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Division II
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No. 53643-9-II

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

MARK AND MICHELLE TAYLOR,
Appellants,

JAMES KIMBALL d.b.a. REALTY PRO,
and DIANA GUARDADO,
Defendants

v.

OTTO GUARDADO
Respondent/Plaintiff

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR CLARK COUNTY

BRIEF OF RESPONDENT

OTTO GUARDADO
6135 NE 14th Ct.
Vancouver, WA 98665
360-713-2448

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I. INTRODUCTION

In 2016, the Skamania County Court ordered that Otto Guardado's home be sold at a price fixed below fair market value in a non-execution sale. While this decision was undergoing review, investors Mark and Michelle Taylor began researching the home. They contacted Otto, who said they could be subject to the pending appellate decision. They received actual notice of a lis pendens. They also consulted an attorney. Apparently satisfied there were no potential legal issues, they purchased the home with the intention of flipping it. But with the title under cloud, they could not.

This Court subsequently reversed and vacated, holding that the Skamania County Court did not have authority to render a judgment. The case transferred to Clark County, and the Taylors were brought into this case upon remand. They sought summary judgment under the theory that they were bona fide purchasers. The trial court did not agree. Now, they ask that this Court hold them as bona fide purchasers.

The Taylors acknowledge they were aware of Otto's interests and the litigation surrounding the home before they purchased it. Despite this knowledge, they argue that they still qualify as bona fide purchasers, relying on case law for execution sales. This was not an execution sale, auction, or sheriff's sale, which are designed to be arm's length transactions where the seller receives optimal market value. The doctrines protecting bona fide purchasers do not apply here.

The Taylors also rely on the Skamania County Court judgment for support. Because the judgment has been vacated and the Skamania County Court acted without authority, any transactions flowing from the judgment should be invalidated.

The trial court's denial of summary judgment was supported by substantial evidence and an appropriate analysis of case law. Accordingly, this Court should affirm.

II. RESTATEMENT OF ISSUES

1. The Taylors did not acquire their claimed rights at an execution sale. Generally, an execution sale promotes the highest price due to the public bidding process. *United Sav. & Loan Bank v. Pallis*, 107 Wn. App. 398, 410-11, 27 P.3d 629 (2001). Can the same protections given to bona fide purchasers (BFPs¹) at execution sales also be granted to purchasers at non-execution sales?

2. The court inferred that the Taylor's pre-sale consultation with an attorney (CP 155, 196) was to discuss the merits of Otto's appeal. 6/13/19 RP 45:9-19. The Taylors now assert that it was with regard to a potential eviction after sale, and not with the appeal. App. Br. 27, n. 1. Did the court properly infer that the Taylors sought legal advice about the appeal?

¹ The terms "purchaser in good faith" and "bona fide purchaser" are generally used interchangeably. *Tomlinson v. Clarke*, 118 Wn.2d 498, 500, 825 P.2d 706 (1992); *Grand Inv. Co. v. Savage*, 49 Wn. App. 364, 368, 742 P.2d 1262 (1987).

3. Otto's² signing of the release of lis pendens was done under the pain of jail. CP 136-38, 151, 179; 11/17/16 RP 4:22-5:4. What effect, if any, does duress have on the validity of a conveyance?

4. The record shows that the notice of release of lis pendens was signed prior to closing, but was not recorded with the county until after closing. CP 133-34, 136-38. Is a release of lis pendens effectuated upon the date of signing by the releasor or upon the date of recording with the county?

5. The Taylors argue that the release of lis pendens entitles them BFP protection. The court apparently was not persuaded that its signing just before closing remedied the Taylors' actual notice of Otto's interest. CP 318-320; 6/13/19 RP 43:15-45:4; 60:6-25. Assuming, without conceding, that the release of lis pendens is valid (see above), does that permit a subsequent purchaser to be bona fide?

6. This Court reversed and vacated the Skamania trial court judgment, holding that the court had no authority to modify the dissolution decree. *Guardado v. Guardado*, 200 Wn. App. 237, 245, 402 P.3d 357 (2017). Did the court's lack of authority mean that it acted without jurisdiction, and does that invalidate its orders?

7. Upon remand, the Skamania Court vacated all relevant orders in the two implicated cause numbers, including final, supersedeas, and contempt orders.

² First names used for clarity. No disrespect is intended.

CP 22-26. What effect does the vacation of these orders have on the Taylors' claims?

III. RESTATEMENT OF FACTS

Following a bench trial, the Skamania County Superior Court entered orders to sell Otto Guardado's home located in Clark County, WA. CP 3, 106-112. Vernon McCray was appointed as special master. CP 48, 111. Rick Shurtliff was assigned as the selling agent. CP 4, 37. The court would consider automatic reductions in price if not sold "by the end of summer 2016". CP 109. The court did not define "summer". *Id.*

Otto disputes the Taylor's assertion that Otto "induced" Diana to execute a quit claim deed for an alleged oral promise he would remove her from mortgage obligations. App. Br. 10. Otto repeatedly denied this allegation, and the trial court did not enter any findings or conclusions of law for the alleged breach of contract. *Guardado* at 241.

Otto disputes the assertion that he would not allow Mr. Shurtliff to enter the home, or that that it required "negotiations and legal threats" to list the home. App. Br. 11. Rick Shurtliff himself notes that he walked through the home with Otto and they discussed details of the potential sale on June 7 and 14, 2016. CP 254, 256; *see also* CP 168-69. On June 17, 2016, Otto contacted Rick Shurtliff that he was seeking a stay. CP 258, 180. Mr. Shurtliff never returned to the home afterwards, even when a stay (CP 180) was lifted. CP 170. He never listed the home for public sale or attracted any public bids. CP 150, 244, 246. He only

sought two private offers from potential buyers. CP 150, 182, 185, 261, 263, 346.

The Skamania court set a supersedeas bond at \$40,000. CP 122-23, 150, 157. A commissioner of this court later fixed it at \$10,000. CP 176. Otto paid \$10,000 to the Skamania County Clerk. CP 125. After the commissioner reversed his ruling about the adequacy of the \$40,000 supersedeas, Otto was not able to raise the remaining \$30,000. CP 150-51, 157-59. Otto argued in the lower court that his inability to raise the remaining bond amount did not constitute a waiver of his interest. *Id.*

Diana's attorney suggested that Otto's attorney would not be able to modify the court's selling order. CP 260. On July 10, Mr. Shurtliff first floats the idea to Vernon McCray and Diana's attorney of selling to an investor "for \$30,000 to \$40,000 sight unseen". CP 261. Mr. Shurtliff wrote a declaration on Diana's attorney's pleading paper, alleging Otto's bad faith and suggesting a lower cost to attract an investor. CP 165-166.

Otto denied the allegations, and raised concerns about conflict of interest between Mr. Shurtliff and Diana's attorney. CP 168-173. Relations were already strained after Mr. Shurtliff refused to speak to Otto's attorney, and further soured after Mr. Shurtliff's declaration. CP 260-61. On August 25, before summer elapsed, the court modified its judgment to fix the home price at \$240,000. CP 265.

Also in August 2016, real estate investors Mark and Michelle Taylor were approached by Rick Shurtliff and Dave Baker of Realty Pro to assess their

interest in buying Otto's home. CP 346. The realtors attracted interest from a second potential buyer.³ CP 49, 150, 154, 185. At this time, Otto did not know of the Taylors, or that they were contemplating a purchase of his home. CP 171, 183; 11/17/16 RP 5:9-13, 6:9-10. Otto recorded a lis pendens on October 10, 2016 at 3:30 PM. CP 133-34.

Mark obtained Otto's work phone number through a Google search. CP 185; 11/17/16 RP 5:11. On November 14, 2016, Mark called Otto about the property and left a voice message. CP 155, 183, 347; 11/17/16 RP 5:9, 6:1-3, 6:6-12. They spoke the following day. *Id.*

During their phone conversation, Otto informed Mark about the pending litigation, the lis pendens, and the appeal. CP 183, 184, 185-86, 347; 11/17/16 RP 6:6-9, 6:17-23. Otto notified Mark that any buyer could potentially be subject to the decision of the appellate court, and he would be asking for his property rights to be restored. CP 184, 185; 11/17/16 RP 11:5-6. Mark asked for legal documents from him, which were emailed that day. CP 185-86. The email contained 10 documents, including the lis pendens recorded October 10, 2016, the Appellant's opening brief from the pending appeal, and various orders from the Skamania County Court. CP 185-86. The lis pendens gives notice to Diana and "all other persons" claiming title to the property. CP 133.

The Taylors consulted with lawyer Robert Bennett on the morning of Wednesday, November 16, 2016. CP 155, 196; 11/17/16 RP 6:24-25. Otto

³ Brett Lawrence also submitted a sales agreement on the Guardado home, but ultimately did not pursue a purchase. He is not a party to this suit.

subsequently spoke to Mark, who had formed the opinion that the appeal had “no merit”. CP 155.

Later that day, Otto notified his family and business partner that he could potentially go to jail after the hearing, and left a list of phone numbers and instructions. CP 151, 179. He lived in his house with his three dependent children, and wrote instructions for childcare for his youngest child. CP 4, 347. The same day, he signed and had notarized a release of lis pendens given to him by Diana’s attorney. CP 136-38.

The Taylor’s opening brief mistakenly asserts that the home was sold “before Otto even filed his opening brief”. App. Br. 7. Otto’s opening brief was postmarked on November 4, 2016. CP 159, 198. The brief was on November 15, 2016. *Id.*

Closing occurred around 11:00 – 11:30 AM on Thursday, November 17, 2016. CP 4, 38, 50, 52, 353; 11/17/16 RP 5:15-20, 7:7-9. Diana’s attorney was apparently in discussion with the title company and was aware the Taylors were scheduled to close that day. 11/17/16 RP 7:23-8:4.

During closing, the Taylors read and approved a title insurance contract. CP 187-193. The insurance contract contained exceptions which the title company would not cover. CP 189. Skamania County Court cause no. 14-2-00141-1 is listed as an exception, and specifically notes the lis pendens recorded under auditor’s file no. 5334316. CP 133, 163, 191, 302. Mark and Michelle Taylor initialed next to the notation that there was a recorded lis pendens on this property. CP 191. Clark County Title “strongly suggested seeking legal advice”

for this transaction. CP 194. The Taylors declined to seek legal counsel and wished to proceed to close on the property. *Id.* Vern McCray signed as special administrator for Otto. CP 353.

Otto appeared in court later that day for show cause on contempt. CP 177-78. Diana's attorney asked the court to find for contempt, and the court apparently treated it as a contempt hearing, not a show cause. CP 151, 161; 11/17/16 RP 4:20-21, 11:24-12:2.

During the hearing, Diana's attorney confirmed that Otto had signed the release of lis pendens. 11/17/16 RP 4:2-6; 15:22-24. A new declaration by Rick Shurtliff was filed that day (not in the record on review) and was presented to Otto at the hearing. *Id.* at 5:7-9. Diana's attorney called Mr. Shurtliff "our" realtor, despite him ostensibly acting as the seller's agent, and relied heavily on his declaration. *Id.* at 4:6-25. Mr. Shurtliff made hearsay allegations that Otto threatened the Taylors with lawsuits and refused to vacate the house. *Id.* at 4:6-15, 11:1-3, 13:4-6. Otto and Mark refuted Mr. Shurtliff's allegations. CP 183; 11/17/16 RP 5:7-9, 6:17-19; 10:6-9, 10:20-25, 11:4-7. Diana's attorney believed that the sale of the house would render the appeal moot. 11/17/16 RP 10:10-12. The court apparently agreed. *Id.* at 16:6-8.

Diana's attorney was concerned that the sale would not close and contemplated asking the court to incarcerate Otto during the pendency of the home sale with his jail communications monitored. 11/17/16 RP 4:18-25. Otto was not represented by legal counsel at this time. 11/17/16 RP 2. Although the court did not order jail time, it modified the final judgment again by directing

where closing funds would go and restraining Otto's contact with potential buyers. CP 177-78.

The deed was recorded with the Clark County auditor on Friday, November 18, 2016 at 9:55 AM, under recording number 5348564. CP 353. The release of lis pendens was also recorded at 9:55 AM, but under subsequent recording number 5348565. CP 136-38, 354-56. The release was filed by the title company, who apparently received it from Diana's attorney along with the court order. *Id.*; 11/17/16 RP 16:9-11.

On or around December 18, 2016, the Guardados vacated the home. CP 195, 222. Otto recorded another lis pendens against the property. CP 357-58. A few weeks later, the Taylors marketed the home for \$325,000 and received an offer. CP 157, 199, 201, 277. The lis pendens clouded title and the Taylors were not able to sell the property. CP 38.

This Court reversed and vacated the Skamania County Court. *Guardado v. Guardado*, 200 Wn. App. 237, 402 P.3d 357 (2017). Diana did not appeal. The Skamania Court vacated the final and subsequent orders in cause 14-2-00141-1 (the breach of contract case), and in cause 08-3-00029-5 (the original dissolution). CP 22-26. The venue was moved from Skamania to Clark County. CP 226; *also see* Appendix.

Otto filed suit against the Taylors and Realty Pro. CP 1-7. That action was consolidated "for all purposes" in the existing cause against Diana CP 27-28, 226-28; *also see* Appendix. The Taylors and Realty Pro filed motions for summary judgments. CP 46-67, 205-214. The court granted summary judgment

for Realty Pro, but not for the Taylors. CP 318-20. An appeal and discretionary review followed. CP 321-22. A commissioner of this Court granted review in favor of Mark and Michelle Taylor. App. Br. 5. Otto is the appellant in the separate appeal against Realty Pro (53636-6-II). Appendix.

IV. ARGUMENT IN REPLY

A. INTRODUCTION

In the period they were contemplating purchasing the Guardado home, the Taylors took actual notice of the litigation, *lis pendens*, and appeal. The title company also took care to provide notice of these instruments and recommended they seek legal counsel. The *lis pendens* was effective throughout the entire buying process. Despite these facts, the Taylors claim they are bona fide purchasers.

Their arguments rely heavily on case law reserved for execution sales – sales that the sheriff normally conducts, and are rooted in statute. These cases are distinguishable and do not lend application to the facts here, as this was not an execution sale.

The *Guardado* court vacated the lower court, holding it did not have authority to grant relief under CR 60, or to modify the dissolution decree under RCW 26.09.170. This Court should also consider how this leaves the rights of the parties, and if the transaction resulting from the trial court's order is valid.

B. STANDARD OF REVIEW

Otto agrees that the de novo standard is used to review summary judgments of the trial court, considering evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn. 2d 358, 370, 357 P.3d 1080 (2015).

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the case. *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 864-65, 324 P.3d 763 (2014).

C. THE TAYLORS WERE NOT BONA FIDE PURCHASERS

A BFP is a purchaser who purchases property without actual or constructive knowledge of competing interests and pays valuable consideration. *Albice v. Premier Mortg. Servs. of Washington, Inc.*, 157 Wn. App. 912, 929, 239 P.3d 1148 (2010). In considering whether a person is a BFP, the courts ask (1) whether the surrounding events created a duty of inquiry to discover title defects or equitable rights of others and, if so, (2) whether the purchaser satisfied that duty. *Albice v. Premier Mortg. Servs. of Washington, Inc.*, 174 Wn. 2d 560, 573, 276 P.3d 1277 (2012).

The “surrounding events” here are important because they establish facts that lend to the examination of the Taylors’ BFP claims. Whether a buyer is a

BFP is a “mixed question of fact and law”. *Miebach v. Colasurdo*, 102 Wn. 2d 170, 175, 685 P.2d 1074 (1984).

Notice of another’s interest need not be actual, nor amount to full knowledge, but should be enough to “excite apprehension in an ordinary mind” and “prompt a person of average prudence to make inquiry”. *Paganelli v. Swendsen*, 50 Wn.2d 304, 308, 311 P.2d 676 (1957) (quoting *Daly v. Rizzutto*, 59 Wn. 62, 65, 109 P. 276 (1910)).

The Taylors argue that Otto is required to prove that they were not BFPs. App. Br. 16. In a summary judgment motion, Otto is not required to prove the Taylors are not BFPs; he is required to show that there are “genuine issue[s] as to any material fact”. CR 56(c).

1. The Taylors had actual notice of Otto’s interest and claims.

The Taylors concede that they had actual notice of pending litigation during the period they contemplated purchasing the property. App. Br. 12-13, 17, 23; CP 347.

Investors Mark and Michelle Taylor were specifically approached by Realty Pro in August 2016 to purchase Otto’s property. CP 346-47. From the beginning, they knew it was court-ordered sale that had to occur quickly. *Id.* Although Otto had no foreknowledge of the Taylors, or that they were an interested party, Mark took initial steps to reach out to him. CP 183, 347; 11/17/16 RP 5:9-13, 6:6-10.

The Taylors now argue that their consultation with attorney Robert Bennett was in reference to evicting Otto, and had nothing to do with the appeal. App.

Br. 27-28. Otto agrees that attorney-client communication is generally privileged. *Richardson v. Gov't Employees Ins. Co.*, 200 Wn. App. 705, 712, 403 P.3d 115 (2017)

The trial court took notice of the consultation, inferring that the Taylors received “bad advice”. 6/13/19 RP 45:9-12. In summary judgments, reasonable inferences from the evidence are considered in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn. 2d 358, 370, 357 P.3d 1080 (2015).

The evidence places their consultation on November 16, 2016. CP 196; 11/17/16 RP 6:24-7:1. Mark Taylor received Otto’s appellate brief the day before. Given the timing of these events, it is reasonable that a prudent buyer would have asked an attorney about the appeal. The Taylors were scheduled to close the very next day. It would be imprudent to consult with an attorney on the eve of purchasing a property pendente lite and *not* discuss potential legal risks. Any reasonably competent attorney would have imparted to their client that title may be at risk.

Mark was also advised that the appellate court could take months to come to its decision. CP 185. There is no evidence that in the two days between receiving this info and the house close that Otto intended to abandon his appeal or claim. A prudent investor would have taken steps to understand the appellate process and the potential effects of a reversal.

The Taylors argue that their consultation was about an eviction only, but that was not argued before the trial court. 6/13/19 RP 45:13-15. Appellate courts generally do not consider arguments raised for the first time on appeal.

Timberland Bank v. Mesaros, 1 Wn. App.2d 602, 606, 406 P.3d 719 (2017); *see also* RAP 2.5(a). Assuming, without deciding, that the Taylors had opportunity to disclose to an attorney known defects about a property they were to close on 24 hours later, their disregard is inconsistent with the exercise of diligence that the BFP doctrine demands.

It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof and will not be heard to say that he did not actually know of them.

Miebach v. Colasurdo, 102 Wn.2d 170, 175–76, 685 P.2d 1074 (1984)

(*quoting Peterson v. Weist*, 48 Wn. 339, 341, 93 P. 519 (1908))

A reasonably diligent inquiry with Mr. Bennett would have revealed the risk of a future claim from Otto. Accordingly, the trial court's inference that the Taylors discussed the merits of the appeal was reasonable and creates a genuine issue of fact.

The Taylors were also put on notice because Otto obviously occupied and possessed the house with his three dependent children. CP 4, 5, 34, 347. The fact that the Taylors – at the very least – discussed the eviction process with their attorney, shows that they knew someone was living in the property they intended to purchase. App. Br. 27.

When possession is visible and evident, a duty of inquiry is required from the purchaser. *Peoples Nat. Bank of Washington v. Birney's Enterprises, Inc.*, 54

Wn. App. 668, 674, 775 P.2d 466 (1989) (Bank failed to undertake prudent inquiry about tenant's interests, and therefore was not a BFP). The Taylors are not excused from their duty of inquiry. The applicable standard is that of a prudent purchaser of property. *Id.* Here, the Taylors failed to make a prudent inquiry into Otto's interests.

The Taylors argue that their experience as real estate investors is "unsupported by the record". App. Br. 26. That is not correct. The courts give "substantial weight" to a purchaser's real estate investment experience when determining inquiry notice. *Albice*, 174 Wn 2d 560 at 574. The Taylors concede that a purchaser's real estate investment experience is a factor in determining BFP status. App. Br. 26.

Albice 174 Wn. 2d 560 is instructive and has some parallels to this case. Ron Dickinson was a real estate investor (*id.* at 574). He had purchased 13 properties, most of them foreclosure sales. *Id.* Dickinson had personal contact with Karen Tecca, who asserted her right to the property. *Id.* The *Albice* court held that because real estate investment was his livelihood, Dickinson "should have taken more care" to preserve his BFP status. *Id.*

The Taylors readily admit that they are real estate investors. CP 345, 346. They do not detail their experience, but describe themselves as "modest" investors. CP 346. They avoided answering interrogatory questions about their real estate experience. CP 196-97. Clark County public land records show that Mark and Michelle Taylor have bought and sold at least 12 properties since the 1970's, including at least one multi-division tax parcel. CR 156, 163. Mark told

Otto that he had extensive real estate experience and had developed real estate before. CP 156. Matthew and Toshia Lay, and Kimber Bergstrom were former tenants of the Taylors, and named as trial witnesses. CP 156, 280.

On July 10, 2016, Rick Shurtliff says he could sell the property to “an investor” for \$30,000-\$40,000 “sight unseen”. CP 261. Four weeks later, he declares that he could sell the house to “an investor” sight unseen for about \$250,000. CP 166. The Taylors say that Rick Shurtliff and a colleague approached them in August 2016. CP 346. They specifically sought out the Taylors because the transaction depended on haste. CP 347. Both Mr. Shurtliff and the Taylors were aware of the appeal. CP 165, 347. Apparently, two real estate professionals felt the Taylors had enough experience to do a quick land deal, with the added complexity of a pending appeal.

Mark Taylor’s own assessment was that Otto “got a real shit deal”, but purchased the home otherwise “someone else would have”. CP 195. This suggests that Mark believed he received a good deal at Otto’s expense. As investors, the Taylors recognized an opportunity to purchase a property at discount and capitalized on it. It took just a few weeks for them to put the property back on the market, for a much higher amount than what they paid. CP 157.

The record shows that the Taylors had prior investment real estate transactions and had enough experience that two real estate professionals sought them out for a complex transaction. Accordingly, they had sufficient facts to put experienced businesspeople, as themselves, on inquiry notice.

Mark Taylor avers that though he knew about Otto's appeal, it "meant nothing to me". CP 347. The implication is that the Taylors' ignorance shields them from the responsibilities of a prudent buyer, and they can claim their interests freely.

The idea that a buyer could claim ignorance and still be considered a buyer "in good faith" was disabused long ago in this state. Buyers cannot be BFPs if they "refuse to pursue inquiry, to which, were [they] honest and prudent, the knowledge [they have] would clearly send [them]." *Levien v. Fiala*, 79 Wn. App. 294, 299, 902 P.2d 170 (1995) (quoting *Mann v. Young*, 1 Wash. Terr. 454, 463 (1874)).

The Taylors are not without their obligations, especially in the framework of the buyer/seller relationship for real property. Just as a seller is obligated to disclose defects, the buyer is obligated to inquire further when there is evidence of a defect. *Stieneke v. Russi*, 145 Wn. App. 544, 560-61, 190 P.3d 60 (2008). Here, the defect was the clouded title. The evidence was the lis pendens, Otto's disclosure of litigation, and the title company's warnings. The Taylors' purported ignorance about the appeal is insufficient as a defense.

The Taylors took actual notice of Otto's claimed rights to the house while an appeal was pending. They consulted an attorney at this time, and were in possession of the appellate brief with Otto's arguments on the matter, so they had an opportunity and a duty to seek legal advice about it. They had – at minimum – enough investment experience to attract attention from two real estate professionals. These facts support that the Taylors had enough

information to put a reasonably prudent person on notice that they are not excused under the BFP doctrine.

2. *The lis pendens clouded title throughout the Taylors' transaction.*

As a threshold issue, the Taylors assert that Otto had “no legal right” to file the October 10, 2016 lis pendens because he did not post a supersedeas bond. App. Br. 12. No supporting authority for this assertion is cited. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992); *also see* RAP 10.3(a)(6).

RCW 4.28.320 is our state’s lis pendens statute. It does not mention that failure to secure a supersedeas renders a lis pendens invalid. In part, it states that either party to an action affecting title to real property may file a notice of lis pendens with the county auditor. RCW 4.28.320. An aggrieved party (here, Taylor) must be able to prove that the claimant (Otto) did not have a reasonable basis in fact or in law to file the lis pendens. *See Richau v. Rayner*, 98 Wn. App. 190, 198, 988 P.2d 1052 (1999) (no substantial justification when claimants assumed that they had the rights to property without any factual basis to support it); *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1070, 1075–76 (9th Cir. 2003) (in interpreting Washington law, the court held that substantial justification exists where a claimant relied on a valid and viable legal theory to file a lis pendens).

Otto’s discretionary review was converted to an appeal by right May 31, 2016 (CP 176). The mandate was issued on November 22, 2017. CP 8. Otto undisputedly lived in and owned the house on the day the lis pendens was

recorded. 6/13/2019 RP 43:15-22. He was appealing the Skamania decision, which was validated by the *Guardado* court. Accordingly, Otto had substantial justification for recording a lis pendens under RCW 4.28.320.

Next, the Taylors argue that because the release of lis pendens was signed on November 16, 2016, the lis pendens had “no effect” on the November 17 sale. App. Br. 23. The Taylors argue that the release just one day before closing cured their knowledge of the lis pendens. The trial court was not persuaded: “So you think that 24-hour period is enough to make them a bona fide purchaser – good faith.” (6/13/19 RP 44:7-8) and “So they weren't on notice that there was an interest that [Otto] had in the property? (*Id.* at 60:20-21).

The filing of a lis pendens in serves two purposes. First, the recording of the lis pendens serves as notice to prospective purchasers of the property that its title is subject to dispute and that the record owner’s interest in the property is in question. Second, the filing of a lis pendens serves to freeze the status of the property in time—a party to the action in which the lis pendens is filed may not alter the outcome of the underlying action by transferring the property to another, because the cloud on the title follows the transfer. *Snohomish Reg'l Drug Task Force v. 414 Newberg Rd.*, 151 Wn. App. 743, 752, 214 P.3d 928 (2009).

Subsequent purchasers “shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action”. RCW 4.28.320; *accord R.O.I., Inc. v. Anderson*, 50 Wn. App. 459, 462, 748 P.2d 1136 (1988). An instrument affecting title imparts notice to “all

persons” from “the time of filing the same with the auditor for record.” RCW 65.04.070.

Next, the Taylors argue that because a release of lis pendens was signed on November 16, 2016, then there were “no encumbrances recorded on the property at the time of sale”. App. Br. 20. Facts show that the release of lis pendens was actually not recorded until *after* the transaction.

The courts review questions of statutory construction de novo, beginning with the plain meaning. *In re Marriage of Ruff & Worthley*, 198 Wn. App. 419, 424, 393 P.3d 859 (2017). The fundamental objective is to discern and implement the intent of the legislature. *Id.*

Recording of a prior interest in property provides constructive notice of that interest. *Tomlinson v. Clarke*, 118 Wn. 2d 498, 500, 825 P.2d 706 (1992) (citing *Kendrick v. Davis*, 75 Wn.2d 456, 464, 452 P.2d 222 (1969)).

Chapter 65 RCW establishes practices for recording documents in Washington counties. “Conveyance” is defined, in relevant part, as any written instrument by which title to any real property may be affected. RCW 65.08.060(3). “Recording officer” means the county auditor. RCW 65.08.060(4). It is the county auditor’s responsibility to record and manage written instruments pertaining to real estate. RCW 65.04.030. The auditor assigns a unique “recording number” (or “record location number”)⁴ to each instrument. RCW 65.04.015(4). The recording officer must record instruments

⁴ The definition "record location number" was changed to "recording number" by Laws of 1999, ch. 233, §10.

by recording number in the order filed. RCW 65.04.040. Put simply, the auditor must number and record documents sequentially in the order received.

An instrument is deemed recorded the minute it is filed for record. RCW 65.08.070. Any conveyance not recorded in the office of the recording officer of the county where the property is situated is void. *Id.* Therefore, a public notice intended to impart notice to everyone is perfected when it is recorded, not when it is signed.

Documents affecting title must be recorded with the county's auditor to impart constructive notice. *Ellingsen v. Franklin County* 117 Wn.2d 24, 30, 810 P.2d 910 (1991) (a conveyance recorded with the county engineer, but not with the auditor does not give constructive notice). The release of lis pendens was apparently in the possession of the title company or Diana's attorney, but it was not recorded with the auditor.

The release of lis pendens was signed and notarized by Otto on November 16, 2016. CP 136-38. The home closing occurred November 17, 2016. CP 4, 38, 50.

The statutory warranty deed was recorded on November 18, 2016 at 9:55 AM with a recording number of 5348564. CP 140. The release of lis pendens was also recorded on November 18, 2016 at 9:55 AM, but with a recording number one number higher of 5348565. CP 136-38.

The title report is silent about the November 16, 2016 signing of the release of lis pendens. CP 187-194. There is nothing to indicate the Taylors had any knowledge of the release except post-sale.

RCW 65.08.070 demonstrates that the timing of conveyances matters, as a claim filed subsequent to an initial claim will be treated differently. *See also OneWest Bank, FSB v. Erickson*, 185 Wn. 2d 43, 65-66, 367 P.3d 1063 (2016) (A claim of interest recorded first by a mortgage company defeated a second claim of interest recorded by the alleged property owner). This makes sense, as Washington is a “race-notice” state. *Id.*

To qualify as a BFP, a party must pay value for an interest in land, record its interest first, and act in good faith without notice of a prior party’s *unrecorded* interest. *Id.* The Taylors did not record their interest first, nor have they established that they have acted in good faith. In fact, the Taylors conducted their entire transaction, including recording their deed, under the cloud of a lis pendens that was effective from October 10, 2016 at 3:30 PM to November 18, 2016 at 9:55 PM. CP 133-38.

It is impossible that a public records search would have revealed a release of lis pendens on November 17, 2016 when the Taylors closed, when the release of lis pendens was not even recorded until the day after. Therefore, the lis pendens was effective throughout the period of the Taylors’ transaction.

Next, the Taylors attack the circumstances surrounding the release of lis pendens and characterize it as “voluntary”. App. Br. 7, 13, 19, 20, 25. Otto argued in the lower court that the removal was not voluntary, but to avoid jail due to Diana’s attorney’s threats. CP 136-38, 151, 179; 11/17/16 RP 4:22-5:4. Because it was signed under duress, it should be held invalid. Circumstances must demonstrate a person was deprived of his free will at the time he entered

into the challenged agreement in order to sustain a claim of duress. *Retail Clerks Health & Welfare Tr. Funds v. Shopland Supermarket, Inc.*, 96 Wn. 2d 939, 944-45, 640 P.2d 1051 (1982).

Cases have examined the cancellation of a lis pendens by a trial court. *See Guest v. Lange*, 195 Wn. App. 330, 381 P.3d 130 (2016), *Beers v. Ross*, 137 Wn. App. 566, 154 P.3d 277 (2007). This author is unaware of any Washington cases where the theory of a party's duress has been applied to the removal of lis pendens.

The Taylors rely on a ruling of a commissioner of this Court to support their contention that Otto was not under a threat of jail to release the lis pendens. The commissioner's opinion is not part of the record on review (RAP 9.1), and should be disregarded, as it came after the superior court rendered its decision based on the entirety of the lower court record.

The day before the hearing, Otto alerted his family and business partner that he may go to jail, and left them contingency instructions. CP 179. Otto had three dependent children and was concerned of the possibility of going to jail for several days. *Id.* He could not have known about the possibility of going to jail unless the issue had already come up between him and Diana's attorney.

During the hearing, Diana's attorney plainly states that he contemplated incarceration for Otto and for his communications be monitored. 11/17/16 RP at 4:22 – 5:4. He says the reason for filing the contempt motion was for Otto to release the lis pendens. 11/17/16 RP 15:19-24. Diana's attorney had previously

threatened Otto with jail if he continued to interfere with the sale (interference not conceded). CP 151; *see* 11/17/16 RP 4:3-5.

Because the court had already found Otto in contempt based on Rick Shurtliff's declaration, Diana's attorney's threats were credible. CP 165-66, 168-75, 265. A reasonable person would infer from Diana's attorney's statements that he was willing to ask for the extraordinary remedy of jail to stop Otto's alleged interference and to coerce the release of *lis pendens*.

Otto was self-represented at the time. 11/17/16 RP 2:12. Whenever there is the potential for jail in a contempt hearing – even in a civil proceeding – there is a right to legal counsel, potentially state-paid. *Tetro v. Tetro*, 86 Wn. 2d 252, 253, 544 P.2d 17 (1975). When Diana's attorney contemplated asking the court for jail, the Skamania court should have stopped proceedings to advise Otto of his rights and ask about legal representation. *Id.* at 255.

The Clark County court took notice of this circumstance when it theorized that the release of *lis pendens* on the day before a show cause hearing did not cure the Taylors' knowledge of Otto's claims:

THE COURT: So [the Taylors] weren't on notice that there was an interest that [Otto] had in the property?

MR. KYLLO: As soon as he removed the *lis pendens*, it's gone.

THE COURT: Yeah, and he had a gun to his head when he did that.

MR. KYLLO: Figuratively, maybe.

THE COURT: Figuratively, up in Skamania.

6/13/19 RP 60:20-61:2.

But for the threat of jail, Otto would not have signed a release of *lis pendens* on the eve of the hearing. Otto's agency to sell his own property was already

taken away by the court's unauthorized use of rules and statutes, so it's reasonable to believe that the court could have ordered more noncompliant remedies. Jail was a credible threat at this time. It is not surprising that Otto chose the safer path when confronted with this inherently coercive environment.

The Clark trial court apparently agreed that Otto was deprived of his free will and did not waive his claim. Otto never intended to waive his claim on the house, otherwise he would not have recorded a second lis pendens on December 28, 2016. CP 357-58. His case was still in appeal, and the underlying issues had not abated. He was clearly asserting his continuing claim on the house.

Because Otto's free will was compromised due to the threat of jail, his signing of the release of lis pendens creates a genuine issue of material fact. The Clark trial court was correct in denying summary judgment.

3. *The lack of supersedeas bond does not excuse the Taylors' duty of inquiry.*

The Taylors argue that if Otto prevails, then it makes the supersedeas procedure "meaningless". App. Br. 8. The point of supersedeas is to stay enforcement of a trial court judgment and preserve the status quo between the parties. *Guest v. Lange*, 195 Wn. App. 330, 338, 381 P.3d 130 (2016); RAP 8.1. It is not the purpose of a supersedeas bond to vest good faith in a subsequent purchaser.

The Taylors argue that Otto's inability to post a bond amounts to a waiver, relying on various cases. However, the cases do not support this theory.

They rely on *Malo v. Anderson*, 76 Wn. 2d 1, 454 P.2d 828 (1969) (*Malo II*) for support, quoting "No prevailing party would expend any money on property

awarded in an un-superseded judgment for fear of losing the investment.”

However, the Taylors use this out of context and misconstrue the case’s meaning of the word “investment”. *Malo II* cannot be examined without also examining *Malo v. Anderson*, 62 Wn. 2d 813, 384 P.2d 867 (1963) (*Malo I*).

George Anderson was awarded the property in a dissolution, subject to payments to former wife Joan Malo. *Malo I* at 814. Anderson fell behind in payments. *Id.* Malo purchased the property at an execution sale (*id.*), to which no actual notice was given to Anderson (*id.* at 816). Anderson did not post a supersedeas bond. *Malo II* at 3.

Sometime after final judgment on March 9, 1962, Malo took possession of the home, which was found to be uninhabitable, and began rebuilding it. *Malo I* at 814; *Malo II* at 2-3. The appellate court subsequently unwound the sale on August 22, 1963, subject to terms, effectively giving the house back to Anderson. *Malo I* at 818; *Malo II* at 3.

Meanwhile, during the 1½ years of the appeal, Malo made over \$10,000 in investments to rebuild the house and make it inhabitable again. *Malo II* at 3. The trial court refused to give a lien for her investments to improve the home. This judgment was the basis for the *Malo II* appeal. *Id.* The *Malo II* court noted that had Anderson superseded the original judgment, Malo could not have possessed the home, and therefore could not conduct her improvements. *Id.* at 5. The court concluded that under the Restatement of Restitution §73, she was permitted to make “necessary” improvements to the property to make it inhabitable. *Id.*

Taylor’s argument conflates the facts of the two cases. Their incorrect interpretation is that *Malo II* permits the subsequent buyer of an un superseded property to retain the entire property even with foreknowledge of an appeal.

This interpretation reaches beyond what the *Malo II* court stated. Remember *Malo I* explicitly set aside the real estate transaction and conditioned the return of the property back to Anderson. Rather, *Malo II* permits the subsequent buyer of an un superseded property to retain the value of his or her “necessary” improvements to the property even with foreknowledge of an appeal.

This circumstance would only come into play if the Taylors had made improvements necessary to make the Guardado home inhabitable during the time they took possession and when this Court made its decision (about December 17, 2016⁵ – August 22, 2017). The Taylors do not argue that the home was uninhabitable when they took possession. In sum, *Malo II* does not support their argument, and *Malo I* cripples their argument.

The Taylors also rely heavily on *Spahi v. Hughes-Nw., Inc.*, 107 Wn. App. 763, 27 P.3d 1233 (2001), particularly because Hughes-Northwest was deemed a bona fide purchaser. An analysis shows that Spahi not only fails to support their argument, but is easily distinguishable.

Nader Spahi never contested an original complaint brought by the United States and agreed to forfeit the land named in the complaint. 766. The US subsequently took possession of the property around 1990. *Id.* at 767. After an execution sale, it was discovered that the complaint omitted a section of land. *Id.*

⁵ The Taylors took possession of the home on December 17 or 18, 2016. CP 195, 222.

A federal district court ruled that the US had already established its ownership by adverse possession or by easement based on prior use, and quieted title in the US in 1997. *Id.* The US then transferred ownership to Hughes-Northwest, Inc in 1998. *Id.* Hughes was never a party to a lawsuit until approximately 1999. *Id.*

This case has numerous distinguishing facts. Spahi was not even in possession of the property, and had transferred it to the US over 7 years before the subsequent transfer to Hughes. Here, Otto was the legal title holder of his home right up until the Taylors signed closing documents; there was no intermediate transferee, as in *Spahi*. The Clark court relied on this fact. 6/13/19 RP 43:20-22. Otto had interest in his property when the Taylors received notice of appeal, but in contrast, Spahi did not have interest in the property when Hughes received notice of appeal. *Spahi* at 771.

Spahi had forfeited his property and transferred it around 1990. It was not until 1997 that he was able to supersede judgment. By then, the federal court had already determined that he had lost interest in the property. Here, Otto never gave up or lost his interest before the Taylor's intervening purchase.

Further, the *Spahi* court made no finding that Hughes was even aware of Spahi's appeal except for what was apparently his own bald statement to the effect. The court stated: "Spahi assumes that filing an appeal gives notice that the appellant claims an interest in the property". *Id.* at 771. This is true: an appeal triggers notice to the adverse party, but not necessarily to a third party. In *Spahi*, only the US would have received notice of an appeal unless Spahi went to the lengths of informing Hughes of his appeal or filed a *lis pendens*.

The *Spahi* court made no finding that he did. Here, in addition to notice given to Diana and a lis pendens, Otto plainly told the Taylors of the appeal, his interest in the property, and the potential for restitution action.

Spahi also did not deal with a jurisdictional challenge as we have here. That court did not deal with issues raised concerning the vacation of judgments or the validity of the court orders themselves.

Last, Hughes purchased the property in an execution sale at a foreclosure auction. Because an execution sale is designed to promote the highest asset price through a bidding process, it serves to protect third parties making purchases in good faith. *United Sav. & Loan Bank v. Pallis*, 107 Wn. App. 398, 410, 27 P.3d 629 (2001).

The Taylors argue that *Spahi* is the “most applicable case” to determine the issue of their bona fide status. App. Br. 31. Examined as a whole, *Spahi* does not support the Taylor’s argument.

The appellant’s argument is that they are BFPs because there was a release of lis pendens signed, but not recorded, ignores that there is still a requirement of “good faith” on the part of the buyer. Their knowledge about the litigation, their investment experience, and their requirement to seek appropriate legal advice contravenes the intentions of the BFP doctrine. The theory that Otto’s lack of supersedeas amounts to a waiver of Otto’s claim is not supported by case law. Accordingly, the Taylors are not BFPs, and the Clark court was correct in believing that genuine issues of material fact remain.

D. THE TAYLORS' ARGUMENT RELIES ON CASE LAW INTENDED FOR EXECUTION SALES.

The Taylors concede that this was not an execution sale. App. Br. 29-30. Execution sales are typically conducted in accordance to RCW 6.17. *Le Tastevin, Inc. v. Seattle First Nat'l Bank*, 95 Wn. App. 224, 227, 974 P.2d 896 (1999). Execution sales typically have numerous requirements, including the issuance of a writ (RCW 6.17.110), and a sheriff's report of proceedings (RCW 6.17.120). Nothing in this sale occurred according to the framework statutorily permitted by execution sales in this state.

The Taylors incorrectly argue that *Grand*, 49 Wn. App. 364 involves a non-execution sale. App. Br. 29-30. In fact, the original property was involved in two execution sales –in 1978 (from Savage to Prince/Grand) and again in 1985 (from the Nortons to Granberg) (*Grand*, 49 Wn. App. at 365). The Taylors are not analogous to the Nortons, as they argue. App. Br. 30. The Nortons actually purchased the property for “a fair market price” (*Grand*, 49 Wn. App. at 365) from Grand. Here, the Taylors purchased the home for \$240,000, yet a few weeks later, put it back up for sale at \$325,000. CP 4, 157, 199, 201, 277, 346.

The Nortons purchased the property without notice of an appeal or of Savage's claims⁶ against the property. *Grand*, 49 Wn. App. at 365. Here, the Taylors concede that they knew about legal proceedings before they purchased the home. CP 4, 33, 183, 185-86, 347.

⁶ Savage was later allowed to redeem against Prince/Grand. *Prince v. Savage*, 29 Wn.App. 201, 627 P.2d 996 (1981). The parties settled in 1985, five years after the Nortons purchased the property.

This author is not aware of any Washington State cases that specifically analyze the distinction between execution sales and judicial sales. American Jurisprudence is instructive. Generally, in an execution sale, a sheriff or marshal acts as a ministerial officer, and the courts exercise no control over the sale beyond setting it aside for noncompliance with statutes. 30 Am. Jur. 2d Executions, Etc. § 308. The officer’s authority rests in the law on the writ, while judicial sales are based on an order to sell specific property. *Id.*

Here, the Skamania Court exercised total control over the sale, including setting the price, timing of the sale, and terms of payment – even up until the day of closing. CP 106-112, 177-178, 265; 11/17/16 RP 7:10-16, 7:23-24, 8:23-25, 11:11-14, 12:5-10, 16:6-11. The special master’s authority flowed from the Skamania County Court, not from a statute or a writ. CP 109, 178. 11/17/16 RP 8:17-21, 12:5-10.

Next, the Taylors urge this Court to apply Restatement of Restitution (1937) §74, cmt. i for authority (App. Br. 21). Comment i applies to “[a] person, other than the judgment creditor or his attorney, who purchases at a valid execution sale upon a judgment which is not void but which is subsequently reversed...”. As the Taylors concede (App. Br. 2, n.1), this was not an execution sale.

The court in *Pallis*, 107 Wn. App. 398 declined to apply the Restatement of Restitution §74, cmt. i to the appellant precisely because of this distinction of execution vs. non-execution sales. *Pallis* at 410-11. They noted that cmt. i dealt specifically with execution sales. Additionally, it held that portion of the Restatement did not address the filing of a lis pendens on the purchaser’s rights

during appeals. *Id.* Accordingly, the *Pallis* court held that the appellant was not a BFP.

Further, it held that the “policy of promoting the highest prices at execution sales” is the rationale for the rule for protecting BFPs. *Id.* The Taylors possibly could have preserved their BFP status if they had purchased Otto’s home at an auction.

The Taylors list other cases that cite Restatement of Restitution (1937) §74 “with approval”. App. Br. 21. But that is an inaccurate representation of their findings. *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 802 P.2d 1353 (1991) cites the Restatement of Restitution (1937) generally, not a specific section (at 45). Progenies *Ehsani v. McCullough Family P’ship*, 160 Wn. 2d 586, 159 P.3d 407 (2007) (at 591) and *Spahi*, 107 Wn. App. 763 (at 772) also generally rely on the Restatement. Specifically, *Spahi* focuses on § 74, comment i, and *Ehsahi* for comments k and h, for attorneys who are bona fide creditors for their clients (at 598-99).

The question posed in *A.N.W. Seed* was not *if* the judgment creditor could obtain restitution, but *what* is “the measure of restitution to be made by the judgment creditor - proceeds of the sheriff’s sale or fair market value of the property sold?” (at 41). In contrast, the question here is: “Can the Taylors demonstrate that there are no genuine issues of material fact?” CR 56.

The Taylors also misapply the following quote: “The risk of such a great exposure renders meaningless the rights granted a judgment creditor under RAP

7.2(c).” *A.N.W. Seed* at 48. App. Br. 19. In the context of a correct analysis, this quote means something entirely different.

In *A.N.W. Seed*, the judgment debtor claimed that the creditor owed \$57,631.50, while the proceeds from a sheriff’s sale only netted \$16,588.50. *A.N.W. Seed* at 42. The *A.N.W. Seed* court held that if the debtor’s theories were validated, the creditor would be responsible for 3½ times what a sale obtained in restitution (at 48). The defendants “sought 6 to 8 times the amount realized”, plus alleged loss of income, real property, and machinery. *Id.* Put simply, the defendants wanted more than what they were entitled to under restitution laws.

That is not the case here. The Taylors purchased Otto’s home under cloud. He wants it back. They still own the property, have not made any improvements, and have enjoyed use of it for over three years. He has a right to have his day in court to determine his rights.

Last, they cite *Ehsani* for support. The *Ehsani* court wrangled with whether a party’s attorney could be held liable for restitution (at 588). Relying on Restatement of Restitution § 74 cmt. h and k, that court held that the facts of the case did not present circumstances for restitution under RAP 12.8. *Ehsani* at 602. Otto is asking for restitution directly from the party responsible, not an attorney. The facts and law analyzed do not have application to this case.

The Taylors are far afield in case law intended for execution sales and other purposes. These cases do not apply to non-execution sales, nor do these cases lend application to the facts of this case. Accordingly, they cannot be used to broadly support the arguments presented by the Taylors.

E. THE JUDGMENT WAS INVALID BECAUSE THE SKAMANIA COURT EXCEEDED ITS JURISDICTION

The Skamania Court was found to have no authority, and the judgments subsequently vacated. They are not valid instruments to support a transfer of interest to the Taylors.

A party may challenge a court's subject matter jurisdiction at any time. *Angelo Prop. Co., LP v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075 (2012). Without statutory authority, any judicial action taken is invalid. *Id.* at 568. 'The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry, not whether its conclusion in the course of it was right or wrong.' *State v. Olsen*, 54 Wn.2d 272, 274, 340 P.2d 171, 172 (1959), quoting 12 A.L.R.2d 1059, 1066 (1950).

As the Taylors point out in their brief, the Skamania Court had "no authority" to modify a judgment under a separate cause number. App. Br. 6; see also *Guardado*, 200 Wn. App. at 239, 242-43, 244, 245. The Clark County Court recognized that the Skamania Court lacked subject matter jurisdiction. CP 319. The Taylors apparently agreed that the Skamania Court lacked subject matter jurisdiction in their motion for summary judgement. CP 52.

A judgment is void if the court lacks jurisdiction of the parties or of the subject matter, or lacks the inherent power to make or enter the particular order involved. *Cole v. Harveyland LLC*, 163 Wn.App. 199, 205, 258 P.3d 70 (2011). The Taylors have not provided any evidence or argument why the Skamania Court's judgment was not void. Because Skamania County had no authority when it made its judgment, it cannot be said that its orders were valid.

Likewise, no authority is granted to the contempt orders that followed the final order. When the Skamania's court's final judgment was reversed, all other proceedings that depended on the judgment for their validity fell with it. *Fahlen v. Mounsey*, 46 Wn. App. 45, 47, 728 P.2d 1097 (1986).

A judgment which has been vacated is of no force or effect and the rights of the parties are left as though no such judgment had ever been entered. *Matter of Estate of Couch*, 45 Wn. App. 631, 634, 726 P.2d 1007 (1986) (holding that a daughter's adoption decree held no legal effect after vacation even though it was vacated well after her birth father's estate was already admitted to probate.)

The Taylors suggest that the sale cannot be set aside. App. Br. 13. But procedural irregularities can invalidate a sale. *Albice v. Premier Mortg. Servs. of Washington, Inc.*, 174 Wn. 2d 560, 567, 276 P.3d 1277 (2012). Case law is replete with property sales unwound due to defects or non-BFPs. *See Hazel v. Van Beek*, 135 Wn. 2d 45, 954 P.2d 1301 (1998) (home sale set aside over procedural defects), *Timberland Bank v. Mesaros*, 1 Wn. App.2d 602, 406 P.3d 719 (2017) (sheriff's sale held invalid), *Mueller v. Miller*, 82 Wn.App. 236, 251, 917 P.2d 604 (1996) (void sale could not be cured and a complicated transaction reversed), *Malo I* (sale of former spouse's home set aside due to bad faith).

The Taylors allude to the fact that the Court of Appeals vacated the judgment, but did not rule on the actual house sale, suggesting it somehow validates the sale. App. Br. 13. But an appellate review is triggered for final judgments, not for subsequent events. RAP 2.2.

Otto's initial brief was postmarked and filed before the November 17, 2016 sale. CP 159, 198, 185. His first opportunity to raise the issue would be the reply brief. Appellate courts generally do not consider issues raised for the first time in a reply brief. *State v. Lee*, 82 Wn. App. 298, 313, 917 P.2d 159 (1996); *See also* RAP 10.3(c).

The Skamania County Court had no authority to enter its order selling Otto's home and were subsequently vacated. Therefore, its orders are invalid, and the Taylors should not rely on the validity of the vacated orders.

V. CONCLUSION

The Taylors contemplated their purchase from August-November 2016. They were given ample information to make a prudent inquiry on the risks of purchasing a property under cloud. The title company notified them of pending litigation and of Otto's interests. The Taylors flouted these warnings and subsequently embroiled themselves in this case. Prudence and good faith are the currency of a BFP, but neither is present here. The Taylors are not BFPs.

The Skamania County Court proceedings were marred by repeated noncompliance. The court did not comply with CR 60 or RCW 26.09.170. Its judgments were subsequently vacated. Transactions flowing from these judgments should be invalidated.

The Taylors cannot demonstrate that there is "no genuine issue as to any material fact" that grants them summary judgment under CR 56. Accordingly, this Court should affirm the trial court's opinion.

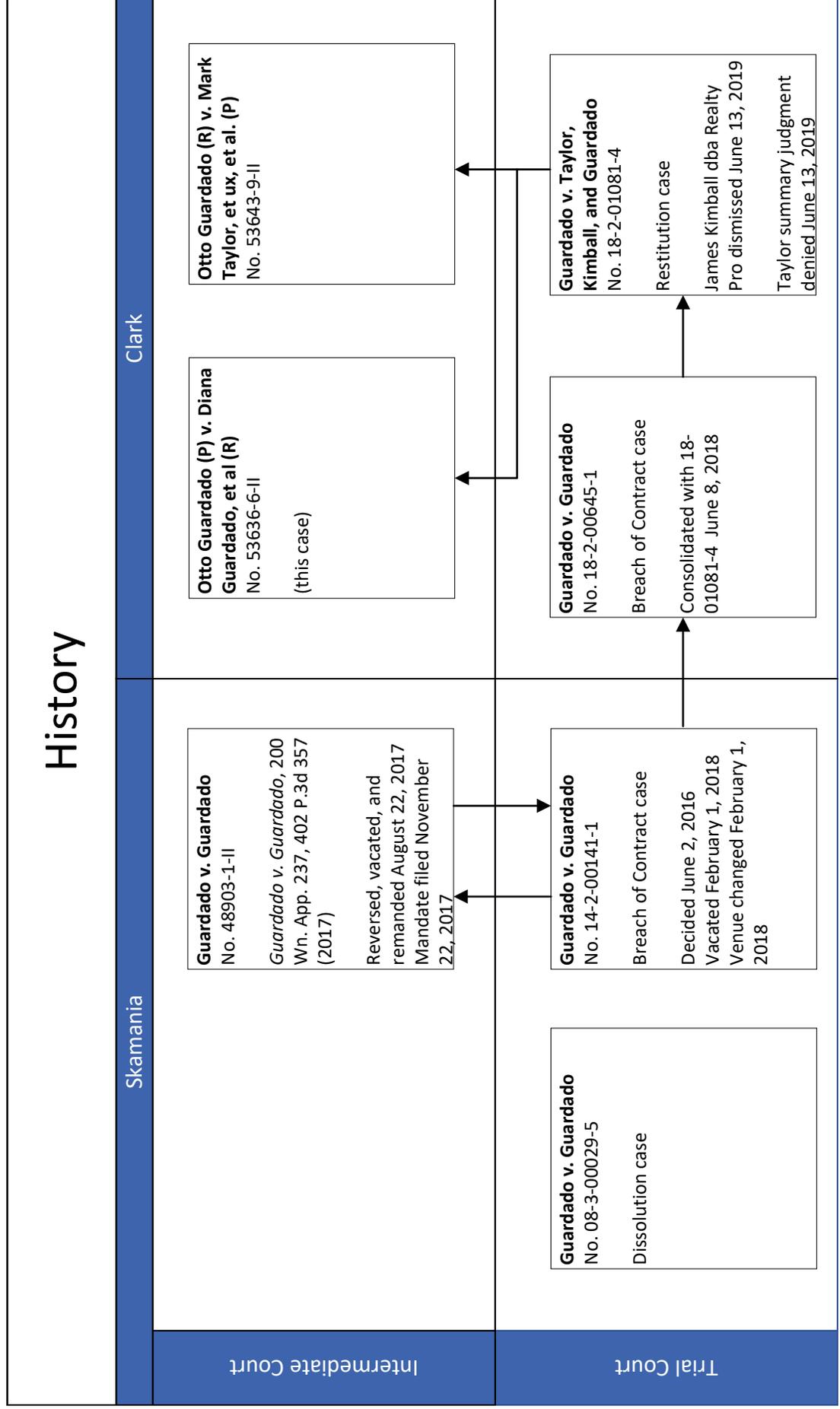
Respectfully submitted April 23, 2020,

/s Otto Guardado
Otto Guardado, Respondent

INDEX TO APPENDIX: RESPONDENT'S BRIEF

<u>Number</u>	<u>Description</u>
A	Table 1- History of this case to present

Appendix A: Table 1



FILED
Court of Appeals
Division II
State of Washington
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellant.

v.

OTTO GUARDADO, an individual,
Respondent,

DIANA GUARDADO, an individual,
and JAMES KIMBALL, d.b.a.

REALTY PRO, INC.,
Defendants.

No. 53643-9-II

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the date below, I arranged for service of:

- Brief of Respondent
- 11/17/2016 Report of Proceedings

to the parties as follows:

Brian Wolfe, attorney for Mark and Michelle Taylor Riverview Tower, Ste 1010 900 Washington St Vancouver, WA 98660 bwolfe@bhw-law.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Personal <input type="checkbox"/> U.S. Mail (home) <input type="checkbox"/> U.S. Mail (work) <input type="checkbox"/> E-Mail (home) <input checked="" type="checkbox"/> E-mail (work)
Brian C. Hickman 9020 SW Washington Square Road, Suite 560 Portland, OR 97223 (503) 242-2922	<input type="checkbox"/> Facsimile <input type="checkbox"/> Personal <input type="checkbox"/> U.S. Mail (home) <input type="checkbox"/> U.S. Mail (work) <input checked="" type="checkbox"/> E-Mail (home)

bhickman@gordon-polser.com	<input type="checkbox"/> E-mail (work)
Thomas Foley, attorney for Diana Guardado 1111 Broadway St Vancouver, WA 98660 thomas@thomasfoleypc.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Personal <input type="checkbox"/> U.S. Mail (home) <input type="checkbox"/> U.S. Mail (work) <input type="checkbox"/> E-Mail (home) <input checked="" type="checkbox"/> E-mail (work)
Shellie McGaughey and Michael Kylo 3131 Western Ave. suite 410 Seattle, WA 98121 shellie@mcbdlaw.com mike@mcbdlaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Personal <input type="checkbox"/> U.S. Mail (home) <input type="checkbox"/> U.S. Mail (work) <input type="checkbox"/> E-Mail (home) <input checked="" type="checkbox"/> E-mail (work)

SIGNED at Vancouver, WA on April 23, 2020,



Otto Guardado
6135 NE 14th Ct.
Vancouver WA 98665
360-713-2448
oguardado@gmail.com

OTTO GUARDADO - FILING PRO SE

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