69135-0

69135-0

No.: 69135-0-I
(consolidated with 69136-8-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SIXTY-01 ASSOCIATION OF APARTMENT OWNERS,
a Washington non profit corporation,

Respondent/Cross-Appellant,

vs.

VIRGINIA A. PARSONS and JOHN DOE PARSONS, wife and husband, or state registered domestic partners; JOHN DOE and JANE DOE, unknown occupants of the subject real property; and also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the Complaint herein,

Defendants,

DANIEL PASHNIAK,

Appellant/Cross-Respondent.

BRIEF OF RESPONDENT/CROSS-APPELLANT

Michael A. Padilla, WSBA No. 26284
LAW OFFICES OF JAMES L. STRICHARTZ
201 Queen Anne Avenue North, Suite 400
Seattle, Washington 98109
Telephone: (206) 388-0600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Washington Cases

Statutes

Other Authorities

I. INTRODUCTION

Washington has evidenced a strong public policy that the stability of land titles should be preserved. This public policy extends to the title that a third party purchaser of real property at a creditor's foreclosure sale receives: Once a third party bid at foreclosure sale is received and accepted, the sale is final, absent any irregularities in the conduct of the foreclosure sale.

A trial court has now ruled that a third party bidder can effectively "change his mind" and withdraw his bid after acceptance, get his purchase money back, force the foreclosing creditor to set up and conduct a new foreclosure sale all over again at significant delay and expense, and in substance grant third party foreclosure investors a legal right to engage in speculative bidding when it suits them. Such is not and cannot be the law in Washington.

If third party purchasers in Washington can now engage in speculative bidding, the stability of foreclosure proceedings and titles obtained thereby are intolerably undermined, in contradiction to long-standing Washington public policy.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering the Order Vacating Sheriff's Sale on July 23, 2012 in *Sixty-01 v. Mallarino, et al,* King Co. Sup. No. 10-2-17742-6 ("*Mallarino*") (CP-B 348-349)[1].

Issues Pertaining to Assignments of Error

1. Does it continue to remain the public policy of this state, as evidenced by the plain meaning of the confirmation of sheriff sale statute, that a foreclosing creditor is entitled to confirmation of that sale once the sheriff accepts a third party's bid? (Assignment of Error No. 1).

2. Can a trial court employ equitable powers to refuse to confirm a sheriff's sale even where there are no irregularities in the sheriff's conduct of the sale, and even where the purchaser had constructive notice of a recorded prior deed of trust that was, by law, not extinguished by the sheriff's sale, simply because the purchaser alleges he failed to apprehend that the sheriff's sale would not affect that prior deed of trust? (Assignment of Error No. 1).

3. Can a trial court uphold an objection to confirmation of sheriff's sale and invalidate the sale even though that objection was not timely filed

---

[1] Pursuant to stipulation between counsel for Plaintiff and Respondent in conference with Laurie Sanders of the Court of Appeals, the parties will cite to Clerk's Papers in *Sixty-01 v. Parsons et al,* King Co. Sup. No. 11-2-22195-4SEA as "CP-A __", and Clerk's Papers in *Sxity-01 v. Mallarino, et al,* King Co. Sup. No. 10-2-17742-6SEA as "CP-B __." Email from William Justyk dated November 7, 2012, filed November 8, 2012 (Court of Appeals file). The Court of Appeals consolidated both actions under the *Parsons* case number. Order dated Oct. 2, 2012 (Court of Appeals file). The Court of Appeals subsequently ordered that the briefs to be filed in the case would be the same as those permitted in cross appeals. Order dated Dec. 3, 2012 (Court of Appeals file).

within the statutorily mandated twenty days after the court clerk's mailing of the Notice of Return on Sheriff's Sale? (Assignment of Error No. 1).

4. Does it continue to remain the public policy of this state to preserve the stability of land titles and the finality of properly conducted foreclosure proceedings, such that once a third party bid at foreclosure sale is received and accepted, the sale is final, absent any irregularities in the conduct of the foreclosure sale? (Assignment of Error No. 1).

Restatement of Issues Assigned by Cross-Appellant Pashniak

1. Did the trial court in *Sixty-01 v. Parsons, et al,* King Co. Sup. No. 11-2-22195-4SEA ("Parsons"), properly determine that a third party investor is not entitled to withdraw his winning bid where there are no irregularities in the sheriff's conduct of the sale, where the purchaser had constructive notice of a recorded prior deed of trust that was, by law, not extinguished by the sheriff's sale, and where the purchaser alleges he failed to apprehend that the sheriff's sale would not affect that prior deed of trust? **Yes.**

2. Did the trial court in *Parsons* properly deny a third party bidder's CR 60 Motion to Vacate the trial court's prior sheriff's sale confirmation order, where motion and hearing on such order was properly noticed and not responded to by such bidder, and where the motion to vacate was brought several months after the order was entered and while an appeal was pending? **Yes.**

III. CONSOLIDATED STATEMENT OF THE CASE

A. Facts Relevant to Issues Presented For Review

1. The Association And Its Declaration of Condominium Liens on the Units.

Appellant Sixty-01 Association of Apartment Owners ("Association") is a Washington non profit corporation duly organized pursuant to the Horizontal Property Regimes Act, RCW 64.32, as amended by the Washington Condominium Act, RCW 64.34 (hereinafter referred to as the "Act") for the operation of Sixty-01, a condominium established under the Act. (CP-B 81). The Association was created under the terms of the Declaration and Covenants, Conditions, Restrictions and Reservations for Sixty-01, a Condominium recorded in the records of King County, Washington under Recording No. 7808300897 and any amendments thereto (hereinafter referred to as the "Declaration"), records of King County, Washington and any amendments thereto. (Id.).

Maria A. Mallarino is the owner of Unit 493 of Sixty-01, a Condominium, located at 6674 138th Avenue N.E., Unit 493, Redmond, WA 98052 ("Unit"). (CP-B 81, 86-8). Mallarino is not a party to this appeal. Viriginia A. Parsons is the owner of Unit 10 of Sixty-01, a Condominium, located at 6439 139th Place NE, Unit 10, Redmond, WA 98052 ("Unit"). (CP-A 39, 44-9). Parsons is not a party to this appeal.

Under RCW 64.32.200(2) and Declaration §19.1, the Association has a continuing statutory lien against the Units, to secure the payment of all assessments levied by the Board of Directors for Sixty-01, including late charges, costs, and reasonable attorneys' fees:

> 19.1. Assessments are a Lien; Priority. All unpaid sums assessed by the Association for the share of the common expenses chargeable to any apartment and any sums specially assessed to any apartment under the authority of this Declaration or the Bylaws (together with interest, late charges, costs, and attorneys' fees in the event of delinquency) shall constitute a continuing lien on the apartment and all its appurtenances from the date the assessment became due until fully paid. The lien for such unpaid assessments shall be subordinate to tax liens on the apartment in favor of any taxing unit and/or special district, and to all sums unpaid on all mortgages of record, but shall have priority over all other liens against the apartment. A first mortgagee of an apartment that obtains possession through a mortgage foreclosure or deed of trust sale, or by taking a deed in lieu of foreclosure or sale, or a purchaser at a foreclosure sale, shall take the apartment free of any claims for the share of common expenses of assessments by the Association chargeable to the apartment that became due before such possession, but will be liable for the common expenses and assessments that accrue after the taking of possession; in which event, the apartment's past-due share of common expenses or assessments shall become new common expenses chargeable to all of the apartment owners, including the mortgagee or foreclosure sale purchaser and their successors and assigns, in proportion to their respective percentages of the undivided

> interest in the common areas and facilities; however, the owner and any contract purchaser shall continue to be personally liable for such past-due assessments, as provided in Section 19.3. For the purpose of this section, the terms "mortgage" and "mortgagee" shall not mean real estate contracts or a vendor or a designee or assignee of a vendor under a real estate contract.

(CP-B 82-83, 104). Under RCW 64.32.200(2)(b) and Declaration § 19.1, the Association's lien is subordinated to any recorded deeds of trust, whenever recorded. (Id.). Under Declaration § 19.3, Mallarino and Parsons are also personally liable for such assessments, as the respective owner of each Unit. (CP-B 105). Declaration § 19.2 provides that the Association may foreclose its statutory lien for assessments in like manner as any mortgage, *i.e.,* under Ch. 61.12 RCW. (CP-B 83, 105).

2. Association Foreclosure of Statutory Liens On Units.

(I) *Mallarino Foreclosure:* On November 1, 2007, Mallarino became delinquent on her statutory assessment obligation to the Association. (CP-B 118). On May 18, 2010, the Association filed a Complaint to foreclose its statutory lien against the Unit, and filed and recorded a Lis Pendens accordingly. (CP-B 1-9, 10-12, 23, 28-31).

In accordance with the Association's statutory and covenant (Declaration) subordination of its lien to any deeds of trust of record, the Complaint and Amended Complaint did not name any deed of trust lender

as a defendant, and thus was not seeking to extinguish any deed of trust that may be encumbering the Unit. (CP-B 1-9, 13-21). A third party deed of trust purportedly encumbering the Mallarino Unit was recorded in favor of Bank of America, N.A. ("Bank of America") as beneficiary, under King County Recording No. 20060228003678 ("Deed of Trust"). (CP-B 138-156).

On November 3, 2011 the trial court entered a Judgment and Decree of Foreclosure ("Judgment") against Mallarino and in favor of the Association in the amount of $31,519.64, the amount owing to the Association for unpaid monthly assessments, late fees, interest, attorney fees and costs. (CP-B 122-128). In accordance with the Association's statutory and covenant (Declaration) subordination of its lien to any deeds of trust of record, the Judgment did not award any relief against Bank of America, and thus did not extinguish the Deed of Trust that purportedly encumbers the Unit. (CP-B 122-128, 132-136). Pursuant to the Judgment and Order of Sale, the Sheriff scheduled the Sheriff's Sale for March 9, 2012. (CP-B 167-170).

The Sheriff levied on the Unit, recording the Sheriff's Notice of Levy and a copy of the Order of Sale with the Recorder of King County, and posting the Sheriff's Public Notice of Sale for not less than four weeks prior to the date of sale. (CP-B 157-8). Said Public Notice of Sale was posted at the first floor lobby of the King County Courthouse, at the front

door of the Unit, and published multiple times in a legal newspaper. (CP-B 158, 164-172). The Sheriff's Notice to Judgment Debtor of Sale was mailed to all known addresses for all persons or parties with any interest in the Unit, regardless of whether such interest would be extinguished by the sheriff's sale or not. (CP-B 129-131). Accordingly, notice of the Sheriff's Sale was sent to Bank of America as beneficiary under the Deed of Trust. (Id.).

Bank of America responded to the sheriff's sale notice, demanding a stipulation expressly declaring that the Association's Sheriff's Sale would not affect the Deed of Trust, even though Bank of America was not a Defendant, was never served with process, and did not have a judgment taken against it in the lawsuit. (CP-B 313). Subsequently, the Association and Bank of America executed a Stipulation and Order, entered with the Court on March 8, 2012, that declared that the Judgment does not affect Bank of America's deed of trust interest, and that the purchaser at the Sheriff's Sale shall take any interest in the Unit subject to any valid interest of Bank of America in the Unit. (CP-B 132-156).

(II) *Parsons Foreclosure:* On November 1, 2009, Parsons became delinquent on her statutory assessment obligation to the Association. (CP-A 42, 67). On June 28, 2011, the Association filed a Complaint to foreclose its statutory lien against the Unit, and filed and recorded a Lis Pendens accordingly. (CP-A 1-9, 12-4, 24, 28-31).

In accordance with the Association's statutory and covenant (Declaration) subordination of its lien to any deeds of trust of record, the Complaint did not name any deed of trust lender as a defendant, and thus was not seeking to extinguish any deed of trust that may be encumbering the Unit. (CP-A 1-9). A third party deed of trust purportedly encumbering the Parsons Unit was recorded in favor of Bank of America, N.A. ("Bank of America") as beneficiary, under King County Recording No. 20070723000298 ("Deed of Trust"). (CP-A 80).

On November 3, 2011, the trial court entered a Judgment and Decree of Foreclosure ("Judgment") against Parsons and in favor of the Association in the amount of $13,750.31, the amount owing to the Association for unpaid monthly assessments, late fees, interest, attorney fees and costs. (CP-A 16-21). In accordance with the Association's statutory and covenant (Declaration) subordination of its lien to any deeds of trust of record, the Judgment did not award any relief against Bank of America, and thus did not extinguish the Deed of Trust that purportedly encumbers the Unit. Id. Pursuant to the Judgment and Order of Sale, the Sheriff scheduled the Sheriff's sale for March 9, 2012. (CP-A 93-5, 104-7).

The Sheriff levied on the Unit, recording the Sheriff's Notice of Levy and a copy of the Order of Sale with the Recorder of King County, and posting the Sheriff's Public Notice of Sale for not less than four weeks

prior to the date of sale. (CP-A 85-6). Said Public Notice of Sale was posted at the first floor lobby of the King County Courthouse, at the front door of the Unit, and published multiple times in a legal newspaper. (CP-A 85-8). The Sheriff's Notice to Judgment Debtor of Sale was mailed to all known addresses for all persons or parties with any interest in the Unit, regardless of whether such interest would be extinguished by the sheriff's sale or not. (CP-A 71-3, 77-8). Accordingly, notice of the Sheriff's Sale was sent to Bank of America as beneficiary under the Deed of Trust. (Id.).

Bank of America responded to the sheriff's sale notice, demanding a stipulation expressly declaring that the Association's Sheriff's Sale would not affect the Deed of Trust, even though Bank of America was not a Defendant, was never served with process, and did not have a judgment taken against it in the lawsuit. (CP-A 74-6, 79-84). Subsequently, the Association and Bank of America executed a Stipulation and Order, entered with the Court on March 7, 2012, that declared that the Judgment does not affect Bank of America's deed of trust interest, and that the purchaser at the Sheriff's Sale shall take any interest in the Unit subject to any valid interest of Bank of America in the Unit. (CP-A 79-84).

3. Investor (Respondent Herein) High Bidder At Both Of Association's Sheriff's Sales.

On March 9, 2012 the sheriff's sale on both units was separately conducted by the King County Sheriff's Office. Detective Esparza

verbally announced the written credit bid by the Plaintiff for the total amount due at the time of sale, as previously provided by Plaintiff to the Sheriff's Office, to wit, $35,397.80 for the Mallarino Unit, and $16,197.03 for the Parsons Unit. (CP-B 288, CP-A 337). Appellant/Cross-Respondent Daniel Pashniak ("Investor") personally attended each sale by Detective Esparza and submitted to the Detective separate winning bids in the amount of $35,400.00 for the Mallarino Unit, and $16,200.00 for the Parsons Unit. (Id.). The respective Sheriff's Returns on Sale of Real Property and Certificates of Purchase of Real Estate was prepared and received by the Judgments Clerk on March 16, 2012. (CP-B 289, CP-A 338). The Sheriff's Returns on Sale of Real Property (and subsequent Deputy Cunio Declarations) state that the Sheriff's Sales were conducted according to the manner required by law. (CP-B 157-158, 194-195, 289, 300-301; CP-A 85-109, 336-350). The Clerk mailed her Notices of Return of Sheriff's Sale On Real Property on March 16, 2012. (CP-B 181-2; CP-A 110-1).

4. Investor Files Untimely Objection Regarding Mallarino Sale.

Under RCW 6.21.110(2), any objection to sale had to be filed by April 5, 2012, twenty days after the Clerk Mailed her Notice of Return. Investor filed his Objection in the Mallarino case on April 9, 2012, more than twenty days after the Clerk Mailed her Notice of Return. (CP-B 148-9). The Objection stated that Investor was confused as to whether the sale

would extinguish any "prior indebtedness," but did not specify any particular irregularity in the sheriff's conduct of the sale, and did not state any authority in support of the Objection. (Id.).

In a letter to the Association, Investor advised that he wanted to surrender his purchaser's interest in the two Units in exchange for the money that he paid to the Sheriff. (CP-B 239). Investor stated that ten years ago he was informed that condominium association dues took precedence over all other matters, admitting that he was not current on the exact status of foreclosure procedures. Investor admitted that his understanding was incorrect. (Id.).

5. Investor Files Objection Regarding Parsons Sale.

Investor filed an objection in the Parsons case on March 22, 2012. (CP-A 112-3). The Objection stated that Investor was confused as to whether the sale would extinguish any "prior indebtedness," but did not specify any particular irregularity in the sheriff's conduct of the sale, and did not state any authority in support of the Objection. (Id.).

6. Investor Background.

Investor is a resident of Spokane County, Washington and a real estate investor with experience in real estate legal matters in King and Spokane counties. (CP-B 222, 311, 325-336). Investor was in King County Superior Court in early 2012 and learned of the sheriff's sale for

two condominiums at Sixty-01 from the legal notices posted on a board in the King County Courthouse. (CP-B 223).

Investor claimed he only learned of the Deeds of Trust on the Units after the Sheriff's Sale when he discovered the Bank of America Stipulation in the court file (despite the Deeds of Trust having been recorded in the county land records since 2006 and 2007, respectively, and despite statutory and recorded covenant (Declaration) subordination of the Association's lien to any deeds of trust. (CP-B 82-83, 104, 138-156, 224, 324). Investor admitted that he knew that Bank of America was not named as a party in each foreclosure when he first saw the Sheriff's Notice to Judgment Debtor of Sale of Real Property while at the King County Courthouse. (CP-B 223, CP-A 186). Investor did not examine the court files prior to submitting his bids. (CP-B 222-8, 231, CP-A 185-94, 199).

B. Procedure In Superior Court

Pursuant to RCW 6.21.110, the Association moved for confirmation of the Mallarino sale on June 13, 2012, and moved for confirmation as to the Parsons unit on June 6, 2012. (CP-B 183-202, CP-A 120-41). Notice of the motions was given to Investor and to all other parties that were previously sent a copy of the Sheriff's Notice to Judgment Debtor of Sale of Real Property. (CP-B 203-205, CP-A 142-4).

(I) Mallarino Proceedings: The Association's motion to confirm sale was continued to July 20, 2012 upon Investor's Motion, over

objection of the Association as untimely. (CP-B 206-208). Investor filed a second Objection to Confirmation and Motion to Vacate Sheriff's Sale on July 12, 2012, *over three months after the 20 day deadline* for objections to the sheriff's sale, now for the first time filing any specific objection to the sheriff's sale. (CP-B 209-286).

The Association filed its Rebuttal to the second Objection on July 18, 2012. (CP-B 304-340). Investor filed a further Reply on July 19, 2012. (CP-B 341-347). On July 23, 2012, the Court entered an Order Vacating Sheriff's Sale, providing a directly contradictory result to that reached by the trial court in the Parsons proceeding, as addressed below. (CP-B 348-349). The Order was stayed by Stipulation and Order on July 26, 2012. (CP-B __ (Dkt. 44, 3rd Suppl. Desig. Rec. dated 12/19/12)). The Association then timely filed its Notice of Appeal. (CP-B 350-3).

II. Parsons Proceedings: The Association's Motion to confirm sale made note of the Investor's Objection, but neither Investor nor anyone else elected to provide any response to the Motion. (CP-A 121, 145-7). The Court confirmed the sale. (CP-A 145-7). Investor then filed his Notice of Appeal. (CP-A 158-63). Several months later, and while the instant appeals were pending, Investor filed a motion attempting to vacate the order confirming the sale. (CP-A 169-84). The Court denied that motion and upheld its order confirming sale. (CP-A 358-9). Investor then

filed an "Amended Notice of Appeal" of the court's denial of his motion to vacate. (CP-A 360-7).

IV. ARGUMENT (ON CONSOLIDATED CASES)

A. Standard of Review

1. Confirmation of Sheriff's Sale: The Court of Appeals reviews an objection to confirmation of sheriff's sale and a trial court's order on motion for confirmation *de novo*, engaging in the same inquiry as the trial court. *Hazel v. Van Beek,* 85 Wn. App. 129, 133 (1997), *aff'd in part and rev'd in part,* 135 Wn.2d 45 (1998). Interpretation of statutes governing sheriff's sales is an issue of law, which the Court of Appeals reviews *de novo*. *Hazel,* 85 Wn. App. at 137. The interpretation and applicability of statutes in general presents questions of law reviewed *de novo*. *Quality Food Ctrs. V. Mary Jewell T, LLC,* 134 Wn. App. 814, 817, 142 P.3d 206 (2006); *In re Electric Lightwave, Inc.,* 123 Wn.2d 530, 536 (1994).

2. Judgment For Attorney Fees: Whether a party is entitled to attorney fees is an issue of law that the Court of Appeals reviews *de novo*. *Ethridge v. Hwang,* 105 Wn. App. 447, 460, 20 P.3d 958 (2001).

3. Parsons Case Motion to Vacate: The denial of Investor's motion to vacate the order confirming sheriff's sale is reviewed for an abuse of discretion. *Graves v. Dep't. Game,* 76 Wn. App. 705, 718 (1994).

B. The Plain Meaning of the Sheriff's Sale Confirmation Statute Mandates That the Foreclosing Creditor is *Entitled* To

Confirmation of the Sale If There Are No Irregularities With The Sheriff's Conduct of the Sale.

Investor asserts that he is entitled to simply withdraw his bid after the sheriff accepted it as the high bid, filed his Sheriff's Return on Sale, and the Clerk issued her Notice of Filing of Return, in effect forcing foreclosing creditors to incur substantial expense and delay to restart sheriff's sale foreclosure proceeedings on the whim of an investor who changes his mind. There is no right for a third-party investor to simply withdraw his bid:

> The *judgment creditor* or successful purchaser at the sheriff's sale is *entitled* to an order confirming the sale at any time after twenty days have elapsed from the mailing of the notice of the filing of the sheriff's return, *on motion* with notice given to all parties who have entered a written notice of appearance in the action and who have not had an order of default entered against them, unless the judgment debtor, or in case of the judgment debtor's death, the representative, or any nondefaulting party to whom notice was sent shall file objections to confirmation with the clerk within twenty days after the mailing of the notice of the filing of such return.

RCW 6.21.110(2) (emphasis added). Unless a timely objection is filed that establishes "substantial irregularities" of the sheriff's doings and undertakings in noticing and conducting the sheriff's sale under RCW 6.21.110(3), the judgment creditor (here, Association) has a legal right to have the sale confirmed, and Investor cannot simply withdraw his bid.

Investor cites *Davies v. Davies*, 48 Wn. App. 29; 737 P.2d 721 (1987) as support for his theory that a third-party bidder can withdraw his bid whenever he wants. *Davies* is inapplicable because in *Davies* no *third party investor* sought to retract his bid; rather, the *judgment creditor* withdrew a motion to confirm the sale *where he was the only bidder, no third party investor bid,* so that the sale could be reset to increase the judgment creditor's opening bid (which had originally been announced at $1k, substantially less than the $30k amount due on his judgment), as he "learned" that the judgment debtor intended to swoop in and redeem the property for the low $1k winning bid. *Davies,* 48 Wn. App. At 30-1. The *judgment debtor* contested the *judgment creditor's* right to refrain from confirming the sale for $1k, withdrawing the *judgment creditor's* $1k bid, re-setting the sale and confirming the second sale for $30k. Id. The Court of Appeals held that the *judgment creditor* was *entitled* to confirmation of the second sale, and was not obligated to have the first, low-bid $1k sale confirmed. *Davies,* 48 Wn. App. At 32. The *Davies* Court based its ruling on a Supreme Court case that reasoned that "the statutory scheme does not contemplate that the judgment creditor can be forced to buy the mortgage property *at all*, and therefore clearly not at a price set by the court." *Davies,* 48 Wn. App. at 31 (emphasis in original) (*quoting American Fed. Sav. & Loan Ass'n v. McCaffrey,* 107 Wn.2d 181, 190-1 (1986)).

The *Davies* court did not have before it a *judgment creditor* seeking to confirm a sale (as the Association is here) and a third party *investor* seeking to withdraw his bid (Investor here) - and thus, the *Davies* Court's broad statement that "before confirmation, the highest bidder may be permitted to withdraw his bid" must be limited to a *judgment creditor* withdrawing her bid, and was *dicta* as to any third party *investor* attempting to withdraw his bid. *Davies,* 48 Wn. App. at 31. Unlike the unusual situation of a judgment debtor seeking to *force* a judgment debtor to confirm a low opening bid sale as was before the *Davies* Court, the confirmation statute unequivocably provides that *if indeed* the *judgment creditor* actually wants to confirm the sale and actually *moves* to confirm the sale, the *judgment creditor* is *"entitled" "on motion"* to confirmation of that sale under the plain language of RCW 6.21.100(2), unless a timely objection is filed that establishes "substantial irregularities" of the sheriff's doings and undertakings in noticing and conducting the sheriff's sale under RCW 6.21.110(3). That was not the case before the *Davies* Court, and thus its holding must be limited to the case before it, and is thus inapplicable to the case at bar. To now hold that the *Davies* Court's ruling applies to bar a *judgment creditor* from confirming a properly conducted sale because a third party *investor* changes his mind and wants to withdraw his bid, would effectively read out the "judgment creditor. . . is

entitled to an order confirming the sale. . . on motion" language of RCW 6.21.110(2).

The *Davies* Court also did not have before it any objection asserting "substantial irregularities concerning the sale" under RCW 6.21.110(3), as Investor is asserting here, addressed in detail below.

C. Purchaser Charged with Constructive Notice of Recorded Prior Deed of Trust, and Thus Not Entitled to Equitable Right to Set Aside Sheriff's Sale.

Investor claimed that he wanted his money back because he only learned of the prior Bank of America Deed of Trust on each unit after the Sheriff's Sale, when he discovered the court-filed Stipulations between Bank of America and the Association confirming that the Association's foreclosures would not foreclose the respective Deed of Trust (despite each Deed of Trust having been recorded in the county land records since February of 2006 (on the Mallarino Unit) and July 2007 (on the Parsons Unit), respectively, and despite RCW 64.32.200(2)(b) statutory subordination and recorded Declaration of Condominium lien subordination to said Deeds of Trust). (CP-B 138-156, 224, 322, CB-A 185-94, 199). Investor's Brief asserts that he learned of the Bank of America Deeds of Trust within 10 days after the sale, Brief of App. at 12, but there is no evidence anywhere in the record as to when Investor actually became aware of those senior liens, only that it was after the sale.

Id. Investor asserts that his failure to discover that there was a prior recorded deed of trust gives him some kind of equitable right to overturn the sheriff's sale. However, a recorded deed of trust imparts constructive notice of such real property interest to a purchaser at a sheriff's sale foreclosing a junior lienholder's interest. *Tomlinson v. Clarke,* 118 Wn.2d 498, 500 (1992) ("Constructive notice exists if the prior interest is recorded"). Investor had constructive notice of the Deed of Trust prior to the Sheriff's Sale, as the Deeds of Trust were recorded in the King County Recorder's records. (CP-B 138-156, CP-A 80). Investor would have easily discovered the Deeds of Trust had he inspected the county records or ordered a title report prior to the Sheriff's Sales. (CP-B 305, 307-309, 312, 322, CP-A). Investor should not be allowed to withdraw his bids and deny confirmation of the sheriff's sales on equitable grounds because Investor failed to conduct any reasonable diligence prior to the Sheriff's sales that would have led to discovery of the Deeds of Trust. (CP-B 306-307, CP-A 185-94, 199). Indeed, Investor stated that he was operating under a misapprehension of the law that all statutory condominium assessment liens enjoyed lien priority over deed of trust interests. (CP-B 239).

The cases at bar - a bidder who wants his money back because he wasn't aware of a senior lien that would survive foreclosure sale - is in substance the judicial foreclosure equivalent to a nonjudicial foreclosure

case that the Court of Appeals examined eleven years ago (where the undersigned counsel served as foreclosing creditor's counsel in that case). In *Mann v. Household Finance Corp. III,* 109 Wn. App. 387 (2001), the third party investor bid at a foreclosure sale of a junior deed of trust, which did not foreclose out the senior deed of trust. The investor then sought to rescind his purchase when the senior deed of trust lender commenced foreclosure, claiming he did not know about the senior deed of trust, despite the recording of that senior deed of trust. *Mann,* 109 Wn. App. at 389. The investor in *Mann* claimed that the notice of trustee's sale indicated that all deeds of trust (even a senior one) would be extinguished upon trustee's sale, but the *Mann* Court held that the statutory form of notice of trustee's sale under RCW 61.24.040 did not state that a senior deed of trust would be extinguished. *Mann,* 109 Wn. App. at 392. Investor in the cases at bar is attempting to make substantially the same arguments that the investor in *Mann* made, that somehow each respective Judgment and Decree of Foreclosure in these cases implied that any and all deeds of trust would be extinguished at foreclosure sale, despite never even naming deed of trust beneficiary Bank of America as a defendant.

Investor asserts that *Miebach v. Colasurdo,* 102 Wn. 2d 170 (1984) gives trial courts an equitable power to overturn a sheriff's sale, where the investor was not aware of a senior deed of trust that would not be foreclosed at sheriff's sale. However, that case is distinguishable, as the

Miebach Court examined a *judgment debtor's* right to have a court employ equitable powers to overturn a sheriff's sale *to a third party investor. Miebach,* 102 Wn.2d at 170. The instant cases involve a *third part investor* (not judgment debtor) who wants his money back because he failed to detect a senior deed of trust that would survive a foreclosure sale.

The *Miebach* court established a court's equitable authority could be employed to overturn a sheriff's sale, where (1) the *winning bidder* is not a bona fide purchaser, (2) there is a gross inadequacy of the price paid, and (3) a simple judgment creditor (not a deed of trust or statutory lien creditor with a decree of foreclosure on specific real property) fails to attempt to satisfy the judgment out of judgment debtor's personal property first. *Miebach,* 102 Wn.2d at 175. Unpacking this three-part test further to illustrate that *Miebach* simply doesn't apply here: (1) the *investor's* knowledge that the judgment debtor wasn't aware of the underlying lawsuit led the *Miebach* court to conclude he wasn't a bona fide purchaser. *Miebach,* 102 Wn.2d at 177 ("if [investor] Miebach had made a reasonably diligent inquiry, he would have discovered the [judgment debtor] Colasurdos were aware of neither the default judgment nor the sheriff's sale"); in the instant case, the judgment debtor is not contesting the investor's winning bid; the investor simply wants his money back because he failed to detect a senior deed of trust that was recorded, of which he is charged with constructive notice; (2) the real property in

Miebach sold for less than $2k despite equity of $77k; there is no assertion or issue that the price paid at sale for the real property in this case, subject to a first deed of trust, was in any way inadequate (indeed, getting residential real property worth six figures each for $16k and $35k, respectively, *free and clear of any senior deed of trust* would be a huge windfall to this Investor); (3) in *Miebach* the judgment creditor failed to attempt to satisfy its simple $1k monetary judgment (on a simple car loan debt, not decree of foreclosure of any real property lien) against judgment debtor's personal property before setting up a sheriff's execution sale on that simple judgment.

Nothing in *Miebach* gives a trial court sweeping equitable powers to sidestep RCW 6.21.110(2)'s mandate that the judgment creditor is *entitled* to confirmation of a sheriff's sale, unless the 3-part *Miebach* test addressed above is met, or there are substantial irregularities in the sheriff's conduct of the sale under RCW 6.21.110(3), neither of which are the case here. In the instant cases, the Investor wants to overturn properly conducted sheriff's sales foreclosing a judgment creditor's statutory liens simply because he didn't detect a recorded senior deed of trust on each unit, of which he is charged with constructive notice, and now wants his money back. This is not a *Miebach* case, but it most certainly is a *Mann* case. Investor also cites *Albice v. Premier Mortgage Servs., Inc.,* 174 Wn.2d 560, 567 (2012) as sweeping authority to vacate a sheriff's sale;

however, *Albice* involved a nonjudicial foreclosure where the foreclosure trustee attempted to conduct a foreclosure sale in violation of RCW 61.24.040(6)'s clear mandate that no sale may be conducted beyond 120 days after the originally-scheduled sale date. The Washington Supreme Court ruled that owners do not waive the right to contest a nonjudicial foreclosure after the sale in scenarios where "when [the owners] received the notice [of trustee's sale], they had no grounds to challenge the underlying debt," and here, the lender and owners then enter into a forbearance agreement, and despite making the forbearance payments, the lender goes ahead with a foreclosure sale without any further notice to the owners. *Albice* examined the owner's right to contest the third party investor purchaser's title obtained through the trustee's deed, which trustee's deed resulted from a foreclosure sale that violated RCW 61.24.040(6). None of these facts are present in the cases at bar - rather than an *owner* contesting that a creditor conducted a foreclosure in violation of RCW 61.24.040(6) and despite the owner making negotiated forbearance payments, we have an investor that wants his money back because he failed to conduct the due diligence to confirm that there was a prior deed of trust that enjoyed statutory and recorded covenant (Declaration of Condominium) lien priority.

D. Statutory and Recorded Covenant (Declaration) Subordination of Lien Foreclosed at Sheriff's Sale Mandates That Such Sheriff's Sale *Not* Extinguish Any Valid Deeds of Trust.

Investor argued to the trial court that the Association should have named Bank of America as a party to the foreclosure pursuant to RCW 64.34.364(3) and *Summerhill Village HOA v. Roughley*, 166 Wn. App. 625 (2012) (addressing foreclosure of a deed of trust by sheriff's sale of a statutory assessment lien). (CP-B 213-216). However, the Association's lien was statutorily subordinated to the Bank of America Deed of Trust pursuant to RCW 64.32.200(2) and the lien subordination clause in § 19.1 of the recorded Declaration of Condominium - of which Investor is also charged with constructive notice. A recorded encumbrance imparts constructive notice of such real property interest to a purchaser at a sheriff's sale foreclosing a junior lienholder's interest. *Tomlinson v. Clarke,* 118 Wn.2d 498, 500 (1992) ("Constructive notice exists if the prior interest is recorded"). Investor had constructive notice of the Declaration of Condominium and its § 19.1 lien subordination clause.

While our Legislature provided for limited lien priority over certain deeds of trust by enacting RCW 64.34.364(3) as part of the Washington Condominium Act in 1990, the Act grandfathered in provisions in previously recorded declarations of condominium that contained contrary provisions. RCW 64.34.010(1). The Association, formed in 1978 under

Declaration of Condominium recorded under King County Recording No. 7808300897, has a Declaration that in § 19.1 contains the subordination clause mandated by RCW 64.32.200(2), in effect at that time. While the Association could, under RCW 64.34.010(2), amend its Declaration to obtain the benefits of limited lien priority under RCW 64.34.364(3), the Association's Declaration has not been so amended.

Accordingly, the Association's statutory lien was subordinated to the Bank of America deed of trust, and the Association could not name Bank of America as a defendant in the instant foreclosure action. Thus, the Association could not foreclose out the Bank of America deed of trust, as the condominium association creditor was able to so do under RCW 64.34.364(3) in *Summerhill. Summerhill,* 166 Wn. App. at 629.

E. Deed of Trust Beneficiary Bank of America Was Not Named As a Defendant, Judgment Does Not Decree Foreclosure Against Same, and Thus Sheriff's Sale Would Not Extinguish Its Recorded Deed of Trust.

In accordance with the statutory subordination of its lien under RCW 64.32.200(2), and the subordination provision in its recorded Declaration of Condominium § 19.1, neither Complaint (and as amended in Mallarino) named respective deed of trust beneficiary Bank of America as a Defendant. (CP-B 1-9, 13-21, 104, CP-A 1-9). It is black letter law that if a person or entity is not made a party to a foreclosure action, its

interest is not affected by that foreclosure. *Hallgren Co. Inc. v. Correl, Inc.*, 13 Wn. App. 263, 265-6 (1975). Washington law provides that a creditor foreclosing its interest in real property through judicial foreclosure, may elect to name *or not name* as Defendants other purported creditors that may appear to have record mortgage, deed of trust or lien interests in that property; the result of not naming such other purported creditor is that the foreclosing creditor's foreclosure action has no effect on the recorded interest of that purported creditor. *U.S. Bank of Wash. v. Hursey,* 116 Wn.2d 522, 526 (1991); *Spokane Savings and Loan Soc. v. Liliopoulos,* 160 Wash. 71, 73-4 (1930). The *Spokane Savings* Court emphasized that such decision whether to name competing creditors lies with the foreclosing creditor:

> [W]hether or not [such third party creditor not made a defendant] was a necessary party was the concern of the plaintiff in this action, not the concern of the defendant mortgagors. In other words, there is no specific mandate, either in the statute or in the general rules of law, which imperatively requires that a junior encumbrancer be made a party to the mortgage foreclosure proceeding.

Spokane Savings, 160 Wash. at 74. See also *Davis v. Starkenburg,* 5 Wn.2d 273, 281 (1940); *California Safe Deposit & Trust Co. v. Cheney Elec. Light, Tel. & Pwr. Co.,* 12 Wash. 138, 139-40 (1895) ("The only proper parties to a foreclosure suit are the mortgagor, the mortgagee and those who have acquired any interest from either of them subsequently to the mortgage"). A purported third party creditor that may have an interest

senior to the foreclosing creditor's interest is not a proper party in a judicial foreclosure.

Indeed, even the Deed of Trust Act, Ch. 61.24 RCW, includes an analogous provision for nonjudicial foreclosure proceedings:

> [Foreclosure sale] shall not affect the lien or interest of any person entitled to notice under subsection (1) of this section [requiring mailed notice of sale to junior lienholders to be extinguished by foreclosure], if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding.

RCW 61.24.040(7).

As Bank of America was not named as a defendant, the Judgments and Decrees of Foreclosure in these cases did not award any relief against Bank of America; Bank of America is not listed as one of the defendants in the Decree of Foreclosure whose interests would be foreclosed out upon sheriff's sale. (CP-B 122-128, CP-A 16-21).

Investor admitted that he knew that Bank of America was not named as a party to the foreclosure when he first saw the Sheriff's Notice to Judgment Debtor of Sale of Real Property while at the King County Courthouse. (CP-B 223, CP-A 186). However, Investor argues that the following language in each Judgment and Decree of Foreclosure is misleading:

> VI. ....[A]ll 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 of any part thereof is inferior and subordinate to Plaintiff's lien and is hereby foreclosed...."

(CP-B 126; CP-A 20). Investor argues that he interpreted this language to mean that by purchasing at the Sheriff's Sale, he would take the property free and clear of encumbrances, even though Bank of America was not a named defendant and the Judgment and Decree of Foreclosure awarded no relief against Bank of America. (CP-B 214-216). Investor's argument is identical to the argument an investor made to the Court of Appeals in another foreclosure case. In *Mann v. Household Finance Corp. III,* 109 Wn. App. 387 (2001), the third party investor bid at a foreclosure sale of a junior deed of trust, which did not foreclose out the senior deed of trust. The investor then sought to rescind his purchase when the senior deed of trust lender commenced foreclosure, claiming he did not know about the senior deed of trust, despite the recording of that senior deed of trust. *Mann,* 109 Wn. App. at 389. The investor in *Mann* claimed that the notice of trustee's sale indicated that all deeds of trust (even a senior one) would be extinguished upon trustee's sale, based on language almost identical to the above-quoted judgment language. The language in the *Mann* notice of trustee's sale came directly, word-for-word, from the statutorily-provided form of Notice of Trustee's Sale under RCW 61.24.040(1)(f)(VIII).

The *Mann* Court reasoned that the senior deed of trust, enjoying lien priority over the junior deed of trust being foreclosed, was *not* one of the interests taken by, through, or under the grantor of the junior deed of trust. *Mann,* 109 Wn. App. at 393. Correspondingly, the Bank of America Deeds of Trust enjoyed statutory and recorded covenant (Declaration) priority over the Association's lien interests, and thus was *not* one of the interests that could be foreclosed by the Association. (CP-B 104). Furthermore, the Judgment and Decree of Foreclosure language at issue is included in conformance with the Lis Pendens statute, RCW 4.28.320, to bind any persons or parties unknown who may take any interest in the Unit *after recording* of the Lis Pendens, to the Judgment and Decree of Foreclosure as if they had been originally been made a party in the action.

The *Mann* Court held that the statutory form of notice of trustee's sale under RCW 61.24.040(1)(f)(VIII) did not state that a senior deed of trust would be extinguished, and "did not suggest to the Manns that any and all senior deeds of trust or other prior encumbrances were thereby extinguished. The Manns could not justifiably rely on such an interpretation." *Mann,* 109 Wn. App. at 394. Investor in the cases at bar is attempting to make substantially the same arguments that the investor in *Mann* made, that somehow the Judgments and Decrees of Foreclosure in these cases implied that any and all deeds of trust would be extinguished at

foreclosure sale, despite never even naming deed of trust beneficiary Bank of America as a defendant, and despite the Judgments and Decrees of Foreclosure awarding no relief whatsoever against Bank of America.

The Judgments and Decrees of Foreclosure in these cases are a verity in this appeal. Investor's erroneous interpretation of the Judgment's provisions is not a "substantial irregularity" under RCW 6.21.110(3), which is limited to the sheriff's doings and undertakings in noticing and conducting the sheriff's sale; see Argument Section (F) below. The RCW 64.32.200(2)(b) subordination statute is clear, the recorded Declaration § 19.1 subordination provision is clear, and the Judgments and Decrees of Foreclosure unequivocably do not within its four corners name Bank of America as a defendant, much less decree any foreclosure against that entity or its respective deed of trust. Investor can point to no authority that would mandate that the failure to disclose a prior recorded deed of trust to potential bidders somehow rises to the level of "substantial irregularities" under RCW 6.32.110(3).

F. Stipulating With A Deed of Trust Beneficiary That Statutory and Recorded Covenant (Declaration) Subordination of the Lien Being Foreclosed Results In No Extinguishment of That Deed of Trust Does Not Constitute Any "Substantial Irregularity."

Investor's allegation of a "substantial irregularity" under RCW 6.21.110(3) and CR 60(b) is based solely on the argument that somehow the Association had a legal obligation to disclose to the Investor the existence of a prior, recorded deed of trust, and that somehow the Judgment and Decree of Foreclosure had to address that prior deed of trust or deed of trust beneficiary Bank of America N.A.

The *Mallarino* trial court's Order Vacating Sheriff's Sale expressly recited the timing of the filing of the Stipulation as a basis to deny confirmation of the sale. (CP-B 348-9). Implicit in the trial court's ruling was the premise that somehow potential third party bidders were entitled to notice of the Stipulation. Nothing in Washington law requires such separate disclosure of a prior recorded deed of trust that already imparts constructive notice, and which deed of trust enjoys lien priority pursuant to statute and a recorded Declaration of Condominium subordination provision. A recorded deed of trust imparts constructive notice of such real property interest to a purchaser at a sheriff's sale foreclosing a junior lienholder's interest. *Tomlinson v. Clarke,* 118 Wn.2d 498, 500 (1992) ("Constructive notice exists if the prior interest is recorded"). The Association had no legal obligation to even so much as *mention* the Bank of America deed of trust in any court filing in these routine foreclosure cases. It is black letter law that if a person or entity is not made a party to a foreclosure action, its interest is not affected by that foreclosure.

Hallgren Co. Inc. v. Correl, Inc., 13 Wn. App. 263, 265-6 (1975). The Association had no legal obligation to enter into the Stipulations and Orders with Bank of America to declare that the sheriff's sales would have no effect on each respective senior deed of trust. Whether it entered into such stipulations or not would change the legal result that the Association's sheriff's sales would have no effect on each deed of trust - and thus of no import to any potential investor who may bid at sale.

The fact that the Association agreed to placate Bank of America and enter into each Stipulation to confirm what was already the law does not mean that Investor suddenly obtained a legal right to some unspecified amount of time to discover that Stipulations in the Court file, as implied by the Mallarino trial court in its Order Vacating Sheriff's Sale. (CP-B 348). Under the trial court's theory as evidenced in its Order noting that the Stipulation and Order was entered by the Court the afternoon before the sale, the trial court grafted some kind of new, extra-statutory obligation to do something - what? To give notice of that Stipulation and Order? To whom, and how? - or else face having the sheriff's sale vacated. What was a foreclosing creditor legally obligated to then do? Upon agreeing to the Stipulation with Bank of America, call off the sale and spend significant money and delay to reissue the order of sale and have the sheriff start all over again with a new sheriff's sale notice, and mailing, posting and recording new sale notices? None of this is required by

Washington law, and there is no evidence that the Association acted inequitably in any way such that a valid, properly conducted sheriff's sale should be overturned by the trial court.

However, Investor's assertions of some legal right to disclosure of a prior recorded deed of trust that is not affected by a foreclosure sale is *not* "substantial irregularities" under RCW 6.21.110(3), which pertains to the *sheriff's* doings and undertakings in noticing and conducting the sheriff's sale pursuant to judgment. RCW 6.21.110(3) ("substantial irregularities *in the proceedings concerning the sale")* (emphasis added); *see, Betz v. Tower Sav. Bank,* 185 Wash. 314, 323-4 (1936). The Sheriff's Return is generally entitled to a *presumption* in any confirmation proceeding:

> It is always presumed that an officer performs his duty and complies with the law, and unless his return of his doings negatives that idea, they will be presumed regular; that is to say an incomplete return is not of itself fatal to the validity of the officer's acts; it must appear affirmatively, either by the return itself or extraneous evidence, that there was a failure to comply with the law.
>
> *Whitworth v. McKee,* 32 Wash. 83, 97 (1903). The seminal Washington case on "irregularities" arose during the actual conduct of a sheriff's sale at the date, time and location so set. *W. W. Williams as Trustee v. Continental Securities Corp.*, 22 Wn.2d 1 (1944). That case involved issues regarding competing bidders and the sheriff's actions in responding to actions of those bidders and the nature of the bids themselves.

Among several objections, one was that the sheriff, although making the public proclamation required by the predecessor statute to RCW 6.21.090(1) at the initial calling of the sale at 10:00 a.m., failed to go through the complete recitals again when the proceeding was resumed at 10:58 that morning. *W.W. Williams,* 22 Wn.2d at 9. The Court found that this was not a substantial irregularity: "Although the duties of the officer selling the property are ministerial in their nature, calling for an observance on his part of all statutory requirements relating to such sales, nevertheless, within these limits, he is invested with a reasonable latitude of discretion as to the time and manner of performing such duties. *W.W. Williams,* 22 Wn.2d at 11, *citing* 21 Am. Jur. 100, 105, Executions §§ 196, 205. Indeed, the *W.W. Williams* Court went on to approve the sheriff's actions in refusing bids from unqualified bidders: "Futhermore, the sheriff has the right to judge of the solvency of bidders, and may refuse to acept the bid of an insolvent or irresponsible person." *W.W. Williams,* 22 Wn.2d at 12.

In the instant cases, the Sheriff's Returns and the Declarations of Eva Cunio of the King County Sheriff's Office establish uncontested evidence that the Sheriff's Office complied with the sheriff's sale requirements of Chapter 6.21 RCW. (CP-B 157-180, 287-303, CP-A 85-109, 336-50). Here, there is no evidence, much less any allegation by Investor, that the *sheriff* did anything but discharge his obligations in noticing and conducting the sale to the letter of the law. There are no "substantial

irregularities" within the limits of RCW 6.21.110(3) that would merit denying confirmation of the sheriff's sale. An intercreditor agreement (that simply confirms the application of a subordination statute (RCW 64.32.200(2)) and a recorded subordination clause to a prior *recorded* deed of trust) cannot be deemed an RCW 6.21.110(3) substantial irregularity (of the county sheriff's doings and undertakings in noticing and conducting a sheriff's sale). Investor's objection to sheriff's sale confirmation is therefore not really an objection that there were any irregularities in the sheriff's conduct of the sales, but rather a thinly veiled attempt to graft a new right of investors to get out of their bids whenever they assert that they erred in apprehending what they were bidding on.

G. Investor's Objection to Confirmation in Mallarino Case Statutorily Barred by Failing to Timely File Any Objection Within 20 Days of Mailing of Clerk's Notice of Return On Sheriff's Sale.

In the Mallarino case, the Clerk mailed her Notice of Return of Sheriff's Sale On Real Property on March 16, 2012. (CP-B 181-2). Under RCW 6.21.110(2), any objection to sale had to be filed by April 5, 2012, twenty days after the Clerk Mailed her Notice of Return. Investor filed his Objection on April 9, 2012. (CP-B 148-9). The untimely Objection stated that Investor was confused as to whether the sale would extinguish any "prior indebtedness," but did not specify any particular irregularity in the

sheriff's conduct of the sale, and did not state any authority in support of the Objection.

Investor filed a second Objection to Confirmation and Motion to Vacate Sheriff's Sale on July 12, 2012, over three months after the 20 day deadline for objections to the sheriff's sale, now for the first time alleging there was a substantial irregularity because the Association and Bank of America had entered into the Stipulation and Order, and that as a result he should be allowed to withdraw his bid. (CP-B 224).

It is clear that Investor's first objection, failing to specify any basis for any objection whatsoever, was not timely, and Investor's second objection, which finally did specify some basis for an objection over three months later, was untimely. RCW 6.21.110(2) provides that:

> the judgment creditor. . . is *entitled* to an order confirming the sale at any time after twenty days have elapsed from the mailing of the notice of the filing of the sheriff's return. . . unless the judgment debtor. . . or other nondefaulting party to whom notice was sent shall file objections to confirmation with the clerk *within 20 days* after the mailing of the notice of the filing of such return.

RCW 6.21.110(3) (emphasis added). Failure to timely file an objection results in waiver of that right, as our Supreme Court succinctly held: "[W]e hold the deadline for procedural deadlines is mandatory." *Hazel v. Van Beek,* 135 Wn.2d 45, 50 (1998). The *Hazel* court overruled the Court of Appeals' reading of the twenty day deadline as discretionary. Id. In the

Hazel case, the objecting party filed his objection three days after the twenty day deadline.

In the Mallarino case, Investor's first objection (not stating any particular basis for the objection) was untimely, and Investor's second objection (filed more than 90 days after the twenty day deadline and now for the first time asserting some procedural irregularity) was untimely. The *Hazel* court made it clear that mandatory means mandatory in such case: "Had Van Beek's objections to the sale been based on procedural irregularities of the sale, they would have been untimely under the mandatory 20-day deadline in RCW 6.21.110(2)." *Hazel,* 135 Wn.2d at 53. Under the foregoing authority, Investor's objections in the Mallarino case must be rejected as untimely, and a mandate issued directing the trial court to confirm the Mallarino sheriff's sale.

H. Long-Standing Public Policy Preserving Stability of Land Titles and Finality of Properly Conducted Foreclosure Proceedings.

Investor asserts that he is entitled to simply withdraw his bid after the sheriff accepted it as the high bid, filed his Sheriff's Return on Sale, and the Clerk issued her Notice of Filing of Return, in effect forcing foreclosing creditors to incur substantial expense and delay to restart sheriff's sale foreclosure proceeedings on the whim of an investor who changes his mind.

If investors in Washington can now show up to foreclosure sales and bid, knowing that they can easily withdraw their bid if, for instance, they later discover a senior deed of trust, or inspect the property and find it in worse condition than they estimated, then Washington has opened the floodgates to rampant speculation in foreclosure sales and risk to foreclosing creditors that they may need to repeatedly re-set otherwise properly conducted sheriff's sales. No reported Washington case has been found where an investor bid at a *judicial foreclosure sheriff's* sale and then *wanted to get out of the sale*, but there is a Washington case holding that an investor bidding at a *nonjudicial trustee's sale* cannot rescind the sale becase he erroneously thought the sale would extinguish a senior deed of trust. *Mann v. Household Finance Corp. III,* 109 Wn. App. 387 (2001). The result in a judicial foreclosure case should be the same as in *Mann.*

The cases addressed in the foregoing sections of this brief involved situations where the *judgment debtor* wanted to stop their real property from being sold to a third party investor (*e.g., Miebach v. Colasurdo,* 102 Wn. 2d 170 (1984); *see also, Albice v. Premier Mortgage Servs., Inc.,* 174 Wn.2d 560, 567 (2012)), or where the *judgment creditor* elected not to confirm a sale where the *judgment creditor* was the only bidder (*Davies v. Davies*, 48 Wn. App. 29; 737 P.2d 721 (1987)); there is a case where a nonjudicial foreclosing creditor's trustee called a very low opening bid in error, an investor submitted a $1 over bid to capitalize on that low opening

bid, and the trustee attempted to reject the bid after the sale was concluded once the erroneous low bid was discovered. *Udall v. T.D. Escrow Servs., Inc.,* 159 Wn. 2d 903 (2007). The Supreme Court in *Udall* upheld the investor's winning bid and ruled that "[t]he trustee cannot withold delivery [of a trustee's deed] unless the sale itself was void due to a procedural irregularity *that defeated the trustee's authority to sell the property.*" *Udall,* 159 Wn.2d at 911 (emphasis added).

If it is now the law in Washington that an investor can withdraw a bid simply because he failed to detect a senior, recorded deed of trust, then any investor can bid on real property at a sheriff's sale in Washington and withdraw his bid after the sale but prior to confirmation without any consequence to him, rewarding investors who utterly fail to exercise any reasonable diligence (such as here, failing to detect a prior, recorded deed of trust that would not be affected by foreclosure sale). By allowing a purchaser to withdraw his bid, title to real estate would be unstable, courts would be burdened with lawsuits filed by speculators who realize after the sale that their investments would not pan out, and creditors who lawfully foreclose their security interests would be prejudiced by having to incur the significant expense and delay to have the clerk reissue a new Order of Sale, have the sheriff issue new foreclosure sale notices, and have those notices recorded, posted, published and mailed all over again - how many times over? Washington courts have historically not granted equitable

considerations to third party investors that purchase distressed real estate. *See, Miebach v. Colasurdo,* 102 Wn. 2d 170 (1984)).

Although judicial foreclosures involve the court system and thus are of necessity more complicated and expensive, once a judgment is entered and a sheriff commences the routine procedures to set up a sheriff's sale, the same goals that apply to nonjudicial trustee foreclosure sales should apply to post-judgment sheriff's sale proceedings: "(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote the stability of land titles." *Albice v. Premier Mortgage Servs., Inc.,* 174 Wn.2d 560, 567 (2012), *quoting Cox v. Helenius,* 103 Wn.2d 383, 387 (1985).

The Mallarino trial court's Order Vacating Sheriff's Sale, if not reversed on appeal, plants the seeds of a crisis for judicial foreclosures in Washington. Enshrining in Washington law an investor right to simply withdraw a bid at a properly conducted sheriff's sale will invite rampant speculative bidding that will effectively kill off judicial foreclosure proceedings as an effective lien enforcement remedy in Washington. Creditors will simply not tolerate the uncertainty, delay and expense of having to restart sheriff's sale proceedings if investors can simply back out of their bids. Judicial foreclosure proceedings are supposed to have an

enhanced level of protection for both debtors and creditors over nonjudicial foreclosure proceedings, not have the reverse effect as would be seen here if Investor prevails.

I. The Parsons Trial Court Properly Denied Investor's Motion Attempting to Vacate the Order Confirming a Properly Conducted Sheriff's Sale.

Investor asserts that the Parsons court should have overturned its prior order confirming the sheriff's sale. The Parsons court properly determined that no CR 60 basis for vacating its prior sale confirmation order existed. Although the Investor in the Parsons case timely filed an objection, that objection only stated that Investor was confused as to whether the sale would extinguish any "prior indebtedness," but did not specify any particular RCW 6.21.110(3) irregularity in the sheriff's conduct of the sale, and did not state any authority in support of the objection. The objection evidenced that Investor was familiar with the legal system, captioned and formatted as required by court rule and reciting that the document also constituted a notice of appearance and a declaration of mailing. (CP-A 112-3). Although *pro se*, by representing himself, Investor will be held to the standard of an attorney in any court proceeding. *Westburg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411 (1997).

The objection was noted in the Association's motion to confirm the sale. Upon being noticed with the Association's motion to confirm, the Investor elected at that time to file no response whatsoever. The Parsons court properly entered the order confirming sale. Investor creatively attempts to label the order confirming sale a "default judgment," Brief of App. at 16, but in substance it was a final CR 7 order entered following Investor's express notice of appearance in the case, following notice and motion that was ignored by this Investor, and following the Court's consideration of Investor's Objection as pointed out to the Court in the Association's motion.

Twenty-nine days after the sale confirmation order was entered, Investor filed an notice of appeal of that order, rather than filing any motion to vacate at that time. Indeed, Investor eventually filed his motion to vacate almost three months after the order confirming sale, and while this appeal was pending - a blatant attempt to derail the Court of Appeals' consideration of this case and a transparent effort to supplement the record in the Parsons case with after-the-fact declarations that have no bearing on the *evidence* that was before the Parsons court *when it considered and ruled on the Association's Motion to Confirm Sheriff's Sale.*

The evidence before the Parsons court when it decided the motion to confirm was straightforward: Evidence presented by the Association of a lawful, regular sheriff's sale, and a vague objection by the Investor

stating that he was confused as to whether the sale would extinguish any "prior indebtedness," but which did not specify any particular RCW 6.21.110(3) irregularity in the sheriff's conduct of the sale, and did not state any authority in support of the objection. The Parsons court properly ordered the sheriff's sale confirmed.

J. Investor's Appeal of Parsons Court Order Denying His Motion to Vacate is Defective and Should Be Dismissed.

Almost three months after the Parsons sheriff's sale was confirmed, and while Investor's appeal was already pending, Investor filed his motion attempting to vacate the order confirming the sale, which was denied. (CP-A 169-84, 358-9). Investor then filed an "Amended Notice of Appeal" of the court's denial of his motion to vacate. (CP-A 360-7). That "Amended Notice of Appeal" specifically recited the already-pending Court of Appeal proceeding by case number, and also recited the prior Order Confirming Sheriff's Sale that was already the subject of review in the already-pending appeal. At no time did Investor initiate a new separate appeal proceeding; at no time did Investor pay the RAP 5.1(b) statutory appeal fee, and at no time has the Court of Appeals opened a new case number for any such proceeding seeking review of the order denying the motion to vacate. RAP 7.2(e) requires initiation of a separate review of an order denying a CR 60 motion to vacate, in the manner required under the Rules of Appellate Procedure. RAP 5.1(f) further details the requirements:

> If a party wants to seek review of a trial court decision entered pursuant to RAP 7.2 after review in the same case has been accepted by the appellate court, the party must initiate a *separate review* of the decision by timely filing a notice of appeal, except as provided by [other rules not applicable here]."

RAP 5.1(f) (emphasis added). That has not occurred here. If a review of the separate appeal is accepted under RAP 6.1, a party may thereafter seek to consolidate that new appeal proceeding into the prior appeal proceeding. RAP 7.2(e). None of that has occurred here. As there is no timely, valid appeal of the Parsons court order denying Investor's motion to vacate, the Court of Appeals should decline to review that decision.

K. In Parsons Case, No CR 60(b) Excusable Neglect Where Investor Waited Three Months After Sheriff's Sale to Hire Attorney.

Although *pro se*, by representing himself, Investor will be held to the standard of an attorney in any court proceeding. *Westburg v. All-Purpose Structures, Inc.,* 86 Wn. App. 405, 411 (1997). In the Parsons case, Investor timely filed his Objection, but failed to present any response to the motion to confirm that the Association filed almost three months after the sale. Investor had plenty of time to retain an attorney over those three months. There is no excusable neglect. Investor's Objection must be limited to that objection that he did timely file, under *Hazel v. Van Beek,* 85 Wn. App. 129, 133 (1997), *aff'd in part and rev'd in part,* 135 Wn.2d 45 (1998). The trial court considered the objection and properly

overruled it by confirming the sale. It was then six months after the sale that the Investor finally filed his Motion to Vacate the confirmation order.

L. In Parsons Case, No CR 60(b) Irregularity in Motion to Confirm Sheriff's Sale.

An "irregularity" within the meaning of CR 60(b) is "the want of adherence to some prescribed rule or mode of proceeding; and consists of either omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner. *Haller v. Wallis*, 89 Wn.2d 539, 543 (1978). There is uncontroverted evidence that the King County Sheriff's Office conducted the sheriff's sales in compliance with RCW 6.21.110(3); there is uncontested evidence that the Association's motion to confirm sheriff's sale was duly noticed, and that Investor's Objection was noted in the Motion. As to Investor's assertions that the Judgments and Stipulations were irregularities, see Brief § IV(E),(F), respectively.

Investor argues that a post-sale letter to the Association should be retroactively deemed a "withdrawal of bid," Brief of App. at 23, but that is a red herring: Investor's filed Objection stated his objection to the sale, which asked the Court to "re-sell" the unit, and which Objection was noted in the Association's Motion to confirm. There was no irregularity.

M. In Parsons Case, No CR 60(b) Newly Discovered Evidence Which By Due Diligence Could Not Have Been Discovered.

Investor asserts that the Parsons Judgment and Decree of Foreclosure and Bank of America Stipulation are newly discovered evidence under CR 60(b)(3). Brief App. at 17.

> A new trial on the ground of newly discovered evidence will not be granted unless the evidence (1) will probably change the result of the trial; (2) was discovered after trial; (3) could not have been discovered before trial even with the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.

Graves v. Dep't. Game, 76 Wn. App. 705, 718-9 (1994). The Judgment and Stipulation do not meet all of the required *Graves* elements, much less any of them. Here, the Court file was only examined after Investor retained counsel on June 22, 2012. (CP-A 185-94, 199). The Judgment, recorded Deed of Trust, RCW 64.32.200(2) statute subordinating the Association lien to the Deed of Trust, and recorded Declaration of Condominium subordination provision is not newly discovered evidence. All of these documents were available for Investor to review in the exercise of due diligence when he first noticed the Amended Sheriff's Public Notice of Sale of Real Property while in the King County Courthouse. Investor admits that he noticed that Bank of America was not listed as a party to the foreclosure. (CP-A 186). Investor could have reviewed the county land records and learned of the Bank of America encumbrance, and Investor could have

reviewed the court file's Judgment and Decree of Foreclosure and learned that Bank of America is not a party to the foreclosure and its interests are not affected thereby. Yet Investor did not conduct any investigation as to encumbrances on the Units until after the sale was over. (CP-A 185-94, 199). Investor cannot argue he was prejudiced in his bidding on March 9, 2012 because of documents in the court file, including the Judgment and Bank of America Stipulation, when he did not even review the court file until June 22, 2012. Id. The Parsons court did not abuse its discretion in denying Investor's motion to vacate the confirmation order.

V. RAP 18.1(B) REQUEST FOR ATTORNEY FEES ON APPEAL

The Association requests that its fees and expenses in this appeal be awarded pursuant to RAP 18.1(b). Applicable law grants the Association a right to recover its attorney fees and expenses on review before the Court of Appeals: Washington law provides for recovery of attorney fees incurred in attempting to recover unpaid condominium assessments through foreclosure. RCW 64.34.364 (14). In addition to the foregoing statutory authority, Section 19.1 of the recorded Declaration of Condominium provides for recovery of attorney fees in foreclosure actions by the Association. (CP 82-83, 104).

Further, while the foregoing authorities provide for attorney fees in an association foreclosure action, as here, state law provides a general right to attorney fees to the Association when enforcing its rights:

> 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 fees to the prevailing party.

RCW 64.34.455. Whether a case under [this statute] is appropriate for an award of fees is a discretionary decision. *Eagle Point Condo. Ass'n v. Coy,* 102 Wn. App. 697, 715, 9 P.3d 898 (2000). This is most certainly an appropriate case: The Association's foreclosure proceeding complied in every respect with Washington law. Investor submitted the winning bid at a properly noticed and conducted sheriff's foreclosure sale, and then wanted to get out of his bid because he failed to detect a recorded prior deed of trust that would survive sale. Investor then dragged the Association into litigation with him over confirmation of the sale, getting a trial court to give him a "pass" on being held to his winning bid, and now forcing the Association to bring this Appeal.

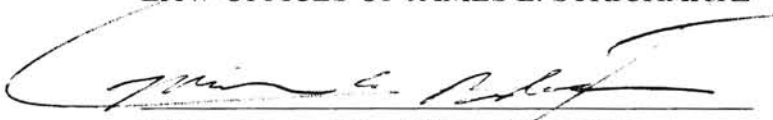
As a matter of public policy, it is inequitable to reward the Investor here at the expense of the Association, engaging in litigation where there is no law authorizing an investor to withdraw a bid submitted in a properly conducted sheriff's sale.

VI. CONCLUSION

The Association's appeal seeks reversal of the Mallarino trial court's Order Vacating Sheriff's Sale, which denied confirmation of a properly conducted sheriff's sale. The appeal herein also seeks an award to the Association of its attorney fees incurred in this appeal. The Parsons trial court's order confirming sheriff's sale should be upheld, and the Parson trial court's denial of Investor's motion to vacate that confirm order should be upheld.

Dated this 19 day of December, 2012.

LAW OFFICES OF JAMES L. STRICHARTZ



Michael A. Padilla, WSBA No. 26284
Attorneys for Respondent/Cross-Appellant Sixty-01 Association of Apartment Owners, a Washington non-profit corporation

CERTIFICATE OF SERVICE

RICHARD PHILLIPS declares and states as follows:

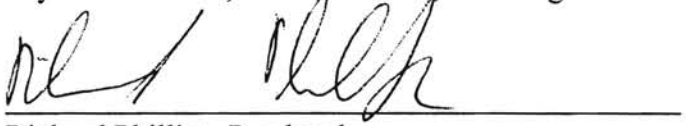
1. I am a legal assistant at the law firm Law Offices of James L. Strichartz, am over the age of 18, and am otherwise competent to testify.

2. On the 20th day of December, 2012, I deposited with ABC Legal Messengers a true and correct copy of the foregoing Brief of Respondent/Cross-Appellant to be delivered to counsel for the Respondent on December 20, 2012 at the following address:

Robert Jason Henry
Lasher, Holzapfel, Sperry & Ebberson, PLLC.
601 Union Street, Suite 2600
Seattle, WA 98101-4000

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct:

Dated this 20th day of December, 2012 at Seattle, Washington



Richard Phillips, Paralegal