Supreme Court No. 95436-4
Court of Appeals No. 75913-2-I

SUPREME COURT
OF THE STATE OF WASHINGTON

FEDERAL HOME LOAN BANK OF SEATTLE,

Petitioner,

v.

BARCLAYS CAPITAL INC.; BCAP LLC; and BARCLAYS BANK PLC,

Respondents.

ANSWER TO BRIEF OF AMICUS CURIAE THE DEPARTMENT OF FINANCIAL INSTITUTIONS

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INTRODUCTION

As the Court of Appeals below correctly confirmed, "reliance is a necessary element" of a claim under the Washington State Securities Act ("WSSA"). *Fed. Home Loan Bank of Seattle v. Barclays Cap., Inc.*, 1 Wn. App. 2d 551, 559, 406 P.3d 686 (2017). Nothing in the brief submitted by the Washington State Department of Financial Institutions ("DFI") demonstrates a conflict with this Court's precedent or a division within the Court of Appeals. Nor does DFI contend that FHLBS's Petition for Review raises a significant question under the Washington State Constitution. Instead, DFI is asking this Court to effect an upheaval of what has been well-settled law in this state for nearly 50 years based primarily on speculative policy arguments.

This is not the first time DFI has urged this Court to revisit the WSSA's long-standing reliance requirement.[1] Following the Court of Appeals' 2004 decision in *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 93 P.3d 919 (2004)—holding that a plaintiff suing under the WSSA must demonstrate that it reasonably relied on the alleged misrepresentations—the plaintiff in that action sought review by this Court. DFI filed an amicus brief in support of plaintiff's petition in that case, arguing that "the

[1] DFI has also submitted a virtually identical amicus brief in support of FHLBS's petition for review of the Court of Appeals decision in the Credit Suisse matter.

Court of Appeals' decision improperly added a new element of reliance to RCW 21.20.010." Respts Estate of George Steiner and Jane Doe Steiner's Ans. to Amicus Curiae Mem. of Dep't of Fin. Insts., *Stewart v. Steiner*, No. 75832-8, 2004 WL 5536567, at *5 (Wash. Dec. 15, 2004) (quoting DFI amicus brief). This Court denied that petition, *see Stewart v. Steiner*, 153 Wn.2d 1022, 108 P.3d 1229 (Table) (Mar. 1, 2005), and Barclays respectfully submits that the Petition here likewise should be denied.

DFI's arguments do not provide a basis for this Court's review under RAP 13.4(b). If DFI wishes to change the WSSA, it must address its request to the Washington Legislature—not this Court.

ARGUMENT

DFI's brief largely echoes the points made by FHLBS. Consequently, most of DFI's arguments are more fully addressed in Barclays' Answer to the FHLBS Petition for Review and are not repeated herein. Instead, consistent with RAP 10.3(f), Barclays addresses solely the new matters raised by DFI.

I. No Conflict Exists Between this Court's Precedent and the Court of Appeals Decision That Warrants Review.

The Court of Appeals' confirmation that reliance is an element of a WSSA claim is entirely consistent with this Court's WSSA jurisprudence. In *Hines v. Data Line Systems, Inc.*, this Court stated

unambiguously that to recover under the WSSA, "investors [must] show that the misrepresentations were material and ***that they relied on the misrepresentations***." 114 Wn.2d 127, 134, 787 P.2d 8 (1990) (emphasis added). Like FHLBS, DFI attempts to attack that articulation of the WSSA's requirements as non-binding dictum or legally erroneous. Not only are those attacks entirely incorrect, for the reasons set forth in the Answer, but they would not warrant review even if they did have merit because nothing in the decision below conflicts with anything this Court said in *Hines*.

DFI's invocation of certain of this Court's post-*Hines* opinions is equally unavailing because the decision below does not conflict with any of them either. In *Go2Net, Inc. v. FreeYellow.com, Inc.*, for example, this Court made sure to note at the outset of its opinion "the jury's findings that Go2Net, in entering the agreement, *relied on Molino's material misrepresentation or omission*" and that those findings established a WSSA violation. 158 Wn.2d 247, 249, 143 P.3d 590 (2006) (emphasis added). The Court did not need to repeat in its opinion that reliance is an element of a WSSA claim, particularly because this was not challenged in the appeal.

Nor is there any conflict between the Court of Appeals decision and this Court's opinion in *Kinney v. Cook*, 159 Wn.2d 837, 154

P.3d 206 (2007). In *Kinney*, this Court described the "two *essential* elements" of a WSSA claim as: "(1) a fraudulent or deceitful act committed (2) in connection with the offer, sale or purchase of any security." *Id.* at 842 (emphasis added).[2] Reliance is a key element of a fraud claim. This Court's description of the "essential" element of a WSSA claim as a "fraudulent or deceitful act" is thus consistent with the WSSA's reliance requirement. In addition, where WSSA liability is based upon a material omission—as it was in *Kinney*, *see id.* at 842-43—reliance is presumed. *See Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 118-19, 86 P.3d 1175 (2004). Accordingly, this Court's statement in *Kinney* in no way suggests that reliance is not an element of a WSSA claim.

II. That the Washington Legislature Chose Not to Follow Commentary from the Drafters of the Uniform Securities Act, Even if True, Does Not Provide a Basis for Review.

DFI's contention that the WSSA's reliance requirement is inconsistent with "the Draftsmen's Commentary from the Uniform Securities Act of 1956" (Br. at 7) is irrelevant. Even if the "Commentary" were understood as suggesting that reliance should not be an element of a cause of action under the model Uniform Securities Act, the Washington

[2] The language in *Kinney* cited by DFI is also unquestionably dictum, as reliance was not at issue in that case. *See* 159 Wn.2d at 839.

Legislature's intent in enacting—and later amending several times—the WSSA is clear.[3] Indeed, the source upon which DFI primarily relies here—a treatise on states' "blue sky laws" (Br. at 7-9)—explicitly acknowledges that Washington law requires investor plaintiffs to prove reliance. *See* Joseph C. Long, et al., *Pleading and Proving Liability for Material Misstatements and Omissions—"By Means Of"—; Reliance*, 12A Blue Sky Law § 9.41[B] (2017) ("A number of states, like Georgia, Iowa, and Washington . . . . do require reliance."). Disagreement with the choices of the Washington Legislature does not provide a valid basis for review by this Court. RAP 13.4(b).[4]

[3] In a single footnote, DFI unavailingly attempts to discount the fact that the Washington Legislature has amended the WSSA eight times without once modifying the reliance requirement confirmed by Washington courts. DFI's suggestion that the Legislature simply did not realize that this Court (and others) had held that reliance is a required element of a WSSA claim—because, according to DFI, this Court failed to be clear on that point (Br. at 7 n.4)—is baseless. This Court was exceedingly clear in *Hines*. *See Hines v. Data Line Systems, Inc.*, 114 Wn.2d at 134 ("[I]nvestors [must] show that the misrepresentations were material and that they relied on the misrepresentations."). So, too, were several Courts of Appeals decisions holding that investors must prove reliance. *See, e.g.*, *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 867-68, 309 P.3d 555 (2013) ("To establish a claim under the WSSA, an investor must prove that . . . [he] relied on those misrepresentations or omissions."), *aff'd*, 180 Wn.2d 954, 331 P.3d 29 (2014); *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 109, 86 P.3d 1175 (2004); *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 264, 93 P.3d 919 (2004) (describing "reliance" as an "essential element to prove a claim under the WSSA"); *Shermer v. Baker*, 2 Wn. App. 845, 858, 472 P.2d 589 (1970).

[4] To the extent DFI's argument focuses on the purported parallels between the remedial section of the WSSA, RCW 21.20.430, and Section 12(a)(2) of the Securities Act of 1933 and/or Section 410 of the Uniform Securities Act, this meritless argument is fully addressed in Barclays' Answer to the FHLBS Petition for Review.

III. FHLBS's Appeal Does Not Involve an Issue of Substantial Public Interest that the Supreme Court Should Decide.

DFI's references to the public interest do not point to a basis for review. DFI's contentions regarding the purported effects of the WSSA's reliance requirement are abstract and speculative. In addition, whether plaintiffs must prove reliance under the WSSA has been a settled issue in Washington for almost half a century and does not require further Supreme Court guidance. Accordingly, this appeal does not involve issues of public interest that "should be determined by the Supreme Court." RAP 13.4(b)(4).

DFI's sweeping claims that the reliance requirement "jeopardizes investor protections[,] . . . weaken[s] the deterrent effect of the Act's antifraud provisions[,] and . . . will prevent defrauded Washington investors from obtaining relief" (Br. at 2) are provided without any support drawn from the decades during which Washington courts have consistently imposed a reliance requirement. Equally baseless is DFI's speculative assertion that "even a prudent investor may not be able to produce" proof of reliance. (Br. at 3.) Indeed, there are very few cases in which a plaintiff's WSSA claims have been dismissed based on an inability to plead or prove reliance.

Similarly, the tentativeness of DFI's contention that a reliance requirement "could" undermine DFI's ability to bring enforcement actions based on the WSSA (Br. at 1, 9-10) suggests the very opposite. Washington courts have made clear for decades that reliance is an element of the WSSA. That DFI merely posits that it *might* negatively impact DFI's enforcement ability, without any concrete support, indicates that this speculation is unfounded.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Respondents' Answer to the FHLBS Petition for Review, this Court should deny review.

Dated: March 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be served via email to the last known address of all counsel of record.

I hereby certify, under penalty of perjury under the laws of the State of Washington and the United States, that the foregoing is true and correct.

DATED this 29th day of March 2018, at Seattle, Washington.

*/s/Michele Smith*_____
Michele Smith

HILLIS CLARK MARTIN & PETERSON P.S.

March 29, 2018 - 3:15 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95436-4
Appellate Court Case Title:	Federal Home Loan Bank of Seattle v. Barclays Capital, Inc., et al.
Superior Court Case Number:	09-2-46320-4

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