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Division I  
State of Washington

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

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BANNER BANK, a Washington chartered banking corporation,

Respondent,

vs.

JOSEPH R. ELENBAAS and MELANIE W. ELENBAAS, husband  
and wife and the marital community comprised thereof,

Appellants,

and

ERROL HANSON FUNDING, INC., a Washington corp.; *et al.*,

Defendants.

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BRIEF OF APPELLANTS JOSEPH AND MELANIE ELENBAAS

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## I. INTRODUCTION

This case arises from respondent Banner Banks's efforts to foreclose on a mortgage securing the repayment of a debt evidenced by two promissory notes (collectively "Note") that appellants Joseph and Melanie Elenbaas (collectively "Elenbaases") allegedly failed to repay. Banner Bank sued the Elenbaases for breach of contract and unjust enrichment, claiming they defaulted on their mortgage payments.

Discovery had not even begun when Banner Bank moved for summary judgment. Despite substantial evidence from the Elenbaases that they paid all amounts owed on the loan, the trial court held as a matter of law that the Elenbaases had breached their contract with Banner Bank.<sup>1</sup> Shortly thereafter the trial court entered orders of foreclosure and sale. The Elenbaases' farm was sold at public auction.

The Elenbaases appeal the trial court's decision to grant summary judgment in favor of Banner Bank. Summary judgment

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<sup>1</sup> The trial court impliedly denied summary judgment to Banner Bank on its unjust enrichment claim based on the existence of the promissory note. Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). Where a valid contract governs the rights and obligations of the parties, unjust enrichment does not apply. *See Mastaba, Inc. v. Lamb Weston Sales, Inc.*, 23 F. Supp. 3d 1283, 1295-96 (E.D. Wash. 2014).

was inappropriate because genuine issues of material fact remained for trial. This Court should reverse the grant of summary judgment to Banner Bank and remand for further proceedings on the merits to give the Elenbaases their day in court. The Court should also award the Elenbaases attorney fees and costs incurred on appeal.

## II. ASSIGNMENTS OF ERROR

### A. Assignments Of Error<sup>2</sup>

1. The trial court erred by entering an order on December 5, 2014 granting summary judgment to Banner Bank on its breach of contract claim.

2. The trial court erred by entering a judgment against the Elenbaases on December 5, 2014, which included an award of attorney fees and costs.

3. The trial court erred by entering an order on January 16, 2015 denying the Elenbaases' motion for reconsideration.

### B. Issues Pertaining To Assignments Of Error

1. Did the trial court erroneously grant summary judgment on a bank's breach of contract claim where it failed to

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<sup>2</sup> Copies of the challenged orders are in the Appendix.

construe the facts in the light most favorable to the non-moving borrowers and the borrowers raised genuine issues of material fact disputing the alleged breach thus requiring a trial on the merits? (Assignments of Error Nos. 1, 3)

2. Did the trial court erroneously grant attorney fees and costs to a bank where it erroneously granted summary judgment in the bank's favor? (Assignments of Error Nos. 1-3)

### III. STATEMENT OF THE CASE

On November 25, 1997, the Elenbaases executed a promissory note in the amount of \$123,500 in favor of Whatcom State Bank (now Banner Bank). CP 26-29. The promissory note was secured by a construction deed of trust ("Deed"). CP 33-40. The Deed was recorded in Whatcom County, Washington on November 25, 1997 and granted Banner Bank a security interest in the Elenbaases' real property at 5200 Defiance Drive, Bellingham, Washington (the "property").<sup>3</sup> CP 34.

On April 29, 2009, the Elenbaases executed a modification of the Deed on the Banner Bank loan to consolidate the first and second mortgages on the property and the second mortgage on the

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<sup>3</sup> This property is not the Elenbaases' primary residence; rather, their primary residence is 5201 Defiance Drive. CP 54. Their mailing address is 600 E. Smith Road. RP (April 3, 2015):5.

Elenbaases' residential property (already held by Banner Bank) and to place their account on auto-pay. CP 30-31. The Elenbaases and Banner Bank refinanced the 1997 loan and Banner Bank loaned the Elenbaases \$177,529. CP 30. As a result of the refinancing, the Elenbaases granted Banner Bank a continuing security interest in the property. CP 30.

Banner Bank now maintains that following the 2009 refinancing, the Elenbaases began missing the deadline to pay their monthly obligations under the Deed and the Note. CP 19, 62. The Elenbaases' payments on the loan were due by the 25th day of each month. CP 30, 62. Banner Bank alleges the Elenbaases missed the deadline for their first payment after the refinancing by 25 days, paying on June 19, 2009. CP 19, 62.

According to Banner Bank, the Elenbaases only met their payment deadlines sporadically and three months of payments were past due by March 2011. CP 62. Banner Bank alleges it sent a demand letter to the Elenbaases in March 2011 and received only a partial payment in response. CP 62, 201. Banner Bank also vaguely alleges the Elenbaases' "default/partial cure/default cycle has been repeated many times over the past three years." CP 62. Banner Bank maintains that it made repeated requests and

demands for full payment from the Elenbaases. CP 62.

As early as November 2013, Banner Bank began refusing to accept “partial payment” from the Elenbaases. CP 246-247. It alerted the Elenbaases to this practice by holding their checks, sometimes upwards of six months, and then returning the checks. CP 293-295. Banner Bank contends it informed the Elenbaases on November 12, 2013 that they had defaulted on their September and October payments. CP 62, 248-49. It demanded payment of \$3,763.32 by November 22nd or “Banner Bank may exercise its rights under the loan agreements and commence further collection remedies against the real property.” CP 248. But neither the Note nor the Deed contain a provision permitting Banner Bank to demand one single payment or to refuse to accept smaller payments that, when added together, total the defaulted amount. CP 26-44.

On November 21, 2013, Banner Bank returned a check for \$2,400 to the Elenbaases that it declared “insufficient.” CP 246. This was one day before the November 22nd deadline arbitrarily imposed in the bank’s November 12th demand letter. CP 248. On December 3, 2012, the Elenbaases sent a letter to Banner Bank with the original check for \$2,400 and an additional check for

\$1,400, which together more than covered the amount Banner Bank had demanded in its last correspondence. CP 243. Although the Elenbaases' November payment was due by November 25th, they would not accrue late fees unless Banner Bank received their payment 16 days after this date. CP 30. Despite the terms of the Note, Banner Bank returned both checks to the Elenbaases on December 19th and claimed the checks were insufficient because the November payment amount was not included. CP 246.

Between December 2013 and May 2014, the Elenbaases continued to make periodic payments that Banner Bank deemed "insufficient" as only "partial payment." CP 293-95. Banner Bank's own accounting shows that by January 21, 2014, the Elenbaases owed Banner Bank \$8,878.35 (inclusive of late fees). CP 293. Yet the Elenbaases had sent Banner Bank six checks totaling \$10,800. CP 293. Despite this, Banner Bank insisted the Elenbaases were \$1,878.35 in arrears. CP 293. The Elenbaases' alleged shortage was due in part to Banner Bank's arbitrary decision to stop crediting and applying the Elenbaases' payments and to return some of their checks. In May 2014, Banner Bank returned six checks, dated as far back as December 2013, to the Elenbaases. CP 119-27, 294. The bank's tendency to refuse checks and send them back to the

Elenbaases occurred again on June 11, 2014 and October 7, 2014. CP 218-36, 293-95.

On July 23, 2014, Banner Bank sent a letter to the Elenbaases informing them of their allegedly delinquent payments.<sup>4</sup> CP 207-208. The letter informed the Elenbaases that “[they had] one final opportunity to pay Banner Bank the total amount necessary to fully reinstate [their] loan as to all past due payments at this time, which amount is \$23,918.20.” CP 207. The letter included a ledger accounting for \$27,100 of payments the Elenbaases sent between December 2013 and June 2014. CP 214-15. Of that amount, Banner Bank had returned \$20,700 to the Elenbaases after refusing to accept the payments and had retained possession of another \$6,400 in July 2014. CP 215. Banner Bank alludes to these payments as “partial payments,” stating the Elenbaases’ “prior partial payments, including all checks (both personal and Cashier’s checks) that Banner Bank returned to you, will not be discussed further.” CP 207. The Elenbaases denied receiving all of the “returned” checks. CP 171.

During the period of time that Banner Bank’s complaint

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<sup>4</sup> Banner Bank knew its communications were not reaching the Elenbaases and that its notices were insufficient. RP (April 3, 2015): 32-33. Although the bank knew the 5200 Defiance Drive address was not the Elenbaases’ primary residence or even their mailing address, it used the property address when it mailed the Elenbaases its final demand letter. CP 207.

alleges the Elenbaases were in default, September 2013 through October 2014, the Elenbaases allegedly owed a total of \$30,594.10, inclusive of late fees. CP 63. Banner Banks' accounting records confirm the Elenbaases sent it \$39,900 in checks, most of which the bank held for months before allegedly returning to the Elenbaases. CP 293-295. The Elenbaases believe Banner Bank still retains possession of those checks and did not process them. Banner Bank did not credit the Elenbaases with their payments and refused to apply these "partial payments" to the amount they owed. CP 293-295.

On September 9, 2014, Banner Bank filed a complaint against the Elenbaases alleging they had defaulted on their loan by providing insufficient partial payments following its demands for payment in full of the defaulted amount.<sup>5</sup> CP 20. Banner Bank identified the default period as September 25, 2013 through August 25, 2014. CP 20. It asserted the Elenbaases owed \$42,890.52 under the Note: \$26,143.50 for the amount past due, \$3,248.51 for "costs," and \$13,498.57 in attorney fees and costs. CP 20. It further asserted that it did not begin returning the

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<sup>5</sup> Banner Bank did not serve the Elenbaases with the complaint until October 1, 2014 because it repeatedly tried to serve them at the wrong address. CP 54. Banner Bank later acknowledged it attempted delivery to an "unreliable delivery address" when it attempted to return checks to the Elenbaases in June 2014. CP 197.

Elenbaases' "partial" payments until May 2014. CP 20. According to Banner Bank, the Elenbaases' "nonpayment constitutes a breach and a default under the terms of any and all agreements between the Elenbaases and Banner Bank." CP 21. As a result of the Elenbaases' indebtedness, Banner Bank for the first time declared the entire unpaid principal sum and accrued interest under the Note immediately due under a provision in the Deed providing for the acceleration of the debt upon default. CP 38.

Banner Bank's September 11, 2014 statement reflected a balance due of \$26,744.84, exclusive of attorney fees and costs. CP 51. By contrast, its complaint alleged a balance due on September 8, 2014 of \$26,143.50 plus costs of \$3,248.51 and attorney fees of \$13,498.58 (totaling \$42,890.58). There is no statement accounting for the \$600 discrepancy. CP 20, 51.

Appearing *pro se*, the Elenbaases answered the complaint on October 20, 2014. CP 49. They specifically stated:

18. Acknowledge that some notices have been received, but were always contested with proffered proof of proper payment. Defendants deny that defaults existed, or that necessary payments were not made.

CP 49-50. They further asserted that "Banner or its agents hold, or have held, for almost a year, checks in the amount demonstrated

due by their written and mailed notices. Said amount at time of this answer, totals some \$42,000[.]” CP 50.

Banner Bank moved for summary judgment a mere two weeks after receiving the Elenbaases’ answer and before discovery had begun. CP 59. It sought to recover \$52,808.24 from the Elenbaases as of October 29, 2014, which included \$18,965.63 in attorney fees and costs through September 30. CP 63. This left the Elenbaases with an allegedly unpaid balance of \$30,594.10. CP 63.

In its motion for summary judgment, Banner Bank argued that no genuine issue of material fact existed in the breach of contract claim. CP 60. It was therefore entitled as a matter of law to \$170,566.32, which consisted of the principal balance of \$117,869.61, interest of \$9,311.70, late fees of \$1,278.64, advances of \$3,248.51, payoff and processing of \$142, and attorney fees and costs of \$18,965.63.<sup>6</sup> CP 63-64.

The Elenbaases argued in response that Banner Bank had acknowledged that all of the monies necessary to meet the principal

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<sup>6</sup> This amount was later reduced because of scrivener’s errors that miscalculated the total principal. CP 388. The total principal should have been \$131,335.06. CP 388. The subsequent partial satisfaction of judgment, which accounts for the scrivener’s error, does not clarify if the appropriate changes were made to the applicable interest and costs; however, it states a “final” judgment amount of \$151,600.69. CP 388.

and interest payments were received incrementally and in a timely manner. CP 155. They argued further that no breach of contract occurred because Banner Bank received “some 18 checks totaling **\$41,600.00**, of which **\$31,300.00** are cashiers checks or postal money orders, during a time frame in which only **\$27,811.68** of payments became due.” CP 155 (emphasis in original). They also argued that Banner Bank failed to demonstrate the validity of the claim of delinquency or the cause for collection costs, “despite at least eight written requests that it do so.” CP 156. Finally, the Elenbaases argued in supplemental briefing that they submitted a list of checks and copies of the same showing when payment was made to Banner Bank. CP 161.

The trial court granted summary judgment to Banner Bank and subsequently denied the Elenbaases’ motion for reconsideration. CP 407. Banner Bank filed a partial Satisfaction of Judgment on December 22, 2014 after it applied \$24,400 in withheld checks previously endorsed to it by the Elenbaases. CP 388. The revised judgment against the Elenbaases thus totals \$129,183.10 as of December 22, 2014. CP 394.

The Elenbaases timely appealed. CP 406.

#### IV. SUMMARY OF ARGUMENT

The trial court summarily determined Banner Bank's breach of contract claim; accordingly, its findings of fact and conclusions of law are superfluous. The Elenbaases need not challenge those findings as review is *de novo*, nor may Banner Bank rely on them.

Taking the evidence in the light most favorable to the Elenbaases, summary disposition was inappropriate here. The trial court erred by concluding there were no genuine issues of material fact and that summary judgment should be entered as a matter of law. The evidence put forth by the Elenbaases, viewed most favorably to them, demonstrates that there was a genuine issue whether the Elenbaases in fact breached any contract with Banner Bank and when such breach, if it occurred, happened.

The trial court's award of attorney fees and costs to Banner Bank was improper where the underlying summary judgment was inappropriate.

This Court should reverse the trial court's summary judgment order and subsequent judgment, and remand for a trial on the merits. The Elenbaases should have their day in court.

As the prevailing party on appeal, the Elenbaases are entitled to their reasonable attorney fees and costs.

## V. ARGUMENT

### A. Standards Of Review

In reviewing a grant of summary judgment, this Court engages in the same inquiry as the trial court. *See, e.g. Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Id.* Although summary judgment motions are intended to avoid unnecessary trials, Washington courts have zealously protected litigants' rights to trial on all legitimately contested issues. Summary judgment is thus appropriate only when the record presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>7</sup> CR 56(c). But a trial is absolutely necessary if there is a genuine issue as to any material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974); *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960).

Despite having relied solely on declarations and ruled summarily, the trial court entered findings of fact and conclusions of

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<sup>7</sup> A material fact is one upon which the outcome of the litigation depends. *INTERS v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998).

law. 298, 411-12. A trial court need not enter findings of fact and conclusions of law when acting summarily. If it does so, those findings are superfluous. CR 56; *Westberry v. Interstate Distrib. Co.*, 164 Wn. App. 196, 209, 263 P.3d 1251 (2011).

This Court reviews a trial court's ruling on a motion for reconsideration for a manifest abuse of discretion. *See, e.g., Kleyer v. Harborview Med. Ctr. of Univ. of Wash.*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

**B. The Trial Court Erred By Granting Summary Judgment In Banner Bank's Favor And By Denying Reconsideration Of That Order**

Banner Bank moved to summarily determine its breach of contract claim, arguing the Elenbaases defaulted on their loan and thus breached their contract with the bank. CP 59-70. The trial court agreed and granted the motion as a matter of law. CP 410/412. Summary judgment was improper because the Elenbaases presented material facts sufficient to withstand

summary judgment on the breach of contract claim. A trial on the merits was required; accordingly, this Court should reverse.

A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *N.W. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (citing *Larson v. Union Inv. & Loan Co.*, 168 Wash. 5, 10 P.2d 557 (1932)).

The Elenbaases raised two genuine issues of material fact that should have precluded summary judgment in this case: (1) whether they breached their contract with Banner Bank and (2) when they allegedly defaulted on their loan.

1. **The Elenbaases raised a genuine issue of material fact concerning their alleged breach of contract**

The Elenbaases consistently asserted they never defaulted on their loan. CP 155-156; 161; 165-168; 172; 173. Banner Bank disagreed, arguing they defaulted between September 2013 and October 2014. CP 63. This disagreement created a classic “he said, she said” dilemma for which summary judgment was ill-suited. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006) (noting neither the trial court nor the appellate court will weigh the evidence or assess witness credibility on a

motion for summary judgment). The trial court thus erred by granting summary judgment in Banner Bank's favor.

Moreover, only if the Elenbaases failed to adhere to some duty contained within the Note or the Deed would they have been in breach of their contract. While Banner Bank summarily contended they defaulted under the terms of the Note and the Deed based on their allegedly late payments, the Elenbaases specifically denied such default. CP 155; 161; 166-167; 170. Notably, while Banner Bank suggested that the Elenbaases continually engaged in a cycle of late payments and defaults for which it demanded payment in full, it failed to establish the Elenbaases' default as a matter of law. The Elenbaases maintained that they paid the amounts due in full before their due dates. CP 155; 161. Whether the Elenbaases paid the amount due each month was essential to determining whether they were in default and therefore had breached their contract with the bank. Had it not been for Banner Bank's refusal to accept the Elenbaases' payments throughout the alleged default period, the Elenbaases would not have been in default.

Indeed, an inspection of Banner Bank's accounting records shows the Elenbaases would have paid more than the amount due during the time period in which Banner Bank claimed they were in

default had it not arbitrarily stopped accepting what it characterized as “partial payment” from them. Between September 2013 and October 2014 the Elenbaases issued 17 separate checks to Banner Bank, many of which were cashiers checks or postal money orders, totaling \$39,900. CP 293-95. During that same period, even with late fees that arguably should not have been assessed had Banner accepted the Elenbaases’ payments when made, the amount due and owing and demanded by Banner Bank totaled only \$30,596.10. CP 295.

The Elenbaases and Banner Bank presented conflicting evidence at summary judgment addressing the Elenbaases’ alleged default. But the trial court failed to construe that evidence in the light most favorable to the Elenbaases as the nonmoving party. Had the trial court properly considered the evidence, it would have denied summary judgment to Banner Bank.

In addition, Banner Bank’s decision to arbitrarily stop accepting what it deemed “partial payments” from the Elenbaases was not provided for in the Note or the Deed. CP 30-40. Its refusal to accept payments in November 2013, May 2014, June 2014, and October 2014 not only exacerbated the situation, but in part caused the Elenbaases’ alleged default. Banner Bank’s refusal to credit the

Elenbaases for their payments, refusal to accept their checks, and return of viable payments made before the capricious deadlines imposed are material facts that the trier of fact should consider when determining at trial whether the Elenbaases breached their contract with Banner Bank.

2. The Elenbaases raised a genuine issue of material fact concerning when they allegedly breached their contract

Even assuming *arguendo* that Banner Bank established as a matter of law that the Elenbaases defaulted on their loan and thus breached their contract with the bank, it never established the timing of their breach. Banner Bank thus failed to satisfy its burden on summary judgment and the trial court erred by granting it.

Here, a genuine issue of material fact exists concerning the amount of the Elenbaases' alleged default. The amount they were in default is determined by the date of their default. While Banner Bank claimed the Elenbaases defaulted on September 25, 2013, the Elenbaases asserted they made their September and October payments before the bank took any action to collect on those payments. CP 166. That is, upon Banner Bank's demand for full payment of \$3,768.32 on November 12, 2013, the Elenbaases remitted \$3,800. CP 244; 250. Banner Bank warned in its

November 12, 2013 letter that “if payment of \$3,763.32 is not made to Banner Bank by Friday, November 22, 2013, Banner Bank may exercise its rights under the loan agreement and commence further collection remedies against the real property.” CP 248. The Elenbaases paid the bank \$3,800 by December 3. CP 243. Although they failed to meet Banner Bank’s November 22nd deadline, they paid the total amount demanded before the bank took any further action to collect. CP 244. Indeed, Banner Bank did not take further action against the Elenbaases until *after* it received their payments. At that point, it returned the checks and noted that a new amount was then due. CP 244. Had Banner Bank simply accepted the checks, the Elenbaases would not have been caught in the alleged cycle of default.

Importantly, neither the Note nor the Deed prevented the Elenbaases from paying the full amount due to Banner Bank with a series of smaller checks that together totaled the amount then due and owing. CP 30-40. Nevertheless, Banner Bank repeatedly rejected the Elenbaases’ efforts to pay their mortgage in this manner during the alleged default period. Had Banner Bank simply accepted the smaller payments rather than refused them after holding them for months, then the Elenbaases’ payments would not

have been insufficient on January 21, 2014 or after June 12, 2014.

The Elenbaases unequivocally disputed the date on which Banner Bank alleged they defaulted on their loan, presenting substantial evidence that they satisfied their monthly mortgage obligation, including any applicable late fees, on three separate occasions during the alleged default period. The trial court erred by construing the evidence in the light most favorable to Banner Bank.

Summary judgment was improvidently granted because the Elenbaases raised genuine fact questions addressing whether and when they breached their contract with the bank. They presented documentary evidence that they paid Banner Bank nearly \$10,000 more than what it demanded during the period in which it alleged they were in default and that the bank never clearly identified when their alleged default occurred. This evidence, construed in the light most favorable to the Elenbaases, was sufficient to preclude summary judgment. The trial court erred by granting it.

Because the trial court's order was entered in error, its denial of reconsideration was likewise in error. *Keck v. Collins*, 181 Wn. App. 67, 94, 325 P.3d 306 (2014). The Elenbaases should have their day in court. The Court should reverse and remand for a trial on the merits.

C. The Trial Court Erred By Entering Judgment In Banner Banks' Favor

The trial court awarded Banner Bank \$20,265.63 in attorney fees and costs. CP 411. Should this Court reverse the underlying summary judgment order, it should also vacate the judgment and award of fees. The issue of trial court fees and costs should await further proceedings below.

D. The Elenbaases Are Entitled To Their Reasonable Attorney Fees And Costs On Appeal

The Elenbaases request attorney fees and costs on appeal pursuant to RAP 18.1, which permits an award of attorney fees and costs on appeal if granted by applicable law. Under the American Rule on attorney fees, the parties bear their own legal expenses unless a statute, contract, or recognized equitable exception to that rule authorizes the recovery of fees. *See, e.g. N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn. App. 228, 236, 628 P.2d 482 (1981); *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941). By statute, attorney fees are awarded to the prevailing party in an action on a contract that specifically provides for attorney fees and costs incurred to enforce its provisions. RCW 4.84.330; *QFC v. Mary Jewell T, L.L.C.*, 134 Wn. App. 814, 818, 142 P.3d 206 (2006). (requiring courts to apply one-

way fee-shifting provisions bilaterally).<sup>8</sup>

Here, the Note the Elenbaases signed provides:

Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes . . . Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees . . . . and appeals.

CP 31. Similarly, the Deed they signed states:

If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and on any appeal . . . . Expenses covered by this paragraph include, without limitation, . . . Lender's attorneys' fees whether or not there is a lawsuit, including attorneys fees' for . . . appeals[.]

CP 38.

As the prevailing party on appeal, the Elenbaases are entitled to their reasonable attorney fees and costs. *See, e.g., State v. John*, 69 Wn. App. 615, 620, 849 P.2d 1268 (1993) (holding

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<sup>8</sup> The statute reads:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements . . . . As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

defendant was prevailing party and entitled to award of fees and costs where order of contempt was reversed on appeal); *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989) (holding party prevailing on appeal may seek reasonable costs and attorney fees incurred on appeal when contract provides for fee award in trial court).

## VI. CONCLUSION

The only issue at this stage of the case is whether the Elenbaases came forward with evidence adequate to survive summary judgment. Accordingly, the Court must analyze the facts and draw the inferences in the light most favorable to them.

Summary judgment was inappropriate here because genuine issues of material fact remained. The trial court erred by holding that as a matter of law the Elenbaases breached their contract with Banner Bank. Having erred by granting summary judgment in Banner Bank's favor, the trial court erred by entering a judgment against the Elenbaases and imposing attorney fees and costs.

The Court should reverse the trial court's summary judgment order and subsequent judgment and remand for a trial on the merits. The Court should also award the Elenbaases their reasonable attorney fees and costs on appeal.

DATED this 5<sup>th</sup> day of January, 2016.

Respectfully submitted,

/s/ Emmelyn Hart

Emmelyn Hart, WSBA #28820  
Sarah Demaree, WSBA #49624  
LEWIS BRISBOIS BISGAARD & SMITH LLP  
1111 Third Avenue, Suite 2700  
Seattle, WA 98101  
Phone: 206-436-2020  
emmelyn.hart@lewisbrisbois.com  
sarah.demaree@lewisbrisbois.com

Carrie Coppinger Carter, WSBA #28817  
COPPINGER CARTER, P.S.  
100 Central Ave.  
Bellingham, WA 98225  
Phone: 360-676-7545  
ccc@coppingercarter.com  
Attorneys for Appellants  
Joseph and Melanie Elenbaas

# **APPENDIX**

SCANNED

FILED IN OPEN COURT

12-5 2014

WHATCOM COUNTY CLERK

By \_\_\_\_\_ Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHATCOM

BANNER BANK, a Washington chartered  
banking corporation,

Plaintiff,

v.

JOSEPH R. ELENBAAS and MELANIE  
W. ELENBAAS, husband and wife and the  
marital community composed thereof;  
ERROL HANSON FUNDING, INC., a  
Washington corporation; WEBSTER BANK,  
N.A., FIA CARD SERVICES, N.A.; ALL  
OTHER PERSONS OR PARTIES  
UNKNOWN CLAIMING ANY RIGHT,  
TITLE ESTATE, LIEN or INTEREST IN  
THE REAL ESTATE DESCRIBED IN  
THE COMPLAINT HEREIN and DOES I-  
X,

Defendants.

NO: 14-2-01964-1

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AGAINST  
DEFENDANTS JOSEPH R.  
ELENBAAS AND MELANIE W.  
ELENBAAS

~~PROPOSED~~

Banner Bank, the above-named Plaintiff ("Banner Bank" or "Plaintiff"), by and through its attorneys of record, Hacker & Willig, Inc., P.S., moved this Court for an Order Granting Motion for Summary Judgment, and corresponding Judgment against the above-named Defendants, Joseph R. Elenbaas and Melanie W. Elenbaas, husband and wife, and the marital community composed thereof (the "Elenbaases" or "Defendants").

THE COURT has considered the Motion; the supporting Declarations of Penne

1 Oberg and Arnold M. Willig; the Defendants' Response, if any; Banner Bank's Reply, if  
2 any; and the pleadings and files on record herein including Banner Bank's Complaint and  
3 Defendants' Answer. After hearing the arguments of counsel, and the Court being fully  
4 advised in the premises the Court FINDS that the Defendants took a loan from Whatcom  
5 State Bank nka Banner Bank in approximately November 2007, and such was  
6 subsequently modified; that the Defendants are liable on their loan obligations to Banner  
7 Bank; that the Defendants are in default on their loan obligations to Banner Bank; that  
8 Defendants owe no less than **\$150,300.69** to Banner Bank, plus Banner Bank's attorneys'  
9 fees and costs in the amount of **\$20,265.63** (\$18,965.63 through September 30, 2014 and  
10 an estimated \$1,300.00 through the date of the hearing); and that there are no genuine  
11 issues of material fact remaining in this proceeding, therefore, Banner Bank is entitled to a  
12 Judgment against the Defendants as a matter of law.

13 Based upon the above findings, NOW, THEREFORE, Plaintiff's Motion is hereby  
14 granted, it is hereby

15 ORDERED, ADJUDGED, AND DECREED that Plaintiff Banner Bank be, and  
16 hereby is, entitled to entry of Judgment against the Defendants, which may be entered  
17 concurrently herewith.

18 And on the issue of Banner Bank's attorneys' fees and costs, the Court further  
19 FINDS:

20 1) Plaintiff's request for attorneys' fees and costs in the amount of \$20,265.63  
21 (\$18,965.63 through September 30, 2014 and an estimated \$1,300.00 through the date of  
22 the hearing), is reasonable;

23 2) All attorneys' fees and costs referenced herein were necessary and regularly  
24 incurred in the representation of Banner Bank.

25 3) All hours were regularly billed at the timekeeper's regular hourly rates  
26 (\$250.00 - \$325.00 for attorney time, and \$150.00 for paralegal time).

1 4) Plaintiff may request allowance of additional attorneys' fees and costs  
2 incurred after its Motion for Summary Judgment was filed by filing a supplemental motion  
3 to allow additional attorneys' fees and costs with the Court.

4 Based upon the above findings, NOW, THEREFORE it is hereby further,  
5 ORDERED, ADJUDGED, AND DECREED that Plaintiff Banner Bank be, and  
6 hereby is, awarded all attorneys' fees, costs and general expenses related to collection under  
7 the loan agreements, in the amounts as set forth above.

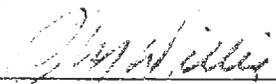
8 ORDERED, ADJUDGED, AND DECREED that Plaintiff Banner Bank be, and  
9 hereby is allowed to file a supplemental motion requesting allowance of additional attorneys'  
10 fees and costs.

11 SO ORDERED this 5 day of December, 2014.

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14 JUDGE IRA UHRIG  
15 WHATCOM COUNTY SUPERIOR COURT  
16

17 Presented by:

18 HACKER & WILLIG, INC., P.S.

19   
20 \_\_\_\_\_  
21 Arnold M. Willig, WSBA #20104  
22 Elizabeth H. Shea, WSBA #27189  
Attorneys for Plaintiff, Banner Bank

FILED IN OPEN COURT  
12-5-2014  
WHATCOM COUNTY CLERK

By \_\_\_\_\_  
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHATCOM

BANNER BANK, a Washington chartered  
banking corporation,

Plaintiff,

v.

JOSEPH R. ELENBAAS and MELANIE  
W. ELENBAAS, husband and wife and the  
marital community composed thereof;  
ERROL HANSON FUNDING, INC., a  
Washington corporation; WEBSTER BANK,  
N.A., FIA CARD SERVICES, N.A.; ALL  
OTHER PERSONS OR PARTIES  
UNKNOWN CLAIMING ANY RIGHT,  
TITLE ESTATE, LIEN or INTEREST IN  
THE REAL ESTATE DESCRIBED IN  
THE COMPLAINT HEREIN and DOES I-  
X,

Defendants.

NO. 14-2-01964-1

JUDGMENT AGAINST  
DEFENDANTS

~~PROPOSED~~

I. JUDGMENT SUMMARY

Judgment Creditor: Banner Bank  
Attorneys for Plaintiff: HACKER & WILLIG, INC., P.S.  
520 Pike Street, Suite 2500  
Seattle, WA 98101  
(206) 340-1935

Attn: Arnold M. Willig

TOTAL JUDGMENT: \$170,665.32  
(plus interest accrued from October 29, 2014 at 7.5%)

Principal Judgment: \$150,399.69  
(including accrued interest  
through October 23, 2014)  
Attorneys' Fees and Costs: \$ 20,265.63

Post-Judgment Interest  
Rate: 18.00 % per annum

Judgment Debtors: Joseph R. Elenbaas and Melanie W. Elenbaas  
600 E. Smith Rd.  
Bellingham, WA 98226

## II. ORDER OF THE COURT & JUDGMENT

Plaintiff, Banner Bank ("Banner Bank" or "Plaintiff"), by and through its counsel, Hacker & Willig, Inc., P.S., moved this Court for an Order Granting Motion for Summary Judgment, and corresponding Judgment, against the Defendants, Joseph R. Elenbaas and Melanie W. Elenbaas, husband and wife, and the marital community composed thereof (the "Elenbaases" or "Defendants").

THE COURT has considered the Motion; the supporting Declarations of Penne Oberg and Elizabeth H. Shea; the Defendants' Response, if any; Banner Bank's Reply, if any; and the pleadings and files on record herein including Banner Bank's Complaint, which was properly served and Defendants' Answer. After hearing the arguments of counsel, and the Court being fully advised in the premises the Court FINDS as follows:

- 1) that the Defendants are liable on their loan obligations;
- 2) that the Defendants are in default on their loan obligations;
- 3) that there are no genuine issues of material fact remaining in this

proceeding;

1 4) that Banner Bank is entitled to a Judgment against the Defendants.

2 NOW, THEREFORE, as Plaintiff's Motion has been concurrently granted, it  
3 is hereby

4 ORDERED, ADJUDGED, AND DECREED that Plaintiff Banner Bank be, and  
5 hereby is, awarded a Judgment against the Defendants, in the amounts as set forth above.

6 And on the issue of Banner Bank's attorneys' fees and costs, the Court further  
7 FINDS:

8 1) Plaintiff's request for attorneys' fees and costs in the amount of \$18,100.91  
9 is reasonable;

10 2) All attorneys' fees and costs referenced herein were necessary and regularly  
11 incurred in the representation of Banner Bank;

12 3) Plaintiff may request allowance of additional attorneys' fees and costs  
13 incurred after its Motion for Summary Judgment was filed by filing a supplemental motion  
14 to allow additional attorneys' fees and costs with the Court.

15 NOW, THEREFORE it is hereby, ORDERED, ADJUDGED, AND DECREED  
16 that Plaintiff Banner Bank be, and hereby is, awarded all attorneys' fees, costs and general  
17 expenses related to collection under the loan agreements, in the amounts as set forth above.

18 ORDERED, ADJUDGED, AND DECREED that Plaintiff Banner Bank be, and  
19 hereby is allowed to file a supplemental motion requesting allowance of additional attorneys'  
20 fees and costs which may be incurred in this case.

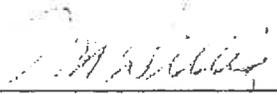
21 SO ORDERED this 5 day of December, 2014.

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23 \_\_\_\_\_  
24 JUDGE IRA UHRIG  
25 WHATCOM COUNTY SUPERIOR COURT  
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Presented by:

HACKER & WILLIG, INC., P.S.



---

Arnold M. Willig, WSBA #20104  
Elizabeth H. Shea, WSBA #27189  
Attorneys for Plaintiff, Banner Bank

SCANNED 1

FILED IN OPEN COURT

1/16 2015

WHATCOM COUNTY CLERK

By \_\_\_\_\_  
Deputy

SUPERIOR COURT OF WASHINGTON  
COUNTY OF WHATCOM

<p><u>BALMAIN BANK</u> Petitioner/Plaintiff,</p> <p>vs</p> <p><u>JOSEPH ELENBAAS, ET AL</u> Respondent/Defendant,</p>	<p>No. <u>14-2-01964-1</u></p> <p>ORDER</p>
---	---

On this 16<sup>th</sup> day of January, 2015, this cause came on regularly for hearing by the Court on DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER AND JUDGMENT GRANTING SUMMARY JUDGMENT DATED DEC. 2014 and after hearing said and the argument of counsel and the Court being fully advised, IT IS HEREBY ORDERED:

THAT THE DEFENDANTS' MOTION FOR RECONSIDERATION BE AND IT HEREBY IS DENIED

Dated: 16 JANUARY 2015

Presented by:  
HACKER & WITZIG, INC., P.S.  
[Signature]  
Attorney for: PLAINTIFF BALMAIN BANK  
WSBA # 20164

[Signature]  
Judge/Court Commissioner

\_\_\_\_\_  
Attorney for:  
WSBA # \_\_\_\_\_

SCANNED

FILED IN OPEN COURT

12-5-2014

WHATCOM COUNTY CLERK

By \_\_\_\_\_ Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHATCOM

BANNER BANK, a Washington chartered  
banking corporation,

Plaintiff,

v.

JOSEPH R. ELENBAAS and MELANIE  
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ERROL HANSON FUNDING, INC., a  
Washington corporation; WEBSTER BANK,  
N.A., FIA CARD SERVICES, N.A.; ALL  
OTHER PERSONS OR PARTIES  
UNKNOWN CLAIMING ANY RIGHT,  
TITLE ESTATE, LIEN or INTEREST IN  
THE REAL ESTATE DESCRIBED IN  
THE COMPLAINT HEREIN and DOES I-  
X,

Defendants.

NO: 14-2-01964-1

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AGAINST  
DEFENDANTS JOSEPH R.  
ELENBAAS AND MELANIE W.  
ELENBAAS

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12 Judgment against the Defendants as a matter of law.

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14 JUDGE IRA UHRIG  
15 WHATCOM COUNTY SUPERIOR COURT  
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17 Presented by:  
18 HACKER & WILLIG, INC., P.S.  
19  
20 *Arnold M. Willig*  
21 Arnold M. Willig, WSBA #20104  
22 Elizabeth H. Shea, WSBA #27189  
Attorneys for Plaintiff, Banner Bank  
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FILED IN OPEN COURT  
12-5-2014  
WHATCOM COUNTY CLERK

By \_\_\_\_\_  
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHATCOM

BANNER BANK, a Washington chartered  
banking corporation,

Plaintiff,

v.

JOSEPH R. ELENBAAS and MELANIE  
W. ELENBAAS, husband and wife and the  
marital community composed thereof;  
ERROL HANSON FUNDING, INC., a  
Washington corporation; WEBSTER BANK,  
N.A., FIA CARD SERVICES, N.A.; ALL  
OTHER PERSONS OR PARTIES  
UNKNOWN CLAIMING ANY RIGHT,  
TITLE ESTATE, LIEN or INTEREST IN  
THE REAL ESTATE DESCRIBED IN  
THE COMPLAINT HEREIN and DOES I-  
X,

Defendants.

NO. 14-2-01964-1

JUDGMENT AGAINST  
DEFENDANTS

~~PROPOSED~~

I. JUDGMENT SUMMARY

Judgment Creditor: Banner Bank  
Attorneys for Plaintiff: HACKER & WILLIG, INC., P.S.  
520 Pike Street, Suite 2500  
Seattle, WA 98101  
(206) 340-1935

Attn: Arnold M. Willig

TOTAL JUDGMENT: \$170,665.32  
(plus interest accrued from October 29, 2014 at 7.5%)

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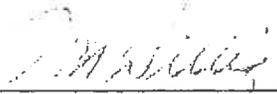
21 SO ORDERED this 5 day of December, 2014.

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24 JUDGE IRA UHRIG  
25 WHATCOM COUNTY SUPERIOR COURT  
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Presented by:

HACKER & WILLIG, INC., P.S.



---

Arnold M. Willig, WSBA #20104  
Elizabeth H. Shea, WSBA #27189  
Attorneys for Plaintiff, Banner Bank

SCANNED 1

FILED IN OPEN COURT

1/16 2015

WHATCOM COUNTY CLERK

By \_\_\_\_\_  
Deputy

SUPERIOR COURT OF WASHINGTON  
COUNTY OF WHATCOM

<p><u>BALMAIN BANK</u> Petitioner/Plaintiff,</p> <p>vs</p> <p><u>JOSEPH ELENBAAS, ET AL</u> Respondent/Defendant,</p>	<p>No. <u>14-2-01964-1</u></p> <p>ORDER</p>
---	---

On this 16<sup>th</sup> day of January, 2015, this cause came on regularly for hearing by the Court on DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER AND JUDGMENT GRANTING SUMMARY JUDGMENT DATED DEC. 2014 and after hearing said and the argument of counsel and the Court being fully advised, IT IS HEREBY ORDERED:

THAT THE DEFENDANTS' MOTION FOR RECONSIDERATION BE AND ITENERY IS DENIED

Dated: 16 JANUARY 2015

Presented by:  
HACKER & WITZIG, INC., P.S.  
[Signature]  
Attorney for: PLAINTIFF BALMAIN BANK  
WSBA # 20164

[Signature]  
\_\_\_\_\_  
Judge/Court Commissioner  
  
\_\_\_\_\_  
Attorney for:  
WSBA # \_\_\_\_\_

## DECLARATION OF SERVICE

On said day below, I caused to be served on the following a true and accurate copy of the **Brief of Appellant's Joseph and Melanie Elenbaas** in Court of Appeals Cause No. 73100-9-I in the manner set forth below:

Arnold M. Willig  
Elizabeth Helen Buch Shea  
Charles Le Grand Butler, III  
Hacker & Willig, Inc. P.S.  
520 Pike Street, Suite 2500  
Seattle, WA 98101-1385  
[arnie@hackerwillig.com](mailto:arnie@hackerwillig.com)  
[Charlie@hackerwillig.com](mailto:Charlie@hackerwillig.com)  
[eshea@hackerwillig.com](mailto:eshea@hackerwillig.com)  
Attorneys for Respondent

- via Legal Messenger
- via U.S. Mail, first class,  
postage prepaid
- via Facsimile
- via Electronic Mail  
(courtesy copy)

Joseph R. Elenbaas  
Melanie W. Elenbaas  
600 E. Smith Road  
Bellingham WA 98226

- via Legal Messenger
- via U.S. Mail, first class,  
postage prepaid
- via Facsimile
- via Electronic Mail  
(courtesy copy)

Carrie Coppinger Carter  
Coppinger Carter, P.S.  
Attorneys at Law  
100 Central Avenue  
Bellingham WA 98225  
[ccc@coppingercarter.com](mailto:ccc@coppingercarter.com)

- via Legal Messenger
- via U.S. Mail, first class,  
postage prepaid
- via Facsimile
- via Electronic Mail  
(courtesy copy)

Original e-filed with:  
Court of Appeals, Division I  
Clerk's Office  
600 University Street  
Seattle, WA 98101-1176

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct. EXECUTED this 22nd day of December, 2015.

/s/ Julie J. Johnson  
Julie J. Johnson