

No. 70019-7-1

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

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SCOTT ANDERSON TRUCKING, INC., a Utah corporation,

Appellant,

v.

PACCAR FINANCIAL CORP., a Washington corporation,

Respondent.

BRIEF OF APPELLANT

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INTRODUCTION

This appeal addresses a bank's exertion of leverage over its customer's business partner, a motor carrier that leased a truck the customer financed through the bank. The bank forced the motor carrier to make loan payments on the customer's behalf under threat of a loan foreclosure the bank knew would harm the motor carrier. The facts of the case demonstrate that the motor carrier and bank developed a relationship by which the motor carrier was the bank's new customer, in place of its original customer. The bank breached duties in contract and tort it owed to its new customer by releasing legal documentation to an imposter without verifying his identity, thereby enabling the imposter to defraud the motor carrier.

ASSIGNMENTS OF ERROR

1. The trial court erred by granting the motion for summary judgment of Defendant/appellee Paccar Financial Corporation ("Paccar") by its order dated March 1, 2013 and dismissing the claims of plaintiff/appellant Scott Anderson Trucking, Inc. ("SATI").

Issues Pertaining to Assignments of Error

- Paccar instigated and maintained for years a relationship with SATI to receive payments on a truck loan Paccar had made to its customer, Glenn Davis ("Davis"). To do so, it threatened to foreclose on the loan, which it knew would harm SATI, as SATI had leased the truck from Davis, and needed it for business operations. SATI made loan

payments to Paccar for years, and ultimately reached an agreement to pay off the loan in exchange for Paccar releasing the truck's title to SATI. Under these circumstances, did Paccar owe a duty of care in tort not to endanger or compromise rights to the truck SATI gained by paying the loan? (Assignment of Error 1)

- After SATI had paid off Davis's loan, Davis called Paccar; falsely identified himself as SATI's principal, Scott Anderson ("Anderson"); advised Paccar that he had lost the title Paccar had released to SATI; and asked Paccar to send "him" (ostensibly Anderson) a lien release which he could present to the Nevada Department of Motor Vehicles to obtain a new title issued without indication of any liens. Paccar violated its own policies by failing to verify the identity of the caller making this request, and sent Davis a lien release by which Davis was able to obtain a new title clear of any noted liens. Under these circumstances, can Davis's foreseeable criminal conduct be a superseding or intervening cause of damages? (Assignment of Error 1)

- Paccar contends that SATI unreasonably delayed re-registering the truck's title, naming SATI as a lienholder, which proximately caused SATI's damages. Is resolution of this issue, including whether it amounts to comparative fault or only one of potentially several proximate causes of SATI's damages, a question of fact not properly determined on summary judgment? (Assignment of Error 1)

- Does contributory fault bar SATI's claim? (Assignment of Error 1)

- Paccar (1) threatened foreclosure on a loan it made to Davis unless SATI, which leased the truck from Davis and had business needs for it, made loan payments to Paccar on Davis's behalf; (2) accepted loan payments from SATI for years; and (3) reached an agreement with SATI whereby SATI paid the bank Davis's loan balance in exchange for Paccar sending SATI the truck's title. Does this amount to a contractual banking relationship? (Assignment of Error 1)
- Under the arrangement described under the preceding paragraph, is SATI a third-party beneficiary of Paccar's modified contract with Davis? (Assignment of Error 1)
- Is Paccar's failure to follow its own policy to verify imposter Davis's identity before issuing to him legal documents that he later used to harm SATI a breach of Paccar's duties in contract and/or tort to SATI? (Assignment of Error 1)

STATEMENT OF THE CASE

SATI is a Utah corporation which operates as a motor carrier. CP 1. Its sole principal is Anderson. CP 110. Paccar is a Washington corporation which operates as a financial institution providing financing to the trucking industry. CP 1. Paccar also has offices in Texas, where all relevant activity took place. CP 25-27.

Non-party Davis, at times material, was a truck driver who contracted as an owner-operator to SATI, leasing to SATI his 2004 KW tractor ("the tractor") and driver services for SATI's trucking operations

between 2006 and December 2009. CP 2; 114-16. This variety of contract is known in the trucking industry as a “lease,” with the owner-operator (Davis) referred to as the “lessor,” and the motor carrier (SATI) as the lessee.

SATI had rights to the tractor under the lease, which specifically provides that the tractor be used “for such purposes as Scott Anderson Trucking, Inc. shall direct.” CP 114. Paccar, as the financier of numerous trucks to owner operators, is familiar with federal regulations at 49 CFR §376 which require owner-operators to lease equipment exclusively to their lessees during lease terms. CP 85-86; 110. It was aware, both at the time it made the loan to Davis, and when it turned to SATI for loan payments and insurance, that motor carrier lessees such as SATI depend on the availability of trucks they lease for their business operations.

Davis had financed his purchase of the tractor through a loan from Paccar. CP 119; 127. Paccar created an internal computerized file that includes Davis’s loan documentation and application materials which was accessible to all Paccar employees involved with this matter’s issues. CP 128.

Davis performed poorly under the Paccar loan. Paccar confirmed that “Davis struggled with financial difficulties and fell behind on his truck payments to PACCAR Financial.” CP 19. He consistently made payments late, and on occasion had to pay two monthly installments together to return his account to current status. CP 130-31; 112. Paccar learned that Davis was under lease to SATI. CP 110.

Davis's poor loan performance prompted Paccar to approach SATI, soliciting it to assume responsibility for paying Davis's loan obligations. CP 19; 182-83. Paccar employee Lisa Robison ("Robison") was charged with collections on Davis's account. CP 19; 182-83. When Paccar's concern about Davis's persistent late payments reached a critical point, she contacted SATI office manager Tina M. Gardner ("Gardner") about SATI making payments on Davis's loan so as to avoid foreclosure. CP 19; 182-83. This commenced a dialogue which led to SATI making payments to Paccar on Davis's behalf, and ultimately paying the loan balance in exchange for Paccar enabling SATI to record a lien on the tractor. CP 19; 182-83. Per Paccar, "Lisa [Robison] happened to be the collector who spoke with Glenn Davis most of the time, [and] was probably having the same conversation with someone she's had conversation with throughout the term of the loan for collection of payment." CP 134-35.

When Paccar encountered difficulty collecting loan payments from Davis, it turned to SATI. CP 19; 182-83. Robison's early dialogue with SATI consisted of Paccar's threats to foreclose on Davis's loan and repossess the tractor. Again, Paccar knew the tractor was under lease to SATI, and that SATI had need for its continued operation. CP 35; 182-83 ("SATI made payments on behalf of Davis so that Davis could continue to haul dirt for SATI on SATI's multi-year Salt Lake City road construction project ...").

Paccar threatened to foreclose on the loan and repossess the truck unless it received payments. CP 111. Commencing in January 2007, SATI agreed to pay Paccar Davis's monthly loan obligations in exchange for Paccar's agreement not to foreclose. This is confirmed by Paccar's internal "Check Payment" confirmations, which state (1) the "Name" of the payor as "Scott Anderson Trucking"; (2) SATI's address; and a "CustomerID" as "Sanderson." CP 146-81.

Robison contacted Gardner on a monthly basis to effect payments and discuss the loan's status and particulars and, indeed, advised Gardner that Robison no longer knew how to reach Davis. CP 183. SATI consistently made payments 60 days past the date when each payment became due to prevent Davis from absconding with the tractor, as Paccar would not be able to foreclose on the loan and repossess the tractor until 60 days past an unpaid monthly installment. CP 111. By maintaining a 60-day arrears, SATI could refuse a payment and empower Paccar to foreclose immediately if necessary. CP 111. Anderson explained these terms to Robison. CP 111. At first Robison protested them, calling Anderson monthly regarding payments, but she ultimately acknowledged the revised arrangement. Paccar and SATI proceeded with SATI making payments in this manner for nearly three years. CP 111. In exchange for SATI's payments on the loan under its modified terms, Paccar honored its agreement not to foreclose. CP 111.

Paccar also learned that the insurance Davis had declared on the tractor, which was required under Paccar's loan agreement, was invalid for

nonpayment of premiums. CP 183. Again, Paccar turned to SATI instead of dealing with its documented customer. CP 183. At Paccar's request, SATI began making payments to Davis's insurer, Capitol Insurance Company, so that coverage would be reinstated. CP 183. Later, SATI procured insurance coverage on the tractor through its own insurer with Paccar's knowledge and consent. CP 183.

Each of SATI's payments to Paccar under the revised arrangement was by a monthly phone call, i.e., with Gardner supplying Paccar with numbers for SATI's checking account, bank routing, and check. CP 183. Paccar frequently provided SATI with account status information, including late payment issues, during its monthly conversations with Gardner. CP 183.

Again, Paccar insisted that SATI agree to pay Davis's loan payments under threat of foreclosure and repossession of the tractor. CP 111. It was aware of the lease and SATI's need to keep the tractor in operation, and leveraged this circumstance as a negotiating tool to entice SATI to make payments on Davis's loan. CP 35; 182-83.

By September 2009, the relationship between Davis and Anderson had deteriorated. CP 111. Anderson was no longer comfortable proceeding without a lien on the tractor and physical possession of its title. CP 111. Davis owed SATI a significant debt based, in part, on SATI's paying installments on Paccar's loan and insurance premiums, and Anderson was concerned Davis might abscond with the tractor. CP 111. On October 8, 2009, Anderson phoned Robison, advised her of these

circumstances, and requested a “payoff” amount so that he could obtain a lien on the truck in SATI’s name. CP 111. Davis did not request the payoff information; rather, SATI did. CP 111. SATI paid the loan balance to Paccar. CP 19; 182-83.

Paccar mailed the tractor’s title to SATI on December 2, 2009. CP 143-44. Anderson did not immediately attend to the title re-registration, as he had a business trip planned for the first week in February 2010 to Las Vegas, Nevada, when he intended to visit the Nevada Department of Motor Vehicles conveniently. CP 111.

On January 7, 2010, Davis called Paccar employee Kimberly Slater; identified himself to her he was Anderson; advised her he (ostensibly Anderson) had lost the title Paccar had earlier sent him; and requested a lien release certification from Paccar so that he could obtain a duplicate title clear of any lien notations. CP 118; 73-74. Slater sent to fellow Paccar employee Lori Brohard (“Brohard”) an email on March 5, 2010, which was forwarded to Anderson, stating:

A person stating they were Scott Anderson called in on the 7th [January 7, 2010] stating we would be getting a DMV form faxed over, and could we please sign and fax back to him. “Scott” stated he had lost his title; I didn’t question this ... we get calls like this daily! We received the form, Raney and I both signed it and I faxed it back to him. According to Joel with the Vegas DMV (702-486-4368) stated that Glenn Davis walked in to the DMV on the 8th with the lien release and was given a duplicate lien free title right then.

CP 118; 73-74. Per Paccar, “[i]t now appears that Glenn Davis presented the Lien Release to the Nevada DMV and was issued a new title for the Truck.” CP 24.

Paccar confirmed that it is its “regular practice” to ask phone callers requesting duplicate lien release documentation “for identifying information before providing the lien release,” and Slater confirmed she has no recollection of doing so, stating only that she “has no reason to believe that she deviated from PACCAR Financial’s normal practice of asking for identifying information.” CP 24. There is no evidence, such as an internal memorandum, log note or copy of the purportedly proffered identification, that suggests Paccar complied with its policy here. Paccar offered no explanation or evidence as to what identification it received, and why it failed to apprise Paccar it was dealing with an imposter. Slater stated she “did not question” Davis, but simply signed the form and faxed it to Davis at a foreign fax number. CP 118; 73-74.

By January 8, 2009, Davis had already fraudulently obtained the lien-free title, such that, allowing for mailing time, less than five weeks had passed – over the year-end holidays – between the time SATI received the title and the fraud was committed rendering re-registration impossible. CP 91.

Paccar explained that critical records, such as the internal computerized file it developed for Davis’s loan, emails, and internal memoranda, are no longer available due to the passage of time. CP 132-33; 140-41. As Paccar’s CR 30(b)(6) designee, Raney testified that

individual Paccar employees are free to determine which emails “need to be maintained,” and to delete those they feel are unnecessary. CP 132-33; 140-41. She also testified that all emails, notes, memoranda and account data, other than the minimal documentation Paccar produced in discovery, are “no longer available” for reasons she does not know. CP 132-33; 140-41.

This lawsuit was filed In the King County Superior Court two years after SATI paid the balance of Davis’s loan. CP 1. The complaint alleges theories of liability sounding in negligence and breach of contract. CP 1-6.

Paccar moved for summary judgment on February 1, 2013, raising issues related to duty and causation. CP 18-39. The trial court, Hon. Theresa Doyle presiding, granted summary judgment on March 1, 2013 without stating any conclusions or explaining the basis for its decision. CP 198-99. This timely appeal followed.

SUMMARY OF ARGUMENT

The history of the parties’ transactions demonstrate a “special relationship” between Paccar and SATI which created duties in tort owed by Paccar to SATI and/or constitute creation of a new contractual relationship by which Paccar undertook to SATI the same obligations it owes to any banking customer. This is particularly true given that Paccar initiated and maintained its relationship with SATI with threats of loan foreclosure that Paccar knew would harm SATI. Paccar’s production of

legal documents to an unverified imposter, which Paccar knew would enable the holder of such documents to defraud SATI, constitutes breach of duties in tort and contract.

Moreover, if the basis for the trial court's decision was Paccar's causation arguments, questions of fact abound on them.

Under these circumstances, the trial court erred by dismissing SATI's claims against Paccar on summary judgment.

ARGUMENT¹

1) Evidence Demonstrates Paccar's Negligence Proximately Caused SATI's Damages²

In negligence actions, Texas requires demonstration of the common law elements of “1) a legal duty owed by one person to another;

¹ This Court is fully familiar with the standard of review on summary judgment. When ruling on a motion for summary judgment, a trial court must view all facts presented and make all inferences and assumptions in the light most favorable to the party opposing the motion. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). A motion for summary judgment must be denied if, after considering all evidence, reasonable persons could draw more than one conclusion from those facts. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001). If there is a genuine issue of credibility or “any reasonable hypothesis under which the nonmoving party may be entitled to the relief sought,” summary judgment must be denied. *Rockey v. W. Conference of Teamsters Pension Trust*, 23 Wn. App. 248, 256, 595 P.2d 557 (1979).

In this instance, abundant evidence demonstrated that Paccar owed to SATI duties in tort and contract, and that Paccar breached those duties by enabling Davis to defraud SATI. Summary judgment in Paccar's favor therefore was inappropriate.

² The parties agree that Texas law applies. After pointing out that “[a]ll of the transactions regarding Glen Davis' loan occurred in PACCAR Financial's Denton, Texas office” and that “... none of the alleged actions took place in Washington”. CP 25-27), Paccar concluded that “the law with the most significant contacts should apply.” Paccar confirmed in its CR 30(b)(6) deposition that all of Paccar's wrongdoing, i.e., Paccar's issuance of a duplicate lien release without confirming the requester's identity, took place in Texas. CP 126).

Texas law should be applied to SATI's contract and tort theories of liability. Washington has adopted the Restatement (Second) of Conflict of Laws § 6 (1971). See *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580-581, 555 P.2d 997 (1976), which quoted the *Restatement* for the concepts that the law of the state which has the “most significant relationship to the occurrence and the parties” taking into consideration “(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred, ... and the place where the relationship, if any, between the parties is centered” should be applied. These considerations make clear, and the parties agree, that to the extent there is conflict between the law of Texas and Washington, the former should govern.

2) a breach of that duty; and 3) damages proximately resulting from the breach.” *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). All of these elements are fully satisfied here. Because it is unclear which element(s) the trial court found unsupported by evidence, SATI addresses each of them.

In its motion, Paccar argued only that it had no duty to SATI; and that its negligence was not a proximate cause of SATI’s loss, ostensibly because SATI’s own alleged negligence was the proximate cause of its loss, or that Davis’s criminal act was superseding cause of that loss. Paccar conceded by silence that if there is adequate evidence to support a determination of a duty in tort to proceed to trial, that Paccar breached such duty (although Paccar improperly first introduced an argument regarding breach in its reply memorandum, which is addressed below); and that SATI suffered damages. Paccar should be deemed to have conceded, at least for present purposes, those two elements (breach and damages) of a tort claim.

a) Duty³

SATI demonstrated through evidence a long and complex working relationship between SATI and Paccar which Paccar initiated for its own ends; which was perpetuated through ongoing communications and negotiations; and which produced rights, obligations and reasonable expectations on the parts of both parties. Paccar sought to dismiss SATI's payments on Davis's loan as purportedly having come from some unknown third-party payor without explanation about which it "did not

³ Preliminarily, the issues raised as elements of a negligence claim inherently involve fact questions that when, as here, are disputed, are not appropriately adjudicated on summary judgment. Even the existence of a duty, which is categorized as a question of law, must be deferred to the trier of fact when questions of fact surround the creation of a duty. When answering the query "[h]ow does the Court Determine Duty in a Summary Judgment Proceeding?", the Texas Court of Appeals ruled that "[i]f the facts are disputed, and one version of the facts would support the imposition of a duty, summary judgment is improper [citation omitted]." This is because "[t]he existence of duty is a question of law when all of the essential facts are undisputed, but when the evidence does not conclusively establish the pertinent facts or the reasonable inferences to be drawn therefrom, the question becomes one of fact for the jury. [citation omitted]." The court concluded that "... in a summary judgment proceeding, if the nonmovant's version of the facts would support the imposition of a legal duty, summary judgment for the defendant based on a claim of no duty is inappropriate." *Sanders v. Herold*, 217 S.W.3d 11, 14-15 (Tex. App. 2006). Here, the parties presented the trial court with conflicting accounts of their relationship prior to Paccar's wrongdoing, including the circumstances of SATI's obtaining a reasonable expectation that Paccar would not jeopardize its financial interests. See also *Stewart v. Columbia Medical Center of McKinney Subsidiary, L.P.*, 214 S.W.3d 659, 665 (Tex. App. 2007) ("Whether a duty exists is a question of law unless the relevant facts are disputed") *Mitchell v. Missouri-Kansas-Texas R.R. Co.*, 786 S.W.2d 659, 662 (Tex.), cert. denied, 498 U.S. 896, 111 S.Ct. 247, 112 L.Ed.2d 205 (1990) (The existence of a legal duty is a question of law for the court, although in some instances it may require the resolution of disputed facts or inferences which are inappropriate for legal resolution.).

question.” SATI’s position was substantiated with declaration testimony and documents Paccar itself produced in evidence.

In Texas, courts determine whether a duty exists by examining factors such as the risk, foreseeability, and likelihood of injury; the social utility of the actor’s conduct; the magnitude of the burden of guarding against the injury; the relationship between the parties; whether one party had superior knowledge of the risk; whether that party had the right and ability to control the actor whose conduct precipitated the harm; and any other relevant competing individual and societal interests implicated by the facts of the case. *Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins*, 926 S.W.2d 287, 289–90 (Tex. 1996). A duty to use reasonable care may arise when a person undertakes to provide services to another, either gratuitously or for compensation. *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 396 (Tex. 1991); *Colonial Sav. Ass’n v. Taylor*, 544 S.W.2d 116, 120 (Tex. 1976); Restatement (Second) of Torts §§ 323, 324A (1965).

Quite clearly, (1) Paccar’s relationship with SATI as described above; (2) Paccar’s presumed understanding of the likely results of issuing a lien release to an imposter; (3) the “social utility” of expecting banks to verify the identity of individuals requesting legal documents, which is a relatively light burden; and (4) the fact Paccar alone had the ability to control the activity that led to the harm, all gravitate toward a finding of a duty in tort. Moreover, Paccar provided no authority for its implied proposition that a bank owes no duty to a party which assumed a bank

customer's financial responsibilities *at Paccar's insistence*. Paccar assumed a duty to close its loan and properly transfer control of collateral to the party it had engaged as its successor borrower. Paccar's own policy required it to take steps to check the identity of individuals seeking lien or title documents, as Paccar was aware of risks involved in providing them to imposters. At a minimum, SATI should be allowed to develop these facts at trial.

Texas is not alone in recognizing that banks owe third parties a duty of care in circumstances, like here, wherein a bank establishes a relationship with the third party, and injury to the third party is foreseeable. *See, e.g., MSA Tubular Products, Incorporated v. First Bank and Trust Company, Yale, Oklahoma*, 869 F.2d 1422 (10th Cir. 1989) (when bank undertook to respond to third party's inquiry regarding a bank customer, bank assumed duty to respond accurately and could be held liable for giving misleading information if the third party reasonably relied on a bank employee's statements. A bank providing account information has duty to do so accurately); *Brunson v. Affinity Fed. Credit Union*, 199 N.J. 381, 403–04 n. 13, 972 A.2d 1112 (2009) (“in appropriate circumstances, a bank may have a duty of care to an innocent, unrelated third party harmed by the theft of his or her identity.”); *Chicago Title Ins. Co. v. Allfirst Bank*, 394 Md. 270, 297, 299 n.22, 905 A.2d 366 (2006) (plaintiff could maintain a negligence claim against a defendant bank, finding that “a defendant's knowledge of a third party's reliance on the defendant's action may be important in the determination of whether that

defendant owes that party a duty of care. . . . In the instant case, Farmers Bank was aware that the check presented by Shannahan ... although endorsed by him ... was not made payable to [him]”); *R.A. Peck, Inc. v. Liberty Fed. Sav. Bank*, 108 N.M. 84, 766 P.2d 928 (1988) (bank owed duty to third party “once it affirmatively involved itself, vis-a-vis Third Party” by making representations to the third party about a bank mortgage customer’s financial condition while at the same time “the Bank stood to benefit directly from Third Party’s continued construction [on the customer’s property] in the form of enhanced mortgage collateral.”) (citations omitted); and *State Bank v. Stoeckmann*, 417 N.W.2d 113, 116 (Minn. App. 1987)(approving a jury instruction which stated that special circumstances exist when a “bank knows or has reason to know that the customer is placing his or her trust and confidence in the bank, and is relying on the bank so to counsel and inform them” on the basis that the bank had dealt directly with the plaintiff).

Here, as in *Peck*, Paccar affirmatively involved itself with third party SATI. Paccar exploited SATI’s relationship with a Paccar customer to induce SATI to satisfy the customer’s financial obligations, thereby benefiting Paccar. As the court in *Kesselman v. National Bank of Arizona*, 937 P.2d 341, 345 (Ariz. App. 1996), recognized, “The key distinguishing factor [in cases recognizing a duty on the part of the banks] is that the banks were directly involved with the third parties in the transactions that were the subject of litigation. This involvement satisfied the necessary relationship giving rise to [a] duty.”

In fact, two jurisdictions – Alabama and Tennessee – expressly acknowledge a bank’s duty to protect third parties from identity theft. Both of those jurisdictions recognize the tort of “negligent enablement of imposter fraud.” In *Patrick v. Union State Bank*, 681 So.2d 1364, 1367 (Ala. 1996), an imposter opened a checking account in the plaintiff’s name, allowing the imposter to write several bad checks. As a result of the imposter’s actions, the plaintiff was arrested and incarcerated for several days. The potentially serious consequences of a bank’s negligence led the Alabama Supreme Court to hold that “a bank owes a duty of reasonable care to the person in whose name, and upon whose identification, an account is opened to ensure that the person opening the account and to whom checks are given is not an imposter.” *Id.* at 1371.

Wolfe v. MBNA America Bank, 485 F. Supp. 2d 874 (W.D. Tenn. 2007), also recognized such a duty. In denying the defendant bank’s motion to dismiss, the court observed that injury to the victim from inadequate identity verification was foreseeable, such that the bank owed a duty to exercise care in extending credit. “Because the injury resulting from the negligent issuance of a credit card is foreseeable and preventable, the Court finds that under Tennessee negligence law, Defendant has a duty to verify the authenticity and accuracy of a credit account application before issuing a credit card.” *Id.* at 882. The court noted that the foreseeability of the harm was key to determining whether a duty exists between a bank and a third party. *Id.* at 881-82.

Here, circumstances are of the kind that courts around the country recognize as giving rise to a duty: First, Paccar affirmatively established a relationship with SATI by *directing* that SATI pay Glen Davis's truck payments under threat of foreclosure that it knew would harm SATI. As a financial institution specializing in the trucking industry, largely by funding owner-operator purchases of trucks, Paccar knew the implications of Davis being under lease to SATI. It knew SATI's rights to the truck under the lease would be impacted by it foreclosing on the loan. Second, Paccar benefitted from that relationship for years, regularly contacting SATI for payments and other concerns related not to SATI, but to a Paccar customer and a Paccar account. By SATI acceding to Paccar's demand for monthly payments, Paccar continued accruing the profits of the loan's interest; and avoided the costs of legal action to foreclose, repossess and sell the tractor; of internal administrative efforts; and a negative loan performance record that might impact the company's valuation. Third, injury to SATI by providing a duplicate lien release to an imposter was foreseeable. Paccar knew SATI had requested the lien release in order to register as the new lien holder of the truck. SATI reasonably relied on Paccar to exercise care in dealing with the lien release. Paccar's failure to do so resulted in the foreseeable harm of an imposter absconding with the truck.

The general rule in Washington is that “[a] bank owes no duty of care to a noncustomer with whom it has no relationship.” *U.S. Bank Nat. Ass'n v. Whitney*, 119 Wn. App. 339, 349, 81 P.3d 135 (2003). The issue

typically is presented, for example, when an entity with which a bank has no relationship whatsoever sues the bank for allowing a wrongdoer to open an account with it, and seeks to recover from the bank sums the wrongdoer deposited into and later withdrew from the bank. *See, e.g., Zabka v. Bank of America Corp.*, 131 Wn. App. 167, 171-172, 127 P.3d 722 (2005). However, the absence of a duty on the bank's part is contingent on the absence of a "special relationship" between the bank and claimant. ("Many other jurisdictions have held that third party non-customers are not owed a duty of care by a bank, *absent a direct relationship or statutory duty* [emphasis added].") *Id.*

Here, a very compelling, direct and special relationship does exist, one which Paccar itself instigated and implemented for its own purposes. Unlike a situation when a bank merely opens an account for a customer in the ordinary course, Paccar and SATI were engaged in monthly transactions for years. Paccar was a party to SATI paying off the remaining loan balance, and it produced the title and issued a lien release to SATI when that was accomplished, all the while understanding that SATI, with Davis's approval, would record a lien in its name. No risk to "unforeseeable frauds," such as those the *Zabka* court was concerned about, would result from banks bearing a duty to entities with which they have special relationships not to produce to unverified individuals documents empowering them to alter those entities' legal rights. Paccar concededly did foresee potential fraud, and ignored or disregarded its own

policy of verifying identification of an individual requesting documentation.

Thus, factual circumstances demonstrate that Paccar bore a duty to SATI in tort not to jeopardize SATI's ability to register its lien on a new title. Ample evidence supports the existence of a duty here.

Texas has found financial institutions have duties in analogous circumstances. In *Gilstrap v. Beakley*, 636 S.W.2d 736 (Tex. App. 1982), First National Bank financed plaintiff Bleakley's purchase of an oil rig. The bank retained the rig's title document per the parties' security agreement. When the rig malfunctioned, Bleakley approached Gilstrap to purchase a new rig. Gilstrap agreed to buy the malfunctioning rig as part of a trade. Bleakley notified the bank of the sale, and informed it that Gilstrap would pay the loan's balance. However, Gilstrap did not do so. Despite having not received payment, the bank signed the title document and gave it to Gilstrap. He took the title to Bleakley, who signed it after Gilstrap falsely told him that he had paid off the loan. Ruling on Bleakley's negligence suit against the bank, the Texas Court of Appeals held:

A creditor in possession of property securing a debt owes a duty of ordinary care to secure and preserve the property [citation omitted]. Both Beakley and [bank employee] Schley testified that Beakley told Schley that someone would be coming in to pay off the note. When Gilstrap appeared at the Bank and requested the title documents, the Bank president signed it and gave it to him without demanding payment of the note or checking with Beakley. This constituted a breach of duty by the Bank which resulted in damages to the plaintiff. When viewed in the

light most favorable to the judgment, the evidence establishes negligence.

636 S.W.2d at 741. Therefore, the court affirmed the trial court's judgment. *Id.*

City Bank v. Compass Bank, 2010 WL 2680585 (W.D. Tex. July 2, 2010), addressed a City Bank loan to SamCorp secured through liens on that customer's property. SamCorp then obtained a line of credit from Compass Bank, also secured by liens. The new line of credit was intended to retire the City Bank debt. However, Compass Bank made the credit directly available to SamCorp instead of first paying off the City Bank loan. SamCorp never paid off that debt, and subsequently defaulted on both loans. City Bank sued Compass Bank for "negligent execution of a refinancing transaction."

Compass Bank moved for summary judgment, arguing that it did not owe a duty of care to City Bank, even if its own internal policy required it to make a direct payment to City Bank, which would have prevented City Bank's harm. While the court acknowledged the general principle that banks do not owe a duty to non-customers, it observed that "[w]here the potential victim's identity, the mode of harm, and the way to avoid that harm are all particularly known to the bank in advance, . . . Texas law may well impose a duty of care on the bank in connection with that victim." *Id.* at 3 (citing *Guerra v. Regions Bank*, 188 S.W.3d 744, 747 (Tex. App. 2006)). Specifically, that court ruled that "[i]n a case of negligent execution of a refinancing transaction (by placing money in the

hands of the borrower with the mere hope that it would be paid to the old lender, rather than remitting it directly), it appears that the traditional factors all weigh in favor of finding a duty of care. The risk and foreseeability of harm to City Bank seems clear, and the likelihood of harm is not inconsiderable should SamCorp pocket or spend the proceeds instead of paying them over properly.” *Id.*

It would have been an easy matter for Paccar to verify the caller’s identity before issuing legal documents to him. Similarly, in *City Bank*, the court observed that “[w]eighed against these concerns is the questionable social utility of giving the money to the borrower directly, the trivial costs involved in avoiding this path by means of making a direct bank-to-bank payment, and the open question of who, if not the new lender, may better ensure that the old lender is repaid when the new lender decides to transact a refinancing with the borrower.” *Id.* Thus, “a bank may be liable to a non-customer if it causes harm to that non-customer by negligently executing its part of a refinancing transaction.” *Id.* at 5. The court further observed that Compass Bank’s making the full line of credit available to SamCorp, with the understanding that SamCorp would arrange to repay City Bank, “could qualify as negligence a fortiori.” *Id.* Compass Bank did not employ any procedural safeguards to ensure that SamCorp would pay off its loan from City Bank, thereby creating a “risk that the funds may be misdirected or misappropriated.” *Id.* Thus, Compass Bank’s complaint survived summary judgment.

The instant matter is even more compelling, as unlike the two banks, SATI and Paccar had an ongoing relationship by which SATI was *de facto* Paccar's customer at Paccar's instance.

Thus, the trial court erred if it found no duty in tort as a matter of law.

b) Paccar Breached Its Duty to SATI

Paccar failed to comply with its own policies regarding identification of individuals who request legal documentation. The fact that it has a policy to confirm the identity of callers asking for lien releases demonstrates Paccar was cognizant that its issuance of such documentation to individuals not entitled to receive it could impact its customers' rights, as well as its own liability. At a minimum, it has no evidence that it complied with its own policies, and the fact that it failed to do so is demonstrated by the very fact that Davis obtained the duplicate lien release. Paccar either failed to obtain or disregarded the caller's identification.

In its reply memorandum, Paccar first argued:

The only alleged wrongful conduct of PACCAR Financial that SATI can point to is that PACCAR Financial told the truth; *viz.*, that on January 7, 2010, 5 weeks after it had delivered title to the Truck to SATI, PACCAR Financial signed a Lien Release on a Nevada DMV Lien Release form wherein it stated truthfully that its lien against the Truck had been fully satisfied. That's it. That is what SATI's lawsuit is based on.

CP 192. First, a bank is not entitled to freely disclose “the truth” about facts it holds in confidence. Knowledge about the “truth” about banking and financial facts can be abused, as it was here. Second, Paccar did far more than just state the truth about circumstances. It issued a legal document to an unverified individual that it knew was needed for purposes of procuring a new title, and that it could be put illegitimately to that use. Again, if Paccar believed stating facts and issuing documents to individuals was unrestricted, it would not have a policy of verifying such individuals’ identity before doing so.

c) Paccar’s Breach of Its Duty Proximately Caused SATI’s Harm⁴

The evidence demonstrates clearly that Paccar’s delivery of a duplicate lien release foreseeably enabled Davis to obtain a duplicate title showing that the existing lien had been extinguished. Indeed, there are few, if any, other purposes to which a lien release could be put. Thus, Paccar’s failure to confirm the identity of a caller, and then tendering to him a legal document intended for SATI, enabled Davis to sell the truck outright, and therefore proximately caused Anderson to suffer damages.

⁴ “Texas courts routinely hold that proximate causation is a fact question within the jury’s province [string citations omitted].” *Berry Prop. Mgmt. v. Bliskey*, 850 S.W.2d 644, 656 (Tex. App. 1993). “It is for the jury to weigh the probability of harm to the plaintiff and the gravity of that harm against the cost or burden imposed by the required precaution.” *Bliskey*, 850 S.W.2d at 656; *see also Farley v. MM Cattle Co.*, 529 S.W.2d 751, 755-56 (Tex. 1975) (“[W]hether a particular act of negligence is a cause in fact of an injury has been said to be a particularly apt question for jury determination.”); *Bernethy v. Walt Failor’s, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982) (“We have consistently held that: [T]he question of proximate cause is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.”).

Citing *Nixon v. Mr. Property Management Co., Inc.*, 690 S.W.2d 546, 549-50 (Tex. 1985), Paccar argued that Davis's fraud was a superseding cause of the harm SATI suffered because such fraud was a criminal act. On this basis, Paccar argued the absence of causation. Paccar omitted a critical proviso the *Nixon* court included in that ruling, i.e., "[h]owever, the tortfeasor's negligence will not be excused where the criminal conduct is a foreseeable result of such negligence." *Id.* at 550. *Nixon* further held as follows:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.*

[Emphasis added.] *Id.* This is precisely the circumstance at issue here. Paccar, a financial institution specializing in the trucking industry, was well aware that the issuance of lien release documentation to an imposter whose identity it did not verify likely would be used for illegal purposes to the detriment of an innocent party. Clearly, it foresaw risks, as it concedes its policy was to verify identification from a caller seeking information such as that at issue here. At a minimum, issues of fact preclude summary judgment on the foreseeability issue. Whether a superseding cause impacts proximate cause is a question of fact particularly within the

province of the jury. *First Interstate Bank v. S.B.F.I., Inc.*, 830 S.W.2d 239, 246 (Tex. App. 1992).

Paccar also argued that “SATI’s own negligence was the proximate cause of its alleged loss,” pointing to the passage of “at least two months” between the time it received the tractor’s title from Paccar and its attempt to register the lien as part of a reissued title with the Nevada Department of Motor Vehicles. CP 31. On this basis, Paccar further urges that its negligence did not proximately cause SATI’s damages.

First, whether or not SATI’s delay in attempting to register its lien proximately caused the loss in question is a fact issue not properly determined on summary judgment.

Second, even were SATI negligent, such negligence would not legitimize, negate, excuse or supersede Paccar’s negligence and breach of contract. It is axiomatic that more than one act may be the proximate cause of the same harm. *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001); *Estate of Shinaul M. v. State Dept. of Social & Health Services*, 96 Wn. App. 765, 770, 980 P.2d 800 (1999).

Third, assuming without conceding that SATI was negligent in delaying its lien registration, such negligence at most would be a contributory factor of its loss, the extent of which is not properly determined on summary judgment. The Texas Court of Appeals has ruled that “contributory negligence does not bar a plaintiff’s claim”; and that:

... a new and independent cause that extinguishes the liability of a party cannot arise out of an affirmative act of negligence by either the plaintiff or the defendant. [citations omitted]. The defensive issue of new and independent cause can be raised and attributed only to some outside agency operating to cause the complained-of injury. [citation omitted]. As a result, any negligence by Biaggi, even if it contributed to her injuries, did not act to extinguish Patrizio's liability ...

Biaggi v. Patrizio Restaurant Inc., 149 S.W.3d 300, 305-306 (Tex. App. 2004). *See also Huston v. First Church of God, of Vancouver*, 46 Wn. App. 740, 746-747, 732 P.2d 173 (1987) (“[C]ourts have held that the trial court should grant defendant’s motions on the ground of contributory negligence as a matter of law only in the clearest of cases when the court can conclude “that reasonable minds could not have differed in their interpretation of the factual pattern.” [citations omitted]).

Fourth, no evidence suggests SATI was negligent. Contrary to Paccar’s argument, less than five weeks, and not “two months” had passed between the time when SATI received from Paccar the tractor’s title and when it no longer could because Davis had already obtained a lien free title. This timeframe was over the holiday season. SATI had no reason to “rush” to have a new title issued, as it was justifiably aware that the Nevada Department of Motor Vehicles still showed a lien on the truck, and had no reason to suspect Paccar would issue a lien release certification to Davis that could be used illicitly. Nothing in law or the facts dictates that a party is negligent by not immediately having a new title issued

immediately after a financial transaction, and a trier of fact could certainly conclude otherwise.

2) *Paccar Breached its Contract with SATI*

By its conduct here, Paccar made SATI its banking customer. In Texas, the “elements of a valid contract are (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party’s consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding.” *Prime Products, Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App 2002). Each of these is satisfied. Paccar offered to forego foreclosing on Davis’s loan if SATI promised to pay loan installments and insurance; and SATI accepted. The meeting of the parties’ minds, and their consent to the terms, are demonstrated by their lengthy adherence to those terms. Similarly, the parties intended to be bound by their respective commitments, from which they both derived benefits. SATI obtained the benefit of a truck in which it had lease rights remaining in service; and Paccar continued earning loan profits, and avoided foreclosure costs. At a minimum, factual issues not properly resolved on summary judgment abound as to whether the parties entered into an express oral contract whereby SATI replaced Davis as Paccar’s customer.

That contractual relationship imposed on Paccar the same obligations a financial institution would have to its customer in any banking relationship. The parties’ contractual relationship imposed on Paccar the same duty to confirm the identity of an individual representing

himself to be Anderson as it would if SATI were its original, documented customer. Indeed, Paccar makes clear that it believed it was servicing a customer request by someone identifying himself as Scott Anderson.

In its reply memorandum, Paccar argued that “the only promise that SATI asserts PACCAR Financial made is ... ‘In exchange for SATI’s payments on the loan under its modified terms, Paccar continued with its agreement not to foreclose.’” CP 188 (emphasis in the original). The thrust of this argument, given that Paccar did not foreclose, is that a bank has obligations in tort and contract only to the extent specifically defined by a contract. However, a bank’s obligations in tort, and implied in contract as part of a good-faith relationship with its customer, extend far beyond negotiated terms of a contract. Paccar’s loan agreement with Davis, whom Paccar concededly considers its “customer,” does not contain terms by which Paccar promises not to release Davis’s confidential information or documents pertinent to his account to unverified individuals that could enable them to compromise his rights.

Any number of rights and obligations – statutory, contractual and in tort – arise from a banking relationship. Paccar’s argument to escape liability on this basis is groundless. Citing precedents from various jurisdictions and treatise law, this Court has ruled that “... the general rule [is] that a bank is under a duty not to disclose the financial condition of its customers.” *Tokarz v. Frontier Federal Sav. and Loan Ass’n*, 33 Wn. App. 456, 459-460, 656 P.2d 1089 (1982), *citing Milohnich v. First Nat’l Bank of Miami Springs*, 224 So.2d 759 (Fla. Dist. Ct. App. 1969); *Peterson*

v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284, 92 A.L.R.2d 891 (1961); *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 244 N.W.2d 648 (1976); and *State v. McCray*, 15 Wash.App. 810, 817, 551 P.2d 1376 (1976), citing Annot., *Bank's Duty to Customer or Depositor not to Disclose Information as to his Financial Condition*, 92 A.L.R.2d 900 (1963).

By producing a legal document that could be used – indeed, would have no use but to be used – for purposes of altering SATI's title rights, Paccar breached obligations implied in its contract with SATI.

Alternatively, SATI was an intended beneficiary of the Paccar-Davis contract to the extent it existed after Paccar began dealing exclusively with SATI. Paccar knew of SATI's interest in the truck and leveraged that interest to secure an arrangement where SATI would take over for Davis. SATI thus became a creditor beneficiary of the contract between Paccar and Davis. An agreement benefits a “creditor” beneficiary if, under the agreement, “that performance will come to him in satisfaction of a duty,” whether it be indebtedness, contractual obligation or other legally enforceable commitment owed to the third party. *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002) (finding that Stine was a third-party creditor beneficiary). “It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made.” *In re Citgo Petroleum Corp.*, 248 S.W.3d 769, 776 (Tex. App. 2008). Whether SATI has an enforceable contract right against

Paccar as a third-party creditor beneficiary is a question to be determined based on the evidence, and cannot be decided on summary judgment.

CONCLUSION

This matter does not present a circumstance wherein a party with no, or even a minimal or tenuous, relationship with a bank seeks to enforce rights against the bank. Rather, SATI seeks to enforce rights under a contract Paccar instigated, both parties clearly understood they had reached, and both parties were operating pursuant to.

SATI seeks to recover from Paccar based on Paccar's breach of duties in tort which can be determined by general negligence principles. The very fact Paccar has a policy, which it claims it should have enforced here, of obtaining identification from individuals requesting documentation of a lien release demonstrates the risk that manifested was foreseeable to Paccar. All factors to be considered in determining the existence of a duty heavily favor determination of duties in tort. Paccar should be held accountable for disclosing legal documents to individuals which could harm the interests of entities with which they have special relationships. This is especially important in this era of frequent identity theft, as certain jurisdictions have recognized by creating the tort of "negligent enablement of imposter fraud."

On these grounds, SATI respectfully requests that the Court reverse the trial court, and remand proceedings for a trial on the merits.

RESPECTFULLY SUBMITTED this 6th day of June, 2013.

FOSTER PEPPER PLLC

A handwritten signature in black ink, appearing to read 'S. Block', written over a horizontal line.

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