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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

MATTHEW L. MASSEY and JACOB R.
MASSEY,

Appellants,

v.

HOWARD M. NEILL, SUCCESSOR
TRUSTEE, STANIA NICKA LOCKEMAN,
Beneficiary and CHRIS DANIEL BOYD,
Beneficiary,

Respondents.

Appeals Case No. 353958

Superior Court Case No. 17-2-00109-38

APPELLANTS' REPLY BRIEF

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ORIGINAL

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ARGUMENT IN REPLY

Respondent's Brief comprises only three erroneous arguments:

1. Respondent argues that real property cannot be 'primarily used for agricultural purposes' under the Deed of Trust Act if a crop has not been 'planted' at the time the Deed of Trust is executed.

The absurdity of this position is clear in a case where property is purchased for the express purpose of agricultural use. For example, a farmer wishes to bring fallow land into production and obtains a loan from a bank to purchase the land, buy equipment and supplies and ready the land for planting. The loan is secured by a Deed of Trust. Under respondent's argument, this Deed of Trust could be foreclosed by Trustee's Sale and the farmer denied the protection of the exception to the Deed of Trust Act. The public policy behind the exemption would clearly require that the farmer be protected and therefore, the startup operation is in fact an agricultural use. As has been stated regarding foreclosures in Washington: "While I am judge it takes thirteen men to steal a ranch."

Klem v. Washington Mutual Bank, 176 Wn.2d 771 fn. 10 (2013)

It is also a general principal of statutory interpretation that:

A statute must be considered as a whole to ensure all parts of the statutory scheme operate in harmony, and to avoid leaving any language without effect. *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, (2000)

Respondent's interpretation gives no effect to the agricultural purpose exception of the Deed of Trust Act in the case of a loan for a *new* agricultural operation, whether or not successful. The Act itself does not make this distinction and therefore, the court cannot add this distinction to the statute. Respondent's argument must fail.

The second part of this argument relies on a definition of 'Production' found in WAC 246-70-030(20):

(20) "Production" includes the manufacturing, planting, cultivating, growing, or harvesting of marijuana.

The definition is however, inapplicable outside of WAC 246-70:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

The Deed of Trust Act does not define 'agricultural', "production" or "operation" and the court must look at the plain meaning of the words. What is the plain meaning of 'operation'? Merriam-Webster.com defines 'operation' as: "a usually small business or establishment." Lenders and borrowers here were partners in a *de facto* joint venture to create an operation to grow crops. The 'operation', a small business, included its own financing, acquisition and construction. Therefore, the agricultural use exception applies.

2. Respondent next argues that the Court could not have continued the Trustee's Sale because that is under the discretion of the Trustee:

The trustee has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days. . . RCW 61.24.040(6) -

Respondent does not cite authority to the effect that the court has no jurisdiction to order a continuance of a Trustee's Sale. On the contrary, the Court has jurisdiction over the Trustee's discretion to continue the sale.

The trustee is bound by his office to present the sale under every possible advantage to the debtor as well as to the creditor. He is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike. *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683, (1985)

The Court also retains:

. . .the general power of the court to afford equitable relief.
" ' [E]quity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.' "*Proctor v. Huntington*, 169 Wn.2d 491 (2010)

There is no doubt therefore, the Court has the power, equitable or otherwise, to afford the relief of continuing the Trustee's Sales in this case.

3. Respondents claim that Appellant acted in bad faith when seeking a continuance of the Trustee's Sale by the Court, alleging that the Court was not informed of the requirement of five days' notice for a hearing to restrain the sales.

First, the express language of the Motion to Continue Trustee's Sale states:

"Pursuant to RCW 61.24.130 we must give five days' notice of the hearing on the Motion to Restrain Trustee's Sale." CP page 46.

Appellant is at a complete loss therefore, to understand how the court and Respondents can argue that this requirement was not expressly before the court.

The reason this is stated was because there were not five days between the Motion and the first sale and the Trustee could not be served. The Appellant asked for a continuance expressly so that the five day requirement could be met.

Because we have been unable to serve Mr. Neill therefore, we ask the court to continue the sales until after the hearing on June 13th. CP page 46

And to what hearing does the last sentence refer? As stated above, it is

"the hearing on the Motion to Restrain Trustee's Sale."*

It is frivolous to simply argue, as does the trial court and Respondent, that every 'continuance' is necessarily a 'restraint.' This is the equivalent of semantic blinders.

The very clear purpose of the initial hearing was to ask for time to give the proper five days' notice of the Hearing to Restrain Trustee's Sale. The court could and did, exercising its equitable powers, give Appellant that additional time so that the Motion to Restrain could be heard on its merits. The Court of Appeals may decide that the court did not have that power but there is certainly no bad faith on the part of Appellant in asking for such relief with full disclosure.

4. Finally it should be noted that Respondents did not raise the argument that the court could not continue the Trustee's Sales at any time in the lower court. "Ordinarily, we will not consider an issue raised for the first time on appeal." *In re Marriage of Knutson*, 114 Wn.App. 866 (2003).

The entire issue therefore, should not be considered here.

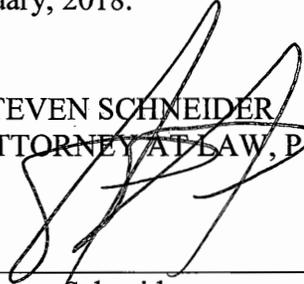
CONCLUSION

The Respondents have stated no serious issue supported by actual authority but continue to rely on semantics and stretched interpretation of statutory language. The loan for the acquisition and improvement of real property for an operation to grow crops is secured by that real property.

The loan is therefore, secured by land primarily used for agricultural purposes. The continuance asked for and granted by the court was not a restraint of sale, it was time granted so that the hearing on restraint of sale could be heard.

DATED this 12th day of February, 2018.

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