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SEP 02 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

NO. 297608-III

STERLING SAVINGS BANK,

Respondent,

v.

DAVID BRICKLIN and ANNE BRICKLIN, husband and wife, as legal
custodians for ALEX BRICKLIN, a minor, JACOB BRICKLIN, a minor,
and LAURA BRICKLIN, a minor,

Appellants,

and

PHILLIP MURPHY, an individual; ROXANNE MURPHY, an individual,

REPLY BRIEF OF BRICKLIN APPELLANTS

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I. STERLING DOES NOT DISPUTE THAT MR. MURPHY OR HIS LEGAL REPRESENTATIVE REQUESTED STERLING TO CHANGE THE BENEFICIARIES TO ONLY THE BRICKLINS

Sterling states that the “undisputed evidence is that Mr. Murphy, or some trusted person acting for him, called and requested a revision to his contract of deposit.” Resp. Br. at 16. Actually, the evidence was even stronger than that regarding Mr. Murphy’s intent. The bank’s deposition testimony was that Sterling would not have mailed to Mr. Murphy the 2008 Certificate signed by the bank’s authorized representative unless Sterling had received the request to change the beneficiaries directly from Mr. Murphy or Mr. Murphy’s “legal representative.” CP 137-138 [Bolden Tr. at 13:6-14:7]. Sterling does not contend otherwise.

II. ATTEMPTING TO GIVE EFFECT TO MR. MURPHY’S REQUEST, STERLING DELIVERED TO MR. MURPHY A FULLY EXECUTED “CERTIFICATE OF DEPOSIT,” NOT MERELY AN UNSIGNED “CUSTOMER COPY” OF A SIGNATURE CARD

What did Sterling do to effectuate Mr. Murphy’s undisputed request to change the beneficiaries? Several times in its response brief, Sterling states it sent him an unsigned “customer copy” of a signature card. Sterling states that this customer copy “is not a contract” and is “not effective to change the contract terms governing the account.” Resp. Br. at 6. Sterling

highlights that the Bricklins “do not argue that [this] unsigned customer receipt . . . is, in and of itself, a ‘contract’ which must be honored by Sterling.” *Id.* at 15. Of course not; an unsigned signature card does not establish anything. But that is not all that Sterling sent to Mr. Murphy.

Our claim relies on a different document, the “Adjustable Rate Certificate of Deposit” which was fully executed by Sterling’s “authorized” representative and also delivered to Mr. Murphy. CP 29; CP 68 (attached to Opening Brief as Appendix B). It was this “certificate of deposit” – signed by Sterling and delivered to Mr. Murphy -- which formed the basis for our contract claims below. It is this fully executed Certificate of Deposit (the “2008 Certificate” or “2008 Certificate of Deposit”) which also forms the basis for our current negligence and Consumer Protection Act claims.

Given the unappealed Superior Court ruling that the executed and delivered Certificate of Deposit did not create a contract, we allege that Sterling was negligent in delivering that document to Mr. Murphy. That is, we allege that Sterling was negligent in signing and delivering to Mr. Murphy a Certificate of Deposit that certified nothing. Likewise, we allege that Sterling violated the Consumer Protection Act by engaging in a practice of delivering signed Certificates of Deposit that certify nothing.

Thus, Sterling's repeated references to the unsigned customer copy of the signature card is distracting and, ultimately, unavailing to Sterling's cause. We do not assert that the delivery of the unsigned signature card to Mr. Murphy is evidence of Sterling's negligence or violation of the CPA. It is the delivery of the signed certificate of deposit – which certified nothing – which forms the foundation of our negligence and CPA claims.

In a similarly misleading statement, Sterling states that the “undisputed evidence is the bank generated two documents, a new draft contract of deposit for Mr. Murphy to sign, and a ‘customer copy’ reflecting the changes to be made which were then mailed to Mr. Murphy’s address. Resp. Br. at 16-17. We are not certain which document Sterling is referencing when it states that it mailed to Mr. Murphy “a new draft contract of deposit.” No citation is provided for this statement in Sterling’s brief. If Sterling is referring to the 2008 Certificate, its characterization of that as a “draft” is absolutely wrong. There is nothing on the 2008 Certificate that indicated that it was a “draft.” To the contrary, it was a fully completed document and signed by the bank’s “authorized” representative. *See* Op. Br. at 15-17 and App. B thereto.

When Sterling references the actual Certificate of Deposit, Sterling mischaracterizes it. Sterling states that Bricklins offered “no evidence or reasoned argument why Sterling’s delivery of a customer copy with the to-be-signed new agreement breached any duty.” Resp. Br. at 17. This is an egregious misstatement of the undisputed facts. The “new agreement” delivered to Mr. Murphy (*i.e.*, the 2008 Certificate) was not “to-be-signed.” The 2008 Certificate delivered to Mr. Murphy was signed by the bank’s “authorized” representative. If the bank had delivered to Mr. Murphy an unsigned certificate we would not have a case. It is precisely because Sterling delivered to Mr. Murphy a certificate that was signed by the bank before the bank received the signature card from Mr. Murphy (specifying the new beneficiaries) that Sterling should be found to have acted carelessly as a matter of law.

III. STERLING’S *RES JUDICATA* DEFENSE SHOULD BE REJECTED

Sterling argues that because the breach of contract claim has been resolved against the Bricklins (and not appealed) that the Bricklins’ remaining negligence and CPA claims are barred by *res judicata*.

Sterling’s *res judicata* defense fails for several reasons. First, *res judicata* is “designed to prevent repetitive litigation of the same matters.”

Tegland, 14A Washington Practice, § 35:21 (2011). This is not a situation where the Bricklins filed and lost one claim and then, later, filed another. The contract, negligence, and CPA causes of action were all filed in the same proceeding. *Res judicata* has no application here.¹

Second, the subject matter and claims are not the same. Indeed, they are almost directly opposite of each other. The contract claim is based on an assertion that a valid contract was formed when Sterling delivered the signed 2008 Certificate of Deposit to Mr. Murphy (listing only the Bricklins as beneficiaries). In contrast, the negligence and CPA claims are based on the opposite finding: that the 2008 Certificate of Deposit was not an effective contract. The Bricklins claim that the 2008 Certificate of Deposit delivered to Mr. Murphy did not create a contract only because of Sterling's negligence and that the delivery of that signed certificate which certified nothing (*i.e.*, was not a contract) was an unfair and deceptive practice in violation of the CPA. Because the contract claim is wholly distinct from the negligence and CPA claims, *res judicata* does not apply.

¹ It may be that a collateral estoppel defense would better fit a situation like this where multiple claims are alleged in a single suit. That argument would fail, too (because, as discussed *infra*, the issue resolved in the contract claim is utterly different from those involved in the negligence and CPA claims), but because Sterling did not raise that defense, we do not address it here.

Sterling claims that the 2008 certificate does not constitute a “superseding contract” and that “disposes of [Bricklins’] claims that Sterling lost or mishandled the alleged new agreement.” Resp. Br. at 14. This statement is illogical and does not track our theory of the case. The Superior Court’s determination that the 2008 Certificate of Deposit does not constitute a “superseding contract” does not “dispose” of our negligence claims. To the contrary, it is the very foundation for our claim that Sterling mishandled the account.

Likewise, Sterling asserts that there was “no superseding contract that Sterling could have mishandled.” *Id.* We are not arguing that Sterling mishandled a superseding contract. We are arguing that the superseding contract never came into existence because Sterling mishandled the account (either by losing the signature card or by issuing the 2008 Certificate of Deposit prior to receiving the signature card from Mr. Murphy).

Two cases demonstrate the fallacy of Sterling’s efforts to apply *res judicata* to this situation. In *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983), Chamberlin sold land to Mellor. A dispute arose as to whether an adjacent parking lot was included in the sale. Mellor filed his first lawsuit alleging that Chamberlin had misrepresented the parking lot as being

included. An order of dismissal with prejudice was entered terminating the lawsuit.

Thereafter, Mellor filed a second lawsuit claiming that one of the buildings on the land encroached on the neighboring parking lot in violation of the covenants of title included in the warranty deed. The trial court rejected Chamberlin's *res judicata* defense noting that "'the primary right' not to misrepresent a sale is distinguishable from the right to enforce a breach of covenant of title." *Id.* at 646. Further, the Court explained that "evidence to show who owned the parking lot [related to the misrepresentation claim] was not directly pertinent in deciding whether the building encroached a few inches." *Id.*

Likewise, Bricklins' "primary right" to seek enforcement of an alleged contract (the 2008 Certificate) is "distinguishable" from their right to assert that the bank negligently handled the account with the result that Mr. Murphy's efforts to create a superseding contract were not effectuated. Likewise, the "primary right" to attempt to enforce an alleged contract is "distinguishable" from the right to assert that delivery by Sterling of the Certificate of Deposit its "authorized" representative had signed was an unfair or deceptive practice in violation of the CPA.

Further, as in *Mellor*, the evidence related to the two claims is different. Bricklins' contract claim was founded entirely on a single piece of paper: the 2008 Certificate of Deposit, executed by Sterling and delivered to Mr. Murphy. We asserted below that that piece of paper, by itself, established a superseding contract. In contrast, our negligence and CPA claims focus on the circumstances that led to the creation, execution, and delivery of that piece of paper to Mr. Murphy. Unlike the contract claim, the negligence and CPA claims focus on issues of whether Sterling received a signature card from Mr. Murphy, whether Sterling lost the signature card, whether Sterling issued the 2008 Certificate prior to receiving the signature card from Mr. Murphy, and whether Sterling had a practice of issuing certificates of deposit prior to receiving signature cards. None of that evidence was necessary for our contract claim. The distinct nature of the evidentiary basis for the claims establishes that the claims are not "identical" for *res judicata* purposes. *Id.*

Another case demonstrating the fallacy of Sterling's *res judicata* defense is *Meder v. CCME Corp.*, 7 Wn. App. 801, 502 P.2d 1252 (1972). In that case, the plaintiffs had lost a prior action for rescission of a real estate contract on the ground that the defendants had procured their signature

fraudulently. The final judgment determined that plaintiff had failed to establish fraud. *Id.* at 807.

The plaintiff then filed a second action alleging claims for an accounting, rescission, reformation of the contract, missing payments, waste to real property, and a breach of fiduciary duty due to a failure to disclose a conflict of interest. *Id.* The Court determined that the rescission and reformation claims were barred by *res judicata*, but none of the others were barred. Even though all of the surviving claims arose out of the same underlying contract, they were distinct causes of action which were not barred by the prior judgment that no fraud had occurred. *Id.* at 808-810.

If Bricklins had previously filed a claim for a declaratory judgment that a superseding contract had been created and now were seeking damages for breach of the alleged superseding contract, Sterling could rightfully assert that the final judgment determining that a superseding contract had not been created would bar our subsequent claim for damages due to breach of the (non-existent) contract. But that is not the situation here. As in *Meder*, our negligence and CPA claims involve a different subject matter and constitute distinct claims from the contract claim. *Res judicata* is not applicable.²

² In the section of its brief discussing cause-in-fact for the tort claim, Sterling revisits the *res judicata* argument noting that the trial court's judgment authorized Sterling to

IV. THE BRICKLINS WERE ENTITLED TO SUMMARY JUDGMENT ON THEIR NEGLIGENCE CLAIM

Sterling challenges three of the elements of Bricklins' tort claim: The existence of a duty; the breach of the duty; and causation. We address each of those arguments in the following subsections.

A. Duty: Sterling Owed Mr. Murphy (and the Contract Beneficiaries) a Duty of Care When Administering Mr. Murphy's Account

In our Opening Brief, we demonstrated that Sterling had a duty of care, independent of its contract obligations, when administering Mr. Murphy's account. *See* Op. Br. at 23-28 (discussing tort principles and the "independent duty doctrine"). Sterling responds by arguing that the independent duty doctrine bars Bricklins' negligence claim, but Sterling's argument is conclusory and superficial. Sterling conclusorily contends that "Bricklins cannot graft additional duties on the contract that do not otherwise exist," Resp. Br. at 23, but Sterling provides no analysis of basic tort principles to determine whether a tort duty of care applies in this situation.

distribute the proceeds from the 2007 Certificate "without liability." Resp. Br. at 22. While we did not appeal the contract ruling and the portion of the Order authorizing Sterling to distribute the proceeds per the listing of beneficiaries in the 2007 Certificate, we certainly are appealing the trial court's determination that that distribution does not expose Sterling to liability, *i.e.*, that the 2007 Certificate was recognized as the last valid contract only because of Sterling's negligent handling of the account. *See also infra* at 15-16, regarding the "without liability" language in RCW 30.22.210(1).

In a similarly conclusory fashion, Sterling attempts to distinguish *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010). But Sterling’s analysis is limited to a single sentence: “*Eastwood* is a clear case where an independent duty existed; Sterling’s is not.” Resp. Br. at 23. Sterling discusses none of the basic tort principles that are used to determine whether a tort duty of care exists. *See* Op. Br. at 23-25. Under the independent duty doctrine, an analysis of those tort principles is required to determine whether an independent tort duty exists. Sterling has totally failed to analyze those tort principles as required by the independent duty doctrine. For the reasons set forth in our Opening Brief, the Court should determine that Sterling had an independent tort duty to manage Mr. Murphy’s account with reasonable care.

B. Breach: Undisputed Facts Demonstrate That Sterling Breached Its Duty to Administer Mr. Murphy’s Account With Reasonable Care

Sterling asserts that the signed 2008 Certificate of Deposit was delivered to Mr. Murphy simultaneously with two copies of a signature card: one copy to be signed by Mr. Murphy and returned to the bank; the other a “customer copy for his records.” *See* Resp. Br. at 17. *See also* CP 162-63. On the other hand, Mrs. Bricklin’s testimony was that Mr. Murphy received

the signature card first, signed it and returned it to the bank, and only later received the signed 2008 Certificate. CP 175. Though the facts on this issue are in dispute, we do not believe this precludes summary judgment in our favor. If events are as described by the bank, then Sterling carelessly delivered a signed certificate to Mr. Murphy *before* receiving the signature card (which, per the superior court's ruling, was necessary to make the contract effective). If events are as described by Mrs. Bricklin, then Sterling received the signature card first, proceeded to issue the 2008 Certificate of Deposit, and then lost track of the signature card. Either way, Sterling breached its duty of care. *See* Op. Br. at 15-18; 22-23.

Sterling argues that the Superior Court's ruling on the contract claim eliminates the possibility that Sterling lost the signature card. Resp. Br. at 17. But the Superior Court's summary judgment ruling included no findings of fact. CP 312-16. Moreover, Sterling argued that because the signature card could not be produced, the 2008 Certificate could not be treated as a contract. The Superior Court accepted that reasoning ruling that the presence or absence of the signature card in Sterling's files was "determinative." CP 103. Thus, the Superior Court's contract ruling does not preclude the possibility that Sterling lost the signature card.

Sterling also argues that there is “no evidence, none,” that Sterling ever received the signature card. Resp. Br. at 17. That is not an accurate characterization of the evidence either. As we discussed, Sterling’s standard operating procedures precludes issuing signed Certificates of Deposit prior to receipt of a signature card. Op. Br. at 7-8. Sterling does not dispute this in its response. Thus, Sterling’s delivery of the signed Certificate of Deposit to Mr. Murphy is evidence that Sterling had received the signature card. Further evidence was supplied by the Bricklins’ mother, Anne Bricklin, who testified that Patrick Murphy had executed the signature card and that she had mailed it back to Sterling. CP 175.

Again, we emphasize that while there certainly was a dispute as to whether Sterling received the signature card or not, that evidentiary dispute does not preclude summary judgment in favor of the Bricklins. If Sterling is right that it never received a signature card, then Sterling mishandled the account by issuing the signed Certificate of Deposit to Mr. Murphy without having a signed signature card from Mr. Murphy in hand. Indeed, such conduct is directly contrary to the procedures set forth in Sterling’s own operations manual. *See* Op. Br. at 7-8.

In sum, while we cannot be sure whether Sterling received the signature card and then lost it or whether Sterling delivered to Mr. Murphy the fully executed 2008 Certificate of Deposit prior to receiving the signature card, it cannot be disputed that one or the other scenario happened – and either way, Sterling breached its duty to manage Mr. Murphy’s account in a careful manner.

C. Causation: No Material Facts Are Disputed Regarding Causation

Sterling notes that proximate cause requires both cause-in-fact and legal causation. Resp. Br. at 18. But Sterling argues only the “cause-in-fact” element, so we limit our reply accordingly.

To a large extent, Sterling’s “cause-in-fact” argument is a rehash of its breach of duty argument, *e.g.*, contending that Sterling never received a signature card and did not lose it. We responded to those contentions above.

Sterling does present one new argument here, *i.e.*, that Bricklins have not explained how “Sterling’s having mailed a customer copy caused any loss.” Resp. Br. at 19. Specifically, Sterling asserts that its mailing a “customer copy” of the signature card to Mr. Murphy could not have “confused Mr. Murphy or in any other sense caused the Bricklins to lose 40 percent to the” Murphy beneficiaries. Resp. Br. at 20. This causation

argument suffers from the same flaw as one of Sterling's "duty" arguments discussed above, *i.e.*, we are not basing our claim on Sterling's delivery of a "customer copy" of the signature card. The confusion resulted not from delivery of a copy of the signature card, but from Sterling delivering to Mr. Murphy a fully executed Certificate of Deposit – which, we have come to learn certified nothing.

D. Sterling's Reliance on RCW 30.22.210(1) is Misplaced

Sterling contends that RCW 30.22.210(1) (the interpleader provision for financial institutions) insulates Sterling from liability. That statute authorizes a financial institution to interplead funds when there is a dispute as to the owner of the funds.

A financial institution may utilize the interpleader process, instead of making immediate payment to one claimant "without liability." Thus, if a claimant contends that the delay in payment due to a bank invoking the interpleader process caused the claimant injury, such a claim would be barred because the bank can use the interpleader process "without liability."

We are not asserting a loss due to Sterling's decision to interplead the funds. Our loss stems from Sterling's earlier actions when it mishandled its response to Mr. Murphy's request to change the beneficiaries. Using the

interpleader statute to resolve a dispute caused by a bank's own negligence does not create an after-the-fact shield for those prior transgressions.

V. THE BRICKLINS HAVE ESTABLISHED A VIOLATION OF
THE CONSUMER PROTECTION ACT AS A MATTER OF
LAW

A. Sterling's Actions Were Unfair and Deceptive

Sterling claims that nothing it did was "unfair or deceptive," yet Sterling never discusses the actions which form the gravamen of our CPA claim. *See* Resp. Br. at 24. Conclusory responses like those should be ignored.

Sterling states that "every time a contract of deposit change is requested, Sterling generates two documents, and no changes can be made to the contract of deposit until the signed signature card is returned." *Id.* If no changes to the account can be made before receipt of the signature card, then Sterling should not have issued and delivered to Mr. Murphy (and others subject to this same practice) a signed certificate of deposit *before* receiving the signed signature card from him. As described in detail in our Opening Brief (at 15-16), the signed Certificate of Deposit delivered to Mr. Murphy in 2008 contained *no* qualifications indicating that it was subject to any condition subsequent, such as the later receipt of a signature card. The words

of the certificate signed and delivered to Mr. Murphy were unconditional. Surely delivery of a “certificate” that we now learn certifies nothing is an unfair and deceptive practice under the CPA.

Sterling argues that because on two prior occasions it successfully responded to Mr. Murphy’s request for account changes without mishap that there was nothing unfair or deceptive about using that practice a third time. *Id.* at 25. Actually, the record is devoid of any evidence regarding the manner in which Sterling processed Mr. Murphy’s earlier request for account changes. All that is known is that whatever process was used, the end result was a successful change of the account in accordance with Mr. Murphy’s request. On the third occasion, though, the record is clear that Sterling bungled its efforts to respond to Mr. Murphy’s request. Sterling, contrary to its own procedures, delivered a signed Certificate to Mr. Murphy that Sterling later successfully argued to the trial judge certified nothing. If delivery of a signed Certificate that certifies nothing is not the essence of an unfair and deceptive practice, we do not know what is.

B. Sterling’s Actions Implicate the Public Interest

In our Opening Brief, we demonstrated that the undisputed evidence indicates that Sterling’s practice at issue here was not a one-time event, but

rather part of an account management procedure that employees engage in on a regular basis. That practice – of delivering signed certificates of deposit prior to receiving signature cards – is not authorized by Sterling’s own procedures manual, but the practice exists nonetheless. Because this practice is not limited to the single account of Mr. Murphy, but rather is applied broadly to many of Sterling’s customers, the public interest is implicated. *See Op. Br.* at 33-35.

In arguing that the public interest is not implicated, Sterling again ignores the arguments presented in our Opening Brief. Sterling merely asserts that this was a “private dispute” between the Bricklins and the Murphy beneficiaries as to who is entitled to distribution. Sterling simply ignores the evidence that the manner in which Sterling handled this account was part of a regular practice that has the potential to affect many other Sterling customers, too. Such evidence readily satisfies the *Hangman Ridge*³ public interest test that the conduct is part of a pattern or generalized course of conduct and/or that there is a real and substantial potential for repetition of the conduct. Presumably, Sterling failed to respond to that evidence because

³ *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company*, 105 Wn.2d 778, 719 P.2d 531 (1986).

it has no effective response to make. But ignoring the evidence does not make it go away.

C. The Bricklins Were Injured in Their Business or Property

Sterling persists with the surprising argument that the Consumer Protection Act does not protect consumers, only businesses. According to Sterling, the only injuries redressable under the CPA are those which involve “loss of professional or business reputation, loss of goodwill, or inability to tend to a business establishment.” Resp. Br. at 26 (*quoting Ambach v. French*, 167 Wn.2d 167, 174, n.3., 216 P.3d 405 (2009)).

If the title of the statute were not a sufficient refutation of Sterling’s argument, the case law certainly is. For instance, in *Sorrel v. Eagle Health Care, Inc.*, 110 Wn. App. 290, 38 P.3d 1024 (2002), the plaintiff sued a health care provider under the CPA when the provider failed to timely refund unearned charges for nursing home care. *Id.* at 293. Eagle argued that Sorrel failed to establish damages under the CPA. The Court rejected that defense:

Sufficient injury to satisfy the fourth and fifth elements of a Consumer Protection Act claim is established when a plaintiff is deprived of the use of his property as a result of an unfair or deceptive act or practice. In this case, Sorrel was denied rightful possession of his funds for a period of two weeks. His CPA claim should not have been dismissed for failure to establish injury.

Id. at 298-99 (footnotes omitted) (emphasis supplied).

Likewise, in *Panag v. Farmers Insurance Company of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009), the Court determined that a consumer satisfies the CPA injury test merely by incurring costs in the process of determining whether the defendant's actions are unfair or deceptive. "Investigation expenses and other costs resulting from a deceptive business practice sufficiently established injury." *Id.* at 62. Likewise, in both *Peterson*⁴ and *Shah*,⁵ alleged errors and misrepresentations during the purchase of insurance policies resulted in the plaintiffs being underinsured compared to the policies they thought they were purchasing. When a loss under the policy occurred, they did not receive the benefits they thought they would receive. Not receiving as much money as they thought they were entitled to under the policy was determined to be a compensable injury under the CPA. *Id.*

These cases are closely parallel to the current situation. Sterling concedes that Mr. Murphy was attempting to change the Certificate to name only the Bricklins as the beneficiaries. Sterling's practice of issuing revised

⁴ *Peterson v. Big Bend Insurance Agency, Inc.*, 150 Wn. App. 504, 202 P.3d 372 (2009).

⁵ *Shah v. Allstate Insurance Company*, 130 Wn. App. 74, 121 P.3d 1204

certificates prior to obtaining the signature card caused Mr. Murphy's intended beneficiaries (the Bricklins exclusively) to obtain less than the full amount of the proceeds that Mr. Murphy intended them to receive. As in *Peterson and Shah*, this is a compensable consumer injury under the CPA.

Sterling's reliance on *Ambach, supra*, is sorely misplaced. The facts of *Ambach* have little to do with this case. There, a patient brought an action against a surgeon alleging a CPA violation after her shoulder became infected following surgery. In denying the CPA claim, the Supreme Court explained that the legal definition of "property" does not include "rights to one's person or body." *Id.* at 172. The Court's description (quoted by Sterling) that *examples* of CPA injuries include loss of business reputation and goodwill are just that, examples. The quoted language does not purport to be an exclusive list of all types of CPA injury. In particular, nothing in *Ambach* suggests that consumer injuries involving the loss of use of money are beyond the scope of a CPA claim. Personal injuries, including pain and suffering and related medical expenses, are excluded from CPA coverage, but the loss of personal property – like cash – falls squarely within the "consumer protection" provisions of the CPA.

(2005).

D. There Is a Causal Link Between Sterling's Unfair and Deceptive Acts and the Bricklins' Injury

In this section of its response, Sterling repeats the causation arguments that it presented with regard to the negligence claim. *See* Resp. Br. at 28-29. Our rebuttal is the same, too. *See supra* at 14-15.

VI. CONCLUSION

We restate the relief requested from our Opening Brief, correcting a typographical error in that portion of our Opening Brief:

The Court should reverse the trial court's rulings on the Bricklins' negligence and Consumer Protection Act claims and grant the Bricklins' summary judgment motions on those claims. The case should be remanded for entry of judgment in the amount of 40 percent of the proceeds and interest of the 2008 certificate.

The Court should also award the Bricklins treble damages up to \$25,000 and their reasonable attorneys' fees pursuant to RCW 19.86.090.

In the alternative, the Court should vacate the trial court's rulings on the negligence and Consumer Protection Act claims and remand those causes of action for trial.

The Court should not address the contract claim which is no longer under appeal. Sterling's liability under the certificate of deposit contract should not be impacted by this appeal.

Op. Br. at 37. (In the Opening Brief, in the first paragraph quoted above, we mistakenly referred to the “2007 certificate.” The reference should have been to the “2008 certificate”).

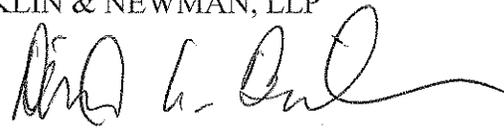
Finally, we note that while Sterling certainly denies that we are entitled to judgment on our CPA claim, they have not disputed that portion of our brief wherein we assert that if we prevail on the CPA claim, we are also entitled to attorneys’ fees and limited treble damages. *See* Op. Br. at 36-37. If the Court directs entry of judgment in favor of the Bricklins on the CPA claim, the Court should award attorneys’ fees and limited treble damages as requested therein.

Dated this 31 day of August, 2011.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By:



David A. Bricklin, WSBA No. 7583
Attorneys for Bricklin Appellants

FILED

SEP 02 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
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STERLING SAVINGS BANK,

Respondent,

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DAVID BRICKLIN and ANNE
BRICKLIN, husband and wife, as legal
custodians for ALEX BRICKLIN, a
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LAURA BRICKLIN, a minor,

Appellants,

and

PHILLIP MURPHY, an individual;
ROXANNE MURPHY, an individual.

NO. 297608-III

(Spokane County Superior
Court Cause No. 09-2-05316-7)

DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING)

ss.

I, PEGGY S. CAHILL, under penalty of perjury under the laws of
the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for appellants David, Anne, Alex, Jacob, and Laura Bricklin herein. On the date and in the manner indicated below, I caused the Reply Brief of the Bricklin Appellants to be served on:

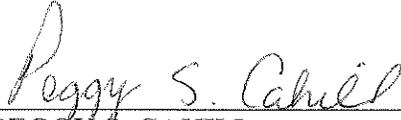
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DATED this 31st day of August, 2011, at Seattle, Washington.



PEGGY S. CAHILL

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