

FILED  
COURT OF APPEALS  
DIVISION II  
2014 AUG 22 PM 12:57  
STATE OF WASHINGTON  
BY   
DEPUTY

No. 45605-2-II

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

---

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.

---

REPLY BRIEF OF APPELLANT

---

D. Jeffrey Courser, WSBA #15466  
Kenneth P. Childs, WSBA #33952  
Christine A. Kosydar, WSBA #39145  
STOEL RIVES LLP  
805 Broadway, Suite 725  
Vancouver, WA 98660  
(360) 699-5900  
Of Attorneys for Appellant

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	iii
I. INTRODUCTION .....	1
II. STATEMENT OF THE CASE .....	2
A.    Whether or Not Hintons Intended That Title to the Property Should Be Vested in Them, Rather Than HDC, Is a Disputed Material Fact.....	2
B.    No Evidence Suggests That the FDIC Knew About or Was Responsible for Recording the Corrected Deed. ....	5
III. ARGUMENT .....	5
A.    The Trial Court’s Ruling Was in Error, Because It Assumes That Hintons’ Trust Deed Attached to the Property and That the Non-Judicial Foreclosure Was Therefore Effective. ....	8
1.    No Exceptions to the Statute of Frauds Render the Corrected Deed Effective to Convey Title.....	8
a.    Without Exception, an Original Signature of the Owner Is Required to Convey or Transfer Title.....	8
b.    Neither Kassab nor HDC Signed the Corrected Deed; It Therefore Does Not Satisfy the Statute of Frauds. ....	10
c.    The Hintons Cannot Carry Their Burden of Proof That an Exception to the Statute of Frauds Applies.....	11
2.    Even if HDC Waived Its Right to Object to the Foreclosure Sale, Such Waiver Would Not Cure the Title Defect.....	12
3.    Title Defects Disclosed by the Public Record Are Still Title Defects.....	14

**TABLE OF CONTENTS**

	<b>Page</b>
B. The Trial Court Erred in Denying Plaintiff’s Motion to Amend Its Complaint.....	15
C. The Trust Deed Did Not Secure Hintons’ Guaranties. ....	16
D. Even if the Non-Judicial Foreclosure Was Valid, and the Trust Deed Secured Hintons’ Guaranties, Hintons Waived Application of Any Anti-Deficiency Statute. ....	20
E. The Trial Court Erred in Granting Hintons Their Attorney Fees. ....	22
F. Even if Hintons Are Entitled to an Award of Attorney Fees, the Trial Court Erred in the Amount Awarded. ....	22
IV. CONCLUSION.....	23

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Amick v. L. M. Baugh</i> , 66 Wn.2d 298, 402 P.2d 342 (1965).....	21
<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wn.2d 535, 160 P.3d 13 (2007).....	18, 19
<i>Ashmore v. Estate of Duff</i> , 165 Wn.2d 948, 205 P.3d 111 (2009).....	18, 19
<i>Barth v. Barth</i> , 19 Wn.2d 543, 143 P.2d 542 (1943).....	10
<i>Colo. Carpet Installation, Inc. v. Palermo</i> , 668 P.2d 1384 (Colo. 1983).....	12
<i>Fid. &amp; Deposit Co. of Md. v. Ticor Title Ins. Co.</i> , 88 Wn. App. 64, 943 P.2d 710 (1997).....	13
<i>First-Citizens Bank &amp; Trust Co. v. Cornerstone Homes &amp; Dev., LLC</i> , 178 Wn. App. 207, 314 P.3d 420 (2013).....	18, 19
<i>First-Citizens Bank &amp; Trust Co. v. Reikow</i> , 177 Wn. App. 787, 313 P.3d 1208 (2013).....	20, 21, 22
<i>Home Sec. Corp. v. Gentry</i> , 235 So. 2d 249 (Miss. 1970).....	13, 19, 20, 22
<i>Losh Family, LLC v. Kertsman</i> , 155 Wn. App. 458, 228 P.3d 793 (2010).....	9
<i>Miller v. McCamish</i> , 78 Wn.2d 821, 479 P.2d 919 (1971).....	9

**TABLE OF AUTHORITIES**

	<b>Page</b>
<i>Pfeifer v. Raper</i> , 486 S.W.2d 524 (Ark. 1972).....	12
<i>Quality Alliance, Inc. v. Atmosphere Processing of Ind., Inc.</i> , No. 93 C 1615, 1994 U.S. Dist. LEXIS 7785 (N.D. Ill. June 9, 1994).....	11, 12
<i>Scruggs v. Caba</i> , No. 54003125, 2007 Conn. Super. LEXIS 628 (Conn. Mar. 6, 2007).....	12
<i>Twisp v. Methow Valley Irrigation Dist.</i> , 32 Wn. App. 132, 646 P.2d 149 (1982).....	11
<i>Wash. Fed. v. Gentry</i> , 179 Wn. App. 470, 319 P.3d 823 (2014).....	19, 20, 22
 <b>Statutes</b>	
RCW 61.24.100(5).....	2, 15, 16, 21
RCW 61.24.100(6).....	2, 16, 17, 21
RCW 64.04.020 .....	8, 10, 11
 <b>Rules</b>	
CR 15 .....	7

## I. INTRODUCTION

Respondents (“Hintons”) assert that “at its core” this case is about Appellant’s election of remedies to proceed with a non-judicial foreclosure. They are wrong. What is truly at the core of this case is Fidelity Title Insurance Company’s (“Fidelity”) mishandling of a closing in 2005, and its efforts in 2009 to redeem its errors by interlineating a copy of a deed to change title to the property (the “Corrected Deed”) without an original signature on the Corrected Deed, without a notarial acknowledgement and without the knowledge or consent of any party affected by the Corrected Deed. Conveniently, Fidelity’s escrow officer responsible for the original transaction and for recording the Corrected Deed<sup>1</sup> claims to have no memory of anything, and Fidelity has destroyed all of its files on the matter.<sup>2</sup> Having assigned counsel to defend Hintons in this appeal, Fidelity now argues, amazingly, that this appeal is really just about Appellant’s mistaken election of remedies.

Underlying Hintons’ election of remedies argument is its position that it is legally acceptable to alter the ownership on a deed without the owner’s signature, knowledge or consent. However, like every state, Washington has instituted a system for recording title to real property that, by necessity, imposes a number of formalities with which the law requires

---

<sup>1</sup> Capitalized terms in this brief have the same meaning as they are defined to have in Appellant’s Opening Brief.

<sup>2</sup> CP 1076-79.

strict compliance. Hintons ask this Court to deviate substantially from those formalities by creating exceptions that have never before been recognized – in Washington or anywhere else – and that would seriously undermine the system’s integrity.

## II. STATEMENT OF THE CASE

Appellant is compelled to correct some of Hintons’ inaccuracies<sup>3</sup> and to highlight the absurdity of some of the inferences they urge this Court to accept as underpinnings to their responsive brief (“Response”).

### A. **Whether or Not Hintons Intended That Title to the Property Should Be Vested in Them, Rather Than HDC, Is a Disputed Material Fact.**

Hintons assert that they intended to take title to the property individually, rather than in their corporation, HDC, as an undisputed fact.<sup>4</sup> Their assertion is central to the determination of whether or not the Trust Deed they signed was given to secure a loan made to HDC (the “Loan”) or to secure their guaranties (“Guaranties”), one of which was given to

---

<sup>3</sup> In the interest of brevity, Appellant will only note here that, among other inaccuracies, Hintons are wrong that the title policies reflecting title in them are the policies that were issued in 2005, and that the title policies reflecting title in HDC are the policies that were issued in 2009, when the Corrected Deed was recorded. (Response, p. 6, n. 2.) Hintons’ assertion of fact here is nonsensical as it assumes that at the same time that Fidelity was recording the Corrected Deed purporting to transfer title to Hintons, it was issuing new title policies reflecting title in HDC. Hintons are also wrong in their assertion that the trial court’s ruling on Appellant’s initial summary judgment motion did not resolve the issue of whether Appellants were entitled to a deficiency under RCW 61.24.100(5), or, instead, only under RCW 61.24.100(6). It certainly did. Appellant made clear in its summary judgment briefing that it was seeking a deficiency under RCW 61.24.100(5). CP 67.

<sup>4</sup> See Brief of Mark and Joni Hinton (“Response”), pp. 5-6.

Appellant's predecessor in interest six years prior to the Loan transaction,<sup>5</sup> and the other of which was given four months prior to the Loan transaction.<sup>6</sup> Little evidence is in the record to support Hintons' assertion that they intended to take title to HDC's property and that therefore the Trust Deed was given to secure their Guaranties, while abundant evidence is to the contrary:

- The deed itself is from Kassab to HDC, not Hintons;<sup>7</sup>
- The purchase and sale agreement identified the buyer as HDC, not Hintons;<sup>8</sup>
- An assignment of the purchase and sale agreement identified the buyer as HDC, not Hintons;<sup>9</sup>
- The preliminary title commitments identified the owner as HDC, not Hintons;<sup>10</sup>
- The Loan from the Bank<sup>11</sup> was made to HDC, not Hintons;<sup>12</sup>
- The real estate excise tax affidavit executed at the time of closing identified the buyer as HDC, not Hintons;<sup>13</sup>
- All of the tax statements for the property identified the owner as HDC, not Hintons;<sup>14</sup>
- HDC, not Hintons, repeatedly made representations to the City of Battle Ground that it owned the property;<sup>15</sup>

---

<sup>5</sup> CP 75, 112.

<sup>6</sup> CP 75, 108.

<sup>7</sup> CP 404.

<sup>8</sup> CP 385-88, 400-03.

<sup>9</sup> CP 410.

<sup>10</sup> CP 412, 418.

<sup>11</sup> The Bank of Clark County (the "Bank").

<sup>12</sup> CP 429-30.

<sup>13</sup> CP 407.

<sup>14</sup> CP 455-62.

- A 2008 title policy commitment given to HDC five years after the closing identified the owner as HDC, not Hintons;<sup>16</sup>
- Hintons' personal financial statements reflected that they held an interest in the property through their membership interest in a limited liability company;<sup>17</sup> and
- Mark Hinton, in his capacity as President of HDC, granted an easement in the property to Clark County PUD.<sup>18</sup>

Even Hintons admit that their Trust Deed covering HDC's property was not intended to secure their Guaranties, because the Trust Deed and the Guaranties were unconnected.<sup>19</sup> This issue is critical to the trial court's ruling in Hintons' favor, because, absent a finding of fact that the parties intended that title be placed in Hintons rather than HDC, the Court had no possible basis—not even a theoretical basis—to determine the necessary elements to support its ruling that a deficiency against Hintons is limited according to statute, to wit, that Hintons gave the Trust Deed to secure their Guaranties.<sup>20</sup>

/////

/////

---

<sup>15</sup> CP 466, 469, 472, 476, 489, 495, 497, 501, 520, 541, 552, 555, 582, 583, 588.

<sup>16</sup> CP 510.

<sup>17</sup> CP 600, 605.

<sup>18</sup> CP 613-14.

<sup>19</sup> Response, p. 7 (*citing* CP 149-53, 159-61, 179-80).

<sup>20</sup> At the same time, however, a finding that the parties did not intend to have title placed in Hintons would not be critical to a ruling in Appellant's favor, since this Court can (and should) find as a matter of law that (i) the wording of the original deed, which grants title to HDC, is controlling, incontrovertible and not subject to revision, and (ii) title could be transferred from HDC to Hintons only by way of a deed signed by HDC.

**B. No Evidence Suggests That the FDIC Knew About or Was Responsible for Recording the Corrected Deed.**

Hintons assert the likelihood that the Corrected Deed was recorded at the direction of the FDIC.<sup>21</sup> The record is devoid of any evidence to support such an inference. Furthermore, if the Corrected Deed was filed at the request of the FDIC, then it was without any question invalid to transfer title, since neither the FDIC nor its predecessor was a party to the purchase and sale agreement and had no authority to direct how title should be issued.<sup>22</sup>

**III. ARGUMENT**

Hintons begin with a lengthy Introduction and Statement of the Case that is disconnected from the remainder of their brief in which they assert that:

- Appellant elected its remedy by conducting a non-judicial foreclosure.<sup>23</sup> However, Hintons do not cite any legal authority to support their election of remedies defense. Further, this argument is specious. Appellant's null foreclosure based on the Trust Deed that never attached to the property would still be null even if Appellant had proceeded with a judicial foreclosure.

---

<sup>21</sup> "It could be inferred from the record that the correction was done at the request of the FDIC, given that it occurred during the time the FIDC [*sic*] was actively evaluating the loan collateral." Response, p. 23.

<sup>22</sup> Other theories as to why the Corrected Deed was recorded are equally, if not more, plausible. An architect filed a mechanic's lien for \$80,932.62 against the property on May 11, 2009 (CP 622-23), about six weeks before the Corrected Deed was recorded and at a time when a prior mechanic's lien for \$54,371.47 against the property was pending (CP 617-21). An appropriate inference from the record is that the correction was done at the request of Hintons, since a retroactive correction of title would have caused the property to be released from the liens.

<sup>23</sup> Response, pp. 1, 4, 33, 35.

- Appellant waived its right to seek a remedy for a lack of title to the property it thought it had foreclosed.<sup>24</sup> Hintons have failed to cite to any facts or law in support of this position. Simply, they cannot prove that Appellant knew its foreclosure was a nullity, that it knowingly and intentionally failed to timely pursue its remedies with respect to such null foreclosure and that Hintons relied on Appellant's waiver or delay to their detriment.<sup>25</sup>
- The FDIC correctly decided to pursue a judicial foreclosure.<sup>26</sup> Whether or not the FDIC, correctly or incorrectly, decided to proceed with a judicial foreclosure is irrelevant. Moreover, a judicial foreclosure without more would have been a nullity. Hintons have provided no evidence, and cannot do so, that the FDIC knew that the Trust Deed had not attached to the property and that despite the absence of any collateral for the Loan, the FDIC would have embarked on any void process to foreclose judicially or non-judicially.
- Appellant is seeking to collaterally attack its own foreclosure.<sup>27</sup> Appellant is not seeking to collaterally attack another judicial process or judgment. Rather, it is seeking to attach Hintons' Trust Deed to HDC's property, so that it can then proceed with the exercise of its remedies with respect to such property and Hintons' Guaranties.

---

<sup>24</sup> “[T]he time to challenge the foreclosure has long passed.” Response, p. 2.

<sup>25</sup> Significantly, while Hintons argue strenuously that Appellant is guilty of delays and that Hintons are entitled to the speed and efficiency associated with a non-judicial foreclosure proceeding, they overlook that Appellant suggested to the trial court and Hintons vigorously opposed a solution that would have affirmed the non-judicial foreclosure sale and avoided any further delays, and would have provided a legally correct result. Specifically, Appellant urged the court to find either (i) that the Trust Deed was granted by HDC and was executed by Hintons in their capacity as agents for HDC, or (ii) that HDC ratified the Trust Deed as having been executed on its behalf. Indeed, Appellant's proposed Amended Complaint seeks precisely that result. CP 687. This Court could resolve this appeal with such a finding.

<sup>26</sup> “Evidently aware of the consequences of judicial foreclosure in Washington, the FDIC concluded its evaluation: Recommend judicial foreclosure.” Response, p. 4.

<sup>27</sup> “[Respondent] cannot avoid those consequences through a collateral attack on its own foreclosure.” Response, p. 4.

Hintons then proceed in their Response to address a different set of issues from those in their Introduction—those raised by Appellant and those compelled by the facts of the case. They argue, inter alia:

- There are exceptions to the statute of frauds;
- HDC has waived any right to challenge the foreclosure sale;
- CR 15, regarding amendments of pleadings, does not authorize challenges to non-judicial foreclosure sales;
- Title defects disclosed in the public record are not really title defects; and
- The Corrected Deed that is a copy of a deed interlined to change the owner of the property is not signed by the owner of the property or anyone else, is not notarized, and is recorded years after the original transfer of title without the knowledge or consent of any affected party, is nonetheless effective not only to transfer title and change the ownership of the property but also to retroactively attach the lien of the Trust Deed to the property.

This Reply is organized to respond to each of these arguments in relation to the three principal issues before this Court:

- (i) Did the Deed of Trust attach to the property it purports to cover the Property and was there an effective foreclosure that serves as a basis for limiting a deficiency award against Hintons?
- (ii) Did the trial court err in denying Appellant's Motion to Amend; and
- (iii) If the foreclosure was effective and not a nullity, was Hintons' Trust Deed given to secure their Guaranties?

The remainder of this Reply responds directly to Hintons' responses on the issues of waiver of the anti-deficiency statute, the trial

court's award of attorney fees and costs and the amount of the trial court's award related to Hintons' attorney fees and costs.

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

Both sides agree that subsumed in the trial court's rulings are the following findings: (i) Hintons' Trust Deed attached to HDC's Property, and therefore, an effective foreclosure occurred; and (ii) Hintons' Trust Deed was given to secure their Guaranties. Hintons do not appear to dispute that Hintons' Trust Deed did not attach to HDC's Property at the time of the Loan transaction. Rather, they respond that the Corrected Deed was effective to transfer title from HDC to Hintons and to retroactively attach the Trust Deed lien to the Property, because (a) exceptions to the statute of frauds apply; (b) HDC waived any objection to the foreclosure sale; and (c) title defects in the public records are not really title defects.

**1. No Exceptions to the Statute of Frauds Render the Corrected Deed Effective to Convey Title.**

**a. Without Exception, an Original Signature of the Owner Is Required to Convey or Transfer Title.**

Because the Corrected Deed lacks an original, acknowledged signature by the owner of the Property, on its face it fails to comply with Washington conveyance statutes, in particular RCW 64.04.020. Hintons

urge this Court to apply an exception to these statutes, although they do not identify any exception in the statutes themselves. Instead they refer to possible general case law exceptions. However, Hintons face two insurmountable problems with their “exception” argument.

First, while Hintons cite some cases in which courts have recognized exceptions to the statutory requirements where a deed was not properly acknowledged or notarized, where a grantee’s name was initially left blank, and where a deed contained a scrivener’s error in the property description, they do not provide any authority from Washington or any other jurisdiction that a deed is effective to transfer title to property without a signature from the owner of the property. For any court to hold that a third party may change title to property by interlineating a copy of a deed without the owner of the property’s signature and without the owner’s knowledge or consent would open the door to fraud and turn upside down real property and related financing transactions.

Second, in every one of the Hintons’ cited cases, the courts recognize limited exceptions to the statute of frauds *only when* other compelling evidence exists sufficient to establish the *certainty* the statute was designed to ensure. In *Losh Family, LLC v. Kertsman*,<sup>28</sup> for example, the court held that in order to recognize an exception to the statute of

---

<sup>28</sup> 155 Wn. App. 458, 465, 228 P.3d 793 (2010) (citing *Miller v. McCamish*, 78 Wn.2d 821, 826-29, 479 P.2d 919 (1971)).

frauds, “there must be clear and unequivocal evidence which leaves no doubt as to the terms, character, or existence of the contract.” In this case, Hintons urge this Court to recognize an exception to RCW 64.04.020 based on the “certainty” that Hintons were the intended title holders to the Property, not HDC, notwithstanding the overwhelming evidence to the contrary,<sup>29</sup> including the original deed from E.G. Kassab Companies (“Kassab”) to HDC, not Hintons,<sup>30</sup> and notwithstanding that neither HDC nor Hintons authorized or were even aware of the recordation of the Corrected Deed.<sup>31</sup>

**b. Neither Kassab nor HDC Signed the Corrected Deed; It Therefore Does Not Satisfy the Statute of Frauds.**

First, this case is distinguishable from *Barth v. Barth*,<sup>32</sup> cited by Hintons, in which the name of the grantee on the deed was left blank. Here the name of the grantee was not left blank, to be completed at a future date as may be instructed, and here HDC is the clearly identified grantee on the original deed executed by Kassab that resulted in title being vested in HDC.

Second, neither Kassab nor HDC signed the Corrected Deed. The Corrected Deed was a mere interlineation to change the name of the

---

<sup>29</sup> See *supra* Section II.A.

<sup>30</sup> CP 632-33.

<sup>31</sup> CP 632-33. Hintons concede that “[t]he Hinton[s] did not cause the re-record to occur and learned about it after-the-fact from their attorneys” (*citing* CP 632-33, 981). Response, p. 9.

<sup>32</sup> 19 Wn.2d 543, 143 P.2d 542 (1943); Response, pp. 22-23.

grantee on a *copy* of the deed from Kassab to HDC. Such an interlineation on a copy of a deed by someone (Fidelity) not even a party to the transaction years after the transaction closed and without the knowledge or consent of any affected party is not even remote evidence of the parties' intent that Hintons were the intended grantee on the original deed. On the contrary, it suggests an inappropriate effort to correct or cover up a mistake without disclosure to any of the affected parties.

**c. The Hintons Cannot Carry Their Burden of Proof That an Exception to the Statute of Frauds Applies.**

Hintons argue that “the one challenging the validity of a deed bears the burden of proof”<sup>33</sup> (*citing Twisp v. Methow Valley Irrigation Dist.*)<sup>34</sup> and they argue that “[t]here is a complete failure of proof for [Appellant’s] allegation that the correction was unauthorized.”<sup>35</sup> The first part of Hintons’ argument is correct as far as it goes. Accepting that Appellant has the initial burden of proof here, Appellant has shown that the Corrected Deed flatly fails to satisfy the requirements of RCW 64.04.020. Having carried its burden of proof that the Corrected Deed does not comply with statutory requirements, the burden then shifts to Hintons to prove that an exception applies. *Quality Alliance, Inc. v. Atmosphere*

---

<sup>33</sup> Response, p. 23.

<sup>34</sup> 32 Wn. App. 132, 135, 646 P.2d 149 (1982).

<sup>35</sup> Response, p. 23.

*Processing of Ind., Inc.*<sup>36</sup> (“[Plaintiff] had the burden of proof of showing an exception to the statute of frauds .”); *Pfeifer v. Raper*;<sup>37</sup> *Colo. Carpet Installation, Inc. v. Palermo*;<sup>38</sup> *Scruggs v. Caba*.<sup>39</sup> In this case, Hintons have failed to carry their burden that an exception exists to the fundamental statutory requirement that a real property conveyance instrument must bear the original signature of the owner.

**2. Even if HDC Waived Its Right to Object to the Foreclosure Sale, Such Waiver Would Not Cure the Title Defect.**

Next Hintons contend that “[Appellant’s] argument is based upon a hypothetical HDC title claim,”<sup>40</sup> that HDC has not in fact raised any such claim, and that, even if it had, it has waived its right to assert such a claim post-sale.<sup>41</sup> They then launch into a lengthy discussion of why HDC is the only party who can challenge the validity of the foreclosure sale and that HDC has waived its right to do so. However, whether or not HDC waived anything is meaningless in the context of the facts and issues of this case.

The underlying predicate to Hintons’ argument that their Trust Deed attached to the Property owned by HDC is simply flat out false. Appellant never had a lien on the Property, and the Corrected Deed was ineffective to cure this problem. Any foreclosure of the Trust Deed,

---

<sup>36</sup> No. 93 C 1615, 1994 U.S. Dist. LEXIS 7785, at \*38 (N.D. Ill. June 9, 1994).

<sup>37</sup> 486 S.W.2d 524 (Ark. 1972).

<sup>38</sup> 668 P.2d 1384 (Colo. 1983).

<sup>39</sup> No. 54003125, 2007 Conn. Super. LEXIS 628 (Conn. Mar. 6, 2007).

<sup>40</sup> Response, p. 25.

<sup>41</sup> Response, p. 25.

whether or not it was judicial or non-judicial, was a meaningless, null process that had no effect on title to the Property. Since the foreclosure sale was a nullity, it is irrelevant whether or not HDC waived its purported right to object to it. HDC lost nothing by the foreclosure—title remains vested in HDC free and clear of Appellant’s lien—thereby rendering any objection to the foreclosure meaningless, and any purported waiver of such meaningless objection, equally meaningless.

Finally, Hintons fail in their efforts to distinguish Appellant’s cited cases that post-foreclosure sale challenges are not barred. First, Hintons address only two of the four cases cited by Appellant and do not even attempt to distinguish Appellant’s other two cases—*Fidelity & Deposit Co. of Maryland v. Ticor Title Insurance Co.*,<sup>42</sup> and *Home Security Corp. v. Gentry*.<sup>43</sup> Second, Hintons argue that the *Bavand* and *Albice* cases are distinguishable because they deal with a “failure to comply with the Deed of Trust Act that rendered the trustee without statutory authority to conduct the sale,”<sup>44</sup> but that is precisely the same reasoning that applies here. If the Trust Deed did not attach to the Property, then, just as in *Bavand* and *Albice*, the Trustee, whose authority is derived exclusively from the Trust Deed itself, had no authority to sell the Property.

---

<sup>42</sup> 88 Wn. App. 64, 943 P.2d 710 (1997).

<sup>43</sup> 235 So. 2d 249 (Miss. 1970).

<sup>44</sup> Response, p. 30.

**3. Title Defects Disclosed by the Public Record Are Still Title Defects.**

Hintons unabashedly assert, contrary to reality, that “[Appellant] received marketable title via the Trustee’s Deed” as the result of a [null] foreclosure and that “[e]ven if there was a cloud on title, it does not provide a basis to vacate the Sale.”<sup>45</sup> Hintons cannot and have not submitted any evidence that Appellant received marketable title or that there is even a cloud on the title to the Property. On the contrary, the only conclusions that can be drawn from the undisputed evidence in this case are that Hintons’ Trust Deed never attached to the Property owned by HDC, and that HDC holds title to the Property unencumbered by any lien or cloud from the Trust Deed.

Hintons then proceed to argue that, even if Appellant acquired the Property with a cloud on the title, the sale was without warranty, it only obtained whatever title the trustee had to convey, and “[i]f it received unmarketable title, [Appellant] has only itself to blame.”<sup>46</sup> This argument is equally and obviously specious, because Appellant never acquired title to the Property, much less any title that is clouded. Title remains vested in HDC, free and clear of any lien of the Trust Deed executed by Hintons.

---

<sup>45</sup> Response, p. 31.

<sup>46</sup> Response, pp. 32-33. Hintons go on to state that “[i]f [Respondent] is damaged by a defect in title, it has a remedy and its recourse is against the title company.” (Response, p. 33, n. 16.) This is a remarkable statement considering that the Hintons are almost certainly represented in this appeal by counsel appointed by Fidelity under their owner’s title insurance policy.

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

Hintons argue that the trial court did not abuse its discretion in denying Appellant's Motion to Amend, even though the record is devoid of any grounds for denying the Motion.<sup>47</sup> Notwithstanding that this alone is a sufficient basis for reversal, Hintons contend they would be prejudiced if the Motion is granted, because (i) the Motion was too late, and (ii) it would have changed the nature of the action.<sup>48</sup> Neither of these arguments—alone or together—amounts to prejudice.

First, contrary to Hintons' contention, mere delay in moving to amend a pleading is not enough, particularly where, as here, the delay was not of Appellant's own making. Appellant had no cause to move to amend until it discovered well into the case that its foreclosure of the Property was a nullity. Moreover, the delays in this case were due largely to the conduct of Hintons, not Appellant. When Appellant filed a summary judgment motion very early in the case, Hintons failed to raise in their response to that motion any of the arguments that they later submitted in their own summary judgment motion.<sup>49</sup> Appellant's initial summary judgment motion and the resulting ruling included a determination that Hintons were liable for a deficiency under

---

<sup>47</sup> CP 752-54.

<sup>48</sup> Response, pp. 35-36.

<sup>49</sup> Notwithstanding Hintons' arguments to the contrary, the trial court's granting of Hintons' summary judgment motion and denial of Appellant's cross-summary judgment motion constituted a complete reversal of its earlier grant of summary judgment in Appellant's favor.

RCW 61.24.100(5).<sup>50</sup> After moving for reconsideration of the order granting that motion, which they lost, Hintons then changed attorneys and filed a new summary judgment motion seeking to have the court reverse its prior ruling.<sup>51</sup> That motion raised entirely new issues and that led to significant discovery, to which Hintons inappropriately refused to respond, further delaying the case.<sup>52</sup>

The second problem with Hintons' argument is that they cannot point to any real prejudice. They have not taken any action or failed to take any action that would be upset by allowing Appellant to amend its complaint. Simply, regardless of whether or not the foreclosure sale was effective or even occurred, this lawsuit on Hintons' Guaranties would still have ensued.

**C. The Trust Deed Did Not Secure Hintons' Guaranties.**

The trial court's ruling that any deficiency claim against Hintons was limited by RCW 61.24.100(6) necessarily required a finding that the Trust Deed was granted by Hintons to secure their Guaranties. However,

---

<sup>50</sup> RCW 61.24.100(5) authorizes a deficiency judgment against a guarantor for the difference between the sale price of the property and its fair market value.

<sup>51</sup> While the court held a hearing on April 20, 2012, on the motion for reconsideration, at which it denied the motion, a written order on the motion was never entered.

<sup>51</sup> CP 310.

<sup>52</sup> CP 960-64. As noted above (note 25), Hintons' complaints about delays allegedly caused by Appellant overlook that Appellant suggested that the trial court find either (i) that the Trust Deed was granted by HDC and was executed by Hintons in the capacity as agents for HDC, or (ii) that HDC ratified the Trust Deed as having been executed on its behalf—yet Hintons vigorously opposed such a finding.

the evidence indicates that the Trust Deed was not granted to secure Hintons' Guaranties, notwithstanding their belated arguments to the contrary. Hintons begin their argument with the patently false representation of the record that "[t]he trial court, based on the plain language in the Deed of Trust, determined that RCW 61.24.100(6) applies."<sup>53</sup> However, the trial court issued no written opinion and provided no explanation whatsoever of the basis for its ruling. The parties do not know if it was language in the Trust Deed or some other evidence upon which the trial court relied to determine whether or not the Trust Deed was given to secure Hintons' Guaranties.

Aside from this, the significant point here is that given the overwhelming evidence discussed above,<sup>54</sup> Hintons did not provide the Trust Deed to secure their Guaranties. Hintons themselves admit that they "did not understand at the time of the loan closing that the Bank considered these previously executed Guaranties as guaranties for [the] November 23, 2005 loan to HDC."<sup>55</sup> If Hintons did not understand that they were guaranteeing the Loan made to HDC, they certainly cannot contend that they gave the Trust Deed for that Loan to secure such Guaranties.

---

<sup>53</sup> Response, p. 37.

<sup>54</sup> See *supra* Section II.A.

<sup>55</sup> Response, p. 7 (*citing* CP 149-53, 159-61, 179-80).

Because Hintons cannot rely on the facts here, they turn to the recent case of *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*.<sup>56</sup> This case, however, is distinguishable from *Cornerstone* in one significant respect. In *Cornerstone*, whether the guaranties were “executed in connection with the indebtedness” in order to qualify as “Related Documents” was a disputed issue that turned entirely upon the Court’s analysis of the wording of the relevant documents. In contrast, whether or not the Hintons’ Guaranties were “executed in connection with the Indebtedness” is not a disputed issue, because Hintons have repeatedly taken the position that they were not.<sup>57</sup> Hintons are therefore judicially estopped from now taking a contrary position. *Ashmore v. Estate of Duff* (“Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage.”);<sup>58</sup> see also *Arkison v. Ethan Allen, Inc.*<sup>59</sup>

Acknowledging their contradictory positions, Hintons argue that their prior inconsistent position was inconsequential because they allegedly did not prevail on the issue.<sup>60</sup> That contention is both incorrect and irrelevant. First, the trial court’s ruling that Hintons’ Guaranties are

---

<sup>56</sup> 178 Wn. App. 207, 210, 314 P.3d 420 (2013).

<sup>57</sup> See CP 149-153, 159-161, 179-180; Appellant’s Opening Brief, pp. 32-34.

<sup>58</sup> 165 Wn.2d 948, 951, 205 P.3d 111 (2009).

<sup>59</sup> 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

<sup>60</sup> Response, p. 41.

valid and enforceable against them with respect to the Loan made to HDC, even though executed prior to such Loan being made, does not and cannot lead to the conclusion that the Guaranties are secured by the Trust Deed. The enforceability of the Guaranties is a separate and distinct matter from whether or not the Guaranties are secured.

Second, the doctrine of judicial estoppel does not require that the initial contradictory statement of the party sought to be estopped was the basis for a court's ruling in that party's favor. *Ashmore*;<sup>61</sup> *Arkison*.<sup>62</sup> Simply, an admission is an admission. Hintons admitted that the Trust Deed was not given to secure their Guaranties. They cannot now put that admission back in the tube to hide what they have already disclosed.

If this Court declines to distinguish *Cornerstone*, then Appellant urges the Court to either limit its holding in *Cornerstone* or overrule it in light of *Washington Federal v. Gentry*,<sup>63</sup> in which Division I reached a contrary conclusion on precisely the same issue.<sup>64</sup> After considering the same language that the court in *Cornerstone* had considered and relied upon to conclude that the trust deeds secured the guaranties, the court in *Gentry* observed the following:

---

<sup>61</sup> 165 Wn.2d 948, 205 P.3d 111 (2009).

<sup>62</sup> 160 Wn.2d 535, 160 P.3d 13 (2007).

<sup>63</sup> 179 Wn. App. 470, 490-95, 319 P.3d 823 (2014).

<sup>64</sup> As Hintons note in the Response (p. 40, n. 18), the *Gentry* case is now on appeal, so it is possible the Washington Supreme Court will have issued an opinion on the issue before this case is decided.

[R]eading this definition to include *all* guaranties, regardless of who the guarantor is, ignores the specifications in the “Payment and Performance” provisions for the deeds of trust that are before us. As we discussed previously in this opinion, this latter provision makes clear whose obligations for payment and performance are secured by the deeds of trust. And there can be no doubt that such obligations are limited to the *Borrower and Grantor* of each instrument, not guarantors of the loan. Accordingly, the scope of the definition of “Related Document” does not include the guaranties of the Gentrys.<sup>[65]</sup>

The “Payment and Performance” provisions the *Gentry* court considered were nearly identical to the same provisions in the Trust Deed at issue here.<sup>66</sup>

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

As pointed out in Appellant’s Opening Brief, both the Trust Deed and the Guaranties contain provisions by which Hintons waived application of the anti-deficiency statute. Hintons challenge the enforceability of such provisions, relying primarily upon *First-Citizens Bank & Trust Co. v. Reikow*,<sup>67</sup> in which the Washington Court of Appeals (Division II) declined to apply a provision expanding the scope of the

---

<sup>65</sup> 179 Wn. App. at 494.

<sup>66</sup> See CP 16 and 17 and compare them with almost identical wording in *Gentry*, 179 Wn. App. at 491. The only apparent difference in the wording of the *Gentry* trust deeds from the Trust Deed at issue here is that the “Payment and Performance” provision in *Gentry* states that “Borrower and Grantor shall pay to Lender,” and the same provision in the Trust Deed at issue here omits the word “Grantor” from that statement. 179 Wn. App. at 491.

<sup>67</sup> 177 Wn. App. 787, 313 P.3d 1208 (2013).

lender's deficiency claim beyond the difference between the sale price and the property's fair market value. *Reikow* does not apply here.

First, contrary to Hinton's suggestion, the court in *Reikow* did not state that a waiver of a statutory requirement governing non-judicial foreclosure sales is absolutely prohibited. It only noted that the Washington Supreme Court "has shown great reluctance to allow" such waivers.<sup>68</sup> As pointed out in Appellant's Opening Brief, the Washington Supreme Court has previously upheld a waiver by a guarantor of a statutory requirement that the creditor pursue a debtor to judgment before enforcing a guaranty. *Amick v. L. M. Baugh*.<sup>69</sup>

Second, the lender in *Reikow* was seeking to enforce a waiver of RCW 61.24.100(5) in its entirety, notwithstanding that the lender's "complaint itself call[ed] for a fair value hearing."<sup>70</sup> In contrast, Appellant here is asserting only a waiver of RCW 61.24.100(6) in favor of the type of deficiency the statute otherwise allows against a guarantor through RCW 61.24.100(5).

Third, the court in *Reikow* was clearly concerned with the lender's inequitable conduct in bidding "over \$1,000,000 less than its own valuation of the property"<sup>71</sup> and in possibly double-dipping by having

---

<sup>68</sup> *Id.* at 794 n.4.

<sup>69</sup> 66 Wn.2d 298, 402 P.2d 342 (1965).

<sup>70</sup> 177 Wn. App. at 795.

<sup>71</sup> *Id.* at 796.

already foreclosed on the property and obtained a settlement from a different guarantor.<sup>72</sup> In this case, no effective foreclosure has occurred.

Significantly, when presented with precisely the same issue, the Washington Court of Appeals in *Gentry* did not state that the matter was resolved by *Reikow*,<sup>73</sup> but instead stated that in light of its ruling on two earlier issues, it was declining to rule on the issue.<sup>74</sup>

**E. The Trial Court Erred in Granting Hintons Their Attorney Fees.**

As noted in Appellant's Opening Brief, if Hintons do not prevail in this case, then there is no basis to award them their attorney fees.

**F. Even if Hintons Are Entitled to an Award of Attorney Fees, the Trial Court Erred in the Amount Awarded.**

While Appellant is not seeking an hour-by-hour review of Hintons' attorney fees, a few glaring errors are apparent in the trial court's award.<sup>75</sup> First, awarding Hintons \$14,820.99 for fees that were billed by their first attorney, Charles Buckley, but that Hintons never paid and clearly have no intention of paying, was patently wrong. Second, while in limited circumstances an award of attorney fees to a party may be appropriate, even if such party did not prevail, an award to Hintons as the losing party on Appellant's discovery motions where Hintons were compelled to

---

<sup>72</sup> *Id.*

<sup>73</sup> The *Reikow* opinion was issued in November 2013, and the *Gentry* opinion was issued in February 2014.

<sup>74</sup> *Reikow*, 179 Wn. App. at 495.

<sup>75</sup> To date, the trial court has still not signed or entered a supplemental judgment awarding the attorney fees.

produce documents that were clearly discoverable, is wholly inappropriate and unsupportable.

Finally, any award of Hintons' attorney fees that were clearly unreasonably and unnecessarily incurred should be denied, including those fees incurred: (i) by Mr. Buckley well after he had been replaced; (ii) for research on issues relevant to a valuation hearing when no valuation hearing was going to occur; (iii) for legal assistant fees billed for secretarial work; and (iv) in drafting a summary judgment motion on issues that were never pled or raised.

#### **IV. CONCLUSION**

The trial court provided no reasons for its rulings. However, subsumed in its ruling are conclusions of fact that are in dispute or have no basis in the record and upon conclusions of law that are clearly erroneous. It leaves Appellant with no collateral for its loan of \$2 million and no recourse on its Guaranties from Hintons. It also leaves title to the Property vested in HDC free and clear of the lien of the Trust Deed. This is a wholly inequitable result that leaves Appellant completely empty handed and HDC and Hintons with \$2 million in free money and free and clear title to the Property. The ruling must be reversed, the case sent back to the trial court with specific instructions that the Corrected Deed is invalid, that

/////

/////

Appellant's motion to amend must be granted, and that Appellant may proceed with its claims against Hintons on their guaranties.

DATED this 20 day of August, 2014.

STOEL RIVES LLP



D. Jeffrey Courser, WSBA #15466  
Kenneth P. Childs, WSBA #33952  
Christine A. Kosydar WSBA #39145  
Of Attorneys for Appellant

FILED  
COURT OF APPEALS  
DIVISION II

2014 AUG 22 PM 12:57

STATE OF WASHINGTON

BY DEPUTY

**CERTIFICATE OF SERVICE**

I certify that I caused the foregoing, REPLY BRIEF OF APPELLANT, to be filed with the Court of Appeals (original one copy); a copy being served on opposing counsel set forth below *via pdf/email and U.S. mail*:

Danny L. Hitt, Jr.                      Email: [dhitt@hittandhiller.com](mailto:dhitt@hittandhiller.com)  
Stacy Rutledge                      Email: [srutledge@hittandhiller.com](mailto:srutledge@hittandhiller.com)  
Hitt Hiller Monfils Williams LLP  
411 SW 2nd Avenue, Suite 400  
Portland, OR 97204  
Attorneys for Defendants/Respondents

Margaret Archer                      Email: [Marcher@gth-law.com](mailto:Marcher@gth-law.com)  
Wells Fargo Plaza  
1201 Pacific Avenue, Suite 2100  
Tacoma, WA 98401  
Attorneys for Defendants/Respondents

DATED: August 20, 2014.

  
Kenneth P. Childs, WSBA #33952  
Of Attorneys for Appellant