10-30-2014

Skinner v. Peterson Appellant's Brief Dckt. 42065

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREG L. SKINNER and JESSICAL L. SKINNER, husband and wife,

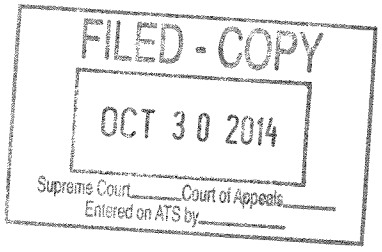
Plaintiffs/Appellants,

v.

ALBERT D. PETERSON and BABETTE PETERSON, husband and wife, individually and d/b/a PCS COMPANY and PCS COMPANY, INC., U.S. BANK HOME MORTGAGE, a United States Corporation, SAFEGUARD PROPERTIES, LLC, a Delaware corporation, JANE DOES and/or JOHN DOES I-X who may be individuals employed by defendants,

Defendants/Respondents.

Supreme Court No. 42065



APPELLANTS, GREG L. SKINNER AND JESSICA L. SKINNER'S, BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

THE HONORABLE JEFF M. BRUDIE
DISTRICT JUDGE

Darrel W. Aherin
Aherin, Rice & Anegon
P.O. Drawer 698
Lewiston, ID 83501

Attorney for Appellants

Scott R. Smith
Bohrnsen, Stocker, Smith, Luciani & Staub
The Morgan Building
312 W. Sprague Avenue
Spokane, WA 99201

Attorney for Respondent, U.S. Bank Home Mortgage

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

Plaintiffs/Appellants Greg L. Skinner and Jessica L. Skinner (the Skinners) filed suit against the Peterson's d/b/a PCS Company and PCS Company, Inc. on March 28, 2008. The Skinners brought suit against U.S. Bank Home Mortgage (U.S. Bank) on October 10, 2008, in an Amended Complaint for negligence. (R. vol. I, pp. 29-37). U.S. Bank filed a Motion for Summary Judgment which the trial court granted. (R. vol. II, pp. 196-212). The Skinners filed a Motion to Reconsider. The trial court denied the Motion to Reconsider in its Opinion and Order on Plaintiffs' Motion to Reconsider. (R. vol. II, pp. 271-281). The court entered judgment in favor of U.S. Bank. This appeal timely followed.

B. STATEMENT OF FACTS

The Skinners had dreamed and planned on living around the Grangeville, Idaho, area when they got close to retirement. In 2004, that dream became a reality when the Skinners custom home was completed. Devastatingly, a fire destroyed the Skinners' home near Grangeville, Idaho, on October 23, 2006. The home was insured through Liberty Mutual Insurance Company. U.S. Bank, as successor to Zions National Bank, and holder of the note required that any insurance proceeds be deposited with them. An Affidavit of Sarah Johnson-Fodge, supervisor of the insurance department at U.S. Bank, filed on February 12, 2010, has the Deed of Trust attached as an exhibit. (R. vol. II., pp. 338-384). *See* Deed of Trust, page 6. (R. vol. II, p. 350). U.S. Bank sent the Skinners a letter on October 31, 2006, outlining the procedures for losses greater than ten thousand dollars ($10,000.00). (R. vol. II, pp. 361-362).

The letter outlined that U.S. Bank would disburse payment for rebuilding the home in three parts. The first one third would be paid immediately to the Skinners and their contractor after needed documentation was received. The second one third would be paid when the Skinners contacted U.S. Bank and U.S. Bank had performed an inspection to ensure that two thirds of rebuilding was complete. (R. vol. II., p. 362). Final payment would occur upon completion of rebuilding, the Skinners' signed Affidavit of Satisfaction, and releases from all contractors and subcontractors. (R. vol. II., pp. 362).

The Skinners submitted all required paperwork to begin the process to U.S. Bank on June 5, 2007. (R. vol. II, p. 341). In the interim, between the fire and submitting documents to U.S. Bank, the Skinners had submitted a floor plan and signed a contract with PCS, Inc., a general contractor to rebuild the home. (R. vol. I, pp. 22-26).

U.S. Bank paid the first one third disbursement to the Skinners and PCS Inc. on June 18, 2007, with a letter that stated "[t]he next draw will be released once the repairs are 66% complete. Please contact our office to request an inspection once your repairs are to this point. The inspection performed is a visual inspection to confirm the work is completed; it does not verify that building codes are met." (R. vol. II, p. 341). The first and second disbursements by U.S. Bank were at the Skinners request and checks were made payable to both the Skinners and PCS. The Skinners notified U.S. Bank of needing the second one third disbursement because the contractor requested the draw. *Id.* Prior to disbursing the money, U.S. Bank contracted with a third party, Safeguard Properties, LLC, to conduct an inspection ensuring that 66% of rebuilding had occurred. *Id.* Safeguard Properties, LLC conducted its

property inspection, through an agent, Karen Smith, of Kooskia, Idaho. (R. Vol. I, pp. 144-162). Ms. Smith inspected the home on September 24, 2007, and found the rebuilding process to be sixty five percent (65%) complete. *Id.* U.S. Bank paid the second one third disbursement on October 4, 2007, in an amount of $139,400.62. (R. vol. II, p. 342). Rebuilding was never completed because PCS, Inc., the general contractor, walked off the job on November 1, 2007, through no fault of the Skinners or U.S. Bank. *Id.* Nearly one year later, on September 23, 2008, Ms. Smith inspected the home. (R. Vol. I, pp. 114-162). During that inspection, Ms. Smith reported the home was only forty percent (40%) complete. *Id.* Except for some roofing, the home was in the same condition as it had been during the inspection in September of 2007 when Ms. Smith found the home to be sixty-five (65%) complete. *Id.* In the interim, it was discovered that the contractor improperly built the foundation without sealing the walls or installing drains. The foundation of the home is cracked, broken, and unsuitable to continue building on.

A new contractor has never been retained to finish the home and the home remains in much the same state as November of 2007 because of the deadlock between U.S. Bank and the Skinners. Because of the situation, the Skinners filed a Chapter 13 bankruptcy. U.S. Bank still holds rebuilding funds, the remaining one third disbursement, earmarked for rebuilding that the Skinners have not been able to get to.

ISSUES PRESENTED ON APPEAL

I.

Idaho courts have held that a bank generally does not owe a fiduciary duty to a borrower and has no relationship with a borrower other than debtor–creditor. A fiduciary relationship does exist if the bank has control over disbursement of building funds. U.S. Bank had exclusive control over when and how the Skinners received funds for rebuilding their home. Did the District Court properly find that there was no fiduciary duty owed by U.S. Bank to the Skinners?

II.

Generally a party may exempt themselves from liability through an exculpatory clause if the clause clearly addresses the harm and one party is not at an obvious disadvantage or a public duty is not involved. U.S. Bank's exculpatory clause does not address the harm in this case and the Skinners are at an obvious bargaining disadvantage. Is U.S. Bank able to disclaim liability based on the exculpatory clause in the "Affidavit of Intention to Complete Repairs?"

III.

Typically, a party will bring suit against another party to make themselves whole. U.S. Bank disbursed loan proceeds based on a home inspection by Safeguard Properties, LLC, that overstated home rebuilding by twenty-five percent. U.S. Bank knows the Skinners will not be able to finish rebuilding the home given the current situation. Should U.S. Bank, because the Skinners do not have standing to do so, have a duty to

bring suit against Safeguard Properties, LLC, to make themselves and the Skinners whole as to the money paid in the second draw?

ARGUMENT

I. The District Court improperly found there was no fiduciary duty owed by U.S. Bank to the Skinners.

A. Standard of Review

The Court reviews appeals of a summary judgment motion under the same standard used by the lower court. *Teurlings v. Larson*, 156 Idaho 65, 320 P.3d 1224, 1228 (Idaho 2014). Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When applying this standard, the Court construes disputed facts and any reasonable inferences drawn from the record, in favor of the nonmoving party. *Grabicki v. City of Lewiston*, 154 Idaho 686, 690, 302 P.3d 26, 30, (Idaho 2013). The motion must be denied if the disputed facts and reasonable inferences might cause reasonable people to reach different conclusions. *Bagley v. Thomason*, 155 Idaho 193, 196, 307 P.3d 1219, 1222 (Idaho 2013).

B. U.S. Bank had a fiduciary duty to the Skinners.

This action arose as a negligence claim against U.S. Bank. Common law negligence has four elements: "(1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the

defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Stoddart v. Pocatello School Dist. #25*, 149 Idaho 679, 683, 239 P.3d 784, 788 (Idaho 2010) (quoting *Nation v. State, Dep't of Corr.*, 144 Idaho 177, 189, 158 P.3d 953, 965 (Idaho 2007)). The trial court entered a judgment of dismissal on a summary judgment motion finding the Skinners had not satisfied the first element, that U.S. Bank owed them a fiduciary duty. (R. vol. II, pp. 196-212). The trial court performed no further analysis on the issue of negligence finding no duty was present. If this Court finds that U.S. Bank owed the Skinners a fiduciary duty, the case should be remanded to the trial court for the Plaintiffs to prove a breach of that duty, causation, and the harm for which U.S. Bank would be responsible.

The Skinners contend that U.S. Bank owed them a fiduciary duty, and that U.S. Bank breached that duty. (R. vol. I, pp. 56-65). Establishing that claim first requires a finding that a fiduciary duty exists. *City of Meridian v. Petra Inc.*, 154 Idaho 425, 441, 299 P.3d 232, 248 (Idaho 2013). Whether a fiduciary duty exists is a matter of law in which the Court exercises free review. *Id.*

i. U.S. Bank is a fiduciary because they exercised complete control over the rebuilding funds.

Generally, the relationship between a bank lender and borrower is that of a debtor – creditor, not a fiduciary. *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 277, 824 P.2d 841, 852 (Idaho 1991). In an "arm's length" transaction, no fiduciary duty arises. *High Valley Concrete, L.L.C. v. Sargent*, 149 Idaho 423, 428, 234 P.3d 747, 752 (Idaho 2010). However, fiduciary duties may arise between lenders and borrowers in limited

circumstances where there is "an agreement creating a duty, or if the lender exercises complete control over the disbursement of funds." *Wooden v. First Security Bank of Idaho, N.A.*, 121 Idaho 98, 100, 822 P.2d 995, 997 (Idaho 1991).

The applicable agreements between the Skinners and U.S. Bank, and before the Court, are the Deed of Trust and Affidavit of Intention to Complete Repairs. Neither document states "fiduciary." Nor does either say anything about someone's interest other than Lender or U.S. Bank. The documents by themselves do not create a duty. However, U.S. Bank did exercise complete control over the disbursement of funds which creates a fiduciary duty.

Several courts, not including Idaho, have found that a fiduciary relationship can be created between a lender and borrower.

> A mortgagee-lender who insists on controlling disbursement of the loan proceeds in order to protect its own interests (mortgage lien), deprives the mortgagor of possession of the loan proceeds for which he has bargained, and in doing so must equitably be considered as the mortgagor's agent saddled with a duty to use reasonable care to protect the principal's interests.

Prudential Ins. Co. of America v. Executive Estates, Inc., 369 N.E. 2d 1117, 1128, 174 Ind. App. 674, 692–693 (Ind. App. 2 Dist. 1977), *citing* 55 Am.Jur.2d Mortgages § 14 at 203 (1971).

In *Falls Lumber Co. v. Herman*, the Court held that the bank owed a duty to the borrower to protect the borrower. While the Court relied on a theory of agency, the Court held the bank was an institution created and holding itself out as skilled in construction loans,

was being paid for their work, and knew the necessary procedure to protect the borrower. 181 N.E.2d 713, 715, 114 Ohio App. 262, 264–265 (Ohio App. 9 Dist. 1961).

In *Bollinger v. Livingston State Bank and Trust Co.*, a Louisiana court held that a bank was a "fiduciary and agent" of the borrower. 187 So.2d 784, 787 (La. Ct. App. 1966). In that case, payments to the contractor were made after agents of the bank inspected the property to ensure that the required quantity of work had been performed to allow the contractor to a progress payment. *Id.* at 786. Further, the Court found that:

> Unquestionably, the bank owed plaintiff a duty in this case. The legal relations existing between plaintiff and the bank were created by the delivery of the collateral mortgage note and building contract to the bank and by the bank's undertaking to advance money and supervise construction as to quality and quantity as the agent of plaintiff.

Id. at 787. In another case, the Mississippi Supreme Court reversed a summary judgment motion and held that a construction lender owed a duty of reasonable diligence to ensure funds were actually used to pay for materials and labor. *Cook v. Citizens Sav. and Loan Ass'n*, 346 So.2d 370, 372 (Miss. 1977). In *Cook*, the lender failed to ensure that materials and labor were paid for, forcing a foreclosure sale which the bank then held the proceeds from, and were due to the plaintiffs. *Id.* Also, the Minnesota Supreme Court held in a blanket statement that "[w]hen a mortgagee undertakes to disburse funds for a mortgagor under a construction contract, a fiduciary relationship arises." *M.S.M. Corporation v. Knutson Co.*, 283 Minn. 527, 529, 167 N.W.2d 66, 68 (Minn. 1969).

U.S. Bank will likely point to several Idaho cases wherein the Idaho Court of Appeals and the Idaho Supreme Court have held when disbursements are at the borrowers request and

checks are made payable to multiple parties, as the facts are in this case, the bank has not exercised complete control over disbursement of funds. *Laight v. Idaho First Nat'l Bank*, 108 Idaho 211, 697 P.2d 1225 (Idaho Ct. App. 1985) (holding bank did not have complete control where disbursement was at borrowers request and checks were made payable to borrower and the contractor) and *Madrid v. Roth*, 134 Idaho 802, 10 P.3d 751 (Idaho Ct. App. 2000) (holding bank lacked complete control over disbursement because borrowers had to request money and checks were made payable to both borrower and contractor). *Wooden v. First Sec. Bank of Idaho*, 121 Idaho 98, 822 P.2d 995 (Idaho 1991) (holding bank owed no fiduciary duty to borrower when disbursements were placed directly into customer's account allowing the customer to pay the contractor).

While the facts at hand are similar to *Laight* and *Madrid* in that the Skinners had to request disbursement and checks were payable to multiple parties, U.S. Bank exercised, and continues to exercise, complete control over the disbursement of funds, distinguishing this case from both *Laight* and *Madrid*. U.S. Bank was protecting its interest in the property. Declaring that the Skinners had any control over disbursement of the insurance proceeds is akin to holding a gun to their head and telling them they have to pull the trigger before they can have the gun, and then saying the Skinners have control. It's irrational.

The Deed of Trust and Affidavit of Intention to Complete Repairs are written to protect U.S. Bank at all costs. *See* Deed of Trust, Affidavit of Intention to Complete Repairs. (R. vol. II, pp. 338-384). The Deed of Trust, on page six (6), requires U.S. Bank control the insurance proceeds in case of home loss. The Skinners and their interests are left wholly out

of the documents save for the requirements they must meet to maintain the mortgage. The Deed of Trust states,

> any insurance proceeds, . . . shall be applied to restoration or repair of the Property, ... During such repair and restoration period, *Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction* . . . .

(emphasis added). *Id.* The opinions in *Laight* and *Madrid* do not state whether there was similar or different contract language in those cases. But here, from the time the insurance money was released by the insurance company, U.S. Bank wanted their hand in the proverbial pot. U.S. Bank was protecting their interest at the expense of the Skinners. U.S. Bank's mortgage requirements were drafted as if the Skinners were not to be trusted and would not have rebuilt the home they had dreamed of, built, and lived in. After receiving the insurance proceeds, U.S. Bank would disperse money in chunks, only at the request of the Skinners. The checks were made payable to both the Skinners and the contractor. Further, U.S. Bank insisted on inspecting the property. U.S. Bank would not release funds *until* the bank had inspected the property. U.S. Bank controlled the money. Saying the Skinners had any meaningful control over the disbursement of funds is contradictory.

If U.S. Bank wanted to protect their interest, they could have received the insurance proceeds, paid off the note, and given the Skinners the difference. U.S. Bank wanted control. The Deed of Trust is replete with requirements the Skinners had to meet to satisfy the "Lender." After the fire, the Deed required the money to go through U.S. Bank. U.S. Bank was to administer the disbursements. U.S. Bank had to complete an inspection to ensure the

work had been completed to their satisfaction. Reviewing these facts in the light most favorable to the Skinners, the nonmoving party for summary judgment, reasonable persons could come to different conclusions. U.S. Bank will argue case law indicates that no fiduciary duty was owed. However, a reasonable person could believe that U.S. Bank's involvement in the rebuilding process and money disbursement created a fiduciary duty. This appeal itself is indicative of reasonable people holding different opinions. U.S. Bank had control. Equity shouldn't allow U.S. Bank to control the insurance proceeds from the beginning until now, dictate when and how money was released, not disburse money until an inspection was completed, and then be able to claim no fiduciary duty was owed.

ii. U.S. Bank is a fiduciary because the Skinners placed the rebuilding funds with U.S. Bank.

Alternatively, a fiduciary relationship is "commonly characterized by one party placing property or authority in the hands of another, or being authorized to act on behalf of the other." *Country Cove Development, Inc. v. May*, 143 Idaho 595, 603, 150 P.3d 288, 296 (Idaho 2006), *High Valley Concrete* at 428, 752.

Here, the Skinners placed the insurance proceeds with U.S. Bank. While the Skinners may not have voluntarily done so absent the Deed of Trust language requiring such, it happened. If U.S. Bank wanted to avoid the role of a fiduciary, they had two options. Either use the insurance proceeds to pay off the then current mortgage amount and give the Skinners the balance or turn over the entire balance to the Skinners for them to administer. U.S. Bank did neither. The bank did neither because U.S. bank wanted control over the insurance

proceeds. In taking control of the funds, U.S. Bank put themselves in the position of a fiduciary.

iii. U.S. Bank is a fiduciary because the Skinners placed their trust and confidence in U.S. Bank.

Idaho law also holds that "the term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him . . . ." *High Valley Concrete* at 428, 752 (quoting *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (S.C. 1986)). Idaho is not alone in recognizing that one party in a superior position can become a fiduciary. *Denison State Bank v. Madeira*, 230 Kan. 684, 692, 640 P.2d 1235, 1241 (Kan. 1982) (rehearing denied 230 Kan. 815) (Holding that a fiduciary relationship implies one party being superior over another), *First Sec. Bank of Utah N.A. v. Banberry Development Corp.*, 786 P.2d 1326, 1333 (Utah 1990) (Holding that a fiduciary implies superiority over another), *Cole v. Wellmark of South Dakota, Inc.*, 776 N.W.2d 240, 253 (S.D. 2009) (Holding that a fiduciary relationship requires one party to have confidence in the other and an inequality, dependence, . . . "or other conditions giving to one advantage over the other.") Yet,

> Mere respect for another's judgment or trust in this character is usually not sufficient to establish such a relationship. The facts and circumstance must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.

High Valley Concrete at 428, 752 (quoting *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986)).

Here, there is no doubt that U.S. Bank is in a superior position. The sheer discrepancy in terms of working knowledge and being a party to mortgages for U.S. Bank puts the Skinners in a weak position in comparison. The second part of the equation, special trust and confidence, is obvious because the Skinners relied on the inspection U.S. Bank had done.

II. U.S. Bank should not be able to disclaim liability based on the exculpatory clause in the "Affidavit of Intention to Complete Repairs."

Freedom of contract is an underlying principle in the law of contracts. *Jesse v. Lindsley*, 149 Idaho 70, 75, 233 P.3d 1, 6 (Idaho 2008). A contracting party may absolve themselves of some liabilities and duties under the contract, subject to some limitation. *Id.* (citing *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 178, 595 P.2d 709, 712 (Idaho 1979)). However, courts disfavor attempts to avoid liability and construe those provisions strictly against the individual relying on the provision. *Jesse* at 75, 6. Especially when the person relying on avoiding liability drafted the document. *Id.*

A. U.S. Bank's exculpatory clause does not clearly and directly speak to the conduct it seeks to be immunized from liability for.

This Court has held when a party attempts to excuse liability, the provision "must speak clearly and directly to the conduct to be immunized from liability." *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 107, 294 P.3d 1111, 1119 (Idaho 2013) (citing *Jesse* at 75, 6). Provisions which exclude liability "must speak clearly and directly to the particular conduct . . . which caused the harm at issue." *Jesse* at 75, 6. In *Jesse*, this

Court found an exculpatory clause was too broad and did not "speak clearly and directly to the particular conduct of the defendant intended to be immunized. *Id.* at 76, 7. In *Jesse*, Ms. Jesse, a tenant, was walking in a planting area to avoid water on the driveway when she fell and sustained injuries. *Id.* at 72, 3. Mr. Lindsley, the defendant and owner of the apartment complex where the injuries occurred, had drafted an exculpatory clause attached to every apartment lease, which Ms. Jesse had signed when she leased an apartment, that read,

> That the owner shall not be liable for damages due to either injuries or accidents caused by slipping, falling or from any other sources that occur either in the apartment building, the outside area of the apartment building, or on the outside premises of the lot or land, paving or sidewalks where the apartment building is located or from any act of God that either directly or indirectly may cause bodily harm of any nature.

Id. The Court evaluated the clause and found that "[I]n short, the clause attempts to relieve the landlord of liability for any type of injury, wherever it may occur." *Id.* at 76, 7. The Court found the clause was "too broad and does not speak clearly and directly to the particular conduct" to be immunized from liability, the slip and fall. *Id.*

U.S. Bank relies upon and several times makes note of the "Affidavit of Intention to Complete Repairs" as a shield to exclude itself from liability for the overpayment of funds. (R. vol. II, pp. 338-384), (R. vol. I., pp. 105-121), (R. vol. II, pp. 266-270). The Affidavit of Intention to Complete Repairs states that "The undersigned also agrees to indemnify and hold U.S. Bank Home Mortgage harmless against any and all claims which may arise as a result of funds being paid in advance for the above work or claim." There is no Idaho law that says U.S. Bank cannot limit their liability. The language is unambiguous and speaks "clearly and

directly to conduct to be immunized from liability." U.S. Bank can't be held liable for funds paid in advance. But, that is not what occurred here.

In accordance with the Deed of Trust, U.S. Bank inspected the property to ensure the work had been completed to their satisfaction. Not quality, but quantity. U.S. Bank, through Safeguard and its agent, stated that work on the home was sixty five percent (65%) complete. U.S. Bank would not release the second one third disbursement to the Skinners until the equivalent two thirds of construction had been completed. U.S. Bank disbursed the second one third draw to the Skinners and the contractor as the home was stated to be sixty-five percent (65%) complete according to Safeguard, the inspection company contracted by U.S. Bank. At the time of disbursement, *the funds were not paid in advance*. Both U.S. Bank and Skinners believed that sixty five percent of the home was complete. U.S. Bank, by its own drafting in the Affidavit of Intention to Complete Repairs, is not excused from liability for funds paid for work done or believed to be done. Because the funds were not paid in advance, or U.S. Bank would not have disbursed them, U.S. Bank's exculpatory clause and attempt to limit liability is inapplicable as the clause does not speak to funds paid for work done, only funds paid in advance. U.S. Bank should be held liable for the second one third disbursement to the Skinners.

B. U.S. Bank's exculpatory clause cannot limit their liability because the Skinners were at an obvious disadvantage in bargaining power.

Two exceptions exist to the general rule that upholds exempting a party from liability, (1) where "one party is at an obvious disadvantage in bargaining power; or (2) a public duty is

involved . . . ." *Lee v. Sun Valley Co.*, 107 Idaho 976, 978, 695 P.2d 361, 363 (Idaho 1984) quoting *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 499–500, 465 P.2d 107, 110–111 (Idaho 1970). Under the first exception, unequal bargaining power, in and of itself, is not sufficient to relieve a party of an exculpatory clause. *Morrison v. Northwest Nazarene University*, 152 Idaho 660, 661, 273 P.3d 1253, 1254 (Idaho 2012). Instead, "the party must be 'compelled to submit to a provision relieving the other from liability for future negligence [because] ... the party injured has little choice, as a practical matter, but to use the services offered by the party seeking exemption.'" *Id.* (quoting 57 Am.Jur.2d Negligence § 63 (2004)).

The first exception applies here. No public duty is involved. The Skinners were at an obvious disadvantage in bargaining power for two reasons. First, U.S. Bank drafted the Affidavit of Intention without input from the Skinners. The Affidavit of Intention was a document that had to be signed before any forward progress, money to rebuild, between U.S. Bank and the Skinners could continue. Two times U.S. Bank asked Skinners for the document. (R. vol. II, pp. 338-384). Signing the Affidavit of Intention was non-negotiable. Second, the Skinners had no other choice. U.S. Bank held the mortgage on their home. The Skinners had originally contracted with Zions National Bank, not U.S. Bank. And after the fire destroyed their home, the Skinners could not seek another lender that they could bargain with, they were "locked in." The Skinners could not bargain with the bank and were "compelled to submit" to the Affidavit of Intention. For those reasons, the Skinners were at an obvious bargaining disadvantage.

III. U.S. Bank, because the Skinners do not have standing to do so, has a duty to bring suit against Safeguard Properties, LLC, to make themselves and the Skinners whole.

U.S. Bank has been damaged as a result of overpayment to the contractor. In U.S. Bank's Cross Claim of U.S. Bank Home Mortgage against the contractor filed December 7, 2009, U.S. Bank states:

> U.S. Bank Home Mortgage has been damaged in multiple ways, including by [sic] not limited to:
>
> a. It was required to pay subcontractors that Defendants Peterson and PCS Company, Inc. failed to pay;
> b. Its collateral has been impaired because of the incomplete and negligent work by Defendants Peterson and PCS Company, Inc.;
> c. Has been drawn into this litigation by Plaintiffs as a consequence of the actions of Defendants Peterson and PCS Company, Inc.;
> d. Has incurred costs and attorney fees in defending Plaintiffs' lawsuit;
> e. Experienced a loan default and has been stayed from foreclosure of its loan.

(R. vol. I, pp. 87-93). Prior to U.S. Bank becoming damaged, U.S. Bank contracted with Safeguard Properties, Inc. to inspect the property for two thirds completion of construction. (R. vol. II, pp. 338-384). Safeguard's agent, Ms. Karen Smith, submitted a report to Safeguard, which was then forwarded to U.S. Bank, stating that the home was 65% complete. *Id.* Thereafter, U.S. Bank issued a check payable to the Skinners and PCS for $139,400.62. *Id.* Ms. Smith, in her deposition, changed her story and said that the home was only forty

percent (40%) complete, rather than the sixty-five percent (65%) complete that she initially submitted which caused U.S. Bank to improperly disburse funds. (R. vol. I, pp. 144-162).

U.S. Bank, relying on Safeguard Properties, LLC and now knowing that the agent was incorrect in her assessment of work completed, has a claim against Safeguard Properties. The trial court, in its Opinion and Order on Defendant U.S. Bank Home Mortgage's Motion for Summary Judgment stated as such. (R. vol. II, pp. 196-212). The court held that "[n]egligent performance of the quantity inspection *might* be actionable for U.S. Bank against Safeguard, but *may not be the basis of a negligence claim by Plaintiffs against the Bank*" (emphasis added). *Id.* But U.S. Bank has not pursued that option. It may be because the attorney representing U.S. Bank also represented Safeguard Properties when sued by the Skinners. Nevertheless, U.S. Bank continues to be damaged. The loan default has been stayed from foreclosure and the Skinners are in a Chapter 13 Bankruptcy. Until U.S. Bank pursues an action against Safeguard Properties to recover the second one third disbursement, U.S. Bank will continue to "lose out." Recovering the second one third draw will allow the Skinners to completely rebuild the home thereby allowing U.S. Bank to hold a lien on a marketable piece of property. All parties would be satisfied.

The District Court correctly found there is no case law requiring U.S. Bank to sue Safeguard. The District Court, quoting extensively from *Rudolph v. First Southern Federal Sav. & Loan Ass'n.*, which held that a lender/borrower relationship, by itself, does not create any fiduciary duty. *Rudolph*, 414 So. 2d 64, 71 (Ala. 1982). (R. vol. II, pp. 196-212).

> But this principle does not prohibit the lender from voluntarily assuming a special relationship whereby the lender undertakes to perform the function of inspecting the borrower's property for the borrower's benefit.
>
> Because the lender may exercise its independent right of inspection for its exclusive benefit, and thus incur no liability to the borrower for its negligent inspection, the burden is on the borrower, seeking to impose liability, to prove the lender's voluntary assumption of activities beyond those traditionally associated with the normal role of a money lender.
>
> This burden of proof is met only when the evidence reasonably supports an inference of fact to the effect that the lender, either affirmatively or through a course of conduct, assumed the function of inspection expressly, though not necessarily exclusively, for the benefit of the borrower. Given the element of duty, of course, the borrower must further prove its breach, either through misfeasance or malfeasance, as well as resultant damage.

Id. All the Skinners have to prove is an inference U.S. Bank conducted the inspection for their benefit. Here, U.S. Bank, through its course of conduct, assumed protection for the Skinners. U.S. Bank conducted the home inspection for the benefit and protection of itself, and of the Skinners because U.S. Bank is in the industry and familiar with construction. The fact that U.S. Bank contracted out the inspection is irrelevant. U.S. Bank is in the industry and knows what is required. The Skinners are not in the industry. U.S. Bank knew the Skinners were "unsophisticated." In any arrangement, an unsophisticated individual is going to rely on the sophisticated party. Just as a new guy on the jobsite will be paired with an experienced employee to learn the ropes before he is given the reins, so no project is destroyed, the Skinners were paired with U.S. Bank, and U.S. Bank realized this. These facts show a logical inference that U.S. Bank knew or should have known they assumed the duty of competently inspecting the home. Because U.S. Bank assumed the duty and the home was

negligently inspected, U.S. Bank has a duty to bring suit against Safeguard to recover the money.

U.S. Bank has a duty and is obligated to bring suit. The Skinners tried to bring suit against Safeguard themselves. Counsel for U.S. Bank/Safeguard argued that the Skinners had no contractual privity with Safeguard. The trial court found as much and dismissed the Skinners action against Safeguard on a Motion for Summary Judgment. That much is undisputed. The Skinners tried and were denied. What remains is a faulty home foundation, a home forty percent complete, and the Skinners have been defeated at their attempt to fix the problem. U.S. Bank is as bad off. The collateral at the site is not sufficient to cover the outstanding balance of the note. Only when U.S. Bank sues Safeguard and recovers the second one third disbursement, because of a negligent inspection, will U.S. Bank be in the black. And then the Skinners can have a home.

CONCLUSION

U.S. Bank owed a fiduciary duty to the Skinners as the parties were in more than a debtor–creditor relationship. U.S. Bank had and continues to have complete control over the rebuilding funds, the funds were placed with U.S. Bank, and the Skinners placed their trust and confidence in the bank. Further, U.S. Bank should not be able to disclaim liability because the exculpatory clause does not speak to the harm and the Skinners were at an obvious disadvantage. Finally, U.S. Bank should have a duty to sue Safeguard Properties, LLC, to make the parties whole. For the foregoing reasons, the Skinners respectfully request

this Court to reverse the trial court in granting summary judgment to U.S. Bank and remand this matter for trial.

RESPECTFULLY SUBMITTED this 23rd day of October, 2014.

AHERIN, RICE & ANEGON

By 
Darrel W. Aherin
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I, Darrel W. Aherin, hereby certify that on the 23rd day of October, 2014, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Scott R. Smith
Bohrnsen, Stocker, Smith,
Luciani & Staub
The Morgan Building
312 W. Sprague Avenue
Spokane, WA 99201

- ☑ U.S. Mail
- ☐ Hand Delivery
- ☐ Fax 509-327-3504
- ☐ Federal Express

Darrel W. Aherin