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Supreme Court Case No. 98625-8

Court of Appeals, Division Two, Case No. 52934-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VERISTONE FUND I, LLC

Petitioner,

v.

MARY-ANN KERRIGAN

Respondent

**VERISTONE FUND I, LLC'S
PETITION FOR DISCRETIONARY REVIEW
BY THE WASHINGTON SUPREME COURT**

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Court of Appeals Decision..A

I. IDENTITY OF MOVING PARTY

Petitioner Veristone Fund I, LLC ("Veristone") seeks the relief as designated below.

II. STATEMENT OF RELIEF SOUGHT

Veristone requests that the Washington Supreme Court accept discretionary review of the decision in this case by the Court of Appeals, Division Two (hereinafter the "Court of Appeals"). Case No. 52934-3-II (May 5, 2020). A copy of this decision is attached hereto as Appendix A.

III. SUMMARY OF ARGUMENT

Veristone supplied all funds necessary for the purchase of real property at a sheriff's sale. But before the sheriff's deed could vest, Respondent Kerrigan "cut in line" and recorded her own deed of trust against the property, based on a debt owed by an individual named Craig Campbell who contributed nothing to the purchase and was a co-owner with Veristone on title to the property in name only.

Because Kerrigan and Veristone had no contractual relationship, Kerrigan could only encumber *Campbell's* title interest—which was zero percent. While the sheriff's deed was recorded, Campbell's inchoate interest ripened, but *it remained zero percent*.

Veristone then quitclaimed its one hundred percent interest to Campbell and recorded a deed of trust against Campbell's now-complete

ownership share. However, Kerrigan's deed of trust could still only encumber the extent of that interest which Campbell individually possessed at the time of Kerrigan's recording, *i.e.* zero percent.

Despite these facts, the Court of Appeals enlarged the scope of Kerrigan's encumbrance from "nothing to everything" and misapplied the doctrine of after-acquired title to find she recorded a superior lien ahead of Veristone on the *entire* property.

The result of the Court of Appeals' erroneous decision is that Veristone will either be forced to pay off Kerrigan to set aside her lien or otherwise be divested of ownership in the property should Kerrigan foreclose, even though Veristone had *no contractual relationship* with Kerrigan and it was *required to wait* until the sheriff's deed vested before it lawfully acquired actual title to the property.[1]

Supreme Court review is necessary and proper to correct this outcome, and to ensure that sheriff's sale purchasers can rely on having clear title when able to acquire record ownership after a redemption period expires and title actually passes from the prior owner.

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[1] The Court of Appeals' decision on the doctrine of after-acquired title is contrary to the reasoning articulated by appellate courts in other jurisdictions. *See*, *e.g.*, *Texas Am. Bank/Levelland v. Morgan*, 105 N.M. 416, 733 P.2d 864 (N.M. 1987) (discussed *infra*. at 14); *Gonzalez v. Chase Home Fin. LLC*, 37 So. 3d 955 (Fla. Dist. Ct. App. 2010).

IV. STATEMENT OF THE CASE

A. Factual History.

1. Veristone Assists Campbell With Buying Real Property at a Sheriff's Sale.

On November 18, 2016, Veristone and Campbell were the winning joint bidders on real property in Lewis County (the "Property") at a sheriff's sale. Veristone fully funded the entire $36,813.61 purchase price. CP 121, ¶ 6; CP 126, CP 129.[2] On November 21, 2016, a Certificate of Sale for the Property was issued. CP 125-127.

In January 2017, Campbell executed a $32,965.09 promissory note (the "Veristone Note") as part of the transaction and secured repayment to Veristone with a deed of trust (the "Veristone Deed of Trust"). CP 131-133, 135-138. On January 23, 2017, a sale confirmation order was entered. Case No. 14-2-00957-5 (Lewis Cty. Supr. Ct.).

2. Campbell Breaches His Loan Agreement With Veristone and Borrows Money From Kerrigan.

A condition of the Veristone Note was that Campbell agreed to not encumber, pledge, mortgage, hypothecate, place any lien, charge or claim upon, or otherwise give as security any interest in the Property without

[2] Under case law discussed below, the unequal contribution to its purchase price created a legal presumption that Veristone and Campbell intended to share ownership proportionately to that price. Because Veristone contributed one hundred percent of the purchase, Campbell did not possess any actual right, title, or interest in the Property.

Veristone's consent. CP 133, ¶ 10.

Nonetheless, without Veristone's knowledge, on March 28, 2017, Campbell executed a $25,000.00 promissory note in favor of Kerrigan and secured its repayment with another deed of trust (the "Kerrigan Deed of Trust"). CP 140-142, 144-148. Veristone was not involved with Kerrigan's loan to Campbell and did not consent to this lien.

On April 6, 2017, the County Sheriff filed a Return on Order of Sale with the Superior Court.

On May 8, 2017, the Kerrigan Deed of Trust was recorded, purporting to secure Campbell's repayment of just $20,000.00. CP 144.[3] Since Kerrigan acted before recording of the Sheriff's Deed, record title at that time was still vested to the prior owner Estate of Richard E. Coats. CP 125-127 (Certificate of Sale); Ex. 150-151 (Sheriff's Deed).

3. The Sheriff's Deed to the Property Issues and the Veristone Deed of Trust is Recorded.

On May 10, 2017, the sheriff's deed vested legal title to Veristone and Campbell – still with zero- and one hundred- percent ownership interests, respectively. CP 150-151.

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[3] The Kerrigan Deed of Trust may not have been a valid encumbrance, given the erroneous amount of the debt obligation referenced therein. *Accord Walker v. Transamerica Title Ins. Co.*, 65 Wn. App. 399, 408, 828 P.2d 621 (1992) (defective deed resulted in void lien).

On May 12, 2017, Veristone quitclaimed its *unencumbered* title interest to Campbell, and immediately recorded its deed of trust executed in January 2017 against the Property to secure repayment of its loan to Campbell. CP 135-138. This recording encumbered the entire, undivided ownership interest Campbell held at that time.

On May 15, 2017, Kerrigan then re-recorded her deed of trust. CP 144-148.[4]

4. Veristone Forecloses Its Deed of Trust.

Campbell defaulted on repaying Veristone, and on November 22, 2017, a Notice of Trustee's Sale to foreclose the Veristone Deed of Trust was recorded with respect to the Property. CP 158-160.

On March 30, 2018, Veristone completed its foreclosure of the Property. CP 162-164 (Trustee's Deed Upon Sale). Kerrigan did not seek to restrain the sale from occurring. This foreclosure should have extinguished Kerrigan's claimed lien.

By the time of foreclosure in March 2018, Campbell's debt to Veristone grew to $55,102.87. CP 158, ¶ III. Veristone paid $43,228.92 to purchase the Property at the auction, thereby suffering a financial loss

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[4] Either the re-recording was of no legal effect, and Kerrigan still only held an encumbrance on Campbell's zero percent interest in the Property, *or* the re-recorded security instrument otherwise became junior to Veristone's May 12, 2017 encumbrance of Campbell's complete ownership interest at that time.

relative to both the original purchase and debt owed. CP 163, ¶ 10.[5]

B. Procedural History.

On or about November 30, 2017, Veristone filed an action against Kerrigan and Campbell, seeking declaratory judgment and to quiet title. Case No. 17-2-01451-21 (Lewis Cty. Supr. Ct.). That same date, Veristone attempted service of process on Kerrigan, but was unsuccessful because her last-known address was a UPS store. CP 50, 54, 75.

On January 11, 2018, Veristone's counsel e-mailed Kerrigan's counsel to inquire about the acceptance of service on her behalf, but that request was declined. CP 50-51, ¶ 13; CP 79.

On February 13, 2018, alternative service by publication on Campbell was approved because he could not be personally served. CP 82-83. Service by mail on Kerrigan was also granted, and on February 23, 2018, service on Kerrigan in that manner was effectuated. CP 84-85.

On May 11, 2018, the Hon. Judge Lawler entered a default judgment finding Campbell had no interest in the Property to encumber after the sheriff's sale.

On June 27, 2018, Kerrigan finally answered Veristone's Complaint; she also pled an unnamed counterclaim seeking priority over

[5] Because of the non-judicial process, Veristone could not seek a deficiency judgment against Campbell. RCW 61.24.100(1).

Veristone's interest in the Property.

On November 2, 2018, the Hon. Judge Toynbee granted summary judgment to Kerrigan against Veristone. This order resulted in Kerrigan's lien attaining priority and clouding Veristone's title to the Property.

On May 5, 2020, the Court of Appeals, Division Two, affirmed the summary judgment ruling below. *Veristone Fund I, LLC v. Kerrigan & Campbell*, 2020 WL 2126525 (2020) (unpublished) (hereinafter "Opin.").

V. ASSIGNMENT OF ERROR

1. The Court of Appeals erred in affirming summary judgment to Kerrigan, and not Veristone instead, thereby giving Kerrigan a superior lien encumbering Veristone's ownership of the Property.

VI. ARGUMENT

A. Standard of Review.

Discretionary review of an appellate decision can be granted if:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

R.A.P. 13.4(b).

Here, *de novo* review should be accepted because the Court of Appeals' decision is contrary to a significant principle of law that one can

only encumber that which he or she possesses. Review is also proper because it is a matter of substantial public interest to ensure that property owners' rights are not subjugated to liens formed in outside deals which they had no knowledge about or control over.

Further, while the after-acquired doctrine raised by Kerrigan has been considered in other jurisdictions—with results that would be favorable to Petitioner Veristone—the Washington Supreme Court has not yet addressed this issue in the context of the facts presented here.

Thus, this petition falls squarely within the criteria set forth under R.A.P. 13.4(b), and Veristone respectfully seeks Supreme Court review.

B. When Kerrigan's Deed of Trust was Originally Recorded to Secure Repayment of Campbell's Loan, Campbell Did Not Possess Any Interest to Encumber.

1. Veristone and Campbell Only Held Inchoate Interests Until the Sheriff's Deed Became Effective.

After a sheriff's sale, a certificate of sale is prepared and delivered to the Court Clerk, who holds it for delivery to the purchaser after the sale is confirmed. RCW 6.21.100(2); *see also* RCW 6.21.110(2) (there is a statutory 20-day post-sale waiting period prior to confirmation); 28 Wash. Prac., Creditors' Remedies - Debtors' Relief § 7.60.

A certificate of sale by itself does not pass title. *Performance Constr., LLC v. Glenn*, 195 Wn. App. 406, 416, 380 P.3d 618 (2016) ("A

sheriff's certificate of purchase does not pass title, but is only evidence of an inchoate interest which may or may not ripen into title."); *Fid. Mut. Sav. Bank v. Mark*, 112 Wn.2d 47, 53, 767 P.2d 1382 (1989).

The sheriff's sale also creates a redemption period for the judgment debtor-mortgagor. *See*, *e.g.*, *City of Tacoma v. Perkins*, 42 Wn.2d 80, 85, 253 P.2d 957 (1953); RCW Ch. 6.23 *et seq*. With abandoned properties, however, there is no redemption period, and a purchaser may receive a sheriff's deed immediately upon sale confirmation. *See* RCW 6.21.120; RCW 61.12.093.

Before a sheriff's deed is finally issued to the sale purchaser, the debtor-mortgagor still "retains legal title to the property." *Glenn*, *supra*. at 416; *see also Gray v. C.A. Harris & Son*, 200 Wash. 181, 187, 93 P.2d 385 (1939) (analyzing legal title after a sheriff's sale); *Cochran v. Cochran*, 114 Wash. 499, 503-04, 195 P. 224 (1921) ("the mortgagor is not by such sale divested of his title to the land prior to the expiration of the redemption period, and can even then be divested of his title only upon his failure to redeem during that period.").

Therefore, as purchasers of the Property, the interests of Veristone and Campbell were strictly inchoate between the November 18, 2016 sale and issuance of the Sheriff's Deed on May 10, 2017. *Glenn*, *supra*. at 418-419 ("Title is not absolute, because the interest of a sheriff's sale

purchaser is subject to the right of redemption. This interest gives the purchaser the right to a sheriff's deed only when redemption rights are extinguished.") (Citations omitted).

The next inquiry is what, if any, inchoate interests Veristone and Campbell respectively possessed at the time of Kerrigan's purported May 8, 2017 encumbrance.

2. Veristone Funded the Full Property Purchase Price and Acquired One Hundred Percent of the Inchoate Ownership Share.

When there are co-owners of real property, "and the instrument by which the property was acquired is silent as to the respective interests of the co-owners, it is presumed that they share equally." *Cummings v. Anderson*, 94 Wn.2d 135, 140, 614 P.2d 1283 (1980).

But when it can be shown that co-owners "contributed unequally to the purchase price, a presumption arises that they intended to share the property proportionately to the purchase price." *Id.*; *see also Iredell v. Iredell*, 49 Wn.2d 627, 631, 305 P.2d 805 (1957) ("[w]hen in rebuttal the purchasers of property are shown to have contributed unequally to the purchase price, the general rule is that a presumption arises that they intended to share the property in proportion to the amount contributed by each."); 17 Wash. Prac., Real Estate § 1.28 ("Washington has held that unequal contribution of purchase price creates a presumption of intent to

own shares proportional to each one's contribution.").[6]

To allow otherwise would permit a minor contributor to "take inequitable advantage of another's investment." *Id*. at 142; *see also Sofie v. Kane*, 32 Wn. App. 889, 895, 650 P.2d 1124 (1982) ("A grantor of property can convey no greater title or interest than the grantor has in the property."); *Tungsten Prod. v. Kimmel,* 5 Wn.2d 572, 575, 105 P.2d 822 (1940) ("It is well settled that one co-tenant cannot do anything with respect to the common property binding upon his co-tenants unless they may have authorized or ratified his act.").

It is undisputed that Veristone paid *all* $36,813.61 to purchase the Property at the sheriff's sale. CP 129 (receipt), CP 150-151 (Sheriff's Deed). Although Campbell was considered a co-owner for title purposes, he contributed nothing toward the sale price. CP 121, ¶ 6.

Consequently, Campbell's inchoate share in the Property prior to issuance of the Sheriff's Deed on May 10, 2017 was legally *zero percent*. Indeed, the Court of Appeals recognized this fact. Opin. at 6. But the Court of Appeals erred in finding that Kerrigan could encumber

[6] Co-ownership principles do not require residence in a property, as they apply to both corporations and individuals. *See, e.g.*, *Silver Surprize, Inc. v. Sunshine Mining Co.*, 88 Wn.2d 64, 558 P.2d 186 (1977) (mining companies jointly owned property); *In re Babian*, 2013 WL 646386 (B.A.P. 9th Cir. Jan. 4, 2013) (four co-owners purchased investment property to build condominiums, each with a 25 percent share).

Veristone's one hundred percent inchoate interest despite the fact that Veristone was not a party to the transaction between Kerrigan and Campbell, did not ask for or receive the benefit of funds Kerrigan loaned to Campbell, and did not owe an obligation to Kerrigan which would entitle her to encumber its interest in the Property.

C. Once the Sheriff's Deed Became Effective, Veristone Conveyed Its *Unencumbered* One Hundred Percent Title Interest to Campbell and Then Recorded a Lien on that Interest.

The sheriff's deed is "valid and effectual to convey to the grantee the lands or premises so sold." *Id.*; *see also* 18 Wash. Prac., Real Estate § 19.15 ("For all intents and purposes, once the sheriff's deed has been delivered to the purchaser, the mortgage foreclosure process has been completed. The purchaser may now convey the property free and clear of any redemption rights or otherwise deal with it as any owner would.").

Here, the Kerrigan Deed of Trust could *not* attach to Veristone's one hundred percent interest upon its May 8, 2017 recording since Veristone was not a party to that instrument, nor the underlying loan. *See*, *e.g.*, 27 Wash. Prac., Creditors' Remedies – Debtors' Relief § 4.1 ("A lien is a charge against property to secure payment of a debt."). In other words, the Kerrigan Deed of Trust could *only* attach to that (zero percent) interest which Campbell possessed, and *nothing more*.

Recordation of the Sheriff's Deed on May 10, 2017 caused the parties' respective inchoate interests to ripen. At that time, legal title to the Property passed to Veristone and Campbell—with the former holding a one hundred percent ownership interest, and the latter holding a zero percent ownership interest but appearing on title in name only.

When Veristone quitclaimed its interest to Campbell on May 12, 2017, that conveyance transferred Veristone's *unencumbered* share in the Property to Campbell and there was no lien upon *that* interest which Campbell then assumed. *See* 18 Wash. Prac., Real Estate § 17.1 (lien is "in the nature of an encumbrance upon the mortgagor's title.").

Finally, on May 15, 2017, Kerrigan's re-recorded Deed of Trust then encumbered Campbell's ownership rights to the entire Property. CP 144. Such re-recording constituted a new valid lien on Campbell's complete ownership interest acquired on May 12, 2017—subject to and *junior* to the Veristone Deed of Trust that was recorded on that date.

Given these facts, the Court of Appeals erred in treating Kerrigan as having put a lien on Veristone's one hundred percent interest rather than Campbell's zero percent interest.

D. The Doctrine of After-Acquired Title is Not Applicable.

The Court of Appeals further erred in misapplying the doctrine of after-acquired title to give Kerrigan a superior encumbrance over

Veristone's interest in the Property. Opin. at 6.

"The 'after-acquired title doctrine' addresses a situation in which a person purports to convey to another an interest in property that person does not possess and then, after actually obtaining that interest, seeks to avoid the consequences of the conveyance on the ground that he or she had no interest to convey in the first place." 23 Am. Jur. 2d Deeds § 278.[7]

A similar situation to Kerrigan's claim was analyzed in the New Mexico Supreme Court case of *Texas Am. Bank/Levelland v. Morgan*, 105 N.M. 416, 733 P.2d 864 (N.M. 1987).[8] That decision involved individuals who jointly owned real property in *equal shares*—much greater than Campbell's ownership interest in this case.

In *Morgan*, a bank loaned money to one owner (Halliburton) and supposedly encumbered the entire property; that individual later conveyed his interest to the other owner (Morgan). *Id*. at 417. The Court

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[7] *See also Occidental Life Ins. Co. v. May*:

> [a] mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, although they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires.

194 Wash. 201, 214, 77 P.2d 773 (1938).

[8] *But see Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 336 P.3d 972, 975 (N.M. 2014), *cert. denied* (Oct. 8, 2014) (finding on second appeal that mortgage covenants led to after-acquired title, unlike a quitclaim deed for which the doctrine does *not* apply).

recognized that:

> New Mexico has never addressed whether one joint tenant may encumber the property interest of another cotenant without consent. *The jurisdictions which have decided this question, however, have uniformly agreed that one cotenant may not encumber the other cotenant's interest without consent.*

Id. (citations omitted; emphasis added). Applying this principle, the Court found that "Halliburton… was not free to execute a mortgage which would encompass a greater interest in the property than he owned himself. It stands to reason, therefore, that the mortgage which Halliburton executed could not encumber Morgan's interest in the property." *Id*.

In addition, the Court held, "[t]he corollary of the rule that a grantor can only give that which he owns is that a grantee can only receive that which the grantor is entitled to convey…. [T]he Bank, having received a mortgage only upon Halliburton's interest, *is unable to enlarge that encumbrance, after the fact, to encompass the entire property*." *Id*. at 418 (citation omitted; emphasis added); *see also Gonzalez v. Chase Home Fin. LLC*, 37 So. 3d 955 (Fla. Dist. Ct. App. 2010) (applying same principle to tenants-in-common).

Here, with Kerrigan acting in the role of the *Morgan* bank as the lienholder, and Campbell acting as owner Halliburton, the decision's reasoning should be persuasive as to the merits of Veristone's position—*i.e.*, Kerrigan could not enlarge her encumbrance on Campbell's *partial*

(and zero percent) interest to later cover the *entire* Property. *Cf.* Opin. at 6 (awarding Kerrigan a lien on "full title" including Veristone's interest).[9]

The law is clear: Kerrigan could possess *only* whatever share in the Property that Campbell acquired through the Sheriff's Deed. Likewise, Kerrigan's re-recording of her Deed of Trust on May 15, 2017 could not supplant the priority to which Veristone was entitled to by virtue of its prior May 12, 2017 deed of trust recording.

The following timeline helps clarify what occurred:

May 8, 2017	Neither Veristone nor Campbell have record title to the Property, which remains vested to the Estate of Richard M. Coats.
May 8, 2017	Kerrigan records her Deed of Trust referencing a debt lower than the amount she loaned Campbell, and which at best, only encumbers Campbell's zero percent inchoate interest in the Property.
May 10, 2017	Veristone acquires record title and a one-hundred percent interest in the Property based on contributing its full purchase price.
May 10, 2017	Campbell jointly acquires record title but with a zero percent interest.
May 10, 2017	The only interest Kerrigan could encumber is zero percent by virtue of her loan

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[9] Like New Mexico, Washington is a lien theory state, meaning a Deed of Trust does not convey title. *See* N.M. Stat. Ann. 48-10-8; *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 92-93, 285 P.3d 34 (2012), *citing* 18 Stoebuck & Weaver, Washington Practice: Real Estate: Transactions § 17.1, at 253 (2d ed. 2004) (describing nature of deed of trust). The Kerrigan Deed of Trust omits the inclusion of a trustee, although it purports to convey an interest in the Property in trust to a non-existent entity. CP 144.

	transaction with Campbell.
May 12, 2017	Veristone quitclaims its one hundred percent interest in the Property to Campbell.[10]
May 12, 2017	Veristone records its Deed of Trust as to Campbell's now-existing one hundred percent interest.
May 15, 2017	Kerrigan re-records her Deed of Trust; this at last encumbers Campbell's now-existing one hundred percent interest, but is junior to Veristone's May 12, 2017 lien.

As such, Veristone was entitled to foreclose its Deed of Trust in a senior position to Kerrigan, and its March 30, 2018 foreclosure should be deemed to have extinguished Kerrigan's junior interest.[11]

The opposite result reached by the Court of Appeals is incorrect, and it punishes forced sale purchasers such as Veristone by giving preclusive effect to liens formed in side deals (such as between Kerrigan and Campbell) which they are not parties to.

[10] A quitclaim deed conveys "all the then existing legal and equitable rights of the grantor in the premises therein described, but *shall not extend to the after acquired title* unless words are added expressing such intention." RCW 64.04.050 (emphasis added). There is no mention of after-acquired title in the quitclaim deed from Veristone to Campbell. CP 153-154. The quit claim deed was expressly for "security purposes only." CP 153. That is because the purpose of Veristone's conveyance was to place a lien on the Property in order to be repaid for funding the entire purchase. Campbell's name would not have appeared on title if not for Veristone's complete contribution.

[11] This result does not leave Kerrigan without a remedy to seek recovery of Campbell's debt, as she may sue him for collection of sums owed under her promissory note. *See*, *e.g.*, *Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 550, 167 P.3d 555 (2007). *Kerrigan's rights against Campbell should not be enforced at Veristone's expense.*

E. Kerrigan Was Also Not a "Bona Fide Purchaser or Encumbrancer."

A bona fide purchaser is:

> 'one who purchases property without actual or constructive knowledge of another's claim of right to, or equity in, the property, and who pays valuable consideration.' If the purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed.

Collings v. City First Mortg. Servs., LLC, 177 Wn. App. 908, 932, 317 P.3d 1047 (2013). There are multiple reasons why the Court of Appeals erred in applying this doctrine here. Opin. at 7.

First, Kerrigan—who was never a purchaser—did not encumber the entire Property until May 15, 2017, after Veristone's Deed of Trust was recorded. Her purported May 8, 2017 lien was limited to encumbering Campbell's zero percent interest.

Second, Kerrigan had constructive knowledge of the Certificate of Sale—recorded long before she executed her Deed of Trust. CP 125. The Certificate of Sale revealed Veristone's contribution to the Property's purchase. CP 126; *cf.* Opin. at 8 (incorrectly finding the certificate did not contain information "about the respective interests of Veristone or Campbell…."). A title search would have revealed Veristone's inchoate interest in the Property pending recordation of the Sheriff's Deed.

Third, Kerrigan's Note dated March 28, 2017 and Deed of Trust dated April 19, 2017 are practically identical to Veristone's Note and Deed of Trust which it prepared three months earlier. *Compare* CP 140-142, CP 144-147 (Kerrigan) *with* CP 131-133, CP 135-138 (Veristone). Given this fact, it defies belief that Kerrigan loaned $25,000.00 to Campbell without an awareness of Veristone's interest.

Kerrigan was not a bona fide encumbrancer, and she did not hold a lien on the entire Property until May 15, 2017, *after* Veristone deeded its one hundred percent interest to Campbell and then perfected its security interest on May 12, 2017. The Court of Appeals erred in letting Kerrigan jump ahead in priority.

VII. CONCLUSION

It is axiomatic that one can only encumber that which he or she possesses. In this case, while Campbell could encumber his zero percent share in the Property with Kerrigan's Deed of Trust, he lacked authority to encumber Veristone's one hundred percent ownership interest in the Property that ripened upon recordation of the Sheriff's Deed.

When title ripened, the best Kerrigan could do was encumber Campbell's zero percent interest, but not Veristone's one-hundred percent interest. Consequently, when Veristone quitclaimed its interest to Campbell and recorded a Deed of Trust to protect its investment based on

funding the Property's purchase in the first place, Kerrigan could not expand the scope of her May 8, 2017 lien from nothing to everything.

Moreover, Kerrigan's May 15, 2017 deed of trust re-recording could not retroactively attach to or supplant Veristone's security interest in the Property. Kerrigan could not simply "cut in line" and gain a superior lien position when she was legally unable to encumber Veristone's interest that it later transferred to Campbell.

The effect of the Court of Appeals' decision leaves Veristone with no remedy apart from paying off Kerrigan even though it never engaged in a deal with her; otherwise Kerrigan will foreclose and divest Veristone of title to the Property. This outcome is based on an incorrect interpretation of lien priority principles. Therefore, the Supreme Court should accept review of this matter and reverse the decision below.

DATED this 4th day of June, 2020.

OSERAN HAHN, P.S.

By: *<u>/s/ Joshua S. Schaer</u>*
Joshua S. Schaer, WSBA No. 31491
Attorneys for Petitioner Veristone
Fund I, LLC

CERTIFICATE OF SERVICE

On June 4, 2020, I caused to be served upon the below named counsel of record at the addresses stated below, via the method(s) of service indicated, a true and correct copy of Veristone Fund I, LLC's Petition for Discretionary Review to the Washington Supreme Court to:

Hillier, Scheibmeir & Kelly, P.S. Attn: Mark C. Scheibmeir P.O. Box 939 Chehalis, WA 98532 Attorney for Respondent Mary-Ann Kerrigan	____ Via hand delivery ____ Via Overnight Mail _X__ Via U.S. Mail, 1st Class, Postage Prepaid ____ Via Overnight Delivery _X__ Via Email:

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Bellevue, Washington on June 4, 2020.

/s/Brittany Ferguson
Brittany Ferguson, Legal Assistant

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

May 5, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VERISTONE FUND I, LLC, Appellant, v. MARY-ANN KERRIGAN, and CRAIG CAMPBELL, Respondents.	No. 52934-3-II UNPUBLISHED OPINION

SUTTON, A.C.J. — This appeal involves which party has the superior interest in the subject property: Veristone Fund I, LLC or Mary-Ann Kerrigan. Veristone and Craig Campbell together purchased the subject property at a sheriff's sale in 2016, subject to issuance of a sheriff's deed. Veristone provided all the money for the purchase. Campbell subsequently executed a promissory note and a deed of trust on the property in favor of Veristone, but Veristone did not record the deed of trust at that time. In March or April 2017, Kerrigan loaned money to Campbell, and Campbell executed a deed of trust on the subject property to secure repayment. Kerrigan recorded her deed of trust on May 8, and at the time, she had no knowledge of Veristone's interest in the property.

The sheriff's deed transferring title to Veristone and Campbell was recorded on May 10. On May 12, Veristone conveyed to Campbell by quitclaim deed all interest it had in the property, making Campbell the 100 percent owner. Also on May 12, Veristone recorded its deed of trust. After Campbell defaulted on both loans, Veristone later acquired title to the property in a trustee's sale auction. Veristone filed a lawsuit against Campbell and Kerrigan, alleging that its deed of

trust was superior to Kerrigan's, and Kerrigan filed counterclaims.[1] The trial court ruled on cross motions for summary judgment that Kerrigan's deed of trust was superior to Veristone's.

We hold that although Campbell had only an inchoate interest in the property between the initial 2016 sale and May 10, 2017, when the sheriff's deed was recorded, once Veristone quitclaimed 100 percent of its interest to Campbell on May 12, Kerrigan's deed of trust attached to the property under the doctrine of after-acquired title. We also hold that Kerrigan did not have constructive notice of Veristone's superior interest in the property at the time she recorded her deed of trust on May 8. Thus, we hold that the trial court did not err by ruling that Kerrigan's interest is superior to Veristone's, and by granting Kerrigan's motion for summary judgment and denying Veristone's motion for summary judgment. We affirm the trial court's orders.

FACTS

I. The Veristone/Campbell Initial Purchase

On November 21, 2016, Veristone and Campbell purchased the subject property at a sheriff's sale for $36,813.61, with Veristone fully funding the purchase. On January 9, 2017, Campbell executed a promissory note in favor of Veristone in the amount of $32,965.09 (Veristone note). As a condition of the Veristone note, Campbell agreed not to "encumber, pledge, mortgage, hypothecate, place any lien, charge or claim upon, or otherwise give as security the property or any interest therein . . . without the written consent of [Veristone]." That same day, Campbell secured repayment of the Veristone note by executing a deed of trust naming Veristone as the

[1] The trial court entered a default judgment against Campbell when he did not respond to the complaint and summons, and ruled that Campbell did not have legal title to the property when he sought to encumber it with the Kerrigan deed of trust.

beneficiary. On March 7, 2017, the sheriff's certificate of sale was recorded with the Lewis County Auditor, but it does not contain any language regarding the respective interests of Veristone and Campbell. CP at 20-22.

II. KERRIGAN NOTE AND DEED OF TRUST

In March or April of 2017, Campbell approached Kerrigan about a loan. He informed her that he had recently purchased the subject property, but he did not mention Veristone's interest in the property. Kerrigan agreed to make a personal loan of $25,000 to Campbell out of her retirement funds. On April 14, Campbell executed a promissory note in favor of Kerrigan (Kerrigan note) in the amount of $25,000. On April 19, Campbell secured repayment of the Kerrigan note by executing a deed of trust to the subject property, naming Kerrigan as the beneficiary (Kerrigan deed of trust).

III. RECORDING OF DEEDS

On May 8, 2017, the Kerrigan deed of trust was recorded.[2] On May 10, the sheriff's deed transferring title to Veristone and Campbell was recorded. On May 12, Veristone executed a quitclaim deed in favor of Campbell, conveying 100 percent of its interest to Campbell, and that deed was recorded that same day. Veristone then recorded Campbell's deed of trust on the same day, May 12.

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[2] Kerrigan re-recorded the Kerrigan deed of trust on May 15 to correct a scrivener's error in the loan amount.

Campbell failed to pay either loan and ultimately was found in default. In November 2017, at a trustee's sale auction, Veristone purchased the property, resulting in a trustee's deed conveying the property to Veristone.[3]

IV. Veristone's Complaint, Kerrigan's Counterclaims, and Summary Judgment

Veristone filed a lawsuit against Kerrigan and Campbell on November 27, 2017, seeking declaratory judgment and quiet title, claiming that its interest was superior to Kerrigan's. Kerrigan filed counterclaims. Both parties filed cross motions for summary judgment. Veristone argued that the Kerrigan deed of trust had no effect because Campbell only had an inchoate interest after the initial 2016 purchase, and thus he had no interest in the property to encumber on May 8, 2017, when Kerrigan recorded her deed of trust. Kerrigan argued that although Campbell's initial interest was inchoate after the initial 2016 purchase, once Veristone quitclaimed all of its interest to Campbell on May 12, Kerrigan's interest attached to Campbell's interest in the property under the doctrine of after-acquired title. And Kerrigan argued that because she recorded her deed of trust first on May 8, before Veristone recorded its deed of trust on May 12, her interest was superior to Veristone's.

The trial court ruled that Kerrigan's interest was superior, and it granted Kerrigan's cross-motion for summary judgment and denied Veristone's motion. Veristone appeals the trial court's summary judgment orders.

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[3] Campbell never responded to the complaint and summons, and a default order and judgment was entered against him. Because Campbell defaulted on both the Veristone note and the Kerrigan note, the property was sold to Veristone at a trustee's sale auction on March 30, 2018. Kerrigan did not participate in the action as she believed that she had a first lien position and foreclosures do not affect higher priority liens.

ANALYSIS

I. STANDARD OF REVIEW

We review a superior court's summary judgment order de novo, performing the same inquiry as the superior court and viewing all the facts and reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

II. PRIORITY OF INTEREST

Veristone argues that Campbell only held an inchoate interest from the initial 2016 purchase to May 10, 2017, when the sheriff's deed was recorded. Thus, Veristone argues that Campbell had no title interest to convey to Kerrigan when he encumbered the property and her recording of the Kerrigan deed of trust on May 8, had no effect. We agree that Campbell's interest from the initial 2016 purchase of the property until May 10 was inchoate. However, as we discuss below, the doctrine of after-acquired title applies here, and once Veristone quitclaimed all of its interest in the property to Campbell, Kerrigan's deed of trust attached to the property. Because Kerrigan recorded her deed of trust first, her interest was superior to Veristone's.

A. DOCTRINE OF AFTER-ACQUIRED TITLE—RCW 64.04.070

Kerrigan argues that when Veristone quitclaimed all of its interest to Campbell on May 12, 2017, making Campbell the 100 percent owner, her deed of trust attached to the property under the doctrine of after-acquired title. We agree.

The doctrine of after-acquired title is set forth in RCW 64.04.070:

> *Whenever* any person or persons having sold and conveyed by deed any lands in this state, and who, at the time of such conveyance, had no title to such land, and any person or persons who may hereafter sell and convey by deed any lands in this state, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a title to such lands so sold and conveyed, *such title shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered*, and to his or her and their heirs and assigns forever.

(Emphasis added). This doctrine applies when a person conveys property by deed to a second person but has no title to that property, and the conveyor subsequently acquires title to the property. *See In re Estate of Frank*, 146 Wn. App. 309, 320, 189 P.3d 834 (2008) (citing 17 W.B. Stoebuck and J.W. Weaver, WASHINGTON PRACTICE: REAL ESTATE PROPERTY LAW § 7.8 at 485 (2d ed. 2004). In that situation, title immediately vests in the second person. Stoebuck and Weaver, at 485. The doctrine of after-acquired title applies to title conveyed by sheriff's deed. *Gough v. Center*, 57 Wash. 276, 278-79, 106 P. 774 (1910).

Here, Campbell conveyed title to the subject property to a trustee by deed of trust, with Kerrigan as the beneficiary. At that time, Campbell arguably had no interest in the property to encumber with a deed of trust because he contributed nothing to the purchase of the property. *See Cummings v. Anderson*, 94 Wn.2d 135, 140, 614 P.2d 1283 (1980) ("[W]hen . . . it is shown that [purchasers] contributed unequally to the purchase price, a presumption arises that they intended to share the property proportionately to the purchase price."). However, when Campbell subsequently obtained full title to the property through Veristone's quitclaim deed, Kerrigan's deed of trust immediately attached to the property. RCW 64.04.070. Therefore, the Kerrigan deed of trust attached to the property before Veristone recorded its deed of trust.

Veristone argues that the doctrine of after-acquired title does not apply because it transferred title to Campbell by quitclaim deed. This argument is misguided. RCW 64.04.050 states that a quitclaim deed does not extend to after-acquired title unless that intention is expressly stated in the deed. Therefore, the doctrine of after-acquired title does not apply to a quitclaim deed. *Brenner v. J.J. Brenner Oyster Co.*, 48 Wn.2d 264, 267, 292 P.2d 1052 (1956) ("*Every* quitclaim deed conveys to the grantee whatever present interest the grantor has."). However, this rule would only apply if Veristone acquired interest in the property after it executed the quitclaim deed, and Campbell was claiming title to that property. It does not apply to Campbell's after-acquired property. Thus, we hold that the trial court correctly ruled that Kerrigan's deed of trust had priority over Veristone's deed of trust.

B. KERRIGAN CONSTRUCTIVE KNOWLEDGE

Veristone argues that Kerrigan's deed of trust cannot have priority because Kerrigan had constructive knowledge of Veristone's interest in the property based on the sheriff's certificate of sale, which was recorded on March 7, 2017. Kerrigan argues that she did not have constructive knowledge, and therefore, she qualifies as a bona fide purchaser. We agree with Kerrigan and hold that, on these specific facts, the sheriff's certificate of sale did not convey to Kerrigan notice of Veristone's interest in the property.

Whether a person is a bona fide purchaser is a mixed question of law and fact. *Levien v. Fiala*, 79 Wn. App. 294, 299, 902 P.2d 170 (1995). A bona fide purchaser is a "good faith purchaser for value, who is without actual or constructive notice of another's interest in real property purchased, [and] has a superior interest in the property." *Levien*, 79 Wn. App. at 298 (citing *Tomlinson v. Clarke*, 118 Wn.2d 498, 500, 825 P.2d 706 (1992)).

> "[[N]otice] need not be actual, nor amount to full knowledge, but it should be such information, from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry. . . . It follows, then, that it is not enough to say that diligent inquiry would have led to a discovery, but it must be shown that the purchaser *had, or should have had, knowledge of some fact* or circumstance which would raise a duty to inquiry."

Levien, 79 Wn. App. at 298 (alteration in original) (internal quotation marks omitted) (quoting *Paganelli v. Swendsen*, 50 Wn.2d 304, 308, 311 P.2d 676 (1957)).

"A bona fide purchaser of an interest in real property is entitled to rely on record title; the protection afforded him by the real property recording statute, RCW 65.08.070, is unaffected by the vendor's lack of good faith or by manners of which the vendor has notice." *Levien*, 79 Wn. App. at 299-300.

> Parties who delay recording their deeds to property until after another has recorded a deed to the same property have the burden of proving actual or constructive notice of their interest in property by the other, and if they fail to do so, their prior conveyance is void as against that party by virtue of RCW 65.08.070. On the other hand, recording of the earlier interest provides constructive notice.

Levien, 79 Wn. App. at 300 (internal citation omitted). Under *Levien*, Veristone has the burden of proving that Kerrigan had constructive notice of its interest in the property.

Here, the sheriff's certificate of sale was recorded on March 7, 2017, and Kerrigan's deed of trust was originally recorded on May 8. The sheriff's deed transferring title was then recorded on May 10. The sheriff's certificate of sale, issued and recorded on March 7, does not contain any detail about the respective interests of Veristone or Campbell in the property. On these specific facts, the sheriff's certificate of sale did not give Kerrigan constructive notice that Veristone had a superior interest. Nor did it give her notice that Campbell did not have a sufficient interest to be able to convey any interest to her.

Because Veristone failed to prove that Kerrigan had constructive knowledge of its interest in the property, we hold that the trial court correctly determined that Kerrigan was a bona fide purchaser of the property.

C. KERRIGAN'S INTEREST WAS SUPERIOR TO VERISTONE'S

Veristone argues that its interest in the property was superior to Kerrigan's. But based on the analysis above, the trial court correctly ruled that her interest was superior.

Washington's recording statute, RCW 65.08.070, states:

> A conveyance of real property . . . may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded.

RCW 65.08.070. "'The purpose of the recording statute is to make the deed first recorded superior to any outstanding unrecorded conveyance of the same property unless the mortgagee or purchaser had actual knowledge of the transfer not filed of record.'" *Kim v. Lee*, 145 Wn.2d 79, 86, 31 P.3d 665 (2001) (quoting *Tacoma Hotel, Inc. v. Morrison & Co.*, 193 Wash. 134, 140, 74 P.2d 1003 (1938)).

The Kerrigan deed of trust was recorded on May 8, 2017. The Kerrigan deed of trust attached to Campbell's 100 percent interest when Veristone quitclaimed all of its interest in the property to Campbell on May 12. *Performance Constr., LLC v. Glenn*, 195 Wn. App. 406, 416, 380 P.3d 618 (2016) ("a sheriff's certificate of purchase does not pass title, but is only evidence of an inchoate interest which may or may not ripen into title"). The Veristone deed of trust was not recorded until May 12, after the Kerrigan deed of trust was recorded. Because Kerrigan

recorded her deed of trust first, we hold that the trial court correctly ruled that Kerrigan's interest was superior to Veristone's, and thus, the trial court did not err by granting Kerrigan's motion for summary judgment and denying Veristone's motion for summary judgment.[4]

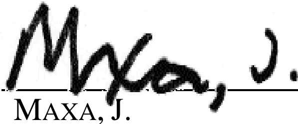
CONCLUSION

We affirm the court's orders on summary judgment.

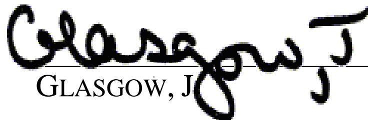
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

SUTTON, A.C.J.

We concur:



MAXA, J.



GLASGOW, J.

[4] Because we are affirming the trial court's order, we do not reach Kerrigan's argument regarding equitability.

OSERAN HAHN P.S.

June 04, 2020 - 11:20 AM

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