

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 413230-II

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IN THE COURT OF APPEALS, DIVISION TWO FOR  
THE STATE OF WASHINGTON

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SUE LEVINE,

Appellant,

v.

TIMBERLAND BANK,

Respondent.

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**REPLY BRIEF OF APPELLANT SUE LEVINE**

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**ORIGINAL**

**TABLE OF CONTENTS**

**INTRODUCTION** ..... 1

**ARGUMENT**..... 2

A. “Upset Price” and “Fair Value” are Interchangeable Terms Determined  
with Reference to an Identical List of Factors..... 2

B. RCW 61.12.060 is Applicable Regardless of Whether the Economy is  
Depressed..... 6

C. Parking is an Easily Remedied Issue. .... 10

D. The Court is not Free to Substitute its Personal Beliefs for the Evidence.... 11

E. Procedural Fairness is not a Relevant Factor in the Fair Value Analysis. 15

**CONCLUSION** ..... 17

## TABLE OF AUTHORITIES

### Cases

#### Page

<i>Feree v. Fleetham</i> , 7 Wn. App. 767, 502 P.2d 490 (1971).....	12, 13, 14
<i>Lee v. Barnes</i> , 61 Wn.2d 581, 379 P.2d 362 (1963).....	4, 5,
<i>McClure v. Delguzzi</i> , 53 Wn. App. 404, 767 P.2d 146 (1989).....	5, 6
<i>National Bank of Washington v. Equity Investors</i> , 81 Wn.2d 886, 506 P.2d 20 (1973).....	2, 3, 4, 6, 7, 9, 15, 16
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005).....	11, 12
<i>Suring State Bank v. Giese</i> , 210 Wis. 489, 246 N.W. 556, 85 A.L.R. 1477 (1933).....	7, 14

### Statutes and Rules

RCW 4.56.190 .....	10
RCW 61.12.060 .....	1, 2, 3, 5, 6, 7, 8, 9, 14, 16

### Other

27 Marjorie Dick Rombauer, <i>Washington Practice: Creditors' Remedies</i> – <i>Debtors' Relief</i> § 3.16 (1998).....	5
18 William B. Stoebuck & John W. Weaver, <i>Washington Practice: Real</i> <i>Estate: Transactions</i> § 19.16 (2d ed. 2004).....	5
Washington Pattern July Instructions (WPI) 1.01 .....	10

## INTRODUCTION

The Brief of Respondent (“Timberland”) presents a confusingly circular argument. Timberland argues at the outset that Levine was not entitled to have the trial court set an upset price, because (according to Timberland) she was *only* entitled to something altogether different, namely, “fair value.” (Brief of Respondent [“BR”] at 10-27.) Timberland then does an about face and concedes that the terms “‘upset price’ and ‘fair value’ often are used interchangeably” and that the trial court “effectively set an upset price in establishing fair value, albeit after the foreclosure sale”. (BR at 20, 28.) Finally, Timberland asserts, in essence, that neither RCW 61.12.060 nor the case law construing it applies in Grays Harbor County in any event because of some unique characteristics of its economy that are not supported by any competent evidence. (BR at 27-33.)

To clarify, Levine does *not* seek to reverse the underlying judgment and decree of foreclosure with this appeal and other than using the term “upset price” (which even Timberland admits is interchangeable with “fair value”) Levine never even hinted at such a thing. Nor does Levine collaterally attack the foreclosure sale, as Timberland repeatedly

suggests. To the contrary, Levine’s appeal is direct and to the point. The trial court abused its discretion in failing to determine the fair value of the Property given the evidence before it and in light of the relevant factors to be considered under *National Bank v. Equity Investors*. Since the fair value is credited against the judgment it serves to reduce a deficiency or perhaps eliminate it, and nothing more. Timberland proposes giving the trial court unfettered freedom to determine fair value without regard to controlling precedent as to the relevant factors to consider and it wants to authorize the court to rely on personal opinion instead of admitted evidence. This is without question an incorrect reading of Washington law and an abuse of discretion.

## **ARGUMENT**

### **A. “Upset Price” and “Fair Value” are Interchangeable Terms Determined with Reference to an Identical List of Factors.**

As Timberland concedes, “upset price” and “fair value” are used interchangeably in Washington case law. BR at 20. The only difference between the two terms is one of timing. RCW 61.12.060 states that “the court, **in ordering the sale**, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price” which shall be the minimum bid at such sale. Or, “**upon application for the confirmation of the sale**, if it has not theretofore

fixed an upset price, conduct a hearing, establish the value of the property, and, as a condition of confirmation, require that the fair value of the property be credited upon the foreclosure judgment”. App. A (emphasis added). Either way, the debtor receives the benefit of a fair value of the subject property as a credit against the judgment debt. This is the remedy Levine sought from the trial court (both before and after the sale)<sup>1</sup> that was roundly denied, and it is the only issue on appeal here.

Appellant is not aware of any Washington case ascribing a difference between the manner for determining an “upset price” as opposed to a “fair value.” Certainly, Timberland has not cited any authority supporting a distinction between the two terms. The Washington Supreme Court has equated the terms if not used them interchangeably. In *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 506 P.2d 20 (1973), the trial court fixed an “upset price” pursuant to RCW 61.12.060 “at a continued hearing on the motion to confirm sale”. *Id.* at 924, 506 P.2d at 42. According to Timberland, at this point in the foreclosure process the trial court should have been limited to determining “fair value,” but Timberland makes this argument without so much as

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<sup>1</sup> See CP 134 (handwritten addition to Order on Summary Judgment stating that “Trial shall . . . include the hearing on Defendants’ motion for an upset price”; see also CP 203-204 (language in the Order Confirming Sale reserving trial court’s jurisdiction to set an upset price at any time before expiration of the redemption period).

hinting much less supporting with citations to precedent how “fair value” differs from an “upset price.” The Washington Supreme Court held unequivocally to the contrary of the position advanced by Timberland, stating in *National Bank* that the determination to set an **upset price** was within the trial court’s discretion. *Id.* at 924, 506 P.2d at 43. The *National Bank* court further held that in arriving at this value – which, again, was determined post sale in that case – the trial court was to consider the factors set forth in *Lee v. Barnes*, 61 Wn.2d 581, 379 P.2d 362 (1963). See Appellant’s Opening Brief (“BA”) at 24 (listing factors). These include, for instance, not only the property’s “potential or future value” but “any other characteristics and conditions affecting its marketability along with any other factors which such a bidder might consider in determining a fair bid for the mortgaged property. The court may properly receive any competent evidence, whether opinion or direct facts which might affect the amount of such a bid.” *National Bank* at 926, 506 P.2d at 44.

Thus, *National Bank* flatly contradicts Timberland’s assertion that in determining fair value the trial court should consider only “as is” value, and nothing else, such as factors affecting potential future value (including, in this case, the cost and value of obtaining the neighboring lot and constructing the necessary additional parking spaces). Timberland

clearly invites this court to hold that “fair value” should be something less than the “upset price”, although it offers no explanation for why that should be and, as set forth above, no Washington court has so held -- or even alluded that such a distinction exists. A frequently cited treatise states that the wording of RCW 61.12.060 is not to suggest a distinction between the two terms (which the treatise also uses interchangeably) but rather solely to prevent a debtor from getting two bites at the apple:

An upset price may be established either at the time the order of sale is obtained or at the time the sale is confirmed. The statute states that an upset price can be obtained when the sale is confirmed “if it has not theretofore fixed an upset price. . . .” This language prevents the issue of an upset price being heard more than once. The final decision on timing is at the discretion of the trial court. Procedurally, an upset price may be requested in a party’s initial pleading or on later motion. Presumably the setting of the “fair value” could also be raised in an objection to confirmation.

18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 19.16 (2d ed. 2004), citing *Lee v. Barnes*, 61 Wn.2d 581, 379 P.2d 362 (1963); *McClure v. Delguzzi*, 53 Wn. App. 404, 767 P.2d 146 (1989). See also 27 Marjorie Dick Rombauer, *Washington Practice: Creditors’ Remedies – Debtors’ Relief* § 3.16 (1998).

The only case cited by Timberland in support of a distinction is *McClure*, which seemingly equates “fair value” with “fair market value.” *McClure* does not hold, however, that the trial court’s task in determining

an upset price is significantly different than that of determining fair market value. To the contrary, *McClure* states that the determinations “involve similar considerations,” even as it suggests that “fair market value” would in fact be *higher* than an upset price: “[I]t is self-evident that a minimum or upset price is not the same as fair market value.” *McClure*, 53 Wn. App. at 406-07, 767 P.2d at 147-48 (emphasis added). Further, *McClure* does not offer any other guidance as to the manner in which a “fair value” should be determined, much less contradict *National Bank*. It merely holds that fair market value is not the same as assessed value. *Id.* at 408, 767 P.2d at 148.

Certainly, neither *McClure* nor any other Washington case holds that when determining “fair value” the trial court need only consider the low-ball “as-is” appraisal obtained by the lender, and contradicted by an appraisal from the same author prepared just weeks earlier, which is what occurred here. *See* BR at 22.

**B. RCW 61.12.060 is Applicable Regardless of Whether the Economy is Depressed.**

Timberland again ignores controlling case precedent in its argument that in the absence of an unusual economic climate, RCW 61.12.060 should not be applied. Timberland’s position is directly contradicted by *National Bank*.

The bank and General Mortgage Investments, tracing the statute's origin in the depression years and its construction in contemporary and later cases say it should be limited in its application to occasions of major economic depression and dislocation, but that contention, we think, was impliedly rejected in the *Lee* case even though the upset price statute (RCW 61.12.060) was adopted while the country was in the throes of a major economic depression. In the *Lee* case, we quoted at length from *Suring State Bank v. Giese*, 210 Wis. 489, 246 N.W. 556, 85 A.L.R. 1477 (1933), from which the Washington statute was derived. That opinion, we think, established a basis for the statute not only during the then-current economic depression generally but was founded more particularly on the premise that want of competitive bidding fails to produce a sale price equivalent to the value in terms of usefulness of the property.

*National Bank*, 81 Wn.2d at 925, 506 P.2d at 43 (emphasis added).

Levine presented evidence regarding the state of the economy both nationally and locally, and this was ignored by the trial court. *See* CP 293-303; 244-48.<sup>2</sup> Under *National Bank*, however, whatever the “normal” state of the Grays Harbor County economy may be, it makes little difference to the application of the statute.

Timberland goes so far as to suggest that the statute should *never* be applied in Grays Harbor County, because (according to Timberland)

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<sup>2</sup> CP 244-48 is Paul Bowen's discussion of the real estate market in Ocean Shores, Washington, the location of the Property. There is no evidence in the record that the real estate market in Ocean Shores is identical to or indicative of the real estate market in Grays Harbor County as a whole. The trial court, however, referred exclusively to the state of the County-wide economy in her oral ruling.

the economy's normal state is "scary." BR at 25.<sup>3</sup> How then did Timberland, which operates in Grays Harbor County and understands its economy as well as or better than the trial court, justify lending \$1.25 million on this project? (CP 231, 323.) Presumably Timberland employed its reasonable business judgment in approving the loan amount given the economy and circumstances at the time the loan was approved. Under RCW 61.12.060 Levine is entitled to the benefit of this business judgment – at least insofar as having the amount of the lender's initial appraisal considered as a factor in determining fair value.

There is no question that the state and the national economy were in a particularly terrible condition as of the date of the sale. The credit situation for financing real estate projects such as the one financed by Timberland's loan were in a highly uncertain if not a distressed situation at this time as well. As the creditor Timberland had the privilege of selecting the timing of the sale. Appellant knows of no authority that would allow a debtor to compel the sale of property by a creditor at a specific time. Timberland could select a sale date when the economy was distressed or when it was closer to normal. If it selected a time when the economy was

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<sup>3</sup> Citing RP 41. Timberland asserts that if Levine's position is correct, then "almost no foreclosure sale in Grays Harbor County would be fair" since it is rare to have multiple bidders. BR at 30. But this is a far more reasonable result than the converse – than RCW 61.12.060 simply does not apply in Grays Harbor County, and thus that banks which operate there are free to obtain windfalls by making credit bids at less than fair value.

particularly distressed then RCW 61.12.060 allows a debtor to seek a determination of fair value or an upset price, in essence to level the playing field. The “normal” state of the Grays Harbor County (or Ocean Shores) economy is relevant only as one factor among multiple factors the court should consider in determining fair value. Timberland could have submitted evidence as to this factor if it believed that the Ocean Shores and/or Grays Harbor County economy was somehow different than the state and national economies, but it did not.

Moreover, evidence as to the local economic conditions is not the bellwether for determining fair value. In *National Bank* the court considered the total amount invested in the subject property as well as the amount of the appraisal initially relied upon by the lender (rather than a post-default “as is” appraisal). These factors point out the fallacy in Timberland’s current argument. Under controlling case law, the concept of fair value encompasses not only “as is” value but also the value ascribed to the Property under the rosier, pre-default conditions that convinced the parties to contract in the first place – with one as a lender and the other as a borrower. These factors were completely ignored by the trial court.

**C. Parking is an Easily Remedied Issue.**

Timberland overlooks the overwhelming evidence that the parking issue could have been dealt with simply and expediently by Timberland. First, Timberland's own appraiser, Pollock, researched the issue while working on his initial appraisal and determined that the matter would have cost approximately \$135,000<sup>4</sup> to remedy. Second, the neighboring property ("Lot 105") is encumbered with the requirement for six parking spaces to serve the Property. CP 575. Third, as of the time of the sale, Timberland had a judgment lien against Lot 105 and a receiver had been appointed with regard to all of Levine's Washington properties, including Lot 105. CP 172-73; RCW 4.56.190. *See* BA at 9-11. There is not a shred of evidence to support the conclusion that Timberland or any subsequent owner of the Property would be forced to construct parking three to four blocks away or that Lot 105 (controlled by Timberland through its receiver) would not completely satisfy the parking issues. The foregoing conclusion is sheer speculation if not a fantasy, and is evidence that the Pollock appraisal was created to justify a specific low-ball bid contemplated by Timberland at the sale. BR 25.<sup>5</sup>

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<sup>4</sup> This amount would also have compensated for obtaining a conditional use permit and all further permits required to obtain the final certificate of occupancy for the building as condominiums. CP 522.

<sup>5</sup> Timberland's citation to RP 28 is a reference to unsupported remarks by its counsel during oral argument. Such remarks are not evidence. *See* WPI 1.01 ("lawyers'")

**D. The Court is not Free to Substitute its Personal Beliefs for the Evidence.**

Timberland's assertion that the trial court may, and in fact is encouraged to substitute personal experience for evidence is a misstatement of law. (See BR at 30-31.) Indeed in *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005), cited by Respondent at page 30 of its brief, the trial court decision was overturned for that very reason. While *Grayson* is a criminal case, and thus has limited relevance, it is instructive. The passage quoted in Respondent's Brief is merely a portion of the court's discussion of the exercise of judicial discretion. The very next sentence of the quoted paragraph states that discretion may only be exercised "[w]ithin the statutory and constitutional guidelines". *Grayson* goes on to explain that applicable statutory guidelines require courts to hold hearings regarding adjudicative facts, meaning "those facts that are in issue in a particular case." *Id.*, 154 Wn.2d at 340, 111 P.3d at 1186.

In *Grayson* the trial court refused to impose an alternative sentence based on its personal knowledge regarding the lack of funding for the program proposed as an alternative to incarceration. The court indicated that the defendant would not have the opportunity to benefit from the program as it was likely to expire from lack of funding in the near future.

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statements are not evidence or the law").

The trial court then cut off counsel’s effort to present argument in support of alternative sentencing. The Washington Supreme Court admonished the trial court that, “[w]hile no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered . . . . We reverse on the limited grounds that the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate.” *Id.* at 342-43, 111 P.3d at 1188. Here, the trial court’s personal opinions, both as to the procedural fairness of sales in Grays Harbor County and as to the timeliness of Levine’s motion, ruled the day and resulted in the court not considering the evidence of fair value in light of the relevant case precedent.

Similarly, Timberland quotes only a portion of a sentence from *Ferree v. Fleetham*, 7 Wn. App. 767, 771, 502 P.2d 490, 493 (1972) (“it is well settled that the courts take judicial notice of generally known financial and business conditions at given times”). BR at 31. But as in *Grayson*, the *Ferree* court discussed the strict limits placed on the use of judicial notice: “[B]asic to this evidentiary rule is the caveat that ‘[i]n order that a fact may properly be the subject of judicial notice, it must be ‘known’ – that is, well established and authoritatively settled, without qualification or contention, and if there is any doubt whatever as to the

fact itself or as to its being a matter of common knowledge, evidence should be required.” *Id.* Ferree insisted that “the trial court ‘certainly had judicial knowledge that there was practically no market for such property at the time the sale was ordered’ and that ‘[t]he economic situation in King County in 1971 bore certain resemblance to that prevailing in Wisconsin in 1933.’” *Id.* at 771, 502 P.2d at 492. The *Ferree* court disagreed, holding that the trial court could not have properly taken judicial notice of these facts, which were not authoritatively settled. *Id.* at 771, 502 P.2d at 493.

Here, neither party asked the Court to take judicial notice of the nature of foreclosure sales in Grays Harbor County or the procedural fairness of these sales, and – as Timberland itself points out – there is no evidence in the record on that issue. BR at 31. Yet the trial court relied on its personal belief that (1) there is never more than a single bidder; and (2) that a single bidder sale therefore produces a presumptively fair price in Grays Harbor County. These facts are a far cry from being “well established and authoritatively settled” and the court therefore could not properly take judicial notice of these “facts”.

Turning to the exercise of judicial discretion in the context of an upset price motion, the *Ferree* court explained that in such a hearing, the court’s primary objective should be to safeguard the debtor’s right to

obtain a fair price for the property.

The exercise of judicial discretion by a court of equity requires equal concern for the rights of both creditor and debtor. We believe that the heart of the temperament which generated the ruling of *Suring State Bank v. Guise* and prompted the enactment of RCW 61.12.060, is the social philosophy that when economic conditions are severely imbalanced, basic concepts of justice require that equity intervene to aid the debtor at the expense of the creditor. The judicial objective is then to insure that the remedy afforded a judgment creditor by means of a judicial sale does not deprive a judgment debtor of the fair market price for his property.

*Ferree*, 7 Wn. App. at 772, 502 P.2d at 493.

Notably absent from the *Ferree* opinion is any discussion that an upset price is designed to protect the creditor. The creditor's rights are protected by its agreed upon contract with the loan balance and an agreed upon interest rate, all of which are bundled in the judgment, and its right to select the time of the sale. The protections of the upset price come into play when the creditor seeks judicial foreclosure of its judgment lien and with it the potential to obtain a deficiency and enforce the judgment against assets that were not originally secured by the deed of trust.

Here, Levine never argued that the foreclosure sale was procedurally unfair, nor has she attempted to overturn the sale. Rather, she asked the court to determine that the fair value of the Property was substantially greater than Timberland's bid and to credit this greater

amount against Timberland's outstanding judgment. The trial court failed completely when it came to having any concern for the rights of the debtor – Levine. The court ignored the common law factors relevant to this determination in favor of its personal belief that procedural fairness of the sale is the only issue. This was an abuse of discretion.

**E. Procedural Fairness is not a Relevant Factor in the Fair Value Analysis.**

Timberland's argument that the written order does not refer to procedural fairness and so it is not an issue is bootstrap at best. Levine never argued that the written order (drafted by Timberland) emphasized this issue, but rather that the pertinent findings of fact (BB and CC) "are not supported by substantial evidence and are contradicted by the evidence and transcript of the hearing". BA at 3.

The evidence is overwhelming that the trial court considered only procedural fairness and not any of the factors in *National Bank*. The transcript of the oral remarks demonstrates that procedural fairness was the focus of the trial court's ruling. Indeed, the trial court appeared irritated with counsel's reference to *National Bank*, misinterpreting the reference to fair price as if it were a comment to the procedural fairness of the sale. Counsel stated as follows:

... the actual quote from *National Bank* at page 925 is that the purpose of the statute is to assure the mortgager

of a fair price as would be attained were there willing and competitive bidders available at the time of sale.

Mr. Parker<sup>6</sup> says, “Well, there weren’t any, and the court should take that as evidence that this property is worth nothing.” But that’s the very point of this statute. When there’s only one bidder at the sale, you don’t get a fair price for the mortgager, and that’s what we’re trying to arrive at here.

RP at 30-31. In referring back to these comments, the court characterized them as follows: “one bidder appearing at a sheriff’s sale is evidence that we [Grays Harbor County] don’t have a fair price or a competitive process.” RP at 38 (emphasis added). The trial court then outlined a number of purely procedural aspects of the sale – its location, the reading of the notice and acceptance of bids, and so on – and concluded that “by [counsel’s] definition, none of those bidding processes would be fair. So I take exception to that.” *Id.* (emphasis added).

This is and was precisely Levine’s point. Facts such as the location of the sale, the form of the notice, and the acceptance of bids are not even mentioned in *National Bank*. And the trial court did not mention any evidence that related to the factors enunciated in *National Bank*. This sort of hearing falls woefully short of that required by RCW 61.12.060 and *National Bank* and have little bearing on fair value. It is not sufficient to paper over a deficient hearing with a one-sentence conclusion that pays lip

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<sup>6</sup> Counsel for Timberland.

service to the controlling precedent that the trial court completely ignored. When the appellate court looks at the evidence before the trial court it must come to but one conclusion, namely, that the trial court ignored the overwhelming evidence before it, ignored controlling precedent and relied on personal opinion in reaching its conclusion that the sale price of \$720,000 was fair value.

### **CONCLUSION**

The remedy of an upset price was fostered to protect debtors from the dual loss of a foreclosure on mortgaged real estate and a monumental deficiency judgment when real estate values have fallen from the more robust values prevailing when a loan is originated. This is precisely what happened here and precisely why Levine should have been afforded the remedy of an upset price by the trial court. The trial court turned a deaf ear to Levine, ignored controlling precedent, and relied on personal beliefs when rubber stamping the result-oriented Pollock appraisal and Timberland's bid of \$720,000. For the reasons set forth above and in Levine's opening brief, the court should reverse the trial court, establish an upset price of \$1.72 million (midway between the Strickland Appraisal obtained at the inception of the loan and the Bowen Cost Approach) and award Levine her attorney fees as the prevailing party on the only issue on appeal.

RESPECTFULLY SUBMITTED this 7th day of July, 2011.

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**CERTIFICATE OF SERVICE**

On July 7<sup>th</sup>, 2011, I caused a copy of the document to which this certificate is attached to be delivered to each of the following, as indicated:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 7<sup>th</sup> day of July 2011, in Seattle, Washington.

  
\_\_\_\_\_  
Jennifer Micheau