

FILED
COURT OF APPEALS
DIVISION II

2013 JAN 17 PM 1:27

STATE OF WASHINGTON

BY W
DEPUTY

No. 43451-2-II, CONS with 43751-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FIRST-CITIZENS BANK & TRUST COMPANY, a Washington
Financial Institution,

Respondent / Cross Appellant,

v.

ROBERT R. HARRISON & TIFFANY J. HARRISON, husband and wife
and the marital community comprised thereof,

Appellants / Cross Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE STEPHANIE A. AREND

BRIEF OF RESPONDENT / CROSS APPELLANT

DAVIES PEARSON, P.C.

By: Brian M. King, WSBA No. 29197
Ingrid McLeod, WSBA No. 44375
920 Fawcett Avenue/P.O. Box 1657
Tacoma, WA 98401
(253) 620-1500
Attorneys for Respondents/Cross
Appellants

TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR2

III. COUNTERSTATEMENT OF ISSUES

 1. Did the trial court correctly enter summary judgment in favor of First-Citizens on its breach of contract claim based on the parties’ promissory note when the Harrisons admitted that they were in default under the terms of the note and failed to establish any defenses to contract formation?3

 2. Did the trial court correctly enter summary judgment in favor of First-Citizens on its breach of contract claim based on the parties’ promissory note when the Harrisons admitted that they were in default under the terms of the note and failed to establish any defenses to contract formation?3

IV. STATEMENT OF FACTS

 A. Venture Bank extended a line of credit to the Harrisons, for which they signed a promissory note.3

 B. Procedural History5

 1. The Harrisons brought a separate suit against First-Citizens on unrelated loans in the Tribal Court for the Puyallup Tribe of Indians.6

 2. First-Citizens successfully moved Pierce County Superior Court for summary judgment on its breach of contract claim.7

 3. First-Citizens began garnishment proceedings to collect on its judgment.8

V. ARGUMENT	12
A. This court’s review is de novo.	12
B. The superior court properly granted summary judgment in favor of First-Citizens because the Harrisons do not dispute that they have defaulted on the promissory note for the line of credit and the Harrisons cannot establish a defense to contract formation as a matter of law.	14
1. Promissory Estoppel	15
2. Equitable Estoppel	17
3. Prevention of Performance	17
4. Impossibility	20
C. The superior court correctly granted First-Citizens’ summary judgment motion, despite the Harrisons’ fraud and Consumer Protection Act counterclaims.	21
D. The superior court erred in denying First-Citizens’ motion to strike the Harrisons’ claimed exemptions because it garnished funds that were in their personal, community property accounts at private banks and they did not meet their burden of proving those funds were exempt.	23
1. Washington garnishment law imposes the burden of proving a claimed exemption on the Harrisons and they have failed to meet that burden.	24
2. 25 U.S.C. 410 does not relieve the Harrisons of their burden of proving their exemption claims under Washington law and, although a matter of first impression, it does not protect funds after they are deposited into private bank accounts.	26
i. The Cases interpreting 25 U.S.C. 410 weigh in favor of restricting the statute’s protection of proceeds from sale of lease of Indian trust land to such funds that are held in trust for the benefit of the Indian and have not been deposited into the Indian’s private bank account.	27

ii. The Washington Supreme Court recently interpreted state and federal grounds for exemption claims in garnishment actions and determined that statutorily exempt funds generally lose their exempt status when they are deposited into the defendant’s personal bank account.	31
E. RAP 18.1 allows First-Citizens to recover its reasonable costs and attorney fees on appeal.	34
VI. CONCLUSION	35

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Aba Sheikh v. Choe</i> , 156 Wn.2d 441, 447, 128 P.3d 574 (2006)	12
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 342, 103 P.3d 773 (2004)	15, 19
<i>Anthis v. Copland</i> , 173 Wn.2d 752, 760-65, 270 P.3d 574 (2012)	31, 32, 33
<i>Baldwin v. Sisters of Providence in Wash, Inc.</i> , 112 Wn.2d 127, 132, 769 P.2d 298 (1989)	13
<i>Cornerstone Equip. Leasing, Inc. v. MacLeod</i> , 159 Wn. App. 899, 907, 247 P.3d 790 (2011)	17
<i>Cowlitz Bank v. Leonard</i> , 162 Wn. App. 250, 244, 254 P.3d 194 (2011)	16, 34
<i>Cregan v. Fourth Mem'l Church</i> , 175 Wn.2d 279, 284, 285 P.3d 860 (2012)	13
<i>Estate of Toland v. Toland</i> , 170 Wn. App. 828, 834-35, 286 P.3d 60 (2012).....	13
<i>Dayton v. Farmers Ins. Group</i> , 124 Wn.2d 277, 280, 876 P.2d 896 (1994)	34
<i>Grande Ronde Lumber Co. v. Buchanan</i> , 41 Wn.2d 206, 213, 248 P.2d 349 (1952)	18
<i>Jordan v. O'Brien</i> , 69 S.D. 230, 9 N.W.2d 146 (1943)	28, 31
<i>Law Offices of Vincent Vitale, P.C. v. Tabbytite</i> , 942 P.2d 1141, 1144 (1997)	29

<i>Negonsott v. Samuels,</i> 507 U.S. 99, 105-09, 113 S. Ct. 1119, 122 I. Ed. 2d 457 (1993) ..	23
<i>Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.,</i> 78 Wn. App. 707, 712, 899 P.2d 6 (1995)	14
<i>Plese-Graham, LLC v. Loshbaugh,</i> 164 Wn. App. 530, 541, 269 P.3d 1038 (2011)	13
<i>Purnel v. Purnel,</i> 52 Cal. App. 4 th 527, 538, 60 Cal.Reptr.2d 667 (1997)	28, 29, 31
<i>Seven Gables Corp. v. MGM/US Entm't Co.,</i> 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986)	13, 22
<i>Testa v. Katt,</i> 330 U.S. 386, 394, 67 S. Ct. 810, 91 L. Ed. 2d 967 (1947).....	23
<i>Wilcox v. Lexington Eye Inst.,</i> 130 Wn. App. 234, 241, 122 P.3d 729 (2005)	15, 19

Interior's Board of Indian Appeals Decisions

<i>Charlie,</i> 24 IBIA 253 (1993)	30
<i>Fredericks,</i> 24 IBIA 115 (1993)	30
<i>G.H.G.,</i> 39 IBIA 27 (2003)	30
<i>Pretty Paint,</i> 38 IBIA 177 (2002)	30
<i>Robinson,</i> 20 IBIA 168 (1991)	30
<i>Vitale,</i> 36 IBIA 177 (2001)	30

Statutes

RCW 6.27.160.....	3, 11, 12, 23, 24, 26, 34
RCW 19.36.110	16

25 U.S.C. 410.....3, 9, 11, 12, 23, 26, 27, 28, 29, 30, 31, 33

Other Authorities

Cohen's Handbook of Federal Indian Law,
§16.04[3]-[4] at 1090-91 (Nell Jessup Newton ed., 2012)27

CR 5613

RAP 18.134

I. INTRODUCTION

First-Citizens Bank & Trust Company (hereinafter “First-Citizens”) is the successor-in-interest to Venture Bank. Venture Bank and Mr. and Mrs. Harrison had entered a contract by signing a promissory note for a \$105,000 line of credit. Under this promissory note, Venture Bank deposited \$105,000 into the Harrisons’ personal bank account with no restrictions on their use of those funds. But the Harrisons have not repaid this sum and are in default under the promissory note.

Accordingly, First-Citizens brought a breach of contract lawsuit against the Harrisons, who freely admit that they have not repaid the loan and that they are in default under the terms of the promissory note. The Harrisons did allege a litany of defenses to contract formation, but they were not able to present facts sufficient to establish any of these defenses. Thus, the trial court granted summary judgment in favor of First-Citizens.

After the trial court entered judgment in its favor, First-Citizens attempted to collect on its judgment through garnishing their personal accounts at three local banks. In response to First-Citizens’ garnishment proceedings, the Harrisons claimed that the funds in these accounts were exempt from garnishment. Because Mrs. Harrison is an enrolled member of the Puyallup Tribe of Indians and is the beneficiary of certain Indian trust land, the Harrisons claimed that the accounts were exempt from

garnishment because they contained lease proceeds from said Indian trust land.

The Harrisons made only bald allegations in support of their exemption claims. At no time did the Harrisons present lease documents or bank documents showing the source and amounts of the funds in their personal accounts that they claim are exempt from garnishment.

Moreover, even assuming the funds in the Harrisons' personal accounts are lease proceeds from Indian trust land, those funds lost any protection and became subject to garnishment when they were distributed to the Harrisons and deposited into their joint, personal bankaccounts held at private banks.

Thus, First-Citizens respectfully requests this court affirm the trial court's summary judgment order and reverse the trial court's order denying its objection to the Harrisons' exemption claim.

II. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in denying First-Citizens' motion to strike the Harrisons' exemption claims in the garnishment proceedings.
2. In denying First-Citizens' motion to strike the Harrisons' claimed exemptions in the garnishment proceedings, the trial court erred in stating that there was no dispute over whether the funds in the accounts were proceeds from the lease of Mrs. Harrison's Indian trust land because First-Citizens argued extensively that the Harrisons failed to meet their burden of establishing the funds were exempt.

III. COUNTERSTATEMENT OF ISSUES

1. Did the trial court correctly enter summary judgment in favor of First-Citizens on its breach of contract claim based on the parties' promissory note when the Harrisons admitted that they were in default under the terms of the note and failed to establish any defenses to contract formation? **YES.**
2. When First-Citizens began garnishment proceedings to collect on its judgment, did the trial court err as a matter of law in denying First-Citizens' motion to strike the Harrisons claimed exemptions based on an improper interpretation of RCW 6.27.160(2) and 25 U.S.C. 410? **YES.**

IV. STATEMENT OF FACTS

A. *Venture Bank extended a line of credit to the Harrisons, for which they signed a promissory note.*

First-Citizens is the successor-in-interest to Venture Bank. CP at 20.

The Harrisons are sophisticated real estate developers and Mr. Harrison is even an attorney licensed to practice in Washington. CP at 182; *see* CP at 21, 31; *see also* 2 CP at 204-07.¹ Venture Bank and the Harrisons maintained a business relationship between 2005 and 2007, during which time Venture Bank made several separate loans to the Harrisons. CP at 21.

Although Venture Bank made several loans to the Harrisons, each individual loan was based on a separate loan agreement, a separate

¹ Because this is a consolidated appeal, there are two volumes of Clerk's Papers that are not consecutively paginated. To avoid confusion, this brief refers to the volume of Clerk's Papers filed under case number 43451-2-II as "CP" and to the volume of Clerk's Papers filed under case number 43751-1-II as "2 CP."

promissory note, and assigned a separate loan number. CP at 21, 31. One of these separate loans was for a \$105,000 revolving line of credit that Venture Bank made to the Harrisons on January 6, 2006 under loan number 9590125672 (hereinafter “line of credit”). CP at 20, 23-24, 190-92. While the line of credit’s maturity date was originally set for January 15, 2007, the parties agreed to extend its maturity date to June 15, 2008. CP at 23, 36.

The Harrisons signed a promissory note on this line of credit. CP at 20, 23-24, 26-27. The signed promissory note on this line of credit states:

PROMISE TO PAY. TIFFANY JANE HARRISON and ROBERT RANDALL HARRISON (“Borrower”) jointly and severally promise to pay Venture Bank (“Lender”) . . . the principal amount of One Hundred Five Thousand . . . Dollars (\$105,000.00) or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance. . . .

PAYMENT. Borrower will pay this loan in full immediately upon Lender’s demand. If no demand is made, Borrower will pay this loan in one payment of all outstanding principal plus all accrued interest on [its maturity date]. In addition, Borrower will pay regular monthly payments of all accrued unpaid interest due as of each payment date, beginning February 15, 2006. . . .

Clerk’s Papers (CP) at 20, 23, 26.² This note also provides that the Harrisons’ failure to make any payment when due constitutes a default and

² When Venture Bank extended the line of credit to the Harrisons, it secured this credit with a second-position deed of trust on a piece of real property that the Harrisons owned in North Bend, King County, Washington. CP at 20, 190. However, Venture Bank lost its security because the holder of the first-position deed of trust on the

entitles Venture Bank to recover its costs and reasonable attorney fees incurred in enforcing the note. CP at 23, 26.

Under this line of credit, at the Harrisons' request, Venture Bank deposited \$105,000 into the Harrisons' personal checking account with no restrictions on their use of the funds in March 2007. CP at 191. But the Harrisons failed to repay this line of credit when due, despite several demands for payment by First-Citizens. CP at 4-5, 191.

B. Procedural History.

As successor-in-interest to Venture Bank, First-Citizens filed a breach of contract cause of action in Pierce County Superior Court based on the Harrisons' breach of the promissory note for their line of credit. CP at 1-6. The Harrisons admitted that they had failed to pay the balance of this line of credit when due, despite First-Citizens' demands for payment.³ CP at 4-5, 238-39. The Harrisons further admitted that they were in default under the terms of the promissory note for this line of credit. CP at 5, 239.

Nonetheless, the Harrisons claimed that they were not liable for their default under the promissory note based on their asserted affirmative defenses and counterclaims. CP at 239-43. The Harrisons initially

Harrisons' North Bend property foreclosed non-judicially, thus extinguishing Venture Bank's security interest. CP at 20, 190.

³ First-Citizens notes that the Harrisons did not designate their Answer in their designation of Clerk's Papers. Thus, the Harrisons' Answer appears towards the end of CP, among the materials that First-Citizens designated.

asserted three affirmative defenses: equitable estoppel, prevention of performance, and promissory estoppel. CP at 239-40. Additionally, the Harrisons asserted amorphous counterclaims based on alleged violations of the Consumer Protection Act and fraud. CP at 240-43.

1. *The Harrisons brought a separate suit against First-Citizens on unrelated loans in the Tribal Court for the Puyallup Tribe of Indians.*

Meanwhile, because Mrs. Harrison is an enrolled member of the Puyallup Tribe of Indians and because some of the other, separate loans that Venture Bank made to the Harrisons were secured by tribal trust land, the Harrisons sued First-Citizens in tribal court. CP at 38-56. In their tribal court action, the Harrisons seek injunctive relief and damages based on the alleged conduct of Venture Bank regarding substantial commercial loans secured by deeds of trust on Mrs. Harrison's allotted tribal trust land. CP at 38-56. The line of credit is not at issue in the Harrisons' tribal court action. *See* CP at 38-56. Moreover, the Harrisons admit that the tribal court does not have jurisdiction over any actions on the line of credit at issue in this litigation. CP at 184. Indeed, the loans and deeds of trust at issue in the tribal court action are wholly distinct from the single promissory note on the line of credit here.

///

2. *First-Citizens successfully moved Pierce County Superior Court for summary judgment on its breach of contract claim.*

Notwithstanding the unrelated tribal court action on separate loans between the Harrisons and the bank, First-Citizens moved Pierce County Superior Court for summary judgment on its breach of contract claim on the line of credit. CP at 7-18. Despite admitting that the tribal court lacked jurisdiction over actions on the line of credit, the Harrisons moved the superior court to stay proceedings on the line of credit based on their pending tribal court action. CP at 30-56, 184-88. The Harrisons argued that, *if* they prevailed in their tribal court action on the separate loans, then they *could* also prove their affirmative defenses and counterclaims in the suit on the line of credit in superior court. CP at 33-34, 60-68. The superior court disagreed and denied the Harrisons' motion to stay proceedings on the line of credit. *See* CP at 200-02.

In opposing First-Citizen's motion for summary judgment, the Harrisons argued that there were material questions of fact relating to their affirmative defenses of promissory estoppel, prevention of performance, and equitable estoppel. CP at 60-61. The Harrisons further argued that there were material questions of fact relating to their Consumer Protection Act and fraud counterclaims. CP at 61-68.

After considering all pleadings on file and the parties' arguments, the trial court disagreed with the Harrisons and granted First-Citizens' motion for summary judgment. CP at 200-02.

The Harrisons moved the superior court to reconsider its ruling on the line of credit, presenting no newly discovered evidence but asserting new legal arguments that the impossibility, impracticability, and frustration of purpose defenses to contract formation applied and excused them from liability on the line of credit. CP at 205-08. The superior court denied the Harrisons' motion to reconsider its judgment on the line of credit. CP at 220-21.

Instead, the superior court entered a judgment against the Harrisons for the principal outstanding on the line of credit, prejudgment interest thereon, late fees, and for First-Citizens' costs and reasonable attorney fees. CP at 212-14, 315-16. The Harrisons appealed. CP at 317.

C. First-Citizens began garnishment proceedings to collect on its judgment.

After the superior court entered judgment in favor of First-Citizens on the line of credit, First-Citizens commenced garnishment proceedings to collect on that judgment. 2 CP at 1-18. First-Citizens obtained writs of garnishment to collect funds from the Harrisons' personal bank accounts at Banner Bank, Fife Commercial Bank and Key Bank. 2 CP at 1-18.

At the time of garnishment, the Harrisons' Key Bank account had a balance of \$165.26, their Banner Bank account had a balance of \$15,403.83, and their Fife Commercial Bank account had a balance of \$94.63. 2 CP at 48-49, 50-51, 195-96. The Harrisons then filed claims of exemption in the garnishment proceedings for the funds in their personal accounts at Banner Bank and Fife Commercial Bank. 2 CP at 20-41.

The Harrisons claimed that the funds in their Banner Bank and Fife Commercial Bank accounts were exempt from garnishment under 25 U.S.C. 410 because these accounts contain proceeds from the lease of Mrs. Harrison's Indian trust land. 2 CP at 21, 32, 42-43, 46-47. The Harrisons stated that the funds in their Banner Bank account were derived from and used exclusively for operating their business, Freedom Storage Centers, and that the funds in their personal Fife Commercial Bank account were derived from and used for an outdoor advertising lease with Clear Channel, both of these leased premises are on Mrs. Harrison's Indian trust land. 2 CP at 42-43, 46-47.

First-Citizens objected to the Harrisons' claimed exemptions and moved the superior court to strike those exemption claims. 2 CP at 52-77, 115, 117.

In support of their claimed exemptions, the Harrisons introduced evidence that both Mr. and Mrs. Harrison were named owners of the Fife

Commercial Bank account and that statements for that account were mailed to their home, outside of Indian Country. 2 CP at 153-69. Mr. Harrison also submitted a declaration stating that the funds in the Fife Commercial account were proceeds from their outdoor advertising lease with Clear Channel for billboards on Mrs. Harrison's Indian trust land. 2 CP at 153. Although Mr. Harrison appended their Fife Commercial Bank statements dated between September 12, 2011 and June 12, 2012 showing the dates and amounts of deposits, those statements do not show the source of any of the deposits. 2 CP at 156-69. But the Harrisons failed to present the actual Clear Channel lease.

In support of their exemption claim for the funds in their Banner Bank account, the Harrisons submitted the declaration of Jeff Oldright. 2 CP at 170-71. Mr. Oldright is the operations manager of Freedom Storage. 2 CP at 170. Mr. Oldright stated that all funds in the Harrisons' Banner Bank account were proceeds from rental fees Freedom Storage received, except for \$139.14 that were sale proceeds. 2 CP at 170-71. Although Mr. Oldright stated that he had reviewed the storage leases and corresponding deposits into the Harrisons' Banner Bank account, he did not attach any of these documents to his declaration. 2 CP at 170-71. Similarly, the Harrisons did not submit any of their Banner Bank statements or any other records. *See* 2 CP at 153-83.

At the hearing on First-Citizens' motion to strike the Harrisons' claimed exemptions, the superior court balanced the defendant's burden on exemption claims under RCW 6.27.160(2) against 25 U.S.C. 410. RP (July 24, 2012) at 3-7. The superior court noted that (1) the Harrisons clearly had the burden of establishing their claimed exemption under Washington law; (2) the Harrisons presented bank statements lacking detail for their Fife Commercial Bank account and failed to present any account records on their Banner Bank account; (3) the funds in both the Banner Bank and Fife Commercial Bank accounts had been deposited into the Harrisons' personal accounts; and (4) the information presented showed that the funds in these accounts were community property, meaning that Mrs. Harrison had made a gift of the proceeds from her leases on Indian Country to the Harrisons' marital community. RP (July 24, 2012) at 3-7.

Nonetheless, although receptive to First-Citizens' arguments, the superior court denied First-Citizens' motion to strike the Harrisons' exemption claims based on the absence of clearly-controlling precedent. 2 CP at 222-23; RP (July 24, 2012) at 7. First-Citizens appealed the superior court's order. 2 CP at 230-31. Then, on First-Citizens' motion, the superior court stayed further proceedings and ordered the Harrisons to

hold their Banner Bank funds in an interest-bearing account as supersedeas pending the appeal. 2 CP at 241-42.

V. ARGUMENT

The Harrisons argue that the superior court erred in granting First-Citizens' summary judgment order because they might establish their affirmative defenses and counterclaims in this action on the line of credit if they eventually prevail in the tribal court action on unrelated loans.⁴ This court should disagree. Instead, this court should affirm the superior court's summary judgment order.

Conversely, this court should reverse the order denying First-Citizens' motion to strike the Harrisons' claimed exemptions because the Harrisons failed to meet their burden under RCW 6.27.160 and the garnished funds were in their personal accounts, in private banks and, thus, outside the protection of 25 U.S.C. §410.

A. *This court's review is de novo.*

Appellate courts review orders granting summary judgment de novo, performing the same inquiry as the trial court. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). An appellate court will affirm a summary judgment order if it concludes there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Estate of*

⁴ The Harrisons have not assigned error to the superior court's denial of their motion for reconsideration of this summary judgment order. *See* Br. of Appellant.

Toland v. Toland, 170 Wn. App. 828, 834-35, 286 P.3d 60 (2012); *see also* CR 56(c).

Although in reviewing a summary judgment motion Washington courts consider the facts in the light most favorable to the nonmoving party, the nonmoving party bears the burden of establishing that there are specific facts in dispute. *Seven Gables Corp. v. MGM/US Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). The nonmoving party cannot satisfy this burden with mere allegations, speculation, argument, or conclusory statements that material facts are in dispute. *Baldwin v. Sisters of Providence in Wash, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989); *see also Seven Gables*, 106 Wn.2d at 13. Further, an appellate court may affirm summary judgment on any ground supported by the record on appeal. *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 541, 269 P.3d 1038 (2011).

Similarly, statutory interpretation is a matter of law that appellate courts review de novo. *Cregan v. Fourth Mem'l Church*, 175 Wn.2d 279, 284, 285 P.3d 860 (2012).

///

///

B. *The superior court properly granted summary judgment in favor of First-Citizens because the Harrisons do not dispute that they have defaulted on the promissory note for the line of credit and the Harrisons cannot establish a defense to contract formation as a matter of law.*

To establish a breach of contract claim, a plaintiff must show (1) the existence of a valid contract, (2) that the contract imposes a duty, (3) that the duty was breached, and (4) that the breach proximately caused damages. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

Here, upon the Harrisons' request for a line of credit, the parties entered a promissory note contract that states:

PROMISE TO PAY. TIFFANY JANE HARRISON and ROBERT RANDALL HARRISON ("Borrower") jointly and severally promise to pay Venture Bank ("Lender") . . . the principal amount of One Hundred Five Thousand . . . Dollars (\$105,000.00) or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance. . . .

PAYMENT. Borrower will pay this loan in full immediately upon Lender's demand. If no demand is made, Borrower will pay this loan in one payment of all outstanding principal plus all accrued interest on [its maturity date]. In addition, Borrower will pay regular monthly payments of all accrued unpaid interest due as of each payment date, beginning February 15, 2006. . . .

CP at 20, 23, 26. Under the terms of the promissory note, First-Citizens' predecessor-in-interest, Venture Bank, deposited \$105,000 into the Harrisons' personal checking account with no restrictions on their use of the funds. CP at 191.

It is undisputed that the Harrisons have not paid off the line of credit under the terms of the promissory note, despite First-Citizens' repeated demands. CP at 4-5, 238-39. It is also undisputed that the Harrisons are in default under the promissory note. CP at 5, 239.

Despite their undisputed default, the Harrisons claimed that they were somehow excused from performance under the promissory note based on evolving theories on defenses to contract formation. However, they have failed to meet their burden of establishing each of these defenses. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d 773 (2004).

The Harrisons initially claimed that they were excused from their obligations under the promissory note based on promissory estoppel, equitable estoppel, and prevention of performance. CP at 239-43. In each of these claims, the Harrisons make unfounded legal arguments based on *other* loans between the parties.⁵ *See* CP at 239-43.

1. *Promissory Estoppel*

In arguing that promissory estoppel relieves their duty to perform the obligations of the promissory note, the Harrisons claim that the bank

⁵ First-Citizens notes that an appellant abandons an argument by failing to raise it on appeal. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). First-Citizens further notes that the Harrisons' briefing on their alleged promissory estoppel, equitable estoppel, and prevention of performance affirmative defenses, the Harrisons merely present unproven allegations they made in their tribal court action on *other* loans. Br. of Appellant at 12-13. Accordingly, the Harrisons fail to present any meaningful analysis of these issues on appeal.

“represented and agreed that it would separate . . . *two loans on [the Harrisons’] property in Fife* into two separate deeds of trust.” CP at 239-40 (emphasis added). Not only does this assertion have no bearing on the promissory note at issue but the Harrisons’ claim is also rendered moot by RCW 19.36.110 and *Cowlitz Bank v. Leonard*, 162 Wn. App. 250, 244, 254 P.3d 194 (2011). This statute unequivocally establishes that:

A credit agreement is not enforceable against the creditor unless the agreement is in writing and signed by the creditor. The rights and obligations of the parties to a credit agreement shall be determined solely from the written agreement, and any prior or contemporaneous oral agreements between the parties are superseded by, merged into, and may not vary the credit agreement.

RCW 19.36.110. Oral agreements to lend money or to modify existing credit agreements are unenforceable. *Cowlitz Bank*, 162 Wn. App. at 253-54. The Harrisons were unable to present any writing supporting their promissory estoppel claim.

Thus, even assuming the bank agreed to consolidate two of the Harrisons’ deeds of trust on their Fife property and even assuming that such agreement was relevant to the parties’ obligations under the promissory note at issue in this case, this affirmative defense is insufficient to overcome summary judgment because there is no writing supporting this purported agreement.

///

2. *Equitable Estoppel*

In arguing that equitable estoppel relieves them of their obligations under the promissory note, the Harrisons claim that the bank engaged in a “systematic effort on part of the plaintiff to gain as much profit as profitable [*sic*] from several transactions with the defendants.” CP at 239. Equitable estoppel is a disfavored affirmative defense that, as a threshold matter, requires a party to establish an act, admission, or statement made by the other party. *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 907, 247 P.3d 790 (2011). Accordingly, a party cannot overcome summary judgment by arguing equitable estoppel without first presenting evidence of some specific act, admission, or statement by the other party.

Here, however, the Harrisons not only failed to present evidence that the bank made an act, admission, or statement supporting their equitable estoppel claim, they also failed to even allege any such act, admission, or statement. *See* CP at 239-43; *see also* Br. of Appellant at 12-13. Thus, the Harrisons failed to meet their burden of establishing equitable estoppel.

3. *Prevention of Performance*

In claiming that a prevention of performance affirmative defense relieves them of their obligations under the promissory note, the Harrisons

argue that “the plaintiff’s actions of predatory lending on numerous loans to the plaintiff [*sic*], including the subject matter of this lawsuit, prevent the success of defendant’s [*sic*] business ventures and ultimately prevented him [*sic*] from being in a position to pay the balance of the note.” CP at 239.

However, prevention of performance constitutes an affirmative defense to contractual obligations only under extreme circumstances. For example, “Actual violence, threats of imprisonment, and the like, which constitute duress, excuse performance which is prevented thereby. . . . Profane and insulting language, or threats of personal violence, do not [prevent] performance . . . and [cannot] be treated as discharging the contract.” *Grande Ronde Lumber Co. v. Buchanan*, 41 Wn.2d 206, 213, 248 P.2d 349 (1952).

Here, the Harrisons have failed to even allege any conduct by the bank that is extreme enough to give rise to a prevention of performance defense. The Harrisons have only baldly asserted that, because the bank loaned them money, it prevented the success of their businesses. *See* CP at 239. However, the bank had no control over the success of the Harrisons’ business ventures.

As with the Harrisons’ other alleged affirmative defenses, their prevention of performance affirmative defense is based largely on other,

unrelated loans and they again fail to present any specific facts sufficient to overcome summary judgment.

Then, after the superior court granted summary judgment in favor of First-Citizens, the Harrisons asserted new legal arguments in a motion for reconsideration. These new legal arguments raised the impossibility, impracticability, and frustration of purpose defenses to contract formation.⁶ CP at 203-11. Next, after presenting new legal arguments in their motion for reconsideration, the Harrisons' claimed affirmative defenses to their duties under the promissory note evolved. In these new arguments, they claimed that they were excused from their obligations under the promissory note based on impossibility, impracticability, and frustration of purpose. Br. of Appellant at 14-17. As with the above affirmative defenses, the party asserting these defenses to contract formation bears the burden of establishing the defense. *Adler*, 153 Wn.2d at 342.

///

⁶ First-Citizens notes that the Harrisons presented new legal arguments in their motion for reconsideration. CP at 203-11. Under CR 59, a party cannot raise new legal arguments in a motion for reconsideration because the party could have raised those legal arguments before entry of the adverse decision. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241-42, 122 P.3d 729 (2005). Accordingly, the Harrisons' arguments on impossibility, impracticability, and frustration of purpose were not properly before the superior court under CR 59. Nonetheless, the Harrisons focus the majority of their arguments on appeal on impossibility, impracticability, and frustration of purpose. See Br. of Appellant at 14-17.

4. *Impossibility*

In asserting an impossibility affirmative defense to their duties under the promissory note in both their motion for reconsideration and their opening brief, the Harrisons conflate prevention of performance, impossibility, impracticability, and frustration of purpose.⁷ CP at 205-08; Br. of Appellant at 14-17. Moreover, the Harrisons again base their claimed affirmative defenses on unproven allegations relating to other loans between the parties at issue in their tribal court action. *Id.* Specifically, the Harrisons claim that “the failure of the [p]laintiff to fulfill its [oral] promise to separate the [Indian] trust property in Milton into two separate deeds of trust [on unrelated loans] made it ‘unreasonably difficult’ for the defendant to pay the [promissory] note [on the line of credit].” CP at 207.

As analyzed above, the Harrisons failed to meet their burden of presenting any evidence sufficient to establish a prevention of performance defense. Similarly, they did not meet their burden of establishing a defense based on impossibility, impracticability, or frustration of purpose because they also failed to present any evidence to support those claims. *See* CP at 203-11. Instead, they make bald

⁷ Additionally, while the Harrisons cite extensively to the Restatement (Second) of Contracts, they fail to cite to Washington precedent governing claims of impossibility, impracticability, or frustration of purpose. *See* Br. of Appellant at 14-17.

assertions in their motion for reconsideration that the bank's alleged, legally unenforceable oral agreement relating to *other* loans between the parties rendered the Harrisons' performance under the promissory note on the line of credit impossible or impracticable. CP at 207. Such allegations are insufficient to overcome summary judgment as a matter of law.

Therefore, the superior court properly granted summary judgment in favor of First-Citizens on its breach of contract claim because First-Citizens showed that: (1) the promissory note and its change in terms agreement were valid contracts; (2) this note required the Harrisons to make regular payments on the line of credit, with full payment by June 15, 2008; (3) the Harrisons breached their duty to pay under the note; (4) the Harrisons' breach caused First-Citizens harm because its payment on the note was more than two-years overdue at the time of trial; and (5) the Harrisons failed to meet their burden of establishing any of their claimed affirmative defenses to contract formation. CP at 4-5, 20-21, 23-27, 238-39.

C. The superior court correctly granted First-Citizens' summary judgment motion, despite the Harrisons' fraud and Consumer Protection Act counterclaims.

In arguing that their fraud and Consumer Protection Act claims prevent summary judgment in First-Citizens' favor, the Harrisons attempt to shift the burden on summary judgment. Br. of Appellant at 18, 20.

While courts reviewing summary judgment motions do take the facts in the light most favorable to the nonmoving party, the nonmoving party still bears the burden of proving that there are specific facts in dispute. *Seven Gables*, 106 Wn.2d at 12-13. The nonmoving party cannot meet its burden of establishing a specific factual dispute with mere allegations, speculation, argument, or conclusory statements. *Seven Gables*, 106 Wn.2d at 12-13.

The Harrisons counterclaims are entirely based on their unproven allegations in their tribal court action on *other* loans between the parties. CP at 61-67; Br. of Appellant at 18-20. The Harrisons failed to present evidence of a single statement that the bank made relating to the line of credit that was fraudulent or in any way in violation of the Consumer Protection Act. *Id.*

Instead, the Harrisons continue to confuse allegations they are making in tribal court on two separate loans and deeds of trust with the promissory note at issue in this case. Accordingly, even when considering the facts in the light most favorable to them, the Harrisons cannot establish that there are any factual disputes regarding the line of credit at issue in this case. Thus, this court should affirm the summary judgment order and corresponding judgment in favor of First-Citizens because they were appropriate as a matter of law.

D. *The superior court erred in denying First-Citizens' motion to strike the Harrisons' claimed exemptions because they garnished funds that were in their personal, community accounts at private banks and they did not meet their burden of proving the funds were exempt.*

After First-Citizens attempted to garnish funds in the Harrisons' personal accounts, the Harrisons claimed those funds were exempt from garnishment under 25 U.S.C. 410. 2 CP at 1-47. The trial court ultimately agreed with the Harrisons. 2 CP at 222-23. This court should reverse the trial court's order denying First-Citizens' objection to the Harrisons' claims that funds in their personal accounts at Banner Bank, Fife Commercial Bank, and Key Bank were exempt from garnishment because the Harrisons failed to meet their burden under RCW 6.27.160 and 25 U.S.C. 410 does not apply here.

As a threshold matter, this court has jurisdiction to consider the application of 25 U.S.C. 410 to the garnishment proceedings below because that statute does not impose exclusive federal jurisdiction and Washington courts have jurisdiction to consider matters of garnishment. *See Negonsott v. Samuels*, 507 U.S. 99, 105-09, 113 S. Ct. 1119, 122 l. Ed. 2d 457 (1993); *see also Testa v. Katt*, 330 U.S. 386, 394, 67 S. Ct. 810, 91 L. Ed. 2d 967 (1947). Accordingly, this court may resolve whether 25 U.S.C. 410 applies here and, if so, it may resolve the consequences of any such application.

1. *Washington garnishment law imposes the burden of proving a claimed exemption on the Harrisons and they have failed to meet that burden.*

Chapter 6.27 RCW governs garnishment actions in Washington.

Under that chapter, a defendant may claim an exemption to a garnishment but, in doing so, “the defendant bears the burden of proving any claimed exemption, including the obligation to provide sufficient documentation to identify the source and amount of any claimed exempt funds.” RCW 6.27.160(1)-(2).

Here, the Harrisons have not met their burden of proving their claimed exemptions because they merely submitted self-serving declarations claiming all funds in the accounts derived from leases of Indian trust land without providing any documentation whatsoever that identifies the source and amount of their allegedly exempt funds. *See* CP at 20-29, 31-41, 42-47, 153-83; RP (July 24, 2012) at 4.

The Harrisons presented the following evidence in support of their exemption claims: (1) a declaration from Mrs. Harrison stating that they use their Banner Bank account exclusively for operating Freedom Storage Centers on her Indian trust land and never commingle personal funds with the funds in that personal account, (2) a declaration from Mrs. Harrison stating that they use their Fife Commercial Bank account funds exclusively for depositing lease income from Clear Channel’s outdoor

advertising lease and never commingle personal funds with the funds in that personal account, (3) a declaration from Mr. Harrison stating that he is an owner of their personal Fife Commercial Bank account that they use for the Clear Channel outdoor advertising lease and appending bank statements that show deposits to that account without any reference whatsoever as to the source of those deposits, (4) a declaration from the operations manager of Freedom Storage Centers stating that he reviewed the Banner Bank statements and storage leases and that the funds in the Banner Bank account are the storage center's lease proceeds but failing to attach any leases or bank statements to corroborate his declaration, and (5) a declaration from attorney John W. Ladenburg stating that the garnished funds at issue here are also at issue in the Harrisons' tribal court action. CP at 153-83.

Although the Harrisons presented several declarations in support of their exemption claims, those declarations contain only bald assertions that the funds in the Harrisons' private, joint bank accounts, in privately owned banks outside of Indian Country are exempt from garnishment. The Harrisons failed to present any documentation whatsoever that identifies the source and amount of the funds they are claiming as exempt. *See* CP at 153-83.

While the Harrisons did present several bank statements showing deposits into their joint account at Fife Commercial Bank, those statements do not show the source of any of those deposits and the Harrisons failed to produce any records whatsoever showing the source of the funds in their joint Banner Bank account. *See* RP (July 24, 2012) at 4. Accordingly, the Harrisons failed to satisfy their burden of proving their claimed exemption under RCW 6.27.160(2) and this court should reverse the trial court's order denying First-Citizens' motion to strike these unproven exemption claims.

2. *25 U.S.C. 410 does not relieve the Harrisons of their burden of proving their exemption claims under Washington law and, although a matter of first impression, 25 U.S.C. 410 does not protect funds after they are deposited in private bank accounts.*

While courts generally construe statutes affecting the reservation or establishment of Indian rights broadly and narrowly construe statutes abrogating or limiting Indian rights, a broad construction of 25 U.S.C. 410 still does not support the Harrisons' exemption claims. Under certain circumstances that are not present here, 25 U.S.C. 410 may exempt funds from garnishment. It states:

No money accruing from any lease or sale of lands held in Trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

25 U.S.C. 410.

Generally, proceeds from the sale or lease of Indian trust land are paid to the Department of the Interior and held in trust for the individual Indian beneficiary in an Individual Indian Money (IIM) account. *Cohen's Handbook of Federal Indian Law*, §16.04[3]-[4] at 1090-91 (Nell Jessup Newton ed., 2012) (hereinafter "*Cohen's Handbook*"). Indians who have attained the age of majority normally may withdraw funds from their IIM accounts at any time. *Cohen's Handbook*, §16.04[4] at 1091. However, while these funds remain in trust in the Indian's IIM account, they remain protected from creditors under 25 U.S.C. 410. *Cohen's Handbook*, §16.04[5] at 1092. Nonetheless, such protection is not unlimited, as a creditor may even reach sale or lease proceeds from Indian trust land in the Indian's IIM account with the approval of the Secretary of the Interior. 25 U.S.C. 410; *Cohen's Handbook*, §16.04[5] at 1092-93.

- i. *The cases interpreting 25 U.S.C. 410 weigh in favor of restricting the statute's protection of proceeds from sale or lease of Indian trust land to such funds that are held in trust for the benefit of the Indian or in the Indian's IIM account and have not been deposited into the Indian's private bank account.*

In one of the few cases interpreting 25 U.S.C. 410, the Supreme Court of South Dakota analyzed whether a creditor could reach proceeds from the sale of land formerly held in trust for Indians after the Secretary of the

Interior had sold that land to a non-Indian. *Jordan v. O'Brien*, 69 S.D. 230, 9 N.W.2d 146 (1943). The *Jordan* court concluded that the purpose of 25 U.S.C. 410 was “for the protection of Indians, who were wards of the government, and not for the protection of the [non-Indian] who purchased Indian land.” 9 N.W.2d at 148. Accordingly, creditors could reach proceeds from the sale of the land after it had been transferred to a non-Indian without running afoul of 25 U.S.C. 410. *Jordan*, 9 N.W.2d at 148.

Additionally, a California case interpreted whether a child support order entered against an Indian constituted an improper charge against proceeds from her lease of Indian trust lands under 25 U.S.C. 410 when the lease proceeds from those lands were her only source of income. *Randy Purnel v. Debrah Purnel*, 52 Cal. App. 4th 527, 538, 60 Cal.Reptr.2d 667 (1997). In conducting its analysis, the *Purnel* court stated that, among the defendant Indian’s assets outside of 25 U.S.C. 410’s protection was her:

[p]ersonal bank account. Once she has received payment of the rental income from lease of her Indian Trust Allotment lands, it loses its “Indian” character.” Money is fungible. When wife bought her Porsche and her BMW, she did not spend “Indian” money. She spent the legal tender which all individuals or persons spend in the United States to acquire goods and property. . . .

52 Cal. App. 4th at 539. The *Purnel* court further reasoned that: “[c]ertainly, once the rental income [from wife’s Indian trust land] was deposited into a bank account outside Indian Country, the money involved lost its identity as immune Indian property [under 25 U.S.C. 410].” 52 Cal. App. 4th at 541. Thus, even if the money in the defendant wife’s personal bank account derived from lease proceeds of her Indian trust land, that money lost its protection under 25 U.S.C. 410 when she deposited it into her non-IIM personal bank account. *Id.*

Conversely, the Alaska Supreme Court concluded that proceeds from an award to an Indian following a condemnation of his Indian trust lands were protected by 25 U.S.C. 410 and not available to satisfy an attorney fee lien against the Indian. *Law Offices of Vincent Vitale, P.C. v. Tabbytite*, 942 P.2d 1141, 1144 (1997). Importantly, however, the condemnation award funds at issue in the case had not yet been disbursed to the Indian and had not been deposited into his personal bank account outside of Indian Country. *Tabbytite*, 942 P.2d at 1146.

Thus, the courts that have addressed 25 U.S.C. 410 weigh in favor of a conclusion that proceeds from the sale or lease of Indian trust land is protected from the Indian’s creditors while the funds remain in trust in an IIM account but that they lose that protection after the Indian removes

them from trust and deposits those funds into a personal bank account or uses those funds to purchase assets.

These courts' decisions align with the Department of the Interior's Board of Indian Appeals (IBIA) decisions applying 25 U.S.C. 410 and its derivative regulations, which all analyze whether proceeds from the sale or lease of Indian trust land are protected from creditors *while those proceeds remain in trust in an IIM account*. See *G.H.G.*, 39 IBIA 27 (2003); *Pretty Paint*, 38 IBIA 177 (2002); *Vitale*, 36 IBIA 177 (2001); *Charlie*, 24 IBIA 253 (1993); *Fredericks*, 24 IBIA 115 (1993); *Robinson*, 20 IBIA 168 (1991).⁸ These IBIA decisions do not even consider applying 25 U.S.C. 410's protection for proceeds from the sale or lease of Indian trust land after those proceeds have been distributed to the Indian and removed from his or her IIM account. See *Id.*

Here, even assuming the Harrisons had met their burden and established that the funds in their Banner Bank and Fife Commercial Bank accounts accrued from the proceeds of leases on Mrs. Harrison's Indian trust land, those funds lost any protection provided by 25 U.S.C. 410 when they were disbursed to Mrs. Harrison and Mrs. Harrison deposited them into joint, community property, private, personal accounts that she co-owned with her husband, who is not an enrolled member of the Puyallup

⁸ The Department of the Interior's Board of Indian Appeals decisions are available at: <http://oha.doi.gov:8080/index.html> by selecting the IBIA Decisions database.

Tribe of Indians. Thus, when the funds were deposited into the Harrisons' joint, community property accounts at private banks, those funds lost any protection they had under 25 U.S.C. 410 while retained in an IIM account, in accordance with *Jordan*.

Similarly, as in *Purcell*, once the Harrisons took possession of the funds and deposited them into their personal accounts, those funds lost any protection under 25 U.S.C. 410 from which they may have benefitted while retained in an IIM account, thus the funds no longer benefitted from a statutory exemption to garnishment. Consequently, the trial court erred in denying First-Citizens' motion to strike the Harrisons' claimed exemptions on their Banner Bank and Fife Commercial Bank accounts.

- ii. *The Washington Supreme Court recently interpreted state and federal grounds for exemption claims in garnishment actions and determined that statutorily exempt funds generally lose their exempt status when they are deposited into the defendant's personal bank account.*

Although whether proceeds from the sale or lease of Indian trust land are protected from creditors under 25 U.S.C. 410 and, thus, exempt from garnishment, is an issue of first impression, the Washington Supreme Court recently determined that pension funds lose their protection and are not exempt from garnishment after disbursement to the individual beneficiary. *Anthis v. Copland*, 173 Wn.2d 752, 760-65, 270 P.3d 574

(2012). Because the same principles at issue in *Anthis* are at issue here, this court should apply the *Anthis* court's analysis.

The *Anthis* court addressed whether the statutory exemption from garnishment for pension benefits under the Law Enforcement Officers' and Firefighters' Retirement System endured after the state had distributed those pension funds to the defendant and after the defendant had deposited those funds into his personal bank account. 173 Wn.2d at 752. In analyzing this issue, our supreme court looked to several state and federal statutes and to case law interpreting those statutes. *Anthis*, 173 Wn.2d at 752-65.

In conducting its analysis, the court noted that the statutory exemption from garnishment of specific monies provided in the federal Social Security Act and World War Veterans' Act endured even after the funds had been paid to the beneficiary and deposited into the beneficiary's personal account. *Anthis*, 173 Wn.2d at 578. The statutory language that creates this enduring protection is explicit. For example, the World War Veterans' Act states that funds paid or due under the Act "were exempt 'either before or after receipt by the beneficiary.'" *Anthis*, 173 Wn.2d 578.

However, the court further noted that the statutory exemption from garnishment of specific monies established under the Employment

Retirement Income Security Act (hereinafter “ERISA”) did not endure after they were disbursed to the beneficiary and deposited into the beneficiary’s personal accounts. *Anthis*, 173 Wn.2d at 578-79. The statutory language creating the ERISA exemption to garnishment states: “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.” *Anthis*, 173 Wn.2d at 579. Thus, because the statutory exemption language did not specify that it applied after the funds were distributed to the beneficiary, payments to a plan beneficiary under ERISA are not exempt from garnishment after they are deposited into the beneficiary’s personal account. *Anthis*, 173 Wn.2d at 579. Because the statute governing the pension fund at issue in *Anthis* did not explicitly state that its exemption from garnishment continued after funds were distributed, the court held that those pension funds were subject to garnishment after being distributed to the defendant.

Here, like the formerly statutorily exempt funds in *Anthis*, the funds in the Harrisons’ joint, personal bank accounts are not protected by 25 U.S.C. 410 and may be garnished. Applying the *Anthis* analysis here, even assuming the Harrisons successfully established their exemption claim, the language of 25 U.S.C. 410 does not expressly provide that the protection from creditors endures after proceeds from the sale or lease of Indian trust land have been distributed to the Indian beneficiary and placed

in his or her personal account. Therefore, those funds lost any protection under 25 U.S.C. 410 when the Harrisons deposited them into their personal bank accounts. Accordingly, the trial court erred in denying First-Citizens' motion to strike the Harrisons' claimed exemptions.

This court should reverse the trial court's order denying First-Citizens' motion to strike and should remand for either: (1) entry of an order striking the Harrisons' claimed exemptions under *Anthis* and the other cited state and IBIA decisions, or (2) evidentiary hearings requiring the Harrisons to produce sufficient documents to establish the source and amount of their claimed exempt funds in their Banner Bank and Fife Commercial Bank accounts in accordance with RCW 6.27.160(2).

E. *RAP 18.1 allows First-Citizens to recover its reasonable attorney fees and costs on appeal.*

A court may award the prevailing party its reasonable attorney fees and costs when authorized by statute, contract, or a recognized ground in equity. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Signed loan documents that state the prevailing party in any action to enforce those loan documents form a contractual basis for an award of attorney fees. *See Cowlitz Bank*, 162 Wn. App. at 254. Here, the superior court properly awarded First-Citizens its reasonable attorney fees and costs based on the language in the promissory note. This court should

similarly award First-Citizens its attorney fees on appeal under the language of the promissory note and RAP 18.1.

VI. CONCLUSION

As analyzed above, the Harrisons have failed to show any material facts in dispute and First-Citizens is entitled to judgment on its breach of contract claim as a matter of law. Accordingly, this court should affirm the trial court's summary judgment order and the corresponding judgment and award of reasonable attorney fees and costs. Because First-Citizens was entitled to its reasonable attorney fees and costs below, this court should also make such an award on appeal.

However, this court should reverse the trial court's denial of First-Citizens' objection to the Harrisons' claimed exemptions in the garnishment proceedings because the Harrisons failed to meet their burden of establishing that the funds in their personal accounts actually were from an exempt source. Moreover, even assuming the Harrisons met their burden of establishing that the funds in their personal accounts were proceeds from the lease of Indian trust land, those funds lost any such exemption when they were distributed to the Harrisons and deposited into their personal bank accounts.

///
///

RESPECTFULLY SUBMITTED this 16th day of January, 2013.

DAVIES PEARSON, P.C.



Brian M. King, WSBA No. 29197
Ingrid McLeod, WSBA No. 44375
920 Fawcett Avenue / P.O. Box 1657
Tacoma, WA 98401
(253) 620-1500
Attorneys for First-Citizens

im / s:\18xxx\184xx\18444\13\appeal court action\consolidated appeals\br. of respondent-cross appellant (12.31.12).doc

2013 JAN 17 PM 1:27

STATE OF WASHINGTON

DECLARATION OF SERVICE

BY _____

I certify under penalty of perjury under the laws of the State of DEPUTY

Washington that I mailed, or caused to be mailed, a copy of the
foregoing **BRIEF OF RESPONDENT/CROSS APPELLANT**,
postage prepaid, via U.S. mail and via e-mail on the 16 day of
January, 2013 to the following:

Court

Court of Appeals, Division II
Office of the Clerk
950 Broadway Street, Suite 300
Tacoma, WA 98402

Counsel for Appellants/Cross Respondents

LADENBURG LAW, PLLC
John W. Ladenburg, Jr.
Erik F. Ladenburg
705 South 9th Street, Suite 305
Tacoma, WA 98405

DATED this 16 day of January, 2013.


Kathy Kardash