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 Rupp and 7HA

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I. INTRODUCTION

The Respondents' brief overlooks two (2) prevailing principles underlying the Deed of Trust Act—RCW 64.21.010 et seq. (herein the "DTA."). The legislative history is the first and the second is construction standard for the DTA:

1. ***Legislative History.***

The DTA, establishing the legality of non-judicial foreclosures in the State of Washington, is the product of a legislative compromise of what would be 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 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)....

27 Wash. Prac., Creditors' Remedies - Debtors' Relief § 3.35

2. ***Strict Construction of DTA in Borrower's Favor.***

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 trustee's 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, 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 (*Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn.2d 94 105, 297 P.3d 677 (2013); quoting *Udall v. T.D. Escrow Servs. Inc.*, 159 Wash.2d at 915-16) and, *Albice v. Premier Mortgages Services of Wash. Inc.*,

174 Wash.2d 560, 568, 276 P.3d 1277 (2012); citing *Udall* ("As we have already mentioned and held, under this statute, strict compliance is required.")).

Finally, a successor trustee in a non-judicial foreclosure may not exceed the authority vested in him or her by that statute. *Albice,* 174 Wash.2d at 560; *Schroeder*, 177 Wash.2d at 111-112.

II. REPLY

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

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

> [U]nder 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* foreclosed agricultural land under the DTA and doing so is unlawful—it must be foreclosed judicially. The trustee therefore had no authority to sell the agricultural land. 177 Wash.2d at 686. *Schroeder* also reinforced the principal that waiver does

not apply where the trustee's actions in a non-judicial foreclosure are unlawful.177 Wash.2d at 111-12. 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, 385, 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*, 174 Wn.2d at 560 (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." (emphasis added)

The cases cited by Respondent Rupp to justify Libey's 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 underlying debt itself, a claim that was known to the debtor *before* the non-judicial foreclosure was commenced. *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003), (citing *Cox v. Helenius*, 103 Wn.2d at 388) *cited in Albice v. Premier Mortgage, 170 Wash.2d 1029 (2011)).* A challenge to the underlying debt is *not* a "procedural irregularity."

In *Frizzell* v. *Murray*, 179 Wash. 2d 301, 297 P.3d 707 (2013), *Frizzell* obtained a TRO but failed to pay the bond 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 post sale 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.

Frizzell, 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 per RCW 61.24.130. However, a bond was not posted and the trustee's sale was held. *Frizzell, Id* at 305. The Supreme Court found

Frizzell waived her right to invalidate the sale. However, the Supreme Court held that *Frizzell* was not foreclosed from her other remedies:

> "Waiver only applies to actions to vacate the sale and not to damages actions."

Id at 309, citing *Schroeder*, 177 Wash.2d at 114, (quoting *Klem v. WAMU,* 176 Wash. 2d 771, 796, 295 P.3d 1179 (2013)).

Plein and *Frizzell* are also not on point because neither *Plein* nor *Frizzell* involved a "procedural irregularity," which is never subject to waiver. *Bavand* v. *OneWest Bank*, 176 Wash.App. 475, 497 (2013) (Without a valid appointment of a successor trustee in this case, the foreclosure and the sale that followed were wrongful because they were without statutory authority...). *Schroeder v. Excelsior Mgmt. Group, LLC,* 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 at 388 (1985). In *Albice*, the Supreme Court came to the same conclusion: "waiver ...cannot apply to all circumstances or types of post-sale challenges." 174 Wn.2d at 560 (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 next case cited by Rupp and 7HA is *Brown v. Household Realty Corp.* 146 Wash.App, 189 P.3d 233 (Div. 1,2008). Likewise, this case does not involve a "procedural irregularity." The trustee had the statutory authority to conduct the trustee's sale at all relevant times.

The *Brown* case was also partially overruled by *Frizzel.* The *Brown* case incorrectly held that waiver also applied to an action for damages. The Supreme Court held otherwise in *Frizzell*--waiver *only* applies to actions to vacate a sale following foreclosure.

The other case cited by Respondents Rupp and 7HA, *Hallas v. Ameriquest Mortgage Company*, 406 F. Supp. 1176 (D.OR. 2005), deals with an erroneous legal description, not a "procedural irregularity." This case was decided well before the *Frizzell* case. As stated above, *Frizzell* held that waiver only applies to actions to vacate a sale following foreclosure and not to damage actions, which the *Hallas* court dismissed on the grounds of waiver. Therefore, Uribe has the right to contest the unlawful actions of Respondent Libey, *post-sale*, without the necessity of seeking a TRO, keeping in mind that Uribe did file a Chapter 11 petition to challenge the debt and stay the foreclosure. RCW 61.24.130(4) and (5).

Furthermore, Uribe never had actual notice, as opposed to constructive 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(4) and (5), 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 the bankruptcy court entered an order granting relief from the stay upholding the debt.

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 is never subject to waiver.

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

[1] Respondent Libey continually argues that Uribe had actual notice of the procedural irregularity, without citation to any evidence, and failed to bring an action to restrain the sale. 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.

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....**

Albice v. Premier Mortgage, 170 Wash.2d at 572 (Emphasis added).

B. A "PROCEDURAL IRREGULARITY" IS NOT A "TECHNICAL VIOLATION" OF THE DTA, IT IS AN UNLAWFUL SALE.

Libey had *not* been appointed the trustee at the time he gave the Notice of Trustee's Sale. 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, or any provision in the DTA that gives retroactive effect to a notice given without the legal authority to do so.

Without citation to any authority, Rupp and 7HA argue a defect in a trustee's sale must be "substantial and prejudicial." The argument goes on that it would be unfair to vacate a sale to a third party, Rupp and 7HA, the property having already been "*sold*" once to the Bank of Whitman, and then to Rupp and 7HA, the parties who failed to carefully check the real property records and relied on their title insurer to do so. See: Section D, pg. 2, Responsive Brief.

The first case Rupp and 7HA cite in support of the "substantial and prejudicial" theory is *Amresco v. SPS Properties*, 129 Wash.App.532, 119

P.3d 884 (Div. 2, 2005). This case first states that strict compliance with the DTA is required and, second, prejudice must be shown. This case, however, does not deal with a "procedural irregularity," such as the one in the case at bar. *Amresco* dealt with a duly appointed trustee with the authority to conduct the trustee's sale giving the Notice of Trustee's Sale *less* than 90 days before the scheduled trustee's sale.

Rupp and 7HA also rely on *Vawter v. Quality Loan Serv. Corp.*, 707 F. Supp. 2d 1115 (W.D. Wa., 2010) for the proposition that the "error" of not being lawfully appointed the successor trustee while conducting entire foreclosure process, excluding the trustee's sale itself, caused the borrower no harm or prejudice and is, therefore, not actionable. *Vawter* was put into question by *Walker v. Quality Loan Service, Corp.*, 176 Wash. App. 294 (2013) and *Bavand v. OneWest Bank, F.S.B.*, 176 Wash. App. 475 (2013).

> The *Bavand* court noted that *Vawter* is distinguishable:
>
> ..... *Vawter* was decided before the Supreme Court's *Bain* decision. Second, we noted that the *Vawter* court relied on two other federal cases decided before the legislature enacted RCW 61.24.127 and that the *Vawter* court failed to take into account the plain language of this section of the Deeds of Trust Act. By amending RCW 61.24.127 in 2009, the legislature explicitly recognized a cause of action for damages for failure to comply with the Act.

Bavand, FN 77

> Third, we noted that the availability of causes of action under the Deeds of Trust Act could actually address some of the concerns expressed by the *Vawter* court regarding a rash of litigation under the Act, given the complication that the emergence of MERS has spawned.

Bavand, FN 80

> Finally, we held that, in contrast to the *Vawter* opinion, prejudice could be shown given the respondent's violations of the Deeds of Trust Act and the consequent effect on the appellant.

Bavand, FN 81

The *Bavand* concluded:

> Here, in addition to these reasons stated in *Walker* there is another reason to reject the analysis in *Vawter*. Our supreme court has repeatedly stressed that our courts must be mindful that the Deeds of Trust Act should be construed to further three basic objectives. They are: "(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles

Bavand, FN 82

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

Bavand, FN 84

Rupp and 7HA next cite *Galladora v. Richter*, 52 Wash. App. 778, 784, 764 P.2d 647 (Div.3, 1988). This case is inapposite and involves the forfeiture of a real estate contract, not a "procedural irregularity" under the DTA. No trustee is involved in forfeiting a real estate contract and there can never be a "procedural irregularity," as that term applies to the DTA.

Finally, Rupp and 7HA claim that Uribe had knowledge of the "procedural irregularity" and did nothing about it until after the trustee's sale. Again, Rupp and 7HA cite what appears to be a quote from a case on page 21 of their brief, but with no specific citation to authority. All that can be said is that Rupp, 7HA and Uribe *all* had constructive knowledge of the "procedural irregularity" because the relevant documents were recorded and each bears a time and date stamp.[2] Rupp and 7HA proceeded to purchase the property with constructive notice of the "procedural irregularity," relying on the title insurer to insure clear title.

C. RUPP AND 7HA ARE NOT BFP's

1. Rupp correctly frames the issue as to whether Rupp and 7HA are BFP's:

> By paying 1.28 million dollars for the property and *relying on the record title as offered by the title insurance company,* can Rupp claim the status of a bona fide purchaser?

Rupp's and 7HA's Responsive Brief, pg. 2 (emphasis added).

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[2] RCW 65.08.070 states: An instrument is deemed recorded the minute it is filed for record.

Rupp also correctly states the law as to how one obtains the status of a BFP:

> A bona fide purchaser is one who gives valuable consideration and *who is without actual or constructive notice* of another's interest in the property. A bona fide purchaser may rely on the record title as shown in the office of the County Auditor.

Rupp's and 7HA's Responsive Brief, pg. 11 (emphasis added).

But, Rupp candidly admits that their title insurance company erred by not catching the false notarization of the RAST and Libey's issuance of the Notice of Trustee's sale prior to being vested with authority to do so:

> The title insurance showed the property was free and clear of any other liens of the previous owner, Uribe. Rupp's title insurance policy showed no reference to any recorded lien or impropriety in the foreclosure proceedings.

Rupp's and 7HA's Responsive Brief, pg. 24 (emphasis added).

Then, Rupp goes on to conclude, without citation to any authority, that their reliance on their title policy cloaks them with BFP status, notwithstanding the title insurer's error:

> *Rupp's title insurance policy showed no reference to any recorded lien or impropriety in the foreclosure proceedings.* Rupp was absolutely entitled to rely on the record title and the Trustee's deed, which showed that as of December 30, 2010 record title belonged to the Bank of Whitman.

Rupp's and 7HA's Responsive Brief, pg. 24 (emphasis added).[3]

[3] "Why do Washington lawyers need to know how to use the index system when they hardly ever use it? Does not everyone in Washington rely upon title companies, who keep

The BFP doctrine ... "provides that a good faith purchaser for value, who is without actual or constructive notice of another's interest in the property purchased, has the superior interest in the property. Constructive notice exists if the prior interest is recorded." *Tomlinson v. Clarke*, 118 Wash.2d 498, 500, 825 P.2d 706 (1992). Moreover, a person who is examining recorded documents is deemed to see what was there to be seen:

> It is the law that every person must not only take notice of the exact contents of mortgages which are properly of record but also of such reasonable inferences as should be drawn therefrom.

Farmers' & Merchants' Bank of Walla Walla v. Small, 131 Wash. 197, 200, 229 P. 531 (1924).[4]

Rupp is asking this Court to set a precedent that reliance on a title policy is all it takes to be a BFP - even if the title insurer failed to see what should have been reasonably discovered, especially by a title insurer, or appreciate defects in documents recorded in connection with a deed of

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tract indexes, to search title? An important byproduct of the indexing system is "chain-of-title" reasoning, which courts use in resolving some of the most difficult recording-priority questions. Basically, chain-of-title reasoning assumes one is in the role of a title searcher who is using the total system of official records, of which the index is a critical part, and asks, 'What would have been reasonably discoverable by using the records as one in the position of the searcher was charged with using them'?" 18 WAPRAC § 14.6

[4] Accord *Chelan County v. Nykrem*, 105 Wash.App. 339, 358, 20 P.3d 416 (2001), ("A properly recorded instrument supplies constructive notice of the rights created by the instrument and of the recitals in the instrument." WASHINGTON REAL PROPERTY DESKBOOK § 34.4(3), (3d ed.1996)).

trust foreclosure. Such a precedent would be contrary to settled law as to who may be a BFP, and it would eviscerate the Washington Recording Act, RCW 65.08.

D. APPLICATION OF THE DOCTRINE OF IMPLIED RATIFICATION REVEALS LIBEY'S WILLFUL VIOLATION OF HIS FIDUCIARY DUTY AND DUTY OF GOOD FAITH TO URIBE

Rupp states at the beginning of his argument that:

> "Appellant Uribe bases his entire case against Rupp on the allegation that because the RAST was recorded two hours after the Notice of Trustee's Sales that the appointment of Libey as successor trustee was invalid."[5]

The quotation above states the obvious—the title insurer's own stated expertise as a title searcher and being the professional hired to discover what is reasonably discoverable failed to discover an obvious "procedural irregularity" that was reasonably discoverable from a review of the dated and timed stamped recorded documents and is, therefore, liable for its own negligence. Supra, 18 WAPRAC § 14.6. The title insurer's liability for its own negligence in no way prejudices Uribes' rights under the DTA. RCW 61.24.010(2) **explicitly** states, in part:

> ...***ONLY*** upon recording the appointment of successor trustee in each county in which the deed of trust is

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[5] See Rupp and 7HA Family, LLC's CORRECTED Responsive Brief to Appellant's Opening Brief at page 12.

> recorded, the successor trustee shall be vested with all powers of the original trustee.

(Emphasis added)

Furthermore, *Udall,* 159 Wn.2d at 915-916, cited in *Albice v. Premier Mortgage*, 170 Wn.2d at 568 states:

> 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.

Rupp also conveniently ignores additional irregularities in the trustee's sale such as false notarization of the RAST, which is a crime is this state:

> C. Predating notarizations
>
> Klem submitted evidence that Quality had a practice of having a notary predate notices of sale. This is often a part of the practice known as "robo-signing.".
>
> .....
>
> Quality suggests these falsely notarized documents are immaterial because the owner received the minimum notice required by law. 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.
>
> .....

> 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. In Washington:
>
> **Official misconduct—Penalty**
>
> (1) A notary public commits official misconduct when he or she signs a certificate evidencing a notarial act, knowing that the contents of the certificate are false. Official misconduct also constitutes unprofessional conduct for which disciplinary action may be taken.
> (2) A notary public who commits an act of official misconduct shall be guilty of a gross misdemeanor.

RCW 42.44.160;

According to Rupp and 7HA, the falsely notarized document is immaterial because it wasn't necessary. Obviously, Rupp and 7HA are oblivious of the sanctity of the notary seal. This argument is as vacuous as the argument Uribe's rights under the DTA are subject to divestment because the recording of the RAST was only two hours after the recording of the Notice of Trustee's Sale.

Rupp and 7HA also believe that Uribe ratified Libey's departure from the DTA against deficiency judgments (RCW 61.24.100) when Libey and the Bank of Whitman colluded to unlawfully apply a portion of the Franklin loan to the Benton loan and Libey's utter failure to give Uribe notice of the scheme. The Implied Ratification doctrine cited by Rupp

actually helps to highlight Libey's breach of his fiduciary duties, as trustee.

RCW 61.24.100(1) states that a deficiency judgment shall not be obtained on an obligation secured by a deed of trust against any borrower after a trustee's sale under that deed of trust. A deficiency judgment against a Borrower is possible only to the extent of a decrease in the fair market value of the property caused by the borrower's waste or the wrongful retention of rents. RCW 61.24.100(3)(a)(1). The remaining exception to the general rule prohibiting a deficiency judgment against a borrower is RCW 61.24.100(3)(b) where one (1) obligation is secured by multiple deeds of trust. None of those situations present themselves here.

Notwithstanding the absence of any situations that would allow a deficiency judgment, Libey, after fully satisfying the Franklin obligation, transferred some $900,000 from the Franklin "deficiency" to the Benton obligation, in violation of RCW 61.24.100.

As stated earlier, it is perfectly clear that Washington law requires a foreclosing trustee to strictly comply with *all* provisions of the Deeds of Trust Act. *See e.g.; Schroeder v. Excelsior Management Group, LLC*, 177 Wash.2d 83,111, 297 P.3d 677 (2013) ("it is well settled that a trustee in foreclosure must strictly comply with the statutory requirements."),

Bavand v. OneWest Bank, 176 Wash.App. 475,487 309 P.3d 636 (Div. 1, 2013) ("The only reasonable reading of this statute [RCW 61.24.010(2)] is that the successor trustee must be properly appointed to have the powers of the original trustee").

Rupp and 7HA contend in the face of the unambiguous language of RCW 61.24.010(2) that: "Libey as Successor Trustee, ratified the act of filing the Notice of Trustee's sale by his subsequent actions."[6] In other words, Rupp is merging Libey into both the principal and the agent and claiming that Libey's subsequent, unlawful acts ratified his violation of the statute. The analysis of Implied Ratification might end here because it is axiomatic that an agency is created by the actions of *two* parties. *See*: *Matsumura v. Eilert*, 74 Wash.2d 362, 368, 444 P.2d 806, 810 (1968). Libey, however, cannot be his own agent and ratify his own, unlawful actions during the foreclosure.

The Washington case Rupp and 7HA cite, *Barnes v. Treece*, 15 Wash. App. 437, 549 P.2d 1152 (Div.1, 1976), is inapplicable, *Treece* involved a principal, a punchboard corporation, and its agent, the vice president of the corporation. The vice president publically stated in a speech to the Gambling Commission that he would pay $100,000 to

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[6] See Rupp and 7HA Family, LLC's CORRECTED Responsive Brief to Appellant's Opening Brief at page 25.

anyone who could find a crooked (illegal) punchboard. *Barnes*, a former bartender, just so happened to have two illegal punchboards the he had purchased years earlier. He brought them to the corporation and demanded the $100,000, but the corporation and vice president refused. *Id* at 438-440.

The issue was whether the corporation vested the vice president with apparent authority to bind the corporation to a unilateral contract because of its implied ratification of the contract. *Id* at 442. The court first noted that implied ratification is a question of fact. The court then stated the elements of Implied Ratification:

> An implied ratification can arise if the corporate principal, with full knowledge of the material facts, (1) receives, accepts, and retains benefits from the contract, (2) remains silent, acquiesces, and fails to repudiate or disaffirm the contract, or (3) otherwise exhibits conduct demonstrating an adoption and recognition of the contract as binding.

Id at 443.

As stated, Implied Ratification is only relevant to determine whether a principal is liable for the contract made by his agent. Implied ratification is inapplicable to this case,which is not about a contract between Libey and Uribe-it's about Libey's violation of the DTA.

The 5th Circuit case cited by 7HA and Rupp, *Halliburton Company Benefits Committee v. Graves*, 463 F.3d 360 (5th Cir. Tex. 2006), rehearing

in banc denied, 479 F.3d 360 (2007), does not support Rupp's and 7HA's assertion that Libey can ratify his own unlawful acts. In this case a corporation was held to be liable on a contract missing a required signature by ratification, because the shareholders approved the contract and corporation performed its obligations under the contract for five years. This case is about a corporation ratifying its officers' actions, not a single individual ratifying his own acts.

The Implied Ratification Doctrine does, however, help to illustrate one of Libey's most serious violations of the DTA. That is, the violation of his fiduciary duty to Uribe by acting as the bank's agent and advocate throughout the foreclosure process. A deed of trust:

> "is a statutorily blessed three-party transaction in which land is conveyed by a borrower, the 'grantor,' to a 'trustee,' who holds title in trust for a lender, the 'beneficiary,' as security for credit or a loan the lender has given the borrower."

Klem v. WAMU, 176 Wash.2d 771, 782, 295 P.3d 1179 (2013).

> ...[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.
> ...
> The trustee is bound by his office to present the sale under every possible advantage to the debtor as well as to the creditor. He is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike. (Cites Omitted)

Cox v. Helenius, 103 Wash.2d 383, 389, 693 P.2d (1985).

"Because a deed of trust foreclosure is a nonjudicial proceeding, the trustee's fiduciary duty to the debtor is 'exceedingly high." *Meyers Way Dev. Ltd. P'Ship v. University. Sav. Bank* 80 Wash.App. 655, 665, 910 P.2d 1308 (1996) (quoting *Cox,* 103 Wash.2d at 388–89).

Libey also obtained an indemnity agreement from BW. This triggers heightened judicial scrutiny to determine if Libey breached his fiduciary duties to Uribe. Id at 666.

Libey's failure to exercise his independent discretion as an impartial third party with duties to both BW *and* Uribe is well illustrated in an e-mail accompanying the indemnity agreement Libey sent to BW.

> 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.* ……..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… …*

CP 0491- 0493. (Emphasis added).

It is plainly evident from the email that Libey is acting as the agent and advocate for BW to the detriment of Uribe. Libey is concocting a scheme to violate RCW 61.24.100 by illegally bidding part of the Franklin

loan to the Benton foreclosure sale. This is a clear breach of the statutory duty of good faith and the fiduciary duty owed by Libey to Uribe. Libey knew that adding the Franklin debt to the Benton debt was likely unlawful, so he demanded an indemnity agreement. Finally, none of this was known to Uribe because Libey did not disclose this to him. See *Cox v. Helenius*, 103 Wash.2d at 389-90; and RPC 1.7(b).

Libey acted as trustee throughout the foreclosure even after he recognized the direct conflict of interest regarding his duties to Uribe. In doing so he violated the Rules of Professional conduct. See: WSBA Ethics Advisory Opinion 926 (1986). The consequence is a void sale. See, *Cox v. Helenius* 103 Wash. 2d at 388.

E. OPPOSITION TO RUPP's MOTION TO STRIKE ARGUMENT CONCERNING URIBE'S BANKRUPTCY FILING

Rupp and 7HA mistakenly argue that this is the first time Uribe argued that their bankruptcy filing resulted in an automatic stay and this prevents raising this issue on appeal. This assertion is incorrect.

Uribe moved for partial summary judgment against Libey, Rupp and 7HA. Uribe replied to both defendants in "Plaintiffs' Rebuttal Brief in Support of Plaintiff's Motion for Summary Judgment." CP 1515-1520.

Rupp and 7HA simultaneously noted their own motion for summary judgment against Uribe and Uribe responded with "Plaintiffs'

Memorandum in Opposition to Rupp's and 7HA's Motion for Summary Judgment." CP 1032-1056.

CP 1516-1517 of "Plaintiffs' Rebuttal Brief in Support of Plaintiff's Motion for Summary Judgment" squarely raises the argument that the Uribes never waived their right to contest the trustee's sale because they filed a Chapter 11 proceeding to prevent the foreclosure of the Bank of Whitman deed of trust. CP 1046 and 1047 of "Plaintiff's Memorandum in Opposition to Rupp's and 7HA's Motion for Summary Judgment" squarely raises the same argument. Consequently, the motion to strike should be denied.

III. CONCLUSION

For the reasons cited above, waiver is inapplicable and Rupp and 7HA are not BFP's. Rupp and 7HA are not without a remedy, however. As they set forth in their opposition, their title insurer missed what was reasonably discoverable and Rupp and 7HA's recourse for the error is obvious.

Date: October 8th 2014

THE LANZ FIRM, P.S.:

By _____
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