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COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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VERISTONE FUND I, LLC

Appellant,

v.

MARY-ANN KERRIGAN

Respondent.

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**MARY-ANN KERRIGAN'S RESPONSE BRIEF**

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## **I. SUMMARY OF ARGUMENT**

The Respondent, Mary-Ann Kerrigan ("Ms. Kerrigan"), is a retired, disabled, single woman with no expertise in lending. Conversely, the Appellant, Veristone Fund I, LLC ("Veristone") is described as a sophisticated, "hard money" lender - a characterization it does not challenge. Ms. Kerrigan and Veristone each loaned roughly the same amount of money to a third party, Craig Campbell ("Campbell"). Campbell gave both Ms. Kerrigan and Veristone Deeds of Trust on a house in Centralia to secure their loans, but Ms. Kerrigan recorded hers first.

Veristone seeks to obtain a judgment declaring its Deed of Trust to be superior to Ms. Kerrigan's. And, if such an Order is entered, it further seeks to have Ms. Kerrigan's Deed of Trust eliminated altogether as an inferior lien, retroactively wiped out by Veristone's earlier nonjudicial foreclosure of its Deed of Trust. Stated slightly differently, Veristone seeks to be declared the owner of the property free and clear of Ms. Kerrigan Deed of Trust.

Both parties moved for Summary Judgment. The Trial Court agreed with Ms. Kerrigan and concluded that her Deed of Trust should remain in a first lien position. Veristone appeals. Ms. Kerrigan asks that the Trial Court be affirmed.

## II. STATEMENT OF THE CASE

In November 2016, Veristone assisted Campbell in purchasing a small house in Centralia (the "Property") at a Sheriff's Sale. CP 126.

Veristone is a sophisticated "hard money" lender, that is, it is in the business of making speculative loans at unusually high interest rates.

CP 175

On January 9, 2017, Campbell executed a Promissory Note payable to Veristone for approximately \$33,000.00<sup>1</sup> (the "Veristone Loan").

CP 131-133.

Also on January 9, 2017, Campbell executed a Deed of Trust against the Property in favor of Veristone to secure the Veristone Note (the "Veristone Deed of Trust"). CP 135-138. Veristone did not promptly record its Deed of Trust.

In March/April 2017, Campbell approached Ms. Kerrigan for a \$25,000.00 loan (the "Kerrigan Loan"). Ms. Kerrigan is a retired, disabled single woman and is not a sophisticated lender. Mr. Campbell convinced Ms. Kerrigan to loan him some of her retirement funds, promising the same high rate of interest (12%) as had been promised Veristone. CP 174-175. Campbell executed the Kerrigan Note on April 14, 2017. CP 140-142.

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<sup>1</sup> The total purchase price was approximately \$37,000.00 or a few thousand dollars more than what Veristone loaned.

Campbell told Ms. Kerrigan that he had just purchased the Property at a Sheriff's Sale and offered to secure the Kerrigan Loan with a Deed of Trust against it (the "Kerrigan Deed of Trust"). CP 144-148. Campbell executed the Kerrigan Deed of Trust on April 19, 2017.

On **May 8, 2017**, the Kerrigan Deed of Trust was recorded<sup>2</sup>.

In March 2017, the Lewis County Sheriff executed a "Sheriff's Deed to Real Property" (the "Sheriff's Deed"), transferring the Property to Campbell and Veristone as tenants in common. The Sheriff's Deed was recorded on **May 11, 2017**. CP 150-151.

On **May 12, 2017**, the day after the Sheriff's Deed was recorded, Veristone voluntarily, and with constructive knowledge of the recorded Kerrigan Deed of Trust, conveyed by quit claim deed all interest it had in the Property to Campbell, making Campbell the 100% owner of the Property (subject to the Kerrigan Deed of Trust). CP 153-154.

Shortly thereafter on **May 12, 2017**, Veristone recorded the Veristone Deed of Trust. CP 135-138.

The following is a summary of these transactions:

May 8, 2017                      The Kerrigan Deed of Trust is recorded.

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<sup>2</sup> The Kerrigan Deed of Trust was re-recorded on May 15, 2017 to correct a scrivener's error in the amount secured by it ("\$20,000" was corrected to "\$25,000"). CP 174.

May 11, 2017            The Sheriff's Deed to Campbell and  
Veristone as tenants in common is recorded.

May 12, 2017            **Veristone voluntarily quit claims all  
interest in the property to Campbell.**

May 12, 2017            The Veristone Deed of Trust is then  
recorded.

Campbell failed to pay either loan. In November 2017, Veristone commenced a nonjudicial foreclosure of its Deed of Trust, resulting in a Trustee's Deed conveying the property to Veristone in March 2018. CP 162-164. Ms. Kerrigan did not respond to the nonjudicial foreclosure as she was in a first lien position. CP 175. Foreclosures have no effect on higher priority liens.

Veristone then filed this lawsuit asking the Court to: (1) declare the Veristone Deed of Trust to be superior to the Kerrigan Deed of Trust; and (2) make this determination retroactive, thereby wiping out the Kerrigan Deed of Trust in its entirety as a result of the earlier nonjudicial foreclosure.

Both parties moved for Summary Judgment. Veristone argued that the Kerrigan Deed of Trust had no effect as the Sheriff's Deed had not yet been recorded. Ms. Kerrigan argued that the Doctrine of After-Acquired Title gave effect to her Deed of Trust as soon as Campbell gained an interest - an interest which became complete when Veristone quit claimed all of its

interest to Campbell. Ms. Kerrigan also argued that she qualified for protection as a "good faith purchaser". The Trial Court agreed with Ms. Kerrigan and declared her Deed of Trust to be superior to Veristone's. CP 186-187.

### III. ARGUMENT

#### 1. **Whatever interest Veristone had in the Property was transferred to Campbell by Quit Claim Deed.**

The Sheriff's Deed conveyed title to the Property to Campbell and Veristone jointly as tenants in common. Veristone spends a significant portion of its briefing arguing that it was the true owner of the property as a result of the Sheriff's Deed, not Campbell, as Veristone had funded the purchase. The point of this lengthy discussion is unclear as, immediately after the Sheriff's Deed was recorded, Veristone voluntarily conveyed any interest it had, either legal or equitable, to Campbell by Quit Claim Deed.

Had Veristone retained its interest in the Sheriff's Deed, it might be in a position to argue that Campbell had little or no interest to convey to Ms. Kerrigan by Deed of Trust. But once Veristone voluntarily conveyed any interest it had in the Property to Campbell, this issue became moot. Whatever interest Veristone may have initially had in the Property was freely and voluntarily conveyed away by Quit Claim Deed to Campbell -

and with constructive knowledge of Ms. Kerrigan's recorded Deed of Trust.

It has been the law since statehood that a quitclaim deed is just as effectual to convey the title to real estate as any other deed, and a grantee of a quit claim deed has the same rights as the grantee of a warranty deed, with the exception that he is given no warranties. . . .

A quitclaim deed is deemed and held a good and sufficient conveyance in fee "of all of the then existing legal and equitable rights of the grantor." *McCoy v. Lowrie*, 44 Wn.2d 483, 486, 487, 268 P.2d 1003 (1954).

This principle is codified at RCW 64.04.050:

Quitclaim deeds may be in substance in the following form [it is undisputed that the Quit Claim Deed to Campbell was in the proper statutory form]:

Every deed in substance in the above form when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his or her heirs and assigns, in fee *of all the then existing legal and equitable rights of the grantor in the premises therein described* . . . (Emphasis ours)

Pursuant to RCW 64.04.050, when Veristone quit claimed the Property to Campbell it conveyed *all legal and equitable rights* it had in the Property. Whatever percentage of ownership Veristone may have had in the Sheriff's Deed became moot as soon as Veristone quit claimed all of its legal or equitable ownership to Campbell. And, the instant Campbell became the 100% owner, the previously recorded Kerrigan Deed of Trust

automatically attached to this ownership pursuant to the Doctrine of After-Acquired Title, discussed below.

It is important to note that Veristone's Quit Claim Deed to Campbell was done freely and voluntarily and with constructive knowledge of the recorded Kerrigan Deed of Trust. It is obvious from Veristone's briefing that it would like to "walk back" the Quit Claim Deed. This is not legally possible, especially where the conveyance was freely and voluntarily undertaken by a sophisticated lender. "A grantor may not attack or defeat his own deed." *Carlson v. Stair*, 3 Wn. App. 27, 29, 472 P.2d 598 (1970) citing to *Standring v. Mooney*, 14 Wn.2d 220, 127 P.2d 401 (1942). Veristone, a sophisticated lender, cannot now claim an interest, either legal or equitable, that it voluntarily gave away.

**2. Pursuant to the Doctrine of After-Acquired Title, the Kerrigan Deed of Trust automatically attached to the Property once Campbell became the owner.**

The Doctrine of After-Acquired Title is explained at 17 Wash. Prac., Real Estate § 7.8:

Suppose A executes and delivers to B a deed that purports to convey Blackacre to B and warrants that A has title, but A does not at that time have any interest in the land. Later, however, A acquires title to Blackacre. No doubt B has an action for damages on the warranties of seisin and right to convey in A's deed, but the question before us now is whether B can actually get A's after-acquired title. In

American law, B clearly may do so upon his complaint, a court will compel A to execute a deed conveying the after-acquired title to B. Even beyond this, modern decisions hold that A's after-acquired title *automatically passes to B as soon as A gets it*; the title is said to "feed the estoppel". (Emphasis ours)

. . . Washington law fully subscribes to the statements of general law just made. RCWA 64.04.070 is most explicit on the matter. It says that when any person who conveys land by deed and does not then have title to it, but later acquires title, "such title shall inure to the benefit of the purchasers or conveyees of such lands to whom such deed was executed and delivered, and to his and their heirs and assigns forever. . . .

Importantly, and for more than a century, our courts have held that the Doctrine of After-Acquired Title applies to title conveyed by Sheriff's Deed. *Gough v. Center*, 57 Wash. 276, 106 P. 774 (1910).

Thus, when the Sheriff's Deed was recorded May 11, 2017, conveying to Campbell a joint interest as a tenant in common, Ms. Kerrigan's Deed of Trust automatically and instantly attached to that interest. The next day, May 12, when Veristone conveyed any and all interest it had in the property to Campbell, giving Campbell 100% ownership, Ms. Kerrigan's Deed of Trust automatically and instantly attached to Campbell's 100% interest.

In its briefing Veristone appears to concede that the Doctrine of After-Acquired Title would cause Ms. Kerrigan's Deed of Trust to attach

to the interest Campbell acquired from the Sheriff's Deed, but then goes on to argue that the Doctrine would somehow not apply to the interest Campbell obtained from Veristone. This argument is difficult to follow and is made without citation to any legal authority. Veristone suggests that two sections of the Washington Practice Series<sup>3</sup> support this argument but neither remotely stands for such a proposition. Again, Veristone offers no other legal authority for this claim.

The Doctrine of After-Acquired Title applies *on each occasion* that the grantor acquires additional title. This is expressly provided for in the statute codifying the Doctrine:

***Whenever*** any person or persons having sold or conveyed by deed any lands in this state, and who, at the time of such conveyance, had no title to such land, and any person or persons who may hereafter sell and convey by deed any lands in this state, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a title to such lands so sold and conveyed ***such title shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered . . . .*** (Emphasis ours) RCW 64.04.070

By statute, the Doctrine applies "*whenever*" a subsequent conveyance gives additional title to the grantor. Thus, the Kerrigan Deed of Trust automatically attached to the interest Campbell acquired by

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<sup>3</sup> 17 Wash. Prac., Real Estate § 7.8 and 18 Wash. Prac. Real Estate § 17.1

Sheriff's Deed, and then again automatically attached to the additional, 100%, interest Campbell acquired by Deed from Veristone.

**3. Ms. Kerrigan's Deed of Trust, being recorded first in time, is first in right.**

Washington's recording statute is found at RCW 65.08.070:

A conveyance of real property, when acknowledged by the person executing the same . . . may be recorded in the office of the recording officer of the county where the property is situated. *Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor . . . whose conveyance is first duly recorded.* (Emphasis ours)

Washington's recording statute is referred to as a "race notice" recording statute. The recording "imparts constructive notice of the estate or interest acquired to all subsequent purchasers, whether or not they are bona fide purchasers for value and whether or not they have actual notice of the conveyance". *Condo Owners v. Supreme N.W., Inc.*, 168 Wn. App. 56, 76, 277 P.3d 18 (2012).

"The purpose of the recording statute is to make the deed first recorded superior to any outstanding unrecorded conveyance of the same property unless the mortgagee or purchaser had actual knowledge of the transfer not filed of record." *Hu Hyun Kim v. Lee*, 145 Wn.2d 79, 86, 31

P.3d 665; 43 P.3d 1222 (2001), citing to *Tacoma Hotel, Inc. v. Morrison & Co.*, 193 Wash. 134, 140, 74 P.2d 1003 (1938).

Ms. Kerrigan's Deed of Trust was recorded May 8, 2017. As discussed above, it automatically and instantly attached to the after-acquired title Campbell received first through the Sheriff's Deed and, a day later, the Quit Claim Deed from Veristone, giving Campbell 100% ownership.

The Veristone Deed of Trust was not recorded until May 12, four days after the Kerrigan Deed of Trust and after Veristone's Quit Claim Deed to Campbell. Ms. Kerrigan's Deed of Trust, being recorded first in time, and automatically attaching to Campbell's interest as it was acquired, is superior to the later recorded Veristone Deed of Trust.

It is important to reiterate that Washington's Recording Statute, RCW 65.04.070, not only establishes the priority of liens based upon the first to be recorded but, in addition, declares that all subsequent lienholders have constructive notice of recorded interests. Thus, when Veristone voluntarily quit claimed any and all interest it had in the Property to Campbell, it did so with constructive notice of the previously recorded Kerrigan Deed of Trust. Veristone would like the Court to relieve it of its own voluntary act, but this act was taken with legal knowledge of the consequences.

**4. Veristone's requested relief - the *retroactive* reversal of lien priorities to a time before its nonjudicial foreclosure - is inequitable.**

Before it commenced this lawsuit Veristone first undertook a nonjudicial foreclosure of its Deed of Trust. Ms. Kerrigan did not intervene in Veristone's nonjudicial foreclosure for the simple reason that her Deed of Trust, having been first recorded, was a superior lien pursuant to the State's recording statute. Superior liens are unaffected by foreclosures of inferior deeds of trust. Veristone was the purchaser at its own trustee's sale, making it the owner of the Property subject to Ms. Kerrigan's Deed of Trust.

It is important to recognize that Veristone has no interest in merely changing the *current* priority of the parties' interests. This remedy, without more, offers no benefit to Veristone:

- Currently, Veristone is the owner of the Property and Ms. Kerrigan retains her Deed of Trust against it to secure her indebtedness.
- If all the Court does is declare that Ms. Kerrigan's Deed of Trust is subordinate to Veristone's, the result is no different than the current situation, as Veristone's Deed of Trust has been converted to ownership, moving Ms. Kerrigan's Deed of Trust from a subordinate position to the only remaining Deed of Trust. Veristone gains nothing from this exercise.

Instead, Veristone seeks a Judgment that not only declares it's Deed of Trust to be superior to Ms. Kerrigan's *but then makes this decree retroactive to a date before Veristone's nonjudicial foreclosure*. By this "two-step" process, Veristone would go from the owner of the Property subject to the Kerrigan Deed of Trust, to the owner of the Property free and clear of any claim by Ms. Kerrigan, as her Deed of Trust would have been erased by the earlier nonjudicial foreclosure. This is an extraordinary request.

The current priority of Ms. Kerrigan's Deed of Trust results from the recording statute, RCW 65.08.070. Veristone is asking the Court to exercise its equitable powers to undo the legal consequences of the recording statute and reverse the priority of the parties' liens, and then dramatically expand this equitable remedy by imposing it at a date prior to Veristone's foreclosure proceedings, thus wiping out Ms. Kerrigan's lien altogether.

A number of maxims have been announced relating to the court's use of its equitable powers: "Washington courts operating in equity need not enforce legal rights when doing so would be inequitable." *Riverview v. Spencer & Livingston*, 173 Wn. App. 568, 590, 295 P.3d 258 (2013).

"It is a contradiction of terms to adhere to a rule which requires a court of equity to act oppressively or inequitably and by rote rather than through

reason. . . . A court's equity power transcends the mechanical application of property rules." *Proctor v. Huntington*, 169 Wn.2d 491, 500-501, 238 P.3d 1117 (2010). "As a matter of equity, the court enjoys broad discretion to do substantial justice. *Estate of Hayes*, 185 Wn. App. 567, 612, 342 P.3d 1161 (2015) citing to *In re Foreclosure of Liens*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). "This court reviews a court's exercise of such discretion for abuse." *Estate of Hayes*, *Supra* at 612.

Ms. Kerrigan did not intervene in Veristone's nonjudicial foreclosure as she had no reason to. Her Deed of Trust, which by law was in a first lien position, did not require her intervention or other involvement. If Ms. Kerrigan had been in a subordinate lien position she would have been afforded the rights and protections given to an inferior lien creditor, and would have had the opportunity to exercise those rights. Yet Veristone now seeks the Court to use its equitable powers to retroactively make Ms. Kerrigan an inferior lien creditor, resulting in the forfeiture of any rights she would have had.

Our courts have stated many times that they abhor the use of equity to cause a forfeiture of rights. "Under equity, Washington disfavors forfeitures unless the right thereto is so clear as to permit no denial." *Estate of Hayes*, *Supra* at 612. "Forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no

denial." *Pardee v. Jolly*, 163 Wn.2d 558, 574, 182 P.3d 967 (2008).

"Equity abhors a forfeiture; conditions of forfeiture must be substantial before they will be enforced in equity." *Esmieu v. Hsieh*, 20 Wn. App. 455, 460, 580 P.2d 1105 (1978).

There is nothing equitable about *retroactively* making Ms. Kerrigan an inferior lienholder, causing the complete forfeiture of her security interest without ever having had the opportunity to defend it. It is important to remember that Ms. Kerrigan qualifies as a "bona fide purchaser". "The bona fide purchaser doctrine provides that a good faith purchaser for value, who is without active or constructive notice of another's interest in real property purchased, has a superior interest in the property." *Levien v. Fiala*, 79 Wn. App. 294, 298, 902 P.2d 170 (1995), citing to *Tomlinson v. Clarke*, 118 Wn.2d 498, 500, 825 P.2d 706 (1992). Ms. Kerrigan, a retired, disabled, unsophisticated lender, loaned a portion of her retirement funds to Ms. Campbell and received in return a Deed of Trust which she recorded before Veristone's Deed of Trust. Ms. Kerrigan loaned these funds without knowledge of Veristone's interest, as Veristone had not yet recorded its Deed of Trust. Ms. Kerrigan was therefore without notice, either actual or constructive, of any competing interest, and recorded her lien before anyone else, and yet Veristone asks the Court to eliminate her interest altogether. This request is inequitable.

Veristone concludes by cavalierly suggesting that Ms. Kerrigan will still be free to pursue a personal judgment against Mr. Campbell. This suggestion comes after Veristone spent an entire page of its brief detailing its extensive - and ultimately unsuccessful - efforts to find Mr. Campbell in order to have him personally served. Mr. Campbell's whereabouts remain unknown to this day. Nonetheless, Veristone is confident that Ms. Kerrigan will be able to determine his location and obtain a judgment against him.

Veristone does not mention that the Property has sufficient value to support both parties' lien interests and that, if Veristone can convince the Court to eliminate Ms. Kerrigan's Deed of Trust, it will reap an enormous windfall - all at Ms. Kerrigan's expense. Again, use of the Court's equity powers must be equitable. There is nothing equitable about this result.

#### **IV. CONCLUSION**

Ms. Kerrigan's Deed of Trust was the first to be recorded. It automatically and instantly attached to the Property when Campbell later acquired title, first through the Sheriff's Deed and then through Veristone's Quit Claim Deed. All of this occurred before Veristone recorded its Deed of Trust.

The Trial Court correctly ruled that there was no basis - in law or equity - to reverse the priority of the parties' liens. Ms. Kerrigan asks this Court to affirm.

Veristone's real goal is to have a decision retroactively reversing the priority of the parties' liens so as to forfeit Ms. Kerrigan's Deed of Trust altogether, without her ever having had the chance to protect it. The use of the Court's equity powers for this result is inequitable.

RESPECTFULLY SUBMITTED this 3 day of May, 2019.

HILLIER, SCHEIBMEIR & KELLY, P.S.

By \_\_\_\_\_

Mark C. Scheibmeir

WSBA #12059

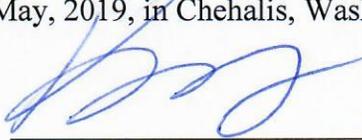
Attorney for Mary-Ann Kerrigan

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the state of Washington that on May 3, 2019, I caused to be served a copy of Mary-Ann Kerrigan's Response Brief in the above-captioned matter upon the parties herein via the Appellate Court Portal Filing system and via U.S. Mail, 1st Class, Postage Prepaid, which will send electronic notifications of such filing to the following:

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DATED this 3<sup>rd</sup> day of May, 2019, in Chehalis, Washington.



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Kristin L. Friend, Legal Secretary

**HILLIER, SCHEIBMEIR & KELLY, P.S.**

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