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COURT OF APPEALS

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No. 40141-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

MICHAEL and THERESA ANNECHINO, husband and wife,

Appellants,

v.

MICHAEL C. WORTHY and SUSAN WORTHY, husband and wife and the marital community composed thereof, JOAN COOPER, KELLI REYNOLDS, UMPQUA BANK, SUCCESSOR IN INTEREST TO BANK OF CLARK COUNTY, and CLARK COUNTY BANCORPORATION,

Respondents.

AMENDED BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case is plaintiffs' unprecedented attempt to impose personal liability upon employees of Clark County Bank (the "Bank") where one of plaintiffs' customer deposits allegedly turned out to be incompletely insured through the FDIC when the Bank failed. It is apparently plaintiffs' position that, in this particular economic climate, the former employees of closed banks must personally assume liabilities that, but for the Bank closure, would have been borne by the Bank itself, if anyone.

Plaintiffs do not contend that any Bank employees intentionally caused plaintiffs' claimed damages. At most, plaintiffs contend that their claimed damages arose because a Bank employee made a mistake at work. Under plaintiffs' theory, that employee would be faced with a potential liability of hundreds of thousands of dollars because her former employer, the Bank, is no longer in existence.

The Clark County Superior Court properly issued orders granting defendants'[1] motion for summary judgment and denying plaintiffs' motion for summary judgment. The law does not support plaintiffs' theory of liability.

[1] The respondents submitting this brief, and who are referred to as the "defendants" herein, are: Michael C. Worthy, Susan Worthy, Joan Cooper, and Kelli Reynolds.

II. RESPONSE TO ASSIGNMENTS OF ERROR AND CROSS-ASSIGNMENT OF ERROR

A. The trial court properly granted summary judgment in favor of the defendants, finding that as a matter of fact and of law, the defendants did not owe or violate a quasi-fiduciary duty to the plaintiffs.

B. The trial court also correctly ruled that plaintiffs were not entitled to summary judgment on their claim that the defendants owed and breached quasi-fiduciary duties to the plaintiffs.

III. STANDARD OF REVIEW

Defendants agree that this Court's review of a motion granting or denying summary judgment is de novo. In conducting de novo review, this Court should evaluate defendants' motion for summary judgment and plaintiffs' motion for summary judgment in accordance with the principles of CR 56, depending on the identity of the moving parties as to each motion. The summary judgment standards set forth in plaintiffs' brief apply to defendants on their motion for summary judgment, but also apply to plaintiffs on their motion for summary judgment.

IV. STATEMENT OF THE CASE

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

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

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

Mr. Worthy had no involvement in determining the configuration of plaintiffs' accounts, and he made no personal assurances to Mr. Annechino that plaintiffs' deposits would in fact be FDIC insured.

CP 183. Mr. Worthy had no social relationship with Mr. Annechino or his family outside of Bank business. CP 182.

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

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

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

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

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

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

> On behalf of the Annechino family we seek compensation under all available legal avenues, including to rectify the error made by the FDIC when it discovered the basic facts underlying this claim yet refused to provide insurance. We also make demand on the FDIC as the legal receiver of the Bank of Clark County since it is the successor in interest and legally liable for the errors the Bank made.

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

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

Plaintiffs had filed the present action on March 10, 2009, seeking damages of $500,000. Shortly after receiving the FDIC letter, plaintiffs filed a second lawsuit, this time against the FDIC in U.S. District Court in Seattle, seeking to recover the same $500,000. CP 157-62. In the federal district court case, plaintiffs alleged that the FDIC "fail[ed] to consider all available evidence and pay plaintiffs' claims for uninsured deposits." CP 161.

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

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

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

The month before they received this distribution, plaintiffs filed their motion for partial summary judgment in this lawsuit. CP 29. Their factual assertions in support of that motion are identical to those they now present to this Court, and remain unsupported or misleading[2]:

1. Plaintiffs claim the Bank held itself out as being FDIC insured, but the cited question asked of Mr. Worthy was simply whether

[2] The following numbered facts utilize the same numbering as set forth in plaintiffs' opening brief (pages 7-12) and in its briefing before the trial court (CP 188-193).

the Bank represented itself as "having deposits that were FDIC insured." CP 188.

2. Plaintiffs claim Mr. Worthy admitted that plaintiffs relied on the Bank's level of service, whereas Mr. Worthy's actual cited testimony was simply that plaintiffs told him the financial institutions plaintiffs dealt with on the east coast did not have the same level of service as the Bank. CP 189.

3. Plaintiffs claim they contacted the Bank before deciding whether to deposit additional funds in the Bank, CP 189, but Mr. Annechino admits it was his discussion with a Charles Schwab representative that led him to pursue deposits with the Bank. CP 62. It is also clear that Mr. Annechino's decision to deposit further funds with the Bank was because of the "great rate" he received. CP 71-73.

4. Plaintiffs claim they received personal assurances that their funds would be FDIC-insured, but their cited evidence reveals that plaintiffs were simply shown parameters regarding FDIC coverage. CP 190. Plaintiffs then failed to follow up regarding those parameters.

5. Plaintiffs assert "direct personal contact" with Mr. Worthy and Ms. Reynolds, CP 191, but it is uncontradicted that all contacts were by e-mail or telephone. CP 178-79, 182-83.

6. Plaintiffs claim Mr. Worthy took action to structure their accounts, CP 191, but the evidence shows that only Ms. Reynolds undertook any of that work, CP 179, and that plaintiffs approved it. CP 72.

7. Plaintiffs claim Bank employees created or reviewed the proposed account structure that was sent to Mr. Annechino, CP 191, but ignore Mr. Annechino's suggestion that one account should be placed in the name of a family trust, Mr. Annechino's approval of the account structure, his execution of the signature cards without question, and plaintiffs' failure to review the monthly statements sent to them. CP 179-180.

8. Plaintiffs place great weight on the letter Ms. Reynolds wrote when she could get no information from the FDIC (CP 12), but ignore Ms. Reynolds' sworn testimony as to her understanding of the true facts that led her letter to be inaccurate. CP 179-80.

9. Plaintiffs note that the deposits were made after the chart was received, CP 192, but ignore that the deposits were made after Mr. Annechino was able to receive a ten percent increase in the interest rate the Bank was paying him. CP 71.

10. Plaintiffs point out Ms. Reynolds' job title, CP 192, but her title is irrelevant to the question of any claimed fiduciary duty owed to plaintiffs.

11. Plaintiffs claim Mr. Annechino had no knowledge of FDIC rules, CP 193, but ignore that Ms. Reynolds directed him to the FDIC website, told Mr. Annechino to verify for himself that his deposits would be FDIC-insured, recommended he consult with his own accountant or other financial advisor, and provided him with an informational FDIC brochure explaining deposit insurance coverage. CP 179.

The claimed "facts" relied upon by plaintiffs are far from "uncontradicted," as plaintiffs assert. CP 193. Even viewing them in the light most favorable to plaintiffs, however, the trial court granted defendants' cross-motion for summary judgment and dismissed plaintiffs' claims against the individual defendants, pursuant to a written memorandum of decision. CP 270-73.

In that memorandum of decision, the Court correctly found that Bank employees generally do not have a "special relationship" with Bank customers. CP 273. It found that it was plaintiffs' own decision to make the deposits after having "had the opportunity to review and approve the account structures." CP 272.

In granting defendants' cross-motion for summary judgment, the Court concluded that there was "no fiduciary duty created" in the course of this transaction, a transaction which was "similar to every day banking activities." CP 273. Finally, the Court properly observed:

> To extend fiduciary responsibility to Bank employees under this set of facts would extend personal liability far beyond anything employees would envision.

Id. Orders denying plaintiffs' motion and granting defendants' cross-motion were subsequently entered. CP 274-77.

IV. LEGAL ARGUMENT

A. No Reported Decision Supports the Claim that Bank Officers and Employees Are Personally Liable to Bank Customers

Plaintiffs have cited no authority for the proposition that bank officers and employees can be held personally liable to bank customers in circumstances similar to this case. Instead, they rely on case law where statutory duties were imposed, where personal injury is involved, and where intentional harm is at issue. None of those circumstances are close to those presented in this case. Plaintiffs have presented no on point authority because none exists.

For example, plaintiff relies upon *Roth v. Kay,* 35 Wn. App. 1, 664 P.2d 1299 (1983). There, claimant sued his treating doctor for failing to file his application for worker's compensation with the Department of

Labor & Industries.[3] The doctor failed to complete and submit the physician's portion of the compensation claim form. The court relied upon RCW 51.28.020, which imposed an affirmative duty upon treating physicians "to lend all necessary assistance" in connection with an application for worker's compensation, in finding that there was a genuine issue of material fact as to whether the doctor was negligent in not submitting in the claim. No similar statutory duty is imposed upon banks, let alone their officers and employees.

Plaintiffs also rely upon *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998), where the court considered the application of Restatement (2d) of Torts § 324A (1965), setting forth the "voluntary rescue doctrine." But that doctrine applies only to situations imposing liability upon a negligent volunteer rescuer for causing *physical harm*. *Id.* at 675-76. Here, because physical harm is not at issue, the volunteer rescue doctrine is not implicated, and the case is off point.

Plaintiffs also rely upon several decisions imposing liability upon individuals where they personally and intentionally engaged in conduct causing damages. For example, they rely upon *Bennett v. Huish*, 155 P.3d 917 (Utah App. 2007). There, Huish located hard money lenders for the plaintiffs, negotiated extension fees, and brokered loans. Throughout the

[3] Of course, the law has long recognized a fiduciary relationship between treating doctors and their patients. *See Liebergesell v. Evans*, 93 Wn.2d 881, 890, 613 P.2d 1170 (1980).

process, Huish took commissions from the various fees paid by the plaintiffs without disclosing to plaintiffs that he would take the commission or that he was in fact setting the fees to be charged. *Id.* at 927-28. Significantly, Huish admitted at trial that he was acting as plaintiffs' agent and that he therefore owed them fiduciary duties. *Id.* at 927, n.8. Thus, Huish breached his admitted fiduciary duties in his admitted role as the plaintiffs' agent, by failing to act in the best interests of plaintiffs, his principals. This type of intentional conduct is not implicated in the present case.

Plaintiffs also rely upon *Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 875 P.2d 637 (1994). In that case, however, the court simply held that the individual defendant, who was an officer and a director of a corporation, owed fiduciary duties to her own corporation. *Id.* at 414. To the extent she could possibly be held liable to third parties, that arose from her knowledge of the corporation's "blatant fraud." *Id.* at 418. Fraud, let alone blatant fraud, is not at issue in this case.

Plaintiffs next rely upon *In Re Eisenberg*, 43 Wn. App. 761, 719 P.2d 187 (1986). There, the court upheld liability against a guardian, who stood in a well-established fiduciary relationship to his ward, where he engaged in self-dealing transactions. Again, the Bank officers and employees in this case did not have a legally recognized fiduciary relationship with plaintiffs, and did not engage in any acts remotely close to self-dealing.

Under Washington law, only in egregious cases can a corporate officer possibly face personal liability for participating in improper conduct. As the court explained in *One Pacific Towers Homeowners' Association v. HAL Real Estate Investments, Inc.*, 108 Wn. App. 330, 347, 30 P.3d 504 (2001), *aff'd in part and rev'd in part*, 148 Wn.2d 319, 613 P.3d 1094 (2002):

> Corporate officers may indeed face personal liability outside the theory of piercing the corporate veil under certain circumstances. Corporate officers may be personally liable for torts committed in the course of their duties. "If a corporate officer participates in wrongful conduct or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties." *Grayson v. Nordic Construction Company, Inc.*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979).

To constitute such wrongful conduct, the officer must have actively committed wrongdoing, converted funds, engaged in fraud, or committed other egregious acts. *See, e.g., State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976). In that case, the court found a litany of unfair business practice and statutory violations. *Id.* at 305-307. The deceptive acts and practices were committed "flagrantly and intentionally" by the defendants, including the corporate officer. *Id.* at 309. The corporate officer, Williams, was himself responsible for many of the unlawful and deceptive acts and practices of his company. *Id.* at 322.

In *One Pacific, supra,* in contrast, the claimed wrongful conduct was that the condominium declarants/sellers failed to comply with certain statutory disclosure duties in the sale of condominiums. Under those circumstances, the court declined to impose personal liability upon the corporate officers, stating, at 347-48:

> Here, the actions by the OPT entities do not rise to the level of those condemned by the court in *Ralph Williams*. The owners do not allege fraud or misrepresentation. The substance of their claims is that the corporations involved in sales were declarants under the condominium act and failed to comply with certain statutory duties imposed by that status. ...On this record, we cannot say that either the OPT entities or Manheim engaged in conduct so wrongful or deceptive that it would justify imposing personal liability on the corporations' sole corporate officer.

The individual defendants in this case are not alleged to have engaged in any egregious conduct such as that condemned in *Ralph Williams, supra.* Under Washington law, they therefore have no possible personal liability for plaintiffs' claimed damages. Plaintiffs lack any authority whatsoever for their unprecedented attempt to impose personal liability under these circumstances.

B. As a Matter of Law, Neither Mr. Worthy nor Ms. Reynolds Entered into a Fiduciary or Quasi-Fiduciary Relationship with Plaintiffs

Plaintiffs' evidence utterly fails to establish the existence of a fiduciary relationship between either Mr. Worthy or Ms. Reynolds and Mr. Annechino. The law of fiduciary duty in Washington is set forth in *Liebergesell* v. *Evans, 93* Wn.2d 881, 613 P.2d 1170 (1980). There, the Supreme Court explained that fiduciary relationships may "arise in fact" regardless of the relationship in law between the parties. *ld.* at 890. Whether such a fiduciary relationship exists "depends on the development of factual proof." *ld.* at 891.[4]

Liebergesell provides the paradigmatic example of such a relationship, and breach. The plaintiff therein was "a widowed school teacher with n[o] expertise in business." *Id.* at 884. The defendant, who was socially acquainted with the plaintiff, induced her to invest money in a business operated by defendant. *Id.* The court found that the plaintiff "appreciated [the defendant]'s superior knowledge of financial affairs and considered his advice important in arranging her family's finances." *Id* at

[4] The court also noted that "a fiduciary relationship arises as a matter of law between and attorney and his client or a doctor and his patient." *ld.* at 890. Plaintiffs attempt to argue that a fiduciary relationship, or "quasi-fiduciary" relationship, likewise arises between bank employees and bank customers. However, as discussed in section C, *infra,* the authorities relied upon by plaintiffs establish only that banks or other financial institutions themselves, rather than employees of those institutions, may enter into quasi-fiduciary relationships with bank customers (and, in fact, this is the exception, rather than the rule). There is no authority for the proposition that fiduciary relationships arise as a matter of law between bank employees and bank customers.

884-85. The defendant drew up loans for the plaintiff to sign at usurious rates, then subsequently defaulted on the loans, and claimed a defense of usury. *Id.* at 885. The defendant was aware that these new loan agreements were usurious at the time he prepared them, and was also aware that the plaintiff did not know that they were illegal. *Id.*[5]

The Supreme Court held that these facts, if "accepted at trial," could establish a fiduciary relationship "as a matter of fact between the parties." *Id* at 891. In so finding, the Supreme Court identified the salient characteristics of a fiduciary relationship as follows: (1) Friendship between the contracting parties; (2) Lack of business expertise on the part of one party; and (3) Superior knowledge and assumption of the role of advisor by the other party. *Id.* The facts alleged by plaintiffs here fall far short of establishing a fiduciary relationship under this test.

First, there was no relationship between either Mr. Worthy or Ms. Reynolds and Mr. Annechino, other than that between Bank employee and customer. Neither had any friendship, or social relationship of any kind, with Mr. Annechino or any member of his family. CP 178, 182. Plaintiffs do not contend otherwise.

[5] The conduct of the defendant in *Liebergesell* arguably constitutes the type of "egregious conduct," discussed *infra*, that has led the courts to impose personal liability upon the actor.

Second, although plaintiffs describe Mr. Annechino as having "no training or expertise regarding the management of money," they also acknowledge that he is a "businessman," who has "held a number of positions with various small corporations in sales, marketing and product development and distribution." CP 62. In *Liebergesell,* the defendant unilaterally drew up loan documents, and presented them to the plaintiff for signature. The present situation is quite different. Mr. Annechino did not simply hand $1.85 million to the Bank, with no questions asked. To the contrary, Mr. Annechino insisted on a higher rate of interest in a discussion with the Bank CEO, Mr. Worthy. CP 183. Mr. Annechino then confirmed that plaintiffs sought a higher rate with Ms. Reynolds, prior to wiring the additional deposits, stating: "Don't forget my great rate for showing this confidence in the bank!" CP 71. Ms. Reynolds responded that plaintiffs' rate would be increased from 3.5% to 3.85%, a ten percent increase from plaintiffs' prior rate. In addition, Mr. Annechino reviewed and approved the recommended account structure, even suggesting that one account be re-titled in the name of a family trust. In short, it is clear that Mr. Annechino is significantly more sophisticated in commercial matters than a "widowed school teacher with n[o] expertise in business." *Liebergesell,* 93 Wn.2d at 884.

Third, no one at Bank of Clark County assumed the role of financial advisor to Mr. Annechino. In *Liebergesell,* the defendant actively solicited the plaintiff to loan money to the defendant's business. Here, it is undisputed that Mr. Annechino initiated the idea to deposit additional funds into the Bank without any input from Bank personnel. CP 62. Indeed, Mr. Annechino decided to move funds to the Bank after receiving advice from an officer at Charles Schwab, *id.*, and after securing a ten percent increase from plaintiffs' prior rate of return. CP 71. There was no solicitation by the Bank. In addition, Ms. Reynolds encouraged Mr. Annechino to independently verify insurance coverage, and provided him with a recommended chart of accounts, for his review and approval. CP 179.

In short, none of the hallmarks of a fiduciary relationship identified in *Liebergesell* are present in this case. On the contrary, the evidence reflects only a typical, bank-customer transaction. A recent Washington Court of Appeals decision, *Micro Enhancement Int'l, Inc.* v. *Coopers & Lybrand, LLP,* 110 Wn. App. 412, 435, 40 P.3d 1206 (2002), provides a useful comparison. The plaintiff in *Micro Enhancement* claimed that its auditing company was a fiduciary because "it agreed to serve as [the plaintiff]'s business advisor, who, as a result of the auditing process, would recommend improvements in internal accounting controls, operating controls and policies, inventory controls, and cost accounting systems," and that it had trust and confidence in the auditor's competence. Id. at 434-35. The court rejected this argument, noting that "[a]fter all, we trust most people with whom we choose to do business." *Id.* at 435 (citation omitted).

Exactly the same is true here. Mr. Annechino entered into a *business relationship* with the Bank of Clark County. He expected that plaintiffs' deposits would be insured, but every customer anticipates that a business will perform to his or her expectations. Plaintiffs have failed to show any of the characteristics of a fiduciary relationship that would take Mr. Annechino's dealings with the Bank outside that of a normal business-customer relationship. Under plaintiffs' theory of the case, every time a customer walked into a bank and asked whether a sum of money to be deposited would be FDIC insured, an affirmative answer by a bank employee would give rise to a personal, fiduciary relationship. Washington law does not support such an expansive view of fiduciary duty.

C. As a Matter of Law, the Individual Defendants, as Bank Officers and Employees, Did Not Owe any Fiduciary Duty to Mr. Annechino, a Bank Customer

As discussed in section B, *supra,* plaintiffs' evidence fails to establish the existence of a fiduciary relationship in fact between the individual defendants and Mr. Annechino. There is no evidence that either Mr. Worthy or Ms. Reynolds befriended Mr. Annechino, induced him to make deposits, or somehow took advantage of confidences they had engendered. There is, to the contrary, substantial evidence that the transaction that led to the alleged loss was conducted at arm's-length, and that Mr. Annechino was more than capable of looking after his own interests.

In addition, there is no basis for the assertion, often repeated by plaintiffs, that bank employees may become personally liable under the law for breach of fiduciary duties to customers. Plaintiffs put forth a variety of citations, theories, and arguments concerning fiduciary duties; none of them, however, stands for the proposition that an *employee* of a bank, as opposed to the *bank* itself, may be held personally liable for breach of fiduciary duty. Rather, they establish only that a bank may, under certain circumstances, take on fiduciary duties to its customers (and that this is the exception, rather than the rule). Because there is no basis to find that the individual defendants, in their personal capacity, took on fiduciary duties to Mr. Annechino, the trial court should be affirmed.

Plaintiffs assert that a "quasi-fiduciary" relationship existed between the individual defendants and Mr. Annechino. The single case plaintiffs rely upon for this proposition, however, concerned an action by an individual against a savings and loan institution, not against any employees, officers, or directors of it. *Tokarz v. Frontier Fed. Savings and Loan Assoc.,* 33 Wn. App. 456, 656 P.2d 1089 (1982). That case does not support the proposition that a fiduciary relationship may arise between the *employees* of a bank and the bank's customers. It does not even purport to address the issue of personal liability.

In addition, *Tokarz* involved a claim that the defendant savings and loan association failed to disclose material information concerning a loan agreement entered into with the plaintiff. *Tokarz*, 33 Wn. App. at 458-59. Ordinarily, when two parties deal at arm's-length, there is no obligation to disclose material facts concerning a transaction. *Tokarz,* 33 Wn. App. at 458-59. It is only when "special circumstances" dictate otherwise that a duty to disclose arises. *Id.* at 459. As the Court of Appeals explained in *Tokarz*, "one who speaks must say enough to prevent his words from misleading the other party; one who has special knowledge of material facts ... may have a duty to disclose these facts to the other party; and one who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts." *Id.*

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

Ultimately, cases such as *Tokarz* serve to illustrate an underlying fallacy of plaintiffs' theory of breach of fiduciary duty. Fiduciary duties are implied to protect one party, who justifiably expects the other party to care for his welfare, from abuse of that trust and confidence by the other. What is alleged here, however, is a Bank error, plain and simple. There is no allegation that anyone at the Bank, in any manner, took advantage of a fiduciary relationship with Mr. Annechino. Or, to put it another way: even if there had been a fiduciary duty here, there was no breach.

Finally, the Court should not be misled into believing that "quasi-fiduciary" relationships are the rule, even as to financial institutions themselves. Quite the opposite is true:

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

Tokarz, 33 Wn. App. at 458-59. Plaintiffs have made no showing as to why this general rule should not apply.

In short, plaintiffs have failed to furnish sufficient evidence even that *the Bank* entered into a quasi-fiduciary relationship with Mr. Annechino. Even if it had, however, plaintiffs offer no authority for the proposition that such relationships may arise between bank employees and bank customers, thus resulting in personal liability.

D. The Trial Court Properly Found that Plaintiffs were Responsible for Their Own Damages

In its memorandum of opinion, the trial court properly found that plaintiffs bear responsibility for their own claimed losses, noting that plaintiffs: (a) had the opportunity to review the proposed deposits prior to transferring any funds, (b) filled out deposit records and account cards showing ownership of the accounts before transferring funds, and (c) failed to notice that any sum had been placed in a different account even though a review of monthly statements and other records would have put plaintiffs on notice. CP 271. Mr. Annechino's in-depth involvement in structuring this transaction strongly supports the trial court's denial of plaintiffs' motion for summary judgment and its decision to grant defendants' motion for summary judgment.

As the FDIC properly explained, responsibility to have deposits that are covered by deposit insurance lies with the depositor, not with the bank. CP 139:

> *[T]he responsibility for understanding deposit insurance coverage ultimately lies with depositors.* The FDIC provides extensive deposit insurance information to banks for the education of their employees and customers. The FDIC also makes available deposit insurance information to banks and the public through deposit insurance brochures, a deposit insurance help line, and electronically through the Internet. In this regard the FDIC's website ... includes guidelines pertaining to deposit insurance coverage for all categories and the Electronic Deposit Insurance Estimator to assist customers in determining whether their funds are insured.

Ms. Reynolds encouraged Mr. Annechino to take advantage of the FDIC's expertise in this regard, directing him to the FDIC website. CP 179.

In its briefing on summary judgment in plaintiffs' federal action against, the FDIC also pointed out that Mr. Annechino had ample time after the deposit was made to confirm the satisfactory structuring of the accounts:

> [T]he main plaintiff was a bank shareholder who proposed to deposit a very significant sum in the bank, far in excess of the maximum $250,000 coverage depositors normally received. *It was certainly incumbent upon him to make sure that the accounts were structured in the manner he needed for complete deposit insurance coverage and not shift the blame for an error or errors he should have caught to bank employees.* In this case, Mr. Annechino made the deposits at issue in mid-November 2008, and the Bank did not close until January 16, 2009. This period was ample to detect and correct errors in the structuring of the accounts.

CP 173-74. The agency's position is clear. Mr. Annechino wished to insure more money than the single-account insurance limit of $250,000. It was incumbent on Mr. Annechino to verify that his accounts were structured in such a manner to permit this, and there was ample opportunity for him to do so. As Ms. Reynolds testified in her declaration, Mr. Annechino was in a position to notice any discrepancies in the documents because he had reviewed the chart of accounts, knew which joint account the Bank intended to change to a trust, and had the signature cards showing that a different account had been changed. CP 179-80. Mr. Annechino also received monthly statements, and should have detected any issues if he had reviewed them.

Finally, the FDIC also pointed out, in both its letter to counsel and in briefing in the federal action, that "[d]espite Mr. Annechino's reference to the bank prepared charts, the signature cards are the ultimate vehicle signifying intent and agreement with the manner in which the accounts are established." CP 139; *see also* CP 167. ("[T]he signature cards, which function as the primary records for establishing the depositors' intent, were consistent in terms of ownership of the accounts and the signatures thereon."). By signing the cards, Mr. Annechino and the other named account holders - *i.e.*, his family signified their agreement with the way the accounts were structured.

In short, the FDIC places the responsibility for understanding FDIC rules on the depositor, not the Bank. Ultimately, therefore, it is Mr. Annechino who bears responsibility for understanding FDIC rules.

E. RCW 62A.4-103 Does Not Impose Statutory Duties on a Bank's Employees

Plaintiffs next ask the Court to find that RCW 62A.4-103 imposes a fiduciary duty on Mr. Worthy and Ms. Reynolds, despite the fact that the plain language of the statute concerns only a *bank's* responsibility. *See* RCW 62A.4-103(a): "...the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care..."

Undeterred by this obvious limitation, plaintiffs nonetheless assert that the statute creates a duty on the part of not only the Bank, but also its employees, arguing that the failure to impose such a duty "would render the bank regulation meaningless." Plaintiffs' Brief, at 22. Rather than rendering the statute meaningless, applying the terms of the statute accomplishes its purposes, that being to impose liability upon a bank for the negligent acts of its employees. Review of the statutory scheme shows that, in fact, no further extension is warranted, and the limitation is intended; RCW Ch. 62A.4, by its terms, is limited in its applicability to: "The liability *of a bank* for action or non-action with respect to an item handled by it for purposes of presentment, payment, or collection." RCW 62A.4-102 (emphasis added).

VI. CONCLUSION

For the reasons set forth above, the Court should affirm the trial court's order denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment.

DATED this 10 day of August, 2010.

HEURLIN, POTTER, JAHN,
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CERTIFICATE OF SERVICE

I certify that I caused the foregoing AMENDED BRIEF OF RESPONDENTS to be served on the following:

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