

**FILED**

JUL 21 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 286762

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

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**WILLARD AND HOLLY BROWN, *Appellant (s)*,**

v.

**WELLS FARGO BANK, N.A., *Respondent*.**

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**BRIEF OF APPELLANT(S)**

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WSBA #29621

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## **A. INTRODUCTION**

This case centers around the application of RCW 61.24.080(3). RCW 61.24.080(3) is the statute that governs the disposition of surplus funds following a non-judicial foreclosure (i.e. the bid at the foreclosure was greater than the amount necessary to satisfy the foreclosing promissory note). Washington's surplus funds statute is an intellectually elegant statute, in that it treats the competing claims to the surplus funds in the same priority as they would have existed against the property. Therefore, the various claimants' claims to the surplus funds are prioritized in terms of the property rights that they possessed in the property prior to the foreclosure. Those property rights could be consensual liens, such as deeds of trust, statutory liens, such as materialman's liens, possessory interests, such as the owner's fee simple, or non-consensual liens, such as a judgment lien.

The surplus funds statute would have the trial court judge imagine that the various claimants were exercising their own rights and remedies as against the property, and prioritize the claims to the surplus funds in terms of which property right would be superior to the other.

For example, if one claimant was a judgment creditor, and the other claimant were a homeowner whose interest in the property qualified as a homestead under RCW 6.13.030, then the homeowner's claim to the surplus funds would defeat that of the judgment creditor's claim up to the

amount of the homestead exemption (\$125,000.00). This is exactly what would have happened if the judgment creditor attempted their own remedy against the property (i.e. foreclosure), since the judgment creditor would have to pay the holder of the homestead the first \$125,000.00 of any funds realized by the sale.

Similarly, a claimant to surplus funds based upon a homestead would lose to the holder of a deed of trust, per RCW 6.13.080(2), as the homestead would not apply to a consensual lienholder such as a deed of trust grantee.

In this case, the question becomes which claimant would have priority to the surplus funds, under RCW 61.24.080(3): a grantee of a deed of trust that secured a personal guarantee of a commercial loan, or a homeowner for whom the foreclosed property was their personal residence.

## **B. ASSIGNMENTS OF ERROR**

### *Assignments of Error*

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

**No. 2** The trial court erred in determining that the Browns “abandoned their homestead.”

**No. 3** The trial court erred in ruling that the Browns contractually waived their homestead exemption.

*Issues Pertaining to Assignments of Error*

**No. 1** How are competing claims under RCW 61.24.080(3) prioritized?

**No. 2** Under RCW 61.24.080(3), when a former homeowner's claim to surplus funds is evaluated against that of a holder of a lien securing a personal guarantee of a commercial loan, do the provisions of RCW 61.24.100(6) apply?

**No. 3** Was the property the Browns' principal residence for purposes of RCW 61.24.100(6)?

**No. 4.** Was the lien in favor of Wells Fargo securing a personal guarantee of a commercial loan?

**No. 5.** Does the trial court abuse its discretion in ruling that a homeowner has abandoned their homestead rights under RCW 6.13.030 when there is no conclusive evidence that the homeowner has established another residence?

**No. 6.** Does the trial court abuse its discretion in finding that a homeowner has contractually waived their homestead rights, when there has never been a judicial or legislative recognition of such waivers, and the waiver is contained in boilerplate language in a deed of trust, rather than a specifically negotiated term of the contract for which consideration is given?

**C. STATEMENT OF THE CASE**

WW Cedar Company was an Idaho Corporation whose principal shareholders were Willard and Holly Brown. On August 23, 2006, WW Cedar Company sought a Small Business Administration (SBA) loan from Wells Fargo Bank in the original amount of \$200,000.00 (*hereinafter* "loan"). CP 43. Wells Fargo sought additional security for the loan from WW Cedar Company's principals, Willard and Holly Brown (*hereinafter* "Browns"), in the form of a personal guarantee and

deed of trust secured by the Brown's personal residence located at 1700 Osborn Drive, Clarkston, Washington 99403 (*hereinafter* "property" or "home"). *CP 43-44*. There is no dispute that the loan was commercial in nature, or that the borrower of the note was WW Cedar Company. *CP 44*. Willard and Holly Brown were guarantors of the note, not the makers of the note. *Id.* There is no dispute that at the time of the personal guarantee, the property was the principal residence of the Browns. *Id.* The Browns have always maintained that the Clarkston home was their principal residence until January 16, 2009. *CP 35-38*.

The SBA deed of trust, which secured the Browns' personal guarantee, was the second lien to be recorded on the Brown's home. *CP 44*. The SBA lien was junior to a first mortgage in favor of Alaska USA Mortgage Company, LLC (*hereinafter* "Alaska USA") which was undertaken on or about June 3, 2003. *Id.* The loan in favor of Alaska USA was non-commercial loan. *Id.*

On or about September 2, 2008, the Browns defaulted on their loan to Alaska USA. *CP 35-38, 44*. ReconTrust Company, as Trustee for Alaska USA, performed a non-judicial foreclosure on the Brown's personal residence on January 16, 2009. *CP 44*. Funds in excess of the amounts necessary to satisfy the obligation to Alaska USA were realized by the sale, and were subsequently deposited by the Trustee into the

registry of the Asotin County Superior Court pursuant to RCW 61.24.080(3). *CP 1-20*.

The lien in favor of Wells Fargo secured by the property, as well as the Browns present possessory (fee simple) interest, were extinguished by the operation of the non-judicial foreclosure conducted by ReconTrust Company, therefore, both the Browns and Wells Fargo have valid claims to the surplus funds pursuant to RCW 61.24.080(3).

On May 6, 2009, the Honorable William Acey of the Asotin County Superior Court heard arguments from counsel for the Browns and counsel for Wells Fargo on their respective claims to the surplus funds pursuant to RCW 61.24.080(3). Judge Acey ruled in favor of the Browns. RP 10:20-13:22, May 6, 2009.

On November 9, 2009, Wells Fargo held a motion for reconsideration, and at that hearing, Judge Acey reversed his earlier ruling, and ruled in favor of Wells Fargo. RP 17:5-18:21, November 9, 2009, *CP 52-54*.

On December 11, 2009, the Browns initiated the present appeal. *CP 55-57*.

#### **D. ARGUMENT**

*Standard of Review:*

The standard of review for legal questions and statutory interpretation is de novo. See, Sunnyside Valley Irrigation Dist. v. Dickie,

149 Wn.2d 873, 880, 73 P.3d 369 (2003); Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), Cerrillo v. Esparza, 158 Wn.2d 194, 199, 142 P.3d 155 (2006).

Procedure for reviewing claims under RCW 61.24.080(3):

RCW 61.24.080(3) provides for the procedure for adjudicating claims related to surplus funds resulting from a non-judicial foreclosure. In ascertaining the relative priorities of competing claimants, RCW 61.24.080(3) provides in relevant part that: “[i]nterests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property.” RCW 61.24.080(3). Generally, the determination of the relative priorities under RCW 61.24.080(3) is within the discretion of the Superior Court judge. *See, Wilson v. Henkle*, 45 Wn. App. 162, 724 P.2d 1069 (1986).

Therefore, the analysis in the present case is to evaluate the Brown’s interest (i.e. the statutory homestead eliminated by the sale) against the secured interest of Wells Fargo (i.e. personal guarantee secured by a deed of trust which was eliminated by the sale).

Under normal circumstances, when evaluating the relative priorities of a former homeowner versus that of a junior deed of trust grantee under RCW 61.24.080(3), the junior deed of trust would trump the interest of the homeowner. *See, In re Upton*, 102 Wn.

App. 220, 6 P.3d 1231 (2000); RCW 6.13.080(2) (homestead is unavailable against deeds of trust).

The critical distinction in this case is that the loan in this case was, in fact, a personal guarantee of a commercial loan, and the deed of trust was against the Brown's personal residence. *CP 44*. Consequently we must look at what Wells Fargo's remedy would have been, had they attempted to seek relief against their secured collateral (i.e. foreclose), and apply the same analysis to the surplus funds. Therefore, RCW 61.24.100(6) does apply.

**THE TRIAL COURT ERRED IN FINDING THAT RCW 61.24.100(6) DID NOT CREATE A PRIORITY IN FAVOR OF THE BROWNS.**

A plain reading of RCW 61.24.080(3) reveals that the relative priorities on the surplus funds attach in the manner in which they attached on the real property. RCW 61.24.080(3). Thus, a claimant to the surplus funds cannot have a greater interest, or claim for relief, than the claimant would have had against the real property had no foreclosure taken place.

Therefore, Wells Fargo's claim must be evaluated against the provisions of RCW 61.24.100(6). RCW 61.24.100(6) provides in relevant part that:

A guarantor granting a deed of trust to secure its guaranty of a commercial loan shall be subject to a deficiency judgment following a trustee's sale under that deed of trust only to the extent stated in subsection (3)(a)(i) of this section. **If the deed of trust encumbers the guarantor's**

**principal residence, the guarantor shall be entitled to receive an amount up to the homestead exemption set forth in RCW 6.13.030, without regard to the effect of RCW 6.13.080(2), from the bid at the foreclosure or trustee's sale accepted by the sheriff or trustee prior to the application of the bid to the guarantor's obligation.**

RCW 61.24.100(6) *emphasis added*. Clearly, the legislature intended that there be a priority in favor of a homeowner, when the lien is a personal guarantee of a commercial loan. Therefore, the court's analysis should apply the facts of the Wells Fargo deed of trust to RCW 61.24.100(6).

*The Clarkson property was the Browns' principal residence:*

The first relevant section of RCW 61.24.100(6) is "[i]f the deed of trust encumbers the guarantor's principal residence...". RCW 61.24.100(6). This was a point of confusion at the trial court level, as the trial court reviewed whether or not the residence qualified as a "homestead". Rather, the proper inquiry should have been whether or not Willard and Holly Brown occupied the property located at 1700 Osborn Drive, Clarkston, Washington 99403 as their "principal residence." Principal residence is not defined in the Revised Code of Washington. That term is defined in the Washington Administrative Code. WAC Code 458.16A.100(25) defines "principal residence" as:

"Principal residence" means the claimant owns and occupies the residence as his or her principal or main residence. It does not include a residence used merely as a vacation home.

WAC Code 458.16A.100(25).

**THE TRIAL COURT ERRED IN DETERMINING THAT THE BROWNS “ABANDONED THEIR HOMESTEAD”.**

The trial court erred in assigning any significance to the fact that the Browns leased vacation property in Florida, and using that fact as evidence that the Browns had abandoned their homestead (and by extension their personal residence). RP 17:1, November 9, 2009. In point of fact the Washington Administrative Code specifically excludes vacation property from the term “principal residence”, therefore the fact that the Browns were on vacation, and may have temporarily resided in a vacation home in Florida, does not mean that the Browns intended to switch their “principal residence” from Clarkston, Washington to the vacation property in Florida. WAC 458.16A.100(25), CP 35-38.

The trial court also felt that the failure of the Browns to maintain water service at the property was affirmative evidence that the Browns intended to abandon their property. The Browns must take affirmative steps to abandon their property, and merely winterizing their home while they took their RV to Florida would not be sufficient. If that were the legal standard, thousands of retired individuals would lose their property every year as they travel to warmer climates in the wintertime in their RV's. On the other hand, the Browns maintained their property insurance

payments up through the date of the foreclosure. CP 38. Selectively favoring some aspects of home ownership, rather than others is not an appropriate analysis for purposes of abandonment of the homestead. By definition, the homestead exemption would only be invoked by homeowners who are in financial distress, and therefore, it is completely logical that some utilities would be shut off, and if this were accepted as evidence of abandonment of the homestead, homeowners would regularly lose the benefit of their homestead exemption, merely because of their distressed financial circumstances. The proper indicia of the abandonment of the debtor's homestead would be establishing another primary residence, regardless of whether the residence was a fee simple. In this case, there was no evidence that the Browns attempted to establish another primary residence. CP 35-38. The Browns merely travelled in their travel trailer, which would not qualify as establishing a new residence under WAC 458.16A.100(25). See, In re Lindsay, 91 Wn. App. 944, 957 P.2d 818 (1998); Smith v. Ferry, 43 Wash. 460, 86 P. 658 (1906) (unknowingly granting quit claim deed does not extinguish homestead), see also *dissenting opinion in*, Seattle Trust Co. v. Stephens, 183 Wash. 687, 49 P.2d 463 (1935) (temporary absence from property does not abandon homestead). Traveling to milder climates is not evidence of establishing a new primary residence. The Browns' connections to other States is not inconsistent with the lifestyle enjoyed

by many retired individuals. Having said that, such a lifestyle does not consign the retired person to a nomadic existence with no connection or property rights as afforded by the law. For example, the Browns maintained a “mobile” bank account through FNB Livingston Bank out of Texas, for ease and convenience when they are travelling, but they also had bank accounts with US Bank in Asotin, Washington. Banking in Texas does not negate the Brown’s connection to Asotin. In another example, if someone travelled across the country and their driver’s license expired during the trip, it would be logical that the person would obtain a driver’s license in the vacationing state, using their temporary address, until they return to their primary residence, so as not to drive with an expired driver’s license. Therefore, the trial court should not have assigned any special significance to Willard Brown obtaining a Florida driver’s license, unless Mr. Brown intended to establish residency in Florida, which he did not. In point of fact, Mr. and Mrs. Brown returned to Washington. *CP 35-38.*

The trial court’s focus on the term “homestead” rather than “personal residence” was an error. RCW 61.24.100(6) uses the homestead exemption found in RCW 6.13.030 as a method of fixing the dollar amount that must be prioritized in favor of the debtor, but it specifically uses the term “personal residence” as opposed to homestead. The debtor’s (homeowner’s) homestead exemption under RCW 6.13.040 is *automatic*

and protects homeowners rights in property as against creditors to the extent of \$125,000.00 of equity in real property used as the debtor's primary residence. R.C.W. 6.13.030. As the court stated in Macumber v. Shafer, 96 Wn.2d 568; 637 P.2d 645 (1981):

Homestead statutes are enacted as a matter of public policy in the interest of humanity and thus are favored in the law and are accorded a liberal construction. *Cody v. Herberger*, 60 Wn.2d 48, 371 P.2d 626 (1962); *Lien v. Hoffman*, 49 Wn.2d 642, 306 P.2d 240 (1957); *Bank of Anacortes v. Cook*, 10 Wn. App. 391, 395, 517 P.2d 633 (1974). The homestead exemption was created to insure a shelter for each family. *Clark v. Davis*, 37 Wn.2d 850, 226 P.2d 904 (1951); **It was not created to protect the rights of creditors**, *First Nat'l Bank v. Tiffany*, 40 Wn.2d 193, 242 P.2d 169 (1952); *Anacortes, supra* at 395.

Shafer, 96 Wn.2d at 570; 637 P.2d at 646. A homestead is not an encumbrance, rather to the contrary, the statute is designed to prevent the property from being encumbered. See, Edgley v. Edgley 31 Wn. App. 795, 799; 644 P.2d 1208, 1210 (1982).

The reason that RCW 61.24.100(6) does not identify the homestead, is that it specifically goes on to say that the homeowner's priority operates "without regard to the effect of RCW 6.13.080(2)". RCW 6.13.080(2) normally provides for a priority for grantees of a deed of trust against homeowners claiming a homestead exemption. In the case of a guarantor of a commercial loan that pledges their personal residence to secure the commercial guarantee, clearly the Legislature felt that such

homeowners were deserving of greater protections, than would normally be accorded under the homestead act.

Therefore, all of the elements necessary for the application of RCW 61.24.100(6) are present (i.e. personal guarantee of a commercial loan secured by the debtors' personal residence). If Wells Fargo's claim to the surplus funds is to be evaluated per the terms of RCW 61.24.080(3) (i.e. in the manner in which its interest attached to the property), then Wells Fargo's claim to the surplus funds would be subject to RCW 61.24.100(6), in *exactly* the same manner as its interest would have applied to the property, as if it had exercised its own rights to foreclose the homeowner's fee simple.

Admittedly, there has been no judicial interpretation of RCW 61.24.100(6), however, the plain language of RCW 61.24.080(3) requires that the court acknowledge that the proper analysis would be to apply the competing claims to the surplus funds as they would have been applied to the real property. *See*, RCW 61.24.080(3). If Wells Fargo had sought relief against the real property, in the nature of a foreclosure, the first \$125,000.00 of any successful bid would have gone to the Browns, per RCW 61.24.100(6). Therefore, as against the surplus funds, the same analysis applies, per RCW 61.24.080(3). Nothing in this analysis precludes Wells Fargo from suing the Browns under the terms of the personal guarantee, therefore, Wells Fargo is in exactly the same position

as it would have been, had no foreclosure taken place. For example, if Alaska USA had not foreclosed, Wells Fargo could have either 1) sued the Browns on the personal guarantee, or 2) performed a foreclosure, giving the first \$125,000.00 of any successful bid to the Browns. There is no reason to believe that the analysis of Wells Fargo's claim against the surplus funds should differ, and in fact, RCW 61.24.080(3) demands that the claim be evaluated in exactly the same manner, as their interest existed against the real property.

**THE TRIAL COURT ERRED IN RULING THAT THE BROWNS CONTRACTUALLY WAIVED THEIR HOMESTEAD EXEMPTION.**

Wells Fargo would argue that the boilerplate language contained in its deed of trust expressly waives such rights as statutory anti-deficiency protections and the Browns' homestead rights. The trial court found this argument compelling. Although, the Browns argue that the existence or non-existence of the homestead is immaterial to the analysis under RCW 61.24.100(6) (*supra*), the Browns object to the creation of a de facto waiver of rights by recognition of the onerous boilerplate clauses contained in Wells Fargo's deed of trust.

There is no statutory recognition of a contractual waiver of the anti-deficiency statute or the homestead exemption found in Washington State law. While Wells Fargo argues that such waivers are commonplace nationwide, in all such circumstances, there has been an explicit legislative

or judicial acknowledgement of such contractual waiver of homestead rights.

When such legislative enactments do not exist, there is no blanket acknowledgment of such waivers. For example, the court in Great Southwest Life Ins. Co. v. Frazier, 860 F.2d 896, 902-903 (9<sup>th</sup> Cir. 1988) discussed the applicability of potentially unenforceable boilerplate SBA loan provisions.

The SBA makes an untenable argument that compels us to respond. **It contends that contractual provisions in the note Frazier originally signed constitute a specific waiver of any defense based on the SBA's duty with respect to the collateral (e.g., impairment).** If Frazier had waived that defense, her status as a co-maker of the note, and the alleged impairment, would be immaterial.

.....

**Furthermore, we are guided by *United States v. Pastos*, 781 F.2d 747 (9th Cir. 1986), and *United States v. Crain*, 589 F.2d 996, to reject the argument that a printed form waiver should be binding.** We noted in *Pastos* that the Pastos's loan contained an express waiver of redemption rights, but determined that "the critical factor is the balance between federal and state interests" and held that "state redemption laws apply to SBA loans even when the loan contains an express waiver of redemption rights." 781 F.2d at 752. Here, as discussed above, the balance tips in favor of adopting U.C.C. debtor defenses. **We also observe that the waiver provisions in Frazier's note, as in *Pastos* and *Crain*, were part of the non-negotiated "boilerplate" printed language of the standard SBA note form.** See *Pastos*, 781 F.2d at 752; *Crain*, 589 F.2d at 998. Both *Pastos* and *Crain* distinguished and declined to follow *United States v. Gish*, which we also find inapposite since in *Gish*, in contrast to this case, the waiver was a typewritten insert to the loan form. 559 F.2d at 573.

Great Southwest Life Ins. Co. v. Frazier, 860 F.2d 896, 902-903 (9<sup>th</sup> Cir. 1988) *emphasis added*. At the motion for reconsideration, Judge Acey clearly was concerned about tempering the availability of SBA loans in Washington State if he did not reverse his earlier ruling and acknowledge a contractual waiver of homestead rights.

Number 1, look at the S.B.A. loan situation. If homestead rights cannot be contractually waived in connection with an S.B.A. loan, if I rule that's the case then what - - what shock waves and ripples have I sent out through the S.B.A. credit industry in Washington State so to speak?

RP 17:10, November 9, 2009. Judge Acey's concerns would have the SBA enact provisions that would completely disregard State law protections, which is not the appropriate application of the SBA loan program. Such a rule would have the SBA and other creditors inserting whatever provisions they wish into their loan and security agreements waiving any State law protections.

In reality notwithstanding the Federal nature of the SBA loan program, individual State law will always control. As the United States Supreme Court stated, "no contention will or can be made that the United States may by judicial fiat collect its loan with total disregard of state laws such as homestead exemptions." United States v. Yazell, 382 U.S. 341, 349; 86 S.Ct. 500, 505 (1965). In explaining its position the Supreme Court went on to say:

This Court's decisions applying "federal law" to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation.

.....

On the other hand, in the type of case most closely resembling the present problem, state law has invariably been observed. The leading case is *Fink v. O'Neil*, 106 U.S. 272. There the United States sought to levy execution against property defined by state law as homestead and exempted by the State from execution. This Court held that Revised Statutes § 916, now Rule 69 of the Federal Rules of Civil Procedure, governed, and that the United States' remedies on judgments were limited to those generally provided by state law. These homestead exemptions vary widely. They result in a diversity of rules in the various States and in a limitation upon the power of the Federal Government to collect which is comparable to the coverture limitation. The purpose and theory of the two types of limitations are obviously related.

Yazell, 382 U.S. at 354-356 (1965). Clearly the Supreme Court contemplated State laws (and defenses) to apply to the SBA loan program, notwithstanding their varied character of State homestead laws. In Washington State there is no statutory provision for contractually waiving homestead protections, and in fact, the courts have consistently acknowledged that the homestead protection cannot be subordinated to the rights of creditors. As the court in Bank of Anacortes v. Cook, 10 Wn. App. 391; 517 P.2d 633 (1974) stated:

The homestead exemption statutes were enacted pursuant to Const. art 19, § 1, for the purpose of providing a shelter for the family and an exemption for a home. *Clark v. Davis*, 37 Wn.2d 850, 226 P.2d 904 (1951). The homestead statutes are favored in the law and should be liberally

construed. *Lien v. Hoffman*, 49 Wn.2d 642, 306 P.2d 240 (1957). **They do not protect the rights of creditors; rather, they are in derogation of such rights.**

Anacortes, 10 Wn. App. At 395; 517 P.2d at 636 (*emphasis added*). In addition, it would be against public policy to allow a creditor to compel a homeowner to contractually waive their homestead rights. As has already been cited, the homestead right is broadly and liberally construed in favor of the homeowner. Banks and lending institutions have unequal bargaining power, and thus if this court recognizes a contractual waiver of the homestead rights, it would offer the incentive for *every* lender who makes a loan to compel the borrower to waive their homestead rights. This would be against public policy. In fact, it is doubtful if a homeowner could contract around the homestead rights as it is a creature of statute and strongly enforced by the courts.

Finally, it is important to recognize that the homestead exemption in Washington State is automatic. *See*, RCW 6.13.080. The Browns need not take any action to rely upon the homestead exemption. Therefore, in this analysis, the homestead exemption would be automatically applied, and the presumption is in favor of the Browns regarding their ownership and occupation of the property.

#### **E. CONCLUSION**

It is clear that the in the present case, if Wells Fargo had been the party to perform the non-judicial foreclosure, there would be no question that

under RCW 61.24.100(6), and RCW 61.24.080(3), the first \$125,000.00 of any funds realized by the sale would go to the Browns *prior to* any application of the proceeds of the sale to Wells Fargo. The question before the court is whether or not this fact has any bearing on the disposition of surplus funds following a non-judicial foreclosure. The court should apply the legal analysis to the surplus funds in exactly the same manner as it would have applied the legal analysis to the claimant's property rights in the foreclosed property. *See*, RCW 61.24.080(3). Furthermore, the issue of the debtor's homestead is immaterial to the analysis, as RCW 61.24.100(6) does not require that the property be the debtor's homestead, but rather that the property be the debtor's "principal residence", which has a different legal meaning than the homestead.

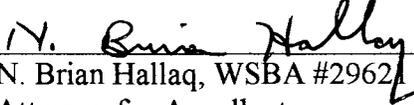
Even if the court were to evaluate the Browns' interest in the Asotin property as a homestead, the court should not create a judicial acknowledgment of a contractual waiver of the debtors' homestead rights, as such a result would invariably encourage lending institutions to insert such boilerplate waivers into their documents, knowing that they have unequal bargaining power with potential consumers.

In this case, the court should focus on the application of RCW 61.24.080(3), and ask itself what rights and remedies the two claimants had in the foreclosed property, and apply those same rights and remedies to the surplus funds. Such an analysis would mean that under, RCW

61.24.100(6) and RCW 61.24.080(3), Wells Fargo and either 1) sue the Browns on the promissory note, or 2) accept any surplus funds greater than \$125,000.00, because under RCW 61.24.100(6) the Browns have a priority claim to the first \$125,000.00 of any funds realized by a foreclosure.

Dated this 20<sup>th</sup> day of June, 2010

Respectfully Submitted by:  
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