

71458-9-I

THE COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON

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THE HEIRS OR DEVISEES OF ALAN E. JAMES, DECEASED, BY  
AND THROUGH CAROLANNE STEINBACH, PERSONAL  
REPRESENTATIVE, *Appellant (s)*,

v.

BANK OF AMERICA, *Respondent*.

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REPLY BRIEF OF APPELLANT(S)

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## APPELLANT'S REPLY

### 1. DEFENSES RAISED FOR THE FIRST TIME ON APPEAL SHOULD NOT BE CONSIDERED

Respondents' brief raises a number of defenses for the first time on this appeal and this court should not consider these untimely raised arguments. Generally, appellate court will not entertain issues raised for the first time on appeal pursuant to RAP 2.5(a); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008); In re Application by Rapid Settlements, Ltd., 166 Wn. App. 683, 695, 271 P.3d 925 (2012); *see also* RAP 9.12.

“A defendant waives the right to assert an affirmative defense if he or she fails to raise the defense at the trial court.” City of Seattle v. Lewis, 70 Wn. App. 715, 718-19, 855 P.2d 327 (1993).

In the instant case, the respondent never argued that Bank of America's (“BANA”) deed of trust was properly perfected. *See*, BANA's Cross Motion for Disbursement, CP 192-201.

BANA's argument focused solely on the fact of whether or not the deed of trust in question was void or voidable and whether the Estate was able to assert a homestead exemption with respect to BANA's deed of trust. As such, the court should limit its review to the defenses raised at the trial court level instead of these issues raised for the first time on this appeal, especially in light of the fact that the record on appeal does not contain

sufficient credible evidence to allow for the proper factual inquiry (and attendant responses and objections) necessary to correctly reach findings of fact on appeal.

## **2. BANA'S DEED OF TRUST IS IMPERFECT AND VOID**

BANA's argument that a duty rested with Dorathy James to take the affirmative step to void the transaction is disingenuous. The deed of trust was signed 40 days before Mrs. James' death. However, the deed of trust was not recorded until 10 months after it was signed and 9 months after Mrs. James death. Additionally, the deed of trust was recorded before probate proceedings were concluded and therefor Mr. James was unable to transfer the property to himself using a personal representative's deed. Accordingly, Mrs. James was never able to affirmatively void the deed of trust as she never signed it, died before it was recorded, and probably never even knew of its existence. This is precisely the situation that the legislature was trying to avoid by requiring both spouses to sign a deed of trust. *See*, RCW 26.16.

What is more, the deed of trust was recorded before Mr. James was the sole owner of the property and during the pendency of the probate proceedings. As such, no one had any notice of the existence of this deed of trust until after probate proceedings were commenced.

BANA tries to confuse this court with the issue of an improperly executed deed of trust by focusing its discussion on a red herring of a void vs. voidable transaction. However, the community property statute clearly

requires that both spouses join the execution of the document. The deed of trust remains imperfect and should not encumber the property. As such, BANA may have an unliquidated claim (unsecured) against the Estate of Alan James; however, BANA does not have a valid deed of trust that was discharged by operation of the foreclosure sale.

The mere recording of the deed of trust does not make it a perfected deed. This rule is perfectly described in the case of Fidelity & Dep. Co. v. Ticor Title Ins., 88 Wn. App. 64 (Wash. Ct. App. 1997). “The recording statute cannot make valid the invalid note Home Federal/Fidelity received. Stated another way, the mere recording of an instrument cannot create legal obligations to pay where none existed before.” Fidelity & Dep. Co., 88 Wn. App. at 69 (1997).

Similarly, whether the deed was void or voidable is immaterial. The question at hand is whether BANA’s imperfect deed of trust was a valid lien at the time of the foreclosure. The mere act of recording the instrument does not create a valid lien. *Id.* As such, the failure to join Mrs. James in the signing of the deed of trust results in the deed being void under RCW 26.16 and RCW 6.13. Consequently, BANA did not have a valid, enforceable lien at the time of the foreclosure, and thus are not a proper claimant under RCW 61.24.080(3).

These two statutes clearly state that community property can only be encumbered if both spouses join in its execution. *See*, RCW 26.16 and

RCW 6.13. BANA's reliance on the 1951 Stabbert case that espouses a superseded version of the community property statute is misplaced. *See, Stabbert v. Atlas Imperial Diesel Engine Co.*, 39 Wash. 2d 789, 238 P.2d 1212 (1951). Similarly, Taylor Distributing is merely one of the subsequent interpretations of the void vs voidable debate. Taylor Distributing Co., Inc. v. Haines, 31 Wn. App 360, 641 P.2d 1204 (1982). In fact, this court held that lack of joinder results in a **void** instrument.

Because the court's finding that the husband owed a debt to his sister is inconsistent with the determination that he did not borrow money from her, **we uphold the court's determination that the transaction was void on the alternate theory that it was void for lack of joinder**. *See, LaMon v. Butler*, 112 Wash. 2d 193, 200-01, 770 P.2d 1027 (1989)

In re Marriage of Smith, 86 Wn. App. 1002. (Wash. Ct. App. May 12, 1997) (emphasis added).

Finally, the respondent raises the issues of merger and after-acquired property for the first time on this appeal. *See supra*. The doctrine of merger is generally disfavored by the law and requires a clear manifestation of the parties' intent in order to apply. "The doctrine of merger has been highly disfavored in Washington since at least 1922. *See generally, Beecher v. Thompson*, 120 Wash. 520, 524, 207 P. 1056 (1922); In re Tr.'s Sale of the Real Prop. of John W. Ball, 179 Wn. App. 559, 564 (Wash. Ct. App. 2014).

Similarly, Respondent's argument regarding after-acquired property is fraught with issues. The respondent relies on RCW 64.04.070 for the proposition that somehow Mr. James "after-acquired" the property in

question. However, one of the statutory prerequisites is that the person gaining title to a given tract of land would inure to benefit of those coming after him and this doctrine requires that that person gaining such title had no interest in the land beforehand. RCW 64.04.070 provides that:

Whenever any person or persons having sold and conveyed by deed any lands in this state, and **who, at the time of such conveyance, had no title to such land**, and any person or persons who may hereafter sell and convey by deed any lands in this state, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a title to such lands so sold and conveyed, such title shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered, and to his or her and their heirs and assigns forever. And the title to such land so sold and conveyed shall pass to and vest in the conveyee or conveyees of such lands and to his or her or their heirs and assigns, and shall thereafter run with such land.

RCW 64.04.070 *emphasis added*. BANA is somehow attempting to stretch “and who shall not at the time of such sale and conveyance have title to such land” into acquiring sole ownership of such land. In other words, the doctrine of after-acquired title cannot apply as Mr. James already had an interest in the land. In addition, this statute is specifically meant to apply to the acquisition of “title” to property, rather the perfection of liens or the conveyance of encumbrances. *Id.*

## **B. CONCLUSION**

The respondent in this case recognizes that they are challenged by the fact that they are asking this court to directly rule in opposition to clear

statutory authority. *See*, RCW 26.16. The statutory requirements of RCW 26.16 are simple and lack any technical complexity. As such, the respondent has attempted to confuse this court with a myriad of novel theories, most of which have been superseded by statute and are simply inapplicable to the case at hand. Fundamentally, BANA is hoping that one of these theories will result in an equitable ruling in their favor (which is what took place at the trial court level); however, this court must recognize that ruling in such a way risks upsetting well settled statutory prerequisites for community property in Washington State.

While the appellant recognizes that the application of RCW 61.24.080(3) in relation to RCW 26.16 and RCW 6.13 in this case, might be technical in nature, and their proper application might result in an outcome that may not seem fair to BANA, the fact is that BANA is an extremely sophisticated party. The defects in BANA's position are their own fault. BANA was in the best position to fix the problems with their purported lien, and having failed to do so, only have themselves to blame. Any result in favor of BANA in this case, dulls the statutory prerequisites for perfecting a deed of trust in Washington State and counters decades of well settled statutory authority for community property. This court should strictly apply the technical requirements of RCW 26.16, and thus find that the BANA deed of trust was not perfected. Without a perfected lien, BANA lacks an interest that was eliminated by the operation of the trustee's sale

(foreclosure), and therefore is not a proper claimant under RCW 61.24.080(3). Any other result would have serious unforeseen consequences for the state of the law in Washington State.

Dated this 19<sup>th</sup> day of March, 2015

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