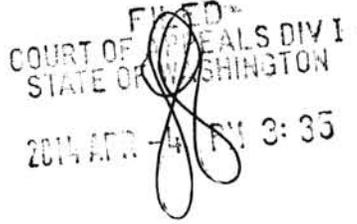


71137-7

71137-7



No. 71137-7-1

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

DEBORAH McCALLUM, an individual, Appellant,

v.

GOLF ESCROW CORPORATION, a Washington corporation; STERLING FINANCIAL CORPORATION, a Washington corporation; TRUSTEE SERVICES, INC., a Washington corporation; PAMELA J. LANE, an individual; PHILIP D. HINGSTON and DEBBIE HINGSTON, husband and wife; HYPERION CAPITAL GROUP, LLC, an Oregon limited liability company; BANK OF AMERICA, N.A.; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, Respondents.

**BRIEF OF RESPONDENTS
GOLF ESCROW AND PAMELA
LANE**

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ORIGINAL

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I. INTRODUCTION

Golf Escrow is an escrow agent. Like all escrow agents it holds money in trust for borrowers and lenders, releasing it pursuant to specific instructions in order to facilitate lending and other financial transactions. Golf Escrow was one of several parties sued by Deborah McCallum after McCallum suffered the loss of an unsecured loan to her close friend, developer Craig Reimer.

According to McCallum's allegations, she made successive loans amounting to over \$800,000 to Reimer, \$550,000 of which was outstanding in 2008. Golf Escrow was not involved in any of those loan transactions.

In a separate transaction, Reimer's company, Eaglewood Homes, obtained a secured loan from Sterling Financial, part of which Reimer intended to use as a payment of \$320,000 to McCallum. Sterling required, as part of that loan transaction, that Eaglewood name McCallum as beneficiary of a deed of trust on Eaglewood's property. McCallum was not privy to that transaction, and she asserts she did not know of it before she was paid.

Golf Escrow acted as escrow agent for the Eaglewood-Sterling transaction and followed the escrow instructions to disburse proceeds to McCallum. The trial court's entry of summary judgment dismissing McCallum's claims against Golf Escrow was correct.¹

First, Golf Escrow² owed no duty to McCallum. Its duty to follow the escrow instructions was owed to Sterling and Eaglewood—the only parties to the escrow agreement, neither of which have asserted a claim against Golf Escrow. Golf Escrow had no duty, for instance, to communicate directly with McCallum or to give her notice of any kind. Golf Escrow had no knowledge of McCallum's bad investments and undertook no duty to protect her from their consequences. It had no duty as escrow agent to inquire into or confirm Reimer's total indebtedness to McCallum. Golf Escrow's duty was to disburse funds as instructed by the parties, which it did.

¹ This ruling applies equally to Pamela Lane and Sterling Financial. (CP 8)

² Pamela Lane was the Golf Escrow employee who handled the Eaglewood-Sterling transaction. Golf Escrow and Lane will be collectively referred to as "Golf Escrow."

Second, McCallum suffered no damages caused by Golf Escrow's exercise of its duties. The Eaglewood-Sterling transaction was intended, in part, to provide payment to McCallum in the total amount of \$320,000, and McCallum received exactly that—\$320,000. Even if the request for reconveyance on the deed of trust was forged as alleged, McCallum received the full benefit to which she was entitled as a beneficiary under the existing deed of trust. Under Washington law, McCallum cannot claim that payoff of a secured interest, as provided by the Eaglewood-Sterling transaction, should be characterized as payment toward an unsecured loan neither Sterling nor Golf Escrow knew of. McCallum did not suffer any loss of her security interest and was paid in full on that interest.

Third, McCallum's purported failure to learn of the deed of trust until after she sued Reimer did not cause her loss of the unsecured balance of the loan to Reimer. McCallum's unsuccessful efforts to recover payment from Reimer belies her claim that such efforts would have succeeded if only Golf Escrow had asked her directly for

the written request for reconveyance or notified her when it received the request from Reimer.³ The trial court properly granted summary judgment.

II. ASSIGNMENTS OF ERROR

McCallum assigns error to the trial court's (1) Order Granting Defendant Trustee Services, Inc.'s Motion for Summary Judgment, dated October 24, 2013, and (2) Order Granting Defendant Golf Escrow Corporation's and Pamela J. Lane's Motion for Summary Judgment, dated October 24, 2013. This brief addresses the order on summary judgment dismissing McCallum's claims against Golf Escrow, including Lane.⁴

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court correctly conclude that Golf Escrow owes no duty to McCallum, who was not a party to the escrow agreement?

³ If anything, had things played out as McCallum now alleges she wished they had, the Eaglewood-Sterling transaction would not have closed and she would not have received the \$320,000.

⁴ Counsel for Sterling has indicated that Sterling will file a joinder to this brief as it did on summary judgment below.

2. Did the trial court correctly conclude that Golf Escrow had not caused damage to McCallum when (a) the loan amount secured by the deed of trust was paid in full and (b) the payoff amount applies to the secured deed of trust, not an unrelated, unsecured loan of which Golf Escrow and the lender, Sterling, were unaware?

3. Did the trial court correctly conclude that Golf Escrow did not cause McCallum's loss of an unsecured loan when McCallum unsuccessfully took the very steps to protect the loan she claims on appeal were lost?

IV. STATEMENT OF THE CASE

A. Factual Background

McCallum is a successful real estate agent with RE/MAX who specializes in locating and marketing properties for residential development. (CP 362) According to McCallum, she had "a long line of builders who approached [her] and waited in line to purchase any property that [she] might locate for development." (CP 362-63)

McCallum knew Craig Reimer, a builder/developer in the industry, and they “became quite close” when Reimer’s family moved into the house next to McCallum’s. (CP 363) Over the years, McCallum listed and sold over 20 properties for Reimer’s company, Eaglewood Homes, which paid McCallum over \$400,000 in commissions for her real estate services. (CP 399)

According to McCallum, Reimer approached her in 2004 asking her to loan him money for his developments. (CP 363) McCallum and Reimer orally agreed the loan would be payable on demand and both Reimer and Eaglewood would provide a promissory note and deeds of trust if McCallum asked. (CP 364) McCallum did not initially ask for any security on the loans because she “trusted [Reimer] at his word.” (CP 366)

McCallum made a number of loans to Reimer over the years and, by 2008, the loan balance had escalated to \$550,000. (CP 367) In the spring of 2008, McCallum became concerned when Reimer allegedly “over-priced” some of his homes for sale, so McCallum asked Reimer to

pay off the loan. (CP 367) She still did not ask for any security interest on the loan. (CP 367)

In July of that year, Reimer refinanced an existing construction loan with Sterling Financial Corporation against one of his properties in Snohomish, Washington (the “Snohomish property”), with the intention of using a portion of the proceeds to pay McCallum. (CP 404) To facilitate paying McCallum from the proceeds of the construction loan, Sterling required Reimer to name McCallum as beneficiary on a deed of trust, which would then be paid off by a portion of the loan proceeds. (CP 404) Sterling would take thereby an interest in the Snohomish property, free and clear, to secure repayment of the construction loan. (CP 483) Reimer issued a deed of trust (the “Deed of Trust”) naming McCallum as beneficiary, securing \$320,000 by encumbering the Snohomish property, and listing Trustee Services, Inc. (“TSI”) as trustee. (CP 552) The Deed of Trust was recorded with the Snohomish County Auditor on July 10, 2008, by Chicago Title Company. (CP 552)

Later that month, Sterling placed the construction loan proceeds in escrow with Golf Escrow, which was instructed to issue a check to McCallum in the amount of \$320,000 to satisfy the Deed of Trust in full. (CP 478) Golf Escrow was given a copy of the Deed of Trust to verify the amount for which security was held, and, on July 31, 2008, Golf issued a check to McCallum for \$320,000, which she cashed the next day without question. (CP 478, 490)

McCallum asserts she was unaware of the Deed of Trust at the time she cashed the check despite the fact the check was written by Golf Escrow and bore an escrow number. (CP 119, 367, 478, 490) She did not ask for a copy of the deed at that time and made no inquiry to Golf Escrow about the origin of the funds. (CP 478)

Having paid the amount of the encumbrance in full, Golf Escrow asked TSI, the trustee on the Deed of Trust, to record a reconveyance of the deed. (CP 556) Golf Escrow sent TSI a title report showing the Deed of Trust in the

amount of \$320,000 as well as a copy of the payoff check for that same amount. (CP 556)

On September 30, 2008, TSI asked for a written request for reconveyance signed by the Deed of Trust beneficiary, McCallum. (CP 566) Golf Escrow forwarded the blank forms from TSI to Reimer for McCallum to sign (CP 566), and Reimer sent back to Golf Escrow a written request for reconveyance signed by McCallum (CP 478). Golf Escrow forwarded the signed form to TSI, and the reconveyance was recorded. (CP 478, 563, 567)

McCallum alleges her signature on the reconveyance had been forged by Reimer and she was unaware of the Deed of Trust or the reconveyance. (CP 119, 120, 367) She does not allege, and there has been no evidence, that Golf Escrow was aware of the alleged forgery or complicit in its realization. (CP 478)

According to McCallum, she had become concerned that Eaglewood might fail, so, after she received the check for \$320,000 from Golf Escrow, she demanded Reimer pay off the loan balance of \$230,000. (CP 367) She also

insisted for the first time that Reimer sign a promissory note and deeds of trust, and she sent him copies of the documents that she had instructed her lawyer to prepare. (CP 367-68) Reimer refused to sign the documents but continued making payments against the loan balance of \$230,000. (CP 368-69)

In fall 2009, Reimer asked McCallum to take a reduction of her loan, and she refused. (CP 369) Reimer continued making payments until December 2009. (CP 369) When the payments stopped, McCallum filed suit against Reimer to recover the balance of the loan. (CP 343) McCallum alleges she first learned of the Deed of Trust on the Snohomish property during discovery in that case against Reimer. (CP 119, 367) She ultimately secured a judgment against Reimer's company, Eaglewood, in the amount of \$238,742.62 and was listed as a creditor in the company's eventual bankruptcy. (CP 407) The bankruptcy court issued an order allowing McCallum's claim of \$238,742.62 on February 25, 2013. (CP 475) According to

McCallum, she has not been paid by Reimer or Eaglewood.
(CP 120)

B. Procedural History

In October 2012, McCallum filed this lawsuit against Golf Escrow and others, including Lane, Sterling, and TSI, alleging the defendants are liable for the amounts McCallum lost as a result of Reimer's default. (CP 660) The trial court granted summary judgment for defendants Golf Escrow, Lane, Sterling, and TSI, dismissing McCallum's claims against these defendants in their entirety.⁵ (CP 6-13) McCallum timely filed a notice of appeal of those orders. (CP 1)

V. ARGUMENT

An order granting summary judgment is reviewed de novo, "with the reviewing court performing the same inquiry as the trial court."⁶ Because the relevant facts are

⁵ The remaining defendants, Phillip and Debbie Hingston, Hyperion Capital Group, Bank of America, and Mortgage Electronic Registration Systems, were dismissed by McCallum.

⁶ *Ski Acres, Inc. v. Kittitas Cnty.*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992) (citing *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987)).

undisputed, this Court must “decide whether the trial court correctly applied the law to those facts.”⁷

A. The trial court correctly dismissed McCallum’s claims against Golf Escrow because Golf Escrow does not owe McCallum a duty as a matter of law.

McCallum has mistakenly represented on appeal that the trial court dismissed McCallum’s claims “based solely on respondents’ argument that they did not proximately cause McCallum any damages.”⁸ McCallum further represents that “respondents did not dispute below that they breached their duties to McCallum.”⁹ McCallum offers no citation to the record, which does not support the assertions.¹⁰

Golf Escrow has consistently argued that it does not owe a duty to McCallum and cannot be found in breach. In its motion for summary judgment, Golf Escrow wrote, “[t]here is simply no evidence that defendant breached any

⁷ *Oakes Logging, Inc. v. Green Crow, Inc.*, 66 Wn. App. 598, 601, 832 P.2d 894 (1992).

⁸ *Opening Brief* at 1.

⁹ *Id.* at 12.

¹⁰ In any event, this Court can affirm the trial court’s grant of summary judgment on any ground supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

duty to Ms. McCallum in accepting the signed request for reconveyance.” (CP 495) Golf Escrow went on, “Golf Escrow and Lane simply had no duty to protect plaintiff’s unsecured loan to Mr. Reimer, even if they had known about it.” (CP 495) In fact, McCallum complained in her opposition to summary judgment that, “[i]ncredibly, Golf Escrow and Lane dispute the existence of their duties.” (CP 182 at n.18) Golf Escrow never conceded the breach of a duty it asserted did not exist.

Indeed, on appeal, McCallum has failed to cite any authority that would create a duty owed to her by Golf Escrow. McCallum alleges Gold Escrow owed “statutory, contractual, and fiduciary duties,” but none of the duties alleged were owed *to McCallum*.

An escrow agent’s fiduciary duties are owed “to all parties to the escrow.”¹¹ Golf Escrow does not have a contract with McCallum, who was never a party to any escrow before Golf. The only contract McCallum cites for

¹¹ *Denaxas v. Sandstone Court of Bellevue, L.L.C.* 148 Wn.2d 654, 663, 63 P.3d 125 (2003) (citing *Nat’l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 910, 506 P.2d 20 (1973)).

the existence of a duty by Golf Escrow is the escrow agreement between Eaglewood and Sterling to close the construction loan.¹² The agreement lists “the borrower [Eaglewood] and lender [Sterling]” as the “parties.” (CP 483) McCallum is not a party to the escrow, and Golf Escrow does not owe her any contractual or fiduciary duties.

McCallum had an existing encumbrance on the property to be used as security for the Sterling loan, which Golf Escrow verified through the Deed of Trust and paid off in its entirety. (CP 478, 490, 552) The escrow instructions did not impose upon Golf Escrow a duty to verify the terms of the loan underlying the encumbrance, to communicate with McCallum, or to authenticate McCallum’s signature on the Deed of Trust or request for

¹² Golf Escrow is not a party to the Deed of Trust and cannot owe any duty as a trustee. In addition, Golf Escrow is not an agent of TSI, as McCallum asserts without support. *Opening Brief* at 5 and 13. TSI forwarded Golf Escrow a blank form request for the reconveyance. (CP 566) There are no facts indicating agency.

reconveyance.¹³ (CP 483) The contractual duty to verify the status of any encumbrance is owed to (and enforceable by) Eaglewood and Sterling, not McCallum. (CP 483) Golf Escrow satisfied that duty when it verified that the entire amount secured by the Deed of Trust was owed, and then paid, to McCallum.

McCallum also cites to two Washington statutes governing escrow agents,¹⁴ but those statutes do not provide a private right of action.¹⁵ Moreover, McCallum fails to cite any basis upon which the Court can interpret those

¹³ *Denaxas*, 148 Wn.2d at 663 (citing *Equity Investors*, 81 Wn.2d at 910) (“The escrow agent’s duties and limitations are defined . . . by his instructions.”).

¹⁴ *Opening Brief* at 12 (citing RCW 18.44.301 and RCW 18.44.400).

¹⁵ RCW 18.44.480 (“Upon petition by the attorney general, the court may, in its discretion, order the dissolution, or suspension or forfeiture of franchise, of any corporation for repeated or flagrant violation of this chapter or the terms of any order of injunction hereunder.”); RCW 18.44.490 (“The director, through the attorney general, may prosecute an action in any court of competent jurisdiction to enforce any order made by him or her pursuant to this chapter and shall not be required to post a bond in any such court proceedings. . . . The attorney general and the several prosecuting attorneys throughout the state may prosecute proceedings brought pursuant to this chapter upon notification of the director.”).

statutes to require an escrow agent to protect a creditor outside of escrow from default.

Despite the lack of authority in her favor, McCallum attempts to rely on “standard practice” to require Golf Escrow to contact McCallum directly to confirm payment, and she cites to the declaration of a lawyer, Dale Galvin, in support.¹⁶ Galvin’s declaration offering his legal conclusions that Golf Escrow was “negligent” and in “breach of Golf Escrow’s fiduciary duties to Ms. McCallum” is inadmissible and insufficient to defeat summary judgment. (CP 115-16) Under Washington law, “experts are not to state opinions of law or mixed fact and law, such as whether X was negligent. An affidavit is to be disregarded to the extent that it contains legal conclusions.”¹⁷

¹⁶ *Opening Brief* at 15.

¹⁷ *Charlton v. Day Island Marina, Inc.*, 46 Wn. App. 784, 788, 732 P.2d 1008 (1987) (citations omitted). *See also Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990) (“An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury.”) (citations omitted); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (“A fact is an event, an occurrence, or something that exists in

Galvin's conclusions are, moreover, incorrect. "In the context of a summary judgment motion, an expert must support his opinion with specific facts, and a court will disregard expert opinions where the factual basis for the opinion is found to be inadequate."¹⁸ McCallum, here, was not a party to the escrow. Golf Escrow, therefore, has no fiduciary or other duty to McCallum. Galvin cites no authority to the contrary, and an attorney's unsupported opinion cannot create a duty where none exists.

B. The trial court correctly dismissed McCallum's claims against Golf Escrow because Golf Escrow did not cause damages related to the Deed of Trust as a matter of law.

1. Golf Escrow paid McCallum the full amount secured by the Deed of Trust.

The Deed of Trust stated on its face that its purpose was to secure "payment of the sum of THREE HUNDRED

reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. The 'facts' required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice.") (citations omitted).

¹⁸ *Rothweiler v. Clark Cnty.*, 108 Wn. App. 91, 100, 29 P.3d 758 (2001) (citing *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 135, 741 P.2d 584 (1987)).

TWENTY THOUSAND AND NO/100 Dollars (\$320,000) with interest” for the benefit of McCallum. (CP 552) Reimer intended to use the Snohomish property as security for a separate loan from Sterling and instructed Golf Escrow, as closing and escrow agent on that separate loan, to disburse \$320,000 from the escrow account *to pay off McCallum’s interest in the property*. (CP 404, 483)

Golf Escrow issued a check to McCallum in the full amount secured by the Deed of Trust, which McCallum cashed the next day. (CP 478, 490) The check bore Golf Escrow’s name and the escrow number. (CP 490) The payoff cleared title so the property could be reconveyed to secure the Sterling loan. (CP 483) The amount secured by the Deed of Trust was paid in full, and McCallum cannot prove damages related to the Deed of Trust as a matter of law.¹⁹

2. McCallum cannot retroactively allocate the payoff amount to a separate unsecured debt.

¹⁹ It is illogical to suppose that the loan could have closed without the Deed of Trust being cleared from the property title.

McCallum does not dispute that she cashed a check for \$320,000 from Golf Escrow. (CP 478, 490) She argues, however, that the payoff amount applies first to her unsecured loan to Reimer, leaving a loan balance of \$230,000 still secured by the Deed of Trust. McCallum is wrong.

McCallum cites the general rule that “unless the creditor has specific instructions from the debtor as to how payments are to be applied, the creditor may apply payments to any part of the debt, as he sees fit.”²⁰ The law, however, requires the creditor to apply the payment at the time it is received in order to protect the debtor and any surety “who may change circumstances in the expectation that the payment will be applied to a debt already matured.”²¹

McCallum did not allocate the payment from Golf Escrow at the time the payment was made in 2008. At that

²⁰ *Oakes Logging*, 66 Wn. App. at 601 (citing *U.S. Fid. & Guar. Co. v. E.I. DuPont de Nemours & Co.*, 197 Wn. 569, 579, 85 P.2d 1085 (1939); *Ellingsen v. W. Farmers Ass’n*, 12 Wn. App. 423, 426, 529 P.2d 1163 (1974)).

²¹ *First Nat’l Bank in Palm Beach v. U.S.*, 591 F.2d 1143, 1148-49 (5th Cir. 1979).

time, if McCallum was unaware of her secured interest in the Snohomish property, as she alleges, she had no reason to make an allocation between secured and unsecured debt. She, in fact, did not assert that the \$320,000 payment should be allocated first to unsecured debt at any time before her response to Golf Escrow's summary judgment motion in this case. (CP 189)

Under Washington law, “[i]f neither party appropriates the payments to any particular part of the debt, the court will apply them ‘according to its own notion of the intrinsic equity and justice of the case.’”²² The trial court, here, applied the payment made in 2008 and did so according to the equities protected by the “particular source” rule. As an exception to the general rule McCallum cites, the particular source rule serves to protect third parties, such as Golf Escrow and Sterling Financial, who

²² *Oakes Logging*, 66 Wn. App. at 601-02 (citing *The Post-Intelligencer Publ'g Co. v. Harris*, 11 Wn. 500, 502, 39 P. 965 (1895)).

have an interest in the allocation and relied on that allocation.²³

Under that rule, “when the money with which the payment is made is known to the creditor to have been derived from a particular source or fund,” the creditor “cannot, without the consent of the debtor [*sic*], apply it otherwise than to the exoneration of the source or fund from which it was derived.”²⁴ The Washington Supreme Court applied the rule in *Cummings v. Erickson*.²⁵ There, the debtor took out a loan secured by several mortgages of chattel. The debtor also had an unsecured open account with the same creditor. When the creditor gave consent to dispose of some of the property covered by the mortgages, the creditor used the money received to pay down the unsecured open account and claimed a balance owing on the

²³ *Moser Paper Co. v. N. Shore Publ’g Co.*, 266 N.W.2d 411, 415 (Wis. 1978) (“[W]hen a payment made to a creditor is known by the creditor to be derived from a particular source or fund, the creditor must apply it to the exoneration of the debt related to that source or fund, **at least where the rights of third parties are concerned.**”) (emphasis added).

²⁴ *Cummings v. Erickson*, 116 Wn. 347, 351, 199 P. 736 (1921) (citations omitted).

²⁵ *Id.* at 348.

mortgages.²⁶ The court disagreed with the allocation and held the payoff must be credited to the secured debt first: “[W]here money is derived from a particular source or fund, it must be applied to the relief of the source or fund from which derived.”²⁷

The rule protects innocent lenders, such as Sterling here, by preventing unrelated obligations between debtors and third parties from destroying the security interests for which the lender has bargained and paid. The particular source rule does not apply when the debtor consents to payment of all debts from a single source of funds.²⁸ For example, in *Ellingsen v. Western Farmers Association*, the particular source rule did not apply because the debtor gave his consent to using payments from one source of funds to credit his secured *and* unsecured debt.²⁹

That is not the case here. Reimer did not—and could not—consent to payment of his secured and unsecured debts from a single fund (the Sterling loan). Sterling’s payment

²⁶ *Id.* at 348-49.

²⁷ *Id.* at 351 (citations omitted).

²⁸ *Ellingsen*, 12 Wn. App. at 427-28.

²⁹ *Id.*

was intended to clear title to the Snohomish property and was made for that purpose alone. (CP 483) The particular source rule applies. Sterling was entitled to have the money paid to McCallum by Golf Escrow applied to the liquidation of the debt for which security was given. Indeed, even if McCallum had been notified of the Deed of Trust, she would have no choice but to sign the request for reconveyance to receive the \$320,000 payoff. Refusal would mean McCallum takes nothing. She did not have the option to receive the \$320,000 check and apply it to unsecured debt.

The only difference between this case and *Cummings* is that, in *Cummings*, the creditor knew when payment was made that part of the debt was secured and part unsecured.³⁰ McCallum, here, alleges she did not know that part of Reimer's debt was secured when the payment was made. She did, however, know that the check came from Golf Escrow—she knew the source of the funds. (CP 490) She did not allocate the funds at the time payment was made

³⁰ *Cummings*, 116 Wn. at 350.

and instead attempts to do so now to the prejudice of third parties Golf Escrow and Sterling. The trial court properly exercised its discretion when it weighed the equities of this case by considering McCallum's failure to earlier make an allocation. The trial court did not err by allocating the payment to the secured debt and concluding the amount secured by the Deed of Trust was fully paid.

C. **The trial court correctly dismissed McCallum's claims against Golf Escrow because Golf Escrow did not cause the loss of McCallum's unsecured interest.**

In the trial court, McCallum argued that Golf Escrow wrongly released the Deed of Trust because (1) the deed secured the entire \$550,000 loan or (2) the deed secured only \$320,000, which had yet to be paid off. (CP 176-77) On appeal, McCallum abandons her first argument and argues, in the alternative, that, even if the secured portion of the loan was fully satisfied, Golf Escrow is liable for the unsecured portion of the loan because, according to McCallum, Golf prevented McCallum from taking steps to protect herself from Reimer's default.

McCallum failed to raise this argument below, and it should not be considered on appeal.³¹ In any event, McCallum is wrong.

McCallum's sole argument on causation is that, had Golf Escrow notified her of the Deed of Trust, she would have protected herself by obtaining full security for the loan balance or taking other steps to protect against Reimer's default.

McCallum argues she would have "immediately demanded that Reimer execute a Deed of Trust securing the remaining loan balance" or filed "suit against Reimer," including a lis pendens.³² But McCallum *did*, in fact, initiate these steps immediately after receiving the \$320,000 payoff check and still failed to prevent Reimer's default.

³¹ RAP 2.5(a); *Buck Mountain Owner's Ass'n v. Prestwich* 174 Wn. App. 702, 720, 308 P.3d 644 (2013) (refusing to consider arguments raised for the first time on appeal).

³² *Opening Brief* at 19. A lis pendens may be filed in Washington only "after an action affecting title to real property has been commenced, or after a writ of attachment with respect to real property has been issued in an action, or after a receiver has been appointed with respect to any real property[.]" RCW 4.28.320.

Golf Escrow issued McCallum a check for the full amount secured by the Deed of Trust on July 31, 2008. (CP 478, 490) McCallum cashed the check the next day on August 1. (CP 478) According to McCallum, when she received the check, she also demanded Reimer pay the remainder of the loan because she “believed that Eaglewood Homes might fail,” and she demanded Reimer execute a promissory note and deeds of trust on the balance. (CP 367-68) In December 2008, McCallum instructed her lawyer to prepare the documents. (CP 368) She sent the proposed documents to Reimer on December 17, 2008, but Reimer refused to sign. (CP 368) Reimer continued making payments against the unsecured loan balance until December 2009. (CP 368-69) When the payments stopped, McCallum filed suit against Reimer on May 10, 2010, (CP 343) and, she alleges, learned of the prior Deed of Trust on September 26, 2010.

McCallum did not lose “the opportunity to protect herself,” as she argues on appeal.³³ McCallum actually

³³ *Opening Brief* at 18.

took the steps to protect herself that she complains were lost. She demanded Reimer give her a security interest on the loan balance when she received the payoff check of \$320,000. (CP 367-68) She then filed suit against Reimer at her first opportunity after Reimer refused to continue making payments. (CP 343, 368-69) Still, Reimer refused to pay. (CP 370) McCallum then obtained a judgment against Reimer (CP 407), secured her claim in Reimer's bankruptcy, and was awarded an order allowing the claim (CP 475). Yet still, Reimer has refused to pay. (CP 120)

In each of the cases cited by McCallum, the injured plaintiff proved he was, in fact, denied an opportunity to protect himself. That is not the case here. McCallum took the opportunity to protect herself even before she had notice of the allegedly forged signature on the Deed of Trust. McCallum's loss is caused by Reimer's failure to pay the judgment,³⁴ not Golf Escrow's lack of notice to McCallum that she was the holder of a Deed of Trust that

³⁴ *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 17 n.7, 810 P.2d 917 (1991) ("An intervening cause may be defined as a force that actively operates to produce harm to another after the actor's act or omission has been committed.").

had been fully paid. McCallum's claims fail as a matter of law.

VI. CONCLUSION

For the reasons set forth above, Golf Escrow and Pamela Lane request the trial court's dismissal of McCallum's claims on summary judgment be AFFIRMED.

DATED this 4th day of April, 2014.

BULLIVANT HOUSER BAILEY PC

By



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The undersigned certifies that on this 4th day of
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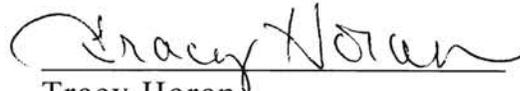
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