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Eagle Equity Fund, LLC v. Titleone Corp.
Appellant's Brief Dckt. 42850

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IN THE SUPREME COURT OF THE STATE OF IDAHO

EAGLE EQUITY FUND, LLC, an Idaho
limited liability company,

Plaintiff-Appellant,

vs.

TITLEONE CORPORATION, and Idaho
corporation, ALLIANCE TITLE & ESCROW
CORP., a Delaware corporation, DAS
INVESTMENTS, LLC, an Idaho Limited
Liability Company, COREY BARTON
HOMES, INC., an Idaho Corporation,

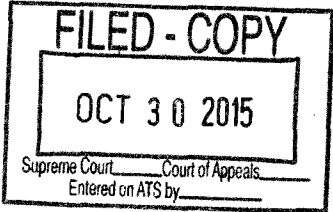
Defendants-Respondents,

and

FIDELITY NATIONAL TITLE COMPANY
(fka Land America Transnation, aka
Transnation Title & Escrow, Inc.), a Delaware
corporation, CHICAGO TITLE INSURANCE
COMPANY, a Nebraska or Florida
corporation (fka Ticor Title Insurance
Company, a California corporation), and John
Does III-X, unknown Individuals and/or
companies,

Defendants.

SUPREME COURT NO. 2015-42850



APPELLANT’S BRIEF

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Appealed from the District Court of the Fourth Judicial District of the State of Idaho,

In and For the County of Ada

The Honorable Jason Scott, District Judge Presiding

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1 **STATEMENT OF THE CASE**

2 In November 2006, Eagle Equity Fund, LLC (“EEF”) loaned Galiano LLC (“Galiano”) 3 \$725,500.00 for the acquisition and development of a parcel of land in Kuna, Idaho, known as the 4 Galiano subdivision. (R. Vol. 1, p. 2565). To secure the property, Galiano executed and recorded 5 a Deed of Trust (“EEF Deed of Trust”) naming Alliance Title (“Alliance”) as trustee. (R. Vol. 1, 6 p. 2589; Ex. C at 2626). Also in 2006, Galiano obtained from RBC a \$6 million secured 7 financing package (“RBC Deed of Trust”) for the development of the property. (R. Vol. 1, p. 8 2660 Ex. D). EEF executed and recorded a subordination agreement putting them in second 9 position behind the RBC Deed of Trust. (R. Vol. 1, p. 2565).

10 The Galiano subdivision was a development project to be sold parcel by parcel. (R. Vol. 1, 11 p. 2589). The projected revenue for the development was \$6.2 million. (R. Vol. 1, p. 980 ¶ 20); 12 (R. Vol. 1, p. 2355 ¶ 7). The proceeds from the parcel sales were to be used first to pay off the 13 RBC debt and then to pay the EEF debt. (R. Vol. 1, p. 2589). The payment schedule and cost 14 projections are contained in the Master Credit Agreement signed by Edward Mason, manager of 15 Galiano, LLC. (R. Vol. 1, p. 2597 Ex B).

16 Alliance was the closing agent for this entire transaction and was responsible for the 17 safekeeping of the original documentation. (R. Vol. 1, p. 1154 ¶ 3). After closing the transaction, 18 EEF never received the original copy of the EEF Deed of Trust. (R. Vol. 1, p. 1154 ¶ 7; R. Vol. 1, 19 p. 1102, l. 19). In 2008 and 2009, EEF authorized partial releases to be recorded for certain lots 20 in the subdivision. (R. Vol. 1, p. 2565 ¶ 4, Ex. B). However, EEF never received full payment on 21 its loan and never represented to anyone that the loan was paid-in-full. (R. Vol. 1, p. 2566 ¶ 7).

22 On February 11, 2010, TitleOne Corporation (“TitleOne”) inexplicably recorded a full 23 reconveyance of the EEF Deed of Trust. (R. Vol. 1, p. 2415 ¶ 4, Ex. A). In this document, 24 TitleOne claimed to be the Trustee of record. *Id.* This reconveyance was signed by TitleOne’s 25 Heidi Emery in the performance of her job duties at TitleOne. (R. Vol. 1, p. 2415, Ex. F pg. 14). 26 The reconveyance clearly references the EEF Deed of Trust, instrument number 106181859, 27 executed on November 17, 2006, by Galiano with EEF as the beneficiary. (R. Vol. 1, p. 2415 ¶ 4, 28 Ex. A). On this reconveyance document, TitleOne falsely states that it received “satisfactory

1 evidence” of payment-in-full of the underlying obligation. *Id.* Yet, TitleOne admits that they had
2 no evidence of payment-in-full of the obligation secured by the EEF Deed of Trust.¹ (R. Vol. 1, p.
3 2415 Ex. F pg. 16-18). EEF never executed any document stating that the obligation under the
4 deed of trust was satisfied. (R. Vol. 1, p. 1155 ¶ 13). EEF never executed any document releasing
5 the Deed of Trust. *Id.* At this time in February 2010, approximately \$4.7 million had already
6 been spent on the acquisition and improvement of the property. (R. Vol. 1, p. 2589 ¶¶ 4 and 9, Ex.
7 B).

8 PCD, the company that TitleOne hired to prepare the reconveyance document, likely
9 received a copy of the original EEF Deed of Trust from TitleOne, and that triggered the creation
10 of the document. (R. Vol. 1, p. 2415, Ex. F pg. 16-18). The original of the Deed of Trust
11 triggered a full reconveyance of the EEF Deed of Trust by PCD. (R. Vol. 1, p. 2494). Alliance
12 however, was unable to explain how the original Deed of Trust got into the hands of TitleOne,
13 and hence, PCD.

14 Vicki White, vice president of TitleOne, stated in deposition that an error such as a
15 wrongful reconveyance would be elevated to legal counsel within TitleOne. (R. Vol. 1, p. 2415
16 Ex. E pg. 38). Cameron McFadden, legal counsel for TitleOne, speaking on behalf of TitleOne in
17 a 30(b)(6) deposition, stated that there were times where a beneficiary would need to be
18 contacted, but TitleOne has never bothered to contact any beneficiaries. (R. Vol. 1, p. 2415 Ex. F
19 pg. 12, l. 7-17). Daniel Thompson, manager of EEF, never received any communication from
20 TitleOne informing him of the wrongful reconveyance. (R. Vol. 1, p. 2566 ¶ 9). In short, despite
21 the fact that TitleOne possessed all of the evidence of a wrongful recording, TitleOne chose to
22 ignore the problem and not inform the interested party, EEF. In filing this false reconveyance,
23 TitleOne removed EEF from the chain of title and created the potential for a later sale by Galiano
24 to a third party (DAS) that would ultimately strip EEF of its security interest.

25 Subsequent to TitleOne’s wrongful full reconveyance, EEF continued to execute
26 additional partial reconveyances at the request of Galiano as lots were sold. This lead EEF to

27 _____
28 ¹ TitleOne points to the fact that PCD relied on the submission of the original Deed of Trust, but
TitleOne themselves had no actual evidence of payment-in-full.

1 believe that there were no problems with the existing title. (R. Vol. 1, p. 2566 ¶ 6, Ex. D). The
2 EEF Deed of Trust, the first partial reconveyances, the full reconveyance recorded by TitleOne,
3 and the subsequent partial reconveyances by EEF all make up the public records that were
4 available to the subsequent titleholders or potential titleholders. (R. Vol. 1, p. 2566 ¶¶ 5-6, Ex. B-
5 C).

6 DAS, LLC (“DAS”) purchased the properties from Galiano in a short sale in 2012. EEF
7 was not provided with notice of the sale. (R. Vol. 1, p. 2566 ¶ 8, Ex. A; R. Vol. 1, p. 1244 ¶ 13).
8 Through a series of lot transactions with DAS that began in 2012, Corey Barton Homes, Inc.
9 (“CBH”) gained title to much of the property that made up the Galiano subdivision. (R. Vol. 1, p.
10 2417 ¶ 14, Ex. J). DAS had signed contracts to transfer the property to CBH at a profit of over
11 \$250,000. (R. Vol. 1, p. 2415 ¶¶ 12-14, Ex. H-J). EEF was given no opportunity to bid on the
12 property at the short sale or capture any of the profit immediately realized by DAS.

13 DAS claims it had no knowledge of the full reconveyance of the EEF Deed of Trust at the
14 time it acquired the property even though it was recorded and part of the public record. (R. Vol. 1,
15 p. 1244 ¶ 16; R. Vol. 1, p. 2415 Ex. B and C). CBH invoked the shelter rule and claimed that it
16 did not have any notice of EEF’s claim or interest in the property when it signed the purchase
17 agreements or when it acquired the properties, but the public records give them inquiry notice. (R.
18 Vol. 1, p. 2765 ¶ 10; R. Vol. 1, p. 2415 Ex. B and C). In short, both CBH and DAS wish to claim
19 *bona fide* purchaser status, but they were on inquiry notice of EEF’s claim at those times.

20 In early March of 2013, Daniel Thompson, manager of EEF, discovered the recording of
21 the wrongful reconveyance. (R. Vol. 1, p. 862 ¶ 6). He immediately took steps to protect his
22 interest, and EEF ultimately filed suit on June 5, 2013, stating claims for, inter alia, negligence
23 and tortious interference with prospective economic advantage. (R. Vol. 1, p. 862 ¶ 7). TitleOne
24 filed a Motion to Dismiss and the District Court dismissed the common law negligence claim. (R.
25 Vol. 1, p. 98; R. Vol. 1, p. 526). EEF amended its complaint to include a claim against TitleOne
26 for violation of Idaho Code § 45-1205. (R. Vol. 1, p. 209). The District Court held that EEF’s
27 claim under §45-1205 was barred by the statute of limitations but allowed the claim to proceed
28 should proof of equitable estoppel be shown. The District Court ultimately dismissed all of the

1 claims against TitleOne on summary judgment on September 19, 2014, holding that EEF did not
2 suffer any damage. (R. Vol. 1, p. 3052). The District Court summarized the undisputed facts
3 upon which it relied in making its rulings as follows:

4 In 2006, Edward I. Mason ("Mason"), as the managing member of Galiano, LLC
5 ("Galiano"), approached Defendant RBC Centura Bank ("RBC") and Plaintiff
6 EEF, to obtain financing to develop a 29.63 acre parcel of real property in Kuna,
7 Idaho, commonly referred to as Galiano Subdivision (the "Property" or the
8 "Subdivision"). The Property was ultimately platted into sixty (60) residential lots.

9 On November 17, 2006, Mason, on behalf of Galiano, executed that certain Deed
10 of Trust, Security Agreement and Fixture Filing and Assignment of Leases and
11 Rents in favor of RBC, as beneficiary, which was recorded in the real property
12 records of Ada County, Idaho on November 17, 2006, as Instrument No.
13 106181858 (the "RBC Deed of Trust"). Pursuant to its terms, the RBC Deed of
14 Trust secured two promissory notes payable to RBC with an aggregate principal
15 balance of \$6,063,300.00: (1) an acquisition and development note in the principal
16 sum of \$3,413,300.00 (the "A&D Note"); and (2) a letter of credit line note in the
17 principal sum of \$2,650,000.00 (the "LOC Note") (the A&D Note and the LOC
18 Note, collectively, the "RBC Loan"). Defendant Alliance Title & Escrow Corp.
19 ("Alliance Title") was the original trustee under the RBC Deed of Trust.

20 Contemporaneous with the execution of the RBC Deed of Trust, Mason, on behalf
21 of Galiano, executed the Deed of Trust and Security Agreement in favor of
22 Plaintiff EEF, as beneficiary, which was recorded in the real property records of
23 Ada County, Idaho, on November 17, 2006, as Instrument No. 106181859 (the
24 "EEF Deed of Trust"). The EEF Deed of Trust secured a promissory note payable
25 to EEF with a principal balance of \$725,500.00 (the "EEF Note" or the "EEF
26 Loan"). Defendant Alliance Title was also the original trustee under the EEF Deed
27 of Trust. However, Defendant Fidelity National Title Company ("Fidelity") was
28 substituted in as trustee of the EEF Deed of Trust on May 7, 2011. Pursuant to the
Subordination Agreement executed by RBC, Galiano, and EEF, the EEF Loan and
Deed of Trust were junior to the RBC Loan and RBC Deed of Trust.

On or about January 25, 2010, TitleOne received a document entitled
"Reconveyance of Deed of Trust" from its third-party contractor/service provider,
Post-Closing Department, Inc. ("PCD"). In 2009, TitleOne had entered into a
service agreement with PCD, under which PCD agreed to provide services to
facilitate the mortgage/deed of trust reconveyance process. Pursuant to that service
agreement, PCD agreed to prepare all documents and reports and provide
all other services necessary to effect reconveyances in compliance with the Idaho
statutory reconveyance requirements, including providing all notices thereunder,
tracking the reconveyance process, and recording the reconveyances. At the time
TitleOne received the Reconveyance of Deed of Trust from PCD for the Property,
TitleOne signed the Reconveyance and returned it to PCD. PCD, in turn, caused
the Reconveyance to be recorded in the real property records of Ada County,
Idaho, on February 11, 2010, as Instrument No. 110012858 (the "Reconveyance"),
and indeed the recorder stamp reflects recording at the request of "PCD."

According to EEF, Heidi Emery of TitleOne is the individual who signed the
reconveyance. EEF never received any communication concerning the
reconveyance of the EEF Deed of Trust. EEF never received satisfaction of the

1 underlying debt. EEF never communicated that the underlying debt was satisfied.
2 EEF did not become aware of TitleOne's recoveyance until late February 2013.

3 Beginning in 2011, Galiano was unable to maintain mortgage payments to
4 Defendant RBC. On or about March 2011, Mason and Galiano told EEF that they
5 had not made payments and that Defendant RBC would likely take action on the
6 Property. On May 17, 2012, Galiano executed a General Warranty Deed
7 conveying the balance of the lots it owned in the Subdivision to DAS Investments,
8 LLC ("DAS"). On November 1, 2012, Defendant RBC, as plaintiff, and Galiano,
9 Ted Mason Signature Homes, Inc., and Edward and Sherry Mason, entered into a
10 Stipulated Judgment, agreeing to a judgment in favor of RBC and against those
11 defendants in the principal amount of \$2,601,541.37, plus costs, fees, and interest
12 as more specifically set forth therein.

13 EEF commenced this action against defendants Alliance Title, TitleOne, Fidelity,
14 RBC, and Chicago Title on June 5, 2013. EEF filed its First Amended Complaint
15 against the originally named Defendants and several other additional Defendants
16 on December 9, 2013.

17 (R. Vol. 1, pg. 1056-8).

18 Shortly after the District Court granted summary judgment in favor of TitleOne, CBH
19 moved for summary judgment, and EEF filed a *Motion to Amend* to include a claim for quiet title.
20 (R. Vol. 1, p. 2759; R. Vol. 1, p. 2742). The District Court denied EEF's *Motion to Amend* while
21 granting CBH's motion for summary judgment. (R. Vol. 1, p. 3120).

22 **ISSUES PRESENTED ON APPEAL**

- 23 I. Under Idaho statutory law, which requires proof of damage to maintain a claim under I.C.
24 § 45-1205, did the District Court err in holding that EEF's loss of its right to participate in
25 the short sale to protect its security interest was insufficient to constitute "damages"?
- 26 II. Under Idaho common law, which requires proof of damage to maintain a claim for
27 Tortious Interference with Prospective Economic Advantage, did the District Court err in
28 holding that the Appellant's loss of its right to participate in the short sale to protect its
security interest was insufficient to constitute "damages"?
- III. Under Idaho Statutory Law, which puts a 20-year statute of limitations on property title
actions and a 4-year limitation on non-injury torts, did the District Court err by dismissing
EEF's I.C. § 45-1205 claim against TitleOne by applying a 3-year limit?

1 IV. Under Idaho law, which allows recovery for monetary loss for negligent rendition of
2 services, did the District Court err by dismissing EEF's common law negligence claim
3 against TitleOne pursuant to the Economic Loss Doctrine?

4 V. Under the Idaho Rules of Civil Procedure, which allow for liberal grants of leave to
5 amend the pleadings, did the District Court abuse its discretion by denying EEF's request
6 to add a meritorious cause of action for quiet title?
7

8 ARGUMENT

9 EEF was the beneficiary of a Deed of Trust securing its interest in the real property known
10 as the Galiano Subdivision in Kuna, ID. Through no fault of its own, EEF was stripped of that
11 interest. EEF made several claims against TitleOne under a variety of theories including
12 Violation of I.C. § 45-1205, Common Law Negligence, and Tortious Interference with
13 Prospective Economic Advantage ("TIPEA"). TitleOne should be held to account for its
14 wrongful reconveyance of EEF's Deed of Trust and resulting damage.

15 In dismissing EEF's claims for Violation of I.C. § 45-1205 and TIPEA against TitleOne,
16 the District Court held that EEF suffered no damage as a result of TitleOne's wrongful
17 reconveyance of EEF's Deed of Trust. The District Court erred in concluding that EEF suffered
18 no damage because (1) EEF was denied its right to participate in the short sale to protect its
19 security interest; (2) the District Court ignored the fact that the subsequent sale by DAS to CBH
20 resulted in an immediate turnaround profit of \$270,000 to DAS and (3) the District Court failed to
21 draw a reasonable inference of market value in favor of EEF, instead drawing it in favor of
22 TitleOne.

23 The District Court further held that EEF's cause of action for Violation of I.C. § 45-1205
24 against TitleOne was barred by the applicable statute of limitations. In reaching this conclusion,
25 the District Court determined that the date of accrual of the claim was the date that TitleOne
26 wrongfully reconveyed EEF's Deed of Trust. The District Court erred in holding the applicable
27 statute of limitation to be 3 years because (1) EEF's cause of action had not yet accrued in
28 February of 2010 and (2) the applicable statute should actually be the more appropriate 4-year

1 “catch all” limit or the titleholder’s 20-year statute.

2 EEF’s claim for common law negligence against TitleOne was dismissed because the
3 District Court held that damages were barred under the economic loss doctrine. The District
4 Court erred by applying the economic loss doctrine to damages that were a direct result of the
5 negligent services provided by TitleOne.

6 EEF made a *Motion to Amend* its complaint to include a claim for quiet title against CBH.
7 The District Court refused to allow amendment of the pleadings to include this claim because it
8 concluded that the claim had no merit. The District Court erred in denying this motion because a
9 claim for quiet title is meritorious and the Court abused its discretion in denying the inclusion of a
10 meritorious claim.

11

12 **I. STANDARD OF REVIEW**

13 This Court exercises *de novo* review of a grant of summary judgment, using the same
14 standard as is used by the district court ruling on the motion. *Stonebrook Const., LLC v. Chase*
15 *Home Fin., LLC*, 152 Idaho 927, 929, 277 P.3d 374, 376 (2012). Summary judgment is proper
16 “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show
17 that there is no genuine issue as to any material fact and that the moving party is entitled to a
18 judgment as a matter of law.” *Teurlings v. Larson*, 156 Idaho 65, 69, 320 P.3d 1224, 1228 (2014)
19 (citation omitted) (quoting Idaho Rule of Civil Procedure (I.R.C.P.) 56(c)). The Court construes
20 all disputed facts in favor of the non-moving party, “and all reasonable inferences that can be
21 drawn from the record are to be drawn in favor of the non-moving party.” *Fuller v. Callister*, 150
22 Idaho 848, 851, 252 P.3d 1266, 1269 (2011) (quoting *Castorena v. Gen. Elec.*, 149 Idaho 609,
23 613, 238 P.3d 209, 213 (2010)). “If the evidence reveals no disputed issues of material fact, then
24 only a question of law remains, over which this Court exercises free review.”

25 The trial court's decision to deny a motion to amend a pleading is discretionary. *Trimble v.*
26 *Engelking*, 130 Idaho 300, 303, 939 P.2d 1379, 1382 (1997) (citing *Jones v. Watson*, 98 Idaho
27 606, 610, 570 P.2d 284, 288 (1977.)) This Court uses a three factor test to determine whether the
28 trial court abused its discretion. The inquiry is: (1) whether the trial court correctly perceived the

1 issue as discretionary; (2) whether the trial court acted within the outer boundaries of its
2 discretion and consistently with the legal standards applicable to the specific choices available to
3 it; and (3) whether the trial court reached its decision by an exercise of reason. *Ramos v. Dixon*,
4 144 Idaho 32, 35, 156 P.3d 533, 536 (2007).

5 **II. THE DISTRICT COURT ERRED IN DISMISSING EEF'S CAUSE OF ACTION**
6 **AGAINST TITLEONE FOR VIOLATION OF I.C. §45-1205 ON THE BASIS THAT**
7 **APPELLANT SUFFERED NO DAMAGES**

8 The District Court erred when it granted summary judgment to TitleOne on EEF's cause
9 of action under I.C. §45-1205. I.C. §45-1205 creates liability for damages suffered upon the
10 negligent reconveyance of a trust deed by a title agent or insurer. The District Court concluded
11 that EEF did not present sufficient evidence that it suffered damages as a result of TitleOne's
12 negligent reconveyance of EEF's deed of trust. (R. Vol. 1, p. 3061.) This reasoning is flawed
13 based on the fact that EEF was in fact damaged when it was deprived of any notice to participate
14 in the short sale of the property and protect its security interest. Evidence in the record further
15 supports that EEF suffered damage by loss of potential profit when Galiano sold the property to
16 DAS for \$860,000, who then turned around and sold the property to Corey Barton Homes for
17 \$1.13 million, collecting a gross profit of \$270,000. Had EEF been granted its rights to
18 participate in the short sale, it would have been allowed to purchase the deed of trust outright, and
19 either sell it for profit (as DAS did), or wait for the market to recuperate and potentially collect
20 the entirety of its security interest.

21 **A. EEF Was Damaged When Its Rights Were Stripped Through TitleOne's**
22 **Violation Of I.C. § 45-1205**

23 EEF was not afforded an opportunity to participate in the short sale of the property for
24 which it held a lien interest. The fact that EEF was not notified of the short sale is not in dispute.
25 (R. Vol. 1, p. 3061.) Neither is the fact that EEF was not allowed to participate in the short sale.
26 Had EEF's Deed of Trust not been wrongfully reconveyed back to Galiano, EEF would have held
27 a junior lien that required satisfaction in some manner in order for DAS to receive clean title to
28 the property. Despite these facts, the District Court concluded that EEF suffered no damages. (R.

1 Vol. 1, p. 3061.) The basis for the Court's conclusion was that at the time of the sale, EEF's
2 second-position deed of trust "had no discernable value." (R., Vol. 1, p. 3824.) However, the
3 complete lack of notice and participation in the sale barred any opportunity EEF had to recoup the
4 value of its investment or protect its security interest by purchasing the first lien at the price DAS
5 paid...\$860,000. An investment by EEF of an additional \$860,000 to acquire the first Deed of
6 Trust would have placed EEF in first position at a total cost of \$1.61 million on a property that
7 had \$4.7 million already invested in it for acquisition and development. EEF would be selling
8 lots at this time instead of CBH.

9 It is also true that DAS quickly resold the property to CBH and realized a significant
10 profit. This profit could have been earned by EEF just as easily so the Court's conclusion that
11 EEF suffered no damage is not supported by the facts.

12 "The burden is upon the plaintiff to prove not only that it was injured but that its injury
13 was the result of the defendant's breach; both amount and causation must be proven with
14 reasonable certainty." *Griffith v. Clear Lakes Trout Co., Inc.*, 143 Idaho 733, 740, 152 P.3d 604,
15 611 (2007). "Reasonable certainty" does not mean that damages need to be proven with
16 "mathematical exactitude," but it does require a plaintiff to prove that damages are not merely
17 speculative. *Id.* Ultimately it is for the trier of fact to fix the amount by determining the
18 credibility of the witnesses, resolving conflicts in the evidence, and drawing reasonable
19 inferences therefrom. *Sells v. Robinson*, 141 Idaho 774, 774, 118 P.3d 106 (2005).

20 EEF held a junior deed of trust to the property in question as security for the \$725,500
21 loan it made to Galiano. (R. Vol.1, p. 3053.) As such, EEF was a record lien holder and should
22 have been provided notice of the short sale. No such notice was given. It is unclear why EEF
23 was not given any notice of the sale. A reasonable inference can be made, however, it was
24 because TitleOne had negligently reconveyed EEF's deed of trust prior to the date of the sale, and
25 no deed or lien appeared on record. In any event, I.C. §45-1205 does not require the damage be
26 caused by any particular party, including the one accused of negligent reconveyance. It simply
27 provides that the party accused of negligent reconveyance is liable for the damages suffered as a
28 result of the improper reconveyance. *Id.* Thus, regardless of how or why EEF was not provided

1 notice, *the fact that no notice was provided* to EEF allowed the short sale to go forward with no
2 consideration of EEF's junior lien. In fact, the District Court itself acknowledged that EEF's
3 rights were violated. In its Memorandum Decision and Order dated February 23, 2015, the
4 District Court stated: "the reconveyance of its deed of trust was an invasion of [EEF's] rights..."
5 (R. Vol. 1, p. 3824.)

6 Thus, EEF was damaged when its junior lien was stripped through the short sale by
7 Galiano to DAS. It was the lack of notice coupled with the loss of opportunity to participate in
8 the short sale which ultimately proves EEF's damages theory "beyond mere speculation."

9 **B. EEF Was Injured When It Was Denied The Right To Participate In The**
10 **Short Sale, And Its Measure of Damage Exceeds Mere Speculation, As**
11 **Evidenced By DAS's \$270,000 Gross Profit When It Immediately Sold to**
12 **Corey Barton Homes**

13 As described above, EEF was denied the right to participate in the short sale of the
14 property for which it held a lien interest due to TitleOne's wrongful reconveyance. According to
15 the District Court, however, EEF's inability to participate in the sale and the loss of its lien
16 interest was not sufficient evidence of damages. Again, the Court pointed to the depreciation in
17 value of EEF's deed of trust as evidence of EEF's lack of injury. (R., Vol. 1, p. 3824.)
18 However, if EEF were able to participate in the sale, it would have had the opportunity to recoup
19 at least part of its investment. EEF never received that opportunity.

20 As a result of the short sale, Galiano sold the property to DAS Investments for \$860,000.
21 (R. Vol. 1, p. 2566 ¶ 8, Ex. A; R. Vol. 1, p. 1244 ¶ 13). DAS then promptly turned around and
22 sold off the property to Corey Barton Homes for \$1.13 million. *Id.* Thus, DAS purchased the
23 property for \$860,000 and sold it for \$1.13 million, collecting a gross profit of \$270,000. The
24 District Court maintained that EEF suffered no injury because RBC could not have recouped its
25 investment as the first-position lien holder, and thus, EEF's second-position deed held no
26 discernable value. (R., Vol. 1, p. 3824.) However, this position entirely disregards the
27 possibility that EEF could have taken action at the short sale if it were allowed to participate. To
28 this point, the District Court reasoned in its *Memorandum Decision and Order Granting*

1 *Defendant TitleOne Corporation's Second Motion for Summary Judgment* that for EEF to prove
2 damages in this regard, it would have had to put forth evidence probative of the price it would
3 have paid for the property at the short sale. (R., Vol.1, p. 3060.) It then speculated that such a
4 price would "presumably [be] more than DAS paid for it, as a competition between DAS and EEF
5 for the property probably would have driven up the price." *Id.* This was a question of fact that
6 was not appropriately resolved through summary judgment.

7 As Idaho law requires with regard to proving damages, amount and causation must be
8 proven with reasonable certainty. *Griffith v. Clear Lakes Trout Co., Inc.*, 143 Idaho 733, 740,
9 152 P.3d 604, 611 (2007). "Reasonable certainty" does not mean that damages need to be proven
10 with "mathematical exactitude," but it does require a plaintiff to prove that damages are not
11 merely speculative. *Id.* While it may be true that the price EEF would have paid could have
12 been higher than what DAS paid, that amount, \$860,000, presents at least a figure that is more
13 than mere "speculation." Additionally, the gross profit that DAS made on the sale to Corey
14 Barton represents a figure of damages that is more than mere "speculation" as well. In fact, it
15 represents potentially the lowest figure that EEF would have obtained, as it could have assumed
16 first lien position and sold the property at a later date, for a higher amount. In any event, while it
17 is impossible to prove with "mathematical exactitude" the measure of damage that EEF sustained
18 as a result of TitleOne's wrongful reconveyance of its deed of trust, the sale of the property by
19 DAS to CBH is evidence that exceeds mere speculation. The exact amount should be determined
20 by a jury upon the consideration of evidence and credibility of witnesses as required by *Sells*.

21 EEF was damaged when its lien rights were stripped through the short sale. This was the
22 direct result of TitleOne's negligent reconveyance of its deed of trust. In addition, DAS's sale of
23 the property for a profit of \$270,000 presents a reasonable amount of damages that EEF
24 sustained. Thus, the cause and amount of EEF's damages can be proven beyond mere
25 speculation, and summary judgment was not appropriate with regard to EEF's cause of action
26 under I.C. §45-1205.

27 In addition, the District Court drew an inference of 2012 market value for the Galiano
28 subdivision that was in favor of TitleOne and detrimental to EEF. Summary judgment standard

1 requires that EEF receive the benefit of all reasonable inferences. Thus, the District Court erred
2 by refusing to infer a value that was more commensurate with the expenditures and costs of the
3 property. Rather, the District Court inferred that the sale value in 2012 was the fair market value
4 of the property in 2010. Thus, the District Court misapplied the standards of summary judgment
5 to the issue of damages.

6
7 **III. THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S CLAIM FOR**
8 **TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE**
9 **AGAINST TITLEONE ON SUMMARY JUDGMENT, ON THE BASIS THAT**
10 **WITHOUT A DETERMINATION OF DAMAGES, APPELLANT'S CAUSE OF**
11 **ACTION COULD NOT LIE.**

12 In dismissing EEF's cause of action for Tortious Interference with Prospective Economic
13 Advantage, the District Court employed the same reasoning as it did in dismissing EEF's claim
14 under I.C. §45-1205. In sum, the Court concluded that EEF did not introduce "competent
15 evidence of damages." (R., Vol. 1, p. 3057.) This reasoning is incorrect based on the fact that
16 EEF suffered damages in the lack of notice and opportunity to participate in the short sale, and
17 the deprivation of its ability to recoup some or all of its investment. As EEF's proof of damages
18 was discussed at length in the preceding section, it will not be reiterated here.

19 With regard to tortious interference claim, 5 elements must be proven. Those elements
20 are: (1) The existence of a valid economic expectancy; (2) knowledge of the expectancy on the
21 part of the interferer; (3) intentional interference inducing termination of the expectancy; (4) the
22 interference was wrongful by some measure beyond the fact of the interference itself (i.e. that the
23 defendant interfered for an improper purpose or improper means) and (5) resulting damage to the
24 plaintiff whose expectancy has been disrupted. *Highland Enterprises, Inc. v. Barker*, 133 Idaho
25 330, 338 986 P.2d 996, 1004 (Idaho 1999.)

26 The District Court dismissed EEF's tortious interference claim based on one solitary
27 issue; that EEF failed to prove sufficient damages. As damages are an essential element of any
28 tortious interference claim, such was dispositive. *Id.* The District Court erred in dismissing the

1 claim on this basis because, as previously discussed, EEF suffered damages as a result of
2 TitleOne's negligent reconveyance, and of which the amount can be proven beyond mere
3 speculation. Specifically, the resale of the property for a \$270,000 profit by DAS immediately
4 after the short sale represents a reasonable figure to present to a jury. As such, summary
5 judgment was not appropriate on this issue.

6
7 **IV. THE DISTRICT COURT MISAPPLIED THE STATUTE OF LIMITATIONS TO**
8 **EAGLE EQUITY FUND'S CLAIM FOR VIOLATION OF I.C. § 45-1205 AGAINST**
9 **TITLEONE**

10 The issue of the statute of limitations comes before this Court as a matter of first
11 impression concerning EEF's claim for violation of I.C. § 45-1205 against TitleOne. This is a
12 claim that arises out of the title to the Galiano Subdivision, but the claim is also a tort. The
13 District Court was faced with a choice between three different statutes of limitations: (1) a four-
14 year period under Idaho Code § 5-224 (2); a twenty-year period under Idaho Code § 5-204, (2),
15 and (3) a three-year period under Idaho Code § 5-218(1). The District Court erred in determining
16 the accrual date of the cause of action and misapplied I.C. § 5-218(1) 3-year limit reserved for
17 purely statutory causes of action. See page 26 of its *Memorandum Decision and Order on*
18 *Various Motions* entered on February 26, 2014.

19 In convincing the District Court to rule as it did, TitleOne argued that Idaho Code §5-
20 218(1) was the applicable statute of limitations because it should cover *all* statutory liabilities. It
21 reads in part "[Within three (3) years:] An action upon liability created by statute, other than a
22 penalty or forfeiture." Idaho Code § 5-218(1). TitleOne argued, and is expected to argue on
23 appeal, that I.C. § 45-1205 is a "liability created by statute" because it's a liability depending for
24 its existence on the enactment of a statute. See *Dietrich v. Copeland Lumber Co.*, 28 Idaho 312
25 (1916). TitleOne's argument and the District Court's holding fail because Idaho Code §45-1205
26 liability is actually a codified tort, and tort law stands independent of the existence of any statute.
27 Idaho Code §45-1205 has never been litigated. However, other codified tort law has been
28 litigated, and a four-year limit has always been applied. Therefore, EEF respectfully requests that

1 this Court reverse the District Court's error and apply the more applicable 20-year or 4-year
2 statute of limitations.

3
4 **A. The District Court Erred In Its Determination Of The Accrual Date Of EEF's**
5 **Cause Of Action Against TitleOne For Violation Of Idaho Code § 45-1205**

6 In its *Memorandum Decision and Order on Various Motions* filed on February 26, 2014,
7 the District Court dismissed EEF's cause of action against TitleOne for the violation of Idaho
8 Code §45-1205 on the basis that the claim was barred by the applicable statute of limitations.
9 The Court applied the three-year limitations period set forth in Idaho Code §5-218(1). In its
10 application of the statute of limitations, the Court held that EEF's cause of action under Idaho
11 Code §45-1205 accrued and the statute began to run no later than February 11, 2010, which was
12 the date the reconveyance was recorded by TitleOne.

13 The Court acknowledged that the following facts were undisputed for purposes of its
14 summary judgment analysis: (1) EEF never received any communication regarding the
15 reconveyance of the EEF Deed of Trust; (2) EEF never received satisfaction of the underlying
16 debt; (3) EEF never communicated that the underlying debt was satisfied; and (4) EEF did not
17 become aware of TitleOne's reconveyance until late February 2013. In short, the undisputed
18 facts established a violation of Idaho Code §45-1205 by TitleOne. EEF filed suit on June 5,
19 2013, just three months after becoming aware of the claim.

20 It is submitted that the Court erred in its determination of the date of accrual of EEF's
21 §45-1205 cause of action. The Court held that the cause of action accrued and the statute of
22 limitations commenced running at the time of the reconveyance which was recorded on February
23 11, 2010. Three years from that date would be February 11, 2013. EEF did not learn of the
24 wrongful reconveyance until late February 2013. In effect, EEF's claim had become time-barred
25 before EEF even knew of its existence. This result is patently unfair and contrary to concepts of
26 fundamental justice.

27 Moreover, EEF was not damaged by the wrongful reconveyance until May 12, 2012,
28 when Galiano sold the property to DAS without notice to EEF thereby stripping EEF of its lien

1 rights. Prior to the sale, the wrongful reconveyance could have been corrected with no harm
2 being suffered by EEF had EEF been aware of it. It was the sale and loss of lien rights (damages)
3 that completed EEF's cause of action and triggered the running of the statute of limitations. The
4 accrual date should therefore be May 12, 2012, the date of the sale to DAS by Galiano. With this
5 accrual date, the EEF §45-1205 cause of action would be timely.

6 While it appears that the issue of determining the accrual date for a cause of action
7 brought under §45-1205 against a trustee has not been litigated before, there are analogous
8 situations that provide useful guidance. *Streib v Veigel*, 109 Idaho 174 (1985) involved a claim
9 for professional negligence brought against an accountant in connection with the preparation of
10 several tax returns. The last return was filed in 1980. The IRS audited the returns in 1982 and
11 denied certain deductions assessing penalties and interest. The lawsuit was filed in April of 1983.
12 The accountant contended that the two-year statute of limitations commenced running at the time
13 of preparation and filing of the tax returns, the last of which was in 1980. The trial court agreed
14 and granted the defendant's motion for summary judgment. The Supreme Court reversed the trial
15 court on the basis that "some damage" did not occur until the IRS audited the returns in 1982
16 which is when the statute of limitations commenced running.

17 In reaching its conclusion, the Idaho Supreme Court found the reasoning of the Texas
18 Supreme Court in *Atkins v. Crosland*, 417 S.W.2d 150 (Tex. 1967) to be persuasive quoting the
19 following language:

20
21 "The general rule is that a cause of action sounding in tort
22 accrues, in the absence of a statute to the contrary or fraudulent
23 concealment, when the tort is committed. This rule obtains
24 notwithstanding the fact that the damages, or their extent, are not
25 ascertainable until a later date. [Citations.]

26 * * * * *

27 "Turning from general principles to the facts involved in the
28 instant case, we have concluded that the plaintiff's cause of action did
not arise until the tax deficiency was assessed by the Commissioner
of Internal Revenue. Prior to assessment the plaintiff had not been
injured. That is, assessment was the factor essential to consummate
the wrong only then was the tort complained of completed. If a
deficiency had never been assessed, the plaintiff would not have been
harmled and therefore would have had no cause of action... . In short,
in the absence of assessment, injury would not have inevitably
resulted." *Streib, id.* at 177.

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The Idaho Supreme Court went on to hold that “the tortious negligence is continuing in nature until plaintiffs suffer damage. In the ordinary course of events, the preparation and submission of income tax returns contemplate a review by the Internal Revenue Service, with damages resulting *at that time* if the returns have been erroneously prepared.” *Streib* at 179. Similar reasoning applies in this case. The act of recording the reconveyance, in and of itself, caused no harm. It was the negligent act that was continuing in nature. A corrective deed of trust could have been recorded to restore EEF’s lien rights. Had that been done, then EEF would not have been damaged and no claim would be available to assert against TitleOne just as no claim for negligence could be asserted against the accountant if the IRS elected not to audit the returns. It was not until Galiano sold the property to DAS thereby stripping EEF of its lien rights that “some damage” actually occurred. At that time, the tort was complete and the statute of limitations commenced running.

The *Streib* case is also significant for the concurring opinion by Justice Bistline where he stated the following addressing the “some damage” rule:

I concur in the result. A better ground upon which to base this result, however, is art. I, § 18 of the Idaho Constitution. This section declares that: "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character, and right and justice shall be administered without sale, denial, delay, or prejudice." (Emphasis added.)

As I stated in *Therault v. A.H. Robins Co., Inc.*, 108 Idaho 303, 698 P.2d 365, 371 (1985) (Bistline, J., dissenting), art. I, § 18 does not invalidate statutes of limitations per se. It does, however, require that "people be granted a reasonable opportunity to seek redress through this state's court system."

In *Therault*, I quoted the language of Justice Shepard and Chief Justice Donaldson, as recorded in *Renner v. Edwards*, 93 Idaho 836, 475 P.2d 530 (1970), in which they declared that allowing a statute of limitations to cut off a person's cause of action before he or she knew, or had a reasonable opportunity to learn of it, would be "manifestly unjust," "palpably unjust," "patently inane," "inconsistent with the concept of fundamental justice," and "manifestly inconsistent and unfair." *Therault, supra*, 108 Idaho at 309-10, 698 P.2d at 371-72, quoting *Renner, supra* at 839, 842-43, 475 P.2d at 533, 536-37. Accordingly, these two Justices, joined by Justice McQuade, held that the forerunner of today's I.C. § 5-219(4) does not begin to run until a person knows or has had a reasonable opportunity to learn of his or her cause of action. *Renner, supra*, at

2 Here, EEF was not even aware of the wrongful reconveyance until after the statute of
 3 limitations had run if one applies the accrual date utilized by the trial court in granting summary
 4 judgment to TitleOne. To allow the statute of limitations to cut off EEF's §45-1205 cause of
 5 action before EEF was even aware of it is manifestly unjust and should not stand. The principals
 6 underlying the "some damage" rule apply equally here as well and they are consistent with the
 7 concept that all of the elements of a cause of action need to be present before a lawsuit can be
 8 filed. The foregoing is also consistent with Idaho Code Section 5-201 which states that civil
 9 actions can only be commenced *after the cause of action shall have accrued*. To give meaning to
 10 this section and the axiom that a party has no right to sue for damages until actual injury occurs
 11 requires a determination that the three-year statute of limitations applied by the Court in this case
 12 did not commence running until the last elements of the claim had been satisfied, i.e. that
 13 damages were incurred by EEF as a result of TitleOne's violation of Idaho Code §45-1205.

14 **B. Codified Non-Injury Torts Have A Four-Year Statute Of Limitations**

15 Non-injury tort claims such as nuisance typically have a 4-year statute of limitations under
 16 Idaho Code §5-224, which reads "[a]n action for relief not hereinbefore provided for must be
 17 commenced within four(4) years after the cause of action shall have accrued." At a minimum, the
 18 I.C. §5-224 4-year statute of limitations for various tort actions should apply to a statutory
 19 negligence claim such as I.C. §45-1205. After all, even common law negligence that does not
 20 involve personal injury or malpractice is subject to the 4-year statute of limitations under I.C. § 5-
 21 224. *Hoglan v. First Sec. Bank of Idaho*, 120 Idaho 682 (1991).

22 Nuisance is also an example of a codified non-injury tort. "A nuisance signified not
 23 merely an infringement of property rights, but a wrong against both person and property — *a*
 24 *tort*." *Carpenter v. Double R Cattle Co., Inc.*, 105 Idaho 320 (Idaho App. 1983) (emphasis
 25 added). And such tort is codified as "an action" where the injurious behavior "may be enjoined
 26 or abated" as well as "*damages recovered*." Idaho Code § 52-111 (emphasis added). Although
 27 nuisance is a tort and has been codified by Idaho Code § 52-101 *et seq*, it is well settled in Idaho
 28

1 that the four-year statute of limitations provided for by Section 5-224 applies to such statutory
2 nuisance actions. See *Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 52 Idaho 766
3 (1933).

4 It stands to reason that other codified torts should also have the same statute of limitations
5 as common law negligence and statutory nuisance. After all, nuisance is a common law cause of
6 action that has found its way into Idaho Code §52-101 *et seq* and has a 4-year statute of limitation
7 under I.C. §5-224. Similarly, trustee negligence has been codified in Idaho Code §45-1205. Why
8 should trustee negligence be treated differently? Indeed, it should receive at least a four-year
9 limit like any other non-injury tort claim.

10 In the alternative to applying the 20-year limit under I.C. § 5-204, this Court should hold
11 that the catch-all statute of limitation in I.C. § 5-224 applies to any negligence action brought
12 under I.C. § 45-1205. EEF respectfully requests that this Court reverse the District Court's
13 application of a three-year statute of limitation.

14 **C. An I.C. § 45-1205 Claim Necessarily Arises Out Of Title To Real Property**

15 In Idaho, actions arising out of title to real property have a different statute of limitations
16 than other claims. Idaho Code § 5-204 provides:

17
18 No cause of action, or defense to an action, arising out of the
19 title to real property, or to rents or profits out of the same, can
20 be effectual unless it appears that the person prosecuting the
21 action, or making the defense, or under whose title the action is
22 prosecuted or the defense is made, or the ancestor, predecessor
or grantor, of such person, was seized or possessed of the
premises in question within twenty (20) years before the
commencement of the act in respect to which such action is
prosecuted or defense made. Idaho Code § 5-204.

23 EEF's I.C. § 45-1205 claim against TitleOne is clearly "arising out of the title to real
24 property" because it arises out of TitleOne's wrongful reconveyance of the Plaintiff's deed of
25 trust that, until 2010, was on the title of the Galiano Subdivision. Because the wording of Idaho
26 Code § 5-204 is sufficiently broad to include any action "arising out of" the title to real property,
27 the Court should conclude that 5-204 was intended to apply to a 45-1205 claim and reverse the
28 District Court. Under this plain language of I.C. § 5-204, the Court should reverse and apply a

1 20-year limit for actions arising out of title.

2 **V. THE DISTRICT COURT MISAPPLIED THE ECONOMIC LOSS DOCTRINE WHEN**
3 **IT DISMISSED EEF’S COMMON LAW NEGLIGENCE CLAIM**

4 The Economic Loss Doctrine was originally created as part of products liability law.
5 However, this is a case involving the negligent rendition of services. Failing to recognize this
6 difference, the District Court applied the Economic Loss Doctrine and reached an untenable
7 result. Even if the District Court had reason to apply the doctrine, TitleOne falls within the
8 exception to the rule.

9 **A. Economic Loss Doctrine Defines The Scope Of A Defendant’s Duty, And Titleone**
10 **Clearly Owed A Duty To Eagle Equity Fund**

11 In January of 2014, the District Court was asked to grant summary judgment on EEF’s
12 common law negligence claim against TitleOne. In making this request, counsel for TitleOne
13 represented to the District Court that the damages suffered by EEF were economic in nature and
14 thus were precluded by the economic loss doctrine.

15 However, TitleOne’s argument preyed upon the most common misconception regarding
16 the economic loss doctrine. In its argument to the District Court, TitleOne presented case law
17 that related to product liability, not the service liability that was at issue in this case. In 2010, this
18 Court addressed the topic of economic loss doctrine as applied to a service negligence scenario,
19 yet it was that decision in 2010 that was disregarded by the District Court.

20 The economic loss rule is a judicially created doctrine of modern products liability law.
21 *Brian and Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 25 (2010). However, this rule
22 applies to negligence cases in general, and its application is not restricted to products liability
23 cases. *Id* at 26.

24 Often misunderstood, economic loss “is not simply damages that can be measured
25 monetarily.” *Id* at 27. Actually, the economic loss rule “does not limit the damages recoverable
26 in a negligence action.” *Id* at 28. Rather, the economic loss rule just places limits on the actor’s
27 **duty** so that there is no cause of action for negligence. *Id* at 28.

28 “Every person has a general duty to use ordinary care not to injure others, to avoid injury

1 to others, to avoid injury to others by any agency set in operation by him, and to do his work,
2 render services, or use his property as to avoid such injury.” *Whitt v. Jarnagin*, 91 Idaho 181, 188
3 (1966). “In circumstances involving the rendition of personal services, the duty upon the actor is
4 to perform the services in a workmanlike manner.” *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho
5 32, 37 (1975). If the actor negligently damages another’s property in performing those services,
6 the actor is liable for such damage. *S.H. Kress & Co. v. Godman*, 95 Idaho 614 (1973).

7 Cases where the plaintiff seeks recovery for purely economic losses without alleging any
8 attending personal injury or property damages *must be distinguished* from cases involving the
9 recovery of economic losses which are parasitic to an injury to person or property. *Just’s, Inc. v.*
10 *Arrington Const. Co.*, 99 Idaho 462 footnote 1 (1978). “It is well established that in the latter
11 case *economic losses are recoverable in a negligence action.*” *Id* (emphasis added).

12 In *Brian and Christie, Inc.*, the court was faced with a situation where a contractor did a
13 shoddy job at installing wiring in a Taco Time restaurant. As a result of the contractor’s shoddy
14 wiring job, the restaurant was damaged substantially from an electrical fire. The district court in
15 *Brian and Christie* ruled in favor of the defendants because it wrongly applied the definition of
16 economic loss as it relates to the purchase of defective property. *Brian and Christie* at 27. This
17 Court explained the court’s holding: the definition of economic loss stated in *Salmon Rivers*, and
18 utilized in *Tusch, Duffin, Ramerth, Bland, and Aardema* does not apply in cases involving the
19 negligent rendition of services, because such cases do not involve the purchase of defective
20 property. *Id.*

21 This Court described the situation well when it said “Taco Time did not contend that it
22 suffered economic loss because Subcontractor sold it a defective restaurant.” *Brian and Christie*
23 at 26. “The restaurant was not defective property. It did not spontaneously combust.” *Id.*

24 In this case, TitleOne convinced the District Court to do exactly what the District Court in
25 *Brian and Christie* did. TitleOne convinced the District Court to use the reasoning in *Duffin v.*
26 *Idaho Crop Improvement Ass’n*, 126 Idaho 1002 (1995). In *Duffin*, losses suffered as a result of
27 defective potato seeds were deemed to be purely economic in nature and thus unrecoverable
28 under the theory of negligence. However, *Duffin* is entirely distinguishable from *Brian and*

1 *Christie* and the instant case because *Duffin* involved a defective product. Both *Brian and*
2 *Christie* and the instant case involve negligent rendition of services. By applying the reasoning of
3 *Duffin* to a services case such as this, the District Court did exactly what this Court condemned in
4 *Brian and Christie*.

5 This case, just like *Brian and Christie*, does not concern defective property. EEF's deed
6 of trust was not defective. It was the negligent service of TitleOne that caused the loss of EEF's
7 property interest. Such losses are recoverable in a negligence action because this is a case about
8 negligent actions that caused damage to property. See *Just's Inc.* fn 1. Just because the damage
9 can be measured monetarily, does not mean that the economic loss doctrine prohibits it.

10 EEF is asking to be compensated for the value of its deed of trust that TitleOne destroyed.
11 These damages are well within the scope of the duty owed by TitleOne. The District Court erred
12 in applying the economic loss doctrine to this scenario. EEF requests that this Court reverse this
13 decision and remand this case to the District Court where EEF's common law negligence claim
14 may proceed.

15 **B. Titleone Has A "Special Relationship" With EEF**

16 Idaho courts have acknowledged a "special relationship" exception to the economic loss
17 rule. "An exception to the economic loss rule is applicable in cases involving a "special
18 relationship" between the parties." *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d
19 997 (1978). "We have held that a party generally owes no duty to exercise due care to avoid
20 purely economic loss." E.g., *Clark* at 336, 581 P.2d at 794. The term "special relationship,"
21 therefore, refers to those situations where the relationship between the parties is such that it would
22 be equitable to impose such a duty. In other words, there is an extremely limited group of cases
23 where the law of negligence extends its protections to a party's economic interest. *Duffin v. Idaho*
24 *Crop Imp.Ass'n*, 895 P.2d 1195, 126 Idaho 1002 (Idaho 1995). Such an example recognized by
25 the Idaho Supreme Court was the relationship between an insurance agent and the insured. In
26 applying the special relationship exception, the Court emphasized the fact that an insurance agent
27 holds himself out to the public as having expertise regarding a specialized function, and that, by
28 so doing, the agent induces reliance on his superior knowledge and skill. *McAlvain v. General*

1 *Ins. Co. of America*, 97 Idaho at 780, 554 P.2d at 958.

2 However, the special relationship exception is not limited to the “professional”
3 relationship such as the insured/insurance agent relationship in *McAlvain*. In *Duffin*, because the
4 seed company (ICIA) was the only company in the state that could certify seed potatoes, it knew
5 that one could sell the certified seeds at a higher price. ICIA even marketed itself based on that
6 fact. The very purpose of such marketing was to induce reliance by purchasers on the fact that
7 seed has been certified. “Under such circumstances, ICIA occupies a special relationship with
8 those whose reliance it has knowingly induced.” *Duffin v. Idaho Crop Imp.Ass'n*, 895 P.2d 1195,
9 126 Idaho 1002 (Idaho 1995).

10 The most recent Idaho Supreme Court case to address this exception was *Aardema v. U.S.*
11 *Dairy Systems, Inc.*, 215 P.3d 505, 147 Idaho 785 (Idaho 2009). This case dealt with a Plaintiff
12 that contracted with the Defendant to install and maintain a milking system for their dairy.
13 Plaintiffs alleged negligent design, installation and maintenance of the milking system which
14 resulted in decreased milk production, quality and damage to the cows. That opinion synthesized
15 the exception into two situations in which a “special relationship” exists. The Court stated:

16 A special relationship exists where the relationship between the
17 parties is such that it would be equitable to impose such a
18 duty.” *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201. The special
19 relationship exception to the economic loss rule is an extremely
20 narrow exception which applies in only limited circumstances.
21 This Court has found a special relationship to exist in only two
22 situations, (1) “ where a professional or quasi-professional
23 performs personal services [;]” and (2) “ where an entity holds
24 itself out to the public as having expertise regarding a
25 specialized function, and by so doing, knowingly induces
26 reliance on its performance of that function.” *Blahd*, 141 Idaho
27 at 301, 108 P.3d at 1001; see *McAlvain v. Gen. Ins. Co. of Am.*,
28 97 Idaho 777, 780, 554 P.2d 955, 958 (1976); see also *Duffin*,
126 Idaho at 1008, 895 P.2d at 1201.

24 TitleOne performs both personal services and it holds itself out as having expertise
25 regarding a specialized function...reconveyancing of title as a trustee. When doing a
26 reconveyance, TitleOne is required to follow the statutory requirements of Idaho Code §45-1203
27 which is a specialized function. The public relies on title companies to follow the statutory
28

1 requirements. Thus, a special relationship exists between title companies and any holder of a
2 deed of trust. As such, equity demands that a duty be imposed on title companies, and fault
3 should lie under a theory of negligence where a title company such as TitleOne breaches its duty.
4

5 **VI. THE DISTRICT COURT FAILED TO ALLOW AMENDMENT TO INCLUDE A**
6 **MERITORIOUS QUIET TITLE CLAIM**

7 Although amendments to the pleadings are to be liberally granted, the District Court
8 decided to disallow amendment by incorrectly analyzing EEF's proposed quiet title claim. EEF
9 requested permission to amend the pleadings to include a claim for quiet title against the current
10 titleholder, Corey Barton Homes, Inc. ("CBH"). In this quiet title claim, EEF sought to assert
11 that CBH was on inquiry notice of the existence of EEF's deed of trust and that equity demanded
12 that the property still be subject to that deed of trust. The District Court incorrectly concluded
13 that CBH did not have inquiry notice of EEF's deed of trust and thus denied EEF's *Motion to*
14 *Amend*.

15 **A. CBH Had Inquiry Notice Of EEF's Deed Of Trust When It Took Title To The**
16 **Galiano Property.**

17 In Idaho, buyers are on notice of facts that can be discovered through an inquiry. It has
18 long been established that a purchaser is charged with every fact shown by the records and is
19 presumed to know every other fact which an examination suggested by the records would have
20 disclosed. *Kalange v. Rencher*, 136 Idaho 192, 195 (2001) (citing *Cordova v. Hood*, 84 U.S. 1
21 (1873) and *Northwestern Bank v. Freeman*, 171 U.S. 620 (1898)). One claiming title to lands is
22 chargeable with notice of every matter affecting the estate, which appears on the face of any
23 recorded deed forming an essential link in his chain of title, and also with notice of such matters
24 as might be learned by inquiry which the recitals in such instruments made it a duty to pursue. *Id*
25 at 196 (citing *Glover v. Brown*, 32 Idaho 426 (1919)). In addition to giving notice to others that
26 an interest is claimed in real property, the recording statutes give protection against *bona fide*
27 third parties who may be dealing in the same property. *Id* at 196.

28 In this case, the *Affidavit of Aaron J. Tribble* filed August 8, 2014, contains the facts that

1 form the basis of a quiet title claim, some of which were uncovered in the discovery process.

2 Three particular facts point towards CBH having inquiry notice.

3 First, the documents relating to the EEF deed of trust were recorded in an incorrect order.
4 Ordinarily, partial reconveyances are recorded prior to any full reconveyance because after the
5 recording of a full reconveyance, there is no interest left to convey. In this case, the Ada County
6 records show that there were two partial reconveyances followed by TitleOne's full reconveyance
7 followed months later by a couple more partial reconveyances. Once a full reconveyance has
8 been executed, there is no longer any interest left to reconvey, thus a partial reconveyance
9 occurring after a full reconveyance indicates a potential problem in the chain of title. Either the
10 people doing the partial reconveyances were confused about the state of their property interest, or
11 the full reconveyance was recorded in error. Either way, facts as they appear in the Ada County
12 records indicate that some kind of inquiry is necessary to discern what went wrong. Both CBH
13 and their predecessor DAS has access to the same county records and therefore were on inquiry
14 notice of EEF's lien.

15 Second, the full reconveyance was not signed and recorded by the Trustee of Record or
16 anyone having a property interest in the Galiano Subdivision. The basis of title in property is the
17 chain of title. Interests in property are handed from a grantor to a grantee, and the grantors title is
18 traceable back through a chain of grantors and grantees. If a grantor conveys without being a part
19 of the chain of title, the conveyance is voidable. In this case, the Ada County records show that
20 TitleOne reconveyed the EEF deed of trust. However, the Ada County Records also clearly show
21 that TitleOne was never a trustee on the EEF deed of trust, so TitleOne was not in the chain of
22 title for this property. This is a major red flag to any potential buyer examining the records,
23 because TitleOne had no property interest to reconvey. TitleOne was not in the chain of title.
24 Certainly, this would warrant an inquiry by CBH and DAS into TitleOne's status as trustee.

25 Third, TitleOne on the face of the reconveyance claims to actually be the Trustee, but the
26 records at the time show the exact opposite. Not only was TitleOne absent from the chain of title,
27 but they actually claimed to be in the chain of title in the reconveyance document. By claiming
28 status as trustee when the records clearly show they are not, TitleOne created another reason for

1 inquiry into the reconveyance recorded in February 2010.

2 Any inquiry into the basis of the reconveyance document would have shown that the
3 document was a sham; a bad accident at best. As the *Affidavit of Aaron J. Tribble* shows,
4 TitleOne admitted in deposition that it was never trustee, and TitleOne had no evidence of
5 payment in full. Therefore, any inquiry by CBH and DAS would have put a buyer on notice of
6 EEF's active lien because the county records, and their contents, suggest that an inquiry is
7 necessary to resolve questions about (1) chain of title, (2) the false information in the
8 reconveyance, and (3) the suspicious order of the recordings. Therefore, a claim of quiet title
9 would likely succeed against Corey Barton because they had inquiry notice of EEF's lien prior to
10 taking title.

11 **B. The District Court Had No Basis To Deny The Inclusion Of A Meritorious**
12 **Claim**

13 The District Court abused its discretion in denying EEF's *Motion to Amend*. When
14 determining whether a trial court has abused its discretion, this Court asks: "(1) whether the court
15 correctly perceived the issue as one of discretion; (2) whether it acted within the outer boundaries
16 of that discretion and consistently with any applicable legal standards; and (3) whether it reached
17 its decision by an exercise of reason." *Hough v. Fry*, 131 Idaho 230, 232, 953 P.2d 980, 982
18 (1998) (internal citations omitted). A detailed examination of IRCP 15(a) was set forth by the
19 Court in *Carl H. Christensen Family Trust*:

20
21 The twin purposes behind the rule are to allow claims to be
22 determined on the merits rather than on technicalities, and to make
23 pleadings serve the limited role of providing notice of the nature of
24 the claim and the facts at issue.

25 It is within the district court's sound discretion to decide whether to
26 allow a party to amend its complaint after a responsive pleading has
27 been served. "[I]n the interest of justice, district courts should favor
28 liberal grants of leave to amend a complaint."

Carl H. Christensen Family Trust v. Christensen, 133 Idaho 866, 871
(1999) (internal citations omitted).

Factors that this Court considers when reviewing a trial court's decision to grant a motion

1 to amend include: 1) if the amended pleading provides a valid claim; 2) if the opposing party
2 would be prejudiced by the delay in adding the new claim; and 3) if the opposing party has an
3 available defense such as the statute of limitations. *Black Canyon Racquetball Club, Inc. v. Idaho*
4 *First Nat'l Bank*, 119 Idaho 171, 175 (1991). If the opposing party has such a defense, it is not an
5 abuse of discretion for the trial court to deny the motion to file the amended complaint. *Id.*

6 In this case, EEF sought to amend the complaint to include a claim for quiet title against
7 CBH, the current titleholder. In that motion, EEF requested that the District Court find that CBH,
8 and their predecessor DAS, had inquiry notice of EEF's deed of trust and declare EEF's deed of
9 trust to be valid and have priority against any other subsequent liens on the property. At issue in
10 the motion was only one of the factors described in *Black Canyon Raquetball Club*. CBH simply
11 opposed the *Motion to Amend* based on the validity of the claim due to lack of inquiry notice.
12 CBH raised no potential defenses and cited no prejudice.

13 As was discussed above, the District Court concluded that there was no inquiry notice; not
14 even a factual issue of inquiry notice. The District Court simply disallowed the *Motion to Amend*
15 because it did not believe that there was any validity to the claim. As was shown above, the
16 District Court erred in finding that there was no inquiry notice to CBH or DAS. However, CBH
17 and DAS were on inquiry notice of EEF's deed of trust. The Court should hold that it was an
18 abuse of discretion to deny amendment based on the District Court's error concerning inquiry
19 notice. This Court should reverse the District Court's holding on inquiry notice and order an
20 amendment to the pleadings to allow the inclusion of a quiet title claim.

21 CONCLUSION

22 In this case, the District Court committed errors of law that have deprived EEF of its right
23 to a jury trial. First among these errors is the dismissal of EEF's claim for common law
24 negligence against TitleOne. The economic loss doctrine is not bar for damages flowing from
25 this type of negligence. TitleOne is in the service business, the business of creating and filing
26 title documents. Their negligent rendition of services directly damaged EEF's interest in the
27 Galiano property. And TitleOne certainly owed EEF a general duty of care to not harm EEF's
28 property interest. As such, economic loss doctrine does not lie in this situation. The Court should

1 reverse the District Court's holding concerning the economic loss doctrine.

2 The District Court erred in concluding that there was no damage suffered in EEF's claims
3 for Violation of I.C. § 45-1205 and TIPEA against TitleOne. In this case, EEF lost its right to
4 notice, which was a right to participate in the short sale. Consequently, EEF was deprived of its
5 opportunity protect its security interest and to capture any of the over \$250,000 profit that DAS
6 immediately realized. There was money to be made on this property. DAS made it. EEF wasn't
7 given the chance. In fact, the District Court drew the inference of value against EEF in
8 contravention of the summary judgment standards. The Court should reverse this erroneous
9 holding concerning the issue of damages.

10 The District Court also misapplied the statute of limitations on EEF's statutory negligence
11 claim for two alternate reasons. First, the District Court held that the cause of action accrued
12 almost two years earlier than it should have. Indeed, EEF did not truly suffer any damage until
13 the property was transferred to a BFP. Should the property records not be found to give inquiry
14 notice of a title flaw, then damage was suffered once DAS took title to the Galiano property.
15 Alternatively, the District Court should not have used the 3-year limitation period reserved for
16 purely statutory liabilities. The Court should either reverse the District Court's error of accrual
17 date or reverse the District Court by applying the correct 4 or 20-year statute of limitations.

18 Finally, the District Court abused its discretion by denying the inclusion of a meritorious
19 claim for quiet title against Corey Barton Homes, Inc.. The Ada County property records very
20 clearly show that TitleOne was never the trustee of EEF's Deed of Trust. Yet, those records show
21 that TitleOne falsely claimed to be trustee and then reconveyed EEF's interest. The records also
22 show that EEF was unaware of what TitleOne had done because EEF was still recording partial
23 reconveyances even after TitleOne had already reconveyed the whole interest. These defects in
24 title clearly warrant inquiry, and any inquiry would have revealed that EEF was never satisfied.
25 Thus, DAS and CBH cannot be bona fide purchasers of that property because they were on
26 inquiry notice of TitleOne's negligent or intentional false reconveyance. The Court should
27 reverse the District Court and hold it to be an abuse of discretion to not allow the inclusion of this
28 meritorious claim for quiet title.

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Dated: October 30, 2015

Respectfully Submitted,

By: 

AARON J. TRIBBLE
Attorney for Appellant

CERTIFICATE OF SERVICE

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I hereby certify that on this 30th day of October, 2015, I caused true and correct copies of this document to be served on the following individual by US Mail.

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