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No. 92483-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE U.S. DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

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TRAVELERS CASUALTY AND SURETY COMPANY, National Association,

Plaintiff,

v.

WASHINGTON TRUST BANK,

Defendant.

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WASHINGTON TRUST BANK'S RESPONSE TO  
AMICUS BRIEF OF NORTHWEST CONSUMER LAW CENTER

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 ORIGINAL

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## I. INTRODUCTION

Skills'Kin is a large, sophisticated commercial entity, reporting \$12,875,987.00 in revenue in September 2014, and \$13,390,537 in revenue the prior year.<sup>1</sup> It paid for a commercial insurance policy from Travelers, insuring Skills'Kin against the risks allocated to it under the U.C.C. Skills'Kin never paid any losses. Skills'Kin's customers never paid any losses (nor made any claims). Only Travelers paid what it contracted to pay under an insurance policy for which it too was paid in exchange for the promises it made.

This case is about checks and the laws governing them. This case is about the allocation of risk, specifically outlined by Washington's U.C.C., between an insurer of a commercial business and a bank. The U.C.C. recognizes that the employer is in a far better position to avoid the loss for unauthorized indorsements by employees who are entrusted with responsibility with checks, by taking care in choosing employees, in supervising them, and in adopting other measures to protect the business.<sup>2</sup> An "employer can insure this risk by employee fidelity bonds."<sup>3</sup> That is exactly what happened here. This is not a case about the rights of "vulnerable populations or "scams" against individuals with disabilities. The interests of Northwest Consumer Law Center (NWCLC) in "consumers with disabilities" and "consumers scammed by those targeting vulnerable populations" are not present in this case.

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<sup>1</sup> Skills'Kin Corporate Reports, 2013 Form 990, [http://skilskin.org/userfiles/2013\\_Form\\_990\\_SKILS\\_KIN\\_Final.pdf](http://skilskin.org/userfiles/2013_Form_990_SKILS_KIN_Final.pdf).

<sup>2</sup> RCW 62A.3-405, cmt. 1.

<sup>3</sup> *Id.*

## II. ARGUMENT

A. **WTB satisfied the safe harbor provision of RCW 62A.4-406(a) by providing Skils'Kin with an account statement detailing more than required by the statute, and separately by providing electronic copies of both sides of the checks clearing Skils'Kin's account.**

**1. NWCLC's brief ignores and misstates the record in this case.**

NWCLC's brief ignores the facts in this record and misconstrues the scope of the question certified about statements of account. NWCLC urges this Court to hold "online access is not sufficient ... if the customer did not agree to receive the statement items via online banking."<sup>4</sup> This statement is not supported by any citation to the record because these are not the facts in this case, and this is not the issue before this Court. There is no dispute: WTB provided Skils'Kin monthly account statements identifying checks drawn on Skils'Kin's account by reciting the check number, the date it cleared, and the amount of the check;<sup>5</sup> each statement contained a 1-800 number Skils'Kin could call to obtain copies of any checks drawn on its account;<sup>6</sup> and those statements included images of the front of each check clearing the account.<sup>7</sup> Skils'Kin received its account statements in paper, and beginning in January 2011, it is also undisputed Skils'Kin also had 24-hour/day online access to its account, which allowed Skils'Kin to view the front and back of each check before it cleared its account.<sup>8</sup>

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<sup>4</sup> NWCLC Amicus Brief at 11.

<sup>5</sup> ECF No. 140 at 10-11 (District Court's Order re Summary Judgment); ECF No. 193 at 3, 5 (District Court's Order Certifying Questions); ECF No. 90 at ¶¶11-12; ECF No. 123 at SOF #27, #28 (Summary Judgment Statement of Undisputed Facts).

<sup>6</sup> ECF No. 90 at ¶¶ 11-14; ECF No. 110-3.

<sup>7</sup> *Supra* note 5; ECF No. 140 at 10-11 (District Court's Order re Summary Judgment) and ECF No. 193 at 3, 5 (District Court's Order Certifying Questions)).

<sup>8</sup> ECF No. 140 at 11 (District Court's Order re Summary Judgment); ECF No. 193 at 5 (District Court's Order Certifying Questions); ECF No. 90, ¶¶6-8; ECF No. 90-2; ECF No. 123 at SOF #36, #37.

Contrary to NWCLC's mistaken understanding,<sup>9</sup> Skils'Kin intentionally chose this electronic access, asking WTB to provide the service for Skils'Kin's business.<sup>10</sup> Finally, Skils'Kin used the online access virtually every business day. This is not a case about consumers without access to computers. It is about the business choices of a sophisticated commercial entity whose business was to balance accounts and handle funds for others.

To avail itself of the safe harbor and trigger the customer's duties, a bank must do one of three things: (1) "return or make available to the customer the items paid," (2) return or make available to the customer "copies of the items paid," or (3) "provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid." RCW 62A.4-406(a). Electing to provide only one of these three options was enough to trigger Skils'Kin's duties under the statute to timely discover and report any unauthorized indorsement, signatures or alterations. WTB exceeded the safe harbor requirements: it satisfied two of the three alternate options in the statute.

First, WTB made copies of the checks available to Skils'Kin by the phone number in each statement Skils'Kin could call to request copies of its

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<sup>9</sup> NWCLC acknowledges "Skils'Kin had access to electronic banking", but argues this is irrelevant because Skils'Kin "did not affirmatively agree to utilize the service for reviewing images of checks." NWCLC Amicus Brief at 12. This statement is not supported by any record citation and the record reveals it is not true. Skils'Kin requested the electronic access. *Supra* note 10.

<sup>10</sup> ECF No. 90-2 is an Agreement between WTB and Skils'Kin. In executing this Agreement, Skils'Kin affirmatively chose to utilize an optional service at WTB in January 2011 called "Positive Pay", which provided Skils'Kin with the 24-hour/7 days a week online access to its accounts and access to images of complete copies of both the front and back of every check that cleared its accounts. ECF No. 90, ¶¶6-7. The same Agreement found at ECF 90-2 shows Skils'Kin elected to receive electronic copies of their monthly account statements. ECF No. 90, ¶8. *See also* ECF No. 91-8 at 56-57. Skils'Kin admitted it had this on-line access to which is subscribed. ECF No. 193 at 5 (Court's Order Certifying Questions).

checks.<sup>11</sup> RCW 62A.4-406(a) (“If the bank does not return the items paid or copies of the items paid, it shall provide in the statement of account the telephone number that the customer may call to request an item or copy of an item....”). WTB’s compliance with this safe harbor triggered Skils’Kin’s duty to examine its statements and timely notify WTB of any unauthorized payment. RCW 62A.4-406(f).

Second, WTB’s account statement provided sufficient information to allow Skils’Kin to reasonably identify the items paid because the statute says “[t]he statement of account provides sufficient information if the item is described by item number, amount, and date of payment.” RCW 62A.4-406(a). There is no dispute Skils’Kin’s statements contained these details.<sup>12</sup> The statements actually contained more: Skils’Kin’s statements also contained images of the front of every cleared check.<sup>13</sup> “If the bank supplies its customer with an image of the paid item it complies with this standard.” RCW 62A.4-406(a), cmt. 1. WTB’s compliance with this option in the safe harbor rule in 4-406(a) triggered Skils’Kin’s duty to examine its statements and timely notify WTB if any payment was not authorized due to an alteration or unauthorized signature or indorsement. RCW 62A.4-406(f).

Third, WTB also separately triggered Skils’Kin’s duties because WTB provided Skils’Kin with “copies of the items paid.” RCW 62A.4-406(a). Beginning in January 2011, Skils’Kin requested and received 24-hour/day on-line access to copies of both the front and back of all cleared checks.<sup>14</sup>

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<sup>11</sup> ECF No. 90 at ¶¶ 11-14; ECF No. 110-3.

<sup>12</sup> *Supra* note 5.

<sup>13</sup> *Id.*; see RCW 62A.4-406, cmt. 1.

<sup>14</sup> *Supra* notes 8 and 10.

NWCLC grossly mischaracterizes WTB's arguments and actions. WTB never insisted or argued online access "automatically" makes statements and checks "available" to satisfy the provisions of 4-406, "regardless of the particular circumstances and capabilities of the customer and regardless of whether the customer even agreed to take advantage of the service to review cancelled items".<sup>15</sup> Here, WTB complied with this prong of the safe harbor under 4-406(a) because it provided, at Skils'Kin's specific instruction and request, electronic "copies of the items paid". This compliance independently allows WTB to avail itself of the statute's safe harbor and obligated Skils'Kin to examine its statements and timely report any alterations, unauthorized signatures or indorsements on the checks. RCW 62A.4-406(f).

This Court should answer the second certified question: yes. WTB satisfied the legislature's bright-line rules in 4-406(a). It separately complied with the statute's alternative options allowing a bank to avail itself of the safe harbor provision: (1) WTB made Skils'Kin's checks available because each statement had a phone number to call to get copies; (2) Skils'Kin's monthly account statements included more details than the statute requires; and (3) WTB provided electronic copies of the front and back of the checks that cleared Skils'Kin's account. WTB exceeded the statutory minimum required to rely on the safe harbor in RCW 62A.4-406(a). Skils'Kin was therefore obligated to examine its statements and timely notify WTB of any unauthorized signatures or indorsements or alterations. RCW 62A.4-406(f).

**2. NWCLC's reliance on New York and Georgia cases is misplaced because those cases do not apply Washington's U.C.C.**

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<sup>15</sup> NWCLC Amicus Brief at 11. Notably, NWCLC's accusations against WTB are not supported by any citation to the record.

NWCL's reliance on *Elden v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2011 WL 1236141 (S.D.N.Y. Mar. 30, 2011) is misplaced and misleading. The facts in *Elden* are nothing like the facts before this Court and the text of the New York statute is nothing like Washington's statute. RCW 62A.4-406(a) says a customer's duty to discover and report unauthorized signatures or indorsements alterations is triggered:

A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid, copies of the items paid or provide information in the statement of account sufficient to allow the customer to reasonably identify the items paid. *The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.*<sup>16</sup>

New York's equivalent U.C.C. 4-406 is completely different. It triggers a customer's duty to discover and report:

(1) When a bank sends to its customer a statement of account *accompanied by items paid* in good faith in support of debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer....<sup>17</sup>

New York requires a bank to send its customer a statement *and* the items paid. Washington does not require both (although *Skills'Kin* provided both).

In *Elden*, the defendant did not send actual copies of any items paid. Therefore, it could only take advantage of the protections of 4-406 if it made the items available to the customer "otherwise in a reasonable manner." It only made the items available electronically and argued the customer should have known about this *voluntary* service because it was advertised in the defendant's newsletters. *Id.* at \*6. But the customer disputed whether it knew

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<sup>16</sup> Emphasis added.

<sup>17</sup> N.Y. U.C.C. § 4-406 (McKinney) (italics added).

about the online access, and there was no evidence the customer used it. *Id.* at \*6-7. The *Elden* Court did not hold all electronic access is unreasonable. It found under the specific circumstances, the defendant could not take advantage of the safe harbor in 4-406. *Id.* at \*7. But those are not the facts in this case. Here, it is undisputed Skils'Kin requested and used online access.<sup>18</sup>

*Elden* does not assist this Court in interpreting RCW 62A.4-406(a).<sup>19</sup> Similarly, NWCLC's citation to *First Citizens Bank of Clayton County v. All-Lift of Georgia, Inc.*, 251 Ga. App. 484, 555 S.E.2d 1 (2001) is irrelevant because here there is no allegation that Skils'Kin's statements or check copies were only "held" at the bank and never delivered to Skils'Kin.

**B. RCW 62A.4-406(f) bars any action against WTB based upon unauthorized withdrawals irrespective of how Travelers or NWCLC characterizes them.**

RCW 62A.4-406(f) bars *any* action premised upon unauthorized withdrawals regardless of how the claim is characterized, if the customer fails to timely report unauthorized indorsements or signatures or alterations. There is no dispute: Patterson's signature appears on the back of every check at issue. That cannot be ignored. Patterson's signature on the back of the checks is presumed an indorsement<sup>20</sup> as the agent and authorized representative of each payee and as a matter of law imposed on Skils'Kin the notice requirements of

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<sup>18</sup> *Supra* notes 8 and 10.

<sup>19</sup> The New York and Washington statutes also differ in another material way. RCW 62A.4-406(f) required Skils'Kin to report to WTB any unauthorized signature or alterations within 60 days, and any unauthorized indorsements within 1 year. New York's statute requires a customer to report unauthorized signatures or alterations within one year, and any unauthorized indorsements within 3 years. N.Y. U.C.C. § 4-406 (McKinney).

<sup>20</sup> WTB's Response Brief on Certified Questions at 35-37; RCW 62A.3-204(a), RCW 62A.3-401, RCW 62A.3-402. NWCLC's brief did not address these statutes.

4-406(f). It does not matter that Patterson signed her own name rather than the name of Skils'Kin or the clients she and Skils'Kin represented.<sup>21</sup> Patterson's signature is also an unauthorized signature, which includes an unauthorized indorsement, imposing the notice requirements of 4-406(f).<sup>22</sup>

Despite NWCLC's complaints, WTB *does* get to define its own affirmative defenses. RCW 62A.4-406(f) is an affirmative defense – a statutory prerequisite of notice to filing a lawsuit by a customer against its bank when the bank complies with the safe-harbor account statement requirements of 4-406(a). 4-406(f) does not contain a good faith requirement. Skils'Kin was obligated to review the back of the checks clearing its account and timely notify WTB of any problem. It is undisputed: Travelers, through its insured, failed to provide WTB the required notice under RCW 62A.4-406(f).

NWCLC's brief misconstrues the question certified, arguing without any citation to statute, that Travelers' claim does not involve an unauthorized indorsement and the checks were not properly payable.<sup>23</sup> But whether the checks were properly payable is not before this Court. The U.S. District Court rejected that argument in denying Travelers' motion for summary judgment because the issue posed a question of fact,<sup>24</sup> and specifically rejected it in certifying the first question to this Court.<sup>25</sup> The checks were properly payable, factually and as a matter of law<sup>26</sup> if Patterson possessed authority to write and

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<sup>21</sup> See RCW 62A.3-402(a); *Domestic Const., LLC v. Bank of Am.*, 2009 WL 2710244 (W.D. Wash. Aug. 26, 2009).

<sup>22</sup> WTB's Response Brief on Certified Questions at 37-39; RCW 62A.1-201(b)(41).

<sup>23</sup> NWCLC Amicus Brief at 3-4.

<sup>24</sup> ECF No. 140.

<sup>25</sup> ECF No. 193; *cf.* ECF No. 191.

<sup>26</sup> See RCW 62A.3-417(a)(1) and 3-402(a).

cash checks on behalf of Skils'Kin and its clients, as she and Skils'Kin represented to WTB that she was. If the checks were properly payable, there is no need to reach the certified questions because the default rule under RCW 62A.4-401 allows a bank to charge its customers account if a check is properly payable. A check is properly payable even if an employee is abusing or misusing her authority.<sup>27</sup> Travelers' claim must turn on whether Patterson's signature on the back of the check is an "unauthorized signature", an "alteration" or an "unauthorized indorsement" as a matter of law. The District Court therefore asked this Court to assume for the sake of certification that the checks were not properly payable. Otherwise, there would be no need to address the 4-406(f) affirmative defense. NWCLC may not rewrite the District Court's certified questions or prior orders.<sup>28</sup>

NWCLC's second argument relating to the first certified question lists five bulleted paragraphs with no citation to authority.<sup>29</sup> Examining the legal implications in each requires application of Washington's U.C.C, which NWCLC failed to do. The Court should reject the unsupported contentions.

NWCLC's third argument relating to the first certified question describes two hypothetical scenarios with no connection to the facts in this case. The hypotheticals confuse the actual issues and should not be examined. Even if the scenarios are dissected, however, they highlight why Travelers has no claim against WTB and that answering questions under the U.C.C. involves

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<sup>27</sup> See WTB's Response Brief on Certified Questions at 29-32.

<sup>28</sup> Even if the Court were to consider the properly payable question outside of the scope of certification, the checks were properly payable because Patterson was Skils'Kin's agent with actual and apparent authority to cash the checks. See WTB's Response Brief on Certified Questions at 29-33.

<sup>29</sup> NWCLC Amicus Brief at 5-6.

a fact-specific analysis and detailed application of the statute.

First, the claim, if any, in Scenario 1 would belong to the payee (John Doe the plumber), not the customer, *Jane Doe*. NWCLC's assumption that *Jane Doe* had to "perfect" her claim and *Jane Doe* would simply be forced to write a second check to John Doe is mistaken. It is not supported by any citation to the U.C.C. so it is not clear why that argument was made. 4-406(f) would not apply to John Doe's claim because 4-406(f) applies to a claim between a bank and a customer. Analyzing the risk allocation under the U.C.C. in the hypothetical would involve the application of additional and different provisions of the U.C.C. and would turn on understanding and knowing more facts (i.e., how the forgery occurred and how the depository bank accepted the check) beyond those limited facts described in the scenario. The facts in Scenario 1 are not like the facts in this case. Here, no payee made any claim against WTB for non-receipt of funds for which the checks were negotiated. And Travelers cannot prove the amounts of funds at issue.

A claim in Scenario 2, if any, would also belong to the payee – John Doe – not to the customer. Scenario 2 is also unhelpful to the Court's analysis in this case because it involves a missing indorsement. That is not the situation here: there is no dispute Patterson signed the back of every check at issue.<sup>30</sup> Even if the "fraudster" had signed the back of the check (the Scenario omits crucial facts, like how the signature on the back of the check read, necessary to examine to answer the hypothetical), Scenario 2 is still irrelevant to the Court's consideration here. For example, Scenario 2 talks about a "crook" and involves

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<sup>30</sup> ECF No. 140 at 3 (District Court Order re Summary Judgment); ECF No. 193 at 3 (District Court Order Certifying Questions); ECF No. 69, ¶12.

a one-off situation, but here, it Patterson had actual and apparent authority to act both for Skils'Kin and its customers.<sup>31</sup> The scenarios do not aid this Court's resolution of the first certified question.

Finally, NWCLC's reliance on *Ford Motor Credit Co. v. United States Services Automobile Ass'n*, 1972 WL 20865, 11 UCC Rep. Serv. 361 (N.Y. Civ. Ct. 1972) is misplaced because the facts (on which the holding was specific) could not be more different than the undisputed facts in this case. In *Ford Motor*, Mr. Thompson indorsed a settlement check made payable to him *and* to Ford Motor Credit ("Ford"). *Id.* at 363. Ford did not indorse it. *Id.* at 362. Thompson did not purport to sign on behalf of Ford, and there was no allegation that Thompson was authorized to sign for Ford. *See id.* There was no agency issue. Consequently, the court analyzed this isolated incident under the U.C.C. as a missing indorsement, not an unauthorized endorsement. *Id.* at 363.

*Ford Motor* does not assist the Court's analysis here because this is not a case of a missing signature, because this was not an isolated incident where WTB accidentally failed to notice Patterson signed the back of one check, and because this does involve agency principles. Patterson signed the back of every check over an ongoing four-year period.<sup>32</sup> Patterson's signature on the back of the checks is presumed an indorsement and is also an unauthorized signature<sup>33</sup> Here Patterson was acting with *actual* and apparent authority for Skils'Kin and

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<sup>31</sup> ECF No. 193 at 2 (District Court Order Certifying Questions); WTB's Response Brief on Certified Questions at 2-7.

<sup>32</sup> ECF No. 140 at 4 (District Court Order re Summary Judgment); ECF No. 193 at 3 (District Court Order Certifying Questions).

<sup>33</sup> *Supra* notes 20-22.

its clients when she signed the front and indorsed the backs of the checks.<sup>34</sup> Unlike in *Ford Motor*, here WTB was not in the best position to stop the scheme by Skils'Kin's agent. Rather, Skils'Kin was in the best and only position to determine Patterson (that it cloaked with actual and apparent authority to handle Skils'Kin's financial affairs, manage the accounts, indorse checks, make withdrawals, make agreements with WTB, and act on behalf of Skils'Kin's clients) was instead conducting a savvy bookkeeping, check-cashing scheme.<sup>35</sup> Although this Court has not been asked to decide any facts, the Court cannot ignore those facts, as NWCLC urges, when deciding the certified questions. Here, RCW 62A.4-406(f) applies because there *is* a dispute about Patterson's signatures on the back of the checks and because Travelers' claim is premised on unauthorized withdrawals. As a matter of law, Skils'Kin's failure to comply with 4-406(f) bars Travelers' claim.

**C. WTB exercised ordinary care when it cashed checks to Skils'Kin, via its agent, Patterson, given the nature of the relationship with and the agreements between WTB and Skils'Kin.**

NWCLC's argument – paying checks to a person other than the payee is always unreasonable as a matter of law – ignores the plain language of Washington's U.C.C. For example, RCW 62A.3-402 recognizes and enforces signatures made by persons “acting, or purporting to act, as a representative”

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<sup>34</sup> WTB's Response Brief on Certified Questions at 3-7; ECF No. 69, ¶¶8, 9. Patterson signed all Skils'Kin's contracts with WTB. ECF Nos. 90, ¶¶5-6, 90-1 and 90-2. Patterson was a signatory on all accounts with WTB. ECF No. 123, #21; ECF No. 90, ¶9; ECF No. 90-3 at 47. Patterson was authorized to sign checks by facsimile signature. ECF No. 193 at 2 (Court's Order Certifying Questions).

<sup>35</sup> *See id.*; WTB's Response Brief on Certified Questions at 5-6. Skils'Kin executed a Resolution and provide a copy to WTB, which gave Patterson broad powers to make contracts, agreements, stipulations with WTB; open any accounts for Skils'Kin; endorse checks and orders for payment of money and withdraw funds on deposit with WTB. ECF No. 90, ¶9; ECF No. 90-3 at 47. And Skils'Kin's contract with WTB gave Patterson the power to endorse all items. ECF No. 90, ¶5; ECF No. 90-1 at 24, 29, 31; ECF No. 90-2.

even if they put their name on the check and not that of the represented person. And RCW 62A.4-406(f) applies “without regard to care or lack of care.”

Ordinary care is only a question applicable to the analysis in this case after application of the affirmative defense in 4-406(f). And here, the ordinary care question would only apply potentially to a small number of checks timely identified within the 4-406(f) notice period, and then it operates as a second defense to the bank against unauthorized signatures and alterations where the customer failed to examine its statements and identify unauthorized payments. RCW 62A.4-406(d) and (e). If Travelers could prove WTB failed to exercise ordinary care for those select checks timely identified to WTB, then the statute details a balancing test, or comparative fault analysis, weighing the bank’s fault against Skils’Kin’s fault in failing to review its statements and failing to identify the unauthorized payments.

NWCLC’s argument – that paying checks to a person other than the payee is always unreasonable as a *matter of law* – is also not supported by the plethora of cases it cites, most of which are not from Washington. The Washington cases cited by NWCLC were all decided *before* Washington enacted the U.C.C.<sup>36</sup> Contrary to NWCLC’s arguments, each case it relies on examines the scope of the agent’s authority and the commercial reasonableness of a bank’s actions as a question of fact, not of law. The cases cited by NWCLC are also significantly distinguishable. By comparison, the facts in this case show as a matter of law WTB did not fail to exercise ordinary care.

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<sup>36</sup> The U.C.C. was enacted in large part in Washington in 1967. See *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wn.2d 893, 425 P.2d 623 (1967). The 1990 versions of Article 3 and 4 were enacted in Washington during the 1993 legislative session.

*California Stucco Co. of Washington v. Marine National Bank*, 148 Wash. 341, 268 P.891 (1928) does not further NWCLC's position. This Court explained the question of agency authority is dependent on the specific facts,<sup>37</sup> and since the bookkeeper employee in that case "had no authority to cash, endorse, handle, or dispose of the checks" in any manner under any circumstances, *id.* at 342, the bank was liable for allowing the employee to personally endorse a corporate check. *Id.* at 343-45. Only because there was no evidence of any actual or apparent authority given to the employee, was the employer's own negligence in failing to supervise the employee not considered. *Id.* at 347. *California Stucco* was decided before the U.C.C. was enacted by Washington, so now a comparative fault analysis is specifically required, *see e.g.*, RCW 62A.3-406, and now the U.C.C. specifically forecloses some of an employer's claims against a bank if the customer fails to comply with its own duty to review its statements and identify unauthorized signatures or alterations. *See* RCW 62A.4-406(f).

Moreover, the facts in this case are not comparable to *California Stucco*. Here, Paterson had specific, actual authority to do all of the things (and more) that the employee in *California Stucco* did not. Patterson had her own stamp that she was authorized to use to make and indorse checks, she had specific authority to write, indorse, cash and deposit checks; she had

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<sup>37</sup> As part of its analysis, the *California Stucco* Court distinguished *Hill Syrup Co. v. American Savings Bank & Trust Co.*, 133 Wash. 501 (1925) where this Court held the opposite – it held *not* liable a bank that paid corporate checks drawn by the president of the corporation in favor of another corporation in which he had a controlling interest on the ground that the bank had no notice of any limitation on the president's authority to draw checks. The president had authority to draw checks of the corporation, just like Patterson, but did not have authority to draw the particular checks at issue.

expansive, unchecked express authority for years given to her by Skils'Kin (the authority Skils'Kin's auditor more than once warned was too risky).<sup>38</sup>

NWCLC cites six additional cases where the agent had no authority to indorse the checks at issue. Those cases are not helpful to this Court's analysis since here it is undisputed that Patterson had actual authority over Skils'Kin's account. NWCLC relies on *Coleman v. Seattle National Bank*, 109 Wash. 80 (1919); *Aetna Casualty & Surety Co. v. Hepler State Bank*, 6 Kan. App. 2d 543, 630 P.2d 721 (1981); *Govoni & Sons Construction Co., Inc. v. Mechanics Bank*, 51 Mass. App. Ct. 35, 50-51, 742 N.E.2d 1094 (2001); *Bank of Southern Maryland v. Robertson's Crab House*, 39 Md. App. 707, 389 A.2d 388 (1978); and *National Bank of Georgia v. Refrigerated Transport Co., Inc.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978). None of these cases support NWCLC's contention that WTB acted commercially unreasonable, as a matter of law; they all hold the scope of an agent's authority is a question of fact.

*Coleman* was decided before Washington enacted the U.C.C. and there this Court explained whether an agent had authority to indorse and transfer the one check at issue was a question of fact so it looked to the surrounding circumstances (or lack of any) to evaluate the agency relationship. 109 Wash. at 85. The bank had no evidence of any agency relationship between the person indorsing the company check and the company, and no evidence the indorser had any authority to do so. *Id.* at 82-83. Likewise, in *Aetna*, there was no evidence the person endorsing the checks at issue had any actual authority to do so and the bank made no inquiry into the implied authority. 630 P.2d at 726. And in both *National Bank of Georgia* and *Govoni & Sons*, there was *no*

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<sup>38</sup> *Supra* notes 34 and 35; ECF No. 90, ¶5, ECF Nos. 90-1, 91-3 at 24, and 91-4.

evidence of *any* authority given to the person indorsing the checks and the banks failed to conduct any inquiry into authority. 248 S.E.2d at 498; 742 N.E.2d 1094. Similarly, in *Robertson's Crab House*, an accountant presented checks made payable to the bank, but the bank allowed the accountant to deposit a portion of the checks into the accountant's personal checking account and did not require him to endorse the checks. 389 A.2d at 390-391. It was undisputed the bank knew the accountant was "never" "authorized to sign any checks or make deposits into any account other than company's. *Id.*

Unlike *Coleman*, this does not involve a one-off situation; Patterson indorsed hundreds of checks over four years.<sup>39</sup> Unlike *Coleman* and *Aetna*, here the record is replete with evidence of Patterson's agent relationship for both Skils'Kin and its customers.<sup>40</sup> By sharp contrast to *Govoni & Sons* and *National Bank of Georgia*, where the banks made no inquiry, here Skils'Kin affirmatively told WTB Patterson had actual authority to make and indorse checks on behalf of Skils'Kin and its clients, and she had full authority to take all other actions in connection with Skils'Kin's accounts.<sup>41</sup> This is not a case of a missing indorsement like *Robertson's Crab House* because Patterson signed the back of every check. And here Patterson was specifically authorized to make checks, cash checks, deposit checks, and indorse checks; she had actual authority, in writing, to take any action on Skils'Kin's account.<sup>42</sup>

This Court distinguished its holding in *Coleman* several years later in *Forker v. Fidelity Savings & Loan Ass'n*, 133 Wash. 524, 526 (1925), where it

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<sup>39</sup> *Supra* note 32.

<sup>40</sup> See WTB's Response Brief on Certified Questions at 39-49 and 3-7.

<sup>41</sup> *Supra* notes 34 and 35.

<sup>42</sup> *Supra* notes 34 and 35.

examined the scope of authority granted through a power of attorney document used by the agent to sell a mortgage on a home.<sup>43</sup> The home sale was disputed by challenging the scope of the agent's authority. *Id.* There, the scope of authority was express and specific so the transfer of the home was affirmed. *Id.* Similarly, here, the scope of Patterson's authority is determined by looking at all the representations Skils'Kin made to WTB. Skils'Kin gave Patterson express and specific authority to: write checks for Skils'Kin, endorse checks and orders for payment of money and withdraw funds from WTB, open any account, endorse all items, and make any contract or agreement or stipulation with WTB.<sup>44</sup> And Patterson exercised that authority to withdraw funds for Skils'Kin's clients and indorse checks on their behalf.

NWCLC's reliance on *Toadvine v. Northwest Trust & State Bank*, 122 Wash. 609, 211 P. 286 (1922) is also misplaced because it was decided before Washington codified the U.C.C. and before the 1990 revisions to Articles 3 and 4. In *Toadvine*, this Court again analyzed the scope of the agent's authority as a question of fact – whether the Secretary was held out to the bank as having implied authority to indorse and cash the checks in question was a question of fact for the jury. 122 Wash. at 614-615. There, the Secretary did not have actual authority to indorse checks. Here, there is no dispute Patterson had the power to make, indorse, and collect checks for Skils'Kin and its clients, and to make agreements with WTB on behalf of Skils'Kin. Patterson had authority to do what she did, even if she misused her authority.<sup>45</sup>

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<sup>43</sup> This case was not cited by NWCLC.

<sup>44</sup> *Supra* notes 34 and 35.

<sup>45</sup> *Supra* notes 34 and 35.

NWCLC cites two cases involving examination of a corporate resolution to ascertain the authority of the individual indorsing the checks at issue: *Master Chemical Corp. v. Inkrott*, 563 N.E.2d 26 (OH 1990) and *Pargas, Inc. v. Estate of Taylor*, 416 So.2d 1358 (1982). Both cases are distinguishable and do not support NWCLC's conclusion that WTB was commercially unreasonable as a matter of law.

First, in *Inkrott* the question was whether the checks were properly payable, which is a question of fact in this case that is not before this Court. Second, in *Inkrott* the issue was how to analyze the scope of authority question in connection with checks made payable to the order of a bank, not an individual payee, and those questions were examined in part under the Ohio Uniform Fiduciaries Act, which is not in play here. Third, in *Inkrott* the Ohio Supreme Court's findings about the scope of the authority of the company controller who indorsed the checks at issue turned on the scope of a corporate resolution the customer supplied to the bank. 563 N.E.2d at 27. And in *Pargas*, the bank never obtained a corporate resolution authorizing the endorsement of checks by the individual. Here, however, Skils'Kin supplied a corporate resolution to WTB, and that resolution specifically gave Patterson full authority to take any action on Skils'Kin's accounts, and to indorse checks.<sup>46</sup> In *Inkrott* the controller was only responsible for paying company taxes, 563 N.E.2d at 27, but here Patterson was responsible for everything on the account.

NWCLC relies on two cases involving restrictive endorsements, which are not the issue before this Court. *Olean Area Camp Fire Council, Inc. v. Olean Dresser Clark Federal Credit Union*, 538 N.Y.S.2d 905 (N.Y. Sup. Ct.

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<sup>46</sup> *Supra* note 35.

1989) involved 10 forged checks by an employee: 6 bore restrictive endorsements of “deposit only”; 3 checks had no endorsements; and one the employee endorsed. *Id.* at 907. The bank was held liable where it ignored the restrictive endorsements, which made the proceeds payable only to the bank. *Id.* at 910. Here, however, none of the checks had restrictive endorsements. The bank was held liable for the one check endorsed by the employee but made payable to a different payee, where the bank did this only one time and based solely on the employee’s oral assertion even though it was undisputed the employee had no authority to draw checks. *Id.* at 910-912. Here the opposite is true. This is not a one-off situation. Patterson made and endorsed hundreds of checks on behalf of Skils’Kin and its customers over 4 years.<sup>47</sup> And Patterson had actual authority to both make and indorse checks.<sup>48</sup>

Finally, the *Olean* Court sent to the jury the question of liability for the three checks missing an endorsement because the conduct of the maker of the check had to be examined to see if reasonable and prudent behavior would have revealed the conduct of its employee and prevented further losses. *Id.* at 912-914. This is not a case of a missing indorsement, but similarly here Skils’Kin was in the best position to discover and prevent Patterson’s actions (of which it was warned).<sup>49</sup>

*O’Petro Energy Corp. v. Canadian State Bank*, 837 P.2d 1391 (OK 1992) also involved restrictive endorsements. There the president of the corporation wrote “for deposit only” on the back of the check but the bank

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<sup>47</sup> *Supra* note 32.

<sup>48</sup> *Supra* notes 34 and 35.

<sup>49</sup> ECF Nos. 91-3 at 24 and 91-4.

deposited the check, made payable to the corporation, into the president's personal account. *Id.* at 1392. The trial court held the bank liable, but the appellate court reversed holding it was error to refuse to hear the bank's evidence about the commercial reasonableness of its actions. *Id.* at 1395. The court explained if the president of the corporation had authority to sign the check then the manner in which the check was indorsed would not have created any liability for the bank if the bank was complying with the president's instructions; if the president had the authority to indorse the check and to put it into any account he wanted, then "how" he went about it was immaterial if the bank was complying with his instructions. *Id.* at 1394-95. *O'Petro* shows WTB did not fail to exercise ordinary care.

Finally, NWCLC's citation to Washington's Vulnerable Adult Statute<sup>50</sup> is misplaced. This is not about financial exploitation of the disabled. Skills'Kin's customers never suffered any loss. Skills'Kin never suffered any loss. Only Travelers paid a loss it contracted to pay under an insurance policy.

The answer to the third certified question is no: as a matter of law, a bank does not fail to exercise ordinary care if it pays cash to a person authorized to act on behalf of the payee and the bank's customer.

### III. CONCLUSION

The Court should answer the first certified question "yes", the second question "yes", and the third question "no".

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<sup>50</sup> The Vulnerable Adult Statute protects banks. RCW 74.34.220 allows banks to share confidential banking records with the police if the bank believes its customer is being exploited, and protects the bank from liability if the information is shared in good faith. Under RCW 74.34.215, banks are immune from any liability for disbursing funds if disbursed in good faith.

Respectfully submitted this 30th day of August, 2016.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 30th day of August, 2016, I caused to be filed via email at [Supreme@courts.wa.gov](mailto:Supreme@courts.wa.gov) with the Washington State Supreme Court, and I served a true and correct copy of the foregoing document as follows:

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Travelers vs. Washington Trust Bank  
Supreme Court No. 92483-0  
USDC – Eastern District of WA No. CV-13-0409-JLQ

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