NO. 43043-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

RICHARD APPLEGATE and KAREN APPLEGATE, husband and wife,

Appellants / Cross-Respondents,

vs.

WASHINGTON FEDERAL SAVINGS, a Savings and Loan subsidiary of WASHINGTON FEDERAL, INC., a Washington Corporation; KITSAP BANK, a Washington Financial Institution; HARBOR HOME DESIGN, INC., a Washington Corporation; CHARLES BUCHER and JANE DOE BUCHER, husband and wife, and the marital community comprised thereof; and OHIO CASUALTY INSURANCE CO.,

Respondents / Cross-Appellants.

RESPONDENT / CROSS-APPELLANT WASHINGTON FEDERAL SAVINGS' RESPONSE TO THE APPLEGATES' SUPPLEMENTAL BRIEF

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I. INTRODUCTION / SUMMARY OF ARGUMENT

The Washington Supreme Court's opinion in *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 312 P.3d 620 (2013), does not have any effect on the Superior Court judge's decision to grant Washington Federal's motion for summary judgment requesting dismissal of the plaintiff's negligence claim. *Donatelli*, like other Washington "independent duty" case law, applies to situations where, in addition to contractual duties, there is a well-recognized body of professional negligence common law governing the "standard of care or practice"[1] applicable to the so-called learned professions—lawyers, doctors, dentists, architects, engineers, etc. There is no similar "standard of care" common law applicable to a bank administering a residential construction loan. But even if there were, the Applegates utterly failed to provide competent expert evidence of what that "standard of care" is, and how Washington Federal violated it in their opposition to Washington Federal's summary judgment motion. In the absence of such controverting "standard of care" evidence, the Superior Court's dismissal

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[1] This brief uses the phrase "standard of care" to refer to professional standards applicable in all professional malpractice actions recognized by Washington courts. Technically, "standard of care" applies specifically to malpractice actions against health care professionals. *See*, 6 Washington Practice Chapter 105 (6th ed. 2012).

of the Applegates' negligence and breach of fiduciary duty claims was perfectly warranted and was, indeed, required. It should not be disturbed on appeal.

But even if this Court were to reverse on the "independent duty" issue, there would still be no reason to remand this case for further proceedings. The jury returned a defense verdict on the Applegates' myriad claims against the contractor co-defendants (Harbor Home Design, Inc. and its principal, Charles Bucher). If that verdict is upheld (as the Court has asked the parties to assume), that means the jury found as a *matter of fact* that the contractor fulfilled its duties to the Applegates and built their home in accordance with the construction contract. The jury also found, as a *matter of fact*, that the contractor co-defendants did not commit forgery, convert funds or defraud the Applegates. So even if the Court were to reverse on the "independent duty" issue, Washington Federal would still be entitled to summary judgment on the negligence and breach of fiduciary duty claims, because there is no proximate cause between Washington Federal's alleged failure to meet it "duties" (whatever they are) and any damage suffered by the Applegates, as the jury found, as a *matter of fact*, the Applegates suffered no damage.

II. ARGUMENT

A. *DONATELLI* IS DISTINGUISHABLE FROM THE CONTRACTUAL RELATIONSHIP BETWEEN WASHINGTON FEDERAL AND THE APPLEGATES BECAUSE THE CIVIL ENGINEER DEFENDANT IN *DONATELLI* IS SUBJECT TO A PROFESSIONAL "STANDARD OF CARE"

The Applegates' supplemental brief correctly notes that the defendant in *Donatelli* was the D.R. Strong civil engineering firm. Supplemental Brief of Appellants / Cross-Respondents at 2. On that grounds alone, *Donatelli* is distinguishable from the relationship between Washington Federal and the Applegates in this case. As the Supreme Court recognized in *Donatelli*, there is a well-recognized body of Washington common law applicable to the duties of professional engineers. *Donatelli* at 624. *Accord, Jarrard v. Seifert*, 22 Wn. App. 476, 479, 591 P.2d 809 (1979). That independent, extra-contractual common law duty is established in the context of a professional negligence (malpractice) claim, by "standard of care" testimony that establishes: (a) what the "standard of care" is in a particular engineering task and/or project; (b) whether that standard was breached in the case at issue; and, (c) whether the breach was a proximate cause of injury and damage. *Id.*, *see also*, 6 Washington Practice (6th ed. 2012) WPI Chapter 105; WPI 105.01; RCW 4.24.290 (standard of care applied to health care professionals); WPI Chapter 107; WPI 107.04 (standard of care

applicable in legal malpractice case). The inquiry is the same in any case that involves an "independent duty" claim (i.e., professional malpractice) against members of the so-called "learned professions"—*e.g.*, medicine, hospitals, law and the design professions. *Id.*, *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 461, 243 P.3d 521 (2010) (professional engineers must use reasonable care consistent with standard engineering practice). Establishing the "standard of care" requires the testimony of a professional in the same field as the defendant. *McKee v. American Home Products Corp.*, 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989).

Washington law recognizes no similar "standard of care" applicable to banks administering loan funds for a residential construction project. But if there is such a "standard of care," the Applegates never brought it to the attention of the Superior Court judge in their opposition to Washington Federal's summary judgment motion to dismiss the Applegates' negligence and breach of fiduciary duty claims. CP 369-454; 755-56; 865-66. Absent such evidence establishing the "standard of care," how Washington Federal breached the "standard of care" and how the breach damaged the Applegates, the Superior Court was certainly correct in granting Washington Federal's dispositive

motion and dismissing the negligence claim. *See* CR 56(c) (court shall grant summary judgment motion where there is no evidence that establishes a genuine issue of material fact on any claim in the case). There is no reason to disturb that ruling here, because even when reviewed *de novo*, there is still no "standard of care" testimony to establish a genuine issue of material fact for trial on the Applegates' negligence claim.[2] RAP 9.12 (appellate court may only consider evidence presented to Superior Court when reviewing an order granting a summary judgment motion).

B. NOTHING THAT WASHINGTON FEDERAL ALLEGEDLY SAID ESTABLISHED A FIDUCIARY DUTY TO THE APPLEGATES

The Applegates' appeal relies on vague and conclusory statements about alleged "representations" Washington Federal employees made to them as the basis for their contention that the Superior Court erred in dismissing the negligence and breach of fiduciary duty claims. A typical example is the following excerpt from the Declaration of Richard and Karen Applegate, filed in opposition to Washington Federal's summary judgment motion:

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[2] There is, similarly, no evidence that Washington Federal ever made any statements that could establish a fiduciary duty to the Applegates. *See, infra.*

> 4. . . . In February 2008, Richard expressed to WFS [Washington Federal] agent, Joni Cross, that we were concerned the construction might not be proceeding according to the Plans, schedule, and according to Budget. Richard informed Ms. Cross that we had never built a house before, and we had no idea what we were doing. Ms. Cross assured Richard that we could rely on her experience and expertise. Ms. Cross stated that WFS would be looking out for our interests during the construction process, and that WFS was representing us in the process. Ms. Cross also stated that the construction project was going well, and that Mr. Bucher was doing an excellent job.
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> 5. In May of 2008, Richard again expressed concern to Ms. Cross, that the construction project was not going according to Plans, or Budget. Ms. Cross again stated to Richard that Mr. Bucher was doing an excellent job, that we need not worry about anything, and that we could trust her to do her job. . . .

CP 389.

Assuming arguendo that Washington Federal's employee made those "representations," the Applegates have failed to establish how: (a) they created a fiduciary duty on the part of Washington Federal to the Applegates; (b) Washington Federal breached that fiduciary duty; or (c) Washington Federal's alleged failure to meet its fiduciary duty damaged the Applegates. The Applegates presented no evidence to the Superior Court that Washington Federal did not have expertise and experience in administering residential construction loans. Washington Federal's employee's subjective opinion that the contractor was "doing

an excellent job" is hardly the kind of affirmative representation that could give rise to some further "duty" (fiduciary[3] or otherwise) on the part of Washington Federal.

And even if there was a breach of these supposed "representations" by Washington Federal, there was no evidence presented to the Superior Court about how those breaches caused the Applegates any damages. CP 369-454. The jury found that the contractor co-defendants were not negligent and did not breach the contract to build the Applegates' residence, or commit any of the other improper acts asserted by the Applegates. CP 2733-38. There was no damage to the Applegates because the jury found the contractor co-defendants did not do anything that could have proximately caused damage in the first place.

C. GIVEN THE JURY'S FINDINGS AS TO THE CONTRACTOR CO-DEFENDANTS, THERE IS NO BASIS TO REMAND THIS CASE FOR FURTHER PROCEEDINGS

The Applegates' Supplemental Brief goes off on a tangent about why the collateral estoppel doctrine does not prevent the Court from

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[3] As noted in Washington Federal's initial brief, the Washington Supreme Court recently declined to impose a fiduciary duty on commercial banks with respect to their business relationships to borrowers. *See*, *Annechino v. Worthy*, 175 Wn.2d 630, 632, 290 P.3d 126 (2012).

remanding the case to the Superior Court in the event the Court reverses the dismissal of the negligence and breach of fiduciary duty claims, but upholds the defense verdict as to the contractor co-defendants. Supplemental Brief of Appellants / Cross-Respondents at 4-6. As a preliminary matter, the collateral estoppel doctrine does not even apply to this case in its present posture. Collateral estoppel applies to situations where the question is whether an issue or claim, which has been litigated to judgment or conclusion in one action, has binding or preclusive effect in a subsequent separate action. *See*, *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987) (collateral estoppel bars relitigation of claim in subsequent action).

The defense verdict as to the contractor co-defendants (which the Court has instructed the parties they should assume will not be reversed) was not rendered in a separate (collateral) action. The jury's verdict on the claims against the contractor co-defendants was rendered in *this* very case, CP 2733-38, and as such the verdict represents the "law of the case" which would certainly be binding on the Superior Court if this case were remanded. *See*, *Bunn v. Bates*, 36 Wn.2d 100, 103, 216 P.2d 741 (1950) (trial court is bound by appellate court's determination on issue in further proceedings). *See generally*, P. Trautman, *Claim and Issue*

Preclusion in Civil Litigation in Washington, 60 Wn. L.R. 805, 810-11 (1985). The "law of the case" doctrine would render futile any remand of this case for consideration of the dismissed negligence and breach of fiduciary duty claims because a jury has already found that the Applegates were not damaged by anything the contractor co-defendants did or did not do.

The jury's defense verdict as to the contractor co-defendants means that the jury found as a *matter of fact* that: (1) the contractor co-defendants did not breach their contract with the Applegates; (2) the contractor co-defendants were not negligent in the performance of their contract; (3) the contractor co-defendants did not "forge" any signature on draw checks; (4) the contractor co-defendants did not convert any funds; and (5) the contractor co-defendants did not defraud the Applegates. CP 2733-38. In short, *every* alleged breach, shortcoming, default or malfeasance of or by the contractor co-defendants that the Applegates claimed should have been "caught" by Washington Federal, was found to have been without basis as a *matter of fact*. Those ***facts***, supported by sufficient evidence, preclude the Applegates from establishing an essential element of their negligence and breach of fiduciary duty claims: namely, damages.

So, even if the negligence and breach of fiduciary duty claims were reinstated, there could be no proximate cause of any damages as a result of anything Washington Federal did or did not do to prevent alleged wrongdoing by the contractor co-defendants, **where the jury found that the contractor co-defendants did nothing wrong as a *matter of fact*, and the Court has instructed the parties to assume that those facts will not be disturbed in this appeal.** That is the fatal tautological flaw in the Applegates' entire appeal as to Washington Federal. The Superior Court's rulings, verdicts and judgments in this matter should be affirmed in all respects.

III. CONCLUSION

Washington Federal respectfully requests that the Court affirm the Superior Court and award Washington Federal its reasonable attorney fees and costs pursuant to its cross-appeal.

DATED this 21st day of January, 2014.

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I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by the law firm of: Todd & Wakefield.

ORIGINAL

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted the document(s) entitled: RESPONDENT / CROSS-APPELLANT WASHINGTON FEDERAL SAVINGS' RESPONSE TO THE APPLEGATES' SUPPLEMENTAL BRIEF; and this CERTIFICATE OF SERVICE on the following person(s):

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