

No. 67375-1-I  
COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION ONE

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ROGER GARDNER,

Appellant, and

LYLE SINCLAIR,

Plaintiff

v.

COLUMBIA STATE BANK, f/k/a FIRST HERITAGE BANK, and

SEL, INC.,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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## I. SUMMARY OF REPLY ARGUMENT

This case is not moot because the Court can give effective relief of (1) setting aside the April 1, 2011 Trustee's Sale, or (2) damages for unlawful sale. Denial of summary judgment is fully reviewable on all legal issues on appeal from final judgment (which this is), and also the issue of disputed material facts is reviewable when (as here) there was no subsequent trial on the merits.

Although it is true that the Bank did not seek a "deficiency judgment" in the conventional sense, by doing what RCW 61.24.100(3)(b) prohibits – subsequent foreclosure on a different deed of trust covering the same personal obligation – the Bank violated the no deficiency rule of RCW 61.24.100(1) as defined by the Legislature. The Bank's assertion that the construction loan was commercial instead of personal is a gross distortion of the record, and even flies in the face of the testimony of Bank Vice-President Kathy Bartha.

There are disputed material issues of fact regarding principal use of Lot 10 as a horse farm for the breeding of Arabians, and that this use continued to the time of the April 1, 2011 Trustee's Sale under breeding contracts good for 2011 and 2012. The Bank's argument that Mr. Gardner said something contrary in his Bankruptcy disclosure is contrary to the actual record, and entitled to no credence. The Bank's argument that the

Sky River Covenants preclude such use is contrary to the actual language of the Covenants, which instead specifically provide for use of Lot 10 as a horse-breeding facility.

The Motion to Amend to add a claim for fraudulent boundary line adjustment was neither untimely – it was filed less than one month after the fraudulent affidavit was first filed with the land records – nor futile – it is not a challenge to the Trustee’s Sale, but a separate damages claim.

## **II. REPLY ARGUMENT**

### **A. The Bank’s Technical Arguments Against Review Are Groundless**

#### **1. Gardner’s Appeal is Not Moot Because this Court Can Provide Effective Relief**

The Bank argues that Gardner’s appeal is moot to the extent it challenges denial of injunctive relief, since the trustee’s sale has been completed. *Brief of Respondents* at 13-14. This is mistaken, because the trustee’s sale can still be set aside, and because the issue of the underlying legality of the sale gives rise to effective damages relief, even if equitable relief is not available.

The parties agree that a case is moot if “the court can no longer provide effective relief.” *Brown v. Vail*, 169 Wn.2d 318, 337, 237 P.3d 263 (2010); *see, Brief of Respondents* at 13. The converse, of course, is also true: a case is *not moot* if the court can provide effective relief. *E.g.*,

*Housing Auth. of the City of Pasco v. Pleasant*, 126 Wn. App. 382, 388-89, 109 P.3d 422 (Div. 3 2005) (though tenant vacated disputed property on command of writ of restitution issued below, her appeal of the underlying legality of the writ is not moot because the court can still determine whether the right to possession was wrongfully terminated and restore possession).

This Court can provide effective relief on appeal. First, it can determine whether the trustee's sale held April 1, 2011, was or was not illegal under RCW 61.24.100 (precluding serial nonjudicial foreclosure) and/or RCW 61.24.030 (barring use of nonjudicial foreclosure against property used principally for agricultural purposes).

Second, it can implement RAP 12.8, which states:

If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution. An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.

Thus, if the property is still in the hands of the Bank at the time of this Court's decision, or if it has been transferred to a party who is not a purchaser in good faith (which, in light of Mr. Gardner's *lis pendens*, seems likely) — the Court can “restore to [Mr. Gardner] any property taken

from [him] . . .” Or, if a bona fide purchaser has intervened, the Court can still “restore to [Mr. Gardner] . . . the value of the property, or in appropriate circumstances, provide restitution.” RAP 12.8.

The Bank argues that a declaration that the Trustee’s Deed is null and void is “at odds with the Deed of Trust Act in promoting the stability of land titles as described in a long line of cases . . .” *Brief of Respondents* at 14 n.13. But it is not Mr. Gardner who threatens the stability of land titles – rather, it is the Bank’s illegal foreclosure practices. There can be no stability when the banks do not follow the law. Mr. Gardner’s opening brief explains how the Bank’s serial nonjudicial foreclosure violates all the policies of the Nonjudicial Foreclosure Act, including the policy in support of stability of land titles, by casting a shadow of doubt over additional collateral given to secure the same obligation long after the first foreclosure is completed. *Brief of Appellant* at 24-25.

The rule is, of course, firmly established, that “A party waives the right to postsale remedies where the party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.” *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163, 189 P.3d 233 (Div. 1 2008) (and cases cited therein).

**But a party who properly brings a pre-sale challenge does not threaten the stability of land titles – instead, considered litigation (including appellate review) is essential to protecting the stability of land titles.**

Mr. Gardner is one of the “good guys” – he carefully and repeatedly brought before the court, *prior to the trustee’s sale*, his motions for restraining orders against the sale. CP 1105, 243. What the Bank is arguing for is a judicial Catch-22 – first, if you wait until after the trustee’s sale, your challenge to the legality of the sale is waived; and second, even if you do exactly what the statute and case law require by seeking injunctive relief prior to the trustee’s sale, if the trial court errs, your challenge to the legality of the sale is moot. That would effectively insulate the trial court ruling from all review, thereby permitting illegal use of nonjudicial foreclosure. The Bank’s position is simply untenable.

Mr. Gardner’s appeal regarding the legality of the trustee’s sale is also not moot because of the award of over \$47,000 in attorneys’ fees against him, and his own claim for attorneys’ fees. Even a dispute over production of record which had since been discarded was held not moot, when there remained a dispute over costs, attorneys’ fees, and statutory penalties. *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 709-10, 780 P.2d 272 (Div. 1 1989). The \$47,000 judgment in this case is plainly

amenable to effective relief, and reason enough for this Court to determine the legality of the underlying nonjudicial foreclosure.

**2. Denial of Summary Judgment is Reviewable In this Case**

Quoting *DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 977 P.2d 1231 (1999) and *Rodin v. O'Beirn*, 3 Wn. App. 327, 474 P.2d 903 (Div. 1), *rev. den.*, 78 Wn.2d 996 (1970), the Bank argues that Mr. Gardner cannot appeal the denial of his motion for summary judgment. *Brief of Respondents* at 14-15. However, the Bank fails to quote the **full statement of the rule of these two cases**. The full statement is:

An order denying summary judgment is interlocutory in nature and “not a final judgment for the claim still remains pending trial. *The issue can be reviewed after trial in an appeal from final judgment.*”

*DGHI, supra*, 137 Wn.2d at 949 (*quoting, Rodin, supra*, 3 Wn. App. at 332) (emphasis added). The Bank omitted the crucial italicized language above. The fact that denial of summary judgment is interlocutory and not *immediately* reviewable (absent grounds for discretionary review), does not mean that it is *never reviewable*.

The case law is very clear that denial of summary judgment is reviewable, subject to a few limitations not applicable here. The general rule is as follows:

“[A] denial of summary judgment cannot be appealed *following a trial* if the denial was based upon a determination that *material facts are in dispute* and must be resolved by the trier of fact.” *Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471 (1988). But the denial of summary judgment may be reviewed after the entry of a final judgment if summary judgment was denied *based on a substantive legal issue*. *Bulman v. Safeway, Inc.*, 96 Wn. App. 194, 198, 978 P.2d 568 (1999), *rev’d [on other grnds.]*, 144 Wn.2d 335, 27 P.3d 1172 (2001).

*In re Custody of A.C. and M.C.*, 124 Wn. App. 846, 852, 103 P.3d 226 (Div. 2 2004) (emphasis added).

The first key point is that there was never any trial in this case – instead, it was ultimately decided on the Bank’s motion for summary judgment. This is significant, because the primary rationale for the rule of nonreviewability of summary judgment denials based disputed issues of fact is that it is unfair to permit a party to prevail on appeal based on the relatively undeveloped factual record of summary judgment, over a party that prevailed on the complete evidentiary record developed at trial. *Johnson v. Rothstein, supra*, 52 Wn. App. at 306-07. “[T]he nature of a summary judgment is such that once the issues have been tried to a finder of fact, the summary judgment procedure to determine the presence of genuine, material issues of fact has no further relevance.” *Id.* at 307. Since this case was never tried to a finder of fact, all issues presented in summary judgment are brought before this Court by the appeal from final

judgment. This case is more like cross-motions for summary judgment (albeit not simultaneous here), in which the trial court not only ruled that Mr. Gardner could not prevail as a matter of law, but then went further to rule that the Bank could.

The second key point is that the primary issues presented by Mr. Gardner on appeal are *legal*, not *factual*. The first issue – serial nonjudicial foreclosure – was argued below under the rubric of improperly “seeking a deficiency” after the first nonjudicial foreclosure. The trial court ruled on this *as a matter of law* in denying summary judgment:

The Court further finds that First Heritage Bank has not sought a deficiency judgment in these proceedings, and no such prayer for relief is pending. Absent an explicit prayer for relief by First Heritage Bank seeking entry of a judgment for a deficiency following a non-judicial foreclosure, the continued assertion that the Bank is seeking a deficiency judgment shall be deemed an argument not made in good faith.

CP 6. As we have argued, this constitutes legal error because it fails to give effect to RCW 61.24.100(3)(b), which provides that, “judicial or nonjudicial foreclosures of any other deeds of trust . . . granted to secure the [personal] obligation that was secured by the deed of trust foreclosed,” will violate the prohibition against seeking a deficiency contained in RCW 61.24.100(1). *Brief of Appellant* at 26-27; *see also, infra* at §II(B).

On the issue that nonjudicial foreclosure cannot be used against a horse farm under RCW 61.24.030, the trial court's denial of Mr. Gardner's motion for partial summary judgment also ruled as a matter of law:

The Court finds that the evidence presented is consistent with the Court's October 27, 2010, Order that the property located at 15713 365<sup>th</sup> Avenue, in Sultan, Washington is not currently nor principally used for the production of livestock, nor, given the Covenants encumbering that property and executed by Mr. Gardner is that property susceptible to being principally used for the production of livestock.

CP 6. Normally, in denying summary judgment, the trial court would simply find disputed issues of material fact, and leave the rest to trial. But that is not what the trial court did here. It flatly found *on summary judgment* (e.g., without weighing credibility), that the property is not used for the production of livestock. This constitutes a legal ruling that the evidence did not satisfy the statute. *Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011) (when court finds no disputed facts, application of law to fact is a question of law). Furthermore, the trial court found (erroneously) that the Covenants preclude principal agricultural use of the property. Interpretation of a contract is a question of law, which is reviewable de novo. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).<sup>1</sup>

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<sup>1</sup> It is true that an important part of Mr. Gardner's argument on the second issue is factual – that the trial court should have found, at a minimum, a disputed issue of material fact on the agricultural use issue, sufficient to go to trial. But as *Johnson v. Rothstein* makes

Denial of summary judgment is reviewable in this case, along with denial of injunctive relief and the grant of summary judgment to the Bank.

**B. The Bank’s Serial Nonjudicial Foreclosure was Illegal Under RCW 61.24.100, and the 2011 Trustee’s Sale Must be Set Aside**

In his opening brief, Mr. Gardner demonstrated that RCW 61.24.100’s protections against deficiency judgments in nonjudicial foreclosure must be strictly construed in favor of borrowers, *Brief of Appellant* at 18; that RCW 61.24.100(1) precludes seeking a deficiency judgment after a nonjudicial foreclosure, *Brief of Appellant* at 17; and that this prohibition includes (except with respect to commercial loans) “nonjudicial foreclosures of any other deeds of trust . . . covering any real . . . property granted to secure the obligation that was secured by the deed of trust foreclosed . . .” RCW 61.24.100(3)(b); *see, Brief of Appellant* at 17-18, 26-27. Under this statute, if there is more than one deed of trust and multiple collateral securing the same obligation, it is incumbent upon the party using nonjudicial foreclosure to take them all at a single sale, rather than spreading out the foreclosures in a piecemeal fashion. This prohibited practice is what we have called “serial nonjudicial foreclosure.” This prohibition of RCW 61.24.100 helps to protect personal borrowers

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clear, even a summary judgment denial based on disputed issues of material fact is reviewable after final judgment when no better record was made – in other words, when the merits were never tried. *See, Johnson v. Rothstein, supra*, 52 Wn. App. at 306-07.

against predatory practices in the relatively unregulated nonjudicial forum, such as underbidding in the absence of an upset price (as happened here), and the lender appropriation of a pending sale (as happened here).<sup>2</sup>

The Bank concedes that the challenged April 2011 nonjudicial foreclosure was based on a deed of trust (February 2007) that secured the same obligation as the previously-foreclosed deed of trust (April 2008, foreclosed in May 2010). *Brief of Respondents* at 3. But the Bank argues that it is not in violation of the serial nonjudicial foreclosure prohibition of RCW 61.24.100 because: (1) it did not seek a deficiency judgment; and (2) the loan in question was commercial, not personal. *Brief of Respondents* at 15-17. Neither of these arguments can withstand analysis.

**1. The Bank Did Seek a Deficiency by Doing what §(3)(b) Prohibits**

The Bank's argument that it did not seek a deficiency judgment is based on the simplistic point that it did not file a lawsuit or counterclaim seeking a monetary award against Mr. Gardner after conducting the first nonjudicial foreclosure in May 2010. But this argument ignores the plain language of the controlling statute:

(1) *Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust*

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<sup>2</sup> This might otherwise be prevented in judicial foreclosure by court supervision, and by the statutory right of redemption.

against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.

\* \* \*

(3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan . . . :

\* \* \*

(b) Any judicial or *nonjudicial foreclosures of any other deeds of trust*, mortgages, security agreements, or other security interests or liens covering any real or personal property *granted to secure the obligation that was secured by the deed of trust foreclosed . . .*

RCW 61.24.100 (emphasis added). By including the “exception clause” for commercial loans in the very section prohibiting obtaining “a deficiency judgment” after a trustee’s sale, the Legislature is telling us that the exceptions specifically listed are equivalent to obtaining a “deficiency judgment.” Under §(3)(b), the Legislature also tells us that **coming back against a personal borrower by a subsequent foreclosure on another deed of trust securing the same obligation is equivalent to coming back against a personal borrower with an action for money.** They are both second bites at the apple, and the fact that one is directly for money and the other is for additional collateral that has value and can be converted into money, is not legally relevant under this statute.

Regardless of the Bank’s argument that it did not seek a conventional kind of “deficiency judgment,” there can be no question that §(3)(b) is an exception to the deficiency judgment prohibition created by

§(1) of the statute, and that the exception only applies to commercial loans. It necessarily follows that **subsequent nonjudicial foreclosure on a deed of trust securing the same personal obligation is prohibited by the combined effect of RCW 61.24.100(1) and (3)(b).**

The Bank admits that it nonjudicially foreclosed on the same obligation – the construction loan – in both May 2010 and April 2011. *Brief of Respondents* at 3-4, 5-6. Although the Bank did not call this second nonjudicial foreclosure an action for a “deficiency,” the substance of the transaction, not the label put upon it by the parties, is what determines the applicability of words in a statute. *See, e.g., Cellular Engineering Ltd. v. O’Neill*, 118 Wn.2d 16, 24-25, 820 P.2d 941 (1991) (quoting, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)) (in interpreting a word in a statute, “form should be disregarded for substance and the emphasis should be on economic reality”); *Pybas v. Paolino*, 73 Wn. App. 393, 398, 869 P.2d 427 (Div. 2 1994) (“the law is to interpret rules and statutes to reach the substance of matters so that substance prevails over form”). The Bank’s second nonjudicial foreclosure on the same personal obligation was clearly in violation of RCW 61.24.100, and it should be declared null and void by this Court.

**2. The Bank's Argument that the Construction Loan was Commercial is Frivolous**

The Bank asserts that “there is nothing in the record to support” Mr. Gardner’s position that the construction loan secured by the 2007 and 2008 deeds of trust were personal, not commercial. *Brief of Respondent* at 16. This is a complete distortion of the record, including even the Bank’s own evidence. The sworn testimony of Bank Vice-President Kathy Bartha confirms that the construction loan which was the basis of the 2007 and 2008 D/Ts was **personal**:

Mr. Gardner’s relationship with First Heritage Bank began with a construction loan for **his personal residence** at 15713 365<sup>th</sup> Avenue, Sultan, WA (sometimes referred to as “Lot 10” or “the Residence”) . . . . The Residence is on Lot 10.

CP 1028-29 ¶2 (emphasis added).

April 9, 2008: . . . [T]his Promissory Note reflected the additional loan that Mr. Gardner requested in November 2007, and *effectively refinanced* the February 27, 2007 loan into a new Note in the then principal amount of \$869,688.17. This loan was secured by Lot 10 and 12.

CP 1029 ¶3 (emphasis added). Exhibit 7 to Ms. Bartha’s declaration states that the house was completed *and the Gardner family moved in* during November, 2007. CP 1085. The Verified Complaint says that the February 2007, November 2007 modification, and April 2008, loans were all for personal purposes in connection with construction of Mr. Gardner’s residence. CP 1117 ¶3.2, CP 1118 ¶¶3.5, 3.6. The Disbursement Request

and Authorization for the November 2007 loan modification expressly states that the purpose of the loan is “personal, family, or household purposes” rather than “business.” CP 410; *see also*, CP 365 ¶11. The record supports *nothing but* the conclusion that this was a personal loan.

Ms. Bartha also testifies to a separate, SBA-backed commercial loan in the amount of \$1,068,000, “secured by a deed of trust on Lot 11, on which a Barn was constructed.” CP 1029 ¶3. As the Bank well knows, that was the commercial loan. Supp. CP 1228 (SBA loan borrowers are Gardner, Sinclair and Rising Sun Arabians, LLC).

The Bank attempts to rely upon what it calls the trial court’s “finding” that the loan was commercial. *Brief of Respondents* at 11, 16. The Bank is mistaken both factually and legally. What the Bank calls a “finding” is an oral ruling in summary judgment about the state of the evidence which, in light of the record cited above, demonstrates that the trial court had no idea what the record actually shows. VRP 34-35/25-4. The trial court is stating its reasoning, not making a finding, and it does not use the phrase “the court finds” until the next line, where it “finds as a matter of law there is no ‘deficiency’.” VRP 35/8-9. Furthermore, even had the trial court made an oral finding that the loan was commercial (it did not), any findings of fact made on summary judgment are superfluous,

and will be disregarded on appeal. *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 614, 141 P.3d 652 (Div. 3 2006).

The Bank tries to paint the construction loan as personal by asserting that it was at least in part for construction of the barn. *Brief of Respondents* at 16-17. The barn on Lot 11 was of course was part of the business of Rising Sun Arabians, LLC, but (despite the small encroachment) it was covered by the SBA business loan, not the personal construction loan for Lot 10. CP 1084. The Bank's only citations to the record for its assertion that the personal construction loan might cover the barn is "CP at 685, 1084." *Brief of Respondents* at 17. At CP 685, Mr. Gardner testifies: "On February 22, 2007 I entered into a loan transaction with . . . [the Bank]. The purpose of this loan was the construction of a residence to be located at 15713 365<sup>th</sup> Avenue SE, Sultan, Washington 98294." Obviously, that does not support the Bank's argument. At CP 1084 (a Bank exhibit), Mr. Gardner details that he applied for two loans – "one loan was an SBA government business loan, and the other was for a construction loan on the house that I was building for my family." CP 1084. Mr. Gardner states that the SBA loan interest rate was higher than he expected when the time came to sign it, and adds: "I immediately asked how could this be possible that they could break their promise and Sherri Williams [of the Bank] said it was because we had cost overruns *on*

*the barn.*” CP 1084 (emphasis added). This demonstrates that the *SBA business loan*, not the personal home construction loan, was for the barn. This is further supported by the record evidence of an entirely separate request for disbursement covering barn construction, which is marked for “business” purposes. CP 365 ¶14, CP 419.

The Bank’s entire argument at page 17 of its brief regarding the commercial purposes of the barn is thus built on the quicksand of false and unsupported citations to the record.<sup>3</sup> The Bank’s assertion that “there is nothing in the record to support” Mr. Gardner’s position that the construction loan was personal, *Brief of Respondent* at 16, is refuted by the record, and therefore not worthy of credence.

**C. The Trial Court Erred by Permitting Nonjudicial Foreclosure Despite Material Disputed Facts Showing that Lot 10 was Principally Used for Agricultural Purposes**

Mr. Gardner previously set out the extensive record pertaining to the business of Rising Sun Arabians LLC, *Brief of Appellant* at 7-10, and compelling legal argument showing that the trial court erred by failing to even find a disputed issue of material fact or likelihood of success on the

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<sup>3</sup> The Bank further misrepresents the record when it asserts that “[e]ach Deed of Trust granted by Gardner in favor of the Bank cross-collateralized all of Gardner’s other obligations . . .” *Brief of Respondent* at 4. In support it quotes a Cross-Collateralization provision lifted from an August 2008 Commercial D/T, CP 1072, which is unrelated to the February 2007 and April 2008 personal construction loan D/Ts at issue. Neither of those two personal D/Ts contain a cross-collateralization provision. CP 1050-59 (April 2008); 1131-40 (Feb. 2007).

claim that Lot 10 was a horse farm not subject to nonjudicial foreclosure. *Brief of Appellant* at 32-42. In evaluating reversible error, two key points must be kept in mind: *first*, the trial court never even appreciated that any evidence of agricultural use was before it; and *second*, the trial court was misled by the Bank's groundless argument that the Sky River Covenants preclude use of the property as a horse farm, when in fact they do the very opposite. *See, Brief of Appellant* at 38-39.

The Bank does not refute the factual record of Rising Sun Arabians in any specific way. Instead, it argues that in order to rely on the statutory ban on nonjudicial foreclosure against agricultural property, Mr. Gardner had to show: (1) that the property produced livestock; (2) that production of livestock was the property's principal use; and (3) that this use was present at the time of the trustee's sale. *Brief of Respondents* at 18. Mr. Gardner accepts this challenge, except that he did not have to *show* this – rather, on summary judgment, he had to present sufficient evidence to create a triable issue of fact on each of these points. It must be remembered that the legality of nonjudicial foreclosure was ultimately dismissed on the Bank's motion for summary judgment, and therefore Mr. Gardner never got his day in court.

There is ample record evidence that Lot 10 produced livestock – specifically, Arabian horses. From 2008 to 2010, between twenty-four

and fifty-seven horses lived in the Rising Sun Arabian barn, CP 366 ¶19, which was partly on Lot 11 and partly on Lot 10, CP 363 ¶33; 1120 ¶3.16. In addition, “young horses or other breeding stock resided in the pasture in numbers up to 12.” CP 366 ¶19. The horse pastures included the subject property – Lot 10. CP 1117 ¶ 3.1 (Gardner used lot 10 for pasturing horses); CP 385 §2.6 (Covenants include Lot 10 in the horse business); CP 421 (Snohomish County approval for agricultural classification includes lot 10). As of October 27, 2010, Roger Gardner and Lyle Sinclair personally had sixteen “active breeders” registered with the Arabian Horse Association. CP 519-20. As of the same date, reports of record show that Sinclair and Gardner owned 20 horses and had bred 47 horses. CP 521-24. Rising Sun Arabians bred both the Gardner-Sinclair stock, and other stock brought to them for that purpose. CP 366-67 ¶¶20-21. Approximately fourteen horses were bred by Rising Sun Arabians during 2008-2010. CP 367 ¶23. In addition, and despite the interference suffered through foreclosure on Lots 11 and 12, Rising Sun Arabians had contracts in place for breeding during 2011 and 2012. CP 367 ¶24; CP 526-28; CP 529-31; CP 535-37. Mr. Gardner and his horses remained in residence on Lot 10 until after the 4/1/2011 sale, when he was forced to vacate in response to the Bank’s Unlawful Detainer action. CP 104-05 ¶10; CP

117, 119, 127-28; VRP 23/11-18 (5-25-11 hearing; counsel for Bank states Mr. Gardner vacated “last Friday”).

In the face of this evidence, the Bank’s argument is not tenable that Mr. Gardner failed to raise a triable issue: (1) that the property produced livestock; or (2) that this use was present at the time of the trustee’s sale in April, 2011. The only remaining issue is whether agricultural use was the principal use of the property. There is nothing about “principal” use that requires the agricultural business to be profitable. If this was the standard, then many struggling farms would be deprived the protection intended by the Legislature in RCW 61.24.030(2). And certainly the fact that Mr. Gardner’s family home was located on a small portion of the 22-acre Lot 10 parcel does not disqualify it from principal agricultural use. It is customary for the farmer’s family home to be located on the agricultural property; indeed, in the work-intensive field of animal husbandry, it is essential. While it is true that *other parts* of the larger Sky River Development were used for the purposes of home development and sales, there is *no evidence whatsoever* that Lot 10 was so used. The only evidence is that it was used for four stalls of the encroaching horse barn, pastures, breeding, and the family home. This certainly raises a triable issue of principal agricultural use.

The Bank argues that the use could not be principal because: (1) Gardner checked “none” on the bankruptcy schedule regarding horses owned; (2) Gardner supposedly represented to the Bankruptcy Court that his equestrian business “had been defunct since 2008,” and (3) the restrictive Covenants precluded principal use of Lot 10 for horse breeding. *Brief of Respondents* at 5, 19-20. The Bank is mistaken.

The bankruptcy schedules to which the Bank refers are both individual filings in the name of Roger Gardner. Supp. CP 1250, 1267. The check boxes on the individual bankruptcy schedules mean nothing, because this simply comes down to where on the forms information was listed. Gardner’s Schedule B “Personal Property” lists farm equipment, animals, feed, and a horse trailer, with a combined value of \$20,000. Supp. CP 1256, 1271. Schedule B also lists an ownership interest in Rising Sun Arabians. Supp. CP 1256. Many horses were owned by Gardner and Sinclair together, not by Gardner individually. Some may have been considered property of Rising Sun Arabians, which did not file bankruptcy. Some may have been considered Sinclair’s property – he listed six Arabians and a horse trailer with a combined value of \$11,000 in his bankruptcy schedule in December 2010. CP 1286. Furthermore, the record evidence shows much activity breeding *other people’s horses*, so the exact extent of Gardner’s personal ownership of Arabians is irrelevant.

In support of its repeated claim that Gardner’s bankruptcy plan “averred that the horse boarding and training business had effectively shut down in 2008, two years before the first scheduled Trustee’s Sale,” *Brief of Respondent* at 20, and *id.* at 5, the Bank cited CP 1085, which states:

Unfortunately, early 2008, the housing crisis hit hard with no let up in the immediate near future. So unfortunately, the business of real estate and the horse boarding was affected drastically. As the months went on more and more of the clients moved out of the barn, most of the clients moved their horses to their own homes or sold them.

*We continued now* at a loss every month. . . . [discusses unsuccessful effort to get a loan modification in Sept. 2008] . . . *[W]e continued to struggle* . . .

So in March 2009, I called Walter at First Heritage Bank and asked him for a loan modification on all notes, he informed me that First Heritage Bank would not modify any notes. I then asked if we just made the Business loan keep it current with Real Estate and Barn business would they allow us to do that he said no.

CP 1085 (emphasis added). Once again, the Bank is misrepresenting the record. The cited record shows that the business of Rising Sun Arabians fell on hard times beginning in 2008 with the general economic slump, but **not** that it “effectively shut down.” Indeed, it positively demonstrates that the business “continued now at a loss” and that it was still operating in March 2009, directly contrary to what the Bank said twice in its brief.

The Bank again raises the canard that the Sky River Covenants preclude principal use of Lot 10 as a horse farm, again based on presenting

only a *partial quote* of the actual record. *Brief of Respondents* at 6-7 & n.7; *id.* at 20. As the *complete* quotation in *Brief of Appellant* at 38-39 demonstrates, the Covenants specifically **permit** what they call “a working horse facility on Lots 10, 11 & 12, which facility shall be exempt from the two employee limit” otherwise applicable to permitted cottage businesses. CP 385 § 2.6.

**D. Denial of Motion to Amend**

The Bank does not contest the general rule that amendment should be freely granted, but argues that it was within the trial court’s discretion to deny the amendment to add a claim arising out of the Bank’s false swearing in the boundary line adjustment because “it was untimely filed and futile.” *Brief of Respondents* at 21.

Considering that the Bank first filed the fraudulent affidavit with Snohomish County Planning and Development on December 10, 2010, CP 108-12, and did not record the same in the land records until April 21, 2011, CP 66, it is completely unreasonable to argue that the May 19, 2011 Motion to Amend was “untimely.” The Bank acted dishonestly and with stealth, and Mr. Gardner diligently uncovered the fraud and presented it to the court less than thirty days after it was first recorded. Because the requested amendment was filed along with Mr. Gardner’s opposition to the Bank’s Motion for Summary Judgment, it was before the court prior to

the time that the case was dismissed, and could easily have been carved out for trial. Contrary to the Bank's argument, it would not have delayed consideration of the Bank's motion. It was an abuse of discretion to deny amendment to add this claim.

Nor was the claim "futile." The Bank tries to bootstrap this point by claiming generally that it would have been futile "because Gardner failed to state a meritorious claim arising from the then-completed foreclosure sales." *Brief of Respondents* at 23. This is both wrong (see Gardner's many arguments re: unlawful serial nonjudicial foreclosure and nonjudicial foreclosure against the horse farm), and immaterial to the amendment, which focuses on the specific claim of fraudulent boundary line adjustment. There is no apparent basis for immediate dismissal of the fraudulent boundary line adjustment claim, since it is not a challenge to the legality of the Trustee's Sale, but is instead a separate claim for damages in the nature of slander of title and/or violation of the Consumer Protection Act. Amendment was not futile, and it was an abuse of discretion to deny it on this basis.

### **III. CONCLUSION**

This Court should declare the April 1, 2011, Trustee's Deed null and void for violation of RCW 61.24.100, and remand with instructions to provide a remedy of either return of Lot 10 (in the absence of an

intervening good faith purchaser) or restitution for the value of the property. If this Court does not reverse the merits outright, it should remand for trial on the merits of the validity of the April 1, 2011 sale. Furthermore, this Court should reverse the denial of amendment, and remand for trial on the Declaratory Judgment/Quiet Title and Consumer Protection Act claims. Finally, this Court should reverse the attorneys' fee award and judgment, and award attorneys' fees and costs on appeal to Mr. Gardner.

DATED this 30<sup>th</sup> day of January, 2012.



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**CERTIFICATE OF SERVICE**

I, Patrick Sullivan, legal assistant to Sullivan & Thoreson, hereby certify that on the date set forth below I caused a copy of the within REPLY BRIEF OF APPELLANT to be delivered by U.S. Mail, first class postage prepaid, to counsel of record for Respondents and to trial counsel/co-counsel for Appellant, at the following addresses:

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Trial counsel for Appellant

DATED this 31<sup>st</sup> day of January, 2012.

  
\_\_\_\_\_  
Patrick Sullivan

WASHINGTON STATE COURT OF APPEALS  
DIVISION ONE

ROGER GARDNER,	)	No. 67375-1-1
	)	
Appellant,	)	
	)	
and LYLE SINCLAIR,	)	NOTICE OF FILING OF
	)	ERRATA TO BRIEF OF
Plaintiff,	)	APPELLANT
	)	
vs.	)	
	)	
FIRST HERITAGE BANK, a Washington	)	
Bank corporation; SEL, INC., a Washington	)	
corporation; and DOE DEFENDANTS 1-10,	)	
	)	
Respondents.	)	

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**TO THE CLERK OF THE COURT AND TO ALL PARTIES OF  
RECORD:**

By this filing, Appellant Roger Gardner supplies errata to the Brief  
of Appellant, as follows:

p. 10 – “Supp CP – [Lerner Decl., Ex. 1].” is replaced by: “Supp CP 1250-52

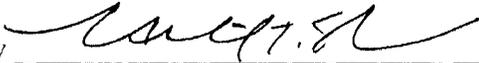
p. 14 – “Supp CP –” is replaced by: “Supp. CP 1201.

These changes are based on the unavailability of page numbering in the Supplemental Clerk’s Papers at the time of filing the Brief of Appellant.

No substantive changes were made. Substitute pages are attached hereto.

DATED this 26<sup>th</sup> day of January, 2012.

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by   
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covering the horse farm. CP 385 §2.6 (Gardner decl.) & 1018 §2.6 (Lerner decl.).

#### **4. Defaults and Foreclosures**

Due to the general decline in the economy, Rising Sun Arabians and Mr. Gardner's other business enterprises began to suffer loss of customers and earnings, beginning in the third quarter of 2008. CP 370 ¶39. On May 19, 2009, SEL, Inc., the successor Trustee under the Gardner Deeds of Trust, executed a Notice of Trustee's Sale, which includes (among other properties) Lot 10 under the February 2007 D/T, and Lots 11 and 12 under the April 2008 D/T. CP 1119 ¶3.9; CP 1168-69. Mr. Gardner filed for individual Chapter 11 bankruptcy protection by petition dated August 13, 2009. Supp CP 1250-52. On March 17, 2010, the Bank obtained relief from the automatic stay regarding Lots 11 & 12, but not Lot 10. CP 222 ¶2 (Lerner Decl.); CP 229-30.

At that point, the Bank and SEL chose to proceed with the trustee's sale without Lot 10, rather than wait for the resolution of the bankruptcy. The trustee's sale for Lots 11 & 12 was held May 14, 2010, CP 1119 ¶3.10; 371 ¶45; CP 597 (Trustee's Deed for Lots 11 & 12 to the Bank), and the bankruptcy was dismissed barely more than one month later, on June 22, 2010. CP 1004.

The Bank and SEL moved for Summary Judgment on December 13, 2010. CP 964-69. Plaintiffs opposed this Motion and filed their own Cross-Motion for Partial Summary Judgment on January 3, 2011. CP 646, 681. In connection with this Motion, Plaintiffs first filed the Declaration of Roger Gardner containing substantial additional documentation of the agricultural use of Lot 10. CP 684-963. However, this set of motions was never ruled on because of Lyle Sinclair's intervening bankruptcy filing. CP 207-08.

Plaintiffs re-filed their Motion for Partial Summary Judgment on February 22, 2011, again supported by the Gardner declaration. CP 340-605. On March 10, 2011, First Heritage Bank and SEL filed their Opposition to this Motion. Supp. CP 1201. The Motion was denied by order dated March 22, 2011, signed by Judge Joseph P. Wilson. CP 5-7; 273-75. Plaintiffs filed a Motion for Reconsideration, which was denied on April 12, 2011. CP 207-18; CP 9-10.

The Trustee's sale was set for April 1, 2011, so Plaintiffs filed a second Motion for TRO on March 24, 2011, pursuant to RCW 61.24.130. CP 243-72. This Motion was denied on March 31, 2011, in a stern order that found this was reapplication on unchanged facts, and that rulings in summary judgment estopped certain arguments. CP 220-21. The order reserved sanctions to trial. CP 221.

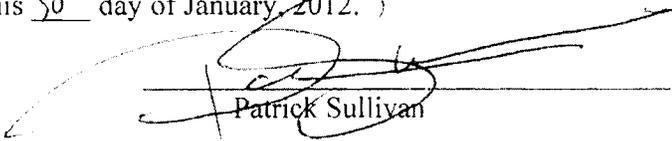
**CERTIFICATE OF SERVICE**

I, Patrick Sullivan, legal assistant at Sullivan Law Firm, hereby certify that on the date set forth below I caused a true copy of the within NOTICE OF FILING OF ERRATA TO BRIEF OF APPELLANT, to be delivered by U.S. Mail, first class postage prepaid, to counsel of record for Respondents and to trial counsel/co-counsel for Appellant, at the following addresses:

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Trial counsel for Appellant

DATED this 30<sup>th</sup> day of January, 2012.

  
Patrick Sullivan

**FILED**  
**COURT OF APPEALS**  
**STATE OF WASHINGTON**  
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