

FILED  
IN SUPREME COURT  
OF TEXAS

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No. 08-0444

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**IN THE SUPREME COURT OF TEXAS**

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**MYRAD PROPERTIES, INC.**

**PETITIONER,**

**v.**

**LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED  
HOLDERS OF GMAC COMMERCIAL MORTGAGE SECURITIES, INC., COMMERCIAL  
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-C1, ROBIN GREEN, AND  
MELISSA COBB**

**RESPONDENTS.**

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**PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS BRIEF ON THE MERITS**

---

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**ATTORNEYS FOR PETITIONER MYRAD  
PROPERTIES, INC.**

*Oral Argument Requested*

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## **I. INTRODUCTION**

On November 8, 2006, all parties were aware of several undisputed facts. A foreclosure sale had been conducted the previous day at which the auctioning trustee, in front of an audience of potential bidders, had recited only the property description of the Casa Grande Apartments in conducting his auction. (CR: 2435-2436, 2438; App. to Petitioner's Brief, Tab 3). Later that same day, the trustee executed, delivered and recorded a Substitute Trustee's Deed transferring legal title to the Casa Grande Apartments to LaSalle. The Substitute Trustee's Deed contained no ambiguities and clearly identified the property conveyed to be only the Casa Grande Apartments. (App. to Petitioner's Brief, Tab 1).

Faced with these undisputed facts, and assuming that Respondents intended but mistakenly did not include the La Casa Apartments in the Notice of Sale and Substitute Trustee's Deed (an assumption which Myrad contests), the Respondents had an easy and proper remedy available to them. In November 2006 they could have rescinded the sale and re-posted the property for foreclosure. This remedy would have added possibly an additional 45 to 60 days to the process. Yet Respondents made the conscious decision to instead utilize a correction deed in a way contrary to its intended purpose. (CR: 2424).

Rather than merely correcting a facial imperfection in the deed, the "Correction Deed" filed by Respondents purported to retroactively add to the foreclosure sale, a wholly separate, non-contiguous parcel of property over one mile away from the Casa Grande Apartments. The tortured logic of Respondents is that the total absence of an

entire description of a piece of property can be a facial imperfection subject to unilateral correction. Such an extension of existing Texas law is not warranted.

There could be no certainty in the deed records of this state if someone can unilaterally modify a deed after-the-fact to add wholly separate parcels of property not where mentioned in the original deed. Someone performing a title search on property would never be certain if that title search was accurate because a day or a year later, another person might file a correction deed to claim title to the same property. Title insurance, if available at all, would become prohibitively expensive because the title companies could no longer insure good title. This level of uncertainty is good to no one in the world of real estate – property owners, mortgage lenders, title insurance companies, realtors or property developers.

In nearly 200 years of jurisprudence in this state, Respondents have been unable to cite a single case allowing a correction deed to be used in the manner they used it in this case. The opinion of the Majority in the Third Court of Appeals would be the first case holding that a party can unilaterally file a correction deed to alter a prior unambiguous deed at foreclosure by adding a wholly separate parcel of property. The Majority's opinion must be reversed to prevent the fundamental departure from settled Texas law.

## **II. ARGUMENT**

### **A. Texas Law Prohibits the Respondents' Use of a Correction Deed.**

Myrad is not attempting to prohibit the use of Correction Deeds. Myrad only seeks to enforce long standing Texas law that holds correction deeds cannot be used to do more than correct facial imperfections in a deed. Under Texas Law, the test is whether

the correction deed is used to correct a facial imperfection of title and will not be used to enlarge the estate granted by the original deed. *Halbert v. Green*, 293 S.W.2d 848, 851 (Tex. 1956); *Sanchez v. Telles*, 960 S.W.2d 762, 768 (Tex. App. – El Paso 1997, writ denied). The circumstances of the cases cited by both parties bear this out. The cases concerning correction deeds cited by Respondents (*see* page 26 of Respondents’ Brief) are as follows: *Wilson v. Dearing, Inc.*, 415 S.W.2d 475, 476 (Tex. Civ. App. – Eastland 1967, no writ); *Parker v. McKinnon*, 353 S.W.2d 954, 955 (Tex. Civ. App. – Amarillo 1962, writ ref’d n.r.e.); *Adams v. First Nat. Bank of Bells/Savoy*, 154 S.W.3d 859 (Tex. App. – Dallas 2005, no pet.).

In *Wilson*, a 1930 deed recited a conveyance of the south 120 acres of the southwest one-half of Section 17, Block B-29 in Ward County instead of the south 120 acres of the north 240 acres of the west half of Section 17, Block B-29 in Ward County. *Wilson*, 415 S.W.2d at 476. A 1951 deed corrected this facial imperfection in the original deed. *Id.*

In *Parker v. McKinnon*, a “quit claim deed” was a correction deed because it corrected scrivener’s errors in the original deed and *did not* change the estate that was originally conveyed. On March 15, 1907, McKinnon conveyed to Davidson 640 acres of land but expressly retained a one-half interest in the minerals. 353 S.W.2d at 955. On December 18, 1911, McKinnon executed a “quit claim deed” to Davidson which acted to re-convey the 640 acres but fixed inaccuracies in the prior deed by inserting the county and state, correcting the volume number from 49 to 39 and correcting the survey designation from ‘G. G. & S. F. Ry. Co.’ to ‘G. C. & S. F. Ry. Co.’. *Id.* The stated

purpose of the “quit claim deed” was to correct these errors. *Id.* at 956. However, the “quit claim deed” failed to include the reservation of the one-half mineral interest. *Id.* at 955. Parker took title from Davidson and brought suit claiming that Parker had all rights to the minerals. *Id.* at 954. Parker argued that the quit claim deed was a new conveyance. The Court of Civil Appeals disagreed stating:

In our opinion the language clearly indicates the correction deed was simply intended to correct the description of the land conveyed by the prior deed. The omission of the mineral reservation in the correction deed, when considered with the language of the deed itself, does not lead to the conclusion that the correction deed was intended to change the parties' rights or the estate conveyed.

*Id.* at 956 (emphasis added).

Respondents cite *Adams v. First Nat. Bank of Bells/Savoy*, 154 S.W.3d 859 (Tex. App. – Dallas 2005, no pet.) for the proposition that “[a] correction deed which is filed and recorded raises a prima facie presumption of the truth of the facts recited within such deed.” Respondents’ Brief at p. 26. However, nothing in *Adams* suggests that a correction deed can be used to add a wholly new piece of real property to a foreclosure deed, after-the-fact. In that case, Adams complained, in part, that the bank which foreclosed on her property did so wrongfully because “the Bank gave different reasons for foreclosing in the foreclosure sale deed and the corrected foreclosure sale deed: in the originally filed documents the foreclosure was because of a default in payment and in the corrected documents the foreclosure was because of the unauthorized transfer of the property.” *Id.* at 871. The borrower did not assert that the original deed remained valid or that the correction deed was invalid. Rather, the borrower asserted estoppel by deed in

an attempt to raise a fact issue to support her wrongful foreclosure claim. *Id.* There were no issues of whether the correction deed operated as a valid conveyance. Merely because LaSalle stated in the Correction Deed that the La Casa Apartments were foreclosed upon on November 7 does not make it so.

In other words, Texas law requires that the Correction Deed in this case be declared a nullity because it does more than correct a facial imperfection in title and because it purports to convey a second wholly separate piece of property not mentioned in the original Deed.<sup>1</sup>

**B. The Foreclosure Sale and the Substitute Trustee’s Deed Only Conveyed the Casa Grande Apartments.**

The law of real estate conveyances in this state mandates clarity and certainty. Texas law holds that the intent of the parties is determined from the four corners of the deed itself. *Sun Oil Company (Delaware) v. Madeley*, 626 S.W.2d 726, 728 (Tex.1981); *Cherokee Water Co. v. Forderhouse*, 641 S.W.2d 522, 524-25 (Tex.1982).<sup>2</sup> Therefore, we can examine the Substitute Trustee’s Deed to determine what happened at the foreclosure sale. In our case, it is absolutely undisputed that the Substitute Trustee’s Deed unambiguously conveys only the Casa Grande Apartments. Even if you look

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<sup>1</sup> The Respondents have taken the extreme position that there are no disputed issues of law in the Dissent, that there is nothing in the Majority opinion conflicting with a prior decision of this Court or a court of appeals and that there is nothing of importance to the jurisprudence of this State such that this Court is without jurisdiction to hear the appeal. Referring to the multiple bases for jurisdiction stated in the Petition, all that is necessary is that one of these issues confer the Court with jurisdiction to allow the Court to hear all other issues on appeal. *Brown v. Todd*, 53 S.W.3d 297, 301-302 (Tex. 2001) (holding that if this Court’s jurisdiction is properly invoked on one issue, the Court acquires jurisdiction of the entire case).

<sup>2</sup> Respondents continue to assert that they “inadvertently omitted” adding the legal description of the La Casa Apartments to the Notice of Sale. See, e.g., Respondents’ Brief at p. 9. As set forth in detail in Myrad’s Brief on the Merits, the overwhelming evidence including numerous pre-foreclosure documents over two months is that Respondents intended to foreclose upon only the Casa Grande Apartments. See evidence cited in Myrad’s Brief at pp. 7-10.

beyond the Substitute Trustee's Deed, Myrad has established through the testimony of Mr. Strickland that he only auctioned "a tract of land" described as the Casa Grande Apartments at the November 7 foreclosure sale. (CR: 2435-2436, 2438; App. to Petitioner's Brief, Tab 3). Contrary to Respondents' assertion (*see* Respondents' Brief at p. 9), Mr. Strickland never mentioned or referenced the deed of trust.

**C. The Majority Opinion Represents a Fundamental and Detrimental Departure from the Current Law on Correction Deeds.**

Allowing Respondents' Correction Deed to stand will serve as a fundamental departure from established Texas jurisprudence that will have a detrimental practical impact. For example, a developer/builder may have 100 homes in varying stages of construction financed under a single Deed of Trust. The lender may decide to foreclose on 30 of the homes which do not have earnest money contracts pending. As in this case, the lender may then post the 30 homes for foreclosure, refer to and define the "Property" to be foreclosed upon as "Exhibit A" which describes only the 30 homes, also reference the Deed of Trust and use the customary language that "Notice is hereby given of Holder's election to proceed against and sell both the real and any personal property described in the Deed of Trust in accordance with the Holder's rights and remedies under the Deed of Trust and Section 9.604 of the Texas Business and Commerce Code."

In this example, a third party may purchase the 30 homes at the foreclosure sale, and record a deed reflecting the sale of the 30 homes. However, the purchaser could claim days, weeks, months, even years after the foreclosure that he actually purchased all 100 homes because the Notice referenced the Deed of Trust, said the Holder was electing

to proceed against and sell both the real and personal property described in the Deed of Trust, the Deed of Trust included all 100 homes, and, therefore, file a correction deed. The lender and developer would then have to defend their positions that only the 30 homes described on Exhibit A as the Property being foreclosed upon were sold, rather than all 100 homes referenced in the Deed of Trust.

If the Majority's ruling were applied, the lender would lose all of his collateral under the note, the builder would lose all of his property including the homes he already had under contract to prospective purchasers, the purchasers who closed on their homes with the builder subsequent to the foreclosure but prior to the filing of the correction deed would have to defend their rights along with their mortgage lenders' rights, the title companies who issued title insurance based on the deed filed at foreclosure would instantly be liable upon the filing of the correction deed, the subcontractors' claims on the homes that had not yet closed at the time the correction deed was filed would be voided, realtors would have their sales subject to postponement, cancellation or rescission and rights to brokerage fees would be the subject of ongoing litigation. The result would be chaos and endless litigation. The Majority's ruling cannot become the law of this state.

**D. The Notice of Sale Clearly Identifying Only the Casa Grande Property for Sale Cannot Modify the Substitute Trustee's Deed to Add the La Casa Property.**

Rather than look to the Substitute Trustee's Deed or even the words uttered by Mr. Strickland to auction the Casa Grande Apartments on November 7, Respondents have constructed an argument where the Notice of Sale could be used to alter the unambiguous Substitute Trustee's Deed. Respondents make the following assertion: "Because

adequate notice was given, both properties were conveyed to LaSalle at the foreclosure sale, and the subsequent filing of the Correction Deed merely corrected an error in the original deed.” Respondents’ Brief at p. 16. Certainly adequate notice of the property is a necessary pre-condition to a conveyance at foreclosure. However, even assuming the Notice did advertise both properties (which it did not), adequate notice is not a sufficient pre-condition to conveyance at foreclosure. This is especially true where the deed and trustee’s auction both contradict the assertion that two properties were conveyed.

Respondents cite to the cases of *Miller* and *Mercer* for the proposition that a notice which makes a general reference to the deed of trust is sufficient to identify the property to be conveyed at foreclosure. However, both cases are easily distinguished from the facts in the present case.

In *Miller*, the notice of foreclosure correctly stated that the property to be sold was the “lots 18 and 19 in block 5 of the Town of Harrisburg”. *Miller v. Gibraltar Sav. & Bldg. Ass’n*, 132 S.W.2d 606, 607 (Tex. Civ. App. – Beaumont 1939, writ dismissed). However, there were two other pieces of property with an identical property description in the Town of Harrisburg. *Id.* In *Miller*, reference to the Deed of Trust was resorted to only after it was determined that the description of the property was insufficient to ascertain which of the three other identically described tracts in the Town of Harrisburg were to be sold. *Id.* Moreover, in *Miller*, there was never an issue of whether the reference in the deed of trust could be used to notice the sale of a second, wholly separate piece of real property. The cases cited within *Miller* for its proposition (*Smith v. Crosby*, 23 S.W. 10 (Tex. 1893) and *Coppard v. Glasscock*, 46 S.W.2d 298 (Tex. Comm. App.

1932)) concern situations where there is absolutely no particular description of property, there is only one tract of property for sale and the notice is for the sale of all of the tract by reference to the deed of trust. The court in *Miller* used the deed of trust to clear up an ambiguity rather than create one where none exists.

In *Mercer v. Bludworth*, a reference to the trustee alone was not sufficient; the notice also set forth the correct metes and bounds description of the property to be conveyed. *Mercer v. Bludworth*, 715 S.W.2d 693, 700 (Tex. App. – Houston [1<sup>st</sup> Dist.], writ ref'd n.r.e.), *overruled on other grounds*, *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 894 (Tex. 1991).

In this case, the Notice of Sale specifically defined the “Property” for sale by referring to the property description attached as “Exhibit A” to the Notice. The Casa Grande Apartments was the only property specifically called out by metes and bounds, survey, acreage and lot and block description. Nowhere in the Notice is there a specific reference to the La Casa Apartments or its property description. Rather, there is only the reference to the Deed of Trust which itself declares that the Trustee can sell all or a portion of the collateral. The Notice of Substitute Trustee’s Sale was the only document to advertise to the public the foreclosure sale that was to be held on November 7, 2006. By its terms, the Notice only offered for sale the Casa Grande Apartments. The Notice of Substitute Trustee’s Sale Cobb issued on October 6 states the following with respect to the property to be conveyed: “Holder, acting by and through Mortgage Servicer has instructed Substitute Trustees, and each of them acting alone, to sell the Property toward

the satisfaction of the Note.” (CR: 2375-2380, Notice of Substitute Trustee’s Sale at p.

2). The Notice of Substitute Trustee’s Sale’s operative language is as follows:

Notice is hereby given that on the Date of Sale, Substitute Trustees, or any of them acting alone, will offer the Property for sale at public auction at the Place of Sale, to the highest bidder for cash, “AS IS.”

(CR: 2375-2380, Notice of Substitute Trustee’s Sale at p. 2). This operative language can only be understood by the fact that each of the capitalized terms are defined earlier in the document.

This use of definitions is typically used in the profession to shorten the operative language. (CR: 2485-2489, Nelson Aff. ¶4(A)). For example, the Notice defines “Date of Sale” to be “Tuesday, November 7, 2006.” *Id.* at ¶4(B). “Place of Sale” means “the front door at 550 East 2<sup>nd</sup> Street, Belton, Bell County, Texas.” *Id.* And the “Property” that is going to be offered for sale is defined to be “the real property described in Exhibit A attached hereto and made a part hereof for all purposes, together with all improvements and personal property described in the Deed of Trust” where “Exhibit A” is the property description for only the Casa Grande Apartments. *Id.* According to the uncontroverted expert opinion of Dan Nelson, with the use of these definitions, it is clear to any reasonable person reading the Notice that the only property offered for sale is the Casa Grande Apartments. (CR: 2485-2489, Nelson Aff. ¶4(C)).

Respondent Cobb has admitted that the Notice of Sale is potentially misleading as a notice of sale of anything more than the Casa Grande Apartments. (CR:2420, Cobb Depo. p. 68:21 to 69:15) The uncontroverted expert opinion of Dan Nelson agrees that

the Notice of Sale is misleading as an advertisement of the sale of any property more than the Casa Grande Apartments. (CR: 2485-2489, Nelson Aff. ¶4(C, E)).

It is true that the Notice of Substitute Trustee's Sale also states the following:

The Deed of Trust may encumber both real and personal property. Notice is hereby given of Holder's election to proceed against and sell both the real and personal property described in the Deed of Trust in accordance with the Holder's rights and remedies under the Deed of Trust and Section 9.604 of the Texas Business and Commerce Code.

(CR: 2375-2380, Notice of Substitute Trustee's Sale at p. 2). But this language is not the operative part of the Notice of Substitute Trustee's Sale. (CR: 2486, Nelson Aff. ¶4(D)). According to the uncontroverted expert opinion of Dan Nelson, such language is not used for purposes of describing the property to be sold but instead is typically included in a notice of sale for purposes of compliance with the Texas UCC provisions allowing a lienholder to foreclose on personal property along with real property. (CR: 2486, Nelson Aff. ¶4(D)).

In the context of a motion for summary judgment where all inferences must be made in favor of the non-movant, the Notice of Sale clearly identifying only the Casa Grande Apartments as the property for sale cannot be used to justify a "correction" of the unambiguous Substitute Trustee's Deed. Moreover, as the Dissent noted, "Because the Deed of Trust specifically allows all or a part of the property to be sold, the Notice referencing the Casa Grande property and the Deed of Trust is consistent with an intention to provide potential purchasers with a 'more particular description' for the Casa Grande properties, the property being sold." *Myrad*, 252 S.W.3d 605, 627-28 (dissent citing *American Sav. & Loan Ass'n v. Musick*, 531 S.W.2d 581, 585 (Tex. 1975)

(“Although the deed did refer to the deed of trust for a more particular description of the land conveyed, the deed did not purport to convey *all* of the tracts described in the deed of trust.”)).

The Majority refers to the ability of a reader of the Notice of Sale to call up the trustee to find out what property was actually being offered for sale at foreclosure. However, the Dissent correctly notes that “Because the Notice on its face contains no error as a notice to sell the Casa Grande property, the public would have had no reason to contact the trustee to determine if any other property was being sold.” *Myrad*, 252 S.W.3d at 628. Even if someone contacted Mr. Strickland, the evidence is conclusive that he would have identified for sale, if anything, only the Casa Grande Apartments since that is the only property he recited at the November 7 auction. (CR: 2435-2436, 2438; App. to Petitioner’s Brief, Tab 3). There is absolutely no evidence in the record that any of the six substitute trustees would have told a hypothetical caller that anything more than just the Casa Grande Apartments would be auctioned on November 7. The record is clear that Melissa Cobb, over the course of the month prior to the foreclosure, included only the Casa Grande Apartments in the various filings and communications she prepared in advance of the sale. *See* evidence cited at pages 7-8 of Petitioner’s Brief on the Merits. It is likely (and there is no contrary evidence), that she would have referred herself to the property description in the Notice of Sale which only identifies the Casa Grande Apartments.<sup>3</sup>

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<sup>3</sup> There is also no evidence that would identify for a hypothetical caller the phone number to call should he or she have had a question. Of the six substitute trustees listed on the Notice of Sale, only three, Melissa Cobb, Robin Green and Janice Wright, are members of the firm of Powell Goldstein. There is no phone number listed for

Respondents repeatedly cite to a letter sent by Myrad's attorney<sup>4</sup> prior to the foreclosure sale which references both apartments. As both the Majority and Dissent below noted, it is notice to the public and not notice to Myrad that is at issue in this case. *Myrad*, 252 S.W.3d at 615 and 626-27. Specifically, the Majority stated:

...we agree with Myrad and the dissent that the Deed of Trust and section 51.002 of the property code required LaSalle to provide 21-day's prior notice of the foreclosure sale to both Myrad *and the public*. "The statutory notice provisions of section 51.002 seek to not only protect the debtor by affording him a lengthy notice period in which he may cure, but also adequately inform the third party public in order to maximize the likelihood of a profitable public sale at market value in which the debtor may recover his equity in his property."

*Id.* at 615 (emphasis in original) (citing *Jasper Fed. Sav. & Loan Ass'n v. Reddell*, 730 S.W.2d 672, 674-75 (Tex.1987)).

An "internally inconsistent" Notice of Sale does not, as a matter of law, adequately inform the public of a proposed sale of both apartments. Even if it did, the facts of the actual conduct of the sale do not bear the notice out, as reflected in both the Substitute Trustee's Deed and Mr. Strickland's testimony, discussed above.

**E. Myrad Is Enforcing the Foreclosure Sale and Cannot Be Held to a Wrongful Foreclosure Burden of Proof.**

Taking the Notice of Sale argument one step further, the Respondents also seek to apply a wrongful foreclosure burden of proof on Myrad even where Myrad has never

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the firm and there is absolutely no information about the other three substitute trustees including the one who actually conducted the sale, Mr. Strickland.

<sup>4</sup> Respondents refer to this letter as being sent by "Myrad's bankruptcy counsel." (See Respondents' Brief at p. 9) However, Myrad never filed bankruptcy or threatened to file bankruptcy. There is no evidence in the record that it ever did so. Simply having bankruptcy experience does not mean that Myrad's attorney was its "bankruptcy counsel." Indeed, Mr. Aurzada, who is counsel to Respondents identifies himself as having represented parties in bankruptcy in his internet biography.

asserted this cause of action. Myrad sought a declaratory judgment to enforce the November 7 Substitute Trustee's Deed. It is Respondents who are seeking to have the November 7 Deed set aside. According to the Dissent:

Myrad's position is that the price was adequate to convey the property that was included in the foreclosure sale, the Casa Grande property. It is appellees – not Myrad – who seek to modify the foreclosure sale. It, therefore, was not Myrad's burden to show 'irregularity' or 'inadequate' price at the foreclosure sale, but appellees' burden to show that the foreclosure was a valid conveyance of the La Casa property in addition to the Casa Grande property.

*Myrad*, 252 S.W.3d at 626 n.5. Even if this standard could be applied to the circumstances of this case, there was sufficient summary judgment evidence to preclude the entry of summary judgment on Myrad's request for declaratory relief upholding the Substitute Trustee's Deed. As noted by the Dissent:

When LaSalle bid \$978,000 at the foreclosure sale, there was evidence that third parties were interested in the properties, that third parties attended the foreclosure sale, and that Myrad had equity in the properties. Cobb testified that she had been contacted by a potential third-party bidder and that there was a good chance that a third-party bidder wanted to purchase the property at the foreclosure sale.

Respondents incorrectly assert that "...the evidence shows that LaSalle's bid approximated the market value for the properties..." *See* Respondents' Brief at p. 23 (emphasis added). However, there is no such evidence in the record. As discussed in Petitioner's Brief, LaSalle's bid approximated the tax appraised value which, according to LaSalle's own appraiser, is typically 70% to 80% lower than the market value. *See* Petitioner's Brief at p. 12-13.

It is also irrelevant whether Myrad's representatives were present at the foreclosure sale. The presence or absence of Myrad's owners at the foreclosure sale was never a matter introduced in the trial court record by either party. In fact, Myrad's owners were present at the sale, heard the trustee announce only the property description of the Casa Grande Apartments for sale which was consistent with the Notice of Sale (and Mr. Strickland's testimony), heard no mention of any other property for sale, then heard LaSalle's credit bid which they felt was an adequate price for the one piece of property being auctioned and therefore had no reason to bid. This fact has been pointed out to Respondents in prior briefs to the Court of Appeals. *See* Petitioner's Reply in Support of Petition for Review at p. 7-8.

**F. The Nelson Affidavit Is Proper Summary Judgment Evidence and Should Not Have Been Excluded.**

Respondents argue that because the Majority ruled that the Nelson affidavit would be considered as further legal argument, the Majority did not exclude the affidavit. However, this is a case decided by summary judgment. The Nelson affidavit provided further evidence raising a question of fact precluding summary judgment. Simply considering it as legal argument does not allow it to serve its purpose as evidence opposing summary judgment. For the reasons stated in Myrad's Brief on the Merits, the Nelson affidavit was proper summary judgment evidence.

**G. LaSalle's Recent Sale of the Subject Properties Precludes Their Remedy of Rescission and Allows this Court to Render Judgment.**

Respondents argue that this Court may not properly render judgment because the trial court may still decide the issue of rescission. However, Respondents have failed to

admit to this Court that, during the pendency of this appeal and in spite of a notice of *lis pendens*, LaSalle has sold both the La Casa Apartments and the Casa Grande Apartments to a third party named 2908 Lake Rd. Properties, LLC. Documents demonstrating this sale have been included in the appendix to Myrad's Brief on the Merits.

Respondents, having sold the properties, cannot return to the trial court to argue that they should rescind the foreclosure sale. The right to rescind a contract may be lost by action and conduct which shows an affirmation or ratification of the contract after knowledge of facts which are grounds for rescission. *Payne v. Baldock*, 287 S.W.2d 507, 509 (Tex. Civ. App. – Eastland 1956, writ ref'd n.r.e.). One who has the right to rescind after acquiring knowledge thereof may exercise that right or retain his rights and benefits under the contract. *Id.* He cannot have both. *Id.* Respondents cannot hold the properties, collect rent on them and even sell them to a third party and, at the same time, maintain a claim to rescind the November 7, 2006 foreclosure sale.

### **III. CONCLUSION AND PRAYER**

In this case, one side to a transaction (LaSalle), filed a correction deed, without the consent of Myrad, and without court approval. The correction deed acted to modify, after-the-fact, what had been a proper legal foreclosure resulting in an unambiguous deed conveying a single piece of property. The correction deed purported to add a wholly separate non-contiguous parcel of real property based upon LaSalle's purported intent to have actually foreclosed on two pieces of property.

As a result, for the following two years the parties have been litigating this question: In the context

of a non-judicial foreclosure, whether or not a person can retroactively and unilaterally, through the filing of a correction deed, **add** a wholly separate, non-contiguous, piece of real property that was never noticed for sale as required by Section 51.002 of the Texas Property Code, auctioned for sale or included in the deed recording the sale to the proper, legal conveyance of another separate piece of real property that was properly noticed for sale, auctioned for sale and recorded as sold. Allowing correction deeds to be unilaterally filed days, months, or years after the completion of a proper, legal conveyance for the purpose of transferring ownership is a recipe for chaos and endless litigation. It is not the law of this state and the Majority decision should be reversed so that it does not become the law of this state.

For the foregoing reasons, Petitioner Myrad Properties, Inc. prays that this Court set this appeal for oral argument, reverse the Majority Opinion of the Court of Appeals as on the issues requested herein, reverse summary judgment order and final judgment of the trial court, render judgment in favor of Petitioner and/or remand this case for trial, and for such other and further relief as it may show itself justly entitled.

Respectfully submitted,

**TAYLOR DUNHAM AND BURGESS, L.L.P.**

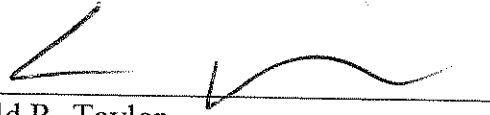
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing document was served on the attorney of record by delivering a true and correct copy via certified mail, return receipt requested on this the 30<sup>th</sup> day of December, 2008, as follows:

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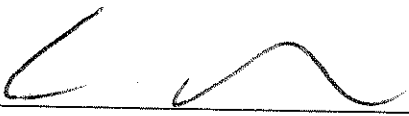
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