

72915-2

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Court of Appeals  
Division I  
State of Washington

72915-2

No. 72915-2-I

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COURT OF APPEALS DIVISION ONE  
OF THE STATE OF WASHINGTON

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PODBIELANCIK, ROBERTA S.,

Appellant/Plaintiff,

v.

LPP MORTGAGE, LTD; DOVENMUEHLE MORTGAGE, INC.;  
NORTHWEST TRUSTEE SERVICES, INC.; MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC.; and Does 1-10,

Respondents/Defendants.

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**REPLY BRIEF OF APPELLANT**

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## **A. REPLY ARGUMENT**

### **1. Standard of Review**

1. Summary judgment is not proper unless the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c).

2. Because there are genuine issues of material fact and Respondent is not entitled to summary judgment as a matter of law, Respondent should be precluded from receiving summary judgment and the trial court's order should be overturned for the reasons set forth herein.

### **2. The Stenman Declaration Was Not Admissible**

1. The Declaration of Jeff Stenman refers to NWTS' business records as the basis for his testimony that the Rules of Auction were read prior to calling the sale and that the sale did indeed take place (as stated above, "NWTS' business records contain a sworn declaration signed by on-site sale agent Vincent Wheaton, formerly employed by Foreclosure Expeditors/Initiators, LLC ("FEI"). According to the declaration, the "Rules of Auction," Which stated an opening bid amount, were read prior to the Property sale.") CP 287-288.

2. Respondent relies heavily on the decision in *American Express Centurion Bank v. Stratman*, for the admissibility of an employee

declaration expressing the contents of business and financial records. (RB 20) What Respondent ignores is that in the *Stratman* case, the actual business records were provided in support of the motion for summary judgment, Lavarta is an American Express employee who had personal knowledge of how American Express's records were kept. His declaration indicated that the account statements were kept in the ordinary course of American Express's business and the transactions within them were recorded at the time of occurrence. The documents were properly admitted.” *American Express Centurion Bank v. Stratman*, 292 P.3d 128, 172 Wn.App. 667, 675 (Wash.App. Div. 1 2012) Here, the business records referenced in the declaration of Jeff Stenman, namely, NWTs’ business records containing a sworn declaration signed by on-site sale agent Vincent Wheaton, were never provided and altogether missing from the case record.

3. Respondent cites the business record exception to hearsay, which provides that, “[a] record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its

admission.” *Id.* The business record exception applies to the record itself and declarant merely lays the foundation for its admissibility. No “record of the act,” indicating that the “Rules of Auction” were followed or that Vincent Wheaton continued the sale to 2:00 p.m. by public proclamation accompanied the Declaration of Jeff Stenman; in turn the business record exception does not apply and, absent an alternate exception to the hearsay rule, none of which have been pled by Respondent, the Declaration of Jeff Stenman was improperly considered by the trial court in granting summary judgment.

**3. The Trustee’s Sale Was Not Properly Conducted**

**a. The Postponement Was a Violation of the DTA**

1. Respondent contends that the argument presented by Podbielancik is a “slippery slope, whereby a sale held after other properties are called, at 11:00 a.m. or 11:30 a.m. for instance must result in invalidation because it did not take place precisely at 10:00 a.m. as set forth in the recorded notice”. Brief of Respondent at 16-17. This is a mischaracterization of Podbielancik’s argument.

2. Appellant agrees that for obvious logistical reasons a sale scheduled for 10:00 a.m. need not take place at precisely 10:00 a.m., but at issue here is that not only was the sale postponed until after 2:00 p.m., after the 10:00 a.m. bidding session had ended, but there was never a

public announcement of the continuation or any announcement regarding the property whatsoever. Podbielancik stated in her declaration that she was “[p]resent for the entire time of the auction,” and, “at no time did [she] hear the name of the owner or . . . the description of the property called by any of the FEI LLC agents acting as ‘auctioneers.’”. CP 69.

3. Respondents have not presented any evidence contradicting Podbielancik that shows the postponement of the sale was announced at the auction, or that potential bidders for the property were in any way made aware that the sale would be continued until later in the day. The declaration of Jeff Stenman states “On January 4, 2013, the Property sale was scheduled for 10:00 a.m. that day, but NWTs instructed the on-site auction agent to hold sale until after 2:00 p.m. Sales are often held to after 2:00 p.m. in order for NWTs to review information concerning the foreclosure process. NWTs’ business records contain a sworn declaration signed by on-site sale agent Vincent Wheaton, formerly employed by Foreclosure Expeditors/Initiators, LLC (“FEI”). According to the declaration, the “Rules of Auction,” Which stated an opening bid amount, were read prior to the Property sale.” CP 287-288.

4. Respondent requests that the Court should find that the delay “amounted to a discretionary continuance of the sale within the meaning of RCW 61.24.040(6)”. However, the RCW in question

explicitly states that the Trustee, “may . . . continue the sale for a period or periods not exceeding a total of one hundred twenty days by (a) a public proclamation at the time and place fixed for sale and if the continuance is beyond the date set for sale, by giving notice of the new time and place of the sale by both first class and either certified or registered mail, return receipt requested.” *RCW 61.24.040(6)*.

5. The statute specifically provides for same day continuances and makes clear that sales continued from the time designated in the notice may only be continued to a time later that same day by public proclamation. Respondents arguments, including the Declaration of Jeff Stenman, are completely void of any reference to a requisite proclamation to continue to the sale to 2:00 p.m. having been made; in turn, the sale was unlawfully consummated at 2:02 p.m. CP 287.

6. In their response brief, respondents refer to analogy used by the trial judge during oral argument, “court rules do not compel the execution of a continuance form simply because a hearing commences at a point later in the same day than what was originally calendared and noticed”. Brief of Respondent at 17. Podbielancik agrees the analogy to a court hearing is appropriate, but Respondents fail to properly apply it to this situation. If a court hearing was continued to later the same day, and the defendant, despite being in the courthouse at the appointed time for the

hearing, and sitting through all the other cases on calendar for that hearing time, was never informed of the continuance, then a hearing occurring several hours after the court session ended, where the plaintiff and the judge were the only ones in attendance, would be a gross miscarriage of justice.

**b. The Trustee's Sale Was Invalid**

1. Respondents cite a number of cases but ignore vital difference between the cases cited and the present issue. Respondents cite *Colo. Structures v. Blue Mtn. Plaza*, which provides "Absent prejudice from [an] error, a challenge arising from a presale defect is waived if the party does not seek to enjoin the sale." Respondents' Brief at 18-19. Here, any assertion of waiver for failing to enjoin the sale is wholly inapplicable given the acts occurred at the time of sale. Failure to call the sale at the time designated in the notice or to continue the sale by public proclamation could not have been known by Appellant in time to file an action and enjoin the sale.

2. Appellant is under no obligation to establish prejudice in order to void the sale given the volitional act or technical error in no way can be corrected absent invalidation of the sale. Given the trustee's formal error is uncorrectable, Appellant should not be required to establish prejudice to find the sale invalid.

3. Respondents also rely heavily on *Koegel v. Prudential Mut. Sav. Bank* and *Udall v. T.D. Escrow Servs., Inc.* However, the Washington State Supreme Court recently ruled in *Albice v. Premier Mortg. Services of Washington, Inc.*, a case very similar to this one, while also citing those same two cases, but came to a very different conclusion regarding strict compliance:

Because the [Deed of Trust] act dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111-12, 752 P.2d 385 (1988). The procedural requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030 and RCW 61.24.040. Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale. *Udall*, 159 Wn.2d at 911.

*Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560 (Wash. 2012).

4. The ruling in *Albice* also relied on the interpretation of RCW 61.24.040(6), and the court found that “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.” *Albice*, 174 Wn.2d at 569. The Court held that because of the necessarily strict interpretation of violations of RCW 61.24.040(6), the trustee’s violation of that specific statute resulted in their having no authority to conduct the sale and the sale was invalidated.

#### **4. LPP’s Bidding Was Deceptive**

1. Podbielancik does not dispute the assertion made by Respondent that beneficiaries are allowed to utilize credit bids, or that a credit bid need not be in the full amount of the obligation. Brief of Respondent at 20-21. The issue raised by Podbielancik is whether the beneficiary can cause a “minimum bid” amount to be made publically available when the beneficiary never intends to bid that amount at the sale.

2. Respondent asserts that the minimum bid was not made available to the public by Respondents, but by Vestus, a third-party investment group, and that Vestus also stated that LPP intended to step-bid up to that amount. Brief of Respondents at 21. LPP’s intention to step-bid was not included in the material made available by Vestus. CP 67. In addition to the Vestus report, the “minimum bid” amount was also made available online by NWTs. CP 294. Even if Respondents did not make the

bidding information available to the public themselves, they provided the information to the third-parties that did, with full knowledge that the information would be provided to the public.

3. Respondent also cites *Country Exp. Stores, Inc. v. Sims* in reference to chilling the bidding, stating the case reflected “this precise subject”. Brief of Respondent at 23. While the case in question does deal with issue of chilling the bidding at a trustee’s sale, there is no issue in *Sims* of whether the sale was properly called, as is at issue here. The question of whether there were actual potential bidders present when the sale was called is therefore a moot point, as any potential bidders would, like Podbielancik, have no idea that the sale was continued to a later time and therefore would be unable to be present at the sale.

4. The court in *Country Exp. Stores, Inc. v. Sims* also stated, “To establish chilled bidding, the challenger must establish the bidding was actually suppressed, which can sometime be shown by an inadequate sales price.” 87 Wn. App. 741, 748-49, 943 P.2d 374 (1997), *citing* G. Nelson & D. Whitman, *Real Estate Finance Law* § 7.21 (3d ed, 1994). In this instance, the sales price of the property was inadequate. Not only was the sales price of \$280,000 just fifty-five percent of the minimum bid, it was \$70,000 less than the fair market value of the property itself, according to Respondents. CP 267.

5. As demonstrated, Respondents representations regarding the minimum bid were deceptive and the trial court's summary judgment order should be overturned.

**5. Podbielancik Was Injured by Respondent**

**a. All Elements of CPA Are Met**

1. Respondents state that Appellant "fails to present any appellate argument on the public interest prong of the CPA test". Brief of Respondents at 26. However, fully Podbielancik explained the issue of public interest in the complaint filed with the superior court. CP 25, 27, 28.

2. Respondents cite the Washington Supreme court in *Panag v. Farmers Ins. Co. of Washington* to show Podbielancik failed to state a damage or causation in relation to the CPA claim, but fail to mention that the court in *Panag* also ruled "[T]he Injury requirement is met upon proof the plaintiff's property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal". *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 64, 204 P.3d 885 (2009). Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA. *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294,

320, 308 P.3d 716 (2013). Podbielancik suffered similar damages and asserted that they were caused by Respondents. CP 14-15.

**6. The Independent Duty Doctrine Does Not Apply**

1. Respondents contend that the Independent Tort Duty doctrine bars recovery in this case because they were enforcing a contractual default remedy, a non-judicial foreclosure sale, contained in contractual agreements entered into by predecessors to their interest and therefore only contractual remedies are available.

2. However, Appellant is incorrectly applying the doctrine because the Respondents breached duties which were independent of the contracts. Appellant alleged Intentional Misrepresentation, Negligent Misrepresentation and Negligence against all Appellants. CP 17-23. The misrepresentation allegations claim that Respondents NWTS and LLP either, knowingly and intentionally, or alternatively, negligently, misrepresented to the public that her property would be sold at public auction and the minimum bid to purchase the property would be \$500,429.00. CP 17-23. The allegations that MERS, LPP and Dovenmuehle had a duty of ordinary care in conducting a statutory non-judicial foreclosure are independent of the reason (contract) they chose to do so. NWTS violated an express duty, the duty to exercise good faith, which is provided for in the RCWs, “trustee or successor trustee has a duty

of good faith to the borrower, beneficiary, and grantor”. RCW 61.24.010(4). Clearly, NWTs cannot avoid tort liability when it is alleged they committed an intentional tort violating a statutory duty.

3. The Supreme Court in *Eastwood v. Horse Harbor Found., Inc.* made the application of the doctrine clear. First it pointed out that “an injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract . . . and, the existence of a duty . . . depends on mixed considerations of logic, common sense, policy and precedent.” *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 389, 241 P.3d 1256 (2010). When a remedy is provided for in a contract, and a party exercising that remedy deliberately misrepresents the amount due to purchase the property at sale, it is breach of a tort duty that is independent of the contractual obligation.

#### **7. Podbielancik Should Receive Attorneys’ Fees and Costs**

1. RCW 19.86.090 states that in a claim for damages under the CPA, a plaintiff can recover actual damages, including attorney’s fees. Violations of the CPA also applies to appeals. *Sherwood v. Bellevue Dodge, Inc.*, 35 Wn. App. 741, 669 P.2d 1258 (1983).

2. Under RAP 18.1(a), if applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before . . .

the Court of Appeals . . . the party must request the fees or expenses as provided in this rule”.

3. RAP 14.2 also allows the appellate court to “award costs to the party that substantially prevails on review.

4. Podbielancik, upon prevailing in this appeal, should be awarded attorneys’ fees and costs.

**B. CONCLUSION**

Appellant requests that this Court reverse the trial court’s order granting summary judgment to Defendants on all causes of action stated in Podbielancik’s complaint.

August 4, 2015

Respectfully Submitted,

/s/ John. A. Long  
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**CERTIFICATE OF SERVICE**

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on August 5, 2015, I caused service of the foregoing on each and every attorney of record herein:

**VIA FIRST CLASS U.S. MAIL**

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DATED this 5<sup>th</sup> day of August, 2015 at Issaquah, Washington.

/s/ John A. Long

John A. Long  
WSBA No. 15119