CASE NO. 91928-3

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON
(Court of Appeals Division III, Case No. 32315-3-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.

URIBE'S REPLY TO ANSWER TO PETITION FOR REVIEW FROM RESPONDENTS RUPP AND 7HA.

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I. IDENTITY OF PETITIONERS

Petitioners are Michael and Helen Uribe (the "Uribes" or "Uribe").

II. NEW ISSUES ADDRESSED IN THIS REPLY

New Issue 1. The failure of the Court of Appeals to include Rupp and 7HA's names in the caption or in the opinion was intentional and dismissed any claims Uribe had as a result of the procedurally irregular trustee's sale.

New Issue 2. The Uribes failed to file a petition for discretionary review of "any issues" pertaining to Rupp and 7HA by the Court of Appeals.

III. ARGUMENT

A. New Issue 1. There is no evidence that the Court of Appeals "intentionally" omitted Rupp and 7HA because all of Uribe's claims derive from the procedurally defective trustee's sale by the purported trustee, Gary Libey.

The Court of Appeals ruled that Uribe waived his right to contest the sale by failing to obtain a TRO to restrain the trustee's sale. Under this misapplied theory of waiver, Rupp and 7HA contend that they were intentionally removed from the caption and, *sua sponte*, Rupp and 7HA were dismissed from the appeal:

> The Court of Appeals did not address the issue that was peculiar to Rupp which was that they were bona fide purchasers for value of the Benton County property. Instead, the Court of Appeals practically ignored Rupp, removed them from the caption and only mentions them

> once in the Opinion where it states that Uribe filed a lawsuit against the Libey defendants and the Rupp defendants.

Rupp and 7HA Family LLC's Answer to Petition for Discretionary Review and Motion to Dismiss, pg. 5 (hereinafter "Rupp and 7HA Answer").

The Court of Appeals opinion, however, directly affects Rupp and 7HA—they bought the property from the Bank of Whitman, with constructive knowledge of a procedurally irregular trustee's sale, which irregularity is characterized by Rupp and 7HA as a "two hour technical error." Rupp and 7HA Answer, pg. 2.

Rupp and 7HA, overlooking existing law, state that:

> Uribe does not and has never understood that a technical error must be substantial and prejudicial before it makes a difference. Uribe cannot and has never been able to show he was prejudiced by this technical error.

Rupp and 7HA Answer, pg. 3.

The prevailing view, as enunciated many times by this Court, is not so myopic and gives reverence to the immense power given to a private trustee to sell another's real property:

> 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 Mutual Bank, 176 Wash. 2d 771 (2013) (emphasis added).

Furthermore, *waiver never occurs where the trustee's sale was unlawful.* (*Frizzell* at 309 (citing *Albice*), *Bavand v. OneWest Bank,* 176 Wash. App. 475, 494 (Div. 1, 2013 and *Schroeder v. Excelsior Mgmt. Group*, 177 Wash.2d 94, 111-112 (2013)). 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, 388-389 (1985).

Cox filed a lawsuit for damages and re-conveyance of the deed of trust *prior* to the recording of the Notice of Trustee's Sale. The Court ruled that conducting the trustee's sale with a lawsuit pending, despite the fact no restraining order was issued, was in violation of the DTA (RCW 61.24. 030(4)), which resulted in a void trustee's sale. *Cox, pg.* 388-389.

Other examples of "procedural irregularities," resulting in the vacation of the trustee's sale, [mis]characterized by Rupp and 7HA as "technical errors," are:

1. ***Schroeder —Voided Trustee's Sale***—Agricultural land MUST be foreclosed judicially. RCW 61.24.030(2). In *Schroeder*, the parties *agreed* to allow the agricultural land to be foreclosed non-judicially. The *Schroeder* Court held:

> It is well settled that the trustee in foreclosure must *strictly comply* with the statutory requirements. A trustee in a non-judicial foreclosure may not exceed the authority vested by that statute. As we have recently held, the borrower may not grant a trustee powers the trustee does not have by contracting around the provisions in the deed of trust statute. *Bain*, 175 Wash. 2d at 100.

Schroeder, 177 Wn.2d at 111-112, citing *Albice*,174 Wash. 2d at 568 (citing *Udall*, 159 Wash. 2d at 915-916)(emphasis added).

2. ***Albice—Voided Trustee's Sale***—Trustee's Sale occurred over the 120 day period allowed for continuances. RCW 61.24.040(f)b. *Albice*, 174 Wash. 2d at 568, held that the failure to strictly comply with the DTA time requirements by selling the property *after* 120 days results in losing the statutory authority to conduct the trustee's sale:

> 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).

3. ***Bavand* (Div. 1)—*Voided Trustee's Sale***—Invalid appointment of successor trustee, RTS, by OneWest - because the appointment was one (1) day before OneWest was the beneficiary. The *Bavand* court ruled there was no waiver because the actions of the trustee were *unlawful*--the appointment of the successor trustee under which the Notice of Trustee's Sale was given when OneWest was not the beneficiary and, at that time, OneWest had no statutory authority to appoint the successor trustee under RCW 61.24.040:

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

Bavand, pg. 494.

During the course of this foreclosure, Libey's "two hour technical error," (i.e.: violation of the DTA) resulted in the following anomalies:

1. Libey recorded and signed the Notice of Trustee's Sale ***before*** he had the statutory authority to do so;

2. Libey conducted the trustee's sale on the Benton County property pursuant to a "Notice of Trustee's Sale" before he had the statutory authority to do so. This court has ruled that the time limits in RCW 61.24.010(2) are subject to strict compliance, according to *Albice*:

> ...***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; and

3. Libey conveyed the Benton County property to the Bank of Whitman, with no statutory authority to do so because there was never a valid "Notice of Trustee's Sale" given by a duly appointed successor trustee:

> A deed of trust foreclosed under this chapter ***shall*** be foreclosed as follows:
>
> (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 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;

.....

(f) The notice shall be in substantially the following form:

NOTICE OF TRUSTEE'S SALE

I.

NOTICE IS HEREBY GIVEN that the ***undersigned Trustee*** will on the . . . . day of . . . . . ., . . ., at the hour of . . . . o'clock . . . . M. at . . . . . [street address and location if inside a building] in the City of . . . . . ., State of Washington, sell at public auction to the highest and best bidder, payable at the time of sale, the following described real property, situated in the County(ies) of . . . . . ., State of Washington, to-wit:

RCW 61.24.040.

Libey was never the "undersigned trustee" under the one and only recorded Notice of Trustee's Sale and it was given *before* the Resignation and Appointment of Successor Trustee ("RAST") was recorded. Libey's procedural error was compounded by never re-issuing a new Notice of Trustee's Sale.

The DTA contains no provision to retroactively correct a "procedural irregularity," caused by the RAST being recorded after the Notice of Trustee's Sale was recorded. The DTA must be strictly construed in the borrowers' favor and to imply such a provision would be

inconsistent with the interpretation of the DTA. As *Albice* holds: a trustee is not authorized, *at least not without reissuing the statutory notices*, to conduct a trustee's sale, and Libey failed to do so. *Albice*, pg. 568. Consequently, if the Bank of Whitman never had good title to the Benton County property, then Rupp and 7HA purchased nothing more than what the Bank of Whitman received in the purported conveyance of title from Libey, which was nothing. However, luckily for Rupp, the record is replete with references to the Rupp's title insurance. Rupp is not lost and will be made whole.[1]

B. New Issue 2. The Uribes filed the petition for discretionary review of the ruling that held the Uribes waived their right to contest the trustee's sale because they had actual and/or constructive knowledge of a defect in the title during the course of the trustee's sale and failed to obtain a restraining order.

Rupp and 7HA raise the issues that if they are not BFP's, then neither are the Uribes because *both* had record notice that the Notice of Trustee's Sale was issued before the trustee was vested with authority to do so. However, Rupp is unable to cite any Washington legal authority for this bold statement. Rupp is simply conflating the words "constructive or record) notice" as having the same legal effect for purchasers of real property as it does someone who is facing the non-judicial foreclosure of

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[1] See e.g., Rupp and 7HA Family, LLC's CORRECTED Responsive Brief to Appellants' Opening Brief, at page 6 – 8.

their property. There is a very significant difference when one is purchasing land, then later, when they are facing foreclosure.

Uribe, the subject of the foreclosure, was not a prospective purchaser who had a duty to search the real property records as did Rupp and 7HA.

Rupp was dealing with an arms-length transaction, understanding they were buying this property, warts, title defects, and all - with the risks of "buyer beware" minimized by the opportunity to have a title company do a title search and insure the deal.

Uribe, and anyone having their property foreclosed upon, is not required to do a title search to make sure the trustee is complying with the DTA. The Trustee is supposed to be strictly complying with the DTA and fairly and impartially protecting the borrower's interests. In fact, Libey affirmatively represented in the Notice of Trustee's Sale that he was the "trustee." Why then should the borrower need to do a title search in the face of such a representation by the trustee?

Rupp and the court of appeals decision below are positing a new rule that shifts the burden of assuring strict compliance to the borrower – in derogation of the long history of judicial interpretation and implementation of the DTA. In this case and even though there was time to do so, the trustee did not reissue a new Notice of Trustee's Sale to

remedy the "procedural irregularity" and proceeded to do what he claimed he would do in his e-mail to the Bank of Whitman:

> 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 (emphasis added).

Uribe would have certainly taken issue with this illegal approach had he been notified about it. Libey, however, *never* notified Uribe that the "cross-collateralization" provision would be invoked even though

Libey knew it was illegal under RCW 61.24.100, but he was going to do it for his client, the Bank of Whitman.

Libey's concern was well founded. RCW 61.24.100(1) generally prohibits a "deficiency judgment" in a foreclosure of a commercial loan except in very specific situations set forth in 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, under RCW 61.24.100(4) and (5). In this case, there was no Guarantor.

The only other situation under the Deed of Trust Act, other than as stated above, that could be construed as the functional equivalent of a "deficiency judgment" arises under RCW 61.24.100(3)(b):

> (3) This chapter does not preclude any one or more of the following after a trustee's sale.....
>
> .....
>
> (b) Any judicial or non-judicial foreclosure of any other deeds of trust, mortgages, security agreement, or other security interest or liens covering any real or personal property granted *to secure the obligation that was secured by the deed of trust foreclosed*...

(emphasis added).

Libey has consistently argued through this litigation that this provision allows for "cross-collateralization" of the "deficiency" from the

Franklin County promissory note to the Benton County promissory note. Libey, however, misconstrues RCW 61.24.100(3)(b), which was the legislative response to *Donovick v. Seattle First National Bank*, 111 Wash.2d 413 (1988)("Donovick")

Donovick involved the non-judicial foreclosure of two (2) separate properties secured by two (2) separate deeds of trust; but only one (1) promissory note evidencing obligation to be foreclosed. At the time *Donovick* was decided, RCW 61.24.100 provided that a non-judicial foreclosure "*shall satisfy the obligation secured by the deed of trust foreclosure.*" (emphasis added)

The *Donovick* trustee foreclosed one (1) property and immediately thereafter foreclosed the other property. The Court noted that this result could have occurred under RCW 61.24.040(4) if the two (2) parcels had been described in the same deed of trust and allowed the trustee's sales to stand. The debtor contended that the 2nd trustee's sale was tantamount to granting the creditor a "deficiency judgment" because the 1st trustee's sale had fully satisfied the obligation evidenced by the one (1) promissory note secured by both deeds of trust.

This Court held:

> Reading the entirety of RCW 61.24 in the context of the mortgage laws and the history of deed of trust legislation, it is apparent that there was contemplated a quid pro quo

> between lenders and borrowers. The borrower, for example, relinquished his right of redemption. See RCW 61.24.050 ("After sale, as in this chapter provided, no person shall have any right by statute or otherwise to redeem from the deed of trust or from the sale.") The secured party, on the other hand, gave up any right to a deficiency judgment. See RCW 61.24.100. By giving up the right to a deficiency judgment, however, the secured party did not also give up the right to realize upon the security given.

Donovick, pg. 416.

Donovick was expressly limited to the facts of that case. In the case at bar, there are two (2) promissory notes secured by two (2) separate parcels and, in the case of the Benton County property, that promissory note was also secured by Uribes' construction equipment. There is no provision in the current DTA that allows for the transfer of a deficiency from one (1) promissory note to other property, real or personal, securing *another* promissory note. In fact, the current RCW 61.24.100 (3)(b) is expressly limited by its own terms *to secure **the obligation** that was secured by the deed of trust foreclosed.*

RCW 61.24.100 (3)(b) is why Libey required an indemnity agreement. Where an indemnity agreement is given, heightened scrutiny over the trustee's actions is required. In this case, it is the strictest of scrutiny. Not only was Libey's trustee's sale invalid, *ab initio*, but it was illegally conducted and should be set aside as to all parties involved,

including as to Rupp and 7HA who had constructive notice of this defect and nonetheless proceeded to purchase the property.

DATE: August 13, 2015.

Respectfully Submitted,

THE LANZ FIRM, P.S.

By: _____
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Importance: High

To whom it may concern:

Attached please find Petitioner Uribe's Reply to Answer to Petition for Review from Respondents RUPP and 7HA for filing with the Court in the matter of Michael Uribe, et ux. v. Libey, Ensley & Nelson, PLLC, et al; Case No. 91928-3.

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