the cloud on title” as is a prerequisite to such recovery.
4. The trial court erred in finding that Appellant Holman’s filing of a lien against the Property constituted a violation of the Consumer Protection Act, RCW 19.86, because the acts complained of did not occur in “trade or commerce”.
5. The trial court erred in finding that Appellant Holman’s filing of a lien against the Property constituted a violation of the Consumer Protection Act, RCW 19.86, because the acts complained of did not have a public interest impact.
6. The trial court erred in finding that Appellant was unjustly enriched by the payment of \$11,550.00 from the proceeds of sale of the Property when the evidence submitted shows that he rendered services for

the benefit of the property and which improve the Property's value and utility.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The burden of proof for a slander of title claim is by clear, cogent, and convincing evidence because the claim contains the element of "malice". Did the trial court err in finding that the evidence presented by the Respondents met this burden of persuasion?

2. Element five of a slander of title claim requires that the false words published by the Appellant actually "go to defeating" Respondents' title to the Property. Given that the claim of lien was only a monetary encumbrance against the Property and did not render title unmarketable, nor did it prevent the Property being sold in fee to a purchaser, did the trial court err in finding that Appellant's lien slandered the title of Respondents' Property?

3. Controlling case law holds that attorneys' fees and costs may be awarded in a slander of title case to the extent that those attorneys' fees were incurred in removing the cloud from the title and restoring vendibility.¹ Given that the cloud on title was removed and the Property sold over a year prior to the current action being filed, and without any

¹ *Rorvig v. Douglas*, 123 Wash.2d 854, 863, 873 P.2d 492 (1994).

attorneys' fees incurred at the time, did the court err in awarding attorneys' fees and costs as special damages to Respondents?

4. A violation of the Consumer Protection Act, RCW 19.86 *et seq*, requires that the acts or practices complained of are committed "in the conduct of trade or commerce."² Appellant performed the services on the Respondents' Property when it was still owned by Appellant's brother and as a favor to his brother. The lien was for an amount sufficient to reimburse Appellant for his services, not for a profit or in the conduct of any business venture. Appellant and Respondents were previously related by marriage. Given that this was not only private but *a transaction among family members*, did the trial court err in finding that these acts occurred in trade or commerce?

5. A violation of the Consumer Protection Act RCW, 19.86 *et seq*, requires that the acts or practices complained of have a public interest impact.³ Given that this was a private, family transaction and Appellant performed the services on the Property which gave rise to the debt owed and the subsequent liens 1) at the request of his brother and 2) outside of the course of his business, did the trial court err in finding that the "public interest impact" was satisfied?

² RCW 19.86.020

³ *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986).

6. Appellant provided services and loaned money to his brother for improvements to the Property during Darin Holman's ownership. The services rendered by Appellant, including permitting and remediation of issues with the wetlands, added value and utility to the Property. Did the trial court err in finding that Appellant was unjustly enriched by receiving \$11,550.00 from the proceeds of sale of the Property, which was less than the amount he was owed for his services?

IV. FACTUAL BACKGROUND

1. Establishment of the debt and authorization of the first lien.

On or about February 19, 2008, Darin and Kristen acquired the Property from NW Big Trucks Salvage and Parts for the purpose of operating a manufactured home business.⁴ After acquiring the Property, Darin asked his brother, Appellant, to assist with various projects at the Property and which coincided with the work Appellant had already performed in connection with Darin's manufactured home business.⁵ Appellant provided funds and general assistance in getting the business up and running at the Property. He helped install signage at the Property. Appellant also arranged and attended meetings with Whatcom County officials, Port of Bellingham, attorneys, wetland specialists and

4 CP 321-322.

5 CP 321-322.

contractors in helping with permitting issues for the Property on behalf of Darin.⁶ These permits were specifically necessary for Darin to run his business out of the Property.⁷

By early 2012, it became apparent that Darin's business was not doing well.⁸ In exchange for all of his help, Darin told Appellant that he could obtain a lien on the Property as a security interest for all of the work Appellant put into the Property because he was not in a position to pay Appellant cash for the services he had rendered.⁹ Because Appellant was aware of the troubles Darin's business was facing, he filed the lien against the Property on April 23, 2012.¹⁰

Appellant used a blank "Claim of Lien" form which he had received from a friend.¹¹ The language in this form is fairly broad, but it appears that it is intended to be used to file a mechanics' and materialman's lien under RCW 60.04.¹² However, Appellant did not intend for this lien to be filed as lien under RCW 60.04; he believed he could use this as a general form to secure the amount owed to him and as agreed with his brother Darin.¹³ The form doesn't cite to any statutes or

6 CP 321-322.

7 CP 321.

8 CP 89.

9 CP 322.

10 CP 90.

11 Id.

12 CP 93-95.

13 CP 90.

specifically reference RCW 60.04 in any way. Darin did not object to the filing of the lien in this manner, as he had already given Appellant verbal permission to file it. Appellant continued to perform work on the Property for Darin through the early summer of 2013.¹⁴

2. Subsequent security in the Property given to Tom Dutcher and listing of the Property for sale.

Unbeknownst to Appellant, shortly after he recorded his lien with the Whatcom County recorder, Darin executed a warranty deed conveying the Property to Tom on June 4, 2012 to be held as a form of security for funds that Tom had lent Darin and Kristen (and their business Elite Homes, LLC) over the years.¹⁵ The intent was that the deed would be recorded in the event Darin failed to repay Tom. Darin did not inform Appellant at that time that he executed the deed, and Appellant had no way to know of the deed because Tom failed to properly record it until over a year later.¹⁶ Conversely, Tom easily could have discovered that Appellant had a security interest in the Property which **predated** his own, because Appellant's lien was recorded and a matter of public record at the time Darin executed the deed in favor of Tom.¹⁷

14 CP 98.

15 CP 110 – 115.

16 CP 322 and CP 110-115.

17 Upon review of Whatcom County Auditor's website, a public records search still shows the April 23, 2012 lien as recorded against the property.

According to Tom, in late 2012 he retained a real estate broker to list the Property.¹⁸ He had not yet recorded the warranty deed, and Darin was still the owner of record on the Property and named on the listing agreement, even though it was Tom who engaged the listing firm for the sale.¹⁹ There is no evidence available that the listing in 2012 led to any bona fide offers to purchase the Property.

In the spring of 2013, Darin was in negotiations with the Lummi Tribe of the Lummi Reservation to purchase the Property.²⁰ They entered into a purchase and sale agreement, dated June 4, 2013.²¹ Tom claims that he was involved in the negotiations with the tribe as well as Darin, although Darin maintains that he was in charge of working with the tribe and getting the transaction closed.²² Darin's position is supported by emails and other correspondence where Tom explicitly refers to the June 2013 purchase and sale agreement as "Darin's Escrow".²³ These emails also show the initial frustration of Tom and his son-in-law Jim Bacus, because the escrow and title companies would not communicate with them openly as Tom was not an owner of record, nor a party to the purchase and

18 CP 188.

19 CP 188.

20 CP 322.

21 CP 322 and CP 228 – 241.

22 CP 322.

23 CP 312- 313.

sale agreement.²⁴ At that time, Tom explicitly authorized Jim Bacus as his representative in the transaction.²⁵

In conjunction with the sale by Darin to the Lummi Tribe, a preliminary title report was produced which showed a number of liens already on title.²⁶ Appellant's 2012 lien was not listed on the title report because the title officer had made the determination that it had expired. Tom acknowledges that he decided to record the warranty deed after reviewing the initial title report and seeing numerous liens against the Property.²⁷ Tom recorded the deed on June 27, 2013, presumably to try and dislodge any liens from the Property which were not properly secured and could be removed if the Property was in new ownership.²⁸ Because there was a new owner of record, a new purchase and sale agreement needed to be negotiated with the Lummi Tribe, and a second agreement was executed on July 8, 2013.²⁹

3. Recording of the second lien and negotiation of its release.

Darin advised Appellant of expiration of the original claim of lien and on June 28, 2013 Appellant prepared a new claim of lien. Darin informed Whatcom Land Title escrow agent Ashley Allison (now

24 CP 309-310.

25 Id.

26 CP 242 – 252.

27 CP 189.

28 Id.

29 CP 124 – 138.

Kenyon) that his brother should still be paid out of the proceeds of the current sale because he had promised him a lien.³⁰ Ms. Kenyon emailed Tom on July 15, 2013 and asked about paying Appellant out of escrow for the amount owed.³¹ Tom responded by saying that it was a “debt between, bothers, I don’t want to pay this bill....”³² After being informed that Tom did not intend to honor the original lien that Appellant had filed, he recorded the second claim of lien on July 18, 2013.³³ When questioned by escrow about the validity of the second claim of lien Darin confirmed to escrow that it was a valid lien.³⁴

The parties began to negotiate about how to deal with Appellant’s lien. The lien did not threaten the closing of the transaction; Respondents just had to decide whether it was going to be paid out of the proceeds of sale or in some other way. Tom was in the process of divorcing his wife Diane Dutcher, and the Property was subject to their divorce settlement and the net proceeds were to be split between them 75/25.³⁵ Appellant had already acknowledged he was willing to negotiate a discounted payoff for the full \$16,600.00 still owed to him by Darin.³⁶ On July 19, 2013,

30 CP 322 and CP 101.

31 CP 311.

32 CP 312.

33 CP 97 – 99.

34 CP 101.

35 CP 311 and CP 319.

36 CP 322.

Colleen Baldwin, a co-owner of Whatcom Land Title, sent an email to Jim Bacus, Ashley Kenyon, and others, proposing a holdback of escrow funds to deal with the lien in the event the parties were not prepared to fully settle prior to closing.³⁷

However, a holdback was not necessary. Jim Bacus negotiated a short payoff of \$11,550.00 to be applied to Appellant's "original lien" which he confirmed in an email to Ms. Kenyon on July 24, 2013: "We are instructing you to pay him \$11,550.00 that he has agreed to accept on his original lien."³⁸ The original lien was the April 2012 lien; Appellant took a discount of over \$5,000.00 for the work he had put into improving the Property for his brother. He then voluntarily agreed to release the second lien, which he has always considered to be a continuation or additional notice of the original lien.³⁹ The transaction with the Lummi tribe closed on July 30, 2013.⁴⁰ Appellant was paid his \$11,550.00 out of escrow and executed a "release of lien" form provided by Whatcom Land Title which was recorded on or about August 8, 2013.⁴¹

37 CP 316-317.

38 CP 318 and CP 103.

39 CP 90.

40 CP 153 – 155.

41 CP 105.

Appellant reasonably thought the matter was settled. He and Tom and Jim Bacus had negotiated the short payoff of the debt.⁴² Tom and Jim knew that Darin owed Appellant money and had promised to pay him or give him a security interest in the property, just as Darin had promised Tom.⁴³ Appellant's filing of his second claim of lien did not interrupt the sale to the Lummi Tribe at all. There were no delays or potential issues with title because of this lien filing; the sale even closed a day earlier than what was anticipated on the purchase and sale agreement.⁴⁴ However, at some point Tom decided that he was unhappy with having had to pay Appellant out of the proceeds of sale and decided to file the current lawsuit in February of 2014.

V. LEGAL ANALYSIS

On appeal, the appellate court reviews the ruling on a motion for summary judgment on a *de novo* basis, engaging in the same analysis as the trial court.⁴⁵ Both the law and the facts will be reconsidered by the appellate court.⁴⁶ Summary judgment is only appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

42 CP 153 – 155.

43 CP 312.

44 CP 153.

45 *Mahoney v. Shinpoch*, 107 Wash. 2d 679, 732 P.2d 510 (1987).

46 *Brouillet v. Cowles Pub. Co.*, 114 Wash. 2d 788, 791 P.2d 526 (1990).

moving party is entitled to a judgment as a matter of law.”⁴⁷ The appellate court views the evidence as the trial court did and the burden is on the moving party to show that there is no genuine issue of material fact.⁴⁸ All facts and reasonable inferences therefrom will be drawn in favor of the nonmoving party.⁴⁹ Even if the facts are undisputed, there still may be an issue for the trier of fact when conflicting inferences may be drawn from such undisputed facts.⁵⁰

A. Issue 1: Slander of Title and Burden of Proof.

To prove its slander of title claim, a plaintiff has the burden of proving that the words concerning the property are (1) false; (2) maliciously published; (3) spoken with reference to some pending sale of the property; (4) resulted in pecuniary loss or injury to the claimant; and (5) such as to defeat the plaintiff's title.⁵¹

The burden of proof for a plaintiff asserting a slander of title claim is by clear, cogent, and convincing evidence due to the fact that malice is an element of this cause of action, similar to slander and defamation cases

47 CR 56(c); *Hartley v. State*, 103 Wash.2d 768, 774, 698 P.2d 77 (1985).

48 *Hartley v. State*, 103 Wash.2d 768, 774, 698 P.2d 77 (1985).

49 *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 349, 588 P.2d 1346 (1979).

50 *Coffel v. Clallam County*, 58 Wash.App. 517, 520, 794 P.2d 513 (1990)[internal citations omitted].

51 *Schwab v. City of Seattle*, 64 Wash. App. 742, 748, 826 P.2d 1089 (1992)[internal citations omitted].

involving public officials.⁵² If malice was not an element of the claim, it would be subject to a negligence standard for the burden of proof (preponderance of the evidence).⁵³ There are no reported slander of title cases in Washington which state this burden of proof clearly. However, a recent Washington Supreme Court certification from the United States Court of Appeals for the Ninth Circuit, *Centurion Properties III, LLC v. Chicago Title Company*, clearly holds that simple negligence is not the standard of proof for slander of title, which also means that the burden of proof for the claim is not merely that of negligence either.

Neither of these torts [slander of title and tortious interference with a contract] is satisfied by simple negligence. Tortious interference with a contract requires intentional conduct, and slander of title requires malicious conduct. The reason for this rule is clear: if simple negligence were the rule, a party claiming an erroneous but good faith interest in real property would not be entitled to litigate his claim and have an adjudication without fear of being penalized in damages. *See, e.g., Ward v. Mid-West & Gulf Co.*, 1923 OK 972, 97 Okla. 252, 223 P. 170; *see also* RESTATEMENT (SECOND) OF TORTS § 773 (AM. LAW INST. 1979) (recognizing privilege to assert claim in good faith). These heightened requirements further the policy of protecting the rights of property owners by

⁵² *See, Duc Tan v. Le*, 177 Wash. 2d 649, 662, 300 P.3d 356 (2013)[Actual malice must be shown in cases involving both public figures and public officials. Standard of review for the case was by clear, cogent and convincing evidence.].

⁵³ *Haueter v. Cowles Publishing Co.*, 61 Wash.App. 572, 582, 811 P.2d 231 (1991) [“When the standard of fault is negligence, the applicable burden of proof is preponderance of the evidence.”].

encouraging property owners to assert valid property rights while protecting property owners from unlawful claims.⁵⁴

Clear, cogent, and convincing evidence is clearly a higher burden of proof, of which it seems the trial court in this matter failed to take note. The evidence propounded by the Respondents at summary judgment simply did not rise to this level on several of the five elements of the slander of title claim.

However, when reviewing a civil case in which the standard of proof is clear, cogent, and convincing evidence, this court “must view the evidence presented through the prism of the substantive evidentiary burden.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported his or her claim with clear, cogent, and convincing evidence. *In re Depend. of C.B.*, 61 Wash.App. 280, 285, 810 P.2d 518 (1991). To overcome a presumption on summary judgment, the challenging party must offer evidence establishing a prima facie case supporting the claim or defense. *Cascade Brigade v. Econ. Dev. Bd.*, 61 Wash.App. 615, 622, 811 P.2d 697 (1991).⁵⁵

Failure to prove even one of these elements by the clear, cogent, and convincing standard is a failure to sustain the burden as to the entire claim.⁵⁶

54 Certification from the United States Court of Appeals for the Ninth Circuit, *Centurion Properties III, LLC v. Chicago Title Company*, not yet published in P.3d, at ¶ 54, 2016 WL 3910991 (July 14, 2016) [attached hereto for reference].

55 *Wood v. Stapp*, 146 Wash.App. 16, 22-23, 189 P.3d 807 (2008).

56 *Herrin v. O’Hern*, 168 Wash.App. 305, 309-310, 275 P.3d 1231 (2012).

The evidence presented by the Respondents does not rise to this level on the elements of “malice”, “pecuniary loss”, and “goes to defeat title”. “The element of malice is met when the slanderous statement is not made in good faith or is not prompted by a reasonable belief in its veracity.”⁵⁷ The evidence presented on summary judgment does not establish by clear, cogent, and convincing evidence that Appellant acted in bad faith or without a reasonable belief in the veracity of the lien he recorded. Respondents acknowledged the debt as valid and negotiated the payoff with Appellant.⁵⁸ Appellant testified that he believed the second lien he recorded was a renewal of his original lien which the title company had decided had expired.⁵⁹ There are issues of material fact and credibility of testimony issues which should have precluded summary judgment as a matter of law on the malice issue and allowed this case to be heard by the trier of fact.⁶⁰

The same can be said for the element of pecuniary loss.

The Restatement provides: (1) The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to (a) the pecuniary loss that results **directly and immediately** from the effect of the conduct of third persons, **including impairment of vendibility** or

⁵⁷ *Rorvig*, 123 Wash.2d at 860-861, *citing*, *Brown v. Safeway Stores, Inc.*, 94 Wash.2d 359, 375, 617 P.2d 704 (1980).

⁵⁸ CP 311 – CP 318.

⁵⁹ CP 90.

⁶⁰ *See, Coffel v. Clallam County*, 58 Wash.App. 517, 794 P.2d 513 (1990); *See also, Morse v. Antonellis*, 149 Wash.2d 572, 70 P.3d 125 (2003).

value caused by disparagement, and (b) the **expense of measures** reasonably necessary to **counteract the publication**, including litigation to remove the doubt cast upon vendibility or value by disparagement.⁶¹

Respondents negotiated an agreement with Appellant where he was given a short payoff of the debt owed to him from the proceeds of sale; they did not suffer a loss.⁶² The evidence shows that the payoff itself was for Appellant's "original lien" from 2012 and not the subsequent 2013 lien.⁶³ Appellant voluntarily released that lien without the Respondents having to incur any damages whatsoever. Further, Appellant's lien did not impair vendibility so Respondents have no damages to claim for that factor either. There are issues of fact which would preclude the finding, for the purposes of summary judgment, that Respondents suffered a "loss" or that the negotiated payment was an expense necessary to "counteract publication".

B. Issue 2: As a matter of law, Appellants lien did not "go to defeating" Respondents' title and therefore the slander of title claim must be dismissed.

1. Defeating title, in general.

Very few cases analyze, let alone discuss, what the fifth element of a slander of title action actually means. The relevant legal definition of "defeat" actually references title and reads "to annul or render (something)

⁶¹ *Rorvig*, 123 Wash.2d at 863, *citing*, Restatement (Second) of Torts § 633 comment b (1977).

⁶² CP 318.

⁶³ *Id.*

void <to defeat title>.”⁶⁴ Maybe that is why there is so little discussion of this element, because the higher courts of the State have all deemed it obvious as to whether a publication “goes to” annulling or rendering title void.

Title is defined as “The union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself <no one has title to that land>. Cf. OWNERSHIP; POSSESSION.”⁶⁵ The Restatement of Property adds to the definition of title by stating: “In common and legal speech the word ‘title’ normally signifies (1) ownership or when used with appropriate limiting words, a claim of ownership, or (2) the totality of the evidence, that is, the operative facts which result in such ownership or on which the claim of ownership is based.”⁶⁶ Title in these circumstances being synonymous with ownership, the Supreme Court of Washington has repeatedly held that the “fundamental attribute[s] of property ownership” are “the right to possess; to exclude others; or to dispose of property.”⁶⁷

⁶⁴ Black's Law Dictionary (10th ed. 2014), “defeat”.

⁶⁵ Black's Law Dictionary (10th ed. 2014), “title”.

⁶⁶ Restatement (First) of Property § 10 (1936), “Note on the use of the word ‘title’ in the Restatement.”

⁶⁷ See e.g., *Guimont v. Clarke*, 121 Wash.2d 586, 602, 854 P.2d 1 (1993).

The “goes to defeat title” element of slander of title is simply not present in this action. At no time was Respondents’ title to the Property in jeopardy of being annulled or voided because of Appellant’s lien. A monetary lien does not impact any of the significant elements of ownership inherent in the meaning of “title”. The lien filed by Appellant in no way impacted the ownership rights of Respondents in the Property or attempted to assert a claim of ownership. Respondents at all times had the right to possess, to exclude others, and to dispose of the Property.

At summary judgment, Judge Ira Urhig made the analogy that title or ownership of property is “like a bag of rocks” and further expanded by saying, “And you want to sell that big bag of rocks to somebody and somebody else says, yeah, but a handful of those rocks are mine, so does that go to defeat the plaintiff’s title when somebody else is saying part of this here is mine? It’s not all that person’s part. It’s mine. I get part of it.”⁶⁸ That analogy is actually appropriate in this instance, but it was applied incorrectly at summary judgment. A monetary lien is not a claim to any of the actual rocks in the bag; when the rocks are sold, the monetary lien requires that some of the money received from those rocks needs to go to pay off a debt incurred by the seller of the rocks, or a debt incurred in improving those rocks.

68 Verbatim Report of Proceedings, Page 56, lines 11 – 20.

Respondents claimed in their summary judgment pleadings that a lien for monies owed is comparable in severity and authority as a *lis pendens* recorded against a property.⁶⁹ However that is not the case. The *lis pendens* itself does not make a claim which would interfere with an owner's title to the property; however, the underlying lawsuit of which it gives notice is supposed to impact title. RCW 4.28.320 specifically states that a *lis pendens* is a recorded notice to inform third parties of "an action affecting title to real property has been commenced, or after a writ of attachment..." It puts third parties on notice that a legal proceeding has been initiated which actually calls into question the ownership of at least some portion of that property or the rights of use or possession thereof.⁷⁰

If the underlying lawsuit does not actually impact title or affect the general principles of ownership, the *lis pendens* is wrongful and can give rise to a slander of title claim *because third parties were lead to believe that the title and ownership to the property are in dispute*. That is why a *lis pendens* actually goes to defeat an owner's title to property because it renders title to the property unmarketable and makes potential purchasers question whether title to the property is clear. The Court of Appeals agreed that the purpose of a *lis pendens* is to prevent " 'third persons from acquiring, during pendency of the litigation, interests in the property

69 CP 165.

70 *Schwab*, 64 Wn. App. at 748.

which would prevent the court from granting suitable relief or such as would vitiate a judgment subsequently rendered in the litigation.’ ”⁷¹

It is important to note, however, that there is no case law in Washington where a *lis pendens* (even where wrongful) has actually lead to liability for slander of title. *Schwab v. City of Seattle* examines whether a *lis pendens* recorded for an easement dispute sufficiently impacted title, and found that it did and therefore the slander of title claim was dismissed because the element of falsity was not present.⁷² In *Richau v. Rayner*, a wrongful *lis pendens* and slander of title were both claimed in the lawsuit; however the Court only analyzed the case under RCW 4.28.328 as they dismissed the slander of title claim for lack of a pending sale.⁷³ The damages and attorneys’ fees awarded in that case were pursuant to the statutory provisions as to the filing of a wrongful *lis pendens* and **not based** on any recovery for the slander of title claim.

A lien on its own, if a suit has not been filed to foreclose upon it, is a monetary encumbrance and simply does not affect title or ownership to the property. An encumbrance has been defined by the Washington Supreme Court,

⁷¹ *Schwab*, 64 Wn. App. at 748. *citing and adopting, Tucson Estates, Inc. v. Superior Court of Pima Cy.*, 151 Ariz. 600, 729 P.2d 954, 959 (1986).

⁷² *Id.* at 750.

⁷³ *Richau v. Rayner*, 98 Wash.App. 190, 988 P.2d 1052 (1999).

to be any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistent with the passing of the fee; and, also, as a burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee.⁷⁴

That is part of the essential reason why a monetary lien does not meet the requirement under slander of title to “defeat title”, because the adverse interest does not prevent the owner from conveying the land in fee. Further, a monetary encumbrance is not directly analogous to an easement or servitude, because a monetary encumbrance does not affect an owner’s possession, exclusionary powers, or vendibility. Easements and servitudes impact all three of those elements.

2. Washington case law on liens giving rise to slander of title claims.

There is no case law in Washington which discusses whether liens of this nature can even give rise to a claim for slander of title. The cases where slander of title is discussed in depth deal with a *lis pendens* recorded concerning a disputed easement case,⁷⁵ a letter sent to a potential future purchaser claiming a title dispute,⁷⁶ a lawsuit to invalidate a

⁷⁴ *Hebb v. Severson*, 32 Wash.2d 159, 167, 201 P.2d 156 (1948) [internal citations omitted][emphasis added].

⁷⁵ *Schwab*, 64 Wn. App. 742.

⁷⁶ *Clarkston Community Corp. v. Asotin County Port Dist.*, 3 Wash.App. 1, 472 P.2d 558 (1970).

trustee's deed,⁷⁷ and an improperly recorded "memorandum of purchase".⁷⁸ Of the above, only the *Rorvig* and *Amresco* cases uphold the claim for slander of title. The key consideration in all of those cases is that the false and malicious publication implied that either the right to own or possess the property was in question. None of the foregoing examples were simply monetary encumbrances.

Filing a *lis pendens* for a dispute regarding an easement was held by the *Schwab* Court to be proper because RCW 4.28.320 permits "the filing of a notice of *lis pendens* in any action involving an adjudication of rights incident to title to real property."⁷⁹ The Court analyzed Arizona case law dealing with an identical *lis pendens* statute and concurred that covenants and easements confer rights and impose duties which arise from ownership of the property "and [are] therefore incident to title."⁸⁰ They further explained that, "the easement in question affects [an owner's] access to its property or, in other words, its possession. Possession is certainly incident to title. Title, in the context of real property, is defined as 'the means whereby the owner of lands has the just possession of his

⁷⁷ *Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 129 Wash.App. 532, 119 P.3d 884 (2005).

⁷⁸ *Rorvig*, 123 Wash.2d 854.

⁷⁹ *Schwab*, 64 Wn. App. at 749.

⁸⁰ *Id.*

property[.]’ Black’s Law Dictionary 1331 (5th ed. 1979).”⁸¹ The Court held that because an easement affects possession of property and is incident to title, the *lis pendens* in question was not “false” and therefore the slander of title claim failed.⁸² This case provides guidance on both the falsity and, to a lesser extent, the defeating title elements of a slander of title claim.

In one of the few cases that even references a lien with regard to slander of title, *Ross v. Scannell*, the Supreme Court held that RCW 60.40 did not authorize an attorney to file a lien against a client’s real property in order to collect unpaid fees, as it amounted to a lien “for unadjudicated and unliquidated claims”.⁸³ However, the case was merely remanded back to the trial court to determine whether those actions constituted slander of title; it did not make that determination, nor was it clear whether the other elements of the claim were present in the facts.⁸⁴ This case only provides insight into the “falsity” element of slander of title as the Court held that the lien was invalid as filed, and therefore presumed false. They do not discuss the lien as to its impact on the title to the property.

Dean v. McFarland discusses supplier’s liens and slander of title, but only briefly. *McFarland*, a supplier of machinery, recorded a lien

⁸¹ *Schwab*, 64 Wn. App. At 749.

⁸² *Id.*, at 750.

⁸³ *Ross v. Scannell*, 97 Wash.2d 598, 606, 647 P.2d 1004 (1982).

⁸⁴ *Ross v. Scannell*, 97 Wash.2d at 608.

under RCW 60.04 for his renting of equipment for clearing and grading on the property of Dean.⁸⁵ McFarland filed suit to foreclose upon his lien and Dean countersued for slander of title. The trial court dismissed Dean's slander of title claim and they did not appeal.⁸⁶ The Supreme Court held that under a strict construction of the version of RCW 60.04 in force in 1972, the lien was not authorized, even if the imposition of a lien under these circumstances might have been reasonable.⁸⁷ The court does not discuss the elements of slander of title at all in their opinion.

Rorvig v. Douglas is one of the most frequently cited cases concerning slander of title. The facts of the case are that the Douglases recorded a false "memorandum of agreement" with reference to property owned by their neighbors the Rorvigs.⁸⁸ This memorandum scared away a potential purchaser of the property, because it claimed that the Douglases had the right to develop and sell the property with the Rorvigs and therefore the title company claimed that the Rorvigs could not provide the purchaser with clear title.⁸⁹ The Court analysed the elements of falsity, pending sale, malice, and damages; they do not even mention defeat of

⁸⁵ *Dean v. McFarland*, 81 Wash.2d 215, 216-217, 500 P.2d 1244 (1972).

⁸⁶ *Id.*, at 217.

⁸⁷ *Id.*, at 215.

⁸⁸ *Rorvig*, 123 Wash.2d at 857.

⁸⁹ *Rorvig*, 123 Wash.2d at 857.

title.⁹⁰ Maybe it was patently clear that the memorandum of agreement implicated the ownership rights of possession and vendibility and therefore they saw no need to discuss it. In any case, it provides no guidance on this particular element of the claim.

3. Out of state case law on slander of title.

There are cases in other jurisdictions which do find that monetary liens may constitute slander of title, however the elements of slander of title in those jurisdictions are broader than that found in Washington and therefore not instructive. “Goes to defeat title” implies that the false publication actually goes to voiding or annulling one of the central elements of the “title to property”, i.e. the ownership rights contained therein. Other states slander of title elements only require that the publication is “derogatory to” or only that it “concerns” the plaintiff’s title.

In *Huff v. Jennings*, a South Carolina Court of Appeals case, the court recognized a common law cause of action for slander of title in that state based on their State constitution specifically adopting the common law of England.⁹¹ The court looked to West Virginia for the elements of the claim to adopt and stated, “the West Virginia court determined that, to maintain a claim for slander of title, the plaintiff must establish: (1) the publication; (2) with malice; (3) of a false statement; (4) that is

⁹⁰ *Id.*, at 860-861.

⁹¹ *Huff v. Jennings*, 319 S.C. 142, 148, 459 S.E. 2d 886 (South Carolina, 1995).

derogatory to plaintiff's title; and (5) causes special damages; (6) as a result of diminished value of the property in the eyes of third parties."⁹² Derogatory is not equivalent to defeat. The *Huff* court held that, "A publication is derogatory to the plaintiff's title if the publication disparages or diminishes the quality, condition, or value of the property."⁹³ Contrast that with "to defeat title" which, as discussed previously, means to "annul or render something void."⁹⁴ "Quality, condition, or value" are broad and subjective terms which, at their heart, get to what third parties think of the state of full ownership of the property in question. They *do not* require that the ownership of the property itself is called into question, which is what "goes to defeat title" really implies. A publication which goes to defeat title is clearly also derogatory; whereas a publication which is derogatory does not necessarily go to defeating title.

A New Jersey Court of Appeals case, *Peters Well Drilling Co., v. Hanzula* deals with mechanic's liens and slander of title.⁹⁵ The facts of that case are that a well drilling company filed a notice of mechanic's lien against a property for more money than the actual balance owed for the work. The property owners paid off the entire amount owed under the contract only minutes after the notice of lien was recorded, but the well

⁹² *Id.*, at 149 [emphasis added].

⁹³ *Id.*, at 150 [emphasis added].

⁹⁴ Black's Law Dictionary (10th ed. 2014), "defeat".

⁹⁵ *Peters Well Drilling Co., v. Hanzula*, 242 N.J. Super. 16, 575 A.2d 1375 (1990).

drilling company refused to remove the notice of lien. The property owner was forced to sue to get it removed. The New Jersey court found that the well drilling company forged documents to try and make it seem as if the amount owed to them was actually higher and that they had completed more work than they had actually done. However, the owner of the well company had previously told one of the property owners that they only filed the lien to recoup money owed (by the property owners) to the well driller's son.⁹⁶

This case provides no meaningful assistance in interpreting Washington slander of title claims. It is particularly useless as commentary for the action at hand because the facts deal with a lien that was never removed and the plaintiff was forced to sue, and an amount in question which was fraudulent. Further, the elements of slander of title in New Jersey are dissimilar. They are: 1) a publication 2) of a false assertion 3) with malice 4) **concerning** plaintiff's title 5) causing plaintiff special damages.⁹⁷ "Concerning plaintiff's title" is even more expansive than the South Carolina element of "derogatory". "Concerning" title could cover all manner of publications or statements about a property or its ownership. Given that this element of slander of title is the farthest away from the

⁹⁶ *Peters Well Drilling*, 242 N.J. Super. at 21-23.

⁹⁷ *Peters Well Drilling*, 242 N.J. Super. at 24-25.

Washington element, this New Jersey case is particularly inapplicable as authority and holds little, if any, precedential value.

C. Issue 3: Attorneys' fees in this matter were not incurred to "remove the cloud on title" or to "restore vendibility" and are therefore not recoverable as special damages.

Fees awarded for a successful slander of title claim are not a typical award of attorneys' fees and costs of the type which are authorized by statute or in a contract. They are *special damages* awarded for and in actions filed **in order to clear** a slanderous cloud placed upon title.⁹⁸ However, the instant case is clearly distinguishable from *Rorvig* and most slander of title actions where the plaintiff had **no choice but to sue** the defendant to clear the cloud on title.⁹⁹ Washington allows recovery of "the expense of measures reasonably necessary to counteract the publication, including litigation **to remove** the doubt cast upon vendibility or value by disparagement."¹⁰⁰ The Court in *Rorvig* awarded fees because they held that litigation was the plaintiff's "only" course of action.

Case law published since the *Rorvig* case has noted that the award of attorneys' fees as special damages authorized by *Rorvig* is an exception to the general rule. "Thus, a more accurate statement of Washington's

98 *Rorvig*, 123 Wn.2d at 861.

99 *Id.*, at 857.

100 *Rorvig*, 123 Wn.2d at 863 [quoting Restatement (Second) of Torts §663] (emphasis added).

American rule is attorney fees are not available as costs or damages absent a contract, statute, or recognized ground in equity.”¹⁰¹ The award of fees as damages in *Rorvig* was based on equitable principles; that because the plaintiff had no choice but to litigate to remove the false publication from their title, they were entitled to recover the fees expended in doing so. “The exceptions recognizing awards of attorney fees as damages are based on a determination a wrongful act may leave another party **with no choice but to litigate.**”¹⁰² However, this is an exception because of the fact that “virtually all litigation compels a party's opponent to litigate” therefore “Washington courts have narrowly limited the type of actions where attorney fees are awarded as damages.”¹⁰³

In the present case, Respondents were not forced to litigate to clear a doubt cast on title. Quite the opposite, *title in the Property was cleared years ago* when Appellant recorded the Release of Lien, and no attorneys’ fees were incurred at the time. Appellant voluntarily released this lien, after Respondents (through their agent Jim Bacus) negotiated a short payoff of the original 2012 lien.¹⁰⁴ Additionally, Respondents did not even have to pay Appellant in order to convey the property to the Lummi Tribe; Whatcom Land Title proposed a holdback of funds which would have allowed them to

101 *City of Seattle v. McCready*, 131 Wash.2d 266, 275, 931 P.2d 156 (1997).

102 *McCready*, 131 Wash.2d at 278.

103 *Id.*

104 CP 318.

close the sale without paying him and investigate his claim of lien after the fact. Litigation, therefore, was **not** necessary to counteract any disparagement and, in fact, a monetary lien is not a disparagement on title as title can still be conveyed subject to such a lien. The attorneys' fees incurred in this matter cannot possibly be framed as "special damages" incurred by Respondents **in order to clear title** on the Property; they don't even own the Property any more.

The case law on this matter is clear that an award of attorneys' fees as damages is a limited exception to the general rule on attorneys' fees as costs of litigation. An award of fees as damages is limited to only a small number of claims and they are awarded in those cases *to the extent that they were necessary to counteract* the wrongful publication, or injunction, or malicious prosecution. It is critical to note that in malicious prosecution cases, attorneys' fees and costs are recoverable as damages only to the extent that they were incurred in the actual defense of the claim which was maliciously prosecuted and not for any fees or expenses incurred while attempting to recover the damages from said malicious prosecution.¹⁰⁵ *Rorvig* specifically references malicious prosecution cases as a reasoning for authorizing attorneys' fees to be recovered as special damages and therefore

¹⁰⁵ *Aldrich v. Island Empire Tel. & Tel. Co.*, 62 Wash. 173, 176, 113 P. 264 (1911).

the reasoning found in malicious prosecution cases on this point are instructive.¹⁰⁶

D. Violations of the Consumer Protection Act, In General.

RCW 19.86.020 states that, “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” Private individuals are allowed to bring a civil action for a violation of the Consumer Protection Act under RCW 19.86.090, seeking an injunction, damages, and attorneys’ fees.

To prevail on a CPA claim, the plaintiff must show “(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.¹⁰⁷ The failure to establish even one of these elements is fatal to a plaintiff’s case.¹⁰⁸ The plaintiff must prove each element of the claim by a preponderance of the evidence.¹⁰⁹

E. Issue 4: The acts complained of by Respondents were not committed in “the conduct of trade or commerce” and therefore cannot give rise to a violation of the Consumer Protection Act.

Trade or commerce is defined as “Every business, occupation carried on for subsistence or profit and involving the elements of bargain

106 *Rorvig*, 123 Wash.2d at 862.

107 *Hangman Ridge*, 105 Wash.2d at 778.

108 *Hangman Ridge*, 105 Wash.2d at 793.

109 RCW 19.182.150

and sale, barter, exchange, or traffic.”¹¹⁰ The Washington Legislature specifically included “the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington” in that definition.¹¹¹

The lien filed by Appellant in this case was not done “in trade or commerce.” Appellant was owed a debt by his brother Darin, after he had invested time, money, and services into improving the Property during Darin’s ownership. Appellant did not perform these services in his trade or business. He is a licensed real estate broker and the activities he performed for the benefit of the Property are not encompassed by the definition of real estate brokerage services found in RCW 18.85.¹¹² Specifically he was not listing, selling, or purchasing the real estate, nor was he negotiating any of the above. He was not advertising for sale, or counseling a buyer or seller on real estate transactions. The work he did on the Property was as a favor to his brother and in no way related to his actual profession.

A claim for a violation of the Consumer Protection Act, in order to meet the “trade or commerce” element, must actually deal with the entrepreneurial aspect of the business in question, not merely the work

¹¹⁰ Black’s Law Dictionary (10th ed. 2014), “trade and commerce”.

¹¹¹ RCW 19.86.010(2).

¹¹² *See*, RCW 18.85.011(16) (a)-(h).

itself.¹¹³ “The term ‘trade’, as used by the Consumer Protection Act (CPA), includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided.”¹¹⁴ The work done on the Property and the subsequent filing of the lien were done by Appellant in his personal and private capacity, as a brother of Darin and former relative of Respondents. Nothing in this case was done in furtherance of his business or career as a real estate broker.

This point is essential, and also ties into the reasoning discussed below: in order to prove the public interest is impacted by a private act, a plaintiff must show that it occurred in the course of the defendant's business, and a number of other business related factors. Without the act being done in the course of the defendant's business, a plaintiff cannot show that the public interest is affected or that there is a likelihood that other consumers will be injured in the same way. Similarly, if the act wasn't committed in the course of the Appellant's business, *or in any business or trade*, then the Respondents cannot prove that element of their CPA claim.

¹¹³ See, *Quinn v. Connelly*, 63 Wash.App. 733, 821 P.2d 1256 (1992).

¹¹⁴ *Michael v. Mosquera-Lacy*, 165 Wash.2d 595, 602-603, 200 P.3d 695 (2009)[internal citations omitted].

F. Issue 5: The acts complained of by Respondents did not have a “public interest impact” and therefore cannot give rise to a violation of the Consumer Protection Act.

A violation of the Consumer Protection Act requires that the acts or practices complained of have a public interest impact.¹¹⁵ “Public interest impact”, which has been defined as “the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion.”¹¹⁶ For private disputes, the factors to consider are whether the acts were committed in the course of the defendant’s business; whether the defendant advertised to the public; whether the defendant actively solicited this particular plaintiff; and whether the plaintiff and defendant occupied unequal bargaining positions.¹¹⁷

For the “public interest” element, a private plaintiff must show “not only that a defendant’s practices affect the private plaintiff but that they also have the potential to affect the public interest.”¹¹⁸ In applying the requirement that the allegedly deceptive act has the capacity to deceive “a substantial portion of the public,” the Washington courts rule out

¹¹⁵ *Hangman Ridge*, 105 Wash.2d at 780.

¹¹⁶ *Id.*, at 790.

¹¹⁷ *Hangman Ridge*, 105 Wash.2d at 790-791.

¹¹⁸ *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash.2d 59, 74, 170 P.3d 10 (2007).

deceptive acts and practices that are unique to the relationship between the plaintiff and defendant.¹¹⁹

The issues which gave rise to Respondents' claims are "unique to the relationship between the parties" as this was a disagreement between members of the same family. Appellant and Respondents all lent money to Darin because they were related to him. Their various interests in the Property arose from that relationship and promises made by Darin. The only reason Respondents and Appellant are in this case together at all is because of the family ties between them; this was not an arms-length business deal between strangers.

The function of the Washington Consumer Protection Act is "to protect consumers from harmful practices, which is why plaintiff must allege an actual or potential impact on the general public, not merely a private wrong."¹²⁰ It is the realistic likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a private dispute to one that affects the public interest.¹²¹ To establish that an unfair or deceptive act has a public impact, one must show "a real and substantial

119 *Burns v. McClinton*, 135 Wash. App. 285, 303–06, 143 P.3d 630 (2006) [emphasis added].

120 *McDonald v. OneWest Bank, FSB*, 929 F.Supp.2d 1079, 1097 (W.D.Wash. 2013)[internal citations omitted].

121 *Hangman Ridge*, 105 Wash.2d at 791.

potential for repetition as opposed to a hypothetical possibility of an isolated unfair or deceptive act being repeated.”¹²²

None of these factors are present in the current case. Appellant did not perform the work on the Property for any consumer or neutral third party; it was for his family. Appellant recorded the liens against the Property, and this Property only, because his brother had owned it and owed him money for the services he rendered. There is no chance that these acts would be repeated and injure other plaintiffs in the exact same fashion.

F. Issue 6: Appellant was not unjustly enriched by receiving \$11,550.00 from the proceeds of the sale of the Property.

Appellant spent years loaning money to his brother so that he could improve the Property and providing his time and services to obtain permits and deal with County zoning and development issues so that the Property could be used to run a business.¹²³ He conferred a tangible benefit to the property which was valued at \$18,354.00.¹²⁴ Appellant was still owed \$16,600.00 as of the filing of his second lien in 2013.¹²⁵ He accepted \$11,550.00 out of the proceeds of Respondents’ sale of the

¹²² *Mosquera-Lacy*, 165 Wash..2d at 604–05, [internal citations omitted].

¹²³ CP 321-322 and CP 89-91.

¹²⁴ CP 93.

¹²⁵ *Id.*

Property to the Lummi Tribe for his original 2012 lien, clearly less than the value of the money and services he had put into it.¹²⁶

“Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.”¹²⁷ Washington cases have established that under these circumstances the parties create a “quasi contract” between them.¹²⁸ There are three elements to the claim which must be proven: 1) a benefit conferred upon the defendant by the plaintiff; 2) an appreciation or knowledge by the defendant of the benefit; 3) and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.¹²⁹

The first two elements are inarguably present in this case. Appellant received \$11,550.00 from the proceeds of the sale of the Property at the time when Respondents owned it. However, the third element is not supported by the facts, or there are at least issues of material fact on this claim which should have precluded summary judgment. Appellant performed services upon and provided money which went to improvements on the Property. He

126 CP 318.

127 *Young v. Young*, 164 Wash.2d 477, 484, 191 P.3d 1258 (2008)[internal citations omitted].

128 *Id.*

129 *Id.*

added a benefit to the Property for which he was not compensated. Respondents received the benefit of his services and any increase in value that they conferred and Appellant was left without payment.

Reasonable minds could argue that it was not unjust under these circumstances for Appellant to receive the payment from the proceeds of sale. The proceeds are based on the value of the Property and his services were of the nature which would have increased that value. Was it really unjust for him to have received some of that in return? The other option is that he would have been left with nothing in return for his efforts and Respondents would have received the entire benefit of his labors.

A person has been unjustly enriched when he has “profited or enriched himself” at the expense of another. Appellant did not profit, nor was he enriched.¹³⁰ In fact, he was never compensated for roughly \$5,000.00 that he put into the Property. “Enrichment alone will not trigger the doctrine; the enrichment must be unjust under the circumstances and as between the two parties to the transaction.”¹³¹ Further, Respondents voluntarily negotiated the payment and made a separate agreement, a contract if you will, to pay the \$11,550.00 to Appellant for his “original lien” which title had already deemed expired. “It is a universally

¹³⁰ *Dragt v. Dragt/De Tray, LLC*, 139 Wash.App. 560, 576, 161 P.3d 473 (2007) [internal citations omitted].

¹³¹ *Id.*

recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge by the payor of the facts on which the claim is based, cannot be recovered on the ground that the claim was illegal, or that there was no liability to pay in the first instance.”¹³²

Appellant was owed the money for the benefit he conferred upon the Property. Respondents were given alternative options if they did not want to pay him out of proceeds for the services he rendered, but they chose to negotiate an agreement with Appellant for him to accept less than he was owed. This agreement should preclude Respondents from recovering on their unjust enrichment claim because the payment was not unjust under the circumstances. In fact, it was equitable for Appellant to receive some payment for the benefit he conferred to the Property.

VI. CONCLUSION

The trial court erred in finding Appellant liable for slander of title. The trial court further erred in awarding attorneys’ fees as special damages for slander of title for a lawsuit brought nearly two years after the lien in question was removed and the Property sold to a third party. These attorneys’ fees were not incurred in order to remove the lien from title, as is required by the jurisprudence of this State. In fact, the Respondents did

¹³²*Hawkinson v. Conniff*, 53 Wash.2d 454, 458, 334 P.2d 540 (1959) [internal citations omitted].

not spend any money on attorneys' fees in order to remove the lien. This was not an acceptable award of "special damages" as is conditionally authorized under *Rorvig* and its descendents.

The trial court also erred in finding that Appellant's actions were in violation of the Consumer Protection Act and awarding treble damages as a result. The facts of this case did not arise out of any action "in trade or commerce", nor did they impact the public interest. This was a private, family dispute over money owed by one individual to two members of his family, to whom he each granted some form of security in the Property. The public was not impacted and there is no chance that this can or even could be repeated with other hypothetical plaintiffs.

Finally, the trial court erred in finding that Appellant was unjustly enriched by the payment of \$11,550.00 from the proceeds of the sale of the Property. He actually suffered a loss for all of his efforts. Appellants services added value to the Property, and under the circumstance it was not unjust for him to have been repaid.

Appellant respectfully requests that the Court of Appeals overturn the grant of summary judgment in the favor of Respondents, and reverse the award of damages for slander of title, unjust enrichment, and violation of the Consumer Protection Act.

Dated this 11th day of August, 2016.

DEMCO LAW FIRM, P.S.



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DECLARATION OF SERVICE

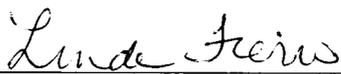
I, Linda Fierro, state:

On this day I caused the foregoing Statement of Arrangements to be delivered by ABC Legal Messengers for delivery no later than August 12, 2016 to the Court of Appeals Division I. On this day I also caused the foregoing to be delivered via email and US Mail to:

James E. Britain
Britain & Vis, PLLC
805 DuPont Street, Suite 1
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Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of August, 2016 at Seattle, Washington.



Linda Fierro

2016 WL 3910991

Editor's Note: Additions are indicated by Text and deletions by Text .

Supreme Court of Washington,
En Banc.

Certification from the United States
Court of Appeals for the Ninth Circuit
in Centurion Properties III, LLC; SMI
Group XIV, LLC, Plaintiffs–Appellants,

v.

Chicago **Title** Insurance Company, a
Nebraska company, Defendant–Appellee.

No. 91932–1

|

Filed July 14, 2016

Synopsis

Background: Landowners brought action against **title** insurer alleging that it negligently recorded unauthorized liens on the property that caused them to default on a loan. The United States District Court for the Eastern District of Washington, Rosanna Malouf Peterson, Chief Judge, 2013 WL 3350836, granted insurer's motion for summary judgment. Landowners appealed. The Court of Appeals for the Ninth Circuit, Sidney R. Thomas, Chief Judge, 793 F.3d 1087, certified question.

[Holding:] As a matter of first impression, the Supreme Court, Wiggins, J., held that insurer did not owe a duty of care to landowners, who were third parties, in the recording of legal instruments.

Question answered.

West Headnotes (12)

[1] **Negligence**
-- Necessity and Existence of Duty
A duty of care is an obligation, to which the law will give recognition and effect, to

conform to a particular standard of conduct toward another.

Cases that cite this headnote

[2] **Negligence**
-- Necessity and Existence of Duty
In a negligence action, in determining whether a duty is owed to the plaintiff, a court must not only decide who owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed.

Cases that cite this headnote

[3] **Negligence**
-- Duty as question of fact or law generally
The existence of a duty and the scope of that duty are questions of law.

Cases that cite this headnote

[4] **Negligence**
-- Necessity and Existence of Duty
Negligence
-- Public policy concerns
The court considers logic, common sense, justice, policy, and precedent, as applied to the facts of the case, when determining whether a defendant owes a duty in tort.

Cases that cite this headnote

[5] **Federal Courts**
-- Proceedings following certification
Certified questions from a federal court are questions of law that the Supreme Court reviews de novo. Wash. Rev. Code Ann. § 2.60.030(2).

Cases that cite this headnote

[6] **Abstracts of Title**
-- Rights, duties, and liabilities of examiners of title

A **title** insurance company does not owe a duty of care to third parties in the recording of legal instruments.

Cases that cite this headnote

Cases that cite this headnote

[7] **Abstracts of Title**

— Rights, duties, and liabilities of examiners of **title**

Insurance

— Insurers' Duties Upon Discovery of Defect

A **title** insurer's duty to identify or disclose **title** defects is owed only in preparing an abstract of **title**. Wash. Rev. Code Ann. §§ 48.29.010(3) (b), 48.29.010(3)(c) (1997).

Cases that cite this headnote

[8] **Abstracts of Title**

— Rights, duties, and liabilities of examiners of **title**

Insurance

— Of Insurers

Title insurance companies have a duty of care in only limited situations outside of a contractual relationship and no duty to third parties in the recording of legal instruments.

Cases that cite this headnote

[9] **Records**

— Purpose of registration

The purpose of the recording acts is to ensure stability and certainty of **title** to real property. Wash. Rev. Code Ann. § 65.08.070.

Cases that cite this headnote

[10] **Libel and Slander**

— Nature and elements in general

“**Slander of title**” is defined as: (1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's **title**; and (5) result in plaintiff's pecuniary loss.

[11] **Torts**

— Contracts

Torts

— Prospective advantage, contract or relations; expectancy

Tortious interference with a contract requires: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.

Cases that cite this headnote

[12] **Vendor and Purchaser**

— Effect of Notice

Vendor and Purchaser

— Constructive Notice, and Facts Putting on Inquiry

Both actual and constructive notice provides a party with knowledge of another person's real property interest.

Cases that cite this headnote

Attorneys and Law Firms

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Matthew J. Segal, Jessica Anne Skelton, Pacifica Law Group LLP, 1191 2nd Avenue Suite 2000, Seattle, WA, 98101–3404, Amicus Curiae on behalf of Washington Land **Title** Association.

Opinion

WIGGINS, J.

*1 ¶ 1 The United States Court of Appeals for the Ninth Circuit certified the following question to this court: “Does a **title** company owe a duty of care to third parties in the recording of legal instruments?” We answer the certified question no and hold that **title** companies do not owe a duty of care to third parties in the recording of legal instruments. Such a duty is contrary to Washington’s policy and precedent, and other duty of care considerations.

FACTS

¶ 2 This certified question arises from a civil action for money damages filed in the United States District Court for the Eastern District of Washington. Plaintiffs Centurion Properties III LLC (CP III) and SMI Group XIV LLC (collectively Plaintiffs) assert that defendant Chicago **Title** Insurance Company negligently breached its duty of care and caused damages when it recorded unauthorized liens on CP III’s property.

¶ 3 Michael Henry, the sole member of SMI, joined with Thomas Hazelrigg to form CP III. They formed CP III in order to purchase property and commercial buildings in Richland, Washington. They further agreed that 90 percent of CP III would be owned by individuals and entities controlled by Hazelrigg and 10 percent would be owned by SMI. Aaron Hazelrigg, through nonparty Centurion Management III LLC, was the managing member of CP III.

¶ 4 To purchase the property, CP III obtained a \$70.8 million loan from General Electric Capital Corporation (GECC). The loan was secured by a deed of trust on the property naming GECC as the beneficiary. The deed of trust and two other instruments—the CP III operating agreement and the GECC loan agreement—prohibited the placement of any liens or encumbrances on the property without GECC’s approval. Any unauthorized lien or encumbrance would constitute an event of default.

¶ 5 Defendant Chicago **Title** served as escrow agent, closing agent, and **title** insurer for the purchase of the property at issue. Chicago **Title** recorded the GECC deed

of trust and is named trustee for GECC’s senior lien. Chicago **Title**, as trustee, also received and reviewed copies of the CP III operating agreement and the GECC loan agreement as part of the transaction.

¶ 6 Following the sale, four liens were placed on the property without GECC’s approval. The four unauthorized liens were recorded by Chicago **Title**; two separate deeds of trust granted by CP III in favor of Centrum Financial Services Inc.; a deed of trust granted by CP III to Trident Investments Inc.; and a memorandum of agreement between CP III and Trident. Two additional liens are not at issue in this case.

¶ 7 Each of these liens was a facially valid instrument: the instruments bore the correct legal description, and they were all signed and notarized through Centurion Management by either Aaron Hazelrigg or Thomas Hazelrigg as director of CP Management on behalf of CP III.¹ Chicago **Title** initially recorded Centrum Financial’s deed of trust in conjunction with issuing a commitment for **title** insurance. The remaining three recordings were done as accommodations.

*2 ¶ 8 Later, GECC obtained a **title** report and learned of the four (prohibited) liens that Chicago **Title** recorded. GECC notified CP III that the junior liens were events of default and accelerated the entire unpaid balance of the loan, imposing a default rate of interest. Though CP III attempted to refinance the loan, no lender would refinance it while the prohibited liens remained on CP III’s **title**. GECC moved forward with its foreclosure, forcing CP III to file for bankruptcy.²

¶ 9 Plaintiffs filed a civil action against the Hazelriggs, Centrum Financial, and others, alleging that the named defendants misappropriated funds from CP III, improperly transferred ownership of CP III, and secretly placed liens on CP III’s property. These claims sought to (1) enjoin foreclosure of the allegedly unauthorized liens and (2) quiet **title** by voiding the instruments that created them. Plaintiffs later added a sole complaint against Chicago **Title**; this complaint asserted that Chicago **Title** was negligent in recording the prohibited liens and that the resulting defaults caused CP III to incur more than \$7.5 million in damages, including \$3 million in default interest. The claims against all other parties settled, leaving only the negligence claim against Chicago **Title**. The district court dismissed this claim on summary

judgment, finding that Chicago **Title** did not owe Plaintiffs a duty of care. *Centurion Props. Ill, LLC v. Chi. Title Ins. Co.*, No. CV-12-5130-RMP, 2013 WL 3350836 (E.D. Wash. July 3, 2013) (court order). Plaintiffs appealed, and the Ninth Circuit certified its question to this court. *Centurion Props. Ill, LLC v. Chi. Title Ins. Co.*, 793 F.3d 1087 (9th Cir.2015). We accepted review pursuant to RCW 2.60.020.

ANALYSIS

[1] [2] [3] ¶ 10 We are asked whether a **title** insurance company owes a duty of care to third parties in the recording of legal instruments. A duty of care is “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” *Affil. FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010) (internal quotation marks omitted) (quoting *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409, 413, 693 P.2d 697 (1985)). The duty of care question implicates three main issues—the existence of a duty, the measure of that duty, and the scope of that duty. *Id.* (quoting DAN B. DOBBS, *THE LAW OF TORTS* § 226, at 578 (2000)). “In a negligence action, in determining whether a duty is owed to the plaintiff, a court must not only decide who owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed.” *Keller v. City of Spokane*, 146 Wash.2d 237, 243, 44 P.3d 845 (2002). The existence of a duty and the scope of that duty are questions of law, and both are determined by considering the factors listed below.

[4] ¶ 11 We consider logic, common sense, justice, policy, and precedent, as applied to the facts of the case, when determining whether a defendant owes a duty in tort. *Affil. FM Ins. Co.*, 170 Wash.2d at 449, 243 P.3d 521. We have long applied these factors when defining “duty,” and they can be traced back for more than 100 years.³ We apply these factors here. We first examine precedent and analyze whether our decisions or the decisions of neighboring jurisdictions support finding a duty here. We next consider whether Washington's policy of protecting the rights of property owners through the **title** recording system is advanced or frustrated by imposing a legal duty of care. Finally, we consider logic, common sense, and justice. These considerations lead us to conclude that a

title insurance company does not owe a duty of care to third parties in the recording of legal instruments.

I. Standard of review

*3 [5] ¶ 12 Certified questions from a federal court are questions of law that we review de novo. *Gray v. Suttell & Assocs.*, 181 Wash.2d 329, 337, 334 P.3d 14 (2014). We consider the legal issues not in the abstract but rather based on the certified record provided by the federal court. *Id.* (citing RCW 2.60.030(2)). Our ruling is not advisory—pursuant to RCW 2.60.020, our ruling in answer to the certified question resolves actual issues pending in the federal proceeding and will be legal precedent in all future controversies involving the same legal question. *Id.*

II. Precedent

[6] ¶ 13 We first consider precedent. Whether a **title** insurance company owes a duty of care to third parties in the recording of legal instruments is a question of first impression for this court. However, our precedent firmly supports the conclusion that the answer to this certified question is no.

¶ 14 Our analysis begins by considering the duties owed by **title** insurance companies in prior cases. We next consider other circumstances that have led us to recognize a professional duty of care. Washington law treats professional duties as discrete duties owed to clients—absent a special relationship, we have extended a professional duty of care to third parties only (1) when the third party is an intended beneficiary, (2) when the third party justifiably relied on a professional's representations under a theory of negligent misrepresentation, or (3) when a professional is best able to mitigate the risk of a physical injury. See, e.g., *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wash.2d 561, 567, 311 P.3d 1 (2013) (no duty to nonclient absent intent to benefit nonclient); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wash.2d 820, 832, 959 P.2d 651 (1998) (negligent misrepresentation); *Affil. FM Ins. Co.*, 170 Wash.2d at 545, 242 P.3d 876 (engineer owed a duty of care to third parties who may be harmed by engineer's negligence). Because Plaintiffs do not assert a theory of negligent misrepresentation, our analysis considers our rule limiting duties to third parties who are intended beneficiaries and the rationale extending a duty to professionals able to mitigate the risk of physical injury. We conclude by considering the approaches of Arizona and California, the only other states to consider the duty

owed by a **title** insurance company to a third party when recording legal instruments.

A. Title insurance companies do not owe a general duty to clients to search for and disclose potential title defects when issuing preliminary commitments

¶ 15 **Title** insurance companies may perform several services for their own benefit or for their client's benefit. Consistent with chapter 48.29 RCW (“**Title Insurers**”), our analysis of the duty owed by **title** insurance companies to their clients follows the nature of the service at issue.

¶ 16 Though we have not considered the duty owed by a **title** insurance company to nonclient third parties, we thoroughly analyzed and explored the duty of a **title** insurer to its clients—namely to its insureds—in *Barstad v. Stewart Title Guaranty Co.*, 145 Wash.2d 528, 541, 39 P.3d 984 (2002). We specifically considered a **title** insurance company's duty to search for and/or to disclose **title** defects to its clients when issuing a preliminary commitment. We held that **title** insurance companies do not owe their clients a duty to search for and/or to disclose **title** defects when preparing a “preliminary **title** commitment” pursuant to the plain language of RCW 48.29.010(3)(c). *Id.* at 530, 39 P.3d 984. To reach this conclusion, we considered the meaning of chapter 48.29 RCW, the legislative purpose of that statutory scheme, and standard industry practice, and we conducted a comparative analysis of other states in the Ninth Circuit. *Id.* at 535–42, 39 P.3d 984.

*4 ¶ 17 *Barstad* considered the general duties imposed on **title** insurance companies by chapter 48.29 RCW. *Id.* at 535, 39 P.3d 984. There, the insureds asserted that **title** insurers owe a duty of care when preparing abstracts of **title** and argued that a preliminary **title** commitment serves the same purpose as an abstract of **title**, giving rise to the same duty of care. *Id.* We rejected this argument. *Id.*

¶ 18 We began by examining the definitions of the services performed—and resultant duties owed—by **title** insurers. *Id.* We observed that an abstract of **title** is

“a written representation, provided pursuant to contract, whether written or oral, intended to be relied upon by the person who has contracted for the receipt of such representation, listing all

recorded conveyances, instruments, or documents which, under the laws of the state of Washington, impart constructive notice with respect to the chain of **title** to the real property described. An abstract of **title** is not a **title** policy as defined in this subsection.”

Id. at 535 n. 8, 39 P.3d 984 (quoting former RCW 48.29.010(3)(b) (1997)⁴). Due to the contractual and reliance principles associated with an abstract, we noted that we have long recognized the potential duties associated with an abstract of **title**. *Id.* at 539 n. 14, 39 P.3d 984.

¶ 19 We contrasted this service with the statutory definition of a “preliminary commitment” at RCW 48.29.010(3)(c):

“ ‘Preliminary report,’ ‘commitment,’ or ‘binder’ means reports furnished in connection with an application for **title** insurance and are offers to issue a **title** policy subject to the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and such other matters as may be incorporated by reference. The reports are not abstracts of **title**, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of **title** applicable to the issuance of any report. Any such report shall not be construed as, nor constitute, a representation as to the condition of the **title** to real property, but shall constitute a statement of terms and conditions upon which the issuer is willing to issue its **title** policy, if such offer is accepted.”

Id. at 535 n. 8, 39 P.3d 984 (quoting former RCW 48.29.010(3)(c)⁵). We observed that a preliminary commitment is “merely an offer to issue the **title** insurance subject to the stated conditions.” *Id.* at 536, 39 P.3d 984 (citing former RCW 48.29.010(3)(c)). This research is

performed specifically for the **title** insurance company's benefit and not for the benefit of the insured. *Id.* at 540, 39 P.3d 984.

¶ 20 We also considered industry practice, legislative intent, and the approach of other jurisdictions, as well as the insured's argument that **title** insurance companies owe a fiduciary duty to disclose **title** defects. *Id.* at 542–44, 39 P.3d 984. Every one of these considerations led to the conclusion that **title** insurance companies have no general duty to disclose potential or known **title** defects when they are not preparing an abstract of **title** because these services are not prepared for or intended to be relied on by a person other than the insurer. *Id.* at 530, 39 P.3d 984.

*5 ¶ 21 Our holding in *Barstad* follows a long line of cases in which we have rejected attempts to impose a duty on **title** insurance companies to search for and disclose **title** defects. See, e.g., *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409, 413–14, 693 P.2d 697 (1985) (no reliance by third party on **title** insurer's preliminary commitment); *Klickman v. Title Guar. Co. of Lewis County*, 105 Wash.2d 526, 528, 716 P.2d 840 (1986) (no liability because no **title** defect); *Lombardo v. Pierson*, 121 Wash.2d 577, 581–83, 852 P.2d 308 (1993) (same). These cases strongly suggest that **title** insurers do not owe a duty of care to third parties when merely recording legal instruments.

¶ 22 **Title** companies may record documents with the county recorder's office in conjunction with the issuance of a **title** commitment or policy, or as a separate accommodation recording at the request of the customer. Here, Chicago **Title** recorded Centrum Financial's deed of trust in conjunction with issuing a commitment for **title** insurance and later completed three such accommodation recordings. No party requested an abstract of **title**, and none of these recordings was done at the request of Plaintiffs,

[7] ¶ 23 Chicago **Title** did not have a duty to identify or disclose **title** defects to its client, Centrum Financial, in preparing a commitment for **title** insurance; such a duty is owed only in preparing an abstract of **title**. Accord *Barstad*, 145 Wash.2d at 536, 39 P.3d 984; former RCW 48.29.010(3)(b), (3)(c). Further, Washington's **title** insurance and recording statutes do not impose liability for the negligent recording of **titles**. See generally ch. 48.29 RCW; ch. 65.08 RCW. Because our **title** insurer liability precedent does not support finding a duty to identify and

disclose **title** defects to its own clients, it cannot support extending this duty of care to nonclient third parties when recording a legal instrument, particularly when that legal instrument is facially valid, as it is here.⁶

B. Our other title insurance company cases do not inform our analysis of this issue

¶ 24 Plaintiffs' citations to other cases holding that **title** insurance companies owe duties in tort are not well taken.

¶ 25 Plaintiffs cite *Denavas v. Sandstone Court of Bellevue, LLC*, 148 Wash.2d 654, 663, 63 P.3d 125 (2003) for the proposition that **title** insurance companies have a duty to exercise reasonable care in carrying out their instructions. However, *Denavas* actually held that “the **Title** Company did not have a duty to point out the discrepancy between the legal description in the Agreement and that in the closing documents.” *Id.* To the extent *Denavas* discussed a duty to follow instructions, we held that an “escrow agent's duties and limitations are defined ... by his instructions.” *Id.* (alteration in original) (quoting *Nat'l Bank of Wash. v. Equity Investors*, 81 Wash.2d 886, 910, 506 P.2d 20 (1973)). This point arises strictly out of the specific characteristics governing escrow holders—characteristics that are undisputedly not at issue in this case as Chicago **Title** did not perform any escrow services. See *Nat'l Bank of Wash.*, 81 Wash.2d at 910, 506 P.2d 20.

*6 ¶ 26 Plaintiffs also rely on *Walker v. Transamerica Title Insurance Co.*, 65 Wash.App. 399, 828 P.2d 621 (1992). But *Walker* addresses only proximate cause; the court did not address duty because Transamerica **Title** conceded duty for the purpose of its summary judgment motion. *Id.* at 402, 828 P.2d 621. Further, *Walker* involved the recording of a facially invalid lien that did not contain a description of the property at issue. *Id.* at 401, 828 P.2d 621. *Walker* does not inform our duty analysis.

C. Absent a substantial risk to public safety or property damage, professionals do not owe a duty to third parties when the transaction at issue is not intended to benefit the third party

¶ 27 The duty of a **title** insurance company to third parties is a question of first impression to this court. Therefore, we turn to analogous considerations of a professional's duty to third-party nonclients for guidance. Using a modified version of California's multifactor test,⁷

we recently considered whether attorneys owe nonclient third parties a duty of care in *Sterling Savings Bank*, 178 Wash.2d 561, 311 P.3d 1. Because our multifactor test is derived from the California test applied in *Seeley v. Seymour*, 190 Cal.App.3d 844, 237 Cal.Rptr. 282 (1987) (see *infra* Section II.D) and because the issue of a lawyer's duty to a nonclient is similar to the duty of a title insurer to a nonclient, our analysis in *Sterling* is instructive to our analysis here.

¶ 28 In *Sterling*, we applied a multifactor test designed to determine when an attorney may be liable for malpractice to a nonclient third party. These factors are:

- “1. The extent to which the transaction was intended to benefit the plaintiff [that is, the third party suing the attorney];
- “2. The foreseeability of harm to the plaintiff;
- “3. The degree of certainty that the plaintiff suffered injury;
- “4. The closeness of the connection between the defendant's ... conduct and the injury;
- “5. The policy of preventing future harm; and
- “6. The extent to which the profession would be unduly burdened by a finding of liability.”

178 Wash.2d at 565–66, 311 P.3d 1 (first alteration in original) (quoting *Trask v. Butler*, 123 Wash.2d 835, 843, 872 P.2d 1080 (1994)). Quoting *Trask*, we explained that the first factor is the “ ‘primary inquiry’ ” in determining liability to third parties. *Id.* (quoting *Trask*, 123 Wash.2d at 842, 872 P.2d 1080). We further explained that “ ‘under the modified multifactor balancing test, the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained’ ” and held that “ ‘no further inquiry need be made unless such an intent exists.’ ” *Id.* (quoting *Trask*, 123 Wash.2d at 843, 872 P.2d 1080). Ultimately we found no duty because the transaction at issue was not intended to benefit the third party. *Id.* at 570, 311 P.3d 1.

¶ 29 These factors do not support finding a duty in this case. Neither Chicago Title's preliminary commitment and recording nor its subsequent accommodation recordings for the benefit of its client, Centrum Financial, were intended to benefit CP III. Indeed, the opposite is

true—any recording of Centrum Financial's interest in the property would burden CP III. Under the multifactor test, this threshold inquiry is dispositive of Plaintiffs' claim.

*7 ¶ 30 Plaintiffs do not argue that the transaction between Centrum Financial and Chicago Title was intended to benefit them. Instead, they seem to assert two separate arguments in support of liability. First, they argue that Chicago Title assumed a duty of care arising out of the foreseeability of the injury to CP III when it agreed to issue a commitment to Centrum Financial and to record its instruments. Second, they assert that Washington law recognizes tort duties by title insurance companies. Our precedent requires rejection of both arguments.

¶ 31 Plaintiffs' first argument is that liability to CP III arises out of Centrum Financial's instruction to Chicago Title. From this instruction, Plaintiffs argue that Chicago Title owed them a duty of care “given the obvious and known risks to the landowner.” Pls.' Reply Br. at 7. This assertion assumes that a duty to CP III could be inferred from the contractual agreement between Centrum Financial and Chicago Title, an argument we reject. See *infra* Section IV.a. This argument for a duty also appears to be entirely predicated on the foreseeability of the harm. However, foreseeability of harm is only one of six factors necessary to determine whether a duty exists. *Sterling*, 178 Wash.2d at 566, 293 P.3d 1168. Further, we do not consider the foreseeability of harm when a transaction is not intended to benefit the third-party plaintiff. *Id.* Thus, foreseeability of harm, alone, is insufficient to support imposing a duty.

¶ 32 Plaintiffs also assert that title insurance companies are professional institutions charged with the public trust; therefore, they owe a duty of reasonable care to third parties in the exercise of their professional responsibilities. Recognizing that title insurance companies may owe a duty of reasonable care to their clients in certain scenarios not before us today, we hold that the duty considerations do not support extending the duties owed by title insurance companies to encompass liability to third parties in the recording of legal instruments.

¶ 33 Plaintiffs rely heavily on a recent decision establishing a professional duty of care toward third parties under a theory of general negligence. See *Affil. FM Ins. Co.*, 170 Wash.2d at 453–54, 243 P.3d 521. Plaintiffs read *Affiliated FM Insurance Co.* too broadly: the policy considerations,

precedent, logic, justice, and common sense underlying that decision are not present here.

¶ 34 In *Affiliated FM Insurance Co.*, we considered a certified question from the Ninth Circuit. The question asked whether a party who has a contractual right to operate commercially and extensively on property owned by a nonparty may sue an engineering consulting firm in tort for damage to that property when the party and the engineers are not in privity of contract. *Id.* at 447, 243 P.3d 521. The dispute arose from a fire aboard a train on Seattle's monorail system. *Id.* at 445, 243 P.3d 521. Though the city of Seattle owned the property that was physically damaged by the fire, Seattle Monorail Service operated the monorail and suffered significant economic damages as a result of the fire. *Id.* Seattle Monorail Services argued that the fire was the result of an engineer's negligent design and sued, arguing that the engineers were under a duty to Seattle Monorail Services to exercise reasonable care, despite the lack of contractual privity. *Id.* at 446, 243 P.3d 521.

¶ 35 We found that a duty existed. *Id.* at 453–54, 243 P.3d 521. In doing so, we balanced the risk to the physical safety of persons and property arising out of an engineer's work against the usefulness of private ordering (e.g., preference for contractual remedies) and against the economic burden a duty would place on engineers. *See id.* at 451–54, 243 P.3d 521. These policy considerations supported the court's analysis that a duty exists where “the interest in safety is significant” and the engineers occupy a position of control such that their training, education, and experience place them in the best position to prevent harms caused by their work. *Id.* at 453, 243 P.3d 521. We also considered precedent, both here and nationally, finding that the “engineers” common law duty of care has long been acknowledged in Washington. *Id.* at 454, 243 P.3d 521.

*8 ¶ 36 These considerations do not weigh in favor of a duty here. There is no significant interest in public safety at issue and no concerns for physical safety. We therefore reject Plaintiffs' attempts to borrow our professional duty analysis from inapposite contexts.

D. Other jurisdictions do not provide persuasive authority on this issue

¶ 37 As the Ninth Circuit recognized in its certification order, only two cases have considered whether title

insurance companies owe a duty of care to third parties: the Arizona Court of Appeals in *Luce v. State Title Agency, Inc.*, 190 Ariz. 500, 950 P.2d 159 (1997) and the California Court of Appeals in *Seeley*, 190 Cal.App.3d 844, 237 Cal.Rptr. 282 (1987). These decisions reach opposite conclusions, in part because the decisions are based on different legal theories and different facts. Due to the difference in legal theories and facts, these cases provide limited persuasive reasoning for our consideration in this case.

¶ 38 On facts nearly identical to this case, the Arizona Court of Appeals considered whether a title agency owed a professional duty of care to protect a third party from foreseeable harm when it gratuitously recorded a deed of trust on behalf of a lender. *See Luce*, 190 Ariz. at 502, 950 P.2d 159. In *Luce*, a general partner signed a deed of trust to a lender without the approval of his limited partners, despite the fact that the partnership agreement required him to have their approval. *Id.* at 501, 950 P.2d 159. The lender asked State Title Agency to insure the policy and to record the deed of trust. *Id.* State Title issued a preliminary title report, provided a lender's policy of title insurance, and gratuitously recorded the deed. *Id.* State Title acknowledged that it read the partnership agreement during this process, and the court inferred that State Title had actual knowledge of the agreement's limitations on the general partner's authority. *Id.*

¶ 39 The limited partners sued, asserting that State Title owed a duty based on either its review of the partnership agreement or its gratuitous recording of the deed of trust. *Id.* at 501–02, 950 P.2d 159. The trial court granted summary judgment in favor of State Title, *id.* at 501, 950 P.2d 159, and the Court of Appeals affirmed. *Id.* at 504, 950 P.2d 159. The Court of Appeals first held that there was no professional duty arising out of the foreseeable harm because State Title had no contractual relationship with anyone, no special relationship (or indeed, any relationship at all) with the injured plaintiff, and no ability to control the behavior of the general partner. *Id.* at 502–03, 950 P.2d 159.⁸

¶ 40 The facts presented to the Arizona Court of Appeals are virtually identical to those in the case before us and reinforce our conclusion here. Further, as discussed *supra* Section II.c of this opinion, Washington recognizes that foreseeability of harm is one of six factors the court considers in deciding whether a duty is owed

to a nonclient. Though Arizona applied a different legal analysis and did not explicitly consider the intent to benefit, the application of the “intent to benefit” factor would have resulted in the same conclusion. Their conclusion that no duty exists on analogous facts supports our decision here.

*9 ¶ 41 In *Seeley*, the California Court of Appeals reached the opposite conclusion on significantly different facts. *See* 190 Cal.App.3d 844, 237 Cal.Rptr. 282. In *Seeley*, a buyer attempted to buy property owned by *Seeley*. *Id.* at 850, 237 Cal.Rptr. 282. *Seeley* was not interested in selling but indicated that he would consider a long term lease of the property. *Id.* at 851, 237 Cal.Rptr. 282. The parties negotiated the terms of the lease at length but did not come to an agreement. *Id.*

¶ 42 Following further negotiations, the buyer unilaterally prepared a “Memorandum of Agreement” that set forth the terms of a 60-year lease between himself and *Seeley*. *Id.* The buyer signed the agreement and had his signature notarized; he never presented the agreement to *Seeley*. *Id.* Instead, the buyer took the agreement to a title insurance company. *Id.* The buyer was a regular customer of the title insurance company, which agreed to file the unsigned agreement for recording. *Id.* The title insurance company filed the agreement in a stack of documents insured by their company, and the recorder recorded the invalid, unsigned encumbrance on *Seeley*'s property. *Id.* *Seeley* knew nothing of this agreement. *Id.*

¶ 43 The encumbrance affected *Seeley*'s ability to sell his title. *Id.* at 852, 237 Cal.Rptr. 282. He then sued the county recording office for negligent recording; he later amended his complaint and sued the title insurance company for negligence. *Id.*

¶ 44 The California Court of Appeals considered whether a title insurance company, not acting as escrow, may be held liable “for the negligent recordation of a nonrecordable document.” *Id.* at 860, 237 Cal.Rptr. 282. In holding that the title company here was liable, the court considered six factors:

“(1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the

closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm.”

Id. at 861, 237 Cal.Rptr. 282 (quoting *Earp v. Nobmann*, 122 Cal.App.3d 270, 290, 175 Cal.Rptr. 767 (1981)). As discussed earlier, these factors are comparable to Washington's multifactor test in *Sterling* and support our adoption of that test here. *Compare Seeley*, 190 Cal.App.3d at 861, 237 Cal.Rptr. 282, with *Sterling*, 178 Wash.2d at 566, 311 P.3d 1.

¶ 45 But there are critical differences between *Seeley* and this case that limit its persuasive value here. *Seeley* first considered whether the transaction was intended to affect a third-party plaintiff. 190 Cal.App.3d at 861, 237 Cal.Rptr. 282. The transaction was intended to undermine *Seeley*'s interest in the property. *Id.* at 861, 237 Cal.Rptr. 282. Conversely, the recordation in the instant case was intended to secure Centrum Financial's procured lien; there was no intent to benefit or harm CP III.⁹

¶ 46 Further, the instrument at issue in *Seeley* was facially invalid.¹⁰ Thus—unlike our case—the title insurance company in *Seeley* did not have to review any other documents to know that the document was not recordable. The title insurer in *Seeley* also submitted the facially invalid instrument to a special “stopped clock” station. *Id.* at 861 n. 7, 237 Cal.Rptr. 282. The county recorder automatically recorded all instruments dropped at that station pursuant to a contract with the title insurer that required the title insurer to review all documents for recording compliance prior to filing; the title insurer in *Seeley* violated its contract with the recording office by submitting the invalid instrument with other, compliant instruments at this station. *Id.*

*10 ¶ 47 These facts played a significant role in the *Seeley* court's evaluation of factors two, four, five, and six. *Id.* at 861, 237 Cal.Rptr. 282. The court held that these facts made the harm foreseeable and that the title insurance company's actions gave the invalid instrument a presumption of validity—establishing both a close connection between the act and the harm, and rendering the title insurer's conduct worthy of moral blame. *Id.* at 861–62, 237 Cal.Rptr. 282. The title insurance company's

violation of the recording statutes as well as its contract with the county recording office also presented a danger to **title** stability in the future, satisfying California's sixth factor. *Id.* at 862, 237 Cal.Rptr. 282.

¶ 48 These considerations are not present here, where a **title** insurer presented facially valid instruments to a county recording office. We discuss the arguments against burdening **title** insurance companies to look behind facially valid instruments before recording throughout this memorandum; in sum, placing this burden on **title** insurance companies frustrates Washington's strong public policy of protecting property owners through the recording process. These factual differences are substantial; *Seeley's* facts and conclusions are inapposite.¹¹

[8] ¶ 49 In sum, our precedent supports our conclusion that **title** insurance companies have a duty of care in only limited situations outside of a contractual relationship and no duty to third parties in the recording of legal instruments. Plaintiff's argument that a duty is created merely because the harm is foreseeable is inconsistent with our jurisprudence; their remaining citations to our case law and to other jurisdictional approaches are not instructive to our analysis. Our review of our precedent suggests that the answer to the certified question is no.

III. Public policy does not support extending a duty on **title** companies recording legal instruments to search for and disclose potential **title** defects

¶ 50 We next consider public policy. "The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a 'plaintiff's interests are entitled to legal protection.'" *Taylor v. Stevens County*, 111 Wash.2d 159, 168, 759 P.2d 447 (1988) (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984)). We balance the interests at stake to determine whether a **title** insurance company owes a duty to search for and disclose potential **title** defects when recording legal instruments. *Accord Affil. FM Ins. Co.*, 170 Wash.2d at 450, 243 P.3d 521.

[9] ¶ 51 Plaintiffs encourage us to find a duty, arguing that the Washington state courts and legislature have long recognized the important public policy of protecting the rights of property owners. We agree that this is

an important policy of this State, but Plaintiffs are incorrect to suggest that extending a duty of care to **title** insurance companies would further this public policy. Washington has a comprehensive **title** insurance scheme, *see generally* ch. 48.29 RCW, and extensive recording requirements, *see generally* ch. 65.08 RCW. The purpose of the recording acts is to ensure stability and certainty of **title** to real property. *See Ellingsen v. Franklin County*, 117 Wash.2d 24, 28–29, 810 P.2d 910 (1991). These recording requirements further this purpose by holding recorded interests superior to unrecorded interests, *See* RCW 65.08.070. Thus, these statutory schemes further Washington's policy of protecting property rights by encouraging parties to record their interests.

*11 ¶ 52 e evaluate whether finding a duty of care from **title** insurance companies to third parties in the recording of legal instruments fulfills or frustrates these public policies. Washington's statutory schemes do not contemplate liability to third parties for the negligent recording of **titles**. *See generally* ch. 65.08 RCW. In lieu of a statutory remedy, Washington protects the valid interests of property owners from improper recording through the torts of **slander of title** and tortious interference with a contract.¹² *Rorvig v. Douglas*, 123 Wash.2d 854, 873 P.2d 492 (1994) (**slander of title**); *Calbom v. Knudtson*, 65 Wash.2d 157, 396 P.2d 148 (1964) (tortious interference). These torts, discussed below, are not within the scope of this opinion.¹³

[10] [11] ¶ 53 "**Slander of title** is defined as: (1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's **title**; and (5) result in plaintiff's pecuniary loss." *Rorvig*, 123 Wash.2d at 859, 873 P.2d 492. Tortious interference with a contract requires (1) the existence of a valid contractual relationship or business expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Calbom*, 65 Wash.2d at 162-63, 396 P.2d 148.

¶ 54 Neither of these torts is satisfied by simple negligence. Tortious interference with a contract requires intentional conduct, and **slander of title** requires malicious conduct. The reason for this rule is clear: if simple negligence were the rule, a party claiming an erroneous but good

faith interest in real property would not be entitled to litigate his claim and have an adjudication without fear of being penalized in damages. See, e.g., *Ward v. Mid-West & Gulf Co.*, 1923 OK 972, 97 Okla. 252, 223 P. 170; see also RESTATEMENT (SECOND) OF TORTS § 773 (AM. LAW INST. 1979) (recognizing privilege to assert claim in good faith). These heightened requirements further the policy of protecting the rights of property owners by encouraging property owners to assert valid property rights while protecting property owners from unlawful claims. Thus, we agree with Chicago Title that recognizing liability for the “negligent recording” of a facially valid instrument would have a chilling effect on recording documents and undermine the goals of RCW 65.08.070. Policy supports our answer of no; to hold otherwise would frustrate Washington's policy of protecting property rights through the title recording process.

IV. Considerations of common sense, logic, and justice provide further support

¶ 55 Our conclusion that title insurance companies do not owe third parties a duty of care when recording legal instruments is consistent with Washington's policies and precedent. The remaining considerations of common sense, logic, and justice only reinforce this conclusion.

A. Logic and common sense weigh against finding a duty of care

*12 ¶ 56 Logic and common sense require us to reject Plaintiffs' argument that Chicago Title's duty of care to CP III arises out of Centrum Financial's instruction to Chicago Title directing it to record the leasehold deed of trust only if they are committed to providing title insurance. That instruction 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 \$10,000,000.00, 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.

2 Appellant's Excerpts of R. at 58.

¶ 57 This instruction plainly directs Chicago Title to issue an insurance policy on the mortgage and to record if it is committed to issue that insurance policy. Chicago Title did so: it issued a commitment, insured the lien as valid, and recorded it. Under *Barstad*, Chicago Title did not owe a duty to Centrum Financial (its actual client) in issuing the title commitment because the commitment was for Chicago Title's benefit. 145 Wash.2d at 541, 39 P.3d 984. If the lien was not valid, Centrum Financial may have had a claim under its insurance policy. But it is impossible to understand how this action and agreement between Centrum Financial and Chicago Title created a duty to CP III when CP III could not possibly have relied on the commitment or the insurance policy. See *ESCA Corp.*, 135 Wash.2d at 832, 959 P.2d 651 (accountant did not owe a duty of care to bank absent justifiable reliance on accountant's draft report in making loan).

¶ 58 As a matter of logic and common sense, CP III is not entitled to something for nothing; not having entered into a contract with Chicago Title relating to future recordings, CP III is not entitled to the benefit of Centrum Financial's bargain with Chicago Title. Nor are they entitled to have Chicago Title review operating agreements and presumably lengthy loan agreements without a contract for—and paying for—that benefit. These factors reinforce our conclusion that title insurance companies do not owe third parties a duty of care when recording legal instruments.

B. Justice does not support finding a duty to search for and disclose potential title defects to third-party nonclients

¶ 59 Finally, considerations of justice do not support finding a duty of care for the recording of these legal instruments. This factor supports placing liability on the party best able to mitigate or control the anticipated harm. Cf. *Affil. FM Ins. Co.*, 170 Wash.2d at 453–54, 243 P.3d 521 (responsibility on party best able to mitigate the risks; balancing engineer's ability to design a project safely against an “innocent party who never had the opportunity to negotiate the risk of harm”); see also *Zabka v. Bank of Am. Corp.*, 131 Wash.App. 167, 173, 127 P.3d 722 (2005) (bank owed no duty of care to plaintiffs who could have easily taken steps to avoid fraud by bank's customer). Here, the manager of CP III had signed the documents filed by Chicago Title. When facially valid instruments are

at issue, justice supports placing liability on the parties to those instruments.

[12] ¶ 60 Plaintiffs urge us to hold that justice requires **title** insurance companies to look behind the signatures on the document and police the parties' agreements against conflicting corporate documents or loan agreements. This is not a just result, and placing this burden on **title** insurance companies increases their costs, slows the recording process, and frustrates public policy, with no appreciable benefit. Here, the existence of the invalid liens was the result of an (arguably invalid) agreement between CP III and Centrum Financial. These liens, which were signed and notarized by CP III's manager, placed CP III in default and caused damages. These actions placed CP III in default regardless of any action taken by Chicago **Title**. We decline to impose these damages on Chicago **Title**.¹⁴

*13 ¶ 61 After considering each of the duty factors, we hold that **title** insurance companies do not owe third parties a duty of care when recording legal instruments.

CONCLUSION

¶ 62 In light of the foregoing, we answer the certified question as follows:

Question: Does a **title** company owe a duty of care to third parties in the recording of legal instruments?

Answer: No.

WE CONCUR:

Madsen, C.J.

Johnson, J.

Owens, J.

Fairhurst, J.

Stephens, J.

González, J.

Gordon McCloud, J.

Yu, J.

All Citations

--- P.3d ----, 2016 WL 3910991

Footnotes

- 1 Plaintiffs allege that even though these liens were purportedly entered into by Centurion Management on behalf of CP III, they were not authorized liens. They further assert that Chicago **Title** was under a duty to look behind the instruments to determine whether the signatures were, in fact, valid.
- 2 During this time, Henry, as the sole member of SMI, took control of CP III from the Hazelriggs. He is now the sole owner of both companies.
- 3 The original language from 1 *Thomas Atkins Street, The Foundations of Legal Liability* 100, 110 (1906) is quoted time and again from *Affiliated FM Insurance Co.*, 170 Wash.2d at 449, 243 P.3d 521, to *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wash.2d 233, 243, 35 P.3d 1158 (2001), to *Hartley v. State*, 103 Wash.2d 768, 779, 698 P.2d 77 (1985), to *King v. City of Seattle*, 84 Wash.2d 239, 250, 525 P.2d 228 (1974).
- 4 Minor wording changes were made in 2005 but do not alter the meaning. LAWS OF 2005, ch. 223, § 14.
- 5 Minor wording changes were made in 2005, including the following changes to the final sentence of subsection (3)(c): "~~Any such~~ The report shall not be construed as, nor constitute, is not a representation as to the condition of the **title** to real property, but shall constitute is a statement of terms and conditions upon which the issuer is willing to issue a its **title** policy, if such the offer is accepted." LAWS OF 2005, ch. 223, § 14. The changes do not affect our analysis.
- 6 Plaintiffs cite *Hu Hyun Kim v. Lee* for the proposition that **title** companies owe a duty of reasonable care when fulfilling professional when fulfilling professional obligations and giving professional advice to their clients. 145 Wash.2d 79, 91, 31 P.3d 665 (2001) (**title** company negligent in rendering an expert opinion when it failed to discover and disclose an existing, recorded, and perfected lien on the client's property). We are unpersuaded by *Kim* on these facts in view of our decision two years later in *Barstad*, 145 Wash.2d 528, 39 P.3d 984, where we held that **title** insurance companies do not have a duty of care when preparing commitment reports under RCW 48.29.010. *Kim* addresses neither chapter 48.29

RCW nor liability in regard to commitments. Furthermore, there being no contract here between Chicago **Title** and CP III, *Kim* cannot inform our analysis of the certified question before us.

7 We first adopted the multifactor test in *Trask v. Butler*, 123 Wash.2d 835, 872 P.2d 1080 (1994). In *Trask*, we considered California's multifactor test and the Illinois "third party beneficiary" test in deciding whether an attorney owes a duty to a nonclient. *Id.* at 840, 872 P.2d 1080. After discussing both tests, the court combined the two and created Washington's modified multifactor test. *Id.* at 841-43, 872 P.2d 1080.

8 The Arizona Court of Appeals also considered whether State **Title** owed a duty of care under *Restatement (Second) of Torts* § 324A (Am. Law Inst. 1965) and concluded that the section was inapplicable.

9 In Washington, the factor to be considered is whether the transaction was intended to *benefit* the third party. *Sterling*, 178 Wash.2d at 566, 311 P.3d 1 (emphasis added).

10 The Arizona Court of Appeals also distinguished the case on this ground. *Luce*, 190 Ariz. at 503, 950 P.2d 159 (citing *Seeley*, 190 Cal.App.3d at 861, 237 Cal.Rptr. 282).

11 We recognize the slight variations between the *Seeley* factors and the *Sterling* factors. Compare *Seeley*, 190 Cal.App.3d at 861, 237 Cal.Rptr. 282, with *Sterling*, 178 Wash.2d at 566, 311 P.3d 1. Due to the significant factual differences, we do not address the differences in the factors. We also note that the *Seeley* court expressly denied that it was recognizing a "tort of 'negligent **slander of title**' " or that liability arose "solely from the recordation of the document." 190 Cal.App.3d at 862 n. 8, 237 Cal.Rptr. 282.

12 Washington residents may also secure their property rights through equitable actions to quiet **title**. See, e.g., *Kobza v. Tripp*, 105 Wash.App. 90, 93, 18 P.3d 621 (2001).

13 CP III does not argue that its proposed duty arises out of a special relationship, such as a fiduciary duty, between itself and Chicago **Title**. Nor do they argue that Chicago **Title** acted maliciously or in bad faith. Plaintiffs assert only that Chicago **Title** owes them a duty under general negligence principles. In rejecting Plaintiffs' argument, our decision does not suggest that **title** insurance companies are not liable for their intentional torts.

14 Plaintiffs' argument that Chicago **Title** "knew" it was recording invalid liens is unavailing. Chicago **Title** conceded, for the purposes of its summary judgment motion arguing that it did not owe Plaintiffs a duty, that it could be charged with knowledge of the GECC loan agreement's prohibition on secondary liens because it had access to that information but did not check it. Washington recognizes that both actual and constructive notice provides a party with knowledge of another person's real property interest. E.g., *Miebach v. Colasurdo*, 102 Wash.2d 170, 175-76, 685 P.2d 1074 (1984). Requiring **title** insurance companies to look behind every facially valid instrument because they have documents in their possession that may undermine that instrument frustrates public policy, increases costs, and asks **title** insurance companies to police legal instruments entered into by the independent parties.

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