IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANISSA WHITE,

Appellant/Plaintiff, **APPEAL NO. 35286**

v.

RG CROWN MORTGAGE/RG CROWN BANK,
now known as FIFTH THIRD BANK, NA,

Appellee/Defendant.

RESPONSE OF FIFTH THIRD BANK, NA TO BRIEF OF APPELLANT

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

I. INTRODUCTION

This case presents two basic, important issues for this Court to decide. First, Appellant Anissa White (hereinafter, "Appellant") asks this Court to deviate from nearly one-hundred fifty years of precedent and to create a tort cause of action in a situation where the parties' duties and responsibilities are governed exclusively by contract. Appellee Fifth Third Bank, NA (hereinafter, "Appellee") asks this Court to decline Appellant's invitation and to, instead, embrace the economic loss doctrine, the rationale for which evidences the intent of courts to keep contract claims and tort claims separate. "Almost every breach of contract involves actions that can be conceived of as a negligent or intentional tort. If left unchecked, the incessant tide of tort law would erode and eventually swallow contract law." Princess Cruises, Inc. v. General Electric Co., 950 F. Supp. 151, 156 (E.D. Va. 1996). Therefore, tort law and contract law must be distinguished where it is possible to do so. Id. "[T]o permit a party to a broken contract to proceed in tort where only economic losses are alleged would eviscerate the most cherished virtue of contract law, the power of the parties to allocate the risks of their own transactions." Id. at 155.

Second, even though Appellant did not assert the cause of action in her complaint, she is now asking this Court to ignore the plain reading of the construction contract at issue and to expand the limited holding in Glascock v. City Nat'l Bank of West Virginia, 213 W. Va. 61, 576 S.E.2d 540 (2002), where the Court determined that a lender had acted beyond the scope of the subject construction contract and had, therefore, created a "special relationship" with the borrowers.

In Glascock, the Court, for very good reason, cautioned that, in the context of construction contracts, it was not making lenders insurers of the work performed or of an inspection or appraisal conducted on its behalf. Glascock "does not ask lenders to be engineers, or architects, or home inspectors." Glascock, 213 W. Va. at 67, 576 S.E.2d at 546. Appellant asserts that such a duty should be extended to this lender in spite of existing law and contract provisions providing that Appellant is responsible for her dealings with her contractor.

If this Court were to accept Appellant's proposition, construction lending in this State would be turned on its ear. Lenders cannot employ full-time inspectors to monitor construction work. Common sense teaches that having a borrower pay for this service would drive up construction costs considerably. As the contract here provides, lenders monitor construction work only for their own protection. It would be bad public policy for this Court to ignore that contract and to hold otherwise. Appellee Fifth Third Bank, NA (hereinafter, "Fifth Third") urgently asks this Court to decline to expand tort law into this contractual domain any further, and to recognize and enforce the contract between the parties.

II. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is, at best, a breach of contract action arising out of a construction contract between Appellant and her contractor and a construction loan between Appellant and Appellee's predecessor. Appellant has also erroneously asserted tort claims based upon the same operative facts. The action was brought by Appellant after her contractor failed (or was not permitted by Appellant) to complete construction of her house. Appellant sued all involved in the construction process, including the loan broker (Allied Home Mortgage Capital Corporation (hereinafter, "Allied")), the original lender (AAMG Construction Lending Center and its successor, ABN AMRO Mortgage Group, Inc. (hereinafter, "ABN")), the assignee of the loan

(R-G Crown Bank FSB, predecessor to Fifth Third), the contractor White Family Properties, LLC (hereinafter, "WFP"), and its owner, Stephen L. White, II (hereinafter, "White") (hereinafter, collectively, "Defendants"). As they relate to Fifth Third, the primary allegations set forth in Appellant's original complaint are that (1) Fifth Third did not conduct proper inspections to insure work had been completed prior to disbursing monies under the construction contract; (2) Fifth Third was negligent in releasing monies to the contractor prior to work being completed; and (3) as a result of the combined negligence of the defendants, Appellant's house was not completed and required substantial work to be completed. Appellant claims financial loss, damage to her house, loss of income, annoyance and inconvenience and emotional distress. As set forth fully below, the Circuit Court of Kanawha County (hereinafter, the "Lower Court") was justified in ruling that each of Appellant's claims against Fifth Third is barred by either the "economic loss" doctrine or by the plain terms of the contract at issue.

After Appellant settled her claims with the other Defendants, the Lower Court granted Fifth Third's Motion for Summary Judgment on all claims asserted by Appellant against Fifth Third on February 4, 2009. The Lower Court properly ruled that the "economic loss" doctrine barred Appellant's tort claims against Fifth Third and that the remainder of Appellant's claims against Fifth Third were barred by the clear terms of the subject construction loan agreement. Accordingly, the Lower Court granted Fifth Third's Motion for Summary Judgment on all claims asserted against it by Appellant.

III. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

The undisputed facts pertinent to the question of whether the Lower Court properly granted Fifth Third summary judgment are as follows:

A. Property and Construction Loan Acquired

On August 2, 2004, Appellant acquired a parcel of land in Lincoln County, West Virginia, at a cost of $40,000.00. (PR1[1]; Ex. 1.)[2] On August 16, 2004, Appellant entered into a contract with WFP to build a house on the property for $193,500.00. (WFP1; Ex. 2) Payment would be made in four draws upon 20%, 25%, 25%, and 20% completion, and a final draw of 10% would be paid upon full completion. Cost allowances for certain specified items were set forth in the addendum. (WFP1 to WFP6; Ex. 2.) If costs exceeded those allowed amounts, there would be an additional cost to Appellant. (S. White depo. at 32; Ex. 31.)

On January 28, 2005, Appellant, working through loan broker Allied, entered into a construction loan agreement with ABN Amro Mortgage Group, Inc. (hereinafter, the "Construction Loan Agreement" or "Contract"). (RG90; Ex. 3.) The maximum loan amount was $150,000.00. (RG90; Ex. 3 at Sec. 3.G) The "Draw Schedule" provided, inter alia, that Fifth Third was not required to make disbursements except for "work in place only" based upon inspection. (RG90; Ex. 3 at Sec. 3.F; see also Sec. 6.) The "Project" was defined to include only the work to be performed under the Construction Agreement, in accordance with the plans and specifications submitted with the loan application and accepted by the lender. Appellant was not to make any material changes to the Project without the prior written approval of the lender. "Work in place," as defined, permitted the lender to withhold payments if, upon inspection, the completed work was not consistent with the draw schedule.

[1] References are to Bates numbered documents.

[2] Unless otherwise specified, references to exhibits are to the exhibits attached to Fifth Third's Motion for Summary Judgment.

Section 13 of the Construction Loan Agreement specifically provided that Appellant was not entitled to rely upon inspections and that inspections were not made for the benefit of Appellant; inspections were solely for the benefit of the lender. Inspections were made only to apprise the lender of the apparent progress of construction. "Consequently, Borrower hereby exonerates, excuses and releases Lender from any and all claims of loss or damage that may be suffered by Borrower, which relate in any way to the quality of construction or lack thereof." (Ex. 3, Sec. 13.B.; see also Construction Rider to Note and Security Agreement dated January 28, 2005, Section 1. RG86; Ex. 4.) (Inspection for Status of Completion Only; "As Borrower, I will not rely on the Lender's inspection for any purpose whatsoever. Rather, I will be solely responsible for the progress and quality of construction, and the discovery of all delays, defects, faults, imperfections and deviations from the Plans and Specifications shall be my sole responsibility as Borrower.")

B. Construction Commences

Work on the house finally commenced in late spring of 2005. On July 18, 2005, Appellant and White submitted a draw request for $48,375.00. (RG12; Ex. 5.) That same day, Appellant signed a disbursement authorization form to disburse the proceeds directly to WFP. (RG15; Ex. 6.)

Also on July 18, 2005, Appellant signed the second critical document – a Disbursement Hold Harmless Agreement appointing White of WFP as her duly authorized agent for requesting inspections, receiving draws, and permitting disbursement of construction loan proceeds directly to WFP. Appellant also waived any claim for damages for disbursement of funds without her joinder. The authorization was subject to cancellation only by written notice

sent by certified mail.[3] (RG16; Ex. 8.) Appellant admitted that she signed the documents. (A. White depo. at 37, 56-57, 63; Ex. 30.) On July 25, 2005, $48,375.00 was paid to Appellant. (RG24; Ex. 9.) The inspection report showed 30% completion. (GLM 1-10; Ex. 10.)

During the construction process, there were "overages" for certain items that exceeded the cost allowances (e.g., wood flooring instead of carpeting). (S. White depo. at 48; Ex. 31.) In August 2005, Appellant and White agreed to make several changes to the house, but did not put any of the agreements in writing (A. White depo. at 38; Ex. 30.), nor did either party advise Fifth Third as required by the Contract. (A. White depo. at 40; Ex. 30.; S. White depo. at 147, 148, 151; Ex. 31.) For example, Appellant and WFP orally agreed to construct a new "bonus room." (S. White depo. at 64; Ex. 31.) Similarly, Appellant and WFP agreed to extend the kitchen into the garage area because Appellant wanted a bigger kitchen. (S. White depo. at 77-78; Ex. 31.) White calculated the overages to be $35,584.87, with credits of $1,033.06, yielding net overages of $34,551.81.[4] (WFP 3; Ex. 2.)

On September 22, 2005, another Draw Request for $48,395.00 was submitted. (RG33; Ex. 11.) The Project Status certified that the work was completed and that "[n]o changes, alterations or modifications have been made to the final, lender approved plans and specifications." (RG48; Ex. 12.) The inspection report showed 55% completion. (GLM 11-20; Ex. 13.) On September 26, 2005, $48,395.00 was wired to WFP. (RG35; RG36; Ex. 15.)

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[3] Appellant has invested a great deal of energy disputing whether she signed disbursement authorization forms on more than one occasion. The disbursement authorization was resubmitted by WFP with each subsequent draw request, ostensibly signed by Appellant each time. Appellant says her signature was forged. The issue, however, is immaterial vis-à-vis Fifth Third. The original Disbursement Hold Harmless Agreement that Appellant admits signing, in accordance with its clear terms, remained in full force and effect as it was never canceled in writing, thereby permitting White to submit draw requests and receive money directly from Fifth Third. It was unnecessary for Appellant to sign subsequent draw requests. (See A. White depo. at 57; Ex. 8.)

[4] Appellant and White dispute the amounts of the overages and credits, but that factual dispute is not germane to the claims against Fifth Third. The point is that they changed the plans and did not tell Fifth Third in violation of the construction loan agreement. Plus, the dispute resulted in the job not being finished and, ultimately, this lawsuit.

C. Problems with the Construction Project Arise

According to both Appellant and White, everything "went okay" until November, 2005. (A. White depo. at 37; Ex. 30; S. White depo. at 167; Ex. 31.) On November 8, 2005, WFP submitted a Draw Request for $34,393.00. (PL77; Ex. 16.) The Project Status contained the same certifications that there had been no changes in Plans. (RG 57; PL80-82; Ex. 17.) That same day, Fifth Third sent a notice to Appellant stating that the draw request had been received, that an inspection had been ordered, and that payment would be made to her or to WFP. (PL74; Ex. 18.)

Granite Loan Management (hereinafter, "Granite")[5] then sent a Notification of Draw Amendment to Appellant stating that a negative adjustment of $6,125.00 had been made because of an issue with work billed but not completed. (PL75, PL85; Ex. 10.) The inspection report showed 65% completion. (GLM 21-32; Ex. 20.) Then, on November 11, 2005, Granite sent another Notice of Draw Amendment to Appellant showing additional inspection variances and further reducing the draw request to $575.00. The inspector's variances were listed and described as "Work Complete Does Not Support Requested Amount." (PL70; Ex. 21.) Later, on November 15, 2005, $5,477.00 was approved and wire transferred to WFP. (PL86-87; Ex. 22.) White admitted that he was requesting payment for work not completed; he was merely plugging in numbers to get the percentages to work out to equal his draw request. (S. White depo. at 44-45; Ex. 31.) Granite told him that it would not work like that; payments could only be made for work completed. (Id at 46.)

That is when Appellant and White began to have difficulties. Appellant stated

[5] Granite Loan Management was the servicer of the loan for R-G Crown Bank.

that the problems began on Thanksgiving evening with a call from White stating (according to Appellant) that Fifth Third owed him a lot of money and he could not make payroll. (A. White depo. at 71, 74; Ex. 30.) Appellant testified that she called Granite the day after Thanksgiving and directed that no further payments would be disbursed until the work not completed at the time was completed; the money would be disbursed when the work was completed and passed inspection. (A. White depo. at 92.)

On November 28, 2005, the Draw Request for $34,393.00 was re-submitted with the same inaccurate certifications that there had been no changes in the plans and specifications. The draw request was not paid. (RG66; Ex. 23.) Remarkably, in light of the allegations now made in this case, on November 28, 2005, and November 30, 2005, Appellant gave WFP two cashiers' checks in the amounts of $3,000.00 and $18,000.00, respectively, in order to keep WFP working. (PL15; Ex. 24.)

A month later, on December 28, 2005, another Construction Draw Request was submitted with the same inaccurate certifications regarding no changes in the plans and specifications. The request was originally for $34,393.00 and then changed to $32,650.00. (RG56; Ex. 25.) On December 29, 2005, Granite sent a Draw Request Confirmation letter of $32,650.00 to Appellant and advised that an inspection was scheduled. (RG65; PL98; Ex. 26.) The inspection report showed 80% completion. (GLM 33-51; Ex. 27.) On January 5, 2006, $32,650.00 was wire-transferred to WFP. (RG60; RG 61; PL94; PL95; Ex. 28.)

Notwithstanding payment of almost 90% of the loan amount, Appellant and WFP continued to have difficulties. Appellant said that she was concerned about having enough money to finish the job. (A. White depo. at 77; Ex. 30.) White admitted that he was in a financial bind on her job. (S. White depo. at 89, 120; Ex. 31.) Appellant and White met on

January 23, 2006, at which time he gave her the list of overages totaling $35,584.87. (A. White depo. at 80; WFP4; Ex. 30.) No work was done between January 23 and February 17, 2006. Appellant then forced White to leave or White quit the job on February 17, 2006. (S. White depo. at 103; Ex. 31.) (A. White depo. at 88; Ex. 30.) In either event, construction ceased. White admitted that 90% of the work was completed at the time he left and that Fifth Third paid him everything except the 10% that was not due until the job was completed. (S. White depo. at 144; Ex. 31.)

On March 15, 2006, Fifth Third notified Appellant that her loan was in default and construction draw privileges were suspended. (PL54; Ex. 29.)

Appellant filed a civil action against Defendants on January 12, 2007. Following discovery and briefing, the Lower Court held a hearing on January 27, 2009, on Fifth Third's Motion for Summary Judgment. By Order entered on February 4, 2009, the Lower Court granted Fifth Third's motion in full.

IV. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). "A motion for summary judgment should be granted only where it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, Aetna Cas. & Surety Co. v. Federal Insur. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963).

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, a party is

entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue[6] as to any material fact[7] and that the moving party is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(c) (1998); Painter, 192 W. Va. at 192, 451 S.E.2d at 758. It is well-settled in West Virginia that the underlying purpose of this rule is to "effect a prompt disposition of controversies on their merit without resort to a lengthy trial, if in essence there is no real dispute as to salient facts or if only a question of law is involved." Hanks v. Beckley Newspapers Corp., 153 W. Va. 834, 172 S.E.2d 816 (1970).

The party opposing summary judgment "must satisfy the burden of proof by offering more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." Lovell v. State Farm Mut. Ins. Co., 213 W. Va. 697, 703, 584 S.E.2d 553, 559 (2003). Stated differently, "[t]he nonmoving party must offer some concrete evidence from which a reasonable finder of fact could return a verdict in his/her favor or other significant probative evidence tending to support his/her case." Id.

This Honorable Court has encouraged the use of summary judgment as an appropriate vehicle to dispose of both issues and entire matters. See, e.g., Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995) (holding that "to the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message, hereby, is modified"). Similarly, "[w]hile the application of law to facts may be complicated or even difficult at times, this is not a bar to a summary judgment." Johnson v. Farmers & Merchants Bank, 180 W. Va. 702, 379 S.E.2d 752 (1989). In applying the foregoing principles, and for the

[6] A "genuine issue" for purposes of summary judgment "does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party." Syl. pt. 2, Fayette County Nat'l Bank v. Lilly, 199 W. Va. 349, 350, 484 S.E.2d 232, 233 (1997).

[7] A "material fact" is "one that has the capacity to sway the outcome of the litigation under the applicable law." Id.

reasons set forth below, Fifth Third is entitled to summary judgment and the Order of the Lower Court should be affirmed.

V. LAW AND ARGUMENT

A. THE ORDER GRANTING FIFTH THIRD SUMMARY JUDGMENT SHOULD BE UPHELD BECAUSE APPELLANT'S NEGLIGENCE AND CONTRACT CLAIMS AGAINST FIFTH THIRD ARE BARRED BY BOTH THE ECONOMIC LOSS DOCTRINE AND BY FUNDAMENTAL CONTRACT PRINCIPLES.

On February 4, 2009, the Lower Court entered a 21-page order (hereinafter, the "Order") detailing findings of fact and conclusions of law in support of its decision to grant summary judgment to Fifth Third. Appellant seeks reversal and remand of that decision, but, as demonstrated below, the Order should be affirmed.

1. The Lower Court Properly Granted Fifth Third Summary Judgment as to Appellant's Negligence Claims Because They Are Premised Upon a Duty Arising (If At All) Under Contract and No Evidence Suggests that a Special Relationship Existed Between Appellant and Fifth Third.

Count I of Appellant's complaint, entitled "Negligent/Reckless Conduct," sets forth a claim grounded in negligence. Appellant completely ignores the Contract and alleges that the Defendants had "an affirmative duty" to insure that the home under construction was at a certain stage of completion before disbursing payments to the contractor. (Compl. ¶ 15.) Appellant alleges that Defendants negligently or recklessly (1) failed to properly inspect the construction prior to disbursing funds and/or draws, and (2) failed to determine whether Appellant signed the disbursement authorization forms. (Compl. ¶¶ 16, 17.)

2. The Lower Court Properly Granted Fifth Third Summary Judgment as to Appellant's Negligence Claims Because They Are Premised Upon a Duty Arising (If At All) Under Contract and No Evidence Suggests that a Special Relationship Existed Between Appellant and Fifth Third.

a. The economic loss doctrine bars Appellant's negligence claim.

The "economic loss doctrine" (sometimes referred to as the "gist of the action doctrine") draws a line between tort and contract and bars an attempt to recover tort damages in a contract action. 1 James J. White & Robert S. Summers, Uniform Commercial Code § 10-5, at 581 (4th ed. 1995). The doctrine is often asserted in two contexts. In the first scenario, in which a party to a contract who has sustained only economic harm sues the other party to the contract not only for breach of contract and breach of warranty, but also for negligence and other tort claims, the defendant may seek dismissal of the tort claims under the economic loss rule and limit the claims to the remedies available under the contract. In the second scenario, in which a third party who has sustained economic harm sues a party to the contract for negligence and other tort-based claims, the party's entire claim will typically be barred — for example, a builder against an architect. Reeder R. Fox & Patrick J. Loftus, Riding The Choppy Waters Of East River: Economic Loss Doctrine Ten Years Later, 64 Def. Couns. J. 260 (April 1997).

This case falls squarely within the first context, that is, Appellant sustained only economic loss but sued the other party to the Contract for both breach of contract and negligence. "[S]eparate claims for breach of contract and tortious breach of duty can co-exist, *but only if the duty tortiously or negligently breached is a common law duty, not one existing between the parties solely by virtue of the contract.*" McKesson Medical-Surgical, Inc. v. A. T. Kearney, 271 F. Supp. 2d 827 (E.D. Va. 2003) (internal quotes and citations omitted) (emphasis added). See also, La Barte v. Seneca Resources Corp., 285 A.D.2d 974, 728 N.Y.S.2d 618

(2001) (clear weight of authority is that a separate cause of action for fraud is not stated where the alleged fraud relates to a breach of contract); Williams v. Hilton Group, 93 Fed. Appx. 384, 2004 WL 516165, (3d Cir. 2004) ("gist of the action" doctrine precludes recasting of ordinary breach of contract claims into tort claims); Penn City Investments., Inc. v. Soltech, Inc., 2003 WL 22844210 (Pa. Sup. 2003) (gist of the action doctrine barred fraudulent inducement claim). The economic loss doctrine is founded on the theory that parties to a contract may allocate their risks by agreement and do not need the special protections of tort law to recover for damages caused by breach of contract. 86 C.J.S. Torts § 26.

The economic loss doctrine is applied regularly in connection with the finance and banking industry. See, e.g., Banque Arabe Et Internationale D'Investissement v. Maryland Nat'l Bank, 819 F. Supp. 1282, 1295–1296 (S.D.N.Y. 1993), judgment aff'd, 57 F.3d 146 (2d Cir. 1995) (claim by participant against lead bank for mismanagement of loan subsequent to execution of participation agreement lies in contract and not in tort); Nat'l Westminster Bank, U.S.A. v. Ross, 130 B.R. 656, 677, 16 U.C.C. Rep. Serv. 2d 272 (S.D.N.Y. 1991), aff'd, 962 F.2d 1 (2d Cir. 1992) (borrower failed to establish existence or breach of obligation independent of loan documents or springing from loan documents which would permit recovery in tort); Int'l Minerals and Mining Corp. v. Citicorp North America, Inc., 736 F. Supp. 587 (D.N.J. 1990) (lender owes no duty to borrower); Nelson v. Prod. Credit Ass'n of the Midlands, 930 F.2d 599, 605 (8th Cir. 1991) (plaintiff could sue for breach of contract for failure to lend adequate amounts to borrower but no cause of action would arise under Nebraska law for negligence in loan administration for same set of facts); LaSalle Bank Nat'l Assoc v. Paramont Properties, 588 F. Supp.2d 840, 851 -853 (N.D. Ill.2008) (no general duty of care creating tort liability owed by a lender party to a construction loan agreement with a borrower; Lema v. Bank of America,

N.A., 375 Md. 625, 826 A.2d 504 (2003) (relationship between a bank and its customer is contractual).

West Virginia jurisprudence is entirely consistent with this philosophy, although it has not been referred to as the economic loss doctrine or the gist of the action doctrine. See, e.g., Basham v. General Shale, 180 W. Va. 526, 377 S.E.2d 830, 834 (1988) ("while a strict liability tort claim may arise when a defective product causes injury, a party who suffers mere economic loss as a result of a defective product must turn to the Uniform Commercial Code to seek relief"). "Contract law has been traditionally concerned with the fulfillment of reasonable economic expectations." Star Furniture Co. v. Pulaski Furniture Co., 171 W. Va. 79, 297 S.E.2d 854, 858 (1982). "[T]ort law is not designed to provide relief to those who have suffered purely economic losses." Wright and Nicholas, The Collision of Tort and Contract in the Construction Industry, 21 U.Rich.L.Rev. 457, 467 (1987) cited approvingly Basham, 377 S.E.2d at 834.

More particularly, this Court has preserved the distinctions between tort and contract law by preventing parties from pursuing tort claims where a duty arises solely out of a contract. Silk v. Flat Top Const., Inc., 192 W. Va. 522, 453 S.E.2d 356 (1994) ("fair interpretation of the complaint shows a breach of only those duties owed to the appellants under the terms of the supervisory consultant agreement. However, the appellants contend that they could nevertheless be held liable under a common law duty of care to supervise the construction of the home, as this Court created in Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988). We disagree. Therefore, we find the damages claimed herein have their origin solely in contract." Silk, 453 S.E.2d at 360); Lockhart v. Airco Heating & Cooling, Inc., 211 W. Va. 609, 567 S.E.2d 619, 624 (2002), (Even if contractor contractually agreed to take precautions to avoid causing any harm to health, plaintiff cannot maintain an action in tort for an alleged breach

of a contractual duty; "[i]n the matters of negligence, liability attaches to a wrongdoer, not because of a breach of a contractual relationship, but because of a breach of duty which results in an injury to others"; tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation. An action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract.) See Nat'l Steel Erection, Inc. v. J.A. Jones Const. Co., 899 F. Supp. 268, 272–74 (N.D. W. Va. 1995) ("The parties involved in a . . . project resort to contracts and contract law to protect their expectations. Their respective rights and duties are defined by the various contracts they enter.")

When applied to the facts of this case, it is clear that count I of the complaint cannot withstand close scrutiny because the tort action would not arise independent of the Contract. Appellant alleges that Fifth Third negligently failed to inspect before disbursing funds and that Fifth Third negligently failed to ascertain that certain documents were not signed by Appellant. As recognized in Silk, Fifth Third cannot be held liable under a negligence theory for alleged failures regarding inspections and disbursement of funds. The premise in count I – that Fifth Third had a *common law* duty to inspect or a *common law* duty to assure completion before disbursement – fails as a matter of law. See also International Minerals, supra (lender owes no duty to borrower) and Nelson, supra (no cause of action for negligence); Banque Arabe, supra. Any duty to Appellant existed, if at all, solely by virtue of the Contract, and a breach of contract action is the proper mechanism for seeking relief. McKesson Medical-Surgical, supra.

In short, this is a classic case of a party inappropriately asserting a tort claim based upon a contract. There are no independent torts called "negligent inspections," "negligent disbursement of funds," or "negligent examination of draw requests." The only relationship

between Appellant and Fifth Third was contractual, arising out of the Construction Loan Agreement. Accordingly, the Lower Court correctly determined that Appellant is barred from pursuing a negligence claim against Fifth Third.

b. No special relationship was created between Appellant and Fifth Third, and, therefore, Appellant is not entitled to pursue a negligence claim against Fifth Third.

In its motion for summary judgment, Fifth Third showed that Appellant's tort claims are barred by the economic loss doctrine. Appellant did nothing to rebut that contention. Instead, she raised – but did not support with facts – a brand new "special relationship" claim not asserted in her complaint, premised upon Glascock v. City Nat'l Bank of West Virginia, 213 W. Va. 61, 576 S.E.2d 540 (2002). Appellant's claims of a special relationship are misplaced and totally unsupported by the facts in the record.

In Glascock, this Court recognized that the contract between the parties should ordinarily govern, but determined, based upon the unique facts of that case, that a "special relationship" had been created between a bank and its borrowers when the bank stepped outside the traditional lender role and actively collaborated with the borrowers in a joint effort to complete the construction of a home. The borrowers became concerned with the quality of the construction work and notified the bank. The bank, in turn, communicated with both the borrowers and the builder and required that a structural inspection be performed. The bank halted construction and refused to distribute any additional funds until after it received the inspection report. The bank's inspection uncovered construction defects and the bank shared the report with the borrowers. The borrowers then fired the builder and hired a second and later a third builder to complete the project. Prior to completion, the bank had another inspection performed which revealed additional construction defects not discovered by the borrowers'

inspectors. The bank failed to share this report with the borrowers and had them convert their construction loan into a permanent loan.

The borrowers sued the bank when the construction defects became apparent, asserting that the bank should have disclosed the second inspection report. Glascock, 213 W. Va. at 62-64, 576 S.E.2d at 541-43. This Court found that a special relationship existed because the bank "*was significantly involved in the construction* of the Glascock home" and that the bank "*possessed information* of no interest to society in general but *of great interest* to the Glascocks." (Emphasis added). Accordingly, this Court held that:

> where a lender making a construction loan to a borrower creates a special relationship with the borrower by maintaining oversight of, or intervening in, the construction process, that relationship brings with it a duty to disclose any information that would be critical to the integrity of the construction project.

Id at 67, 576 S.E.2d at 546.

Unlike the bank in Glascock, Fifth Third never operated outside of the four corners of the Construction Loan Agreement; never acted in concert with Appellant in a collaborative effort to complete the construction project; and never became involved with the contractor in the construction of the house. The only thing in common between this case and Glascock is that they both mention the word "inspections" in connection with construction loans.

Appellant cites seven factors that she asserts support her belated claim of a special relationship. As shown more fully below, every one of Appellant's factors involves something that is specifically covered in the Contract. If the factors are specifically governed by the Contract, then, a fortiori, Fifth Third could not have stepped outside the bounds of the Contract and formed a "special relationship." It must be observed that the construction loan agreement in Glascock had substantially similar provisions regarding inspections as those in the

case sub judice.[8] It was because the bank went *beyond* those contract provisions that a special relationship was held to exist. Here, Appellant asserts that the mere *existence* of the Contract provisions justifies a finding of a special relationship. This is a misreading of Glascock. Appellant's logic simply fails.

Even considered individually, Appellant's assertions fail. Appellant claims that a special relationship was created because Appellant had to pay for the inspections and because the "lender maintained oversight of the job by hiring the inspector and by disbursing the construction loan monies only after its approval." (Appellate Brief, Section IV.A.) Appellant also asserts that "Fifth Third assumed oversight duties when it required that Appellant use its inspector and further required that the inspector report to Fifth Third and not to the Petitioner." Id.

Fifth Third does not dispute that Appellant had to pay for the cost of the inspections – just as borrowers must pay for a title examination or flood inspection fees associated with mortgage loans. But that does not create a "special relationship" as envisioned by Glascock, particularly in the face of specific Contract provisions stating that the inspections were being performed for the sole benefit of Fifth Third. (See Section V.A.3. below for further discussion). Merely hiring an inspector to do periodic inspections and disburse funds as envisioned in the Construction Loan Agreement does not constitute "maintaining oversight of the job," as the Court specifically recognized in Glascock. Appellant also cites no record support for her assertion that Fifth Third "required that Appellant use its inspector." This is a misleading, incorrect and inaccurate statement. She was not "required" to "use" any inspector. There is nothing in the Contract prohibiting Appellant from having her own inspections performed.

[8] The loan agreement in Glascock contained a provision reading: "Inspections required with respect to this loan are solely for the bank's benefit; borrowers shall receive no comfort or rights with respect to such inspections or bank's evaluation thereof." Glascock, 213 W. Va. at 63, 576 S.E.2d at 542.

Indeed, the Contract specifically provides that it was her sole responsibility to monitor the progress and quality of construction and to discover delays and defects and deviations from plans and specifications. See Contract at § 13. Moreover, the inspector reporting only to Fifth Third is entirely consistent with the plain terms of the Contract (inspections are for sole benefit of Bank) and is a tacit recognition that there was no special relationship between Appellant and Fifth Third. Finally, Appellant has not shown, and cannot show, any evidence that Fifth Third "intervened in" the construction process. The only record evidence is that Fifth Third performed its own inspections for its own purposes and disbursed funds. Fifth Third did not direct construction or "oversee" the construction process. The record is utterly devoid of any evidence that Fifth Third was even aware that Appellant and her contractor were experiencing problems following the November episode.[9]

Appellant further distorts the record by asserting that "[a]ppellant had no control over when or if monies would be paid." (Appellate Brief, Section IV.C.) In fact, Appellant specifically appointed – in writing – her builder as her agent to submit draw requests and to receive payments. She could have revoked that authorization at any time but chose not to do so. The builder acted as her agent pursuant to her explicit written authorization, and she cannot reasonably claim that she "had no control." It is axiomatic that an agent acts for and on behalf of his principal.

In yet another overstatement, Appellant asserts that Fifth Third orally told her in late November that no more money would be disbursed until the work was completed (Appellate Brief at Sec. V.C.), creating the impression that no more funds would be disbursed until full

[9] See footnote 9, supra.

completion.[10] Fifth Third, in fact, did not disburse more money (note that the November 28th draw request was rejected) until December 29th after another draw request was submitted pursuant to the Disbursement Hold Harmless Agreement and following another inspection that showed the project was at 80% completion, up from 65% completion from the previous month. Accordingly, no more money was disbursed under the November draw request and Fifth Third did not distribute additional funds until additional work was completed, consistent with its rights under the Contract and Appellant's testimony. In the meantime, on November 28th, Appellant herself – without the knowledge of Fifth Third – provided WFP with two cashiers' checks totaling $22,000.00 so that WFP would continue working. It bears repeating that Appellant *never* canceled the Disbursement Hold Harmless Agreement in writing and sent it by certified mail as required by that agreement. Accordingly, WFP and White were entitled to continue making draw requests and receiving payments on behalf of Appellant directly from Fifth Third.

Appellant also offers that Fifth Third sent draw request confirmations to Appellant at the wrong address. However, Appellant fails to show that Fifth Third was even required to send draw request confirmations. In any event, Appellant admitted that her agent who was to make draw requests and receive payments, WFP, received the notices. (A. White depo. at 60, Exh. 30.)

Similarly, the argument that the unexercised power of attorney permitting Fifth

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[10] The actual testimony is as follows:

Q. So, Mrs. White, you never sent any writing to R-G Crown Bank or to Granite Loan Management withdrawing your authorization for them to disburse money?
A. No.
Q. – to Mr. White?
A. No. I was told on November 25th that nothing else would be – I thought that anything that verbally was said between us would have been –
Q. Now, as I understand it, the conversation was that nobody – or no further money would be disbursed until the money – or the work was completed that they said was not completed at the time?
A. Right.

(A. White depo. at 92.)

Third to complete the construction if, at some point, Appellant was rendered unable to do so likewise fails to create a "special relationship" between Appellant and Fifth Third because Fifth Third *never* acted under the powers granted to it by the power of attorney and Appellant cannot make any allegation or showing that it did.

Accordingly, Appellant has not made the necessary factual showing to support a claim based on a "special relationship." Appellant must show facts to defeat a motion for summary judgment or her claims will be dismissed. Petros v. Kellas, 146 W. Va. 619, 122 S.E.2d 177 (1961) ("It is well settled that to resist a motion for summary judgment the party against whom it is made must present some evidence to indicate that the facts are in dispute when the evidence of the ensuing party shows no disputed facts, and that the mere contention that the issue is disputable is not sufficient."). Appellant failed to present any evidence of a special relationship. Therefore, the Lower Court properly granted Fifth Third summary judgment as to Appellant's negligence claim.

c. Appellant failed to plead a cause of action based upon a "special relationship."

The complaint is completely devoid of any allegation that Appellant intended to assert the existence of a "special relationship" with Fifth Third. Rather, with respect to the negligence claim, Appellant alleged only that Fifth Third (a) failed to properly inspect or to have the home inspected and (b) failed to determine if Appellant had signed the Disbursement Authorization Forms, neither of which in any way placed Fifth Third on notice of a claim based upon a supposed "special relationship." (Compl. ¶¶ 17, 18.) Furthermore, at no time prior to the close of discovery below did Appellant petition the Lower Court to amend her pleadings and to assert the existence of a special relationship.

Appellant filed her original complaint on January 12, 2007, more than two years

prior to the Lower Court granting Fifth Third summary judgment. Discovery had been ongoing since June of 2007. Appellant had ample opportunity to inspect all documents and to depose all witnesses that would serve to establish any claim she might assert against Fifth Third. Rule 15(a) of the West Virginia Rules of Civil Procedure provides:

> a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The liberality afforded by the West Virginia Rules of Civil Procedure in the amendment of pleadings *does not* entitle a party to be dilatory in asserting claims. Although this Court has recognized that Rule 15 should be liberally construed, it has likewise found, on more than one occasion, that a motion to amend should be denied when the party seeking to amend has been dilatory. See Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W. Va. 385, 393, 508 S.E.2d 102, 110 (1998) (affirming circuit court's denial of motion to amend on the grounds that Appellants were dilatory in pursuing their claim) (citing Mauck v. City of Martinsburg, 178 W. Va. 93, 95, 357 S.E.2d 775, 777 (1987)). "Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his neglect and delay." Mauck, 178 W. Va. at 95, 357 S.E.2d at 777. Appellant did not plead "special relationship" until responding to Fifth Third's motion seeking summary judgment, which was granted less than one month prior to trial. Appellant had ample time to amend her pleadings during the pendency of this action, but elected not to do so. Indeed, to permit her to do so at that late stage in the litigation would have greatly prejudiced Fifth Third because it was not aware that Appellant would assert such a claim and, thus, did not

conduct discovery or otherwise prepare a defense to the claim. For example, Fifth Third may have decided to use an expert witness to respond to such allegations. In Rosier v. Garron, Inc., this Court stated that the:

> purpose of the words 'and leave [to amend] shall be freely given when justice so requires' in Rule 15(a) West Virginia R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) *the adverse party is not prejudiced by the sudden assertion of the subject of the amendment*; and (3) the adverse party can be given ample opportunity to meet the issue.

Syl. Pt. 3, 156 W. Va. 861, 199 S.E.2d 50 (1973) (overruled on other grounds) (emphasis added). Accordingly, the Lower Court correctly ruled that Appellant should not be permitted to effectively amend her pleadings without leave of court to include allegations premised upon the existence of a special relationship at such a late juncture.

3. The Lower Court Properly Granted Fifth Third Summary Judgment as to Appellant's Breach of Contract Claim Because the Clear and Unambiguous Terms of the Construction Loan Agreement State that Appellant is Not Permitted to Rely Upon Any Inspections Performed for Fifth Third.

a. The provisions of the contract provide that Appellant had no right to rely on lender's inspections.

Count II of the complaint asserts an alleged breach of contract on the grounds that Fifth Third failed to carry out inspections prior to disbursing funds. The claim cannot be sustained because it is precluded by the express terms of the Contract. The Contract documents specifically and repeatedly provide that inspections were solely for the benefit of the lender and that Appellant was not entitled to rely on the inspections:

13. LIMITATION OF LENDER'S LIABILITY

A. Non-Reliance on Lender. Borrower has selected the General Contractor and all others furnishing services or materials for the construction of the Project, and Lender shall not have any responsibility for their selection or for the quality of their materials or workmanship. *It is understood and agreed that Lender's sole function is that of lender and the only consideration passing from Lender to Borrower is the Loan proceeds. Neither Borrower nor any other person shall have any right to rely on any procedures required by Lender herein* (including but not limited to review of the Plans and Specifications, the cost breakdown of the Project or inspection of the construction of the Project), or the payment of any liens or claims, *such procedures being solely for the protection of Lender as lender.*

B. Inspections of Apparent Status, Not Quality of Work. *All inspection services*, if any, by Lender, its officers, agents or employees, *are or shall be rendered solely for the benefit of Lender, and said inspections are not made for the benefit of, and shall not be construed to have been made for the benefit of Borrower*, any of its successors or assigns, or any subsequent owner or occupant of the Property. *Borrower acknowledges that such inspection shall not regard nature and quality of the work, but are intended only to appraise the Lender of the apparent progress thereof. Consequently, Borrower hereby exonerates, excuses and releases Lender from any and all claims or loss or damage that may be suffered by Borrower, which relate in any way to the quality of construction or lack thereof.*

(Emphasis added.) Similarly, the Construction Rider to Note and Security Agreement provides that:

3. INSPECTION FOR STATUS OF COMPLETION ONLY

The Lender shall inspect the project in order to ascertain the status of completion and the progress of the construction of improvements. The sole purpose for Lender's inspection is to determine the approximate amount of value of the work which has been done, so that Lender may disburse funds for such work in place. Such inspection shall not require a review by Lender of the quality of the construction. *As Borrower, I will not rely on the Lender's inspection for any purpose whatsoever. Rather, I will be solely responsible for the progress and quality of construction, and the discovery of all delays, defects, faults, imperfections and*

> *deviations from the Plans and Specifications shall be my sole responsibility as Borrower.*

(Emphasis added.)

Finally, Appellant waived any claim for damages for disbursement of funds without her joinder when she signed the Disbursement Hold Harmless Agreement:

> Borrower(s) hereby *waives any claims for damages* against [Fifth Third] which might arise or could be claimed as the result of [Fifth Third] distributing funds directly to the Builder, subcontractors, suppliers, and/or materialmen without the joinder in said request by undersigned Mortgagor(s).

(Emphasis added.) As noted above, this agreement was never canceled in writing and delivered by certified mail, as required by its express terms.[11] Appellant chose to place her trust in her contractor to request and receive funds. Fifth Third does not question her right to seek redress against the contractor if he betrayed that trust, but that does not translate into Fifth Third being liable for those transgressions.

Simply put, there is no disputed issue of material fact – the Contract documents unambiguously provide that Appellant is not entitled to rely upon inspections performed on behalf of Fifth Third for any reason and that *Appellant accepted sole responsibility* for the progress and quality of the work performed. Furthermore, *Appellant appointed WFP and White as her agents and waived any claim for damages* arising from Fifth Third's distribution of funds directly to WFP. Appellant is bound by the terms of the Contract and Fifth Third was correctly awarded summary judgment as to count II of her complaint. The Lower Court correctly construed and gave effect to those unambiguous contractual terms. Wellington Power Corp. v. CNA Sur. Corp., Syl. Pts. 1-3, 217 W. Va. 33, 614 S.E.2d 680 (2005).

[11] Appellant admitted signing the document. Nonetheless, she attempts to create a contrary impression by saying that "Appellant denies ever signing a document that she believed held the lender harmless for the improper distribution." (Appellate Brief at Sec. V.D.) Appellant confirmed that the signature that appears on the document is her signature. (A. White depo. at 57-58, Ex. 30.)

b. Appellant is barred from raising arguments for the first time on appeal.

Appellant continues her attempts to find new arguments to avoid the clear terms of the Contract by asserting, for the first time on appeal, that Fifth Third's loan documents are "ambiguous," creating a disputed issue of material fact. (Appellate Brief at Sec. V.D.) Generally, non-jurisdictional questions that have not been decided at the circuit court level and are first raised on appeal should not be considered by the appellate court.

> The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Whitlow v. Bd. of Educ. of Kanawha County, 190 W. Va. 223, 438 S.E.2d 15, 18 (1993). Appellant inappropriately raises an issue before this Court not raised in the Lower Court. Appellant had every opportunity to raise this argument in her response to Fifth Third's motion for summary judgment, but failed to do so. As the argument was not raised below, it should not be considered by this Court.

c. The contract is not ambiguous.

Even if the Court considers Appellant's belated ambiguity argument, it must fail. In an attempt to create an ambiguity and avoid the consequences of appointing White as her agent to make draw requests and receive payments, Appellant misinterprets a sentence in the disbursement processing guide Q&A (hereinafter, the "Guide") that advises her that she must still approve draw requests. (Appellate Brief, Sec. V.D.) The sentence advises Appellant that she still has an obligation to oversee and monitor construction and approve draw requests and, in

effect, that signing the Disbursement Hold Harmless Agreement does not release her from that responsibility. Reading the sentence as Appellant proposes would completely nullify the Disbursement Hold Harmless Agreement and render it superfluous.

Appellant's interpretation of a sentence in a non-contractual document is totally at odds with and would totally read Section 13 out of the Construction Loan Agreement and the Construction Rider to Note cited above. (See Resp. to Pet. For App., Section V.A.3. at pp. 23-24.) A contract must be considered as a whole, effect being given, if possible, to all parts of the instrument. Clayton v. Nicely, 116 W. Va. 460, 182 S.E. 569 (1935); Correct Piping Co. v. City of Elkins, W. Va., 308 F. Supp. 431 (N.D. W. Va. 1970). No word or clause in a contract is to be treated as meaningless if any reasonable meaning consistent with the other parts of the contract can be given to it, and no word or clause should be discarded unless the other words used are so specific and clear in contrary meaning as to convincingly show it to be a false demonstration. Moore v. Johnson Service Co., 158 W. Va. 808, 219 S.E.2d 315 (1975). No part or portion of a contract may be disregarded unless other terms used are specific, clear, and convincing in contrary meaning as to prove it to be a false demonstration. South Penn Oil Co. v. Knox, 68 W. Va. 362, 69 S.E. 1020 (1910). No word or paragraph can be omitted in construing a contract if it can be retained and a sensible construction given to the contract as a whole. Carnegie Natural Gas Co. v. South Penn Oil Co., 56 W. Va. 402, 49 S.E. 548 (1904); Ashland Coal & Coke Co. v. Hull Coal & Coke Corp., 67 W. Va. 503, 68 S.E. 124 (1910).

Properly interpreted, the Contract gave Fifth Third a right to refuse to make disbursements until it determined, in its discretion, whether sufficient work had been completed to protect Fifth Third's security interest. That is why the inspections were done solely for the benefit of Fifth Third. Fifth Third wanted to know that the collateral property had sufficient

value to cover its loan. The Guide, consistent with this philosophy, meant that Appellant should still be monitoring the construction draw requests even though she authorized the contractor to submit them; the Guide did not absolve her of that responsibility.

Fifth Third has not found any West Virginia case construing these particular contract provisions, although this Court, in Glascock, was careful to point out that it was not making lenders insurers of the work performed or insurers of an inspection or appraisal conducted on a lender's behalf; the ruling was not asking lenders to be engineers, or architects, or home inspectors. 213 W. Va. at 67, 576 S.E.2d at 546. In In re Fordham, 130 B.R. 632, 15 U.C.C. Rep. Serv.2d 400 (Bkrty. D. Mass. 1991) at 642-43, similar language was used in a well-reasoned opinion to spell out a Bank's rights, not obligations. See also, the very recent case of Alpine Bank v. Hubbell, 555 F.3d 1097, 1104 (10th Cir. 2009) (loan agreement permitted bank to oversee construction and to deny advances but did not create duty to do so). When construed in this manner, Section 13 is read back into the Construction Loan Agreement. Appellant has not shown any reason why the Court must not simply apply that part of Section 13 stating that:

> *As Borrower, I will not rely on the Lender's inspection for any purpose whatsoever.* Rather, I will be solely responsible for the progress and quality of construction, and the discovery of all delays, defects, faults, imperfections and deviations from the Plans and Specifications shall be my sole responsibility as Borrower.

(Emphasis added.) Appellant never attempts to explain this paragraph or any of the paragraphs cited by Fifth Third; she simply continues to ignore them and urges an inconsistent interpretation. The Lower Court's construction gives meaning to them all and illustrates that summary judgment was properly granted on this issue.

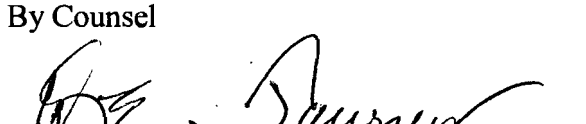
VI. RELIEF PRAYED FOR AND CONCLUSION

The Lower Court properly granted Fifth Third's Motion for Summary Judgment. The Lower Court properly held that Appellant's claims against Fifth Third were barred, in full, by the "economic loss" doctrine and by the express terms of the Construction Loan Agreement between the parties. The Lower Court properly held that Appellant failed to plead a cause of action based upon a "special relationship," and, even if she had, Appellant made no evidentiary showing that such a special relationship had been created. For each of these reasons, Fifth Third Bank, NA, respectfully requests that the Order of the Lower Court be affirmed.

Respectfully submitted,

FIFTH THIRD BANK, NA

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANISSA WHITE,

Appellant/Appellant, **APPEAL NO. 35286**

v.

RG CROWN MORTGAGE/RG CROWN BANK,
now known as FIFTH THIRD BANK, NA,

Appellee/Defendant.

CERTIFICATE OF SERVICE

I, Kevin R. Waldo, counsel for Fifth Third Bank, NA, do hereby certify that the foregoing **RESPONSE OF FIFTH THIRD BANK, NA, TO BRIEF OF APPELLANT** was made on the 24th day of February, 2010, by causing a true and exact copy thereof to be mailed by First-Class United States mail, postage prepaid, to:

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