

FILED
COURT OF APPEALS
DIVISION II

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No. 53643-9-II

STATE OF WASHINGTON

BY

CRD

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' REPLY BRIEF

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I. MOTION TO STRIKE

Respondent Guardado has violated the Rules of Appellate Procedure throughout his entire Brief. RAP 9.12 states, “[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. “The purpose of RAP 9.12 ‘is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.’” *Green v. Normandy Park*, 137 Wn. App. 665 (2007), as amended on reconsideration (Apr. 6, 2007), quoting *Wash. Fed’n of State Employees*, 121 Wn.2d 152, 157 (1993). This Court is limited to review of documents and filings on record before the Trial Court that were also brought to the attention of the Trial Court. *See Southcenter View Condo. Owners’ Ass’n v. Condo. Builders, Inc.*, 47 Wn. App. 767, 770–71 (1986) citing *American Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 816 (1962) (“There are no citations to the record and we have discovered no proof of those matters after reading all affidavits before the trial court. This being a review of a summary judgment, we are limited to the record before the trial—no more, no less.”); *Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wn.App. 743, 754–55 (2007) (“It is our task to review a ruling on a motion for summary judgment based on the precise record considered by the trial court.”) (emphasis added).

Where a party designates documents that were not before the Trial Court for consideration on Appeal, they should be stricken and not considered. *Beaupre v. Pierce Cty.*, 161 Wn.2d 568, 576 (2007), fn. 3 (“We grant Pierce County's motion to strike the discovery requests and answers that Beaupre attached to his motion on the merits at the Court of Appeals... Although Beaupre contends that he mentioned the discovery documents during oral argument, he never attached the documents to his response to the county's motion for summary judgment.”). The same situation in *Beaupre* occurred here – Respondent Guardado mentioned or alluded to evidence not in the record to the Trial Court but failed to file it. Respondent cannot cure his error now by designating documents and an additional report of proceedings from an entirely different county heard in front of an entirely different Judge in 2016. Neither the documents nor transcripts were ever considered by the Trial Court below.¹

Case law in our State gives conflicting guidance with regard to the necessity of a formal Motion to Strike improper factual references, evidence presented, and unpreserved arguments from the record. In *Green v. Normandy Park*, 137 Wn. App. 665 (2007), as amended on

¹ Notably, in reviewing the November 17, 2016 improperly designated transcript of the Hearing on Contempt, which presumably was filed by Respondent to support his allegation that he removed the *lis pendens* under duress via threat of incarceration, the Court never actually mentions or entertains the idea of incarcerating Mr. Guardado for his actions. There is no mention of confinement aside from off-hand statements from counsel for Diana Guardado that he had considered requesting the Court order confinement.

reconsideration (Apr. 6, 2007), Division One referenced a Motion to Strike affidavits filed in violation of RAP 9.12 stating that the violation, “forced the Edlemans to bring this motion to strike.” *Id.* at 680. In a contradicting footnote five years later, Division One stated, “a motion to strike is typically not necessary to point out evidence and issues a litigant believes this court should not consider...So long as there is an opportunity (as there was here) to include argument in the party’s brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials – not a separate motion to strike.” *Engstrom v. Goodman*, 166 Wn. App. 905, 909 (2012), as amended (Apr. 16 2012) at fn. 2.

Out of an abundance of precaution and lacking Division Two authority on the matter, Appellants move to strike the following:

- (1) References to Appellants Taylor being experienced “investors;”
- (2) References to Appellants Taylor’s “meeting with an attorney” and any inferences drawn from that fact;
- (3) References to Respondent’s alleged removal of the *lis pendens* under duress, threat of jail, or threat of confinement;
- (4) The Supplemental Report of Proceedings from the November 17, 2016 Hearing on Contempt in Skamania County;
- (5) All documents designated in Respondent’s Supplemental

Designation of Clerk's Papers (CP 339-361);

(6) Argument in Respondent's Brief regarding the timing of recording the Release of *Lis Pendens*, as that argument was raised by Respondent for the first time on Appeal.

A cursory review of record established below reveals no supporting evidence of items (1), (2), and (3) aside from argument in Respondent's briefing. "Allegations of fact without support in the record will not be considered by an appellate court." *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 513 (1993). With regard to the allegations that the *lis pendens* was removed under duress, as Commissioner Schmidt recognized, Respondent "presented no evidence of such a threat, other than in an email suggesting that he might be found in the Skamania County Jail." Ruling Granting Review at p. 4-5.

Next, the Trial Court below did not consider the content of the November 17, 2016 Hearing on Contempt nor did it consider the documents designated in Respondent's Supplemental Designation of Clerk's Papers (CP 339-361). "Matters appearing in the briefs or adverted to during oral argument but not contained in the record on appeal cannot be considered." *Moore v. Pac. Nw. Bell*, 34 Wn. App. 448, 455 (1983) citing *Redmond v. Kezner*, 10 Wn. App. 332 (1973).

Pursuant to RAP 9.12, there are three ways—and only three ways—for a

document or evidentiary item to properly be made part of the record on review: (1) the document or evidentiary item may be designated in the order granting or denying the motion for summary judgment; (2) the document or evidentiary item may be designated in a supplemental order of the trial court; or (3) counsel for all parties may stipulate that the document or evidentiary item was called to the attention of the trial court.

Green v. Normandy Park at 679.

Respondent Guardado drafted the Trial Court's Order Denying Partial Summary Judgment at issue. CP at 298-299. The Order makes no reference to the November 17, 2016 Hearing on Contempt or the Declarations designated by Respondent. "In this case, as in most cases in our trial courts, counsel for the prevailing party was afforded the opportunity to draft and present to the court the order granting summary judgment it wished the court to sign an enter." *Id.* at 679. "Thus, [Respondent] is aggrieved – if [he] is aggrieved at all – as a direct result of actions [he] took in preparing and submitting to the court the order...ultimately entered by the court." *Id.* Instead of presenting the evidence he relied upon to the Trial Court and including it in his proposed order or requesting the Trial Court supplement the order entered, Respondent attempted to improperly stuff the record on appeal. Like in *Green*, Appellant "chose a third course of action – complete defiance of

the Rules of Appellate Procedure. Without the permission of either this court or the superior court, [Respondent] designated the...items for inclusion in the Clerk's Papers." *Id.* at 680. "[He] then cited to the documents and argued from their content to this court in [his] briefing." *Id.*

Respondent did not list any of the additional documents designated in his Order Denying Summary Judgment, nor did he include "catchall" language regarding the Trial Court's reviewing of the "entire court file in reaching this decision." *See Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 335 (2018), fn. 10 ("However, in the order granting Soap Lake's motion for summary judgment, the trial court indicated that it had considered the [declarations at issue] and 'the entire court file in reaching this decision.' Thus, it is clear that the declarations were brought to the 'attention of the trial court...'"). Respondent never brought these items to the attention of the Trial Court below. Thus, "these evidentiary items are not properly part of the record on review." *Green v. Normany Park* at 679.

Further, Respondent made no argument with regard to the timing of filing the Lis Pendens or the recording of the statutory warranty deed below. *See Respondent's Brief* at p. 18-25; CP at 148-199. That argument must be excluded and cannot be considered by this Court. "Failure to raise an issue before the trial court generally precludes a party from raising it on

appeal.” *Smith v. Shannon*, 100 Wn.2d 26, 37 (1983); *Silverhawk, LLC v. KeyBank Nat. Ass'n*, 165 Wn. App. 258, 265 (2011) (“An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.”).

II. REPLY

Respondent’s argument asks this Court to invalidate supersedeas procedure entirely. What homeowner would post a supersedeas bond, for fear of losing it, if a simple *lis pendens* (which was removed) and a phone call to the subsequent purchaser would serve the exact same purpose? Strategically, Respondent’s Brief scantily references the lack of supersedeas bond and removal of the *lis pendens*. That is strategic – those two actions in conjunction are determinative.

Respondent sets forth four primary arguments in response to Appellants’ Brief: (1) the Taylor’s knowledge and inquiry defeats good-faith purchaser status, (2) the applicable case law applies only to execution sales, (3) the Skamania Court lacked subject matter jurisdiction to order sale of the home, and (4) the Release of Lis Pendens was recorded after the deed.

The first two arguments are addressed in Appellants’ Opening Brief. In sum, case law in our state follows the Restatement of Restitution §74 comment i which states simple notice of a pending appeal, and even

actual knowledge of the grounds for appeal, does not defeat good faith purchaser status where no supersedeas bond is filed. There is no evidence that the Taylors are sophisticated real estate investors who made a tactical pre-meditated decision. The Taylors simply purchased Respondent's home for a court-ordered purchase price. Further, there are cases in our state where courts have applied the case law relied upon to non-execution sales. The simple fact that this was a judicial sale is not determinative, especially in light of the fact that had Respondent not been held in contempt, the home would have been publicly listed. Respondent's own actions caused Skamania County Superior Court to fix a purchase price (allegedly) below market value. That sanction levied against Respondent has no bearing on Appellants' good-faith purchaser status.

Respondent's remaining arguments fail due to a fundamental misunderstanding of subject matter jurisdiction and the fact that Respondent removed (or intended to remove) the *lis pendens* prior to the sale.

A. Subject Matter Jurisdiction is Not At Issue Because the Skamania County Superior Court Had Subject Matter Jurisdiction Over the Underlying Divorce Proceeding.

Respondent sets forth a misguided argument claiming that Skamania County Superior Court did not have subject matter jurisdiction to order the sale of his home in his dissolution action, *Guardado v.*

Guardado, Skamania County Superior Court Cause No. 14-2-00141-1. However, in reviewing this Court's opinion in *Guardado v. Guardado*, 200 Wn. App. 237 (2017), it is clear subject matter jurisdiction was never at issue. In fact, the term is never mentioned in the opinion. Superior Courts have *exclusive* subject matter jurisdiction over family law and dissolution cases. Respondent is mistaken that the underlying sale and court order compelling it are void or voidable for lack of subject matter jurisdiction.

“Subject matter jurisdiction’ refers to a court’s ability to entertain a type of case.” *Banowsky v. Guy Backstrom, DC*, 193 Wn.2d 724, 731, (2019) (emphasis added). Subject matter jurisdiction is:

the authority of the court to hear and determine the class of actions to which the case belongs. The classes of action over which the superior court has jurisdiction are defined by the state constitution. Under the Washington Constitution, superior courts have original jurisdiction in all cases involving dissolution or annulment of marriage. The petition for dissolution was within the subject matter jurisdiction of the superior court.

In re Marriage of Buecking & Buecking, 167 Wn. App. 555, 559 (2012), *aff’d sub nom. Buecking v. Buecking*, 179 Wn.2d 438 (2013) (emphasis added).

The critical concept in determining whether a court has subject

matter jurisdiction is the “type of controversy.” *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 539 (1994). “If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.” *Id.* “Superior Courts are courts of general jurisdiction and have subject matter jurisdiction over family law cases.” *Matter of Marriage of Orate*, 455 P.3d 1158, 1161 (Wash. Ct. App. 2020) citing Wash. Const. Art. IV, § 6; *In re Marriage of Buecking*, 179 Wn.2d 438, 448-50 (2013).

It is clear Skamania County Superior Court has subject matter jurisdiction over family law and dissolution actions such as the one between Otto and Diana Guardado. Respondent’s Argument that the Court Order directing sale is void due to lack of subject matter jurisdiction fails.

B. The Timing of the Lis Pendens Recording is Immaterial and Argument to the Contrary Is Not Preserved for Appeal.

Respondent never argued to the Trial Court that the Release of Lis Pendens was recorded immediately after (at essentially the exact same time) as the Statutory Warranty Deed. Respondent’s argument asks this Court to determine that because the Clark County Auditor, who received those documents likely at the exact same time, arbitrarily recorded one immediately before the other, that he is entitled to restitution of his home. Respondent executed the Release of Lis Pendens on November 16, 2016,

the day before the Statutory Warranty Deed was executed by Special Master Vern McCray. Appellant expressly does not waive objection to consideration of this argument by providing briefing in Reply. Regardless of whether this Court considers Respondent's timing argument, the outcome is the same. It matters not when the documents were recorded. There is no dispute that Respondent released the operative *lis pendens*. In fact, the home was owned by the Taylors unencumbered with the title free of cloud for a month and a half before Respondent Guardado decided to record a second *lis pendens*.

The issue of whether a *lis pendens* has any legal effect without a corresponding claim to the property – such as a supersedeas bond in place to stay enforcement of an underlying judgment, was addressed in *Guest v. Lange*, 195 Wn. App. 330 (2016) in reverse order. Following sale of the home at issue, the trial court cancelled the associated *lis pendens*, despite the fact that the Guests posted a supersedeas bond. “The Guests argue[d] that the trial court lacked the authority to cancel the *lis pendens* because they had filed a supersedeas bond.” *Id.* at 332. The Court of Appeals considered the direct issue of whether a supersedeas bond and corresponding *lis pendens* operated to defeat good-faith purchaser status. *Id.* at 338. Ultimately, the Court “h[e]ld that the Guests' supersedeas bond rendered the action not ‘settled, discontinued, or abated.’” *Id.* Thus, had

Respondent filed a bond, the *lis pendens* would operate to defeat good-faith purchaser status.

The Court of Appeals in *Guest* specifically contrasted that situation with the one in *Beers v. Ross*, 137 Wn. App. 566 (2007), where appellant had not filed a bond, just like the current situation before this Court. “In *Beers*, the appellant took no action apart from appealing.” 195 Wn. App. at 340 citing *Beers*, 137 Wn. App. at 575.

But here, the Guests did all they could to preserve the *lis pendens*. They filed a notice of appeal, filed a supersedeas bond, and stayed enforcement of the judgment. Even if a notice of appeal alone does not prevent the canceling of a *lis pendens*, we hold that the filing of a supersedeas bond does.

Id.

In essence, the *lis pendens* had no operative effect on the sale of the home *regardless* of when it was removed because no bond was filed. “In Washington, *lis pendens* is procedural only; it does not create substantive rights in the person recording the notice.” *Guest* at 336 citing *Beers*, at 575.

A similar timing issue arose also in *Merrick v. Pattison*, 85 Wn. 240 (1915) where appellant:

contended in appellant’s behalf that the commencement of this action [filing of a *lis pendens*] and the filing of the notice of the pendency thereof in the office of the auditor

of Snohomish county before the recording therein of respondents' deed...rendered appellants' claimed right to the property superior to that of respondents under their deed.

Id. at 244.

In denying plaintiff/appellant's claim of superior interest, our Supreme Court held: "It does not follow that a decree must necessarily be rendered in favor of the plaintiff because his notice of *lis pendens* is prior in time to the recording of a conveyance of a purchaser." *Id.* at 245.

The Court went on, "it would be impossible to claim that a *lis pendens* could give a creditor under an attachment a lien superior to the title of a purchaser under an unrecorded conveyance." *Id.* at 247. That is because a *lis pendens* is procedural only – it does not affect the substantive rights of the parties:

The following also lend support to the view that our statute is one of procedure only, for the purpose of making effective whatever decree may be rendered in favor of the plaintiff in an action of this nature, regardless of conveyances made or recorded subsequent to the filing of the notice of *lis pendens*, and that it is not a law controlling the substantive rights of the parties which may be adjudicated upon the merits in the action.

Id. at 248.

Respondent's timing argument, if considered at all by this Court,

also fails.

C. Respondent Fails to Identify What Material Questions of Fact Remain, and Thus Summary Judgment Should Have Been Granted in Appellants' Favor.

Once Appellant identified to the Trial Court that no genuine issue of material fact remained, the burden shifted to Respondent Guardado to present sufficient evidence, not just arguments, that a fact question existed. To date, the only alleged questions of fact Respondent identifies are either undisputed or unsupported by evidence. Appellants admit that Mark Taylor had actual knowledge of the Appeal, but there is no evidence that he is a sophisticated real estate investor or that he requested the advice of an attorney with regard to the transaction. Respondent admits he released the *lis pendens* in conjunction with sale of the home but fails to present evidence that it was under duress. There is no evidence that a supersedeas bond was filed, thus it is undisputed that the *lis pendens* had no effect regardless. Even if it did, Respondent Guardado removed it for approximately six weeks at the time of the sale and only re-recorded it in a last-ditch attempt to regain the home after the risk that he would be held in contempt of court had passed. Because Respondent Guardado failed to present sufficient evidence to the Trial Court that a material question of fact remained, summary judgment should have been entered in Respondents' favor.

III. CONCLUSION

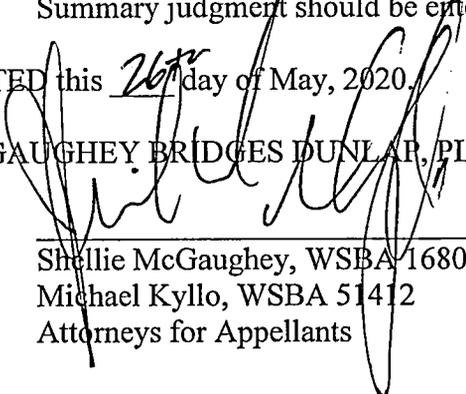
As the facts are materially undisputed, there is no jury question in this case. Otto Guardado was Court Ordered to sell his home for a Court-fixed price of \$240,000, following a finding of contempt. Guardado never superseded the Trial Court Order directing sale of the home. The home failed to sell by the end of summer 2016. Guardado recorded a *lis pendens* on the property in October, removed it on November 16, 2016, and the home was sold to the Taylors on November 17, 2016. Prior to the sale, Guardado spoke with Mark Taylor telephonically and informed him that he intended to appeal the Trial Court's judgment. Guardado recorded a second *lis pendens* in December 2016 and now claims that subsequent *lis pendens* entitles him to return of the home. However, Guardado had to corresponding claim to the home at the time of sale or the time of recording the second *lis pendens*. Simply filing a *lis pendens*, which was subsequently removed, does not create any right to the property superior to that of good-faith purchaser Taylors.

Summary judgment should be entered in favor of Defendants.

DATED this 26th day of May, 2020.

McGAUGHEY BRIDGES DUNLAP, PLLC

By:



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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused the foregoing document to be delivered to:

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