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NO. 664204

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

**BOEING EMPLOYEES' CREDIT UNION,
Appellant,**

v.

**RUSS E. BURNS AND SUZANNE K. BURNS,
husband and wife,
Respondents.**

**APPEAL FROM THE KING COUNTY SUPERIOR COURT
Case No.: 10-2-33837-3SEA
Honorable Eric Watness**

REVISED BRIEF OF APPELLANT

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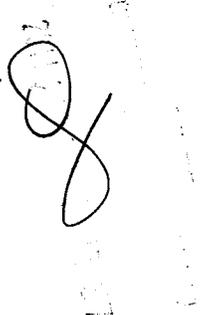


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I. INTRODUCTION

Appellant Boeing Employees' Credit Union ("BECU") seeks review of the King County Superior Court's Order Disbursing Funds Pursuant to RCW 61.24.080(3), entered on November 16, 2010 (the "Order"). Respondents Russ E. Burns and Suzanne K. Burns (together, "Burns") executed a promissory note in connection with an \$85,000.00 loan from BECU, which was secured by a second position deed of trust. Burns defaulted. BECU sued and obtained a judgment, but was unable to collect anything because Burns filed for bankruptcy.

Subsequently, the first position deed of trust beneficiary, Wells Fargo, sold Burns' property in a trustee's sale. There were surplus funds left over. The Superior Court erred by holding these surplus funds were subject to Burns' homestead exemption, because BECU's deed and note merged with its judgment and provided BECU with no grounds to claim the surplus funds.

To the contrary, Washington law permits a creditor to recover funds from both a judgment and a subsequent trustee's sale, provided there is no double recovery. And the homestead exemption is not available against a junior deed of trust lien holder such as BECU. Further, the Superior Court's Order is contrary to the purposes of the merger and election of remedies doctrines. Accordingly, BECU respectfully requests this Court reverse the

Superior Court's Order and permit BECU to recover the surplus funds previously released to Burns.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The court erred by determining that BECU's Deed of Trust and Promissory Note merged when BECU obtained a judgment, and that BECU was precluded from claiming the excess funds from the trustee's sale of the Property.
2. The court erred by determining that the homestead exemption is available against a judgment lien creditor that is also a deed of trust beneficiary of RCW 61.24.080.

B. Issues Pertaining to Assignments of Error

1. The purpose of the merger and election of remedies doctrines is to prevent a creditor from vexatious re-litigation and double recovery. BECU sued Burns once and obtained a judgment from which it has recovered nothing. Should BECU be permitted to claim the surplus funds which the Superior Court ordered transferred to Burns?
2. RCW 61.24.100 permits a beneficiary to collect on an obligation secured by a deed of trust even after that beneficiary has completed an action against the debtor. BECU completed an action against Burns when it obtained a judgment. May BECU seek recovery from surplus funds from a trustee's sale after completion of its action against Burns?
3. This Court has held that a debtor's homestead exemption does not take priority to surplus funds

following a trustee's sale over the beneficiary of a second deed of trust. BECU was the beneficiary of a second Deed of Trust, and there were surplus funds available after the trustee's sale of the Property. Was it error for the Superior Court to determine Burns' homestead exemption took priority to BECU's interest with respect to the surplus funds?

III. STATEMENT OF THE CASE

A. The Loan from BECU to Burns

Burns owned real property located at 9440 17st Ave NE, Redmond, Washington (the "Property"). (CP 3.¹) On or about October 24, 2005, Burns executed a promissory note (the "Promissory Note") in connection with a loan from BECU in the principal amount of eighty-five thousand dollars (\$85,000.00). (CP 37.) The Promissory Note was secured by a second position Deed of Trust (the "Deed of Trust"). (CP 91 ¶ 3.) Burns subsequently defaulted on the Promissory Note. (*Id.*)

B. BECU's Judgment and Inability to Collect

After Burns' default, BECU initially decided to initiate a non-judicial trustee's sale on its second position Deed of Trust. (CP 51 ¶ 2.) BECU recorded a Notice of Trustee's Sale on December 5, 2008. (*Id.*) BECU discontinued its trustee's sale proceeding and caused a

¹ Citations to "CP" refer to the Clerk's Papers. Citations to "Transcript 11/16/2010 at _____" refer to the transcript of proceedings before Commissioner Watness, while citations to "Transcript 12/10/2010 at _____" refer to the transcript of proceedings before Judge Robinson. Both transcripts are described in greater detail in Appellant's Statement of Proceedings.

Notice of Discontinuance of Trustee's Sale to be recorded on February 24, 2009. (*Id.*)

Subsequently, BECU commenced an action in King County Superior Court against Burns on the Promissory Note. (CP 51 ¶ 2.) On April 14, 2009, BECU obtained a judgment in the amount of \$81,986.52, exclusive of post-judgment interest and post-judgment attorneys' fees and costs. (CP 69-71.) BECU obtained a writ of garnishment and at first collected a small amount of the debt – but Burns subsequently filed for bankruptcy and BECU was required to disgorge the small amount it had previously collected. (Transcript 12/10/2010 at 4:10-19.) Accordingly, BECU collected nothing on its Judgment. (*Id.*)

C. Surplus Funds from Wells Fargo's Trustee Sale

On August 20, 2010, Northwest Trustee Services, Inc., as Successor Trustee, conducted a non-judicial trustee's sale on the first position deed of trust on the Property, on behalf of Wells Fargo Bank. (CP 91 ¶ 4.) As a result of the trustee's sale, \$100,648.42 in surplus funds were deposited with the King County Superior Court Clerk. (CP 34 ¶ 3.)

D. Motions for Disbursement of Surplus Funds

BECU subsequently brought a motion to disburse a portion of the surplus funds to satisfy the obligation secured by its deed of trust which was eliminated by Wells Fargo's trustee's sale. (CP 33.)

BECU later renewed its motion to be placed in possession of \$91,620.77 of the surplus funds. (CP 33, CP 110.) BECU's position was that its second position Deed of Trust on the Property entitled it to priority as to the surplus funds. (CP 33-34.)

Burns filed a subsequent motion to disburse the surplus funds. (CP 36.) Burns alleged that since BECU had sued on the Promissory Note, BECU had released the Deed of Trust, and the only lien remaining to the surplus funds was BECU's judgment lien, which Burns claimed was subordinate to their homestead exemption. (*Id.*)

The Commissioner's Order found that BECU's Deed of Trust and Promissory Note had merged into its Judgment, and awarded the entire balance of the surplus funds to Burns. (CP 82-83.) BECU moved for revision of the Commissioner's Order. (CP 85.) The Court denied that motion. (CP 104.) This appeal followed. (CP 105.)

IV. ARGUMENT

A. Standard of Review

Statutory interpretation is a question of law reviewed de novo. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citing *City of Seattle v. Burlington N. R.R.*, 145 Wn.2d 661, 665, 41 P.3d 1169 (2002)). Washington appellate courts apply the de novo review standard to other questions of law as well. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845 (2008). This appeal involves the construction of Washington statutes and

other questions of law regarding the effect a lawsuit (and subsequent judgment) on a promissory note has on an underlying deed of trust. Accordingly, the de novo standard applies to all issues presented in this appeal.

B. California’s “One Action” and “Security First” Rules Have Been Rejected in Washington.

In granting the Order and later affirming it, the Superior Court reviewed Burns’ comparison of Washington law to the law of other jurisdictions. By conflating several different principles, Burns reached erroneous conclusions regarding Washington law. (CP 97-98.) A brief overview of these laws indicates that Washington has not adopted key principles discussed in Burns’ memoranda. Briefly stated, there are three principles at issue.

First, there is the “one action rule.” This rule limits a creditor to one action for the recovery of debt secured by a mortgage on real estate. *See, e.g.*, California (Cal. Code Civ. Proc. § 726(a)), Nevada (Nev. Rev. Stat. § 40.430), Idaho (Idaho Code Ann. § 6-101), and Montana (Mont. Code Ann. § 71-1-222). One purpose of this rule is “to protect the mortgagor against multiplicity of actions when the separate actions, though theoretically distinct, are so closely connected that normally they can and should be decided in one suit... The other is to compel a creditor who has taken a mortgage on land to exhaust his security before attempting to reach any unmortgaged property to satisfy his claim.” *FDIC v. Shoop*, 2 F.3d 948, 950 (9th

Cir. 1993). Several states in the Ninth Circuit have adopted this rule, but Washington is not one of them. There is no rule limiting a Washington creditor to a single action when recovering a debt.

Second, there are anti-deficiency statutes that limit the right to recover on a debt that exceeds the value of the security.

Washington has such a statute, as do several other states in this Circuit.² But the anti-deficiency statute, RCW 61.24.100, expressly allows a creditor, whose obligation is secured by a deed of trust, to sue on the promissory note that deed secures, without forfeiting the creditor's right to also recover from a trustee's sale. The plain language of RCW 61.24.100(2) provides:

2(a) Nothing in this chapter precludes an action against any person liable on the obligations secured by a deed of trust or any guarantor prior to a notice of trustee's sale being given pursuant to this chapter or after the discontinuance of the trustee's sale.

(b) No action under (a) of this subsection precludes the beneficiary from commencing a judicial foreclosure or trustee's sale under the deed of trust after the completion or dismissal of that action.

Id. This statute was amended in 1998 to allow a lender to judicially or nonjudicially foreclose a deed of trust, when that lender has concluded another action and any portion of the debt remains outstanding. *Id.*; *see also* 1998 Wash. Laws c 295 § 12.

² *See, e.g.*, Cal. Civ. Proc. Code § 580a; Nev. Rev. Stat. §§ 40.451-40.459; Idaho Code § 6-108 and § 45-1512; Ariz. Rev. Stat. Ann. § 33-814.

As discussed herein, a Washington creditor is barred from double recovery. But if the creditor sues on a \$1,000 loan, obtains a judgment, and collects \$200, that creditor may then foreclose its deed of trust. If the resulting sale generates more than \$800, the creditor must deposit the excess in the court registry. There is currently no law in Washington that precludes this course of action.

Third, some states have “security first” laws that require a creditor to foreclose on its security prior to taking any further action to recover the debt (assuming that state permits any further action). Arizona is one such state (Ariz. Rev. Stat. Ann. § 33-722), as is California. The court in *Prestige Ltd. Pshp. v. East Bay Car Wash Partners (In re Prestige Partnership)*, 234 F.3d 1108, 1114 (9th Cir. 2000) explained “security first” laws as follows:

[Cal. Civ. Proc. Code § 726(a)] “is both a ‘security-first’ and ‘one-action’ rule: It compels the secured creditor, in a single action, to exhaust his security judicially before he may obtain a monetary ‘deficiency’ judgment against the debtor.” [cites omitted] Thus, when a secured creditor sues on the obligation rather than seeking foreclosure of the mortgage or deed of trust, he has made an election of remedies, “electing the single remedy of a personal action, and thereby waiving his right to foreclose on the security or to sell the security under a power of sale.” *Prestige I*, 205 B.R. at 434.

Id. Washington does not have a “security first” law. Indeed, the policy of this state, as expressed in Washington’s merger and election of remedies doctrines, rejects the conclusion that BECU was

required to choose a single remedy or to foreclose on its security before bringing an action to collect Burns' unpaid debt.

C. The Court Erred by Determining That BECU's Deed of Trust and Promissory Note Merged When BECU Obtained a Judgment, and That BECU Was Precluded from Claiming the Excess Funds From the Trustee's Sale of the Property.

1. The Court's Order Violates the Merger and Election of Remedies Doctrines.

The Court's Order found that "BECU's deed of trust and promissory note merged when BECU obtained a judgment." This finding contradicts the purpose of the merger rule. In *Caine & Weiner v. Barker*, 42 Wn. App. 835, 837 (Wash. Ct. App. 1986), this Court provided as follows:

The merger rule is based in part upon the need to prevent vexatious re-litigation of matters that have already passed into judgment as between the parties to the litigation and their successors. Williston, *supra* § 1875. However, *despite the general rule that underlying rights and obligations are extinguished by the judgment, the doctrine is designed to promote justice and should not be carried further than that end requires.* 11 Am. Jur. 2d *Bills and Notes* § 922 (1963); 50 C.J.S. *Judgments* § 599 (1947). Therefore, where the original obligation provides for special rights or exemptions, in some circumstances these may be preserved and recognized despite merger. *Nelson v. Nelson*, 91 Ariz. 215, 370 P.2d 952 (1962).

Id. (emphasis added). No reasonable person could conclude from the record that BECU is "vexatiously relitigating" its Judgment

against Burns. Although BECU obtained the Judgment, it collected nothing from attempts to enforce it. There has not been a second lawsuit, and there will be no double recovery if the surplus funds are disbursed to BECU in satisfaction of a debt Burns incurred but did not pay. To the contrary, the Superior Court's Order prevented BECU from claiming the funds it was rightfully owed, and led to an unjust result – Burns still has BECU's money.

A similar policy underlies the election of remedies doctrine. The purpose of that doctrine is to prevent double redress for a single wrong. *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 112, 942 P.2d 968 (1997) (citations omitted). Indeed, that is the *sole* purpose of the doctrine. *Lange v. Town of Woodway*, 79 Wash.2d 45, 49, 483 P.2d 116 (1971). The doctrine seeks to prevent a party from asserting inconsistent positions in order to recover more than the value of the harm suffered. *Bremerton Central Lions Club, Inc. v. Manke Lumber Co.*, 25 Wn. App. 1, 5, 604 P.2d 1325 (1979) (citation omitted). A party will be only be constrained by the doctrine if: (1) two or more remedies exist at the time of the election; (2) *the remedies are repugnant to and inconsistent with each other*; and (3) the party to be bound chose one of the remedies. *Birchler*, 133 Wn.2d at 112 (citations omitted; emphasis added).

Here, BECU is not asserting inconsistent positions. It merely wants its money back. BECU sued Burns but collected nothing. BECU is not attempting to recover more than the value of the harm

suffered. It is not inconsistent with this Court's previous remedy – a Judgment which resulted in no recovery – to allow BECU to obtain relief from the surplus funds. If this Court reverses the Superior Court's Order, its decision will be consistent with the merger and election of remedies doctrines.

2. Washington Law Permits a Creditor to Recover Funds from Both a Judgment and a Subsequent Trustee's Sale.

Moreover, Washington law expressly allows a creditor, whose obligation is secured by a deed of trust, to sue on the promissory note that deed secures, without forfeiting the creditor's right to also recover from a trustee's sale. *See* RCW 61.24.100(2). This statute permits a creditor to obtain funds from both a judgment and a subsequent trustee's sale. As *Caine* and *Birchler* indicate, a creditor is precluded from double recovery. But if the creditor is not recovering an amount in excess of the debt, the creditor may obtain a judgment and then use other procedures, such as a trustee's sale, to collect the debt.

By the express terms of RCW 61.24.100(2), a creditor may file an action against a debtor – as BECU did – and then “commenc[e] a judicial foreclosure or trustee's sale... after the completion... of that action.” *Id.* If the underlying obligation were merged into the judgment, it would not exist and no further action “under the deed of trust” would be possible. Therefore, the

obligation must continue to exist after “completion” of the “action”. And if the creditor were not allowed to recover money from the judicial foreclosure or trustee’s sale mentioned in RCW 61.24.100(2)(b), there would be no point in commencing either of them.

Washington courts first look to a statute’s plain language when interpreting its meaning. *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citing *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). If the plain language is subject to only one interpretation, the inquiry ends because plain language does not require construction. *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). Absent ambiguity, the interpretation of a statute's plain language is guided by the common and ordinary meaning of its words. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976).

The plain language of RCW 61.24.100(2) indicates that a creditor whose obligations are secured by a deed of trust may sue the debtor, then recover from a judicial foreclosure or trustee’s sale after completion of the action. As numerous courts throughout the United States have confirmed, the common and ordinary meaning of “completion” in this context means the end of a lawsuit. *See, e.g., Sacher v. United States*, 343 U.S. 1, 11, 72 S. Ct. 451, 96 L. Ed. 717 (1952) (“If [the trial judge] believes the exigencies of the trial require that he defer judgment until its completion, he may do so

without extinguishing his power”); *Firth v. United States*, 554 F.2d 990, 993 (9th Cir. 1977) (citing 1B *Moore's Federal Practice* para. 0.404(10), at 571 (2d ed. 1975)) (referring to “the judgment rendered after completion of the proceedings for which the case was remanded”); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 379 F.3d 1120, 1127 (9th Cir. 2004) (“LICRA and UEJF have followed their lawsuit to completion in the French court”); *Chrysler Credit Corp. v. Marino*, 63 F.3d 574, 578 (7th Cir. 1995) (“We review the denial of a motion to stay proceedings pending the completion of another lawsuit for an abuse of discretion”); *Ketterle v. B.P. Oil, Inc.*, 909 F.2d 425, 430 (11th Cir. 1990) (“This could have been accomplished by completion of the lawsuit...”).

These cases all indicate that BECU’s action against Burns was completed when the lawsuit ended and BECU obtained the Judgment. Subject to the reasonable prohibition against double recovery, the statute expressly provides that a creditor who sues on a deed of trust may subsequently recover from a judicial foreclosure or trustee’s sale of that deed of trust.

Washington law provides that a creditor who holds a note and mortgage can sue on the note and obtain a judgment without eliminating the underlying security interest. The Supreme Court’s opinion in *American Fed. Sav. & Loan Ass’n v. McCaffrey*, 107

Wn.2d 181, 189-90,728 P.2d 155 (1986) supports this reading of the statute:

In transactions involving both notes and mortgages, the notes represent the debts, the mortgages security for payment of the debts. Either may be the basis of an action... *The mortgagee may sue and obtain a judgment upon the notes and enforce it by levy upon any property of the debtor. If the judgment is not satisfied in this manner, the mortgagee still can foreclose on the mortgaged property to collect the balance.* Alternatively, the mortgagee may foreclose on the mortgaged property and obtain a deficiency judgment. Concurrent actions to execute a judgment and foreclose on the mortgaged property are prohibited....

Id. (emphasis added; cites omitted). Another case, *Metropolitan Mortgage & Securities Co., Inc. v. Becker*, 64 Wn.App. 626, 631, 825 P.2d 360 (1992), emphasizes that the promissory note represents the debt, while the mortgage provides the security for the debt. *Id.* Either provides a separate basis for an action against the debtor. *Id.* This is consistent with the Legislature's express provision that the beneficiary of a deed of trust may recover from both an action and other collection proceedings.

The underlying logic is that a creditor should be able to recover what is owed him, but no more. For example, RCW 61.24.110 indicates that if a lawsuit results in a judgment which is fully satisfied, the security document must be released. This is consistent with the purpose of the merger

and election of remedies doctrines – to prevent vexatious relitigation of a satisfied claim.

But that is not what BECU is doing. BECU merely seeks to recover the funds Burns owes it, after it was prevented from recovering on the Judgment. Washington law allows BECU to recover funds from a trustee’s sale after the “completion” of an “action.” BECU respectfully requests this Court affirm BECU’s interpretation of 61.24.100, reverse the Superior Court’s Order, and permit BECU to recover the surplus funds previously released to Burns.

D. The Court Erred by Determining That the Homestead Exemption Is Available Against a Judgment Lienholder That is Also a Deed of Trust Beneficiary Under RCW 61.24.080.

The Court’s Order mandated disbursal of the surplus funds to Burns “per RCW 61.24.080(3).” That statute provides:

Interests 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.

Id. The disbursement followed Burns’ claim that the surplus funds were subject to the homestead exemption in RCW 6.13.080. (CP 41-42.)

But RCW 6.13.080 provides, in relevant part, as follows:

The homestead exemption is not available against an execution or forced sale in satisfaction of judgments obtained:

(2) *On debts secured* (a) by security agreements describing as collateral the property that is claimed as a homestead or (b) *by mortgages or deeds of trust* on the premises that have been executed and acknowledged by both spouses...

Id. (emphasis added). In *Household Fin. Indus. Loan Co. v. Upton* (*In re Upton*), 102 Wn. App. 220, 6 P.3d 1231 (2000), this Court analyzed a similar fact pattern and applied RCW 61.24.080 and RCW 6.13.080 in a manner that favors BECU's reading of those statutes:

... the deed of trust statute provides no basis to conclude that the second deed of trust beneficiary's interest in the excess proceeds is subordinate to the homestead interest. To the contrary, that statute provides that a creditor's interest in the excess proceeds from a nonjudicial foreclosure sale pursuant to a deed of trust continues at the same priority as the creditor's interest in the property: "interests 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).

Id., 102 Wn. App. at 224 (emphasis added). The word "shall" is mandatory. *Crown Cascade v. O'Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983) (the word "shall" in a statute is presumptively imperative and creates a duty). And the phrase "had attached" is past tense. It refers to liens that were *eliminated* but nevertheless

prescribes that each of those liens “shall” attach to the surplus in the order that it “had attached” to the property. This is consistent with BECU’s position – that even if this Court finds that BECU’s security interest was eliminated, BECU’s interest nevertheless attaches to the surplus funds and takes priority over Burns’ alleged homestead interest.

The *Upton* court reached a similar conclusion:

Household's interest in the real property was superior to the homestead interest. Under RCW 61.24.080(3), Household maintained its priority interest in the excess proceeds from the nonjudicial foreclosure sale. A contrary holding would discourage lenders from granting second deeds of trust and from entering subordination agreements. Both of these services are important to consumers. Moreover, our holding will not in effect extinguish the homestead right by operation of the deed of trust statute. Liens other than junior deeds of trust continue to be subordinate to the homestead interest.

Id., 102 Wn. App. at 224-25. Similarly in this case, a holding that Burns’ alleged homestead exemption takes precedence over BECU’s second Deed of Trust would have a chilling effect on Washington lenders and discourage them “from granting second deeds of trust and from entering subordination agreements”. The *Upton* case, as well as the express language of the statutes it interprets (RCW 61.24.080 and RCW 6.13.080), leads to a reasonable conclusion – that a second deed of trust beneficiary’s interest attaches to surplus

funds *even after that beneficiary's interest is eliminated* with respect to the underlying real property.

Since BECU is (or was) the beneficiary of a second position Deed of Trust, the homestead exemption is not available to Burns. Burns has attempted to characterize BECU as a general judgment creditor. But BECU's judgment lien is based on debt that was secured by its second position Deed of Trust against the Property. Accordingly, BECU's interest in the surplus funds takes precedence over Burns's alleged homestead exemption.

In *Upton*, the court distinguished a contrasting case, *In re the Trustee's Sale of the Real Property of Michael Sweet*, 88 Wn.App. 199, 944 P.2d 414 (1997), as follows:

In *Sweet*, the competing claimant was not a deed of trust beneficiary. Thus, *the creditor's lien was "not based on a liability exempted from any application of the homestead right."* In contrast, an execution in satisfaction of *a judgment obtained on a debt secured by a deed of trust is specifically excepted from the homestead exemption under RCW 6.13.080(2)*. *Sweet* does not apply. (emphasis added)

Upton, 102 Wn.App. at 225-26. The *Sweet* court recognized the difference between a general judgment creditor and a subordinate deed of trust beneficiary: "O'Leary's judgment lien is not based on a liability exempted from any application of the homestead right... O'Leary does not assume the position of a beneficiary of a deed of trust." *Sweet*, 88 Wn.App. at 202. *Sweet* was a general judgment

creditor, but the creditor in *Upton* was not. Taken together, these cases support the view that a judgment lien holder that is (or was) also a beneficiary of a deed of trust may execute on the judgment, with that judgment taking precedence to the homestead exemption. As *Upton* indicates, a debtor's homestead exemption does not take priority to surplus funds over a subordinate deed of trust beneficiary.

After a trustee's sale, liens attach to the surplus funds in the same priority they had attached to the property. RCW 61.24.080(3) provides:

Interests 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.

Id. Regardless of whether BECU's deed of trust was in existence at the time of the foreclosure sale, or eliminated and replaced by its judgment lien, the end result is the same. BECU is the holder of a lien which is specifically excepted from the homestead exemption under RCW 6.13.080(2). Thus, BECU has priority to the surplus funds and the Superior Court's Order should be reversed.

V. CONCLUSION

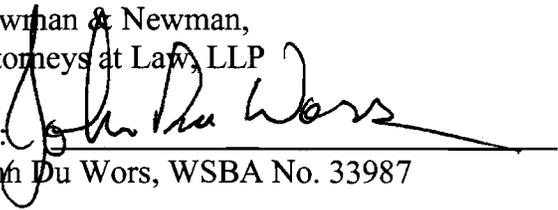
Washington law permits a junior deed of trust beneficiary to recover funds from both a judgment and a subsequent trustee's sale. There will be no double recovery if this Court affirms BECU's interpretation of the laws. Rather, BECU will collect the debt Burns

agreed to pay. And Burns, as well as many other debtors in Burns' position, will be prohibited from relying on a form-over-substance argument that thwarts the purposes of both the merger and election of remedies doctrines. This Court should reverse the decision of the King County Superior Court, vacate the Order, and permit BECU to recover the surplus funds that the Superior Court erroneously awarded to Burns.

DATED this 28th day of April, 2011.

Respectfully Submitted,

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