Case No. 22-CV-0548



**IN THE DISTRICT OF COLUMBIA COURT OF APPEALS**

**CAPITAL RIVER ENTERPRISES, LLC, ET AL.**

*Appellants*,

v.

**CHRISTOPHER ABOD, ET AL.,**

*Appellees*.

*Appeal from the Superior Court of the District of Columbia*
*Civil Division*

# BRIEF FOR APPELLANTS CAPITAL RIVER ENTERPRISES, LLC AND KUEI-YIN CHANG LIU

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## RULE 28(a)(2)(A) LIST OF INTERESTED PARTIES

The parties to this appeal are Appellants Capital River Enterprises, LLC ("Capital River") and Kuei-Yin Chang Liu ("Ms. Liu"), and Appellees Christopher Abod, Harry Roupas, BCJCL, LLC ("BCJCL"), and Premium Title & Escrow, LLC ("Premium Title").

Benjamin G. Chew and Andrew C. Crawford of Brown Rudnick LLP, and Brian West of Sandground, West, Silek, & Raminpour, PLC, represent Capital River and Ms. Liu in this appeal. Mr. Chew, Mr. Crawford, and Mr. West also represented Capital River and Ms. Liu in the D.C. Superior Court proceeding.

David H. Cox and Nathan J. Bresee of Jackson & Campbell, PC, and Michael J. Bramnick and Joseph M. Creed of Bramnick Creed, LLC, represent Christopher Abod and Harry Roupas. Mr. Cox, Mr. Bresee, Mr. Bramnick, and Mr. Creed also represented Mr. Abod and Mr. Roupas in the D.C. Superior Court proceeding.

David H. Cox and Nathan J. Bresee of Jackson & Campbell, PC, and David S. Panzer of Whiteford, Taylor & Preston L.L.P., represent BCJCL. Mr. Cox, Mr. Bresee, and Mr. Panzer also represented BCJCL in the D.C. Superior Court proceeding.

Richard W. Luchs, Gwynne L. Booth, Natasha N. Mishra, and Spencer B. Ritchie of Greenstein Delorme & Luchs, PC, represent Premium Title. Mr. Luchs,

Ms. Booth, Ms. Mishra, and Mr. Ritchie also represented Premium Title in the D.C. Superior Court proceeding.

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Rules of the District of Columbia Court of Appeals, Capital River hereby states as follows: Capital River Enterprises, LLC does not have any parent corporation or any publicly held corporation that owns 10% or more of its stock.

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## RULE 28(a)(5) STATEMENT

This appeal is from a final order that disposed of all the parties' claims.

## RULE 28(a)(6) STATEMENT OF THE ISSUES

Capital River and Ms. Liu submit this brief to address the following issues:

1. Did the Superior Court err in granting the Motions to Dismiss of Mr. Abod, Mr. Roupas, and BCJCL and the Motion for Summary Judgment of Premium Title based on its finding that the submission of a forged and fraudulent operating agreement (in connection with obtaining loans secured by two Deeds of Trust) did not automatically void the two Deeds of Trust?

2. Did the Superior Court err in granting the Motions to Dismiss of Mr. Abod, Mr. Roupas, and BCJCL and the Motion for Summary Judgment of Premium Title based on its finding that the Memorandum of Understanding provided Napoleon Ibiezugbe and Kevin Falkner with actual authority to encumber the Property at issue with two Deeds of Trust?

3. Did the Superior Court err in granting Premium Title's Motion for Summary Judgment as to Count Two of the Complaint alleging negligence?

## RULE 28(a)(7) STATEMENT OF THE CASE

This case arises from a series of real estate transactions in which Capital River and Ms. Liu purchased two parcels of real property located at 2318 and 2322

Nicholson Street, S.E., Washington, D.C. 20009 (the "Property"). The Property subsequently became encumbered by two (unauthorized and void) Deeds of Trust held by Mr. Abod, Mr. Roupas, and BCJCL. Capital River and Ms. Liu brought suit on January 29, 2022 in the Superior Court to both quiet title of the Property in their favor as against Mr. Abod, Mr. Roupas, and BCJCL, and also to hold Mr. Abod, Mr. Roupas, BCJCL, and Premium Title liable for various torts, including negligence, tortious interference, slander of title, and civil conspiracy. Appx.0001-0022.[1]

On March 7, 2022, Mr. Abod and Mr. Roupas moved to dismiss the Complaint. Appx.0105. On March 10, 2022, in an effectively identical motion, BCJCL also moved to dismiss the Complaint. Appx.0126. After briefing by the parties, the Superior Court granted both motions to dismiss on April 21, 2022. Appx.0218. Shortly thereafter, on May 25, 2022, Premium Title moved for summary judgment based on the Superior Court's April 21 Order on the motions to dismiss. Appx.0225. On July 6, 2022, the Superior Court granted Premium Title's Motion for Summary Judgment. Appx.0282. This appeal followed.

No discovery was conducted as to Mr. Abod, Mr. Roupas, and BCJCL. An initial round of discovery requests were propounded on Premium Title, but the Superior Court granted Premium Title's Motion for Summary Judgment before any

[1] Citations to "Appx." refer to the Joint Appendix submitted contemporaneously herewith in accordance with Rule 30.

response. Thus, Capital River and Ms. Liu were deprived of any opportunity to take discovery.

## RULE 28(a)(8) STATEMENT OF RELEVANT FACTS

Capital River was formed on October 18, 2017 by its three members: Ms. Liu (50 percent owner), Napoleon Ibiezugbe (25 percent owner), and Kevin Falkner (25 percent owner). See Appx.0006; Appx.0026. The members were governed by Capital River's Operating Agreement ("Operating Agreement") and Memorandum of Understanding ("MOU"). See Appx.0006; Appx.0026; Appx.0123. As stated in those documents, Capital River was created for the sole purpose of purchasing the Property, obtaining a building permit for the Property, and selling the Property at a profit either (a) with the building permit attached or (b) after developing the Property. See Appx.0003; Appx.0007; Appx.0123. Capital River purchased the Property shortly after its formation on October 27, 2017. See Appx.0032-0039. Ms. Liu paid the full purchase price and closing costs for the Property, totaling $1.6 million. See Appx.0006; Appx.0250; Appx.0275. As a result and as stated in the MOU, any return on the Property was to be paid first to Ms. Liu to recoup her $1.6 million investment (plus 10 percent), after which profits would be allocated among the three Capital River members based on percentage ownership. See Appx.0007; Appx.0124. Ibiezugbe and Falkner, on the other hand, did not contribute anything to the purchase price of the Property and faced no financial risk in this venture. See

Appx.0006. Per the terms of the MOU, Ibiezugbe and Falkner were in charge of obtaining the building permit and completing development of the Property (should Capital River decide to proceed with that route prior to selling the Property). See Appx.0007; Appx.0123-24.

However, instead of obtaining the building permit, and without authority or permission, Ibiezugbe and Falkner used the Property as collateral (through two deeds of trust) to secure their own personal loans from Mr. Abod, Mr. Roupas, and BCJCL. See Appx.0003; Appx.0251. Specifically, on or about April 1, 2019, Ibiezugbe and Falkner entered into a Deed of Trust and Security Agreement, Assignment of Leases and Rents ("First Deed of Trust") pursuant to which Mr. Abod and Mr. Roupas acquired an interest in the Property in exchange for a loan of $499,000 to Ibiezugbe and Falkner (the First Deed of Trust secured two promissory notes). See Appx.0042-86. Then, on or about November 5, 2019, Ibiezugbe and Falkner entered into a Second Deed of Trust pursuant to which BCJCL acquired an interest in the Property in exchange for a loan of $375,000 to Ibiezugbe and Falkner (collectively with the First Deed of Trust, the "Deeds of Trust"). See Appx.0088-104.

Ibiezugbe and Falkner obtained these loans through use of a **forged and fraudulent** operating agreement for Capital River that completely omitted Ms. Liu's 50 percent ownership interest and instead represented that Ibiezugbe and Falkner

were the sole members of Capital River.[2] See Appx.0003; Appx.0009; Appx.0251. Ibiezugbe and Falkner created and used a forged/fraudulent operating agreement to obtain these personal loans because they knew they did not have authority under the real Capital River Operating Agreement and MOU to encumber the Property. See Appx.0009; Appx.0251. They have admitted that fact multiple times, both in conversations with Appellants' agents (Yu-Dee Chang and Jerry Boutcher) and in writing. See Appx.0009; Appx.0181; Appx.0251.

These loans, totaling $874,000, were in no way related to, or for the benefit of, Capital River. See Appx.0003; Appx.0251. Neither Ms. Liu nor Capital River ever received the loans. See Appx.0003; Appx.0008. They were fraudulently obtained personal loans for Ibiezugbe and Falkner. See Appx.0003; Appx.0251. Ultimately, Ms. Liu had no idea that these loans were even obtained by Ibiezugbe and Falkner, or that the Property had been encumbered, until over a year later when she discovered the liens on the Property through an independent title search conducted by her agents, Mr. Chang and Mr. Boutcher. See Appx.0003; Appx.0251. When confronted by Mr. Chang and Mr. Boutcher about the Deeds of Trust, Ibiezugbe and Falkner admitted that they did not have authority under the real Operating Agreement and MOU to use the Property as collateral, and that they used

[2] Upon information and belief, and as alleged in the Complaint, Ibiezugbe and Falkner also submitted a forged and fraudulent unanimous consent of members in connection with securing the Deeds of Trust. See Appx.0003; Appx.0004.

a forged/fraudulent operating agreement to obtain the loans. See Appx.0009; Appx.0251. The Complaint alleged that Mr. Abod, Mr. Roupas, BCJCL, and Premium Title each knew or should have known that Ibiezugbe and Falkner lacked authority to enter into the Deeds of Trust. See Appx.0004; Appx.0014; Appx.0015.

For its part, Premium Title served as the settlement and escrow agent for both Capital River's original purchase of the Property in October 2017 ***and*** for the Deeds of Trust in 2019. See Appx.0013; Appx.0032; Appx.0081; Appx.0101. In fact, the same exact person, Lola Shannon, served as the closing agent for all three transactions. See Appx.0013; Appx.0036; Appx.0081; Appx.0101; Appx.0254. In its capacity as the settlement/escrow agent for purchase of the Property in 2017, Premium Title received a copy of the true and correct Capital River Operating Agreement in an October 27, 2017 email from Jerry Boutcher.[3] See Appx.0010-11; Appx.0250; Appx.0254-262; Appx.0273. This, of course, means that Premium Title knew that Capital River had three members, including Ms. Liu as the 50 percent owner. See Appx.0004; Appx.0010-11; Appx.0254-262. Moreover, Premium Title knew that the $1.6 million purchase amount came from Ms. Liu. See Appx.0013; Appx.0019; Appx.0275; see also Premium Title's Answer at ¶ 23 ("Admitted as to receipt of payment from Ms. Liu's account."). Despite these facts, Premium Title

[3] Premium Title dealt almost exclusively with Mr. Boutcher in connection with the original purchase of the Property. Appx.0011.

proceeded with closing the Deeds of Trust even though Ms. Liu's 50 percent interest had mysteriously disappeared from the operating agreement and Mr. Boutcher was no longer involved in the deals. See Appx.0013-14. And, Premium Title proceeded without notifying Ms. Liu (or her agents Mr. Boutcher or Mr. Chang) about the fraudulent operating agreement submitted by Ibiezugbe and Falkner. See Appx.0019. Capital River and Ms. Liu were harmed by Premium Title's actions (and inactions). See Appx.0020; Appx.0252.

At the Superior Court level, Capital River and Ms. Liu brought suit to quiet title of the Property in their favor, alleging in the Complaint two separate grounds for doing so: (1) that the Deeds of Trust were void because they were secured by Ibiezugbe and Falkner through use of a forged and fraudulent Capital River operating agreement; and (2) that the Deeds of Trust were void because Ibiezugbe and Falkner exceeded their authority and that the Defendants/Appellees knew Ibiezugbe and Falkner lacked authority. Appx.0018. Mr. Abod, Mr. Roupas, and BCJCL all moved to dismiss the Complaint, arguing that the MOU gave Ibiezugbe and Falkner actual authority to encumber the Property. See Appx.0115-117; Appx.0136-138. The Superior Court agreed, finding that "The MOU authority is clear and unambiguous and provided Ibiezugbe and Falkner with actual authority to make 'major decisions and choices regarding the Property' with a two-third majority vote of the Members, which would include borrowing and encumbering the Property

with the First and Second Deeds of Trust." See Appx.0221. The Superior Court also determined that because Ibiezugbe and Falkner purportedly had actual authority to encumber the Property, it did not matter that they submitted a fraudulent operating agreement in connection with securing the Deeds of Trust. See Appx.0221. These findings served as the basis for the Superior Court's dismissal of all claims (the quiet title claim and various tort claims) against Mr. Abod, Mr. Roupas, and BCJCL. See Appx.0220-224. Moreover, following this decision, Premium Title moved for summary judgment, invoking the same argument as Mr. Abod, Mr. Roupas, and BCJCL (that the MOU provided actual authority for Ibiezugbe and Falkner to act) and citing to the Superior Court's decision. See Appx.0227-230. The Superior Court then granted Premium Title's summary judgment motion on the same grounds. See Appx.0282-288. This appeal followed.

## RULE 28(a)(9) SUMMARY OF ARGUMENT

It is well-settled law in the District of Columbia that property rights cannot be acquired by means of a forged instrument relating to the property. Here, because Ibiezugbe and Falkner submitted a forged and fraudulent operating agreement for Capital River in connection with obtaining the loans secured by the Deeds of Trust, the Deeds of Trust are void *ab initio* under D.C. law and the interests in the Property of Mr. Abod, Mr. Roupas, and BCJCL are null. However, the Superior Court ignored this black letter law. In granting the motions to dismiss of Mr. Abod, Mr. Roupas,

and BCJCL, as well as the motion for summary judgment of Premium Title, the Superior Court ultimately held it was of no consequence that Ibiezugbe and Falkner submitted fraudulent documents in obtaining the loans. In so holding, the Superior Court effectively authorized fraud.

Instead, the Superior Court focused exclusively on the MOU and incorrectly determined that the MOU gave Ibiezugbe and Falkner actual authority to use the Property as collateral for their own personal loans. First, under D.C. law, whether Ibiezugbe and Falkner had actual authority to use the Property as collateral is a separate and distinct ground for voiding the Deeds of Trust. In other words, the Deeds of Trust are void under D.C. law if *either* the transaction involved forged/fraudulent documents *or* if Ibiezugbe and Falkner exceeded their actual authority. The Superior Court improperly disregarded the fraud committed by Ibiezugbe and Falkner by finding it does not automatically void the Deeds of Trust. Separately, the Superior Court also erred in determining that Ibiezugbe and Falkner had actual authority to use the Property as collateral to secure their own personal loans. Indeed, even Ibiezugbe and Falkner have admitted that they lacked authority to take this action without Ms. Liu's signoff.

Additionally, even if the Superior Court correctly determined that Ibiezugbe and Falkner had actual authority to enter into the Deeds of Trust *and* that it did not matter Ibiezugbe and Falkner submitted a fraudulent operating agreement to

complete the transactions, the Superior Court *still* erred in granting Premium Title's motion for summary judgment as to Count Two of the Complaint, negligence. As the settlement/escrow agent, Premium Title owed various duties to Capital River and Ms. Liu, including a duty of reasonable care. The full scope of the standard of care is properly determined by a jury, not the Superior Court, but it is clear that Premium Title's duties included a duty to inform Capital River and Ms. Liu of fraud. Premium Title received a true and correct copy of the Operating Agreement when Capital River purchased the Property in 2017 and therefore knew or should have known that the operating agreement submitted by Ibiezugbe and Falkner in connection with the Deeds of Trust was forged and fraudulent. Premium Title failed in its duties which caused harm to Capital River and Ms. Liu (whether the alleged breaches of duty caused harm also is a question for the jury to decide, not the Superior Court on a motion for summary judgment). Capital River and Ms. Liu should have been afforded an opportunity to prove at trial (a) what the standard of care is for Premium Title; and (b) that Premium Title's breaches of duty led directly to the harm Capital River and Ms. Liu suffered.

## ARGUMENT

1. **The Superior Court erred in granting the Appellees' Motions to Dismiss and Motion for Summary Judgment based on its finding that the submission of a forged and fraudulent operating agreement did not automatically void the two Deeds of Trust.**

A. Standard of Review

"The only issue on review of a dismissal made pursuant to Rule 12(b)(6) is the legal sufficiency of the complaint." Scott v. FedChoice Fed. Credit Union, 274 A.3d 318, 322 (D.C. 2022). "As a motion to dismiss a complaint 'presents questions of law, our standard of review ... is *de novo*.'" Id. (citing to Johnson-El v. District of Columbia, 579 A.2d 163, 166 (D.C. 1990)). "All that is required for a complaint to be sufficient is 'a short and plain statement of the claim showing that the pleader is entitled to relief.' We 'construe the complaint in the light most favorable to the plaintiff by taking the facts alleged in the complaint as true.' The complaint need only 'contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (internal citations omitted). "In the District of Columbia, an action to quiet title may not be dismissed for failure to state a claim when the complaint alleges, as appellants' complaint does, that the plaintiffs are the owners of the land in fee simple." In re Tyree, 493 A.2d 314, 317 (D.C. 1985) (citations omitted).

The Court will "review orders granting summary judgment *de novo*." Steward v. Moskowitz, 5 A.3d 638, 646 (D.C. 2010). Consequently, the Court will "consider

the evidence in the light most favorable to the non-moving party, and conduct an independent review of the record." Id. (internal quotation marks and citation omitted). "It is well-established that '[s]ummary judgment is properly granted only if there are no genuine issues of material fact in dispute and if the moving party is entitled to judgment as a matter of law.'" Id. "Cases in which issues of negligence and proximate cause will not be for the jury are unusual." D.C. v. Watkins, 684 A.2d 395, 401 (D.C. 1996).

B. Discussion

It is well-settled law in the District of Columbia that property rights cannot be acquired by means of a forged instrument relating to the property. There is extensive case law in the District of Columbia (and elsewhere) supporting this black-letter rule of law. Smith v. Wells Fargo, a quiet title case with analogous facts to this case, is instructive. See 991 A.2d 20 (D.C. 2010). In that case, Willie Smith was the fee simple owner of real property located in the District of Columbia. See id. at 22. Mr. Smith purportedly executed a "Durable Power of Attorney" ("POA") that named his daughter, Mary Smith, as his Attorney in Fact and authorized her to convey any interest in Mr. Smith's real property. See id. Shortly thereafter, Ms. Smith executed a deed transferring the property to herself. See id. Ms. Smith then obtained a mortgage on the property upon execution of a deed of trust, which deed of trust eventually came to be held by the defendant in the action, Wells Fargo. See id. at 23.

Plaintiffs in the action were several of Mr. Smith's other children who filed suit against Wells Fargo and Mary Smith to quiet title and declare that the deed of trust was invalid, null, and void on the grounds that the POA pursuant to which Mary Smith transferred the property was a forgery. See id. The trial court granted summary judgment in Wells Fargo's favor, finding that Wells Fargo was a bona fide purchaser for value. See id. at 24. The D.C. Court of Appeals, however, reversed and remanded the trial court's decision, recognizing that "BFP [bona fide purchaser] status, though affording some protection, would not protect Wells Fargo if the conveyances underlying Wells Fargo's interest in the property were void ab initio." See id. at 26. The Court continued: "The underlying deed to Mary Smith and the deed of trust in favor of her mortgage lender would be void if the POA was a forgery, or if the POA was valid but Mary Smith exceeded the authority it gave her as attorney-in-fact when she conveyed the property to herself." See id. at 26-27. Ultimately, the Smith Court held:

> As explained above, **if the POA was a forgery, it rendered ineffectual** the deed by which Mary Smith conveyed the property to herself and the deed of trust that she executed, which is the basis of Wells Fargo's interest in the property[], because even a bona fide purchaser **cannot acquire a property right by means of a forged instrument relating to the property.**

See id. at 31 (emphasis added).

Thus, the D.C. Court of Appeals recognized in Smith that the Deeds of Trust themselves do *not* need to be forged in order for the transactions to be void. Rather,

it is sufficient if any "instrument relating to the property" is forged. In Smith, the forged instrument was the POA. See also McNairy v. Baxter, 320 B.R. 30, 39 (Bankr. D.D.C. 2004) ("[I]f the Limited Power of Attorney was a forgery, the deed of trust executed pursuant to the Limited Power of Attorney is ineffective."). Here, in this case, the forged instrument is the fake Capital River LLC operating agreement. See, e.g., Levi v. Commonwealth Land Title Insurance Co., No. 09 CIV. 8012 SHS, 2013 WL 5708402 at *3 (S.D.N.Y. Oct. 21, 2013) (mortgage was unenforceable because it was obtained using a forged/fraudulent LLC operating agreement that falsely represented defendant was 60% owner). Much like a power of attorney, which authorizes a person to act on another's behalf, the Capital River Operating Agreement governs the authority by which its members act on the LLC's behalf. See, e.g., D.C. Code § 29-801.07 (noting that an LLC's "operating agreement shall govern…[t]he activities and affairs of the company and the conduct of those activities and affairs."). Indeed, that is why title insurers require title companies to obtain full and complete copies of operating agreements from LLCs prior to issuing insurance policies. See Appx.0011; Appx.0270; see also Fid. Nat'l Title Co. v. First Am. Title Ins. Co., 310 P.3d 272, 276 (noting testimony from title company that "the title commitment requirements are the 'bible' that specifies all of the 'particular items that need to be ... met before' the closer can disburse funds at closing"). As noted in the Complaint, in this case (and all others), the Commitment for Title

Insurance issued by Chicago Title Insurance Company provided at Schedule B, Paragraph 23(f) that for a limited liability company (like Capital River), the title company (here Premium Title) was required to obtain and submit "a full and complete copy of the Operating Agreement **governing the authority of any or all of the members of the LLC to act on behalf of the LLC**." See Appx.0011; Appx.0270 (emphasis added).

Here, because Ibiezugbe and Falkner **submitted a forged and fraudulent operating agreement** for Capital River in connection with granting and executing the Deeds of Trust (see, e.g., Appx.0009; Appx.0251), **the Deeds of Trust are void** *ab initio* under D.C. law and the interests in the Property of Mr. Abod, Mr. Roupas, and BCJCL are null. See Smith, 991 A.2d at 31; see also Kemp v. Eiland, 139 F. Supp. 3d 329, 339 (D.D.C. 2015) (dismissal of a quiet title action is improper where there are allegations supporting "a basis for finding as void the documents" which cloud the title).

But the Superior Court effectively ignored this clear-cut law. In granting the motions to dismiss of Mr. Abod, Mr. Roupas, and BCJCL and the motion for summary judgment of Premium Title, the Superior Court focused exclusively on its determination that the MOU purportedly gave Ibiezugbe and Falkner actual authority to act:

> Moreover, that Ibiezugbe and Falkner may have secured the First and Second Deeds of Trust through the use of a fraudulently altered Operating Agreement,

> as alleged in the complaint, does not automatically void the First and Second Deeds of Trust because Ibiezugbe and Falkner had the actual authority to enter into these transactions on behalf of Capital River pursuant to the plain language of the MOU.

See Appx.0221 (decision on motions to dismiss); Appx.0286 (decision on motion for summary judgment).

In so ruling, the Superior Court effectively authorized fraud (and to take money to which Ibiezugbe and Falkner were not entitled). That cannot stand. It was improper for the Superior Court to disregard entirely the fact that **Ibiezugbe and Falkner utilized forged and fraudulent documents in securing the Deeds of Trust when D.C. law is clear that forged/fraudulent documents cannot be used in securing an interest in property**. Indeed, in the Wells Fargo v. Smith case, this Court recognized that is true *regardless* of whether there might be actual authority: "The underlying deed to Mary Smith and the deed of trust in favor of her mortgage lender would be void if the POA was a forgery, **or** if the POA was valid but Mary Smith exceeded the authority it gave her as attorney-in-fact when she conveyed the property to herself." See Smith, 991 A.2d at 26-27 (emphasis added). Put differently, the transaction is void *ab initio* if **either** (a) the document(s) on which it was based were forged/fraudulent, **or** (b) a party exceeded its authority. As discussed above, the Deeds of Trust in this case are void because Ibiezugbe and Falkner utilized forged documents in securing them. As a separate and distinct ground for voiding the Deeds of Trust, the Complaint also alleged that Ibiezugbe and Falkner exceeded

their authority (which Ibiezugbe and Falkner have admitted). Appx.0018; Appx.0173.

The Superior Court improperly discounted and ignored the fraud that was committed. And as discussed in further detail immediately below, even if Ibiezugbe and Falkner had used the real Capital River Operating Agreement, the Deeds of Trust still would have been void because Ibiezugbe and Falkner exceeded their authority under the MOU. Either way, the Superior Court erred in granting the motions to dismiss of Mr. Abod, Mr. Roupas, and BCJCL and the motion for summary judgment of Premium Title.

**2. The Superior Court erred in granting the Appellees' Motions to Dismiss and Motion for Summary Judgment based on its finding that the MOU provided Ibiezugbe and Falkner with actual authority to encumber the Property.**

A. Standard of Review

"The only issue on review of a dismissal made pursuant to Rule 12(b)(6) is the legal sufficiency of the complaint." Scott, 274 A.3d at 322. "As a motion to dismiss a complaint 'presents questions of law, our standard of review ... is *de novo*.'" Id. (citing to Johnson-El, 579 A.2d at 166). "All that is required for a complaint to be sufficient is 'a short and plain statement of the claim showing that the pleader is entitled to relief.' We 'construe the complaint in the light most favorable to the plaintiff by taking the facts alleged in the complaint as true.' The complaint need only 'contain sufficient factual matter, accepted as true, to 'state a

claim to relief that is plausible on its face.'" Id. (internal citations omitted). "In the District of Columbia, an action to quiet title may not be dismissed for failure to state a claim when the complaint alleges, as appellants' complaint does, that the plaintiffs are the owners of the land in fee simple." In re Tyree, 493 A.2d at 317 (citations omitted).

The Court will "review orders granting summary judgment *de novo*." Steward, 5 A.3d at 646. Consequently, the Court will "consider the evidence in the light most favorable to the non-moving party, and conduct an independent review of the record." Id. (internal quotation marks and citation omitted). "It is well-established that '[s]ummary judgment is properly granted only if there are no genuine issues of material fact in dispute and if the moving party is entitled to judgment as a matter of law.'" Id. "Cases in which issues of negligence and proximate cause will not be for the jury are unusual." Watkins, 684 A.2d at 401.

B. Discussion

In this action, Capital River and Ms. Liu have alleged that Ibiezugbe and Falkner did **not** have actual authority to use the Property as collateral for their own personal loans (Appx.0004; Appx.0018; Appx.0251), that the members of Capital River each understood Ms. Liu's approval was necessary to use the Property as collateral (Appx.0012; Appx.0251), that for a decision like encumbering the Property Capital River's members were intended to vote based on their percentage

ownership such that Ms. Liu had to agree to whatever course of action was being taken (Appx.0011-12)[4], that Ibiezugbe and Falkner **knew** they did not have authority under the real Operating Agreement or MOU to encumber the Property with personal loans (Appx.0003; Appx.0251), and that they admitted both in discussions with Ms. Liu's agents and in writing that they did not have authority to encumber the Property (Appx.0009; Appx.0251). Indeed, immediately after Ms. Liu's agents (Mr. Chang and Mr. Boutcher) discovered the fraudulently obtained loans through an independent title search, they confronted Ibiezugbe and Falkner. Appx.0009. At that meeting, not only did Ibiezugbe and Falkner acknowledge in conversation that they lacked authority to enter into the Deeds of Trust, but they also signed an Amendment to the Operating Agreement and Memorandum of Understanding for Capital River Enterprises, LLC, which stated that they exceeded their authority:

> the Parties acknowledge that the Contractors [Ibiezugbe and Falkner] **have breached the OA [Operating Agreement] and MOU [Memorandum of Understanding]** and are entering into this Amendment in order to address the

[4] This was the intent of the Capital River members given the fact that Ms. Liu put up all of the $1.6 million used to purchase the Property and faced all of the financial risk in this venture, while Ibiezugbe and Falkner did not commit any money to purchase or developing the Property and faced no financial risk. See Appx.0251.

issues created by such breaches without LIU waiving any rights it may have as to said breaches."

See Appx.0181 (emphasis added).

Despite these facts, the Superior Court found that Ibiezugbe and Falkner had actual authority to use the Property as collateral for their personal loans, and on that basis, granted the motions to dismiss of Mr. Abod, Mr. Roupas, and BCJCL as well as Premium Title's motion for summary judgment. Appx.0221; Appx.0286. The language relied upon by the Superior Court is Paragraph 10 of the MOU: "All major decisions and choices during the Investment Period shall be made by a two-third majority vote of the Members, each of whom shall have one vote for each major decision required." See Appx.0221; Appx.0286.

First, Mr. Abod, Mr. Roupas, BCJCL, and Premium Title never even saw this language, and could not have possibly relied on it, as none of them ever received a copy of the MOU.[5] Appx.0011-12; Appx.0017. Second, as stated above, Capital River and Ms. Liu alleged that the three Capital River members were intended to vote in accordance with their percentage interest. That interpretation is supported by the critical fact that **Ibiezugbe and Falkner themselves have admitted they did**

[5] Aside from allegations in the Complaint to that effect, Mr. Abod, Mr. Roupas, BCJCL, and Premium Title each had to request a copy of the MOU from counsel for Capital River and Ms. Liu prior to filing their motions at the Superior Court level. The implication of that is, of course, none of them had a copy of the MOU in their own files.

**not have authority under the MOU to encumber the Property without Ms. Liu's signoff.** Indeed, if Ibiezugbe and Falkner could actually encumber the Property under the terms of the real Operating Agreement and MOU, why would they create a forged and fraudulent operating agreement in connection with securing the Deeds of Trust? Why wouldn't they just submit the real Operating Agreement and MOU? Why would they risk criminal prosecution by committing fraud? Simply put, there is no reason at all for them to create a forged and fraudulent operating agreement if they had actual authority under the real LLC documents.

Third, at a minimum, the MOU language is ambiguous.[6] For example, there is no definition of what constitutes a "major decision" or whether such decisions were limited to "investments" in the Property (indeed, Ibiezugbe and Falkner were tasked with obtaining a building permit and potential construction on the Property). Appx.0123-125. The whole purpose of the Capital River venture was to acquire and flip the Property for a profit. Appx.0003; Appx.0026; Appx.0123. The parties never contemplated encumbering the Property with loans, especially when Ms. Liu was the financier. Capital River and Ms. Liu should be entitled to present evidence as to the Capital River members' understanding and intention of the MOU. See Sanders, 985 A.2d at 441-42. Instead, the Superior Court improperly ignored these facts and

[6] The Court will review *de novo* the question of whether contract language was in fact ambiguous in the first instance. See Sanders v. Molla, 985 A.2d 439, 441–42 (D.C. 2009).

erred in granting the motions to dismiss of Mr. Abod, Mr. Roupas, and BCJCL and the motion for summary judgment of Premium Title.

### 3. The Superior Court erred in granting Premium Title's Motion for Summary Judgment as to Count Two, Negligence.

A. Standard of Review

The Court will "review orders granting summary judgment *de novo*." Steward, 5 A.3d at 646. Consequently, the Court will "consider the evidence in the light most favorable to the non-moving party, and conduct an independent review of the record." Id. (internal quotation marks and citation omitted). "It is well-established that '[s]ummary judgment is properly granted only if there are no genuine issues of material fact in dispute and if the moving party is entitled to judgment as a matter of law.'" Id. "Cases in which issues of negligence and proximate cause will not be for the jury are unusual." Watkins, 684 A.2d at 401.

B. Discussion

In Count Two of the Complaint, Capital River and Ms. Liu asserted a claim of negligence against Premium Title. Appx.0019. Even if the Superior Court properly determined that Ibiezugbe and Falkner had actual authority to use the Property as collateral for their personal loans (they did not), the Superior Court still erred in granting Premium Title's motion for summary judgment as to Count Two. Significant issues of material fact remain as to (a) the standard of care to which Premium Title was subject, and (b) whether the breaches of duty proximately caused

harm to Capital River and Ms. Liu. "Cases in which issues of negligence and proximate cause will not be for the jury are unusual." See Watkins, 684 A.2d at 401. This is not one of those "unusual" cases and the Superior Court's erroneous decision should be reversed.

"The elements of a negligence action are: (1) a duty, owed by the defendant to the plaintiff, to conform to a certain standard of care; (2) a breach of this duty by the defendant; and (3) an injury to the plaintiff proximately caused by the defendant's breach." Morgan v. D.C., 449 A.2d 1102, 1108 (D.C.), *reh'g granted and opinion vacated on other grounds*. There is an important distinction between whether a defendant owes a duty to a plaintiff, which is a question of law to be decided by the court, and the standard of care, *i.e.* the scope of the duty owed, which is a question for the jury. Compare Tolu v. Ayodeji, 945 A.2d 596, 601 (D.C. 2008) ("[T]he question of whether a defendant owes a duty to a plaintiff under a particular set of circumstances is entirely a question of law that must be determined only by the court."); with Ray v. Am. Nat. Red Cross, 696 A.2d 399, 404 (D.C. 1997) ("the jury, informed by expert testimony where appropriate, determines what the applicable standard of care is in a particular case. That standard is measured by 'the course of action that a reasonably prudent [professional] with the defendant's specialty would have taken under the same or similar circumstances.'") (internal citation omitted); Burke v. Scaggs, 867 A.2d 213, 219 (D.C. 2005) ("Determining

the applicable standard of care is a question of fact for the jury."); see also Gilbert v. Miodovnik, 990 A.2d 983, 1000 (D.C. 2010) (Ruiz, J., dissenting) ("There is a significant and well-established distinction between the existence of a duty and a determination of the applicable standard of care. Whether a duty exists is a question of law to be determined by the court…whereas a determination of the applicable standard of care is a question of fact to be found by the jury based on expert testimony.").

Here, as the escrow/settlement agent in the relevant transactions at issue, Premium Title owed certain duties to Capital River and Ms. Liu.[7] The scope of the duty of reasonable care, *i.e.* what would a reasonably prudent escrow/settlement

[7] Such duties included, at a minimum, a duty of reasonable care, a duty to deal fairly with Capital River, a duty of good faith and candor, and a duty to disclose to Capital River all matters coming to Premium Title's notice or knowledge that are material for Capital River to know for its protection or guidance. See, e.g., Aronoff v. Lenkin Co., 618 A.2d 669, 687 (D.C. 1992) (finding duties owed by the settlement/escrow agent to principal in real estate transaction); id. ("Whether as settlement agent or escrowee, the agent has a duty in such circumstances to alert the principal to the real state of affairs.") (citing to Restatement (Second) of Agency § 381 comment a (1958) ("duty to give information arises when agent 'has notice of facts which, in view of his relations with the principal, he should know may affect the desires of his principal as to his own conduct or the conduct of the principal....'")); see also Title and Escrow Claims Guide § 13.4 Duty of Care and Parties to Whom Owed, available at 2016 WL 6637302 ("An escrowee owes a duty of reasonable care to the escrow parties (known as principals)"); 2 Title Ins. Law § 20:3 (2020 ed.) (noting that escrow/closing agents bear a fiduciary relationship to each party and as such must exercise ordinary skill and diligence in performing duties); 2 Title Ins. Law § 20:5 (2020 ed.) (escrow holder's duty to disclose material information includes the duty to disclose fraud).

agent have done under the same circumstances, is properly determined by a jury based on expert testimony and other evidence. Had Capital River and Ms. Liu been provided an opportunity to do so (they were improperly denied such opportunity by the Superior Court), they would have introduced evidence and expert testimony as to the standard of care with which a title company in the District of Columbia should conduct itself when dealing with a limited liability company (like Capital River) as a party in a real estate transaction. Appx.0242. Capital River and Ms. Liu also would have submitted evidence and expert testimony that Premium Title breached that standard of care by, among other things, failing to check its records for prior transactions involving Capital River and/or the Property, failing to obtain an affidavit of members accurately identifying the full membership of Capital River (as was required by the title insurance commitment issued by Premium Title itself), failing to obtain a resolution from all members authorizing Capital River to take the contemplated action regarding the Deeds of Trust, failing to fulfill the requirements of the title insurance commitment, failing to confront Ibiezugbe and Falkner about their submission of a fraudulent operating agreement, failing to stop the transaction involving the Deeds of Trust, and failing to notify Capital River and Ms. Liu about the submission of a forged operating agreement.[8] Appx.0242.

[8] Should Premium Title offer competing expert testimony, it will be up to the jury to weigh the credibility of the experts and make a decision as to the appropriate

Indeed, Premium Title received a true and correct copy of Capital River's Operating Agreement, that reflected Ms. Liu's 50 percent ownership, in connection with Capital River's original purchase of the Property. Appx.0010; Appx.0241; Appx.0254. So Premium Title **knew** (or should have known) that Capital River had three members (not two) and that the operating agreement submitted in connection with the Deeds of Trust was forged and fraudulent. Setting aside the fact that the same exact agent (Lola Shannon) conducted all three transactions (Capital River's original purchase and both Deeds of Trust) and therefore should have known, a simple check of Premium Title's prior records relating to Capital River or the Property would have revealed the discrepancy. Premium Title also knew that it received the full $1.6 million purchase price for the Property from **Ms. Liu**. Appx.0275 (disbursement statement generated by Premium Title reflecting $1.6 million wire from Ms. Liu). And yet, despite these facts, when Ms. Liu's 50 percent ownership interest mysteriously disappeared without explanation, Premium Title did nothing. Premium Title failed in its duties, including its duty to inform Capital River (and more specifically Ms. Liu or Mr. Boutcher) as to the fraudulent operating agreement submitted in connection with the Deeds of Trust.

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standard of care. That is not for the Superior Court to decide at the summary judgment stage.

Premium Title's failures led directly to the harm suffered by Capital River and Ms. Liu today. Indeed, if Premium Title had not failed in its duties, Capital River and Ms. Liu would have stopped the Deeds of Trust from being executed and the liens on the Property today would not exist. Appx.0251. (Strong evidentiary support exists for this assertion given Ibiezugbe's and Falkner's oral and written **admissions** that they did not have authority to enter into the Deeds of Trust without Ms. Liu's signoff. Appx.0009; Appx.0181; Appx.0251). At the very least, the loans obtained from Mr. Abod, Mr. Roupas, and BCJCL would have gone to Capital River and Ms. Liu – not directly (and solely) into Ibiezugbe's and Falkner's personal bank accounts – given that Ms. Liu is entitled to recoup her $1.6 million investment plus 10 percent profit before Ibiezugbe and Falkner realize any return. Appx.0007; Appx.0124. But Premium Title's negligence resulted in Ibiezugbe and Falkner getting away with their fraud to the detriment of Capital River and Ms. Liu.

Capital River and Ms. Liu were deprived of the opportunity to present any evidence or expert testimony on these subjects because the Superior Court erroneously granted Premium Title's motion for summary judgment. The basis for the Superior Court's decision was (again) its determination that Ibiezugbe and Falkner had actual authority to use the Property as collateral:

> Plaintiffs' argument ignores this Court's prior ruling that "that Ibiezugbe and Falkner may have secured the First and Second Deeds of Trust through the use of a fraudulently altered Operating Agreement, as alleged in the complaint, does not automatically void the First and Second Deeds of Trust

> because Ibiezugbe and Falkner had the actual authority to enter into these transactions on behalf of Capital River pursuant to the plain language of the MOU."
>
> ***
>
> Accordingly, Premium Title's actions were consistent with Capital River's MOU and there was no "fraud" perpetrated against Capital River that Premium Title had a duty to notify Plaintiffs of.

Appx.0286.

First, it is wrong to say that there was no "fraud" to notify Capital River of. The submission of a forged and fraudulent operating agreement of Capital River that completely omits a 50 percent owner is fraud. (And it is fraud regardless of whether or not Ibiezugbe or Falkner ultimately had actual authority to enter into the Deeds of Trust). Second, while the basis for the Superior Court's decision is that Premium Title's actions "were consistent with" the MOU, **Premium Title did not even have a copy of the MOU**. Appx.0011. There is no possible way Premium Title could have known what authority Ibiezugbe and Falkner had or did not have under an MOU that they never received and were not even aware of. That cannot be a basis to excuse Premium Title's negligence.[9] Third, even if Ibiezugbe and Falkner were

[9] Put another way, this is not a situation where Premium Title looked at the MOU and determined Ibiezugbe and Falkner had actual authority to act on Capital River's behalf. Premium Title had no knowledge of the MOU. Appx.0011. All Premium Title knew was that Ibiezugbe and Falkner had submitted a fake and fraudulent operating agreement. In such a situation, a title company's reasonable response is to notify the person it knows to be the 50 percent owner who had previously funded

authorized under the MOU to use the Property as collateral to secure loans, that is not a sufficient basis to grant summary judgment as to the negligence count against Premium Title. Those loans rightfully belonged to Capital River and Ms. Liu, as Ms. Liu is entitled to recoup her $1.6 million investment plus 10 percent profit before Ibiezugbe and Falkner realize any return. Appx.0007; Appx.0250; Appx.0124. Instead, Premium Title directed the loans into Ibiezugbe and Falkner's personal accounts. But for Premium Title's failure in its duties as an escrow agent and adherence to the applicable standard of care, Ms. Liu would have received the $874,000 in loans, not Ibiezugbe and Falkner. Fourth, even if there was no "fraud" that Premium Title had a duty to disclose, as the Superior Court improperly determined, it does not follow that summary judgment was merited. There are other duties which Premium Title failed to satisfy as well. Premium Title owed a duty of reasonable care (the scope of which is determined by the jury, not the court).[10]

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the full venture. It is negligence to do nothing and simply proceed with the transaction without question.

[10] Capital River and Ms. Liu identified several ways in which Premium Title violated the applicable standard of care at page 25 above, including by failing to check its records for prior transactions involving Capital River and/or the Property, failing to obtain an affidavit of members accurately identifying the full membership of Capital River (as was required by the title insurance commitment issued by Premium Title itself), failing to obtain a resolution from all members authorizing Capital River to take the contemplated action regarding the Deeds of Trust, failing to fulfill the requirements of the title insurance commitment, failing to confront Ibiezugbe and Falkner about their fraud, and failing to stop the transaction involving the Deeds of Trust. These violations are separate and distinct from Premium Title's failure to notify Capital River and Ms. Liu about the fraud being perpetrated.

Premium Title also owed a duty to disclose all information that "may affect the desires of his principal as to his own conduct or the conduct of the principal." See Aronoff, 618 A.2d at 687. Certainly the submission of a forged and fraudulent operating agreement and receipt of loans to Ibiezugbe's and Falkner's personal bank accounts (rather than Capital River's/Ms. Liu's account) also qualify as facts that "may affect the desires of his principal as to his own conduct or the conduct of the principal." This provides further basis for Premium Title to disclose those facts to Capital River and Ms. Liu. The Superior Court's decision and underlying rationale are deeply flawed.

Simply put, there are significant material facts still in dispute, including whether Premium Title breached the standard of care (it did) and whether such breach caused harm to Capital River and Ms. Liu (it did). Capital River and Ms. Liu should have been afforded an opportunity to submit evidence and testimony showing that the liens presently encumbering the Property would not exist (or that Capital River would have received the loan proceeds) but for Premium Title's negligence and abject failure in its duties as escrow/closing agent. Instead, the Superior Court improperly granted Premium Title's motion for summary judgment and should be reversed.

## CONCLUSION

This Honorable Court should hold that the Superior Court erred in granting the motions to dismiss of Mr. Abod, Mr. Roupas, and BCJCL, as well as the motion for summary judgment of Premium Title, and reverse and remand those orders.

November 28, 2022

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of November 2022, I caused a copy of the foregoing to be served via the Court's electronic filing system and email on the following:

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# District of Columbia
# Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

**Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.**

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayeridentification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Andrew Crawford

Signature

22-CV-0548

Case Number(s)

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11/28/22

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