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No. 70719-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOHN JOHNSTON AND DARCEE FOX-JOHNSTON
RESPONDENTS / PLAINTIFFS,

v.

PETE TORKILD, JULIA TORKILD, & FIRST CAPITAL, INC.
APPELLANTS / DEFENDANTS.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

REPLY BRIEF OF APPELLANTS

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The record cites in the Johnston's response ***do not*** support any of their arguments whatsoever:

I. <u>The Johnston Response Has Not Identified Clear and Convincing Evidence of Causation</u>.

This appeal is about the absence of causation. The trial court erroneously found the Torkilds *caused* damages by "deflecting" the Johnstons from three options to preserve their property from foreclosure: Refinance, Bankruptcy, or selling three of the six acres to a "Good Samaritan" type of neighbor:

1. The Refinance Option.

The Torkilds Opening Brief said the trial court had ***<u>no evidence whatsoever</u>*** that the purported loan offer would have followed through to save the property from foreclosure.

The Johnstons first responded with two continuous cites to the record, VRP Part I, 133:5-14 and VRP Part I, 133:15-17:

By Mr. Mumford:
Q. Darcee, I just have a couple of questions for you. In the timeframe of early 2004 when you knew that your house was in foreclosure, and you were looking at options, did you go, in fact, talk to a lender who approved a loan for you?
A. I did. I, I was actually referred there by Horizon Bank.
Q. Okay, and who was the lender?
A. I believe it was Creative Mortgage. It was a little, a little office in, on the Guide behind the car wash on the Guide. There's a some office

buildings back there. I think it was Creative Mortgage.

Q. And I think your testimony was that, that the rate was high, and so you wanted to keep looking for other options?
A. Uh-huh, uh-huh, right.

These two cites ***do nothing*** to prove the loan offer would have followed through to preserve the property from foreclosure. The Johnstons next responded with one record cite reproduced in their brief, VRP Part I, 134:15-21:

By Mr. Mumford:
Q. Do you feel like if you hadn't met Mr. Torkild that you may have gone back and talked to Creative Financing again?
A. Sure. There were other options. I mean I kind of stopped looking when he said that he would help. I, he said don't, you know, we'll take care of this, and so I was assured that I didn't need to go back and do any of those other things. Brief of Respondents at 8.

Again, this record cite offers the Court ***no evidence whatsoever*** to demonstrate the loan offer would have followed through to save the property from foreclosure. ***The Torkilds have asserted there's no evidence of causation on this issue, and the Johnstons have proved it by providing this Court with nothing substantive in response.***

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn.App 789, 796. 137 P.3d 892 (2006). The Johnstons argue that the trial court is permitted to make inferences however, ***inferences must follow***

from proven facts. State v. Odom, 83 Wn.2d 541, 548, 520 P.2d 152 (1974). Here, there are no facts to prove causation. The absence of essential facts and findings are deemed to be *negative* findings against the party having the burden of proof. *See,* In re Welfare of A.B., 168 Wn.2d 908, 926 & n.42, 232 P.3d 1104 (2010) (Stating rule "that lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof").

The finding that the loan offer was a feasible option to preserve the property from foreclosure is also erroneous because the record proves – without substantive opposition from the Johnstons – that the loan offer *itself* was speculative in light of the clear and convincing standard of review: **The Johnston's circumstances changed once the Notice of Foreclosure was recorded:**

- The trial court findings show that the loan offer was received four full months before the Johnstons met the Torkilds:

> 5. On ***October 27, 2003***, Horizon Bank issued a Notice of Foreclosure with attorney Jack Ludwigson acting as trustee. (Emphasis Added.) CP 68 at Finding #5.
>
> 13. Darcee Johnston ***sought refinancing when the foreclosure notice was received*** and qualified for a loan through Creative Mortgage. (Emphasis Added.) CP 68 at Finding #13.
>
> 21. Ms. Johnston discussed the situation in detail with Mr. Torkild and after numerous phone calls with him, Ms.

Johnston met him on ***March 3, 2004***, at Top Mortgage where he was working. (Emphasis Added.) CP 69 at Finding #21.

► The record shows Ms. Johnston rejected the loan offer from Creative Mortgage:

14. Because of the high interest rate of the Creative Mortgage loan, Ms. Johnston looked for other solutions. CP 68 at Finding #14.

► The record shows that the Johnstons circumstances *"really deteriorated"* during the four months between the Creative Mortgage offer and the time she met Mr. Torkild:

Q. Oh, ok. So then you, you recall when you contacted me thinking that you were contacting me as *one last try*?
A. Yeah, **because I was looking for a better rate, and by the time that much time had gone by**, and you told me that I didn't need to do anything, **our credit had really deteriorated.** (Emphasis Added) VRP 141:21-142:1.

► The record shows that lenders were not willing to do a loan for the Johnstons *"after that point in time"* - when the Notice of Foreclosure was filed:

VRP, Part I, 133:15-134:2:
By Mr. Mumford:
Q. And I think your testimony was that, **that the rate was high, and so you wanted to keep looking for other options?**
A. Uh-huh, uh-huh, right.
Q. Okay, and when you did your declaration, you heard Mr. Torkild read part of your declaration in this case **and talk about how you had gone to lenders, and that you**

couldn't find a lender?
A. Right.
Q. **To make a loan for you?**
A. Right.
Q. What were you referring to there?
A. I think it was probably **after that point in time,** you know. (Emphasis Added.)

► The record shows there were no other loan offers available despite making multiple attempts:[1]

> "I contacted several mortgage brokers and lending agencies ***and was not able to secure financing."*** VRP Part I, 141:2-3.
>
> "Because of our poor credit status, we were ***unable*** to refinance with any of the agencies or brokers I contacted." VRP Part I, 137:10-12.
>
> "Refinancing was ***declined*** by each loan agent and/or broker I contacted despite my income increase." VRP Part I, 138:10-11.

► The record shows Ms. Johnston had exhausted her options, the foreclosure sale was "imminent" (CP 82 at Finding #152), and she contacted Mr. Torkild as one last try, whereby Mr. Torkild *also* informed her that because of the foreclosure filing, that the Johnstons were unable to qualify for any type of financing:

[1] The reason a lender will not refinance someone in foreclosure is because a lender will not willingly pay off the loan of another lender just to substitute themselves in as the one *not* being paid.

> "Given the fact we believe to have nearly exhausted all our options to save our home, ***I contacted Mr. Torkild as one last try.***" VRP Part I, 138:24-139:1.
>
> "Mr. Torkild, a mortgage broker (CP 89), told her that their credit was so poor, they were ***unable*** to qualify for any type of financing, particularly after filing of the foreclosure action." VRP Part I, 139:20-22.

Further, ***the record contains no loan application, no evidence of federally mandated loan disclosures, and no evidence there was any communication about the loan whatsoever.***

Lastly, there is no evidence that the loan offer was still in effect, or could have been originated in time to avoid the foreclosure sale in light of the foregoing.

A conclusion of law is based on untenable reasons if the facts do not meet the requirements of the correct standard. Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). Clearly the trial court had insufficient evidence under the clear and convincing standard to find that this loan offer would have followed through to save the property from foreclosure.

2. The Bankruptcy Option.

The Torkilds Opening Brief said there was no evidence whatsoever that merely "filing" a Chapter 13 bankruptcy Petition would have

preserved the property from foreclosure, because the trial court's finding on this issue is fatal:

> 18. The Plaintiffs could have filed for chapter 13 bankruptcy. Under the stipulation of the parties, **it is *undetermined* whether they would have qualified, if an attorney would have found it worthwhile to file such a petition, or how long it would have taken for the lender to seek relief from stay.** (Emphasis added) CP 69 at Finding 18.

The Johnstons don't respond to this record cite. The Johnstons don't respond to the Torkilds analysis regarding the unfeasibility of qualifying for a chapter 13 bankruptcy.

Additionally, the trial court did not have the Bankruptcy Code before it, nor did it have an expert witness testify about the requirements of bankruptcy. Without reference to what the Code required, the trial court had *no basis to make any conclusion* about whether the Johnstons could have fulfilled its requirements to preserve the property from foreclosure:

For example, only a Petitioner with regular income can file a Chapter 13 petition. 11 U.S.C. §§109(e). The trial court made no findings that the Johnstons had the ability to resume making their mortgage payments because there's no evidence in the record to establish the Johnston's income and expenses. A Chapter 13 may help preserve a property from foreclosure ***if*** the debtor can resume normal payments as

they come due (11 USC §1325(a)(5) & §1322(b)(4)&(5)), *plus* re-pay all arrearages over time in a court-approved "Plan". 11 U.S.C. §§101-1330.

A chapter 13 bankruptcy is not automatic. A Chapter 13 Petition cannot, by itself, preserve a property from foreclosure for someone who could not afford to make their mortgage payments. This is not what Chapter 13 of 11 USC provides for. 11 U.S.C. §1301-1330.

The trial court's finding is in the Torkild's favor. The Court reviews de novo whether a trial court's findings support its conclusions of law. Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). The trial court abused its discretion when, despite its finding, it entered an emotionally based conclusion that filing a Chapter 13 Petition was an authentic and feasible opportunity. [2]

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[2] Contrary to the Johnston response, the record proves they never "explored" the option of filing bankruptcy during their 16 months of default:

Q. (By Mr. Torkild) So during that period of time that you're past due for a significant period of time before we met, is it true that you did not seek any legal counsel for any matter including bankruptcy?

A. I think that's true. RP Part II, 117:2-6

Nor did the Johnstons explore bankruptcy on their own, because they evidenced no personal research had been conducted:

Q. (By Mr. Torkild to Ms. Johnston) Part of your testimony in this case is that you believe you could have filed a Chapter 13 bankruptcy; is that correct?

A. Gee, I don't remember speaking of which chapter we would have filed. I don't -- up until recently I didn't even really know what the differences between them were. RP Part II, 113:2-7

The Johnstons made several peripheral arguments:

- ***"The Johnstons knew that if foreclosure was imminent they could file for bankruptcy..."*** Brief of Respondents at 9.

  Knowing they *could* file bankruptcy does not prove the Johnstons *would have* qualified for a court supervised re-organization plan, or that the plan *would have* enabled the Johnstons to preserve the property from foreclosure.

- **That, *"the Johnstons could have filed bankruptcy which would have forestalled the foreclosure."*** Brief of Respondents at 9.

  The trial court found the amount of time the foreclosure might have been forestalled was also ***"undetermined":***

  > *"it is undetermined ... how long it would have taken for the lender to seek relief from stay."* CP 69 at Finding 18.

- **The Johnstons next argue that, *"the Torkilds ask the Court to draw inferences in their favor."*** Brief of Respondents at 9.

  The Johnstons had the burden of proof. They have provided nothing to rehabilitate the trial court's fatal finding that the Johnstons ***did not*** meet their burden of proof on this issue.

  And nothing can be *inferred* from facts that were not first proven by the appropriate standard. **Inferences must follow from proven facts.** State v. Odom, 83 Wn.2d 541, 548, 520 P.2d 152 (1974).

- **The Johnstons next argue that, *"The Johnstons did prove they were capable of filing for bankruptcy. They were able to stay in a chapter 13 plan for several years.*** Brief of Respondents at 10.

The Johnstons are overreaching. Qualifying for a chapter 13 Plan in 2008 does not overcome the trial court's finding that the Johnstons ***did not*** meet their burden of proof about their ability to qualify in 2004. In 2008 the Johnstons no longer had the property with two large mortgage payments, and did not have to prove to the bankruptcy court and to creditors that they could start making the regular mortgage payments - plus arrearages.

The trial court's finding remains fatal, and the Johnston response could cite nothing in the record to prove otherwise.

3. The Good Samaritan.

A. Selling the <u>entire</u> property.

The Torkild's Opening Brief said there is no evidence whatsoever to indicate the Johnstons had any interest from anyone in the entire world to buy the *entire* 6-acre property.

The Johnstons responded by citing VRP, Part II, 7:3-15. The Torkilds expand this record cite to include <u>6:21</u>-7:15 to prove that this cite ***<u>does not</u>*** support the Johnston's argument that their neighbor, Mr. Bailey

was interested in buying the *entire* property:

VRP, Part I, 6:21-7:15:

A. I think it was 2002 or 2003, the neighbor's cows got loose in our meadow, and so I called the Johnstons, and John came over, shooed the cows back, and we invited him in for a cup of tea and chatted and got better acquainted, and it was at that point I said you have a beautiful piece of land there. If you ever divide it, ***I would be interested in buying the three-acre parcel, the piece to the West.***
Q. And why were you interested in that parcel?
A. Because I wanted to protect my view. It lies directly, ***that three acres*** lies directly down the sloping hill below my piece in the direction of the water, and I, I like the lay of the land and wanted to keep it that way, and I knew from this discussion that the Johnstons intended to keep their land undeveloped, so it was fine for me, fine for them, and I simply said should you ever change your mind or need to sell, please let me know because I'm definitely interested.
Q. Did you remain interested in acquiring their ***three-acre*** parcel or a portion of their land from that time forward?
A. Yes, uh-huh.
Q. Okay. Hmm, if the Johnstons had come to you in 2004, and had offered to sell you their ***three acres***? Would you have been interested in buying it?
A. Definitely. (Emphasis Added.)

This cite provides no evidence at all to indicate Mr. Bailey or anyone else was interested in buying the *entire* six-acre property.

B. Selling part of the property.

The Johnstons use the same cite to argue that Mr. Bailey was interested in purchasing *part* of the property. This is true, however the Torkild's Opening Brief demonstrates the "Zoning Code" relied upon by the trial court (CP 68 at Finding #4), ***required the Johnstons to first***

complete a legal subdivision before they could offer to sell any portion of real property:

> **Chapter 21.11**[3]
> **Enforcement**
> **21.11.010 Violations**
> **No land comprising any part of a proposed land division in the unincorporated area of Whatcom County shall be sold, leased, or offered for sale or lease unless approved under this title.** Any person being the owner or agent of the owner of such land who shall **sell, lease, or offer for sale or lease, any lot or portion thereof shall be guilty of a gross misdemeanor.** Each sale or lease, or offer for sale or lease, shall be a separate and distinct offense for each separate lot or portion of said land. (Whatcom County Ord. 2000-056 Sec. 1) (Emphasis Added)

The real property is in the unincorporated area of Whatcom County. CP 67. **The trial court erred on this issue because the Johnstons could not legally offer *part* of the property for sale.**

Further, there are no findings to indicate either of the Johnston's lenders would have agreed to release half of the land from their security just to bring the payments current. This is an essential finding if three acres was to be sold off to Mr. Bailey.

The "option" of selling part of the property to Mr. Bailey was

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[3] This Enforcement provision of the Land Division Regulations is available at http://www.codepublishing.com/wa/whatcomcounty/html/Whatco21/Whatco2111.html#21.11.010 or by going to www.co.whatcom.wa.us and clicking on "Code Enforcement" in the "Planning and Development Services" Section, then "Codes Enforced", "Title 21" and then navigating to Title 21.11 from there.

illegal, speculative, and the record contains no evidence whatsoever that it would have followed through to save the property. The trial court abused its discretion when it found this was a viable option the Johnstons had available to them to preserve the property from foreclosure.

C. There is no finding that the neighbor would have "helped" other then his interest in buying part of the property.

The Johnstons next argue that they could have creatively preserved the property from foreclosure with either a right of first refusal, a short term loan, or an option to purchase. They provide several record cites to show these hypothetical questions were posed at trial:

RP, Part II, 8:21-9:2 (The Torkilds expand the Johnstons cite to 8:11-9:2 to include testimony showing this cite is about offering a right of first refusal only:

A. ... I would have actually formalized it with a lawyer and paid some money for the, you know, **right of first refusal *where I could purchase that three acres in the future.***
Q. Would you have been willing to pay, say, $10,000 for a right of first refusal in 2004?
A. Sure, yeah. I mean in relation to the value of the land, it's rather small to secure ***that I can buy eventually.*** Sure, I would do that. I would have done that happily had I had the opportunity.
Q. Would you have been financially capable of paying $10,000 in spring of 2004?
A. I would have. I had the cash at the time, and in fact, I had the money in the bank, and in fact, about a year later I paid off my whole remaining mortgage. So I could have used that money and not paid off the old mortgage. It would

have been easy for me to do. (Emphasis Added.)

RP Part II, 11:16-22 (The Torkilds expand the Johnstons cite to 11:11-22 to prove there was no substantial evidence beyond Mr. Bailey merely affirming a hypothetical question about a short term loan):

THE WITNESS: You mean to the question of had there been, you know, some -- had they needed a ***short-term loan*** or something to complete the deal with their own foreclosure; is that the question?
THE COURT: That's the one.
THE WITNESS: Yeah I would have certainly considered it very carefully and most likely done it, because first of all, I'm predisposed to be a good neighbor to help people out when they're in difficulty, and secondly, I would have sought my own attorney's help to make sure that I could manage the risk. ***The point of the process to buy from them the three acres.*** (Emphasis added.)

RP Part II, 18:17-22 (The Torkilds expand the Johnstons cite to 18:6-22. This cite only refers to the fact that Mr. Bailey did not know the Johnstons precarious financial position or that the property was in foreclosure, and that he would hire an attorney and maybe a tax consultant in order to exercise due diligence before entering into any transaction with the Johnstons):

Q. If you put money down before it was subdivided, and it took two years to subdivide, would that concern you?
A. ***Sure, it would concern me, and that's why I would use an attorney to advise me and maybe a tax consultant,*** and sure, any time you have money at risk, you want to manage it responsibly, of course.
Q. Would it concern you further if you had known the Johnston property had been in and out of foreclosure two times because they were not able to make the payments?
A. Uh-huh.
Q. Was that a yes?
A. I think it really depends on the circumstances, probably since I did want to buy the land, probably I would have

taken the risk, ***but I certainly would have evaluated it carefully,*** and knowing their, ***knowing their financial history would have been a part of that, no doubt.***

Neither of the mere affirmations prove they would have followed through to preserve the property from foreclosure for several reasons:

- ***First, the trial court made no findings that any of these creative theories were viable opportunities.*** This is fatal. The trial court didn't find these hypotheticals to be valid "options" available to the Johnstons because there's no substantive evidence to support them.
- Second, these theories are contrary to the law because every hypothetical - including the short term loan - ***purported to offer a Mr. Bailey an equitable or contractual right to purchase just part of the land,*** which is illegal until a legal subdivision was completed:

  Regarding the right of first refusal: Mr. Bailey testifies, *"...I would have actually formalized it with a lawyer and paid some money for the, you know, right of first refusal* ***where I could purchase that three acres in the future."*** VRP, Part II, 8:11-14. (*Infra.*)

  Regarding the loan: Mr. Bailey testifies, ***"... The point of the process to buy from them the three acres."*** VRP, Part II, 11:21-22 (*Infra.*)

  The Option to Purchase: Plainly the exchange of money for the equitable right to eventually purchase part of the property.

None of these scenarios create a legal lot of record pursuant to the "Zoning Code". The Johnstons show no authority to prove otherwise.

► Third, these hypotheticals were entirely speculative:

- The trial court did not enter a finding about how much money the Johnstons needed to cure the default;
- The trial court did not enter a finding about whether the Johnstons could have resumed making payments again - obviously this was necessary to stop the sale, and to protect Mr. Bailey's hypothetically proposed investment;
- The record of Mr. Bailey's testimony shows he didn't know about the Johnstons precarious financial position during Direct Examination:

> Q. (Cross Examination by Mr. Torkild) So is it true that you could not make a decision as to whether you would do this or not unless you had all of the information and were able to speak to your attorney?
> A. Sure, and I assume that had they come to me and said that they were ready to, would like to sell, then they would, I would have proceeded to ask, do the due diligence, and all of this would have come out..."
> VRP Part II, 19:20-20:2

- Mr. Bailey didn't know the Johnstons were in default, nor that the property was in foreclosure. VRP Part II, 15:10-22
- There is nothing about the proposed terms of these hypotheticals;
- And the hypotheticals are speculative further because the record proves that during the entire 16 months of default, ***the Johnstons***

never approached Mr. Bailey about any of this:

Q. (By Mr. Torkild) So is it true that you could not make a decision as to whether you would do this or not unless you had all of the information and were able to speak to your attorney?

A. Sure, and I assume that ***had*** they come to me and said that they were ready to, would like to sell, then they would, ***I would have proceeded to ask, do the due diligence, and all of this would have come out,*** and then I would have proceeded from there, ***but in fact, I never had the opportunity to do due diligence because they never came to me and said we're ready to sell or we need to sell, and here's the situation.*** (Emphasis added.) RP Part II, 19:20-20:6.

► Fourth, these hypotheticals were based upon a condition that had not occurred. Mr. Bailey said that he might do these things, but only on the condition that he first exercise due diligence:

- ***"...I would use an attorney to advise me and maybe a tax consultant,*** and sure, any time you have money at risk, you want to manage it responsibly, of course." VRP Part II, 18:8-11
- ***"...I certainly would have evaluated it carefully..."*** VRP Part II, 18:19-20
- ***"...knowing their financial history would have been a part of that, no doubt."*** VRP Part II, 18:20-22
- ***"...I would have proceeded to ask, do the due diligence, and all of this would have come out..."*** VRP Part II, 20:1-2

Mr. Bailey did not conducted due diligence because the Johnstons never approached him during their default. Without findings, without a

certain level of specificity, these hypotheticals are just an exercise in speculation.

II. The Trial Court's Finding of Fraud Does Not Excuse the Johnstons From Identifying Clear and Convincing Evidence of Causation, Nor Does it Estop the Torkilds From Contesting Causation.

The finding of fraud was disputed at trial (and it is still disputed for that matter), although it has been accepted for purposes of this appeal.

The trial court's finding of fraud does not excuse the Johnstons from identifying clear and convincing evidence of causation. The Johnstons do not cite authority to show otherwise.

Nor does it *estop* the Torkilds from contesting causation. If the Johnston's argument was true, then they could dispense with all elements of fraud.

III. Testimony From Handwriting Expert McFarland Would Have Been Relevant to Many of the Trial Court's Findings.

The *entire* testimony of expert witness Hannah McFarland is before this Court. RP Part I, 5:9-42:8 The trial court ***did not find*** that her testimony was irrelevant:

> 137. Ms. Hannah McFarland, Defendants handwriting expert, is qualified to present her expert opinion, ***but the***

> ***exemplars examined all came from the Torkilds*** after discovery commenced and based upon testimony presented by the Plaintiffs, ***this evidence was not taken into consideration.*** (Emphasis Added.) CP 80 at Finding 137.

The record shows the court actually made an error as to how Ms. McFarland obtained her Exemplars (*Id.*), and on that erroneous basis, *refused to consider* her testimony and Exhibits for relevance or anything else.

2. <u>Prejudice to the Torkilds</u>.

The Johnston response ignored this issue. The Torkilds point directly to the record to demonstrate the Johnstons own attorney recognized prejudicial impact. During closing arguments, he stated Expert McFarland's testimony has, *"the potential to blow this case wide open."* RP 145. ***<u>Indeed, without Ms. McFarland's expert testimony, the Johnston's credibility was left to be assumed at face value by the court.</u>*** As a result of the trial court's error, the Torkilds challenged any Johnston testimony that provided a basis for trial court findings:

> "All of the Johnston's oral testimony is challenged by the Torkilds because the trial court refused to consider whether Ms. McFarland's testimony would indeed "blow the case wide open" or bear upon the Johnston's credibility. As a result of the trial court's error, no one will ever know whether this evidence would have changed the outcome of the trial." Opening Brief of Appellants at 43.

3. The Johnstons next argue that the trial court found the Torkilds testimony not to be "reliable".

This argument has nothing to do with the trial court's responsibility to consider evidence properly before it.

If the trial court had properly considered expert McFarland's testimony, the trial court may have given less weight to Ms. Johnston's ***unsupported*** affirmation that they had a loan offer from Creative Mortgage.

As one example of many, Ms. McFarland's expert opinion proved that ***John Johnston's signatures on all of the documents in this case were forged with the help of Darcee Johnston's notary friend.*** RP Part I, 24:12-15. Because the agreement here pertained to real property in a community property state, this one example would have affected the validity of the parties' overall agreement had the trial court not refused to consider it. The trial court's plainly erroneous finding is what led to it's refusal to consider this type of, *"blow the case wide open"* evidence.

4. The Johnstons argue that Expert McFarland's testimony is not relevant because the documents testified to were not operative.

The Torkilds point directly to the trial court's Findings at CP 70-71 which are two pages *almost completely filled* with findings pertaining to the documents. This demonstrates relevance. Moreover, the trial court

found *all* of the documents became a part of the parties' overall agreement:

> 41. **"The Agreement and all other documents became a part of the parties' overall agreement,** even though they all have different legal consequences." (Emphasis Added.) CP 71 at Finding #41.

This is a finding that all of the documents are, to some degree, operative.

IV. Damages.

1. Loss of equity.

The trial court awarded damages based upon the amount of equity the Johnstons lost ***by going through the foreclosure sale.*** CP 86 at Finding #197. Obviously *both* mortgages should have been deducted from market value to determine the equity lost *by going through the sale.*

2. Loss of use.

Out-of-pocket damages are a wash because *if* the Johnstons did have use of the property, then they would have had to pay $2,042 per month pursuant to the lease. Ex. 81.

V. Absence of Proximate Cause Is *Consistent* With the Commissioner's Ruling in Johnston v. Torkild No. 59368-4-I.

In an earlier case brought to this Court, the Johnstons sought

interlocutory review of a trial court order striking their challenge to the non-judicial foreclosure sale and quashing a *lis pendens*. In denying review, the Court Commissioner wrote:

> "The sale occurred ***because the Johnstons had no other choice*** and the arrangement with Peter Torkild seemed to offer the only chance to save the property." Commissioner's Ruling Denying Motion for Discretionary Review at 6.
>
> ***"The Johnstons do not allege prejudice from the foreclosure sale itself. As far as the evidence shows, the Johnstons had no way to stop the foreclosure process and it would have occurred whether or not Peter and Julia played any part in it."*** Commissioner's Ruling Denying Motion for Discretionary Review, P.7, Footnote 3.
>
> "The arrangement between the Johnstons and Peter Torkild has some questionable aspects and having Julia Torkild and her company involved in the process raises some legitimate concerns. ***But the Johnstons were aware of the questionable aspects and concerns before the sale occurred..."*** *Id.* at 9.
>
> ***"There was going to be a foreclosure sale no matter who was involved and the process they agreed to at least offered some hope that they might get the property back."*** *Id.* at 9.

VI. Conclusion.

An abuse of discretion is present when there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

A decision is manifestly unreasonable if the court, despite applying

the correct legal standard to the supported facts, ***adopts a view that no reasonable person would take.*** State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 922 (1990).

A conclusion of law is based on untenable reasons if the facts do not meet the requirements of the correct standard. Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

When a trial court abuses its discretion, reversal is required if the error was prejudicial to the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

The Johnston's inability to pay their mortgage was the natural and proximate cause of their foreclosure. Proximate cause must be proved by clear, cogent, and convincing evidence. Inferences must be based upon facts *first* proven to this higher standard. Causation has been directly challenged by this appeal. ***In response, the Johnstons cannot identify one single spec of evidence in the record to prove anything would have been different had the Torkilds not become involved.*** Causation has not been proven.

DATED: August 25, 2014

Respectfully Submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JOHN R. JOHNSTON, and DARCEE L. FOX-JOHNSTON, Respondent / Plaintiffs, v. PETER A. TORKILD, JULIA A. TORKILD, and FIRST CAPITAL, INC., a Washington Corporation, Appellant / Defendants	NO. 70719-1 **CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that I am over the age of 18 and that on August 25, 2014, I deposited into the United States Mail, First Class postage prepaid, a true and correct copy of "Reply Brief of Appellants" addressed to Tom Mumford, Attorney for Respondents, 1601 F street, Bellingham, WA 98825.

August 25, 2014, Moses Lake, WA

Peter A. Torkild

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