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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DANIEL PASHNIAK

Appellant/Cross-Respondent,

v.

SIXTY-01 ASSOCIATION OF APARTMENT OWNERS,

Respondent/Cross-Appellant.

BRIEF OF CROSS-RESPONDENT AND REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This brief consists of two discrete parts. The first is Daniel Pashniak's Response to the Cross-Appeal of Sixty-01 Association of Apartment Owners (the "Association"). Pashniak argues that this Court should affirm the decision of the trial court below, Judge Ronald Kessler, which denied the Association's motion to confirm a Sheriff's sale, vacated the sale and directed return to Pashniak of his bid money.

The second part is Pashniak's Reply Brief in support of his own appeal. In other words, the Reply Brief urges, as did Pashniak's opening Brief, that this Court reverse the decisions of the trial court, Judge Laura Inveen, confirming the other sale and denying Pashniak's CR 60(b) motion.

II. RESPONSE TO BRIEF OF CROSS-APPELLANT

A. Response to Assignment of Error.

1. Assignment of Error.

Cross-Appellant assigns a single error: that the trial court, Judge Kessler, erred in entering the Order Vacating the Sheriff's Sale on July 23, 2012 in the *Mallarino* case.

Cross-Respondent submits that the Order Vacating the Sheriff's Sale was well within the trial court's discretion.

2. Restatement of Issues Assigned By Cross-Appellant.

a. Does the sheriff sale confirmation statute, RCW 6.21.110, and the public policy of this State require that a creditor is entitled to an order confirming the sale once the Sheriff accepts a bid? No.

b. Can a trial court employ equitable powers to refuse to confirm a Sheriff's sale, where there is a significant disparity between value and price and irregularities occurred in the proceedings concerning the sale? Yes.

c. Can a trial court deny confirmation and vacate a Sheriff's sale where the creditor asserts that the objection was not timely filed, but has previously admitted that objection was timely filed, and the issue of timeliness was raised for the first time on appeal? Yes.

d. Does the decision of a trial court pursuant to its statutorily mandated duty to confirm or set aside a Sheriff's Sale improperly harm or threaten the stability of land titles? No.

B. Counterstatement of the Case.

Unlike the Association's Consolidated Statement of the Case, Pashniak will here address the facts of the *Mallarino* case decided by Judge Kessler, and discuss the *Parsons* case later in this brief.

Many of the facts recited in Cross-Appellant's Brief are undisputed. With regard to the defaults by defendant Mallarino in the

payment of her condominium dues, Pashniak has no information which would contradict the Association, and no reason to do so. However, beginning at page 6 of the Association's brief, Pashniak must take issue with a number of factual representations made by the Association.

The Association asserts that when it sued Mallarino to foreclose its lien for unpaid dues, the Association "was not seeking to extinguish any deed of trust that may be encumbering the Unit" (p. 7, Brief of Respondent/Cross-Appellant). This assertion is belied by the Association's own pleadings. The Amended Complaint against Ms. Mallarino (CP-A 13-21) includes in its caption as defendants not only Ms. Mallarino but also "all other persons or parties unknown claiming any right, title, estate, lien, or interest in real estate. . . ." (CP-A 13). This description of defendants would certainly include any lender with a mortgage or deed of trust recorded against the condominium unit. In its Prayer for Relief, ¶ 9, the Association asks that

> . . . the rights of them, and all persons claiming by, through or under them, be adjudged inferior and subordinate to the Association's lien and be forever foreclosed except for the statutory right of redemption allowed by law.

CP-A 19-20 (emphasis added). Given this broad prayer for relief, it is difficult to credit the Association's description of a narrow lawsuit seeking only to foreclose Ms. Mallarino.

The apparent intention of the Association to foreclose all other claims and liens follows from the Amended Complaint through to the default judgment. On November 3, 2011, the Association presented the Order of Default and Default Judgment (CP-A 122-128) in the Ex Parte Department of the King County Superior Court and the Order was entered. In the judgment summary, the judgment debtors are described to include "all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate. . . . (CP-A 123). The Order includes a Decree of Foreclosure against the interest of "all other persons or parties unknown claiming any right, title, estate, lien, or interest." (CP-A 125.) Finally, on page 5, the Order includes this sweeping foreclosure language:

> ORDERED, ADJUDGED and DECREED that all right, title, claim, lien, estate or interest of the Foreclosed Defendants, each and all of them, and of all persons claiming by, through, or under them, in and to the Property or any part thereof is inferior and subordinate to Plaintiff's lien and is hereby foreclosed;

CP-A 126.

In light of this fulsome language of wholesale foreclosure it is difficult to accept the Association's factual assertion that it did not seek to extinguish any deed of trust which encumbered the property. Even if it did not serve its Complaint on Bank of America, the Order of Default and Default Judgment entered by the Association appears on its face to

foreclose any secured lender. That order became a public record when it was filed.

It is clear that Bank of America was concerned by the broad language foreclosing all liens in the Association's order. As the Association admits on page 8 of its Brief, the Lane Powell law firm contacted the Association shortly before the scheduled Sheriff's sale, "demanding" that a stipulated order be entered declaring that the Sheriff's sale would not affect Bank of America's security interest. Consequently, the Association and Bank of America prepared, signed and presented to the Ex Parte Department a Stipulation and Order (CP-A 132-136) which undid the effect of the Order of Default and confirmed Bank of America's priority over all others. However, this Stipulation and Order was not entered and filed until 4:04 p.m. on March 8, 2012, the day before the Sheriff's sale.

C. Argument.

1. Standard of Review.

In its opening brief, the cross-appellant Association mistakes the standard of review applicable to Judge Kessler's order denying confirmation of the Sheriff's sale in the *Mallarino* case. The Association mistakenly argues (at p. 15, Brief of Respondent/Cross-Appellant) that the trial court's order should be reviewed *de novo*. Pashniak disagrees,

relying on a series of well-established precedents in this State, holding that the general rule, followed in Washington, is that "confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of discretion." *Casey v. Chapman*, 123 Wn. App. 670, 678, 98 P.3d 1246 (2004) (where trial court declined to set upset price as a condition of confirming a judicial sale there was no abuse of discretion); *Braman v. Kuper*, 51 Wn.2d 676, 681, 321 P.2d 275 (1958); *Williams v. Continental Securities Corp.*, 22 Wn.2d 1, 17, 153 P.2d 847 (1944); *Meller v. Edwards*, 179 Wash. 272, 283, 37 P.2d 203 (1934); *Davis Estate, Inc. v. Rochelle*, 181 Wash. 81, 83, 42 P.2d 788 (1935); *Lovejoy v. Americans*, 111 Wash. 571, 574, 191 Pac. 790 (1920); *Triplett v. Bergman*, 82 Wash. 639, 642, 144 Pac. 899 (1914). The Association's Brief omits mention of any of these precedents, does not argue for their reversal, and presents no argument that they should not be followed.

In support of its argument for a *de novo* standard of review, the Association relies on *Hazel v. Van Beek*, 85 Wn. App. 129, 931 P.2d 189 (1997), *aff'd in part, rev'd in part*, 135 Wn.2d 45 (1998). However, the two issues considered by this Court in the *Hazel* case did not involve the trial court's decision whether to confirm a Sheriff's sale. Rather, the case was decided on two issues of statutory interpretation:

1. Is an objection filed more than 20 days after the Clerk's mailing of the Sheriff's return timely or untimely under RCW 6.21.110(2)?

2. Is a Sheriff's sale valid where the judgment expires pursuant to RCW 4.56.210 before the sale is confirmed?

This Court in *Hazel* explicitly recognized that these two issues were entirely a matter of statutory interpretation and thus applied the *de novo* standard of review. The *Hazel* case did not consider whether the trial court erred in making the discretionary decision required in a confirmation hearing, that is, whether there were "substantial irregularities in the proceedings." RCW 6.21.110(3). Therefore, the *Hazel* case is entirely distinguishable and need not be considered.

2. Summary of Argument.

Once it is established that the standard of review is abuse of discretion, rather than *de novo*, it is easy to affirm Judge Kessler's Order Vacating Sheriff's Sale, a copy of which is attached hereto as **Appendix A**.

Cross-Appellant Association raises procedural and substantive arguments attacking Judge Kessler's Order Vacating Sheriff's Sale. The Association argues that Pashniak's objection to the Sheriff's sale was time barred because it was not filed and served within 20 days after mailing of

the Clerk's Notice of Return, yet the Association has twice admitted that Pashniak filed a timely Objection to Confirmation on or about March 19, 2012, only three days after the Clerk's mailing. This admission is found at CP-A 184, lines 22 and 23 of the Association's Motion for Confirmation of the Sheriff's sale. The same admission can be found on page 2 of Plaintiff's Opposition to Motion for Postponement, a pleading which the Association chose not to designate. This procedural issue will be discussed at section 3 below.

The facts and arguments presented to the Trial Court provided multiple grounds to deny confirmation and to vacate the Sheriff's sale. The Trial Court could have vacated the sale on the strength of *Davies v. Davies*, 48 Wn. App. 29, 737 P.2d 721 (1987), which allows a purchaser to withdraw his bid at any time before confirmation. This is precisely what Pashniak did, in writing, on March 19, 2012. CP-A 239. The Association ignored the request and did not inform either Judge Inveen or Judge Kessler that Pashniak wanted to withdraw his bid. This irregularity, discussed at section 4 below, by itself would have supported denial of confirmation.

The Association also wishes to rely on constructive notice, but would deny Pashniak the same opportunity. The Association argues that Pashniak had constructive notice that the condominium was encumbered

by Bank of America, because the encumbrance can be found in the public record. Yet the Association ignores the fact that the public records also contain the false Order of Default and Default Judgment which says that all persons or parties claiming any right, title, claim, or lien under Ms. Mallarino were foreclosed. If the Association wishes to invoke constructive notice, certainly it must allow Pashniak to rely on constructive notice of the representations placed in the public record by the Association, falsely representing that all liens had been foreclosed. This materially false court order is a substantial irregularity which precludes confirmation of the sale. This issue is discussed at section 6 below.

Finally, there is the irregularity which Judge Kessler selected as grounds to deny confirmation and vacate the sale: At 4:04 p.m. on March 8, 2012 (less than 18 hours before the Sheriff's sale), the Association filed a stipulated order, in league with Bank of America, which entirely contradicted the earlier default judgment. No notice of this new ex parte order was given to Pashniak or any other bidder, not before the sale and not at the sale. As Judge Kessler noted in the Order Vacating Sheriff's Sale (CP-A 348-49): ". . . a reasonable citizen, and even a reasonable citizen who buys property at sheriff's sales, would not have had inquiry notice of the lien." *See* Appendix A hereto for the full text of Judge

Kessler's Order, which was written by the trial court, not submitted by counsel. This issue is discussed in more detail below at section 7.

The Trial Court had the duty to examine the record and determine whether there were "substantial irregularities in the proceedings concerning the sale." This is a discretionary decision and will only be reversed for abuse of discretion. Each of the irregularities detailed above amply supports the discretion exercised by the Trial Court in denying confirmation and vacating the Sheriff's sale.

3. The Association Admitted That Pashniak Timely Objected to the Sale and Failed to Raise the Issue Below.

The Association's Brief argues, for the first time, that Pashniak's successful opposition to confirmation of the Sheriff's sale was time-barred. The Association did not present this argument below. For the first time on appeal, the Association claims that Pashniak did not file an objection to the Sheriff's sale within 20 days after the mailing of the Clerk's Notice of Return, as required by statute. This new assertion is as surprising as it is untimely. The Association has previously admitted twice in writing that Pashniak did file a timely objection. The first unequivocal admission is contained in the Association's Motion for Confirmation of the Sheriff's sale, at CP-A 184, lines 22 and 23:

> Daniel W. Pashniak ("Purchaser") filed a Notice of Appearance, Objection to Confirmation of Sheriff's Sale

> and Declaration of Mailing on or around March 19, 2012. Court file. [Emphasis in original.]

The second admission of Pashniak's timely *pro se* objection is found on page 2 of Plaintiff's Opposition to Motion for Postponement, where the Association made this statement:

> Neither the Declaration of Robert J. Henry dated June 22, 2012, nor the Purchaser's pro se filing on or around March 19, 2012 allege any irregularities in the sheriff's sale process.

Unfortunately, when the Association designated the record, it chose to omit this pleading. Since there was at that time no issue regarding timeliness of objection, Pashniak had no reason to designate that pleading either. Pashniak will now file a motion pursuant to RAP 9.10 to supplement the record.

Having failed to raise this issue below, the Association cannot do so now. When a party does not make an argument in the trial court, the issue is not preserved for appeal. *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 826, 965 P.2d 636 (1998); *Symes v. Teagle*, 67 Wn.2d 867, 873, 410 P.2d 594 (1966); *State v. Paysse*, 80 Wash. 603, 608, 142 Pac. 3 (1914). Furthermore, an appellate court should refuse to consider an issue or argument inconsistent with the appellant's position in the trial court. *Cosmopolitan Eng'g Group, Inc. v. Ondro Degremont, Inc.*, 128 Wn. App. 885, 893, 117 P.3d 1147 (2005). If the issue had been

raised sooner, Pashniak could have easily disproved the assertion. Pashniak has his cover letter to the Clerk dated March 19, 2012 as well as a copy of his objection which was returned by the Clerk with a filing stamp showing that it was filed on March 22, 2012 at 1:11 p.m. In an abundance of caution, Pashniak will submit a motion pursuant to RAP 9.11 to provide this evidence to this Court, but because the Association's argument was not made below, it should be ignored.

4. Pashniak Was Entitled to Withdraw His Bid at Any Time Before Confirmation.

The Trial Court, Judge Kessler, denied confirmation of the *Mallarino* Sheriff's sale, vacated the sale, and ordered the return of Pashniak's money. This ruling was expressly based on the filing of a stipulated order regarding priority of encumbrances, less than a day before the sale. But confirmation could also be denied because Pashniak withdrew his bid before confirmation. The sale took place on March 9, 2012 and on March 19 Pashniak sent a handwritten letter to the attorneys for the Association, requesting that the sales be undone and that he get his money back. CP-A 239.

The Association failed to respond to this letter and simply moved forward with its confirmation motion. More importantly, the Association failed to inform both trial courts of Pashniak's wish and request to

withdraw his bid and get his money back. Both judges should have been informed of this request because the case law allows a purchaser to withdraw his bid at any time before confirmation. *Davies v. Davies*, 48 Wn. App. 29, 737 P.2d 721 (1987). In the *Davies* case, the judgment creditor, Mr. Davies, changed his mind between the Sheriff's sale and the confirmation hearing. He asked the court to allow the withdrawal of his bid. The Trial Court granted Mr. Davies' motion and ordered the property resold. The Court of Appeals affirmed.

The reason Mr. Davies withdrew his bid was not any irregularity in the proceedings relating to the sale. Rather, he withdrew his bid because it was too low. Mr. Davies held a lien against his ex-wife's home which he attempted to collect by execution and Sheriff's sale. At the sale, he bid only $1,000 of his much larger lien, and when no one else bid, the property was knocked down to him for $1,000.

Only after the sale did Mr. Davies realize his mistake, when he learned that his ex-wife intended to redeem the property for the $1,000 and then discharge the balance of her debt in bankruptcy. He was allowed by the Trial Court to withdraw his bid so he could do the sale over.

The Association has argued below and to this Court that Judge Kessler should not have vacated the sale because Pashniak's purchase of the worthless condominiums was a result of his own errors in judgment.

Pashniak could have done better due diligence, says the Association, and therefore he must suffer the results. But this same argument could apply to Mr. Davies, who made a foolish mistake but was allowed to correct it.

Furthermore, the Association argues that Pashniak was the purchaser at the sale, not the judgment creditor like Davies, so he should not be allowed to withdraw his bid. However, this distinction finds no support and in fact is rejected in the *Davies* decision. The decision treats judgment creditors and purchasers identically:

> We disagree, holding that only the judgment creditor or purchaser has standing to move for confirmation of a bid at a sheriff's sale, and that before confirmation, the highest bidder may be permitted to withdraw his bid. Consequently, the trial court did not err in ordering a resale.
>
> * * *
>
> We adopt the reasoning of *American Fed. Sav. & Loan* that nothing in the confirmation statute, RCW 6.24.100, authorizes the trial court to confirm a sale over the objection of the judgment creditor or purchaser.

Davies, 48 Wn. App. at 31-32 (emphasis added).

Consequently, Pashniak had as much right to withdraw his bid as he would if he were the judgment creditor.

Finally, the Association argues that allowing Pashniak to withdraw his two bids would make land titles unstable, hypothesizing wild-eyed speculators repeatedly bidding at Sheriff's sales and then withdrawing their bids. Presumably, the Court of Appeals was able to consider this

hobgoblin, but nonetheless affirmed in *Davies*. The Association offers no cogent reason to fear that such a catastrophe would occur.

5. The *Mann* Case Is Not Applicable to an Execution Sale.

The Cross-Appellant argues that the case of *Mann v. Household Finance Corp.*, 109 Wn. App. 387 (2001), applies here and should result in reversal. In *Mann*, a bidder at a non-judicial trustee's sale sought unsuccessfully to rescind his purchase because he misunderstood the encumbrances on title. However, a non-judicial trustee's sale is final, whereas a Sheriff's sale is not. There is no statutory confirmation hearing or other judicial oversight of the non-judicial foreclosure process.

In contrast, the judicial execution sale here was never final because it was never confirmed by a judge. In this State, it is still the law that a bid at a Sheriff's sale does not become a contract until it is confirmed by the court:

> A bid, though accepted by the commissioner conducting the sale, does not become a contract until reported to and confirmed by the court. Up to that time it is merely an offer to buy, but as an offer it becomes binding upon the bidder when accepted and confirmed by the court, and may be enforced against him. [Citations omitted.] Until then the right of the purchaser is inchoate; the sale is an incomplete bargain, merely an offer which the court may or may not accept as circumstances and conditions may require. That is the stage at which the court may open anew the bidding upon an advanced offer, substantial and made in good faith. But even at this stage it is always discretionary with a court whether it will confirm a sale,

> though made and complied with in all respects as required by its decree, or set it aside and direct a resale. Whether a court will confirm must depend in great measure on the circumstances in each case, abuse of the discretion when effecting inequities being subject to review by the appellate court.

In re Spokane Savings Bank, 198 Wash. 665, 672, 89 P.2d 802 (1939), quoting *Eakin v. Eakin*, 83 W. Va. 512, 98 S.E. 608 (1919); *Davies v. Davies*, 48 Wn. App. 29, 32, 737 P.2d 721 (1987).

Unlike the *Mann* case, the Sheriff's sale here was not final until confirmed, and when the judge assigned to the case refused to confirm it, the sale was vacated. Consequently the *Mann* case offers no authority for this case.

6. The Association Falsely Represented in Its Order of Default and Default Judgment That All Liens Had Been Foreclosed, and Pashniak Is Entitled to Rely on Constructive Notice of That Irregularity.

The Association has had the opportunity, both below and in this Court, to explain why it presented its default judgments in the form that it did. The Association has chosen not to explain, leaving this Court to reach its own conclusions.

On November 3, 2011, the Association presented an Order of Default and Default Judgment in the Ex Parte Department of the King County Superior Court. CP-A 122-128. In the judgment summary, the judgment debtors are described to include "all other persons or parties

unknown claiming any right, title, estate, lien, or interest in the real estate. . . ." CP-A 123. Identically, the body of the Default Judgment includes a Decree of Foreclosure against the interest of "all other persons or parties unknown claiming any right, title, estate, lien, or interest." CP-A 125. Finally, on page 5, the Default Judgment includes this sweeping foreclosure language:

> ORDERED, ADJUDGED and DECREED that all right, title, claim, lien, estate or interest of the Foreclosed Defendants, each and all of them, and of all persons claiming by, through, or under them, in and to the Property or any part thereof is inferior and subordinate to Plaintiff's lien and is hereby foreclosed;

CP-A 126.

Pashniak submits that there is only one way for a layperson to understand this court order. A lawyer or title insurance officer might inquire whether all lienors had been named and served, but a layperson would reasonably conclude that the Default Judgment had foreclosed the interests of all others claiming under Maria Mallarino.

Ironically, the Association argues that Pashniak's motion must fail because of constructive notice. Whether or not he was aware of it, the Bank of America encumbrance could have been found in the public record. Therefore, the Association argues, Pashniak must be deemed to have constructive notice. However, constructive notice here is a double-

edged sword. If Pashniak is deemed to have constructive notice of the recorded Bank of America encumbrance, so must he also be deemed to have constructive notice of the false Order of Default and Default Judgment in the court file, which gives the world notice that all claims and liens upon the property have been foreclosed.

Even without the concept of constructive notice, the false court order rises to the level of a substantial irregularity, sufficient to deny confirmation of the Sheriff's sale in the *Mallarino* case. In the absence of an explanation from the Association, it must be assumed that the order was presented in the Ex Parte Department and then filed with the Clerk in order to create the impression that all claims and liens had been foreclosed and thus cleared from the property, which could easily enhance the value of the property at a Sheriff's sale. For this reason, too, Judge Kessler could deny confirmation and vacate the sale.

7. The Stipulated Order Filed by the Association Less Than 18 Hours Before the Sale Was Not Timely.

The reasoning of the Trial Court, Judge Kessler, which led to the denial of confirmation and vacation of the Sheriff's sale in *Mallarino* is set out clearly and explicitly in the Order Vacating Sheriff's Sale. CP-A 348-49, Appendix A hereto:

> The court also took judicial notice of the fact that a document filed in the clerk's office would not be viewable

> in the electronic court record for 24 to 48 hours after filing, although a hard copy would be viewable during working hours if a citizen knew to ask for paper filings not yet in the electronic court file. The order filed by plaintiff at 4:04 p.m. the day before the sale would only have been viewable by a citizen who went to the clerk's office between 4:04 p.m. to 4:30 p.m., when the office closes, and between 8:30 a.m. and the time of the sheriff's sale ninety minutes later. The court, exercising its equitable authority, concludes that a reasonable citizen, and even a reasonable citizen who buys property at sheriff's sales, would not have had inquiry notice of the lien. Therefore it is hereby
>
> ORDERED that plaintiff's motion to confirm the sheriff's sale is denied and that intervenor's motion to vacate the sheriff's sale is granted.

This decision was crafted by the Judge, not submitted by one of the parties. While all trial court orders are entitled to equal respect, nonetheless the fact that the Trial Court took the trouble to explain its rationale shows that the matter received careful thought and attention.

On March 8, 2012, the Association and Bank of America presented a Stipulation and Order in the Ex Parte Department. CP-A 132-156. At 4:04 p.m., the pleading was filed. The issue of this stipulated order, which led the Trial Court to vacate the sale, is a troubling one. Both the content and the timing are problematical, although the Trial Court focused on timing.

The problem with the content of the stipulated order is that it contradicts the Order of Default and Default Judgment entered four

months earlier. CP-A 122-28. The Default Judgment stated that:

> . . . all right, title, claim, lien, estate or interest of the Foreclosed Defendants, each and all of them, and of all persons claiming by, through, or under them, in and to the Property or any part thereof is inferior and subordinate to Plaintiff's lien and is hereby foreclosed. . . .

As respondent Pashniak has argued elsewhere in this Brief, the Default Judgment goes far beyond the relief to which the Association was entitled. It should not have been presented to the Ex Parte Department in that form.

In contrast, the Stipulation and Order presented four months later, again in the Ex Parte Department, went too far in the opposite direction, subordinating all others to Bank of America. Rather than limit its agreement to the relative priority of the Association's judgment versus the Bank's deed of trust, the stipulation adopted by the Court purports at paragraph 7 to adjudicate the relative priority of the Bank's position versus third parties not present at the time and not a party to the action:

> Plaintiff acknowledges and agrees that the purchaser at the Sheriff's Sale (whether Plaintiff or a third party) shall take any interest in the Subject Property subject to any valid interest of [Bank of America] in the Subject Property.

CP-A 133.

The Association and the Bank had no right to present an order which subordinated the rights of third parties not present. This agreement,

adopted by the court commissioner in an order, could have a significant effect on a bidder at the Sheriff's sale the next day, yet it was extremely unlikely that it would be found buried in a stipulated order in the court file.

Adding to the prejudice is the timing of the stipulated order. As the Trial Court took judicial notice, documents filed in the court file take as long as 48 hours to become available. Thus, any pleading filed in the two days before the sale would not be known to bidders at the sale. The Trial Court found that this failure would deny inquiry notice to prospective bidders. This analysis and decision are well within the Trial Court's discretion.

The Association objects strenuously to the Trial Court's decision, arguing that it places a judgment creditor such as the Association in a very difficult position. Brief of Respondent/Cross-Appellant at 33. But the Association has no one to blame but itself, for its demonstrably false default judgment, which led Bank of America to insist on a clarifying court order.

8. The Trial Court Appropriately Exercised Its Equitable Powers.

The Trial Court order under review states that it was granted "exercising its equitable authority." CP-A 348; Appendix A. The

equitable powers of the trial courts in this state are broad, and the case law establishes that the exercise of equitable authority is appropriate with regard to foreclosure sales.

In *Miebach v. Colasurdo*, 102 Wn.2d 170, 177, 685 P.2d 1074 (1984), our Supreme Court held that the trial court may set aside an execution sale of real property on equitable grounds, as long as the rights of any bona fide purchaser are not contravened. Even "slight circumstances indicating unfairness will be sufficient to justify a decree setting the sale aside on equitable grounds." *Miebach*, 102 Wn.2d at 178. There is much more than "slight" evidence of unfairness here, where the plaintiff took secret action that severely prejudiced the purchaser, and in fact rendered his purchase valueless.

The Court's equitable power to invalidate a foreclosure sale was recently reaffirmed, when the Washington Supreme Court filed its long-awaited decision on May 24, 2012 in *Albice v. Premier Mortgage Services of Washington, Inc.,* 174 Wn.2d 560, 276 P.3d 1277 (2012). This decision arose in the context of a deed of trust foreclosure sale, not a condominium lien foreclosure sale, but the analogies between the two are apt. In particular, the concurring opinion by Justice Stephens offers persuasive reasoning for this case, arguing that the Supreme Court could have and should have set aside the foreclosure sale on narrow equitable grounds,

rather than a blanket rule. In so doing, she identified two equitable grounds in the *Albice* case justifying the voiding of the foreclosure, both of which are present in this case: (1) a gross disparity between the sale price and the value of the property, and (2) unfair circumstances or procedural irregularities surrounding the sale. *Albice,* 174 Wn.2d at 585. Since the sale to Mr. Pashniak involves a gross disparity between the price and value, as well as procedural irregularities, equity demanded that it be set aside. The decision of the Trial Court on equitable grounds should be affirmed.

9. The Trial Court Did Not Abuse Its Discretion.

As discussed previously, the standard of review for decisions relating to confirmation of Sheriff's sales is abuse of discretion. When the Legislature enacted RCW 6.21.110, it imposed a duty on the judicial system to examine each Sheriff's sale occurring in this State on a case-by-case basis and decide in each case whether the sale should be confirmed. This is not a question of law that can be answered by interpreting a statute or a contract; the court must decide factual issues. Where there is no objection to a sale, the confirmation process will likely be cursory. But where, as here, there is timely objection, the Trial Court must decide whether there were "substantial irregularities in the proceedings concerning the sale" and if so, whether there is "probable loss or injury" to

the objecting party. Where a judicial decision must be based on the facts of a particular case, that decision is discretionary. *Amy v. Kmart of Washington LLC*, 153 Wn. App. 846, 855, 223 P.3d 1247 (2009) (deciding what is required for "speedy and inexpensive" discovery is a discretionary decision).

Confronted with the factual question of whether there were substantial irregularities in the *Mallarino* case, Judge Kessler chose to deny confirmation and vacate the sale. This Court can rest assured that discretion was exercised appropriately because the Order Vacating Sheriff's Sale carefully explains the Trial Court's reasoning and the basis for the decision. CP-A 348; Appendix A. A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for tenable reasons." *Mayer v. Sto Industries*, 156 Wn.2d 677, 684, 132 P.2d 115 (2006). Because the Trial Court here carefully explained both its grounds and its reasons, there can be no serious suggestion that the grounds or reasons were untenable.

Furthermore, there were several additional grounds which would support the same result, including the withdrawal of Pashniak's bid and the false and deceptive default judgment. This Court may affirm a discretionary ruling on any basis supported by the record, whether or not the Trial Court considered that basis. *Amy v. Kmart*, 153 Wn. App. at 868;

State v. Carter, 74 Wn. App. 320, 324 n.2, 875 P.2d 1 (1994). Given the strength and clarity of the trial court decision here, and the multiple other grounds which would support the same result, there can be no abuse of discretion and the Trial Court should be affirmed.

III. REPLY TO BRIEF OF RESPONDENT

A. Argument.

1. Form and Timing of Objection to Sale Proceedings.

The Association admits it received a timely objection from Pashniak in the *Parsons* case, filed on March 22, 2012 (CP-B 112-13). Nonetheless, the Association complains that the objection filed did not specify any irregularity and did not provide any authority in support of the objection. However, the pertinent statute, RCW 6.21.110, requires neither specificity nor citation of authority. It requires only the filing of an objection, which will be followed by a hearing on the motion for confirmation. At that hearing, the objector must persuade the judge that there was one or more "substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting." Since the statute identifies no requirements for the form of the objection, the Association's unhappiness with the form of Pashniak's objection is without merit. The Association received timely notice of the objection and had ample opportunity to respond when the grounds for objection

were presented to the Trial Court.

2. Respondent Has Adopted Too Narrow a Definition of "Irregularity."

Throughout its Brief, the Association puts forward its own insupportably narrow definition of the statutory term "irregularity," when the statute provides a different, broader definition.

RCW 6.21.110(3) states that at the hearing on confirmation of a Sheriff's sale, the Trial Court is to look for "substantial irregularities in the proceedings concerning the sale." The Association wishes to narrow the definition so that only the conduct of the Sheriff can create an irregularity, when no such limitation is found in the statute. Over and over, the Association repeats its own definition: "irregularities in the sheriff's conduct of the sale." Brief of Respondent/Cross-Appellant at, *e.g.*, p. 2, 3, 12, 16, 23, 36, 42. Sometimes, the Association uses different language, but with the same import: "substantial irregularities of the sheriff's doings and undertakings." Brief of Respondent/Cross-Appellant at, *e.g.*, p. 16, 18, 31, 34, 36.

Neither of the Association's definitions is justified by the language of the statute, which gives no indication that the Legislature wished to limit the definition of "irregularities" to the conduct of the Sheriff. The statutory language – "substantial irregularities in the proceedings

concerning the sale" – is not limited to the conduct of the Sheriff, and certainly allows a trial court to find an irregularity in the conduct of the judgment creditor. The *Davies* case, discussed elsewhere for the right to withdraw a bid, offers support for a broader definition than the Association argues. In *Davies v. Davies*, 48 Wn. App. 29, 737 P.2d 721 (1987), the Court of Appeals considered and construed the previous statute relating to confirmation of Sheriff's sales – RCW 6.24.100 – which was later recodified as 6.21.110, the statute at the heart of this case. In the *Davies* case, there was no suggestion of an irregularity in the conduct of the Sheriff. Rather, the judgment creditor opposed confirmation of the Sheriff's sale because of the actions of his ex-wife. The trial court allowed the judgment creditor to withdraw his bid and the Court of Appeals confirmed, holding that ". . . nothing in the confirmation statute, RCW 6.24.100, authorizes the trial court to confirm a sale over the objection of the judgment creditor or purchaser." *Davies*, 48 Wn. App. at 32 (emphasis added). If the courts are required to confirm all sales except when the Sheriff did something wrong, as the Association argues, the *Davies* case could not have been decided as it was.

3. Respondent Appears to Misunderstand Its Opponent's Arguments.

Pashniak did not argue to the Trial Court, and does not now argue

to this Court, that the failure to name Bank of America as a defendant was an irregularity which justifies denying confirmation of the Sheriff's sale. Rather, Pashniak submits here, as he did to the Trial Court, that a fatal irregularity inheres in the fact that the Association obtained a false default judgment from the Ex Parte Department, ostensibly foreclosing all "persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate. . ." (CP-A 123, 125) even though the Association had not named or served Bank of America as a party. The Association appears to not recognize the incongruity and potential for mischief inherent in the untruthful judgment which purported to foreclose the interest of "all persons claiming by, through or under [Ms. Parsons]." The Association offered no explanation to the Trial Court for its actions, and it offers no explanation to this Court. The unanswered question is pregnant: why did the Association present a default judgment for entry which explicitly but falsely stated that all persons or parties claiming by, through or under Ms. Parsons were foreclosed, when in fact no one other than Ms. Parsons had been foreclosed? Pashniak and his counsel can think of no innocent explanation for this falsehood. It must have been done to deceive bidders. This false court order constituted an irregularity in the proceedings which should have invalidated the sale, even after confirmation, and it was an abuse of discretion not to do so.

4. Excusable Neglect.

The Association argues that Pashniak did not establish excusable neglect in support of his CR 60(b) motion because he waited three months after the Sheriff's sale to hire an attorney. That argument does not adequately describe or consider what happened in these two cases. The Sheriff's sale occurred on March 9, 2012. Pashniak wrote to the Association's attorneys on March 19, asking to withdraw his bid. (CP-B 192.) On March 22, thirteen days after the sale, he filed a timely general objection to confirmation, even before a motion for confirmation had been filed. CP-B 112-13. He then began the search for an attorney to handle the anticipated confirmation hearing. On May 22, 2012, he hired Seattle attorney Ann Marshall and sent her a retainer. CP-B 187-88, ¶ 18. Four days later, on May 26, 2012, Pashniak left Spokane to visit his sister in Edmonton, Alberta, and celebrate her 94th birthday. CP-B 188, ¶ 19. At that time, the Motion to Confirm had not yet been filed.

When he returned to Spokane on June 10, 2012, Pashniak learned that a Motion to Confirm the *Parsons* sale had been filed and noted for hearing eight days later, on June 18, 2012. CP-B 188, ¶ 20. He learned the same day that attorney Marshall had returned his retainer check, due to a potential conflict of interest. CP-B 188, ¶ 20. Despite strenuous efforts, detailed in his Declaration, Pashniak was not able to locate and engage

another Seattle attorney until June 22, 2012. CP-B 188, ¶ 21.

If Pashniak were an attorney, or if he knew how to ask a judge for more time, he certainly would have been given more time by Judge Inveen to find an attorney and respond to the motion, just as Judge Kessler did in the *Mallarino* case. But Pashniak is not an attorney, he is an 81-year-old retired teacher suffering from Parkinson's disease (CP-B 187, ¶15), and he did not find an attorney until after the Order Confirming Sale had been signed in the *Parsons* case. CP-B 188, ¶ 21.

Under these circumstances, Pashniak has established sufficient excuse for his failure to respond in time. The Trial Court should have considered his submittals and should have granted his Motion to Vacate the confirmation. It was an abuse of discretion to deny that motion.

5. The Trial Court Was Not Informed That Pashniak Withdrew His Bid.

In his opening brief in the *Parsons* case and in his responding brief in the *Mallarino* case, set forth above, Pashniak discussed the right of a bidder to withdraw his bid before confirmation. The *Davies* case discussed at section II.C.4 above is a strong precedent with direct applicability here. Cross-respondent has offered no cogent rebuttal of the *Davies* holding. At least since 1939, when our Supreme Court decided *In Re Spokane Savings Bank*, 198 Wash. 665, 89 P.2d 502 (1939), it has been

the law in this State that a bid at a judicial sale is "merely on offer to buy" which the court "may or may not accept as conditions and circumstances may require." *In Re Spokane Savings Bank* at 672. Therefore, the repeated argument by the Association that it is entitled to confirmation flies in the face of the case law. No party, whether creditor or purchaser, is ever entitled to confirmation; ". . . it is always discretionary with a court whether it will confirm a sale, . . . or set it aside and direct a resale." *Id.* This venerable holding was reaffirmed by the Court of Appeals in the *Davies* case, 48 Wn. App. at 32.

Once an order has been entered confirming a Sheriff's sale, it becomes final, and will only be avoided for fraud or mistake. *In Re Spokane Savings Bank*, 198 Wash. at 672. In the *Parsons* case, a mistake was made by the Association. It failed to inform Judge Inveen that Pashniak had previously withdrawn his bid, on March 19, 2012. The Association admitted, at CP-B 121, that it had received an appearance and objection from Pashniak on or about March 19, 2012. But it failed to mention the handwritten letter it received bearing the same date. CP-B 192.

The Association compounded its mistake when it failed to advise the Trial Court of the *Davies* case, which allows a purchaser to withdraw his bid before confirmation. When Pashniak was unable, through no fault

of his own, to obtain counsel in time for the confirmation motion, the Association's mistakes became critical. Without the all-important fact of the March 19 withdrawal of Pashniak's bid, the Trial Court had no opportunity to apply the *Davies* holding, even if the case had been disclosed by counsel.

Once the Trial Court became aware of the withdrawal and of the *Davies* case, by Pashniak's CR 60(b) motion, it was incumbent on the Trial Court to correct the error caused by the Association's mistake. As a matter of *stare decisis*, the trial courts are bound by the published opinions of the Court of Appeals. *Marley v. Department of Labor and Industries*, 72 Wn. App. 326, 330, 864 P.2d 415 (1993). Where the facts are identical or substantially similar, the rule laid down by an appellate court is binding upon a trial court. *Id.* Here, the Trial Court was denied the opportunity to consider the rule in *Davies* because the Association forgot to mention that Pashniak withdrew his bid, and Pashniak did not find a lawyer soon enough to put that fact before the court. However, once the court learned the truth facts through the filing of Pashniak's CR 60(b) motion, the *Davies* decision should have been followed, and it was an abuse of discretion not to do so.

6. Pashniak's Appeal Is Not Defective.

Respondent Association has concocted a "gotcha" argument that

Pashniak's appeal is defective. The Association argues that the Amended Notice of Appeal (CP-B 360-67) filed after the denial of Pashniak's CR 60(b) motion should have been filed as a separate proceeding. The Amended Notice meets all the requirements of RAP 5.3(a), including attachment of a copy of the court order from which the appeal is made. RAP 1.2(a) provides for liberal interpretation of the appellate rules "to promote justice and facilitate the decision of case on the merits." The Association's hypertechnical objection would not promote justice and would prevent a decision on the merits. RAP 1.2(a) mandates that cases and issues not be determined on issues of compliance with the rules, except in compelling circumstances. The Association offers no compelling circumstances in support of its procedural grievance.

Furthermore, RAP 5.3(f) directs that defects such as the Association points out should be disregarded, as long as the notice of appeal clearly reflects an intent by a party to seek review. For these reasons, the Association's assertion of a defective appeal should be rejected.

7. The Stability of Land Titles Is Not at Risk Here.

Respondent Association argues vigorously that the stability of land titles in Washington State is at risk if Pashniak is allowed to withdraw his bid and get his money back. *See* Brief of Respondent/Cross-Appellant,

pp. 40-42. This overwrought argument, that allowing Pashniak to prevail would "plant the seeds of a crisis in judicial foreclosures in Washington," fails on several levels.

First, the result of a Sheriff's sale can only be reversed by denial of confirmation due to substantial irregularity. This is a procedure created by statute. We must presume that the Legislature would not have created a statutory right to object to confirmation if it did not feel that the stability of land titles in this state could withstand the shock of having to do a Sheriff's sale over.

Second, it must be presumed that the Trial Court and the Court of Appeals would not have confirmed a purchaser's right to withdraw his bid in the *Davies* case, discussed *supra*, if they felt that land titles throughout the state could become unstable as a result. *Davies v. Davies*, 48 Wn. App. 29, 737 P.2d 721 (1987).

Furthermore, there would be no threat to any title if all Sheriff's sales occurred without irregularity. Here it is the fault of the Association, not the actions of Pashniak, which requires that the sale be vacated. It was the Association, not Pashniak, which obtained the inexplicable Default Judgment, falsely representing that all parties claiming any right, title, claim or lien under the condominium owner were foreclosed. It was the Association, not Pashniak, which entered a contradictory stipulation and

order into the court file after it was too late to be discovered before the sale. In other words, if the Association had conducted its business properly, none of this would have happened.

IV. NEITHER PARTY IS ENTITLED TO AN AWARD OF ATTORNEY FEES

This case is governed by the American Rule, which provides that each party to litigation shall bear their own attorney fees and costs "absent specific statutory authority, contractual provision, or recognized grounds in equity." *Weismann v. Safeco Insurance Co.*, 157 Wn. App. 168, 173, 236 P.3d 240 (2010) (emphasis added). The Respondent/Cross Appellant does not assert or rely on any contract between the parties, nor does it argue the existence of a recognized ground of equity. The Association relies only on statutes, and specifically Chapter 64.34 RCW, the Condominium Act.

The Association first asserts that it is entitled to an award of fees and costs under RCW 64.34.364(14). However, that provision of the Condominium Act only provides for fees "incurred in the collection of delinquent assessments." Since the provision appears in a portion of the Act entitled Lien for Assessments, it is clear that it is intended to allow the Association to recover fees from delinquent owners. The statute does not provide for fees in disputes with bidders over the confirmation of Sheriff's

sales. Thus, RCW 64.34.364(14) does not provide the specific statutory authority necessary under the American Rule to award fees in this case.

Furthermore, the Association has already been awarded a judgment for its attorney fees for the collection of delinquent assessments, $11,572.36 against Ms. Mallarino, and $7,225.82 against Ms. Parsons. CP-A 123; CP-B 17.

Next, the Association asks for fees under the Condominium Declaration, which is neither a statute nor a contract between the parties.

Finally, and incredibly, the Association asks for fees under RCW 64.34.455, another provision of the Condominium Act which has absolutely nothing to do with confirmation of Sheriff's sales. The provision is here set forth in full:

> **RCW 64.34.455**
> **Effect of violations on rights of action — Attorney's fees.**
> If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

This provision on its face applies only to violations of the Condominium Act and the Condominium Declaration and Bylaws. The Association offers no evidence and no argument that Pashniak is subject to the Act or

that he has failed to comply with the Act, or that he has failed to comply with any Declaration or Bylaw.

In short, the request for fees on appeal pursuant to RAP 18.1(b) is entirely without merit and should be denied.

V. CONCLUSION

In these two civil cases with identical parties and identical issues, two respected judges of the King County Superior Court reached opposite results. One decision, to deny confirmation and vacate the *Mallarino* Sheriff's sale, was made upon full briefing by both sides. The other decision, to confirm the *Parsons* sale, was made by default, without hearing from the objector and without a full representation of the facts from the moving party. Daniel Pashniak submits that the decision by Judge Kessler to vacate the *Mallarino* sale was made carefully and thoughtfully, on the ground that irregularities marred the sale. A reasoned written decision, crafted by the Judge, explained the ground relied upon. Because this ground, and others presented by the facts, fully justified the exercise of the Court's discretion, the Order Vacating Sheriff's Sale should be confirmed.

The *Parsons* decision, on the other hand, was made by default, and the Trial Court was not informed that Pashniak had withdrawn his bid. Pashniak submits that he demonstrated excusable neglect in his CR 60(b)

motion for his inability to engage a new attorney on short notice, which should have earned a full consideration of the facts of his case despite the default order entered against him. Those facts included his withdrawal of his bid, the unexplained entry of a false and misleading default judgment into the public records, and the filing of a stipulated order deciding priority of encumbrances too late to be discovered by potential bidders. For these reasons, the *Parsons* sale, too, should be vacated.

Respectfully submitted this 8th day of March, 2013.

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CERTIFICATE OF SERVICE

I certify that on March 8, 2013, I caused a copy of the foregoing document to be served via first class U.S. mail, postage prepaid, to the following counsel of record:

Michael Padilla
William J. Justyk
201 Queen Anne Avenue N., Suite 400
Seattle, WA 98109

Lee Brewer

FILED
KING COUNTY, WASHINGTON
JUL 23 2012
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

SIXTY-01 ASSOCIATION,

Plaintiff,

vs.

MARIA A. MALLARINO, *et al.*,

Defendants

Case No.: 10-2-17742-6

ORDER VACATING SHERIFF'S SALE

Plaintiff moved to confirm a sheriff's sale. Intervenor Pashniak moved to vacate the sale. The court considered the motion to vacate, declarations of Pashniak and Robert J. Henry, affidavit of Jeannette Zimmerman, the court files and records and pleadings supporting and opposing the sale. The court also took judicial notice of the fact that a document filed in the clerk's office would not be viewable in the electronic court record for 24 to 48 hours after filing, although a hard copy would be viewable during working hours if a citizen knew to ask for paper filings not yet in the electronic court file. The order filed by plaintiff at 4:04 p.m. the day before the sale would only have been viewable by a citizen who went to the clerk's office between 4:04 p.m. to 4:30 p.m., when the office closes, and between 8:30 a.m. and the time of the sheriff's sale ninety minutes later. The court, exercising its equitable authority, concludes that a reasonable citizen, and even a reasonable citizen who buys property at sheriff's sales, would not have had inquiry notice of the lien. Therefore it is hereby

ORDERED that plaintiff's motion to confirm the sheriff's sale is denied and that intervenor's motion to vacate the sheriff's sale is granted. The clerk shall refund to intervenor

King County Superior Court
516 Third Avenue C-203
Seattle, Washington 98115

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$35,400, less clerk's fees, c/o his counsel, Robert J. Henry; Lasher Holzapfel Sperry & Ebberson PLLC; 601 Union Street, Suite 2600; Seattle, WA 98101.

DATED 23 July 2012.

RONALD KESSLER, Judge

King County Superior Court
516 Third Avenue C-203
Seattle, Washington 98115

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