No. 85260-0

Stephens, J. (concurring)—Washington's deed of trust act, chapter 61.24 RCW, reflects a legislative policy choice to create an efficient and inexpensive process for nonjudicial foreclosures. It balances the interests of preventing wrongful foreclosures and promoting the stability of land titles. In reaching for a remedy for the grantors in this case, the majority upsets this balance, broadly allowing postsale challenges to foreclosure sales and eroding the presumed validity of a standard-form deed of trust. While this leads to a positive outcome for Bart and Karen Tecca, ultimately it will disserve the public by undermining confidence in the deed of trust system and discouraging its use.

I would resolve this case on narrow equitable grounds and leave the deed of trust system intact. Washington courts recognize that a foreclosure sale may be set aside based on a grossly inadequate sales price coupled with unfair circumstances or procedural irregularities surrounding the sale. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 914, 154 P.3d 882 (2007). While there is no firm benchmark for

when a sale price is inadequate, courts frequently set aside sales for less than 20 percent of property value, especially when the surrounding circumstances suggest that irregular procedures may have contributed to the low price. Restatement (Third) of Property § 8.3 cmt. b (1997) ("Generally, however, a court is warranted in invalidating a sale where the price is less than 20 percent of fair market value . . . ."); *Long Lake Lumber Co. v. Stewart*, 198 Wash. 348, 352, 88 P.2d 414 (1939) ("'But where there is a serious inadequacy in the price realized, *the court will seize upon any incident of surprise, undue advantage, irregularity, or other equitable circumstance to grant relief . . . .*'" (emphasis added) (quoting 26 Ruling Case Law § 1294)).

The low sales price and unfair circumstances in this case provide equitable grounds to invalidate the sale despite the Teccas' failure to seek an injunction before the sale. Like the majority, I find it significant that the string of sale continuances made it difficult for potential buyers to participate. Four or five bidders appeared at the initial sale, but only Ron Dickinson and one other bidder were present at the eventual sale 161 days later. Dickinson himself had to do a fair amount of legwork to determine if the sale was going to happen. And, he paid far less than he was prepared to pay for the property. For their part, the Teccas tendered the final payment under the forbearance agreement more than 11 days before the sale, supporting their argument that it should have been canceled or rescheduled with additional public notice.

Moreover, in light of the clear procedural irregularities and the low sale price, Dickinson cannot claim the status of a bona fide purchaser, though not for all the reasons the majority articulates. [1] "A bona fide purchaser for value is one who without notice of another's claim of right to, or equity in, the property prior to his acquisition of title, has paid the vendor a valuable consideration." *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960). Notice of another's claim can be imputed when the buyer has "such information as would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry . . . ." *Id.* When such a circumstance would put a person of reasonable prudence on inquiry notice, however, that circumstance "is only notice of what a reasonable inquiry would reveal." *Id.* (citing *Paganalli v. Swendsen*, 50 Wn.2d 304, 311 P.2d 676 (1957)). Here, Dickinson obtained the original notice of sale; he therefore had actual notice the sale had been continued for more than 120 days. The procedural irregularities surrounding the sale, combined with the extremely low sale price, would put a person of reasonable prudence on inquiry notice. A reasonable inquiry would have revealed the Teccas' efforts to cure.

[1] Given the majority's conclusion that the sale is invalid because it was without statutory authority, majority at 8-9, it is unclear why the majority goes on to consider whether Dickinson was a bona fide purchaser, majority at 14-15. While the majority does not use the term "void," it essentially concludes the sale was ultra vires and without legal force. But a void deed cannot pass title; only where a transaction is *voidable* (that is, subject to avoidance by the original parties under common law or statutory law) can a bona fide purchaser take good title. *See, e.g.*, *State v. Mermis*, 105 Wn. App. 738, 748 & nn.27, 28, 20 P.3d 1044 (2001). Thus, if the transaction is truly invalid and of no legal effect, as the majority maintains, there is no need to consider whether Dickinson was a bona fide purchaser.

Accordingly, I would affirm the Court of Appeals based solely on the Teccas' equitable argument arising from these facts. I would not reach beyond these particular circumstances, however. I am concerned that the majority's resolution of this case greatly unsettles reasonable expectations in the arena of nonjudicial foreclosures. In particular, the majority declares that a trustee's violation of timelines in the act renders a foreclosure sale invalid, thereby allowing a grantor to set aside the sale after-the-fact, notwithstanding the grantor's failure to use the presale remedies under RCW 61.24.130. Further, in concluding that Dickinson is not a bona fide purchaser, the majority creates new duties of inquiry that are in no way reasonable and make it impractical for potential buyers to rely on the recitals in a deed of trust. I will address each of these concerns separately.

Procedural Irregularities

Initially, I disagree with the majority that a violation of statutory timelines by a trustee is a procedural irregularity that invalidates a foreclosure sale. The majority's reasoning all but eliminates the statutory requirement that a challenge to a foreclosure sale be brought before the sale takes place. Until today, we have consistently held that the statutory procedure of seeking to enjoin the sale is "'the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.'" *Plein v. Lackey*, 149 Wn.2d 214, 226, 67 P.3d 1061 (2003) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985)). Under the act, interest holders are notified that "[a]nyone having any

objection to the sale *on any grounds whatsoever* will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale . . . ." RCW 61.24.040(1)(f)(IX) (emphasis added). Accordingly, courts deem the claims of interested parties waived where they failed to seek an injunction despite having had an opportunity to do so. *Plein*, 149 Wn.2d at 227. Courts thereby maintain the sanctity of land titles and ensure efficient resolution of defaulted loans secured by real property.

The majority erodes these protections for reasons that cannot withstand scrutiny. First, the majority assumes that property owners such as the Teccas are not in a position to restrain a sale when they have acknowledged their default by entering into a forbearance agreement. Majority at 12 ("Dickinson seemingly argues that [the owners'] presale remedies were triggered the moment they received notice of the trustee's sale. Yet this argument assumes the borrower can challenge the underlying debt."). But an owner can seek to enjoin the sale even while acknowledging the underlying debt. *See Steward v. Good*, 51 Wn. App. 509, 514-15, 754 P.2d 150 (1988) (noting owners in default waived right to contest a procedurally defective sale where they failed to enjoin the sale). The second reason the majority declines to find waiver is that the owners had no opportunity to restrain the sale. *See* majority at 13. This contention is belied by the uncontested facts. The Teccas were given notice that their property was subject to a foreclosure sale unless they moved to enjoin. Given that the trustee did not file a notice of

discontinuance or reinstate the deed of trust, *see* RCW 61.24.090(3), (6), it should have been clear to the owners that a motion to restrain the sale was in order. 27 Marjorie Dick Rombauer, Washington Practice: Creditors' Remedies—Debtors' Relief § 3.61, at 202-03 (1998) (noting "the dangers" in failing to enjoin the sale "are obvious").

The majority makes much of the forbearance agreement, suggesting that the sale itself violated its terms and that the owners were therefore taken by surprise when the sale occurred in breach of contract. *See* majority at 13-14. A breach of contract, however, is not unforeseeable. The statutory means for grantors to protect themselves against the contingency of a *scheduled, recorded* judicial foreclosure sale going forward is by enjoining it. RCW 61.24.040(1)(f)(IX). Assuming the property was sold in violation of the forbearance agreement, the owners' remedy is to be found in a suit for breach of contract seeking money damages. They should not be allowed to invalidate the sale when they had ample opportunity to obtain an injunction and raise these grounds in a presale lawsuit.[2]

The majority claims this case is unlike *Plein*—where the borrower had a

[2] Amendments to the act postdating this case additionally authorize a claim for monetary damages against a trustee for, among other things, failure to materially comply with the act. RCW 61.24.127; Engrossed S.B. 5810, at 8-9, 61st Leg., Reg. Sess. (Wash. 2009). While the Teccas argue these legislative changes support granting relief, significantly none of the relief they authorize includes invalidating a foreclosure sale. Nor do the amendments alter the strong statutory policy of requiring a motion to enjoin a sale before it occurs. Indeed, the amendments to RCW 61.24.127 suggest that money damages against the trustee are warranted in part because the grantor cannot recover property sold to a bona fide purchaser. *See* RCW 61.24.127(2)(c) (noting claims for money damages do "not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property").

defense two months before the sale—because here the owners supposedly had no knowledge of their alleged breach of the forbearance agreement in time to restrain the sale. Again, this assertion is not borne out by the record. To the extent that the owners' "defense" is that the sale occurred outside the 120 day limit, they were on notice that the timelines had passed and had sufficient time to move to enjoin any sale.[3] To the extent the owners claim they had no written notice of the sale continuance in accordance with the forbearance requirement, they *did* receive the statutory notice their property was to be sold and could have sought an injunction to enforce the contract and restrain the sale.

This court in *Plein* held that waiver applies when the borrower has notice of the right to enjoin the sale, knows the asserted defense before the sale, and fails to pursue presale remedies. *Plein*, 149 Wn.2d at 229 (citing RCW 61.24.040(1)(f)(IX)). In contrast, the majority today holds that "courts must be able to review postsale challenges" promptly brought "to ensure trustees strictly comply with the requirements of the act." Majority at 14. In fact, the majority concludes that seeking an injunction is merely permissive. *Id.* at 11 (noting use of the word "'may'").

[3] The sale occurred 161 days after originally scheduled. Because the trustee must be given at least five days' notice, RCW 61.24.130(2), the owners had 36 days following the expiration of the 120 day period during which they could have sought to restrain an untimely sale. At the time of the events in this case, the act permitted a continuance to be announced by public proclamation at the time and place fixed for sale. Former RCW 61.24.040(6) (2006). The act was subsequently amended to require written notice for continuances beyond the date of sale. Substitute S.B. 5378, at 13, 60th Leg., Reg. Sess. (Wash. 2008).

This line of reasoning effectively ends the doctrine of waiver and overrules *Plein*. The majority concludes that "[w]hen trustees strictly comply with their legal obligations under the act, interested parties will have no claim for postsale relief . . . ." *Id.* at 14. Of course, it is hard to imagine a claim for relief *not* based on a violation of some legal obligation. Therefore, the majority's approach would actually permit postsale challenges to foreclosure sales as a general rule, at least where "the claims are promptly asserted." *Id.*[4]

There may be some merit to creating a system that allows courts to broadly review procedural irregularities in foreclosure proceedings after a sale is complete, but this is not the system our legislature created in the act. The legislature ranked finality of land sales over entertaining the postsale grievances of grantors. This valuing of sale finality is evidenced by the *conclusive* presumption given to deed recitals showing statutory compliance when the buyer is a bona fide purchaser. RCW 61.24.040(7). It is also manifested by the statutory warning that failure to enjoin may result in waiver "of *any* proper grounds for invalidating the Trustee's

[4] The act's procedural requirements are extensive. While strict compliance is ideal, it is far from certain that failure to comply with every statutory mandate will prejudice the interest-holder. Where the interest-holder believes noncompliance results in prejudice, an injunction should be sought. Of course, some procedural violations cannot be enjoined before the sale because they occur *at* the sale. For example, if the trustee accepted the third highest bid, instead of the first highest bid, a postsale challenge may be countenanced. However, the challenger would still need to show prejudice. *Colo. Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 666, 246 P.3d 835 (2011) ("The same standard applies to defects occurring at or after the time of the sale—absent actual prejudice from the error, a claim is waived if no action is taken to set aside the sale."). Even then, the grantor would likely only have an action for money damages against the trustee, assuming the deed recitals were adequate under RCW 61.24.040 and the buyer was a bona fide purchaser.

sale." RCW 61.24.040(1)(f)(IX) (emphasis added). This rule makes sense. Many interest-holders, especially grantors in default, may decide a challenge is not worth their while and will allow the sale to proceed. Doing so is a gamble, the risk of which the act places squarely on the interest-holder.

The majority would undo this risk allocation. Its insistence that the goal of stable land titles is better met "[w]hen trustees strictly comply with their legal obligations under the act," majority at 14, misses the mark. If a postsale challenge may be entertained, grantors aware of a procedural flaw will be well advised to keep mum until after the sale, especially when no cure of default is on the horizon. After all, a presale challenge may not delay the sale at all; it may simply result in a court order requiring the sale conform to the act. Waiting until the sale has occurred, however, may prove advantageous: under the majority's view, the sale is invalid and the beneficiary's only option may be to begin the notice and sale process all over again. By the time the property is finally renoticed for sale, the grantor may be able to cure and avoid the sale altogether.

Although avoiding the sale may benefit the individual grantor, allowing such postsale challenges will weaken the reliability of nonjudicial foreclosure sales to the detriment of landowners and purchasers alike. Indeed, if a trustee's sale can be challenged after the fact, "'title insurers will not insure, secured lenders will not lend on, and buyers will not purchase real property with title tracing to a trustee's deed.'" *Plein*, 149 Wn.2d at 228 n.5 (quoting amicus mem.).

Bona Fide Purchaser Doctrine

I also disagree with the majority's analysis of the bona fide purchaser doctrine. The breadth of circumstances the majority considers to conclude Dickinson was not a bona fide purchaser will make it very difficult for buyers at foreclosure sales to qualify for this status.

Building on Dickinson's real estate experience, the majority finds significance in Dickinson's brief conversation with Karen Tecca, during which he offered to buy the property and she insisted the foreclosure sale would not happen. From this exchange, which lasted about one minute, the majority draws the remarkable conclusion that Dickinson was on inquiry notice that the sale may have violated the forbearance agreement. The majority's implicit reasoning goes like this: Tecca's refusal to sell would suggest to the reasonably prudent person that Tecca intended to cure her default; a reasonable person, learning the property had come up for sale, would contact Tecca again to see if she had tried to cure the default; this conversation would likely reveal the forbearance agreement and its terms; and a reasonable person would then discern the fact that the sale was not in accordance with the agreement.

Not only does this chain of reasoning pile inference upon inference, it promotes a duty of inquiry previously unknown in this area of the law. Under the majority's view, a potential buyer must approach foreclosure proceedings with an inquisitiveness verging on the paranoid. He is no longer entitled to rely on the

notice of sale as establishing default if the owner has said something that implies an intent to cure. If such a verbal statement puts a potential buyer on notice that the owner may not actually be in default, what about the owner's *written* statement of intent to make payments? After all, a trust deed grantor has promised to make timely payments to the beneficiary, so is the existence of a recorded trust deed a circumstance putting a reasonable person on notice to ask the grantor whether the default referred to in the notice of sale actually exists? Apparently so, because the majority holds that Dickinson was not entitled to rely on the deed recitals here.

As to the deed recitals, the majority acknowledges that a recital of statutory compliance constitutes prima facie evidence of such compliance, which is conclusive in favor of a bona fide purchaser. Majority at 12 & n.5; *see* RCW 61.24.040(7). However, the majority takes an unprecedented look at these recitals, questioning their adequacy in light of "conclusory language" stating that all legal requirements of the act are met. Majority at 15 & n.9. The majority insists the deed must set forth the "facts" supporting this statement, which apparently includes the existence of any forbearance agreement that might support an owner's claim that a default has been cured. But we have never required such an exacting standard and have previously accepted nearly identical conclusory recitals. *See Glidden v. Mun. Auth. of Tacoma*, 111 Wn.2d 341, 345, 347, 758 P.2d 487, 764 P.2d 647 (1988) (giving conclusive presumption where deed inaccurately stated that notice had been "'transmitted by mail to all persons entitled thereto'" and that "'[a]ll legal

requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in Chapter 61.24 RCW'" (quoting recitals)).

Moreover, the specific recitals in this deed follow the form set out in the real property desk book and undoubtedly repeated in countless deeds recorded in Washington. 4 Wash. State Bar Ass'n, Washington Real Property Deskbook § 47.11(16), at 39-40 (3d ed. Supp. 2001). There is no precedent for the majority's conclusion that the drafters of deeds of trust fail to "recite the facts showing [statutory compliance]," RCW 61.24.040(7), when they use standard-form statements of statutory compliance. Majority at 15 n.9. The majority does not explain why conclusory recitals of fact are any less recitals of fact, and we have never before construed the statute in the way the majority would. Moreover, the majority is really complaining that the recitals in the deed of trust were inaccurate. *Id.* (noting "the deed also misleadingly listed the sale date in the notice of trustee's sale as February 16, 2007, instead of the original sale date of September 8, 2006" and that it "incorrectly states that the default was not cured"). Such looking behind the face of the deed's factual recitals is precisely what the presumptive validity of the deed precludes. RCW 61.24.040(7). I fear that the majority's new-found scrutiny of deeds of trust will greatly unsettle reasonable expectations in land titles.

In sum, I depart from the majority's reasoning. I would reject the argument that a trustee's failure to strictly comply with the procedural requirements of the act

invalidates a sale and opens the door to a postsale challenge. I would also be more circumspect in considering when a buyer at a foreclosure sale may rely on the recitals in a trust deed to claim the status of a bona fide purchaser. Instead, I would resolve this case on the narrow equitable ground that courts may invalidate an unfair foreclosure sale based on the combination of a grossly inadequate sale price and procedural irregularities. The combination of these circumstances cannot be known before the sale, and so it is appropriate—in exceptional circumstances—for a court to grant relief even after the sale has occurred. On this basis alone, I would affirm the Court of Appeals.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Mary E. Fairhurst