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JUN 06 2011  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
B3

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

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NO. 297608-III

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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,

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OPENING BRIEF OF BRICKLIN APPELLANTS

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David A. Bricklin, WSBA No. 7583  
BRICKLIN & NEWMAN, LLP  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
(206) 264-8600  
Attorneys for Bricklin Appellants

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## I. INTRODUCTION

This case involves a dispute regarding Sterling's management of a certificate of deposit account opened with the bank by Gerald "Patrick" Murphy. The Bricklin defendants contend that Sterling mis-managed its handling of the account to their detriment.

It is undisputed that in 2007, Mr. Murphy had a \$250,000 certificate of deposit account with Sterling that named the Bricklin defendants as beneficiaries of 60% of the account. The Murphy defendants (Roxanne and Philip Murphy) were named as beneficiaries of 40% of the account.

It also is undisputed that in 2008 Mr. Murphy sought to change the beneficiaries on that account to name the Bricklin defendants as sole beneficiaries; that Sterling took steps to effectuate the change in beneficiaries (including issuing a new certificate of deposit to Mr. Murphy in 2008 showing the Bricklin defendants as sole beneficiaries); but that, ultimately, the changes were not made. As a result, the Bricklin defendants received 60 percent of the proceeds, not the 100 percent intended by Mr. Murphy. Their 40 percent loss was due to Sterling's mismanagement of the account.

The 2008 certificate naming the Bricklin defendants as sole beneficiaries was signed by Sterling's "authorized representative," issued by

the bank on August 25, 2008, and delivered to Mr. Murphy. But Sterling asserted this certificate certified nothing because Sterling could not find a signature card from Mr. Murphy corresponding to the requested change in beneficiaries (even though Sterling acknowledged it received the requested change from Mr. Murphy).

Sterling contended that it had issued the 2008 certificate of deposit before receiving written confirmation from Mr. Murphy for the change. Sterling claimed it never received the signature card from Mr. Murphy confirming the requested change and that, therefore, the 2008 certificate of deposit it had issued to Mr. Murphy (naming the Bricklins as sole beneficiaries) was not valid.

The Superior Court determined that in the absence of a signature card corresponding to the beneficiary change, the account proceeds should be distributed pursuant to the terms of the earlier certificate of deposit. Thus, the Bricklin defendants received 60%, not 100%, of the account proceeds.

The essence of our negligence theory is this: One of two things happened. Either Sterling issued and delivered to Mr. Murphy an unconditional certificate of deposit *before* receiving Mr. Murphy's signature card or Sterling sent the certificate of deposit to Mr. Murphy after receiving

the signature card, but then lost track of the signature card. Either way, it is Sterling's carelessness that resulted in the Bricklins receiving 60 percent, instead of 100 percent, of the certificate of deposit proceeds. A careful bank would not sign and deliver a certificate of deposit before receiving a signature card nor would a careful bank lose track of a signature card in its records. One way or the other, Sterling's carelessness cost the Bricklins' 40 percent of the proceeds.

Sterling's own written protocols preclude bank personnel from issuing certificates of deposit in advance of receiving a signature signed by the depositor. If, as Sterling asserts, the second scenario above occurred, *i.e.*, that Sterling issued the new certificate before receiving the signed signature card from Mr. Murphy, then bank personnel were operating directly contrary to the bank's own written procedures.

Further, Sterling's personnel admitted that they had no tracking system in place to assure that the bank ultimately received signature cards from depositors when the bank issued certificates "on the come," *i.e.*, in advance of receiving the signed signature card. It was bad enough that Sterling issued certificates that certified nothing (because they were subject to a silent condition subsequent), but Sterling compounded its ineptitude by not

maintaining a system to make sure that the signature cards ultimately were received. The result was that Mr. Murphy was left holding a certificate, signed by the bank and delivered to him, that purported to “certify” the Bricklin defendants as sole beneficiaries, when, in fact, the certificate certified nothing.

For reasons explained below, we do not challenge the trial court’s dismissal of our contract claim, i.e., that the 2008 certificate was valid and should have been honored. Rather, we appeal the trial court’s dismissal of our negligence claim. We demonstrate herein that the reason that the 2008 certificate was determined invalid was because of the bank’s negligent management of Mr. Murphy’s account. If the bank had either not lost the signature card or not issued the certificate prior to receiving the signature card, Mr. Murphy’s undisputed intent to provide 100% of the proceeds to the Bricklin defendants would have been realized. The 40% loss the Bricklins suffered is the direct and proximate result of the bank’s mismanagement of the account. Thus, we appeal the trial court’s dismissal of our negligence claim.

During discovery, it was revealed that Sterling’s shoddy account management practices were not limited to its handling of Mr. Murphy’s

account. Rather, Sterling personnel testified that in the ordinary course of their business, bank personnel routinely issue certificates of deposit that certify nothing (*i.e.*, they are subject to an unstated condition subsequent (the bank's subsequent receipt of a signature card)). Just as Mr. Murphy received a certificate that misleadingly seemed to certify that the beneficiaries on his account had been changed when in fact that had not yet occurred, so, too, other Sterling customers are at risk of receiving similar certificates that certify nothing. This practice of issuing nominally unconditional certificates that, in fact, are subject to an unstated condition subsequent, is unfair and deceptive and, therefore, violates the Consumer Protection Act. The trial court's dismissal of our Consumer Protection Act claim was in error and is also being appealed.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

The trial court erred in entering the Order Granting Plaintiff's and the Murphy Defendants' Motions for Summary Judgment and Denying the Bricklin Defendants' Motion for Summary Judgment.

B. Issues Pertaining to the Assignment of Error

1. If a bank mismanages an account to the detriment of a beneficiary of the account, may the beneficiary maintain an action against the bank sounding in negligence and/or the Consumer Protection Act, or is the beneficiary limited to a contract law cause of action?

2. Do the undisputed facts establish that either the bank lost a signature card or issued a revised certificate of deposit before receiving the signature card authorizing the revision and, if so, did the bank act negligently as a matter of law?

3. Was there evidence that the bank lost a signature card (and, therefore, refused to honor a modified certificate of deposit), and, if so, did that evidence preclude summary judgment dismissal of the Bricklin defendants' negligence claim?

4. Was there evidence that the bank issued a modified certificate of deposit before receiving a signature card from the account holder attesting to the modification request and that the bank maintained no system for monitoring receipt of the signature card thereafter, and, if so, did that evidence preclude summary judgment dismissal of the Bricklin defendants' negligence claim?

5. Was there evidence that the bank has a practice of issuing certificates of deposit that purport to certify the terms of the account stated therein but, in fact, certify nothing (because they are subject to an unstated condition subsequent) and, if so, did the Bricklins establish a claim under the Consumer Protection Act?

6. Should the Bricklins be awarded their reasonable attorneys fees, costs, and exemplary damages up to \$25,000 under the Consumer Protection Act?

### III. STATEMENT OF THE CASE

#### A. Sterling's Procedures for Issuing and Modifying Certificates of Deposit

1. Sterling's written procedures for issuing certificates of deposit do not allow a certificate of deposit to be issued prior to receiving the customer's signature card

Sterling's Account Setup and Maintenance Manual directs bank personnel on all aspects of creating and managing customer accounts, including certificate of deposit accounts. CP 45-48. Sterling does not dispute that the manual instructs bank employees to acquire a signed signature card before issuing a certificate of deposit. The bank's testifying employees agreed that nothing in the manual authorizes bank personnel to sign a certificate of deposit and deliver it to the account holder prior to the

bank obtaining a signature card from the account holder. CP 150 [Allert Tr. at 18:1-6; 18:25-19:6]; CP 164 [Painchaud Tr. 25:7-25:14].

Likewise, nothing in the manual authorizes bank personnel to issue a certificate of deposit modifying the named beneficiaries prior to obtaining a signature card from the account holder requesting the change. *Id.* “Changes in ownership, name or Social Security number require a new signature card to be prepared and signed.” CP 49 (Account Manual at 7.1).

Certificate of deposit accounts are subject to Sterling’s standard Rules and Regulations distributed to its customers. CP 53-58. Nothing in those rules authorizes bank personnel to issue, sign, and deliver a new or modified certificate of deposit prior to obtaining a signed signature card from the account holder. *Id.* Likewise, nothing in the bank’s Rules and Regulations states that a signed certificate of deposit (new or modified) issued by the bank is not valid unless the account holder provides the bank with a signature card after the certificate of deposit is issued. *Id.*

2. Sterling’s employees regularly utilize an unauthorized procedure and issue certificates of deposit prior to receiving the customer’s signature card

Even though the bank’s written policies do not allow employees to issue a signed certificate of deposit before receiving written authorization for

the change from the account holder, three bank employees testified about an unwritten procedure whereby the bank issues signed certificates with changed beneficiaries without first obtaining a signed signature card.

According to Sterling employees Allert, Bolden, and Painchaud,<sup>1</sup> Sterling condones this “off-manual” policy of issuing signed certificates and delivering them to bank customers *before* obtaining the signature from the customer. No bank employee contradicted this testimony.

According to this undisputed testimony, the bank issues certificates of deposit without first obtaining the signature card, if there is an oral request from a known account holder. CP 137-139; 149-150; 162-164. If a telephone request for a change in beneficiaries is made by a known account holder, the bank will issue the certificate based on the telephone authorization alone. *Id.* In that situation, the bank will sign and issue the certificate of deposit and deliver it to the account holder with a request that the account holder sign a signature card and return it to the bank by ordinary mail *after* receipt of the signed certificate of deposit from the bank. CP 162-163. Nothing in the bank’s written procedures condones this practice. CP 163.

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<sup>1</sup> Ms. Allert is Sterling’s Assistant Vice President and Branch Support Manager. Ms. Painchaud is an Assistant Branch Manager. Ms. Bolden is a Financial Service Specialist. CP 146 (Allert); CP 160 (Painchaud); CP 135 (Bolden).

3. Sterling never issues modified certificates unless it has at least a verified oral request from the account holder for the change

While Sterling's practice of issuing modified certificates in advance of receiving a signature card from the customer creates record management problems (as discussed below and as were manifest in this case), at least this procedure leaves no doubt as to the customer's intent. Each employee confirmed that under this unwritten procedure, the signed certificate is not sent to the account holder unless there has been an affirmative request by a known account holder for the change in beneficiaries. Never does the bank mail a signed certificate of deposit to the account holder changing beneficiaries without express authorization from the account holder. As explained in the testimony of Assistant Branch Manager Rhonda Painchaud:

Question: (By Mr. Bricklin) In describing the process of making a change of the type at issue here, you described two different ways. One if the customer is in the branch, and one if they're not. And you said something along the lines I think that if the customer is not in the branch, that you can verify that -- that they're talking to the customer, that you'll go ahead and send out this kind of information. Is that an accurate characterization --

A Yes.

Q -- of your testimony?

A Yes.

Q All right. So for you to have -- for you, meaning the bank, to have sent out this Exhibit 1 [the 2008 certificate of deposit naming only the Bricklins as beneficiaries] to Mr.

Murphy, there would have had to have been somebody at the branch who had confirmed that in fact Mr. Murphy had made this request; is that right?

A Mr. Murphy or a -- somebody that has authorization to make decisions on an account.

Q So if there was a -- a guardian appointed or --

A Power of attorney.

Q -- power of attorney. But you would not send this out -- the bank would not send this out unless there was a request either from the named customer or somebody with legal authority to speak for the customer; is that right?

A Yes.

CP 165 [Painchaud Tr. at 27:5 – 28:4].

Ms. Bolden, who signed the Certificate of Deposit in question, testified to the same effect:

Question: (By Mr. Bricklin) . . . Under what circumstances would you be putting into the mail to the customer a signed CD by you and a signature card to be signed by the customer?

If the customer called up and asked you to make the change, is that one example of when you would do that?

A Yes, that's one example.

Q All right. If somebody who had legal authority to speak for the -- had a power of attorney, or other legal authority, is that another example when you would do this?

A It could be. I -- I don't know.

Q Would you ever mail a certificate of deposit signed by you if you did not -- before you received a signature card, if you did not have some direct communication with either the customer or their legal representative?

A I wouldn't just decide to create a signature card and mail it out.

Q Okay.

A I would need to be asked by the client.

Q All right.

A I don't just come up with things to do.

Q Right. Or if somebody walked into the bank and said, hey, my uncle wanted to add me to the CD, would you please issue a new one so that I'm one of the beneficiaries on there.

A No, you can't do that.

Q All right. **You have to have a direct communication with the customer or the customer's legal representative?**

A Correct.

CP 137-138 [Bolden Tr. at 13:6 – 14:7] (emphasis supplied).

Likewise, Ms. Allert (the bank's Assistant Vice President and Branch Support Manager) testified that issuance of a certificate like the one issued to Mr. Murphy in 2008 "acknowledge[s] that the request [for a change in beneficiaries] was received" from the customer. CP 81-82, ¶ 7.<sup>2</sup>

4. Sterling has no procedure to track certificates it issues in advance of receiving the signature card to assure the signature card is eventually received by the bank

While it may seem surprising that Sterling condoned an off-manual practice of issuing certificates of deposit before receipt of the signature card, another surprise surfaced during discovery: Sterling has no procedure to track these accounts and assure that Sterling receives a signature card to

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<sup>2</sup> In Ms. Allert's initial declaration, she had asserted that the signed certificate delivered to Mr. Murphy did not reflect that the "Account Holder has agreed to the change." CP 82 (¶ 9). But that assertion was abandoned in Ms. Allert's later deposition testimony. As did her colleagues, she testified at her deposition that the only way the bank would mail out a signed Certificate of Deposit is if the bank had first received a request for the beneficiary change from the account holder. The new certificate is "acknowledging that

vouch for the certificate issued “on the come.” While we think it is imprudent for a bank to systematically deliver signed certificates of deposit in advance of receiving the signature card, certainly if such a system were employed, one would expect the bank to have a tracking system in place to assure eventual receipt of the signature card (or issuance of a rescission notice if the card were not received). Without such a system, the bank would have no way of knowing whether the validity of the certificate it had issued, signed and delivered to the customer was open to question because of the failure of the bank to subsequently receive the signature card.

It would have been a simple, inexpensive matter for Sterling to have a tracking system and to re-contact customers from whom signature cards were not received within a relatively short period of time. But the testimony of the employees reveals that no such system was used. *See, e.g.*, CP 140 (Bolden); 149 (Allert); 169 (Painchaud).

B. Sterling’s Management of Gerald Murphy’s Account

1. The 2006 Certificate of Deposit

In 2006, Mr. Murphy opened a certificate of deposit account with Sterling. CP 66. The original deposit was \$250,000. The account holder

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the request was received, because that’s why the changes were put on there.” CP 150 [Allert Tr. at 20:24 – 20:25].

was identified as Gerald Murphy. The beneficiaries were identified as Jennifer, Jacob, Alex, and Laura Bricklin. *Id.*

2. The 2007 Certificate of Deposit

In 2007, Mr. Murphy requested that the beneficiaries on the account be changed to eliminate Jennifer Bricklin and to add Roxanne and Philip Murphy. Thus, the 2007 certificate identified five beneficiaries: Roxanne and Philip Murphy (the Murphy defendants) and Jacob, Alex and Laura Bricklin (the Bricklin defendants). The amount of the deposit was left unchanged at \$250,000. CP 211. For the Court's convenience, a copy is attached hereto as Appendix A.

3. In 2008, Gerald Murphy requests that the beneficiaries be changed to only the Bricklins

In 2008, Mr. Murphy requested additional changes to the account. Because of withdrawals in the interim, the account now had a balance of \$117,000. Mr. Murphy requested that Roxanne and Philip Murphy be removed as beneficiaries. CP 266-67. Bank personnel acknowledge that the request must have been made. CP 150 [Allert Tr. 20:24-25]; CP 137-138; [Bolden Tr. 13:6-14:7]; CP 165 [Painchaud Tr. 27:5-28:4].

4. As requested by Mr. Murphy, Sterling issues a new certificate of deposit in 2008 listing only the Bricklins as beneficiaries

Consistent with Mr. Murphy's request, it is undisputed that Sterling issued, signed and delivered a new certificate of deposit to Mr. Murphy. CP 29; CP 68. For the Court's convenience, a copy is attached hereto as Appendix B.

The Certificate of Deposit was signed by "K. Bolden," who provided the bank's "authorized signature." CP 136.

The Certificate of Deposit "**certifies** that the Accountholder [Gerald Murphy] holds a time deposit with the Opening Balance and for the initial term expiring on the Initial Maturity Date shown herein in Sterling Savings Bank." *See* Certificate of Deposit, § II (first paragraph) (emphasis supplied). CP 29.

The Certificate of Deposit identifies the Opening Balance as \$117,000 and the "Initial Maturity Date" as November 25, 2009.

The Certificate of Deposit states: "The Certificate value hereof is **as shown on the records of the Bank . . .**" *Id.*, § II, ¶ 3 (emphasis supplied).

The Certificate of Deposit identifies the Bricklin defendants – and only the Bricklin defendants – as the beneficiaries.

The Certificate of Deposit was delivered to Mr. Murphy with a note signed by Ms. Bolden (the Bank's financial services specialist) which said, "This copy is for your records." CP 136 [Bolden Tr. at 6:3 – 6:5].

5. The 2008 certificate of deposit does not state it is conditional

Nowhere in that Certificate of Deposit is there a statement that the certificate has been issued conditioned upon a subsequent act by the account holder, Mr. Murphy, or anyone else. CP 29. In particular, there is no statement on the Certificate of Deposit that requires the account holder to submit a signature card to make the Certificate of Deposit effective. *Id.*; CP 151 [Allert Tr. 22:7-11].

The bank provided Mr. Murphy with no written notification that the 2008 Certificate of Deposit was contingent on Mr. Murphy taking some further action. In particular, there is nothing on the face of the 2008 certificate or in any note or written communication from the bank to Mr. Murphy that this certificate had been issued, signed, and delivered to Mr. Murphy in advance of receiving his signature card or that the bank needed a signature card from Mr. Murphy for this Certificate of Deposit to become effective. CP 29; CP 165 [Painchaud Tr. at 28:12-17] (no statement in the

certificate of deposit that it is effective only if the bank has a signature card on file (over counsel's objection)).

The 2008 certificate of deposit naming only the Bricklin defendants as beneficiaries provides that the account holder may exercise a Late Adjustment Option if the option is exercised "in writing on a form provided by the Bank and acknowledged by the authorized representative thereof." CP 29., § III, ¶ 4. That requirement for a further writing by the account holder is the only place on that Certificate of Deposit where the bank specifies that anything further is required from the account holder in writing or otherwise.

6. Sterling refuses to honor the 2008 certificate of deposit it had issued, signed and delivered to Mr. Murphy

Mr. Murphy died on July 12, 2009. The Bricklin defendants' mother, Anne Bricklin, presented the 2008 certificate of deposit to Sterling for payment on their behalf. CP 27. Sterling refused to pay the proceeds to the Bricklin beneficiaries. *Id.* The bank refused payment even though the Bricklin defendants were the only named beneficiaries on the 2008 certificate that the bank had signed and delivered to Mr. Murphy and even though the bank's employees admit that the certificate was signed and delivered to Mr.

Murphy only after receiving a “direct communication” from Mr. Murphy to make the change in beneficiaries. The bank refused because it said it could not find in its records a signature card from Mr. Murphy authorizing the beneficiaries to be only the Bricklin defendants. *Id.* Sterling then commenced this interpleader action to determine whether to honor the 2007 certificate of deposit (which included the Murphy defendants as beneficiaries) or to honor the 2008 certificate of deposit it issued and delivered (which excluded the Murphys).

C. Procedural History

In Superior Court, Sterling’s complaint portrayed this case as a typical interpleader action (where the bank deposits the funds and then is dismissed, leaving it to the defendants to litigate how the proceeds should be disbursed). CP 1-19. The Bricklin defendants counter-claimed against the bank with causes of action sounding in negligence and under the Consumer Protection Act. CP 22-24; First Supp. CP 332-333. The Bricklin defendants alleged that if the contract claim were decided against them and they were thereby deprived of the 100 percent share of the proceeds that they would have obtained consistent with Mr. Murphy’s undisputed intent, then the bank

should be liable for that loss because of its negligence and/or unfair and deceptive practices (violations of the CPA). *Id.*

The bank moved to be dismissed, as would be typical in most interpleader actions. The Bricklin defendants argued that this was not an ordinary interpleader case because there was evidence that the bank's negligence had contributed to the uncertainty on how the proceeds should be disbursed. Initially, the trial court agreed with the Bricklin defendants and denied Sterling's first motion to be dismissed. CP 103-104; 109-110.

Discovery then ensued. During depositions, bank personnel acknowledged that Mr. Murphy had requested the changes reflected in the 2008 certificate. But the bank again moved for summary judgment, contending that because the bank could not locate a signature card for the 2008 certificate, that the bank was precluded from honoring that certificate and was, therefore, required to honor the 2007 certificate *i.e.*, to include the Murphy defendants among the beneficiaries.

The Bricklin defendants responded that, consistent with its written procedures, Sterling would not have issued the 2008 certificate unless it had received a signature card from Mr. Murphy reflecting the change in beneficiaries. Issuance of the 2008 certificate (signed and certified by a bank

employee) was proof that Mr. Murphy had requested the change in beneficiaries and that the bank had received the signature card. The fact that the bank could not find the signature card was not the fault of the Bricklin defendants.

On cross-motions for summary judgment, the trial court ruled in favor of Sterling Bank and the Murphy defendants. Applying contract law principles, the trial court determined that because the bank could not find a signature card in its records, Sterling had to honor the 2007 certificate. CP 311. The 2008 certificate was not an enforceable contract given the absence of a signature card executed by Mr. Murphy in the bank's files. *Id.* The trial court dismissed the Bricklins' negligence and CPA claims, too. CP 314.

The Bricklin defendants appealed the summary judgment order. CP 317. Initially, the Bricklin defendants intended to challenge both the trial court's ruling on the contract issue and the trial court's ruling on the negligence and CPA issues. Because the initial notice of appeal covered all of the claims, Sterling Bank advised the beneficiaries that it would not distribute any of the proceeds until the appeal was concluded. This caused one of the Murphy defendants (Philip Murphy) to become quite agitated. Philip Murphy called Anne Bricklin (the mother of the Bricklin defendants)

and threatened that if the appeal were pursued “something is going to happen to you or someone in your family.” CP 331.

Reluctantly, the Bricklins decided to give in to Philip’s intimidation. The money at issue was simply not worth the risk of physical harm or the fear that would pervade the family. *Id.*

As a result, the Bricklins filed the Amended Notice of Appeal herein on March 16, 2011. CP 324-330. The Amended Notice of Appeal made clear that the Bricklin defendants were no longer challenging resolution of the contract claim, only the negligence and CPA claims. By doing so, the Bricklin defendants and the Murphy defendants expected that the bank would then distribute the proceeds of the 2007 certificate.

But instead of honoring the 2007 certificate per the judgment (and per the bank’s position in the litigation) the bank refused and filed its so-called “Response in Opposition” to the Amended Notice of Appeal. The clerk notified the parties to treat the bank’s response as a motion to dismiss and/or a motion to stay. After further briefing, the Court Commissioner denied the Bank’s Motion to Dismiss without prejudice to the bank’s right to renew it after the filing of appellants’ opening brief. Commissioner’s Ruling (May 2, 2011).

#### IV. ARGUMENT

- A. Sterling's Handling of Mr. Murphy's Account Was Negligent as a Matter of Law; the Summary Judgment Dismissal of the Bricklins' Negligence Claim Should Be Reversed
1. Undisputed facts demonstrate that Sterling negligently administered Mr. Murphy's account

As stated at the outset of this brief, one of two things happened. Either Sterling issued and delivered to Mr. Murphy an unconditional certificate of deposit *before* receiving Mr. Murphy's signature card contrary to its own written procedures (and common sense) or Sterling appropriately did not send the certificate of deposit to Mr. Murphy until after it received the signature card, but then lost track of the signature card. Either way, it is Sterling's carelessness that resulted in the Bricklins receiving 60 percent, not 100 percent, of the certificate of deposit proceeds. A careful bank would not sign and deliver a certificate of deposit before receiving a signature card nor would a careful bank lose track of a signature card in its records. One way or the other, Sterling's carelessness cost the Bricklins' 40 percent of the proceeds.

Moreover, as explained above, Sterling's imprudence in issuing certificate of deposits before receiving signature cards was exacerbated by its

failure to maintain a tracking system to assure ultimate receipt of the signature cards.

Oddly, though there is uncertainty as to exactly what occurred, summary judgment in favor of the Bricklins is appropriate nonetheless. While we cannot be certain whether Sterling acted negligently in issuing the 2008 certificate *before* receiving Mr. Murphy's signature card or whether Sterling acted negligently in losing the signature card for the 2008 certificate, the inevitable conclusion is that Sterling acted negligently one way or the other. Sterling's negligence can be determined as a matter of law.

2. Sterling owed Mr. Murphy (and the contract beneficiaries) a duty of care

A negligence claim is founded on the existence of a duty. Basic tort law teaches that "tort liability arises from conduct that imposes a risk of harm to other people . . . By creating the risk of harm to others, the defendant is charged with a duty to use reasonable care to see that the injury to others does not occur." 16 Washington Practice, § 1.13. To meet its duty of care, a person must have exercised "that care which an ordinarily reasonable person would exercise under the same or similar circumstances." *Granger Insurance Company v. Pierce County*, 164 Wn.2d 545, 553, 192 P.3d 886

(2008) (quoting *Berglund v. Spokane County*, 4 Wn.2d 309, 315, 103 P.2d 355 (1940)).

To determine whether the law imposes a duty of care, courts “weigh ‘considerations of logic, common sense, justice, policy, and precedent.’ ‘The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a plaintiff’s interests are entitled to legal protection against the defendant’s conduct.’” *Affiliated FM Insurance Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 449-50, 243 P.3d 521 (2010) (internal citations omitted).

In this case, considerations of “logic, common sense, justice, policy, and precedent” lead to the conclusion that Sterling had a duty to exercise reasonable care in its handling of the transaction whereby Mr. Murphy was seeking to change the beneficiaries on his account. There was an obvious “risk of harm” to Mr. Murphy and his intended beneficiaries if Sterling mishandled the account changes. Either by issuing the 2008 certificate prematurely or losing the signature card, Sterling created a risk of harm. Therefore, Sterling had a duty to act with reasonable care in the manner in which it managed the account.

Sterling asserted below it has no legal duty because there is no evidence that Sterling ever received the purported signature card from Mr. Murphy. This argument is fatally flawed as a matter of law. Sterling's duty to properly handle the paperwork is not dependent on the bank having received the signature card. Assume that Sterling did not receive the signature card from Mr. Murphy. Then, Sterling breached its duty of care by delivering the signed 2008 certificate to Mr. Murphy before it had received the signature card from him (compounded by the lack of a tracking system).<sup>3</sup>

3. The economic loss rule has been abrogated by the Supreme Court and, therefore, cannot be used to preclude the Bricklins' negligence claim

Sterling argued below that the Bricklins' negligence claim is barred by the economic loss rule, but the economic loss rule has been abrogated. Only a relic of the rule survives under a new name with new analytic requirements. *See Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d

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<sup>3</sup> Sterling's argument also is not factually correct. Contrary to Sterling's claim, there was evidence that Sterling received the signature card from Mr. Murphy, to wit, Sterling's delivery of the signed 2008 certificate to Mr. Murphy. While we believe Sterling's negligence can be determined as a matter of law, in any event, summary judgment could not be granted in favor of Sterling because a jury could reasonably conclude that the bank would not issue a certificate of deposit *before* receiving the signature card from the customer, *i.e.*, there were material facts in dispute regarding the factual predicate for Sterling's (legally flawed) defense.

380, 241 P.3d 1256 (2010). See also *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, *supra*.

*Eastwood* involved a lease dispute (*i.e.*, a contract claim). But the landlord also asserted the tort of waste. The Supreme Court determined that “[e]conomic losses are sometimes recoverable in tort, even if they arise from contractual relationships.” *Id.* at 1261.<sup>4</sup>

The Court explained that the “question is how a court can distinguish between claims where a plaintiff is limited to contract remedies from cases where recovery in tort may be available. A review of our cases on the economic loss rule shows that ordinary tort principles have always resolved this question. . . . A court determines whether there is an independent tort duty of care . . .” *Id.* at 1261-62 (emphasis supplied).

Sterling argued that because Bricklins sought economic relief under the contract (the certificate of deposit), they were asserting an economic loss that was barred by the economic loss rule. But the Supreme Court in *Eastwood* debunked that notion:

The test is not simply whether an injury is an economic loss arising from a breach of contract, but rather whether the injury

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<sup>4</sup> The lead opinion was signed by only two justices, but Justice Chambers’ concurrence signed by four justices joined in the lead opinion’s discussion of all of the points discussed in this brief, making those holdings the holdings of a majority of the Court.

is traceable also to a breach of a tort law duty of care arising independently of the contract.

*Id.* at 1264 (emphasis supplied).

The Supreme Court explained that the economic loss rule developed in the field of product liability cases. *Id.* at 1265. The court questioned the wisdom of applying the economic loss rule in other settings. The categories to which it historically applied “can be confusing when removed from their original context.” *Id.*

As the concurring opinion stated:

In sum, a careful examination of our case law reveals that this court has applied the independent duty rule to limit tort remedies in the context of product liability where the damage is to the product sold and in the contexts of construction on real property and real property sales. We have done so in each case based upon policy considerations unique to those industries. We have never applied the doctrine as a rule of general application outside of these limited circumstances.

*Id.* at 1275 (Chambers, J., concurring).

The court announced the end of the old economic loss rule, to be replaced with a new analytic tool called “the independent duty doctrine.” *Id.* at 1266. Under the independent duty doctrine, “the availability of a tort remedy depends on the nature of the risk that created the harm.” *Id.* at 1265.

Applying the new independent duty doctrine to the facts of the case before it, the court in *Eastwood* determined that a lessee's tort duty not to commit waste was a duty independent of the parties' contractual rights and duties. *Id.* at 1266-1267. The plaintiff's tort claims were not barred. Likewise, in *Affiliated FM Ins. Co., supra*, the Supreme Court determined that an engineering firm which provided engineering services for Seattle's Monorail had a tort law duty of reasonable care independent of its contractual obligations. *See also, Putz v. Golden*, \_\_\_ F. Supp.2d \_\_\_, 2010 WL 5071270 (W.D. Wa., Dec. 7, 2010) (applying *Eastwood* and *Affiliated FM* to deny motion to dismiss claim for tortious interference and negligent misrepresentation arising from a contract).

We have applied the new independent duty doctrine to the facts of this case in subsections IV.A.1 and 2, *supra*. We have demonstrated that applying basic negligence law principles, Sterling had a duty to carefully manage Mr. Murphy's account so as to not cause harm to Mr. Murphy or his intended beneficiaries. Sterling does not dispute that in 2008 Mr. Murphy was attempting to change the certificate account to name only the Bricklin defendants as the beneficiaries. Sterling cannot dispute that either it lost the signature card or delivered to Mr. Murphy a certificate of deposit showing

only the Bricklin defendants as the new beneficiaries before receiving the signature card. Sterling's contractual relationship with Mr. Murphy does not shield Sterling from the additional harm it caused the Bricklin beneficiaries by negligently administering this account.

Pursuant to contract and the trial court's now un-appealed ruling, Sterling is liable to the beneficiaries named on the 2007 certificate for a distribution in accordance with the terms of that certificate. But the Bricklin defendants will receive only 60 percent of the proceeds pursuant to the 2007 certificate and have suffered a loss of the remaining 40 percent due solely to the bank's failure to administer the account in accordance with Mr. Murphy's undisputed expressed intent. The Bricklins' negligence claim against Sterling is a valid claim under the independent duty doctrine.

The conclusion that tort principles apply is strengthened by the nature of the underlying contract. It would be one matter if this were a contract that had resulted from sophisticated entities bargaining over the terms of the contract between them and in that bargaining expressly allocated the risks of loss between themselves. That obviously is not the circumstance here. This was a classic contract of adhesion where the bank customer is given a signature card to sign and is thereby bound to the bank's uniform "Rules and

Regulations.” In such one-sided bargaining situations, the courts more readily infer a duty of due care (indeed, even a fiduciary duty) on the part of the party with superior bargaining power. *See, e.g., Webber v. Biddle*, 4 Wn. App. 519, 525, 483 P.2d 155 (1971). As stated in *Putz v. Golden, supra* at 15, where a contract is not the result of negotiations between sophisticated commercial players, “the court’s preference of ‘private ordering’ and limiting the parties to their contractual remedies is less compelling.”

Moreover, in this instance, the negligence arose not during the performance of the contract terms, but rather during the creation of the contract (or, more precisely, during the creation of a contract amendment). The bank had an independent duty to be careful when it worked with its customer to modify the beneficiaries on the contract of account. That duty of care arose not from the terms of the contract, but from the actions preceding the creation of the new contract (or contract amendment). *See, e.g., Putz v. Golden, supra* at 15; *Wells v. Chase Home Finance, LLC*, \_\_ F. Supp.2d \_\_, 2010 WL 4858252 (Nov. 19, 2010) (bank’s conduct during process of modifying loan agreement may give rise to tort duty independent from contract claims arising from the original loan agreement). Sterling’s duties while processing Mr. Murphy’s request to change beneficiaries were

independent of whatever rights and responsibilities were created in the contract itself.

B. The Bricklin Defendants Were Entitled to Summary Judgment on Their Consumer Protection Act Claims

Sterling advanced several grounds below for dismissing the Bricklins' Consumer Protection Act claims. None of these grounds are meritorious. The motion to dismiss the CPA claims should not have been granted. Indeed, this Court could determine that the undisputed facts establish a Consumer Protection Act claim as a matter of law.

1. Sterling's actions were unfair or deceptive

The Consumer Protection Act claim requires evidence of an "unfair or deceptive act or practice." *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Sterling asserted below that the Bricklins have no evidence of any "unfair or deceptive act or practice." But to the contrary, the evidence discussed above provides ample support for Bricklins' claim that Sterling acted in an unfair or deceptive manner.

The bank's delivery of a signed certificate of deposit to Mr. Murphy that purported to "certify" that the bank was holding Mr. Murphy's funds pursuant to the terms stated on that certificate (*i.e.*, for the benefit of only the

Bricklin defendants) certainly was deceptive if, as the bank claims and the Superior Court determined, the certificate did not “certify” anything. Sterling provided a written certificate of deposit to Mr. Murphy, signed by an authorized bank representative with a note stating “This copy is for your records.” Nowhere on the certificate of deposit is there any wording that the validity of the certificate is subject to the bank being able to produce a signature card signed by Mr. Murphy at a later date. No warning was provided by the bank that if the bank lost or did not receive the signature card signed by Mr. Murphy that the certificate would be invalid. It appeared to Mr. Murphy that he had a valid certificate naming only the three Bricklin children as beneficiaries.

Viewed from the perspective of the consumer, the risks associated with the bank’s alleged system of mailing a certificate of deposit before receipt of a signature card are abundantly clear. A bank customer in the position of Mr. Murphy would have received a signed certificate from the bank; signed the signature card; and mailed it back to the bank. At that juncture, the customer would reasonably assume he was the holder of an unconditional instrument issued by the bank that “certifies” the bank is holding his funds pursuant to the terms stated on the certificate. “This copy

is for your records,” Sterling advised. CP 102. Transaction completed. What a surprise to learn later that the bank is disclaiming a duty to honor the unconditional certificate signed by the bank’s authorized representative and delivered to the account holder.

A jury could readily determine that Sterling’s delivery of an unconditional certificate that, in reality, was conditional and, therefore, “certified” nothing was unfair or deceptive. Indeed, this Court could make that determination as a matter of law.

2. The public interest is impacted

Sterling also argued that there is no evidence that the public interest is implicated by Sterling’s practices here. An impact to the public interest can be demonstrated by evidence that the unfair or deceptive practice was not a one-time event, but rather was part of a pattern or practice that the defendant employs generally with the public:

An act or practice affects the “public interest impact,” when  
(1) it is part of a pattern or generalized course of conduct, and  
(2) there is a real and substantial potential for repetition of defendant’s conduct after the act involving plaintiff.

*Eifler v. Shurgard Capital Management Corp.*, 71 Wn. App. 684, 697, 861 P.2d 1071 (1993) (citing *Hangman Ridge, supra*; *Travis v. Washington Horsebreeders*, 111 Wn.2d 396, 407, 759 P.2d 418 (1988)).

Here, all of Sterling's witnesses testified that the manner in which they handle Mr. Murphy's account was not unique, but rather was part of their standard (though unwritten) procedure. According to the bank's employees, they routinely sign and deliver certificates of deposit to customers *before* the bank receives a signature card from the customer:

Question: . . . So you are saying that it is standard bank policy to mail a certificate of deposit signed by the bank with the new title before the bank receives the signed signature card from the customer?

Answer: [Ms. Allert] Yes, because they are sent to the customer at the same time. So the customer signs the signature card, and all they have to do is file their certificate away rather than waiting for us to get the signed signature card and then turn around and mail them their copy.

CP 149.

Because, according to the bank's testimony, these procedures were not unique to Mr. Murphy's situation, these unfair and deceptive practices can just as readily damage other unwary customers who believe a signed certificate of deposit really means the bank is certifying that it possesses the customer's funds under the terms stated on that written document. If the Bricklins prevail on their CPA claim, it will benefit not only the Bricklins, but all the other customers of Sterling Savings Bank who are at risk of injury

because of these unfair and deceptive practices which Sterling states it routinely follows.

3. The economic loss suffered by the Bricklins is an “injury to property” covered by the CPA

Below, Sterling made the extremely strained argument that only losses to a business interest are redressable under the Consumer Protection Act, *i.e.*, that consumer losses are not covered – despite the very title of the Act. To support this surprising assertion, Sterling quotes a case that states that a “business or property” injury is one in which the party suffers “loss of professional or business reputation, loss of goodwill, or inability to tend to a business establishment.” *Ambach v. French*, 167 Wn.2d 167, 173, 216 P.3d 405 (2009)). But *Ambach* does not state that these business losses are the “only” losses that qualify as “property” injury under the Consumer Protection Act. Rather, *Ambach* invoked the well-established rule that the CPA does not cover personal injury claims (including medical costs attributable to the personal injury). But the Bricklins are not alleging personal injuries. *Ambach* is irrelevant.

Contrary to Sterling’s suggestions, there are many cases in which the CPA has been utilized to recover consumer (*i.e.*, non-business) property damages. *See, e.g., Mayer v. Sto Industries, Inc.*, 123 Wn. App. 443, 98 P.3d

116 (2004) (consumer homeowner damages resulting from defective siding); *McRae v. Bolstad*, 32 Wn. App. 173, 646 P.2d 771 (1982) (residential real estate transaction damages); *Lidstrand v. Silver Crest Industries*, 28 Wn. App. 359, 623 P.2d 710 (1981) (defective mobile home for private use). *See also Seattle Endeavors, Inc. v. Mastro*, 67 Wn. App. 866, 871, 841 P.2d 73 (1992), *reversed on other grounds*, 123 Wn.2d 339, 868 P.2d 120 (1994) (attorneys' fees available under CPA in both "consumers' suits" and in suits between business entities). The statute, after all, is titled the "Consumer" Protection Act, not the "Business" Protection Act. RCW 19.86.910. The Bricklins' economic losses fall well within the "consumer protection" ambit of the CPA.

V. THE BRICKLIN DEFENDANTS ARE ENTITLED  
TO ATTORNEYS' FEES AND  
LIMITED TREBLE DAMAGES

The Consumer Protection Act authorizes an award of attorneys' fees to a plaintiff who prevails in a Consumer Protection Act case. RCW 19.86.090. In addition, the Court has discretion to award up to \$25,000 of exemplary damages. *Id.*

If this Court determines that the Bricklin defendants are entitled to judgment as a matter of law on their Consumer Protection Act claim, then the

Court should also enter an award of the Bricklins' actual, reasonable attorneys' fees and litigation costs. *See, e.g., Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 170, 795 P.2d 1143 (1990) (RCW 19.86.090 "entitles" a successful CPA claimant to an award of attorneys' fees and costs). Fees on appeal should be determined by this Court in accordance with RAP 18.1. Fees and costs at the trial court level should be determined by the trial court on remand.

## VI. CONCLUSION

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 2007 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.

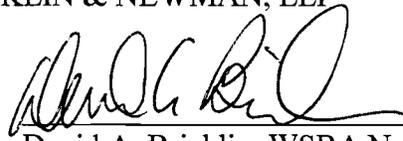
The Court should not address the contract claim which is no longer under appeal. Sterling's liability under the certificate of deposit contract should not be impacted by this appeal.

Dated this 1 day of June, 2011.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By:



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

Date: 08/22/2007 Term: 365 Days Tax ID: 327-14-8583 Number: 49994113298

**CERTIFICATE OF DEPOSIT COPY AND**

Account Number: CD49994113298

**CERTIFICATE OF DEPOSIT SIGNATURE CARD**

Amount of Deposit: \*\*\*Two hundred fifty thousand and no/100\*\*\* \$ 250,000.00

This Time Deposit is Issued to: \_\_\_\_\_ Issued: **STERLING SAVINGS BANK**  
1700 S 320TH ST  
FEDERAL WAY, WA 98003-5412

GERALD MURPHY  
ITF PHILLIP MURPHY/ROXANNE MURPHY  
ITF ALEX/JACOB/LAURA BRICKLIN  
9133 NE SALMON RUN LANE  
BAINBRIDGE ISLAND, WA 98110

By [Signature]

Not Negotiable - Not Transferable - Additional terms are below.

auth to change beneficiaries 2/6/07

**Additional Terms and Disclosures**

This form contains the terms for your time deposit. It is also the Truth-in-Savings disclosure for those depository institutions. There are additional terms and disclosures on page two of this form, some of which explain or expand on those below. You should keep one copy of this form.

Minimum Balance Requirement: You must make a minimum deposit to open this account of \$ 100,000.00

Maturity Date: This account matures 08/22/2007

You must maintain this minimum balance on a daily basis to earn the annual percentage yield disclosed.

Rate Information: The interest rate for this account is 05.400% with an annual percentage yield of 05.40%. This rate will be paid until the maturity date specified above. Interest begins to accrue no later than the business day we receive credit for the deposit of non-cash items (for example, checks).

Withdrawals of Interest: Interest  accrued  credited during a term can be withdrawn: at maturity

Interest will be compounded Non-Compounding. Interest will be credited monthly to this acct & trf monthly to Acct # 59990145096

Early Withdrawal Penalty: If we consent to a request for a withdrawal that is otherwise not permitted you may have to pay a penalty. The penalty will be an amount equal to: \_\_\_\_\_ interest on the amount withdrawn.

The annual percentage yield assumes that interest remains on deposit until maturity. A withdrawal of interest will reduce earnings.

Renewal Policy:

If you close your account before interest is credited, you will not receive the accrued interest.

Single Maturity: If checked, this account will not automatically renew. Interest  will  will not accrue after maturity.

Automatic Renewal: If checked, this account will automatically renew on the maturity date. (see page two for terms) Interest  will  will not accrue after final maturity.

The NUMBER OF ENDORSEMENTS needed for withdrawal or any other purpose is: 1

ACCOUNT OWNERSHIP: You have requested and intend the type of account marked below.  
 Single Account  
 Joint Account - With Survivorship  
 Joint Account - No Survivorship  
 Community Property Account  
 Trust: Separate Agreement Dated \_\_\_\_\_

**BACKUP WITHHOLDING CERTIFICATIONS**

TIN: 327-14-8583  
 Taxpayer I.D. Number - The Taxpayer identification Number shown above (TIN) is my correct taxpayer identification number.  
 Exempt Recipients - I am an exempt recipient under the Internal Revenue Service Regulations.

Backup Withholding - I am not subject to backup withholding either because I have not been notified that I am subject to backup withholding as a result of a failure to report all interest or dividends, or the Internal Revenue Service has notified me that I am no longer subject to backup withholding.  
SIGNATURE - I certify under penalties of perjury the statements checked in this section and that I am a U.S. person (including a U.S. resident alien).  
[Signature]  
DATE 2/29/07

Revocable Trust or  Pay on Death Designation as defined in this agreement (Beneficiaries' names and addresses)

PHILLIP MURPHY  
ROXANNE MURPHY  
ALEX BRICKLIN  
JACOB BRICKLIN  
9133 NE SALMON RUN LANE

SIGNATURES: I AGREE TO THE TERMS STATED ON PAGE ONE AND PAGE TWO.  
[Signature]

APPENDIX A

AA Don x4

ACCOUNT NUMBER CD49994113298

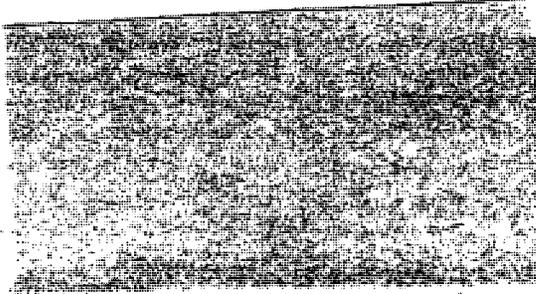
# ADJUSTABLE RATE CERTIFICATE of DEPOSIT

STERLING SAVINGS BANK  
1700 S 320TH ST  
FEDERAL WAY, WA 98003-5412  
(253) 529-3311

## I. ACCOUNT SUMMARY SECTION

Accountholder:

GERALD MURPHY  
ITF ALEX BRICKLIN & JACOB BRICKLIN  
ITF LAURA BRICKLIN  
9133 NE SALMON RUN LN  
BAINBRIDGE ISLAND, WA 98110-3412



Date of Issue	Issuing Office	Opening Balance	Minimum Balance Requirement	Initial Maturity Date	
08/25/2008	035	\$117,000.00	\$5,000.00	11/25/2009	
Renewal Term Rate: See Section IV.	Annual Percentage Yield	Interest Rate	Minimum Addition	Renewal Term	Frequency of Compounding
	04.00 %	03.930 %	\$500.00	15 Months	Monthly

Earnings Distribution:

8/31/2008

Dates Beginning

and

Monthly Transfer

throughout, with the last distribution on the final maturity date.

Non-transferable/Non-negotiable

## II. GENERAL SECTION

This certifies that the Accountholder holds a time deposit with the Opening Balance and for the initial term expiring on the Initial Maturity Date shown herein in Sterling Savings Bank.

The Accountholder may make additions to the balance of this account at any time during the term of this certificate in amounts not less than the Minimum Addition provided for in Section I. In the event of such an addition, the terms of this account shall remain the same as the initial term. The option to make additions on general terms will be subject to management consent.

The certificate value hereof is as shown on the records of the Bank and may not be transferred or withdrawn when the holder of record is indebted to the Bank hereon and shall be transferable only upon the records of the Bank when this certificate is surrendered.

## III. EARNINGS SECTION

Interest begins to accrue no later than the business day we receive credit for the deposit of non-cash items (for example, checks). This account shall receive earnings at the Interest Rate and with the frequency of compounding as set forth. Such earnings shall be payable on the Earnings Distribution Dates above set forth, provided the balance in the account is not reduced below the Minimum Balance Requirement.

If such balance is reduced below the Minimum Balance Requirement, this certificate shall be canceled and the remaining balance shall be deposited in a regular savings account and receive the rate of earnings then paid on regular savings accounts. (See also Section V.)

The Annual Percentage Yield assumes that interest will remain on deposit until maturity. A withdrawal of interest will reduce earnings.

The holder of this certificate is only allowed the option of a RATE ADJUSTMENT if this box is checked. The option must be exercised by the Accountholder in person in writing on a form provided by the Bank and acknowledged by an authorized representative thereof. The Rate Adjustment Option does not extend the Initial Maturity Date. The new adjusted rate is paid from the date the original rate is adjusted to the end of the initial term. The Rate Adjustment Option on renewal terms will be subject to management consent.

## IV. AUTOMATIC RENEWAL SECTION

This account shall be automatically renewed at the close of business on the Initial Maturity Date or the maturity date of any renewal or extended term at the rate then being offered by the Bank on this class of account unless (1) withdrawn within the 10-day period referred to in Section V. hereof or (2) at least 30 days prior to any such date the Bank gives written notice, by mailing to the Accountholder at his address last shown on the Bank records, that this account will not be renewed at the Interest Rate and/or for the Renewal Term set forth above. In such event, the account will either be renewed for such additional term and at such rate of earnings as set forth in said notice or the account will be converted to a regular savings account and receive earnings at the rate then paid on regular savings accounts.

Member FDIC

## V. PENALTY CLAUSE SECTION

Except as otherwise provided herein, in the event of any withdrawal from this account prior to a maturity date, the Accountholder shall forfeit an amount equal to (1) for terms of 1 year or less, three months simple interest or (2) for terms of more than 1 year, six months simple interest, on the amount withdrawn at the interest rate being paid on the account, regardless of the time the funds withdrawn have remained in the account. Such penalty will first be taken from interest and any additional amount necessary will be taken from the principal.

The penalty prescribed herein will not be imposed for a withdrawal following the death or adjudication of incompetence of Accountholder.

Any withdrawal which reduces the account balance below the Minimum Balance Requirement shall be considered as a withdrawal of the entire account balance and shall be subject to the penalty prescribed herein.

Earnings credited to this account may be withdrawn at any time during the current term without penalty. Earnings in the account at the commencement of the Renewal Term shall be deemed earned with the principal and any earnings for the Renewal Term may be withdrawn at any time without penalty during such term.

If the account or any portion thereof is withdrawn not more than 10 days after maturity date, earnings shall be paid through from maturity at the rate then applicable to this account to the date of withdrawal without reduction for any penalty.

To the extent necessary to comply with these requirements, deductions shall be made from the amount withdrawn or the remaining account balance.

AUTHORIZED SIGNATURE

STERLING SAVINGS BANK



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 Opening Brief of the Bricklin Appellants to be served on:

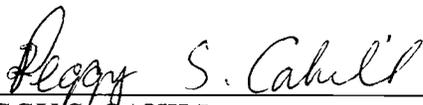
Leslie R. Weatherhead  
Steven J. Dixson  
Witherspoon, Kelley, Davenport & Toole, P.S.  
1100 U.S. Bank Building  
422 West Riverside Avenue  
Spokane, WA 99201-0300  
(Attorneys for Sterling Savings Bank)

By United States Mail  
 By Federal Express/Express Mail  
 By E-Mail to [sjd@witherspoonkelley.com](mailto:sjd@witherspoonkelley.com)

Kevin H. Breck  
Jeffrey A. Herbster  
Winson & Cashatt  
601 W. Riverside Avenue, Suite 1900  
Spokane, WA 99201  
(Attorneys for Roxanne Murphy and Phillip Murphy)

By United States Mail  
 By Federal Express/Express Mail  
 By E-Mail to [khb@winstoncashatt.com](mailto:khb@winstoncashatt.com)

DATED this 1<sup>st</sup> day of June, 2011, at Seattle, Washington.

  
\_\_\_\_\_  
PEGGY S. CAHILL

Bricklin\Sterling Savings Bank\Appeals\Decsv