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No.: 69135-0-I
(consolidated with 69136-8-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SIXTY-01 ASSOCIATION OF APARTMENT OWNERS,
a Washington non profit corporation,

Respondent/Cross-Appellant,

vs.

VIRGINIA A. PARSONS and JOHN DOE PARSONS, wife and husband, or state registered domestic partners; JOHN DOE and JANE DOE, unknown occupants of the subject real property; and also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the Complaint herein,

Defendants,

DANIEL PASHNIAK,

Appellant/Cross-Respondent.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT SIXTY-01

Michael A. Padilla, WSBA No. 26284
LAW OFFICES OF JAMES L. STRICHARTZ
201 Queen Anne Avenue North, Suite 400
Seattle, Washington 98109
Telephone: (206) 388-0600

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I. ARGUMENT (ON CONSOLIDATED CASES)

A. Prefatory Note: Citation to Clerk's Papers in Consolidated Cases.

As noted in the December 19, 2012 Brief of Respondent/Cross Appellant Sixty-01 Association of Apartment Owners ("Association"):

> Pursuant to stipulation between counsel for Plaintiff and Respondent in conference with Laurie Sanders of the Court of Appeals, the parties will cite to Clerk's Papers in *Sixty-01 v. Parsons et al,* King Co. Sup. No. 11-2-22195-4SEA as "CP-A __", and Clerk's Papers in *Sixty-01 v. Mallarino, et al,* King Co. Sup. No. 10-2-17742-6SEA as "CP-B __." Email from William Justyk dated November 7, 2012, filed November 8, 2012 (Court of Appeals file). The Court of Appeals consolidated both actions under the *Parsons* case number. Order dated Oct. 2, 2012 (Court of Appeals file). The Court of Appeals subsequently ordered that the briefs to be filed in the case would be the same as those permitted in cross appeals. Order dated Dec. 3, 2012 (Court of Appeals file).

Brief of Respondent Sixty-01 dated Dec. 19, 2012 at 2 n. 1. The Reply Brief of Cross-Respondent Daniel Pashniak ("Investor") dated March 8, 2013 erroneously switches the reference to the Clerk's Papers for each consolidated case below, citing "CP-A___" Clerk's Papers as "CP-B___."

B. Standard of Review is *De Novo:* The Court Must Interpret Whether RCW 6.21.110(3) "Substantial Irregularities in the Proceedings Concerning the Sale" Includes, as a Matter of Law,

Investor Who Fails to Conduct Any Due Diligence To Determine Sale is Subject to Senior Deed of Trust.

The central issue in this consolidated case is the interpretation of a statute providing that a judgment creditor (Association) is "*entitled*" to an order confirming sheriff's sale absent "substantial irregularities in the proceedings concerning the sale" under RCW 6.21.110(3). Specifically, determining whether, as a matter of law under RCW 6.21.110(3), there can be any "substantial irregularities in the proceedings concerning the sale" where the sheriff properly conducted the sale, but a winning bidder (Investor) fails to conduct any due diligence to determine if the properties he wants to bid on met his particular investment expectations. In this case, Investor did not even (a) review the court files before bidding, (b) investigate the County Recorder records to discover the recorded senior deeds of trust, (c) investigate the County Recorder records to discover the recorded Declaration of Condominium provision providing for unconditional subordination of the Association's lien to such deed of trust and (d) investigate Washington law that mandates the statutory subordination of the Association's lien to such deed of trust under RCW 64.32.200(2). Investor wants his bid back because he failed to apprehend that the sales were each subject to a senior deed of trust. (CP-B 148-9, CP-A 112-3).

The Court of Appeals reviews an objection to confirmation of sheriff's sale and a trial court's order on motion for confirmation *de novo*, engaging in the same inquiry as the trial court. *Hazel v. Van Beek,* 85 Wn. App. 129, 133 (1997), *aff'd in part and rev'd in part,* 135 Wn.2d 45 (1998). Interpretation of statutes governing sheriff's sales is an issue of law, which the Court of Appeals reviews *de novo*. *Hazel,* 85 Wn. App. at 137. The interpretation and applicability of statutes in general presents questions of law reviewed *de novo*. *Cosmopolitan Eng'g Group Inc. v. Ondeo Degremont, Inc.,* 159 Wn.2d 292, 298-9 (2006); *Quality Food Ctrs. V. Mary Jewell T, LLC,* 134 Wn. App. 814, 817, 142 P.3d 206 (2006); *In re Electric Lightwave, Inc.,* 123 Wn.2d 530, 536 (1994).

Investor in substance asserts that the Court's determination of whether there were "substantial irregularities in the proceedings concerning the sale," which of necessity requires an interpretation of RCW 6.21.110(3), is a matter of discretion for the trial court, attempting to relax the standard of review of RCW 6.21.110(3) by this Court . Reply Brief Pashniak dated Mar. 8, 2013 at 6. Under the foregoing authorities, it is not a matter of trial court discretion where there is an issue of law, as here, as to the meaning of "substantial irregularities in the proceedings concerning the sale" under RCW 6.21.110(3). As a matter of law, there were no "substantial irregularities in the proceedings concerning the sale." As addressed at length in the Association's Brief, the sheriff in both

consolidated cases regularly and properly conducted the sales. Brief Sixty-01 dated Dec. 19, 2012 at 7-11.

Investor cites to no applicable authority supporting his assertion that this Court should review the two conflicting trial court decisions (one confirming the sale in *Parsons*, the other denying confirmation in *(Mallarino)* under a relaxed abuse of discretion standard. None of the following cases cited by Investor address facts even remotely similar to the case at bar, to wit, an investor seeking to retract a bid accepted by a sheriff regularly and properly conducting a sheriff's sale, simply because he failed to conduct any due diligence to determine that the sale was subject to a senior deed of trust. Reply Brief Pashniak dated Mar. 8, 2013 at 6.

Casey v. Chapman, 123 Wn. App. 670 (2004): The only issue was whether the trial court had the authority to decline to set an upset price in a UCC personal property (partnership interest) foreclosure sale. *Casey,* 123 Wn. App. at 683. The case is not applicable to the case at bar as the sale was of personal property under the UCC and examination of whether the sale was commercially reasonable under the UCC, not a sheriff's sale under Ch. 6.21 RCW. The RCW 61.12.060 upset price provision (for real property foreclosure sales where the creditor wished to preserve a right to pursue the debtor post-sale with a deficiency claim) wasn't applicable to this UCC case, but was considered as a guide to the *Casey* court's examination of the UCC sale. *Casey,* 123 Wn. App. at 683-4.

Braman v. Kuper, 51 Wn.2d 676 (1958): The judgment debtor objected to the sale confirmation on the basis that the sheriff improperly took a bid higher than the creditor's opening credit bid without receiving those funds over that opening credit bid, and that the sheriff sold multiple parcels as one sale rather than by serial sales. *Braman,* 51 Wn.2d at 683-4. The *Braman* court determined that the *sheriff's undertakings* did not rise to "substantial irregularities." The *Braman* court had squarely before it the issue of whether *the sheriff's actions* were "substantial irregularities in the proceedings concerning the sale" under predecessor to RCW 6.21.110(3), and not the question at issue in this case, to wit, interpretation of whether RCW 6.21.110(3) "substantial irregularities in the proceedings concerning the sale" includes an investor who fails to conduct any due diligence to confirm that the sale is subject to a senior deed of trust.

W.W. Williams v. Continental Securities Corp., 22 Wn.2d 1 (1944): A bidder objected to confirmation of sale to another bidder, where the *sheriff* rejected the objecting bidder's bid because he failed to actually tender the money in payment of his bid, and instead accepted the next high bidder's bid; the court reviewed the *sheriff's* (not the trial court's) discretion "as to the time and manner of performing such duties [statutory requirements relating to such sales]." *W.W. Williams,* 22 Wn.2d at 11. The *W.W. Williams* court had squarely before it the issue of whether *the sheriff's actions* were "substantial irregularities in the proceedings

concerning the sale" under predecessor to RCW 6.21.110(3), and not the question at issue in this case, to wit, interpretation of whether RCW 6.21.110(3) "substantial irregularities in the proceedings concerning the sale" includes an investor who fails to conduct any due diligence to confirm that the sale is subject to a senior deed of trust.

Mellen v. Edwards, 179 Wash. 272 (1934), *Davis Estate, Inc. v. Rochelle*, 181 Wash. 81 (1935), *Lovejoy v. Americus,* 111 Wash. 571 (1920), and *Triplett v. Bergman,* 82 Wash. 639 (1914): In each of these cases, the judgment debtor objected to a low opening bid by the judgment creditor, where the judgment creditor had preserved a deficiency right to pursue against the debtor post-sale. The court in each case concluded that the trial court had an equitable power to require an upset price where the judgment creditor was attempting to improperly increase its post-sale deficiency claim, since at the time of these early cases there was no statutory right to require an upset price in deficiency cases. *Mellen,* 179 Wash. at 276-7; *Davis Estate,* 181 Wash. at 83; *Lovejoy,* 111 Wash. at 575; *Triplett,* 82 Wash. at 642.

Obviously reacting to *Mellen* and *Davis Estate,* the next year the Legislature passed the statutory upset provision in deficiency cases, 1935 Laws Washington c. 125 § 1, present-day RCW 61.12.060.

The *Mellen, Davis Estate, Lovejoy* and *Triplett* courts did not have before them the question at issue in this case, to wit, interpretation of

whether RCW 6.21.110(3) "substantial irregularities in the proceedings concerning the sale" includes an investor who fails to conduct any due diligence to confirm that the sale is subject to a senior deed of trust.

C. Investor Waived Any Right to Object to Mallarino Sale By Failing to File Objection Within 20 Days; Such Waiver Removes Court Jurisdiction to Consider Any Late Objection.

In the Mallarino case, the Clerk mailed her Notice of Return of Sheriff's Sale On Real Property on March 16, 2012. (CP-B 181-2). Under RCW 6.21.110(2), any objection to sale had to be filed by April 5, 2012, twenty days after the Clerk Mailed her Notice of Return. Investor filed his Objection on April 9, 2012. (CP-B 148-9). The untimely Objection stated that Investor was confused as to whether the sale would extinguish any "prior indebtedness," but did not specify any particular irregularity in the sheriff's conduct of the sale, and did not state any authority in support of the Objection.

Investor filed a second Objection to Confirmation and Motion to Vacate Sheriff's Sale on July 12, 2012, over three months after the 20 day deadline for objections to the sheriff's sale, now for the first time alleging there was a substantial irregularity because the Association and Bank of America had entered into the Stipulation and Order, and that as a result he should be allowed to withdraw his bid. (CP-B 224).

It is clear that Investor's first objection, failing to specify any basis for any objection whatsoever, was not timely, and Investor's second objection, which finally did specify some basis for an objection over three months later, was untimely. RCW 6.21.110(2) provides that:

> the judgment creditor. . . is *entitled* to an order confirming the sale at any time after twenty days have elapsed from the mailing of the notice of the filing of the sheriff's return. . . unless the judgment debtor. . . or other nondefaulting party to whom notice was sent shall file objections to confirmation with the clerk *within 20 days* after the mailing of the notice of the filing of such return.

RCW 6.21.110(3) (emphasis added). Failure to timely file an objection results in waiver of that right, as our Supreme Court succinctly held: "[W]e hold the deadline for procedural deadlines is mandatory." *Hazel v. Van Beek,* 135 Wn.2d 45, 50 (1998). The *Hazel* court overruled the Court of Appeals' reading of the twenty day deadline as discretionary. Id. In the *Hazel* case, the objecting party filed his objection three days after the twenty day deadline. The *Hazel* court made it clear that "mandatory" means mandatory in such case: "Had Van Beek's objections to the sale been based on procedural irregularities of the sale, they would have been untimely under the mandatory 20-day deadline in RCW 6.21.110(2)." *Hazel,* 135 Wn.2d at 53.

In response to the foregoing, Investor asserts that his failure to meet the mandatory filing requirement and the result required under *Hazel* (that the judgment creditor is *"entitled"* under RCW 6.21.110(2) to sale

confirmation), is somehow forgiven and the late objection could be considered based on a new creative argument. Reply Brief Pashniak dated Mar. 8, 2013 at 11. Investor attempts to make an end-run around the *Hazel* mandate and invites the Court of Appeals to create a new judicial exception to the *Hazel* mandate (much like the Court of Appeals did with RCW 6.21.110(2) and which was rejected by the Supreme Court in *Hazel*): Under Investor's theory, the *Hazel* mandate (that timely filing of an objection is mandatory) is subject to a new judicially-created exception where the trial court, as here, failed to examine the Mallarino court docket to confirm that no timely objection had been filed, and where Association trial court counsel in his Motion for Sale Confirmation, reasonably concluded from communication from the Investor that the Investor had actually timely filed an objection, when that was not in fact the case. (CP-B 183-202, CP-B 239). Nowhere before the trial court did the Association stipulate to a late filing of any objection. Investor thus attempts to capitalize on this state of affairs by asserting that the line of cases on failure to raise issue to trial court should give him a new judicially-created exception to the *Hazel* mandate. Reply Brief Pashniak dated Mar. 8, 2013 at 11. However, that is forbidden by *Hazel*: The *Hazel* court concluded that under RCW 6.21.110(2), any objection is *waived* if not timely filed. *Hazel,* 135 Wn.2d at 50-1 ("Our first issue is whether Van Beek waived his right to object by filing his objections in an untimely fashion"). Here,

there is no question that on the 21st day after sale, Investor had in fact and as a matter of law *waived* his right to any objection, and the Association was *entitled* to sale confirmation:

> "The operative word [in RCW 6.21.110(2)] is 'entitled.' The purchaser is entitled to the order of confirmation at any time after 20 days have passed, unless the debtor files an objection within the time limit."
>
> *Hazel,* 135 Wn.2d at 51.

Under *Hazel,* then, Investor had on the 21st day following sale *waived* his right to object. The trial court's failure to examine the trial court docket to detect that Investor had failed to timely file any objection, and the Association's trial court counsel's reasonable conclusion (based on communication from the Investor) that Investor had actually filed an objection, does not mean that there is some judicially-created right to overturn that waiver. Under *Hazel,* the failure to timely file an objection to sale removes any authority of the trial court to consider an objection and vests ("entitles") in the Association the right to sale confirmation. In that regard, the *Hazel* mandate (that failure to timely file an objection absolutely waives that right) is in substance identical to a lack of subject matter jurisdiction (here, to entertain an objection to sale confirmation), which can be raised at any time:

> [W]e are asked by Camp Finance to pass upon a number of procedural irregularities [regarding the sheriff's conduct of the sale]. And although the parties do not discuss our jurisdiction in this regard, [because of the failure to file an objection within 20 days after the sheriff's sale], we do not

> believe we have the authority to pass on these procedural irregularities.

Camp Finance, LLC v. Hersel Brazington, 135 Wn. App. 156, 165-7 (2006).

In the alternative, even if the Court of Appeals concludes that it can create a new judicial exception to the *Hazel* mandate and hold that the line of cases on failure to raise issue to trial court should apply: Even in such case, the appellate court "may" still consider errors which were not raised at the trial court level. *Postema v. Postema Ent., Inc.,* 118 Wn. App. 185, 193 (2003). This is a case where the appellate court should consider the issue, because the issue arises solely from the actions of the Investor himself (Association trial court counsel in his Motion for Sale Confirmation reasonably concluded from communication from the Investor that the Investor had actually timely filed an objection, when that was not in fact the case).

Under the foregoing authority, Investor's objections in the Mallarino case must be rejected as untimely, and a mandate issued directing the trial court to confirm the Mallarino sheriff's sale.

D. No Authority Holds That A Third Party Bidder May Simply Withdraw A Winning Bid Accepted By the Sheriff and Where Payment on the Bid has Been Tendered.

Investor asserts that, after the sheriff had accepted his bids on the two properties, and tendered payment thereon, that he can later withdraw his bids. Reply Brief Pashniak dated Mar. 8, 2013 at 12. Investor cites to *Davies v. Davies,* 48 Wn. App. 29 (1987) in support of that contention, which the Association fully rebutted as distinguishable and in any event dicta in its opening Brief. Brief Sixty-01 dated Dec. 19, 2012 at 17-19. However, Investor in his Reply Brief asserts that the 1939 case *In re Spokane Savings Bank,* 198 Wash. 665 (1939) supports the proposition that the bid is not binding until the sale is confirmed by the Court. Reply Brief Pashniak dated Mar. 8, 2013 at 15-16. Investor's characterization of *Spokane Savings* as applicable is incorrect: That case involved a petition by a bank liquidator for court approval of one of two competing *structured* bids (*i.e.,* subject to delayed payment terms and other terms) to purchase a defunct bank's real property asset, and a contest by one bidder that wanted to overturn the court's order authorizing the liquidator to sell the unit to another bidder. *Spokane Savings,* 198 Wash. at 665-7, 674. Nothing in the *Spokane Savings* case involved a sheriff's foreclosure sale under Ch. 6.21 RCW where, as here, a third party investor tendered a bid, the sheriff accepted it, the investor paid the sheriff for the bid, and then later the investor asserted that he wanted his money back. Nothing in *Spokane Savings* examined a judgment creditors right to confirm the sheriff's sale under RCW 6.21.110(2),(3). Indeed, upon the sheriff

accepting this Investor's respective bids and the Investor paying the sheriff for the bids, the Investor obtained a recognized interest:

> [A]cceptance of the bid is conditioned upon its being a cash bid payable as prescribed in the statute. Until and unless the bidder makes such payment he acquires no interest in the property.

W.W. Williams v. Continental Securities Corp., 22 Wn.2d 1, 12 (1944).

E. Investor Never Even Examined the Court Files Prior to Submitting His Bids, And Thus Never Relied On Anything in the Court Files, Including the Judgments And Decrees of Foreclosure, Prior to Sale.

Investor spends a significant amount of pages in his Reply Brief arguing that the respective Judgments and Decrees of Foreclosure imply that the senior deeds of trust would be foreclosed at sheriff's sale. Reply Brief Pashniak dated Mar. 8, 2013 at 16-18. Investor also spends a significant amount of time in his Reply Brief arguing that he was somehow prejudiced by the timing of the filing of the stipulation with Bank of America confirming the priority of that lender's deed of trust on the Mallarino property. Id. at 18-21. The critical fact is that Investor never even examined the trial court files before submitting his bids. (CP-B 222-8, 231; CP-A 185-94, 199). He relied on nothing within the four corners of each Judgment and Decree of Foreclosure, because he never looked at the court files. And because of this utter failure to conduct any

due diligence and examine the court files, whether any stipulation with the lender was filed in the Mallarino court file the day before the sheriff's sale or a month before, this Investor would not have seen the stipulation - again, because he never examined the court files. In this regard, Judge Kessler erred by refusing to confirm the Mallarino sale on his stated basis that the stipulation in that case was filed the day before the sheriff's sale, implying in that order that the sale should have been postponed to give potential bidders the opportunity to discover the stipulation in the court file. In this case, it wouldn't have mattered at all because this Investor never examined the Court files before placing his bids.

Investor was an experienced real estate investor. (CP-B 222, 311, 325-336). But he failed to conduct the basic due diligence of examining the court files and examining the King County Recorder's title records regarding the units before bidding. Rather, Investor was in King County Superior Court in early 2012 and learned of the sheriff's sales for the two condominiums from the legal notices posted on a board in the King County Courthouse. (CP-B 223). Investor admitted that he knew that senior deed of trust beneficiary Bank of America was not named as a party in each foreclosure when he first saw the respective sheriff's Notice to Judgment Debtor of Sale of Real Property posted on that board. (CP-B 223, CP-A 181).

As a result of the above undisputed facts, all of Investor's arguments regarding the timing of the filing of the Mallarino case lender stipulation, and arguments asserting that the Judgments and Decrees of Foreclosure purported to foreclose the respective senior lender deeds of trust, as some basis to assert there was a "substantial irregularity" under RCW 6.21.110(3), are simply irrelevant, *because he never relied on anything within the Court file before placing his bids.* It was only after Investor retained an attorney, months after each sale was conducted, that the Mallarino case lender stipulation and the Judgments and Decrees of Foreclosure were examined by his counsel and new arguments put forth by Investor regarding the Mallarino case lender stipulation and the Judgments and Decrees of Foreclosure. (CP-B 209, 286).

The Judgments and Decrees of Foreclosure had no bearing on this Investor's decision to place bids on the two units, because he never examined either Judgment before placing those bids. Investor's arguments regarding the timing of the Mallarino case lender stipulation and the effect of the Judgments on the senior deeds of trust are transparent after-the-sales-event attempts to assert a basis - any basis - to permit him to change his mind and overturn the sheriff's acceptance of his winning bids and payments on those bids.

F. "Substantial Irregularities in the Proceedings Concerning the Sale" Under RCW 6.21.110(3) Means The Sheriff's Undertakings and Conduct of the Sale, And Not Investor's Failure to Apprehend that the Sales Were Subject to A Senior Deed of Trust.

Investor argues for an impermissibly expansive reading of RCW 6.21.110(3)'s provisions at issue here:

> If objections to confirmation are filed, the court shall nevertheless allow the order confirming the sale, unless on the hearing of the motion, it shall satisfactorily appear that there were *substantial irregularities in the proceedings concerning the sale*, to the probable loss or injury of the party objecting.

RCW 6.21.110(3) (emphasis added). Investor argues that the emphasized language includes not only the sheriff's undertakings and conduct of the sale, but also can be interpreted expansively to include an alleged "irregularity in the conduct of the judgment creditor." Reply Brief Pashniak dated Mar. 8, 2013 at 27. (In essence, arguing that the Mallarino lender stipulation and the Judgments and Decrees of Foreclosure are somehow "substantial irregularities in the *proceedings concerning the sale*" within the meaning of RCW 6.21.110(3)). As addressed *supra*, Investor never examined the court files or the county land title records to detect the recorded deed of trust, the recorded Declaration of Condominium unconditional subordination provision, or examined RCW 64.32.200(2)'s statutory mandate subordinating the Association's lien to

the deed of trust, and cannot assert any prejudice by anything in the court files - including the Mallarino lender stipulation and the provisions of the Judgments and Decrees of Foreclosure - because he never even examined the files before placing his bids.

Investor has provided no authority holding that anything unrelated to the *sheriff's* doings and undertakings in noticing and conducting the sale is encompassed within the RCW 6.21.110(3) statutory definition of "substantial irregularities I the proceedings concerning the sale." Investor as objecting party has the burden to establish any substantial irregularities, and that the irregularities resulted in, or will result in, a probably loss or injury to him. *Braman v. Kuper,* 51 Wn.2d 676, 681 (1958). However, as discussed below, reported cases examining an RCW 6.21.110(3) challenge to the "proceedings concerning the sale" limit the inquiry under that statute to contests over the *sheriff's* conduct of the sale, not of any other asserted matter. Investor's expansive reading of the statute is novel and unsupported.

The plain language of RCW 6.21.110(3) does not support Investor's overly expansive reading: The Judgments and Decrees of Foreclosure are not "proceedings concerning the sale" under RCW 6.21.110(3); those documents *do nothing to affect the noticing of or conduct of the sheriff's sale.* The Mallarino case lender stipulation is not a "proceeding concerning the sale;" that document only confirms to Bank of

America that which is already required by (a) the Judgment (lender not named Defendant and no decree of foreclosure awarded against Bank of America or its respective deed of trust), (b) the recorded Declaration of Condominium unconditional subordination provision, and (c) RCW 64.32.200(2)'s statutory subordination mandate - that foreclosure of the Association's lien shall have no effect on that deed of trust.

A finding that there are no "substantial irregularities in the proceedings concerning the sale" means that the "sale has been regularly and legally made," *Betz v. Tower Sav. Bank,* 185 Wash. 314, 325 (1936). An examination of the "proceedings concerning the sale" includes the "manner in which payment was made" to the sheriff, and "the manner in which the property shall be sold to bring the highest selling price obtainable." *Betz,* 51 Wn.2d at 683-4.

The Sheriff's Return on Sale evidences the "proceedings concerning the sale," and is generally entitled to a *presumption* in any confirmation proceeding:

> It is always presumed that an officer performs his duty and complies with the law, and unless his return *of his doings* negatives that idea, they will be presumed *regular*; that is to say an incomplete return is not of itself fatal to the validity of the officer's acts; it must appear affirmatively, either by the return itself or extraneous evidence, that there was a failure to comply with the law.

Whitworth v. McKee, 32 Wash. 83, 97 (1903) (emphasis added). The seminal Washington case on "irregularities" arose during the actual

conduct of a sheriff's sale at the date, time and location so set. *W. W. Williams as Trustee v. Continental Securities Corp.*, 22 Wn.2d 1 (1944). That case involved issues regarding competing bidders and the sheriff's actions in responding to actions of those bidders and the nature of the bids themselves. Among several objections, one was that the sheriff, although making the public proclamation required by the predecessor statute to RCW 6.21.090(1) at the initial calling of the sale at 10:00 a.m., failed to go through the complete recitals again when the proceeding was resumed at 10:58 that morning. *W.W. Williams,* 22 Wn.2d at 9. The Court found that this was not a substantial irregularity: "Although the duties of the officer selling the property are ministerial in their nature, calling for an observance on his part of all statutory requirements relating to such sales, nevertheless, within these limits, he is invested with a reasonable latitude of discretion as to the time and manner of performing such duties. *W.W. Williams,* 22 Wn.2d at 11, *citing* 21 Am. Jur. 100, 105, Executions §§ 196, 205. Indeed, the *W.W. Williams* Court went on to approve the sheriff's actions in refusing bids from unqualified bidders: "Futhermore, the sheriff has the right to judge of the solvency of bidders, and may refuse to accept the bid of an insolvent or irresponsible person." *W.W. Williams,* 22 Wn.2d at 12. "Execution sales are not scrutinized by the courts with a view to defeat them. On the contrary, every reasonable intendment will be made in their

favor so as to secure, if such can be done consistently with legal rules, the object they were intended to accomplish." *W.W. Williams v. Continental Securities Corp.,* 22 Wn.2d 1, 17-18 (1944); *Braman v. Kuper,* 51 Wn.2d 676, 683 (1958).

In *Braman v. Kuper,* 51 Wn.2d 676 (1958), the judgment debtor objected to the sale confirmation on the basis that the sheriff sold multiple parcels as one sale rather than by serial sales. *Braman,* 51 Wn.2d at 683-4. The *Braman* court determined that the *sheriff's undertakings* did not rise to "substantial irregularities." The *Braman* court had squarely before it the issue of whether *the sheriff's actions* were "substantial irregularities" under predecessor to RCW 6.21.110(3), and not the question at issue in this case, to wit, interpretation of whether RCW 6.21.110(3) "substantial irregularities" includes an investor who fails to conduct any due diligence to confirm that the sale is subject to a senior deed of trust.

G. No Right to Withdrawal of Winning Bid Simply Because Investor Later Discovered That Investor's Particular Investment Expectations Regarding the Properties Would Not Be Met.

Investor characterizes the two real properties he purchased as "worthless condominiums." Reply Brief Pashniak dated Mar. 8, 2013 at 13. There is no evidence in the record before the appellate court supporting such a broad contention. The fair market value of the two

properties may indeed exceed the balances due each respective third party mortgage lender and the respective statutory assessment debt due the Association as reflected by the Association's respective opening full-debt bid, such that there may be equity in each unit. And even if there is no equity in either or both units, each unit is certainly an improved real property asset (residential condominium unit) in a long-established (since the late 1970s), very large condominium community in a very desirable neighborhood (Redmond). (CP-B 81, 86-8, CP-A 39, 44-9). Investor as winning bidder could have elected to take possession of and rent out both units, and obtain significant revenue streams from each unit. But Investor has decided for whatever unknown reason that *his particular investment expectations* are not being met, and now wants this Court to give him a do-over and withdraw his bids accepted by the sheriff and paid for, *something that no appellate court in any reported Washington case has ever permitted in any judicial or nonjudicial foreclosure proceeding.*

This Investor's particular original investment expectations, leading him to bid on these two units, is not a concern for the Association or this Court; if investment expectations were a sufficient legal reason to overturn a valid sheriff's sale, then investors can bid on judicial foreclosures and engage in "exploratory bidding," withdrawing their bids at their whim if after the sale they inspect the property and find it in poorer condition than originally estimated, or, as here, after the sale finally undertaking a due

diligence examination of the County Recorder title records for each unit and any senior liens or deeds of trust. If the Court of Appeals now rules for the first time in Washington that third party bidders have a right to later withdraw a bid accepted by the sheriff and paid for, such right directly contradicts a judgment creditor's statutory right under RCW 6.21.110(2),(3) ("entitled") to confirmation of the sale absent irregularities in the sheriff's conduct of the sale, and will undermine the stability of the foreclosure process, as further discussed in the Association's opening Brief. Brief Sixty-01 dated Dec. 19, 2012 at 38-42. It must be emphasized that the appellate decision in this case will not be just another "condo case," but will have far-reaching effect on future foreclosures by banks, credit unions and other financial institutions as well.

H. No Obligation of Party Moving for Confirmation to Make an Objection For a Third Party.

In a remarkable twist of logic, Investor asserts that the Association had some kind of legal obligation in the Parsons case to make the Investor's objection to confirmation. Reply Brief Pashniak dated Mar. 8, 2013 at 31. Such assertion is unsupported by any authority. Investor as a *pro se* litigant will be held to the standard of any attorney. *Westburg v. All-Purpose Structures, Inc.,* 86 Wn. App. 405, 411 (1997). Investor timely filed his objection in the Parsons case, which stated no basis or

authority for the objection, or any allegation of any irregularity in the conduct of the sale, but only stated that Investor was confused as to whether the sale would extinguish any "prior indebtedness." (CP-A 112-3). The Association noted in its motion for sale confirmation that the Investor had filed an objection. (CP-A 121, 145-7). Investor then saw fit to utterly ignore the motion, and the sale was duly and properly confirmed.

I. Failure to Initiate *Separate* Appeal of Decision on a CR 60 Motion In Parsons Case Is Fatal to Any Review of Such Decision.

In the Parsons case, Investor failed to seek a *separate* review of an order denying his CR 60 motion to vacate the confirmation order, which "must" be done according to RAP 5.1(f). Investor argues that bringing these mandatory RAP requirements to the Court's attention is a "gotcha argument." Reply Brief Pashniak dated Mar. 8, 2013 at 32-3. Rather, the wisdom of RAP 5.1(f) is not subject to debate; it is an appellate jurisdictional requirement. RAP 5.1(a).

Faced with this failure to meet this jurisdictional requirement, Investor argues RAP 5.3(f) should be a basis to disregard the omission. Reply Brief Pashniak dated Mar. 8, 2013 at 33. However, there is no defect in the "form of notice" under RAP 5.3(f), *i.e.,* a failure to fully identify the decision for which review is sought. Here, the defect was the failure to initiate any *separate appeal* ("separate review") of the order

denying his CR 60 motion, mandated by RAP 5.1(f). As there is no timely, valid appeal of the Parsons court order denying Investor's motion to vacate the confirmation order, the Court of Appeals should decline to review that decision.

II. CONCLUSION

The Association's appeal seeks reversal of the *Mallarino* trial court's Order Vacating Sheriff's Sale, which denied confirmation of a properly conducted sheriff's sale. The Association's appeal seeks the issuance of a mandate directing the trial court to confirm the Mallarino sheriff's sale.

The *Parsons* trial court order confirming sheriff's sale should be upheld.

The Court of Appeals should dismiss Investor's defective appeal of the *Parsons* trial court order denying Investor's motion to vacate the sheriff's sale confirmation order.

In the alternative, the *Parsons* trial court order denying Investor's motion to vacate the sheriff's sale confirmation order should be upheld.

The Association also seeks an award of its attorney fees incurred in this consolidated appeal.

Dated this 5 day of April, 2013.

LAW OFFICES OF JAMES L. STRICHARTZ

Michael A. Padilla, WSBA No. 26284
Attorneys for Respondent/Cross-Appellant Sixty-01 Association of Apartment Owners, a Washington non-profit corporation

CERTIFICATE OF SERVICE

RICHARD E. PHILLIPS declares and states as follows:

1. I am a paralegal at the law firm Law Offices of James L. Strichartz, am over the age of 18, and am otherwise competent to testify.

2. On the 8th day of April, 2013, I deposited with ABC Legal Messengers a true and correct copy of the foregoing Reply Brief of Respondent/Cross- Appellant Sixty-01 to be delivered to counsel for the Respondent on April 8, 2013 at the following address:

Robert Jason Henry
Lasher, Holzapfel, Sperry & Ebberson, PLLC.
601 Union Street, Suite 2600
Seattle, WA 98101-4000

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct:

Dated this 8th day of April, 2013 at Seattle, Washington

Richard E. Phillips, Paralegal