

No. 43043-6-II

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COURT OF APPEALS, DIVISION II,  
FOR THE STATE OF WASHINGTON

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RICHARD APPEGATE and KAREN APPEGATE, husband and wife,

Appellants/Cross-Respondents,

v.

WASHINGTON FEDERAL, INC. d/b/a WASHINGTON FEDERAL SAVINGS, a Washington Corporation and Federal Savings and Loan; 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; OHIO CASUALTY INSURANCE CO., Bond No. 3620699,

Respondents/Cross-Appellants.

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SUPPLEMENTAL BRIEF OF APPELLANTS/CROSS-RESPONDENTS  
RICHARD AND KAREN APPEGATE

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A. INTRODUCTION

Richard and Karen Applegates' negligence claims against their progressive construction lender were dismissed on summary judgment. The trial court cited the independent duty doctrine. Our Supreme Court recently clarified that doctrine and found that it did not apply in a situation strikingly similar to the Applegates.' Their contract, fraud, and forgery claims were tried, but that verdict does not foreclose the Applegates' tort claims. No issue decided by the jury is identical to the tort issues such that collateral estoppel is implicated.

B. SUPPLEMENTAL ISSUES DESIGNATED BY THE COURT

(1) What effect, if any, does *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 312 P. 3d 620 (2013)<sup>1</sup> have on whether the trial court erred in applying the independent duty doctrine to summarily dismiss the Applegates' negligence claims?

(2) Assume arguendo that the trial court's summary dismissal of the Applegates' negligence and breach of fiduciary duty claims is reversed, but that the jury verdict against the Applegates is upheld in its entirety. What effect, if any, would the upheld jury verdict have on the Applegates' claims for: (a) Negligence, and (b) Breach of fiduciary duty?

C. ARGUMENT

(1) The Supreme Court's Ruling in *Donatelli* Affirms that the Independent Duty Doctrine Was Improperly Applied Here

The Applegates have argued that the trial court incorrectly applied the independent duty doctrine and dismissed their claims for negligence

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<sup>1</sup> This Court should be aware that a motion for reconsideration is currently pending in *Donatelli*.

and breach of fiduciary duty. Brief of Appellants/Cross-Respondents at 23-26. They argued that the Applegates produced sufficient evidence that WFS made oral assurances to them that created a tort duty independent of their contractual relationship. *Id.* They also argued that under Supreme Court precedent limiting the doctrine, some professionals in a position of tremendous control and power have the responsibility to internalize losses for their own negligence. *Id.*

As this Court indicated in its supplemental briefing order, the Applegates' arguments regarding the independent duty doctrine were reinforced by the Supreme Court in *Donatelli*. In that case, the plaintiffs hired an engineering firm to help them develop their real property into two short plats. *Donatelli*, 312 P.3d at 621. When negligent actions led to financial losses, the plaintiffs sued the firm. *Id.* at 622. The plaintiff alleged that the firm had assumed a managerial role over the construction project, and made assurances to them that it would properly oversee other subcontractors on the project. *Id.* at 625. The Court noted that there was "evidence that D.R. Strong performed additional work not contemplated by the written agreement." *Id.*

Declining to find the independent duty doctrine precluded a negligence claim, the *Donatelli* Court clarified that when disputed oral assurances are made regarding the duties owed, the proper course is a trial

to resolve the disputed factual issues. *Id.* The Court explained that professionals can sometimes assume tort duties in addition to their contractual duties by their affirmative conduct or oral representations. *Id.* at 624. In such cases, the nature and scope of the duties must be established by the finder of fact *before* it decides whether an extracontractual tort duty exists. *Id.* at 625. “To determine whether a duty arises *independently* of the contract, we must first know what duties have been assumed by the parties *within* the contract.” *Id.* at 624. The Court also observed that contract interpretation is normally a question of fact, *Id.*, citing *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 654, 266 P.3d 229 (2011).

This case is virtually identical to *Donatelli*. The Applegates presented evidence that WFS assured them it would oversee their construction project – at least to the extent that it would ensure the work represented to have been completed was actually done, and done correctly. CP 289, 298-99, 397. They presented evidence that WFS orally assumed a special fiduciary duty to protect the money that belonged to the Applegates, but remained in WFS’ possession and was under its control. CP 299, 389. The Applegates relied on WFS, who held out its agents as professionals and experts in providing progressive construction loans, to

undertake its professional responsibilities with reasonable care. CP 388. WFS breached these duties, which led to the Applegates' damages.

Under *Donatelli*, WFS should not have been allowed to simply point to its contract and rely on the independent duty doctrine to avoid trial on the Applegates' tort claims. The Applegates' negligence and breach of fiduciary duty claims should be tried to a jury.

(2) Collateral Estoppel Does Not Foreclose a Trial on the Applegates' Dismissed Tort Claims Because the Issues are Not Identical, the Factual Context Is Distinct, and the Application of Estoppel Would Be Unjust

In their briefing, the Applegates argued that a number of significant errors by the trial court, including the exclusion of witnesses and a misleading verdict form, necessitate a new trial on all of the Applegates' claims. Br. of Appellants at 26-30. Nevertheless, this Court in its supplemental briefing order asked the parties to assume *arguendo* that the verdict would be upheld in its entirety, and then asked the parties to provide argument regarding any effect on the Applegates' dismissed tort claims.

The verdict as to WFS and Bucher does not preclude a trial on the Applegates' wrongly dismissed tort claims. That verdict only forbids a trial on the dismissed claims if the doctrine of collateral estoppel applies.

*Brown v. Scott Paper Worldwide Co.*, 98 Wn. App. 349, 363, 989 P.2d 1187, 1194 (1999) *aff'd*, 143 Wn.2d 349, 20 P.3d 921 (2001).

The doctrine of collateral estoppel is a means to prevent relitigation of issues already actually litigated by the parties and decided by a competent tribunal. Collateral estoppel promotes judicial economy and prevents inconvenience or harassment of parties. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). The elements of collateral estoppel are well-known:

(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

*Southcenter Joint Venture v. National Democratic Policy Comm'n*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989) (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987)).

The party invoking collateral estoppel has the burden of proving the facts needed to sustain it. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 714, 899 P.2d 6, 10 (1995). Thus WFS has the duty of demonstrating that the doctrine should be applied here.

Regarding the first element of collateral estoppel, the issues of whether WFS breached its fiduciary duty and/or breached its duty of care

to the Applegates are not identical to whether WFS breached its contract. A breach of contract is actionable if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Larson v. Union Investment & Loan Co.*, 168 Wash. 5, 10 P.2d 557 (1932); *Alpine Industries, Inc. v. Gohl*, 30 Wn. App. 750, 637 P.2d 998 (1981), *review denied*, 97 Wn.2d 1013 (1982). Negligence is actionable if public policy imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984).

Although the contract and tort claims each require proof of duty, breach, causation and damage, they are not identical unless the “ultimate facts” underlying the claims involved are also identical. *McDaniels v. Carlson*, 108 Wn.2d 299, 305, 738 P.2d 254 (1987). The facts underlying the tort and contract claims here are different. Neither the fiduciary duty to oversee the dispersal of another’s funds, nor the duty to reasonable care in administering a progressive construction loan, is identical to the duties undertaken in WFS’ contract.

Duty in negligence context is to act as a reasonably prudent person would act in similar circumstances. *Mathis v. Ammons*, 84 Wn. App. 411, 416, 928 P.2d 431 (1996). The duty of care as a fiduciary is unique, and goes beyond the minimum effort required under a contract.

*Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 401, 663 P.2d 104, 109 (1983).

For example, a trust document may empower a trustee to sell property, and therefore selling the property fulfills its contractual duty. However, that trustee breaches its fiduciary duty if it fails to keep the trust beneficiary informed, or fails to sell that property at the highest possible price. *Id.*

The jury decided that WFS did not “breach its contract to provide a construction loan” to the Applegates. This verdict does not reflect a judgment by the jury regarding any extracontractual tort duties WFS undertook. At trial, the factual distinction between the contractual claims and the tort claims was manifest, as was the prejudice to the Applegates of having those claims excluded. For example, Karen Applegate tried to explain that WFS’ loan professional, Joni Cross, had promised to oversee Bucher’s work:

Q. [Y]ou understand that Ms. Cross is not Mr. Bucher, right?

A. She told us she knew as much as he did about building.

...

Q. Okay. So she wasn’t somebody who was actually building the house is my point. She's not a building tradesperson?

A. But she told us that she was that good. She told us she knew more than the county inspectors.

Q. Okay. Well, but you read the loan agreement that we put up on the board here several times, haven't you?

A. Yes.



- Q. You remember the provision in the loan agreement that says Washington Federal is not responsible for quality of construction and it's not responsible for compliance with state or local building codes, right?
- A. Your website says, rely on our construction expertise.
- Q. I know our website says that, ma'am. I'm asking you about the loan document.

VRP 10/26/2011 at 160. Because the tort claims were excluded, the Applegates were precluded from arguing to the jury that Cross' representations created a duty of care, fiduciary or otherwise, beyond what was written in the contract.

The jury's verdict in favor of HHD/Bucher on breach of contract also does not involve identical issues with the tort claims against WFS. First, the parties are not the same. Second, HHD/Bucher's duties under the contract are not identical with WFS' duties to ensure the Applegates' funds and real property were protected from waste and squander.

The Supreme Court has established that it is unfair to apply collateral estoppel when the context of each claim is distinct. *McDaniels*, 108 Wn.2d at 305. The factual context of the contract claim against HHD/Bucher was essentially that HHD/Bucher contracted to build a house, and they built a house. The factual context of the Applegates' negligence and fiduciary duty claims was that it was WFS' responsibility was to spend the Applegates' money prudently, standing in the place of

the Applegates themselves. They had a duty to oversee that the project was proceeding according to the Applegates' wishes, to communicate with them and with Bucher, and to withhold payment if the project was not proceeding accordingly. It did not do that, and the house was not built as the Applegates wished, necessitating significant additional repair and investment. That issue has not been resolved by the jury.

Nor does the verdict in favor of Bucher on fraud and forgery, even if upheld, estop the Applegates from bringing their tort claims against WFS. The fact that the evidence may not have shown Bucher committed all nine elements of fraud, or forged documents, is not identical to whether WFS undertook to ensure that the construction funds were not disbursed until the work was done in conformance with the Applegates' wishes. It nevertheless negligently disbursed the Applegates' funds without verifying the work. Disbursing another's funds cavalierly does not equate with fraud and forgery, but it can constitute negligence and breach of fiduciary duty.

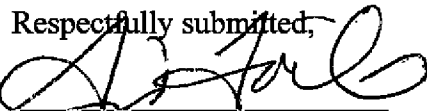
Finally, under element (4) of collateral estoppel, application of the doctrine here would work an injustice on the Applegates. They are not requesting a second bite at the apple, or trying to reframe previously adjudicated claims to harass WFS. The trial here was focused solely on the terms of the written contracts, and not on the oral representations and

whether those representations created a duty of care by WFS to prudently and reasonably manage the Applegates' funds. It is impossible to say that the trial would not have been factually and contextually quite different if the jury was allowed to consider whether WFS was careful and reasonable in making decisions on the Applegates' behalf, rather than simply whether the Applegates received a loan and received a house.

D. CONCLUSION

This Court should reverse the trial court's summary judgment order and remand the Applegates' tort claims for trial, even if this Court concludes that the flawed jury verdict should be upheld.

DATED this 14th day of January, 2014.

Respectfully submitted,  


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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the Supplemental Brief of Appellants/Cross-Respondents Richard and Karen Applegate in Court of Appeals Cause No. 43043-6-II to the following:

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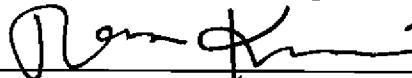
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 14, 2014, at Tukwila, Washington.

  
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