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' Reply to Libey

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I. INTRODUCTION

The Respondent's brief overlooks two (2) prevailing principals underlying the Deed of Trust Act—RCW 64.21.010 et seq. (herein the "DTA."). The first principle is the legislative intent for the DTA and secondly, the standard by which the DTA must be construed.

Legislative Intent. The DTA, establishing the legality of non-judicial foreclosures in the State of Washington, is the product of a legislative compromise between the debtor's right to a judicial foreclosure with a redemption period and the secured creditors' preference for a speedy foreclosure process without judicial oversight. A judicial foreclosure is continually monitored by the court and the non-judicial foreclosure is conducted by a successor trustee without court supervision. The DTA eliminates the debtor's 12 month right to redeem following a judicial foreclosure and provides the secured creditor with a relatively quick foreclosure process:

> Non-judicial foreclosures mirror these attributes. The procedure is relatively expedited. There is a 120-day IRS redemption period but no other party may redeem. RCWA 61.24.050 and 26 U.S.C.A. § 7425(d)(1). In addition to the obvious possibility of a quicker payoff or sale of the property, the element of speed is also desirable when the property is in physical decline. *Peoples Nat. Bank of Wash. v. Ostrander*, 6 Wash. App. 28, 491 P.2d 1058 (Div. 3 1971); *Thompson v. Smith*, 58 Wash. App. 361, 793 P.2d 449 (Div. 1 1990) (notes that inability, as a general rule, to obtain a deficiency judgment was a trade-off for elimination of a redemption period when the non-judicial foreclosure act was written); John A. Gose, *The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94 (1966). In

Country Express Stores v. Sims, 87 WaApp 741, 748 (Div. 2 1977), the court stated:

> We note that Washington's deeds of trust act RCW 61.24, should be construed to further three basic objectives. First, the non-judicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.

27 WAPRAC § 3.35

Strict Construction of the DTA is Required: The DTA 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 the non-judicial foreclosure sales. *Udall v. T.D. Escrow Servs. Inc.*, 159 Wash..2d 903, 915-916, 154 P.3d 882 (2007) citing *Queen City Sav. and Loan v. Mannhalt*, 111 Wash.2d 503, 514, 760 P.2d 350 (1988); *Koegel v. Prudential Mutual Sav. Bank*, 51 Wash.App. 108, 752 P.2d 385, review denied, 111 Wash.2d 1004 (1988). Moreover, lenders must strictly comply with the DTA and courts must strictly construe the DTA in the borrowers favor because the DTA dispenses with many protections commonly enjoyed by borrowers in judicial foreclosures (*Albice v. Premier Mortgages Services of Wash. Inc.* 174 Wash.2d 560, 568, 276 P.3d 1277 (2012); citing *Udall v. T.D. Services*, 159 Wash.2nd at 915-16 ("As we have already mentioned and held, under this statute, strict compliance is required.")).

Most recently, the Supreme Court has reiterated the principal that the DTA "must be construed in favor of the borrowers because of the relative ease with which lenders can forfeit borrowers' interest and the lack of judicial oversight in conducting non-judicial foreclosure sales." *Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wash.2d 94 105 (2013); quoting *Udall v. T.D. Escrow Servs. Inc.*, 159 Wash.2d 903, 915-16, *Bain*, 175 Wn.2d at 93 (quoting *Udall*, 159 Wash. 2d at 915-16). It is well settled law that the trustee in foreclosure must strictly comply with the statutory requirements. "As we have already mentioned and held, under this statute, strict compliance is required." *Schroeder, 177 Wash 2d at 106 (citing Albice v. Premier Mortgages Services of Wash. Inc.* 174 Wash.2d 560, 568, 276 P.3d 1277 (2012)), (citing *Udall v. T.D. Services*, 159 Wn.2d 915-916 (2007)). Finally, a successor trustee in a non-judicial foreclosure may not exceed the authority vested in him or her by that statute. Id. *Schroeder*, 177 Wn.2d at 111-112.

II. REPLY

A. LIBEY WAS NOT THE TRUSTEE AT THE TIME HE GAVE THE NOTICE OF TRUSTEE'S SALE

1. Libey had not been appointed the trustee at the time he gave the Notice of Trustee's Sale and there is no provision in the DTA that authorizes a trustee to give the Notice of Trustee's Sale until he is lawfully appointed the trustee.

Libey relies on *Frizzell v. Murray*, 179 Wash. 2d 301, 306-7, 313 P.3d. 1171 (2013) and *Plein v. Lackey*, 49 Wash.2d 214, 67 P.3d 1061

(2003), claiming that Uribe had notice of the procedural irregularity and did nothing about it until after the trustee's sale. However, neither *Frizzell* nor *Plein* addressed this issue in the context of an unlawful sale. Uribe's trustee's sale was unlawful because Libey was not vested with the authority to give the Notice of Trustee's Sale at the time it was given:

> (1) At least ninety days before the sale, or if a letter under RCW 61.24.031 is required, at least one hundred twenty days before the sale, ***the trustee shall***:
>
> (a) Record a notice [of trustee's sale] in the form described in (f) of this subsection in the office of the auditor in each county in which the deed of trust is recorded;
>
> .....

RCW 61.24.040.

The DTA clearly states when a successor trustee, such as Libey, shall be vested with the authority to act trustee:

> (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**.

RCW 61.24.010(2) (Emphasis added).

This provision of the DTA neither provides that a "trustee" can give the Notice of Trustee's Sale *BEFORE* being appointed the trustee nor provides retroactive effect for a Notice of Trustee's Sale recorded *BEFORE* the trustee is appointed. The DTA must be strictly construed and construing the DTA by balancing the equities, as the trial court did, is improper. Under the strict construction standard, Libey had to be appointed the trustee BEFORE he gave the Notice of Trustee's Sale. Id.

To correct Respondent Libey's procedural irregularity would have been quite easy. Respondent Libey in the exercise of his duty of good faith to the borrower could have simply re-sent the Notice of Trustee's Sale **AFTER** he had been lawfully appointed as the trustee. Notwithstanding the ease with which this could have been done, Respondent Libey did nothing about it except blindly proceed with the trustee's sale in total derogation of Uribes' rights under the DTA.

Respondent Libey also notes that:

> Under a "strict reading" of RCW 61.24.010(2), while Libey technically was not vested with the power under the DTA at the exact time the notices were recorded, he was vested with the power that same day, approximately 2 hours later, and everything he did thereafter was authorized.

Respondent Gary Libey's Brief, pg. 20.

As stated immediately above, Libey was not vested with the authority to give the Notice of Trustee's Sale at the time it was given, and until the RAST was recorded, Libey had no authority to give any Notice of

Trustee's Sale. Nothing in the DTA provides that whatever Respondent Libey did before being appointed trustee was ratified after he was lawfully appointed the trustee (eg. "everything he did thereafter was authorized." Id).

If Respondent Libey had simply given another Notice of Trustee's Sale *after* he was authorized, in accordance with the terms of the DTA (RCW 61.24.010(2)—"Only upon recording the appointment of successor trustee....the successor trustee shall be vested with all powers of the original trustee"), Libey would have strictly complied with the DTA, and the trustee's sale would have not been subject to attack. Moreover, Respondent Libey had a fiduciary duty to Uribe and he breached that duty when he conducted a trustee's sale without strict compliance with the DTA. (Respondent Libey's Brief, pg. 15, last line).

Finally, the word "Only" was added Laws 2009, ch. 292, Sec. 7, subsec (1)(b). The prior version of the same statute did not contain the word "Only." The earlier provision read "Upon recording ....the appointment of successor trustee, the successor trustee shall be vested with all the powers of the original trustee."

B. THE URIBES DID NOT WAIVE THEIR RIGHT TO CHALLENGE THE TRUSTEE'S SALE BECAUSE THERE IS NO WAIVER FOR AN UNLAWFUL SALE

Waiver never occurs where the trustee's sale was unlawful (e.g. a procedural irregularity occurred):

> But under our case law—including *Schroeder, Albice and Frizzell*—these failures cannot by themselves constitute a waiver of the right to relief for damages. 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 the trustee's sale invalid.

Bavand v. OneWest Bank, 176 Wash.App. 475, 494, 309 P.3d 636, 646 (Div. 1, 2013)

The trustee in *Schroeder v. Exeelsior Management Group, LLC, 177 Wash.2d 94, 297 P.3d 677 (2013)* foreclosed agricultural land under the DTA and doing so is unlawful—it must be foreclosed judicially and the trustee had no authority to sell the agricultural land. 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*: 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. *Cox v. Helenius,* 103 Wash.2d 383, 693 P.2d 683 (1985). In *Albice*, the Supreme Court came to the same conclusion: "waiver ...cannot apply to all circumstances or types of post-sale challenges..." *Albice v. Premier Mortg. Servs. Of Wash, Inc.*, 174 Wash.2d 560, 276 P.3d 1277 (2012). RCW 61.24.040(1)(f)(IX) states that the "failure to bring a ...lawsuit *may* result in waiver of any property grounds for invalidating the trustee's sale."

The cases cited by Respondent Libey to justify his inattention to the critical details of the DTA, *Plein* and *Lackey,* totally miss the mark.

In *Plein,* the issue was the waiver of a claim to challenge the undrlying debt itself, a claim which was known to the debtor before the non-judicial foreclosure was commenced. *Plein v. Lackey*, 149 Wash.2d 214, 227, 67 P.3d 1061 (2003). A challenge to the underlying debt is not a "procedural irregularity."

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. *Frizzell*, who had borrowed money from the defendants, claimed the loan was a de facto sale, the loan was not a business loan, that the lender had no real estate license to make a residential loan and the underlying deed of trust was invalid because of her lack of capacity to contract. On appeal, the trial court was reversed by the appellate court and the Supreme Court reversed the appellate court, in part, on the grounds that waiver only applies to actions to vacate the sale, not to an action for damages. Echoing *Albice*, the *Frizzell* court concluded:

> t]he word 'may' indicates the legislature neither requires nor intends for courts to strictly apply waiver" and correctly concluded that "[w]aiver ... cannot apply to all circumstances or types of postsale challenges." *Albice v. Premier Mortg. Serv. of Wash., Inc.,* 174 Wash.2d 560, 570, 276 P.3d 1277 (2012). Applying this logic to the facts in *Albice,* we decided that equity demanded that waiver not apply to a challenge of a trustee's sale that was marred by procedural irregularities. *Id.* at 571, 276 P.3d 1277.

179 Wash.2d. at 315, 316

The Supreme Court further 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 damages actions." *Frizzell*, pg. 1175, citing *Schroeder*, 177 Wash.2d at 114 at 114, (quoting *Klem v. Washington Mutual Bank,* 176 Wash. 2d 771, 796, 295 P.3d 1179 (2013)). It was left for the trial court to consider whether the loan to *Frizzell* was for owner occupied property.

Neither *Plein* nor *Frizzell* involved a "procedural irregularity," which is never subject to waiver. *Schroeder* ,177 Wash.2d at 105, (foreclosing agricultural land non-judicially) 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*: 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. *Cox v. Helenius,* 103 Wn.2d 383, 388, 693 P.2d 683 (1985). In *Albice*, the Supreme Court came to the same conclusion:

> Waiver, however, cannot apply to all circumstances or types of post-sale challenges. RCW 61.24.040(1)(f)(IX) states that the 'failure to bring a ...lawsuit *may* result in waiver of any property grounds for invalidating the

> trustee's sale. The word "may" indicates the legislature neither requires nor intends for courts to strictly apply waiver. Under the statute, we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act.

174 Wash.2d at 570.

Therefore, Uribe has the right to contest the unlawful actions of Respondent Libey, post-sale, without the necessity of seeking a TRO. Furthermore, Uribe never had actual notice of this procedural irregularity, as claimed by Defendant Libey.[1]

The trial court also failed to consider the effect of RCW 61.24.130, which provides that a trustee's sale can also be stayed by the filing of a bankruptcy petition. Uribe filed such a petition to challenge the Bank of Whitman's debt and an order granting relief from the stay was entered upholding the debt by the bankruptcy court.[2]

Uribe waived nothing and could have done nothing more than what he did to preserve his right to a post-sale challenge for damages alone or to vacate the sale due to a "procedural irregularity," which is unlawful and never subject to waiver.

The Washington Supreme Court was confronted with the argument that to allow a post-sale challenge, such as Uribe's, undermines the third

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[1] Respondent Libey continually argues that Uribe had notice of the procedural irregularity, without citation to any evidence. What notice Uribe had is the same notice all of the parties had in this case, which was constructive notice due to the recording of the RAST after the Notice of Trustee's Sale was recorded.

[2] If Libey had informed Uribe that BW and he intended to take debt from the Franklin Loan and apply it to the Benton Loan under the cross collateral clause, Uribe could have refiled the Chapter 11 or sought a TRO to stop this illegal act.

goal of the DTA to promote stability of land titles. The *Albice* court responded to that concern as follows:

> Additionally, and equally important, to ensure trustees 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 Dickinson contends this defeats the third goal, the goal is to promote the stability of land titles. *Cox*, 103 Wn2d 387. **Enforcing statutory compliance encourages trustees to conduct procedurally sound sales. When trustees strictly comply with their legal obligations under the act, interested parties will have no claim for post sale relief**, thereby promoting stable land titles overall

Albice v. Premier Mortgage, 174 Wash.2d at 572 (Emphasis added).

Respondent Libey also cites *Steward v. Good,* 51 Wash.App. 509, 754 P2d 150 (Div 1, 2005) for the proposition that the trustee in *Steward v. Good* didn't *record* the Notice of Trustee's Sale until thirty (30) days before the trustee's sale, when the DTA requires at least ninety (90) days notice. All of the parties to the trustee's sale, however, received the "Notice of Trustee's Sale." This case did not involve a procedural irregularity, however. In *Steward v. Good*, it is clear that the trustee had the authority to conduct the trustee's sale, which authority was lacking for Respondent Libey because he never recorded or mailed a Notice of Trustee's Sale when he had the legal authority to do so.

1. False notarization is a crime and is never irrelevant.

Respondent Libey is correct about the fact the DTA does not require the signature of the resigning trustee. Nonetheless, the fact that a crime occurred cannot be overlooked.

Chicago Title Company's representative, Jennifer Lopez, signed the Resignation and Appointment of Successor Trustee "DATED this 26th day of August, 2010." However, Notary Public, Tracy M. Rosane's jurat states:

> I certify that I know or have satisfactory evidence that **Jennifer Lopez is the individual who appeared before me**, and said individual acknowledged that her/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the person of Chicago Title Insurance Company, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.
>
> **DATED this 8th day of August, 2010.**
>
> [Signature]

(Emphasis added)

It is not evident from the document itself why the trustee, Chicago Title Insurance Company, signed a RAST that was notarized eighteen (18) days *before* it was signed, but this appears to be the same issue that was of significant concern to the Washington Supreme Court in *Klem v. Washington Mut. Bank*, 176 Wash. 2d 771, 789, 295 P.3d 1178, 1188 (2013).[3]

[3] The supreme court stated in footnote 15 that "[t]he question of whether or not a falsely notarized notice of sale is valid is not before us." This issue is present in the instant case.

In *Klem*, the foreclosing trustee, Quality Loan Services had its notaries predate notices of sale, a practice known as "robo-signing." The trustee implored the court that the false dating notarization practice was immaterial because the debtors received all the required notices under the Act. The Supreme Court replied:

> This no-harm, no-foul argument again reveals a misunderstanding of Washington law and the purpose and importance of the notary's acknowledgment under the law. A signed notarization is the ultimate assurance upon which the whole world is entitled to rely that the proper person signed a document on the stated day and place. ... "The proper functioning of the legal system depends on the honesty of notaries who are entrusted to verify the signing of legally significant documents." Amicus Br. of WSBA at 1. While the legislature has not yet declared that it is a per se unfair or deceptive act for the purposes of the CPA, **it is a crime in both Washington and California for a notary to falsely notarize a document**. ... . *Klem*, 176 Wash.2d at 792-93.
> ...
>
> We hold that the act of false dating by a notary employee of the trustee in a non-judicial foreclosure is an unfair or deceptive act or practice and satisfies the first three elements under the Washington CPA. *Id* at 794-95.
>
> The trustee argues as a matter of law that the falsely notarized documents did not cause harm. The trustee is wrong; a false notarization is a crime and undermines the integrity of our institutions upon which all must rely upon the faithful fulfillment of the notary's oath... (Emphasis added).

The false notarization of the resigning trustee in this case casts doubt on the integrity of the recorded RAST itself and the validity of the appointment of Respondent Libey as the successor trustee. As previously

stated, the failure to record the RAST *before* the recordation of the Notice of Trustee's Sale, in and of itself, deprived the successor trustee of authority to conduct the foreclosure of the Benton County property. Most importantly, false notarization is a crime and casts doubt on the validity and enforceability of the RAST itself and its overall effectiveness in purporting to give Respondent Libey the authority to proceed with the trustee's sale. Moreover, the false notarization itself is an unfair or deceptive act or practice under the CPA. Id.

C. RCW 61.24.127 IS NOT APPLICABLE TO COMMERCIAL LOANS, WHICH IS EXACTLY WHAT APPELLANT URIBE STATED IN HIS OPENING BRIEF.

Uribe noted that RCW 61.24.127 was inapplicable to a commercial loan. The trial court's ruling stated that because it was a commercial loan, RCW 61.24.127 was inapplicable and ruled that there was no prohibition against finding waiver for that reason.

As is demonstrated in Uribe's Opening Brief, Uribe's loan was a commercial loan and not subject to RCW 61.24.127. The trial court cited RCW 61.24.127 and found that this commercial loan was subject to waiver, notwithstanding other law to the contrary, and Appellant Uribe waived all claims, causes of action and remedies. This is an incorrect interpretation of RCW 61.24.127.

In Schroeder v. Excelsior Management Group, LLC, a case involving a commercial loan for agricultural land, the Washington State Supreme Court ruled that:

> Schroeder brought a complaint for damages and injunctive relief under the Washington Mortgage Broker Practices Act, the CPA, the Real Estate Settlement Practices Act, and claimed unconscionability and civil conspiracy. Again, the respondents appear to claim Schroeder's failure to successfully avail himself of presale remedies extinguish or render moot all his claims for damages. We find no support in the law for the idea that the failure to enjoin a sale somehow extinguishes other claims, causes of actions, or remedies available to parties to a real estate transaction or deed of trust. As we noted recently, "waiver only applies to actions to vacate the sale and not to damages actions."

177 Wash. 2d at 113-114

D. THE BACK TO BACK SALES FORECLOSING ON THE CROSS-COLLATERALIZED LOANS WERE IN DIRECT VIOLATION OF RCW 61.24.100

Libey *fully satisfied* the Franklin County obligation at the first trustee's sale; but nonetheless "cross collateralized" the fully satisfied debt with 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. See: CP 0491-0493.

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 because a creditor is entitled to recover all its collateral irrespective of how many obligations are involved, echoing the *Donovick*

case that is factually distinguishable from this case (e.g. *Donovick* involved one promissory note securing two obligations; not two promissory notes securing two separate and distinct obligation.) [4]

The DTA started with the basic rule that deficiency actions after non-judicial foreclosure are the exception: "Except to the extent permitted in this section for deeds of trust securing commercial loans, *a deficiency judgment shall* ***not*** *be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust."* RCW 61.24.100(1) (Emphasis added).

The DTA allows a deficiency judgment against a commercial *borrower* only where a *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 was given to secure its obligation (see: RCW 61.24.100 (3)(b)). In essence, this is what Respondent Libey claims he can do with two (2) *separate* obligations, which is clearly outside the purview of RCW 61.24.100 (3)(a)(i).

[4] The *Donovick* case arose in the context of a prior version of RCW 61.24.100 that stated a non-judicial foreclosure "shall satisfy the obligation secured by the deed of trust foreclosed." Consequently, the fear was that foreclosing on one deed of trust would fully satisfy the obligation and there would be no obligation to foreclose on the remaining deed of trust. The *Donovick* court reasoned that the lender was entitled to all his collateral and engaged in the fiction that the trustee's sales were nearly simultaneous and constituted one sale.

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) and neither of these situations are presented in the Uribe case.[5] Libey had no statutory 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 Loan without incurring a surplus. Doing so clearly was in violation of Libey's duty of good faith and fiduciary duty to Uribe under RCW 61.24.010(4) and the DTA itself, which contains no explicit provisions permitting such action.

Respondent Libey claims, inter alia, that the trustee's deeds were executed days after the trustee's sale, for whatever unarticulated reason that may be, and that *Donovick* allows for such sales because there were two (2) deeds of trust, without mentioning that there were also two (2) separate obligations. And finally, as further justification for the procedurally irregular trustee's sale, that Uribe had no equity in the property, again without citation to any authority or any reference to the Clerk's Papers for evidence of that fact.

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[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 Wn.App. 361, 365 (1990)

Respondent Libey also claims the "full satisfaction" language in the trustee's deed was included to indicate that the Bank of Whitman was not going to pursue a deficiency against Uribe. When interpreting a contract, the subjective intention of the parties is irrelevant, and, instead, emphasis is placed on the outward manifestation of assent made by each party to the other. *Condon v. Condon*, 177 Wash. 2d 150, 298 P.3d 86 (2013) (trial court erroneously implied additional terms to settlement agreement); *Chevalier v. Woempner*, 172 Wash. App. 467, 290 P.3d 1031 (Div. 2 2012); *Stein v. Geonerco, Inc.*, 105 Wash. App. 41, 17 P.3d 1266 (Div. 1 2001) (arbitration clause in warranty agreement was enforceable). *City of Everett v. Sumstad's Estate*, 95 Wash. 2d 853, 631 P.2d 366 (1981) (auctioneer was bound by what would be inferred from his behavior in selling locked safe; auctioneer's subjective intent to sell only the safe itself and not its contents properly disregarded). The court must declare the meaning of what is written rather than what was intended to be written. *Max L. Wells Trust by Horning v. Grand Cent. Sauna and Hot Tub Co. of Seattle*, 62 Wash. App. 593, 815 P.2d 284 (Div. 1 1991) (trustee's subjective understanding of contract not controlling; trustee was bound by written language of contract). Consequently, the language is clear—the Franklin County obligation was fully satisfied in the legal sense of the term and there was no debt to transfer to the Benton County Property.

The other misconception propounded by Respondent Libey is that even though he recites in the trustee's deed that the sales were in cash;

they really weren't, they were credit bids or possibly even Bitcoins. This post trustee's sale fabrication is a transparent attempt to avoid the implications of the written language in the writing by contradicting his own writing to suit his present circumstances.

1. 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, pg. 912 (emphasis added).

Now, Respondent 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.

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." CP 0557-0561. At that point, the contract for $1.2 million was formed.

E. APPELLANT URIBE CONCEDES THE ISSUES OF COLLUSIVE BIDDING, CONSPIRACY AND CHILLED BIDDING.

F. RESPONDENT LIBEY COMMITTED CONVERSION NOTWITHSTANDING THE FACT THAT LIBEY NEVER HAD POSSESSION OF THE PROCEEDS.

Libey contends that he is not liable for the proceeds of the sale of Uribe's equipment because he never had possession of those proceeds and because he never "wrongfully received anything." Libey *is* liable to Uribe for the proceeds of the sale of the equipment pursuant to a replevin order for several different reasons.

First, Libey is liable for the conversion of the funds pursuant to the Washington Supreme Court's ruling in *Dodson v. Economy Equip. Co.*, 188 Wash. 340, 343, 62 P.2d 708 (1936). In *Dodson*, the president and general manager of an ice machine supplier were found personally liable for their participation in the conversion of the proceeds from the sale of an ice machine. The court stated:

> To be liable personally the officer or agent must, in fact, assist his principal in the conversion. (cite omitted)
>
> Where the officer performs an act or a series of acts which would amount to conversion if he acted for himself alone, he is personally liable even though the acts were performed for the benefit of his principal and without profit to himself personally. (cites omitted).
>
> 188 Wash. At 343 – 344. (emphasis added).

The basis of the conversion is that after the foreclosure of the Franklin property the amount due on the Franklin loan was reduced to zero. For the reasons stated above, Libey had no legal right to take part of the Franklin debt and add it to the Benton debt - then bid that amount at the Benton County foreclosure sale – without incurring a surplus. Therefore, Libey then had the duty to deposit the surplus into the Benton County Superior Court Registry pursuant to RCW 61.24.080(3). The surplus also would include the proceeds from the sale of the equipment that were received before and after the sale. As stated in *Dodson*, the fact that he did not touch the money or personally benefit from the transaction is irrelevant.

Next, Libey, in concert with BW, concocted this illegal cross collateralization scheme, and Libey played it out to the detriment of Uribe. Libey was well aware of the potential illegality of this scheme as evidenced by the November 9, 2010 email he sent to the bank:

> Bill, as you know I am the trustee … and am in the process of conducting… 2 Uribe foreclosure sales scheduled on 12/17 … *all these foreclosures concern me as trustee from*

the liability potential from these sales. Let me explain why. In Uribe there are both separate mortgages and deeds of trust on land in both Benton and Franklin County. There are two loans: 5091 in the original sum of $1.65m from 5/31/02, now up to $2.4m, on the Franklin County piece; and 5006 in the original sum of $571k from 9/5/07, now $400k, on the Benton County piece. *The BW in my opinion correctly decided to foreclose non-judicially, which means that the trustee conducts the sale,* ***there is no deficiency judgment*** *and no right of redemption.* {Although the land at one time was farmland, from my review of the files there were no crops, just crp, on the land since the loans were made to date, so the BW has the option to foreclose non judicially.} The sales are public and anyone can bid. I will have an agent at each sale to conduct the sale. Normally this is not a concern as the BW bids its debt and acquires title from a deed I execute as trustee. However I expect something unusual may happen in any of these sales from the nature of the borrowers involved. I have the first Uribe foreclosure sale scheduled in Franklin County at 10 am. This is land with a current fmv of $600k, although the debt is close to $2.4m. The second Uribe foreclosure sale is scheduled in Benton County at 11 am. This land with a current fmv of [illegible number] m [million] and a debt of $400k. {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. (Emphasis added).[6]

Libey argues a conversion claim requires the funds to be "wrongly received." Libey somehow contends that despite the November 9, 2010 email and the actions he took to the benefit of BW and detriment to Uribe, he was acting in "good faith" under RCW 61.24.010(4) (2009) and subsequent case law

Libey's wrongful conduct includes his willful concealment of the cross collateral scheme from Uribe. In *Cox v. Helenius,* the Washington Supreme Court stated that "after a trustee undertakes a course of conduct reasonably calculated to instill a sense of reliance thereon by the grantor, that course of conduct may not be abandoned without notice to the grantor." 103 Wash.2d at 389-390. Uribe was therefore, at a minimum, entitled to be informed that, contrary to the information set forth in the Notice of Trustee Sale[7], Libey intended to enforce the cross collateral language in the Benton deed of trust and add part of the Franklin debt to the Benton loan.

It is plainly evident from the email and his deliberate failure to

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[6] Libey's email also included his proposed Indemnity Agreement.

[7] Which states that the balance due on the loan was $420,221.98 and that the default could be cured and the trustee's sale discontinued if that amount plus additional costs was paid 2 weeks before the sale. CP at 0500-0507.

disclose that Libey was not acting as an impartial and independent trustee. Libey favored BW to such extent that he was the agent for BW in violation of his statutory duty of good faith to Uribe. His conduct was "wrongful" and the consequences for this are spelled out in *Klem v. Washington Mut. Bank*, 176 Wash.2d 771, 1295 P.3d 1179 (2013):

> An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.

176 Wash.2d at 790.

For these reasons and the reasons set forth earlier, Libey is legally liable in damages for the conversion of the surplus from sale of the Benton County Property, including the proceeds from the sale of the equipment.

G. LIBEY WRONGLY CONTENDS THAT URIBE CANNOT PROVE DAMAGES.

Libey contends that, irrespective of whether this Court finds Libey to be liable for damages, Uribe is unable to prove any damages. They reason that Uribe has no equity because the bank's loans were not paid in full, and because the Benton County property is presently subject to a mortgage securing the Franklin loan.

Their first argument boils down to whether there will be a deficiency following the foreclosure sale. If so, the borrower cannot claim irregularities in the foreclosure because the bank got less that what was

owed. This result would relax the standards for compliance with RCW 61.24 for the foreclosure of underwater real estate loans.

The second argument, that the Benton County property is presently secured by a mortgage, also fails. Libey conveniently forgot to mention that the judicial foreclosure of the mortgage must be commenced within one year of the Trustee's Sale under RCW 61.24.100 (4). So, if there was still a deficiency owed on the Franklin loan, BW and Libey waived any action on the deficiency because they failed to sue on the deficiency within the one year statute of limitations.

H. APPELLANT URIBE'S CPA, CIVIL CONSPIRACY, AND RICO CLAIMS WERE DISMISSED, *SUA SPONTE*, BY THE TRIAL COURT WHEN APPELLANT URIBE ONLY MOVED FOR PARTIAL SUMMARY JUDGMENT ON THE PROCEDURAL IRREGULARITY AND THE CONTRACT CLAIMS.

Appellant Uribe never submitted his CPA, Civil Conspiracy, and RICO claims for consideration by the trial court on summary judgment. Uribes' motion was for partial summary judgment only on the procedural irregularity and the contract claims. The trial court, *sua sponte*, dismissed all the remaining claims when it ruled on the two (2) claims presented to the trial court for consideration as a partial summary judgment.

III. 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: October 3 2014

THE LANZ FIRM, P.S.:

By: _____

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