

NO. 66019-5-I

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

---

DALE E. ALSAGER and BETTY J.L. ALSAGER

Appellants,

v.

WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION,  
SUCCESSOR BY MERGER TO FIRST MUTUAL BANK,

Respondent.

2011 JAN -3 PM 10:56  
*[Handwritten signature]*

---

RESPONDENT, WASHINGTON FEDERAL SAVINGS AND LOAN  
ASSOCIATION'S BRIEF

---

APPEAL FROM KING COUNTY SUPERIOR COURT

The Honorable Brian D. Gain

---

Annette E. Cook, WSBA #31450  
Bishop, White, Marshall & Weibel, P.S.  
720 Olive Way, Suite 1201  
Seattle, WA 98101  
(206) 622-5306, Ext. 5917

## TABLE OF CONTENTS

I. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
II. RESTATEMENT OF THE CASE.....	1
III. SUMMARY OF ARGUMENT .....	5
IV. ARGUMENT.....	6
A. STANDARD OF REVIEW .....	6
B. THE ALSAGERS BREACHED THEIR PROMISE TO REPAY THEIR LOAN TO WASHINGTON FEDERAL.....	7
C. THE ALSAGERS ARE PRESUMED TO HAVE READ AND UNDERSTOOD THE DOCUMENTS THAT THEY SIGNED .....	9
D. THE ALSAGERS RATIFIED THEIR JANUARY 2007 LOAN.....	10
E. THE ALSAGERS FAIL TO ALLEGE SUFFICIENT FACTS IN SUPPORT OF A CLAIM FOR FRAUD.....	13
1. The Lender Did Not Make Any False Statements to the Alsagers.....	13
2. The Alsagers Have No Right to Rely Upon Any Alleged Misrepresentations .....	14
3. The Alsagers' Fraud Claims are Barred by the Economic Loss Rule .....	16
F. THE ALSAGERS HAVE FAILED TO SHOW THE EXISTENCE OF A SPECIAL RELATIONSHIP WITH WASHINGTON FEDERAL THAT IS NECESSARY TO ESTABLISHING A FIDUCIARY RELATIONSHIP.....	18

G. THE ALSAGERS' CLAIMS UNDER TILA AND RESPA FAIL BECAUSE THEY RECEIVED AND SIGNED THE REQUIRED DISCLOSURES FOR THEIR ADJUSTABLE RATE LOAN.....	20
1. TILA Only Applies to a Borrower's "Principal Dwelling" .....	20
2. Even if TILA and RESPA Were Applicable, The Alsagers Were Provided With The Proper Disclosures .....	21
3. The Alsagers Do Not Have a Right to Rescind Under TILA .....	22
4. The Alsagers' TILA Claims are Barred By The One Year Statute of Limitations.....	27
H. THERE IS NO VIOLATION OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.....	28
I. THE ALSAGERS FAIL TO ALLEGE SUFFICIENT FACTS IN SUPPORT OF THEIR CONSUMER PROTECTION ACT CLAIM.....	28
V. CONCLUSION.....	31

## Table of Authorities

### Cases

Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007) .....	16, 17
Am. Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wash.2d 217, 797 P.2d 477 (1990).....	18
Anhold v. Daniels, 94 Wn.2d 40, 614 P.2d 184 (1980).....	29
Bank of Wash. v. Equity Investors, 81 Wn.2d 886, 506 P.2d 20 (1973) .....	9, 10 14
Barrett v. JP Morgan Chase Bank, N.A., 445 F.3d 874 (6th Cir. 2006) .....	23
Betchard-Clayton, Inc. v. King, 41 Wn. App. 887, 707 P.2d 1361, <i>rev. den'd</i> , 104 Wn.2d 1027 (1985).....	28
Cooper v. First Government Mortgage and Investors Corp. 238 F. Supp.2d 50 (D.C. 2002).....	27
Corbit v. J.I. Case Co., 70 Wn.2d 522, 424 P.2d 290 (1967).....	7
Dimmick v. Sprinkel, 59 Wash. 329, 109 Pac. 1018 (1910).....	11
Eastwood v. Horse Harbor Foundation, Inc., 241 P.3d 1256, 1264 (2010) .....	17
Garza v. American Home Mortg., 2009 WL 188604, 4 (E.D. Cal., 2009).....	26
Gross v. City of Lynnwood, 90 Wn.2d 395, 583 P.2d 1197 (1978).....	7
Handy v. Anchor Mortgage Corp., 464 F.3d 760 (7th Cir. 2006) .....	22, 23, 26

Hangman Ridge Training Stable, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986) .....	29, 30
Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985) .....	6
Hoffer v. State, 110 Wn.2d 415, 755 P.2d 781 (1988) .....	13
Hubbard v. Fidelity Federal Bank, 91 F.3d 75, (9 <sup>th</sup> Cir. 1996)....	27
Indoor Billboard, 162 Wn.2d 82, 170 P.3d 10 (2007) .....	30
In re Wepsic, 231 B.R. 768 (S.D.Cal. 1998).....	27
Johnston v. Spokane & I.E.R.R., 104 Wn. 562, 177 P. 810 (1919) .....	9
LaGrone v. Johnson, 534 F.2d 1360 (9th Cir. 1974) .....	26
Life Insurance Co. v. Turnbull, 51 Wn. App. 692, 754 P.2d 1262 (1988) .....	29
Ljepava v. M.S.S.C. Properties, Inc., 511 F.2d 935 (9th Cir.1975) .....	26
Klein v. First Edina Nat'l Bank, 293 Minn. 418, 196 N.W.2d 619 (1972) .....	19
McCly v. Simon, 64 Wash. 574, 117 P. 400 (1911) .....	11
Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 64 P.3d 22 (2003) .....	9
Micro Enhance v. Coopers & Lybrand, 110 Wn. App. 412, 40 P.3d 1200 (2002).....	18
Miller v. U.S. Bank, 72 Wn. App. 416, 865 P.2d 536 (1994).....	18, 28
Mills v Equicredit Corp., 294 F. Supp. 2d 903 (2003).....	23
Mortas v. Korea Ins. Corp., 840 F.2d 1452 (9th Cir. 1988).....	26

Nat'l Bank of Wash. V. Equity Investors, 81 Wn.2d 886, 506 P.2d 209 (1973).....	9
Northwest Independent Forest Mfrs. v. Dept. of Labor & Industries, 78 Wn. App. 707, 899 P.2d 6 (1995) .....	7
Olympic Fish Products v. Lloyd, 93 Wn.2d 596, 611 P.2d 737 (1980).....	7
Perry v. Continental Ins. Co., 178 Wash. 24, 33 P.2d 661 (1934).....	15
Power v. Esarey, 37 Wn.2d 407, 224 P.2d 323 (1950).....	11
Powers v. Sims & Levin, 542 F.2d 1216 (4th Cir. 1976) .....	26
Puget Sound Nat'l Bank v. McMahon, 53 Wn.2d 51, 330 P.2d 559 (1958).....	13, 15
Resolution Trust Corp. v. KPMG Peat Marwick, 844 F. Supp. 432 (N.D.Ill. 1994).....	18
Rudisell v. Fifth Third Bank, 622 F.2d 243 (6th Cir. 1980) .....	26
Rummer v. Throop, 38 Wn.2d 624, 231 P.2d 313 (1951) .....	15
Schweiter v. Hooker, 94 Wash. 642, 162 P. 981 (1917).....	11
Schnall v. AT & T Wireless Services, Inc., 168 Wn2d. 125, 225 P.3d 929, 939 (2010).....	30
Semar v. Platte Valley Federal Sav. & Loan Ass'n., 791 F.2d 699 (9th Cir. 1986).....	22
Shields v. Morgan Fin., Inc., 130 Wn. App. 750, 756-757 (2005) .....	21
Skagit State Bank v. Rasmussen, 109 Wn.2d at 377, 745 P.2d 37 (1987).....	9, 10, 14, 15

Stevens v. Rock Springs National Bank, 497 F.2d 307 (10 <sup>th</sup> Cir. 1974) .....	27
Stiley v. Block, 130 Wn.2d 486, 925 P.2d 194 (1996) .....	13
Stroud v. Beck, 49 Wn. App. 279, 742 P.2d 735 (1987) .....	11
Tokarz v. Frontier Sav. & Loan Ass'n., 33 Wn. App. 456, 656 P.2d 1089 (1983) .....	18, 19
Tremmel v. Safeco Ins. Co., 42 Wn. App. 684, 713 P.2d 155 (1986) .....	21
Unisys Corp. v. Senn, 99 Wn. App. 391, 994 P.2d 244 (2000) ...	6
Wendle v. Farrow, 102 Wn.2d 380, 686 P.2d 480 (1984) .....	7
Williams v. Joslin, 65 Wn.2d 696, 399 P.2d 308 (1965) .....	15
Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982) .....	6
Yamamoto v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003) .....	26

## STATUTES

9 Am. Jur. 389, §46 .....	12
12 C.F.R. § 226(3) .....	22
12 C.F.R. § 226.1 .....	24
12 C.F.R. § 226.23(3) .....	22
12 C.F.R. § 226.23(a)(3) .....	20
12 C.F.R. § 226.23(d) .....	24
12 C.F.R. § 226.23(d)(4) .....	24

12 U.S.C. § 2601 – 2617 .....	21
12 U.S.C. § 2604(c).....	21
15 U.S.C. § 1601 – 1693 .....	21
15 U.S.C. § 1635(a).....	20, 22 23
15 U.S.C. § 1635(b) .....	24, 25
15 U.S.C. § 1635(f).....	20, 23
15 U.S.C § 1638(b)(2).....	21
15 U.S.C § 1640(e).....	27

**SECONDARY AUTHORITY**

Restatement (Second) of Contracts § 235(2)(1981).....	7
Washington Commercial Law Deskbook, Vol. IV, §37.2(3)(b) .....	16
Washington Pattern Instruction 310.01 .....	29

**I.        RESTATEMENT OF ISSUES PERTAINING  
            TO ASSIGNMENTS OF ERROR**

1.        The trial court did not err when it granted Summary Judgment in favor of Washington Federal on August 10, 2010, finding that the allegations of the complaint are true; that no genuine issue exists as to any material fact and that Washington Federal is entitled to Judgment as a matter of law.

2.        The trial court did not err when it denied Appellants' Motion for Reconsideration on August 27, 2010.

**II.       RESTATEMENT OF THE CASE**

In essence, the Alsagers argue that although they are highly educated, were presented and signed complete and accurate loan documents, they cannot be bound by them, even after making payments for more than a year, because they now explain the third party notary who attested to their signatures made representations to them regarding the loan terms that differed for the documents they signed. The trial court correctly held, as a matter of law, that the Alsagers were bound by their loan agreement, and entered judgment in favor of the Plaintiff.

On or about January 11, 2007, in Bellevue, Washington, for a valuable consideration, Dale E. Alsager and Betty J. L. Alsager made and delivered to First Mutual Bank, an Fixed/Adjustable Rate Promissory Note in the principal sum of \$304,000.00, with interest at 8.375% per annum,

scheduled to change to an Adjustable Rate on February 1, 2014, on unpaid balances from that date thereof payable in monthly installments. CP 17.

The heading of the Note reads as follows:

FIXED/ADJUSTABLE RATE NOTE  
(LIBOR One-Year Index (As Published in the *Wall Street Journal*)  
- Rate Cap)

THIS NOTE PROVIDES FOR A CHANGE IN MY FIXED INTEREST RATE TO AN ADJUSTABLE INTEREST RATE. THIS NOTE LIMITS THE AMOUNT MY ADJUSTABLE INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

CP 17 (hereafter the “Adjustable Rate Promissory Note”).

Securing said Note Dale E. Alsager Betty J. L. Alsager, being then the owner of the real property hereinafter described, did on January 11, 2007, make and deliver to First Mutual Bank, a Deed of Trust (hereinafter called "security instrument") encumbering the following described real property in King County, Washington commonly known as: 20275 269<sup>th</sup> Avenue SE, Maple Valley, WA 98038 (hereinafter “property”), which security instrument was recorded in the office of the Recorder of King County, Washington, on January 19, 2007, under Recorder's File No. 20070119000265. CP 21-45.

To obtain their loan, the Alsagers utilized the mortgage broker, First Magnus Financial Corporation, d/b/a Charter Funding. CP 89-95. The Alsagers signed the Initial Disclosures indicating that they had read

the disclosures and understood the contents. *Id.* The disclosures informed the Alsagers that the mortgage broker is not an employee or a representative of First Mutual Bank and that the mortgage broker and the lender are separate and independent parties. *Id.*

The Alsagers also received and signed written disclosures detailing the specific terms of their loan. For example, the Alsagers signed a “HUD 1 Settlement Statement.” This disclosure details how the proceeds from the loan were to be disbursed. CP 72-79. Of the \$304,000.00 loaned to the Alsagers, \$130,807.32 went to pay off existing first mortgage loan with Washington Federal, \$45,000.00 went to pay off existing second mortgage loan with Evans, and the Alsagers received \$117,016.49 in cash. CP 72-79.

The Alsagers also signed a Federal Truth In Lending Disclosure Statement, which like the Note explains that their loan is a fixed interest rate loan for seven years, then adjusts beginning March 1, 2014. CP 65. They also received and signed a “5/1, 7/1, 10/1 LIBOR ARM Disclosure,” that described how and when the payment due under their Adjustable Rate Promissory Note would be adjusted. CP 69.

The Alsagers executed an “Affidavit of Occupancy.” On this document, the Alsagers checked the box that states: “The Property is or will be investment Property.” CP 81. The Affidavit of Occupancy

informed the Alsagers that the lender originated the loan in reliance upon the occupancy status being as represented. *Id.* Further, by signing this document the Alsagers acknowledged that they understood it was a crime to knowingly make a false statement to any federal agency of the United States on this or any similar form, and penalties upon conviction can include a fine and imprisonment pursuant to Title 18 U.S.C Sections 1001, 1010, and 1014. CP 81. The Alsagers testified in their deposition that the property is their residence. CP 112.

The Settlement Agent that handled the closing of the Alsager loan was Stewart Title. CP 72-79. In the Escrow Instructions signed by the Alsagers they represented that the signing agent had not offered them any legal advice:

DALE E. ALSAGER and BETTY J. L. ALSAGER fully understand that Stewart Title is not licensed to practice law and that neither it nor any of its employees are permitted to offer legal advice of any nature, nor have they done so, nor may they advise as to the merits of a transaction or manner in which DALE E. ALSAGER and BETTY J.L. ALSAGER should hold title. CP. 83.

The Alsagers further represented they understood they were accepting and signing a binding loan agreement:

The execution by the undersigned of the Deed of Trust, Note and/or other documents required by the Lender shall constitute approval thereof and acceptance of all terms and conditions therein. CP 83.

After making payments for approximately a year and a half after origination, the Alsagers defaulted on their Note by failing to pay monthly installments of \$2,199.75 due for the month of June 1, 2008, and all subsequent months. CP 12-13.

On August 10, 2010, based upon on the record before this court, the trial court entered an Order granting Washington Federal's Motion for Summary Judgment and Decree of Foreclosure in the amount of \$383,230.49 and interest continues to accrue on said judgment. CP 185-189.

On August 27, 2010, the trial court denied Appellants' Motion for Reconsideration. CP 190.

On September 21, 2010, Appellant filed its Notice of Appeal. CP 182.

### **III. SUMMARY OF ARGUMENT**

The record in this case consists of the pleadings filed by each party and excerpts of the testimony at deposition of the Appellants Dale E. Alsager and Betty J. L. Alsager. Appellants defaulted on her loan with Washington Federal Savings, successor by merger to First Mutual Bank (hereinafter "Washington Federal").

Washington Federal filed a judicial foreclosure action seeking to enforce the terms of the loan agreement and to recover all amounts owed

and was awarded Summary Judgment on against Appellants on August 10, 2010, in the amount of \$383,230.49, plus accruing interest.

The trial court's order granting summary judgment should be affirmed because claims alleging a violation of the Truth in Lending Act, Fraud, Breach of Fiduciary Duty, and Breach of Duty of Good Faith and Fair Dealing are time barred by the applicable statute of limitations or also barred by the doctrines of ratification, waiver and estoppel. Additionally, on the merits, as argued below, there is no factual basis to support the claims for Fraud, Breach of Fiduciary Duty, and Breach of Duty of Good Faith and Fair Dealing, or for the Alleged violation of the Consumer Protection Act.

#### **IV. ARGUMENT**

##### **A. Standard Of Review**

This court should review the trial court's entry of the August 10, 2010, order *de novo*, engaging in the same inquiry as the trial court. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Because the appellate court is in as good a position as the trial court to judge the evidence, the appellate court may substitute its judgment for that of the trial court about the facts as well the application to the law. *Unisys Corp. v. Senn*, 99 Wn. App. 391, 394, 994 P.2d 244 (2000).

Summary judgment will be granted when, after viewing the pleadings, depositions, admissions and affidavits, and all reasonable inferences that may be drawn therefrom, in the light most favorable to the nonmoving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment. *Olympic Fish Products v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980).

A trial court's decision will also be affirmed on appeal if it is sustainable on any theory within the pleadings and proof. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984); *Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978).

**B. The Alsagers Breached Their Promise To Repay Their Loan To Washington Federal**

A contract is a set of promises, that when breached, allows for recovery of damages under the law. *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 531, 424 P.2d 290 (1967). Any failure to perform a contractual duty is a breach. Restatement (Second) of Contracts § 235(2) (1981). 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. *Northwest Independent Forest Mfrs. v. Dept. of Labor & Industries*, 78 Wn.App. 707, 712, 899 P.2d 6 (1995).

On January 11, 2007, the Alsagers made and delivered an Adjustable Rate Promissory Note for the principal sum of \$304,000.00, which imposed a duty upon them to repay the loan to Washington Federal. CP 16-20. To secure the Note, the Alsagers made and delivered to Washington Federal, a Deed of Trust encumbering the property. CP 22-45. At closing, the Alsagers received \$117,000.49 cash from the loan. CP 72.

The Alsagers breached their promise to pay under the Adjustable Rate Promissory Note by failing to pay the monthly installment of \$2,199.75 beginning June 1, 2008, and then all subsequent months thereafter. CP 12-13. The Alsagers testified that they have not made any payments since June 1, 2008. CP 104.

Because of the Alsagers' breach, Washington Federal filed a lawsuit for judicial foreclosure to enforce the terms of the loan agreement and to recover all amounts owed that naturally occurred from the breach. CP 1-10.

On August 10, 2010, the trial court granted Summary Judgment in favor of Washington Federal in the amount of \$383,230.49 and interest continues to accrue on said judgment. CP 185-189. As the Alsagers signed a valid contract, then breached its terms, Washington Federal is entitled to have the trial court's order of summary judgment affirmed.

**C. The Alsagers Are Presumed To Have Read And Understood The Documents That They Signed**

The Alsagers testified in their deposition that they signed the loan documents, but did not review them. CP 99-112. Under Washington law, a party cannot choose to be willfully ignorant of the terms of a contract they sign. By signing the loan agreement and loan disclosures the Alsagers are presumed to have understood and agreed the terms of the loan. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 799, 64 P.3d 22 (2003)(quoting *Nat'l Bank of Wash. V. Equity Investors*, 81 Wn.2d 886, 912-913, 506 P.2d 209 (1973)). It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents. *Id.*

We have always held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein.

*Id.* at 913 (quoting *Johnston v. Spokane & I.E.R.R.*, 104 Wn. 562, 569, 177 P. 810 (1919)). In *Skagit State Bank v. Rasmussen*, a borrower, Robert Hayton, sought to avoid the effect of a Note and deed of trust he voluntarily signed without reading them, contending the legal effect of the documents was misrepresented to him. *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 378, 745 P.2d 37 (1987). The Court held,

Appellant had ample opportunity to examine the contract in as great a detail as he cared, and he failed to do so for his own personal reasons.

Under these circumstances, he cannot be heard to deny that he executed the contract, and he is bound by it.

*Skagit State Bank v. Rasmussen*, 109 Wn.2d at 381 (citing *Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912-913, 506 P.2d 20 (1973)).

Here, the loan agreement signed by the Alsagers clearly provided it was an adjustable rate loan. CP 12-20. All of the loan fees, terms, and conditions were fully disclosed to the Alsagers in writing. CP 16-45; 65; 67; 69-70. There is no dispute that the Alsagers signed the loan disclosures, the note and the deed of trust. Under Washington law they are presumed to have understood them, and they are now bound by the terms of their loan.

**D. The Alsagers' Ratified Their January 2007 Loan**

The Alsagers actions of signing the loan documents, accepting the benefits of the loan, including having their existing debts consolidated and receiving \$117,016.49 in cash, and then making mortgage payments for approximately fifteen months, are clear and manifest indications of their intent of accepting and agreeing to the terms of their loan. CP 104. They cannot now claim that they did not understand nor agree to the terms of their loan to which they signed and accepted.

The equitable doctrines of acquiescence, estoppel, ratification and laches bars the Alsagers' claims relating to the origination of the loan. CP 115; 118-119. In *Stroud v. Beck*, 49 Wn. App. 279, 286, 742 P.2d 735 (1987), an agent acted outside his scope in a purchase and sale transaction.

The court held:

For a principal to be charged with the unauthorized act of its agent by ratification, it must ...accept the benefits of the act or intentionally assume the obligation imposed without inquiry.

*See also* *McCly v. Simon*, 64 Wash. 574, 576-77, 117 P. 400 (1911) (Agent's unauthorized assignment of a mortgage on the principal's property is ratified when the principal takes no action against the agent and instead accepts a deed to other property of the agent as security for the repayment of funds received through the sale of the mortgage); *Dimmick v. Sprinkel*, 59 Wash. 329, 331, 109 Pac. 1018 (1910); *Schweiter v. Hooker*, 94 Wash. 642, 162 P. 981 (1917) (Where a wife accepted and signed a deed that referenced that the real property was subject to a mortgage, though she did not sign the mortgage, mortgage was valid as she ratified it, and her spouse was barred by laches from challenging the mortgage).

In *Power v. Esarey*, 37 Wn.2d 407, 224 P.2d 323 (1950), the court held that a purchaser of real estate, for which the true boundaries have been misrepresented to him by the vendors, ratified the contract and was not entitled to a rescission thereof on the grounds of misrepresentation.

The purchaser became aware of the true boundaries of the property shortly after he purchased it and called the matter to the attention of the vendors, but did not commence his action for more than two years. In the meantime he made numerous payments on the contract and attempts to sell the property. The court cited "Cancellation of Instruments" in 9 Am. Jur. 389, §46, with favor:

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he remains silent, and continues to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred.

Here, the Alsagers allege that the third party notary who attested to their signatures at signing, misrepresented the loan terms to them and did not leave a copy of the loan documents for them to review and reconsider. Brief at 6; 18. However, the Alsagers ratified and acquiesced to the mortgage loan by making payments for nearly a year and a half and in all respects accepted and treated their loan as valid. CP 104. Accordingly, the Alsagers' claims relating to the origination of their loan are barred, and the trial court did not err when it concluded that the Washington Federal was entitled to Summary Judgment and Decree of Foreclosure against the Alsagers. CP 185-189.

**E. The Alsagers Fail To Allege Sufficient Facts In Support Of A Claim For Fraud**

Under Washington law, proof of fraud requires nine distinct elements to be established:

(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the Plaintiff; (6) Plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff

*Hoffer v. State*, 110 Wn.2d 415, 425, 755 P.2d 781 (1988). The Alsagers must prove each and every element by clear, cogent, and convincing evidence. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). The absence of *any* element is fatal to their recovery. *Puget Sound Nat'l Bank v. McMahon*, 53 Wn.2d 51, 54, 330 P.2d 559 (1958).

*1. The Lender Did Not Make Any False Statements to the Alsagers*

The Alsagers fail to identify any specific representations made to them by the lender regarding the loan terms that were false or misleading. The only allegation in their Opening Brief is that "The essential terms and conditions of the loan as set forth in the Alsagers' application were summarily changed by First Mutual Bank without informing the Alsagers." Brief at 14; CP 81.

Again, all terms of the Alsagers' loan were reduced to writing. By signing these documents they are also imputed to have understood the terms and agreed to the terms of the loan. *Skagit State Bank v. Rasmussen*, 109 Wn.2d at 381 (citing *Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912-913, 506 P.2d 20 (1973)). The Alsagers cannot now avoid the effect of their loans for reason of any alleged oral misrepresentations, when they voluntarily signed the documents, and did not rescind them. Any claim they did not read them fully does not constitute a defense.

2. *The Alsagers Have No Right to Rely Upon Any Alleged Misrepresentations*

In their Opening Brief, the Alsagers assert that the loan and security papers were brought to them and handled by a notary for Washington Federal, who affirmatively represented to them that underlying loan was a fixed rate note over the duration of the entire loan. Brief at 6, 15, 18.

Under Washington law, a party does not have a right to rely when the customer signs unambiguous loan documents that are understandable to persons of common intelligence. *Skagit State Bank v. Rasmussen*, 109 Wn.2d at 377, 385, 745 P.2d 37 (1987). In that case the court observed,

[T]his court has stated that reliance upon a fraudulent representation “must be reasonable under the circumstances, that is, a party may not be heard to say that he relied upon a representation when he had no right to do so.” *Williams v. Joslin*, 65

Wn.2d 696, 698, 399 P.2d 308 (1965); see also *Rummer v. Throop*, 38 Wn.2d 624, 633, 231 P.2d 313 (1951). The court has emphasized that “[t]he right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him.” *Williams*, at 698; *Puget Sound Nat'l Bank v. McMahon*, 53 Wn.2d 51, 54, 330 P.2d 559 (1958). The extent to which the representee must verify the truth of the representation, if he or she must do so at all, depends upon the circumstances of the case....

In the case of a loan transaction, the court noted,

It requires little in the way of diligence to ascertain the truth of a representation made as to the legal effect of plain and unambiguous documents which a party has the opportunity to read. A party generally cannot escape the duty of reading the documents (the duty to “investigate” by simply reading the documents in order to know their contents) in the absence of a showing that he or she was unable to read or understand the language used, that there was a special relation of trust and confidence in the representing party, that some artifice was employed to obtain his or her signature, or that something was done to prevent his or her reading the document. See *Perry v. Continental Ins. Co.*, 178 Wash. 24, 28, 33 P.2d 661 (1934).

*Skagit State Bank v. Rasmussen*, 109 Wn.2d at 385.

Mr. Alsager is a well educated, Osteopathic Physician. CP 147. He has negotiated many loans in the past. CP 165-166. The Alsagers testified that they chose not read the loan documents presented to them in this case, and stated that as a normal practice they usually do not read loan documents when they have obtained loans in the past. CP 102-103; 165.

The Alsagers cannot reasonable or justifiably rely upon the alleged oral representations of the Notary in an effort to escape their obligations under the terms of the loan – which they signed and agreed. Consequently, as the terms and conditions of the Alsagers’ loan were unambiguous, they cannot show they were justified in relying on any alleged false representations of a Notary.

3. *The Alsagers’ Fraud Claims are Barred by the Economic Loss Rule*

In *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007)(*en banc*), the Washington Supreme Court, held that the economic loss rule operated to bar a fraud claim, (with the exception of fraud in the inducement), where the plaintiff and defendant were already parties to a contract. In doing so provided a thorough discussion of the rule:

The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief. It is a “device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract. . . . [E]conomic loss describes those damages falling on the contract side of “the line between tort and contract”.’

The rule “prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from contract” because “tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.”

*Alejandre v. Bull*, 159 Wn.2d at 681-82 (citations omitted). *Alejandre v. Bull* involved the sale of real property and the seller's failure to disclose a defective septic system. Because this issue was within the parties' contract, the economic loss rule prevented any recovery in tort. *Id.* at 677, 686.

The Browns argue that the economic loss rule should not bar their tort claims because they had no bargaining power when they entered into their loan contracts with Household. Appellants' Brief, pp. 13-15. The Supreme Court rejected the same argument in *Alejandre* when it quoted another court's holding: "Exact parity in bargaining power is not required." *Alejandre*, 159 Wn.2d at 689 n.5 (citation omitted). Where the parties to a contract vary widely in their "sophistication" or have disparate bargaining power, "then there may be an issue as to enforceability of the contract – a different question from whether tort remedies should be available." *Alejandre*, 159 Wn.2d at 689.

The Washington Supreme Court's recent decision in *Eastwood v. Horse Harbor Foundation, Inc.*, does not appear effect the application of *Alejandre* on these facts as there is no showing of intentionally fraudulent conduct on the part of lender. *Eastwood v. Horse Harbor Foundation, Inc.* 241 P.3d 1256, 1264 (2010) (we do not disturb "[t]he general rule ... that a party to a contract can limit liability for damages resulting from

negligence.” *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 230, 797 P.2d 477 (1990)).

**F. The Alsagers Have Failed To Show The Existence Of A Special Relationship With Washington Federal That Is Necessary To Establishing A Fiduciary Relationship**

In Washington, the general rule is that a lender is *not* a fiduciary of its borrower. Only if a “special relationship” is found to exist does a lender become a fiduciary to a borrower. *Miller v. U.S. Bank*, 72 Wn. App. 416, 426-427, 865 P.2d 536 (1994) “This confidential relationship requires proof that the borrower’s relationship with the lender was such that the borrower could justifiably expect the lender to care for his or her welfare. Important considerations are the borrower’s lack of business expertise, friendship between the parties, the lender’s superior knowledge, and the lender’s assumption of an adviser’s role.” *Washington Commercial Law Deskbook*, Vol. IV, §37.2(3)(b).

Simply placing trust in another is not sufficient to give rise to a fiduciary duty. *Micro Enhance v. Coopers & Lybrand*, 110 Wn. App. 412, 40 P.3d 1200 (2002); *Resolution Trust Corp. v. KPMG Peat Marwick*, 844 F. Supp. 432, 436 (N.D.Ill. 1994) (placing trust and confidence in firm as independent advisor insufficient to create fiduciary duty).

In the case of *Tokarz v. Frontier Sav. & Loan Ass’n.*, 33 Wn. App. 456, 462, 656 P.2d 1089 (1983), the Court did not find any “special

circumstances” giving rise to a quasi-fiduciary relationship between the borrower and the Bank. The Court,

[Found] none of the special circumstances which may impose a fiduciary duty. There is no allegation or evidence that Frontier (1) took on any extra services on behalf of Tokarz other than furnishing the money for construction of a home; (2) received any greater economic benefit from the transaction other than the normal mortgage; (3) exercised extensive control over the construction; or (4) was asked by Tokarz if there were any lien actions pending. The parties did not contractually agree to impose on Frontier an additional duty to disclose financial information regarding the builder, nor does Frontier's conduct impliedly create such a duty. To hold otherwise would impose an awesome burden on lenders to notify all of their customers whenever a contractor had difficulties.

*Tokarz v. Frontier Sav. & Loan Ass'n.*, 33 Wn. App at 462. See *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 422, 196 N.W.2d 619 (1972) (the Court found no special relationship even though the plaintiff had been a bank customer for 20 years, the plaintiff stated they placed their trust in the bank and the plaintiff socialized with bank president's wife).

The Alsagers utilized Charter Funding to originate their loan. CP 89-95. Charter Funding's Initial Disclosures informed the Alsagers that the Mortgage Broker is not an employee or a representative of the Lender and that the Mortgage Broker and the Lender are separate and independent

parties. *Id.* Washington Federal did not perform any extra services for the Alsagers, nor did it have any reason to know the Alsagers were relying on it as a fiduciary.

**G. The Alsagers' Claims Under TILA And RESPA Fail Because they Received And Signed The Required Disclosures For Their Adjustable Rate Loan**

The Alsagers allege that the signing agent failed to provide them with a copy of the loan documents at signing and they did not receive all the required loan disclosures. These claims fail, not only because the Alsagers were provided and signed the necessary disclosures for the loan, which expressly disclosed that the loan was an adjustable rate loan, but the claims are also barred by the statute of limitations.

*1. TILA Only Applies To A Borrower's "Principal Dwelling"*

TILA provides that when a consumer credit transaction is secured by the *principal dwelling* of the obligor, the obligor has the right to rescind the transaction within three business days after the consummation of the transaction or after receiving notice of this rescission right, whichever is later. 15 U.S.C. § 1635(a) (emphasis added). However, even if the obligor does not receive notice, "the right of rescission shall expire three years after the date of the consummation of the transaction. 15 U.S.C. § 1635(f); *see also* 12 C.F.R. § 226.23(a)(3).

Here, the Alsagers executed a “Affidavit of Occupancy” representing that property encumbered by the Deed of Trust was an “Investment Property” and “will not be occupied or claimed as a primary or secondary residence by any of the Borrowers.” CP 81. By representing that the property was non owner occupied, the Alsagers do not have a claim under TILA nor a right to rescind their loan.

2. *Even If TILA And RESPA Were Applicable, The Alsagers Were Provided With The Proper Disclosures*

The regulations implementing RESPA, 12 U.S.C. § 2601-2617, and TILA, 15 U.S.C. § 1601-1693, require a lender disclose certain information to a borrower within three days of receiving a loan application. 12 U.S.C. § 2604(c); 15 U.S.C. § 1638(b)(2).

The regulation expressly states that proof of actual receipt is irrelevant in determining whether disclosure obligations have been satisfied. This is consistent with Washington case law. *Shields v. Morgan Fin., Inc.*, 130 Wn. App. 750, 756-757 (2005) (citing *Tremmel v. Safeco Ins. Co.*, 42 Wn. App. 684, 689, 713 P.2d 155 (1986) (“When a statute authorizes the giving of notice by mail, the fact that the mail is properly posted and addressed to the person to whom notice is required is prima facie evidence that the statute was fully complied with and that the notice was effectively given. . . . Proof of receipt is not required.”)).

Here, the record reflects the Alsagers received all required disclosures. They were provided with a TIL Disclosure, a HUD-1 Settlement Statement, a RESPA servicing disclosure, and a Libor Arm disclosure, all which were signed by the Alsagers and informed them of the terms of their loan. CP 65-79.

3. *The Alsagers Do Not Have A Right To Rescind Under TILA*

In a footnote to their Opening Brief, Footnote 31, p. 7, the Alsagers state they did not receive a copy of their loan records in violation of the Truth in Lending Act and RESPA constituting a basis for rescission under 12 C.F.R. 226(3). This claim fails first, because the record reflects the Alsagers received the required disclosures. Furthermore, there is no evidence the Alsagers ever placed the Lender on notice they were invoking their right to rescind. And lastly, there is no evidence the Alsagers ever tendered back the loan proceeds to the lender.

TILA's "buyer's remorse" provision allows borrowers *three business days* to rescind, without penalty, a consumer loan that uses their principal dwelling as security. *Semar v. Platte Valley Federal Sav. & Loan Ass'n.*, 791 F.2d 699, 701 (9th Cir. 1986); 15 U.S.C. § 1635(a). Rescinding a loan transaction under TILA "requires unwinding the transaction in its entirety and thus requires returning the borrowers to the position they occupied prior to the loan agreement." *Handy v. Anchor Mortgage Corp.*,

464 F.3d 760, 765 (7th Cir. 2006) (quoting *Barrett v. JP Morgan Chase Bank, N.A.*, 445 F.3d 874, 877 (6th Cir. 2006)). Under 15 U.S.C. § 1635(a), the Alsagers' right to rescind expired three days after they signed their loan documents. In this case there is no evidence in the record that the Alsagers elected to rescind their loan three days after the loan signing.

Under 15 U.S.C. § 1635(f) the TILA's three day "buyer's remorse" period can be extended beyond three days if a creditor does not deliver all material disclosures to the debtor. However, here, the time period is not extended because the record reflects the Alsagers received all material disclosures.

Even if the court could find a violation of TILA in the disclosures it was a technical violation and technical violations do not entitle debtors to relief as nondisclosure must be material. 15 U.S.C. §1635(a). For example, even when borrowers receive the wrong form, notice is not defective as long as the form informs borrowers of their right to cancel within a three-day period. *Mills v Equicredit Corp.*, 294 F. Supp. 2d 903 (2003).

Even if the Alsagers could show the lender failed to provide all material disclosure, the claim would still fail as there is no evidence they delivered to the lender a notice of their intent to rescind or that the

Alsagers have an ability to tender the loan proceeds back to Washington Federal.

15 U.S.C. § 1635(b) governs the return of money or property when a borrower exercises the right to rescind:

... Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

Regulation Z, 12 C.F.R. § 226.1 *et seq.*, which implements TILA, reiterates the procedures above. However, Regulation Z also makes clear that the court can modify the rescission procedures: “The procedures outlined in paragraphs (d) (2) and (3) of this section may be modified by court order.” 12 C.F.R. § 226.23(d) (4).

12 C.F.R. § 226.23(d) sets out procedural steps for TILA rescission and provides:

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, **the consumer shall tender the money or property to the creditor** or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation. (Emphasis added).

The Ninth Circuit, in applying these statutes, has repeatedly held that it is within the court's equitable powers to require a borrower to prove their ability to repay the proceeds of a loan before rescission is granted:

As rescission under § 1635(b) is an on-going process consisting of a number of steps, there is no reason why a court that may alter the sequence of procedures after deciding that rescission is warranted, may not do so before deciding that rescission is warranted when it finds that, assuming grounds for rescission exist, rescission still could not be enforced because the borrower cannot comply with the borrower's rescission obligations no matter what. Such a decision lies within the court's equitable discretion, taking into consideration all the circumstances including the nature of the violations and the borrower's ability to repay the proceeds. If, as was the case here, it is clear from the evidence that the borrower lacks capacity to pay back what she has received (less interest, finance charges, etc.), the court does not lack discretion to do before trial what it could do after.

*Yamamoto v. Bank of New York*, 329 F.3d 1167, 1173 (9th Cir. 2003) (affirming summary judgment for lender in absence of evidence that borrowers could refinance or sell property).

Courts in other jurisdictions have reached the same conclusion. The Sixth Circuit Court of Appeals in *Rudisell v. Fifth Third Bank*, 622 F.2d 243, 254 (6th Cir. 1980) held that “[s]ince rescission is an equitable remedy, the court may condition the return of monies to the debtor upon the return of the property to the creditor”). Likewise in *Powers v. Sims & Levin*, 542 F.2d 1216 (4th Cir. 1976), the Fourth Circuit Court of Appeals held that even where the lender is sanctioned based on its TILA violation, conditional rescission is appropriate where it does not appear that the borrower intends or is able to repay the lender’s money. See also *Mortas v. Korea Ins. Corp.*, 840 F.2d 1452, 1455 (9th Cir. 1988) (*Mortas* echoes the general principle that restoration of the status quo is a condition to rescission of contracts); *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 765 (7th Cir. 2006); see *LaGrone v. Johnson*, 534 F.2d 1360, 1362 (9th Cir. 1974) (loan rescission conditioned on the borrower's tender of advanced funds); see also *Garza v. American Home Mortg.*, 2009 WL 188604, 4 (E.D. Cal., 2009); see also *Ljepava v. M.S.S.C. Properties, Inc.*, 511 F.2d 935, 944 (9th Cir.1975).

As the Alsagers have shown no ability to tender the loan proceeds to the lender, rescission is an empty remedy, and was appropriately dismissed.

4. *The Alsagers' TILA Claims Are Barred By The One Year Statute Of Limitations*

The TILA statute of limitations provides that, "Any action under this section may be brought in any... court of competent jurisdiction within *one-year* of the occurrence of the violation." 15 U.S.C. 1640(e); *Hubbard v. Fidelity Federal Bank*, 91 F.3d 75, 79 (9<sup>th</sup> Cir. 1996). In a similar case, *In re Wepsic*, the consumer brought an adversary action alleging TILA violations consisting of inaccurate disclosures and faulty rescission notices. The Court held the statute of limitations for these violations begins to run from the date on which the parties consummated the loan. *In re Wepsic*, 231 B.R. 768, 775 (S.D.Cal. 1998); 15 U.S.C. 1640(e). *See also Stevens v. Rock Springs National Bank*, 497 F.2d 307 (10<sup>th</sup> Cir. 1974); *Cooper v. First Government Mortgage and Investors Corp.* 238 F. Supp.2d 50 (D.C. 2002).

If, as alleged in this case, Washington Federal failed to make certain disclosures required by the TILA, then the Alsagers had one year from the date of consummation of the loan to bring a claim for damages. They failed to do so and as a result, their TILA statutory damages claims are barred by the statute of limitations. 15 U.S.C. 1640(e).

**H. There Is No Violation Of The Implied Covenant Of Good Faith And Fair Dealing**

There is an implied duty of good faith and fair dealing imposed on the parties to a contract. *Betchard-Clayton, Inc. v. King*, 41 Wn. App. 887, 890, 707 P.2d 1361, *rev. den'd*, 104 Wn.2d 1027 (1985). However, a party's duty to act in good faith exists only in relation to the performance of specific contract terms and does not obligate the party to accept new obligations which represent a material change in the terms of the contract. *Miller v. United States Bank, N.A.*, 72 Wn. App. 416, 425 (1994). The duty of good faith and fair dealing under a contract is limited to performance of the provision of that contract and the basic loan contract upon which it is based. *Id.* Therefore, there can be no breach where a party simply enforces their rights under a contract, such as a demand for payment or commencing a foreclosure if the account is delinquent. Here, no specific facts are alleged that support this cause of action and the claim was properly dismissed.

**I. The Alsagers Fail To Allege Sufficient Facts In Support Of Their Consumer Protection Act Claim**

To establish a claim under the Washington State Consumer Protection Act (CPA), a plaintiff must prove, (1) The defendants engaged in an unfair or deceptive act or practice; (2) The act or practice occurred in trade of commerce; (3) The act or practice affected the public interest; (4)

The plaintiffs were injured in either their business or their property, and (5) The act or practice caused the plaintiffs injury. *Hangman Ridge Training Stable, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986); WPI 310.01.

Furthermore, Plaintiffs cannot make the requisite showing of public impact nor reliance. To prove impact on public interest in an essentially private dispute, a plaintiff must prove that, "it is likely that additional plaintiff have been or will be injured in exactly the same fashion." *Life Insurance Co. v. Turnbull*, 51 Wn. App. 692, 702-03, 754 P.2d 1262 (1988). The court in *Anhold v. Daniels*, 94 Wn.2d 40, 614 P.2d 184 (1980) identified the following indicia of an effect on public interest:

We believe the presence of public interest is demonstrated when the proof establishes that (1) the defendant by unfair or deceptive acts or practices in the conduct of trade or commerce has induced the plaintiff to act or refrain from acting; (2) the plaintiff suffers damage brought about by such action or failure to act; and (3) the defendant's deceptive acts or practices have the potential for repetition.

*Id.*, at 46. Plaintiffs' loan terms, such as their payment amount, interest rate, term, the circumstances surrounding their failure to make their payments, and the initiation of a nonjudicial foreclosure are unique to them. While the unfair or deceptive acts allegations are unclear, they are certainly unique to the plaintiffs and cannot support the public interest requirements.

Also, the Washington Supreme Court of *Schnall v. AT & T Wireless Services, Inc.*, 168 Wn2d. 125, 225 P.3d 929, 939 (2010) recently ruled that for a deception-based CPA claim, the court must decide if the plaintiff was actually deceived and would have purchased the product “But For” the alleged deceptive act:

*Hangman Ridge*, 105 Wn.2d at 785, 719 P.2d 531, requires CPA plaintiffs to establish a causal link “between the unfair or deceptive act complained of and the injury suffered.” We have more recently held that this causal link must establish that the “injury complained of ... would not have happened” if not for defendant's violative acts. *Indoor Billboard*, 162 Wn.2d at 82, 170 P.3d 10. The quantum of proof necessary to establish the proximate, “but for” causation required by the CPA is not fully developed in our case law. However, *Indoor Billboard* clearly establishes that proximate cause in a class action cannot be established by “mere payment” of an allegedly injurious charge, though that payment can be “considered with all other relevant evidence on the issue of proximate cause.” *Id.* at 83.

*Schnall v. AT & T Wireless Services, Inc.* 168 Wn2d. at 143.

In this case, the relevant contention appears to be the plaintiffs were misled by the third party notary at the time they signed the loan documents. However, the claim fails because plaintiffs have not alleged any facts showing reasonable or justifiable reliance or even how they were harmed by these allegations. Under terms of the note it was fixed rate for seven years. The Alsagers breached after only a year-and-a-half, well before the loan began adjusting.

**V. CONCLUSION**

For the reasons set forth above, the Respondent respectfully requests that the Court of Appeals affirm the Trial Court's Order entered on August 10, 2010, Granting Respondent's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of December, 2010.

BISHOP, WHITE, MARSHALL &  
WEIBEL, P.S.



David A. Weibel, WSBA# 24031/23533  
Annette Cook, WSBA# 31450  
Attorneys for Respondent  
720 Olive Way, Suite 1201  
Seattle, Washington 98101  
(206) 622-5306, Ext. 5917

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

DALE E. ALSAGER and BETTY J.L.  
ALSAGER,

Case No. 66019-5-I

Appellants,

AFFIDAVIT OF  
SERVICE

v.

WASHINGTON FEDERAL  
SAVINGS AND LOAN  
ASSOCIATION, SUCCESSOR BY  
MERGER TO FIRST MUTUAL  
BANK,

Respondent.

2011 JAN -3 10:10:50

COUNTY OF KING )  
 ) ss  
STATE OF WASHINGTON )

The undersigned being first duly sworn upon oath, deposes and  
says:

That on the 30th day of December, 2010, she caused to be  
delivered copies of: (1) Respondent Washington Federal Savings and  
Loan Association's Brief, to the following parties in the manner indicated:

**Via U. S. Mail**  
Rhys A. Sterling  
P. O. Box 218  
Hobart, WA 98025-0218

Dated this 30 day of December, 2010.



Ann T. Marshall, WSBA #23533  
Bishop, White, Marshall & Weibel, P.S.  
Attorneys for Respondent  
720 Olive Way, Suite 1201  
Seattle, WA 98101  
206-622-5306, Ext. 5916

SIGNED AND SWORN TO (or affirmed) before me on the 30<sup>th</sup> day of  
December, 2010.



ANA I. TODAKONZIE  
Notary Public in and for the  
State of Washington.  
Residing in Seattle, Washington.  
My appointment expires: 2/28/2011.