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NO. 55043-9-11

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

MARK and MICHELLE TAYLOR, husband and wife, and their marital
community;

Appellants,

vs.

OTTO GUARDADO, an individual;

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellants are Mark and Michelle Taylor, Defendants below. Respondent is Otto Guardado, Plaintiff below. This case comes before this Court following Commissioner Schmidt's Ruling Granting Discretionary Review of Clark County Superior Court's denial of Appellants Taylor's Motion for Partial Summary Judgment. Appellants Taylor sought a ruling from Clark County Superior Court that they were, as a matter of law, bona fide purchasers in good faith of Otto Guardado's former property.

The Taylors originally purchased the property pursuant to a Trial Court Order which was never superseded by Guardado. That Trial Court Order was later reversed by this Court nearly a year post-sale. Respondent Guardado brought suit to recover the home from Appellants Taylor under equitable principles. Appellants Taylor moved for summary judgment for purposes of determining whether restitution of the property is appropriate under RAP 12.8. The Trial Court below erred when it failed to grant summary judgment in Appellants Taylor's favor where Otto Guardado failed to supersede the Trial Court Order directing sale of the home and, at the time of sale, had recently removed a recorded lis pendens.

Respondent Otto Guardado previously owned a home jointly with his now ex-wife Diana Guardado located at 10007 NE 28th Ave.,

Vancouver, WA 98686.¹ During the process of their divorce, Otto retained the home under the alleged agreement that he would remove Diana from her obligation under the mortgage. Otto was unable to do so. Instead, Otto made late and sporadic mortgage payments for a period of years. Subsequently, Diana brought suit against Otto for breach of an alleged oral contract for his failure to remove her from the obligation, claiming that it caused her damage in the form of repeated credit application denials. Following a bench trial, Diana prevailed on that claim in Skamania County Superior Court. In Skamania County Superior Court Judge Altman's findings of fact and conclusions of law, he ordered Otto to sell the home by modifying the former couple's dissolution decree under CR 60. These facts may appear familiar to this Court, as Otto eventually appealed that ruling to this Court and prevailed. This Court reversed Skamania County Superior Court's modification of the dissolution decree as procedurally deficient holding Judge Altman had no authority under CR 60 to modify a judgment under a separate cause number. *See Guardado v. Guardado*, 200 Wn. App. 237 (2017).

When Otto first filed his Notice of Appeal in that matter, he failed to post a supersedeas bond. He attempted to file a bond – twice – but both attempts were deemed insufficient; the first for insufficient funds and the

¹ Throughout this Brief Respondent will refer to Otto and Diana Guardado by their first names where appropriate to avoid confusion. No disrespect is intended.

second for attempting to post unapproved alternate security under RAP 8.1(b)(4). While the appeal was pending and before Otto even filed his opening brief, the home was sold pursuant to the un-superseded Trial Court Order to Appellants Mark and Michelle Taylor through a Court-appointed special master. The sale price of the home had previously been fixed by the Court at \$240,000 due to a finding of contempt against Otto following his failure to prepare the home for showing and allow the real estate agent access to the property.

The most crucial facts before this Court are as follows: (1) Otto never posted a supersedeas bond to stay enforcement of the Trial Court Order directing sale of his home, (2) Otto filed a lis pendens on the property a month prior to the sale, (3) Otto voluntarily released that lis pendens before Appellants closed on the home, and (4) there was no recorded encumbrance on the property at the time of sale.

Respondent Guardado now seeks to regain possession of the home from Appellants Taylor. Guardado argues that the Taylors bore the risk that the Trial Court Order would be reversed and that they should live with the consequences of buying the property while an appeal was pending. Guardado's theory is contrary to well-settled Washington law. In fact, by failing to post an adequate supersedeas bond, Guardado himself assumed the risk the property would be sold. If Guardado prevails, supersedeas

procedure would prove meaningless.

Respondent's primary argument that he is entitled to return of the home is that Appellant Mark Taylor had knowledge that the appeal was pending. However, a Notice of Appeal does not act as supersedeas, nor does knowledge of the grounds for appeal. Respondent likewise argues that his release of the lis pendens prior to sale of the home was not voluntary, but instead under threat of being jailed for contempt. But, as Commissioner Schmidt addressed in his Ruling Granting Review, "he presented no evidence of such a threat, other than in an email suggesting that he might be found in the Skamania County Jail." *See* Ruling Granting Review from this Court dated November 4, 2019 at p. 4-5.

Respondent's failure to post a supersedeas bond and his subsequent release of the lis pendens are fatal to his claim. Appellants moved Clark County Superior Court for partial summary judgment on Respondent's claims below. That motion was denied. Upon denial of reconsideration and the subsequent motion for discretionary review, which was granted, Appellants seek reversal of the Trial Court's denial of partial summary judgment. Appellants moved for partial summary judgment only because that Motion did not seek to resolve the Taylors' counterclaim.

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II. ASSIGNMENTS OF ERROR

1. The Trial Court Erred in Denying Appellants' Motion for Summary Judgment Where Respondent Guardado Failed to Present Sufficient Evidence Showing Mark and Michelle Taylor Were Not Bona Fide Purchasers in Good Faith.
2. The Trial Court Erred When it Found the Existence of the Lis Pendens Which Was Removed Pre-Sale Created a Genuine Issue of Material Fact as to Appellants' Good-Faith Purchaser Status.
3. The Trial Court Erred By Considering Respondents' Arguments Below Where There Was No Evidence in the Record to Support Those Arguments.
4. The Trial Court Erred When it Determined that Mark Taylor's Knowledge of the Pending Appeal Created a Genuine Issue of Material Fact as to Appellants' Good-Faith Purchaser Status.
5. The Trial Court Erred When it Considered Allegations That Otto Guardado Removed the Lis Pendens Under Duress, That Mark Taylor Was a Sophisticated Real Estate Investor, and that the Taylors Sought Legal Counsel With Regard to Purchasing the Home, Despite No Evidence in the Record of the Same.
6. The Trial Court Erred When it Placed the Burden on Appellants Taylor To Show They Were Good Faith Purchasers When The Law Instead Presumes a Buyer is a Purchaser in Good Faith.

III. STATEMENT OF THE CASE

A. Background Facts

The following facts are not materially disputed. The property at issue is located at 10007 NE 28th Ave., Vancouver, WA 98686. CP at 4. Otto and Diana were married on December 16, 2006 and purchased the

home together on February 5, 2007. Otto and Diana purchased the home by way of a balloon payment mortgage agreement for \$334,900. On April 14, 2008, Otto and Diana separated and were divorced later that year on October 17, 2008. CP at 73-90. Otto retained the home so long as he assumed full payments on the mortgage. *Id.*

Ostensibly, due to the housing crash of 2008, Otto fell behind on his mortgage payments. Otto applied to have the loan modified in early 2009, which was denied. Otto sporadically made mortgage payments until November 2012 when he was eventually granted a loan modification. At that time, Otto induced Diana to execute a Quit Claim Deed devising any remaining interest in the property to Otto in exchange for an alleged oral promise that he would remove her from any obligations under the now-modified mortgage. CP at 92-93. To this date Otto denies the existence of said oral contract. However, that fact is not material to the outcome of this litigation.

At some point in 2012-13, Diana realized she had not been removed from the mortgage and claims her credit was adversely affected because it was linked to Otto's late payments. CP at 95-104. She was unable to obtain various loans she had applied for due to the delinquent mortgage. Diana eventually filed suit for breach of oral contract on October 27, 2014 under Skamania County Superior Court Cause No. 14-2-

00141-1. That breach of contract action was heard by Judge Brian Altman for a bench trial in May 2016. Following the bench trial, Judge Altman entered an Order directing the sale of Otto's home for market value. CP at 106-112. In his Order, Judge Altman contemplated a drastic reduction in sale price if the home was not promptly listed and sold before the end of summer 2016. *Id.*

According to the realtor, Otto fiercely resisted any effort to list the home. First, Otto would not allow the special administrator or the real estate agent Rick Shurtliff to enter the home and prepare it for showing. CP at 117-118. After some negotiations and legal threats, Otto finally agreed to list the home. Otto repeatedly grasped at straws to prevent sale of the home, filing multiple motions for emergency stay of enforcement of the Order. CP at 253, 254, 256, 258, 260, 261. Finally, due to Otto's actions, Diana's counsel filed a motion for contempt against Otto, which the Trial Court granted. CP at 120. In granting the motion – as a direct result of Otto's actions – the Trial Court directed that the house be sold at a reduced price of \$240,000 to allow for a quick sale and as a sanction against Otto. *Id.* The Taylors had no involvement in that litigation and Otto has no evidence in the record that they did. The circumstances surrounding the reduction in sale price are extremely relevant, as a large thrust of Otto's argument before this Court will be that the home was

never listed for public sale. However, Otto's own actions in the summer of 2016 were aimed directly at preventing a public listing. Otto has unclean hands in bringing that argument as it was his own actions that resulted in the reduce sale price after he himself acted as to prevent a public listing. CP at 117-120.

Otto filed an appeal to this Court in late summer 2016. He attempted to file a supersedeas bond of \$10,000. CP at 125. However, the Trial Court set the bond amount at \$40,000. CP at 122-123. Consequently, Otto's bond did not supersede enforcement of the Court Order. Otto again attempted to file a "bond guarantee" through another ex-wife Kim Bailey. CP at 127-129. On September 2, 2016 this Court ruled that his supersedeas "bond guarantee" did not satisfy the requirements of RAP 8.1 because it amounted to unapproved alternative security under RAP 8.1(b)(4). CP at 131. This Court explicitly stated that Otto's attempt to supersede the Court Order and his accompanying Motion to Stay was denied. *Id.*

On October 10, 2016 Otto recorded a lis pendens on the property with no legal right to do so as he had failed to post a supersedeas bond. CP at 133-134. By this time, Mark and Michelle Taylor were well into negotiations for purchase of the home. Just a matter of days before the Taylors closed on the home at issue, Appellant Mark Taylor called Otto to discuss issues related to the transfer of possession. During that phone call,

Otto discussed the pending appeal with Mark Taylor. Appellants have never argued that they did not have, at minimum, actual knowledge of Otto's pending appeal to Division 2. Otto subsequently voluntarily removed the lis pendens on November 16, 2016. CP at 136-138. Mark and Michelle Taylor, Appellants, closed on the home the next day. CP at 140.

Months after closing and well after title was legally transferred, Otto recorded a second fraudulent lis pendens on the property on December 28, 2016. CP at 142-143. That lis pendens remains to this day.

As this Court knows, Otto prevailed on appeal on procedural grounds. This Court ruled that Skamania County's use of CR 60 to modify the divorce decree was improper. This Court did not state that the sale of the home should be unwound. By the time this Court reversed the Trial Court Order directing sale of the home, Respondents had owned the former Guardado home for nearly a year.

B. Procedural Facts

Respondent Guardado filed the suit below against Appellants Mark and Michelle Taylor and Realty Pro Inc., the real estate agency who facilitated the sale. CP at 3. On September 7, 2018 Otto filed a second complaint under the same cause number against Diana Guardado for return of attorney fees awarded in the Skamania County matter under the divorce decree's hold harmless provision. CP at 29. Those cases have been

consolidated and the Trial Court has determined that Otto's complaint for return of attorney fees should be construed as a counterclaim under the original breach of contract action. VRP at page 17.

Appellants filed a Motion for Summary Judgment on April 22, 2019. CP at 46-68. The hearing was scheduled for June 7, 2019 in Clark County. CP at 147. For context only, Realty Pro Inc. filed a Motion to Dismiss and noted their hearing for the same date and time. CP at 205. Both hearings were rescheduled and heard on June 13, 2019. CP at 204; CP at 294. Realty Pro Inc.'s Motion to Dismiss was granted. CP at 296. Appellants' Motion for Partial Summary Judgment was denied. CP at 298.

Appellants timely filed a Motion for Reconsideration in light of the perceived notion that no genuine issue of material fact exists in this case and a pure question of law is presented. CP at 300-315. Respondent Guardado likewise filed a Motion for Reconsideration of dismissal of Defendant Realty Pro Inc. Judge Stahnke of Clark County Superior Court issued a detailed Order Denying Reconsideration as to both motions but certified the issue for direct review to this Court. CP at 318-320. This Court accepted review following Commissioner Schmidt's granting of Appellants' Motion for Discretionary review. This appeal follows.

IV. ARGUMENT

A. Standard of Review.

“The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.” *Folsom v. Burger King*, 135 Wn.2d 658, 663 (1998). Summary judgment is proper when all of the pleadings, affidavits, depositions, and admissions on file show “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

This case presents pure questions of law. A determination of whether or not a party is a good-faith purchaser is a mixed question of law and fact. *Miebach v. Colasurdo*, 102 Wn.2d 170, 175 (1984). However, when the purchaser’s knowledge is not disputed, the legal significance of what he knew is a question of law. *Peoples Nat. Bank of Washington v. Birney’s Enterprises, Inc.*, 54 Wn. App. 668, 674 (1989). As such, review of this issue is de novo. *Allen v. State*, 118 Wn.2d 753, 757 (1992). Summary judgment orders are likewise reviewed de novo. *Keck v. Collins*, 184 Wn.2d 358, 370 (2015).

Further, Appellants Taylor are presumed good-faith purchasers:

Contrary to the contentions of [former owner], there is no presumption that they were not purchasers in good faith. The presumption is the other way. Such a presumption always attends ordinary business transactions, and he who asserts that a particular transaction is not such has the burden of alleging and proving it.

Nourse v. Klein, 131 Wn. 114, 116–17 (1924). The burden rests with

Respondent Guardado to prove otherwise. “The burden of establishing that a purchaser had prior notice of another's claimed right or equity rests upon the one who asserts such prior notice.” *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wn.2d 436, 439 (1956). A bona fide purchaser of an interest in land is entitled to rely on record title. *Lind v. City of Bellingham*, 139 Wn. 143, 147 (1926). In order to overcome a motion for summary judgment, the non-moving party must do more than express an opinion or make conclusory statements. *Marquis v. City of Seattle*, 130 Wn.2d 97, 105 (1996). They cannot rely on mere allegations in their pleadings. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989). They must establish specific and material facts to support each element of their prima facie claim. *Marquis*, at 105. It is not Appellants burden to prove they were good-faith purchasers in order to retain the property, although the evidence shows they were. Respondent was required to present sufficient evidence below, not just arguments, to show that Appellants were not purchasers in good faith. Appellants contend he did not do so.

B. The Trial Court Order Directing Sale of the Home Was Presumptively Valid and By Failing to Post a Supersedeas Bond, Respondent Guardado Assumed the Risk the Home Would Be Sold.

In the face of overwhelming authority to the contrary, Respondent Guardado argues he is entitled to return of his home after his failure to post an adequate supersedeas bond at the Trial Court level. “A trial court

decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule.” RAP 8.1(b). “The purpose of such a bond is to stay further proceedings, such as execution on a judgment, and to maintain the status quo.” *Malo v. Anderson*, 76 Wn.2d 1, 5 (1969). “Where no supersedeas bond is filed, the law permits enforcement of the judgment and decree by appropriate process.” *Fite v. Lee*, 11 Wn. App. 21, 31 (1974) citing *Ryan v. Plath*, 18 Wn.2d 839 (1943). “[A]n appeal...from a judgment of the superior court will not stay proceedings on that judgment unless a supersedeas bond is given.” *St. Paul & Tacoma Lumber Co. v. Dep't of Labor & Indus.*, 19 Wn.2d 639, 649 (1943).

The entire purpose of supersedeas procedure is to prevent instances like this. Appellants purchased Mr. Guardado’s home for a Court-ordered price from a Court-appointed special master. Mr. Guardado argues that he informed Appellant Mark Taylor of the pending appeal prior to the sale of the home. Appellant has stated that he spoke to Mr. Guardado with regard to the appeal himself. CP at 155. However, simple knowledge of a pending appeal does not defeat good-faith purchaser status absent a proper supersedeas bond. “If [an] appellant's knowledge of the pending appeal prevented her from doing anything with the property, except at her own risk, the appeal itself would act as a supersedeas. No prevailing party would expend any money on property awarded in an un-superseded

judgment for fear of losing the investment.” *Malo v. Anderson*, 76 Wn.2d 1, 5 (1969) (emphasis added).

Equally important is RAP 8.1(a) which “provides a means of delaying the enforcement of a trial court decision in a civil case,” i.e., by supersedeas. RAP 8.1(b). If defendants' theory prevails, the judgment debtor need not post a supersedeas bond or other security. The debtor would know that he would get the most favorable of either the sale proceeds or market value plus interest. In effect the notice of appeal would be a substitute for supersedeas. That is not the purpose or intent of RAP 7.2(c) and RAP 8.1.

State v. A.N.W. Seed Corp., 116 Wn.2d 39, 48 (1991).

Respondent will argue that since this Court vacated the Order directing sale of the home, the sale must also fail.² However, the Trial Court Order directing sale of the home was inherently valid at the time it was executed. “We start with the proposition that a trial court judgment is presumed valid and, unless superseded, the judgment creditor has specific authority to execute on that judgment.” *Id.* at 44.

There are compelling principles of policy which warrant our holding. RAP 7.2(c) permits a judgment creditor to execute on a judgment. The court rule decrees also that “[a]ny person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rules 8.1 or 8.3.” RAP 7.2(c). This authority to act upon a

² Respondent has also repeatedly argued that this Court reversed the Skamania County Superior Court Order directing sale of his home due to lack of subject matter jurisdiction. However, the opinion *Guardado v. Guardado*, *supra*, makes no mention of any subject matter jurisdiction issue. As Commissioner Schmidt pointed out, this Court reversed on grounds that CR 60 was not an appropriate mechanism under which to order Guardado to sell the property. That is not a subject matter jurisdiction issue.

presumptively valid judgment would be essentially negated if the judgment creditor risked liability for the uncertain and perhaps then unascertainable market value of the property executed upon.

Id. at 47–48.

“The risk of such a great exposure renders meaningless the rights granted a judgment creditor under RAP 7.2(c).” *Id.*

Respondent Guardado has argued time and again that Appellants Taylor took a risk when they purchased his home and that risk simply did not pay off. This could not be further from the law in accordance with our Rules of Appellate Procedure: “[Respondent’s] position is that the risk of losing the property in the event that the appellant wins on appeal should be assumed by the third party purchaser. Our rules of appellate procedure do not support that position.” *Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763 (2001).

C. Appellants’ Knowledge of Respondent Guardado’s Pending Appeal Does Not Defeat Good-Faith Purchaser Status and Respondent Removed the Lis Pendens from the Property Prior to Sale.

Respondent Guardado argues that his telephone call with Appellant Mark Taylor defeats good-faith purchaser status. Respondent Guardado also argues that his recording of a lis pendens on the property prior to sale defeats Appellants’ claim. However, Respondent voluntarily removed the lis pendens from the home the day before the sale. CP at 136-138.

Appellants Taylor had no involvement in whatever, if any legal proceeding resulted in Mr. Guardado's decision to voluntarily remove the lis pendens and Respondent has presented no evidence of the same. The only material fact, at least as it relates to Appellants Taylor, is that the lis pendens was removed. There were no encumbrances recorded on the property at the time of sale. With regard to good-faith purchaser status and a duty to investigate any clouds on a title, "[a] circumstance that would lead a person to inquire, however, is only notice of what reasonable inquiry would reveal." *Levien v. Fiala*, 79 Wn. App. 294, 299 (1995) citing *Paganelli v. Swendsen*, 50 Wn.2d 304, 309 (1957). Here, reasonable inquiry into the status of the home's title would have revealed nothing. No encumbrance was recorded.

To receive protection as a bona fide purchaser, the purchaser must: (a) be a purchaser, not a donee, heir or devisee, (b) be bona fide, that is, act in good faith, (c) have paid value as the law defines value, and (d) be without notice, actual or constructive, of the rights, equities, or claims of others to or against the property.

Grand Inv. Co. v. Savage, 49 Wn. App. 364, 368 (1987) quoting *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wn.2d 436 (1956); *Barth v. Barth*, 19 Wn.2d 543 (1943).

"Generally, a purchaser for value without notice from one with notice is held to be a bona fide purchaser and not affected by any notice to his vendor and takes title free from the equities of which his predecessor

had notice.” *Id.* citing *Bernard v. Benson*, 58 Wn. 191 (1910); *Sayward v. Thompson*, 11 Wn. 706 (1895). However, the Restatement of Restitution §74, cmt. i confirms that a purchaser “is not prevented from being a bona fide purchaser by the fact that he has knowledge that an appeal is pending or even that he has knowledge of the grounds for appeal, **except where he knows that the judgment was obtained by fraud.**” (emphasis added). Respondent has never pled fraud against Appellants or against any other party in this matter. As Judge Stahnke even pointed out, fraud must be specifically pled. VRP at page 38-39. Restatement of Restitution §74 has been cited with approval by our Supreme Court in *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 48 (1991), *Ehsani v. McCullough Family P'ship*, 160 Wn.2d 586, 588 (2007), and by Division 1 in *Spahi v. Hughes-Nw., Inc.*, 107 Wn. App. 763, 777 (2001), modified, 33 P.3d 84 (Wash. Ct. App. 2001). The Trial Court likewise relied upon §74 in dismissing Respondent’s claim against co-Defendant Realty Pro, Inc. VRP at 24:19-20; 25:10-20.

Spahi v. Hughes-Nw., Inc., 107 Wn. App. 763, 777 (2001), modified, 33 P.3d 84 (Wash. Ct. App. 2001) is the most applicable case in determining the issue presently before the Court. The Trial Court instead chose to rely upon *United Savings and Loan Bank v. Pallis*, 107 Wn. App. 398 (2001), another Division One case. VRP at 42:4-5; 58:17-15. The

principal difference between the two cases which were handed down within days of each other was that in *Pallis*, the previous homeowner had recorded a lis pendens on the property which stood through the sale. In *Spahi*, there was no lis pendens recorded. Each case involved un-superseded judgments dealing with the sale of real property.

The decision in *Pallis* actually supports Appellants' position. In wrestling with the good-faith purchaser analysis, the *Pallis* Court stated:

It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent [person] upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title...the purchaser will be held chargeable with the knowledge thereof.

Id. (emphasis added). In reviewing the evidence which was before the Trial Court on Appellants' Motion for Summary Judgment below, it is clear the title was free of defects at the time of sale.

This issue is ripe for summary judgment. Both *Spahi* and *Pallis* were summary judgment cases. If there is any doubt as to whether this issue can be decided as a matter of law, “[w]hether [a purchaser] was a bona fide purchaser is a question of mixed law and fact.” *Miebach v. Colasurdo*, 102 Wn.2d 170, 175 (1984). “[W]hat the purchaser knew is, indeed, a question of fact³, but the legal significance of what he knew is a

³ Here, what the Taylors knew is not disputed. Therefore a pure question of law is presented.

question of law.” *Peoples Nat. Bank of Washington* at 674. (emphasis added). There is no dispute that Mark Taylor had actual knowledge of Otto Guardado’s intent to appeal. The question presented is what legal significance Mark Taylor’s knowledge had. Additionally, there is a legal question as to what legal effect the released lis pendens had on the sale of the property. In accordance with the overwhelming authority, the lis pendens had no effect on the sale because Guardado released it.

In *Grand, supra*, Division 1 concluded that, “[b]ecause Savage did not file a lis pendens or a supersedeas bond, Grand was free to dispose of the property with its title unencumbered by the possibility of a future reversal. In this way, Granberg's claim is defeated.” *Grand Inv. Co. v. Savage*, 49 Wn. App. 364, 368 (1987). The same situation occurred here.

“Under RAP 8.1(b)(2), unless prohibited by statute, a party may obtain a stay of enforcement of a decision affecting a right to use of real property by filing a supersedeas bond, cash, or alternate security.” *Beers v. Ross*, 137 Wn. App. 566, 575 (2007). “Innocent third parties have a right to rely upon a judgment or decree of a court having jurisdiction to pronounce it.” *Id.* at 298. “The purpose of such a bond is to stay further proceedings, such as execution on a judgment, and to maintain the status quo.” *Ryan v. Plath*, 18 Wn.2d 839 (1943). In *Beers, supra*, following the trial court’s cancellation of a fraudulent lis pendens due to failure to post a

supersedeas bond, Division 2 affirmed: “the trial court did not abuse its discretion when it cancelled the lis pendens in this case because the Beerses did not request a stay.” *Beers* at 575.

Spahi is likewise on point. While not directly controlling, as it is a Division 1 case, the Supreme Court authority cited above is.⁴

A litigant who appeals an un-superseded judgment affecting an interest in property takes the risk that a third party will purchase the property at an execution sale before the judgment can be reversed. Knowledge that the judgment is being appealed does not deprive the third party of protection as a purchaser in good faith; a successful appellant's recourse is against the judgment creditor only.

Id. at 766.

“We hold that Spahi's failure to supersede is fatal to his claim.” *Id.* at 768. “Under Washington law, a trial court judgment is presumed valid, and unless the judgment is superseded, a judgment creditor has specific authority to execute on that judgment.” *Id.* at 768-69 citing *State v. A.N.W. Seed Corp.*, 116 Wn.2d at 44. “By failing to supersede the judgment, Spahi took the risk that title to the property would pass into the hands of a third party during the period of appellate review.” *Id.* at 770. “Spahi assumes that filing an appeal gives notice that the appellant claims an interest in the property. This assumption is unfounded.” *Id.* at 771. (emphasis added).

⁴ Equally as ‘not directly controlling’ is the other Division 1 case *United Savings and Loan Bank v. Pallis*, 107 Wn. App. 398, 403-04 (2001).

Following *Prince*, *Grand Investment Co.*, *A.N.W. Seed*, *Malo*, and the Restatement, we hold that a purchaser of property is a ‘purchaser in good faith’ for purposes of RAP 12.8 notwithstanding knowledge of the pendency of an appeal. In this case, there is no allegation that the United States obtained its judgment by fraud. Hughes obtained legal title and paid value for Parcel 2 before the reversal of the judgment occurred. Because the sale was lawful, Hughes enjoys protection ‘as a bona fide purchaser’.

Id.

In *Pallis*, Division One focused on the lis pendens which was recorded on the property throughout closing of the sale. “Here, unlike that case, there was a recorded lis pendens that defeats United's claimed status as a purchaser in good faith under RAP 12.8.” *Pallis* at 409. The Court went on, “the Restatement does not address the effect of the lis pendens recording on a purchaser’s right acquired during pending appeals...[it] is clear that United cannot be afforded the protection of a purchaser in good faith under RAP 12.8 because of the recording of the lis pendens.” *Id.* at 410-411. However, in *Pallis*, the lis pendens remained on the property through the sale. Here, Respondent removed the lis pendens voluntarily prior to sale. The situation in *Spahi* is more applicable than *Pallis*, and in *Spahi*, Division One determined by way of summary judgment that the third party purchaser was a purchaser in good faith. The same should have been done here.

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D. The Trial Court Considered Evidence Not in the Record in Denying Summary Judgment.

Respondent will argue, as he did below, that the Taylors' alleged real estate investment prowess and their alleged conversation with an attorney prior to purchasing the home tips the scales in favor of a finding that they were not purchasers in good faith. It is agreed that there is case law to support the argument that those factors would be considered when determine good-faith purchaser status. However, Respondent sets forth two alleged facts which are entirely unsupported by the record: (1) the Taylors are sophisticated real estate investors, and (2) the Taylors sought advice from a real estate attorney with regard to the appeal. Neither fact is true. Neither is supported by any documentary evidence in the record before this Court aside from argument in Respondent's briefings below. Respondent stating as such in the argument section of his briefs does not make these facts any more or less true. There was nothing before the Trial Court to indicate that either statement is true. Yet, the Trial Court considered both unsupported facts. VRP at 45:9-12.

The Taylors did answer a single interrogatory in the affirmative as to whether they sought the advice of an attorney between April 29, 2016

and November 18, 2016, generally.⁵ Indicating that they spoke with an attorney during that time period, without expanding more on the content of that conversation which would likely be attorney-client protected, does not create a genuine issue of material fact here as to their good-faith purchaser status. Nothing in the interrogatory answer indicates that their conversation with *an* attorney had anything to do with the appeal, the sale, or any other germane issue. Thus, this Court should decline to consider any argument with regard to the Taylors' real estate prowess or their consultation with an attorney. Self-serving statements unsupported by the record should not be considered. *Hous. Auth. of Grant Cty. v. Newbigging*, 105 Wn. App. 178, 184 (2001); *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 513 (1993) ("Allegations of fact without support in the record will not be considered by an appellate court."). The Trial Court inappropriately considered Respondent's arguments with regard to the same where there was nothing in the record to support them.

This Court should not consider multiple arguments and pieces of alleged evidence that Respondent Guardado presents. In responding to Appellants' Motion for Discretionary Review, Respondent stated "Mark spoke to Otto about the litigation...Mark consulted with a real estate

⁵ While it cannot be considered for purposes of this Appeal, Mark Taylor sought advice from an attorney with regard to eviction process if Mr. Guardado did not vacate the property following the sale. The "meeting with an attorney" Mr. Guardado references time and again had nothing to do with the appeal.

attorney at this time. He spoke to an attorney at Clark County Title about potential problems with the title.” Respondent’s Answer to Appellants’ Motion for Discretionary Review at page 1. Respondent argued “the Taylors also have significant real estate knowledge…” citing only to sections of argument in his own briefings supported by no evidence. *Id* at page 5-6. Respondent goes on, “[i]n a deposition taken August 8, 2019, Mark Taylor stated that he purchases real estate for cash investment purposes.” *Id*. That deposition, which is not even in the record, took place months after the summary judgment hearing of June 13, 2019. Finally, Respondent argued that he had a proverbial “gun to his head” when he removed the lis pendens, which the Trial Court undoubtedly considered. VRP at 60:17-25. As this Court recognized in granting Appellants’ Motion for Discretionary Review, there was no evidence to support that claim. Ruling Granting Review at p. 4-5. These various factual allegations cannot be considered by this Court because they were not in the record before the Trial Court. The Trial Court clearly considered them, which was error. VRP at 60:17-25; 45:9-12.

“Generally, an appellate court will not consider an issue not raised below.” *Washington Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163 (1993) citing *Rones v. Safeco Ins. Co.*, 119 Wn.2d 650, 656 (1992); *Hansen v. Friend*, 118 Wn.2d 476,

485 (1992). “This rule also applies to attempts to raise factual allegations at the appellate level that were not before a trial court in granting summary judgment.” *Id.* citing *Kendall v. Douglas, Grant, Lincoln, & Okanogan Cys. Pub. Hosp. Dist.* 6, 118 Wn.2d 1, 8–10 (1991) (appellate court refused to consider evidence outside of the record submitted by party opposing summary judgment). “To do otherwise would be to undermine the rule that an appellate court is to engage in the same inquiry as the trial court in reviewing an order of summary judgment.” *Id.*

E. Respondent Will Present a Red-Herring Argument That This Case Did Not Involve an Execution Sale, and Thus the Above-Cited Authority Does Not Apply.

Respondent Guardado has argued repeatedly that this case does not involve an execution sale, thus the above authority cited in support of the proposition that Appellants are good-faith purchasers does not apply. VRP at 48:9-12; 53:1-9. Respondent will likely argue that no case has involved the facts presented here and thus this case must be treated differently than an execution sale.

Respondent will be misguided in relying upon that red-herring argument. *Grand Investment Co. v. Savage*, 49 Wn. App. 364 (1987) addressed this situation in the context of a non-execution sale. In *Grand*, Prince obtained a judgment against Savage which was ultimately assigned to Grand Investment Company. *Id.* at 365. Grand executed on the

judgment on real estate owned by Savage. *Id.* Savage attempted to redeem, which was denied. *Id.* Savage subsequently appealed but filed no supersedeas bond. *Id.* During the appeal, Grand sold the property to the Nortons, who are analogous to Appellants Taylor here. *Id.* Grand issued a warranty deed for the property. *Id.* That sale was not an execution sale but instead a private sale between Grand and the Nortons. *Id.* At issue in *Grand*, was whether the Nortons were good faith purchasers. *Id.* at 366. The Court ultimately held “Norton must be allowed to keep the property.” *Id.* at 368. The Court analyzed *Prince v. Mottmon*, 84 Wn. 287 (1915) in reaching their decision noting that, “[a]lthough in *Prince* the Mottmans were the actual purchasers at the sheriff’s sale, the principle expounded there remains true for the innocent bona fide purchasers (the Nortons) who purchased from a judgment creditor holding title pursuant to a decision of a trial court.” The Court went on to cite *Singly v. Warren*, 18 Wn. 434 (1898): “It would be unjust to require such purchasers to suffer loss on account of errors of the trial courts of which they had no knowledge, and which they were nowise instrumental in producing.” *Id.* at 369.

It matters not that this case did not involve an execution sale. What matters is that the home was sold to the Taylors under the specific instructions and at the specific direction of a valid Trial Court Order.

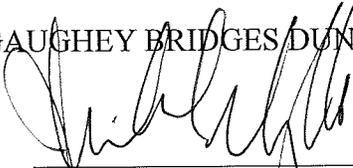
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V. CONCLUSION

There can be no more lawful of a sale than one that is Court Ordered. The Taylors paid value for the former Guardado home long before reversal by this Court. The Court Order was un-superseded and no lis pendens was recorded on the property. Good faith purchaser status can be decided here as a matter of law, and should have been at the Trial Court level. The Trial Court failed to grant Summary Judgment where Appellants had decisively shown no genuine issue of material fact was presented. Allowing this case to go before a jury to decide a pure question of law is error.

DATED this 23rd day of January, 2020.

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