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COURT OF APPEALS  
DIVISION II

2012 DEC 21 PM 1:43

NO. 43043-6-II

STATE OF WASHINGTON

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

BY   
DEPUTY

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**RICHARD APPELATE and KAREN APPELATE,**  
**husband and wife,**

**Appellants / Cross-Respondents,**

**vs.**

**WASHINGTON FEDERAL SAVINGS, a Savings and Loan  
subsidiary of WASHINGTON FEDERAL, INC., a Washington  
Corporation; KITSAP BANK, a Washington Financial Institution;  
HARBOR HOME DESIGN, INC., a Washington Corporation;  
CHARLES BUCHER and JANE DOE BUCHER, husband and wife,  
and the marital community comprised thereof; and OHIO  
CASUALTY INSURANCE CO.,**

**Respondents / Cross-Appellants.**

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**BRIEF OF RESPONDENT / CROSS-APPELLANT  
WASHINGTON FEDERAL SAVINGS**

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## I. INTRODUCTION

A Pierce County Superior Court jury listened for three weeks as the plaintiffs/appellants, Richard and Karen Applegate, bemoaned the complexities involved in building a high-end single family residence that cost more than \$770,000. The Applegates blamed the contractor that built the home, defendants/respondents Harbor Home Design, Inc. (“HHD”) and its principal, Charles Bucher (collectively “HHD/Bucher”) and bank that gave the Applegates a residential custom construction loan for the project, defendant/respondent/cross-appellant Washington Federal, Inc. (“WFI”) for everything from not having the correct kind of shingles on the roof to unaesthetic sheetrock work in the “lower” bathroom. VRP 10/31/2011 at pp. 409-410; 436; VRP 10/11/2011 at pp. 122-123.

The properly instructed jury decided that neither HHD/Bucher nor WFI violated their respective contracts to build and finance the appellants’ residential construction project and returned defense verdicts on all claims against both respondent HHD/Bucher and respondent WFI. CP 2733-2738 and 2739-2741.

Dissatisfied with this result, the appellants now seek to re-litigate the case in the forum of the Court of Appeals. They urge this Court to

reverse the Superior Court's order granting WFI's dispositive motion to dismiss appellants' claims for breach of fiduciary duty and negligence (CP 755-756 and 865-866), and adopt a standard of liability that has never been accepted by Washington courts as being applicable to the borrower-lender relationship.

The appellants also contend that the Special Verdict Form pertaining to appellants' claims against WFI was "confusing" because it referred to the construction loan agreement between the appellants and WFI as a "contract to provide a construction loan." CP 2739. Of course, that is exactly what the construction loan agreement was: a contract to provide a loan to the appellants to build a single family residence. In their appeal, the appellants ignore the fact that the court gave a detailed "contentions" instruction that explicitly set forth the appellants' theory of the case: that various alleged construction deficiencies were somehow the fault of WFI, the appellants' lender. CP 2698-2700. Further, the special verdict form given by the trial court did not prevent the appellants from arguing their theory of the case to the jury and did not conflict with the other instructions. VRP 10/31/2011 at pp. 423-429; 481-485.

There was no error in the trial court's jury instructions. The judgment in favor of WFI should be affirmed.

WFI also cross-appeals the Superior Court's denial of its post-trial motion for reasonable attorney fees and litigation expenses pursuant to an attorney fees provision in the construction loan agreement. The court erred in failing to grant WFI's motion to recover its attorney fees and other costs of defense incurred in this matter, as it was certainly the prevailing party and is entitled to fees under the loan agreement.

## **II. ISSUES RELATED TO APPELLANTS' APPEAL**

A. Where the jury determined that the builder, HHD/Bucher, did not breach its construction contract with appellants, did not convert appellants' funds, did not commit fraud and did not engage in any other improper activity with respect to the construction of appellants' residence, is WFI in breach of the loan agreement for failing to "discover" that HHD/Bucher allegedly engaged in such wrongful conduct?

B. Did the Superior Court err in granting WFI's motion for summary judgment to dismiss appellants' claims against WFI for breach of fiduciary duty and negligence, where well-established Washington law specifies that the relationship between a borrower and a commercial lender is not subject to the standards applicable to a fiduciary relationship

and the independent duty doctrine bars tort claims between parties to a contract?

C. Did the trial court abuse its discretion in submitting a special verdict form as to the breach of contract claim against respondent WFI which asked the jury to decide whether WFI breached its “contract to provide a construction loan” to the appellants, where: (1) the purpose of WFI’s “construction loan agreement” was in fact to provide a construction loan to appellants; (2) appellants did not propose an alternative special verdict form; (3) the jury instructions as a whole did not conflict and clearly informed the jury as to the precise nature of the appellants’ claims against WFI; and (4) the verdict form did not misstate the law or prevent appellants’ counsel from arguing his theory of the case to the jury?

### **III. ASSIGNMENTS OF ERROR ON CROSS-APPEAL**

**Cross-Appeal Assignment of Error No. 1:** WFI is entitled to recover its attorney fees under the loan agreement. The trial court erred when it denied WFI’s post-trial motion for reasonable attorney fees and other costs WFI incurred in defending itself in this matter by enforcing the terms of the construction loan agreement.

#### **IV. ISSUE RELATED TO ASSIGNMENTS OF ERROR ON WFI'S CROSS APPEAL**

Did the Superior Court err in denying respondent/cross-appellant WFI's post-trial motion for its reasonable attorney fees and other costs of defense under the loan agreement where the jury returned a defense verdict as to all appellants' claims against WFI, and WFI's primary defense was to enforce the liability disclaimer provisions contained in the loan agreement and agreed to by appellants? (Cross-appeal assignment of Error No. 1.)

#### **V. STATEMENT OF THE CASE IN ANSWER TO APPEAL**

##### **A. FACTS**

##### **1. The Appellants' Relationship With WFI Was That Of A Borrower And Commercial Lender**

In 2007, the appellants went to a loan broker to obtain financing for an expensive custom single family residence to be located in Gig Harbor, Washington. CP 272. The broker placed the loan with WFI. On June 12, 2007, the appellants signed a five page Construction Loan Agreement & Assignment of Account (Trial Exhibit No. 61 / Appendix No. 1) and other documents to secure a \$550,000 loan for the construction of a custom single family residence. CP 3770-3774. The Construction Loan Agreement & Assignment of Account ("loan

agreement”) contained the following standard provisions that insulated WFI from liability for issues that sometimes arise between an owner and a builder in the performance of any complicated construction project:

**3. USE OF LOAN PROCEEDS.**

\* \* \*

C. The Lender shall have no obligation to see that funds advanced to the Borrower, the contractor/builder or both, are applied to claims against the Project. The Borrower accepts full responsibility for the proper application of all funds advanced at Borrower’s direction. The Lender may rely solely upon the Borrower’s disbursement requests, certifications of job progress, statements and reports when making advances from the Account, and the Borrower releases and agrees to indemnify and hold harmless the Lender from any and all losses, demands, claims and expenses arising from or related to the misapplication or misuse of the loan proceeds by the Borrower; **provided** that the Lender reserves the right to make loan disbursements as it deems necessary (in its sole discretion) for the benefit of the Project...

**4. APPROVAL OF BUILDER ON “CUSTOM” CONSTRUCTION LOAN.**

\* \* \*

B. The Borrower acknowledges and agrees that the Lender does not insure, guarantee or warranty the character, creditworthiness or honesty, or degree of skill, care and prudence of the Builder, or the Builder’s conduct in any given instance in relation to the Borrower or the Project. The Borrower further acknowledges and agrees that the Borrower’s contract with the Builder for the Project has been freely and independently negotiated,

bargained for and made with no involvement, either direct or indirect, by the Lender...

\* \* \*

**13. INSPECTION BY THE LENDER.**

The lender or its agents shall at all times have the right to enter upon the Property... *However, the Lender shall have no obligation to and shall not insure or guarantee compliance with any federal, state or local building codes or standards or the quality of the Project for either Borrower, his heirs, successors and assigns or any third person.* The provisions of this paragraph are in addition to and shall not be construed as the only basis for an interpretation of Paragraph 15.

*Id. See also, Trial Exhibit No. 61 / Appendix No. 1. (Boldface and italics supplied.)*

The reasons for the limitation of liability provisions in the loan agreement are self-evident. A bank does not build a home. A building contractor does. WFI, like any construction lender, retains the right to inspect a project that it is financing while the project is under construction to make sure that the project is generally at the level of completion represented by the contractor, and to verify that its loan is protected by the collateral pledged to secure it (the real estate and improvements thereto). CP 298-300. But WFI did not control the means, manner or method of construction of the appellants' project and had no contractual authority to do so, as it has no contractual relationship with the contractor, in this case, HHD/Bucher. CP 301; 3771.

In addition, the Custom Construction Loan Policies and Procedures (“policies and procedures”) that generally outline the process by which loan proceeds are disbursed to the builder, contains the following similar limitations on WFI’s liability for construction related defects and issues:

**5.     **DRAWS:**** WFS will disburse funds no more frequently than once each month. Draws will be based on the percentage of completion per the submitted approved contract, plans, and specifications, **UNLESS** a line item disbursement procedure has been specifically agreed upon in writing. WFS will not advance any money for items not yet delivered and installed.

\* \* \*

Draw inspections are completed solely for the purpose of assisting Lender in determining construction disbursements. ***WFS shall have no obligation to and shall not insure or guarantee compliance with any federal, state, or local building codes or standards or the quality of the project for either Borrower or Builder.***

Trial Exhibit No. 62 / Appendix No. 2; CP 397-398. (Boldface and italics supplied.)

Appellants are fond of characterizing the policy and procedures document as somehow creating further unspecified “duties” on the part of WFI that would be tantamount to making it the project architect or construction superintendant. But WFI is not a licensed architect and it cannot require that the builder do anything with respect to the way the

project is built, the time it takes or the costs involved. CP 297-299; 3771-3774. That is the contractual prerogative and responsibility of the appellants. *Id.*

## **2. The Construction Loan “Draw” Process**

The construction loan agreement and the policies and procedures document describe the construction “draw” process. CP 397. Once a month a representative of WFI (in this case mostly WFI branch manager Joni Cross) would go to the project and make a general inspection of the status. CP 297-302.

Ms. Cross has a regular procedure for issuing monthly draw checks on custom residential construction loans. *Id.* At the beginning of each month, someone from the branch office contacts the builder to inquire as to how much money is being requested for work completed in the past month. CP 298. The builder is then required to submit a written draw request to WFI. *Id.* A draw request includes an itemized list of the amounts the builder is seeking out of each line item from the Preliminary Cost Estimate in the contract between the borrower and the builder. *Id.*

Once WFI obtains the draw request, or shortly before, Ms. Cross physically inspects the property at issue. *Id.* She compares the amounts requested for each particular line item with the status of those line item

components. *Id.* Ms. Cross is not a licensed builder or architect and is not an expert on building codes. *Id.* Nevertheless, if a builder has requested the full amount for a line item such as roofing, Ms. Cross can visually inspect the property and tell from a layman's perspective whether or not the roof has been installed. *Id.* If Ms. Cross' inspection yields anything at odds with the draw request, Ms. Cross or one of her staff contacts the builder and informs him of the issue. *Id.*

After resolution of any issues with the builder, Ms. Cross or one of her staff contacts the borrower (here the Applegates) to ensure that the borrower is aware of the draw request and the requested line items. *Id.* If the borrower has not seen a physical copy of the draw request (which is not unusual), the WFI representative reads off to the borrower each line item requested. *Id.* Once the borrower has given verbal authorization, WFI issues a check for the agreed-upon amount. CP 298-299. WFI generally makes the check out to both the borrower and the builder, requiring endorsement from each. CP 299.

In many situations, the borrower then physically comes to the branch office and picks up the check. *Id.* When they do so, Ms. Cross or someone from her staff presents the borrower with a Certification of Job Progress ("CJP") form. *Id.* This is a form indicating the amount of that

month's draw, how many draws have been taken on the loan up to that point, and what percentage of the construction project has been completed (calculated as the percentage of funds that have been disbursed out of the total contract price). *Id.* If the borrower does not pick up the check in person, Ms. Cross or her staff mails the check and the CJP to the agreed upon location, *e.g.*, borrower's home, builder's office, etc. *Id.* The borrower and the builder are then each responsible for returning a signed copy of the CJP form back to WFI and for jointly endorsing the draw check so that it can be used to pay the subcontractors and the builder. *Id.*

This was the process that was used throughout the time that WFI was issuing draw checks to HHD/Bucher. *Id.* There are numerous safeguards embedded in this procedure to make sure that the owner only releases funds to the builder when the owner is ready to do so. CP 299-300.

### **3. The March 2008 Draw Request And Alleged Forgery**

In early March 2008, HHD/Bucher sent WFI a draw request for the month via facsimile. Trial Exhibit No. 150; CP 203-205; 208; 210 and 312. On March 6, 2008, Pam Stephen-Jordan (an associate of Ms. Cross') of WFI spoke with Mr. Applegate on the phone regarding the

items specified on the draw request. CP 203-205; 208; 210; 300 and 313. Mr. Applegate asked that WFI not release the requested funds until he had spoken with Mr. Bucher; he claimed Mr. Bucher was requesting more for the roofing component of the project than he thought was appropriate. *Id.* Trial Exhibit No. 150. The following day, March 7, 2008, Ms. Stephen-Jordan again spoke with Mr. Applegate on the phone. *Id.* Trial Exhibit No. 150. This time Mr. Applegate verbally approved the disbursement of the requested check. *Id.* With this approval—and because Ms. Cross’ monthly inspection had been consistent with the items requested—WFI mailed both the check and the CJP form to Mr. Bucher’s office, as had always been the custom in the Applegate loan. *Id.*

The check was deposited in HHD’s account at Kitsap Bank and, subsequently, WFI received the CJP for March 2008, signed by Mr. Applegate. CP 300; 1986. Trial Exhibit No. 150.

The appellants did not inform WFI that they suspected Mr. Bucher had forged Mr. Applegate’s endorsement of this March 2008 draw check until nine months later in December 2008. CP 300. At that time, the appellants requested copies of all the checks WFI issued for the project. *Id.* Ms. Cross and her staff complied with appellants’ request

and provided them with copies of all the draw checks issued. *Id.* A few days after they picked up the copies, Mrs. Applegate contacted Ms. Cross to inform her of the suspected forgery. *Id.*

Ms. Cross was surprised, and she explained to Mrs. Applegate that if she had been notified earlier, WFI might have been able to put a “stop payment” order on the check and do some sort of investigation, but that, because nine months had elapsed since the check had been issued, endorsed, and deposited, there was not a great deal WFI could do at that point. *Id.* Mrs. Applegate did not ask that Ms. Cross take any further steps, but rather indicated she (Mrs. Applegate) would take the issue up with Kitsap Bank. *Id.* This was the first and last Ms. Cross or any of her staff heard about the forgery allegation until one of the appellants’ lawyers demanded a refund of the money just prior to filing the lawsuit from which this appeal arises. *Id.*

**4. WFI Properly Credited The Appellants For Their \$52,262.50 “Construction Deposit”**

Among the more opaque “issues” raised by the appellants is HHD/Bucher’s supposed failure to “credit” them for a \$52,262.50

“construction deposit.”<sup>1</sup> But this is another red-herring argument that the jury rejected.

The Closing Statement for the appellants’ construction loan shows that appellants were fully credited for their \$52,262.50 deposit to HHD/Bucher. VRP 10/31/2011 at pp. 466-470; Trial Exhibit No. 176 / Appendix No. 3. The loan-in-process account for appellants’ project was required to have an amount equal to construction costs (\$773,273.60) (CP 992-999) plus loan closing fees and costs (\$6,453), for a total of \$779,276.60. Trial Exhibit No. 176.

The principal amount of appellants’ construction loan was \$550,000. Trial Exhibit No. 61. So the appellants would have been required to deposit \$229,726 at closing to bring the loan-in-process account to \$779,726. But WFI agreed that appellants only needed to deposit \$177,464 at closing. Trial Exhibit No. 176. That was because WFI *credited* appellants for the \$52,262 “construction deposit” funds against the construction costs, as is clearly shown on the Closing Statement. Trial Exhibit No. 176 / Appendix No. 3.

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<sup>1</sup> These were funds that appellants had expended on the project and/or deposited with the builder before they got their construction loan with WFI. CP 394-395.

There is no merit to the appellants' contention that WFI failed to "credit" them for their \$52,262 pre-construction deposit.

**5. Other Loan Administration "Issues"**

Appellants also assert that because there were no signatures on two CJP forms, one in September 2007 (CP 412-413) and one in October 2007 (CP 416), they were damaged in some as-yet unexplained way. As an initial matter, appellants are incorrect: the CJP for October 2007 *was* signed by appellant Richard Applegate. Trial Exhibit No. 155. But this argument also ignores the fact that the appellants endorsed the draw checks that were associated with both those CJPs and then forwarded the draw checks to HHD/Bucher. CP 301. If appellants were that concerned with the progress of their project in September and October 2007, they should have refused to endorse the draw checks until they resolved their concerns with HHD/Bucher. Why appellants failed to do that is a mystery. But, as the jury correctly noted, it is a mystery that had nothing whatsoever to do with WFI's performance of the construction loan agreement.

**6. The Special Verdict Form**

The first question on the Special Verdict Form pertaining to WFI states: "Did Washington Federal Savings ("WFS") breach its contract to

provide a construction loan to the Applegates?” CP 2739. The jury answered this question: “No.” *Id.* The appellants did not bother to provide the trial court with any alternative Special Verdict Form as to the claims against WFI, instead orally requesting that the verdict form read, “Did WFS breach its contract?” VRP 10/31/2011 at p. 393. The trial court refused and appellants now speculate that the jury was somehow “confused” by the Special Verdict Form, and did not realize that the appellants were complaining about the way WFI administered their construction loan.

But that argument ignores the following portion of jury instruction No. 2 concerning the “claims of the parties,” which specifically states:

In addition to the claims against the builder, [HHD/Bucher] plaintiffs also claim that defendant Washington Federal breached its construction loan agreement with the plaintiffs by failing to properly inspect the residence while it was under construction to make sure that amounts requested by the builder for building the Project were proper.

CP 2699. The “claims of the parties” instruction<sup>2</sup> succinctly and accurately advised the jury exactly what appellants’ theory of the case

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<sup>2</sup> On page 9 of their Opening Brief, appellants misquote this portion of jury instruction No. 2. Appellants state that this portion of jury instruction No. 2 reads: “plaintiffs also claim that Washington Federal breached its **construction agreement** with the plaintiffs by failing to properly inspect the residence while it was under construction to make sure

was with respect to the breach of contract claim against WFI. CP 2698-2699. The jurors are instructed to consider the instructions as a whole and not to give “special significance” to any particular instruction (CP 2697), much less a question on a Special Verdict Form. Further, appellants’ counsel had ample opportunity to argue his theory of the case against WFI to the jury, VRP 10/31/2011 at pp. 423-429; 481-485, and the Special Verdict Form does not conflict with the other jury instructions. There is no evidence in the record before this Court that the jury in this case failed to follow the court’s instructions as a whole, or were confused about the basis of appellants’ breach of contract claim against WFI when completing the Special Verdict Form.

**VI. STATEMENT OF THE CASE SUPPORTING  
CROSS APPEAL**

The loan agreement executed between WFI and the appellants explicitly limited WFI’s liability for a variety of things, including construction inspections and the misallocation of loan disbursements. CP 3770, 3773. Despite these clear provisions, appellants pressed on with baseless claims against WFI, seeking liability for the exact things

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that amounts requested by the builder for building the Project were proper.” (Boldface supplied.) Appellants omitted the word “loan” between the words “construction” and “agreement.” WFI believes the error was inadvertent.

that the parties to the loan agreement contractually agreed WFI could not be liable for. CP 2699; VRP 10/31/11 at pp. 423-429; 481-485.

As a protection against such frivolous claims, the loan agreement contained an attorney fee provision that very clearly stated WFI was entitled to its fees if required to retain an attorney to enforce “*any provision*” of the agreement. CP 3774 at ¶ 25(c) (emphasis added).

After the jury returned a verdict in its favor, WFI moved to recover its attorney fees from appellants pursuant to the attorney fee provision in the loan agreement. CP 3790-3794; 3819-3822. WFI argued it was entitled to its fees because its defense against appellants’ allegations was largely based on the fact that by signing the agreement, appellants agreed to the various provisions stating WFI was not liable for quality of construction, appropriation of loan disbursements, etc., which happened to be the very things the appellants were claiming WFI should have done. CP 3790-3794; 3819-3822. In other words, WFI defended the suit by enforcing the liability disclaimers contained in the loan agreement. *Id.* Failing to recognize this, the trial court misinterpreted and chose not to apply the fee provision of the loan agreement, and incorrectly denied WFI’s motion for fees. CP 3837-3838.

## VII. ARGUMENT FOR ANSWERING BRIEF

**A. THE JURY DETERMINED THAT THE BUILDER, RESPONDENT HHD/BUCHER, DID NOT BREACH ITS CONSTRUCTION CONTRACT WITH APPELLANTS, OR COMMIT ANY OTHER IMPROPER ACTS IN BUILDING APPELLANTS' RESIDENCE, SO THERE IS NO BASIS TO FIND THAT ANYTHING WFI DID IN ADMINISTERING APPELLANTS' CONSTRUCTION LOAN CAUSED THEM ANY DAMAGES**

The crux of appellants' case against WFI was that it should have done more to "monitor" and prevent HHD/Bucher's alleged poor construction practices and misappropriation of funds. The fatal tautological flaw in the appellants' entire appeal as to WFI, however, rests on the simple fact that the jury rejected every claim that appellants asserted against their builder, HHD/Bucher, and returned a complete defense verdict for HHD/Bucher. CP 2733-2738. The jury found that: (1) HHD/Bucher did not breach the construction contract with appellants, (2) the construction of plaintiff's home was not "defective"; and, (3) HHD/Bucher did not engage in any of the other myriad acts of malfeasance alleged by appellants. *Id.* So anything WFI did (or did not do) in administering the draws for appellants' construction loan could not, as a matter of law, result in any damages to appellants because the jury determined that HHD/Bucher did not breach its contract or engage in other improper activity in building appellants' residence in the first place.

In fact, given the jury's verdict as to HHD/Bucher, that there was no breach of the construction contract by HHD/Bucher, there was, afortiori, nothing that WFI "should have" (or even could have) "discovered" about HHD/Bucher's allegedly improper performance of the construction contract.<sup>3</sup> CP 2733. Similarly, the jury found that HHD/Bucher did not forge the March 2008 draw check, convert funds or commit fraud in its dealings with appellants while building their house. CP 2733-2738. So how could WFI "discover" a forgery that did not occur, a conversion that did not occur or any other fraudulent activity that did not occur? The answer, of course, is that it could not.

As a matter of simple logic, appellants have no basis to appeal the jury's verdict finding that WFI did not breach its construction loan agreement with appellants, because the jury found that there was no wrongful conduct by HHD/Bucher for WFI to "prevent" or "discover" or "correct" in the first place. The judgment as to WFI should therefore be affirmed on this basis alone.

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<sup>3</sup> Assuming WFI had such a duty, which it did not, under the loan agreement or the policies and procedures. CP 3770-3774; 1051 and 397-398; Trial Exhibit Nos. 61 and 62.

**B. THE SUPERIOR COURT PROPERLY GRANTED WFI'S SUMMARY JUDGMENT MOTION TO DISMISS APPELLANTS' CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY**

The standard of review of an order granting summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2000). On review of an order granting a motion for summary judgment, the appellate court will consider only evidence and issues called to the attention of the trial court. RAP 9.12. Thus, when reviewing a summary judgment order, an appellate court should not consider an argument that was not made to the trial court. *1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 6 P.3d 74 (2000), *review granted*, 143 Wn.2d 1001, 20 P.3d 944 (2001), *affirmed* 144 Wn.2d 570, 29 P.3d 1249 (2001). Accordingly, an argument never pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Silverhawk, LLC v. Keybank Nat. Ass'n*, 165 Wn. App. 258, 268 P.3d 958 (2011).

Here, the trial court properly granted WFI's motion for summary judgment on appellants' breach of fiduciary duty and negligence claims. Washington law does not impose a fiduciary duty on banks in dealings with their borrowers, absent special circumstances, none of which were present between appellants and WFI. As a result, appellants' failed to

present evidence that created a genuine issue of material fact and WFI was entitled to judgment as a matter of law.

**1. Under Washington Law, The Relationship Between A Borrower And Commercial Lender Is Governed By The Arms-Length Standard Applied To Contracts Generally**

For decades, Washington courts have held that no fiduciary relationship exists between a commercial lender and a borrower because the parties deal at arm's length. *Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wn. App. 456, 458-59, 656 P.2d 1089 (1983). This notion is deeply entrenched in Washington jurisprudence and the trial court properly applied the rule when it dismissed appellants' claims for breach of fiduciary duty. Tacitly acknowledging that the trial court's granting of summary judgment was a correct application of Washington law, appellants seek reversal not because of an incorrect ruling, but rather because in appellants' view, this deep rooted tenet of Washington law should be changed.<sup>4</sup>

The trial court's dismissal of appellants' fiduciary duty claims should be upheld. Before imposing a heightened, fiduciary duty on a

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<sup>4</sup> Notably, in *Annechino v. Worthy*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (Supreme Court No. 86220-6, October 18, 2012), the Washington Supreme Court declined appellants' *Amicus Curiae* invitation to create a *per se* fiduciary duty with respect to the relationship between a commercial bank and its borrowers.

lending bank, Washington law requires a showing of “special circumstances” between the bank and its customer. *Id.* “Special circumstances” exist in limited situations, typically where a customer is financially unsophisticated and heavily dependent upon the bank’s advice in connection with particularly complex or unusual commercial transactions. *Id.* at 459-460. No such factors were present here and as the trial court correctly found, there were no special circumstances regarding appellants’ loan with WFI. Thus, the trial court correctly ruled there was no basis for the appellants’ claim for breach of fiduciary duty to survive summary judgment.

**2. Appellants Failed To Present Evidence Necessary To Establish That Special Circumstances With WFI Existed**

The *Tokarz* court set forth a series of factors the trial court used to determine whether special circumstances were present between a commercial lender and a borrower. *Tokarz* at 462-463. Such factors include (1) whether the lender received any greater economic benefit from the transaction other than the normal mortgage; (2) whether the lender exercised extensive control over the construction; and (3) whether the lender took on any extra services outside of those proscribed in the loan agreement. *Id.* In addition to these, Washington courts also look to

whether the parties to a loan agreement are social acquaintances or have a relationship amounting to something more than a business relationship. *Liebergesell v. Evans*, 93 Wn.2d 881, 661 P.2d 1170 (1980).

Appellants failed to present any evidence in response to WFI's summary judgment motion that any of the elements necessary to establish special circumstances existed in this case. Specifically, there was no evidence that WFI: (1) received any greater economic benefit than the normal mortgage called for in the loan agreement; (2) exercised extensive control over the construction; (3) took on any extra services beyond those spelled out in the loan agreement; or (4) had any kind of personal relationship with appellants outside the confines of the loan agreement. Thus, even when the scant evidence presented by appellants was viewed in the light most favorable to them, there was still no factual or legal basis for the trial court to find that special circumstances existed. The superior court properly granted WFI's summary judgment motion and that ruling should be affirmed.

Despite appellants' attempt to paint the instant matter as one unique in Washington jurisprudence, this case is factually analogous to *Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, *supra*. Like appellants here, the plaintiff in *Tokarz* obtained a construction loan to build a custom

design home and hired a contractor to build the house prior to obtaining the loan. *Id.* See also CP 274.

Shortly after executing the loan agreement, the bank learned that the builder, who was also a customer of the bank, was having credit and financial problems. *Tokarz* at 458. The bank failed to alert Tokarz of this fact. The bank in *Tokarz* progressively made multiple advances on the loan as called for in the construction loan agreement, just as WFI did here. *Id.* Like the appellants, Tokarz fired the builder for delays and dissatisfaction with the work. Later, Tokarz discovered that the bank knew the builder was having financial problems while he was employed by Tokarz and during the time the bank disbursed funds from the loan. *Id.* Tokarz sued the bank alleging breach of fiduciary duty, among other claims. *Id.*

Finding no special circumstances to support the breach of fiduciary duty claim, the *Tokarz* court dismissed the claim and expressly held that the bank was not subject to any fiduciary, quasi-fiduciary or any other duty outside of what was proscribed in the loan agreement. Specifically, the court held:

We find none of the special circumstances which may impose a fiduciary duty. There is no allegation or evidence that Frontier (1) took on any extra services on behalf of Tokarz other than furnishing the money for

construction of a home; (2) received any greater economic benefit from the transaction other than the normal mortgage; (3) exercised extensive control over the construction; or (4) was asked by Tokarz if there were any lien actions pending.... The parties did not contractually agree to impose on Frontier an additional duty to disclose financial information regarding the builder, nor does Frontier's conduct impliedly create such a duty. To hold otherwise would impose an awesome burden on lenders to notify all of their customers whenever a contractor has difficulties.

*Id.* at 462-463.

Like the *Tokarz* court, this Court should uphold the summary judgment order dismissing appellants' claim for breach of fiduciary duty. At the hearing before the trial court, appellants presented no evidence to support a finding of special circumstances necessary to impose a fiduciary duty on WFI. This is because no such evidence exists. In their opposition to WFI's motion for summary judgment, appellants only alluded to a few alleged statements by WFI employee Joni Cross that were nothing more than reassuring customer service. CP 389. Even after taking these statements as true, appellants fall well short of the standards necessary for establishing the "special circumstances" required for maintaining a claim for breach of fiduciary duty against WFI.

In fact, the overwhelming evidence before the trial court clearly establishes that appellants unequivocally agreed that WFI would not undertake the responsibilities appellants now attempt to impose upon

WFI. *See e.g.*, CP 3770-3774. The loan agreement executed by appellants and WFI expressly and repeatedly states WFI was not responsible to ensure loan funds were applied to claims against the project or guarantee or verify the quality of the construction during building inspections. *Id.* Indeed, under the loan agreement appellants took full responsibility for the proper application of all funds advanced. *Id.* Further, the loan agreement also requires appellants to indemnify and hold WFI harmless for any claims related to the misuse of loan proceeds. *Id.* These were the express terms of the contract agreed to by appellants. Appellants cannot claim WFI breached the loan agreement by not performing a duty that WFI had no obligation to perform in the first place.

Appellants' reliance on *Hutson v. Wenatchee Federal Savings & Loan Ass'n*, 22 Wn. App. 91, 588 P.2d 1192 (1978) to establish a question of material fact precluding summary judgment is equally misplaced. First, the *Hutson* court found that no fiduciary duty existed between the bank and its customer. *Id.* Second, the *Hutson* holding is of no precedential value in that it is limited to its facts. In finding that a jury question existed, the *Hutson* court specifically stated the opinion was limited to "the circumstances of this case." *Id.* at 105.

Like appellants, the plaintiff in *Tokarz, supra* also cited to *Hutson* to overcome summary judgment. However, the *Tokarz* court found little value in the decision, holding that, “*Hutson* is limited to its facts” and upheld the trial court’s summary judgment dismissal of the breach of fiduciary duty claim. *Tokarz* at 460. This Court should do the same.

Finally, appellants’ reliance on out of state case law is unpersuasive and those cases should not be considered. Such out of state authority is not binding and represents the laws and policies of other states. Further, it is an inappropriate attempt to paint Washington as an “outlier,” because it does not impose the per se fiduciary duty on construction loan agreements that appellants would have this Court create. To the contrary, there are a host of other states which have refused to impose a “fiduciary” standard to the relationship between a commercial lender and borrower. *See, e.g., Sobi v. First Bank South Inc.*, 946 So.2d 615 (Fl. App. 2007) (holding that a construction lender’s duty arises solely from contract, and tort claims are precluded by the economic loss rule); *Harden v. Akridge*, 389 S.E.2d 6 (Ga. App. 1989) (realty company’s inspection of work in connection with disbursement of loan funds was insufficient to hold it liable for poor construction performed); *Daniels v. Army Nat’l Bank*, 822 P.2d 39 (Kan. 1991)

(construction lender did not owe fiduciary duty to borrower, that its failure to inspect the construction did not breach duty of good faith in performing under its contract, and that it was not liable for failing to stop making disbursements absent express direction from borrower); *Construction Lender v. Sutter*, 491 S.E. 2d 853 (Ga. App. 1997) (construction lender had no independent duty to ensure payment made to builder went to work performed).

Appellants bear the burden of establishing that special circumstances surrounding their loan agreement with WFI exist. They failed to meet this burden. The trial court properly recognized that WFI owed no fiduciary duty to appellants under Washington law. The trial court correctly dismissed appellants' claim for breach of fiduciary duty and that decision should be affirmed by this Court.

**C. THE TRIAL COURT CORRECTLY RULED THAT THE INDEPENDENT DUTY DOCTRINE BARS APPELLANTS' CLAIM FOR NEGLIGENCE AGAINST WFI**

By asking this Court to overturn the trial court's order granting WFI's motion for summary judgment dismissing appellants' negligence claims, appellants once again ask this Court to ignore well-established Washington jurisprudence and create new law. Formerly known as the "economic loss rule," the independent duty doctrine states that between

contracting parties, an injury is remediable in tort only if it traces back to the breach of a tort duty that arises independently of the contract. *See Eastwood v. Horse Harbor Foundation Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010); *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). It is well established in Washington that contract law is designed to protect contracting parties' expectation interests and to provide incentives for "parties to negotiate toward the risk distribution that is desired or customary." *Affiliated FM Ins. Co. v. LTK Consulting Services Inc.*, 170 Wn.2d 442, 451-452, 243 P.3d 521 (2010) (citing *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 827, 881 P.2d 986 (1994)). Conversely, "tort law is a superfluous and inapt tool for resolving purely commercial disputes." *Id.* (citing *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990)). Thus, the policy in Washington is that if aggrieved parties to a contract could bring tort claims whenever a contract dispute arose, "certainty and predictability in allocating risk would decrease and impede future business activity." *Id.* (citing *Berschauer/Phillips*, 124 Wn.2d at 826, 881 P.2d 986).

The question of whether a tort duty exists is a question of law, not fact and is appropriately decided on summary judgment. *See Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 914 P.2d 728 (1996). Here,

the trial court properly found no basis to enforce a generic duty of care upon WFI when its entire relationship with appellants was set out in the loan agreement. CP 865-866. Appellants presented no evidence or authority in which Washington courts have imposed a negligence standard on the conduct of a construction lender. This is because there is no Washington case that stands for such a proposition. The relationship between WFI and appellants was created and governed solely by the loan agreement. The loan agreement duly allocated the risk between WFI and appellants. There is no basis on which appellants can maintain a negligence action against WFI because WFI owed appellants no duties outside of those set forth in the loan agreement. Without an independent duty, appellants' sole means of recovery from WFI is via a claim for breach of the loan agreement, which was the claim the jury ultimately considered in this case. The trial court properly applied the independent duty doctrine in dismissing appellants' negligence claim.

Appellants evade this principle of Washington law by asking this Court to haphazardly extend the holding of *Affiliated FM Ins. Co. v. LTK Consulting Services Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010) and apply it to WFI. There is no basis for this request and it should be rejected.

In *Affiliated FM*, the Court applied a standard of care upon a professional engineering firm whose work was implicated in a fire that occurred on the Seattle Monorail. *Id.* Recognizing the particular issue before it involved grave safety concerns for the general public, namely the protection of thousands of monorail riders from physical injury—“an interest that the law of torts protects vigorously”—the Court allowed negligence claims against the engineering firm to survive. *Id.* at 452. In reaching this result, the Court noted that an “engineers’ common law duty of care have long been acknowledged in this state.” *Id.* at 454. The Court also distinguished *Affiliated FM* from previous cases against engineers, where the harm alleged was purely economic and negligence claims were dismissed. *Id.* The Court made sure to limit its holding in *Affiliated FM* and clarified that such economic claims against engineers would still be barred by the independent duty doctrine. *Id.* at 453 (citing *Berschauer/Phillips Construction Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994) (holding that general contractor’s attempt to recover purely economic damages from engineer in tort was barred by the economic loss rule)).

*Affiliated FM* clearly does not apply to the instant matter. Unlike *Affiliated FM*, there are no overriding safety concerns to people or the

general public in play. Rather, like *Berschauer/Phillips*, the sole harm alleged by appellants is purely economic and the relationship between WFI and appellants is governed by the loan agreement. Further, unlike engineers, Washington has never acknowledged a common law duty of care for construction lenders. Simply put, appellants' negligence claim against WFI is exactly the kind of claim the independent duty doctrine is designed to preclude. The trial court recognized this and appropriately dismissed that allegation on summary judgment. Its decision should be affirmed.

**D. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY**

While appellants did verbally object to the language of the special verdict form pertaining to the claims against WFI at trial, they failed to present any alternative special verdict form. VRP 10/31/11 at p. 393. The first question on the special verdict form asked "Did Washington Federal breach its contract to provide a construction loan to the Applegates?" CP 2739. Failing to present their own special verdict form, appellants merely suggested that the special verdict form proposed by WFI should instead read, "Did Washington Federal breach its contract?" VRP 10/31/11 at p. 393. The trial court denied this request.

Appellants ignore the fact that their claims against WFI were clearly spelled out in Instruction No. 2 (CP 2699) and that the purpose of the loan agreement was, in fact, to provide appellants with a construction loan. Appellants contend that the inclusion of these eight words in the first question on the special verdict form, somehow “misled” the jury and precluded appellants from arguing their case. Those assertions are unsupported by the record.

As an initial matter, appellants misstate the applicable standard of review. While errors of law in jury instructions and verdict forms are reviewed de novo, the specific wording of a special verdict form is reviewed for abuse of discretion. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996); *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 151, 210 P.3d 337 (2009). Here, appellants do not contend that the special verdict form misstated the law. Rather, their objection to the special verdict form lies with the specific language selected by the trial court. Thus, the trial court’s decision to phrase the special verdict form as it did cannot be disturbed absent a finding of abuse of discretion.

An abuse of discretion occurs when the court’s decision rests on untenable grounds or reasons. *McKay v. McKay*, 55 Wn.2d 344, 347

P.2d 1062 (1960). Here, there is no basis to find the trial court abused its discretion in wording the special verdict form the way it did. WFI's ultimate duty under the loan agreement was to provide appellants with a construction loan. Each of appellants' various theories as to how WFI breached the loan agreement were specifically and completely set forth in Instruction No. 2. CP 2699. Had the jury found that any of the allegations summarized in Instruction No. 2 were true, it would have necessarily found that WFI breached the "contract to provide a construction loan."

Even assuming, *arguendo*, that the standard of review for the special verdict form is *de novo*, there is still no basis to reverse the jury's verdict. Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Singh v. Edwards Lifesciences Corp.*, *supra*. Even if an instruction is misleading, it will not be reversed unless prejudice is shown. *Id.*

At trial, counsel for appellants spent a substantial portion of his closing argument explaining in detail his theory as to how WFI breached the loan agreement. VRP 10/31/11 at pp. 423-429; 481-485. Clearly, the special verdict form did not prevent appellants' trial counsel from

arguing his theory of the case. Further, appellants' allegation that the special verdict form confused or misled the jury as to the issues before them is unfounded, as the issues were clearly spelled out in detail by trial counsel during closing argument and in Instruction No. 2. *Id.*; CP 2699. In sum, even if the special verdict form was incorrect, appellants cannot demonstrate any resulting prejudice to their ability to present and argue their case. Therefore, regardless of which standard of review is applied, there are no grounds to overturn the jury's verdict based on the special verdict form.

*Capers v. Bon Marche, Div. of Allied Stores*, 91 Wn. App. 138, 143, 955 P.2d 822, 825 (1998), relied upon by appellants, is distinguishable from the facts at bar for a variety of reasons. First, the issue before the *Capers* court was whether the trial court provided the jury with a special verdict form that correctly stated the applicable law. Second, in addition to misstating the law, the special verdict form in *Capers* also directly contradicted other instructions given to the jury. *Id.* at 144-145. Third, trial counsel for The Bon compounded the mistake during closing argument when he focused on the inaccurate special verdict form while stating the applicable law to the jury. *Id.* at 146.

None of the factors present in *Capers* exist here. Appellants' issue with the special verdict form is not related to the law provided the jury, but rather the trial court's choice of words. The special verdict form did not conflict with the other jury instructions and when read as whole, the instructions comprehensively set forth the allegations and defenses of the parties and the law applicable thereto. Finally, at trial neither counsel misstated the applicable law or made any argument that could have confused the jury's understanding of the law or appellants' allegations. When reviewing a special verdict form, the Court need only find that it adequately presents the contested issue to the jury in an unclouded, fair manner. *Lahmann v. Sisters of St. Francis*, 55 Wn. App. 716, 723, 780 P.2d 868 (1989). There is no doubt that the special verdict issued by the trial court in this case succinctly and accurately presented the appellants' issue to the jury.

Appellants have failed to show the trial court abused its discretion in wording the special verdict form and the jury's verdict must be affirmed. The result is the same even if this Court were to review this issue de novo. The verdict form did not conflict with other jury instructions, did not impede appellants' counsel's ability to argue his theory of the case, and it did not mislead or confuse the jury.

**VIII. ARGUMENT ON WFI'S  
CROSS-APPEAL OF THE DENIAL  
OF ATTORNEY FEES**

**A. INTRODUCTION: THE ATTORNEY FEE PROVISION IN THE WFI  
LOAN AGREEMENT**

The loan agreement executed between WFI and appellants authorizes WFI to recover its fees in any proceeding to enforce any provision of the loan agreement. CP 3774 at ¶ 25(c). Failing to recognize WFI's trial defense was premised upon the enforcement of the provisions of the loan agreement that absolved it from liability for appellants' claims, the trial court improperly denied WFI's motion for fees. CP 3837-3838.

WFI's motion for attorney fees and litigation expenses was fully supported by the declarations and billing statements that allowed the trial court to determine the reasonableness of its request. *See e.g.*, CP 3639-3789; 3790-3794; 3819-3822. Appellants did not even challenge the reasonableness of WFI's attorney fees request. CP 3834-3836; CP 3844-3847.

**B. THE TRIAL COURT MISCONSTRUED THE LOAN AGREEMENT  
AND RCW 4.84.330 WHEN IT FAILED TO AWARD WFI ITS  
ATTORNEY FEES AS THE PREVAILING PARTY**

WFI incurred more than \$264,000 in attorney fees and litigation expenses defending against appellants' meritless claims. CP 3641. After

the jury returned a defense verdict, finding in favor of WFI and awarding appellants nothing, WFI moved to recover its attorney fees and other litigation expenses, pursuant to the loan agreement and RCW 4.84.330. CP 3790-3794; 3819-3822.

The loan agreement between appellants and WFI specifically authorized WFI to recover its attorney fees and costs if WFI was required to seek assistance of counsel to enforce any provision of the loan agreement against appellants. Specifically, it states:

**Attorney's Fees and Costs; Trustee's Fees and Costs.**

If the Lender seeks the services of an attorney (whether Lender's employee or outside counsel) *to enforce any provisions of this Agreement*, the Note, the Security Instrument or other promises of the Borrower as contained in the loan documents, the Lender shall be entitled to all of its attorney's fees and costs of enforcement, and the Lender shall have the right to add these fees and costs to the principal balance of the loan as they accrue. In addition, the Lender shall have the right to add to the principal balance of the loan all costs as they accrue which relate to the Lender's exercise of non-judicial foreclosure by the Trustee (if any) of the Security Instrument.

Trial Exhibit No. 61 at p. 5; CP 3774 at ¶ 25(c) (italics added).

WFI moved post-trial to recover its attorney fees and litigation expenses as called for in the loan agreement. CP 3790-3794; 3819-3822. WFI argued that the fee provision in the loan agreement was triggered because in defending against appellants' claims, WFI was required to

enforce various provisions of the loan agreement that clearly stated WFI was not liable for the claims alleged by appellants at trial. *Id.*

Specifically, WFI argued that its defense required enforcing various provisions of the loan agreement wherein the appellants explicitly agreed that:

- WFI would have no obligation to see that funds advanced to the appellants or HHD were applied to the construction. Section 3(C).
- WFI could rely solely on the disbursement requests, certifications of job progress, and other statements and records provided or signed by the appellants. Section 3(C).
- The appellants would accept full responsibility for the proper application of all loan funds advanced at their direction and would indemnify WFI against any losses arising from misapplication of any loan funds. Section 3(C).
- Regardless of all the above, WFI reserved the right to disburse loan funds as it deemed necessary (in its sole discretion) for the benefit of the construction project. Section 3(C).
- WFI did not insure, guarantee, or warrant anything about HHD or its conduct with respect to the construction project. Section 13.
- Despite making regular inspection to satisfy itself of the progress on the project, WFI would have no responsibility to guarantee the quality of HHD's work to the appellants. Section 13.

CP 3820; 3771; 3773.

Indeed, these contractual provisions directly rebutted the appellants' claims against WFI at trial, including their assertion that WFI breached the loan agreement by failing to "properly inspect the residence" and "to make sure amounts requested by the builder for building the project were proper." CP 2699. WFI had to enforce these provisions of the loan agreement by retaining legal counsel to defend against appellants' baseless lawsuit.

Despite the clear applicability of these provisions of the loan agreement as key defenses to the appellants' claims, the trial court incorrectly ruled that the attorney fee provision of the loan agreement did not apply and denied WFI's motion for attorney fees and litigation expenses. Appellants and their counsel knew of these provisions in the loan agreement prior to filing suit. Regardless, they chose to take the calculated risk of proceeding with claims against WFI despite the clear disclaimer provisions contained in the loan agreement that provided a complete defense to all appellants' claims. WFI respectfully asks this Court to reverse the trial court's ruling and award WFI its attorney fees.

A court reviews a trial court's interpretation of contractual provisions and statutes regarding attorney fees *de novo*. *See State v. Azpitarte*, 140 Wn.2d 138, 140-141, 995 P.2d 31 (2000); *Estep v.*

*Hamilton*, 148 Wn. App. 246, 201 P.3d 331 (2008) (“[w]hether a statute, contract or equitable theory authorizes the award is a matter of law subject to de novo review”).

RCW 4.84.330 mandates that contractual attorney fee provisions, like the one contained in the loan agreement, must be enforced:

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.

There is no doubt that WFI was a “prevailing party” in this case. As such, it is entitled to recover its attorney fees under both the loan agreement and RCW 4.84.330. At trial, appellants sought damages because, in their view, WFI failed to properly inspect the construction and disburse funds under the loan agreement. CP 2699 and VRP 10/31/11 at pp. 423-429; 481-485. However, sections 3(c) and 13 of the loan agreement specifically and unequivocally state that WFI was not, and could not, be liable for such claims. CP 3771, 3773. Appellants and counsel were aware of this but chose to proceed with their lawsuit against WFI anyway.

Not surprisingly at trial, counsel for WFI repeatedly pointed to these contractual provisions as a complete defense to appellants' claims, asking the jury to find that WFI could not be liable for appellants' claims under the loan agreement. VRP 10/31/11 at pp. 462-466. The jury ultimately agreed these provisions applied and absolved WFI from liability, finding it did not breach the loan agreement. Accordingly, as the prevailing party that successfully enforced the liability disclaimers contained in the loan agreement, WFI is entitled to recover its attorney fees.

Washington Courts have found that attorney fees provisions very similar to the one in the WFI loan agreement are enforceable. In *Scoccolo Const., Inc. ex rel., Curb One Inc. v. City of Renton*, 158 Wn.2d 506, 145 P.3d 371 (2006), the Washington Supreme Court upheld an award of attorney fees based on a contractual provision very similar to that contained in the WFI loan agreement. *Id.* at 520.

In *Scoccolo*, the Court interpreted a contract that provided a contractor pay attorney fees incurred by the City of Renton for the enforcement of "any . . . provision" in the contract:

[c]ontractor agrees to pay all cost, expenses, and reasonable attorney's fees that may be incurred or paid by the City in the **enforcement of any of the covenants, provisions and agreements hereunder.**

*Id.* at 520 (boldface added). On appeal, Division One held that the attorney fee provision was a "very broad statement" that was triggered if the City was required to enforce "'any' provision of the contract":

It contains a very broad statement that would require Scoccolo to pay "all" costs and fees incurred by Renton to enforce "any" provision of the contract, and is not limited by statements regarding fault or identifying the initiator of the action.

*Scoccolo*, 125 Wn. App., 150, 165, 103 P.3d 1249 (2005).<sup>5</sup> This holding, which awarded the contractor its fees as the prevailing party under RCW 4.84.330, was affirmed by the Washington Supreme Court. *Scoccolo*, 158 Wn.2d at 520-521 ("As noted by the Court of Appeals, the language of the provision refers to enforcement of the contract's provisions, and since they can be enforced only against a party to the contract, it follows it applies in the instant case."); *see also Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 197 P.3d 710 (2008) (upholding attorney fee clause that contained the words "enforce any provision").

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<sup>5</sup> Division One's opinion was published in part and unpublished in part. We include this unpublished portion of the opinion solely to provide context for decision rendered by the Supreme Court.

In the instant matter, the trial court erred in its interpretation of the loan agreement. Like the prevailing parties in *Scoccolo* and *Kaintz*, WFI was required to retain counsel to enforce the provisions of the loan agreement that disclaimed liability for the appellants' claims. Therefore, WFI is entitled to its attorney fees under both the loan agreement as well as RCW 4.84.330. WFI asks this Court to reverse the trial court and remand for an award of its reasonable attorney fees and litigation expenses.

#### **IX. ATTORNEY FEES ON APPEAL**

Pursuant to RAP 18.1, WFI requests this Court award it attorney fees on appeal. If WFI prevails on its cross-appeal, the Court should also grant its attorney fees for the cross-appeal. *Martin v. Johnson*, 141 Wn. App. 611, 623, 170 P.3d 1198 (2007). Cross-appeal aside, WFI should also be awarded its fees for this appeal pursuant to RCW 4.84.185, which authorizes an award of fees to a prevailing party for fees related to defending a frivolous action or appeal. *Fernando v. Nieswandt*, 87 Wn. App. 103, 940 P.2d 1380 (1997).

## X. CONCLUSION

The trial court properly dismissed appellants' claims for breach of fiduciary duty and negligence. There was no evidence of the special circumstances between appellants and WFI necessary to impose a fiduciary duty on WFI. This Court should uphold the trial court and decline appellants' request to create new law governing the relationship between banks and borrowers. Additionally, because the relationship between the parties was purely contractual, the independent duty doctrine barred appellants' negligence claim.

There is also no basis to find that the language used in the special verdict form warrants overturning the jury's verdict. The verdict form did not misstate the law, did not conflict with the other jury instructions, did not prevent appellants' trial counsel from arguing his case, and there is nothing in the record which demonstrates that it misled or confused the jury. The trial court did not abuse its discretion in the wording of question No. 1 on the special verdict form pertaining to WFI.

There is no basis on which to reverse the jury's verdict and remand this matter for a new trial. The judgment should be affirmed. The trial court's refusal to award WFI its fees, however, should be reversed and the case should be remanded with an order directing the trial court to award WFI its reasonable fees as the prevailing party.

DATED this 20<sup>th</sup> day of December, 2012.

TODD & WAKEFIELD

By 

Scott C. Wakefield WSBA #11222

Justin M. Monroe WSBA #35683

Attorneys for Respondent / Cross-Appellant Washington Federal Savings, a savings and loan subsidiary of Washington Federal, Inc.

1501 Fourth Avenue, Suite 1700  
Seattle, WA 98101-3660  
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# **APPENDIX 1**

**CONSTRUCTION LOAN AGREEMENT & ASSIGNMENT OF ACCOUNT**

THIS AGREEMENT is made by the undersigned RICHARD A APPELATE AND KAREN A APPELATE,  
HUSBAND AND WIFE KA

(the "Borrower")  
 for the purpose of obtaining a construction loan from WASHINGTON FEDERAL SAVINGS (the "Lender"), which loan is evidenced by a promissory note (the "Note") of the Borrower for FIVE HUNDRED FIFTY THOUSAND AND NO/1008 Dollars (\$550,000.00) dated June 12th 2007, in favor of the Lender and is to be secured by a first Deed of Trust or Mortgage (the "Security Instrument") on real property in the County of PIERCE, State of Washington, described as follows:

**LOT 1 OF PIERCE COUNTY SHORT PLAT RECORDED AUGUST 15, 1990  
 UNDER RECORDING NUMBER 9908150515, RECORDS OF PIERCE COUNTY AUDITOR;**

**SITUATE IN THE COUNTY OF PIERCE, STATE OF WASHINGTON.**

The real property above described is known in this Agreement as the "Property."  
 THE LENDER AND THE BORROWER AGREE AS FOLLOWS:

**1. "SPEC" AND "CUSTOM" CONSTRUCTION LOAN DISTINGUISHED.**

This Agreement is applicable to a "spec" construction loan or "custom" construction loan, whichever is the case between the Borrower and the Lender in this transaction. If this is a "custom" construction loan, the Borrower is obtaining permanent financing to construct or remodel a residential dwelling. The Borrower on a "custom" construction loan shall be an owner of the Property and obligor on the permanent financing. If this is a "spec" construction loan, the Borrower is a contractor/builder who is obtaining financing in order to construct or remodel a single-family or multi-family dwelling. Specific provisions of this document referring to a "spec" construction loan shall be applicable only to that type of loan. Specific provisions of this document referring to a "custom" construction loan shall be applicable only to that type of loan. Otherwise, every provision of this document refers to either type of construction loan. The loan evidenced by the Agreement, the Note, the Security Instrument and any other loan documents between the Borrower and the Lender is (check only one):

- a "spec" construction loan.  
 a "custom" construction loan.

**2. LOAN IN PROCESS ACCOUNT.**

The proceeds of this loan are not to pass into the possession or under the control of the Borrower, but upon recordation of the Security Instrument the sum of FIVE HUNDRED FIFTY THOUSAND AND NO/1008 Dollars (\$550,000.00) is to be placed by the Lender in a special non-interest bearing account known as a Loan in Process Account (the "Account") and such funds are to be used solely for the purposes and in the manner stated below. Costs associated with this transaction are to be deducted from the Account. These costs may include loan fees and costs payable to others incurred by the Lender in making the loan (such as title insurance, credit reports and legal fees). The Lender may also pay itself interest accrued on the outstanding balance of the loan at the interest rate and at the times provided in the Note. Subject to the provisions of this Agreement, the Borrower (and each of them) irrevocably assigns to the Lender, as additional security for the obligations secured by the Security Instrument, all of the right, title and interest of the Borrower in and to the Account and all monies to be placed there, specifically including amounts that may be deposited in the Account from time to time either by the Borrower, the Lender or others. The Borrower acknowledges that the Borrower has no right to the monies in the Account other than to have them disbursed by the Lender as stated in this Agreement.

**3. USE OF LOAN PROCEEDS.**

A. One of the following statements applies to the loan evidenced by this Agreement (check only one):

- A portion of the loan proceeds will be used by the Borrower to acquire the Property.  
 None of the loan proceeds will be used by the Borrower to acquire the Property or repay monies borrowed for previous acquisition of the Property, and the Borrower warrants fee ownership of the Property as of the date of this Agreement or use of the Borrower's own funds for acquisition of the Property.

B. The Borrower shall use the loan proceeds, or so much of them as may be necessary, exclusively for the purpose of the Property and the improvements proposed to be constructed upon the Property (the "Project"), and shall apply for these proceeds only in accordance with this Agreement, and only if the Property is purchased and the Project is constructed promptly and in accordance with plans and specifications (the "Plans") and the construction cost estimate or budget (the "Budget") as approved or to be approved by the Lender. The use of the loan proceeds may include the acquisition cost of the land and any other costs incident to the Project as may be specified in the Loan Closing Statement, Account Statements, Project Schedules or other loan documents.

C. The Lender shall have no obligation to see that funds advanced to the Borrower, the contractor/builder or both, are applied to claims against the Project. The Borrower accepts full responsibility for the proper application of all funds advanced at Borrower's direction. The Lender may rely solely upon the Borrower's disbursement requests, certifications of job progress, statements and

Borrower's initial(s) KA

reports when making advances from the Account, and the Borrower releases and agrees to indemnify and hold harmless the Lender from any and all losses, demands, claims and expenses arising from or related to the misapplication or misuse of the loan proceeds by the Borrower; provided that the Lender reserves the right to make loan disbursements as it deems necessary (in its sole discretion) for the benefit of the Project. The Borrower's indemnification of the Lender does not extend to losses arising strictly due to any material breach of this Agreement by the Lender.

#### 4. APPROVAL OF BUILDER ON "CUSTOM" CONSTRUCTION LOAN.

The provisions of Paragraph (4) (A) and (B) apply if this is a "custom" construction loan.

A. The Lender shall have the right to approve the Borrower's choice of general contractor (the "Builder") for the Project as a condition for making the loan; and the Lender shall reserve the right to approve, as a condition for any continued funding of the Project, a successor Builder chosen by the Borrower as a substitute for the original Builder. These conditions shall apply even if the Borrower's proposed choice of Builder is the Borrower. As a part of its approval of the Borrower's choice of Builder, the Lender shall require evidence satisfactory to the Lender that the Borrower's proposed choice has an up-to-date and applicable general contractor's license, a sufficient contractor's bond (if required by state law) with no adverse claims against it, an acceptable credit report and history of dealings with suppliers, subcontractors and other trade creditors, and a reputation for suitable quality of workmanship. In addition, the Lender may employ other criteria for evaluating the Borrower's proposed choice of Builder as it may establish in its own discretion.

B. The Borrower acknowledges and agrees that the Lender does not insure, guarantee or warrant the character, creditworthiness or honesty, or degree of skill, care and prudence of the Builder, or the Builder's conduct in any given instance in relation to the Borrower or the Project. The Borrower further acknowledges and agrees that the Borrower's contract with the Builder for the Project has been freely and independently negotiated, bargained for and made with no involvement, either direct or indirect, by the Lender. However, the Lender reserves the right, as a condition for funding of the loan, to approve the content of any contract made between the Borrower and the Builder as it may relate to the Plans, the Budget, the amount of loan proceeds and other funds available for the Account, and the feasibility of the Project.

#### 5. TITLE INSURANCE.

The Borrower shall furnish the Lender, after the recordation of the Security Instrument and before any funds from the Account are disbursed by the Lender, a policy of Title Insurance satisfactory to the Lender, together with title endorsements as the Lender may require, insuring the Lender that the Security Instrument is a first lien on the Property, with exceptions only as may be approved in writing by the Lender. **NO WORK OF ANY CHARACTER IS TO BE COMMENCED OR MATERIALS DELIVERED ON THE PROJECT BEFORE THE TITLE POLICY IS FURNISHED TO THE LENDER AND THE LENDER HAS ADVISED THE BORROWER THE POLICY HAS BEEN RECEIVED.** The intention is that the Security Instrument shall be prior to any labor or material liens. Should any material be delivered or work performed before a satisfactory policy of title insurance is received by the Lender, the Lender may, at its option, cancel its commitment to make this loan (which commitment was previously given to the Borrower) and apply the funds in the Account to the payment of the indebtedness secured by the Security Instrument, and pay all expenses incurred in connection with the loan. If the total of the indebtedness and the expenses incurred by the Lender in connection with the loan exceed the total amount in the Account, the Borrower shall immediately pay the difference to the Lender.

#### 6. FOUNDATION PREREQUISITE AND TITLE INSURER'S INSPECTION.

No disbursements shall be made on this loan unless the Project's foundation has been constructed according to the Plans. In addition, unless otherwise waived by Lender, no disbursements shall be made on this loan unless the title insurer of the Lender, or the title insurer's authorized representative, has communicated a satisfactory foundation inspection to the Lender. If, as a condition of Lender's required title insurance coverage, the title insurer requires a certified foundation survey report or equivalent, Borrower must furnish at Borrower's expense and on request of Lender a survey of the proposed Project site and the Property.

#### 7. LOAN INTEREST RATE, SERVICE CHARGE AND LATE CHARGE.

The Borrower shall be charged interest at the rate provided for in the Note and from the date of advance upon actual advances from the Account. Borrower also agrees to pay an applicable service charge at time of origination and closing of this loan transaction. The Borrower agrees that interest will be paid monthly as billed by the Lender. However, in the event any interest payment is not received by the end of the 15th day after it is due, Borrower agrees to pay a late charge of five percent (5%) of the overdue interest payment.

#### 8. MATURITY DATE; DEFAULT OF BORROWER AND REMEDIES OF LENDER.

A. The Lender shall be paid in full on this loan on or before the maturity date on the Note, unless the Lender shall consent in writing and in its own discretion to an extension of maturity.

B. If construction of the Project be at any time abandoned, discontinued, or not carried on with reasonable dispatch, or if the work is not properly performed as determined by the Lender (or if this be an FHA loan and any work on the planned improvement is rejected by the FHA and not promptly corrected, or if the FHA cancels or withdraws the commitment to insure the loan), or if any other term of this Agreement be not faithfully performed by the Borrower after five days' written notice of the nonperformance, then the Lender may, at its option, upon written notice to the Borrower, (a) declare the loan due or (b) take possession of the Property and thereafter proceed with completing the Project according to the Plans, and pay the cost of completing the Project. If the cost to complete the Project is more than the balance of the Account, then additional cost may be expended by the Lender, at its option, in which event it shall be considered to be an additional loan to the Borrower, and the repayment of it, together with interest at the default rate provided in the Note, shall be secured by the Deed of Trust and shall be repaid within 30 days after the completion of the Project.

C. If any advances to the Borrower are not applied exclusively to bills arising directly out of the work on the Project, or are applied to costs other than those set forth in the cost breakdowns approved by the Lender from time to time, or if any disbursements to the Borrower should be diverted to other purposes, the Lender may, at its option, declare the loan due and payable.

D. Should the Borrower breach this Agreement or default on any of its terms, or breach the provisions of, or default on any of the Borrower's duties or obligations provided in the Note or Security Instrument, the Lender may, at its option and without waiver of other remedies of the Lender, refuse to permit further payments from the Account and may apply the Account funds upon indebtedness secured by the Security Instrument and in payment of the expenses incurred on the loan, and may declare the Note immediately due and payable.

E. In addition to and without any waiver of other remedies the Lender may have for the Borrower's default of any term of this Agreement, the Lender reserves the right, at its own option, and upon written notice, to cancel any prior arrangement with the

Borrower in which interest on the Note is paid from the Account if the Borrower is in default of any term of this Agreement, the Note or the Security Instrument, or the Lender determines, in its own discretion, that there are not enough remaining funds in the Account to complete the Project according to the Plans.

#### 9. PERSONAL PROPERTY SECURITY AGREEMENTS.

Materials, fixtures or any other part of the Project to be constructed upon the Property, or any apparatus to be used for the Project, shall not be purchased or installed by the Borrower under any conditional sale agreements or other arrangements if the right is reserved or may accrue to anyone to remove or repossess such items.

#### 10. WARRANTY AGAINST THIRD PARTY LIENS.

A. The Borrower warrants that there are no claims against the Borrower for past due taxes of any kind, or other obligations to or claims by any governmental body or any private person, firm or corporation, which are or could become liens upon the Property.

B. The Borrower shall make all necessary payments so that, at all times, the Property shall be completely free of any lien or claim of any governmental department or agency or any private person, firm, entity or corporation. In the event the Lender becomes aware of a lien filed (or threatened to be filed) against the Property, the Lender shall have the right to withhold from any disbursement request (or hold in the Account) a sum equal to one-hundred fifty percent (150%) of such claim.

#### 11. WARRANTY OF REPRESENTATION, SUPPLYING INFORMATION AND MASTER FILE REQUIREMENTS.

A. The Borrower has provided to the Lender, prior to commitment for this loan, a copy of the Borrower's most recent financial statement [which shall not be older than ninety (90) days prior to the date of this Agreement]. The Borrower represents and warrants that all information provided by the Borrower to the Lender, including the Borrower's financial statement, is true, accurate and correct. The Borrower further warrants that no unsatisfied judgments exist against the Borrower and that the Borrower is not a named party in any pending or threatened litigation.

B. The Borrower shall furnish to the Lender information and documentation as the Lender may request concerning the Property, the construction of improvements made to it, or the provision of labor, equipment or materials related to it. The Borrower shall permit the Lender to inspect the Borrower's books and records relating to the Property and the construction of improvements made to it.

C. If this is a "spec" construction loan, the Lender shall maintain, in addition to any file(s) for this loan or any existing or future construction or development loan made to the Borrower, a generic information file concerning the Borrower known as the "Master File". The Borrower accepts the Lender's right to periodically request of and obtain from the Borrower and from other persons and entities (including credit reporting agencies) all necessary information to create, update and maintain the Master File as a condition for initial or continued funding of this loan. The Borrower warrants all information submitted or to be submitted for inclusion in the Master File is or shall be true, accurate and correct.

#### 12. DRAW REQUESTS AND ACCOUNT DISBURSEMENTS; RESPA "ESCROW ITEMS"; LENDER'S PROTECTION AGAINST POTENTIAL LIEN CLAIMANTS; INDEMNIFICATION OF LENDER BY BORROWER

A. The Account shall be disbursed by the Lender to provide funds for the purchase of the Property and/or the construction of the Project as set forth in the Plans and in accordance with the Budget, and before making any or each disbursement(s) from the Account, the Lender shall be entitled, at its option, to receive a true and correct statement of all indebtedness incurred for labor performed, materials ordered or delivered, and equipment furnished, and shall have the right to inspect all of the Borrower's books, records and accounts relating to the work. The Lender shall only be obligated to make disbursements from the Account (1) when the Project has reached a percentage of completion (as estimated by the Lender's inspector) equal to that required by the Lender's draw schedule on this loan and (2) in further reliance upon Borrower's disbursement requests, certifications of job progress or reports, as the Lender may periodically or specifically require of the Borrower. The Borrower (and in the case of a "custom" construction loan, the Borrower and the Builder) shall execute a draw request in the form required by the Lender at the time any loan disbursements are requested, and shall make all requests for disbursements from the Account in writing. The Lender shall not be obligated to make disbursements from the Account more often than once monthly.

B. Draw disbursements, except any made for purchase by the Borrower of the Property, shall be made by the Lender only to the Borrower (in the case of a "spec" construction loan) and to the Borrower and the Builder (in the case of a "custom" construction loan), unless otherwise agreed in writing. Waiver by the Lender of any condition of disbursement must be expressly made in writing. The making of a disbursement prior to fulfillment of one or more of these conditions shall not be construed as a waiver of any such conditions, and the Lender reserves the right to require their fulfillment prior to making any subsequent disbursements.

C. If this is a "custom" construction loan and if "Escrow Items" [as defined under the Real Estate Settlement Procedures Act (RESPA) and Regulation X thereof and initially disclosed and estimated in Borrower's Initial Reserve Account Statement] are required by Lender, then Lender shall require that additional personal funds to pay these Escrow Items (Reserves) be deposited with Lender prior to issuance of the final draw. This shall be in addition to all other preconditions of the final draw, including those set forth in Paragraph 16(B) below. These additional personal funds must be deposited with Lender from either (1) remaining amounts in the Account which are neither loan proceeds or necessary for completion of the Project according to the agreed-upon Plans and Budget, or (2) another out-of-pocket resource of the Borrower.

D. If the Property is situated outside Oregon and unless otherwise required by Lender at its option, Lender shall make draw disbursements without procedural assurances that potential lien claimants will be paid. If this is a construction loan upon Property situated in Oregon, then the following condition will apply to Borrower and be part of this Agreement (check one only):

Oregon: Procedural Assurances Waived. Lender shall not require procedural assurances from Borrower that potential lien claimants will be paid, including but not limited to waiving any requirement of (1) a voucher system for payment of potential lien claimants or (2) the depositing with Lender of checks drawn on Borrower's separate checking account that are made payable to potential lien claimants and which are then tendered by Lender to the potential lien claimants.

Oregon: Procedural Assurances Required. Lender shall require procedural assurances from Borrower that potential lien claimants will be paid, including but not limited to requiring (1) a voucher system for payment of potential lien claimants or (2) the deposit with Lender of checks drawn on Borrower's or Builder's separate checking account that are made payable to potential lien claimants and which are then tendered by Lender to the potential lien claimants.

Borrower's initial(s) 

Regardless of what state the Property is situated, any waiver of procedural assurances granted in this Paragraph 12(D) is conditional upon Borrower not being in default of any term of this loan, including the Note, the Security Instrument, or this Agreement [including, without limitation, Paragraph 3(C) hereof]; and Lender has the right, upon Borrower's default and without further notice to Borrower, to cancel any conditional waiver of procedural assurances granted in Paragraph 12(D) and thereafter require any such procedural assurances which it deems necessary in its sole discretion to protect the priority of its Security Instrument from the claims of any potential lien claimants. In addition, Lender may, at its option, make any disbursement to the Borrower or directly to potential lien claimants engaged in the construction of the Project or an off-site work of improvement which benefits the Property and/or the Project; and Lender may at any time require lien waivers from any potential lien claimant as allowed by state law. Borrower shall hold harmless, indemnify, protect and defend Lender from any and all claims of potential lien claimants which affect the Lender, including but not limited to any claims which assert a lien priority over the Security Instrument; and upon notice from Lender, Borrower shall defend Lender against any adverse claims of potential lien claimants and indemnify Lender from any loss resulting from such claims. If ever Lender deems itself to be insecure due to the lien priority of a potential lien claimant, Lender may exercise any of its rights in law or equity, including, without limitation, those granted to Lender under the language of the Security Instrument.

### 13. INSPECTION BY THE LENDER.

The Lender or its agents shall at all times have the right to enter upon the Property during the period of construction work; and if the work is not satisfactory to the Lender, it shall have the right to stop the work and order its replacement, whether or not the unsatisfactory work has already been incorporated into the improvements. However, the Lender shall have no obligation to and shall not insure or guarantee compliance with any federal, state or local building codes or standards or the quality of the Project for either Borrower, his heirs, successors and assigns, or any third person. The provisions of this paragraph are in addition to and shall not be construed as the only basis for an interpretation of Paragraph 15.

### 14. CONSENT OF LENDER TO ALTER THE PLANS.

No change in the Plans shall be made after they have been approved by the Lender, without first obtaining the written consent of the Lender to any changes. The Borrower warrants that the improvements to the Property will be built in strict accordance with the Plans and any applicable building codes or regulations. Should there be any deficiency in the Account to fully complete the Project in strict accordance with the approved Plans, the Borrower shall, upon demand by the Lender, deposit sufficient funds into the Account to make up any deficiency.

### 15. RIGHTS LIMITED TO LENDER AND BORROWER.

This Agreement is made for the sole protection of the Borrower; and the Lender and no other person or persons shall have any right or action under this Agreement, or any claim to the Account or the loan funds. In addition, the Lender shall have no duty of care or contractual obligation to third persons with whom the Lender has not directly contracted incident to this loan or the Project, and Borrower shall hold harmless and indemnify the Lender from any claims of third persons arising from the Borrower's acts or omissions incident to the construction of the Project.

### 16. OCCUPANCY PERMIT, SATISFACTORY COMPLETION CERTIFICATE AND FINAL DRAW; NOTICE OF COMPLETION

A. Upon completion of construction, the Borrower shall provide proof of an issued occupancy permit or final approval from the appropriate governmental authority prior to receiving any final draw of not less than ~~ten percent (10%)~~ of the total funds in the Account allocated for construction purposes.

B. If this is a "custom" construction loan, the final draw will not be disbursed unless (1) the occupancy permit or appropriate governmental authority has been issued and (2) there has been a satisfactory completion certificate by the appraiser designated by the Lender.

C. If the Property is situated in Arizona, Oregon or Utah, Lender may upon completion or substantial completion of the Project cause to be filed in the official records of the County where the Property is situated a Notice of Completion, or similar document, the purpose of which is to begin the running and thereby limit the time for filing of any construction lien claims whose filing periods may under state law run from date of "completion" or "substantial completion" of the entire Project. The filing of any such Notices of Completion shall be at the expense of Borrower, and Lender may treat such expense (if any) as an item which may be capitalized to the principal balance of the loan or paid by disbursement from any residual funds in the Account prior to issuance of the final draw.

### 17. CHARGES FOR CONSTRUCTION DRAW INSPECTIONS.

If the Lender is required to make more than one construction draw inspection per month of the improvements on the Property, a fee of \$75.00 will be charged for each additional inspection. If the construction term is extended beyond the original construction term, a fee of \$75.00 will be charged for each inspection performed during the extended construction term. If inspections must be performed out of the Lender's lending area, a fee of \$75.00 will be charged for each out of area inspection.

### 18. INSURANCE COVERAGE.

If this is a "spec" construction loan and notwithstanding insurance provisions of the Security Instrument to the contrary, the Borrower shall provide, maintain and keep in force a broad form comprehensive general liability insurance policy, with limits of not less than One Million Dollars (\$1,000,000.00) in coverage as to personal injury or death to any one or more persons or damage to property, and (2) a builder's all risk extended coverage ("Course of Construction") insurance policy for not less than one hundred percent (100%) of the full replacement value of the completed improvements. Any "Course of Construction" insurance coverage shall apply specifically to the Project and not merely to the principal place of business of the Borrower or other operations of the Borrower not related to the Project. If the Borrower does not comply with provisional or other reporting requirements of the insurance carrier so as to cause a lapse or cancellation of any of the above-stated required coverages, the Borrower shall be deemed to be in default on this loan, and Lender may in such event, at its option and without notice to Borrower, secure "forced place" insurance coverage at Borrower's expense and capitalize such expense to the principal balance of this loan.

B. If this is a "custom" construction loan, the Borrower, in addition to the insurance provisions of the Security Instrument, shall provide, maintain and keep in force a "Course of Construction" insurance policy or an equivalent substitute, for not less than one hundred percent (100%) of the full replacement value of the completed improvements and broad form comprehensive general liability coverage or equivalent (addressing ownership of the Property and construction of the Project) in an amount satisfactory to Lender in its sole discretion. The Borrower shall, upon the request of the Lender, provide the Lender with endorsements to these policies of insurance, naming the Lender a "Mortgagee" and/or "Certificate Holder".

C. If the Property is determined to be in a Special Flood Hazard Area (SFHA) as determined by the Federal Emergency Management Agency, proof of adequate flood insurance at Borrower's expense shall be a condition of the closing of this loan

transaction. If Lender will require "reserve" payments ["Escrow Items" as defined in Paragraph 12 (C) above] for taxes, hazard insurance and/or mortgage insurance premiums, Lender will also require "reserve" payments to cover premiums for any mandatory flood insurance as authorized by federal law and not inconsistent with state law (if any). Notwithstanding the above, Borrower may voluntarily elect "reserve" payments for taxes, hazard insurance and/or flood insurance to the extent agreed upon in writing by Lender.

**19. REQUIREMENTS OF BUILDING PERMIT.**

The Borrower shall provide to the Lender a copy of the building permit from the appropriate governmental authority for the proposed project; Custom Construction prior to closing and "Spec" Construction prior to the first disbursement from the account.

**20. PUBLIC IMPROVEMENTS.**

The Borrower agrees promptly to commence and to complete any required off site improvement adjoining the Project (e.g., public streets, walks and like areas), and to provide all utilities and other facilities, in accordance with any plat or subdivision requirements or other requirements of the governmental body having jurisdiction over the Property (the "Public Improvements"). If there are required Public Improvements, they shall be deemed a part of the Project; and the Lender shall condition funding of the loan upon (a) the Borrower obtaining and maintaining for the benefit of the governmental body having jurisdiction a surety bond for such work of the requisite amount and coverage required by that governmental body, and/or (b) a set aside of funds from the Account in an amount of not less than 150% of the estimated cost of the Public Improvements as certified by the applicable governmental authority and to be approved by the Lender. The Borrower agrees to indemnify Lender from any claim of any surety furnishing a bond for such work to the governmental body having jurisdiction, whether the claim be founded upon existing or future liability, and whether liability be express or implied.

**21. FIRE OR CASUALTY LOSSES.**

In the event the Project is materially damaged by fire or other casualty, the Lender need not make further disbursements from the Account unless and until the Lender receives insurance proceeds or a cash deposit from the Borrower in a timely manner, either of which must be sufficient, in the Lender's judgment, to pay for the repair to the Project.

**22. ASSIGNMENT OF RIGHTS IN THE PLANS.**

The Borrower hereby assigns and grants to the Lender the absolute right of ownership and use of the Plans and permits for the Project, in the event of the Borrower's default of this Agreement or the Note and Deed of Trust.

**23. CROSS-DEFAULT.**

If this is a "spec" construction loan, Borrower already has executed or may in the future execute additional construction, developed lot, land development, or other loan contracts and security instruments ("Other Agreements") in connection with other loans from Lender to Borrower. Lender has entered into this agreement in reliance on Borrower's financial statements, personal abilities, and reputation. In the event Borrower defaults under the terms of this Loan Contract and Security Instrument (as modified by this Agreement or any other instruments) or any Other Agreements, whether now in force or becoming effective in the future, then such a default shall likewise constitute a default of the terms of this loan contract and security instrument or all Other Agreements then in force between the Lender and the Borrower.

**24. FEDERAL TAX REPORTING.**

Borrower acknowledges, understands and agrees that Lender may be required to solicit from any or all third party recipients of disbursements under this loan taxpayer identifications (W-9 forms) so as to form a database for the issuance of miscellaneous income statements (1099-MISC forms) as may be required of Lender under tax regulations of the Internal Revenue Service for institutions which make disbursements to non-borrower third parties from escrow accounts, such as the Account. Borrower shall cooperate with Lender in meeting Lender's tax reporting requirements and exercise best efforts to assure cooperation from affected third parties.

**25. MISCELLANEOUS PROVISIONS.**

A. No Waiver; Consents. Any waiver by the Lender must be in writing and will not be construed as a continuing waiver. No waiver will be implied from any delay or failure by the Lender to take action on account of any default of the Borrower. Consent by the Lender to any act or omission by the Borrower will not be construed to be a consent to any other or subsequent act or omission so as to waive the requirement for the Lender's consent to be obtained in any future or other instance.

B. Severability. A declaration by a court that any provision of this Agreement is void or unenforceable shall have no effect on any other provision or the validity of this Agreement as a whole.

C. Attorney's Fees and Costs; Trustee's Fees and Costs. If the Lender seeks the services of an attorney (whether Lender's employee or outside counsel) to enforce any provisions of this Agreement, the Note, the Security Instrument or other promises of the Borrower as contained in the loan documents, the Lender shall be entitled to all of its attorney's fees and costs of enforcement, and the Lender shall have the right to add these fees and costs to the principal balance of the loan as they accrue. In addition, the Lender shall have the right to add to the principal balance of the loan all costs as they accrue which relate to the Lender's exercise of non-judicial foreclosure by the Trustee (if any) of the Security Instrument.

D. If this is a "custom" construction loan in the state of Washington, the Borrower acknowledges receipt of a notice prepared by the Washington State Attorney General and Department of Labor and Industries, entitled "Construction Liens: What You Should Know About Contracts" (Confer Revised Code of Washington, Section 60.04.250).

EXECUTED THIS 12th day of June, 2007

**WASHINGTON FEDERAL SAVINGS**

By: [Signature]  
Its VICE PRESIDENT & MANAGER

Lakewood Office  
9919 Bridgeport Way SW  
Lakewood WA 98499

[Signature]  
RICHARD A APPLGATE  
[Signature]  
KAREN A APPLGATE  
K.A.

# **APPENDIX 2**



## Washington Federal Savings

### CUSTOM CONSTRUCTION LOAN POLICIES AND PROCEDURES

1. **RATE:** The interest rate will remain the same during the construction and permanent loan period unless the borrower selects a Convertible ARM program in which case the interest rate will remain the same during the construction and initial permanent loan period subject to rate adjustment as described in the ARM Loan Program Disclosure.
2. **TERM:** 30 or 15 years *plus* the construction period.
3. **CREDIT FOR PREPAID ITEMS:** All credits to the borrower must be submitted no later than at time of underwriting the loan. Requests for credit of prepaid items can not be credited by escrow at the time of signing loan closing documents. These items may be considered after the loan closes, with a check issued to Borrower and considered as a draw against construction funds. Any confirmed, preliminary deposit paid to Builder will be credited at closing and subtracted as a draw against the loan in process account (construction loan funds plus funds paid by Borrower).
4. **BUILDING PERMIT/CONSTRUCTION COMMENCEMENT:** Prior to the date of loan closing, Washington Federal Savings ("WFS" or "Lender") must be provided a copy of the building permit. Construction of improvements may not commence until WFS' deed of trust has been recorded.
5. **DRAWS:** WFS will disburse funds no more frequently than once each month. Draws will be based on the percentage of completion per the submitted approved contract, plans, and specifications, UNLESS a line item disbursement procedure has been specifically agreed upon in writing. WFS will not advance any money for items not yet delivered and installed. WFS shall at all times have the right to enter upon the property during the period of construction work, and if the work is not satisfactory to Lender, it shall have the right to stop the work and order its replacement, whether or not the unsatisfactory work has already been incorporated into the improvements.

On-site inspections are typically completed between the 1st and 9th day of each month. Unless otherwise agreed upon, the first inspection and draw will be completed the month following the closing date. Prior to the payment of any draw, a Certificate of Job Progress, signed by both the Builder and the Borrower(s) will be required. Checks will be issued payable to the Builder *and* the Borrower(s) *unless* WFS is previously instructed otherwise in writing. However, in all cases, the final draw must be made payable to the Builder *and* the Borrower(s).

If the property is located in Oregon, draw checks may be issued to solely the general contractor, provided a Request For Payment of Bills has been completed and signed by both the general contractor and the borrower(s) and approved by WFS. For Oregon properties, the final draw check may also be payable to only the general contractor; however, a Request For Payment of Bills must be completed and signed by the general contractor and all borrowers and approved by WFS.

If the Lender is required to make more than one construction draw inspection per month of the improvements on the Property, a fee of \$75.00 will be charged for each additional inspection. If the Construction Term is extended beyond the original construction term, a fee of \$75.00 will be charged for each inspection performed during the extended construction term. If inspections must be performed out of the Lender's lending area, a fee of \$75.00 will be charged for each out of area inspection. Draw inspections are completed solely for the purpose of assisting Lender in determining construction disbursements. WFS shall have no obligation to and shall not insure or guarantee compliance with any federal, state, or local building codes or standards or the quality of the project for either Borrower or Builder.

6. **FOUNDATION INSPECTION/SURVEY:** A satisfactory inspection/survey, as determined by the title insurance company insuring WFS' deed of trust, must be obtained after the foundation has been poured and prior to payment of the first construction draw. A satisfactory inspection/survey must disclose no encroachments and consists of one of the following: a) a foundation inspection performed by the title company; b) a foundation inspection performed by a private firm approved by the title company; or c) a foundation survey completed by a licensed surveyor and approved by the title company. If there is a fee for the inspection/survey, funds to pay for the inspection or survey will be collected at the time the loan closes.
7. **CHANGE ORDERS:** All changes to the contract, plans, specifications, and cost breakdown must be authorized by WFS *prior* to any alterations. A reduction in the quality of the project will not be allowed. Any request for changes that will increase the cost of the project are to be taken care of according to the construction contract executed by Borrower and Builder. WFS loan funds will not pay for change orders which increase the cost of construction.
8. **LIENS:** With the exception of loans granted in the state of Oregon, WFS does *not* typically require lien releases or any other documentation of payment to the subcontractors or suppliers from the general contractor; however, Borrower may obtain these direct from the Builder under the terms of the construction contract.

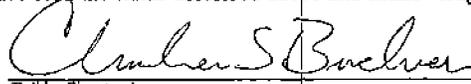
When lien waivers are required on property being constructed or renovated in the state of Oregon, the Builder or Borrower must complete a "Request for Payment of Bills" with the payee's name, address, purpose, and amount filled in and totaled. A check payable to each vendor must be attached to a copy of the invoice being paid along with an addressed, stamped envelope. Each check should reference the property address for the loan in process. The Request for Payment of Bills form must be signed by both Builder and Borrower.

Checks submitted by the Builder will be stamped with a lien waiver and mailed by WFS the same day the draw check is picked up if the Builder banks with a local financial institution, or one day after the check is picked up if the Builder does not bank locally.

9. **COMPLETION:** Ten percent (10%) of the cost to build will be held back from the final draw until WFS receives either the final Certificate of Occupancy or "permit finalized", a satisfactory final inspection from the appraiser (form #442), and a final Certificate of Job Progress signed by Builder and all Borrowers stating that construction is 100% complete.
10. **PAYMENTS:** During construction, Borrower will be billed each month for interest only payments based on the portion of the loan which has been disbursed. Payments are due on the 1st of each month. A grace period is allowed until the 16th of the month; a late charge will be assessed if payments are received after that date. Construction draws will not be paid if interest payments are not current. When construction is completed and the loan is converted to its permanent phase, monthly payments of principal and interest and taxes and insurance (if applicable) will either be deducted from Borrower's deposit account by pre-authorized automatic withdrawal or paid directly by Borrower (via coupon).
11. **RESERVES:** Property taxes and insurance premiums must be paid by Borrower during construction. If reserves for taxes and insurance are a condition of the loan, WFS will require adequate funds to be deposited (initial reserve deposit) to Borrower's reserve account after completion of the improvements and prior to the issuance of the final construction draw. NOTICE: These are *additional* funds required from Borrower *separate* from funds required to close the loan. An initial reserve account disclosure statement will be provided to Borrower at closing which estimates the amount of the reserve deposit to be paid at completion of construction and conversion to the permanent phase of the loan. A final Reserve account disclosure will be provided to Borrower prior to issuance of the final construction draw which will show how the initial Reserve deposit is computed.
12. **EXTENSIONS:** If the house is not completed at least one month prior to the first scheduled payment of principal and interest, a modification must be approved by WFS that extends the first principal and interest payment date. WFS may charge an additional fee of 0.50% of the loan amount and/or increase the interest rate if the modification results in 1.) an extension of more than 2 months or 2.) extends the construction phase to greater than 12 months. The modification extending the first payment date will require a slightly higher monthly principal and interest payment as the final maturity date will remain the same.
13. **INSURANCE COVERAGE.** In addition to the insurance provisions of the Security Instrument, the Borrower shall provide, maintain and keep in force a "Course of Construction" insurance policy or an equivalent substitute, for not less than one hundred percent (100%) of the full replacement value of the completed improvements. In conjunction with the "Course of Construction" homeowners policy, the borrower must obtain liability coverage addressing ownership of the Property and construction of the Project in the amount of \$500,000. The Borrower shall, upon the request of the Lender, provide the Lender with endorsements to 1.) the Liability policy of insurance, naming WFS as Certificate Holder and 2.) the Course of Construction homeowners policy naming WFS as "Mortgagee". If the Builder provides liability insurance, the coverage must be \$1,000,000 per occurrence, show either Washington Federal Savings or a State Agency where the builder is Licensed as a Certificate Holder. If the Builder provides hazard insurance, it must be stated in the contract, Washington Federal Savings and the Borrower must each be named as "Additional Insured" and the site address must be reflected on the Evidence of Insurance.

**BUILDER AND BORROWER ACCEPTANCE**

I have read the terms described above and acknowledge and accept them.

  
\_\_\_\_\_  
(Builder Signature)

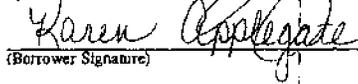
06/14/07  
\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Builder Signature)

\_\_\_\_\_  
(Date)

  
\_\_\_\_\_  
(Borrower Signature)

\_\_\_\_\_  
(Date)

  
\_\_\_\_\_  
(Borrower Signature)

\_\_\_\_\_  
(Date)

# **APPENDIX 3**



# Washington Federal Savings

## CLOSING STATEMENT

IN ACCOUNT WITH **RICHARD A APPELEGATE**  
**KAREN APPELEGATE**

Settlement date 06/15/07  
Branch 139  
Escrow No. 4334084  
Loan No. 331759-1  
Closer's Initials PSJ

PROPERTY: 11108 12TH AVE CT NW  
GIG HARBOR WA 98335

		DEBIT	CREDIT
Principal Amount of New Loan			550,000.00
Less:			
<b>Washington Federal Savings Charges</b>			
WFS - Loan Origination Fee		5,500.00	JE 6-15-07
WFS - Loan Buydown/Discount		0.00	
WFS - Document Preparation Fee			
WFS - Underwriting Fee		525.00	JE
WFS - Payment Processing Charge		200.00	JE
WFS - Wire Transfer Fee		25.00	JE
<b>Reserves</b>			
Hazard Ins	0 months @ 0.00 per month		
Mortgage Ins	0 months @ 0.00 per month		
County RE Taxes	0 months @ 0.00 per month		
Flood Ins	0 months @ 0.00 per month		
Other	0 months @ 0.00 per month		
Aggregate Adjustment	0.00	Reserve Deposit	0.00
<b>Interest</b>			
from 06/15/07 to at 0.0000			
<b>Other Loan Charges or Credits</b>			
First American R.E. Tax Service, Inc. (Tax Monitoring)		63.00	JE
First American Flood Data Services, Inc. (Flood Det/Life of Loan)		15.00	JE
<b>REMAINING COST TO BUILD</b>		721,011.14	
<b>SOUND VALUATION INC FINAL 442</b>		125.00	
Application deposit to Washington Federal Savings			
Collect from	CHICAGO TITLE INSURANCE CO	\$0.00	wired rec'd 6-18-07
Total		\$727,464.14	\$727,464.14

WF\_APPLE 000607

FILED  
COURT OF APPEALS  
DIVISION II

2012 DEC 21 PM 1:44

STATE OF WASHINGTON

BY                       
DEPUTY

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

RICHARD APPELATE and  
KAREN APPELATE,

Appellants /  
Cross-Respondents,

vs.

WASHINGTON FEDERAL  
SAVINGS, a Savings and Loan  
subsidiary of WASHINGTON  
FEDERAL, INC., a Washington  
Corporation; KITSAP BANK, a  
Washington Financial Institution;  
HARBOR HOME DESIGN, INC.,  
a Washington Corporation;  
CHARLES BUCHER and JANE  
DOE BUCHER, husband and wife,  
and the marital community  
comprised thereof; and OHIO  
CASUALTY INSURANCE CO.,

Respondents /  
Cross-Appellants.

NO. 43043-6-II

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of  
Washington that the following is true and correct:

I am employed by the law firm of: Todd & Wakefield.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted the document(s) entitled: BRIEF OF RESPONDENT / CROSS-APPELLANT WASHINGTON FEDERAL SAVINGS; and this CERTIFICATE OF SERVICE on the following person(s):

**For Appellants/Cross-Respondents:**

Sidney Tribe, Esq.  
Philip A. Talmadge, Esq.  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630

**[XX] Email / U.S. Mail**

**For Appellants/Cross-Respondents:**

Justin David Bristol, Esq.  
Gourley | Bristol | Hembree  
1002 10<sup>th</sup> Street  
Snohomish, WA 98290

**[XX] Email / U.S. Mail**

**For Respondents Harbor Home Design, Inc.; Bucher:**

Pamela Marie Andrews, Esq.  
Jennifer Lauren, Esq.  
Andrews & Skinner PS  
645 Elliott Avenue West, Suite 350  
Seattle, WA 98119-3911

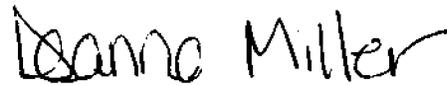
**Email / U.S. Mail**

**Court of Appeals:**

Court of Appeals, Division II  
Clerk's Office  
950 Broadway, Suite 300  
Tacoma, WA 98402

**Messenger**

DATED this 21<sup>st</sup> day of December, 2012.



DEANNA MILLER

Todd & Wakefield  
1501 Fourth Avenue, Suite 1700  
Seattle, WA 98101-3660  
TEL: 206/622-3585  
FAX: 206/583-8980