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No. 70719-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOHN JOHNSTON AND DARCEE FOX-JOHNSTON
RESPONDENTS / PLAINTIFFS,

v.

PETE TORKILD, JULIA TORKILD, & FIRST CAPITAL, INC.
APPELLANTS / DEFENDANTS.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

OPENING BRIEF OF APPELLANTS

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I. Introduction

We are here because: The Johnstons were facing imminent foreclosure. CP 82. The parties did not know each other. CP 68:24. Ms. Johnston briefly met with Mr. Torkild *just 30 days* before the foreclosure sale. CP 69:14. Mr. Torkild represented that he was interested in purchasing the property either directly or through foreclosure (CP 82:2), and if successful, "promised to lease it to them with the hope of resale in the near future." CP 72:21. Ms. Torkild's Company, First Capital, Inc. bought the delinquent note from the bank. CP 74. The foreclosure sale continued to completion and First Capital acquired the property. CP 75. The property was leased back to the Johnstons (CP 76:3), but the Johnston's financial difficulties continued. CP 78:11. They defaulted in rent. CP 78:11 & 85:16. When it came time to purchase the property, it was impossible for the Johnstons to secure mortgage financing. RP 3:15. Resale was futile. They were eventually evicted. CP 85:17.

The Johnstons blamed the Torkilds for the ultimate loss of the property rather than their own inability to make the mortgage payments. To circumvent the Statute of Frauds and the impossibility to perform a re-purchase at the end of the lease, the Johnstons alleged *fraud-in-the-inducement.* The Johnstons alleged Mr. Torkild's pre-foreclosure "hope

of resale" statement was a fraudulent misrepresentation designed to "*deflect*" them from a chance to successfully stop the foreclosure sale on their own. CP 87:1.

Specifically, the Johnstons alleged that if Mr. Torkild didn't intervene, they could have "preserved the property" by "seeking" one of these three opportunities:

A. Sell off a portion of the property to a neighbor to raise cash, or sell the entire property; CP 69:11;

B. Go back to accept a high interest loan offer from Creative Mortgage. CP 85:23; or

C. File a Chapter 13 bankruptcy petition. CP 69:5

Following a bench trial, the trial court concluded that the Johnstons could have stopped the foreclosure with either of these "options". CP 69:11. Implicit in the court's conclusion was that that Mr. Torkild's unfulfilled "hope of resale" representation was the *cause-in-fact* and *proximate cause* of the foreclosure sale.

The first assignment of error is that the trial court had no basis to conclude the Torkild's were the *cause* of the loss. The court had no basis to conclude that Mr. Torkild's representation prevented the Johnstons from "preserving" the property (CP 86:22), from the foreclosure sale **because there are no findings to establish these three opportunities**

were feasible or even possible ***given the limited timeframe and the Johnston's lack of financial capability.***

Second, these three opportunities were only evidenced by Ms. Johnston's oral trial testimony. To establish the Johnston's credibility was a serious issue in this case, the Torkilds entered testimony and evidence from their handwriting expert. RP 5-42 & Ex. 144. The Johnston's own attorney demonstrated the prejudice to the Torkilds when he argued that the handwriting expert's testimony had *"...the potential to blow this case wide open in some ways depending on how the Court goes with it."* CP 82. The second assignment of error is that the trial court made a clearly erroneous finding as to how the expert's exemplars were gathered (CP 80:16), ***and then based upon the error, the trial court refused to consider the expert's testimony for any purpose whatsoever.*** CP 80:18

The remaining assignment of error is the review of two damage calculation errors.

II. Assignments of Error & Issues

The Whatcom County Superior Court erred by entering particular Findings and Conclusions that were not consistent with the law, not supported by essential findings, or clearly erroneous. CP 67-98.

Error #1. The Johnstons claimed they had three opportunities to stop the

imminent foreclosure sale. The theory was that if one of these opportunities were successful, it could have broken the chain of causation between the Johnston's inability to pay their mortgage, and the foreclosure sale. The trial court concluded Mr. Torkild's "hope of resale" representation deflected them from "a ***chance*** to *seek* these other remedies." CP 87:1. Essential findings are missing. The absence of these essential findings were wrongly construed in favor of the Johnstons. *These errors affect all of the causes of action in this case.* **Is the trial court's conclusion that the Torkilds caused the loss of the property contrary to law, and not supported by essential findings or substantial evidence?**

Erroneous Findings of Fact: 13, 18, 19, 20, 187, 199, 240, 242, 254, 261
Erroneous Conclusions of Law: 2, 3, 6, 8, 10, 11

The three opportunities are each discussed separately as part of the first assignment of error:

Subpart A. First opportunity: The opportunity to preserve the property by selling off a portion of the property, or by selling the entire property: The property consisted of one, 6 acre parcel which the court found, "was *capable* of subdivision according to the zoning code". CP 68:1.

Because it was *capable* of subdivision, the court leaped to the conclusion that selling off a portion of the property would stop the foreclosure sale. CP 69:12. However, there was no subdivision in process. CP 76:8. The court made no findings to support a conclusion that it was possible or financially feasible. *The court did not* ***link*** *how a mere "capability" could translate into a financially feasible way to preserve the property from the foreclosure sale.* The property is located in Whatcom County (CP 67), and the "zoning code" that the court refers to as its legal authority (CP 68:1), is Title 21 of the Whatcom County Land Division Regulations. However, Title 21.11.010 (Ord. 2000-056 §1)[1] actually makes it ***illegal*** to enter into any agreement, to transfer or sell "any part" of a piece of property, until a formal subdivision is completed. The trial court's conclusion is contrary to the law.

Secondarily, there are no findings to support an alternate opportunity that selling the <u>*entire*</u> property (CP 69:12), was a feasible or possible means to stop the

[1] The pertinent part of this legal authority is reproduced in the Argument on page 22 of this brief.

foreclosure sale given the very short time frame (CP 69:14), and distressed nature of the property. CP 68:2. **Is the trial court's conclusion that the Johnstons could have stopped the foreclosure by selling off a portion of the property, or by selling the entire property, contrary to the law and not supported by essential findings or substantial evidence?**

Subpart B. Second Opportunity: The opportunity to preserve the property by with a new "high interest rate" loan: The court found the Johnstons were delinquent on both of their mortgages. CP 68:4. The court found that the Johnstons had been "qualified" for a refinance loan at the time the refinance notice had been received, but that they didn't accept the loan at that time, *"because of the high interest rate"*. CP 68:19-23. Ms. Johnston testified at trial that by the time she had met Mr. Torkild, *"much time had gone by"*, and *"our credit had really deteriorated."* RP 141:24 - 142:1. Ms. Johnston's previous deposition testimony confirmed at trial, was that she had *not* been able to get financing from anyone except for this one

earlier offer. RP 137-139. The trial court made no findings as to whether this one isolated loan offer was still in effect, what the loan amount was, what the terms would have been, whether it would be enough to pay off the existing mortgages (CP 67:25), whether an appraisal had been ordered, disclosures sent to the Johnstons, or whether this loan offer was subject to further underwriting which would require verification of sufficient income, expenses, creditworthiness, and other conditions that, *according to the court's findings of mortgage delinquency at the time* (CP 68:4), could not be met. No findings were entered to support the feasibility of this opportunity. No findings were entered to conclude this opportunity was authentic. The Johnstons burden of proof was high. And substantial evidence indicates the pre-qualification was preliminary at best, and no longer valid at the time Ms. Johnston met Mr. Torkild. RP 141:24 - 142:1. The lack of essential findings were construed against the Torkilds. **Is the trial court's conclusion that the Johnstons could have preserved the property from foreclosure with a new mortgage loan, supported by its findings?**

Subpart C. Third Opportunity: The opportunity to preserve the property by filing a Chapter 13 Petition in the Bankruptcy Court: A Chapter 13 bankruptcy may help preserve a property from foreclosure *if a debtor can start to pay the mortgage payments again after they file the Petition.* 11 USC §1325(a)(5) & §1322(b)(4)&(5). Additionally, the debtor must also earn sufficient "regular income" (11 U.S.C. §§109(e)), to not only make the mortgage payments again as they regularly come due, *but to also be able to re-pay all the arrearages over time in a court-approved "Plan".* 11 U.S.C. §§101-1330. However, the trial court found the opposite - that at the time of the foreclosure, the Johnstons were not able to make the mortgage payments on the loan that they already had. CP 68:4. The trial court made no findings to support a conclusion that the Johnstons could resume normal payments again on their existing mortgages. Nor are there essential findings to establish they had *sufficient income to* ***qualify*** for a Chapter 13 bankruptcy plan because the court found: ***"it is undetermined whether***

they would have qualified" (CP 69:5), or *"if an attorney would have found it worthwhile to file such a petition". (Id.)* The trial court abused its discretion by entering a conclusion that filing a Petition was an opportunity the Johnstons could have sought when the court expressly found the Johnstons could *not* establish this issue. **Is the trial court's conclusion that the Johnstons could have preserved the property from foreclosure by filing a Chapter 13 bankruptcy Petition, contrary to the law and not supported by findings or substantial evidence?**

Error #2. The trial court abused its discretion when it refused to consider particular evidence: The court adopted unsupported assertions made by the Johnstons at trial because the court concluded the Johnstons were "substantially credible". CP 80. Ms. Johnston was a Certified Paralegal for 20 years. CP 73. The Torkilds provided evidence that the Johnston's testimony was not credible. RP 5-42 & Ex. 144. The Torkilds entered the testimony of Handwriting Expert Hannah McFarland, who demonstrated through her testimony that *Mr. Johnston*, an owner of the real property, never signed any of the deeds or

documents, never signed the Lease, and that his signatures were forged. RP 23:4 - RP 24:15 & Ex. 144. This was contrary to the Johnston's testimony. CP 72:11-13. Ms. McFarland's testimony helped to demonstrate these contradictions, and helped to demonstrate that Mr. Johnston's claimed total loss of memory during the foreclosure period - as the reason he couldn't testify about it - could have been fabricated to avoid these truths being revealed. The Johnston's attorney argued the expert's testimony could *"blow the case wide open"*. RP 145. Further, if the court had considered Ms. McFarland's testimony, *it could have substantially impacted the Johnston's credibility, and void any agreements.* Handwriting Expert McFarland testified that she personally gathered many of the exemplars containing the original signatures of John Johnston. RP 14, L.6 - 15, L.3.

Did the trial court err and abuse its discretion when it found that all of the exemplars examined by Ms. McFarland came from the Torkilds, and thereby refused to consider her testimony for any purpose?

Erroneous Findings of Fact: 132 *(in part),* 137
Erroneous Conclusions of Law: 2, 3, 4 *(in part),* 6, 8

Error #3. The trial court made two errors in its award of damages: **Was the trial court's calculation of damages for loss of equity, and for loss of "use and enjoyment" of the property, clearly erroneous and contrary to the law?**

Erroneous Findings of Fact: 203, 205, 205, 209
Erroneous Conclusions of Law: 3

Subpart A. Loss of equity: Damages for loss of equity were awarded against the Torkilds, (CP 87:10), which the court calculated based upon the equity of the subject property at the time of the foreclosure sale, (market value minus secured loans equaled remaining equity). *(Id.)* However, the court neglected to subtract the Johnston's $80,000 second mortgage from the market value of the home even though it entered a finding that there were two outstanding mortgages on the property. CP 67. **When it calculated loss of equity, did the trial court neglect to subtract the balance of the secured second mortgage from the market value?**

Subpart B. Loss of use and enjoyment: The Johnstons paid rent pursuant to a written Lease (Ex. 81), in order to use the

property after the foreclosure sale. CP 76:3. The Johnstons defaulted in their promise to pay rent, and were eventually evicted. CP 85:17. The trial court entered a separate award of damages against the Torkilds in the amount of $171,258 because it found the Johnstons lost seven years of use of the property during the pending litigation. CP 87:20. If the Johnstons had been able to use the property for those seven years, they would have had to pay rent during that time pursuant to the Lease. Ex. 81. **When it calculated damages for "loss of use and enjoyment" of the property, did the trial court fail to offset the amount of rent that the Johnstons would have been required to pay for their use?**

III. Standard of Review

Central to this case is the allegation of fraud-in-the-inducement. Establishing fraud requires all nine elements, ***including causation and damages,*** be proved by the clear, cogent, and convincing evidence standard ("highly probable"). The standard of review for facts and findings is substantial evidence, but must account for the higher burden of proof for the fraud claim.

1. Pertaining to the issue of whether all or a portion of the property could have been sold to stop the foreclosure sale: The findings are reviewed by the substantial evidence standard, and the law is reviewed *de novo*.
2. The trial court's refusal to consider the handwriting expert's testimony: The trial court's exercise of discretion must be based upon factual findings supported by substantial evidence. (If a finding or conclusion lacks substantial evidence, then it is an *inherent* abuse of discretion because it was not based upon the correct facts.) Marriage of Littlefield, 133 Wn. 2d 39, 46-47, 940 P.2d 1362 (1997).
3. The trial court's calculation errors are reviewed *de novo*.

IV. Argument

Almost all cites to the Clerk's Papers in this brief refer to the trial court's own findings and conclusions in this case, which are CP 67-96.

Error #1. Is the trial court's conclusion that the Torkilds caused the loss of the property contrary to law, or not supported by essential findings or substantial evidence?

In March 2004, the Johnstons had a property that was facing "imminent" foreclosure (CP 82), and set to occur *in 30 days*. CP 69:14 & 75:18. The parties did not know each other. CP 68:24. The Johnstons

testified that before the sale, Mr. Torkild said he would purchase the property at the public auction, and lease back it to them "with the ***hope*** of resale in the near future". (Emphasis added) CP 72:21.

The court found that Mr. Torkild's *"hope of resale"* did not invoke any professional relationship, because the trial court found that, "Mr. Torkild did not proffer or negotiate a loan or mortgage for the Plaintiffs." CP 91:12. It found the Johnstons did not solicit, nor did Mr. Torkild provide, any advice or assistance regarding their credit (CP 89:6), or debt. CP 91:7. No findings indicate Mr. Torkild represented them as a Realtor. Mr. Torkild did not represent the Johnstons in any legal capacity, nor did he provide any legal advice whatsoever. CP 91:19-23. And Mr. Torkild did not receive any commission or fees from the Johnstons. CP 91:1.

The court found that the foreclosure, purchase, and lease occurred. CP 75:18-76:4. The court found that the Johnston's financial difficulties continued. CP 78:11. They continued to seek loans to help them buy the property back. CP 85:5. The Johnstons defaulted on the Lease. 78:11 & 85:16. The Johnston's ability to obtain financing to re-purchase the property was hopelessly impossible. RP 3:15-21.

The Johnston's lawyer and Realtor never presented a written offer. By 2006, the Torkilds realized that hope of resale was futile. After a long period of default in rent, the Johnstons were eventually evicted. CP 85:17.

The Johnston's inability to pay their mortgage payments caused the foreclosure sale. CP 68:2-4. This was the natural and foreseeable outcome of the Johnston's lengthy mortgage default. However, the Johnstons sought to shift the blame for the loss of the property by claiming the Torkilds substituted themselves as the *cause* of the foreclosure when they became involved with the property. The trial court adopted the Johnston's argument and attempted to support its decision with the following findings and conclusions:

2. Plaintiffs owned 2183 Tuttle Lane, a six-acre parcel on Lummi Island. CP 67.

3. Plaintiffs had a first mortgage with Horizon Bank and a second mortgage with Household Finance. CP 67

5. On October 27, 2003 Horizon Bank issued a Notice of Foreclosure with attorney Jack Ludwigson acting as trustee. CP 68.

6. At this time the Plaintiffs were delinquent on both mortgages. CP 68.

152. The Plaintiffs were facing imminent foreclosure. CP 82.[2]

13. Darcee Johnston sought refinancing when the foreclosure notice was received and qualified for a loan through Creative Mortgage. CP 68.

14. Because of the high interest rate of the Creative Mortgage loan, Ms. Johnston looked for other solutions. CP 68.

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[2] Findings are arranged to more accurately reflect the order in which the events occurred.

148. The Defendants represented that they, through Mr. Torkild, would arrange to purchase the Plaintiffs' property either directly or through foreclosure, lease it to the Plaintiffs for a period of time, and resell it to the Plaintiffs. CP 82.

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

51. The Plaintiffs relied on Mr. Torkild's assurances and statements that he did this regularly, that he was legally trained and knowledgeable about real estate. They relied on his statement that he didn't want to end up with a house on Lummi Island, and that he promised to lease it to them *with the **hope**[3] of resale in the near future.* (Emphasis added) CP 72.

18. The Plaintiffs could have filed for Chapter 13 bankruptcy. Under the stipulation of the parties, it is undetermined whether they would have qualified, if an attorney would have found it worthwhile to file such a petition, or how long it would have taken for the lender to seek relief from stay. CP 69.

20. Additional options available to the Plaintiffs included a refinance for sale of three acres to a neighbor or sale of the entire property if that was necessary. CP 69.

187. They did not follow up on any of the things they had available to them because they were relying upon Mr. Torkild's representations. CP 85.

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[3] The word "*hope*", stated in the court's finding to characterize the Johnston's reliance upon an alleged representation to resell real property in the future without any written agreement is, in itself, an independent reason to vacate the judgment against the Torkilds because hope cannot be relied upon, particularly when the *hope of resale* was to occur two years in the future, and *after* an intervening public auction, coupled with a finding by the court that the Johnstons were in default of rent and had financial difficulties at the time they were supposed to repurchase the property. Absent are findings of any pre-foreclosure agreement - written or otherwise - containing the necessary provisions required by the Washington State Statute of Frauds, such as price or terms. If the trial court had the correct view of the facts and the law, it would have found that hope is *not* an actionable representation.

196. The Plaintiffs lost any opportunity to preserve their home and their land. CP 86.

199. They were deflected from a chance to seek other remedies and ended up homeless. CP 87.

For the trial court to support its conclusion that the *Torkilds* caused the loss of the property, rather than the Johnston's inability to pay their mortgage, the court was required to enter findings to establish Mr. Torkild's representation was the *cause-in-fact* ("but for"), and the *proximate cause* of the loss. This had to be proved to a clear, cogent, and convincing standard of proof for each element of fraud, *including causation and damages.*

The Johnstons argued that, *but for* their reliance upon Mr. Torkild's representation, they *"could have"* preserved the property from foreclosure by taking advantage of one of these three opportunities before the auction date:

A. Sell off three acres of the property to a neighbor, or sell the entire property; CP 69:11.

B. Go back to accept a high interest loan offer from Creative Mortgage; CP 85:23 or

C. File a Chapter 13 bankruptcy petition. CP 69:5.

The trial court adopted that argument and concluded that the Torkilds were fully liable for the loss of the property because Mr.

Torkild's *"hope of resale in the near future"* statement was a misrepresentation that "*deflected*" the Johnstons from a chance to "*seek*" these three opportunities. CP 87:1.

However, absent are essential findings to establish these three opportunities were actually possible, and not mere speculation.

The trial court was required to enter findings essential to support its conclusion that one of these three opportunities was earnest and possible given the limited timeframe, and the Johnston's lack of financial capability. Only then could the original chain of causation be broken by Mr. Torkild's 11th hour representation.

And in order to conclude Mr. Torkilds representation was the *sole* cause of the loss, the court must have also found that the Johnston's inability to make their mortgage payments, or inability to re-purchase the property, played *no part* in their own loss.

But none of these findings were made by the trial court, because none of the three opportunities were actually established at trial. Regarding the first opportunity - selling a portion of the property: It is illegal to sell off a portion of real property without completing a subdivision first. (Whatcom County Land Division Regulations.)[4] The court made no essential findings to support this first claimed opportunity

[4] This legal authority is available at www.co.whatcom.wa.us

other than, "the property was *capable* of subdivision". Capability, does not by itself prove it was possible, particularly within the very limited time remaining before the foreclosure sale. No findings were made about selling the *entire* property either.

Regarding the "high interest" loan offer: The record remains void of any essential findings to support this conclusion was a real possibility.

And pertaining to the Chapter 13 bankruptcy opportunity: The court's finding was that the Plaintiffs *could* have filed for chapter 13 bankruptcy, but it remained *"undetermined"* whether they would have qualified or even if an attorney would have found it worthwhile to file such a petition. CP 69. This was a finding in favor of the Torkilds since the Johnstons did not meet their burden of proof.

When the trial court enters findings of fact and conclusions of law, review is limited to determining whether substantial evidence supports the findings of fact, and whether the findings of fact support the conclusion of law. Douglas v. Visser, No. 67242-1 P.6 (2013), citing Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the declared premise. Douglas v. Visser, No. 67242-1 P.6 (2013), citing Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555-56, 132 P.2d 789 (2006), affd, 162 Wn.2d 340,

172 P.3d 688 (2007).

The lack of essential findings to support the court's conclusions of law are glaring. There was nothing the court could use to support a conclusion that the Johnstons could have actually preserved the property with any of these three opportunities. Nor could Mr. Torkild's representations be the proximate cause of the loss, because there is no finding that Mr. Torkild represented nor attempted to stop the foreclosure sale, which only occurred because of the Johnston's inability to make their mortgage payments.

The foreclosure would have occurred regardless of the Torkild's involvement and there are no findings to support the court's conclusion that these three alleged opportunities would have made any difference.

The Johnstons burden of proof for the fraud allegation was the clear, cogent, and convincing evidence standard ("highly probable"), for each element, including for causation and damages. The court is only entitled to make a discretionary finding, (such as a conclusion), if it has before it substantial evidence considering the appropriate standard of proof, combined with the correct view of the law. Marriage of Littlefield, 2133 Wn. 2d 39, 46-47, 940 P.2d 1362 (1997). Here, if the court *had* utilized the correct view of the facts and the law, it could *not* enter a judgment against the Torkilds and First Capital.

In short, the Johnston's loss of the property was inevitable. The chain of causation directly links the Johnstons inability to pay their mortgages with the loss of the property at a foreclosure sale. And this is the natural and foreseeable outcome for anyone who cannot make their mortgage payments. The three alleged opportunities are examined separately:

Subpart A. The trial court's conclusion that the Johnstons could have preserved the property from foreclosure by selling off a portion of the property without completing a legal subdivision is contrary to the law.

The trial court found that prior to the foreclosure sale:

> 4. The property was **capable** of subdivision according to the zoning code. (Emphasis Added) CP 69.

With no other findings to establish this capability was actually possible, the court leaped to the conclusion that the Torkilds therefore *deflected* the Johnstons from a chance to sell off a portion of the property in order to raise cash to stop the foreclosure sale from occurring:

> 20. Additional options available to the Plaintiffs included a refinance **for sale of three acres to a neighbor**... (Emphasis Added) CP 69.

There were only 30 days remaining until the foreclosure sale. CP 69:14 & 75:18. The property was *not* subdivided (CP 67, L.2 & CP 76,

L.8), nor had a subdivision commenced.

Legal authority for subdivisions in Whatcom County rests in the Whatcom County Land Division Regulations (Ord. 2000-056 §1) (Title 21.11.010 Land Division Regulations). The pertinent part of the Land Division Regulations state:

> **Chapter 21.11**[5]
> **Enforcement**
>
> **21.11.010 Violations**
> **No land comprising any part of a proposed land division in the unincorporated area of Whatcom County shall be sold, leased, or offered for sale or lease unless approved under this title.** Any person being the owner or agent of the owner of such land who shall **sell, lease, or offer for sale or lease, any lot or portion thereof shall be guilty of a gross misdemeanor.** Each sale or lease, or offer for sale or lease, shall be a separate and distinct offense for each separate lot or portion of said land. (Ord. 2000-056 Sec. 1) (Emphasis Added)

Because a trial court's exercise of discretion must be based upon substantial evidence *and a correct view of the law*, the trial court abused its discretion when it concluded the Johnstons could have preserved the property with this opportunity.

Additionally, the trial court lacked essential findings necessary to

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[5] This Enforcement provision of the Land Division Regulations is available at http://www.codepublishing.com/wa/whatcomcounty/html/Whatco21/Whatco2111.html#21.11.010 or by going to www.co.whatcom.wa.us and clicking on "Code Enforcement" in the "Planning and Development Services" Section, then "Codes Enforced", "Title 21" and then navigating to Title 21.11 from there.

enter a conclusion that selling off parts of a single parcel of real property was an earnest, or feasible opportunity within the limited time available.

Proving fraud requires clear, cogent, and convincing evidence ("highly probable"). However, no findings were entered to establish the Johnstons could have brought the loans current, *paid* for the subdivision, *completed* a subdivision, qualified for a loan on the remaining portion of the property to release the two secured loans on the part to be sold off, or whether all of this could have been accomplished within the final 30 days before the foreclosure sale.

The absence of these findings are deemed to be *negative* findings against the party having the burden of proof. *See* In re Welfare of A.B., 168 Wn.2d 908, 926 & n.42, 232 P.3d 1104 (2010) (Stating rule "that lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof"). Without these essential findings, the court had no basis to support a conclusion that the Johnstons could have preserved the property from the foreclosure sale with this opportunity.[6]

The court alternatively entered a conclusion that the Johnstons

[6] A subdivision was eventually done on the property by Ms. Torkild which cost approximately $60,000, and required survey, wetlands delineation, a new road, a new well and water system, and took *over two years* to complete. *See dates,* CP 77:6 & CP 79:21. In contrast, the Johnstons had no money and only 30 days from the time they first met Mr. Torkild until the foreclosure sale.

could have sold the *entire* property prior to the sale to avoid losing the property. CP 69. Again, there is a complete absence of findings to support this. There are no findings to establish the Johnstons had a potential buyer for the entire property, or a bona fide offer, or how much the offer would have been considering the deferred maintenance inside the house (RP 79:8-24), and rotting LP siding on the outside (RP 79:25-81:1), or whether there would have been any net proceeds after paying off the existing loans, real estate commissions, excise taxes, and foreclosure costs. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn.App 789, 796 137 P.3d 892 (2006). The standard of review on appeal is whether there is substantial evidence to support the findings in light of the "highly probable" test. Douglas Northwest v. O'Brien & Sons, 64 Wn.App. 661, 828 P.2d 565 (1992), citing In re Estate of Eubank, 50 Wn.App. 611, 618, 749 P.2d 691 (1988).

There are no findings to establish how long it would have taken to find a willing buyer from the time they first met with Mr. Torkild, how long a buyer would have needed to inspect the property, negotiate the significant defects, get an appraisal, obtain financing, and close escrow on this rural island property. There are no findings to indicate the Johnstons even consulted with a Realtor at any time during their lengthy default.

Given the Johnston's state of affairs, these findings were necessary to support the trial court's conclusion that this was a feasible option. The absence of a finding is deemed to be a negative finding against the party having the burden of proof. The trial court appears to have incorrectly construed the absence of these findings against the Torkilds.

Subpart B. The trial court's conclusion that the Johnstons could have preserved the property from foreclosure with a new mortgage loan is not supported by its findings.

The Johnstons were delinquent on their 1st and 2nd mortgages. CP 68. Ms. Johnston sought refinancing five months before the sale date - at the time she received the foreclosure notice (CP 68:19), and qualified for a loan offer through Creative Mortgage at that time (*Id.*), however:

> 14. Because of the high interest rate of the Creative Mortgage loan, Ms. Johnstons looked for other solutions. CP 68:21.

The court concluded that the availability of this early loan offer was one of the options that the Johnstons had to preserve the property from foreclosure (CP 85:23), despite not accepting the loan before she met Mr. Torkild because of its high interest rate. The court concluded that the Torkild's are fully liable to the Johnstons for the loss of the property because they deflected the Johnstons from going back to accept this offer:

> 186. The Plaintiffs did not accept the loan from Creative Mortgage which was available to them. CP 85:23.

The court had *no* facts before it other than a bare assertion that there was some high interest rate loan approved by a company called Creative Mortgage. No findings identify if the company was real, nor identify any terms of this loan offer, or conclusiveness of the approval, or that the offer was still available so close to the foreclosure sale.

In order to conclude the Torkilds were the cause-in-fact of the loss of the property, *the court would have to enter findings that this loan offer was a feasible and authentic opportunity* that was wrongly interrupted, given the Johnston's severe financial difficulties (CP 68:4), their lengthy default (CP 68:2 & CP 75:18), *and despite a pending foreclosure sale on a lower interest mortgage the Johnstons already had.*

Still, the Johnstons were required to prove that this opportunity was not only available, but that it was "highly probable" it would have stopped the foreclosure sale. *But the trial court did not know the nature of the approval.* The court did not know whether the "loan approval" was a bulk-mail offer, a pre-qualification, *a preliminary approval subject to satisfying typical income and credit conditions*, or whether it was actually processed to a "final" approval.

The Johnstons did not enter into the record any loan application, appraisal, loan disclosures. This indicates the loan offer was very

preliminary and still speculative.

The Johnstons had a clear, cogent, and convincing burden to prove this loan was a feasible opportunity. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn.App 789, 796. 137 P.3d 892 (2006). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the declared premise. Douglas v. Visser, (*Infra*). **A conclusion of law is based on untenable reasons if the facts do not meet the requirements of the correct standard.** Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

The court did not know if there was enough *time* before the foreclosure sale to complete an appraisal, or to complete the loan underwriting process, or to close escrow.

The court did not know what the "high interest rate" (CP 68), would have been, nor what the payments would have been, nor whether the Johnstons could afford the loan fees to do a loan, or if the Johnstons could have afforded to make payments on this high interest loan.

Once again, the absence of essential findings are deemed to be negative findings against the party having the burden of proof. Without these findings, the court could *not* conclude that this opportunity was authentic, nor whether it was a possible means to stop the foreclosure sale.

As explained fully in Marriage of Littlefield, 133 Wn. 2d 39, 46-47, 940 P.2d 1362 (1997):

> A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; *it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.* (Citations omitted; emphasis added.)

Here's what the court did know: The trial court found the Johnstons could *not* afford the mortgages they already had. *"At this time, the Plaintiffs were delinquent on both mortgages."* CP 68:4.

The trial court had evidence before it indicating the loan offer was *not large enough* because the *initial* loan amounts for the first and second mortgage were $160,000 and $73,839 respectively. Exh 143:4-5. Then after arrearages, the total outstanding balance of the secured first mortgage was $169,000 (CP 203:9), and the balance of the secured second mortgage was $80,000. **The total amount of loans required to be paid off was therefore a *minimum* of $249,000, plus loan commissions and foreclosure costs.** However, Ms. Johnston testified in her deposition, which was entered as evidence during the trial, **that the loan approval was only for $220,000.** RP 143-144. The trial court did not enter any

finding to help it conclude how a $220,000 loan offer could pay off $249,000 in existing mortgages, not including costs.

The trial court had nothing to conclude the loan offer was authentic except for a bare assertion from Ms. Johnston. There was no indicia of a loan application, loan terms, interest rate, credit report, appraisal, underwriting conditions to be satisfied, correspondence, or loan disclosures which the Johnstons would have been provided pursuant to federal loan disclosure requirements. The Johnstons offered none of these things into evidence, which ordinarily would be available for trial, other than an unsupported assertion that they had a loan approval.

The trial court's conclusion is based on untenable reasons because the facts in evidence do not meet the requirements of the correct standard - clear, cogent, and convincing ("highly probable"). A conclusion based upon untenable reasons is an abuse of discretion.

When a trial court abuses its discretion, reversal is required if the error was prejudicial to the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

Meanwhile, the court heard substantial evidence at trial that Ms. Johnston's *own prior testimony* was *grossly contradictory to having a loan approval.* In her written Declaration dated December 4, 2006, which was presented to the court as evidence at trial by reading it into the record, Ms. Johnston, a paralegal (CP 73:4), testified:

> (a) Because of our poor credit status, we were ***unable*** to refinance with any of the agencies or brokers I contacted. RP 137.
>
> (b) Refinancing was ***declined*** by each loan agent and/or broker I contacted despite my income increase. RP 138.
>
> (c) Given the fact we believe to have nearly exhausted all our options to save our home, I contacted Mr. Torkild as ***one last try.*** RP 138-139.
>
> (d) That Mr. Torkild, a mortgage broker (CP 89), told her that their credit was so poor, they were ***unable*** to qualify for any type of financing, particularly after filing of the foreclosure action. RP 139.

The court also heard Ms. Johnston confirm at trial that she had previously testified:

> (e) I contacted several mortgage brokers and lending agencies ***and was not able to secure financing.*** RP 141.

The court heard Ms. Johnston's trial testimony when she testified that things had changed dramatically from the time of the Creative

Mortgage approval to the time she first met Mr. Torkild:

> Q. Oh, okay. So then you, you recall when you contacted me thinking that you were contacting me as *one last try*?
> A. Yeah, because I was looking for a better rate, and by the time that much time had gone by, and you told me that I didn't need to do anything, **our credit had really deteriorated.** RP 141:19-142:1.

By Ms. Johnston's own testimony, her credit had really deteriorated around the time she contacted Mr. Torkild as "one last try". *The trial court acknowledged that all of Ms. Johnston's cross examination testimony,* ***"would be sufficient to impeach whatever [direct] testimony she might have given."*** RP 130:15.

Yet faced with all this evidence contradicting the alleged loan approval, the court did *not* enter findings necessary to support its conclusion that this loan offer was feasible or authentic, and then erroneously construed the absence of these findings against the Torkilds, even though the Johnstons had a high burden of proof.

Subpart C. Is the trial court's conclusion that the Johnstons could have preserved the property from foreclosure by filing a Chapter 13 bankruptcy Petition, contrary to the law and not supported by findings or substantial evidence?

The trial court entered a conclusion with imbedded findings that filing a Chapter 13 Petition was one of the three opportunities the Johnstons had to preserve the property from foreclosure (CP 69):

18. The Plaintiffs could have filed for chapter 13 bankruptcy. Under the stipulation of the parties, **it is *undetermined* whether they would have qualified, if an attorney would have found it worthwhile to file such a petition**, or how long it would have taken for the lender to seek relief from stay. (Emphasis added) CP 69.

19. They could have filed bankruptcy within hours of the actual foreclosure sale. CP 69.

185. The Plaintiffs did not file bankruptcy. CP 85.

187. They did not follow up on any of the things they had available to them because they were relying upon Mr. Torkild's representations. CP 85.

The trial court found that Mr. Torkild "deflected" (CP 87), the Johnstons from this "opportunity to preserve" the property. CP 86.

Legal authority to determine what a Chapter 13 bankruptcy requires rests in Title 11, U.S. Code, Chapters 1, 3, 5, (which apply to all bankruptcies), and Chapter 13 - Adjustment of Debts of an Individual with Regular Income.[7]

The Johnstons did not have an expert witness testify about the requirements of bankruptcy. Without reference to what the Bankruptcy Code required, the trial court had *no basis to make any conclusion* about whether the Johnstons could have fulfilled its requirements to preserve the

[7] Authority governing Chapter 13 Bankruptcy requirements rests in the U.S. Code which is available at http://www.law.cornell.edu/uscode/text/11

property from foreclosure.

Only a Petitioner with regular income can file a Chapter 13 petition. 11 U.S.C. §§109(e). A Chapter 13 may help preserve a property from foreclosure ***if*** the debtor can resume normal payments as they come due (11 USC §1325(a)(5) & §1322(b)(4)&(5)), *plus* re-pay all the arrearages over time in a court-approved "Plan". 11 U.S.C. §§101-1330.

Chapter 13 does not simply eliminate secured mortgages on real property (11 USC Subchapter II, §506(a)(1)), nor does it eliminate the arrearages on those secured mortgages. 11 USC §1325(a)(5) and §1322(b)(4)&(5).

Chapter 13 bankruptcy is not automatic. 11 USC §1325. The Bankruptcy Code requires all debtors to not only file a Petition with the court, but also to file a detailed "Financial Statement" listing all income, expenses, debts, assets, investments, and liabilities. 11 USC §521. The Code further requires the debtor to prepare and file a detailed "Plan" to propose how they intend to restructure their financial position. 11 USC §1322. Any creditor can object to either the Plan, or to the entire bankruptcy itself. 11 USC §1324. The Plan is then reviewed by the Chapter 13 Trustee, the Office of the US Trustee, all the creditors, and ultimately the Plan must be approved by the Bankruptcy Court in order to get relief, (11 USC §1325), and will contain various conditions.

There are no findings pertaining to any of these things at all. At a minimum, to conclude the Johnstons could have preserved the property by filing a Chapter 13 Petition, the court had to find that they could have qualified for a Chapter 13 Plan. **However, the trial court found it could not make this determination with the evidence provided by the Johnstons:**

> ***"...it is undetermined whether they would have qualified, if an attorney would have found it worthwhile to file such a petition...*** **CP 69.**

This is a finding in the Torkild's favor. The trial court abused its discretion when it entered an emotionally based conclusion that filing a Chapter 13 Petition was an authentic and feasible opportunity.

Additionally, the trial court *lacked substantial evidence* to support its conclusion, given the other findings that the trial court entered: The Johnstons were delinquent on both mortgages before the foreclosure. CP 68. During the Lease the Johnstons again had financial difficulties. CP 78. The Johnstons were ultimately evicted. CP 85:16. These demonstrate the Johnstons could *not* meet the requirements of a Chapter 13 Plan. The exercise of discretion must be based upon substantial evidence and a correct view of the law. Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

A Chapter 13 Petition cannot, by itself, preserve a property from foreclosure for someone who could not afford to make their mortgage payments. This is not what Chapter 13 of 11 USC provides for. 11 U.S.C. §1301-1330.

The Johnstons can *not* alternatively argue that the trial court's conclusion was *supposed* to mean they could have filed a Petition *just to postpone the foreclosure sale for a while,* because it's illegal for a bankruptcy petition preparer, including the debtor, to file a Petition knowing they could not meet the requirements of the code. 11 U.S.C. §110.

The trial court didn't know what the Bankruptcy Code required, didn't know whether the Johnston's income was sufficient in relation to its expenses, didn't know whether the Johnstons could begin to regularly pay mortgage payments again as required by the Code, and didn't know whether they could pay the arrearages as a part of the plan *in addition* to the mortgage payments.

The court didn't know whether the Johnstons could qualify for a Chapter 13, or whether an attorney would find it worthwhile. CP 69. The court didn't know how filing a Petition would have affected the foreclosure sale, or whether the secured lenders could complete the foreclosure regardless of a Petition being filed. The absence of these

findings are deemed to be negative findings against the party having the burden of proof.

The trial court's conclusions throughout this case were speculation, which is an inherent abuse of discretion. A trial court's conclusion must be based on substantial evidence and a correct view of the law.

When a trial court abuses its discretion, reversal is required if the error was prejudicial to the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

As a summary to Assignment of Error #1, if the trial court had the correct view of the law, and had properly construed the absence of essential findings in this case, it would have been *forced to conclude* that nothing would have been different had the Torkilds never become involved. The trial court's judgment should be reversed and vacated.

The Johnston's other claims in this case are derivative of the fraud claim: The alleged violations of the Mortgage Broker Practices Act ("MBPA"), the Consumer Protection Act ("CPA"), and the lesser claims

found by the trial court, cannot survive on their own if the fraud claim is reversed. The facts and circumstances within these causes of action are inextricably entwined with the Torkilds representations that formed the basis of the fraud claim. For example, to support the fraud claim, the trial court found that Mr. Torkild represented that he would use his expertise *as a mortgage broker:*

> 149. **Mr. Torkild represented he would use his expertise *as a mortgage broker*,** real estate broker, and an attorney to act in Plaintiffs' best interest to ultimately keep them from losing their property. (Emphasis added) CP 82.

And conversely, to support violation of the Mortgage Broker Practices Act, the trial court found that the damages were *caused by the fraud:*

> 240. **Mr. Torkild obtained an interest in the property by** operation of the community property law and **by fraud and misrepresentation.** CP 90.

These are inextricably entwined. Particularly because we know the violation of the Mortgage Broker Practices Act **did not arise independently** from a mortgage broker relationship:

> 251. Mr. Torkild did not proffer or negotiate a loan or mortgage for the Plaintiffs. CP 91.
>
> 231. Mr. Torkild did describe to the Johnstons at the time that he would **not** be able to arrange financing for them when the time came for them to purchase the property. (Emphasis added) CP 89 at L.16.

The only possible way the MBPA was violated in this case is with the same representations and actions that formed the basis of the underlying fraud claim.

And like dominos, the trial court found that the CPA was violated *because of* the violation of the MBPA and fraud claims:

> 260. A violation of the Mortgage Broker Practices Act also violates the Consumer Protection Act. CP 92:1.
>
> 261. Fraud as found by this Court is sufficient to be a violation of the CPA. CP 92:3.
>
> 262. *The nature of the scheme* is a deceptive act or practice which constitutes ***fraudulent misrepresentation.*** (Emphasis added) CP 92:6.

A private party cannot recover damages under the Consumer Protection Act absent proof of a *causal link between the unfair or deceptive act or practice and the injury.* Fid. Mortgage Corp. v Seattle Times Co., 131 Wn.App. 462 (Div. 1) (2005). (Emphasis added).

Similarly, the trial court found the various claims for Unconscionability, Civil Conspiracy, and Breach of Fiduciary Duty were "*subsumed in the fraud finding*". CP 91:18.

It is apparent that the claims are derivative, and the basis of all claims in this case would be unsupported if the fraud claim is reversed.

Error #2. Did the trial court err and abuse its discretion when it found that all of the exemplars examined by Ms. McFarland came from the Torkilds, and thereby refused to consider her testimony for any purpose?

If the court does not reverse the fraud claim, it should remand the case for a new trial. The purpose of the trial was to consider evidence. However, the trial court entered the following findings and conclusion:

> 137. Ms. Hannah McFarland, Defendants handwriting expert, is qualified to present her expert opinion, but the exemplars examined **all came from the Torkilds** after discovery commenced and based upon testimony presented by the Plaintiffs, ***this evidence was not taken into consideration.*** CP 80.
>
> 132. The Johnstons are substantially credible. CP 80.

The exemplars did not all come from the Torkilds. RP 14-15. The trial court used these two findings to literally adopt almost every allegation the Johnstons made at trial, *such as Ms. Johnston's unsupported testimony that they qualified for a loan offer*. This erroneous finding and conclusion was highly prejudicial to the Torkilds.

At trial, the Torkilds demonstrated the Johnstons credibility was a significant issue by entering evidence to prove most of Mr. Johnston's testimony about the events were fabricated. RP 148 & Ex. 144. The Torkilds sought to demonstrated the Johnston's credibility gap by proving Mr. Johnston fabricated his trial testimony to hide the fact that Ms.

Johnston never told him about Mr. Torkild's "hope of resale" representation, that all of Mr. Johnstons signatures on the initial documents were forged by Ms. Johnston, that Ms. Johnston's best friend falsely notarized the forged signatures, that Mr. Johnston never participated in the alleged sale and re-purchase agreements, and that Mr. Johnston subsequently pretended to know about the alleged representation only because Ms. Johnston commenced the lawsuit.

The Torkilds presented Handwriting Expert Hannah McFarland to prove documents were forged (Ex. 144), **which contradicted the Johnston's testimony and should have significantly affect the weight given to the Johnston's testimony as well.**

The court found Ms. McFarland qualified to present her expert opinion. CP 80. However, the trial court *refused to consider any part of her testimony for any purpose whatsoever*, because it erroneously found that "...the exemplars examined *all* came from the Torkilds...":

> 137. Ms. Hannah McFarland, Defendants handwriting expert, is qualified to present her expert opinion, but the exemplars examined **all came from the Torkilds** after discovery commenced and based upon testimony presented by the Plaintiffs, **this evidence was not taken into consideration.** CP 80.

Note that this is <u>not</u> a finding that the court didn't *believe* Ms. McFarland. Instead, the court stated a *specific reason* why it chose

not to consider **her testimony for any purpose - because it thought that the exemplars all came from the Torkilds.**

The trial court's finding is clearly erroneous and not supported by substantial evidence. The testimony from Ms. McFarland was clear:

> Q. How did you obtain the exemplars?
> A. Some of them were mailed to me, and others, I went to, I came to Bellingham here and went to several different medical facilities that had original documents with Mr. Johnston's signature on them, and I examined them, and scanned them.
> Q. Okay. So some of the documents, some of the exemplars were mailed to you. That would be mainly like deeds and things; is that correct?
> A. Yes.
> Q. And Notarized Deeds?
> A. Yes.
> Q. And then, and then you actually physically came to Bellingham from Port Townsend, and you had an appointment, and you actually went into these medical facilities and looked at their original medical records?
> A. Yes.
> Q. And you scanned them personally?
> A. Yes, I examined them with a handheld magnifier, and then I scanned them.
> Q. Okay, and so then you took that data and that data is your examples which we call exemplars; is that correct?
> A. Yes. (RP 14-15)

It was apparent that the Torkilds did not provide their expert with all the exemplars. Based upon this error, the court committed reversible error by refusing to consider Ms. McFarland's testimony for any purpose. The court abused its discretion because its decision was not based on fact.

When a trial court abuses its discretion, reversal is required if the error was prejudicial to the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Prejudice is obvious; reversal is required.

Hannah McFarland's testimony demonstrated that the Johnston's testimony should not be taken at face value without corroboration. *Ms. McFarland's testimony, if considered by the trial court, had the potential to entirely change the outcome of the case because it would force the court to consider the Johnstons unsupported statements in a new light.* So much of the trial court's conclusions were based upon nothing more than bare assertions made by the Johnstons. This is why the trial court could not enter any findings to support its conclusion about the three opportunities.

The Johnston's attorney demonstrates the prejudice from excluding Ms. McFarland's testimony:

> MR. MUMFORD: And also his handwriting, this whole sideshow about his handwriting, I don't know what that's about, really. **I guess that has the potential to blow this case wide open in some ways depending on how the Court goes with it**, because if he really didn't sign any documents and didn't have a lease with them, then where are we? (Emphasis added) RP 145.

An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)

(quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

The purpose of trial is to consider evidence. But instead of considering this potential outcome-changing evidence, the trial court avoided it.[8] The trial court was obligated to at least *consider* the evidence properly before it. All of the Johnston's oral testimony is challenged by the Torkilds because the trial court refused to consider whether Ms. McFarland's testimony would indeed "blow the case wide open" or bear upon the Johnston's credibility. As a result of the trial court's error, no one will ever know whether this evidence would have changed the outcome of the trial.

The trial court's clearly erroneous finding that the Torkilds provided all of the exemplars to their handwriting expert should be reversed. It should also be found that the trial court erred when it refused to consider the expert's testimony for any purpose, and the case should be remanded for a new trial.

Error #3. Was the trial court's calculation of damages for loss of equity, and for loss of "use and enjoyment" of the property, clearly erroneous and contrary to the law?

If the court does not vacate the entire judgment, or remand the case

[8] The trial court avoided considering other exculpatory evidence in this case. It also incorrectly attributed portions of Ms. Johnston's testimony to Mr. Torkild, such as findings number 53 and 103.

for a new trial, then the judgment should be reduced. There are two issues in this assignment of error:

Subpart A. When the court calculated loss of equity, it neglected to subtract the balance of the Johnston's second mortgage from the market value.

Findings 203, 204, and 205 are clearly erroneous and not supported by substantial evidence.

The trial court entered a finding that the market value of the property was $375,000 at the time of the foreclosure. CP 87. That the Johnstons had two outstanding loans secured on the property. CP 67. The Johnstons were delinquent on both mortgages. CP 68. However the court failed to subtract the outstanding balance of the *second* mortgage from the $375,000 market value of the property. CP 87:8-11.

The court found that Mr. Torkild obtained a Commitment for Title Insurance ("Title Commitment") before the foreclosure sale. CP 69. This Title Commitment (Ex. 143), identified the starting balance of three loans on the property:

- First mortgage (existing): $160,000.00
  Previous Second Mortgage: *25,000.00*
  (Refinanced into the larger second mortgage approximately two years before the default and foreclosure.)
- Second Mortgage (existing): 75,383.15

The court's formula to calculate equity was like this (CP 87:8-11):

$375,000	Market Value
- $169,000	Total Outstanding Balance of 1st Mortgage
$206,000	Damages for loss of property (loss of equity).

When it should have been like this:

$375,000	Market Value
- $169,000	Total Outstanding Balance of First Mortgage
- $ 80,000	**Total Outstanding Balance of 2nd Mortgage**
$126,000	Damages for loss of property (loss of equity).

Therefore, damages for loss of the property (loss of equity), should be reduced by the outstanding balance of the second mortgage ($80,000), and total damages should be reduced from $206,000 to $126,000, which would put the Johnstons in the same position they were in prior to the foreclosure.[9]

Subpart B. When it calculated damages for "loss of use and enjoyment" of the property, the trial court failed to subtract the amount of rent that the Johnstons were required to pay for such use.

After the foreclosure sale, the Johnstons executed a written Lease to occupy the property. Ex. 81. The amount of the Lease payments that the Johnstons agreed to pay was $2,042 per month. (*Id.*) This is the amount that the Johnstons would have had to pay on their mortgages and taxes to maintain the property if they had never met the Torkilds. CP

[9] It is unknown where the trial court derived the $375,000 *pre-foreclosure* value, because the MAI Certified forensic appraisal valued the property at $296,000 assuming *no* deferred maintenance. Ex. 192.

76:10. The Johnstons paid $2,042 per month in rent but soon defaulted. CP 78:11 & 85:16. They were eventually evicted. CP 85:17.

The Johnstons use of the property required payment of rent, as demonstrated by the written Lease executed by the Johnstons after the foreclosure sale (Ex. 81), *and* by their partial performance. CP 77:24.

The trial court awarded damages to the Johnstons in the amount of $171,258 because after they were evicted, they lost the use of the property while the parties were awaiting trial. CP 87:20. The court calculated the amount of damages by this formula: $2,042 per month x 7 years (84 months) = $171,258. [sic. It should have been $171,*528*.] CP. 87:20.

However, the Johnstons use of the property was never free. There were two mortgages secured on the property. 67:25. The Johnstons were obligated to pay a similar amount to maintain the property before they met the Torkilds. CP 76:10. And the Johnstons agreed in a written Lease to pay $2,042 per month in rent to use the property after the foreclosure sale (Ex. 81); and *did* pay $2,042 per month for a period of time. CP 77:24. The court's award of $171,258 to the Johnstons for loss of use, without offsetting the amount that they promised to pay to use the property, was erroneous.

Awarding damages for loss of use, without subtracting the amount that the Johnstons agreed to pay for the use, is a *windfall* for the Johnstons,

which is not justifiable.

The court should have concluded that regardless of whether they lost the equity in the property, the Johnston's loss of use was offset by the cost required to use the property, and so there were no actual damages.

Further, loss of the property and loss of "use" of the property are similar enough to be considered a double recovery.

In this circumstance, appropriate damages could have been awarded ***if*** the trial court entered findings that the Johnstons were forced to incur a monthly housing expense *in excess* of $2,042 to rent a *similar* property if they were wrongly evicted. If so, this would have resulted in actual damages. However, there were no such findings.

Therefore, Finding #209 and Conclusion #3 is erroneous.

V. Conclusion

The trial court's findings and conclusions are lengthy and written to appear that Mr. Torkild's "hope of resale" was an intentional act designed to hurt the Johnstons.

Regardless of what was said or done, the Johnstons inability to make their own mortgage payments *caused* the loss of the property by foreclosure. The Johnstons didn't have any money before the foreclosure sale, and didn't have any money when it came time to repurchase the

property. It was impossible for them to stop the foreclosure sale, and it was impossible for them to re-purchase the property when the time came to do so. RP 3:15-21. The Torkilds intervention allowed the Johnstons to remain in the property for an additional two years - time they would not have otherwise had.

Without findings to support them, the Johnston's three ostensible opportunities to preserve the property were entirely speculative. The only conclusion that the trial court could have possibly made according to its findings, and consistent with the law, was that the foreclosure sale was inevitable regardless of the Torkild's involvement. This affects all claims.

Relating to Assignment of Error Number 1:

The judgment should be reversed and vacated in its entirety because the trial court did not enter findings sufficient to support its conclusion that the Johnston's three opportunities to preserve the property from foreclosure were feasible or possible; it wrongly construed the absence of essential findings, and it entered conclusions that were contrary to the law.

Relating to Assignment of Error Number 2:

If the judgment is not reversed and vacated in entirety, then the trial court's clearly erroneous finding that the Torkilds provided all the

exemplars to their handwriting expert should be reversed. It should be found that the trial court erred when it excluded Ms. McFarland's testimony from any consideration. In this instance, the judgment should be vacated, and the case should be remanded for a new trial.

Relating to Assignment of Error Number 3:

In the alternative to reversal, or remand for a new trial, damages for *loss of equity* should be reduced by $80,000, because the trial court failed to deduct the 2nd mortgage from the market value; and the separate damage award for *loss of use* of the property should be zero, because the Johnstons were required to pay rent in order to use the property.

March 19, 2014

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JOHN R. JOHNSTON, and DARCEE L. FOX-JOHNSTON, Respondent / Plaintiffs, v. PETER A. TORKILD, JULIA A. TORKILD, and FIRST CAPITAL, INC., a Washington Corporation, Appellant / Defendants	NO. 70719-1 **CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that I am over the age of 18 and that on March 21, 2014, I deposited into the United States Mail, First Class postage prepaid, a true and correct copy of "Opening Brief of Appellants" addressed to Tom Mumford, Attorney for Respondents, 1601 F street, Bellingham, WA 98825.

March 21, 2014, Moses Lake, WA

Peter A. Torkild