

NO. 66319-4-1

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

THE NEWPORT YACHT BASIN ASSOCIATION OF
CONDOMINIUM OWNERS, an unincorporated condominium
association,

Respondent,

v.

SUPREME NORTHWEST, INC., a Washington corporation d/b/a
SEATTLE BOAT NEWPORT, and SEATTLE MARINE
MANAGEMENT COMPANY, LLC, a Washington limited liability
company,

and

BRIDGES INVESTMENT GROUP, LLC, a Washington limited
liability company, and DOUGLAS BURBRIDGE and MARGIE
BURBRIDGE, husband and wife, and their marital community,

Additional respondents,

v.

JOHN and CAROL RADOVICH,

Appellants.

OPENING BRIEF OF APPELLANTS JOHN AND CAROL
RADOVICH

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I. INTRODUCTION¹

At issue in this case is whether defendants Carol and John Radovich (Radovich) should be liable in attorney fees for the chance discovery of a 30 year old recorded deed they signed in 1980, when the retained title insurance company failed in its responsibility to locate that deed.

The history of this matter begins in 1976 when the Radoviches and Constance and Russell Keyes² (Keyes) bought an existing boat moorage in the City of Bellevue, located just south of the I-90 East Channel Bridge.

Keyes and Radovich converted the moorage slips into a condominium whereby each individual slip became a privately owned condominium "apartment". Keyes and Radovich sold or retained the moorage slips and conveyed the docks to an owner's association (the Newport Yacht Basin Association, or NYBA). Keyes and Radovich also retained ownership of the upland property, surrounded by the moorage slips on three sides. This property became known as the "Commercial Parcel." At the time

¹ See Appendix A, "Abbreviations Employed In This Brief," for a listing of abbreviations employed.

² Russell Keyes died since this litigation commenced.

the property was acquired, the Commercial Parcel was leased to a boat and engine repair business called "Mercer Marine," which was owned and operated by Margie and Doug Burbridge.

To allow access for moorage owners to their slips (and to provide parking for them), several easements were created in 1978 by Keyes and Radovich across the Commercial Parcel.

When some concerns about the easements arose with the moorage owners, the newly created owners' association, the NYBA asked Keyes and Radovich if they would convey ownership of the three easement areas nearest the docks to the NYBA so these areas might be improved for parking and access. As these areas were already fully utilized for marina parking and access and thus had little value to Keyes and Radovich, they agreed to convey the easement areas to the NYBA. A quit claim deed to that effect was signed by the Keyes and the Radoviches in July, 1980 and recorded by the NYBA in May, 1981. This is referred to herein as the "1980 Quit Claim Deed."

At about this time, renewal of Mercer Marine's lease came due. During lease negotiations in April, 1981, the Burbridges expressed an interest in buying the Commercial Parcel for their business (though a lease renewal was later signed).

In 1983, the Burbridges followed up on their wish to acquire the Commercial Parcel by entering into an agreement to buy just the one-half undivided interest held by the Keyes. In a written agreement the Burbridges agreed to pay \$300,000 for that interest, with \$30,000 down and payment of about \$3095 per month. In 1991, Keyes conveyed his one-half interest in the property to the Burbridges. The legal description for the one-half interest conveyed by Keyes to Burbridge in 1991 neither recognized nor excepted the 1980 Quit Claim Deed. The Burbridges continued to operate Mercer Marine until 2008.

In 2004, Burbridge approached the Radoviches to acquire their remaining undivided one-half interest in the Commercial Parcel. A price was agreed upon and a purchase and sale agreement was signed. The customary preliminary title report and a title insurance policy were ordered from PNWTIC, with Radovich paying the premium. Though it was duly recorded in 1981, the 1980 Quit Claim Deed was not located or disclosed by PNWTIC in the 2004 title insurance policy. By this time, Mr. Radovich had completely forgotten he and his wife had signed that deed 24 years before. The Radoviches eventually executed a warranty deed for their undivided one-half interest in the property to Burbridge's LLC,

Bridges Investment, which did not disclose the 1980 Quit Claim Deed as it was not shown on PNWTIC's title report.

In 2007, the Burbridges decided to sell their entire ownership to a company called Seattle Marine, which was in the boat sales and repair business. A new purchase and sale agreement was entered into, calling for a bargain and sale deed as the conveyance mechanism. Once again PNWTIC was engaged to prepare title work and a title insurance policy, but once again they failed to locate or disclose the recorded 1980 Quit Claim Deed.

Burbridge/Bridges conveyed the property by bargain and sale deed in March, 2007, again not referencing the 1980 Quit Claim Deed. The Radoviches were not involved in this transaction.

Later in 2007 and into 2008, Seattle Marine filed with the City of Bellevue applications to develop the Commercial Parcel, including variances and shoreline permits. Because of the potential impacts on the moorage slips, parking and access, moorage owners (including Radovich) and the NYBA became involved in the Bellevue land use proceedings. When doing research on the history of the marina developments, members of the NYBA found their original copy of the 1980 Quit Claim Deed in a filing cabinet. Copies of this old deed were provided to Radovich,

Seattle Marine and to PNWTIC.

After reviewing the situation, PNWTIC decided to re-record the 1991 deed from Keyes to Burbridge and the 2004 deed from Radovich to Burbridge/Bridges with amended legal descriptions to now include the 1980 Quit Claim Deed (that PNWTIC had originally missed).

When Seattle Marine refused to recognize the validity of the 1980 Quit Claim Deed, NYBA sued them to establish its validity. In response, Seattle Marine claimed the deed was invalid and unenforceable and pled other affirmative defenses and counter-claims. Seattle Marine also filed a Third Party complaint against Burbridge/Bridges claiming they violated the purchase and sale agreement and bargain and sale deed covenants because of the failure to disclose the 1980 Quit Claim Deed. Burbridge/Bridges in turn filed a Fourth-Party Complaint seeking damages and attorney fees against the Radoviches asserting violations of the purchase and sale agreement and deed covenants if the 1980 Quit Claim Deed was determined to be valid and enforceable. Under their title policy, PNWTIC engaged attorneys and paid all of the attorney fees for Burbridge/Bridges in this litigation.

Though Radovich' motion for summary judgment for

dismissal on the Burbridge/Bridges claim was denied, a later motion brought by Burbridge/Bridges was granted. The order stated that Radovich would be liable under the purchase and sale agreement and deed covenant if the 1980 Quit Claim Deed was later determined to be valid and enforceable during the trial between Seattle Marine and NYBA.

After the summary judgment order was entered against Radovich, a bench trial was held before Judge Gregory Canova. In its findings and conclusions, the trial court held, *inter alia*, that the 1980 Quit Claim Deed was invalid and unenforceable. Though the summary judgment order regarding liability of Radovich was premised on the validity of the 1980 Quit Claim Deed, Burbridge/Bridges moved for the assessment of attorney fees against Radovich anyway, which motion was granted by the trial court.

At the center of the issue of the liability of Radovich for attorney fees is whether Radovich should be liable when Burbridge/Bridges made a whole new agreement with Seattle Marine, independent of participation or input by the Radoviches and based on new title investigations and insurance. In addition, the Burbridge/Bridges transaction with Seattle Marine was by a

bargain and sale deed, which explicitly ruled out any responsibility of Burbridge/Bridges for transactions before they acquired title, which would include the deed from Radovich. Finally, because the Burbridge/Bridges legal fees were paid in full by PNWTIC, who was responsible for the errors that lead to this litigation because they missed the 1980 Quit Claim Deed, no equitable subrogation should be allowed when PNWTIC is simply satisfying its own contractual obligation to be responsible for its mistakes. Radovich should also be awarded his attorney fees.

II. ASSIGNMENTS OF ERROR

2.1 Assignments of Error.

1. The trial court erred in denying the Radovich motion for summary judgment by its order entered on November 17, 2009. CP 639-641.

2. The trial court erred in granting the Burbridge/Bridges motion for summary judgment entered on March 26, 2010. CP 1314-17.

3. The trial court erred in granting Burbridge/Bridges motion for attorney fees by entering its "Judgment and Order Awarding Burbridge/Bridges Group LLC Attorney Fees and Costs Against Radovich" on December 8, 2010. CP 2129-2133.

4. The trial court erred in entering Paragraphs 5, 12, 16, 17 and Conclusions 1, 2 and 3 in “Judgment and Order Awarding Burbridge/Bridges Group LLC Attorney Fees and Costs Against Radovich” on December 8, 2010. CP 2129-2133.

5. The trial court erred in entering its “Order Denying Motion for Reconsideration of Judgment and Order Awarding Burbridge/Bridges Investment Group LLC Attorney Fees and Costs Against Radovich” on January 11, 2011. CP 2326-2349.

6. The trial court erred in entering its “Order Denying Fourth-Party Defendant Radovich’s Motion to Enter Judgment on Fourth-Party Complaint” on November 5, 2010. CP 1996-97.

2.2 Issues Related to Assignments of Error

1. Is Radovich liable to Burbridge/Bridges for attorney fees arising from errors in a statutory warranty deed when Burbridge/Bridges has conveyed that property to a third party, Seattle Marine, in a whole new transaction in which the retained title insurance company failed to locate a quit claim deed recorded in 1981? Assignment of Error, 1, 2, 3, 4, 5, 6.

2. Is Radovich liable to Burbridge/Bridges on a pass through claim from a subsequent grantee (Seattle Marine) where that subsequent grantee took title by a bargain and sale deed which

specifically excluded all warranties except those against defects incurred by the immediate grantor (Burbridge/Bridges)?

Assignment of Error, 1, 2, 3, 4, 5, 6.

3. Is Radovich liable for attorney fees to his tenant in common on his deed for his one-half of the property when that tenant in common's title is already encumbered by a prior deed?

Assignment of Error, 1, 2, 3, 4, 5, 6.

4. Where the Fourth Party Complaint and summary judgment order stated that Radovich would be liable under his deed and the purchase and sale agreement "if" the 1980 Quit Claim Deed was determined to be valid and enforceable, and the trial court held that it was invalid and unenforceable, is Radovich liable for attorney fees? Assignment of Error, 1, 2, 3, 4, 5, 6.

5. Where a recorded quit claim deed was not discovered by the title insurer hired by a grantor, and that title insurer paid litigation costs to its insureds, is that insurer entitled to recover attorney fees and other costs from the grantor? Assignment of Error, 1, 2, 3, 4, 5, 6.

6. Where the amount of attorney fees are substantial and issues regarding them complex, should the trial court have ordered an evidentiary hearing? Assignment of Error, 1, 2, 3, 4, 5, 6.

7. Should Radovich be awarded his attorney fees when the court concluded the 1980 Quit Claim Deed was invalid?

Assignment of Error, 1, 2, 3, 4, 5, 6.

III. STATEMENT OF THE CASE.

3.1 Statement of Facts

As the important facts in this case arise from a sequence of events over several years, the facts are set forth in the following chronology.

June, 1976. Radovich/Keyes purchased the Newport Yacht Basin property. CP 153-54. The property consisted of existing moorage slips and adjacent upland areas.

Over the next several years the moorage slips located over water in Lake Washington were developed into a condominium marina. A diagram of the condominium moorage slips assigned to individual owners is found at CP 426. A homeowners association known as the Newport Yacht Basin Homeowner Association (NYBA) was established to manage common areas in the new condominium. After conveyance of the moorage slips to individual owners in the NYBA, Radovich/Keyes retained the center portion of the upland property for future development, which will be referred to herein as the "Commercial Parcel". At this time the Commercial

Parcel was leased to Douglas and Margie Burbridge (Burbridge) and Don Starbuck, who operated a boat and engine repair business known as "Mercer Marine." CP 527.

January 1978. Because the condominium moorage owners needed both access to their moorage slips and parking while using their boats, Radovich/Keyes established easements over the Commercial Parcel for these purposes. In June, 1978, the easement document was recorded, which included a total of ten easements, some for parking, some for access and others for both. CP 156-169. Three of the easements, Numbers 4, 5 and 6 were located respectively along the west, north and east sides of the Commercial Parcel and adjacent to the moorages. The precise terms of each easement are set forth at CP 157.

July, 1980. After concerns with the adequacy of parking and access arose, Radovich and Keyes executed a quit claim deed to NYBA for Easements 4, 5 and 6 as described above on July 17, 1980. CP 162-163 (hereinafter "1980 Quit Claim Deed.")

Mercer Marine continued to lease the Commercial Parcel from Radovich/Keyes through 2007. CP 527-28 (Burbridge Declaration). From about 1981 on it was the "goal" of Burbridge to acquire the entire Commercial Parcel, moorage slips and other

property from Radovich/Keyes. CP 527, 1153.

May, 1981. The 1980 Quit Claim Deed was recorded with the King County Recorder on May 29, 1981 by NYBA. CP 162-63.

September, 1981. Burbridge renews the lease for the Commercial Parcel for a period of 10 years from Radovich/Keyes. CP 1039-1045.

November 1, 1983. Burbridge and Keyes enter into an agreement by which Burbridge will acquire Keyes' one-half interest in the Commercial Parcel and other property for \$300,000. CP 1034-37. In 1984, Radovich objects to the sale on grounds it violates the partnership agreement between Radovich and Keyes. CP 1083.

February, 1987. An attorney for NYBA sends a letter to Burbridge and Radovich notifying them that a portion of a building owned by Mercer Marine on the Commercial Parcel "is resting approximately 15 feet across property owned by the Association." CP 1031-32. The letter refers to the identical parcel B as described on the 1980 Quit Claim Deed. See CP 998.

May, 1989. On May 1, 1989, Keyes executed a Statutory Warranty Deed to Burbridge for his "undivided one-half interest" in the Commercial Parcel and other property, which was recorded on

May 15, 1991 (CP 167-68), but re-recorded by PNWTIC on May 27, 1993. CP 1003-05.

Mr. Burbridge leased the other half of the property from Radovich from 1991 to 2004. CP 527. See Lease dated November 3, 1989 between Burbridge and Radovich. CP 1071-81.

December, 1996. Burbridge borrows \$868,209 against the property on a deed of trust, with Radovich co-signing. See CP 1115-23.

August 5, 2004. Radovich sells his remaining one-half interest of the Commercial Parcel to Bridges. See CP 1015-21. Radovich pays for a title insurance policy from PNWTIC in favor of Bridges, which does not disclose the 1980 Quit Claim Deed. The "Special Exceptions" in the title policy are copied nearly verbatim into the legal description in the deed Radovich signs. Compare CP 243-250 with CP 1018-1021.

March 30, 2007. Bridges sells the whole parcel to Seattle Marine by way of a Bargain and Sale Deed. CP 1023-29. As noted, PNWTIC again failed to identify the 1980 Quit Claim Deed as an encumbrance on title. CP 252-67.

June 2008. The 1980 Quit Claim Deed, showing its recording number, is discovered by NYBA in an old filing cabinet in

their offices. CP 998-999.

July 2008. On learning of the existence of the 1980 Quit Claim Deed, PNWTIC re-records both the 1991 Keyes to Burbridge and the 2004 Radovich to Bridges deeds to disclose the 1980 Quit Claim Deed. CP 195-98, 200-207.

September 2009. This litigation was commenced.

3.2 Litigation History

September 9, 2008. Following the discovery of the 1980 Quit Claim Deed, NYBA asserted its rights to the Disputed Strips by filing a Complaint for Declaratory Judgment and Quiet Title to Real Property on September 9, 2008. CP 1-11. The complaint named Seattle Marine Management, Seattle Boat Newport and Supreme Northwest, the current title holders of the property, as defendants (these defendants will be collectively referenced herein as "Seattle Marine").

October 29, 2008. The defendants filed their Answer, Counterclaims and Third Party Complaint. CP 23-53. Among other assertions, Seattle Marine claimed that the 1980 Quit Claim Deed was not "a valid, effective conveyance of fee title to the Disputed Strips." CP 38.

Seattle Marine also filed a Third Party Complaint against the

party that conveyed the property to them, Bridges Investment Group LLC (“Bridges”) and against Doug and Margie Burbridge as managers of Bridges. CP 39-46. Seattle Marine claimed that Bridges and Burbridge had violated the terms of a purchase and sale agreement between them and violated the terms of the Bargain and Sale Deed. *Id.* The Third Party Complaint by Seattle Marine did not make any claims against Radovich.

October 30, 2008. A letter is sent from Riddell Williams law firm (representing Burbridge/Bridges) to the Helsell law firm (representing Seattle Marine) confirming that both were being retained by Pacific Northwest Title to defend their respective claims. CP 235-36. Mr. Buck of the Riddell firm indicated that: “We look forward to coordinating our efforts with you and your office and with Pacific Northwest Title which we understand has retained your services on behalf of Seattle Boat.” CP 236.

November 8, 2008. NYBA answered the Seattle Marine complaint, denying all allegations. CP 54-57. NYBA made no claims against Radovich.

March 20, 2009. Burbridge/Bridges answered the Third Party Complaint filed by Seattle Marine. Bridges also raised a variety of affirmative defenses including estoppel, failure of

consideration, lack of acceptance, illegality and similar claims.

Bridges also filed a Fourth Party claim against both Keyes and Radovich. CP 71-77. The Fourth Party Complaint alleged that:

23. If Plaintiff and/or its members hold fee title to the Disputed Strips by virtue of the Quit Claim Deed or otherwise, then Radovich and Keyes have breach (*sic*) their agreements to convey their interests in the Commercial Property to Burbridge and Bridges, and have breached the statutory warranty deeds which conveyed these interests.

CP 76 (emphasis supplied). At Paragraphs 26 and 29 (CP 76-77) of the Fourth Party Complaint, the liability of both Keyes and Radovich was premised on the condition "If the Quit Claim Deed constituted and/or memorialized a valid, effective conveyance of fee title to the Disputed Strips" (emphasis supplied) then Radovich/Keyes would be liable to Burbridge/Bridges under the Fourth-Party Complaint.

June 9, 2009. Keyes answers the Fourth-Party Complaint.

CP 81-87.

June 10, 2009. Fourth-Party Plaintiffs enter a "Partial Voluntary Dismissal without Prejudice" against Keyes. CP 90-91.

July 22, 2009. Radovich files their Answer and Affirmative Defenses. CP 93-100.

October 2, 2009. Radovich files a motion for summary judgment against Burbridge/Bridges. CP 127-148. The motion had

several parts. First, it claimed that Radovich could not be liable to Burbridge/Bridges based on claims brought by Seattle Marine because Radovich was not a party to the Burbridge/Bridges to Seattle Marine purchase and sale agreement and bargain and sale deed. Secondly, Radovich claimed that Burbridge/Bridges would not be liable to Seattle Marine on the Third-Party Complaint because the bargain and sale deed eliminated any warranties to Seattle Marine.

October 9, 2009. Fourth-Party Plaintiffs Burbridge/Bridges file a summary judgment motion against Seattle Marine on the grounds that Burbridge/Bridges has no liability to Seattle Marine because the bargain and sale deed eliminated all warranties. CP 110. However, on October 19, 2008, that motion was withdrawn. CP 548-51.

November 17, 2009. Judge Canova denied the Radovich motion for summary judgment. CP 639-641.

February 12, 2010. Fourth-Party Plaintiffs Burbridge/Bridges file a motion for summary judgment against Radovich. CP 658-669. Burbridge/Bridges claims that “if the 1981 Quit Claim Deed is valid and enforceable” (emphasis supplied) then Radovich had breached its warranties of title and the purchase and sale

agreement between the parties. Radovich opposed the motion (CP 962-83) and filed declarations of Mr. Radovich (CP 1124-26) and counsel (CP 984-1123) supporting their position.

March 26, 2010. Some six weeks after the motion is heard, the trial court entered its "Order Granting Burbridge/Bridges LLC's Motion for Summary Judgment Against Radovich." CP 1314. As argued in the Burbridge/Bridges motion, the Court ruling on the liability against Radovich was contingent, i.e. Radovich would be liable "if the 1981 Quit Claim Deed is later found to be valid and enforceable. . ." CP 1316 (emphasis supplied).

May 17 to June 2, 2010. A bench trial is held before Judge Canova on the claims and counterclaims between NYBA and Seattle Marine. CP 1578. Burbridge/Bridges participates in the trial, but Radovich does not as the March 26, 2010 summary judgment fixed their contingent liability.

August 2, 2010. Judge Canova enters Findings of Fact and Conclusions of Law on the claims between NYBA and Seattle Marine. CP 1578-1608. At Conclusion 2.3 at CP 1594:19-21, the court concluded that:

As a result, the Quit Claim Deed did not convey fee simple title to the property described therein to NYBA.

In its Order, the court declared that "the Quit Claim Deed is

invalid...” CP 1606:7.

September 9, 2010. Burbridge/Bridges filed its “Motion for An Award of Attorney Fees and Costs Against Radovich. CP 1708-25. In that motion, Burbridge/Bridges claimed entitlement to attorney fees based on certain provisions of the Purchase and Sale Agreement between Burbridge/Bridges and Radovich in the amount of \$376,469.41. CP 1718:4.

Radovich filed a response to the attorney fees motion. CP 1934-1945. Radovich specifically requested that the Court hold an evidentiary hearing on the attorney fees matter. CP 1935-36. Radovich opposed the motion on several grounds and filed a Declaration supporting his opposition to the motion. CP 1946-1959.

November 5, 2010. The Court enters its “Phase I Judgment” stating that the Quit Claim Deed “is invalid and unenforceable.” CP 2002:12-14.

December 8, 2010. Judge Canova enters his “Judgment and Order Awarding Burbridge/Bridges Investment Group LLC Attorney Fees and Costs against Radovich,” following the text of the order presented by counsel for Burbridge/Bridges. CP 2129-2133. The order awarded Burbridge/Bridges \$376,489.41 in

attorney fees and costs and declined to order an evidentiary hearing regarding the liability for and amount of attorney fees. In the order, the trial judge included a finding that: "14. On August 2, 2010 this court entered an order invalidating the Quit Claim Deed and dismissing NYBA's claims." CP 2132:13-14. The court also concluded that:

3. Burbridge/Bridges LLC are entitled to attorney fees under the statutory warranty deed because Radovich bears some responsibility for Burbridge/Bridges LLC's involvement in this lawsuit.

CP 2133:6-8 (emphasis supplied).

December 10, 2010. Radovich files a motion for reconsideration of the ruling of the trial court on attorney fees. CP 2149-58. The motion is supported by a declaration of counsel at CP 2159-2179. In that declaration, counsel for Radovich provided discovery responses from Burbridge/Bridges that admitted:

All legal fees and expenses billed in this matter were paid by Pacific Northwest Title Insurance Company Inc. on behalf of its insured's, the Burbridge/Bridges LLC.

CP 2168:3-5.

December 30, 2010. Radovich files an amended notice of appeal to include the ruling of the court granting attorney fees entered on December 8, 2010. CP 2177.

January 11, 2011. Following receipt of a response from

Burbridge/Bridges to the Radovich motion for reconsideration, the trial court denied the reconsideration motion. CP 2346.

This appeal followed.

IV. ARGUMENT

4.1 Standard for Reviewing Summary Judgment Rulings.

This matter was decided on summary judgment entered by the trial court against Radovich on December 8, 2010. Accordingly, the standards for review of summary judgment rulings apply.

Summary judgment is appropriate “if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56. *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 348, 96 P.3d 979 (2002). A material fact is one upon which the outcome of litigation depends. See *Shields v. Morgan Financial*, 130 Wn.App. 750, 125 P.3d 164 (2005).

In reviewing a summary judgment decision, the Court must review the evidence, and all reasonable inferences therefrom, in the light most favorable to the nonmoving party, here the Radoviches. See *Roger Crane and Associates v. Felice*, 74 Wn.App. 769, 875 P.2d 705 (1994). A genuine issue of fact exists,

which precludes summary judgment, when reasonable minds could reach different factual conclusions after considering the evidence; when reasonable minds could differ, a summary judgment motion should be denied and the case should proceed to trial. *Klinke v. Famous Recipe Fried Chicken, Inc*, 94 Wn.2d 255, 616 P.2d 644 (1980).

Issues of law and corresponding conclusions of law are reviewed to determine whether the correct legal standard was applied; such review is *de novo*. *Rasmussen v. Bendotti*, 107 Wash.App. 947, 954, 29 P.3d 56 (2001).

In the present case, the trial court erred in entering its summary judgment motion and entering judgment for attorney fees.

4.2 Radovich Has No Liability to Burbridge/ Bridges Because They Made a New Independent Contract with Seattle Marine

As described above, Radovich executed a warranty deed to Burbridge/Bridges in August 2004 for only one-half of the property (CP 1015-1021); the other undivided half had been conveyed to Burbridge some 13 years before in 1991 (CP 1007). Subsequently, on March 30, 2007, Burbridge/Bridges conveyed the entirety of the original Radovich/Keyes ownership to Seattle Marine by a Bargain and Sale Deed (CP 1023-29) such that no portion of the property

conveyed by Radovich to Bridges remained in the ownership of Bridges.

The sale by Bridges to Seattle Marine was a new independent transaction; Radovich was not involved in any manner in its negotiation. See Radovich Declaration, CP 125. Bridges and Seattle Marine entered into a Real Estate Purchase and Sale Agreement (PSA) which was long and complex. See CP 215-229. That agreement called for a bargain and sale deed, which limited the warranties and liabilities of Bridges as the grantor. CP 217, Section 5.1.³ The PSA between Bridges and Seattle Marine also called for the preparation of a new title report and new title insurance for both Seattle Marine and its lender. CP 218 at Section 5.3. See CP 217-18. The new title report is found at CP 252-267. In addition, the transaction involved the conveyance of additional property beyond that conveyed by Radovich to Bridges in 2004. See PSA at CP 218. The seller Bridges made certain “Representation and Warranties” at page 6-7 of the PSA (CP 221-222), but none of them related to any transactions with Radovich. Nowhere in the PSA or other documents is there any reliance

³The terms and particular limitations of this deed are discussed below in Section 4.3 of this brief.

placed on documents, conveyances or statements of Radovich.
CP 215-229.

The Third Party Complaint by Seattle Marine against Burbridge/Bridges asserts that in "preacquisition discussions" Burbridge/Bridges "contemplated and represented that Bridges and Burbridge were the lawful fee title holders of the entire Commercial Parcel . . ." See page 20 of Third Party Complaint, CP 42:9-19. However, there are no allegations that Radovich "contemplated or represented" anything to Seattle Marine. New independent title abstract work was prepared by PNWTIC, which failed to identify the 1980 Quit Claim Deed as an encumbrance on title. CP 252-67.

In short, the Burbridge/Bridges/Seattle Marine deal was a brand new transaction, not based in any fashion on the 2004 Radovich/Burbridge/Bridges transaction nor on representations by Radovich. Significantly, Seattle Marine did not sue or implead Radovich in its complaint.

Under these circumstances, Burbridge/Bridges cannot pass through any liability it has to Seattle Marine to Radovich. The general Washington rule, common to general contract law, is that:

A contract, on the other hand, can be enforced only against those party to it. *McIntyre v. Johnson*, 66 Wash. 567, 120 P. 92 (1912). See 17 Am.Jur.2d Contracts §§ 1, 15 (1964).

State v. Antoine, 82 Wn. 2d 440, 445, 511 P.2d 1351, 1354 (1973), reversed on other grounds, *Antoine v. Washington*, 420 U.S. 194, 95 S.Ct. 944 (1975).

As applied here, Burbridge/Bridges sold the property to another party, here Seattle Marine, based on a new contract, new consideration and a new deed. It cannot seek to make Radovich liable for its own errors. Burbridge/Bridges and Seattle Marine were free to conduct new investigations of title, and in fact did just that.

Radovich was not a part of the contract between Burbridge/Bridges and Seattle Marine and cannot be held accountable for the parties' dealings in that transaction. The trial court erred in holding Radovich liable to Burbridge/Bridges.

4.3 Radovich Has No Liability to Bridges Because Bridges' Restrictive Bargain and Sale Deed Eliminates Liability by Bridges to Seattle Marine.

Washington law is clear that recording is constructive notice to any subsequent person or buyer of the existence of the deed and interest in property. See *Kendrick v. Davis*, 75 Wn.2d 456, 452 P.2d 222 (1969); *Strong v. Clark*, 56 Wn.2d 230, 352, P.2d 183 (1960).

As applied to the present case, the recording of the 1980 Quit Claim Deed in 1981 (CP 162-63) gave notice to all subsequent

owners of the existence and terms of the deed. PNWTIC's own re-recording of both the prior Keyes and Radovich deeds in July, 2008, after they learned of their mistakes, made clear that the 1980 Quit Claim Deed was an encumbrance on the property. CP 200-207 and 195-98. But whether the parties actually covenant or warrant against the existence of past conveyances is a matter of business judgment and the kind of deed selected for their transaction.

In the instant case, when Burbridge/Bridges entered into the agreement (the PSA) to sell the commercial parcel to Seattle Marine, it reached an understanding about the form of the deed to be employed. The parties agreed on a "bargain and sale" deed in the PSA. See page 2, §5.1 , CP 211. Following the preparation of a title report by PNWT (CP 252-267), and an agreement for issuance of a title insurance policy, a bargain and sale deed was executed by Bridges and accepted by Seattle Marine. That deed is found at CP 187-93.

The effect of the use of a bargain and sale deed is established by statute. RCW 64.04.040. That deed conveys to the grantees "an estate of inheritance in fee simple." The distinguishing feature of the bargain and sale deed is that the

grantor warrants only against encumbrances from the grantor and quiet enjoyment only from the “grantor, his heirs and assigns.” The deed does not protect the bargain and sale deed grantee from claims from prior owners, as Professor Stoebuck says:

When the granting language of RCW 64.04.040 is used the “bargain and sale” deed carries only covenants number 1, 3, and 4, and they are covenants against defects incurred only by the immediate grantor.

18 Washington Practice at Section 14.3, page 118 (emphasis supplied). This is fully explained by Professor Stoebuck at page 115:

Moreover, the covenants of the bargain and sale deed are only against title defects incurred by the grantor, not against defects that existed on the land when the grantor took title. As Washington has recognized, a deed that contains covenants against only defects incurred by the grantor is sometimes called a “special warranty deed.”

Washington law approves the use of bargain and sale deed or special warranty deeds:

A special warranty deed, therefore, normally warrants title only against claims held by, through, or under the grantor, or against incumbrances made or suffered by him, and it cannot be held to warrant title generally against all persons. [Omitting citations.] A special warranty deed therefore protects the grantee against a claim under a title from his grantor, but not against a claim under a title against, or superior to, his grantor. *Kentucky River Coal Corp. v. Swift Coal & Timber Co.*, *supra*; *Gittings v. Worthington*, 67 Md.

139, 9 A. 228.

Central Life Assur. Soc. v. Impelmans, 13 Wn.2d 632, 645-646, 126 P.2d 757, 763 (1942).

Important to this matter, the statute specifically allows the grantor to limit even these modest covenants implied by the statute for bargain and sale deeds. As the statute says, the stated covenants apply “unless limited by express words contained in the deed; . . .”⁴ RCW 64.04.040.

In the present case, Bridges employed this statutory option to limit the covenants by express language in the bargain and sale deed. Thus limiting language was included in the deed by Bridges as follows:

The Grantor for itself and its successors in interest, hereby expressly limits the covenants of this deed to those herein expressed, and excludes all covenants arising or to arise by statutory or other implication, and does hereby covenant that, against all persons whomsoever lawfully claiming or to claim by, through or under said Grantor, and not otherwise, it will forever warrant and defend the said described real estate.

See CP 188. As is seen, Bridges as grantor “expressly limits the covenants of the deed to those herein expressed and excludes all

⁴ This potential for modification of a bargain and sale deed is not found in RCW 64.04.030, the statute creating statutory warranty deeds.

covenants arising or to arise by statutory or other implication . . .” (emphasis supplied). This broad and expansive language excludes “all covenants,” which means all covenants of the deed, including “an indefeasible estate in fee simple,” “encumbrances done or suffered by the grantor” and “for quiet enjoyment against the grantor.” The only covenant remaining, or the one “herein expressed,” is found in the final clause of the deed provision and is as follows:

The Grantor . . . does hereby covenant that, against all persons whomsoever lawfully claiming or to claim by, through or under said Grantor, and not otherwise, it will forever warrant and defend the said described real estate.

Thus Burbridge/Bridges’ only warranty under the deed is as against those “persons whomsoever lawfully claiming . . . through or under” them. Because the 1980 Quit Claim Deed was not a claim “through or under” them, Burbridge/Bridges has no liability to Seattle Marine for the existence of that deed.

Significantly, Seattle Marine has not impleaded the Radoviches and makes no claims against them for enforcement of deed covenants, damages or attorney fees. The assertion made by Burbridge/Bridges in its Fourth Party Complaint is that it has liability to Seattle Marine, which it claims should be passed on to

Radovich and Keyes. Seattle Marine bases its claim on the alleged warranty made by Bridges that "at the time of making and delivering the deed it was indefeasibly vested of an estate in fee simple in the Commercial Parcel. . . ." Third Party Complaint, page 22. However, that warranty was expressly deleted from the deed by the limiting clause in the bargain and sale deed. Thus the Bridges' Bargain and Sale Deed makes very clear that Bridges has no liability to Seattle Marine for past transactions and accordingly there is nothing to pass on to Radovich.

Indeed, after Radovich filed its summary judgment motion, Burbridge/Bridges filed its own summary judgment motion (filed October 2, 2009) against Seattle Marine based on this same claim i.e. that they had no liability to Seattle Marine because of the restrictive language of the bargain and sale deed. See CP 112-113. Unaccountably, ten days later, Burbridge/Bridges withdrew this motion. CP 548-49. Burbridge/Bridges' about face on this issue is likely due to the fact that the attorney fees of both Burbridge/Bridges and Seattle Marine were being paid by Pacific Northwest Title. CP 234-35.

Based on the foregoing, Burbridge/Bridges was never liable to Seattle Marine on its bargain and sale deed. That deed

eliminated any liability to Burbridge/Bridges on any encumbrances except ones that Burbridge/Bridges created. Accordingly Burbridge/Bridges would not be liable to Seattle Marine for title defects from other than its own actions. As the claim against Radovich is only a pass-through claim from Seattle Marine, there is no liability from Radovich to Burbridge/Bridges. The trial court erred in creating such liability.

4.4. As Burbridge/Bridges Already Owned an Undivided One Half of the Property Encumbered by the 1980 Quit Claim Deed, There Is No Basis for Liability Against Radovich.

One of the unusual features of the relationship of the parties herein was the origin of the interests of the parties.

As explained in the statement of facts, the Newport Yacht Basin property was originally conveyed to the Keyes' and the Radoviches' marital communities as equal owners. See the June, 1976 Deed at CP 989-990. Documents for the subsequent creation of the NYBA, the original easements and the 1980 Quit Claim Deed were each signed by both Keyes and Radovich. See CP 992-96, 998-999.

Early on, the Burbridges indicated that they wished to purchase the Commercial Parcel; as they said in a letter in April 1981: "It is no secret that we would like to purchase this property."

CP 1048.

By November 1983, the Burbridges decided to buy just the one half interest in the property held by the Keyes and submitted an "Offer to Purchase." CP 1034-37. The transaction called for a total price of \$300,000, with \$30,000 down and payments of \$3095 per month, plus annual principal payments of \$10,000 per year. *Id.*

In 1991, apparently on completion of Burbridges' payments, the Keyes conveyed their "undivided one-half interest" in the Commercial Parcel and other property to the Burbridges by a statutory warranty deed. See CP 1001. From that time forward the Burbridges, then their LLC, Bridges Investments, owned an undivided one-half interest in the property.

The legal description in the 1991 statutory warranty deed from Keyes to Burbridge did not exclude or discuss the 1980 Quit Claim Deed. See CP 1001. Nor did a later re-recording in 1993, which added the notation "Being re-recorded to correct legal description," mention the 1980 Quit Claim Deed. CP 167-69. Much later (2008), PNWTIC amended and re-recorded the 1991 Keyes-to-Burbridge statutory warranty deed yet again, this time excepting the 1980 Quit Claim Deed in the legal description. See CP 195-98.

Thus the 2004 Burbridge and Radovich transaction was only

for the undivided one-half of the property, as is stated in the deed. CP 179-85. If there was an unknown encumbrance on the title, it was already in place on the Burbridge/Bridges undivided one-half interest when they acquired the Radovich one-half interest in 2004. Indeed, though the original Fourth-Party Complaint named Russell and Constance Keyes as Fourth-Party Defendants (CP 71-78), they were later voluntarily dismissed. See CP 90-92.

Though there were no agreements or paper work between them, legally Radovich and Burbridge had become tenants-in-common after 1991. A tenant-in-common has a separate undivided interest in property. *Butler v. Craft Eng Constr. Co.*, 67 Wn.App. 684, 694, 843 P.2d 1071 (1992). Significantly, the 1980 Quit Claim Deed at issue here was recorded before Burbridge acquired his one-half interest from Keyes in November 1983 by the "Offer to Purchase".

Accordingly, at the time Burbridge sought to acquire Radovich's half interest, the Burbridges' half was already encumbered by the 1981 deed. Since the Burbridge one-half interest was separate, the conveyance from Radovich could not change his already encumbered interest. Thus Burbridge's claim is in fact assailing his own title after voluntarily acquiring it from

Keyes.

It is obvious that a property can have only one actual legal description. The law is also clear that one cannot assail his own title or the common title of property owned in common with others:

The common title was assailed. It was believed that another had a better title, and one of the holders of the common title purchased an outstanding interest in such superior title. Under such circumstances we believe there was a tangible substance to which a co-tenancy would attach, and that the parties sustained to each other the relation of co-tenants. A co-tenant will not be permitted to question the common title upon a contest between him and his co-tenants. *Bornheimer v. Baldwin*, 42 Cal. 27; *Olney v. Sawyer*, 54 Cal. 379; Freem. Co-Ten. (2d Ed.) § 152.

Cedar Canyon Consol. Min. Co. v. Yarwood, 27 Wash. 271, 281-282, 67 P. 749, 752 - 753 (1902) (emphasis supplied).

There are also indications that demonstrate that Burbridge, who had been on the property for 28 years when their LLC purchased the Radovich interest, was aware their own title was encumbered by the 1980 Quit Claim Deed. First, Burbridge understood that part of the property he leased had been given over to the NYBA in 1981, contemporaneous with the execution of the 1980 Quit Claim Deed. See CP 1047-48. Second, Doug Burbridge was specifically told in 1987 that NYBA owned the property found in the 1980 Quit Claim Deed. On February 10, 1987, Mary Anne Vance, the lawyer for the NYBA, wrote a letter to Mr. Burbridge

saying that:

It has come to our attention that the north side of a building occupied by Mercer Marine is resting approximately 15 feet across property owned by the Association.

CP 1031-32. Importantly, Ms. Vance went on to describe the property that “was owned by the Association,” as “Parcel B” taken exactly from the 1980 Quit Claim Deed. CP 998-999. Significantly, this notice was given while Burbridge was buying the property from Keyes. Even in the face of this notice, Burbridge took a deed to the property in 1991 from Keyes. See CP 1001.

In summary, Burbridge's one-half interest in the property, acquired in 1991, was already encumbered by the 1980 Quit Claim Deed. The conveyance from Radovich did not affect this underlying condition of title. Summary Judgment was inappropriately granted to Burbridge/Bridges and should have been granted to Radovich.

4.5 Because the 1980 Quit Claim Deed Was Found to Be Invalid and Unenforceable, There Is No Liability of Radovich to Burbridge/Bridges.

As described in the Statement of Facts, the liability of the Radoviches for possible breach of warranties regarding the deed and the purchase and sale agreement was contingent upon the 1981 deed being found valid and enforceable. As the Fourth Party

Complaint stated: “If the Quit Claim Deed constituted and/or memorialized a valid and effective conveyance of the fee title to the Disputed Strips,” then Radovich would be liable. CP 76-77 (emphasis supplied). When the court ruled on the Bridges/Burbridge summary judgment motion, it signed an order (prepared by counsel for Bridges/Burbridge) which ruled that Radovich would be liable only “if the 1981 Quit Claim Deed is later found to be valid and enforceable. . .” CP 659:6-9. However, following the trial (involving only NYBA, Seattle Marine, and Bridges/Burbridge), the court concluded that the 1981 Quit Claim Deed was invalid and unenforceable for several reasons.

As noted above, the trial court erred in entering summary judgment for Burbridge/Bridges. Even if summary judgment was proper, the court erred in concluding that Radovich should be liable after the NYBA/Seattle Marine trial.⁵ This is so because if the 1980 Quit Claim Deed was invalid and unenforceable, there was no encumbrance on the title that was conveyed from Radovich to Bridges/Burbridge in 2004. Under the circumstances, the claim against the Radoviches, which was premised on the validity of the

⁵ The trial court also erred in not ordering an evidentiary hearing on the attorney fees matter, for the reasons stated at CP 1935-36.

1980 Quit Claim Deed, should be dismissed.

Washington law is clear that no damages or attorney fees are appropriate in an action for violation of deed covenants if the claimed encumbrance is determined to be invalid. *Foltz v. Manson*, 164 Wash. 692, 699, 4 P.2d 509, 512 (1931) (deed covenants protect only against lawful claims); see also *Double L. Properties, Inc. v Crandall*, 51 Wn.App. 149, 751 P.2d 1208 (1988). This is confirmed in 18 Washington Practice, Real Property Transactions, §14.4 (2004) where Professor Stoebuck states:

It is axiomatic that a grantee may not recover from a grantor on any of the covenants, including the covenant to defend, unless it is somehow established that the third person who claims a superior right has it. This is another way of saying that the grantor is liable only if there is in fact a breach of a covenant.

In the same section, Professor Stoebuck summarizes the law in this area:

However it is handled, the third person's superior right against the grantee's title must be established. It is ironic that, to win, the grantee must lose.

Moreover, Burbridge/Bridges have admitted that absent a valid encumbrance on title, there is no basis for liability of a grantee under Washington law. CP 1715.

In the present case, the "superior right against the grantee's title" was not established. The only claimed "superior right" was the

1980 Quit Claim Deed, which was declared invalid by the court, thus removing any possible liability. Indeed, in the order granting Burbridge/Bridges the attorney fees against Radovich, the court made the same finding:

14. On August 2, 2010, this court entered an order invalidating the Quit Claim Deed and dismissing the NYBA's claims.

CP 2132.

Based on the foregoing, there is no basis to hold Radovich liable under deed covenants and the Superior Court judgment for attorney fees should be reversed.

4.6 Absent a Valid Encumbrance on Title, There Is No Basis for Liability Against Radovich under Any Deed Theories.

Notwithstanding the foregoing rulings, the Superior Court premised liability based on the statutory warranty deed in its conclusions:

3. Burbridge/Bridges LLC are entitled to attorney fees under the statutory warranty deed because Radovich bears some responsibility for Burbridge/Bridges LLC's involvement in this lawsuit.

CP 2133. However, what is the basis for determining "some responsibility" and what does that mean? It is not identified in the conclusions. To the extent that Finding 16 at CP 2133 is intended to support the claim, such finding is not supported by substantial

evidence nor is it legally sufficient.⁶

Finding 16 provides as follows:

16 | 16. Burbridge/Bridges LLC incurred substantial legal fees and costs
17 | because of the actions of Radovich, including his attempt to convey the same
18 | property twice, ^(1/23) forgetting² about the purported conveyance via quit claim deed to
19 | the NYBA, orchestrating a take over of the Board of the NYBA to ensure it was
20 | hostile to the development proposed by Seattle Marine, and finally, using his
21 | voting power and persuasion to initiate and pursue this litigation.

CP 2132.

To begin with, none of the assertions now made by Burbridge/Bridges were either pleaded by them or included as bases for the summary judgment motion. In their Fourth-Party Complaint, Burbridge/Bridges alleged claims for “Breach of Agreements and Deeds” and “Unjust Enrichment.” See CP 76-77. There were no allegations that would base liability on matters found in Finding 16 such as allegedly taking over the Board of the NYBA or using voting power and persuasion to initiate this litigation. Similarly, the summary judgment motion brought by

⁶ Under Washington law, the substantial evidence test is applied to findings of the trial court:

An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings. *In re Marriage of Schweitzer*, 132 Wash.2d 318, 329, 937 P.2d 1062 (1997). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. *Bering v. SHARE*, 106 Wash.2d 212, 220, 721 P.2d 918 (1986).

Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162, 164 (2010).

Burbridge/Bridges dealt exclusively with the foregoing claims from the complaint. See CP 658-69.

The first two of the “facts” found by the trial court deal with the 1980 Quit Claim Deed itself. As identified above in Section 4.5, Washington law makes clear that for the deed to be the basis for a claim for attorney fees, it must be determined to be valid.

However, the trial court has determined that it is not valid or enforceable. See Finding 14 in the attorney fee order at CP 2132. As such there is no liability based on the deed.

In any event, one of the claims in Finding 16 (CP 2132) is that Radovich forgot about the 1980 Quit Claim Deed. This is true and admitted by Radovich in his declaration to the court opposing the Burbridge/Bridges summary judgment motion. See CP 1125. Importantly, the proposed Burbridge/Bridges order on the attorney fees motion put quotation marks around the word “forgetting,” which would have implied that Radovich did not forget at all and was feigning the whole thing. However, as shown above at CP 2132 at line 18, the trial court carefully removed the quotation marks, indicating that the Court found that Mr. Radovich forgetting was honest and accurate (and perfectly understandable 24 years after signing the document). In any event, it is impossible to say

that forgetting is an “action;” indeed, forgetting is the opposite of an action.

Next, Finding 16 is apparently cited as the basis for substantial award of attorney fees (\$376,489.41) because Mr. Radovich took steps to oppose the land use applications filed by Seattle Marine. See Finding 16, CP 2132 at lines 19-20.

Though there is no support for this proposition in the motion filed by Burbridge/Bridges, nor in the supporting declaration, any opposition by Radovich (or others) to the land use applications by Seattle Marine cannot be considered wrongful. Land use applications require public notice, including the “statement of the right of any person to comment on the application, receive notice of and participate in any hearings” RCW 36.70B.110(2)(e). Indeed, Washington law protects the rights of individuals to speak out on land use matters under the anti-SLAPP statute, RCW 4.24.510.⁷ Under that statute:

A person who communicates a complaint or information to any agency of federal, state, or local government ... is immune from civil liability for claims based upon the communication to the agency ... regarding any matter reasonably of concern to that

⁷ “SLAPP” refers to “Strategic Lawsuit Against Public Participation.” *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn. 2d 370, 382, 46 P.3d 789, 795 (2002)

agency....

See Right-Price Recreation, LLC v. Connells Prairie Community Council 146 Wn. 2d 370, 383, 46 P.3d 789 (2002). Accordingly, opposition or “hostility” to a land use development cannot, as a matter of law, be the basis for civil liability. Indeed, attempts to use litigation as a basis to stifle public comment on land development proposals results in the award of attorney fees under RCW 4.24.510 against the plaintiff in favor of the party that is making public comment. *See Right-Price, supra*, 146 Wn.2d at 384-85; *Gilman v. MacDonald*, 74 Wn. App. 733, 734, 875 P.2d 697 (1994). Accordingly, public comments on the Seattle Marine proposal cannot be considered wrongful and cannot be the basis for an assessment of attorney fees against Radovich.

Next, Finding 16 states that one of the “actions of Radovich” that allegedly created legal fees for Burbridge/Bridges was as follows: “finally, using his voting power and persuasion to initiate and pursue this litigation.” CP 2132, lines 20-21. However, there is no basis at all in the record for this finding and accordingly it is not supported by substantial evidence. The declaration of Mr. Kundtz that accompanied the motion for attorney fees mentions nothing about these asserted actions. See CP 1726-33. Burbridge/Bridges

claims that it was the actions of Radovich that lead to this litigation. But, as will be discussed more extensively below, the precipitating factor of this litigation was that the title company that Burbridge/Bridges hired to provide title insurance, PNWTIC, for the transaction with Seattle Marine completely failed to do its job. It was their negligence that was the proximate cause of this litigation rather than Mr. Radovich simply signing a deed 24 years before.

These circumstances do not permit Burbridge/Bridges to put the entire blame on Radovich for their own errors. The trial court erred in its entry of the attorney fee judgment.

4.7 Radovich Is Not Liable for Fees Under the PSA Because the 1980 Quit Claim Deed Was Declared Invalid

As described above, any liability of Radovich was contingent on whether the 1980 Quit Claim Deed was valid and enforceable. The summary judgment order entered on March 26, 2010 (CP 1314-16), clearly spelled out the circumstances under which Radovich would be liable. It concluded that liability would attach only “if” the 1980 Quit Claim Deed was “later found to be valid and enforceable.” CP 1316. That issue was disposed of in the August 2, 2010 Findings and Conclusions of the Court: the 1980 Quit Claim Deed was declared to be invalid and unenforceable.

With respect to indemnity and attorney fee clauses, the rule is clearly stated in *Nunez v. American Bldg. Maintenance Co. West*, 144 Wn. App. 345, 351, 190 P.3d 56, 58 - 59 (2008): "A duty to indemnify generally 'arises when the plaintiff in the underlying action prevails on facts that fall within coverage.' *Knipschild v. C-J Recreation, Inc.*, 74 Wn. App. 212, 216, 872 P.2d 1102." Here, the Court has ruled that the 1980 Quit Claim Deed is invalid. The basis for liability stated in the Fourth-Party Complaint was that Radovich would be liable "if" the 1980 Quit Claim Deed was valid. The terms of Section 19.3 provide that if an action "is brought by either party against the other related to this agreement," the "substantially prevailing party" shall recover their fees. CP 728. As the 1980 Quit Claim Deed was determined not to be valid, Radovich is the prevailing party. Burbridge/Bridges cannot recover its attorney fees under PSA §19.3 because it was not the substantial prevailing party. Indeed, under these circumstances the Radoviches should receive their fees.

For many of the same reasons that Radovich is not liable under the attorney fees/prevaling party provisions of Section 19.3 of the PSA, Radovich is not liable under the indemnity provisions of Section 10.2 of the same agreement.

The fundamental deficiency of this claim is that the claims of Seattle Marine against Burbridge/Bridges did not arise from the agreement between Burbridge/Bridges and Radovich. The relationships and promises between Seattle Marine and Burbridge/Bridges arose from a new transaction between these parties. Further, Section 10.2 provides indemnity only for claims "which relate to any period prior to closing." However, the claims brought by Seattle Marine against Burbridge/Bridges arose from a contract and bargain and sale deed executed in 2007, three years after the Radovich to Burbridge/Bridges transaction. Moreover, in Washington, "the general rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligence unless this intention is expressed in clear and unequivocal terms." *Northwest Airlines v. Hughes Air Corp.*, 104 Wash.2d 152, 155, 702 P.2d 1192, 1194 (1985). In the present case, the cause of the problems between Burbridge/Bridges and Seattle Marine arose from the negligence of Burbridge/Bridges own title insurer, PNWTIC, who failed to locate the recorded 1980 Quit Claim Deed. Radovich cannot be held liable for this negligence.

Similarly, equitable indemnity principles, as expressed in

cases such as *Dauphin v. Smith*, 42 Wn.App. 491, 713 P.2d 116 (1886) do not apply. The causes of Burbridge/Bridges litigation with Seattle Marine were its own new problems together with the errors of PNWTIC, whom it hired to provide title insurance to Seattle Marine. These events transpired without the knowledge or involvement of Radovich.

There is no basis in these theories for the award of attorney fees against the Radoviches.

4.8 The Negligent Title Insurer Should Not Benefit from its Own Error by this Attempt at Subrogation.

As described above, from the very start, PNWTIC has been paying the fees of both Burbridge/Bridges and SMM. CP 2168:3-5. They were so obligated as the title insurer for both the Radovich-to-Burbridge/Bridges and the Burbridge/Bridges-to-Seattle Marine transactions. See CP 234-35. Indeed, the trial court found that the title company only identified easements in the property, missing entirely the 1980 Quit Claim Deed recorded in 1981. CP 1589.

Accordingly, this motion by Burbridge/Bridges is actually an attempt by PNWTIC through its retained lawyers to recover the fees it was obligated to pay for Burbridge/Bridges under its insurance contract. The underlying claim is actually for subrogation, *i.e.*, an attempt to recover those fees supposedly

owed to Burbridge from Radovich.

Generally, subrogation is “traditionally invoked only to prevent unjust enrichment; . . .” *Kim v. Lee*, 145 Wn. 2d 79, 89, 31 P.3d 665 (2001). Subrogation is an equitable doctrine designed “to impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it.” *Mahler v. Szucs*, 135 Wn. 2d 398, 411, 957 P.2d 632 (1998).

In the *Kim* case, a title company failed to discover a recorded document, but sought subrogation against a judgment creditor. The Supreme Court refused to allow the title insurer to be subrogated saying:

Under a contractual obligation, Yakima Title was negligent in giving its expert opinion and insuring title. The doctrine of subrogation does not apply to relieve a title insurance company of its contractual obligation because a title insurance company not only receives consideration for rendering an expert opinion, but also for acting as an insurer of its accuracy. *Coy*, 69 Wn. 2d at 351, 418 P.2d 728. Yakima Title failed to discover a recorded and perfected judgment lien and upon receiving actual notice, failed to disclose or remedy the situation.

Kim v. Lee, 145 Wn. 2d at 92-93. The reference to page 351 of the *Coy* case is particularly instructive:

It would be a gross misapplication of the doctrine of subrogation were we to hold that its cloak settles automatically upon one who has simply made a mistake, when it is a commercial transaction involving a consideration. Intervenor's [the title company's] relationship

is governed by the law of contracts. Further, it is difficult to think of a situation in which a title insurance company could not claim unjust enrichment as to someone who might inadvertently benefit by their negligence. Either they insure or they don't. It is not the province of the court to relieve a title insurance company of its contractual obligation. Intervenor has not cited us authority to the contrary.

Coy v. Raabe, 69 Wn. 2d 346, 351, 418 P.2d 728, 731 (1966).

In the present case, Radovich bought and paid for a policy of title insurance with PNWTIC for Burbridge/Bridges' benefit. The exceptions in the title policy were incorporated in the Radovich's deed. Compare CP 243-250 with CP 1018-1021. The title policy included the responsibility to provide a defense to any claims. CP 2168. PNWTIC received its premium, but was negligent in not discovering the recorded 1980 Quit Claim Deed.⁸ Under the circumstances, there is no basis on which to conclude that the fees PNWTIC paid should be recovered from Radovich.

4.9. Attorney Fees Should Be Awarded to Radovich.

Attorney fees on appeal and at trial should be awarded to the Radoviches.

Burbridge/Bridges filed a Fourth-Party Complaint against Radovich based on the theory that the 1980 Quit Claim Deed

⁸ Indeed when PNWTIC discovered its error, it re-recorded the 2004 Radovich to Burbridge/Bridges deed to except the 1980 Quit Claim Deed. CP 200-207.

encumbered its title and that it would have to pay Seattle Marine damages. Burbridge/Bridges sought damages and attorney fees if the 1980 Quit Claim Deed was valid and enforceable. See the Fourth-Party Complaint at CP 74-77. However, after trial, it was determined that the 1980 Quit Claim Deed was in fact invalid and unenforceable. Nor was there any unjust enrichment to Burbridge/Bridges as claimed in the complaint. CP 77. Moreover, under Section 19.3 of the agreement between Radovich and Burbridge/Bridges, the substantially prevailing party shall recover their reasonable attorney fees. Since the Radoviches prevailed on the claims brought by Burbridge/Bridges against them, attorney fees and costs at trial and on appeal should be awarded to them.

V. CONCLUSION.

As has been demonstrated herein, the trial court erred in denying the Radoviches summary judgment, entering summary judgment against them and awarding attorney fees to Burbridge/Bridges. The decision of the trial court should be

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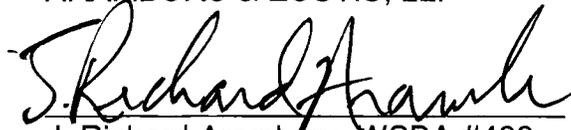
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reversed and the Radoviches should be awarded their attorney fees.

DATED this 9th day of MAY, 2011.

Respectfully submitted,

ARAMBURU & EUSTIS, LLP

A handwritten signature in black ink, appearing to read "J. Richard Aramburu". The signature is written in a cursive style with a large initial "J" and "R".

J. Richard Aramburu, WSBA #466
Attorney for John and Carol Radovich

Appendix A

Abbreviations Employed In This Brief

1. John C. and Carol Radovich - "**Radovich**"
2. Russell and Constance Keyes - "**Keyes**"
3. Newport Yacht Basin Association of Condominium Owners - "**NYBA**"
4. Douglas and Marjorie Burbridge - "**Burbridge**"
5. Bridges Investment Group LLC (an LLC formed by Burbridge) - "**Bridges**"

As appropriate, Bridges and Burbridge will be referenced collectively as "**Burbridge/Bridges.**"

6. Seattle Marine Management, Supreme Northwest, and Seattle Boat Newport - collectively "**Seattle Marine.**"
7. Pacific Northwest Title Company, though not a party, will be referenced herein as "**PNWTIC.**"
8. A key deed in this case, a quit claim deed signed on July 17, 1980 and recorded in 1981, is referenced herein as the "**1980 Quit Claim Deed.**"

NO. 66319-4-I

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

THE NEWPORT YACHT BASIN ASSOCIATION OF
CONDOMINIUM OWNERS, an unincorporated condominium
association,

Respondent,

v.

SUPREME NORTHWEST, INC., a Washington corporation d/b/a
SEATTLE BOAT NEWPORT, and SEATTLE MARINE
MANAGEMENT COMPANY, LLC, a Washington limited liability
company,

and

BRIDGES INVESTMENT GROUP, LLC, a Washington limited
liability company, and DOUGLAS BURBRIDGE and MARGIE
BURBRIDGE, husband and wife, and their marital community,

Additional respondents,

v.

JOHN and CAROL RADOVICH,

Appellants.

DECLARATION OF SERVICE
for OPENING BRIEF OF APPELLANTS RADOVICH

J. Richard Aramburu, WSBA 466
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206/625-9515

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ORIGINAL

DECLARATION OF SERVICE

The undersigned declares as follows:

I am an employee in the law office of J. Richard Aramburu over the age of 18 years and competent to be a witness herein. On the date below written, a copy of the foregoing document and this declaration were served on counsel of record herein by email, addressed as follows, with hard copies placed in the U.S. mail or with messengers:

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I declare under the penalty of perjury under the laws of the
State of Washington that the foregoing is true to the best of my
knowledge and belief.

Dated at Seattle, Washington this 9th day of May,
2011.



Carol Cohoe