

66103-5

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No. 66103-5-I

**THE COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON**

THOMAS AND SUSAN ARRINGTON, *Appellant (s)*,

v.

VISUAL GRAPHICS and BANK OF AMERICA., *Respondent(s)*.

BRIEF OF APPELLANT(S)

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A. INTRODUCTION

This case centers around the application of RCW 61.24.080(3). RCW 61.24.080(3) is the statute that governs the disposition of surplus funds following a non-judicial foreclosure (i.e. the bid at the foreclosure was greater than the amount necessary to satisfy the foreclosing promissory note, hence excess funds are generated by the sale and a process must take place to determine the proper claimants to those funds).

Washington's surplus funds statute is an intellectually elegant statute, in that it treats the competing claims to the surplus funds in the same priority as they would have existed against the property prior to the foreclosure. Therefore, the various claimants' claims to the surplus funds are prioritized in terms of the property rights that they possessed in the property prior to the foreclosure.

The surplus funds statute would have the trial court judge imagine that the various claimants were exercising their own rights and remedies as against the property, and prioritize the claims to the surplus funds in terms of which property right would be superior to the other.

In this case, the question becomes which of three claimants would have priority to the surplus funds, under RCW 61.24.080(3): a deed of trust holder, a judgment-lien creditor, or the holders of a homestead interest. While there are general rules established by statute and case law that should govern the priorities of the parties listed above, there were

factual matters that caused the trial court to deviate from general application of the rules.

B. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1 The trial court erred in ruling that the holder of a homestead may not avail themselves of the homestead rights against a judgment lien creditor who they had harmed.

No. 2 The trial court erred in determining that Bank of America had a valid lien against the property.

No. 3 The trial court erred in ruling that Fleet National Bank's interest was eliminated by operation of the non-judicial foreclosure and that Bank of America was Fleet National Bank's successor in interest for purposes of RCW 61.24.080(3).

Issues Pertaining to Assignments of Error

No. 1 Is there any legal or equitable relevance to the nature of the facts/circumstances giving rise to a civil judgment?

No. 2 Can a party claiming a homestead right avail itself of that right against a judgment creditor that she injured?

No. 3 When a grantee of a deed of trust ceases to exist and transfers its interest to a successor, does that successor have any responsibility to record evidence of that assignment?

No. 4. If a successor to a deed of trust does not record evidence of its assignment, may it claim that it had a valid perfected security interest against the property when its predecessor in title ceases to exist?

No. 5. Does the trial court abuse its discretion in ruling that a purported deed of trust holder that never received notice of a non-judicial foreclosure had its interests eliminated by the operation of that foreclosure?

C. STATEMENT OF THE CASE

Facts related to the property:

Thomas and Susan Arrington were the owners of real property located at 6812 69th Pl. N.E., Marysville, WA 98270 (*hereinafter* “property”). In 1999, Thomas and Susan Arrington filed for a dissolution of their marriage under cause number 99-3-01239-1 in Snohomish County Superior Court. The property was equally divided between Thomas and Susan Arrington, with Thomas Arrington having the right to sell the property and give Susan Arrington 50% of the proceeds of the sale. Sometime after 2002, Susan Arrington began living in the property as her sole and exclusive residence continuously and the property was Susan Arrington’s primary residence within the meaning of R.C.W. 6.13. *See CP 4-25, 123-124.* This property was subject to a non-judicial foreclosure conducted on June 11, 2010. *CP 260-281.*

The sale yielded funds in excess of those necessary to satisfy the obligation owed to the primary lienholder, and the Trustee, Northwest Trustee Services Corporation, pursuant to RCW 61.24.080 deposited the surplus funds into the court registry of the Pierce County Superior Court. *Id.* The funds were deposited on July 8, 2010 in the amount of \$57,381.30. *Id.*

Facts related to the judgment-lien:

Visual Graphics is a judgment lien creditor (non-consensual) by virtue of a civil judgment obtained on August 11, 2009. The judgment is solely against Susan Arrington. Susan Arrington formerly worked for

Visual Graphics. During her employment she embezzled funds from the company.

On September 24, 2009, Susan Arrington plead guilty in Snohomish County Superior Court cause number 09-1-00705-0, and began serving a sentence at the Mission Creek Corrections Center for Women. Thomas Arrington was not involved in any way with the criminal action, or the related civil action.

Ms. Arrington was living at the property continuously and immediately preceding her incarceration, and the non-judicial foreclosure took place while Ms. Arrington was incarcerated.

Facts related to Bank of America's Claim:

In 2001, Thomas and Susan Arrington executed a promissory note secured by a deed of trust in favor of Fleet National Bank. This represented a junior lien (i.e. second mortgage) on the property. In 2004, Bank of America (*hereinafter* "BOA") acquired all the outstanding shares of Fleet National Bank's parent company in a tax-free, stock for stock merger. As part of this merger, Fleet National Bank was merged into Bank of America. Accordingly, Fleet National Bank was dissolved and ceased to exist on March 31, 2004. *See attached CP 4-25.*

The 2001 promissory note executed by the Arrington's contained a notice address of 315-317 Court Street, PO Box 3092, in Utica, NY 13502 and PO Box 3092 Utica, NY 13599. These were the notice addresses that

were later used by the trustee for the senior lien to provide notice of the non-judicial foreclosure. *See CP 257-259.*

A search of the Snohomish County Recorder's archives revealed that neither Fleet National Bank nor Bank of America recorded an assignment of the deed of trust or provided a new notice address for 2001 deed of trust.

In 2010, Northwest Trustee Services Inc, conducted a non-judicial foreclosure sale and provided notice of the foreclosure to Fleet National Bank at the two Utica addresses referenced above. *CP 43-94.* Similarly, with respect to the 2001 deed of trust the Trustee Sale Guarantee prepared for this sale only lists Fleet National Bank. *CP 260-281.* Bank of America is not listed anywhere in the Trustee Sale Guarantee or any other pleadings or recordings.

Facts related to the appeal:

At the motion to disburse surplus funds, Judge Kurtz ruled that Bank of America was Fleet National Bank's successor in interest, and that the first \$25,533.61 of surplus funds should be directed to BOA. *CP 1-3.* As to the remaining balance of funds, Judge Kurtz ruled that 50% of those funds should be directed to Thomas Arrington as his share of the equity in the home, and because he had no connection to the Visual Graphics civil judgment. *Id.* As to the remaining 50% of the funds (representing Susan Arrington's share), Judge Kurtz ruled that Susan Arrington cannot avail

herself of the homestead protections against a judgment creditor that she had harmed, and that her portion should go to Visual Graphics. *Id.*

D. ARGUMENT

Standard of Review:

The standard of review for legal questions and statutory interpretation is de novo. *See, Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), *Cerrillo v. Esparza*, 158 Wn.2d 194, 199, 142 P.3d 155 (2006).

Procedure for reviewing claims under RCW 61.24.080(3):

RCW 61.24.080(3) provides for the procedure for adjudicating claims related to surplus funds resulting from a non-judicial foreclosure. In ascertaining the relative priorities of competing claimants, RCW 61.24.080(3) provides in relevant part that: “[i]nterests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property.” RCW 61.24.080(3). Generally, the determination of the relative priorities under RCW 61.24.080(3) is within the discretion of the Superior Court judge. *See, Wilson v. Henkle*, 45 Wn. App. 162, 724 P.2d 1069 (1986).

THE TRIAL COURT ERRED IN RULING THAT THE HOLDER OF A HOMESTEAD MAY NOT AVAIL THEMSELVES OF

THEIR HOMESTEAD RIGHTS AGAINST A JUDGMENT LIEN CREDITOR WHO THEY HAD HARMED.

Under the general priorities established by 61.24.080(3) for distribution of surplus funds, the rule of law is well settled that a homeowner (judgment debtor) has priority over judgment creditors/judgment lienholders for any surplus funds that represent the debtor's homestead exemption (i.e. the first \$125,000.00 of surplus funds), and judgment lienholders that have perfected their lien have priority for any funds *in excess* of the debtor's homestead exemption to the extent of the value of the judgment (i.e. all surplus funds exceeding \$125,000.00). *See*, R.C.W. 6.13.030.

As an example, in the case In re the Trustee's Sale of the Real Property of Michael Sweet, 88 Wn. App. 199, 944 P.2d 414 (1997), the Court of Appeals reviewed this exact issue and found that:

The lien on excess value of homestead property is similar to a second mortgage. The second mortgage is for a certain amount, but the actual value of the lien is limited by the value of the property in excess of the first mortgage. Similarly, the lien on excess value of homestead property is for a certain amount, the amount of the judgment. **The actual value of the creditor's lien, however, is limited by the value of the property *in excess of the homestead exemption*.** Following its policy of protecting homesteads, the Legislature has required that a determination be made that there is indeed excess value before the lien is actually executed. However, the lien created is on the property.

In re Sweet, 88 Wn. App. at 202 (1997) *emphasis added*. There are exceptions to this rule, which are codified by statute, such as

mechanic's/materialman's liens, and specifically an exception for those debts owed by the party claiming the homestead exemption when that party owes debts related to child support or spousal maintenance, etc. *See generally*, R.C.W. 6.13.080(4).

In the present case, it is undisputed that Susan Arrington lived at the property as her sole and exclusive residence until the time of her conviction and subsequent incarceration. She was also 50% owner of the property with Thomas Arrington as tenants in common. Consequently, all of the operative elements of the statutory homestead protection afforded under RCW 6.13 are available to Ms. Arrington, and under the well established rules relating to the priorities of claimants, Ms. Arrington's homestead rights are superior to that of Visual Graphics as judgment lien creditor. *See, supra and Sweet*, 88 Wn. App. 199 (1997).

As a judgment lien creditor the issue of whether or not the homestead rights (up to the first \$125,000.00 of equity) is superior in priority would ostensibly be clear, however, in the present case Judge Kurtz was very troubled by the notion that Susan Arrington had harmed Visual Graphics and was now availing herself of homestead protections against the victim of her criminal act.

There is no legal authority to support this position and this issue must be reviewed *de novo*. As a judgment creditor Visual Graphics has a civil judgment, and all the rights accorded thereto. Therefore, Visual

Graphics can take any action allowed by law to collect against Susan Arrington, however, this does not mean that there is legal authority to suggest that Visual Graphics obtains any additional equitable rights, and in this case by virtue of the type of activity that generated the civil judgment. It is clear that under the ordinary application of the rules related to claimants to surplus funds, Susan Arrington's legal claim to the funds is superior to that of Visual Graphics.

As the court in Bank of Anacortes v. Cook, 10 Wn. App. 391; 517 P.2d 633 (1974) stated:

The homestead exemption statutes were enacted pursuant to Const. art 19, § 1, for the purpose of providing a shelter for the family and an exemption for a home. *Clark v. Davis*, 37 Wn.2d 850, 226 P.2d 904 (1951). The homestead statutes are favored in the law and should be liberally construed. *Lien v. Hoffman*, 49 Wn.2d 642, 306 P.2d 240 (1957). **They do not protect the rights of creditors; rather, they are in derogation of such rights.**

Anacortes, 10 Wn. App. At 395; 517 P.2d at 636 (*emphasis added*). As the court stated in Macumber v. Shafer, 96 Wn.2d 568; 637 P.2d 645 (1981):

Homestead statutes are enacted as a matter of public policy in the interest of humanity and thus are favored in the law and are accorded a liberal construction. *Cody v. Herberger*, 60 Wn.2d 48, 371 P.2d 626 (1962); *Lien v. Hoffman*, 49 Wn.2d 642, 306 P.2d 240 (1957); *Bank of Anacortes v. Cook*, 10 Wn. App. 391, 395, 517 P.2d 633 (1974). The homestead exemption was created to insure a shelter for each family. *Clark v. Davis*, 37 Wn.2d 850, 226 P.2d 904 (1951); **It was not created to protect the rights of**

creditors, *First Nat'l Bank v. Tiffany*, 40 Wn.2d 193, 242 P.2d 169 (1952); *Anacortes*, *supra* at 395.

Shafer, 96 Wn.2d at 570; 637 P.2d at 646. A homestead is not an encumbrance, rather to the contrary, the statute is designed to prevent the property from being encumbered. *See*, Edgley v. Edgley 31 Wn. App. 795, 799; 644 P.2d 1208, 1210 (1982).

It is clear that the judgment lien held by Visual Graphics is non-consensual in nature and would have been a junior interest to Susan Arrington's homestead exemption under any normal analysis under RCW 61.24.080(3). The only distinction is the fact that Susan Arrington embezzled monies from Visual Graphics. It should be noted that Visual Graphic's claim is solely based upon its civil judgment that was obtained based upon Ms. Arrington's tort of conversion. *CP 4-25*. Visual Graphic's claim is not a restitution claim arising from the criminal conviction; it is a normal civil judgment.

Susan Arrington's actions are admittedly indefensible, however, for her actions, Ms. Arrington has been convicted in a criminal court. The origin of Visual Graphic's civil judgment does not alter its character. Every holder of a civil judgment can claim that it was injured by the judgment debtor. This does not allow them to by-pass the normal rules associated with judgments and homestead rights. In fact, as unfortunate as Ms. Arrington's actions were, the fact is that she took money from Visual

Graphics. If special equitable rights are to be accorded a creditor who claims that the party claiming a homestead harmed it, then when does the analysis reach its logical conclusion? Every judgment creditor can claim that the judgment debtor harmed it in some way. Is the injury to Visual Graphics any more or less damaging (i.e. the loss of money) than a creditor who loans monies and is never repaid?

The trial court was attempting an equitable solution to a legal problem, which is admirable on its face, but the court must be cognizant that in many ways, there is nothing equitable about the application of debtor's protections, especially homestead rights. Somebody must necessarily lose, in order accord the debtor protections that the society has favored over the rights of injured creditors.

THE TRIAL COURT ERRED IN DETERMINING THAT BANK OF AMERICA HAD A VALID LIEN AGAINST THE PROPERTY.

Bank of America's claim never met the prerequisites for claiming relief under RCW 61.24.080(3). RCW 61.24.080(3) states (in relevant part) that "[i]nterests in, or liens or claims of liens against the property **eliminated by sale** under this section shall attach to the surplus in the order of priority that it had attached to the property." R.C.W. 61.24.080(3) *emphasis added*. The initial element that must be satisfied by any claimant is that they held an interest or lien in the property that was foreclosed.

The issue with respect to BOA's claim in this case is what effect failing to have *any* recorded interest for purposes of notice has on BOA's claim. The answer to that question is that BOA has no interest upon which to predicate relief under RCW 61.24.080(3). This conclusion is reached under two different analysis. 1) Having no recorded interest, or notice to third parties, and with Fleet National Bank no longer in existence, BOA does not have a valid recorded interest under Washington State law upon which to claim a priority over third parties. *See* RCW 65.08.070. 2) No notice of the trustee's sale was received by either Fleet National Bank or BOA of the sale, and therefore, its lien (to the extent one existed at all) cannot have been eliminated by the operation of the non-judicial foreclosure, and therefore BOA does not meet the prerequisites of seeking relief under RCW 61.24.080(3). *See supra*.

RCW 65.08.070 provides 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 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.

RCW 65.080.070 *emphasis added*. In this case, Fleet National Bank ceased to exist in 2004 (*six years before the foreclosure*). Every

deed of trust is still a trust, and needs a grantor (e.g. homeowner), a trustee, and a beneficiary (e.g. the bank). In this case, the beneficiary ceased to exist, and therefore in order for the deed of trust to remain valid against third parties, some compliance with Washington's recording statute had to take place on the part of BOA.

BOA could have simply recorded an assignment of deed of trust and they would have appeared on the record for any party to see, however, they believed that they had no obligation to comply with the recording statute.

No third party would be aware of the existence of BOA's interest or that it had purchased Fleet's interest. Whenever a party fails to properly comply with the recording statute the normal result is that the interest is unperfected and unsecured. Conceptually, no third party could bring suit against BOA on the lien, because nobody would know that BOA claimed an interest in the property. The fact that Fleet National Bank had an interest before 2004 is insufficient. *See, Congregational Church Bldg. Soc'y v. Scandinavian Free Church, 24 Wash. 433, 64 P. 750 (1901).* (Mortgagee may not be charged with notice of prior mortgage of same corporation where it appears under different name). Any party providing notice to Fleet National Bank would have had all inquiries returned, as Fleet ceased all operations and no forwarding address/party for notice was available. *See also, Sengfelder v. Hill, 21 Wash. 371, 58 P. 250 (1899).*

(Recording of instrument which fails to show interest of mortgagor may not constitute notice).

The problem in this case is that the trial court felt that faulting Bank of America for failing to follow the recording statute would result in a windfall to Mr. & Mrs. Arrington (and Mrs. Arrington is, admittedly, not a sympathetic party). The rule that the court established, however, is that banks need not provide notice to any third parties of their interests in property, when they buy and sell loan packages. This gives banks the ultimate insulation from suit, because they can always claim that they did not receive notice of any action (they simply couldn't receive notice because nobody would know of their existence). The onus should be on a bank, who purchases a loan, to record some evidence of its security and provide a physical address for notice purposes, in case any party wished to challenge the bank's position. Failing to take this minimum and simple action is simply unfair, especially when the bank later wishes to avail itself of its secured position, without having recorded that security instrument.

THE TRIAL COURT ERRED IN RULING THAT FLEET NATIONAL BANK'S INTEREST WAS ELIMINATED BY OPERATION OF THE NON-JUDICIAL FORECLOSURE AND THAT BANK OF AMERICA WAS FLEET NATIONAL BANK'S SUCCESSOR IN INTEREST FOR PURPOSES OF RCW 61.24.080(3).

R.C.W. 61.24.040(1) sets forth that in order to foreclose a lien the trustee in a non-judicial foreclosure shall: at least ninety days before the sale, send notice of the sale in the form proscribed by R.C.W. 61.24.040(1)(f) to the beneficiary of a deed of trust via both first class and certified or registered mail. See, R.C.W. 61.24.040(1). *CP 4-25*.

R.C.W. 61.24.040(7) provides that if the trustee fails to give the required notice the lien or interest shall not be affected by the sale. See, R.C.W. 61.24.040(7) *Id.* R.C.W. 61.24.080(3) provides that as a prerequisite to disbursement of surplus funds, parties claiming an interest in surplus funds from a non-judicial foreclosure must show that their liens against the property were eliminated by the sale. See, R.C.W. 61.24.080(3).

In this case, it is clear Bank of America was not notified of the Trustee's Sale per the requirements of RCW 61.24. This fact can be verified by consulting the Declaration of Mailing filed by Routh Crabtree Olson, dated July 6, 2010, as it does not list Bank of America. *CP 257-259*. In addition, the trustee, Northwest Trustee Services, by and through their counsel, Routh Crabtree Olson, verified that Bank of America was not given notice of the trustee sale. See, *CP 4-25*; RCW 61.24. Consequently, under R.C.W. 61.24.040(7) even if BOA had a valid security instrument (*see infra*), that interest was not affected by the non-judicial foreclosure that took place on June 11, 2010.

Since their interest was not affected by the non-judicial foreclosure, BOA has no interest that can attach to the surplus funds within the meaning of R.C.W. 61.24.080(3) as their lien either survived the sale and is now the senior lien on the property, or was not perfected by recording notice of BOA's successor interest to Fleet. *Infra.* BOA's remedy in this case is to either perform their own foreclosure based on the deed of trust (if they can establish a valid lien), or file suit on the promissory note, however, they have not met the prerequisites of a valid claim under RCW 61.24.080(3).

Washington courts have interpreted the deed of trust statute to require strict compliance in order to protect borrowers. In the case of Amresco v. SPS Props., 129 Wn. App. 532 (2005) the court stated "Because these statutes remove many protections borrowers have under a mortgage, lenders **must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor.** Amresco v. SPS Props., 129 Wn. App. 532, 540, 119 P.3d 884, 888 (2005); Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108, 111, 752 P.2d 385 (1988) (*citing to Queen City Sav. & Loan Ass'n v. Mannhalt*, 49 Wn. App. 290, 294-95, 742 P.2d 754 (1987)). Additionally, the Amresco court noted that "the Trustee can serve a lienholder at **its address in the recorded documents** or the Trustee can serve the lienholder's **legal representative at an address otherwise known to the Trustee.** Moreover, requiring the

Trustee to serve the legal representative at the lienholder's address could easily prevent the lienholder from receiving **actual** notice.” *Id emphasis added*. Clearly, the courts read the statute to require not only strict compliance with the deed to trust act, but also **actual** notice.

In the instant case, BOA failed to record an assignment or provide any notice to outsiders that it owned the Fleet National Bank promissory note and was the successor to its deed of trust. Accordingly, the trustee sent notice to the only two known Utica addresses for Fleet National Bank. Neither address is a valid service address, as evidenced by the returned mailings (as undeliverable) in Thomas and Susan Arrington’s motion. As such, we must conclude that the all of Fleet National Bank’s Utica addresses are invalid, which is consistent with the fact that the company no longer exists. *CP 240-243*. Similarly, the building located at 315-317 Court Street in Utica, New York appears to be occupied by Northland Communications. As such, BOA did not receive actual or constructive notice of the foreclosure, as required by RCW 61.24.040.

Additionally, as discussed above, in order to obtain disbursement under RCW 61.24.080(3) BOA must prove that its lien was eliminated by operation of the trustee sale and that BOA is a successor in interest to Fleet National Bank.

BOA uses the Amresco case for an interesting proposition; namely that having no recorded interest exempts BOA from the operation of RCW

61.24.040(1). Amresco, 129 Wn. App. 532 (2005). The argument bypasses the issue of whether or not BOA has a valid lien (*see supra*), and assumes that Fleet National Bank's deed of trust naturally flows to BOA, along with all the lien priorities associated therewith, despite giving no notice to third parties, or complying with Washington's Recording Statute. The argument then goes on to say that because BOA had no recorded interest (though they still claim a lien), the trustee was not under any obligation to provide them notice of the trustee's sale, and hence though they were not provided notice, RCW 61.24.040(1) would still eliminate the lien, and thus entitle them to make a claim under RCW 61.24.080(3).

This is circular logic at its best. First, how can BOA acknowledge that no recorded interest existed in their name, and still maintain that it had a valid lien? Of course, the argument will be that they were Fleet National Bank's successor, and therefore, they get to use Fleet's position. The problem is that Fleet ceased to exist, and all notice addresses for Fleet were invalid as of 2004, and therefore, the beneficiary of that deed of trust (whether it was Fleet or BOA) had an obligation to record something to notify third parties of their priority claim. *Supra*.

Notwithstanding BOA's assumption that Fleet's lien was still valid, BOA still has failed to meet its burden for establishing the prerequisites of relief under RCW 61.24.080(3) (that their interest was eliminated by the trustee's sale). There is only one method to eliminate

interests by operation of the non-judicial foreclosure, and it is strictly described in the statute. RCW 61.24. No exemption for this procedure exists. Furthermore, the burden firmly rests on BOA to assert such a claim of priority in light of the unrecorded interest. *See, Glaser v. Holdorf*, 56 Wn.2d 204, 352 P.2d 212 (1960). (The burden of establishing that a purchaser had prior notice of another's claim, right, or equity, rests upon the one who asserts such notice); *Hendricks v. Lake*, 12 Wn. App. 15, 528 P.2d 491 (1974), review denied, 85 Wn.2d 1004 (1975). (A party asserting an unrecorded interest in real property against a later purchaser of an interest in such property has the burden of proving that the purchaser had either actual or constructive notice of his unrecorded interest). BOA's current circumstances are most analogous to a lienholder that records their lien in the wrong county, and therefore, fails to have a priority over other claimants who had no notice of the mis-recorded interest.

BOA's argument would have vast negative public policy implications. Essentially, BOA is claiming that any time an entity with a lien ceases to exist, the successor to that entity has no obligation to provide recorded notice to third parties of their successor claim. Under this theory, banks who buy the lien interests of entities that no longer exist have all the options in the world and none of the liability (or responsibilities) associated with being a lienholder. For example, there is simply no legal authority preventing BOA from claiming that the

purchaser of the property purchased subject to BOA's mortgage, and then subsequently perform their own non-judicial foreclosure, now in the senior position. At the same time, if it makes tactical sense to do so, BOA can claim that their interest was eliminated by the operation of the non-judicial foreclosure (as in this case), and seek any surplus funds from the senior lienholder's foreclosure action, despite never having received notice of the sale. The more troubling aspect is that by abrogating their requirements under Washington's Recording Statute, other lienholders, or litigants would have no notice of BOA's purported interest, and BOA could simply assert that interest whenever it is convenient for them, without regard to bonafide purchasers, or claimants who had no notice of BOA's claim.

BOA cannot abrogate its responsibility to comply with the recording statute, and as such, it is questionable whether or not BOA even had a valid lien. To acknowledge this situation is to set a dangerous precedent. Assignees to recorded interests, will simply have no obligation to provide third parties notice of that assignment. Grantors (i.e. homeowners) will never know who owns their loan. Litigants will have no discoverable parties to serve lawsuits, and the outcome of any lawsuit will be in question because the holder of the unrecorded interest can appear at any time and claim that it did not receive notice of the action.

Certainly there is no authority to suggest that BOA's current circumstances are an exception to the requirements of RCW 61.24.040(1)

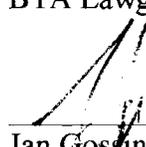
or RCW 61.24.080(3). BOA has no basis in law to claim that it has met the statutory requirements of RCW 61.24.080(3).

E. CONCLUSION

The trial court's ruling in this matter is understandable from an equitable perspective, however, the court deviated from established statutory and common law construction to reach a result that it felt was equitable. The issue before the court however is that this ruling will create negative public policy implications which cannot be ignored. Judgment lien creditors will be able to argue that their monetary loss supercedes the homestead protection. Successors to promissory notes will no longer be obligated to record evidence of their new interest, and afford themselves wide tactical advantages against third parties, who have no knowledge of their existence. The most appropriate solution is for this court to reverse the trial court's ruling and follow a strict statutory and common law interpretation of the priorities of the claimants in this case.

Dated this 8th day of February, 2011

Respectfully Submitted by:
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