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No. 90755-2
(Court of Appeals No. 43043-6-II)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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RICHARD APPEGATE and KAREN APPEGATE,
husband and wife,

Petitioners,

vs.

WASHINGTON FEDERAL SAVINGS,

Respondent.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
THE HONORABLE JOHN R. HICKMAN

ANSWER TO PETITION FOR REVIEW

TODD & WAKEFIELD

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ORIGINAL

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I. IDENTITY OF RESPONDENT

Washington Federal Savings (now known as Washington Federal) (“WFS”), by and through its undersigned counsel, respectfully requests this Court deny review of the unpublished June 24, 2014 Court of Appeals opinion in the matter of *Applegate v. Washington Federal, Inc., et al.*, No. 43043-6-II. This decision correctly upheld the jury’s verdict in favor of WFS and co-defendants Charles Bucher and Harbor Home Design, Inc., and is in accordance with Washington law.

II. COURT OF APPEALS DECISION

The Court of Appeals correctly decided this matter and upheld the jury’s verdict in favor of WFS and the other defendants in this case. In its opinion, the Court of Appeals held that Question No. 1 on the special verdict form pertaining to the claims against WFS was legally sufficient, correctly worded and did not mislead the jury. Accordingly, review under RAP 13.4(b)(2) is not appropriate and the Supreme Court should deny review of this matter.

III. STATEMENT OF THE CASE

In 2007, petitioners Richard and Karen Applegate went to a loan broker to obtain financing for an expensive custom single family residence to be located in Gig Harbor, Washington. CP 272. The broker

placed the loan with WFS. On June 12, 2007, the petitioners signed a five page Construction Loan Agreement & Assignment of Account (Trial Exhibit No. 61) (hereinafter “loan agreement”) and other documents to secure a \$550,000 loan from WFS for the construction of a custom single family residence. CP 3770-3774. The loan agreement authorized WFS to issue “draws” on the construction loan principal to either the Applegates or their builder, Harbor Home Design, Inc., as work on the house progressed, but expressly stated WFS had no obligation to insure or guarantee the quality of construction or the builder’s compliance with building codes or standards. *Id.*

After various disputes during construction arose, petitioners sued their builder, Harbor Home Design, Inc. and its principal, Charles Bucher and his spouse (collectively referred to as “Bucher/HHD”), for breach of contract, fraud and wrongful conversion among other claims. Petitioners also sued WFS for negligence, breach of fiduciary duty and breach of contract. The petitioners’ case against WFS alleged several causes of action based on allegations that WFS failed to detect and correct Bucher/HHD’s alleged wrongdoing during construction. Before trial the court dismissed petitioners’ claims for negligence and breach of fiduciary duty against WFS, but the claim for breach of contract

proceeded to trial. After a three week jury trial, the court provided instructions to the jury. Jury Instruction No. 2 stated in part:

In addition to the claims against [HHD], [the Applegates] also claim that [WFS] breached its construction loan agreement with the [Applegates] by failing to properly inspect the residence while it was under construction to make sure that amounts requested by [HHD] for building the home were proper.

CP at 2699.

In addition to Jury Instruction No. 2, the trial court also provided the jury with a special verdict form for claims against WFS. Question No. 1 of the special verdict form asked:

Did Washington Federal Savings (“WFS”) breach its contract to provide a construction loan to the Applegates?

CP 2739.

The petitioners took exception to Question No. 1 and asked the court to revise it to read: “Did Washington Federal Savings breach its contract?” VRP (October 31, 2011) at 393. The trial court denied the petitioners’ request and submitted Question No. 1 to the jury as quoted above. *Id.*

During his closing argument, counsel for petitioners spent a substantial portion of time explaining in detail his theory as to how WFS breached the loan agreement. VRP 10/31/11 at pp. 423-429; 481-485.

However, the properly instructed jury decided that neither Bucher/HHD nor WFS violated their respective contracts to build and finance the petitioners' residential construction project, and returned defense verdicts on all claims against both Bucher/HHD and WFS. CP 2733-2738 and 2739-2741.

Petitioners appealed the jury's verdict on a variety of grounds, including an argument that Question No. 1 of the special verdict form misled the jury. In an unpublished opinion, the Court of Appeals disagreed, finding that when read in conjunction with Jury Instruction No. 2, the special verdict form was legally sufficient and allowed the petitioners to argue their case to the jury. Slip Opinion, Appendix A to Petition for Review (hereinafter "Slip Opinion") at pp. 11-12. The Court further held that the trial court's wording of the special verdict form was not manifestly unreasonable or an abuse of discretion. The Court of Appeals affirmed the jury's verdict in its entirety. Slip Opinion at p. 12.

IV. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

A. THE PETITION FOR REVIEW DOES NOT MEET THE CRITERIA FOR SUPREME COURT REVIEW UNDER RAP 13.4(b)(2)

Petitioners seek review under RAP 13.4(b)(2), which states the Supreme Court will accept review only:

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals.

Petitioners argue the Court of Appeals failed to follow precedent set by *Capers v. Bon Marche*, 91 Wn. App. 138, 955 P.2d 822 (1998), but their argument is really just a disagreement with the Court of Appeals' decision to uphold the jury's verdict. Petitioners concede the Court of Appeals utilized the correct criteria from *Capers* in analyzing the special verdict form. But petitioners contend that the Court of Appeals misapplied that criteria when analyzing Question No. 1 on the special verdict form. But petitioners offer no support for this position.

The Court of Appeals properly reviewed the jury instructions, including the special verdict form, as a whole and correctly determined that, when viewed as a whole, they were legally sufficient. Once the Court made that determination, it correctly reviewed the wording of Question No. 1 on the special verdict form under the appropriate abuse of discretion standard. Finding no abuse of discretion, the Court of Appeals upheld the jury's verdict in favor of WFS. Consequently, there is no basis for the Supreme Court to find that the Court of Appeals failed to follow the *Capers* criteria for analyzing jury instructions and/or a special verdict form. Accordingly, the petition for review should be denied.

B. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION IN THIS CASE AND *CAPERS*

Petitioners argue Supreme Court review is warranted because the Court of Appeals' decision in this case conflicts with the Court of Appeals' decision in *Capers v. Bon Marche*, 91 Wn. App. 138, 955 P.2d 822 (1998). Specifically, they argue the Court of Appeals applied the standard for reviewing jury instructions to review of the special verdict form. Petitioners claim a different standard of appellate review applies to special verdict forms. Petitioners are wrong. As stated in *Capers*, the standard for reviewing special verdict forms is the same as that applied to a review of jury instructions. *Capers* at 142 (citing *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995)). Thus, petitioners' argument that the Court of Appeals reviewed the special verdict form under the wrong standard is without merit and their petition for review should be denied.

The facts of *Capers* are clearly distinguishable from those in this matter. In *Capers*, the trial court provided the jury with a special verdict form that incorrectly stated the applicable law for deciding the plaintiff's racial discrimination claim against her former employer. *Id.* at 140. At issue was the dichotomy between the jury instruction which correctly stated the standard that the jury should use, and the special verdict form

which misstated the legal standard. After deliberations, the *Capers* jury found for the defendant and the plaintiff appealed, arguing the jury instructions were legally insufficient.

On review the *Capers* court correctly stated the three part test to determine the legal sufficiency of the jury instructions:

When reviewing jury instructions, they are considered in their entirety and are sufficient if they: (1) permit each party to argue his theory of the case; (2) are not misleading; and (3) when read as a whole, properly inform the trier of fact of the applicable law.

Id. at 142 (citing *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (citing *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993); *Farm Crop Energy, Inc. v. Old Nat'l Bank*, 109 Wn.2d 923, 933, 750 P.2d 231 (1988)). The court noted that the same test applies to review of special verdict forms. *Id.*

After reviewing the jury instructions, including the special verdict form, as a whole, the *Capers* court determined the jury instructions were legally sufficient, but reversed the verdict because the legal standard set forth in the special verdict form directly contradicted the legal standard stated in the jury instructions. *Id.* at 144.

Here, unlike *Capers*, there is no allegation that the special verdict form misstated the applicable law. On appeal, the petitioners contended that the wording of the special verdict form misled the jury so as to warrant a retrial. Slip Opinion at 11. The Court of Appeals engaged in the correct analysis by first reviewing the jury instructions and special verdict form under the three part test cited in *Capers*. The Court found the instructions and special verdict form did not mislead the jury, allowed the petitioners to argue their theory of the case and properly informed the jury of the applicable law when read as a whole. *Id.* at 12. Thus, the Court found the instructions and by extension the special verdict form were legally sufficient. *Id.*

After determining the instructions and special verdict form were legally sufficient, the Court then reviewed the wording of the special verdict form, which was the basis for petitioners' claim of error. Citing *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996) and *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 151, 210 P.3d 337 (2009), the Court of Appeals in this case correctly reviewed the wording of the special verdict form for abuse of discretion. It found no abuse of discretion. Slip Opinion at p. 12.

The petitioners contend this holding was incorrect. In their request for Supreme Court review, they argue the Court of Appeals improperly applied the abuse of discretion standard to the wording of Question No. 1 on the special verdict form because *Bodin* and *Singh* apply to jury instructions, not special verdict forms. Petition for Review at 8. Petitioners are again incorrect. Special verdict forms are part of the jury instructions and as stated in *Capers*, they are reviewed under the same standards as jury instructions. *Capers* at 142, *supra*. Thus, like jury instructions, the specific wording of a special verdict form is reviewed for an abuse of discretion. Slip Opinion at 11.

The Court of Appeals correctly applied the abuse of discretion standard when reviewing the wording of Question No. 1 on the special verdict form at issue in this case. Unlike *Capers*, Question No. 1 on the special verdict form in this case did not conflict with the other jury instructions, nor did it misstate the law. Any appeal of jury instructions is fact specific. The simple fact that the Court of Appeals did not agree with petitioners' theory that Question No. 1 on the special verdict form was erroneous, does not mean that the Court of Appeals "ignored" *Capers*. It simply means that there was no error when the *Capers* criteria was applied to Question No. 1 on this special verdict form.

Petitioners have failed to make any showing that the Court of Appeals deviated from Washington law concerning the standards for appellate review of jury instructions/special verdict forms. The Court of Appeals' decision is completely consistent with the *Capers* decision and was a correct application of Washington law to the issues presented. Supreme Court review of this case is not appropriate under RAP 13.4(b)(2) and the petition for review should be denied.

C. EVEN IF QUESTION NO. 1 ON THE SPECIAL VERDICT FORM WAS NOT PROPERLY WORDED, THE ERROR WAS HARMLESS AND THE ISSUE IS MOOT BECAUSE THE JURY RETURNED DEFENSE VERDICTS ON ALL CLAIMS AGAINST CO-DEFENDANTS BUCHER/HHD AND PETITIONERS HAVE NOT SOUGHT REVIEW OF THE VERDICT AS TO THEIR CLAIMS AGAINST BUCHER/HHD

Even assuming *arguendo* that the special verdict form *did* conflict with other instructions, impeded petitioners from arguing their theory of the case as to WFS, misstated the law and/or misled or confused the jury, the error is harmless, because it is a moot point given the current posture of the case. The entire thrust of the petitioners' theory against WFS at the superior court trial was that, while WFS did provide loan funds to finance petitioners' project in a timely and appropriate manner, WFS neglected to discover and correct various contract breaches and other acts of misfeasance or malfeasance by the

contractor, co-defendants Bucher/HHD. (VRP 423-429; 481-485; CP 2699.)

But the jury returned a defense verdict on each and every one of the seven claims asserted against Bucher/HHD that were presented for their consideration. (CP 2733-2738.) The Court of Appeals affirmed the jury's verdict as to Bucher/HHD in its entirety, and petitioners have not sought review of the Court of Appeals' decision as to Bucher/HHD by this Court.

So how was WFS supposed to discover and correct breaches of contract by Bucher/HHD that the jury found did not occur? How was WFS supposed to discover and prevent Bucher/HHD's conversion of funds that the jury also found never happened? How was WFS supposed to discover and prevent fraud by Bucher/HHD where the jury determined no fraud was ever committed by Bucher/HHD? How was WFS supposed to prevent a forgery by Bucher/HHD that the jury concluded never took place? These are not simply rhetorical questions. The jury found that Bucher/HHD engaged in no actionable misconduct in performing work on the petitioners' residential construction project. Those factual findings are supported by substantial evidence and are

verities on appeal that cannot be challenged because petitioners have not sought review of the jury's verdict as to Bucher/HHD by this Court.

So *even if* the wording of Question No. 1 on the special verdict form was deficient in some way, it does not matter. The point is moot. There was no harm to petitioners that was proximately caused by WFS' alleged "failure" to discover and correct purported contractual deficiencies and other misconduct by Bucher/HHD that the jury found never occurred in the first place. As the Court of Appeals noted in its well-reasoned analysis of this issue:

The Applegates argue that the trial court erred by granting summary judgment to WFS on their claims of negligence and breach of fiduciary duty. We do not review this issue because it is moot.

"A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights." *State v. G.A.H.*, 133 Wn. App. 567, 572, 137 P.3d 66 (2006) quoting *Hansen v. W. Coast Wholesale Drug Co.*, 47 Wn.2d 825, 827, 289 P.2d 718 (1955)). We will not review a moot case unless it presents issues of continuing and substantial public interest, considering (1) the public or private nature of the issue presented, (2) the desirability of an authoritative determination which will provide future guidance to public officers, and (3) the likelihood that the question will recur. *In re Marriage of Horner*, 151 Wn.2d 884, 891-92, 93 P.3d 124 (2004).

The jury is the trier of fact. *Jurgens v. Am. Legion, Cashmere Post 64 Inc.*, 1 Wn. App. 39, 43, 459 P.2d 79 (1969). Here, we uphold the jury's defense verdicts. Through a special verdict form, the jury determined that

HHD did not breach its contract with the Applegates, commit fraud in respect to the draws and billings submitted to the Applegates, or wrongfully convert the Applegates' funds. Thus, the jury has established as a fact that HHD did not commit any wrongdoing related to its dealings with the Applegates.

The Applegates' claims for negligence and breach of fiduciary duty assert that WFS failed to prevent HHD's wrongdoing. The jury established as a fact that HHD committed no wrongdoing. WFS cannot have failed to properly protect the Applegates from HHD's wrongdoing when HHD committed no wrongdoing. Thus, whether the trial court erred in granting summary judgment in favor of WFS on these claims is an abstract question that does not rest upon existing facts or rights.

This moot issue does not present issues of continuing and substantial public interest because the issue is essentially private in nature, a determination is not necessary to provide guidance to public officers, and the particular issue raised is unlikely to recur.

Slip Opinion at pp. 18-19. There is no reason for this Court to review a moot issue. The petition for review of this matter should, accordingly, be denied.

V. REQUEST FOR ATTORNEYS' FEES PURSUANT TO RAP 18.1(j)

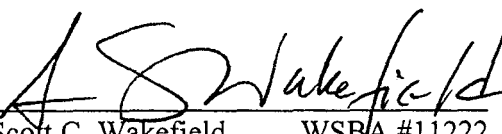
The Court of Appeals awarded WFS its attorneys' fees for defending this lawsuit at trial and as the prevailing party on appeal. Slip Opinion at 22. Pursuant to RAP 18.1(j), WFS requests an award of the attorneys' fees incurred in answering this petition for review.

VI. CONCLUSION

For the foregoing reasons, respondent WFS respectfully requests that the Court deny the petition for review of this matter and award WFS its reasonable attorney fees and costs incurred in responding to the petition for review.

DATED this 1st day of October, 2014.

TODD & WAKEFIELD

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To: Deanna Miller
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From: Deanna Miller [mailto:dmiller@twlaw.com]
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Subject: Applegate v. Washington Federal Savings / Supreme Court Case No. 90755-2

Dear Court Clerk:

Scott Wakefield and Justin Monroe are attorneys for respondent Washington Federal Savings in the above matter. Attached please find Washington Federal's Answer to Petition for Review and Certificate of Service. The case information is:

Applegate v. Washington Federal Savings
Case No. 90755-2
Filed by Scott Wakefield (WSBA #11222 / email: swake@twlaw.com) and Justin Monroe (WSBA #35683 / email: jmonroe@twlaw.com)
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Let us know if you have any questions or need any further information. Thank you.

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