IN THE SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. 91371-4

(Court of Appeals No. 69625-4-I)

JACK M. GARRISON; the GARRISON FAMILY LLC, a Washington limited liability company; LESA B. NEUGENT, individually and as Trustee of the JACK M. GARRISON AND CHARLOTTE L. GARRISON REVOCABLE TRUST, the JACK M. GARRISON SURVIVOR'S TRUST, the CHARLOTTE L. GARRISON MARITAL TRUST, the CHARLOTTE L. GARRISON EXEMPT MARITAL TRUST, the CHARLOTTE L. GARRISON EXEMPT FAMILY TRUST FBO MARK GARRISON and the CHARLOTTE L. GARRISON EXEMPT FAMILY TRUST FBO LESA NEUGENT,

Plaintiffs/Respondents,

v.

MARK M. GARRISON and MICHELLE GARRISON, his wife, and their marital community, and SAGEPOINT FINANCIAL, INC., a Delaware corporation licensed to do business in Washington, f/k/a/ AIG FINANCIAL ADVISORS, INC.,

Defendants/Petitioner.

SAGEPOINT FINANCIAL, INC.'S REPLY TO ANSWER TO PETITION FOR REVIEW

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REPLY BRIEF

At the most basic level, the Court of Appeals' opinion speaks for itself. So time being what it is and word limits being what they are, AIG will not respond to the Garrison Plaintiffs' over-caffeinated attacks. But certain points warrant a response.

1. The Court of Appeals' opinion represents an abrupt departure from the judicial mainstream.

The Garrison Plaintiffs repeat like a mantra that the Court of Appeals' decision "does not conflict with any Washington appellate court case." Garrison Answer ("G.A.") 15. They're both right and wrong.

In one sense, the Garrison Plaintiffs are right, but only because the Court of Appeals broke decisively from established practice. Never before has a court applied NASD Rule 3040 to impose on broker-dealers a duty to monitor the suitability of transactions in a non-customer's account held at another broker-dealer. Never before has a court suggested that a registered representative's making investment decisions for and taking advisory fees from an account that he partly *owned* could count as a "red flag," triggering a duty to protect the registered representative from himself. Never before has a court held that a broker-dealer may face control-person liability for transactions that it could not and did not control.

In another sense—the one that matters—the Garrison Plaintiffs are wrong: By charting a new path on broker-dealer liability, the Court of Appeals upended Washington negligence and securities law.

It has long been the law in Washington and nearly everywhere else that there is no negligence "in the air." *See* Pet. 1 (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99, 248 N.Y. 339, 341 (N.Y. 1928)). The Court of Appeals' decision casts doubt on that rule by imposing on broker-dealers a new duty to monitor the suitability of transactions in a non-customer's brokerage account held at another brokerage firm. That is about as "in the air" as you can get. The Court of Appeals opened Washington courts to opportunistic negligence and WSSA claims premised on nothing more than the plaintiff's dissatisfaction with a securities transaction. Operating with the benefit of hindsight, a crafty plaintiff need only slap a "red flag" label on otherwise innocent facts and claim that the broker-dealer had some power to stop the challenged transaction (even if the facts were otherwise). The Court of Appeals' decision represents a startling departure from Washington's negligence and WSSA jurisprudence. *See* Pet. 15-20.

The Court of Appeals reached that result in part by misinterpreting NASD Rule 3040. The Court of Appeals' novel interpretation of the rule conflicts with the NASD's 30-year-old interpretation of the rule—an interpretation owed substantial deference. *See* Pet. 14-15. For all their huffing and puffing, the Garrison Plaintiffs never get around to explaining how the Court of Appeals' interpretation of Rule 3040 stands up to the NASD's contrary interpretation. For good reason: There is no defending the Court of Appeals' interpretation. *See* Pet. 14 (citing, among other things, NASD Notice to Members 85-84 and FINRA Notice to Members

91-27 n.1 (1991) ("The transactions subject to [Rule 3050] are not considered to be private securities transactions" under Rule 3040.). Rule 3040 did not apply to Mark's transactions in the Garrison Wells Fargo accounts. Rule 3050 did. And the Garrison Plaintiffs concede that AIG complied with Rule 3050. *See* G.A. 5-6; *see also* Court of Appeals' Jan. 20, 2015 Op. 22.[1]

The Court of Appeals also misapplied this Court's decision in *Hines v. Data Line Systems, Inc.*, 114 Wash. 2d 127, 136 (1990) (en banc), which held that control-person liability under the Washington State Securities Act (WSSA) requires a defendant to have "actually participated in (*i.e.*, exercised control over) the operations of the corporation in general" and to have held the "*power to control* the specific transaction or activity upon which the primary violation is predicated." *Id.* (emphasis in original); *see also* Pet. 19-20. AIG had no control over Mark's transactions in the Garrison Trusts' accounts, but the Court of Appeals nevertheless revived the WSSA claim against AIG. The *Hines* Court would have left the claim in its grave.

[1] The Garrison Plaintiffs suggest that AIG has no answer for the NASD Notices to Members (NTMs) that the Court of Appeals relied on. G.A. 12. Nonsense. Those notices are inapposite because they involved Rule 3040 transactions, not Rule 3050 transactions. AIG has made that point all along. *See* SagePoint's Motion to Reconsider 10-11.

2. AIG is not asking this Court to decide facts.

Another of the Garrison Plaintiffs' mantras: AIG is arguing about the facts, and "[t]his Court ought not take review to reevaluate the[] facts." G.A. 16. The Garrison Plaintiffs misapprehend the nature of appellate review.

Washington appellate courts, like most appellate courts, are not in the business of issuing advisory opinions about abstract legal questions. They decide live controversies. *See, e.g.*, *Walker v. Munro*, 124 Wash. 2d 402, 418 (1994) (en banc) ("this court is not authorized . . . to render advisory opinions or pronouncements upon abstract or speculative questions"). So anytime this Court or the Court of Appeals decides a legal question, it does so against a particular factual background.

The Garrison Plaintiffs miss that point. They argue that the Court of Appeals said nothing about the underlying facts and instead reserved all factual issues for trial. G.A. 16. But in reviving the negligent-supervision and WSSA claims against AIG, the Court of Appeals did say something about the facts. It ruled that the Garrison Plaintiffs' factual assertions *could be sufficient* to sustain negligence and WSSA claims against AIG. That was error: Even taking the facts as the Garrison Plaintiffs present them, there is no basis under Washington law for pinning liability on AIG for allegedly failing to monitor transactions in a non-customer's account held at another broker-dealer.

3. Trouble would follow the Court of Appeals' decision.

Finally, the Garrison Plaintiffs argue that AIG has not identified a substantial public interest justifying discretionary review because (1) "virtually all claims by customers against stockbrokers and broker-dealers are required to be resolved in FINRA arbitration" (G.A. 20); (2) the rules that the Court of Appeals applied "have long been in effect around the country" (*id.* 20-21); and (3) "the Court of Appeals' Opinion on the issue of duty is based on federally-regulated rules and regulations" and "does not affect any other part of the economy." *Id.* 21. The Garrison Plaintiffs are wrong, wrong, and wrong again.

First, no claims of the type presented here are subject to FINRA arbitration. FINRA arbitration procedures apply to disputes between a broker-dealer and its customers. The Garrison Plaintiffs were not AIG's customers, so AIG could not compel them to arbitrate. If the Court of Appeals' decision stands, meritless negligence and WSSA claims against broker-dealers would fill the courts, not arbitration conference rooms.

Second, it is a canard to say that the rules announced by the Court of Appeals "have long been in effect around the country." That simply isn't true. To AIG's knowledge, no court anywhere has imposed on broker-dealers the duty to monitor the suitability of transactions in a non-customer's account held at another broker-dealer. The Court of Appeals' decision broke new ground.

Third, the Court of Appeals' decision on the "issue of duty" assuredly was not based on "federal rules and regulations." On the contrary, the Court of Appeals ignored the NASD's interpretation of its own rule. *See* Pet. 14-15.

The end result? The Court of Appeals turned the law of broker-dealer liability on its head. It created a universe in which Wells Fargo—the broker-dealer that held the Garrison accounts—is insulated from liability but AIG, a stranger to those accounts, is not. That wrongheaded result portends more than a trickle of meritless broker-dealer litigation in the State.

CONCLUSION

This Court should grant review because the Court of Appeals set the State's jurisprudence far outside the judicial mainstream.

Respectfully submitted this 7th day of April, 2015.

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CERTIFICATE OF SERVICE

I certify that on April 7, 2015, I served a copy of this motion on the following parties by personal service:

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I further certify that on April 7, 2015, I served a copy of this brief on the following parties by Overnight Courier and U.S. Mail:

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Supreme Court No. 91371-4
Jack M. Garrison et al v. Mark M. Garrison et al

Attached for filing in the referenced matter is Petitioner SagePoint Financial, Inc.'s reply to answer to petition for review.

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