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### Puckett v. Bergmann Respondent's Brief Dckt. 47074

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IN THE SUPREME COURT OF THE STATE OF IDAHO

<p>ROYAL VON PUCKETT,  Plaintiff/Appellant,  vs.  SHARON KAY SMITH nka SHARON KAY BERGMANN,  Defendant/Respondent.</p>	<p><b>Supreme Court No. 47074-2019</b> <b>Ada Case No. CV-OC-1995-02445D</b> <b>Ada Case No. CV-OC-1995-30747</b></p>
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RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT DIVISION OF THE FOURTH JUDICIAL  
DISTRICT FOR ADA COUNT

HONORABLE JASON SCOTT  
District Judge, presiding

<p>Ronald L. Swafford, Esq. Swafford Law, P.C. 675 S. Woodruff Avenue Idaho Falls, ID 83401 Attorney for Defendant/Respondent Telephone: 208-524-4002 Fax: 208-524-4131 Email: office@swaffordlaw.com</p>	<p>Vernon K. Smith, Esq. 1900 West Main Street Boise, ID 83702 Attorney for Plaintiff/Appellant Telephone: 208-345-1125 Fax: 208-345-1129 Email: vkslaw@live.com</p>
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### ATTORNEY FEES ON APPEAL

Sharon requests this Court grant her attorney fees and costs pursuant to Idaho Code § 12-121. Under the totality of the circumstances of this bizarre historical case, an award of fees and costs to Sharon would be reasonable, equitable, and required in the interest of justice. Sharon has engaged in an extremely contentious, expensive and painful civil war with her ex-husband, Vernon K. Smith, for over thirty (30) years, simply to receive her divorce settlement. The record is replete with thousands of pages of appeals, hearings, notices, bankruptcies and efforts to thwart Sharon's pursuit of her judgment against Vernon K. Smith. Mr. Smith, either as a party and/or an attorney for a party, as in this case for his good friend and long time client, Royal Von Puckett, has appealed each and every court decision in every case in which Sharon has been involved. It is abundantly clear that the Sheriff's Sale which is at issue in this matter was done under the name of Royal Von Pucket to allow Vernon K. Smith an avenue to be assigned Sharon's judgments against Vernon K. Smith. The sheriff's sale set up by Vernon K. Smith, attorney for Royal Von Pucket, was so substantially and legally flawed that the trial court was left without any option but to set aside the sheriff's sale of November 13, 2014. But as is true to form and action, Vernon K. Smith, through the guise and permission of Royal Von Pucket, continued this pattern of frivolous and unsubstantiated legal tactics i.e., this appeal.

## ARGUMENT

### I

#### FACTUAL AND PROCEDURAL BACKGROUND

This matter has been ongoing since 1995 and is yet another case added to the long list of additional litigation arising from the *Smith v. Smith* divorce action, CV-DR-1990-12684. The Judgment in this matter was entered against the respondent (Sharon K. Smith nka Sharon K. Bergmann “Sharon”) in favor of appellant (Royal Von Puckett “Puckett”) who was and is a long term client and friend of Vernon K. Smith, the ex-husband of Sharon and the attorney for Puckett. The Judgment in this matter has been renewed on a number of occasions over the years. On October 8, 2014, a Writ of Execution was issued in favor of Puckett against Sharon. (R. 39) On November 13, 2014, a Sheriff’s Sale was held, pursuant to the Writ of Execution and instructions from Puckett. (R. 85-91) The Sheriff’s Sale was held on November 13, 2014 and a Certificate of Sale For Personal Property Sold Under Writ of Execution was issued on November 24, 2014. (R. 40 and 41). **On November 14, 2014, appellant assigned the “Judgment” sold at the Sheriff’s sale on November 13, 2014 to his attorney Vernon K. Smith. (R. 222, last line of that page)**

Thereafter:

1. December 22, 2014: Respondent filed her Motion to Set Aside Sheriff’s Sale, Affidavit of Sharon Kay Bergmann In Support of Motion to Set Aside Sheriff’s Sale and Memorandum in Support of Motion to Set Aside Sheriff’s Sale. (R. 47, 49 and 52)

2. January 5, 2015: Appellant filed his Response and Objection to Defendant's Motion to Set Aside Sheriff's Sale and Affidavit of Vernon K. Smith In Support of Response and Objection to Motion to Set Aside Sheriff's Sale. (R. 61 and 76)
3. January 16, 2015: Respondent filed her Reply Memorandum of Law in Support of Motion to Set Aside Sheriff's Sale on January 16, 2015. (R. 202)
4. January 20, 2015: Appellant filed his Supplemental Memorandum in Opposition to Defendant's Motion to Set Aside Sheriff's Sale. (R. 213)
5. February 4, 2015: Appellant filed his Supplemental Affidavit in Support of Further Supplemental Memorandum in Opposition to Defendant's Motion to Set Aside Sheriff's Sale. (R. 232)
6. February 4, 2015: Respondent filed her Supplemental Memorandum in Support of Motion to Set Aside Sheriff's Sale. (R. 283)
7. February 4, 2015: Respondent filed her Affidavit of Larren K. Covert, Esq., in Support of Motion to Set Aside Sheriff's Sale.
8. February 6, 2015: The Honorable Jason D. Scott entered his Memorandum Decision and Order Granting Motion To Set Aside Sheriff's Sale. (R. 466)
9. February 9, 2015: Respondent filed her Additional Supplemental Memorandum Of Law In Support Of Motion To Set Aside Sheriff's Sale. (R. 474)
10. February 9, 2015: Appellant filed his Motion to Strike Portions of Affidavit of Larren K. Covert, Esq., Filed in Support of Motion and Supplemental Memorandum to Set Aside Sheriff's Sale. (R. 479)
11. February 10, 2015: Appellant filed his Affidavit Of Vernon K. Smith in Support Of Motion To Strike Portions Of The Affidavit of Larren K. Covert. (R. 486)

12. **February 13, 2015:** Appellant filed his Affidavit of Vernon K. Smith for Computation of Judgment Amounts Owing for Inclusion in Writ of Execution (R. 500)
13. February 19, 2015: Appellant filed his Motion for Reconsideration. (R. 507)
14. February 20, 2015: Appellant sought and received a **second** Writ of Execution. (R. 512)
15. March 20, 2015: Appellant filed a **second** Notice of Sheriff's Sale. The second sale was set for April 2, 2015. (R. 514)
16. March 31, 2015: Sharon filed a Chapter 13 bankruptcy proceeding. (R. 712)
17. January 4, 2016: Judge Pappas enters a Corrected Order Confirming Chapter 13 Plan filed June 17, 2015. Page 3, paragraph F of that Order specifically retained as part of the bankruptcy estate of Sharon, the **two** judgments entered in Smith v. Smith, CV-DR-1990-2684, in favor of Sharon against Vernon K. Smith. (R. 716)
18. **March 11, 2019:** Puckett files his Notice of Relief From Stay entered in Sharon's Chapter 13 bankruptcy proceeding.
19. April 12, 2019: The District Court enters its Order Denying Motion to Reconsider. (R. 824)
20. May 24, 2019: Appellant files his Notice of Appeal. (R. 828)

## II

### STANDARD OF REVIEW

“Whether to set aside an execution sale lies largely within the trial court’s discretion” *Phillips v. Blazier-Henry*, 154 Idaho 724, 272, 302 P.3d 349, 352 (2013) quoting *Suchan v. Suchan*, 113 Idaho 102, 109, 741 P.2d 1289, 1296 (1986)

“Each case depends largely on its own peculiar facts; and whether the circumstances, coupled with the inadequacy of price, are sufficient to warrant setting aside the sale is a matter largely within the discretion of the trial court.” *Id.* quoting *Gaskill v. Neal*, 77 Idaho 428, 433, 293 P.2d 957, 960 (1956)

“This Court evaluates whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with relevant legal standards; and (4) reached its decision by an exercise of reason.” *Lunneborg v. My Fun Life*, slip op. 45200 at p.7 (June 28, 2018).

Title 11 of the Idaho Code enumerates the particular requirements governing sheriff sales. The requirements of Title 11 evidence the twin aims of compensating the judgment creditor **while simultaneously protecting the judgment debtor from overreaching.** *Safaris Unlimited, LLC, a Georgia limited liability Company v. Mike Von Jones*, Docket No. 44914 (2018). (emphasis added)

The “general rule” that governs whether a sheriff’s sale should be vacated is as follows: “mere inadequacy of consideration is not sufficient grounds for setting aside a sheriff’s sale, but it is uniformly held that “gross inadequacy of consideration,” coupled with very slight additional circumstances is sufficient.” *Fed. Land Bank of Spokane v. Curts*, 45 Idaho 414, 425, 262 P. 877, 880 (1927).



### III.

#### A.

### THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN SETTING ASIDE

#### SHERIFF'S SALE

The November 13, 2014 Sheriff's sale purported to sell the "Judgment" Sharon holds against Vernon K. Smith in case CV-DR-1990-12684. As a result of the failure of Puckett to adequately identify the personal property to be sold at the Sheriff's Sale on November 13, 2014 (as will be discussed below), the actual item of purported "personal property" sold cannot be ascertained. It must be noted, with further discussion below, that Sharon has **two** judgments against Vernon K. Smith in Case No. CV-DR-1990-12684. The first judgment was entered on February 11, 1991, for the sum of \$194,936.13 plus interest at the rate of 13.25% per annum (R. 588) and the second judgment was entered on January 6, 1999, in the sum of \$31,770.16 at the rate of 10.50% per annum. (R. 605) The Sheriff's sale of the "Judgment" [singular] on November 13, 2014, could only have been for one of the two judgments for which approximately \$1,000,000.00 and \$94,000.00, respectively, are owing.

The Sheriff's Return on Writ of Execution sets out the results of the sale of the "Judgment" on November 13, 2014. In this document, the Sheriff lists \$187.17 in Sheriff's Fees and \$10.00 for a recording fee. This gives a total for the sheriff's fees in the amount of \$197.17. The amount paid at the sale was a \$100.00 credit bid by Puckett. With this being the only amount noted for the sale, the Sheriff's sale in this matter resulted in a net **negative** loss of \$97.17 to Sharon thereby **increasing the judgment debt** due by Sharon to Puckett from \$175,294.89 to \$175,392.06. (R. 101)

The Trial Court specifically found as to the value of the property sold:

“Several years after the Court’s decision was issued, the Idaho Supreme Court issued an opinion to the effect that, when a district court relies on price inadequacy in setting aside a sheriff’s sale, it must make a factual finding as to the value of the property sold.” *Safaris Unlimited, LLC v. Jones*, 163 Idaho 874, 886, 421 P.3d 205, 217 (2018)

“As a general matter, that’s a reasonable requirement. Here, however, no such finding should be required (and none is being made). As already explained, Smith’s judgment debt **increased** because of the sheriff’s sale, as the winning bid was smaller than the sheriff’s fees, which are added to the judgment debt. This anomalous outcome – the judgment debtor owing even more money after the sheriff’s sale – justifies a finding that the sale price was grossly inadequate as a matter of law, no matter what the property sold is worth. That property couldn’t possibly have been worth less than nothing, yet less than nothing is what Smith received for it. Any way you slice it, that’s gross inadequacy.”

(R. 825, footnote 1)

The Trial Court therefore concluded that the sale price was grossly inadequate and that this price inadequacy, when coupled with the discussed additional circumstances (below) provides an additional justification for setting aside the sheriff’s sale. (R. 825, footnote 1)

In addition, and critical to this case’s compliance with the requirements of *Safaris Unlimited, LLC*, supra, there was not a readily and fully identifiable item of personal property for which the Trial Court could make a finding of value. If the personal property cannot be identified with any certainty or specificity, there certainly cannot be a determination nor finding of value. The Trial Court made the only finding it could as to the value of the “property” sold at the November 13, 2014, Sheriff’s sale as a result of the record before it.

This Court has considered the standard of gross inadequacy of consideration in previous decisions. In the *Gaskill* case, a sheriff’s sale was conducted on two parcels of real property. At the sale, the two parcels were purchased for the combined price of

\$426.12 including fees. *Gaskill* at \$433,960.00. It was undisputed that the two parcels of property in that case were valued at \$11,000.00. *Id.* The Supreme Court held that the price paid at the sale was grossly inadequate, and when combined with other factors, was sufficient to set aside the sale. *Id.* In the *Gaskill* case, the percentage of the amount paid for the property was **3.65% of its value.**

In the case of *Federal Land Bank of Spokane v. Curts*, supra the issue of an inadequate consideration at the sale was examined by the Supreme Court. In *Curts*, the sheriff's sale sold 240 acres of property to a single bidder for \$300.00. *Curts* at 880. This property was worth at least \$8,700.00 by virtue of another bid, though not accepted by the sheriff, as determined by the Court. The Supreme Court held that this amount of the sale was grossly inadequate and shocked the conscience of the court. *Id.* at 881. In the *Curts* case, the purchase price was **3.45% of its value.**

In this case, the purchase price at the sale should "shock the conscience" of this Court as well though realizing it is not the standard for review in this matter. For argument sake, if the "property" sold at the sheriff's sale was the lesser of the two judgments, the purchase price, **before deduction of the Sheriff's fees**, is approximately **0.001%** of the value of the property. This is one thousandth of a percent. If the property sold was the greater of the two judgments, the purchase price, **before deduction of the Sheriff's fees**, is approximately **0.0001%**, or one ten thousandth of a percent of the value. Either of these amounts are substantially more than the other two cases where this Court determined the consideration to be grossly inadequate.

While case law on this topic states that as “a **general rule**”, the mere inadequacy of consideration is not sufficient grounds to set aside a sheriff’s sale, argument can clearly be made that this case does not fit into the "general rule."

**B.**

**ADDITIONAL CIRCUMSTANCES OF THE SALE**

On October 8, 2014 (and recorded on October 23, 2014) Vernon K. Smith attorney for Puckett had a *Writ of Execution* and *Notice of Levy Under Writ of Execution* issued in this matter. (R. 82 and 85) The *Notice of Levy* read as follows:

“NOTICE IS HEREBY GIVEN that under and by virtue of a Writ of Execution issued out of the above entitled Court in the above entitled action, of which the annexed Writ is a true copy, I have this day attached and levied upon the right, title, claim, interest and Judgment Creditor rights of Sharon K. Smith, formally known as Novotny, Moore and now known as Bergmann, and in particular, as said Defendant is described with such personal property, to wit:

THAT PERSONAL PROPERTY INTEREST PRESENTLY CLAIMED BY SAID SHARON K. SMITH, AS A **JUDGMENT** CREDITOR, IN THAT CERTAIN JUDGMENT SHE HOLDS WHEREIN SHE IS IDENTIFIED AND NAMES AS THE PLAINTIFF THEREIN, AND HER FORMER HUSBAND VERNON K. SMITH, IS NAMED AND IDENTIFIED AS THE DEFENDANT THEREIN, CASE NO. CV-DR-1990-12684.” (emphasis added)

The *Notice of Sheriff’s Sale* (R. 97) contained the same description of the personal property as the *Writ*, as follows:

**NOTICE OF SHERIFF’S SALE**

BY VIRTUE of a Writ of Execution in my hands, issued out of the District Court of the Fourth Judicial District, of the State of Idaho, in and for the County of Ada in the suit of ROYAL VON PUCKETT against SHARON K. SMITH formerly known as Sharon K. Novotny CVOC9502445D duly attested 10/08/20147, I have levied upon all the right, title and interest of the said judgment debtor in and to the following described property, situated in Ada County, Idaho, viz:

THAT PERSONAL PROPERTY INTEREST PRESENTLY CLAIMED BY SAID SHARON K. SMITH, AS A JUDGMENT CREDITOR, THAT CERTAIN **JUDGMENT** SHE HOLDS WHEREIN SHE IS IDENTIFIED AND NAMED AS THE PLAINTIFF THEREIN, AND HER FORMER HUSBAND VERNON K. SMITH, IS NAMED AND IDENTIFIED AS THE DEFENDANT THEREIN, CASE NO. CV-DR-1990-12684” (emphasis added)

The *Certificate of Sale for Personal Property Sold Under Writ of Execution* (R. 99), contained the same description of the personal property as the *Writ and Notice of Levy*, as follows:

“NOTICE IS HEREBY GIVEN that under and by virtue of a Writ of Execution issued out of the above entitled Court in the above entitled action, of which the annexed Writ is a true copy, I have this day attached and levied upon the right, title, claim, interest and Judgment Creditor rights of Sharon K. Smith, formally known as Novotny, Moore and now known as Bergmann, and in particular, as said Defendant is described with such personal property, to wit:

THAT PERSONAL PROPERTY INTEREST PRESENTLY CLAIMED BY SAID SHARON K. SMITH, AS A JUDGMENT CREDITOR, IN THAT CERTAIN **JUDGMENT** SHE HOLDS WHEREIN SHE IS IDENTIFIED AND NAMES AS THE PLAINTIFF THEREIN, AND HER FORMER HUSBAND VERNON K. SMITH, IS NAMED AND IDENTIFIED AS THE DEFENDANT THEREIN, CASE NO. CV-DR-1990-12684.” (emphasis added)

The first circumstance allowing the sale to be set aside is the fact that there is no clear indication as to what was actually placed for sale and sold by the Sheriff. As noted above, the description of the property levied by the Sheriff was inadequate to properly place anything in the Sheriff's possession to sale. The property is identified as a "**certain judgment**," but does not give any specific identifying information as to allow identification of that "**certain judgment**". As stated above, Sharon has **two** separate and distinct judgments against Vernon K. Smith. These judgments were

issued separately and have been renewed numerous items in separate pleadings. Both judgments have been separately recorded and have never been combined.

The Notice of Levy Under Writ of Execution, the Notice of Sheriff's Sale nor the Sheriff's Return of Service contain any additional or further information as to identify the personal property the sheriff believes was levied and sold. Without specific, identifying information, there cannot be a proper sale, as the property was not and cannot be identified. The documents only describe a single "Judgment", and therefore Puckett cannot now claim he levied upon and sold both judgments. Further, Puckett cannot, after the completion of the sale, try to pick or choose which of the two judgments was actually sold. The sale had to be set aside for failure to identify the property with particularity and specificity.

The second circumstance of the sale is that Sharon did not receive actual notice of the sheriff's sale prior to the sale being held. In the case of *Tudor Engineering Company v. Moww*, 109 Idaho 573, 709 P.2d 146, (1985), this Court held that not receiving notice of a sale was a factor to consider in granting equitable relief after the sale. In *Tudor*, supra, the Supreme Court acknowledged that the notice of the sale in that case had been conducted pursuant to I.C. §11-302. *Id at 147. 576.* However, in reviewing the setting aside of the sale or granting an extension of the redemption period, this Court noted that the property owners and interested parties had not been provided with actual notice of the sale. *Id. at 148, 577.* This Court upheld the trial court's decision to grant relief.

In this case, the Defendant did not receive any notice of the sheriff's sale prior to the

sale.

This is confirmed by the Affidavit of Sharon Bergman filed herewith. (R. 49)  
Additionally, none of the documents filed in this matter evidence Sharon being served with any notice of the sale. As such, when combined with the gross inadequacy of the consideration in this matter, the sheriff's sale was properly set aside by the trial court.


In summary, when all these circumstances of the sale are combined with the gross inadequacy of the consideration in this matter, the Sheriff's sale was properly set aside by the Trial Court.

### CONCLUSION

There is no valid argument that can be made by Puckett that the sheriff's sale held on November 13, 2014, should not have been set aside. The outrageously shocking gross inadequacy of consideration coupled with the substantial (not just slight) circumstances of the sale left the Trial Court with no other option but to set aside the Sheriff's sale of November 13, 2014. The Trial Court was fully mindful and cognizant of the legal requirements/standards as set forth in *Safaris*, supra and met all those requirements/standards based on the record before it.

Sharon requests that this Court affirm the Trial Court's Memorandum Decision and Order Granting Motion to Set Aside Sheriff's Sale and Order Denying Motion to Reconsider.

DATED this 9<sup>th</sup> day of January, 2020.

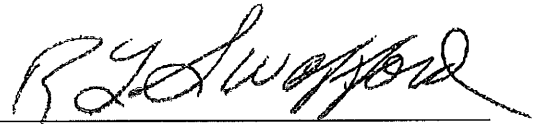
  
RONALD L. SWAFFORD, ESQ.  
Attorneys for Defendant/Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9<sup>th</sup> day of January, 2020, I served a true and correct copy of the foregoing document on the following by the method of delivery indicated:

Vernon K. Smith, Esq.  
1900 West Main Street  
Boise, ID 83702

- U.S. Mail, postage prepaid
- Designated courthouse box
- Hand-delivered
- Email/iCourt: vlslaw@live.com



RONALD L. SWAFFORD, ESQ.  
Attorneys for Defendant/Respondent