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Court of Appeals No. 66019-5-I  
King County Superior Court No. 08-2-40263-1 KNT

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION  
SUCCESSOR BY MERGER TO FIRST MUTUAL BANK,

RESPONDENT,

v.

DALE E. ALSAGER and BETTY J.L. ALSAGER,  
husband and wife;

APPELLANTS,

PUGET SOUND LEASING CO., INC., a corporation; JOHN  
and JANE DOE, unknown occupants of the subject  
real property; and ALL OTHER PERSONS OR PARTIES  
UNKNOWN CLAIMING ANY RIGHT, TITLE, INTEREST, LIEN,  
OR ESTATE IN THE PROPERTY HEREIN DESCRIBED,

DEFENDANTS.

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COURT OF APPEALS  
DIVISION I  
CLERK  


REPLY OF APPELLANTS

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ORIGINAL

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## REPLY

Following Washington Federal's treatise on mortgage foreclosures and the in's and out's of federal law regarding RESPA and TILA, the Alsagers wish the Court refocus on the undisputed evidence that underscores their singular contention that there are genuine issues of material fact in this matter which makes the loss of their real property by summary judgment inappropriate and improper under the circumstances.

**A. UNDISPUTED EVIDENCE RAISE GENUINE ISSUES OF MATERIAL FACT AS TO THE ABSENCE OF MEETING OF THE MINDS ESSENTIAL FOR EXISTENCE OF A VALID AND ENFORCEABLE CONTRACT AND TO FRAUD IN THE INDUCEMENT SUFFICIENT TO MILITATE AGAINST SUMMARY JUDGMENT**

Undisputed in the record is the following evidence relevant to the impropriety of the trial court's grant of summary judgment of foreclosure to Washington Federal:

1. On July 7, 2006, the Alsagers applied for a 30 year, conventional, fixed-rate loan in the amount of \$352,000 at 7.375 percent interest. CP at 142, ¶ 9; CP at 146-51.

2. The foregoing were the Alsagers' fundamental and essential terms and conditions required by them for obtaining a loan that they needed and were capable of fulfilling over its lifetime. CP at 142, ¶ 9.

3. Without prior notice to the Alsagers,<sup>1</sup> on December 1, 2006, Washington Federal's pre-merger predecessor First Mutual Bank summarily and unilaterally changed the type of loan it approved for the Alsagers to a 7/1 ARM, and the principal amount reduced to \$304,000 at an increased rate of 8.375 percent. CP at 155; CP at 144, ¶ 17; CP at 65.

4. Alsagers did not receive notice as to any such changes made at that time from either First Mutual Bank or Charter Funding and at all times continued to in good faith rely on their original loan application for a conventional fixed rate loan and understanding that such was processed for approval by First Mutual Bank. CP at 142, ¶ 11.

5. On January 12, 2007, the Alsagers met with Notary Public David Schlieps who presented

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<sup>1</sup> CP at 142, ¶ 10.

them for the first and only time with a stack of documents comprising the final loan, deed of trust, and supporting documents. CP at 142, ¶ 12.<sup>2</sup>

6. The Notary was rushed, had no extra copy to leave with the Alsagers, and simply flipped through the documents and had the Alsagers sign each one without reviewing them or giving the Alsagers time to review them. CP at 143, ¶ 13.

7. The Notary affirmatively told the Alsagers that the underlying loan was in fact a fixed rate note over the entire duration of the loan. CP at 143, ¶ 13.

8. Having no time afforded them to review these loan documents, and no copy left with them to review thereafter, and especially not during the 3 day rescission period, the Alsagers still believed and understood they were signing the final papers for the 30 year conventional fixed rate loan they originally applied for as they were aware of no

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<sup>2</sup> The Notary was either retained by First Mutual Bank or by Stewart Title Company, the escrow company selected by First Mutual Bank. In any event, the Alsagers did not select either the escrow company or the notary who would present to them the Bank's documents for signature.

changes to such essential and material terms. CP at 143, ¶ 14.

9. The Alsagers did not receive a copy of the loan documents until such were finally provided to them during this lawsuit.<sup>3</sup>

10. The Alsagers then discovered that the loan and documents they were induced into signing at a hurried pace were in fact not at all what they intended as applied for and believed in good faith to have obtained.<sup>4</sup>

**B. THE UNDISPUTED EVIDENCE SUPPORTS THE ALSAGERS' AFFIRMATIVE DEFENSES**

The Alsagers pleaded the affirmative defenses of (1) fraud/misrepresentation in the inducement, and (2) absence of meeting of minds.<sup>5</sup> Each of these affirmative defenses is dependent on the specific circumstances of each case as borne out by the evidence to be adduced at trial, and are thus

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<sup>3</sup> CP at 143, ¶ 15. All the Alsagers received from First Mutual Bank was a payment coupon book. A copy of the loan documents was never provided as promised by Schlieps.

<sup>4</sup> CP at 143, ¶ 16; CP at 144, ¶ 18.

<sup>5</sup> Answer And Affirmative Defenses For Defendants Dale E. And Betty Alsager, at pp. 4-5 ¶ 26.

inappropriate for summary judgment. Sea-Van Investments Associates v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994); Evans & Sons, Inc. v. City of Yakima, 136 Wn. App. 471, 149 P.3d 691 (2006); Sedwick v. Gwinn, 73 Wn. App. 879, 865 P.2d 545 (1994); Grimes v. New Century Mortgage Corporation, 340 F.3d 1007 (9th Cir. 2003).

The trial court granted Washington Federal's motion for summary judgment based on the erroneous conclusion that the notary's affirmation that the loan was fixed rate over its entire duration could not be considered as competent evidence because such was not in writing. Clearly, however, as a matter of law an oral representation of fact regarding an agreement otherwise required to be in writing is not itself required to be in writing under the statute of frauds. Blum v. Smith, 66 Wash. 192, 119 Pac. 183 (1911); Zuckerman v. Cochran, 158 So. 324, 326 (Ala. 1934); Whitcomb v. Moody, 49 S.W.2d 513 (Tex.Civ.App. 1932); Grimes, 340 F.3d 1007; 37 C.J.S. Frauds, Statute of, § 27 (1997).

And also contrary to the trial court's grounds for its decision to wrest Alsager's property from them on summary judgment, the use of the *virgule* in the documents heading "Fixed/Adjustable Rate" in light of (1) the notary's unequivocal affirmation that the loan was in fact fixed rate, and (2) the rushed signatures gathering without leaving a copy for review, supports the Alsagers' assertions of absence of a meeting of the minds and good faith reliance, and militates against any rush to summary judgment without full exploration at trial. Mumma v. Rainier National Bank, 60 Wn. App. 937, 940, 808 P.2d 767 (1991). Especially so where, as here:

(a) Washington Federal has the burden of proving the existence of a valid and enforceable loan contract, which includes proving the existence of the parties' mutual intentions, Johnson v. Nasi, 50 Wn.2d 87, 309 P.2d 380 (1957), and

(b) all facts and reasonable inferences therefrom must be considered in the light most favorable to the Alsagers, Citizens for Clean Air v. Spokane, 114 Wn.2d 20, 38, 785 P.2d 447 (1990).

**C. PUBLIC POLICY AND EQUITY DEMAND THIS COURT  
APPLY THE NOTICE REQUIREMENTS OF RCW 19.144  
.020 RETROACTIVELY**

That the statutory law regarding any changes made to the material terms of a mortgage loan application now positively requires notice to the prospective borrower within 3 days of when made was raised in the trial court, but to no avail.

If any material terms of the residential mortgage loan change before closing, a new disclosure summary must be provided to the borrower within three days of any such change or at least three days before closing, whichever is earlier.

RCW 19.144.020. The reasons for imposing this statutory duty were cogently set forth by the Legislature as follows:

The legislature finds that responsible mortgage lending and homeownership are important to the citizens of the state of Washington. The legislature declares that protecting our residents and our economy from the threat of widespread foreclosures and providing homeowners with access to residential mortgage loans on fair and equitable terms is in the public interest. The legislature further finds that this act is necessary to encourage responsible lending, protect borrowers, and preserve access to credit in the residential real estate lending market.

Wash. Laws of 2008, Ch. 108, § 1 (SHB 2770).

First Mutual Bank made its unilateral and secret material changes to the terms and conditions of Alsagers' loan application on December 1, 2006. Had the statute been in effect at that time, actual notice of such material changes was required to have been made to the Alsagers by not later than December 4, 2006 -- more than a month prior to when the changed loan documents were presented in a rush to the Alsagers for signature, and under the positive affirmation to them that the loan documents had not changed their essential and fundamental requirement of a fixed rate conventional loan. The Alsagers have suffered direct, adverse, and very substantial injury by the Bank's abject failure to give notice.

Under these circumstances and the fact that the Alsagers have suffered injury directly as the result of a lender's failure to give fair notice declared by the Legislature to be contrary to the public interest and policy, this Court in its equitable powers should apply the notice requirements of RCW 19.144.020 retroactively in support of the

Alsagers' affirmative defenses of (1) absence of a meeting of the minds and fraud in the inducement, and (2) unenforceability of mortgage and loan as unconscionable and contrary to public policy,<sup>6</sup> singularly and collectively sufficient to militate against declaring foreclosure by summary judgment.<sup>7</sup>

### CONCLUSIONS

Refocusing on the undisputed evidence in the record and considered by this Court in the light most favorable to the Alsagers, the Alsagers' affirmative defenses of (1) absence of a meeting of the minds, (2) fraud in the inducement, (3) unconscionability, and (4) unenforceability as contrary to public policy singularly and collectively militate against the summary foreclosure of Alsagers' rights and interests in their real property.

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<sup>6</sup> Answer, at p. 6 ¶ 31.

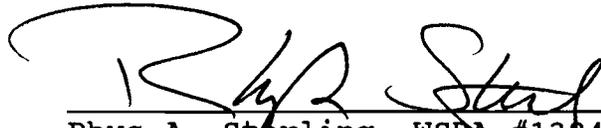
<sup>7</sup> Because the notice requirement of RCW 19.144.020 is remedial as such relates to procedural rather than to substantive requirements, retroactive application is appropriate and customary as a matter of law where such furthers the law's remedial purpose. Miebach v. Colasurdo, 102 Wn.2d 170, 180-81, 685 P.2d 1074 (1984) (remedial statutes are generally enforced as soon as they are effective, even if they relate to transactions predating their enactment); Macumber v. Shafer, 96 Wn.2d 568, 570, 637 P.2d 645 (1981).

The Alsagers respectfully ask this Court to vacate the trial court Orders and remand this matter to the superior court for trial.

Dated this 31<sup>st</sup> day of January, 2011.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.

A handwritten signature in black ink, appearing to read "Rhys A. Sterling", written over a horizontal line.

Rhys A. Sterling, WSBA #13846  
Attorney for Appellants Alsager

Court of Appeals No. 66019-5-I  
King County Superior Court No. 08-2-40263-1 KNT

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OF THE STATE OF WASHINGTON

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WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION  
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UNKNOWN CLAIMING ANY RIGHT, TITLE, INTEREST, LIEN,  
OR ESTATE IN THE PROPERTY HEREIN DESCRIBED,

DEFENDANTS.

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DECLARATION OF SERVICE

---

RHYS A. STERLING, P.E., J.D.  
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STATE OF WASHINGTON



STATE OF WASHINGTON )  
 ) ss. DECLARATION OF RHYS A.  
 ) STERLING  
COUNTY OF KING )

RHYS A. STERLING hereby says and states under penalty of per jury:

1. I am over the age of 21 and I am competent to testify regarding the matters herein described. I make this declaration on my own personal knowledge.

2. I am the attorney of record representing Appellants Dale E. Alsager and Betty J.L. Alsager, husband and wife, in the action captioned Washington Federal Savings and Loan Association v. Dale and Betty Alsager, et al., Court of Appeals No. 66019-5-I.

3. By postage prepaid first class mail on January 31, 2011 I served on the other parties in this action, through their respective counsel, a copy of the REPLY OF APPELLANTS and this DECLARATION OF SERVICE filed in this matter, by placing in the United States mail the same addressed to:

Annette E. Cook  
Bishop, White, Marshall and Weibel, P.S.  
720 Olive Way, Suite 1201  
Seattle, Washington 98101-1801

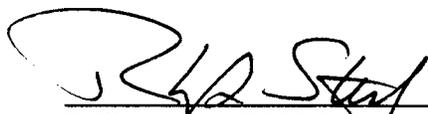
Attorney for Respondent Washington Federal.

4. By postage prepaid first class mail on January 31, 2011 I filed in the Court of Appeals, Division I the original and one (1) copy of the REPLY OF APPELLANTS and the original DECLARATION OF SERVICE in this matter, by placing in the United States mail the same addressed to:

Richard D. Johnson  
Court Administrator/Clerk  
Court of Appeals I  
One Union Square, 600 University Street  
Seattle, Washington 98101-1176

*I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:*

January 31, 2011  
DATE

  
\_\_\_\_\_  
RHYS A. STERLING  
(WRITTEN) WSBA # 13846

H/Barb, WA  
PLACE OF SIGNATURE

  
\_\_\_\_\_  
RHYS A. STERLING  
(PRINTED)