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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 331920

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

**FIRST BANK OF LINCOLN,
A Montana Bank Corporation,**

Appellant,

v.

**DONALD TUSCHOFF and JANE DOE TUSCHOFF,
husband and wife and the marital community comprised thereof;
BANANA BELT GAMING, LLC;
JOHN DOES 1-IV, and all parties claiming right title or interest in
the subject real property in Asotin County Washington,**

Respondents.

BRIEF OF APPELLANT, FIRST BANK OF LINCOLN

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I. INTRODUCTION

This is an action by Plaintiff/Appellant, First Bank of Lincoln (First Bank) for declaratory relief to establish its rights to an assignment of a note and deed of trust on certain real property by Mr. Donald Tuschoff. First Bank duly recorded the Assignment with the Asotin County Auditor and filed a UCC Financing Statement with the Washington Department of Licensing referencing its security interest in the Schwab/Tuschoff Note and Deed of Trust. Defendant/Respondent, Banana Belt Gaming, LCC, (Banana Belt) the current owner of the real property, denied the validity of this assignment even though it was listed as an exception to the title commitment prepared prior to the closing when Banana Belt purchased the property. The trial court ruled in favor of Banana Belt on cross motions for summary judgment and this appeal followed.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignments of Error:

1. The trial court erred in denying First Bank's Motion for Summary Judgment and granting summary judgment in favor of Banana Belt.
2. The trial court erred by failing to recognize that Banana Belt is not a bona fide purchaser under Washington law because Banana Belt had notice that the Schwab/Tuschoff Note and Deed of Trust had been assigned to First Bank.
3. The trial court erred in quieting title in favor of Banana Belt in derogation of Washington's Recording Act.

4. The trial court erred by failing to recognize that First Bank properly perfected its security interest in the Schwab/Tuschoff Note and Deed of Trust by filing a UCC Financing Statement with the Washington Department of Licensing pursuant to RCW 62A.9A-312(a).

5. The trial court erred in making findings of fact when ruling on cross motions for summary judgment.

B. Issues Pertaining to Assignment of Error

1. May a purchaser of real property avoid a recorded security interest in real property when the purchaser and its closing agent have notice of the interest and fail to obtain release of the interest prior to the closing?

2. May a purchaser of real property avoid a perfected security interest in a promissory note?

III. STATEMENT OF THE CASE

This case involves a series of real estate transactions related to a Bowling Alley in Clarkston, Washington also referred to as the 1250 Bridge Street property, the assignment of interests to a Note and Deed of Trust affecting that property, and ultimately the purchase of that property by the Defendant Banana Belt. First American Title was hired to handle the closing and provided title insurance policies to the purchaser and the purchaser's lender.

A. Tuschoff Purchases the Property from Rex & Mary Helen Humphrey. Donald Tuschoff purchased the Bowling Alley (1250 Bridge Street property) from Rex and Mary Helen Humphrey in July 1994. CP 287-291. Rather than obtain conventional commercial financing for the purchase, Rex and Mary Helen Humphrey financed the

purchase by accepting a Note and Deed of Trust dated July 22, 1994. CP 215. This Deed of Trust is referenced in paragraph 21 of First American Title Company's Title Commitment. Id. At the time of the transaction at issue in this case, Land Title of Nez Perce County (hereinafter Land Title) handled the escrow payments from Donald Tuschoff to Rex and Mary Helen Humphrey in connection with Tuschoff's purchase of the Bowling Alley. CP 228, 298-300.

B. Tuschoff Sells the Property to the Schwab Group. In 1998, Donald Tuschoff sold the Bowling Alley to a group of investors collectively referred to as Gene Schwab et al., or the Schwab Group for \$1,100,000. CP 80. The Schwab Group's purchase was financed by an Installment Note for \$1,100,000 in favor of Donald Tuschoff. CP 80. The Schwab/Tuschoff Installment Note was secured by a Deed of Trust dated October 22, 1998. CP 61, 82-84. The Schwab/Tuschoff Deed of Trust is referenced in paragraph 23 of First American Title Company's Title Commitment. CP 216. The Humphreys remained as senior lienholders.

C. First Bank Lends Funds To Tuschoff and Takes an Assignment of Tuschoff's Interest in the Schwab/Tuschoff Note and Deed of Trust. First Bank is a small, community-owned, single branch, state-chartered bank located in Lincoln, Montana. CP 60. On January 27, 2011 First Bank arranged a loan with a partner bank to lend the sum of \$440,000 to Donald Tuschoff and his daughter Laurie Parks in connection with their purchase of the Lincoln Hotel located in Lincoln, Montana. CP 60-61, 70-74. To secure payment of the \$440,000 loan from First Bank, Donald Tuschoff executed an Assignment of his beneficial interest in the Note and the 1998 Schwab/Tuschoff Deed of

Trust. CP 61-62, 86-87. Mr. Tuschoff's Assignment of his beneficial interest in the Schwab/Tuschoff Deed of Trust to First Bank was recorded with the Asotin County Auditor on February 14, 2011. CP 86-87. The assignment is referenced in the last sentence of paragraph 23 of the Title Commitment prepared by First American Title Company. CP 216. Mr. Tuschoff also signed a Security Agreement wherein he granted First Bank a security interest in all instruments evidencing rights to payments. CP 95. On February 22, 2011 First Bank filed a UCC-1 statement with the Washington Department of Licensing providing notice to the world of its secured interest in all instruments, including promissory notes issued to Donald Tuschoff in the amount of \$1,100,000 specifically referencing the Schwab/Tuschoff Deed of Trust dated October 22, 1998. CP 99-103.

D. Banana Belt Purchases the Property. Unbeknownst to First Bank, in June 2013, the Schwab group sold the Bowling Alley property to Banana Belt. CP 64, 261-271. Banana Belt hired First American Title Company to close the sale between the Schwab Group and Banana Belt. CP 193, 273-276. Tonja Hatcher, a Limited Practice Officer employed by First American Title Company, handled the closing of the sale of the property. CP 191, 193 & 196. At the time of the closing, Mrs. Hatcher had 35 years of experience in closing loans and had been licensed through the Washington State Bar Association as a Limited Practice Officer since 1985, a period of 28 years. CP 190-191. Mrs. Hatcher was well trained, having completed 10 hours of training per year through the Washington State Bar Association, as well as training through her employer, First American Title Company, pertaining to the escrow and title field. CP 191-192

As part of the sale, both Banana Belt and its lender, Columbia Bank, purchased title insurance policies through the closing agent, First American Title Company. CP 162-167, 303-314. Mrs. Hatcher obtained a title commitment listing the exceptions to title of the 1250 Bridge Street property. CP 194, 207-220. The Assignment of Tuschoff's beneficiary interest in the 1998 Tuschoff/Schwab Deed of Trust to First Bank was specifically referenced on the Title Commitment in the last paragraph of exception 23. CP 216. Mrs. Hatcher reviewed the title commitment and admitted that she saw the assignment by Mr. Tuschoff of his interest in the 1998 Tuschoff/Schwab Deed of Trust to First Bank. CP 194-196. Mrs. Hatcher did not contact First Bank to ascertain whether the assignment of the Deed of Trust Mr. Tuschoff granted to First Bank had been satisfied. CP 197.

Banana Belt borrowed \$600,000 from Columbia Bank in connection with the purchase. CP 222-223. Columbia Bank issued a letter of instruction to First American Title Company in connection with the closing of the transaction. CP 30-31, 222-223. In the letter of instruction Columbia Bank specifically states as follows:

We will provide you with the original documents. You are authorized and instructed to record the Deed of Trust and Assignment if [sic] Rents when you are in a position to assure Columbia Bank of its first lien position in the amount of \$600,000 on the subject property under the Lenders Policy issued by First American Title Insurance Company. **We request that exceptions 21 and 23 be released.** Once you have assured Columbia Bank as 1st lien holder then we will allow Jim and Gene Schwab take a 2nd lien position in the amount \$350,000. (*emphasis added*).

CP 222-223. Furthermore, the Escrow Instructions to First American Title Company specifically noted that an Owner's policy and

Mortgagees' policies would be issued with exceptions 21 and 23 eliminated. CP 273-274. Unfortunately, as discussed below, Banana Belt's escrow or closing agent, First American Title Company, did not ensure that Mr. Tuschoff's assignment of his beneficial interest in the Deed of Trust to First Bank had been satisfied before it erroneously distributed the sales proceeds.

Ms. Rita Johnson was the Bookkeeper at Land Title who handled the contract collection or escrow in connection with Humphrey/Tuschoff transaction and the Tuschoff/Schwab transaction. CP 227-228, 298-301. On April 10, 2013 Mrs. Hatcher sent Ms. Johnson an email requesting a payoff quote and providing a copy of the title commitment that referenced Mr. Tuschoff's assignment of all his right, title, and interest in the Tuschoff/Schwab Deed of Trust to First Bank. CP 229-230 & 240. Mrs. Hatcher drew an arrow beside the Assignment of the Deed of Trust to First Bank, "to make it apparent that there was somebody else involved." CP 202. Ms. Johnson stated that she did not review the title commitment attached to Mrs. Hatcher's email, nor did she notice that the Tuschoff/Schwab Deed of Trust had been assigned. CP 230, 233. On Monday, April 15, 2013, Ms. Johnson responded to Mrs. Hatcher by email. CP 247. That same day, Mrs. Hatcher responded by stating "Please confirm this one does in fact wrap and will payoff the other Deed of Trust in paragraph 23 listed on our title commitment." CP 247. Ms. Johnson testified that she interpreted Mrs. Hatcher's email to mean that she was going to pay off the Tuschoff/Schwab Deed of Trust and the Humphrey/Tuschoff Deed of Trust. CP 231. Again, Mrs. Hatcher does not mention in the text of her email that Mr. Tuschoff had assigned his interest in the Tuschoff/Schwab Deed of Trust. Ms. Johnson responded

to Mrs. Hatcher's email on April 15, 2014 at 1:41 p.m. by stating "This is a wrap and both deed of trust will be paid." CP 247. Ms. Johnson understood that to mean that Mary Helen Humphrey would be paid and Donald Tuschoff would be paid. CP 232. In other words, although Mrs. Hatcher admitted she noticed Mr. Tuschoff's assignment to First Bank, there is no reference whatsoever in the email communication that First Bank will be paid off. CP 247.

In recognition of her duty to make sure all the liens against the property were released, Mrs. Hatcher emailed Ms. Johnson again on Monday April 15, 2013 at 3:52 p.m. and states:

Hi Rita, Please advise, as the contract collection co., what your status will be to obtain all of the original documents necessary so you may provide release on the two Deed of Trusts as I had referenced in my prior email. I must be in a position prior to closing to be able to guarantee the liens will be released at or shortly after payoff. Since I am not in control, I need your assurance that you are in the position to guarantee that you can provide the same. Thank you for your assistance. Tonja.

CP 249. Ms. Johnson does not recall whether she responded to this email. CP 234-235. Despite Mrs. Hatcher recognizing that she was not in control, as she did not have the documents in her possession, Mrs. Hatcher never inquired of Land Title whether it was handling the assignment to First Bank as reflected in her deposition testimony as follows:

Q. Okay. Did you clarify with Land Title whether they were also handling the assignment to First Bank of Lincoln in your contact with Land Title?

A. I gave him [her] instruction to follow to pay off and clear paragraphs 21 and 23.

Q. Okay. Did you specifically ask them about the assignment to First Bank.

A. It was not my position to do so.

CP 198. Ms. Johnson of Land Title testified that she does not look at the title report to determine who should get the money, rather she follows the instruction in the contract collection or escrow company's file. CP 237-238. Mrs. Hatcher of First American Title never contacted First Bank to ascertain whether the assignment had been satisfied. CP 197. Again in emailing Land Title and disbursing the sales proceeds, and despite the fact that Mrs. Hatcher was aware of First Bank's interest, Mrs. Hatcher on behalf of First American Title Company never references or follows up on the satisfaction of Mr. Tuschoff's assignment to First Bank. CP 247-259, 492-494.

E. **First Bank Commences Action.** First Bank's loan to Mr. Tuschoff matured on February 1, 2014. CP 64, 70-71. In reviewing whether the loan would be renewed on January 29, 2014 First Bank learned that the Bowling Alley property had been sold and funds disbursed to Mr. Tuschoff despite the recorded assignment and UCC Financing Statement on file with the Washington Department of Licensing. CP 64. First Bank commenced this action for a declaration of its rights to its assignment of the Tuschoff/Schwab Deed of Trust. CP 1-4. The trial court ruled in error in favor of the defendant Banana Belt on cross motions for summary judgment. CP 720-724. First Bank appealed. CP 725-732.

IV. ARGUMENT

A. **Summary of Argument.** The facts in this case are undisputed. The issue is whether a purchaser of real property is subject to a prior recorded assignment of a security interest when the purchaser pays the assignor and ignores the rights of the assignee. As will be shown, the purchaser ignores a senior recorded interest at its peril. The purpose of recording statutes is to protect the holders of security interest from subsequent purchasers. Subsequent purchasers who have actual and constructive knowledge of a senior lien take subject to that lien unless it is properly satisfied at the time of purchase; they cannot claim to be bona fide purchasers when they ignore a senior interest. Here, Banana Belt, and its agents, First American Title Company had actual knowledge of the claims of First Bank. Those claims were not satisfied and First Bank should be allowed to proceed to foreclose on its claim.

B. **Standard of Review.** This is an appeal of the trial court's ruling on cross motions for summary judgment. Appellate courts review summary judgment rulings *de novo*, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. Flower v. T.R.A. Industries, Inc., 127 Wn. App. 13, 26, 111 P.3d 1192 (2005) *citing* Hubbard v. Spokane County, 146 Wn.2d 699, 706-707, 50 P.3d 602 (2002). In this case there are no disputed facts. All issues presented for review in this case are subject to the *de novo* standard of review. As a preliminary matter, it should be noted that the trial court made factual findings in granting Banana Belt's Motion for Summary Judgment and denying First Bank's Motion for Summary Judgment. CP 720-724. "[F]indings of fact on summary judgment are not proper, are

superfluous, and are not considered by the appellate court.” Hemenway v. Miller, 116 Wash. 2d 725, 731, 807 P.2d 863, 867 (1991), *citing* Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wash.2d 282, 294 n. 6, 745 P.2d 1 (1987). *See also* CR 52(5)(B). Accordingly, this court should ignore the trial court’s factual findings and review its legal determinations *de novo*.

C. The Purpose of Recording Mr. Tuschoff’s Assignment of the Deed of Trust is to Give Subsequent Third Party Purchasers such as Banana Belt Notice that Mr. Tuschoff was Not the Owner of the Debt. First Bank recorded the Assignment of Deed of Trust with the Asotin County Auditor on February 14, 2011 showing that Mr. Tuschoff had assigned his interest in the Schwab/Tuschoff Note and Deed of Trust to First Bank. CP 86. The sole purpose of recording an assignment is “to put parties who subsequently purchase an interest in the property on notice as to which party owns the debt secured by the property.” Corales v. Flagstar Bank, FSB, 822 F. Supp. 2d 1102, 1109 (W.D. Wash. 2011) *citing* RCW 65.08.070; In re United Home Loans, 71 B.R. 885, 891 (W.D. Wash. 1987) *affirmed* 876 F.2d 897 (9th Cir. 1989). In addition to the federal courts applying Washington law, the Washington State Supreme Court has also held that recording of an assignment is “notice to all the world” of the assignment. Hargis v. Hargis Bank & Trust Co. of Jackson KY., 160 Wn. 594, 600, 295 P. 742 (1931). Furthermore, a title report referencing an assignment of a deed of trust constitutes actual notice. Rodgers v. Seattle-First Nat’l. Bank, 40 Wn. App. 127, 132, 697 P.2d 1009 (1985). The effect of recording the Assignment in this case gave notice to Banana Belt that the property it was purchasing was encumbered by the Schwab/Tuschoff Deed of Trust and that

Mr. Tuschoff was not the owner of the debt secured by the property. By granting quiet title to Banana Belt, the trial court erroneously ignored the purpose and effect of the recording statutes. This Court should reverse and order that First Bank retains all right, title, and interest to the Note and Deed of Trust by virtue of Tuschoff's Assignment and is entitled to foreclose.

D. Banana Belt is Not a Bona Fide Purchaser Since it had Notice of the Assignment and Failed to Obtain a Release of that Interest as Part of Closing. It is undisputed that Banana Belt and its agents had notice of the assignment to First Bank well before closing. It is further undisputed that the closing agents utterly failed to obtain a release from First Bank of its interest. It is unclear how Banana Belt can now contend it took title free and clear of First Bank's claims. More than two months prior to closing Banana Belt's purchase of the Bowling Alley, First American Title Insurance prepared a Title Commitment. CP 240-245. Paragraph 23 of the Title Commitment specifically references the \$1,100,000.00 note from Schwab to Tuschoff secured by a Deed of Trust and further states that:

The beneficial interest under said Deed of Trust was assigned to First Lincoln Bank, (sic) under Instrument No. 323264, recorded February 12, 2011, records of Asotin County, Washington.¹

CP 216.

As the record showed, it was undisputed that the purchaser, Banana Belt had notice of Mr. Tuschoff's assignment to First Bank. Banana Belt signed a statement acknowledging that it had reviewed the preliminary

¹ The Assignment was actually recorded on February 14, 2011 and was assigned to First Bank of Lincoln. CP 86-87.

Title Commitment. CP 273-276. In fact, Banana Belt initialed immediately after the following statement:

I have read the above referenced preliminary title commitment and approve the policy of title insurance to be issued as required by instructions to include the above vesting and exceptions.

BUYER'S INITIALS: /s/ MG /s/ LR SELLER'S INITIALS /s/ J.S. /s/ GMS by MP atty in Fact

CP 274. In addition, Banana Belt's agent, First American Title Company had actual knowledge of Mr. Tuschoff's assignment of his interest in the Schwab/Tuschoff Note and Deed of Trust. CP 196-197. An escrow agent conducting a real estate closing is an agent of the buyer or purchaser. National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 910, 506 P.2d 20 (1973). Banana Belt's closing agent, Tonja Hatcher gave the following testimony regarding her awareness of Mr. Tuschoff's Assignment to First Bank:

Q. When you were reviewing this [Title Commitment/Title Report], did you notice that the deed of trust referenced in paragraph 23 had been assigned by Mr. Tuschoff to First Bank of Lincoln as referenced on the last paragraph of paragraph number 23 right before paragraph 24?

MR. RAMSDEN: To the extent it calls for a legal conclusion, I object. But go ahead and answer it based on what your understanding was.

THE WITNESS: [TONJA HATCHER]: I did see the assignment.

Q. Okay.

A. Yes.

Q. Did you pull up [a] copy of the assignment in your review of the title report?

A. No.

Q. Okay. But you were aware that it existed.

A. Yes.

Q. Okay. In your process of closing the transaction, did you contact First Bank of Lincoln to ascertain whether the assignment had been satisfied?

A. No.

Mrs. Hatcher also testified that when sending a copy of the title commitment to Land Title, she drew an arrow to the paragraph referencing the assignment to call attention to it or make it more apparent that someone else was involved in the transaction. CP 202.

In spite of the actual and constructive knowledge of the prior claim of First Bank, Banana Belt somehow asserts it took title free and clear of the recorded interest. In other words, Banana Belt seems to claim it is entitled to the protections given a bona fide purchaser. A bona fide purchaser is “one who purchases property without actual or constructive knowledge of another’s claim of right to, or equity in, the property, and who pays valuable consideration.” Albice v. Premier Mortg. Services of Washington, Inc., 174 Wn.2d 560, 573, 276 P.3d 1277 (2012); Collings v. City First Mortg. Services, LLC, 177 Wn. App. 908, 932, 317 P.3d 1047 (2013) *review denied* 179 Wn.2d 1028 (2014).

If the purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed.

Albice, 174 Wn.2d at 573. In considering whether the purchaser of property is a bona fide purchaser, courts will ask whether the surrounding events (1) created a duty of inquiry and if so (2) whether the purchaser satisfied that duty. Id. To make this determination courts will give substantial weight to the purchaser's knowledge and experience with real estate. Albice, 174 Wn.2d at 573-574, *citing* Miebach v. Colasurdo, 102 Wn.2d 170, 175-176 685 P.2d 1074 (1984); Collings, 177 Wn. App. at 933. In both Collings v. City First Mortg. Services, LLC, and Albice v. Premier Mortg. Services of Washington Inc., *supra*, the party asserting the right to possess or foreclose on real property had reasonable notice of another's senior claim to right or title. In both cases, the Court found that one who ignored information of a prior interest in the real property could not later claim to be a bona fide purchaser or encumbrancer and take free of the prior interest. The same result should occur here. Banana Belt is not a bona fide purchaser because it and its agent had knowledge of the assigned interest.

Notice to the purchaser of real estate that parties other than the seller or encumbrancer have a claim of interest in the property need not be actual nor amount to full knowledge, but such notice should be "information as would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry." Glaser v. Holdorf, 56 Wn.2d 204, 215, 352 P.2d 212 (1960). A person cannot be a bona fide purchaser if they "refuse to pursue inquiry, to which, were [they] honest and prudent, the knowledge [they have] would clearly send them." Miebach v. Colasurdo, 102 Wn.2d 170, 177, 685 P.2d 1074 (1984) *quoting* Mann v. Young, 1 Wash.Terr. 454, 463 (1874).

In the instant case, the reference in the Title Commitment of Mr. Tuschoff's Assignment of his beneficial interest in the Schwab/Tuschoff Deed of Trust to First Bank gave Banana Belt's agent, First American Title Company, information that would cause the ordinary prudent title company to inquire further. Such inquiry or investigation regarding the assignment, such as a telephone call to First Bank, would have revealed that the Assignment had not been satisfied. Alternatively, specifically asking or inquiring of Land Title as to whether it was handling the contract collections on behalf of First Bank would have also revealed that the Assignment to First Bank was not being handled by Land Title.

The escrow officer, Mrs. Hatcher, was extremely well qualified. She had been working in the real estate escrow / closing business since 1978 or for 35 years at the time of this transaction at issue. CP 190. Mrs. Hatcher has been licensed as a Limited Practice Officer with the Washington State Bar Association since 1985 or for 28 years at the time of the transaction. Pursuant to Regulation 12 of Washington Admission to Practice Rules Appendix, Mrs. Hatcher was required to complete 10 hours of training per year. CP 191. Unfortunately, those qualifications and training did not prevent her from making a simple human error. As is unarguably settled practice in competently managing a real estate closing, she should have determined the status of the assignments and made certain that the obligation would be satisfied and the interest released. She did not. Instead, the closing agent sent \$359,271.82 to Land Title who then paid out the funds to Mr. Tuschoff without consideration of the recorded assignment. CP 494. Accordingly, Banana Belt is not a bona fide purchaser because its agent, First American Title

Company, did not make the appropriate inquiry as required by controlling Washington case law before it disbursed the sales proceeds. Since Banana Belt is not a bona fide purchaser as a matter of law, this Court should reverse the trial court and rule that the underlying assigned Deed of Trust has not been satisfied. This Court should further order that First Bank may proceed with foreclosure on the Deed of Trust that was assigned to it and Banana Belt may look to its title insurance policy for coverage.

E. The Trial Court Erred in Quieting Title in Favor of Banana Belt in Derogation of Washington's Recording Act. First Bank recorded the Assignment of Deed of Trust wherein Donald Tuschoff assigned to First Bank his beneficial interest in the Schwab/Tushoff Deed of Trust with the Asotin County Auditor on February 14, 2011. CP 86-87. This recording was done pursuant to Washington law. Those laws are designed to protect those who comply with the Recording Acts. The trial court wrongfully denied First Bank those statutory protections.

The rules regarding recording of real property interests are set forth in Chapter 65.08 RCW. RCW 65.08.060 contains to definitions relevant to this case:

(2) The term "purchaser" includes every person to whom any estate or interest in real property is conveyed for a valuable consideration and **every assignee of a mortgage, lease or other conditional estate.** (*emphasis added*).

(3) The term "conveyance" includes every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument releasing in

whole or in part, postponing or subordinating a mortgage or other lien; except a will, a lease for a term of not exceeding two years, and an instrument granting a power to convey real property as the agent or attorney for the owner of the property. "To convey" is to execute a "conveyance" as defined in this subdivision.

RCW 65.08.070 is the key provision; it provides:

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

"The purpose of the recording statutes is to make the deed first recorded superior to any outstanding unrecorded conveyance of the same property unless the mortgagee or purchaser had actual knowledge of the transfer not filed of record." Kim v. Lee, 145 Wn.2d 79, 86, 31 P.2d 665 (2001) *citing Tacoma Hotel v. Morrison & Co., Inc.*, 193 Wn. 134, 140, 74 P.2d 1003, 1006 (1938). This protection applies to the assignee of an interest in real property as well as the original holder or owner. This was recently confirmed by Judge Rossmeissl of the Eastern District of Washington Bankruptcy Court, who held that a recorded Assignment of Mortgage was entitled to the protections of Washington Recording Statutes citing RCW 65.08.060(3) and RCW 65.08.070. In re HW Partners, LLC, 2014 WL 1203205 (E.D.WA 2014). Moreover, the Court held that that a recorded Assignment of Mortgage had priority over an unsecured creditor even though the assignee did not have possession of the original note. In finding the assignee of the mortgage was entitled to protections of the

Washington Recording Statute the Court in HW Partners quoted and cited Price v. Northern Bond & Mortg. Co., 161 Wn. 690, 698, 297 P. 786

(1931):

An assignee of a mortgage is a purchaser, and is entitled to the protection of the recording acts as much as a purchaser of the equity of redemption.

The same result should occur here. The closing agent or escrow officer has a duty to ensure that all liens and encumbrances recorded against the real property are released at or near the time the sales proceeds are disbursed. CP 124. Furthermore, the closing agent or escrow officer must deliver the sales proceeds to the proper party so that the liens or encumbrances against the real property will actually be released upon disbursing payment. Id. The closing agent or escrow officer should never disburse sales proceeds in connection with a transaction unless he or she is certain that the proper party is receiving payment. Id. The Assignment recorded with the Asotin County Auditor was not cleared because First Bank did not receive payment. Recorded assignments are entitled to the protections of the Washington Recording Act. HW Partners, supra., Price v. Northern Bond & Mortg. Co., 161 Wn. 690, 698, 297 P.786 (1931). Thus, the trial court improperly quieted title in favor Banana Belt in derogation of the recording acts. First Bank has not been paid and its lien has not been satisfied. This Court should accordingly declare that First Bank may foreclose its recorded lien.

F. Payment to the Wrong Party Does Not Remove First Bank's Rights to the Assigned Interest. In the trial court, Banana Belt argued that it should be able to avoid First Bank's claim because Mr. Tuschoff was paid as part of the closing and therefore the assigned claim was no longer valid, relying on RCW 65.08.120. As will be

shown, such reliance is totally misplaced and eviscerates the protections provided by the recording statutes.

It is first necessary to discuss the interplay of several statutes dealing with real property. RCW 65.08.120 specifically involves mortgages, but in Washington, the rules of mortgage law apply to deeds of trust unless contrary to other provisions of Chapter 61.24 RCW. RCW 61.24.020. The statute in question is part of Title 65 RCW, which is entitled "Recording, Registration and Legal Publication." Chapter 65.08 RCW governs recording. RCW 65.08.070 provides that real property conveyances may be recorded and RCW 65.08.030 provides that recording documents, even if the document is somehow irregular, provides notice to third persons. RCW 65.08.120 is an exception to the general rules of notice in the case of an assignment of a mortgage. It provides:

The recording of an assignment of a mortgage is not in itself notice to the mortgagor, his heirs, assigns or personal representatives, to invalidate a **payment made by any of them** to a prior holder of the mortgage. (*emphasis added*).

This statute is limited to the relationship between the mortgagor and the holder of the mortgage in cases where the holder assigns his interest. The obvious purpose of this statute is to prevent disputes regarding payments made by a mortgagor to a holder when the mortgagor is not given actual notice of an assignment. In other words, the mortgagor is not obligated to conduct a title search each month to determine who to pay. No Washington appellate decision has provided an in depth analysis of RCW 65.08.120. However, in interpreting a nearly identically worded statute the Court of Appeals of New York held that when payment is being made by a person other than the mortgagor, then the statute does not apply.

Brewster v. Carnes, 103 N.Y. 556, 561, 9 N.E. 323 (1886) (interpreting 1 Revised Statute 763, §41); Assets Realization Co. v. Clark, 205 N.Y. 105, 98 N.E. 457 (1912). In doing so the Brewster Court stated:

If the statute was designed to include a purchaser of the mortgaged premises it no doubt would have so stated and thus made it manifest that was its intention.

As is obvious, Banana Belt has no right to rely on this statute. Banana Belt was not the mortgagor and was not making payment as a mortgagor. Rather, Banana Belt was a subsequent purchaser, who had not only constructive notice, but also actual notice, of First Bank's prior right to the Deed Of Trust and note. CP 196-197, 274. As Banana Belt must admit, it provided money to satisfy Schwab's debt to Tuschoff as a third-party purchaser. CP 338. Thus, RCW 65.08.120 does not apply to the factual circumstances of this case.

Moreover, applying RCW 65.08.120 to this case eviscerates the entire purpose of the recording statutes and ignores the fact that purchasers, including the purchasers in this case, hire professional closing agents and purchase title insurance to allocate the risk if problems in fact occur. The purpose of RCW 65.08.070 requiring recording of an assignment of an interest in a deed of trust is to put parties who subsequently purchase an interest in the property on notice of which entity owns a debt secured by the property. Corales v. Flagstar Bank, FSB, 822 F. Supp.2d 1102 (W.D. Wash. 2011). Again, Banana Belt and its agent, First American Title Company, had notice that Mr. Tuschoff had assigned his interest in the Schwab/Tuschoff Note and Deed of Trust. CP 196-197, 274. Banana Belt and its agent should have made sure that the assignment to First Bank was satisfied upon disbursing the sales

proceeds so that all liens and encumbrances against the property would be released. Banana Belt and its agent did not do so and the property is still encumbered as a matter of statute by the unsatisfied assignment of the Note and Deed of Trust to First Bank.

The fundamental issue in this case: what is the proper remedy when the closing agent fails to pay the proper party and obtain a release of senior security interest? Certainly it is not to void the interest of the senior lienholder who properly recorded its interest. Rather, the proper result is to find that the lien remains valid and in full force and effect. If this causes damage to the purchaser, the purchaser has recourse with the closing agent and the title insurance company for failing to properly clear the title. It would defeat the entire statutory recording scheme if a recorded interest can be avoided in the manner suggested by Banana Belt. Thus, this Court should reverse the trial court and declare that First Bank is entitled to proceed in reliance on its recorded interest.

G. First Bank Perfected its Security Interest in the Schwab/Tuschoff Note and Deed of Trust by Filing a UCC Financing Statement with the Washington Department of Licensing and Thus Has Priority Over Banana Belt A Subsequent Purchaser. Washington law provides two ways a secured party can perfect its security interest in a promissory note either by filing or by taking possession. RCW 62A.9A-312(a) (filing) or RCW 62A.9A-313(a) (taking possession) *also see* RCW 62A.9A-102(a)(47) and (65) (defining instruments and promissory notes). The method of perfecting a security interest by filing a UCC financing statement became the law in Washington on July 1, 2001 when the legislature's adoption of the revised Article 9 became effective. 2000 Wash. Legis. Service Ch. 250 (S.S.B. 6186). The

Official Comments to RCW 62A.9A-312 recognized that perfecting by filing is a departure from the prior version of Article 9, which only allowed perfection by possession. RCW 62A.9A-312 Comment 2. On February 22, 2011 First Bank perfected its security interest that Mr. Tuschoff granted to it in the Schwab/Tuschoff Promissory Note and Deed of Trust by filing a financing statement with the Washington State Department of Licensing UCC office. RCW 62A.9A-501(a)(2); CP 99-103. The Washington State Supreme Court held that in order for an assignee of a real estate contract to have priority over subsequent lien creditors and purchasers the assignee must file pursuant Article 9 of the UCC (to protect the personal property payment stream) and record pursuant to RCW 65.08.070 (to protect the real property interests). In re Freeborn, 94 Wn.2d 336, 344, 617 P.2d 336 (1980). First Bank did both, it filed a UCC Financing Statement with the Washington Department of Licensing, (perfecting its interest in the personal property stream of payments from the Promissory Note), and recorded the Assignment with the Asotin County Auditor, (perfecting its interest in the real property).

The purpose of filing a financing statement is to give notice to the world that the parties have entered into a secured transaction. Hobart Corp. v. North Central Credit Services, Inc., 29 Wn. App. 302, 305, 628 P.2d 842 (1981). Here a free UCC lien search on the Washington State Department of Licensing's website would have also revealed Mr. Tuschoff's assignment of his interest in both the Promissory Note and Deed of Trust to First Bank. Prior to closing on a \$1,350,000 transaction, Banana Belt and/or its counsel obviously did not perform due diligence to ascertain whether the interest in the Schwab/Tuschoff Note and Deed of Trust that Mr. Tuschoff assigned to First Bank had been

satisfied. Both the UCC lien records and the property records revealed First Bank's security interest in the Schwab/Tuschoff Note and Deed of Trust. Banana Belt purchased property that was subject to liens and encumbrances and an Assignment of Deed of Trust. Additionally, Banana Belt paid off a promissory note that had been assigned and was subject to a security interest. Washington law is very clear that a perfected interest in a promissory note and deed of trust has priority over subsequent purchasers. In re Freeborn, 94 Wn.2d at 344. In granting summary judgment in favor of Banana Belt, the trial court failed to recognize First Bank's perfecting its security interest in the Promissory Note by filing as prescribed by RCW 62A.9A-312(a). First Bank had clearly perfected its security interest in the Schwab/Tuschoff Promissory Note. Banana Belt and/or its agent failed to direct payment to the secured party, First Bank. Accordingly, the Promissory Note has not been satisfied and First Bank is entitled to foreclose on the Deed of Trust.

V. CONCLUSION

The purpose of recording an assignment of a Deed of Trust is to put subsequent purchasers on notice of what entity owns the debt secured by the property. Here, Banana Belt and its agent had notice of the assignment of the deed of trust under Washington's recording statutes and the Promissory Note under UCC. The closing agent at First American Title Company admitted that she noticed the assignment at the time the Title Commitment was prepared. This notice required the reasonable, prudent title insurance company to make the appropriate inquiry to determine whether Mr. Tuschoff's assignment to First Bank had been satisfied. Neither Banana Belt nor its agents did so, thus it is not a bona fide purchaser and for this reason alone this court should

determine that the 1250 Bridge Street property is subject to the lien as First Bank did not receive a payoff. Furthermore, assignments of deeds of trust are subject to the protection of Washington's Recording Act. Quieting title in favor of Banana Belt completely ignored the Assignment recorded with the Asotin County Auditor.

In addition to recording, First Bank also perfected its security interest in the Schwab/Tuschoff Note and Deed of Trust by filing a UCC Financing Statement with the Washington Department of Licensing. Thus, First Bank had a perfected security interest in the stream of payments pursuant to RCW 62A.9A-312. Pursuant to the rule announced by the Washington State Supreme Court In re Freeborn, First Bank duly perfected its interest in both the property and the promissory note. The trial court did not follow the rule announced in the Freeborn case. In summary, this Court should declare that First Bank's security interests reflected in both the property records and the UCC lien filings have not been satisfied, therefore, it is entitled to proceed with foreclosure against the property.

RESPECTFULLY SUBMITTED this 20th day of May, 2015.

By: 
MICHAEL A. ROOZEKRANS, WSBA#25194
ERIKA BALAZS, WSBA#12952

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury that on the 20th day of May, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

<input checked="" type="checkbox"/>	HAND DELIVERY	Mr. Thomas T. Bassett
<input type="checkbox"/>	U.S. MAIL	KL Gates, LLP
<input type="checkbox"/>	OVERNIGHT MAIL	618 West Riverside Suite, 300
<input type="checkbox"/>	FAX TRANSMISSION	Spokane, WA 99201
<input type="checkbox"/>	EMAIL	

<input type="checkbox"/>	HAND DELIVERY	Mr. Donald C. Tuschoff
<input checked="" type="checkbox"/>	U.S. MAIL	101 Sleepy Hollow Drive
<input type="checkbox"/>	OVERNIGHT MAIL	Lincoln, MT 59369
<input type="checkbox"/>	FAX TRANSMISSION	
<input type="checkbox"/>	EMAIL	

DATED this 20th day of May, 2015 at Spokane, Washington.


MICHAEL A. ROOZEKRANS