CASE NO. 32315-3-III

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

MICHAEL URIBE and HELEN URIBE husband and wife,

Appellants,

v.

LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, RANDALL RUPP AND LUZ DARYL-RUPP, husband and wife and the marital community comprised thereof; and 7HA FAMILY, LLC, a Washington limited liability company,

Respondents.

RESPONDENTS GARY LIBEY AND LIBEY, ENSLEY & NELSON, PLLC'S BRIEF

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I. INTRODUCTION

Respondents Gary Libey and Libey, Ensley & Nelson, PLLC ("Libey"), as trustee, conducted non-judicial foreclosure sales arising out of the defaulted loans of Michael and Helen Uribe ("the Uribes"), appellants. The loans were made by the Bank of Whitman. The loans were cross-collateralized, with both loans being secured by real property in Benton County and Franklin County Washington, and secured by certain personal property.

There is no dispute that the Uribes were in default under their loans. After the bankruptcy court lifted the automatic stay to allow the Bank of Whitman to proceed with foreclosures, the bank commenced the non-judicial foreclosures.

There is no dispute that:

- The Uribes owed the Bank of Whitman over $2.7 million as of June 2010 and the Uribes' assets securing that debt was only worth approximately $2.5 million.
- After the sales and auctions of the Uribes' assets, including *both* properties and their personal property, the Bank of Whitman only recovered approximately $1.8 million.
- The Benton County property was also subject to a first priority mortgage that remained in place even after the foreclosure sales

of both properties occurred.

- The Uribes received adequate notice of the sales.
- Prior to the sales, the Uribes never sought to restrain the sales or otherwise raise any pre-sale issues, including their lawsuit-constructed hyper-technical arguments that Libey's appointment as trustee was recorded approximately two hours after the notices of sale were filed and that the prior trustee's resignation contained an irregular notarization. Libey had full power to conduct the sales. Also, Libey's appointment as trustee replaced the prior trustee as a matter of law, regardless whether the prior trustee successfully resigned.
- No potential bidders knew what the Bank of Whitman's opening bid was going to be on either property and no potential bidders were present at either sale.
- The Uribes' did not bring this lawsuit until almost a year after the sales.

With respect to the Uribe's conversion claim relating to the sale of their personal property, it is undisputed:

- Libey was not present or involved with the actual sales or auctions of the Uribes' personal property, and never had possession of any of the proceeds from those sales or auctions.

- The money recovered from those personal property sales and auctions was sent directly to the Bank of Whitman and applied to Plaintiffs' debt.

Given the Uribes' debt, which greatly exceeded the value of the Benton County and Franklin County real properties, and the mortgage that still remained on the real property, even after the foreclosures, the Uribes cannot prove any damages regardless of any liability issues.

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the Trial Court correctly found that the Uribes waived alleged pre-sale issues and claims when the Uribes were on notice of alleged issues but failed to raise any of them with the trustee Libey or the courts prior to the sales?

B. Whether the Trial Court correctly found that Libey was properly appointed as the successor trustee and had the power to engage in all foreclosure-related activities?

C. Whether the Trial Court correctly found that the back-to-back sales foreclosing on the cross-collateralized loans were proper and no contract to the contrary was created at the trustee's sales?

D. Whether the Trial Court correctly found that no collusion or conspiracy occurred and the bidding was not chilled.

E. Whether the Trial Court correctly found that Libey did not commit conversion of proceeds from personal property sales because

Libey did not conduct the sales and never had possession of any of those proceeds.

F. Apart from the lack of merit of any of the Uribe's Consumer Protection Act ("CPA") arguments, whether the Appellate Court should find that the Uribes have waived any CPA claims by failing to raise the issues in opposition to Libey's motion for summary judgment.

G. Whether the Court correctly found that Uribes cannot prove damages given the amount of secured debt owing on their loans from Bank of Whitman and the mortgages that were still in place?

III. STATEMENT OF FACTS

This case arises out of the foreclosure and replevin proceedings involving the Uribes, who defaulted on two loans provided by the Bank of Whitman. The timing and order of the various events in the underlying bankruptcy case, foreclosure action, and replevin proceedings are critical to this Court's analysis of the Uribes' claims; therefore, below is a helpful timeline of the relevant events.

- **May 31, 2002**: Bank of Whitman Loan Number 560005091 was made to the Uribes in the amount of $1,655,185.50, which will be referred to as the "Franklin loan." CP 136-139, 198-270. This Franklin loan was secured by a first priority deed of trust on the

Franklin County property located in Pasco, Washington, and a first priority mortgage on the Benton County property. *Id.* In addition, the loan was also secured with personal property that the Uribes used in their excavation business under the company name Uribe, Inc. CP 936-942.

- **September 7, 2007**: Bank of Whitman Loan Number 560005006 was made to the Uribes in the amount of $571,000, which will be referred to as the "Benton loan." CP 136-193. This Benton loan was secured by a second priority deed of trust on the Benton County property, and a second priority mortgage on the Franklin County property. *Id.* In addition, as with the Franklin loan, the Benton loan was also secured with personal property that the Uribes used in their excavation business under the company name Uribe, Inc. CP 943-957. This deed of trust also included a cross-collateralization clause linked to the 2002 Franklin Loan.
- **March 23, 2009:** The Uribes were notified by letter that they were in default on all outstanding Bank of Whitman loans. CP 958-961.
- **June 4, 2009:** The Uribes filed for Chapter 11 bankruptcy in the Eastern District of Washington Bankruptcy Court.

- **June 26, 2009:** In the Uribes' Chapter 11 bankruptcy case, the Bank of Whitman filed a Motion for Relief from Automatic Stay and Order Requiring Debtors to Abandon Property. CP 275-280.
- **June 30, 2010:** The Bankruptcy Court entered an order granting the Bank of Whitman's Motion for Relief from Automatic Stay as to Real and Personal Property. CP 281-286.[1] In its order, the Court incorporated findings of fact made by the Court earlier that year and entered additional findings of fact, including, in relevant part, the following:

> "The Bank of Whitman holds perfected liens secured by the Debtors' real property whose common description is [legal description of both Benton and Franklin properties was included]….The Bank of Whitman holds perfected loans secured by the Debtors' equipment….The Bank of Whitman is owed $2,745,982.78 as of May 4, 2010. The per diem interest is $672.20**. The balance as of June 10, 2010, is $2,770,854.18.**" *Id.*

[1] As explained in the Court's order, the long delay between Bank of Whitman's motion and the final order related to that motion—almost an entire year— was apparently due to the Debtors own request for continuances. *See id.* ¶¶5-7 ("…Debtors were instructed to file a feasible plan and corresponding disclosure statement premised upon liquidation… The Court having granted the Debtors several continuances previously is not willing to grant additional time to Debtors to prepare an amended plan and disclosure statement.").

In its order, the Court found that the total value of Debtors' real and personal property was $2,550,171.00, listing the value of each as follows: Equipment ($403,950.00); Benton County Land ($1,500,000.00); Pasco/Franklin County property ($646,221.00).

Based on these findings of the Bankruptcy Court, the Uribes owed the Bank of Whitman a total of $2,770,854.18 as of June 10, 2010, on both loans, and the assets securing those loans only totaled $2,550,171.00. Thus, there was a deficiency of approximately $220,683.18 between the amount owed by the Uribes and the value of those secured assets (Benton property, Franklin property, and personal property).

After the June 30, 2010 Order was entered in the Bankruptcy Court, the Bank of Whitman proceeded to begin foreclosure proceedings on both the Benton and Franklin County properties and also began replevin proceedings to obtain the Uribes' personal property. Libey was originally acting as counsel for Bank of Whitman in the replevin proceedings, but was asked to withdraw and was authorized to act as successor trustee to conduct the foreclosures of the Benton and Franklin County properties. CP 932 at ¶5. After that, Libey had no involvement in the actual sales or auctions of the Uribes' personal property. *Id.* and CP 287-305.[2] Libey was, therefore,

[2] Booker's declaration demonstrates that he was in contact with Tom Hammons and that he transferred all funds to the Bank of Whitman, not Libey.

never in possession of any of the proceeds from these personal property-related sales or auctions. CP 932 at ¶5.

- **July 14, 2010**: Notices of Default for Franklin and Benton County properties were sent to the Uribes by certified mail. CP 962, 976-982, 994-999.
- **July 20 - 21, 2010:** Process server posted Notices of Default on Franklin County and Benton County properties. CP 962, 983-993, 964-975.
- **September 7, 2010**: Notices of Trustee's Sale and Foreclosure for Franklin and Benton County properties were sent to the Uribes by certified mail. CP 1000, 1030-1031, 1013-1019.
- **September 8, 2010**:
    - **9:09 a.m.**: Notice of Trustee's Sale of Franklin County properties filed with Franklin County Auditor. CP 306-312.
    - **11:37 a.m.:** Resignation of Chicago Title and Appointment of Successor Trustee filed with Franklin County Auditor. CP 313-319.
    - **1:57 p.m.:** Notice of Trustee's Sale of Benton Properties filed with Benton County Auditor. CP 320-327.

- **4:02 p.m.:** Resignation of Chicago Title and Appointment of Successor Trustee filed with Benton County Auditor. CP 328-334.

- **September 13, 2010:** Process server posted Notices of Trustee's Sale on Franklin and Benton County properties. CP 1000, 1022-1029, 1003-1013.
- **December 17, 2010**: Non-judicial foreclosure sales held.
  - **10:00 a.m.**: The Bank of Whitman bid a portion of the Uribes' debt—$390,000—for the Franklin County property. CP 876-886. There were no other bidders present, so the Bank of Whitman was the successful bidder and acquired the Franklin County property. *Id.*
  - **11:00 a.m.**: Bank of Whitman bid a portion of the Uribes' debt—$1,200,000—for the Benton County property. CP 887-898. There were no other bidders present, so the Bank of Whitman was the successful bidder and acquired the Benton County property. *Id.*
- **December 28, 2010**: Trustee's Deed for Franklin County properties was recorded and filed in the Franklin County Auditor's office. CP 335-340.

- **December 30, 2010**: Trustee's Deed for Benton County properties was recorded and filed in the Benton County Auditor's office. CP 341-347.

IV. STANDARD OF REVIEW

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn. 2d 478, 483, 78 P.3d 1274 (2003); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

V. ARGUMENT

A. THE TRIAL COURT CORRECTLY FOUND THAT LIBEY WAS PROPERLY APPOINTED AND THE URIBES WAIVED THEIR PRE-SALE CHALLENGES TO THE TRUSTEE'S SALES.

At the outset, it bears noting that in any case involving the application of the Deeds of Trust Act ("DTA"), the Court should consider the three goals of the act: (1) that the non-judicial foreclosure process be efficient and inexpensive, (2) that parties have an adequate opportunity to prevent wrongful foreclosure, and (3) that the stability of land titles be promoted. *Plein v. Lackey*, 149 Wn.2d 214, 225 67 P.3d 1061 (2003). These goals have been given varying weight and importance by the courts over the course of the DTA's existence, but in this case, as demonstrated below, all three goals are met with the dismissal of the Uribes' claims.

1. The Uribes had notice of alleged pre-sale issues and took no action, waiving these issues.

The Uribes claim that certain pre-sale aspects of the foreclosure process were improper, including the (1) timing of recording Libey's appointment as successor trustee approximately two hours after the Notices of Sale were recorded and (2) an issue with the notarization on the prior trustee's withdrawal as trustee. CP 363-386. The Uribes failed to raise these issues prior to the sales. The Uribes' arguments fail, and regardless, were waived.

a) The Uribes waived the time-gap issue relating to Libey's appointment as successor trustee being recorded approximately two hours after the Notices of Sale were recorded.

Whether or not the time gap in the recordings of the documents is relevant, the Uribes' claims to set aside, vacate, or void the sale should be dismissed because the Uribes have admitted they were on notice of the alleged issue, and therefore under the DTA, they should have sought to restrain the sale. Not seeking to restrain the sale was a waiver of their right to do so in this case. *See Frizzell v. Murray*, 179 Wn. 2d 301, 306-7, 313 P.3d 1171 (2013); *Plein v. Lackey*, 149 Wn.2d 214, 229 (2003).

In the Uribes' answers to interrogatories in this case, they testified in relevant part:

The world, including Rupp and 7HA, were put on actual notice of

> ***Libey's lack of authority to sell the Benton County Property when the instruments for the non-judicial foreclosure were recorded***. *Strong v. Clark*, 56 Wn.2d 230 (1960) (When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents (citations omitted)). Therefore and notwithstanding actual knowledge of a procedural irregularity in the trustee's sale, Rupp and 7HA proceeded to acquire the Benton County Property from the BW [Bank of Whitman] for a price less than what the Benton County Property was worth, which according to the bankruptcy court, was worth $1.5 million. CP 348-362 (emphasis added).

If the Uribes are claiming that the current owners of the Benton County property, the Rupp Defendants, were on notice, then the Uribes were also on notice. The Uribes cannot argue that the Rupp Defendants had notice, but claim they did not. As such, because the Uribes had notice, they should have sought to restrain the sale before it occurred, and because they did not seek to restrain the sale (or even contact Libey to address the alleged issue), the Uribes waived their right to raise the issue now.

RCW 61.24.040(1)(f)(IX) provides:

> Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. **Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the trustee's sale**.[3]

[3] (emphasis added). RCW 61.24.130 provides that a party seeking to restrain a sale has to comply with several pre-conditions before the Court will grant the order to restrain. For example, the Court shall require the party seeking the restraint to pay the clerk of the court "the sums that would be due on the obligation secured by the deed of trust." The statute also requires the person seeking the restraint to give five days' notice to the trustee of the hearing date for the restraining order or injunction.

Courts have held that where the debtor failed to obtain a preliminary injunction or restraining order to bar a non-judicial foreclosure sale, the debtors' defenses were waived and the sale was not set aside or vacated. *See Frizzell*, 179 Wn.2d at 306-11 (2013); *Plein*, 149 Wn.2d at 229. The Washington Supreme Court established that a waiver of a post-sale contest occurs if "a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale." *Plein*, 149 Wn.2d. at 227 (citing *Country Exp. Stores, Inc.*, 87 Wn. App. at 751).

The facts in *Plein* involved an individual (Cameron) who co-signed a promissory note secured by a deed of trust with a corporation as the primary borrower on the note. 149 Wn.2d at 218-220. There were a number of junior liens attached to the property, which Cameron eventually satisfied with the obligor on the note, and in turn, he was assigned the obligor's interests in the note and deed of trust. *Id.* Cameron initiated non-judicial foreclosure proceedings, and sent notice of foreclosure to all of the secured creditors that a sale of the property would be held on March 31, 2000. *Id.* at 220. Several of the creditors, including Plein, filed suit against Cameron seeking a permanent injunction, but no preliminary injunction or order restraining sale was sought. *Id*. With no injunction or order

restraining sale in place, the sale took place as scheduled. *Id.* Cameron, the only bidder, brought the property. *Id.*

In the action initiated by Plein, Cameron filed a cross-summary judgment motion, which the trial court granted, and Plein's complaint was dismissed. *Id.* at 220-21. Plein appealed, and the Court of Appeals reversed the dismissal. *Id.* at 221. Cameron's petition for review to the Washington Supreme Court was granted, and the Supreme Court reversed the Court of Appeals decision, holding in relevant part that the statutory procedure in RCW 61.24.130 (1) and (2) is the "only means by which a grantor may preclude a sale once foreclosure has begun with the receipt of the notice of sale and foreclosure." *Id.* at 225-26.

In *Plein*, the Court found that Plein was properly notified of the sale and advised of his right to seek an injunction, but failed to do so, which was sufficient grounds to find that Plein had waived his right to object to the sale under the DTA. *Id.* The Court determined that application of the waiver doctrine served all three goals of the DTA. *Id.* at 227-28. "Adequate remedies to prevent wrongful foreclosure exist in the presale remedies, and finding waiver in these circumstances furthers the goals of providing an efficient and inexpensive foreclosure process and promoting the stability of land titles." *Id.* at 228.

Similarly, in *Frizzell v. Murray*, the Washington Supreme Court

reached the same conclusion where a borrower with diminished capacity received an order to restrain a foreclosure sale on her home but failed to pay the cash bond set by the court. 179 Wn.2d at 306-11 (2013). The Court held that "[i]t is not inequitable to conclude that Frizzell waived her sale claims where she had knowledge of how to enjoin the sale and failed to do so through her own actions." *Id.*

The facts in this case mirror those in *Plein* and *Frizzell* in all important respects. In fact, it is even more convincing in this case that the Uribes have waived their right to bring these post-sale claims because unlike in *Plein* and *Frizzell* where the debtors had at least attempted to object to the sales before they happened, here, despite having notice of the alleged defects related to the notices of sale, not only did the Uribes fail to bring any action to restrain the sale, but they even failed to contact the trustee, Libey, and alert him to their objections. Perhaps, if the Uribes had alerted Libey, the Uribes could have asked for a continuance or requested that Libey begin the process over by noting a new sale date. Certainly, under the recent holdings in *Klem v. Washington Mutual Bank*, if the Uribes had called Libey and indicated that they had strong reservations to the sale continuing, Libey would have been under an obligation to consider how their objections could be addressed. *See* 176 Wn.2d 771, 295 P.3d 1179 (2013) (holding that a trustee has a fiduciary duty to both the lender

and the borrower to ensure that the rights of both are protected).

Instead, the Uribes said nothing until long after both sales had occurred and after the Benton County property had been sold to the Rupps and 7HA. The Uribes slept on their rights, if any, and took no action, and should not be allowed to void or vacate a sale on issues of which they were on notice. "[C]onsciously choosing not to peruse all remedies is not an excuse." *Frizzell,* 179 W.2d at 307.

Recognizing that they had notice of any pre-sale issues and failed to take any timely action, the Uribes attempt to argue that they filed bankruptcy and that was sufficient to preserve the pre-sale issues. However, this argument fails because the bankruptcy court lifted the stay before any pre-sale issues, CP 281-286, and the Uribes took no timely action to address the alleged pre-sale issues after the issues arose.

b) Libey Had Power to Engage in All Foreclosure-Related Activities As Soon As the Resignation and Appointment of the Successor Trustee ("RAST") Was Recorded.

When sales have been set aside or voided, the trustee failed to follow one of the enumerated mandatory statutory prerequisites to a foreclosure sale. *See Schroeder v. Excelsior Management Group, LLC,* 177 Wn.2d 94, 297 P.3d 677 (2013) (holding statutory requirement at RCW 61.24.030(2) that agricultural land be foreclosed judicially cannot be waived); *Albice v. Premier Mortgage Servs. of Wash., Inc.,* 174 Wn.2d 560,

276 P.3d 1277 (2012) (holding that failure of a trustee to hold a sale within 120 days of the original notice as required by RCW 61.24.040(6) invalidated sale); *Cox v. Helenius,* 103 Wn. 2d 383, 693 P.2d 683 (1985) (holding sale invalid where an action had been commenced by the beneficiary before the notice of sale was issued, in violation of RCW 61.24.030(4)).

RCW 61.24.030 lists eight (8) separate prerequisites that have to be met before a trustee can begin foreclosure proceedings. Similarly, RCW 61.24.040 provides the mandatory statutory procedure that has to be followed for every non-judicial foreclosure. The *Schroeder* Court explained that these prerequisites are not rights held by the debtor, but "instead, they are limits on the trustee's power to foreclose without judicial supervision," and therefore, are not provisions that the borrower can choose to waive. 177 Wn.2d at 683. In this case, unlike in *Schroeder, Albice,* and *Cox* where those affirmative, mandated, statutory prerequisites were not followed, all of those prerequisites were followed by Libey. There are no arguments by the Uribes to the contrary. As such, voiding the foreclosure sale would be an extreme remedy, not in line with Washington case law.

Those cases are distinguishable in other respects as well. For example, in *Albice*, after the borrower was notified of the default, the borrower and lender entered into a forbearance agreement, and under that

agreement, the borrowers agreed to make monthly payments to cure their default. *Id.* at 564. The borrowers commenced making payments under this agreement, and despite the fact that the payments were late each month to the lender, the lender accepted all of the payments, except for the last one which the lender rejected on February 10, 2007. *Id.* Under the forbearance agreement, if a breach of the agreement occurred, the lender was supposed to provide a 10-day written notice to the borrower. *Id.* After the borrowers last payment was rejected, the lender failed to send this notice. *Id.*

Based on the forbearance agreement, the lender had continued the foreclosure sale six times after each payment made by the borrower. *Id.* The sale had originally been sent for September 8, 2006, and after the borrower's last rejected payment, the lender held the sale on February 16, 2007, which was the same day that the borrowers were refunded the rejected final payment and well over 120 days from the original sale date. *Id.*

Based on those facts, the *Albice* Court held that the sale was invalid because it was outside the statutory mandated 120-day timeframe. *Id.* Under RCW 61.24.040(6), a trustee may continue a sale for a period of time, "not exceeding a total of one hundred twenty days."

The irregularity in *Albice* is easily distinguishable from the alleged

recording issue in this case. First, and perhaps most importantly, because of the multiple continuances and the lack of notice provided to the borrowers in *Albice*, the borrowers had no idea any sale was going to take place. Because of that, the Court felt that the second goal of the DTA was not met at all—borrowers were not provided an adequate opportunity to prevent wrongful foreclosure. *Id.* at 571-572. Unlike the borrowers in *Albice* who had no notice that the foreclosure sale was going to happen and thus no ability to object or contest it, in this case, the Uribes had actual notice of the alleged recording issue and simply failed to raise the alleged issue with any one at any time before the sale occurred. The trustee's actions in *Albice* prevented the borrowers from asserting their right to object to the sale, whereas in this case, nothing Mr. Libey is alleged to have done resulted in any interference with or limitation placed on the Uribes' rights. The Uribes had the property notice of the sales and notice of any alleged issue, but failed to take action.

In construing the DTA, as mentioned above, the Court should consider the three goals of the act: (1) that the non-judicial foreclosure process be efficient and inexpensive, (2) that parties have an adequate opportunity to prevent wrongful foreclosure, and (3) that the stability of land titles be promoted. *Plein v,* 149 Wn.2d at 225. In this case, to set aside, vacate, or void one or both of the foreclosure sales would serve none

of those goals. Dismissing the Uribes' case would serve all of them, particularly where the Uribes had the opportunity to seek to restrain the sale, but failed to, and where the Benton County property has already been sold to a third party.

While the Uribes are correct that Mr. Libey's appointment as successor trustee in both foreclosure proceedings was recorded approximately two hours after both respective notices of sale were recorded, such a hyper-technical issue should not result in voiding the sales, particularly where the Uribes admit that they were on notice, and failed to restrain the sales.

Under a strict reading of RCW 61.24.010(2), while Mr. Libey technically was not vested with the power under the DTA at the exact time the notices of sale were recorded, he was vested with the power that same day, approximately 2 hours later, and everything he did thereafter was authorized.

The Uribes rely on *Bavand v. OneWest Bank* to support their argument, but their reliance on that case is improper, and in fact, Washington case law would support the opposite position. In *Bavand*, the entity who signed the appointment of the trustee was not the proper or authorized beneficiary, so the appointment of the trustee was found to be invalid, and thus, all actions that occurred after could not be valid. *Bavand*

v. OneWest Bank. 176 Wn.App. 475, 644, 309 P.3d 636 (2013). Here, we have an entirely different situation. The Bank of Whitman ***was*** the proper beneficiary and, thus, their appointment of Mr. Libey as successor trustee was proper. The fact that the RAST was filed two hours after the notices of sale does not invalidate Mr. Libey's appointment in any way.

In *Steward v. Good,* 51 Wn. App. 509, 754 P.2d 150 (1988), an action was brought against the purchaser of a foreclosed property, seeking to set aside the trustee sale based in part on allegations that the trustee failed to file the notice of sale until approximately 30 days before the sales took place, despite the statutory requirement that the notice of sale be recorded 90 days before the actual sale. *Id.* at 515. The Court held that despite the technical flaw in filing times, the sale was not void because there was no harm to the debtor, particularly where the debtor had notice of the flaw and failed to restrain the sale. *Id.*

Just as in *Steward*, here, while the RAST was not recorded until two hours after the notices of sale were recorded, that is a technical issue that does not warrant voiding the sale, particularly (as with *Steward*), where the Uribes had notice of the issue and failed to bring an action to restrain the sale. And, even further, the Uribes cannot show that that recording issue had any effect on the sales or harmed the Uribes in any way. Mr. Libey was properly appointed by the Bank of Whitman and everything he did

after the RAST was recorded was properly authorized, including the sales.

c) Notarization issue is irrelevant relating to Resignation of the Prior Trustee in the Resignation and Appointment of Successor Trustee.

The Uribes are claiming that the notary's signature predates the signature of the Chicago Title trustee and, therefore, the resignation of Chicago Title as trustee was invalid. While this argument was waived, it is irrelevant because the original trustee does not need to resign in order for a successor trustee to be appointed; his resignation and related signature are irrelevant and based on an old practice and, presumably, old versions of the statute. Under RCW 61.24.010, the DTA states clearly that the trustee does not need to resign before the successor trustee is appointed; instead, the beneficiary can simply appoint a new successor trustee, which has the effect of simply replacing the original trustee. RCW 61.24.010(2)("The trustee may resign at its own election or be replaced by the beneficiary"). The Uribes' argument fails.

d) RCW 61.24.127 is Not Applicable to Commercial Loans.

Libey is further baffled by the Uribes' attempt to apply RCW 61.24.127 and argue that waiver is only applicable to claims to invalidate a sale and that the Uribes are still entitled to damages. That statute clearly states "This section ***does not apply*** to the foreclosure of a deed of trust used

to secure a ***commercial loan***." RCW 61.24.127(4) (emphasis added). The statute couldn't be clearer. Here, only commercial loans are involved, so the Uribes waived their rights to ***all*** post-sale remedies, including both a claim to invalidate the sale and for damages.

B. THE BACK-TO-BACK SALES FORECLOSING ON THE CROSS-COLLATERALIZED LOANS WERE PROPER (NO DEFICIENCY JUDGMENT), AND NO CONTRACT TO THE CONTRARY WAS CREATED AT THE TRUSTEE'S SALE.

The Franklin loan was secured by a first priority deed of trust on the Franklin County property located in Pasco, Washington, and a first priority mortgage on the Benton County property. CP 136-139, 198-270. In addition, the loan was also secured with personal property that the Uribes used in their excavation business under the company name Uribe, Inc. CP 936-942. Similarly, the Benton loan was secured by a second priority deed of trust on the Benton County property, and a second priority mortgage on the Franklin County property. CP 136-193. In addition, as with the Franklin loan, the Benton loan was also secured with personal property that the Uribes used in their excavation business under the company name Uribe, Inc. CP 943-957. This deed of trust also included a cross-collateralization clause linked to the 2002 Franklin Loan.

The Uribes seem to be alleging that the "full satisfaction" language that appears in the trustee's deeds demonstrates that after the first sale took

place at 10:00 a.m. for the Franklin County property, the proceeds of the second Benton County property sale should go to the Uribes because the deed indicates that their debt had been fully satisfied. A parallel claim by the Uribes is that the nature of the sales—being held back-to-back—was somehow improper. They also allege that because the Trustees' Deeds state that the bids were made in "cash" that the cash proceeds from the Benton County sale should be given to the Uribes because of the "full satisfaction language" and/or because the sales were allegedly held improperly. CP 363-386.

However, the Uribes' claims overlook three critical facts: (1) the Trustee's Deeds were executed several days after the actual sales took place, not at the sales themselves; (2) per *Donovick v. Seattle-First Nat'l Bank*, back-to-back sales are an appropriate way to liquidate collateral under two separate deeds of trust; and (3) the Uribes had no equity in the property.

Significantly, the Trustee's Deeds were not drafted or executed at the sales themselves. Instead, ***several days after the sales took place*** when the Trustee's Deeds were being drafted, the "full satisfaction" language was included to indicate that the Bank of Whitman was not going to go after the Uribes for any deficiency, despite the fact that there were two mortgages still in place. CP 933 at ¶8. The non-judicial foreclosures and

the personal property sales were in "full satisfaction" of the Uribes' obligations, despite the fact that the Bank of Whitman only recovered approximately $1.8 million on the Uribes' approximately $2.7 million debt owing and that there were mortgages on both properties.

Additionally, while the Trustee's Deeds indicate that the bids were in "cash," they were not. *Id.* At both the Franklin and Benton County property sales, a portion of the Uribes' debt was bid by the Bank of Whitman, not cash. *Id.* Therefore, there is no cash to deposit or to have been wrongfully withheld by the Bank of Whitman.

Regardless of the language in the Trustee's Deeds, the Uribes are also alleging that the sales themselves were improperly held, and thus, the second sale of the Benton property should be vacated or void. Contrary to the Uribes' arguments, the back-to-back sales were proper, as established in *Donovick v. Seattle-First Nat'l Bank,* 111 Wn.2d 413, 757 P.2d 1378 (1988).

In *Donovick*, the Washington Supreme Court upheld Seattle-First National Bank's right to non-judicially foreclose on a second deed of trust where there were two separate deeds of trust on separate properties, securing one financial obligation. *Id*. at 416. The Court held that the bank's first foreclosure on a first deed of trust was irrelevant to the status of the second. *Id.* "Any other result would 'give an unjustified, unwarranted

windfall to the debtor—a windfall completely without merit in logic or equity in principle.'" *Id.; see also Beal Bank, SSB v. Sarich,* 161 Wn.2d 544, 553, 167 P.3d 555 (2007). The *Donovick* Court emphasized that the Deed of Trust Act does not preclude a creditor bank from realizing upon the entire security given by debtors. 111 Wn.2d at 416. In fact, the Court stated that "the deed of trust act does not mandate or even contemplate that the entirety of the security must be sold in gross as a single parcel." *Id.* at 415.

In this case, the larger of the Uribes' two loans, the 2002 Franklin loan, was secured by some of Plaintiff's personal property, a first priority deed of trust on the Franklin property, and a first priority mortgage on the Benton County property. CP 136-139, 198-270. The second loan, the 2007 Benton loan, was secured by some of the Uribes' personal property, a second priority deed of trust on the Benton County property, and a second priority mortgage on the Franklin County property. CP 136-193. Notably too, the second 2007 loan included a cross-collateralization clause back to the 2002 Franklin loan.[4] CP 200. Just as in *Donovick* where the Court allowed the bank to conduct back-to-back foreclosure sales to recover the debt owing, here, holding back-to-back foreclosure sales to recover the

[4] "Collateral" states "Borrower acknowledges this Note is secured by all previous Mortgages" and includes both the first priority mortgage on the Benton county property and the first priority deed of trust on the Franklin County property).

debt owing on two separate deeds of trust was the proper way for the bank to attempt to recover on the Uribes' exceptionally large debt under both loans. Notably too, the fact that there were two loans in this case versus one loan in the *Donovick* case is an irrelevant distinction, as the cross-collateralization clause permits the Bank of Whitman to realize upon all collateral secured under the loans, as they did.

The Deed of Trust Act contemplated what the *Donovick* Court called a "quid pro quo between the lenders and borrowers," where the borrower has no right to redemption (RCW 61.24.050) and the secured party has no right to a deficiency judgment (RCW 61.24.100). *Id*. "***By giving up the right to a deficiency judgment, however, the secured party did not also give up the right to realize upon the security given***." *Id.* (emphasis added)

In this case, the Uribes owed Bank of Whitman over $2.7 million, which was secured by both real and personal property valued at approximately $2.5 million as of June 2010, which was approximately 6 months before the sales were held. CP 281-286. While the bank was not allowed to go after the Uribes directly for any deficiency after the foreclosure sales, the bank is allowed, as recognized in *Donovick*, to liquidate any additional collateral that secured that debt. 111 Wn.2d at 415-16. The cross-collateralization clause found in the 2007 Benton

County loan allowed the lender to realize upon multiple pieces of collateral, including the Benton County property and the Uribes' personal property, in order to satisfy the Uribes' full obligation. *See* RCW 61.24.030(4); RCW 61.24.100; *see also* 27 Wash. Prac., Creditors' Remedies—Debtors' Relief §3.37 (2d ed.) (amendments to the Deed of Trust Act clarify that cross collateralization clauses—which "are frequently found in commercial loan documents"—"allow recovery against all of the collateral held on any of the obligations"). The Uribes' claim, that this process was improper, is without merit.

Furthermore, and perhaps more importantly, the Uribes had no equity in the property and, thus, cannot prove that they were damaged by the conduct of the sales. The Benton County property was subject to ***both a deed of trust and a mortgage***. To set aside, vacate, or void the Benton county property foreclosure under the deed of trust would still leave the Uribes with a property subject to a mortgage under the first 2002 loan. CP 136-139, 198-270. Without equity in the property, the Uribes cannot prove that they were damaged by the non-judicial foreclosure sale of the Benton County property.

C. NO COLLUSION OR CONSPIRACY AND THE BIDDING WAS NOT CHILLED.

The Uribes have alleged that Libey, the Bank of Whitman, and its

officers colluded "to raise the bid for the Benton County Property at the trustee's sale to chill any competitive bids…because these defendants knew that there was at least one interested bidder for the Benton County Property." CP 378. The Uribes claim that this alleged collusion gives rise to claims under RCW 61.24.135, RCW 19.86, et seq (CPA), Civil Conspiracy, and under §1962(d) of RICO. However, these allegations are based on erroneous facts and unsupported allegations.

There are two types of chilled bidding:

The first is intentional, occurring where there is collusion for the purpose of holding down the bids. The second consists of inadvertent and unintentional acts by the trustee that have the effect of suppressing the bidding. To establish chilled bidding, the challenger must establish the bidding was actually suppressed, which can sometimes be shown by an inadequate sales price. *Country Exp. Stores, Inc. v. Sims*, 87 Wn. App. 741, 749, 943 P.2d 374 (1997).

First, and most importantly, there were no other bidders present at the foreclosure sales. CP 876-898.[5] The Bank of Whitman was the only bidder at the sales. *Id.* In order to establish chilled bidding, "the challenger must establish the bidding was actually suppressed." *Country Express*

[5] Both of the *Trustee's Sale Affidavits* signed by Mr. Matheson on the day of the sales state that "[t]here were no other bidders present no any other bids received."

Stores, Inc., 87 Wn. App. at 749. In *Country Express Stores*, the Court held that "[i]f Appellants cannot put forth evidence that there were bidders present at the sale and that the bids were chilled, Appellants cannot prevail on their claims." *Id.* That Court emphasized the rules cited above and stated that "in order to meet their burden to oppose summary judgment in respondent's favor, [appellants] must make a showing sufficient to establish the existence of the elements essential to that party's case." *Id.* (citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). The debtors in that case asserted that there were third parties present at the sale, but the debtors failed to present evidence that these parties were bidders. *Id.* at 750.

Even more convincing than the facts in *County Express Stores*, in this case, the Uribes' cannot prove that there were any other bidders present at the sale, as the person who called the sales in both counties confirmed in affidavits he signed the day both sales took place. CP 876-898. Thus, it is impossible for the Uribes to prevail on any claims regarding collusion or conspiracy based on chilled bidding at the sales because there was no one present at the sales to be "chilled."

Second, Libey recalls receiving only one phone call from an interested party before the sales took place. CP 932-933 at ¶6. The call was received by Libey several weeks before the sales occurred. *Id*. At the

time, he indicated that he was unsure what the opening bid was going to be on the properties and that the caller should call back a few days before the sale to get that information. *Id*. That person never called Libey back. *Id*. Therefore, before the sales took place, no third parties even knew what the opening bid on either property would be, because Libey had not told any third parties, so it is impossible for the Uribes to prove that any potential bidder was "chilled" before the sales took place.

Also, to emphasize again, the Benton County property was not just encumbered by the deed of trust, it was also encumbered by a first priority mortgage under the Uribes' first 2002 Franklin loan. CP 136-139, 198-270. As such, it is unlikely any potential bidder would have been interested in the Benton County property regardless of the bid price because there was still a mortgage on the property, and the Uribes had no equity.

To support this chilled bidding theory, the Uribes are presumably relying on correspondence exchanged between the Bank of Whitman and Libey in the months preceding the sales, in which the two parties were trying to find the most cost efficient and proper way to conduct the sales. However, such communications are not improper, nor do they indicate collusion. It is not uncommon for the trustee and beneficiary to have a relationship or to communicate with one another, just as the Uribes-debtors could have been in touch with Libey about the sales. Notably, however,

the Uribes never contacted Libey before the sales occurred. CP 933 at ¶7.

Further, the notices of sale as recorded and posted to the public indicated that the debt owing on the Benton County property under the deed of trust was approximately $400,000. CP 284. While it did not indicate that the property was cross-collateralized under another larger loan in default, that fact only works to the Uribes' advantage. Even assuming *arguendo* that the Benton County property was worth $1.5 million at the time of the sale, as the Bankruptcy Court found, the notice of sale could ***not*** have, in and of itself, chilled bidding because people would presumably be more inclined to show up at the sale if they thought there was only $400,000 owing, as opposed to $2.7 million. However, as stated above, no other bidders were present at the sales and no third parties, much less potential bidders, were even told by Libey that the Bank of Whitman intended to place a $1.2 million opening bid on the Benton County property, so the Uribes' claims for collusion and conspiracy as well as their related claims under the Deed of Trust Act, Consumer Protection Act, and RICO, should be dismissed.

D. LIBEY DID NOT COMMIT CONVERSION OF PROCEEDS FROM PERSONAL PROPERTY SALES BECAUSE LIBEY NEVER HAD POSSESSION OF ANY OF THOSE PROCEEDS.

First, while Libey was originally appointed to handle the replevin

proceedings related to the Uribes' personal property, Libey ceased assisting in the replevin matter before any of the sales or auctions took place. CP 932 at ¶5. Libey was not present at any of the sales or auctions of the Uribes' personal property, and he was never in possession of the Uribes' personal property or the proceeds from the sales or auctions. *Id.* In fact, the auctioneer in charge of handling the sales of the Uribes' personal property has already testified that the proceeds from the auctions and sales were given directly to the Bank of Whitman. CP 287-305.[6] Perhaps the Uribes could have raised this claim against the Bank of Whitman or the auctioneer who handled the money and transferred it to the Bank, but no such claim should survive against Libey.

Therefore, because Libey was never in possession of any proceeds from the sales or auctions of the Uribes' personal property, it is impossible for him to have "wrongfully received" anything. As such, Libey cannot be held liable for conversion as to any proceeds from the personal property auctions and sales.

Second, regardless of Libey's involvement—or lack thereof—in the personal property sales and auctions, the Uribes cannot prove that they have been damaged. The Uribes owed Bank of Whitman at least

[6] Booker's declaration demonstrates that he was in contact with Tom Hammons and would transfer all funds to the Bank of Whitman directly, not to Libey.

$2,770,854.18 as of June 2010. CP 281-286. The proceeds from both the non-judicial foreclosures and the personal property sales/auctions totaled $1,896,687.13, which is far below the debt owing. CP 876-898, 287-305. Thus, the Uribes cannot demand monetary damages when the total sales did not cover the debt owing on their loans. Such a result would be absurd as a conversion claim requires some amount to be "wrongfully received." Therefore, the Uribes' claim that the Bank of Whitman somehow owed the Uribes' money—despite the fact that even after all of the sales were conducted and the Uribes' debt was still not fully satisfied—is nonsensical.

E. THE URIBES' CPA ARGUMENTS FAILS.

1. The Uribes waived the CPA arguments by failing raise them in the trial court.

On review, an appellate court may affirm the superior court's decision on any ground supported by the record. *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696 (2003); *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994). Issues not raised in the hearing for summary judgment cannot be considered for the first time on appeal. *Almy v. Kvamme*, 63 Wn.2d 326, 329, 387 P.2d 372 (1963); *Save-Way Drug, Inc. v. Standard Inv. Co.*, 5 Wn. App. 726, 727, 490 P.2d 1342 (1971). A party who fails to raise an issue at trial normally waives the right to raise that issue on appeal. RAP 2.5(a). *Brundridge v. Fluor Fed. Servs.*,

164 Wn. 2d 432, 441, 191 P.3d 879 (2008)*; River House Dev. Inc. v. Integrus Architecture,* 167 Wn. App. 221, 230, 272 P.3d 289 (2012).

For the first time on appeal, the Uribes assert CPA arguments and analyses. Appellants' Brief at 37-50. With the exception of mentioning the CPA in passing while citing the *Klem* case in the context of the Uribes' waiver analysis issue, CP 1055, the Uribes never raised any specific CPA claim or analysis in their opposition brief to Libey's motion for summary judgment. Accordingly, these arguments and issues have been waived.

2. The notarization issue in the case relates to the resigning trustee, not Libey.

In addition to waiving any CPA arguments by failing to raise them in the trial court in opposition to Libey's motion for summary judgment, the Uribe's CPA arguments fail.

Regarding the notarization issue, in their appellants' brief, the Uribe's cite *Klem* in support of their CPA theory against Libey. However, the facts in Klem are distinguishable from the Uribe's case.

In *Klem*, the trustee had a practice of its employees falsely predating notices of sale. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 77 P.3d 1179 (2013)("This notice of sale was one of apparently many foreclosure documents that were falsely notarized by Quality and its employees around that time. There was considerable evidence that

falsifying notarizations was a common practice, and one that Quality employees had been trained to do."). The notarization at issue in *Klem* arose from the trustee's employee's conduct. *Id.* at 794-95 ("We hold that the act of false dating by a notary employee of the trustee in a nonjudicial foreclosure is an unfair or deceptive act or practice . . . .").

Unlike in *Klem*, in the Uribe's case, trustee Libey had no involvement with the prior trustee's resignation or the notarization of his signature, and the notarization issue only relates to the resigning trustee Chicago Title's signature. CP 313-319, 328-334. Moreover, the RASTs appointing Libey as the successor trustee were signed by the beneficiary, Bank of Whitman, who appointed Libey as the trustee. The Uribes have raised no issue with the Bank of Whitman's signature appointing Libey. Additionally, as stated above, the prior trustee, Chicago Title, did not need to resign before Libey could be appointed. Instead, Libey's appointment occurred when the beneficiary, Bank of Whitman, appointed him. *See* RCW 61.24.010(2)("The trustee may resign at its own election or be replaced by the beneficiary"). There is no evidence that Libey, or any of his employees or agents, falsely notarized any signatures.

3. Back-to back sales and cross-collateralized sales, and conversion issue, do not give rise to CPA liability.

Similar to the notarization issue, the Uribes failed to assert any CPA

analysis in response to Libey's motion for summary judgment, and therefore, the Uribes have waived this issue.

Notwithstanding the waiver, on appeal, the Uribes cite no CPA authority relating to the back-to-back sales, cross-collateralized sales, and the conversion issue. The Uribes merely conclude these issues give rise to CPA liability.

Moreover, as previously discussed in this brief, the law supports the back-to-back and cross collateralized sales, and the trial court agreed and dismissed the claims arising from the sales. Additionally, regarding the proceeds from the sale of the Uribes' personal property, Libey was not involved in the actual sales or auctions of the Uribes' personal property and never received any proceeds from those sales. Those proceeds were submitted directly to the Bank of Whitman. As to the "proceeds" from the non-judicial foreclosure sales, there were none. A portion of the Uribes' debt was bid by the Bank of Whitman. Further, the proceeds from all sales (personal and real property) did not cover the debt owing by the Uribes, and as such, the Uribes cannot prove damages. The Uribes owed approximately $2.7 million to the Bank of Whitman as of June 2010 under two loans, and the sales of both the personal and real property that secured those loans only recovered approximately $1.8 million.

Finally, with respect to their CPA claims, the Uribes seem to

suggest that any deviation from the statutory foreclosure procedures should result in CPA liability. That is not the law, as demonstrated by the fact that the Uribes cite no law imposing CPA liability relating to back-to-back sales and cross-collateralized sales.

F. THE URIBES CANNOT PROVE DAMAGES GIVEN THE AMOUNT OF SECURED DEBT OWING ON THEIR LOANS FROM BANK OF WHITMAN AND THE MORTGAGES THAT WERE STILL IN PLACE.

The Uribes cannot prove damages on any of their claims given the debt owing on their loans (approximately $2.7 million) and the amount recovered by the Bank of Whitman on those debts (approximately $1.8 million), as well as the fact that the Benton County property was still subject to a first priority mortgage, which leaves the Uribes with no equity in the property. Thus, irrespective of any potential liability, the Uribes cannot prove damages.

As the Bankruptcy court found before any of the underlying facts that give rise to this case occurred, the Uribes owed more to the Bank of Whitman than their secured assets covered. At the time, back in 2010, the Uribes owed the Bank of Whitman approximately $2.7 million, but their secured assets were valued at approximately $2.5 million, including both Franklin and Benton County properties as well as their personal property. CP 281-286. And, in fact, as a result of the sales of all of their secured

property, Bank of Whitman only recovered $1.8 million. Further, even if this Court were to void or unwind the sales, the Uribes' property was not only subject to the Deeds of Trust, but also to two mortgages. The Benton County property (the sale of which the Uribes are seeking to set aside) was encumbered not just by a deed of trust, but also by a first priority mortgage under the first, larger 2002 Franklin loan. Thus, the Uribes had no equity in the Benton County property, so even if this Court were to set aside the Benton County sale, it would still be encumbered by that first priority mortgage from 2002.

G. ATTORNEY'S FEES.

The Uribes' claim for attorney's fees should be denied.

Initially, the claim for fee under RCW 4.84.330 should be denied because there is no contract between Libey and the Uribes. The documents cited by the Uribes are contracts between the bank and the Uribes. The bank has already been dismissed from the case. To the extent that the Uribes construe this statute to apply to Libey, then Libey requests an award of reasonable fees and costs against the Uribes under the same statute.

The claim for fees under RCW 61.24.135 should be denied because there is no CPA liability as argued above.

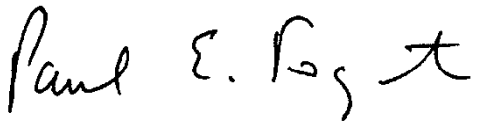
VI. CONCLUSION

For the foregoing reasons stated above, Libey requests that the trial

court's summary judgment be affirmed and that all of the Uribe's claims against Libey be dismissed with prejudice.

Respectfully submitted this 3rd day of September, 2014.

DEARMIN FOGARTY PLLC



Paul E. Fogarty, WSBA No. 26929

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2014, I caused to be served a true and correct copy of RESPONDENTS GARY LIBEY AND LIBEY, ENSLEY & NELSON, PLLC'S BRIEF by US Mail and email (per email agreement between all parties) to the following:

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