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STATE OF WASHINGTON
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No. 99609-1

SUPREME COURT
OF THE STATE OF WASHINGTON

JOSE DIAZ,

Petitioner,

v.

NORTH STAR TRUSTEE and U.S. ROF II; and all other persons unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint herein,

Respondents.

PETITION FOR REVIEW

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A. Identity of Petitioner.

The petitioner is Jose Diaz, appellant in the Court of Appeals.

B. Court of Appeals Decision.

Petitioner seeks review of the Court of Appeals' February 16, 2021, decision affirming the trial court's order that Mr. Diaz's interest in a condominium purchased at a sheriff's sale was junior to a mortgage because, years before the sheriff's sale, the lender executed an unrecorded agreement purporting to subordinate the lien of the foreclosing condominium association under RCW 64.34.364. *Diaz v. North Star Trustee, LLC,* 16 Wn. App.2d 341, 481 P.3d 557 (2021) (App. A). The Court of Appeals denied petitioner's timely motion for reconsideration (App. B), and this Court granted petitioner an extension of time to file this petition until April 30, 2021. (App. C)

C. Issues Presented for Review.

1. RCW 64.34.364(3) grants condominium associations a lien that is senior to mortgages "to the extent of assessments for common expenses . . . which would have become due during *the six months immediately preceding* the date of a sheriff's sale." RCW 64.34.364(3) (emphasis added). Does a lender's payment of six months of assessments three years before a sheriff's sale of a condominium subordinate the association's lien in perpetuity?

2. Does an unrecorded order agreed to by a condominium association and a lender purporting to subordinate the association's lien under RCW 64.34.364(3) give a purchaser at a sheriff's sale three years later constructive notice the foreclosing association's lien has been subordinated to the lender's mortgage?

D. Statement of the Case.

In May 2007, Tatyana Jenson purchased a condominium in Seattle, borrowing $132,000 and signing a promissory note and deed of trust. (CP 65-88) The deed of trust listed as beneficiary Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Pierce Commercial Bank. (CP 69-71) Ms. Jensen stopped paying her mortgage in 2010. (CP 59) Her deed of trust was assigned to Bank of America (BOA) in 2011. (CP 227)

Ms. Jensen's condominium is a part of the Roseberg Condominium Association (the Association). (CP 69) Ms. Jensen also stopped paying the Association's assessments in 2010, prompting the Association to file a judicial foreclosure against her in May 2012, including BOA and MERS as defendants. (CP 481) On September 4, 2012, the court presiding over the Association's suit (the Roseberg court) entered a default order against BOA and MERS after they failed to appear. (CP 9-11) The Roseberg court also

entered a decree of foreclosure, declaring that any lien held by BOA and MERS was “inferior and subordinate to the plaintiff’s lien and . . . forever foreclosed.” (CP 12-13)

On January 11, 2013, the Association agreed to entry of an order stating BOA had paid “the super priority lien amount of $1,164.00 . . . as contemplated under RCW 64.34.364(3)” (representing six months of assessments) and that the payment “reestablishe[d] the above-referenced Deed of Trust as a lien fully senior to the lien being foreclosed by Plaintiff.” (CP 318-20) The order also dismissed BOA and MERS from the foreclosure action with prejudice. (CP 319) Neither the Association nor BOA recorded this stipulated order with the King County Recorder’s Office.

The Roseberg court then entered a default judgment and foreclosure decree ordering that “the rights of all defendants, including mortgage lenders, be adjudged inferior and subordinate to the plaintiff’s lien and be forever foreclosed except only for the statutory right of redemption allowed by law.” (CP 235) Although the default judgment stated a “Stipulation and Agreed Order of Dismissal of defendants” BOA and MERS “was entered with the court” on January 11, 2013, it did not specify the terms of that order, including the basis for dismissing BOA and MERS. (CP 234) The

Association recorded the January 29, 2013 default judgment and foreclosure decree on February 28, 2013. (CP 232) The Roseberg court ordered the sale of the property and on January 15, 2016, Mr. Diaz, the highest bidder at a sheriff's sale, purchased the property for $17,571.26—$1 more than the assessments then due. (CP 46, 958)

BOA had assigned any beneficial interest secured by the deed of trust to PROF-2014-S2 Legal Title Trust (PROF) in November 2015. (CP 1613-14) PROF did not redeem the property within one year, as authorized by RCW 6.23.020(1). In March 2017, PROF assigned any beneficial interest secured by the deed of trust to U.S. ROF II Legal Title Trust 2015-1 (U.S. ROF), which appointed North Star Trustee, LLC, as successor trustee. (CP 109, 764)

At no point during the eight years following Ms. Jensen's default did Pierce Commercial Bank or any of its successors foreclose on the deed of trust. (CP 59) When U.S. ROF purchased the note, Ms. Jensen had been in default for seven years. (CP 229)

North Star sent Mr. Diaz a "Notice of Default" on August 9, 2017, demanding he pay all arrears on Ms. Jensen's note and late fees, costs of enforcement, and interest, a total of $68,998.51. (CP 114-19, 735) North Star then scheduled a nonjudicial foreclosure sale for March 30, 2018. (CP 121-22)

On March 5, 2018, Mr. Diaz filed a complaint against U.S. ROF and North Star seeking to quiet title and enjoin the foreclosure. (CP 1-7) The trial court initially ruled that Mr. Diaz had superior title. (CP 166-67) Almost a year later, on May 15, 2019, the Association and U.S. ROF jointly asked the Roseberg court to vacate the September 4, 2012 default order against BOA and MERS, asserting the failure to vacate the default order was "excusable neglect" under CR 60(b)(1). (CP 448-51) Despite the one-year time limit for relief under CR 60(b)(1), the Roseberg court granted the motion and—almost seven years after it was entered—vacated the September 2012 default order nunc pro tunc as of January 11, 2013. (CP 472-74)

U.S. ROF and North Star then moved to vacate the partial summary judgment in favor of Mr. Diaz in this action, arguing that the Roseberg court's order constituted "newly discovered evidence" under CR 60(b)(3).[1] (CP 359-90) The trial court denied the motion (CP 552-56), concluding the nunc pro tunc order did not change what Mr. Diaz knew or should have known when he purchased the condominium because he "could not have anticipated that more than three years after his purchase the September 4, 2012 default order against the

[1] Given it was entered nunc pro tunc almost seven years later, the Roseberg court's order might more accurately be characterized as "newly manufactured evidence."

Bank in the Roseberg case would be vacated." (CP 553) The trial court further found that the January 11 Order reestablishing BOA's senior lien rights was "never filed with the King County Recorder's Office and Mr. Diaz was unaware of the order when he purchased the property," and that Mr. Diaz had no affirmative duty to search the Roseberg court record for the January 11 order or to contact the Association to inquire about potential liens. (CP 554-55)

After U.S. ROF and North Star's first motion for reconsideration was denied (CP 1670), they filed a second motion claiming an April 2019 unpublished decision involved "identical facts." (CP 1680-89 (citing *Diaz v. Hsueh*, No. 77771-8-I, 2019 WL 1781098, *rev. denied*, 194 Wn.2d 1003 (2019), discussed *infra* at 19 n.3)) The trial court dismissed Mr. Diaz's claims with prejudice. (CP 738-41)

Division One affirmed in a published decision. (App. A) The Court of Appeals rejected Mr. Diaz's argument the Association's lien had priority under RCW 64.34.364 and thus the mortgage lien was extinguished when the Association foreclosed its lien, holding that because BOA paid six months of assessments in 2013 the mortgage lien was senior to the Association's lien when the condominium was sold at the 2016 sheriff's sale. 16 Wn. App.2d at 350-55, ¶¶ 18-28. The

Court of Appeals ruled Mr. Diaz was not a bona fide purchaser because "[t]he information in the July 29 [sic] Judgment was sufficient to trigger a duty to make further inquiry into the possible existence of a mortgage." 16 Wn. App.2d at 358, ¶ 39.[2]

E. Argument Why This Court Should Grant Review.

1. The Association's lien had priority under RCW 64.34.364 and its foreclosure extinguished the deed of trust.

The Court of Appeals held that U.S. ROF—which purchased debt that had been in default for seven years—holds a superior interest to Mr. Diaz because its predecessor in interest paid six months of assessments three years before Mr. Diaz purchased the property. The Court of Appeals' decision conflicts with this Court's precedent and the plain language of RCW 64.34.364, undermining the important public policy the statute is intended to serve by encouraging lenders to timely enforce their rights instead of forcing associations and unit owners to bear the burden of preserving their collateral. This Court should grant review. RAP 13.4(b)(1), (4).

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[2] The Court of Appeals also affirmed the dismissal of Mr. Diaz's claims under the Consumer Protection Act (CPA) and its refusal to award U.S. ROF and North Star attorney's fees under CR 11 and RCW 4.84.185. 16 Wn. App.2d at 360-63, ¶¶ 46-56. As the Court of Appeals acknowledged, Mr. Diaz's first CPA claim turns on whether "U.S. ROF had a legal right to commence a nonjudicial foreclosure." 16 Wn. App.2d at 360, ¶ 48. Mr. Diaz reserves the right to reassert this claim on remand should he prevail in this Court.

RCW 64.34.364 is part of the Washington Condominium Act (WCA), modeled on the Uniform Condominium Act (UCA). RCW 64.34.950. RCW 64.34.364(1) creates on behalf of condominium associations "a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due." RCW 64.34.364(2) then provides that this lien is, with certain exceptions, "prior to all other liens and encumbrances on a unit." One of those exceptions is for "a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent." RCW 64.34.364(2)(b). RCW 64.34.364(3) then creates an exception to this exception, giving an association's lien priority over all mortgages for unpaid assessments "which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure":

> [T]he lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments for common expenses, excluding any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW 64.34.360(1) which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, the date of a trustee's sale in a nonjudicial foreclosure by a mortgagee, or the date of recording of the declaration of forfeiture in a proceeding by the vendor under a real estate contract.

"In other words, the statute first alters the typical priorities, but then a condominium association regains its priority to collect six months' worth of unpaid assessments." *BAC Home Loans Servicing, LP v. Fulbright*, 180 Wn.2d 754, 764, ¶ 15, 328 P.3d 895 (2014). As with any lien, if a lien for six months of assessments—often dubbed a "superpriority" lien—is foreclosed, it extinguishes all junior liens. *BAC Home Loans*, 180 Wn.2d at 765, ¶ 17.

a. The Court of Appeals' published decision conflicts with the clear language of RCW 64.34.364 and this Court's precedent.

The Court of Appeals erroneously held that BOA subordinated the Association's superpriority lien because it "paid the six months of assessments in January 2013." 16 Wn. App.2d at 354, ¶ 27. RCW 64.34.364(3) does not permit a lender to pay *any* six months of assessments and thereby preserve—in perpetuity—the seniority of its lien. Rather, the statute specifies that an association's lien is senior to mortgages "to the extent of assessments for common expenses . . . *which would have become due during the six months* ***immediately preceding*** *the date of a sheriff's sale*." RCW 64.34.364(3) (emphasis added). The Legislature thus intended that an association's superpriority lien would always cover the most recent six months of assessments before sale.

The legislative history of RCW 64.34.364 confirms this intent. After enacting RCW 64.34.364 in 1989, the Legislature amended the statute a year later to specify that the six months of assessments covered by the superpriority lien are those immediately preceding a foreclosure sale, instead of the six months immediately preceding "institution of an action to enforce the lien":

> . . . the lien shall also be prior to the mortgages described in subsection (2)(b) of this ((~~subsection~~)) section to the extent of assessments for common expenses, excluding any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW 64.34.360(1) which would have become due ((~~in the absence of acceleration,~~)) during the six months immediately preceding ((~~institution of an action to enforce the lien: PROVIDED That the~~)) the date of a sheriff's sale in an action for judicial foreclosure . . . .

Laws of 1990, ch 166, § 6 (underlining and deletions in original). The Legislature thus *rejected* language that would have "reprioritized" the liens "at the moment the condominium association filed its foreclosure lawsuit," contrary to the Court of Appeals' reasoning. 16 Wn. App.2d at 354, ¶ 27. The Senate Journal confirms that the superpriority lien "dates back from the time of the foreclosure sale," not the filing of the foreclosure lawsuit. 2 SENATE JOURNAL, 51st Leg., Reg., 1st & 2nd Spec. Sess., at 2080 (1990).

The Court of Appeals reasoned RCW 64.34.364(3) allows a lender to pay *any* six months of assessments because it does not

"mandate when the sum must be paid by a mortgage lender to retain its senior lien status." 16 Wn. App.2d at 352-53, ¶ 23. But BOA's payment was ineffective because of *what* it paid, not because of *when* it was paid—BOA did not pay assessments for the "six months immediately preceding the . . . sheriff's sale," RCW 64.34.364(3), but instead paid six months of assessments *three years* before the property was sold. As the Court of Appeals itself recognized—but then ignored—RCW 64.34.364(3) "describes which six-month period is covered by the super priority lien." 16 Wn. App.2d at 352, ¶ 23.

The Court of Appeals' published decision misreads and conflicts with this Court's decision in *BAC Home Loans*. The Court of Appeals reasoned that "[u]nder *BAC Home Loans*, the Association's super priority lien *existed* by the time Bank of America paid the six months of assessments," and thus BOA could pay any six months of assessments to subordinate the superpriority lien. 16 Wn. App.2d at 354, ¶ 27 (emphasis added). But this Court rejected that reasoning in *BAC Home Loans,* explaining "it is not relevant which lien arises first, but which lien has statutory priority and can subordinate, under certain circumstances, other liens." 180 Wn.2d at 765, ¶ 18.

Under RCW 64.34.364(3), an Association's lien subordinates a prior mortgage only when there is a sheriff's or trustee's sale

scheduled, or a declaration of forfeiture by the vendor of a real estate contract. Absent these circumstances, there is no way to determine the assessments for "the six months immediately preceding" the relevant date that have regained priority under RCW 64.34.364(3). When BOA purported to subordinate the Association's lien, in perpetuity, in 2013, there was nothing to subordinate, because no sheriff's sale had been scheduled. BOA's payment was "a voluntary business decision which was not compelled to make to protect its lien priority." Report of the Joint Editorial Bd. for Unif. Real Prop. Acts, *The Six-Month "Limited Priority Lien' for Association Fees Under the Uniform Common Interest Ownership Act*, at 14-15 (2013) (JEB Report), available at https://perma.cc/LEV9-PZSL.[3]

b. The Court of Appeals' published decision undercuts RCW 64.34.364, which is intended to prevent dilatory tactics by lenders and their successors.

The Court of Appeals' published decision undermines the public policy effected by giving associations superpriority liens, which is to discourage lenders from sleeping on their rights while associations and other unit owners bear the burden of a delinquent

[3] The Joint Editorial Board for Uniform Real Property Acts provides guidance to the Uniform Law Commission regarding potential subjects for uniform laws relating to real estate. JEB Report at 1.

owner's unpaid assessments. By keying the superpriority lien to the sale or forfeiture of property—and not just the filing of an action—the Legislature sought to ensure property is actually sold to a responsible owner, thus minimizing the time assessments go unpaid. Moreover, by specifying that the superpriority lien covers the most recent six months of assessments under an association's "periodic budget," RCW 64.34.364(3), the Legislature ensured that if, as is often the case, assessments must be raised to cover shortfalls caused by delinquent owners, lenders pay those increased assessments.

As the comments to the most recent version of the UCA explain, the superpriority lien "was premised on the assumption that, if an association took action to enforce its lien and the unit owner failed to cure its assessment default, the first mortgage lender *would promptly institute foreclosure proceedings* and pay the unpaid assessments (up to six months' worth) to the association." UCA (2017) § 3-116 comment 2 (emphasis added). RCW 64.34.364(3) thus was intended to ensure that a lender will pay six months of assessments *and* promptly foreclose its lien, so it could "deliver clear title in its foreclosure sale," "minimizing the period during which unpaid assessments would accrue for which the association would not have first priority." UCA (2017) § 3-116 comment 2.

Far from encouraging prompt resolution of defaults, the Court of Appeals' published decision encourages lenders and their successors to gauge the fortunes of the real estate market while letting condominiums languish; the longer a lender delays foreclosure, the longer it "receives a benefit in that the value of its collateral is preserved." UCA (2017) § 3-116 comment 2. This is especially unjust because "the association (and the remaining unit owners) bear the full financial consequences of" the lender's delay; "the association must either force the remaining owners to bear increased assessments to meet budgeted expenses or reduce expenditures for (or the level of) condominium maintenance, insurance and services." UCA (2017) § 3-116 comment 2.

The inequity of allowing lenders to profit from delay is fully seen here. A junk debt purchaser foreclosed seven years after the debtor defaulted, while the original lender and its assignees did *nothing* to enforce their rights, including failing to bid their credit at the sheriff's sale or redeem the property from Mr. Diaz. In contrast, Mr. Diaz paid *all* past due assessments and has renovated the property and paid taxes and assessments. (CP 196, 729-30)

The Court of Appeals' published decision also undermines RCW 64.34.030, which provides that the WCA "may not be varied by

agreement, and rights conferred by this chapter may not be waived." Yet that is precisely what the Court of Appeals permitted here—if a lender and association can arbitrarily decide that payment of *any* six months of assessments is sufficient to subordinate the association's superpriority lien in perpetuity, then there is nothing to stop mortgage holders from pressuring associations to make further "agreements" regarding their liens, contrary to the express purpose of RCW 64.34.364. *See Liu v. U.S. Bank Nat'l Ass'n*, 179 A.3d 871, 878-79 (D.C. 2018) (association's agreement to subordinate its superpriority lien violated statute paralleling RCW 64.34.030 because the statute "effectively shields condominium associations from pressure by lenders to require foreclosure-sale purchasers to agree that the property is subject to the first mortgage, a term that could reduce the number of interested bidders and impair the condominium association's ability to recover unpaid assessments.").

This Court should grant review under RAP 13.4(b)(1) and (4).

2. The Court of Appeals' notion of "inquiry notice" conflicts with over a century of Washington precedent and undermines the policies of the Recording Act.

The Court of Appeals' published decision conflicts with Washington precedent governing constructive notice, RAP 13.4(b)(1), eviscerating the Recording Act, RCW ch. 65.08, and the right of

purchasers of real property to rely on recorded title. RAP 13.4(b)(4). "The bona fide purchaser . . . is the favored creature of the law." *Tomlinson v. Clarke*, 118 Wn.2d 498, 508, 825 P.2d 706 (1992) (quoted source omitted). A bona fide purchaser is "a good faith purchaser for value, who is without actual or constructive notice of another's interest in the property purchased." *Tomlinson*, 118 Wn.2d at 500. "[A] circumstance that would lead a person to inquire . . . is only notice of what reasonable inquiry would reveal." *Selene RMOF II REO Acquisitions II, LLC v. Ward*, 189 Wn.2d 72, 87, ¶ 22, 399 P.3d 1118 (2017). "The party claiming a purchaser had notice of a prior party's interest has the burden to prove such notice." *OneWest Bank, FSB v. Erickson*, 185 Wn.2d 43, 66, ¶ 54, 367 P.3d 1063 (2016).

This Court has "[f]rom the beginning . . . held without deviation that a bona fide purchaser of real property may rely upon the record title." *Ellingsen v. Franklin Cty.*, 117 Wn.2d 24, 28, 810 P.2d 910 (1991) (quoted source omitted); *Paganelli v. Swendsen*, 50 Wn.2d 304, 309, 311 P.2d 676 (1957) ("We have consistently held that a purchaser may rely upon record title."). Accordingly, "'[o]ne searching the index . . . is not bound to search the record outside the chain of title of the property presently being conveyed.'" *Selene*, 189 Wn.2d at 87 n.9, ¶ 22 (quoting *Valentine v. Portland Timber & Land*

Holding Co., 15 Wn. App. 124, 131, 547 P.2d 912 (alteration in original), *rev. denied*, 87 Wn.2d 1015 (1976)).

The Court of Appeals' published decision conflicts with these fundamental principles of property law and record title. The Court of Appeals reasoned that Mr. Diaz had constructive notice that BOA's lien had regained priority over the Association's superpriority lien because of "[t]he circumstances surrounding the sheriff's sale," including that "the judgment at issue was well below the tax assessed value of this property." 16 Wn. App.2d at 356-57, ¶¶ 33-35. But there is nothing unusual about the fact the Association's judgment was for less than the assessed value of the property. Associations can and do foreclose on liens worth far less than the tax-assessed value of the property. *See, e.g.*, *BAC Home Loans*, 180 Wn.2d at 757, ¶ 3 ($15,000 in assessments); *Summerhill Vill. Homeowners Ass'n v. Roughley*, 166 Wn. App. 625, 626, ¶ 4, 270 P.3d 639 ($10,000 in assessments), *opinion corrected and superseded*, 289 P.3d 645, 647 (2012).

Moreover, an examination of the recorded January 2013 judgment—the last relevant document in the chain of title before the sheriff's sale—confirms that "the rights of *all defendants*, *including mortgage lenders*" were "inferior and subordinate to the plaintiff's lien and . . . *forever foreclosed*." (CP 235 (emphasis added))

Nothing about this judgment indicates that "a lender may have an interest in the property" that "would survive the Association's foreclosure sale." 16 Wn. App.2d at 357, ¶¶ 35-36. There was no reason (or obligation) for Mr. Diaz to contact the Association's attorney before the sale, contrary to the Court of Appeals' conclusion that he should have done so. 16 Wn. App.2d at 358, ¶ 40.

The Court of Appeals erroneously reasoned that Mr. Diaz nonetheless had constructive notice that BOA might have an existing mortgage because the judgment references the earlier stipulation dismissing BOA as a defendant. 16 Wn. App.2d at 357, ¶ 37. But, as the Court also recognized, "the January 29 Judgment did not explicitly indicate the Association had agreed to revive Bank of America's senior lien rights." 16 Wn. App.2d at 358, ¶ 39. And this Court has long recognized that it "would wreak havoc with the land title system" and "render impossible a meaningful title search" to require purchasers of real property to comb through documents outside the chain of title simply because they are a matter of public record. *Ellingsen*, 117 Wn.2d at 30.

To the contrary, this Court has held that a "reasonable inquiry" involves a "search of the county *deed records*," not every

document in a court file.[4] *Ward*, 189 Wn.2d at 87, ¶ 22 (emphasis added). Yet under the Court of Appeals' decision a purchaser at foreclosure sale forfeits both the property and his purchase price because of an unrecorded stipulation purporting to subordinate, in perpetuity and contrary to RCW 64.34.030, an association's lien. *See also* RCW 65.08.060(3) (a "conveyance" of real property includes "an instrument releasing in whole or **in part**, postponing or subordinating a mortgage or other lien") (emphasis added); *Paganelli*, 50 Wn.2d at 311 ("plaintiffs were negligent and should bear the loss" caused by their failure to record their deed).

U.S. ROF's "vacation" of the default order against its predecessor BOA, *seven years* after it was entered, underscores the chaos the Court of Appeals' notion of "inquiry notice" will cause. If a lender's successor can "revive" a lien by vacating an order extinguishing it, years after the encumbered property is sold to a third party, then no purchaser could ever be confident of good title, undermining not only the general transfer of property, but

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[4] The Court of Appeals contradicted itself in holding the stipulation did not need to be recorded, stating both that it did not subordinate a lien and that it was how BOA "retained its priority status." 16 Wn. App.2d at 360, ¶ 44. The failure to record the stipulation distinguishes this case from *Diaz v. Hsueh*, No. 77771-8-I, 2019 WL 1781098, at *1, *rev. denied*, 194 Wn.2d 1003 (2019), because in that case, unlike here, the lender recorded a notice of trustee's sale "three months *before* Diaz purchased the property." (emphasis added)

Washington's "policy . . . to protect third parties who in good faith and for value become purchasers at judicial sales, so that the highest and best price may be obtained at such sales." *Prince v. Mottman*, 84 Wash. 287, 295, 146 P. 841 (1915); *see also Williams v. Cont'l Sec. Corp.*, 22 Wn.2d 1, 10, 153 P.2d 847 (1944) ("execution sales should be so conducted as to multiply bidders, promote competition, and effect sale of the property to the highest responsible bidder.").

This Court should grant review under RAP 13.4(b)(1) and (4).

F. Conclusion.

This Court should accept review and hold that Mr. Diaz purchased the property free and clear of U.S. ROF's deed of trust.

Dated this 30th day of April, 2021.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 30, 2021, I arranged for service of the foregoing Petition for Review, to the Court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-File
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DATED at Seattle, Washington this 30th day of April, 2021.

*/s/ Andrienne E. Pilapil*________
Andrienne E. Pilapil

16 Wash.App.2d 341
Court of Appeals of Washington, Division 1.

Jose DIAZ Appellant,
v.
NORTH STAR TRUSTEE, LLC & U.S. ROF II Legal Title Trust 2015-1, by U.S. Bank National Association, as Legal Title Trustee; and all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint herein. Respondents

No. 80716-1-I
|
FILED 2/16/2021

Synopsis
Background: Purchaser of condominium at sheriff's sale after a condominium association foreclosed on a lien for unpaid assessments brought action against legal title trustee, the successor beneficiary of a deed of trust on the property, and against successor trustee, seeking to quiet title and enjoin foreclosure by mortgage lender holding senior lien. The Superior Court, King County, granted defendants' summary judgment motion, but denied defendants' request for sanctions and for an award of attorney fees. Parties cross-appealed.

Holdings: The Court of Appeals, Andrus, J., held that:

[1] as a matter of first impression, condominium association's foreclosure sale did not extinguish mortgage lender's senior lien;

[2] purchaser failed to establish he was a bona fide purchaser for value;

[3] mortgage lender's payment of six month super priority portion of condominium association's assessment lien was not a conveyance that was required to be recorded;

[4] as a matter of first impression, successor trustee did not violate Consumer Protection Act (CPA); and

[5] action was not frivolous, and thus trial court did not abuse its discretion in denying sanctions and refusing to award attorney fees.

Affirmed.

Mann, C.J., and Verellen, J., concurred.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Sanctions; Motion for Attorney's Fees.

West Headnotes (29)

[1] **Appeal and Error** Review using standard applied below

Appellate courts review the trial court's summary judgment orders de novo, performing the same inquiry as the trial court.

[2] **Appeal and Error** Statutory or legislative law

Appellate courts review questions of statutory interpretation de novo.

[3] **Statutes** Intent

Courts interpret statutes to give effect to the legislature's intentions.

[4] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

When interpreting a statute courts begin by examining the plain language of the statute.

[5] **Statutes** Construction based on multiple factors

The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.

[6] **Constitutional Law** Judicial "reading into" or "out of" statutory language

Courts will not read into a statute matters that are not in it.

[7] **Common Interest Communities** Perfection and priority

Mortgages and Deeds of Trust Condominium; common interest communities

Statute establishing an exception to the usual, first-in-time lien priority rule by giving a condominium association's lien for unpaid assessments a limited priority over any pre-existing recorded mortgage did not require mortgage lenders to wait until the passage of six-month period before paying assessments to retain senior lien status; legislature's expectation was that if a condominium owner owes monthly assessments and fails to pay them, the association may conduct a sheriff's sale to foreclose its lien and a mortgage holder may retain its superior lien status by prepaying six months of assessments that otherwise would have become due and would have been owed to the association by the owner. Wash. Rev. Code Ann. § 64.34.364(3).

[8] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

Statutes Grammar, spelling, and punctuation

Courts employ traditional rules of grammar in discerning the plain language of a statute.

[9] **Statutes** Tense, mood, and voice

A legislative body's use of a verb tense holds significance in construing statutes.

[10] **Common Interest Communities** Perfection and priority

Mortgages and Deeds of Trust Condominium; common interest communities

Under condominium lien statute, condominium association's foreclosure sale on lien for unpaid assessments did not extinguish mortgage lender's senior lien, which was preserved when mortgage lender prepaid six months of condominium assessments; condominium association's foreclosure sale could not extinguish mortgage lender's lien which remained senior to that of condominium association. Wash. Rev. Code Ann. § 64.34.364(3).

[11] **Mortgages and Deeds of Trust** Liens and Encumbrances

Mortgages and Deeds of Trust Other mortgages or deeds of trust

Title of a purchaser at a foreclosure sale will be subject to all mortgages and other interests that are senior to the mortgage being foreclosed. Restatement (Third) of Property: Mortgages § 7.1 cmt. a.

[12] **Real Property Conveyances** Bona Fide Purchasers

The "bona fide purchaser doctrine" provides that a good faith purchaser for value who is without actual or constructive notice of another's interest in purchased real property has superior interest in that property.

[13] **Real Property Conveyances** Questions of law or fact

The determination of a buyer's status as a bona fide purchaser to establish a superior interest in a property is a mixed question of law and fact.

[14] **Real Property Conveyances** Questions of law or fact

In determining whether a buyer is a bona fide purchaser who has superior interest in a property, what a buyer actually knew is a factual question but the legal significance of that knowledge is a legal question.

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[15] **Appeal and Error** Mixed questions of law and fact

The Court of Appeals reviews mixed questions of law and fact de novo.

[16] **Real Property Conveyances** Constructive Notice, and Facts Putting on Inquiry

In considering whether a person is a bona fide purchaser having a superior interest in a property, courts ask (1) whether the surrounding events created a duty of inquiry, and if so, (2) whether the purchaser satisfied that duty.

[17] **Real Property Conveyances** Constructive Notice, and Facts Putting on Inquiry

In answering the question whether a purchaser satisfied the duty of inquiry to establish bona fide purchaser status entitled to superior interest in the property, the court considers the purchaser's knowledge and experience with real estate.

[18] **Real Property Conveyances** Constructive Notice, and Facts Putting on Inquiry

In considering whether a buyer is a bona fide purchaser, and thus entitled to a superior interest in the property, a buyer receives constructive notice of another party's claim of right when the facts and circumstances surrounding the sale would cause an ordinarily prudent person to inquire further.

[19] **Real Property Conveyances** Constructive Notice, and Facts Putting on Inquiry

The inquiry rule for establishing bona fide purchaser status, for entitlement to a superior interest in a property, imputes to a purchaser notice of all facts which reasonable inquiry would disclose.

[20] **Real Property Conveyances** Lien or incumbrance and extent thereof

Purchaser of condominium at sheriff's sale after condominium association foreclosed on lien for unpaid assessments failed to establish bona fide purchaser status, and thus purchaser did not have a superior interest to mortgage lender with senior lien; purchaser, a sophisticated real estate investor, had constructive notice of existence of mortgage holder with superior lien rights as he aware sheriff's sale arose out of judicial foreclosure for unpaid condominium dues, search of county property records would have revealed existence of deed of trust on property and association's judgment for unpaid assessments, purchase price at sheriff's sale was well below tax-assessed value, and purchaser would have discovered that mortgage lender had reestablished senior lien rights upon contacting association's attorney. Wash. Rev. Code Ann. §§ 64.34.364(2), 64.34.364(3).

[21] **Common Interest Communities** Perfection and priority

Mortgages and Deeds of Trust Condominium; common interest communities

Real Property Conveyances Necessity and Effect as Between Parties to Instrument

Mortgage lender's payment of six month super priority portion of condominium association's assessment lien was not a “conveyance” that was required to be recorded; by making payment mortgage lender was not seeking a release of association's lien or seeking to have association subordinate its lien to that of mortgage lender, but rather mortgage lender merely reduced the total monetary value of association's lien and retained its priority status by prepaying assessments the owner would otherwise have been responsible for. Wash. Rev. Code Ann. § 65.08.060(3).

[22] **Antitrust and Trade Regulation** Nature and Elements

To succeed on a Consumer Protect Act (CPA) claim, a plaintiff must establish (1) an unfair or deceptive act (2) in trade or commerce (3)

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that affects the public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act complained of and the injury suffered. Wash. Rev. Code Ann. § 19.86.020.

[23] **Antitrust and Trade Regulation** In general; unfairness

The first two elements of a Consumer Protection Act (CPA) claim, an unfair or deceptive act in trade or commerce, may be established by a showing that the alleged act constitutes a per se unfair trade practice. Wash. Rev. Code Ann. § 19.86.020.

[24] **Antitrust and Trade Regulation** Debt collection

Finance, Banking, and Credit Licensing and registration of debt collectors

Trustee whose sole business was conducting nonjudicial foreclosure sales under Deed of Trust Act (DOTA) was not legally required to register as a collection agency under Washington Collection Agency Act (WCAA), and therefore trustee did not violate WCAA by failing to register as a collection agency, such that trustee did not violate Consumer Protection Act (CPA), even though trustee's foreclosure activities constituted collection of a debt; legislature explicitly excluded entities engaged in collection activities, such as trust companies, from collection agency registration requirements, and trustee was not licensed as a collection agency. Wash. Rev. Code Ann. §§ 19.16.100(5), 19.86.020, 61.24.030.

[25] **Liens** Enforcement

Foreclosure is a means of collecting a debt.

[26] **Costs** Nature and Grounds of Right

A trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success.

[27] **Costs** Bad faith or meritless litigation

A lawsuit is frivolous for purposes of imposing attorney fees and costs against a non-prevailing party if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. Wash. Rev. Code Ann. § 4.84.185.

[28] **Appeal and Error** Costs and Fees

Appeal and Error Attorney Fees

Appellate courts review a trial court's ruling on a motion for sanctions and for attorney fees for abuse of discretion. Wash. Rev. Code Ann. § 4.84.185; Wash. Super. Ct. Civ. R. 11.

[29] **Costs** Nature and Grounds of Right

Quiet title action against trustees by purchaser of condominium at sheriff's sale after condominium association foreclosed on lien for unpaid assessments was not frivolous, and thus trial court did not abuse its discretion in denying sanctions and refusing to award attorney fees to trustees, where purchaser raised legal arguments of first impression, including the proper interpretation of condominium lien statute and Consumer Protection Act (CPA), and raised non-frivolous questions relating to his status as a bona fide purchaser, and, although purchaser did not prevail in making similar arguments on appeal in a similar case, Court of Appeals did not issue its decision in that case until long after purchaser initiated this quiet title action. Wash. Rev. Code Ann. §§ 4.84.185, 19.16.100(5)(c), 64.34.364(3); Wash. Super. Ct. Civ. R. 11.

****560** Honorable Sandra E. Widlan, Judge

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Attorneys and Law Firms

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PUBLISHED OPINION

Andrus, A.C.J.

****561** ***345** ¶ 1 Jose Diaz appeals the dismissal of his lawsuit seeking to quiet title to property he purchased at a sheriff's sale after a condominium association foreclosed on a lien for unpaid assessments. Diaz filed this complaint against U.S. ROF II Legal Title Trust 2015-1, by U.S. Bank National Association, as Legal Title Trustee (U.S. ROF), the successor beneficiary of a deed of trust on the property, and North Star Trustee, LLC (North Star), the successor trustee, after North Star sent Diaz a notice of a foreclosure sale. Diaz contended any interest the predecessor mortgage holder, Bank of America, had in the property was extinguished when the condominium association foreclosed its lien for unpaid assessments. He claimed their attempt to foreclose on that extinguished lien violated the Washington Consumer Protection Act (CPA), chapter 19.86 RCW.

¶ 2 The trial court granted U.S. ROF and North Star's motion for summary judgment, concluding that the foreclosure did not extinguish the mortgage lender's lien because ***346** Bank of America paid six months of outstanding condominium fees to reserve its senior lien status under RCW 64.34.364(3). It also dismissed Diaz's CPA claims. We affirm.

FACTS

¶ 3 On May 18, 2007, Tatyana Jensen purchased a condominium at 11915 Roseberg Avenue South, in Seattle. Jensen borrowed $132,000 and signed a promissory note with the lender, Pierce Commercial Bank, for this transaction. The deed of trust Jensen executed listed Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary of the deed of trust, as nominee for Pierce Commercial Bank, and Ticor Title Company as the trustee. The deed of trust was assigned to Bank of America [1] in 2011, and assigned to U.S. ROF in 2017. MERS appointed North Star as successor trustee, also in 2017.

¶ 4 Jensen's condominium is a part of the Roseberg Condominium Association (the Association). In May 2012, the Association initiated a judicial foreclosure against Jensen to collect unpaid assessments. The Association also named Bank of America and MERS as defendants in that foreclosure suit.

¶ 5 On September 4, 2012, the trial court entered a default order against Bank of America and MERS after they failed to appear. The court also entered a decree of foreclosure, declaring that any lien held by Bank of America and MERS was inferior and subordinate to the Association's lien and was foreclosed.

¶ 6 Approximately four months later, on January 11, 2013, the Association agreed to the entry of an order (January 11 Order) with Bank of America that provided in relevant part:

> ***347** 2. [Bank of America] has tendered to Plaintiff, and Plaintiff has accepted, the super priority lien amount of $1,164.00 (6 months X $194.00) as contemplated under RCW 64.34.364(3).
>
> 3. Plaintiff acknowledges that the sum tendered reestablishes the above-referenced Deed of Trust as a lien fully senior to the lien being foreclosed by Plaintiff.
>
> 4. With the super priority lien now fully satisfied, in the event that Plaintiff elects to foreclose, such a foreclosure would not foreclose, affect, or impair Lenders' Deed of Trust.
>
> 5. The terms and conditions stipulated to herein will continue to bind and inure both stipulating parties, including any successor in interest to either party.

The January 11 Order dismissed Bank of America and MERS from the foreclosure action with prejudice. It did not, however, vacate the prior order of default against Bank of America and MERS.

¶ 7 On January 29, 2013, the trial court entered a default judgment and decree of foreclosure against Jensen and authorized the Association to sell the property at a ****562** sheriff's sale (January 29 Judgment). It decreed that "the rights of all defendants, including mortgage lenders, be adjudged

inferior and subordinate to the plaintiff's lien and be forever foreclosed" subject to any statutory right of redemption. The January 29 Judgment did not explicitly exclude Bank of America from the "mortgage lenders" whose lien rights were subordinated to the Association's lien. However, the order specifically indicated it was based, in part, on the "January 11, 2013... Stipulation and Agreed Order of Dismissal of defendants Bank of America ..." which had dismissed Bank of America with prejudice.

¶ 8 After obtaining the January 29 Judgment, the Association tried to locate Jensen to collect its judgment. When the Association was unable to do so, it opted to conduct a sheriff's sale. The court issued an order of sale in November 2015. On January 15, 2016, the sheriff conducted this sale and Diaz, the highest bidder, purchased the property for $17,571.26. On January 18, 2016, Diaz contacted Patricia ***348** Army, the Association's attorney, to ask if the lender had paid any "priority fees" before his purchase. Army informed Diaz that the bank had paid these fees in 2013. She sent Diaz a copy of the January 11 Order that reestablished Bank of America's priority lien position.

¶ 9 The court confirmed the sheriff's sale to Diaz on February 23, 2016. After the expiration of the redemption period, the sheriff issued a Sheriff's Deed to Real Property to Diaz on August 14, 2017.

¶ 10 Bank of America's assignee to the deed of trust, U.S. ROF, asked North Star to foreclose its lien for nonpayment of the mortgage under chapter 61.24 RCW. In August 2017, North Star mailed a "Notice of Default" and, a couple of months later, a "Notice of Foreclosure" to Jensen and to any occupant of the condominium. North Star recorded a "Notice of Trustee's Sale" with King County and set a sale date.

¶ 11 On March 5, 2018, Diaz filed a complaint against U.S. ROF and North Star seeking to quiet title and to enjoin the foreclosure. Diaz asserted U.S. ROF's deed of trust could not be enforced against the property and any attempt to foreclose violated the CPA. The trial court temporarily restrained the sale on April 20, 2018. North Star then postponed the trustee's sale.

¶ 12 In July 2018, Diaz filed for, and the trial court subsequently granted, partial summary judgment finding Diaz's title superior to U.S. ROF's interest. On May 15, 2019, the Association and U.S. ROF jointly moved to vacate the September 4, 2012 default order against Bank of America and MERS. The parties stipulated that their failure to vacate that order when they entered into the January 11 Order affirming the superiority of Bank of America's lien rights was excusable neglect under CR 60. The court granted the motion and vacated the September 4, 2012 default order nunc pro tunc as of January 11, 2013.

¶ 13 Based on this change of circumstances, in June 2019, U.S. ROF and North Star moved to vacate the partial ***349** summary judgment in favor of Diaz, arguing newly discovered evidence justified setting aside the summary judgment order. The trial court denied the motion, concluding that none of the evidence changed what Diaz knew or should have known when he purchased the condominium and that "Diaz could not have anticipated that more than three years after his purchase the September 4, 2012 default order against the Bank in the Roseberg case would be vacated." The court found that the January 11 Order reestablishing Bank of America's senior lien rights was "never filed with the King County Recorder's Office and Mr. Diaz was unaware of the order when he purchased the property." It concluded that nothing in the January 29 Judgment provided sufficient notice or warning of Bank of America's outstanding lien, that Diaz had no affirmative duty to search the court record for the earlier court order or to contact the Association's attorney to inquire about other potential liens and, as a matter of law, Diaz was entitled to reasonably rely on the January 29 Judgment when he purchased the property. The court also denied their motion for reconsideration.

¶ 14 In July 2019, U.S. ROF and North Star filed a second motion for reconsideration after they discovered Diaz had lost an ****563** almost identical case, Diaz v. Hsueh, 8 Wash. App. 2d 1043, 2019 WL 1781098, review denied, 194 Wash.2d 1003, 451 P.3d 326 (2019). The trial court granted this motion and vacated the partial summary judgment order because "the Court of Appeals rejected the identical arguments that plaintiff advanced in his motion for partial summary judgment." It wrote:

> First, the Court of Appeals held that a mortgage holder's stipulated order of dismissal from a condominium foreclosure action does not affect the mortgage holder's superior lien position. Second, the Court of Appeals held that the plaintiff was not entitled to additional notice of the mortgage holder's superior lien position, and rejected the argument that the ***350** stipulation was a conveyance of real property that needs to be recorded under RCW 65.08.070....

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Based on Diaz v. Hsueh, the court concludes that it improperly granted plaintiff partial summary judgment. The mortgage holder in the case at hand was dismissed from the condominium association's foreclosure lawsuit pursuant to a stipulated order whereby the mortgage holder paid six-months of condominium association fees and thus reestablished its super priority lien. Under Diaz v. Hsueh, the mortgage holder had a super priority lien when the plaintiff purchased his condominium. Applying Diaz v. Hsueh, the court erroneously ruled that plaintiff's title is superior to defendants' interest in the condominium when it granted partial summary judgment on July 13, 2018.

¶ 15 The trial court further noted that North Star and U.S. ROF had been unaware of the unpublished decision when it moved to vacate the partial summary judgment motion and Diaz's attorney did not bring the case to the court's attention. It noted that Diaz involved "the same plaintiff, the same plaintiff's counsel, and is directly on point," and imposed CR 11 sanctions in the amount of $1,000 on Diaz's counsel for willfully failing to bring Diaz to the court's attention.

¶ 16 U.S. ROF and North Star then filed a motion for summary judgment. The trial court granted the motion and dismissed Diaz's claims with prejudice. The trial court denied U.S. ROF's request for further CR 11 sanctions and its request for an award of attorney fees.

¶ 17 Diaz appeals the dismissal of his claims. U.S. ROF and North Star cross-appeal the trial court's decision not to impose CR 11 sanctions and the denial of its request for attorney fees under RCW 4.84.185.

ANALYSIS

A. Lien Priority Status

[1] ¶ 18 Diaz first argues the trial court erred in concluding on summary judgment that Bank of America's lien survived ***351** the Association's foreclosure sale under RCW 64.34.364. We review the trial court's summary judgment orders de novo, performing the same inquiry as the trial court. Wilkinson v. Chiwawa Cmtys. Ass'n, 180 Wash.2d 241, 249, 327 P.3d 614 (2014). A court may grant summary judgment if the evidence, viewed in a light most favorable to the nonmoving party, establishes that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

¶ 19 Diaz advances two arguments. First, he contends that under RCW 64.34.364(3), a mortgage lender like Bank of America cannot maintain a senior lien interest in a condominium unless (1) assessments owed for the six months immediately preceding the foreclosure sale remain unpaid on the date of sale; and (2) the mortgage lender pays those assessments after they became due. Because Bank of America paid six months of assessments in 2013 and the sale did not occur until 2016, Diaz contends the bank failed to preserve its lien. Second, he argues that because no foreclosure sale was scheduled when the bank paid these assessments, the Association's lien did not yet have any priority over the bank's lien and the payment had no legal effect. We reject both arguments.

¶ 20 RCW 64.34.364 establishes an exception to the usual, first-in-time lien priority rule by giving a condominium association's lien for unpaid assessments a limited priority over any pre-existing recorded mortgage. ****564** Summerhill Vill. Homeowners Ass'n v. Roughley, 166 Wash. App. 625, 629, 270 P.3d 639 (2012). RCW 64.34.364 provides in relevant part:

> (1) The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due.
>
> (2) A lien under this section shall be prior to all other liens and encumbrances on a unit except: ... (b) a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent ...
>
> ***352** (3) ... [T]he lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments ... which would have become due during the six months immediately preceding the date of the sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee ...
>
> ....
>
> (5) If the association forecloses its lien under this section nonjudicially pursuant to chapter 61.24 RCW ... the association shall not be entitled to the lien priority provided for under subsection (3) of this section.

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(Emphasis added).

¶ 21 Diaz contends that under paragraph (3), a mortgage holder can retain the priority of its lien only by paying the Association six months of assessments after these assessments became due and immediately before the sheriff's sale. To support this position, Diaz relies on the phrase "immediately preceding the date of sheriff's sale," which he argues dictates when the mortgage holder's payment must be made.

[2] **[3]** **[4]** **[5]** ¶ 22 We review questions of statutory interpretation de novo and interpret statutes to give effect to the legislature's intentions. City of Spokane v. County of Spokane, 158 Wash.2d 661, 672–73, 146 P.3d 893 (2006). We begin by examining the plain language of the statute. In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wash.2d 834, 838-39, 215 P.3d 166 (2009). " 'The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.' " Chadwick Farms Owners Ass'n v. FHC LLC, 166 Wash.2d 178, 186, 207 P.3d 1251 (2009) (internal quotation marks omitted) (quoting State v. J.P., 149 Wash.2d 444, 450, 69 P.3d 318 (2003)).

[6] **[7]** ¶ 23 First, the phrase "immediately preceding the date of the sheriff's sale" describes which six-month period is covered by the super priority lien. It does not mandate when the sum must be paid by a mortgage lender to retain ***353** its senior lien status. There is nothing in RCW 64.34.364(3) requiring the lender to wait until the passage of this six-month period before it may pay such assessments. We will not "read into a statute matters that are not in it." Kilian v. Atkinson, 147 Wash.2d 16, 21, 50 P.3d 638 (2002).

[8] **[9]** ¶ 24 Second, Diaz's interpretation ignores the verb tense used in the same sentence—a construction which clearly contemplates payment of assessments in advance of their due date. We employ traditional rules of grammar in discerning the plain language of the statute. Chevelle, 166 Wash.2d at 839, 215 P.3d 166. "A legislative body's use of a verb tense holds significance in construing statutes." Crown West Realty, LLC v. Pollution Control Hearings Bd., 7 Wash. App. 2d 710, 738, 435 P.3d 288, review denied, 193 Wash.2d 1030, 447 P.3d 165 (2019) (citing United States v. Wilson, 503 U.S. 329, 333, 112 S. Ct. 1351, 117 L. Ed. 2d 593 (1992)). The phrase "would have become due" is the conditional or subjunctive mood of the future tense verb phrase "will become due." [2] THE CHICAGO MANUAL OF STYLE § 5.123, § 5.131 (17th ed. 2017). The use of this verb tense and mood indicates the legislature's expectation that if a condominium owner will owe monthly assessments and fails to pay them, the association may conduct ****565** a sheriff's sale to foreclose its lien and a mortgage holder may retain its superior lien status by prepaying six months of assessments that otherwise would have become due and would have been owed to the association by the owner.

¶ 25 If the legislature had intended the mortgage holder to wait for the occurrence of the otherwise hypothetical condition, it would have chosen a different verb tense and ***354** mood in drafting the statute. Diaz's interpretation would require this court to change the current statutory language to the non-conditional past tense: "[T]he lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments ... which became due during the six months immediately preceding the date of the sheriff's sale." RCW 64.34.364(3) (emphasis added). This is not the language the legislature chose.

¶ 26 Next, Diaz argues that Bank of America's payment three years before the sheriff's sale could not extinguish the Association's super priority lien because the Association's lien had not yet taken "priority" over the bank's lien. He contends the Association's lien only gains priority if there is an actual judicial foreclosure. We reject this argument as well.

¶ 27 In BAC Home Loans Servicing, LP v. Fulbright, 180 Wash.2d 754, 328 P.3d 895 (2014), our Supreme Court held that, under RCW 64.34.364, a condominium association "establishes its priority to collect unpaid condominium assessments at the time the condominium declaration is recorded, even though it is not enforceable until the unit owner defaults on his or her assessments." Id. at 767, 328 P.3d 895. The court explained that at the moment the condominium association filed its foreclosure lawsuit the liens became reprioritized. Id. at 765, 328 P.3d 895. The Association initiated the foreclosure action before Bank of America paid the six months of assessments in January 2013. Under BAC Home Loans, the Association's super priority lien existed by the time Bank of America paid the six months of assessments.

[10] **[11]** ¶ 28 Because Bank of America's lien remained senior to that of the Association, the Association's foreclosure sale could not extinguish it. It is a "fundamental principal of

mortgage law" that title of a purchaser at a foreclosure sale will be subject to all mortgages and other interests that are senior to the mortgage being foreclosed. Worden v. Smith, 178 Wash. App. 309, 319-20, 314 P.3d 1125 (2013) (citing RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 7.1 cmt. a (AM. ***355** LAW INST. 1997)). Because Bank of America preserved the seniority of its lien by prepaying six months of condominium assessments in January 2013, the Association's 2016 sale to Diaz did not, as a matter of law, extinguish that lien.

B. Bona Fide Purchaser

¶ 29 Diaz next contends that, regardless whether Bank of America's lien survived the foreclosure, he was a bona fide purchaser at the sheriff's sale because he bought the condominium for value without notice of the mortgage holder's interest in the property. Because the undisputed record demonstrates Diaz had constructive notice of the senior lien, we reject this argument.

[12] **[13]** **[14]** **[15]** ¶ 30 "[T]he bona fide purchaser doctrine provides that a good faith purchaser for value who is without actual or constructive notice of another's interest in purchased real property has superior interest in that property." S. Tacoma Way, LLC v. State, 169 Wash.2d 118, 127, 233 P.3d 871 (2010). The determination of a buyer's status as a bona fide purchaser is a mixed question of law and fact. Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wash.2d 560, 573, 276 P.3d 1277 (2012). What a purchaser actually knew is a factual question but the legal significance of that knowledge is a legal question. Peoples Nat'l Bank of Wash. v. Birney's Enters., Inc., 54 Wash. App. 668, 674, 775 P.2d 466 (1989). This court reviews mixed questions of law and fact de novo. Clayton v. Wilson, 168 Wash.2d 57, 62, 227 P.3d 278 (2010).

[16] **[17]** ¶ 31 In considering whether a person is a bona fide purchaser, we ask (1) whether the surrounding events created a duty of inquiry, and if so, (2) whether the purchaser satisfied that duty. Albice, 174 Wash.2d at 573, 276 P.3d 1277. In answering the second question, the court considers the ****566** purchaser's knowledge and experience with real estate. Id.

[18] **[19]** ¶ 32 Diaz contends he had no duty to investigate the status of Bank of America's lien because the January 11 ***356** Order reestablishing the seniority of its lien was unrecorded. But the test issue is not whether the document was recorded with the county auditor. A buyer receives constructive notice of another party's claim of right when the facts and circumstances surrounding the sale "would cause an ordinarily prudent person to inquire further." Albice, 174 Wash.2d at 573, 276 P.3d 1277. The inquiry rule imputes to a purchaser "notice of all facts which reasonable inquiry would disclose." Olson v. Trippel, 77 Wash. App. 545, 551, 893 P.2d 634 (1995) (quoting Diimmel v. Morse, 36 Wash.2d 344, 348, 218 P.2d 334 (1950)).

[20] ¶ 33 The circumstances surrounding the sheriff's sale of the condominium put Diaz on notice of a possible senior mortgage lien. Diaz testified he was aware the sheriff's sale arose out of a judicial foreclosure for unpaid condominium dues. A search of King County property records would have revealed the Association's judgment against Jensen for these unpaid assessments but not the judgment amount. The only way a prospective purchaser would know how much to bid at a sheriff's sale would be to determine the amount of money the judgment creditor was seeking to collect at the sale. And the only way to obtain this information would be to review a copy of the January 29 Judgment against Jensen. This judgment, had Diaz reviewed it, showed the principal amount owing of $6,841.26, with interest, attorney fees and costs of another $4,474.38, for a total judgment of $11,315.64.

¶ 34 A reasonable prospective purchaser would also need to know the value of the property. The tax-assessed value of the condominium in 2016 was between $82,000 and $95,000.[3] At the time an ordinarily prudent buyer would have been investigating whether to bid at the sheriff's sale, he would have understood the lien being foreclosed was well below the property's tax-assessed value. Indeed, Diaz bid only $17,571.26 to purchase this property. His purchase ***357** price was therefore between 18.5 percent and 21.43 percent of the property's tax-assessed value.

¶ 35 Diaz contends that any purchase price over 20 percent of a property's tax-assessed value is, as a matter of law, a purchase "for value" making him a bona fide purchaser as a matter of law. This argument, however, conflates the issue of whether Diaz was on constructive notice of Bank of America's lien and whether he purchased the property "for value." These issues are legally distinct. The undisputed facts demonstrate the judgment at issue was well below the tax assessed value of this property which would have put any ordinary purchaser

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on inquiry notice that a lender may have an interest in the property.

¶ 36 A property records search would have also revealed the existence of a Bank of America deed of trust on this property. A reasonable prospective purchaser would have investigated the status of this deed of trust, before bidding, to determine if it would survive the Association's foreclosure sale.

¶ 37 Diaz maintains he was entitled to rely on the January 29 Judgment which decreed that all mortgage lender liens were foreclosed. And he argues he had no duty to "comb through" the pleadings of the Association's foreclosure lawsuit to find the January 11 Order reestablishing Bank of America's lien rights. Neither argument is persuasive.

¶ 38 First, the January 29 Judgment decreed that "the rights of all defendants, including mortgage lenders, be adjudged inferior and subordinate to the plaintiff's lien." But it also clearly stated that Bank of America had been dismissed as a defendant on January 11, 2013. Thus, as of the date of the January 29 Judgment, Bank of America was no longer a defendant in that lawsuit and any decree foreclosing liens of "defendants" could not, as a matter of law, have extinguished the rights of a mortgage lender who was no longer a defendant in the foreclosure action.

***358** ¶ 39 While the January 29 Judgment did not explicitly indicate the Association had ****567** agreed to revive Bank of America's senior lien rights, it clearly identified the January 11 Order and identified Bank of America as the dismissed mortgage lender. A reasonably prudent prospective purchaser could have verified the status of Bank of America's mortgage interest either by contacting the Association to determine its status or by reviewing a copy of the January 11 Order. The information in the July 29 Judgment was sufficient to trigger a duty to make further inquiry into the possible existence of a mortgage.

¶ 40 Second, Diaz has identified no case in which a Washington appellate court has ruled that a purchaser, as a matter of law, never has a duty to examine court filings. There may be facts and circumstances surrounding a sale that would cause an ordinarily prudent person to do so or at least to reach out to the judgment creditor's counsel to ask about court filings. Here, Diaz concedes he did not ask the Association whether the mortgage lender had paid condominium assessments until after he purchased the property. Had Diaz contacted the Association's attorney to inquire into the status of any mortgage before he purchased, as he did after the fact, he would have discovered that Bank of America had paid six months of assessments and had reestablished its senior lien rights. When Diaz contacted counsel after he purchased, this attorney immediately provided him a copy of the January 11 Order. He would not have had to comb through court filings—a simple email would have uncovered this information.

¶ 41 The record further reveals Diaz was not an inexperienced purchaser involving condominium association foreclosures. According to Diaz, he had purchased an interest in a different condominium in January 2016 at a sheriff's sale. 2019 WL 1781098 *1. Diaz testified he purchased this condominium a week before he purchased Jensen's property and the unpublished decision indicates he paid $12,181.84 for it. Diaz, 2019 WL 1781098 *1. Diaz did ***359** not purchase either condominium as a personal residence. He testified in this case that he rented the Jensen condominium for $1,350 a month starting April 1, 2016. We can only conclude from these undisputed facts that Diaz is a real estate investor and was not an unsophisticated first time home buyer.

¶ 42 Diaz next maintains that he was not required to inspect the January 11 Order because that order was an unrecorded "conveyance" of real estate in violation of RCW 65.08.070. [4] We disagree.

¶ 43 Under RCW 65.08.060(3), a "conveyance" includes all written instruments by which any "interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected, including ... an instrument releasing in whole or in part, postponing or subordinating a mortgage or other lien ... " (emphasis added). Diaz contends that the stipulation indicating Bank of America had paid six months of assessments and thereby retained its senior status as lienholder needed to be recorded because the Association used this payment to subordinate its lien to Bank of America's lien. But this argument misunderstands the operation of the condominium lien statute.

[21] ¶ 44 Under RCW 64.34.364(2) and (3), the Association has a single lien against a condominium for unpaid assessments, six months of which is prior to any mortgage, and the remaining portion of which has no priority over any mortgage recorded before the date on which the assessments became delinquent. By paying the six month "super priority" portion of this lien, Bank of America was not seeking a ***360** "release" of the Association's lien or seeking

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to have the Association subordinate its lien to that of the bank. By prepaying assessments the owner would otherwise be responsible for, Bank of America merely reduced the total monetary value of **568 the Association's lien and retained its priority status. Thus, the payment was not a "conveyance" within the meaning of RCW 65.08.060(3) and it was not required to be recorded.

¶ 45 Based on this record, Diaz failed to establish he was a bona fide purchaser for value. The undisputed evidence shows he had constructive notice of the existence of a mortgage holder with superior lien rights. Diaz therefore purchased the Jensen condominium subject to U.S. ROF's mortgage.

C. Consumer Protection Act

¶ 46 Diaz contends North Star violated the CPA by initiating a foreclosure without having a legal entitlement to do so in violation of the Deed of Trust Act (DOTA). He also argues North Star violated the CPA by failing to register as a collection agency under the Washington Collection Agency Act (WCAA).

[22] **[23]** ¶ 47 The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. To succeed on a CPA claim, a plaintiff must establish (1) an unfair or deceptive act (2) in trade or commerce (3) that affects the public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act complained of and the injury suffered. Trujillo v. Nw. Tr. Servs., Inc., 183 Wash.2d 820, 834-35, 355 P.3d 1100 (2015). The first two elements may be established by a showing that the alleged act constitutes a per se unfair trade practice. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash.2d 778, 785-86, 719 P.2d 531 (1986).

[24] ¶ 48 Because the deed of trust was valid and U.S. ROF had a legal right to commence a nonjudicial foreclosure, *361 Diaz's first CPA claim fails. And we reject his second contention that North Star is required by law to register as a collection agency because North Star's trustee services in nonjudicial foreclosure proceedings are exempt from the registration requirement.

¶ 49 In order to pursue collection work in Washington, a collection agency must be properly licensed in this state. RCW 19.16.110; RCW 19.16.250(1). Violations of the WCAA constitute per se violations of the CPA. RCW 19.16.440. RCW 19.16.100(4)(a) defines "collection agency" as "[a]ny person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person." Diaz argues that North Star was operating as an unlicensed debt collection agency.

¶ 50 RCW 19.16.100(5)(c) specifically excludes from the definition of "collection agency"

> "[a]ny person whose collection activities are carried on in ... its true name and are confined and are directly related to the operation of a business other than that of a collection agency, such as but not limited to: Trust companies; ... lawyers; ... credit unions; loan or finance companies; mortgage banks; and banks ...."

North Star contends that this exclusion applies to trustees whose sole business is conducting nonjudicial foreclosure sales under the DOTA. We agree.

¶ 51 The legislature explicitly excluded entities engaged in collection activities, such as "trust companies," from the registration requirements. The phrase "trust company" is not defined in the WCAA but a "trust" is the well-established right of a trustee to hold a property interest at the request of another for the benefit of a third party, or beneficiary. BLACK'S LAW DICTIONARY 1817 (11th ed. 2019). The only reasonable interpretation of the phrase "trust company" is a business entity engaged in providing the services of a trustee.

*362 ¶ 52 Under the DOTA, a "trustee" is the person designated in the deed of trust or appointed under RCW 61.24.010(2) to hold the real property in trust to secure the performance of an obligation of the grantor, such as the payment of a mortgage. RCW 61.24.005(16); RCW 61.24.020. This trustee may be "[a]ny domestic corporation or domestic limited liability corporation incorporated [under Washington law] of which at least one officer is a Washington resident." RCW 61.24.010(1)(a). Trustees are statutorily **569 authorized to conduct nonjudicial trustee foreclosure sales. RCW 61.24.020; RCW 61.24.030. Nothing in the DOTA requires trustees to register as collection agencies under the WCAA.

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¶ 53 According to Lisa Hackney, the vice president of North Star's Trustee Operations, North Star is not licensed as a collection agency but it operates in its own name and its sole business in Washington is enforcing security interests and conducting nonjudicial foreclosure sales as a trustee under Washington's DOTA. Its customers are loan servicers, investors, mortgage lenders, credit unions and other lending institutions. These business operations fall within the exemption of RCW 19.16.100(5).

¶ 54 Diaz argues North Star admitted it was a "collection agency" when it referred to itself as a debt collector in foreclosure documents. The "Notice of Default" that North Star sent on August 9, 2017, contained the following warning in capital letters:

> THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Included with the Notice of Default was a "Validation of Debt," that identified the amount of the debt and the amount of money needed to reinstate the loan. This document included the statement: "The communication to which this Validation is attached is an attempt to collect a debt and any information obtained will be used for that purpose."

***363** **[25]** ¶ 55 The fact that North Star's foreclosure activities constitute the collection of a debt does not negate its statutory exclusion under RCW 19.16.100(5)(c). The exclusion extends to anyone engaged in "collection activities" as long as its operations are done in its true name and are confined and directly related to the operation of a trust company. As the Supreme Court noted in Obduskey v. McCarthy & Holthus LLP, ––– U.S. ––––, 139 S. Ct. 1029, 1036, 203 L. Ed. 2d 390 (2019), "foreclosure is a means of collecting a debt." It is immaterial that North Star notified Diaz it was attempting to collect a debt. What is important is that North Star conducts no debt collection activities other than acting as a trustee in nonjudicial foreclosure proceedings under written deeds of trust. These activities render it exempt from registration under the WCAA.

¶ 56 North Star is not legally required to register as a collection agency under the WCAA and therefore did not violate the WCAA by failing to register as a collection agency. The trial court did not err in dismissing Diaz's CPA claim.

D. DCR 11 Sanctions and Attorney Fees under RCW 4.84.185

¶ 57 North Star and U.S. ROF contend the trial court erred in denying its request for CR 11 sanctions and attorney fees under RCW 4.84.185. We disagree.

[26] ¶ 58 CR 11 provides that all pleadings filed with a court constitute a certification by a party or its attorney that the pleading is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law or the establishment of new law. A trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co., 151 Wash. App. 195, 208, 211 P.3d 430 (2009).

[27] ¶ 59 In addition to CR 11, RCW 4.84.185 allows a trial court to impose attorney fees and costs against a non-prevailing party in any civil action the court finds to be ***364** "frivolous and advanced without reasonable cause." A lawsuit is frivolous under RCW 4.84.185 "if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law." Dave Johnson Ins. v. Wright, 167 Wash. App. 758, 785, 275 P.3d 339 (2012).

[28] ¶ 60 We review a trial court's ruling on a motion for CR 11 sanctions and for attorney fees under RCW 4.84.185 for abuse of discretion. Kearney v. Kearney, 95 Wash. App. 405, 416, 974 P.2d 872 (1999); MacDonald v. Korum Ford, 80 Wash. App. 877, 884, 912 P.2d 1052 (1996).

[29] ¶ 61 The trial court did not abuse its discretion in denying CR 11 sanctions and ****570** refusing to award attorney fees to North Star and U.S. ROF under RCW 4.84.185. First, Diaz raised legal arguments of first impression, including the proper interpretation of RCW 64.34.364(3) and RCW 19.16.100(5)(c). He also raised non-frivolous questions relating to his status as a bona fide purchaser. Second, although Diaz did not prevail in making similar arguments in the Diaz appeal, this court did not issue its decision in that case until 2019, long after Diaz initiated his 2016 lawsuit against North Star and U.S. ROF. Given the lack of clear published case authority, it cannot be said

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that Diaz's arguments, and those of his counsel, were not good faith requests for the extension of existing law. Because the litigation was not frivolous, the court did not abuse its discretion in denying the request for CR 11 sanctions for attorney fees under RCW 4.84.185.

¶ 62 We similarly decline to award attorney fees to North Star or U.S. ROF on appeal under RAP 18.1.

¶ 63 We affirm.

WE CONCUR:

Verellen, J.

Mann, C.J.

All Citations

16 Wash.App.2d 341, 481 P.3d 557

Footnotes

1 Bank of America was the successor in interest to BAC Home Loans Servicing, LP, f/k/a/ Countrywide Home Loans Servicing, LP. The record is unclear as to when Pierce Commercial Bank assigned its deed of trust to BAC Home Loans Servicing but it appears undisputed that this assignment occurred.

2 "[T]he future tense is formed by using will with a verb's stem form {will walk} {will drink}. It refers to an expected act, state, or condition {the artist will design a wall mural} {the restaurant will open soon}." THE CHICAGO MANUAL OF STYLE § 5.131 (Future tense). The subjunctive mode "express[es] an action or state not as a reality but as a mental conception. Typically, the subjunctive expresses an action or a state as doubtful, imagined, desired, conditional, hypothetical, or otherwise contrary to fact." Id. at § 5.123.

3 King County tax records indicate the condominium was valued in 2015 at $82,000 for the 2016 tax year and valued in 2016 at $95,000 for the 2017 tax year.

4 RCW 65.08.070 (1) indicates that "[a] conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record."

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3/17/2021
Court of Appeals
Division I
State of Washington

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

JOSE DIAZ, Appellant, v. NORTH STAR TRUSTEE, LLC & U.S. ROF II LEGAL TITLE TRUST 2015-1, BY U.S. BANK NATIONAL ASSOCIATION, AS LEGAL TITLE TRUSTEE; and all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint herein, Respondents.	No. 80716-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Jose Diaz, filed a motion for reconsideration of the opinion that was filed on February 16, 2021. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Andrus, A.C.J.

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
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CHIEF STAFF ATTORNEY

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April 2, 2021

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Re: Supreme Court No. 99609-1 - Jose Diaz v. North Star Trustee, LLC, et al.
Court of Appeals No. 80716-1-I

Clerk and Counsel:

On March 31, 2021, this Court received the Petitioner's "MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW". The matter has been assigned the above referenced Supreme Court case number. The Supreme Court Clerk entered the following ruling regarding the motion on April 2, 2021.

> **Motion granted. The petition for review should be served and filed by April 30, 2021. The $200 filing fee for a petition for review should also be paid to this Court by April 30, 2021.**

Counsel are advised that upon receipt of the petition for review and filing fee, a due date will be established for the filing of any answer to the petition for review. The petition for review will be set for consideration by a Department of the Court without oral argument on a yet to be determined date.

Counsel are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

Counsel are advised that future correspondence from this Court regarding this matter will most likely only be sent by an e-mail attachment, not by regular mail. This office uses the e-mail address that appears on the Washington State Bar Association lawyer directory. Counsel are responsible for maintaining a current business-related e-mail address in that directory.

Sincerely,

Susan L. Carlson
Supreme Court Clerk

SLC:bw

SMITH GOODFRIEND, PS

April 30, 2021 - 2:18 PM

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