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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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NO. 67934-1-I

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

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AARON REINSTRA and JAIME REINSTRA, husband and wife

Appellants,

v.

GLEPCO, LLC, a Washington limited liability company; and  
GREG HINTON and PAMELA HINTON, husband and wife

Respondents.

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**APPELLANTS REINSTRA OPENING BRIEF**

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## I. INTRODUCTION

GLEPCO, LLC bid at a public auction of Parcel “A” conducted pursuant to the Trust Deed Act Chapter 61.24 RCW. After delivery of the Trustee’s Deed to Parcel “A”, GLEPCO, LLC sued the Trustee and the Reinstras for quiet title to Parcel “B” not legally described in Reinstras Deed of Trust, the Notice of Trustee’s Sale, or the Trustee’s Deed.

Reinstras appeal the denial of their CR 12(b)(6) motion to dismiss GLEPCO, LLC’s quiet title action. Reinstras also contend that genuine issues of fact and law make the Court’s Summary Judgment Order reforming the Trustee’s Deed to add Parcel “B” erroneous.

## II. ASSIGNMENTS OF ERROR

A. Reinstras’ CR 12(b)(6) motion should have been granted by the trial court.

1. Whether the Statute of Frauds RCW 64.04.010 precludes the relief claimed by Glepco, LLC - Hinton?

2. Whether Glepco, LLC - Hintons’ failure to read the legal description used in the Notice of Trustee’s Sale can be excused by the trial court under the holdings of this Court in Washington Federal Sav. & Loan Ass’n v. Alsager 165 Wash.App 10, 266 P.3d 905 (2011) and Skagit State Bank v. Rasmussen, 109 Wash.2d 377, 745 P.2d 37 (1987)?

3. Whether RCW 7.28.010 defining the right to maintain a quiet title action excludes GLEPCO, LLC and Greg Hinton and Pamela Hinton because they have no valid subsisting interest in Parcel "B" and they do not have a right to possession of Parcel "B"?

4. Whether the after acquired title statute RCW 64.04.070 applies to Reinstras' CR12(b)(6) motion?

5. Whether the contact remedy for mutual mistake can arise from a relationship between the trustee selling at a non-judicial foreclosure auction and purchaser at that auction as a matter of law? RCW 64.04.020 and RCW 61.21.050?

6. Whether RCW 65.04.045 requiring recording of instruments with legal description and parcel number create an ambiguity that negates proof required to grant Reinstras' CR 12(b)(6) motion?

7. Whether Chapter 61.24 RCW gives the court authority to look beyond the four corners of an unambiguous deed of trust, notice of trustee's sale and trustee's deed to award Parcel "B" to GLEPCO, LLC?

B. Glepco, LLC - Hintons' motion for summary judgment under CR 56 should have been denied by the trial court because of inconclusive factual matters.

1. Whether the legal description attached to the Deed of Trust signed by the Reinstras and later foreclosed by the Trustee's Notice of Trustee's Sale and Trustee's Deed are the result of a scrivener's error?

2. Whether Glepco, LLC - Hintons' self-inflicted injury attributable to not reading the Notice of Trustee's Sale which plainly states that the legal description and the parcel number are not identical is grounds for a trial court error with respect to both Reinstras' CR 12(b)(6) motion and Glepco, LLC - Hintons' summary judgment motion under CR 56?

3. Whether all the requisites to a trustee's sale of Parcel "B" are presented in the record?

C. The remedy of reformation granted to Glepco, LLC - Hinton erroneously denied Reinstras their rights under the Trust Deed Act, non-judicial foreclosure process Chapter 61.24 RCW to be free of deficiency judgment and violated the constitutional due process standards protecting the right to property found in the Fifth Amendment to the United States Constitution and Article I, Section 3 of the Washington State Constitution.

1. Whether the purchaser at the trustee's sale receives any warranty, including the right to pursue remedies of quiet title or the doctrine of reformation of contracts?

2. Whether the trial court should have considered local zoning codes, regulatory subdivisions, health and safety issues raised by the Glepco, LLC - Hinton in deciding the validity of a non-judicial foreclosure?

3. If the court finds authority to grant reformation of the Trustee's Deed what is the effect on other participants, actual or potential, in the public auction conducted pursuant to the trustee's sale?

4. Whether the right of buyer at the trustee's sale is equivalent to the lender's position extinguished by that sale? Chapter 61.24 RCW.

5. Whether the lender as buyer at the trustee's sale would have recourse to Reinstra for Parcel "B"?

6. Whether the trial court's ruling violates the Trust Deed Act by granting a deficiency judgment?

7. If the trustee has no power to reform a deed of trust and trustee's deed, whether the court can do so absent procedural defect in the trustee's sale?

### **III. STATEMENT OF THE CASE**

Appellants Aaron Reinstra and Jaime Reinstra, husband and wife ("Reinstra" hereafter) purchased property on Dodge Valley Road in April

2003 and received a statutory warranty deed to Parcels "A" and "B". [CP 38, lines 3-5; CP 111].

The deed of trust which is the subject matter of this action is dated 05/19/2008 and was recorded by Equity Loan Services, Inc. under Skagit County Auditor's File No. 200806110056 [CP 228-303 inclusive]. The legal description appears on a single page 16 of 16 [CP 303] and describes:

The East 105 feet of the West 314 feet of the North 418 feet of the Northwest  $\frac{1}{4}$  of the Northwest  $\frac{1}{4}$  of Section 9, Township 33 North, Range 3 East, W. M. lying South of the county road running along the North line of said subdivision.

This deed of trust was assigned to GMAC Mortgage, LLC on October 16, 2009. [CP 304]

Thereafter Northwest Trustee's Service, Inc. was named Trustee by GMAC Mortgage, LLC and recorded a Notice of Trustee's Sale in the office of the Skagit County Auditor on June 17, 2010 under File No. 201006170064 [CP 305-308 inclusive]. Defaults in monthly payments, late charges, lender's fees and costs are detailed at page 2 of 4 [CP 306]. The Notice of Trustee's Sale declared September 17, 2010 at the Skagit County Courthouse as the place for a public auction to the highest and best bidder payable at the time of sale. At the bottom of page 1 [CP 305] an asterisk appears with the following words:

“The Tax Parcel ID # and Abbreviated Legal Description are provided solely to comply with the recording statutes and are not intended to supplement, amend or supersede the property’s full legal description provided herein.”

The legal description covers Parcel “A”. It does not include Parcel “B”. [CP 303, 305]

The Trustee’s Deed was recorded on September 29, 2010 under Skagit County Auditor’s File No. 201009290098. This Trustee’s Deed Paragraph 2 recites the trustee grantor’s factual support for compliance with the Deed of Trust Act:

“was executed to secure, together with other undertakings, the payment of one or more promissory note(s) (Note) in the sum of \$250,100.00 with interest thereon, according to the terms thereof in favor of Mortgage Electronic Registration Systems, Inc. and to secure any sums of money which might become due and payable under the terms of said deed of trust”.

Paragraph 5 of the Trustee’s Deed recites that GMAC Mortgage, LLC, as holder of the indebtedness secured by the deed of trust delivered to the grantor a written request directing the grantor to sell the property in accordance with the law and the terms of the deed of trust [CP 309]. On page 2 of the Trustee’s Deed [CP 310] the deed states:

“This conveyance is made without representations or warranties of any kind, expressed or implied. By recording this Trustee’s deed, grantee understands, acknowledges and agrees that the property was purchased in the context of the foreclosure, that the trustee made no representations to grantee concerning the Property and that the trustee owed

no duty to make disclosures to grantee concerning the Property, grantor relying solely upon his/her/their/its own due diligence investigation before electing to bid for the Property.”

As a result of the sale the trustee received \$283,137.51, satisfied the obligation secured by the deed of trust in the amount of \$278,831.27 recovered its costs of \$535.00 accrued after the date of sale and deposited the \$3,541.24 surplus with the court on December 28, 2010. [CP 311, 312].

Glepeco, LLC – Hinton’s complaint was filed against Reinstra on January 26, 2011. In the complaint, plaintiffs are named as Greg and Pamela Hinton, husband and wife, residing in Whatcom County, Washington [CP 36, line 16 to 18] GLEPCO, LLC, a Washington limited liability company, whose members are Greg and Pamela Hinton individually, was also named as plaintiff. At page 6, paragraph 19 [CP 41, lines 10-11] Glepeco, LLC – Hinton admit that they were:

“not aware of the defect in the legal description on the 2008 Deed of Trust or on the Trustee’s documentation including the Trustee’s Deed until after the transaction was closed...”

The court held a preliminary hearing pursuant to CR 12(d) on the CR 12(b)(6) Motion filed by Reinstra on February 17, 2011 [CP 281-312]. Reinstra filed a proposed order to dismiss for failure to state a claim CR 12(b)(6) [CP 313-314]. The complaint to quiet title and for declaratory

relief does not assert possession of Parcel “B”. [CP 36-42]. That subject came up on March 28, 2011 when the motion was heard by David R. Needy [RP Page 7, Line 20] the court inquired of Reinstra’s Counsel as follows:

“Your client’s not in that house at this point, are they?  
Are they?”

Mr. Jones: They are not in the house, but I don’t – that is not in the record....

The court: I’m not – I’m not - ... trying to go too far afield. I just want to make sure I understand from a practical standpoint why the action was brought against your client...

Mr. Jones: I’m willing to talk about this ... to a limited degree. I would first say that it’s not in the record and it’s not something that should be in the record. The question is what – what are the pleadings?”

Later in the hearing Mr. Watts, attorney for Glepco, LLC – Hinton [RP Page 9, line 20] “to answer the court’s question, my clients while not living in the house, are in possession of it. They have a renter in it.”

At this hearing the court also considered Reinstra’s motion to revise a commissioner’s order continuing Reinstra’s CR 12(b)(6) motion. [CP 16-21 inclusive].

The trial court at the end of the argument on the CR 12(b)(6) motion and the continuance of discovery ruled at page 16 and 17 RP that

the CR 12(b)(6) motion would be considered on the pleadings and not on discovery produced:

“...the court will deal with the motion before it today based on the facts known prior to any motion to continue. So, I’m in a sense, I hope, freezing the matters regardless of the continuance granted by the commissioner... the court is going to deny the motion to dismiss based on the possibility that a reformation could, in fact, be a valid legal remedy under these circumstances”.

See Order at CP 52, 53 signed the day of the hearing.

Thereafter, the parties engaged in discovery, the depositions of Aaron Reinstra [CP 233-245] and Jaime Reinstra [CP 213-231] were taken, further evidence from Skagit County about the boundary line adjustment and permit process for construction of the residence were produced [CP 114-137].

The Motion for Summary Judgment [CP 74-92 inclusive] and Declarations of Greg Hinton, Pamela Hinton and Charles Watts [CP 97-106 inclusive, supplemented by documents (a)-(r) inclusive]. Reinstras did not dispute the documents submitted by Mr. Watts in support of the motion. They note document (m) in which David Parsons, SRA a Washington State certified appraiser gave his professional opinion of the market value of the subject property as improved as of May 4, 2006 as \$725,000.00 [CP 210].

In their affidavits in response to Glepco, LLC – Hinton’s motion for summary judgment, Reinstras acknowledge moving from the property under pressure from Hinton [CP 338, lines 1-6]. The real property taxes are still charged to the Reinstras [CP 337, lines 21-24]. Jaime Reinstra’s affidavit relates that Reinstras spent “far more than \$300,000.00 of our own money for purchase of and improvements to the property in addition to the borrowed money and arrears in foreclosure”. [CP 338, lines 11-15]

Affidavits of Peter Papadopoulos and Jaime Reinstra support the conclusion that Glepco, LLC – Hinton’s are not casual participants in the public auction of foreclosure properties. Rather, they are well known and very experienced in the acquisition of foreclosure properties at public auction. [CP 338, lines 21-23; CP 329, lines 7-12]. Mr. Papadopoulos stated in his own affidavit that he found the omission of Parcel “B” from the Deed of Trust and Trustee’s Sale Notice. [CP 329, lines 1-6] He did not recommend the property to clients:

“...this legal description variance required further research I chose not to investigate any further.” [CP 328, lines 7-12]

#### **IV. AUTHORITY & ARGUMENT**

**A.** The trial court should have granted Reinstras CR 12(b)(6) motion to dismiss the complaint of Glepco, LLC – Hinton.

**Issue A-1.** Washington has codified the Statute of Frauds in RCW 64.04.010 as follows:

“Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed...”

As stated in 25 Washington Practice Section 3.3 Sale of Land:

“Conveyances or encumbrances of real property require a deed, which must include a description of the property conveyed, the description must be sufficiently definite to locate it without recourse to oral testimony or else it must contain a reference to another instrument which does contain a sufficient description.”

*Key Design, Inc. vs. Moser 138 Wash.2d 875, 983 P.2d 653 (1999), Opinion amended 593 P.2d 900.* The case upholds the *Martin Rule* stated in *Martin v. Seigel 35 Wash.2d 23, 212 P.2d 107 (1950)*. As Glepco, LLC – Hinton admitted in their complaint they are not the legal owner of record of Parcel “B” [CP 37 and CP 40, lines 18-22 and CP 41, lines 1-2]. Further, Glepco, LLC – Hintons’ allegation 19 on CP 41 states:

“Plaintiffs were not aware of the defect in the legal description on the 2008 deed of trust or on the trustee’s documentation including the trustee’s deed until after the transaction had closed whereby they acquired their interest in the property for good and valuable consideration.”

The purchasers want the benefit of no competition at the auction bidding and Parcel “B” as a bonus. See CP 328 and 329 where Peter Papadopoulos rejects the property as a recommendation for purchase at foreclosure because of the legal description discrepancies. [CP 329, lines 1-7]. This fact should negate the Glepco, LLC – Hinton claim of good faith purchase for value and foreclose equitable relief. *Udall v. T.D. Escrow Services, Inc.* 159 Wash.2d 903, 915, 154 P.3d 882 (2007).

The court should distinguish cases such as *Tenco, Inc. v. Manning* 59 Wash.2d 479, 368 P.2d 372 (1962) and *Snyder v. Peterson* 62 Wash.App 522, 814 P.2d 1204 (1991). In those cases the court disregarded the *Martin Rule*. In the *Snyder v. Peterson* case it was a deed to children for tax avoidance purposes which the court allowed to be reformed because the attorney preparing the deed failed to include Section, Township and Range as well as the Meridian in the legal description. In *Tenco v. Manning* the case has been overruled by the holding in *Sea-Van Investments Associates v. Hamilton* 71 Wash.App 537, 861 P.2d 485 (1993). The court should also take account of the fact that there are no parties capable of participating in a mutual mistake under the circumstances. A bidder such as Glepco, LLC chooses to bid or

not to bid based on their assessment of the property. As is explicit throughout the deed of trust foreclosure process, no warranties are made or can be made by the trustee and therefor the reformation of a trustee's deed falls outside the scope of the authority of the non-judicial foreclosure process and should not be expected by participants in that process. *McPherson v. Purdue* 21 Wash.App 450, 585 P.2d 830 (1978).

**Issue A-2.** Glepco, LLC – Hinton essentially asked the court to excuse their failure to read the legal description found in the deed of trust, the notice of trustee's sale and the trustee's deed. This contention when made by borrowers has been soundly rejected in *Skagit State Bank v. Rasmussen* 109 Wash.2d 377, 745 P.2d 37 (1987). The same principle is affirmed in the court's opinion in *Washington Federal Sav. & Loan Ass'n v. Alsager* 165 Wash.App 10, 266 P.3d 905 (2011). The court in the Washington Federal case went on to reference the rule enunciated in *Berg v. Hudesman* 115 Wash.2d 657, 801 P.2d 222 (1990).

“Generally, extrinsic evidence is not admissible to add, modify, or contradict a written contract, but under the *Berg Rule*, Washington courts may consider extrinsic evidence relevant to discern parties' intent.” *Berg* at pp 667, 669. “However, this court has held that the application of the *Berg*

*Rule* does not ‘apply where evidence would show an intention independent of [a written] instrument’.”

*Save Sea Lawn Acres Ass’n v. Mercer*, 140 Wash.App. 411, 166 P.3d 770 (2007). In this case there is no evidence from GMAC who prepared the original deed of trust and the instruments involved in the lending and the foreclosure speak for themselves as consistently referring only to Parcel “A” and not to Parcel “B”.

**Issue A-3.** Reinstras contend that Glepco, LLC – Hinton are without standing to complain about the title they received from the trustee. RCW 7.28.120 requires a plaintiff in such action to:

“Set forth in his or her complaint the nature of his or her estate, claim or title to the property, and the defendant may set up a legal or equitable defense to plaintiff’s claims; and the superior title, whether legal or equitable, shall prevail.”

If the equitable theory of reformation set forth in the complaint is not applicable and if the rights of a purchaser at a trustee’s sale are limited as described in the trustee’s deed prescribed by RCW 60.24.050, then the pleadings do not survive the test of RCW 7.28.120 and should be dismissed on defendant’s motion under CR 12(b)(6).

The right to maintain actions for quiet title are further defined in RCW 7.28.010. That statute begins with the words:

“Any person having a valid subsisting interest in real property and a right to the possession thereof may recover the same by action in the superior court of the proper county to be brought against the tenant in possession; if there is no such tenant then against the person claiming the title or some interest therein, and may have judgment in such action quiet or removing a cloud from the plaintiff’s title;...”

The balance of the code section is devoted to clearing title to property of deceased persons, persons absent or nonresident of this state. As purchasers at a trustee’s sale Glepco, LLC – Hinton have only a valid and subsisting interest in Parcel “A” and no valid or subsisting interest in Parcel “B”. Reinstras believe the court improperly found a “possibility of reformation” [RP 17, lines 6-8] through consideration of the facts outside of the pleadings. While the statute does contemplate equitable claims the statute does not have in its terms or by interpretation any application to non-judicial foreclosure under the Trust Deed Act of 1965 as amended. Glepco, LLC – Hinton cited no case to the trial court and we believe that there is no case authority for the proposition that Glepco, LLC – Hinton are entitled to relief from the non-judicial foreclosure process Chapter 61.24 RCW under the quiet title statute for ejectment of the Reinstras. Chapter 7.28 RCW.

**Issue A-4.** In the trial court proceedings Glepco, LLC – Hinton argued that the Parcel “B” amounted to an after acquired title subject to RCW 64.04.070 covered by language in the deed of trust to that effect. However, the facts do not support the contention of Glepco, LLC – Hinton. Rather, the statute very clearly says:

”Whenever any person or persons having sold and/or conveyed by deed any land in this state, and who, at the time of such conveyance, had no title to such land, and any person or persons who may hereafter sell and convey by deed any lands in this state and who shall not at the time of such sale and conveyance have the title to such land, shall acquire title to such land so sold and conveyed, such title shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered and to his and their heirs and assigns forever. And the title to such land so sold and conveyed shall pass to invest in the conveyee or conveyees of such lands and to his or her or their heirs and assigns and shall thereafter run with the land.” RCW 64.04.070. Emphasis added.

This is not an after acquired title case. Reinstras at the time of conveyance of Parcel “A” to their lender by deed of trust owned Parcel “A” and had been the owners since 2003. They also owned Parcel “B” and did not deed it to the Trustee for GMAC. Therefore RCW 64.04.070 does not apply.

Cases that predate the Deed of Trust Act show that after acquired title inures to the benefit of the purchaser at a mortgage

foreclosure. *Gough v. Center* 57 Wash. 276, 106 P. 774 (1910) and *Davis v. Starkenburg*, 5 Wash.2d 273, 105 P.2d 54 (1940). There are factual circumstance in these cases to justify the after acquired title statute. RCW 64.04.070.

**Issue A-5.** Glepco, LLC – Hinton allege that a scrivener’s error occurred in the deed of trust that was carried forward into the notice of trustee’s sale and trustee’s deed. Glepco, LLC – Hinton produced no evidence whatsoever concerning the GMAC document preparation [CP 363, lines 16-23]. The evidence from Reinstras is that they did not prepare the documents or in any way question the actions of GMAC or its agents [CP 217-218]. They signed the documents and delivered them. In this case there is no scrivener identified and there is no evidence of GMAC’s intent except the documents describing Parcel “A”.

The cases cited at the end of issue A-4 above, all contain very clear proof of the chain of title that justifies the conclusion by the court that there is an after acquired interest that should follow the chain of title describing particular real property whose disputed ownership was resolved and whose ownership therefore follows the deeds made by the true owner of the disputed property. That

set of facts and circumstances is not present in this case and should not form any basis for relief to Glepco, LLC – Hinton.

The claim to Parcel “B” by the plaintiff is directly contrary to RCW 64.04.020 which requires that every deed shall be in writing, signed by the party to be bound thereby and acknowledged by the party before some person authorized to take acknowledgments. This case is not different from the case of *Berg v. Ting* 25 Wash.2d 544, 886 P.2d 564 (1994) in that like the grantor in *Berg v. Ting* the Reinstras did not describe Parcel “B” and did not approve conveyance by deed of any more than Parcel “A”. Enforcement based on claimed intent or actions outside the four corners of the document were rejected in *Berg v. Ting* and should be rejected in the present case.

This contention is reinforced by the language of the Deed of Trust Act which relies upon a non-judicial process. RCW 61.24.050 provides:

“When delivered to the purchaser, the trustee’s deed shall convey all of the right, title, and interest in the real property and personal property sold at the trustee’s sale which the grantor had or had the power to convey at the time of execution of the deed of trust and such as the grantor may have thereafter acquired. If the trustee accepts a bid, then the trustee’s sale is final as of the date and the time of such acceptance if the trustee’s deed is recorded within 15 days thereafter. After a

trustee's sale, no person shall have any right, by statute or otherwise, to redeem the property sold at the trustee's sale."

Glepco, LLC – Hinton have asked the trial court to consider the words "or had the power to convey at the time of the execution of the deed of trust", as distinct from the after acquired title language. The Reinstras propose that the language has meaning but that the meaning is limited to the type of corporate or fiduciary power that is being exercised by the Hintons for Glepco, LLC and not for the purpose portrayed by them at the trial court argument. [CP 374-375; RP 12, lines 21, 22]. For example, a personal representative, an attorney in fact under a power of attorney, a corporate officer should be bound by their act on behalf of an entity or represented party and the statute protects that expectation of the lender. The language is not as suggested by Glepco, LLC – Hinton a reason to sweep additional property into the deed of trust without legal description and without compliance with the Statute of Frauds as we have previously argued.

It is inconceivable that a person reading the notice of trustee's sale and reading the trustee's deed could reasonably expect to have a remedy against the original borrower or the original lender for defect in the legal description. This is not a situation where parties

bargain directly as was the case in Sea-Van Investment Associates v. Hamilton. Supra p 14 It is not even a situation like Washington Federal Sav. & Loan Ass'n v. Alsager case Supra pp 2 and 15 where there is a face to face completion of closing documents with the inevitable potential for misunderstanding between interacting persons. This process including the bid by Glepco, LLC and the trustee's deed can have only one outcome, conveyance of Parcel "A" to the highest bidder. Udall v. T.D. Escrow Services, Inc., 159 Wash.2d 903, 911, 154 P.3d 882, 887 (2007).

**Issue A-6.** At the hearing on Reinstra's motion to dismiss under CR 12(b)(6) [RP 2, lines 17, 18] the trial court mentioned the application of RCW 65.04.045 indirectly. See also Motion for Reconsideration [CP 55, lines 21-24] In Skagit County searches online for property information often originate with the parcel number. The statute RCW 65.04.045 requires use of the parcel number in recorded instruments because of the shorthand this provides. However, the statute itself says at subsection (1)(g) "the assessor's property tax parcel or account number set forth separately from the legal description or text" in describing the requirements and content restrictions for recorded instruments. Thereafter at RCW 65.04.047 says that

“the coversheet information shall be used to generate the auditor’s / grantor’s / grantee’s index, however, the name and legal description in the instrument itself will determine the legal chain of title.

The trustee who foreclosed the Reinstra deed of trust at the bottom of the first page of the notice of trustee’s sale added information in asterisk form [CP 305 supra at page 6]:

“the tax parcel ID number and an abbreviated legal description are provided solely to comply with the recording statutes and are not intended to supplement, amend or supersede the property’s full legal description provided herein.”

This notation helped Mr. Papadopoulos to understand the peril associated with bidding on the Reinstra property with the expectation that the house and not the drain field would be included in the sale [CP 329]. Glepco, LLC – Hinton say that they did not know [CP 41, lines 10-12]. The outcome is the same. No conveyance of Parcel “B” occurred when the deed of trust was signed. Parcel “B” was not included in the notice of trustee’s sale or when the trustee’s deed was delivered. The court should not do that which the law does not compel beyond genuine dispute by summary judgment order.

**Issue A-7.** In 1965 the legislature enacted the Trust Deed Act which removed the impediment created by RCW 7.28.230 to non-

judicial foreclosure. The constitutionality of non-judicial deed of trust foreclosure was upheld in *Kennebec v. Bank of the West* 88 Wash.2d 718, 565 P.2d 812 (1977). It is generally accepted that the deed of trust does not affect other judicial remedies. II Real Property Deskbook 41-45 (1979). For example, the holder of a note may still sue on the note, judicially foreclose and seek a deficiency judgment in a case where there is a one year redemption period. RCW 61.12.093.

In this case it is not disputed that the non-judicial foreclosure process was chosen by GMAC and it was conducted in accordance with the statute by the trustee. Neither party has contested these facts.

It has been settled by law that there is no duty on the trustee's part to make disclosure of title defects to property the trustee sells at foreclosure of a deed of trust. *McPherson v. Purdue*, 21 Wash.App 450, 585 P.2d 830 (1978). The court declared the nature of the trustee's duty as follows:

“The trustee sells the title he receives. It is not his duty to guarantee the title in any way or to assure anyone that it is good and marketable. Even if that title be defective, the trustee must still on proper demand proceed to sell such title as he took.”

The McPherson case is like the Glepco, LLC – Hinton case in the sense that McPherson expected an easement that added value to the property he purchased at sale. The easement was described in Trustee’s Deed legal description. McPherson sued to quiet title, establish a prescriptive easement and recover damages. The court relied upon the policy underlying Chapter 61.24 RCW and cited *Peoples Nat. Bank of Wash. v. Ostrander*, 6 Wash.App 28, 491, P.2d 1058 (1971) for the proposition requiring a trustee to make disclosures concerning defects of title would add burdens to the lender and the trustee. These risks were shifted to the bidder at a trustee’s sale. The court clearly said that Caveat emptor applied to sales based on foreclosure of deeds of trust and cited reasons for the application of the Caveat emptor rule set forth in *Feldman v. Rucker* 201 Va. 11, 109 S.E.2d 379 (1959) at pp 385-386. The holding in *McPherson v. Purdue supra* has been regarded as good authority for the proposition that the trustee is an agent acting under a power of sale and has no powers except those conferred upon him by the deed of trust. The Reinstras contend that the court should not do what the trustee is clearly forbidden from doing under Chapter 61.24 RCW. Consequently the appropriate relief is

to grant the CR 12(b)(6) motion and dismiss the complaint of Glepco, LLC – Hinton.

The primary contention of the Reinstras in the trial court boils down to a policy question whether quiet title issues should be resolved in a judicial proceeding under Chapter 61.12 RCW or whether the court will intervene in a non-judicial proceeding under the Trust Deed Act. The Reinstras ask the court to affirm the integrity of the non-judicial process, limiting the relief against them to that which is warranted by the recorded documents. They characterize the Glepco, LLC – Hinton position as one which penalizes them, in effect imposing a deficiency judgment banned by the Trust Deed Act RCW 61.24.100. The outcome of the trial court proceeding also adds to the harm suffered by the borrower in that people who read the notice of trustee's sale and rejected the idea of bidding because of the legal description [See Peter Papadopoulos and Vestus Program [CP 328] would have bid and possibly outbid Glepco, LLC – Hinton if they were presented with Parcel "A" and Parcel "B" as the reward for their bid.

**B.** The court reviews summary judgment motions de novo and engages in the same inquiry as the trial court *Sheikh v. Choe* 156 Wash.2d 441, 447, 128 P.3d 574 (2006). Whether there are genuine issues of

material fact and whether the moving party is entitled to judgment as a matter of law are the standard of review set by CR 56(c). *Huff v. Budbill* 141 Wash.2d 1, 7, 1 P.3d 1138 (2000). The court should construe the facts and all reasonable inferences from the facts in the light most favorable to the non-moving party. *Hertog v. City of Seattle*, 138 Wash.2d 265, 275, 979 P.2d 400 (1999). The central factual defect negating grant of summary judgment in this case is the fact that the deed of trust, notice of trustee's sale and trustee's deed all consistently describe Parcel "A" and do not describe Parcel "B" as part of the non-judicial foreclosure process. Glepco, LLC – Hinton contend that the court should disregard these facts and apply the remedy of reformation. There is no case law and no warrant in the Chapter 61.24 RCW governing the non-judicial foreclosure of deeds of trust to justify the relief requested. If the court does not grant Reinstras CR 12(b)(6) motion then the burden of proof shifts to Glepco, LLC – Hinton to prove its case for reformation. The trial court said that Glepco, LLC – Hinton did do this. Reinstras ask the appeals court to review de novo this erroneous conclusion and reverse it.

The force of the Division I Court of Appeals opinion in *McPherson v. Purdue supra at 13* is undiminished in the context of summary judgment. The court's role should be to determine whether the procedures set forth in the Deed of Trust Act have been followed. *Udall v.*

*T.D. Escrow Services, Inc.*, 159 Wash.2d 903, 911, 154 P.3d 882, 887 (2007).

**Issue C-1.** The Supreme Court has declared in recent cases applying the Trust Deed Act as follows.

“There are three goals of the non-judicial foreclosure statute: (1) that the ... process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles. ‘Udall, 159 Wn.2d at 916 n 9 quoting *Plein v. Lackey* 149 Wn.2d 214, 225, 67 P.3d 161(2003).’”

The court in these cases has affirmed its intent that the court not intervene unless the sale itself was void due to procedural irregularity that defeated the trustee’s authority to sell property.

Under these principles the trial court summary judgment order is wrong in that it invites litigation regarding the reformation of trustee’s deeds when there is no ambiguity about the content of the deed of trust, notice of trustee’s sale or the trustee’s deed leading to a procedurally irregular non-judicial foreclosure. The interested parties referred to in the statement of principles would be the beneficiary and the borrower who have a stake in avoiding wrongful foreclosure. In particular wrongful foreclosure remedies are given to the borrower. And finally, the process should promote stability of land titles. The statutory interpretation given

by the trial court would do the opposite, inviting those who have complaints such as one resolved in the McPherson case against the bidder at the sale and in favor of the trustee. The statute and cases place the burden of resolving uncertainty to the care and attention of the people who bid at the trustee's sale. This is consistent with previous holdings of the court including Queen City Savings & Loan Ass'n v. Mannhalt, 111 Wash.2d 503, 760 P.2d 350 (1988). That case began with a summary judgment in favor of the lender, beneficiary of a deed of trust in which properties in both Whatcom and Snohomish County were taken as security for a loan. Reinstras contend that the Mannhalt case and others demonstrate the policy in favor of upholding the trustee's sale which is regular in its procedural application of the Trust Deed Act and against the intervention of the courts. The McPherson case cited supra is to the same effect.

**Issue C-2.** Glepco, LLC – Hinton have argued that the division of Parcel “A” from Parcel “B” is contrary to local zoning laws and creates a problem in that the dwelling on the Dodge Valley Road property is separated from the drain field approved by the County. The Reinstras contend that the security given for obligations by signatures on a deed of trust are not subject to the regulatory control of county government. Subdivisions for a variety of purposes can occur which limit the utility of

real property. Estate of Telfer v. Board of County Comr's San Juan County, 71 Wash.App 833, 862 P.2d 637 (1993). However the conveyance of these properties as security, is not, therefore illegal. See Friend v. Friend, 92 Wash.App 799, 964 P.2d 1219 (1998) limiting partition by agreement of co-tenants. If the court leaves the parties where they are there will be an opportunity for the purchaser at the trustee's sale to have the benefit of their bargain and the rights of the borrower to be free from the deficiency judgment will allow them to resolve a dispute between themselves without court intervention.

**Issue C-3.** A summary judgment order granting reformation does not take account of the impact which the public non-judicial foreclosure process limited by the Trust Deed Act contemplates. An example is found in the Affidavit of Peter Papadopoulos [CP 238, 239]. Computers programs have now caused information about the published notice of trustee's sale to be available to many realtors. Interested property owners look at the published documents to determine whether or not to bid at the sale. In this case Mr. Papadopoulos and those he advises decided not to participate in the sale because of the inclusion of Parcel "A" and not Parcel "B" in the notice of trustee's sale.

Procedural due process requires continuity between the instruments on which the trustee forecloses and the Trustee's Deed See

discussion of the due process issues based on the seminal case of *Kennebec Inc. v. Bank of the West*, 88 Wash.2d 718, 720-721, 565 P.2d 812 (1977) in *Pavino v. Bank of America N.A.*, W. D. Wash. 2011 WL 834146 III.B. pp 2 and 3. Reformation of the trustee's deed confers a special benefit on the bidder not available to which those who might have bid to the advantage of the borrower. The court's order does not account for bidders who go away because they relied on published information. There is no case law on this point because the structure of Chapter 61.24 RCW is intended to avoid these consequences. Plain reading of the statute and in particular the trustee's deed cited in the statement of facts Supra pp 6 and 7 shows why reformation is inappropriate after the non-judicial foreclosure sale. The Deed of Trust Act should be strictly applied in borrower's favor. *CHD, Inc. v. Boyle*, 139 Wash.App 131, 137, 157 P.3d 415 (2007).

**Issue C-4.** If the bank had purchased at the trustee's sale and received Parcel "A" it would be barred by RCW 61.24.100(1) from receiving any other relief than the property described in the trustee's deed:

“(1) Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor or guarantor after a trustee's sale under that deed of trust.”

**Issue C-5.** The beneficiary of the deed of trust is thus put to an election. When they elect to call for a trustee's sale they are giving up the right to the deficiency. In this case the bank had the option to sue on its note and have recourse to the assets of the Reinstras including Parcel "B". They did not choose that course of action. They are bound by the trustee's sale just as Glepco, LLC – Hinton and Reinstra should be. Reinstras contend that the buyer at a trustee's sale given the lack of warranties previously recited in the trustee's deed and the notice of trustee's sale preclude any action in excess of the relief that would have been accorded to the lender. When post sale relief, such as the summary judgment order quieting title to Parcel "B," is granted to Glepco, LLC – Hinton the effect is to impose a deficiency judgment on Reinstra in violation of RCW 61.24.100(1).

**Issue C-6.** If they have been followed then the sale as conducted is conclusive and no further relief is available to the bidder at the auction for Parcel "A". Likewise, the lender is satisfied by the disposition of the proceeds from the sale and the borrowers protected from any deficiency. RCW 61.24.100(1). Reinstras contend that none of the exceptions set forth in RCW 61.24.100 subsections (2) through (12) apply to their circumstances. Therefore:

“A deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor or guarantor after a trustee’s sale under that deed of trust.”

The court is urged to deny summary judgment based on the proposition that the conveyance of more than Parcel “A”, the equitable relief requested by Glepco, LLC – Hinton is barred by RCW 61.24.100(1).

This conclusion is further supported by the lack of any evidence that the actual preparer of the deed made a mistake. No evidence has been produced about the representatives of GMAC or the conditions or circumstances under which the alleged mistaken Deed of Trust description was attached. When taken together with the fact that the Reinstras continue to receive the real estate tax statement for the house they built, the fact that the Reinstras put more than \$300,000.00 of their own money in addition to the borrowed money into improvement of the real property foreclosed, the court should reverse the trial court grant of summary judgment.

**Issue C-7.** The role of the court is to assure the procedural regularity of the trustee’s sale. This is the role described in the *Udall* case supra. When these rules limit intervention, the three goals of the non-judicial foreclosure statute: efficiency; an adequate opportunity to prevent wrongful foreclosure; and stability of land titles follow. The legislature

and courts have adequately prescribed conditions for non-judicial foreclosure for the benefit of borrowers, trustees and lenders as well as bidders at public auction. The trial court overstepped legal bounds when it reformed the Trustee's Deed to convey Reinstra's Parcel "B".

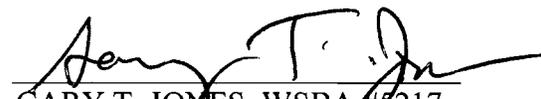
#### V. CONCLUSION

A. The court should reverse the trial court March 28, 2011 ruling and grant the Reinstra Motion pursuant to CR 12(b)(6) dismissing with prejudice the Plaintiffs' Complaint.

B. The Plaintiffs' CR 56 Motion for Summary Judgment and reformation of the Trustee's Deed to include Parcel "B" should be reversed and the title to Parcel "B" quieted in Reinstra.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of March 2012.

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

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AARON REINSTRA and JAIME REINSTRA, husband and wife

Appellants,

v.

GLEPCO, LLC, a Washington limited liability company; and  
GREG HINTON and PAMELA HINTON, husband and wife

Respondents.

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**DECLARATION OF SERVICE OF  
APPELLANT REINSTRA'S OPENING BRIEF**

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ORIGINAL

Attorney for Appellants Reinstra

I declare under penalty of perjury under the laws of the State of Washington that on the 17<sup>th</sup> day of March 2012, I caused to be served in the manner indicated, APPELLANT'S OPENING BRIEF on file herein upon the following:

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Signed at Mount Vernon, Washington on this 17<sup>th</sup> day of March 2012.

  
LEWELLA FAYE DAVIS