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I. ASSIGNMENT OF ERROR

A. The trial court erred by granting summary judgment when there are issues of fact regarding the affirmative defense of impossibility/impracticability?

B. The trial court erred by granting summary judgment when there are issues of fact regarding appellants' claims of fraud and misrepresentation?

II. STATEMENT OF THE CASE

Appellant, TIFFANY JANE HARRISON, is an enrolled member of the Puyallup Tribe of Indians and owns real property contained within the boundaries of the Puyallup Tribe ["Harrison Property"]. Appellant, TIFFANY JANE HARRISON, and P Appellant, RANDALL HARRISON, are husband and wife.

The Harrisons and First Citizens Bank (Bank) entered in several loans all related to the development of real property located on tribal trust land owned by the Harrisons. The Bank first loaned the Harrisons \$2,800,000 on February 6, 2006. The Bank loaned that money to the Harrisons for the purpose of paying off two existing loans and "to provide monies for the equity portion of the construction loan request" that was pending.

The construction loan was for \$4,000,000 and its purpose was to build storage unit on the defendants' property that is held in trust on Puyallup Tribal Land in Fife, Washington. The developer on the construction project worked directly with the Bank and received money disbursed from these loans directly from the Bank. When the construction of the storage unit ran over budget and it was clear that the Harrisons were going to have a difficult time making payments on their existing loans with the Bank, the Bank encourage the Harrisons to obtain additional loans to pay existing loan payments. By this time Venture Bank was in financial distress and being closely watched by the FDIC. *CP 69-141.*

The Bank harmed the Harrison's financial situation by continuing to loan them money when the Bank knew that they did not have the resources or equity to support more debt. In particular, the Bank loaned the Harrison's money on seven separate occasions. Venture Bank Loan Numbers: 9590125670, 95901256702, 9590125673, 9590143470, 9590143471, 9590188470, and 9590220171. The Bank breached its agreement with the Harrisons in the Storage facility construction loan and in another loan on the development project in Mason, WA. *CP 69-141.*

The Bank loaned money on the note which is the subject to this lawsuit and secured it with a second deed of trust on a property that had little or no equity. The funds from this loan were used by the Bank to pay

interest on other loans to prevent those loans from defaulting, to the benefit of the financial stability of Bank and to the detriment of the Harrisons.

In April 2009, the Harrisons filed a lawsuit in Puyallup Tribal Court against the Bank. The Harrisons raise identical issues in the Tribal Court action as they have in their affirmative defenses and counterclaims in this action. The Bank's counsel in this action is co-counsel in the Tribal Court action. Discovery in the Trial Court action is already complete. Witness lists have been exchanged, interrogatories answered, and 6 depositions have been taken including those of the Harrisons' expert witnesses. The trial in Puyallup Tribal Court is set for November 13, 2012. *CP 114-121*.

The loan in this matter was provided to the Harrisons so they could pay the interest on their larger loans from Venture Bank. Their larger loans were related to the development of a mini storage facility on the Harrisons' property in Milton, WA (Harrison Property). The Harrison Property is a part of and subject to and protected by the federal statutes governing lands held in trust for the benefit of Tribes and Indian allottees, administered by the Bureau of Indian Affairs ["BIA"], and the applicable federal rules, statues and regulations; including those established for and by the BIA; and including without limitation 25 U.S.C. Sec 1322(b).

Venture loaned Harrisons certain monies for a construction project and development upon the Harrison Property ["Venture Loan"].

The Bank initially agreed to separate the two loans on the Harrison Property into two deeds of trust and change the legal description for each. The Harrisons relied upon that promise from the Bank and their agreement to the loans and The Project was dependent upon that promise. If the two loans were divided into two separate deeds of trust, Harrisons could have market the two properties more effectively and prevented the Project from failing. After the loans were issued the Bank wrongfully refused to complete the agreement. The Bank's breach of the contract increased the financial harm to the Harrisons. *CP 69-141*.

As a part and very important portion of the Venture Loan arrangements and related agreements with Venture (and a major reason Plaintiffs agreed to the Venture Loan and terms), Venture promised that it would release its Deed of Trust interest ["1st DOT"] relative to a three (3) three acre section of the Harrison Property so that it could be used as security for the construction loan for the Storage Facility on the Harrison Property ["2nd DOT"]. *CP 69-141*

Further, as part and significant portion of the Venture Loan and the financing arrangements and agreements, Venture executed a *Subordination, Non-Disturbance and Attornment Agreement* dated July

31, 2007 [“SNA Agreement”]. Parties to the SNA Agreement were TIFFANY JANE HARRISON, as Landlord; Venture Bank as Lender under the Venture Loan; and Four Points Communications, LLC [“Four Points”] as Tenant. *CP 69-141*

Four Points entered into a Lease with the Harrisons, whereby Four Points would construct certain advertising billboards upon a portion of the Harrison Property at Four Points expense [“Four Points Billboards”], and then make payment to the Harrisons of the agreed portion of the advertising revenues generated from third party companies utilizing the billboards for company Ads. This Lease was approved by the BIA; and Venture was well aware of the Lease arrangements and requirements when the Venture Loan was contemplated and finalized. *CP 69-141*

Based upon and in reliance upon the SNA Agreement, and specifically §3.5 of that SNA Agreement, and the promises and representations of Venture set forth therein, Harrisons and Four Points entered into the Subject Lease and Four Points spent the required monies for the Four Points Billboards. *CP 69-141*

Section 3.5 of that SNA Agreement provided that Venture would fully release any security interest in and to that portion of the Harrison Property which contained the Four Points Billboards so as to insure that same would stay in the Land Trust. This requirement was critical to the

Lease and the parties because if the property upon which the Four Points Billboards were located came out of the Land Trust as a result of foreclosure or other action, the Four Points Billboards would then be subject to Washington State and Federal laws regarding prohibition on outdoor advertising on interstate highways and would be illegal. Obviously, Four Points would not want to invest the large amount of capital needed to construct the Four Points Billboards without protection in that regard. The SNA Agreement provided that protection and now Venture refuses to honor that commitment, in breach of the parties' agreement, leading to financial hardship for the Harrisons. *CP 69-141*

Further, during the negotiations of this transaction with Venture, Harrisons' and Venture's attorneys were from the same Law Firm, and Harrisons' were assured by Venture and Venture's counsel that the referenced Section 3.5 of the SNA Agreement referenced below would effectuate a release of Venture's security interest as to the property underlying the Four Points Billboards. Notwithstanding the foregoing, Venture now refuses to honor their promises and/or comply with the requirements under the SNA Agreement

Venture has failed and refused to release its security interest in the underlying Four Points Billboards property as promised and as set forth in said §3.5 of the SNA Agreement notwithstanding written demand to do so.

Even with the required release of Venture's security interest in that portion of the Harrison's Property upon which the Four Points Billboards are located, the amount of the Venture Loan is less than the remaining value of the Harrison Property as constituted following such release of the security interest. *CP 69-141*

The following are facts from depositions and discovery in the Puyallup Tribal Court matter that are relevant to the affirmative defenses and counterclaims herein:

- 1) The central focus of this litigation is two loans and deeds of trust covering trust land owned by Tiffany Harrison in the City of Milton, Washington. The original loan, for \$2.8 million, covered the purchase of the land and buildings on the land. The second loan, for \$4 million, covered the construction costs for the Freedom Storage facility the Harrisons built on the land.
- 2) Michael Kuehner is an expert in the area of banking, having been in the business for over 20 years, currently serving as regional manager for loan modifications for Bank of America. See Pg 5, of the Deposition of Michael Kuehner attached as Exhibit L. *CP 123*.
- 3) David Pollock is an expert appraiser, having more than 20 years' experience in the field. *CP 111-113*.

- 4) In the process of obtaining the construction loan, the parties agreed that they would create a new deed of trust to replace the original deed that secured the first \$2.8 million loan. This new deed would release the land needed to construct the storage facility so that the storage facility would have its own separate lot and separate deed of trust and note. Also, the remaining land containing the smoke shop and the dome building would have its own lot and deed and note. The purpose was to protect the Harrisons should they need to sell either parcel. *CP 69-141.*
- 5) The Bank took specific actions to evidence this agreement. The Bank hired an appraiser with instructions to appraise the smoke shop and the dome businesses and land as if they were segregated from the adjoining three acres needed to build the storage facility. The Bank also instructed that appraiser to appraise the proposed storage facility as if it was constructed on land free and clear of the original deed of trust. *CP 102,103,106*
- 6) The Appraiser completed his work and submitted the appraisals as instructed. See documents from Bank's discovery, appraisal letter Exhibit "E" attached. *CP 94-98.*

- 7) The Bank had the Plaintiffs hire a surveyor to survey out three acres of the original land for the storage facility and provide a legal description. *CP 106-107*
- 8) That legal description was used by the Bank in the second, \$4 million loan, and recorded, although it does not describe a legal lot accepted by either the Puyallup Tribe or the BIA. *CP 95.*
- 9) The Bank entered into an agreement with Tiffany Harrison and FourPoints Communications, the company leasing the billboards on the site that they would not attempt to foreclose on the billboards. See SNA, agreement Exhibit C, attached. *CP 79-98.*
- 10) Sometime after the second loan for construction of the storage facility closed and while the facility was under construction, at a time unknown to the Harrisons, the Bank decided to breach the agreement and not separate out the two parcels and have the original deed of trust cover less land. This left the original deed of trust encumbering all the land, and the second deed of trust encumbering a non-lot unrecognized legal description covering the three acres where the storage facility was under construction. See documents from Bank's loan file, wherein some unknown staff of the Bank wrote "not happening" over

the loan officer's request for the segregation agreed to. See Exhibit J deposition of Randall Harrison pages 22-23, documents from Bank's files, *CP 99-103, 117-118*.

11) When the construction of the storage facility got into red ink in the amount of approximately \$800,000.00, the Harrisons could not attempt to sell either the smoke shop or the dome building to acquire cash because the Bank would not segregate the loans as agreed. The breach of contract by the Bank helped create the conditions that prevented the Harrisons from being able to cover the loans and forced them to lose their other properties including the property that the note is this action involves. *CP 119-120*.

12) At this time the Bank was undergoing reviews and audits by the FDIC that eventually lead to the collapse of the Bank. The FDIC public documents reveal a bank that was in serious trouble and noted for having troubled commercial and construction loans. Releasing the three acres for the storage facility would have clearly resulted in less collateral for the original bank loan and drawn attention from the FDIC. *CP 107-109*.

13) The Bank entered into another loan with the Harrisons to purchase a property in Chelan, WA whereby the Bank would advance the Harrisons the purchase price and money to subdivide the property and then make a profit. Instead, the Bank took the excess cash from the loan and applied it to the loans for the construction project, causing the Harrisons to lose that property and fall further into debt. *CP 121,132-134.*

14) The Bank has a fiduciary duty to the borrower in such transactions and their action of careless loans without due diligence, the Bank breached that duty. In this case, the Bank's breach with respect to the other loans caused the Harrisons' different projects to fail which lead to severe financial harm to the Harrisons making it impossible for them to pay the loan that is the subject of this lawsuit. *CP 125-130.*

III. ARGUMENT

A. STANDARD OF REVIEW

Following summary judgment, the standard of review by the appellate courts is de novo. The appellate court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004); *Sea-Pac Co., Inc. v. United Food*

& Commercial Workers Local Union 44, 103 Wash.2d 800, 802, 699 P.2d 217 (1985). Summary judgment is appropriate only if " the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). All facts must be viewed in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham*, 154 Wash.2d at 26, 109 P.3d 805.

B. THERE ARE ISSUES OF FACT PERTAINING TO EACH OF THE DEFENDANTS' AFFIRMATIVE DEFENSES WHICH MAKES SUMMARY JUDGMENT IMPROPER.

The loan in this case is one of seven different loans between the parties. The loan here was for just over \$100,000 and makes up only a small portion of the \$8,000,000 loaned to the Harrisons by the Bank. The Harrisons have filed an action in Puyallup Tribal Court alleging predatory lending, breach of contract, and fraud.

The allegations in the Puyallup case is that the Harrison's were convinced to take out this loan, a second mortgage on a home they owned, in order to provide money to bring other, much larger, commercial loans

into payment status for the benefit of the Bank, just prior to a Federal audit.

Allegations from the Puyallup case complaint include:

2.25 The Defendant Venture Bank further harmed the Plaintiffs' financial situation by continuing to loan the Plaintiffs money when the bank knew that the Plaintiffs did not have the resources or equity to support more debt. In particular, the Venture Bank loaned the Plaintiffs money on seven separate occasions. Venture Bank Loan Numbers: 9590125670, 95901256702, 9590125673, 9590143470, 9590143471, 9590188470, and 9590220171.

2.26 The Defendant Venture Bank loaned money on property that had little or no equity. The funds from some loans were used to pay interest on other loans to prevent those loans from defaulting, to the benefit of the financial stability of Venture Bank and to the detriment of the Plaintiffs Defendant engaged in predatory lending by encouraging Plaintiffs to enter into several questionable loans, using inflated appraisals, in order to pay interest on prior loans to Defendant. This benefited Defendant's financial reports to the Federal Government, but plunged Plaintiffs into deeper debt. Defendant knew or should have known that Plaintiffs would be unable to meet the requirements of that debt load, would be unable to service the debt, and would be forced into delinquency in time.

CP 39-56.

The allegation made in the Puyallup Tribal Court matter, if proved, would also prove the elements of the Harrison's affirmative defenses of promissory estoppel, equitable estoppel, and prevention of performance as well as the Harrison's counter-claims.

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C. SUMMARY JUDGMENT IS IMPROPER WHEN THERE ARE ISSUES OF FACT PERTAINING TO THE DEFENSE OF IMPRACTIBILITY.

The Harrison's answer contained the following affirmative defense:

Prevention of Performance. The plaintiff's action of predatory lending on numerous loans to the plaintiff, including the subject matter of this lawsuit, prevented the success of defendant's business ventures and ultimately prevented him from being in a position to pay the balance of the note.
CP 238-234.

The affirmative defense alleges that the Bank's actions made it impossible for the Harrison's to pay the note. The defense of impossibility is a recognized defense to enforcement contracts in Washington. *Metropolitan Park Dist. v. Griffith*, 106 Wash.2d 425, 723 P.2d 1093 (1986). The Griffith case recognized the defense of impossibility, citing *Thornton v Interstate Secs. Co.*, 35 Wn.App. 19, 666 P.2d 370, review denied, 100 Wash.2d 1015 (1983) which in turn cited *Liner v. Armstrong Homes, Inc.*, 19 Wash.App. 921, 579 P.2d 367 (1978), as well as Restatement of Contracts §§ 454, 455, and 457 (1932). Restatement (Second) of Contracts (1981). The pertinent parts of the Restatement are as follows:

§ 261 Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the

contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

An introductory note to chapter 11 preceding § 261 states, at 309:

An extraordinary circumstance may make performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance. In such a case the court must determine whether justice requires a departure from the general rule that the obligor bear the risk that the contract may become more burdensome or less desirable.... The question is generally considered to be one of law rather than fact, for the court rather than the jury.

Usually the impracticability or frustration that is relied upon as a justification for non-performance occurred after the contract was made.

§ 265 Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Comment "a" to §265 denotes the difference between the four preceding sections and §265; namely, in §265 there is no impediment to performance by either party. It denotes the elements as: (1) the purpose that is frustrated must have been a principal purpose of that party making the contract, (2) the frustration must be substantial, (3) the nonoccurrence of the frustrating event must have been a basic assumption on which the

contract was made, and (4) neither the language nor the circumstances indicate the contrary.

Restatement (Second) of Contracts (1981) denotes that the first Restatement of Contracts (1932) talked of impossibility, whereas the Restatement (Second) speaks in terms of impracticability as distinguished from impracticable. A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover. Restatement (Second) of Contracts § 261 comment d (1981). Rather, impracticability has been described as extreme or unreasonable difficulty, expense, injury, or loss to one of the parties.

In this case, the failure of the Bank to fulfill its promise to separate the trust property in Fife into two separate deeds of trust, made it “unreasonable difficult” for the Harrison to pay the note. All the elements of the Restatement have been alleged and will be proved: (1) the main reason the Harrison’s agreed to the Note was to further the development of the Fife property project; (2) not separating the property into two deeds of trust eliminated the Harrison’s options in earning money from that part of the property; (3) Harrison were enticed into taking the Note by Bank’s

promise to create deeds of trust; and (4) there is no language in the Note or the circumstances surrounding the Fife property that indicates the property would not be separated into two deeds of trust.

The Bank has argued that this affirmative defense fails because of RCW 19.36.110 which states that the rights and obligations of the parties to a credit agreement shall be determined solely from the credit agreement. The Bank argues that any agreement made between the parties with respect to the Fife property is separate and distinct from the parties' transaction pertaining to this Note. Even if that were true, it does not prevent the Harrison's from raising the affirmative of impossibility/impracticability. In fact, the defense of impracticability does not have to be based upon conduct of the Bank or any party to the contract. Circumstances creating the defense can arise from zoning changes, natural disasters, and changes in the law. RCW 19.36.110 has no impact on Harrison's ability to raise the affirmative defense of impracticability.

D. THERE IS AMPLE EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO HARRISON'S COUNTERCLAIMS.

Harrisons have separate counterclaims and affirmative defenses that allege different defenses to the claims of the Bank that offset or

extinguish it. To prevail on summary judgment, the Bank must show that there are no disputed facts and that it can prevail on each defense and counterclaim.

Washington has adopted the Restatement (second) of Torts. The Restatement outlines the nine elements of fraud: 1) Representation of an existing fact, opinion, intention, or law; 2) Its materiality; 3) Its falsity; 4) The speaker's knowledge of its falsity or ignorance of the truth of the representation; 5) the speaker intention that it be acted on or that a person refrain from acting; 6) The good faith of the person to whom it is made; 7) The hearer's reliance on the truth of the representation; 8) The hearer's reliance is justifiable; and 9) The hearer's damage is caused by the reliance.

Section 552 of the Restatement provides:

One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of other in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communication the information.

To prove negligent misrepresentation, most states require a plaintiff to show that: 1) the defendant made a representation in the course of business or in a transaction in which the defendant has pecuniary

interest; 2) the defendant provided false information for the guidance of other in their business; 3) the defendant failed to exercise reasonable care or competence in obtaining or communicating the information; 3) the defendant's misrepresentation proximately caused the plaintiff's injury; 4) the plaintiff suffered pecuniary loss by justifiably relying on the defendant's misrepresentation.

The Harrison's have alleged and there are issues of fact pertaining to:

- 1) That Bank represented a fact or intention (that the Bank would split the Milton property into two parcels and two deeds of trust)
- 2) That the misrepresentation was material (it was integral into allowing the properties to be marketed and profitable)
- 3) Its falsity (It was not done, the bank unilaterally decided not to split the property)
- 4) The speaker's knowledge of its falsity or ignorance of the truth (Bank officer Kilen assuring the defendants, while higher officers of the bank already decided the property would not be split)

- 5) The speaker's intention that it be acted upon (Kilen and Harrsion statement that it would allow the sale of one of the two parcels)
- 6) The good faith of the person to whom it was made (Harrison's good faith in signing the \$4 million loan)
- 7) The hearer's reliance on the statement (Harrisons' relied upon the statement when agreeing to the loans)
- 8) The reliance was justified (The Bank actually began to separate the property and produce a loan document with a modified legal description)
- 9) Damage to the hearer of the statement (Harrisons were forced into financial crises, losing 4 properties to foreclosure)

In order to prevail on summary judgment the Bank must show that there are no issues of fact that could allow the fact finder to conclude that fraud or negligent misrepresentation occurred. The Bank is alleged to have directly caused the collapse of the Harrison's development projects and forced them into financial failure, causing the loan in this case to be unpaid.

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V. CONCLUSION

The trial court should not have granted summary judgment under circumstances where there are issues of fact as to how the Bank handled certain other loans and whether the Bank's breach of those loans caused the Harrisons' financial failure and inability to pay this loan.

DATED this 13th day of September 2012.

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