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No. 71137-7

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

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DEBORAH McCALLUM,  
an individual,

Appellant,

vs.

GOLF ESCROW CORPORATION,  
a Washington corporation, et al.,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR SNOHOMISH COUNTY  
THE HONORABLE GEORGE APPEL

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Respondents Golf Escrow and Trustee Services Inc. (TSI) concede that without ever contacting appellant Deborah McCallum they reconveyed a Deed of Trust securing McCallum's \$550,000 loan to a real estate developer, Craig Reimer. (Golf Escrow Br. 9; TSI Br. 3) Nor do they dispute that their conduct violated the Deed of Trust's requirement that it be reconveyed only "upon . . . written request for reconveyance made *by the Beneficiary.*" (CP 553) (emphasis added) Instead, Golf Escrow defends the trial court's summary judgment dismissal of McCallum's claims by disputing the duties it owed McCallum, and both Golf Escrow and TSI argue that their conduct did not prevent McCallum from protecting herself against Reimer's eventual default.

Viewing the facts in the light most favorable to McCallum, however, a fact finder could have reasonably found for McCallum and the trial court erred in granting summary judgment of dismissal. Golf Escrow owed McCallum fiduciary duties under both the Deed of Trust, which it reconveyed as TSI's agent, and the escrow instructions that Reimer executed expressly for McCallum's benefit during a refinancing loan with Sterling Savings Bank. Both Golf Escrow and TSI failed to conduct any due diligence, which

required at a minimum contacting McCallum directly to obtain her written authorization before reconveying her Deed of Trust. Moreover, because Reimer's \$320,000 partial payment applied first to the unsecured portion of the \$550,000 loan, \$230,000 remained secured by the Deed of Trust when the respondents negligently reconveyed it. This Court should reverse and remand for trial on McCallum's claims against respondents.

## II. REPLY ARGUMENT

### A. **Golf Escrow owed McCallum fiduciary duties under both the Deed of Trust it reconveyed as TSI's agent and the escrow instructions that were executed expressly for her benefit.**

Golf Escrow owed McCallum fiduciary duties under both the Deed of Trust, which it reconveyed as TSI's agent, and the escrow instructions. Whether Golf Escrow breached those duties should have been determined at trial, not on summary judgment.

A party that renders services on another's behalf is liable for harm resulting from its failure to exercise reasonable care. *Estes v. Lloyd Hammerstad, Inc.*, 8 Wn. App. 22, 25-26, 503 P.2d 1149 (1972); see also *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 268, ¶ 93, 215 P.3d 990 (2009) ("An agency relationship exists, either expressly or impliedly, when one party

acts under the direction and control of another.”), *rev. denied*, 168 Wn.2d 1024 (2010); Restatement (Third) of Agency § 1.01 (2006). Here, Golf Escrow acted as TSI’s agent when it undertook TSI’s duty to reconvey McCallum’s Deed of Trust – as was “standard procedure” for Golf Escrow and TSI. (CP 557)

The Deed of Trust, which Golf Escrow’s principal Pamela Lane notarized, required that TSI reconvey the Deed of Trust “upon . . . written request for reconveyance made by the Beneficiary.” (CP 553) To meet this requirement, TSI sent “Pamela Lane at Golf Escrow a Request for Full Reconveyance to have signed by the beneficiary Deborah McCallum.” (CP 557; CP 61, 566; Golf Escrow Br. 9) Despite his clearly conflicting interests, Golf Escrow then sent the unsigned written request for reconveyance, on TSI letterhead, to Reimer, to obtain McCallum’s signature. (Golf Escrow Br. 9; CP 61, 120, 123, 478, 557, 566)

The request for reconveyance that Golf Escrow sent to Reimer confirmed that McCallum was the “Original Beneficiary.” (CP 567) Golf Escrow’s assertion that it was “not an agent of TSI” and that it owed McCallum no duties as the party reconveying the Deed of Trust naming her as beneficiary is without merit. (Golf

Escrow Br. 14 n.12)<sup>1</sup> At the very minimum, the evidence creates a question of fact regarding whether Golf Escrow acted as TSI's agent when it reconveyed McCallum's Deed of Trust. *O'Brien v. Hafer*, 122 Wn. App. 279, 281, 93 P.3d 930 (2004) ("The question of agency is generally a question of fact"), *rev. denied*, 153 Wn.2d 1022 (2005).

Moreover, Golf Escrow owed McCallum fiduciary duties under the escrow instructions, which were undisputedly executed for McCallum's benefit. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 362, 662 P.2d 385 (1983) (duties are owed to any party when "performance under the contract would necessarily and directly benefit" that party). As both Golf Escrow and TSI concede, Sterling Savings Bank<sup>2</sup> required Reimer to execute the DOT to facilitate payment to McCallum. (Golf Escrow Br. 7; TSI Br. 3) Thus, both

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<sup>1</sup> Indeed, Golf Escrow appears to have been TSI's "general agent," *i.e.*, "an agent authorized to conduct a series of transactions involving a continuity of service." *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 178 Wn.2d 120, 140, ¶ 35, 309 P.3d 372 (2013). As TSI conceded during discovery, "TSI had a longstanding relationship with Golf Escrow . . . and its principal Pamela Lane . . . since 1997, frequently providing reconveyance services." (CP 556)

<sup>2</sup> Sterling Savings Bank has not filed a separate brief disputing its liability and has essentially conceded that it is liable for its own conduct as well as the conduct of Golf Escrow, who served as its agent when it reconveyed McCallum's Deed of Trust. (*See* Golf Escrow Br. 14-15) If this court reverses as to Golf Escrow it must reverse as to Sterling as well.

Sterling Savings Bank and Reimer intended that McCallum would benefit from Golf Escrow's compliance with the escrow instructions, including its requirement that Golf Escrow obtain "a written statement from the holder of each existing encumbrance on the property, verifying its status, terms, and balance owing." (*Compare* CP 483 *with* Golf Escrow Br. 14 ("The escrow instructions did not impose upon Golf Escrow a duty to verify the terms of the loan underlying the encumbrance"))

Golf Escrow violated its duties both under the Deed of Trust and the escrow instructions when it negligently "reconveyed" McCallum's Deed of Trust. (App. Br. 13-15)<sup>3</sup> Contrary to the terms of the Deed of Trust and escrow instructions, as well as standard

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<sup>3</sup> TSI does not argue that it did not owe or breach duties to McCallum, but instead argues only that its actions did not proximately cause McCallum's damages. (TSI Br. 8-14)

practice within the escrow industry<sup>4</sup>, Golf Escrow did not contact McCallum directly to obtain her signature on the request for reconveyance, or to verify the “status, terms, and balance owing” on her encumbrance. (CP 483, 553)

Golf Escrow failed to contact McCallum despite numerous red flags, including 1) why the Deed of Trust did not include an address for the beneficiary or a payoff date for the referenced “promissory note of even date herewith,” 2) why Golf Escrow had never in fact seen such a promissory note, or 3) why the Deed of Trust stated that it should be returned to the grantor instead of the beneficiary. (CP 56-58, 115-16, 552) Upon noticing that the Request for Reconveyance was not dated, Lane did not contact McCallum, but instead simply dated it herself. (CP 61, 99) This

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<sup>4</sup> McCallum’s expert, Dale Galvin, followed established precedent in relying “on facts that were already in the record” to opine that Golf Escrow failed to comply with established standards for reconveying a deed of trust. *Owen v. Burlington N. Santa Fe R.R., Inc.*, 114 Wn. App. 227, 236-37, 56 P.3d 1006 (2002) (reversing summary judgment because expert’s declaration that defendant failed to comply with “[c]ommonly accepted traffic engineering practice” created an issue of fact), *aff’d* 153 Wn.2d 780, 108 P.3d 1220 (2005). Here, as in *Owen*, Galvin based his opinion on facts already in the record. (CP 115 (“I have read and understand the facts stated in Ms. McCallum’s Opposition”)) The “specific facts” that Lane failed “to obtain the original note and deed of trust . . . directly from the holder, along with a signed request for reconveyance” (CP 116), provided ample support for Galvin’s opinion. (Golf Escrow Br. 16-17)

Court should remand for trial on whether Golf Escrow breached the duties it owed McCallum under the Deed of Trust and escrow instructions.

**B. Whether McCallum would have prevented or mitigated her damages is a question of fact that cannot be resolved on summary judgment.**

Whether or not the defendant's conduct caused plaintiff's damages is generally a question of fact. *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 854, 751 P.2d 854 (1988) ("proximate cause generally [is] not susceptible to summary judgment"; reversing summary judgment because "an issue of fact exists as to whether [defendant's actions] proximately caused [plaintiff]'s injuries"); see also App. Br. 15-20. Wholly ignoring this principle, both TSI and Golf Escrow argue that McCallum failed to establish *as a matter of law* any damages from their failure to conduct any due diligence before reconveying her Deed of Trust. Viewing the facts in the light most favorable to McCallum, there is an issue of material fact whether TSI and Golf Escrow caused McCallum damages when they negligently reconveyed her Deed of Trust.

Had respondents *ever* contacted McCallum, she would have learned that Reimer had forged her signature, that Reimer had lied to Sterling Savings Bank about the amount he owed her, and that

Reimer had violated their loan agreement by executing a deed of trust for less than the full amount of the loan balance. (App. Br. 18-19)<sup>5</sup> But because respondents never contacted McCallum, Reimer was able to “string [McCallum] along . . . until he was able to sell his properties and otherwise dispose of much of his assets.” (CP 369) On December 4, 2009 – more than a year after respondents reconveyed McCallum’s Deed of Trust – Reimer sold his last property, leaving no property to secure McCallum’s loan, or against which that McCallum could attach or file a *lis pendens*. (CP 370) Far from having “full knowledge of Reimer’s financial status” (TSI Br. 14), because of respondents’ negligence McCallum had no idea Reimer was disposing of the properties he had promised McCallum would secure her loan.

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<sup>5</sup> This issue was preserved below. McCallum has consistently argued that respondents negligently reconveyed her Deed of Trust by failing to contact her, and that but for their negligence she would not have been left with a \$230,000 loan that she had no effective means of collateralizing. (*Compare* CP 182 (“There is no dispute [Golf Escrow and TSI] failed to communicate in any way with McCallum before eliminating her security”), 193 (“Defendants . . . were in position to strip McCallum of \$230,000 worth of security without her knowledge – which they did”) *with* Golf Escrow Br. 25; TSI Br. 12)) At a minimum, McCallum’s argument on appeal is “closely related” to her arguments below, and should be addressed on the merits. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, ¶ 7, 160 P.3d 1089 (2007) (considering issue “arguably related” to issues raised in the trial court”), *aff’d*, 166 Wn.2d 264, 208 P.3d 1092 (2009).

McCallum's efforts to have Reimer execute deeds of trust securing the remaining balance of the loan in December 2008 do not show she "took the steps to protect herself that she complains were lost." (Golf Escrow Br. 27; TSI Br. 10-11) Had Golf Escrow actually verified the status of McCallum's loan in July 2008, as required by the escrow instructions (CP 483), she could have insisted *at that time* that Reimer execute deeds of trust fully securing her loan, and would not have "chose to wait several months before preparing deed of trust documents to secure the remaining balance of the loan." (TSI Br. 16) A trier of fact could reasonably conclude that respondents' negligence delayed – and ultimately prevented – McCallum from obtaining additional security from Reimer in a rapidly deteriorating real estate market.

Moreover, although McCallum eventually asked Reimer to execute additional deeds of trust, because of respondents' conduct she did not take further steps to protect herself, *e.g.*, filing suit *before* Reimer sold his last property at the end of 2009. (App. Br. 19; Golf Escrow Br. 26-27; TSI Br. 14) McCallum's claim that she would have sued Reimer sooner had respondents' negligence not concealed Reimer's deceit is not "speculative." (TSI Br. 13) McCallum *did* sue Reimer. But McCallum did not file suit until

May 2010, five months after Reimer disposed of his last property, because Reimer continued to promise that he would pay McCallum – a promise she would not have believed had respondents not allowed Reimer to “string her along” by placing him in charge of obtaining her signature on the reconveyance. (CP 369-70)

Regardless whether Golf Escrow or TSI was “aware of the alleged forgery” (Golf Escrow Br. 9), their failure to conduct any due diligence allowed Reimer to commit that forgery and prevented McCallum from learning that he had violated their loan agreement by executing a deed of trust for less than the loan balance. Likewise, regardless whether the respondents were involved in the “initial transaction,” *i.e.*, the loan between McCallum and Reimer (TSI Br. 11), but for the breach of their duties McCallum could have prevented, or at least mitigated, her damages. That establishes a cause of action that must be resolved by the trier of fact. *Johnson v. Aluminum Precision Products, Inc.*, 135 Wn. App. 204, 210, ¶ 19, 143 P.3d 876 (2006) (“The elements of a negligence claim are duty, breach, proximate cause, and damage”), *rev. denied*, 161 Wn.2d 1005 (2007).

**C. The \$320,000 partial payment could not apply to the secured portion of McCallum’s loan absent her knowledge of the Deed of Trust.**

The trial court erred in dismissing McCallum’s claims on summary judgment for a second reason – the \$320,000 partial payment applied first to the unsecured portion of McCallum’s \$550,000 loan to Reimer, leaving \$230,000 still secured by the Deed of Trust when the respondents negligently released McCallum’s security interest.

Respondents concede that as a general rule, a “creditor may apply payments to any part of the debt, as he sees fit.” (Golf Escrow Br. 19; TSI Br. 14; *see also* App. Br. 21-22) They rely on the “particular source” exception to this rule, which prevents a creditor from applying funds paid to discharge a particular debt to another debt “when the money with which the payment is made is *known to the creditor* to have been derived from a particular source” for the purposes of discharging a specific debt. (Golf Escrow Br. 21; TSI Br. 15-16 (citing *Cummings v. Erickson*, 116 Wash. 347, 351, 199 P. 736 (1921) (emphasis added)))

Here, however, the gravamen of the complaint is that the creditor, McCallum, *did not know* that Reimer had executed a deed of trust because respondents failed to contact her. Thus she could

not have known that the funds were meant to extinguish that obligation. (Golf Escrow Br. 23; McCallum “did not know that part of Reimer’s debt was secured when the payment was made”) On its face, the particular source exception does not apply.

Moreover, applying the equities, respondents, not McCallum, should bear the loss caused by their negligence in reconveying her Deed of Trust. (Golf Escrow Br. 20-24; TSI Br. 16-17) Respondents could have prevented any dispute regarding the application of Reimer’s partial payment to McCallum if they had complied with the requirement in both the Deed of Trust and escrow instructions that they contact McCallum. They did not.

Respondents should not be allowed to benefit from their negligence. This Court should reverse the trial court’s summary judgment order because the \$320,000 partial payment left \$230,000 still secured by the Deed of Trust when the respondents negligently released McCallum’s security interest.

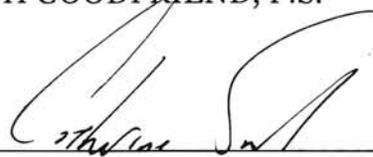
### **III. CONCLUSION**

This Court should reverse the trial court’s summary judgment orders and remand for a trial on McCallum’s claims against respondents.

Dated this 8th day of May, 2014.

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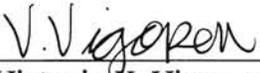
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 8, 2014, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 8th day of May, 2014.

  
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Victoria K. Vigoren