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SUPREME COURT OF THE STATE OF WASHINGTON

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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

PLAINTIFFS' OPENING BRIEF

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I. INTRODUCTION

The United States Court of Appeals for the Ninth Circuit has 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?

The Court should answer this question in the affirmative, based upon the relevant considerations of logic, common sense, justice, policy and precedent as applied to the facts of this case. *See Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521, 526 (2010) (citations omitted). The Court should find that a title insurance company, like other professionals doing business in Washington, has a duty to exercise its professional judgment to avoid negligently causing injury to third parties.

The certified question arises from a civil action for money damages filed in the United States District Court for the Eastern District of Washington by Plaintiffs Centurion Properties III, LLC (“CPIII”) and SMI Group XIV, LLC (“SMI”) against Defendant Chicago Title Insurance Company (“Chicago Title”). Chicago Title is a title insurance company doing business in Washington. At the time in question, CPIII owned real property located in Washington. Plaintiffs seek to recover damages caused by Chicago Title’s admittedly “careless” act of recording four

invalid liens on title to the real property owned by CPIII. Chicago Title's careless acts caused Plaintiffs to incur millions of dollars in default interest plus thousands of dollars in attorney fees and costs to have the invalid liens removed from CPIII's title.

Before recording the first lien, Chicago Title was provided with legal instruments showing that the liens were expressly prohibited by CPIII's Operating Agreement and by a prior deed of trust recorded on title to the property. Chicago Title also received instructions from its customer to record the lien *only if* Chicago Title could insure it as a "valid" second lien. Thus, Chicago Title knew that its customer was relying on Chicago Title to exercise its professional judgment to determine whether the liens could be lawfully recorded. Chicago Title also knew that recording invalid junior liens on title to this property would cause CPIII to be in default under the prior, and only authorized, deed of trust recorded on CPIII's title.

Despite its customer's instructions, and despite its actual knowledge that the liens were prohibited, Chicago Title recorded all four liens on CPIII's title. The result was predictably catastrophic: Chicago Title's actions put CPIII in immediate default under the terms of a \$70 Million loan secured against the property. There is no basis in logic, common sense, justice, policy or precedent for a title insurance company

to be permitted, without legal consequence, to knowingly and carelessly record prohibited liens on title to property in Washington State.

While Chicago Title stipulates that it knew the junior liens were prohibited, and that it was “careless” in recording them, Chicago Title argues that it had no duty to Plaintiffs to avoid recording invalid liens. That position is contrary to Washington law as set forth in *Affiliated FM*. In that case, this Court held that the defendant engineering firm had a duty to exercise its professional judgment to avoid causing economic harm to third parties. The principle addressed in *Affiliated FM*—that a professional whose exercise of professional judgment has the potential to cause harm to third parties owes a duty of care to such third parties—is directly applicable here.

Plaintiffs do not argue that a title company has a duty to conduct a burdensome investigation every time it records a lien, or that a title company has a duty to ensure, in every case, that recording a lien will not improperly impair the property rights of a third party. But the Court should confirm that a duty to exercise reasonable care exists under the facts of this case, where: (1) Chicago Title knew that all four junior liens were prohibited by various governing instruments (ER 13); (2) Chicago Title was instructed to determine “validity” before it recorded the initial lien (ER 58); (3) Chicago Title knew that recording the prohibited liens

would cause harm to Plaintiffs (ER 13); and (4) Chicago Title has stipulated that it was careless in recording the prohibited liens (ER 5).

II. STATEMENT OF THE CASE

A. Title Insurance Companies Provide Professional Services

Title insurance companies, like Chicago Title, are chiefly engaged in the business of issuing title insurance policies. 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE § 14.17 (2d ed. 2004). Title companies sometimes provide other professional services, such as preparing foreclosure reports and acting as escrow agents. *Id.* Title companies often record liens on the titles of third-party property owners who are not customers of the title company. *Id.* § 14.16. Title companies provide recording services in a number of different capacities, sometimes in connection with issuing a policy of title insurance, sometimes when acting as an escrow or closing agent, and sometimes as an “accommodation” to an existing customer. *See* ER 343; *Fidelity Title Co. v. State of Wash. Dept. of Revenue*, 49 Wn. App. 662, 663, 745 P.2d 530, 531 (1987) (describing “[w]hat is commonly known as the ‘title business’”).

B. CPIII's Purchase of the Property

CPIII was the owner of five commercial buildings located in Richland, Washington (the "Property"). ER 285-88. CPIII's governing corporate instrument is the "Limited Liability Company Agreement for Centurion Properties III, LLC" (the "CPIII Operating Agreement"). ER 380. When CPIII was formed, and when Chicago Title recorded the four prohibited liens, Plaintiff SMI was a minority owner of CPIII. ER 406.

CPIII purchased the Property in 2006 with the proceeds of a loan from General Electric Capital Corporation ("GECC"). ER 286. CPIII and GECC entered into a loan agreement (the "GECC Loan Agreement") whereby GECC loaned \$70,866,000 to CPIII to purchase the Property (the "GECC Loan"). ER 425. The GECC Loan was secured by a Deed of Trust on the Property, naming GECC as the beneficiary and naming Chicago Title as the Trustee (the "GECC Deed of Trust"). ER 474.

As a condition to making its loan, GECC required that there could be no junior liens on the Property without the express written approval of GECC. This prohibition is reflected in three legal instruments: the CPIII Operating Agreement, the GECC Loan Agreement, and the GECC Deed of Trust. ER 321-23; 382; 424; 440-41; 479.

C. Chicago Title Had Actual Knowledge that Recording Additional Liens Was Prohibited

Chicago Title served as the escrow, closing agent and title insurer for CPIII's purchase of the Property with the proceeds of the GECC loan. ER 46; 250-51; 474. Chicago Title recorded the GECC Deed of Trust on November 29, 2006. ER 474. In or around November 2006, Chicago Title received all three documents—the CPIII Operating Agreement, the GECC Loan Agreement and the GECC Deed of Trust—which prohibit the recording of any junior liens on the Property. ER 13; 324-25; 587.

The GECC Loan Agreement states that placing any unauthorized lien or encumbrance on the Property constitutes an Event of Default. ER 441 (definition of "Transfer" includes liens and other encumbrances); ER 446 (Events of Default include "Any Transfer ... in violation of Section 8.1 of this Agreement.") The GECC Loan Agreement and Deed of Trust provide for various remedies and penalties should an Event of Default occur. The penalties and remedies include the requirement that CPIII pay an increased "Default Rate" of interest on the Loan. ER 421 (definition of Default Rate); ER 426 ("While any Event of Default exists, the Loan shall bear interest at the Default Rate"); ER 446-47 (Events of Default); ER 480-84 (Default and Foreclosure).

Because of the large size of the GECC loan, increasing the amount of monthly interest from the “Contract Rate” to the “Default Rate” caused CPIII to incur millions of dollars in additional interest charges while the prohibited liens remained on title to the Property. ER 370. The damage to Plaintiffs was foreseeable to anyone with knowledge of the legal instruments that were provided to Chicago Title. *See* ER 13 (“Chicago Title concedes for the purposes of summary judgment that it could be charged with actual knowledge of these documents when it later recorded the liens.”); ER 587 (“For the purposes of this motion only, we concede that Chicago Title was careless....”).¹

D. Chicago Title Carelessly Recorded Four Prohibited Liens

In 2007, only six months after Chicago Title closed CPIII’s purchase of the Property, a “hard money lender” called Centrum Financial Services, Inc. (“Centrum”) engaged the same Benton County office of Chicago Title to record a junior lien on title to the Property for the benefit of Centrum or its affiliates. ER 3. In fact, Centrum had never loaned any money to CPIII. ER 329; 366. Centrum instructed Chicago Title in

¹ In its brief in Opposition to Appellants’ Motion to Supplement the Record, filed November 7, 2013, “Chicago Title admitted, for the purposes of its [summary judgment] motion, that it was negligent.” Dkt. No. 10-1, p. 4.

writing to record the lien *only if* it was a “valid SECOND Lien.” ER 58 (capital letters in original).

Before the lien was recorded, Centrum provided Chicago Title with *another* copy of the CPIII Operating Agreement, which Chicago Title had first received when it closed the GECC Loan. ER 509, 510. Despite Chicago Title’s knowledge of the prohibition against junior liens, and despite the written instruction from Centrum not to record unless the lien was “valid,” Chicago Title recorded the first of four invalid liens in July of 2007, and issued a policy of title insurance to Centrum insuring the lien for \$10 million dollars. ER 60-76; ER 523-24.

During the next year, Chicago Title recorded three more unauthorized liens for the benefit of Centrum or its affiliates. ER 23; 332; 47-49. According to Chicago Title, these three liens were recorded as an “accommodation” done “at the request of a customer.” ER 332-34. In other words, the recordings were done as a business service for Centrum. *Id.* Chicago Title recorded all four Centrum liens with knowledge that they were prohibited and constituted Events of Default under the GECC Loan Agreement. ER 13; 587-89.

Chicago Title also had knowledge of the effect that recording prohibited liens would have on Plaintiffs. During his deposition, the branch manager of Chicago Title’s Benton County, Washington office

(where the property in question is located), testified that restrictions on junior liens are “common;” that “since the 1980s, deeds of trust have provided for default interest rates upon events of default;” that “[GECC] probably had the authority to start a foreclosure,” that “the placement of a lien against a piece of property can have a significant impact on whether or not a lender loans money against that property or refinances the property;” and that recording a prohibited lien could “hurt the property owner.” ER 504-05; 507; 516-17.

None of the four junior liens recorded by Chicago Title was authorized under the CPIII Operating Agreement. ER 382. Only one of the four liens was executed by CPIII’s then Managing Member, who, in any event, lacked authority under the Operating Agreement and Loan Documents to encumber the Property without GECC’s prior written approval. ER 382. Based on all of these facts, Chicago Title conceded that it was “careless” when it recorded each of the four unauthorized liens. ER 5; 588.

E. Chicago Title’s Careless Actions Caused CPIII to Incur Millions of Dollars in Penalty Interest and Attorney Fees

In 2009, GECC obtained a title report which disclosed the four prohibited liens recorded by Chicago Title. ER 533-36. GECC notified CPIII that the junior liens were Events of Default under the GECC Loan

Documents, and that CPIII was responsible for payment of interest at the Default Rate. ER 533-34 (GECC Notice of Default, explaining that multiple encumbrances “were recorded against the [Property], without [GECC’s] knowledge or consent” and were Events of Default).

After receiving the Notice of Default, Michael Henry, the owner of SMI, began making efforts to try to avoid foreclosure by GECC. At Mr. Henry’s request, the majority owners of CPIII executed an amendment to the CPIII Operating Agreement which made SMI the Managing Member of CPIII. ER 366-67; 538. Plaintiffs worked diligently to try to refinance the defaulted GECC Loan. ER 347-48; 367-70. No lender would refinance the Property, however, as long as the prohibited liens remained on CPIII’s title. GECC moved forward with its non-judicial foreclosure. ER 368-69; 585. CPIII was forced to file for Chapter 11 bankruptcy protection to stop the foreclosure, remove the unauthorized liens, and refinance the GECC Loan. ER 369.

The defaults caused by the prohibited liens ultimately caused Plaintiffs to incur more than \$7.5 million in damages, including payment of more than \$3 million in default interest, plus other fees and costs incurred in the bankruptcy process as Plaintiffs worked to avoid foreclosure and to remove the prohibited liens from CPIII’s title. ER 369-70.

As a proximate result of Chicago Title's careless acts: GECC declared a default and began to foreclose the Property; CPIII was unable to refinance the Property to avoid foreclosure; CPIII was forced to seek bankruptcy protection; and Plaintiffs incurred substantial damages, including default interest and attorney fees.

Plaintiffs filed a civil action against Chicago Title seeking to recover the damages caused by Chicago Title's negligence. The District Court dismissed Plaintiffs' claims on summary judgment, finding that Chicago Title had no duty of care to avoid carelessly recording prohibited liens on title to CPIII's Property.

III. SUMMARY OF ARGUMENT

Whether a duty of care exists is a question of law. The existence of a duty is determined on the facts of each case, based upon mixed considerations of logic, common sense, justice, policy, and precedent. Like other professionals doing business in this State, Chicago Title is under a duty to exercise reasonable care in the exercise of its professional activities to avoid causing harm to third parties. *See Affiliated FM*, 170 Wn.2d at 454, 243 P.3d at 528-29.

Applying the relevant considerations to this case, Chicago Title had a duty to avoid knowingly recording invalid junior liens where it had actual knowledge that the liens were prohibited, and particularly where it

was charged by its customer with determining if the lien was valid. As a company providing professional services which affect the public interest, Chicago Title is not immune from normal tort liability for injuries to third parties caused by its careless acts.

Property owners in Washington State have a legitimate interest in having their titles remain free of carelessly recorded, invalid liens. Recognizing a duty by a title company to avoid carelessly recording a lien that it knows to be invalid would balance the legitimate interests of property owners and title companies. Such a duty promotes Washington State's interest in maintaining an orderly and accurate title recording system without unduly burdening title companies.

IV. ARGUMENT

A. Legal Framework for Determining if a Duty of Care Exists

“In a negligence action, the threshold question is whether the defendant owes a duty of care to the injured plaintiff.” *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 474, 951 P.2d 749, 752 (1998). “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 against the defendant's conduct.” *Affiliated FM*, 170 Wn.2d at 450, 243 P.3d at 526 (citations and internal punctuation

omitted); *Hunsley v. Giard*, 87 Wn.2d 424, 434 553 P.2d 1096, 1102 (1976).

A duty of care “is defined as ‘an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.’” *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697, 700 (1985) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 331 (5th ed. 1964)). Courts look to “ordinary tort principles” to determine the existence of a duty. *Affiliated FM*, 170 Wn.2d at 449, 243 P.3d at 526.

The proper analysis of duty “is always to be determined on the *facts of each case* upon mixed considerations of logic, common sense, justice, policy, and precedent.” *King v. Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228, 235 (1974) (emphasis added).

[A] duty arises from the facts presented. To determine whether a defendant owes a duty to the plaintiff, appellate courts have frequently reviewed whether sufficient evidence supports a finding that the alleged duty was owed in the particular circumstances of the case. Thus, a challenge to whether the defendant owes a duty to a plaintiff sometimes requires a determination whether facts can be proved that give rise to the alleged duty. In such cases, the issue of duty does not present a pure question of law. ... We reject the ... overly simplistic characterization that only a legal question existed.

Washburn v. City of Federal Way, 169 Wn. App. 588, 610-11, 283 P.3d 567, 579 (2012); see *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44

P.3d 845, 848 (2002) (existence of duty depends on the “particular situation”).

In addition to considering the particular situation, Washington courts recognize that, “[c]hanging social conditions lead constantly to the recognition of new duties.” *Webstad v. Stortini*, 83 Wn. App. 857, 872, 924 P.2d 940, 948 (1996) (quoting PROSSER & KEETON § 53, at 359). But these duties are only “new” in the sense that they constitute explicit recognitions of long-established principles. For example, in 2010, this Court applied established tort principles to recognize a common law duty of care by engineers to avoid negligently causing economic harm to third parties. *Affiliated FM*, 170 Wn.2d at 454, 243 P.3d at 529 (“Although we have not held so specifically until now, we think engineers’ common law duty of care has long been established in this state.”). Applying established legal principles to the facts of this case, the Court should confirm that a duty of care by Chicago Title has long been established here.

When a duty of care is found to exist, the court must then consider two secondary questions: “What is the measure of care required? To whom and with respect to what risks is the obligation owed?” *Affiliated FM*, 170 Wn.2d at 449, 243 P.3d at 526. “The answer to the [scope] question defines the class protected by the duty and the answer to the

[measure] question defines the standard of care.” *Id.* at 449 n.2, 243 P.3d at 526 n.2 (*quoting Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845, 848 (2002)).

B. Logic, Common Sense, Justice, Policy and Precedent Support Recognizing a Duty of Care in this Case

1. Duty of Care by Professionals to Third Parties

Professionals have a duty of care that often extends to third parties. *See Bohn v. Cory*, 119 Wn.2d 357, 832 P.2d 71 (1992) (*en banc*) (duty of care by attorney to third parties who are not clients); *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (1995) (duty of care by appraisers to third parties); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 959 P.2d 651 (1998) (duty of care by accountant to third parties); *accord Dewar v. Smith*, 185 Wn. App. 544, 342 P.3d 328 (2015); *Webb v. Neuroeduc. Inc., P.C.*, 121 Wn. App. 336, 88 P.3d 417 (2004) (duty of care by doctors to third parties who are not patients); *Affiliated FM*, 170 Wn.2d at 455, 243 P.3d at 529 (duty of care by engineers to third parties who are not in privity of contract). Non-professionals can also have a duty of care to third-parties. *See Phillips v. Kaiser Aluminum & Chemical Corporation*, 74 Wn. App. 741, 875 P.2d 1228 (1994) (aluminum manufacturing company owed duty of care to third-party employee of independent contractor).

In *Affiliated FM*, the Court accepted a certified question from the Ninth Circuit regarding whether an engineer had a duty of care to avoid causing economic harm to a third party. The case was a negligence action filed by the insurer of a company that operates the Seattle Monorail pursuant to a “concession” agreement with the City of Seattle, which owns the Monorail. *Id.* at 444, 243 P.3d at 523. The insurance company sued an engineer who had been hired by the City of Seattle to design the Monorail’s electrical system. *Id.* at 447, 243 P.3d at 524. As a result of the engineer’s negligent design, a fire occurred which caused the concession operator to suffer “business interruptions” and economic losses, but without any personal injury or property damage to the concession operator. *Id.* *Affiliated FM* argued that the engineer was under a duty to exercise reasonable care as to the third party concession operator with whom the engineer had no contractual privity. *Id.*

The Court found that a duty existed, rejecting policy arguments similar to those made by Chicago Title in the instant case:

We recognize that some economic considerations militate in favor of holding that an engineer in LTK’s shoes is not under a duty of care. Engineers provide socially beneficial services. If tort claims against them were to be layered on top of the breach of contract suits that they already face, the costs of engineering services would likely increase. ... And the liability for some accidents could prove so costly that engineering companies go out of business. Society as a whole could incur more costs and could have fewer

engineers willing to take on the risks of liability. On balance, however, we think engineers who undertake engineering services in this state are under a duty of reasonable care.

Id. at 453, 243 P.3d at 528.

As in *Affiliated FM*, there is no policy reason here for immunizing a title company from normal tort liability when it is providing professional services that can affect third-party property owners. This is particularly true here, where Chicago title knew that recording any of the four junior liens would put CPIII in default on the GECC Loan.

Chicago Title argues that this Court found a duty to third parties in *Affiliated FM* only because of the risk of personal injury that can arise from the work of an engineer. But risk of personal injury has never been a *sine qua non* for finding a duty of care to third parties, as shown by the other third-party cases cited above. *See Bohn, supra* (attorney); *Schaaf, supra* (appraiser). For example, an accountant has a duty of care that often extends to third parties even though an accountant's work does not create a risk of personal injury or property damage. *See ESCA Corp.*, 135 Wn.2d at 827-28, 959 P.2d at 654-55; *Dewar*, 185 Wn. App. at 556-57, 342 P.3d at 333-34.

2. *Protecting the Rights of Property Owners is an Important Public Policy*

The Washington State courts and legislature have long recognized that protecting the rights of property owners is an important public policy. For example, Washington law protects purchasers of real property against unrecorded conveyances. *See* RCW 65.08.070. Washington law protects property owners by permitting equitable actions to quiet title. *Kobza v. Tripp*, 105 Wn. App. 90, 93, 18 P.3d 621, 622 (2001). Washington law recognizes the tort of slander of title, which protects property owners from false statements made with malice that affect property transactions. *See Rorvig v. Douglas*, 123 Wn.2d 854, 859, 873 P.2d 492, 496 (1994). Washington State also has an interest in protecting property owners from the expense and loss of value that predictably result when someone improperly uses the public title recording system to record an invalid lien on a property owner's title.

In addition to the State's policy interest in protecting property rights, justice demands that the interests of a property owner be protected from "careless" recordings by a title insurance company licensed to do business in Washington. When a professional's activities have the potential to cause harm to third parties, the interests of an innocent plaintiff are entitled to more weight than the interests of the careless

professional. *See Affiliated FM*, 170 Wn.2d at 454, 243 P.3d at 529 (recognizing a duty where otherwise “an innocent party who never had the opportunity to negotiate the risk of harm [would be] forced to bear the costs of a careless engineer’s work”).

3. *Duties of Title Companies*

The title insurance industry is a professional service industry. *See Seeley v. Seymour*, 190 Cal. App. 3d 844, 860, 237 Cal. Rptr. 282, 291 (1987) (“Equally beyond dispute is the principle that the standard of care for professionals, including title companies, is that of other professionals within their area of expertise”); *100 Investment Ltd. P’ship v. Columbia Town Center Title Co.*, 430 Md. 197, 225, 60 A.3d 1, 12 (2013) (“a tort duty to act with reasonable care will be imposed on those [such as title companies] who hold themselves out as possessing the requisite skill”) (citations omitted); *Id.* at 18 (title company had a duty “to exercise a reasonable degree of skill and diligence in the conduct of the transaction”).

This Court has recognized that title companies have a duty of care when performing title searches. *Kim v. Lee*, 145 Wn.2d 79, 91, 31 P.3d 665, 671 (2001). In *Kim*, the title company recorded and insured a deed of trust as a first priority home mortgage, but negligently failed to disclose a previously recorded judgment lien on title to the property. When the third-party judgment lienholder sought to enforce its lien, the title

company argued that the judgment lien should be considered junior to the mortgage under the doctrine of equitable subrogation. This Court held that because the title company had actual knowledge of the prior lien and negligently failed to disclose it, “legal remedies and equity suggest that the loss should fall on the title company rather than on the innocent” third party judgment lienholder. *Id.* Thus, this Court has already recognized Washington State’s interest in holding title companies legally responsible for their negligence.

The interest in holding title companies responsible for their negligence has been recognized in Washington even when the recording was done as an accommodation or “courtesy.” *Walker v. Transamerica Title Ins. Co., Inc.*, 65 Wn. App. 399, 401, 828 P.2d 621, 623 (1992). In *Walker*, a homeowner sued Transamerica Title Insurance Company for negligently recording a deed of trust without including the required legal description of the property. The Court of Appeals decided certain causation issues based on the assumption that that title company had a duty to avoid negligently recording the deed, even where the recording was a “courtesy filing.” *Walker*, 65 Wn. App. at 400, 828 P.2d at 623.²

² Before reaching the merits of the causation issues, the Court stated: “For purposes of this appeal, the parties assume that Walker can prove duty, breach and damages. Thus, they focus on proximate cause.” *Walker*, 65 Wn. App. at 402, 828 P.2d at 623.

4. *The Court Should Look to Seeley for Guidance*

Although finding a duty in this case is consistent with Washington law, it appears that no Washington court has directly considered a third-party claim for “negligent recording.” This Court may look to other jurisdictions for guidance. *See Affiliated FM*, 170 Wn.2d at 452, 243 P.3d at 528.³

In *Seeley v. Seymour*, *supra*, the California Court of Appeals held that Safeco Title Insurance Company could be sued for negligently recording an encumbrance against the property of a third-party property owner. The plaintiff property owner in *Seeley* had no business relationship with Safeco. The court rejected Safeco’s argument that it had no duty to the third-party property owner. *Seeley*, 190 Cal. App. 3d at 860, 237 Cal. Rptr. at 290.

The court further held that Safeco could be liable for negligently recording even though Safeco was acting as a “mere messenger” and “as an accommodation” to its customer. *Id.* The court found that “there was a strong element of foreseeability that [plaintiff] would suffer economic harm as the result of Safeco’s recordation of [the unauthorized] memorandum.” *Id.* at 861, 237 Cal. Rptr. at 291. The court held that the

³ Washington courts often rely on California courts for tort jurisprudence. *See, e.g., Smith v. Jackson*, 106 Wn.2d 298, 302, 721 P.2d 508, 510 (1986).

case was properly presented to the jury on claim for “general negligence” in addition to a separate claim for slander of title. *Id.* at 860-62, 237 Cal. Rptr. at 290-92; see *Countrywide Homeloans, Inc. v. United States*, No. CVF026405, 2005 WL 1355440, at *12-*14 (E.D. Cal. April 25, 2005) (denying motion to dismiss a negligence claim asserted by purchasers against a title company that improperly recorded a document before the purchasers bought the property).

Chicago Title tries to distinguish *Seeley* by pointing out that the title company, Safeco, had a contract with the county recorder to review documents for “validity” prior to recording. This fact makes *Seeley* more similar to this case than different, however, because Centrum instructed Chicago Title to record the first prohibited lien only if Chicago Title first determined that the lien was “valid.” ER 58. Centrum was relying upon Chicago Title’s professional judgment as to validity, just as the county recorder in *Seeley* was relying on Safeco’s professional judgment as to validity.

Chicago Title also tries to distinguish *Seeley* as concerning an instrument that was “invalid on its face.” But Chicago Title concedes that it had *actual knowledge* that the four junior liens it recorded for Centrum were invalid. ER 13. Thus, Chicago Title had the same knowledge in this case that Safeco had in *Seeley*.

Given the significant role that title companies play in the title recording system, public policy favors holding them accountable for their “careless” actions. *See Seeley*, 190 Cal. App. 3d at 862, 237 Cal. Rptr. at 291-92 (“As institutions charged with the public trust, it is important that [title companies] be held accountable when their negligent acts result in economic harm to individual property interests”); *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 884, 221 Cal. Rptr. 509, 710 P.2d 309, 315-16 (1986) (“A title company is engaged in a business affected with the public interest and cannot ... exculpate itself from liability for negligence”); *Luce v. State Title Agency*, 190 Ariz. 500, 504, 950 P.2d 159, 163 (1997) (Gerber, J., dissenting) (“[b]ecause title companies participate in the vast majority of real estate transactions in this state, they are chargeable with a public trust regarding such property transactions”).⁴

Holding Chicago Title accountable here will advance the policy of insuring that title companies use the reasonable care required of all professionals. The alternative—immunity for careless and improper

⁴ The majority in *Luce* held that a title company was not liable to the limited partners in a partnership for gratuitously recording a deed of trust executed by the general partner in violation of the partnership agreement. Unlike this case, the title company in *Luce* was not instructed to determine the validity of the lien, did not insure any lien, did not have knowledge of a prohibition against junior liens contained in an existing, first priority deed of trust, did not stipulate that it was careless, and “had no contractual relationship with anyone regarding recordation of the deed of trust.” *Luce*, 190 Ariz. at 502, 950 P.2d at 161.

recordings—would undermine the state’s recording system and the legitimate interest of Washington in protecting property owners from unlawful claims.

C. Economic Concerns about Unlimited Liability Are Properly Addressed Through the Measure and Scope of a Duty of Care

Chicago Title argues, without any supporting evidence, that recognizing a duty of reasonable care under the facts of this case would place an undue financial burden on title companies generally. This Court addressed similar arguments in *Affiliated FM*, holding that economic concerns about “liability run amok” are overstated, and can be addressed through “conventional concepts of the measure and scope of a duty of care.” *Affiliated FM*, 170 Wn.2d at 453, 243 P.3d at 529. Specifically, the Court held:

We are aware of the economic drawbacks of the dangers of creating “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179, 174 N.E. 441 (1931). Still, we think economic concerns about liability run amok are overstated and can be addressed through conventional concepts of the measure and scope of a duty of care.

Id.

The Court rejected similar arguments about potential “unlimited liability” in *Crowe v. Gaston*, 134 Wn.2d 509, 518, 951 P.2d 1118, 1122 (1998) (holding that the public policy interest in prohibiting the sale of

alcohol to minors outweigh an alcohol vendor's concerns about unlimited liability). The Court held that "other legal principles such as foreseeability, superseding causation, and contributory negligence serve to dispel these fears ... especially so where the duty involved is not onerous." *Id.* Similarly, the interests of the State of Washington in maintaining an accurate title recording system, and protecting Washington property owners from invalid liens, outweighs the interests of a title company who knowingly and "carelessly" records invalid liens. Any concerns about liability being imposed in *different* factual situations "can be addressed through conventional concepts of the measure and scope of a duty of care." *Affiliated FM*, 170 Wn.2d at 454, 243 P.3d at 528; *accord Crowe*, 134 Wn.2d at 518.

D. Reasonable Care is the Appropriate Measure

"A duty of care is necessarily limited to the level of care that is reasonable in the particular circumstances." *Affiliated FM*, 170 Wn.2d at 455, 243 P.3d at 529. Under the particular circumstances of the instant case, the "usual measure of care, ordinary care" is sufficient. *Id.*

E. There is No Evidence that Recognizing a Duty of Care Under the Facts of this Case Would Place an Unreasonable Burden on Title Companies

Chicago Title attempts to posit a parade of horrors, arguing that if it were subject to a duty of care in this case, then title companies would be

charged with reviewing their files every time they record a lien or other instrument. This argument ignores the facts of this case and the nature of Plaintiffs' claim. Chicago Title did not need to "review its files" to know that the four junior liens were prohibited, because its customer specifically provided another copy of CPIII's Operating Agreement when it asked Chicago Title to make the initial determination of validity. *See* ER 13; 324-25; 587. And Chicago Title has stipulated that it knew all four Centrum liens were prohibited when it carelessly recorded them. ER 5; 13. Thus, Chicago Title's "burden" argument is a red herring.

Moreover, title companies are perfectly capable of protecting themselves when they perform low-cost accommodation or courtesy recordings. *See Rooz v. Kimmel*, 55 Cal. App. 4th. 573, 590, 64 Cal. Rptr. 2d 177 (1997) (finding a "standard practice throughout the industry" that title companies are "generally unwilling to carry out and perform accommodation recordings" and willing to do so "only if the party requesting the recording agrees to sign ... [an] indemnity and hold harmless agreement").

To the extent recognizing a duty in this case would have an impact on recording practices, which is unproven here, the quality of recordings

will be improved by encouraging title companies, when they have specific knowledge that a lien is prohibited, not to ignore that knowledge.⁵

Chicago Title's unfounded speculation concerning the demise of the title insurance industry is undermined by the fact that California, the most populous state in the nation, has recognized a duty to avoid negligent recording since at least 1987. *Seeley*, 190 Cal. App. 3d at 860-61, 237 Cal. Rptr. at 290-91 (title company has a duty to avoid negligently recording an unauthorized encumbrance even when acting as a "mere messenger" and "as an accommodation" to a customer); *Countrywide Homeloans*, 2005 WL 1355440 at *14 and n.3 (denying motion to dismiss "[b]ased on the reasoning in *Seeley*" that a "title company was held liable for the negligent recording of a non-recordable document" which "was, quite simply, an act of professional malpractice for which the title company was properly held accountable") (internal citation omitted).

F. The District Court Did Not Follow the Analytical Approach Prescribed by this Court

This Court has identified three steps for analyzing a tort duty of care: (1) determine whether a duty exists; (2) if a duty exists, then

⁵ The evidence suggests that finding a duty of care would impose no greater obligation than what is already imposed by Chicago Title's internal company policies. The evidence shows that Chicago Title already has a practice of reviewing limited liability company operating agreements when recording a lien on title to property owned by an LLC. ER 502-03.

determine the applicable measure of care; and (3) determine the scope of the duty. *See Affiliated FM*, 170 Wn.2d at 449, 243 P.3d at 526. It is necessary to follow this analytical framework in the order presented, because the second and third steps are not part of the analysis of whether a duty exists in the first place. *Id.* at 453, 243 P.3d at 529 (rejecting argument that recognizing a duty would result in “liability run amok,” and holding that the extent of liability could be “addressed through conventional concepts of the measure and scope of a duty of care”).

The District Court improperly combined all three steps into one, analyzing the existence, measure, and scope of the duty interchangeably. *See* ER 9-16. This caused the District Court to take an inappropriately narrow view of the threshold “duty” question. For example, one of the District Court’s policy reasons for rejecting the existence of a duty was its concern about “the *scope* of Plaintiffs’ proposed duty” ER 13 (emphasis added). But concerns about scope should be addressed only after the existence of a duty has been recognized. *See Joyce v. Dep’t of Corr.*, 155 Wn.2d 306, 315, 119 P.3d 825, 829-30 (2005) (rejecting argument that “confus[ed] the *existence* of a duty with the *scope* of the duty”) (emphasis in original); *id.* at 329 n.1, 119 P.2d at 836 n.1 (“[T]he scope is irrelevant if no duty exists”) (Fairhurst, J., dissenting in part and concurring in part); *Lam v. Global Med. Sys.*, 127 Wn. App. 657, 663, 111

P.3d 1258, 1261 (2005) “[i]f there is no duty, standard of care is irrelevant”).

The District Court also improperly considered the *measure* of care in determining whether a duty exists. ER 13. By conflating the issues of duty, scope and measure, the District Court improperly concluded that finding *any* duty would necessarily inflict a “substantial cost” on the title insurance industry as a whole. ER 14. That conclusion is incorrect as a legal matter and is not supported by the facts of this case.

V. CONCLUSION

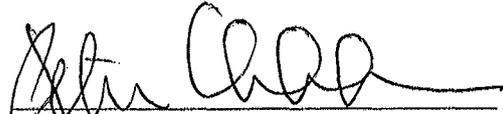
In considering whether the District Court applied Washington law correctly, the Ninth Circuit sought the advice of Washington’s highest court, posing the question of whether a duty exists under Washington law that would require Chicago Title to avoid carelessly recording liens that it knew to be prohibited. To answer the question, this Court is not required to speculate whether a duty of care would exist in a different factual setting, as Chicago Title urges. It is clear under Washington law that the proper measure and scope of such a duty are issues to be decided based on the facts of each case.

Considerations of logic, common sense, justice, policy and precedent all dictate that Chicago Title be held to a duty of care to avoid carelessly recording liens that it knew to be prohibited. The Court should

confirm the existence of a duty under these narrow circumstances in affirmatively answering the question certified by the Ninth Circuit.

Respectfully submitted this 17th day of September, 2015.

DORSEY & WHITNEY LLP

A handwritten signature in black ink, appearing to be "Peter S. Ehrlichman" and "Todd S. Fairchild", written over a horizontal line.

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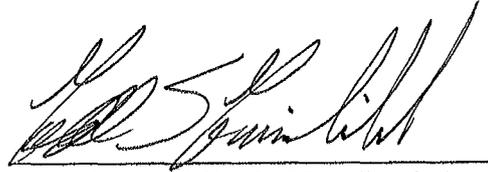
Attorneys for Plaintiffs-Appellants

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the foregoing Plaintiffs' Opening Brief to be served this day, September 17, 2015, on counsel for Defendant/Appellee/Cross-Appellant Chicago Title Insurance Company by hand delivery as follows:

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Signed this 17th day of September, 2015, at Seattle, Washington.



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

Case Number: Supreme Court No. 91932-1

Name, phone number, bar number and email address of person(s) filing the document:

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

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