

NO. 74607-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JULIE REZNICK, a married woman on behalf of her separate estate, and
CAROL LORENZEN, an unmarried woman,

Appellants,

vs.

LIVENGOOD, ALSKOG, PLLC, a professional limited liability company
formerly known as LIVENGOOD, FITZGERALD & ALSKOG, PLLC,
and HUGH W. JUDD and JANE DOE JUDD, husband and wife,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The existence of an attorney-client relationship usually is required to bring a claim of malpractice against an attorney. This requirement prevents the lawsuit by prospective non-client beneficiaries of an estate like Appellants Julie Reznick and Carol Lorenzen (collectively “Julie and Carol” or “the sisters”). Julie and Carol are the sisters of Ellen Lorenzen. Ellen died while she was considering changing her will. After Ellen’s health declined due to cancer, she requested a visit from estate planning attorney Hugh Judd, who worked at the firm Livengood, Alskog, so that she could consider changes to her estate plans. No changes were made before Ellen died.

Julie and Carol sued the attorneys, claiming that Julie and Carol did not receive increased portions of the estate that Ellen was considering for them. The sisters fail to substantiate a right to sue because, as non-clients, they were owed no duty. Their claim fails as a matter of law because they cannot show they fall within an exception to the rule: they cannot show that Ellen hired the attorneys with the intent of benefitting them. Other policy considerations also support the dismissal. The Court should affirm the summary judgment.

II. STATEMENT OF THE ISSUES

Appellants failed to comply with RAP 10.3(a)(4) by omitting a

statement of the issues presented. The issues for resolution that should result in affirmance are:

1. Was the Superior Court correct that no material issues of fact prevented summary judgment because all facts were viewed in the light most favorable to Julie and Carol, including that a juror could find that hours before her death, client Ellen communicated by squeezing Judd's hand a wish to die intestate so that her sisters would inherit her estate and that Judd was mistaken regarding how to revoke the will?

2. Was the Superior Court correct as a matter of law that the attorneys did not owe a duty to non-clients Julie and Carol?

III. COUNTER STATEMENT OF THE CASE

Julie and Carol are not clients of the attorneys. They have no claim as a matter of law, even assuming that the evidence could show that hours before she died, the client communicated a desire to die intestate and have her sisters inherit her estate. The evidence shows that Ellen did not hire the attorneys with the intent to benefit Julie and Carol. This is fatal to the sisters' claim under Washington law.

A. The 2005 Will

The client Ellen was an estate planning client of attorney Judd's for years. CP 47-6 ¶ 2. For thirteen years she survived a 1990's diagnosis of chordoma sarcoma, or cancer of the spinal cord. *Id.*; CP 87 ¶ 9; CP 149:16-23.

In 2005, Judd drafted a new will that Ellen properly executed (the "Will"). During this process, she crossed out a direction to distribute a

larger portion of her estate to her sister Carol, and directed a gift of \$10,000. CP 48 ¶ 3. This equaled a direction of \$10,000 to her sister Julie.

Id. Carol testified that Ellen disliked Julie's husband and had told Carol that she intended to limit Julie's inheritance "as long as she remained married to [her husband]." CP 130 ¶ 3; CP 139:12-15; 140:19-141:8; CP 142:12-19. Carol had told Ellen that Carol only wanted to receive an amount equal to Julie's gift. CP 141:21-142:9. Subsequent to Ellen's death, Julie and her husband divorced. CP 139:16-22.

Ellen named as residual beneficiaries Ron Brill, a friend, and trustees on behalf of minor Christopher Nagridge, the disabled son of a college friend. CP 48 ¶ 3; CP 8 at ¶¶ 1-2.

B. The Client's Hospitalization and Rapid Death in 2012

Seven years after, Carol left Judd a voicemail in mid-February 2012 stating that Ellen's health was not good and Ellen wished to talk to Judd about changing her Will. CP 48 ¶ 5; CP 53-4; CP 98:1-4, 98:13-19. Judd spoke directly with Ellen the night he received Carol's voicemail. *Id.* When Judd asked Ellen if she wanted to revise the Will to provide for increased distributions to her sisters, Ellen responded that she wanted to think about it, but was not decided on what to do. CP 98:13-23; CP 48-49 ¶ 6 ("I specifically asked Ellen if she wanted to consider...increased

distributions to her sisters. Ellen told me she wanted to think about it, and provided no indication of her intent.”). Because Judd was leaving town, he asked Ellen if he should send over another attorney immediately. CP 49 ¶ 7. Ellen explained that she expected to return to her home the following Wednesday. *Id.* They set a meeting. *Id.* Judd sent an email to Carol stating that Ellen wanted to think about changing her Will and he would meet with Ellen on February 22. *Id.*; CP 53.

Carol re-contacted Judd by email, sent on February 20 and received on February 21, reporting that Ellen was at Evergreen Hospice. CP 49 ¶ 8; CP 53. Carol indicated that Ellen hoped to return home, but that Carol was not optimistic. *Id.* Judd contacted Julie and arranged to meet with Ellen at Evergreen Hospice on Thursday morning, February 23. *Id.*

From these communications, Judd expected Ellen to be competent and alert at the meeting. CP 49 ¶ 9. He expected to discuss her estate planning objectives, “to learn Ellen’s intent,” to help her execute an engagement letter and possibly to be asked to prepare a new will if Ellen decided to make changes. *Id.* Judd testified, “I planned to learn Ellen’s intent, and if she chose to revise her Will I would execute an engagement letter to do so and prepare a new Will for her to sign.” *Id.* Nothing shows that Ellen had the intent to modify her estate plan to increase her sisters’

prospects at the time she requested Judd's services. The opposite is shown: Ellen had not decided what to do when she engaged Judd to meet with her about her estate plans.

Unfortunately, when Judd arrived for the meeting Ellen's condition had dramatically deteriorated overnight. CP 49 ¶ 10 ("On Thursday, when I arrived at Evergreen Hospice, I was shocked to learn that Ellen's condition had dramatically deteriorated."). A nurse told Judd that Ellen had only hours left to live. *Id.* Judd found Ellen unresponsive to him or her surroundings. *Id.* He lifted her hand, but received no response. *Id.* She appeared near death or comatose. *Id.*; CP 156:5-6. He tried to talk to her, saying, "Can you hear me? It's Hugh. Can you hear me?", but received no response. CP 156:16-22.

Judd testified that because he "still had no indication of Ellen's intent with regards to her Will" when he arrived, he tried to discuss her wishes and whether she wanted to revoke the Will so that she would die intestate and her heirs would be Julie and Carol. CP 50 ¶ 11. Judd took Ellen's hand and asked her to squeeze if she wanted to revoke the Will and provide the estate to her sisters. CP 50 ¶ 11. Judd thought that Ellen had squeezed his hand. *Id.* See also CP 101:4-19. Based upon that, he planned to tear up the Will subsequently, not realizing that this would not be an effective manner to destroy the Will outside of Ellen's presence. CP 50

¶ 12. He testified, “Later on, upon reflection, I was not sure what Ellen may have meant by squeezing my hand.” *Id.*

A friend of the sisters present in Ellen’s hospice room when Judd was there, Anne Nogatch, testified that she heard Judd ask Ellen if she wanted to change her estate plan and disregard the previous will and divide her estate between her sisters, and that she witnessed Ellen squeeze Judd’s hand. CP 84 ¶¶ 7-9. Carol testified that after Judd met with Ellen, he called Carol and confirmed that Ellen wanted her estate to go to her sisters. CP 88 ¶ 14.

Ellen died later that day. CP 88 ¶ 15. The Will had not been torn up. CP 50 ¶ 13.

For purposes of the summary judgment motion, Judd did not contest that he was mistaken that he could tear the Will up outside of Ellen’s presence to properly revoke it. CP 27:18-20. After Ellen died, Judd requested another attorney at his firm, Mr. Thomas Windus, to represent the personal representative of Ellen’s estate. CP 50 ¶ 13. Judd and Windus discussed tearing up the Will. *Id.* Mr. Windus determined that there was no effective manner to destroy the Will after the testator’s death. *Id.* Mr. Windus met with Julie and Carol and told them that Ellen’s Will had not been destroyed. CP 50 ¶ 15.

Carol asked Judd to approach the beneficiaries of the Will as a

“dispassionate,” neutral third party to see if they would disclaim the bequests. CP 50 ¶ 15; CP 56 (from Carol to Judd: “I see you as a dispassionate third party which I would think would hold more weight tha[n] someone who may benefit from them disclaiming their entitlements in the Will.”). Judd did so. *Id.* The beneficiaries of the Will did not disclaim their bequests.

The Will was admitted to probate with residual beneficiary Ron Brill as the personal representative. CP 49-50 ¶¶ 16-17.

C. The Attorney-Client Relationship Was Not Formed with the Intent to Benefit the Sisters Julie and Carol

Julie and Carol never alleged or offered evidence that Ellen engaged Judd with the intent of benefitting them. In 2005, Judd assisted Ellen with her estate planning that included the Will benefitting multiple intended beneficiaries. Carol testified that when arranging for Judd to meet with Ellen at the hospital in 2012, neither sister knew Ellen’s intent, CP 134:22-136:9; CP 137:21-138:5, including this testimony:

- Q:You said you discussed that she wanted to update her will. What did she say to you?
- A: That she wanted to consider updating her will.
- Q: But she didn’t mention any details?
- A: No.
- Q: That was the extent of what she said?
- A: Yeah.

Q: Okay. And then she asked you to contact Hugh [Judd]?

A: Right.

CP 135:25-136:9.

Carol testified that the extent of her expectation when Judd met with Ellen was that “he would take care of her wishes.” CP 148:6-11.

The evidence is uncontested that when Ellen spoke with Judd requesting a visit to discuss her estate planning, she was still thinking about what to do and had not made any decisions. CP 98:13-23; CP 48-49 ¶ 6. Ellen engaged Judd to assist her in considering her estate plans and making a decision about what to do. Ellen had not made or communicated any decision to benefit the sisters when she engaged Judd. Further, she engaged Judd to consider changing her Will, not to revoke it and die intestate.

Unfortunately, Ellen never was able to have that conversation with Judd due to her untimely death. Even if testimony shows that she wished in her final hours to die intestate in order to leave her estate to her sisters, that intent was never the purpose of Judd’s engagement.

IV. ARGUMENT

The claims fail as a matter of law because Judd owed no duty to Julie and Carol. The evidence failed to satisfy Julie and Carol’s burden to show that Ellen intended the attorney-client relationship with Judd to

benefit them. Additional policy considerations support the conclusion that no duty was owed to Julie and Carol.

The trial court viewed Julie and Carol's evidence favorably to them. Judd did not challenge their evidence for purposes of the hearing. No dispute of fact prevented the judgment. Julie and Carol simply could not make out a legally sufficient claim. A jury trial was not warranted.

A. Standards of Review

Appellate courts review a superior court's order granting summary judgment *de novo*, engaging in the same inquiry as the superior court and considering the same record. *Linth v. Gay*, 190 Wn. App. 331, 336 (2015); RAP 9.12. The court resolves all factual disputes and reasonable inferences in favor of the nonmoving party, and reviews issues of law *de novo*. *Id.* Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* “[A] defendant is entitled to summary judgment if (1) the defendant shows the absence of evidence to support the plaintiff's case” and (2) the plaintiff fails to demonstrate a genuine issue of fact on an element essential to the plaintiff's case. *Id.*, quoting *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 699, review denied, 181 Wn.2d 1008 (2014). “The nonmoving party may not rely on mere allegations, denials, opinions, or conclusory statements” to show a

genuine issue of fact on an essential element. *Id.* citing *Parks v. Fink*, 173 Wn. App. 366, 374, *review denied*, 177 Wn.2d 1025 (2013). If the nonmoving party fails to demonstrate the existence of an essential element, then the court should grant summary judgment. *Id.*

B. Under *Parks* and *Trask*, Summary Judgment Was Proper Because Estate Planning Attorneys Owe No Duty to Potential Beneficiaries Except in Unique Circumstances Not Shown Here

This Court should affirm the judgment as a matter of law based on *Parks v. Fink*, 173 Wn. App. 366 (2013) and *Trask v. Butler*, 123 Wn.2d 835, 839-40 (1994). These cases show that summary judgment was legally correct based on the undisputed facts.

A plaintiff must establish four elements to bring a claim for legal malpractice: an attorney-client relationship giving rise to a duty of care to the client, an act or omission in breach of that duty, damage and proximate cause. *See Parks v. Fink, supra*, at 376, quoting *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61 (1992). The summary judgment motion put at issue the element of duty. CP 28-29 (“Statement of the Issues”). The existence of a duty is a matter of law subject to *de novo* review. *Id. Centurion Props. III, LLC v. Chicago Title Ins. Co.*, Supreme Court No. 91932, ___ Wn.2d ___, 2016 WL 3910991 (2016).¹

¹ In *Centurion Props. III*, the Supreme Court reiterated its commitment to

The sisters assert that “...Mr. Judd owed [the sisters] a duty to correctly advise Ellen Lorenzen regarding how to make Appellants the primary beneficiaries of her estate including correctly advising her as to the requirements to effectively revoke a will under RCW 11.12.040.” Opening Brief 10. This duty was not owed to the sisters.

The general rule holds that attorneys do not owe a duty to third parties, and that only an attorney’s client may bring an action for attorney malpractice. *Parks*, 173 Wn. App. at 377. The Supreme Court in *Trask* established that a limited exception to the general rule can apply based on application of a multifactor balancing test. *Trask, supra*, 123 Wn.2d at 843. Six factors apply, although the first is a “threshold inquiry” that, if lacking, resolves the issue and establishes that “no further inquiry need be made,” as follows:

- (1) the extent to which the transaction was intended to benefit the plaintiff;
- (2) the foreseeability of harm to the plaintiff;
- (3) the degree of certainty that the plaintiff suffered injury;
- (4) the closeness of the connection between the defendant’s conduct and the injury;
- (5) the policy of preventing future harm;
- and (6) the extent to which the profession would be unduly burdened by a finding of liability.

123 Wn.2d at 842-43. *See also Centurion Props. III, supra*, at 5. Thus, a

the *Trask* factors when it applied the test by analogy to hold that a title company does not owe a duty to third parties in recording legal instruments. *Centurion Props. III, supra*, 2016 WL 3910991 at 4-5.

plaintiff must satisfy the first factor, and, only if it is met, a Court should then consider and weigh all other factors.

Here, the first threshold inquiry whether the transaction between the client and lawyer was intended to benefit the third parties is unsatisfied. The record is devoid of any evidence to support a conclusion that Ellen engaged Judd with the intent of benefitting her sisters. To the contrary, Ellen disclaimed that intent to Judd in their telephone call and no party testified to the contrary. In addition, the fifth and sixth factors of the *Trask* balancing test weigh against recognizing a duty.

1. The sisters failed to show that the engagement of Judd was intended to benefit them.

The sisters failed to present evidence to satisfy the threshold inquiry of *Trask*: that the transaction was intended to benefit the non-client plaintiffs. *Trask, supra*, 123 Wn.2d at 843. The evidence shows Ellen's engagement of Judd was not intended to benefit the sisters, but rather to allow Ellen to consider her options and make estate planning decisions. The claim fails.

In *Trask*, the transaction at issue was the attorney-client relationship between an attorney and the personal representative of an estate. 123 Wn.2d at 837. Beneficiaries of the estate sued the attorney. *Id.* The Court found that the beneficiaries were not intended beneficiaries of

that transaction between the attorney and the personal representative, because that attorney-client relationship was intended to benefit the personal representative and assist with the PR's probate of the estate, not to benefit the beneficiaries. The Court explained, "[T]he estate and its beneficiaries are incidental to, not intended, beneficiaries of the attorney-personal representative relationship." *Id.* at 845. If the benefit to the third parties was only incidental to the transaction, it does not qualify. As incidental and not intended beneficiaries of the attorney-client relationship, the beneficiaries could not sue the attorney. *Id.* Lack of a duty was found even though no one disputed that the beneficiaries were in fact named beneficiaries of the estate. Being a beneficiary of the estate did not translate to being an intended beneficiary of the attorney-client relationship.

As in *Trask*, the evidence here shows that the attorney-client relationship was not formed to benefit the plaintiffs. No evidence supports a conclusion that Ellen called on Judd to benefit her sisters. Instead, the evidence is undisputed that Ellen requested a meeting with Judd and told Judd she wanted to think about her estate planning and wanted to consult with him. Judd specifically asked Ellen whether she wanted to make changes that would benefit her sisters, and instead of confirming this, Ellen said she wanted to think about it and discuss it with him. This denial

is controlling. It demonstrates that the purpose of the attorney-client relationship was to obtain advice *for herself* and allow her to make decisions. Any benefit to the sisters was incidental to the transaction.

Strait v. Kennedy underscores that the heart of the inquiry concerns what the client intended to accomplish, not what the non-clients hoped to gain. 103 Wn. App. 626, 630-31 (2000). In *Strait*, two daughters sued their mother's dissolution attorney, claiming that because the attorney failed to timely finalize their mother's divorce, they lost part of their inheritance upon her death. The claim was rejected for lack of duty because the representation was not intended to benefit the daughters, whose expectancies were only incidental to the dissolution representation, not the objective of it. *Id.* at 633-38. Similarly here, the evidence shows that Ellen engaged an attorney for her own legal needs, not to benefit her relatives. She engaged Judd to help her reconsider her estate plan with the intent of making decisions about what to do. The focus on what Ellen wanted to accomplish through the representation is determinative: she wanted help making decisions about her estate. She did not simply wish to implement a decision to maximize the benefit to her sisters and cut out beneficiaries under her Will.

The evidence does not satisfy the threshold inquiry required by *Trask* to show that the lawyer-client relationship was intended to benefit

Julie and Carol. The contrary is shown. Ellen had a desire to receive advice to help her decide how to leave her estate, but she did not set out to benefit Julie and Carol, as Carol herself has conceded. CP 148:6-11. *See also* CP 134:22-136:9; CP 137:21-138:5. The facts do not support a duty.

The sisters conflate the concept of a lawyer-client relationship intended to benefit a plaintiff with the concept of an intended beneficiary of the estate. They are different things. Here, the lawyer-client relationship between Ellen and Judd was not intended to benefit the sisters, even if the evidence shows that hours before Ellen's death the sisters became intended beneficiaries (or intended heirs). Even if Ellen intended on her deathbed to increase the sisters' inheritance, they are not intended beneficiaries of Ellen's lawyer-client relationship with Judd. The law provides that even intended beneficiaries are owed no duty unless the *Trask* factors are satisfied. The first factor is not satisfied.

The 2013 *Stewart Title* decision elucidates this point. The Supreme Court applied the *Trask* factors to conclude that attorneys did not owe a duty of care to an insurer paying for the defense of the insured, even where the client had a duty to inform the insurer and had some alignment of interests. *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561, 567-71 (2013). The Court reasoned that the fact that the insurer's and insured's interests "happen to align in some respects" does not show "that

the attorney or client intended the insurer to benefit from the attorney's representation of the insured." 178 Wn.2d at 567.²

The sisters refer to inapposite cases that recognize a duty owed by an insurance adjuster to unrepresented third parties intended to benefit from the transaction, i.e., a global settlement of an insurance dispute, who were treated like clients, and by a guardian and an attorney to a non-client ward. Opening Brief 9-10, citing *Jones v. Allstate Insurance Company*, 146 Wn.2d 291, 307 (2002) (adjuster); *Estate of Treadwell*, 115 Wn. App. 238, 247 (2003) (guardian) ("We conclude that a guardian's attorney owes an incompetent ward a duty to establish the guardianship consistent with the requirements of RCW 11.88.100 and .105."); *In re Guardianship of Karan*, 110 Wn. App. 76 (2002) (attorney) ("The primary reason to establish a guardianship is to preserve the ward's property for his or her own use."). These cases are factually distinguishable. *Jones* concerns unique facts involving an insurance adjuster who inserted herself into third parties' decisions about the third parties' claims. *Treadwell* and *Karan* involve the special circumstances of a guardianship proceeding.

The sisters also attempt to rely on *Ward v. Arnold*, 52 Wn.2d 581

² The Court also noted concern about the attorney's duties under RPC 5.4(c). *Id.* This ethical rule provides that attorneys may not permit a person who recommends them to another—as here Carol and Julie arranged for Judd to confer with Ellen—to direct the lawyer's judgment.

(1958), Opening Brief 10-11, but, unlike here, that case concerned a direct attorney-client relationship. In *Ward*, the Supreme Court reversed an order sustaining a demurrer (similar to a CR 12(b) motion) based on allegations that potential beneficiary *the wife*, not the testator, had hired the attorney. 52 Wn.2d at 585 (“The plaintiff alleged that she had employed the defendant as her attorney....”). In other words, the surviving wife *was* the client, not the deceased testator or a third party. The *Ward* case does not recognize a duty to a non-client. Further, this case predates *Trask* and *Parks* and does not apply the *Trask* factors, so it is not helpful.

The sisters ask this Court to leap from the evidence presented of Ellen’s squeezing of Judd’s hand in her final hours to the conclusion that “[t]he entire point of the representation was to benefit Julie and Carol.” Opening Brief 13. That conclusion is simply not supported. This last meeting, which occurred in very emotional and dire circumstances when Judd perceived Ellen to be comatose, does not transform the purpose of the attorney-client relationship. Even crediting the testimony that Ellen signaled a wish to die intestate to benefit Julie and Carol, it does not alter the purpose of the transaction that had been established prior to that day, nor does it counter the undisputed evidence that Ellen was in the process of deciding what to do with her estate, nor does it assuage the concerns with issues of proof and capacity that weigh against a duty.

2. No clear manifestation of Ellen's intent exists.

An impediment to recognizing a duty is also the lack of evidence of a clear manifestation of Ellen's intent. This Court stated in its 2013 *Parks* decision the requirement that courts "insist upon the clearest manifestation of commitment that the circumstances will permit." *Parks*, 173 Wn. App. at 381, citing *Radovich v. Locke-Paddon*, 35 Cal. App. 4th 946, 964 (1995) (rejecting liability when testator died before new will was finalized). See also *Sisson v. Jankowski*, 809 A.2d 1265 (N.H. 2002) (same). Here, the sisters offer no evidence that represents a clear manifestation of Ellen's intent.

When a clear manifestation of intent is present, courts have more comfort recognizing a duty to third persons. If a formal will exists but was, for example, negligently executed or attested, courts are more likely to recognize a duty. California cases that address this issue are persuasive because the *Trask* factors are taken from California law. See *Trask*, 123 Wn.2d at 841; *Bohn v. Cody*, 119 Wn.2d 357 (1992) ("An attorney may be held liable under a multifactor balancing test developed in California...."). A duty has been recognized where the testator's intent was thwarted after a will was drafted and executed but the beneficiary was prohibited under the probate code. *Osornio v. Weingarten*, 124 Cal. App. 4th 304, 324, 331-36 (2004). The *Osornio* court distinguished cases, including *Radovich v.*

Locke-Paddon, supra, where malpractice claims should be rejected when no formal writing exists to establish the testator's intent. The existence of the fully executed will in *Osornio*, in addition to the probate code provisions, convinced the court to recognize a duty.

Like in *Radovich*, the California appellate court again rejected a duty where no testamentary document naming the plaintiff as a beneficiary existed in *Hall v. Kalfayan*, 190 Cal. App. 4th 927 (2010). The *Hall* court explained that liability will not be extended absent an executed will or trust instrument, stating,

In these cases [where a duty was recognized], the testamentary instrument had been executed; the question was whether the will or trust had been negligently prepared so as to frustrate the testator's intent. But in cases where a potential beneficiary seeks to recover for negligence where the will or trust has not been executed, courts have refused to extend liability.

190 Cal. App. 4th at 935. *See also Myung Chang v. Lederman*, 172 Cal. App. 4th 67, 81 (2009) (an attorney owes no duty to a potential beneficiary whose bequest might be increased based on changes to an estate plan that were not implemented).

This case law articulates the rationale that where a clear manifestation of the testator's intent exists in a formal writing, the potential for conflict of interests between the testator and the intended beneficiaries is reduced. Issues of proof are minimized when a writing

exists, signed by the testator, to show what the testator intended. Those indicia give courts comfort in recognizing a duty and, depending on the circumstances, confine potential harm to the attorney's duty of loyalty. Such indicia do not exist here.

The sisters assert that *Paul v. Patton*, 235 Cal. App. 4th 1088, 1097-1100 (2015), supports reversal because the court held plaintiffs were not required to allege that an executed trust instrument reflected the decedent's intent to benefit them. Opening Brief, 12. To the extent this case stands for the proposition that a plaintiff is not required to make that allegation, the attorneys do not take issue with it. This does not show, however, that the sisters' evidence satisfies the *Trask* factors. Generally, a formal writing is required to demonstrate that the decedent intended that the attorney-client relationship benefit the third parties.

The testimony by witnesses of Ellen's last moments with Judd is not a clear manifestation of Ellen's intention to benefit Julie and Carol, even when taken in the light most helpful to the sisters. The testimony does not approach this mark even when viewed favorably to the sisters. There was no conversation between Judd and Ellen. Ellen was not conversant, she could not utter a word, she was close to death, she could not confirm her understanding of what Judd was saying, and the "squeeze" of Judd's hand is open to interpretation. Ellen could not even make an *oral*

direction, which itself would be insufficient. Courts desire a writing or similarly clear manifestation before recognizing a duty. This is lacking.

3. Summary judgment also was proper based on the fifth and sixth *Trask* factors that focus on policy concerns.

If the Court concludes that the first factor is satisfied, the Court still should affirm based on the fifth and sixth *Trask* factors. These factors weigh against recognizing a duty as a matter of law.

i. The policy of preventing future harm does not outweigh the need to protect a lawyer's duty of undivided loyalty to his or her client in these circumstances.

The fifth factor is “the policy of preventing future harm” to third parties who do not receive potential benefits. This policy very rarely supports recognizing a duty to third parties because it is outweighed by the concern of protecting an attorney’s duty of undivided loyalty to his or her client. Courts are more averse to dividing an attorney’s loyalty than leaving third parties without benefits they hoped to receive. This factor supports the Superior Court’s judgment.

In *Parks*, Division One refused to recognize a duty to an intended beneficiary when the decedent had executed a revision of a will naming that beneficiary, but the execution had not been properly witnessed. 173 Wn. App. at 369. The attorney had explained to the client that the will had

to be witnessed. *Id.* The client then ended the meeting. *Id.* The attorney held the improperly executed will for fifteen months without having it properly witnessed, then the client died.³ This Court rejected recognizing a duty to the non-client to have the will executed promptly in favor of preserving an attorney's undivided loyalty and avoiding "creat[ing] an incentive to exert pressure on the client to execute estate planning documents summarily." 173 Wn. App. at 388-89. The Court also remarked that the ethical rules "require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated." *Id.* at 388.

The same holding that no duty exists is proper here for the same reasons. An opposite outcome would cause attorneys to encourage or insist that their clients execute wills immediately, or at the least create divided loyalty that is antithetical to the attorney-client relationship. When trying to meet their clients' needs, attorneys should not suffer interference with their "undeviating fidelity" owed to the client by potential duties to third parties. *Parks*, 388-89. In *Parks*, the attorney—owing a duty to no one but the testator—respected the testator's condition and did not force execution of the will upon the testator based on fear that another party might sue her. Similarly, Judd owed a duty to serve Ellen,

³ The record shows the attorney made attempts to prompt the client to execute the will, but the client "grew agitated" and responded that he wanted to get better before taking action. 173 Wn. App. at 370.

not the sisters who might have gained. Judd arrived at Ellen's hospice bed to find her unexpectedly unresponsive and unable to discuss her estate plans with him. He was without the Will. Judd never owed a duty to Julie and Carol to advise Ellen for their benefit or to compel actions within hours before Ellen died so that they could receive a larger inheritance. He did not owe *the sisters* a duty to give Ellen correct advice about how to revoke her Will.

In these circumstances, as in *Parks*, a desire to prevent harm to third parties such as Julie and Carol does not overcome the competing concern to preserve an attorney's duty of undivided loyalty to a client.

Parks rejects the assertion that an attorney owes a duty to a prospective beneficiary to execute a will promptly and correctly. Similarly, this Court should reject that Judd owed a duty to the prospective heirs to destroy the Will promptly and correctly. The two situations should be similarly viewed and analyzed.⁴

This Court should affirm because to do otherwise would divide an estate planning attorney's duty of loyalty to his or her client. The benefit of providing a remedy to Julie and Carol does not outweigh the detriment

⁴ An Alabama court similarly analogized the situations, applying its same privity requirement applicable to disappointed beneficiaries of a written will to disappointed heirs when a will was not destroyed. *Robinson v. Benton*, 842 So.2d 631 (Ala 2002).

to opening attorneys up to such third party claims.

- ii. The policy of preventing an undue burden on the profession applies to prevent finding a duty here.

The sixth factor is “the extent to which the profession would be unduly burdened by a finding of liability.” *Trask*, 123 Wn.2d at 843. Courts remain averse to unduly burdening attorneys by dividing their loyalties. Just as in *Parks*, this concern weighs against finding a duty here.

Division One thoroughly addressed “[t]he undeviating fidelity of the lawyer to his client,” reasoning in *Parks* that if a duty extended to the intended beneficiaries, it would divide an attorney’s loyalties. *Parks*, 173 Wn. App. at 388-89. The Court explained that this concern outweighs the smaller benefit of providing a remedy to disappointed heirs. As Division One recognized in *Parks*, this factor allows few circumstances where claims by third parties should be recognized. Julie and Carol have not presented that unique case where these significant and well-founded policy concerns give way to the interests of third parties not included in the lawyer-client relationship.

Parks addressed whether a duty existed to have a will promptly executed, and contrasted situations where a duty has been recognized for what are essentially drafting or witnessing errors when the decedent actually has signed the will. *Id.* at 379-81. As noted above, the latter

satisfy courts because they include clear manifestations of the testator's intent. *Id.* at 381. When a clear commitment is evidenced by more than "a direction," such as by signed documents, courts have less concern of a conflict of interest between the testator and the intended beneficiaries. *Id.* at 381-82 citing *Radovich, supra*, and *Myung Chang v. Lederman, supra*. This Court should follow *Parks* and not recognize a duty where no clear commitment is evident. Here, no signature or document exists, and there was not even an oral declaration of commitment. Even if the testimony of the hand-squeeze is credited, it does not provide the type of clear manifestation of intent that would allay a court's concern about creating conflicting loyalties if it recognized a duty.

On the other hand, the beneficiaries of the Will have a clear manifestation of Ellen's intent in the Will. Rather than dividing loyalties between two parties (Ellen vs. the sisters), the circumstances here arguably could support yet a third conflicting interest of the beneficiaries under the Will. Under the sisters' theory, would Judd owe a duty to these beneficiaries, named by Ellen in a formally executed writing, to avoid eliminating their bequests based on the unclear events in Ellen's hospice room and concern whether Ellen had testamentary capacity? Would he owe a duty to these beneficiaries to prevent revocation of the Will in Ellen's final hours? The sisters' arguments raise the specter of numerous

parties potentially claiming that Judd failed them. But none of these third parties can lay claim to Judd's duties. His duty was only to Ellen. This lawsuit was properly dismissed.

The *Parks* court reiterated a caution to avoid recognizing a duty in circumstances that could "create an incentive to exert pressure on the client to execute estate planning documents summarily." 173 Wn. App. at 382. These cautions apply here. The sisters pin their case on accounts of the final meeting between Judd and Ellen hours before she passed away, when Ellen was not conversant and could not speak. They complain that their expectations were not met when, as a result of this meeting, Judd did not act quickly or correctly to revoke Ellen's Will before she died hours later. This is the type of duty where conflicts between the testator and the intended beneficiaries can arise. The authorities show that courts should not recognize a duty to third persons in such situations.

The sisters argue that the cases rejecting a duty that would encourage attorneys to rush or exert pressure on the client are distinguishable because Ellen "herself" did not fail to execute a new will or revoke her Will, Opening Brief 1-2, implying that in the other cases it was the testators' own failures to act that were dispositive. This is an inaccurate implication. The issue in the cases was whether *the attorney* had a duty to be sure that necessary acts timely occurred to implement the

testator's wishes, not whether the testator was or was not culpable regarding the failures. The sisters' attempted distinction has no support in the case law.

The sisters seek to impose a duty owed to them to act quickly and accurately to have the Will immediately revoked before Ellen died so that she could die intestate and the sisters would inherit her assets. Courts do not like to recognize such duties because the testator and the intended beneficiaries do not necessarily have the same interests. The duty proposed by the sisters is a recipe for damage to the attorney-client relationship.

The sisters attempt to focus this Court's attention on the alleged breach of duty, i.e., the mistake, rather than on the true policy concerns when they argue, "It would not greatly burden the legal profession to require an attorney to read a 115 word statute and correctly advise a client as to its contents." Opening Brief 1. This argument misses the mark. It addresses the standard of care, not the burden that results when the law imposes an additional duty owed to non-clients. The standard of care is not relevant. This Court must consider the potential for a conflict of interests that "militates against imposing a duty of care even though some plaintiffs will be left without a remedy." *Parks*, 173 Wn. App. at 389.

The factors discussed here compel rejection of a duty as a matter of

law. They support affirmance.

C. No Claim Should Be Revived Based on Conduct After Ellen's Death

The sisters do not frame any issue in their Opening Brief that concerns whether an attorney-client relationship was formed between Judd and the sisters after Ellen's death. They include no argument or authority on this point. The Complaint concerns no allegations that any attorney-client relationship exists between Judd and the sisters. *See* CP 1-5. There was no preservation before the Superior Court of any claim supposedly premised on a relationship between Judd and the sisters, including any such relationship formed after Ellen's death. Nevertheless, the sisters conclude their brief with a recitation of communications after Ellen's death and state, "[T]here is a very real question as to whether [Judd] owed duties to Julie and Carol following Ellen's death." Opening Brief 18-20. No further explanation of the "duties" is included.

The Court will not consider arguments not supported by citation to authority. *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) ("We will not consider issues on appeal that ... are not supported by argument and citation to authority."). *See* RAP 10.3(a)(6) (argument should be supported by citations to legal authority). The Court generally will not consider arguments raised for the first time on appeal.

RAP 2.5(a). Further, a party cannot obtain reversal of a summary judgment by asserting claims the party failed to plead. “A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.” *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 256 (2012) (summary judgment affirmed because asserted claim was never pleaded).

Based on these rules and principles, this Court should disregard the statements at pp. 18-20 of the Opening Brief, and should not reverse based on events after Ellen’s death or any passing reference to an attorney-client relationship between the sisters and Judd. The sisters have articulated only one duty that they ask this Court (and, before this appeal, the Superior Court) to find: the duty to correctly advise Ellen regarding how to make the sisters the primary beneficiaries of the estate and to revoke the Will. *See* Opening Brief 10. This duty does not concern conduct after Ellen died, or any direct relationship with the sisters.

Because the statements are cryptic, unexplained and unsupported, the attorneys cannot respond further.

V. CONCLUSION

Everybody involved in this case regrets that Ellen declined so quickly, before she could consider, make and finalize new estate plans.

Julie and Carol attempt to hold Judd responsible for failing to fix an unfortunate situation and to ensure their maximum inheritance. Judd simply did not owe them these duties.

The Court should sustain the Superior Court's dismissal. The focus must be on the attorney-client relationship and whether Judd's representation of Ellen was undertaken with the intention that it would benefit the sisters. It was not. This is so even if a jury might conclude from the testimony concerning Ellen's final hours that she decided she wanted to die intestate. Nothing in writing or even stated orally shows this with the clarity required by the law. The issues of proof that concern courts about claims like this are present here. The case does not present circumstances to justify deviating from the paramount goal not to divide an attorney's loyalties. Under well-explored Washington law, dismissal was the correct legal outcome.

Respectfully submitted this 25th day of July, 2016.

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APPENDIX

2016 WL 3910991
Supreme Court of Washington.

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
IN CENTURION PROPERTIES III, LLC;
SMI GROUP XIV, LLC, Plaintiffs-Appellants,
v.
CHICAGO TITLE INSURANCE COMPANY,
a Nebraska company, Defendant-Appellee.

No.
91932

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Filed JULY 14, 2016

En Banc

WIGGINS, J.

The United States Court of Appeals for the Ninth Circuit certified the following question to this court: “Does a title company owe a duty of care to third parties in the recording of legal instruments?” We answer the certified question no and hold that title companies do not owe a duty of care to third parties in the recording of legal instruments. Such a duty is contrary to Washington's policy and precedent, and other duty of care considerations.

FACTS

This certified question arises from a civil action for money damages filed in the United States District Court for the Eastern District of Washington. Plaintiffs Centurion Properties III LLC (CP III) and SMI Group XIV LLC (collectively Plaintiffs) assert that defendant Chicago Title Insurance Company negligently breached its duty of care and caused damages when it recorded unauthorized liens on CP III's property.

Michael Henry, the sole member of SMI, joined with Thomas Hazelrigg to form CP III. They formed CP III in order to purchase property and commercial buildings

in Richland, Washington. They further agreed that 90 percent of CP III would be owned by individuals and entities controlled by Hazelrigg and 10 percent would be owned by SMI. Aaron Hazelrigg, through nonparty Centurion Management III LLC, was the managing member of CP III.

To purchase the property, CP III obtained a \$70.8 million loan from General Electric Capital Corporation (GECC). The loan was secured by a deed of trust on the property naming GECC as the beneficiary. The deed of trust and two other instruments—the CP III operating agreement and the GECC loan agreement—prohibited the placement of any liens or encumbrances on the property without GECC's approval. Any unauthorized lien or encumbrance would constitute an event of default.

Defendant Chicago Title served as escrow agent, closing agent, and title insurer for the purchase of the property at issue. Chicago Title recorded the GECC deed of trust and is named trustee for GECC's senior lien. Chicago Title, as trustee, also received and reviewed copies of the CP III operating agreement and the GECC loan agreement as part of the transaction.

Following the sale, four liens were placed on the property without GECC's approval. The four unauthorized liens were recorded by Chicago Title; two separate deeds of trust granted by CP III in favor of Centrum Financial Services Inc.; a deed of trust granted by CP III to Trident Investments Inc.; and a memorandum of agreement between CP III and Trident. Two additional liens are not at issue in this case.

Each of these liens was a facially valid instrument: the instruments bore the correct legal description, and they were all signed and notarized through Centurion Management by either Aaron Hazelrigg or Thomas Hazelrigg as director of CP Management on behalf of CP III.¹ Chicago Title initially recorded Centrum Financial's deed of trust in conjunction with issuing a commitment for title insurance. The remaining three recordings were done as accommodations.

Later, GECC obtained a title report and learned of the four (prohibited) liens that Chicago Title recorded. GECC notified CP III that the junior liens were events of default and accelerated the entire unpaid balance of the loan, imposing a default rate of interest, Though CP III

attempted to refinance the loan, no lender would refinance it while the prohibited liens remained on CP III's title. GECC moved forward with its foreclosure, forcing CP III to file for bankruptcy.²

Plaintiffs filed a civil action against the Hazelriggs, Centrum Financial, and others, alleging that the named defendants misappropriated funds from CP III, improperly transferred ownership of CP III, and secretly placed liens on CP III's property. These claims sought to (1) enjoin foreclosure of the allegedly unauthorized liens and (2) quiet title by voiding the instruments that created them. Plaintiffs later added a sole complaint against Chicago Title; this complaint asserted that Chicago Title was negligent in recording the prohibited liens and that the resulting defaults caused CP III to incur more than \$7.5 million in damages, including \$3 million in default interest. The claims against all other parties settled, leaving only the negligence claim against Chicago Title. The district court dismissed this claim on summary judgment, finding that Chicago Title did not owe Plaintiffs a duty of care. *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, No. CV-12-5130-RMP, 2013 WL 3350836 (E.D. Wash. July 3, 2013) (court order). Plaintiffs appealed, and the Ninth Circuit certified its question to this court. *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 793 F.3d 1087 (9th Cir. 2015). We accepted review pursuant to RCW 2.60.020.

ANALYSIS

We are asked whether a title insurance company owes a duty of care to third parties in the recording of legal instruments. A duty of care is “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” *Affil. FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010) (internal quotation marks omitted) (quoting *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697 (1985)). The duty of care question implicates three main issues—the existence of a duty, the measure of that duty, and the scope of that duty. *Id.* (quoting DAN B. DOBBS, *THE LAW OF TORTS* § 226, at 578 (2000)). “In a negligence action, in determining whether a duty is owed to the plaintiff, a court must not only decide who owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed.” *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 815 (2002).

The existence of a duty and the scope of that duty are questions of law, and both are determined by considering the factors listed below.

We consider logic, common sense, justice, policy, and precedent, as applied to the facts of the case, when determining whether a defendant owes a duty in tort. *Affil. FM Ins. Co.*, 170 Wn.2d at 449. We have long applied these factors when defining “duty,” and they can be traced back for more than 100 years.³ We apply these factors here. We first examine precedent and analyze whether our decisions or the decisions of neighboring jurisdictions support finding a duty here. We next consider whether Washington's policy of protecting the rights of property owners through the title recording system is advanced or frustrated by imposing a legal duty of care. Finally, we consider logic, common sense, and justice. These considerations lead us to conclude that a title insurance company does not owe a duty of care to third parties in the recording of legal instruments.

I. Standard of review

Certified questions from a federal court are questions of law that we review de novo. *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 337, 334 P.3d 14 (2014). We consider the legal issues not in the abstract but rather based on the certified record provided by the federal court. *Id.* (citing RCW 2.60.030(2)). Our ruling is not advisory—pursuant to RCW 2.60.020, our ruling in answer to the certified question resolves actual issues pending in the federal proceeding and will be legal precedent in all future controversies involving the same legal question. *Id.*

II. Precedent

We first consider precedent. Whether a title insurance company owes a duty of care to third parties in the recording of legal instruments is a question of first impression for this court. However, our precedent firmly supports the conclusion that the answer to this certified question is no.

Our analysis begins by considering the duties owed by title insurance companies in prior cases. We next consider other circumstances that have led us to recognize a professional duty of care. Washington law treats professional duties as discrete duties owed to clients—absent a special relationship, we have extended a professional duty of care to third parties only (1) when the

third party is an intended beneficiary, (2) when the third party justifiably relied on a professional's representations under a theory of negligent misrepresentation, or (3) when a professional is best able to mitigate the risk of a physical injury. See, e.g., *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561, 567, 311 P.3d 1 (2013) (no duty to nonclient absent intent to benefit nonclient); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 832, 959 P.2d 651 (1998) (negligent misrepresentation); *Affil. FM Ins. Co.*, 170 Wn.2d at 545 (engineer owed a duty of care to third parties who may be harmed by engineer's negligence). Because Plaintiffs do not assert a theory of negligent misrepresentation, our analysis considers our rule limiting duties to third parties who are intended beneficiaries and the rationale extending a duty to professionals able to mitigate the risk of physical injury. We conclude by considering the approaches of Arizona and California, the only other states to consider the duty owed by a title insurance company to a third party when recording legal instruments.

A. Title insurance companies do not owe a general duty to clients to search for and disclose potential title defects when issuing preliminary commitments

Title insurance companies may perform several services for their own benefit or for their client's benefit. Consistent with chapter 48.29 RCW ("Title Insurers"), our analysis of the duty owed by title insurance companies to their clients follows the nature of the service at issue.

Though we have not considered the duty owed by a title insurance company to nonclient third parties, we thoroughly analyzed and explored the duty of a title insurer to its clients—namely to its insureds—in *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 541, 39 P.3d 984 (2002). We specifically considered a title insurance company's duty to search for and/or to disclose title defects to its clients when issuing a preliminary commitment. We held that title insurance companies do not owe their clients a duty to search for and/or to disclose title defects when preparing a "preliminary title commitment" pursuant to the plain language of RCW 48.29.010(3)(c). *Id.* at 530. To reach this conclusion, we considered the meaning of chapter 48.29 RCW, the legislative purpose of that statutory scheme, and standard industry practice, and we conducted a comparative analysis of other states in the Ninth Circuit. *Id.* at 535-42.

Barstad considered the general duties imposed on title insurance companies by chapter 48.29 RCW. *Id.* at 535. There, the insureds asserted that title insurers owe a duty of care when preparing abstracts of title and argued that a preliminary title commitment serves the same purpose as an abstract of title, giving rise to the same duty of care. *Id.* We rejected this argument. *Id.*

We began by examining the definitions of the services performed—and resultant duties owed—by title insurers. *Id.* We observed that an abstract of title is

"a written representation, provided pursuant to contract, whether written or oral, intended to be relied upon by the person who has contracted for the receipt of such representation, listing all recorded conveyances, instruments, or documents which, under the laws of the state of Washington, impart constructive notice with respect to the chain of title to the real property described. An abstract of title is not a title policy as defined in this subsection."

Id. at 535 n.8 (quoting former RCW 48.29.010(3)(b) (1997)⁴). Due to the contractual and reliance principles associated with an abstract, we noted that we have long recognized the potential duties associated with an abstract of title. *Id.* at 539 n.14.

We contrasted this service with the statutory definition of a "preliminary commitment" at RCW 48.29.010(3)(c):

"'Preliminary report,' 'commitment,' or 'binder' means reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and such other matters as may be incorporated by reference. The reports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. Any such report shall not be construed as, nor constitute, a representation as to the condition of the title to real property, but shall constitute a statement of terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted."

Id. at 535 n.8 (quoting former RCW 48.29.010(3)(c)⁵). We observed that a preliminary commitment is "merely an offer to issue the title insurance subject to the stated

conditions.” *Id.* at 536 (citing former RCW 48.29.010(3)(c)). This research is performed specifically for the title insurance company's benefit and not for the benefit of the insured. *Id.* at 540.

We also considered industry practice, legislative intent, and the approach of other jurisdictions, as well as the insured's argument that title insurance companies owe a fiduciary duty to disclose title defects. *Id.* at 542-44. Every one of these considerations led to the conclusion that title insurance companies have no general duty to disclose potential or known title defects when they are not preparing an abstract of title because these services are not prepared for or intended to be relied on by a person other than the insurer. *Id.* at 530.

Our holding in *Barstad* follows a long line of cases in which we have rejected attempts to impose a duty on title insurance companies to search for and disclose title defects. *See, e.g., Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 413-14, 693 P.2d 697 (1985) (no reliance by third party on title insurer's preliminary commitment); *Klickman v. Title Guar. Co. of Lewis County*, 105 Wn.2d 526, 528, 716 P.2d 840 (1986) (no liability because no title defect); *Lombardo v. Pierson*, 121 Wn.2d 577, 581-83, 852 P.2d 308 (1993) (same). These cases strongly suggest that title insurers do not owe a duty of care to third parties when merely recording legal instruments.

Title companies may record documents with the county recorder's office in conjunction with the issuance of a title commitment or policy, or as a separate accommodation recording at the request of the customer. Here, Chicago Title recorded Centrum Financial's deed of trust in conjunction with issuing a commitment for title insurance and later completed three such accommodation recordings. No party requested an abstract of title, and none of these recordings was done at the request of Plaintiffs,

Chicago Title did not have a duty to identify or disclose title defects to its client, Centrum Financial, in preparing a commitment for title insurance; such a duty is owed only in preparing an abstract of title. *Accord Barstad*, 145 Wn.2d at 536; former RCW 48.29.010(3)(b), (3)(c). Further, Washington's title insurance and recording statutes do not impose liability for the negligent recording of titles. *See generally* ch. 48.29 RCW; ch. 65.08 RCW. Because our title insurer liability precedent does not support finding

a duty to identify and disclose title defects to its own clients, it cannot support extending this duty of care to nonclient third parties when recording a legal instrument, particularly when that legal instrument is facially valid, as it is here.⁶

B. Our other title insurance company cases do not inform our analysis of this issue

Plaintiffs' citations to other cases holding that title insurance companies owe duties in tort are not well taken.

Plaintiffs cite *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 663, 63 P.3d 125 (2003) for the proposition that title insurance companies have a duty to exercise reasonable care in carrying out their instructions. However, *Denaxas* actually held that “the Title Company did not have a duty to point out the discrepancy between the legal description in the Agreement and that in the closing documents.” *Id.* To the extent *Denaxas* discussed a duty to follow instructions, we held that an “escrow agent's duties and limitations are defined ... by his instructions.” *Id.* (alteration in original) (quoting *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 910, 506 P.2d 20 (1973)). This point arises strictly out of the specific characteristics governing escrow holders—characteristics that are undisputedly not at issue in this case as Chicago Title did not perform any escrow services. *See Nat'l Bank of Wash.*, 81 Wn.2d at 910.

Plaintiffs also rely on *Walker v. Transamerica Title Insurance Co.*, 65 Wn. App. 399, 828 P.2d 621 (1992). But *Walker* addresses only proximate cause; the court did not address duty because Transamerica Title conceded duty for the purpose of its summary judgment motion. *Id.* at 402. Further, *Walker* involved the recording of a facially invalid lien that did not contain a description of the property at issue. *Id.* at 401. *Walker* does not inform our duty analysis.

C. Absent a substantial risk to public safety or property damage, professionals do not owe a duty to third parties when the transaction at issue is not intended to benefit the third party

The duty of a title insurance company to third parties is a question of first impression to this court. Therefore, we turn to analogous considerations of a professional's duty to third-party nonclients for guidance. Using a modified

version of California's multifactor test,⁷ we recently considered whether attorneys owe nonclient third parties a duty of care in *Sterling Savings Bank*, 178 Wn.2d 561. Because our multifactor test is derived from the California test applied in *Seeley v. Seymour*, 190 Cal. App. 3d 844, 237 Cal. Rptr. 282 (1987) (*see infra* Section II.D) and because the issue of a lawyer's duty to a nonclient is similar to the duty of a title insurer to a nonclient, our analysis in *Sterling* is instructive to our analysis here.

In *Sterling*, we applied a multifactor test designed to determine when an attorney may be liable for malpractice to a nonclient third party. These factors are:

- “1. The extent to which the transaction was intended to benefit the plaintiff [that is, the third party suing the attorney];
- “2. The foreseeability of harm to the plaintiff;
- “3. The degree of certainty that the plaintiff suffered injury;
- “4. The closeness of the connection between the defendant's ... conduct and the injury;
- “5. The policy of preventing future harm; and
- “6. The extent to which the profession would be unduly burdened by a finding of liability.”

178 Wn.2d at 565-66 (first alteration in original) (quoting *Trask v. Butler*, 123 Wn.2d 835, 843, 872 P.2d 1080 (1994)). Quoting *Trask*, we explained that the first factor is the “‘primary inquiry’” in determining liability to third parties. *Id.* (quoting *Trask*, 123 Wn.2d at 842). We further explained that “‘under the modified multifactor balancing test, the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained’” and held that “‘no further inquiry need be made unless such an intent exists.’” *Id.* (quoting *Trask*, 123 Wn.2d at 843). Ultimately we found no duty because the transaction at issue was not intended to benefit the third party. *Id.* at 570.

These factors do not support finding a duty in this case. Neither Chicago Title's preliminary commitment and recording nor its subsequent accommodation recordings for the benefit of its client, Centrum Financial, were intended to benefit CP III. Indeed, the opposite is true—any recording of Centrum Financial's interest in the

property would burden CP III. Under the multifactor test, this threshold inquiry is dispositive of Plaintiffs' claim.

Plaintiffs do not argue that the transaction between Centrum Financial and Chicago Title was intended to benefit them. Instead, they seem to assert two separate arguments in support of liability. First, they argue that Chicago Title assumed a duty of care arising out of the foreseeability of the injury to CP III when it agreed to issue a commitment to Centrum Financial and to record its instruments. Second, they assert that Washington law recognizes tort duties by title insurance companies. Our precedent requires rejection of both arguments.

Plaintiffs' first argument is that liability to CP III arises out of Centrum Financial's instruction to Chicago Title. From this instruction, Plaintiffs argue that Chicago Title owed them a duty of care “given the obvious and known risks to the landowner.” Pls.' Reply Br. at 7, This assertion assumes that a duty to CP III could be inferred from the contractual agreement between Centrum Financial and Chicago Title, an argument we reject. *See infra* Section IV.a. This argument for a duty also appears to be entirely predicated on the foreseeability of the harm. However, foreseeability of harm is only one of six factors necessary to determine whether a duty exists. *Sterling*, 176 Wn.2d at 566. Further, we do not consider the foreseeability of harm when a transaction is not intended to benefit the third-party plaintiff. *Id.* Thus, foreseeability of harm, alone, is insufficient to support imposing a duty.

Plaintiffs also assert that title insurance companies are professional institutions charged with the public trust; therefore, they owe a duty of reasonable care to third parties in the exercise of their professional responsibilities. Recognizing that title insurance companies may owe a duty of reasonable care to their clients in certain scenarios not before us today, we hold that the duty considerations do not support extending the duties owed by title insurance companies to encompass liability to third parties in the recording of legal instruments.

Plaintiffs rely heavily on a recent decision establishing a professional duty of care toward third parties under a theory of general negligence. *See Affil. FM Ins. Co.*, 170 Wn.2d at 453-54. Plaintiffs read *Affiliated FM Insurance Co.* too broadly: the policy considerations, precedent, logic, justice, and common sense underlying that decision are not present here.

in *Affiliated FM Insurance Co.*, we considered a certified question from the Ninth Circuit. The question asked whether a party who has a contractual right to operate commercially and extensively on property owned by a nonparty may sue an engineering consulting firm in tort for damage to that property when the party and the engineers are not in privity of contract. *Id.* at 447. The dispute arose from a fire aboard a train on Seattle's monorail system. *Id.* at 445. Though the city of Seattle owned the property that was physically damaged by the fire, Seattle Monorail Service operated the monorail and suffered significant economic damages as a result of the fire. *Id.* Seattle Monorail Services argued that the fire was the result of an engineer's negligent design and sued, arguing that the engineers were under a duty to Seattle Monorail Services to exercise reasonable care, despite the lack of contractual privity. *Id.* at 446.

We found that a duty existed. *Id.* at 453-54. In doing so, we balanced the risk to the physical safety of persons and property arising out of an engineer's work against the usefulness of private ordering (e.g., preference for contractual remedies) and against the economic burden a duty would place on engineers. *See id.* at 451-54. These policy considerations supported the court's analysis that a duty exists where "the interest in safety is significant" and the engineers occupy a position of control such that their training, education, and experience place them in the best position to prevent harms caused by their work. *Id.* at 453. We also considered precedent, both here and nationally, finding that the "engineers' common law duty of care has long been acknowledged in Washington. *Id.* at 454.

These considerations do not weigh in favor of a duty here. There is no significant interest in public safety at issue and no concerns for physical safety. We therefore reject Plaintiffs' attempts to borrow our professional duty analysis from inapposite contexts.

D. Other jurisdictions do not provide persuasive authority on this issue

As the Ninth Circuit recognized in its certification order, only two cases have considered whether title insurance companies owe a duty of care to third parties: the Arizona Court of Appeals in *Luce v. State Title Agency, Inc.*, 190 Ariz. 500, 950 P.2d 159 (1997) and the California Court of Appeals in *Seeley*, 190 Cal. App. 3d 844 (1987). These decisions reach opposite conclusions, in part because the

decisions are based on different legal theories and different facts. Due to the difference in legal theories and facts, these cases provide limited persuasive reasoning for our consideration in this case.

On facts nearly identical to this case, the Arizona Court of Appeals considered whether a title agency owed a professional duty of care to protect a third party from foreseeable harm when it gratuitously recorded a deed of trust on behalf of a lender. *See Luce*, 190 Ariz. at 502. In *Luce*, a general partner signed a deed of trust to a lender without the approval of his limited partners, despite the fact that the partnership agreement required him to have their approval. *Id.* at 501. The lender asked State Title Agency to insure the policy and to record the deed of trust. *Id.* State Title issued a preliminary title report, provided a lender's policy of title insurance, and gratuitously recorded the deed. *Id.* State Title acknowledged that it read the partnership agreement during this process, and the court inferred that State Title had actual knowledge of the agreement's limitations on the general partner's authority. *Id.*

The limited partners sued, asserting that State Title owed a duty based on either its review of the partnership agreement or its gratuitous recording of the deed of trust. *Id.* at 501-02. The trial court granted summary judgment in favor of State Title, *id.* at 501, and the Court of Appeals affirmed. *Id.* at 504. The Court of Appeals first held that there was no professional duty arising out of the foreseeable harm because State Title had no contractual relationship with anyone, no special relationship (or indeed, any relationship at all) with the injured plaintiff, and no ability to control the behavior of the general partner. *Id.* at 502-03.⁸

The facts presented to the Arizona Court of Appeals are virtually identical to those in the case before us and reinforce our conclusion here. Further, as discussed *supra* Section II.c of this opinion, Washington recognizes that foreseeability of harm is one of six factors the court considers in deciding whether a duty is owed to a nonclient. Though Arizona applied a different legal analysis and did not explicitly consider the intent to benefit, the application of the "intent to benefit" factor would have resulted in the same conclusion. Their conclusion that no duty exists on analogous facts supports our decision here.

In *Seeley*, the California Court of Appeals reached the opposite conclusion on significantly different facts. *See* 190 Cal. App. 3d 844. In *Seeley*, a buyer attempted to buy property owned by Seeley. *Id.* at 850. Seeley was not interested in selling but indicated that he would consider a long term lease of the property. *Id.* at 851. The parties negotiated the terms of the lease at length but did not come to an agreement. *Id.*

Following further negotiations, the buyer unilaterally prepared a “Memorandum of Agreement” that set forth the terms of a 60-year lease between himself and Seeley. *Id.* The buyer signed the agreement and had his signature notarized; he never presented the agreement to Seeley. *Id.* Instead, the buyer took the agreement to a title insurance company. *Id.* The buyer was a regular customer of the title insurance company, which agreed to file the unsigned agreement for recording. *Id.* The title insurance company filed the agreement in a stack of documents insured by their company, and the recorder recorded the invalid, unsigned encumbrance on Seeley's property. *Id.* Seeley knew nothing of this agreement. *Id.*

The encumbrance affected Seeley's ability to sell his title. *Id.* at 852. He then sued the county recording office for negligent recording; he later amended his complaint and sued the title insurance company for negligence. *Id.*

The California Court of Appeals considered whether a title insurance company, not acting as escrow, may be held liable “for the negligent recordation of a nonrecordable document.” *Id.* at 860. In holding that the title company here was liable, the court considered six factors:

- “(1) the extent to which the transaction was intended to affect the plaintiff;
- (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm,”

Id. at 861 (quoting *Earp v. Nohmann*, 122 Cal. App. 3d 270, 290, 175 Cal. Rptr. 767 (1981)). As discussed earlier, these factors are comparable to Washington's multifactor test in *Sterling* and support our adoption of that test here.

Compare Seeley, 190 Cal. App. 3d at 861, with *Sterling*, 178 Wn.2d at 566.

But there are critical differences between *Seeley* and this case that limit its persuasive value here. *Seeley* first considered whether the transaction was intended to affect a third-party plaintiff. 190 Cal. App.3d at 861. The transaction was intended to undermine Seeley's interest in the property. *Id.* at 861. Conversely, the recordation in the instant case was intended to secure Centrum Financial's procured lien; there was no intent to benefit or harm CP III.⁹

Further, the instrument at issue in *Seeley* was facially invalid.¹⁰ Thus—unlike our case—the title insurance company in *Seeley* did not have to review any other documents to know that the document was not recordable. The title insurer in *Seeley* also submitted the facially invalid instrument to a special “stopped clock” station. *Id.* at 861 n.7. The county recorder automatically recorded all instruments dropped at that station pursuant to a contract with the title insurer that required the title insurer to review all documents for recording compliance prior to filing; the title insurer in *Seeley* violated its contract with the recording office by submitting the invalid instrument with other, compliant instruments at this station. *Id.*

These facts played a significant role in the *Seeley* court's evaluation of factors two, four, five, and six. *Id.* at 861. The court held that these facts made the harm foreseeable and that the title insurance company's actions gave the invalid instrument a presumption of validity—establishing both a close connection between the act and the harm, and rendering the title insurer's conduct worthy of moral blame. *Id.* at 861-62. The title insurance company's violation of the recording statutes as well as its contract with the county recording office also presented a danger to title stability in the future, satisfying California's sixth factor. *Id.* at 862.

These considerations are not present here, where a title insurer presented facially valid instruments to a county recording office. We discuss the arguments against burdening title insurance companies to look behind facially valid instruments before recording throughout this memorandum; in sum, placing this burden on title insurance companies frustrates Washington's strong public policy of protecting property owners through the recording process. These factual differences

are substantial; *Seeley's* facts and conclusions are inapposite.¹¹

In sum, our precedent supports our conclusion that title insurance companies have a duty of care in only limited situations outside of a contractual relationship and no duty to third parties in the recording of legal instruments. Plaintiff's argument that a duty is created merely because the harm is foreseeable is inconsistent with our jurisprudence; their remaining citations to our case law and to other jurisdictional approaches are not instructive to our analysis. Our review of our precedent suggests that the answer to the certified question is no.

III. Public policy does not support extending a duty on title companies recording legal instruments to search for and disclose potential title defects

We next consider public policy. "The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a plaintiff's interests are entitled to legal protection." *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988) (quoting W. PAGE KEETON, ETAL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984)). We balance the interests at stake to determine whether a title insurance company owes a duty to search for and disclose potential title defects when recording legal instruments. *Accord Affil. FM Ins. Co.*, 170 Wn.2d at 450.

Plaintiffs encourage us to find a duty, arguing that the Washington state courts and legislature have long recognized the important public policy of protecting the rights of property owners. We agree that this is an important policy of this State, but Plaintiffs are incorrect to suggest that extending a duty of care to title insurance companies would further this public policy. Washington has a comprehensive title insurance scheme, *see generally* ch. 48.29 RCW, and extensive recording requirements, *see generally* ch. 65.08 RCW. The purpose of the recording acts is to ensure stability and certainty of title to real property. *See Ellingsen v. Franklin County*, 117 Wn.2d 24, 28-29, 810 P.2d 910 (1991). These recording requirements further this purpose by holding recorded interests superior to unrecorded interests, *See* RCW 65.08.070. Thus, these statutory schemes further Washington's policy of protecting property rights by encouraging parties to record their interests.

We evaluate whether finding a duty of care from title insurance companies to third parties in the recording of legal instruments fulfills or frustrates these public policies. Washington's statutory schemes do not contemplate liability to third parties for the negligent recording of titles. *See generally* ch. 65.08 RCW. In lieu of a statutory remedy, Washington protects the valid interests of property owners from improper recording through the torts of slander of title and tortious interference with a contract.¹² *Rorvig v. Douglas*, 123 Wn.2d 854, 873 P.2d 492 (1994) (slander of title); *Calhom v. Knudtson*, 65 Wn.2d 157, 396 P.2d 148 (1964) (tortious interference). These torts, discussed below, are not within the scope of this opinion.¹³

"Slander of title is defined as: (1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's title; and (5) result in plaintiff's pecuniary loss." *Rorvig*, 123 Wn.2d at 859. Tortious interference with a contract requires (1) the existence of a valid contractual relationship or business expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Calhom*, 65 Wn.2d at 162-63.

Neither of these torts is satisfied by simple negligence. Tortious interference with a contract requires intentional conduct, and slander of title requires malicious conduct. The reason for this rule is clear: if simple negligence were the rule, a party claiming an erroneous but good faith interest in real property would not be entitled to litigate his claim and have an adjudication without fear of being penalized in damages. *See, e.g., Ward v. Mid-West & Gulf Co.*, 1923 OK 972, 97 Okla. 252, 223 P. 170; *see also* RESTATEMENT (SECOND) OF TORTS § 773 (AM. LAW INST. 1979) (recognizing privilege to assert claim in good faith). These heightened requirements further the policy of protecting the rights of property owners by encouraging property owners to assert valid property rights while protecting property owners from unlawful claims. Thus, we agree with Chicago Title that recognizing liability for the "negligent recording" of a facially valid instrument would have a chilling effect on recording documents and undermine the goals of RCW 65.08.070. Policy supports our answer of no; to

hold otherwise would frustrate Washington's policy of protecting property rights through the title recording process.

IV. Considerations of common sense, logic, and justice provide further support

Our conclusion that title insurance companies do not owe third parties a duty of care when recording legal instruments is consistent with Washington's policies and precedent. The remaining considerations of common sense, logic, and justice only reinforce this conclusion.

A. Logic and common sense weigh against finding a duty of care

Logic and common sense require us to reject Plaintiffs' argument that Chicago Title's duty of care to CP III arises out of Centrum Financial's instruction to Chicago Title directing it to record the leasehold deed of trust only if they are committed to providing title insurance. That instruction reads in full:

You may record the Leasehold [deed of trust], provided you are irrevocably committed to insure the enclosed Mortgage, on a mortgagee's extended basis with coverage of \$10,000,000.00, as a valid SECOND lien against the leasehold property which is the subject of the commitment for title insurance issued under the referenced file number, subject only to the matters set forth therein.

2 Appellant's Excerpts of R. at 58.

This instruction plainly directs Chicago Title to issue an insurance policy on the mortgage and to record if it is committed to issue that insurance policy. Chicago Title did so: it issued a commitment, insured the lien as valid, and recorded it. Under *Barstad*, Chicago Title did not owe a duty to Centrum Financial (its actual client) in issuing the title commitment because the commitment was for Chicago Title's benefit. 145 Wn.2d at 541. If the lien was not valid, Centrum Financial may have had a claim under its insurance policy. But it is impossible to understand how this action and agreement between Centrum Financial and Chicago Title created a duty to CP III when CP III could not possibly have relied on the commitment or the insurance policy. See *ESCA Corp.*, 135 Wn.2d at 832 (accountant did not owe a duty of care to bank absent

justifiable reliance on accountant's draft report in making loan).

As a matter of logic and common sense, CP III is not entitled to something for nothing; not having entered into a contract with Chicago Title relating to future recordings, CP III is not entitled to the benefit of Centrum Financial's bargain with Chicago Title. Nor are they entitled to have Chicago Title review operating agreements and presumably lengthy loan agreements without a contract for—and paying for—that benefit. These factors reinforce our conclusion that title insurance companies do not owe third parties a duty of care when recording legal instruments.

B. Justice does not support finding a duty to search for and disclose potential title defects to third-party nonclients

Finally, considerations of justice do not support finding a duty of care for the recording of these legal instruments. This factor supports placing liability on the party best able to mitigate or control the anticipated harm. Cf. *Affil. FM Ins. Co.*, 170 Wn.2d at 453-54 (responsibility on party best able to mitigate the risks; balancing engineer's ability to design a project safely against an “innocent party who never had the opportunity to negotiate the risk of harm”); see also *Zabka v. Bank of Am. Corp.*, 131 Wn. App. 167, 173, 127 P.3d 722 (2005) (bank owed no duty of care to plaintiffs who could have easily taken steps to avoid fraud by bank's customer). Here, the manager of CP III had signed the documents filed by Chicago Title. When facially valid instruments are at issue, justice supports placing liability on the parties to those instruments.

Plaintiffs urge us to hold that justice requires title insurance companies to look behind the signatures on the document and police the parties' agreements against conflicting corporate documents or loan agreements. This is not a just result, and placing this burden on title insurance companies increases their costs, slows the recording process, and frustrates public policy, with no appreciable benefit. Here, the existence of the invalid liens was the result of an (arguably invalid) agreement between CP III and Centrum Financial. These liens, which were signed and notarized by CP III's manager, placed CP III in default and caused damages. These actions placed CP III in default regardless of any action taken by Chicago Title. We decline to impose these damages on Chicago Title.¹⁴

After considering each of the duty factors, we hold that title insurance companies do not owe third parties a duty of care when recording legal instruments.

Question: Does a title company owe a duty of care to third parties in the recording of legal instruments?

Answer: No.

CONCLUSION

In light of the foregoing, we answer the certified question as follows:

WE CONCUR.

All Citations

--- P.3d ----, 2016 WL 3910991

Footnotes

- 1 Plaintiffs allege that even though these liens were purportedly entered into by Centurion Management on behalf of CP III, they were not authorized liens. They further assert that Chicago Title was under a duty to look behind the instruments to determine whether the signatures were, in fact, valid.
- 2 During this time, Henry, as the sole member of SMI, took control of CP III from the Hazelriggs. He is now the sole owner of both companies.
- 3 The original language from 1 *Thomas Atkins Street, The Foundations of Legal Liability* 100, 110 (1906) is quoted time and again from *Affiliated FM Insurance Co.*, 170 Wn.2d at 449, to *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001), to *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985), to *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974).
- 4 Minor wording changes were made in 2005 but do not alter the meaning. LAWS OF 2005, ch. 223, § 14.
- 5 Minor wording changes were made in 2005, including the following changes to the final sentence of subsection (3)(c): “Any such The report shall not be construed as, nor constitute, is not a representation as to the condition of the title to real property, but shall constitute is a statement of terms and conditions upon which the issuer is willing to issue a its title policy, if such the offer is accepted.” LAWS OF 2005, ch. 223, § 14. The changes do not affect our analysis.
- 6 Plaintiffs cite *Hu Hyun Kim v. Lee* for the proposition that title companies owe a duty of reasonable care when fulfilling professional when fulfilling professional obligations and giving professional advice to their clients. 145 Wn.2d 79, 91, 31 P.3d 665 (2001) (title company negligent in rendering an expert opinion when it failed to discover and disclose an existing, recorded, and perfected lien on the client’s property). We are unpersuaded by *Kim* on these facts in view of our decision two years later in *Barstad*, 145 Wn.2d 528, where we held that title insurance companies do not have a duty of care when preparing commitment reports under RCW 48.29.010. *Kim* addresses neither chapter 48.29 RCW nor liability in regard to commitments. Furthermore, there being no contract here between Chicago Title and CP III, *Kim* cannot inform our analysis of the certified question before us.
- 7 We first adopted the multifactor test in *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1993). In *Trask*, we considered California’s multifactor test and the Illinois “third party beneficiary” test in deciding whether an attorney owes a duty to a nonclient. *Id.* at 840. After discussing both tests, the court combined the two and created Washington’s modified multifactor test. *Id.* at 841-43.
- 8 The Arizona Court of Appeals also considered whether State Title owed a duty of care under *Restatement (Second) of Torts* § 324A (Am. Law Inst. 1965) and concluded that the section was inapplicable.
- 9 In Washington, the factor to be considered is whether the transaction was intended to *benefit* the third party. *Sterling*, 178 Wn.2d at 566 (emphasis added).
- 10 The Arizona Court of Appeals also distinguished the case on this ground. *Luce*, 190 Ariz. at 503 (citing *Seeley*, 190 Cal. App. 3d at 861).
- 11 We recognize the slight variations between the *Seeley* factors and the *Sterling* factors. *Compare Seeley*, 190 Cal. App.3d at 861, *with Sterling*, 178 Wn.2d at 566. Due to the significant factual differences, we do not address the differences in the factors. We also note that the *Seeley* court expressly denied that it was recognizing a “tort of ‘negligent slander of title’ ” or that liability arose “solely from the recordation of the document.” 190 Cal. App. 3d at 862 n.8.
- 12 Washington residents may also secure their property rights through equitable actions to quiet title. *See, e.g., Kobza v. Tripp*, 105 Wn. App. 90, 93, 18 P.3d 621 (2001).

- 13 CP III does not argue that its proposed duty arises out of a special relationship, such as a fiduciary duty, between itself and Chicago Title. Nor do they argue that Chicago Title acted maliciously or in bad faith. Plaintiffs assert only that Chicago Title owes them a duty under general negligence principles. In rejecting Plaintiffs' argument, our decision does not suggest that title insurance companies are not liable for their intentional torts.
- 14 Plaintiffs' argument that Chicago Title "knew" it was recording invalid liens is unavailing. Chicago Title conceded, for the purposes of its summary judgment motion arguing that it did not owe Plaintiffs a duty, that it could be charged with knowledge of the GECC loan agreement's prohibition on secondary liens because it had access to that information but did not check it. Washington recognizes that both actual and constructive notice provides a party with knowledge of another person's real property interest. *E.g., Miebach v. Colasurdo*, 102 Wn.2d 170,175-76, 685 P.2d 1074 (1984). Requiring title insurance companies to look behind every facially valid instrument because they have documents in their possession that may undermine that instrument frustrates public policy, increases costs, and asks title insurance companies to police legal instruments entered into by the independent parties.

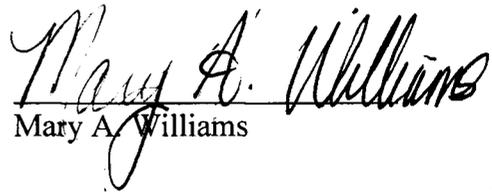
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CERTIFICATE OF SERVICE AND MAILING

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 25th day of July, 2016, I arranged for service *via U.S. Mail and Email* of the foregoing BRIEF OF RESPONDENTS, to the parties to this action as follows:

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