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COURT OF APPEALS

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STATE OF WASHINGTON No. 32963-8-II

BY  DEPUTY COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

T.D. ESCROW SERVICE, INC. d/b/a T.D. SERVICE COMPANY,

Appellant,

v.

WILLIAM UDALL, et al.,

Respondent.

BRIEF OF RESPONDENTS

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I. STATEMENT OF THE ISSUES

Did the trial court properly conclude that the trustee-appellant cannot unwind a foreclosure sale by refusing to deliver the trustee's deed for a property to the highest bidder at the sale where (a) the trustee's own unilateral mistake caused an irregularity in price, (b) there was no procedural error in the foreclosure sale, (c) the respondent was the highest bidder at the foreclosure sale, (d) the respondent delivered a check for the bid amount to the trustee, who then negotiated the check, and (e) the respondent obtained a receipt for the payment?

Did the trial court properly quash the *lis pendens* and rule that the appellant is not responsible for attorney fees where the respondent filed an action to quiet title to real property and had a substantial justification to file the quiet title action because the appellant was attempting to sell property that the respondent asserts it did not own?

II. STATEMENT OF THE CASE

A. Prior to the Sale

Mr. William N. Udall, respondent in this action, is in the business of buying properties at non-judicial foreclosure sales in order to make repairs and upgrades to the properties with the intent of selling those properties for a profit; however, due to the risky nature of foreclosure sales, some properties are sold at a loss. (CP 75, 87). Mr. Udall began

purchasing properties from foreclosure sales around 1995 and has purchased approximately one hundred properties through the foreclosure process. (CP 75). In his 10 years in the industry, other than on April 16, 2004, Mr. Udall has never encountered a situation where a trustee refuses to deliver the trustee's deed and attempts to unwind a sale on the ground that it made a unilateral mistake when it read the opening bid and sold the property to the highest bidder at the foreclosure sale. (CP 85).

Mr. Udall subscribes to a service that provides very limited foreclosure information on all Pierce County Properties. (CP 76). The information provided is limited to the real property address, the grantor's name, the trustee's name, the trustee's phone number, and the tax assessed value of the property. (CP 76). The information does not include a copy of the title report. (CP 76). A person interested in purchasing property at a foreclosure sale must contact the trustee to obtain any additional information, including the amount of the opening bid. (CP 76).

Based on the limited information that Mr. Udall obtains from the trustee and based on experience, Mr. Udall determines whether he is going to bid on the property at the foreclosure sale. (CP 76). Generally, the day prior to the sale, Mr. Udall will call the trustee and attempt to obtain the opening bid information. (CP 76). Only if he receives the opening bid will he view the property. (CP 77). With regard to the real property at issue in

this case, Mr. Udall did not receive an opening bid prior to the date of sale, nor did he have an opportunity to view the property prior to the foreclosure sale. (CP 78).

B. The Sale

On Friday, April 16, 2004, Mr. Udall attended a non-judicial foreclosure sale at the Pierce County Courthouse and purchased the real property at issue. (CP 78). The trustee who conducted the auction on behalf of T.D. Service (successor trustee) was Donna Hayes, an employee of ABC Messenger Service (“ABC”). (CP 78). As the trustee’s agent, Ms. Hayes called the opening bid at \$59,422.19 and read the standardized script. (CP 108). Mr. Udall had no knowledge of where that number came from: he did not receive the intended opening bid the day prior to the sale, he had not seen the property, nor had he received a title search on the house. (CP 78-79). After Ms. Hayes cried the sale, Mr. Udall cast the highest bid on the property in the amount of \$59,422.20. (CP 107). This was an inherently risky decision because if Mr. Udall discovered a problem with the property, he would not have been permitted to rescind his offer to purchase. (CP 81). Rather, if the situation were reversed, the trustee would argue that the sale was final and enforceable. Pursuant to the procedural requirements, Mr. Udall tendered a check to Ms. Hayes for

\$59,422.20 on April 16, 2004, which was subsequently negotiated. (CP 112).

Ms. Hayes, acting as trustee, gave Mr. Udall a receipt for the payment, which stated "VESTING CANNOT BE ALTERED ONCE THE AUCTIONEER COMPLETES THIS RECEIPT." (CP 107).

C. After the Sale

After the sale, Mr. Udall went to Ticor Title Company to check the title on the property. (CP 82). Additionally, Mr. Udall entered the property to check the condition of both the house and the premises. (CP 82).

On April 17, 2004, Mr. Udall began making repairs on the house. (CP 82). He pressured-washed the back of the house and the deck, performed general lawn maintenance, filled nail holes in the walls, and painted portions of the exterior of the house. (CP 82). Additionally, he removed the items left in the residence and paid to dispose of the items at the county dump. (CP 82).

On April 18, 2004, Mr. Udall returned to the property to install baseboard molding in the house. (CP 82). He again returned to the property on April 19, 2004, to measure for and order a door that needed to be replaced. (CP 82). Further, he replaced light bulbs and light fixtures, reinstalled the mini-blinds, and painted the handrail in the house. (CP 83).

D. Trustee's Attempt to Unwind the Sale

On Tuesday, April 20, 2004, Mr. Udall spoke with Vanessa of T.D. Service who informed him that T.D. Service made a mistake. (CP 83). Shortly thereafter, T.D. Service sent Mr. Udall a check for \$59,422.20, the amount that he paid for the property. (CP 83). This check was never negotiated. (CP 70). Further, T.D. Service mailed Mr. Udall a letter dated April 21, 2004, indicating that it was refusing to deliver the trustee's deed for the property based on its unilateral inadequacy of price mistake. (CP 83).

III. ARGUMENT

When the trustee refuses to deliver the trustee's deed to the highest bidder at a foreclosure sale, and thus precludes the high bidder from recording the deed, RCW 61.24.050 is ambiguous. When a statute is ambiguous, it must be read in conjunction with the common law. Based on the common law of contracts, this Court must affirm the trial court's entry of summary judgment in favor of Mr. Udall and force T.D. Service to bear the risk of its unilateral mistake, as it is the party with the most knowledge and the party best able to guard against the risk of that mistake.

Further, T.D. Service asks this court to interpret the statute in a manner that permits a trustee to slip under the language of a statute, making a foreclosure sale non-final into perpetuity. T.D. Service's

reasoning is flawed, as Washington courts do not interpret statutes in a manner that leads to such absurd and fundamentally unjust results.

T.D. Service's flawed interpretation regarding the finality of foreclosure sales ignores the rulings of other courts where the courts have consistently held that a foreclosure sale is final at the moment a bid is accepted by the trustee.

T.D. Service and Mr. Udall agree that this Court should interpret RCW 61.24.050 in the manner that advances the goals behind Washington's Deed of Trust Statute. Accordingly, this Court must affirm the trial court's entry of summary judgment in favor of Mr. Udall in order to uphold the integrity of the foreclosure process by affording finality to foreclosure sales and to ensure that the foreclosure process is equitable.

T.D. Service asks this court to interpret RCW 61.24.050 in a manner that allows it to ignore its duty to deliver the trustee's deed, as imposed by the deed of trust. T.D. Service cannot ignore its duty to deliver the trustee's deed based on its unilateral mistake.

T.D. Service also asks this court to follow the analysis of California courts. California law mandates that this Court affirm the trial court's entry of summary judgment for Mr. Udall because a trustee must bear the burden of its unilateral mistake in price.

Finally, this Court must affirm the trial court's ruling that denied T.D. Service's request for attorney fees. RCW 4.28.328 does not provide for attorney fees and costs because Mr. Udall established a substantial justification for filing the *lis pendens*: the lender was attempting to resell real property to which Mr. Udall contends it did not have title.

A. RCW 61.24.050, Washington's Deed of Trust Statute, is ambiguous when a trustee refuses to deliver the trustee's deed and prevents the high bidder at a foreclosure sale from recording the deed and must be read in conjunction with the common law of contracts.

Both T.D. Service and Mr. Udall argue that RCW 61.24.050 is unambiguous regarding when a foreclosure sale is final. Where T.D. Service is wrong is in its failure to recognize that the statute is not unambiguous in all situations: it is only unambiguous under certain facts. Under the facts of this case, the statute is ambiguous.

The statute is unambiguous to the extent that it renders a sale final at the date and time that the trustee accepts a bid. RCW 61.24.050. The plain language of RCW 61.24.050 states that a foreclosure sale is final the moment the "gavel falls." "If the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within 15 days thereafter." RCW 61.24.050 (emphasis added).

Moreover, the statute is also unambiguous when the sale is completed and the trustee delivers the deed to the purchaser so that the

purchaser can record the deed. Under those facts, the statute still states that the sale was final at the date and time that the trustee accepted the bid. RCW 61.24.050.

However, under the facts of this case, the statute – or at least a portion of it - is ambiguous. RCW 61.24.050 does not contemplate the current factual situation, where the trustee refuses to deliver the deed. When the trustee refuses to deliver the deed to the highest bidder, and thus precludes the high bidder from recording the deed, the statute is murky and in limbo because, under those facts, it does not state when a sale is final. Here, T.D. Service mistakenly argues that the statute allows it to back out of the sale. T.D. Service’s interpretation of the statute is flawed and this Court should reject its interpretation.

The sale was final when the trustee accepted Mr. Udall’s bid. Delivery of the trustee’s deed was simply a ministerial act.¹ Given that recording the trustee’s deed was simply a ministerial act, at best, this statute is ambiguous under the facts of this case, in which case it must be read in conjunction with the common law of contracts. “Statutes must be construed with reference to the common law” and a court cannot presume that the “legislature intended to make any innovation to the common law

¹ The societal purpose behind recording the trustee’s deed is to give notice to bona fide parties of the sale, not to finalize a non-judicial foreclosure sale. Thus, recording the deed is a ministerial act.

without clearly manifesting such intent.” Green Mountain School District No. 103 v. R.S. Durkee, 56 Wn.2d 154, 161, 351 P.2d 525 (1960), citing Marble v. Clein, 55 Wn.2d 315, 347 P.2d 830); see also Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982) (“In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law.”); Washington Federation of State Employees v. State, 86 Wn. App. 1, 7-8, 933 P.2d 1080 (1997).

Because the statute is at least partially ambiguous, its interpretation is supplemented by the common law of contracts. The common law of contracts dictates that this Court affirm the trial court’s entry of summary judgment in favor of Mr. Udall because T.D. Service must bear the risk of its unilateral mistake, as it is the party with the most knowledge and the party best able to guard against the risk of that mistake.²

² Appellant attempts to argue that the ability to set aside a non-judicial foreclosure sale in the face of inadequacy of price comports with Washington law. The appellant fails to cite legal authority for its argument that the common law supports the requirement that delivery and recording of a deed must occur before a sale is final. Furthermore, appellant’s citation to an unpublished opinion in an attempt to establish its argument is disingenuous, at best. See Appellants Brief at footnote 4. First, an unpublished opinion has no precedential value in Washington. RCW 2.06.040. Second, citing an unpublished opinion is directly prohibited by RAP 10.4(h). Appellant’s attempt to bring an unpublished opinion to this Court’s attention and then immediately dismiss it claiming that it did so only to demonstrate that T.D. Service’s conduct was based on this unpublished opinion has the practical effect of pointing the court to an unpublished opinion that has no precedential value and is directly prohibited by the rules of appellate procedure and, to say the least, is highly inappropriate.

1. Contract law dictates that a party who makes a unilateral mistake bear the risk of that mistake.

A party who assumes the risk of a unilateral mistake when it enters into a contract loses the contractual remedy of rescission. CPL (Delaware) LLC v. Conley, 110 Wn. App. 786, 791, 40 P.3d 679 (2002); Rest.2d Contracts § 154(b) (1981). The court may allocate the risk of a mistake to a party “on the ground that it would be reasonable in the circumstances to do so.” Rest.2d Contracts § 154(c).

Here, any mistake in the sale price was a unilateral mistake on the part of T.D. Service. The alleged error in price was within T.D. Service’s control and it was responsible for it. Likewise, it was responsible for transmitting that price to its agent, ABC. If a trustee and the trustee’s agent fail to bear the risk of unilateral error in communicating the opening bid price when they set the internal procedures to communicate that bid, a low opening bid at a foreclosure sale will invariably trigger suspicion. T.D. Service’s mistake was its own fault. Under basic contract principles, it bears the risk of loss resulting from that mistake.

2. Contract law also places the risk of a mistake on the party with the most knowledge and the party best able to guard against the risk of that mistake.

T.D. Service has the most knowledge and is best able to guard against the risk. The trustee is the only party qualified to set the opening bid. (CP 57). The trustee’s agent cries the bid on behalf of the trustee at

the foreclosure sale. (CP 57). It is the trustee and its agent who establish the internal procedures for communicating the proper opening bid amount to be cried at the sale. (CP 12). If those procedures are flawed, the trustee and its agent are the only parties with the ability to correct those procedures. Further, if the trustee or its agent cries the wrong bid, the beneficiary has a cause of action for negligence against the trustee. A bidder at the sale has no recourse and if the roles were reversed and it was the bidder who made a unilateral mistake in its bid, it would be bound by the sale, just as the trustee should be bound by the sale. (CP 81).

A reasonable purchaser at the foreclosure has no reason to know that the opening bid cried by the trustee's agent was in error. A purchaser in Mr. Udall's situation would only know the assessed value. (CP 76). He or she does not know why the trustee opted to start the bidding below the assessed value. In some instances, the structure may be damaged by fire or flood, the property may be on wetlands, or it may suffer from a number of other problems. The lender may choose to underbid to gain some financial recovery on a house that is no longer worth its assessed value. In the past, Mr. Udall has obtained property through a foreclosure sale for less than the sum owing. T.D. Service is the party with the most knowledge and is the only party qualified to set its internal procedures for communicating

opening bids. Thus, under basic contract principles, it bears the risk its unilateral mistake.

B. This Court should affirm the trial court's entry of summary judgment because it is impractical to rule that a foreclosure sale is not final when the trustee refuses to deliver the trustee's deed based on the trustee's own unilateral mistake.

Appellant's "unambiguous argument" is illogical, as it would allow a trustee having made a unilateral mistake to slip under the language of the statute, making a foreclosure sale non-final into perpetuity, leading to absurd results. Washington courts will not interpret a statute in a manner that leads to such "absurd and fundamentally unjust results." Flanigan v. Dept. of Labor and Indus., 123 Wn.2d 418, 426, 869 P.2d 14 (1994).

The statutory interpretation that T.D. Service requests this court to adopt would lead to impractical results. Under the deed of trust, the lender is permitted to conduct a sale when the borrower defaults on the loan. (CP 94, 96). The deed of trust only gives the lender one right to sell the property through its power of sale provision. (CP 96). The power of sale in this case was exhausted on April 16, 2004, when all statutory notice procedures were followed and when the trustee's agent cried the opening bid and sold the property to Mr. Udall, the highest bidder at the sale. T.D. Service requests that this Court interpret RCW 61.24.050 in a manner that

would preclude foreclosure sales from being final into perpetuity and would allow a trustee to resell the property anytime it alleges that it made a unilateral mistake in price in the opening bid. This interpretation is incorrect.

Furthermore, T.D. Service should be estopped from arguing that Mr. Udall did not obtain the right to possession under RCW 61.24.050 on the ground that he failed to record the trustee's deed. It is T.D. Service who prevented Mr. Udall from completing the statutory requirement by refusing to deliver the trustee's deed, asserting its unilateral mistake in price as the sole reason it was refusing to deliver the deed. (CP 83). To allow T.D. Service to argue that a sale is not complete until it chooses to deliver the trustee's deed allows T.D. Service to freely disregard its contractual obligations and sale finality because it could always argue that a sale is not final into perpetuity and it could always argue that a purchaser has no right to possession simply by refusing to deliver the trustee's deed when, as in this case, it makes a unilateral mistake in the price.

C. This Court should affirm the trial court's entry of summary judgment in favor of Mr. Udall and hold that the foreclosure sale was completed at the moment the bid was accepted by the trustee in order to follow the rulings of other courts.

Other courts considering when a foreclosure sale was final have held that the sale was complete and final at the moment the bid was

accepted by the trustee. In Tucker v. Ameriquest Mortgage Co., 290 B.R. 134, 135 (E.D. Mo. 2003), the court denied a Chapter 13 debtor's request to set aside a pre-bankruptcy foreclosure sale because the sale was complete at the end of the auction. The court held that the sale was completed prior to the commencement of the debtor's Chapter 13 case, when the bid was accepted by the trustee and the trustee's deed was issued to the high bidder, but not yet recorded. Id. at 337. The court reasoned that "[a] foreclosure sale is complete at the end of the auction." Id. at 136-37, citing In re Brown, 75 B.R. 1009 (E.D. Pa. 1987). The court noted that a sale is final at the auction and that delivery of the trustee's deed is simply a ministerial act:

A power of sale foreclosure sale is an auction held pursuant to statute. At the auction, the acceptance of the bid by the trustee constitutes an executory contract of sale. The purchaser becomes the equitable owner of the real property and has a right to a Trustee's Deed upon the payment of the bid price to the Trustee. The delivery of the Trustee's Deed evidences the transfer. It is not the sale but the final step in the sale. The deed relates back to the contract. As between the parties, the title is considered to have vested from the time the contract was made.

Id. at 137 (emphasis added) (internal citations omitted).

Similarly, in In re Grant, 303 B.R. 205, 210 (Nev. 2003), the court held that a Chapter 13 debtor could not unwind a foreclosure sale because

the sale was final at the auction and delivery of the trustee's deed was purely ministerial:

The acceptance of a bid at an auction is signified by the fall of the hammer or by the auctioneer's announcement "sold." J. PERILLO, 1 CORBIN ON CONTRACTS § 4.14 (1993). 'After such an acceptance, the sale is consummated.' Id. A foreclosure sale is not legally complete or binding until the purchaser has actually paid the amount bid. 59A C.J.S. MORTGAGES § 641 (1998). Title is deemed to have vested from the day the bid for the property was made.

Id. at 209-210 (emphasis added).

Under the undisputed facts of this case, the sale was final and T.D. Service cannot unwind the sale on the basis of its later-discovered, unilateral mistake in price. It is undisputed that Mr. Udall paid the bid price to the trustee and that T.D. Service subsequently negotiated Mr. Udall's check. (CP 112). It is also undisputed that the trustee announced that the property was "sold" to Mr. Udall, as per the script read at the auction, and gave him a receipt for payment. (CP 107). Thus, the foreclosure sale was final at the end of the auction and cannot now be unwound by T.D. Service.

D. The court must affirm the trial court's entry of summary judgment quieting title in favor of Mr. Udall in order to uphold the integrity of the process of foreclosure sales.

The public policy underlying the comprehensive framework governing foreclosure sales is a concern for final sales in order to promote

stability, while maintaining proper notice to interested parties. This Court must affirm the trial court's entry of summary judgment in favor of Mr. Udall in order to uphold the integrity of the foreclosure process and to ensure that the foreclosure process is equitable.

1. Public policy mandates finality of foreclosure sales.

As noted in T.D. Service's brief, the Deed of Trust Act, RCW 61.24, is designed to advance three goals:

First, the non-judicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity to prevent wrongful foreclosure. Third the process should promote the stability of land titles.

Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). Put another way, the public policy underlying the comprehensive framework governing foreclosure sales is a concern for swift, inexpensive, and final sales to promote stability, while maintaining proper notice to interested parties. The purpose of the Act is not to relieve a trustee of the consequences of its own unilateral mistake. For the reasons stated below, this Court must affirm the trial court's entry of summary judgment quieting title in favor of Mr. Udall because any other result would frustrate rather than promote the policy underlying the Deed of Trust Act by adding uncertainty to the finality of foreclosure sales.

Foreclosure sales are, by nature, inherently risky. The high bidder (purchaser) at the auction has no knowledge of the true value of the property; does not know whether the property is being inhabited by the person in default; often, as in Mr. Udall's case, has never seen the property; does not know whether the sale will be invalidated by the bankruptcy court for last minute, presale bankruptcies; may inadvertently purchase a second mortgage, forcing the purchaser to suffer a substantial financial loss; and does not know the condition of the property.

Here, the alleged error in price was not a procedural irregularity. Procedural irregularities occur when proper notice is not given to interested persons pursuant to the deed of trust and/or Washington law.³ Instead, the irregularity in price was an error that was under the control of the Trustee and its agent, ABC. (CP 12). T.D. Service and ABC are solely responsible for the error. (CP 12). Unless the parties responsible for the error in price are required to assume the risk of their errors, a low opening bid at a foreclosure sale will invariably trigger suspicions about a sale's

³ The Deed of Trust provides the procedural steps that must be taken to provide notice to proper parties. It states:

If Lender invokes the power of sale, Lender shall give written notice to Trustee of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee and Lender shall take such action regarding notice of sale and shall give such notices to Borrower and to other persons as applicable law may require.

(CP 96).

finality, which will deter buyers and impair the efficacy of foreclosure sales.

2. Equity dictates that T.D. Service deliver the trustee's deed to Mr. Udall.

It is imperative that this Court affirm the trial court's entry of summary judgment quieting title in favor of Mr. Udall to uphold the integrity of foreclosure sales. As noted, there was no procedural error in the sale. All parties agree that the required notices were provided to all interested parties. This Court must affirm the trial court's entry of summary judgment quieting title in favor of an innocent bidder acting in good faith and on information provided by the trustee and its agent. Otherwise, a purchaser's confidence in the foreclosure process would be undermined. Furthermore, the purchaser would be left without any remedy. On the other hand, if the lender or beneficiary is discontent with the manner in which the sale was conducted, the lender and beneficiary always have a cause of action for negligence against the trustee or its agent. Here, T.D. Service has a claim against ABC.

If the roles were reversed, Mr. Udall could not withdraw from the sale after the "gavel fell." (CP 81). For instance, one could easily imagine Mr. Udall purchasing property where a borrower defaulted on a second mortgage and the lender exercised its power under the deed of trust to

conduct a non-judicial foreclosure sale. Proper notice was given to all interested parties. Mr. Udall was the highest bidder at the foreclosure sale, delivered a check to the trustee, which was subsequently cashed, and received a receipt that was signed by both the trustee and Mr. Udall. Mr. Udall later discovered that he purchased a second mortgage and desired to return the property to the trustee. Because Mr. Udall's mistake was unilateral, and because the sale was final at the moment the "gavel fell," the trustee enforced the sale and Mr. Udall suffered a substantial financial loss. See also In re McDuffie, 114 N.C. App. 86, 440 S.E. 2d 865 (1994) (where the court refused to allow a purchaser to undo a sale based on the purchaser's mistaken high bid).

This Court should affirm the trial court's entry of summary judgment quieting title in favor of Mr. Udall. Any other result would be highly inequitable, because not only does the foreclosure purchaser assume all the risk of his/her own mistake, but he/she would also be forced to assume the risks of mistakes caused by the trustees and their agents that he/she has no control over and cannot guard against. Mr. Udall simply requests that this court affirm the trial court's entry of summary judgment in order to balance the equities. Just as a purchaser cannot unwind a sale if he/she makes a mistake, a trustee should not be able to unwind a sale when it makes a mistake.

E. This court should affirm the trial court's entry of summary judgment in favor of Mr. Udall because the deed of trust requires that T.D. Service deliver the trustee's deed.

Section 18 of the deed of trust requires that T.D. Service sell the property to Mr. Udall because he was the highest bidder at the foreclosure sale:

After the time required by applicable law and after publication of the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines.

(CP 96, 97). Further, the deed of trust requires that T.D. Service deliver the trustee's deed to Mr. Udall: "Trustee shall deliver to purchaser the Trustee's deed conveying the Property without covenant or warranty, express or implied." (CP 97).

Here it is not alleged that there was any deficiency in the notice provided regarding the sale. Further, it is undisputed that Mr. Udall: 1) was the highest bidder at the auction; 2) delivered a check for the bid amount to the trustee, which the trustee accepted and subsequently negotiated; and 3) obtained a receipt from the trustee for his payment. T.D. Service simply made a unilateral mistake and now asks this Court to unwind the sale. Under the undisputed facts, this Court should affirm the trial court's entry of summary judgment in favor of Mr. Udall and force

T.D. Service to comply with its contractual obligations and deliver the trustee's deed to Mr. Udall, as the deed of trust states that the sale was final when the "gavel fell" at the public auction.

Moreover, the trustee gave Mr. Udall a receipt for payment on April 16, 2004, when it sold the property to Mr. Udall at the conclusion of the public auction. The receipt was signed by both the trustee's agent, ABC, and Mr. Udall and stated that "VESTING CANNOT BE ALTERED ONCE THE AUCTIONEER COMPLETES THIS RECEIPT." (CP 107).

F. A California court deciding identical facts has mandated that the trustee deliver the bid to the highest bidder at the foreclosure sale.

The California courts would affirm the trial court's entry of summary judgment in favor of Mr. Udall, and force T.D. Service to bear the burden of its unilateral mistake.⁴ In 6 Angels, Inc v. Stuart-Wright Mortgage, Inc., 85 Cal. App. 4th 1279, 1288, 102 Cal. Rptr. 2d 711 (2001), a California court ruled in the high bidder's favor under virtually identical facts. There, 6 Angels successfully bid \$10,000.01 on a piece of

⁴ Appellants would have this court believe that there is a circuit split in California. Appellant's attempt to argue that Residential Capital v. Cal-Western Reconveyance, 108 Cal. App. 4th 807, 134 Cal. Rptr. 2d 162 (2003) is more similar to the case at bar and that court rejected the reasoning of 6 Angels is patently false. In Residential Capital, there was a procedural defect in the sale as the trustee told the beneficiary that the sale would be postponed, thus the notice requirement was not followed. 108 Cal. App. 4th at 820-821 (2003). The court stated, "if there is a defect in procedure which is discovered after the bid is accepted, but prior to delivery of the trustee's deed, the trustee may abort the sale to a bona fide purchaser...." Id. In Mr. Udall's case, it is undisputed that there was no procedural error and all parties received proper notice. The only error in this case was

real property offered for \$10,000.00 at a foreclosure sale. Id. at 1282. The Appellant, DMI, refused to transfer the trustee's deed to 6 Angels, contending that the property should have been offered at \$100,000. Id. The trial court granted summary judgment on 6 Angels' claim to quiet title and judgment was subsequently entered in favor of 6 Angels. Id. at 1282-83. DMI appealed and the court of appeals affirmed. Id. at 1283.

The court found in favor of 6 Angels for the following reasons: 1) mere inadequacy of price, absent some procedural irregularity that contributed to the inadequacy of price or otherwise injured the trustor, is insufficient to set aside a non-judicial foreclosure sale, Id. at 1284; 2) the error was wholly under DMI's control and arose solely from DMI's own negligence and the error was not procedural, Id. at 1285; 3) the public policy underlying the statutory framework governing California's foreclosure sales was intended to promote swift, efficient, and final sales and any other result would add uncertainty to the finality of foreclosure sales, Id. at 1287; and 4) rescission of contract on the basis of a unilateral mistake is unavailable to a party who assumed the risk of mistake in entering into the contract. Id.

T.D. Service's and/or its agent's unilateral mistake in price, which mirrors the facts in 6 Angels, not Residential Capital.

Under California's analysis of this issue, the Court must find in favor of Mr. Udall. All parties agree that proper notice was given to interested parties; thus, there was no procedural irregularity in the foreclosure sale that would give the trustee a reason to unwind the sale. Further, the error in this case was wholly under T.D. Service's control, as it set the internal procedures to communicate the opening bid to the trustee. Moreover, the mistake was unilaterally made by T.D. Service: it should bear the burden of its mistake, not Mr. Udall. Finally, allowing a trustee to refuse to deliver a trustee's deed every time that it makes a mistake would add uncertainty to the finality of foreclosure sales because a low opening bid would invariably trigger suspicions about a sale's finality.

G. This Court should affirm the trial court's decision that denied T.D. Service's request for attorney fees because RCW 4.28.328, Washington's *lis pendens* statute, does not provide for attorney fees under these facts.

This Court should affirm the trial court's decision denying T.D. Service's request for attorney fees because RCW 4.28.328, Washington's *lis pendens* statute, does not provide for attorney fees and costs under the facts of the present case. RCW 4.28.328 only provides for attorney fees and costs when a party files a claim for *lis pendens* in an action that does not affect title to real property or when the claimant fails to establish a

substantial justification for filing the *lis pendens*. RCW 4.28.328 (2)(3). Here, this Court should affirm the trial court's decision to deny T.D. Service's request for attorney fees for three reasons. First, a quiet title action, by nature, affects title to real property; thus, RCW 4.28.328(2) does not provide for attorney fees and costs. Second, Mr. Udall established a substantial justification for filing the *lis pendens*: the lender was attempting to resell real property to which Mr. Udall contended it did not have title. Third, the trial court clearly agreed that Mr. Udall had substantial justification for filing the *lis pendens* otherwise it would not have entered summary judgment in favor of Mr. Udall.

IV. CONCLUSION

This Court should affirm the trial court's entry of summary judgment in favor of Mr. Udall. The law should comport with common sense. Here, one party followed all the procedural requirements to purchase property at a foreclosure sale. Another party made a unilateral mistake in price and that mistake was solely under that party's control. This Court should not permit the party making the unilateral mistake to avoid its obligation to deliver the trustee's deed, nor should it permit trustees to upset the finality of foreclosure sales any time that it makes a unilateral error in price.

For the reasons set out above, Mr. Udall respectfully requests that the Court affirm the trial court's order quieting title in favor of Mr. Udall.

Submitted this 28th day of July, 2002.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

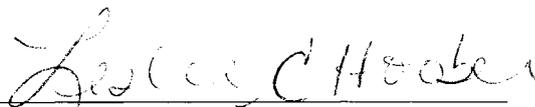
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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2005, I caused a copy of this Brief of Respondents to be delivered to counsel for the Appellant by ABC-Legal Messengers, Inc. at his office address as follows:

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