

No. 297608 - III



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

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DAVID BRICKLIN and ANNE BRICKLIN, husband and wife, as  
legal custodians for ALEX BRICKLIN, JACOB BRICKLIN and LAURA  
BRICKLIN,

Petitioners/Defendants,

v.

STERLING SAVINGS BANK, a Washington state chartered bank,

Respondent/Plaintiff,

and

PHILIP MURPHY and ROXANNE MURPHY, Respondents/Defendants.

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RESPONDENT STERLING SAVINGS BANK'S ERRATA  
RESPONSE TO THE APPELLANTS' OPENING BRIEF

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## I. INTRODUCTION

Sterling Savings Bank ("Sterling") maintained a contract of deposit for its account holder, Gerald Murphy. Upon death of the account holder, the contract specified payment to five beneficiaries (known respectively as the three "Bricklin Claimants" and the two "Murphy Claimants"). Following Mr. Murphy's death, the Bricklin Claimants asserted that the late Mr. Murphy intended to change his Deposit Agreement to exclude the Murphy Claimants.

Sterling interpleaded the deposited funds as prescribed by statute. The Bricklin Claimants failed to prove that the late Mr. Murphy ever signed any change or amendment to his Deposit Agreement. The Superior Court entered summary judgment that only one contract existed in favor of both the Bricklin and Murphy Claimants. The Court ordered that payments be made according to that contract.

The Bricklins appealed. Then they withdrew their appeal except as to dismissal of their Consumer Protection Act, ("CPA"), (RCW 19.86) and negligence claims, intending that Sterling pay out the funds pursuant to the judgment, and fully aware that the judgment affirming the workout was now final. The proceeds from the account were then paid according to the terms of the contract of deposit. Sterling's payment of those funds

pursuant to what the Superior Court finally determined is the only fully executed contract of deposit is not challenged on appeal.

The Bricklin Claimants, despite having received their full share of the proceeds from Mr. Murphy's account, continue to appeal this matter and seek additional sums from Sterling. The Bricklins allege that Sterling was negligent in its administration of Mr. Murphy's contract of deposit and that Sterling violated Washington's Consumer Protection Act, RCW 19.86. The trial court correctly rejected the same arguments from the Bricklins. Since then, the Bricklins have acceded to the Superior Court's judgment, now final, that only one contract ever existed. Consequently, the Bricklins' arguments should similarly be rejected on appeal.

The Bricklins expressly acknowledge that Sterling honored the terms of the only contract of deposit (*Opening Brief of Appellants*, p. 4), yet somehow claim that Sterling was negligent or deceptive in failing to acknowledge and honor a competing contract, whose non-existence has been finally determined by the trial court. Any claims for negligence or violations of the Consumer Protection Act as alleged by the Bricklins are barred by res judicata once the contract claim is removed – after the Bricklins let the trial court's judgment that there was an enforceable contract involving the Murphy Claimants go final by dismissing their

appeal, the Bricklins' contention that there is a triable issue of fact that a superseding contract existed is extinguished as a matter of law.

Assuming, *arguendo*, that the Bricklins' negligence claim survives application of the principles of res judicata, the claim is not supported by the record. First, Sterling owed Gerald Murphy, its account-holder, a statutory duty to administer his contract of deposit according to the terms of his contract of deposit. The Bricklins do not appeal the trial court's ruling that Sterling has properly paid the full amount of the contract of deposit according to the beneficiaries designated on that document. Upon payment according to the terms of the contract of deposit, Sterling's duties to the account holder are discharged. Sterling cannot be liable to the Bricklins for acts or omissions in maintaining Mr. Murphy's account where the Bricklins acknowledge Sterling's right to rely on the contract of deposit maintained in its records, and where the Bricklins have received proceeds from that account. The Court should affirm the trial court's dismissal of the Bricklins' "independent duty" theory of liability.

The Bricklins' CPA claim is similarly flawed. The Bricklins cannot meet the five requirements necessary to establish a violation of the CPA. First, Sterling's actions, in carrying out the terms of the contract of deposit according to the demands of the account-holder and the bank's internal controls, were not unfair or deceptive. Second, Sterling's actions

in accord with a private contract and pursuant to governing Washington law do not implicate the public interest. Third, there is no admissible evidence that the late Mr. Murphy ever executed a new contract of deposit (as stated above, it is now *res judicata* that he did not). Fourth, the Bricklins have not shown how Sterling's alleged negligence caused them to lose the share of the funds that went to the Murphy Claimants. It did not – those funds did not go to the Murphy Claimants until after the Bricklins expressly decided to let the Superior Court's judgment that there was no other contract go final. The Bricklins have not suffered injury to their business or property. Fourth, because the Bricklins have already been paid \$70,200 pursuant to the terms of the only contract of deposit all parties agree governs this case, there is no causal link between Sterling's actions and the Bricklins' alleged "harm." The Bricklins' CPA claim should be dismissed as a matter of law.

There is no admissible evidence that Sterling violated any duty or statute. The Bricklins cling to conjecture that Mr. Murphy must have signed a new contract. But, there was no dispute of fact (based on admissible evidence) that he did, and the Superior Court's determination that he did not is now final and *res judicata*. Mr. Murphy maintained a contract of deposit with Sterling which specified payment of his account proceeds to five beneficiaries; the proceeds from the account have been

distributed to the five beneficiaries pursuant to the account terms; there is no evidence of an additional, superseding contract of deposit that Sterling must honor. No matter their urged construction of the law, the Bricklins cannot escape these dispositive facts.

This Court should affirm the trial court's dismissal of the Bricklins' negligence and Consumer Protection Act claims.

## **II. STATEMENT OF UNDISPUTED FACTS**

### **A. Gerald Murphy Signed a Contract of Deposit with Sterling Savings Bank in 2006**

1. On or about August 22, 2006, Gerald Murphy opened Adjustable Rate Certificate of Deposit Account No. CD \*\*\*\*\*3298 (the "Account") with Sterling's Federal Way branch. The contract of deposit originally named only Gerald Murphy as the sole owner of the account. Mr. Murphy signed the contract on September 9, 2006. CP 65.

2. On September 20, 2006, Mr. Murphy requested a change in his Account to add beneficiaries. CP 66.

### **B. When a Customer or a Customer's Representative Requests a Change to a Contract of Deposit, Sterling's Computer System Generates Two Documents – A Customer Copy Which Reflects the Requested Changes and a New Deposit Contract Which Must Be Signed by the Account Holder and Returned to Sterling Before it is Effective**

3. When a customer requests a change to his or her contract of deposit, Sterling's internal account management system generates two

documents. CP 81. First, a new contract of deposit, denominated a "Certificate of Deposit and Certificate of Deposit Signature Card" (for short, "Deposit Agreement") is generated that verifies the change in ownership (or as in this case beneficiaries). CP 81-82. No change is effective unless and until this document is signed by the account owner and received by Sterling. CP 82. Second, the system generates an account summary statement for the customer (the "customer copy") that reflects the requested change. *Id.* The customer copy is not a contract, it is not signed by the customer, and it is not effective to change the contract terms governing the account; rather the Deposit Agreement must be executed by the account owner and received by Sterling before the change is effective. *Id.*

4. Each contract of deposit executed by Mr. Murphy was a two-page document. The front page of the contract provides that "this form contains the terms for your time deposit" and that "[t]here are additional terms and disclosures on page two of this form, some of which explain or expand on those below." Above the signature block is a statement acknowledging that Mr. Murphy "agree[s] to the terms stated on page one and page two." CP 65-67.

5. The second page of the deposit contract includes further terms of the Account to which Mr. Murphy agreed. CP 196. Crucially,

the document provides this statement to the account-holder: "You intend these rules to apply to this account depending on the form of ownership and beneficiary designation, if any, specified on page 1" and that "only those of you who sign the permanent signature card may withdraw funds from this account." *Id.*

6. The contract of deposit further provides that "We [Sterling] make no representations as to the appropriateness or effect of the ownership and beneficiary designations, except as they determine to whom we pay the account funds." *Id.*

**C. No Changes To a Contract of Deposit Can Be Made Without Receipt of a Signed Deposit Agreement**

7. Sterling has a duty to pay according to the terms of the contract of deposit so long as it is signed by the account-holder or any person with a current right to payment of funds from the account. RCW 30.22.060. Prior to his death, the only person who had a current right to payment of funds and/or the withdrawal of any funds from the Account was Mr. Murphy.

8. No changes could be made to the Account without Sterling's receipt of Mr. Murphy's signature. CP 194.

**D. Gerald Murphy Has Twice Executed the Proper Documents to Verify and Ratify a Change of Beneficiaries Under His Contract of Deposit**

9. On September 20, 2006, Mr. Murphy executed a signature card indicating a change of beneficiaries for his Account. The new beneficiaries were Jennifer Bricklin, Alex Bricklin, Jacob Bricklin, and Laura Bricklin as "payable on death" ("POD") beneficiaries. CP 66.

10. On February 9, 2007, Gerald Murphy executed a new signature card for the Account which changed the beneficiaries again. The new contract of deposit included five beneficiaries: Alex Bricklin, Jacob Bricklin and Laura Bricklin, Philip Murphy, Roxanne Murphy, CP 67.

**E. The Bricklins Acknowledge the Validity and Enforceability of the February, 2007 Contract of Deposit, and Sterling Has Distributed the Proceeds of the Account to the Five Beneficiaries Named Therein**

11. The Bricklins acknowledge that the February 9, 2007 contract of deposit is the only fully executed contract of deposit in this case and that Sterling is obligated to pay according to the terms of that contract. CP 324-325.

12. The Bricklins are not appealing the trial court's now final determination that Sterling is obligated to pay the five beneficiaries named in the February, 2007 contract of deposit. *Id.*

13. Sterling distributed the proceeds of Gerald Murphy's contract of deposit to the named beneficiaries on June 3, 2011. *See* Appendix A, attached to Sterling's Opening Brief herein.

**F. The Bricklins' Contentions That Sterling Failed to Honor a "Second" Contract of Deposit Are Not Supported by Any Evidence**

14. After acknowledging the validity of the February, 2007 contract of deposit, and receiving \$70,000 in profits from Sterling following liquidation of that contract, the Bricklins still contend that Sterling owes them additional funds. *Appellants' Brief*, p. 37.

15. On or about August 25, 2008, Gerald Murphy, or someone on his behalf, requested that Sterling change the Account's beneficiaries. CP 61 (*Bolden Aff.*, ¶ 6).

16. The proposed change would have left the Account with only three beneficiaries: Alex Bricklin, Jacob Bricklin and Laura Bricklin. *Id.*

17. Unlike the September, 2006, and February, 2007, contract amendments, in which Mr. Murphy carried out the requisite steps to change his account beneficiaries, Sterling never received a signed Deposit Agreement from Gerald Murphy indicating that he wished to limit his account to just three beneficiaries. Absent receipt of the signed signature card from the account holder, Sterling cannot and did not

change the contract of deposit's designation of beneficiaries. CP 62  
(*Bolden Aff.*, ¶ 10).

**G. The Bricklins Presented No Evidence of Sterling's Receipt of a Signed Deposit Agreement Which Would Have Allowed Sterling to Make Changes to Mr. Murphy's Contract of Deposit**

18. Anne Bricklin, the mother of Alex, Jacob and Laura Bricklin, testified that she mailed a signed deposit agreement to Sterling that, if received by the Bank, would have limited the Account beneficiaries to just the Bricklin children. CP 190.

19. Mrs. Bricklin did not mail the deposit agreement to Sterling via certified mail or with any other proof of receipt. CP 189.

20. Mrs. Bricklin did not return the signature card in person to Sterling's Federal Way Branch where the Account is kept; in fact, Mrs. Bricklin has never been to the Federal Way Branch. CP 188.

**H. Mr. Murphy Passed Away in July, 2009; The Bricklins Subsequently Demanded That Sterling Issue Proceeds From Mr. Murphy's Contract of Deposit Which Distribution Was Contrary to the Records of the Bank**

21. Gerald Murphy died on July 12, 2009. CP 27.

22. At the time of his death, the Account had a principal balance of \$117,000. CP 59.

23. On or about July 29, 2009, Mrs. Bricklin made demand upon Sterling's Bainbridge Island branch for payment of the proceeds of

the Account to her children. Mrs. Bricklin insisted that her three children, and not Philip or Roxanne Murphy, were the only beneficiaries of Gerald Murphy's account, pursuant to the purported beneficiary change in August, 2008. CP 26 (*Anne Bricklin Dec.*, ¶ 6).

24. When Sterling reviewed its records upon Mrs. Bricklin's demand, the Bank's records of the contract of deposit indicated five current beneficiaries on the Account as identified above, pursuant to the February, 2007, change in beneficiaries. CP 51-52.

25. Even accepting as true Mrs. Bricklin's claim that she mailed one, the Bricklins have never produced any evidence that Sterling received a signed signature card from Gerald Murphy which reflects the Bricklins' urged construction of the Account.

26. In order to prove that Sterling mishandled the Account, the Bricklins would need to produce a signed document from Mr. Murphy which ratifies the Bricklins' contention that Mr. Murphy intended to change his deposit contract to reflect the purportedly new beneficiary designation. CP 62 (*Bolden Aff.*, ¶ 9), CP 41-42 (*Allert Aff.*, ¶¶ 6, 10); CP 262 (*Supp. Allert Aff.*, ¶ 4).

**I. Sterling Sought to Interplead the Funds and Seek a Judicial Determination of Proper Payment**

27. In November, 2009, Sterling filed its complaint for interpleader and sought to allow the Spokane County Superior Court to direct payments to the proper beneficiaries. CP 3-8.

28. The Bricklins opposed Sterling's motion for interpleader and counter-claimed for negligence against Sterling. CP 20-25.

29. In April and May of 2010, the Bricklins and Sterling filed cross-motions for summary judgment seeking a judicial determination of their respective duties and obligations in this matter. CP 32-36; CP 74-76. On June 3, 2010, the Court denied the motions. CP 103-104.

30. The parties, after conducting discovery, re-filed their motions for summary judgment in January, 2011. The trial court awarded judgment in favor of Sterling and dismissed each of the Bricklins' three causes of action. CP 310-311; 312-316.

31. The Bricklins now appeal the trial court's ruling of the negligence and CPA claims, but fully acknowledge that the Superior Court's ruling that Sterling honored the terms of the only fully executed contract of deposit is final and not within their appeal.

### III. ARGUMENT

#### A. **The Bricklins' Negligence and Consumer Protection Act Claims Are Barred by Res Judicata Where Sterling Honored the Terms of the Only Existing Contract of Deposit and the Bricklins Dropped Their Appeal of that Issue**

Sterling owes a duty to its accountholder, Gerald Murphy, to pay the proceeds of his account according to the terms of the fully executed contract of deposit. Mr. Murphy's contract of deposit had a principal balance of \$117,000; that balance has been distributed to the five beneficiaries of the deposit contract according to the trial court's Order (CP 312-315) and the wishes of the Bricklins. Sterling's duties and obligations are capped at that number; it is not liable for any amounts in excess of the entirety of the account proceeds.

The Bricklins admit that they are "no longer challenging resolution of the contract claim" and "are conceding ... that the first CD issued is the one that Sterling should honor." *Appellant's Response in Support of Motion to Amend Notice of Appeal*, p. 8; p. 12. Now that the trial court's judgment as to the Murphy/Sterling contract is final, the Bricklins' additional causes of action are barred by res judicata.

Res judicata precludes a party from relitigating claims and issues that were litigated, and resolved in a prior action. *Pederson v. Potter*, 103 Wash.App. 62, 69 (2000). Res judicata applies "where a prior final

judgment is identical to the challenged action in '(1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.'" *Lynn v. Dept. of Labor & Indus.*, 130 Wash.App. 829, 839 (2005), quoting *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763 (1995).

Here, the trial court's judgment regarding the breach of contract is a "final judgment" to which res judicata applies. The Bricklins' negligence and CPA claims are inextricably tied to the contract issue. By asking this Court to confirm the trial court's adjudication of the contract claim, the Bricklins necessarily conceded that there never was a superseding contract of deposit. That disposes of their claims that Sterling lost or mishandled the alleged new agreement.

The now-final judgment disposes of the Bricklins' appeal regarding their remaining claims under the CPA or negligence theories. Once the Bricklins dismissed their appeal as to the Murphy Claimants on the breach of contract, it is res judicata that there was an enforceable contract in existence (i.e., which had not been revoked or superseded) as appeared in Sterling's files. There was no superseding contract that Sterling could have mishandled, or that should be applied to the Bricklins.

**B. The Bricklins' Negligence Claims Fail as a Matter of Law**

*1. Elements of Negligence*

The Bricklins failed to prove each of the requisite elements of a negligence claim: 1) the existence of a legal duty, 2) the breach of that duty, 3) an injury resulting from the breach, and 4) proximate cause. *Little v. Countrywood Homes, Inc.*, 132 Wash.App. 777, 780 (2006). A court "never presume[s] negligence;" instead, "a party alleging negligence bears the burden of proving it by substantial evidence." *Johnson v. Aluminum Precision Products, Inc.*, 135 Wash.App. 204, 208 (2006). Substantial evidence is "of a character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Id.* at 209, quoting *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 818 (1987). The record is void of substantial evidence to support the Bricklins' negligence claim.

The Bricklins do not argue that the unsigned customer receipt of a requested change in beneficiaries is, in and of itself, a "contract" which must be honored by Sterling. They cannot, as Washington law does not permit this result. Gerald Murphy maintained a deposit account with Sterling and, while he was alive, Mr. Murphy was the only person with a present right to payment of account funds or the ability to change the contract of deposit's ultimate distribution. Pursuant to RCW 30.22.060, a

contract of deposit "shall be in writing and signed by all individuals who have a current right to payment of funds from an account." That is, the contract of deposit must be signed by Mr. Murphy in order to be valid.

2. *The Bricklins Cannot Establish Breach of a Duty*

Sterling has a legal duty to administer its accounts according to the terms of its contract of deposit with its depositors. RCW 30.22.120. A contract of deposit must be signed by the deposit owner. RCW 30.22.060. The operative contract of deposit is the Certificate of Deposit Copy and Deposit Signature Card, signed by Sterling and the depositor, which "contains the terms for [the depositor's] time deposit." CP 67. The parties are free to alter their agreement by signed amended agreement; Mr. Murphy did so twice in this case. CP 65, 66. Sterling has no right or duty to make changes to an account contract based upon an oral request of a person purporting to act for a depositor without written direction from the depositor, received by Sterling. If the contrary were true (Sterling had a duty to make changes based upon oral requests or the purported mailing of undelivered documents), no customer account could be adequately protected from fraud.

The undisputed evidence is that Mr. Murphy, or some trusted person acting for him, called and requested a revision to his contract of deposit. The undisputed evidence is that the bank generated two

documents, a new draft contract of deposit for Mr. Murphy to sign, and a "customer copy" reflecting the changes to be made which were then mailed to Mr. Murphy's address. The undisputed evidence is that Sterling never received a signed copy from Mr. Murphy executing the proposed new contract of deposit.

The Bricklins argue that Sterling breached a duty in one of two ways. They say that Sterling either had a duty not to send Mr. Murphy a courtesy copy summarizing the agreement-to-be or it had a duty not to lose a signed agreement which it received. The second point is moot. There was no evidence, none, that Sterling ever received a signed agreement, and the Bricklins now accede to the Superior Court's judgment that none ever existed.

As to the first point, the Bricklins offer no evidence or reasoned argument why Sterling's delivery of a customer copy with the to-be-signed new agreement breached any duty. It didn't; it was intended as a convenience to the customer CP 149 (*Allert*, Dep., 14:6-15) and breached no duty.

Here, the Bricklins do not challenge the validity and enforceability of the only fully executed contract of deposit. In fact, Sterling has paid the Bricklins \$70,200 pursuant to the contract of deposit all parties agree is the operative and governing document in this case.

Despite their receipt of payment, the Bricklins contend that Sterling owes them *even more* money. The trial court properly rejected this argument.

3. *The Bricklins Cannot Show Causation*

The Bricklins failed to show that Sterling's actions were the proximate cause of that injury. Proximate cause requires both cause in fact and legal causation. *Countrywood Homes*, 132 Wash.App. at 780. Cause in fact requires that the Bricklins "establish that the harm [they] suffered would not have occurred but for an act or omission of [Sterling]." *Id.* Legal causation is a conclusion that the cause in fact of the injury should be deemed the legal cause of that harm. *Id.*

The record does not support the Bricklins' contention that Sterling's acts or omissions were the "cause in fact" of their alleged injury. Giving full credit to Anne Bricklin's testimony, the record only establishes that Mrs. Bricklin placed a signature card signed by Mr. Murphy into the mail.<sup>1</sup> CP 189-190. Critically, the record does not establish that Sterling ever received the signature card, nor that Sterling received the signature card and mishandled or misplaced it, nor that

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<sup>1</sup> The Bricklin Defendants are not entitled to the "mailbox rule's" rebuttable presumption that the signature card, if it was placed in the mail, was received by Sterling in the usual time. To invoke the presumption of receipt, the party asserting it must present "proof of mailing, such as an independent proof of postmark, a dated receipt, or evidence of mailing apart from a party's own self-serving testimony." *Olson v. The Bon, Inc.*, 144 Wash.App. 627, 634-635 (2008). Mrs. Bricklin affirmatively testified that she has no independent proof of mailing. CP 189.

Sterling received the signature card and disregarded or ignored it. There is simply no evidence that Sterling ever received a signed signature card from Mr. Murphy to make any changes to the Account, and therefore no evidence that Sterling was negligent in its handling of Mr. Murphy's account. The Superior Court's ruling on that point is final, and *res judicata*.

The Bricklins argue that "either way, it is Sterling's carelessness that resulted in the Bricklins' recovery of 60 percent, not 100 percent, of the certificate of deposit proceeds. A careful bank would not sign and deliver a certificate of deposit before obtaining a signature card nor would a careful bank lost track of a signature card in its records. One way or the other, Sterling's carelessness lost the Bricklin's 40 percent of the proceeds." *Appellants' Brief*, p. 3. There was no evidence, none, that Sterling received and lost a new Deposit Agreement that had been signed by the late Mr. Murphy. The Superior Court's judgment that there was none is now final and *res judicata* of that contention.

Nowhere in the Bricklins' brief do they explain their alternative contention, that Sterling's having mailed a customer copy caused any loss. There is no evidence that it did. The Bricklins flirt with the idea that "it appeared to Mr. Murphy that he had a valid certificate naming only the Bricklin children as beneficiaries." *Appellants' Brief*, p. 32.

But there is absolutely no evidence of that. What evidence there is, is to the contrary.

For example, Anne Bricklin's asserted actions on behalf of her children, contemporaneous with the purported execution of the revised deposit contract by Mr. Murphy, reveal that the Bricklins and Mr. Murphy knew that the signature card had to be returned to Sterling in order to effectuate the requested change.

Mrs. Bricklin says she went to Mr. Murphy's home to have him sign an updated deposit contract. She says she then put that revised deposit contract in the mail to be returned to Sterling. That evidence is wholly antithetical to any claim that the mailing of the "customer copy" confused Mr. Murphy or in any other sense caused the Bricklins to lose 40 percent to the Murphys. What caused that "loss" was the failure of proof of the existence of a new contract, or that it ever reached Sterling. CP 311. Sterling doesn't have an interest in dictating who gets the proceeds; its sole interest is to heed its statutory duty to pay according to the contract of deposit on record. When a dispute arose, it tendered that dispute to a court, which concluded that there was only one contract that was ever in Sterling's possession. The Bricklins let that ruling go final and insisted that Sterling pay them and the Murphys according to the

judgment. They cannot now claim that they "lost" funds they insisted be paid to the Murphys because of anything Sterling did.

**C. Where Sterling Had "Actual Knowledge" of a Dispute Regarding Proper Account Beneficiaries, Sterling Was Allowed to, *Without Liability*, Interplead the Account Proceeds into the Court Registry and Receive Proper Direction from the Court as to Payment**

Where, as here, a financial institution has "actual knowledge" of the existence of a dispute between beneficiaries, RCW 30.22.210(1) provides that the institution may, "without liability," notify all beneficiaries in writing of the dispute, and may, "also without liability," refuse to distribute any funds ... until such time as either (a) all such depositors and/or beneficiaries have consented, in writing, to the requested payment; or (b) the payment is authorized or directed by a court of proper jurisdiction." RCW 30.22.210(1) (emphasis added). In short, where Sterling was aware of an actual dispute as to account proceeds, the proper course dictated by law and followed by Sterling here was to 1) notify the beneficiaries of the dispute and 2) take no further action until such time as the beneficiaries could agree (in writing) upon a distribution of funds or a court ordered a particular distribution.

Sterling had actual knowledge of a dispute regarding the Account proceeds in this case. Sterling's response to the dispute was in accord with the statutory law, which required Sterling to notify the beneficiaries

in writing of the dispute and wait for either an agreement between the parties or a court's determination of the proper payment. By dismissing this case with prejudice upon payment of the sums in the Account to the proper beneficiaries, the trial court issued judgment in Sterling's favor *without liability* for any additional damages. The Superior Court ruled that "Sterling is entitled to summary judgment as a matter of law as to its authority to distribute, without liability, the proceeds . . . according to the terms of this Order. . ." CP 314. That judgment is final.

**D. The Bricklins' Negligence and CPA Claims Are Barred by the Independent Duty Doctrine**

The Bricklins claim that Sterling owed an "independent duty" to them separate and apart from Sterling's duty to pay according to the terms of the contract of deposit maintained by Mr. Murphy. The facts and law support Sterling's conclusion that it fulfilled its duties under the contract of deposit.

The Bricklins bear the burden of proof to establish a tort claim, and they cannot carry that burden. "When no independent tort duty exists, tort does not provide a remedy." *Eastwood v. Horse Harbor Foundation, Inc.*, 241 P.3d 1256, 1262 (2010). An injury is remediable in tort only if "the injury is traceable also to a breach of a tort law duty of care arising independently of the contract." *Eastwood*, 241 P.3d at 1264. Here, it is apparent that the only relationship between the parties is the contract of

deposit. The Bricklins have admitted that "essentially, this is a contract case." CP 123, ll. 19-20. Sterling's duty was to maintain the deposit account for Mr. Murphy according to the terms of the contract of deposit. The Bricklins cannot graft additional duties on to the contract that do not otherwise exist.

The present case is readily distinguishable from *Eastwood*, where, separate and apart from the lease ("contractual") obligations, the Defendants owed an "independent duty" to avoid waste. That duty existed at common law and in statutory form. *Id.* at 1268-69, *quoting* RCW 64.12.020 (the statutory duty to avoid waste). *Eastwood* is a clear case where an independent duty existed; Sterling's is not. The independent duty doctrine does not eviscerate the economic loss rule where the fundamental claims sound in contract, and no independent duty exists.

**E. The Bricklins' Claim for a Violation of Washington's Consumer Protection Act Fails as a Matter of Law**

The Bricklin Defendants' claim that Sterling violated Washington's CPA fails as a matter of law. A party asserting a claim for violation of the CPA must establish: (1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, (4) and causes injury to the plaintiff in his or her business or property, and (5) that the injury is causally linked to the unfair or

deceptive act. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602 (2009) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986)). "A plaintiff alleging injury under the CPA must establish all five elements." *Id.* The trial court properly granted Sterling summary judgment on the CPA claim.

*1. Sterling's Actions Were Not Unfair or Deceptive*

The Bricklins assert that Sterling's management of Mr. Murphy's Account was "unfair and deceptive" in that they imply Mr. Murphy may have believed that he had a contract of deposit with three named beneficiaries. *Appellants' Brief*, p. 31-32.<sup>2</sup> Outside of their conjecture about how Sterling's account process *ought* to run, the Bricklins cannot point to any evidence which supports any unfair or deceptive act that Sterling engaged in with regards to Mr. Murphy's account. Instead, the testimony from Sterling's witnesses is that every time a contract of deposit change is requested, Sterling generates two documents, and no changes can be made to the contract of deposit until the signed signature

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<sup>2</sup> A court may only consider admissible evidence in support of a summary judgment motion. *Lynn v. Labor Ready, Inc.*, 136 Wash.App. at 306 (2006); CR 56(e). The Bricklins argue that "[i]t appeared to Mr. Murphy that he had a valid CD naming the three Bricklin children as beneficiaries." *Appellant's Brief*, p. 32. The Bricklins are speculating as to what Mr. Murphy, now deceased, subjectively believed about his contract of deposit in August, 2008. That speculation is admissible. ER 602.

card is returned. CP 138 (*Bolden Dep.*, 16:16-25); CP 259 (*Allert Dep.*, p. 16:1-7; 14-25).

Acts performed pursuant to the terms disclosed and agreed upon in a contract do not constitute an "unfair or deceptive act" under the CPA. *Seattle First v. West Coast Rubber*, 41 Wash.App. 604, 605, 609 (1985); *Robinson v. Avis Rental Car, Sys.*, 106 Wn. App. 104, 106 – 109, 114, 118 – 119 (2001). Here, the terms of the contract of deposit were fully disclosed to Mr. Murphy, and he ably followed the "account change" procedures two times prior to the contested transaction. There is nothing unfair or deceptive about a practice that was 1) disclosed to Mr. Murphy, and 2) that he was able to follow when he wished to change beneficiaries, and 3) that Mrs. Bricklin claimed he did follow. Absent proof of an unfair and deceptive act, the Bricklins cannot satisfy the first element of a CPA claim.

2. *Sterling's Private Interpleader Action Pursuant to the Terms of a Private Contract and Governing Washington Law Does Not Implicate the Public Interest*

Sterling's private motion for interpleader, pursuant to the terms of the contract of deposit with Mr. Murphy and governing Washington law, did not implicate the public interest. Moreover, Sterling's maintenance of a private deposit account for a private client does not impact the public interest. "A breach of a private contract affecting no one but the parties

to the contract is not an act or practice affecting a public interest." *Hangman*, 105 Wn.2d at 790. Here, the fundamental dispute was between the Bricklins and Murphys as to who was entitled to distribution of funds held in a contract of deposit maintained by Sterling. This is not a matter of public interest, but instead a private dispute.

3. *The Bricklins Were Not Injured in Their Business or Property*

The Bricklins cannot demonstrate an injury to their business or property as required for a successful CPA claim. "To state a valid CPA claim, a plaintiff must prove that the injury, separate from any monetary loss, is to business or property." *Ambach v. French*, 167 Wn.2d 167, 174, fn. 3. A "business or property" injury is one in which the party suffers "loss of professional or business reputation, loss of goodwill, or inability to tend to a business establishment." *Ambach* at 173, citing *Nordstrom Inc., v. Tampourlos*, 107 Wn.2d 735, 739-41 (1987).

Additionally, Washington courts interpret the words "business or property" in a "restrictive" manner. See *Washington State Phys. Ins. Exchange & Ass'n v. Fisons*, 122 Wn.2d 299, 318 (1993) ("The phrase 'business or property' also retains restrictive significance. It would, for example, exclude personal injuries suffered"); *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wash.App. 366, 370 (1989), quoting *Hamman v.*

*United States*, 267 F.Supp. 420, 432 (D. Mont. 1967) ("The term 'business or property' is used in the ordinary sense and denotes a commercial venture or enterprise.").

The Bricklins cite the same three cases to this Court as they did to the trial court to support their proposition that "many cases" have upheld CPA damages for "non-business property damages." *Appellants' Brief*, pp. 35-36. As was the case the first time, none of those cases support their position. *See Mayer v. Sto Industries, Inc.*, 123 Wash.App. 443 (2004) (damages awarded to homeowner who suffered actual property damage to his home as a result of defective siding); *McRae v. Bolstad*, 32 Wash.App. 173 (1982) (damages awarded to consumers for physical property damage incurred by standing water and sewage damage to the home they purchased); *Lidstrand v. Silver Crest Industries*, 28 Wash.App. 359 (1981) (damages awarded for costs incurred by a leaky roof in a mobile home). In each of the cited cases, there was a distinct *property* damage that is wholly lacking here.

It is beyond dispute that, as minor children, the Bricklins had no "business" interest that could have been harmed by Sterling's alleged acts or omissions. The Bricklin Defendants must establish that they were harmed in their property. They cannot do so.

4. *The Alleged Injury is not Causally Linked to the Alleged Unfair or Deceptive Act*

The Bricklins cannot meet the causation element required for a CPA claim. Claimants under the CPA must prove "a causal link between the unfair or deceptive act complained of and the injury suffered." *Hangman* at 785. Here, with no eligible injury under the CPA, there can be no causation.

The fact is that the Bricklins have suffered no harm whatsoever as a result of Sterling's acts. The Bricklins' true dispute was against the Murphys as to who was entitled to proceeds from Mr. Murphy's account. That dispute has now been resolved by final judgment, and the Account proceeds paid to all beneficiaries. That is, the trial court issued an award pursuant to the contract of deposit interpleader statute, RCW 30.22.210, and Sterling was entitled to pay the proceeds "without liability" to any of the disputing beneficiaries. The Bricklins received \$70,200 from the only contract of deposit of record in this case; they are incapable of suffering harm which could be causally linked to any unfair or deceptive act of Sterling. For the same reasons set out in regard to negligence, *supra*, the Bricklins fail to show that the customer receipt caused them any loss.

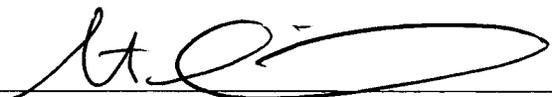
Because the record does not support the Bricklins' CPA claim, this Court should affirm the trial court's summary judgment dismissal of that cause of action.

### III. CONCLUSION

The Bricklins ask this Court to find that their claims for negligence and violations of the CPA survive the dismissal of their breach of contract claim. They do not. By admitting the validity and enforceability of the only fully executed contract of deposit in Sterling's files, the Bricklins necessarily concede that no superseding contract of deposit revoked Mr. Murphy's express direction in the original contract of deposit. It is legally impossible for Sterling to have been negligent or unfair in its treatment of the only existing contract of deposit.

Respectfully submitted this 18<sup>th</sup> day of July, 2011.

WITHERSPOON • KELLEY

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 18<sup>th</sup> day of July, 2011, the foregoing was delivered to the following persons in the manner indicated:

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