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(Kitsap County Case No. 19-2-00808-5)

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

GARY McGREAL and JESSICA McGREAL,

Appellants,

v.

PEAK FORECLOSURE SERVICES, INC. (a California Corporation),
SHELLPOINT PARTNERS, LLC and BYRON HARRIS,

Respondents.

RESPONSE BRIEF OF RESPONDENT BYRON HARRIS

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I. RESTATEMENT OF THE CASE

On April 15, 2015, Appellants filed suit against defendants Peak Foreclosure Services, Inc., Peak Foreclosure Services of Washington, Inc., and New Penn Financial LLC DBA Shellpoint Mortgage Servicing, among others, under Kitsap County Superior Court Case No. 15-2-00770-1 (the "2015 Case"). (CP 123-141). Appellants' Second Amended Complaint dated September 14, 2016, was subsequently dismissed at summary judgment on May 25, 2018. (CP 142-146).

On March 19, 2019, Appellants filed a new case that asserts substantially the same facts and causes of action as the 2015 Case. (CP 1-22).

A. Facts Common to Both the 2015 Case and the 2019 Case.

The following factual statements are taken from Appellant's Complaint filed herein and are also found in the 2015 Second Amended Complaint.

In 1998 Appellants purchased that certain real property commonly known as 23044 NE Jefferson Point Road, Kingston, WA 98346. The address was later changed in 2012 to 12336 Harmony Lane NE, Kingston, WA 98346. (CP 4, 125).

On October 16, 2006, Appellant entered into a 30 year loan with Countrywide Home Loans, Inc. (CP 4, 125, 147-159).

Appellants continued to make loan payments until May 16, 2011. All of Appellants liquid assets including stocks, IRAs and 401ks had been liquidated and exhausted at this point. (CP 4, 125).

On September 15, 2014, Appellants received a "Notice of Default," which showed a balance due $257,080.19, an increase of $116,002.29 over the bill of Nov. 17, 2013. (CP 6, 127).

Appellants had not received a Notice of Pre-Foreclosure Options (hereinafter "NOPFO") that is required under RCW 61.24.031(5). (CP 6, 127).

The AGO [Washington Attorney General] sent a letter to Shellpoint asking for an explanation. (CP 7, 128).

Defendants did not respond in the time specified by AGO and when it did it failed to produce a NOPFO. (CP 7, 129).

In addition, Appellants raised the accounting irregularities with Donna Loitz who asked for an explanation from Shellpoint. Appellants never received that explanation. (CP 8, 128).

In the complaint to the AGO Appellants had also indicated that property was used for agricultural purposes, which requires a judicial foreclosure action. (CP 8, 128). Appellants state the property consisted of a residence, extensive orchards, rose gardens, flower beds, numerous trees,

rare plants from Heronswood botanical garden and mature plantings. The apple trees were also harvested by a local cider producer. (CP 9, 140).

Appellants notified Peak of these errors and omissions by e-mail and by certified mail. At this point in full knowledge that they were engaged in an illegal foreclosure Peak issued a "Notice of Trustee's Sale." (CP 8, 130, 160-167).

On April 24, 2015, the property was sold to BDH Holdings, Inc., an LLC owned by Respondent Byron Harris and several relatives. (CP 8, 130, 168-173).

Throughout this process Respondents did not use the legal address of the Property. (CP 8,131).

Based on these facts, Appellants pleaded the following causes of action:

1. First Cause of Action: Failure to Follow Statutory Foreclosure Process;

2. Second Cause of Action: Failure of Trustee to act in Good Faith; and

3. Third Cause of Action: Violations of Consumer Protection Act. (CP 3-22, 124-141).

Appellants Second Amended Complaint filed September 14, 2016, was subsequently dismissed at summary judgment on May 25, 2018. (CP 142-146).

B. Additional Facts Alleged in the 2019 Case.

The 2019 Complaint recites the same factual history set forth in the 2015 Case. The only exceptions are two new paragraphs that appear at page 18 of the Complaint, which state as follows:

> The Plaintiffs owned a second water-front lot adjacent to the house at Spring Chapel Court. This lot was not included in the original loan collateral (not mentioned by either tax ID number nor address) nor was it mentioned in the single public notice of sale. Peak was aware of this lot through property tax documents in their possession and also because they requested an appraisal that included the lot.
>
> Peak conspired with Byron Harris to steal this lot. They issued a "deed" to Byron Harris, who hand modified the document to include the tax ID of this lot and who personally filed it with the County.

(CP 20).

In their new Complaint, Appellants pleaded the same three causes of action that were dismissed in their 2015 Case and added two new claims:

1. First Cause of Action: Failure to Use Judicial Foreclosure on Identified Agricultural Property;

2. Second Cause of Action: Failure to Follow Statutory Foreclosure Process;

3. Third Cause of Action: Failure of Trustee to act in Good Faith; 4

4. Fourth Cause of Action: Violations of Consumer Protection Act; and

5. Fifth Cause of Action: Theft of Second Lot.

(CP 3-22).

II. SUMMARY OF ARGUMENT

Respondent Byron Harris requests this court affirm the trial court's order granting summary judgment dismissing this action with prejudice pursuant Civil Rule 56 for the following reasons:

First, Appellants' claims are barred by the doctrine of claim preclusion (*res judicata*). In 2015, Appellants filed an action that alleged nearly identical facts and claims against defendants Peak Foreclosure Services Inc. and Shellpoint Mortgage Servicing. As the 2015 case was dismissed at summary judgment on May 25, 2018, the Appellants are now barred from bring this present action against Harris who is in privity with Peak Foreclosure Services.

Second, Appellant claims are waived and are now time barred by the two year statute of limitations found under RCW 61.24.127.

Third, Respondent Byron Harris is a *bona fide* purchaser for value and takes title free and clear of any claims Appellants may have related to the foreclosure process.

Fourth, the property is not used principally for agricultural purposes, but a residential property, and one of several waterfront homes in this neighborhood, that consists almost entirely of the large residence, two garages, driveway and a lawn area.

Fifth, the Deed of Trust, Notice of Trustee's Sale and the Trustee's Deed all correctly described the real property and are valid and enforceable conveyances under the real estate statute of frauds.

III. ARGUMENT

A. Standard of Review

This court should review the trial court's entry of the June 7, 2019, Order Granting Plaintiff's Motion for Summary Judgment *de novo*, engaging in the same inquiry as the trial court. *Hartley v. State,* 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Because the appellate court is in as good a position as the trial court to judge the evidence, the appellate court may substitute its judgment for that of the trial court about the facts as well the application to the law. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080, 1086 (2015).

All facts must be viewed most favorably to the party resisting the motion. The motion will be granted when, after viewing the pleadings, depositions, admissions and affidavits, and all reasonable inferences that may be drawn therefrom, in the light most favorable to the nonmoving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment. *Olympic Fish Products v. Lloyd,* 93 Wn.2d 596, 602, 611 P .2d 737 (1980).

B. Appellants' Claims are Barred by *Res Judicata.*

Appellants' claims are barred by the doctrine of claim preclusion (*res judicata*). *Res judicata* is a judicially created doctrine designed to prevent relitigation and to curtail multiplicity of actions by parties, participants or privies who have had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. *Corbin v. Madison*, 12 Wn. App. 318, 323, 529 P.2d 1145 (1974), *review denied*, 85 Wn.2d 1005, 1975 WL 48230 (1975). Also referred to as claim preclusion, *res judicata* prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009), *review denied*, 168 Wn.2d 1028, 230 P.3d 1060 (2010). The doctrine "puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial

proceedings." *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949). Allowing a claimant to split a single cause of action or claim "would lead to duplicitous suits and force a defendant to incur the cost and effort and defending multiple suits." *Landry v. Luscher*, 95 Wn. App. 779, 782, 976 P.2d 1274 (2001). The general rule is that "if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim." *Landry*, 95 Wn. App. 779, 782, 976 P.2d 1274 (2001).

Application of *res judicata* requires identity between a prior judgment and a subsequent action on the following: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against whom the claim is made. *Hilltop Terrace Homeowner's Ass'n v. Island Co.*, 126 Wn.2d 22, 32, 891 P.2d 29 (1995); (*quoting Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)). In this case the required elements are met.

1. Subject matter.

This element cannot be disputed as the subject matter of both actions involves the nonjudicial foreclosure of the Appellants' former residence.

2. Causes of action.

The general rule is that *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'" *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986) (*quoting Sayward v. Thayer*, 9 Wash. 22, 24, 36 P. 966, 38 P. 137 (1894)) (emphasis added).

In determining if causes of action are identical for purposes of *res judicata*, this court has considered the following criteria:

> (1) Whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Norco Const., Inc. v. King Cty., 106 Wn.2d 290, 293, 721 P.2d 511, 513 (1986).

Here, Judge Dalton dismissed three causes of action in the 2015 Case that are repleaded in the new case: (a) Failure to Follow Statutory Foreclosure Process; (b) Failure of Trustee to act in Good Faith; and (c) Violations of Consumer Protection Act. The additional two new causes of action, (d) Failure to Use Judicial Foreclosure on Identified Agricultural

Property, and (e) Theft of Second Lot, arise out of the same nucleus of facts, use the same evidence, involve the same rights, and if allow to proceed would impair the prior judgment, and so also are properly subject to the doctrine of *res judicata.*

3. Parties and the quality of persons for or against whom the claim is made.

In cases where the identity of the party in question is not strictly the same, secondary sources state the rule may be more easily grasped if it is not stated as a requirement for *res judicata* but rather as a rule about privity and who is bound by the first judgment. The general rule is that a judgment is *res judicata*, and therefore binding, on all parties to the original litigation, plus all persons in privity with such parties. 14A WASH. PRAC., CIVIL PROCEDURE § 35:27 (3d ed.); *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764, 887 P.2d 898, 900 (1995) (Under the principles of *res judicata*, a judgment is binding upon parties to the litigation and persons in privity with those parties). One is in "privity" with a party when he stands in a mutual or successive relationship to the same rights of property. *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 721-722, 116 P.2d 315 (1941).

Here, Respondent Harris is in privity with defendant Peak Foreclosure Services of Washington, Inc. as Harris acquired title to the

property by virtue of a Trustee's Deed. Because of this relationship of privity, Harris can assert the defense of *res judicata* in the instant case.

C. Appellants' Claims are Barred by Waiver.

The Deeds of Trust Act "creates a three-party mortgage system allowing lenders, when payment default occurs, to nonjudicially foreclose by trustee's sale." *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). The Act has three goals: an efficient and inexpensive process, adequate opportunities for parties to prevent wrongful foreclosure, and stability of land titles. *Id.*

To further these goals, RCW 61.24.130 provides a procedure for stopping a trustee's sale. *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061 (2003). The DTA requires borrowers to use this procedure or risk waiving their objections to the sale. *Plein v. Lackey*, 149 Wn.2d at 227, 67 P.3d 1061; RCW 61.24.040(1)(f)(IX) ("Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.").

This waiver occurs if the party "(1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a

court order enjoining the sale." *Plein v. Lackey*, 149 Wn.2d at 227, 67 P.3d 1061. Waiver under these provisions is equitable and applies only where a party knowingly and intentionally relinquishes its rights by not asserting them. *Albice v. Premier Mortg. Servs. of Wash., Inc*, 174 Wn.2d at 569–70, 276 P.3d 1277.

In *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 169, 189 P.3d 233 (2008), the court held that the plaintiffs waived their tort claims by failing to seek a presale injunction. The court reasoned that each of the plaintiffs' claims related to the underlying obligation, that the plaintiffs had constructive notice of their claims, and that those claims would have provided them a defense to foreclosure and concluded that applying waiver in this situation would further the three goals of the DTA. *Id.*

In response to the *Brown* decision, the legislature adopted RCW 61.24.127. RCW 61.24.127(1) lists four types of claim that a plaintiff "may not" waive by failing to use the DTA procedure for obtaining a presale injunction. These include claims against any party for violating the CPA and against a trustee for violating the DTA. The Supreme Court has stated that "[w]here applicable, waiver applies only to actions to vacate the sale and not to damages actions," *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 796, 295 P.3d 1179 (2013); *Frizzell v. Murray*, 179 Wn.2d 301, 311, 313 P.3d 1171 (2013) ("We have not yet had occasion to discuss the

interplay of the waiver provision in RCW 61.24.040(1)(f)(IX) with RCW 61.24.127(1).”).

RCW 61.24.127 does not purport to supersede the entire *Brown* decision. If the legislature intended to prohibit waiver for any type of damages claim based on the underlying obligation, it could have stated simply, “The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages.” RCW 61.24.127(1). It did not. The legislature's decision to limit the statute's safe harbor to four types of damage claims shows that the legislature did not intend to protect other claims from waiver if the requirements of notice, knowledge of a defense, and failure to enjoin the sale are satisfied. *Patrick v. Wells Fargo Bank, N.A.*, 196 Wn. App. 398, 405–07, 385 P.3d 165, 169–70 (2016).

Here, the Appellants failed to use the DTA's procedure to restrain the trustee's sale, had notice of the sale, knew of the defenses they now assert, and did not try to enjoin the sale. The Appellants further concede that they did not make any payments after May 16, 2011. Under RCW 61.24.040(1)(f)(IX), RCW 61.24.130(1), Appellants have waived their claims and are now barred from pursuing them in this action.

While RCW 61.24.127(1) protects the Appellants from waiver of their CPA claims and their DTA claim against the trustee, those claims

"must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier."[1] As Appellants brought this action more than two years from the 2015 trustee's sale, they are now time barred.

Consequently, to the extent Appellants claims are not barred by *res judicata*, they are barred by waiver.

---

[1] RCW 61.24.127 provides,
(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:
(a) Common law fraud or misrepresentation;
(b) A violation of Title 19 RCW;
(c) Failure of the trustee to materially comply with the provisions of this chapter; or
(d) A violation of RCW 61.24.026.
(2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:
(a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;
(b) The claim may not seek any remedy at law or in equity other than monetary damages;
(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;
(d) A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document purporting to create a similar effect, related to the real property foreclosed upon;
(e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, except to the extent that a judgment on the claim in favor of the borrower or grantor may, consistent with RCW 4.56.190, become a judgment lien on real property then owned by the judgment debtor; and
(f) The relief that may be granted for judgment upon the claim is limited to actual damages. However, if the borrower or grantor brings in the same civil action a claim for violation of chapter 19.86 RCW, arising out of the same alleged facts, relief under chapter 19.86 RCW is limited to actual damages, treble damages as provided for in RCW 19.86.090, and the costs of suit, including a reasonable attorney's fee.
(3) This section applies only to foreclosures of owner-occupied residential real property.
(4) This section does not apply to the foreclosure of a deed of trust used to secure a commercial loan.

D. Respondent Byron Harris is a Bona Fide Purchaser and Takes Title Free and Clear of Appellants' Claims.

Under RCW 61.24.040(7), the trustee's deed's "recital shall be prima facie evidence of [statutory] compliance and conclusive evidence thereof in favor of bona fide purchasers." *Albice v. Premier Mortg. Servs. of Washington, Inc.*, 174 Wn.2d 560, 573, 276 P.3d 1277, 1284 (2012).

A bona fide purchasers (BFP) is one who purchases property without actual or constructive knowledge of another's claim of right to, or equity in, the property, and who pays valuable consideration. But if the purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed. *Miebach v. Colasurdo*, 102 Wn.2d 170, 175–76, 685 P.2d 1074 (1984); *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960).

In considering whether a person is a BFP, the court must ask (1) whether the surrounding events created a duty of inquiry and, if so, (2) whether the purchaser satisfied that duty. In this determination, the court considers the purchaser's knowledge and experience with real estate. *Miebach v. Colasurdo*, 102 Wn.2d 170, 175–76, 685 P.2d 1074 (1984);

Glaser v. Holdorf, 56 Wn.2d 204, 209, 352 P.2d 212 (1960) (a bona fide purchaser for value is one who without notice of another's claim of right to, or equity in, the property prior to his acquisition of title, has paid the vendor a valuable consideration.").

Notice of another's claim can be imputed when the buyer has "such information as would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry...." *Id.* When such a circumstance would put a person of reasonable prudence on inquiry notice, however, that circumstance "is only notice of what a reasonable inquiry would reveal." *Id.* (*citing Paganelli v. Swendsen*, 50 Wn.2d 304, 311 P.2d 676 (1957)).

Here, Respondent Harris is a BFP like the purchaser in *Steward v. Good*, 51 Wn. App. 509, 513, 754 P.2d 150, 152–53 (1988). (CP 168-173). In *Steward v. Good* the court found the purchaser to be a bona fide purchaser for value because at or before the time of the sale, the Goods had little real estate investing experience, they had no notice of any claims of any defects in the sale, nor were they aware of any other party's claim to, any right to, or equity in, the property that might defeat a trustee's deed; further, before the sale, the Goods had not met the trustee nor had any communication from him that would indicate any defects in the presale procedure. Ann Good went to the sale, and after the opening bid, made a

slightly higher bid. Thereafter she was informed she had won the auction for the property. Valuable consideration, i.e., $4,870, was paid for the right to the property. *Steward v. Good*, 51 Wn. App. 509, 513, 754 P.2d 150, 152–53 (1988); see also *Triangle Prop. Dev., LLC v. Barton*, 190 Wn. App. 1017 (2015) (finding the purchase to be a BFP because the Plaintiffs did not assert, and the record does not suggest, that Triangle Property is not a bona fide purchaser).

E. The Waterfront Residence was Not "Principally Used for Agricultural Purposes."

Relying on *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 115, 297 P.3d 677, 687 (2013), Appellants argue the nonjudicial foreclosure sale of their property was invalid because it was used, in part, for agricultural purposes.

In *Schroeder v. Excelsior Mgmt. Grp., LLC* the court reversed and remanded a challenged to a nonjudicial foreclosure action for the trial court to determine whether the property was "primarily agricultural at relevant times." *Id.*[2] The *Schroeder* court observed that, among other things, the DTA provides additional protection for land that is primarily used for agricultural purposes:

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[2] On remand, the trial court held it was not: that timber was not a crop, and therefore property used for growing or felling timber was not agricultural property protected from nonjudicial foreclosure under DTA. *Schroeder v. Haberthur*, 200 Wn. App. 167, 401 P.3d 319 (2017).

> It shall be requisite to a trustee's sale:
>
> ....
>
> (2) That the deed of trust contains a statement that the real property conveyed is <u>not used principally for agricultural purposes</u>; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially.

RCW 61.24.030 (emphasis added); *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d at 105.

In this case, in order to secure a loan from Countrywide, the Plaintiffs gave a covenant and agreed that "The Property is not used principally for agricultural purposes." (CP 157). Although Appellants now seek to disavow their prior representations, the undisputed record reflects the property is nothing more than a waterfront residence, in a neighborhood of other similar residences, and any agriculture uses were incidental to the residential use. (CP 174-178).

According to Kitsap County Assessor records, the property is zoned Rural Residential (1DU/5Ac), and has been improved by a 3690 square foot residence since 1935. Aerial photos from the Kitsap County Assessor records from 2005 and 2017 show the property is one of several waterfront homes in this neighborhood and that the property consists almost entirely of the residence, two garages, driveway and a large lawn

area. (CP 174-178). Because the property is not used principally for agricultural purposes, this claim fails.

F. Appellants' Claim of "Theft of Second Lot" Must be Dismissed Because the Deed of Trust, Notice of Trustee's Sale and the Trustee's Deed all Described Both Parcels of Real Property.

In October 16, 2006, when Appellants entered into their loan with Countrywide, they granted a deed of trust against their residential property, then commonly known as 23044 NE Jefferson Point Road, Kingston, WA 98346, and legally described as follows:

> LOTS 3 AND 4 OF SHORT PLAT NO. 1143 RECORDED UNDER AUDITOR'S FILE NO. 9001080119, BEING AN AMENDMENT OF SHORT PLAT RECORDED UNDER AUDITOR'S FILE NO. 7709060141 AND 8905100141;
>
> TOGETHER WITH AN EASEMENT FOR INGRESS, EGRESS AS DELINEATED ON SAID SHORT PLAT NO. 1143, SAID SHORT PLAT BEING A PORTION OF GOVERNMENT LOTS 2 AND 3 IN SECTION 1, TOWNSHIP 26 NORTH, RANGE 2 EAST, W.M., KITSAP COUNTY, WASHINGTON.

(CP 147-159),

According to Kitsap County Assessor's records, Lot 3 of Short Plat No 1143 is identified as Tax Parcel No. 012602-4-088-2000 and Lot 4 of Short Plat No 1143 is identified as Tax Parcel No. 012602-4-089-2009. (CP 175-178).

On October 14, 2014, Peak Foreclosure Services of Washington, Inc, issued its Notice of Trustee's Sale. This Notice of Trustee's Sale uses the same legal description as the Deed of Trust, and a "more accurately described" description for the property. (CP 160-167).

On April 30, 2015, Peak Foreclosure Services of Washington, Inc., issued its Trustee's Deed to BDH Holding LLC, as the successful purchaser. This deed also uses the same legal description as the Deed of Trust, and a "more accurately described" description for the property. (CP 168-173).

Appellants incorrectly contend these conveyances are somehow incomplete or invalid because they do not contain the correct street address and both tax parcel numbers.

In 2015, the DTA required the Notice of Trustee's Sale to only contain a legal description of the property. The Notice of Trustee's Sale was not required to include a mailing address or tax parcel number. *See* prior RCW 61.24.040(1)(f). While the DTA was subsequently amended to require inclusion of the tax parcel number, this amendment did not go into effect until June 7, 2018. *See* Second ESHB 2057, Ch. 306, Laws of 2018.

As to the Trustee's Deed, the real estate statute of frauds provides, "Every conveyance of real estate, or any interest therein, and every

contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 60.04.010. To satisfy this statute, the description of the land in a deed must be "sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description." *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960) (*citing Bingham v. Sherfey*, 38 Wn.2d 886, 889, 234 P.2d 489 (1951)); *Nielson v. Robbins*, 156 Wn. App. 1017 (2010). Thus, the inclusion of the address or tax parcel numbers is not a real estate statute of frauds requirement; rather, it is merely a Recording Act requirement. *See* RCW 65.04.045(1)(g) that is met here.

IV. CONCLUSION

Respondent Byron Harris requests this court affirm the trial court's order granting summary judgment dismissing this action with prejudice pursuant Civil Rule 56.

RESPECTFULLY SUBMITTED this 18 day of June, 2020.

By _____

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on June 18, 2020, a true and accurate copy of the document to which this Certificate is affixed was sent via electronic mail and was deposited in the mails of the United States of America, by regular mail, postage prepaid, a properly stamped and addressed envelope directed to:

Gary L. McGreal Jessica McGreal 24800 Chris Lane Kingston, WA 98346 mcgreal@aol.com	Donald G. Grant, P.S. Attorneys and Counselors at Law Washougal Town Square, Suite 245 1700 Main Street Washougal, WA 98367 don@dongrantps.com

DATED at Silverdale, Washington, this 18th day of June, 2020.

Tracey Hamilton-Oril
Legal Assistant

TEMPLETON HORTON WEIBEL PLLC

June 18, 2020 - 4:06 PM

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