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NO. 1034156

**SUPREME COURT OF THE
STATE OF WASHINGTON**

JOSEPH GAVIN MORGAN, Petitioner,

v.

PIERCE COUNTY, a governmental entity of Pierce County,
State of Washington, Respondent.

**RESPONDENT PIERCE COUNTY'S ANSWER TO
PETITION FOR REVIEW**

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I. INTRODUCTION

COMES NOW Respondent Pierce County (hereinafter "Respondent") by and through its attorneys of record, Pierce County Prosecuting Attorney Mary Robnett and Deputy Prosecuting Attorney Kristal Cowger and submits this brief in opposition to Petitioner's Petition for Discretionary Review.

II. RESTATEMENT OF THE ISSUES

Was Petitioner's case properly dismissed when the public duty doctrine barred Petitioner's negligence claim against Pierce County?

III. STATEMENT OF THE CASE

Petitioner was the owner of a property located at 1707 South State Street, Tacoma, Pierce County, Washington. CP 4. Petitioner Joseph Gavin Morgan was served with a Summons and Complaint for Judicial Foreclosure of Deed of Trust. CP 5. The lawsuit was titled *Broker Solutions, Inc. dba New American Funding, a Corporation v. Joseph Gavin Morgan, an individual, et. al.*, and was filed in Pierce County Superior

Court, Cause No. 17-2-12071-1 on October 9, 2017. CP 5, 11-58. Neither Pierce County nor Pierce County Sheriff's Department were party to that lawsuit. A Judgment and Decree of Foreclosure was entered in favor of the Plaintiff in that suit, Broker Solutions, Inc., on February 6, 2020. CP 5. An order authorizing the sale of the subject property was entered on February 26, 2020. CP 6. The sale was held on May 1, 2020, at 930 Tacoma Avenue South, Tacoma, Washington, conducted by a Pierce County Sheriff's Department agent. CP 6.

The Announcement of Sale provided that the "successful bidder will be allowed until 2:00 PM" the day of the sale to present cash or cashier's check in the full amount of the bid. CP 117.

Vestus, LLC had the highest bid during the auction but failed to tender payment by the 2:00 PM deadline. At 2:04 PM Sheriff's Department representative Christine Eaves called Catamount Properties and "offered opportunity to tender 2nd place bid" by the 4:00 PM conclusion of the sale, but they

"didn't show up or call." *Id.* The sale concluded at 4:00 PM. *See* RCW 6.21.050(1) ("All sales of property under execution, order of sale, or decree, shall be made by auction between nine o'clock in the morning and four o'clock in the afternoon."). At the conclusion of the sale, the property was sold to the judgment creditor for the amount owing on the judgment. CP 6, 74, 117.

The Sheriff's Return on Writ of Execution was filed with the Court on May 11, 2020. CP 70-79. A Motion for Order Confirming Sale was filed by attorneys for Broker Solutions, Inc., on June 1, 2020. CP 81-88. The Order Confirming Sale was entered on June 1, 2020. CP 90-93. Petitioner concedes that no objection to an Order Confirming Sale was filed, and that Petitioner did not appeal the Order Confirming Sale.

Petitioner then filed this new and separate lawsuit against Pierce County and Pierce County Sheriff's Department, alleging negligence in conducting an execution sale, resulting from a

case in which Pierce County and Pierce County Sheriff's Department were not parties.

IV. ARGUMENT

A. PLAINTIFF'S NEGLIGENCE CLAIM IS BARRED BY THE PUBLIC DUTY DOCTRINE.

To prove an action for negligence, a plaintiff must demonstrate that the defendant owed a duty to him, breached this duty, and that his breach proximately caused the plaintiff's injury. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). A plaintiff must prove each of the following elements by a preponderance of the evidence: (1) duty; (2) breach; (3) injury; and (4) proximate cause. *See, e.g., Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 802 P.2d 1360 (1991). The threshold determination "is a question of law; this is, whether a duty of care is owed by the defendant to the plaintiff." *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988).

"Because governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort

law, we carefully analyze the threshold element of duty in negligence claims against governmental entities." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013) (citing *Osborn v. Mason Cnty.*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006)); *see, also, Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 887, 288 P.3d 328 (2012) (Chambers, J., concurring) ("Private persons do not govern, pass laws, or hold elections. Private persons are not required by statute or ordinance to issue permits, inspect buildings, or maintain the peace and dignity of the state of Washington."). Under the public duty doctrine, "[w]hen the defendant is a public official ... no liability will attach for a public official's negligent conduct unless the plaintiff can show that the duty was owed to [him] rather than to the general public." *Donaldson v. City of Seattle*, 65 Wn.App. 661, 666, 831 P.2d 1098 (1992) (citing *Taylor*, 759 P.2d at 449-50).

There are "four exceptions to the public duty doctrine that provide for liability even in the face of other public duties."

Beltran-Serrano v. City of Tacoma, 193 Wn.2d 537, 549, 442 P.3d 608 (2019). The four exceptions are "(1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, (4) a special relationship." *Id.* at 549 n. 7. Petitioner argues that either the legislative intent or failure to enforce exception applies in this case. Petitioner's Brief at 1.

1. RCW 6.21 Governing Execution Sales of Real Property Does Not Show an Intent to Create a Duty.

The legislative intent exception to the public duty doctrine applies "when the terms of a legislative enactment evidence an intent to identify and protect a particular circumscribed class of persons." *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). The "intent must be clearly expressed within the provision – it will not be implied." *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 930, 969 P.2d 75 (1998).

The statute governing execution sales of real property following judicial foreclosures is RCW 6.21, et. seq.

Specifically, until July 24, 2021, RCW 6.21.100 addressed the sale of real property and the Sheriff's return and certificate of sale, and provided in part:

(1) The officer shall strike off the land to the highest bidder, **who shall forthwith pay the money bid to the officer**, who shall return the money with the execution and the report of proceedings on the execution to the clerk of the court from which the execution issued: PROVIDED, HOWEVER, That when final judgment shall have been entered in the supreme court or the court of appeals and the execution upon which sale has been made issued from said court, the return shall be made to the superior court in which the action was originally commenced, and the same proceedings shall be had as though execution had issued from that superior court.

(2) At the time of the sale, the sheriff shall prepare a certificate of the sale, containing a particular description of the property sold, the price bid for each distinct lot or parcel, and the whole price paid; and when subject to redemption, it shall be so stated. The matters contained in such certificate shall be substantially stated in the sheriff's return of proceedings upon the writ. Upon receipt of the purchase price, the sheriff shall give a copy of the certificate to the purchaser and the original certificate to the clerk of the court with the return on the execution to hold for delivery to the purchaser upon confirmation of the sale.

RCW 6.21.100 (Effective: to July 24, 2021) (Emphasis added).

The statute here creates no duty to a specific individual or class of individuals. In fact, case law provides that the officer "has duties to perform to the complainant, the vendor, to the purchase **and** to the court." *Williams v. Cont'l Sec. Corp.*, 22 Wn.2d 1, 11, 153 P.2d 847 (1944) (Emphasis added). The statute simply provides for the Sheriff (as a nonparty to the judicial foreclosure action) to conduct the sale of the property pursuant to the underlying obligation owed to the judgment creditor. The statute is in place for the Sheriff to conduct the sale for the benefit of the judgment creditor, as well as to ensure a fair process for the debtor, in that the property will be sold to allow the creditor to collect on the obligation they are owed, as well as to obtain the highest bid for the property. The statute does not create a duty owed to one individual; it simply provides the process for the Sheriff to conduct judicial foreclosure sales.

2. The County Did Not Owe a Duty Under the Failure to Enforce Exception.

The failure to enforce exception to the public duty doctrine applies when "(1) the official has a duty to enforce a statute, (2) the official has actual knowledge of a statutory violation, (3) the official fails to correct the violation, and (4) the plaintiff is within the class the statute protects." *Smith v. City of Kelso*, 112 Wn.App. 277, 282, 48 P.3d 372 (2002). This exception is construed narrowly, *Gorman v. Pierce County*, 176 Wn.App. 63, 77, 307 P.3d 795 (2013).

The failure to enforce exception applies if there is a mandatory duty to take a specific action to correct a known statutory violation. *Halleran v. Nu W., Inc.*, 123 Wn.App. 701, 714, 98 P.3d 270 (2011). The burden is on the plaintiff to prove each element of this exception. *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

The Sheriff was not **mandated** by statute to sell the property to the highest bidder as asserted by Petitioner. Instead,

the statute provides the Sheriff "a reasonable latitude of discretion" as to the method of selling in varying respects. *Williams*, 22 Wn.2d at 11. Courts have consistently upheld the Sheriff's exercise of discretion in conducting execution sales. *See, e.g., Investment Exchange Corp. v. Magnum T., Inc.*, 3 Wn.App. 612, 476 P.2d 731 (Div. 1 1970); *Braman v. Kuper*, 51 Wn.2d 676, 321 P.2d 275 (1958); *Williams*, 22 Wn.2d 1; *Brice v. Minshull*, 137 Wn. 70, 241 P. 667 (1925); *State v. Carpenter*, 19 Wn. 378, 53 P. 342 (1898).

In this case, the Sheriff conducted the sale as the Announcement of Sale provided. There was a high bidder during the sale. CP 117-118. The high bidder failed to pay by the time required in the Announcement of Sale. *Id.* The property was offered to the party with the second highest bid during the sale, who was provided a reasonable time to pay. *Id.* The party with the second highest bid also failed to pay. *Id.* Statute provides the sale is concluded at 4:00 PM, and with the discretion granted to the Sheriff, the property was sold to the

judgment creditor at the 4:00 PM conclusion of the sale. RCW 6.21.050(1); CP 117-118. The Sheriff's representative prepared a Return on Writ of Execution and Certificate of Sale that described the property sold and the amount bid for the parcel sold exactly as required by RCW 6.21.100(2). CP 70-71, 117. The Return on Writ of Execution and Certificate of Sale were filed with the Clerk's Office as provided by statute. *Id.*

A review of the case law makes it clear that the officer conducting the sale has discretion and does not have a specific duty to sell the property for the highest amount bid at the sale.

3. The Statute Provides a Specific Remedy to Address Any Irregularities in Sale Proceedings, Which Petitioner Failed to Utilize.

RCW 6.21.110 outlines the process of judicial confirmation of execution sales and provides in part:

(1) Upon the return of any sale of real estate, the clerk: (a) Shall enter the cause, on which the execution or order of sale issued, by its title, on the motion docket, and mark opposite the same: "Sale of land for confirmation"; (b) shall mail notice of the filing of the return of sale to all parties who have entered a written notice of appearance in the action and who have not had an order of default

entered against them; (c) shall file proof of such mailing in the action; (d) shall apply the proceeds of the sale returned by the sheriff, or so much thereof as may be necessary, to satisfaction of the judgment, including interest as provided in the judgment, and shall pay any excess proceeds as provided in subsection (5) of this section by direction of court order; and (e) upon confirmation of the sale, shall deliver the original certificate of sale to the purchaser.

(2) The judgment creditor or successful purchaser at the sheriff's sale is entitled to an order confirming the sale at any time after twenty days have elapsed from the mailing of the notice of the filing of the sheriff's return, on motion with notice given to all parties who have entered a written notice of appearance in the action and who have not had an order of default entered against them, **unless the judgment debtor, or in case of the judgment debtor's death, the representative, or any nondefaulting party to whom notice was sent shall file objections to confirmation with the clerk within twenty days after the mailing of the notice of the filing of such return.**

(3) **If objections to confirmation are filed, the court shall nevertheless allow the order confirming the sale, unless on the hearing of the motion, it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting.** In the latter case, the court shall disallow the motion and direct that the property be resold, in whole or in part, as

the case may be, as upon an execution received as of that date.

RCW 6.21.110 (emphasis added).

"[A] confirmation of the sale is a conclusive determination of the regularity of the sale proceedings." *Northern Commercial Co. v. E.J. Hermann Co., Inc.*, 22 Wn.App. 963, 971, 593 P.2d 1332 (1979) (citing RCW 6.24.100). Plaintiff "cannot question the adequacy of the sale price, where he took no steps to prevent confirmation of the sale." *Atwood v. McGrath*, 137 Wn. 400, 406-407, 242 P. 648 (1926) (citing *Grunden v. German*, 110 Wn. 237, 188 P. 491 (1920)). "Pursuant to RCW 6.24.100 ... a court order confirming a sheriff's sale cures all irregularities attending such sale aside from jurisdictional defects. Thus, objections relating to inadequate price, inadequate search for personal property or other irregular circumstances must be made prior to confirmation." *Miebach v. Colasurdo*, 35 Wn.App. 803, 812, 670 P.2d 276 (1983) (citing *Atwood*, 137 at 406-407; *Malo v.*

Anderson, 62 Wn.2d 813, 815, 384 P.2d 867 (1963); *Casa del Rey v. Hart*, 31 Wn.App. 532, 537-38, 643 P.2d 900 (1982) (Waiting 16 months after order of confirmation, without moving to set aside the sale or object to entry of the order of confirmation, with constructive notice of sale constituted waiver of right to object.). The "order confirming an execution sale is a final judgment and appealable." *Casa del Rey*, 31 Wn.App. at 537 (1982) (*citing Northern Commercial Co.*, 22 Wn.App. at 963).

Here, Petitioner concedes he failed to object to confirmation of the sale and also failed to appeal the order confirming the sale in the judicial foreclosure action. RP 3. If Petitioner had objected to the confirmation of sale and the court determined in its discretion that there was sufficient reason not to confirm the sale, per statute, the remedy would have been for the court to order the property to be resold, rather than confirming the sale. *See, Sixty-01 Ass'n of Apartment Owners v. Parsons*, 181 Wn.2d 316, 335 P.3d 933 (2014).

V. CONCLUSION

The Court of Appeals properly affirmed the Trial Court's dismissal of Petitioner's Complaint because the public duty doctrine barred Petitioner's negligence claim.

I certify that this brief contains 2,620 words and is in compliance with the length limitations of RAP 18.17(c).

DATED this 27th day of September, 2024.

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CERTIFICATE OF SERVICE

On September 27, 2024, I hereby certify that I electronically filed the foregoing RESPONDENT PIERCE COUNTY'S ANSWER TO PETITION FOR REVIEW using the Washington State Appellate Courts Filing Portal, which will send notification of such filing to the following active parties on the case:

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