4th Civil No. G035874

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HOSSEIN ZAND,

Plaintiff and Appellant,

vs.

OLD REPUBLIC TITLE COMPANY,

Defendant and Respondent.

Appeal from the Superior Court of Orange County
Superior Court Case No. 04CC11775
Honorable William Monroe, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Plaintiff's ex-wife unilaterally sold property the couple had purchased while married. Now plaintiff wants to sue the property purchaser's title insurance company for negligence.[1/]

Although plaintiff was neither an insured under the title policy, nor a party to the escrow, he advances two theories of liability against the title insurance company: (1) for negligently underwriting the title insurance policy issued to the purchaser, and (2) for recording a facially valid deed in a sub-escrow capacity pursuant to instructions. He argues that these acts enabled the sale by his former wife to be consummated without his consent, which he alleges was necessary (although it was contrary to the title insurance company's underwriting determination).

The trial court correctly sustained the title company's demurrer without leave to amend:

First, a title insurance company or title company cannot be liable to a party to a transaction, let alone to a third party, for its internal underwriting acts of examining title and issuing a preliminary report.

Second, a title insurance company cannot be liable for title defects to someone who is not an insured under the title insurance policy since that policy is an indemnity contract that runs *only* to the insured.

Third, a title company cannot be liable for recording a facially valid deed as a sub-escrow pursuant to sub-escrow instructions.

The law does not authorize third-party causes of action against title insurance companies or title companies for negligent underwriting or negligent recording as a sub-escrow. This Court should affirm.

[1/] Plaintiff has sued the underwritten title company (Old Republic Title Company). Old Republic National Title Insurance Company is the insurance company, however.

STATEMENT OF FACTS

Because this is an appeal from a judgment following an order sustaining a demurrer, we recite the facts as alleged in the complaint. (See *Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214 [for purposes of proceedings on demurrer, reviewing court regards as true the facts alleged in their pleading].)

A. Hossein And Shirin Purchase The Property.

Hossein Zand and his wife, Shirin Zadeh-Zand, purchased real property in Dana Point, California (the Property). (CT 12 [¶ 11].) They later transferred title to the Property "in whole or in part" to the Fati Limited Partnership (Fati LP), of which Shirin was the sole general partner. (CT 12 [¶ 12].)

Hossein and Shirin divorced in 1997. (CT 6 [¶ 6].) Hossein maintained his community property and/or separate property interest in the Property and his partnership interest in Fati LP. (CT 12-13 [¶¶ 13, 14].)

B. Shirin Sells The Property To Wazzan Without Hossein's Consent.

Without Hossein's knowledge or consent, Shirin executed a Residential Purchase Agreement and Escrow Instructions (collectively, Agreement) on June 14, 2002, for the sale of the Property to Fatemeh Faye Wazzan for $328,000. (CT 13 [¶ 15].)

Wazzan retained defendant Diamond County Escrow, Inc. to handle the escrow for the transaction, and she retained Old Republic Title Company (Old Republic) to issue a title insurance policy. (CT 13 [¶¶ 16, 17].)

Prior to issuing its preliminary report, Old Republic reviewed information relating to the status of Hossein and Shirin's marriage, as well

as Shirin's authority to sell the property without Hossein's consent.[2/] (CT 14-15 [¶ 23].) Among other things, Old Republic reviewed:

(1) Hossein and Shirin's Marital Settlement Agreement, which stated that Shirin "can take over the properties [and] sell them with court approval" and "[a]ny sale of the properties requires approval of the other party,"

(2) A court order dated April 9, 2002, which stated that "[m]anagement and control of all properties to be with [Shirin] forthwith," and

(3) The limited partnership agreement of Fati LP dated January 1997, which stated that Shirin was the sole general partner and that Hossein (as a limited partner) gave his power of attorney to Shirin to "dispose of or otherwise deal with any partnership interest" in real property. (CT 15 [¶ 23], emphasis omitted.)

Old Republic ultimately concluded that Hossein's consent was unnecessary to transfer title. (CT 15 [¶ 26].) It issued a preliminary report, which reflected that title to the Property was vested in Hossein and Shirin, husband and wife, as joint tenants, and Fati LP. (CT 13, 14 [¶¶ 17, 23].) Old Republic later issued Wazzan a title policy for the Property. (CT 13 [¶ 17].)

Hossein filed a separate action to quiet title to the Property seeking, among other things, damages for fraud from Wazzan. (CT 13 [¶ 19].)

[2/] While the courts and counsel frequently use the term "preliminary title report," by statute the proper term is "preliminary report." (See Ins. Code, § 12340.11.)

C. Hossein Sues Old Republic For Negligence.

In the present case, Hossein sued Old Republic and Diamond County Escrow for negligence. (CT 10.) He asserted that Old Republic had actual notice of his interest in the Property prior to its sale to Wazzan. (CT 14 [¶¶ 22, 23].) He alleged that Old Republic acted negligently by determining and representing to Wazzan and Shirin that his consent was unnecessary. (CT 15-16 [¶ 26].)

Hossein further alleged that Old Republic's conduct "ultimately facilitated and caused the recording of the grant deed" conveying title to Wazzan. (CT 16 [¶ 27].)

For damages, Hossein claimed that the Property had been sold for $270,000 less than its fair market value. (CT 16 [¶ 28].) He requested general damages, special damages and his fees and costs. (CT 16 [¶ 29].)

PROCEDURAL HISTORY

Old Republic filed a demurrer to Hossein's complaint on the ground that it owed him no duty of care. (CT 17-25.) The trial court sustained the demurrer without leave to amend. (CT 44.) Hossein timely appealed. (CT 50.)

STANDARD OF REVIEW

When reviewing a judgment following an order sustaining a demurrer, this Court assumes the truth of all facts properly pleaded by the plaintiff. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Whether a duty of care is owed is a question of law, and is therefore reviewable de novo. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674; *Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406; see also *Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1450-1451.)

The Court reviews the trial court's failure to grant leave to amend the complaint for an abuse of discretion; it may reverse only if it determines there is a reasonable possibility the pleading can be cured by amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) The plaintiff has the burden of showing how the complaint can be amended to state a cause of action. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.)

ARGUMENT

I. AS A MATTER OF LAW, OLD REPUBLIC OWED PLAINTIFF NO DUTY OF CARE.

Before Hossein can state a claim for negligence, he must establish that Old Republic owed him a duty of care. (*Adelman v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 352, 361 [establishment of a duty of care is an "essential prerequisite" to any negligence cause of action].)

Hossein was neither a party to the real estate transaction, nor a party to the title insurance policy. As a mere third party, he had an uphill battle to establish the presence of a duty, since "[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in

their financial transactions is the exception, not the rule, in negligence law." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58; *Adelman, supra,* 90 Cal.App.4th at p. 364 [same].)

Hossein cannot win that uphill battle.

A. The Insurance Code Bars Liability.

Hossein argued below that Old Republic was negligent for concluding, on the basis of its examination of title prior to issuing a preliminary report, that his consent was unnecessary to transfer title (and for communicating that opinion to Shirin and Wazzan). But statutory law bars any liability based on this theory of the case.

Insurance Code sections 12340.10 and 12340.11 preclude reliance upon a preliminary report or title insurance policy to show the condition of title.[3/] Those statutes state that preliminary reports are mere "offers to issue a title policy subject to the stated exceptions set forth in the reports" and "shall not be construed as, nor constitute, a representation as to the condition of title to real property." (Ins. Code, § 12340.11; see also *ibid*. [a preliminary report is only a "statement of the terms and conditions upon which the issuer is willing to issue its title policy"].)

In other words, a title insurance company performs a title search and examination only to make *its own* internal underwriting decision, not for the

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[3/] Insurance Code section 12340.11 provides: "'Preliminary report,' 'commitment,' or 'binder' are reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions set forth in the reports and such other matters as may be incorporated by reference therein. The reports are not abstracts of title, nor are any of the rights, duties or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. Any such report shall not be construed as, nor constitute, a representation as to the condition of title to real property, but shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted."

benefit of the insured, let alone any third party like Hossein. (*Fidelity National Title Ins. Co. v. Miller* (1989) 215 Cal.App.3d 1163, 1175 ["'[A]ny title search or examination is performed by the insurer solely for the purpose of seeking to evaluate its underwriting decision in issuing the policy, not for the benefit of the insured'"]; see also *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1191-1192 [same].)

Thus, the Insurance Code "leave[s] no room for the existence of a duty of care based on the title company's search of records and issuance of a preliminary report and title insurance policy." (*Siegel, supra*, 46 Cal.App.4th at p. 1193; see also *Southland Title Corp. v. Superior Court* (1991) 231 Cal.App.3d 530, 537-538 ("*Southland Title*") [same]; *Fidelity, supra,* 215 Cal.App.3d at p. 1175 [same].)

Here, all of Hossein's allegations of negligence run afoul of the Insurance Code because all depend upon Old Republic's statutorily-protected examination of title incident to issuing a preliminary report and policy. Specifically, Hossein alleged that Old Republic acted negligently in two ways:

(1) It negligently determined, on the basis of its examination of documents prior to issuing its preliminary report, that Hossein's consent was unnecessary to transfer title; and

(2) It negligently represented to the buyer (Wazzan) and the seller (Shirin) that Hossein's authorization was unnecessary.

(CT 15-16 [¶¶ 26, 27].)

These acts are subsumed within Old Republic's protected role as a title insurer extending an offer to its insured (Wazzan) to issue a title policy under the terms described in the preliminary report.

For example, Hossein alleged that Old Republic "had actual notice" of his interest in the Property prior to its sale and was therefore "legally obligated to obtain [his] consent to sell." (CT 14 [¶ 22].) But under

Hossein's theory of the case, Old Republic's alleged notice of his ownership interest came from *its investigation of title* prior to issuing a preliminary report to Wazzan. (See CT 14 [¶ 23].) The Insurance Code bars liability on the basis of this investigation; no tort liability can stem either from what the investigation revealed, or from Old Republic's resulting internal underwriting decision to offer title insurance to Wazzan even though she purchased the property without Hossein's consent.

Under the statutory scheme, the notice that Old Republic allegedly received of Hossein's interest only gave rise to an underwriting decision—that is, Old Republic had to decide whether to take on certain risks or to include those risks as exceptions to coverage. (See 7 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 7:4.) The alleged notice created no duty to Hossein.

That the preliminary report may have given the parties to the transaction the comfort to go forward with the sale of the Property is irrelevant. Courts have rejected this theory of liability even in cases where the *insured party* has sued a title insurance company for failing to show an impediment to title on the preliminary report.

For example, in *Southland Title*, the preliminary report did not show a recorded easement affecting the value of the property, and the purchasers brought suit. The court agreed with the defendant title insurance company that in the wake of the enactment of Insurance Code sections 12340.10 and 12340.11, a preliminary report "is merely the inducement to purchase a title policy" and is not "a current representation as to the status of title." (231 Cal.App.3d at p. 536, fn. omitted.) The Court expressly rejected the purchasers' argument "that in the everyday world of real estate transactions buyers and sellers continue to order and rely upon preliminary title reports as an integral part of the sale transaction," holding instead that "it is now

clear that such reliance cannot be justified and is done only at a party's peril." (*Id*. at p. 537, fn. omitted.)

Thus, under governing statutory law, Old Republic cannot owe a duty to Hossein—or anyone else—based upon either its examination of title or its issuance of a preliminary report and title insurance policy. This alone defeats Hossein's attempt to state a claim for negligence.

B. Case Law Bars Liability.

1. A title insurance policy cannot create any rights in third parties.

A title insurer's obligations run only to *the insured*, and its legal obligations are circumscribed by the insurance policy. This is so because a title insurance policy has a limited purpose—to indemnify the insured against certain losses caused by defects in title. (*Radian Guaranty, Inc. v. Garamendi* (2005) 127 Cal.App.4th 1280, 1289 ["'[T]he function of title insurance is to protect against the possibility that liens and other items not found in the search or disclosed in the preliminary report exist'"]; see also *Siegel, supra,* 46 Cal.App.4th at p. 1191 ["The policy expressly provides merely that the insurer will pay any loss or damage suffered by the insured from any omitted defect not excluded by the terms of the policy"; "A title policy is 'a contract to indemnify against loss caused by defects in the title or encumbrances on the title'"].)

Here, by agreeing to issue a title insurance policy to Wazzan, Old Republic undertook a duty to Wazzan *alone*. That duty was described by the title insurance policy—i.e., Old Republic promised that it would indemnify Wazzan for defects, liens and encumbrances not excepted from coverage pursuant to the conditions and stipulations of the policy. (See *Radian Guaranty*, *supra*, 127 Cal.App.4th at p. 1289, internal citations

omitted ["'[t]itle insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs'"].)

That Old Republic's decision to offer title insurance to Wazzan may have helped facilitate the sale and therefore incidentally affected Hossein is irrelevant. As the Supreme Court explained in *Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th 26, the incidental impact of business transactions on third parties does not give rise to a duty of care. (*Id.* at pp. 58-59.) There, the prospective sellers of real property sued a title insurance company for negligence on the basis of its refusal to issue title insurance for property acquired by the plaintiffs in a tax sale. The Court held that the plaintiffs' complaint did not state a claim for negligence because the title insurance company had no duty "to avoid business decisions that may affect the financial interests of third parties, or to use due care in deciding whether to enter into contractual relations with another." (*Id.* at p. 58.)

The same is true here. Old Republic's decision to enter into a contract to provide title insurance to Wazzan cannot give rise to any duty to third parties like Hossein.

As a matter of public policy, Old Republic's exposure to liability *must* be limited to its indemnity obligations under the title insurance policy. Any other result would have a deleterious effect on the title insurance industry because it would mean that by issuing a title policy to one party, a title insurer would become liable to every potential lien-holder or alleged co-owner who came out of the woodwork to make a claim to the property. As the Court of Appeal has explained in a related context: "Facing the imposition of negligence liability they can neither define nor circumscribe, rational insurers will either leave the market or severely limit the

availability of insurance. This is not fanciful speculation, but market reality." (*Adelman, supra,* 90 Cal.App.4th at p. 369 [held, by insuring a homeowner association, insurer did not undertake a duty to the individual unit owners].)[4/]

Permitting Hossein to sue for negligence on the basis of Old Republic's alleged failure to recognize or protect his alleged interest in the Property would expose Old Republic to as much liability for a party with whom it had *not* contracted as it undertook for the party with whom it had. The courts have refused to sanction this type of result. (See *id.* at p. 368; cf. *Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 59 ["With rare exceptions, a business entity has no duty to prevent financial loss to others with whom it deals directly. A fortiori, it has no greater duty to prevent financial losses to third parties who may be affected by its operations"].)

2. So long as Old Republic does not step outside of its role as title insurer, it cannot be liable to third parties like plaintiff.

As discussed above, the Insurance Code shields title insurance companies and title companies from liability to third parties for acts incident to issuing preliminary reports and title insurance policies. Where,

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[4/] See also *id.* at pp. 368-369: "[I]f insurers were exposed to unlimited liability to uninsured parties whom they had not agreed to insure for risks they had no chance to evaluate, and for which they were paid no premium, there would be serious adverse consequences for not only the insurance industry in particular but also for the economic health of society in general. Adoption of the rule advocated by the plaintiffs would place insurers in the position of exposing themselves to unknown (and unknowable) liabilities to unknown parties they had not agreed to insure, all for no compensation."

as here, a statute confers protection from liability, an entity can only forfeit that protection from liability by *stepping outside* of its traditional role.

For example, in the workers compensation context, the Supreme Court has repeatedly held that an employer can forfeit its immunity from civil suit under the Workers' Compensation and Insurance Act only if it engages in conduct that takes it outside of its proper role as a compensation insurer (i.e., as an employer). (See, e.g., *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616 [insurer engaged in deceitful conduct in investigating the workers' compensation claim of an injured employee, and therefore stepped outside the boundary of its proper role as an insurer]; *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465 [employer stepped outside of its Workers' Compensation Act-protected role as an employer and lost immunity from civil suit where it fraudulently concealed employee's disease and its cause]; *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 706 ["an employee subject to false imprisonment at the hands of her employer may sue that employer in a civil action"; "her suit would not be barred, because an employer that falsely imprisons its employee has stepped outside its proper role, and an injury resulting therefrom is beyond the scope of what we have termed the 'compensation bargain'"].)

The same rule applies in the construction defect context. While lenders are generally not liable for construction defects (because their connection to the construction projects is too attenuated), they can become liable if they step outside of their traditional role by becoming directly involved in the construction project. (Civ. Code, § 3434 [construction lender not liable to third persons for "any loss or damage occasioned by any defect" in the property "unless such loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money"]; see also *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089,

1096 ["as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money"].)

For example, in *Connor v. Great Western Sav. & Loan Assn*. (1968) 69 Cal.2d 850, a group of home buyers sought relief against the construction lender when their houses exhibited severe cracking due to poor design. The evidence showed the lender was intimately involved in building the tract and had the right to control the activities of the contractor. The Supreme Court held that "[the lender] became much more than a lender content to lend money at interest on the security of real property. It became an active participant in a home construction enterprise." (*Id*. at p. 864.) Public policy therefore dictated the imposition of a duty of reasonable care on the part of the bank to the home buyers. (*Id*. at pp. 865-868; see also *Nymark, supra,* 231 Cal.App.3d at p. 1096 ["Liability to a borrower for negligence arises only when the lender 'actively participates' in the financed enterprise 'beyond the domain of the usual money lender'"].)

The same rule should apply in the title insurance context—that is, a title insurance company should not forfeit its statutory immunity to liability so long as it remains within its traditional role as a title insurer. Here, by examining title and issuing a preliminary report and title insurance policy, Old Republic remained firmly within its statutorily-protected role. Thus, the trial court correctly concluded that Old Republic could not be liable to Hossein.

C. Recordation Of The Grant Deed Cannot Change The Result.

On appeal, Hossein tries to re-pitch his case by arguing that the wrongful "transaction" Old Republic conducted was *not* its examination of title or its issuance of the preliminary report and title insurance policy, but

rather the *recordation* of the grant deed conveying title to Wazzan. (See AOB 9.) Hossein's claim fails as a matter of law.

1. Recordation did not transfer title; Shirin's execution and delivery of the grant deed to Wazzan did.

Essential to Hossein's claim is that he was damaged by the conveyance of the Property. But recordation of the deed didn't convey the Property—by that time, the conveyance *had already occurred*. (See Civ. Code, § 1217 ["An unrecorded instrument is valid as between the parties thereto and those who have notice thereof"]; *Blackledge v. McIntosh* (1927) 85 Cal.App. 475, 483 ["The deeds would pass title without recording"]; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 254, p. 311 ["recordation is likewise unnecessary; its effect is to give constructive notice and to determine priorities"].)

It was Shirin's execution and delivery of the grant deed that transferred title, and thereby allegedly injured Hossein. (See Civ. Code, §§ 1054, 1055, 1056.) Old Republic's alleged recordation of the grant deed merely *gave notice* of that transfer. (See *Blackledge*, *supra*, 85 Cal.App. at p. 483 ["Recordation has no other function than that of notice to the world"]; *City of Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 733 [same].)

Thus, Old Republic's allegedly negligent act—recording a facially valid grant deed—cannot save Hossein's complaint from demurrer.

2. Recordation of the facially-valid grant deed cannot be the basis of negligence liability.

The only ground upon which Hossein argues that the recordation of the grant deed was wrongful is that Old Republic learned of his interest in

the Property during its examination of title prior to issuing the preliminary report to Wazzan. (See AOB 2.) Hossein argues that Old Republic's title examination put it on notice that he had an interest in the Property. (*Ibid*.) But that examination is central to Old Republic's role as a title insurer and therefore cannot serve as a basis for negligence liability as to third parties like Hossein. (See pp. 6-9, *supra*.)

Recordation of the deed can add nothing to the mix. Indeed, there can be no doubt that had Old Republic been retained *only* to record the grant deed, it would not have been negligent for doing so. The deed was facially valid. Thus, its recordation was proper—unlike in *Seeley v. Seymour* (1987) 190 Cal.App.3d 844 ("*Seeley*"), where a title company was properly found liable for making an accommodation recording of a facially *invalid* and concededly *unrecordable* document. (See pp. 17-18, *infra*.)

3. That Old Republic recorded the grant deed as a sub-escrow provides an additional shield to liability.

If Old Republic recorded the grant deed, it did so as a "sub-escrow"—that is, upon the instructions of Diamond Escrow, the escrow company retained for the purchase and sale transaction. (See *Siegel v. Fidelity Nat. Title Ins. Co*. (1996) 46 Cal.App.4th 1181, 1186 [escrow company requested that title insurance company "act as 'sub-escrow' by holding the funds and recording the deeds on its behalf"].) As a matter of law, this means that Old Republic's obligations were limited to following Diamond Escrow's instruction to record the deed—an instruction that Old Republic indisputably obeyed.

Siegel v. Fidelity Nat. Title Ins. Co., supra, 46 Cal.App.4th 1181, is instructive. There, the plaintiff homeowners brought an action for negligence against their title insurance company, alleging that the preliminary report failed to disclose a lien recorded against the property and

that the title insurer was engaged by the escrow company to record the deed (and thus owed the homeowners a duty stemming from that role). The plaintiffs argued that even if the court declined to impose liability on the basis of the preliminary report, it should nonetheless impose liability on the title insurance company for recording the deed. (*Id*. at p. 1193 ["Fidelity was not acting simply as a title insurer but also performed certain escrow functions assigned it by (the escrow company) and was in effect a 'sub-escrow'"].)

The Court of Appeal refused to do so, holding that the escrow company's obligations to the homeowners "were limited by the terms of the escrow instructions," and that therefore "the responsibilities of [the title insurer] acting as sub-escrow *were even more limited*." (*Id*. at p. 1194, emphasis added.) It noted that by recording the deed, the title insurance company had "obeyed [the escrow company's] instructions in precise accordance with their terms" and had thereby discharged the *only* obligations it had undertaken in its capacity as a sub-escrow. (*Id*. at pp. 1193-1194.)

The same rule applies here. By agreeing to record the grant deed as a sub-escrow for Diamond Escrow, Old Republic obligated itself only to perform that task correctly. Hossein does not allege that Old Republic failed to do so. Thus, as a matter of law, no liability can stem from Old Republic's recordation of the grant deed in its capacity as a sub-escrow.

D. *Seeley* Does Not Establish A Duty Of Care.

1. *Seeley* has no bearing on this case.

On appeal, Hossein relies entirely on a single case: *Seeley v. Seymour*, *supra*, 190 Cal.App.3d 844. He argues that *Seeley* permits the imposition of a duty on Old Republic. But that case is inapposite.

In *Seeley*, a prospective lessee of real property signed a *unilateral* "Memorandum of Agreement" that he gave to a title company to record. (*Id*. at p. 851.) Despite the fact that the document was not signed by the owner of the property and was therefore *facially unrecordable*, the title insurance company recorded it anyway. (*Id*. at p. 856.) The owner of the real property successfully sued the title insurance company for damages caused by its negligent recording of the facially invalid document that clouded title to the owner's property and impeded a subsequent sale. (*Id*. at pp. 860-862.)

Thus, in decisive contrast with our case, the defendant in *Seeley* could not have been acting as either a title insurer or a sub-escrow when it recorded the document. (See *id*. at p. 860 [noting that title company had not acted in escrow capacity].) The title insurance company had not been retained by anyone to issue title insurance. It did not conduct any examination of title or issue any preliminary report. Instead, it made an accommodation recording of a facially invalid document. By so doing, it stepped *outside* its regular role and took on liability for its separate negligence.[5/]

Here, in contrast, Old Republic stayed firmly within its role as both an underwritten title company and a title insurer when it examined title and issued a preliminary report and title insurance policy.[6/] And, as a matter of law, it did not act negligently when it recorded a facially valid grant deed as a sub-escrow.

[5/] Recording a facially invalid document was especially egregious in *Seeley* because the title company had entered into a relationship with the recorder's office under which it promised to verify the recordability of all documents it submitted. (*Id*. at pp. 861-862 & fn. 7.)

[6/] See fn. 1, *supra*.

Thus, *Seeley* is no more applicable to the present case than it was to *Southland Title*, where the court explained: "*Seeley*, on its facts, has little to do with our case. There, the title company was held liable for the negligent recording of a nonrecordable document. This was, quite simply, an act of professional malpractice for which the title company was properly held accountable." (*Southland Title, supra,* 231 Cal.App.3d at p. 537, fn. 6.)

2. In any event, the *Seeley* factors are not satisfied here.

Governing law bars the duty that Hossein alleges Old Republic owed him. (See sections I.A. & I.B., *supra*.) Nonetheless, Hossein urges this Court to evaluate the case under the standards articulated in *Seeley*. Given the legal impediments to liability, this Court should decline to engage in any *Seeley* analysis. Even if it does, however, it will come to the same result: Old Republic owed Hossein no duty of care and therefore cannot be liable for negligence.

Seeley held that a defendant "can be liable for economic harm inflicted upon a third party with whom he has no direct dealing, provided that the consideration of the appropriate factors warrants the imposition of a duty to the third party." (*Seeley, supra*, 190 Cal.App.3d at p. 860.) The *Seeley* factors are: "'(1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm.'" (*Id*. at p. 861, internal citations omitted.)

These factors weigh in favor of Old Republic.

The extent to which the transaction was intended to affect the plaintiff. The transactions at issue in Hossein's complaint were the examination of title and the issuance of the preliminary report and title insurance policy. As discussed above, the purpose of the title examination and preliminary report was to facilitate Old Republic's *internal* underwriting decision and thus to protect Old Republic. (See pp. 7-9, *supra*.) The purpose of the title insurance policy was to protect Old Republic's insured—Wazzan. As a stranger to that policy, Hossein cannot allege it was intended to affect him in any way.

The courts have applied the "intended to affect plaintiff" test narrowly. For example, in *Nymark v. Heart Fed. Savings & Loan Assn., supra*, 231 Cal.App.3d 1089, a lending institution favorably appraised plaintiff's property in connection with plaintiff's loan application. The plaintiff sued the lender for negligence when he later discovered his property was in need of costly repairs. The Court rejected plaintiff's claim, even though it was directed against *his own lender*: "[T]he purpose of the appraisal was to protect *defendant's* interest by satisfying it that plaintiff's property provided adequate security for the loan. Plaintiff did not allege that the appraisal was intended to assure him that his collateral was sound or to induce him to enter into the loan transaction. Thus, the appraisal was not intended to affect plaintiff in a manner dictating the existence of a duty of care in its preparation." (*Id.* at p. 1099, emphasis in original.)

The same is true here. The transactions alleged in Hossein's complaint were not intended to affect Hossein in any manner.

Even if the transaction is defined as the recordation of the deed, that act cannot serve as a basis for liability because that act was intended only to *give notice* of the transfer of title by Shirin and Wazzan. (See p. 14, *supra*.) It was not intended to have any effect on Hossein.

Thus, our case differs from *Seeley*, where the title company recorded a facially invalid instrument that was *intended* to prevent the owner from disposing of his property. (See *Seeley*, *supra*, 190 Cal.App.3d at pp. 858, 861.) By recording the unilaterally-executed "Memorandum of Agreement" as an accommodation to the prospective lessee, the title company knowingly affected the owner by clouding title with a facially invalid document. (*Id*. at p. 856 [parties conceded document was unrecordable].) In the words of the Court, the "primary purpose" of the document was to affect the owner and his ability to dispose of his property. (*Id*. at p. 861.)

The foreseeability of harm to the plaintiff. In the trial court, Hossein argued that it was foreseeable that if Old Republic failed to recognize his interest in the Property by seeking his consent to the sale, then the purchase of the Property would go forward to his detriment. (CT 33.)

This view of foreseeability has been rejected by the courts. *Stagen v. Stewart-West Coast Title Co.* (1983) 149 Cal.App.3d 114, is on all fours. There, the plaintiff sued title companies for failing to advise a purchaser of the lis pendens he had recorded in order to prevent the property from being sold while he litigated his claim to it with the owner. Relying on the *Seeley* factors, the plaintiff made the same arguments that Hossein makes here—i.e., that the title companies were negligent in failing to disclose his claim to the property, and that they should have foreseen that "their omission of the lis pendens from the title report would jeopardize the rights of that class of individuals (e.g., persons, such as himself, who are claimants of an interest in the title to, or the right of possession of, real property) who reasonably rely on title companies to disclose the recordation of a lis pendens." (*Id*. at p. 118 [citing factors recited in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650, that were later adopted in *Seeley*].)

The Court of Appeal rejected the plaintiff's notion of foreseeability. It reasoned that "[t]he 'end and aim' of the transaction here, the title search

and issuance of title insurance, was not intended to affect [the plaintiff] but to protect the buyers." (*Id.* at p. 124; see also *id.* at p. 124, fn. 3 ["The title search was not undertaken for (the plaintiff's) benefit, nor was he, as a party to a prior land sale contract with the seller, in the same class of foreseeable plaintiffs as a subsequent grantee"].)

The same is true here. The "end and aim" of the transaction was to allow Old Republic to provide Wazzan with title insurance, not to protect Hossein's property interests. No duty to Hossein can stem from Old Republic's underwriting decision to issue a policy to Wazzan.

On appeal, Hossein now argues that it was reasonably foreseeable that his rights would be affected adversely if Old Republic recorded the deed without his consent to the sale. (AOB 11.) He argues that Old Republic should have foreseen that he might have to file a lawsuit to recover his interests in the Property (i.e., an action to quiet title). (*Ibid.*)

Again, this reading of foreseeability is untenable. By recording the grant deed as a sub-escrow, Old Republic gave future purchasers notice of the sale to Wazzan. That act had nothing to do with Hossein.

In any event, as in *Seeley*, the bare act of recordation is not the basis for Hossein's allegation of negligence. (See *Seeley*, *supra*, 190 Cal.App.3d at p. 862, fn. 8 ["It is clear that [the title company's] negligence liability did not, as it claims, arise solely from the recordation of the document"].) Under Hossein's theory of the case, it is the knowledge that Old Republic gleaned *during its title examination* that rendered the recordation wrongful. (AOB 9-10.)[7/] But that examination was conducted so that Old Republic

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[7/] In particular, Hossein states that the alleged facts "which show that [Old Republic's] act in recording the Grant Deed conveying title to buyer (Wazzan) was negligent, consist[] of the following: that [Old Republic] had actual knowledge of the existence of [Hossein's] interest in the Property; that [Old Republic], prior to the close of escrow, investigated in some detail the authority of the seller [Shirin] to sell and transfer the

could issue a preliminary report and title insurance policy. Neither of those acts foreseeably affected Hossein.

Thus, our case is distinguishable from *Seeley*, where it was foreseeable that by recording the Memorandum of Agreement on title, the title company would prevent the owner of the Property from selling to another buyer. (*Seeley*, *supra*, 190 Cal.App.3d at pp. 851, 858, 861 ["Once the nonrecordable memorandum found its way into the official register (with the stamp 'Safeco Title Ins. Co.' prominently displayed), it could reasonably be anticipated that Seeley would henceforth encounter difficulty in consummating a sale to interested third parties"].)

Degree of certainty that plaintiff suffered injury. Hossein alleges that he suffered injury when Wazzan purchased the Property for $270,000 under market value. (AOB 12.) But if, in fact, the sale could not be consummated without Hossein's consent, then Hossein retains his interest in the Property. If Hossein can recover the Property, he cannot have been damaged by the alleged low purchase price.

Closeness of the connection between the defendant's conduct and the injury suffered. Hossein argues that Old Republic's recordation of the deed without his consent to the sale *caused* the transfer of the Property for less than fair market value. (AOB 13.) But if Hossein suffered any injury, it resulted from Shirin's sale of the Property to Wazzan, not from Old Republic's recordation of the deed. At the time of the recordation, the

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Property without [Hossein's] written authorization—which involved having engaged in direct communication with the seller, requesting and reviewing specific documents from the seller, including the Judgment and various Orders in the Dissolution Proceedings between [Hossein] and seller [Shirin] and reviewing the partnership agreement for Fati LP in which [Hossein] and seller [Shirin] were partners; and, that [Old Republic] negligently and/or recklessly concluded [Hossein's] consent was not required for the sale and transfer of the Property to Wazzan." (AOB 9-10, emphasis and some capitalization omitted.)

transfer of title *had already occurred*. (See p. 14, *supra* [recordation merely gives notice of transfer].) Thus, if Hossein has a remedy, it is against Shirin and Wazzan, not against the sub-escrow that competently discharged its limited sub-escrow duties by recording a facially recordable document. (See pp. 15-17, *supra*.)

Likewise, there is no connection between Hossein's alleged injuries and Old Republic's title examination and issuance of a preliminary report and title insurance policy. Title insurance companies conduct examinations of title and issue preliminary reports to protect themselves by making internal underwriting decisions. (See pp. 7-11, *supra*.) Neither those acts, nor the issuance of a title insurance policy, can be relied upon by third parties. (*Ibid*.) Even if Old Republic's issuance of a preliminary report gave the parties to the purchase and sale transaction the comfort to consummate the deal, that fact cannot serve as a basis for liability. (See p. 10, *supra*.) Thus, as a matter of law, there is no connection between Old Republic's conduct and Hossein's alleged injury.

In contrast, in *Seeley*, "the 'closeness of the connection' between the act and the harm suffered [was] self evident" because the facially invalid document could not have been recorded without the title company's negligent conduct. (*Seeley*, *supra*, 190 Cal.App.3d at p. 861.) Specifically, the title company had a special arrangement with the recorder's office under which it "was required to review for recording compliance all documents which were recorded." (*Id*. at p. 862, fn. 7.) "In violation of its agreement with the recorder," the title company submitted the unrecordable document to the recorder's office for regular recordation (rather than accommodation recording) and thus "gave the appearance that [the title company] had given its imprimatur to the document." (*Id*. at pp. 861, 862, fn. 7.)

The moral blame attached to the defendant's conduct. Like the closeness of the connection between the negligent act and the harm, the

moral blame attached to the defendant's conduct in *Seeley* was also self-evident: "By violating both its contract with the recorder and standard title company practices, [the title company] gave the document an aura of presumptive validity, thereby dramatically increasing the likelihood that the document would not be given normal scrutiny by the recorder." (*Id*. at p. 862.)

Here, in contrast, Old Republic recorded a facially valid document in its capacity as a sub-escrow. No moral blame can attach to this conduct. By the same token, no moral blame can stem from Old Republic's statutorily-protected examination of title and issuance of a preliminary report.

The public policy of preventing future harm. Because Old Republic did not cause Hossein's alleged injuries, public policy does not weigh in favor of imposing negligence liability here. While public policy certainly requires that escrow companies and title companies act responsibly, those concerns are not implicated by this case. (Compare *Seeley*, *supra*, 190 Cal.App.3d at p. 862.)

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Governing law precludes the duty that Hossein alleges Old Republic owed him. Accordingly, the trial court properly sustained Old Republic's demurrer without leave to amend. (See *Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 880 ["if the defendants negate any essential element of a particular cause of action, this court should sustain the demurrer to that cause of action"].)

II. FACTS ON THE FACE OF A JUDICIALLY-NOTICEABLE DOCUMENT IN THE CHAIN OF TITLE ESTABLISH THAT PLAINTIFF CANNOT

AMEND HIS COMPLAINT TO STATE A CLAIM AGAINST OLD REPUBLIC.

Hossein argues that he can amend his complaint to state a claim by alleging that Old Republic negligently recorded the grant deed transferring title to Wazzan. As discussed above, this is wrong as a matter of law. (See section I.C., *supra*.) As we now show, it is also wrong as a matter of judicially-noticeable fact.

This provides yet another ground upon which this Court may affirm the trial court's order sustaining the demurrer without leave to amend. (See *Cantu, supra,* 4 Cal.App.4th at p. 880, fn. 10 ["If another proper ground for sustaining the demurrer exists, this court will still affirm the demurrers even if the trial court relied on an improper ground, whether or not the defendants asserted the proper ground in the trial court"]; *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 127 ["A proper judgment or decision of a lower court will be affirmed regardless of the correctness of the grounds upon which the court reached its conclusion"].)

A. Reviewing Courts Can Affirm Judgments On Orders Sustaining Demurrers Without Leave To Amend On The Basis Of Judicially-Noticeable Matters.

A demurrer may be based upon "any matter of which the court is required to or may take judicial notice." (Code Civ. Proc., § 430.30, subd. (a).) "The theory is that the pleader should not be allowed to bypass a demurrer by suppressing facts which the court will judicially notice. The principle is that of truthful pleading . . . ." (*Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107.) Numerous cases so hold.[8/]

[8/] See, e.g., *Cantu v. Resolution Trust Corp*., *supra*, 4 Cal.App.4th at p. 877 ("in the interests of justice, on demurrer, a court will also consider judicially noticeable facts, even if such facts are not set forth in the

To affirm a demurrer, a reviewing court "may take judicial notice of matters which could have been noticed by the trial court, even where the trial court was not requested to take such notice." (*Hogen v. Valley Hospital*, *supra*, 147 Cal.App.3d at p. 125 [concluding that judicially-noticeable materials provided an "independent reason" to support order sustaining demurrer without leave to amend]; see also *B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 960 [affirming demurrer based, in part, on judicially-noticeable materials that were not before the trial court; "An appellate court is permitted to take judicial notice of any matter specified in Evidence Code section 452, although the trial court did not take notice of it and it is not in the record, so long as a record is made of the matter and each party is afforded an opportunity to respond to it"].)

Indeed, reviewing courts regularly affirm judgments on the basis of judicially-noticeable materials that were not before the trial court. (See, e.g., *Cal-American Income Property Fund II v. County of Los Angeles* (1989) 208 Cal.App.3d 109, 112, fn. 2 [affirming based, in part, on judicially-noticed trust deeds not before trial court]; *Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 200, fn. 3 [reviewing court affirmed after

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complaint"; held, statements made by plaintiff in earlier action that contradicted statements in current action were judicially noticeable on demurrer); *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 824, internal citations omitted (when reviewing order sustaining demurrer, "any allegations that are contrary to the law or to a fact of which judicial notice may be taken will be treated as a nullity. A party may not avoid demurrer by suppressing facts, including those that are judicially noticeable, which prove the pleaded facts false. Given that the principle at issue is that of 'truthful pleading,' the court also will consider such facts"); *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517 (same); *Four Star Elec. v. F & H Const*. (1992) 7 Cal.App.4th 1375, 1379 (taking judicial notice of files in prior court action; "'a complaint may be read as if it included matters judicially noticed. Such matters may show the complaint fails to state a cause of action though its bare allegations do not disclose the defect'").

taking judicial notice of legislative history of statute on its own motion]; see also Evid. Code, §§ 452, 459.)

The Court should do the same in this case.

B. The Grant Deed Transferring Title To Fati LP Establishes That Hossein Cannot Amend His Complaint To State A Claim.

Hossein concedes in his complaint that Fati LP owned the Property. (CT 12 [¶ 12].) He also concedes that the limited partnership agreement of Fati LP gave Shirin the unilateral power, as the sole general partner, "to purchase, manage, dispose of or otherwise deal with any partnership interest in real or personal property." (CT 15 [¶ 23].) Nonetheless, Hossein alleges that he retained an individual interest in the Property, separate from that he had transferred to Fati LP. (CT 12-13 [¶¶ 13, 14].)

The grant deed from Shirin and Hossein to Fati LP establishes that this is not true and, rather, that Hossein retained *no* separate interest in the Property. A grant deed conveys the grantor's entire fee simple interest—i.e., all of the grantor's rights in the property. (Civ. Code, §§ 829, 1105; see also *American Enterprise, Inc. v. Van Winkle* (1952) 39 Cal.2d 210, 220 ["a grant deed is presumed to convey the grantor's entire interest"].) Thus, the grant deed gave Fati LP full ownership of the Property, with no reservation of any rights in either Hossein or Shirin.

In light of Shirin's power under the limited partnership agreement of Fati LP to *unilaterally* dispose of the Property, Old Republic correctly concluded that Hossein's consent was unnecessary to transfer title. This conclusion is buttressed by the allegation in Hossein's complaint that a court order dated April 9, 2002, stated: "Management and control of all properties to be with [Shirin] forthwith." (CT 15 [¶ 23], emphasis omitted.)

Thus, Hossein cannot amend his complaint to state a claim for negligence on the basis of Old Republic's recordation of the deed.

The courts regularly rely upon judicially-noticeable title documents to affirm demurrers in cases involving real estate. For example, *Livermore v. Beal* (1937) 18 Cal.App.2d 535 is on all fours. There, the plaintiffs sued to quiet title to parcels of real property that were actually government lands, pursuant to regulations promulgated by the federal Land Office. The Court of Appeal affirmed judgment for the defendants on demurrer, holding that although the complaint to quiet title disclosed none of these facts, the trial court was bound to take notice of "the records and documents of the Land Office relating to the issues on this appeal." (*Id*. at pp. 540-541; see also *Arnold v. Universal Oil Land Co.* (1941) 45 Cal.App.2d 522, 529 [reaching similar result on similar facts]; *Dubin v. Robert Newhall Chesebrough Trust* (2002) 96 Cal.App.4th 465, 472 [taking judicial notice of lease and deeds showing the chain of title of the leased property].)

Likewise, in *People v. Oakland Water Front Co.* (1897) 118 Cal. 234, 244-245, the complaint alleged that the plaintiff held title to certain land. However, the plaintiff's allegation of ownership was contrary to a legislative act that had granted the land to Oakland. The Court held that the trial court was justified in looking beyond the face of the complaint and relying on the legislative grant in sustaining the demurrer. The Court of Appeal explained:

> "Why should a general demurrer to a complaint be overruled and the parties required to proceed to the trial of an issue of fact when the court, looking to a law of which it is bound to take a notice, can clearly see that one of the essential allegations of the complaint can never by any legal possibility be proved? What useful or desirable end could be attained by shutting its eyes to the certain event of the litigation and putting the parties to the trouble, delay, and expense of framing and preparing to try issues which can have no

> influence upon the final result? These questions answer themselves . . . ."

(*Id*. at p. 245; see also *Watson v. Los Altos School Dist.* (1957) 149 Cal.App.2d 768, 771 ["It would be a travesty on justice were we required to send the case back for a trial that we know would end in but one way . . . . No such ridiculous result is necessary"; affirming demurrer by taking judicial notice of documents which were part of the record on a prior appeal].)

Here, the grant deed transferring title *entirely* to Fati LP conclusively establishes that Old Republic correctly determined that Hossein's consent was unnecessary. It would be "a travesty on justice" were this Court "to send this case back for a trial that we know would end in but one way." (See *Watson v. Los Altos School Dist.*, *supra*, 149 Cal.App.2d at p. 771.)

CONCLUSION

For all of the foregoing reasons, this Court should affirm the trial court's order sustaining Old Republic's demurrer without leave to amend.

DATED: March ___, 2006

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CERTIFICATION

Pursuant to California Rules of Court, Rule 14, I certify that this Respondent's Brief contains 8,523 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: March ___, 2006

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Cynthia E. Tobisman

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