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

IN

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

Plaintiffs-Appellants-Cross Appellees,

v.

CHICAGO TITLE INSURANCE COMPANY,

Defendant-Appellee-Cross Appellant.

Ninth Circuit Nos. 13-35692 & 13-35725

**BRIEF IN ANSWER TO THE BRIEF OF AMICUS CURIAE
WASHINGTON LAND TITLE ASSOCIATION**

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I. INTRODUCTION

Plaintiffs-Appellants Centurion Properties III, LLC and SMI Group XIV, LLC (“Plaintiffs”) submit this Answer to the brief filed by *amicus curiae* Washington Land Title Association (“WLTA”), a membership-based trade group which includes Defendant-Appellee Chicago Title Insurance Company (“Chicago Title”) among its members. *See* <http://washingtonlandtitle.com/wp-content/uploads/2015/12/WLTA-Member-Directory-9-2-2015-Sort-by-Company.pdf>. In its amicus brief, WLTA simply rehashes the arguments that its member, Chicago Title, offered in its Opposition Brief. Mindful of RAP 10.3(f), Plaintiffs respectfully submit this short response.

II. ARGUMENT

A. There is No Binding Precedent

WLTA argues that the certified question “must” be answered in the negative based on RCW 48.29 and *Barstad v. Stewart Title Guar. Co. Inc.*, 145 Wn.2d 528, 39 P.3d 984 (2002). *See* WLTA Brief at 15. In fact, there is no Washington State statute or court decision directly on point, as recognized by the Ninth Circuit and by Chicago Title. *See* Order Re Certification at 10; Chicago Title Br. at 1 (“There is no reported Washington case with claims or facts identical to ours.”)

The only issue in *Barstad* was whether a title company has a

“general duty to disclose title defects in preliminary commitments... .” *Barstad*, 145 Wn.2d at 541, 39 P.3d at 991. Plaintiffs are not claiming that Chicago Title failed to discover “title defects” or that Chicago Title negligently issued a preliminary commitment for title insurance. Plaintiffs instead claim that Chicago Title had a duty not to record liens it knew to be invalid, especially in light of the instructions that Chicago Title received from its customer. *See* ER 58 (“You may record the [Deed of Trust], provided you are irrevocably committed to insure [it] ... as a valid SECOND lien ...”) (emphasis in original). *Barstad* is inapposite. *See* Plaintiffs’ Reply Brief at 6-7.

B. The Duty Considerations Recognized in *Affiliated FM* and Other Washington Cases Are Not Limited to Any Specific Business or Profession

WLTA argues that this Court’s decision in *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010) is not applicable here, because the work of an engineer raises safety concerns that are not present in this case. But this Court’s ruling in *Affiliated FM* was not so limited. This Court squarely identified a general framework for determining when a professional owes a duty of care to third parties. The Court did not hold, or imply, that “safety” is the only consideration that gives rise to a duty of care.

To the contrary, this Court listed various business and professional

torts that do not involve any risk of personal injury or property damage. *Affiliated FM*, 170 Wn.2d at 450 n.3, 243 P.3d at 526 n.3.¹ As shown by this Court's list of examples, a risk of personal injury or property damage is not a condition to finding a duty of care. Similarly, an accountant's duty of care to third parties is well established in Washington, despite the absence of any safety concerns. *See, e.g., ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 959 P.2d 651 (1998); *Dewar v. Smith*, 185 Wn. App. 544, 342 P.3d 328 (2015). Indeed, the appellate courts of Washington have recognized a tort duty of care by title companies, engineers, attorneys, appraisers, accountants, doctors and other professionals and non-professionals, many of which do not involve personal safety. *See* Plaintiffs' Opening Brief at 12-17; Plaintiffs' Reply Brief at 9-10, 15-19.

This Court has never held that a duty of care arises only for a fixed and unchanging list of professions. In the cases cited above, and others, this Court has established a set of legal principles for analyzing the duties

¹ This Court held: "For instance, we recognize the torts of intentional and wrongful interference with another's contractual relations or business expectancies; wrongful discharge in violation of public policy; failure of an insurer to act in good faith; fraudulent concealment; fraudulent misrepresentation; negligent misrepresentation; breach of an agent's fiduciary duty to act in good faith; and negligent real estate appraisal." *Id.*, quoting *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 388-89, 241 P.3d 1256 (2010) (citations and internal punctuation omitted).

of professionals, like Chicago Title, who, in the exercise of their professional skills, present a risk of harm to others.

C. The Facts of this Case are Similar to Those in *Seeley v. Seymour* and Different from the Facts in *Luce v. State Title*

WLTA argues that the case of *Seeley v. Seymour*, 190 Cal. App. 3d 844, 237 Cal. Rptr. 282 (1987) is factually distinguishable, and that this Court should follow *Luce v. State Title Agency, Inc.*, 190 Ariz. 500, 950 P.2d 159 (1997). WLTA simply repeats Chicago Title's argument, and, for the reasons explained in Plaintiffs' briefs, the opposite is true. See Plaintiffs' Opening Brief at 21-24; Plaintiffs' Reply Brief at 13-14.

The *Seeley* court found a duty of care because the title company (Safeco), like Chicago Title here (ER 58), had been instructed to exercise its professional judgment to determine if the instrument in question could be properly recorded. *Seeley*, 190 Cal. App. 3d at 861 n.7, 237 Cal. Rptr. at 290 n.7. In *Luce*, by contrast, the title company "gratuitously" recorded a deed of trust without any contract or instruction that required it to review the instrument for validity. *Luce*, 190 Ariz. at 501-03, 950 P.2d at 160-62.

WLTA suggests that finding a duty of reasonable care will have disastrous effects for title insurers doing business in Washington State. But WLTA offers no indication that, following the decision in *Seeley*, the title recording system was disrupted in California, or that any title

company abandoned the profession. WLTA's dire predictions are unsupported and overblown.

D. This Court Held in *Affiliated FM* that Issues Regarding the "Scope" of a Duty of Care Should Not Be Conflated With the Question of Whether a Duty Exists

Whether a duty of care exists "is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent." *King v. Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228, 235 (1976). WLTA argues that finding a duty of care under the specific facts of this case would necessarily mean that all title companies would have the exact same duties each time one of them records an instrument, regardless of the title company's instructions or knowledge. This Court rejected a similar argument in *Affiliated FM*, holding that such concerns "are overstated and can be addressed through conventional concepts of the measure and scope of a duty of care." *Affiliated FM*, 170 Wn.2d at 453.

WLTA claims that the instructions given to Chicago Title were "standard," but offers no support for that argument. WLTA also claims that its interpretation of the deposition of Chicago Title's customer (ER 523-24) does not support the proposition that Chicago Title was being directed to exercise its professional skill and judgment in recording the subject lien. But taken in context, and together with its written

instructions, Chicago Title was clearly called upon to exercise its professional judgment before recording the subject lien. (ER 58).

Importantly, this Court has not been asked to make factual determinations, but instead to opine whether, as a matter of Washington law, a title company owes a duty of care to third parties in the recording of legal instruments. Plaintiffs respectfully request that the Court hold that where a title company is instructed to exercise its professional skill and judgment in connection with the recording of a lien, or where the title company has actual knowledge that a lien is invalid, it owes a duty of care to the property owner not to record an invalid lien. Any factual disputes regarding the meaning of instructions, the scope of duties undertaken, or the degree of actual knowledge of the defects, are a matter for the trier of fact on remand.

E. There is No Conflict between the Tort of Negligent Recording and the Tort of Slander of Title

WLTA argues that recognizing a duty of care in this negligence case would conflict with Washington law regarding slander of title. But intentional and negligent torts coexist under Washington law in many areas. As just one example, Washington recognizes the tort of negligent misrepresentation and also the intentional tort of fraud. *See Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032

(1987) *amended*, 109 Wn.2d 107, 750 P.2d 254 (1988) (reversing trial court order dismissing claims for negligent misrepresentation and fraud). The existence of an intentional tort does not presume the non-existence of negligent torts.

As a professional title insurance company that regularly records liens on title to property owned by third-parties (non-customers), Chicago Title knew with certainty that Plaintiffs are the ones who would be harmed if Chicago Title was careless in carrying out its responsibilities. It would not be just or logical, and would not comport with this Court's jurisprudence, to immunize Chicago Title from normal tort liability under this set of facts, as advocated by WLTA and Chicago Title.

III. CONCLUSION

WLTA's *amicus* brief adds nothing to the arguments made by its member, Chicago Title. WLTA's predictions about harmful impacts on the title industry are not supported, and are an obvious effort to shield WLTA members from the normal tort duties that other professionals have when doing business in Washington. WLTA's legal arguments are not consistent with this Court's prior rulings, and do not justify answering the certified question in the negative.

Respectfully submitted this 7th day of December, 2015.

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A handwritten signature in black ink, appearing to read "Peter Ehrlichman", written over a horizontal line.

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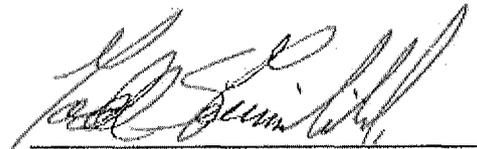
I certify that I caused a copy of the foregoing Plaintiffs' Reply Brief to be served this day, January 7, 2016, by email on Counsel for Defendant/Appellee/Cross-Appellant Chicago Title Insurance Company, as agreed by counsel for the parties,

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