

67934-1

67934-1

NO. 67934-1-I

---

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

---

AARON REINSTRA and JAIME REINSTRA, husband and wife

Appellants,

v.

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

Respondents.

---

**APPELLANTS REINSTRA REPLY BRIEF**

---

Submitted by: Gary T. Jones, WSBA #5217  
Jones & Smith  
PO Box 1245  
Mount Vernon, WA 98273  
Telephone: (360) 336-6608  
Facsimile: (360) 336-2094

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 MAY 22 AM 11:20

Attorney for Appellants Reinstra

ORIGINAL

## TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. REPLY TO CASE OF FIRST IMPRESSION.....	1
III. ARGUMENT .....	2
IV. CONCLUSION.....	25

## TABLE OF AUTHORITIES

### Cases

<u>Bennett v. Shinoda Floral, Inc.</u> , 108 Wash.2d 386, 396, 739 P.2d 648 (1987).....	8, 9
<u>Cornish College of the Arts v. 1000 Virginia Ltd. Partnership</u> , 158 Wash.App. 203, 242 P.3d 1 (Div. 1, 2010).....	23
<u>Cox v. Helenius</u> , 103 Wash.2d at 383, 887, 693 P.2d 683 (1985) .....	16
<u>CPL (Delaware) LLC v. Conley</u> , 110 Wash.App. 786, 40 P.3d 679 (2002) .....	8, 9
<u>Denaxas v. Sandstone Court of Bellevue, L.L.C.</u> , 148 Wash.2d 654, (667), 63 P.3d 125 (2003).....	10, 11, 22
<u>Halbert v. Forney</u> , 88 Wash.App. 669, 945 P.2d 1137 (1997).....	17, 18
<u>Hallas v. Ameriquet Mortg. Co.</u> , 280 Fed.Appx. 667, 2008 WL 2230060 (C.A.9 (Or.)) .....	11, 12, 13
<u>Koegel v. Prudential Mut. Sav. Bank</u> , 51 Wash.App. 108, 752 P.2d 385 (1988).....	12

<u><i>Lutkens v. Young</i></u> , 63 Wash. 425, 115 P. 1038 (1911).....	14
<u><i>Martin v. Seigel</i></u> , 35 Wash.2d 223, 228, 212 P.2d 107 (1950).....	18
<u><i>Phillips v. Blaser</i></u> , 13 Wash.2d. 439, 449, 125 P.2d 291 (1942).....	21
<u><i>Plein v. Lackey</i></u> , 149 Wash.2d 214, 225, 67 P.3d 1061 (2003).....	16
<u><i>Rogers v. Miller</i></u> , 13 Wash. 82, 42 P. 525, 525-26 (1895).....	12, 13, 14
<u><i>Rorvig v. Douglas</i></u> , 123 Wash.2d 854, 873 P.2d 492 (1994) .....	24
<u><i>Seattle First Nat. Bank v. Washington Insurance Guaranty Ass 'n</i></u> , 116 Wash.2d 398, 804 P.2d 1263 (1991).....	24
<u><i>Snyder v. Peterson</i></u> , 62 Wash.App. 522, 526-28, 814 P.2d 1204 (1991)..	17
<u><i>Spaulding v. Collins</i></u> , 190 Wash. 506, 68 P.2d 1025 (1937).....	2, 13
<u><i>Swindle v. Harvey</i></u> , 23 So.3d 562 (Miss.App 2009).....	24
<u><i>Udall v. T. D. Escrow Services, Inc.</i></u> , 159 Wash.2d 903, 154 P.3d 882 (2007).....	2, 16
<u><i>Wash. Mut. Sav. Bank v. Hedreen</i></u> , 125 Wash.2d 521, 525, 886 P.2d 1121 (1994).....	10, 11
 <b>Statutes</b>	
15 U.S.C. §1692(f)(6) .....	12
61.24.140(1)(f)(ix) .....	12
Chapter 61.24 RCW .....	2, 10, 14, 19, 20, 30
Chapter 7.28 RCW.....	22
RCW 58.17.210 .....	23
RCW 61.24.040 .....	15

RCW 61.24.040(f)II.....	16, 23
RCW 61.24.040(f)V.....	17
RCW 61.24.060 .....	16
RCW 61.24.100(1).....	24
RCW 61.24.100 .....	23
RCW 61.24.100(2)(a) .....	16
RCW 61.24.127 .....	23
RCW 61.24.130 .....	12, 16
RCW 61.24.135 .....	16
RCW 64.04.010 .....	18
RCW 64.04.020 .....	18

**Rules**

CR 12(b)(6).....	7, 18, 24
CR 56(c).....	6
RAP 18.1(a) .....	22, 23

**Other Authorities**

RESTATEMENT (SECOND) OF CONTRACTS §151 (1981) .....	8, 17
Restatement (Second) of Contracts §151-53 (1981).....	10
RESTATEMENT (SECOND) OF CONTRACTS §154.....	9, 11
RESTATEMENT (SECOND) OF CONTRACTS §154(b) (1981).....	9

## **I. INTRODUCTION**

Glepeco/Hinton's Brief defends the erroneous application of reformation as an equitable remedy to procedurally regular non-judicial public foreclosure auction. The Brief does not accept any adverse consequences for Glepeco/Hinton failing to read the legal description and failing to discern the successor trustee's limitations. Among the "facts" that should be recounted in the Counter-Statement of the Case is the consistent adherence of the Successor Trustee to the legal description that was in the Reinstras recorded Deed of Trust. If the court should consider the "facts" recited in the Response Brief, and Reinstra does not concede that the trial court should have done this, then Glepeco/Hinton should be held to have constructive knowledge that negates any "mistake" and acknowledges that the successor trustee had no power to sell more than Parcel A.

## **II. REPLY TO CASE OF FIRST IMPRESSION**

No case cited by Glepeco/Hinton is on all fours with the facts they argued to the trial court or referenced in the Respondent's Brief. That circumstance is admitted in Section II of their brief. Reinstra contends that the cases cited in support of summary judgment do not confer rights claimed by Glepeco/Hinton on any purchaser at a non-judicial sale under the Trust Deed Act, unless the Trustee has proceeded with an irregular

sale. An irregular sale is one not in conformity with Chapter 61.24 RCW. *Udall v T. D. Escrow Services, Inc.*, 159 Wash.2d 903, 154 P.3d 882 (2007). The case most analogous to the case at bar is *Spauling* discussed infra at pages 15 and 16.

### III. ARGUMENT

#### **Argument in Reply of Counter-Statement of the Case:**

The Respondents' Brief devotes pages 4 through 18 and a portion of page 19 to 34 paragraphs described as a Counter-Statement of the Case. With the exception of some quotes from Reinstras' depositions, the facts recited in the Counter-Statement of the Case are facts that could have been discovered, investigated, and evaluated by Glepco/Hinton prior to bidding at the trustee's sale. The public record is replete with examples highlighted by Respondents in the 34 paragraphs of the counter-statement all leading to the conclusion Peter Papadopulos reached. [CP328-329]. There is a discrepancy in the legal description between the property Reinstra purchased and what they conveyed to the Trustee for GMAC.

Reinstras contend that Glepco, LLC and its principals knew or should have known that the legal description in the Notice of Trustee's Sale and in the subsequent Trustee's Deed did not match the legal description in the Statutory Warranty Deed dated April 15, 2003 [Paragraph 1, Page 4 of Respondent's Brief]. Respondents describe in

great detail and refer to Clerk's Papers submitted in support of their Motion for Summary Judgment materials which make it progressively more obvious that the asterisk at the bottom of page 1 of the Notice of Trustee's Sale [CP 305] contradicts the claimed combination of P15602 and P15604 noted at CP 111 and in paragraph 1, page 4 of Respondent's Brief.

As between the Trustee and Glepco/Hinton there was no mistaking the difference in description. Reinstras did mortgage Parcels A and B to People's Bank and made a Quit Claim Deed to themselves of Parcel A as directed by Skagit County. These things are apparently news to Glepco/Hinton and the result of Mr. Watt's after-the-fact investigation. Glepco/Hinton had every right to the same information before the trustee's sale and they dismissed it:

The elaborate treatment of the boundary line adjustment process in Respondents' Brief, paragraphs 1 and 2 put a prudent observer, Peter Papadopoulos in the position of suspending his review of this potential property acquisition at trustee's sale. [CP 329, line 6]. Why the information was not acted upon similarly by Glepco/Hinton is a question for them to answer and not a subject for trial court decision. Glepco/Hinton asks the court to disregard constructive knowledge of facts which discouraged Peter Papadopoulos, another potential bidder, from

pursuing the property. For example, the paragraphs 1 through 6, pp. 4-7 of the Respondents' Brief recapitulate public records available before the sale. The Counter-Statement of the Case repeatedly refers to the facts about the development of the property, the sequential financing in which the entire 314 foot wide unitary lot was given as security for construction borrowing and for a permanent loan, page 7, paragraphs 4 and 5 of Respondents' Brief. The difference between the cited documents and the Deed of Trust which forms the basis for the trustee's September 17, 2010 non-judicial foreclosure sale is apparent to anyone comparing the legal descriptions.

In paragraphs 7 and 8 of Respondents' Brief references are made to the state of mind of the Reinstras when the GMAC Financing was done in 2008. Nothing about the circumstances or the testimony suggests that the Reinstras did anything wrong or inequitable. Rather they relied upon papers prepared by the bank for the refinancing transaction unaware of the difference between the earlier People's Bank financing based on 314 feet frontage and the GMAC financing based on 105 feet of frontage on Dodge Valley Road. Page 8 of the Respondents Brief offers several alternatives to the legal description as a basis for identifying the property as a unit. The street address, the parcel number, the lack of understanding of the owners of any distinction between Parcel A and Parcel B are repeatedly

used in the Respondents' Counter-Statement of the Case without any explanation of how the purchaser failed to discern these facts. How can a Trust Deed Act purchaser expect to get more than what is described in the recorded deed of trust, the recorded notice of trustee's sale and the recorded trustee's deed?

The information provided in the Respondent's Brief counterstatement of the facts paragraphs 10, 11, 12, 13, 14, 15, 16 and 17 essentially have to do with the state of mind of the borrowers. Because there is no contractual relationship between Reinstras and Glepco/Hinton and because the non-judicial foreclosure process relies on the legal description of the property, Reinstras contend that these facts are irrelevant. They are beyond the scope of the CR 12(b)(6) Motion preserved by Judge Needy. CP 52; CP69; RP 3/28/11, Page 16, line 25 and Page 17, lines 1-14.

As described in Respondents' Brief, paragraph 17, pages 11 and 12 the Counter-Statement of the Case simply quotes from the deed of trust. The boilerplate language including the "duty of occupancy" in paragraph 18 as further evidence that the purchasers at the trustee's sale did not carefully examine what they were purchasing. At page 19 the Respondents' Brief resorts to language protective of the bank that drew the document to sweep in as broadly as possible the rights of the maker of

the note and the signer of the security in the Deed of Trust. This is not an excuse for inaccurately describing what is given as security. There is nothing hidden about the omission of the 209 feet from the description of the total east width with the 314 feet described on Exhibit A of the 2008 Deed of Trust. Respondents' Brief paragraph 20, page 13.

The selective quoting from the Notice of Foreclosure is accurate. It does not change the objective manifestation of intent to foreclose on the east 105 feet Parcel A which Glepco/Hinton contend that the court should expand to 314 feet by adding Parcel B.

At paragraph 24, page 15 of the Respondents' Brief Glepco/Hinton rely on Clerk's Papers 334 for the proposition that Mr. & Mrs. Reinstra voluntarily moved out of the home 21 days after the sale. The circumstances including Hinton's visits, pressure from law enforcement, and lack of legal advice about their rights all temper the significance of the Reinstras moving from the house. [CP 274, lines 16-24 and CP 275, lines 1-4, 15-25]. The voluntariness of the move is contested and should not be considered by the Court in arriving at a conclusion about the CR 12(b)(6) motion or summary judgment in favor of reformation. The appealed ruling by the trial court requires this court to give Reinstras the benefit of any facts tending to show that the move was involuntary. CR 56(c).

Paragraphs 26, 27, 28, 29, 30, are a repetition of facts previously recited and continue to be dependent upon the state of mind of the Reinstras rather than upon any objective manifestation of the rights granted or conveyed to GMAC or to the successor trustee who conducted the non-judicial foreclosure.

The ample evidence produced in Respondents' 34 paragraph Counter-Statement of the Case overwhelmingly demonstrates that the purchaser had every opportunity to discover and apply the knowledge of a discrepancy in the legal description to its decision to bid or not to bid at the public auction. To allow the assertion of a mutual mistake and an after-the-fact reformation completely defeats the integrity of the auction system which is devised to achieve benefits for the financier by producing cash not subject to redemption and relieving the borrower of the risk of a deficiency. If Glepco/Hinton gambled and lost it bears the risk of its mistake. The borrower's alleged windfall is encumbered in all the ways described by the Glepco/Hinton Brief. However, the conclusion of the discussion is that the parties should be left where there are, one owning Parcel A and the other owning Parcel B.

Glepco/Hinton reach for evidence of the state of mind of Reinstras in paragraphs 7-16 pp. 7-11 of Respondents' Brief. Such information was not available to the Trustee or to other bidders at the trustee's sale.

Collecting such information would defeat the purpose of the Trust Deed Act to avoid litigation.

**Argument of Law:**

Mutual mistake as grounds for equitable relief – reformation of the deed of trust in this case was discussed in *CPL (Delaware) LLC v. Conley*, 110 Wash.App. 786, 40 P.3d 679 (2002). That case about the purchase of a skilled nursing facility turned on the consequences of an alleged mutual mistake as to the facilities’ earnings. The court ruled that even if there was a mutual mistake about the material fact alleged by CPL that CPL was not entitled to relief because it assumed the risk of that mistake. *Conley*, 110 Wash.App 786, 791.

“A contract is voidable on grounds of mutual mistake when both parties independently make a mistake at the time the contract is made as a basic assumption of the contract, unless the party seeking avoidance bears the risk of the mistake.” *Bennett v. Shinoda Floral, Inc.*, 108 Wash.2d 386, 396, 739 P.2d 648 (1987). See also RESTATEMENT (SECOND) OF CONTRACTS §151 (1981). “A mistake is a belief that is not in accord with the facts.”

In the contractual setting a party bears the risk of a mistake if “he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.” *Bennett*, 108 Wash.2d at 396, 739 P.2d 648 (quoting RESTATEMENT (SECOND) OF CONTRACTS

§154(b) (1981). In other words, a party's willingness to enter a contract notwithstanding limited knowledge of certain facts shows that those facts were not essential elements of the contract. *Bennett*, 108 Wash.2d at 396, 739 P.2d 648 ("In such a situation there is no mistake. Instead there is an awareness of uncertainty or conscious ignorance of the future.") This case also relied on RESTATEMENT (SECOND) OF CONTRACTS §154 for the proposition that a party bears the risk of a mistake under certain circumstances. RESTATEMENT (SECOND) OF CONTRACTS §154 provides:

"A party bears the risk of a mistake when  
(a) the risk is allocated to him by agreement of the parties, or  
(b) and he is aware at time the contract is made that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or  
(c) a risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so."

Reinstras have consistently contended that the risk of mistake is allocated by Chapter 61.24 RCW to the purchaser at a trustee's sale. For the court to use mutual mistake as grounds for reformation of their deed of trust, the successor trustee's notice of trustee's sale and trustee's deed to Glepco/Hinton violates the principles announced in RESTATEMENT (SECOND) OF CONTRACTS §154. The reasoning of the court in the *Bennett* and *Conley* cases where equitable relief was denied are matched

by the grounds for reversal urged to this court. The trial court should not have considered evidence of a mutual mistake when the Trust Deed Act clearly allocates the risk of such a mistake to the purchaser at a trustee's sale.

A more relevant application of the principles declared in Wash. Mut. Sav. Bank v. Hedreen, 125 Wash.2d 521, 525, 886 P.2d 1121 (1994) can be found in Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wash.2d 654, (667), 63 P.3d 125 (2003). There a seller of real estate refused to reform instruments when a purchaser sought to avoid its contractual promises in a manner the court characterized as “rewarding selective ignorance” Denaxas case asks whether the doctrine of mutual mistake may be invoked where the purchaser had constructive knowledge of the variant legal description before closing. At page 667 the Court concluded its analysis of mutual mistake and the application of constructive knowledge as follows:

“Purchaser had ample opportunity to read the survey, title reports, and closing documents. Had purchaser exercised reasonable care, it could have known their contents. Purchaser is charged with that knowledge. Therefore, we reverse the Court of Appeals and hold that Purchaser is charged with knowledge of not only the correct square footage but also the correct legal description of the Denaxas property.”

The Denaxas court relied on the Restatement (Second) of Contracts §151-53 (1981) and cases cited at p 668 to deny equitable relief.

However, the court acknowledged cases in which a party's negligence did not bar the remedy of reformation. p.669 Denaxas. This case is different in that a successor trustee of a Deed of Trust is the party to Glepco/Hinton's purchase. No one contends that the Successor Trustee erred. No one can say that the Successor Trustee had more to sell than the Deed of Trust described when it was granted and then non-judicially foreclosed.

As the court stated the law in Wash. Mut. Sav. Bank v. Hedreen, 125 Wash.2d 521, 525, 886 P.2d 1121 (1994):

“A party to a contract is entitled to reformation of the contract if either there has been a mutual mistake or one party is mistaken and the other party has engaged in inequitable conduct.”

Hallas v. Ameriquest Mortg. Co., 280 Fed.Appx. 667, 2008 WL 2230060 (C.A.9 (Or.)). This memorandum case arising from a stipulation for decision of a case by a Magistrate Judge in Oregon has become a centerpiece of the respondents' argument in favor of reformation. The case was ruled by the Court of Appeals not to be appropriate for publication and “is not precedent except as provided by 9<sup>th</sup> Cir. R. 36-3”. The case is one in which a note and deed of trust were signed without the legal description being attached. Thereafter, the legal description was attached. A string of citations are offered by the Magistrate and the Court of Appeals in response to the contention that the deed of trust should be

ruled invalid. The case holds that the deed of trust may be reformed after the foreclosure sale citing *Rogers v. Miller*, 13 Wash. 82, 42 P. 525, 525-26 (1895). In fact the deed of trust appears to have been recorded with a legal description approved by the borrower and sold by the same description. This distinguishes the *Hallas* case from the Reinstras circumstances.

Hallas asserted that Ameriquest was equitably estopped from seeking reformation. The court accepted the *Rogers* case, a mortgage foreclosure that predates by approximately forty-five (45) years the adoption of the Trust Deed Act now codified as Chapter 61.24 RCW. Hallas was held by the court also to have waived her right to pursue other remedies based on RCW 61.24.130 and 61.24.140(1)(f)(ix) also citing *Koegel v. Prudential Mut. Sav. Bank*, 51 Wash.App. 108, 752 P.2d 385 (1988). The *Hallas* case was in federal court because the debtor asserted that the lender's conduct violated 15 U.S.C. §1692(f)(6). Plaintiff borrower asserted that Ameriquest did not have a security interest in her property. The court ruled that reformation of the deed of trust created a security interest. The date at which the discovery of the lack of an attached legal description is not clear from the abbreviated record of the memorandum of decision. The *Hallas* court does assume for the purposes of appeal a contention that at the time of signing the deed of trust it did not

contain any legal description of the property. The addition of a legal description that accurately described her property provides the foundation for the ruling that Hallas' property should be encumbered. Unlike Ameriquest whose claim was supported by Glepco and its principals Greg and Pamela Hinton acquired more than the recorded and published deed of trust and notice of trustee's sale described.

There is ample legal authority in Washington law for finding that Rogers v. Miller is not authority for the proposition cited in Hallas or in the present controversy. Cases more analogous to Reinstras' circumstances come to a different conclusion. For example, the Supreme Court reviewed foreclosure of a local improvement district lien by the Town of Morton in Spaulding v. Collins, 190 Wash. 506, 68 P.2d 1025 (1937). The Court reversed the judgment and sale of real property which was not described in the foreclosure process as it was described in the assessment rolls. Lack of legal description required by the statute governing lien foreclosure rendered the town's judgment and sale void. Spaulding stood in the same position as the Reinstras do in this case as to Parcel B.

There are several cases after Rogers in which claims related to the jurisdiction of courts and the availability of collateral attack on judgments and sheriff's deeds are treated by the state supreme court. An example

that substantially contradicts the holding in *Rogers* is *Lutkens v. Young*, 63 Wash. 425, 115 P. 1038 (1911). In that case arising in Lewis County service by publication was the foundation for a judgment and sheriff's deed. The Supreme Court held that the judgment under which the party in Glepco/Hinton's position claiming title was void and the judgment was reversed. This conclusion was reached because an after the fact affidavit purported to cure defects in the process supporting the judgment and sheriff's deed. In the present controversy the failure to legally describe the property in the original deed of trust and in each of the subsequent documents leading to the trustee's deed upon which Glepco/Hinton sued should reach the same conclusion as the court in *Lutkens v. Young supra*.

The Glepco/Hinton argument includes repeated references to "a windfall" resulting from denial of reformation [Respondent's Brief 21, 32, 40]. This argument ignores relevant facts and assumes the equivalence of GMAC loan amount and the house value. That assumption is wrong. The Reinstras invested more than \$300,000.00 of their own money and had a substantial equity. [CP 333, lines 9-11], The market value of all the property Reinstras owned was twice the loan amount after interest and expenses of sale are added to principal.  $\$283,137.51 \times 2 = \$566,275.02$ . The Assessor declared \$559,500.00 for tax year 2010 [CP 252] and the

professional appraiser David Parsons \$725,000.00 fair market value on May 1, 2006 [CP 252].

Immediately before the foreclosure sale Reinstras were told they had a loan modification that would postpone the sale. This sale occurred to their surprise. [CP 334, lines 2-4]. Also the Reinstras continue to receive the Skagit County Real Property Tax bill as owners [CP 337, lines 21-24].

The trial court should have left the parties where the Trustee's Deed placed them – Glepco/Hinton holding Parcel A and Reinstra holding Parcel B. Each can decide whether it is better to buy or sell their interest. Each would be subject to whatever regulatory limits and sanctions as they may arise from the alleged illegal subdivision.

Reinstras asked the court to leave the parties where they were after the Trustee's Sale in their CR 12(b)(6) motion. [CP 281-314]. Denial of that motion is fundamentally erroneous because of the primacy of the Trust Deed Act non-judicial foreclosure. It's the duty of the trustee to sell what is legally described in the deed of trust. RCW 61.24.040. As Glepco/Hinton admit in II of their Brief this is a Case of First Impression. The purchaser at a trustee's sale does not have the right to reform a deed of trust, notice of trustee's sale or trustee's deed unless the court goes outside the legislative framework for non-judicial foreclosure. RCW

61.24.060. The statute gives a cause of action to deed of trust grantors for irregularities. RCW 61.24.130; RCW 61.24.135. It does not give such rights to bidders at a Trustee Sale. Chapter 61.24 RCW. Therefore, the court erred when it accepted Glepco/Hinton reformation as a remedy. Furthermore, the constructive knowledge of Glepco/Hinton as to the legal description eliminates mutual mistake and reformation as a remedy.

Udall supra page 1 reiterates the purposes of the Trust Deed Act in footnote 9 - 159 Wash.2d 903, 916:

“The three goals of the Act are: ‘(1) that the nonjudicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles.’ *Plein v. Lackey*, 149 Wash.2d 214, 225, 67 P.3d 1061 (2003) (citing *Cox*, 103 Wash.2d at 387, 693 P.2d 683).”

GMAC had the option under Trust Deed Act to sue Reinstras and foreclose deed of trust as a mortgage. RCW 61.24.100(2)(a).

GMAC could have sued to quiet title and reform the Reinstra deed of trust. When GMAC elected to use non-judicial foreclosure it accepted the consequences of applying Chapter 61.24 RCW to recoup loan principal, interest, and expenses of sale. RCW 61.24.040(f)II.

“No action by the Beneficiary is now pending to seek satisfaction of the obligation in any court by reason of the Borrower’s or Grantor’s default on the obligation secured by the Deed of Trust.” RCW 61.24.040(f) II. Counterpart at CP 306 (top).

The Trust Deed Act specifically forbids any deficiency claim by a lender who elects non-judicial foreclosure of a residence RCW 61.24.100(1). Why should the purchase at a trustee's sale be given more relief than the lender under the same circumstances?

The Trust Deed Act declares to all auction purchasers that the trustee's deed is without warranty. RCW 61.24.050 and RCW 61.24.040(f)V. The Trust Deed Act notice of sale requires as recitals:

“The above described property will be sold to satisfy the expense of sale and the obligation secured by the Deed of Trust as provided by statute. The sale will be made without warranty express or implied regarding title, possession or encumbrances on the day of \_\_\_\_\_.” RCW 61.24.040 (f) V. Counterpart of CP 306.

Another case which negates the contentions of Glepco/Hinton with respect to the availability of reformation of legal descriptions is found in *Halbert v. Forney*, 88 Wash.App. 669, 945 P.2d 1137 (1997). The court at page 674 recites the same RESTATEMENT (SECOND) OF CONTRACTS §151 (1981) cited in the above case and further references a restatement illustration at page 675 and footnote 2 as follows:

“The Halberts rely on Snyder for the proposition that mutual mistake can be invoked to insert a legally effective intent into the agreement. The Snyder court analyzed the doctrine of mutual mistake only after concluding that scrivener's error provided a basis for reformation. Snyder, 62 Wash.App. at 526-28, 814 P.2d

1204. Thus, the discussion of mutual mistake was dicta and was intertwined with the discussion of scrivener's error."...

The Halbert court said at page 675:

"... if instruments such as this were routinely reformed, parties would have no incentive to include a proper legal description in any instruments purporting to convey real property. Enforcement of such agreements would effectively nullify the Statute of Frauds and involve the courts and precisely the "recourse to oral testimony" the statute seeks to avoid. We have no authority to create a holding that leads to such a result. The Supreme Court's 1949 holding still controls: "[I]t is fair and just to require people dealing with real estate to properly and adequately describe it, so that courts may not be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties." *Martin*, 35 Wash.2d at 228, 212 P.2d 107; *See* RCW 64.04.010; RCW 64.04.020."

The court should not intervene to add legal description in a setting where parties actually negotiate and make representations to each other. How much less equitable is it for the trial court to have overridden the clear mandate of the Trust Deed Act and the constructive knowledge of the purchaser at the trustee's sale to change the legal description from the east 105 feet to 314 feet frontage on Dodge Valley Road? As the court in *Halbert* declared, the rule is well founded that persons dealing with real property must describe it precisely.

**Relief Sought by Appellants who Violate State Law and County Ordinance:** Glepco/Hinton asks the court to become a code enforcement officer for Skagit County. In a context of a banking

transaction it is preferable to respect the judgment of the lender and the borrower as to the security given for a particular loan. If there are consequences under local codes or state law respecting subdivisions, the lender and borrower should make wise decisions. When there are problems that result in default and foreclosure it is not the role of the successor trustee to resolve the application of subdivision rules or county ordinances. Rather, the bidders at the sale decide what is appropriate. The bank as a potential bidder takes what they reserved to themselves as security. The borrower who satisfies the loan gets what they gave as security. In the case of a bid as Glepco/Hinton made they get what the deed of trust legally describes. Among other provisions not mentioned in the Respondent's Brief are the saving provisions of RCW 58.17.210, the so called innocent purchaser rule. Reinstras submit that the parties can resolve the land use issues without the intervention of the successor trustee or the court.

**Deed of Trust Statute RCW 61.24.050.** The language cited by Glepco/Hinton has a clear purpose. That purpose is to bring forward the sequential conveyances in a chain of title to the most recently recorded document affecting a tract of land. In the case of Reinstras they were the original deed of acquisition, the deed by which People's Bank and later GMAC secured loans. At a point along the way in the sequence of

transactions there may have been a delay by a trustee in recording the reconveyance of the prior deed of trust. That delay is not to prevent the validation of the subsequently granted deed of trust pending recording of the reconveyance of the previously satisfied obligation.

Glepeco/Hinton would have the court believe that the language is intended to adopt a standard other than legal descriptions sufficient to give a surveyor adequate direction to find the property without further instruction. That is an erroneous interpretation of the highlighted language in RCW 61.24.050.

**Mutual Mistake:** All the cases cited with respect to mutual mistake are cases in which the grantor and the grantee or the vendor and the purchaser make claims with respect to their contractual undertakings between them. In none of the cases does a purchaser at a trustee's sale assert the right to reform the trustee's deed or to reform the deed of trust upon which a notice of sale is based.

**B. Reply to opposition to CR 12(b)(6) issues:** 1. See Discussion of *Denaxas* case supra pp. 10.

2. The record is very clear that Vestus provides the same information to its subscribers that the trustee gives to the public. See Peter Papadopulos Affidavit. [CP 328, lines 7-12]. For Glepeco/Hinton to ignore the fact that thousands of people are looking at notices of trustee's

sale and making decisions about whether or not to bid belies the argument presented at pages 32 and 33 of the Respondents' Brief. The Glepco/Hinton Brief pp. 21, 32, and 40 refers to a windfall. The Brief does not acknowledge the harm done to the Reinstras interest and the harm to third parties who would have bid if they were given an opportunity to bid on the combined Parcel A and Parcel B described by Glepco/Hinton. Thus the trial court erred when it reformed the trustee's deed.

3. Quiet Title Relief. Any post sale activity which exacts further consideration from the participant in a non-judicial foreclosure is inconsistent with the intent of the Trust Deed Act as argued in the Appellant's Brief. *Phillips v. Blaser*, 13 Wash.2d. 439, 449, 125 P.2d 291 (1942) served to illustrate why the Trust Deed Act was adopted. The tendency of deeds given as security create legal problems including proliferation of quiet title actions and the need for declaratory relief. The purpose of the Trust Deed Act was to avoid these things by providing a rigid structure within which a borrower could borrow with a limited liability in the event of a non-judicial foreclosure. The lender could lend with the expectation that the land would be security for their loan, interest and costs of enforcement.

4. Reinstras have previously stated a position with respect to the after acquired title references in RCW 61.24.050 supra at page 20.

5. The “identifiers”. Glepco/Hinton continue to ignore the asterisk provided by the successor trustee on the Notice of Sale. Reading the published information is the responsibility of a bidder at a trustee’s sale. Failure to read it is not a cause for reformation of the trustee’s deed. See case law including *Denaxas* supra at page 10.

The cases cited by Glepco/Hinton are not interpretation of the Trust Deed Act or the rights of parties who purchase at trustee’s sales. Glepco/Hinton are not able to put their square peg described as Parcel A in the round hole that encompasses Parcel A and Parcel B.

**IV. Attorney Fees Request (RAP 18.1).** The Respondent’s Brief contends that Glepco/Hinton is entitled to attorney’s fees on appeal. RAP 18.1(a) declares:

“If applicable law grants to a party the right to recovery reasonable attorney’s fees or expenses on a review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule unless a statute specifies that the request is to be directed to the trial court.”

The legislature has not granted attorney fees to parties engaged in litigation under the Declaratory Judgment Act or the Quiet Title Chapter 7.28 RCW.

Glepco/Hinton suggests that the deed of trust paragraph 26 quoted at page 42 of the Respondent’s Brief [CP 189] provide a contractual basis

for collection of fees. This interpretation is completely at odds with the Trust Deed Act and particularly the sections of Trust Deed Act protective of borrowers whose interest is terminated by non-judicial foreclosure. The election of GMAC to use the non-judicial method of foreclosure ends the right of the lender and the lender's successors to collect a deficiency judgment against the homeowner. See RCW 61.24.040(f) II Notice of Trustee's Sale supra at 20. Also RCW 61.24.100. It is also instructive to note that RCW 61.24.127 specifically preserves right of the borrower or grantor and not others to certain remedies for a foreclosure. Post sale remedies are limited to monetary damages. Thus a claim for attorney's fees against a purchaser suing for remedies not available to the lender open the door to an award of fees under RAP 18.1(a). The same statute does not have a remedy for the lender or for the lender's successors. Most recent case cited Cornish College of the Arts v. 1000 Virginia Ltd. Partnership, 158 Wash.App. 203, 242 P.3d 1 (Div. 1, 2010) awarded attorney's fees based on a contract between the parties to the litigation calling for attorney's fees and costs to the "substantially prevailing party". The circumstances of that dispute involving an option, leased property and avoid any reference to the Trust Deed Act or the Declaratory Judgment Act do not guide the court's action with respect to their requested award of fees. The Supreme Court has a common law cause of action recognized

that malicious acts in clouding the title of a real property owner seeking to sell can give rise to a cause of action for damages. This was a departure from the statutory language and was justified by extraordinary circumstances in Rorvig v. Douglas, 123 Wash.2d 854, 873 P.2d 492 (1994). The facts and circumstances here are not analogous and the claim of attorney fees should be dismissed.

The case of Seattle First Nat. Bank v. Washington Insurance Guaranty Ass'n, 116 Wash.2d 398, 804 P.2d 1263 (1991) involves litigation over the recovery of attorney's fees from the State Insurance Guaranty Association under an act of the legislature protecting insurance companies against the insolvency of insurers within the Association. The court found that where policies of insurance provided for shifting of fees that the State Insurance Guaranty Act applied and allowed for recovery of attorney's fees. The application of this case to a purchaser at a trustee's sale suing the original maker of the note and grantor of the trust deed seems remote at best.

The case of Swindle v. Harvey, 23 So.3d 562 (Miss.App 2009) has been offered for the proposition that a reformation request involving a deed of trust was granted. A commercial borrower is treated differently than a residential borrower by the Trust Deed Act. RCW 61.24.100(1). Nevertheless, the case of Swindle v. Harvey is also unusual in that lender

and commercial borrower had an arbitration clause in their agreement. The bank sued to enforce the arbitration clause. Under the arbitration clause the dispute arose. Therefore, it is difficult to deduce the proposition for which the case is cited by Glepco/Hinton. In any case the deed is not controlling authority because it is a Mississippi Court of Appeals case. It involves an arbitration clause in a particular contract not the Trust Deed Act and it involves commercial lender/borrower even though the subject matter of the dispute involves the residence of the commercial borrower.

#### IV. CONCLUSION

Chapter 61.24 RCW does prevent the equitable relief of reformation to a trustee's sale purchaser where the legal description of the property is constructively known to the buyer at the time of purchase and is consistent with the deed of trust and notice of trustee's sale.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of May 2012.

JONES & SMITH

  
GARY T. JONES, WSBA #5217  
Attorney for Appellants Reinstra  
415 Pine Street  
PO Box 1245  
Mount Vernon, WA 98273  
(360) 336-6608

NO. 67934-1-I

---

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

---

AARON REINSTRA and JAIME REINSTRA, husband and wife

Appellants,

v.

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

Respondents.

---

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

---

Submitted by: Gary T. Jones, WSBA #5217  
Jones & Smith  
PO Box 1245  
Mount Vernon, WA 98273  
Telephone: (360) 336-6608  
Facsimile: (360) 336-2094

Attorney for Appellants Reinstra

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 MAY 22 AM 11:20

ORIGINAL

I declare under penalty of perjury under the laws of the State of Washington that on the 19<sup>th</sup> day of May 2012, I caused to be served in the manner indicated, APPELLANT'S REPLY on file herein upon the following:

Charles E. Watts, WSBA #2331  
Oseran, Hahn, Spring, Straight & Watts, P.S.  
Attorney for Plaintiffs  
10900 NE Fourth Street #1430  
Bellevue, WA 98004  
 Via Mail  
 Via Hand-Delivery  
 Via email to: tedwatts@ohswlaw.com

Court of Appeals, Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-1176

Via Mail  
 Via Hand-Delivery  
 Via Facsimile to: Laurie.Sanders@courts.wa.gov

Signed at Mount Vernon, Washington on this 19<sup>th</sup> day of May  
2012.

  
LEWELLA FAYE DAVIS