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No. 40141-0-II

SUPREME COURT
OF THE STATE 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, KELLI REYNOLDS, UMPQUA BANK, SUCCESSOR IN INTEREST TO BANK OF CLARK COUNTY, and CLARK COUNTY BANCORPORATION,

Respondents.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS

Respondents are certain of the defendants before the trial court and Respondents before the Court of Appeals: Michael C. Worthy, Susan Worthy[1], and Kelli Reynolds.[2] Accordingly, the Respondents for purposes of this petition are: Michael C. Worthy and Kelli Reynolds.

II. RESTATEMENT OF ISSUES PRESENTED

1. Did the Court of Appeals correctly hold that bank employees do not enter into a fiduciary relationship with the Bank's customers when, in the course of their employment, they attempt to structure the customers' accounts so as to obtain full FDIC insurance coverage?

2. Did the Court of Appeals correctly hold that, even where a bank enters into a fiduciary relationship with its customers, the bank's employees are not personally held to similar fiduciary obligations, particularly where there is no evidence that the employees knowingly and in bad faith committed or condoned the commission of a wrongful act?

3. Did the Court of Appeals correctly hold that bank employees are not deemed to have gratuitously assumed a personal duty of

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[1] Susan Worthy passed away during the time that this matter has been on appeal.

[2] Plaintiffs named several other defendants in this action. Among those defendants was Joan Cooper, who was granted summary judgment by the trial court. Plaintiffs did not include Ms. Cooper in any of their arguments at the Court of Appeals, and the Court therefore affirmed the trial court's order dismissing plaintiffs' claims against Ms. Cooper. The Court of Appeals opinion, at 4 n.2.

care to the Bank's customers where the employees were performing duties within the scope of a normal banking transaction?

III. SUMMARY OF GROUNDS FOR DENYING PETITION

Plaintiffs do not even attempt to explain that this case matches any of the considerations governing acceptance of review by the Supreme Court set forth in RAP 13.4(b). Plaintiffs merely contend, erroneously, that the Court of Appeals' decision is in conflict with established case law. To the contrary, the decision was entirely consistent with longstanding case law regarding fiduciary duties.

Plaintiffs ask this Court to create a new set of legal obligations, applicable only to the employees of financial institutions, rendering those employees personally liable to customers if they make a clerical or other inadvertent mistake in the course of performing their duties.[3] No other class of employee is faced with the risk of losing everything simply by going to work and doing their job. Plaintiffs present no compelling legal, factual, or policy reasons justifying such a gross expansion of the law governing personal liability.

Plaintiffs ignore longstanding case law that, even where unique facts justify the imposition of fiduciary duties upon an employer institution, those same fiduciary duties are not imposed upon the

[3] Or, in the case of Mr. Worthy, apparently where the employee simply sees e-mails and other work of fellow employees.

employees of that institution. To accept plaintiffs' arguments would create unprecedented risks of personal liability upon not only the responding employees, but upon thousands of persons employed by financial institutions throughout the state.

IV. COUNTERSTATEMENT OF MATERIAL FACTS

Plaintiff Michael Annechino was both a customer of and an investor in Bank of Clark County ("the Bank"). CP 62. Plaintiff was an experienced and apparently successful business person, having worked with corporations in sales, marketing, and product development and distribution. *Id.*

In October 2008, plaintiffs had approximately $1.15 million on deposit with the Bank of Clark County, spread among several different accounts, in the names of various Annechino family members. CP 69. Plaintiffs then chose to withdraw and transfer approximately $2,000,000 in investments from their Charles Schwab accounts. CP 62. The Bank did not solicit this deposit.

Mr. Annechino spoke with Bank CEO Michael Worthy about possibly depositing a significant sum with the Bank, and focused on whether plaintiffs could receive a premium interest rate on those deposits. CP 183. Mr. Worthy quoted Mr. Annechino specific, premium rates. *Id.* Mr. Annechino subsequently sought to confirm that he would receive a "great rate for showing this confidence in the Bank!" CP 73. In response, Bank employee Kelli Reynolds confirmed that the Bank would pay 3.85 percent rather than the 3.50 percent plaintiffs were currently earning. CP 71. In other words, Mr. Annechino was able to negotiate a generous 10 percent increase on his rate of return.

Mr. Worthy had no involvement in determining the configuration of plaintiffs' accounts, and he made no personal assurances to Mr. Annechino that plaintiffs' deposits would in fact be FDIC insured. CP 183. Neither Mr. Worthy nor Ms. Reynolds had a social relationship with Mr. Annechino or his family outside of Bank business. CP 182.

Defendant Kelli Reynolds was employed with the Bank as a financial services officer. CP 178. In that capacity, she prepared a chart for plaintiffs entitled "Recommended Account Structures and FDIC [Coverage]," which she then e-mailed to Mr. Annechino for his review and approval. CP 179, CP 71-73, CP 69.

As was the case with Mr. Worthy, Ms. Reynolds did not personally assure Mr. Annechino that all of his money would be FDIC insured, and has never made such a personal guarantee to any client of the Bank. CP 179. Instead, she recommended that Mr. Annechino view the FDIC website and verify for himself that his deposits would be insured. *Id.* She also recommended that Mr. Annechino have his accountant or other financial advisor review the chart to ensure its accuracy. *Id.* Finally, she believes that she provided plaintiffs with an informative FDIC brochure explaining deposit insurance coverage. *Id.*

In response, Mr. Annechino e-mailed Ms. Reynolds on October 13, 2008, approving the proposed account structure, and suggesting that one of the accounts be placed in the name of a family trust. CP 72. After receiving confirmation that the Bank would play plaintiffs a premium rate, Mr. Annechino transferred an additional $1.85 million to the Bank and executed signature cards for each of the deposit accounts. CP 71, 114-24.

A few months later, the Bank of Clark County was involuntarily placed into receivership by the FDIC on January 16, 2009. CP 179. After speaking with Mr. Annechino, Ms. Reynolds called the FDIC to determine why plaintiffs' deposits were being held, but could not get an answer from the FDIC. *Id.* Shortly after the Bank was closed, and while still not knowing why the FDIC was holding plaintiffs' deposits, Ms. Reynolds wrote a letter in which she assumed that she must have misinterpreted the FDIC coverage rules. CP 77, CP 179. She subsequently learned that she had not misinterpreted the rules, and that plaintiffs' money would have been fully insured if it had been deposited in accordance with the chart she prepared. CP 179-80.

What had actually happened, however, was that Mr. Annechino had requested by e-mail that one of plaintiffs' accounts be changed to a family trust account. CP 180. Ms. Reynolds said this could be done by changing account number 12009528 to a trust account. *Id.* Instead, though, account number 12009536 was changed, resulting in funds in excess of FDIC insurance limits being deposited into the 528 joint account. *Id.* Mr. Annechino had every opportunity to notice this when he received and signed the signature cards for the accounts, given that he had the original chart of accounts and the Reynolds e-mail stating which accounts the Bank intended to change to the family trust account. *Id.* Mr. Annechino should have also noticed this when he received monthly statements from the Bank showing what funds were deposited in each of plaintiffs' accounts. *Id.*

On March 20, 2009, plaintiffs wrote to the FDIC, asserting a demand for $500,000 against the FDIC because it "wrongfully refused" to insure plaintiffs' deposits. CP 133. Plaintiffs also asserted that "[t]he failure of the FDIC to rectify this wrong and to provide FDIC insurance to cover this loss is inexplicable," and demanded that the agency make payment as follows:

> On behalf of the Annechino family we seek compensation under all available legal avenues, including to rectify the error made by the FDIC when it discovered the basic facts

> underlying this claim yet refused to provide insurance. We also make demand on the FDIC as the legal receiver of the Bank of Clark County since it is the successor in interest and legally liable for the errors the Bank made.

CP 134. The FDIC sent a final determination letter to plaintiffs' counsel on April 7, 2009, reiterating its conclusion that nearly $500,000 was not covered by deposit insurance. CP 142. The FDIC explained, however, that plaintiffs may recover this amount through the receivership process, and that plaintiffs "have a claim with the highest priority except for administrative...claims against the estate." CP 139.

In its letter, the FDIC also stated that, "*The responsibility for understanding deposit insurance coverage ultimately lies with depositors.*" *Id.* (emphasis added). The FDIC also noted that, "The signature cards are the ultimate vehicle signifying intent and agreement with the manner in which the accounts are established[,]" and "[e]ach of the accounts in question...bears the appropriate signature(s) of the owners named on the account(s)." *Id.* In other words, since plaintiffs had reviewed and approved the account structure and deposits made into each account, plaintiffs bore responsibility for any uninsured loss.

Plaintiffs had filed the present action on March 10, 2009, seeking damages of $500,000. Shortly after receiving the FDIC letter, plaintiffs filed a second lawsuit, this time against the FDIC in U.S. District Court in

Seattle, seeking to recover the same $500,000. CP 157-62. In the federal district court case, plaintiffs alleged that the FDIC "fail[ed] to consider all available evidence and pay plaintiffs' claims for uninsured deposits." CP 161.

On September 30, 2009, the FDIC filed a motion for summary judgment, again stressing that plaintiffs bear the ultimate responsibility for plaintiffs' own loss: "It was certainly incumbent upon [Mr. Annechino] to make sure that the accounts were structured in the manner he needed for complete deposit insurance coverage and not shift the blame for an error or errors he should have caught to Bank employees." CP 173-74. The FDIC further pointed out that two months passed after the money was deposited, prior to the FDIC takeover of the Bank, and that "[t]his period was ample to detect and correct errors in the structuring of the accounts." *Id.*

On October 23, 2009, having filed multiple lawsuits to recover the same alleged damages, plaintiffs stipulated to the dismissal of their lawsuit against the FDIC, and the court entered an order of dismissal on October 26, 2009. CP 202.

That same month, plaintiffs received a partial liquidation distribution from FDIC of over $115,000. CP 254. Additional funds should be paid from FDIC to plaintiffs, as additional Bank assets are liquidated. *Id.*

On cross-motions for summary judgment, the trial court granted defendants' cross-motion and dismissed plaintiffs' claims against the individual defendants. This decision was upheld by the Court of Appeals in its June 1, 2011, opinion.[4] The Court of Appeals properly held: "that the facts of this case are not sufficient to overcome the general rule that parties to a business transaction deal at arm's length and do not enter into a fiduciary relationship." Opinion, at 7. The Court also found that there was "no evidence that the parties' relationship or the nature of this transaction involved more trust and confidence than a typical arm's length transaction." *Id.* at 8. As a result, the Court concluded that there was no basis to find "that a bank officer or employee, acting within the ordinary scope of his or her duties, can be individually liable for breaching the *bank's* fiduciary duty to a customer." (Emphasis by Court). *Id.*

The Court of Appeals also concluded that the facts of this case fell within established Washington case law, providing generally "that a corporate officer cannot be held personally liable unless the officer knowingly and in bad faith commits or condones a wrongful act in the course of carrying out his or her duties." *Id.* at 9. The Court found "there is

[4] A copy of the Opinion is attached hereto as an Appendix.

no evidence that Worthy or Reynolds knowingly participated in wrongful conduct or acted in bad faith when helping the Annechinos structure their accounts. Accordingly, they cannot be held personally liable for the Annechinos' loss." *Id.* at 10.

Finally, the Court found that there was no gratuitous assumption of a duty of care on the part of defendants. Instead, the Court held that:

> Worthy and Reynolds were acting on behalf of the Bank, the parties were engaged in a business transaction, and the service they agreed to perform, even if characterized as an "extra service," was still within the scope of a normal banking transaction. To hold that Worthy and Reynolds voluntarily assumed a duty to the Annechinos in this context would eviscerate the general rule that parties to a business transaction generally deal at arm's length and do not assume a duty to one another or enter into a special relationship absent the circumstances detailed above.

Id. at 10-11. The Court of Appeals' decision is wholly consistent with Washington case law. The opinion was sound, thorough, and well-reasoned. Plaintiffs' petition for review should be denied.

V. REASONS WHY REVIEW SHOULD BE DENIED

A. Plaintiffs Have Not Met Any of the Considerations Set Forth in RAP 13.4(b).

The Supreme Court will accept a petition for review only if at least one of four considerations set forth in RAP 13.4(b) has been met. Here, plaintiffs do not argue that any of the four considerations have been met. As a result, the petition for review should be summarily denied.

B. The Opinion is Consistent With Washington Case Law Concerning Fiduciary Duties.

Plaintiffs erroneously argue that the Court of Appeals' refusal to impose personal liability upon the Bank employees is a reinterpretation and misapplication of existing case law. Notably, plaintiffs have cited no authority for their proposition that bank officers and employees can be held personally liable to bank customers in circumstances similar to this case. Plaintiffs have presented no on point authority because none exists.

Instead, plaintiffs argue that case law imposing fiduciary duties upon financial institutions should be treated as imposing personal liability upon the *employees* of those institutions. For example, plaintiff cites *Tokarz v. Frontier Fed. Savings and Loan Assoc.,* 33 Wn. App. 456, 656 P.2d 1089 (1982). That case does not support the proposition that a fiduciary relationship may arise between the employees of a Bank and the Bank's customers. Nor does it purport to address the issue of personal liability at all.

In addition, *Tokarz* involved a claim that the defendant savings and loan association failed to disclose material information concerning a loan agreement it entered into with the plaintiff. *Id.* Ordinarily, as the Court of Appeals held in the present case, when two parties deal at arm's length, there is no obligation to disclose material facts concerning a transaction.

Id. It is only when "special circumstances" dictate otherwise that a duty to disclose arises. *Id.* at 459.

Significantly, in this case there is no allegation that the Bank or any of its employees withheld material information from Mr. Annechino. To the contrary, the Bank's process was completely transparent. Mr. Annechino reviewed and approved the chart of accounts, and he was provided sufficient information to make an independent determination as to deposit coverage (and, in fact, was encouraged to do so by Bank personnel). CP 179.

Moreover, *Tokarz* confirmed that fiduciary or quasi-fiduciary relationships are not the rule, even as to financial institutions themselves, let alone as to the employees of those institutions. *Tokarz*, 33 Wn. App. at 458-59:

> As a general rule, the relationship between a bank and a depositor or customer does not ordinarily impose a fiduciary duty of disclosure upon the bank. They deal at arm's length.

The opinion of the Court of Appeals in this case properly recognized this general rule.

Plaintiffs also rely upon *Hutson v. Wenatchee Federal Savings & Loan Association*, 22 Wn. App. 91, 588 P.2d 1192 (1978). As the Court of Appeals correctly noted, however, *Hutson* merely held that a savings &

loan association had established a fiduciary relationship with a borrower. *Id.* at 102-03. However, *Hutson* in no way established "that a bank officer or employee, acting within the ordinary scope of his or her duties, can be individually liable for breaching the *bank's* fiduciary duty to a customer." Opinion, at 8 (emphasis by Court).

Plaintiffs next erroneously argue that the Court of Appeals' opinion created new law and set forth multiple factors that must be established before a fiduciary duty may be deemed to be present. Petition for Review, at 11-12. In point of fact, however, the opinion merely explains that it is the contention of plaintiffs that, if accepted, would create new law. The Opinion does not mandate that certain factors be found to be present before a fiduciary duty can be imposed. Instead, the Opinion simply recognizes well-established case precedent which holds that, even if a fiduciary relationship is established as between an institution and its customers, that same fiduciary duty and its attendant liabilities do not extend to the employees of that institution.

C. The Court of Appeals Correctly Concluded That Bank Officers and Employees Do Not Face Personal Liability Where They Do Not Knowingly and in Bad Fact Commit or Condone a Wrongful Act.

The Court of Appeals properly recognized that, while corporate officers owe fiduciary duties to their corporation, they do not owe such duties to third parties unless they knowingly participate in wrongful conduct. Opinion, at 9-10.[5] Plaintiffs argue, however, that personal liability is appropriate under cases such as *Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 875 P.2d 637 (1994). In that case, however, a corporate officer was deemed to have breached a fiduciary duty to the company itself, not to third parties, a holding that is consistent with the Opinion and the other cases cited by the Court of Appeals. *See Senn*, 74 Wn. App. at 410-11. If there was any possibility of liability to a third party, it would have resulted from the officer's knowledge of the corporation's "blatant fraud." *Id.* at 418. Fraud, let alone blatant fraud, is not at issue in this case.

Plaintiffs also rely upon *Bennett v. Huish*, 155 P.3d 917 (Utah App. 2007). There, Huish located hard money lenders for the plaintiffs, negotiated extension fees, and brokered loans, all while taking secret commissions. *Id.* at 927-28. Significantly, Huish admitted at trial that he was acting as plaintiffs' agent and that he therefore owed them fiduciary duties. *Id.* at 927, n. 8. Thus, Huish breached his admitted fiduciary duties

[5] The Court cited multiple cases, from Washington and from other jurisdictions, in support of this conclusion: *Slottow v. American Casualty Company of Reading, Pennsylvania*, 10 F.3d 1355, 1359 (9th Cir. 1993) (California law); *Grierson v. Parker Energy Partners* 1984-I, 737 SW.2d 375, 377 (Texas App. 1987); *Schwarzmann v. Association of Apartment Owners of Bridge Haven*, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982); *Grayson v. Nordic Construction Company*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979); *Consulting Overseas Management, Ltd. v. Shtikel*, 105 Wn. App. 80, 84-85, 18 P.3d 1144 (2001). Opinion, at 9.

in his admitted role as the plaintiffs' agent, by failing to act in the best interests of the plaintiffs, his principals. This type of wrongful, intentional conduct is not implicated in the present case.

D. The Court of Appeals Correctly Concluded That the Defendant Employees Did Not Gratuitously Assume a Personal Duty of Care to Plaintiffs.

Finally, plaintiffs briefly argue that the individual defendants gratuitously assumed a duty of care to plaintiffs, citing *Roth v. Kay,* 35 Wn. App. 1, 664 P.2d 1299 (1983). There, a patient sued his doctor for failing to file his worker's compensation application with the State. *Id.* at 2. In that case, however, the doctor agreed to perform a service that was outside the scope of the typical physician-patient relationship. In this case, defendants Worthy and Reynolds were acting in the scope of a normal banking transaction with one of the Bank's customers. As the Court of Appeals concluded:

> To hold that Worthy and Reynolds voluntarily assumed a duty to the Annechinos in this context would eviscerate the general rule that parties to a business transaction generally deal at arm's length and do not assume a duty to one another or enter into a special relationship absent the circumstances described [therein].

Opinion, at 10-11. *Roth* does not support plaintiffs' contentions. Not only is there a general recognized fiduciary duty running from physicians to their patients, the doctor in that case was arguably under a statutory obligation to assist the plaintiff pursuant to the terms of RCW 51.28.020. No similar circumstances exist in this case that would justify the Court in finding that this case falls outside the general rule described above.

VI. CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' petition for review.

DATED this 29 day of July, 2011.

HEURLIN, POTTER, JAHN,
LEATHAM & HOLTMANN, P.S.

Stephen G. Leatham, WSBA #15572
Of Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that I caused the foregoing RESPONSE TO PETITION FOR REVIEW to be served on the following:

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by mailing, by U.S. Mail, First Class postage prepaid, a true copy to the foregoing on the 29 day of July, 2011.

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Of Attorneys for Respondents

APPENDIX

FILED
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DIVISION II

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STATE OF WASHINGTON

BY ________ DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL and THERESA ANNECHINO, husband and wife, Appellants, v. MICHAEL C. WORTHY and SUSAN WORTHY, husband and wife and the marital community composed thereof; JOAN COOPER; KELLI REYNOLDS; UMPQUA BANK, successor in interest to BANK OF CLARK COUNTY; and CLARK COUNTY BANCORPORATION, Respondents.	No. 40141-0-II PUBLISHED OPINION

ARMSTRONG, P.J. — When the State closed the Bank of Clark County (Bank), Michael and Theresa Annechino discovered that approximately $500,000 of their deposits was not insured by the Federal Deposit Insurance Corporation (FDIC). The Annechinos sued the Bank and several individual officers and employees for breach of a fiduciary duty. The Clark County Superior Court dismissed the claims against the individual defendants on summary judgment. On appeal, the Annechinos argue that the Bank's officers and employees established a quasi-fiduciary relationship with them and are personally liable for breaching that duty. Because the Annechinos have failed to establish that the individual defendants entered into a fiduciary relationship with them, we affirm the summary judgment order.

FACTS

In October 2008, the Annechinos[1] decided to transfer their savings from Charles Schwab to the Bank because they had learned that their Schwab deposits would not be fully insured if Schwab failed. Before transferring the funds, the Annechinos wanted to ensure that their deposits would be fully FDIC insured. Michael spoke to Michael Worthy, the chief executive officer of the Bank, and exchanged several e-mails with Kelli Reynolds, a financial services officer at the Bank, expressing this concern.

Reynolds prepared a chart recommending that the Annechinos spread their deposits over seven accounts to provide $3 million in FDIC coverage. She copied Worthy and Joan Cooper, her supervisor, on her e-mail communications with Michael. Michael reviewed the chart and suggested putting one of the accounts in the name of the family trust. He also negotiated a higher interest rate on his deposits. The Annechinos then transferred $1.85 million to the Bank, bringing their total deposits to $3 million.

Reynolds asserts that she never personally assured Michael that his deposits would be fully FDIC insured; rather, she claims that she recommended he review the FDIC rules to verify for himself, or have his accountant verify, that his deposits would be fully insured. Michael counters that Reynolds never told him to review the FDIC rules or to independently verify that his deposits would be fully insured.

In January 2009, the State closed the Bank and appointed the FDIC as receiver. The FDIC determined that approximately $500,000 of the Annechinos' deposits were uninsured and issued receivership certificates for the uninsured amount. After learning that the FDIC was

[1] We refer to the appellants by their first name but intend no disrespect.

withholding a portion of the Annechinos' deposits, Reynolds reviewed her recommendation chart and found no errors. Assuming, therefore, that she must have misinterpreted the FDIC rules, she wrote a letter to the chief financial officer of the Bank explaining the Annechinos' situation and stating:

> It is unfortunate that my interpretation of coverage was not accurate and I am regretful that my expertise was not sufficient to protect our client who trusted us to protect their interests, and seek any options we make [sic] have at our disposal to right this wrong.

Clerk's Papers at 76, 179.

Worthy and Reynolds later learned that, due to an error, the Annechinos' funds were not deposited according to Reynolds's recommendations. When Michael requested that one of the accounts be put in the name of the family trust, Reynolds had suggested changing account 12009528 to a trust account, but the Bank accidentally changed account 12009536 instead. Consequently, funds in excess of FDIC insurance were deposited into the 528 account. Although the Annechinos received monthly statements showing which funds were deposited into which accounts, neither they nor the Bank noticed the error. The parties dispute whether the Annechinos' funds would have been fully FDIC insured but for the Bank's error in changing the wrong account to a trust account.

The Annechinos sued Worthy, Reynolds, Cooper, Umpqua Bank (the successor in interest to the Bank), and the Clark County Bancorporation. The individual defendants moved for summary judgment, arguing they could not be held personally liable for the Annechinos' loss. The trial court granted their motion and dismissed the claims against Worthy, Reynolds, and Cooper.

ANALYSIS

I. STANDARD OF REVIEW

We review summary judgment orders de novo. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). We will affirm an order granting summary judgment if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ranger*, 164 Wn.2d at 552.

II. FIDUCIARY DUTY

The Annechinos argue that the critical issue before us is whether Worthy and Reynolds established a quasi-fiduciary relationship with them when they sought assurances that their deposits would be fully FDIC insured and relied on Worthy and Reynolds' superior knowledge to structure their accounts accordingly.[2] They rely primarily on *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980), *Tokarz v. Frontier Savings & Loan Ass'n*, 33 Wn. App. 456, 656 P.2d 1089 (1982), and *Hutson v. Wenatchee Federal Savings & Loan Ass'n*, 22 Wn. App. 91, 588 P.2d 1192 (1978). Worthy and Reynolds counter that none of the Annechinos' authorities supports holding bank officers and employees personally liable for breaching a fiduciary duty to a bank customer. We agree.

As a general rule, participants in a business transaction deal at arm's length and do not enter into a fiduciary relationship. *Liebergesell*, 93 Wn.2d at 889. The rule applies to transactions between a bank and a depositor. *Tokarz*, 33 Wn. App. at 458-59. But special

[2] The Annechinos do not include Cooper in this or any of their other arguments concerning personal liability. Accordingly, we affirm the trial court's order dismissing the Annechinos' claims against Cooper without further discussion.

circumstances may establish a quasi-fiduciary relationship in fact where one would not normally arise in law. *Liebergesell*, 93 Wn.2d at 890; *Tokarz*, 33 Wn. App. at 459; *Hutson*, 22 Wn. App. at 102-03.

For example, in *Liebergesell*, our Supreme Court considered whether special circumstances established a fiduciary relationship between a borrower and a lender where a businessman induced a widowed school teacher to lend him money at a 20 percent interest rate, even though he knew that interest rates over 12 percent were illegal. *Liebergesell*, 93 Wn.2d at 884-85. The lender, in contrast, had no business expertise, considered the borrower a friend, and relied on him for financial advice. *Liebergesell*, 93 Wn.2d at 884-85. But when she attempted to collect the unpaid interest, the borrower raised usury as an affirmative defense. *Liebergesell*, 93 Wn.2d at 885-86. In considering whether the lender could estop the borrower from raising the usury defense, based on a fiduciary relationship between the parties, the *Liebergesell* court reviewed the relevant case law and listed several factors that may establish a fiduciary relationship in fact where one would not normally arise in law:

> For instance, in *Salter v. Heiser*, [36 Wn.2d 536, 550-55, 219 P.2d 574 (1950)], lack of business expertise on the part of one party and a friendship between the contracting parties were important in establishing the right to rely. *Graff v. Geisel*, 39 Wn.2d 131, 141-42, 234 P.2d 884 (1951). Superior knowledge and assumption of the role of adviser may contribute to the establishment of a fiduciary relationship. Friendship seemed a determinative element under the facts of *Gray v. Reeves*, 69 Wash. 374, 376-77, 125 P. 162, 163 (1912).

Liebergesell, 93 Wn.2d at 891. The *Liebergesell* court then concluded that the lender had submitted sufficient evidence to establish a fiduciary relationship and overcome summary judgment. *Liebergesell*, 93 Wn.2d at 891.

Similarly, in *Tokarz*, Division Three of our court considered whether a savings and loan association had a duty to disclose to a borrower that his builder was having financial problems and was unable to perform other contracts in which the savings and loan was the lender. *Tokarz*, 33 Wn. App. at 458. The *Tokarz* court first observed that a bank generally does not enter into a fiduciary relationship with a depositor or customer, but it acknowledged that modern banking practices involve complexities that "often thrust a bank into the role of an adviser, thereby creating a relationship of trust and confidence which may result in a fiduciary duty upon the bank to disclose facts when dealing with the customer." *Tokarz*, 33 Wn. App. at 458-59 (citing *Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 64 P.2d 101, 106 (1937)). But the *Tokarz* court concluded that no special circumstances established a fiduciary duty in that case, because there was no evidence that the savings and loan: (1) took on any extra service for the borrower, other than furnishing the money for constructing a home; (2) received any greater economic benefit from the transaction, other than the normal mortgage; (3) exercised extensive control over the borrower's construction project; or (4) was asked by the borrower if there were any lien actions pending against the builder. *Tokarz*, 33 Wn. App. at 462-63.

Finally, in *Hutson*, Division Three of this court considered whether a savings and loan association had a duty to define the phrase "mortgage insurance" for a borrower where the borrower alleged that she had asked the lender to procure credit life insurance (which pays the balance of the mortgage if the mortgagor dies), but the lender procured only mortgage insurance (which insures the lender if the borrower defaults on the mortgage). *Hutson*, 22 Wn. App. at 92, 100. The lender never explained the difference between the two and, when the borrower saw that she was paying for mortgage insurance, she believed it was credit life insurance. *Hutson*, 22

Wn. App. at 93. Division Three recognized that a "lender is not a fiduciary in the common sense of the term" because it profits from the business transaction. *Hutson*, 22 Wn. App. at 102. But the court observed that the lender in this case had (1) advised the borrower about the availability of a federal subsidy and reviewed and submitted the application to the federal government on her behalf; (2) persuaded the borrower to obtain a home construction loan, rather than a home improvement loan, because the former would be easier to finance; and (3) offered to provide an "extra service" by arranging credit life insurance for the borrower. *Hutson*, 22 Wn. App. at 92, 94, 102-03. The *Hutson* court held:

> While the lender's duty is not that of a fiduciary, we hold that, under the circumstances of this case, it was a jury question whether the lender had a duty to define any ambiguous or specialized terms which might mislead unknowledgeable and uncounseled customers, members of the lay public who rely on the lender's advice. The relationship between such parties involves more trust and confidence than is true of ordinary arm's-length dealing, even though the lender legitimately profits from the transaction.

Hutson, 22 Wn. App. at 105.

Applying these principles, we hold that the facts of this case are not sufficient to overcome the general rule that parties to a business transaction deal at arm's length and do not enter into a fiduciary relationship. Viewing the facts in the light most favorable to the Annechinos, we will assume that the Bank took on an "extra service" by agreeing to help the Annechinos structure their accounts to provide full FDIC coverage, and that Worthy and Reynolds never advised the Annechinos to independently verify the FDIC rules and regulations. Even so, there is no evidence that the Bank sought out the Annechinos' business, knowingly withheld relevant information from them, exercised extensive control over the transaction, or received a greater than customary economic benefit from the transaction. Nor is there any evidence that the Annechinos were induced to rely on the Bank due to a close personal relationship or lack of business expertise. On the contrary, the Annechinos reviewed the Bank's recommendations, requested revisions, and successfully negotiated a favorable interest rate on their deposits. There is no evidence that the parties' relationship or the nature of this transaction involved more trust and confidence than a typical arm's length transaction.

Furthermore, even assuming the facts are sufficient to create a fiduciary relationship, *Tokarz* establishes that a *bank* may enter into such a relationship with a depositor:

> [M]odern banking practices . . . often thrust a *bank* into the role of an adviser, thereby creating a relationship of trust and confidence which may result in a fiduciary duty upon the *bank* to disclose facts when dealing with the customer.

Tokarz, 33 Wn. App. at 459 (emphasis added). Similarly, *Hutson* held that a savings and loan association, through the actions of one of its employees, had established a fiduciary relationship with a borrower. *Hutson*, 22 Wn. App. at 102-03. Neither case establishes that a bank officer or employee, acting within the ordinary scope of his or her duties, can be individually liable for breaching the *bank's* fiduciary duty to a customer.

The Annechinos cite *Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 875 P.2d 637 (1994), for the proposition that "[p]ersonal liability is routinely imposed when fiduciary duties are breached." Br. of Appellants at 20. In *Senn*, an insurance company was placed into receivership and the receiver sued the company's president and secretary for breach of a fiduciary duty. *Senn*, 74 Wn. App. at 410-11, 413. The president and secretary were husband and wife and owned all of the company's stock. *Senn*, 74 Wn. App. at 410-11. Division One of this court held that the secretary clearly owed a fiduciary duty to the *company* under RCW

48.05.370,[3] and that her failure to discover the president's conversion of over $12 million in insurance premium payments was a breach of that duty. *Senn*, 74 Wn. App. at 414-17. The *Senn* court did not hold the secretary personally liable for breaching a fiduciary duty to a third party.

Senn is consistent with Washington case law, which generally holds that a corporate officer cannot be held personally liable unless the officer knowingly and in bad faith commits or condones a wrongful act in the course of carrying out his or her duties. *See Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven*, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982); *see also Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979); *Consulting Overseas Mgmt., Ltd. v. Shtikel*, 105 Wn. App. 80, 84-85, 18 P.3d 1144 (2001) (citing *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 753, 489 P.2d 923 (1971)).

Senn is also consistent with case law from other jurisdictions holding that corporate officers generally owe a fiduciary duty to their *corporation*, but owe no such duty to third parties unless they knowingly participate in wrongful conduct. *Slottow v. Am. Cas. Co. of Reading, Pa.*, 10 F.3d 1355, 1359 (9th Cir. 1993) ("[A] corporation's employees owe no independent fiduciary duty to a third party with whom they deal on behalf of their employer.") (internal quotation marks omitted) (applying California law); *Grierson v. Parker Energy Partners 1984-I*, 737 S.W.2d 375, 377 (Tex. App. 1987) ("Corporate officers owe a fiduciary duty to the shareholders and the corporation. Generally, however, they owe no duty to third persons. They may not, however, direct or participate in tortious acts. A corporate agent who knowingly participates in

[3] RCW 48.05.370 provides:

> Officers and directors of an insurer or a corporation holding a controlling interest in an insurer shall be deemed to stand in a fiduciary relation to the insurer, and shall discharge the duties of their respective positions in good faith, and with that diligence, care and skill which ordinary prudent persons would exercise under similar circumstances in like positions.

tortious or fraudulent acts may be held individually liable to third persons even though he performed the act as an agent for the corporation.") (internal citations omitted). Here, there is no evidence that Worthy or Reynolds knowingly participated in wrongful conduct or acted in bad faith when helping the Annechinos structure their accounts. Accordingly, they cannot be held personally liable for the Annechinos' loss.

III. ALTERNATIVE ARGUMENTS

The Annechinos also rely on *Roth v. Kay*, 35 Wn. App. 1, 664 P.2d 1299 (1983), to argue that Worthy and Reynolds voluntarily assumed a duty to properly structure their accounts and, therefore, can be held personally liable for failing to do so. In *Roth*, a worker brought a negligence claim against a doctor for failing to file his worker's compensation application with the Department of Labor and Industries. *Roth*, 35 Wn. App. at 2. Division One of this court held that the doctor arguably had a statutory duty to file the application under RCW 51.28.020, but even if the doctor had gratuitously agreed to file the application, "'one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.'" *Roth*, 35 Wn. App. at 3-4 (quoting *Glanzer v. Shepard*, 135 N.E. 275, 276 (1922) (Cardozo, J.)).

Roth is distinguishable. There, the doctor gratuitously agreed to perform a service outside the scope of a typical doctor-patient relationship. Here, Worthy and Reynolds were acting on behalf of the Bank, the parties were engaged in a business transaction, and the service they agreed to perform, even if characterized as an "extra service," was still within the scope of a normal banking transaction. To hold that Worthy and Reynolds voluntarily assumed a duty to the Annechinos in this context would eviscerate the general rule that parties to a business transaction generally deal at arm's length and do not assume a duty to one another or enter into a special relationship absent the circumstances described above. *Liebergesell*, 93 Wn.2d at 889; *Tokarz*, 33 Wn. App. at 458-59; *Hutson*, 22 Wn. App. at 102-03, 105.

Finally, the Annechinos argue in passing that RCW 62A.4-103,[4] which requires banks to "exercise ordinary care," also applies to bank employees. Br. of Appellants at 22. We decline to address this argument. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) ("[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment as been made.").

Accordingly, we affirm the trial court's summary judgment order dismissing the Annechinos' claims against the individual defendants in this case.

Armstrong, P.J.

We concur:

Quinn-Brintnall, J.

Johanson, J.

[4] Chapter 62A.4 RCW codifies Article 4 of the Uniform Commercial Code, which concerns bank deposits and collections. RCW 62A.4-101. RCW 62A.4-103(a) provides:

> The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure.