No. 91864-3

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

JOHN JOHNSTON AND DARCEE FOX-JOHNSTON
RESPONDENTS / PLAINTIFFS,

v.

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

Court of Appeals Case No. 70719-1-I
Appeal from the Superior Court of the State of Washington for Whatcom County

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PETITION FOR REVIEW

PETER A. TORKILD
WSBA #28204
PO Box 268
Moses Lake, WA 98837
LegalMatter86@Yahoo.com
(509) 760-0124

Attorney for Petitioners

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INTRODUCTION

The Court of Appeals decision in this case unsettles the oversight authority granted by Land Division Codes in every County of the State of Washington. In this case, the Court of Appeals created an exemption to every county's ability to oversee land divisions by concluding that proposed new lots, initially sold with a right-of-first-refusal, do not violate county land division codes.

This is a case from Whatcom County. The Whatcom County Code (Ch. 21.11), prohibits a property owner from dividing and selling off parts of real property before they properly complete the subdivision process - a critical step in the health, safety, and welfare of Washington citizens - because there are too many unknowns: *"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."* Whatcom County Code, Title 21.11.010 (Emphasis added.)

However, in this case, the Court of Appeals incorrectly concluded that a right-of-first-refusal to sell off an equitable interest in un-subdivided real property, *"...did not require violation of Whatcom County land use regulations"* (*Infra.* at Pg.9). Offering to sell a right-of-first-refusal is offering to sell an equitable interest in real property. The buyer of a right-of-first-refusal exchanges money and owns the equitable interest in that

property, even though title is not yet transferred.

This type of sale pre-supposes the County will approve the subdivision as it was offered to the buyer, including its access, water supply, utility services, and the like. If the County decides the land is not dividable, or that access, water, etc. is ultimately not available, or less than what was promised, then what? Can the buyer and seller just record a quit claim deed to transfer title anyways, by just identifying the metes and bounds that were sold? How will this impact adjacent parcels? So many difficult questions arise.

This is why all counties have Land Division Codes that require oversight of land division before parts of undivided real property can be offered for sale. The Pierce County Code best articulates the significance of government oversight of land divisions:

> The purpose of [the Land Division Code] is to regulate the division of land and to promote the public health, safety and general welfare in accordance with standards established by the State to prevent the overcrowding of land; to lessen congestion in the streets and highways; to promote effective use of land; to promote safe and convenient travel by the public on streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage, parks and recreation areas, sites for schools and school grounds and other regulatory requirements; to provide for proper ingress and egress; to promote conformance with comprehensive plan policies and development regulations; to adequately provide for housing and commercial needs of the citizens of unincorporated Pierce County; and

> to require uniform monumenting of land division actions and conveyance by accurate legal description. (Pierce County Code Title 18F.10.010)

We generally take land division requirements for granted, yet land development regulations directly and significantly affect the health, safety, and welfare of every person in Washington State.

Because they are codified in every county of this state, and because the Court of Appeals concluded that a sale couched in a right-of-first-refusal can avoid county oversight, this case warrants review under RAP 13.4(b)(4) in order to continue a county's authority over all land divisions in this state.

Second, the Court of Appeals departed from a long history of case law - both Supreme Court cases and Court of Appeal cases - pertaining to standard of proof requirements.

IDENTITY OF PETITIONER

The Petitioners are Peter A. Torkild, Julia Ann Torkild, and First Capital, Inc. a Washington corporation.

CITATION TO COURT OF APPEALS DECISION

The Torkilds and First Capital, Inc. seek review of the Court of Appeals opinion, Johnston v. Torkild, et al, No. 70719-1-I (April 27,

2015) (Appendix (App.) A), which affirmed the judgment of the Whatcom County Superior Court. On May 20, 2015, the Court of Appeals denied Petitioners motion for reconsideration. (App. B.)

ISSUES PRESENTED FOR REVIEW

1. Can real property owners offer or sell a "right-of-first-refusal" for just a portion of their undivided property before they participate in the subdivision process required by Title 21 of the Whatcom County Code?

2. In a trial requiring facts to be proved by clear, cogent, and convincing evidence, is it sufficient for a party to prove they could have obtained a mortgage by only proving they knew the name of the bank and where the office was located?

STATEMENT OF THE CASE

The Johnstons were in foreclosure and met the Torkilds 30 days before the foreclosure sale. The Torkilds offered to help, and subsequently bought the home at the foreclosure sale. They leased it to the Johnstons for two years during which time the Johnstons were supposed to get back on their feet financially, but couldn't. Before the end of the lease, the Johnstons defaulted on their lease obligations. The lease subsequently ended, the Johnstons still refused to move, and then filed suit claiming the Torkilds defrauded them by inducing them to cease specific efforts to stop the foreclosure sale on their own. The Johnstons alleged they could have stopped the foreclosure by pursuing one of the following

two opportunities that they were "induced" out of pursuing:

> A. Offering to sell a "right-of-first-refusal" to their neighbor, Mr. Bailey, to raise some cash;
>
> B. Refinance, despite imminent foreclosure.

The trial court found that both of these opportunities to stop the foreclosure were proved, and the appeals court affirmed, reasoning, *"Bailey's assistance did not require violation of Whatcom County land use regulations."* (*Infra.* at Pg. 9)

The Torkilds appeal to this Court because the Court of Appeals decision in this case unsettles the authority granted to the County by the Whatcom County Code. The Whatcom County Code expressly prohibits **offering** undivided property for sale until a subdivision is complete:

> 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. Pertinent portion of Whatcom County Code, Title 21.11.010 (Emphasis added.)

The second issue is the Court of Appeals' departure from a long history of case law pertaining to standard of proof. Proof that a party knows the name of a bank and where its office is located is not clear, cogent, and convincing evidence that they can obtain a mortgage from that lender.

Whether the Court of Appeals was correct to exempt a sale couched in terms of a short term right-of-first-refusal from the "offer for sale" prohibition in the Whatcom County Code, and to disregard the level of evidence required to prove the refinance opportunity, will be dispositive of this case.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeals erred by exempting some land divisions from the official subdivision process.

The Whatcom County Code makes it illegal to offer portions of real property for sale if the subject portions have not already been legally divided through the county subdivision process:

> **Title 21.11**[1]
> **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. (Whatcom

[1] 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.

County Ord. 2000-056 Sec. 1) (Emphasis Added)

The court of appeals opined:

> "But Bailey testified that he **was sufficiently interested in buying three acres** of the Johnstons' property to provide them with sufficient time, including **loaning them money** or **buying a right of first refusal,** to structure the transaction around the foreclosure proceeding. Bailey's assistance did not require violation of Whatcom County land use regulations."

The Court of Appeals erred in three regards:

A. The Whatcom County Code prohibited the Johnstons from making any offer to sell a portion of the real property before it was subdivided, regardless of the neighbor's level of interest, because the neighbor only wanted three of the six acres:

> "... I would have actually formalized it with a lawyer and paid some money for the, you know, **right of first refusal *where I could purchase that three acres in the future.*"**
> (Emphasis added.) RP Part II, 8:11-20

A right of first refusal is the present sale of an equitable interest, which is prohibited, because it could be triggered at any time, and before a proper subdivision has been completed. The Court of Appeal's reasoning that the neighbor was *"sufficiently interested in buying three acres"* does not support an exemption to the Land Division Code requirements.

B. The Court of Appeals then referenced the neighbor's interest in alternatively advancing a short term loan to the Johnstons, but this too was in connection with purchasing only part of the real property, and therefore the same prohibition applies:

> THE WITNESS: You mean to the question of had there been, you know, some -- had they needed a ***short-term loan*** or something to complete the deal with their own foreclosure; is that the question?
> THE COURT: That's the one.
> THE WITNESS: Yeah I would have certainly considered it very carefully and most likely done it, because first of all, I'm predisposed to be a good neighbor to help people out when they're in difficulty, and secondly, I would have sought my own attorney's help to make sure that I could manage the risk. ***The point of the process to buy from them the three acres.*** (Emphasis added.) RP Part II, 11:11-22

Here the neighbor testifies the whole point of the short term loan scenario is also to facilitate buying just part of the undivided property.

C. Finally, the Court of Appeals erred when it made a reference to the neighbor being potentially interested in purchasing all of the property. This should have been moot because the Johnstons responded to the Torkild's Opening Brief by citing VRP, Part II, 7:3-15. However, in their Reply Brief, the Torkilds expanded this cite to include the portion that the Johnstons hid from the court, proving the neighbor's interest was always in just the three acres:

VRP, Part I, 6:21-7:15:

A. I think it was 2002 or 2003, the neighbor's cows got loose in our meadow, and so I called the Johnstons, and John came over, shooed the cows back, and we invited him in for a cup of tea and chatted and got better acquainted, and it was at that point I said you have a beautiful piece of land there. If you ever divide it, ***I would be interested in buying the three-acre parcel, the piece to the West.***
Q. And why were you interested in that parcel?
A. Because I wanted to protect my view. It lies directly, ***that three acres*** lies directly down the sloping hill below my piece in the direction of the water, and I, I like the lay of the land and wanted to keep it that way, and I knew from this discussion that the Johnstons intended to keep their land undeveloped, so it was fine for me, fine for them, and I simply said should you ever change your mind or need to sell, please let me know because I'm definitely interested.
Q. Did you remain interested in acquiring their ***three-acre*** parcel or a portion of their land from that time forward?
A. Yes, uh-huh.
Q. Okay. Hmm, if the Johnstons had come to you in 2004, and had offered to sell you their ***three acres***? Would you have been interested in buying it?
A. Definitely. (Emphasis Added.)

Briefing made it clear that the neighbor was interested in only part of the property, and the Court of Appeals opinion about his interest in buying the entire property is without support, and should not be a consideration in this appeal.

In sum, offering to sell a right-of-first-refusal for just a portion of a real property is the present sale of an equitable interest that could be triggered at any time regardless of whether a proper subdivision is ever

completed. If offering rights-of-first-refusal could get around subdivision statutes, then any time a county disallows a land division for whatever reason, people could just go ahead and offer it for sale couched in a short-term right-of-first-refusal.

The Whatcom County Code prohibits offering any property before it is subdivided in order to ensure important health, safety, and welfare requirements are met. The Court of Appeals opinion in this case opens the door to avoiding this essential oversight. Back yards could be sold off to stop foreclosures, driveways could be sold off to sell parking spots in congested areas. There would have to be many more cases heard to settle the County's oversight authority once again.

This Court should find that Title 21.11.010 of the Whatcom County Code prohibited the Johnstons from offering to sell a right-of-first-refusal on undivided land, and therefore this was not a real opportunity that the Johnstons could be induced out of.

2. The Court of Appeals erred when it concluded that evidence of a lender's name and office location was independently sufficient to prove the Johnstons could have obtained a mortgage under a heightened standard of evidence.

The entirety of the Court of Appeal's analysis of the evidence used to support the refinance "opportunity" is as follows:

> "Darcee testified that in early 2004, Horizon Bank referred her to another lender who approved her loan application. Darcee **identified the lender** as Creative Mortgage **and described the location of the office.** But she then decided to look for other options because of the high interest rate, a decision that led her to Peter Torkild. The trial court found Darcee's testimony to be credible. **Substantial evidence supports the court's finding that refinancing was an option."**

The Johnstons offered no other evidence in this case to support the contention that they could have obtained a new mortgage. This is a fraud in the inducement case which required facts be proved by clear, cogent, and convincing evidence. The only evidence the Johnstons offered was that they knew the name of the lender and where its office was located. We all know the name of a lender and location of their office, because lenders are all around us - we see them while commuting to work, and in running our daily errands. But merely knowing a name and location of a lender does not constitute substantial evidence that the Johnstons – just 30 days away from a foreclosure sale – could have obtained a mortgage to replace the one they couldn't afford to pay.

The Court of Appeals departed from well-settled case law:

> Inferences must follow from proven facts. State v. Odom, 83 Wn.2d 541, 548, 520 P.2d 152 (1974)

> "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)

> "A decision is **manifestly unreasonable** if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take." State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 922 (1990)
>
> "An abuse of discretion is present when there is a clear showing that the exercise of discretion was **manifestly unreasonable**, based on untenable grounds, or based on untenable reasons." Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)

This issue should be reviewed to ensure standards of proof are maintained evenly throughout the state. This is of fundamental importance and raises a good opportunity to re-establish what distinguishes the clear, cogent, and convincing evidence standard from the preponderance standard.

CONCLUSION

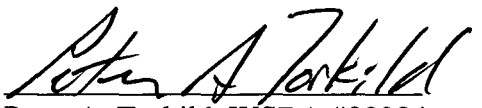
The purpose of Land Division Codes throughout the State is to regulate the division of land and to promote the public health, safety and general welfare in accordance with standards established by the State. Land division by right-of-first-refusal significantly unsettles the authority of every County in this State to fulfill one of their most important duties to the public. This case should be heard now to clarify the authority that counties have, and the Court of Appeals' uncertainty, before unregulated land divisions begin to accrue.

Second, perhaps nothing is more important than maintaining the distinction between standard of proof requirements. The level of evidence required to meet the clear, cogent, and convincing standard must remain reasonably fixed and understood, and not subjectively movable.

These are very narrow issues that carry a huge importance for every citizen of this state.

DATED: June 14, 2015

Respectfully Submitted,



Peter A. Torkild, WSBA #28204
Attorney for Petitioners
PO Box 268
Moses Lake, WA 98837
LegalMatter86@Yahoo.com
(509) 760-0124

APPENDIX – A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN and DARCEE JOHNSTON, a married couple,	)	No. 70719-1-I
Respondents,	)	DIVISION ONE
v.	)	
PETE TORKILD, JULIA TORKILD, individually, and the marital community composed thereof, and FIRST CAPITAL INC., a Washington Corporation,	)	
Appellants,	)	
TOP MORTGAGE CORPORATION, A Washington corporation and SIHA TOP, individually, TORKILD CORPORATION, a Washington Corporation, MAIN STREET MORTGAGE COMPANY INC., a Washington Corporation, MAIN STREET REALTY, INC., a Washington Corporation, AVANTI INTERNATIONAL HOLDINGS, LLC, a Delaware Series Limited Liability Company,	)	UNPUBLISHED OPINION
Defendants.	)	FILED: April 27, 2015

LAU, J. – The trial court found that Peter and Julia Torkild fraudulently promised John and Darcee Johnston that they would help the Johnstons save their home from imminent foreclosure. In reliance on that promise, the Johnstons took no

further steps to avoid the foreclosure. The Torkilds then arranged to purchase the Johnstons' property, which they subdivided and sold. As a result of the Torkilds' fraud, the Johnstons lost their home and the equity in their property. Because substantial evidence supports the trial court's findings of fraud, and the Torkilds fail to demonstrate any abuse of discretion in the trial court's evidentiary rulings, we affirm.

FACTS AND PROCEDURAL HISTORY

Following a two-week trial, the trial court entered 285 findings of fact. The unchallenged findings of fact support the following factual summary.

In 1992, John and Darcee Johnston purchased a six-acre subdividable parcel of property on Lummi Island and built a house. The Johnstons became delinquent in their mortgage payments, and on October 23, 2003, Horizon Bank issued a notice of foreclosure.

After receiving the foreclosure notice, the Johnstons explored options for saving their property. Darcee[1] was able to qualify for a refinancing loan through Creative Mortgage, but decided to look for other solutions because of the loan's high interest rate.

At around this time, Darcee saw a sign near Birch Bay. The sign displayed Peter Torkild's name and telephone number and listed "home loans, mortgages, and

[1] Where necessary for clarity, we use the parties' first names.

debt consolidation."[2] Darcee discussed the Johnstons' situation in detail with Peter during numerous telephone calls. On March 3, 2004, Darcee met with Torkild at Top Mortgage, where he was working.

Peter claimed to be an experienced real estate broker, mortgage broker, and real estate agent. He told Darcee that he could help her and that the best way to proceed would be to permit him, "or his compatriot,"[3] to purchase the Johnstons' property either directly or through foreclosure, lease it to the Johnstons for a period of time, and then allow the Johnstons to repurchase the property. Peter never intended to sell the property back to the Johnstons.

Ostensibly in support of the plan, Peter had prepared several documents for the meeting, including a purchase and sale agreement for his purchase of the property, a deed in lieu of foreclosure in Peter's favor, a statutory warranty deed in his favor, and an assignment and agreement that Peter could buy the Johnstons' promissory note from Horizon Bank. Some of the provisions in the documents were not consistent with Peter's oral representations.

Peter also prepared an agreement providing that he would purchase the property at the trustee sale or purchase the promissory note and conduct the trustee sale himself for the purpose of eliminating the second mortgage on the property. The agreement recited that the Johnstons would have the opportunity to lease the

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[2] Clerk's Papers (CP) at 68.
[3] CP at 82.

property after the sale and that the future lease might contain an option to purchase the property in one or two years. The document also provided that the Johnstons agreed not to disclose the arrangement, file for bankruptcy, refinance the property, or take any actions that would interfere with the foreclosure. The agreement included "numerous waivers, disclaimers, and hold harmless provisions"[4] that purported to protect Peter and Julia Torkild.

Peter told Darcee to take the documents home and have John sign them. None of the documents were ever used in the subsequent transactions. Relying on Peter's assurances and representations, the Johnstons undertook no further actions to avoid foreclosure.

On March 10, 2004, Peter opted not to purchase the Johnstons' property himself. On March 18, 2004, Julia Torkild incorporated First Capital, Inc. The Torkilds funded First Capital on March 24, 2004, with joint assets. The trial court found that the Torkilds treated the corporation "as an alter ego in an attempt to shield themselves."[5]

On March 25, 2004, First Capital purchased the Johnstons' promissory note from Horizon Bank. On March 29, 2004, Darcee provided a letter requesting that Peter be named as successor trustee. On March 31, 2004, First Capital appointed

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[4] CP at 71.
[5] CP at 83.

Peter as the successor trustee. On April 2, 2004, Peter conducted the trustee sale. First Capital purchased the property, thereby eliminating the second mortgage.

On April 6, 2004, the Johnstons entered into a 25-month lease with First Capital for three acres of the six-acre property. The lease did not contain an option to purchase. Although Peter had initially represented to the Johnstons that the monthly rent would be about the same as the first mortgage payment, the lease payments were nearly the same as both the first and second mortgages plus taxes.

On April 10, 2004, First Capital deeded the property to Julia Torkild for $300,000. Julia financed the purchase with a loan from Aegis. Peter quitclaimed any interest in the property to Julia.

On August 3, 2004, while the lease was still in place, Peter began investigating a short plat of the remaining three acres of the property. Peter continued to reassure the Johnstons that "We will take care of this for you."[6] At a meeting with Darcee in December 2005, Peter said that he intended to sell the property to the Johnstons, but later indicated that he would not sell the property. Also in December 2005, Julia, as president of First Capital, filed an unlawful detainer action against the Johnstons. In May 2006, after the lease expired, the trial court granted a writ of restitution.

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[6] CP at 77.

The Torkilds eventually subdivided the Johnstons' property into two parcels and sold them to a third party. First Capital was dissolved in 2007, shortly after completion of the short plat.

The Johnstons filed this action against the Torkilds and First Capital on February 26, 2008, alleging numerous claims, including fraud, breach of contract, conspiracy, and violations of the Credit Services Organizations Act, chapter 19.134 RCW, Consumer Protection Act (CPA), chapter 19.86 RCW, Washington Deed of Trust Act, chapter 61.24 RCW, Washington Debt Adjusting Act, chapter 18.28 RCW, Truth in Lending Act, and Mortgage Broker Practices Act, chapter 19.146 RCW.

Following a two-week bench trial in March 2013, the trial court found that the Torkilds had fraudulently induced the Johnstons to allow them to take over the foreclosure proceedings and purchase the property. Based on the Torkilds' false promises and assurances that they would be able to repurchase the property, the Johnstons complied with the Torkilds' demands that they not pursue available remedies to avoid the foreclosure. The court found that as a result of the fraud, the Johnstons lost the opportunity to preserve their home and land, resulting in the loss of their home and their equity in the property. The court found that Peter had also violated the Consumer Protection Act, the Deed of Trust Act, and the Mortgage Broker Practices Act, but rejected the Johnstons' remaining claims.

The court entered a judgment in favor of the Johnstons for $551,152.05 plus attorney fees, including damages for emotional distress, the loss of equity in the

property at the time of the foreclosure, and the loss of use and enjoyment of the property.

ANALYSIS

The trial court found that the Johnstons had established each of the nine elements of fraud by clear, cogent, and convincing evidence: (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage. See Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 166, 273 P.3d 965 (2012). On appeal, the Torkilds contend that the evidence and findings failed to establish that their fraudulent representations and actions caused the Johnstons to lose their home. They argue that the Johnstons' inability to afford their mortgage payments was the sole cause of the foreclosure sale and the loss of their property.

This court reviews factual findings for substantial evidence. In re Dependency of A.V.D., 62 Wn. App. 562, 568, 815 P.2d 277 (1991). When a challenged factual finding must be proved at trial by clear, cogent, and convincing evidence, we incorporate that standard into our review and determine whether there is substantial evidence in light of the "highly probable" test. In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). We view the evidence and all reasonable inferences in the light

most favorable to the prevailing party. Woody v. Stapp, 146 Wn. App. 16, 22, 189 P.3d 807 (2008).

The trial court found that in reliance on the Torkilds' assurances, the Johnstons undertook no further actions to preserve their property until after the foreclosure was completed and they had been evicted from their house. The court expressly found that the Johnstons could have sold a portion of the property or all of the property to a willing neighbor, accepted the available loan from Creative Mortgage, or filed for bankruptcy. The Torkilds contend that the court's determination of causation rests solely on speculation because the evidence failed to establish that any of the options were viable.

Charles Bailey, a neighbor, testified that he would have been willing to negotiate a purchase of part or all of the Johnstons' property in 2004. He confirmed that he had the money available and would have been willing, on short notice, to pay for a right of first refusal in a future sale or provide a short-term loan to give the Johnstons time to structure the transaction in light of the impending foreclosure.

The Torkilds' claim that there was no evidence supporting the trial court's finding that the Johnstons' property was "capable of subdivision"[7] is disingenuous. After evicting the Johnstons from the property, the Torkilds subdivided the property and sold the two resulting parcels.

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[7] CP at 68.

The Torkilds also assert that there was no evidence that the Johnstons could have subdivided the property and sold it within the short period of time remaining until the foreclosure. They maintain that any attempt to sell off a portion of the property before subdividing it would have been unlawful under Whatcom County land use regulations.

But Bailey testified that he was sufficiently interested in buying three acres of the Johnstons' property to provide them with sufficient time, including loaning them money or buying a right of first refusal, to structure the transaction around the foreclosure proceeding. Bailey's assistance did not require violation of Whatcom County land use regulations.

The Torkilds next contend that the evidence and findings failed to establish that the Johnstons could have obtained a loan to refinance the property. They argue that there was no evidence establishing that "the company was real," what the precise terms of the loan were, the "conclusiveness of the approval,"[8] or whether the offer was still available closer to the time of the foreclosure.

Darcee testified that in early 2004, Horizon Bank referred her to another lender who approved her loan application. Darcee identified the lender as Creative Mortgage and described the location of the office. But she then decided to look for other options because of the high interest rate, a decision that led her to Peter

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[8] Br. of Appellants, at 26.

Torkild. The trial court found Darcee's testimony to be credible. Substantial evidence supports the court's finding that refinancing was an option.

The Torkilds also contend that the evidence failed to support the trial court's finding that bankruptcy was a viable option. They argue that the Johnstons made no showing that could have satisfied the requirements for a bankruptcy filing or that they ultimately would have been able to save their property through this option.

But the parties stipulated that the Johnstons could have delayed the foreclosure sale by filing for bankruptcy, even though the ultimate success of that option was undetermined. The possible bankruptcy filing, which Darcee acknowledged would have been a last resort, must be viewed in conjunction with the refinancing and sale options that the Johnstons could have pursued.

The Torkilds do not challenge the trial court's findings that they assured the Johnstons they would help them avoid the loss of their property. In reliance on those assurances, the Johnstons complied with the Torkilds' express demands that they not cure the deficiency, pursue refinancing or bankruptcy, or otherwise interfere in any manner with the foreclosure. Many of the Torkilds' allegations about the Johnstons' ability to pursue available options and the possible outcomes involve issues of credibility that the trial court resolved adversely to the Torkilds. This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

Viewed in the light most favorable to the Johnstons, substantial evidence established viable options that they could have pursued to stop the foreclosure sale.

The Torkilds next contend the trial court erred when it failed to consider the testimony of their handwriting expert, Hannah McFarland. McFarland testified that John Johnston's signatures on the documents that Peter gave to Darcee at the first meeting were not genuine. The trial court found that McFarland qualified as an expert but declined to consider the testimony in its decision. We review the trial court's admission or exclusion of expert testimony for an abuse of discretion. Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004).

The Torkilds argue that McFarland's testimony undermined the Johnstons' credibility and "proved" the Torkilds' theory that John Johnston "fabricated his trial testimony"[9] to hide the fact that Darcee never told him about Peter's representations. They allege that "Mr. Johnston subsequently pretended to know about the alleged representation only because Ms. Johnston commenced the lawsuit."[10]

The trial court concluded that the genuineness of John's signature on the documents that McFarland examined was not relevant because "[the documents] were not used. They were not operative documents."[11] The Torkilds have not provided any persuasive argument suggesting how McFarland's testimony about

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[9] Br. of Appellants, at 39.
[10] Br. of Appellants, at 40.
[11] CP at 72.

John's signature on the documents would have undermined the Johnstons' testimony or credibility about the transaction. Nor have they identified any evidence in the record supporting their conclusory allegations that John's testimony was fabricated or that Darcee never told John about her meeting with Peter and forged his signature on the documents. The partial verbatim report of proceedings that the Torkilds provided this court contains none of John's trial testimony and only brief excerpts from Darcee's testimony. Under the circumstances, the Torkilds have not demonstrated that the trial court abused its discretion in not considering McFarland's testimony.

The Torkilds next contend that the trial court should have subtracted the balance due on the second mortgage when calculating the Johnstons' loss of equity and should have subtracted the Johnstons' rent payments when awarding damages for their loss of use and enjoyment of the property. But the Torkilds have not supported these contentions with any meaningful legal argument or citation to relevant authority. Nor have they provided this court with a record of the arguments they presented to the trial court on these issues. We therefore decline to consider the alleged errors. See Ang v. Martin, 154 Wn.2d 447, 487, 114 P.3d 637 (2005) (appellate court will not review assignments of error unsupported by argument or citation to authority); see also RAP 10.3(a)(6).

Finally, the Torkilds contend that the trial court's decision on the Johnstons' remaining claims, including violations of the CPA and Mortgage Broker Practices Claim, are derivative of the fraud claim and must also be reversed. Because

substantial evidence supports the trial court's fraud determination, the Torkilds' challenges to the remaining claims also fail.

The trial court awarded the Johnstons attorney fees under the CPA. See RCW 19.86.060. As the prevailing party on appeal, the Johnstons are also entitled to attorney fees on appeal, subject to compliance with RAP 18.1(d).

Affirmed.

Dwyer, J.

WE CONCUR:

Trickey, J

Becker, J.

APPENDIX – B

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

APPELLANTS MOTION FOR RECONSIDERATION

PETER A. TORKILD, *pro se*
WSBA #28204
PO Box 268
Moses Lake, WA 98837
(509) 760-0124

JULIA A. TORKILD, *pro se*
PO Box 268
Moses Lake, WA 98837
(360) 220-0933

In general, the court of appeals upheld the superior court's conclusion that the Johnstons could have preserved the property from foreclosure by: (A) selling a portion of the property or all of the property to Mr. Bailey; (B) accepting a loan from Creative Mortgage; or (C)filing for bankruptcy.

1. The Court of Appeals Erroneously Affirmed that Mr. Bailey's assistance would not be in violation of Whatcom County land use regulations.

The Court of Appeals stated:

> "Charles Bailey, a neighbor testified that he would have been willing to negotiate a purchase of **part** or **all** of the Johnstons' property in 2004."
>
> "He confirmed that he had the money available and would have been willing, on short notice, to pay for a right of first refusal **in a future sale** or provide a short-term loan to give the Johnstons time to structure the transaction in light of the impending foreclosure."
>
> "But Bailey testified that he was sufficiently interested in **buying three acres of the Johnstons' property to provide them with sufficient time, including loaning them money or buying a right of first refusal,** to structure the transaction around the foreclosure proceeding. **Bailey's assistance did not require violation of Whatcom County land use regulations.**"

The Relevant Statute that the Court of Appeals Misapprehended:

The Whatcom County land use ordinance makes it illegal to enter

into a transaction, or tender money, for the purposes of buying just part of a piece of property if it has not already been legally created through the county subdivision process:

> **Chapter 21.11**[1]
> **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. (Whatcom County Ord. 2000-056 Sec. 1) (Emphasis Added)

Points of Law and Fact that the Court of Appeals Overlooked or Misapprehended:

A. Mr. Bailey had no interest in purchasing all of the property:

Mr. Bailey's entire testimony is before the court. There is no testimony nor facts of record whatsoever to support the court of appeals affirmation that Mr. Bailey was interested in purchasing *the entire property.* This was made very clear in the briefing and Mr. Bailey's own

[1] 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.

testimony. This fact cannot be used to support an affirmation.

B. Mr. Bailey's interest in tendering money for a right of first refusal was with the intention, and toward furtherance of, purchasing only three of the six acres of land, which was illegal:

Mr. Bailey's testimony about purchasing a right of first refusal is as follows:

> "... I would have actually formalized it with a lawyer and paid some money for the, you know, **right of first refusal *where I could purchase that three acres in the future.*"** (Emphasis added.) RP Part II, 8:11-20

Mr. Bailey's testimony about advancing a short term loan is as follows:

> THE WITNESS: You mean to the question of had there been, you know, some -- had they needed a ***short-term loan*** or something to complete the deal with their own foreclosure; is that the question?
> THE COURT: That's the one.
> THE WITNESS: Yeah I would have certainly considered it very carefully and most likely done it, because first of all, I'm predisposed to be a good neighbor to help people out when they're in difficulty, and secondly, I would have sought my own attorney's help to make sure that I could manage the risk. ***The point of the process to buy from them the three acres.*** (Emphasis added.) RP Part II, 11:11-22

The assistance Mr. Bailey was willing to offer was illegal because it was with the intention and for the purpose of a future purchase transaction for a parcel of land that had not been legally created yet. This is in violation of the Whatcom County land use ordinance.

The court of appeals opined:

> "But Bailey testified that he was **sufficiently interested in buying three acres of the Johnstons' property to provide them with sufficient time, including loaning them money or buying a right of first refusal, to structure the transaction around the foreclosure proceeding.** Bailey's assistance did not require violation of Whatcom County land use regulations."

Mr. Bailey did not testify he would give the Johnstons money as a mere gift. He did not testify that he would give them the money as a personal loan with ONLY the expectation of repayment. He said over and over that, *"The point of the process [was] to buy from them the three acres."*

The reason for the Ordinance is because there is no way the purchase agreement can contemplate what the county will require in terms of lot size, shape, road dedications, easements, utility requirements, wetland mitigation, setbacks, legal description, etc. So there is no way to identify what the buyer would be buying, and who is responsible for what, or even if the county will allow a subdivision.

Is the court of appeals holding otherwise? Can I buy a right of first refusal for my neighbor's back yard so when he sells it I can add it to mine even though it would make his lot size smaller than required by the zoning code? And if I should file bankruptcy before I exercise the right, the bankruptcy trustee will own the right and call sell it off to a third party.

The court of appeals would be wise to reverse their opinion on this point.

2. The Court of Appeals Erroneously Affirmed That There Was Substantial Evidence That the Johnstons Could Qualify for a Refinance Mortgage When the Only Substantial Evidence Overwhelmingly Proved the Opposite.

The totality of the court of appeal's analysis of the refinance option is as follows:

> "Darcee testified that in early 2004, Horizon Bank referred her to another lender who approved her loan application. Darcee **identified the lender** as Creative Mortgage **and described the location of the office.** But she then decided to look for other options because of the high interest rate, a decision that led her to Peter Torkild. The trial court found Darcee's testimony to be credible. **Substantial evidence supports the court's finding that refinancing was an option."**

Everyone in America knows the name of a bank and the location of a bank's office. Is this what constitutes substantial evidence under the clear, cogent, and convincing evidence standard for Division I? This is absurd.

And then the court of appeals added to the absurdity by finding that **FILING BANKRUPTCY would have helped the Johnstons buy time to get a new mortgage loan.**

> "The possible bankruptcy filing, which Darcee acknowledged would have been a last resort, **must be viewed in conjunction**

> **with the refinancing** and sale options that the Johnstons could have pursued."

If any court in the world analyzed as this court did – by finding the plaintiff could have qualified for a refinance loan **while in foreclosure *and* while in bankruptcy**, and that **the only evidence the plaintiff needed for proof of qualifying for a new mortgage was that they knew the name of the bank and where the office was**, they would be the joke of the bar. Yet that is exactly the analysis of this court. The court of appeal's review of this point is exactly that absurd.

But it does not stop there. What makes the court of appeals analysis even more shocking, is that the Torkilds **provided this court with real factual testimony from the same witness which overwhelmingly proved the opposite.** We provide it once again. View these facts in the light most favorable to the Johnstons and tell the people of this State if Division I still believes that knowing the name of a bank and where the office is, was enough that the Johnstons qualified for a loan while in foreclosure already. Ms. Johnston herself, 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.

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

In light of this being **the only evidence** of their refinance opportunity in the case, exactly how can this court affirm that the Johnstons proved this point by clear, cogent, and convincing evidence? What happened to common sense. What happened to simply applying the law to the facts. The Johnstons provided nothing to indicate a loan approval other than the name of a bank and the office location. NOTHING.

This court chose a desired outcome, and then engineered some garbage response just to support it. I will make sure everyone knows it because it's not fair and not right. Law only works if people perceive it to be fair and just. This isn't a game. You actions ruin lives and families, the least you should do is properly analyze a case.

This is the law on this point, and it should be followed:

> Inferences must follow from proven facts. *State v. Odom*, 83 Wn.2d 541, 548, 520 P.2d 152 (1974)
>
> "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)
>
> "A decision is **manifestly unreasonable** if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take." *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 922 (1990)
>
> "An abuse of discretion is present when there is a clear showing that the exercise of discretion was **manifestly unreasonable**, based on untenable grounds, or based on untenable reasons." *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)

No one can believe or trust the court of appeal's analysis on this point. At the very least, the court of appeals should admit that the Johnstons were required to demonstrate something more than the name and location of the bank. And the court should try to explain how filing bankruptcy on top of being in foreclosure could possibly enable anyone to get a new mortgage loan.

A party to an appeal knows when the court seeks to justify a desired outcome regardless of law or reality. It's not right to ruin people's lives because of mere speculation.

3. The Court of Appeals Erroneously Affirmed That Buying Some Time by Filing Bankruptcy would have Helped the Johnstons Sell Off Three Acres to Mr. Bailey or Enable Time to Obtain a New Mortgage.

The totality of the court of appeal's analysis of the bankruptcy option is as follows:

> "But the parties stipulated that the Johnstons could have delayed the foreclosure sale by filing for bankruptcy, even though the ultimate success of that option was undetermined.
>
> The possible bankruptcy filing, which Darcee acknowledged would have been a last resort, must be viewed in conjunction with the refinancing and sale options that the Johnstons could have pursued."

The foreclosing lender can file relief from the bankruptcy stay immediately after the bankruptcy petition is filed. The Johnstons provided the trial court with nothing to indicate a lender would have been willing to cooperate with them.

The court of appeals lumped the bankruptcy issue into the illegal Bailey land sell-off and the unproven refinance option.

Bankruptcy does nothing to make the illegal Bailey transaction possible. Obviously people can't go around selling off parts of their lots to each other without county approval, regardless of bankruptcy buying some extra time. And more important is that the Johnstons did not demonstrate how bankruptcy would have helped – **which was their burden to do.**

And just as obvious, filing bankruptcy does nothing to further

enable a refinance mortgage, regardless of having a little extra time – in fact it makes it even more impossible to get a loan – which apparently everyone in the world knows except this court.

The court of appeals should properly find that the act of physically filing a bankruptcy petition, with evidence of nothing more, **is not sufficient** to support any of the Johnston's arguments under the heightened standard.

Remember, the Johnstons provided the trial court with no evidence of income, no evidence of expenses, no evidence of what the bankruptcy code required. So exactly how could the trial court have come to ANY conclusions.

II. The Court of Appeals Overlooked a Material Finding, and a Material Fact When it Reviewed the Trial Court's Refusal to Consider Ms. McFarland's Expert Testimony.

A. The Court of Appeals Overlooked a Material Finding.

The court of appeals seized on the trial courts finding that the documents had no operative effect, but overlooked the trial court's finding that the Agreement and all other documents became a part of the parties'

overall agreement, and that they have legal consequences:

> 41. **"The Agreement and all other documents became a part of the parties' overall agreement,** even though they all have different legal consequences."
> (Emphasis Added.) CP 71 at Finding #41.

This proves the agreement was operative, and that they had legal consequences.

B. The Court of Appeals Overlooked a Material Fact.

Mr. Johnston was an owner of the real property and the spouse of Ms. Johnston. Washington is a community property state. Owners of real property must execute all agreements pertaining to the sale and purchase of community property, as required by the pertinent parts of RCW 26.16.030:

> RCW 26.16.030
> Community property defined — Management and control.
>
> Either spouse or either domestic partner, acting alone, may manage and control community property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property, except:
>
> (2) Neither person shall give community property without the express or implied consent of the other.
>
> (3) Neither person shall sell, convey, or encumber the community real property without the other spouse or other domestic partner joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses or both domestic partners.

> (4) Neither person shall purchase or contract to purchase community real property without the other spouse or other domestic partner joining in the transaction of purchase or in the execution of the contract to purchase.

Mr. Johnston's signature to the Agreement was essential – and Expert Witness Hannah McFarland's testimony spoke DIRECTLY to this point. She testified that Mr. Johnston's signatures were **forged** on the Agreement and all the other documents. The trial court purposefully did not want to consider her testimony because it would have meant the Johnstons could not have relied on any of the alleged oral or written agreements made.

The Johnston's own attorney acknowledged the issue that arises with her testimony:

> MR. MUMFORD: **I guess that has the potential to <u>blow this case wide open</u> 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.

So the trial court INTENTIONALLY made an error so it could refuse to consider her testimony. The trial court to refused to consider Ms. McFarland's testimony on this issue BASED ON THE ERRONEOUS FINDING that all of the exemplars 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.*** (Emphasis Added.) CP 80 at Finding 137.

But Ms. McFarland's testimony was clear:

> 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 15)

The court of appeals erred by not only rubber-stamping the trial court's error, but also avoiding the issue by avoiding the material Finding that the Agreement and all the documents were a part of the parties' overall agreement, something the Johnstons own attorney recognized, and which was a part of many other findings, including, for example, these:

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

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

If the trial court found the Agreement and documents to be a part of "the parties over all agreement", and RCW requires all owners to execute Agreements relating to real property, but Ms. McFarland's expert testimony proved Mr. Johnston did NOT sign the Agreement and was NOT a party to the overall agreement, and the Johnston's own attorney recognizes the significance of Mr. Johnston's necessary participation, and prejudice to the Torkilds, but the trial court abused its discretion by purposefully avoiding this issue by refusing to consider McFarland's testimony based on its OWN intentional error - prejudicially saying the Torkilds provided all the exemplars to Ms. McFarland - then Ms. McFarland's testimony should have been considered by the trial court, even if the court chose to give it little weight, and the trial court's abuse of discretion should have been properly reviewed by the court of appeals. It's not right to avoid an issue because it's not convenient to the outcome.

The trial court needs to consider the import of Ms. McFarland's testimony. The case should be remanded for a new trial.

III. The Court of Appeals Overlooked Pertinent Legal Argument and Material Facts on the Record.

When the trial court calculated loss of equity, it neglected to subtract the balance of the Johnston's second mortgage from the market value. This was a math error. It could not be resolved before the Findings and Conclusions were entered because by the time they were completed, the Torkilds were outside of the country on a pre-planned humanitarian trip constructing a fresh water sources and providing medicine to three villages in rural Asia, and the Torkilds were unavailable. So it was left to handle in this appeal.

A. The court of appeals refused to review this assignment of error by referring to RAP 10.3(a)(6) which states:

> Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each case.

and to Ang v. Martin, 154 Wn.2d 447, 487, 114 P.3d 637 (2005):

> appellate court will not review assignments of error unsupported by argument or citation to authority (emphasis added.)

The Torkild's Opening Brief provided a concise legal argument:

> "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.**" (Emphasis added.) (Brief of Appellants at 45)

This is a legal argument based upon common law because the remedy for fraud is to put the parties back into the position they were as if the alleged fraud had not occurred.

B. However in this circumstance, no legal argument should be necessary because it is a mathematical error. The trial court **entered a finding** that the Johnstons had **two** outstanding loans **secured** on the property, but in determining the equity the Johnstons lost, it subtracted only one:

> 3. Plaintiffs had a first mortgage with Horizon Bank and **a second mortgage** with Household Finance. CP 67.
>
> 17. Peter Torkild obtained a title report and preliminary commitment as early as February 1, 2004 for the Tuttle Lane Property (Exhibit 143). CP 69

This Title Commitment identified the starting balance of the outstanding loans on the property (Ex. 143):

- First mortgage (existing): $160,000.00
- Second Mortgage (existing): 75,383.15

The trial court awarded damages based upon the amount of equity the Johnstons lost ***by going through the foreclosure sale.*** CP 86 at Finding #197. This means the Johnstons would have lost the market value of the property **minus the <u>two</u> secured loans.** Therefore, the trial 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 by this same amount, which would put the Johnstons in the same position they were in prior to the foreclosure on this issue.

DATED: May 8, 2015

Respectfully Submitted,

Peter A. Torkild, *pro se*
WSBA #28204
Attorney for First Capital, Inc.
PO Box 268
Moses Lake, WA 98837
(509) 760-0124

Julia Torkild, *pro se*
PO Box 268
Moses Lake, WA 98837
(360) 220-0933