CASE NO. 32315-3-III

Court of Appeals
of the State of Washington
Division III

MICHAEL URIBE and HELEN URIBE husband and wife,

Appellants,
v.

LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, RANDALL RUPP AND LUZ DARYL-RUPP, husband and wife and the marital community comprised thereof; and 7HA FAMILY, LLC, a Washington limited liability company;

Respondents.

Appellants' Opening Brief

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I. ASSIGNMENT OF ERROR

The trial court erred in awarding summary judgment to all of the defendants on all issues and dismissing all of Uribe's claims with prejudice.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. ISSUES REGARDING THE CONDUCT OF THE NON-JUDICIAL FORECLOSURE UNDER THE DTA.

1. ***Waiver*** - Did the trial court err in ruling that the failure of Uribe to file an action to restrain the trustee's resulted in the waiver of any objections to the trustee's sales because waiver is an equitable doctrine and the trial court found that the equities weighed in favor of finding waiver *even though* the Deed of Trust Act ("DTA") should be strictly construed in the borrower's favor?

2. ***Procedural Irregularity***. Did the trial court err in ruling that recording the Resignation and Appointment of Successor Trustee ("RAST") under a fraudulent notarization recorded *after* the Notice of Trustee's Sale was recorded was *not* a procedural irregularity under the DTA, but a mere technicality, and that the failure to strictly follow the DTA's mandatory procedures *did not* result in an unlawful trustee's sale.

3. ***Strict Compliance with the DTA is Required***. Did the trial court err in ruling that if effect were given to the plain and unequivocal terms of the Trustee's Deed for the Franklin County Property, Plaintiffs' would receive an unjustified and unreasonable windfall, notwithstanding settled law that the DTA must be strictly construed in favor of the Borrower?

4. ***Prejudice.*** Did the trial court erroneously require a showing of prejudice where no showing of prejudice is required?

B. ISSUES PERTAINING TO FORMATION OF AN ENFORCEABLE CONTRACT AT THE TRUSTEE'S SALE. Did the trial court erroneously overlook the fact that Libey formed an enforceable contract when he concluded the trustee's sale?

C. ISSUE PERTAINING TO THE PER SE VIOLATION OF CONSUMER PROTECTION ACT. Did the trial court err in ruling that the non-judicial foreclosures, as conducted in this case by the successor trustee, Libey, were not "per se" violations of the Consumer Protection Act?

D. ISSUE CONCERNING RUPP'S AND 7HA'S BFP STATUS. Did the trial court err in ruling that Rupp and 7HA were "bona fide purchasers for value" when a search of the real property records would have revealed the "procedural irregularities" that rendered Libey's trustee's sale unlawful?

III. STATEMENT OF CASE

Plaintiffs, Michael and Helen Uribe, husband and wife, appellants on this appeal (hereinafter "Uribe") are the owners of an excavation company doing business as Uribe, Inc. Uribe has been doing business in Benton County and other counties in the State of Washington and other states for over forty-five (45) years. Michael Uribe is 72 years old and Helen Uribe is 68 years old. See: CP 0603, para. 2.

In addition to operating an excavation company, Uribe was developing a certain parcel of real property located in Benton County into

47, 2.5 acre residential/commercial lots, valued at approximately $3.76 million *before* the real estate crash (the "Benton County Property"). The Benton County Property was part of a 1,000 acre parcel that Uribe owned and the entire 1,000 acre parcel, including the residential/commercial lots, was worth substantially more than $3.76 million at the time. Id., para.3.

The Uribes invested a substantial amount of their time and money into the development of the Benton County Property. The engineering drawings for the preliminary plat were completed ($10,000) and submitted to the county for review and approval, the preliminary plat was approved by Benton County, the engineering for the roads was completed and the roads were constructed ($264,000), 100 perk holes were dug ($10,000), a power line was run under the freeway to the Benton County Property ($100,000) and a barn was built and a well for the barn was drilled ($50,000). All of these improvements cost, at least, $442,000. Id., para. 5.

In 2007 Uribe obtained a line of credit from the Bank of Whitman (BW) for up to $571,000 to finance a pipeline construction project in Idaho.[1] Uribe's line of credit had a maximum limit of $571,000 ("Benton

[1] BW is or was under control of the FDIC at the time of the occurrences set forth herein.

County Line of Credit") and was secured with a 1st lien deed of trust on the "Benton County Property" (see: CP 0475-0488) and by Uribe's heavy equipment on the terms and conditions set forth in the "Commercial Security Agreements for Loan No. 560005006." See: CP 0525-0540 and CP 0603, para. 4. The Benton County Line of Credit was also secured with the "Franklin County Property" with a mortgage in 2nd lien position. The Uribes signed no personal or corporate guaranty separate and distinct from the promissory note itself.

The Uribes also had a loan from BW in the amount of $1,655,185 that was secured with 1st lien deed of trust on the Franklin County Property, hereinafter referred to as the "Franklin County Loan." See: CP 0457, Para. 2. The Franklin County Loan was also secured with the "Benton County Property" by a *mortgage* in 2nd lien position. Uribe signed no personal or corporate guaranty separate and distinct from the promissory note itself.

In 2010, both the "Benton County Line of Credit" (up to $571,000 at the time) and the "Franklin County Loan" ($1,655,185) were alleged to be in default according to BW. According to the Notices of Trustee's Sales, the amount due on the Benton County Line of Credit was

approximately $420,000 and the amount due on the Franklin County Loan was approximately $2,432,990. See: CP 0495-0499 and CP 0500-0507.

BW hired attorney Gary Libey (Libey) as the "Successor Trustee" to foreclose the two (2) separate deeds of trusts securing two (2) separate promissory notes on each of the two (2) separate properties, the Benton County and the Franklin County properties. BW also hired Libey to file a replevin action in superior court to repossess and ultimately sell the Uribes' construction equipment "Personal Property."

BW and Libey planned the non-judicial foreclosures of the Benton County and the Franklin County properties. However, BW and Libey were very aware of a serious problem relating to the proposed double foreclosures:

> My main concern is that we have 2 loans on 2 parcels which we are foreclosing on in 2 separate proceedings as allowed by the law. I understand one parcel *(Benton County Property)* is worth a lot more than the debt and the other is worth a lot less than its debt *(Franklin County Property)*. Atty Crane Bergdall, who is the attorney for the CRP tenant, who will lose his CRP share after the foreclosure, called me and said they may bid at the sale *(Benton County Property)* since the land is worth a lot more than the debt against it. On the other hand the land in Franklin County is worth a lot less, so if a sale happens and someone bids more than the BW debt, the BW is faced with losing any equity in the piece *(Benton County Property)*.

CP 0489-0493.

After failing to obtain a deed in lieu, BW and Libey discussed how to resolve their problem and came up with the following solution:

> The BW in my opinion correctly decided to foreclose non-judicially which means that the trustee conducts the sale, there is no deficiency and no right of redemption.
>
> ..... [I suspect the BW will bid up to the fmv of the Franklin County property of $600k, although the debt is close to $2.4m, and then roll the excess debt into the second sale whereby the BW would bid up to or close to the $1.4m fmv of the Benton County land to maximize the value of both pieces of land due to the cross-collateralization as explained below]. I have been contacted by an attorney [Crane Bergdall] who says he has a client interested [the tenant/crp tenant] who will likely bid on the Benton county land because the land may have $1m in equity. The Benton County Deed of Trust contains a cross-collateralization clause which states in part that in addition to Note referenced; the Deed of Trust also secures all other indebtedness from Uribe to the BW, which is great of course. However, *Uribe may take issue with me as the trustee taking the excess money from the bidder and applying it to the other loan. If I get sued as trustee by these borrowers or any third party who may be involved, then I need full and complete indemnification from the BW [and so does Tim Esser].* I may have to resign as trustee because of liability concerns if indemnification is not granted.

CP 0491-0493.

As stated above, Libey requested an "Indemnity Agreement" from BW in case Libey, as the Successor Trustee, takes "...excess money from the bidder and applies it to the other loan" and then gets sued by Uribe. Id.

The "Indemnity Agreement" BW signed protects Libey from liability for: "...any acts, errors, or omissions as trustee or successor trustee to any deed of trust foreclosure action." Id.

Despite knowing the risks and the status of the law generally prohibiting a deficiency in a non-judicial foreclosure, except under the very specific conditions set forth in RCW 61.24.100, none of which were present here, BW and Libey nonetheless decided to "cross-collateralize" the "deficiency" from the trustee's sale for the "Franklin County Property" (the under-secured property) onto the "Benton County Property" (the over-secured property). By formulating the foreclosure strategy in this way BW and Libey hoped to deter a cash bidder for the "Benton County Property" (e.g. "the tenant/CRP tenant") from bidding up to the fair market value of the "Benton County Property."

Therefore, by "cross-collateralizing" the "deficiency" from the Franklin County Loan onto the Benton County Line of Credit, the appellees would "chill" any attempt to outbid BW for the alleged amount claimed due and owing (approx. $420,000) in the Notice of Trustee's Sale for the Benton County Property, which was worth $1.5 million. CP 0574-0578. Libey *never* notified Uribe that the "cross-collateralization" provision would be invoked in the non-judicial foreclosure even though he

knew it was questionable if this procedure was legal under RCW 61.24.100.[2] CP 0494-0507.

After the Notices of Trustee's Sale for both properties were purportedly "given" by Libey, more discussions ensued by and among BW and Libey to obtain both properties at the trustee's sales. Libey and the other former defendants discussed how much to bid on each property in an e-mail dated early in December 2010. CP 0508-0511. The aforementioned e-mail includes the title company's analysis about how to foreclose two deeds of trust on two parcels of property securing *one* promissory note and obtaining title insurance thereafter within the parameters of *Donovick v. Seafirst*, 111 Wash.2d 413, 757 P.2d 1378 (1988). CP 0510-0511.

Even though *Donovick* does not apply to foreclosing two deeds of trust securing the repayment of *two* promissory notes, as is the situation

[2] The issue of whether a deficiency judgment is proper under the DTA has recently been the subject of several lower court cases and there is a split of authority in that regard. The facts in those cases are also distinguishable from this case; but the point is the DTA provides for a deficiency against a Borrower, as that term is defined in the DTA, in the cases arising under RCW 61.24.100 (3)(a)(i)(A)-waste to the property and (B) wrongful retention of rents. Otherwise, a deficiency judgment can only be obtained against a Guarantor, who cannot be a Borrower. In this case, there is no Guarantor only the Borrowers, the Uribes. Consequently, it would be impossible under the DTA to obtain a "deficiency judgment" against the Uribes.

here[3], BW, Libey and the title company apparently decided to proceed to the trustee's sale as had been done in *Donovick* by foreclosing one property quickly after the other in order to (in theory) preserve the "deficiency" from Franklin County Property to "cross-collateralize" onto the Benton County Property. As stated above, Libey decided to do this because at the time of the trustee's sales, the Benton County Property was worth $1.5 million and had a debt of only $420,000, according to the Notice of Trustee's Sale and the Franklin County Property was worth around $400,000 and had a debt of $2.4 million, according to the Notices of Trustee's Sale even though *both Notices of Trustee's Sale explicitly stated that the amount due on each obligation was limited to the amount due on the promissory note secured thereby.* CP 0494-0507

The Trustee's Sale for the "Franklin County Property" (the under-secured property) was set for 10:00 a.m. and the trustee's sale for the "Benton County Property" (the over-secured property) was set for 11:00 a.m. As stated above, there was no notice in either of the Notices of Trustee's Sale that indicated the Successor Trustee was going to "take" the

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[3] After *Donovick* was decided in 1988, the legislature amended RCW 61.24.100 to permit the foreclosure of as many parcels as were encumbered by deeds of trusts that secured ***one*** promissory note. See RCW 61.24.100(3)(b). This amendment covers that situation, but not the situation presented here where there are ***two*** (2) promissory notes secured by ***two*** (2) parcels of real properties—separate loans and different collateral.

deficiency from the Franklin County Property and "give" it to the Benton County Property.

Moreover, by treating each of these loans separately and distinctly, both Notices of Trustee's Sale made it crystal clear that any "deficiency" from one obligation or the other would ***not*** be "cross-collateralized" with the other obligation. Libey never notified Uribe that this course of conduct was changing or had been changed and the trustees' sales were held.

First, Libey sold the "Franklin County Property" on December 17, 2010 at 10:00 a.m. The Trustee's Deed for the "Franklin County Property" states:

> ...the trustee then and there sold at the public auction to said Grantee the highest bidder therefor, the property hereinabove described for the sum **of Three Hundred Ninety Thousand Dollars ($390,000)** ***cash by satisfaction in full of the obligation then secured by said deed of trust,*** together with all fees, costs and expenses as provided by statute.

CP 0494-0500 (emphasis added).

Next, Libey sold the "Benton County Property" on the same day at 11:00 a.m. The Trustee's Deed for the "Benton County Property" states:

> ...the trustee then and there sold at the public auction to said Grantee the highest bidder therefor, the property hereinabove described for the sum of **One Million Two**

> **Hundred Thousand Dollars ($1,200,000)** ***cash by satisfaction in full of the obligation then secured by said deed of trust,*** together with all fees, costs and expenses as provided by statute.

CP 0512-0517 (emphasis added).

With the Franklin County Loan having been satisfied in full as stated in the Trustee's deed (and per the DTA), Libey had no "deficiency" to cross-collateralize onto the "Benton County Property." Any further proceedings to foreclose the Franklin County Loan were illegal—the Franklin County Loan had been satisfied in full.

Nevertheless, BW and Libey "took" the non-existent "deficiency" from the Franklin County Loan and "gave" it to the Benton County Property to open the bid at $1.2 million for the Benton County Property, though the actual obligation outstanding against that property was only $420,000, less the proceeds from the sale of the Uribes' Personal Property.

Libey and BW knew that "giving" the non-existent "deficiency" from the Franklin County Property to the Benton County Property all but eliminated the potential for being outbid by a bidder at the trustee's sale. This bid, based on a non-existent deficiency, or, if the trustee's sale had been conducted as planned, an illegal deficiency under RCW 61.24.100,

resulted in BW acquiring Uribe's most valuable property—the "Benton County Property" for pennies on the dollar.

Before BW commenced the trustee's sales, BW and Libey, as BW's attorney, sued Uribe for the replevin of Uribe's Personal Property. CP 0518-0521. During the pendency of the trustees' sales, BW took physical possession of Uribe's Personal Property and sold most of Uribe's Personal Property at a public auction. On the day of the trustee's sales, December 17, 2010, BW had realized at least $281,245 from the sale of Uribe's Personal Property and should have credited that amount to the amount due on the Benton County Line of Credit (e.g. the "bulk" of the proceeds "going to Loan No. 20005006 ($271,245)). CP 0522-0524, CP 0525-0540, CP 0582-0600, the auctioneer testimony indicating that the proceeds from the sale of Uribe's personal property were available at the time of the trustee's sale on December 17, 2010. CP 0582-CP0586.

Again, BW and Libey were fully aware of the public auction of Uribe's Personal Property. Libey-was the attorney who filed the action. He withdrew as BW's lawyer in that action in October 2010 during the pendency of the trustees' sales that he was conducting as the "trustee." CP 0541-0544.

By the time the proceeds from the sale of Uribe's Personal Property were delivered to BW, both the Benton County Line of Credit and the Franklin County Loan had been satisfied in full at the trustee's sales. *Nonetheless, on December 31, 2010 the net proceeds from the sale of Uribes' Personal Property were paid to BW instead of Uribe.* CP 0523-0524. Thus, not only did BW obtain both the Benton County and the Franklin County properties, it also obtained the net proceeds from the sale of Uribe's Personal Property in the amount of, at least, $281,487.14--the "Grand Slam" for BW and Libey.

If Libey had *not* illegally "taken" the non-existent "deficiency" from the "Franklin County Property" (some $800,000) and "given" it to the "Benton County Property" and *had* credited the Benton County Loan (balance due of approximately $420,000 as set forth in Notice of Trustee's Sale (CP 0500-0507)) with the $271,241 in cash from the sale of Uribe's Personal Property, as should have been done, Uribe would have only had to pay approximately $149,000 to save the Benton County Property, worth $1.5 million, from foreclosure. CP 0547-0578.

The Benton County Property sold four (4) months later for $1,281,200 to Randall Rupp and Luz Dary-Rupp, husband and wife and 7HA Family, LLC). CP 0545-0549

It must be noted that the Benton County Property had an adjudicated fair market value of $1.5 million at the time, as stated in the Bankruptcy Court Order Granting Bank of Whitman's Motion for Relief from Stay as to Real and Personal Property. Now, Rupp and 7HA, the purchasers of Uribe's former 946.04 acres, have that same property under contract to sell for **$3,879,950**. CP 0573--0578. Furthermore, and after that sale, Rupp and 7HA will retain 170.05 acres. CP 0411-0414.

IV. STANDARD ON REVIEW

Plaintiff disputes the trial court's conclusions as set forth in the Judgment. Conclusions of law are reviewed *de novo*, a standard which permits the appellate court to substitute its judgment for that of the trial court. *See: e.g., Skamania County v. Columbia River Gorge Commission*, 144 Wash.2d 30, 42, 26 P.3d 241 (2001). In this case, the trial court's rulings, as incorporated in the judgment, are outside the range of acceptable choices given the applicable legal standard, based on an incorrect standard, and on facts that do not meet the requirements of the correct standard.

When the facts are undisputed, as here, application of the facts to the law is reviewed *de novo*. *Crystal, China and Gold, Ltd. v. Factoria Center Investments*, 93 Wn. App. 606, 610, 969 P.2d 1093 (1999); *and*

see: *Seattle v. Sheperd,* 93 Wash.2d 861, 867, 613 P.2d 1158 (1980); *State v. Niedergang*, 43 Wash.App. 656, 658-59, 719 P.2d 576 (1986).

V. ARGUMENT

A. ISSUES REGARDING THE CONDUCT OF THE NON-JUDICIAL FORECLOSURE UNDER THE DTA:

1. ***Waiver.*** The trial court ruled that Uribe waived any and all post-sale challenges to the trustee's sale when he failed to restrain the trustee's sale under RCW 61.24 et seq. This ruling ignores the fact that a trustee's sale can be restrained in two (2) ways under RCW 61.24.130: (i) by an injunction; or (ii) a bankruptcy filing and Uribe filed a bankruptcy petition to do just that:

> The statute RCW 61.24.127 states that a failure to bring suit to enjoin the sale for any reason whatsoever, essentially, may result in waiver. And in regard to this court's analysis of the motion for summary judgment filed by Rupp and 7HA, *primary irregularity* that the court believes needs to be considered is that the *change of trustee was not recorded until a few hours after the notice of sale was recorded.* And I have considered the *Bavand* – if I am pronouncing that correctly – case, and I think this case is factually significantly different from that case. Unlike in the *Bavand* case where the trustee was never actually appointed, and even after filing a notice and before the sale, there was never an actual appointment, I believe plaintiff actually did file a suit at that point. I think one of the key issues is that the plaintiffs were never given notice of the sale.

> Here the notice was provided to the plaintiffs with, what the court believes, was more than adequate notice for the plaintiffs to contest the sale to file a motion to enjoin the sale. *So the court finds that the failure to record the change in trustee until a few hours after notice of the sale was recorded was not a material breach of the duties of the statute, as it had no adverse impact on either the debtor or the creditor or members of the public.*

Transcript of the Verbatim Report of Proceedings, pg. 5 (emphasis added).

The trial court first cites authority applying to foreclosures of owner-occupied residential real property in support of its ruling. RCW 61.24.127—*Failure to bring civil action to enjoin foreclosure—Not a waiver of claims*; is inapplicable to a commercial loan - and Uribe's loan was a commercial loan. RCW 61.24.127(4) states: "This section does not apply to the foreclosure of a deed of trust used to secure a commercial loan." If this statute were applicable, it clearly states that the failure to bring an action to enjoin a trustee's sale is *not* a waiver of damages for the failure of the trustee to materially comply with the provisions of this chapter. RCW 61.24.127(1)(c).

Next, the trial court continued with the reasoning that the failure to enjoin the sale for *any* reason whatsoever may result in waiver. This analysis distorts the law of "waiver" as it has evolved over the years through a line of cases starting with *Plein v. Lackey*, 149 Wn.2d 214, 67

P.3d 1061 (2003). In *Plein,* the issue was the waiver of a claim to challenge the underlying debt itself, a claim which was known to the debtor *before* the non-judicial foreclosure was commenced. *Plein* specifically provides that waiver occurs where a party:

> a. received notice of the right to enjoin the trustee's sale;
>
> b. had actual or constructive knowledge of a defense to foreclosure prior to the sale; and
>
> c. failed to bring an action to enjoin the sale.

Plein, 149 Wn.2d at 227.

Uribe had no way of knowing that Libey and BW intended to implement their " cross collateralization" scheme and *add* the (extinguished) debt owed on the loan secured by the Franklin County property to the debt secured by the Benton County property.

The trial court also failed to consider the effect of RCW 61.24.130. This statute clearly states that a trustee's sale can also be stayed by the filing of a bankruptcy petition:

> (4) If a trustee's sale has been stayed as a result of the filing of a petition in federal bankruptcy court and an order is entered in federal bankruptcy court granting relief from the stay or closing or dismissing the case, or discharging the debtor with the effect of removing the stay, the trustee may set a new sale date .....

Uribe filed such a petition and an order granting relief from the stay was entered. This fact alone eviscerates the trial court's waiver argument—Uribe waived nothing because he filed a petition for relief under Chapter 11 of the U.S. Bankruptcy Code and submitted to an evidentiary hearing, challenging the validity and amount of Uribes' debts to the Bank of Whitman and the value of the properties being foreclosed. CP 0573-0578. Absent facts sufficient to challenge or dispute the Bank of Whitman debt, such as in *Plein*, any state court challenge to the debt or the values of the properties would have been barred by res judicata. Uribe, therefore, had no basis to challenge the debt or the values of the properties in state court as they had been judicially established by the bankruptcy court.

a. Waiver is simply not applicable to all circumstances or all types of post-sale challenges as the trial court ruled.

RCW 61.24.040(1)(f)(IX) provides that:

> "[f]ailure to bring...a lawsuit ***may*** result in waiver of any proper grounds for invalidating the trustee's sale."

The word "***may***" indicates the legislature neither requires nor intends for the courts to strictly apply waiver. It is to be applied only

where it is equitable under the circumstances and where it serves the goals of the act:

> Still, once a property is sold, the act favors property owners and other borrowers by giving preference to the third goal--*stability of land titles*. It does so by creating a **rebuttable presumption** that the sale was conducted in compliance with the procedural requirements of the DTA. Thus, in determining whether waiver applies, the *second goal* that the non-judicial foreclosure process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure—becomes particularly important.

Albice v. Premier Mort. Services of Washington, 174 Wash. 2d 560, 570-571, 276 P.3d 1277 (2012).

Albice then distinguishes *Plein* on the grounds that *Plein* involved a challenge to the underlying debt versus a case where grounds to challenge the debt were not present:

> Under the facts of this case, we conclude waiver cannot be equitably established. Dickinson seemingly argues that Tecca's presale remedies were triggered the moment they received notice of the trustee's sale. Yet this argument assumes the borrower can challenge the underlying debt. Although this was correct in *Plein*, because the borrower believed the debt had been paid, here, when Tecca received the notice they had *no grounds to challenge the underlying debt*. In fact, by entering into a Forbearance Agreement .....Tecca had no reason to seek an order restraining a sale that may not even proceed.
>
> Further, unlike in *Plein*, where the borrower had a defense almost two months prior to the sale, here, Tecca had no knowledge of their alleged breach in time to restrain

> the sale....They rightly assumed the sale would be cancelled after they tendered the last payment.
>
> .....
>
> Additionally, and equally important, to ensure trustee's strictly comply with the requirements of the act, courts must be able to review post-sale challenges where, like here, the claims are *promptly asserted.* Although Dickenson contends this defeats the 3rd goal, the goal is to promote stability of land titles. *Cox*, 103 Wn.2d at 387. *Enforcing statutory compliance encourages trustees to conduct procedurally sound sales.*

Id., pg. 572 (emphasis added).

In Uribe's case, Uribe had no basis to challenge the debt—that issue was res judicata. CP 0573-0578. Therefore, there were no challenges to the debt left for Uribe to assert. Furthermore, there was no other defense to the trustee's sale prior to the institution of the sale—the Bank of Whitman's debt was in default and the Bankruptcy Court granted relief from the stay giving Libey the authority to proceed with a ***lawful*** trustee's sale.

Finally, under *Plein*, waiver only applies to defenses to the non-judicial foreclosure when the borrower has actual or constructive notice of the defense. *Plein*, 149 Wn.2d at 227. No one told Uribe about the cross collateralization scheme or that the trustee's sale was unlawful.

b. Waiver only applies to actions to vacate sale, not to actions for damages.

In *Frizzell* v. *Murray*, 179 Wash.2d 301, 313 P.3d 1171 (2013), *Frizzell* obtained a TRO but failed to pay the bond required to actually restrain the sale - and the trial court held that was a waiver of all claims. On appeal, the trial court was reversed and the reversal was upheld by Supreme Court on the grounds that waiver only applies to actions to vacate the sale, not to action for damages.

The Supreme Court noted that *Plein* was inapplicable to *Frizzell* because *Frizzell* actually obtained a TRO conditioned on posting a bond; but never restrained the trustee's sale because the bond was never posted. *Frizzell*, pg. 1174. The Supreme Court; however, found that *Frizzell* failed to comply with the conditions necessary to enjoin the sale and she waived her right to claims to invalidate the sale; provided, however: "Waiver only applies to actions to vacate the sale and not to an action for damages." *Frizzell*, pg. 1175, citing *Schroeder v. Excelsior Mngt. Group, LLC*, 177 Wash.2d, 94,114, 297 P. 3d 677 (2013) (quoting *Klem v. Washington Mutual Bank,* 176 Wash. 2d 771, 796, 295 P.3d 1179 (2013)).

2. *Procedural Irregularity--Waiver never occurs where the trustee's sale was unlawful (e.g. a procedural irregularity):*

Under existing case law, waiver does not apply when the trustee fails to comply with the DTA. *Frizzell* at 309 (citing *Albice v. Premier Mortgage Services*, 174 Wash.2d 560, 276 P.3d 1277 (2012). This is particularly on point in this case, where the record illustrates the invalidity of the appointment of Libey as the successor trustee. This invalid appointment, in turn, made Libey's subsequent foreclosure and the trustee's sale invalid. See, *Bavand v. OneWest Bank,* 176 Wash. App. 475, 494, 309 P.3d 636 (Div. 1, 2013). *See also, Albice*, 174 Wn.2d at 570 (no authority to sell property after 120 days of continuances); *Schroeder v. Exelsior Management*, 177 Wash.2d 94, 112, 297 P.3d 677 (2013), (foreclosing agricultural land non-judicially when not permitted to do so by the DTA).

The trustee in *Schroeder* foreclosed agricultural land under the DTA and doing so is unlawful—agricultural land must be foreclosed judicially. See: RCW 61.24.030(2). *Schroeder* also reinforced the principal that waiver does not apply where the trustee's actions in a non-judicial foreclosure are unlawful. *In accord, Cox v. Helenius,* 103 Wash.2d 383, 693 P.2d 683 (1985): Even where a party fails to timely

enjoin a trustee sale under RCW 61.24.130, if a trustee's actions are unlawful, the sale is void. *Id* at 388-89.

The unlawful action at issue in *Bavand* was that OneWest was not the beneficiary at the time it appointed RTS as the successor trustee—the successor trustee was appointed a *one (1) day* before OneWest became the beneficiary and RTS gave the Notice of Trustee's sale under RCW 61.24.040 as if the appointment was procedurally correct. The *Bavand* court ruled that there was no waiver because the actions of the trustee were *unlawful*--the appointment of the successor trustee was one day late.

The facts in *Bavand* warrant a close look:

(i) OneWest signed the Appointment of Successor Trustee, appointing RTS the successor trustee on 12-15-2010.

(ii) MERS assigned the beneficial interest in the DOT to OneWest on 12-16-2010, **ONE DAY after OneWest appointed RTS as trustee.**

(iii). On 1-6-2011, RTS commenced foreclosure as the successor trustee under these conditions.

(iv). *Bavand* obtained TRO, but didn't pay the bond and trustee's sale occurred.

(v) *Bavand* received the notice of the trustee's sale, albeit the notice was not signed by the lawful trustee at the time it was given.

a. *In Uribes' case, the trial court misconstrued the facts in Bavand*:

> *Unlike in the Bavand case where the trustee was never actually appointed*, and even after filing a notice and before the sale, there was never an actual appointment, I believe plaintiff actually did file a suit at that point. I think one of the key issues is that the plaintiffs were never given notice of the sale.
>
> Here the notice was provided to the plaintiffs with, what the court believes was more than adequate notice for the plaintiffs to contest the sale to file a motion to enjoin the sale.

Transcript of the Verbatim Report of Proceedings, pg. 5 (emphasis added).

The "procedural irregularity" in *Bavand* is exactly the same as the procedural irregularity in Uribe. RCW 61.24.010(2) clearly states:

> (2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. *Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the*

> *successor trustee shall be vested with all powers of an original trustee.* (Emphasis added)

The plain and unambiguous words of this statute make it crystal clear that:

> (i) The lawful beneficiary must appoint a successor trustee *before* the successor trustee is "vested" with all the powers of the original trustee.
>
> (ii). The lawful successor trustee *must* be properly appointed to have the powers of the original trustee.
>
> (iii) Without a proper appointment, neither RTS nor Libey ever succeeded to any of the original trustee's powers under the deed of trust. Specifically, neither RTS nor Libey had the statutory authority to conduct trustee's sale. These events are *material failures to comply* with the provisions of the DTA, according to *Bavand.*

RTS, like Libey, was not the successor trustee at the time it "gave" Notice of Trustee's Sale." OneWest appointed RTS on 12-15-2010, which was the day *before* OneWest became the beneficiary. Same thing here - Libey was appointed successor trustee *after* the Notice of Trustee's Sale was recorded and the Notice of Trustee's Sale was invalid, *ab initio*, for that reason. Again, RCW 61.24.010(2) states, in part:

> ...***ONLY*** upon recording the appointment of successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of the original trustee.

(emphasis added).

Furthermore, RCW 61.24.040 requires the "trustee" to record the Notice of Trustee's Sale in the auditor's office in the county the deed of trust was recorded. Libey was *never* validly appointed the trustee under the Notice of Trustee's Sale that was recorded before Libey was appointed the successor trustee. Without a Notice of Trustee's Sale being given by the lawful trustee, there is no strict compliance with the DTA and any actions taken thereafter were unlawful.

3. Strict Compliance. ***The trial court ruling is clearly erroneous because it did not require strict compliance with the DTA***:

Libey fully *satisfied* the Franklin County obligation at the first trustee's sale; but nonetheless transferred or cross collateralized the fully satisfied debt to the Benton County Trustee's Sale to ensure that the Bank of Whitman acquired the Benton County Property and didn't lose it to a higher bidder[4].

[4] Libey's argument that the recitation in the trustee's deed that the debt was fully satisfied was inserted to confirm that the Bank of Whitman waived a deficiency judgment against the Uribes contradicts an integrated, unambiguous instrument and is nothing more than Libey's subjective intent as to the meaning of the terms. Courts do not interpret what was intended to be written but what was written. *J.W. Seavy Hop Corp. of Portland v. Pollock*, 20 Wash.2d 337, 348-49, 147 P.2d 310 (1944), cited with approval in *Berg v. Hudesman*, 115 Wash.2d 657,669, 801 P.2d 222 (1990).

The theory the trial court used to justify the two foreclosures of two separate obligations secured by different properties was that the DTA allows this under the theory a creditor is entitled to recover all its collateral irrespective of how many obligations are involved. The DTA, however, allows a deficiency judgment against a commercial *borrower* (not a guarantor) only in the cases where the *borrower* converts rents or wastes the property (see: RCW 61.24.100 (3)(a)(i)) or where multiple security instruments secure a single obligation (see: RCW 61.24.100(3)(b)). In this latter case and only in this case can multiple security instruments be foreclosed to recover all the collateral the creditor has to secure its obligation (see: RCW 61.24.100 (3)(b)).

The DTA, which must be strictly construed in the borrowers favor, allows a deficiency judgment against a borrower ***only*** in the situations set forth RCW 61.24.100 (3)(a)(i) and RCW 61.24.100 (3)(b). ***Neither*** of these situations are present in the Uribe case.[5] Libey had no statutory

[5] The benefit of the DTA was that it removed judicial oversight and sped up the vesting process for the sale of secured property. The non-judicial option comes with one major drawback for lenders, such as the Bank of Whitman. Normally, under a judicial foreclosure, a creditor may sue for any deficiency when the sale of property secured under a deed of trust falls short of the debt. But, as a general rule, those utilizing the DTA may not sue a borrower for a deficiency. This trade-off is the "quid pro quo" between borrowers and lenders. *Thompson v. Smith*, 58 Wash. App. 361, 365, 793 P.2d 449 (Div. 1, 1990)

authority to take a fully satisfied obligation, the Franklin County obligation, a separate and distinct obligation from the Benton County obligation, and bid in the fully satisfied debt on another property pledged as collateral for another loan, the Benton County Line of Credit. Doing so clearly was in violation of Libey's duty of good faith to Uribe under RCW 61.24.010(4) and the DTA itself, which contains no explicit provisions permitting such action and must be strictly construed:

> ..... [I suspect the BW will bid up to the fmv of the Franklin County property of $600k, although the debt is close to $2.4m, and then roll the excess debt into the second sale whereby the BW would bid up to or close to the $1.4m fmv of the Benton County land to maximize the value of both pieces of land due to the cross-collateralization as explained below]. I have been contacted by an attorney [Crane Berdgall] who says he has a client interested [the tenant/crp tenant] who will likely bid on the Benton county land because the land may have $1m in equity. The Benton County Deed of Trust contains a cross-collateralization clause which states in part that in addition to Note referenced; the Deed of Trust also secures all other indebtedness from Uribe to the BW, which is great of course. However, *Uribe may take issue with me as the trustee taking the excess money from the bidder and applying it to the other loan. If I get sued as trustee by these borrowers or any third party who may be involved, then I need full and complete indemnification from the BW [and so does Tim Esser].* I may have to resign as trustee because of liability concerns if indemnification is not granted.

CP 0491-0493 (emphasis added).

The Trial Court decided:

> .....So the court finds that *the failure to record the change in trustee until a few hours after notice of the sale was recorded was not a material breach of the duties of the statute, as it had no adverse impact on either the debtor or the creditor or members of the public.*

Transcript of the Verbatim Report of Proceedings, pg. 5, lns 25, pg. 6, lns.1-4.

This position is entirely inconsistent with *Bavand, at 494*:

> .....This is particularly true in this case, where the record illustrates the invalidity of the appointment of RTS as the successor trustee. This invalid appointment, in turn, made RTS' subsequent foreclosure and trustee's sale invalid.

The trial court stated that the trustee in *Bavand* was never properly appointed and this distinguished Uribe from *Bavand.* Libey, however, was never properly appointed either. Libey was purportedly appointed AFTER the Notice of Trustee's Sale was recorded and RTS was purportedly appointed successor trustee BEFORE OneWest became the beneficiary empowered to appoint the successor trustee. There is no provision in the DTA that provides for the "nunc pro tunc" appointment of a successor trustee to validate what was done before the appointment in the case of *Uribe* or before OneWest became the beneficiary in the case of *Bavand.*

And again in *Bavand*, at 497:

> The legislature could not have intended that the first of these three goals—an "efficient and inexpensive process—could be accomplished at the expense of the other two. For example, OneWest, and RTS disregarded the plain words of the former RCW 61.24.010(2)(2009) governing the appointment of successor trustees. *Without a valid appointment of a successor trustee in this case, the foreclosure and sale that followed were wrongful because they were without statutory authority.* Thus, the conclusions are consistent with a proper balancing of the objectives of this legislation, particularly the first two.

Furthermore, the trial court distinguished *Bavand* when *Bavand was entirely on point because the failure to properly timely appoint the successor trustee is a material breach of the DTA* . See: RCW 61.24.010(2).

The DTA *does not* provide for an appointment "nunc pro tunc" where the appointment by the beneficiary preceded the assignment of the deed of trust to the beneficiary ("*Bavand*") or where the recording of the Notice of Trustee's Sale preceded the appointment of the successor trustee ("*Uribe*"). Again, the trial court was in error for not strictly construing the DTA in favor of Uribe.

4. Prejudice. *The trial court also required a showing of prejudice where no showing of prejudice is required.*

Another "*procedural irregularity*" analyzed in *Albice* (trustee's sale after 120 days of continuances was in violation of DTA) was strict

compliance with the DTA when the trustee was divested of the authority to sell the property by operation of the DTA—*without consideration of how the grantor was specifically prejudiced by the violation.* The Supreme Court analyzed RCW 61.24.040(6) which provides that a trustee may continue a sale "for any cause the trustee deems advantageous ... for a period or periods not exceeding a total of one hundred twenty days " The *Albice* court then held:

> A *plain reading* of this provision permits a trustee to continue a sale once or more than once but unambiguously limits the trustee from continuing the sale past 120 days.
>
> When a party's authority to act is prescribed by a statute and the statute includes time limits, as under RCW 61.24.040(6) failure to act within that time violates the statute and divests the party of statutory authority. *Without statutory authority, any action taken is invalid. As we have already mentioned and held, under this statute, strict compliance is required. Udall*, 159 Wash.2d at 915-16, 154 P.3d 882. Therefore, strictly applying the statute as required, we agree with the Court of Appeals and hold that under RCW 61.24.040(6), a trustee is not authorized, *at least not without reissuing the statutory notices,* to conduct a sale after 120 days from the original sale date, and such a sale is invalid.

Albice at 568 (emphasis added).

The trial court's ruling eviscerates the principle of law enunciated in *Albice*. A showing of prejudice is *not* required. Id. What is required is

strict compliance with the DTA, which was studiously overlooked by the trial court.

B. ISSUES PERTAINING TO FORMATION OF AN ENFORCEABLE CONTRACT AT THE TRUSTEE'S SALE.

1. ***Formation of Contract.***

A contract was formed when the trustee announced that the property was "SOLD." *See: Udall v. T.D. Trustee's Services,* 159 Wash.2d 903, 154 P.3d 882 (2007) (hereinafter "Udall"). Defendant Libey, as "Successor Trustee," also affirmatively represented in the trustee's deed that the *cash sales price* for the Benton County Property was $1.2 million. Libey's representation in that regard is binding. Id.

In *Udall*, the trustee refused to deliver the trustee's deed to the purchaser of the property at the trustee's sale because the successor trustee had mistakenly underbid the property by $400,000. The successor trustee argued that he had no obligation to deliver the trustee's deed because the sale was void due to his own mistake, claiming such was a "procedural irregularity" that justified the trustee's refusal to deliver the trustee's deed under RCW 61.24.050.

Disagreeing with the successor trustee, the *Udall* Court explained the process in detail:

> RCW 61.24.040 sets out the non-judicial foreclosure procedure. RCW 61.24.040(4) and (7) detail a sequence of events in that procedure. First "the trustee or its authorized agent shall sell the property at public auction to the highest bidder." RCW 61.24.040(4) (emphasis added). Then the purchaser "*shall forthwith pay* the price bid and *on payment* the trustee shall execute" the deed of trust to the purchaser. RCW 61.24.040(7) (emphasis added). As the Court of Appeals itself stated, "this statutory language imposes on the trustee, or its authorized agent, an obligation to sell the property to the highest bidder and to execute the deed to the highest bidder." Udall, 132 Wash.App. at 300, 130 P.3d 908.
>
> The trustee's delivery of the deed to the purchaser is a ministerial act, symbolizing conveyance of property rights to the purchaser. The trustee cannot withhold delivery unless the sale itself was void due to a procedural irregularity that defeated the trustee's authority to sell the property. *Examples of procedural irregularities* that void a non-judicial foreclosure sale include the borrower's *presale bankruptcy filing*, see 11 U.S.C. § 362(a) and *In re Schwartz*, 954 F.2d 569, 570–71 (9th Cir.1992) ("creditor violations of the Bankruptcy Code's automatic stay provision are void"), and a *pending action on the obligation* secured by the deed of trust. See RCW 61.24.030(4); *Cox v. Helenius*, 103 Wash.2d 383, 388, 693 P.2d 683 (1985) (*suit brought by borrower prevented the trustee's initiation of foreclosure). Insufficiency of price, as in this sale, is not a procedural irregularity that voids the sale, it is merely a mistake.*

Udall, 159 Wash.2d at 910-911 (emphasis added).

The Supreme Court held that the trustee's underbidding mistake in *Udall*, as stated above, wasn't a "*procedural irregularity*" that justified voiding the trustee's sale—it was simply a mistake. In this case, Libey

refuses to deposit the difference between the cash sales price of $1.2 million and the amount due and owing BW at the time of the trustee's sale ($149,000) into the Court Registry. In support of this refusal, Libey, in essence, claims that he made a "mistake." CP 0550-0556, pg. 3, paragraph 8 ("...There were no cash proceeds whatsoever from the sales of the real estate...").

Libey, however, affirmatively represented in the trustee's deed that he sold the Benton County Property for $1.2 million *in cash*. This representation in the form of a recital cannot be repudiated by Libey on the basis of it being a "mistake." A contract was formed when Libey "SOLD" the "Benton County Property" at the trustee's sale. *Udall*, supra.

2. *Acceptance of the $1.2 million cash bid created a legally enforceable contract.*

As the Supreme Court stated in *Udall* in interpreting RCW 61.24.050 in effect at the time:

> The second sentence of RCW 61.24.050, *"[i]f the trustee accepts a bid, then the trustee's sale is final,"* establishes that a bid at a non-judicial foreclosure sale is not automatically accepted. Rather, the bid operates as an offer that creates the power of acceptance in the trustee. This is consistent with settled auction law, wherein asking for bids is asking for offers, which the seller (or the seller's agent) remains free to reject prior to acceptance. 1 Joseph M. Perillo, Corbin on Contracts § 4.14 (rev. ed.1993).

> Acceptance at auction is "commonly signified by the fall of the hammer or by the auctioneer's announcement 'Sold,' "*after which the "sale is consummated and neither party can withdraw." Id. at 643.*

Udall, 159 Wash.2d at 912 (emphasis added).

Now, Libey conveniently claims that there were no cash proceeds after he accepted the "cash bid" at the trustee's sale for the Benton County Property. Libey accepted this bid and delivered the Trustee's Deed. These actions formed a legally enforceable contract.

Before Libey delivered the Trustee's Deed to the Benton County Property; however, he reserved the following rights:

> The trustee will *not* issue the trustee's deed to the successful bidder until the trustee has:
>
> .....
>
> B. Confirmed that the subject loan was not satisfied or reinstated before the sale;
>
> C. Confirmed that no event, act, or omission has occurred which might expose the trustee to liability of defense costs if the foreclosure sale is consummated and the trustee's deed is issued;
>
> D. Confirmed that no event, act, or omission has occurred which, in the trustee's sole opinion, might render the sale unlawful, invalid, or contrary to the interests of the beneficiary, trustee and/or borrower;

CP 0557-0561.

When Libey delivered the trustee's deed he confirmed that the obligation wasn't satisfied before the trustee's sale, the trustee's sale was conducted in a manner which would not expose the trustee to liability and no "procedural irregularity" had occurred that would render the trustee's sale "....unlawful, invalid, or contrary to the interests of the beneficiary, trustee and/or borrower." Id.

The opportunity to rescind the contract on the basis of the reservations in the trustee's sale cry has long passed. The contract Libey formed by conducting the trustee's sale is enforceable according to its terms and conditions, and to allow Libey to repudiate the contract would be first, a breach of that contract and, secondly, inconsistent with the enumerated goals of the Act:

> (i) The non-judicial foreclosure process should be *efficient and inexpensive*;
>
> (ii) The process should result in interested parties having *an adequate opportunity to prevent wrongful foreclosure*; and
>
> (iii) The process should *promote stability of land titles*.

Udall, 159 Wash.2d at 916.

C. ISSUE PERTAINING TO THE CONSUMER PROTECTION ACT.

1. Libey had no authority to conduct Uribe's trustee's sale and doing so was a "per se" violation of the DTA.

As stated above, Libey had no authority to conduct the trustee's sale. Libey, in doing so, committed an "unfair and deceptive" act in trade or commerce. *Klem v. Washington Mutual Bank*, 176 Wash.2d 771, 295 P.3d 1179 (2013) held:

> *The first two elements* may be established by a showing that (1) an act or practice which has a capacity to deceive a substantial portion of the public (2) has occurred in the conduct of any trade or commerce.
> ...
>
> But, as we noted in *Saunders*, "[b]ecause the act does not define "unfair" or "deceptive," this court has allowed the definitions to evolve through a "gradual process of judicial inclusion and exclusions. *Saunders*, 113 Wash.2d at 344, 779 P.2d 249 (quoting *State v. Reader's Digest Ass'n*, 81 Wash.2d 259, 275, 501 P.2d 290 (1972), *modified in Hangman Ridge*, 105 Wash.2d at 786, 719 P.2d 531).
>
> ...
>
> Our statute clearly establishes that unfair acts or practices can be the basis for a CPA action. *See* RCW 19.86.020 ("[U]nfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."); RCW 19.86.090 ("Any person who is injured in his or her business or property by a violation of RCW 19.86.020 ... may bring a civil action in superior court.").

Klem v. Wash. Mut. Bank, 176 Wash. at 787 (clarifying *Hangman Ridge,* 105 Wash.2d at 785-86).

A defendant's act or practice is per se unfair or deceptive if the plaintiff shows it violates a statute declaring the conduct to be an unfair or deceptive act or practice in trade or commerce. *See: Klem, pg. 787,* clarifying *Hangman Ridge,* 105 Wash.2d at 786, cited by this Court in *Mellon v. Regional Trustee's Services,* No 31570-3-III (July 17, 2014), which held:

> To state a claim for a per se CPA violation, the plaintiff must allege "'the existence of a pertinent statute'" and "'its violation.'" *Fidelity Mort. Corp. v. Seattle Times Co.,* 131 Wn. App. 462, 471, 128 P.3d 621 (2005) (quoting *Keyes v. Bollinger,* 31 Wn. App. 286, 290, 640 P .2d 1077 (1982); see *Dempsey v. Joe Pignataro Chevrolet, Inc.,* 22 Wn. App. 384, 393, 589 P.2d 1265 (1979).

Id., pg. 7.

Libey unfairly and deceptively proceeded with a trustee's sale, which he had no lawful statutory authority to conduct, first. In addition, there were the following unfair and deceptive acts and practices:

> 1. Libey violated RCW 61.24.100, the anti-deficiency provision of the Deed of Trust Act. Libey transferred "non-existent" debt from the Franklin County trustee's sale to bump UP the bid price for the Benton County Property closer to its fair market value; and
>
> 2. Libey knew, or should have known, about additional proceeds from the sale of Uribe's Personal

> Property and didn't apply those proceeds in reduction of the Benton County Loan or continue the trustee's sale to address the issue and unlawfully foreclosed the Benton County Property.
>
> As stated in *Mellon v. Regional Trustee's Services*, pg. 9, *supra*:
>
> We must liberally construe the CPA to serve its beneficial purposes and may look to federal law for guidance in doing so. RCW 19.86.920. Our Supreme Court has suggested a defendant's act or practice might be "unfair" if it "'causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits.'" *Klem,* 176 Wn.2d at 787 (quoting 15 U.S.C. § 45(n». Similarly, a defendant's act or practice might be "unfair" if it "offends public policy as established 'by statutes [or] the common law,' or is 'unethical, oppressive, or unscrupulous,' among other things." *Id.* at 786 (alteration in original) (quoting *Magney v. Lincoln Mut. Sav. Bank,* 34 Wn. App. 45, 57, 659 P.2d 537 (1983); *see Fed. Trade Comm'n v. Sperry & Hutchinson Co.,* 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972) (quoting Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964

The occurrence of either one of the two (2) unethical, oppressive, and unscrupulous events set forth above constitutes an "unfair or deceptive" act occurring in trade or commerce, sufficient to satisfy the first two (2) elements of a Consumer Protection Act violation, in addition, to the "per se" violation for the unlawful trustee's sale.

2. Libey also failed to act impartially and failed to discharge his duty of good faith to the Uribes.

With reference to the reasons set forth above, Libey also failed to act impartially between the Uribes and BW and made all decisions concerning the trustee's sale on the basis of what was best, whether illegal or not, for the Bank of Whitman:

> As a pragmatic matter, it is the lenders, servicers, and their affiliates who appoint trustees. Trustees have *considerable financial incentive* to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude. *Bain v. Metro. Mortg. Grp., Inc.* 175 Wash.2d 83, 95–97, 285 P.3d 34 (2012). However, despite these pragmatic considerations and incentives under our statutory system, a trustee is not merely an agent for the lender or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4) ("The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor."); *Cox v. Helenius,* 103 Wash.2d 383, 389, 693 P.2d 683 (1985) ("[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.") (citing George E. Osborne, Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 7.21 (1979)).

Klem v. Washington Mut. Bank, 176 Wash.2d at 779 (emphasis added).

3. A non-judicial foreclosure conducted under RCW 61.24 et seq., impacts the public interest.

Common law and equity require that the power to sell another person's property be done in an even-handed way and strictly in

accordance with the Deed of Trust Act. Id. and RCW 61.24.010 "(The trustee or successor trustee has a duty of good faith to the borrower, beneficiary and grantor"). Libey foreclosed the Benton County Property without the statutory authority to do so and in a way inimical to the public interest:

> The power to sell another person's property, often the family home itself, is a tremendous power to vest in anyone's hands. Our legislature has allowed that power to be placed in the hands of a private trustee, rather than a state officer, but common law and equity requires that trustee to be evenhanded to both sides and to strictly follow the law. *Albice,* 174 Wash.2d at 568, 276 P.3d 1277 (citing *Udall,* 159 Wash.2d at 915–16, 154 P.3d 882); *Cox,* 103 Wash.2d at 389, 693 P.2d 683 (citing Osborne,, *supra*). *This court has frequently emphasized that the deed of trust act "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales." Udall,* 159 Wash.2d at 915–16, 154 P.3d 882 (citing *Queen City Sav. & Loan Ass'n v. Mannhalt,* 111 Wash.2d 503, 514, 760 P.2d 350 (1988) (Dore, J, dissenting)). ***We have invalidated trustee sales that do not comply with the act.*** *See* Albice, 174 Wash.2d at 575, 276 P.3d 1277.

Klem v. Washington Mut. Bank, 176 Wash.2d at 789 (emphasis added).

4. *The non-judicial foreclosure conducted by Libey without the statutory authority to do so caused the Uribes' loss of the Benton County Property worth $1.5 million.*

As stated above, had Libey told Uribe of his illegal plan to violate RCW 61.24.100 by "cross-collateralizing" the "non-existent" debt from

the Franklin County Property to the Benton County Property, to deter any bidders for less than $1.2 million; and the bank's intention not to apply the proceeds from the sale of the Personal Property to the Benton County Loan (CP 0522-0524), Uribe could have filed another bankruptcy or obtained a loan to pay the $149,000 due on the Benton County Line of Credit and saved the Benton County Property, worth $1.5 million, from foreclosure for pennies on the dollar. The loss occurred after the time period for the rescission of the trustee's sale passed. CP 0557-0561.

D. ISSUE CONCERNING RUPP'S AND 7HA'S BFP STATUS

The Trial Court ruled:

> ....Nothing in the record that could be located by a search of the records by the defendants Rupp and 7HA would have disclosed there was any issue with the title and with the sale. And the court finds that the defendants Rupp and 7HA paid a reasonable price for the property and are essentially bona fide purchasers....

Judge's Ruling, pg. 6

Washington's bona-fide-purchaser doctrine provides that "a good faith purchaser for value, who is *without actual or constructive notice* of another's interest in real property purchased, has a superior interest in the property." *Levien v. Fiala*, 79 Wash App. 294, 298, 902 P.2d 491(Div. 1, 1995) (citing *Tomlinson v. Clarke*, 118 Wash.2d 498, 500 (1992)). The

question is whether a hypothetical purchaser[6] at the time of the purchase would have had constructive notice of Uribe's interest in the Benton County Property from the unlawful foreclosure completed by Defendant Libey. Uribe has the burden of proving that a bona fide purchaser had constructive notice of its claim. *Glaser v. Holdorf*, 56 Wash.2d 204, 209, 352 P.2d 212 (1960).

Constructive notice is notice arises by presumption of law from the existence of circumstances of which a party had a duty to take notice. *Nagle v. Snohomish County*, 129 Wash.App. 703, 119 P.2d 1201 (Div 1 2005). Inquiry notice is a form of constructive notice. "[K]nowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed." *Ellingsen v. Franklin County*, 117 Wash.2d 24, 33, 778 P.2d 1072 (1991); *see also, United Savings Loan & Bank v. Pallis*, 107 Wash.App. 398, 27 P.3d 629 (Div.1 2001).

Generally, "the record of a conveyance by a person not connected with the record title is not notice to a subsequent purchaser or encumbrancer from one who holds the record title." 66 Am. Jur. 2d *Records and Recording Laws* § 100 (2010). Washington adopts this generally accepted view, and its courts consistently hold that to impart

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[6] Or their Title Insurance carrier.

constructive notice, a recorded document must appear within the property's chain of title. *See, e.g.*, *Paganelli v. Swendsen*, 50 Wash.2d 304, 311 P.2d 676, 679 (1957); *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wash.App. 411, 166 P.3d 770 (Div. 1, 2007); *Koch v. Swanson*, 4 Wash.App. 456, 481 P.2d 915 (Div 3, 1971).

Importantly, Washington has long held that a bona fide purchaser for value may rely upon the chain of title recorded by the county auditor, *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wash.2d 436, 301 P.2d 198 (1956), and that a purchaser need not inquire beyond the record title, *Ellingsen*, at 29. Washington emphasizes the importance of a purchaser's ability to rely on record title. *See, e.g.*, *Id.*; *Paganelli*, at 309.

A property's chain of title is "the ownership history of a piece of land, from its first owner to the present one." *Black's Law Dictionary* (8th ed. 2004). In Washington, chain-of-title notice asks, "What would have been reasonably discoverable by using the records as one in the position of the searcher was charged with using them?" 18 William B. Stoebuck & John W. Weaver, *Wash. Prac., Real Estate* § 14.6 (2d ed. 2010) (quotation marks omitted).

A prospective purchaser of the Benton County Property, using the grantor-grantee index, would search the title for the properties under the

name "Gary Libey, as successor trustee," as grantor and Bank of Whitman, as grantee; *see also* Washington Real Property Deskbook (2009) KFW112.W37, *supra*,§ 6.4(3) ("There is constructive notice of the information in the index, because it is a part of the record, and of the necessity of pursuing a clue from the index even though the information is not complete."). This would give Rupp and 7HA notice that the Bank of Whitman acquired the Benton County Property from a trustee's sale, as would be evidenced by the trustee's deed from Defendant Libey to the Bank of Whitman. This clue would lead a purchaser to inquire whether the trustee's sale was conducted consistently with the recitations in the trustee's deed, which state:

> 1. This conveyance is made pursuant to the powers, including the power of sale, conferred upon said Trustee by that certain Deed of Trust between .....and by that certain RAST recorded on September 8, 2010, under Benton County Auditor's File No. 2010-025855... .; and
>
> 9. All legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given...

See: CP 0566-0571

Defendants Rupp and 7HA may claim that Uribe should be charged with the same constructive notice. However, Uribe was not a

prospective purchaser who had a duty to search the real property records as did Defendants Rupp and 7HA. More importantly, Uribe is not challenging the validity or amount of the debt, both issues being adjudicated in the U.S. Bankruptcy Court. See: CP 0573-0578.

As established is *Plein v. Lackey,* those claims are waived unless an action is filed to restrain the trustee's sale; but claims for events occurring during the trustee's sale are not waived. In distinguishing Plaintiff Uribe's situation, the target of a foreclosure, from Rupp's and 7HA's situation, as the purchaser of foreclosed property, it is clear from a review of the public record that:

1. Libey had no authority to give the Notice of Trustee's Sale he gave because he wasn't the trustee at the time it was given, which fact is clearly evident from a cursory search of the real property records. That search would show that the RAST was recorded two (2) hours ***after*** the Notice of Trustee's Sale was recorded. Whatever Libey did before the RAST was recorded was without the statutory authority to do so and invalid (e.g. a "procedural irregularity").

2. Libey also acquired no authority by, through or under the *forged* RAST to issue the Notice of Trustee's Sale or to issue the Trustee's Deed. The forged resignation is dated August 26, 2010, but was

notarized on August 8, 2010 when: "...the individual who appeared before me [the notary] and said individual acknowledged he/she signed this instrument..."

> We hold that, consistent with due process, RCW 4.28.185(1)(b) encompasses the tortious action nonresident notaries when a notarized forgery is affixed to a document affecting interests in immovables. Cf. *Golden Gate Hop Ranch, Inc. Velsicol Chem Corp.* 66 Wash.2d 469, 403 P.2d 351 (1965). *Werner*, 84 Wash. 2d at 367, 526 P.2d 370. We noted that without the notary's acknowledgment, the documents would not have been valid.

Klem, at 1191;

3. Because Libey failed to record a valid Notice of Trustee's Sale, either under the theory the forged RAST was invalid or Libey didn't have the authority to issue the Notice of Trustee's Sale at the time because the RAST wasn't recorded *before* the Notice of Trustee's Sale was given, the trustee's deed he issued is void because RCW 61.24.040 requires a lawful Notice of Trustee's Sale be given by a lawful successor trustee.

4. The recitals in the trustee's deed relating to the conduct of the trustee's sale are inconsistent with the actual facts--Libey did not comply with the Deed of Trust Act in the conduct of the trustee's sale. Libey had no statutory power to conduct the trustee's sale because he was not the successor trustee at the time of the recording of the Notice

of Trustee's Sale and was never a lawful successor trustee due to the forged RAST. Therefore, the recitals are not conclusive evidence that the trustee's sale was conducted in compliance with the Deed of Trust Act. As stated by the Court of Appeals in the *Albice* case:

> California courts have held that where recitals of regularity appear on the face of the deed but the deed also sets forth facts which are inconsistent with that recital, the deed is void on the basis that the recitals are not valid. *Dimock v. Emerald Props. LLC,* 81 Cal.App.4th 868, 877, 97 Cal.Rptr.2d 255 (2000),(*citing Little v. CFS Serv. Corp., 188 Cal.App.3d 1354, 1359, 233 Cal.Rptr. 923 (1987)). We agree with this reasoning. We are unwilling to accept a trustee's legal conclusions contrary to the actual facts of the foreclosure process as conclusive evidence where an accurate reporting of the facts would have shown the legal conclusions to be incorrect.*

Albice v. Premier Mortgage Services of Washington, 157 Wash.App. 912, 924-25, 239 P.3d 1148 (Div. 2, 2010)(Court of Appeals opinion upheld by Supreme Court (*emphasis added); and*

5. RCW 61.24.100 does not provide for "cross-collateralizing" what would have been the "deficiency" from the Franklin County Property's trustee's sale with the Benton County Property. RCW 61.24.100(5) permits an action for a "deficiency" from a trustee's sale only against a "guarantor." RCW 61.24.005(8) defines a "Guarantor" as any person who is *not* a borrower and who guarantees any of the obligations secured by a deed of trust in any written agreement other than

the deed of trust itself).[7] First, there was no separate guaranty signed by Uribe, the borrower, who couldn't be the guarantor under RCW 61.24.005(8). Secondly, there was no "deficiency" to cross collateralize--Defendant Libey satisfied the Franklin County obligation in full.[8]

BFP status is a highly factual determination and generally requires a case by case analysis. *Stewart v. Good*, 51 Wash. App. 509, 514-15, 754 P.2d 150 (Div. 1, 1998) held that an inadequate sales price was not enough to provide the requisite notice. However, a grossly inadequate sales price was one of the deciding factors in avoiding a sheriff's sale in *Miebach v. Colasardo*, 102 Wash.2d 170, 685 P.2d 1074 (1984) as was the alleged

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[7] The 1998 Amendments created a new section of RCWA 61.24, RCWA 61.24.005, which serves as an introductory definitional section. These definitions should be reviewed carefully. They include "grantor," "beneficiary," "senior beneficiary," "borrower," "guarantor," "commercial loan," and the new term "fair value."..... The definitions make clear that the grantor and the borrower are different parties and that while a grantor may be a guarantor, a borrower may not. A guarantor must have signed a written guarantee separate from the deed of trust and cannot be the borrower. 27 WAPRAC § 3.35

[8] Even if Defendant Libey had not fully satisfied the Franklin County Obligation, the DTA does not provide the "right" to "cross collateralize" different obligations. The very limited situation where this occurs arises under RCW 61.24.100(3)(b) and involves multiple security instruments; but only one obligation, not two separate obligations:

> (3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:
>
> .....
>
> b) Any judicial or non-judicial foreclosures of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property *granted to secure the obligation that was secured by the deed of trust foreclosed;* (emphasis added).

BFP's real estate experience and background knowledge. In *Glidden v. Municipal Authority*, 111 Wash. 2d 341, 758 P.2d 487 (1988), the purchaser had sufficient notice of irregularities that the appeals court remanded the case for an evidentiary determination as to whether the buyers had satisfied their duty to inquire. Rupp and 7HA had multiple "clues" from the public record that something was amiss with the foreclosure through which they acquired Uribe's property from the Bank of Whitman. This undischarged "inquiry" notice is sufficient to destroy Rupp's and 7HA's BFP status, assuming it ever existed.

VI. ATTORNEY'S FEES

Appellants request an award of reasonable attorney's fees pursuant to RAP 18.1(b) and RCW 61.24.135 and under RCW 4.84.330. All of the loan documents contain an attorney's fee provision. (see: CP 0475-0488, CP 0525-0540 and CP 0603, and CP 0457, Para. 2).

VII. CONCLUSION

For the reasons set forth above, the trial court's ruling should be overruled in its entirety and attorney's fees and costs awarded.

Date: August 4, 2014

THE LANZ FIRM, P.S.:

By: _____

Bernard G. Lanz, WSBA #11097
Robert M. Seines, WSBA #16046

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

MICHAEL URIBE and HELEN URIBE husband and wife, Appellants, vs. LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof; RANDALL RUPP AND LUZ DARYL-RUPP, husband and wife and the marital community; 7HA FAMILY, LLC, a Washington limited liability company; and JOHN AND JANE DOES 1-20, Respondents.	Case No. 32315-3-III DECLARATION OF SERVICE

I, Kathryn M. Daines, declare as follows: I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action. My business address is Suite 333, 216 1st Avenue South, Seattle, WA 98104.

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On the 4th day of August, 2014, I caused true and correct copies of the listed documents below to be served via e-mail (per e-mail service agreement between all parties) and via U.S. Mail on the following:

1. Verbatim Report of Proceedings (Hearing Date: January 30, 2014);
2. Appellant's Opening Brief; and
3. Declaration of Service,

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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

DATED this 4th day of August, 2014.

Kathryn M. Daines, Paralegal

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