FILED
SUPREME COURT
STATE OF WASHINGTON
9/19/2022 4:05 PM
BY ERIN L. LENNON
CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 101288-8

(Court of Appeals No. 38346-6-III)

KARISSA FEYEN
on behalf of herself and all others similarly situated,

Respondent-Appellant,

v.

SPOKANE TEACHERS CREDIT UNION,

Petitioner/Appellee

PETITION FOR DISCRETIONARY REVIEW UNDER RAP 13.4

Fred Burnside, WSBA No. 32491
Davis Wright Tremaine LLP
920 Fifth Avenue, Suite 3300
Seattle, Washington 98104
Phone: (206) 622-3150

Kimberley Hanks McGair, WSBA No. 30063
FARLEIGH WADA WITT
121 SW Morrison St.
Portland, Oregon 97204

Attorneys for Petitioner/Appellee
Spokane Teachers Credit Union

TABLE OF CONTENTS

Page

I. INTRODUCTION 6

II. IDENTITY OF PARTY FILING MOTION 7

III. COURT OF APPEALS' DECISION 7

IV. ISSUES PRESENTED FOR REVIEW 10

V. STATEMENT OF THE CASE...................................... 10

A. STCU Credit Union, Its Members, and Its Account Documents. 10

B. Debit Card Transactions and Overdraft Fees. 10

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED. 18

A. The Court Should Confirm that CR 12(b)(6) Does Not Require the Court to Accept as True Allegations Contrary to the Contract Attached to the Complaint. 18

1. Misapplication of the Standard for CR 12(b)(6) Motions Created Error Here. 18

2. The Court of Appeals Accepted as True Allegations Contrary to the Contract at the Center of the Dispute. 19

3. Supreme Court Precedent Confirms that Contract Terms Control Over Inconsistent Allegations. 21

B. The Court of Appeals' Decision Conflicts With Reasoning From Other Court of Appeals Decisions and Ignores Federal Preemption Issues. 24

C. The Court Should Accept Review Because the Overlay of Federal Law in this Case Involves Issues of Substantial Public Interest 26

VII. CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Federal Cases

McCollam v. Sunflower Bank, N.A.,
--- F. Supp. 3d ---, 2022 WL 1134276 (D. Colo. April 15, 2022) 20

Rader v. Sandia Lab. Fed. Credit Union,
2021 WL 1533664 (D. N.M. 2021) 6

State Cases

Benjamin v. Columbia State Bank,
No. 21-2-08744-4 (Pierce Cnty. Dec. 16, 2021) 6

Feyen v. Spokane County Teachers Credit Union
--- Wn. App. ---, 515 P.3d --- 2022 WL 3571967 (Aug. 18, 2022) 24

Foltz v. Matanuska Valley Federal Credit Union,
2021 WL 865542 (Alaska Super. 2021) 28

Haberman v. Wash. Pub. Power Supply Sys.,
109 Wn.2d 107, 744 P.2d 1032 (1987) 18

Lawson v. Sprague,
51 Wash. 286, 98 P. 737 (1908) 9, 21

Moore v. Solarity Credit Union,
No. 22-20149338 (Yakima Cnty. July 7, 2022) 6

Nelson v. Peoples Bank,
No. 22-20078137 (Whatcom Cnty. June, 28, 2022) 6

Nichols v. Severtsen,
39 Wn.2d 836, 239 P.2d 349 (1951) 9, 21

Oatis v. TwinStar Credit Union,
No. 21-2-00281-34 (Thurston Cnty. Feb. 25, 2021) 6

P.E. Sys., LLC v. CPI Corp.,
176 Wn.2d 198, 289 P.3d 638 (2012) 19

Rieken v. Timberland Bank,
No. 22-2-05814-1 (Pierce Cnty. April 4, 2022) 6

Silvey v. Numerica Credit Union,
2022 WL 3209419 (Wn. App. Aug. 9, 2022) .... *passim*

Swetman v. Columbia Credit Union,
No. 22-2-01863-06 (Clark Cnty. July 29, 2022) 6

Tenore v. AT&T Wireless Servs.,
136 Wn.2d 322 962 P.2d 104 (1998) 18

Turner v. Tjosevig-Kennecott Copper Co.,
116 Wash. 223, 199 P. 312 (1921) 9, 21

Federal Statutes

12 U.S.C. § 4301 26

Federal Regulations and Regulator Materials

12 C.F.R. § 229.10 31

12 C.F.R. § 229.16 30

12 C.F.R. § 1005.17 .... 10, 30

12 C.F.R. § 1030.1 .... 26, 27

12 C.F.R. § 1030.3 30

12 C.F.R. § 1030.4 27

CFPB Supervisory Highlights (2015), available at https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf 32

CFPB Blog, Understanding the Overdraft "Opt-in" Choice (Jan. 2017), available at www.consumerfinance.gov/about-us/blog/understanding-overdraft-opt-choice/ 32

State Statutes

RCW 19.86 8

Rules

CR 10 19

CR 12 .... 10, 18, 19, 23

RAP 13.4 .... *passim*

RAP 18.17 34

Appellate Court Materials

Feyen v. Spokane County Teachers Credit Union, No. 38346-6-III, Oral Argument (June 8, 2022), avaialbe at https://www.courts.wa.gov/content/OralArgAudio/a03/20220608/383466 Feyen.mp3 .... 20, 28

I. INTRODUCTION

This case is one of hundreds of putative class actions nationwide—and one of over a half-dozen pending in Washington—which seek damages for consumers who admittedly spent more money than they had:

> [T]here is an ongoing national battle between certain interest groups against federal credit unions, with consumers attacking overdraft fee disclosures via attempted class action lawsuits. Federal credit unions are now being forced to defend membership agreements and overdraft fee disclosures from technical accounting arguments, even though the consumers incurring the penalties literally appear to be spending more money than they actually have.

Rader v. Sandia Lab. Fed. Credit Union, 2021 WL 1533664, *1 (D. N.M. 2021).[1] This is one of "a spate of class action lawsuits" alleging that "charges for overdraft protection have been imposed more frequently than permitted by the agreement

---

[1] The following overdraft cases are pending in state courts: *Swetman v. Columbia Credit Union*, No. 22-2-01863-06 (Clark Cnty. July 29, 2022); *Moore v. Solarity Credit Union,* No. 22-20149338 (Yakima Cnty. July 7, 2022); *Benjamin v. Columbia State Bank,* No. 21-2-08744-4 (Pierce Cnty. Dec. 16, 2021); *Nelson v. Peoples Bank*, No. 22-20078137 (Whatcom Cnty. June, 28, 2022); *Oatis v. TwinStar Credit Union,* No. 21-2-00281-34 (Thurston Cnty. Feb. 25, 2021); and *Rieken v. Timberland Bank*, No. 22-2-05814-1 (Pierce Cnty. April 4, 2022).

signed by the consumer." *Silvey v. Numerica Credit Union*, 2022 WL 3209419, *2 (Wn. App. Aug. 9, 2022).

These cases affect millions of Washington citizens and implicate hundreds of millions of dollars. The Court should accept review because of substantial public interests at stake.

II. IDENTITY OF PARTY FILING MOTION

Petitioner/Appellee is Spokane Teachers Credit Union ("STCU"), a member-owned, democratically controlled, non-profit financial institution. STCU was the defendant in the trial court and Appellee in the Court of Appeals, Division Three.

III. COURT OF APPEALS' DECISION

Plaintiff admittedly spent more money than she had in her STCU deposit account and, as a result, was assessed an overdraft fee. She specifically ***asked*** STCU to pay transactions when she lacked sufficient funds (in exchange for an overdraft fee "each time [STCU] pay[s]s an overdraft"). But Plaintiff contends STCU's Account Agreement bars it from assessing fees for a subset of debit-card transactions authorized when her account had a sufficient available balance but paid to the

merchant later, when her account had an insufficient one, because she spent those funds in the meantime.

Plaintiff claims STCU must assess overdraft fees for debit-card transactions based on her available balance when a transaction is ***authorized*** (i.e., when she gives her debit card to a merchant)—even if that transaction is ***never*** completed, if the transaction amount changes between authorization and payment (e.g., when a restaurant-tip is added), or if she chooses to spend the available balance between swiping her card and when the transaction gets paid. She claims that whenever a transaction is authorized into a positive balance, STCU must "sequester" funds sufficient to pay the transaction and not allow Plaintiff to use those funds to pay other transactions. Plaintiff brought contract claims and alleged violations of RCW 19.86. The trial court granted STCU's Motion to Dismiss.

In a reported decision on August 18, 2022, 515 P.3d ---- 2022 WL 3571967, the Court of Appeals reversed. A copy of the published opinion is in the Appendix at pages A-1 to A-15. The Court should accept review under RAP 13.4 because:

First, the Court of Appeals accepted as true Plaintiff's allegations that the parties' contract requires STCU to "sequester" funds when the Account Documents contain no such promise. This holding is in conflict with this Court's prior rulings that when a claim is founded on a contract attached to the Complaint, the contract terms control over contrary allegations. *Nichols v. Severtsen*, 39 Wn.2d 836, 839, 239 P.2d 349, 351 (1951); *Turner v. Tjosevig-Kennecott Copper Co.*, 116 Wash. 223, 226, 199 P. 312, 313-14 (1921); *Lawson v. Sprague*, 51 Wash. 286, 290-91, 98 P. 737, 738 (1908).

Second, the Court of Appeals' decision is contrary to the reasoning of *Silvey v. Numerica Credit Union*, No. 380474-III (Aug. 9, 2022).

Third, this case raises substantial issues of public importance because the decision reverses based on STCU's use of disclosures required by federal law, is contrary to regulatory guidance, ignores that federal law preempts these claims, will result in ***more*** overdraft fees, and because myriad similar cases are now pending in courts of this state.

IV. ISSUES PRESENTED FOR REVIEW

1. On a CR 12(b)(6) Motion, must courts accept as true allegations of a Complaint about contract terms that are contrary to the terms of the contract attached to the Complaint?

2. Does the federal Truth in Savings Act (TISA) preempt Plaintiff's claims?

3. Is the Court of Appeals' decision contrary to existing federal requirements for account disclosures under Regulation E, Regulation CC, and the Truth in Savings Act?

V. STATEMENT OF THE CASE

A. STCU Credit Union, Its Members, and Its Account Documents.

Plaintiff has a checking account with STCU. CP 5 ¶ 2.2. Plaintiff's account is governed by (among other documents): STCU's Membership and Account Agreement, Overdraft Disclosure, and Privilege Pay Agreement (collectively, the "Account Documents"). CP 7-8 ¶ 3.13, CP 12-13 ¶¶ 3.33-3.36.

B. Debit Card Transactions and Overdraft Fees.

Plaintiff's Complaint relates solely to one type of debit card transaction, which is alternatively referred to as a "swipe," "every day, non-recurring," or "signature-based" debit card

transaction (“swipe debit card transaction”). CP 27 ¶ 3.28. As alleged in Plaintiff’s Complaint, swipe debit card transactions take place in at least two steps. CP 27 ¶¶ 3.28-3.30.

Step One: Authorization to Proceed. The first step occurs when Plaintiff swipes her debit card to initiate a potential purchase with a merchant. *Id.* The merchant’s card reader transmits a request to STCU to determine whether the merchant is authorized to proceed with the potential transaction. If Plaintiff has sufficient available funds to pay the proposed transaction, then STCU authorizes the transaction to go forward, which commits STCU to pay the merchant for the full amount authorized. If Plaintiff lacks available funds to pay the proposed transaction, then STCU will decline the authorization, and Plaintiff is left to find some other way to pay her merchant.

But STCU also offers an overdraft-protection plan known as Privilege Pay, for members who would prefer that STCU authorize and pay transactions that overdraw their account (up to $1,000 maximum). CP 37, 40. Where, as here, Plaintiff has opted into the Privilege Pay program, STCU will authorize transactions to proceed (even where Plaintiff lacks sufficient

available funds), and ***if*** those transactions are completed, it will pay those transactions. CP 40. STCU charges "a fee of $29.00 each time [it] ***pay[s]*** on overdraft." *Id.*

Of course, that a transaction is authorized for a certain amount does not mean that Plaintiff will necessarily complete the transaction at all. For example, if Plaintiff were to book a hotel reservation using her debit-card, the hotel would seek authorization for an amount necessary to pay for the length of the expected hotel stay. But if Plaintiff cancels that reservation before it is presented for payment, then the authorization becomes meaningless because the transaction is never consummated and STCU never pays the amount authorized.

Likewise, that a transaction is authorized in a certain amount does not mean final payment will be for that same amount. As explained by STCU, some transactions require that the "merchant preauthorize you for an amount larger than the actual purchase." CP 38. So, if Plaintiff wants to purchase $20 in gasoline and inserts her debit card to authorize the transaction, the gas station does not know whether she will spend $5 or $100, and will seek an authorization for a higher

amount to make sure it gets paid for the full amount of gas dispensed. CP 38. In that instance, the final payment will be less than the amount of authorization. Alternatively, if Plaintiff has $50 in her account, and buys a $40 meal at a restaurant using her debit card, neither the merchant nor STCU has any ability to know whether or how much Plaintiff will tip the restaurant. Thus, STCU has no ability to determine whether Plaintiff has sufficient available funds at authorization (i.e., when she swipes her debit card but before the tip is added). In that instance, the final payment amount—assuming Plaintiff tips her servers—is more than the amount authorized.

The crucial point is that the merchant does not get paid, ***nor does it even request payment*** at the time of authorization. CP 27 ¶¶ 3.28-3.30. In other words, during step one, STCU does not actually transfer any funds from the member's account to the merchant's account because the merchant has not yet "presented" the transaction to STCU for processing payment.

Step Two: Payment. Plaintiff admits that "[s]ometime thereafter" authorization, "the funds are actually transferred from the customer's account to the merchant's account." CP

27, ¶ 3.29. This is, of course, when STCU actually pays any completed transaction for the actual amount of the transaction. *Id.* Plaintiff concedes the time period between when a transaction is authorized and when it is paid—if the transaction is completed—"may be up to three days." CP 25 ¶ 3.19. Overdraft fees arise only after a transaction has been ***both*** authorized and paid. CP 40. Indeed, STCU confirms an overdraft fee arises "each time we ***pay an overdraft***." *Id.* (emphasis added) This makes sense, because only when STCU actually pays the merchant a specific amount can it know the final payment amount and whether Plaintiff has sufficient funds to pay for that transaction. This is why STCU discloses that it charges an overdraft fee only when Plaintiff's "available funds in your checking account are not sufficient to cover checks and other items posted to your account." CP 44. An authorized transaction that Plaintiff never completes—e.g., a canceled hotel reservation—never posts to an account.

Available Balance. Plaintiff will only incur an overdraft fee if her available balance is insufficient to pay the transaction when it is presented for payment. CP 44 § 12(a). Plaintiff

attempts to sow confusion about the phrase "available balance," and the effect of using available balance. The available balance is "a gauge" of the amount of money you have left to spend before the next transaction will either be declined or cause an overdraft. CP 38. It is a tool to assist members in tracking their balance, and offers a snapshot in time as to how much money Plaintiff has available to spend without overdrawing the account ***at that moment***. But the available balance necessarily relies on imperfect information, because STCU has no insight into outstanding checks or whether Plaintiff deposited checks that will later bounce (causing available balance to decrease).

Plaintiff alleges that because pending authorized transactions cause her available balance to decrease, that must mean that STCU is required to "set[] aside" those funds and "sequester[] these funds for payment." CP 24. But she made that up. Nothing in the Account Documents states that STCU "sets aside" or "sequesters" funds tied to potential transactions. Indeed, the Account Documents state the opposite, noting that Plaintiff can overdraw her account even with a positive available balance, CP 38, merchants (not STCU) "control the

timing of when" they demand payment from STCU, *id.*, and debit-card transactions are paid in the order received from those same merchants. *Id.* at 45 § 12(a). Any other construction of the Account Documents leads to absurd results. For example, under Plaintiff's theory, she could have $100 in her account, buy dinner for $99 using her debit card (which would be authorized into a positive balance), and leave a $1,000 tip—knowingly overdrawing her account—without consequence. That makes no sense.

Available Balance Determination Timing: Plaintiff claims STCU must determine the sufficiency of funds and assess overdraft fees at authorization—as soon as the member swipes her debit card and the transaction is initially authorized, even though the transaction could settle days later, for a different amount, or not at all. Intervening transactions (deposits or withdrawals) can affect a member's available balance after initial authorization but before the debit card transaction is paid. Plaintiff's construction of the contract language is contrary to the contract terms but also illogical because it would result in overdraft fees on transactions that

would not overdraw her account. For example, as discussed above, if Plaintiff had a $50 available balance in her account, and bought $20 worth of gas, the gas station may seek authorization of up to $100 because the gas station does not know in advance how much gas she will pump. CP 38. On Plaintiff's construction, STCU must impose an overdraft fee on these facts—***even though she never intended to and never did overdraw the account***—because the authorization amount exceeds her available balance. That makes no sense.

The contract provides that STCU will determine whether a debit card transaction is subject to an overdraft fee only when the item is "presented for payment" and paid by STCU, not at the time of authorization. CP 44-45, § 12(a). Indeed, the Membership Agreement defines STCU's ***payment*** as the act that creates the overdraft. *Id.*

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

A. The Court Should Confirm that CR 12(b)(6) Does Not Require the Court to Accept as True Allegations Contrary to the Contract Attached to the Complaint.

This Court should accept review because the Court of Appeals' decision is contrary to existing Washington Supreme Court precedent. RAP 13.4(b)(1).

1. Misapplication of the Standard for CR 12(b)(6) Motions Created Error Here.

This Court's standard for deciding motions under CR 12(b)(6) has been misinterpreted. Under CR 12(b)(6), the Court may dismiss a Complaint if the plaintiff cannot prove any set of facts which would justify recovery. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330 962 P.2d 104 (1998)). Courts must accept all "well-pleaded" facts as true, but is not required to accept legal conclusions as true. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987)). Where Plaintiff attaches underlying contracts to the Complaint, those documents are incorporated into the Complaint. *See* CR 10(c); *P.E. Sys., LLC v. CPI Corp.*, 176

Wn.2d 198, 202-06, 289 P.3d 638, 641-43 (2012). The requirement that the Court accept the Complaint's allegations as true has created errors in Washington courts.

Plaintiff alleges her contract with STCU required it to "segregate" or "sequester" funds once a debit-card transaction is authorized, and not allow her to use those funds for any other payments. CP 24, ¶ 3.15. But that purported promise appears nowhere in the Account Documents and the actual Account Documents provide the opposite. Because CR 12(b)(6) requires the courts to accept allegations as true, the Court of Appeals felt bound to accept Plaintiff's "sequestration" allegation as true, even though this allegation is contrary to the contract attached to the Complaint. That is contrary to Washington law.

2. The Court of Appeals Accepted as True Allegations Contrary to the Contract at the Center of the Dispute.

This Court should confirm that in deciding a Motion to Dismiss under CR 12(b)(6), the Court need not accept as true allegations about contract terms that are contrary to the actual contract. The Court of Appeals felt bound to accept as true legal conclusions contrary to the plain language of the contract.

During argument the Court stated that "under a 12(b)(6) motion, we have to treat a Complaint as accurate, and if the contract is inconsistent with the Complaint['s allegations] then there is a breach of contract" claim. *See* https://www.courts.wa.gov/content/OralArgAudio/a03/20220608/383466 Feyen.mp3, at 13:10-13:24. Likewise, the Court stated that "[b]ecause the Complaint is inconsistent with the Contract—you admit that the Complaint is inconsistent—and under a 12(b)(6), we have to assume the Complaint is true," despite that inconsistency. *Id.* at 13:52-14:01.

The Court of Appeals' decision accepted as true the unsupported allegation that STCU promised that when it authorized a debit card transaction, it would then supposedly "sequester" and "segregate funds from the account" (App. at 12) and earmark those funds to be used only to pay the authorized debit card transaction. But the Account Documents ***never*** make any such representation.[2]

---

[2] *Compare McCollam v. Sunflower Bank, N.A.*, --- F. Supp. 3d ---, 2022 WL 1134276, *5 n.6 (D. Colo. 2022) (rejecting same "sequester" allegations as "legal conclusions based on Plaintiff's interpretation of the Contract Documents"; not "factual allegations in the context of a Rule 12(b)(6) analysis.").

3. Supreme Court Precedent Confirms that Contract Terms Control Over Inconsistent Allegations.

When claims are founded on a contract which is attached as an exhibit to the complaint, the pleadings in the complaint must give way to contrary provisions of the contract. *Turner*, 116 Wash. at 226, 199 P. at 313-14. Thus, a plaintiff's allegation as to the legal effect of the contract is a conclusion that is not admitted on a motion to dismiss; to the contrary, "the court must construe the [contract's] effect independently of the pleader's interpretation of it." *Lawson*, 51 Wash. at 290-91, 98 P. at 738. "If there is a conflict between the allegations of a pleading and an exhibit attached thereto, the latter will govern where the exhibit is the foundation of the pleading." *Nichols*, 39 Wn.2d at 839, 239 P.2d at 351.

Here, because of the liberal pleading standards under CR12(b)(6), the Court of Appeals felt bound to accept as true allegations that it acknowledged were contrary to the contract terms. But those allegations are not "well-pleaded" because they are contrary to documents incorporated into the Complaint,

and the Court of Appeals was not required to accept them as true, and indeed, had an obligation to reject those allegations.

The Court of Appeals cites no language supporting its theory that pre-authorized funds are "sequestered" and earmarked for a particular transaction. That is because there are no such terms anywhere in the Account Documents—it was made up as a legal conclusion by Plaintiff. Instead, the Court of Appeals refers only to the allegations of Plaintiff Complaint for the propositions regarding "sequestering" and "earmarking." (App. at 5-6.) But even then, the Court of Appeals mischaracterizes the allegation in the Complaint, stating that the "credit union then immediately reduces the member's checking account for the amount of the purchase." *Id*. That is not true.

First, not even the Complaint alleges that STCU "reduces the member's checking account." Rather, STCU reduces only the balance available to spend before paid transactions will incur overdraft fees. Plaintiff is always free to spend whatever funds she has available, whenever she wants, and because she has overdraft protection, she can spend more than she has

available. The decision to overspend is entirely Plaintiff's and entirely in her control.

Second, STCU does not reduce the account "for the amount of the purchase." Instead, STCU reduces only the available balance and then only in the amount requested by the merchant, which—may be an entirely different amount than the final purchase amount. *See, e.g.,* CP 38.

Plaintiff's Complaint hinges on the argument that the purportedly "sequestered" funds are put in a lockbox and remain untouchable. The problem with her theory is that the Account Documents fail to contain any such promise.

The Court of Appeals believed it was bound under CR 12(b)(6) to accept as true allegations contradicted by the documents attached to the Complaint. That analysis is contrary to Supreme Court precedent. This Court should accept review to confirm that courts considering a Motion to Dismiss under CR 12(b)(6) are not bound by allegations contradicted by documents incorporated into the Complaint or legal conclusions contrary to the Account Documents.

B. The Court of Appeals' Decision Conflicts With Reasoning From Other Court of Appeals Decisions and Ignores Federal Preemption Issues.

This Court should accept review because the Court of Appeals' decision is contrary to reasoning from an existing Court of Appeals decision, which has a pending Motion to Publish. *Compare* RAP 13.4(b)(2). The week before the Court of Appeals' decision in this case Division III of the Court of Appeals issued a related decision reaching a contrary result in *Silvey v. Numerica Credit Union,* No. 380474-III, 2022 WL 3209419 (Wn. App. Aug. 9, 2022).

The same counsel for Plaintiff in *Silvey* is counsel in this case. In *Silvey*'s Reconsideration Motion, she asks the Court of Appeals to reconsider the opinion in that case because it "stands in stark contrast to the Court's published decision, issued a scant nine days later, in *Feyen v. Spokane County Teachers Credit Union*." *See Silvey*, No. 38047-5-III, Motion to Reconsider, at 2-3 (Aug. 29, 2022). Thus, counsel in this case concedes the reasoning of this case and *Silvey* conflict, and if Defendant's publication request is granted, there will be a conflict between published Court of Appeals decisions.

As in this case, Plaintiff in *Silvey* alleged that her account agreement with the credit union promised to only charge an overdraft fees when a payment drew her account negative and that the credit union improperly used the available balance in applying overdraft fees. *See Silvey*, 2022 WL 3209419, at *1, *5. Like Plaintiff's manufactured "sequestration" allegations in this case, plaintiff in *Silvey* likewise manufactured allegations about non-existent contract terms, which she asked the Court to accept as true. *Id.* The court in *Silvey* rejected that argument because "none of the expressions … appear in the agreements on which she relies," such that she "can point to no direct textual support in Numerica's agreements for the promise she claims was made." *Id.* This Court should accept review and follow *Silvey*'s analysis (which tracks this Court's analysis) holding that the Court need not accept allegations contrary to the contract incorporated into the Complaint.

C. The Court Should Accept Review Because the Overlay of Federal Law in this Case Involves Issues of Substantial Public Interest

The Court should accept review because the Court of Appeals' decision involves issues of substantial public interest. RAP 13.4(b)(4).

As noted above, this case and other putative class actions like it, implicate hundreds of millions of dollars. *See* § I, supra & n.1. The Court of Appeals' decision also raises issues of federal law, which implicate issues of substantial public interest that warrant review.

TISA Preempts Plaintiff's Claims. The Court in *Silvey* recognized that any argument that the disclosures "are insufficiently detailed as opposed to false or misleading is preempted" by, among other statutes, the federal Truth in Savings Act ("TISA"). 2022 WL 3209419 at *6 n.6. TISA's purpose is to "require the clear and uniform disclosure of … the fees that are assessable against deposit accounts, so that consumers can make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts." 12 U.S.C. § 4301; *see also* 12 C.F.R. §

1030.1. To that end, TISA regulates disclosures "explain[ing] . . . how [a] fee will be determined[] and the conditions under which the fee may be imposed." 12 C.F.R. § 1030.4(b)(4) (emphasis added). Critically, "[s]tate law requirements that are inconsistent with the requirements of [TISA] and this part are preempted to the extent of the inconsistency." *Id*. § 1030.1(d).

The court in *Silvey* acknowledged that TISA preempts any state law claims regarding a credit union's "*failure to disclose certain fee practices* or any perceived unfairness in the fee practices." *Silvey*, 2022 WL 3209419 at *6 n.6. (citations omitted). Here, by contrast the Court of Appeals held that the basis for Plaintiff's claims was that account documents were "confusing and ***unfair***" and that "the overdraft fees [were] an unfair and unlawful assessment." (App. at 2, 8) (emphasis added). The Court of Appeals' decision turns on the alleged unfairness of the practice generally and alleged failure to provide additional disclosures (rather than whether STCU breached an existing promise). *See* App. at 3 (disclosure "does not inform" whether presentment and authorization are at the same time), App. at 5 (same).

In fact, the Court of Appeals, misquoting a CFPB document (addressed below), held that the mere practice of charging overdraft fees on transactions authorized into positive funds—no matter how it is disclosed—was by itself unfair and supported Plaintiff's claims. App. at 6-7. That is ***exactly*** what TISA preempts. *E.g., Foltz v. Matanuska Valley Federal Credit Union*, 2021 WL 865542, *4 (Alaska Super. 2021) ("Foltz's state law claims regarding the federal credit union's failure to disclose certain fee practices or any perceived unfairness in the fee practices themselves are preempted").

During oral argument, Plaintiff admitted her theory is that STCU acted deceptively because "the contract documents ***do not disclose***" the allegedly improper fee practice of imposing fees based on the available balance at payment. *See* https://www.courts.wa.gov/content/OralArgAudio/a03/20220608/383466 Feyen.mp3, at 34:00-34:04. The Court of Appeals accepted Plaintiff's argument—and went beyond the scope of determining whether Plaintiff's allegations ***could*** state a claim based on Complaint—and improperly found that STCU's contract language "***is*** deceptive" because the "account

documents ***do not expressly warn***" that all transactions paid into a negative balance cause overdraft fees. (App. at 6, 7.) (emphasis added).

Federal law (and the Court of Appeals in *Silvey*) recognizes that TISA preempts Plaintiff's claims here because they are based on a purported failure to disclose and the generalized claim (regardless of any disclosure) charging overdraft fees at the time of payment is per se unfair. The Court of Appeals in this case refused to address STCU's TISA preemption arguments, *see* Respondent's Brief, at 4 n.1, and this Court should accept review to resolve this issue of substantial public interest.

Federal Law Requires Multiple Disclosure Documents. The Court of Appeals chides STCU for the fact that it "foists" three different disclosures on its members that bear on overdraft fees, and observes that "STCU does not explain why it needs three separate documents to govern its compact with members." (App. at 2).

The Court of Appeals fails to appreciate that the Electronic Funds Transfer Act's Regulation E ***requires*** that

STCU provide its overdraft opt-in disclosures (CP 40) in a ***separate*** document, segregated from all other disclosures (and the account agreement), that the consumer can keep. 12 C.F.R. § 1005.17(b)(1)(i). TISA likewise requires separate Membership Agreement (CP 42-48) disclosures. 12 C.F.R. § 1030.3(a). That STCU ***also*** provides a disclosure on how to ***avoid*** overdraft fees (CP 37-38) is not a basis for liability.

Federal Law Requires STCU to Disclose "Available-Funds." The Court of Appeals suggests that STCU's use of the phrases "available funds" and "available balance" creates potential confusion because as applied here, they are synonymous. (App. at 4). Again, the Court of Appeals fails to appreciate the overlay with federal banking laws.

Regulation CC mandates STCU use and disclose a federal funds-availability policy, such that "available funds" is a term of art required by federal law. 12 C.F.R. § 229.16. Regulation CC requires STCU make at least $225 of certain deposited checks "available" within one business day, even if STCU has not yet received payment from the issuing bank. *See* 12 C.F.R. § 229.10(c)(vii).

Every financial institution must disclose its available funds policy consistent with Regulation CC. But not every financial institution uses the available-balance methodology for assessing overdraft fees, with some using a "ledger balance" that only factors in settled (rather than pending) transactions. *Silvey*, 2022 WL 3209419, at *2. That STCU must disclose its funds-availability policy and also chooses to further explain that it uses an available-balance methodology for assessing fees (as opposed to a ledger balance) to help members avoid fees is not an error, it is a virtue.

The CFPB Guidance Supports STCU. The Court of Appeals wrongly suggest that the federal Consumer Financial Protection Bureau (CFPB) believes STCU's practices are unfair or deceptive. (*See* App. at 6-7.) But the CFPB publication cited merely suggests that if a financial institution ***changes*** how it assesses overdraft fees without disclosing that change, then that practice is deceptive. The Court of Appeals misquotes the cited passage, omitting text immediately before the quoted passage. What the CFPB found deceptive was that the financial institution "switched balance-calculation methods" used to

assess fees without disclosing the change. *See* CFPB Supervisory Highlights (2015), at 8, available at https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf. There is no allegation that STCU switched balance calculation methods, making this publication irrelevant. Indeed, in a more recent publication, the CFPB confirms that STCU's practice is not deceptive or unfair, and is a common and accepted practice:

> ***Just because your account has enough funds when you're at the checkout counter doesn't mean you'll have the funds later when the transaction finally settles.*** If you've recently written checks or made online bill payments that have yet to be deducted from your account, these could draw down your funds in the meantime, leaving you without enough funds to cover your purchase. ***Debit card overdraft fees can occur on transactions that were first authorized when there were sufficient funds to cover them, but took the account negative when the transaction settled***.

CFPB Blog, Understanding the Overdraft "Opt-in" Choice (Jan. 2017), available at www.consumerfinance.gov/about-us/blog/understanding-overdraft-opt-choice/ (emphasis added).

The Court of Appeals' Decision Harms Consumers. The Court of Appeals adopted Plaintiff's argument that STCU is required to assess fees based on an available balance at the

time a transaction is authorized. But as discussed above, there are myriad instances where this approach will result in ***more*** overdraft fees, including situations where the account was never actually overdrawn (e.g., a gas station purchase) or where the transaction was never even completed (a canceled reservation). Likewise, the Court of Appeals' construction—requiring overdraft fees to be assessed immediately at authorization—prevents consumers from adding funds to their account in between authorization and posting so as to avoid overdraft fees, despite STCU advising members that doing so is an effective means of avoiding overdraft fees and preventing more fees. CP 38. STCU's interpretation of the plain language of the account documents avoids this absurdity and ensures overdraft fees only occur when payments from Plaintiff actually overdraw her account. The Court should accept review to prevent harm to consumers.

VII. CONCLUSION

Petitioners ask the Court to grant review under RAP 13.4(b).

This document contains 4,999 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED on September 19, 2022.

Davis Wright Tremaine LLP
Attorneys for Appellee/Petitioner

By _/s/ Fred Burnside_ __________________
Fred B. Burnside, WSBA # 32491

Kimberley Hanks McGair, WSBA #30063
FARLEIGH WADA WITT
121 SW Morrison St.
Portland, Oregon 97204

DECLARATION OF SERVICE

On this 19th day of September, 2022, I caused to be served on the following a true and accurate copy of Petition for Discretionary Review, in the manner set forth below:

Counsel of Record Roger Davidheiser FRIEDMAN RUBIN 1109 1st Ave Ste 501 Seattle, WA 98101-2988 United States	[ ] via U.S. Mail, first class, postage prepaid [ ] via Legal Messenger Hand Delivery [ ] via Facsimile [X] via Email: rdavidheiser@friedmanrubin.com
Howard M. Goodfriend Jonathan B. Collins SMITH GOODFRIEND, P.S. 1619 8th Ave N. Seattle, WA 98109-3007	[ ] via U.S. Mail, first class, postage prepaid [ ] via Legal Messenger Hand Delivery [ ] via Facsimile [X] via Email: howard@washingtonappeals.com jon@washingtonappeals.com
Taras Kick THE KICK LAW FIRM 815 Moraga Dr, Los Angeles, CA 90049	[ ] via U.S. Mail, first class, postage prepaid [ ] via Legal Messenger Hand Delivery [ ] via Facsimile [X] via Email: Taras@kicklawfirm.com

By */s/ Fred Burnside*
Fred Burnside, WSBA #32491

APPENDIX

FILED
AUGUST 18, 2022
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

KARISSA FEYEN, on behalf of herself and all others similarly situated, Appellant, v. SPOKANE TEACHERS CREDIT UNION, Respondent	)))))))))	No. 38346-6-III PUBLISHED OPINION

.

FEARING, J. — Karissa Feyen appeals the dismissal of her complaint for failing to plead a cause of action. Her complaint alleges that her credit union, Spokane Teachers Credit Union (STCU or the credit union), engaged in an unfair or deceptive act or practice when imposing overdraft user fees on use of her debit card. Because misleading and ambiguous language in STCU's documents could sustain Feyen's causes of action, we reverse dismissal of Feyen's complaint. The language renders even the best of lawyers dizzy when reading.

FACTS

Because the trial court dismissed this action pursuant to CR 12(b)(6), we glean the facts from Karissa Feyen's amended complaint. STCU is one of the largest credit unions in Washington State, with branches throughout the state and with assets exceeding $3 billion. Feyen, a member of STCU, complains that the credit union imposed overdraft

fees on her despite her not overdrawing her account. She further finds fault with confusing and unfair language in the credit union's membership account documents. Feyen focuses on overdraft fees imposed as a result of debit card transactions.

STCU foists on each member at least three distinct documents that control the relationship between the member and the credit union: a membership and account agreement (membership agreement), a privilege pay agreement, and an overdraft disclosure. STCU does not explain why it needs three separate documents to govern its compact with members. Karissa Feyen attaches all three agreements to the amended complaint. STCU drafted the documents and retains the right to change the language in the documents whenever convenient for it. We quote relevant provisions from all three governing documents. When quoting the pertinent language, we also parse the prose in an attempt to understand it.

Section 12(a) of the membership agreement, which section is entitled "Your Overdraft Liability," explains that STCU's payment on a transaction, which payment causes a negative available balance in a credit union member's account, causes an overdraft. The section also explains when the credit union deems the member to hold a negative available balance:

> If on any day the *available funds* in your checking account are not sufficient to cover checks *and other items* posted to your account, those checks and items will be handled in accordance with our overdraft procedures and the terms of this Agreement. The Credit Union's determination of an *insufficient balance* is made at *the time the check or*

> *item is presented to us* [*the credit union*]*, which may be later than the time you conduct your transaction.* The Credit Union processes checks and items as follows: (i) checks are paid based upon the number of the check with the lowest numbered check paid first, (ii) for ACH [Automated Clearing House] items, credits are processed first and ACH debits processed second with the lowest items paid first, and (iii) *debit card transactions are paid in the chronological order they are received*. The Credit Union has no duty to notify you of a check or item that will overdraw your account. *If we pay an item that overdraws your account, you are liable for and agree to pay the overdraft amount and any fees immediately.* You will be subject to a charge for the item whether paid or returned as set forth in the Rate and Fee Schedule. We reserve the right to pursue collection of previously dishonored items at any time, including giving a payer bank extra time beyond any midnight deadline limits.

Clerk's Papers (CP) at 44-45 (emphases added). The second sentence of this section references determination of the account balance when an "item is presented to us." We assume an "item" includes a debit card transaction, although the membership agreement does not define the word. The third sentence reads that the credit union pays debit card transactions "in the chronological order they are received." The section does not inform the member whether the act and timing of an item being presented is the same as the act and timing of the credit union first receiving notice of the debit card transaction. The sentence states that the "time the . . . item is presented to us" "may be later" than the transaction. Since this time may be later, conceivably the time "may" also be the time of the transaction.

The overdraft disclosure defines "available balance":

> Your *available balance* is the money in your account *after deducting all outstanding debits*, ATM [automated teller machine] withdrawals, and

> other pending electronic charges. It does not include outstanding checks, online bill payments, or pre-authorized debits such as health club dues or auto insurance premiums.
>
> *Available balance* is a gauge of how much money is in your account at any moment in time. It can fluctuate throughout the day as debit card purchases, direct deposits, transfers, and so on are posted to your account.

CP at 38 (emphases added). Note that Section 12(a) of the membership agreement, quoted on the previous page, utilizes the term "available funds." The overdraft disclosure employs the phrase "available balance." The documents do not divulge whether STCU intended the two expressions to be synonymous. A transactional attorney learns at a fresh age to employ the same word or phrase throughout all governing documents when conveying the same concept, and the attorney shreds his or her thesaurus in order to thwart confusion in the reader.

We assume that a debit charge falls within the classification of "outstanding debits," "pending electronic charges," or both as written in the overdraft disclosure. Later in this second governing document, the disclosure declares that "an overdraft can occur at any hour that your 'available balance' drops below zero." CP at 37.

The overdraft disclosure elucidates that a credit union member may experience an overdraft, despite having a positive balance:

> Yes, it's possible to overdraft even when your account seems to have enough to cover the charge. That's because merchants—not STCU—control the timing of when *debits are settled*, so it is possible to overdraft by mistake when a merchant waits to settle your debit transaction.
>
> For example, if you bought $200 in groceries Saturday with your debit card, but the supermarket did not collect the money from your

> account until Tuesday, your available balance would appear to be $200 higher than the money you actually have to spend. During that time, you could overspend and experience an overdraft.

CP at 38 (emphasis added). The phrase "debits are settled" returns us to language in section 12(a) of the membership agreement. The second sentence of section 12(a) mentions the determination of the account balance when an "item is presented to us." CP at 44. The third sentence of section 12(a) reads that the credit union pays debit card transactions "in the chronological order they are received." CP at 45. We do not know whether "the timing of when debits are settled" is synonymous with "the time the . . . item is presented to us," "in the chronological order they are received," or both. CP at 45.

According to STCU's third document, the privilege pay agreement, the credit union authorizes and pays overdrafts at its discretion. If STCU does "not authorize and pay an overdraft, [the] transaction will be declined." CP at 40. If the credit union authorizes and pays an overdraft, it charges the credit union member an overdraft fee of $29.

According to the amended complaint of Karissa Feyen, debit card transactions occur in two steps. The first step transpires when a credit union member swipes his or her debit card when making a purchase. Following a swipe, the merchant's card reader transmits a request for preauthorization from STCU. Step one is completed if STCU preauthorizes the transaction. The credit union then immediately reduces the member's

checking account for the amount of the purchase. Stated differently, STCU sets aside funds in the member's account to cover that transaction. The member's displayed "available balance" reflects the subtracted amount. Nevertheless, despite this sequester at the time of sufficient funds, the member may need to pay an overdraft fee on that purchase. Feyen labels this practice as "Authorize Positive, Purportedly Settle Negative Transactions." CP at 24. Despite STCU withholding a specific sum from the account to pay for a debit transaction and the account having sufficient funds, the member can be charged an overdraft fee.

When STCU sequesters the funds from the member's account, the credit union does not immediately wire the funds to the merchant. During the second and later step, STCU actually transfers the authorized funds to the merchant. This latter step, referred to as settlement, may occur up to three days after STCU preauthorized the transaction. Other transactions may take place between steps one and two, further reducing a credit union member's available account balance. But STCU still charges an overdraft fee on the initial transaction, for which it segregated funds, even if, at the time of the transaction, sufficient funds lay in the account. Karissa Feyen asserts that the account documents fail to warn the members that a fee will also be assessed on the initial transaction.

In her amended complaint, Karissa Feyen quotes a portion of the Consumer Financial Protection Bureau, Winter 2015 "Supervisory Highlights," to show that the

federal government deems STCU's practice unfair and deceptive.

> A financial institution authorized an electronic transaction, which reduced a customer's available balance but did not result in an overdraft at the time of authorization; settlement of a subsequent unrelated transaction that further lowered the customer's available balance and pushed the account into overdraft status; and when the original electronic transaction was later presented for settlement, because of the intervening transaction and overdraft fee, the electronic transaction also posted as an overdraft and an additional overdraft fee was charged. Because such fees caused harm to consumers, one or more supervised entities were found to have acted unfairly when they charged fees in the manner described above. Consumers likely had no reason to anticipate this practice, which was not appropriately disclosed. They therefore could not reasonably avoid incurring the overdraft fees charged. Consistent with the deception findings summarized above, examiners found that the failure to properly disclose the practice of charging overdraft fees in these circumstances was deceptive. At one or more institutions, examiners found deceptive practices relating to the disclosure of overdraft processing logic for electronic transactions. Examiners noted that these disclosures created a misimpression that the institutions would not charge an overdraft fee with respect to an electronic transaction if the authorization of the transaction did not push the customer's available balance into overdraft status. But the institutions assessed overdraft fees for electronic transactions in a manner inconsistent with the overall net impression created by the disclosures. Examiners therefore concluded that the disclosures were misleading or likely to mislead, and because such misimpressions could be material to a reasonable consumer's decision-making and actions, examiners found the practice to be deceptive. Furthermore, because consumers were substantially injured or likely to be so injured by overdraft fees assessed contrary to the overall net impression created by the disclosures (in a manner not outweighed by countervailing benefits to consumers or competition), and because consumers could not reasonably avoid the fees (given the misimpressions created by the disclosures), the practice of assessing fees under these circumstances was found to be unfair.

CP at 25-26. Feyen alleges that STCU engages in transactions described in this Consumer Financial Protection Bureau document.

The membership agreement includes a provision on attorney fees. It provides that credit union members are liable:

> for any liability, loss, or expense as provided in this Agreement and that the Credit Union incurs as a result of any dispute involving your accounts or services. . . . In the event either party brings a legal action to enforce the Agreement or collect any overdrawn funds on accounts accessed under this Agreement, the prevailing party shall be entitled, (subject to applicable law), to payment by the other party of its reasonable attorney's fees and costs, including fees on any appeal, bankruptcy proceedings, and any post judgment collection actions, if applicable.

CP at 48.

According to her amended complaint, Karissa Feyen maintains a personal checking account with STCU. Feyen uses a debit card to make purchases that deduct from her checking account. On many occasions, including on May 24, 2020, STCU charged Karissa Feyen overdraft fees on debit card transactions settled on that day despite isolating funds in her account to pay for the transactions.

Karissa Feyen characterizes the overdraft fees as an unfair and unlawful assessment on transactions that did not overdraw checking accounts. The language in the account documents misleads members about the true nature of STCU's practices. By the imposition of the fees, STCU reaps millions of dollars.

> These fees are, by definition, most often assessed on consumers struggling to make ends meet with minimal funds in their accounts. These practices work to catch accountholders in an increasingly devastating cycle of fees.

CP at 20.

PROCEDURE

Karissa Feyen alleges causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and unfair and deceptive acts in violation of the Consumer Protection Act (CPA) RCW 19.86. In the amended complaint, Karissa Feyen seeks certification of a plaintiffs' class. Neither party has filed a motion to certify a class.

STCU moved the trial court to dismiss Karissa Feyen's complaint under CR 12(b)(6) for failure to state a claim on which the court could grant relief. The trial court granted the credit union's motion to dismiss.

During oral argument before this court, STCU's counsel presented a hypothetical situation in order to explain how the credit union's overdraft rules work. We label the hypothetical the breakfast charges scenario. The example explains the significance of the difference between the member's actual balance and available balance. According to this hypothetical, the member starts the day with an actual and available $10 balance. The member visits Starbucks and buys an $8 latte with her debit card. Her STCU available balance is now $2.00 and her actual balance is $10.00. The member next visits McDonald's for breakfast and purchases an Egg McMuffin for $2.79 and hash browns for $1.00, for a total of $3.79. Again, the member pays with her debit card. The member now still retains an actual balance of $10.00. But her available balance decreased to a negative $1.79. Assuming McDonald's settles its transaction first with STCU, the member overdrafts. STCU assesses a $29.00 overdraft fee, and the member's available

balance tumbles further to negative $30.79. Counsel's hypothetical did not disclose the amount of the actual balance at this moment in time. Regardless, a day later, Starbucks settles its transaction. Because of the negative balance, STCU charges another overdraft fee to the member. The member's available balance plummets to negative $67.79. Thus, the member pays two overdraft fees despite her account having sufficient funds to pay for the latte at the time of its purchase.

LAW AND ANALYSIS

Washington liberal pleadings rules compel our reversal of the superior court's grant of STCU's motion to dismiss. The credit union's motion falls under CR 12(b)(6), which reads in pertinent part:

> [T]he following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

We review some familiar and some unfamiliar principles controlling a motion to dismiss. We review de novo a trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6). *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). The superior court and this court grant such motions sparingly, with care, and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief. *Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

Courts should dismiss a complaint under CR 12(b)(6) only when it appears beyond a reasonable doubt that no facts justifying recovery exist. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Courts presume the allegations of the complaint to be true for the purpose of such a motion. *Berst v. Snohomish County*, 114 Wn. App. 245, 251, 57 P.3d 273 (2002). We examine the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint, which would entitle the claimant to relief. *North Coast Enterprises, Inc. v. Factoria Partnership*, 94 Wn. App. 855, 859, 974 P.2d 1257 (1999). We must also accept any reasonable inferences from the facts alleged as true. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). This court may consider any factual scenario under which the plaintiff might have a valid claim, including facts asserted for the first time on appeal. *North Coast Enterprises, Inc. v. Factoria Partnership*, 94 Wn. App. 855, 859 (1999).

When a complaint alleges the contents of documents and does not attach them to the complaint, a court may consider those documents as well. *Davidson v. Glenny*, 14 Wn. App. 2d 370, 374-75, 470 P.3d 549 (2020). Karissa Feyen not only attached the STCU contract documents, but also quoted relevant portions of the documents in her complaint. We need not deem the complaint's legal conclusions as true. *Jackson v. Quality Loan Services Corp.*, 186 Wn. App. 838, 843-44, 347 P.3d 487 (2015).

This may be the first decision wherein the reviewing court relies on a hypothetical presented by the party moving for dismissal rather than the defending party. We

particularly rely on the hypothetical that STCU counsel presented to this court during oral argument. We deem the hypothetical antithetical to the credit union's motion to dismiss. We would have thought before argument that, under the breakfast charges scenario, the member would pay an overdraft fee on one of the debits, but not both. The account documents do not expressly warn the member that she may incur overdraft fees on both purchases. The language is deceptive. Because of the varying, undefined, and esoteric words used in the documents, a reasonable consumer could be confused. The documents nowhere send clear notice of being required to pay an overdraft fee on a transaction for which the credit union segregates funds from the account when those funds are sufficient to retire the debit card debt. One could readily believe that, assuming STCU separates the funds for the Starbucks purchase, the credit union should at least apply those funds to prevent the paying of a second overdraft fee on that transaction after the member pays an overdraft fee on the intermediate McDonald's transaction that settles first.

We have formulated another hypothetical that confirms our conclusion that Karissa Feyen's complaint states a cause of action. Say a credit union member has $10 in his or her account on Monday morning. The member purchases a $6 coffee that morning with his or her debit card. The transaction is authorized and the member's available balance is reduced to $4. Later that same day, the member writes a check for $7. The next morning, the $7 check is presented for payment and the credit union pays the check,

reducing the available balance into overdraft negative $3. On Wednesday, the $6 coffee debit is presented for payment against a negative $3 available balance.

At this point, under our own hypothetical, the credit union could process the coffee transaction in two ways. Feyen alleges that the contract requires STCU to determine the sufficiency of funds at the time of authorization. Since there were sufficient funds when the $6 coffee was authorized, and those funds were deducted from the available balance, those sequestered funds should be kept separate and applied directly to the charge when it is later presented regardless of the available balance at the time of presentment.

The credit union argues that the contract clearly states that the sufficiency of funds is determined at the time of presentment, not authorization, and items are paid from the available balance. Under this scenario, when the $6 debit charge is presented for payment, the $6 hold is released back into the account bringing the available balance to $3. But when the $6 charge is then applied to that balance, it creates another overdraft. Under the credit union's process, the two charges create two overdrafts and two overdraft fees even though the credit union member possessed sufficient funds in the account to cover one of the two charges.

We need not discuss contract law to bolster our decision. An implied duty of good faith and fair dealing inheres in every contract. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This duty obligates the parties to cooperate with

each other so that each may obtain the full benefit of performance. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569 (1991). The covenant requires the parties to perform in good faith the obligations imposed by their agreement. *Badgett v. Security State Bank*, 116 Wn.2d at 569. Karissa Feyen sufficiently pleads causes of action for breach of contract and violation of the implied duty of good faith.

To succeed in a private CPA action, a party must establish the following elements: (1) unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). An unfair or deceptive act or practice need not be intended to deceive. The practice need only have the capacity to deceive a substantial portion of the public. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 74-75, 170 P.3d 10 (2007); *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 785 (1986). The CPA "affords a right to recover damages independent of underlying contract rights." *Keyes v. Bollinger*, 31 Wn. App. 286, 293, 640 P.2d 1077 (1982).

The facts pled by Karissa Feyen can sustain a finding in her favor as to all elements of a CPA claim. The credit union does not dispute that its acts occur in trade or commerce or that the acts can impact the public interest. Feyen alleges that STCU imposes its deceptive contract language on hundreds, if not thousands of consumers.

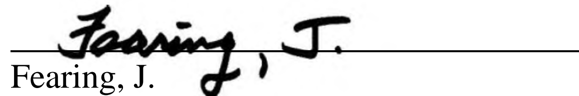
Attorney Fees

Karissa Feyen requests attorney fees on appeal under RCW 19.86.090, which statute authorizes the trial court to award the prevailing party reasonable attorney fees. Alternatively, Feyen asks this court to instruct the trial court to award fees on remand pursuant to RAP 18.1. We deny the request because Feyen has yet to prevail on her CPA claim. We remand to the superior court only for further proceedings.

STCU seeks attorney fees on appeal pursuant to RCW 4.84.330 and the language in the membership agreement. Because we reverse the superior court, we also deny STCU recovery of fees.

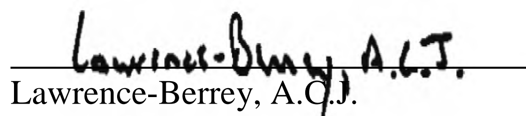
CONCLUSION

We reverse the superior court's dismissal of Karissa Feyen's amended complaint. We remand for further proceedings consistent with this opinion.

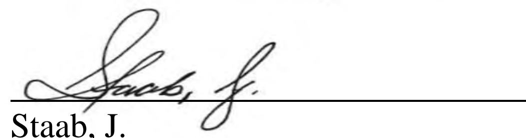


Fearing, J.

WE CONCUR:



Lawrence-Berrey, A.C.J.



Staab, J.

DAVIS WRIGHT TREMAINE LLP

September 19, 2022 - 4:05 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,288-8
Appellate Court Case Title:	Karissa Feyen v. Spokane Teachers Credit Union
Superior Court Case Number:	20-2-03072-9

The following documents have been uploaded:

- 1012888_Other_20220919160257SC863526_5481.pdf
  This File Contains:
  Other - Petition for Discretionary Review
  The Original File Name was STCU- Petition for Review.pdf

A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- asmith@fwwlaw.com
- branit@litchfieldcavo.com
- howard@washingtonappeals.com
- jkaliel@kalielpllc.com
- jon@washingtonappeals.com
- jonathan.bruce.collins@gmail.com
- kmcgair@fwwlaw.com
- rdavidheiser@friedmanrubin.com
- taras@kicklawfirm.com

Comments:

Sender Name: Fred Burnside - Email: fredburnside@dwt.com
Address:
920 5TH AVE STE 3300
SEATTLE, WA, 98104-1610
Phone: 206-757-8016

Note: The Filing Id is 20220919160257SC863526