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DIVISION II
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STATE OF WASHINGTON
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NO. 43043-6-II

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

RICHARD APPELATE and KAREN APPELATE,
husband and wife,

Appellants / Cross-Respondents,

vs.

**WASHINGTON FEDERAL SAVINGS, a Savings and Loan
subsidiary of WASHINGTON FEDERAL, INC., a Washington
Corporation; KITSAP BANK, a Washington Financial Institution;
HARBOR HOME DESIGN, INC., a Washington Corporation;
CHARLES BUCHER and JANE DOE BUCHER, husband and wife,
and the marital community comprised thereof; and OHIO
CASUALTY INSURANCE CO.,**

Respondents / Cross-Appellants.

**REPLY BRIEF OF RESPONDENT / CROSS-APPELLANT
WASHINGTON FEDERAL SAVINGS**

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I. INTRODUCTION

In their opposition brief, appellants do not deny that Washington Federal, Inc. (“WFI”) was the “prevailing party” at trial. They do not deny their claims against WFI at trial were based in large part on their belief that WFI failed to monitor construction, inspect construction and disburse funds under the loan agreement. Similarly, appellants do not dispute that WFI’s argument at trial focused on the provisions contained in sections 3(c) and 13 of the loan agreement, that expressly stated WFI could not be liable for claims related to quality of construction, project inspections or disbursement of funds to the builder. CP 3814; 3817.

Rather, in an attempt to avoid their contractual obligation to pay the prevailing party, WFI, its attorneys’ fees, appellants ask this Court to ignore the plain language of the loan agreement and focus on the procedural posture of the parties, instead of interpreting the clear and unambiguous language of the loan agreement itself, which plainly does not require WFI to initiate a lawsuit to recover its attorneys’ fees.

The reason for appellants’ strategy is simple: when applied here, the attorneys’ fees clause of the loan agreement and the law clearly and unambiguously require appellants to pay WFI’s attorneys’ fees as the prevailing party. In winning at trial, there is no doubt that WFI

“enforced” the provisions found in sections 3(c) and 13, both of which directly spoke to the claims asserted by appellants and provided WFI a complete defense to appellants’ largely baseless allegations. *See e.g.*, CP 2699 and VRP 10/31/11 at pp. 462-466.

Appellants’ claims for damages against WFI were certainly barred by these provisions. Despite this, appellants elected to proceed to trial, essentially asking the jury to ignore these portions of the agreement. Why they chose to proceed with their unjustifiable claims against WFI is a mystery. Not surprisingly, the jury correctly applied the terms of the loan agreement and found in favor of WFI. Appellants were well aware of the contractual consequences of asserting their baseless claims against WFI—specifically, payment of WFI’s attorneys’ fees—but chose to go forward anyway at a great expense to WFI.

To avoid the consequences of their decision to proceed with a baseless lawsuit, appellants ask this Court to ignore the unambiguous language of the attorneys’ fees provision. In addition to the loan agreement, WFI also is entitled to recoup its attorneys’ fees pursuant to RCW 4.84.330, which states that attorneys’ fees provisions, like the one here, “shall” be enforced. This is not a situation where the Court has an option: WFI was the prevailing party. WFI won by “enforcing” the

provisions of the loan agreement that exonerated WFI from liability for the very construction-related issues that appellants alleged at trial. It is therefore entitled to its reasonable attorneys' fees, the amount of which were unchallenged below.

The trial court misinterpreted the attorneys' fees provision of the loan agreement and RCW 4.84.330 when it denied WFI's motion for its attorneys' fees. WFI respectfully asks this Court to reverse the trial court's order denying its motion for attorneys' fees, and remand with a directive that the trial court enter an order awarding WFI its reasonable attorneys' fees and costs associated with litigating this matter.

A. THE APPLICABLE STANDARD OF REVIEW IS DE NOVO

Contrary to appellants' assertions, the standard of review for the trial court's decision is not complicated and is undoubtedly *de novo*. Whether a contract authorizes an award of attorney fees is a question of law, not an exercise of judicial discretion. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126–27, 857 P.2d 1053 (1993).

Moreover, the language in the loan agreement is patently unambiguous. The attorneys' fees provision of the loan agreement, particularly the operative phrase at issue, "If the lender seeks the services

of an attorney . . . to enforce any provisions of this Agreement . . .” is clear, concise and easily understood.

Words in a contract should be given their ordinary meaning. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 275, 883 P.2d 1387 (1994), *review denied*, 127 Wn.2d 1003, 898 P.2d 308 (1995). A provision, however, is not ambiguous merely because the parties suggest opposing meanings, *Shafer*, 76 Wn. App. at 275, 883 P.2d 1387, and “[A]mbiguity will not be read into a contract where it can be reasonably avoided.” *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983). Additionally, an unambiguous term will not be construed against the drafter. *Forest Marketing Enterprises, Inc. v. State Department of Natural Resources*, 125 Wn. App. 126, 132-133, 104 P.3d 40 (2005). If the language of a contract is clear and unambiguous, the court must enforce the contract as written, and it may not modify it or create ambiguity where none exists. *Lehrer v. State, Dept. of Social and Health Services*, 101 Wn. App. 509, 515, 5 P.3d 722 (2000).

As appellants point out, the Washington Supreme Court has defined the term “enforce” or “enforcement” as “‘the act or process of enforcing’ . . . ‘to put or keep in force’ . . . ‘to give force to.’” *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 10, 802 P.2d 784 (1991) citing *Random House Dictionary* 644 (2d ed. 1987); *Webster's Third New International Dictionary* 751 (1986). Reply Brief of Appellants Applegate at 20.

Applying the above definitions, the words of the attorneys’ fees provision in the loan agreement are plainly unambiguous and easily applied to the current matter. The issue before the Court is not whether WFI *defended* against appellants’ claims, but rather whether it “enforced” the contractual provisions that clearly insulated WFI from liability for appellants’ allegations at trial. WFI undoubtedly did so under the plain meaning of the words used in the loan agreement. The standard of review is therefore *de novo*.

Appellants also misstate the nature of WFI’s appeal regarding the trial court’s refusal to award fees under RCW 4.84.330. Reply Brief of Appellants Applegate at 19, fn. 2. In moving to recoup its fees, WFI relied both on the loan agreement itself as well as RCW 4.84.330, which

requires a court to award attorneys' fees to the prevailing party in an action on a contract with such a provision. CP 3821.

The trial court improperly refused to follow the statutory mandate, however, and in doing so effectively ruled that RCW 4.84.330 did not apply. WFI challenges the trial court's misinterpretation and misapplication of RCW 4.84.330 and the standard of review for this is also *de novo*.

B. WFI ENFORCED THE LOAN AGREEMENT AT TRIAL AND ITS PROCEDURAL POSTURE AS A DEFENDANT IS IRRELEVANT

Giving force to, or enforcing the provisions of the loan agreement in sections 3(c) and 13 was exactly what WFI did at trial. VRP 10/31/11 at 462-466. Appellants do not dispute that WFI relied on these provisions. Rather than acknowledging WFI's enforcement of the loan agreement and awarding fees to WFI as the prevailing party, the trial court improperly focused on its procedural position as a defendant in denying the motion. Whether WFI sought to enforce these provisions as a plaintiff or as a defendant is irrelevant to the analysis, however, and the trial court's decision must be reversed.

The attorneys' fees clause states it applies to the enforcement of "any provisions" of the loan agreement. CP 3774. There is no dispute that sections 3(c) and 13 undoubtedly qualify as "provisions" of the loan

agreement. Thus, the trial court's interpretation that the attorneys' fees clause does not apply because of WFI's status as a defendant does not follow the terms of the agreement. Furthermore, the trial court's interpretation improperly renders the fees provision meaningless any time WFI defends an action on the loan agreement. This creates an absurd result considering that the purpose of many provisions in the loan agreement, including sections 3(c) and 13, specifically set forth what WFI will *not* be responsible for when administering the loan. Working in the negative, provisions like these can only be "enforced" in defense to claims that WFI breached the loan agreement by failing to take some course of action it was purportedly required to do under the contract. Because the attorneys' fees clause applies to enforcement of "any provisions" in the loan agreement, WFI's costs for enforcing sections 3(c) and 13 are subject to this clause. CP 3770-3771; 3773-3774.

In signing the contract, appellants expressly agreed that WFI was not responsible for the quality of construction or misapplication of loan proceeds by the builder after appellants approved the disbursement of funds. CP 3770-3771, ¶ 3(c). Despite the clear terms of the agreement, appellants inexplicably filed suit alleging breach of the contract for WFI's purported failure to undertake these very duties. In defending

against these baseless claims, WFI *enforced* sections 3(c) and 13 of the loan agreement, the terms of which were agreed upon by the appellants.

It was not as if the loan agreement was silent on these issues. Sections 3(c) and 13 expressly and directly rebutted appellants' claims that WFI breached the loan agreement by failing to inspect the project and verify the application of loan disbursements for the project. This was the central focus of WFI's defense at trial. CP 3770-3771; 3773; CP 2673; 10/31/11 VRP 462-466. Thus, WFI "enforced" the provisions of the loan agreement at trial and it is entitled to its attorneys' fees.

The trial court's ruling also leads to an interpretation that conflicts with the plain language of the loan agreement. Nothing in the loan agreement requires WFI to initiate legal proceedings to recover its fees and the trial court erroneously added such a requirement when denying WFI's motion.

Whether WFI is enforcing provisions as a plaintiff or defendant is wholly beside the point. Since contractual provisions apply only to the parties thereto, it is unreasonable to conclude that WFI, as defendant to an action for breach of the loan agreement, cannot respond by enforcing other applicable provisions against the plaintiff. Such an interpretation would directly contradict the loan agreement's proviso that WFI shall

recover its attorneys' fees incurred to enforce "*any* provisions of this Agreement." CP 3774 at ¶ 25(c) (emphasis added). It is hard to imagine a scenario where WFI would ever initiate legal proceedings to disclaim its liability for claims that it failed to adequately inspect construction or guarantee the quality of work being performed. Under the trial court's interpretation, however, this is the only way WFI could "enforce" these provisions for purposes of recovering attorneys' fees. This is an illogical result and an incorrect interpretation of the terms of the loan agreement that must be overturned.

The trial court erroneously denied WFI's motion for its litigation expenses and attorneys' fees. By denying the motion, the trial court effectively ignored the parties' agreement that attorneys' fees shall be awarded for enforcement of "*any* provisions" in the agreement. CP 3774 at ¶ 25(c) (emphasis added). This decision must be reversed.

C. WFI IS ENTITLED TO ITS FEES UNDER RCW 4.84.330

The appellants' interpretation of the attorneys' fees provision directly violates RCW 4.84.330, which states:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, 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.

Appellants incongruously argue that if they win, they are entitled to their fees under this statute, but contend that the statute does not apply to WFI, even though there is no dispute WFI won on all issues asserted against it by appellants at trial. This interpretation ignores the clear intent of RCW 4.84.330 to create a reciprocal obligation to pay attorneys' fees of a prevailing party, even if an attorneys' fees provision is drafted in favor of only one party.

The plain language of the loan agreement makes no distinction between initiating or defending claims arising from it for purposes of awarding attorneys' fees. At trial, WFI asked the jury to enforce the sections of the loan agreement that clearly and unequivocally insulated it from the appellants' claims. The jury agreed and found in favor of WFI. WFI is entitled to recoup its attorneys' fees and costs under RCW 4.84.330.

II. CONCLUSION

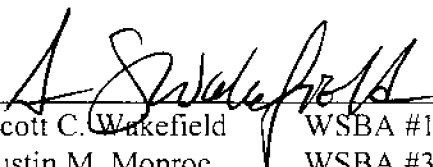
In their complaint, appellants sought to enforce various contractual provisions which they believed WFI breached. *See, e.g.*, CP 7. As a result of the alleged breach, appellants asked for their attorneys' fees pursuant to the loan agreement, acknowledging that the fees provision was in play. CP 11. WFI responded to appellants' allegations by asking the jury to enforce the actual terms of the loan agreement, which spoke directly to appellants' claims against it. The jury agreed with WFI and found in its favor, making appellants liable for WFI's attorneys' fees. Without basis, the trial court improperly ruled that as a defendant, WFI was not enforcing the agreed upon terms of the loan agreement, but only "defending an action." CP 3837-3838.

The trial court erroneously focused on the procedural posture of WFI as a defendant and failed to engage in the proper inquiry, which was not whether WFI *defended* the action, but rather whether it *enforced* contractual provisions at trial, which it clearly did. The trial court's denial of WFI's motion for attorneys' fees must be overturned. WFI respectfully requests that this Court reverse the trial court and remand

with an order directing the superior court to enter an order awarding WFI its reasonable attorneys' fees and litigation expenses, which appellants have never challenged as being unreasonable.

DATED this 5th day of April, 2013.

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and the marital community
comprised thereof; and OHIO
CASUALTY INSURANCE CO.,

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Cross-Appellants.

NO. 43043-6-II

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of
Washington that the following is true and correct:

CERTIFIED

I am employed by the law firm of: Todd & Wakefield.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted the document(s) entitled: REPLY BRIEF OF RESPONDENT / CROSS-APPELLANT WASHINGTON FEDERAL SAVINGS; and this CERTIFICATE OF SERVICE on the following person(s):

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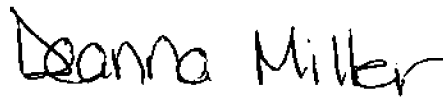
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