11-12-2018

First Bank of Lincoln v. Land Title of Nez Perce County, Inc. Appellant's Reply Brief Dckt. 46000

IN THE SUPREME COURT OF THE STATE OF IDAHO

FIRST BANK OF LINCOLN, a Montana bank corporation,

Plaintiff/First Bank,

vs.

LAND TITLE OF NEZ PERCE COUNTY INC., an Idaho Corporation,

Defendant/Land Title.

SUPREME COURT NO. 46000-2018

FIRST BANK OF LINCOLN'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF NEZ PERCE

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HONORABLE JEFF BRUDIE, DISTRICT JUDGE PRESIDING

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Scott C. Cifrese, ISB #4965
Gregory S. Johnson, ISB #9664
PAINE HAMBLEN LLP
717 West Sprague Avenue, Suite 1200
Spokane, WA 99201
(509) 455-6000
scott.cifrese@painehamblen.com
greg.johnson@painehamblen.com

Attorneys for Appellant/First Bank

Thomas E. Dvorak, ISB #5043
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
(208) 388-1200
ted@givenspursley.com

Attorneys for Appellee/Land Title

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First Bank of Lincoln ("First Bank") submits this brief in reply[1] to Land Title of Nez Perce County's ("Land Title") Respondent's Brief. For reference convenience, as much as possible, First Bank's Reply Brief utilizes the same outline as the Respondent Land Title's Brief.

I. CASE STATEMENT

A. Nature Of The Case And Argument Summary.

Land Title frames this matter as whether a secured creditor should recover twice for the same debt and recover an unjustified windfall. Land Title's "double recovery/windfall" claim is a false premise that ignores the uncontested facts and pleadings of this matter, all of which establish that First Bank does not seek double recovery. Instead, First Bank seeks to be made whole by recovering the amount of its original loan ($440,000.00), less what it received when it resold the Hotel Lincoln to a good faith purchaser ($190,000.00).[2]

There is little doubt that First Bank incurred damages in this matter as it was never repaid the full amount of the Hotel loan. The primary issues before this Court are: (1) did the District Court err as to Montana deficiency law and the full credit bid rule; and (2) who proximately caused the First Bank's loan shortfall and therefore should be held liable for it?

It is uncontested that Tuschoff's Hotel loan could not take place without sufficient collateral. This collateral was comprised of the Hotel and Tuschoff's interest in the Bowling

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[1] Errata: First Bank's initial brief at pg. 32, line three contains a "typo:" The phrase "not untenable" is incorrect; the word "not" should be deleted.

Alley. When Tuschoff's rights in the Bowling Alley were assigned to First Bank, it stood in Tuschoff's shoes and whatever rights Tuschoff had, and whatever duties Land Title owed Tuschoff, were transferred to First Bank.

Further, when the Bowling Alley was to be sold, Land Title had notice of First Bank's interest. Land Title was directed to pay off First Bank's interest and Land Title represented that it would do so. At the time of closing, despite the assignment and in breach of its fiduciary duty and contractual obligations, Land Title negligently distributed the Bowling Alley sale funds to Tuschoff and paid nothing to First Bank. First Bank submits that under commonly accepted majority law, Land Title is responsible for these breaches, its negligence, and the damages that stem from its nonfeasance.

In response, Land Title argues that under Montana deficiency law and the full credit bid rule, its nonfeasance is excused, because under the plain terms of Montana's anti-deficiency statute there can be no loan deficiency and at the Hotel foreclosure sale, First Bank made a full credit bid which extinguished the loan debt.

First Bank replies that Montana's anti-deficiency law does not apply to commercial transactions such as the one at bar. The parties agree that the full credit bid rule was meant to protect borrowers, not third-parties. Land Title concedes an exception to the full credit bid rule, but claims the exception is limited to instances of fraud or misconduct. First Bank responds that the failure of an escrow agent to properly pay out funds held in trust

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[2] The amounts used are a close example, but do not include contractually required interest, payments, fees, costs, etc.

constitutes misconduct and cites case law which holds that matters involving breach of contract, breach of fiduciary duty, negligence, and negligent misrepresentation are also excepted from the full credit bid rule. Hence, as a matter of law, neither the Montana anti-deficiency statute nor the full credit bid rule apply to this matter and the District Court erred when it ruled otherwise.

In short, the instant case is one where Land Title blames First Bank for Land Title's nonfeasance. Timing and sequencing are important and show that Land Title, while acting as an escrow, held funds in trust, that, via assignment, belonged to First Bank. There is little doubt Land Title was acting in a fiduciary capacity. Given Land Title's fiduciary duties and contractual obligations, it should have paid First Bank when the Bowling Alley sale closed. Had Land Title done so, the sale funds would have been applied to Tuschoff's Hotel loan and Land Title's failure would not have opened the door to default and foreclosure. But for Land Title's nonfeasance, none of us would be before the Court.

The uncontested facts and concomitant law establish that Land Title was the direct and proximate cause[3] of the damages sustained by First Bank. Land Title should be held liable as a matter of law and the District Court's failure to do so constitutes an error of law. In the alternative, there are genuine issues of material fact that preclude summary judgment.

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[3] IDJI 2.30.1 sets forth the jury instruction for the proximate cause, "but for" test, and provides, in part: "proximate cause" means "a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage." (emphasis added)

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

In its motion for summary judgment, Land Title asserted that there were no issues of material fact and it sought dismissal of all of the causes of action of First Bank's complaint. In its cross-motion for summary judgment, First Bank averred that there were no issues of material fact and it pursued judgment on the causes of action of its complaint.

In the lower court's Opinion and Order on Summary Judgment (CR pgs. 723 - 730), the Honorable Judge Jeff Brudie addressed Montana deficiency law and the full credit bid rule. Notably, he stated: "[h]aving granted Land Title's motion for summary judgment [on the basis of Montana deficiency law and the full credit bid rule] the Court need not decide the other issues raised on summary judgment by either party." *Id.*, at pg. 6, Ftn 8.

Land Title's Response brief at § II (B), pg. 11, raises issues as "alternative grounds" which "provide an independent basis to uphold the District Court's decision." Because the District Court did not address the alternative grounds, First Bank did not address these alternative grounds in its original brief. Via Land Title's alternative grounds argument, it has opened the door to these additional appeal issues:

> Whether the District Court erred when it did not hold that Land Title was negligent as a matter of law;
>
> Whether the District Court erred when it failed to hold that Land Title breached its contract and harmed First Bank;
>
> Whether the District Court erred when it did not order Land Title to specifically perform the contract and pay First Bank in accordance with the escrow instructions; and

Whether the District Court erred when it did not hold that Land Title should be estopped from not doing what it was supposed to do and represented, in writing, that it would do.

In its Response In Opposition to Summary Judgment CR 468 – 507, as to summary judgement and issues of fact Land Title argued:

> First Bank is in error in so indicating or implying that Land Title does not take issue with the underlying facts in this regard. In the event that the Court finds the grounds raised in Land Title's motion for summary judgment are not appropriate to grant Land Title summary judgment in its favor, evaluation of the remaining arguments in Plaintiff's Memo. will show that those arguments fall short of demonstrating the absence of a material issue of fact such as to justify granting summary judgment in First Bank's favor.

CR 471. Land Title next argued that even if the full credit bid rule was not applied a material issue of fact as to the fair market value of the property exists, precluding summary judgment. CR 481 and 482. Land Title went on to argue that there is an issue of fact as to negligence in the form of a deviation from applicable duty. CR 488 and 489. With regard to First Bank's estoppel action Land Title argued that: "[a]t the very least, there is a triable issue of fact as to whether there is an enforceable contract between Land Title and First American upon which Plaintiff's equitable estoppel claim may be based. Either way, summary judgment on this claim in favor of First Bank is inappropriate." CR 496 – 497. Land Title further argued that issues of comparative fault vis-à-vis First American Title and Land Title preclude summary judgment, citing its affirmative defenses. CR 497. In conclusion, Land Title stated:

> For the reasons set forth above, there are a number of legal defenses raised in Land Title's Motion for Summary Judgment that provide independent grounds for dismissing some or all of First Bank's Complaint,

> including the Montana Anti Deficiency Statute, the Full Credit Bid Rule, the Economic Loss Rule and others. However, if the Court finds that those do not apply to dismiss the case, then genuine material issues of fact stand in the way of summary judgment in favor of First Bank, including the failure to identify a duty owed, issues of comparative fault, contributory negligence and failure to make out a prima facie case on damages/mitigation of damages and election of remedies.

CR 505 – 506. Hence, as to issues that are before the Court, Land Title has argued that there are genuine issues of material fact that preclude summary judgment.

III. ATTORNEY FEES ON APPEAL

No reply is necessary to this section, but *see, infra*, at § IV D.

IV. LEGAL ARGUMENT

A. Standard Of Review.

No reply is necessary.

B. Montana Deficiency Law And Modern Full Credit Bid Rule Law Establish That The District Court Erred.

Montana law's anti-deficiency statute does not apply to commercial property. Montana law also requires that its courts consider the intrinsic value of the property sold. The District Court erred when it did not hold that there was a deficiency in the matter at bar. The District Court further erred when it held that the full credit bid rule bars First Bank's claims.

1. Montana's Anti-Deficiency Statute Does Not Apply To Commercial Property.

Land Title argues that the plain language of Montana's anti-deficiency statute justifies the District Court's decision. Land Title's claim ignores the Montana Supreme

Court's interpretation of the anti-deficiency statute, ignores the clear language of *First State Bank v. Chunkapura*, 226 Mont. 54, 66-67, 734 P.2d 1203, 1210 (1987), and disregards the Honorable James P. Reynolds' Opinion (*See*, Appendix 8 - 19) that construes Montana law as it applies to the facts of this case.

When construing § 71-1-317, the Montana Supreme Court has unfailingly limited this statutory prohibition to deeds of trust used as security for the financing of occupied, single-family, residential property. *Chunkapura*, *supra*, ("Our opinion in this cause is . . . to be considered as precedent only for trust deeds related to occupied, single family residential property." Order on Rehearing, 734 P.2d at 1211). *See also*, *First Federal Savings and Loan Association of Missoula v. Anderson*, 238 Mont. 296, 777 P.2d 1281 (1989), where the Montana Court upheld *Chunkapura,* so far as it relates to single family, occupied residential property. *Trs. of Wash.-Idaho-Mont. Carpenters-Emp'rs Ret. Trust Fund v. Galleria P'ship*, 239 Mont. 250, 780 P.2d 608 (1989) ("*Galleria I*") where the Court determined "[w]hen a lender holding a trust indenture as security chooses to foreclose under the mortgage laws, *Chunkapura* as modified holds that except for occupied single family residential property, lenders can obtain a deficiency judgment even on trust indentures." 239 Mont. at 258, 780 P.2d at 613. These three cases establish that the Montana Supreme Court protects consumers of occupied, single family residences from deficiency judgments, however the Montana Court has not expressed an intent to protect commercial loans such as the one at bar.

Land Title casts *Chunkapura* as an ambiguous case that may or may not apply to trustees' sales of commercial property. In fact, the rehearing opinion in *Chunkapura* is clear

that the anti-deficiency statute does not apply to commercial property, regardless of the type of foreclosure sale. The *Chunkapura* rehearing opinion states:

> The rationale of our decision in *Chunkapura* is based upon the "quid pro quo" suggested to the legislature to secure passage of the Small Tract Financing Act, that is the giving up of a deficiency judgment on the one hand by the lenders in exchange for the giving up by the borrowers of the right of possession to the property for one year and the right of redemption after foreclosure sale. Such quid pro quo does not apply to loans made in commercial settings, nor to trust deeds secured by residential or other property which are only part of larger, more complex loans for commercial or agricultural purposes.

Chunkapura, supra., 226 Mont. 54, 66-67, 734 P.2d 1203, 1210 (1987) (emphasis added).

Montana's anti-deficiency statute was adopted to exchange a borrower's right of redemption for the lender's right to pursue a deficiency. *Id.* Because there is no right of redemption for commercial property in Montana, the Montana Supreme Court recognized that lenders must retain the right to pursue a deficiency for commercial property. *Id.* The reasoning and ruling of *Chunkapura* does not distinguish between judicial sales and trustee's sales. The District Court therefore correctly declined to apply the anti-deficiency statute to the commercial property at issue here.

Land Title's deficiency judgment analysis also avoids the Order on Motion for Summary Judgment (Appendix 8 - 19) issued by Judge Reynolds in the Montana District Court of the First Judicial District (See, Appendix 8 - 19). Judge Reynolds is, to date, the only Montana Judge who has construed Montana law as it applies to the facts of this case. Pointedly, in accordance with Montana law, Judge Reynolds held that because the trust indenture was not for a single family residence, but for a commercial transaction, a

deficiency amount owing could be calculated. Appendix 16. Likewise, he noted that foreclosing on a trust indenture for a commercial transaction can result in a deficiency amount being owed to the lender, concluding: "in this case, the Bank could claim a deficiency amount owing if the amount bid was insufficient to satisfy the Bank's loan." Appendix 17.

In accordance with three cited holdings of the Montana Supreme Court, and Judge Reynold's opinion, which cites and applies *Galleria I*, *supra*, First Bank can claim a deficiency amount owing.

2. Montana Law Requires Courts To Consider The Intrinsic Value Of Property Sold To Determine A Deficiency.

a. *Stuart does not control deficiencies following the foreclosure of commercial property.*

Appellee cites numerous authorities from jurisdictions other than Montana in support of its argument for application of the full credit bid rule. Deficiency law and the full credit bid rule are inexorably intertwined and Montana case law is controlling on the question of how a trustee's sale bid should be applied to a deficiency amount on Montana commercial property. Thus, this Court need not look to other jurisdictions. As to Montana law, Land Title cites two cases: *Rocky Mt. Bank v. Stuart*, 280 Mont. 74, 928 P.2d 243 (1996); and *Jurgens v. Hauser*, 19 Mont. 184, 47 P. 809 (1897).

Stuart concerned a credit bid at a trustee's sale of residential property under the Small Tract Financing Act. *Stuart*, 280 Mont. at 77, 928 P.2d at 245. *Stuart* did not, and due to its factual background could not, decide the question of how deficiencies are calculated in

a foreclosure of commercial property. Instead, *Stuart* simply acknowledged that a credit bid was a proper means of bidding at a foreclosure sale. *Id.*, 280 Mont. at 81, 928 P.2d at 247. Moreover, the general proposition for which Appellee cites *Stuart*—that a credit bid is equivalent to a cash bid—was qualified by the *Galleria* line of cases, which hold that the "intrinsic value" of the real property is the only measure of the deficiency, rather than the amount bid at the sale. *Galleria I, supra. See also Trs. of Wash.-Idaho-Montana Carpenters-Employers Ret. Tr. Fund v. Galleria P'ship*, 250 Mont. 175, 819 P.2d 158 (1991) ("Galleria II"). The *Stuart* Court did not address the deficiency question, and if it had, the residential property at issue in that case would have been squarely controlled by the Montana anti-deficiency statute, as provided in *Chunkapura, supra. Stuart* is, therefore, immaterial to the question of how Montana law determines a deficiency following foreclosure of commercial property.

In *Jurgens, supra*, the Court decided whether a sheriff was entitled to the costs of sale when mortgaged property was sold to a creditor at foreclosure. *Jurgens*, 19 Mont. at 186, 47 P. at 810. Like *Stuart*, *Jurgens* does not address the deficiency question. Instead, *Jurgens* held that a sheriff is entitled to the statutory commission for a sale to a creditor, because the creditor accepted the real estate in lieu of cash. *Id.*, 19 Mont. at 187, 47 P. at 810. In the present case, there is no dispute that a sale took place or that First Bank took possession of the real estate in lieu of cash. The only outstanding question regarding the foreclosure is the amount of money Tuschoff is entitled to have credited against his Bank

debt. That question is currently being answered by the Montana First Judicial District Court under the precedent set in the *Galleria* cases, rather than *Jurgens*.

b. *In Montana, the deficiency on commercial property is determined by the property's intrinsic value, not the amount bid at foreclosure.*

In its Response In Opposition to Summary Judgment Land Title argued that even if the full credit bid rule was not applied a material issue of fact as to the fair market value of the property exists, precluding summary judgment. CR 481 and 482. Land Title misconstrues Montana law as the deficiency on commercial property is determined by the property's intrinsic value, not the amount bid at foreclosure.

Land Title incorrectly asserts the *Galleria* line of cases is applicable only to cases wherein the property's fair market value exceeds the amount bid at sale. Land Title reasons that a bank should not be entitled to the same equitable analysis of a property's intrinsic value, for fear that some banks would obtain a double recovery through "unscrupulous" bidding practices. As First Bank has consistently maintained, it has never sought double recovery, rather it only seeks to be made whole. Further, the *Galleria* cases make clear, there is no possibility of a double recovery when the Court objectively determines the intrinsic value of the property sold.

In *Galleria* I, the Montana Supreme Court observed that mortgage foreclosure proceedings rest in the court's equity jurisdiction. *Galleria* I, 239 Mont. at 265, 780 P.2d at 617. The equitable nature of foreclosure proceedings required the trial court to look beyond the bid amount and determine the intrinsic value of the property. *Id.* In foreclosure

proceedings, regardless of the relative value of the bid and the property's intrinsic value, Montana courts have equitable power to determine the intrinsic value of the foreclosed property. The Montana First Judicial District Court is currently engaged in this equitable analysis.

> In *Galleria*, the Court was concerned about the effect of a "low-ball" bid. Nonetheless, the Court cautions against using the amount bid at the trustee's sale as the sole determinant of the fair market value of the property being sold. In the present case, the parties apparently acknowledged that the hotel alone was not adequate to secure the loan from the Bank to Parks. For this reason, the parties agreed to pledge additional security from the Washington bowling alley.
>
> This raises a genuine issue of material fact which precluded granting Parks' motion for summary judgment. The Court will need to take in additional evidence to determine if the Bank is owed a deficiency amount by Parks.

Order on Motion for Summary Judgment, 11–12, Montana First Judicial District Court, Cause No. DDV-2014-326 (July 19, 2018).

It was error for the District Court to conclude that First Bank was not entitled to a deficiency. That error is placed in sharper contrast now that a Montana court, applying Montana law, is taking evidence on the intrinsic value of the property to determine the deficiency. Moreover, it is precisely this inquiry into the property's intrinsic value that will ensure neither First Bank nor the borrowers end up with a windfall. The Montana court's determination will ensure that the borrowers are credited the intrinsic value of the property at the time of foreclosure — nothing more and nothing less. First Bank, meanwhile, will be entitled to pursue any deficiency left after the value of the property is deducted from the amount owed. As a matter of law, First Bank can claim a deficiency amount owing and the

District Court's holding to the contrary constitutes an error of law. In the alternative, there are material issues of fact that preclude summary judgment.

3. The Full Credit Bid Rule Does Not Bar First Bank's Causes Of Action.

Land Title argues that the full credit bid law meant to protect borrowers from double recoveries, creditor windfalls (Respondent's Brief pgs. 16 – 18) and "unscrupulous underbidding by lenders at foreclosure sales to drive the price down." Respondent's Brief, pg. 22). Land Title's arguments are founded on false premises. First Bank does not seek a double recovery. Instead, it only seeks to be made whole. Second, it is uncontested that First Bank did not engage in underbidding. Third, as set forth above, under Montana law, any deficiency on commercial property is determined by the property's intrinsic value, not the amount bid at foreclosure and this works against a double recovery. Because the very reasons for application of the full credit bid rule are not present, it is inapplicable.

a. *First Bank seeks to be made whole.*

The uncontested facts of this matter establish that First Bank provided the Hotel loan only because it was secured via the Hotel and the Bowling Alley. When, the Bowling Alley was to be sold, First Bank's Bowling Alley interest appeared in the title report. Land Title, who was acting as an escrow, was directed to pay off First Bank's interest and Land Title represented it would do so. Had Land Title done what it was required to do, First Bank would have been paid and would have applied the Bowling Alley sale funds to the Hotel loan. The Hotel loan would have been greatly reduced, such that there may have been enough equity in the Hotel to cover the loan and therefore renew it. In the alternative, had

Tuschoff defaulted, First Bank would have bid on the Hotel, resold it, and any overage between the amounts received from the Bowling Alley and the resale of the Hotel and what was due on the loan would have been returned to Tuschoff. In either event, there would not have been a double recovery or a windfall.

In its brief at page 2, § B, Land Title states that the "[t]he Complaint alleges that First Bank suffered damages in the amount of the original loan . . . , less the fair-market value of the Hotel Lincoln." Land Title's admission demonstrates that First Bank does not seek double recovery. Rather, First Bank seeks that amount of its original loan, less what it received from a good faith buyer for the Hotel, plus interest, fees and costs.

In its full credit bid argument Land Title claims the full credit bid rule keeps lenders from cutting off or discouraging lower bidders and "deprives the sale of whatever leaven comes from other bidder." Respondent's Brief, pg. 18. Land Title has consistently argued that First Bank was the only bidder at the sale. Respondent's Brief, pg. 8. Hence, the "other bidder" issues raised by Land Title, by its own admission, would not have occurred.

Land Title's arguments are based on false premises and are without merit.

b. *None of the full credit bid rule cases cited by Land Title address the facts at bar.*

None of the full credit bid rule cases cited by Land Title address the material facts of this matter. Significantly, First Bank's loan was contingent upon two pieces of collateral, not one; none of the cases cited by Land Title address this material fact. Further, in Judge Reynold's Order on Summary Judgment, which addresses the facts of the instant case, he

held that the additional security that was the Bowling Alley raised a genuine issue of material fact that precluded summary judgment. First Bank's Appendix, pg. 19.

Moreover, in the matter at bar, the collateral that was the Bowling Alley closed first. Had Land Title done what it was obligated to do, the Bowling Alley funds would have been provided to First Bank and then applied to Tuschoff's loan. As a result, what was due and owing on the Hotel loan would have been known. Had Tuschoff defaulted on the Hotel loan, First Bank could have bid accordingly (there were no other bidders) and any overages would have been returned to Tuschoff.

Similarly, unlike the cases cites by Land Title, in this matter there is not a monetary shortfall due to application of the full credit bid rule. Rather, there is a shortfall because Land Title breached its fiduciary duty and it failed to do what it said it would do. It is not equitable for Land Title to be the self-created proximate cause of the issues at bar, and then benefit from it nonfeasance at First Bank's expense.

c. *Full credit bid rule law holds that actions against non-borrower third parties such as Land Title are viable.*

On one hand, Land Title claims that emerging full credit bid law, which holds that actions against third parties such as Land Title are not barred, does not apply to this matter. Respondent's Brief § IV (2)(d), pgs. 25 – 39. On the other hand, Land Title concedes that as it argued below, there are exceptions to the full credit bid rule and "an action against a third party will still lie in the face of the Full Credit Bid Rule where an erroneous full credit bid was proximately caused by the defendant's fraudulent misrepresentations or misconduct,"

citing, *All. Mortg. Co. v. Rothwell*, 10 Cal. 4th 1226, 1247, 900 P.2d 601, 614 (1995) (emphasis added) Respondent's Brief, pg. 25.

Land Title quotes a small portion of *All. Mortg. Co* and concludes that because there is no dispute that Land Title had nothing to do with the bid made by First Bank, the fraud/misconduct exception does not apply. Land Title's quote is misleading and its "no dispute" conclusion, erroneous.

This issue and holding of *All. Mortg. Co.,* was self-stated by the Court:

> We here determine whether a lender's acquisition of security property by full credit bid at a nonjudicial foreclosure sale bars the lender as a matter of law from maintaining a fraud action against third party nonborrowers who fraudulently induced the lender to make the loans. The Courts of Appeal are in conflict on this issue. We granted review to resolve the conflict, and now conclude that such an action is not precluded. We therefore affirm the judgment of the Court of Appeal.

10 Cal.4th 1231. As Land Title concedes and *All. Mortg. Co*, holds in the instance of fraud or misconduct, actions against third party nonborrowers are not precluded.

First Bank disputes Land Title's claim that it had nothing to do with First Bank's bid and its implication that its actions did not constitute misconduct. As discussed above, given First Bank's interest in the Bowling Alley, had Land Title done what it was required to do, and paid First Bank the sale funds from the Bowling Alley, those funds would have been applied to Tuschoff's loan and First Bank would have known precisely what was due at the time of the Hotel auction and therefore what to bid (amount of the loan due, minus the Bowling Alley funds = bid amount). As it turned out, due to Land Title's nonfeasance, First Bank was unable to discern a correct bid amount until the Hotel was resold because, at the

time of the Hotel foreclosure, it could not know what the Hotel resale would provide. There is little doubt this untenable situation was proximately caused by Land Title's failure to pay First Bank when the Bowling Alley sale closed. Thus, Land Title's nonfeasance had much to do with First Bank's bid.

Land Title claims that fraud or misconduct are the only exceptions to the full credit bid rule. Response Brief, pg. 26. Land Title's nonfeasance via its failure to pay First Bank the funds it held in trust meets the definition of "misconduct." Additionally, the cases cited by First Bank establish that fraud and misconduct are not the only exceptions to the full credit bid rule. *Bank of America, NA v. First American Title Insurance Co.*, 499 Mich. 74, 878 N.W.2d 816 (2016) ("closing instructions constitute a contract upon which a breach of contract claim can be brought." *Id.* at 80, 878 N.W.2d at 818.); *Kolodge v Boyd*, 88 Cal.App.4th 349, 105 Cal. Rptr. 2d 749 (2001) ("the full credit rule does not bar claims of negligence and negligent misrepresentation." 88 Cal. App. 4th at 353); *Glenham v. Palzer*, 58 Wn. App. 294, 792 P.2d 511 (Div. I, 1990) ("the full credit bid rule does not bar an action alleging . . . negligence and breach of fiduciary duty." 58 Wn. App. at 298, 792 P.2d at 553).

Land Title next argues that the Bowling Alley was a "second form of security" whereas the Hotel was the "first form of security." Thus, having foreclosed on the first form, First Bank was precluded from foreclosing on the second. Respondent's Brief, pg. 28. Land Title's claim is contrary to *AVCO Fin. Servs. of Billings One, Inc., v. Christiaens*, 201 Mont. 117, 652 P.2d 220 (1982) wherein the Montana Supreme Court held that a secured creditor

is not required to first take possession and dispose of collateral, before obtaining a judgment and execution upon other property owned by a debtor. 201 Mont. at 120. Hence, there are no first or second forms of security and a creditor can foreclose on security in any order it sees fit. Land Title also has its facts backward. The Bowling Alley sale closed first and First Bank was to receive funds from that sale; if there had been a default (there may not have been) the Hotel foreclosure would have come second. Land Title cannot create a problem via its nonfeasance and then attempt to blame others (First Bank or First American Title) for the proximate result of that which it caused.

Land Title confuses the *Bank of America, supra,* facts and tries to distinguish it on the basis that the First American's and Westminster's right to recover came from a separate contract. Respondent's Brief, pg. 32. *Bank of America's* holding rests on the fact that defendant First American failed to follow closing instructions which proximately caused damages. The same circumstances exist at bar: Land Title's failure to follow closing instructions proximately caused First Bank to be damaged. Moreover, when Tuschoff contractually assigned his rights in the Bowling Alley to First Bank the escrow contract that had been between Tuschoff and Land Title, became a contract between First Bank and Land Title. Given the *Bank of America* holding, under the facts of this case, whether the two contracts were separate is a distinction without a legal difference.

Land Title next argues that First Bank's right of recovery is entirely derived from its right to recover a deficiency. Respondent's Brief, pg. 33. Land Title also claims First Bank's damages claim against it are derived solely from losses between First Bank and Tuschoff.

Respondent's Brief, pg. 33. Land Title then claims the alleged "contract"/escrow agreement cannot give First Bank greater rights than it would have received had no alleged "breach" (*i.e.* dispersing the funds to Tuschoff or releasing the deed of trust) taken place. *Id.* First Bank's response to each of Land Title's claims is founded in the same uncontested facts. When Tuschoff assigned his rights in the Bowling Alley to First Bank, it stood in Tuschoff shoes. As a result, whatever rights Tuschoff had in the escrow account and its funds, and whatever duties Land Title owned Tuschoff, were owed to First Bank. When Land Title negligently failed to tender the Bowling Alley sale funds to First Bank, in accordance with First American's instructions, Land Title breached the contract and the fiduciary duty it owed to First Bank. First Bank's actionable rights are independent of any deficiency and independent of any losses between First Bank and Tuschoff. First Bank has never claimed rights greater than what Tuschoff had vis-à-vis Land Title, nor does it need to.

Land Title again attempts to distinguish the first bid rule exception cases cited by First Bank on the basis that they only apply in instances of fraud. Respondent's Brief, pgs. 35 – 38. As discussed above, the cases cited by First Bank address actions for fraud, breach of contract, negligence, negligent misrepresentation, and breach of fiduciary duty. With the exception of fraud, the uncontested facts establish most of these actionable instances are present here.[4]

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[4] First Bank will likely amend its complaint to add causes of action for negligent misrepresentation, breach of fiduciary duty, and conversion.

Land Title concludes its full credit bid rule arguments by claiming that "this case is about alleged impairment to First Bank's security interest, and the Full Credit Bid Rule renders moot any such alleged impairment." *Id.*, at 38. As argued multiple times, this case is about Land Title's nonfeasance, its breach of contract, its failure to follow escrow instructions and its concomitant breach of its fiduciary duty to turn over escrow funds it held in trust, to their assigned owner, First Bank.

As a matter of law, the trial court erred when it held that First Bank's full credit bid for the Hotel extinguished its causes of action against Land Title. In the alternative, there are genuine issues of material fact that preclude summary judgment.

C. Alternative Grounds Exist To Hold That The Trial Court Erred.

Land Title's brief at § II (B), pg. 11 raises "alternative grounds" which "provide an independent basis to uphold the District Court's decision." These "alternative grounds" were not addressed in the lower court's summary judgment ruling, nor addressed in First Bank's Notice of Appeal. In raising alternative grounds, Land Title has opened the door to additional issues presented on appeal, and these grounds further support First Bank's assertion that the District Court erred.

1. The District Court Erred When It Did Not Hold That Land Title Was Negligent As A Matter Of Law.

In Idaho, negligence requires proof of: "(1) the existence of a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and

(4) actual loss or damage." *Antim v. Fred Meyer Stores, Inc.,* 150 Idaho 774, 777, 251 P.3d 602, 605 (Ct. App. 2011) (*quoting Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175 - 76, 804 P.2d 900, 904 – 05 (1991). The uncontested facts of Land Title's negligence have been previously stated in First Bank of Lincoln's Brief at § III, pgs. 5 – 10, and need not be repeated in full here.

In short, Tuschoff contracted with Land Title to act as his long term escrow agent, to manage the Bowling Alley funds, and hold them in trust. When First Bank loaned funds to Tuschoff, he assigned his interest in the Bowling Alley to First Bank.

When the encumbered Bowling Alley was sold, First American Title's Tonja Hatcher, emailed a copy of the title report to Land Title's Rita Johnson, who handled the Schwab/Tuschoff escrow account. First American's title commitment at ¶23 included the Schwab/Tuschoff deed of trust and First Bank assignment. Numerous e-mails between Hatcher and Johnson demonstrate that Hatcher reminded Johnson about the ¶23 exception on multiple occasions and in one instance, even placed an arrow next to ¶23 and circled "First Bank" in the sentence referencing First Bank's assignment. This title report, in concert with the emails, put Land Title on notice that Tuschoff's interest in the Bowling Alley had been assigned to First Bank. Thus, the fiduciary duties Land Title owed to Tuschoff, and the funds Land Title held for Tuschoff, it held in trust for First Bank.

On April 15, 2013, Johnson acknowledged First Bank's interest when she sent an email to Hatcher which stated "both deeds of trust will be paid." About June 24, 2013,

Columbia Bank sent closing instructions. The closing instructions stated: "We request that exceptions 21 and 23 be released." Johnson's response: "We are good to go."

Land Title ignored Tuschoff's First Bank assignment, ignored Hatcher's written closing instructions, and disbursed the funds was holding in trust on behalf of First Bank to Tuschoff. Notably, all of this occurred without First Bank's knowledge, and it did not learn of it until it subsequently contacted Land Title as part of an annual loan review.

Land Title holds itself out to the public as having professionals in the areas of title insurance, escrows and long-term escrows. In fact, its website states: "Land Title of Nez Perce County is a locally owned company comprised of dedicated professionals. We strive to meet your needs through knowledge, experience and attention to detail, while maintaining a vested interest in our community." https://landtitlelewiston.com/.

When Land Title undertook the obligation to handle the Schwab/Tuschoff long-term escrow account, it owed a duty to those who held interests in the funds Land Title would disburse from escrow. With Tuschoff's assignment of his Bowling Alley interests to First Bank, that duty inured to First Bank. Land Title breached this duty when, despite multiple reminders regarding First Bank's interest, Land Title paid nothing to First Bank. Land Title's breach proximately caused actual loss and damage to First Bank.

In *All American Realty, Inc. v. Sweet*, 107 Idaho 229, 687 P.2d 1356 (1984), this Court addressed the duty of an attorney acting as closing agent in a real estate transaction, and the failure of that attorney to pay the broker its commission as required by the earnest money agreement and escrow instructions. In resolution of this issue, this Court noted:

In Am.Jur.2d Escrow § 16, the rule is stated:

> Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. He is held to strict compliance with the terms of the escrow agreement; and he may not perform any acts with reference to handling the deposit, or its disposal, which are not authorized by the contract of deposit.

By failing to pay the broker's commission in accordance with the earnest money agreement, Sweet violated one of FmHA's express instructions and breached his duty as the depositary. He is therefore liable to All American for the losses it suffered due to his breach:

> Since the depositary is bound by the terms of the deposit and charged with the duties voluntarily assumed by him, the rule is that liability attaches to him if he improperly parts with his deposit. His breach of duty in this respect has been held to constitute conversion. If he violates instructions or acts negligently he is ordinarily liable for any loss occasioned by his breach of duty. 28 *Am.Jur.2d Escrow* § 18.

Id., 107 Idaho 229, 203-231 (emphasis added). In the instant case, Land Title, as a depositary in escrow, violated the instructions to clear the title exception at ¶23, when it did not pay First Bank what it was owed. Under *All American Realty, Inc.*, *Id.*, Land Title is liable for any loss occasioned by its breach of duty when it acted as a depositary escrow, and the District Court should have held that Land Title was negligent as a matter of law.

"Causation" is generally a question of fact for the jury although the issue may be resolved on summary judgment "when reasonable minds could only come to one conclusion." *Fragnella v. Petrovich*, 153 Idaho 266, 272, 281 P.3d 103, 109 (2012). Here, a

reasonable person could conclude that Land Title's nonfeasance proximately caused First Bank's damages as a matter of law.

Land Title argues that under *Chavez v. Barrus*, 146 Idaho 212, 192 P.3d 1036 (2008), it owed no duty to First Bank. Respondent's Brief, pg. 38. *Chavez* is easily distinguished.

Chavez pivots on the fact that "Chavez has presented no meaningful legal or factual argument establishing the existence of a duty owed to her by First American." The facts at bar are opposite, First Bank has provided meaningful facts and law which establish that as a result of Tuschoff's assignment to First Bank, Land Title was holding funds in trust for First Bank's benefit. Further, as a result of the ¶23 exception in the title documents, Land Title knew or should have known of its fiduciary obligation to First Bank. In its Response In Opposition to Summary Judgment, Land Title Land Title argued that there was an issue of fact as to negligence in the form of a deviation from applicable duty. CR 488 and 489. There are few duties greater than a fiduciary duty. Hence, contrary to *Chavez*, a duty was owed to First Bank, both factually and legally.

Further, in *All American Realty, Inc. v. Sweet, supra,* this Court indicated that where an entity such as Land Title, assumes to and does act as the depositary in escrow, it is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. If it violates instructions or acts negligently it is ordinarily liable for any loss occasioned by its breach of duty.

Vis-à-vis negligence and summary judgment, the "reasonable minds" doctrine exists for a purpose. Given the uncontested facts regarding the Tuschoff's assignment to First Bank, Land Title's fiduciary duty regarding the funds it held in trust for First Bank as a result of the assignment, the written escrow instructions, and Land Title's representation that it would follow the instructions, reasonable minds could conclude that Land Title was negligent when it paid nothing to First Bank and everything to Tuschoff. Hence, the District Court erred when it failed to hold that Land Title was negligent as a matter of law.

Land Title claims that First Bank's choice to proceed to enforce the Bowling Alley deed of trust in the Washington matter and then to voluntarily give up that deed of trust constituted an election of remedies, or raised a judicial estoppel or quasi estoppel or prevents proof of any damages against Land Title. Response Brief, pg. 39.

To establish "choice to proceed" claim, Land Title concedes it must prove:

> (1) There must be in fact two or more coexisting remedies between which the party has the right to elect; (2) the remedies thus open to him must be inconsistent; and (3) he must, by actually bringing his action or by some other decisive act, with knowledge of the facts, indicate his choice between two inconsistent remedies.

Wolford v. Tankersley, 107 Idaho 1062, 1066-67, 695 P.2d 1201, 1205-06 (1984). Among other things, Land Title admits that the "choice doctrine" is limited to a choice by a party between inconsistent remedial rights; the assertion of one being necessarily repugnant to or a repudiation of the other. *Largilliere Co., Bankers v. Kunz,* 41 Idaho 767, 772, 244 P. 404, 405 (1925)). Land Title has failed to show how First Bank's two alleged remedial rights are repugnant to or a repudiation of the other. Land Title claims a dichotomy between the

Washington lawsuit which it alleges was about recovery of the deed of trust from Tuschoff and alleges that in the current case, First Bank has taken the position that its deed of trust was released.

Land Title makes up supporting facts. There is nothing in First Bank's Amended Complaint (CR 235 – 246) which alleges that a deed of trust was released nor has First Bank asserted a cause of action on that basis. Rather, First Bank's complaint sets forth facts that show Land Title had an obligation to First Bank, failed to do what it was required to do and said it would do, and as a proximate result, First Bank was injured. Because Land Title's choice to proceed claim is based upon an unsupported fallacy, it must fail.

Moreover, while Land Title has set forth the three elements it must prove, other than several conclusory statements, it fails to show how each of the elements are legally met.

Further, "[i]nconsistency of remedies is defined not as an inconsistency between the remedies, but as an inconsistency in the facts relied upon. 'To make actions inconsistent one action must allege what the other denies, or the allegation in one must necessarily repudiate or be repugnant to the other.'" *Wolford*, 107 Idaho at 1067, 695 P.2d at 1206 (quoting *Taylor v. Robertson Petroleum Co.*, 156 Kan. 822, 137 P.2d 150, 154 (Kan. 1943)). There is no consistency of the facts relied upon and Land Title has not and cannot show such.

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a. *The economic loss rule does not apply.*

In its briefing, Land Title argues that First Bank's negligence action is barred by the economic loss rule. Respondent's Brief, pg. 39. Land Title is incorrect[5].

> There are two exceptions to the general rule which prevents a party from recovering purely economic loss in a tort claim; those two exceptions are, (1) where a special relationship exists between the parties, **or** (2) where unique circumstances require a reallocation of the risk. *Just's, Inc.*, 99 Idaho at 470, 583 P.2d at 1005. A special relationship exists "where the relationship between the parties is such that it would be equitable to impose such a duty." *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201. The special relationship exception to the economic loss rule is an extremely narrow exception which applies in only limited circumstances. This Court has found a special relationship to exist in only two situations, (1) "where a professional or quasi-professional performs personal services [;]" and (2) "where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function." *Blahd*, 141 Idaho at 301, 108 P.3d at 1001; *see McAlvain v. Gen. Ins. Co. of Am.*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976); *see also Duffin*, 126 Idaho at 1008, 895 P.2d at 1201.

Aardema v. U.S. Dairy Systems, Inc., 147 Idaho 785, 791, 215 P.3d 505 (2009) (emphasis supplied). The conjunctive "or" as opposed to "and," establishes that First Bank only has to prove one exception. Here, both exceptions apply.

(1) *The special relationship exception applies.*

Land Title holds itself out to the public as having expertise regarding a specialized function (title insurance and escrow), and by so doing, knowingly induces reliance on its

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[5] This Court has addressed the economic loss rule since at least 1978. Yet, in *All American Realty, Inc., supra*, the Court allowed recovery of economic damages that were unpaid by the depository in escrow and the economic loss rule did not bar the 1984 action. Thus, the economic loss rule does not bar First Bank's action.

performance of that function. Similarly, Land Title claims to be dedicated professionals and it performs the very personal service of holding funds in escrow and parsing them out in accordance with underlying instructions. The special relationship exception twice applies.

In *McAlvain v. General Ins. Co. of America*, 97 Idaho 777, 554 P.2d 955 (1976), this Court considered an instance where an insurer appealed from a jury verdict judgment finding it liable for its negligent failure to issue sufficient insurance to plaintiff McAlvain on the inventory at his retail store. The insurer argued that it owed no duty to McAlvain which would subject it to liability. As part of its analysis, this Court stated:

> We must first consider appellant's argument that McAlvain's causes of action must be grounded, if at all, in contract rather than tort. The weight of authority is that the insured may recover under either theory. *Adkins and Ainley, Inc. v. Busada*, 270 A.2d 135 (D.C.App. 1970); *Hellbaum v. Burwell & Morford*, 1 Wn.App. 694, 463 P.2d 225 (1969); *Austin v. Fulton Insurance Co.*, 444 P.2d 536 (Alaska 1968); *Anderson Feed & Produce Co. v. Moore*, 66 Wn.2d 237, 401 P.2d 964 (1965); and *see 3 Couch on Insurance 2d*, § 25.32, and 43 *Am.Jur.2d, Insurance*, § 174. *In Hellbaum, supra*, a case which involved facts similar to this case, a jury award in favor of the insured was affirmed by the Washington Court of Appeals on contract, tort and promissory estoppel theories.
>
> A person in the business of selling insurance holds himself out to the public as being experienced and knowledgeable in this complicated and specialized field. The interest of the state that competent persons become insurance agents is demonstrated by the requirement that they be licensed by the state, I.C. § 41-1030; pass an examination administered by the state, I.C. § 41-1038; and meet certain qualifications, I.C. § 41-1034. An insurance agent performs a personal service for his client, in advising him about the kinds and extent of desired coverage and in choosing the appropriate insurance contract for the insured. Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent's hands. *See discussion in Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 171 S.E.2d 486 (1969).

McAlvain, 97 Idaho 781 (emphasis added). Similarly, an entity such as Land Title, that sells title insurance or provides escrow services holds itself out to the public as being experienced and knowledgeable in this specialized field.

In Idaho, title insurance companies and title insurance agents are licensed professionals who come under the purview of the Idaho Department of Insurance. They are controlled by I.C. 41-2017 *et seq.* I.C. 41-2710 sets forth the requirements for title insurance agents. They must obtain "a license from the director of insurance and file a bond or cash deposit in lieu thereof as required herein." I.C. 41.2711 sets forth the statutory requirements for title insurance related businesses and specifically defines an escrow officer as "an officer or an employee of a title insurance agent whose duties include any of the following: handling escrows, settlements, closings, and funds related thereto, . . ."

Land Title is also bound by IDAPA 18.01.25, *et seq.* IDAPA 18.01.25.001 sets forth the purpose of Chapter 25:

> 001. TITLE AND SCOPE.
>
> The purpose of these rules is to adopt with reference to title insurance and title insurance agents and escrow officers rules governing rates charged for various services and insurability on certain matters; rules governing procedural methods as to the way the title insurers, title insurance agents and their officers are to perform certain actions and rules governing actions of title insurance agents and employees acting as escrow agents. The purpose is to further protect consumers of title insurance industry products by ensuring that consumers are not injured by delivery of certain funds or documents (for recordation or otherwise) from an escrow without prior receipt of "collected funds" by the escrow agent and to preserve the financial stability of title insurers and title insurance agents. (emphasis added)

IDAPA 18.01.25.011, sets forth ten rules that govern "Title Insurance Agents and Employees Acting as Escrow Agents." Entities such as Land Title are well regulated.

This Court concluded that when an insurance agent performs his services negligently, to the insured's detriment, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services. Consequently, the Court held that the insurer was liable to McAlvain for damages resulting from its tortious conduct. The District Court should have reached the same conclusion and held that under the special relationship exception, Land Title is liable to First Bank in tort.

(2) *The unique circumstances exception also applies.*

The unique circumstances exception involves "unique circumstances requiring a different allocation of risk." *Just's Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978). The circumstances at bar meet this articulated standard.

As previously established, Land Title holds itself out to the public as "dedicated professionals" who strive to meet their client's needs "through knowledge, experience and attention to detail." https://landtitlelewiston.com/. It practices in a heavily regulated industry that expects much of them. In addition, Land Title holds large sums of money, in trust. Via multiple reminders, Hatcher made Land Title aware of the title exception that was Tuschoff's assignment to First Bank, and she directed Land Title to address it. The report and reminders put Land Title on notice that because Tuschoff assigned his interests to First Bank, Land Title's duty was now to First Bank. In short, First Bank did all it could be

reasonably expected to do to protect its loan and Tuschoff's assignment. Not only did Land Title breach its fiduciary duty and its contractual obligation, but it never informed First Bank it was holding funds in trust on First Bank's behalf. First Bank was unaware of Land Title's nonfeasance until it contacted Land Title to find out about its collateral, only to learn that it had been sold.

These unique circumstances require a different allocation of risk. Land Title assumed the risk of acting as an escrow. The title report and the exceptions set forth therein were clear. As professionals, Land Title knew or should have known of its assigned duties vis-à-vis First Bank. The circumstances only become more stark when one takes into account that on several occasions, Hatcher specifically reminded Land Title of what it must do. Land Title did not properly perform its tasks, negligently breached its fiduciary duty to First Bank; and as a proximate result, First Bank was damaged. This Court should also apply the unique circumstances exception and hold Land Title liable to First Bank in tort as a matter of law.

b. *There is not a statute of limitations issue.*

Land Title claims Washington's statute of limitation bars Frist Bank's negligence claim. Respondent's Brief, pg. 39.

Like Idaho, Washington state's statute of limitations are determined via the discovery rule. The discovery rule provides that a statute of limitations does not begin to run until the plaintiff, using reasonable diligence, would have discovered the cause of action. *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986), *citing, U.S. Oil & Ref. Co. v.*

Department of Ecology, 96 Wn.2d 85, 92, 633 P.2d 1329 (1981). Here, First Bank's cause of action was not discovered until First Bank contacted Land Title as part of an annual loan review and learned that the Bowling Alley had been sold and the resulting funds sent to Tuschoff. On or about January 29, 2014, Ms. Johnson spoke to Mr. Tuschoff and told him that the funds derived from the Bowling Alley sale should have been forwarded to First Bank and not to Mr. Tuschoff and the bank learned the misdirected funds would not be returned. Under Washington's discovery rule, the three-year statute of limitation did not begin to run until January, 2014. First Bank filed its Complaint on November 29, 2016, well within the three years set forth in the statute. In the alternative, the discovery rule raises an issue of material fact that precludes summary judgment.

2. The District Court Erred When It Did Not Hold That Land Title Breached Its Contract And Harmed First Bank. In the Alternative, First Bank Was A Third-Party Beneficiary Under the Contract.

Land Title contractually agreed to act as a long-term escrow for Tuschoff vis-à-vis his interest in the Bowling Alley. When Tuschoff assigned his rights in the Bowling Alley, to First Bank, Tuschoff's rights and Land Title's concomitant fiduciary duties vis-à-vis the escrow account funds it was holding in trust transferred to First Bank.

When the Bowling Alley was being sold, Land Title's additional duties as to the escrow account were to create clear title by distributing funds to the persons or entities who were designated as exceptions on the title report. First Bank's registered assignment of Tuschoff's interest in a deed of trust and promissory note was clearly set forth in ¶23's exception of the title report. Despite multiple reminders of this exception and Land Title's

written, e-mail representation stating that "both deeds of trust will be paid," Land Title breached this contract when it did not pay the deed of trust and their holder, First Bank.

Because, of the contractual assignment, First Bank stood in Tuschoff's shoes and the Bowling Alley sale funds should have been paid to it. In the alternative, because the title report exception had to be paid off so as to provide clear title to lender Columbia Bank, First Bank was a third party beneficiary and sale funds should have been paid to it. Either way, summary judgment should have been granted in First Bank's favor as a matter of law and the District Court erred when it did not do so.

3. The District Court Erred When It Did Not Order Land Title To Specifically Perform The Contract And Pay First Bank In Accordance With The Assignment And The Escrow Instructions.

In *Fazzio v. Mason,* 150 Idaho 591, 349 P.3d 390 (2011), this Court addressed specific performance, stating:

> The remedy of specific performance may be invoked where necessary to complete justice between the parties. "The object of specific performance is to best effectuate the purpose for which the contract is made, and specific performance should be granted upon such terms and conditions as justice requires." 81A C.J.S. Specific Performance § 2 (2011). In considering whether to award specific performance, a court must balance the equities between the parties. *Fullerton v. Griswold*, 142 Idaho 820, 823, 136 P.3d 291, 294 (2006).

Fazzio v. Mason, 349 P.3d at 396-397.

Land Title contractually agreed to act as an escrow for Tuschoff vis-à-vis his interest in the Bowling Alley. When Tuschoff assigned his rights in the Bowling Alley to First Bank, Tuschoff's rights, and Land Title's duties as to the escrow account, transferred to First Bank.

When the Bowling Alley was being sold, Land Title's duties as escrow was to create clear title by distributing funds to the persons or entities who were designated as exceptions on the title report. First Bank's registered assignment of Tuschoff's interest in a deed of trust and promissory note was clearly set forth in ¶23's exception of the title report. Despite: (1) multiple reminders of this exception; (2) Land Title's written, e-mail representation stating that "both deeds of trust will be paid;" and, (3) closing instructions that requested that Exception 23 be released, Land Title failed to perform that which it was required to do under the contract. Land Title should be ordered to do that which it did not, and pay First Bank. The equities between the parties can be seen above in First Bank's unique circumstances argument at § IV. (C)(a)(2). In short, First Bank is with little fault, whereas Land Title is entirely at fault.

Land Title argues that specific performance is a remedy, not a cause of action. Respondent's Brief, pg. 41.

In *Peterson v. Gentillon*, 154 Idaho 184, 296 P.3d 390 (2013), this Court addressed the following issue: "[w]hether the five-year statute of limitations for actions arising from contracts bars the Partnership's claim for specific performance." *Id.* 296 P.3d 394. In its analysis, this Court noted that it had never specifically addressed whether I.C. § 5-216 bars actions for specific performance where the claimant or vendee is in possession of the property. Rather, in an action for specific performance where the claimant was not in possession of the property, the Court held that the statute of limitations applied and began to run at the time "the cause of action accrued in the vendee." *Singleton v. Foster*, 98 Idaho

149, 151, 559 P.2d 765, 767 (1977). However, this Court explicitly noted that the vendees "did not have and never have had possession of the property in question." *Id.* at 150, 559 P.2d at 766.

> Here, there is no indication that the cause of action for specific performance accrued in the Partnership when it failed to exchange deeds with the Gentillons after the survey's completion.

Id., 154 Idaho 184. (emphasis added). This Court held that the five-year statute of limitations under I.C. § 5-216 did not bar the Partnership's claim for specific performance. If, as Land Title claims, Idaho does not recognize specific performance actions, that, by itself, would have been determinative and the *Gentillon* Court would not have needed to address the issue of whether the action was barred by the statute of limitations. Given the *Gentillon* Court's decision and its "action for specific performance" language, this Court clearly recognized specific performance actions. Further, that this Court differentiated a cause of action for specific performance from a cause of action for contract, establishes that Idaho recognizes actions for specific performance and, in fact, distinguishes contractual actions from specific performance actions.

First Bank's motion for summary judgment as to specific performance should have been granted as a matter of law, and the District Court erred when it did not do so.

4. The District Court Erred When It Did Not Hold That Land Title Should Be Estopped From Not Doing What It Represented That It Would Do.

In *Silicon Intern. Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 314 P.3d 593 (2013), this Court addressed Idaho quasi-estoppel law, stating that "[t]he doctrine of quasi-estoppel

prevents a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions. *Garner v. Bartschi*, 139 Idaho 430, 437, 80 P.3d 1031, 1038 (2003)." It then distinguished equitable estoppel from quasi-estoppel stating: "[u]like equitable estoppel, quasi-estoppel does not require either misrepresentation by one party or the reliance by the other." *Id.* (emphasis suppled).

The *Silicon* Court set forth the elements of quasi-estoppel as follows:

> * [Quasi-estoppel] prevents a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her.
>
> * The doctrine applies where it would be unconscionable to allow a person to maintain a position with one in which he acquiesced or of which he accepted a benefit.
>
> * The act of the party against whom the estoppel is sought must have gained some advantage to himself or produced some disadvantage to another; . . ..

Silicon v. Monsanto, supra, 314 P.3d 60 (*quoting E. Idaho Agric. Credit Ass'n v. Neibaur*, 133 Idaho 402, 410, 987 P.2d 314, 322 (1999)).

The first element prevents Land Title from asserting, to First Bank's disadvantage, the right to obtain payment under the title report exception at ¶23, which Land Title was required to address, would be expected to address, and, in fact, stated it would address, but did not.

The second element applies because it would be unconscionable for Land Title to hold itself out to the public as a professional title insurance and escrow company, profit

from doing so (the benefit), represent that it would address the title report exception at ¶23, and then not do so.

The third element applies because Land Title gained advantage by acting as the escrow company and getting paid to do so, and produced a disadvantage to First Bank which was not paid from funds Land Title held in trust, as First Bank should have been.

As to each of the elements, Land Title owed a duty to First Bank when Tuschoff assigned his interest in the Bowling Alley to First Bank via the deed of trust and promissory note demonstrated in the title exception at ¶23. Further, Land Title was given multiple reminders of Tuschoff's assignment and the ¶23 exception. Closing instructions stated that exception ¶23 be released so as to provide clear title, and Land Title represented that both deeds of trust would be paid. Had Land Title done what it said it would do First Bank would have been paid, the funds would have been applied to the Hotel loan, and we would not be before the Court. Hence, Land Title should be estopped from claiming it should not have to pay First Bank and do what it said it would do and First Bank's summary judgment on this issue, should have been granted.

D. First Bank Should Be Awarded Attorney Fees And Costs On Appeal.

In *Hoffer v. Shappard*, 160 Idaho 870, 380 P.3d 681 (2016), this Court held that attorney fees are available to a prevailing party under I.C. § 12-121 and will be awarded in any case when "justice so requires." Further, if First Bank prevails on appeal it is entitled to costs pursuant to I.A.R. 40.

Land Title argues that if it prevails it should be awarded attorney fees because First Bank's action is frivolous, unreasonable and without foundation. In support, it attempts to reduce all that First Bank has asserted in this matter to one claim: "[First Bank's] whole claim against Land Title . . . appears to be premised on Land Title having caused that deed of trust to be improperly released." First Bank's complaint and briefing establishes that its claims against Land Title are founded on much more than an improper release of a deed of trust. Hence, this Court, in its discretion, cannot be left with the abiding belief that First Bank's case was "brought and pursued frivolously, unreasonably, or without foundation." *Teurlings v. Larson*, 156 Idaho 65, 75, 320 P.3d 1224, 1234 (2014) (citation omitted).

V. CONCLUSION

Montana's anti-deficiency law does not apply to commercial transactions. Land Title claims attorney fees on the basis that this matter is a commercial transaction, thus Montana's anti-deficiency law does not apply to the matter at bar and there can be a deficiency owed to First Bank. This accords with Judge Reynold's holding in the Montana District Court on the same facts.

Land Title argues that the full credit bid rule is meant to protect borrowers from double recoveries, windfalls and unscrupulous underbidding by lenders at foreclosure sales. The uncontested facts establish that none of these issues are present in this case, thus, the full credit bid rule has no applicability in the instant matter.

Land Title concedes that the full credit bid rule does not bar actions against third parties, but it asserts the exception applies only to instances of fraud. The cases cited by

First Bank show that matters involving breach of contract, breach of fiduciary duty, negligence, and negligent misrepresentation are also excepted. The full credit bid rule does not apply to this matter and the District Court erred when it ruled otherwise. In the alternative, there are genuine issues of material fact that preclude summary judgment.

The "alternative grounds" raised by Land Title open the door to additional issues presented on appeal. As a matter of law, the District Court erred when it dismissed First Bank's negligence, breach of contract/third party beneficiary, specific performance and quasi-estoppel actions.

First Bank respectfully requests that the decision of the District Court be reversed. In the alternative, this Court should hold that there are genuine issues of fact that preclude summary judgment. First Bank further requests that its cross motion for summary judgment against Land Title be granted as a matter of law.

Finally, pursuant to I.A.R. 40, I.C. § 12-120(3) and/or I.C. § 12-121, First Bank requests an award of its attorneys' fees and costs.

DATED this 12th day of November, 2018.

PAINE HAMBLEN LLP

By: _____
Scott C. Cifrese, ISBA #4965
Gregory S. Johnson, ISBA #9664
Attorneys for Appellant/First Bank

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of November, 2018, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Thomas E. Dvorak
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720

- ☐ U.S. Mail
- ☐ Overnight Delivery
- ☐ Hand Delivered
- ☐ Via Fax: (208) 388-1300
- ☒ Court Email

Gregory S. Johnson

I:\SPODOCS\41175\00002\PLEAD\1750886