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Court of Appeals No. 68240-7
King County Superior Court No. 10-215811-1 SEA

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

GBC INTERNATIONAL BANK

Plaintiff/Respondent,

v.

CORY AND GENEANNE BURKE, ET AL.,

Defendants/Appellants,

REPLY BRIEF OF APPELLANTS

TACEY GOSS P.S.
C. Chip Goss, WSBA #22112
330 112th Avenue NE, Suite 301
Bellevue, WA 98004
Tel. (425-489-2878)
Fax. (425-489-2872)
Attorney for Defendants/Appellants

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Table of Contents

I.	GBC Misrepresents the Record Evidence.....	1
II.	All Assignments of Error are Reviewed De Novo.....	6
III.	GBC Ignores the Explicit Terms of the Deed of Trust Securing the 2545 Loan and the Requirements of the Deed of Trust Act, RCW 61.24 et seq	7
1.	Two Loans Are Not Disputed.....	8
2.	Admitting Fair Value Evidence Does Not Alleviate Harm.....	9
3.	Loan Documents Do Not Preclude Fair Value Defenses.....	9
4.	The Election to Foreclose Does Not Erase Fair Value Rights	14
5.	The Burkes Are Not Required to Enjoin the Trustee’s Sale to Preserve Fair ValueRights	14
6.	The Burkes May Apply \$200,000 of Fair Value Evidence Against the 2545 Loan Debt and the Court’s Error Was Not Harmless.....	15
IV.	The Lower Court’s Refusal to Give the Instruction that an Oral Promise Could be Enforced Defensively Misled the Jury About the Applicable Law.....	16

V.	No Record Support that the Jury Considered and Rejected the Controverted Evidence of the Dollar Amount Due on the 2545 Loan.....	17
VI.	The Lower Court Properly Admitted Parol Evidence.....	22
VII.	The Burkes Are Entitled to Attorney Fees and Costs.....	23
VIII.	Conclusion.....	24

Table of Authorities

Cases

<u>Becker v. Lagerquist Bros., Inc.</u> , 55 Wn.2d 425, 348 P.2d 423 (1960)....	23
<u>Berg v. Hudesman</u> , 115 Wash.2d 657, 801 P.2d 222 (1990).....	22
<u>Bjerkeseeth v. Lysnes</u> , 173 Wash. 229, 22 P.2d 660 (1933)	12
<u>Black v. Evergreen Land Developers, Inc.</u> , 75 Wn.2d 241, 450 P.2d 470 (1969)	23
<u>Boeing Airplane Co. v. Firemen's Fund Indem. Co.</u> , 44 Wn.2d 488, 268 P.2d 654 (1954)	11
<u>Bowman v. Webster</u> , 44 Wn.2d 667, 269 P.2d 960 (1954)	11, 12
<u>Brundridge v. Fluor Fed. Servs., Inc.</u> , 164 Wash.2d 432, 191 P.3d 879 (2008).....	9
<u>Brust v. McDonald's Corp.</u> , 34 Wn. App. 199, 660 P.2d 320 (1983).....	11
<u>Buffington v. Henton</u> , 70 Wash. 44 (1912)	19, 20
<u>Cahn v. Foster & Marshall, Inc.</u> , 33 Wn. App. 838, 658 P.2d 42 (1983).....	6, 7

<u>City Bond & Share Inc. v. Klement</u> , 165 Wash 408, 5 P. 2d 523 (1931).....	17
<u>Cook v. Vennigerholz</u> , 44 Wn.2d 612, 269 P.2d 824 (1954)	23
<u>Denny's Rests., Inc. v. Sec. Union Title Ins. Co.</u> , 71 Wn. App. 194, 859 P.2d 619 (1993).....	22
<u>Fischler v. Nicklin</u> , 51 Wn.2d 518, 319 P.2d 1098 (1958);.....	10
<u>Hearst Commc'ns, Inc. v. Seattle Times Co.</u> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	10
<u>Hyrkas v. Knight</u> , 64 Wn.2d 733, 393 P.2d 943 (1964).	12
<u>J.W. Seavey Hop Corp. of Portland v. Pollock</u> , 20 Wn.2d 337, 147 P.2d 310 (1944).....	11
<u>Jacoby v. Grays Harbor Chair & Mfg. Co.</u> , 77 Wn.2d 911, 468 P.2d 666 (1970).....	11
<u>Jones v. Best</u> , 134 Wn.2d 232, 950 P.2d 1 (1998).....	11, 12
<u>King v. Rice</u> , 146 Wn.App. 662, 191 P.3d 946 (2008).....	11, 22
<u>Lynott v. Nat' l Union Fire Ins. Co. of Pittsburgh, Pa.</u> , 123 Wn.2d 678, 871 P.2d 146 (1994)	10
<u>McGregor v. First Farmers-Merchants Bank & Trust Co.</u> , 180 Wash. 440, 40 P.2d 144 (1935).....	23
<u>Meenach v. Triple "E" Meats, Inc.</u> , 39 Wn. App. 635 (1985)	19
<u>S. Kitsap Family Worship Ctr. v. Weir</u> , 135 Wn. App. 900, 146 P.3d 935 (2006).....	22
<u>S.D. Deacon Corp. of Washington v. Gaston Bros. Excavating, Inc.</u> , 150 Wn. App. 87, 206 P.3d 689 (2009)	22
<u>Satomi Owners Ass'n v. Satomi, LLC</u> , 167 Wn.2d 781, 225 P.3d at 225 (2009).....	7

<u>Sav. Bank of So. Calif. v. Asbury</u> , 117 Cal. 96, 48 P. 1081 (1897).	23
<u>Schwab v. City of Seattle</u> , 64 Wn. App. 742, 826 P.2d 1089 (1992)	6
<u>Seattle-First Nat'l Bank v. Hawk</u> , 17 Wn. App. 251, 562 P.2d 260 (1977).....	10
<u>Simpson Logging Co. v. Northwest Bridge Co.</u> , 76 Wash. 533, 137 P. 127 (1913).....	10
<u>Sintra, Inc. v. City of Seattle</u> , 131 Wn.2d 640, 935 P.2d 555 (1997).....	20, 21
<u>Spradlin Rock Products, Inc. v. Public Utility Dist. No. 1 of Grays Harbor County</u> , 164 Wn. App. 641, 266 P.3d 229 (2011).....	7
<u>State v. Smits</u> , 58 Wn. App. 333, 792 P 2d 565 (1990).....	16, 17
<u>State v. Staley</u> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	16
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P. 2d 883 (1998).....	6
<u>Usher v. Leach</u> , 3 Wn. App. 344, 474 P.2d 932 (1970)	6
<u>Victoria Tower Partnership v. Lorig</u> , 40 Wn. App. 785, 700 P.2d 768 (1985).....	6
<u>W. T. Rawleigh Co. v. Langeland</u> , 145 Wash. 525, 261 P. 93 (1927).....	10

Other Authorities

11 Williston on Contracts § 30:25, at 233-34 (4th ed.1999).....	7
Restatement of Security s 88 (1941).....	10

Statutes

RCW 61.24 et seq 8

RCW 61.24.100 (5).....5, 12, 14

RCW 4.84.330..... 23

Rules

RAP
2.5(A)..... 9

RAP
18.1..... 24

COME NOW, Cory and Geneanne Burke, et al., Appellants,¹ and pursuant to RAP 10.3 submit the following Reply Brief of authorities in support of relief to vacate the judgment and remand for a new trial.

I. GBC Misrepresents the Record Evidence

GBC's Introduction and Statement of Facts in its Brief of Respondent is inaccurate or misleading on several points. By repeated references to "Defendants," GBC conflates with the Burkes the conduct of Queen Anne Builders (hereinafter QAB) and its principal, Andy Ryssel, when the Burkes were not involved. Although the Burkes did participate in the initial project and acquisition of the property in 1999, the Burkes were completely out of the project in 2003 long before any loans with GBC International Bank (hereinafter GBC).² The Burkes only returned to the project with the Commercial Guaranties five years later in 2008. GBC's representation of "Defendants" seeking a loan from GBC in 2007³ and asking for an extension of the 4190 loan⁴ is also conduct of Mr. Ryssel, not the Burkes. Another example is GBC's assertion of

¹ For simplicity, Appellants Cory and Geneanne Burke, Greg and Jill Blunt, and Crown Development, Inc. collectively are hereinafter referenced as "the Burkes."

² RP at 603:10-15. For simplicity, the reference "GBC" also includes GBC's predecessor, Shoreline Bank.

³ Brief of Respondent at p. 6.

⁴ Brief of Respondent at p. 6

"Defendants manufacturing their own 'defenses'" and citing record evidence that is only Mr. Ryssel and his bookkeeper.⁵ Where the jury found that Mr. Ryssel and GBC acted in concert to obtain guaranties from the Burkes,⁶ GBC's effort to attribute Mr. Ryssel's conduct to the Burkes is dishonest.

More troubling is GBC's reliance upon its own witnesses to support its factual assertions about the parties' intent and purpose for the 2545 Loan to be unsecured. Neither GBC President Jeff Lewis, nor Loan Officer Theresa Robinson, nor Loan Servicing Manager Dawn Beagan testified to any communications or negotiations with QAB, Ryssel or the Burkes over the terms of the 4190 and 2545 loans.⁷ In fact, GBC's loan officer and consultant who negotiated the QAB loans, Tim Pearson and Mel Johnson,⁸ did not testify. Instead, GBC extensively cites the testimony of Theresa Robinson,⁹ who did not even handle the QAB loan file until October 2009, almost a year after the loans were entered.¹⁰ The only record evidence that GBC offers of the Burkes' understanding of the

⁵ Cross Examination of Ryssel, RP 642:19- 644:11 and email of Kathy Bennett to Mr. Ryssel, Trial Exhibit 66 and Bennett Testimony, RP 684:10-14.

⁶ Special Verdict at Question No. 3, CP at 1627.

⁷ RP 182:25 – 183:14 and RP 426:2-3.

⁸ RP 529:12-22. GBC's Chief Lending Officer, Dale Anderson, testified he only attended an introductory meeting for a few minutes where loan terms and guaranties were not discussed (RP 250:20 – 251:18).

⁹ Brief of Respondent at 6 and 10, RP

¹⁰ RP at 381:23 – 382:2.

2545 Loan is the leading language of its counsel's questioning.¹¹ Simply, there is no testimony from any party actually involved in the negotiation and execution of the 2545 loan that the parties intended it to be excluded from the Deed of Trust and unsecured. In fact, the opposite is true. Greg Blunt testified that he "absolutely" understood that the 2545 loan was "an obligation, debt or liability of Queen Anne Builders to Shoreline Bank" secured by the Deed of Trust.¹²

GBC further misrepresents the "\$500,000 Note" when it asserts the document "confirms" that it is unsecured.¹³ Nowhere does the Promissory Note expressly state that it is unsecured. Rather, the Promissory Note does not identify what collateral secures it.¹⁴

Similarly, the specific purpose of the 2545 funds does not establish GBC's claim that the loan is unsecured. It does not follow that the dedicated use of the 2545 Loan funds to reduce the principal on the 4190 Loan, or to establish interest reserves, or to pay loan costs necessarily means the 2545 Loan is exempted from the security of the Deed of Trust. In fact, that funds were dedicated to pay property taxes

¹¹ Brief of Respondent at p. 10, citing RP

¹² Blunt Trial Testimony, RP 736:19 – 737:23; See also RP 716:25 – 717:1, "My understanding was that [the foreclosure notice] was for closing (*sic*) on 1,600,000 or five something."

¹³ Respondent's Brief at p. 10.

¹⁴ Promissory Note at "Collateral," Trial Exhibit 21.

shows the 2545 Loan is intended to be tied to the property and the Deed of Trust.¹⁵

Most damning is GBC's erroneous citation to the Change In Terms Agreement that it identifies as Trial Exhibit 22.¹⁶ Actually, Trial Exhibit 22 is the 2545 Business Loan Agreement which does not state anywhere that the 2545 Loan is unsecured. Presumably, GBC meant Trial Exhibit 23, which is a Change in Terms Agreement that does state "[t]his loan is unsecured." However, GBC's representation of Exhibit 23 is false. This document could not have been "entered into on December 19, 2008"¹⁷ with the 2545 Promissory Note because the document is dated "**FEBRUARY 18, 2010.**" (Emphasis Added). In truth, Exhibit 23 is a proposed Change In Terms Agreement that the parties contemplated after the 2545 Loan went into default. Where no 2545 Loan document actually states that the loan is unsecured and it must be inferred to support the trial court's ruling, the issue is for the jury to determine. The trial court exceeded its authority when it inferred as a matter of law that the 2545 Loan was unsecured and not incorporated by the Deed of Trust.

Additionally, GBC misstates the procedural history of the Burkes' fair value defenses and there is no basis in the record for unfair

¹⁵ Promissory Note at "Loan Proceeds Designation," Trial Exhibit 21.

¹⁶ Respondent's Brief at p. 11.

¹⁷ Ibid.

surprise or prejudice. GBC's reference to the Burkes' Answer in this matter ignores the temporal context. The Burkes filed the Answer and Affirmative Defenses September 23, 2010, the day before the Trustee's Sale.¹⁸ The Burkes could not have raised a fair value defense in its Answer that did not exist until the sale price was established at the Trustee's Sale. While the Answer was not amended thereafter, GBC was well aware that the Burkes were asserting the Deed of Trust Act in their defense. The Burkes' Response Opposing GBC's Motion for Summary Judgment filed April 18, 2011, almost seven months before trial, specifically argued that "the \$900,000 purchase price in foreclosure fully satisfies all amounts owing on the debt claimed by GBC."¹⁹ Furthermore, the Burkes offered the following jury instruction before trial:

NO. ____

A guarantor of a commercial loan secured by property sold at Trustee's sale has the right to deduct the fair value of the property on the date of the Trustee's sale from the amount owing on the loan.

RCW 61.24.100(5)²⁰

Any assertion that the Burkes' fair value defenses were not timely raised is unfounded.

¹⁸ Trustee's Deed, Trial Exhibit 115.

¹⁹ Defendants' Queen Anne Builders, Crown Development and Individual Guarantors Response Opposing GBC's Motion for Summary Judgment (CP 167-187) at 6:24-25.

²⁰ CP at 928.

II. All Assignments of Error Are Reviewed De Novo

The lower court's interpretation of the 2545 Loan contract and the Deed of Trust to strike the Burkes' fair value defenses is a matter of law reviewed de novo. Schwab v. City of Seattle, 64 Wn. App. 742, 751, 826 P.2d 1089 (1992); Victoria Tower Partnership v. Lorig, 40 Wn. App. 785, 788, 700 P.2d 768 (1985). GBC's attempt to characterize the lower court's striking of Burkes' fair value defenses as an evidentiary ruling is erroneous.

Likewise, a trial court's refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). Also, the lower court's correction of the Special Verdict to award a specific amount of damages is subject to de novo review. Usher v. Leach, 3 Wn. App. 344, 474 P.2d 932 (1970).

III. GBC Ignores the Explicit Terms of the Deed of Trust Securing the 2545 Loan and the Requirements of the Deed of Trust Act, RCW 61.24 et seq.

As a matter of law, the Deed of Trust secures the 2545 Loan and the Lower Court erred in ruling otherwise to exclude the Burkes' fair value defenses. If a signed writing incorporates other writings by reference, those writings are also part of the contract. Cahn v. Foster & Marshall,

Inc., 33 Wn. App. 838, 841–42, 658 P.2d 42 (1983); see also 11 Williston on Contracts § 30:25, at 233-34 (4th ed.1999). “If the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract.” Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 801, 225 P.3d 213, 225 (2009).

Here, the Deed of Trust unequivocally secures “. . . all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender . . .” There is no doubt that the 2545 Loan is an obligation, debt and liability between the Grantor QAB and the Lender GBC explicitly incorporated into the Deed of Trust.²¹ GBC offers no argument against this explicit language of the Deed of Trust.

As a matter of fact, the Lower Court erred in taking from the jury the determination of whether the 2545 Loan can be excluded from the Deed of Trust by omission and extrinsic evidence. Contrary to GBC's assertion, no 2545 loan document states that the loan is unsecured, so it only may be inferred by omission. Whether these omissions establish the intent of the parties that the 2545 loan be unsecured is a question of fact for the jury. Spradlin Rock Products, Inc. v. Public Utility Dist. No. 1 of Grays Harbor County, 164 Wn. App. 641, 654-655, 266 P.3d 229 (2011).

²¹ RP 178:11–19 and RP 322:8-21.

In its Brief of Respondent in opposition, GBC makes several arguments to avoid the explicit language of the Deed of Trust and the constraints of RCW 61.24. Each argument fails.

1. Two Loans Are Not Disputed

GBC repeatedly emphasizes that there were "two separate loans," with "separate loan numbers," and that GBC sought at trial only collection of the 2545 Loan.²² These facts are not disputed. What is at issue is the Burkes' right to apply fair value from the Trustee's Sale against the only loan upon which they faced collection at trial.

GBC is disingenuous to suggest that Burkes' fair value rights are confined to a second action on the 4190 Note by its holder, Republic Credit One, LP.²³ GBC conceals that at the time of trial on the 2545 Loan, the Burkes had no knowledge of any deficiency action on the 4190 Note. That action was not filed until September 23, 2011, nearly seventeen (17) months after the lawsuit at issue was commenced and the day before the statute of limitations ran. The Burkes were not served that lawsuit until the Thanksgiving Holiday (November 25, 2011), and first learned of the action when it was disclosed to their counsel in the middle of trial (November 10, 2011).

²² Brief of Respondent at 22.

²³ Brief of Respondent at 9, King County Superior Court Cause No. 11 2 32517 2 SEA.

2. Admitting Fair Value Evidence Does Not Alleviate Harm

It cannot be disputed that the Lower Court denied the Burkes' fair value defenses from being submitted to the jury,²⁴ and the admission of the evidence supporting these defenses does not erase the error in the Special Verdict and Judgment. It makes no sense and GBC offers no authority that the jury's hearing of the property value evidence somehow prevented the harm resulting from the court denying the jury from considering this evidence in determining any amount due on the 2545 loan.

3. Loan Documents Do Not Preclude Fair Value Defenses

Contrary to GBC's Brief of Respondent, the 2545 loan documents do not state that the loan is unsecured and the Commercial Guaranties do not state that the Burkes' fair value defenses are waived. For the first time in its Brief of Respondent, GBC appears to suggest that the Commercial Guaranties executed by the Burkes include waivers of the Burkes' fair value rights under the Deed of Trust Act. Generally, an Appellate Court will not consider for the first time on appeal new issues that were neither pleaded nor argued to the trial court. Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008). Still, RAP 2.5(a) allows that "[a] party may present a ground for affirming a

²⁴ RP 760:24 – 761:7 and 774:5-10.

trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." Because waiver is a mixed question of law and fact, Brundage, supra., the record here does not permit GBC to raise this issue for the first time on appeal.

Notwithstanding, a strict construction of the Commercial Guaranties does not preclude the Burkes' fair value defenses. It is a bedrock principal that guarantors can be held only to the strict terms of their contract and, as a contract to answer for the debt of another, guaranties must be explicit and strictly construed. Seattle-First Nat'l Bank v. Hawk, 17 Wn. App. 251, 256, 562 P.2d 260 (1977); *citing* Simpson Logging Co. v. Northwest Bridge Co., 76 Wash. 533, 137 P. 127 (1913); W. T. Rawleigh Co. v. Langeland, 145 Wash. 525, 261 P. 93 (1927).

Proper interpretation and construction of the guaranties at issue involves the same principles as those applied to contracts generally. Fischler v. Nicklin, 51 Wn.2d 518, 319 P.2d 1098 (1958); Restatement of Security s 88 (1941). Under the objective manifestation theory of contracts, the intention of the parties is determined from the reasonable and ordinary meaning of the words used. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005); Lynott v. Nat' l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 684, 871 P.2d 146 (1994). The court interprets what was written, not what may have been

intended to be written. J.W. Seavey Hop Corp. of Portland v. Pollock, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944). When the language of a guaranty is susceptible to more than one meaning, it is ambiguous and construed against the drafter and the party using the language. Boeing Airplane Co. v. Firemen's Fund Indem. Co., 44 Wn.2d 488, 496, 268 P.2d 654 (1954); Brust v. McDonald's Corp., 34 Wn. App. 199, 207, 660 P.2d 320 (1983); King v. Rice, 146 Wn.App. 662, 671, 191 P.3d 946 (2008); Jacoby v. Grays Harbor Chair & Mfg. Co., 77 Wn.2d 911, 918, 468 P.2d 666 (1970).

The waiver language of the commercial guaranties at issue is ambiguous as to fair value rights and not clear and convincing evidence that the Burkes knowingly and intentionally waived their right to a fair value hearing. Waiver is the intentional and voluntary relinquishment of a known right. Jones v. Best, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). In Bowman v. Webster, 44 Wn.2d 667, 269 P.2d 960 (1954), the Washington Supreme Court explained waiver as the following:

It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions

must be inconsistent with any other intention than to waive them.

Bowman, 44 Wn.2d at 669. The Burkes' intention to relinquish their fair value rights must be proved, and the burden is on GBC to establish by clear and convincing evidence that does not leave the matter to speculation. Jones v. Best, 134 Wn. 2d 232, 241–42, 950 P.2d 1 (1998); Bjerkeseth v. Lysnes, 173 Wash. 229, 232, 22 P.2d 660 (1933). The forfeiture of rights is not favored and will not be found unless it is so clear as to permit no denial. Hyrkas v. Knight, 64 Wn.2d 733, 734, 393 P.2d 943 (1964).

The lack of any reference to "fair value" in the waiver provisions of the Commercial Guaranties is at least ambiguous, and the express language does not apply to fair value rights. GBC admits the Deed of Trust Act, RCW 61.24 et seq. "makes clear that the Lender retains rights to collect deficiency judgments from guarantors of secured debt,"²⁵ so GBC could not have intended a waiver of "anti-deficiency" laws in the guaranties would preclude the Burkes' statutory "fair value" rights. Next, the explicit language of the guaranties contemplates Lender ". . . bringing any action, including a claim for deficiency, against Guarantor . . ." and RCW 61.24.100(5) simply defines what a "deficiency" following non-judicial foreclosure is. This definition includes the right to a "fair value" hearing. Accordingly, "fair value" is not a set off or defense, but the

²⁵ Brief of Respondent at p. 29.

statutory mechanism for determining the "actual value" of the collateral to be applied to satisfy all or part of the debt following the Trustee's Sale.

More importantly, the record evidence establishes that GBC understood and intended that the Burkes would have the right to a "fair value" hearing under their guaranties. With full knowledge of the terms of the Commercial Guaranties, GBC's attorney issued a Notice of Default to the Burkes advising that:

7. GUARANTOR'S LIABILITY FOR DEFICIENCY AND RIGHTS IN TRUSTEE'S SALE.

... In any action for a deficiency, the Guarantor will have the right to establish the fair value of the property as of the date of the trustee's sale ...²⁶

(Emphasis Added)

This same advisement is affirmed in the Notice of Trustee Sale also sent to the Burkes.²⁷

Adopting an expansive reading of the guaranties' waiver terms also would do injustice to the principles of waiver and the purposes of the Deed of Trust Act. The "any defenses" language of the waiver is simply too generic and broad to comply with the requirement that a waiver be knowing and voluntary. These general words do not provide the Burkes with any actual awareness of the right to a fair-value hearing and their knowing intent to waive it. This is particularly true where the fair value

²⁶ Notice of Default, Trial Exhibit 41.

²⁷ XI. Notice to Guarantor, Notice of Trustee's Sale, Trial Exhibit 42.

hearing under RCW 61.24.100(5) is not a "defense" to a deficiency action, but the mechanism for determining the amount of the deficiency owing under the guaranty.

4. The Election to Foreclose Does Not Erase Fair Value Rights

The Burkes also do not challenge GBC's election to sue on their Commercial Guaranties. Rather, GBC's simultaneous election to non-judicially foreclose on the collateral property provides the Burkes' with fair value rights under the Deed of Trust Act, RCW 61.24 et seq. The Lower Court erred in denying the Burkes the application of the fair value evidence to the 2545 debt secured by the Deed of Trust.

5. The Burkes Are Not Required to Enjoin the Trustee's Sale to Preserve Fair Value Rights

GBC's argument that the Burkes are required to enjoin the Trustee's Sale in order to preserve their fair value rights is nonsensical. The Burkes' fair value rights arise from RCW 61.24.100(5), which is triggered only "**following a Trustee's Sale.**" To be sure, a deficiency judgment "for an amount equal to the sum of the total amount owed to the beneficiary by the guarantor as of the date of the trustee's sale, less the fair

value of the property sold at the trustee's sale or the sale price paid at the trustee's sale, whichever is greater . . ."28 cannot be had before the Trustee's Sale.

6. The Burkes May Apply \$200,000 of Fair Value Evidence Against the 2545 Loan Debt and the Court's Error Was Not Harmless

The fundamental question before this court is whether the Burkes as guarantors may determine how their fair value rights are applied between more than one debt secured by a Deed of Trust. GBC claims the exclusion of the Burkes' fair value defense is harmless because, had GBC's lawsuit or the foreclosure included both loans (totaling \$1,617,316.14²⁹ exclusive of interest and fees), the appraisal showing the fair value of the collateral property at \$1,100,00³⁰ would mean the Burkes still are liable for more than the judgment. However, GBC conceals the fact that the Burkes sought to apply at trial their statutory fair value credit against the only debt under the Deed of Trust that was being collected: the 2545 Note. Because the separate deficiency action by the holder of the 4190 Note, Republic Credit One, LP was not filed until just before trial and not

²⁸ RCW 61.24.100(5).

²⁹ \$1,117,316.14 on the 4190 loan, Trial Exhibit 3, and \$500,000 on the 2545 loan, Trial Exhibit 21.

³⁰ A Property Valuation Report, Trial Exhibit 113.

served upon the Burkes until after trial, GBC is disingenuous to rely upon it to support striking the Burkes' fair value defenses in this action.

IV. The Lower Court's Refusal to Give The Instruction That An Oral Promise Could be Enforced Defensively Misled the Jury About the Applicable Law

The verdict and judgment should be reversed because the jury instructions given by the Lower Court did not fully inform the jury of the applicable law. The Burkes are entitled to instructions from the court that accurately state the law and are supported by evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

The case of State v. Smits, 58 Wn. App. 333, 792 P.2d 565 (1990) is illustrative. There, an officer requested the driver's license of a driver who was voluntarily stopped and the driver refused. When the officer arrested him for the refusal, the driver resisted. The court found that an instruction that an operator of a motor vehicle could not lawfully refuse to produce his driver's license to an officer was not an accurate statement of the law and impermissibly invited the jury to infer the officer's arrest was lawful. Smits, 58 Wn. App. at 341.

The problem here is that, absent the Burke's proffered instruction, GBC was able to invite the jury in closing to infer that the law of Washington prohibited oral promises from being enforced in defense of

a loan.³¹ Like Smits, this was an impermissible inference and an inaccurate statement of the law. The Lower Court erred in denying the Burkes' instruction on the lawful enforceability of an oral promise in defense.

V. No Record Support That the Jury Considered and Rejected the Controverted Evidence of the Dollar Amount Due on the 2545 Loan

GBC offers no record support for its conclusory assertion that the jury "considered and rejected" the controverted evidence on the amount due on the 2545 Loan. The crux of the Lower Court's error in awarding an amount of damages omitted from the Special Verdict is the record evidence placing the amount due on the 2545 Loan in dispute, and whether the jury actually resolved that controversy. City Bond & Share Inc. v. Klement, 165 Wash. 408, 410, 5 P.2d 523 (1931). GBC's Brief of Respondent neither explains away the controverted evidence nor substantiates that the jury actual found a specific damage amount.

GBC simply asserts without authority that Dawn Beagan's calculations of the amount due on the 2545 loan were "clear, uncontroverted" and "not successfully attacked by way of cross-

³¹ GBC Closing, RP at 840:1-4.

examination."³² But Ms. Beagan admitted on cross-examination that it was GBC that issued IRS Form 1099A (not the FDIC and not the holder of the 4190 Loan, Republic Credit One, LP) indicating GBC had received the \$900,000 bid credit from the Trustee's Sale that would wipe out the amount owing on the 2545 Loan.³³ GBC provides no explanation how the jury disregarded the fact that GBC received the credit for the \$900,000 bid price at the Trustee's Sale³⁴ when it never held the 4190 loan.

Furthermore, GBC acknowledges but dismisses without any credible explanation the testimony at trial supporting QAB's claim that the bank misappropriated \$22,000 of the 2545 Loan.³⁵ GBC points to no indication that the jury ever considered this evidence, let alone rejected it.

Additionally, the loan documents also establish that "the amount that is currently due on Loan No. 2545" is not a "very basic mathematical calculation." The mathematical evidence does not account for \$17,316.04 that never was disbursed from the 2545 Loan. The Change In Terms Agreement extending the 4190 Loan for two months in September 8, 2008 indicates that \$40,000 of the \$1,515,000 4190 loan was not disbursed to

³² Brief of Respondent at p. 41.

³³ Beagan Testimony at 415:24 to 417:13. This issue is separate and distinct from the Burkes' defense to apply the fair value to the 2545 loan. GBC's Form 1099A is an admission that, in fact, the \$900,000 bid credit was applied to the 2545 loan and not given to the holder of the 4190 loan, Republic Credit One, LP.

³⁴ IRS Form 1099A, Trial Exhibit 116.

³⁵ Brief of Respondent at p. 41; citing Bennett Testimony at RP 688:13 and Ryssel's Closing Argument at RP 853:15 and 857:16.

Queen Anne Builders,³⁶ leaving the principal balance owing of \$1,475,000. If \$375,000 of the 2545 Loan were applied to the principal owing on the 4190 Loan as the 2545 Promissory Note represents, the principal balance owing on the 4190 Loan would be reduced to \$1,100,000. However, the principal of the 4190 Loan when renewed was only paid down to \$1,117,316.04.³⁷ It follows that the full \$375,000 was not disbursed and no record evidence accounts for this \$17,316.04 discrepancy.³⁸ Again, the wording of the Special Verdict provides no insight to whether the jury accounted for the mathematical discrepancies in these loan documents and the resulting amount due on the loan, if any.

GBC's citation to Meenach v. Triple "E" Meats, Inc., 39 Wn. App. 635, 639 (1985) does not help in determining the jury's intent from the Special Verdict. In Meenach, the court found that where the jury specifically awarded \$0, it was a reliable verdict for the defendant. Here, the jury did not provide any award amount that reliably indicates the jury's intent to award anything.

GBC's reliance on Buffington v. Henton, 70 Wash. 44 (1912) also is misplaced. In Buffington, the jury was asked to return a general

³⁶ Trial Exhibit 104, CP

³⁷ Trial Exhibit 21, CP

³⁸ Dawn Beagan did testify that the some of this amount may have been applied to interest, leaving \$30,695 undisbursed. RP 419:13 – 420:8 and Trial Exhibit 105.

verdict determining who broke a contract to dig a well where the amount of damages was not disputed. Accordingly, once fault was determined, the amount of the judgment "was a mere matter of computation." Buffington, 70 Wash. at 47. Here, the jury was presented a special verdict that not only sought the jury's determination of fault, but also expressly asked the jury to determine the amount of damages to be awarded, if any.³⁹ In fact, Jury Instruction No. 19 reads:

...

In calculating Plaintiff's actual damages, **you should determine the sum of money** that will put the Plaintiff in as good a position as it would have been if both Plaintiff and defendant had performed all their promises under the contract.

The burden of proving damages rests upon the Plaintiff and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

(Emphasis Added)

The amount of damages was at issue here, so Buffington has not application to the Jury's Special Verdict.

The matter of Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997), is more analogous to the Special Verdict here. In Sintra, the court declined to change a damage award to reflect the uncontroverted

³⁹ See Special Verdict at Question No. 8 and Jury Instruction No. 19.

income value of property over an undisputed period of an unlawful taking. The Appellate Court affirmed because there were "no means of determining exactly how the jury determined the amount of computation or whether the jury equated [the] income calculations with the leasehold value of the property." Sintra, 131 Wn.2d at 667-68.

Here, the only certainty from the regrettable wording of the Jury's Special Verdict is that it cannot be determined whether the jury actually deliberated and decided "the dollar amount that is currently due on loan No. 2545." GBC asked the jury to award \$574,000 in damages.⁴⁰ The Burkes asserted the \$900,000 foreclosure bid price paid the loan.⁴¹ Because the Special Verdict includes no figure, it cannot be said with any reliability that the jury even considered this conflicting evidence, or the mathematical discrepancies in the loan documents, or any amount of damages that should be awarded. Rather, it is entirely plausible, if not most likely, that upon seeing the court's direction on how to answer the damages question, the jury simply followed the direction and did not even deliberate on the issue. Accordingly, the Lower Court erred in entering judgment for the damage amount claimed by GBC.

⁴⁰ GBC Closing, RP 849:25.

⁴¹ The Burke's Closing, RP 861:1-9.

VI. The Lower Court Properly Admitted Parole Evidence

The Court properly admitted parole evidence for the jury to consider in interpreting the 2545 loan and GBC's reliance on an integration clause is unavailing. Whether the parties intend an agreement to be integrated is a question of fact for the jury. S.D. Deacon Corp. of Washington v. Gaston Bros. Excavating, Inc., 150 Wn. App. 87, 93, 206 P.3d 689 (2009). A contract integration clause does not preclude evidence of fraud, incorrect statements of fact, or a collateral agreement not addressed by the contract. The parole evidence rule applies only in the absence of fraud. Berg v. Hudesman, 115 Wash.2d 657, 669, 801 P.2d 222 (1990). An integration clause that is boilerplate is void if enforcing the clause would amount to endorsement of a fraud. S. Kitsap Family Worship Ctr. v. Weir, 135 Wn. App. 900, 907, 146 P.3d 935 (2006).

Moreover, notwithstanding an integration clause, an agreement may be only partially integrated if the clause is false boilerplate. Parties are not bound by incorrect statements of fact. Denny's Rests., Inc. v. Sec. Union Title Ins. Co., 71 Wn. App. 194, 203, 859 P.2d 619 (1993). "While boilerplate integration clauses are strong evidence of integration, they are not operative if they are factually incorrect." King v. Rice, 146 Wn. App. 662, 670, 191 P.3d 946 (2008). An integration clause is false boilerplate when: (1) the prior agreement was the inducing and moving cause of the final contract; (2) the prior agreement forms part of the consideration for the final contract; and (3) the final contract was executed on the faith of

the prior agreement. McGregor v. First Farmers-Merchants Bank & Trust Co., 180 Wash. 440, 444, 40 P.2d 144 (1935). "A party to a contract is not bound by a false recital of fact, and parole evidence is admissible to show the true state of affairs." Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 250, 450 P.2d 470 (1969); *quoting* Cook v. Vennigerholz, 44 Wn.2d 612, 616-17, 269 P.2d 824 (1954).

The parole evidence rule also "has no application to a collateral agreement upon which the instrument is silent, and which does not purport to affect the terms of the instrument." Becker v. Lagerquist Bros., Inc., 55 Wn.2d 425, 429 n. 3, 348 P.2d 423 (1960); *quoting* Sav. Bank of So. Calif. v. Asbury, 117 Cal. 96, 103, 48 P. 1081 (1897). In Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 248, 450 P.2d 470 (1969), *overruled on other grounds*, 114 Wash.2d 896, 792 P.2d 1254, the court found that the parties' oral agreement to preserve a view covenant was not displaced by the integration clause of the contract that stated the contract contains the final and entire agreement between the parties. Here, the security of the Deed of Trust is not displaced by the silence of the 2545 loan and its boilerplate integration clause.

VII. The Burkes Are Entitled to Attorney Fees and Costs

Under the loan documents and RCW 4.84.330, the Burkes should be awarded attorney fees and costs in the event this appeal is successful. All the 2545 loan documents provide that QAB will pay attorney fees and

legal expenses "incurred in connection with the enforcement" of the document, or if QAB does not pay.⁴² The Deed of Trust also states that in an action to enforce any of its terms, "Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal."

By statute, GBC's right to attorney fees must be mutual. RCW 4.84.330 requires that in any contract providing for attorney's fees, "the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements." Although RAP 18.1 calls for the Burkes to request attorney fees in their opening brief, the mutuality of remedy intended by RCW 4.84.330 supports an award of attorney fees to the Burkes under the loan documents and the Deed of Trust.

VIII. CONCLUSION

The judgment of the trial court should be vacated and GBC's Brief of Respondent offers no substantive opposition to the Burkes' assignments of error. The Lower Court improperly denied the Burkes' fair value defenses by disregarding the clear and unambiguous terms of the Deed of Trust as a matter of law, or by improperly interpreting omissions and inconsistent evidence as a matter of fact for the jury. The Lower Court

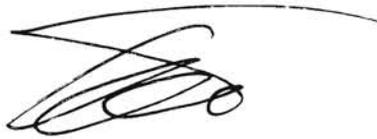
⁴² Promissory Note, Trial Exhibit 21; Business Loan Agreement, Trial Exhibit 22; Commercial Guaranties, Trial Exhibits 24-

also erred when it denied the Burkes' offered jury instruction on the defensive use of an oral loan promise that resulted in GBC misleading the jury on the correct law. Finally, the record evidence establishes that the amount actually due on the 2545 Loan is in dispute and the Jury's Special Verdict does not indicate with any confidence that the Jury considered and resolved the disputed evidence.

For these errors, the judgment should be vacated and the matter remanded for a new trial.

Respectfully submitted this 18th day of July, 2012.

TACEY GOSS P.S.



C. Chip Goss WSBA #22112
330 112th Avenue NE, Suite 301
Bellevue, WA 98004
Tel. (425-489-2878)
Fax. (425-489-2872)
Attorney for Defendants/Appellants

CERTIFICATE OF SERVICE

I, Mary Johnson, certify under penalty of perjury of the laws of the State of Washington, that a true and correct copy of this Appellant's Reply Brief was provided to ABC legal messengers for delivery on this day to counsel of record for Respondent, GBC International Bank, at the addresses of record, Hacker & Willig, Inc., 1501 4th Avenue, Suite 2150, Seattle, WA 98101.

SIGNED in Bellevue, WA this 18th day of July, 2012.



Mary Johnson, Legal Assistant

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STATE OF WASHINGTON
2012 JUL 19 AM 9:25

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

GBC INTERNATIONAL BANK,

Plaintiff/Respondent,

Court of Appeals No. 68240-7
King County Superior Court No. 10-215811-1 SEA

CORY AND GENEANNE BURKE, ET AL.,

Defendants/Appellants,

DECLARATION OF DELIVERY

DOCUMENTS : REPLY BRIEF OF APPELLANTS

THE UNDERSIGNED BEING FIRST DULY SWORN ON OATH DEPOSES AND SAYS: THAT HE AND/OR SHE IS NOW AND AT ALL TIMES HEREIN MENTIONED WAS A CITIZEN OF THE UNITED STATES AND RESIDENT OF THE STATE OF WASHINGTON, OVER THE AGE OF 18 YEARS, NOT A PARTY TO OR INTERESTED IN THE ABOVE ENTITLED ACTION AND COMPETENT TO BE WITNESS THEREIN.

ON July 18, 2012, at approximately 4:58p.m., I ATTEMPTED TO DELIVER THE ABOVE DESCRIBED DOCUMENTS TO the office of the Court of Appeals of the State of Washington, Division I, at 600 University Street, Seattle, WA 98101, but the door was locked.


Michael Schauer

7/19/12
DATE

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