

NO. 47728-9-II

COURT OF APPEALS  
DIVISION II OF THE STATE OF WASHINGTON

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RESTORE EQUITY, LLC,  
APPELLANT

vs.

The BANK OF NEW YORK MELLON, as successor in interest,  
RESPONDENT

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**ANSWERING BRIEF OF RESPONDENT THE BANK OF NEW  
YORK MELLON, AS SUCCESSOR TRUSTEE TO JPMORGAN  
CHASE BANK, AS TRUSTEE FOR NOVASTAR MORTGAGE  
FUNDING TRUST, SERIES 2004-1, NOVASTAR HOME EQUITY  
LOAN ASSET-BACKED CERTIFICATES, SERIES 2004-1**

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Robert W. Norman, Jr., WSBA No. 37094  
Sakae S. Sakai, WSBA No. 44082  
HOUSER & ALLISON, APC  
1601 5<sup>th</sup> Avenue, Suite 850  
Seattle, WA 98101  
Telephone: (206) 596-7838  
Facsimile: (206) 596-7839

Attorneys for Respondent The Bank of New York Mellon, as Successor  
Trustee to JPMORGAN CHASE BANK, As Trustee for NovaStar  
Mortgage Funding Trust, Series 2004-1, NovaStar Home Equity Loan  
Asset-Backed Certificates, Series 2004-1

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## I. INTRODUCTION

This appeal involves Appellant Restore Equity, LLC's ("Restore Equity") attempt to obtain a windfall based on a foreclosure trustee's inadvertent reliance on an outdated title report when determining who was entitled to receive a notice of trustee's sale. This mistake led the foreclosure trustee to proceed with a trustee's sale without providing notice of the sale to Restore Equity. RCW 61.24.040(7) sets forth the rule that an omitted party is treated as an omitted defendant in a judicial foreclosure proceeding. While the omitted party's rights cannot be affected by the sale, Washington case law establishes that reforeclosure is the appropriate remedy. There is no basis to award Restore Equity with exclusive title to the property.

Restore Equity contends that it is entitled to quiet title to the foreclosed property free and clear of The Bank of New York Mellon, as Successor Trustee to JPMORGAN CHASE BANK, As Trustee for NovaStar Mortgage Funding Trust, Series 2004-1, NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1's (the "Trust") interests due to the nature of the foreclosure trustee's mistake.

However, in *U.S. Bank of Washington v. Hursey*, 116 Wn.2d 522, 526, 806 P.2d 245 (1991) ("*Hursey*"), the Washington Supreme Court set forth precedent which unequivocally establishes that a reforeclosure is

appropriate where a party is omitted due to any mistake. Reforeclosure is a fair remedy as it places the omitted party in the position they would have been had they been joined in the original action. The reforeclosure does not take away any rights that the omitted party possessed before foreclosure.

Apparently, restoration of the status quo is not sufficient for Restore Equity. Instead, Restore Equity attempts to introduce a new standard with regards to what constitutes an “excusable” mistake under *Hursey*, arguing that the mistake does not provide grounds for reforeclosure if the omitted interest is a matter of public record. Neither *Hursey* nor any other Washington authority supports such a distinction. To support its argument, Restore Equity relies on dicta set forth in an Indiana Supreme Court opinion, as well as Washington case law setting forth the standard applicable to judicial review of a state agency’s decision to reject an untimely appeal of an order denying unemployment benefits. Neither of these sources constitutes precedent which would override the clear holding in *Hursey*.

Much of Restore Equity’s briefing relies upon arguments which are raised for the first time on appeal. Restore Equity attacks the due diligence conducted by the Trust, as the successful bidder at the trustee’s sale. This analysis is irrelevant to the issue of whether the foreclosure

trustee made a mistake in the foreclosure process. Neither *Hursey*, nor any other authority cited by Restore Equity, conditions reforeclosure on the due diligence of the purchaser. The doctrine focuses on the cause of the omitted party, which in the context of non-judicial foreclosures, hinges on the actions of the foreclosure trustee.

Similarly, Restore Equity contends that reforeclosure is inappropriate given the only way to rescind a trustee's sale is through RCW 61.24.050(2), which allows a trustee or beneficiary to unilaterally rescind a non-judicial foreclosure up to 11-days after the sale. This argument fails for multiple reasons. First, this novel argument was not raised in the trial court. Second, the argument contradicts Washington Supreme Court precedent which establishes a foreclosure can be declared void by judicial decree. Finally, the 11-day process in RCW 61.24.050(2) was not enacted until 2012, a year after the non-judicial foreclosure sale.

The trial court's decision should be affirmed as the unrefuted evidence established that Quality Loan Services made a mistake by failing to issue the notice of trustee's sale to Restore Equity. No evidence was provided by Restore Equity regarding whether Quality Loan Services committed some sort of malfeasance that would create a genuine issue for trial as to whether its actions were calculated, intentional, or otherwise did

not constitute a mistake. Consequently, the precedent in *Hursey* directly applies, and allows reforeclosure.

Finally, the trial court properly dismissed the Consumer Protection Act and Accounting claims. These claims were pled in the alternative, contingent on a ruling by the court that Restore Equity's interests were extinguished. Moreover, Restore Equity failed to provide any admissible evidence that would substantiate its allegation that the interest was not properly calculated on the mortgage loan at issue. Accordingly, the trial court's order granting summary judgment to the Trust should be affirmed.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Whether reforeclosure of a deed of trust is appropriate when a trustee fails to issue a notice of trustee's sale to a party entitled to notice under RCW 61.24.040(b), due to an inadvertent mistake.

2. Whether the evidence establishes that Quality Loan Services Corporation failed to issue the Notice of Trustee's Sale to Restore Equity due to a mistake.

3. Whether the merger doctrine precludes reforeclosure.

4. Whether the trial court properly granted summary judgment in favor of the Trust over Restore Equity's CPA and Accounting claims.

### III. COUNTERSTATEMENT OF THE FACTS

The underlying facts and procedure pertinent to this appeal are as follows:

#### A. The Crowder Mortgage Loan

On or about December 15, 2003, in consideration for a loan (“Loan”), Ronald Crowder and Debra Crowder executed a promissory note (“Note”) in the amount of \$126,000.00 in favor of Novastar Mortgage, Inc. (CP 80.) On or about December 15, 2003, in order to secure repayment of the Note, Micah Schnall executed a deed of trust (“Deed of Trust”) encumbering real property located at 1116 West Young Street, Elma, WA 98541 (the “Property”). (CP 239–240.) The Deed of Trust was recorded on December 19, 2003 with the Grays Harbor County Auditor’s Office as Ins. No. 2003-12180092. (CP 240.) Collectively, the Note and Deed of Trust are referred to as the “Loan” or the “Loan Documents.”

On or about May 3, 2010, Mortgage Electronic Registration Systems, Inc. (“MERS”), acting solely as nominee for Novastar Mortgage, Inc., executed an assignment of deed of trust (“Assignment of Deed of Trust”), granting MERS’ record interest under the Deed of Trust to the Trust. The Assignment of Deed of Trust was recorded on May 21, 2010

with the Grays Harbor County Auditor's Office as Ins. No. 2010-05210037. (CP 45)

**B. The Crowders default on their Loan payments and foreclosure trustee is appointed**

The Crowders fell into default under the terms of the Note and Deed of Trust by failing to perform monthly payment obligations beginning with the December 1, 2009 installment. (CP 80.) On May 10, 2010, Quality Loan Services Corporation of Washington, in its capacity as agent of Bank of New York Mellon, issued a notice of default ("Notice of Default") to the Crowders due to their failure to perform monthly mortgage payment obligations. (CP 92.)

On or about June 3, 2011, the Trust appointed Quality Loan Services Corporation of Washington ("QLS") as successor trustee under the Deed of Trust. (CP 92-93.) The Appointment of Successor Trustee was recorded on June 22, 2011 with the Grays Harbor County Auditor's Office as Ins. No. 2011-06220038. (CP 96-97.)

**C. The Crowders quitclaim the Property to Restore Equity, LLC**

On October 16, 2010, the Crowders transferred their interest in the Property to Restore Equity by way of a quit claim deed ("Quitclaim deed"). The Quitclaim deed was recorded on November 16, 2010 with the Grays Harbor County Auditor's Office as Ins. No. 2010-11160032. (CP 47.) The Crowders did not obtain permission from Bank of New York

Mellon to transfer their interest in the Property to Restore Equity, LLC, regardless of the fact that failure to obtain permission constituted a grounds for acceleration of the underlying debt. (CP 80.)

On October 19, 2010, the Crowders assigned to Restore Equity, LLC, any and all claims against Novastar Mortgage, Inc., as well as its successors and assigns, resulting from or related to the Deed of Trust, Note, and Crowder Loan. (CP 49–50.)

**D. Issuance of the Notice of Trustee's Sale**

On or about June 3, 2011, the Trust appointed Quality Loan Services Corporation of Washington (“QLS”) as successor trustee under the Deed of Trust. (CP 92–93.) The Appointment of Successor Trustee was recorded on June 22, 2011 with the Grays Harbor County Auditor’s Office as Ins. No. 2011-06220038. (CP 96–97.)

On June 28, 2011, based on the Crowders’ default under the Loan for the December 1, 2009 installment, QLS issued a Notice of Trustee’s Sale, setting a trustee’s sale date of September 30, 2011. (CP 93.) QLS recorded the Notice of Trustee’s Sale with the Grays County Auditor’s Office on June 30, 2011 as Ins. No. 2011-06300088. (CP 99–101.) On July 1, 2011, QLS mailed the Notice of Trustee’s Sale by first class and certified mail to the Crowders. On June 30, 2011, QLS posted the Notice of Trustee’s Sale on the Property. (CP 93, 103–104, 106.)

In issuing the Notice Trustee's Sale, QLS inadvertently failed to serve the Notice of Trustee's Sale upon Restore Equity, LLC. QLS first learned of Restore Equity, LLC's interest in the Property after the Notice of Trustee's Sale was issued. (CP 93.)

**E. Non-judicial foreclosure and issuance of the Trustee's Deed**

On September 16, 2011, Ocwen Loan Servicing, LLC, the servicer of the Crowder Loan, sent foreclosure bidding instructions ("Bid Instructions") to McCarthy & Holthus, LLP, counsel for QLS. (CP 80–81) The Bid Instructions set forth all amounts owing under the Crowder mortgage loan as of September 30, 2011, with the exception of foreclosure fees and costs. (CP 88–89.) The Bid Instructions directed QLS to add its foreclosure fees and costs to the total amounts owed under the Crowder mortgage loan. *Id.*

As of September 30, 2011, the total outstanding amount owing under the Crowder mortgage loan, exclusive of foreclosure fees and costs, was \$148,496.32. (CP 81.) This amount included an unpaid principal balance of \$120,923.65 and outstanding interest in the amount of \$19,400.07. *Id.* As of September 30, 2011, the amount owed to QLS for foreclosure fees and costs totaled \$2,471.68. (CP 94.) Accordingly, as of

September 30, 2011, the total debt owed to the Trust, including foreclosure fees and costs, was \$150,968.00. (CP 81.)

On September 30, 2011, the Property was sold at a nonjudicial foreclosure by QLS. Bank of New York Mellon was the highest bidder with a bid amount of \$150,968.00. (CP 94.) In accordance with the Bid Instructions, QLS credited \$150,968.00 towards the Trust's bid, the total debt owed under the Crowder mortgage loan secured by the Deed of Trust. *Id.* On October 5, 2011, QLS executed a Trustee's Deed in favor of the Trust, which was recorded on October 7, 2011 with the Grays Harbor County Auditor's Office as Ins. No. 2011-10070054. (CP 94, 108–109.)

**F. Restore Equity notifies Quality Loan Services of the error.**

On October 18, 2011, after the trustee's sale, Restore Equity, reached out to Quality Loan Services and informed them of the fact that Restore Equity did not receive a Notice of Trustee's sale. (CP 155.) Subsequently, Quality Loan Services discussed the issues with counsel for Restore Equity on November 10, 2011, and issued a letter confirming Quality Loan Services' mistake, and that the sale would be rescinded immediately so a new foreclosure could be initiated. (CP 154.) This action is consistent with RCW 61.24.040(7) and the holding in *Hursey*, which

together, establish that reforeclosure is the appropriate remedy when a party does not receive the notice of trustee's sale they are entitled to.

**G. Restore Equity files a lawsuit to quiet title to the Property, or in the alternative, obtain damages.**

On October 21, 2011, Restore Equity filed a complaint in Grays Harbor County Superior Court under Cause No. 11-2-01446-7, alleging claims against the Trust. (CP 1) The Complaint sought claims for Quiet Title, Declaratory Relief, Accounting, and violation of the Consumer Protection Act ("CPA").

Restore Equity alleges that because QLS did not serve it with the Notice of Trustee's Sale prior to the non-judicial foreclosure, it owns the Property free and clear of any interest asserted by the Trust. (CP 7, 10.) Additionally, Restore Equity pled two claims in the alternative, in case the trial court ruled that Restore Equity's interests were extinguished by the foreclosure sale. If the trial court so ruled, Restore Equity alleged an Accounting claim, asserting that the Trust's credit bid at the Trustee's Sale exceeded the actual amount owing on the Note, thereby entitling Restore Equity to surplus funds, which were not deposited with the Court registry. (See CP 7-8.) Second, through the CPA claim, Restore Equity averred that the Trust's failure to properly calculate interest on the Note and

failure to properly serve the Notice of Trustee's Sale constituted unfair and deceptive acts or practices. (*See* CP 8–9.)

On April 28, 2015, the Trust filed a Motion for Summary Judgment against Restore Equity's Declaratory Relief, Quiet Title, Consumer Protection Act, and Accounting claims. (CP 56.) In opposition, Restore Equity contended that reforeclosure was inappropriate as the trustee's failure to issue the notice of trustee's sale to Restore Equity did not constitute excusable inadvertence. (CP 112–113.) Restore Equity also argued that the merger doctrine operated to preclude reforeclosure. (CP 129–130.)

In support of its response to the summary judgment motion, Restore Equity submitted the Declaration of Edward P. Weigelt ("Weigelt Decl."), its counsel. (CP 134–163.) The testimony in the Weigelt Declaration is based on Mr. Weigelt's "involvement in the case and review of the records produced or not produced by the Bank during discovery." (CP 134.)

Mr. Weigelt sets forth testimony regarding why the Crowders defaulted on the Loan. (CP 1365). Mr. Weigelt also testified that the Note is an adjustable rate promissory note with periodic rate adjustments and "overcharged interest". (CP 135.)

On May 26, 2015, the trial court entered an Order granting the Trust's Motion for Summary Judgment. (CP 194–197.) Restore Equity filed a Notice of Appeal on June 22, 2015, attributing error to the trial court's grant of summary judgment in favor of the Trust.

**H. Issues raised by Restore Equity on appeal.**

On appeal, Restore Equity's statement of issues focus on (1) the effect of a non-judicial foreclosure when the owner is not given notice of the sale, (2) under what circumstances a trustee's failure to provide notice of a trustee's sale constitutes excusable error, (3) whether a deed of trust and the debt merge or are extinguished by the non-judicial foreclosure, and (4) whether a beneficiary of a deed of trust violates the CPA by overcharging interest and/or failing to confirm the amount owed at the time of the foreclosure sale. *See* Opening Brief, Pg. 8–9.

**IV. ARGUMENT**

**A. Standard of Review.**

When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a

judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Summary judgment is proper if, in view of all the evidence, reasonable persons could reach only one conclusion. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Nor may the nonmoving party rely on “speculation, argumentative assertions that unresolved issues remain, or in having its affidavits considered at face value.” *Seven Gables Corp. v. MGM/US Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

**B. Restore Equity is precluded from raising arguments for the first time on appeal**

A review of the record establishes that Restore Equity sets forth specific arguments regarding reforeclosure for the first time on appeal. First, Restore Equity raises arguments regarding the Trust’s due diligence. (See Opening Brief, Pg. 23–25.) Restore Equity failed to raise any argument whatsoever to the trial court regarding the Trust’s due diligence, and how that due diligence impacts the reforeclosure analysis. No

argument raised by Restore Equity cited *Sixty-01 Ass'n of Apartment Owners v. Parsons*, 178 Wn.App. 228, 232–233, 314 P.3d 1121 (2013) (“*Sixty-01*”), despite the fact that the summary judgment hearing took place the year after *Sixty-01* was published. Ultimately, this argument is not based on new facts or case law that was unavailable at the time of the summary judgment motion, nor are there any unusual circumstances that justify its consideration on appeal.

Second, Restore Equity raises arguments regarding RCW 61.24.050(2)(a) for the first time on appeal. Restore Equity contends that the Trust and Quality Loan Services failed to rescind the sale within 11-days of the foreclosure. (Opening Brief at 32.) Setting aside the fact that the 11-day rescission option in RCW 61.24.050(2)(a) was not enacted at the time of the 2011 foreclosure, this argument was never raised in the trial court.

Finally, Restore Equity argues that Quality Loan Services may have had actual notice of Restore Equity’s ownership. (Opening Brief, Pg. 24, 28–29.) This speculative argument was never raised in the trial court. RAP 2.5(a) expressly precludes Restore Equity from raising this novel argument for the first time on appeal.

Generally, failure to raise an issue before the trial court precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666

P.2d 351 (1983); RAP 2.5. An argument raised for the first time on appeal will normally not be reviewed absent unusual circumstances. *Savage v. State*, 72 Wn.App. 483, 495 n.9, 854 P.2d 1009 (1994), *reversed in part on other grounds*, 127 Wn.2d 434, 899 P.2d 1270 (1995). None of these arguments should be considered as the Trust did not have an opportunity to develop the record in order to defend these new theories presented on appeal. *State v. Houvener*, 145 Wn.App. 408, 421, 186 P.3d 408 (2008) (citations omitted).

**C. Restore Equity's contention that reforeclosure is not appropriate has no basis in law or fact.**

One of the issues in this case is under what circumstances the Deed of Trust Act allows for a reforeclosure when a trustee fails to issue the notice of trustee's sale to a party entitled to receive the notice. Restore Equity argues that a reforeclosure is not appropriate if the omitted party's interest was a matter of public record. *See* Opening Brief, Pg. 20–21. A review of the Deed of Trust Act and Washington case law establishes that a reforeclosure is the appropriate remedy when a necessary party has been mistakenly omitted from the foreclosure proceeding. Further, as discussed below, none of the authorities cited by Restore Equity support its arguments that reforeclosure is not appropriate here.

- i. Reforeclosure is authorized by the Deed of Trust Act and Washington case law.

The DTA sets forth the statutory requirements regarding which parties are entitled to receive the notice of trustee's sale, and the effect of the trustee's failure to provide the notice of trustee's sale. The DTA and corresponding case law is critical in understanding the parameters of reforeclosure in the context of non-judicial foreclosures, and why the trial court should be affirmed.

In conducting a non-judicial foreclosure under the DTA, a trustee is required to provide a notice of trustee's sale to the holder of any conveyances of the property, if such conveyance was recorded after the recordation of the deed of trust being foreclosed and before the recordation of the notice of trustee's sale. RCW 61.24.040(1)(b)(iii). The DTA sets forth the consequences of the trustee's failure to provide the notice of trustee's sale to any party entitled to receive the notice:

“In such case, the lien or interest of such omitted person shall not be affected by the sale and **such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding.**”

RCW 61.24.040(7). (**emphasis** added).

Accordingly, it is critical to analyze authority regarding the rights of an omitted party defendant in a judicial foreclosure proceeding to understand the rights of Restore Equity, an omitted party in a non-judicial foreclosure.

Washington case law establishes that where a defendant is omitted from a judicial foreclosure proceeding due to a mistake, the appropriate remedy is to initiate a reforeclosure. The Washington Supreme Court provides unambiguous guidance: “We hold that reforeclosure is proper where a junior lienholder has been mistakenly omitted from a foreclosure action.” *U.S. Bank of Washington v. Hursey*, 116 Wn.2d 522, 526, 806 P.2d 245 (1991) (“*Hursey*”).

Restore Equity argues that *Hursey* is not compelling authority and should be disregarded in the context of the present case. Specifically, Restore Equity contends that *Hursey* sets forth a limited equitable exception, which conditions reforeclosure on a mistake where (1) the foreclosing plaintiff was not at fault, and (2) the mistake was based on the court’s own error. (See Opening Brief, Pg. 21.) *Hursey* is not limited to its facts or the nature of the mistake. The holding in *Hursey* is unequivocal and a reforeclosure is appropriate where any mistake is made, as the reforeclosure is a fair remedy which places the parties in the position they would have been had the omitted party been joined. See *Hursey*, 116 Wn.2d at 526–528.

Restore Equity also ignores the fact that *Hursey* relied upon a prior Washington Supreme Court case which discusses the reforeclosure remedy in dicta. The *Hursey* opinion cites to *Tacoma Sav. Bank & Trust*

*Co. v. Safety Inv. Co.*, 123 Wn. 481, 484, 212 P. 726 (1923), an opinion discussing re-foreclosure in the context of omitted defendants in general, not just junior lienholders:

“A decree in a foreclosure suit, so long as it remains in full force, is a bar to any second action for foreclosure between the same parties on the same mortgage, although a new action may be instituted to bring in and foreclose a defendant through a mistake or ignorance of his claims.”

*Tacoma Sav. Bank & Trust Co. v. Safety Inv. Co.*, 123 Wn. 481, 484, 212 P. 726 (1923) (citations omitted) (“*Tacoma Sav. Bank*”). Conveniently, *Tacoma Sav. Bank* is not referenced by Restore Equity. Nor are any of the other cases cited in *Hursey* which discuss the re-foreclosure remedy. Ultimately, while there is little Washington case law regarding reforeclosure, the process of reforeclosure has been recognized by Washington courts for almost a century.

- ii. Reforeclosure is not contingent on whether the omitted party’s interest is in the public record.

Restore Equity contends that the critical element of whether reforeclosure is appropriate is whether the omitted interest in the foreclosed property is a matter of public record. (See Opening Brief, Pg. 5.) However, as discussed above, Washington case law establishes that the operative issue in whether reforeclosure is appropriate is whether the omission is due to a mistake. *Hursey*, 116 Wn.2d at 526 (“We hold that

reforeclosure is proper where a junior lienholder has been mistakenly omitted from a foreclosure action.”) Restore Equity’s argument that reforeclosure hinges on whether the omitted party’s interest is a matter of public record is not only erroneous, it fails to understand the nature of an omitted party in the first place.

A party cannot qualify as an omitted lienholder or omitted party in a non-judicial foreclosure unless they either have a recorded interest in the property, or they reside in the property. *See* RCW 61.24.040(1)(b). The omitted lienholder or owner itself accounts for the situation where a foreclosing party fails to notify the owner or lienholder, *notwithstanding their recorded interest*. One cannot be an omitted junior lienholder or owner of record without a recorded interest in the property.

The point of the omitted lienholder rule is to account for a situation where a trustee, or a creditor in a judicial foreclosure, fails to notify a party with a recorded lien interest in the Property. This is an unequivocal mistake, which derives from the fact that an omitted interest is a matter of public record.

Case law from other jurisdictions provides persuasive authority and guidance as to why Restore Equity’s attempt to redefine the reforeclosure doctrine should be denied. Notably, *Hursey* analyzes holdings from other jurisdictions which recognize that reforeclosure is

appropriate where a necessary party is omitted through a mistake. *Hursey*, 116 Wn.2d at 526–528.

The Arizona Supreme Court has specifically held that where a party was omitted from the original suit by reason of mistake, a second foreclosure action to deal with the property rights of the junior lienholder could be maintained. See *Williams v. Williams*, 32 Ariz. 164, 173, 256 P. 356 (1927) (“*Williams*”). Importantly, in *Williams*, the foreclosing party had actual knowledge of the omitted property owner prior to initiating the judicial foreclosure. *Id.* at 166–167. Notably, some jurisdictions hold that a reforeclosure is appropriate regardless of the reason why the junior lienholder was omitted. *Mortgage Comm’n Realty Corp. v. Columbia Heights Garage Corp.*, 169 Misc. 618, 620, 7 N.Y.S.2d 740, 742 (1938).

Ultimately, there is no basis for Restore Equity’s argument that *Hursey* is not binding authority allowing for reforeclosure in this case. The fact that an omitted party from a foreclosure has a recorded interest in a property is the genesis of the reforeclosure doctrine and the mistake standard. It is not a basis to invalidate the reforeclosure doctrine or *Hursey*. Accordingly, the trial court’s ruling should be affirmed as Restore Equity’s argument lacks merit.

iii. Restore Equity's reliance on *Citizens State Bank* is misplaced.

Restore Equity relies on dicta set forth in an Indiana opinion for the proposition that failure to notify a junior lienholder with a recorded interest in the Property is not an adequate equitable ground to authorize a re-foreclosure. Opening Brief, Pg. 6, 21. Analyzing *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, 949 N.E.2d 1195 (2011) ("*Citizens State Bank*") establishes that Restore Equity's reliance on the case is erroneous.

In *Citizens State Bank, Countywide Home Loans, Inc.* ("Countrywide") filed a judicial foreclosure claim and failed to include a junior lienholder, Citizens State Bank of New Castle ("Citizens Bank"). *Citizens State Bank*, 949 NE.2d at 1196. After the property reverted to Countrywide through a sheriff's sale, Countrywide conveyed the property to a third party, Federal National Mortgage Association ("Fannie Mae"). *Id.* Subsequently, Countrywide discovered the omission and filed an action titled "Complaint for Strict Foreclosure" against Citizens Bank. *Id.* at 1197.

A review of *Citizens State Bank* reveals that the case addresses whether the merger doctrine operated to extinguish Countrywide's lien, so that it could no longer be asserted against Citizens Bank. *Id.* at 1197. The Indiana Supreme Court noted that whether the conveyance of the fee to the

mortgagee results in a merger of the mortgage and fee depends primarily upon the intention of the parties. *Id.* at 1200 (citations omitted). There is a rebuttable presumption that the mortgagee intended to do that which was most advantageous to itself. *Id.* at 1200–1201.

*Citizens State Bank* held that the evidence before the trial court rebutted the presumption that Countrywide intended that the two estates remain separate. Countrywide's conveyance of title in fee simple to Fannie Mae, free of all encumbrances, manifested Countrywide's intent to pass clear title and for merger to occur. *Citizens State Bank*, 949 NE.2d at 1201–1202.

In dicta, the Indiana Supreme Court noted that although the mortgagee's intent is the primary consideration in determining whether a merger has occurred, there could be a circumstance where the equitable remedy of strict foreclosure would be appropriate. *Id.* at 1201–1202 (citing *Hursey*). The opinion notes that other than essentially declaring mistake or inadvertence, Countrywide failed to explain why Citizen Bank's lien was overlooked. Accordingly, it was not entitled to strict foreclosure. *Id.* at 1202. The court did not set forth any standard regarding what error constituted an excusable error justifying strict foreclosure. To the contrary, the court noted that based on the record, no explanation was provided as to why Countrywide overlooked the omitted lien.

*Citizens State Bank* is distinguishable. In contrast to *Citizens State Bank*, the record establishes that the Trust provided testimony of the foreclosing trustee, explaining the nature of the mistake. (CP 93.) There was no conclusory statement, unsupported by any explanation.

This is buttressed by the fact that Restore Equity takes issue with Quality Loan Services' explanation, stating that Quality Loan Services could have obtained a current title report to remedy the mistake. Opening Brief, Pg. 28. Restore Equity itself acknowledges not only the mistake, as well as the explanation, but goes so far as to present a solution. Regardless, the argument and the record establish that *Citizens State Bank*, which has no precedential value, is distinguishable.

As to the merger doctrine, Restore Equity failed to present any evidence that would rebut the presumption that the Trust intended for a merger of the Deed of Trust and its fee interest in the Property, a requirement under Washington law. *Anderson v. Starr*, 159 Wn. 641, 643, 644, 294 P. 581 (1930) (citations omitted). Moreover, under Washington law, the doctrine of merger is highly disfavored. *In re Trustee's Sale of Real Property of Ball*, 179 Wn.App. 559, 565, 319 P.3d 844 (2014). Finally, reforeclosure is not an exception to, or circumstance that voids the merger doctrine. Under Washington law, the reforeclosure moots any questions of whether the merger doctrine applies. *Hursey*, 116 Wn.2d at

528. Accordingly, the trial court's decision should be affirmed as Restore Equity's reliance on *Citizens State Bank* is erroneous.

iv. Restore Equity's reliance on *Sixty-01* is inappropriate, as it is irrelevant to the issues underlying this proceeding.

Restore Equity contends the *Hursey* decision was not followed by the Washington Supreme Court in *Sixty-01*, and that *Sixty-01* supports the proposition that a party's lack of due diligence is not a "mistake" which warrants a reforeclosure. *See* Opening Brief, Pg. 23–25. Restore Equity is wrong. *Sixty-01* does not mention reforeclosure, and importantly, does not overturn or even discuss *Hursey*. A review of *Sixty-01* establishes that Restore Equity's argument, which is raised for the first time on appeal, does not present a basis to overturn the trial court's ruling.

The issue addressed in *Sixty-01* is whether a successful purchaser at a sheriff's sale has a right to withdraw his or her bid prior to confirmation or if a judgment creditor is entitled to confirmation of the sale absent substantial irregularities, even if the purchaser no longer wishes to purchase the property. *Sixty-01 Ass'n of Apartment Owners v. Parsons*, 181 Wn.2d 316, 318, 335 P.3d 933 (2014). The Washington Supreme Court held that a third-party purchaser does not have a unilateral right to withdraw a successful bid before confirmation. *Id.*

*Sixty-01* is distinguishable as it focuses on whether a third party purchaser can withdraw a bid prior to confirmation of a sheriff's sale. The purchaser sought to withdraw his bid after learning of liens encumbering the Property, stating he would have never bid on the properties if he knew they were encumbered. *Id.* at 320–321.

In contrast, the present proceeding addresses whether the Trust can reforeclose the Deed of Trust due to the trustee's failure to comply with the DTA by issuing a Notice of Trustee's Sale to the property owner. Unlike *Sixty-01*, where a bidder is seeking to unwind a sheriff's sale so he can absolve himself from a bad business decision, the reforeclosure preserves the status quo. There was no omitted party to the foreclosure in *Sixty-01*, a central issue in this present proceeding.

Reforeclosure is a fair remedy which puts the party in the position they would have been had the junior been joined in the original action. *U.S. Bank of Washington v. Hursey*, 116 Wn.2d 522, 528, 806 P.2d 245 (1991). The reforeclosure does no more than provide the omitted party that which was denied to it at the previous foreclosure, a sale at which the omitted party could appear and protect its interest. The reforeclosure does not take away any rights which it possessed before foreclosure. *See id.* (citations omitted).

To the extent Restore Equity contends that *Valentine v. Portland Timber & Loan Holding Co.*, 15 Wn.App. 124, 547 P.2d 912 (1976) (“*Valentine*”) supports its argument that a mistake is not grounds for reforeclosure, a review of *Valentine* establishes otherwise. (Opening Brief, Pg. 23); (CP 124.) Moreover, Washington Supreme Court precedence establishes that a mistake in the foreclosure process that results in an omitted party allows for a reforeclosure. *Hursey*, 116 Wn.2d at 526

In *Valentine*, the Court of Appeals, Division One, cited to the general rule that lack of knowledge or notice of a subordinate interest does not excuse a foreclosing mortgagee from joining that party. The subordinate interest is not subject to the foreclosure decree. *See id.* at 128. However, the Court of Appeals noted that Portland Timber and Land Holding Company (“Portland Timber”) held an unrecorded and subordinate interest in real property, and therefore was subject to the foreclosure decree as the purchaser was a bona fide purchaser. *Id.* at 129.

Contrary to Restore Equity’s argument, *Valentine* is irrelevant to the reforeclosure analysis and what constitutes a valid mistake under *Hursey*. As evidenced by *Valentine*, there is no analysis of the reforeclosure process, nor was it an issue in that proceeding. The Trust does not dispute that the DTA, and Washington case law, establish that an omitted party’s rights are not impacted by the foreclosure. RCW

61.24.040(7). This is the law and moreover, this issue was not contested in the trial court. However, Restore Equity's attempt to mold *Sixty-01*, *Valentine*, and *Spokane* into a rule regarding what constitutes a valid mistake in the reforeclosure analysis is a misrepresentation of the cases and should be disregarded.

Ultimately, this case does not present a situation where allowing reforeclosure would impair the pre-sale rights of the Trust, the foreclosing trustee, or even Restore Equity, the omitted owner of the Property. In *Sixty-01*, the third party purchaser sought to retract his bids so that he could avoid his ownership of encumbered properties. There was no omitted party involved in *Sixty-01*, which is what differentiates the reforeclosure doctrine from *Sixty-01* and the sale confirmation analysis at issue in that case, as well as the other cases cited by Restore Equity. Accordingly, Restore Equity's reliance on *Sixty-01* is misplaced and fails to present a basis to overturn the trial court's ruling.

v. There is no genuine issue as to whether QLS failed to serve Restore Equity with the Notice of Sale due to a mistake.

As set forth in *Hursey*, the central issue regarding whether reforeclosure is appropriate is whether a mistake led to the omitted party. In this case, the Trust set forth evidence establishing that Quality Loan Services failed to provide the Notice of Trustee's Sale to Restore Equity

because it mistakenly relied on an outdated title report. (CP 93.) As the non-moving party, Restore Equity failed to set forth any evidence sufficient to establish a genuine issue for trial regarding whether Quality Loan Services mistakenly failed to provide the Notice of Trustee's Sale to Restore Equity. Accordingly, the trial court properly granted summary judgment in favor of the Trust.

In support of its summary judgment motion, the Trust submitted the Declaration of Sierra Herbert-West ("Herbert-West Declaration"), a Trustee's Sale Officer employed by Quality Loan Services Corporation of Washington, the foreclosing trustee. (CP 91–109.) The Herbert-West Declaration sets forth testimony explaining why Quality Loan Services failed to issue the Notice of Trustee's Sale to Restore Equity: it relied on an outdated title report and did not learn of Restore Equity's interests until receiving an endorsement to the title policy after the Notice of Trustee's Sale was issued. (CP 93.)

Restore Equity contends this testimony does not establish an "excusable" mistake, given that if the Trust had ordered a title report or done a title investigation, "we would not be here". Opening Brief, Pg. 28. This argument is based on a misunderstanding of the DTA. The foreclosing trustee is the party who issues the notice of trustee's sale. RCW 61.24.040(1)(b). The trustee, not the beneficiary or purchaser at the

trustee's sale, issues the Notice of Trustee's Sale to parties with a recorded interest in the property, or who are otherwise known to the trustee. *See id.* How the actions of the Trust would have impacted Quality Loan Services, is not only pure speculation, this argument was not raised at the trial court.

Moreover, to support its response to the summary judgment motion, Restore Equity submitted a declaration of its counsel, criticizing the failure of Quality Loan Services to comply with the DTA and order current title information. (CP 136.) As evidenced by the record, Restore Equity did not present any evidence which would create a genuine issue for trial regarding whether Quality Loan Services failed to issue a Notice of Trustee's Sale to Restore Equity due to a mistake. To the contrary, the criticism set forth by Restore Equity only reaffirms the mistake.

Now, for the first time on appeal, Restore Equity argues that Quality Loan Services *may* have had actual knowledge of Restore Equity's ownership. Opening Brief, Pg. 24, 28–29. As set forth above, this argument was not raised at the trial court and Restore Equity is precluded from raising the issue for the first time on appeal.

Restore Equity argues that Quality Loan Services' actual knowledge of Restore Equity's ownership can be inferred from the Herbert-West Declaration. Opening Brief, Pg. 24. Specifically, Restore Equity claims that Quality Loan Services failed to establish it was ignorant

of Restore Equity's interest at the time of the sale, making it conceivable that Quality Loan Services informed the Trust of Restore Equity's ownership and sought instructions. *Id.* This kind of speculation does not establish a genuine issue for trial. No affidavit or other evidence was submitted to the trial court which would create a genuine issue for trial regarding Quality Loan Services' intent and mistake. Under CR 56(e), affidavits supporting or opposing summary judgment must (1) be made on personal knowledge, (2) set forth such *facts* as would be admissible in evidence, and (3) show affirmatively that the affiant is competent to testify to the matters stated therein. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (*emphasis in original*).

A fact is an event, an occurrence, or something that exists in reality. *Id.* (citations omitted). It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Id.* (citations omitted). An affidavit does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Snohomish County v. Rugg*, 115 Wn.App. 218, 224, 61 P.3d 1184 (2002) It is not enough that the affiant be "aware of" or be "familiar with" the matter; personal knowledge is required. *Guntheroth v. Rodaway*, 107 Wn.2d 170, 178, 727 P.2d 982 (1986).

This argument, raised for the first time on appeal, is unsupported by any facts or the record. Restore Equity assumes that Quality Loan Services would knowingly proceed with a foreclosure that would expose it to liability from both the Trust, Restore Equity, and a third-party purchaser for failing to comply with the notice requirements of the DTA. Restore Equity sets forth pure speculation, unsupported by any facts or evidence, regarding Quality Loan Services knowledge and actions. This argument fails to satisfy the baseline requirements of CR 56(e).

Moreover, the argument is contradicted by the evidence. Restore Equity first reached out to Quality Loan Services on October 18, 2011, over a year after the trustee's sale, to notify the trustee of the mistake. (CP 155.) Quality Loan Services then reached out to Restore Equity on November 10, 2011, confirming the mistake and that the sale would be rescinded so that a new foreclosure could be commenced. (CP 154.) The record establishes that Quality Loan Services did not learn of the mistake, and Restore Equity's interest, until after the sale.

Similarly, Restore Equity contends the Trust and Quality Loan Services failed to exercise ordinary care by ordering a title report, or obtaining updates to the title report. Opening Brief, Pg. 30. Restore Equity did not file a negligence claim against either the Trust or Quality Loan Services. Nor did Restore Equity raise this argument to the trial court.

Whether the mistake committed by Quality Loan Services satisfies the reforeclosure requirements, and whether that same mistake breaches a duty owed to Restore Equity, are two wholly separate issues. The irrelevant issues, raised for the first time on appeal, should be rejected.

Ultimately, Restore Equity chose not to sue Quality Loan Services, chose not to depose Quality Loan Services, and ultimately, did not request a CR 56(f) continuance. For the first time on appeal, Restore Equity attempts to cure these issues by setting forth speculative arguments. The trial court should be affirmed as there is no genuine issue as to whether Quality Loan Services committed a mistake by relying on an outdated title report when issuing the Notice of Trustee's Sale.

vi. Any due diligence by the Trust prior to the sale is irrelevant to the reforeclosure analysis.

For the first time on appeal, Restore Equity claims that reforeclosure is not appropriate as the Trust, as purchaser, failed to do its due diligence before purchasing the property at the foreclosure sale. (Opening Brief, Pg. 24.) As set forth above, this argument fails procedurally as it was not raised to the trial court. This argument also fails on the merits as the purchaser's actions are irrelevant to the reforeclosure analysis. The Washington Supreme Court held, without limitations or caveats, that "reforeclosure is proper where a junior lienholder has been

mistakenly omitted from a foreclosure action.” *Hursey*, 116 Wn.2d at 526.). The reforeclosure analysis focuses on why the foreclosing creditor *omitted* a party that was entitled to be joined in the foreclosure action, not on any mistake or due diligence of a purchaser.

Restore Equity argues that if the Trust had cross-checked the Notice of Sale and a current title report, it would have realized that Restore Equity was not provided proper notice. Opening Brief, at 24. This argument fails for a few reasons. First, the Notice of Sale does not set forth to whom the trustee issued the Notice of Sale to. (CP 99–102) Second, the Deed of Trust Act does not require the trustee to put mailing information in a notice of sale. RCW 61.24.040(f).

Third, the bid tendered at a foreclosure sale, as well as any due diligence conducted by the purchaser, are not facts that are relevant to the only question at issue concerning reforeclosure; that is, did the foreclosure trustee make a mistake in who it issued Notices of the Trustee’s Sale to.

Finally, to the extent Restore Equity contends that the foreclosure sale became final 11-days after the sale date, thereby precluding reforeclosure, this argument is meritless. Opening Brief, Pg. 31–32. A non-judicial foreclosure can be voided due to any substantial irregularities which divest the foreclosing trustee of its authority. *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 568, 276 P.3d 1277

(2012). There is no 11-day deadline to void a sale, as established by *Hursey*.

RCW 61.24.050(2) provides a mechanism where the trustee's sale can be unilaterally voided, but it does not preclude other methods, as evidenced by *Albice* and other Washington cases which declare a trustee's sale void. *See, e.g., Rucker v. NovaStar Mortg., Inc.*, 117 Wn.App. 1, 311 P.3d 31 (2013). Moreover, RCW 61.24.050(2)(a) was not even enacted at the time of the 2011 foreclosure. Laws of 2012, 62 Leg., Reg. Sess., ch. 185 §145. This argument not only fails on the merits, it was not raised by Restore Equity to the trial court, thereby precluding its consideration.

Ultimately, Restore Equity does not, and cannot, cite to any authority which supports its argument that the purchaser's due diligence has any relevance to the reforeclosure analysis. As set forth in *Hursey*, the operative issue is whether a party entitled to receive notice of the sale was omitted due to a mistake. As this argument fails on the merits, and was not raised below, the trial court should be affirmed.

vii. Restore Equity's reliance on *Rasmussen* is misplaced.

It is also curious that Restore Equity relies on *Rasmussen v. Employment Sec. Dept. of State*, 98 Wn.2d 846, 658 P.2d 1240 (1983) ("*Rasmussen*") to set the standard of what constitutes a valid mistake to

merit reforeclosure. Opening Brief, Pg. 29. *Rasmussen* has nothing to do with reforeclosure or the omitted lienholder doctrine and is irrelevant to the issues in this case.

*Rasmussen* addresses the standard applicable to the review of a state agency's decision involving mixed questions of law and fact. *Rasmussen*, 98 Wn.2d 846, 849–850 (citations omitted). In *Rasmussen*, the Washington Supreme Court reviewed the decision of the Department of Employment Security to terminate and reject Patricia Rasmussen's untimely appeal from a denial of unemployment benefits. *Id.* at 847. The Court noted that whether good cause exists to excuse untimely appeals presents a mixed question of law and fact reviewable under the "error of law" standard. *Id.* at 850.

The applicable standard in the context of untimely unemployment benefit appeals is (1) the shortness of the delay, (2) the absence of prejudice to the parties, and (3) the excusability of the error. *Id.* As recognized by the trial court, none of this analysis is germane or in any way relevant to the reforeclosure doctrine.

**D. The Merger Doctrine is not applicable given the reforeclosure process.**

Restore Equity contends that the merger doctrine precludes reforeclosure of the Deed of Trust, as the debt secured by the Deed of

Trust merged into the sale proceeds or the trustee's deed. (Opening Brief, Pg. 27.) A review of the merger doctrine and Washington case law regarding reforeclosure establishes that the doctrine is inapplicable to the present case and is irrelevant to reforeclosure.

i. *Hursey* precludes operation of the merger doctrine.

As set forth by the Washington Supreme Court, the reforeclosure remedy precludes the operation of the merger doctrine. The holding in the *Hursey* opinion, conveniently ignored by Restore Equity, effectively disposes of the argument:

“A related issue raised by the bank is whether the trial court erred by holding that U.S. Bank's mortgage was extinguished by merger and not revived by the reforeclosure action. Our decision that the bank is entitled to reforeclose and join *Hursey* in such action effectively disposes of this issue.”

*U.S. Bank of Washington v. Hursey*, 116 Wn.2d 522, 528, 806 P.2d 245 (1991).

*Hursey* establishes that the merger doctrine is not applicable as reforeclosure is the appropriate remedy where the foreclosing creditor omits a party with a recorded interest due to a mistake. The reforeclosure itself precludes operation of the merger doctrine. *Hursey*, 116 Wn.2d at 528. Accordingly, Restore Equity's argument is contrary to established precedent and should be rejected.

- ii. The merger doctrine is not applicable because two distinct property rights have not vested in the Trust.

Assuming *arguendo* that the clear mandate in *Hursey* was not applicable, the merger doctrine does not apply due to the nature of the non-judicial foreclosure. Restore Equity contends that the foreclosure of a deed of trust and the issuance of a trustee's deed triggers the operation of the merger doctrine, thereby precluding reforeclosure. Opening Brief, at 25. Washington case law unequivocally establishes that a merger does not apply in this situation, nor is it favored. A review of established precedent provides guidance.

Merger may occur when the fee interest and a charge, such as a deed of trust or encumbrance, vest in the possession of one person. *Anderson v. Starr*, 159 Wn. 641, 643, 294 P. 581 (1930); *In re Trustee's Sale of Real Property of Ball*, 179 Wn.App. 559, 564, 319 P.3d 844 (2014) ("*Ball*"). Thus, for a merger to occur, two distinct estates or property rights must vest in the same person and that person must intend for the interests to unite. *Ball*, 179 Wn.App. at 564 (emphasis added). The person against whom merger is sought is presumed to have intended that which is most to his advantage. *Hilmes v. Moon*, 168 Wn. 222, 237, 11 P.2d 253 (1932) (citations omitted).

A baseline requirement for merger to apply is that two interests in the Property vest in the possession of one person. In this case, Restore Equity, similar to the appellant in *Ball*, argues that the Deed of Trust merged into the Trustee's Deed. Opening Brief, at 25–26. This argument fails on the merits. A trustee's deed is issued upon the non-judicial foreclosure of the underlying deed of trust. RCW 61.24.050(1). The trustee's deed and deed of trust are mutually exclusive interests in the real property that is the subject of the non-judicial foreclosure action. Moreover, the debt itself is not an interest in the Property. The repayment of the Loan is secured by the Deed of Trust.

Curiously, this principle is recognized and argued by Restore Equity: “The sale extinguishes the deed of trust.” Opening Brief, Pg. 27. By operation of law, the merger doctrine does not apply as the Trust does not hold both the fee interest in the Property, and the Deed of Trust, at the same time. Restore Equity concedes this fact in its briefing. *Id.*

Furthermore, Restore Equity presented no evidence that would rebut the presumption that merger would not apply if it was adverse to the interests of the Trust, another baseline requirement of the doctrine. *Hilmes v. Moon*, 168 Wn. at 237. There is no genuine issue for trial regarding the application of the merger doctrine. On appeal, Restore Equity does not raise any argument regarding the intent element or its failure to rebut the

presumption in favor of the party against whom merger is sought. Accordingly, the merger doctrine fails on this basis as well.

Finally, Restore Equity appears to argue that the *Ball* decision precludes reforeclosure. Opening Brief, at 27. A review of *Ball* establishes that the case is wholly unrelated to reforeclosure, or the rights of omitted parties. Instead of recognizing the clear precedent in *Hursey*, Restore Equity argues that *Ball* precludes any reforeclosure in the non-judicial foreclosure context. The argument was properly rejected by the trial court as it misrepresents *Ball* and moreover, contradicts the DTA: “[S]uch omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding.” RCW 61.24.040(7).

**E. Restore Equity does not challenge the trial court’s evidentiary ruling.**

In reply to Restore Equity’s response to the summary judgment motion, the Trust tendered an evidentiary objection regarding the Weigelt Declaration. (CP 181–183) Restore Equity does not challenge the trial court’s evidentiary ruling that the Weigelt Declaration, and the attached exhibits, failed to actually constitute an establishment of facts. *See* Verbatim Report of Proceedings, Pg. 8:5–16; 18:12–24.

Restore Equity sets forth conclusory arguments regarding the overcharging of interest in order to support its Accounting and CPA claims as if they are verities on appeal. *See* Opening Brief, Pg. 3, 11, 33–34. Tellingly, Restore Equity cites to the Weigelt Declaration to support its argument that Novastar mishandled the Crowder loan and overcharged interest. *Id.* at 11.

As argued before the trial court, the Weigelt Decl. does not set forth facts, it sets forth Mr. Weigelt’s opinion and supposition. (CP 181–183.) Moreover, the testimony is unsupported by any foundation which is sufficient to support a finding that Mr. Weigelt had personal knowledge of why the Crowders defaulted on their contractual obligations under the Loan, or even whether interest was overcharged as testified. (CP 135.)

Finally, underlying CR 56(e) is the requirement that documents the parties submit must be authenticated to be admissible. *International Ultimate, Inc. v. St. Paul Fire & Marine Ins.*, 122 Wn.App. 736, 745, 87 P.3d 774 (2004). None of the evidence submitted with the Weigelt Declaration were properly authenticated.

Ultimately, the trial court properly ruled that the Weigelt Declaration failed to comply with CR 56(e), a ruling which Restore Equity does not challenge on appeal. Accordingly, this Court should disregard

Restore Equity's second attempt to introduce evidence which fails to satisfy CR 56(e).

**F. The trial court properly granted summary judgment in favor of the Trust on the CPA and Accounting Claim.**

As set forth by the Complaint, the Accounting claim and CPA claim were pled in the alternative, contingent on a ruling that Restore Equity's interest in the Property was extinguished by the 2011 foreclosure sale. (*See* CP 7–9) The trial court expressly ruled that Restore Equity's interests in the Property were not affected by the September 30, 2011 trustee's sale. (CP 202) Notably, the trial court ruled that the claims against the Trust were dismissed with prejudice. *Id.*

On appeal, Restore Equity requests that the trial court's findings regarding the CPA claim be stricken so that it can refile the claim in the future. Opening Brief, Pg. 36. Restore equity also assigns error to the trial court's ruling that the "erroneous assessment of interest" was not a violation of the CPA. Opening Brief, Pg. 2.

While Restore Equity appears to contend that the dismissal of the CPA claim should not be deemed a final determination, it was Restore Equity, as the underlying Plaintiff, who made the strategic decision to plead the CPA claim in the alternative. Restore Equity does not contest the denial of its request for leave to amend the Complaint. (CP 133)

Moreover, as set forth above, Restore Equity failed to submit any admissible evidence in support of its claims.

To the extent Restore Equity claims there was outstanding discovery, Restore Equity failed to request a continuance pursuant to CR 56(f), the appropriate remedy. Opening Brief, Pg. 34. Restore Equity fails to mention the fact that the discovery deadline passed on December 10, 2014, almost half a year prior the filing of the Motion for Summary Judgment and 4-years after the lawsuit was filed. (CP 181.) Nor was an affidavit filed which would support a valid request for a CR 56(f) continuance, or an extension of the discovery deadline. (CP 180–181.)

Whether the Trust violated the rules of discovery is a conclusory claim, and Restore Equity had an obligation to comply with the case schedule, CR 26(i) and CR 37 if it felt there was a discovery issue. It failed to do so. Accordingly, the trial court's ruling dismissing the CPA and Accounting claims, with prejudice, should be affirmed.

## V. CONCLUSION

In an attempt to gain a windfall, Restore Equity attempts to redefine Washington case law regarding the reforeclosure doctrine. With the exception of the dicta set forth *Citizens State Bank*, the authority cited by Restore Equity is either irrelevant and/or based on arguments which are presented for the first time on appeal. As recognized by the Washington

Supreme Court in *Hursey*, reforeclosure is appropriate where a mistake leads to the omission of a party entitled to receive notice of the sale.

The trial court's decision should be affirmed as the unrefuted evidence established that Quality Loan Services made a mistake by failing to issue the notice of trustee's sale to Restore Equity.

RESPECTFULLY SUBMITTED this 3rd day of February, 2016.

HOUSER & ALLISON, APC



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Sakae S. Sakai, WSBA #44082  
Robert W. Norman, WSBA #37094  
Attorneys for Respondent

CASE NO. 47728-9-II  
COURT OF APPEALS  
DIVISION I OF THE STATE OF WASHINGTON

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RESTORE EQUITY, LLC,  
APPELLANT

vs.

The BANK OF NEW YORK MELLON, as successor in interest,  
RESPONDENT

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PROOF OF SERVICE

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Appeal from Judgment of Grays Harbor County Superior Court  
Consolidated Case No.: 11-2-01446-7  
Honorable Dave Edwards

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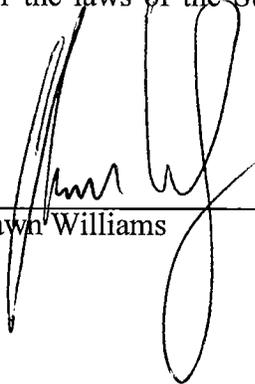
Attorneys for Respondent The Bank of New York Mellon, as Successor  
Trustee to JPMORGAN CHASE BANK, As Trustee for NovaStar  
Mortgage Funding Trust, Series 2004-1, NovaStar Home Equity Loan  
Asset-Backed Certificates, Series 2004-1

**I THE UNDERSIGNED STATE AS FOLLOWS:** I am not a party to this action and I am over the age of 18 years. On February 3, 2016, I served Answering Brief of Respondent The Bank of New York Mellon, as Successor Trustee to JPMORGAN CHASE BANK, As Trustee for NovaStar Mortgage Funding Trust, Series 2004-1, NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1, on the following individual(s) via email and U.S. Mail to:

Edward Paul Weigelt, JR  
Attorney at Law  
PO Box 2299  
Lynnwood, WA 98036  
[eweigeltjr@msn.com](mailto:eweigeltjr@msn.com)

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

Dated: February 3, 2016

  
\_\_\_\_\_  
Shawn Williams

# HOUSER & ALLISON APC

**February 03, 2016 - 10:26 AM**

## Transmittal Letter

Document Uploaded: 7-477289-Respondent's Brief.pdf

Case Name: Restore Equity, LLC v. BONY

Court of Appeals Case Number: 47728-9

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Shawn Williams - Email: [skuger@houser-law.com](mailto:skuger@houser-law.com)