

FILED

SEP 15 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 28676-2

**THE COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON**

WILLARD AND HOLLY BROWN, Appellant(s),

v.

WELLS FARGO BANK, N.A., Respondent.

BRIEF OF RESPONDENT

Mark B. Perry
Attorney for Respondent

2627 W. Idaho St
Boise, ID 83702
(208) 338-1001
WSBA # 35301

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A. INTRODUCTION AND SUMMARY OF ARGUMENT

This is an appeal of an order on cross motions for disbursement of surplus proceeds following a trustee’s sale of real property (“the Property”) in Asotin County. Appellants, Willard H. Brown and Holly M. Brown (“the Browns”), who owned the Property until the trustee’s sale, moved for disbursement as did Wells Fargo Bank, N.A. (“Wells Fargo”), a non-foreclosing holder of a junior deed of trust (“the Wells Fargo Deed of Trust”). The Wells Fargo Deed of Trust secured the Browns’ personal guarantees of a loan (“the Loan”) from Wells Fargo to WW Cedar Company (“WWC”), a corporation in which the Browns were the shareholders. The Loan was also guaranteed by the U.S. Small Business Administration (“SBA”). The Loan was further secured by a lien in WWC’s inventory, accounts and equipment (“the Personal Property Collateral”).

In the court below, the Browns argued they are entitled to the surplus proceeds from the trustee’s sale under RCW 61.24.100(6), a subsection of Washington’s antideficiency statute which establishes priority of homestead rights upon foreclosure of a deed of trust. Wells Fargo argued (a) that statute does not apply to a non-foreclosing holder of a junior consensual lien, (b) the Browns waived their homestead rights in the Wells Fargo Deed of Trust, and (c) the Browns had abandoned their homestead prior to the trustee’s sale. The trial court ruled in favor of Wells Fargo on the issues of waiver and abandonment and for that reason did not reach the question of whether RCW 61.24.100(6) applies to a non-foreclosing holder of a deed of trust.

B. ANSWERS TO ASSIGNMENTS OF ERROR

Assignment of Error No. 1: “The trial court erred in ruling that RCW 61.24.100(6) did not create a priority claim in favor of the Browns.”

Answer to Assignment of Error No. 1: The trial court did not so hold. Rather, it did not reach that issue because it held that the Browns both waived and abandoned their homestead.

Assignment of Error No. 2: “The trial court erred in determining that the Browns ‘abandoned their homestead.’”

Answer to Assignment of Error No. 2: The trial court did not err because (a) its finding of abandonment as a matter of fact is supported by substantial evidence in the record and (b) the Browns never filed a declaration of nonabandonment as required by RCW 6.13.050.

Assignment of Error No. 3: “The trial court erred in ruling that the Browns contractually waived their homestead exemption.”

Answer to Assignment of Error No. 3: The trial court did not err in ruling as a matter of law that grantors may waive their homestead rights in a deed of trust, particularly where doing so allows them to obtain credit for which they otherwise would not qualify. Its holding is supported by sound policy and the law in a majority of states.

C. STATEMENT OF THE CASE

In August 2006 Wells Fargo extended credit in the form of an SBA-guaranteed loan to WWC, an Idaho corporation in which the Browns were the sole shareholders. CP at 74, 133. The Loan was evidenced by a promissory note in the original amount of Two Hundred Thousand Dollars (the “Note”). CP at 74-76. As security for the Note, in accordance with the specific SBA loan requirements, the Browns executed Unconditional Guarantees (“the Guarantees”) in favor of Wells Fargo. CP at 78-83. The Browns also executed the Wells Fargo Deed of Trust to secure repayment of the Loan and the Browns’ performance under the Guarantees. It was recorded September 26, 2006 as Instrument No. 294287, records of Asotin County, Washington. CP at 63-65.

It is undisputed that the Wells Fargo Deed of Trust contains an express waiver of the Browns’ homestead exemption. CP 63-65; 93; RP 13:16-20 (November 9, 2009); Brief of Appellants at 18.

The waiver states:

Grantor hereby releases and waives all rights and benefits of the homestead exemption laws of the state of Washington as to all Indebtedness secured by this Deed of Trust.

CP at 93.

The Property was also subject to a prior perfected deed of trust in favor of Alaska USA Mortgage Company, LLC, dated June 3, 2003, and recorded on June 6, 2003, as Instrument No. 268450, records of Asotin County, Washington (“the Alaska Deed of Trust”). CP at 88.

In 2008, the WWC and the Browns began having financial difficulties and the Browns eventually defaulted on their obligations under the Alaska Deed of Trust. CP at 35, 137. The Browns also caused WWC to cease operations that year, CP at 135, and WWC defaulted in making payments as and when promised in the Note. CP at p. 70, LL 8-10. Mr. Brown liquidated the assets of WWC and converted the proceeds of that liquidation notwithstanding Wells Fargo's perfected security interest. CP at 134 (Deposition of Willard H. Brown at p. 12, LL. 3-20). In May or June of 2008, the Browns left the Property, terminated utilities including their water service, and relocated to Florida where they entered into a one year lease of an apartment and obtained Florida driver's licenses. They also registered cars in the state of Texas. CP at 128-159 (Brown Depo. at pp. 26, 32-33, 57-58).

On January 16, 2009, ReconTrust Company ("ReconTrust"), as Successor Trustee under the Alaska Deed of Trust, caused the Property to be sold by public sale to satisfy the obligation secured by the Alaska Deed of Trust. CP 1-20. Wells Fargo, in order to protect its interest in the Property as required by the SBA, entered a cash bid and was the successful purchaser of the Property. *Id.* The surplus funds in excess of the amount necessary to satisfy the obligation to Alaska USA were deposited by ReconTrust into the registry of the Asotin County Superior Court as required by RCW 61.24.080(3). *Id.*

The Browns and Wells Fargo filed cross motions for disbursement of the surplus funds. CP at 24-29; 60-62; 66-68. The motions were scheduled

for hearing on May 6, 2009. Two days before the hearing, Mr. Brown filed an unsworn declaration wherein he asserted that he and Mrs. Brown had been on vacation in Florida and that they “never intended” to abandon their homestead. CP at 35-38.

After hearing oral argument from counsel, The Honorable William Acey ruled in favor of the Browns, based upon Mr. Brown’s unsworn declaration. RP 10:20-13:22 (May 6, 2009). Wells Fargo subsequently moved for reconsideration and was granted leave to conduct discovery. CP 39-42.

On November 9, 2009, after reviewing supplemental memoranda from both parties and supplemental affidavits from Wells Fargo which introduced several material facts discovered since the May 2009 hearing, Judge Acey granted Wells Fargo’s motions for reconsideration and disbursement, holding:

I’m granting the motion for reconsideration on two grounds. Number 1, look at the S.B.A. loan situation. If homestead rights cannot be contractually waived in connection with an S.B.A. loan, if I rule that’s the case then what – what shock waves and ripples have I sent out through the S.B.A. credit industry in Washington State so to speak?

I’ve got to make a judgment call I agree with you it seems to be a case of first impression in Washington but I think Number 1, . . . in connection with an S.B.A. loan . . . that you can contractually waive your homestead rights.

I further find based on the additional evidence provided to the Court that moving to Florida during the hot season not during the snowbird season, permanently shutting off your water seven and a half months before the actual sale, no filing of declaration of non-abandonment under that statute,

leasing a Florida condo for a year, obtaining Florida driver's licenses, registering vehicles in Texas, all of these combined the total cumulative affect of all of these things – I understand, you're – you're talking about a valley here that exceeds triple digits a least 20 days every summer and sometimes it gets to 110 or 115. That's not part of the record, I apologize to the Court of Appeals but you know, to shut off your water as opposed to leaving it where somebody could do some watering or keep the sprinkler system going if there is one et cetera is – is – it means a lot to shut your water off on May 31st in the Lewiston Clarkson Valley. That sends a message loud and clear that you don't intend to come back, you don't care what happens to the place while you're gone during the hot season.

So there – for those two reasons one's as a matter of law, two's as a matter of fact I find that they abandoned their homestead but as a matter of law I find that they can contractually waive it in connection with a commercial S.B.A. loan.

RP 17:9 – 18:21 (November 9, 2009).

D. ARGUMENT

I. Standard of Review

Questions of law and conclusions of law are reviewed de novo. *See Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) citing *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). This Court also reviews statutory interpretation de novo. *State v. Williams*, 158 Wn.2d 904, 908, 148 P.3d 993 (2006) (citing *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004)). Where the plain language of the statute is unambiguous, the statute's plain meaning should be enforced. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

This Court reviews the trial court's findings of fact for substantial supporting evidence in the record and, if the evidence supports the findings, whether those findings support the trial court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999), *cited with approval in Cohoon v. CUNY*, 155 Wn.App. 1026, ___ P.3d ___, (2010). Substantial evidence is evidence sufficient to persuade a rational fair-minded person that the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

II. There Is Substantial Supporting Evidence In The Record To Support The Trial Court's Conclusions Of Fact On the Issue of Abandonment.

In Washington, abandonment of a homestead is governed by RCW 6.13.050, which provides:

A homestead is presumed abandoned if the owner vacates the property for a continuous period of at least six months. However, **if an owner is going to be absent from the homestead for more than six months but does not intend to abandon the homestead**, and has no other principal residence, the owner may execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of nonabandonment of homestead and file the declaration for record in the office of the recording officer of the county in which the property is situated.

The declaration of nonabandonment of homestead must contain:

- (1) A statement that the owner claims the property as a homestead, that the owner intends to occupy the property in the future, and that the owner claims no other property as a homestead;
- (2) A statement of where the owner will be residing while absent from the homestead property, the

estimated duration of the owner's absence, and the reason for the absence; and

(3) A legal description of the homestead property.

RCW 6.13.050 (emphasis supplied).

The trial court's findings of fact on this issue are as follows: (a) the Browns moved to Florida "during the hot season not during the snowbird season," (b) the Browns permanently shut off their water seven and a half months before the trustee's sale, (c) leased a condo in Florida for a year, (d) obtained Florida's driver's licenses, (e) registered vehicles in Texas, and (f) failed to file a declaration of nonabandonment. RP 17:21 – 18:16 (November 9, 2009).

There is substantial evidence in the record to support the Court's conclusions of fact. Much of this evidence is in the form of Mr. Brown's own deposition testimony (the transcript of relevant portions of Mr. Brown's deposition is found on pages 131 through 149 of the Clerk's Papers). For example, Mr. Brown testified that he and his wife purchased a 2008 travel trailer and pulled it behind their Ford pickup truck, leaving Washington for Florida in "mid 2008," Brown Depo. p. 25, L. 24 – p. 26, L. 23, and around the time they left, the Browns terminated their utility service. *Id.* p. 57, L. 24 – p. 58, L. 2. Mr. Browns' testimony is corroborated by records from the Asotin County Public Utility District, which indicate that on May 30, 2008 — more than six months prior to the trustee's sale — the Browns closed their utility account permanently and were subsequently issued a refund in the

amount of \$509.49. CP at 51.

Mr. Brown also testified that after arriving in Florida, the Browns signed a one-year lease for a two-bedroom condominium in Cape Coral. Brown Depo. p. 32, L. 11 – p. 33, L. 4. He further testified that he and Mrs. Brown obtained Florida driver’s licenses in 2008, Brown Depo. p. 57, LL. 1-7, and registered cars in Texas. *Id.* p. 60, LL 19-24. Finally, it is undisputed that the Browns did not file a Declaration of Nonabandonment. CP at 116.

Not only is there substantial evidence to support the trial court’s findings of fact, there is little if any evidence in the record to support Mr. Brown’s unsworn declaration that he did not abandon the Property. The Browns contend the trial court erred in failing to recognize that their condo in Florida was a “vacation home” and that they merely “winterized” the Property when they left for Florida. Appellants’ Brief at 13. They also argue that a homeowner must “take affirmative steps” to abandon their homestead. *Id.*

The Browns’ argument lacks merit for three reasons. First, as Judge Acey noted, the Browns left the Property at the beginning of “the hot season.” They weren’t protecting their property against the cold. Second, the Browns **permanently closed** their utility account which had been open for several years, and had their balance refunded. CP at 150-158. Finally, the Browns’ argument ignores the plain language of RCW 6.13.050, which states that a homestead is “presumed abandoned if the owner vacates the property for a

continuous period of at least six months.” Thus, the only requirement for a presumed abandonment is a six-month absence from the Property.

The statute requires homeowners to take specific action to rebut that presumption and give notice to the world of their intent to maintain the homestead. An intent is a present “state of mind in which a person seeks to accomplish a given result through a course of action.” *State v. Powell*, 126 Wn. 2d 244, 261, 893 P.2d 615 (1995) (quoting *Black’s Law Dictionary* 810 (6th ed. 1990)). Willard Browns’ Declaration was never recorded as required by the statute and was made almost one year after the Browns left for Florida and two months after the trustee’s sale. It could not have given anyone notice of the Browns’ “present intent” at the time of their departure from Washington or at the time of the trustee’s sale. The Browns failed to take the course of action required by the statute (or any other course of action, for that matter) to manifest a present intent not to abandon.

A material requirement of the abandonment statute is that the declaration of nonabandonment be recorded. The purpose of filing an instrument with the recorder’s office is to provide notice to the world of its contents. *E.g.*, *Dickson v. Kates*, 132 Wn. App. 724, 737, 133 P.2d 498 (2006); *see also Kendrick v. Davis*, 75 Wn.2d 456, 464, 452 P.2d 222 (1969) (“A mortgage properly recorded *gives notice* of its contents *to parties acquiring interests subsequent to the filing and recording* of the instrument”) (emphasis supplied). Those charged with constructive notice of the real property records are entitled to rely on the recorder’s index and

recorded documents. They are not bound to search elsewhere for information affecting the chain of title. *E.g., Koch v. Swanson*, 4 Wn. App. 456, 459, 481 P.2d 915 (1971). *See also Cunningham v. Norwegian Lutheran Church*, 28 Wn. 2d. 953, 184 P.2d 834 (1947) (holding that a bona fide purchaser of real property may rely upon the record of title).

Before the trustee's sale, Wells Fargo searched the Asotin County real property records and did not find a declaration of nonabandonment. CP 116. Similarly, a recorded declaration of nonabandonment does not appear on the Trustee's Sale Guaranty attached as Exhibit B to the *Notice of Deposit of Surplus Funds*. CP 9-18. There is no evidence in the record that the Browns made any effort to fulfill the purpose of the nonabandonment statute.

In short, the evidence reviewed by the trial court was sufficient to persuade a rational fair-minded person that the Browns abandoned their homestead when they moved out, terminated their utilities, stopped making their mortgage payments and left for Florida more than six months before the trustee's sale.

III. The Trial Court Did Not Err In Concluding That the Contractual Homestead Waiver In the Wells Fargo Deed of Trust Is Enforceable.

The Wells Fargo Deed of Trust provides in pertinent part: "Grantor hereby releases and waives all rights and benefits of the homestead exemption laws of the state of Washington as to all Indebtedness secured by this Deed of Trust." CP 93. Most states deem a homestead exemption to be a personal right which may be waived. Even Florida, a state known for its

protection of homestead rights, allows the homestead exemption to be waived in a loan transaction so long as the transaction is not unsecured. *See, e.g., DeMayo v. Chames*, 934 So.2d 548 (Fla. 3d DCA 2006), There, the court provided an instructive summary of homestead rights across the country:

[T]oday the **vast majority of states now permit waivers**, some by legislative enactment and others as matter of judicial interpretation of their respective constitutional and statutory provisions. *See Tenn. Code. Ann. § 26-2-301(b)(2006)* (permitting waiver of homestead “when the exemption has been waived by written contract”); *Wash. Rev. Code § 6.13.080(2)(a)(2006)*; *Ferguson v. Ferguson*, 111 S.W.3d 589, 598 (Tex.App. 2003); *Red River State Bank v. Reiersen*, 533 N.W.2d 683 (N.D. 1995) (approving waiver of shield of homestead exemption relating to non-purchase money second mortgages); *Sunwest Bank of Clovis, N.A. v. Garrett*, 113 N.M. 112, 823 P.2d 912 (1992); *Rogers v. Great American Federal Sav. & Loan Ass’n*, 304 Ark. 143, 801 S.W.2d 36, 38 (1990) (“This court has recognize^d waivers or releases of home-stead rights for many years.”); *Hawkeye Bank & Trust Co. v. Michel*, 373 N.W.2d 127 (Iowa 1985); *Knight v. Parish Nat. Bank*, 457 So.2d 1219 (La.App. 1st Cir. 1984); *Matter of Wallace’s Estate*, 1982 OK 80, 648 P.2d 828, 832 (1982) (“The constitutional homestead exemption is a personal right which may be waived or abandoned.”); *State v. Smith*, 129 Ariz. 28, 628 P.2d 65, 67 (1981) (“From a review of the Arizona statutes governing homestead exemptions, it is abundantly clear that the exemption may be voluntarily waived.”); *Argonaut Ins. Co. v. Cooper*, 261 N.W.2d 743, 744 (Minn. 1978) (“[T]he owner of a homestead may waive his homestead rights, even though they be constitutional rights, by an act which evidences an unequivocal intention to do so.”); *Schutterle v. Schutterle*, 260 N.W.2d 341, 354 (S.D. 1977) (“Although some courts have held such waivers to be invalid, we believe that the better rule is that homestead rights may be waived just as any other rights.”) (internal citations omitted); *I.H. Kent Co. v. Miller*, 77 Nev. 471, 366 P.2d 520, 522 (1962) (“The exercise and preservation of the homestead exemption is held to be a purely personal right which can be exercised or waived by the debtor.”); *In re Moore’s Estate*, 210 Or. 23, 307 P.2d 483, 492 (1957) (“[T]he homestead

exemption, during the lifetime of the owner, is not an estate but is a personal privilege which must be claimed to be effective, and hence it is subject to waiver.”); *In re Dalton's Estate*, 109 **Utah** 503, 167 P.2d 690 (Utah 1946); *Cameron v. McDonald*, 216 N.C. 712, 6 S.E.2d 497, 499 (1940); *Home Owners Loan Corp. v. Reese*, 170 **Va.** 275, 196 S.E. 625, 626 (1938); *Shearon v. Goff*, 95 **Neb.** 417, 145 N.W. 855, 858 (1914) (“It is well settled that a homestead right is a purely personal one, which the owner may at any time waive or renounce.”); *Prather v. Smith*, 101 **Ga.** 283, 28 S.E. 857 (1897); *Weaver v. Weaver*, 109 **Ill.** 225 (Ill. 1883) (limiting the public policy bar to waiver of homestead exemptions to “the actual facts in the case in which [it was] made”); *Case v. Dunmore*, 23 **Pa.** 93 (Pa. 1854); see also *McMillan v. Aru*, 773 So.2d 355 (**Miss.App.** 2000); *Schuler v. Wallace*, 61 Haw. 590, 607 P.2d 411 (**Haw.** 1980) (permitting waiver by failure to raise the issue at trial); *Kennett v. McKay*, 336 **Mich.** 28, 57 N.W.2d 316 (1953) (permitting waiver of homestead rights in antenuptial setting); *Tibbetts v. Tibbetts*, 113 Me. 201, 205, 93 A. 178 (**Me.** 1915).

934 So.2d at 552-53 (emphasis supplied).

Some states, including Florida and Washington, have prohibited a homestead waiver in loan transactions or fully executory contracts where the homestead is not pledged as collateral. *E.g.*, *Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007) (prohibiting waiver in an unsecured attorney fee retainer agreement); *Slyfield v. Willard*, 43 Wash. 179, 86 P. 392 (1906) (holding, where mortgagor purported to waive his exemptions as against the mortgage debt on property not included within the mortgage, that the statute apparently authorizing such a waiver was unconstitutional). However, as explained in *DeMayo*, where a loan transaction is secured by the grantor’s residence and the securing document contains an express homestead waiver, the waiver is enforceable. *E.g.*, *In re Espelund*, 181 F. Supp. 108 (W. D. Wash. 1959):

What the *Slyfield* case does hold is that it would be unconstitutional to allow a husband and wife to make a binding executory contract to waive all their exemptions. The case also holds that a statute permitting a husband and wife to mortgage a homestead is constitutional. The case of *Cammarano v. Longmire*, 99 Wash. 360, at page 361, 169 P. 806, at page 807 explains the *Slyfield* holding in the following language:

* * * but its (*Slyfield* decision) reading in the light of the record will show that the mortgagor purported by the terms of the mortgage to waive his exemptions as against the mortgage debt on property not included within the mortgage. The statute apparently authorizing such a waiver was held unconstitutional, but it was not held that the mortgage was void as to exempt property included within the description of the property mortgaged.

Espelund at 113.

The purpose of allowing homeowners to waive their homestead rights in a deed of trust was summarized in *Federal Land Bank of Omaha v. Blankemeyer*, 422 N.W. 2d 81 (Neb. 1988) (“Thus in permitting mortgage liens . . . to reach [a borrower’s] homestead property, the Legislature . . . has merely recognized that some debtors may wish to waive their homestead exemption when mortgaging land in order to increase their borrowing power”). Such was the case here.

Wells Fargo’s loan to WWC was an SBA-guaranteed loan. Such loans use taxpayer dollars to help provide small business loans to borrowers who would not otherwise qualify for financing. See, e.g, 13 C.F.R. § 120.101:

Credit not available elsewhere. SBA provides business loan assistance only to applicants for whom the desired credit is not otherwise available on reasonable terms from non-Federal sources. SBA requires the Lender or CDC to certify or otherwise show that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal sources without SBA assistance, taking into consideration the prevailing rates and terms in the community in or near where the applicant conducts business, for similar purposes and periods of time.

The Browns did here just what the *Blankemeyer* court described: they elected to waive their homestead exemption in order to increase their corporation's borrowing power. If borrowers in the state of Washington are not free to waive their homestead in order to obtain SBA loans (and they are only eligible for an SBA loan when they do not qualify for financing on reasonable terms from non-federal sources), then the ability of small businesses to obtain financing in this state will be greatly diminished.

The Browns argue the express waiver is unenforceable boilerplate, citing *Great Southwest Life Ins. Co. v. Frazier*, 860 F.2d 896 (9th Cir. 1988). *Frazier* is distinguishable, however, because the borrower's homestead rights were not at issue. There, the Ninth Circuit Court of Appeals affirmed the district court's decision allowing the SBA to obtain a deficiency judgment. The issue in *Frazier* was whether the Ninth Circuit should adopt an "impairment of collateral" defense in the Uniform Commercial Code as a federal common law rule in SBA loan cases or whether the defense constituted a "local immunity" which SBA regulations preclude. The court

did adopt the UCC defense as a federal common law rule but held that defense failed the Fraziers as makers of the note because it is only available to sureties. 860 F.2d at 902-903.

In dicta, the *Frazier* court did decline to enforce a waiver of the borrower's redemption rights, relying on *United States v. Pastos*, 781 F.2d 747 (9th Cir. 1986), and *United States v. Crain*, 589 F.2d 996 (9th Cir. 1979). However, those cases distinguished redemption rights (which were at issue in *Frazier* and which generally cannot be waived in a mortgage) from local immunities such as antideficiency laws:

A redemption right provides protection for the debtor. It is not a local immunity because it requires complete payment of the principal, interest, and sale costs. . . . This case is different from *Gish* where we held that federal law does not apply state anti-deficiency laws to SBA disaster relief loans. 559 F.2d at 575. Anti-deficiency laws provide a total local immunity, which SBA regulations expressly preclude. Since a debtor must pay the debt in full to qualify for redemption, the right does not provide immunity to defeat an obligation.

United States v. Pastos, 781 F.2d at 751 (emphasis supplied).

In short, a majority of states allow waiver of a homestead exemption in a deed of trust and the case authority cited by Browns to the contrary is not on point. The trial court did not err in finding that the Browns expressly waived their homestead exemption.

IV. RCW 61.24.100(6) Does Not Apply Here.

RCW 61.24.100 provides, in pertinent part:

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

....

(6) A guarantor granting a deed of trust to secure its guaranty of a commercial loan shall be subject to a deficiency judgment *following a trustee's sale under that deed of trust* only to the extent stated in subsection (3)(a)(I) of this section. If the deed of trust encumbers the guarantor's principal residence, the guarantor shall be entitled to receive an amount up to the homestead exemption set forth in RCW 6.13.030, without regard to the effect of RCW 6.13.080(2), from the bid at the foreclosure or trustee's sale accepted by the sheriff or trustee prior to the application of the bid to the guarantor's obligation.

RCW 61.24.100(1), (6).

In *Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 167 P.3d 555 (2007), the Supreme Court of Washington interpreted subsection (1) of the statute. It held the statute does not prevent a nonforeclosing junior lienholder from bringing an action for breach of a promissory note after foreclosure by a senior lienholder:

We turn to the plain language of the relevant portion of RCW 61.24.100 and find the right of nonforeclosing junior lienholders and creditors is simply not implicated. To accept the Sariches' argument would render a result whereby all liens attached to security would be automatically extinguished upon foreclosure. We find nothing in the statutory scheme supporting this conclusion.

161 Wn.2d at 548, 167 P.3d at 559 (emphasis supplied).

Subsection (6) contains the same clear language as subsection (1), stating that it applies only where the holder of a deed of trust elects to foreclose nonjudicially.

Here, Wells Fargo did not elect to conduct a nonjudicial foreclosure of its deed of trust. It was a nonforeclosing holder of a junior consensual lien. Therefore, even if this Court reaches this issue by reversing the trial court's findings and conclusions on the issues of waiver and abandonment, RCW 61.24.100(6) would be inapplicable and have no effect on the priority of Wells Fargo's rights in the surplus funds.

Because the facts of this case fall outside the narrow scope of RCW 61.24.100(6), the Browns are not entitled to have their interest in the surplus proceeds elevated in priority above the interest of Wells Fargo. *See, e.g.*, RCW 61.24.080(3) (“[i]nterests in . . . the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property”); *In re Upton*, 102 Wn. Ap. 220, 6 P.3d 1231 (2000) (“an owner’s homestead interest in property is subordinate to the interest of a deed of trust beneficiary”); RCW 6.13.080 (“The homestead exemption is not available against an execution or forced sale in satisfaction of judgments obtained . . . [o]n debts secured . . . by mortgages or deeds of trust on the premises that have been executed and acknowledged by the husband and wife”). Therefore, Wells Fargo is entitled to the surplus proceeds even if this Court finds reversible error in the trial court’s findings of fact and conclusions of law.

E. CONCLUSION

The trial court’s findings of fact on the issue of abandonment are supported by substantial evidence. Its conclusion of law on the issue of

waiver is supported generally by Washington law and specifically by a majority of states. Washington law should reflect a policy of allowing individuals freedom to waive homestead rights to obtain credit which would otherwise be unavailable to them. Finally, although this Court need not interpret RCW 61.24.100(6) unless it reverses the trial court's findings and conclusions, nothing in the plain language of that statute supports the conclusion that the Browns are entitled to the surplus proceeds.

Respectfully submitted this 13th day of August, 2010.

Perry law P.C.

A handwritten signature in black ink, appearing to read "Mark B. Perry", written over a horizontal line.

Mark B. Perry, WSBA # 35301
Attorney for Respondent