

66761-1

66761-1

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 AUG -8 PM 1:39

66761-1-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

CD TRUST UTD 10/22/92; CHRISTOPHER J. KOH and DAVID A. KOH, co-Trustees;
and WESTAR FUNDING, INC., a Washington corporation,

Respondents,

v.

QUALITY LOAN SERVICE CORP., Trustee; and DLJ MORTGAGE CAPITAL, INC.
through its servicing agent, SELECT PORTFOLIO SERVICING, INC.,

Appellants,

REPLY BRIEF OF THE APPELLANTS

Submitted by:

Lance E. Olsen, WSBA No. 25130
Brian S. Sommer, WSBA No. 37019
Routh Crabtree Olsen, P.S.
13555 SE 36th Street, Suite 300
Bellevue, WA 98006
Tel: (425) 586-1972
Fax: (425) 283-5972

ORIGINAL

TABLE OF CONTENTS

I. REPLY ARGUMENT

A. REPLY TO STATEMENT OF THE CASE.....1

1. WESTAR’S STATEMENT OF THE CASE INCLUDES NUMEROUS ALLEGATIONS NOT SUPPORTED BY REFERENCE TO THE TRIAL COURT RECORD, AND MANY ALLEGATIONS WITH CITATION REFERENCES ARE INCONSISTENT WITH THE TRIAL COURT RECORD.....1

B. REPLY TO ARGUMENT.....7

1. IN RESPONSE TO IV.A.1. OF WESTAR’S RESPONSE BRIEF, WESTAR’S INTERPRETATION OF RCW 65.08.070 IS WITHOUT BINDING AUTHORITY, AND WESTAR’S ANALYSIS ESSENTIALLY IGNORES THE *SABLEFISH* INTERPRETATION OF RCW 65.08.060(3) AND RCW 65.08.070.....7

2. IN RESPONSE TO IV.A.2. OF WESTAR’S RESPONSE BRIEF, THE SELECT PORTFOLIO FORECLOSURE SALE WAS VOID FROM THE OUTSET; CONSEQUENTLY, SANCHEZ HAS ALWAYS REMAINED N TITLE, AND THE SELECT PORTFOLIO DEED OF TRUST HAS ALWAYS REMAINED PERFECTED LIEN.....10

3. SECTION IV.B. OF WESTAR’S APPELLATE BRIEF DOES NOT RESPOND TO AN IMPORTANT STATUTE CITED BY SELECT, 11 U.S.C. § 349(B)(1), WHICH CODIFIES THAT A BANKRUPTCY DISMISSAL DOES NOT VACATE MANY TYPES OF ORDERS PREVIOUSLY ENTERED IN A BANKRUPTCY CASE, INCLUDING THE BANKRUPTCY ORDER VOIDING THE TRUSTEE SALE.....11

4. IN RESPONSE TO IV.C. OF WESTAR’S RESPONSE BRIEF,
WESTAR HAD ACTUAL KNOWLEDGE OF THE
INACCURACIES WITHIN BORROWER’S LOAN
APPLICATION AND A DUTY TO INVESTIGATE THE
SAME IN ORDER TO QUALIFY AS A BONA FIDE
ENCUMBRANCER UNDER RCW 65.08.070.....14

5. IN RESPONSE TO IV.D. OF WESTAR’S RESPONSE BRIEF,
THE COMPARATIVE INNOCENCE DOCTRINE IS ROOTED
IN EQUITY, AND EQUITY SHOULD NOT RELIEVE
WESTAR FROM ITS OWN VICE AND FOLLY.....16

II. CONCLUSION.....18

TABLE OF AUTHORITIES

A. Table of Cases

Washington Cases

<i>Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish</i> , 111 Wn.2d 219, 758 P.2d 494 (1988).....	8-9
<i>Foster v. Nehls</i> , 15 Wn. App. 749, 551 P.2d 768 (1976).....	17
<i>Income Investors v. Shelton</i> , 3 Wn.2d 599, 602, 101 P.2d 973 (1940).....	13
<i>J.L. Cooper & Co. v. Anchor Securities Co.</i> , 9 Wn.2d 45, 13 P.2d 845 (1941).....	17
<i>Leschner v. Dep't of Labor & Indus.</i> , 27 Wn.2d 911, 185 P.2d 113 (1947).....	13
<i>Levien v. Fiala</i> , 79 Wn. App. 294, 902 P.2d 170 (1995).....	15
<i>Litho Color, Inc. v. Pacific Employers Ins., Co.</i> , 98 Wn. App. 286, 305-06, 991 P.2d 638 (1999).....	6
<i>Mann v. Young</i> , 1 Wash.Terr. 454 (1874).....	15
<i>Miebach v. Colasurdo</i> , 102 Wn.2d 170, 685 P.2d 1074 (1984).....	15
<i>Scott v. Pac. West Mountain Resort</i> , 119 Wn.2d 484, 834 P.2d 6 (1992).....	15-16
<i>Soper v. Knafllich</i> , 26 Wn. App. 678, 682, 613 P.2d 1209 (1980).....	17
<i>Strong v. Clark</i> , 56 Wn. 2d 230, 232, 352 P.2d 183 (1960).....	14-15
<i>Udall v. T.D. Escrow Services, Inc.</i> , 159 Wn.2d 903, 154 P.3d 882 (2007).....	2, 10

Tucker v. English, 135 Wash. 146, 153, 237 P. 297 (1925).....2

Other Cases

In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992).....10-11

In re Joyce, 399 B.R. 382 (Bankr. D. Del. 2009).....12

B. Statutes

11 U.S.C. § 103..... 12

11 U.S.C. § 107(a)..... 12

11 U.S.C. § 349(b)(1)..... 12-13

11 U.S.C. § 522(i)(1)..... 12-13

11 U.S.C. § 542.....12-13

11 U.S.C. § 550.....12-13

11 U.S.C. § 553.....12-13

RCW 65.08.060(3)..... 8-9

RCW 65.08.070.....8-9, 12, 16, 18

C. Other Authorities

18 Wash. Prac., Real Estate § 14.10 (2d ed. 2004).....16

2 Collier on Bankruptcy ¶ 107.02 (15th ed.2008)..... 12

Black’s Law Dictionary, 1568 (7th ed. 1999).....11

RAP 9.12.....1
RAP 10.3(a)(5).....1, 3, 6

I. REPLY ARGUMENT

A. Reply to Statement of Case

1. Westar's Statement of the Case includes numerous allegations not supported by reference to the trial court record, and many allegations with citation references are inconsistent with the trial court record.

The appellate court will consider only evidence and issues called to the attention of the trial court when reviewing an order granting or denying a motion for summary judgment. RAP 9.12. For the Statement of the Case: "Reference to the record must be included for *each* factual statement." RAP 10.3(a)(5) (emphasis added).

Westar's Statement of the Case includes numerous statements without a citation to the Clerk's Papers. Every statement in Select Portfolio's Statement of the Case is followed by a citation to the Clerk's Papers. Brief of Appellants at 2-7. Westar's Statement of the Case fails to include the required references and is not a fair characterization of the court record.

Westar states without a citation to the CP: "The foreclosure sale and Trustee's Deed eliminated Select's deed-of-

trust lien. . . . Thus, after the foreclosure sale, purchaser Gamlam then held record fee title unencumbered by any recorded deeds of trust.” Brief of Respondents at 4. These two statements are legal arguments, not factual statements. Furthermore, these two assertions are contrary to *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 911, 154 P.3d 882 (2007) (holding that a trustee foreclosure sale in violation of a bankruptcy automatic stay is a procedural irregularity that renders the foreclosure sale void).

A vesting deed fraudulently or wrongfully obtained does not pass title to the grantee even if the deed was issued. *See Tucker v. English*, 135 Wash. 146, 153, 237 P. 297 (1925). A trustee’s deed issued following a trustee foreclosure in violation of a bankruptcy automatic stay is a deed wrongfully obtained. Therefore, under the law, title never passes despite a written and recorded trustee’s deed declaring otherwise. In short, Gamlam has never held title to the foreclosed Property, and Select Portfolio’s deed of trust has always remained an encumbrance.

Westar also states in its appellate brief: “On September 21, 2006, after the Trustee’s Deed to Gamlam was recorded, the

bankruptcy court entered an order setting aside the foreclosure sale, requiring return of the purchase price and **arguably restoring** Select's deed of trust lien ("Bankruptcy Order)." Brief of Respondents at 4 (emphasis added).

First, the "arguably" statement contradicts Westar's filed complaint where Westar alleged: "On September 21, 2006, the Court in the 2005 Bankruptcy entered an order voiding the Foreclosure Sale, requiring return of the purchase price and apparently restoring the Defendant's title to the Property and **restoring** Defendant's interest under the WaMu [Select] Deed of Trust." CP 221 (emphasis added). Second, this statement contradicts the admission of Westar's president: "Before it made the loan, Westar did not know that Mr. Sanchez had an outstanding loan that was secured by a deed of trust on the Property." CP 91.

Westar's duty in articulating the Statement of Facts is to provide a fair characterization of the *court record*, especially of Westar's own statements. RAP 10.3(a)(5). Westar's newest characterization of the Select Portfolio Deed of Trust is not

reflective of the court record or consistent with its prior statements.

Westar also opines in its Statement of Facts (no citation to the CP): “In December 2009, Select apparently realized that it had no record interest in the Property.” Brief of Respondents at 6. Westar then surmises: “On December 16, 2009, it [Select] recorded with the Snohomish County Auditor the 2006 Bankruptcy Order that voided the Trustee’s sale. CP 153-55.” Brief of Respondents at 6. Westar’s reference to CP 153-55 is the recorded bankruptcy order voiding the trustee sale.

Westar’s citation to CP 153-55 is a distorted suggestion to this Court that Select Portfolio recorded the Bankruptcy Order. Select Portfolio did not record the 2006 Bankruptcy Order, nor was the recording done at the behest of Select Portfolio. The document itself identifies who recorded the Bankruptcy Order- First American Title Insurance Company. CP 153. Select Portfolio maintains that it did not have to record the bankruptcy order in order to again perfect its deed of trust. CP 201. In short, Westar’s assertion that Select recorded the bankruptcy order is

unsupported conjecture and an effort to persuade this Court that Select acknowledged some defect.

Westar also introduces novel assertions that are not part of the trial court record and contradicted by its own evidence. For example, Westar argues (these three assertions were made without a citation to a CP): “Westar made a *commercial* loan to Sanchez. It was not a purchase money loan or a refinance of a personal residence. The loan funds were to be used in Sanchez’s business.” Brief of the Respondents at 8 (emphasis in original).

First, Select Portfolio is unclear what Westar is implying by introducing “commercial” into its appellate brief, and then emphasizing the word. In contrast, the loan application states in bold letters at the top of the application: “Uniform Residential Loan Application.” CP 109. Second, Westar’s assertion that the loan was not a refinance contradicts the Sanchez loan application. Sanchez represents that the purpose of the loan was a “refinance.” CP 109.

Westar asserts in its Statement of Facts: “On August 29, 2008, Gamlam deeded the Property to Sanchez. This deed was

recorded on August 29, 2008 in the Snohomish County records, **making Sanchez the record owner.**” Brief of Respondents at 5 (emphasis added). Elsewhere Westar asserts in its Statement of Facts: “[T]he bankruptcy court entered an order setting aside the foreclosure sale” Brief of Respondents at 4. It is axiomatic that if the Bankruptcy Order filed on September 21, 2006 established that the foreclosure sale was void, then the August 29, 2008 quitclaim deed from Gamlam to Sanchez was of no legal effect.

The purpose of RAP 10.3 is to enable this Court to expeditiously review the accuracy of the established evidentiary record and efficiently consider relevant legal authority argued by counsel. *See Litho Color, Inc. v. Pacific Employers Ins., Co.*, 98 Wn. App. 286, 305-06, 991 P.2d 638 (1999). Select Portfolio is mindful of adhering to the Rules of Appellate Procedure and has therefore restrained from introducing at appeal beneficial facts now known to Select but not part of the trial court record.

Select Portfolio respectfully requests that any statement offered by Westar in its Statement of Facts without a correlating

reference to the Clerk's Papers be disregarded. Furthermore, Select objects to every legal argument made by Westar based upon facts not accompanied by a citation to the Clerk's Papers. Due to Westar's extensive mischaracterization of the facts, Westar respectfully requests that this Court render its decision based only upon the Select Portfolio Statement of Facts.

B. Reply to Argument

1. In response to IV.A.1. of Westar's Response Brief, Westar's interpretation of RCW 65.08.070 is without binding authority, and Westar's analysis essentially ignores the *Sablefish* interpretation of RCW 65.08.060(3) and RCW 65.08.070.

In the Argument section of its appellate brief, Westar continues to make factual assertions not supported by the trial court record and states: "**It is undisputed** that Westar had no knowledge of Select's Deed of Trust. CP 91-92." Brief of Respondents, p. 11 (emphasis added). This assertion is patently false. In fact, the crux of the dispute between Westar and Select is whether Westar had knowledge of the Select deed of trust. This is the central issue on appeal and argued at summary judgment. Westar's citation to CP 91-92 is misleading, as it implies that Westar and Select agree on this point. CP 91-92 is the Declaration of

Eric Hogan, the President of Westar. Mr. Hogan's statement is self-serving hearsay strenuously refuted by Select.

Westar's argument under IV.A.1. can be distilled down to the following syllogism: Westar argues that Select Portfolio had to record the bankruptcy order voiding the trustee sale (DOCUMENT A) in order for Select Portfolio to *again* have a valid and perfected Deed of Trust (DOCUMENT B). Brief of Respondents, pp. 9-11. Lacking from this analysis is *any* authority, binding or nonbinding, whereby a race-notice recording statute is interpreted to hold that recording DOCUMENT A is necessary to perfect an already recorded and previously perfected DOCUMENT B.

RCW 65.08.070, Washington's race-notice recording statute, is not applicable to circumstances of void documents. The key word under RCW 65.08.070 is "conveyance," and it is a term of art defined under RCW 65.08.060(3). *Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish*, 111 Wn.2d 219, 226-27, 758 P.2d 494 (1988), is the seminal case on point. The Supreme Court has held that conveyance as defined under RCW 65.08.060(3) does not include a lien created by a money judgment. The court's reasoning is useful in determining this appeal.

The court stated that RCW 65.08.070 is limited to requiring the recording of *conveyances*, and the definition of *conveyance* has been defined by the Washington legislature:

[W]e do not perceive that a judgment lien can reasonably be considered to be a conveyance of real property, which commonly denotes a transfer of an estate or title. Moreover, conveyances must be by deed, and deeds, in turn, must be in writing, signed by the party bound, and acknowledged. Such requirements simply do not apply to a judgment lien.

Westar's brief is devoid of any analysis that reconciles the *Sablefish* analysis with its own conclusive assertion that the Bankruptcy Order was a conveyance as defined by RCW 65.08.060(3). The *Sablefish* court established that a court document can affect title (e.g., a monies judgment) without the court document constituting a conveyance. The Bankruptcy Order does not have the hallmarks of a conveyance; therefore, it does not meet the definition of conveyance under RCW 65.08.060(3). It follows that if the Bankruptcy Order does not meet the definition of conveyance, then RCW 65.08.070 is not applicable.

For these reasons, the trial court erred as a matter of law by granting Westar summary judgment and denying Select Portfolio summary judgment.

2. In response to IV.A.2. of Westar's Response Brief, the Select Portfolio foreclosure sale was void from the outset; consequently, Sanchez has always remained in title, and the Select Portfolio Deed of Trust has always remained a perfected lien.

Westar states: “[A]s a matter of law, that [Select Portfolio] deed of trust was extinguished when Select completed its foreclosure.” Brief of Respondents at 10. This assertion is false and contrary to binding case law. Furthermore, Westar’s statement asserted as “a matter of law” was not followed by a citation to a statute or case law. A trustee foreclosure sale held in violation of an automatic stay is a procedural irregularity that renders the foreclosure sale void. *See Udall v. T.D. Escrow Services, Inc.*, 159 Wash.2d 903, 911, 154 P.3d 882 (2007) (en banc). The Ninth Circuit Court of Appeals unequivocally declares that violations of the bankruptcy automatic stay are void, not voidable. *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992).

Udall and *In re Schwartz* are the controlling cases on point, and *Udall* is binding authority. Whereas Select Portfolio’s arguments are

based upon *Udall* and *Schwartz*, Westar relies upon unsubstantiated assertions and one secondary source, the Washington Practice, Real Estate: Transactions. Brief of Respondents at 10. Moreover, the Washington Practice citation does nothing more than support the general rule concerning the affect of a *valid* foreclosure.

From this inapplicable citation, Westar asserts without authority that: “When Select’s trustee recorded his deed to purchaser Gamlam, Select’s deed of trust was extinguished of record.” Brief of Respondents, p. 10. “Void” means of no legal effect or null. *Black’s Law Dictionary* 1568 (7th ed. 1999). Because the foreclosure sale was void, the condition of title and corresponding liens remained intact. *See In re Schwartz*, 954 F.2d at 571.

There has not been a moment of time when Gamlam held title to the property, Borrower’s interest had been foreclosed, or Select Portfolio’s deed of trust was not a perfected lien.

3. Section IV.B. of Westar’s appellate brief does not respond to an important statute cited by Select, 11 U.S.C. § 349(b)(1), which codifies that a bankruptcy dismissal does not vacate many types of orders previously entered in a bankruptcy case, including the Bankruptcy Order voiding the trustee sale.

Section IV.B. of Westar’s appellate brief can be distilled down to the following: Westar asserts that Westar and Fidelity had no duty to review the bankruptcy record (or even the summary docket report) of a dismissed bankruptcy in order to enjoy bona fide encumbrancer status under RCW 65.080.70. Brief of Respondents at 14-20. Westar’s appellate brief fails to address or deny the impact of 11 U.S.C. § 107(a) or 11 U.S.C. § 349(b)(1). Rather, Westar attempts to avoid the issue and assert instead that: “The Bankruptcy code does not provide that orders and pleadings in the bankruptcy court file constitute constructive notice for purposes of state recording schemes.” Brief of Respondents at 17.

“Pursuant to 11 U.S.C. § 107(a), filing for bankruptcy is a public act and, accordingly, all papers filed in bankruptcy cases and the dockets of bankruptcy courts are public documents subject to examination by members of the public.” *In re Joyce*, 399 B.R. 382, 385 (Bankr. D. Del. 2009), citing 2 Collier on Bankruptcy ¶ 107.02 (15th ed. 2008). The Bankruptcy Order was entered in a Chapter 13 case. CP 176. Under 11 U.S.C. § 349(b)(1), made applicable to Chapter 13 cases by 11 U.S.C. § 103, a Chapter 13 dismissal only vacates an order filed pursuant to sections 522(i)(1), 542, 550, or 553 of title 11. The Bankruptcy Order

was *not* entered pursuant to sections 522(i)(1), 542, 550, or 553 of title 11.

Westar readily admits knowing that the bankruptcy was dismissed. Brief of Respondents, p. 14. It is a “universal maxim that ignorance of the law excuses no one.” *Leschner v. Dep’t of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947). As a matter of law, the Bankruptcy Order survived the bankruptcy court dismissal and continues to this day to be a valid order. Westar and Fidelity are imputed with knowledge of 11 U.S.C. § 349(b)(1). “It is a well-known maxim that a person who comes into an equity court must come with clean hands.” *Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940).

Westar never checked Sanchez’s bankruptcy record. CP 90-92. Fidelity only performed a bankruptcy “name search,” and upon seeing that the bankruptcy was dismissed, Fidelity inquired no further. Brief of Respondents at 19. The sixty-third bankruptcy docket entry is entitled “ORDER Voiding Sale.” If Fidelity or Westar had reviewed at all the bankruptcy court summary docket entries, then they would have learned that the trustee sale was void.

For these reasons, the trial court erred as a matter of law by granting Westar summary judgment and denying Select Portfolio summary judgment.

4. In response to IV.C. of Westar's Response Brief, Westar had actual knowledge of the inaccuracies within Borrower's loan application and a duty to investigate the same in order to qualify as a bona fide encumbrancer under RCW 65.08.070.

Westar makes the following statement in its appellate brief: "Select has failed to identify **any fact** that, if Westar had inquired further, would have notified it of the voidance of the foreclosure sale." Brief of Respondents at 24 (emphasis added). The following are representations made by Borrower in the Loan Application:

- 1) Have you had property foreclosed upon or given title or deed in lieu thereof in the last 7 years? "**NO.**" (Sec. VIII.c.) (CP 110);
- 2) Have you directly or indirectly been obligated on any loan of which resulted in foreclosure, transfer of title in lieu of foreclosure, or judgment? "**NO.**" (Sec. VIII.e.) (CP 110);

"[W]hen an instrument involving real property is properly recorded, it becomes notice to all the world of its contents." *Strong v.*

Clark, 56 Wn. 2d 230, 232, 352 P.2d 183 (1960); RCW 65.08.070. The Trustee Deed was recorded on September 5, 2006. CP 131. Westar made its loan on October 28, 2008. CP 91. By operation of law, Westar is imputed with notice of Trustee Deed that was recorded prior to Westar making the loan. Borrower's denial of ever having been foreclosed contradicts Westar's imputed knowledge of the recorded Trustee Deed, yet Westar never investigated the discrepancy.

In *Levien v. Fiala*, 79 Wn. App. 294, 299, 902 P.2d 170 (1995), a case involving RCW 65.08.070, the court cited the following excerpt from *Miebach v. Colasurdo*, 102 Wn.2d 170, 177, 685 P.2d 1074 (1984), quoting *Mann v. Young*, 1 Wash.Terr. 454, 463 (1874):

Persons cannot be bona fide purchasers if they refuse to pursue inquiry, to which, were [they] honest and prudent, the knowledge [they have] would clearly send [them]. It will not do for a purchaser ... to rely on the interested representation of the seller of land that a suspicious circumstances does not concern the title.

On a motion for summary judgment, the trial court must view all evidence and draw all reasonable inferences in favor of the nonmoving party; then it must deny the motion if the evidence and inferences create

any question of material fact. *Scott v. Pac. West Mountain Resort*, 119 Wn.2d 484, 487, 834 P.2d 6 (1992).

Westar was not a bona fide encumbrancer because Westar *chose* not to investigate the inconsistency between the loan application and public record (i.e., the recorded Trustee Deed). Consequently, Westar does not meet the good faith prong of RCW 65.08.070. *See* 18 Wash. Prac., Real Estate § 14.10 (2d ed. 2004) (RCW 65.08.070 requires that, in order for a subsequent party to reverse the priority of a prior unrecorded party, he must be in good faith.).

For these reasons, the trial court erred by implicitly finding that Westar acted in good faith and granting Westar lien priority presumably pursuant to RCW 65.08.070.¹

5. In response to IV.D. of Westar's Response Brief, the comparative innocence doctrine is rooted in equity, and equity should not relieve Westar from its own vice and folly.

The comparative innocence doctrine “is available only to an innocent party who proceeds without knowledge or warning that he is

¹ The Order Granting Westar's Cross-Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment (“Summary Judgment Order and Denial”) does not state the legal basis for the trial court's decision. Westar's Cross-Motion for Summary Judgment was based upon RCW 65.08.070. CP 85.

acting contrary to another's vested property interest." See *Foster v. Nehls*, 15 Wn. App. 749, 754, 551 P.2d 768 (1976). The comparative innocence doctrine will not relieve a complainant from his own vice and folly. *J.L. Cooper & Co. v. Anchor Securities Co.*, 9 Wn.2d 45, 72, 113 P.2d 845 (1941).

Westar admits having no prior dealings with Sanchez. CP 91. Westar states further inquiry into the numerous inconsistencies and red flags on Sanchez's loan application cited by Select "would not have led Westar to discover the Bankruptcy Order." Respondents Brief at 25. Westar never performed a bankruptcy check; rather, Westar relied upon Fidelity's cursory bankruptcy check. Brief of Respondents at 19; CP 90-92. Westar tries to bootstrap its lack of a bankruptcy check to Fidelity's bankruptcy "findings." But as Westar states in its appellate brief: "[K]nowledge of a title insurer cannot be imputed to its insured. *Soper v. Knafllich*, 26 Wn. App. 678, 682, 613 P.2d 1209 (1980)." Brief of Respondents at 25-26. In short, Westar never did a bankruptcy check to its own vice and folly, and Fidelity's check cannot be imputed to Westar.

Westar's own vice and folly led to an imprudent \$375,000.00

lending decision devoid of reasonable due diligence. For these reasons, Westar does not qualify under the comparative innocence doctrine.

II. CONCLUSION

If this Court determines that RCW 65.08.070 is not applicable, then Select Portfolio respectfully requests this Court to instruct the trial court to: 1) vacate the Summary Judgment Order and Denial; 2) grant Select Portfolio summary judgment; and 3) deny Westar summary judgment.

If this Court determines that Westar had constructive or inquiry notice of the Bankruptcy Order and/or the 1994 Deed of Trust, then Select Portfolio respectfully requests this Court to instruct the trial court to: 1) vacate the Summary Judgment Order and Denial; 2) grant Select Portfolio summary judgment; and 3) deny Westar summary judgment.

If this Court determines that RCW 65.08.070 is applicable and this Court makes no determination whether Westar had actual, constructive or inquiry notice of the Bankruptcy Order and/or the 1994 Deed of Trust, then Select Portfolio respectfully requests this Court to instruct the trial court to: 1) vacate the Summary Judgment Order and Denial; and 2) remand the case to the trial court for further proceedings.

Finally, if this Court determines that Westar or Select Portfolio can avail themselves of the comparative innocence doctrine but this Court makes no determination whether Westar had actual, constructive or inquiry notice of Bankruptcy Order and/or the 1994 Deed of Trust, then Select Portfolio respectfully requests this Court to instruct the trial court to: 1) vacate the Summary Judgment Order and Denial; and 2) remand the case to the trial court for further proceedings.

DATED this 8th day of August, 2011.

ROUTH CRABTREE OLSEN, P.S.

By: 

Lance E. Olsen, WSBA No. 25130
Brian S. Sommer, WSBA No. 37019
Attorneys for Appellants