

No. 86220-6

THE SUPREME COURT OF WASHINGTON

MICHAEL and THERESA ANNECHINO, husband and wife,

Petitioners,

v.

MICHAEL C. WORTHY and SUSAN WORTHY, husband and wife and
the marital community composed thereof, JOAN COOPER, KELLY
REYNOLDS, UMPQUA BANK, SUCCESSOR IN INTEREST TO
BANK OF CLARK COUNTY, and CLARK COUNTY
BANCORPORATION,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

INTRODUCTION1

ARGUMENT2

 A. Existing Case Law Does Not Support the Imposition of
 Personal Liability Upon Bank Officers and Employees
 Arising From Their Job Performance2

 B. There are no Genuine Issues of Material Fact That
 Compel a Reversal8

 C. Alternatively, the Decision Should be Affirmed Because
 Petitioners Were Responsible for Their Own Damages9

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases Cited

<i>Grayson v. Nordic Construction Company, Inc.</i> , 92 Wn.2d 548, 599 P.2d 1271 (1979).....	2
<i>Grierson v. Parker Energy Partners, 1984-I</i> , 737 SW.2d 375 (Tex. App. 1987).....	7
<i>Grosvenor Properties Ltd. v. Southmark Corp.</i> , 896 F.2d 1149, (9 th Cir. 1990).....	6
<i>Hutson v. Wenatchee Federal Savings and Loan Association</i> , 22 Wn. App. 91, 588 P.2d 1192 (1978).....	3
<i>Liebergessell v. Evans</i> , 93 Wn.2d 881, 613 P.2d 1170 (1980).....	2, 4
<i>Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP</i> , 110 Wn. App. 412, 40 P.3d 1206 (2002).....	5
<i>Nasrawi v. Buck Consultants, LLC</i> , 713 F. Supp. 2d 1080, (E.D. Cal. 2010).....	7
<i>One Pacific Towers Homeowners’ Association v. HAL Real Estate Investments, Inc.</i> , 108 Wn. App. 330, 30 P.3d 504 (2001), <i>aff’d in part and rev’d in part</i> , 148 Wn.2d 319, 613 P.3d 1094 (2002).....	6
<i>Pommier v. Peoples Bank Marycrest</i> , 967 F.2d 1115 (7 th Cir. 1992).....	5
<i>Schwarzmann v. Association of Apartment Owners of Bridge Haven</i> , 33 Wn. App. 397, 644 P.2d 1177 (1982).....	2
<i>Senn v. Northwest Underwriters, Inc.</i> , 74 Wn. App. 408, 875 P.2d 637 (1994).....	2, 6
<i>Slottow v. American Casualty Company of Reading, Pennsylvania</i> , 10 F.3d 1355 (9 th Cir. 1993).....	6
<i>State v. Ralph Williams’ North West Chrysler Plymouth, Inc.</i> , 87 Wn.2d 298, 553 P.2d 423 (1976).....	6

Tokarz v. Frontier Savings and Loan Association, 33 Wn. App. 456,
656 P.2d 1089 (1982).....3

United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal.3d 586,
83 Cal. Rptr. 418, 463 P.2d 770 (1970).....6

Rules and Statutory Provisions

RCW 62A.4-40610

INTRODUCTION

Respondents Michael C. Worthy and Kelli Reynolds submit this supplemental brief as authorized by the Court in its order of November 1, 2011, and pursuant to RAP 13.7. Respondents respectfully ask this Court to affirm the holding of the Court of Appeals, that bank officers and employees do not face personal liability as fiduciaries to bank customers in the performance of their daily bank duties.

Division II of the Court of Appeals concluded that none of petitioners' authorities supports the imposition of personal fiduciary duties upon bank officers and employees in their dealings with bank customers. Court of Appeals Opinion ("Opinion"), at 4. Nevertheless, petitioners ask this Court to create a special class of fiduciary duties and personal liability, applicable to bank officers and employees. Such a result is unwarranted and unsupported by existing law, as well as a result that no bank employee would reasonably contemplate. Furthermore, petitioners' requested relief would be contrary to public policy, as a decision in petitioners' favor would open the floodgates of litigation, allowing thousands of bank customers to file suit against bank employees to attempt to impose personal liability of untold amounts, and for litigation by customers against corporate employees in general.

Because existing law does not impose personal liability or fiduciary duties upon bank officers and employees, and because the creation of a special class of such potential liability would likely result in a groundswell of litigation against banks, and against corporations in general, the decision of the Court of Appeals should be affirmed.

ARGUMENT

A. Existing Case Law Does Not Support the Imposition of Personal Liability Upon Bank Officers and Employees Arising From Their Job Performance

It is well-established under Washington case law that a corporate officer does not face personal liability in the course of performing his or her duties unless the officer knowingly and in bad faith commits or condones the commission of a wrongful act. *See, e.g., Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 875 P.2d 637 (1994). *See also Grayson v. Nordic Construction Company*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979); *Schwarzmann v. Association of Apartment Owners of Bridge Haven*, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982). It is also well established that parties to a business transaction are generally held to deal with one another at arm's length, rather than in a fiduciary relationship. *See, e.g., Liebergesell v. Evans*, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980). This general rule is applicable to transactions between a bank and

its customers. See *Tokarz v. Frontier Savings and Loan Association*, 33 Wn. App. 456, 458-59, 656 P.2d 1089 (1982).

The authorities relied upon by petitioners stand for the proposition that, under special and limited circumstances, a bank may owe quasi-fiduciary duties of disclosure to one of its customers. None of these authorities, however, supports the proposition that a bank's officers and employees can be deemed personally to owe similar quasi-fiduciary duties. At most, these authorities allow a duty to disclose to be imposed on a bank when special circumstances are shown.

In *Tokarz, supra*, a bank-customer case, the court recognized that special circumstances could result in the imposition of a fiduciary duty upon a bank to disclose facts to one of its customers. However, the court did not discuss even possibly imposing a similar fiduciary duty or duty to speak upon the officers and employees of the financial institution.¹

In *Hutson v. Wenatchee Federal Savings and Loan Association*, 22 Wn. App. 91, 588 P.2d 1192 (1978), another bank case, the court found that special circumstances could result in the imposition of a duty upon the bank to provide information to a customer so as to avoid misleading the customer, based upon a quasi-fiduciary relationship between the financial

¹ Notably, there is no allegation in this case that respondents withheld any information from petitioners. Instead, the contention is that respondents made a mistake in performing their job duties, and that petitioners failed to notice the claimed mistake over several months' time.

institution and the customer. *Id.* at 103. Again, nothing in the court's opinion suggests the possible imposition of a similar quasi-fiduciary duty upon the bank's officers and employees.

Consistent with these principles is *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980); another case involving a lender and a borrower. There, the lender was an individual rather than an institution. Under the special circumstances of that case, the court held there was a question of fact as to whether the lender and her borrower had entered into a fiduciary relationship. *Id.* at 891.² Those special circumstances included the lender's lack of business expertise, the friendship between the parties, superior knowledge on the part of the borrower, and the borrower acting in the role of an advisor. *Id.* This Court held that there was a question of fact as to whether these circumstances estopped the borrower from asserting a usury defense and whether the lender had a right to rely on statements made by the borrower.

Each of these cases, at most, holds that a duty to disclose or to not mislead may arise, under special circumstances, in connection with a lender-borrower transaction. The cases do not stand for the proposition

² *Liebergesell* presented a unique situation, as the unsophisticated party in that case was the widowed school teacher lender, while the sophisticated and knowledgeable party was the borrower.

that financial institutions generally owe fiduciary duties to their customers; indeed the general rule is expressly to the contrary.³

And most significantly, nothing in the case law supports the proposition that the officers and employees of a financial institution owe their employer's customers a duty to disclose, let alone a general fiduciary or quasi-fiduciary duty in connection with their job performance. It would be an extreme and unwarranted expansion of the law if it were held that individuals such as Kelli Reynolds face personal liabilities of hundreds of thousands of dollars as the result of accepting employment with a bank.

Thus, it has been established that a financial institution or other lender may, in certain limited circumstances, be deemed to owe one of its customers a duty to disclose or not to mislead, under principles concerning fiduciary or quasi-fiduciary duties. There is no legal or principled basis to announce an extension of this principle, imposing similar unlimited fiduciary duties on a financial institution's officers and employees to their employer's customers.

Further, a reversal would be contrary to case law holding that officers and employees do not owe independent fiduciary duties to third

³ See, e.g., *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 435, 40 P.3d 1206 (2002) (a business advisor did not enter into a fiduciary relationship with its customer, even though the customer testified it trusted and had confidence in the business advisor, with the court noting, "[w]e trust most people with whom we choose to do business." *Pommier v. Peoples Bank Marycrest*, 967 F.2d 1115, 1119 (7th Cir. 1992)).

parties in connection with the performance of their employment duties. For example, in *Senn, supra*, the corporate director was found to owe a fiduciary duty to her own company, but was not found to owe fiduciary duties to third parties. *Senn*, 74 Wn. App. at 414-17. To be personally liable to third parties, the officer or employee must have engaged in fraudulent or other intentionally wrongful conduct. See, e.g., *State v. Ralph Williams North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976); *One Pacific Towers Homeowners' Association v. HAL Real Estate Investments, Inc.*, 108 Wn. App. 330, 347, 30 P.3d 504 (2001), *aff'd in part and rev'd in part*, 148 Wn.2d 319, 613 P.3d 1094 (2002).

Cases from other jurisdictions are consistent with this rule. In *Slottow v. American Casualty Company of Reading, Pennsylvania*, 10 F.3d 1355 (9th Cir. 1993) (California law), the court declined to impose personal liability upon a bank president and director (Slottow), where third parties alleged that he had breached fiduciary duties to them. The court stated the general rules at 1359-60:

Although Slottow may have faced liability *to the bank* for his mistakes, "a corporation's employees owe no independent fiduciary duty to a third party with whom they deal on behalf of their employer." *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1154 (9th Cir. 1990) (California law); accord *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal.3d 586, 595, 83 Cal. Rptr. 418, 463 P.2d 770 (1970). The mere fact that Slottow signed the agreements in the ordinary course of his duties

as President of [Fidelity National Trust] does not convert his actions into the type of personal direction or participation in the tort that would expose him to substantial risk of personal liability.

Accord Nasrawi v. Buck Consultants, LLC, 713 F. Supp. 2d 1080, 1086

(E.D. Cal. 2010) (“Directors and/or officers of a corporation do not incur

personal liability for torts of the corporation merely by reason of their

official position, unless they personally participate in the wrong”). In

Grierson v. Parker Energy Partners, 1984-I, 737 SW.2d 375 (Tex. App.

1987), the court held that a corporate president did not personally owe

fiduciary duties to a partnership, a third party, stating:

In order to hold Grierson [the president] personally liable without piercing the corporate veil, he must have knowingly participated in a tortious act. Stating Grierson breached fiduciary duties to the partnership is unclear when he ordinarily owes no fiduciary duty to the partnership. The corporation as general partner owes the fiduciary duty.

Petitioners’ position on appeal continuously fails to distinguish between the rules of law that are applicable to banks and those which are applicable to officers and employees of banks.⁴ In doing so, appellants fail to cite a single case for the proposition that an officer or employee can

⁴ Amicus Curiae Richard and Karen Applegate similarly fail to distinguish between the legal obligations of a bank and the legal obligations of a bank’s officers and employees. See Brief of Amicus Curiae, at 3 (“Incredibly, this Court has never decided what legal principles apply to the question of whether a bank has, through its actions, created a fiduciary duty to a customer.”) (Emphasis added.) The pleadings in the Applegate case, referred to by Amicus, reveal that bank officers and employees were not even named as individual defendants. See pleadings available at http://www.co.pierce.wa.us/cfapps/linx/calendar/getcivilcase.cfm?cause_num=10-2-05028-6.

be held personally responsible for the breach of a fiduciary duty where there is no allegation that the officer or employee committed an intentional and wrongful act or acted in a manner so as to obtain a personal benefit. The Opinion below is wholly consistent with existing case law. The only distinguishing feature at place in this case is that the FDIC closed the Bank of Clark County, leading petitioners to pursue novel legal theories in an effort to find another source of recovery, rather than to pursue their available remedies through the FDIC.

B. There are no Genuine Issues of Material Fact That Compel a Reversal

The trial court and the Court of Appeals both assumed that petitioners' factual assertions were true for purposes of deciding respondents' motion for summary judgment. Before the Court of Appeals, petitioners argued that there were no factual issues to be resolved. *See* Brief of Appellants, at 3:

At the outset it is important to re-iterate (sic) the legal and factual basis of the Plaintiffs' case. The factual predicates to the legal issue identified above are all uncontradicted and a matter of record. The clear cut legal issue for this court, on de novo review, is...

Despite this position and judicial admission, petitioners then contended in their petition for review that issues of fact remained. *See* Petition for Review, at 13-14:

In addition, the Court of Appeals impermissibly resolved the numerous factual disputes,...

* * *

...The Court of Appeals opinion, though it cited *Hutson*, failed to follow this rule by improperly resolving disputed facts against the petitioners and failing to accord them the reasonable inferences from those facts.

There are no genuine issues of fact. Even if it were to be assumed that the facts were all as stated by petitioners, there is no basis in law for the imposition of fiduciary or quasi-fiduciary duties, or the imposition of personal liability, upon bank officers and directors such as respondents Worthy and Reynolds.

C. Alternatively, the Decision Should be Affirmed Because Petitioners Were Responsible for Their Own Damages.

The trial court properly concluded that petitioners bear responsibility for their own claimed damages, noting that petitioners: (a) had the opportunity to review their proposed deposits prior to transferring any funds, (b) filled out deposit records and account cards showing ownership of the accounts before transferring funds, and (c) failed to notice that any deposits had been placed in an account other than they intended even though petitioners' own review of the monthly statements and records provided by the bank would have put petitioners on notice of that fact. CP 271. Although the Court of Appeals did not address this

conclusion,⁵ the fact that petitioners failed to see what was plainly there to be seen provides an alternative basis for this Court to affirm the Court of Appeals.

RCW 62A.4-406 sets forth a general policy of requiring bank customers to examine statements and other documentation provided to them by banks, and precluding customers from asserting claims that could have been avoided by a reasonable inspection. Here, petitioners apparently failed to examine the records provided to them by their bank, failed to review monthly statements received by petitioners, and failed to verify that their accounts were structured in the way petitioners desired. Petitioners' failure to comply with their statutory and common sense obligations to care for their own interests caused their claimed damages, and this failure provides an alternative ground for this Court to affirm the Court of Appeals.

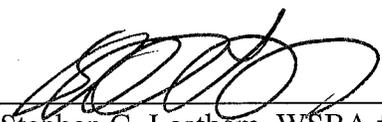
CONCLUSION

For the foregoing reasons, the opinion of the Court of Appeals should be affirmed.

⁵ The trial court did reach this conclusion.

RESPECTFULLY SUBMITTED this 30 day of November, 2011.

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing RESPONDENTS' SUPPLEMENTAL BRIEF to be served on the following:

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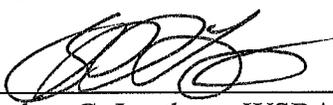
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