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NO. 664204

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

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**BOEING EMPLOYEES' CREDIT UNION,**  
Appellant,

v.

**RUSS E. BURNS AND SUZANNE K. BURNS,**  
husband and wife,  
Respondents.

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APPEAL FROM THE KING COUNTY SUPERIOR COURT  
Case No.: 10-2-33837-3SEA  
Honorable Eric Watness

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

In their brief (the “Opposition”), Respondents Russ E. Burns and Suzanne K. Burns (together, “Burns”) note that there are consensual liens, such as deeds of trust, and nonconsensual liens, such as judgment liens. (Opposition at 4.) Then, Burns asks the following question:

[W]hat happens to the lien priority of a deed of trust holder, who elects to sue on the promissory note, and obtain a civil judgment? Does that lienholder retain the priority of a deed of trust holder, or does that lienholder lower its priority to that of a judgment-lien creditor...

(Opposition at 5.) Under Washington law, a lien secures an obligation. Burns’ obligation to repay BECU remained in place when BECU was unable to collect on its judgment. And the Washington Supreme Court allows the holder of a judgment to enforce its separate consensual lien, if the holder is unable to satisfy the judgment. *See American Fed. Sav. & Loan Ass’n v. McCaffrey*, 107 Wn.2d 181, 728 P.2d 155 (1986). Thus, the answer to Burns’ question is clear: BECU retained its consensual lien priority, and is entitled to recover the surplus funds previously released to Burns.

## II. ARGUMENT

Burns concedes he executed a promissory note in favor of BECU and that the underlying “loan was secured by a deed of trust.” (Opposition at 7.) But Burns incorrectly implies that “[a]t the time of the trustee’s sale, BECU held a judgment lien” (emphasis original)

and nothing more. (*Id.*) To the contrary, BECU also retained the consensual lien created by the deed of trust Burns granted in favor of BECU. Nothing in either the record or Washington law suggests otherwise.

**A. De Novo Review Is Appropriate**

Burns is mistaken when he argues the applicable standard is abuse of discretion. He cites *Wilson v. Henkle*, 45 Wn.App. 162, 724 P.2d 1069 (1986), which addressed the correction of clerical mistakes in a Superior Court judgment pursuant to a CR 60 motion. *Id.* (Opposition at 8.)

*Wilson* is inapposite here. BECU did not file a CR 60 motion. This appeal concerns the Superior Court's interpretation of a Washington statute – RCW § 61.24.100(2). Accordingly, the *de novo* standard of review applies. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 144, 451, 210 P.3d 297 (2009)(citing *City of Seattle v. Burlington N. R.R.*, 145 Wn.2d 661, 665, 41 P.3d 1169 (2002)).

**B. BECU Retained Its Consensual Lien Priority**

BECU and Burns agree that the interest of a junior consensual lienholder (in this case, BECU) normally takes precedence over the homeowner's homestead interest. (Opposition at 9.) But Burns mistakenly argues that BECU may not claim the surplus funds from Wells Fargo's trustee sale, because "BECU converted its secured

interest (deed of trust) into a judgment by suing on the promissory note.” (*Id.*) Burns argues that “at the time of the foreclosure [by Wells Fargo], BECU held a judgment lien, not a deed of trust.” (*Id.* at 9-10.)

Burns conflates BECU’s promissory note with Burns’ obligation to repay BECU. Burns’ obligation is secured by the consensual lien granted by the deed of trust. Regardless of whether Burns’ promissory note was merged with the judgment, the obligation remains. And the consensual lien that secures the obligation did not merge with the judgment that arose from BECU’s lawsuit on the promissory note.

Burns is wrong. The Washington Supreme Court, as well as RCW Chapter 61.24, indicate that BECU’s consensual lien was additional to its nonconsensual judgment lien. *See Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 548 (2007). Regardless of the disposition of BECU’s promissory note, BECU is entitled to maintain the consensual lien priority created by its deed of trust to collect the surplus funds previously released to Burns.

**1. The Judgment Did Not Extinguish the Obligation Secured by the Consensual Lien.**

Under Washington law, a lien secures an obligation, not a note:

Beal Bank asks us to rule that a nonjudicial foreclosure does not extinguish a junior nonforeclosing party's

right to sue on the independent obligation of the debtors...

We turn to the plain language of the relevant portion of RCW 61.24.100 and find the right of nonforeclosing junior lienholders and creditors is simply not implicated. To accept the Sariches' argument would render a result whereby all liens attached to security would be automatically extinguished upon foreclosure. We find nothing in the statutory scheme supporting this conclusion. *While foreclosure eliminates the security of a junior lienholder, the debts and obligations owed to that nonforeclosing junior lienholder are not affected by foreclosure under the statutes.*

*Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 548 (2007) (emphasis added); *see also In re Marriage of Young*, 44 Wn. App. 533, 534, 723 P.2d 12 (1986) (referring to "a lien imposed to secure an obligation due at a future date"). As the *Beal* court held, the plain language of RCW § 61.24.100(2) indicates that the *obligations* a debtor owes a junior lienholder are not extinguished upon foreclosure by a senior foreclosing lienor.

Burns' Opposition ignores this critical point. He cites *Bradley Engineering & Machinery Co. v. Muzzy*, 54 Wash. 227, 103 P. 37 (1909) in support of the argument that "a suit on the promissory note waives the underlying security." (Opposition at 10.) Burns' citation of *Bradley* is misleading.

*Bradley* was based on a chattel mortgage statute (Section 2 of the act of March 8, 1899, Laws of 1899, p. 85) that no longer exists and was replaced by other statutes. (See RCW Chapter 61.12.) Burns failed to inform this Court that his cited portion of *Bradley* is a

verbatim but out-of-context quote from the repealed 1899 anti-deficiency statute—not a case interpreting existing real estate mortgage law. The sentence *before* the portion of the statute Burns cites is:

The judgment creditor may also obtain from the clerk of the court execution or executions in the ordinary form for such deficiency: *Provided*, That in case of mortgage foreclosure where the mortgage contains a stipulation that no deficiency judgment shall be taken against the mortgagor, but that the mortgagee shall look to the mortgaged premises for satisfaction of his claim, no deficiency judgment shall be allowed.

*Bradley*, 54 Wash. at 231 (emphasis original) (citing Section 2 of the act of March 8, 1899, Laws of 1899, p. 85). In *Bradley*, the defendant gave the plaintiff “a chattel mortgage on certain personal property.” *Id.* at 228. “The notes and mortgage contained no agreement for a deficiency judgment in case of foreclosure.” *Id.*

The Washington Supreme Court reviewed the cited statute and noted that “[i]t authorizes a deficiency judgment when stipulated for in the mortgage, it denies a deficiency judgment when stipulated against in the mortgage, but where the mortgage is silent that statute is also silent.” *Bradley*, 54 Wash. at 231. The court concluded that when the “mortgage is silent”, the creditor “was entitled to its deficiency judgment.” *Id.* at 235. The *Bradley* court determined the underlying security was waived because the lawsuit at issue was an end run around the anti-deficiency laws in place at the time. *Id.* at 235-36. *Bradley* is inapplicable to this case.

Burns' discussion of *Sullins v. Sullins*, 65 Wn.2d 283, 396 P.2d 886 (1964) is similarly misleading. In *Sullins*, a divorce lawyer (Potts) voluntarily released his attorneys' lien on certain real estate. *Id.* at 284. As Burns notes, the Washington Supreme Court subsequently held that "[t]he waiver of the lien does not extinguish the debt. He may elect to abandon the security and sue upon the debt alone." *Id.* at 285 (cited in Opposition at 11).

*Sullins* dealt with a voluntary decision to allow collateralized property to be sold free and clear of the lien Potts waived. BECU made no such decision. Yet Burns argues that when BECU obtained a judgment, it made an "election of remedies" and "waived its deed of trust." (Opposition at 11.) But unlike Potts, BECU did not abandon anything. It merely sued to recover the debt Burns owed while the underlying Promissory Note was still secured by the Deed of Trust on Burns' Property.

Burns has cited no authority indicating that the obligation secured by the consensual lien he granted to BECU was ever satisfied. That obligation remains. The superior court erred by awarding surplus funds to Burns even though Burns' obligation to repay BECU – secured by the consensual lien Burns granted when Burns made BECU the beneficiary on the deed of trust – was never satisfied.

**2. The Consensual Lien Secured Burns' Obligation to Repay BECU.**

Burns cites *Petri v. Nanny*, 99 Wash. 601, 170 P. 127 (1919) for the proposition that “[w]hen a judgment is obtained on a note... the... note is thereby extinguished and merged in the judgment.” (Opposition at 12.) But Burns cites no authority indicating that an obligation secured by a consensual lien is extinguished prior to the satisfaction of that obligation. There is no such authority.

The Washington Supreme Court allows the holder of a judgment to enforce a separate consensual lien, if the holder is unable to satisfy the judgment:

The mortgagee may sue and obtain a judgment upon the notes and enforce it by levy upon any property of the debtor. *If the judgment is not satisfied in this manner, the mortgagee still can foreclose on the mortgaged property to collect the balance.*

*American Fed. Sav. & Loan Ass'n v. McCaffrey*, 107 Wn.2d 181, 189-90, 728 P.2d 155 (1986)(emphasis added). *McCaffrey* clearly allows a creditor to enforce a consensual lien when the creditor cannot collect on its judgment. *See also Beal*, 161 Wn.2d at 548 (RCW § 61.24.100(2) provides that the obligations a debtor owes a junior lienholder are not extinguished upon foreclosure).

Burns is attempting to prevent BECU from collecting money Burns agreed to repay, based on an argument that emphasizes form over substance. But even the cases cited in Burns' Opposition support BECU's position. *See, e.g., Caine & Weiner v. Barker*, 42

Wn.App 835, 837, 713 P.2d 1133 (1990) (*cited in Woodcraft Construction, Inc. v. Hamilton*, 56 Wn.App. 885, 786 P.2d 307 (1990)) (Opposition at 12). *Caine* noted that the merger rule was based in part on the need to prevent “vexatious re-litigation”, and emphasized that “despite the general rule... the doctrine is designed to promote justice and should not be carried further than that end requires.” *Id.*

Burns’ Opposition promotes injustice by claiming a debtor’s previously-granted consensual lien is erased when the creditor obtains a judgment upon which it cannot collect. This is the opposite of what the Supreme Court decided in *McCaffrey*. This Court should reverse the Superior Court and allow BECU to recover the surplus funds that were wrongly disbursed to Burns.

**3. RCW 61.24.100 Permits BECU to Recover on the Basis of Its Consensual Lien.**

Burns claims BECU is attempting to “have its cake and eat it too” when BECU contends a lender may enforce a consensual lien, if it is unable to collect on its separate judgment. (Opposition at 13.) But BECU’s position is supported by *McCaffrey*, 107 Wn.2d at 189-90 (“If the judgment is not satisfied ... the mortgagee still can foreclose on the mortgaged property to collect the balance”) and *Beal*, 161 Wn.2d at 548 (“While foreclosure eliminates the security of a junior lienholder, the debts and obligations owed to that nonforeclosing junior lienholder are not affected by foreclosure

under the statutes.”) Burns selectively cites *Beal* (Opposition at 14), ignoring that court’s affirmation that an obligation to a creditor – such as Burns’ obligation to BECU – is not affected by foreclosure.

Burns also overlooks the fact that Wells Fargo – not BECU – foreclosed on Burns’ Property. *Beal* indicated that such a decision by a senior lienholder “does not preclude a junior lienholder... from seeking its legal recourse.” *Beal*, 161 Wn.2d at 558. This is precisely what BECU is doing – seeking to collect surplus funds after Wells Fargo initiated a trustee’s sale of the Property. The *Beal* court specifically held as follows:

[T]he nonjudicial foreclosure of a senior lienholder’s deed of trust under RCW 61.24.100(1)... does not preclude an action by a nonforeclosing holder of a junior deed of trust to recover on a debt secured by a junior deed of trust on the same property.

*Id.*

*Beal* plainly allows BECU to recover on the debt secured by the consensual lien Burns previously granted to BECU. Burns’ argument to the contrary ignores *Beal* as well as *McCaffrey* (“If the judgment is not satisfied ... the mortgagee still can foreclose on the mortgaged property to collect the balance”, 107 Wn.2d at 189-90). The *McCaffrey* court specifically held the mortgagee could collect the balance of the debt after a “judgment”. *Id.* Burns’ argument to the contrary is illogical and unsupported by any authority. (Opposition at 15.)

Burns also suggests, misleadingly, that BECU is attempting to “simultaneously obtain legal remedies (civil judgment) and equitable remedies (foreclosure).” (Opposition at 15.) This is not true – and as the above cases indicate, Washington law permits the *sequential* (not simultaneous) pursuit of legal and equitable remedies, provided there is no double recovery. Washington law wisely restricts a creditor to one type of action *at a time*. *See, e.g.*, RCW § 61.24.030(4) (preventing a trustee’s sale from going forward when there is a simultaneous lawsuit “pending to seek satisfaction of an obligation secured by the deed of trust”); *see also* RCW § 61.24.100(2), which provides:

2(a) Nothing in this chapter precludes an action against any person liable on the obligations secured by a deed of trust or any guarantor prior to a notice of trustee’s sale being given pursuant to this chapter or after the discontinuance of the trustee’s sale.

(b) No action under (a) of this subsection precludes the beneficiary from commencing a judicial foreclosure or trustee’s sale under the deed of trust after the completion or dismissal of that action.

*Id.* This statute emphasizes that the debtor’s liability stems from “obligations” secured by a deed, not from the deed itself. *McCaffrey, Beal*, and the plain language of RCW § 61.24.100 all indicate that BECU may obtain the surplus funds from Wells Fargo’s trustee’s sale, since BECU was unable to collect on its judgment.

**C. BECU'S Claim Is Not Subject to Burns' Homestead Exemption.**

Burns cites *In re the Trustee's Sale of the Real Property of Michael Sweet*, 88 Wn.App. 199, 202, 944 P.2d 414 (1997), arguing that the value of a creditor's lien is limited by the value of the debtor's property in excess of the homestead exemption. (Opposition at 16.) In its opening brief, BECU provided an extensive analysis of *Household Fin. Indus. Loan Co. v. Upton*, 102 Wn.App. 220, 6 P.3d 1231 (2000), which distinguished *Sweet*. The *Upton* court held that "an execution in satisfaction of a judgment obtained on a debt secured by a deed of trust is specifically excepted from the homestead exemption... *Sweet* does not apply." *Upton*, 102 Wn.App. at 225-26. As the *Upton* court noted, RCW § 6.13.080 provides, in relevant part, as follows:

*The homestead exemption is not available against an execution or forced sale in satisfaction of judgments obtained:*

(2) *On debts secured* (a) by security agreements describing as collateral the property that is claimed as a homestead or (b) *by mortgages or deeds of trust* on the premises that have been executed and acknowledged by both spouses...

*Id.* (emphasis added; cited in *Upton*, 102 Wn.App. at 223). BECU obtained a judgment against Burns based on a debt secured by a deed of trust. Accordingly, the homestead exemption is not available against BECU. And, as the *Upton* court emphasized,

[T]he homestead act provides that the homestead exemption is not available against an execution in satisfaction of judgments obtained on debts secured by deeds of trust. RCW 6.13.080. This provision does not distinguish between first and second deeds of trust. The provision does not require that a deed of trust beneficiary must satisfy the debt through a foreclosure sale in order to take priority over a homestead interest.

*Upton*, 102 Wn.App. at 224.

Burns admits that BECU is entitled to priority if it has a consensual lien (which BECU does). (Opposition at 9: “BECU’s consensual lien (deed of trust) would normally have priority over the Burns’ claim (homestead).”) But Burns argues incorrectly that BECU’s consensual lien was converted into a judgment lien, which (Burns argues) prevents BECU from obtaining the surplus funds from Wells Fargo’s trustee’s sale. Burns is wrong. *Upton* indicates that a debtor’s homestead exemption does not take priority to surplus funds over a subordinate deed of trust beneficiary. *Upton*, 102 Wn.App. at 225-26. Accordingly, *Sweet* does not apply, and BECU (not Burns) is entitled to priority with respect to the surplus funds.

### III. CONCLUSION

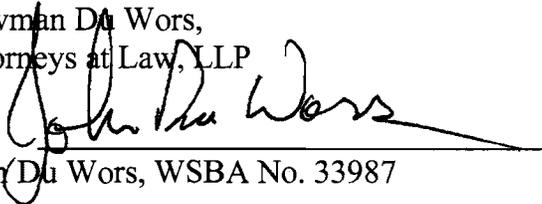
Burns borrowed money from BECU and did not repay it. Burns still has an obligation to repay BECU. This obligation – secured by a consensual lien Burns granted when Burns made BECU the beneficiary on the deed of trust – was not extinguished when BECU obtained a judgment against Burns. Indeed, the Washington

Supreme Court as well as the plain language of RCW § 61.24.100 all provide that since BECU did not recover on its judgment, it may now obtain the surplus funds from Wells Fargo's trustee's sale. BECU respectfully requests this Court reverse the decision of the King County Superior Court, vacate the Order, and declare that BECU is entitled to recover the surplus funds.

DATED this 8th day of June, 2011.

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