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SUPREME COURT NO. 102254-9
COURT OF APPEALS NO. 83994-2-I

SUPREME COURT
OF THE STATE OF WASHINGTON

AL and PAULETTE JANSEN,

Appellants,

v.

PEOPLES BANK,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

Daniel A. Brown, WSBA #22028
Bradley H. Bartlett, WSBA #54680
Williams Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Tel: (206) 628-6600
Fax: (206) 628-6611
dbrown@williamskastner.com
bbartlett@williamskastner.com

Counsel for Respondent

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I. INTRODUCTION

This was and is a straightforward contract interpretation case that both the trial court and the Court of Appeals correctly interpreted while granting and affirming summary judgment in favor of Peoples Bank ("Bank"). Plaintiffs Al and Paulette Jansen ("Plaintiffs") obtained financing from the Bank to build a home pursuant to the parties' Construction Loan Agreement ("CLA"). As a condition of the CLA, Plaintiffs needed to obtain the Bank's approval before making any material or substantial changes to the construction plans, such as changing contractors in this case. After Plaintiffs terminated their contractor without notice to the Bank, the Bank sent the Jansens a letter declaring them to be in default as provided under the CLA.

In response to this letter, Plaintiffs ultimately found take-out financing, then later sued the Bank, alleging breach of contract, breach of the duty of good faith and fair dealing, and violations of the Consumer Protection Act. Plaintiffs also sued the Bank's lawyer for tortious interference with the parties'

contract. The trial court dismissed all Plaintiffs' claims in consecutive summary judgment motions. Plaintiffs appealed, and the Court of Appeals affirmed the trial court. Plaintiffs now seek discretionary review of the Court of Appeals decision in their Amended Petition for Review ("Petition").

Plaintiffs' Petition fails to identify a valid basis upon which this Court may grant review under RAP 13.4(b), and instead largely rehashes the same frivolous arguments made in their briefs below. Plaintiffs continue to intimate that the Bank is somehow the unspoken guarantor of all performance issues between a homeowner and their contractor relative to construction simply because the Bank was willing to lend money to Plaintiffs in the first instance. Unfortunately for Plaintiffs, the CLA's own terms that they agreed to remain fatal to their claims.

The fact remains that Plaintiffs terminated their contractor without the Bank's approval in violation of the CLA so their son, apparently a contractor, could finish building their home instead. Unilaterally terminating a contractor without Bank approval was

unequivocally a “substantial and material change to the conditions of the loan.” After providing Plaintiffs a fair opportunity to remedy this issue and the default, Plaintiffs instead refinanced the existing loan with another lender, saving substantial money on interest moving forward, and then served the Bank and its lawyer with a lawsuit.

While Plaintiffs continue to try and twist provisions in the loan agreement that grant the Bank the *right* to do things but do not impose *any obligation* for the Bank to do them, they still fail to identify any legal authority to support this assertion. Ultimately, Plaintiffs fail to identify a single Supreme Court or published Court of Appeals decision that conflicts with the decision of the Court of Appeals affirming the trial court’s decision to grant summary judgment as to all Plaintiffs’ claims.

Accordingly, the Petition should be denied and the Bank awarded further attorney fees in accordance with the contractual provisions governing the same.

II. COUNTER-ISSUES PRESENTED FOR REVIEW

1. Have Plaintiffs identified a decision of the Supreme Court that conflicts with the decision of the Court of Appeals for this case? **No.**

2. Have Plaintiffs identified a published decision of the Court of Appeals that conflicts with the decision of the Court of Appeals for this case? **No.**

3. Have Plaintiffs articulated any other basis upon which this Court may grant review under RAP 13.4(b)? **No.**

4. Should this Court award the Bank fees and costs incurred in answering Plaintiffs' amended discretionary review petition? **Yes.**

III. COUNTER-STATEMENT OF THE CASE

A. Relevant Facts.

The facts section of the unpublished opinion of the Court of Appeals for this matter, *Jansen v. People's Bank*, No. 83994-2-I, 2023 WL 4077427, at *1-2 (Wash. Ct. App. June 20, 2023), accurately summarizes the relevant facts of this matter in and is

incorporated herein by reference. Moreover, Plaintiffs do not contest the accuracy of the appellate court's factual recitation in their Petition. *See* Petition at 1-26.

B. Procedural History.

On June 10, 2021, Plaintiffs sued the Bank and its lawyer, Craig Cammock in Whatcom County Superior Court. *See* CP 7-18. Against the Bank, Plaintiffs alleged causes of action for breach of contract, breach of the duty of good faith and fair dealing, and a CPA violation. CP 13-16. Against Mr. Cammock, Plaintiffs alleged tortious interference with a contract. CP 7-18.

The Bank promptly moved to dismiss under CR 12(b)(6), but the trial court denied its motion. CP 26-39, 136-37. However, in doing so, the trial court noted that it had "significant question[s] as to some of the breaches alleged in the Complaint, particularly those subsequent to the termination of the contractor" and "invite[d] these issues to be brought back before [it] on a motion for summary [judgment]." *Jansen*, 2023 WL 4077427, at *2. The Bank subsequently moved for summary

judgment after completing initial discovery, and the trial court granted the Bank's motion on April 2, 2022 (having previously dismissed the claims against the Bank's lawyer on an earlier dispositive motion). *Id.*; *see also* CP 247-68, 450-51. Plaintiffs appealed. CP 452.

Shortly after Plaintiffs filed their notice of appeal in superior court, the Bank petitioned the court for attorney's fees. The trial court "granted the Bank's petition for fees and awarded it $92,142.50." *Jansen*, 2023 WL 4077427, at *2. On June 20, 2023, the Court of Appeals issued an unpublished opinion affirming the trial court's ruling granting the Bank's motion for summary judgment and dismissing the case. *See Jansen*, 2023 WL 4077427, at *1-9. The Court of Appeals also granted the Bank's request for attorney's fees on appeal. *Jansen*, 2023 WL 4077427, at *7. ("[B]ecause the Bank does provide a legal and contractual basis for fees, we award them fees.").

On July 7, Plaintiffs filed a motion to reconsider the Court of Appeals decision, which was denied on July 11. On August 8,

Plaintiffs incorrectly filed their petition for review in the Court of Appeals. On August 9, this Court sent a letter advising that the petition for review was forwarded from the Court of Appeals and directing Plaintiffs to file an amended petition correcting their errors in failing to include a certificate of compliance and a copy of the Court of Appeals decision. Plaintiffs filed an amended petition for review in the correct court on August 9.

IV. ARGUMENT

A. Plaintiffs Have Failed to Establish That The Decision of The Court of Appeals is in Conflict With a Decision of The Supreme Court Pursuant to RAP 13.4(b)(1).

1. The Decision of the Court of Appeals is Not in Conflict with *Conway Constr. Co. v. City of Puyallup*.

The argument section of Plaintiffs' Petition opens with the claim that the appellate court's "conclusion that [Plaintiffs'] breach of contract claim fails because the bank determines construction progress ignores prior holdings of this Court." Petition at 13. To support this claim, Plaintiffs rely on *Conway Constr. Co. v. City of Puyallup*, 197 Wn.2d 825, 490 P.3d 221

(2021). It is important to note that *Conway* was never discussed or cited in Plaintiffs' opening brief or reply brief before the Court of Appeals and was only mentioned for the first time in Plaintiffs' failed motion for reconsideration. *See* Br. of Appellant at iii-v; Reply Br. of Appellant at iii; Pls.' Mot. For Recons. at ii.

Plaintiffs begin their *Conway* argument with the claim that "only a jury should decide" whether the Bank acted in accordance with the implied duty of good faith and fair dealing. Petition at 14. Plaintiffs further develop this claim when they cite *Conway* in support of their assertion that the facts of this case "should be decided by a jury, not on summary judgment." *See* Petition at 17. However, *Conway* does not provide any authority for this assertion, as the appellate litigation in *Conway* took place "[a]fter a lengthy trial" and not after a motion for summary judgment. *Conway*, 197 Wn.2d at 829. Rather, *Conway* has nothing to do with what does and does not constitute a genuine issue of material fact in the context of a summary judgment

motion involving an alleged breach of the duty of good faith and fair dealing. *See generally*, *id.* at 828-40.

Next, Plaintiffs claim that *Conway* is "directly on point" in "employing the implied duty of good faith and fair dealing in a contract termination setting." Petition at 15. Again, *Conway* is easily distinguishable from this case because it applies the duty of good faith in relation to the performance of a specific contractual term, and not a "free-floating duty of good faith unattached to the underlying legal document." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356 (1991). This Court has repeatedly and expressly rejected the concept of a free-floating duty of good faith in *Badgett*. *Id.* at 570; *see also Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 112-13, 323 P.3d 1036 (2014) ("the implied covenant of good faith and fair dealing . . . does not impose a free-floating obligation of good faith on the parties").

As the Court of Appeals correctly observed in its *Jansen* decision, "[i]n every contract, there is 'an implied duty of good

faith and fair dealing' that 'obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.'" *Jansen*, 2023 WL 4077427, at *7 (quoting *Badgett*, 116 Wn.2d at 568). However, "this duty does not impose a 'free-floating' obligation of good faith on the parties." *Id.* (citing *Rekhter*, 180 Wn.2d at 112-13).

Instead, the duty of good faith and fair dealing arises "only in connection with terms agreed to by the parties." *Badgett*, 116 Wn.2d at 569. "'It requires only that the parties perform in good faith the obligations imposed by their agreement.'" *Pierce v. Bill & Melinda Gates Foundation*, 15 Wn. App. 2d 419, 433, 475 P.3d 1011 (2020) (quoting *Badgett*, 116 Wn.2d at 569). Therefore, "there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." *Badgett*, 116 Wn.2d at 570.

Conway pertained to the wrongful termination of a contractor retained by the City of Puyallup to complete a road construction project. *Conway*, 197 Wn.2d at 828-29. The

relevant contract in *Conway* allowed termination based on defective work only if the contractor "neglects or refuses to correct rejected [w]ork." *Id.* at 833. The contract also allowed for termination where "the remedy does not take place to [the City's] satisfaction." *Id.*

When the City informed its general contractor, Conway Construction Company, of nine alleged contract violations in a notice of suspension and breach of contract, Conway "took steps to remedy the breaches." *Id.* at 829. Additionally, Conway "asked to meet and discuss the City's concerns." *Id.* When Conway requested a meeting, "[t]he City's engineer refused, stating that 'the required actions seem to be clear, therefore I don't see the need for a meeting.'" *Id.* Based on the foregoing, the appellate court determined that "substantial evidence supports the trial court's conclusion that Conway was not neglecting or refusing to correct the defects" because "Conway took steps to remedy the defaulting conditions, reached out to the

City to determine whether these efforts were sufficient, and repeatedly requested a meeting." *Id.* at 833.

With respect to good faith, the appellate court in *Conway* concluded that "the City's withholding of 'satisfaction' with the proposed remedy was unreasonable" because the City's refusal to discuss further details raised by Conway implicated concerns of bad faith on the City's part. *Id.* at 834. The court also noted that the City engineer's loss of confidence in Conway's ability to satisfactorily complete the road construction project "is not grounds for termination" under the contract. *Id.* Most importantly, the good faith issue in *Conway* existed "only in relation to [the] performance of a specific contract term"—e.g., the term allowing for termination *only* where "the remedy does not take place to [the City's] satisfaction." *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 234, 370 P.3d 25 (2016); *Conway*, 197 Wn.2d at 833.

Applied here, notwithstanding this Court's holding in *Badgett*, which was heavily relied upon in the portion of the

Jansen decision pertaining to the duty of good faith,[1] Plaintiffs still persist in seeking to "expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract—a free-floating duty of good faith unattached to the underlying legal document." *Badgett*, 116 Wn.2d 563; *see also* Petition at 13-20. Plaintiffs make no attempt to distinguish *Badgett*, do not contend that the decision of the Court of Appeals conflicts with *Badgett*, and do not even mention or cite *Badgett* in their Petition at all. *See* Petition at ii, 13-20.

Rather, Plaintiffs discuss *Conway* entirely ignorant of the fact that *Conway* applied the duty good faith <u>only in relation to the performance of a specific contractual term</u>. *See* Petition at 14-18. In doing so, Plaintiffs tacitly persist in reiterating their failed argument that the Bank was bound by a free-floating duty of good faith unattached to the CLA, which the Court of Appeals

[1] *See* Jansen, 2023 WL 4077427, at *7.

correctly rejected in *Jansen*, citing *Badgett* as its main supporting authority. *Jansen*, 2023 WL 4077427, at *7-8.

The facts of *Conway* are also highly distinguishable from this case. As noted above, when Conway was given a notice of suspension and breach of contract, the contractor "took steps to remedy the breaches" and "asked to meet and discuss the City's concerns." *Conway*, 197 Wn.2d at 829. In response, the City refused to meet with Conway to discuss the City's concerns and instead terminated the contract due to a loss of "confidence" in Conway. *Id.* at 834.

Here, Plaintiffs unilaterally "terminated their contractor without notice to the Bank" in violation of the CLA and received a letter that not only informed them of their default but graciously provided Plaintiffs the opportunity to "promptly and adequately address this substantial change of circumstance in compliance with the provisions of the Loan Documents." *Jansen*, 2023 WL 4077427, at *1-2. Instead of attempting to fix their default or set up a meeting with the Bank to discuss their concerns with the

original contractor as Conway did, Plaintiffs did nothing to remedy their default and instead, refinanced the loan with another lender, and thereafter "sued the bank and its lawyer." *Id.*, at *2. In this respect, the Bank's actions are more analogous to those taken by Conway as opposed to the City in *Conway*.

Considering the foregoing, the decision of the Court of Appeals is not in conflict with this Court's decision in *Conway*. Therefore, discretionary review is not warranted pursuant to RAP 13.4(b)(1) based on the *Conway* decision.

2. Plaintiffs' Argument That Division One Improperly Concluded That The Bank Did Not Breach Section 3(c) of The CLA Fails to Establish a Direct Conflict With a Supreme Court Decision.

While the second portion of Plaintiffs' Petition presents a general argument that "the language of Section 3(c) [in the CLA] is ambiguous," it fails to demonstrate any kind of conflict with a decision from this Court. This claim in general fails for several independently sufficient reasons.

First, Plaintiffs never contended that Section 3(c) was ambiguous in their opening brief and did not discuss Section 3(c) at all in their reply brief. *See* Br. of Appellant at 28-29; Reply Br. of Appellant at 1-19. An issue is too late to warrant consideration when it is raised and argued for the first time in a *reply brief*, much less a motion for reconsideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Therefore, Plaintiffs cannot rely on this new argument in their Petition as a basis for this Court to grant review.

Second, Plaintiffs never assigned error to the trial court in failing to deem Section 3(c) of the CLA ambiguous. Br. of Appellant at 2; *see also Archer v. Marysville Sch. Dist.*, 195 Wn. App. 1014, 2016 WL 3982925, at *8 (2016) (unpublished; *see* GR 14.1) (deeming a general "assignment of error to the trial court's summary judgment dismissal" as insufficient to preserve new issues raised for the first time in a reply brief).

Third, and most egregiously, Plaintiffs never argued that Section 3(c) was ambiguous to the trial court to preserve this

claim for review on appeal in accordance with RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.")[2] and RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."). *See* CP 334-50.

Instead, Plaintiffs first claimed that Section 3(c) was ambiguous in their motion for reconsideration. *See* Pls.' Mot. For Recons. at 17. It therefore makes sense why the Court of Appeals never discussed whether Section 3(c) is ambiguous—as the issue was never raised either with the trial court or in Plaintiffs' opening or reply briefs. *Jansen*, 2023 WL 4077427, at *4.

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[2] The preservation rule articulated in RAP 2.5(a) "reflects a policy of encouraging the efficient use of judicial resources." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). It does so by discouraging litigants from "remain[ing] silent as to claimed error during trial and later, for the first time, urg[ing] objections thereto on appeal." *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967).

Fourth, while Plaintiffs cite a string of Supreme Court and Court of Appeals decisions regarding general contractual provisions, Plaintiffs fail to explain how any of these cases directly conflict with the decision of the Court of Appeals. *See* Petition at 16-17. As noted above, the Court of Appeals never addressed whether Section 3(c) was ambiguous because the issue was never presented to either the trial court or to the Court of Appeals in Plaintiffs' opening and reply briefs.

Last, Section 3(c) is not at all ambiguous. Plaintiffs' attempt to construe an ambiguity ignores the longstanding principle that appellate courts avoid interpreting contracts in a manner that would lead to absurd results, *see Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 213, 905 P.2d 379 (1995), or that ambiguity will not be read into a contract where it can be reasonably avoided, *see Green River Valley Found., Inc. v. Foster*, 78 Wn.2d 245, 249, 473 P.2d 844 (1970). Additionally, appellate courts harmonize different contractual provisions with the purpose of interpreting contracts "in a manner that gives

effect to all of the contract's provisions." *Healy v. Seattle Rugby, LLC*, 15 Wn. App. 2d 539, 545, 476 P.3d 583 (2020).

Applied here, it is entirely absurd to interpret Section 3(c) to hold the Bank responsible for independently verifying that the work was proceeding as planned, as Plaintiffs attempt to do. *See* Petition at 21-25. Specifically, this is because Section 3(h) provided expressly that: "You [the borrower] understand and agree that you have full and sole responsibility to make sure that the Work is fully completed and complies with the Plans and Specifications." CP 357. Section 3(h) also provides that "[n]othing Lender does (including inspecting the Work or making an advance) will be a representation or warranty by Lender that the Work complies with ... this Loan Agreement." CP 357; *see also Jansen*, 2023 WL 4077427, at *4. Considered holistically along with Section 3(h), the only reasonable interpretation of Section 3(c) is that it did not require the Bank to independently verify that the work was proceeding as planned.

B. Plaintiffs Have Failed to Establish That The Decision of The Court of Appeals is in Conflict With a Published Decision of The Court of Appeals Pursuant to RAP 13.4(b)(2).

While Plaintiffs only expressly assert that review should be granted pursuant to RAP 13.4(b)(1), Plaintiffs also cite several published Court of Appeals decisions as grounds for why they claim this Court should grant their motion for discretionary review. That said, Plaintiffs fail to establish how *any* of these decisions conflict with the decision of the Court of Appeals in *Jansen*. The only published Court of Appeals case Plaintiffs discuss at some length in their Petition is S*ilverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 677 P.2d 773 (1984).

Indeed, while Plaintiffs reiterate their contention that the Bank's actions "mirror those of the lender's actions" in *Silverdale*, they fail to explain how *Silverdale* conflicts with the decision of the Court of Appeals for this case. Petition at 18-19. Instead, Plaintiffs make the threadbare and conclusory assertion that "the Court of Appeals erroneously distinguished [*Silverdale*]

from this case because it found no breach of contract," without ever identifying an actual conflict between the decision in this case and *Silverdale*. Petition at 18-19.

Upon closer review, it is clear that the Court of Appeals correctly distinguished *Silverdale*. Indeed, *Silverdale* does not stand for the proposition that a party violates the duty of good faith and fair dealing when it stands on its rights under the contract and requires performance under the contract according to its terms. *See Silverdale*, 36 Wn. App. at 764-74. Rather, as stated above, this Court has held precisely the opposite. *See Badgett*, 116 Wn.2d at 570 ("As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.").

In *Silverdale*, the court determined that the lender breached specific terms of the contract *in addition to* the duty of good faith and fair dealing. *Silverdale*, 36 Wn. App. at 767. Specifically, the lender in Silverdale initially promised "it would

fund [the contractor's] draw requests up to $500,000 while final plans were being established," and then went back on the promise by "refus[ing] to fund [the contractor's] draw requests … until Silverdale submitted final plans, a final cost breakdown, and a $1,200,000 deposit." *Id.*

The Bank, on the other hand, never breached the contract or made a specific promise and then went back on the promise. Instead, the Bank stood on its rights under the CLA after Plaintiffs unilaterally "terminated their contractor without notice to the Bank" in violation of the CLA. *Jansen*, 2023 WL 4077427, at *1-2. In response, the Bank gave Plaintiffs the opportunity to remedy their material breach of the CLA. *Id.* Instead of working out the situation with the Bank in good faith to "fulfill the primary objective of the CLA," Plaintiffs did nothing other than ultimately sue the Bank and its lawyer. *Id.* at *2; Petition at 21. Considering the foregoing, *Silverdale* does not conflict with the decision of the Court of Appeals in *Jansen*.

C. The Petition for Review Fails to Make Any Showing Under RAP 13.4(b)(3) or (4).

As noted above, Plaintiffs' Petition only cites RAP 13.4(b)(1) as grounds for discretionary review. Plaintiffs do not make any argument that this matter involves a significant question of law under the Constitution of the State of Washington or of the United States, or that this matter involves an issue of substantial public interest. *See* Petition at 13-26. Notwithstanding the foregoing, the unprecedented expansion of what "good faith" would mean if this Court were to adopt Plaintiff's interpretation would be in the public's *disinterest*, as it would invite causes of action for breaches of "good faith" against parties who simply choose to stand on their rights to require performance of a contract according to its terms. *Badgett*, 116 Wn.2d at 570.

As discussed in Section IV.A and IV.B, *supra*, Plaintiffs fail to make any kind of showing that the decision of the Court of Appeals conflicts with a decision of the Supreme Court or a published decision of the Court of Appeals. Considering that

Plaintiffs make no other argument for why this Court should accept their Petition, discretionary review must be denied in this case pursuant to RAP 13.4(b).

V. ATTORNEY'S FEES

RAP 18.1(a) allows an appellate court to award attorney's fees when "applicable law grants to a party the right to recover reasonable attorney's fees or expenses on review." RCW 4.84.330 expressly provides that fees are awarded to the prevailing party in an action on a contract with a fee provision. Accordingly, "[a] contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal." *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App. 814, 818, 142 P.3d 206 (2006) (citing *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989)).

Applied here, both the trial court and the Court of Appeals correctly awarded the Bank fees associated with responding to Plaintiffs' lawsuit and subsequent appeal based on Section 6(b) of the CLA. *Jansen*, 2023 WL 4077427, at *2, *7; *see also* CP

360-61 (portion of CLA stating that the borrower agrees "to promptly pay to Lender all attorney's fees, costs and other expenses paid or incurred by Lender in enforcing or exercising Lender's Rights and Remedies under this Loan Agreement"). Considering the foregoing, should the Bank prevail against Plaintiffs' Petition here, reasonable fees and costs should be awarded to the Bank pursuant to Section 6(b) of the CLA, RCW 4.84.330, and RAP 18.1(a). CP 360-61.

Additionally, RAP 18.9(a) authorizes the appellate court, on its own initiative or on motion of a party, to order a party or counsel who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." RAP 18.9(a). "Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party." *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (2008) (citing *Rhinehart v. Seattle Times, Inc.*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990)).

In determining whether an appeal is frivolous, five considerations guide the reviewing appellate court: (1) a civil appellant has a right to appeal, (2) any doubts about whether an appeal is frivolous are resolved in the appellant's favor, (3) the record is considered as a whole, (4) an unsuccessful appeal is not necessarily frivolous, and (5) an appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that no reasonable possibility of reversal exists. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 220, 304 P.3d 914 (2013); *see also Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007) ("An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.").

Applied here, this Court should additionally award attorney fees and costs due to the frivolous nature of Plaintiffs' appeal and discretionary review petition. Plaintiffs' Petition fails

to raise issues upon which reasonable minds could differ and is so devoid of merit that no reasonable possibility of reversal exists. For example, Plaintiffs entirely fail to even attempt to distinguish key cases cited in the *Jansen* decision as to good faith such as the *Badgett* case, and instead persist in their frivolous insistence that a "free-floating" obligation of good faith exists via citing *Conway*, which correctly applies the duty of good faith in reference to a *specific contractual term*. *See* Petition at 14; *Badgett*, 116 Wn.2d at 569; *Jansen*, 2023 WL 4077427, at *7.

Plaintiffs also promulgate a new argument raised for the first time in their motion for reconsideration that Section 3(c) of the CLA was ambiguous in violation of RAP 2.5(a) and RAP 9.12. Given that this argument is wholly meritless, was never preserved for appellate review at the trial court level, was never argued in Plaintiffs' opening or reply briefs, and was not the subject of an assignment of error, it is unequivocally frivolous in nature. *See* analysis in Section A.2, *supra*.

VI. <u>CONCLUSION</u>

For the foregoing reasons, the Bank respectfully requests that this Court deny the Jansens' Petition and award the Bank its fees and costs on appeal under the parties' express contract, RCW 4.84.330, and/or because of the frivolous nature of Plaintiffs' appeal and subsequent discretionary review petition.

This document contains **4,803** words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 7th day of September, 2023.

/s/ Daniel A. Brown
Daniel A. Brown, WSBA #22028
Bradley H. Bartlett, WSBA #54680
Williams Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Tel: (206) 628-6600
Fax: (206) 628-6611
dbrown@williamskastner.com
bbartlett@williamskastner.com

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on September 7, 2023, I caused a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following counsel of record:

Counsel for Appellants: Sam E. Baker, Jr. Nicole E. Wolfe SMITH CURRIE & HANCOCK LLP 600 University Street, Suite 1800 Seattle, WA 98101 206-623-3427 sbaker@smithcurrie.com newolfe@smithcurrie.com	SENT VIA: ☑ Court's Efiling Portal

DATED this 7th day of September, 2023, at Seattle, Washington.

/s/ Janis Hager, Legal Assistant
On behalf of Daniel A. Brown and Bradley H. Bartlett

WILLIAMS KASTNER

September 07, 2023 - 12:46 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,254-9
Appellate Court Case Title:	Al and Paulette Jansen v. People's Bank, et al.
Superior Court Case Number:	21-2-00595-3

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