

No. 45605-2-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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RES-WASH ONE, LLC, a Florida limited liability company,

Appellant,

v.

MARK HINTON and JONI HINTON, husband and wife, and the marital  
community comprised thereof,

Respondents.

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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

This lawsuit arises out of a transaction involving the purchase and financing of a parcel of real property and raises the issue of whether a party who is not in title to a particular parcel of property can grant a trust deed covering it. Appellant is the successor in interest to the lender, and Respondents are guarantors of the loan granted to finance the purchase. Central to the issues in dispute is a mistake that occurred at the time of closing both the purchase and the loan in 2005, which no one discovered for several years. At the time of the closing, the deed to the property was transferred to the purchaser, Hinton Development Corporation (“HDC”), but a trust deed to the property, which was executed in the same closing and recorded at the same time, was granted by Mark and Joni Hinton (the “Hintons”). Obviously, the Hintons’ trust deed could not attach to property they did not own.

More than three years after the purchase, someone crossed out HDC’s name on a copy of the deed to the property and wrote in the names of the Hintons, after which the escrow officer who handled the original escrow re-recorded the revised deed.

In 2011, unaware that the trust deed granted by the Hintons had not attached to the property, Appellant conducted a non-judicial

foreclosure. Appellant assumed that the foreclosure was effective and resulted in a deficiency between the amount of the debt to Appellant and the amount bid at the foreclosure sale. Appellant thereafter commenced this lawsuit against the Hintons and Hinton Industrial Contractors, Inc. (“HICI”) as guarantors to recover the deficiency. After learning about the title problem, Appellant sought to amend its complaint to, among other things, have the non-judicial foreclosure declared invalid, add HDC as a party, add a claim for judicial foreclosure of the trust deed, and increase the amount of damages against the Hintons on their guaranties from the deficiency to the full amount of the debt.

The Hintons moved for partial summary judgment arguing that they had granted the trust deed to secure their guaranties and that any deficiency against them was therefore limited by RCW 61.24.100(3)(a)(i) and 61.24.100(6) to a claim for waste or diverted rents. Appellant filed a cross-motion for summary judgment on similar issues.

The trial court granted the Hintons’ summary judgment motion and denied Appellant’s cross-motion, but without providing any explanation for its rulings. However, underlying its ruling is the necessary predicate that there was a valid foreclosure, which predicate in turn is necessarily based on the assumption that the Hintons individually, not HDC, are the grantors on the trust deed that attached to HDC’s property. In addition,

and, again, without any explanation, the trial court denied Appellant's motion to amend. Following its ruling, the trial court entered a final judgment in which it awarded the Hintons their costs and attorney fees.

There are a number of errors in the trial court's rulings. First, the necessary bases to support the trial court's rulings – (i) that the Hintons were the grantors under the trust deed, (ii) that the trust deed attached to the property, and (iii) that there was valid foreclosure – are inherently inconsistent with its ruling that a deficiency judgment against the Hintons is limited by RCW 61.24.100(3)(a)(i) and 61.24.100(6). If the Hintons were the grantors of the trust deed, then the trust deed never attached to the property that was owned by HDC. As a consequence, the non-judicial foreclosure of the trust deed was ineffective and no deficiency could result. Because the foreclosure was ineffective, it follows that the Hintons are liable on their guaranties, not for a deficiency, but for the full amount of the debt.

The second error in the trial court's ruling was its denial of Appellant's motion to amend its complaint. The court's denial of the motion to amend was necessarily based on false predicates – that the Hintons' trust deed attached to HDC's property and that the non-judicial foreclosure was valid.

The third error in the trial court's ruling was its necessary conclusion that the Hintons' trust deed, even if it was valid and even if it attached to HDC's property, was granted by the Hintons to secure their guaranties. The trust deed was not given to secure their guaranties. The Hintons' guaranties, while securing all future indebtedness, were granted in connection with other transactions and were not secured by the trust deed.

The fourth error in the trial court's ruling was its failure properly to recognize that both the guaranties and the trust deed contained provisions expressly waiving the application of any anti-deficiency statutes. Hence, even if the trust deed attached to the property, which it did not, and even if it secured the guaranties, which it did not, Appellant was still entitled to a judgment against the Hintons for the full amount of the deficiency.

As a result of its ruling, the trial court awarded the Hintons their costs and attorney fees and approved an amount of fees that was excessive.

The trial court's rulings must be reversed, the final judgment set aside, and the case sent back to the trial court with instructions that the trust deed and the non-judicial foreclosure were invalid and that Appellant's motion to amend must be granted.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Defendants Mark Hinton and Joni J. Hinton's Motion for Partial Summary Judgment and Alternative Motion for Revision. (CP 752-754, 761-763.)
2. The trial court erred in denying Plaintiff's Cross-Motion for Partial Summary Judgment and Findings of Fact Under CR 56(d). (CP 752-754, 761-763.)
3. The trial court erred in denying Plaintiff's Motion to Amend Complaint and to Add Additional Party. (CP 752-754, 761-763.)
4. The trial court erred in entering the Final Judgment. (CP 758-759.)
5. The trial court erred in granting Defendants Mark Hinton and Joni J. Hinton's Motion for Award of Attorneys Fees and Costs. (CP 758-759.)
6. The trial court erred in the amount of attorney fees it awarded to the Hinton's. (CP 911-914.)<sup>1</sup>

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<sup>1</sup> See note 10 *infra*.

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Was there a valid foreclosure of the property that could serve as the basis for limiting a deficiency award against the Hintons under the non-judicial foreclosure statutes?
2. Did the trial court err in denying Plaintiff's motion to amend its complaint?
3. Even if the non-judicial foreclosure of the trust deed was valid, did the trust deed secure the Hintons' guaranties?
4. Even if the non-judicial foreclosure of the trust deed was valid, did the Hintons waive application of any anti-deficiency statute?
5. Did the trial court err in granting the Hintons their attorney fees and costs?
6. Even if the Hintons were entitled to an award of attorney fees, did the trial court err in the amount that it awarded to them?

### **IV. STATEMENT OF THE CASE**

#### **A. Background Facts**

##### **1. The Property Sale**

On August 5, 2004, HDC entered into a Purchase and Sale Agreement and Receipt for Earnest Money (the "Earnest Money

Agreement”) with E.G. Kassab Companies (“Kassab”), by which HDC agreed to purchase from Kassab a parcel of real property of approximately 8.13 acres in Battle Ground, Washington (the “Property”).<sup>2</sup> (CP 380-381, 385-403.)

## **2. The Loan, the Deed and the Trust Deed**

HDC obtained a loan (the “Loan”) of \$1,760,000.00 from The Bank of Clark County (“BOCC”) to finance the purchase, and on November 23, 2005, the Property sale and the BOCC Loan were closed (the “Closing”) with Fidelity National Title Insurance Company (“Fidelity”) serving as the escrow agent. The parties executed various documents in connection with the Closing, including the following:

- Kassab executed a Statutory Warranty Deed (the “Kassab Deed”) vesting title to the Property in HDC (CP 380-381, 404);
- HDC executed a Promissory Note (the “Note”) in the amount of \$1,760,000.00 made payable to BOCC in consideration for the Loan (CP 70-71, 75-78); and
- The Hintons executed a Deed of Trust (the “Trust Deed”) to secure the Note. The Trust Deed named the Hintons as the grantors and

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<sup>2</sup> The original Earnest Money Agreement listed both HDC and Recreational Design Services, LLC (“Recreational Design”) as the purchaser; however, HDC and Recreational Design subsequently entered into an Assignment of Contract Interest by which Recreational Design assigned to HDC all of its interest in the Earnest Money Agreement. (CP 409-410.)

BOCC as the beneficiary, and covered the Property described in the Kassab Deed (CP 70-71, 84-94).

On November 23, 2005, Fidelity recorded both the Kassab Deed and the Trust Deed. (CP 404, 84.)

### **3. The Guaranties**

Prior to obtaining the Loan, the Hintons had done other business with BOCC and, in connection with unrelated loans, had executed guaranties (the "Guaranties"). Specifically, on or about November 15, 1999, Joni Hinton executed a Commercial Guaranty (the "Joni Hinton Guaranty") by which she guaranteed payment of HDC's obligations to BOCC (CP 70-72, 112-114), and on July 28, 2005, Mark Hinton executed a Commercial Guaranty (the "Mark Hinton Guaranty") by which he likewise guaranteed payment of HDC's obligations to BOCC. (CP 70-72, 108-111.) Both of the Guaranties contained the following language:

The Indebtedness guaranteed by this Guaranty includes any and all of Borrower's Indebtedness to Lender and is used in the most comprehensive sense and means and includes any and all of Borrower's liabilities, obligations and debts to Lender, now existing, or hereinafter incurred or created, including without limitation, all loans, advances, interest, costs, debts, overdraft indebtedness, credit card indebtedness, lease obligations, other obligations, and liabilities of Borrower, or any of them, and any present or future

judgments against borrower, or any of them[.]

(CP 108, 112 (emphases added).)

#### **4. The Assignment of the Loan Documents**

On January 16, 2009, BOCC was closed by the Director of Banks of the Department of Financial Institutions, State of Washington, and the Federal Deposit Insurance Corporation was appointed receiver. In its capacity as the receiver of BOCC, the FDIC sold and assigned to Multibank 2009-1 RES-ADC Venture, LLC (“Multibank”) the Loan, the Note, the Trust Deed, the Guaranties, and all related Loan documents, and Multibank subsequently assigned its interest in such documents to Appellant. (CP 70-72.)

#### **5. The “Corrected Deed”**

On June 26, 2009, someone struck out “Hinton Development Corporation, a Washington corporation” from a copy of the Kassab Deed, typed in “Mark Hinton and Joni J. Hinton, husband and wife,” attached a new coversheet and re-recorded it, purportedly to correct vesting. (The re-recorded Kassab Deed shall be referred to as the “Corrected Deed.”)<sup>3</sup>  
(CP 656, lines 19-24.)

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<sup>3</sup> While the Respondents are relying upon the Corrected Deed to establish that they were in title to the Property and that therefore the Trust Deed and the Non-Judicial Foreclosure were valid, they never introduced the Corrected Deed into the trial court record and it is, therefore, not a part of the appellate record.

The Hintons disclaim any knowledge of or involvement in re-recording the Corrected Deed. As Mark Hinton<sup>4</sup> testified in his deposition:

Q. Okay. So if we look at Exhibit 27 [the Corrected Deed], the cover sheet you indicate today you've never seen before?

A. I don't think I've ever seen that, no.

Q. But if we look at the inside, the second page, you have seen this before. Does that mean you've seen the line out of Hinton Development Corporation?

A. Yes. Yes.

Q. You've seen that?

A. Yes.

Q. Mark and Joni Hinton, husband and wife typed in; you've seen that before?

A. Yes.

Q. Do you recall when you first saw this?

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At the time of closing the escrow in November 2005, Fidelity issued both an Owner's Policy and a Lender's Policy insuring title to the Property in HDC. (CP 635-640 (Owner's Policy); CP 435-447 (Lender's Policy).) However, after recording the Corrected Deed in 2009, Fidelity issued new Owner's and Lender's Policies insuring title in the Hintons, but back-dated the policies to November 23, 2005 (the same date as the original policies). (CP 641-647 (Owner's Policy).)

<sup>4</sup> Mark Hinton stated in his affidavit that he "was the President of Hinton Development Corporation at all relevant times." (CP 627, lines 7-9.)

- A. I don't know the date, no.
- Q. Would it have been before or after it was recorded?
- A. After. Oh, definitely after.

(CP 632, line 12-633, line 3.)

- Q. So I take it that this line-out of Hinton Development, the typing in of you and your wife on the deed and then attaching a new cover sheet and recording it, this was not done at your direction?
- A. No. No, I had no idea.
- Q. Do you know who did this?
- A. That's the mystery.

(CP 633, lines 14-20.)

## **6. The Foreclosure**

In January 2011, Appellant commenced a non-judicial foreclosure process of the Trust Deed (the "Non-Judicial Foreclosure"), which ended in a trustee's sale on June 10, 2011, at which Appellant was the successful bidder with its credit bid of \$925,000.00. (CP 72-73.) Assuming the sale was valid, it resulted in a deficiency (the "Deficiency") of \$1,154,918.30. (CP 73.)

**B. Procedural History**

**1. The Lawsuit and the Plaintiff's Summary Judgment Motion**

On July 19, 2011, Appellant commenced the instant lawsuit against the Hintons and HICI<sup>5</sup> for recovery of the Deficiency. (CP 19.) On September 28, 2011, Appellant filed Plaintiff's Motion for Summary Judgment ("Plaintiff's Summary Judgment Motion"). (CP 59.) On March 8, 2012, after a hearing that was followed by further briefing, the trial court granted Plaintiff's Summary Judgment Motion. (CP 301-303.) On March 19, 2012, Respondents filed a Motion for Reconsideration (CP 304-306), but that was denied.<sup>6</sup>

**2. The Hintons' Summary Judgment Motion**

On July 18, 2012, Respondents filed a Notice of Substitution advising that they had retained new counsel to replace their prior counsel, and on September 7, 2012, Respondents filed Defendant Mark Hinton and Joni J. Hinton's Motion for Partial Summary Judgment and Alternative Motion for Revision (the "Hintons' Summary Judgment Motion"). (CP 310-320.) Pursuant to the Hintons' Summary Judgment Motion, Respondents sought a determination that "the deficiency judgment to

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<sup>5</sup> HICI was subsequently dismissed from the lawsuit and is therefore not a party to this appeal.

<sup>6</sup> The court's ruling denying the motion for reconsideration was made orally at the hearing on the motion and no written order was ever entered.

which...[Respondents were] subject...is limited to the deficiency allowed by RCW 61.24.100(6)<sup>7</sup> and RCW 61.24.100(3)(a)(i).”<sup>8</sup> (CP 310.)

Briefing and a hearing on the Hintons’ Summary Judgment Motion was

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<sup>7</sup> RCW 61.24.100(6) provides as follows:

A guarantor granting a deed of trust to secure its guaranty of a commercial loan shall be subject to a deficiency judgment following a trustee’s sale under that deed of trust only to the extent stated in subsection (3)(a)(i) of this section. If the deed of trust encumbers the guarantor’s principal residence, the guarantor shall be entitled to receive an amount up to the homestead exemption set forth in RCW 6.13.030, without regard to the effect of RCW 6.13.080(2), from the bid at the foreclosure or trustee’s sale accepted by the sheriff or trustee prior to the application of the bid to the guarantor’s obligation.

<sup>8</sup> RCW 61.24.100(3)(a)(i) provides as follows:

This chapter does not preclude any one or more of the following after a trustee’s sale under a deed of trust securing a commercial loan executed after June 11, 1998:

(a)(i) To the extent the fair value of the property sold at the trustee’s sale to the beneficiary or an affiliate of the beneficiary is less than the unpaid obligation secured by the deed of trust immediately prior to the trustee’s sale, an action for a deficiency judgment against the borrower or grantor, if such person or persons was timely given the notices under RCW 61.24.040, for (A) any decrease in the fair value of the property caused by waste to the property committed by the borrower or grantor, respectively, after the deed of trust is granted, and (B) the wrongful retention of any rents, insurance proceeds, or condemnation awards by the borrower or grantor, respectively, that are otherwise owed to the beneficiary.

delayed while the parties conducted discovery on issues raised by the motion.

Appellants subsequently filed (i) Plaintiff's Response to Hintons' Motion for Partial Summary Judgment (CP 649-676), (ii) Plaintiff's Cross-Motion for Partial Summary Judgment and Findings of Fact Under CR 56(d) (the "Cross-Motion") (CP 676-679), and (iii) Plaintiff's Motion and Memorandum in Support to Amend Complaint and to Add Additional Party (the "Motion to Amend") (CP 679-738).

Pursuant to the Cross-Motion, Appellant sought an order determining that RCW 61.24.100(6) was inapplicable to the Hintons' Guaranties and that the Hintons were therefore liable for the full amount of any deficiency. In addition, pursuant to CR 56(d), Appellant's Cross-Motion also sought, among other things, a determination that the Hintons did not hold title to the Property after issuance of the 2005 Kassab Deed from Kassab to HDC, that, as a result, the Trust Deed was ineffective to create a lien on the Property, and that, therefore, RCW 61.24.100(6) had no applicability to the Hintons' Guaranties. (CP 676-679.)

Pursuant to the Motion to Amend, Appellant sought authority to file an amended complaint that would include the following new claims: (i) a claim seeking a declaration that the Trust Deed was either signed by the Hintons in their capacity as agents for HDC, or ratified by HDC as

having been signed by the Hintons as agents for HDC; (ii) a claim seeking a declaration that the Non-Judicial Foreclosure was ineffective, because Plaintiff relied upon its understanding that title to the Property was in the name of the Hintons, rather than HDC; (iii) a claim judicially foreclosing the Trust Deed; and (iv) a judgment against the Hintons on their Guaranties for the full amount of the outstanding debt.

On June 14, 2013, the trial court heard argument on the Hinton's Summary Judgment Motion and on July 30, 2013, the trial court issued its Memorandum of Decision on Partial Summary Judgment and Motion to Amend Complaint (the "Decision"). (CP 752-755.) In its Decision, the trial court granted the Hintons' Summary Judgment Motion, denied the Cross-Motion, and denied the Motion to Amend. Other than announcing the ruling, the written Decision did not include any analysis or explanation of how or why the trial court arrived at its rulings. Similarly, the Decision contained no specific findings or conclusions.

### **3. Entry of Judgment**

On October 25, 2013, the trial court entered a Final Judgment (the “Judgment”) dismissing claims against the Respondents<sup>9</sup> and awarding them their costs and attorney fees.<sup>10</sup> (CP 758-760.)

### **4. The Appeal**

On November 19, 2013, Appellant filed a Notice of Appeal to the Court of Appeals (the “Notice of Appeal”). (CP 760-767.) The Notice of Appeal was filed within 30 days of entry of the Judgment.

### **5. Award of Costs and Attorney Fees**

While the Judgment awarded costs and attorney fees, it did not determine the amount of such award. Therefore, on November 1, 2013, Respondents filed Defendant Mark Hinton and Joni J. Hinton’s Motion for Award of Attorney Fees and Costs, together with a Declaration of Danny I. Hitt, Jr. In Support of Motion for Attorney Fees and Costs (collectively the “Application”). (CP 773-823.) On November 20, 2013, Appellants filed Plaintiff’s Memorandum in Opposition to Defendants Mark Hinton and Joni J. Hinton’s Motion for Award of Attorney Fees and Costs,

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<sup>9</sup> Prior to entry of the Judgment, Appellant dismissed its claims against the only other defendant in the lawsuit, HICI. Therefore, the Judgment also dismissed claims against HICI. Appellant is not appealing the dismissal of claims against HICI.

<sup>10</sup> In granting the Second Summary Judgment Motion and denying the Cross-Motion, the trial court determined that any claim against the Hintons for a deficiency was limited to waste to the Property for which they were responsible, and rents wrongfully withheld by them. However, Appellant subsequently notified the trial court that it did not intend to pursue a claim for those items, and the trial court therefore entered a Judgment that dismissed claims against them entirely.

together with a Declaration of Kenneth P. Childs In Opposition to Defendants Mark Hinton and Joni J. Hinton's Motion for Award of Attorney Fees and Costs (collectively the "Objection"). (CP 824-906.) A hearing was held on the Application and the Objection on November 22, 2013, and on January 2, 2014, the trial court issued a Memorandum of Decision: Attorney Fees (the "Decision on Attorney Fees"), wherein the court awarded Respondents costs of \$162.06 and attorney fees of \$165,463.50. (CP 911-914.) As of the date of filing this opening Brief of Appellant (*i.e.*, May 9, 2014) the trial court had not yet signed and entered a Supplemental Judgment, awarding Respondents the amounts that had been determined in the Decision on Attorney Fees.<sup>11</sup>

## **V. ARGUMENT**

### **A. Standard of Review**

Summary judgment decisions and questions of statutory interpretation are reviewed *de novo*. *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 744, 257 P.3d 586 (2011); *Hubbard v. Spokane Cnty.*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002); *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991).

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<sup>11</sup> On or about February 4, 2014, both Appellant and Respondents submitted alternative forms of supplemental judgments awarding the attorney fees and advised the court that a hearing was unnecessary, and that the court should simply select one of the submitted forms and sign it and have it entered. After several weeks with no action being taken, Respondents scheduled a presentation hearing for April 25, 2014, at which the trial judge said that he would decide on the form of the supplemental judgment and sign it that day; however, so far he has not done so.

Denial of a motion to amend is reviewed for an abuse of discretion. *Bank of Am. v. David W. Hubert, P.C.*, 153 Wn.2d 102, 122, 101 P.3d 409 (2004); *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).

A determination of the amount of attorney fees awarded by a trial court is reviewed for an abuse of discretion. *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

**B. The Trial Court's Ruling Was in Error, Because It Assumes That the Hintons' Trust Deed Attached to the Property and That the Non-Judicial Foreclosure Was Valid.**

The trial court found that the deficiency against the Hintons is limited under RCW 61.24.100(6) and 61.24.100(3)(a)(i). The following predicates are necessary to support the trial court's ruling: (i) the Hintons, not HDC, were the grantors on the Trust Deed; (ii) the Trust Deed attached to HDC's Property; and (iii) there was a valid foreclosure from which a deficiency would follow. However, these predicates are irreconcilable. If the Hintons were the grantors on the Trust Deed (the first predicate), then the Trust Deed never attached to HDC's Property, which is inconsistent with the second predicate, and therefore a valid foreclosure never occurred, which is contrary to the third predicate. In

short, if the Hintons were the grantors on the Trust Deed covering the Property owned by HDC, the Trust Deed never attached and no valid foreclosure ever occurred. If no valid foreclosure occurred, no deficiency could have resulted. For this reason alone, the trial court's ruling must be reversed.

**1. The Trial Court Found That the Hintons Were the Grantors of the Trust Deed.**

The trial court's ruling is necessarily based on an inherent finding that the Hintons were the grantors of the Trust Deed. This is so because the Hintons' Summary Judgment Motion sought a determination that the Hintons' liability for a deficiency judgment was limited by RCW 61.24.100(3)(a)(i) and 61.24.100(6) following a valid foreclosure sale. The trial court granted the Hintons' Motion, and the inescapable conclusion is that the trial court agreed with them that, as the grantors of the Trust Deed, their liability was limited under RCW 61.24.100(6).

**2. The Hintons Were Never in Title to the Property.**

**a. The Kassab Deed Transferred Title to HDC, Not the Hintons.**

The Kassab Deed, which was recorded in 2005, conveyed fee simple title to HDC and, therefore, as a matter of law, did not operate to vest title to the Property in the Hintons.

**b. The Corrected Deed Was Ineffective to Transfer Title.<sup>12</sup>**

Likewise, the “Corrected Deed,” which was recorded in 2009, did not transfer title to the Hintons, because it was of no legal effect. In Washington, a transfer of title to real estate is done by statutory deed. Chapter 64.04 RCW provides the forms of deeds available to transfer title, including the statutory warranty deed, the bargain and sale deed, and the quit claim deed. *See* RCW 64.04.030-050. Other ways of transferring title to real estate are not at issue in the present case, such as by will or adverse possession. For each form of deed, the transfer must be in writing, signed by the party bound, and acknowledged by the party before a notary. *See* RCW 64.04.020.

In the present case, someone lined out “Hinton Development Corporation” as grantee on the Corrected Deed and inserted the Hintons as grantees, and then someone at Fidelity, without the consent, permission, or knowledge of Kassab, the Hintons, HDC , BOCC, the FDIC, or Appellant, re-recorded it with a new coversheet.<sup>13</sup> The Corrected Deed was not

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<sup>12</sup> Appellant is addressing the effect of the Corrected Deed, because Respondents relied upon it in arguing to the trial court that they were in title to the Property and were therefore valid grantors of the Trust Deed. However, the Corrected Deed was never introduced into the trial court record and is therefore not a part of the appellate record.

<sup>13</sup> Mark Hinton, who is the President of HDC, testified that he was not aware of the Corrected Deed being filed (CP 632, line 12-633, line 3; CP 633, lines 14-20), and no evidence was ever introduced indicating that Kassab, BOCC, the FDIC, Appellant, or

acknowledged by Kassab or HDC. As a matter of law, the Corrected Deed was insufficient to convey title from HDC to the Hintons. Chapter 64.04 RCW; *cf. Johnson v. Hovland*, 795 N.W.2d 294, 301 (N.D. 2011) (“Generally, a ‘grantor may, by executing a subsequent deed, reform a deed to reflect the parties’ original intent.’ ... To be effective, however, the correction deed must be executed by the same grantor that executed the original deed.” (quoting *Gallups v. Kent*, 953 So. 2d 393, 394-95 (Ala. 2006))).

**c. Both HDC and the Hintons Always Treated the Property as Belonging to HDC.**

After the Kassab Deed was recorded in 2005, both HDC and the Hintons repeatedly represented to the City of Battle Ground (the “City”) that HDC was both the owner and the applicant of the development. In connection with its application to the City, HDC submitted a Fidelity National Title deed report that clearly showed that HDC owned the Property. (CP 506-517.) Mark Hinton concedes that record title has been in HDC (CP 631-632), and the Hintons’ 2008 Personal Financial Statement showed the Hintons’ investment in the Property through a limited liability company but it did not indicate that the Hintons held title to the Property. (CP 659-664, 594-612.) In addition, Mark Hinton, as

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anyone else, other than employees of Fidelity, were aware or approved of the Corrected Deed or its recording.

President of HDC, encumbered the Property with an easement and right-of-way utility easement for the benefit of Clark County PUD. (CP 613-616.) There is no evidence in the record whatsoever that the Hintons ever claimed that they were the owners of the Property or that anyone other than HDC owned the Property.

**3. Since the Hintons Were Never in Title to the Property, Their Trust Deed Never Attached to the Property.**

That a party with no interest in a property may not grant a trust deed to it is stating the obvious and hardly requires citation to legal authority. Nevertheless, courts have on occasion been called upon to confirm this conclusion. In *Ethridge v. Tierone Bank*, 226 S.W.3d 127 (Mo. 2007), the court addressed the issue of whether a deed of trust that was signed by a wife, but not her husband, and that covered property in which only the husband was in title, was effective. The court disposed of the issue in short order:

This Court's reading of the deed of trust is controlled by *Bradley v. Missouri Pac. Ry. Co.*, 91 Mo. 493, 4 S.W. 427, 428 (Mo. 1887). In *Bradley*, the husband deeded a piece of property owned by the wife to a third party. The deed, however, was signed and acknowledged by the wife. Despite the wife's signature, which was attested to, this Court ruled that her interest in the property was not conveyed. "The party in whom the title is vested, [sic] must use appropriate

words to convey the estate. Signing, sealing, and acknowledging a deed by the wife in which her husband is the only grantor, [sic] will not convey her estate.” *Id.*

Mary and David Ethridge held the property as tenants by the entirety. Under *Bradley*, in order to validly convey Mary’s interest in the property, she must have been named as a grantor, who in this case is the individual defined as “Borrower” under the deed of trust. A deed by only one of two tenants by the entirety conveys nothing. *Austin & Bass Builders, Inc. v. Lewis*, 359 S.W.2d 711, 714 (Mo. [ ] 1962). Because Mary Ethridge was not a grantor of the deed of trust, she did not make any covenants of title and did not otherwise convey an interest in the property. The deed of trust did not convey a valid lien.

*Ethridge*, 226 S.W.3d at 132.

Since the Hintons were never in title to the Property, they could not grant a trust deed to it.

**4. Since the Trust Deed Did Not Attach to the Property, the Non-Judicial Foreclosure Was Invalid.**

If the Hintons had no interest in the Property to convey, and if, therefore, the Trust Deed was ineffective to attach to the Property, it necessarily follows that the Non-Judicial Foreclosure did not foreclose the Property and was therefore invalid. In numerous cases, courts have held that trust deed foreclosure sales were void where the trust deed did not attach or there was otherwise a defect in the foreclosure procedures. *Cf.*

*Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 501, 309 P.3d 636 (2013) (holding that foreclosure sale was void where trustee was not properly appointed); *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 157 Wn. App. 912, 239 P.3d 1148 (2010) (holding that a foreclosure sale held more than 120 days from the original notice of sale was void); *Fid. & Deposit Co. of Md. v. Ticor Title Ins. Co.*, 88 Wn. App. 64, 943 P.2d 710 (1997) (holding that the holder of a forged note secured by a trust deed had no right to foreclose); *Home Sec. Corp. v. Gentry*, 235 So. 2d 249 (Miss. 1970) (holding that foreclosure sale was void where trust deed was invalid due to fraud).

**5. Since the Trust Deed Did Not Attach to the Property and the Non-Judicial Foreclosure Was Ineffective, the Trial Court Erred in Granting the Hintons' Summary Judgment Motion.**

Since the Trust Deed did not attach to the Property and the Non-Judicial Foreclosure was invalid, the trial court erred in concluding that, as the grantors of the Trust Deed, the Hintons' liability on their Guaranties was limited by RCW 61.24.100(3)(a)(i) and 61.24.100(6) to waste and diversion of rents. Instead, the Hintons were liable for the full amount of their Guaranties. The trial court should have denied the Hintons' Summary Judgment Motion and further should have granted Appellant's Motion to Amend.

**6. Since the Trust Deed Did Not Attach and the Non-Judicial Foreclosure Was Invalid, the Trial Court Erred in Denying Appellant's Cross-Motion.**

The trial court erred in denying Appellant's Cross-Motion, or in failing to at least grant it in part, for the same reasons that it erred in granting the Hintons' Summary Judgment Motion. Among other things, Appellant requested in its Cross-Motion that the court find that the Hintons did not hold fee simple title to the Property, that the Hintons did not grant the Trust Deed to secure their Guaranties, and that RCW 61.24.100(6) had no applicability to the Hintons' Guaranties. As explained above, the trial court erred in granting the Hintons' Summary Judgment Motion and thereby ruling that RCW 61.24.100(6) applied to their Guaranties. For the same reason, the trial court also erred in denying the Cross-Motion and ruling that RCW 61.24.100(6) applied.

**C. The Trial Court Erred in Denying Plaintiff's Motion to Amend Its Complaint.**

**1. The Trial Court's Denial of Appellant's Motion to Amend Was in Error for the Same Reason That the Trial Court Erred in Granting the Hintons' Summary Judgment Motion and Denying Appellant's Cross-Motion.**

While the trial court's Decision provided no explanation at all for its ruling, presumably, the court denied the Motion to Amend for the same reason that it granted the Hintons' Summary Judgment Motion and denied

Appellant's Cross-Motion. If, as the trial court necessarily concluded in granting the Hintons' Summary Judgment Motion, the Hintons were the grantors of the Trust Deed, the Trust Deed attached to the Property, the Non-Judicial Foreclosure was valid, and the deficiency against the Hintons was limited under RCW 61.24.100(3)(a)(i) and 61.24.100(6), then the Court must have also necessarily concluded that there was no reason to allow Appellant's Motion to Amend. Since, as discussed above, the trial court's ruling on the Hintons' Summary Judgment Motion is based on faulty predicates, *i.e.*, that the Trust Deed attached and the Non-Judicial Foreclosure was valid, it likewise necessarily erred in denying Appellant's Motion to Amend.

**2. Allowing the Motion to Amend Would Have Resulted in No Prejudice to Respondents.**

Even assuming that the trial court denied Appellant's Motion to Amend for other reasons, its ruling was in error and should be reversed, because allowing the Motion to Amend would not have resulted in any prejudice to the Hintons.

CR 15 provides that a party may amend its pleadings with leave of the court and that leave shall be freely given when justice so requires. Leave should be denied only if a party can demonstrate prejudice. *See Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d

343, 349-50, 670 P.2d 240 (1983). There would have been no prejudice to the Hintons, because the amendment would only have changed the nature of the claim against them from being a claim for a deficiency to being a claim for the full amount of the debt.

In opposing the Motion to Amend, the only prejudice the Hintons argued they would suffer was that allowing the Motion would deprive them of the quick and efficient finality that would result from a non-judicial foreclosure.<sup>14</sup> Had the Non-Judicial Foreclosure been effective, it would have established a deficiency amount, but Appellant would then have needed to file a lawsuit against the Hintons to obtain a judgment against them. Such a lawsuit would have been no different from and no quicker or more efficient than a lawsuit to collect from them the entire amount due. The Hintons did not otherwise explain any reason for why they would be prejudiced if the Motion to Amend were granted.<sup>15</sup> *Cf. Quality Rock Prods., Inc. v. Thurston Cnty.*, 126 Wn. App. 250, 108 P.3d 805 (2005) (holding that the trial court abused its discretion in denying a motion to amend where, among other things, the party opposing the

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<sup>14</sup> As of the date of filing this Appellant's Brief (*i.e.*, May 9, 2014), Appellant has not yet received all of the Clerk's Papers, and has specifically not yet received Defendants' Opposition to Plaintiff's Motion to Amend the Complaint. Appellant is therefore unable to include a cite to this reference.

<sup>15</sup> See note 14 *infra*.

motion did not argue or explain how the amendment prejudiced its interest).

**3. The Trial Court's Failure to Explain the Reasons for Its Denial of the Motion to Amend Constitutes Abuse of Discretion.**

While the appellate courts review a trial court's denial of a motion to amend for an abuse of discretion, they will overturn such a ruling upon a showing of abuse. *Watson v. Emard*, 165 Wn. App. 691, 267 P.3d 1048 (2011). Among other things, a trial court's failure to explain its reasons for denying the motion to amend may amount to an abuse of discretion. 165 Wn. App. at 697-98. As the court stated in *Watson*:

We review a trial court's denial of leave to amend a complaint for an abuse of discretion. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 728-29, 189 P.3d 168 (2008) (citing *Tagliani v. Colwell*, 10 Wn. App. 227, 233, 517 P.2d 207 (1973)). A court abuses its discretion if its decision is not based on tenable grounds or tenable reasons. *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 889-90, 155 P.3d 952 (2007), *aff'd*, 166 Wn.2d 489 (2009). But a trial court's failure to explain its reason for denying leave to amend may amount to an abuse of discretion unless the reasons for denying the motion are apparent in light of circumstances shown in the record. *Rodriguez*, 144 Wn. App. at 729, 189 P.3d 168 (citing *Tagliani*, 10 Wn. App. at 233).

*Id.* (emphasis added).

The trial court provided no explanation whatsoever for its denial of Appellant's motion to amend. Instead, the court's Memorandum Decision stated only that "[t]he Plaintiff's Motion to amend the complaint is denied." Furthermore, the reasons for denying the Motion are not apparent in light of the circumstances shown in the record. On the contrary, there are very good reasons for allowing the Motion to Amend. Since the Trust Deed did not attach and the Non-Judicial Foreclosure was ineffective, Appellant necessarily needs to pursue an alternative course of action in order to realize a remedy.

**4. Courts Generally Allow Amendments to Add Claims and Parties.**

Consistent with the policy of liberally allowing amendments, appellate courts have generally held that parties should be allowed to amend their pleadings to add new claims and new parties based upon changes in circumstances or facts that are discovered during the course of the case. As the court in *Watson* stated:

Under CR 15(c), parties may generally amend pleadings to relate back to the date of original filing if the amendment relates to conduct, transactions, or occurrences in the original pleading. *Miller v. Campbell*, 164 Wn.2d 529, 537, 192 P.3d 352 (2008). This rule is based on the premise that once litigation involving particular conduct has been instituted, the parties are not entitled to statute of

limitations protection against adding claims that arise out of the conduct alleged in the original pleading. *Caruso*, 100 Wn.2d at 351. CR 15(c) clearly distinguishes between amendments that add new claims and amendments that add new parties. *Stansfield v. Douglas Cnty.*, 146 Wn.2d 116, 122, 43 P.3d 498 (2002). Inexcusable neglect is not a ground for denying a motion to add new claims. *Id.*

165 Wn. App. at 698; *see also Chadwick Farms Owners Ass'n v. FHC, LLC*, 139 Wn. App. 300, 160 P.3d 1061 (2007) (reversing trial court's failure to allow motion to amend to add additional party as defendant); *Honan v. Ristorante Italia, Inc.*, 66 Wn. App. 262, 832 P.2d 89 (1992) (reversing trial court's failure to allow motion to amend to add additional party as defendant).

Consistent with the above authority, the trial court erred in denying Appellant's motion to amend to add a new party and to add a new claim for judicial foreclosure. Adding the new party (*i.e.*, HDC) would have resulted in no prejudice to Respondents. And amending the claim against Respondents from a claim for a deficiency on the guaranty to a claim for the full amount of the guaranty would not have resulted in any prejudice, since it would only have changed the amount of damages being sought.

**D. Even if the Non-Judicial Foreclosure Was Valid, the Trust Deed Did Not Secure the Hintons' Guaranties.**

Even if the trial court was correct in concluding that the Trust Deed attached to the Property and that the Non-Judicial Foreclosure was valid, it nevertheless erred for two reasons in concluding that the Hintons' liability for a deficiency was limited.

First, under RCW 61.24.100(6), a guarantor's liability for a deficiency following the non-judicial foreclosure of a trust deed is limited to RCW 61.24.100(3)(a)(i) only if the guarantor granted the trust deed to secure his or her guaranty. However, the Trust Deed that was foreclosed did not secure the Hintons' Guaranties.

The Hintons' argument that the Trust Deed secured their Guaranties rests upon the following language from the Trust Deed:

THIS DEED OF TRUST...IS GIVEN TO  
SECURE...(B) PERFORMANCE OF ANY  
AND ALL OBLIGATIONS UNDER...THE  
RELATED DOCUMENTS[.]

(Emphasis added.)

The Hintons then point out that the term "Related Documents" is defined in the Trust Deed as follows:

The words "Related Documents" mean all  
promissory notes...guaranties...deeds of  
trust... and...other instruments...executed  
in connection with the Indebtedness[.]

(Emphasis added.)

The term “Indebtedness” is defined in the Trust Deed to refer to the “Note,” and the term “Note” is in turn defined as “the promissory note dated November 22, 2005, in the original principal amount of \$1,760,000.00.”

The flaw in the Hintons’ argument is their failure to recognize that the term “Related Documents” is limited to instruments “executed in connection with the Indebtedness” (*i.e.*, the November 22, 2005, promissory note). It is undisputed that the Hintons’ Guaranties were not executed in connection with the Note. On the contrary, the Hintons executed the Guaranties in conjunction with other loans to cover all of their obligations to the BOCC. Indeed, the Hintons vigorously made this argument themselves both in Defendants’ Answer to Complaint (the “Answer”) and in response to Plaintiff’s Summary Judgment Motion. In paragraph 6 of their Answer, they stated:<sup>16</sup>

Defendants...deny that they unconditionally guaranteed payment of Hinton Contractors’ [sic] obligation under the Note and Deed of Trust. Further, that the guaranties relied upon by the Plaintiffs [sic] herein by Mark Hinton and Joni Hinton were executed on prior loans and were not for commercial purposes. That neither Mark Hinton nor Joni Hinton executed a commercial guarantee on

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<sup>16</sup> As of the date of filing this Appellant’s Brief (*i.e.*, May 9, 2014), Appellant has not yet received all of the Clerk’s Papers, and has specifically not yet received Defendants’ Answer to Complaint. Appellant is therefore unable to include a cite to this reference.

the obligation which is the subject matter of this complaint.

And in response to Plaintiff's Summary Judgment Motion, they argued:

The assumption that Mark Hinton and Joni Hinton personally guaranteed payments on the Hinton Development obligation under the present note is not factually accurate. The document [sic] relied upon were for different obligations.... Clearly they were preceding the loan which is at issue in the present matter. They were not for guaranties for this transaction.

(CP 129.) And further:

Therefore it is the defendants, Mark Hinton, Joni Hinton and Hinton Industrial Contractors Inc.'s position that...these guaranties do not relate to the present transaction and cannot be used to facilitate an obligation that was not in affect [sic] at the time the guarantee [sic] was executed.

(CP 134.)

The Hintons supported the above arguments with declarations from both Mark and Joni Hinton, as well as from Dennis Rugg, the Chief Financial Officer for HICI at the time the Property sale closed in 2005. Each of them specifically stated that the Guaranties were not executed in connection with the Note and Trust Deed. Indeed, both Mark and Joni Hinton explained in their declarations at some length and in some detail the circumstances under which their Guaranties were executed and the

reasons why their Guaranties were not executed in connection with the Note and Trust Deed. (CP 149-153, 159-161, 179-180.)

The Hintons have argued vigorously in a series of prior briefings, declarations, and affidavits in this case that their Guaranties were not executed “in connection with” the present note and deed of trust, yet they rely upon a definition of “Related Documents” that requires them to show precisely that – that their Guaranties were executed “in connection with” the Note and Trust Deed.

**E. Even if the Non-Judicial Foreclosure Was Valid and the Trust Deed Secured the Hintons’ Guaranties, the Hintons Waived Application of Any Anti-Deficiency Statute.**

The second reason why the trial court erred in its ruling, even if it was correct in concluding that the Hintons’ Trust Deed attached to HDC’s Property and the Non-Judicial Foreclosure was valid, is that the Hintons waived application of any anti-deficiency statute.

The Hintons’ Motion for Summary Judgment is based entirely upon the argument that their Guaranties were secured by the Trust Deed, and that, since the Trust Deed was foreclosed non-judicially, RCW 61.24.100(3)(a)(i) and 61.24.100(6) prohibit a deficiency judgment against them. One problem with this argument is that in both of their Guaranties and in the Trust Deed, the Hintons expressly waived

application of any anti-deficiency statute. The Mark Hinton Guaranty provides in part as follows:

Guarantor...waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale[.]

(CP 109.) The Joni Hinton Guaranty contains an almost identical provision:

Guarantor...waives any and all rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale[.]

(CP 112-113.)

In addition to the Guaranties, the Trust Deed also contained a similar provision waiving any anti-deficiency statute:

Grantor waives all rights or defenses arising by reason of any "one-action" or "anti-deficiency" law, or any other law which may prevent Lender from bringing any action against Grantor, including a claim for deficiency to the extent Lender is otherwise

entitled to a claim for deficiency, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale.

(CP 85.)

Numerous courts have enforced such waivers. *Gramercy Inv. Trust v. Lakemont Homes Nev., Inc.*, 130 Cal. Rptr. 3d 496, 502 (Cal. App. 2011) (“Although certain antideficiency protections (e.g., Cal. Civ. Proc. Code § 2787) are applicable to guarantors, a guarantor may waive such defenses.” (citations omitted)); *Cadle Co. II v. Harvey*, 100 Cal. Rptr. 2d 150, 154 (Cal. App. 2000) (“[T]he protections afforded to debtors under the antideficiency legislation do not directly protect guarantors from liability for deficiency judgments. Accordingly, if a guarantor expressly waives the protections of the antideficiency laws, a lender may recover the deficiency judgment against the guarantor.” (citations omitted)); *Valley Bank v. Larson*, 663 P.2d 653, 655 (Idaho 1983) (“A guarantor may legally contract to waive a defense provided by [the] anti-deficiency judgment statute.”); *see also Grayl CPB, LLC v. Kolokotronis*, 135 Cal. Rptr. 3d 448 (Cal. App. 2011); *Bennett v. Union Nat'l Bank & Trust Co.*, 315 S.E.2d 431, 434 (Ga. App. 1984); *Vickers v. Chrysler Credit Corp.*, 280 S.E.2d 842 (Ga. App. 1981); *First Sec. Bank of Idaho, N.A. v. Gaige*, 765 P.2d 683 (Idaho 1988); *Nat'l City Bank of Minneapolis v. Lundgren*,

435 N.W.2d 588 (Minn. App. 1989); *O'Brien v. Ravenswood Apartments, Ltd.*, 862 N.E.2d 549 (Ohio App. 2006); *Riverside Nat'l Bank v. Manolakis*, 613 P.2d 438, 441 (Okla. 1980); *AVB Bank v. Hancock*, 282 P.3d 796 (Okla. App. 2012).

While Washington courts do not appear to have specifically addressed this issue, they have enforced broad waivers of defenses by guarantors. *Fruehauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn.2d 704, 708, 409 P.2d 651 (1966) (upholding waiver by guarantors of the defense that the principal obligation had been discharged); *Amick v. L.M. Baugh*, 66 Wn.2d 298, 402 P.2d 342 (1965) (upholding guarantor's waiver of statutory requirement that creditor pursue debtor to judgment before enforcing guaranty); *Grayson v. Platis*, 95 Wn. App. 824, 833, 978 P.2d 1105 (1999).

Since the Hintons waived any anti-deficiency statute, they are now barred from seeking to assert RCW 61.24.100 (Washington's anti-deficiency statutes) as a defense to enforcement of their Guaranties.

**F. The Trial Court Erred in Granting the Respondents Their Attorney Fees and Costs.**

The trial court awarded the Respondents their attorney fees and costs on the ground that they were the prevailing party. If the trial court's

rulings are reversed, the award of the Respondents' attorney fees and costs must also be reversed.

**G. Even if the Respondents Were Entitled to an Award of Attorney Fees, the Trial Court Erred in the Amount That It Awarded to Them.**

The Respondents sought an award of attorney fees of \$186,963.50 (CP 772-775), and the trial court awarded them \$165,463.50, for a reduction of \$21,500.<sup>17</sup> (CP 911-914.) While the court wrote a memorandum opinion explaining the general basis for its ruling, it did not provide any explanation of the reasons for or the amount of any specific reductions. (CP 911-914.) Even assuming the Respondents are the prevailing parties and are therefore entitled to an attorney fee award, the trial court should have reduced the Respondents' request by much more than \$21,500.

**1. Respondents Were Not Entitled to an Award of Fees Incurred in Connection with Motions on Which They Were Not the Successful Parties.**

Washington courts have reduced attorneys' fee applications based upon unsuccessful claims and unsuccessful motions. In *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 146-47, 144 P.3d 1185 (2006), the trial court awarded \$249,000 in attorney fees based upon a requested

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<sup>17</sup> While Appellant is challenging the award of any costs or attorney fees to Respondents, if Respondents are determined to be the prevailing parties and therefore entitled to an award of fees and costs, Appellant is not otherwise challenging the amount of costs that the trial court awarded.

amount of \$343,000. On remand requiring the trial court to make findings, the court noted the reduction likely was related, in part, to unsuccessful motions for summary judgment, for exclusion of expert testimony, and for dismissal. *Id.* at 147.

In this case, Respondents' Application sought attorney fees of \$20,968.00 that were incurred in connection with motions on which Respondents were not successful. These included (i) Appellant's original summary judgment motion, (ii) Respondents' motion for reconsideration, (iii) Respondents' motion to compel answers to interrogatories and request for production and Appellant's related motion to limit discovery, and (iv) Appellant's motion to compel discovery and related order. Some of these motions were in bad faith and lacked any merit at all. For example, Respondents' original attorney, Charles Buckley, filed a motion to compel Appellant to respond to an extensive set of interrogatories;<sup>18</sup> however, after Respondents changed attorneys and one of their new attorneys (Stacy Rutledge) reviewed the discovery request and Appellant's response, she revised the request and sent it to Appellant's counsel with an email stating, "I did not include any interrogatories because you already answered the important ones, numbers 1 and 30." (CP 825, 835.)

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<sup>18</sup> The interrogatories, including subparts, totaled 97.

**2. Respondents Were Not Entitled to Recover Fees That They Had Never Paid to Charles Buckley and Had No Intention of Ever Paying.**

Respondents' Application included fees of \$19,383.50 that were incurred while they were represented by Charles Buckley; however, their own pleadings indicated that they had only paid him \$6,731.78 and that they had failed to pay him \$14,820.99 of the total amount.<sup>19</sup> Under the circumstances, Respondents inappropriately included them in the Application,<sup>20</sup> and the trial court should have expressly excluded them from the award.

**3. The Court Should Not Have Awarded Fees for Services That Were Neither Reasonable nor Necessary.**

While the trial court has discretion to determine the amount of fees to award, it should not award fees that are neither reasonable nor necessary. *Cf. CHD, Inc. v. Boyles*, 138 Wn. App. 131, 136, 141, 157 P.3d 415 (2007) (court granted \$7,500 of \$16,813.10 prevailing party originally claimed in attorney fees); *J. Wilderman Autoplex Corp. v. Norton*, No. 3:09-cv-00154-PMF, 2010 U.S. Dist. LEXIS 122801 (S.D. Ill. Nov. 19, 2010) (court found it unreasonable to award prevailing party

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<sup>19</sup> See Exhibit 2 to the Declaration of Danny I. Hitt, Jr. In Support of Motion for Attorney Fees and Costs, which is a four-page summary of Charles Buckley's billings. The amounts invoiced and paid are summarized on page 4 of that Exhibit. (CP 789-792.)

<sup>20</sup> Including these fees in the Application arguably amounted to fraud and should have been grounds for denying the entire Application.

attorney fees in an amount five times greater than enforceable judgment amount and reduced amount accordingly). Appellant documented \$21,198.50 of fees included in the Application that were neither reasonable nor necessary. These included (i) services performed by Mr. Buckley after Defendants had retained new counsel; (ii) research on issues relevant to a valuation hearing that was never held and never intended to be held; (iii) messenger and secretarial services charged as attorney and legal assistant services (*e.g.*, travel to court to pick up documents; copying files; arranging to mail pleadings; scanning and emailing pleadings to co-counsel; (iv) preparation of affidavits and pleadings that were never filed or used; (v) arranging to obtain records from Mr. Buckley's office; (vi) drafting complex email to Mr. Buckley long after he had been replaced; (vii) duplication of services (*e.g.*, two attorneys attending the same hearing); and (viii) drafting a motion for summary judgment on issues that were never pled or litigated (*e.g.*, claim for waste). (CP 827-828, 879-880, 892-900.) The fees associated with these services should not have been awarded.

**4. The Trial Court Should Have Denied Fees Associated with Vague and Inadequate Time Entries.**

Appellant identified \$3,993.00 of billings that were associated with time entries that were so vague that it was not possible to determine what

they were about. Examples include such entries as “Legal Research”; “Responding to email”; “Material in Plaintiff supplemental response”; “Emails responses”; “Appraisal of plaintiff”; and “Review of file and email to client.” These descriptions are impossible to evaluate and should therefore have been denied.

**5. The Trial Court Should Have Denied Fees That Could Not Be Evaluated Because They Were Included in a Block Billing of Multiple Services.**

Block billing combines numerous tasks into a total of time spent, preventing the court from assessing the reasonable number of hours spent on a given task. *Robinson v. City of Edmond*, 160 F.3d 1275, 1284 n.9 (10th Cir. 1998) (“‘[B]lock billing’ refers to ‘the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.’” (quoting *Harolds Stores, Inc., v. Dillard Dep’t Stores, Inc.*, 82 F.3d 1533, 1554 n.15 (10th Cir. 1996))). Lumping of entries, or “block billing,” is universally rejected as improper. *See also Frevach Land Co. v. Multnomah Cnty.*, No. CV-99-1295-HU, 2001 U.S. Dist. LEXIS 22255, at \*26 (D. Or. Dec. 18, 2001); *Harolds Stores, Inc.*, 82 F.3d at 1554 n.15.

Block billing is not allowed because it prevents the court from assessing the reasonable number of hours spent on a given task due to the lack of segregation of time spent on other tasks. *See Reyes v. Nations Title*

*Agency of Ill., Inc.*, No. 00 C 7763, 2001 U.S. Dist. LEXIS 8446 (N.D. Ill. June 18, 2001) (entire time entries billed as block time voided from attorney's fee request); *McDannel v. Apfel*, 78 F. Supp. 2d 944, 948 (S.D. Iowa 1999) (faced with block billing that does not permit the court to determine a reasonable fee on the basis of work performed, the court may reduce applicant's hours to reflect percentage reduction).

Appellant failed to itemize \$24,937.50 of fees that were included in block billings. None of these fees can be adequately evaluated and they should therefore be denied.

## **VI. CONCLUSION**

Since the Hintons were not in title to the Property, they could not grant a trust deed that would attach to it. The Trust Deed they executed was therefore of no effect, and, likewise, neither was the Non-Judicial Foreclosure. Since the Hintons' Summary Judgment Motion sought a determination that they were the grantors of the Trust Deed and were entitled to the protection of RCW 61.24.100(6) and 61.24.100(3)(a)(i), which in turn would necessitate a finding that the Non-Judicial Foreclosure was valid, the trial court's granting of their Motion and denial of Appellant's Cross-Motion were necessarily in error.

The trial court abused its discretion in denying Appellant's Motion to Amend, because Respondents identified no respects in which they

would be prejudiced by the amendment and because the trial court failed to provide any basis or explanation for its ruling. The Motion to Amend was particularly appropriate in light of the title issues.

Even if the Hintons' Trust Deed attached to HDC's Property, which it did not, and even if the Non-Judicial Foreclosure was valid, which it was not, the Hintons are not entitled to the protection of RCW 61.24.100(6) and 61.24.100(3)(a)(i) because (i) the Trust Deed did not secure their Guaranties, and (ii) they expressly waived the protection of any anti-deficiency statutes.

Finally, even if Respondents are nonetheless found to be the prevailing parties, the trial court erred in the amount of attorney fees it awarded to them.

DATED this 8 day of May, 2014.

STOEL RIVES LLP



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Of Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **BRIEF OF APPELLANT** on the following named person(s) on the date indicated below by 

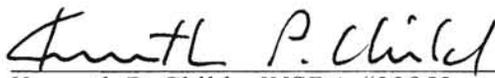
- mailing with postage prepaid
- hand delivery
- facsimile transmission
- overnight delivery
- email

to said person(s) a true copy thereof, contained in a sealed envelope if by mail, addressed to said person(s) at his or her last-known address(es) indicated below.

Danny L. Hitt, Jr.                      Email: [dhitt@hittandhillier.com](mailto:dhitt@hittandhillier.com)  
Stacy Rutledge                      Email: [srutledge@hittandhillier.com](mailto:srutledge@hittandhillier.com)  
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DATED: May 8, 2014.

  
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