

No. 47785-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

---

U.S. BANK NATIONAL ASSOCIATION, as Trustee For Structured  
Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust, Mortgage  
Pass-Through Certificates, Series 2006-3,

Plaintiff/Appellant,

v.

NORTH AMERICAN TITLE COMPANY; CV JOINT VENTURES,  
LLC; STEVEN SHELLEY AND JANE DOE SHELLEY; THE UNITED  
STATES OF AMERICA; and JOHN AND JANE DOES, I THROUGH  
V, OCCUPANTS OF THE SUBJECT REAL PROPERTY, and ALL  
OTHER PERSONS OR PARTIES UNKNOWN, CLAIMING AN  
RIGHT, TITLE, INTEREST, LIEN OR ESTATE IN THE PROPERTY  
HEREIN DESCRIBED,

Defendants/Respondents.

FILED  
COURT OF APPEALS  
DIVISION II  
2015 DEC 30 PM 3:19  
STATE OF WASHINGTON  
DEPUTY

---

BRIEF OF RESPONDENT

---

Martin Burns  
Burns Law, PLLC  
524 Tacoma Ave. S.  
Tacoma, WA 98402  
(253) 507-5586

Attorneys for

*Defendant/Respondent CV Joint  
Ventures, LLC*

December 30, 2015

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. REPLY STATEMENT OF ISSUES .....	3
III. REPLY STATEMENT OF THE CASE.....	3
IV. ARGUMENT .....	4
a. Standard of Review.....	4
b. Reformation is a remedy and is not a cause of action	6
c. Quiet Title is improper as Bank has no valid subsisting interest.....	9
d. Reformation based on claimed mutual mistake or scrivener's error is inapplicable to third party purchaser at tax sale auction .....	18
e. There has been no bona fide attempt to pay Parcel C's taxes.....	33
f. The statute of limitations bars this action even if it were deemed to be a challenge to the tax deed.....	38
V. REQUEST FOR ATTORNEY FEES .....	43
VI. CONCLUSION .....	48
CERTIFICATE OF SERVICE .....	49

## TABLE OF AUTHORITIES

### Washington Cases:

<i>Albice v. Premier Mortgage Servs. of Washington, Inc.</i> , 157 Wash. App. 912, 239 P.3d 1148 (2010) <u>aff'd</u> , 174 Wash. 2d 560, 276 P.3d 1277 (2012).....	30
	<u>Page</u>
<i>Berg v. Hudesman</i> , 115 Wash.2d 657, 801 P.2d 222 (1990) (quoting <i>Stender v. Twin City Foods, Inc.</i> , 82 Wash.2d 250, 510 P.2d 221 (1973)).....	7
<i>Berry v. Pond</i> , 33 Wn.2d 560, 206 P.2d 506 (1949) .....	15, 22, 23
<i>Blenheim v. Dawson &amp; Hall Ltd.</i> , 35 Wn. App. 435, 667 P.2d 125, 127 (1983) .....	4
<i>Brown v. Wells</i> , 103 Wash.2 <sup>nd</sup> 96, 108, 690 P.2d 1144 (1984) .....	29
<i>Bldg. Indus. Ass'n of Washington v. McCarthy</i> , 152 Wn. App. 720, 745, 218 P.3d 196, 208 (2009).....	46
<i>Buty v. Goldfinch</i> , 74 Wash. 532, 133 P. 1057 (1913) .....	42
<i>Coastal Bldg. Corp. v. City of Seattle</i> , 65 Wash. App. 1, 5, 828 P.2d 7 (emphasis added), <i>review denied</i> , 119 Wash.2d 1024, 838 P.2d 690 (1992) .....	17
<i>Continental Distributing Co. v. Smith</i> , 74 Wash. 10, 132 Pac. 631. ....	20
<i>Cutler v. Phillips Petroleum Co.</i> , 124 Wash.2d 749, 755, 881 P.2d 216 (1994).....	4
<i>Denaxas</i> , 148 Wash.2d at 669, 63 P.3d 125 (citing <i>Akers v. Sinclair</i> , 37 Wash.2d 693, 702, 226 P.2d 225 (1950)).....	6
<i>Dolan v. Jones</i> , 37 Wash. 176, 79 P. 640 (1905) .....	12
<i>Eagles v. Gen. Elec. Co.</i> , 5 Wn.2d 20, 104 P.2d 912 (1940) .....	18

<i>Eller v. E. Sprague Motors &amp; R.V.'s, Inc.</i> , 159 Wn. App. 180, 194, 244 P.3d 447, 454 (2010).....	47
<i>Fairfax v. Simpson</i> , 170 Wn. App. 757, 286 P.3d 55, (2012), <u>as corrected</u> (Sept. 27, 2012), <u>rev'd sub nom. In re C.M.F.</u> , 179 Wn.2d 411, 314 P.3d 1109 (2013).....	4
<i>Fitzgerald v. Neves, Inc.</i> , 15 Wash. App. 421, 550 P.2d 52 (1976). 41, 42 <i>Glepeco, LLC v. Reinstra</i> , 175 Wn. App. 545, 307 P.3d 751-52 (2013) <u>review denied</u> , 179 Wn.2d 1006, 315 P.3d 530 (2013).....	7
<i>Glepeco, LLC v. Reinstra</i> , 175 Wn. App. 545, 307 P.3d 744 <u>review denied</u> , 179 Wn.2d 1006, 315 P.3d 530 (2013). <u>Glepeco</u> at 563.....	10, 21, 37
<i>Gustaveson v. Dwyer</i> , 78 Wash. 336, 139 P. 194 (1914) <u>on reh'g</u> , 83 Wash. 303, 145 P. 458 (1915).....	20,21
<i>Hanson v. Carr</i> , 66 Wash. 81, 118 P. 927,(1911) .....	20
<i>In re King Cty. for Foreclosure of Liens for Delinquent Real Prop. Taxes for Years 1985 Through 1988</i> , 117 Wash. 2d 77, 83, 811 P.2d 945, 948 (1991)(Citing <u>Label v. Cleasby</u> ).....	37
<i>Johnson v. Burgeson</i> , 25 Wash.2d 269, 170 P.2d 311 .....	20
<i>Jones v. National Bank of Commerce of Seattle</i> , 66 Wash.2d 341, 402 P.2d 673 (1965).....	7
<i>Kearney v. Kearney</i> , 95 Wash. App. 405, 416, 974 P.2d 872, 877 (1999).....	46
<i>Kennedy v. Anderson</i> , 88 Wash. 457, 153 P. 319 (1915), <u>Kennedy supra</u> . .....	22, 25, 28
<i>Kim v. Lee</i> , 145 Wash. 2d 79, 31 P.3d 665, <u>as amended</u> (Dec. 12, 2001), <u>opinion corrected</u> , 43 P.3d 1222 (Wash. 2001) .....	24, 25
<i>Kincaid v. Baker</i> , 66 Wash.2d 550, 403 P.2d 888 (1965) .....	7

<i>Kupka v. Reid</i> , 50 Wn.2d 465, 312 P.2d 1056 (1957) .....	21, 41
<i>Label v. Cleasby</i> , 13 Wash. App. 789, 537 P.2d 859, (1975) review denied 86 Wash. 2d 1013 (1976) ) .....	23,24,36,37
<i>Leonard v. Washington Emp., Inc.</i> , 77 Wn. 2d 271, 461 P.2d 538 (1969).....	8, 32
<i>Loving v. Maltbie</i> , 64 Wash. 336, 116 P. 1086 (1911) .....	13
<i>Loving v. McPhail</i> , 48 Wash. 113, 92 P. 944 (1907) .....	13
<i>McGuinness v. Hargiss</i> , 56 Wash. 162, 105 P. 233 (1909) <u>overruled by <i>Rorvig v. Douglas</i></u> , 123 Wash. 2d 854, 873 P.2d 492 (1994) .....	5
<i>Morcom v. Brunner</i> , 30 Wash. App. 532, 635 P.2d 778 (1981) .....	13, 42
<i>Morrison v. Berlin</i> , 37 Wash. 600, 79 P. 1114 (1905).....	11, 12
<i>Nalley v. Hanson</i> , 11 Wash. 2d 76, 118 P.2d 435 (1941).....	28
<i>Neal v. Green</i> , 71 Wash.2d 40, 426 P.2d 485 (1967) .....	7
<i>Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.</i> , 168 Wn.2d 56, 76, 277 P.3d 18 (2012). .....	43
<i>Palin v. Sherman</i> , 38 Wash. 2d 806, 232 P.2d 105 (1951).....	26
<i>People's Sav. Bank v. Bufford</i> , 90 Wash. 204, 155 P. 1068 (1916)...	27
<i>Peyton Bldg., LLC v. Niko's Gourmet, Inc.</i> , 180 Wash. App. 674, 323 P.3d 629 (2014).....	39
<i>Pierce Cty. v. Newbegin</i> , 27 Wash. 2d 451, 178 P.2d 742 (1947) ....	16
<i>Port of Port Angeles v. Davis</i> , 21 Wash. 2d 660, 152 P.2d 614 (1944) .....	41

<i>Proctor v. Huntington</i> , 169 Wash. 2d 491, 238 P.3d 1117 (2010) ...	27
<i>Reynolds v. Farmers Ins. Co.</i> , 90 Wash.App. 880, 885, 960 P.2d 432 (1998) .....	7
<i>Rhodes v. D &amp; D Enterprises, Inc.</i> , 16 Wn. App. 175, 554 P.2d 390 (1976) .....	5
<i>Richau v. Rayner</i> , 98 Wn. App. 190, 194, 988 P.2d 1052, 1054 (1999).....	45
<i>Rushton v. Borden</i> , 29 Wn.2d 831, 190 P.2d 101 (1948) .....	21
<i>Sallee v. Bugge Canning Co.</i> , 38 Wash. 2d 737, 232 P.2d 81 (1951).....	40
<i>Sasse v. King Cty.</i> , 196 Wash. 242, 251, 82 P.2d 536, 541 (1938)....	16
<i>Schultz v. Plate</i> , 48 Wash. App. 312, 739 P.2d 95 (1987).....	30
<i>Simonson v. Fendell</i> , 101 Wash.2d 88, 91, 675 P.2d 1218 (1984) ...	6
<i>Skimming v. Boxer</i> , 119 Wash.App. 748, 754, 82 P.3d 707 (2004) (citing <i>Biggs v. Vail</i> , 124 Wash.2d 193, 197, 876 P.2d 448 (1994)).....	46
<i>Smith v. Henley</i> , 53 Wash. 2d 71, 330 P.2d 712 (1958) .....	23, 28, 36, 38
<i>Smith v. Jansen</i> , 43 Wash. 6, 85 P. 672 (1906) .....	14
<i>Snyder v. Peterson</i> , 62 Wash.App. 522, 527, 814 P.2d 1204 (1991).	6
<i>S. Kitsap Family Worship Ctr. v. Weir</i> , 135 Wash. App. 900, 914-15, 146 P.3d 935, 942 (2006).....	46
<i>State v. Delgado</i> , 148 Wash.2d 723, 727, 63 P.3d 792 (2003).....	31
<i>State v. J.P.</i> , 149 Wash. 2d 444, 69 P.3d 318 (2003).....	31

*State ex rel. Anderson v. Chapman*, 86 Wash. 2d 189, 543 P.2d 229, (1975)..... 31

*Udall v. T.D. Escrow Servs., Inc.*, 159 Wash. 2d 903, 154 P.3d 882 (2007)..... 29

*Woodfield Neighborhood Homeowner's Ass'n v. Graziano*, 154 Wash. App. 1, 4, 225 P.3d 246, 247 (2009)..... 17

Foreign Cases:

*Buk Lhu v. Dignoti*, 431 Mass. 292, 727 N.E.2d 73 (2000).  
*Id.* at 296 ..... 25

*Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) .... 4

*Glaziers & Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc.*, 823 F. Supp. 1185 (E.D. Pa. 1992) on reconsideration in part, 823 F. Supp. 1188 (E.D. Pa. 1993) ..... 4

*Pennsylvania ex rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 179 (3d Cir.1988)..... 4

*Riggle v. Skill*, 7 N.J. 268, 81 A.2d 364 (1951) ..... 26

*Riggle v. Skill*, 9 N.J. Super. 372, 74 A.2d 424 (Ch. Div. 1950) aff'd, 7 N.J. 268, 81 A.2d 364 (1951)..... 26

Other Authorities:

CR 11 ..... 44, 46  
CR 12(b)(6).....Passim  
Fed.R.Civ.P. 12(b)(6) ..... 4  
RAP 18.1 ..... 43  
RCW 4.16.090 ..... 39, 41  
RCW 4.28.328(3)..... 46  
RCW 4.84.185 ..... 44  
RCW 4.84.328(3)..... 44, 45

RCW 7.28 .....	9
RCW 7.28.010 .....	10
RCW 61.24.040(6).....	30
RCW 61.24.040(7).....	30
RCW 84.04.090 .....	35
RCW 84.40.030. ....	36
RCW 84.56.360--.380.....	36, 40
RCW 84.56.370 and 380.....	36
RCW 84.64.080(8).....	29
RCW 84.64.180 .....	8,9,21,26,30
RCW 84.68.060 .....	14
RCW 84.68.070 .....	15,17,40
RCW 84.69.020 .....	14

COMES NOW the Defendant/Respondent CV Joint Ventures, LLC, (“CV”), and submit for the Court's consideration this Response brief:

## I. INTRODUCTION

This case does not present a justiciable controversy. As argued to the Superior Court, both parties own exactly what they own. CV owns the real property and the improvements on what has been denoted as Parcel C and U.S. Bank (“Bank”) owns the real property and improvements on Parcel B. There is a house that straddles the line but while it is an unusual and somewhat impractical situation – there is nothing illegal about it.

The Appellate Brief tries to create a legal controversy by misstating fact and law. It claims to own the house. However, as set forth in its Complaint, the Bank has never owned Parcel C and never had a security interest in Parcel C. The Bank claims to have paid taxes on the house by improperly segregating real property from the improvements thereon when the taxation statute clearly defines the improvements as part of the real estate. The Bank throws out the word “encroachment”– but that presupposes one side owns the portion of the house on the parcel of the other. The Bank tries to invoke equity when case law clearly rejects equity to upset a tax deed. The Bank repeatedly cites to nonjudicial deed of trust foreclosure cases while ignoring the unique nature of tax deeds. The Bank argues cases that were challenges to tax deeds but ignores that

the Bank's own claim for relief and prior pleadings acknowledge it is not trying to set aside a tax deed. The Appellate Brief has shifted as to what relief was requested before the Superior Court. The reason is simple: The Bank must try to repackage its action because the Complaint failed to state a proper claim for relief. Still it fails.

The court needs to actually look at the causes of action pled by the Bank. There are three causes of action – one of which is directed to the other defendant, North American Title Company. The two “causes of action” actually directed at CV are a claim for “Reformation” and a claim to “Quiet Title”. Reformation is a remedy – not a cause of action. The quiet title action does not describe a legal theory to quiet title (such as adverse possession, outlaw mortgage...) but merely sets forth what the Bank claims was “intended” and what it wants.

What consistently is lost in the Appellate Brief is that CV has done nothing wrong. It bid at a proper tax sale. There has been no allegation that the tax sale process was improper. CV was the successful bidder, paid the bid amount and got a tax deed on the property. As will be discussed herein, tax sales are different from other types of foreclosure sales. Statute and case law protects such deeds and protects such buyers. The entire notion of bona fide purchaser does not apply – but even if it did – what did CV do except legally bid at a legal sale? The irony of the situation is that the Bank had since 2006 to figure out the Parcel/Straddling House issue and failed to do so but now wants to claim that CV must have had such knowledge. As we are at a CR 12(b)(6)

junction in this case – we will assume the Bank was justified in its ignorance and CV has fully aware and calculatedly bought a property with a straddling house.

Even assuming everything in the Complaint to be absolutely true – there still is no legal claim here. “Unusual” is not synonymous with “illegal.” “Impractical” is not synonymous with “justiciable.” CV owns Parcel C and everything on it. The Bank owns Parcel B and everything on that. There is nothing to quiet or partition. The tax deed is not susceptible to equitable reformation. There simply is no case here.

## **II. REPLY STATEMENT OF ISSUES**

Can the court invoke equity to reform a tax deed after the running of statutes of limitation to the detriment of a third party which did nothing but bid at a legal tax sale?

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

Given that this is an appeal from a CR 12(b)(6) dismissal, this court should assume the facts in the Complaint are true. While CV will similarly assume such facts for this appeal, it is doing so *arguendo* and should not be assumed to be agreeing to the ultimate truth of such averments. With such caveat duly noted, the recitation of facts – as based on the complaint – set forth by Appellant is fair and accurately reflects alleged (and assumed true) facts.

The court should take particular note of the timeline:

1/31/06	Bank’s Deed of Trust Executed
4/4/08	IRS sale of Parcel A

12/4/09	CV buys Parcel C at tax sale
8/20/10	Trustee Sale on Parcel B
4/24/12	Bank notified of straddling house
4/21/15	Present lawsuit filed

This present case was filed 4 ½ years after the tax sale.

#### IV. ARGUMENT

##### a. Standard of Review:

Appellant is correct that this is a de novo review. What should be kept in mind in reviewing the case is that a CR 12(b)(6) motion is for “judgment on the pleadings”. Blenheim v. Dawson & Hall Ltd., 35 Wn. App. 435, 437, 667 P.2d 125, 127 (1983). “Dismissal is proper when we can conclude that there are no facts that would justify the relief requested, here custody. Cutler v. Phillips Petroleum Co., 124 Wash.2d 749, 755, 881 P.2d 216 (1994). CR 12(b)(6)” Fairfax v. Simpson, 170 Wn. App. 757, 763, 286 P.3d 55, 58 (2012), as corrected (Sept. 27, 2012), rev'd sub nom. In re C.M.F., 179 Wn.2d 411, 314 P.3d 1109 (2013). “A court may grant a motion to dismiss in accordance with Fed.R.Civ.P. 12(b)(6) if it appears beyond a doubt that the plaintiff can prove no facts to support the relief requested. Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 179 (3d Cir.1988).” Glaziers & Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc., 823 F. Supp. 1185, 1186 (E.D. Pa. 1992) on reconsideration in part, 823 F. Supp. 1188 (E.D. Pa. 1993).

The point is that the court is to review the matter de novo while keeping in mind the relief that was actually requested. The Appellate Brief talks in broad notions of challenging tax deeds, reformation and quieting title. However courts are to look beyond the title to examine the substance of a document. Rhodes v. D & D Enterprises, Inc., 16 Wn. App. 175, 177, 554 P.2d 390, 392 (1976). It should be noted that the case cited by Appellant, McGuinness v. Hargiss, 56 Wash. 162, 105 P. 233 (1909) overruled by Rorvig v. Douglas, 123 Wash. 2d 854, 873 P.2d 492 (1994), that somehow CR 12(b)(6) would not apply in a quiet title action was (1) from 1909 before CR 12(b)(6) was implemented; (2) does nothing to prohibit a summary decision on a nonexistent claim; (3) would be authority normally presented by a party in CV's position – not the Bank's position; and (4) does not explain why the trial court's order to dismiss would not be an adjudication that the claim was "absolutely invalid" as provided in McGuinness.

Accordingly, the court should examine closely the actual two relevant causes of action and the relief therein requested. The two causes of action are set forth:

27. To correct the mistake of NATC in failing to include at a minimum both Parcels B and C in the legal description on the U.S. Bank Deed of Trust, and to place all parties in the position they would have been in if the U.S. Bank Deed of Trust had used the correct legal description, the U.S. Bank Deed of Trust and the Trustee's Deed issued to U.S. Bank should be reformed to include Parcel C, and the consideration paid by CV Joint Ventures returned to it.

and

33. The parties to the U.S. Bank loan intended that the U.S. Bank Deed of Trust encumber both Parcels B and C. Because the dwelling that was intended to provide the security for the U.S. Bank Loan traverses both Parcels B and C, U.S. Bank seeks quiet title to Parcel C, and U.S. Bank will reimburse CV Joint Ventures for the consideration it paid in connection with obtaining Parcel C.

Given the fact we are dealing with a tax sale, the actual relief requested by the Bank is not legally permissible.

**b. Reformation is a remedy and is not a cause of action.**

Please note that nowhere is there any allegation that CV ever had any relationship with the Bank related to Parcel C. The Complaint does not set forth any document CV and the Bank ever jointly executed. There is no relationship between CV and the Bank except that they own abutting property. The relevance of this situation is that there is no identified document between CV and the Bank to reform.

Reformation by a court is an equitable remedy that brings a writing that is materially different from the parties' agreement into conformity with that agreement. *Denaxas*, 148 Wash.2d at 669, 63 P.3d 125 (citing *Akers v. Sinclair*, 37 Wash.2d 693, 702, 226 P.2d 225 (1950)). A party seeking reformation must prove the facts supporting it by clear, cogent, and convincing evidence. *Akers*, 37 Wash.2d at 703, 226 P.2d 225. A mutual mistake occurs if the parties had the same intentions but their written agreement does not accurately express their intentions. *Snyder v. Peterson*, 62 Wash.App. 522, 527, 814 P.2d 1204 (1991). A mistake is a belief not in accord with the facts. *Simonson v. Fendell*, 101 Wash.2d 88, 91, 675 P.2d 1218 (1984). "A scrivener's error occurs when the intention of the parties is identical at the time of the transaction but the written agreement errs in

expressing that intention.” *Reynolds v. Farmers Ins. Co.*, 90 Wash.App. 880, 885, 960 P.2d 432 (1998). A court ascertains the parties' intent “ ‘by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’” *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wash.2d 250, 254, 510 P.2d 221 (1973)).

Glepeco, LLC v. Reinstra, 175 Wn. App. 545, 560-61, 307 P.3d 744, 751-52 (2013) review denied, 179 Wn.2d 1006, 315 P.3d 530 (2013). Appellant puts much stock in Glepeco, but it was not a tax foreclosure situation but rather a deed of trust sale. Trustee deeds are neither subject to the same statutory priority as tax deeds nor given status as “favorites” of the law per case law. While the courts have allowed reformation of trustee deeds, the Supreme Court has flatly rejected reformation of tax deeds, discussed, *infra*. Glepeco also was a situation where the party who was negatively affected by the reformation was not a third party but rather was the defaulted, foreclosed party to the actual deed of trust.

One seeking reformation of an instrument must prove, by clear, cogent and convincing evidence, (1) both parties to the instrument had an identical intention as to the terms to be embodied in a proposed written document, (2) that the writing which was executed is materially at variance with that identical intention, and (3) **innocent third parties will not be unfairly affected by reformation of the writing to express that identical intention.** *Neal v. Green*, 71 Wash.2d 40, 426 P.2d 485 (1967); *Kincaid v. Baker*, 66 Wash.2d 550, 403 P.2d 888 (1965); *Jones v. National Bank of Commerce of Seattle*, 66 Wash.2d 341, 402 P.2d 673

(1965); *Thorsteinson v. Waters*, Supra; *Akers v. Sinclair*, Supra.

(bold added) Leonard v. Washington Emp., Inc., 77 Wn.2d 271, 279, 461 P.2d 538, 543 (1969). Assuming that Shelley and the Bank intended the Bank's deed of trust to cover all of the property, a reformation clearly would "unfairly impact" CV which did nothing but legally bid at a legal tax sale. Additionally, the Bank's bare assertion that it "has a valid and subsisting interest in the property at issue" stands in stark contrast to RCW 84.64.180 which estops all parties from raising objections to the tax title. Remember, the Bank has not a single document tying it to Parcel C – ever. To the extent the Bank had the most remote claim to Parcel C – that was wiped away by the tax deed.

But backing up, reformation is a remedy. Courts normally do not go around doling out remedies without a legally cognizable claim. So, really, the two causes of action merge into the overall, yet incorrect, "quiet title" action. Such quiet title cause of action essentially asks for the same relief – the reforming of the 2006 deed of trust and the 2010 trustee deed so as to somehow magically wipe out the 2009 tax deed. As discussed below, even if the 2006 deed of trust was reformed to include Parcel C – the 2009 tax deed would wipe out such the deed of trust anyways under RCW 84.64.180.<sup>1</sup>

---

<sup>1</sup> "And any judgment for the deed to real property sold for delinquent taxes rendered after January 9, 1926, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all

The Bank further does not explain how a court can, essentially, nunc pro tunc reform a trustee deed for an entirely different parcel that could, theoretically have different lienholders, judgments, owners, that could have been in bankruptcy...none of whom received notice of the trustee sale in 2010 and none of whom are party to the litigation. The Bank invites this court to create a very problematic precedent.

Moreover, there is a statute of limitation on reformation – normally three years. However, given the implausible allegation that the Bank learned of the deed of trust problem in April of 2012 (despite the loss of Parcel A and Parcel C in 2008 and 2009, respectively), this brief will assume notice to the Bank in April 2012 as alleged – but still given the prejudice to CV – reformation would be unavailable as more fully discussed below.

**c. Quiet Title is improper as the Bank has no valid subsisting interest.**

Quieting title is a statutory cause of action under RCW 7.28. To bring such an action a party must have a valid subsisting interest in the property:

**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**

---

such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax has been paid, or the real property was not liable to the tax.” RCW 84.64.180.

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 quieting or removing a cloud from plaintiff's title....

(bold added) RCW 7.28.010. There are two problems with the Bank's pleadings in this regard. First, the Bank's complaint concedes it has no legal interest in Parcel C and the entire thrust of the Complaint is to create a legal interest. Second, there is no "cloud" to the title to the parcel the Bank owns – Parcel B. Nowhere does the Complaint is there any allegation that CV is claiming any interest in Parcel B. Nowhere in the Complaint has the Bank alleged it could not sell Parcel B. The problem the Bank has is that it does not like what it owns and would also like to own the neighbor's property as that would increase the value of the Bank's property. The undersigned suggests that letting a person take their neighbor's property and add it to their own would increase the value of the vast majority of all properties. However, it is hardly a judicial claim. **The Bank's own pleading shows that the Bank has never had a single document that shows it ever held any interest in Parcel C.** There is no "valid subsisting interest". Respondent cites to non-tax deed cases to try to draw an analogy. However, as discussed below, tax deeds are unique in Washington jurisprudence and not subject to reformation. Regardless, the Appellant's cases are inapplicable. Glepeco, LLC v. Reinstra, 175 Wn. App. 545, 307 P.3d 744 review denied, 179 Wash.2d 1006, 315 P.3d 530 (2013) was a nonjudicial foreclosure case where courts of equity are not prohibited from reforming deed. In such case, the Reinstras had done a lot

combination but the subsequently refinanced deed of trust had the legal description of only one of the two combined lots. After a deed of trust nonjudicial foreclosure, the Hiltons purchased the property thinking they were getting the combined lot. The Hiltons sued Rienstra for declaratory relief. The court allowed the reformation to change the legal description to that of the combined lots. In such case, not only was it not a tax sale, but reformation was granted to protect the rights of a third party purchaser not harm the third party as is proposed by the Bank. Also, unlike Glepeco, there was no scrivener's error in the present case. The legal description that the Bank had in its deed of trust was a correct description for Lot C. In Reinstra – the two old legal descriptions had been combined into one legal description for construction purposes so that the old single lot description used in the deed of trust was incomplete to describe the sole remaining combined lot. The judgment in Glepeco protected the third party bidder and reformed against a party to the original deed of trust. This is absolutely the opposite of what is being urged here. Also, the standing arose from having a deeded interest in part of a combined lot – in essence there were two people owning one lot. In the present case, there are two entities each clearly having a deeded interest in two distinct legal lots.

Appellant cites to Morrison v. Berlin, 37 Wash. 600, 79 P. 1114 (1905) for the notion that quiet title is appropriate for claims of title from a tax sale. However, that case predates other cases that reject equity interfering with a tax deed and actually is adverse to Appellant. It was a case claiming a void tax sale based on irregularities. There had been a

previously void judgment in a tax sale so the court had entered a second judgment for a tax sale for the east 110 feet of a lot in West Seattle. The buyer at the tax sale took possession of the entire lot. The Supreme Court actually sustained standing of the original owner to bring an action under quiet title to the remainder of the lot but not on the part sold at the tax sale:

As to the second objection, we think there can be no question that a cause of action is stated in the complaint for the recovery of the portion of the lot not included in the east 110 feet thereof. Apart from the bill of particulars, the complaint contained all of the essential allegations of a good complaint in ejectment to the whole lot; and, although the bill of particulars did show that these allegations could not be established as to the east 110 feet of the same, the court was not justified in sustaining a demurrer thereto. The appellant is not to be denied the right to recover that to which he is justly entitled simply because he claims too much, and **the court should have overruled the demurrer, and compelled the respondents to answer as to their possession and claims to that part of the property not included in the foreclosure sale.**

(emphasis added) Morrison v. Berlin, 37 Wash. at 603. Such case actually holds there is no cause of action in quiet title as to the tax foreclosed east 110 lot. To try to create the perception of authority and precedent, Appellant throws in bits and pieces of other inapplicable cases. Dolan v. Jones, 37 Wash. 176, 79 P. 640 (1905) was under prior statutes where people could buy tax certificates and sell the property themselves. However, the thrust of such case was that the tax sale was void for lack of proper service. As to the notion of quiet title, there were two parties setting forth the nature of their actual title. That is unlike the present case

where the Bank fully admits it has no title in Parcel C and is asking the court to create one under the guise of reformation.

Continuing on the tactic of citing inapplicable cases to try to project strength, Appellant's cite Morcom v. Brunner, 30 Wash. App. 532, 635 P.2d 778 (1981) which is a three year statute of limitation case on actions to set aside tax deeds. However, such case was to set aside a tax deed as void based on the failure of the county treasurer to comply with statutory provisions as to content and the manner of service. There is no procedural challenge to Pierce County's actions in the present case as to conducting the tax sale. Despite a new tact taken in the Appellant Brief to claim the ground under the house, an improper sale was never alleged or argued to the trial court. The appellant in Morcom actually had a deed to the property at issue so as to have standing in a quiet title action. The Bank in this case has never had a solitary title document to Parcel C. The case of Loving v. Maltbie, 64 Wash. 336, 116 P. 1086 (1911) was tied to Loving v. McPhail, 48 Wash. 113, 92 P. 944 (1907) where there was actual payment and receipt of taxes and yet a tax foreclosure without notice was instituted and, even then, it took the Supreme Court to reverse the trial court that a claim was stated. It was again a case as to a tax sale conducted without notice – which is not the case here as the Bank obliquely admits (by not challenging service) that as it had no recorded interest in Parcel C, that it was not entitled to service. CP 6. Such cases are different also in that all the taxes were paid in the Loving cases while it is undisputed that the taxes on Parcel C were not paid in this case.

Smith v. Jansen, 43 Wash. 6, 85 P. 672 (1906) was yet another case of actual payment of all taxes on the parcel foreclosed – unlike Parcel C.

The Bank simply does not set forth a cause of action based on taxes paid on Parcel C which undisputedly were not paid. Accepting for argument sake that Parcel B, in retrospect, was perhaps overtaxed, there is a remedy through the taxation statute. RCW 84.69.020 provides relief for taxes paid for many reasons including “error in description...improvements that did not exist...mistake, inadvertence or lack of knowledge by either a public official or employee or by any person with respect to real property in which the person paying the same has no interest...paid on basis of assessed valuation which was appealed to the county board of equalization and ordered reduced by the board...” Granted, the Bank presently may have statute of limitation issues in such an action given that RCW 84.68.060 allows a taxpayer until to June 30<sup>th</sup> of the succeeding year to sue for a refund. However, what is interesting is the next statute that states:

Except as permitted by RCW 84.68.010 through 84.68.070 and chapter 84.69 RCW, no action shall ever be brought or defense interposed attacking the validity of any tax, or any portion of any tax: PROVIDED, HOWEVER, That this section shall not be construed as depriving the defendants in any tax foreclosure proceeding of any valid defense allowed by law to the tax sought to be foreclosed therein except defenses based upon alleged excessive valuations, levies or taxes.

RCW 84.68.070. The Bank did not bring any of the acceptable challenges under the statute as to the county but now brings a collateral action challenging a “portion of any tax” by challenging the portion of the assessment related to improvements. Note, the entire nature of this action is complaining as to the “validity of such tax” and the amount of tax the Bank paid. To get to where the Bank wants this court to go, the court has to say that the taxes on Parcel B and Parcel C were somehow erroneous. That is barred as RCW 84.68.070 does not limit the prohibition of such collateral attack to cases involving the county – it mandates “no action shall ever be brought”. Now, RCW 84.68.070 does allow actions under RCW 84.68.010 which sets for the statutory bases to challenge a tax. The three exceptions to the finality of a tax deed are (1) taxes paid; (2) property exempt from tax; (3) frustration of taxpayer in payment of his taxes by public officer. Berry v. Pond, 33 Wn.2d 560, 567, 206 P.2d 506, 509 (1949). The present case is an improper attack on the tax deed by a party who never owned Parcel C.

The Washington Supreme Court a long time ago required a party challenging a tax sale (which is what the Bank is collaterally doing) must show an interest in the subject property:

The reason for the rule as so declared is that one who has no interest in the subject matter is not the ‘real party in interest.’ Another reason for not allowing such actions rests in public policy. If tax titles were allowed to be upset in this way, then every purchaser at resale would be subject to the hazard of later suits by persons having no direct interest in the property. As a consequence, there would be no safety

in existing tax titles, nor would there be any incentive in the future to bid at such sales. The county would thus be hampered in collecting delinquent taxes, and properties sold under tax foreclosure would remain off the tax rolls indefinitely. We conclude and hold that appellant, as a general taxpayer, has no right to maintain this action.” Sasse v. King Cty., 196 Wash. 242, 251, 82 P.2d 536, 541 (1938).

To counter this, Appellant again cites inapplicable law in Pierce Cty. v. Newbegin, 27 Wash. 2d 451, 178 P.2d 742 (1947) to try to make it seem that there is some general notion that tax sales do not extinguish equitable rights that would permit this action. That is not what such case was about. It was a WWII case where a property owner had been drafted and asked his uncle to pay his property taxes. The uncle arranged for a co-worker (who also had to go pay taxes) to pay the service member’s taxes. Such co-worker told the deputy treasurer he wanted to pay all such taxes but the deputy assessor only showed him the current year taxes and took such amount and wrote “B.T.” on the receipt. Apparently, that was to mean “back taxes” as a prior statute required the treasurer “that in issuing a receipt for such current tax the county treasurer shall endorse upon the face of such receipt a memorandum of all delinquent taxes against the property therein described, showing the year for which said tax is delinquent and the amount of delinquent tax for each and every year.” Id., at 452 citing RRS 11246. The property was foreclosed for the back taxes and upon discharge from the military, the service member challenged the sale and the court held that the treasurer had not complied with the statute and the tax sale was invalid. However, no one has ever claimed the tax

sale in this case to be invalid. In fact, to do so, Pierce County would have had to have been named as it is a necessary party. “A party is necessary if that party's absence ‘would prevent the trial court from affording complete relief to existing parties to the action or *if the party's absence would either impair that party's interest or subject any existing party to inconsistent or multiple liability.*’ *Coastal Bldg. Corp. v. City of Seattle*, 65 Wash. App. 1, 5, 828 P.2d 7 (emphasis added), *review denied*, 119 Wash.2d 1024, 838 P.2d 690 (1992).” Woodfield Neighborhood Homeowner's Ass'n v. Graziano, 154 Wash. App. 1, 4, 225 P.3d 246, 247 (2009). “Because the trial court lacks jurisdiction to adjudicate a dispute if all necessary parties are not before it, this issue may be raised for the first time on appeal by either party or this court.” (citations omitted) Id. at 3-4.

Despite Appellant labeling the structure “U.S. Bank’s house”, as if saying it numerous time makes it true, it is undisputed that there is not a shred of paper that ever showed the Bank to have any interested in Parcel C upon which about 90 percent of the house sits. Paying taxes for the portion of the structure not on Parcel B would perhaps give the Bank a right to a refund but RCW 84.68.070 and policy prohibits this belated attack on the tax against a third party purchaser. This action is an impermissible attack on the tax, an impermissible action by a party with no subsisting claim to title, and an impermissible attack on a tax deed – all to the detriment to a party who simply legally bid at a legal tax sale. The action attacks Pierce County’s tax deed without naming Pierce County. In actuality, the action never even claims to want to set aside the deed but the

effect of the relief requested would result in a partial cancellation of the tax deed as to the ground under the house. As the Supreme Court has brushed back a similar back door attempt holding: “Appellants urge that they have not prayed the court to set aside or cancel the deeds, but merely to find that General Electric Company holds the land impressed with a trust. It is true that they have not used the specific words ‘set aside or cancel’ either in their allegations or in their prayer for relief, but they pray that the tax deeds be decreed null and void, and held for naught. This is equivalent to a prayer for cancellation.” Eagles v. Gen. Elec. Co., 5 Wn.2d 20, 27, 104 P.2d 912, 915 (1940). Characterize the Appellant’s action any way one might – the net effect would be denying CV Joint Ventures the full benefit of its tax deed. The Appellant’s action is a backdoor attempt to attack a tax, attack a tax deed and adjudicate a time barred matter without even naming the grantor of the tax deed which is entity Appellant speculates caused the problem. This action is not a proper lawsuit. The trial court was correct in dismissing the action.

**d. Reformation based on claimed mutual mistake or scrivener’s error is inapplicable to third party purchaser at tax sale auction.**

The starting point in this case should be a general recognition that we are dealing with a tax deed. Tax deeds are statutorily created interests. Tax deeds wipe out all interests that predate the judgment for the tax sale:

**84.64.180. Deeds as evidence--Estoppel by judgment**

**Deeds executed by the county treasurer, as aforesaid, shall be prima facie evidence in all controversies and suits in relation to the right of the purchaser, his or her**

**heirs and assigns, to the real property thereby conveyed** of the following facts: First, that the real property conveyed was subject to taxation at the time the same was assessed, and had been listed and assessed in the time and manner required by law; second, that the taxes were not paid at any time before the issuance of deed; third, that the real property conveyed had not been redeemed from the sale at the date of the deed; fourth, that the real property was sold for taxes, interest, and costs, as stated in the deed; fifth, that the grantee in the deed was the purchaser, or assignee of the purchaser; sixth, that the sale was conducted in the manner required by law. **And any judgment for the deed to real property sold for delinquent taxes** rendered after January 9, 1926, except as otherwise provided in this section, **shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered,** and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax has been paid, or the real property was not liable to the tax.

(bold added). The statute is not unclear – it “estop all parties from raising any objections...to a tax title”. The Bank is violating this statute by objecting to CV’s tax title. The essence of the Bank’s claim is that had everything been done perfectly in 2006, that the Bank’s deed of trust would have covered Parcel C. The CR 12(b)(6) motion assumed that to be true. But, before the trial court there was no allegation that the tax sale was not properly performed. That is the difference in 90 percent of the cases cited by Appellant where it selectively plucks inapplicable quotes from such cases with allegations of a void tax sale. Even now, Appellant only wants to claim the land under the house, presumably conceding the

tax deed is otherwise valid. There was no allegation that CV was not entitled to the tax deed having been the successful bidder. That being the case, the law is pretty clear:

**In short, the tax lien is paramount to all other liens or claims.** When foreclosure of such lien is made and real estate is sold thereunder, the fee passes to the purchaser, **and all grants made by the owner of the fee must, of course, fall with the foreclosure.**

(bold added) Hanson v. Carr, 66 Wash. 81, 83, 118 P. 927, 928 (1911).

The Bank's deed of trust is a grant from Shelley that "must, of course, fall with the foreclosure." The case law has been clear that a tax deed creates a new title independent of all prior claims:

The regular foreclosure of such a lien as was concededly had against this lot has, under our revenue law, all the force of a proceeding in rem (Continental Distributing Co. v. Smith, 74 Wash. 10, 132 Pac. 631), and vests in a purchaser at a sale held under such foreclosure a new title, **independent of all previous titles or claims of title to the property** (Hanson v. Carr, 66 Wash. 82, 118 Pac. 927). Manifestly both record and possessory titles are equally absolutely destroyed by such a foreclosure.

(bold added) Gustaveson v. Dwyer, 78 Wash. 336, 338-39, 139 P. 194, 195 (1914) on reh'g, 83 Wash. 303, 145 P. 458 (1915). An uncontested, valid tax sale "destroys" "all previous titles or claims to title."

We have held that a tax foreclosure wipes out any rights acquired by adverse possession: Gustaveson v. Dwyer, 78 Wash. 336, 139 P. 194; Johnson v. Burgeson, 25 Wash.2d 269, 170 P.2d 311. **Appellant has no title or claim of interest in tract B which can be quieted** against the claim and title of respondent.

Rushton v. Borden, 29 Wn.2d 831, 839, 190 P.2d 101, 106 (1948) (bold added to emphasis appropriation of CR 12(b)(6). This is in keeping with tax deeds being favored at law. Kupka v. Reid, 50 Wn. 2d 465, 470, 312 P.2d 1056, 1059 (1957). Simply applying a calendar to this case shows the Appellant's claims to be "destroyed" or "wiped out". The Bank's deed of trust was executed in January 2006. *Appellant Brief p. 5*. The tax deed was in December 2009. *Appellant Brief p. 6*. The tax sale destroyed the deed of trust. There is nothing to reform – it was destroyed. The Supreme Court in Gustaveson at 338-339 was absolutely clear that a "a purchaser at a sale held under such foreclosure a new title, independent of all previous titles or claims of title to the property". CV took its title independent of the previous deed of trust that might have been subject to a claim of reformation. To rule otherwise would be to make the tax title "dependent" not "independent" on such deed of trust. That is not what RCW 84.64.180 says, it is not what the Supreme Court has ruled and it would be error to allow an estopped, back door attack on a tax deed.

Even if this court wanted to bypass the statutes and precedent – reformation is not proper in this case. Reformation is an equitable remedy. Glepcu at 563. Even assuming, as the trial court did for CR 12(b)(6) purposes, that everything the Appellant has said about the tax deed and how it relates to the tax deed to Parcel C is true, the relief requested is for this court to alter the real property "thereby conveyed" pursuant to RCW 84.64.180 by the tax deed so that the land under the structure actually is on Parcel B. The Appellant invites error by this

invitation to invoke equity to change the conveyed legal description in a tax deed:

‘A tax title being a purely technical title, as distinguished from a meritorious title, and depending for its validity on strict compliance with the requirements of the statutes in respect to all the prior proceedings, which are wholly in invitum as respects the owner of the property, **a court of equity will not interfere to reform a tax deed or order the correction of errors in it.**’ 37 Cyc. 1450.

Kennedy v. Anderson, 88 Wash. 457, 460, 153 P. 319, 321 (1915). As argued to the trial court – Appellant owns exactly what it owns (Parcel B) and Respondents own exactly what it owns (Parcel C). It is an uncomplicated characterization of the situation – but it is what the law mandates and what precedent has upheld. To counter that, the Appellant cites to all sorts of deed reformation cases that do not involve tax deeds. To avoid this obvious problem, Appellant again cites to inapplicable void tax sale cases to lend the appearance of legitimacy. However, note that Appellant is not arguing that CV tax deed is void – just that it “Should Be Reformed Based on Mistake and/or Scrivener’s Error”. *Appellant Brief p. 16.*

For instance, the Bank cites to Berry v. Pond, 33 Wash. 2d 560, 206 P.2d 506 (1949) as some great precedent for reformation. But that is not what the case is about. In such case, there was a 60’ overlap in the legal descriptions of two adjoining parcels so the tax, when paid, was actually paid twice as to such 60’. One of the adjoining properties was lost to a tax sale and the other owner of the other adjoining property ownr

claimed that the tax sale did not extinguish his claim to the 60' as the tax had been paid – which is one of the applicable bases for challenging a tax sale under RRS 11288. However, Berry was not a reformation case – it was an adverse possession case and it was based upon a proper statutory challenge to a tax deed in that the tax was paid. Unlike Berry, there is no overlap in the legal descriptions of Parcel B and Parcel C. While it appears clear the Bank paid its taxes on Parcel B – and perhaps too much – it must be conceded that the taxes actually assessed against Parcel C were not paid which gave rise to the tax sale.

Smith v. Henley, 53 Wash. 2d 71, 330 P.2d 712 (1958) is another case cited by the Bank in support of its argument for reformation but again is a payment of taxes case somewhat like Berry. It differs a bit in that the court found in Smith that “the taxes on the disputed land had been paid.” Id. at 76. Such situation is far different than the present case as Smith was an action to set aside a tax deed – not an action to reform it. Moreover, in Smith, the court found the taxes paid. There is not even an allegation in the Complaint that the Bank ever tried to pay on Parcel C. (CP 1-9) Smith was distinguished in Label v. Cleasby, 13 Wash. App. 789, 793, 537 P.2d 859, 861 (1975), *review denied* 86 Wash. 2d 1013 (1976) wherein Division 1 made clear that Smith did not apply when “the taxes on the disputed property were not paid by anyone.” Smith was a 6-3 decision of the Supreme Court and was significantly limited to the facts of such case in Label. Note that the Supreme Court refused to review such limiting. The Smith case had an unopposed finding that the taxes on the disputed

land had been paid. Such allegation has never been made in the subject Complaint as to Parcel C – the subject of the tax deed. The Appellant’s assertion is that it incorrectly paid on the entire structure as part of paying the taxes on Parcel B. However, it is undisputed that the taxes actually assessed on Parcel C were never paid and led to the tax sale.

The notion that there was some misunderstanding as to a “faulty legal description” does not help the Bank as “[i]f there was error here which prevented the payment of tax, it was purely the error of the taxpayer who, in the absence of remedial legislation, must be deemed to bear the risk of a faulty legal description contained in his deed.” Label v. Cleasby, 13 Wash. App. 789, 793, 537 P.2d 859, 862 (1975). Expanding and paraphrasing on such notion, it should be the Bank that “must be deemed to bear the risk of a faulty legal description contained in [its] deed [of trust].” It is even clearer that the Bank should bear such risk when the Bank in its own briefing sets forth how the Bank actually insured against such risk. *Appellate Brief p. 6*.

In a perverse way, the Bank is attempting to relieve another defendant to this action, North American Title Company – a defendant the Bank called negligent – from liability from the very risk the title company is in the business to protect against. The Supreme Court rejected such a notion in Kim v. Lee, 145 Wash. 2d 79, 91, 31 P.3d 665, 671, as amended (Dec. 12, 2001), opinion corrected, 43 P.3d 1222 (Wash. 2001) when the court refused to invoke equity to bail out a title company. The court said “[t]he role of the title insurer is to insure title; [e]ither they insure or they

don't.” (citations omitted) Id. The court went on to say: “The doctrine of subrogation does not apply to relieve a title insurance company of its contractual obligation because a title insurance company not only receives consideration for rendering an expert opinion, but also for acting as an insurer of its accuracy. “ Id. at 92-93. Invoking equity in a title insured setting is also a back door attempt to avoid the contractual risk the title insurer assumed. This is yet another independent reason to reject this appeal.

But...discussing all of these void tax deed cases detracts from what is going on in this case. In this case there is a claim to reform a tax deed to adjust property lines effecting a parcel wherein the taxes were admittedly not paid. The Appellant’s referenced cases had overlaps or errors in the legal description and the court found the taxes paid. Such cases were to set aside the tax deed. There seems to be no case that allows reformation as the Supreme Court was pretty clear: “[E]quity will not interfere to reform a tax deed.....” Kennedy supra. Citing to inapplicable out of state cases from New Jersey and Massachusetts does not support ignoring a clear dictate of the Washington Supreme Court. Besides, such foreign cases are also inapplicable to this situation. Buk Lhu v. Dignoti, 431 Mass. 292, 727 N.E.2d 73 (2000) was a case where the plat was off due to a surveyor error. There was an intervening tax sale although the process seems significantly different than in Washington. The court did reform the lines to what the original plat was supposed to show. The court pointed out that the Massachusetts tax deed “extinguishes only the

interests of any party claiming rights ‘through the record owner, such as “mortgagees, lienors, [or] attaching creditors”’(citations omitted) Id. at 296. That is different from Washington law that a tax deed extinguishes **all** interests – even interests not of record such as adverse possession. Palin v. Sherman, 38 Wash. 2d 806, 807, 232 P.2d 105, 106 (1951). Unlike Massachusetts, law, RCW 84.64.180 not only destroys all interests – it wipes out all claims (such as, for example, a claim for reformation). Clearly, Washington law differs than Massachusetts on this point.

Riggle v. Skill, 7 N.J. 268, 81 A.2d 364 (1951) also is of no help as it just adopts the underlying decision in Riggle v. Skill, 9 N.J. Super. 372, 74 A.2d 424 (Ch. Div. 1950) aff'd, 7 N.J. 268, 81 A.2d 364 (1951). Such case did have a house straddling a line but it was a case of “that equity will afford relief where one erects a building upon the lands of another in the mistaken belief that he is the owner thereof, and the true owner, having knowledge of the improvement, does nothing to apprise the builder of the true situation.” Id. at 378. But that is not what happened in the present case. No one has alleged that anyone built on the property of others who idly sat back and let them build. Rather, the allegations is that there was common ownership of Parcels A, B and C which later gave rise to this situation when the lots were separated in various foreclosures. (CP 3-4). The New Jersey case does not hinge in any way on a tax foreclosure except that it found the township was “free of culpable negligence” in computing the assessment on the lot “as if the lot was unimproved.” Id. at

381. It is a factually dissimilar case invoking different law for different reasons.

This also is not an encroachment case – as the Appellant seems to concur in looking at encroachment cases for “some guidance”. *Appellant Brief p. 17*. Even in seeking such guidance, such citation does not help Appellant’s case. In Proctor v. Huntington, 169 Wash. 2d 491, 238 P.3d 1117 (2010) there was an unwitting building of a house, well and garage on their neighbors property involving 27 and 30 acre lots where the seller of both parcels had misrepresented where the common boundary line was. A surveyor had set a marker for logging activities but was assumed to be the boundary which added to the confusion. The court ordered the encroacher to pay the title owner for the value of the property upon which sat the improvements. However, such case is based upon the court’s ability to afford equitable relief – a remedy precluded when a tax deed is involved. The “Liability Rule” in Proctor has no applicability in tax sale cases. People's Sav. Bank v. Bufford, 90 Wash. 204, 155 P. 1068 (1916) is very similar to Proctor in that it dealt with party building on the wrong lot than the lot it had purchased. As both parties invoked the equitable powers of the court, the Supreme Court cleverly ordered, essentially, that the parties swap the lots. That way the builder got the improved lot and the lot owner got a vacant lot. Not only has Respondent not invoked equity, it has argued that the court cannot invoke equity. Such equitable cases provide little to no guidance at all in a statutory tax deed situation.

Then, curiously, the Bank goes back to citing Smith v. Henley, *supra* and Nalley v. Hanson, 11 Wash. 2d 76, 118 P.2d 435 (1941). Both cases are cases to have a tax deed declared invalid based on payment of taxes. Nalley actually was a case where a deputy in the treasurer's office promised to give a taxpayer a list of all property he had to pay on and then left two parcels off the list. The taxpayer paid all that was requested and then sought to set aside the tax deed on the two lots the deputy failed to list. That is a far cry from this situation where the Bank sat idly by from 2006 until it claims it learned of the straddling issue in April 2012. So, assuming again for CR 12(b)(6) purposes that the such April 2012 date is true, the bank left this expensive view house (which it thought it fully owned) just sitting without an attempt to sell or rent for over six years? Then, when it learns of this issue it sits for another three years filing only to beat such contrived April 2015 statute of limitation deadline? Even based on such timelines and situation as set forth in the Complaint – it is not a case to invoke equity. The request is untimely, is to the detriment of a third party and is prohibited by case law as discussed above.

For some reason, the Appellant goes off on a tangent that CV is not a “good faith” purchaser. Apparently, the line of reasoning is that being a supposed “bad faith” purchaser would make CV susceptible to reformation. Obviously, given the clear language in Kennedy, that is not an issue – precedent prohibits reformation of a tax deed. However, such argument brings up a couple of interesting points that shed some light as to why courts do not get into such matters when looking at tax deeds.

First, this was a tax sale auction. Auctions are unlike many other types of sales where various duties of disclosure and good faith may come into play. At an auction, so long as you are a qualified buyer,<sup>2</sup> your only obligation as a buyer is to pay up. Buying at auction is not the same as going to an escrow company: “Acceptance at auction is ‘commonly signified by the fall of the hammer or by the auctioneer’s announcement “Sold,” ‘after which the “sale is consummated [and n]either party can withdraw.’” (citation omitted) Udall v. T.D. Escrow Servs., Inc., 159 Wash. 2d 903, 912, 154 P.3d 882, 888 (2007). The Supreme Court in *Brown v. Wells*, 103 Wash.2d 96, 108, 690 P.2d 1144 (1984) recognized tax sales is a gamble as to the title for a “nominal price with expectations of large profits.” It is not a normal sale. Second, despite whatever characterizations the Bank may wish to make as to CV, the actual record before this court is that CV legally bid at a legally conducted (and not challenged) tax sale. The record reflects that CV paid the amount of its bid and got a tax deed. Third, one has to wonder why the Bank argues that CV is not in good faith because “[s]imply looking at the property would have revealed that not only was it not unimproved vacant land, but that the U.S. Bank House extended over the boundary onto the adjacent parcel, which was not the subject of the tax sale.” *Appellant Brief p. 21*. Now, if “simply looking at the property” imparts knowledge, the Bank had

---

<sup>2</sup> For instance, employees of the treasurer’s office are prohibited from bidding at tax sales. RCW 84.64.080(8).

nine years to be imparted such knowledge before commencing this action. Put the Appellant's legal quote on the other foot: "A purchaser/grantee, 'may not now be heard to say that [he] failed to see that which was plainly visible and which could have been ascertained upon inquiry.'" Schultz v. Plate, 48 Wash. App. 312, 317, 739 P.2d 95, 98 (1987); *Appellant Brief p. 21*. If that truly is the standard – we are far beyond the three year statute of limitations that would arise when the court would impute knowledge to the Bank – a buyer in 2006. This court should see that a remand would be met with a summary judgment on the statute of limitation grounds.

Be that as it may be, nothing in the Appellant Brief provides the least bit of support that a buyer at an auction must be "innocent" or "bona fide". Not a single "bona fide purchaser" case cited by the Appellant involves an auction. In full disclosure, the recent case of Albice v. Premier Mortgage Servs. of Washington, Inc., 157 Wash. App. 912, 929, 239 P.3d 1148, 1157 (2010) aff'd, 174 Wash. 2d 560, 276 P.3d 1277 (2012) did examine if a purchaser was a bona fide purchaser for value. The case had already held the sale void for exceeding the 120-day window provided for extending a nonjudicial trustee sale under RCW 61.24.040(6). The bona fide buyer analysis in such a context was appropriate as RCW 61.24.040(7) actually refers to "bona fide purchasers" in that the recitals in a trustee deed are prima facia evidence of statutory compliance and "conclusive evidence thereof in favor of bona fide purchasers." Nothing in the tax foreclosure statute mentions bona fide purchasers. Rather RCW 84.64.180 provides that the tax deed "shall be

prima facie evidence in all controversies and suits in relation to the right of the purchaser....” Had the legislature wished to add a bona fide purchaser requirement to the ability to rely on a tax deed – it could have done so having proved itself capable of doing so in the trustee sale statutes. To add a bona fide purchaser requirement to a tax sale would violate basic precepts that courts do not add words to otherwise clear statutes – even if the court feels it is unwise. “Just as we ‘cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language,’ *State v. Delgado*, 148 Wash.2d 723, 727, 63 P.3d 792 (2003), we may not delete language from an unambiguous statute....” (citation omitted) *State v. J.P.*, 149 Wash. 2d 444, 450, 69 P.3d 318, 320 (2003). “The wisdom of statutes or of constitutional provisions is not subject to judicial review.” (citations omitted). *State ex rel. Anderson v. Chapman*, 86 Wash. 2d 189, 196, 543 P.2d 229, 233 (1975).

Respondent has been reluctant to get into the “bona fide purchaser” notion as such cases are usually based in equity where the courts are invoking such equitable power to right some wrong. The court should also decline such invitation for at least three reasons: (1) the court cannot invoke equity to reform a tax deed; (2) tax auctions are not subject to good faith requirements; and (3) all that is before the court is that CV legally bid at a legal tax auction. The Bank’s desire to examine the worthiness of a

buyer is demonstrative of trying to invoke equity in non-equitable situations.<sup>3</sup> For instance, as previously briefed, reformation is an equitable remedy. “One seeking reformation of an instrument must prove, by clear, cogent and convincing evidence, (1) both parties to the instrument had an identical intention as to the terms to be embodied in a proposed written document, (2) that the writing which was executed is materially at variance with that identical intention, and (3) innocent third parties will not be unfairly affected by reformation of the writing to express that identical intention.” (citations omitted) Leonard v. Washington Emp., Inc., 77 Wash.2d at 279. Reformation just doesn’t apply. CV was not a party to the deed of trust. The Bank was not a party to the tax deed. Obviously the Bank and CV did not have identical intentions. The notion of “innocent third parties” is interesting as no one yet has identified, let alone alleged, that CV did anything wrong so as to “not be innocent”. No authority is found that somehow having knowledge (assuming arguendo that CV knew of the straddling house) makes you somehow a lesser buyer at a tax foreclosure. Practical experience tells us that it is the experts, the collectors - the ones with knowledge - who routinely attend auctions as they can better value what they are bidding on. There is nothing wrong with such conduct.

---

<sup>3</sup> The Appellate Brief at page 13 claims that CV is claiming the Bank is seeking a windfall. That is inaccurate and has never been alleged. What is asserted is that the Bank is seeking to increase the value of what it owns inappropriately at the expense of CV.

And yet, Appellant wants to not only reform its own deed of trust – it wants to reform CV’s tax deed. It is not enough for the Appellant to have its 2006 deed of trust reformed – because it would be a useless act as the tax deed would wipe out such interest – reformed or not. No, the Bank wants to reform CV’s tax deed. Remember (1) the Bank never has held any title Parcel C; (2) The Bank wants to reform a tax deed that it has no knowledge of the intent of the grantor (Treasurer) and the Grantee (CV) beyond the clear language of the deed which unambiguously grants CV the entirety of Parcel C; and (3) for the court to do what the Bank requests would harm CV that legally bid at a tax sale so as to benefit a sophisticated bank that sat on its property for 6 to 9 years before acting to bail out a sophisticated title company. Nothing in any of this has any support in law. Equity would not even support such a claim.

It is also noteworthy that the relief requested is shifting in this case. In the Complaint, the Bank asked for all of Parcel C outright conditioned only on it paying back CV the money CV paid. Now, the Bank seeks the house “and the land lying thereunder”. *Appellant Brief p. 36*. There is no precedent for this. Why would a holder of a “destroyed” deed of trust on Parcel B have a stronger claim to the land under the house on Parcel C than would a holder of a tax deed on Parcel C have to the land under the house in Parcel B?

e. **There has been no bona fide attempt to pay Parcel C's taxes.**

The Appellant implies that the County Treasurer prevented the Bank from paying the taxes on Parcel C. This is in direct conflict with the facts as set forth by the Appellant. Further, nothing would give rise to reforming a tax deed in such scenario. The Complaint does not contend that taxes were attempted to be paid on Parcel C. None of the pleadings below contended that taxes were actually paid on Parcel C. At best, the allegation in the Complaint was that the Bank paid taxes on Parcel B and mistakenly believed that the house was solely on Parcel B. While courts of appeal will indulge hypothetical factual scenarios in reviewing CR 12(b)(6) dismissals, there is no authority saying the court has to consider patently false allegations. No one tried to pay the taxes assessed against Parcel C.

The alleged facts are simply that the Parcel B taxation included a component for the improvements and that Parcel C had no component for the improvements. The allegation is that the Bank paid Parcel B's taxes thinking that it was paying on the entire house. There is not a shred of any evidence or allegation that anyone from the Bank ever tried to pay the Parcel C taxes and was prevented from doing so. The Bank tries to make the insinuation that the Treasurer's allocation is somehow wrong without any support. Given that the house was built over two parcels, it would seem logical that the improvement could either be taxed to one of the two lots or be segregated between the two lots. Normally, the lots are consolidated.

Recall, the Bank did not build the house. The Bank has not alleged it did a construction loan for the improvements. It merely alleges it made a refinance loan to Mr. Shelley and took back a deed of trust that it intended would cover all of the house. Now, the Bank keeps claiming it “owns” the house as it sits on Parcel C without any explanation of how it owns the house when not a single document ever gave the Bank an interest in Parcel C. The claim that the Bank owns the improvement despite not owning the land is not well supported. The presumption at law is that the real estate includes the improvements permanently affixed thereto. In one of the longer definitional sentences in the code, real property is defined as:

**The term “real property” for the purposes of taxation shall be held and construed to mean and include the land itself, whether laid out in town lots or otherwise, and all buildings, structures or improvements or other fixtures of whatsoever kind thereon, except improvements upon lands the fee of which is still vested in the United States, or in the state of Washington, and all rights and privileges thereto belonging or in any wise appertaining, except leases of real property and leasehold interests therein for a term less than the life of the holder; and all substances in and under the same; all standing timber growing thereon, except standing timber owned separately from the ownership of the land upon which the same may stand or be growing; and all property which the law defines or the courts may interpret, declare and hold to be real property under the letter, spirit, intent and meaning of the law for the purposes of taxation.**

(emphasis added) RCW 84.04.090. So when CV got a tax deed with the legal description which is Parcel C – it got all “all buildings...thereon.” There is nothing in the statute about who paid for the improvements or

who refinanced the property. If you get a tax deed, it comes with everything “thereon”.

This is not to say that there could not be separately taxed improvements if owned separately from the fee ownership. RCW 84.56.360 authorizes separate ownership of improvements from the fee interest but one has to follow the process in RCW 84.56.370 and .380. There is no allegation that any such request for segregation was done and segregation makes no sense if Mr. Shelley had owned all the parcels and the improvements. Ironically, it is only when a request to segregate is made that the treasurer is compelled to segregate the land from the improvements. The case trumpeted by Appellant, Smith v. Henley, 53 Wash. 2d 71, 74, 330 P.2d 712, 713-14 (1958), explicitly notes that such segregation is necessary only if improvements are owned separately from the fee even though in valuing the property, the assessor is supposed to value the land “exclusive of the structures”. RCW 84.40.030. However, nothing in the assessment statute requires surveys to ascertain the exact location of such structures. The obvious reason for the lack of such requirement is that in 99 percent of the cases, if someone got taxed for an improvement that was not on their property – they would object.

The overriding point to such analysis is to show that the Bank’s claim that the Assessor did anything wrong is doubtful at best. The court may wonder why there is no precedent related to houses straddling lines or why similar cases do not come up more commonly. It is because municipalities require lot line eliminations, adjustments or combinations

to ensure a structure sits on its own lot and cannot be segregated. For example, Pierce County Code 18F.70.030 disallow any such adjustment if it circumvents setback laws – which this building arguably would as now situated. For further example, in Glepeco at 550, the Reinstras were required to combine the two lots into one lot so as build their home as they wished. If there was any “fault” that has given rise to the present situation, arguably it would have been in the granting of building permits for the house on unconsolidated lots. That would be an issue for the Edgewood Building Department if it knowingly allowed this to occur. However, also possible is that the house may have been planned to be built on one parcel but errors pushed it across an unconsolidated commonly owned lot line. That might be a builder or surveyor mistake. However, it is unlikely it was an assessor mistake and, as such, much of the Appellate Brief is based on unsupported and illogical supposition that the assessor made a mistake. Besides, it does not matter. Instead of speculating as to who may have done what years ago, the courts have put the risk of error in a legal description so that it is borne by the taxpayer. Label at 793. The Bank admits it was in error as to what it thought it owned by claiming mutual mistake. “It is well settled that a mistake of the taxpayer is insufficient reason to vacate a tax sale.” In re King Cty. for Foreclosure of Liens for Delinquent Real Prop. Taxes for Years 1985 Through 1988, 117 Wash. 2d 77, 83, 811 P.2d 945, 948 (1991)(Citing Label v. Cleasby). Unlike the cases cited by Appellant where a treasurer wrote a confusing “B.T.” on a receipt to indicate back taxes or left a couple of properties off

the list of properties for which the taxpayer owed taxes – the assessor here never affirmatively mislead anyone and there is no authority or facts presented to show that assessing the structure to one of two parcels previously in common ownership was in error.

Instead of dealing with its own allegations and own causes of relief, Appellate goes back to the case of Smith v. Henley. However, the basis upon which the court allowed a challenge to the tax deed in Smith was “it was made manifest that it was not the intent of the legislature to subject land on which taxes have been paid to foreclosure, or to deprive **one in possession** of the right to set up his payment as a defense to an action to oust him.” (emphasis added) Id. at 75. Smith also set forth that the records of the assessor were in a state of confusion and the house actually moved back and forth between the lots on the assessor’s records. Id. There is no confusion of records alleged in the present case and the Bank was not “one in possession”. In fact, the Appellate offered to amend its complaint to make that clear “that the property has been vacant for several year.”<sup>4</sup> (CP 87 ft. nt. 2) The Appellant has come late to this argument but it does not help as it was not in possession, never paid taxes for Parcel C and bears the risk it was wrong as to the legal description of the property it had nonjudicially foreclosed. Further, the Bank shows no active conduct of the assessor that prevented the payment of taxes. Given

---

<sup>4</sup> CV agree the house was vacant for argument purposes only for CR 12(b)(6) purposes reserving, if necessary, the right to set forth its actions upon the property demonstrating possession and control if the case were to be remanded.

that there is undisputedly two parcels and one house, Appellant does not demonstrate the error of the assessment particularly when the all parcels and the residence were previously under common ownership. The Bank, hypocritically, wants to blame the assessor for not discovering the boundary straddling house when the Bank had six years to do so but claims not to have known. The court should see such argument for what it is – a belated attempt to awkwardly fit into a possible basis to challenge a tax deed. However, that does not fix the problem that this is an action for reformation – not to set aside a tax deed.

**f. The statute of limitation bars this action even if it were deemed to be a challenge to the tax deed.**

RCW 4.16.090 requires actions to set aside a tax deed to be brought “within three years from and after the date of issuance of such treasurer’s deed.” The deed at issue was in December 2009 and this action was filed in April 2015. Obviously, we are past three years. But one still has to again question if the Appellant even has standing to challenge the tax deed at issue. Appellant never own Parcel C. In fact, it is asking the court to violate all sorts of other precedent to reform the tax deed, its deed of trust and its trustee deed on Parcel B to judicially create an interest. As the title is situated today, the Appellant is a stranger to Parcel C. “Standing refers to the demonstrated existence of ‘an injury to a legally protected right.’” Peyton Bldg., LLC v. Niko's Gourmet, Inc., 180 Wash. App. 674, 680, 323 P.3d 629, 632 (2014). Being a neighbor to a tax

foreclosed lot does not confer standing. This is yet another fatal defect in the Appellant's case.

Putting standing aside, Appellant erroneously sets forth argument as fact. It claims it paid taxes on the Parcel C house. That is not correct. It paid taxes on Parcel B. As explained above, while land and improvements are valued separately – unless segregated per RCW 84.56.360-.380 – they both are combined and assessed as “real property”. The Parcel B taxes included the improvements “thereon” and if it was over-assessed for the portion of the structure thereon – it had a remedy to challenge the tax. The Bank did not and now is prohibited from challenging the tax. Presently the Bank is doing a back door challenge by telling this court the assessment was wrong and misled Appellant. RCW 84.68.070 prohibits such a challenge at this time, as previously briefed. The tax sale was for Parcel C. It is undisputed that the real property taxes for Parcel C were not paid. Even accepting the Bank's inappropriate interpretation of paying taxes for the improvement on Parcel C – the Bank did not pay on the taxes assessed as to the land on Parcel C. The Appellant Brief at page 28-29 cites to many foreign cases requiring an intent to pay “all of his taxes” – not “a portion of his taxes.”

Appellant cites to inapplicable cases having dissimilar facts and based on superseded statutes. Sallee v. Bugge Canning Co., 38 Wash. 2d 737, 232 P.2d 81 (1951) related to a tax certificate from 1918 which the court ruled “was not authorized by the Law of 1897....” The entire situation was unusual as Jefferson County was actually selling the land on

contract and had issued the certificates of delinquency to itself – not the purchasers. It has no relevance to this action. Port of Port Angeles v. Davis, 21 Wash. 2d 660, 152 P.2d 614 (1944) was a case where the Port moved to set aside a tax sale where the taxes were undisputedly paid and the County had erroneously listed the property on the certificate of delinquency. More than 3 years went by and the action was filed. However, the court ruled that tax foreclosures on property where the taxes were paid conveyed no title. The taxes on Parcel C were never alleged to be paid. The only allegation is that the Bank paid the taxes on Parcel B that might have contained taxes that more appropriately should have been assessed to Parcel C.

Further, the statute of limitation in RCW 4.16.090 does apply. It says the action must be brought within three years from the issuance of the tax deed. There is the “Kupka exception” from Kupka v. Reid, 50 Wash. 2d 465, 472-73, 312 P.2d 1056, 1060 (1957) that held: “The legislature intended, in enacting RCW 4.16.090, that its provisions would apply only in those instances where possession had been taken by the purchaser under the tax deed.” But then there was an exception to the Kupka exception in Fitzgerald v. Neves, Inc., 15 Wash. App. 421, 426, 550 P.2d 52, 56 (1976) which held:

Thus, we deem the holding in Kupka-that actual possession by the purchaser under a tax deed is a prerequisite to invoking the bar of RCW 4.16.090-is limited to those cases in which ‘the original owner remained in possession.’ Kupka, 50 Wash.2d at 471, 312 P.2d at 1060. The

defendants note that neither Fitzgerald nor Deschamps was ever in actual physical possession of the disputed strip of land.

The possession rules make sense. If the foreclosed owner remains in possession, “it cannot be said that possession has been ‘taken’ by the purchaser under the tax deed.” Id. This was the holding in Buty v. Goldfinch, 74 Wash. 532, 540, 133 P. 1057, 1060 (1913) where the court held “The logic of all these decisions is that the statute will not run in favor of the holder of a tax deed while the land in question is in the actual possession of the original owner. This, of course, is in harmony with the view that he who is in possession and full enjoyment of his property is not required to protect his right to the property by instituting legal proceedings against another who merely claims such property but takes no steps to recover it.” However, if neither party is in possession (again *assuming arguendo* that CV was not in possession) none of these judicially created presumptions designed to protect possessors apply and, as such, the plain language of the statute of limitation would apply. It is interesting that Appellant cites to Morcom v. Brunner, 30 Wash. App. 532, 535, 635 P.2d 778, 780 (1981) which in *dicta* discusses how Fitzgerald applies “only where the property in dispute is ‘wild and unimproved’ and there is no party in possession.” Morcom v. Brunner, at 535. But that makes little sense in that people could use wild and unimproved land daily for all sorts of outdoor purposes such as having RV’s on the property, regular camping, storage, motorcycling while a residential structure could sit empty as alleged in this case. The idea behind the possession rules is most

appropriately focused on the foreclosed party's possession. If such foreclosed owner remains in possession, then a tax deed holder has to assert their rights to put the possessor on knowledge that their ownership is at issue. If the foreclosed taxpayers are not in possession – they may have moved from the state, they may be dead, they may have abandoned the property – it may be next to impossible to give them actual notice as to the tax deed claim. That is why with nonpossession cases the notice is “constructive” like in Fitzgerald whereas in possession cases actual notice is required to start the running of the statute to challenge the deed. The recording of the tax deed imparts constructive notice. Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc., 168 Wn.2d 56, 76, 277 P.3d 18 (2012).

The courts have somewhat confused what should be a simple rule. The statute of limitation to set aside a tax deed runs from the date of delivery of the tax deed except as to foreclosed taxpayers still in possession, wherein the statute of limitations begins to run from when such foreclosed taxpayer knew or should have known of the tax deed claim.

#### **V. REQUEST FOR ATTORNEY FEES**

Pursuant to RAP 18.1 CV requests an award of attorney fees and costs on appeal. In filing this action, the Bank filed a lis pendens under Pierce County Auditor Filing No. 201504210976. CP 129. Before the trial court CV requested attorney fees based upon the lis pendens statute

and based upon a frivolous claim statutes and rules. CP 128-135. Such legal reasons are applicable as to this appeal.

RCW 4.84.328(3) reads:

Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

RCW 4.84.185 reads:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

CR 11 provides in pertinent part

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the

extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief... If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

Should this court affirm the trial court which held that the Bank had failed to state a claim upon which it could be granted relief, it seems to logically follow that there was not a “substantial justification” for the complaint and hence attorney fees should be awarded pursuant to the RCW 4.84.328(3). This is the basis for the trial court’s award of attorney fees. CP 212. It is noteworthy that the Bank devotes no argument that the trial court was wrong in such ruling. Rather the Bank seems to rest their request to overturn the fee award solely on the merits of the dismissal. In a case where a party filed a lis pendens against property, claiming an interest and asking the court for “reformation of both their deed and the [defendants’] deed to reflect the parties' intentions” the court found no substantial justification. Richau v. Rayner, 98 Wn. App. 190, 194, 988 P.2d 1052, 1054 (1999). Given that the lis pendens remains in effect as the Bank has posted the required supersedeas amount and as the Bank is

still asserting the claim to the title to a portion Parcel C on appeal, fees under RCW 4.28.328(3) are awardable on appeal. S. Kitsap Family Worship Ctr. v. Weir, 135 Wash. App. 900, 914-15, 146 P.3d 935, 942 (2006).

Without completely rehashing all the problems with the Bank's case (attacking a tax deed, standing, real party in interest, failure to join necessary party, no subsisting interest, statute of limitations, improper invocation of equity, pleading remedies as causes of actions....) there is no road that lead to recovery.

While the briefing of the Bank was well written, over and over it had to be pointed out that the cases had no application to the present case and were not cases supporting the relief that the Bank requested.

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Skimming v. Boxer*, 119 Wash.App. 748, 754, 82 P.3d 707 (2004) (citing *Biggs v. Vail*, 124 Wash.2d 193, 197, 876 P.2d 448 (1994)). A filing is baseless if it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law. *Skimming*, 119 Wash.App. at 754, 82 P.3d 707.

Bldg. Indus. Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 745, 218 P.3d 196, 208 (2009). Note the standard is the disjunctive "or". "An appeal is frivolous when there are no debatable issues over which reasonable minds could differ and there is so little merit that the chance of reversal is slim." Kearney v. Kearney, 95 Wash. App. 405, 416, 974 P.2d 872, 877 (1999). While the Bank raises interesting points as to cases seeking to set aside a deed

– that is not what was requested in this case. This was an unfounded equitable request for a court to adjust boundary lines.

In this case, the case just is not well grounded in fact or law. The Bank, in this appeal is requesting the court move the boundary line around the house as if this were an adverse possession claim. That is the crux of the problem in this case – there is no legal theory such as adverse possession that applies in this case. The claim seemed to be filed at the last minute to try to protect statutes of limitation – presumably against the title company. While there may be a meritorious claim against the title company that does not prevent the award of fees as to the claims directed at CV. Eller v. E. Sprague Motors & R.V.'s, Inc., 159 Wn. App. 180, 194, 244 P.3d 447, 454 (2010).

This appeal is frivolous as it tries to invoke equity against a tax deed when the Supreme Court has said it could not. The appeal is frivolous in that there is no cognizable legal basis for any of the relief requested. The “causes of actions” do not set forth a known legal theory such as adverse possession, outlaw mortgage, competing deeds. No, the “causes of action” are simply what the Bank wants.

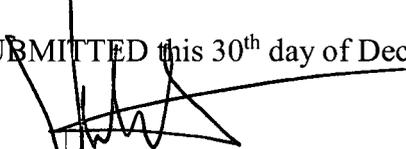
The undersigned sent former counsel for the Bank a letter on July 10, 2015 that the proper remedy for the Bank was to pursue the title company – not CV who “own exactly what they claim to own.” CP 148-150. CV raised the specter of frivolous claim in the answer. CP 24. The Bank was warned at the outset the case had large defects and was pointed in the right direction. In return, there has been expensive litigation brought to bear on an entity that did

nothing more than bid a proper tax sale. An award of attorney fees and costs is warranted in favor of CV.

## VI. CONCLUSION

The Bank's claim as related to CV is to reform its deed of trust and then to reform its trustee's deed to include Parcel C and then to ignore the effect of the tax deed as to a portion of Parcel C under the house to the detriment of CV that did nothing but legally bid at a legal tax sale. The Bank is asking this court to create a legal interest in a property that the Bank admittedly never obtained nine years ago. The Bank is essentially trying to bail out the title company that, according to the Bank, was hired to secure the Bank's loan against three parcels – not just Parcel B. The Bank wants the court to invoke equity when the Supreme Court has prohibited equity to interfere with tax deeds. Tax deeds are favorites of the law and the Bank wants to stomp all over such a deed because it "intended" to have protection that it did not see to fruition. The court should not indulge this Appellant in nonexistent claims but should affirm the trial court as to the dismissal of CV and allow the Bank to pursue the title company.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of December, 2015.



---

MARTIN BURNS  
Attorney for Respondent/Defendant CV  
Joint Ventures, LLC  
WSBA No. 23412

CERTIFICATE OF SERVICE

I certify that on the 30<sup>th</sup> day of December, 2015, I caused a true and correct copy of this Brief to be served on the following to:

**Attorney for Plaintiff:**

Thomas F. Peterson  
Joshua D. Krebs  
SOCIUS LAW GROUP, PLLC  
Two Union Square  
601 Union Street, Suite 4950  
Seattle, WA 98101-3951  
Fax: (206) 838-9101  
*tpeterson@sociuslaw.com*  
*jkrebs@sociuslaw.com*

- Legal Messenger
- US Mail
- Electronic Mail
- Facsimile

BY \_\_\_\_\_  
DEPUTY

STATE OF WASHINGTON

2015 DEC 30 PM 3:18

FILED  
COURT OF APPEALS  
DIVISION II

**Attorney for Defendant North  
American Title Company:**

Robert W. Sargeant  
Marshall Ferguson  
WILLIAMS KASTNER  
601 Union Street, #4100  
Seattle, WA 98101  
Fax: (206) 628-6611  
*mferguson@williamskastner.com*  
*rsargeant@williamskastner.com*

- Legal Messenger
- US Mail
- Electronic Mail
- Facsimile

**Attorney for Defendant United  
State of America:**

Kerry J. Keefe  
United State Attorney Office  
700 Stewart Street, Suite 5220  
Seattle, WA 98101  
Fax: (206) 553-5228  
*Kerry.keefe@usdoj.gov*

- Legal Messenger
- US Mail
- Electronic Mail
- Facsimile

DATED this 30<sup>th</sup> day of December, 2015, at Tacoma, Washington.

**BURNS LAW, PLLC**

By: \_\_\_\_\_

Sheila Gerlach, Paralegal