

65004-1

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No. 65004-1

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

RANDY BREIWICK,

Appellant,

vs.

FIRST AMERICAN TITLE INSURANCE COMPANY;
CITIMORTGAGE, INC.; AND CITIBANK N.A.,

Appellees.

APPELLEE'S BRIEF

Submitted By:

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I. Statement of the Issues

- A. Whether the trial court properly interpreted the plain meaning of the legislature’s use of the word “defective” in RCW 61.24.135 to include an innocent human error, thus authorizing the trustee’s refusal to deliver the trustee’s deed.
- B. Whether the trial court properly considered the Affidavit of David Leen as fact witness testimony when Leen testified only as to the fact of, content of, and his belief relating to his personal contact with representatives within the legislature.

II. Statement of the Case

A. Statement of Facts

This appeal focuses on the meaning of the term “defective,” as found in RCW 61.24.135. The primary issue is whether the trustee can refuse delivery of a trustee’s deed to a third-party buyer after “defective” bidding at a nonjudicial foreclosure sale.

On or about March 24, 2009, First American Title Insurance Company (“First American”), as trustee under the Deed of Trust granted by Kyle Webster and recorded under King County Auditor’s File No. 2007032230024785, recorded a Notice of Trustee’s Sale (“Notice of Sale”) pursuant to RCW 61.24 *et. seq.* CP 10. The Notice of Sale described the property as:

PARCEL B, CITY OF SEATTLE SHORT PLAT NUMBER 9002440, RECORDED UNDER RECORDING NUMBER 9205180338, SAID SHORT PLAT BEING A SUBDIVISION OF A PORTION OF LOTS 3 AND 4, BLOCK 2, MORNINGSIDE HEIGHTS, AN ADDITION TO THE CITY OF SEATTLE, ACCORDING TO THE PLAT THEROF, RECORDED IN VOLUME 21, OF PLATS, PAGE 7, IN KING COUNTY, WASHINGTON.

(the "Property") CP 10.

The Notice of Sale indicated as owing a principal sum of \$487,915.97, together with interest on the obligation secured by the Deed of Trust. CP 10, CP 17.

On or about June 26, 2009, First American, acting at the instruction of the beneficiary, CitiMortgage, Inc. ("Citi") and by and through its authorized agent, CR Title Services, Inc. ("CR Title") held a trustee's sale pursuant to the Notice of Sale. CP 10. Defendants First American and Citi are hereafter collectively referred to as "Defendants."

Citi intended that the bidding open at \$442,837.50. CP 10, CP 24. As a result of a keystroke error, the bid was communicated at \$44,837.50. CP 10, CP 24. The employee who entered the bid

mistakenly dropped the “2” from the bid intended. CP 10, CP 24. CR Title Services mistakenly opened bidding at \$44,837.50 and Plaintiff tendered a bid of \$45,000.00, the only bid received at sale. CP 10-11, CP 24.

Upon discovery of the defective bidding process, Citi instructed First American, who then instructed CR Title, not to deliver the trustee’s deed to Plaintiff. CP 11, CP 24.

On behalf of First American, CR Title contacted Plaintiff to advise that the bidding had been defective and that the sale would be deemed a nullity. CP 11, CP 24. On or about July 17, 2009, Plaintiff’s counsel sent a letter to CR Title indicating Plaintiff would not consent to an invalidation of the sale. CP 11, CP 24.

On or about July 29, 2009, CR Title wrote to Plaintiff’s counsel and advised that the trustee would decline to deliver the trustee’s deed pursuant to RCW 61.24.135. CP 11, CP 24.

B. Procedural History

On or about July 29, 2009, Plaintiff filed the underlying lawsuit in King County Superior Court to quiet title and seeking damages. CP 1-8.

On or about October 8, 2009, Defendants filed a motion for summary judgment (“Defendants’ Motion”) as to all claims. CP 9-

22. Defendants' Motion was accompanied by the Affidavits of Therese Hart and David Leen. CP 23-25, CP 74-76.

On or about November 18, 2009, Plaintiff filed a cross motion for summary judgment ("Plaintiff's Motion"). CP 77-83. Plaintiff's Motion was accompanied by the Declarations of Randy Breiwick, Brian Jessen, Chris Dijulio Jr., and Shauna Ferrey. CP 28-44, CP 45, CP 46-47, and CP 48-49, respectively.

On or about December 18, 2009, the Honorable Judge Regina Cahan heard argument as to both Defendants' Motion and Plaintiff's Motion. CP 69-70.

On or about January 21, 2010, Judge Cahan granted Defendants' Motion for Summary Judgment as to all claims and denied Plaintiff's Motion. CP 69-70. Plaintiff's appeal followed. CP 71-73.

III. Argument

A. THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BY FINDING THAT THE BIDDING PROCESS WAS DEFECTIVE UNDER THE PLAIN MEANING OF RCW 61.24.135 SO AS TO WARRANT THE TRUSTEE'S REFUSAL TO DELIVER THE TRUSTEE'S DEED.

1. The trustee was empowered to withhold delivery of the trustee's deed because under the plain meaning of "defective" as discerned by its ordinary usage the bidding process was "defective."

The legislature has plenary power to enact, amend, or repeal a statute, except as it is restrained by the state and federal constitutions. *Brown v. Owen*, 162 Wn.2d 706, 722, 206 P.3d 310 (2009). The legislature is presumed to know the previous law and, therefore, by changing the language of a statute, it is presumed that the legislature intended to change the law. *State v. Carlson*, 65 Wn. App. 153, 159, 828 P.2d 30 (Wash. Ct. App. 1992).

A court's objective in construing a statute is to determine the legislature's intent. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007) citing *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020, 1023 (2007)). [I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Id.* Plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Id.* When writing statutes, the legislature intends to use ordinary English words in their ordinary senses. *Caminetti v. U.S.*, 242 U.S. 470 (1917). If after discerning the plain meaning, the statutory language

remains susceptible to more than one reasonable interpretation, the statute is considered ambiguous, and the court may then employ statutory construction tools, including legislative history, for assistance in discerning legislative intent. *Id.*

In discerning the legislative intent, the court should note that where the legislature uses certain statutory language in one instance and different language in another, there is a difference in legislative intent. *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984). Furthermore, words have meaning, and words in a statute are not superfluous. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 24, 992 P.2d 496 (2000).

During its 2008 session, the Washington State Legislature amended the Deed of Trust Act by adding a provision to the statute that reads in relevant part,

“The trustee may decline to complete a sale or deliver the trustee’s deed and refund the purchase price, if it appears that the bidding has been collusive *or defective*, or that the sale might have been void.”

RCW 61.24.135 (emphasis added).

The legislature did not define “defective.” Thus, under the principles of statutory interpretation, the court should discern the plain meaning of the word “defective” as it is ordinarily used.

Webster's Revised Unabridged Dictionary defines "defective" as: "being imperfect, deficient, incomplete or inchoate; wanting in something; incomplete; lacking a part; deficient; imperfect; faulty; or being short, inadequate or insufficient." Webster's Revised Unabridged Dictionary, <http://www.websters-online-dictionary.org> (2008). Furthermore, by definition, "faulty" includes something that is erroneous or a mistake. *Id.* Based on the ordinary usage of the word "defective," it appears the legislature intended that the statute cover a scenario where the opening bid was faulty or erroneous.

Applying the ordinary use of "defective" to this case, the trial court was correct to determine that the bidding process was faulty or erroneous. The beneficiary intended that the bidding open at \$442,837.50. Yet, due to a keystroke error, the bidding opened at \$44,837.50. The keystroke error was an innocent mistake, rendering the bidding process defective. As such, under the 2008 amendment of RCW 61.24.135, First American was authorized to withhold delivery of the trustee's deed to Plaintiff.

Plaintiff argues that the mistake was somehow not defective or faulty because Plaintiff and his agents made efforts to confirm the opening bid. However, there is no evidence that Plaintiff confirmed the bid with the beneficiary. Rather, the Plaintiff's evidence only supports that Plaintiff

confirmed the bid with the trustee and the trustee's agent, the recipients of the defective bid information.¹

2. A contextual analysis of RCW 61.24.135 reveals that under the plain meaning of “defective” the trustee was empowered to withhold delivery in this case, and in amending RCW 61.24.135, the legislature intended to reverse *Udall*.

In the case at bar, context also aids in discerning the plain meaning of the statute. RCW 61.24.135 is the only provision in the Deed of Trust Act which discusses the trustee's authority to decline delivery of a trustee's deed. Furthermore, the context of the specific clause where “defective” appears aids in discerning the plain meaning. The clause reads, “If it appears that the bidding has been collusive *or defective*, or that the sale might have been void.” RCW 61.25.135 (emphasis added). The use of the word “or” separates “defective” from “collusive” showing that the statutory wording is such that it covers a circumstance where bidding is “defective” while not necessarily involving collusion.

The timing of the amendment also provides context that supports the trial court's reading of the statute as the amendment was enacted in the legislative session following the court's decision in *Udall*. *Udall v. T.D. Escrow Services*, 159 Wn.2d 903, 911, 154 P.3d 882 (2007).

¹ The Declaration of Chris Dijullio, Jr. confirms that the crier at the sale, the agent of the trustee, confirmed the bid with the trustee. CP 47. The Declaration of Shauna Ferrey confirms that the trustee's website listed the opening bid at \$44,837.50. CP 48.

Prior to the 2008 amendment, the Washington Supreme Court had held that a trustee is not permitted to withhold the deed at its discretion. *Udall v. T.D. Escrow Services*, 159 Wn.2d 903, 911, 154 P.3d 882 (2007).

The facts of *Udall* are similar to this case. After the borrowers defaulted on their home mortgage, U.S. Bancorp directed T.D. Escrow Services to commence a nonjudicial foreclosure. *Udall*, 159 Wn.2d at 906. T.D.'s agent, ABC Legal Services, conducted the nonjudicial foreclosure sale. *Id.* T.D. directed ABC to open bidding at \$159,421.20. *Id.* However, at the auction, the ABC auctioneer mistakenly opened bidding on the property at \$59,421.20. Udall was the highest bidder with a bid of \$59,422.20. *Id.* Udall tendered full payment for the property at the sale. Upon discovery of the bidding discrepancy, T.D. returned Udall's check. *Id.* Udall rejected the refund, and T.D. refused to deliver the deed. *Id.*

Upon review, the Washington Supreme Court held that a trustee may only withhold delivery if the sale itself was void due to procedural irregularity that defeated the trustee's authority to sell the property such as the borrower filing bankruptcy prior to the sale or where there is a pending action on the obligation secured by the deed of trust. *Id.* At 911 (*citing* 11 U.S.C. § 362(a); *In re Schwartz*, 954 F.2d 569, 570-71 (9th Cir.1992) and RCW 61.24.030(4); *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985)). The court further determined that insufficiency of price, alone, is

not a procedural irregularity that voids the sale. *Udall*, 159 Wn.2d at 911. Rather, insufficiency of price is merely a mistake. *Id.*

In the legislative session directly following the *Udall* decision, the legislature amended RCW 61.24.135 to expand the trustee's authority to refuse delivery to include a circumstance where the sale is "collusive or defective." *See* RCW 61.24.135.

The 2008 amendment is a clear legislative reversal of the holding in *Udall*. In fact, David A. Leen, the attorney who represented T.D. Trustee Services in *Udall*, contacted the Washington State Legislature after the court's decision in *Udall* and proposed that an amendment be enacted to reflect the notion that a trustee may decline to deliver the trustee's deed at its discretion when a defect in bidding is discovered. CP 75. Following this contact, the legislature enacted the 2008 amendment. CP 75. As Leen testified, it is his belief that the change to the law was intended to reverse the holding in *Udall* and make clear the right of a trustee to withhold a deed when bidding is defective. CP 75.

The timing of the amendment to RCW 61.24.135 suggests that it was intended as a legislative overruling of the holding in *Udall*.

3. Plaintiff's reading of the statute is inconsistent with the plain meaning of "defective" and presumes that the legislature used superfluous words.

Washington courts have repeatedly held that there is a presumption that no superfluous words are used by the legislature and that where different terms are used in statutes, it is deemed that the legislature intended they have different meanings. *See City of Seattle v. Winebrenner*, 167 Wn.2d 451, 458, 219 P.3d 686 (2009); *State v. Stately*, 152 Wn. App. 604, 604, 216 P.3d 1102 (Wash. App. Ct. 2009); *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009).

Plaintiff's reading of the statute reads the words "collusive" and "defective" to mean the same thing. However, by using both words, the legislature intended that they have a different meaning. Under Plaintiff's interpretation, the legislature's use of the word "defective" is superfluous and has no meaning at all in the statute.

Further, under Plaintiffs' interpretation, the meaning of "defective" does not include a "mistake." RP 28 (Line 16-17). "What we have here is simply a mistake by one party to the process." RP 28. This interpretation is at odds with the plain meaning of "defective," and as discussed above, given the ordinary usage and definition of the word "defective," Plaintiff's interpretation of "defective" contradicts the ordinary usage of the word.

4. Contrary to Plaintiff's assertions, communication of the bid from the beneficiary to the trustee is part of the sale process.

Communication of the bid from the beneficiary to the trustee is part of the sale process such that RCW 61.24.135 applies. Plaintiff argues: "The only 'defect' asserted by Citi is a typographical error in the document it created which communicated the bid to the trustee. The sale process itself was completed without irregularity." *See Appellant's Brief* at 7.

Plaintiff's argument suggests that communication of the bid is not part of the sale process and therefore does not fall under the purview of RCW 61.24.135. However, the opening bid communicated by the beneficiary is itself a credit bid.² Additionally, the opening bid is phrased in the trustee's script at the sale as just that, "an opening bid." Thus, as the opening price, it is a bid, and is most certainly part of the sale process. Therefore, where that communication was "defective," RCW 61.24.135 is triggered such that the trustee may refuse delivery of the trustee's deed.

² For example, if the bidding is opened at \$40,000.00, and another bidder bids \$40,001.00, the beneficiary can then bid \$40,002.00. Thus, the opening bid is an actual bid.

5. Plaintiff's reading of the statute is inconsistent with Plaintiff's previous statements regarding the statute.

During oral argument before the trial court, Plaintiff's counsel acknowledged that the statutory amendment was a response to *Udall*. RP 21. With this admission, the trial court pointed out the inconsistencies in Plaintiff's argument as under Plaintiff's reading of the statute, the circumstance in *Udall* would not be covered by the amendment. RP 22.

Judge Cahan stated to Plaintiff's counsel, "Your argument doesn't add up...I mean, if this is truly – assuming for a moment that the change was in response to *Udall*, the way you're interpreting it wouldn't cover *Udall*." RP 22 (Lines 16-19). In response, Plaintiff acknowledged that under his reading, the mistake in *Udall* would not be covered by the amendment. RP 22 (Lines 24-25). Plaintiff then argued that the statutory terms "collusive" and "defective" would not cover a unilateral mistake. RP 23.

However, based on the ordinary usage of the word "defective," Plaintiff's reading of the statute is only possible if the word "defective" is superfluous. But this interpretation is contrary to the rules of statutory construction and the recognized legal principle that all statutory words have meaning.

6. Plaintiff's concern for increased litigation if a trustee is authorized to refuse delivery of the deed where bidding is defective is overstated.

Plaintiff argues that by interpreting the meaning of defective in accordance with its ordinary usage to include a mistake, litigation to enjoin or compel issuance of a trustee's deed or to set aside a trustee's deed is encouraged. *See Appellant's Brief at 10.* However, Plaintiff provides no support for this assertion, and there is nothing to support that notion.

As Defendants stated in oral argument, by recognizing that the word "defective" has meaning, a trustee is simply able to give meaning to the statute by refusing delivery where bidding is defective. In the case at bar, there is clear circumstantial evidence to support the offered testimony that the bidding process was defective. There is no reason to expect that a scheme authorizing the trustee to recognize and address a defective bid process would give way to the floodgates of litigation. Plaintiff provides nothing to show or suggest that a trustee's determination of what is "defective" and what is not would be so unclear and difficult that it would inevitably lead to an increase in litigation.

7. The *6 Angels* case cited by Plaintiff is not binding or persuasive because it is outside of this jurisdiction and applied a rule different than that of the rule in Washington as defined by RCW 61.24.135.

The California case cited by Plaintiff is not binding precedent. *See 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.*, 85 Cal.App.4th 1279 (Cal. Ct. App. 2001). Further, it is not persuasive authority because the California Court of Appeal interpreted a different statutory scheme than the statutory scheme the trial court in this case interpreted.

California's nonjudicial foreclosure statute has no equivalent provision to RCW 61.24.135 that allows the trustee to withhold delivery where the process is defective. Rather, the Court in *6 Angels* essentially applied the same rule as put forth by *Udall*. But as stated above, the amendment to RCW 61.24.135 was a clear legislative overruling of the *Udall* holding.

Therefore, not only is the California court's application not binding on this Court, it is also not persuasive because the trial court's application of RCW 61.24.135 in the case at bar is distinguishable from the rule in *6 Angels*.

8. Even if *Udall* is controlling, the *Udall* holding supports Defendants' position as *Udall* held that delivery may be withheld when there is a grossly inadequate price plus some additional unfairness.

Even if *Udall* applied in this case, its holding still supports Defendants' position. A grossly inadequate purchase price together with circumstances indicating some additional unfairness may provide sufficient equitable grounds to set aside a nonjudicial foreclosure sale. *Udall*, 159 Wn.2d at 914.

There is no steadfast rule in Washington to show what a "grossly inadequate" price is, but case law suggests an answer. In *Udall*, the purchase price was approximately 35 percent of the value of the property. *Id.* at 915. There, the court held that a price of 35 percent was not "grossly inadequate" enough to justify setting aside the sale. *Id.* at 915. However, in *Cox*, the case *Udall* used as its benchmark to determine what was not "grossly inadequate," the purchase price was four to six percent of the value of the property. *Udall* at 915 (citing *Cox*, 103 Wn.2d at 386). Here, the purchase price was roughly 10 percent of the price at which the beneficiary intended to open the bidding. Thus, the case at bar is much more akin to the circumstance in *Cox* than to that of *Udall*.

Furthermore, in the case at bar, an additional condition of unfairness is present. Essentially, Plaintiff's theory is that because of an

innocent error by the beneficiary's agent, the beneficiary should stand to suffer a \$400,000.00 loss. Plaintiff would ask this Court to find that an innocent human error, recognized and corrected within a short period of time, justifies a \$400,000.00 loss. This result is indicative of an "additional unfairness" that the *Udall* court envisioned.

Therefore, the grossly inadequate price of 10 percent of the intended opening bid, coupled with the additional condition of unfairness in that an innocent mistake results in a loss of \$400,000.00, supports setting aside the sale under *Udall*.

B. THE TRIAL COURT PROPERLY CONSIDERED THE AFFIDAVIT OF DAVID LEEN IN CONJUNCTION WITH DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE LEEN'S TESTIMONY WAS THAT OF A FACT WITNESS TESTIFYING AS TO HIS OWN PERSONAL KNOWLEDGE.

Under CR 56(e), an affidavit may accompany a motion for summary judgment. CR 56. Such an affidavit must be made on personal knowledge, set forth such facts as would be admissible in evidence, and affirmatively show that the affiant is competent to testify to the matters stated therein. CR 56(e). If the witness is not testifying as an expert, testimony in the form of opinions or inferences is limited to those opinions or inferences which are a) rationally based on the perception of the witness, b) helpful to a clear understanding of the witness' testimony or the

determination of a fact in issue, and c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702. ER 701.

Courts have not insisted upon strictly factual statements, as opposed to statements that arguably constitute lay opinion rather than pure fact. *Atherton Condominium Apartment-Owners Association v. Blume Development*, 115 Wn.2d 506, 799 P.2d 250 (1990); *Henry v. St. Regis Paper Co.*, 55 Wn.2d 148, 346 P.2d 692 (1959). It is true that the courts will not consider mere conclusions that simply reiterate the allegations in the complaint or answer. *Id.* However, these authorities do not bar lay opinion based upon personal knowledge which is opinion that would be admissible at trial under ER 701. *Id.* Opinions that would be admissible at trial under ER 701 are admissible for purposes of summary judgment as well. *Id.*

The question of whether the court may consider lay opinion in summary judgment proceedings should not be confused with the question of whether lay opinion testimony is sufficient to support a motion for summary judgment. *Space Needle v. Kamla*, 105 Wn. App. 123, 19 P.3d 461 (Wash. Ct. App. 2001). Mere opinions or conclusions, without factual support, may indeed be insufficient to support a motion for summary judgment. See, e.g., *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 779, 875 P.2d 705 (1994); *Grimwood v. University of Puget*

Sound, 110 Wn.2d 355, 360, 753 P.2d 517 (1988). The question, however, is one of weight rather than admissibility, and the cases addressing the weight of lay opinion testimony for purposes of summary judgment should not be misinterpreted as barring that testimony altogether. *See Roger Crane*, 74 Wn. App. at 779.

David Leen's testimony is not expert testimony, and Defendants did not attempt to present Leen's testimony as "expert testimony." Rather, Leen's testimony puts forth relevant admissible lay opinion testimony based on his personal knowledge as he testifies to the fact of, content of, and his belief relating to his personal contact with representatives within the legislature. As there is no legislative history accompanying the amendment, and as Plaintiff argues, the meaning of the word "defective" may be open to more than one interpretation; Leen's testimony is helpful in discerning the intent of the legislature.

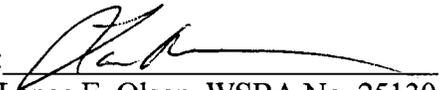
The trial court noted that it considered the Affidavit of David Leen to be that of a fact witness, and supported this in pointing out that the Affidavit states, "It is my belief that it was the legislature's intent to reverse *Udall*." RP 36 (Line 15-16). Therefore, the trial court properly considered the Affidavit of David Leen as fact witness testimony.

IV. Conclusion

For the reasons set out above, the Defendants respectfully request that the Court affirm the trial court's judgment.

DATED this 24 day of August, 2010.

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