

No. 70719-1-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

JOHN JOHNSTON AND DARCEE FOX-JOHNSTON,
Respondents,

v.

PETE TORKILD, JULIA TORKILD, and FIRST CAPITAL, INC.,
Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
06-2-01137-2

BRIEF OF RESPONDENTS

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COURT OF APPEALS
DIVISION ONE

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ORIGINAL

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INTRODUCTION

This case involves a foreclosure rescue scam carried out by Appellants Pete and Julia Torkild in which they fraudulently obtained Respondents John and Darcee Johnston's family home. Mr. Torkild used a series of false promises and his professional credentials as an attorney, mortgage broker, and real estate agent to induce the Johnstons to rely on him to save their home. Ms. Torkild actively assisted Mr. Torkild with the scheme. Instead of helping the Johnstons, the Torkilds, through a series of transactions stole the Johnstons equity, collected rent, and then eventually evicted them from their own home while making the arrangement appear legitimate on paper. After several years of litigation¹, Whatcom County Superior Court entered judgment of \$754,766.04 against the Torkilds based on the Johnstons' claims for Fraud, Violations of the Consumer Protection Act, The Deed of Trust Act, and the Mortgage Broker Protection Act. The Torkilds have appealed.

¹ These events have led to related litigation in Bankruptcy Court, Criminal Court, this court and the Washington Supreme Court.

I. RESTATEMENT OF ISSUES PRESENTED

The Whatcom County Superior Court entered 285 Findings of Fact. (Findings of Fact and Conclusions of Law, Appendix A). The Torkilds have challenged only 16 of those findings. The unchallenged findings are verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). The Torkilds allege that substantial evidence does not support the court's findings regarding causation and damages because the Johnstons did not prove they could have saved their property from foreclosure.

There are several flaws in this argument:

First, the Torkilds committed fraud by assuring the Johnstons that they could and would save the property;

Second, the Torkilds' scheme allowed the Johnstons to stay in their home, and would have worked if the Torkilds kept their promise to reconvey the property to the Johnstons. In other words, the Torkilds, by taking control of the property, removed the inevitability of the foreclosure and assumed control of the fate of the Johnston property. They are therefore estopped from arguing that loss of the property was inevitable.

Third, the Torkilds made money on the Johnston sale. The Torkilds argue that the damage awards were erroneous because they did not include a second mortgage or an offset for the rental payments. However, the Torkilds removed the second mortgage and benefitted from the use, enjoyment, and ultimate sale of the property and cannot deny to the Johnstons the benefits they enjoyed for themselves.

II. STATEMENT OF FACTS

Because the trial court made detailed factual findings and the majority of those are not challenged by the Torkilds, the Johnstons submit the court's Findings of Fact and Conclusions of Law in lieu of a detailed statement of facts in this brief. (Appendix A). However, certain facts relevant to the issues raised in this appeal will be emphasized here.

The Johnstons owned a home on six sub-dividable acres on Lummi Island in Whatcom County and had substantial equity in the property. (Findings of Facts and Conclusions of Law ¶¶ 2, 4; CP 67 & 68; ¶¶ 204; CP 87). Because of medical bills and other financial problems, they fell behind on their mortgage and received a notice of foreclosure from the lender. (Findings of Facts and Conclusions of Law ¶ 5, CP 68) While the Johnstons were facing foreclosure,

they investigated several things they could do to avoid losing their home. They qualified to refinance their mortgage from a lender called "Creative Finance". (VRP Part I, 133:5-14) (Findings of Facts and Conclusions of Law ¶¶ 13 & 14; CP 68). They also knew that they could avoid or postpone a foreclosure by filing for bankruptcy. (VRP, Part II; 111:18-19) (Findings of Facts and Conclusions of Law ¶¶ 18 & 19; CP 69). They also had a neighbor who was interested in buying all or a part of their property and had the means to do so. (Findings of Facts and Conclusions of Law ¶¶ 20; CP 69). They were exploring these options when they came in contact with the Torkilds through a sign Mr. Torkild used to advertise his services as a mortgage broker. (Findings of Facts and Conclusions of Law ¶¶ 15; CP 68)

Mr. Torkild met with Mrs. Johnston. (Findings of Facts and Conclusions of Law ¶¶ 21; CP 69). He told her that he was an attorney, mortgage broker, and real estate agent and that he could help her keep her home by getting control of the foreclosure process. (Findings of Facts and Conclusions of Law ¶¶ 22, 23; CP 69; ¶¶ 149, CP 82; ¶¶ 188 & 194, CP 86). His plan was to get title to the property, lease it back to them, help them improve their credit, help them get a new mortgage, and then reconvey the

property back to them. (Findings of Facts and Conclusions of Law ¶¶ 148 & 153; CP 82; ¶¶ 173, CP 84; ¶¶ 238, CP 90). The Johnstons trusted and relied on Mr. Torkild and his promises and expertise to help them keep their home. (Findings of Facts and Conclusions of Law ¶¶ 51, CP 72; ¶¶ 145, CP 81; ¶¶ 180, CP 85).

When the Johnstons came in contact with the Torkilds they stopped pursuing the other options they had been exploring. (Findings of Facts and Conclusions of Law ¶¶ 154, CP 82; ¶¶ 169, CP 84; ¶¶ 183-187, CP 85). Mr. Torkild required them to sign documents stating that they would stop pursuing other options and work exclusively with him (Findings of Facts and Conclusions of Law ¶¶ 34 & 35, CP 70-71; ¶¶ 167, CP 84; ¶¶ 182; CP 85). This gave Mr. Torkild total control over the foreclosure process. After they gained the Johnstons' reliance and trust, the Torkilds obtained control of the foreclosure sale by buying the promissory note from the lender and enlisted the Johnstons' help in getting Mr. Torkild appointed as successor trustee. (Findings of Facts and Conclusions of Law ¶¶ 66, CP 74; and ¶¶ 75-76; CP 75). Mr. Torkild conducted the foreclosure sale and sold the property to First Capital Inc., a corporation created by the Torkilds, which the court found was simply the alter ego of the Torkilds. (Findings of Facts

and Conclusions of Law ¶¶ 58 & 59, CP 73; ¶¶ 78, CP 75; ¶¶ 160, CP 83; ¶¶ 216-220, CP 88; ¶¶ 271-272; CP 93). First Capital Inc. then leased the property to the Johnstons and also conveyed the property to Julia Torkild, who obtained a loan secured by the equity of the property. (Findings of Facts and Conclusions of Law ¶¶ 81, 88, 89, 91; CP 76).

The Torkilds collected rent from the Johnstons and led them to believe that they would reconvey the property to them. (Findings of Facts and Conclusions of Law ¶¶ 114, CP 78; ¶¶ 148, CP 82; ¶¶ 233, CP 89). However, at the end of the lease, the Torkilds evicted the Johnstons, subdivided the property, and sold the two parcels to a third party. (Findings of Facts and Conclusions of Law ¶¶ 97, CP 77; ¶¶ 129, CP 79; ¶¶ 161, CP 83; ¶¶ 183, CP 85).

III. STANDARD OF REVIEW

This Court reviews Judge Snyder's Findings of Fact for substantial evidence. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Substantial evidence means sufficient evidence in the record "to persuade a rational, fair-minded person of the truth of the finding." Id. Under the substantial evidence standard, all of the evidence **and all reasonable inferences drawn from the evidence** must be considered in the light most favorable to the

party who prevailed in the highest forum that exercised fact-finding authority.” Cingular Wireless, LLC v. Thurston County, 131 Wn.App. 756, 129 P.3d 300 (2006), (emphasis added). Questions of law and conclusions of law are reviewed de novo.

ARGUMENT

IV. THE COURT’S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Johnstons Proved They Had Options to Prevent The Foreclosure.

When they were facing foreclosure, the Johnstons explored several options. They could have: (1) refinanced their mortgage, (2) declared bankruptcy, or (3) sold all or part of the property.

1. The Refinance Option

Darcee Johnston testified that she had contacted a lender called “Creative Finance” who had approved a loan to refinance the property. (VRP Part I, 133:5-14) (Findings of Facts and Conclusions of Law ¶ 13; CP 68). However, because of the high interest rate, she wanted to consider other options as well. (VRP Part I, 133:15-17) (Findings of Facts and Conclusions of Law ¶ 14; CP 68). The Torkilds argue that having preliminary approval from a lender does not satisfy the burden of proof because the Johnston did not prove that the loan would have actually been funded.

(Opening Brief at 6). The fallacy with this argument is that once the Torkilds induced them to rely on their foreclosure rescue plan, the Johnstons stopped pursuing this option:

Q. Did you feel like if you hadn't met Mr. Torkild that you may have gone back and talked to Creative Financing again?

A. Sure. There were other options. I mean, I kind of stopped looking when he said that he would help. I, he said don't, you know, we'll take care of this, and so I was assured that I didn't need to go back and do any of those other things.

(VRP Part I 134:15-21)

The Superior Court found Ms. Johnston's testimony about refinancing to be consistent and credible. (Findings of Facts and Conclusions of Law ¶¶ 186-187; CP 85). The Torkilds had the opportunity to conduct discovery on this issue, and also to cross examine the Johnstons at trial. After hearing all the evidence, the court made the permissible and reasonable inference that the Johnstons could have proceeded to refinance if they had not been ensnared in Torkilds' scam. (Findings of Facts and Conclusions of Law ¶¶ 34 & 35, CP 70; ¶¶ 154 & 155, CP 82; and ¶¶ 168-171, CP 84).

2. The Bankruptcy Option

The Johnstons knew that if foreclosure was imminent they could file for bankruptcy to protect themselves from losing their home. (VRP, Part II; 111:18-19) (Findings of Facts and Conclusions of Law ¶ 18 & 19; CP 69). This was an option of last resort, and they never chose it because they met the Torkilds and became victims of the foreclosure rescue scam. (VRP, Part II; 112:1-5) (Findings of Facts and Conclusions of Law ¶¶ 154, CP 82; ¶¶ 169, CP 84; ¶¶ 184, CP 85).

At trial, the parties agreed that rather than present expert testimony from bankruptcy specialists, they would stipulate that the Johnstons could have filed for bankruptcy which would have forestalled the foreclosure. (Part II VRP; 111:16-19). The Torkilds argue that the causation element is not supported by substantial evidence because it is not certain that a bankruptcy filing would have been successful in saving the Johnston home. (Opening Brief at 4). In essence, the Torkilds to ask the Court to draw inferences in their favor. Indeed, the Torkilds' argument is simply speculation about any number of scenarios that might have occurred. But Judge Snyder found, based on the stipulation of the parties that the Johnstons could have filed for bankruptcy and did not use this

option because they got drawn into the Torkild scam. (Findings of Facts and Conclusions of Law ¶¶18, CP 69).

Furthermore, the Johnsons did prove they were capable of filing for bankruptcy. (Findings of Facts and Conclusions of Law ¶¶ 201; CP 87). They were able to stay in a chapter 13 plan for several years. (VRP, Part II; 110:12-13, 111:4-5)

3. The Option to Sell the Property

At trial the Johnstons presented testimony from their neighbor, Charles Bailey. He stated that he would have been interested in purchasing all or a portion of their property if they had approached him. (VRP Part. II; 7:3-15) He also testified that he had the funds to make the purchase, and that he would have been willing to loan money to the Johnstons to help bring their mortgage out of arrears so that he could purchase all or part of their property. (VRP Part II, 8:21-9:2; 11:16-22, 18:17-22).

The Torkilds again speculate that there may have been many reasons why that arrangement could have fallen through. But they are inviting the court to draw inferences in their favor instead of in favor of the established findings.

The Torkilds also argue that it would have been impossible or illegal to sell a portion of the property, asserting that the

Whatcom County Code prohibited sales of undivided parcels. (Opening Brief at 22). This argument fails because the Torkilds leased 3 acres of the 6-acre parcel to the Johnstons before it had been subdivided which, under the Torkild's interpretation, also violates the Whatcom County Code.

More importantly, there is nothing in the County Code that would have prevented Mr. Bailey from paying for an option to purchase all or a portion of the Johnston property once it had been subdivided. Such an option payment would have allowed the Johnstons to cure the default, remain in their home, and complete a subdivision themselves. (Findings of Facts and Conclusions of Law ¶ 83; CP 76). The real issue is not whether the property could have been subdivided, but whether the Johnstons could have turned to their neighbor for help to avoid the foreclosure. The court concluded that this was a feasible option, and was not pursued because of the Torkild scam. (Findings of Facts and Conclusions of Law ¶¶ 20, CP 60; ¶¶ 184 & 187, CP 85)

B. The Torkilds Own Actions Preclude Their Causation Argument.

The Torkilds do not dispute that they intentionally set up a scam to defraud the Johnstons of their home. (Findings of Facts

and Conclusions of Law ¶¶ 45, CP 72; ¶¶56-130, CP 73-79; ¶¶155, CP 82; ¶¶ 157, CP 83; ¶¶ 158-179, CP 83-85; ¶¶ 188-195, CP 86; ¶¶ 211-221, CP 87-88; ¶¶239, 241, CP 90; ¶¶ 262, CP 92; ¶¶ 271-272; CP 93) (All unchallenged). They only dispute causation. However, because they were the architects of the foreclosure rescue scam, and because they acquired control over the foreclosure process, including getting Mr. Torkild appointed as the successor trustee, the Torkilds are estopped from arguing that the causation element was not proven. In other words, the Torkilds showed by their own actions that *the home could have been saved* had they kept their promises. They are therefore precluded from arguing that the foreclosure was inevitable. Indeed, if the foreclosure was inevitable, the Torkilds would have committed fraud by representing to the Johnstons that they could help them avoid it.

C. The Trial Court Correctly Concluded That Testimony By The Defendant's Handwriting Expert Was Not Relevant

The Torkilds claim that the court erred in concluding that testimony by their handwriting expert was not relevant, and that it would have allowed them to impeach the Johnston's credibility. (Opening Brief at 9). The court found that the Johnstons were

substantially credible. (Findings of Facts and Conclusions of Law ¶ 132; CP 80). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987).

Additionally, the Torkilds failed to appeal Finding No. 143 which states:

Based on conflicting testimony from the Torkild's themselves, an inability to take responsibility for any questionable actions, and their focus on matters that are trivial or collateral issues to the case at hand, their testimony is not reliable.

(Findings of Facts and Conclusions of Law ¶ 143; CP 81). The issue of Mr. Johnston's handwriting was not relevant because the documents at issue were not operative documents. (Findings of Facts and Conclusions of Law ¶ 50; CP 72).

D. The Damages Claims Are Supported By Substantial Evidence

The Court found that the Johnston's damages included the loss of the equity of their property and also the loss of use of the property for the time period that the Torkilds owned the property until the time of trial. There are two distinct categories of losses.

The Torkilds argue that the court should have subtracted the amount of the second mortgage from its calculation of the loss of

equity. (Opening Brief at 11). However, the second mortgage was eliminated through the foreclosure sale. Indeed Mr. Torkild represented to the Johnstons that allowing him to control the foreclosure sale would allow him to wipe out the junior liens, thus creating more equity in the property. The Torkilds themselves took advantage of the elimination of the second mortgage when they obtained a loan to get most of the equity out of the property. If the Torkilds had kept their promises to the Johnstons, and reconveyed the property to the Johnstons as promised, it would not have been encumbered with the second mortgage. Therefore, the trial court was correct in omitting the second mortgage from its calculation of the Johhson's loss of equity.

The Torkilds also argue that the court erred in awarding loss of use value to the Johnstons. (Opening Brief at 11). The court found that because the Torkild's evicted them from their home, that they were deprived of the use and enjoyment of their home from the time they were evicted to the time of trial. The court used the lease prepared by the Torkilds to establish the monthly rental value, and simply multiplied that figure for the time that the Johhsons were deprived of their property before. (4/10/2013 Courts Oral Ruling p.

48:2-12) (Appendix B). This is not a double recovery, but accounts for the damages for the time period of non-use, while the loss of equity accounts for the permanent loss of the property. Thus, the trial court's findings are correct and should be affirmed.

V. THE CONSUMER PROTECTION ACT ENTITLES THE JOHNSTONS TO ATTORNEYS' FEES ON APPEAL.

Under RCW 19.86.060, the Consumer Protection Act provides an award of reasonable attorneys' fees to the prevailing party. This applies as well on appeal.

The District Court correctly determined that the Holts are entitled to an award of a reasonable attorney's fee pursuant to RCW 19.86.090. We remand to the Superior Court for a determination of reasonable attorney's fees on appeal to that court. The Holts are also entitled to a reasonable attorney's fee on appeal to this court. Wilkinson v. Smith, 31 Wn. App. 1, 15, 639 P.2d 768, review denied, 97 Wn.2d 1023 (1982) (the Consumer Protection Act provides "adequate grounds" for the award of attorney's fees on appeal).

Evergreen Collectors v. Holt, 60 Wn. App. 151, 157, 803 P.2d 10 (1991).

The Johnstons respectfully request an award of reasonable attorneys' fees on appeal.

CONCLUSION

The Torkilds failed to appeal most of the findings and conclusions of the trial court, which are now verities in this case.

They have instead focused only on the causation element, arguing that they should not be liable because the Johnstons loss of their home was inevitable. However, if the Torkilds had followed through on their promises, the Johnstons would have kept their home. Additionally, there is substantial evidence in the record that the Johnstons had other options for keeping their home, and that they did not pursue those options because they were induced to trust and rely on the Torkilds.

The court found the Johnstons credible and the Torkilds not credible, and this finding is not reviewable on appeal. Finally, the court carefully awarded damages to the Johnstons for the different ways they were affected by the Torkild scam. This included the total loss of their home and the loss of the use and enjoyment of the home from the time they were evicted to the time of trial. All these findings are supported by substantial evidence, and these damages were properly awarded by the trial court. The Judgment should be affirmed.

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DATED this 23rd day of July, 2014.

BURI FUNSTON MUMFORD, PLLC

By 
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Brief of Respondent to via email and U.S. Mail:

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DATED this 23rd day of July, 2014.


Heidi Main

APPENDIX A

FILED
COUNTY CLERK

2013 JUL -2 AM 9: 28

WHATCOM COUNTY
WASHINGTON

BY _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

JOHN AND DARCEE JOHNSTON,
a Married Couple,

No. 06-2-01137-2

Plaintiffs,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

v.

(Clerk's Action Required)

PETE TORKILD, et al.,

Defendants.

FINDINGS OF FACT

1. This matter came before the Court for a bench trial on March 5-28, 2013. Plaintiffs John and Darcee Johnston appeared and were represented by Tom Mumford, Buri Funston Mumford, PLLC. Defendants Peter A. Torkild and Julia A. Torkild appeared pro se; First Capital Inc. and Torkild Corp. appeared and were represented by Spencer McGrath-Agg.

2. Plaintiffs owned 2183 Tuttle Lane, a six-acre parcel on Lummi Island.

3. Plaintiffs had a first mortgage with Horizon Bank and a second mortgage with Household Finance.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW
PAGE 1

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1 4. The property was capable of subdivision according to the zoning code.

2 5. On October 27, 2003 Horizon Bank issued a Notice of Foreclosure with
3 attorney Jack Ludwigson acting as trustee.

4 6. At this time the Plaintiffs were delinquent on both mortgages.

5 7. In the past, Plaintiffs had been able to cure their default.

6 8. John Johnston was working as a delivery truck driver and Darcee
7 Johnston was working part time as a massage therapist and part time as a legal
8 assistant.

9 9. Plaintiffs also raised English Bulldogs as a hobby. It was not a profit-
10 making business.

11 10. Darcee Johnston was responsible for the financial management of the
12 household.

13 11. On December 27, 2003 the Torkilds signed an agreement to separate. It is
14 not notarized nor is it recorded.

15 12. Because it was not recorded, the separation agreement was not effective
16 as notice.

17 13. Darcee Johnston sought refinancing when the foreclosure notice was
18 received and qualified for a loan through Creative Mortgage.

19 14. Because of the high interest rate of the Creative Mortgage loan, Ms.
20 Johnston looked for other solutions.

21 15. Ms. Johnston saw Mr. Torkild's sign in Birch Bay. (Exhibit 2) The sign
22 listed home loans, mortgages, and debt consolidation, and had Mr. Torkild's name and
23 phone number.
24
25
26

1 16. Who initiated the first contact is not material or relevant.

2 17. Peter Torkild obtained a title report and preliminary commitment as early
3 as February 1, 2004 for the Tuttle Lane Property. (Exhibit 143)

4 18. The Plaintiffs could have filed for Chapter 13 bankruptcy. Under the
5 stipulation of the parties, it is undetermined whether they would have qualified, if an
6 attorney would have found it worthwhile to file such a petition, or how long it would have
7 taken for the lender to seek relief from stay.
8

9 19. They could have filed for bankruptcy within hours of the actual foreclosure
10 sale.

11 20. Additional options available to the Plaintiffs included a refinance for sale of
12 three acres to a neighbor or sale of the entire property if that was necessary.

13 21. Ms. Johnston discussed the situation in detail with Mr. Torkild and after
14 numerous phone calls with him, Ms. Johnston met with him on March 3, 2004, at Top
15 Mortgage where he was working.
16

17 22. At this meeting he represented several ways in which he could help her.

18 23. Mr. Torkild represented himself to be a real estate broker, a mortgage
19 broker, and an attorney. (Exhibit 57). He clearly presented himself as having these
20 qualifications and skills.

21 24. At the time of the meeting, he prepared various documents.

22 25. One document was a purchase and sale agreement where Mr. Torkild,
23 personally, would purchase the Tuttle Lane property from the plaintiffs. (Exhibit 3).
24

25 26. A second document was a deed in lieu of foreclosure in his favor. (Exhibit
26 6)

1 27. He prepared a Statutory Warranty Deed in his favor. (Exhibit 7)

2 28. He provided and prepared an Acknowledgement to Horizon Bank that
3 Plaintiffs assigned and agreed that he could buy the note. The Acknowledgement did
4 not mention First Capital Inc. Mr. Torkild did not disclose that there were other
5 agreements between the parties regarding the property or foreclosure. The
6 Acknowledgement ignores the fact that there were other documents he prepared.
7

8 29. The Acknowledgement to Horizon Bank does not contemplate the lease,
9 which is set forth in another document.

10 30. Another document prepared was a Disclosure and Release. (Exhibit 77)
11 This document states that Mr. Torkild will earn substantial profit and that he is not the
12 owner of Top Mortgage. The Disclosure also states he is acting in good faith and
13 provides a disclaimer that he gave them any advice. The document also contains a hold
14 harmless releasing him from any obligation of liability whatsoever.
15

16 31. The Disclosure and Release also states that the Plaintiffs assisted in the
17 preparation of the documents.

18 32. The Plaintiffs did not assist with the preparation of the documents.

19 33. Another document provided at the meeting of Ms. Johnston and Mr.
20 Torkild was the Agreement. (Exhibit 76) This Agreement states that Mr. Torkild will buy
21 at the trustee's sale or buy the note and continue the foreclosure, himself, and that the
22 Plaintiffs have the opportunity to lease the property after sale.
23

24 34. The Agreement also states that the Plaintiffs agreed not to disclose this
25 arrangement, not to do anything regarding the property prior to foreclosure. Plaintiffs
26 agreed they would not file bankruptcy and that they would not try to refinance the

1 property. This agreement put them in the position of secrecy, and noted that the
2 foreclosure is for the purposes of clearing title to see if they could get the second
3 mortgage off the property.

4 35. In the Agreement, the Plaintiffs also agreed to take no action to reinstate,
5 cure, or discuss these options with anybody else. They agreed to allow the foreclosure,
6 not to interfere or delay in any way, which closed off any other options they had.
7

8 36. Mr. Torkild told Ms. Johnston not to attend the trustee's sale.

9 37. The Plaintiffs agreed not to file bankruptcy.

10 38. Mr. Torkild states in the Agreement he need not record the deeds that
11 were signed by Plaintiffs, which does not match his testimony that Plaintiffs were not
12 expected to sign all the documents. The Agreement says that when they sign them, he
13 may or may not record them. This indicates it was his intent for them to sign those
14 documents, contrary to his testimony.
15

16 39. The Agreement contained a provision that the lease may include an option
17 to repurchase the property in one or two years. Although the lease ultimately did not
18 include that provision, it was part of their initial agreement.

19 40. The Agreement includes numerous waivers, disclaimers, and hold
20 harmless provisions that protect Mr. and Mrs. Torkild.

21 41. The Agreement and all other documents became a part of the parties'
22 overall agreement, even though they all have different legal consequences.
23

24 42. The Agreement states that the Johnstons waived their right to defend
25 against any foreclosure instituted by Mr. Torkild if the documents' terms were breached.

26 43. This is inconsistent with what the other options might be.

1 44. The Agreement further provides that breach makes any note held by Mr.
2 Torkild or Horizon payable in full. The Agreement cannot alter the terms of any note
3 between Horizon and the Johnstons, but it purports to do so, and this is all to the benefit
4 of Mr. Torkild. None of it benefits the Johnstons.

5 45. Mr. Torkild signed this document and no others. This contract is one sided
6 and benefits only Mr. Torkild. All liability for him is removed.

7 46. It is not an arm's length transaction.

8 47. Mr. Torkild directed Ms. Johnston to get the signatures of John Johnston
9 and return the documents to him.

10 48. Ms. Johnston took the documents home and Mr. Johnston signed them
11 that evening in reliance on what Ms. Johnston indicated to him that Mr. Torkild had told
12 her.
13

14 49. It is possible that they were notarized without Mr. Johnston's presence.

15 50. Whether or not Mr. Johnston signed them is not relevant because they
16 were not used. They are not operative documents.

17 51. The Plaintiffs relied on Mr. Torkild's assurances and statements that he
18 did this regularly, that he was legally trained and knowledgeable about real estate. The
19 relied on his statement that he didn't want to end up with a house on Lummi Island, and
20 that he promised to lease it to them with the hope of resale in the near future.
21

22 52. Mr. Torkild represented that the rent would be roughly the same as the
23 parties' first mortgage.
24

1 53. Mr. Torkild's testimony regarding why the rent was higher than originally
2 anticipated indicates that he did represent to the Johnston's that the lease payment
3 would be lower. It also indicates his knowledge and involvement.

4 54. Darcee Johnston was a paralegal or legal assistant by training and by
5 experience.
6

7 55. Darcee Johnston is not an attorney and has very little experience as a
8 paralegal in the field of real estate law. Her education and expertise do not make her
9 specifically knowledgeable to be held to a different standard in this case than an
10 average homeowner.

11 56. Mr. Torkild informed Ms. Johnston that a friend could set up a corporation
12 to purchase the property and would ultimately be in control.

13 57. On March 10, 2004, six days later, Mr. Torkild opted not to purchase the
14 property, himself. (Exhibit 127)
15

16 58. Eight days later, First Capital Inc. is incorporated. (Exhibit 176)

17 59. First Capital Inc. is funded by assets owned jointly by Peter Torkild and
18 Julia Torkild.

19 60. Julia Torkild went to Horizon Bank to obtain the pay-off figure for the note.

20 61. On March 24, 2004, First Capital is funded.

21 62. The evidence shows through various exhibits including Exhibits 20, 21, 22,
22 23, 25, 26, 31, and 112 that the monies came from property which had been jointly
23 owned by the Torkilds.
24

25 63. The properties in which the funding was obtained were jointly owned.
26

1 64. There was no indication that the properties had changed hands or were
2 transferred officially.

3 65. These are community funds. The money went in and out of joint accounts.
4 The Equity was withdrawn from jointly-owned property and converted to cash. It then
5 went from their joint account to fund First Capital.
6

7 66. First Capital received the money from the Torkilds and then purchased the
8 note from Horizon Bank on March 25, 2004. (Exhibits 20, 21, 22, 23, 25, 26, 31, & 112)

9 67. There are checks involved in this process from both Peter Torkild and
10 Julia Torkild to their joint account and from their joint account to First Capital.

11 68. First Capital provided money to Peter Torkild and Julia Torkild, not Julia
12 Torkild individually, in the amount of \$150,000 to repay capitalization. (Exhibit 31)

13 69. The joint account bank statements show these transactions. (Exhibit 112)

14 70. On March 26, 2004 the Torkilds executed a Separate Property
15 Agreement. (Exhibit 99)
16

17 71. No values were included in the division. Therefore, one cannot know what
18 the values of the properties were, whether the equity withdrawal from the properties was
19 sufficient to be merely one party's share or a community share. Despite the Separate
20 Property Agreement, the properties were still community property and would have been
21 treated as community property at the time of the agreement, it is presumed to be
22 community funds.
23

24 72. The Separate Property Agreement signed on March 26, 2004 does not in
25 any way refer to the separation agreement on December 27th. The December 27th
26 agreement refers to one that will be created, but the one that was created to supposedly

1 divide the property does not refer back to the December agreement or say this is in
2 furtherance of that agreement.

3 73. The timing is convenient. The lack of cross referencing indicates that they
4 may have been created as part of a mechanism to make it look as though the parties
5 were separated.

6 74. There is very little evidence that the Torkild's lived separate and apart or
7 that anything else was done; that they separated their money, their funding, their
8 accounts, because the banking statements and the financial documents would indicate
9 they continued to comingle funds throughout this period of time.

10 75. On March 29, 2004 Ms. Johnston provided a letter requesting that Mr.
11 Torkild be named as successor Trustee. (Exhibit 79)

12 76. On March 31, 2004 Mr. Torkild is appointed by First Capital as the
13 trustee. (Exhibit 145)

14 77. On April 1, 2004 there is a confirmatory letter that it is acceptable to the
15 Plaintiffs even though it has already been done.

16 78. On April 2, 2004 Mr. Torkild personally conducted the trustee sale. First
17 Capital purchased the property. The second mortgage with HFC was eliminated through
18 the process.

19 79. On April ^{TW} 6, 2004 a document is created waiving any claims regarding the
20 foreclosure, any irregularities in the foreclosure, any defects in the foreclosure, and
21 reaffirms that Mr. Torkild acted properly, and that no advice was given. This is signed
22 only by Darcee Johnston, and three weeks later by John Johnston.
23
24
25
26

1 80. This document was created as a paper shield, purportedly to prevent any
2 liability from attaching to Mr. Torkild.

3 81. On April 6, 2004 the parties entered into the lease with First Capital.
4 (Exhibit 81)

5 82. There is no evidence that the Torkild's sought renters other than the
6 Johnstons.

7 83. The lease states that it is for three acres, although the property is not yet
8 subdivided showing intent of the Torkilds to subdivide in the future.

9 84. The rent on the lease was nearly the same as the Johnstons payment on
10 both the first and second mortgage, plus taxes.

11 85. This was not originally represented to them by Mr. Torkild.

12 86. Also on April 6, 2004 the Plaintiffs signed the Disclosure and Release
13 presented by First Capital. (Exhibit 122)

14 87. Exhibit 122 and Exhibit 77 were written by the same hand.

15 88. On April 10, 2004, First Capital deeded the property to Julia Torkild for
16 \$300,000. (Exhibits 4, 64, 50, and 105)

17 89. The sale is financed by the Aegis loan mortgage obtained by Julia Torkild.

18 90. The application for the Aegis mortgage shows significant
19 misrepresentations about income and the separation of Mrs. Torkild from Mr. Torkild.

20 91. The property is transferred to Mrs. Torkild.

21 92. Mr. Torkild quit claims to Mrs. Torkild any interest in the property.

22 93. Mrs. Torkild signed a second home rider on the Aegis loan stating the
23 home will be used as a second home. (Exhibit 202)

1 94. On August 3, 2004, Mr. Torkild inquired into a short plat of the three acres
2 on the property.

3 95. On November 28, 2004 Mr. Torkild is listed as the applicant for a wetland
4 determination for the short plat. (Exhibit 203)

5 96. On November 29, 2004, Mrs. Torkild places a work order with Christie and
6 Christie for the short plat. (Exhibit 207)

7 97. On January 3, 2005, Mr. Torkild is named on the application submitted to
8 Whatcom County for a short plat. (Exhibit 204)

9 98. The record of title shows movement between Mr. Torkild, Avanti
10 International, Julia Torkild, and back again to the series of the LLC's created in
11 Delaware. (Exhibits 205 and 206)

12 99. No explanations were given for the purpose of the movement of title.

13 100. All this is further evidence of intermingling of the Torkilds' corporate and
14 individual assets, and using the corporate form as a shell by Mr. Torkild and Mrs. Torkild
15 and their variously created entities.

16 101. The evidence shows that Mr. Torkild was involved throughout the entire
17 process; his name shows up everywhere.

18 102. During the lease period Mr. Torkild became difficult to contact and elusive.

19 103. Mr. Torkild continued to promise through various communications that,
20 "We will help you." "We will find a way to resolve this." "We will take care of this for you."
21

22 104. During the lease period, rent checks were written to First Capital, Julia
23 Torkild, or Peter Torkild. All checks were negotiated, some by Mr. Torkild, some by Mrs.
24 Torkild, some were signed by both.
25
26

1 105. The Torkilds would sign each other's names on the checks from time to
2 time.

3 106. The funds were initially placed into the joint account. At times the funds
4 were actually cashed for cash.

5 107. The parties could not have been separated. They continued to comingle
6 their funds like people who are continuing to maintain a marriage relationship, and they
7 intermingled these funds with First Capital.
8

9 108. The corporate funds were not kept separate.

10 109. The Personal funds were not kept out of the corporation.

11 110. At the end of the lease, the Johnstons were in financial difficulties again.

12 111. In December, 2005 Ms. Johnston wrote an email to Charles Bailey and
13 another neighbor trying to find another way to get some money. (Exhibit 85)
14

15 112. In December, 2005 Darcee Johnston and Mr. And Mrs. Torkild met in
16 Gloria Calderheads' office.

17 113. Ms. Calderhead took clear and contemporaneous notes.

18 114. Testimony shows that Mr. Torkild said he intended to sell the property to
19 the Plaintiffs.

20 115. Mr. Torkild informed Ms. Calderhead he would provide her with a price at
21 a later date.

22 116. At the meeting with Ms. Calderhead, a document was drawn up by the
23 Torkilds. (Exhibit 83)
24

25 117. Exhibit 83 stating that no agreement had been made is inconsistent with
26 the evidence on the record as Exhibits 76 and 77 are agreements between the parties.

1 118. Mr. Torkild never provided the price to Ms. Calderhead.

2 119. Mr. Torkild provided the price of \$425,000 to Ms. Johnston.

3 120. Mr. Torkild offered to arrange financing for the amount, plus an interest
4 only note for an additional \$150,000 which Mr. Torkild would later forgive.

5 121. Mr. Torkild later indicated his associates were not willing to finance the
6 Johnstons and referred her to Deborah Cook.

7 122. Ms. Cook is an experienced Mortgage Broker.

8 123. Ms. Cook spoke with Ms. Johnston on the phone regarding the situation.

9 124. Ms. Cook identified the proposed loan by Mr. Torkild as 'equity skimming'.

10 125. Ms. Cook called the Department of Financial Institutions and referred Ms.
11 Johnston to contact them about Mr. Torkild.

12 126. In April, 2005 Mr. Torkild left a voicemail for Mrs. Johnston that he would
13 not sell the property to them.

14 127. Mr. Torkild had a conversation with David Sorensen of the Department of
15 Financial Institutions that he had intended to sell the property to the Johnstons, but
16 since they filed a complaint against him, he was no longer going to sell to them.

17 128. Mr. Torkild served as the realtor for the three acre parcel while in
18 negotiations with Mr. Templeton and Mr. Bailey.

19 129. In 2007, shortly after the short plat was completed, First Capital was
20 dissolved.

21 130. The value of the property in 2004 at the time of the transaction is
22 \$375,000.

1 131. The value of the property is determined by witness testimony and the
2 condition of the property in March, 2004.

3 132. The Johnstons are substantially credible. Their description of the events is
4 consistent with the records and has not varied much through time.

5 133. Ms. Cook, the mortgage broker who testified on behalf of the plaintiffs, and
6 Mr. Sorenson, previously from the Department of Financial Institutions, are neutral,
7 credible witnesses.
8

9 134. Ms. Calderhead, a local realtor, provided credible testimony.

10 135. Mr. Bailey, a neighbor of the Tuttle Lane property, is a credible witness,
11 but only as a collateral witness.

12 136. Dr. Mariah Wallener, a medical expert witness called by the defense,
13 does not bring much weight to the issues at hand.
14

15 137. Ms. Hannah McFarland, Defendants handwriting expert, is qualified to
16 present her expert opinion, but the exemplars examined all came from the Torkilds after
17 discovery commenced and based on testimony presented by the Plaintiffs, this
18 evidence was not taken into consideration.

19 138. Mr. Steve Dahl, a previous co-worker from Top Mortgage and Mr. Siha
20 Top, former owner of Top Mortgage, called by the Plaintiffs did not provide information
21 that was helpful as they did not clear up the issue of Mr. Torkild's position at Top
22 Mortgage and his type of pay.

23 139. Mr. Tyrome Francisco, a former student of Peter Torkild and Plaintiffs'
24 witness, provided valuable testimony illuminating the method of operation of Mr. Torkild.
25
26

1 140. Mr. Wm. T. Follis, Plaintiffs' expert real estate appraiser and Mr. Don
2 Gustafson, Defendants' expert real estate appraiser are both professional and their
3 testimony is reliable.

4 141. Mr. Dale Serbousek, a Whatcom County realtor called by the Defendants,
5 provided very little helpful information.

6 142. Mr. Torkild, Mrs. Torkild, and their corporation were often evasive,
7 particularly when specifics were required and needed.

8 143. Based on conflicting testimony from the Torkild's themselves, an inability
9 to take responsibility for any questionable actions, and their focus on matters that are
10 trivial or collateral issues to the case at hand, their testimony is not reliable.

11 144. The corporate documents provided in Exhibits 177 and 178 are not
12 accepted nor considered appropriate or good evidence based on the statements made
13 by the Corporation's prior counsel in exhibits 131, 123, 133
14

15 145. The Plaintiffs relied on Mr. Torkild's representations, expressed expertise,
16 his feigned concern for their best interest and their trust in the process that he put in
17 motion.
18

19 CAUSE OF ACTION – FRAUD

20 Element One: Representation of Existing Facts

21 146. Based on the testimony and evidence submitted at trial, the Court finds
22 the Johnstons proved the following facts regarding their fraud claim by clear, cogent and
23 convincing evidence.

24 147. Mr. and Mrs. Torkild acted together to effectuate a fraud upon the
25 Plaintiffs.
26

1 157. The Defendants at no time intended to sell the property back to the
2 Plaintiffs as evidenced by letter of March 10, 2004 (Exhibit 127) and all subsequent
3 failures to set out any process for resale, provide any information, provide any sale
4 prices that were functional, and do any of the things that they promised despite
5 numerous requests by the Plaintiffs and many promises to do so.
6

7 **Element 4: Speaker's Knowledge of the Falsity**

8 158. Mr. Torkild had already obtained a preliminary title commitment on this
9 property at the time he made the promise.

10 159. Mr. and Mrs. Torkild controlled the foreclosure process in order to gain the
11 title.

12 160. First Capital was formed, but treated as an alter ego in an attempt to
13 shield themselves.

14 161. The Torkilds worked in concert to maintain the façade of leasing the
15 property while at the same time transferring it to Mrs. Torkild and beginning the short
16 plat process while the lease terms were ongoing.
17

18 162. None of the documents Mr. Torkild prepared in March, 2004 were used.

19 163. The Torkilds continued to get the Plaintiffs' cooperation with regard to
20 substituting the trustee, authorizing the sale of the note from Horizon to First Capital,
21 and treating the property as their own as evidenced by the Second Home Rider signed
22 by Mrs. Torkild.
23

24 164. The nature of Mr. Torkild's dealings were such that his intent all along was
25 that the promises to the Johnstons were known to be false.
26

1 165. Mr. Torkild put himself in the successor trustee position to control the
2 process.

3 166. His knowledge of the falsity is demonstrated by his actions.

4 **Element 5: Defendants Intended Plaintiffs to Act on the Information**

5 167. The Torkilds directed the Plaintiffs to sign the documents as evidence of
6 his good faith.

8 168. Mr. Torkild continually reassured them he would take care of them.

9 169. Mr. Torkild gave directions to the Plaintiffs not to disclose, not to take
10 other options, not to try to save their house from foreclosure, not to tell anybody else
11 what was going on, and not to participate or even attend the trustee's sale to see what
12 happened.

13 170. Mr. Torkild intended the Plaintiffs to follow his direction while the process
14 to acquire the property was set up and carried out.

15 171. If the Plaintiffs had not done what he told them, the scheme would not
16 have worked.

18 **Element 6: Ignorance of the Falsity of the Claims**

19 172. The Johnstons believed Mr. Torkild was helping them.

20 173. The Johnstons believed Mr. Torkild that they would be able to purchase
21 their property back.

22 174. The Plaintiffs acted consistently with carrying out the duties that Mr.
23 Torkild set out for them to meet his promises, including entering into the lease and other
24 release documents.
25
26

1 175. Plaintiffs were not aware that each time they signed a document provided
2 by Mr. Torkild, they helped him build his case.

3 176. Two years after entering into the lease agreement they were still unsure of
4 their status with regard to the property.

5 177. The Johnstons continued to seek loans to help them buy it back.

6 178. Mr. Torkild continued to reassure them that all would be well and to trust
7 him.
8

9 179. The Plaintiffs clearly did not understand the falsity of his claims or the
10 nature of his scheme.

11 **Element 7: Plaintiffs' Reliance on the Representation**

12 180. The Plaintiffs relied on Mr. Torkild's representations to be true.

13 181. The Plaintiffs did whatever Mr. Torkild asked.

14 182. The Plaintiffs signed all documents prepared by Mr. Torkild.

15 183. The Plaintiffs took no further action to seek help until the foreclosure was
16 done, and they were evicted.
17

18 184. The Plaintiffs did not further follow up with Mr. Bailey except almost two
19 years later when they needed the financing to carry out the scheme that Mr. Torkild said
20 he would allow them to buy the property back.

21 185. The Plaintiffs did not declare bankruptcy.

22 186. The Plaintiffs did not accept the loan from Creative Mortgage which was
23 available to them.
24

25 187. They did not follow up on any of the things they had available to them
26 because they were relying upon Mr. Torkild's representations.

1 **Element 8: Right of the Plaintiffs to Rely on the Information**

2 188. Mr. Torkild held himself out as having expertise and being there to help,
3 repeated his reassurances over and over, provided his documents that he was a real
4 estate agent, mortgage broker, and an attorney.

5 189. These give Plaintiffs a certain level of right to rely.

6 190. Plaintiffs were not as sophisticated in this area as Mr. Torkild.

7 191. Ms. Johnston has fair legal training, but it does not make her an expert
8 and does not give her the knowledge of the real estate market and financing, and all of
9 the things that were involved in this.

10 192. Ms. Johnston's experience does highlight that she would trust an attorney
11 and rely upon that person to do what they state they will do.

12 193. Mr. Torkild is very knowledgeable about the mortgage business and how
13 things work, he is an attorney, and he has a lot of skills in regard to drawing up
14 documents and making systems operate.

15 194. Mr. Torkild's expertise is also in the area of real estate and real estate
16 lending, just the type of person someone in the Plaintiffs' position might seek out for
17 help.

18 195. The Plaintiffs rightfully relied on the information he provided.

19 **Element 9: Damages**

20 196. The Plaintiffs lost any opportunity to preserve their home and their land.

21 197. They lost all equity they had in the home.

22 198. The Plaintiffs lost the ability to live in their home.

1 199. They were deflected from a chance to seek other remedies and ended up
2 homeless.

3 200. The Plaintiffs suffered significant emotional distress and illnesses, and
4 these other problems that had preexisted this situation were exacerbated due to the
5 stress of the situation.

6 201. The Plaintiffs were eventually forced into bankruptcy.

7 202. The property was worth \$375,000 at the time of the foreclosure.

8 203. Plaintiffs owed \$169,000 on the home.

9 204. The equity was \$206,000.

10 205. The First element of Damages is: \$206,000.

11 206. Medical costs for emotional damages were not quantified or proven.

12 207. Emotional distress can be awarded in a fraud case, which is an intentional
13 tort as per Nord v. Shoreline Sav. Ass'n, 116 Wn.2d 477, 485, 805 P.2d 800, 804
14 (1991), and McRae v. Bolstad, 32 Wn. App. 173, 646 P.2d 771 (1982), aff'd. on other
15 grounds, 101 Wn.2d 161 (1984).

16 208. The Court finds that the Johnstons suffered emotional distress as a result
17 of the Torkild's actions, in the amount of \$75,000 each, for a total of \$150,000.

18 209. Plaintiffs are awarded \$171, 258 for the loss of use and enjoyment of the
19 property.

20 210. There are other claims.

21
22
23 **Violation of the Deed of Trust Act, RCW 61.24.010**

24 211. Based on the testimony and evidence submitted at trial, the Court finds
25 the Johnstons proved the following facts by a preponderance of the evidence.
26

1 212. RCW 61.24.010(4) imposes a duty upon persons involved in this to act in
2 good faith.

3 213. At the time of this event, the fiduciary duty still applied.

4 214. The law shows there is a duty to act impartially towards both sides.

5 215. Mr. Torkild did not do that.

6 216. Mr. Torkild presided over the sale and prevailed upon the Plaintiffs to
7 substitute him as trustee so he could control the sale.
8

9 217. Mr. Torkild sold the note.

10 218. Mr. Torkild made arrangements for the sale after Mrs. Torkild purchased
11 the note.

12 219. Mr. Torkild and Mrs. Torkild, working together, transferred the property to
13 First Capital, the corporation funded by both Mr. and Mrs. Torkild.

14 220. The corporation was used as an alter ego by both Mr. and Mrs. Torkild.

15 221. Mr Torkild's actions as trustee did not meet the statutory standard for good
16 faith towards the grantor or the borrower.
17

18 222. The Deed of Trust Act has been violated by Mr. Torkild.

19 **Violation of the Credit Services Organization Act; RCW Ch. 19.134**

20 223. Based on the testimony and evidence submitted at trial, the Court finds
21 the following:

22 224. A Credit Services Organization is one who with respect to extensions of
23 credit by others represents that he or she can or will provide advice or assistance to a
24 buyer regarding improvement, saving, preserving credit ratings, obtaining essential
25 credit, stopping, preventing, or delaying foreclosure.
26

1 225. A buyer in a this statute is defined as one who solicits to purchase or who
2 purchases the services of a CSO.

3 226. Mr. Torkild's documents acknowledge he would make a profit from the
4 deal.

5 227. The Johnstons did not solicit or purchase from him services that fall under
6 the provisions of the statute.

7 228. There was no violation of the Credit Services Organization Act.

8 **Violation of the Mortgage Broker Practices Act; RCW Ch. 19.146**

9 229. Mr. Torkild was a mortgage broker by licensure and by his own
10 representation. (Exhibit 77)

11 230. RCW 19.146.010(4) defines a person as a mortgage broker who for
12 compensation or gain assists in applying for or obtaining a loan or holds himself or
13 herself out as being able to assist in applying for obtaining a loan.

14 231. Mr. Torkild did describe to the Johnstons at the time that he would not be
15 able to arrange financing for them when the time came for them to purchase the
16 property.

17 232. Section 020 (1) states it is a violation to directly or indirectly employ any
18 scheme, device or artifice to defraud or mislead borrowers or lenders or to defraud any
19 person. It is a violation to engage in any unfair or deceptive practice toward any
20 persons, or to obtain property by fraud or misrepresentation.

21 233. Mr. Torkild promised to keep the Johnstons in their house and to sell it
22 back to them.

1 234. The promise was directly stated that the Defendant could get financing for
2 them at the end of the lease.

3 235. Mr. Torkild was working for Top Mortgage at the time which lent credibility
4 to the promise at the time that he could get financing for them.

5 236. Mr. Torkild's employer, Top Mortgage, advertised during this time frame
6 that they had a 99.9% approval rating.

7 237. It is realistic to believe that the Johnstons believed Mr. Torkild could and
8 would be able to do these things.

9 238. Mr. Torkild held himself out as being able to assist in getting a loan after
10 the lease.

11 239. Mr. Torkild employed a scheme and an artifice, the lease, and defrauded
12 the Plaintiffs.

13 240. Mr. Torkild obtained an interest in the property by operation of the
14 community property law and by fraud and misrepresentation.

15 241. Mr. Torkild engaged in deceptive practices toward the Plaintiffs.

16 242. Mr. Torkild violated the Mortgage Broker Practices Act.

17 243. The exemption for an attorney does not apply because under the statute
18 he must be principally engaged in the business of negotiating residential mortgage
19 loans at Top Mortgage.

20 244. Because of Mr. Torkild's employment with Top Mortgage and his
21 testimony that he primarily engaged in this type of work, he is not exempt as an
22 attorney.

23 245. Mr. Torkild is not exempt as a real estate agent.
24
25
26

1 246. Mr. Torkild did not receive any customary commission or engage in a
2 bona fide sale of real estate with regard to the Johnstons.

3 **Violation of The Debt Adjusting Act; RCW 18.28**

4 247. Based on the testimony and evidence submitted at trial, the Court finds
5 the following facts:

6 248. Mr. Torkild does not meet the definition of a debt adjustor.

7 249. Mr. Torkild is not in violation of the Debt Adjusting Act.

8 **Violation of the Truth in Lending Act; 15 USC 1601**

9 250. Based on the testimony and evidence submitted at trial, the Court finds
10 the following facts:

11 251. Mr. Torkild did not proffer or negotiate a loan or mortgage for the Plaintiffs.

12 252. The statute does not apply.

13 **Unconscionable Behavior, Civil Conspiracy, and Breach of Fiduciary Duty**

14 253. Based on the testimony and evidence submitted at trial, the Court finds
15 the following:

16 254. These are subsumed in the fraud finding that this court has made.

17 255. Mr. Torkild was not acting as an attorney with regard to the Plaintiffs.

18 256. The Johnston's did not consider him their attorney.

19 257. There was no formation of an Attorney/Client relationship.

20 258. There was no legal advice.

21 **Violation of the Consumer Protection Act**

22 259. Based on the testimony and evidence submitted at trial, the Court finds
23 the Johnstons proved the following facts by clear, cogent and convincing evidence.
24
25
26

1 260. A violation of the Mortgage Broker Practices Act also violates the
2 Consumer Protection Act.

3 261. Fraud as found by this Court is sufficient to be a violation of the CPA
4 under 19.86.020.

5 262. The nature of the scheme is a deceptive act or practice which constitutes
6 fraudulent misrepresentation.

7 263. It occurred in trade or commerce relating to mortgages, property sales,
8 and leasing.

9 264. It impacted public interest.

10 265. Mortgage fraud does impact the public interest.

11 266. The violation of the statute regarding licensed mortgage brokers, the
12 public interest is clearly served by proper, legal, and clear foreclosure procedures.

13 267. This is not what occurred here, particularly in a non-judicial foreclosure
14 where there is no oversight by the court.

15 268. There is advertising to the public. This could have happened to someone
16 else.

17 269. The actions caused injury to the Plaintiffs: They lost their property, money,
18 and equity in their home.

19 270. The injury as a direct result of the fraudulent acts is supported by the
20 testimony of Mr. Francisco about other transactions, and the potential harm to others
21 who dealt with Mr. Torkild through Top Mortgage.
22
23
24
25
26

1 **First Capital Inc.**

2 271. First Capital was merely an alter ego to the Torkilds; it had no legitimate
3 independent existence with regard to this transaction.

4 272. This court finds that the corporate veil shall be pierced and First Capital
5 Inc. is also liable for this matter as would the Torkilds, individually.
6

7 **DAMAGES**

8 273. The Court finds an award of treble damages is appropriate under the
9 Consumer Protection Act, totaling \$25,000.

10 274. Plaintiffs are also entitled to an award of Attorney's fees, which will be
11 determined upon submission of an affidavit and appropriate demonstration as to what
12 the fees were.

13 275. The total award to the Plaintiffs is \$552,258 plus attorney's fees.
14

15 **Counterclaims: Waste (RCW 64.12.020)**

16 276. Based on the testimony and evidence submitted at trial, the Court finds
17 the following facts:

18 277. There is little to no evidence of intentional acts.

19 278. Nearly all items complained of by the Defendants occurred at the time and
20 existed at the time that the property was foreclosed, not during the time of the lease.

21 279. Torkilds spent \$1,105.95 for disposal of items that they had to remove
22 from the property after the eviction.

23 280. No compensation will be awarded for any damage or items that were
24 listed on the move-in checklist.
25
26

1 281. No allowance will be made for the well as work on the well coincided with
2 work on the short plat. No evidence of arsenic was provided other than discussions.

3 282. No other counterclaims were supported by any of the evidence or
4 testimony.

5 **Sanctions Regarding Discovery Violations**

6
7 283. Based on the testimony and evidence submitted at trial, the Court finds
8 the Johnstons proved the following facts by clear, cogent and convincing evidence.

9 284. The Torkilds deliberately failed to comply with discovery by failing to
10 disclose new evidence.

11 285. Plaintiffs are entitled to an award of sanctions. Because the plaintiffs are
12 entitled to an award of attorney's fees and costs, the sanctions will be included in the
13 fees and costs award.

14 **CONCLUSIONS OF LAW**

15
16 1. The Court has personal jurisdiction, subject matter jurisdiction and venue
17 to decide this case.

18 2. Plaintiffs John and Darcee Johnstons have proven by clear, cogent and
19 convincing evidence that Defendants Peter Torkild, Julia Torkild, and First Capital Inc.
20 committed all nine elements of fraud.

21 3. As a result of Fraud, plaintiffs have suffered damages of \$526,152.05

22 4. The Johnstons have proven by a preponderance of the evidence that
23 Defendant Peter Torkild, violated his statutory duties under RCW 61.24.010.

24
25 The provisions regarding the hold harmless from all potential penalties are an
26

1 unconscionable adhesion type of contract. Mr. Torkild cannot waive the obligations
2 under statute.

3 5. The Johnstons have not proven by a preponderance of the evidence that
4 Defendant Peter Torkild violated RCW ch. 18.86.

5 6. The Johnstons have proven by a preponderance of the evidence that
6 Defendant Peter Torkild violated RCW Ch. 19.134. *146 TM*

7 7. The Johnstons have not proven by a preponderance of the evidence that
8 Defendant Peter Torkild violated his statutory duties under RCW Ch. 19.146. *134 TM*

9 8. The Johnstons have proven by a preponderance of the evidence that
10 Peter Torkild violated the Consumer Protection Act.

11 9. As a consequence of the Torkilds' and First Capitals' actions violating the
12 Consumer Protection Act, the Johnstons are entitled to enhanced damages of \$25,000.

13 10. Under the Consumer Protection Act, the Johnstons are entitled to
14 attorneys' fees and costs as prevailing party in this lawsuit.

15 11. The Johnstons owe the Torkilds \$1,105.95 for disposal fees. That amount
16 is an offset against the total the Torkilds owe the Johnstons.

17 11. Judgment shall be entered for the Johnstons in the amount of
18 \$551,152.05 plus attorneys' fees and costs.

19 SIGNED this 2ND day of July, 2013.

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21
22 **Charles R. Snyder**

23
24 Judge Charles Snyder

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BURI FUNSTON MUMFORD, PLLC



TOM MUMFORD, WSBA # 28652
Attorney for Plaintiff

Copy Received. Notice of Presentation waived.

PETER TORKILD, WSBA # 28204

JULIA TORKILD, PRO SE

SPENCER McGRATH-AGG, WSBA #43675
Attorney for First Capital, Inc.

APPENDIX B

1 each Plaintiff for a total of \$150,000.

2 I also find that during the course of this process
3 through the scheme, the loss, the time after they lost the
4 use of the property, I guess, from the time that it was
5 taken from them at the foreclosure sale up until the time
6 that this matter has been resolved is a total of seven
7 years, and I find the rental value to be \$2,042 a month,
8 the amount that they negotiated with Mr. Torkild. He
9 thought it was worth \$2,042 a month, so I find that to be
10 a reasonable amount, and I am allowing that for seven
11 years' worth prior to trial. That is \$171,258 awarded for
12 loss of use and enjoyment of the property.

13 There are other claims. One of those involves a
14 violation of the Deed of Trust Act, RCW 61.24.010.
15 Section 010(4) imposes a duty upon persons involved in
16 this to act in good faith. At the time of this event, the
17 fiduciary duty still applied. The cases that Mr. Torkild
18 cited that he says somehow relieve him of some of that
19 duty hadn't been decided. A change in the law hadn't been
20 done, and in fact, if you look at more recent cases, the
21 Klem v. Washington Mutual Bank, it is pretty clear that
22 the state supreme court still believes there is a duty to
23 act impartially towards both sides. Mr. Torkild did not
24 do that.

25 He presided over this sale and prevailed upon the