APPENDIX

1. Remittitur and Opinion of the Appellate Court of California, Second Appellate District

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TICOR TITLE COMPANY OF CALIFORNIA et al.,

Plaintiffs and Respondents,

v.

YAN MINKOVITCH,

Defendant and Appellant.

B312634

(Los Angeles County Super. Ct. No. BC701437)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elaine Lu, Judge. Affirmed.

Yan Minkovitch, in pro. per., for Defendant and Appellant.

Fidelity National Law Group and Kevin R. Broersma for Plaintiffs and Respondents.

We consider whether a title insurer or an escrow agent owes a duty of care to the spouse of a purchaser of real property where the spouse and the purchaser expressly agreed the purchaser would procure the property in the purchaser's name alone, and the spouse was not a party to the purchase or the related escrow instructions.

I. BACKGROUND[1]

A. The Underlying Purchase

In 2013, cross-complainant and appellant Yan Minkovitch (Yan) engaged the services of cross-defendants and respondents Ticor Title Company of California (Ticor) and Lawyers Title Company (Lawyers Title) to provide him and his then-wife, Lina Minkovitch (Lina), with title insurance and escrow services in connection with their purchase of real property located at 4949 Palo Drive, Tarzana, California 91356 (the property). The parties discovered Yan had a credit history that jeopardized the couple's ability to jointly obtain financing. Lina, however, could qualify for the loan on her own. Yan and Lina accordingly decided she would purchase the property in her name alone.

Before the purchase transaction closed, Ticor and Lawyers Title demanded Yan execute a real property quitclaim deed in favor of Lina. The final escrow instructions, however, did not specifically demand the execution of the quitclaim deed. They did provide, though, that Lawyers Title was "authorized to prepare,

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[1] Our factual recitation is taken from the operative cross-complaint's allegations and attached exhibits. (See generally *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1 (*Yvanova*).)

obtain, record, and deliver the necessary instruments to carry out the terms and conditions of this escrow and to order the policy of title insurance to be issued at the close of escrow as called for in these instructions."

Yan told Ticor and Lawyers Title that he held a community property interest in the property and the property was being taken in Lina's name alone solely to facilitate the transaction. But Ticor and Lawyers Title continued to demand Yan execute a quitclaim deed, and he felt compelled to sign what they required to ensure the purchase could be completed. The deed Ticor and Lawyers Title ultimately presented to Yan was an interspousal transfer grant deed (not a quitclaim deed). Ticor and Lawyers Title neither explained the form to Yan nor gave him time to seek counsel. Yan signed the deed presented.

B. The Property Is Sold While Yan and Lina Are in Divorce Proceedings; a Lawsuit Ensues

In April 2016, Lina, as seller, opened escrow with Ticor in order to sell the property. At the time of escrow, Lina and Yan were in the midst of divorce proceedings.[2] Ticor received competing claims for the property sale proceeds that remained after the close of escrow, and Ticor filed a complaint in interpleader naming Yan, Lina, and the United States (i.e., the Internal Revenue Service) as parties with an interest in the funds.

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[2] We affirmed the trial court's judgment of dissolution in *In re Lina & Yan Minkovitch* (Oct. 16, 2020, Nos. B297022, B300374, B301994) [nonpub. opn.].

In August 2019, Yan filed a cross-complaint against Ticor in the interpleader action. Ticor demurred. The trial court sustained the demurrer and granted leave to amend. In March 2020, Yan filed a first amended cross-complaint (the operative complaint) alleging causes of action against both Ticor and Lawyers Title.

The operative cross-complaint asserts causes of action for negligence, breach of fiduciary duty, and interference with prospective economic advantage. Generally, the operative cross-complaint alleges: Yan lost the ability to make a community property claim on the property sale proceeds in the divorce proceeding because Ticor and Lawyers Title required him to sign the interspousal transfer deed; Ticor wanted the deed to be signed in the interest of its own risk management, perhaps in protection of the lender, and without consideration of his community property interest; and Lawyers Title acted only in Ticor's interest and without regard for the escrow instructions, which did not call for recording any deed other than the seller's grant deed.

Turning to the specific causes of action, the negligence claim alleges Yan was a customer of Ticor and Lawyers Title and paid for their services. It further alleges cross-defendants "and particularly, Lawyers [Title], Escrow Division, had a legally cognizable duty to [Yan] to administer the escrow according to the Escrow Instructions, no more and no less." As alleged, Ticor and Lawyers Title acted in excess of the final escrow instructions by demanding Yan execute the interspousal transfer grant deed and breached their duty to him to operate under and within the confines of the escrow instructions. The breach of fiduciary duty cause of action alleges Lawyers Title agreed to act as the escrow

holder for the purchase of the property, thereby assumed fiduciary responsibilities as to Yan because it knew he held potential and actual community property interests in the property, and breached its fiduciary duty by forcing Yan to sign the interspousal transfer deed. The interference with prospective economic advantage cause of action alleges Ticor and Lawyers Title forced him to sign away his community property interest in the home in order to decrease their own risk.

The operative cross-complaint attached two exhibits. Exhibit A, the form Residential Purchase Agreement and Joint Escrow Instructions, listed "Lina Mikovitch" as the buyer of the property. "Yan Minkovitch" was mentioned only as an "agent." Exhibit B, the Supplemental Escrow Instructions, similarly stated that title was to be vested in Lina only.

C. The Demurrers

Lawyers Title demurred to the operative cross-complaint. The company argued the negligence claim failed to state a cause of action because an escrow company does not owe any duty to a third party to the transaction because there is no contract between them. Lawyers Title argued the cause of action for breach of fiduciary duty failed for a similar reason, i.e., Lawyers Title owned no such duty to Yan. As for the cause of action for interference with prospective economic advantage, Lawyers Title's demurrer argued it did not state a claim because Yan did not allege an independently wrongful act.

Ticor, too, demurred to the operative cross-complaint. It argued the cause of action for negligence failed to state a claim because Lina purchased the property alone, Yan was not an insured under the title policy, and Ticor owes a duty only to

insureds under the title policy. Ticor's arguments as to the breach of fiduciary duty and interference with prospective economic advantage were the same as Lawyers Title's: no fiduciary duty was owed and Yan alleged no independently wrongful act.

Yan's opposition to the demurrers contended that any duty Ticor and Lawyers Title owed to Lina was similarly owed to him because he had a community property interest in the property, the community funds being used in the transaction, and the escrow contract Lina executed during the marriage. Though his specific arguments were nominally directed to both cross-defendants, the substance of his arguments referenced only the duties owed by escrow holders and did not specifically address title insurers.[3]

Ticor filed a reply arguing in pertinent part that Yan did not address Ticor's specific role as a title company. Ticor reiterated its argument that Lina, not Yan, was the purchaser

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[3] Yan also asked the trial court to judicially notice a reporter's transcript of proceedings that took place in his marriage dissolution case (case number BD630832) and the final supplemental escrow instructions for Lawyers Title Escrow Number WHL17573 ST. The transcript reflects the family court received the interspousal transfer grant deed into evidence and stated the document included the following language: "Grantors, Yan Minkovitch, spouse of grantee, hereby grants to Lina Minkovitch, a married woman as her sole and separate property." The family court then said, "if there was anything respondent even owned, he's transferred it by this document to petitioner. So it is her sole and separate property." The final supplemental escrow instructions provided title would be vested in "Lina Minkovitch."

and the named insured on the policy, which precluded negligence liability. Lawyers Title's reply argued in pertinent part that an escrow holder is a limited fiduciary to the parties to the escrow only, Yan was not a party to the transaction, and Yan had not alleged and could not allege Lawyers Title failed to follow any escrow instructions.

D. The Trial Court's Ruling

The trial court sustained both demurrers (and granted Yan's request for judicial notice).

In addressing the negligence cause of action, the trial court recognized the duties Ticor and Lawyers Title were alleged to owe to Yan arose from their respective roles as title insurance company and escrow agent. The court then analyzed whether Ticor or Lawyers Title had a legally cognizable duty to Yan. It noted Yan was not listed as a party or beneficiary on either the real estate purchase forms or the escrow instructions. Yan was thus neither the buyer nor an intended third-party beneficiary. He was, at most, an incidental beneficiary and therefore neither Ticor nor Lawyers Title had a duty to him.

The trial court then turned to whether a duty could exist by virtue of the relationship of the parties. The court analyzed the question by applying the factors identified by our Supreme Court in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*).[4] With

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[4] The *Biakanja* factors "are used to determine whether persons must exercise reasonable care to avoid negligently causing economic loss to others with whom they were *not* in privity (sometimes referred to as third parties)." (*Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 937-938.) The factors are "'[1] the extent to which the transaction was intended to

respect to Ticor, the court found Yan was not an intended third-party beneficiary of any contract with Ticor (and Yan did not argue otherwise). As at most an incidental beneficiary, Ticor owed no duty to Yan. With respect to Lawyers Title, the court applied the *Biakanja* factors and concluded they militated against finding a duty. As a result, the court found as a matter of law that neither Ticor nor Lawyers Title owed a duty to Yan, and his negligence cause of action therefore failed as a matter of law.

Regarding the other two causes of action, the trial court found the breach of fiduciary duty cause of action failed to state a claim because neither Ticor nor Lawyers Title owed a fiduciary duty to Yan and the cause of action for interference with prospective economic advantage failed because the operative cross-complaint did not allege any independently wrongful act on the part of Ticor or Lawyers Title. Having sustained the demurrers, the court denied leave to amend as to all three causes of action, reasoning neither the opposition nor the arguments at the hearing demonstrated any possibility of a successful amendment.

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affect the plaintiff, [2] the foreseeability of harm to him, [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.'" (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1013-1014 (*Centinela*).)

II. DISCUSSION

Yan's appeal of the trial court's ruling challenges only the court's analysis of the *Biakanja* factors to conclude cross-defendants owed him no duty. The trial court reached that conclusion only in connection with the negligence claim. We therefore confine our analysis to that claim and that issue, and we hold the trial court correctly concluded Ticor and Lawyers Title did not owe Yan a duty of care.[5] The transactions between Lina, Ticor, and Lawyers Title were aimed at facilitating Lina's purchase of the property. They were not meant to affect Yan. Though his injury might have been foreseeable to some degree, it was the result of Yan and Lina's independent decision that Lina would purchase the property in her name only so the transaction could go forward. Ticor's business decision to require Yan to sign the grant deed in order for it to issue title insurance was well within its rights, and Lawyers Title was merely executing the escrow instructions by helping Ticor obtain the signed deed. There is no moral blame attributable to cross-defendants' actions and there is no need to impose a duty to prevent future harm.

A. Standard of Review

We review an order sustaining a demurrer without leave to amend de novo. (*Centinela, supra*, 1 Cal.5th at 1010; *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 537.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or

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[5] In so narrowing the question on appeal, Yan agrees he was a third party to the transactions between Lina and each of the cross-defendants.

conclusions of fact or law. We may also consider matters subject to judicial notice. [Citation.]" (*Yvanova*, *supra*, 62 Cal.4th at 924, fn. omitted.) "'[T]he plaintiff has the burden of showing that the facts pleaded are sufficient to establish every element of the cause of action and overcoming all of the legal grounds on which the trial court sustained the demurrer, and if the defendant negates any essential element, we will affirm the order sustaining the demurrer as to the cause of action.'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1490-1491.)

B. Yan's Negligence Cause of Action Fails to State a Claim

"[T]he threshold question in an action for negligence is whether the defendant owed the plaintiff a duty to use care." (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 715 (*Summit*).) A defendant generally does not owe a duty to prevent purely economic loss to third parties under negligence law. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58 (*Quelimane*).) Rather, "[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 . . . ." (*Ibid.*)

"Title insurance is a contract by which the title insurer agrees to indemnify its insured against losses caused by defects in or encumbrances on the title not excepted from coverage." (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 675 (*Vournas*).) "Put another way, the 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." (*Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181,

1191 (*Siegel*).) "An insured's claim against his title insurer is under the policy, and an insured has no separate claim against a title insurer based on negligence or negligent misrepresentation." (*Vournas*, *supra*, at 675-676.) "A party who does not purchase title insurance may not rely on the title insurer to protect his or her interests or to disclose all detrimental information contained in the recorded files." (*Siegel*, *supra*, at 1193.) Title insurers "may opt to limit their potential liability by declining certain risks without violating any statutory or common law obligation." (*Quelimane*, *supra*, 19 Cal.4th at 59.)

"An escrow may be defined as any transaction in which one person, for the purpose of effecting a sale, transfer or encumbrance of real or personal property to another person, delivers any written instrument, money, evidence of title or other thing of value to a third party, the escrow holder or depository, to be held by him for ultimate transmittal to the other person upon the happening of an event or the performance of certain specified conditions." (*Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508, 526.) "An escrow holder is an agent and fiduciary of the parties to the escrow. [Citations.] The agency created by the escrow is limited—limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. [Citations.]" (*Summit*, *supra*, 27 Cal.4th at 711.) An escrow holder "'has no general duty to police the affairs of its depositors'; rather, an escrow holder's obligations are 'limited to faithful compliance with [the depositors'] instructions.' [Citations.]" (*Ibid.*)

In assessing whether a title insurer (here Ticor) or an escrow holder (here Lawyers Title) owed a duty of care to a third party, we consider the aforementioned *Biakanja* factors. (See,

e.g., *Summit*, *supra*, 27 Cal.4th at 715-716; *Quelimane*, *supra*, 19 Cal.4th at 58-59; *Alereza v. Chicago Title Co.* (2016) 6 Cal.App.5th 551, 557-562 (*Alereza*); *Stagen v. Stewart-West Coast Title Co.* (1983) 149 Cal.App.3d 114, 123-124 (*Stagen*).) To review, the factors are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, any moral blame attached to the defendant's conduct, and the policy of preventing future harm. We believe, as the trial court did, that these factors do not support finding either cross-defendant owed a duty of care to Yan.

1. The extent to which the transaction was intended to affect Yan

We look first to the extent to which the transactions were intended to affect Yan. Or, as *Biakanja* also described it, we examine the "'end and aim'" of the transaction. (*Biakanja*, *supra*, 49 Cal.2d at 650.) The matter is rather straightforward in our view: the end and aim of the transaction between Lina and Ticor was to protect the buyer, Lina, and the end and aim of the escrow instructions was the completion of the sale of the property from the seller to the buyer, Lina. (*Alereza*, *supra*, 6 Cal.App.5th at 560; *Stagen*, *supra*, 149 Cal.App.3d at 124.) Yan, quite consciously, was not an intended beneficiary of either.

Yan disputes this, contending the sale of a home to a married couple necessarily means the spouse of the purchasing customer will be affected by the transaction and the end and aim of the transaction is to benefit the marital community. But that

was not the sale agreed upon here—by Lina and Yan's own design. The property was not sold to a married couple but to Lina alone, and this is demonstrated both by the allegations in the operative cross-complaint (alleging Yan's credit profile jeopardized the couple's ability to obtain financing) and the terms of the purchase agreement and escrow instructions (specifying Lina was the sole buyer). Lina and Yan structured the purchase to purposely exclude Yan.

2. Harm, foreseeability, and closeness of connection between conduct and injury

The next *Biakanja* factors concern injury and foreseeability. Yan's allegation that he was harmed by the loss of his community property interest in the home is sufficient to establish harm at the demurrer stage. And his injury was, in a certain sense, foreseeable: he signed an interspousal transfer deed granting the property to Lina, and the function of the deed was to transfer any interest Yan might have arguably had in the property to Lina. That the injury may have been foreseeable (at least insofar as Yan could acquire an interest in the property while married and a divorce between Lina and Yan could be foreseen) does not by itself mean Lawyers Title or Ticor had a duty to avoid the harm. (*Quelimane*, *supra*, 19 Cal.4th at 58 ["Foreseeability of financial injury to third persons alone is not a basis for imposition of liability for negligent conduct"].)

The more probative factor, in our view, is the relation between Ticor and Lawyers Title's conduct and the injury suffered. Ticor required Yan to sign the interspousal transfer deed in order to issue a title insurance policy as a result of Yan and Lina's decision that Lina would purchase the property in her

name alone. As Yan alleged, it did so in the interest of its own risk management, and perhaps to protect the lender. Ticor was well within its rights to impose such a requirement. Title insurers "may opt to limit their potential liability by declining certain risks without violating any statutory or common law obligation." (*Quelimane, supra*, 19 Cal.4th at 59.) Further, "insurer[s] do[ ] not have a duty to do business with or issue a policy of insurance to any applicant for insurance." (*Id.* at 43.)

Similarly, by assisting Ticor in obtaining the signed deed, Lawyers Title was following the instruction that directed it to ensure a title insurance policy was issued, as it was bound to do. (*E.g.*, *Summit, supra*, 27 Cal.4th at 711 [escrow holder is obliged to carry out instructions of parties to escrow].) Yan was thus presented with a choice—he could agree to sign the deed and the title insurance policy would issue, or he could refuse, and it would not. His knowing and voluntary decision to accept those terms is what caused the transfer of whatever right he had to the property.

Yan resists this conclusion and believes the cross-defendants' conduct was the cause of his injury because, in his view, there were alternative courses of action Ticor and Lawyers Title could have pursued—e.g., to let title vest in Lina without requiring him to sign the interspousal transfer grant deed (perhaps by having him sign a quitclaim deed that would not have transmuted the property)[6] or to exclude community property

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[6] Contrary to Yan's assertion, the execution of a quitclaim deed would not necessarily have allowed him to retain a community property interest in the property. A quitclaim deed may constitute "sufficient evidence that a transmutation of his

claims from coverage under the title insurance policy. That Ticor and Lawyers Title could, in theory, have made alternative business decisions does not mean they had any duty to do so. (*Quelimane*, *supra*, 19 Cal.4th at 58 [declining to "recognize a duty to avoid business decisions that may affect the financial interests of third parties"].) Ticor had the right to place conditions on its issuance of the title insurance policy. It was under no obligation to tailor its decisions to attempt to ensure Yan could permit Lina to obtain financing contingent upon his absence from the purchase transaction while still somehow retaining a community property interest in the property.

3. Moral blameworthiness and prevention of future harm

Finally, we look to the moral blameworthiness of the conduct and the policy of preventing future harm. Yan contends the steps Ticor chose to reduce its liability for facilitating the purchase and sale transaction, and Lawyers Title's execution of the transaction as directed, are morally blameworthy because Ticor could have limited its liability in some other manner. As we have already explained, that Ticor might have attempted to reduce its liability in some other fashion does not render the steps it took morally blameworthy. (*Quelimane*, *supra*, 19 Cal.4th at 59.) Lawyers Title also committed no morally blameworthy act by complying with the escrow instructions. (*Summit*, *supra*, 27 Cal.4th at 716 [escrow agency complying with fiduciary duty to follow escrow instructions is not blameworthy].)

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community interest in the property resulted." (*In re Marriage of Stoner* (1983) 147 Cal.App.3d 858, 864.)

The policy of preventing future harm also does not require the imposition of a new legal duty on either Lawyers Title or Ticor. To the extent the financial arrangement Yan and Lina arrived at in this case arises especially frequently, spouses who agree not to be listed as a buyer on a real estate transaction under conditions similar to these have a built-in and obvious incentive to understand the consequences of their decisions. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 403 ["As a matter of economic and social policy, third parties should be encouraged to rely on their own prudence, diligence, and contracting power, as well as other informational tools"].) Imposing upon title insurers and escrow agents a duty to both discover and guard any community property interest had by spouses of purchasers who have been knowingly and intentionally excluded from purchase documents would impose a duty to affirmatively assist purchasers to obtain title in a manner that differs from that represented in their purchase documents (or to their lenders). That would not serve the public interest.

DISPOSITION

The judgment is affirmed. Ticor and Lawyers Title are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.

a. Case Docket of the Second Appellate District

Appellate Courts Case Information

2nd Appellate District

Change court

Docket (Register of Actions)

Ticor Title Company of America v. Minkovitch
Division 5
Case Number B312634

Date	Description	Notes
05/25/2021	Notice of appeal lodged/received.	April 27, 2021: Yan Mionkovitch
05/25/2021	Default notice sent-appellant notified per rule 8.100(c).	No fee rcvd
05/25/2021	Appellant's notice designating record on appeal filed in trial court on:	Notice dated April 29, 2021: 8.122 no RT
06/04/2021	Application for waiver of filing fee filed.	
06/15/2021	Default notice sent; no case information statement filed, or statement incomplete.	Appellant (April 27, 2021: Yan Mionkovitch) is in default for failure to file a Case Information Statement pursuant to California Rules of Court, Rule 8.100(g).
06/15/2021	Order waiving filing fee.	Granted on June 15, 2021
06/21/2021	Civil case information statement filed.	Defendant and Appellant: Yan Minkovitch Pro Per
09/10/2021	Record on appeal filed.	C-3 (695 Pages)
10/20/2021	Appellant's opening brief.	Defendant and Appellant: Yan Minkovitch Pro Per
10/21/2021	Stipulation of extension of time filed to:	
10/21/2021	Change of address filed for:	Attorney for Plaintiff and Respondent TICOR TITLE COMPANY OF CALIFORNIA
12/16/2021	Respondent's brief.	Plaintiff and Respondent: Ticor Title Company of America Attorney: Kevin R. Broersma One extension granted for a total of 31 days: 10/21/2021 Stipulation of extension of time filed to:. Due on 12/20/2021 By 31 Day(s)
01/05/2022	Appellant's reply brief.	Defendant and Appellant: Yan Minkovitch Pro Per
01/06/2022	Note:	Notice of non-conformance emailed to appellant re: missing proof of service of Reply Brief on superior court (CRC 8.212(c)(1).
01/06/2022	Case fully briefed.	
01/10/2022	Filed proof of service.	Proof of service of appellant's reply brief on superior court

04/08/2022	Calendar notice sent electronically. Calendar date:	May 4, 2022 at 9 am
04/11/2022	Request for oral argument filed by:	Yan Minkovitch, Pro Se Appellant (30 minutes)
04/12/2022	Request for oral argument filed by:	Kevin R. Broersma for respondent (10 minutes)
05/04/2022	Cause argued and submitted.	
05/04/2022	Received:	Received appellant's request for copy of oral argument audio recording
07/20/2022	Opinion filed.	(Signed Unpublished)The judgment is affirmed. Ticor and Lawyers Title areawarded costs on appeal. Baker-Rubin-Kim / 17 pages
08/30/2022	Service copy of petition for review received.	Appellants service copy of petition for review.
09/06/2022	Received letter from:	California Supreme Court dated September 1, 2022, re S276207 "Dear Mr. Minkovitch: The court has granted your application for relief from default to file the untimely petition for review and the petition was filed on September 1, 2022."
09/09/2022	Record transmitted to Supreme Court.	1x4"
10/19/2022	Petition for review denied in Supreme Court.	The petition for review is denied.
10/24/2022	Remittitur issued.	Ticor and Lawyers Title are awarded costs on appeal.
10/24/2022	Case complete.	
10/21/2022	Record returned from Supreme Court.	1x4"

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b. Appellant's Opening Brief.

CASE NO. B312634

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

IN AND FOR THE SECOND APPELLATE DISTRICT

TICOR TITLE COMPANY OF CALIFORNIA, et al.

Cross-Defendants & Respondents

vs.

YAN MINKOVITCH

Cross-Complainant & Appellant

From the order of the Los Angeles Superior Court
Honorable Elaine Lu, Judge of the Superior Court
Superior Court Case No. BC701437

APPELLANT'S OPENING BRIEF

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Introduction

This matter comes to the Appellate Court seeking review of the trial court's dismissal of Apellant's Cross-Complaint against Ticor Title Company, after Ticor's Demurrer was sustained without leave to amend.

In 2013, Cross-Complainant, YAN MINKOVITCH, (Minkovitch), and his then wife purchased a home in Los Angeles County. As a practical matter only, the couple planned to take title in the wife's name only, in order to facilitate the loan process. They hired Cross-Defendant, TICOR TITLE, (Ticor), and their subsidiary, LAWYER'S TITLE, (Lawyer's) to handle the transaction.

During that transaction, and without any instructions to do so, Ticor & Lawer's required of Minkovitch that he execute what they described as a "quit-claim deed" as to the subject property. However, the deed they selected, prepared, and required Minkovitch to sign was actually an Interspousal Transfer Deed. With the transaction pending, Minkovitch was compelled to and did sign the Deed as offered.

A few years later, Minkovitch and his wife separated and filed for dissolution. During those proceedings the home was sold. Again, Ticor and Lawyer's handled the escrow of the sale. Upon completion of the sale, the proceeds were held by Ticor, pending resolution of the couple's divorce action.

The couple's divorce action proceeded to a family law trial, at which trial the Court determined that the specific language of the Interspousal Transfer Deed, selected by Ticor & Lawyer's, acted to satisfy the statutory parameters of a family law transmutation, resulting in an award of the entire value of the home to the wife, to Minkovitch's loss and damage.

Accordingly, when Ticor filed the instant action in interpleader, Minkovitch filed his cross-complaint against Ticor and Lawyer's, seeking compensation for their negligence, breach of fiduciary and interference with prospective economic advantage.

Ultimately, Ticor's Demurrer to Minkovitch's First Amended Complaint

came on regularly. Ticor and Lawyer's stood on the position that, as a title company, they owed no duty to Minkovitch, who they characterized as a third party to the original escrow transaction in 2013, lacking in privity.

Minkovitch contended in defense that Ticor and Lawyer's have a normal duty to act reasonably and that the Cross-Defendants had a duty to him in his community interest co-equal to that enjoyed by his wife.

Ticor and Lawyer's contended in their Reply that Minkovitch's position did not meet the six factors set forth in Biankanja v Irving (1958) 49 Cal.2d 647. The Court agreed and sustained Ticor's and Lawyer's Demurrers without leave to amend.

Accordingly, this appeal ensues. Minkovitch argues on appeal that his position and participation in the transaction brings him within the *Biankanja* factors and that the Court below has applied the factors in error.

Minkovitch contends that, instead, Cross-Defendants should be rightly held to be responsible to him, as the transaction was intended to affect the him and his family, that the foreseeability of harm to him by the requirement that he execute an unnecessary title deed is clear, and that, losing his interest in the home, it is a certainty that Minkovitch suffered injury as a direct result of the operation of the unnecessary deed selected and required of him by Ticor and Lawyer's. The moral blame attached to Cross-Defendant's conduct is palpable, as the deed they foist upon Minkovitch was required only to protect Ticor and Lawyer's own interests and their own concerns of liability, without concern for anyone else's rights and interests, a decision taken by them despite their fiduciary capacity.

Minkovitch contends that, in preventing future harm, the Court here has the opportunity to, once and for all, limit the right and power of non-lawyer escrow and title officers to, without counsel, select, prepare and require a client in Minkovitch's position, or any other spouse, to sign title documents which act only to protect the title company, and which are of no benefit to the members of the public.

In fact, Minkovitch contends, a title insurance company can protect itself completely from any liability for any such potential community property claims

simply by excluding such claims within the terms of their policy, which they control. In fact, they can in that manner protect themselves without touching or disturbing anyone's real property title, and in so doing they would completely avoid any danger of such harm occurring in the future to anyone in the entire escrow purchasing public.

As such, Minkovitch contends on appeal that any reasonable application of the *Biankanja* factors should properly have resulted in the trial court's finding that Ticor and Lawyers should be held to answer Cross-Complainant's allegations.

Statement of the Facts

Parties:

Appearing in this matters are two national Title Insurance Companies, both of which are owned by and held under the Fidelity Group's financial umbrella. Ticor Title and Lawyers Title companies are well known industry players and they are the Plaintiffs and Cross-Defendants in an action below that commenced as an interpleader, and they are the Respondents in this appeal.

Yan Minkovitch, appeared below as Defendant and Cross-Complainant, and he is the Appellant herein, proceeding self-represented.

Proceedings:

This matter commenced with Ticor's Summons and Complaint in Interpleader, and Deposit of Funds, dated April 09, 2018, (CT 17-32.)

Shortly after that filing, on May 14, 2018, the IRS stepped in and removed the matter to the District Court. (CT 13) Once the IRS settled that matter with Mrs. Minkovitch, the case was remanded to the Superior Court on May 28, 2019. (CT 12.)

Thereafter, on August 16, 2019, Minkovitch filed his Answer After Remand (CT 54-55), with his Cross-Complaint. (CT 36.)

Factual Allegations of Minkovitch's Cross Complaint:

By his Cross-Complaint, Minkovitch claimed that Ticor, *et al.*, by their powerful position as the prospective title insurer in Minkovitch's home purchase transaction, had wrongfully forced him to sign a Deed which, by Ticor's selection and preparation of an Interspousal Transfer Deed, instead of a more commonly used Quit-Claim Deed, acted to relinquish forever all of Minkovitch's right title and interest in and to the property. (CT 38.)

Minkovitch alleged that Ticor demanded this execution from him in order to, and only in order to, support their own risk management policies, and the action was not performed under any instruction contained in any escrow instruction. (CT 38.)

Minkovitch alleged that Ticor made this demand of him in their own interest, and not for the benefit of any principal in the transaction. (CT 38.)

Minkovitch alleged that Ticor made it clear that if Minkovitch refused to so sign, they would cause the escrow transaction to fail, as they controlled the title and the escrow offices. (CT 38.)

Minkovitch alleged further that Ticor provided him no opportunity to seek counsel to review the document, nor did they provide any such counsel from their own staff. (CT 38.)

Minkovitch also alleged that Ticor was aware that he and his wife had no desire at that time to have the property transmuted from a community property interest into a separate property interest. (CT 38.)

Ticor's First Demurrer:

On October 21, 2019, Ticor filed and served their demurrer to Minkovitch's Cross-Complaint. (CT 83.) By their demurrer, Ticor contended, variously, that the matter was time-barred and that Ticor lacked any duty to Minkovitch, as a non-contracting party. (CT 94-100.)

At the hearing on that Demurrer, on March 5, 2020, after discussion in open court regarding whether Minkovitch's community interest in the property rendered him to be not a third party, nor a stranger, to the escrow, the Court sustained the Demurrer, with leave to Amend in 10 days. (CT 125.)

Minkovitch's First Amended Complaint:

Minkovitch filed his First Amended Cross-Complaint on March 13, 2020. (CT 149.)

By his filing, Minkovitch alleged very much the same facts as he had in his original Cross-Complaint, with the addition of a recitation of Cross-Complainant's community property interest in the property (CT 152), and with some clarification of Lawyer's Title's position in the controversy. (CT 151.)

Ticor's Second Demurrer:

On April 28, 2020, Ticor and Lawyer's filed their Demurrer to Minkovitch's First Amended Complaint. (CT 226.)

In their Demurrer, Ticor argued that Cross- Defendants owed to Minkovitch no duty at all, as he was a "third party" who was not standing in privity to the transaction. (CT 235-238.)

Minkovitch filed his response and opposition on January 5, 2021. (CT 630.) By his responsive papers, Minkovitch argued, essentially, that title companies should not be allowed to hide behind previous, narrowly drawn, protective rulings, when the company had clearly harmed Minkovitch by its want of ordinary care and prudence.

The matter was heard on January 21, 2021. (CT 655.) The Court, after taking the matter under submission, issued its ruling on March 29, 2021. (CT 652.) In ruling on whether Ticor and Lawyer's has or had any duty to Minkovitch, the Court expressly relied on the six-factor analysis found in Biakanja v Irving (1958) 49 Cal.2d 647, 650. (CT 664.)

On that date, March 29, 2021, the Court sustained Cross-Defendants' Demurrer in its entirety without leave to amend. The Court also entered an Order and Judgment of Dismissal in favor of Cross-Defendants. (CT 653.)

It is from that dismissal that Appellant appeals. Appellant respectfully contends on appeal that the trial court erred in finding Cross-Complainant to be outside the criteria expressed in the *Biakanja* factors.

Statement of Appealability

It is settled in California that "[n]either an order overruling a demurrer nor one sustaining a demurrer, whether with or without leave to amend, is appealable." *see* San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal. 4th 893 (overruling demurrer); Youngblood v. Board of Supervisors (1978) 22 Cal. 3d 644, 651 (sustaining demurrer without leave to amend).

But, the ruling may be reviewed on appeal from a subsequent judgment or order of dismissal. *See* Code Civ. Proc. § 472c; Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 878, *and see* McKelvey v. Boeing North American, Inc. (1999) 74 Cal. App. 4th 151, 157 n.8.

Standard of Review

The standard of review of a dismissal upon the sustaining of a demurrer has been addressed at some length in California case law. The Sixth District explains:

> A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]' [Citation.] Thus, the standard of review on appeal is de novo. [Citation.] 'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . ." [Citations.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]' [Citations.] Berg & Berg Enterprises, LLC v. Boyle (2009) 178 Cal.App.4th 1020, 1034. (6th Dist.)

The Third District states the standard thusly:

> In reviewing a grant of nonsuit, an appellate ***court*** evaluates the evidence in the light most favorable to the plaintiff. The judgment of nonsuit will be affirmed if a judgment for the defendant is required as a matter of law, after resolving all presumptions, inferences and doubts in favor of the plaintiff. The review of a grant of nonsuit is de novo. Alereza v. Chicago Title Co. (2016) 6 Cal . App. 5th 551 (3rd Dist.)

Here in the Second District, it has been held that:

[o]n a motion for nonsuit, ' "the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give 'to the plaintiff['s] evidence all the value to which it is legally entitled, ... indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor ... .' " [Citations.] [¶] In an appeal from a judgment of nonsuit, the reviewing court is guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff. 'The judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.' Markowitz v. Fidelity Nat. Title Co., (2006) 142 Cal. App. 4th 508, 520 (2nd Dist.), *citing* Carson v. Facilities Development Co. (1984) 36 Cal.3d 830, 838–839.

ARGUMENT

1. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE *BIAKANJA* FACTORS.

It is well settled in California that in order to impose liability upon a Title Company or Escrow Company acting in performance of their services, a third party must meet certain enumerated criteria. Cross-Defendants themselves have argued these criteria in the their court filings.

As explained at length by Justice Crosky of the Second District:

a. The *Biakanja* Factors

> Over 40 years ago, our Supreme Court employed a checklist of factors to consider in assessing the existence of a legal duty of one party to another in the absence of a privity of contract between them. In *Biakanja*, ... the defendant notary public had prepared the will of the plaintiff's brother, which left the entire estate to the plaintiff. Due to the defendant's negligence, the will was improperly attested and could not be admitted to probate. As a result, the plaintiff received only his one-eighth intestate succession share of the estate rather than its entirety as he would have under the will. The court concluded that the defendant owed a duty of reasonable care to the plaintiff, which he had clearly breached. In reaching this conclusion, the court was careful not to declare an unlimited scope of liability in favor of any person who might have received a benefit under a contract but for its negligent performance. The court emphasized that the "end and aim" of the transaction was to benefit the plaintiff and the injury to the plaintiff from the defendant's negligent actions was clearly foreseeable. (Id. at p. 650.) But this would not always be true. The court said: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are
>
> [1] the extent to which the transaction was intended to affect the plaintiff,
> [2] the foreseeability of harm to him,
> [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." (Ibid.)
>
> Adelman v. Associated Int'l Ins. Co., (2001) 90 Cal. App. 4th 352, 361-362 (2nd Dist.), *citing* Biakanja v. Irving (1958) 49 Cal. 2d 647, 650

b. Application of the "*Biakanja Test*"

The Court in *Adelman* continued on to discuss several cases in which the Courts applied the "*Biakanja test,*" explaing that "[t]his test has been applied, in cases following Biakanja, to impose a duty of care, and liability in negligence for its breach, in a variety of factual contexts. Id., *at* 362.

Justice Crosky explains the application of the tests as follows:

> In both Lucas v. Hamm (1961) 56 Cal. 2d 583 and Heyer v. Flaig (1969) 70 Cal. 2d 223, disapproved on another point in Laird v. Blacker (1992) 2 Cal. 4th 606, 617, the court concluded that an attorney who undertakes to draft or prepare a will owes a duty not only to the testator but also to the testator's intended beneficiary to complete that task in a manner which will achieve the testator's purpose. "When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries." (Heyer v. Flaig, *supra*, 70 Cal. 2d at p. 228) If the attorney's task is negligently performed and the intended transfer to the designated beneficiary is thereby frustrated, that beneficiary should be allowed to recover for the attorney's negligence, otherwise, "no one would be able to do so and the policy of preventing future harm would be impaired." Lucas v. Hamm, *supra*, 56 Cal. 2d at p. 589.
>
> Id., *at* 362.

> In Connor v. Great Western Sav. & Loan Assn. (1968) 69 Cal. 2d 850, the Supreme Court again applied the Biakanja factors to find that a construction lender owed a duty to third party home buyers to discover and prevent major defects in homes the construction of which were financed by the lender. Because of this unique and essential position in the development process it effectively exercised control over the quality of the construction.
>
> Id., *at* 363.

> Similarly, in Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, the court found that an attorney, in giving a written opinion to a client which the attorney knew would be transmitted to and relied upon by a third party in dealing with the client, owed a duty of care to such third party in providing the advice contained in the opinion. This was so because the third party's anticipated reliance upon such opinion was the "end and aim of the transaction."
>
> Id., *at* 363.

> In J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, the court had before it the claim of a plaintiff lessee who had no contractual

relationship with the defendant contractor hired by the lessor but whose injury from the defendant's negligence was reasonably foreseeable. The plaintiff sued the defendant for damages resulting from the delay in completion of a construction remodel of the leased premises at the Sonoma County Airport where the plaintiff operated its restaurant. The plaintiff's lessor, the County of Sonoma, had entered into a construction contract with the defendant to make certain improvements to the restaurant premises. The contract did not specify a completion date and thus the defendant contractor was required to complete it within a reasonable time. He negligently failed to do so and, as a result, the plaintiff suffered a loss of business and profits. The plaintiff filed suit alleging that the defendant was liable to the plaintiff for the negligent performance of his contract with the lessor. Applying the Biakanja factors, the court held that these circumstances established a "special relationship" between the plaintiff and the defendant and, even though they were not in contractual privity, the defendant did owe the plaintiff a duty of care. (Id. at pp. 803-804.)

Id., *at* 363.

Justice Crosky explained why he set these cases forth in such detail:

Each of these cases reflects the principle that, as the Biakanja case itself demonstrated, **where the "end and aim" of the contractual transaction between a defendant and the contracting party is the achievement or delivery of a benefit to a known third party or the protection of that party's interests, then liability will be imposed** on the defendant for his or her negligent failure to carry out the obligations undertaken in the contract even though the third party is not a party thereto. Adelman v. Associated Int'l Ins. Co., 90 Cal. App. 4th 352, 362-363 (**Emphasis added.**)

c. The *"Biankanja Test"* as applied to Appellant

Here, Appellant contends that the Court erred in finding him to be without the six enumerated *Biakanja* factors.

i. "The extent to which the transaction was intended to affect the plaintiff."

In its Attorney-drafted order of March 29, 2021, the Court seems to adopt the position that, as to this factor, " [t]he escrow agreement was not designed to benefit Cross-Complainant, but only to complete the sale of the subject property to Lina (Mrs. Minkovitch, Appellant's then wife) Thus, the first factor militates against a duty of care to Cross-Complainant." (*see* CT 666, Line

20.)

Appellant respectfully contends the finding does not support the conclusion.

Appellant contends that logic and reason militate the more proper conclusion that, where, as here, an Escrow officer is selling a home to a married couple, in *California*, a state rather well known to be a community property state -- well then, under that fact, Appellant contends that any reasonable Escrow officer would understand and anticipate that the spouse of the purchasing customer will be jolly-well AFFECTED!

Appellant respectfully contends that, in practical fact, any California Escrow officer has stumbled across the Family Code of California in their day to day operations, and understand the rudiments of its operation as a necessity of the job. Appellant respectfully contends that, in practical fact, any California Escrow officer has to contend with marital property and with concepts of community property on a regular basis – couples buy and sell houses when they are getting married and particularly when they are getting divorced. Thus, Appellant submits, Cross-Defendants understand marital property. To imagine that these Cross-Defendants had no reason to believe that a husband might be "affected" by a wife's purchase of real property in California with community property funds just beggars all credulity.

Here, Minkovitch himself conducted all of the client side of the transaction for himself and his wife, and he was the person who interacted with the Cross-Defendants in conducting the transaction and it was Minkovitch himself who provided the downpayment money to the Escrow. Ticor, and their escrow agent, knew full well that title was being taken in the wife's name only to facilitate financing. They've seen that before. It was of course discussed with them. Appellant contends that these are by no means unique circumstances in the Escrow world – everyone knows how this works: The buyers get the loan however necessary, buy the house and then they intend to perfect title in the community later when they get around to it. Escrow agents see this all the time.

Appellant contends that to conclude, under such facts, that the transaction was not intended to affect the husband, – when we're looking at a marital

community's purchase of real property, is a conclusion unsupportable in logic, reason or common sense in California.

Clearly, the "end and aim" of such a transaction is to benefit both Husband and Wife, the community, regardless of the vesting under which title is taken. (*See* Family Code §760.) Certainly a title company the size of Ticor understands that civil presumptions of title have often bowed to a California community property claim. (*See, ie:* In re Brace (2020) 9 Cal.5th 903, 914. "[t]he presumption, ... that property acquired during the marriage is community, is perhaps the most fundamental principle of California's community property law," reflecting the "'general theory ... that the husband and wife form a sort of partnership, and that property acquired during the marriage by the labor or skill of either belongs to both.'" *Brace*, Id, *citing* In re Marriage of Valli (2104) Cal.4th. 1396.)

But, the Court below, by its order, seems to say that it's OK for Cross-Defendants to just ignore the spirit of California's community property scheme. That's just wrong.

ii. "The foreseeability of harm to him."

In the Court's order on Demurrer, March 29, 2021, the court found that "it was unforeseeable to the escrow agent that the couple would subsequently divorce..." (CT 667, Line 11.)

Appellant respectfully contends that such a statement defies a known reality of life. It is commonly held by the public that at least half of the marriages in America will fail. "The national divorce rate is about 50 percent. In California, it's 60 percent." O.C. divorce rate one of highest in nation, David Whitting. OC Register, 6/25/2012.

Whether or not that statistic is accurate, Appellant contends that any citizen of America understands that divorce rates are significant. To imagine that divorce, divorce under any circumstances, is "unforseeable" is patently an unsupportable statement. Common sense alone militates rather that one, such as an Escrow Officer, would (or should) always assume that a marriage might fail, and that such an Officer would act to ward against doing harm in that eventuality.

Here, Ticor and its agents completely ignored the potential for harm that might flow to Minkovitch, in favor of covering their own imagined liability

exposures. Appellant contends that the Courts finding of undforseeability in this regard is not supported in logic or reason.

iii. "The degree of certainty that the plaintiff suffered injury."

In the Court's Attorney-Drafted order of March 29, 2021, the Court adopted the statement that "[c]ross-complainant could not, as a matter of law, maintain his community property interest in the subject property while specifically agreeing for title to vest in his then wife's ... name alone." (*See* CT 668, Line 22.)

Appellant contends that this is not a correct view of the law. Had Cross-Defendants simply allowed title to vest in Mrs Minkovitch, then and in that event, Mr Minkovitch would have enjoyed his community property interest, under any normal understanding of California community property. No problem would have arisen.

It was the imposition of Ticor's requirement that Minkovitch execute a relinquishing deed that caused the harm.

That Ticor's action itself in foisting upon Minkoviotch such a deed, which harmed him, but for which Minkovitch would have suffered no harm – that such action could now stand to support the idea that Minkovitch suffered no harm... well, gee, that's not dystopian, is it?

As such, Appellant respectfully contends that the court's finding is erroneous and illogical and does not support the conclusion to which the Court came in its Attorney-drafted order.

iv. "The closeness of the connection between the defendant's conduct and the injury suffered"

In it's order of March 29, the Court below found that "there is only a remote connection between any act of negligence on the part of Lawyers and Cross-Complainant's financial loss." (*See* CT 670, Line 1.)

Appellant contends that conclusion to be unsupportable by any facts on the ground. Had Ticor and Lawyers simply closed the escrow without worrying about their later liability, without making Minkovitch sign that Interspousal Transfer Deed, then Minkovich would have had a community property interest in his wife's real property purchased during marriage. It's simple as that. (See Family Code §§ 760, 2581.)

In fact, even if Ticor and Lawyers had handed Minkovitch a standard California Quit-Claim Deed form, the lack of positive transmuting language on such a Quit-Claim would not act to satisfy the requirements of Family Code 852 regarding such transmutations. Thus, even a quit claim would not have severed Minkovitch's community interest in the property, only an Interspousal Transfer Deed does that ... and, that is precisely the sort of deed that Ticor and Lawyers decided to force Minkovitch to sign. And it did later act to so sever.

As such, Appellant respectfully contends that the Court's holding it in its March 29 order is misplaced. But for Ticor and Lawyer's deed, which they selected themselves, without any counsel overseeing their actions, Minkovitch would have suffered no loss from of any problems arising from any Deed. The only reason Minkovitch is injured here at all is because an Interspousal Transfer Deed had been recorded, which acted to satisfy Family Code 852. The Minkovitches did not intend that result and, apparently, Ticor and Lawyers just did not care. Appellant respectfully contends that the holding of the Court below is erroneous.

v. "The moral blame attached to the defendant's conduct."

In the Court's (Attorney-drafted) order of March 29, the Court states " Cross-Complainant fails to recognize that his decision for Lina to take title in her name alone precluded him as a matter of law from retaining a community property interest in the property." (*See* CT 671, Line 13.)

Appellant contends that the Court's holding is an incorrect statement of law. Nonetheless, the Court relies upon it for the proposition that Ticor and Lawyers suffer from no lack of moral center.

Family Code 760 provides "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property."

In In re Brace, an opinion filed by the Supreme Count on July 23, 2020, the Court explained: "We answer the Ninth Circuit's question as follows: Evidence Code section 662 does not apply to property acquired during marriage when it conflicts with Family Code section 760. In re Brace, 2020 Cal. LEXIS 5134.

Thus, at the time that the Court entered the order of March 29, 2021, the state of the law was not as that which the Court imagined it to be and upon which it relied in the Attorney-Drafted order.

In fact, Appellant contends, it is utterly reprehensible that a Title Company can (and so often does) use its overwhelming power to make someone sign a Deed unnecessarily. Appellant contends that anyone who has purchased or sold a house has experienced the authoritarian and dictatorial approach with which a Title Insurer approaches the provision of its policies.

Appellant would point out, at this juncture, just how ironic it is that Title Insurers are so risk adverse that they will routinely force spouses to sign real property deeds, as they did here to Minkovitch. They take advantage of the innocent public and, without care, impact the rights of the public, just in order to manage their perceived future risk from title issues.

But, Title Insurance Companies are actually the only insurance companies who have the ability to manage entirely their own risk, by their own schedule of exclusions, which is attached to every policy. In fact, its just simply true that if a title insurance company properly researches, reviews and lists all of its title risks in the Exclusions section of the title policy itself, then and in that event, they would never have to pay out on a claim.

However, instead of doing their job, they make regular people, who stand always nervous and sweating in Escrow, and unrepresented by counsel, execute Deeds which affect their rights, title and interests, all upon the threat of no insurance, no deal and maybe no deposit back. All with no chance to see a lawyer. It's just reprehensible!

To find no moral blame attached to such conduct is unreasonable. Inhuman. Blind. Appellant respectfully contends the Court's holding in this regard is unsupportable in logic, reason or even in simple humanity.

vi. "The policy of preventing future harm."

Appellant respectfully contends that it would no burden at all to Title Companies if they were each required to, instead of making spouses sign off the title of property by a deed, they instead simply excluded within the policy itself any risks of which they were concerned, in fact it would be less work in the

creation of Deeds. In this manner, Title and Escrow companies would remain protected, and they would not need to mess about with any spouse's real property interests.

Conclusion

Therefore, for the reasons set forth above, and because Minkovitch does, in fact, fall within the provisions of the Biankanja Test, Appellant contends that the Court below has erred in its application of the Test, and has relied on unsupportable conclusions and mistaken understanding of real property law as it interacts with the California Family Code.

Dated: October 19, 2021 Respectfully submitted,

By: _____
Yan Minkovitch, Appellant *in Pro Per*

Certificate of Word Count

I hereby certify that the Appellant's Opening Brief contains 5,364 words as counted by the WordPerfect™ word-processing software. This word count is exclusive of the Table of Contents, Table of Authorities, and this certificate, but inclusive of all footnotes.

This certificate is prepared in accordance with California Rules of Court, Rule 8.204(c).

By: 

Yan Minkovitch, Appellant *in Pro Per*

Case No. B312634

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 10337 Haskell Avenue, Granada Hills, California 91344.

On October 19, 2021 I served the following document(s) described as

APPELLANT'S OPENING BRIEF ON APPEAL

on the interested parties in this action as follows:

Angela Young Shin
Fidelity National Law Group
601 S. Figueroa Street, Suite 4025
Los Angeles, California 90017
angela.shin@fnf.com

BY ELECTRONIC SERVICE I caused a copy of such document to be electronically served.

I declare that I am employed by the Appellant, in pro per, at whose direction the service was made.

Executed on October 19, 2021at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

By: _____
Jamie E. Slaton

Case No. B312634

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 10337 Haskell Avenue, Granada Hills, California 91344.

On October 19, 2021 I served the following document(s) described as

APPELLANT'S OPENING BRIEF ON APPEAL

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

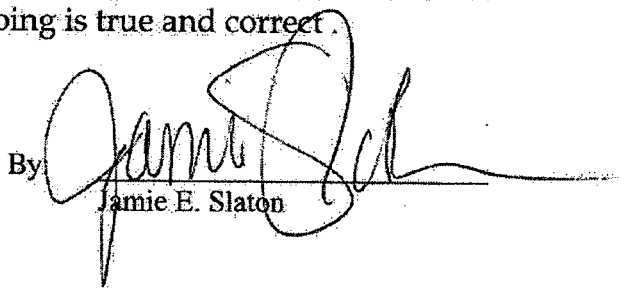
Superior Court of California
County of Los Angeles
Honorable Elaine Lu, Judge
111 North Hills Street
Los Angeles, California 90012

BY US Mail: I deposited such envelope, with postage thereon fully prepaid, in the mail at Los Angeles, California.

I declare that I am employed by the Appellant, in pro per, at whose direction the service was made.

Executed on October 19, 2021at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

By 
Jamie E. Slaton

c. Respondent's Brief

CASE NO. B312634

UNITED STATES COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT, DIVISION 5

TICOR TITLE COMPANY OF CALIFORNIA, et al.

Plaintiffs and Respondents

v.

YAN MINKOVITCH

Defendant and Appellant,

Appeal from a Decision of the Los Angeles County Superior Court
Case No. BC701437 · Honorable Elaine Lu

RESPONDENTS' BRIEF

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Attorney for Plaintiff and Respondents
TICOR TITLE COMPANY OF CALIFORNIA
and LAWYERS TITLE COMPANY

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STATUTES

Plaintiffs in Interpleader/Respondents, Lawyers Title Company ("Lawyers") and Ticor Title Company of California ("Ticor") (collectively "Respondents") hereby submit their Respondent's Brief in response to Cross-Defendant/Appellant Yan Minkovitch's ("Appellant") Opening Brief.

1. INTRODUCTION

The scope of this appeal is limited to Yan Minkovitch's ("Appellant") claim that the Trial Court misapplied the *Biakanja* factors in sustaining the respective demurrers of Lawyers Title Company ("Lawyers") and Ticor Title Company of California ("Ticor") (collectively "Respondents"). Appellant claims that Respondents *forced* him to execute an interspousal grant deed, conveying any interest he had in the subject property, 4949 Palo Drive, Tarzana, California 91356 (the "Property"), in connection with a sale in which Appellant and his former wife, Lina Minkovitch ("Lina") agreed to purchase the Property solely in Lina's name for the purpose of obtaining financing.

Appellant admits that it was the intent of Lina and himself for Lina to take the Property in her name only, as it was discovered that Appellant had a depressed credit profile, and would likely not be a suitable candidate for a loan. This entire appeal is based upon the following contradictory claim: The Respondents were negligent for

ensuring that title was, in reality, consistent with the manner in which they insured title (as Lina's sole and separate property), while at the same time Respondents *forced* Appellant to relinquish any community interest in the Property in order to facilitate the sale.

Respondents could not *both* ensure that Appellant retained a community interest in the Property *and* insure the Property as Lina's sole and separate property (for the purpose of procuring favorable loan terms) without subjecting themselves to potential future liability under the policy. Appellant laments throughout the Opening Brief that Respondents' desire to minimize their potential coverage liability under the title policy by taking action to ensure title was fixed just as they insured it in the policy is somehow evil and nefarious.

One of the major problems with Appellant's characterization of this matter, which began in the FACC and has continued throughout this appeal, has been the fact that Appellant seems to confuse and conflate the word *demanded* with *required.* There is simply nothing wrong with a title company making issuance of a title policy dependent upon the removal of potential interests in the insured property that are not consistent with the manner of title the company is insuring. Any title company that is insuring that Lina is the fee title owner of the Property as her sole and separate property is going to comb title and

make sure any other outstanding interests are properly dealt with by disclaimer or reconveyance.

Regarding the *Biakanja* factors, as the Trial Court noted, Appellant was not a party to the escrow as he was not a buyer or seller and it was not foreseeable that Respondent's actions would cause harm to the Appellant. In fact, there is an inherent contradiction in this case between the harm Appellant claims to have suffered and the express demands that he made. The very act that Appellant alleges caused his harm is the same act that was necessary to accomplish the desired end sought by the Appellant himself.

This fact (the inherent contradictory nature of the alleged harm and Appellant's admitted desire) makes application of the remaining *Biakanja* factors problematic for Appellant. As the FACC alleges, in order for Lina to procure the loan that was needed to purchase the Property, she needed to take title as her sole and separate property. However, this could not be done without the execution of a deed from the Appellant explicitly renouncing any community interest in the Property. Appellant asserts in the Opening Brief numerous times that the title company did not *have* to demand an interspousal deed from the Appellant, but nowhere does Appellant argue for a proposed

solution. He simply asserts that the interspousal deed did not need to be requested.

Regarding the blameworthiness of the conduct and the connection between the conduct and Appellant's alleged harm, the very essence of the Appellant's argument to this Court is dependent upon Appellant's deception to a third party (the lender). To the extent any conduct in this transaction was morally blameworthy, it certainly was not on the part of Respondents. After all the factors are analyzed, one is left with Respondents simply doing what title and escrow companies do. Title companies insure title or lien positions; escrow companies facilitate the carrying out of the instructions. To find a title company liable simply by virtue of the fact that it was making sure the state of title was consistent with what it was insuring would lead to a policy that would completely undermine title and escrow. For these reasons, the Court of Appeal should affirm the Trial Court's judgment.

2. STATEMENT OF FACTS

In 2016, Ticor was appointed the escrow holder for the purchase and sale of the Property. At the time of the sale, Lina was in the middle of a divorce from Appellant. **(CT, 151)** One of the issues in divorce action was the distribution of the net proceeds from the sale of

the Property. Lina filed the divorce petition on November 20, 2015. Appellant responded to the petition on February 16, 2016 at which time the family court acquired jurisdiction over Appellant.

Based upon conflicting claims to certain proceeds of the sale between Lina, Appellant, and the United States Internal Revenue Service, on April 9, 2018, Ticor filed a complaint in interpleader, depositing funds from the purchase and sale of the Property, to Lina. **(CT, 17-32)** After the deposit of funds, Appellant filed the operative FACC against Respondents for negligence, breach of fiduciary duty and interference with prospective advantage. **(CT, 149-209)**

Appellant alleged that he and his then-wife Lina decided to purchase the Property. During the escrow process, Appellant alleged that he had poor credit and was unable to obtain financing. Therefore, Appellant and Lina decided the purchase the Property in Lina's name only. **(CT, 151)**

In the FACC, the Appellant attached as Exhibit A a copy of the California Residential Purchase Agreement and Joint Escrow Instructions showing Lina as the buyer and Bank of New York Mellon as the seller. Appellant attached as Exhibit B a copy of the Supplemental Escrow Instructions, which he claims is the final escrow instructions. **(CT, 158-209)**

In relevant part in the FACC, Appellant alleged that shortly before closing of escrow, Ticor and Lawyers Title "demanded" Appellant sign a quitclaim deed in favor of Lina and that if he failed to do so, Ticor and Lawyers Title would not complete the transaction. **(CT, 152)** Appellant further alleged that the final escrow instructions provided only that Lawyers record "a grant deed executed by Bank of New York Mellon fka the Bank of New York Inc." and that the interspousal transfer grant deed that he signed was not authorized by the final escrow instructions. **(CT, 152-153)**

Appellant further alleged that he made it clear to Ticor and Lawyers Title that he held a community interest in the Property regardless of the manner in which title was being taken and that he had no desire to relinquish his community interest in the Property, and that Ticor wanted the interspousal transfer grant deed signed only in the interest of its own risk management instead of protecting Appellant's community interest in the Property. **(CT, 152)**

Appellant claimed that he felt compelled to sign the interspousal transfer grant deed, because otherwise Ticor and Lawyers Title would not close the transaction, and that Ticor and Lawyers Title did not provide any explanation of all the legal consequences of his execution of

the interspousal transfer grant deed. As a result, Appellant claims that he lost any community interest claim he had to the Property in his divorce with Lina. **(CT, 152)**

Respondents filed a demurrer to the FACC based upon Appellant's status as a third party to the transaction. On March 29, 2021, this Court issued a lengthy, carefully written tentative ruling to sustain the demurrer without leave to amend based primary on the factors listed in *Biakanja v. Irving,* 49 Cal.2d 647, 650 (1958)) This appeal then followed, challenging the Trial Court's analysis of the *Biakanja* factors.

3. ARGUMENT

A. Title Insurance and Escrow Duties in California

The elements for breach of a fiduciary duty are: (1) a fiduciary relationship; (2) a material non-disclosure; (3) an intent to deceive; (4) reliance; and (5) resulting injury. (*Younan v. Equifax, Inc.*, 111 Cal. App. 3d 498, 516 (1980); *Civil Code* section 1573) Regarding a breach of duty, only the named insured is owed a duty by the title insurer. The named insured in a title insurance policy is typically the purchaser of the property or a lender on the property. (*Walters v. Marler*, 83 Cal. App. 3d 1, 33–34 (1978)) An insurance policy is a contract between the

insurer and the insured. No person other than a person who is a named insured may enforce the policy against the insurer. (*Id* at 31-34)

As a matter of law, there can be no third-party beneficiary to a title insurance policy. (*Kenny v. Safeco Title Ins. Co.*, 113 Cal.App.3d 557, 561-562 (1980); see also *Banville v. Schmidt*, 37 Cal.App.3d 92, 104-105 (1974) (no duty was owed by a title insurer to a broker because the end and aim of escrow and title insurance was not to protect the broker and the broker's conduct was not undertaken in reliance upon information furnished by title company). Where the title company does not intend to confer a benefit upon a third party, that party cannot be a third-party beneficiary merely by virtue of their status as being incidentally affected by the transaction. (*Kenny v. Safeco Title Ins. Co., supra, at* 561-562)

"Title insurance" is defined by statute to mean "insuring, guaranteeing or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein against loss or damage suffered by reason of: (a) liens or encumbrances on, or defects in the title to said property; (b) invalidity or unenforceability of any liens or encumbrances thereon; or (c) incorrectness of searches relating to the title to real or personal property. (*Insurance Code* §§ 104, 12340.2, 12340.1)

The business of title insurance is defined by statute to include (i) issuing or proposing to issue any title policy; (ii) transacting or proposing to transact any phase of title insurance; (iii) the performance of any service in conjunction with the issuance or contemplated issuance of a title policy; (iv) the issuance of a letter of indemnity; and (v) the issuance of a Closing Protection Letter. *Insurance Code* § 12340.3.

Due to the peculiar nature of title insurance and the express exemption from negligence liability the title insurer or underwritten title company is not an agent for the buyer or insured, and neither has a duty to disclose to a buyer or insured any defect in the title that is known to the insurer or company. (*Insurance Code* § 12340.11; *Rosen v. Nations Title Ins. Co.*, 56 Cal. App. 4th 1489, 1499–1500 (1997); *Siegel v. Fidelity Nat. Title. Ins. Co.*, 46 Cal. App. 4th 1181, 1193 (1996); *Herbert A. Crocker & Co. v. Transamerica Title Ins. Co.*, 27 Cal. App. 4th 1722, 1727 (1994); *Southland Title Corp. v. Superior Court*, 231 Cal. App. 3d 530, 537–538 (1991))

The title policy is not a representation of the condition of title or a guarantee that the title is in the condition represented in the policy. (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, 199 Cal.App.4th 1132, 1145 (2011)) Rather, it is merely an agreement by the insurer

that it will indemnify the insured against losses. (*Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 41-42 (1998)) Because the policy is only a contract for indemnity, there is no action for negligent misrepresentation based on a policy of title insurance. (*Golden Security Thrift & Loan Assn. v. First American Title Ins. Co.*, 53 Cal. App. 4th 250, 256–257 (1997))

An escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition. An escrow holder is an agent of and fiduciary *of the parties to the escrow.* The agency created by the escrow is limited to the obligation of the escrow holder to carry out the instructions of each of the parties to escrow. (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.*, 27 Cal.4th 705, 711 (2002)) [Emphasis added]

The determination of whether a defendant can be held liable to third persons not in privity is a matter of policy and involves a balancing of various factors, including: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of the harm; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct; and (6) the policy of preventing future harm. (*Biakanja v. Irving,* 49 Cal.2d 647, 650 (1958))

In *Summit* case, *supra*, the Court of Appeal analyzed these factors in the context of the underlying transaction. The trial court ruled that the escrow did owe a duty to a third-party beneficiary to issue payoff funds to the appropriate note holder where the note had been assigned and the escrow was aware of that assignment. The escrow in that case had instead sent funds, wrongly, to the assignor, who was no longer the note holder. The Court of Appeal reversed the trial court, holding that there was no reason to depart from the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow for a loss caused by following the escrow instructions. (*Id.* at 715) Therefore, the Court of Appeal held that the escrow was not liable to the assignor of the note.

In its analysis as to why the assignee of the note could not state a claim for breach of duty as to the escrow, the Court of Appeal reasoned that a refinance transaction was not intended to affect of benefit the assignee. It was not a party to the loan that paid off its note, and any impact on the assignee was incidental. Furthermore, there was no foreseeability of harm because the there was no reason for the escrow to believe that the original note holder who assigned the note would not simply forward the funds to the assignee.

B. The Trial Court Properly Applied the *Biakanja Factors*

i. Intent to Affect the Appellant/Foreseeability of Harm

As outlined in the *Summit* case, the fact that a transaction may incidentally affect a third party is not enough to meet the requirements of this element. Even using the case quote chosen by the Appellant in *Adelman v. Associated Int'l Ins. Co.*, 90 Cal.App.4th 352, 362-363 [sic] (2001), the Appellant here cannot be seen as a third-party beneficiary under any stretch of the imagination. As the Appellant quotes:

> *"...where the 'end and aim' of the contractual transaction between a defendant and the contracting party is the achievement or delivery of a benefit to a known third party of the protection of that party's interests, then liability will be imposed on the defendant for his or her negligent failure to carry out the obligations undertaken in the contract even though the third party is not a party thereto.* (*Id.* at 363) [Emphasis added]

To be clear, the Court in *Adelman* ultimately refused to impose liability on the insurer, and, after analyzing cases in which liability was imposed on an insurer to a third party, noted that subsequent cases have limited the application of the *Biakanja* factors, quoting the California Supreme Court that:

> *"[F]oreseeability' ... 'is endless because [it], like light, travels indefinitely in a vacuum."* (*Thing v. LaChusa,* 48 Cal.3d 644, 659, 257 Cal.Rptr. 865, 771 P.2d 814. (1989) *"[It] proves too much.... Although it may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for non-physical harm.' It is apparent*

> *that reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury. In order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited."* (*Id.* at pp. 663–664) *These same concerns have been expressed with respect to losses that were purely economic. "Recognition 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.,* 19 Cal.4th 26, 58 (1998)) [Emphasis added]

The Court in *Adelman* then went on to analyze cases where the Court refused impose liability on an insurer. The cases analyzed in this section of *Adelman* much more closely resemble Appellant's claims.

In the *Adelman* case itself, a group of condominium owners sued an insurance company that issued a policy to their homeowner's association for earthquake coverage. When the Northridge earthquake happened, and the homeowner's association made a claim, the insurance company was unable to pay for damages incurred to the covered common areas. The individual unit owners could not engage in repairs to their own units until the common area repairs were completed. Even in this case, the Court of Appeal, after analyzing the

Biakanja factors, refused to extend liability. Regarding foreseeability, the Court of Appeal stated:

> *"While harm to the plaintiffs' individual interests, as well as to their collective ownership interests, might be foreseeable from AIIC's failure to perform its obligations under the policy, that is not, of itself, sufficient to justify imposition of a duty to the individual plaintiffs. Given the explicitness of the statutory and contractual provisions that govern condominium ownership, as well as the scope of coverage to which AIIC's policy was expressly limited, plaintiffs could be reasonably expected to take appropriate action to insure and otherwise protect their own interests.* (*Id.* at 366) [Emphasis added]

As the Trial Court correctly pointed out here, Appellant was not a party to the escrow; he was not listed as a buyer or seller on the purchase agreement or escrow instructions. He was identified only as the real estate agent. The agreement was not designed to benefit the Appellant, but only to complete the sale of the Property from the seller to Lina. Thus, this factor militates against a duty of care to the Appellant. **(CT, 666)**

Appellant's claim to foreseeability/intent to affect him seems to be based upon the following quote from the Opening Brief:

> *"Appellant contends that logic and reason militate the more proper conclusion that, where, as here, an Escrow officer is selling a home to a married couple, in California, a state rather well known to be a community property state – well then, under that fact, Appellant contends that any reasonable Escrow officer would understand and*

anticipate that the spouse of the purchasing customer will be jolly-well AFFECTED!" **(Opening Brief, p. 15)** [Emphasis added]

Appellant also claims that Respondents should be aware of the alarmingly high divorce rate in Orange County, California and concluded that in the event the Appellant executes a deed to conform to his and Lina's desires to procure a loan to purchase the Property, they may later have a falling out and Appellant will be precluded from getting his interest back. **(Opening Brief, p. 16)**

Appellant's argumentation here is shockingly unreasonable. At the outset, this argument simply does not meet the standard in California of an *intended* benefit to a third party, as opposed to mere incidental effect. Whether the Appellant is incidentally affected by the transaction is irrelevant; there is no allegation that either Lawyers or Ticor *intended* him to benefit. In fact, the very allegation that Appellant was asked to execute a deed completely relinquishing title to Lina (so they could accomplish procuring a loan to purchase the Property) militates against an intended benefit to the Appellant.

It is conceded by the Appellant that both he and Lina specifically sought for her to take title to the Property in her name alone for the benefit of procuring the underlying loan. **(CT, 151)** To the extent an explicit quitclaim or interspousal deed was not executed from the

Appellant to Lina making Lina's sole interest clear, the Appellant would not have achieved the benefit he specifically sought by the manner in which Lina took title to the Property.

To the extent the Appellant now wishes to complain that he *should* have a community interest and title was only conveyed to Lina for the purpose of acquiring the Property, then he can get Lina to execute a deed conveying title to him; not blame the companies that did the only thing possible to achieve the exact end Appellant sought.

At one point in the Opening Brief, Appellant claims that a company the size of Ticor would obviously know the presumptions of community property in California. Appellant is absolutely correct; it is for that exact reason that a deed clearly divesting Appellant of title was necessary in order for the loan to fund. Without that deed, Appellant would have retained a community interest in the Property, which would not be consistent with Lina being the sole and separate owner of fee title to the Property.

Appellant is simply precluded from arguing the foreseeability element in this case. That is because the Respondents, in requesting the deed from Appellant, were specifically requesting the deed so title would conform to what they insured; in other words, they were protecting the interests of themselves and their insured. Therefore,

the *end and aim* of the transaction was to facilitate a sale in which Lina was the sole owner of the Property; an end that Appellant desired for his own benefit.[1]

a. Policy Reasons Support the Trial Court's Decision Not to Impose Liability

Even if the Appellant could show foreseeability of harm, the California Supreme Court has declined to allow for recovery on a negligence theory for policy reasons where, (1) liability may, in particular cases, be out of proportion to fault, (2) parties should be encouraged to rely on their own ability to protect themselves through their own prudence, diligence and contracting power, and (3) the potential adverse impact on the class of defendants upon whom the duty is imposed. (*Bily v. Arthur Young & Co.*, 3 Ca.4th 370, 399-405 (1992))

To the extent Lawyers was insuring title to the Property in Lina as her sole and separate property, which is something Appellant admits was done for the purpose of accomplishing the transaction due

[1] The allegations that Appellant always sought to retain a community property interest while at the same time he desired that the Property be acquired in Lina's name only due to her creditworthiness are inherently contradictory. To the extent Lina's creditworthiness facilitated the transaction, and Appellant's creditworthiness would have hindered it, Appellant's retention of a community property interest would wholly undermine the entirety of the benefit Appellant himself sought to achieve.

to Appellant's poor credit, Lawyers has every right to ensure that Appellant's community interest is demonstrably being relinquished.

This is quite common in the title industry. If a title company issues an insurance policy that the insured is the fee title holder to the property, something that lender's and other relevant parties rely upon, then it would be subjecting itself to liability and substantial costs in the event another party claims an interest in that same property.[2]

If the Court were to impose liability in this instance, as a policy matter, it would punish title companies for, (1) procuring documents from insureds that conform to the manner of title in which they seek to take the property, and (2) failing to speculate as to the intent of third parties to retain an interest in the underlying property, although their overt actions directly contradict that speculative intent.

If the Appellant had some kind of arrangement with Lina that he

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[2] Just for example (and many hypotheticals could be raised), the lender issued a loan to Lina based upon her creditworthiness and based upon the assumption that she would take title to the Property as her sole and separate property. In the event the lender retained a policy from Lawyers to insure their loan, and in the event of Lina failing to pay her mortgage, the lender would have a right to foreclose *on the entirety of the Property*. However, if Appellant retained a community interest in the Property, and then asserted that the lender could not foreclose on his community interest in the Property, the lender would look to Lawyers Title for any damages associated with the loss of the value of their encumbrance. Similarly, Lina would look to Lawyers for reimbursement for any damages *she* suffered as a result of a loss of her half interest.

would ultimately retain an interest after they procured the loan that allowed them to purchase the Property, then he should have protected himself with some kind of contractual document between himself and Lina. Neither Lawyers nor Ticor did anything wrong here; in fact, as already alluded to, failing to obtain a deed confirming title in Lina only would subject themselves to potential liability at a later date from their own insured, or other parties.

ii. Degree of Certainty the Appellant Suffered Injury

Under this element, the Trial Court caught on to the inherently contradictory nature of the Appellant's claim (the fact that Appellant wanted *both,* for the Property to be taken in Lina's name only so the loan could be procured, but also that he retain his community property interest), by finding:

> "[Appellant] *could not, as a matter of law, maintain his community property interest in the subject property while specifically agreeing for title to vest in his then-wife Lina Minkovitch's name alone."* **(CT, 668)** [Emphasis added]

Leaving out the entire page of analysis the Trial Court gave before issuing the above finding and conclusion, Appellant simply asserts that the Trial Court is incorrect by arguing for what he calls an alternative solution.

Without citing to a single authority, Appellant incorrectly asserts the following:

> *"Had* [Respondents] *simply allowed title to vest in Mrs. Minkovitch, then and in that event* [sic], *Mr. Minkovitch would have enjoyed his community property interest, under any normal understanding of California community property. No problem would have arisen."* **(Opening Brief, p. 17)** [Emphasis added]

The above quote is incoherent. Appellant fails to explain what, *simply allowed title to vest in Mrs. Minkovitch,* means. As the Trial Court properly explained, community property, by definition, would mean that both parties own the underlying asset equally. (*California Family Code,* Section 760) To the extent something happened to Lina, the Property would have gone completely to Appellant (someone who was admittedly not creditworthy), instead of through the estate of the creditworthy applicant, Lina.

Therefore, Appellant's mere assertion that the Trial Court was incorrect without any legal support whatsoever, is wrong. It is beyond controversy that property held as community is owned equally by the parties thereto.

iii. Closeness of Connection Between Respondents' Conduct and the Injury Suffered

The biggest problem with this element for Appellant is that it assumes problematic conduct on the part of Respondents at the outset. Since Appellant cannot establish problematic conduct on the part of Respondents, this element can never be met. The conduct in question was simply Respondents requesting that Appellant execute a document that was consistent with the scheme in which Appellant wanted to engage.

However, even assuming the conduct was problematic, as the Trial Court noted, the nexus between that conduct and any harm suffered by the Appellant is tenuous. **(CT, 670)** In fact, as alluded to all throughout this brief, the alleged injury suffered (Appellant's loss of community interest in the Property) was *caused* by the very action that was required to accomplish the desires of Lina and Appellant: to take title to the Property in Lina's name only.

While Appellant asserts other things could have been done, he is simply wrong, and fails to explain with supporting authority why Respondents' actions were unreasonable and/or unnecessary. Appellant makes the following astounding statement in the Opening Brief:

> *"Had Ticor and Lawyers simply closed the escrow without worrying about their later liability, without making Minkovitch sign that Interspousal Transfer Deed, then Minkovitch would have had a community property interest in his wife's real property purchased during marriage. It's as simple as that."* **(Opening Brief, 17)** [Emphasis added]

Appellant here is demanding that an insurance company draft a policy of insurance without worry about its liability later. Appellant is quite right to say that had no deed been executed, he would have retained a community property interest in his wife's property. The dispute seems to be what a community property interest *is*. As already argued, a community property interest is a very real interest in fee title to the underlying property. Therefore, to retain such an interest would clearly undermine the very purpose of Lina holding title as her sole and separate property for the purposes of procuring a loan to purchase the Property.

As the Trial Court properly pointed out, it is actually the Appellant who should have engaged in different conduct to protect his own interest. **(CT, 669-670)** This could have included entering into some kind of agreement with Lina to preserve his interest (if anyone should have predicted a divorce, it should be one of the people involved in the marriage and not a title and escrow company based upon Orange County divorce rates); engaging a different lender that would have

loaned purchase funds without the Appellant executing a deed clearly relinquishing his interest in the Property. There are many other options Appellant could have engaged in. Appellant fails to mention a single alternative way of accomplishing the task of Lina taking title in a manner that would satisfy a lender that she is the sole and separate property owner.

Appellant seems to be under the misapprehension that if a property is taken as sole and separate property, then no quitclaim deed would be necessary from the spouse not taking title to make clear they are relinquishing any community interest. However, without that deed, third parties have no way of knowing whether property really is the sole and separate because they have nothing from the other spouse specifically stating such. One party to a marriage cannot unilaterally declare that real property acquired during marriage is acquired as their sole and separate without some kind of evidence from the other spouse agreeing to such.

iv. Moral Blameworthiness of the Conduct

What is especially interesting about this element is that the very essence of the Appellant's claim to this Court is dependent upon an admission by Appellant that he was purposely being deceptive and engaged in what could be described as fraud. Under this heading,

Appellant's brief contains a lot of invective against Respondents with no substance. In fact, other than the claim that Respondents had him sign a deed (because it was the only way to accomplish the exact end Appellant desired), there are no other arguments; only assertions that Respondents' conduct was *reprehensible* and *inhuman.*

As the Trial Court correctly pointed out, Appellant admits that Appellant needed to be completely removed from consideration of title so as to avoid his depressed credit profile **(CT, 151)** Also, and again, as the Trial Court pointed out, in looking at Appellant's side of the scale when assessing moral blameworthiness, it is actually Appellant who is engaged in morally reprehensible conduct. The Trial Court aptly stated:

> *"In essence, the FACC appears to allege that putting solely Lina's name on the purchase agreement and escrow instructions was 'merely in facilitation of the transaction' and was only a fiction to fool the lender into believing that* [Appellant] *(who represented a poor credit risk) had no interest in the subject property used to secure the loan. (FACC ¶18) According to* [Appellant], [Appellant] *was somehow, in reality, retaining his community share in the subject property.* [Appellant] *in essence faults the title company and escrow agent for not assisting in his deceptive scheme to maintain a false pretense to the rest of the world. Including the lender, that Lina was taking title in her name alone."* **(CT, 671)** [Emphasis added]

Contrasted with Appellant's general attacks that escrow and title companies *make regular people nervous and sweating,* the above claims

are actually true and relevant to the relative blameworthiness of the parties. The Trial Court was correct to conclude not only that Lawyers and Ticor were blameless, but also that Appellant was the one who is blameworthy.

v. Policy of Preventing Further Harm

Respondent can quote Appellant's entire argument here:

> *"Appellant respectfully contends that it would be no burden at all to Title Companies if they were each required to, instead of making spouses sign off the title of property by a deed,* [sic] *they instead simply excluded within the policy itself any risks of* [sic] *which they were concerned* [sic], *in fact it would be less work in the creation of Deeds. In this manner, Title and Escrow companies would remain protected, and they would not need to mess with any spouse's real property interests."* **(Opening Brief, 19-20)** [Emphasis added]

The problem with the above argument is that the very *risk* Appellant asserts the title company can avoid is contrary to the manner in which Lina sought to take title. So it is quite literally the case that the Appellant is arguing that the title company should insure against Appellant potentially having an interest in the Property, but then not procure the deeds to accomplish that end.

To say this yet another way to illustrate the absurdity, the risk the title company would be concerned about would be insuring Lina as the sole owner (something both her and Appellant admittedly desired),

but then later having other third parties (including the Appellant) claim an interest in the Property. When title companies insure that someone is the fee title sole owner of Property, they painstakingly comb the title records to determine whether there are any outstanding interests. Title and escrow companies will not close a transaction if the title they are insuring (sole ownership in Lina) is not matched by the actually record title.

To the extent there are outstanding interests, whether that be outstanding tax obligations, liens, potential ownership interests, the title company will work to ensure those interests are no longer at issue. Part of this process involves getting those potential interest holders to execute reconveyances, quitclaim deeds, interspousal deeds, etc. At the end of the day, both Lawyers and Ticor did exactly what title and escrow companies do, and Appellant is demanding that they insure title in a certain state, but then not take action to ensure that title is, *in fact,* in that state before closing.

Encouraging such a policy would essentially force title companies to insure title without mitigating potential claims at the outset. But insurance companies should be free to insure how they want to insure. To the extent Appellant did not want to execute the deed in question, he was not forced to, and Lawyers should not be forced to into a

transaction that insures that Lina is the sole and separate owner of the Property when Appellant admits freely that he sought to retain a community interest in the same Property.

4. CONCLUSION

For the foregoing reasons, Respondents would request that this Court affirm the Trial Court's ruling below.

DATED: December 16, 2021 **FIDELITY NATIONAL LAW GROUP**

By: */s/ Kevin R. Broersma*
KEVIN R. BROERSMA
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TICOR TITLE COMPANY OF CALIFORNIA AND LAWYERS TITLE COMPANY

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,735 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Century Schoolbook 13-point font.

DATED: December 16, 2021 **FIDELITY NATIONAL LAW GROUP**

By: *__/s/ Kevin R. Broersma__*
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PROOF OF SERVICE

Ticor Title Co. v. Minkovitch

Los Angeles County Superior Court Case No. BC701437

Court of Appeal Case No. B312634

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within entitled action; my business address is 4 Executive Circle, Suite 270, Irvine, California 92614.

On December 16, 2021, I served the foregoing document(s) described as: on the interested parties in said action:

[X] By placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

[X] **(BY OVERNIGHT MAIL)** I delivered to an authorized driver authorized by an overnight mail carrier to receive documents, in an envelope or package designated by the overnight mail carrier with delivery fees paid or provided for, addressed to the person on who it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service; or at that party's place of residence.

[X] **(ELECTRONIC SERVICE)** I served said document by electronic service or electronic transmission, to the persons at the addresses listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[X] **(STATE)** I declare under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on December 16, 2021, at Irvine, California.

Christine Hipp

SERVICE LIST

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d. Appellant's Reply Brief

CASE NO. B312634

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

IN AND FOR THE SECOND APPELLATE DISTRICT

TICOR TITLE COMPANY OF CALIFORNIA, et al.

Cross-Defendants & Respondents

vs.

YAN MINKOVITCH

Cross-Complainant & Appellant

From the order of the Los Angeles Superior Court
Honorable Elaine Lu, Judge of the Superior Court
Superior Court Case No. BC701437

APPELLANT'S REPLY BRIEF

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I.

RESPONDENTS SEEM TO PREDICATE THEIR ENTIRE RESPONSIVE ARGUMENT ON AN INCORRECT UNDERSTANDING OF THE LAW.

Respondents could have ensured the community interest as well as convey to Wife. These things are not mutually exclusive.

Respondents commence their Responsive Brief with a clear mis-statement of the law in California. Basing their defensive position on such a misunderstanding of the state of the law, Respondents claim to have been choiceless in their processing of the subject escrow transaction: that they could not provide title insurance and also ensure the retention of Appellant's community property interest at the same time. They are mistaken. They are just plain wrong.

The fact of the matter is that, certainly, of course, in California, Respondents could absolutely both 1) ensure that Appellant retained a community interest in the Property and 2) insure the Property as Appellant's former wife's sole and separate property (for the purpose of procuring favorable loan terms), and they could have done so without subjecting themselves to potential future liability under the policy, despite Respondents express claims to the contrary. (RB, Page 6, first full paragraph.) Respondents were not choiceless, as they claim. In fact, Respondents could have excluded coverage for any peril for which they entertained trepidations. It was a title policy after all, Respondents had the power to simply list marital issues in their policy's exclusion schedule.

Their entire argument is thus based in what seems to be a mis-apprehension of how marital title of property works under the Family Code. Thus, it can be seen that Respondents start their argument from an erroneous point of law and that, as such, the contentions of their Responsive presentation are colored and clouded by that mistaken understanding.

II

PROPERTY ACQUIRED BY A SPOUSE DURING MARRIAGE IS COMMUNITY PROPERTY REGARDLESS OF WHICH SPOUSE'S NAME IS ON THE DEED. HERE, RESPONDENTS WILLFULLY AND UNREASONABLY INTERFERED WITH THE OPERATION OF CALIFORNIA'S COMMUNITY PROPERTY SCHEME, FOR THEIR OWN PURPOSES

As discussed more fully in Appellant's Opening Brief, the Family Code of California provides that property acquired during marriage belongs to both parties, regardless of which spouse's name is on the title document (*See* Family Code §760 and *see* In re Brace (2020) 9 Cal.5th 903, 914; In re: Marriage of Valli (2014) 58 Cal.4th 1396), and that, upon dissolution, the property would be split equally, unless it had been previously transmuted in satisfaction of the "express declaration" requirements of Family Code §852.

Here, Respondents seem to take the unsupportable position that they had some obligation to defeat the operation of that community property scheme... that their own interest in risk management created an obligation greater to themselves than to their buying public, one that compelled their actions. However, Appellant contends that they could have simply left well enough alone, rather than try to re-structure the spirit and intent of California's Family Law Act.

If in fact Respondents just HAD to try to limit their imagined liability, they could have just used a Quit Claim Deed form (which would not have transmuted the property for the purpose of the Family Code), or in fact, they could have simply done nothing – just nothing. With either of those courses of action, as a matter of law, the proper result would have been realized – Appellant would have retained his community property interest AND his wife would have held title in her name alone. These characteristics are not mutually exclusive, as Respondent seems to assert and would have the Court believe.

Instead, this title company foist upon the Appellant an Interspousal Transfer Deed, which expressed an intent other than that of Appellant, and insisted that he sign it. By their Response, Respondents ignore utterly the effect

that their choice of such a Deed form has subsequently had under the operation of the Family Code of California, and the damage done to Appellant thereby.

It was these Respondents who, by their choice to present the Deed that they did, assailed and interfered with California's community property scheme. Had they not acted at all in this regard, had they simply facilitated the conveyance, then they would not have entered to disturb anyone's community interest.

III

THE PROPERTY TITLE WAS FULLY INSURABLE

Moreover, Appellant would note that, contrary to Respondsent's claims, such an interest would be fully insurable. After all, a marital community's interest is not adverse to those who are married, but yet insured.

If Ticor had wanted to, they could have simply excluded coverage of marital property issues in their Policy Terms. Of course it could have been insured, Title Companies have full control over the coverage of perils by their exclusionary Addendums, usually by "exhibit" or "attachment" B, to the Policy Document.

IV

APPELLANT HAD NO INTENT TO PERFECT A SECTION §852 TRANSMUTATION, BUT RESPONDENTS' INTERSPOUSAL TRANSFER DEED OPERATED TO WRONGLY RECITE APPELLANT'S INTENT, AND DID SO PERFECT.

A transmutation, under §852, is effective with a written instrument that contains a clear expression of the intent to transfer. This Appellant had no such intent, but the Deed on which his signature was demanded by Respondents, an Interspousal Transfer Deed, expressed (wrongly) such an intent.

It has been held in California that the word "grant," as found on an Interspousal Transfer deed form, allows that form to satisfy the requirements of

§852. (*See* In re Marriage of Kushesh & Kushesh-Kaviani, (2018) 27 Cal. App. 5th 449; In re Marriage of Begian & Sarajian (2018) 31 Cal.App.5th 506).

Conversely, a Quitclaim Deed form, absent more, does not contain language which could constitute a "clear expression of intent to transfer." The words used, and intent demonstrated, by the Quitclaim form, "remise and release," without more, are ambiguous and are, as such, subject to interpretation. Thus a quit claim does not support a Family Code §852 transmutation. The Deed Respondents chose to use, instead though, does.

V

RESPONDENTS GO ON TO MIS-CHARACTERIZE THE CONTENTS OF APPELLANT'S OPENING BRIEF.

Additionally, Respondents suggest that Appellant, in his own opening brief, failed to suggest that there existed any alternative to the use of an Interspousal Transfer Deed. This is false.

In fact, Appellant's suggested alternatives can be found on pages 17 -18 of Appellant's Opening Brief, as follows:

> Had Cross-Defendants simply allowed title to vest in Mrs Minkovitch, then and in that event, Mr Minkovitch would have enjoyed his community property interest, under any normal understanding of California community property. No problem would have arisen. ...
>
> Had Ticor and Lawyers simply closed the escrow without worrying about their later liability, without making Minkovitch sign that Interspousal Transfer Deed, then Minkovich would have had a community property interest in his wife's real property purchased during marriage. It's simple as that. (See Family Code §§ 760, 2581.)
>
> In fact, even if Ticor and Lawyers had handed Minkovitch a standard California Quit-Claim Deed form, the lack of positive transmuting language on such a Quit-Claim would not act to satisfy the requirements of Family Code 852 regarding such transmutations. Thus, even a quit claim would not have severed Minkovitch's community interest in the property, only an Interspousal Transfer Deed does that ... and, that is precisely the

sort of deed that Ticor and Lawyers decided to force Minkovitch to sign. And it did later act to so sever. (AOB, 17-18.)

VI

RESPONDENTS THEMSELVES CHOSE THIS MANNER OF VESTING

Respondents rely on the contention that they were simply trying to keep the insured title clean to the vesting chosen by Buyer. But, the buyer did not choose the vesting of "sole and separate property," Ticor did. (The title companies always draft the deeds themselves, without consultation.) Here, the buyer and Appellant never saw the transferring deed prior to execution, as that one goes to the seller for signature, not to the buyer.

But now, Respondents say that buyer requested that particular vesting and that they were just acting in support of that. However, Appellant contends that they never made such a request. Respondents could have simply vested the property in "Lina Minkovitch, a Married Woman," and then insured that title, leaving the California community property scheme to act as it does, as the legislature intended. Where's the liability in that?

VII

RESPONDENTS' CONTENTION THAT THE TRANSACTION WAS NOT INTENDED TO AFFECT THIS APPELLANT IS WITHOUT MERIT

By their Response, Respondents now seem to advance the position that they wanted to, sought to, defeat any community property interest that may have remained in Appellant. That's why they gave him the deed, they say. That why the Court should understand that the transaction was not intended to affect this Appellant, they say.

Respondents' argument make no sense. Surely, if one intends to destroy another's community property interest in real property, then that intent, necessarily, was designed to *affect* that other person.

But, the Court in Adelman v. Associated Int'l Ins. Co., 90 Cal.App.4th 352, explained what "affect" means. We've all cited this case for the point that

"...where the '*end and aim*' of the contractual transaction between a defendant and the contracting party is the achievement or delivery of a benefit to a known third party of the protection of that party's interests, then liability will be imposed on the defendant for his or her negligent failure to carry out the obligations undertaken in the contract even though the third party is not a party thereto. (*Id.* at 363.)

Here, the purchasers of the property were a married couple. Respondents contend that means nothing to them, but in California that's a big deal.

Appellant respectfully submits that, surely, Respondents cannot seriously contend that a wife, while purchasing a house, in this community property State, means to confer no benefit upon her husband or to have no interest in protecting her husband's interests, whatever they are. That just cannot be so. Such a contention seems utterly antithetical to the entire public policy of this State that stands in staunch support of the marital community and to policies of marriage.

After all, "[i]t is the public policy of this state 'to foster and promote the institution of marriage. ... [T]he structure of society itself largely depends upon the institution of marriage . . . ." In re Marriage of Haines, 33 Cal. App. 4th 277, 287, citing Marvin v. Marvin (1976) 18 Cal. 3d 660, 683 - 684. "'It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation. . . .'" *Id*, at 287, *citing* Borelli v. Brusseau (1993) 12 Cal. App. 4th 647, 651.

Appellant contends then, with such policies in mind, that part and parcel of the marital relationship are the parties' community property interests. While not as central to the policy as the fact of the marriage itself, certainly (*See* i.e. *Haines, supra*), those community property interests surely are more important to the people of California than are the worries of the Respondent national insurance companies regarding their own risk management.

Here, Respondent, without a care, trampled all over our vital public interest in our community property scheme, just to ensure themselves protected from any later imagined potential suit. Appellant contends that title companies and esscrow companies should worry less about their potential liability and be a bit more careful to not run roughshod over the public policies that support

California's carefully crafted community property laws.

In Conclusion

Thus, Appellant contends that this matter should be returned to the trial court for further adjudication of the reasonableness of Respondents' actions. National size title insurers seem to care naught for a State's laws, imagining themselves of a economic might that allows them, for example, as here, to contemptuously and carelessly disturb and defeat the operation of California community property laws, on their own behalf, in their own interests, in protection of their own butts, negligent of the interests of the tiny little people affected by their machinations, despite their nominal designation as "fiduciaries."

This matter is an opportunity to call these sorts of corporate bullies back down to earth.

Dated: January 5, 2022

Respectfully submitted,

By: _____

Yan Minkovitch, Appellant, *in Propria Persona*

STATEMENT AS TO LENGTH OF BRIEF

This Brief contains 2,450 words, according to the program used to create this document.

Dated: January 5, 2022

Respectfully submitted,

By: _____

Yan Minkovitch, Appellant, *in Propria Persona*

2.Order of Dismissal of Action by the Superior Court of California
County of Los Angeles.

Superior Court of California

County of Los Angeles

Department 26

TICOR TITLE COMPANY OF CALIFORNIA; Plaintiff, vs. LINA MINKOVITCH; YAN MINKOVITCH; et al., Defendants.	Case No.: BC701437 Hearing Date: January 21, 2021 ~~[TENTATIVE]~~ **ORDER RE:** CROSS-DEFENDANTS TICOR TITLE COMPANY OF CALIFORNIA'S AND LAWYERS TITLE COMPANY'S DEMURRER TO THE FIRST AMENDED CROSS-COMPLAINT

Procedural Background

On April 9, 2018, Ticor Title Company of California ("Ticor") filed the underlying complaint in interpleader with funds from the purchase and sale of real property against each of the following who had a claim in interest in said funds: Lina Minkovitch ("Lina"), Yan Minkovitch, and the United States of America.[1]

[1] The United States has since released its claims to the disputed funds and on December 16, 2020 was dismissed from the underlying complaint.

On August 16, 2019, Yan Minkovitch ("Cross-Complainant") filed a cross-complaint against Ticor for (1) Negligence, (2) Breach of Fiduciary Duty, and (3) Interference with Prospective Economic Advantage. On March 5, 2020, the Court sustained Ticor's demurrer to the cross-complaint with leave to amend.

On March 13, 2020, Cross-Complainant filed the operative first amended cross-complaint ("FACC") alleging the same causes of action against Ticor and against Lawyers Title Company ("Lawyers") (jointly "Cross-Defendants")

On April 28, 2020, Ticor and Lawyers each filed a demurrer to the FACC. On May 6, 2020, the Court set the instant demurrers for hearing on September 23, 2020. On May 12, 2020, Cross-Defendants provided notice of the September 23, 2020 hearing for the demurrers. On June 25, 2020, the instant action was stayed pending the resolution of the appeal in *In re: Marriage of Minkovitch*, Appeal Case Number B297022. (Minute Order 6/25/20.) The Court also continued Cross-Defendants' demurrers to January 21, 2021. (Minute Order 6/25/20.) On December 15, 2020, the stay was lifted. (Minute Order 12/15/20.)

On January 5, 2021, Cross-Complainant filed a single opposition to both Cross-Defendants' demurrers. On January 12, 2021, Cross-Defendants each filed a reply. As Ticor's and Lawyer's demurrers are similar, the Court will, for judicial efficiency, consider the demurrers together. On January 21, 2021, the Court took the matter under submission.

Factual Background

The FACC alleges as follows: in 2013, the parties agreed that Ticor and Lawyers would provide escrow and title insurance services in support of a real estate transaction entered into by Cross-Complainant and his then-wife, Lina Minkovitch ("Lina"). (FACC ¶¶ 7-8.) The transaction involved a purchase of 4949 Palo Drive, Tarzana, California 91356 ("the Subject Property") in Lina's name only. (FACC ¶¶ 11-12, Ex. A.)

"During the course of the escrow process, it came to light that Minkovitch suffered from a depressed credit profile, and had other problems, that jeopardized the couple's ability to obtain financing. However, Minkovitch's (then) wife, Lina, could qualify for the loan. Because of that, the Minkovitch's, husband and wife, decided to purchase the property in the name of Mrs. Minkovitch, only." (FACC ¶ 12.)

The final escrow instructions "did not act to instruct Cross-Defendants, or any of them, to select, prepare or seek the execution of any quit claim deed, or any other deed." (FACC ¶ 17, Ex. B.)

However, shortly before closing, Cross-Defendants demanded Cross-Complainant execute and record a real property quitclaim deed in favor of Lina, making clear that if Cross-Complainant was unwilling to execute such a quitclaim deed, Cross-Defendants would not complete the transaction. (FACC ¶ 16.)

"[Cross-Complainant] made it clear to Cross-Defendants that he held a community property interest in the subject real property, regardless of the manner in which title was being taken by [Lina], and [Cross-Complainant] explained to Cross-Defendants that he had no desire to relinquish his community property interest, or any interest of whatever nature that he had, at law or in equity, in and to the home that he and [Lina] were purchasing. He made clear to Cross-Defendants that the home was being taken, initially, in the name of [Lina] alone, merely in facilitation of the transaction. [Cross-Complainant] relied on the fact that, as a married man, he retained a community property interest in the property." (FACC ¶ 18.)

"Ticor wanted the extra deed signed only in the interest of their own risk management and, perhaps, in protection of the Lender, but not in protection of Minkovitch or with any consideration of his community property interest in the title of the property." (FACC ¶ 19.)

"[D]espite Minkovitch's protestations, Cross-Defendants would not relent in their demand that he execute a quit claim deed, despite the fact that the Escrow Instructions did not call for or

require such a deed. . . . Lawyers, by and through their escrow agent, Susie Torres, presented a deed prepared by Susie Torres for [Cross-Complainant]'s signature and demanded that he execute it, forthwith. Minkovitch felt compelled then to sign as demanded as, otherwise, Cross-Defendants would cause the whole deal to fall through, as they had threatened" (FACC ¶ 20.)

"Despite the fact that Cross-Defendants referred to the deed as a 'quit claim' deed, and despite the fact that their action was not authorized by the final Escrow Instructions, the Deed presented to [Cross-Complainant] by Lawyers was an Interspousal Transfer Grant Deed." (FACC ¶ 21.) Cross-Defendants did not provide any explanation of all of the legal consequences of Minkovitch's execution of an Interspousal Transfer Grant Deed. "Ticor was concerned only to satisfy their own internal risk management policies and Lawyers acted only in Ticor's interest and without any regard for the Escrow Instructions under which they proceeded, which did not call for the recordation of any deed beyond Seller, New York Bank's, Grant Deed." (FACC ¶ 22.) "However, Ticor faced no risk. A title insurer has full control over their own liability in the offering of title policies, as they can exclude any anticipated peril. Ticor had the ability to simply exclude from coverage any peril arising from the buyer's marital status. Instead, Ticor had Lawyers force Minkovitch to execute, not a just a quit claim deed, as they had initially discussed and as which they characterized the deed, but rather they presented to Minkovitch an Interspousal Transfer Deed, demanding his immediate execution, without any thought of the actual and potential serious legal consequences of such an act." (FACC ¶ 23.)

"As a direct and proximate result of Ticor's action, [Cross-Complainant], in a later action in dissolution of his marriage, lost any community property claim to the property, the payments that he had made to the property, the down payment that he had provided to the property and the proceeds of the eventual sale of the property, all to his damage." (FACC ¶ 24.)

Request for Judicial Notice

Cross-Complainant's Request for Judicial Notice

Cross-Complainant requests that the court take judicial notice of:

1) A certified transcript of the proceedings of December 18, 2018, in Department K, of the Superior Court of California, located in Pomona, California, during the Trial in Case Number BD630832.

2) A true and correct copy of the Final Supplemental Escrow Instructions as to Lawyer's Title Escrow Number WHL17573 ST, opened February 05, 2013, with escrow officer Susie Torres attached to the FACC as Exhibit B.

As the court may take judicial notice of court records, (See Evid. Code, § 452(d)), and the request is unopposed, Cross-Complainant's request for judicial notice is GRANTED. However, the court does not take judicial notice of the truth of any assertions within the judicially noticed records.[2] (See *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

Legal Standard

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal 3d 311, 318.) No other extrinsic evidence can be considered. (i.e., no "speaking demurrers"). (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.)

A demurrer for sufficiency tests whether the complaint states a cause of action. (*Hahn v. Mirda* (2007) 147 Cal. App. 4th 740, 747.) When considering demurrers, courts read the allegations liberally and in context. (*Taylor v. City of Los Angeles Dep't of Water & Power* (2006) 144 Cal. App. 4th 1216, 1228.) In a demurrer proceeding, the defects must be apparent on the face of the pleading or via proper judicial notice. (*Donabedian v. Mercury Ins. Co.*

[2] The Court notes that even if the court had denied the request for judicial notice, it would not change the outcome of the Court's ruling.

(2004) 116 Cal. App. 4th 968, 994.) "A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed." (*SKF Farms v. Superior Ct.* (1984) 153 Cal. App. 3d 902, 905.) "The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." (*Hahn, supra*, 147 Cal.App.4th at 747.)

Demurrer Discussion

Meet and Confer Requirement

Code of Civil Procedure section 430.41, subdivision (a) requires that "[b]efore filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." The parties are to meet and confer at least five days before the date the responsive pleading is due and if they are unable to meet the demurring party shall be granted an automatic 30-day extension. (CCP § 430.41(a)(2).) The demurring party must also file and serve a declaration detailing the meet and confer efforts. (*Id.* at (a)(3).) If an amended pleading is filed, the parties must meet and confer again before a demurrer may be filed to the amended pleading. (*Id.* at (a).)

The Court notes that Cross-Defendants have fulfilled the meet and confer requirement. (Shin Decl[3]. ¶¶ 2-4.)

First Cause of Action: Negligence

[3] The Court notes that Ticor and Lawyers are represented by the same counsel and the declarations submitted are nearly identical. Therefore, the reference is to both declarations.

Cross-Defendants contend that as a matter of law, they do not owe Cross-Complainant a duty.

" 'The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury.' [Citations.]" (*McIntyre v. The Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664, 671.) "The existence of a duty is a question of law that must be determined on a case-by-case basis." (*Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 244.) "As a general rule, each person has a duty to use ordinary care and 'is liable for injuries caused by his failure to exercise reasonable care in the circumstances....' [Citations.]" (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472.) However, "legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434.) In short, "A duty may arise through statute, contract, or the relationship of the parties." (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 45.) "Absent duty there can be no breach and no negligence." (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1294.)

Here, the FACC alleges that "[a]t the time of the transaction, and at all times herein mentioned, Lawyers, in its capacity as a licensed Escrow Agency, and Ticor, in its capacity as a licensed Title Insurance Company, had control of all aspects of [Cross-Complainant]'s home purchase." (FACC ¶ 27.) The FACC further alleges that in their capacity as escrow agent and title insurance company, Cross-Defendants "had a legally cognizable duty to [Cross-Complainant] to administer the escrow according to the Escrow Instructions, no more and no less." (FACC ¶ 28.) In sum, the FACC alleges that Cross-Defendants' duty to Cross-Complainant arises from Lawyers' and Ticor's role as the escrow agent and title insurance company respectively for the real estate transaction of the Subject Property. However, merely

alleging that there is a legal duty is insufficient to withstand demurrer because "[t]he court does not ... assume the truth of contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) Thus, the Court turns to whether Ticor, as the title company, and Lawyers, as the escrow holder, for the real estate transaction at issue, had a legally cognizable duty to Cross-Complainant. The Court turns to the duty of Ticor as Title Insurer and Lawyers as Escrow Holder for the transaction at issue.

Lack of Privity of Contract

"Title 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." (*Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1191.) "[A]n insurance policy is a contract and must be construed in the same manner as other contracts." (*Garcia v. Trans Pacific Life Ins. Co.* (1984) 156 Cal.App.3d 900, 903.) "Title insurance policies are governed by the same general rules and principles of interpretation and construction as other insurance policies. [Citations.] Consequently, it follows that the basic principles of third party beneficiary law apply with equal force to title insurance policies. As a result, one who is only an incidental beneficiary of an insurance policy has no grounds for recovery." (*Walters v. Marler* (1978) 83 Cal.App.3d 1, 33 disapproved of on other grounds by *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498.)

The FACC alleges that "[Cross-Complainant] made it clear to Cross-Defendants that he held a community property interest in the subject real property, regardless of the manner in which title was being taken by [Lina]," (FACC ¶ 18), and that the subject property was being taken in Lina's name alone to facilitate the transaction. However, the FACC also alleges that Lina was the one who entered into the real estate transaction in her name alone. (FACC ¶ 12.)

Consistent with this allegation, the attached Real Estate Purchase forms and the Escrow Instructions both identify Lina as the sole Buyer. (FACC, Exs. A, B; see also *Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1145–1146, ["While the 'allegations [of a cross-complaint] must be accepted as true for purposes of demurrer,' the 'facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence.' "].)

Cross-Complainant is not listed on either the Real Estate Purchase forms or the Escrow Instructions as a party or as a beneficiary. (FACC, Exs. A, B.) The only mention of Cross-Complainant in the contract is as the Real Estate Agent for the purchase. (FACC, Ex. A.) Thus, Cross-Complainant is not the buyer. Similarly, Cross-Complainant is not an intended third-party beneficiary as " '[t]he promisee[s], [Ticor], must have intended to confer a benefit on the third party [Cross-Complainant].' This, clearly, is not and was not the intention of a title insurance company insuring the title of the buyer." (*Kenny v. Safeco Title Ins. Co.* (1980) 113 Cal.App.3d 557, 561.) Thus, Cross-Complainant is at most an incidental beneficiary. Accordingly, there is no duty under privity of contract with Ticor.

The analysis is similar with respect to Lawyers. " 'An escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition.' [Citations.] An escrow holder is an agent and fiduciary *of the parties to the escrow*. [Citations.] The agency created by the escrow is limited—limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow." (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 [italics added].) Accordingly, there is no duty under privity of contract with Lawyers.

Duty through Relationship of the Parties

"The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [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, [6] and the policy of preventing future harm." (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.)

In *Biakanja*, our Supreme Court allowed recovery for a plaintiff despite a lack of privity, where the defendant, a notary public, prepared an improperly attested will by which the plaintiff's brother had attempted to give his entire estate to the plaintiff. The will was denied probate, and the plaintiff received only his intestate share. (*Id.* at pp.648-651.) The Supreme Court noted that "the 'end and aim' of the transaction was to provide for the passing of [plaintiff's brother]'s estate to plaintiff. (*Id.* at p.650.)

Here, with respect to Ticor, Cross-Complainant is not an intended third-party beneficiary of any contract with Ticor. In order for Cross-Complainant to be deemed a third-party beneficiary, " '[t]he promisee[s], [Ticor], must have intended to confer a benefit on the third party [Cross-Complainant].' This, clearly, is not and was not the intention of a title insurance company insuring the title of the buyer." (*Kenny v. Safeco Title Ins. Co.* (1980) 113 Cal.App.3d 557, 561.) Thus, Cross-Complainant is at most an incidental beneficiary. Accordingly, Ticor owes no duty to Cross-Complainant as a third-party beneficiary. [4]

Next, with respect to Lawyers, two published cases apply *Biakanja* to a determination whether an escrow agent owed a duty to a third-party. The first case, *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, arose out of an escrow to refinance real property. The borrower intended that a portion of the new loan be used to pay

[4] The Court notes that Plaintiff fails to provide any opposition to Ticor's arguments.

off an original promissory note held by Talbert Financial. (*Id.* at p.708.) The escrow company acted according to the escrow instructions by issuing a check to Talbert Financial. (*Ibid.*) Summit Financial Holdings, Ltd. sued the escrow company on grounds that an assignment of the note and deed of trust from Talbert to Summit had been recorded, and the escrow company knew Summit had received the note by assignment, but the escrow company still paid Talbert Financial instead of Summit. (*Ibid.*) Even though neither Talbert Financial nor Summit was a party to the escrow transaction, the trial court ruled that the escrow company owed Summit a duty of care. (*Ibid.*)

The California Supreme Court, however, applied the six-factor *Biakanja* test and held that the escrow company did not owe a duty of care to Summit. (*Ibid.*) The Court saw "no reason to depart from "the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions." (*Summit Financial Holdings, Ltd.*, 27 Cal.4th at 715.) First, the refinancing transaction was not intended to affect or benefit Summit. Summit was not a party to the loan transaction, and any impact that transaction may have had on Summit was collateral to the primary purpose of the escrow. (*Ibid.*) Second, although the certainty of injury element was satisfied because the evidence supported the conclusion that Summit did not receive the funds paid to Talbert, the foreseeability of harm element did not support a duty because there was no suggestion that the escrow agent could have foreseen that Talbert would not disburse the funds to Summit. (*Id.* at 715-716.) With regard to the moral blame factor, compliance by the escrow with its fiduciary duty to follow the instructions of the parties to the escrow was not blameworthy and was, instead, a policy consideration that militated against concluding the company had a tort duty in this case. (*Id.* at 716.) Finally, there was not a sufficiently close connection between the payment of Talbert and the injury suffered by Summit to warrant imposition of a duty of care. Although the payment to Talbert was found by the bankruptcy

court to have extinguished the borrower's obligation under the note, Summit's injury was caused by Talbert's breach of its contractual obligation to Summit. (*Ibid.*)

Similarly, the court in *Alereza v. Chicago Title Co.* (2016) 6 Cal.App.5th 551, applied the six-factor *Biakanja* test and concluded that the defendant Chicago Title Co. did not owe a duty to the plaintiff Alereza because (1) Alereza was not a party to the escrow agreement; (2) the was no reasonable foreseeability of harm to Alereza at the close of escrow; (3) the loss that Alereza suffered was not solely caused by Chicago Title Co. but rather by drops in market prices; (4) there was only a remote connection between the eventual financial loss and the errors in the escrow; (5) there was no inherent moral blame as the escrow officer did not act fraudulently, illegally, or with any intent to cause anyone disadvantage; and (6) the policy of preventing future harm did not require the imposition of a new legal duty on Chicago Title as escrow companies already owe a fiduciary duty to parties to an escrow to properly carry out all escrow instructions. (*Alereza, supra,* 6 Cal.App.5th at pp.560-561.)

Similar to the *Summit* and the *Alereza* cases, application of the *Biakanja* test to the instant case militates against finding a duty to exist on the part of Lawyers.

First, the allegations of the FACC make clear that Cross-Complainant was not a party to the escrow. (FACC ¶ 12, Ex. B.) He was not listed as either buyer or seller on the purchase agreement or in the escrow instructions. (FACC Exs. A-B.) Instead, Cross-Complainant was identified only as the real estate agent. (*Ibid.*) Nor was Cross-Complainant a third-party beneficiary. The escrow agreement was not designed to benefit Cross-Complainant, but only to complete the sale of the subject property from the seller to Lina. Thus, the first factor militates against a duty of care to Cross-Complainant.

Second, the foreseeability of harm also fails to support the imposition of a duty upon Cross-Complainant. The FACC alleges that Cross-Complainant himself and his then-wife Lina made the deliberate decision to purchase the property in the name of Lina only. (FACC ¶ 12.)

The FACC also explains the reason that Cross-Complainant and Lina agreed to have title vest in Lina's name alone: Cross-Complainant "suffered from a depressed credit profile, and had other problems, that jeopardized the couple's ability to obtain financing." (FACC ¶ 12.) Thus, it is clear from the FACC that it was Cross-Complainant himself who set up the transaction to have title vest in Lina's name alone, and Cross-Complainant did so in order to satisfy the *lender's* requirement that title vest only in the name of Lina, who had a better credit profile. Given that Cross-Complainant himself requested at the outset that title to the property vest in Lina's name alone, it was not reasonably foreseeable to the escrow agent Lawyers that requiring Cross-Complainant to execute a quitclaim or interspousal transfer deed -- consistent with Cross-Complainant's own plan for the transaction to proceed in Lina's name alone -- would result in harm to Cross-Complainant.[5] It was also unforeseeable to the escrow agent that the couple would subsequently divorce and that Cross-Complainant would subsequently change his mind and claim harm from title vesting in Lina's name alone, precisely as Cross-Complainant himself had requested. In terms of foreseeability, the stability of Cross-Complainant's marriage with Lina was a matter within the realm of Cross-Complainant's own knowledge, and it was likely more foreseeable to Cross-Complainant himself than to Lawyers that he and Lina would

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[5] Cross-Complainant alleges that Ticor and Lawyers described the deed that they demanded him to execute to be a quit claim deed, but in fact, ultimately provided Cross-Complainant with an interspousal transfer deed to execute. (FACC ¶¶ 16, 20, 21.) Regardless whether it was a quit claim deed or interspousal transfer deed that Cross-Defendants required Cross-Complainant to execute, Cross-Complainant alleges that by way of that deed, Cross-Complainant relinquished his community interest in the subject property, and Cross-Complainant faults Cross-Defendants for requiring him to so relinquish his interest in the subject property. For the reasons stated in greater detail below, Cross-Complainant's decision for Lina to take title to the subject property in her name alone is contradictory to and mutually exclusive of Cross-Complainant's supposed retention of a community interest in the property, and any harm to Cross-Complainant has flowed from his own decision to structure the transaction for title to vest in Lina's name alone. Thus, regardless whether it was a quit claim deed or interspousal transfer deed that Cross-Defendants required Cross-Complainant to execute, Cross-Defendants did not owe either a fiduciary duty or tort duty of care to Cross-Complainant, and Cross-Complainant fails to state a claim against either Cross-Defendant.

ultimately divorce and that Cross-Complainant would lose his investment in the subject property as a result of title vesting in Lina's name alone.

The third factor, the degree of certainty that Cross-Complainant suffered harm as a result of lawyers' negligence, also does not support the imposition of a legal duty. The alleged act of negligence on the part of Lawyers was conditioning the transaction on Cross-Complainant's execution of a quitclaim or interspousal transfer deed in Lina Minkovitch's favor. (FACC ¶ 20.) However, the FACC itself alleges why Lawyers required Cross-Complainant to execute the quitclaim deed to complete the transaction. Specifically, the FACC alleges that the title company (Ticor) was requiring Cross-Complainant to execute the deed transferring Cross-Complainant's interest in the subject property to the only purchaser identified in the purchase agreement and escrow instructions, Lina Minkovitch. (FACC ¶ 19 ["*Ticor wanted the extra deed signed* only in the interest of their own risk management and, perhaps, in protection of the Lender"] [italics added]; see also FACC ¶ 22.) The FACC further alleges why Ticor, as the title company, required Cross-Complainant's execution of the quitclaim or interspousal transfer deed as a condition of issuing title insurance — Ticor's assessment of the risk involved and to protect the lender. (FACC ¶ 19, 22.) Indeed, in light of the FACC's allegation that the lender would not have approved the loan if Cross-Complainant, who "suffered from a depressed credit profile," remained on title, thereby retaining an interest in the subject property, it is understandable why Ticor and Lawyers required Cross-Complainant to execute a quit claim or interspousal transfer deed. Cross-Complainant's maintaining a community property interest in the subject property, as Cross-Complainant asserts (FACC ¶ 18), is incompatible and incongruous with Cross-Complainant's decision for title to vest in Lina's name alone. Cross-Complainant could not, as a matter of law, maintain his community property interest in the subject property while specifically agreeing for title to vest in his then-wife Lina Minkovitch's name alone.

None of the alleged facts demonstrate any tortious or wrongful conduct on the part of Ticor or Lawyers that could have caused Cross-Complainant to suffer harm. As a Title Company, Ticor was free to make its assessment of the risk involved and according to its underwriting and risk assessment, impose any requirements it deemed necessary as preconditions to the issuance of a title insurance policy, including requiring Cross-Complainant to execute a quitclaim or interspousal transfer deed, consistent with the vesting of title in Lina's name alone, and to avoid any contradiction between the express terms of the sales agreement and the escrow instructions on the one hand and how title vested on the other hand. (FACC Ex. A-B.) If those requirements were not satisfied, Ticor was free to decline to issue a title insurance policy. Lawyers, for its part as the escrow agent, was simply carrying out the steps necessary to close the transaction by presenting Cross-Complainant with the quitclaim deed, as required by Ticor. Indeed, the escrow instructions themselves required Lawyers as escrow officer to take all steps to bind a title insurance policy in order to close the transaction. For example, the escrow agreement provided that, "[Lawyers] is authorized to prepare, obtain, record and deliver the *necessary instruments* to carry out the terms and conditions of this escrow and to order the policy of title insurance to be issued at the close of escrow as called for in these instructions."(FACC Ex. B, General Provision 5, italics added].) The first page of the escrow agreement specifically notes that title is to be vested solely in Lina. (FACC Ex. B.) Because Lawyers was authorized and required to take all steps necessary to have title vest in Lisa's name alone and to order a title insurance policy, it is inapposite that the escrow instructions did not specifically reference execution of a quit claim or interspousal transfer deed. (FACC ¶ 17, Ex. B.) Accordingly, Cross-Complainant did not suffer harm as a result of negligence or wrongful conduct on the part of either Lawyers or Ticor. Instead, any harm that Cross-Complainant has suffered has flowed from his own decision to structure the transaction to have title vest exclusively in the name of Lina Minkovitch.

Fourth, there is at best only a remote connection between any act of negligence on the part of Lawyers and Cross-Complainant's financial losses. The FACC makes clear that ultimately, it was Cross-Complainant's own decision whether to go forward with the transaction the way that he had structured it, namely, for Lina to take title in her name alone. (FACC ¶ 16 ["Cross-Defendants made it quite clear to Minkovitch that, if he was unwilling to execute such a quitclaim deed, Cross-Defendants would not complete the transaction."],) Cross-Complainant fails to identify any reason why the title insurance company (Ticor) could not, as a result of its own underwriting and risk assessment, and consistent with Cross-Complainant's and his wife's decision to have title vest in her name alone, require Cross-Complainant to execute a quitclaim or interspousal transfer deed before issuing the title insurance policy. Nor has Cross-Complainant explained why Lawyers' conveyance of Ticor's requirement of an executed quitclaim or interspousal transfer deed to Cross-Complainant should be deemed an act of negligence. In any event, ultimately, as the FACC makes clear, the choice was Cross-Complainant's as to whether to proceed with the transaction that he himself had structured – for title to vest in Lina's name alone. Cross-Complainant could have selected a different lender willing to extend a loan for the purchase of the subject property with Cross-Complainant to take title to the subject property with Lina despite Cross-Complainant's poor credit risk. Alternatively, Cross-Complainant could have selected a different title company whose risk assessment would not have led the title company to require an executed quit claim or interspousal transfer deed from Cross-Complainant. Or, Cross-Complainant could have selected a different escrow company or elected not to proceed with the purchase of the subject property at all. Accordingly, any damages that Cross-Complainant has suffered have flowed from his own decision to go forward with the purchase under his then wife's name alone using this particular combination of lender, title company, and escrow. Cross-Complainant's divorce from Lina was a further intervening event. Thus, the remoteness of any connection between

any act of negligence on the part of Lawyers and Cross-Complainant's financial losses further militates against a finding of duty on the part of Lawyers.

Fifth, Lawyers' alleged negligence is not morally blameworthy. If the FACC identifies any moral blameworthiness, it would be on the part of Cross-Complainant himself. The FACC alleges that Cross-Complainant agreed to structure the transaction such that Lina would take title to the subject property alone and qualify for the loan as the sole borrower and sole purchaser, as a way to circumvent Cross-Complainant's "depressed credit profile." (FACC ¶ 12.) Despite having elected to proceed with the transaction in Lina's name alone, Cross-Complainant alleges that he somehow retained a community interest in the subject property. (FACC ¶ 18 ["Minkovitch . . . held a community property interest in the subject real property, regardless of the manner in which title was being taken by his Wife, and Minkovitch explained to Cross-Defendants that he had no desire to relinquish his community property interest"].) However, Cross-Complainant fails to recognize that his decision for Lina to take title to the subject property in her name alone precluded him as a matter of law from retaining a community interest in the property. In essence, the FACC appears to allege that putting solely Lina's name on the purchase agreement and escrow instructions was "merely in facilitation of the Transaction" and was only a fiction to fool the lender into believing that Cross-Complainant (who presented a poor credit risk) had no interest in the subject property used to secure the loan. (FACC ¶ 18.) According to Cross-Complainant, Cross-Complainant was somehow, in reality, retaining his community share in the subject property. Cross-Complainant in essence faults the title company and escrow agent for not assisting in his deceptive scheme to maintain a false pretense to the rest of the world, including the lender, that Lina was taking title in her name alone. Cross-Complainant cites no support whatsoever in support of such a contention that either the title company or the escrow agent owed him a duty to participate in such a fraud.

Accordingly, Lawyers' alleged negligence in refusing to assist Cross-Complainant in effecting a sham transaction is not morally blameworthy.

Finally, the policy of preventing future harm also does not require the imposition of a new legal duty on Lawyers in this case. Escrow companies already owe a fiduciary duty to parties to an escrow to properly carry out all escrow instructions. *Alereza, supra,* 6 Cal.App.5th at p.561.) Here, Cross-Complainant fails to point to a single escrow instruction that the escrow agent (Lawyers) violated in demanding that Cross-Complainant, as a third-party, execute a quitclaim deed to enable the transaction to proceed in Lina's name alone – which Cross-Complainant himself and his then-wife expressly requested. The FACC simply fails to allege how Lawyers, as the escrow agent, failed to faithfully execute the escrow instructions of the parties. Imposing a duty upon Lawyers as the escrow agent to follow some side instructions according to a third-party's request would not further any policy of preventing future harm.

Applying the *Biakanja* test to the instant case, the Court finds that neither Ticor nor Lawyers owed a tort duty to Cross-Complainant, and Cross-Complainant's negligence cause of action fails as a matter of law.

Second Cause of Action: Breach of Fiduciary Duty

Cross-Defendants assert that the second cause of action fails because neither Ticor nor Lawyers owed a fiduciary duty to Cross-Complainant. The Court agrees.

"'The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach.'" (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 646, [internal citation omitted].)

To plead a cause of action for breach of fiduciary duty, a plaintiff must allege facts showing the existence of a fiduciary duty owed to that plaintiff, a breach of that duty, and resulting damage. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524.) A fiduciary duty is

founded upon a special relationship imposed by law or under circumstances in which "confidence is reposed by persons in the integrity of others" who voluntarily accept the confidence. (*Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1150; see CACI 4100, et seq.)

"'[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law.'" (*City of Hope Nat'l Med. Ctr. v. Genentech* (2008) 43 Cal.4th 375, 386.) Facts giving rise to a confidential, fiduciary or trustee relationship must be pled, and a "bare allegation that defendants assumed a fiduciary relationship" is a conclusion. (*Zumbrun v. Univ. of So. Cal.* (1972) 25 Cal.App.3d 1, 13.)

As to Ticor, as discussed above, there is no contractual relationship or tort duty between Ticor and Cross-Complainant. Moreover, Cross-Complainant fails to allege any other basis for a fiduciary duty to arise on the part of Ticor. Nor has Cross-Complainant cited any authority supporting imposition of a fiduciary duty on a title insurance company to a non-party to the transaction at issue. Accordingly, Ticor's demurrer is SUSTAINED.

As to Lawyers, "[a]n escrow holder is an agent and fiduciary of *the parties to the escrow*." (*Summit Financial Holdings, Ltd., supra,* 27 Cal.4th at p. 711 [italics added].) In *Summit Financial Holdings, Ltd.,* our Supreme Court expressly disapproved of *Kirby v. Palos Verdes Escrow Co.* (1986) 183 Cal.App.3d 57, which at the time was "the only California case that [held] an escrow holder [could] be liable to strangers to the escrow for injuries allegedly caused by the escrow holder following its principals' instructions. (*Summit Financial Holdings, Ltd., supra,* 27 Cal.4th at p.712-713.) Rejecting the reasoning in *Kirby*, the Supreme Court in *Summit Financial Holdings, Ltd.* held that there is no fiduciary duty between an escrow holder and a third party. (*Id.* at pp.711-714; see also *Hannon v. Western Title Ins. Co.* (1989) 211 Cal.App.3d 1122, 1128 ["An escrow holder has no general duty to police the affairs of its

depositors, however. An escrow holder's agency is limited to faithful compliance with instructions."].) As discussed above, Cross-Complainant is not a party to the escrow. Therefore, the basis for a fiduciary duty does not exist. Nor does Cross-Complainant allege any other basis for a fiduciary duty. Accordingly, Lawyers' demurrer to the second cause of action is SUSTAINED.

Third Cause of Action: Interference with Prospective Advantage

"To establish a prima facie case of intentional interference with prospective economic advantage, a plaintiff must demonstrate (1) an economic relationship between the plaintiff and a third party, with a probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of this relationship; (3) intentional and wrongful conduct on the part of the defendant, designed to interfere with or disrupt the relationship; (4) actual disruption or interference; and (5) economic harm to the plaintiff as a proximate result of the defendant's wrongful conduct." (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 713.) "With respect to the third element, a plaintiff must show that the defendant engaged in an independently wrongful act." (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1544.) "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard .... an act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive." (*Id.* at p.1545, [internal citations omitted].)

"Such conduct must also be independently actionable [Citation], meaning the legal standards must 'provide for, or give rise to, a sanction or means of enforcement for a violation of the particular rule or standard that allegedly makes the defendant's conduct wrongful." (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1006.)

Cross-Defendants assert that the FACC fails to allege any independently wrongful act on their part. The Court agrees. As noted above, the FACC fails to allege any particular rule or standard that Ticor's or Lawyers' actions violated. Nor does the FACC state a claim of negligence against either Ticor or Lawyers. Accordingly, Cross-Defendants' demurrer to the third cause of action is SUSTAINED.

Leave to Amend

Leave to amend must be allowed where there is a reasonable possibility of successful amendment. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 348.) The burden is on the cross-complainant to show the court that a pleading can be amended successfully. (*Goodman v. Kennedy, supra*, 18 Cal.3d at p. 348; *Lewis v. YouTube, LLC* (2015) 244 Cal.App.4th 118, 226.)

The Court has already previously sustained Ticor's demurrer to Cross-Complainant's original Cross-Complaint and granted Cross-Complainant leave to amend. Based on the facts alleged in the First Amended Cross-Complaint, the Court finds that as a matter of law there is no basis for imposing any duty -- either a tort duty or a fiduciary duty -- on the part of either Ticor or Lawyers. Nor does the FACC identify any independently wrongful act on the part of Ticor or Lawyers. Further, neither the opposition nor Cross-Complainant's arguments at the hearing demonstrate any reasonable possibility of a successful amendment. Thus, the Court denies leave to amend.

CONCLUSION AND ORDER

Based on the foregoing, Cross-Defendants Ticor Title Company of California's and Lawyers Title Company's demurrer to the First Amended Cross-Complaint is SUSTAINED IN ITS ENTIRETY WITHOUT LEAVE TO AMEND. An order and judgment of dismissal is

entered in favor of Cross-Defendants Ticor Title Company of California and Lawyers Title Company on the Cross-Complaint.

The Court Clerk is to give notice to all parties.

Elaine Lu

DATED: March 29, 2021

Elaine Lu
Judge of the Superior Court

3. Denial of Review by the California Supreme Court

Supreme Court

Change court

Docket (Register of Actions)

TICOR TITLE COMPANY OF CALIFORNIA v. MINKOVITCH
Division SF
Case Number S276207

Date	Description	Notes
08/30/2022	Received untimely petition for review	Defendant and Appellant: Yan Minkovitch Pro Per
09/01/2022	Application for relief from default filed	Yan Minkovitch, Defendant and Appellant Pro Per
09/01/2022	Forma pauperis application filed	Yan Minkovitch, Defendant and Appellant Pro Per
09/01/2022	Petition for review filed with permission	Defendant and Appellant: Yan Minkovitch Pro Per
09/01/2022	Record requested	
09/01/2022	Received Court of Appeal record	Court of Appeal record has been imported and is available in electronic format.
09/14/2022	Received additional record	One doghouse.
10/19/2022	Petition for review denied	Corrigan, J., was absent and did not participate.
10/20/2022	Returned record	one doghouse
10/27/2022	Note: Mail returned and re-sent	

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