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DIVISION III
OF THE STATE OF WASHINGTON

<p>MATTHEW L. MASSEY and JACOB R. MASSEY,</p> <p style="text-align: center;">Appellants,</p> <p>v.</p> <p>HOWARD M. NEILL, SUCCESSOR TRUSTEE, STANIA NICKA LOCKEMAN, Beneficiary and CHRIS DANIEL BOYD, Beneficiary,</p> <p style="text-align: center;">Respondents.</p>	<p>Appeals Case No. 353958</p> <p>Superior Court Case No. 17-2-00109-38</p>
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APPELLANTS' BRIEF

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

The bases for the Appeal are as follows:

1. The Court made an error of law because it treated the Motion to Continue as if it were a Motion to Restrain Trustee's Sale.
2. The Court made an error of law when it stated that 'Continuance' and 'Restraint' have the same meaning when the Motion to Continue asked for the court to continue the sales pending the hearing on Motion to Restrain Trustee's Sale, a continuance can be granted pursuant to RCW 61.24.040(6) while restraint is granted pursuant to RCW 61.24.130 and the court's own order continuing the sales makes that same express distinction:

The Trustee's Sale scheduled for May 26, 2017, and the Trustee's Sale scheduled for June 2, 2017, are continued until after the hearing on the Motion to Restrain Trustee's Sale scheduled for June 13, 2017, or further order of this court. (CP 49)

3. The court made an error of fact when it stated that it was not informed that the Trustee was entitled to 5-days' notice of the hearing on Motion to Continue, when the notice applies only to a Motion to Restrain Trustee's Sale, the Motion and Declaration to Continue state that the matter should be continued so that the

Motion for Restraint could be heard with 5 days' notice and the Declaration of counsel expressly 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 46)

4. The court therefore, made an error of fact and abused its discretion when it found counsel to have acted in bad faith based on the erroneous facts set forth in 2 and 3 above.

5. The Court made an error of law when it found that Appellants had waived the right to restrain the trustee's sale based agricultural use of the property.

6. The Court was in error by not ruling in Appellants' favor based on the absence of default under the express terms of the Boyd Note.

B. STATEMENT OF THE CASE

The Appellant is asking this Court to review a decision by the Honorable Gary Libey, rendered in writing, entered on June 13, 2017 and denominated in Whitman County Superior Court Case No: 15-4-00097-

9, CP 180 - 187.(CP 231-232) Two Trustee's Sales were set. Under the Lockeman Note there was a default in failure to pay the debt when mature. Under the senior Boyd Note however, there was no default, and if there were, a 365 day notice of default was required before foreclosure. Appellants and Respondents were involved, in essence, in a joint venture for the construction and operation of a licensed marijuana grow operation, an agricultural purpose. Lockeman was a Liquor and Cannabis Board (LCB) approved financier of the grow operation pursuant to WAC 314-55-010(10). The non-judicial foreclosure of both Deed(s) of Trust is therefore, prohibited because of the agricultural purpose of the land.

C. FACTS

(1 through 9 below CP 167-169)

1. Appellants are the fee simple owners of certain real property purchased from Chris Boyd and legally described as follows:
 - i. Lot 3, Chris Boyd Airport Short Plat No. 1, recorded under Auditor's File No. 698897, records of Whitman County Washington.
 - ii. Commonly known as 3631 Airport Rd. Pullman, Washington

2. Stania Lockeman is the Beneficiary of a Deed of Trust recorded on July 30, 2014, under Whitman County Auditor's File Number 725258. (See Exhibit "B" attached to Declaration of Matthew Massey). (CP 184-187)
3. The Deed of Trust secures a Promissory Note dated July 21, 2014, in the principal amount of \$105,000.00, the due date for which was July 22, 2016. (See Exhibit "C" attached to Declaration of Matthew Massey). (CP 188-191)
4. Stania Lockeman commenced a non-judicial Deed of Trust foreclosure proceeding and scheduled a Trustee's Sale for June 2, 2017.
5. Chris Boyd is the Beneficiary of a Deed of Trust recorded on July 30, 2014, under Whitman County Auditor's File Number 725259. (See Exhibit "E" attached to Declaration of Matthew Massey). (CP 203-206)
6. The Deed of Trust secures a Promissory Note dated July 21, 2014, in the principal amount of \$150,000.00, the due

date for which was August 1, 2019. (See Exhibit “F” attached to Declaration of Matthew Massey). (CP 07-213)

7. As related in detail below, Stania Lockeman and her son, Chris Boyd, had actual knowledge from the beginning of the business relationship, specifically that the land was to be used for a marijuana grow operation. Stania Lockeman financed the grow operation and Chris Boyd was hired to construct some of the improvements needed for the operation.

8. Chris Boyd’s mother, Stania Lockeman, applied and was approved as a ‘financier’ of the grow operation and was subject to the ‘LCB’ background check and fingerprinting (See Exhibit “A” attached to Declaration of Matthew Massey) (CP 174-183) which comprises relevant documents provided to Appellants by Shannon Angel, former contact at the LCB that illustrate the involvement of Stania Lockeman and Chris Boyd in the agricultural use of the property. There is no question that Stania Lockeman’s

loan was for the construction and operational expenses of the marijuana grow operation. (CP 167-168)

9. Chris Boyd commenced a non-judicial Deed of Trust foreclosure proceeding and scheduled a Trustee's Sale for May 26, 2017. (CP 169) (See Exhibit "G" attached to Declaration of Matthew Massey). (CP 214-217)

10. There was no default under the terms of the Chris Boyd Note and Deed of Trust, which has a maturity date of August 1, 2019, with no installment payments. Section 9 of the Note, "Acceleration" requires a 365 day Notice and opportunity to cure. No such notice was been given, merely the standard notices in the Deed of Trust Act. (CP 169)

11. The only default described in the Chris Boyd Amended Notice of Trustee's Sale is the failure to pay the Stania Lockeman Note and Deed of Trust when it came due on July 22, 2016, stating that such failure "is a failure to defend an action or proceedings purporting to affect the security of this deed of trust brought to foreclose on the

property secured.” (CP 169)

12. There is no cross collateralization of debt under the Notes or Deeds of Trust and failure to make a payment to Stania Lockeman is not, by definition, a failure to defend an action or proceeding that affects Boyd.(CP 169)

13. There is therefore, no default under the Boyd Deed of Trust and the Boyd Notice of Trustee’s Sale should be restrained on that basis alone.(CP 169)

14. The subject real property was and is primarily used for agricultural purposes, both on the date that the deed of trust was executed and on the scheduled dates of the Trustee’s Sale.(CP 169)

15. The Lockeman loan was made for the express purpose of lending start up operating money for the grow operation. (See Exhibit “A” attached to Declaration of Matthew Massey). (CP 174-183) Stania Lockeman then agreed to make two more loans to finance the completion and start up

of the grow operation in the total amount of \$259,000.00
(CP 171)

16. The following additional facts relate to the financing of the purchase and start of the grow operation by Stania Lockeman and Chris Boyd. (CP 170-172)

17. On December 23, 2013, Appellants finished an initial application for producer/processor license and submitted to the Washington Liquor and Cannabis Board.

18. In May of 2014, Appellants began searching for possible locations for their future cannabis farm.

19. In June of 2014, a real estate agent and friend of Chris Boyd's, Craig Lester, indicated he had a possible location, and wanted to introduce Appellants to the seller. Craig Lester arranged an impromptu meeting with Chris Boyd, Bob Homer, himself and Appellants. This meeting was around 9:00 p.m., as Appellant Matthew Massey remembered arriving at Chris Boyd's property in the

Palouse after the sun had already set. Chris Boyd, Bob Homer, Craig Lester, and Appellants talked of the property, and possibly the large investment of funding, as Appellants let it be known that they needed both. Appellants met with Chris Boyd at his residence three or four more times over the next couple weeks to discuss rough details of the deal that is forming for property and construction capital.

20. On July 21, 2014, Chris Boyd, Craig Lester, Appellants and Cheryl Rodeen (representative for Stuart Title Company) meet at Stuart Title office in Pullman, Washington. Two sets of documents were signed: (1) the sale of 3631 Airport Rd by Chris Boyd to Appellants on a balloon payment (\$150k principal), secured by a second position deed of trust securing a purchase money loan (2) A first position deed of trust securing a financing loan by Stania Lockeman.

21. In August of 2014, building began on the property at 3631 Airport Rd. Because of the extremely tight budget for this project, Chris Boyd suggested that his recently formed

construction company with Bob Homer be used, as they would give Appellants an exceptional deal, and allow them use of the following equipment: Kabota tractors, skid steer loader, and mini excavator.

22. Chris Boyd also asked to use a road across the property and small barn on the property for his adjacent business. Appellants were not using the road and barn at the time and agreed to those temporary terms of use for the added value of not having to rent additional equipment.

23. On October 20, 2014, the ecology block foundation was completed by Bob Homer and Appellant Matthew Massey. The pole building installation was started with Bulldog Contractors from Spokane, Washington. Well drilling was completed by Uhlenkott and paid for by Stania Lockeman, as terms of land sale include this utility to be put on the property by the seller (Chris Boyd).

24. On July 10, 2015, the shell of the building was completed with the concrete floor as well as installation of the septic system and work progressed on the 8 ft. security fence.

Most of the initial finances were utilized, and Appellants sought more funding, to which Chris Boyd indicated his mother, Stania Lockeman, was interested. Appellants had a meeting with Stania Lockeman and Chris Boyd at Chris Boyd's residence regarding further investment into the company. Stania Lockeman agreed to give Appellants two more monetary installments, the second of \$109,000 and the third of approximately \$150,000. Mrs. Lockeman wrote and confirmed the dates of further investment directly to Appellants' WALCB handler, Shannon Angell. Negotiations continued for almost three months. Stania Lockeman and Chris Boyd decide not to give Appellants any further funding, wasting their entire second building season and leaving them with no funding to move forward and one year closer to the due date of the initial Stania Lockeman loan.

25. Upon the decision to deny further funding, Chris Boyd refused to let Appellants use the equipment that he had promised them, while still using their road and barn to this day. Boyd also told multiple individuals and businesses

that it was OK to dump garbage, yard waste, and animal waste onto Appellants' property. It was communicated multiple times that this was not Okay, yet it continued to happen. This had been an on-going problem since the previous summer.

26. On October 19, 2015, Appellants secured funds from an alternate source, though their building season had been entirely wasted. Appellants completed the pole-building and metal siding during the cold winter months and whatever construction they could indoors.

27. Between the months of March-September 2016, the fence was completed and low-voltage security camera lines were installed. Additionally, the electrical system, water system and building insulation were installed. During this same time the wall board installation began.

28. In March of 2017, additional operating capital was secured for opening start-up costs such as personnel and plant nutrients. Stania Lockeman began the foreclosure process.

29. In May of 2017, Appellant, Matthew Massey made a

reasonable pay-off offer to Stania Lockeman and Chris Boyd to re-finance the property through a private lender, as is necessary for the cannabis industry. This deal included full payoff of Stania Lockeman's note with interest to date and \$100,000 to Chris Boyd immediately. Chris Boyd refused to subordinate his lien on this loan to the new lender, choosing to foreclose.

D. ARGUMENT

1. THE SALE WAS PROPERLY RESTRAINED BECAUSE OF AGRICULTURAL USE

There are proper legal grounds and clear jurisdictional and procedural reasons for the sales to be stayed. If the property is principally used for agricultural purposes at the time of the Deed of Trust was executed and at the date of the Trustee's Sales, then the Trustee's Sales cannot be conducted under Chapter 61.24 RCW. Rather, the Deed of Trust must be foreclosed judicially as a mortgage.

The key to this analysis is the term "principally agricultural." In this case, the Beneficiaries claimed that the property was not principally used for agricultural purposes on the date of the Deed of Trust because no marijuana had been grown.

The Court here also stated that there could be no agricultural

purpose because the crop had not yet been planted:

Counsel admits today in Court that marijuana had never been planted on the premises, so it's - the premises have not been used principally for agricultural or farming purposes. VRP p. 16, 1 22-25

The basis for the Court's finding is that marijuana had not been planted. The court further finds that because marijuana had not been planted, the property had not been used for agricultural purposes. The corollary therefore, must also be true; if marijuana had been planted the court would have to have found that the property was used for agricultural purposes. The Court should note that the related issue of whether or not marijuana is an agricultural product is not therefore, a subject of the Court's ruling.

The problem with this holding is that the Beneficiaries of the Deed(s) of Trust were financiers and contractors of the marijuana grow operation. The only purpose of the purchase of the property and all activities conducted on the property was to make it possible to grow marijuana. This effort included the lengthy and detailed application process with the Liquor and Cannabis Board, a process that included the approval of Ms. Lockeman as a statutorily defined financier of the operation.

The court's holding would produce an absurd result in most other

analogous situations. For example, a farmer wants to start a dairy operation. He buys real property and obtains a loan from a bank in order to construct the dairy operation, purchase dairy cows and equipment. He has to provide the bank with a pro forma projection of his construction and operation plans and convince the bank to loan on these representations that profitable farming activity will occur in the future. If the farmer goes into default before a cow sets foot on the property, Judge Libey's holding would allow the lender to foreclose non-judicially.

The trial court's holding however, establishes an even more onerous result if the agricultural operation has been in active agricultural use. This is because the statute requires that the property is not principally used for agricultural purposes both on the date the Deed of Trust was signed and on the date of the Foreclosure Sale.

It shall be requisite to a trustee's sale: . . .

(2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;
RCW 61.24.030

Following Judge Libey's interpretation, this would mean that a Deed of Trust securing a loan for construction of the necessary buildings

of a farm or livestock operation, executed before the operation was actually built and went into operation, could be foreclosed non-judicially no matter how many years of agricultural production had gone on after the Deed of Trust was executed.

The case of *Gardner v. First Heritage Bank*, 175 Wn.App 650 (2013) involved the use of three adjoining lots for a horse boarding and training operation. Two of the lots were dedicated solely to the commercial operation. The third lot was the site of the residence of the owner of the facility. When the boarding business failed, the bank started a non-judicial foreclosure on all three lots. The owner sought to prove that the residence lot, lot 10 was used principally for agricultural purposes. The only evidence of such use was the conclusory statement that Lot 10 was used “as part of a livestock program.”

The issue was; how much agricultural use between zero and 100% is principal use? The court made a factual inquiry and found that the established commercial operation was never on the Lot 10. There was no doubt that the loans were obtained at least partially for the construction of the horse facility though the operation had ceased. The two lots that were used for the operation were used for agricultural purposes during construction of agricultural facilities. Gardner sought to stop the trustee’s

sale on his adjacent residence because it was used after its acquisition as pasture for horses. The court found

None of the voluminous documents he submitted on summary judgment indicates he used lot 10 principally for agricultural purposes. Some activity on the property does not establish that it is used "principally for agricultural purposes," as set forth in the statute. *Gardner*

Something more than "some use" is required, but how much more than 'some' equals 'principally' is a question of fact for the Court. More importantly however, in *Gardner*, there was no evidence that lot 10 was used for agricultural purposes when the deed of trust was signed.

In the instant case, the purchase money and operational loans, made specifically for an agricultural purpose, show that the property was primarily used for an agricultural purpose on acquisition. Construction of the grow facility confirmed that use.

Appellants filed the action subject to this appeal to restrain the Trustee's Sales for the lawful reasons set forth herein and deposit monthly payments due under the Deeds of Trust into the court registry pursuant to RCW 61.24.130.

The subject real property was and is used for agricultural purposes on the date the Deed(s) of Trust were executed and on the date of the trustee's sales.

RCW 61.24.130 states in pertinent part as follows:

Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed:

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on said obligation at the non-default rate, paid to the clerk of the court every thirty days.

Both the Lockeman and Boyd Deeds of Trust falsely state that the property is not primarily used for agricultural purposes.

If not self-evident, the Washington Administrative Code defines "Production" of marijuana as "manufacturing, planting, cultivating, growing, or harvesting of marijuana." WAC §246-70-030

The Respondents entered into loan agreements for the purchase, construction and startup of a marijuana grow facility. Stania Lockeman is an LCB approved financier for the operation. Boyd participated in the construction of the building for the grow operation. The operation had to satisfy specific requirements as to fencing, lighting, ventilation, security

and other matters specific to a marijuana grow operation. As of the dates of the Trustee's Sales, the operation was mostly complete and Appellants were seeking additional financing to take out the Lockeman and Boyd loans and begin the planting of the crop. The two Deeds of Trust must therefore, be foreclosed judicially.

2. THE COURT ERRED IN CHARACTERIZING ITS OWN ORDER OF CONTINUANCE AS AN ORDER RESTRAINING TRUSTEES SALE UNDER RCW 61.24.130.

The Order of Continuance entered May 26, 2017 was not a Restraining Order pursuant to RCW 61.24.130. The Order states:

Now therefore, it is ORDERED, ADJUDGED AND DECREED that, for good cause shown, the Trustee's Sale scheduled for May 26, 2017, and the Trustee's Sale scheduled for June 2, 2017, are continued until after the hearing on the Motion to Restrain Trustee's Sale (CP 48-49)

Counsel for Respondents, Howard Neil, also understood that the Order was for a continuance and stated that he did in fact continue both sales. His power to do that was under the statute cited in the Motion and Order for Continuance RCW 61.24.010(4). (CP 45)

“in essence, what really transpired, a motion for continuance was heard the next day, the 26th, I believe if I've got my dates right. Yeah, the 26th and an order or continuance was entered that day. Now, had I gone ahead with my sale that was scheduled for the 25th, I would have been in contempt of this Court. And so as a result, that sale was continued and then the second sale that was scheduled for June 2nd I also

continued that one because of the fact there was this order of continuance in place that basically continued those sales. I could have gone ahead with those because there was no restraining order...”

3. PROTECTIONS OF THE DEED OF TRUST ACT CANNOT BE WAIVED CONTRACTUALLY BETWEEN THE PARTIES

The court ignored Supreme Court precedent when it stated that, since the Appellants had sworn under oath in the Deeds of Trust that the property was not primarily used for agricultural purposes, Appellants could not now allege that it *was* primarily used for agricultural purposes. (VRP 16) *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, (2013) holds that a borrower may not waive that requirement by stating falsely, whether by inadvertence or intention, that the property was not primarily used for agricultural purposes. In *Schroeder, supra*, the Beneficiaries “argue that Schroeder waived the right to raise this argument by signing a deed that stated that “[t]he Property has not been used, and will not be used, for agricultural purposes,” *Id.* at 106. They also argued that the Grantor waived any right to claim agricultural purpose expressly in a settlement agreement:

For valuable consideration, the receipt of which is hereby acknowledged, Schroeder, through his attorney, knowingly waives his right, pursuant to RCW 61.24.030(2) to judicial foreclosure on the subject property on the grounds it is used for agricultural purposes.

... .

1. Schroeder has knowingly waived any and all right he may have to judicial foreclosure of the subject property on the grounds it is used for agricultural purposes,
2. Schroeder shall not be allowed to again allege that the subject property is used for agricultural purposes,
3. Any future deed of trust executed by Schroeder to the defendant, an associated company or assigns, need not be judicially foreclosed but may be foreclosed non-judicially in accordance with RCW Chapter 61.24. *Schroeder, supra.* at 100.

In contrast to the facts in *Schroeder*, the waiver found by Judge Libey was boilerplate in the Deed of Trust which stated merely “which real property is not used principally for agricultural or farming purposes . . .” Therefore, in a much stronger case for waiver, the Washington Supreme Court found that waiver was prohibited under the Deed of Trust Act. “A waiver is an intentional relinquishment or abandonment of a known right or privilege.” *Schuster v. Prestige Senior Management, LLC*, 193 Wn.App. 616, (2016). The *Schroeder* court however, found the express waiver void on its face. Specifically, the requirement of non-agricultural use cannot be waived by language in the Deed of Trust stating otherwise.

This is not the first time we have confronted the argument that statutory requirements of the deed of trust act may be waived contractually. In *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), we held the statutory requirement that the beneficiary hold the note or other instrument of indebtedness could not be waived.

Id. at 108. In *Bain*, we followed the reasoning of other cases in which we have held other statutory requirements could not be contractually waived. Id. at 107-08 (citing *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001); *Nat'l Union Ins. Co. of Pittsburgh v. Puget Sound Power & Light*, 94 Wn.App. 163, 177, 972 P.2d 481 (1999); *State ex rel. Standard Optical Co. v. Superior Court*, 17 Wn.2d 323, 329, 135 P.2d 839 (1943)). As we said in *Bain*, "The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly." Id. at 108. *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, (2013)

In direct contradiction of *Schroeder*, the Court here stated:

The deed of trust was signed by the Appellant, proclaimed under oath. The land was not principally used for agricultural purposes VRP page 16. Ll. 21-24

The court therefore, expressly stated that signing the Deed of Trust under oath waived the Deed of Trust Act. Appellant signed a boiler plate term in a Deed of Trust that he did not prepare (CP 6) and would have had no knowledge of the meaning and consequences of the statement even if he had read it. Judge Libey erroneously based his decision on this prohibited waiver.

In *Schroeder*, the waiver was explicit and not capable of misinterpretation. Even so, the waiver was void. The trial court here could not therefore, find here, in a much more doubtful fact pattern, that the

mere signing of the Deed of Trust acted as a waiver of rights to restrain the Trustee's Sale.

The Trustee here, faced with these unusual and conflicting facts, is still required to act in good faith toward the Grantees. RCW 61.24.010(4). This duty has been breached by the attempt to create cross collateralization and the failure to give the 365 day notice required by the Boyd Note. This duty can only be met by staying the illegal and improper Trustee's Sales until these matters are resolved.

4. FIVE DAYS' NOTICE WAS GIVEN OF THE MOTION FOR TEMPORARY RESTRAINING ORDER

The Motion for Order to Restrain Trustee's Sale was filed on May 25, 2017 with the Complaint. The Complaint sought a Temporary Restraining Order until the matter could be tried. The date set for hearing of the Motion for Order Restraining Trustee's Sale was June 13, 2017. In the meantime, a Trustee's Sale on the Boyd Deed of Trust was scheduled to occur on May 26, 2017. A Trustee's Sale regarding the Lockerman Deed of Trust was set for the following Friday, June 2, 2017.

To be very clear then, there is no dispute that a five day notice was given regarding the Lockerman Trustee's Sale set for June 2nd. The Boyd

Deed of Trust was not even in default and therefore, restraint of that sale was not based solely upon the agricultural purpose argument.

Nonetheless, Appellant sought a continuance of both sales by contacting the Trustee, Mr. Neil, but he was unavailable. Mr. Neil could have continued the sale pursuant to RCW 61.24.010(6)

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
...

Considering the valid grounds for restraint of sale under RCW 64.24.130, including lack of default and agricultural purpose of the land, Mr. Neil had an obligation of good faith to the Appellant to continue the sales.

The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor. RCW 61.24.010 (4)

Unable to obtain a continuance from Mr. Neil's office, Appellant then asked the court to exercise its discretion and continue the sales until after June 13th, the date set for the hearing on the Motion to Restrain Trustee's Sale.

The Court, in its June 13, 2017 decision regarding this request, erroneously stated:

...there was not proper and timely notice. As a matter of fact, the only procedural or substantive errors are—were submitted by the Appellant who failed to advise the Court of the full provision of RCW 61.24.130. that being the following: 61.24.130(2) Appellant doesn't quote (2) in his complaint. He only quotes (1). (2) says:

No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint gives five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. No judge may act upon such application unless it is accompanied by proof, evidenced by return of a sheriff, a sheriff's deputy, or by any person eighteen years of age or over who is competent to be a witness, that the notice had been served on a trustee.

“That did not happen on May 26th when we had the hearing to restrain.”
(VRP 16)

Contrary to this statement, on May 26th the necessity of five days' notice was disclosed to the court expressly in the wholly separate Motion and Declaration for Order to Continue Trustee's Sale (CP 46, ll 8-17) wherein counsel declared:

3. Pursuant to RCW 61.24.130, **we must give five days' notice** of the hearing on the Motion to Restrain Trustee's Sale.

...

7. 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.

The very grounds for the Motion to Continue were stated as the fact that Appellant could not give the five days' notice required by the statute. The Court certainly could have denied the Motion to Continue but the Court was not misled or uninformed about the notice requirement.

The Order the Court signed is titled "Order Continuing Trustee's Sale" and expressly states:

Now therefore, it is ORDERED, ADJUDGED AND DECREED that, for good cause shown, the Trustee's Sale scheduled for May 26, 2017, and the Trustee's Sale scheduled for June 2, 2017 are continued until after the hearing on the Motion to Restrain Trustee's Sale scheduled for June 13, 2017 or further order of this court. (CP 48-49)

The Court brushes this aside with the assertion that restraint and continuance are the same thing:

That did not happen on May 26th when we had the hearing to restrain. Well, you want to call it motion to continue, but it was a, that was a Court order that stopped the sales. It stopped the sale that was to occur that day, May 26th. (VRP 16).

The Court was in error. The power of the Trustee to continue the sale 'for any reason the trustee deems advantageous' is found in RCW

61.24.010(6), tempered by the trustee's duty of good faith found in RCW 61.24.010(4). Appellants set the date of the hearing on Motion to Restrain for June 13th in order to give the proper notice for both sales. Unable to give the required five days' notice, the Appellant then asked the court to continue the sales until after the hearing on Appellants' Motion to Restrain Trustee's Sale. The Motion for Continuance was not seeking substantive relief on the merits, but a procedural delay so that substantive relief could be considered in an orderly fashion.

Substantive relief was the subject of the Motion to Restrain, filed with the Complaint pursuant to RCW 61.24.130. The remedy provided for in the statute is to restrain Trustee's Sale permanently, requiring the parties to proceed judicially. The hearing which occurred on June 13th, sought a temporary restraining order pending trial.

There is a clear difference between a procedural continuance and the restraint of the Trustee's Sale in favor of a judicial proceeding which the court here did not comprehend. Worse than that, the Court relied on this error to accuse counsel of bad faith, (VRP 17) falsely stating that the Court was not informed of the requirement of five days' notice, disparaging counsel with no basis.

Additionally, regarding the issue of agricultural use and lack of default under the Boyd Deed of Trust, the Supreme Court has held that

such grounds make the Deed of Trust Act, including RCW 61.24.130, inapplicable.

Based on Plein, (*Plein v. Lackey*, 149 Wn.2d 214 (2003)) the defendants argue that Schroeder failed to give the statutory five-day notice required by RCW 61.24.130 (2), failed to successfully enjoin the sale. We emphasize the obvious. If Schroeder's land was agricultural, then not only did the trustee not have authority to proceed with a nonjudicial foreclosure, but the very statute upon which the trustee relies to support its five-day notice requirement, RCW 61.24.130(2) is inapplicable. *Schroeder, supra.* at 111.

Schroeder then affirms the fact that RCW 61.24.130 does not alter the 'reasonable grounds' to which a Grantor is entitled in seeking to restrain a non-judicial foreclosure. The same rights could be asserted in an action that made no reference to RCW 61.24.130 if the grounds were that one or more of the 'requisites to trustee's sale' in RCW 61.24.030 had not been met. In such a case, there is no requirement for a five day notice.

In *Schroeder*, one of the requisites was:

That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes . . . (and) the statement is (not) false on the date the deed of trust was granted or amended to include that statement, and (not) false on the date of the trustee's sale...
RCW 61.24.030(2)

This is the same requisite at issue here. Additionally however, another requisite is missing regarding the Boyd Deed of Trust. The trustee

asserts that a default under the Lockerman Deed of Trust constitutes a default under the Boyd Deed of Trust.

There is no dispute that the Lockerman Deed of Trust was in default for failure to pay interest payments. However, the Boyd Note was not due, under its own terms until August 1, 2019:

DUE DATE: The entire balance of the promissory note secured by this Deed of Trust, together with any and all interest accrued thereon shall be due and payable in full on August 01, 2019. (CP 204 and 208)

The Beneficiary argues that the Lockerman default constitutes a default under the Boyd Deed of Trust because of the following language:

4. (Grantor promises) To defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, and to pay all costs and expenses including cost of title search and attorney's fees in a reasonable amount in any such action or proceeding, and in any suit brought by Beneficiary to foreclose this Deed of Trust (CP 205)

The Boyd Note, however, requires a 365 day notice of default before acceleration:

ACCELERATION: If Maker fails to make any payment owed under this Note, or if Maker defaults under any Deed of Trust or any other instruments securing repayment of this Note, and such default is not cured within 365 days (30 days if not filled in) after written notice of such default then Holder may, at its option, declare all outstanding sums owed on this Note to be immediately due and payable, in addition to any other rights or remedies that Holder may

have under the Deed of Trust or other instruments securing repayment of this Note. (CP 209)

Since there are no monies due under the Boyd Note, and can be no monies due before maturity until after a 365 day notice, there was no default under the Note and Boyd Deed of Trust at any time material to the facts of this case.

The judge however, ignored these facts and the language of the governing documents completely, not differentiating between the two deeds of trust and stating:

There are no procedural or substantive defects. All notices and documents were properly and timely recorded. The beneficiaries of the deed of trust followed all statutorily required steps. Both deeds of trust were in default. (VRP 16)

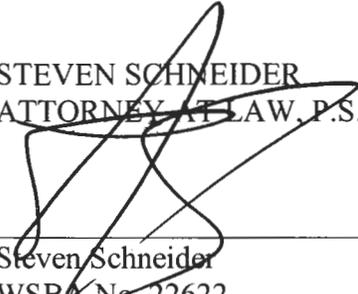
The Court is in error as set forth above because substantial evidence cannot support the assertion that the Boyd Deed of Trust was in default. In *Schroeder, supra*, the Supreme Court also found that this error constituted an abuse of discretion. The Court here therefore, also abused its discretion in denying the restraining order under these grounds.

E. CONCLUSION

The trial court made errors of fact and law that make the decision on appeal untenable. The court falsely stated that it was not informed of the requirement of five days' notice. The court abused its discretion in finding that counsel had acted in bad faith based on its own false statement. The court erred in finding that Appellant waived the protections of the Deed of Trust Act by signing Deeds of Trust that falsely stated the property was not primarily used for agricultural purposes. The court erred when it found that the Boyd Deed of Trust was in default. The order on appeal therefore, should be reversed and the trustee's sales restrained pending trial.

DATED this 10th day of November, 2017.

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Attorney for Appellant

WHITMAN COUNTY SUPERIOR COURT CASE NO.
17-2-00109-38

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III
CASE NO. 353958

MATTHEW L. MASSEY and JACOB R. MASSEY,

Appellants,

v.

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

Respondents.

CERTIFICATE OF SERVICE

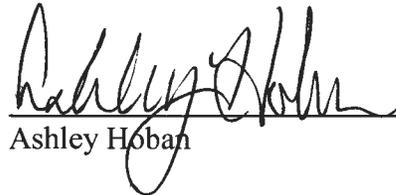
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ORIGINAL

I, Ashley Hoban hereby declare under penalty of perjury under the laws of the State of Washington and the United States that: (1) I am a citizen of the United States of America and over the age of eighteen years and competent to be a witness; (2) I make this declaration based upon my personal knowledge and am competent to be a witness; and (3) I mailed a true and correct copy of the **Appellants' Brief** postage pre-paid, regular first class mail on the 10th day of November, 2017, to the person(s) listed below:

Mr. Howard M. Neill, Trustee
165 N.E. Kamaiken, Ste. 210
Pullman, WA 99163

SIGNED at Spokane, Washington, this 10th day of November,
2017.


Ashley Hoban