

No. 293793

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

DONALD J. ROKKAN, individually; and DONALD J. ROKKAN, personal representative for
the Estate of Marsalle F. McHale, deceased, Appellants

v.

GESA CREDIT UNION, a corporation; and PAULA MILLER and JOHN DOE MILLER,
Respondents

BRIEF OF APPELLANTS

MARTIN GALES PLLC
Martin Gales, WSBA #14611
3337 E. 16th Ave.
Spokane, WA 99223
(509) 535-3534
Attorneys for Appellants

No. 293793

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

DONALD J. ROKKAN, individually; and DONALD J. ROKKAN, personal representative for
the Estate of Marsalle F. McHale, deceased, Appellants

v.

GESA CREDIT UNION, a corporation; and PAULA MILLER and JOHN DOE MILLER,
Respondents

BRIEF OF APPELLANTS

MARTIN GALES PLLC
Martin Gales, WSBA #14611
3337 E. 16th Ave.
Spokane, WA 99223
(509) 535-3534
Attorneys for Appellants

TABLE OF CONTENTS

I.	DESIGNATION OF PARTIES.....	1
II.	SUMMARY OF ARGUMENT... ..	1
III.	ASSIGNMENTS OF ERROR.....	1
IV.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
V.	SUMMARY OF RELIEF REQUESTED ON APPEAL.....	5
VI.	STATEMENT OF THE CASE.....	5
	A. Mr. Rokkan’s Statement of Facts.....	5
	B. Relevant Procedural History.....	15
VII.	ARGUMENT.....	17
	A. Standard of review.....	17
	B. This appeal was timely filed.....	19
	C. The making of the beneficiary designations created nonprobate assets that passed outside the will.....	20
	D. There was substantial evidence that Gesa violated the CPA.....	21
	E. There was substantial evidence that the Gesa employees were negligent	31
	F. There was substantial evidence that Paula Miller fraudulently concealed her interest in one of the term share certificates.....	35
	G. Gesa was liable for the acts and omissions of its agents, Paula Miller and Cynthia Cook	36
	H. There was evidence to support a verdict that Gesa was negligent in training and supervising its employees.....	39
	I. ER 803(a)(3) permits hearsay statements where a decedent has left a will.....	41
	J. The trial court should be directed on remand to award reasonable attorney’s fees and costs related to his appeal....	48
VIII.	CONCLUSION.....	48

TABLE OF AUTHORITIES

CASES	PAGE
<i>Alejandre v. Bull</i> , 123 Wn.App. 611, 623, 98 P.3d 844 (2004)	36
<i>Bentzen v. Demmons</i> , 68 Wn.App. 339, 344, 842 P.2d 1015 (1993)	43
<i>Bishop v. Corporate Business Park</i> , 138 Wn.App. 443, 454, 158 P.3d 1183 (2007)	18
<i>Brown v. Labor Ready N.W., Inc.</i> , 113 Wn.App. 643 54 P.3d 166 (2002)	40
<i>Broyles v. Thurston County</i> , 147 Wn.App. 409, 428, 195 P.3d 985 (2008)	36
<i>City of Fircrest v. Jensen</i> , 158 Wn.2d 384, 394, 143 P.3d 776 (2006)	45
<i>City of Spokane v. Ward</i> , 122 Wn.App. 40, 44, 92 P.3d 787 (2004)	46
<i>Dempere v. Nelson</i> , 76 Wn.App. 403, 406, 886 P.2d 219 (1994)	18
<i>Dussault v. American International Group, Inc.</i> , 123 Wn.App. 863, 871-72, 99 P.3d 1256 (2004)	35
<i>Edmonds v. Scott Real Estate</i> , 37 Wn.App. 834, 844, 942 P.2d 1072 (1997)	23
<i>Estate of Burks</i> , 124 Wn.App. 327, 100 P.3d 328 (2004)	20
<i>Estate of Furst</i> , 113 Wn.App. 839, 843, 55 P.3d 664 (2002)	21

<i>Estate of Sherry</i> , 158 Wn.App. 69, 82-83, 240 P.3d 1182 (2010)	44
<i>Estate of Wind</i> , 27 Wn.2d 421, 426, 178 P.2d 731 (1947)	42
<i>Grip v. Buffelen Woodworking Co.</i> , 73 Wn.2d 219, 224, 437 P.2d 915 (1968).....	19
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 787-93, 719 P.2d 531 (1986)	21, 22, 25, 26
<i>In re Real Estate Brokerage Antitrust Litig.</i> , 95 Wn.2d 297, 301, 622 P.2d 1185 (1980)	22
<i>Joyce v. Department of Corrections</i> , 116 Wn.App. 569, 75 P.3d 548 (2003)	18
<i>Lasher v. Univ. of Wash.</i> , 91 Wn.App. 165, 169, 957 P.2d 229 (1998)	43
<i>Litho Color, Inc. v. Pacific Employers Ins. Co.</i> , 98 Wn.App. 286, 298, 991 P.2d 638 (1999)	17
<i>Marriage of Scanlon</i> , 109 Wn.App. 167, 174-75, 34 P.3d 877 (2001)	17
<i>Miller v. Payless Drug Stores</i> , 61 Wn.2d 651, 653, 379 P.2d 932 (1963)	17
<i>Panag v. Farmers Ins. Co.</i> , 166 Wn.2d 27, 37, 204 P.3d 885 (2009)	23
<i>Physicians Insurance Exchange v. Fisons Corporation</i> , 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)	17
<i>Putnam v. Wenatchee Medical Center</i> , 166 Wn.2d 974, 216 P.3d 374 (2009)	46

<i>Richland Sch. Dist. v. Mabton Sch. Dist.</i> , 111 Wn.App. 377, 385, 45 P.3d 580 (2002)	36
<i>Robinson v. Avis Rent a Car Systems</i> , 106 Wn.App. 104, 111-12, 22 P.3d 818 (2001)	22, 23
<i>Seidler v. Hanson</i> , 14 Wn.App. 915, 917, 547 P.2d 917 (1976)	19
<i>Singleton v. Naegeli Reporting</i> , 142 Wn.App. 598, 175 P.3d 594 (2008)	22
<i>State v. Castellanos</i> , 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)	17
<i>State v. Knox</i> , 86 Wn.App. 831, 835-36, 939 P.2d 710 (1987)	19
<i>State v. Murray</i> , 35 Wn.App. 658, 664, 669 P.2d 891 (1983)	44
<i>State v. Nolan</i> , 98 Wn.App. 75, 81, 988 P.2d 473 (1999)	46
<i>State v. Ryan</i> , 103 Wn.2d 165, 691 P.3d 197 (1984)	45
<i>State v. Smith</i> , 84 Wn.2d 498, 501, 527 P.2d 674 (1974)	46
<i>Taufen v. Estate of Kirpes</i> , 155 Wn.App. 598, 230 P.3d 199 (2010)	27, 44

<i>Titus v. Tacoma Smeltermen’s Union</i> , 62 Wn.2d 461, 469, 383 P.2d 504 (1963)	37
<i>Vogt v. Seattle-First National Bank</i> , 117 Wn.2d 541, 817 P.2d 1364 (1991)	22, 23
<i>Walker v. Truck & Auto Outlet</i> , 155 Wn.App. 199, 211, 229 P.3d 871 (2010)	22, 23, 24
<i>Weber Constr., Inc. v. County of Spokane</i> , 124 Wn.App. 29, 33, 98 P.3d 60 (2004)	17

STATUTES

RCW 2.04.190	45
RCW 2.04.200.....	45
RCW 5.60.030.....	2, 4, 13, 41-47
RCW 11.02.005(15)	20
RCW 11.11.020(1)	20
RCW 11.20.020(3).	20
RCW 11.11.020(4)	20
RCW 19.86.090.....	48
RCW 19.86.170.....	22
RCW 74.34.005	27
RCW 74.34.020.....	27
SSB 6202, Chapter 133, Laws of 2010.....	26

COURT RULES

CR 54.....	19, 20
CR 58.....	19, 20
ER 803(a)(3)	2, 4, 42-44, 46-47
RAP 5.2.....	19, 20
RAP18.1.....	48

OTHER AUTHORITIES

Mueller and Kirkpatrick, <i>Federal Evidence</i> , Section 8.74, p. 653 (Third Edition 2007).....	43
Tegland, <i>5C Washington Practice</i> , Section 803.14, footnote 1 and Section 803.1, footnote 3 (5 th ed. 2006)	42
<i>Restatement (Second) of Torts</i> , Section 551.....	36
<i>Washington Appellate Practice Deskbook</i> , section 7.4(3)(2005)	20
Washington Bar Journal, <i>Should Bank Tellers Engage in Estate Planning?</i> (July 2010).....	27
Washington Pattern Jury Instructions	
WPI 10.01.....	33-34
WPI 310.04.....	25

INDEX TO APPENDICES

Documents	Appendix Page
Order Dated September 8, 2010.....	App – 1-4
2 nd Special Verdict Form.....	App – 5-7
Plaintiff’s Sixth Proposed Instruction No. 5B.....	App – 8
Court’s Instruction No. 7.....	App – 9
Court’s Instruction No. 8	App – 10
Plaintiff’s Third Proposed Instruction No. 23.....	App – 11
SSB 6202 (Laws of 2010).....	App – 12-21
Washington State Bar News, <i>Should Bank Tellers Engage in Estate Planning?</i> (July 2010)	App. – 22-24
 Statutes	
RCW 2.04.190	App. – 25
RCW 2.04.200.....	App – 25
RCW 5.60.030.....	App – 25
 Court Rules	
ER 803(3)(a)	App – 26
CR 54	App – 26
CR 58	App – 27
RAP 5.2 (a), (b) and (c)	App – 27

I. DESIGNATION OF PARTIES

Appellant Donald J. Rokkan, individually, and as personal representative of the Estate of Marsaelle F. McHale, deceased, was the plaintiff at trial and will be referred to herein as “Rokkan.” Respondents Gesa Credit Union and Paula [Daniels] Miller, defendants at trial, will be referred to herein collectively as “Gesa” unless otherwise indicated.

II. SUMMARY OF ARGUMENT

The trial court erred in dismissing during trial Mr. Rokkan’s claims under the Washington Consumer Protection Act, Chapter 19.86 RCW (CPA), and other claims that were supported by substantial evidence. The trial court erred in refusing to allow Mr. Rokkan to testify, pursuant to ER 803(a)(3), about the decedent’s statements to him relating to provisions in her will. The trial court further erred in refusing to hold as a matter of law that certain employees of Gesa, held to be its agents, were acting within the scope of their employment.

III. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing claims brought under the CPA.
2. The trial court erred in dismissing claims of negligence.
3. The trial court erred in dismissing claims of fraudulent concealment.

4. The trial court erred in dismissing claims of negligent supervision and training by Gesa.

5. The trial court erred in refusing to find as a matter of law that certain employees of Gesa were acting within their scope of their employment.

6. The trial court erred in holding that the Deadman's Statute, RCW 5.60.030, precluded testimony about statements by the decedent relating to her will that were proffered under ER 803(a)(3).

7. The trial court erred in holding that filing of the jury verdict on July 9, 2010, was "the order of the court for purposes of . . . appeal." (See, Conclusion of Law 2.1, CP 0639).

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial erred in dismissing claims brought under the CPA, where there was proof that in the course of their employment Gesa's employees gave erroneous information to, and then filled out beneficiary forms for, Marsaelle McHale, an elderly depositor, that resulted in assets being lost from her estate? (Assignment of Error No. 1.)

2. Whether the trial court committed error in dismissing negligence claims against Gesa where there was proof that in the course of their employment Gesa's employees gave erroneous information to, and then filled out beneficiary forms for, Marsaelle McHale, an elderly

depositor, that resulted in assets being lost from her estate? (Assignment of Error No. 2.)

3. Whether the trial court erred in dismissing claims of negligence against Gesa where respondent Paula Miller, a Gesa employee acting in the course of her employment, induced Mrs. McHale to name her as a beneficiary on an instrument? (Assignment of Error No. 2.)

4. Whether the trial court committed error in dismissing claims of fraudulent concealment where respondent Paula Miler, a Gesa employee acting in the course of her employment, failed to notify the decedent's attorney-in-fact of her financial interest in an instrument when she advised him to make no changes in the related account? (Assignment of Error No 3.)

5. Whether the trial court erred in dismissing negligent supervision and negligent training claims against Gesa where it failed to train and supervise its employees about conflict of interest policies? (Assignment of Error No. 4.)

6. Whether the trial court erred in dismissing negligent supervision and training claims against Gesa where it failed to train and supervise its employees as to the consequences of their inserting beneficiary names on financial instruments? (Assignment of Error No. 4.)

7. Whether the trial court erred in refusing to grant judgment as a matter of law that Cynthia Cook and respondent Paula Miller, employees of Gesa, were acting within the scope of their employment when providing assistance and advice to Mrs. McHale and to Mr. Rokkan as her attorney-in-fact? (Assignment of Error No. 5.)

8. Whether, in the absence of any proof of acts or omissions not performed in furtherance of Gesa's interests, the trial court erred in refusing to give Plaintiff's Sixth Proposed Instruction No. 5B (CP 0476), that would have instructed the jurors that the acts and omissions of Cynthia Cook and respondent Paula Miller, employees of Gesa, were the acts and omissions of Gesa? (Assignment of Error No. 5.)

9. Whether the trial court erred in giving Instruction No. 7 (CP 0494) and Instruction No. 8 (CP 0495), thereby allowing the jurors to find that Cynthia Cook and Paula Miller, employees of Gesa, were not acting within the course of their employment with Gesa? (Assignment of Error No. 5.)

10. Whether the trial court erred in applying the Deadman's Statute, RCW 5.60.030, to preclude testimony about statements by the decedent that were otherwise admissible under ER 803(a)(3)? (Assignment of Error No. 6.)

11. Whether the Notice of Appeal herein was timely filed?
(Assignment of Error No. 7.)

V. SUMMARY OF RELIEF REQUESTED ON APPEAL

Mr. Rokkan seeks reversal and remand of the trial court's dismissal of contested claims prior to submission to the jury. He also seeks reversal and remand of the trial court's decision upholding the jury verdict. Finally, Mr. Rokkan seeks recovery of taxable costs on appeal, and further requests that upon retrial, should he be successful in proving violations of the CPA, the trial court be directed to award reasonable attorney's fees incurred in this appeal that are related to CPA claims.

VI. STATEMENT OF THE CASE

A. Mr. Rokkan's Statement of Facts.¹

1. General Statement of Proof Pertaining to Wrongful Acts and Omissions on March 1, 2000, and of the Resulting Harm to Mrs. McHale's Estate.

On March 1, 2000, Marsaelle F. McHale, age 79, was driven by a friend, Oneta Denson, to Gesa Credit Union in Richland, Washington, to deposit a cashier's check for \$94,832.09. (See, RP 43-44; see also, RP 299-301; see also, Ex. P-10 and Ex. P-3). Mrs. McHale was in the process of closing out an account at U.S. Bank that had belonged to her recently

¹ Unless otherwise indicated all references herein to the Report of Proceedings (RP) are to the verbatim report of proceedings consisting of pages 1-543, filed on December 17, 2010, by court reporter John McLaughlin.

deceased husband, “Mac” McHale. (RP 299-300; see also, RP 41 and RP 287). She was just planning to make a simple deposit into her Gesa checking account. (See, RP 42-43; RP 49; and RP 65). However, when Ms. Denson and Mrs. McHale arrived at Gesa, a teller declined to deposit the U.S. Bank check and instead told Mrs. McHale that she should seek help from a Gesa clerk in another department. (RP 44). During the ensuing transactions, the Gesa employees assisting Mrs. McHale told her to open another kind of Gesa account and that she would be “wise” to name beneficiaries on the new accounts. (RP 45-46; RP 73). The whole idea of opening new accounts and naming beneficiaries came from the Gesa employees. (RP 44-46). The effect of naming beneficiaries that day was to divert \$200,000, plus accrued interest, from Mrs. McHale’s estate and to the named beneficiaries after her death on April 5, 2005. (See, RP 8-10; RP 367-370; cf. Ex P-3).

Mrs. McHale had been institutionalized since 1999. (RP 33-35; RP 39). She suffered from depression and some age-related cognitive impairments. (See, RP 33-34; RP 41; RP 43-44; RP 50; and RP 301). There was substantial proof that she was unsophisticated in matters of business and banking and had relied on her husband to manage all of her business affairs until his death in 1999. (See, RP 33 and RP 296). Over the years, Mr. and Mrs. McHale had maintained with Gesa the credit

union equivalents of simple savings and checking accounts. (See, Ex. P-4 and Ex. P-5; see also, RP 166-168).

The new accounts opened by the Gesa employees for Mrs. McHale on March 1, 2000, were called “term share” accounts and were the credit union’s equivalent of bank certificates of deposit. (RP 144). The Gesa employee in charge of the transactions, Cynthia Cook, physically put in the names of beneficiaries onto three separate certificates for term share accounts. (RP 75-76; RP 81-82). The combined face value of the certificates was \$200,000.00. (See, Ex. P-6, Ex. P-7, and Ex. P-8, see also, RP 81-82.) According to Oneta Denson, in the course of assisting with the transactions, another Gesa employee who was present, respondent Paula [Daniels] Miller, influenced and manipulated Mrs. McHale into naming Ms. Miller as a beneficiary for \$50,000 on one of the certificates. (RP 47-49; see also, Ex. P-8).

Oneta Denson testified that Mrs. McHale was confused when she made the beneficiary designations, and did not know what she was doing. (RP 50). Mrs. McHale’s estate planning attorney, Thomas Heye, testified that she actually intended for the disputed assets to pass under her will dated July 25, 2002. (See, RP 8-10; see also, Ex. P-2). Because of the beneficiary designations, Gesa instead paid out the \$200,000 plus accrued interest to the beneficiaries. (See, RP 367-370).

2. Other Proof Supporting Claims that Respondent Gesa Violated the CPA and Was Negligent.

a. Solicitation of Consumers, including but not limited to Mrs. McHale, by Gesa Employees.

James McKinney, identified as Gesa's expert on its policies and procedures, testified that it was not uncommon for its tellers to redirect customers to Gesa's Member Services Department when large deposits were involved. (RP 185-186; RP 197-199). Todd Hanson, a former Gesa executive vice president during the period in question, also testified that Gesa tellers would at times redirect members into purchasing CDs or other products depending on the amount of the deposit. (See, RP 118 and RP 139). Gesa could earn greater profits from the types of term share accounts that its employees recommended to Mrs. McHale, as opposed to, for example, a simple passbook account. (See, RP 199-200).

b. When Filling Out Beneficiary Designations, Ms. Cook Failed to Warn Mrs. McHale and Other Gesa Members that the Assets Might Not Pass through their Wills.

James McKinney testified that when filling out beneficiary forms, the Gesa representative should have explained to members that the assets would possibly not go through the member's will. (RP 204). Ms. Cook, who prepared the documents and inserted the beneficiary designations, testified that she did not know the legal consequences of making a beneficiary designation. (RP 75-76; RP 79). Oneta Denson testified that

the Gesa employees assisting Mrs. McHale failed to give any explanation as to the legal effect of naming beneficiaries. (RP 49-50; RP 73). In detailing procedures for opening accounts and filling out beneficiary forms, Ms. Cook made no mention of ever cautioning a Gesa member that such assets might not go through their wills. (See, RP 107-111). She claimed that she used the “same process” every time she opened an account. (RP 107-108). She denied receiving any training from Gesa as to the legal effect of naming beneficiaries on term share certificates. (See, RP 79).

c. The Gesa Employees Made Improper Statements to Persuade Mrs. McHale to Name Beneficiaries on the New Accounts.

James McKinney testified that when opening a term share account, it would be improper for a Gesa Member Services Representative to advise that a member “should” have a beneficiary. (RP 201). Gloria Campbell, a fellow employee in the same department at Gesa with Ms. Cook, also testified the Gesa employees were not allowed to give members advice about whether to name beneficiaries. (RP 455-456; cf., RP 441-442). Yet Oneta Denson testified that the Gesa employees told Mrs. McHale that she had to have beneficiaries and that it would be “wise” to name beneficiaries. (See, RP 45-46; RP 73).

d. The Consumer Transaction Involving Mrs. McHale Was Not Isolated; there Was Probably Similar Harm to Other Gesa Members.

It was not uncommon for Gesa tellers to redirect customers who were planning to make simple deposits of large sums into purchasing term share certificates instead. (RP 197-199 and RP 139). While Ms. Cook denied that she ever told any customer that it was “required” or would be “wise” to name beneficiaries, she admitted that she used the “same process” every time she opened an account. (RP 107-108). Oneta Denson disputed Ms. Cook’s testimony about what was said and not said to Mrs. McHale in the course of the transactions on March 1, 2000. (See, RP 45-46; RP 73).

Gloria Campbell testified that she was opening at least one term share account each business day during 2000. (RP 441-442). She estimated that Ms. Cook, her fellow employee, was likewise opening more than one term share account each day. (RP 453). Ms. Cook estimated that during 2000 she would see more than ten Gesa members each day. (RP 97). Ms. Campbell testified that most of the Gesa members who obtained term share certificates during that period were over age 70. (RP 443).

Ms. Campbell gave no indication in describing her own procedures for opening accounts that she ever told any Gesa members that making

beneficiary designations might result in the assets not going through their wills. (See, RP 443-446). As with Ms. Cook, it was Ms. Campbell's testimony that she did not know if beneficiary designations could affect a will. (RP 453). From the foregoing proof, the jury could have found there was probably similar harm to other Gesa members as to Mrs. McHale.

3. Other Proof Supporting Claims against Gesa of Negligent Training and Supervision.

Cynthia Cook received no training from Gesa as to the legal effect of naming beneficiaries on term share certificates. (RP 79). She had not been trained by Gesa to ask members if they had estate planning before filling out beneficiary forms for them. (RP 79).

The Gesa employee training manual prohibited its employees from using their positions at Gesa for personal financial gain. (See, RP 193; see also, Ex. P-14, paragraph 14). A letter from Terri Salinas, Gesa's in-house counsel, admitted that it would be improper for a Gesa employee involved in a transaction to be named as a beneficiary. (See, Ex. P-16, p. 2). Cynthia Cook testified that when she was hired at Gesa she had no training on how to avoid conflicts of interest. (RP 78 and RP 84). Respondent Paula Miller also testified that she received conflict of interest training at Gesa before the transactions involving Mrs. McHale. (RP 238).

4. Proof Supporting Appellant's Claim that Respondent Paula Miller Fraudulently Concealed her Interest in One of the Term Share Accounts.

Mrs. McHale had named Mr. Rokkan as her attorney-in-fact in January 2000, so that he could help with her affairs and be her advocate when needed. (RP 285-286; see, Ex. P-1). He did this as her friend and not as any sort of business manager. (RP 287-288). Mr. Rokkan was the one who had made arrangements for Mrs. McHale to pick up the check from U.S. Bank on March 1, 2000. (See, RP 301-302). Later during the same week, he confirmed with Mrs. McHale that she had moved the assets from U.S. Bank to Gesa. (RP 302). However, he knew nothing about the three term share accounts until after Mrs. McHale's death. (RP 303).

Mr. Rokkan first saw a renewal notice, identified as a "Certificate Maturity Notice," for one of the term share accounts in approximately August 2000. (RP 304 and Ex. P-17). He did not know what the renewal notices were for. (RP 304). He testified that he telephoned respondent Paula Miller to ask her what to do about the maturity notice. (RP 305-306). It was his understanding that Ms. Miller was the contact at Gesa for Mrs. McHale. (RP 337). Ms. Miller told him to leave the accounts as they were. (RP 307). Ms. Miller did not tell Mr. Rokkan that she was a beneficiary on one of the certificates, or that any beneficiaries existed.

(RP 307). Mr. Rokkan followed Ms. Miller's advice and left the accounts alone. (RP 307).

5. The Trial Court Precluded Offered Testimony of Mr. Rokkan as to Statements by Mrs. McHale Relating to Her Testamentary Intent.

During pretrial argument on motions in limine, counsel for Mr. Rokkan made an offer of proof as to conversations between Mr. Rokkan and Mrs. McHale, when she said that it was her intention under the will that he receive all of the money in the Gesa term share accounts when she died. (Supplemental RP dated February 14, 2011, pp. 5-7). The offer of proof also included testimony that Mrs. McHale told Mr. Rokkan that she hoped his daughters would someday receive from him the money in those accounts. (Supplemental RP dated February 14, 2011, p. 6). Mr. Rokkan's children were contingent beneficiaries in Mrs. McHale's will. (See, Ex. P-2, p. 2). Mr. Rokkan maintains that testimony was erroneously excluded by the trial court under the Deadman's Statute. (RP 271-273).

6. All Proof at Trial Was that Ms. Cook and Ms. Miller Were Acting within the Course of Their Employment with Gesa.

Cynthia Cook testified that she was the employee at Gesa who filled out the three term share certificates identified as Ex. P-6, Ex. P-7, and Ex. P-8. (RP 75-76). Filling them out was part of her regular duties

at the time, and she was trained to do so. (See, RP 78, RP 81, and RP 105). Ms. Cook could not recall Mrs. McHale or any details of how the term share certificates came to be filled out. (RP 79-80).

Paula Miller testified that on March 1, 2000, she was on duty at Gesa and remembered meeting with Mrs. McHale. (RP 232-233). She testified that she met with Mrs. McHale in the lobby for around ten to fifteen minutes. (RP 234-35). She admitted that she sat with Mrs. McHale at Ms. Cook's desk for around five minutes before the term share certificates were filled out. (RP 235-36). She denied being present when the term share certificates were filled out. (RP 236-37). Oneta Denson testified that Ms. Miller was called downstairs to assist after the Gesa teller initially declined to accept Mrs. McHale's deposit. (RP 44-45).

There was no testimony, proof, or defense argument that any of the acts and omissions alleged by the plaintiff to have been performed by Ms. Miller and Ms. Cook as agents for Gesa were done, or would have been done, outside of their scope of employment with Gesa. To the contrary, for example, Gloria Campbell testified to the effect that if Paula Miller had been called downstairs to Ms. Cook's desk to assist in a transaction with a member, it was what employees at Gesa were expected do. (See, RP 459).

B. Relevant Procedural History.

1. The Trial Court Refused to Hold As a Matter of Law that Ms. Cook and Ms. Miller Were Acting within Their Scope of Employment with Gesa.

As to claims submitted to the jurors, the trial court refused to hold as a matter of law that Ms. Cook and Ms. Miller were acting within the scope of their employment with Gesa. (RP 486-87). Under Instructions No. 7 and No. 8 (CP 0494 and CP 0495), the scope of employment issue was submitted to the jury.

2. The Trial Court Orally Dismissed Most of the Plaintiff's Claims without Submitting Them to the Jury.

At the time of trial, Mr. Rokkan's claims for damages to the estate included the following causes of action:

1. Violation of the CPA
2. Negligence
3. Negligent estate planning
4. Negligent misrepresentation
5. Fraudulent concealment
6. Breach of fiduciary duty
7. Negligent training and supervision of its employees by Gesa

At the conclusion of the plaintiff's case-in-chief on July 7, 2010, the trial court orally dismissed several of the plaintiff's claims, as follows: Consumer Protection Act claims (RP 411-412); negligence/negligent estate planning claims (RP 415); fraudulent concealment claims (RP 419); and negligent training and supervision claims. (RP 433-434). These

dismissals left only breach of fiduciary duty and negligent misrepresentation claims. Before the case went to the jury, Mr. Rokkan orally moved twice for reconsideration of the dismissal of the CPA claims. (RP 436-438; RP 494). The trial court orally denied the motions. (RP 438 and RP 494).

3. The Trial Court Did Not Enter a Written Order Dismissing Claims or Adopting the Verdict until September 8, 2010.

No written orders were signed during the course of the trial to effectuate any dismissal of claims by the Court on July 7, 2010. The case went to the jury on the remaining two claims on July 9, 2010, when the jury returned a Special Verdict Form against Mr. Rokkan. (CP 507-509.) On July 16, 2010, within ten days of filing of the jury verdict, Mr. Rokkan moved for a new trial on the CPA claims. (CP 530-532). Eventually, by Order signed without notice to Mr. Rokkan and entered on September 8, 2010, the trial court refused to consider Mr. Rokkan's Motion for New Trial. (CP 637-640.) Mr. Rokkan subsequently waived notice of presentment of the Order entered on September 8, 2010, to clear the way for an appeal. (CP 643-645). The Notice of Appeal herein was filed on September 15, 2010, within 30 days of September 8, 2010. (CP 646-651).

VII. ARGUMENT.

A. STANDARD OF REVIEW.

1. Dismissal of Claims.

Dismissal of claims based upon insufficient evidence is made as a matter of law and is not discretionary with the trial court. See, *Miller v. Payless Drug Stores*, 61 Wn.2d 651, 653, 379 P.2d 932 (1963). Appellate review is de novo. *Weber Constr., Inc. v. County of Spokane*, 124 Wn.App. 29, 33, 98 P.3d 60 (2004). Dismissal is appropriate only if, construing all evidence most favorably to the non-moving party, there is no evidence or reasonable inference from evidence to sustain a verdict. See, *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn.App. 286, 298, 991 P.2d 638 (1999).

2. Preclusion of Evidence.

Decisions involving evidentiary issues lie within the discretion of the trial court and are subject to the abuse of discretion standard. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A trial court necessarily abuses its discretion when its ruling is based on an erroneous view of the law. *Physicians Insurance Exchange v. Fisons Corporation*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993); *Marriage of Scanlon*, 109 Wn.App. 167, 174-75, 34 P.3d 877 (2001). Preclusion of evidence under

the Deadman's Statute is accordingly an abuse of discretion if based upon an erroneous view of the law.

3. Denial of Judgment as a Matter of Law.

The appellate court reviews de novo the denial of a party's motion for judgment as a matter of law. *Joyce v. Department of Corrections*, 116 Wn.App. 569, 75 P.3d 548 (2003). When there is substantial evidence to support granting a motion for a judgment as a matter of law, the motion can be denied only when there is also substantial evidence on which a contrary verdict could rest. See, *Bishop v. Corporate Business Park*, 138 Wn.App. 443, 454, 158 P.3d 1183 (2007). Substantial evidence exists in the record that Cynthia Cook and Paula Miller were acting within the scope of their employment. No evidence exists to the contrary. The trial court's denial of Mr. Rokkan's motion for a judgment as a matter of law on this issue is in error and should be overturned.

4. Conclusions of Law.

An appellate court's review of a conclusion of law is de novo. *Dempere v. Nelson*, 76 Wn.App. 403, 406, 886 P.2d 219 (1994). Mr. Rokkan has challenged any construction of post-trial Conclusion of Law 2.1 that would hold that the time for taking an appeal commenced with entry of the jury verdict. (See, CP 639).

B. THIS APPEAL WAS TIMELY FILED.

Conclusion of Law 2.1 of the Order dated September 8, 2010, from which appeal is taken, reads as follows:

2.1 The jury's verdict filed with the court on July 9, 2010 *is the order of the court for purposes of . . . appeal.* (Emphasis added).

(CP 639). Although unclear, such language could possibly be construed as purporting to establish the verdict filing date of July 9, 2010, as commencing the time for taking an appeal under RAP 5.2. Gesa had argued to the trial court prior to entry of the Order on September 8, 2010, that the time for appeal "became operational" when the jury verdict was entered on July 9, 2010. (See, CP 0610).

The time for taking an appeal is set forth by RAP 5.2 (a) and (c), and is determined by reference to the date of entry of judgment pursuant to CR 58. A judgment is not deemed entered until it has been signed by the judge and delivered to the clerk of the court for filing. See, CR 58(a) and (b); see also, *State v. Knox*, 86 Wn.App. 831, 835-36, 939 P.2d 710 (1987); see also, *Grip v. Buffelen Woodworking Co.*, 73 Wn.2d 219, 224, 437 P.2d 915 (1968). A formal written order is required under CR 54(e). *State v. Knox, supra*, 86 Wn.App. at 836. A trial court's oral decision has no binding effect until it is formally incorporated into a judgment. *Seidler v. Hanson*, 14 Wn.App. 915, 917, 547 P.2d 917 (1976). See also,

Washington Appellate Practice Deskbook, section 7.4(3)(2005): “Entry of the judgment or final written order starts the clock ticking on a notice of appeal. The court’s oral decision, memorandum decision, or a jury verdict does not.”

The Order entered on September 8, 2010 was the final order of the trial court pursuant to CR 54(b) and CR 58. Under RAP 5.2(c), this appeal was timely filed.

C. THE MAKING OF THE BENEFICIARY DESIGNATIONS CREATED NONPROBATE ASSETS THAT PASSED OUTSIDE THE WILL.

A person who makes a deposit with a financial institution identified as “payable-on-death” and who makes a beneficiary designation on the account creates what is called a “nonprobate asset” that passes free of the will and estate. See, RCW 11.02.005(15) and *Estate of Burks*, 124 Wn.App. 327, 100 P.3d 328 (2004). Beneficiary designations for a renewed account are deemed effective from the date when the account was first opened. RCW 11.11.020(4). A beneficiary designation made prior to a will can be revoked if specific language is used in the will. See, RCW 11.11.020(1) and RCW 11.11.020(3). That did not happen in this case because the drafting estate planning lawyer was not aware of the beneficiary designations. (See, RP 8-10). Accordingly, the general residuary clause in Mrs. McHale’s will was insufficient to draw the assets

back into the estate. See, *Estate of Furst*, 113 Wn.App. 839, 843, 55 P.3d 664 (2002). Mrs. McHale had not been told by the Gesa employees that the beneficiary designations might possibly result in the assets not passing under her will. (RP 49-50; RP 73).

D. THERE WAS SUBSTANTIAL EVIDENCE THAT GESA VIOLATED THE CPA.

1. Elements of a CPA Violation.

The elements of a CPA violation are:

(1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) public interest; (4) injury to business or property; and (5) causation.

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 787-93, 719 P.2d 531 (1986). Dismissal of CPA claims in this case was based solely on the trial court's view that the public interest element of the CPA had not been met. (RP 411-412). For a non-regulatory violation, as in the present case, the following public interest factors may be considered in a consumer transaction:

1. Whether the acts or practices were done in the course of business;
2. Whether the acts or practices were part of a pattern or general course of conduct of business;
3. Whether the defendant did similar acts or practices prior to the act or practice involving the plaintiff;
4. Whether there is a real and substantial potential for repetition of conduct after the act involving the plaintiff; or
5. If only one transaction is complained of, whether many customers were affected or likely to be affected by it.

See, Hangman Ridge, supra, 105 Wn.2d at 790. It is not necessary that all factors be present, nor is any single factor dispositive. See, Hangman Ridge, supra.

2. The CPA Should Be Liberally Construed, and Exemptions from It Should Be Narrowly Construed.

Financial institutions, even though they are heavily regulated by both state and federal agencies, are not generally exempt from CPA claims. *Vogt v. Seattle-First National Bank*, 117 Wn.2d 541, 817 P.2d 1364 (1991). The provisional CPA exemption, found at RCW 19.86.170, “does not exempt actions or transactions merely because they are regulated generally.” *Vogt, supra* at 522. For exemption to apply in the banking industry, the court must find that there is a conflict between the CPA and the banking laws, and that applying the CPA would threaten or destroy or otherwise jeopardize the conflicting banking laws. *Vogt, supra* at 553. See also, Singleton v. Naegeli Reporting, 142 Wn.App. 598, 175 P.3d 594 (2008). For exemption to apply, the specific act or practice in question must be expressly subject to regulation. *Robinson v. Avis Rent a Car Systems*, 106 Wn.App. 104, 111-12, 22 P.3d 818 (2001). See also, Walker v. Truck & Auto Outlet, 155 Wn.App. 199, 211, 229 P.3d 871 (2010); *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d 297, 301, 622 P.2d 1185 (1980). The *Walker* court explained:

Stated another way, [for exemption to apply] the activity in question must be expressly permitted instead of merely being not prohibited.

Walker, supra, 155 Wn.App. at 211.

The purpose of the CPA is to complement other state and federal laws. See, *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009). The CPA should be liberally construed, and exemptions from it should be narrowly construed. Id. at 40; see also, *Vogt v. Seattle-First National Bank*, supra, 117 Wn.2d at 552, *Robinson v. Avis Rent a Car Systems*, supra, 106 Wn.App. at 111; *Edmonds v. Scott Real Estate*, 37 Wn.App. 834, 844, 942 P.2d 1072 (1997).

A court must balance the following factors in determining whether preemption exists as to any specific acts and practices:

1. The administrative agency has the authority to resolve issues that would be referred to it by the court;
2. The agency must have special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and
3. The claim before the court must resolve issues that fall within the scope of the pervasive regulatory scheme so that the danger exists that judicial action would conflict with the regulatory scheme.

Vogt, supra at 554.

In this case, the trial rightly declined to find preemption. (RP 411).

3. Defendant Gesa's Sales Practices Were at Issue.

Ontea Denson testified that Mrs. McHale went to Gesa on March 1, 2000, with the singular intention of depositing a check. (See, RP 42-43; RP 49; and RP 65). The Gesa teller redirected Mrs. McHale to another Gesa department. (RP 44). This was consistent with what Gesa tellers were allowed to do when large deposits were being made. (RP 139; RP 197-199). Gesa could possibly earn greater profits from term share accounts over other types of accounts. (RP 199-200). The Gesa employees then told Mrs. McHale that she had to name beneficiaries and that it would be wise to do so. (RP 45; RP 73). Such advice was improper. (RP 201; RP 444; RP 456). Acting for Gesa, Cynthia Cook then actually filled out the beneficiary designations. (RP 75-76; RP 81-82).

The aspect of unregulated sales practices creating CPA liability was recently addressed in *Walker v. Truck & Auto Outlet*, supra, 155 Wn.App. 199. In *Walker*, certain WAC provisions applicable to advertising might have governed the practices of a car dealership, except that the CPA claims asserted arose from deceptive *sales* practices rather than deceptive *advertising* practices. *Walker*, supra at 211. The result reached in *Walker* was consistent with liberally construing the CPA and narrowly construing exceptions or exemptions from it.

Similarly, in the present case, the CPA claims arise from the sales practices of Gesa, rather than from any regulated activity. Moreover, even as to any activity that might arguably be considered regulated, no conflict has been shown to arise from applying the CPA to Mr. Rokkan's claims.

4. There Is a Strong Public Interest in Preventing Clerks at Financial Institutions from Giving Improper Advice and then Filling Out Forms Based on Such Advice.

The Supreme Court in *Hangman Ridge*, supra, 105 Wn.2d at 789-90, set forth five specific public interest factors in a consumer transaction "to be determined by the trier of fact" (emphasis added). Those five factors were incorporated into Washington Pattern Jury Instruction No. 310.04, upon which appellant's Proposed Jury Instruction No. 23 was based. (See, CP 230). Under the pattern instruction the jurors "are not required to find any one particular factor, nor are you limited to considering only these factors." RPI 310.04. Under *Hangman Ridge*, supra at 791, the jurors were not limited to the five enumerated factors of the Proposed Jury Instruction No. 23.

Of great significance to the present inquiry, *Hangman Ridge* emphasized that it is the trier of fact that makes the public interest determination:

As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present. The factors in both the "consumer" and "private dispute"

contexts represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.

Hangman Ridge, supra at 791 (emphasis added); see also, *Hangman Ridge*, supra at 789 (“whether the public has an interest in any given action is to be determined by the trier of fact from several factors” (emphasis added)).

There is a strong public interest in protecting the deposits of consumers at financial institutions. This public interest and potential for widespread and repetitive harm could not be more starkly evidenced than by the Washington legislature’s recent enactment of SSB 6202, Chapter 133, Laws of 2010. (See, CP 558-567). The legislature’s 2010 amendments to the Vulnerable Adult Act have explicitly singled out financial institutions as places where vulnerable adults are likely to be harmed. (See, CP 559-560 and CP 566-567).

The effective date of SSB 6202 was June 10, 2010, but the underlying reality that vulnerable adults and elderly persons can misunderstand the consequences of filling out forms at financial institutions is not novel. The new legislation responded to a pre-existing condition and need. These transactions at financial institutions have such inherent potential for repetition and widespread harm that under Section 5 of this new law, a financial institution is affirmatively required to train its

employees “concerning the financial exploitation of vulnerable adults.” Mrs. McHale was an institutionalized person over age 79. (RP 42; Ex. P-3). She met the statutory definition of a vulnerable adult. (See, RCW 74.34.005 and RCW 74.34.020).

Transactions of this nature at financial institutions can cause harm to ordinary consumers, regardless of age, as evidenced by *Taufen v. Estate of Kirpes*, 155 Wn.App. 598, 230 P.3d 199 (2010). In *Taufen*, the financial institution clerk had remembered the transaction and had testified that it was she, the clerk, and not the customer, who had decided what kind of account to open. *Taufen*, supra at 606. There was evidence in *Taufen* that the customer did not understand what she had done when the transaction was completed. *Taufen* was not a CPA case, and no claims were asserted against the financial institution.

Legal publications point to the obvious dangers of depositors being assisted by overly helpful clerks at financial institutions when opening accounts. Cf., article from the July 2010 Washington Bar Journal, *Should Bank Tellers Engage in Estate Planning?* (CP 553-555).

5. Gesa’s Acts and Practices Were Part of a Generalized Pattern that Probably Deceived Other Members of the Public into Converting their Gesa Accounts into Nonprobate Assets.

From the evidence and testimony at trial, if believed, a trier of fact could fairly conclude that, more probably than not, a substantial portion of

the public were deceived as was Mrs. McHale into converting their Gesa accounts into nonprobate assets. The transaction involving Mrs. McHale was not isolated. Her referral by a teller to the Gesa member services department for purposes of opening a term share account was consistent with Gesa's normal business practice. (See, RP 44; RP 139; and RP 197-199). Employees in Gesa's Member Services Department were each opening at least one term share account every day during the year 2000. (RP 442 and RP 453). Most of these accounts were being sold to customers over age 70. (RP 443). Cynthia Cook, the Gesa employee who filled out the term share certificates at issue in this case, claimed that she used the same procedure every time with every customer. (RP 107-108). Oneta Denson testified that it was the idea of the Gesa employees to name beneficiaries, and that Mrs. McHale was told that it would be "wise" to name beneficiaries on the certificates. (RP 45). Oneta Denson also testified that Mrs. McHale was just told to "name the beneficiaries." (RP 73). Cynthia Cook denied receiving any training by Gesa as to the consequences of making beneficiary designations. (RP 79). In describing her procedures in opening accounts and filling out beneficiary forms, Ms. Cook never said that she told members that the assets might not go through their wills. (See, RP 107-111). Oneta Denson testified that no explanation was given about the effect of making beneficiary designations.

(RP 49-50; RP 73). On the other hand, Gesa's expert testified that when opening new accounts, its employees were supposed to explain that assets might not pass through a member's will if a beneficiary designation was made. (RP 204). Taken together from this testimony, it was probable that other customers of Gesa were being similarly misled into making beneficiary designations without having any idea they were creating nonprobate assets that would undo their other estate planning. Significantly, it was the Gesa clerks who were filling out the forms.

If allowed to consider the CPA claim, the jurors could have considered other factors such as the advanced age of Mrs. McHale, her mental and emotional state, and her institutionalization. They could also have considered that most of the other members opening term share accounts at Gesa were over age 70. (RP 443). They could have considered that Gloria Campbell testified that she and Ms. Cook were opening at least one or more term share accounts every day during 2000. (RP 441-442; RP 453). They could have considered that Ms. Cook estimated that during 2000 she would see more than ten Gesa members each day. (RP 97).

While Ms. Cook denied that she ever told any member that it was "required" or would be "wise" to name beneficiaries, the jurors could have considered that Ms. Denson contradicted such testimony as to

Mrs. McHale (RP 45-46; RP 73), and could further have considered that Ms. Cook claimed to have used the “same process” every time she opened an account. (RP 107-108). They could have considered that neither Ms. Cook nor Ms. Campbell had any idea of the effect of making beneficiary designations. (RP 79; RP 453). They could have considered that neither of these Gesa employees, when filling out forms, advised Gesa members that the beneficiary designations could affect their wills and estates. (See, 107-111; RP 443-446). They could have considered James McKinney’s testimony that these Gesa employees were supposed to be telling members when filling out beneficiary forms that the result could be that the assets might not go through their wills. (RP 204).

6. Conclusion.

Ultimately, when low-level, transactional clerks at financial institutions routinely give misleading advice or incomplete information, and then fill out forms that can adversely affect depositors’ estate planning, many persons are impacted adversely. Overall estate planning can be eviscerated. The widespread dangers are so transparent as to be the subject of recent legislation, legal commentary, and litigation. Affected persons include the depositors and their heirs and beneficiaries. This is true whether or not the customer is an elderly or vulnerable adult.

The proof at trial was that Mrs. McHale was referred over to another Gesa department when all she wanted to do that day was make a simple deposit into her checking account. When Cynthia Cook filled out beneficiary designations she had no idea about the legal effect on the customers' wills. She never gave appropriate warnings to any customer. She claimed to use the same routine every time with every customer and, as witnessed by Oneta Denson, that routine included advising the customers to name beneficiaries. Cynthia Cook actually filled out the beneficiary designations. There was a real and substantial probability that similar acts and practices happened when other Gesa customers were involved. The issue should have been decided by the jury.

E. THERE WAS SUBSTANTIAL EVIDENCE THAT THE GESA EMPLOYEES WERE NEGLIGENT.

1. There Was Evidence that Paula Miller Breached a Duty by Engaging in Wrongful Self-Dealing.

Gesa itself had established duties for its employees to prevent conflicts of interest from occurring between employees and depositors, among which the following prohibited actions were identified:

4. Accepting substantial gifts, excessive entertainment, or a referral fee from an outside organization, agency or individual without reporting or receiving approval for such gifts or entertainment from the President/CEO.

7. Misusing privileged information or revealing confidential data to outsiders.

8. Using one's position in the credit union or knowledge of its affairs for outside personal gain, or for the benefit of family, friends, or organizations with which the employee is affiliated.

(See, Ex. P-14).

Gesa's in-house counsel had written to Mr. Rokkan's counsel that the typical policy found throughout the financial industry would prohibit an employee involved in a transaction from being a beneficiary. (See, Ex. P-16, p. 2). There was evidence at trial that Paula Miller was present when named as a beneficiary, and that she influenced or manipulated Mrs. McHale into making her a beneficiary. (RP 47-49). The issue of negligence by Ms. Miller should have been submitted to the jury.

2. Ms. Cook Was Negligent in Advising Mrs. McHale to Name Beneficiaries on the Term Share Accounts and in Filling out the Beneficiaries Designations.

The employee training manuals at Gesa contained information as to the potential effect on a depositor's will of naming beneficiaries on Gesa accounts, and also contained information about how depositors could supersede such designations by a "Super Will." (See, Ex. P-28, p. 2 (re: "Super Wills"); see also, Ex. P-29 (re: "Super Wills) and Ex. P-32, pp. 9-12). A "Super Will" is one with a superseding clause that revokes a beneficiary designation. (See, Ex. P-32, p. 10). Gesa's expert testified that it would be improper for a Gesa clerk to tell a depositor that he or she

“should” name beneficiaries on accounts. (RP 201). Cynthia Cook denied receiving any training at Gesa about how beneficiary designations could affect a depositor’s estate planning. (RP 79). She had no idea what the legal effect would be of making beneficiary designations. (RP 79). Oneta Denson testified that the Gesa employees who were assisting Mrs. McHale told her to name beneficiaries and that it would be wise to do so. (RP 45; RP 73). Such advice was incorrect because there was no requirement to name beneficiaries. (RP 201). Beyond giving bad advice and failing to give a precautionary explanation, Ms. Cook actually filled out the beneficiary designation sections on the forms. (RP 75-76; RP 81-82).

Mr. Rokkan’s claims for negligence and negligent estate planning are essentially the same and are embraced by the overall concept of negligence. The Gesa employees gave negligent advice and were negligent in filling out forms they did not understand, which adversely affected Mrs. McHale’s estate planning. Moreover, when filling out the beneficiary forms, the Gesa employees were supposed to explain to members that the assets might possibly not go through their wills. (RP 204). Ms. Cook failed to give such explanation to Mrs. McHale. (RP 49-50; RP 73).

As set forth by WPI 10.01, and the trial court’s Instruction No. 3:

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

(CP at 490). The trial court here instructed the jury as to the elements of negligence and the burden of proof. (CP at 498). Ultimately, however, the trial court held to its dismissal of the claims of negligence, while limiting the plaintiff to claims of breach of fiduciary duty and negligent misrepresentation. See, 2nd Special Verdict Form. (CP 507-509).

Mr. McKinney, Gesa's own expert, testified that a Gesa representative should not tell a customer that she should have a beneficiary. (RP 201). A reasonable person in the position of Ms. Cook would not have told Mrs. McHale that she should have a beneficiary or that it would be wise to have one. A reasonable person in the position of Ms. Cook would have explained to Mrs. McHale when filling out a beneficiary designation for her that the assets might not go through her will. (See, RP 204). A reasonable person in the position of Ms. Cook, lacking knowledge of the legal effect of the document, would not have filled it out. Given this extensive evidence in the record, the trial court committed error taking the negligence claims from the jury.

F. THERE WAS SUBSTANTIAL EVIDENCE THAT PAULA MILLER FRAUDULENTLY CONCEALED HER INTEREST IN ONE OF THE TERM SHARE CERTIFICATES.

Mr. Rokkan testified at trial that when the Term Share Certificates first came up for renewal around August 2000, he called respondent Paula Miller at Gesa on behalf of Mrs. McHale to ask what to do. (RP 305-306). The clear inference from Oneta Denson's testimony was that Ms. Miller knew of the beneficiary designations and had manipulated Mrs. McHale into naming her as a beneficiary. (RP 48-49). However, Ms. Miller said nothing to Mr. Rokkan about her status as beneficiary when she recommended that no changes be made to the term share accounts. (RP 307). Her silence under the circumstances amounted to self-dealing and concealment of a material fact.

Fraudulent concealment is a type of fraud arising from the failure to speak out when a duty of disclosure is owed. *Dussault v. American International Group, Inc.*, 123 Wn.App. 863, 871-72, 99 P.3d 1256 (2004). The elements of the claim are as follows:

- (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation in trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading.

Alejandre v. Bull, 123 Wn.App. 611, 623, 98 P.3d 844 (2004) (quoting from *Richland Sch. Dist. v. Mabton Sch. Dist.*, 111 Wn.App. 377, 385, 45 P.3d 580 (2002), quoting in turn from *Restatement (Second) of Torts*, Section 551). A duty to disclose arises when one party to a transaction has a financial stake in the matter. *Richland Sch. Dist. v. Mabton Sch. Dist.*, supra, 111 Wn.App. at 386-87.

The trial court erred in dismissing the fraudulent concealment claims without sending them to the jury.

G. GESA WAS LIABLE FOR THE ACTS AND OMISSIONS OF ITS AGENTS, RESPONDENT PAULA MILLER AND CYNTHIA COOK.

Gesa is a state-chartered credit union. It was not contested that Paula Miller and Cynthia Cook were Gesa employees on March 1, 2000, and were on duty that day. A corporation or other similarly state-chartered entity acts through its employees, who are deemed to be its agents. See, *Broyles v. Thurston County*, 147 Wn.App. 409, 428, 195 P.3d 985 (2008). An employer is liable for the acts of its employees, even if

the employer may not know or approve of them, if such acts are done within the scope of the employment. *Titus v. Tacoma Smeltermen's Union*, 62 Wn.2d 461, 469, 383 P.2d 504 (1963). As a matter of law, an employee is acting within the scope of employment when doing some act that is in furtherance of the employer's interests. *Titus v. Tacoma Smeltermen's Union*, supra, 62 Wn.2d at 469; *Broyles v. Thurston County*, supra, 147 Wn.App. at 428.

The Complaint alleged that the employees of Gesa were agents acting within the scope of their employment. (See, CP 006, paragraphs 4.1 and 4.2.) The proof at trial was that Cynthia Cook was in the course of her employment advising Mrs. McHale and filling out forms while opening the term share accounts. (See, RP 45-46; RP 73, RP 75-76; RP 81-82). The proof at trial was that respondent Paula Miller was in the course of her employment while having discussions with Mrs. McHale when the term share accounts were opened, and also when Mr. Rokkan called her later to ask what to do about the maturity notices. (RP 44-49; 232-236; RP 304-307). While there is a dispute about exactly what was said and done on these occasions, there is nothing in the record to negate that in some way Ms. Cook and Ms. Miller were acting in the furtherance of Gesa's business interests.

Nonetheless, Gesa and Paula Miller generally denied the agency claims in their Answers and Amended Answer. (See, CP 021, CP 037, and CP 435). Gesa's pleadings raised no affirmative defense that any Gesa employee acted outside the scope of employment. (See, CP 438-440). At trial, Gesa produced no evidence or testimony to dispute that Cynthia Cook or Paula Miller were acting, or may have acted, outside the scope of their employment as to any factual allegations that were made. Even as to Paula Miller, there was positive testimony that, if she had been called downstairs to assist in the transaction with Mrs. McHale on March 1, 2000, such conduct was what Gesa employees were expected to do. (See, RP 459).

At the close of all evidence, Mr. Rokkan made a motion for judgment as a matter of law that Ms. Miller and Ms. Cook were agents of Gesa acting within the scope of their employment. (RP 486-487). At this point Gesa finally admitted agency, while still denying scope of employment. (RP 487). The trial court granted the motion as to "agency," but refused to find that the Gesa employees were acting within their scope of employment. (RP 487). Mr. Rokkan submitted jury instruction No. 5B that the acts and omissions of Ms. Cook and Ms. Miller were the acts and omission of defendant Gesa. (See, CP 476). However, consistent with its oral ruling, the trial court refused to give this agency instruction. Instead,

the trial court gave Instructions No. 7 (CP 494) and No. 8 (CP 495). These instructions impermissibly invited the jury to find against Mr. Rokkan on the issue of scope of employment. Regardless of whose story the jury believed as to what happened on March 1, 2000, or what happened when Mr. Rokkan later called respondent Paula Miller about the maturity notices, the evidence was manifest that Ms. Cook and Ms. Miller were employees of defendant Gesa and were acting within the scope of their employment. The trial court should have given Plaintiff's Proposed Instruction No. 5B (CP 476).

H. THERE WAS EVIDENCE TO SUPPORT A VERDICT THAT GESA WAS NEGLIGENT IN TRAINING AND SUPERVISING ITS EMPLOYEES.

1. Gesa's Own Published Policies Prohibited Employees from Using their Positions to Receive Substantial Gifts.

Gesa had written policies to prevent conflicts of interest from occurring between employees and others, among which the following prohibited actions were identified:

4. Accepting substantial gifts, excessive entertainment, or a referral fee from an outside organization, agency or individual without reporting or receiving approval for such gifts or entertainment from the President/CEO.

7. Misusing privileged information or revealing confidential data to outsiders.

8. Using one's position in the credit union or knowledge of its affairs for outside personal gain, or for the benefit

of family, friends, or organizations with which the employee is affiliated.

(See, Ex. P-14). Gesa's in-house counsel admitted that the standard of care in the industry prohibited employees from using their positions for personal financial gain. (See, Ex. P-16).

Gesa's own expert, James McKinney testified that Gesa had a personnel policy in place to prevent employees from using their positions for personal gain. (RP 192-193). Cynthia Cook and respondent Paula Miller denied receiving any training from Gesa as to any duty to refrain from engaging in conflicts of interest. (RP 78; RP 84; RP 238).

Mr. McKinney testified that when opening new accounts and filling out beneficiary forms, the Gesa employees were supposed to tell the members that the assets might pass outside their wills. (RP 204). However, in describing their procedures, neither Cynthia Cook nor Gloria Campbell mentioned that they ever gave members such precautionary explanations. (RP 107-111; RP 443-446). Ms. Cook denied receiving any training on how beneficiary designations could affect a will. (RP 79). Both Ms. Cook and Ms. Campbell testified that they had no idea how beneficiary designations could affect a will. (RP 79 and RP 453)

An employer may be liable for direct negligence damages caused by an employee if the employer "knows or should know the employee is

unfit, the employee's unfitness is a proximate cause of the harm, and the harm is foreseeable." *Brown v. Labor Ready N.W., Inc.*, 113 Wn.App. 643, 655-56, 54 P.3d 166 (2002) (footnote omitted). From these facts recited above, the jury could have found that Gesa was negligent in supervising and training its employees, and that this negligence was a proximate cause of harm to the estate of Mrs. McHale.

I. ER 803(a)(3) PERMITS HEARSAY STATEMENTS WHERE A DECEDENT HAS LEFT A WILL.

The trial court refused to allow Mr. Rokkan to testify that Mrs. McHale told him that she wanted the term share certificates to go to him upon her death under the provisions of her will, and that she hoped that ultimately he would pass the money on to his daughters. (See, Supplemental RP dated February 14, 2011, pp. 5-7). Mr. Rokkan's daughters were named as contingent beneficiaries in the will. (See, Ex. P-2, p. 2).

RCW 5.60.030, commonly known as the Deadman's Statute, provides as follows:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the

estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

It generally prohibits a party in interest from testifying as to transactions with and statements by the decedent. *See, Estate of Wind*, 27 Wn.2d 421, 426, 178 P.2d 731 (1947). The Deadman's Statute was enacted long before the Rules of Evidence were adopted by Washington in 1979.

In contrast to the Deadman's Statute, ER 803(a)(3) provides as follows:

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

ER 803(a)(3) effectively reverses the line of case authority prior to 1979 that applied the Deadman's Statute in cases where a decedent had left a will. *See, Tegland*, 5C *Washington Practice*, Section 803.14, footnote 1 and Section 803.1, footnote 3 (5th ed. 2006).

In general, Deadman's Statutes throughout the United States have been roundly criticized for achieving exactly the opposite of their supposed intent; by precluding testimony as to what the decedent said, the result is most likely to achieve a disposition other than what the decedent had intended. ER 803(a)(3) is taken from the same Federal Rule. The rationale of the Federal Rule is that it is of overarching importance to give effect to the testamentary intent. See, Mueller and Kirkpatrick, *Federal Evidence*, Section 8.74, p. 653 (Third Edition 2007). Wills should be given a special exception to the hearsay rule that is not available for other kinds of instruments and transactions. Id. at 653. Most persons in making statements about their testamentary intentions tend to be truthful. Id. at 655. The issue becomes one of credibility of the testifying witness, a matter well within the competence of the trier of fact.

This issue is one of first impression, as it does not appear that any published appellate decision in Washington has considered the impact of ER 803(a)(3) on the Deadman's Statute. The published cases decided after 1979 that actually apply the Deadman's Statute to preclude testimony involve fact patterns without a duly executed will. See, e.g., *Lasher v. Univ. of Wash*, 91 Wn.App. 165, 169, 957 P.2d 229 (1998) (malpractice claims and discussions with a patient's deceased doctor); and *Bentzen v. Demmons*, 68 Wn.App. 339, 344, 842 P.2d 1015 (1993) (breach of

contract claims on an oral contract to devise where the decedent ultimately left no will). Dicta in other cases involving wills discuss possible preclusion of testimony under the Deadman's Statute, but do so without actually applying the Deadman's Statute, and without any analysis of ER 803(a)(3). See, e.g., Estate of Sherry, 158 Wn.App. 69, 82-83, 240 P.3d 1182 (2010); Taufen v. Estate of Kirpes, 155 Wn.App. 598, 601, 230 P.3d 199 (2010).

The general rule in construing a court rule and a statute is that the two should be harmonized whenever possible. State v. Murray, 35 Wn.App. 658, 664, 669 P.2d 891 (1983). In this case the court rule and the statute can be harmonized, insofar as the Deadman's statute makes no specific reference to a will, whereas the court rule does. Thus, in harmonizing the two, the Deadman's Statute would apply in instances that do not involve a testator's intent with respect to a will. Where the case involves a will and the testimony purports to explain the testator's intent, ER 803(a)(3) should control.

However, even if it were found that the statute and the court rule are in conflict with each other, the court rule should supersede the statute where a procedural matter is at issue. State v. Murray, supra at 664. This rule is consistent with the legislative intent that court rules should

supersede statutes where there is a conflict. See, RCW 2.04.190 and RCW 2.04.200, which provide as follows:

The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

RCW 2.04.190

When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

RCW 2.04.200

When a rule of court is in conflict with a procedural statute, the court's rule-making power is supreme and the court rule controls. *State v. Ryan*, 103 Wn.2d 165, 691 P.3d 197 (1984). "Where there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail." *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006).

Rules of evidence may be promulgated by both the legislature and the courts. *City of Fircrest v. Jensen*, supra at 394. The test of whether a

statute is substantive or procedural is whether it creates a new right or takes away a vested right. See, *State v. Nolan*, 98 Wn.App. 75, 81, 988 P.2d 473 (1999). Substantive law prescribes norms for societal conduct and creates, defines, and regulates primary rights. *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974); see also, *Putnam v. Wenatchee Medical Center*, 166 Wn.2d 974, 984, 216 P.3d 374 (2009); *City of Spokane v. Ward*, 122 Wn.App. 40, 44, 92 P.3d 787 (2004).

The Deadman's Statute is a procedural rule of evidence that falls under the inherent power of the courts. Essentially, the Deadman's Statute creates an irrefutable evidentiary presumption that in all trials involving a decedent's estate, including those involving disputes over wills, persons of interest are not credible witnesses. When enacted, the Deadman's Statute did not establish societal norms nor did it create primary rights in any person or class of persons. Dead persons have no rights. Accordingly, as to the Deadman's Statute, ER 803(a)(3) cannot be said to have taken away any vested right when it was enacted. Thus, ER 803(a)(3) supersedes the Deadman's Statute insofar as any conflict may exist between the two.

The outcome of the entire case rested upon the testamentary intent of Mrs. McHale. If in drafting her will she intended that the three term share accounts should go to the beneficiaries named on the certificates, the Estate's case for damages fails. Thomas Heye, the lawyer who wrote the

will, testified that it was Mrs. McHale's intention upon her death that all of her assets other than two \$5,000 special bequests pass to Mr. Rokkan. (RP 7-8). If Mr. Heye had known of the beneficiary designations, he would have inserted a clause in the will to revoke them so as to effectuate the intent of Mrs. McHale. (RP 9; see also, p. 7 herein).

On the other hand, Gesa vigorously argued that Mrs. McHale was a "sophisticated" woman who knew exactly what she was doing with her estate planning and that she intended that the contested term share certificates should go to the named beneficiaries. (RP 515-519; RP 522-523). Absent application of the Deadman's Statute, Mr. Rokkan would have testified that he specifically discussed the term share certificates with Mrs. McHale in relation to her will, and that she wanted the assets to go to him when she died. (See, Supplemental RP dated February 14, 2011, pp. 5-7) Such testimony would have been consistent with Mr. Heye's testimony as to the decedent's intentions. (See, RP 8-10.)

Since ER 803(a)(3) controls in this case over the Deadman's Statute, the trial court erred in precluding Mr. Rokkan's testimony about Mrs. McHale's testamentary intentions. Such testimony provides substantial support to his claim that the estate was damaged by the wrongful acts of the Gesa employees.

J. THE TRIAL COURT SHOULD BE DIRECTED ON REMAND TO AWARD REASONABLE ATTORNEY'S FEES AND COSTS RELATED TO HIS APPEAL.

Mr. Rokkan seeks recovery of taxable costs of appeal pursuant to RAP 18.1. He also seeks reasonable attorney's fees and costs on appeal pursuant to the CPA, RCW 19.86.090, and respectfully requests pursuant to RAP 18(1)(i) that the trial court be directed to determine the amount of such fees after remand should he prevail at trial on the CPA claims.

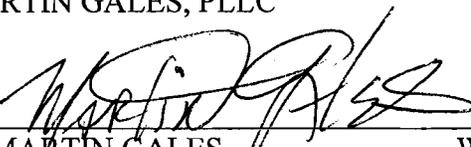
VIII. CONCLUSION

The trial court erred when it dismissed as a matter of law Mr. Rokkan's claims under the CPA, negligence, fraudulent concealment, and negligence supervision. The trial court erred in refusing to hold that Gesa was responsible for the acts and omissions of its employees, Cynthia Cook and respondent Paula Miller. The trial court erred by precluding testimony by Mr. Rokkan about Mrs. McHale's statements to him as her intentions in relation to the terms of her will. This case should be remanded to the trial court, and the trial court should be directed to reserve

on the issue of attorney's fees related to this appeal, depending upon the jury's verdict as to the CPA violations.

RESPECTFULLY SUBMITTED this 1st of March, 2011.

MARTIN GALES, PLLC

By: 

MARTIN GALES
Attorney for Appellants

WSBA 14611

INDEX TO APPENDICES

Documents	Appendix Page
Order Dated September 8, 2010.....	App – 1-4
2 nd Special Verdict Form.....	App – 5-7
Plaintiff's Sixth Proposed Instruction No. 5B.....	App – 8
Court's Instruction No. 7.....	App – 9
Court's Instruction No. 8	App – 10
Plaintiff's Third Proposed Instruction No. 23.....	App – 11
SSB 6202 (Laws of 2010).....	App – 12-21
Washington State Bar News, <i>Should Bank Tellers Engage in Estate Planning?</i> (July 2010)	App. – 22-24
 Statutes	
RCW 2.04.190	App. – 25
RCW 2.04.200.....	App –. 25
RCW 5.60.030.....	App – 25
 Court Rules	
ER 803(3)(a)	App – 26
CR 54	App – 26
CR 58	App – 27
RAP 5.2 (a), (b) and (c)	App – 27

JOSIE DELVIN
BENTON COUNTY CLERK

SEP 08 2010

FILED

TS
LX

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

DONALD J. ROKKAN, individually; and
DONALD J. ROKKAN, personal
representative of the Estate of Marsaelle F.
McHale, deceased,

Plaintiffs,

v.

GESA Credit Union, a corporation; and
PAULA MILLER and JOHN DOE
MILLER, wife and husband,

Defendants.

) NO. 08-2-00797-6

) ORDER DENYING PLAINTIFF'S
) MOTION FOR LEAVE OF COURT
) TO FILE MOTION FOR NEW
) TRIAL

THIS MATTER came before the Court on the Plaintiff's motion for leave to file a further motion for a new trial. The Court heard the oral argument of counsel or Plaintiff, Martin Gales, and counsel for Defendants, Lucinda J. Luke. The Court considered the trial record, the pleadings filed in this action and the parties' oral argument.

BASED ON the argument of counsel, the record and evidence presented, the Court makes the following:

Order Denying Leave of Court to File Motion for New Trial- 1

COWAN MOORE STAM LUKE & PETERSEN

Attorneys at Law
P.O. Box 927
503 Knight Street, Suite A
Richland, Washington 99352
Telephone (509) 943-2676

APP-1

0-000000637

I. FINDINGS OF FACT

1.1 Trial in the underlying cause of action commenced on June 28, 2010.

1.2 On July 7, 2010 at the completion of Plaintiff's case, the Court granted Defendants' motion for dismissal as to several of Plaintiff's claims, including but not limited to the Consumer Protection Act (CPA) claim.

1.3 Only July 7, 2010 Plaintiff requested reconsideration of the Court's decision dismissing the CPA claim. The Court considered Plaintiff's request as a Request for Reconsideration. After hearing from both parties, the Court denied Plaintiff's request for reconsideration.

1.4 On July 8, 2010 at the conclusion of testimony in this matter, Plaintiff again requested reconsideration of the Court's decision dismissing the CPA claim. Plaintiff cited case law, relevant statutes, and testimony from the trial record. Plaintiff argued extensively regarding the matter. The Court heard argument from the Defendants and provided sufficient time to both counsel to argue their respective positions. The Court denied Plaintiff's second Request for Reconsideration.

1.5 On July 9, 2010 the jury deliberated and returned a final verdict in favor of Defendants. The court polled the jury and the clerk of the court then read the verdict into the record. The verdict met the requirements contained in Ch. 4.64 RCW and in the court rules. Upon direction of the court, the clerk filed the verdict.

1.6 On July 16, 2010 Plaintiff filed a motion for new trial on the sole basis of the CPA claim, after twice requesting reconsideration of this claim prior to the case going to the jury. Plaintiff's

Order Denying Leave of Court to File Motion for New Trial- 2

COWAN MOORE STAM LUKE & PETERSEN

Attorneys at Law
P.O. Box 927
503 Knight Street, Suite A
Richland, Washington 99352
Telephone (509) 943-2676

APP-2

0-000000638

1

motion was not accompanied by a motion for leave of court to file a motion for new trial. Plaintiff agreed to a hearing date that was more than 30 days from entry of the verdict on July 9, 2010.

1.7 On August 24, 2010 Plaintiff filed a motion for leave of court to file a motion for new trial.

II. CONCLUSIONS OF LAW

2.1 The jury's verdict filed with the court on July 9, 2010 is the order of the court for purposes of new trial, reconsideration, and appeal.

2.2 Plaintiff's two requests for reconsideration prior to jury deliberations constitute Requests for Reconsideration as contemplated by Civil Rule 59.

2.3 Plaintiff failed to timely seek leave of court to file a motion for new trial, as required by Civil Rule 59(j) and 59(b).

Based upon the above Findings of Fact and Conclusions of Law, the Court issues the following:

III. ORDER

3.1 Plaintiff's motion is denied.

3.2 Plaintiff is not granted leave of court to file a further motion for new trial.

DATED this 7 day of September, 2010.



JUDGE/COURT COMMISSIONER

Order Denying Leave of Court to File Motion for New Trial- 3

COWAN MOORE STAM LUKE & PETERSEN
Attorneys at Law
P.O. Box 927
503 Knight Street, Suite A
Richland, Washington 99352
Telephone (509) 943-2676

App-3

0-000000639

Presented by:

COWAN MOORE STAM LUKE & PETERSEN

By: 
LUCINDA J. LUKE, WSBA #26783
Attorney for Defendants

Approved as to form and content;
Notice of Presentment Waived:

MARTIN GALES, WSBA #14611
Attorney for Plaintiffs

Order Denying Leave of Court to File Motion for New Trial- 4

COWAN MOORE STAM LUKE & PETERSEN
Attorneys at Law
P.O. Box 927
503 Knight Street, Suite A
Richland, Washington 99352
Telephone (509) 943-2676

APP-4

0-000000640

JOSIE DELVIN
BENTON COUNTY CLERK

JUL 09 2010

FILED

TS
B

SUPERIOR COURT OF WASHINGTON FOR BENTON COUNTY

DONALD J. ROKKAN, individually; and)	
DONALD J. ROKKAN, personal)	No. 08-2-00797-6
representative of the Estate of Marsaelle F.)	2nd
McHale, deceased,)	SPECIAL VERDICT FORM
)	
Plaintiffs,)	
)	
vs.)	
)	
Gesa Credit Union, a corporation; and Paula)	
Miller and John Doe Miller, wife and husband,)	
)	
Defendants.)	
_____)	

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Are any of the defendants liable for breach of a fiduciary duty to Marsaelle F. McHale?

Defendant Gesa Credit Union	ANSWER:	Yes: _____	No: <u>X</u>
Defendant Paula Miller	ANSWER:	Yes: _____	No: <u>X</u>

(If you answered "yes" as to any defendant, answer Question No. 2. If you answered "no" as to each defendant, then proceed to Question No. 4.)

APP-5

QUESTION NO. 2: If your answer to Question No. 1 was "yes" as to any defendant, was such breach of fiduciary duty a proximate cause of damage to the Estate of Marsaelle F. McHale?

Defendant Gesa Credit Union ANSWER: Yes: ___ No: ___
Defendant Paula Miller ANSWER: Yes: ___ No: ___

(If you answered "yes" as to any defendant, answer Question No. 3. If you answered "no" as to each defendant, then proceed to Question No. 4.)

QUESTION NO. 3: As to any defendant for which your answer was "yes" in Question No. 2, identify which of the identified Term Share Certificates you find the loss of which resulted in damage to the Estate of Marsaelle F. McHale:

Defendant Gesa Credit Union:

Certificate No. 18801 with a 4/5/05 value of \$88,675.61 Yes: ___ No: ___
Certificate No. 18802 with a 4/5/05 value of \$88,675.61 Yes: ___ No: ___
Certificate No. 18803 with a 4/5/05 value of \$59,117.05 Yes: ___ No: ___

Defendant Paula Miller:

Certificate No. 18801 with a 4/5/05 value of \$88,675.61 Yes: ___ No: ___
Certificate No. 18802 with a 4/5/05 value of \$88,675.61 Yes: ___ No: ___
Certificate No. 18803 with a 4/5/05 value of \$59,117.05 Yes: ___ No: ___

(After answering Question No. 3 proceed to Question No. 4.)

QUESTION NO. 4: Are any of the defendants liable for negligent representation to Marsaelle McHale?

Defendant Paula Miller ANSWER: Yes: ___ No: X
Defendant Gesa Credit Union ANSWER: Yes: ___ No: X

(If you answered "yes" as to any defendant, answer Question No. 5. If you answered "no" as to each defendant, then skip the remaining questions and sign and date this Verdict Form)

QUESTION NO. 5: If your answer to Question No. 4 was "yes" as to any defendant, was such negligent representation a proximate cause of damage to the Estate of Marsaelle F. McHale?

Defendant Paula Miller ANSWER: Yes: ___ No: ___
Defendant Gesa Credit Union ANSWER: Yes: ___ No: ___

(If you answered "yes" as to any defendant, then answer Question No. 6. If you answered "no" as to each defendant, then sign and date this Verdict Form.)

APP-6

QUESTION NO. 6: As to any defendant for which your answer was "yes" in Question No. 5, identify which of the identified Term Share Certificates you find the loss of which resulted in injury or damage to the Estate of Marsaelle F. McHale:

Defendant Paula Miller:

Certificate No. 18801 with a 4/5/05 value of \$88,675.61	Yes: _____	No: _____
Certificate No. 18802 with a 4/5/05 value of \$88,675.61	Yes: _____	No: _____
Certificate No. 18803 with a 4/5/05 value of \$59,117.05	Yes: _____	No: _____

Defendant Gesa Credit Union:

Certificate No. 18801 with a 4/5/05 value of \$88,675.61	Yes: _____	No: _____
Certificate No. 18802 with a 4/5/05 value of \$88,675.61	Yes: _____	No: _____
Certificate No. 18803 with a 4/5/05 value of \$59,117.05	Yes: _____	No: _____

(Sign and date this verdict form and notify the bailiff.)

Dated July 9, 2010.

Renée A. Mathews
PRESIDING JUROR

APP-7

A credit union acts through its employees, who are deemed to be its agents. An employer is liable for the acts of its employees, even if the employer may not know or approve of them, if such acts are done within the scope of the employment. An agent is acting within the scope of employment if the agent is performing duties that were expressly or impliedly assigned to the agent by the principal or that were expressly or impliedly required by the contract of employment. Likewise, an agent is acting within the scope of employment if the agent is engaged in the furtherance of the principal's interests.

Defendant Paula Miller was the agent of defendant Gesa Credit Union and, therefore, any act or omission of Paula Miller that she performed while working at Gesa Credit Union was also the act or omission of defendant Gesa Credit Union.

Cynthia Cook was the agent of defendant Gesa Credit Union and, therefore, any act or omission of Cynthia Cook was the act or omission of defendant Gesa Credit Union.

WPI 50.01 Agent and Principal—Definition (Modified)

WPI 50.02 Agent—Scope of Authority Defined (Modified)

WPI 50.03 Act of Agent Is Act of Principal (Modified)

WPI 50.05 Principal Sued But Not Agent—No Issue As to Agency or Authority (Modified)

Broyles v. Thurston County, 147 Wn.App. 409, 428, 195 P.3d 985 (2008)

See, *Titus v. Tacoma Smeltermen's Union*, 62 Wn.2d 461, 469, 383 P.2d 504 (1963)

APP-8

INSTRUCTION NO. 7

One of the issues for you to decide is whether defendant Paula Miller was acting within the scope of authority.

APP-9

0-000000494

INSTRUCTION NO. 8

A credit union acts through its employees, who are deemed to be its agents. An employer is liable for the acts of its employees, even if the employer may not know or approve of them, if such acts are done within the scope of the employment. An agent is acting within the scope of employment if the agent is performing duties that were expressly or impliedly assigned to the agent by the principal or that were expressly or impliedly required by the contract of employment. Likewise, an agent is acting within the scope of employment if the agent is engaged in the furtherance of the principal's interests.

APP-10

0-000000495

PLAINTIFF'S THIRD PROPOSED INSTRUCTION NO. 23

In deciding whether defendant Gesa Credit Union's acts or practices "affect the public interest," you may consider the following factors, among other things:

1. Whether the acts or practices were done in the course of Gesa Credit Union's business;
2. Whether the acts or practices were part of a pattern or general course of conduct of business;
3. Whether Gesa Credit Union did similar acts or practices prior to the act or practice involving Marsaelle F. McHale;
4. Whether there is a real and substantial potential for repetition of defendant Gesa Credit Union's conduct after the act involving Marsaelle F. McHale; or
5. If only one transaction is complained of, whether many customers were affected or likely to be affected by it.

In reaching your decision you are not required to find any one particular factor, nor are you limited to considering only these factors.

WPI 310.04 Public Interest Element in Consumer Disputes (Modified)

APP-11

SUBSTITUTE SENATE BILL 6202

AS AMENDED BY THE HOUSE

Passed Legislature - 2010 Regular Session

State of Washington

61st Legislature

2010 Regular Session

By Senate Human Services & Corrections (originally sponsored by Senators Hargrove, Holmquist, Franklin, Honeyford, McCaslin, Regala, Morton, Keiser, Delvin, Swecker, Rockefeller, Tom, Kline, McAuliffe, and Kilmer; by request of Attorney General)

READ FIRST TIME 02/05/10.

1 AN ACT Relating to vulnerable adults; amending RCW 30.22.210,
2 74.34.020, and 74.34.035; and adding new sections to chapter 74.34 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 30.22.210 and 1981 c 192 s 21 are each amended to read
5 as follows:

6 (1) Nothing contained in this chapter shall be deemed to require
7 any financial institution to make any payment from an account to a
8 depositor, or any trust or P.O.D. account beneficiary, or any other
9 person claiming an interest in any funds deposited in the account, if
10 the financial institution has actual knowledge of the existence of a
11 dispute between the depositors, beneficiaries, or other persons
12 concerning their respective rights of ownerships to the funds contained
13 in, or proposed to be withdrawn, or previously withdrawn from the
14 account, or in the event the financial institution is otherwise
15 uncertain as to who is entitled to the funds pursuant to the contract
16 of deposit. In any such case, the financial institution may, without
17 liability, notify, in writing, all depositors, beneficiaries, or other
18 persons claiming an interest in the account of either its uncertainty
19 as to who is entitled to the distributions or the existence of any

APP-12

1 dispute, and may also, without liability, refuse to disburse any funds
2 contained in the account to any depositor, and/or trust or P.O.D.
3 account beneficiary thereof, and/or other persons claiming an interest
4 therein, until such time as either:

5 ~~((1+))~~ (a) All such depositors and/or beneficiaries have
6 consented, in writing, to the requested payment; or

7 ~~((2+))~~ (b) The payment is authorized or directed by a court of
8 proper jurisdiction.

9 (2) If a financial institution reasonably believes that financial
10 exploitation of a vulnerable adult, as defined in RCW 74.34.020, may
11 have occurred, may have been attempted, or is being attempted, the
12 financial institution may refuse a transaction as permitted under
13 section 3 of this act.

14 **Sec. 2.** RCW 74.34.020 and 2007 c 312 s 1 are each amended to read
15 as follows:

16 Unless the context clearly requires otherwise, the definitions in
17 this section apply throughout this chapter.

18 (1) "Abandonment" means action or inaction by a person or entity
19 with a duty of care for a vulnerable adult that leaves the vulnerable
20 person without the means or ability to obtain necessary food, clothing,
21 shelter, or health care.

22 (2) "Abuse" means the willful action or inaction that inflicts
23 injury, unreasonable confinement, intimidation, or punishment on a
24 vulnerable adult. In instances of abuse of a vulnerable adult who is
25 unable to express or demonstrate physical harm, pain, or mental
26 anguish, the abuse is presumed to cause physical harm, pain, or mental
27 anguish. Abuse includes sexual abuse, mental abuse, physical abuse,
28 and exploitation of a vulnerable adult, which have the following
29 meanings:

30 (a) "Sexual abuse" means any form of nonconsensual sexual contact,
31 including but not limited to unwanted or inappropriate touching, rape,
32 sodomy, sexual coercion, sexually explicit photographing, and sexual
33 harassment. Sexual abuse includes any sexual contact between a staff
34 person, who is not also a resident or client, of a facility or a staff
35 person of a program authorized under chapter 71A.12 RCW, and a
36 vulnerable adult living in that facility or receiving service from a

APP-13

1 program authorized under chapter 71A.12 RCW, whether or not it is
2 consensual.

3 (b) "Physical abuse" means the willful action of inflicting bodily
4 injury or physical mistreatment. Physical abuse includes, but is not
5 limited to, striking with or without an object, slapping, pinching,
6 choking, kicking, shoving, prodding, or the use of chemical restraints
7 or physical restraints unless the restraints are consistent with
8 licensing requirements, and includes restraints that are otherwise
9 being used inappropriately.

10 (c) "Mental abuse" means any willful action or inaction of mental
11 or verbal abuse. Mental abuse includes, but is not limited to,
12 coercion, harassment, inappropriately isolating a vulnerable adult from
13 family, friends, or regular activity, and verbal assault that includes
14 ridiculing, intimidating, yelling, or swearing.

15 (d) "Exploitation" means an act of forcing, compelling, or exerting
16 undue influence over a vulnerable adult causing the vulnerable adult to
17 act in a way that is inconsistent with relevant past behavior, or
18 causing the vulnerable adult to perform services for the benefit of
19 another.

20 (3) "Consent" means express written consent granted after the
21 vulnerable adult or his or her legal representative has been fully
22 informed of the nature of the services to be offered and that the
23 receipt of services is voluntary.

24 (4) "Department" means the department of social and health
25 services.

26 (5) "Facility" means a residence licensed or required to be
27 licensed under chapter 18.20 RCW, boarding homes; chapter 18.51 RCW,
28 nursing homes; chapter 70.128 RCW, adult family homes; chapter 72.36
29 RCW, soldiers' homes; or chapter 71A.20 RCW, residential habilitation
30 centers; or any other facility licensed by the department.

31 (6) "Financial exploitation" means the illegal or improper use of
32 the property, income, resources, or trust funds of the vulnerable adult
33 by any person for any person's profit or advantage other than for the
34 vulnerable adult's profit or advantage.

35 (7) "Financial institution" has the same meaning as in RCW
36 30.22.040 and 30.22.041. For purposes of this chapter only, "financial
37 institution" also means a "broker-dealer" or "investment adviser" as
38 defined in RCW 21.20.005.

APP-14

1 (8) "Incapacitated person" means a person who is at a significant
2 risk of personal or financial harm under RCW 11.88.010(1) (a), (b),
3 (c), or (d).

4 ~~((+8+))~~ (9) "Individual provider" means a person under contract
5 with the department to provide services in the home under chapter 74.09
6 or 74.39A RCW.

7 ~~((+9+))~~ (10) "Interested person" means a person who demonstrates to
8 the court's satisfaction that the person is interested in the welfare
9 of the vulnerable adult, that the person has a good faith belief that
10 the court's intervention is necessary, and that the vulnerable adult is
11 unable, due to incapacity, undue influence, or duress at the time the
12 petition is filed, to protect his or her own interests.

13 ~~((+10+))~~ (11) "Mandated reporter" is an employee of the department;
14 law enforcement officer; social worker; professional school personnel;
15 individual provider; an employee of a facility; an operator of a
16 facility; an employee of a social service, welfare, mental health,
17 adult day health, adult day care, home health, home care, or hospice
18 agency; county coroner or medical examiner; Christian Science
19 practitioner; or health care provider subject to chapter 18.130 RCW.

20 ~~((+11+))~~ (12) "Neglect" means (a) a pattern of conduct or inaction
21 by a person or entity with a duty of care that fails to provide the
22 goods and services that maintain physical or mental health of a
23 vulnerable adult, or that fails to avoid or prevent physical or mental
24 harm or pain to a vulnerable adult; or (b) an act or omission that
25 demonstrates a serious disregard of consequences of such a magnitude as
26 to constitute a clear and present danger to the vulnerable adult's
27 health, welfare, or safety, including but not limited to conduct
28 prohibited under RCW 9A.42.100.

29 ~~((+12+))~~ (13) "Permissive reporter" means any person, including,
30 but not limited to, an employee of a financial institution, attorney,
31 or volunteer in a facility or program providing services for vulnerable
32 adults.

33 ~~((+13+))~~ (14) "Protective services" means any services provided by
34 the department to a vulnerable adult with the consent of the vulnerable
35 adult, or the legal representative of the vulnerable adult, who has
36 been abandoned, abused, financially exploited, neglected, or in a state
37 of self-neglect. These services may include, but are not limited to

APP-15

1 case management, social casework, home care, placement, arranging for
2 medical evaluations, psychological evaluations, day care, or referral
3 for legal assistance.

4 ~~((14))~~ (15) "Self-neglect" means the failure of a vulnerable
5 adult, not living in a facility, to provide for himself or herself the
6 goods and services necessary for the vulnerable adult's physical or
7 mental health, and the absence of which impairs or threatens the
8 vulnerable adult's well-being. This definition may include a
9 vulnerable adult who is receiving services through home health,
10 hospice, or a home care agency, or an individual provider when the
11 neglect is not a result of inaction by that agency or individual
12 provider.

13 ~~((15))~~ (16) "Vulnerable adult" includes a person:

14 (a) Sixty years of age or older who has the functional, mental, or
15 physical inability to care for himself or herself; or

16 (b) Found incapacitated under chapter 11.88 RCW; or

17 (c) Who has a developmental disability as defined under RCW
18 71A.10.020; or

19 (d) Admitted to any facility; or

20 (e) Receiving services from home health, hospice, or home care
21 agencies licensed or required to be licensed under chapter 70.127 RCW;
22 or

23 (f) Receiving services from an individual provider.

24 NEW SECTION. **Sec. 3.** A new section is added to chapter 74.34 RCW
25 to read as follows:

26 (1) Pending an investigation by the financial institution, the
27 department, or law enforcement, if a financial institution reasonably
28 believes that financial exploitation of a vulnerable adult may have
29 occurred, may have been attempted, or is being attempted, the financial
30 institution may, but is not required to, refuse a transaction requiring
31 disbursement of funds contained in the account:

32 (a) Of the vulnerable adult;

33 (b) On which the vulnerable adult is a beneficiary, including a
34 trust or guardianship account; or

35 (c) Of a person suspected of perpetrating financial exploitation of
36 a vulnerable adult.

App-16

1 (2) A financial institution may also refuse to disburse funds under
2 this section if the department, law enforcement, or the prosecuting
3 attorney's office provides information to the financial institution
4 demonstrating that it is reasonable to believe that financial
5 exploitation of a vulnerable adult may have occurred, may have been
6 attempted, or is being attempted.

7 (3) A financial institution is not required to refuse to disburse
8 funds when provided with information alleging that financial
9 exploitation may have occurred, may have been attempted, or is being
10 attempted, but may use its discretion to determine whether or not to
11 refuse to disburse funds based on the information available to the
12 financial institution.

13 (4) A financial institution that refuses to disburse funds based on
14 a reasonable belief that financial exploitation of a vulnerable adult
15 may have occurred, may have been attempted, or is being attempted
16 shall:

17 (a) Make a reasonable effort to notify all parties authorized to
18 transact business on the account orally or in writing; and

19 (b) Report the incident to the adult protective services division
20 of the department and local law enforcement.

21 (5) Any refusal to disburse funds as authorized by this section
22 based on the reasonable belief of a financial institution that
23 financial exploitation of a vulnerable adult may have occurred, may
24 have been attempted, or is being attempted will expire upon the sooner
25 of:

26 (a) Ten business days after the date on which the financial
27 institution first refused to disburse the funds if the transaction
28 involved the sale of a security or offer to sell a security, as defined
29 in RCW 21.20.005, unless sooner terminated by an order of a court of
30 competent jurisdiction;

31 (b) Five business days after the date on which the financial
32 institution first refused to disburse the funds if the transaction did
33 not involve the sale of a security or offer to sell a security, as
34 defined in RCW 21.20.005, unless sooner terminated by an order of a
35 court of competent jurisdiction; or

36 (c) The time when the financial institution is satisfied that the
37 disbursement will not result in financial exploitation of a vulnerable
38 adult.

APP-17

1 (6) A court of competent jurisdiction may enter an order extending
2 the refusal by the financial institution to disburse funds based on a
3 reasonable belief that financial exploitation of a vulnerable adult may
4 have occurred, may have been attempted, or is being attempted. A court
5 of competent jurisdiction may also order other protective relief as
6 authorized by RCW 7.40.010 and 74.34.130.

7 (7) A financial institution or an employee of a financial
8 institution is immune from criminal, civil, and administrative
9 liability for refusing to disburse funds or disbursing funds under this
10 section and for actions taken in furtherance of that determination if
11 the determination of whether or not to disburse funds was made in good
12 faith.

13 **Sec. 4.** RCW 74.34.035 and 2003 c 230 s 2 are each amended to read
14 as follows:

15 (1) When there is reasonable cause to believe that abandonment,
16 abuse, financial exploitation, or neglect of a vulnerable adult has
17 occurred, mandated reporters shall immediately report to the
18 department.

19 (2) When there is reason to suspect that sexual assault has
20 occurred, mandated reporters shall immediately report to the
21 appropriate law enforcement agency and to the department.

22 (3) When there is reason to suspect that physical assault has
23 occurred or there is reasonable cause to believe that an act has caused
24 fear of imminent harm:

25 (a) Mandated reporters shall immediately report to the department;
26 and

27 (b) Mandated reporters shall immediately report to the appropriate
28 law enforcement agency, except as provided in subsection (4) of this
29 section.

30 (4) A mandated reporter is not required to report to a law
31 enforcement agency, unless requested by the injured vulnerable adult or
32 his or her legal representative or family member, an incident of
33 physical assault between vulnerable adults that causes minor bodily
34 injury and does not require more than basic first aid, unless:

35 (a) The injury appears on the back, face, head, neck, chest,
36 breasts, groin, inner thigh, buttock, genital, or anal area;

37 (b) There is a fracture;

APP-18

1 (c) There is a pattern of physical assault between the same
2 vulnerable adults or involving the same vulnerable adults; or

3 (d) There is an attempt to choke a vulnerable adult.

4 (5) When there is reason to suspect that the death of a vulnerable
5 adult was caused by abuse, neglect, or abandonment by another person,
6 mandated reporters shall, pursuant to RCW 68.50.020, report the death
7 to the medical examiner or coroner having jurisdiction, as well as the
8 department and local law enforcement, in the most expeditious manner
9 possible. A mandated reporter is not relieved from the reporting
10 requirement provisions of this subsection by the existence of a
11 previously signed death certificate. If abuse, neglect, or abandonment
12 caused or contributed to the death of a vulnerable adult, the death is
13 a death caused by unnatural or unlawful means, and the body shall be
14 the jurisdiction of the coroner or medical examiner pursuant to RCW
15 68.50.010.

16 (6) Permissive reporters may report to the department or a law
17 enforcement agency when there is reasonable cause to believe that a
18 vulnerable adult is being or has been abandoned, abused, financially
19 exploited, or neglected.

20 ((+6+)) (7) No facility, as defined by this chapter, agency
21 licensed or required to be licensed under chapter 70.127 RCW, or
22 facility or agency under contract with the department to provide care
23 for vulnerable adults may develop policies or procedures that interfere
24 with the reporting requirements of this chapter.

25 ((+7+)) (8) Each report, oral or written, must contain as much as
26 possible of the following information:

27 (a) The name and address of the person making the report;

28 (b) The name and address of the vulnerable adult and the name of
29 the facility or agency providing care for the vulnerable adult;

30 (c) The name and address of the legal guardian or alternate
31 decision maker;

32 (d) The nature and extent of the abandonment, abuse, financial
33 exploitation, neglect, or self-neglect;

34 (e) Any history of previous abandonment, abuse, financial
35 exploitation, neglect, or self-neglect;

36 (f) The identity of the alleged perpetrator, if known; and

37 (g) Other information that may be helpful in establishing the

APP-19

1 extent of abandonment, abuse, financial exploitation, neglect, or the
2 cause of death of the deceased vulnerable adult.

3 ((+8+)) (9) Unless there is a judicial proceeding or the person
4 consents, the identity of the person making the report under this
5 section is confidential.

6 NEW SECTION. Sec. 5. A new section is added to chapter 74.34 RCW
7 to read as follows:

8 (1) A financial institution shall provide training concerning the
9 financial exploitation of vulnerable adults to the employees specified
10 in subsection (2) of this section within one year of the effective date
11 of this act and shall thereafter provide such training to the new
12 employees specified in subsection (2) of this section within the first
13 three months of their employment.

14 (2) A financial institution that is a broker-dealer or investment
15 adviser as defined in RCW 21.20.005 shall provide training concerning
16 the financial exploitation of vulnerable adults to employees who are
17 required to be registered in the state of Washington as salespersons or
18 investment adviser representatives under RCW 21.20.040 and who have
19 contact with customers and access to account information on a regular
20 basis and as part of their job. All other financial institutions shall
21 provide training concerning the financial exploitation of vulnerable
22 adults to employees who have contact with customers and access to
23 account information on a regular basis and as part of their job.

24 (3) The training must include recognition of indicators of
25 financial exploitation of a vulnerable adult, the manner in which
26 employees may report suspected financial exploitation to the department
27 and law enforcement as permissive reporters, and steps employees may
28 take to prevent suspected financial exploitation of a vulnerable adult
29 as authorized by law or agreements between the financial institution
30 and customers of the financial institution. The office of the attorney
31 general and the department shall develop a standardized training that
32 financial institutions may offer, or the financial institution may
33 develop its own training.

34 (4) A financial institution may provide access to or copies of
35 records that are relevant to suspected financial exploitation or
36 attempted financial exploitation of a vulnerable adult to the
37 department, law enforcement, or the prosecuting attorney's office,

APP-20

1 either as part of a referral to the department, law enforcement, or the
2 prosecuting attorney's office, or upon request of the department, law
3 enforcement, or the prosecuting attorney's office pursuant to an
4 investigation. The records may include historical records as well as
5 records relating to the most recent transaction or transactions that
6 may comprise financial exploitation.

7 (5) A financial institution or employee of a financial institution
8 participating in good faith in making a report or providing
9 documentation or access to information to the department, law
10 enforcement, or the prosecuting attorney's office under this chapter
11 shall be immune from criminal, civil, or administrative liability.

Passed by the Senate March 8, 2010.

Passed by the House March 3, 2010.

Approved by the Governor March 19, 2010.

Filed in Office of Secretary of State March 19, 2010.

APP-21

BarNews

FEATURES

11 Legislation Lineup for Lawyers

Bills of interest to attorneys considered by the House and Senate Judiciary Committees
by Senator Adam Kline and Representative Jamie Pedersen



19 On Language: Words Misspoken, Words Misheard

by Robert C. Cumbow

26 Should Bank Tellers Engage in Estate Planning?

(Like It or Not, That's What They Do)
by Theresa Schrempf

28 Return of the Diploma Privilege?

Taking a look at a former way of gaining admittance to the Bar
by W. Clinton Sterling

34 Read it in De Novo: Lessons From the Press Box: What Sports Reporting Taught Me About Legal Writing

by Allison Peryea



COLUMNS

9 President's Corner Dangerous Words *by Salvador A. Mungia*

64 The Bar Beat Purr-severance *by Michael Heatherly*

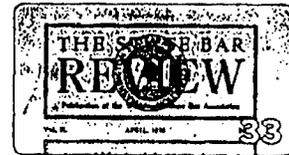


DEPARTMENTS

7 Letters to the Editor

33 Blast from the Past From the 1936 Law Review: Admitting Neophytes

39 Reading Around Circle of Greed: The Spectacular Rise and Fall of America's Most Feared and Loathed Lawyer *Reviewed by Nigel S. Malden*



42 The Board's Work *by Michael Heatherly*

63 Briefly About Me Justice Susan Owens

LISTINGS

45 WSBA Awards Dinner Registration Form

46 FYI

48 Professionals

50 Disciplinary Notices

55 Announcements

57 CLE Calendar

58 Classifieds

Cover photo: ©iStockphoto.com/LyleWood

The Washington State Bar Association's mission is to serve the public and the members of the Bar, ensure the integrity of the legal profession, and to champion justice.

APP-22

ISTOCKPHOTO.COM/ALCORO/PT/128



Should Bank Tellers Engage in Estate Planning?

(Like It or Not, That's What They Do)

BY THERESA SCHREMPF

A True Story: An elderly widower comes to an attorney's office, asking the attorney to prepare a will which would leave his modest estate, consisting mainly of four bank accounts solely in his name, to his four adult children. The attorney drafts, and the client executes, a simple will consistent with these instructions.

Later, the client mentions that he has added his youngest daughter's name to his bank accounts. The attorney confirms the change — the four accounts have, in fact, been converted to Joint Tenancy with Right of Survivorship (JTWROS) accounts in the name of the client and his youngest daughter. The attorney contacts the client to determine whether he understands the significance of the change. Does he realize that, upon his death, his entire estate will pass to his youngest daughter?

He doesn't. The reason he added his daughter's name to the accounts was because a teller at his bank told him that setting up a JTWROS account would "avoid probate." The phrase "avoid probate" was like catnip to the client, since he had a firm, albeit vague, idea that "probate" involved a fate (taxes, delay, attorney fees, litigation, expense, pain, suffering, etc.) far worse than the death which precipitated it. He also liked the idea that his youngest daughter could write checks for him if he ever needed help, and that she would have immediate access to his funds to pay for funeral expenses when the time came.

But surely the change at the bank wouldn't affect the terms of the will, would it? The helpful bank teller never mentioned his estate plan, and there was nothing in the papers he and his daughter signed which would

lead him to believe that his will had been "trumped" by the designation on the bank signature card.

This is a true story. I was the attorney; the client was my father. Fortunately, the problem was discovered and corrected before my father's death. Many others are not so lucky.

Taufen v. Estate of Kirpes. (Wash. App. Div. 3; April 10, 2010; No. 27799-2-III). Mrs. Kirpes was dying of cancer and wanted to get her affairs in order. Her will, executed shortly before her death, left her estate, in varying shares, to two Catholic nuns, to a Catholic church in Clarkston, Washington, and to her late husband's cousins. She left her house to her longtime handyman and friend, Terry Yochum.

Shortly before signing her will, Mrs. Kirpes closed a joint bank account which was in her name and that of a former caregiver. She told her banker that the new account would be a joint account with Terry Yochum. Mrs. Kirpes made no mention of a survivorship provision. The banker, however, unilaterally designated the account as JTWROS.¹ A few days later, Mrs. Kirpes transferred a substantial investment account to the JTWROS bank account. Upon her death, Mr. Yochum argued that the bank account (\$231,624) passed to him pursuant to the JTWROS designation. The trial court, relying on the provisions of RCW 30.22.100 (3), agreed.

In April, 2010, the Washington Court of Appeals, Division Three, reversed, holding that the facts of the case demonstrated, by clear, cogent, and convincing evidence, that Mrs. Kirpes did not intend that the "right of survivorship" provision apply to her checking

account or to the funds which were subsequently transferred to it from her investment account. (A Petition for Review has since been filed with the Washington State Supreme Court in *Taufen v. Estate of Kirpes*.)

Bank Teller or Estate Planner? The *Taufen* case is unusual in that the banker specifically remembered the account change and testified that she had checked the "right of survivorship" box on the signature card without authorization from the client. A more common scenario is that the identity of the banker setting up the account is unknown, or the banker "doesn't remember" what was said. The only person who really knows what was intended is deceased, and others may be barred from testifying because of the Dead Man's Statute (RCW 5.60.030).

Worse, the banker may be unfamiliar with, or indifferent to, the impact that checking a "right of survivorship" box has on the client's entire estate plan.² Most non-attorneys and even some attorneys don't understand the difference between a joint account (which belongs to the depositor's estate after death, per RCW 30.22.100 (2)) and a JTWROS account (which passes to the survivor, unless contrary intent is shown by clear, cogent, and convincing evidence, RCW 30.22.100(3)).

The *Taufen* case notes that the Financial Institution Individual Account Deposit Act, RCW 30.22, was enacted mainly to provide consistency and simplicity in the relationship between the depositor and the financial institution and to protect financial institutions from becoming embroiled in disputes between and among depositors. Tragically, the Act provides a mechanism for

undoing the most carefully drafted estate plan, resulting in dispositions not intended by the decedent. The high standard of proof required to overcome the presumption that the decedent intended a right of survivorship disposition results in only a slim opportunity for a successful challenge. Financial institutions are generally shielded from liability by RCW 30.22.120. Few probate practitioners have not been confounded and frustrated by this problem.

A Few Modest Proposals. RCW 30.22 enables banks to engage in estate planning with no safeguards and no accountability. JTWR0S accounts are favored by banks for their simplicity upon the death of the depositor, but may create chaos in the context of an estate plan. I therefore submit the following suggestions for change:

- **Abolish JTWR0S Accounts.** Financial institutions won't like it, but such a change would get bankers out of the estate planning business. Given the expected opposition from the banking industry, the chance of enacting such legislation is admittedly minimal.
- **Reverse the Presumption.** Under current law, there is a presumption, rebuttable only by clear, cogent, and convincing evidence,

that a depositor who leaves money in a "right of survivorship" account intended that it pass to the survivor. My experience is that depositors rarely understand or intend such a result. The law should be changed to reverse the existing presumption to provide that, unless a survivor can show by clear, cogent, and convincing evidence that the decedent intended to leave the account to him/her, the account would be presumed for convenience only and funds deposited by the decedent would pass to the depositor's estate.

• **Require Disclosure.** Financial institutions which offer "right of survivorship" accounts should be required to clearly explain, in a separate writing signed by the depositor in the banker's presence: 1) that a "right of survivorship" designation will result in the account being transferred to the survivor upon death, regardless of the terms of the depositor's will or other estate-planning device; 2) that the depositor should not ask or receive legal advice from bank employees regarding the type of account he/she selects; and 3) that the depositor should consult with an attorney regarding the type of account he/she establishes. A banker who sets up a "right of survivorship" account should identify himself/

herself on the signature form.

Any of these changes would reduce the chaos, confusion, and uncertainty existing under the current law. ☹

Theresa Schrempp practices law with Sorokin & Schrempp PLLC in Bellevue. Her practice emphasizes probate and litigation. She can be contacted at theresas@lawyerseattle.com.

NOTES

1. The banker testified that she knew the difference between a joint account and a joint tenancy with right of survivorship account, but did not discuss the difference with clients. She also testified that it was her standard practice to check the joint tenancy with right of survivorship box on the signature card anytime someone asked to set up a joint account.
2. One major bank in Washington uses a signature card which doesn't even designate whether an account is "joint" or "joint tenancy with right of survivorship," but merely refers to the contract of deposit. The contract of deposit consists of a thick pamphlet in miniscule type, which contains the following language buried in the middle: "[i]f two or more of you open an account together it will be conclusively presumed to be owned by all of you as joint tenants with right of survivorship").

Communication.

Do you get an automated response when you call an Insurance agent?

At Daniels-Head Insurance Agency, you will always speak to a live human being during regular business hours. Personal service is just one of the reasons nearly 100,000 clients nationwide choose us when looking for professional insurance coverage.

If you're looking for the human touch when it comes to your insurance, give us a call. Operators are standing by.

Daniels-Head Insurance Agency, Inc.
Professional Insurance Solutions Since 1954
www.danielshead.com
800.848.7160

APP-24

STATUTES AND COURT RULES

Statutes

RCW 2.04.190

The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

RCW 2.04.200

When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

RCW 5.60.030

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

Court Rules

ER 803(3)(a)

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

CR 54 (a) and (b)

(a) Definitions.

(1) Judgment. A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

(2) Order. Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

CR 58 (a) and (b)

(a) When. Unless the court otherwise directs and subject to the provisions of rule 54(b), all judgments shall be entered immediately after they are signed by the judge.

(b) Effective Time. Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing, unless the judge earlier permits the judgment to be filed with him as authorized by rule 5(e).

RAP 5.2 (a), (b) and (c)

(a) Notice of Appeal. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).

(b) Notice for Discretionary Review. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice for discretionary review must be filed in the trial court within the longer of (1) 30 days after the act of the trial court that the party filing the notice wants reviewed or (2) 30 days after entry of an order deciding a timely motion for reconsideration of that act under CR 59.

(c) Date Time Begins To Run. The date of entry of a trial court decision is determined by CR 5(e) and 58.

