

72805-9

72805-9

NO. 72805-9-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

Randy Previs, Katie Previs and John Blanchard,
Appellants

v.

UNION BANK, N.A., successor-in-interest to the
Federal Deposit Insurance Corporation, as receiver of Frontier Bank

APPELLANTS REPLY TO RESPONDENTS REPLY BRIEF

Randy and Katie Previs, *Pro Se*
22819 Woodway Park Road
Woodway, Washington 98020
(425) 774-0188
katieprevis@comcast.net

John T. Blanchard, WSBA No. 5049.
Attorney for John T. Blanchard
340 N. 133rd Street
Seattle, Washington 98101
(206) 621-3555
John@JTBAAdvocate.com

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I. INTRODUCTION

It is important to recognize at the outset that this appeal, and the guaranty enforcement from which it comes, is not about Randy Previs or John Blanchard trying to get out of paying a debt that is fairly owed. It is about allowing a defense to guaranty enforcement that holds Frontier Bank and Union Bank accountable for their breaches, misdeeds, and bad conduct – including fraud, deceit and bad faith which are expressly allowed in a guaranty defense. Union Bank wants to have the benefit of the Frontier Bank documentation the Appellants signed, and the benefit of compliance of the Appellants with all requests of Frontier Bank and Union Bank (including injecting an additional \$2,000,000 into the Wellington Project) but wants no obligation or responsibility for the banks' end of the bargain. Appellants here seek only to defend themselves as permitted by law.

In its reply to Appellants Opening Brief Union Bank did not substantively reply to Appellants position, arguments and legal authority. Instead, it resorted to what we now see is its *modus operandi* as to dealing with this matter: Create legal noise in the hope that it will be regarded as substantive; misstate caselaw and ignore those points for which they have no answer.

Appellants agree that this is a complex case; all the more reason that it should not be decided by Summary Judgment. The precise issue before this appellate court is whether Union Bank is entitled to Summary Judgment that disposes of the case and denies Appellants of their right to trial, and whether the Trial Court erred in granting Summary Judgment. Appellants believe it is abundantly clear under applicable Summary Judgment standards and applicable caselaw that Union Bank is not entitled to Summary Judgment and that the Trial Court erred in granting same.

II. OVERVIEW OF APPELLANTS' AND RESPONDENT'S POSITIONS

Appellants' position is simple, and is clearly supported by applicable statutes and caselaw. To prevail on Summary Judgment, Union Bank must clearly and unambiguously establish that there are no disputed factual matters *in this legal dispute* and that Union Bank is entitled to judgment as a matter of law. That is a two prong test – facts *and* law – and if Union Bank cannot clearly establish either prong Summary Judgment is not warranted. Appellants have established that Union Bank fails on both prongs. Appellants have cited twenty five specific and documented material facts at issue (there are actually more), and Union Bank has not refuted any of them. Appellants have also clearly

established that fraud, deceit and/or bad faith on behalf of a bank or its agents are viable defenses in a guaranty enforcement action, and have cited multiple instances of same by Frontier Bank, Union Bank and/or its agents. Appellants have also provided ample documentation and legal rationale for its numerous defenses and counterclaims, which Union Bank attempts to dismiss with a sweep of its hand and by asserting, wholly without merit, that all such counterclaims and potential defenses of Appellants were somehow resolved by the Receivership and Bankruptcy actions involving the Wellington Property, none of which involved the guaranties or enforcement thereof.

Union Bank's position is that the liability of Appellants on their guaranties is "absolute and unconditional" as of the day the loan documents are signed, notwithstanding clear caselaw to the contrary and notwithstanding egregiously bad conduct by the bank and its agents thereafter. Union Bank asserts that after the loan documents are signed, the banks involved can thereafter engage in all manner of deceit, fraud, cheating, lying and other skullduggery, with total impunity. Union Bank further asserts that because the Wellington Property was involved in a Receivership and a Bankruptcy, that the actions of those courts in the sale of the Wellington Property foreclose Appellants from raising similar or related issues in their guaranty defense or assertion of their counterclaims,

even though guarantor liability was not before those courts and over which they had no jurisdiction. Bottom line, Union Bank asserts that with the stroke of a pen (i.e. signing the loan documents) Appellants somehow lost their constitutional right to trial, lost their right to testify and to establish the impropriety of Union Bank's position, and are now saddled with over \$42 million in debt because of procedural skirmishes in the Receivership and Bankruptcy over who should be allowed to buy the Wellington Property. However, that is not the law. Nor should it be.

**III. STANDARD OF SUMMARY JUDGMENT REVIEW;
SUMMARY JUDGMENT IS IMPROPER IF THERE
ARE MATERIAL FACTS IN DISPUTE**

Although Union Bank acknowledges that entitlement to Summary Judgment requires that there be “no genuine issue as any material fact” and “entitlement as a matter of law,” it conveniently ignores the other important aspects of these standards, those being that in determining these criteria the Court must interpret and apply such standards “*most favorably*” to the Appellants, that Summary Judgment should be granted only if “*reasonable persons could reach but one conclusion,*” and “*if reasonable persons might reach different conclusions*” the motion should be denied. As to the material facts in dispute alleged by Appellants, Union Bank does not claim that any such facts are not in dispute. Instead, with broad strokes and a chart, Union Bank contends that such material

facts have been previously litigated and decided. That is not remotely the case. Again, simply because some facts and issues have been involved in a matter involving the sale of the Wellington Property in no manner determines or decides such matter as regards Appellants defense of guaranty enforcement by Union Bank.

**IV. RES JUDICATA AND DEFENSES AVAILABLE TO
APPELLANTS IN THIS GUARANTY ENFORCEMENT ACTION;
PROCEDURAL RULINGS OF RECEIVERSHIP AND
BANKRUPTCY COURTS INAPPLICABLE**

Union Bank argues that with respect to the material facts in dispute in this matter, that these are somehow no longer in dispute because some such facts have been involved in the Receivership and Bankruptcy matters involving the Sale of the Wellington Property. In effect, Union Bank asserts that *all* issues involved in its guaranty enforcement action are *res judicata*, and accordingly Appellants are prohibited (i.e. collaterally estopped) from raising same in their defense. Union Bank's position is not only legally wrong and unsupportable under the standards of *res judicata*, it confuses the concept of "disputed facts" with "legal issues" and purports to dispense with same by lumping everything into a chart reflecting fifteen "issues" and by prominent placement of x's on the chart. In engaging in this meaningless exercise, Union Bank conveniently leaves out some of the Appellants list of disputed facts. However, in contrast to

this position, the Washington State Supreme Court has been abundantly clear that *res judicata* does not bar claims arising out of different causes of action, or intend to deny the litigant his or her day in court. The Receivership and Bankruptcy matters referenced by Union Bank dealt only with the sale of the Wellington Property, and in no manner involved the enforcement of guaranties against the Appellants. Moreover, Union Bank is totally wrong in asserting the Wellington Bankruptcy Court “upheld the guaranties.” While Union Bank referenced the guaranties in its motion to the Bankruptcy Court, that motion involved only and exclusively the issue of subordination, which Appellants challenged after a small portion of the Wellington Property sale price was allocated to unsecured creditors who performed services for Wellington but were not paid. After inducing the Bankruptcy Court to accept Onward’s offer to these unsecured creditors, Union Bank then swooped down and claimed nearly all of the “unsecured creditors set aside” for itself. On behalf of the unsecured creditors, Appellants objected to that. Enforcement of the guaranties was not involved.

V. ARGUMENT

A. Summary of Appellants Position

It is not exaggeration to say that Randy Previs and John Blanchard are fighting for their lives here. If this unjust and unwarranted \$42 million+ Summary Judgment is allowed to stand, their lives will be ruined, both financially and otherwise. Of course, now that the Wellington Project has been taken from them for a fraction of its real value, neither of the Appellants personally have the ability to pay such a judgment, a fact known to Union Bank when it blithely turned down numerous opportunities to recoup all amounts owed or a substantial portion thereof. Union Bank argues it has no obligation to do anything except “stand on its rights.” That of course is not the case, as Union Bank has done far more than “stand on its rights.” It has actively taken control of the Property through its appointed Receiver, over whom it had total control, it has turned down numerous offers to sell the Wellington Property for millions more than it finally realized in selling for a small fraction of its own appraised value for the Property.

Union Bank makes various arguments here, all of which Appellants believe they can refute. Union Bank is free to make whatever arguments it chooses at a trial on the matter. It is not, however, legally entitled to dispense with any substantive evaluation of its arguments by depriving Appellants of their right to a trial on the merits. A limited debate “on paper” is very different than trial on the merits.

Summary Judgment was improperly granted here. There are numerous material facts in dispute, the absence of which is an absolute precondition to Summary Judgment. Moreover, caselaw cited by Union Bank to address the other “prong” of Summary Judgment – entitlement by law to a judgment – actually support Appellants position.

For the most part, our judicial system is very good at what it does, but it does sometimes make mistakes and correction of those mistakes is the domain of appellate courts. Randy Previs and John Blanchard have never had any trial of any ilk on the issues and counterclaims raised here in their defense. Summary Judgment is intended only to dispose of issues that are already clearly and completely decided as a matter of law, not to deprive citizens of any opportunity to defend themselves in the face of the unmitigated calamity that was the “Union Bank” handling of this matter.

B. Standard of Review: Review *De Novo*; Summary Judgment Improper if Material Facts in Dispute. All Inferences Must Favor Appellants.

As previously noted, although Union Bank purports to agree to the basic standards of appellate review of this matter, they attempt to apply a quite different standard. And, they totally ignore the clear standard in determining whether there are any material facts in dispute, that being that all facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. *Trimble v.*

Washington State Univ., supra, citing *Clements*, 121 Wn.2d at 249; *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Clements, supra*, 121 Wn.2d at 249 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982); *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wash. 2d 471, 484, 258 P. 3d 676 (2011); *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn. 2d 640, 646, 835 P.2d 1030 (1992). If reasonable persons might reach different conclusions, the motion should be denied. *Millikan v. Board of Directors*, 93 Wn.2d 522, 532, 611 P.2d 414 (1980); *Hayes v. City of Seattle*, 131 Wn.2d 706, 711-712, 934 P.2d 1174 (1979). An order erroneously granting Summary Judgment on a claim is inherently prejudicial and ***requires reversal***. (emphasis added) *Beers v. Ross*, 173 Wn. App. 566, 569, 154 P.3d 277,279 (2007). The Summary Judgment here also requires reversal.

Moreover, Union Bank fails to distinguish between material facts in dispute and the issues those facts relate to. Accordingly, it seeks to lump all disputed facts into categories of "issues" set forth on a chart and contend that if those issues have been before another court in any context, that somehow renders the disputed material facts no longer disputed.

Union Bank wrongfully conflates issues with facts. A primary purpose of a trial is to determine material facts (i.e. facts that could affect the outcome, if proven). Summary Judgment is warranted only if there is no need for that as the parties agree on the material facts. In other words, that there is absolutely no need for “fact finding” and the court need only apply applicable law to come to a just and fair decision. That is absolutely not the case here, as is demonstrated by Appellants’ recital of at least twenty five disputed facts in this matter. Yes, some of those disputed facts also relate to issues involved in other Wellington proceedings. But it remains that such facts are clearly “material” in this matter and are hotly contested between the parties (unless Union Bank is willing to concede on Appellants allegations of fraud, deceit and bad faith). Summary Judgment looks not to issues but to whether a trial is necessary for determining the facts, which is clearly the case in this complex matter.

C. Appellants Factual Assertions Are Not Speculative and Need Not Be Proven Before Trial.

Union Bank attempts to suggest that the claims made by Appellants and the facts supporting same are speculative or not real. It states there is an issue as to whether Appellants are making “mere allegations conclusory statements and speculation” in lieu of specific facts. However, Union Bank’s speculation in that regard is far from the truth.

All of Appellants claims and defenses are based on the personal experience and observations of Randy Previs and John Blanchard, and their personal interaction with the Receiver and with officers of Frontier Bank and Union Bank. Did the Appellants “speculate” that Frontier Bank and Union Bank acted in bad faith? No, they personally experienced that. Did the Appellants “speculate” that Frontier Bank induced them to contribute an additional \$2 million to Wellington on assurance that Frontier would provide a mini-perm loan? No. The Appellants were there when that occurred. They experienced that. They acted on it, and at the request of Frontier Bank prepared a “mini-perm” term sheet. The same is true for the other claims and factual assertions made by the Appellants.

Union Bank also asserts that Appellants claims regarding fraud fail because Appellants have not established each of the nine elements they contend are legally required for a fraud claim. Here again Union Bank fails (intentionally so, it would seem) to distinguish between providing facts related to claims – which is the only aspect involved in this Summary Judgment matter – and ultimately proving the claim at trial. Union Bank conflates “allegations” and “claims” which is all that is required to get to trial, and proving such allegations and claims which is the purpose of a trial. In other words, Union Bank argues that Appellants are not entitled

to a trial to prove its claims because they have not proven same in advance of a trial. If that sounds totally illogical and inequitable it's because it is.

D. Appellants are Entitled to a Full and Complete Defense.

The ability to defend oneself against a claim is a basic constitutional right, and should not be deprived except in the most exceptional and clearly warranted circumstances. The lawsuit from which this appeal is taken is solely and exclusively about enforcement of the Frontier Bank guaranty signed by Randy Previs, Katie Previs and John Blanchard. Although Union Bank asserts that the guarantors waived all conceivable defenses, that is not the case according to applicable caselaw. Moreover, just because in a different context there has been some judicial involvement on some of the issues raised in Appellants defenses, the Appellants here cannot be deprived of their right to defend themselves on this guaranty enforcement action, which has not been litigated. While it may be that some of Appellants rights as creditors are affected by the Receivership and Bankruptcy Court matters, that does not mean that their right to defend themselves as guarantors is affected or barred. Appellants are not making claims against the Receiver or the "Receivership estate." Appellants do contend that notwithstanding Union Bank's assertion that the Receiver is "independent," Union Bank had and in fact exercised full

authority over the unreasonable, unjust, incompetent and mendacious actions of the Receiver against the Appellants and Randy Previs in particular. And, in response to Union Bank's pointing to the fact that the Previs' appeal of the Receivership and Bankruptcy decisions was withdrawn, that was done only because of Union Bank's aggressive action in requiring an appeal bond of \$9,876,741, when it accepted a \$10,000 bond for the Receiver who wielded total authority over the Wellington Property, including the right of sale.

In effect, Union Bank argues that because of the involvement of the Receivership Court and the Bankruptcy Court as regards the sale of the Wellington Property, those actions are *res judicata* on the matter of enforcement of the Appellants' guaranties. As referenced above, the Washington State Supreme Court has been abundantly clear that *res judicata* does not bar claims arising out of different causes of action, or that "intend to deny the litigant his or her day in court." *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (Wash. 2004). Application of *res judicata* or collateral estoppel is inappropriate unless the action contended to have resolved the issues at stake is identical with a subsequent action in four respects: (1) parties; (2) cause of action; (3) subject matter; and (4) quality of the persons for or against whom the claim is made. *Landry v. Luscher*, 95 Wn.App. 779, 783, 976 P.2d 1274

(1999) (citing *Hayes v. City of Seattle*, 131 Wn.2d 706, 711-12, 934 P.2d 1179, 943 P.2d 265 (1997); *Kuhlman v. Thomas*, 78 Wn. App. 115, 120, 897 P.2d 365 (1995)).

Union Bank fails on all four requisite elements for *res judicata*, but if it fails even on any one of these elements, *res judicata* is inapplicable. The the *res judicata* test is a conjunctive one requiring satisfaction of all four elements, if even one of the “prongs” does not apply, then *res judicata* cannot apply. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108 (Wash. 2004).

Parties: Neither Randy Previs, Katie Previs or John Blanchard was a party to either the Receivership Court action nor to the Bankruptcy Court action. Yes, they did argue against some of the actions of the Receiver, objected to the sale of the Wellington Property and filed claims in the Wellington Bankruptcy, but they were not a party in those matters. Wellington was a party, and Wellington is owned by Previs/Blanchard. But, Wellington and all its actions and decisions was totally controlled at the time (and in fact continues to be) by the Receiver, so there can be no “vicarious party” attribution here.

Cause of Action: The cause of action in this matter on appeal (enforcement of guaranties) is totally different and distinct from the Receivership and Bankruptcy matters (sale of the Wellington Property).

Subject Matter: The “subject matter” of the Receivership court action was whether Onward Partners was should be allowed to purchase the Wellington Property. The subject matter of the Bankruptcy Court action was whether the various claims of the parties, and in particular the claim of Union Bank as an unsecured creditor, should be allowed. Here again, that “subject matter” is separate and distinct from the subject matter of the guaranty enforcement. Moreover, the specific “subject matter” of the appeal before this court is the appropriateness of the Summary Judgment granted in favor of Union Bank. Neither the Receivership action, the Bankruptcy action, nor any other legal proceeding referenced by Union Bank dealt substantively with the guaranties or with Summary Judgment in any manner.

Furthermore, for an issue, claim or defense to be barred by *res judicata* or collateral estoppel it must have been previously litigated and *finally determined*. The issues raised by Appellants in their defense such as fraud by Frontier Bank, and deceit and bad faith dealing by Union Bank have never been litigated and certainly have not been “finally determined”

by a court. Neither the Receivership matter nor the Wellington bankruptcy substantively dealt with all of the Appellants allegations and neither dealt with enforcement of the guaranties. Although objections were asserted by the Appellants and by others as to some of the more egregious conduct of the banks and the Receiver, there was no “trial” or even a semblance of one on these issues. All that occurred were certain Union Bank procedural actions brought by motion and supported by declarations of certain parties – a one-shot paper battle. There was no investigation of these claims, no testimony about them, no cross examination and virtually none of the legal process necessary to have a “final determination” of these claims. There were simply motions made and briefs filed, and then a determination the Appellants bankruptcy claims were subordinate, and that Onward Partners should be allowed to purchase the Wellington Property.

E. Appellants Defenses and Counterclaims are Not Limited to “Inducement” of the Loan Nor is a Bank Free to Commit Fraud and Deceit, and Deal With Borrowers/Guarantors in Bad Faith After the Loan Documents are Signed.

Applicable caselaw, in fact the primary cases cited by Union Bank to support its position (*National Bank of Washington v. Equity Investors*, 81 Wash. 2d 886 (1973) and *Grayson v. Platis*, 95 Wash. App. 824 (1999)) make it abundantly clear that a lender cannot exculpate itself from fraud,

deceit and bad faith by means of waivers. In its ruling, the *Equity Investors* court consistently noted exceptions to enforcement of a guaranty based on *fraud, deceit, coercion, misrepresentation, overreaching and bad faith*, without limitation. Union Bank attempts to deal with this by claiming, wholly without merit, that the *Equity Investors* ruling applies only to such acts or bad conduct occurring at the “inception” of the loan, meaning when the loan documents were signed. Appellants have rebutted this fanciful interpretation in two ways: 1) the actual language of *Equity Investors* in no manner supports Union Bank’s “inducement of the loan” argument, and 2) that if Union Bank’s interpretation were correct, it would mean that our appellate courts have in effect ruled that once the loan documents are signed, lenders can become totally bad actors, including fraud, deceit and bad faith, with impunity. How did Union Bank deal with this rebuttal? It didn’t. It simply restated its original incorrect and incomprehensible interpretation that *Equity Investors* means bad lender conduct only matters “at the inducement, i.e. when the loan documents are signed. It states, at page 32 of its Brief,

“When it mentions fraud and deceit, Equity Investors is discussing only fraud or deceit in the inducement at the making of the guaranty, which is not the case here. 81 Wn.2d at 920.

The *Equity Investors* decision does in fact state that guarantors have a viable defense to guaranty enforcement based on fraud, deceit or bad faith, but in no manner limits that to the loan inception or to any other period. It is clear that lenders must refrain from fraud, deceit and bad faith during the entire course of the loan, and the entire relationship with borrowers and guarantors. Attached hereto as Appendix 2 is page 920 of the *Equity Investors* decision cited by Union Bank. On that page, the Court notes that the guarantors in that matter came aboard sometime after the loan had been made and after a portion of the loan proceeds had been disbursed. The guarantors alleged that the lender had acted negligently as to the “administration” of the loan, including the lenders disbursement of the entire loan proceeds rather than retaining 10% of the loan proceeds at the end of the loan. Clearly the claim of the guarantors included the entire loan, not just the “inducement” i.e. when the guaranty was made. The *Equity Investors* guarantors lost not because the bad conduct of the bank occurred after the loan “inception,” but because the appellate court did not find negligence or bad conduct on the part of the bank throughout the course of the loan. The specific language of *Equity Investors* clearly supports this:

Whatever duty the plaintiff bank may have owed to the defendant new guarantors with reference to the method, manner and time of *disbursing the remainder*, we cannot find in this record that it breached

that duty and, thus, we must conclude as a matter of law that the bank was without negligence toward the guarantor in making the *postguaranty advances*. *Equity Investors* at 920. (emphasis added)

What part of “postguaranty” does Union Bank not understand?

How can Union Bank contend that *Equity Investors* only applies to fraud or bad lender conduct “in the inducement,” (i.e. only at the very beginning of a loan) when the language of the decision clearly states it applies to the lender conduct in “disbursing the remainder” of the loan, and that the bank was not negligent in making its “postguaranty advances.” It can’t, and hopefully we will hear no more of this from Union Bank.

Additionally, Union Bank contends that the *Platis* decision (*Grayson v. Platis*, 95 Wash. App. 824 (1999) which enunciated viable guarantor defenses based on bad faith is based solely on *Equity Investors*. That is not true. *Platis* was decided on its own merits. In any event, since Union Bank’s effort to distinguish *Equity Investors* based on its meritless “inducement” standard, Union Bank’s effort to distinguish *Platis* on the same basis also fails. The bottom line is that based on *Equity Investors*, *Platis*, *Miller* (*Miller v. U.S. Bank of Washington, N.A.*, 72 Wash.App. 416, 425, 865 P.2d 536 (1994) and other applicable caselaw, the Appellants have a right to defend against the guaranty on the basis of fraud, deceit, bad conduct and other aspects attributable to Frontier Bank or Union Bank.

Finally, although Union Bank has not challenged the veracity of any of the allegations and claims made by Appellants, relying instead on legal technicalities and discredited caselaw, it may question whether Frontier Bank or Union Bank actually did act in bad faith as regards the guarantors. That of course is a matter that Appellants will establish at trial, but it can be said now that the ultimate and most egregious bad faith in this matter is Union Bank's repeated refusal to even look at multiple opportunities to realize millions of dollars more for the Wellington Property, for the sole purpose of saddling the guarantors with millions of dollars more in potential liability. Union Bank attempts to justify this by stating it was merely "standing on its rights." While Union Bank's active involvement with the management and sale of the Wellington Property and its other assets (for example its fraudulent/deceptive dealings re the Wellington insurance claim against ACOA to justify a General Receiver) clearly belies this "only standing on rights" argument, the more important factor is that Union Bank cannot "stand on its rights" if in doing so it is acting capriciously, unreasonably and maliciously. That is not how "rights" work. Clearly Union Bank's deception and bad faith here is not simply "standing on its rights." It is assault with intent to harm.

F. In Their Defense Appellants Are Entitled to Assert Exceptions to the Application of the *D'Oench* Doctrine and 12 U.S.C 1823(e)

In Appellants Opening Brief Appellants cited various exceptions to barring evidence to be provided at trial regarding Appellants defenses and counterclaims, based on the *D'Oench* Doctrine and its statutory counterpart 12 U.S.C. 1823(e). Included among these are claims involving fraud, deceit or bad faith by the lender, the Diligent Party/Alternate Records exception, and potential inapplicability of *D'Oench*/1823 to the \$17.7 million increase in the Wellington loan. Union Bank conveniently ignores that Appellants contentions involving agreements and understandings with Frontier Bank are in fact supported in writing for example the Previs “mini-perm” application and the bank’s letter to Donovan Construction (CP 132, 263, 267,269).

As Respondent acknowledges, because the *D'Oench* doctrine and its statutory counterpart are so unfair and discredited, a lender must have specific FDIC consent to utilize same. Appellants question, and continue to do so, the validity of Union Bank’s consent here, particularly in light of FDIC Regulation 5000 (cited in Appellants Opening Brief) that the *D'Oench* doctrine was formulated only for the purpose of protecting the FDIC from unrecorded schemes designed to “mislead banking authorities.” That is clearly not the case here. The “mini-perm” was Frontier Bank’s idea, and was specifically promised to the guarantors.

Appellants seek not to “mislead” but to let the truth come out. It is the guarantors who were misled, by Frontier Bank.

However, resolution of this issue by this Court portends far greater potential harm than just this case and these Appellants. As is documented in Appellants Opening Brief and a myriad of law review and scholarly articles and caselaw in other jurisdictions, the 73 year old *D’Oench Doctrine* is highly discredited and unjust, violates the basic tenants of our legal system and visits the sins of banks that go out of business due to bad business practices or unscrupulous behavior upon innocent borrowers and, if Union Bank has its way, on guarantors. As a result, *D’Oench* has been discarded or highly limited by numerous jurisdictions. To our knowledge, Washington courts have not weighed in on whether we will support or reject *D’Oench*. This is an opportunity for that, and this decision will have far ranging implications as a result. So, the question is, will this Court uphold this manifestly unjust “doctrine” or reject it? Appellants urge rejection, not only on their behalf but on the basis that doing so is the right thing to do. Why should banks, among all businesses, be given a license to lie, cheat and steal? They shouldn’t. Why should banks be allowed to enforce obligations owed to a failed bank, but not be required to perform basic obligations of the failed bank to its affected borrowers and guarantors? They shouldn’t.

G. Appellants Defenses on Guaranties Are Not Barred by Washington's Credit Agreement Statute of Frauds. FIRREA is Irrelevant to Appellants' Rights to Defend on Guaranty Enforcement.

Union Bank is saying here that Appellants cannot be allowed to show fraud by Frontier Bank, which Appellants believe they can establish, because they are barred from doing so by the Credit Agreement Statute of Frauds. However, the law is clear that a Statute of Frauds cannot be used to, in effect, perpetrate or allow a fraud. As stated in *Greaves v. Med. Imaging Sys. Inc.*, 71 Wn. App. 894, 898, 862 P.2d 643 (1993), rev'd on other grounds, 124 Wn.2d 389, 879 P.2d 276 (1994). *The underlying purpose of a statute of frauds is to prevent fraud, not be a means of perpetuating one.* The *Greaves* decision goes on to say:

The purpose and intent of the statute of frauds is to prevent fraud, and not to aid in its perpetration, and courts, particularly the courts of equity, will, so far as possible, refuse to allow it to be used as a shield to protect fraud, or an instrument ... [by which] to perpetrate a fraud ... [.] On the contrary, the courts will endeavor in every proper way to prevent the use of the statute of frauds as an *instrument of fraud or as a shield for a dishonest and unscrupulous person ... Greaves* at p. 396 (emphasis added)

Even if arguably applicable, a statute of frauds must be strictly construed by courts and not applied to cases that are not squarely within its terms. *Sherwood B. Korssjoen, Inc. v. Heiman*, 52 Wn. App. 843, 852, 765 P.2d 301 (1988). In this matter, Appellants include in their defense credible allegations of fraud, deceit, misconduct and bad faith involving Frontier Bank and Union Bank and its Receiver. Appellants should not be

deprived of this defense by allowing the application of a Statute of Frauds in a context not intended by the drafters thereof.

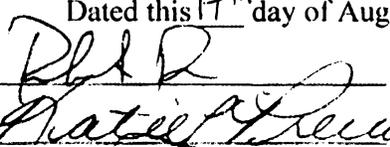
As to FIRREA, Union Bank contends that the Trial Court does not have jurisdiction over Appellants counterclaims because of Appellants failure to exhaust remedies under FIRREA, and thus “properly dismissed them.” This is erroneous on several levels. First, the Trial Court granted Summary Judgment to Union Bank and dismissed counterclaims based on an improper application of Summary Judgment standards. There is absolutely no mention of FIRREA in the Trial Court’s Order, which merely stated, erroneously, that “there are no genuine issues as to material facts.” Secondly, this is not a claim by Appellants against Frontier Bank, it is a defense on enforcement of a Frontier Bank guaranty, being asserted by Union Bank. Two completely different contexts. Union Bank cannot use the dead body of Frontier Bank to deprive Appellants of a full defense, and the “exhaustion” of remedies under FIRREA do not apply here. Lastly, Union Bank repeatedly harps on the number of notices provided to the guarantors here as to rights, legal consequences and the like, but no notice of any kind was provided to Appellants (whose claims were well known to both Frontier Bank and Union Bank) as to FIRREA and its (according to Union Bank) cataclysmic consequences. A lenders right of

enforcement is built on fair notice, and none was given here. It is inconsistent and unfair for Union Bank to parade its goodness by reference to numerous notices, yet to set a trap re FIRREA, without notice.

VI. CONCLUSION

Union Bank has failed to establish that there are no genuine issues of fact underlying this case. In reality, there are many contested material facts, supported by credible evidence and personal experience. Appellants are not barred by the Credit Agreement Statute of Frauds or by FIRREA. Union Bank's claim that bad conduct or fraud by the lender only counts when the loan documents are signed is not supported by the specific language of the Equity Investors decision and in any event is logically and morally preposterous. The Trial Court rid itself of this complex and difficult case without proper foundation or analysis. The Summary Judgment in favor of Union Bank should be overturned by this Court, and the matter remanded for trial on the merits.

Dated this 17th day of August, 2015



Randy and Katie Previs, *Pro Se*



John T. Blanchard, WSBA #5049

340 N. 133rd Street
Seattle, WA 98133

22819 Woodway Park Road
Woodway, Washington 98020

Appendix 1

Material Issues of Fact in Dispute Previously Cited by Appellants

(Appendix A to Appellants Opening Brief)

- Whether and to what extent the Bank's decisions and those of its appointed receiver impaired the collateral.
- Whether and to what extent the banks acted with deceit, in bad faith or with fraud toward the defendants, which is an exception to the general rule that unconditional guaranties are enforceable. The exception is found in every case cited by Union Bank.
- Whether the Receiver acted as the agent for Union Bank, and his obvious animus towards the Previs family can be attributed to Union Bank.
- Whether Frontier Bank acted with the intent of fraud, deceit, and/or bad faith in compelling the defendants to contribute nearly \$2 million of their own funds with the written assurance that the loan would be modified, only to renege on that promise.
- Union Bank has claimed it had no obligation to protect the collateral. It in fact took control of the Wellington Hills Business Park and botched control of the project entirely. Issues of material fact exist with respect to the errors and omissions of Union Bank and the ramifications to the value of the collateral and to the damages incurred by the defendants.
- Whether the FDIC authorized Union Bank to assert the *D'Oench* doctrine. Also at issue is what facts were presented by Union Bank to the FDIC with respect to the Wellington Hills Park, LLC receivership and subsequent bankruptcy proceedings.

- Whether reliance on the *D'Oench* doctrine and its statutory extensions (which the bank mistakenly believes completely exonerates them of liability) is supportable, given the fraud, deceit and bad faith exercised by Frontier Bank.
- Whether the writings in the files of Frontier Bank and those authored by Mr. Blanchard and Mr. Previs confirming the agreement to refinance the loan if the defendants contributed their own funds to the project are sufficient to avoid assertion of the *D'Oench* doctrine.
- Whether the conduct of Frontier Bank's successor, Union Bank, makes the improper actions and conduct of Frontier Bank attributable to Union Bank.
- Whether the writings in the files of Frontier Bank and those authored by Mr. Blanchard and Mr. Previs confirming the agreement to refinance the loan if the Defendants contributed their own funds to the project (most of which went directly to Frontier Bank) are sufficient to avoid assertion of the *D'Oench* doctrine and its statutory extensions.
- Whether Union Bank acted deceitfully or in bad faith in discontinuing payment to the law firm handling the Wellington/ACOA lawsuit to create a crisis upon which it justified conversion of its Custodial Receiver to General Receiver.
- Whether Union Bank acted deceitfully or in bad faith in settling the Wellington/ACOA lawsuit, which was commenced when Randy Previs and John Blanchard managed the Wellington Project, for a fraction of its value without advising or involving either of them in the matter.
- Whether Union Bank acted in bad faith in non-renewing the Frontier Bank Airplane Loan to John Blanchard, the full proceeds of which were contributed into the Wellington Project.
- Whether the Receiver, and/or Union Bank, acted fraudulently, deceitfully or in bad faith in approving the bona fides and financial capability of Veritas Development, and then rejecting

Veritas despite the fact that the Veritas bid for the Wellington Property was over a million dollars higher than the bid accepted by Union Bank.

- Whether Union Bank acted fraudulently, deceitfully or in bad faith in discontinuing payments to the law firm representing Wellington in the ACOA matter to artificially create a crisis which Union Bank then argued justified conversion of its Custodial Receiver to General Receiver. Ultimately this conversion significantly increased the potential liability of the Defendants due to the inept and improper judgments and decisions of the Receiver.
- Whether Union Bank, and/or its agents, dispensed or allowed the dispensation of untrue and inflammatory information to potential bidders for the Wellington Project, including that the cost of repair of the Project's wall would cost \$10 million, when the true cost was only \$250,000. This drove down the selling price of Project by at least \$5 million, and increased the Defendants' potential liability by the same amount.
- Whether Union Bank allowed the sale of the Wellington Property for less than \$10 million, when its own (undisclosed) appraisal found the true value to be about three times that amount.
- Whether Union Bank acted improperly and in bad faith to increase the potential liability of the Defendants in allowing Onward/OIBP, the potential purchaser of the Wellington Property, to renegotiate and substantially decrease the rent of Primus International (the Wellington tenant) without any notice to or involvement of the Defendants. This action immediately reduced the pending offer of Onward/OIBP for the Wellington property by 28%.
- Whether Union Bank and/or Frontier Bank reneged on promises to the Defendants to consider in good faith joint venture or other proposals initiated by the Defendants at the urging of such banks to acquire or restructure the Wellington Project.
- Whether Union Bank acted fraudulently, deceitfully or bad

faith in not advising Veritas Development that despite being designated as “backup bidder” to Onward/OIBP, that the Veritas bid was in fact substantially higher than the Onward/OIBP bid.

- Whether Union Bank acted in bad faith in proposing to the Defendants that the proceeds of the ACOA lawsuit be shared in accordance with which party funded the expense thereof, and then reneging on this proposal when the Defendants offered to fund 100% of such costs.
- Whether Union Bank acted in bad faith to allow the sale of the Wellington Property to Onward/OIBP at a substantially lower price than that offered by Veritas Development.
- Whether Union Bank acted irrationally, unreasonably and/or in bad faith with respect to “joint venture” and other offers made by various parties for the Wellington Project, and in its dealings with the Defendants, due to expected remuneration to Union Bank by the FDIC in its commitments to Union Bank in getting Union Bank to take over the failed Frontier Bank

Additional input on the issue of material facts in dispute, significant evidence of at least negligence, deceit and bad faith in Union Bank’s administering the Wellington Hills Park loan, was set forth in Section V of the Appellants Motion for Reconsideration as follows:

- Union Bank rejected a proposal by Trilateral Partners in February 2011 to refinance the Wellington Project in the amount of \$58 million, which would have paid off the Frontier/Wellington loan in full;
- Union Bank refused to even entertain an offer from Gramor Development to pay \$20 - \$25 million for a “joint venture” acquisition of the Wellington Property, along with the Defendants.
- Union Bank rejected an offer from Orbis Financial for \$24.5

million in 2011 and sold the property to Onward/OIBP for under \$10 million;

- Union Bank rejected five offers between \$12 million and \$15 million in the summer of 2011, and ultimately sold the property to Onward/OIBP for under \$10 million.
- In the initial auction, Union Bank rejected an offer from Veritas Development, Inc. that was \$5 million higher than Onward/OIBP.
- After Onward/OIBP was awarded the project, it missed numerous deadlines to close on the financing for the deal, yet the second place bidder, Veritas Development, was never offered the opportunity to close on the project.
- Veritas Development, Inc. is owned 100% by Ashley Previs, the daughter of defendant Randy Previs. The bank's illogical conduct seems motivated by animus against the Previs family, which is a clear indication of bad faith. At a minimum, issues of fact exist with respect to the mismanagement of the loan.
- Union Bank's Receiver acted with obvious personal animus against defendant Randy and Katie Previs, by, among other things, distributing negative articles about the Previs family to persons absolutely unrelated to the receivership.

Appendix 2 to Appellants Reply Brief

Page 920 of *Equity Investors Decision*

were authorized to protect the bank. Additionally, the expenditure of the funds into the project would necessarily operate to enhance the security by adding to its value or reducing the claims against it. We find unacceptable the new guarantors' argument that the bank's retention of an additional sum of about \$70,000, or about 3 percent of the project's total cost, constituted a condition, either precedent or subsequent, to guarantors' obligation to make good on their guaranty.

[7] There was no claim here of fraud, misrepresentation, deceit or overreaching. At the time when the new guarantors bound themselves to the guaranty agreement, the project was well along. \$1,386,659.21 of the loan funds contracted to be disbursed had already been advanced and projections already showed cost overruns. Whatever duty the plaintiff bank may have owed to the defendant new guarantors with reference to the method, manner and time of disbursing the remainder, we cannot find in this record that it breached that duty and, thus, we must conclude as a matter of law that the bank was without negligence toward the guarantor in making the postguaranty advances.

Outside the contract, the major duty which a construction lender owes to any other party is the duty of good faith; though a loan may be inefficiently managed and with adverse consequences, neither inferior lienors nor absolute guarantors have any recourse against the lender unless it is alleged and proved that the lender acted in bad faith. *Brooklyn Trust Co. v. Fairfield Gardens, Inc.*, 260 N.Y. 16, 182 N.E. 231 (1932). The decisions of the trial court releasing the new guarantors from the agreement are reversed.

Next, we must decide whether the court retained jurisdiction over the estate of Walter F. Stepnitz. Following his death, the estate was opened for probate in Minnesota and defendant Donald S. Julen was there appointed as administrator. Did the Superior Court for the State of Washington lose jurisdiction because of the death of new guarantor Walter Stepnitz? During his lifetime, Mr. Stepnitz had

CERTIFICATE OF SERVICE

I, JAEL MEJIA, certify under penalty of perjury that, on August 19, 2015, I caused the foregoing Appellants Reply to Respondent's Brief to be served on the persons identified below via hand delivery to:

Joseph Shickich
Riddell Williams PS
1001 4th Ave Ste 4500
Seattle W A 98154-1065

Dated this 19th day of August, 2015.



JAEL MEJIA

*COURT OF APPEALS
STATE OF WASHINGTON
2015 AUG 19 PM 12:20*