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Court of Appeals No. 68240-7
King County Superior Court No. 10-215811-1 SEA

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

GBC INTERNATIONAL BANK

Plaintiff/Respondent,

v.

CORY AND GENEANNE BURKE, ET AL.,

Defendants/Appellants,

APPELLANTS' BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

ORIGINAL

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COME NOW, Cory and Geneanne Burke, et al., Appellants, and pursuant to RAP 10.3 submit the following brief in support of relief to vacate the judgment and remand for a new trial.

A. INTRODUCTION

This matter arises from a bank's solicitation of Appellants to guaranty the conversion of a development loan secured by a Deed of Trust into a construction loan and, when the loan went into default, the bank's splitting the loan into two loan extensions to hide it from the bank's regulators. Without construction, there was no method to pay the extensions and the loans defaulted again. The bank compounded the problem further by removing one loan from its collection lawsuit and proceeding simultaneously with non-judicial foreclosure. The second loan proceeded to jury trial where the trial court erred by striking foreclosure defenses as a matter of law, refusing an instruction on the defensive enforceability of the oral promise of a construction loan, and in correcting the jury's special verdict that did not determine a certain amount of damages. It is for these errors, the judgment should be vacated and a new trial granted.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that the Deed of Trust explicitly securing all Queen Anne Builders' loans with Shoreline Bank did not secure the 2545 Loan as a matter of law, and excluding from trial the Burkes' fair value defense.
2. The trial court erred in refusing Burke's instruction to the jury that an oral promise to loan money was an enforceable defense for estoppel under Washington law and leaving the jury with the incorrect and misleading advisement in the loan documents that an oral promise to loan money was not enforceable.
3. The trial court erred by entering judgment with a sum certain for damages where the jury's special verdict did not state any sum certain for damages and the jury may not have decided what amount actually was owing on the loan.

C. STATEMENT OF THE CASE

This is a deficiency action by GBC International Bank (hereinafter GBC), successor to Shoreline Bank through receivership by the FDIC,¹ against a developer, Queen Anne Builders, LLC (hereinafter QAB) and its guarantors, Cory and Geneanne Burke, Greg and Jill Blunt, and Crown Development Inc. (collectively hereinafter "the Burkes")² on one part of a defaulted development loan.

When the real estate development market was imploding in 2008, QAB had a \$1.515 Million development loan with Shoreline Bank to develop eight townhomes on two properties in Queen Anne.³ QAB had taken the loan in 2007 with the understanding that Shoreline Bank would continue the project through construction.⁴ In the summer of 2008, QAB and its principal, Andy Ryssel, had submitted paperwork for the construction loan that had been adjusted by Shoreline Bank's loan officer to meet its approval.⁵ Unfortunately, QAB and Ryssel had had lost the financial strength to back the loan. Additionally, an FDIC audit in July 2008 determined Shoreline Bank was over-concentrated in residential

¹ RP 159:18-21.

² Defendants Andy Ryssel and Rene Ryssel, Seattle Signature Homes, Inc., and John Bargreen and Teresa Bargreen also were guarantors but are not part of this appeal.

³ Promissory Note, Trial Exhibit 1, CP Sub No. 192.

⁴ RP 603:16 – 604:8.

⁵ RP 610:14 - 611:20.

construction loans and needed to diversify.⁶ Facing the loan's maturity in September, Shoreline Bank extended QAB's loan for sixty (60) days for Ryssel to find guarantors.⁷

Ryssel approached the Burkes and, after demonstrating QAB's numbers looked fine, they agreed to guaranty it.⁸ Ryssel and the Burkes then met with Shoreline Bank in October 2008 where they discussed construction loan and the Burkes agreed to provide personal guaranties for the construction loan.⁹ In November, QAB's loan extension matured and the loan went into default.¹⁰

The Burkes second contact with Shoreline Bank was picking up the loan documents in early December.¹¹ There, for the first time, the Burkes discovered the negotiated construction loan had changed to two bridge loans: a \$1.117 Million loan (the 4190 loan)¹² and a second \$500,000 loan (the 2545 loan) to service the first loan.¹³ The Burkes rejected the documents. Shoreline Bank informed the Burkes that it could not convert the "nonconforming" loan in default to the promised

⁶ RP 166:23-167:4

⁷ Change in Terms Agreement, Trial Exhibit 5, CP 953-960.

⁸ RP 528:22 – 529:11; 586:20 – 587:2.

⁹ RP 529:12-22; RP 701:8 – 702:4.

¹⁰ Change in Terms Agreement, Trial Exhibit 5, CP 953-960.

¹¹ RP 728:4-15.

¹² Business Loan Agreement, Trial Exhibit 3, CP 953-960.

¹³ Promissory Note, Trial Exhibit 21, and Business Loan Agreement CP 953-960; RP 698:21-24.

construction loan until it was made "conforming."¹⁴ To return the loan to "conforming," the original \$1.515 Million loan needed to be split because it couldn't build the interest reserves into the first loan and it needed to pay down the principal on the first loan to meet the FDIC LTV regulation.¹⁵ Andy Ryssel also assured the Burkes that the bridge loans simply returned the original QAB loan to "conforming" so that Shoreline Bank could convert it into the construction loan that they had agreed to guaranty. On Christmas Eve, Ryssel delivered the loan documents to the Burkes and they executed them.¹⁶

Neither QAB nor the Burkes received a penny of the 2545 loan funds, which were dedicated to servicing the 4190 loan.¹⁷ The bank placed all but \$100,000 in a bank controlled account to pay its loan fees, to pay down the principal on the 4190 loan, and even to pay the anticipated property taxes on the collateral. The other \$100,000 also went to Shoreline Bank to service the interest on the loans.¹⁸

During its negotiations with Ryssel and the Burkes, Shoreline Bank never disclosed the FDIC direction to diversify away from

¹⁴ RP 657:16 – 658:5; RP 524:2-13, 531:9-13.

¹⁵ RP 658:18-22; RP 728:4-15; RP 524:2-13.

¹⁶ RP 514:18, RP 698:5-6.

¹⁷ RP 205:21 – 206:21.

¹⁸ Promissory Note, Trial Exhibit 21, CP 953-960.

residential construction loans.¹⁹ In fact, no one at Shoreline Bank ever told Ryssel or the Burkes that there was "no way in hell" the bank would give them a construction loan.²⁰ When Shoreline Bank finally acknowledged that it could not provide the promised construction loan, QAB predictably defaulted. Shoreline Bank commenced this lawsuit to enforce the guaranties on both the 4190 loan and the 2545 loan April 28, 2010.²¹

Despite the lawsuit, Shoreline Bank removed the 4190 loan from the complaint²² and proceeded to foreclose on QAB's Deed of Trust.²³ The Deed of Trust explicitly secured both of QAB's bridge loans.²⁴ Just ten days before the foreclosure sale, Shoreline Bank obtained an appraisal valuing the property at \$1,100,000.²⁵ Nevertheless, the trustee conveyed the property by foreclosure sale to Shoreline Bank for \$900,000.²⁶ Six days later, the FDIC closed Shoreline Bank October 1, 2010 and GBC immediately assumed QAB's 2545 loan from the FDIC.²⁷ GBC never had

¹⁹ RP 734:4-5; RP 464:1-17.

²⁰ RP 185:15 – 183:14.

²¹ Complaint, CP 1-95.

²² Amended Complaint, CP 96-190.

²³ Notice of Trustee's Sale, Trial Exhibit 42, CP 953-960.

²⁴ Deed of Trust at Cross-Collateralization, Trial Exhibit 4, CP 953-960.

²⁵ A Property Valuation Report, Trial Exhibit 113, CP 953-960.

²⁶ Trustee's Deed, Trial Exhibit 115, CP 953-960.

²⁷ RP 159:18-21.

an interest in the 4190 as that was kept by the FDIC.²⁸ Nevertheless, GBC issued an IRS 1099A form to Queen Anne Builders reporting its credit of the foreclosure bid price.²⁹

GBC proceed to jury trial against QAB, Ryssel and the Burkes on the 2545 loan. At trial, the Honorable Sharon Armstrong found that QAB's Deed of Trust did not secure the 2545 loan and struck the Burkes' fair value defense.³⁰ In light of the statute of frauds advisement in some of the loan documents, the Burkes proffered the following jury instruction on the defensive enforceability of an oral promise:

Washington law does not permit a party to enforce an oral agreement to loan money offensively against a bank in order to make the bank loan money. However, Washington law does not prevent a party from relying upon an oral agreement to loan money defensively to excuse performance.

Judge Armstrong declined to give the instruction³¹ and GBC's counsel argued the statute of frauds at closing.³²

Following two days of deliberations, the jury returned a special verdict.³³ Question No. 8 of the Special Verdict Form provided for the

²⁸ RP 159:21-23. Indeed, the entity that obtained the 4190 loan from the FDIC, Republic Credit One, LP, attempted a deficiency action which was recently dismissed on res judicata grounds. Republic Credit One, LP v. Queen Anne Builders, et al., King Co. Sup. Ct. No. 11 2 32517 2.

²⁹ IRS Form 1099A, Trial Exhibit 116, CP 953-960.

³⁰ RP 760:24 – 761:7.

³¹ RP 802 – 807:16.

³² RP 840:1-5.

jury to determine the amount of damages, and instructed the jury to "write the dollar amount that is currently due on loan No. 2545." The jury did not write a dollar amount, but took the instruction literally and wrote "the dollar amount that is currently due on loan No. 2545." The jury was excused.

GBC moved the court to enter judgment awarding an amount certain and the Burkes moved for judgment on the Special Verdict.³⁴ The trial court denied the Burke's motion and held the amount owing on the 2545 loan was not controverted. The trial court entered Judgment Upon Jury Verdict awarding GBC \$578,465.18 against QAB, Ryssel and the Burkes. The Burkes moved for a new trial and the trial court denied the motion.³⁵ The Burkes timely filed a Notice of Appeal.³⁶

D. ARGUMENT

The Burkes were denied a fair trial by the trial court's error in excluding the Burke's fair value defenses, in refusing to instruct the jury on the proper legal enforceability of an oral promise as a equitable defense, and in reforming the jury verdict to include a disputed damage

³³ Special Verdict Form, CP 1626-1629.

³⁴ CP 1673-1679.

³⁵ CP 1833-1836.

³⁶ CP 1826-1832.

amount that the jury did not determine. This court should vacate the judgment and remand for a new trial to include the Burkes' proper defenses and jury instruction.

1. THE TRIAL COURT ERRED IN FINDING THAT THE DEED OF TRUST DID NOT SECURE THE 2545 LOAN AS A MATTER OF LAW AND STRIKING THE BURKE'S VALID DEFENSES ARISING FROM THE NON-JUDICIAL FORECLOSURE.

The trial court denied the Burkes a fair trial by striking defenses that the fair value of the property subject to non-judicial foreclosure satisfied all or part of the 2545 loan on the erroneous determination that, as a matter of law, the Deed of Trust did not secure the 2545 loan. The record evidence supports that the Deed of Trust did secure the 2545 loan as a matter of law and, if the absence of a reference to the Deed of Trust in the 2545 loan documents may prove the opposite intent of the parties, it is a question for the jury.

The touchstone of contract interpretation is the mutual intent of the parties determined from the objective manifestations of the agreement. U.S. Life Credit Life Ins. Co. v. Williams, 129 Wn.2d 565, 569, 919 P.2d 594 (1996). Contract interpretation is governed by the principles that (1) the parties' intent controls, (2) the intent is ascertained from reading the contract as a whole, and (3) ambiguity will not be read into a contract that

is otherwise clear and unambiguous. Mayer v. Pierce County Medical Bureau, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323 (1995).

The objective manifestation of the mutual intent of the parties to a contract is found in the ordinary, usual, and popular meaning of the words used. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wash.2d 493, 503, 115 P.3d 262 (2005). If needed to aid in ascertaining the intent of the parties, the court also may consider extrinsic evidence as to the entire circumstances under which the contract was made. Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

The parties' intent in a contract may be decided by the court only where the interpretation of the contract does not depend on extrinsic evidence or if only one reasonable inference can be drawn from the extrinsic evidence. Dice v. City of Montesano, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006); *see also* Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 85, 60 P.3d 1245 (2003). Plain and unequivocal words may be interpreted as a matter of law without extrinsic evidence. Tapper v. State Employment Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *see also* Hogan v. Sacred Heart Med. Ctr., 101 Wn. App. 43, 49, 2 P.3d 968 (2000). However, when the meaning of a contract is not clear on its face, the parties' intent at the time it was executed is an issue for the jury. Wm. Dickson Co. v. Pierce County, 128 Wn. App. 488, 493, 116 P.3d 409

(2005); Berg, 115 Wn.2d at 668, *citing* Restatement (Second) of Contracts § 212(2).

The plain and unequivocal words of the Deed of Trust objectively manifest the parties' intent that the Deed of Trust secures all indebtedness between them, including the 2545 Loan. It reads:

In addition to the Note, this Deed of Trust secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation by party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay amounts may be or hereafter may become otherwise unenforceable. (Emphasis Added)³⁷

The 2545 Loan is an obligation, debt and liability of Queen Anne Builders to Shoreline Bank as referenced by the Deed of Trust.³⁸ As a matter of law for the trial court, the Deed of Trust did secure the 2545 loan and the trial court's contrary decision should be reversed.

The trial court's decision also should be reversed because the trial court exceeded its authority when it disregarded the clear and

³⁷ Deed of Trust at CROSS-COLLATERALIZATION, Trial Exhibit 4, CP 953-960.

³⁸ RP 219:1-13.

unambiguous words of the Deed of Trust by interpreting "some inconsistencies in the documents."³⁹ It is the province of the jury to determine whether the absence of an expressed incorporation of the Deed of Trust into the 2545 loan document⁴⁰ is sufficient to prove the parties intended to exclude the 2545 loan from the explicit language of the Deed of Trust.

It is not clear on its face that the 2545 loan is unsecured by the Deed of Trust. No express language in the Promissory Note or the Business Loan Agreement for the 2545 loan states that the loan is excluded from the Deed of Trust. The 2545 Promissory Note does read that ". . . this Note is secured by the following collateral described in the security instrument listed herein:" with nothing listed thereafter.⁴¹ Yet, the promissory note expressly provides its funds are dedicated to paying principal, interest, and the renewal fee for the 4190 loan, as well as the taxes on the collateral property.⁴² The 2545 Business Loan Agreement also states that the loan is advanced upon the Borrower providing "Security Agreements granting Lender security in the Collateral;" and further defines "Collateral" as:

³⁹ RP 746:17-18.

⁴⁰ RP 760:24 – 761:7.

⁴¹ 2545 Promissory Note, Trial Exhibit 21, C.P. 953-960.

⁴² Promissory Note at Loan Proceeds Designation, Trial Exhibit 21, CP 953-960.

. . . all property and assets granted as collateral security for a Loan, whether real or personal property, whether granted directly or indirectly, whether granted now or in the future, whether granted in the form of a security interest, mortgage, collateral mortgage, deed of trust . . .⁴³

Moreover, although the 2545 Notice of Final Agreement also does not specifically list the Deed of Trust, it does acknowledge that any party that has ". . . pledged property as security for the Loan . . ." (which the Deed of Trust does) is a party to the Final Agreement.⁴⁴ More importantly, the only record document indicating that the 2545 loan is "unsecured," the Business Credit Application Short Form, is extrinsic evidence that is not included in final loan documents.⁴⁵ In fact, the only record testimony as to the parties' intent at the time that the 2545 loan was executed is that of Greg Blunt, who stated that he "absolutely" understood that the 2545 loan was "an obligation, debt or liability of Queen Anne Builders to Shoreline Bank" secured by the Deed of Trust. RP 736:19 – 737:23.⁴⁶ It was for the jury to decide whether this "inconsistent" evidence removed the 2545 loan from the explicit language in the Deed of Trust, and the trial court erred in interpreting the extrinsic evidence as a matter of law.

⁴³ 2545 Business Loan Agreement, Trial Exhibit 25, CP 953-960.

⁴⁴ 2545 Notice of Final Agreement, Trial Exhibit 63, CP 953-960.

⁴⁵ Notice of Final Agreement, Trial Exhibit 63, CP 953-960, and Business Credit Application – Short Forms, Trial Exhibits 31, 32 and 39 CP 953-960.

⁴⁶ See also Blunt Trial Testimony at RP 716:25 – 717:1, " My understanding was that [the foreclosure notice] was for closing (*sic*) on 1,600,000 or five something."

The trial court's erroneous ruling denied the Burkes a fair trial when it struck valid defenses arising from the foreclosure. Under the Deed of Trust Act, RCW 61.24 et seq., the Burkes have the right to apply the "fair value" of the foreclosed property to satisfy some or all of the debt secured by the Deed of Trust. RCW 61.24.100(5) provides:

In any action against a guarantor following a trustee's sale under a deed of trust securing a commercial loan, the guarantor may request the court or other appropriate adjudicator to determine, or the court or other appropriate adjudicator may in its discretion determine, the fair value of the property sold at the sale and the deficiency judgment against the guarantor shall be for an amount equal to the sum of the total amount owed to the beneficiary by the guarantor as of the date of the trustee's sale, less the fair value of the property sold at the trustee's sale or the sale price paid at the trustee's sale, whichever is greater, plus interest on the amount of the deficiency from the date of the trustee's sale at the rate provided in the guaranty, the deed of trust, or in any other contracts evidencing the debt secured by the deed of trust, as applicable, and any costs, expenses, and fees that are provided for in any contract evidencing the guarantor's liability for such a judgment . . .

⁴⁷

The ultimate ramification on the Burkes' "fair value" rights by Shoreline Bank's non-judicial foreclosure on only one of two loans secured by the same Deed of Trust appears to be a matter of first impression. Nevertheless, it would be illogical that "fair value" rights could be extinguished by a beneficiary's unilateral choice of which loan to

⁴⁷ RCW 61.24.100(5).

foreclose upon. In other words, a bank should not be able to designate for Trustee's Sale only one of two loans (e.g. a smaller loan) secured by a Deed of Trust, underbid the fair value, then deny a guarantor's opportunity to use any excess "fair value" in defense of a lawsuit on the second loan (e.g. a larger loan).

Here, the Burkes presented evidence that Shoreline Bank's own appraisal of the property only ten days before the Trustee's Sale was \$200,000 greater than the bid price for which it took the property at Trustee's Sale.⁴⁸ Additionally, the Burkes presented evidence that the foreclosure bid price was credited to GBC,⁴⁹ who held only the 2545 loan while the 4190 loan stayed with the FDIC.⁵⁰ This convoluted situation is further complicated by Shoreline Bank's claim splitting and unlawful foreclosure.

In its original complaint on both loans,⁵¹ Shoreline Bank had the opportunity for the court to determine "all obligations, debts and liabilities . . . of [Queen Anne Builders] to [Shoreline Bank]"⁵² and to what extent any of those obligations were satisfied by the fair value of the foreclosed

⁴⁸ Compare "A Property Valuation Report," Trial Exhibit 113, CP 953-960, with Trustee's Deed, Trial Exhibit 115, CP 953-960, and IRS Form 1099A, Trial Exhibit 116, CP 953-960.

⁴⁹ IRS Form 1099A, Trial Exhibit 116, CP 953-960.

⁵⁰ RP 164:22 – 165:19.

⁵¹ Complaint, CP 1-95.

⁵² Deed of Trust, Trial Exhibit 4, CP 953-960.

collateral. By unilaterally removing the 4190 loan from this lawsuit and electing to foreclose simultaneously with the lawsuit, Shoreline Bank essentially split its claims.

Washington does not allow "claim splitting," or multiple actions against the same defendant arising from the same facts. 14 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 12.4, at 359 (2003). As a judicial prohibition, "claim splitting" cannot be waived by a guaranty and GBC should not receive the benefit of excluding the Burke's fair value defenses from this action. Moreover, splitting the foreclosure from the lawsuit was prohibited by the Deed of Trust Act.

GBC's predecessor, Shoreline Bank, illegally directed the Trustee to foreclose on the Deed of Trust while simultaneously prosecuting a deficiency on the guaranties for only for the 2545 loan debt. The Deed of Trust Act empowers a Trustee to conduct a non-judicial foreclosure only if "no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured."⁵³ A Trustee's Sale in violation of this provision is a procedural irregularity that voids the sale. Udall v. T.D. Escrow Services, Inc., 159 Wn.2d 903, 911, 154 P.3d 882 (2007), *citing* Cox v. Helenius, 103 Wn.2d 383, 388,

⁵³ RCW 61.24.030(4).

693 P.2d 683 (1985). Arguably, if the Trustee's Sale were voided, then Queen Anne Builders and the Burkes are entitled to the return of the property or the unjust enrichment to the FDIC (\$490,000)⁵⁴ from the subsequent sale of the property.⁵⁵ In sum, Shoreline Bank's non-negotiated loan splitting and subsequent claim splitting created a tangled mess that the trial court could not dismiss as a matter of law. The judgment should be vacated and the matter remanded for a new trial on the Burkes' fair value defense.

2. THE TRIAL COURT ERRED BY DENYING BURKES' JURY INSTRUCTION THAT WAS NECESSARY TO REBUT THE INCORRECT STATUTE OF FRAUDS

This court should vacate the judgment and remand for a new trial because the Burkes' defense was prejudiced when the jury was misled by the court's refusal to instruct the jury that the bold and capitalized statement in the loan documents that **"ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR FORBEAR FROM ENFORCING PAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW"**⁵⁶ was not the

⁵⁴ RP 150:20.

⁵⁵ The Burkes do not seek to unwind the Trustee's Sale at this late date, but to illustrate the absurd repercussions of Shoreline Bank's improper conduct.

⁵⁶ Notice of Final Agreement, Trial Exhibit 63, CP 953-960; Business Credit Application – Short Forms, Trial Exhibits 31, 32 and 39, CP 953-960.

applicable law in this case. Without the corrective instruction offered by the Burkes that an oral promise to loan money is enforceable as an estoppel defense, the jury was allowed to decide the reliability of the promised construction loan on incorrect law. This is reversible error.

The Burkes are entitled to have the jury instructed on the enforceability of the promised construction loan when it is supported by the evidence. Egede–Nissen v. Crystal Mt., Inc., 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). To be sufficient, jury instructions must not be misleading and must properly inform the jury of the applicable law when read as whole. Farm Crop Energy, Inc. v. Old Nat. Bank of Washington, 109 Wash.2d 923, 750 P.2d 231 (1988). Jury instructions must properly inform the jury of the proper law to be applied to the issues that the jury must decide. Thompson v. King Feed & Nutrition Service, Inc., 153 Wn.2d 447, 453, 105 P.3d 378 (2005). This court reviews the denial of an offered jury instruction "de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact." Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).

In Farm Crop Energy, Inc. v. Old Nat. Bank of Washington, 109 Wash.2d 923, 750 P.2d 231 (1988), the Appellate Court found that the trial court committed reversible error when it failed to instruct the jury on the effect of a conditional noncontractual promise in a promissory estoppel

claim. Investors in Farm Crop sought to recover damages for efforts made in reliance on a loan commitment letter and verbal assurance by a bank to fund construction of an ethanol plant. The bank had produced evidence that, like the loan commitment letter, the verbal assurance by its loan officer was dependent upon requisite conditions. Although the jury instructions addressed the conditional nature of the loan commitment letter, the Appellate Court held:

. . . because of the trial court's failure to instruct the jury on the effect of a conditional noncontractual promise, [the bank] was unable to argue its theory that because the conditions were not satisfied so as to create liability under the written loan commitment, they similarly were not satisfied so as to create liability under Farm Crop's promissory estoppel theory . . .

Farm Crop, 109 Wn.2d at 933-34.

In Chunyk & Conley/Quad-C v. Bray, 156 Wn. App. 246, 232 P.3d 564, *review denied* 169 Wash.2d 1031, 241 P.3d 786 (2010), the court reversed a jury's denial of worker's compensation benefits to an injured worker because the court refused to instruct the jury that the parties had stipulated that the injury caused certain symptoms. The court found the failure to give the instruction was "misleading to the extent that [the instructions] allowed the jury to premise its verdict on whether Bray's industrial injury caused the accepted conditions, rather than whether the

accepted conditions prevented Bray from working." Chunyk, 156 Wn. App. at 254.

The court's refusal to give the Burkes' corrective instruction left the jury with the erroneous impression that the statute of frauds advisement in the loan documents was the correct law. To rebut the bold and capitalized advisement in the loan documents, the Burkes offered the following jury instruction:

Washington law does not permit a party to enforce an oral agreement to loan money offensively against a bank in order to make the bank loan money. However, Washington law does not prevent a party from relying upon an oral agreement to loan money defensively to excuse performance.⁵⁷

The statute of frauds, RCW 19.36.110, has no application here because the Burkes were not seeking to enforce the promised construction loan offensively against GBC, but defensively to estop GBC from enforcing the guaranties it obtained from the Burkes. RCW 19.36.110 provides only that an agreement to provide a loan that is not in writing "is not enforceable against the creditor." RCW 19.36.110. Moreover, the statute of frauds does not apply to defenses in equity. Johnson v. Mt. Baker Park Presbyterian Church, 113 Wash. 458, 464-65, 194 P. 536 (1920)(neighbors could enforce unrecorded restrictive building scheme on

⁵⁷ Supplemental Proposed Jury Instructions of Defendants Crown Development Inc., Blunt and Burke, first instruction, CP 1054.

church that purchased property with full knowledge of the restrictions, even though statute of frauds prevented neighbor's claiming an interest or easement over the property).

In Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 616 P.2d 644 (1980) the court acknowledged that the statute of frauds does not preclude a claim of estoppel, even offensively, by a franchisee who relied upon the franchisor's representation that it would register in Washington and execute a franchise agreement. Klinke, 94 Wn.2d at 647. Also in Flower v. TRA Industries, 127 Wn. App. 13, 111 P.3d 1192 (2005), the court held that, even without a valid contract, promissory estoppel can be a "sword" where "injustice can only be avoided by enforcing the promise of employment" outside the statute of frauds. Flower, 127 Wn. App. at 31.

No authority supports the notion that RCW 19.36.110 provides immunity for Shoreline Bank to falsely promise a construction loan to the Guarantors. Because the statute of frauds is intended to prevent fraud, the bank cannot rely upon it to protect itself from fraud or to perpetrate fraud. Miller v. McCamish, 78 Wn.2d 821, 825-26, 479 P.2d 919 (1971).

It was prejudicial error for the court to deny the Burkes' instruction when the loan documents contained a clear misstatement of the law. Furthermore, counsel for GBC directed the jury to the incorrect law.

You will see as you go through these page after page after page of loan documents, you'll see warnings in there, you'll see guess what in all bold, all caps, oral representations to loan money are unenforceable in Washington.⁵⁸

A clear misstatement of the law is prejudicial. Keller v. City of Spokane, 146 Wash.2d 237, 249–50, 44 P.3d 845 (2002). This court should vacate the judgment and remand for a new trial with the proper instruction on the defensive enforceability of an oral promise to loan money.

3. THE TRIAL COURT ERRED BY COMPLETING THE JURY VERDICT AND ENTERING JUDGMENT WITH AN AMOUNT OF DAMAGES THAT THE JURY DID NOT DECIDE.

The Judgment Upon Jury Verdict should be reversed and either entered without damages or remanded for a new trial where the trial court improperly corrected the jury verdict to award an amount of damages that the jury did not decide. "After a trial court has discharged a jury, the court may correct a verdict form only to conform to **an actual jury finding** if the verdict is 'defective or erroneous in a mere matter of form, not affecting the merits of rights of the parties.'" Marvik v. Winkelman, 126 Wn. App. 655, 660, 109 P.3d 47 (2005)(Emphasis Added); *quoting* City Bond & Share Inc. v. Klement, 165 Wash. 408, 410, 5 P.2d 523 (1931); and also *citing* Quarring v. Stratton, 85 Wash. 333, 334, 148 P. 26 (1915).

⁵⁸ RP 840:1-5.

The court may not substitute its assessment of damages for the conclusions of the jury on the amount of damages. Tolli v. School Dist. No. 267 of Whitman County, 66 Wn.2d 494, 403 P.2d 356 (1965). Where the Burkes presented contrary evidence of the amount owing on Loan No. 2545, the court "has no power to supply substantial omissions" in the special verdict form by entering an amount after discharging the jury. City Bond, 165 Wash. at 411.

It also is universally accepted that the court may not correct a verdict for a jury's misunderstanding of the judge's instructions. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962). The perceived failure of the jury to follow the court's instructions inheres in the verdict and cannot be impeached. Rasor v. Retail Credit Co., 87 Wn.2d 516, 531-32, 554 P.2d 1041 (1976).

In Richey & Gilbert Co. v. Northwestern Natural Gas Corp., 16 Wn.2d 631, 134 P.2d 444 (1943), the court refused to grant judgment notwithstanding the verdict where the jury awarded damages far less than the lowest amount testified by Plaintiff's experts. The court held that:

"If a general verdict is returned and the amount which should have been found is a matter of *mere computation* and over which there is no controversy, the court may amend. But the court cannot, under the guise of amending a verdict, invade the province of the jury or substitute his verdict for theirs."

It may very well be that a larger verdict of the jury could have been sustained, still this court knows of no mathematical process by which it can compute away their verdict.

Richey, 16 Wn.2d at 651, *quoting* City Bond & Share, Inc. v. Klement, *supra*.

Again in Kadmiri v. Claassen, 103 Wn. App. 146, 10 P.3d 1076 (2000), the court properly refused Plaintiff's motion for a new trial where the jury verdict was substantially less than his uncontroverted medical bills. Because the defendant had presented evidence from several doctors that Plaintiff's complaints were from aging, exaggerated, and not caused by the collision, the Appellate court concluded the verdict was not contrary to the evidence. Kadmiri, 103 Wn. App. at 151. *See also* O'Brien v. Puget Sound Plywood, 23 Wn.2d 917, 165 P.2d 86 (1946)(increase of award conforming with the Plaintiff's evidence of lost wages was properly denied where the jury may have considered evidence of the Plaintiff's failure to mitigate damages); Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 422 P.2d 515 (1967)(additur by trial court reversed because the jury may have awarded less due to Plaintiff's prior accidents).

Here, the court erred in correcting the verdict to enter judgment with a specific damage amount because the conflicting evidence, the jury's

verdict simply does not conclude that a specific amount was proven. In interpreting a verdict, the court should view it in light of the instructions and the record to see if the clear intent of the jury can be established. Meenach v. Triple "E" Meats, Inc., 39 Wn. App. 635, 639, 694 P.2d 1125, *review denied*, 103 Wn.2d 1031 (1985).

Where the jury has rendered a special verdict, and no general verdict, greater certainty in their findings is naturally required. As the court must use the special findings of the jury as its findings of fact and enter judgment upon them. When it cannot safely enter judgment on the uncertain answers in the special verdict it would be intruding on the province of the jury for the judge to determine for himself what is the fact that the jury did not find. An uncertainty may sometimes be resolved by a consideration of the issues, the evidence, the admissions of the parties, and the instructions of the court, all of which the jury presumably had in mind when making its answers to the special verdict questions.

State Dept. of Highways v. Evans Engine and Equipment Co., Inc., 22 Wn. App. 202, 205-06, 589 P.2d 290 (1978).

Turning to the evidence and instructions in this case, it cannot be concluded with certainty that the jury actually considered and determined the sum of money owing on the 2545 loan. From the law and the jury instructions, it was GBC's burden to convince the jury of the amount of damages and the sum of money to be awarded. GBC failed to do so.

Mr. Ryssel presented evidence through Kathy Bennett that Shoreline Bank had failed to account for \$22,684 of the loan funds which

he could have used to continue to make payments.⁵⁹ The Crown Guarantors also produced contrary evidence that the only debt of Queen Anne Builders held by GBC, the 2545 loan, was fully satisfied by \$900,000 in proceeds credited to GBC from the foreclosure.⁶⁰

The verdict demonstrates that the jury did not resolve the contradictory evidence of the amount currently due on the loan favor of GBC. After being instructed to determine the amount of damages, when the jury returned a verdict that did not identify the amount due, the only reasonable inference is that GBC did not meet its burden to convince the jury of the amount due from the controverted evidence. The court must presume that the jury obeyed the court's instructions and based its verdict on those contentions sufficiently supported by the evidence. McLaughlin v. Cooke, 112 Wash.2d 829, 839, 774 P.2d 1171 (1989). Where the evidence of the amount currently due on the loan is controverted, the court "has no power to supply substantial omissions" and the entry of judgment upon the special verdict with a sum certain award for damages was error. The judgment should be reversed and entered without damages.

⁵⁹ RP 687:6 – 688:14.

⁶⁰ IRS Form 1099A, Trial Exhibit 116, CP 953-960; RP 417:5-13. This is a separate issue from the Burkes' right to apply fair value to the 2545 loan. Rather, this issue is whether GBC actually received the benefits of the foreclosure bid credit when GBC only held the 2545 loan.

Alternatively, where substantial justice has not been done, a new trial is the appropriate remedy. A new trial should be granted if the special verdict makes the jury's resolution of an ultimate issue impossible to determine. Blue Chelan, Inc. v. Department of Labor & Indus., 101 Wn.2d 512, 515, 681 P.2d 233 (1984). A new trial is the appropriate remedy where the instructions and special verdict make it impossible to determine with greater certainty whether the jury actually decided to award damages or how much. Thola v. Henschell, 140 Wn. App. 70, 164 P.3d 524 (2007).

In Thola, the jury returned a general verdict after the court had improperly instructed the jury on one cause of action that had been preempted. Because the award could not be segregated, the Appellate court had to reverse the award in its entirety and remand for a new trial. Thola, 140 Wn. App. at 85. A new trial also was warranted when the jury misunderstood the verdict form in Beglinger v. Shield, 164 Wash. 147, 2 P.2d 681 (1931). There, the court granted a new trial because the jury presented a verdict worded in a way that awarded to the plaintiff \$5,000 against only two of the three defendants. The court read the verdict, polled the jury to be unanimous, and dismissed the jury. Before leaving, however, a juror stood and advised the court that the jury intended to award \$10,000 to the plaintiff: \$5,000 against the two defendants, and

\$5,000 against the third. The entire jury confirmed this. The court denied plaintiff's motion to correct the verdict, but granted a new trial. The Appellate Court affirmed, finding that "[i]n as much as the trial judge, before the discharge of the jury, had failed to have the jury correct or amend their verdict, the granting of a new trial was necessary and proper." Beglinger, 164 Wash. at 154-55.

Similarly, in Marvik v. Winkelman, 126 Wn. App. 655, 109 P.3d 47 (2005), the Appellate court reversed the denial of a new trial under CR 59(a)(1) and (9) where the presiding juror listed the jury's damage award twice on the verdict form by accident. The court reasoned that the juror's mistake "clearly shows an irregularity in the verdict," and affected the substantial rights of the defendant by exposing her to double damages. Marvik, 126 Wn. App. at 663. Moreover, the court found that the judgment twice the amount the jury intended meant that substantial justice had not been done. Ibid., at FN 6.

The matter of Miles v. Mead, 98 Wash. 215, 167 P. 106 (1917) also is instructive. There, the plaintiff land purchaser sued for damages resulting from misrepresentations of the property's acreage and a stream upon the property. The jury returned a special verdict awarding damages only for the stream, but also finding the value of the property reduced by the amount that plaintiff claimed for the lesser acreage. After the jury was

discharged, counsel noted the verdict was incomplete and the court, over objection, reassembled the jury to correct the verdict. Thereafter, the defendant moved for j.n.o.v. or a new trial, and the court granted the latter.

The Appellate court affirmed, holding that:

. . . where a mistake has been made by the jury in rendering a verdict, and the jury discharged, the proper remedy is to set aside the verdict and grant a new trial. This appears to be the generally accepted rule in a case where the verdict of the jury has been received and filed with the clerk, or recorded and the jury discharged. (citation omitted)

Miles, 98 Wash. 217; *quoting* Quarring v. Stratton, 85 Wash. 333, 148 Pac. 26 (1915)(verdict mistakenly awarded sum to defendant when jury intended to make award to plaintiff).

Although the present situation is not as clear, it may be impermissible speculation to conclude that the jury did consider damages, and did not simply write in the special verdict form exactly what the court directed. If so, this court should vacate the judgment and remand for a new trial.

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V. CONCLUSION

The judgment of the trial court should be vacated and the matter remanded for a new trial because errors of the trial court denied the Burkes a fair trial. The trial court improperly determined that Queen Anne Builders' Deed of Trust did not secure the 2545 Loan either by disregarding the plain, clear and unambiguous language of the Deed of Trust as a matter of law, or by resolving inconsistencies in the loan documents that are for the jury to decide. This error resulted in prejudice to the Burkes by the trial court striking the Burkes' fair value defense. The trial court also erred in denying the Burkes' offered jury instruction correcting the incorrect statement of law on the statute of frauds in the loan documents. The failure to give the corrective instruction prejudiced the Burke's by allowing the jury to conclude incorrectly that the Burkes could not reasonably rely upon the promised construction loan because if it was unenforceable under Washington law. The trial court also erred in entering judgment with a sum certain award of damages when the special verdict did not indicate with reasonable certainty that the jury actually resolved the contradictory evidence on the amount owed to GBC on the loan. For these errors, the judgment should be vacated and the matter remanded for a new trial.

Respectfully submitted this 18th day of May, 2012.

TACEY GOSS P.S.

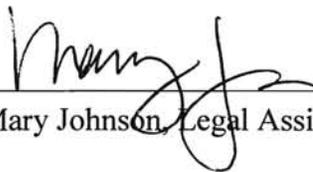


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CERTIFICATE OF SERVICE

I, Mary Johnson, certify under penalty of perjury of the laws of the State of Washington, that a true and correct copy of this Appellant's Brief was provided ABC legal messengers for delivery on this day to counsel of record for Respondent, GBC International Bank, at the addresses of record, Hacker & Willig, Inc., 1501 4th Avenue, Suite 2150, Seattle, WA 98101.

SIGNED in Bellevue, WA this 18th day of May, 2012.



Mary Johnson, Legal Assistant