

**FILED**

OCT 31 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**IN THE WASHINGTON STATE COURT OF APPEALS**

**DIVISION III**

**Court of Appeals Case No. 298469**

**On Appeal from Spokane County Superior Court**

**Case No. 10200401-1**

**Hon. Gregory D. Sypolt**

---

**ESTATE OF VANCE BROWNFIELD,  
through its personal representative, LESLIE SCHNEITER,**

**Appellant,**

**v.**

**BANK OF AMERICA, N.A., a national banking association;  
KAREN RHODES, an individual, and the marital community  
of KAREN RHODES and JOHN DOE RHODES,**

**Respondents.**

---

**APPELLANT'S REPLY BRIEF**

---

Stephen D. Phillabaum, WSBA #11268  
Karl W. Kime, WSBA #41668  
PHILLABAUM LEDLIN MATTHEWS SHELDON & KIME, PLLC  
421 West Riverside, Suite 900  
Spokane, Washington 99201  
(509) 838-6055 (tel)  
(509) 625-1909 (fax)  
ATTORNEYS FOR APPELLANT  
Estate of Vance Brownfield

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

I. INTRODUCTION.....1

II. ARGUMENT.....3

III. CONCLUSION.....13

## TABLE OF AUTHORITIES

### Case Law

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).....	8
<i>Humleker v. Gallagher Bassett Services, Inc.</i> , 159 Wn. App. 667, 246 P.3d 249 (2011).....	4, 9-11
<i>Torgerson v. State Farm Mut. Auto. Ins. Co.</i> , 91 Wn. App. 952, 957 P.2d 1283 (1998).....	4, 9-11
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn. 2d 216, 770 P.2d 182 (1989).....	8

### Statutes

RCW 26.04.090 .....	11
RCW 30.22.060 .....	1, 2, 7, 11, 13
RCW 48.22.030 .....	9, 10

### Court Rule

CR 56 .....	5
CR 56(c).....	8
ER1004(a).....	4

### Treatises

KARL B. TEGLUND AND DOUGLAS J. ENDE, <i>Washington Handbook on Civil Procedure</i> (2008-09 ed.) §69.15 .....	8
---	---

Appellant Estate of Brownfield (“Estate” or “Appellant”) hereby replies to the brief of Respondents Bank of America, N.A. (“Bank of America”) and Karen Rhodes (“Rhodes”) (collectively, “Respondents”).

## **I. INTRODUCTION.**

Bank accounts in Washington, including those with a POD feature, require a signed contract of deposit. This is the rule established in RCW 30.22.060, and it is recognized by Respondents and reflected in the trial court’s ruling. The only issue in dispute is *when* such documentation is required and *what evidence* may be considered if it is absent. There are two alternatives.

- ***The statute requires a signed contract of deposit at all times during the life of an account.***

Appellant contends that this is the plain meaning of the statute and that it advances the statute’s implicit policy rationale.

To briefly reiterate:

- This is what the statute says. The statute provides no exceptions. It contains no language implying that the signed contract need only exist fleetingly — there for one significant moment but of no importance later. It contains no language stating that some other piece of information, such

as a bank's computer records, is an adequate substitute for the required documentation.

- The statute advances the long-established public policy that formalities, even if (or especially because) they are minimal, such as a signed contract of deposit, must be followed to provide a uniform means of verifying the identity and intent of the depositor. Requiring the signature of the depositor is a rational way of fulfilling this policy goal. This is particularly important in the case of a POD account, which is a "poor man's will." A decedent's estate and all potential claimants to an estate have an interest in a signed contract of deposit. The bank is statutorily obligated to serve those interests by maintaining a signature card.

If this is the rule, Appellant wins.

- *The statute requires only proof that a signed contract of deposit existed at some point.*

Respondents argue, and the trial court held, that this is the rule.

Both of these two positions agree on one thing: The existence of a signed contract of deposit is necessary under RCW 30.22.060. The former relies on its present existence, the latter on proof that it once existed.

For reasons set forth in the Opening Brief and in this Reply, Appellant's position should be the rule endorsed by this Court.

## II. ARGUMENT.

To properly analyze the issue on appeal, it is important to accurately describe the logic underlying the trial court's ruling. The logic runs as follows. From extrinsic evidence of Brownfield's intent to benefit Rhodes, together with the Bank's practice and computer records, the trial court inferred that Brownfield actually signed a contract of deposit on September 25, 2008.

Bank of America is explicit about this logic. On pages 21 through 22 of its opposition brief, Bank of America cites pieces of evidence that it claims show Brownfield's intent to change the Accounts.<sup>1</sup> The idea here is that because Brownfield intended to benefit Rhodes, he must have signed the contract of deposit at Bank of America.

Yet, the court's granting of Respondents' motions for summary judgment based on this inference is faulty for three reasons.

---

<sup>1</sup>For purposes of the motions for summary judgment, Appellant does not contest that Brownfield intended to name Rhodes as the POD beneficiary on the Accounts. Thus the bulk of Bank of America's briefing is beside the point raised in this appeal.

First, consideration of custom and practice evidence to establish the existence of a statutorily mandated documents contradicts the Division III decision of *Torgerson v. State Farm Mut. Auto. Ins. Co.*, 91 Wn. App. 952, 957 P.2d 1283 (1998). *Torgerson*, along with its counterpart cited by the trial court, *Humleker v. Gallagher Bassett Services, Inc.*, 159 Wn. App. 667, 246 P.3d 249 (2011), are discussed in greater detail below. To summarize those holdings, no extrinsic evidence based on practice, habit or custom may be admitted to show the existence of a statutory document. Its existence is itself operative; thus its nonexistence is itself fatal.

Second, the trial court's ruling is question-begging. Bank of America laid the groundwork for this ruling based on a fallacious application of ER 1004(a). The Bank argued that extrinsic evidence of the existence of the contract of deposit is admissible because it was "lost." The document "must" have been lost, according to the Bank, because extrinsic evidence suggests it should have existed. But this assumes the very matter at issue — namely, whether it ever existed. Moreover, ER 1004(a) only concerns proof of the "contents" of a writing, not its existence. Evidence Rule 1004(a) does not support the use of extrinsic evidence to establish whether a document was lost; rather, the Rule

presupposes that a document is lost and operates only to prove what it contained. Thus there is something deeply amiss about Bank of America's argument. It assumes what must be proven.

Third, the trial court ignored the only direct evidence of what happened on September 25, 2008, which violates the standards applicable to summary judgment under CR 56. The evidence is clear and undisputed: Karen Rhodes testified at deposition that Brownfield signed nothing that day at the bank. Rhodes does not and cannot refute her own sworn testimony. Nor does Bank of America refute the credibility of this testimony. Nowhere does Bank of America suggest that Rhodes did not observe what she claims to have observed, or that she lacked the capacity to comprehend it then or to testify accurately about it now. *This is key: Without saying so, Bank of America is attempting to argue against Rhodes whose credibility it otherwise does not question, and by so doing, the Bank admits that no contract of deposit was ever signed but that other factors should outweigh this fact.* Try as it might, Bank of America cannot escape this conclusion. It accepts the credibility of Rhodes, who testified that nothing was signed. Tacitly, however, Bank of America urges the court to overlook this testimony and conclude that, despite the fact nothing was

signed, the “mountain of evidence” (the trial court’s words) of intent can function to supply the statutory requirement of a signed contract that is missing. Bank of America is not arguing that intent and procedure show that the contract was signed because that would require contradicting Rhodes, which it does not do. In fact, Rhodes has joined in the Bank’s briefing. Rather, the Bank parades before the court an array of facts: Brownfield drove with Rhodes to change the Accounts on September 25, 2008; he went to Numerica Credit Union immediately before; he did not object to the four months of bank statements that included Rhodes; the Bank would not have changed its computer records but for a signed contract, etc. The Bank assumes that the parade speaks so loudly that the court will not hear an important whimper from the sole eyewitness: Nothing was signed. There is a simple reason Bank of America cannot find the contract. It was never signed.

Appellant wishes to be clear about the implications of these considerations. Bank of America, as noted in the Introduction, concedes that the statute requires a signed contract of deposit and that mere intent to create a POD account is not in itself sufficient to create one. Yet, Bank of America, *sotto voce*, takes a position contrary to the only witness capable

of describing what actually happened at the teller window. Ignore that fact, Bank of America essentially insists in its argument, and instead take a look at what Brownfield intended to do. But this is of no moment. A parallel example illustrates the point. Evidence that a driver is generally careful, makes it a habit and personal rule to stop at red lights and proceed with caution on yellow, and has not received a ticket in 20 years does not matter in the face of uncontradicted eyewitness testimony or intersection traffic photograph showing that the driver, on the occasion in question, ran the red light. Respondents' argument is defeated by logical implication from a rule Respondents accept — namely, that RCW 30.22.060 requires the existence of a signed contract at least at some point in time — together with the undisputed testimony of Rhodes that nothing was signed on September 25, 2008.

Even if this logic were not secure, for procedural reasons Respondents' argument fails. The evidence adduced by Respondents and relied on by the trial court in granting summary judgment concerns what *should have happened*, not what did happen. This is not proper on summary judgment in the face of direct evidence of what did happen.

Summary judgment is appropriate if there is no genuine issue of material fact. CR 56(c). However, on summary judgment “the focus is not so much on whether the nonmoving party identifies a factual *dispute* as it is on whether the nonmoving party has presented sufficient prima facie evidence to support a verdict in favor of the nonmoving party.” KARL B. TEGLUND AND DOUGLAS J. ENDE, *Washington Handbook on Civil Procedure* (2008-09 ed.) §69.15 (italics in original). This approach, adopted by the United States Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), has been favorably cited by the Washington Supreme Court. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989). Summary judgment should be denied only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 251. Based on Rhodes’s testimony, which neither Respondent questions, is that Brownfield signed nothing. No amount of wishful thinking — which accurately characterizes all the intent, policy and procedure evidence offered by Respondents — can change that, and no reasonable jury would conclude that it could.

This issue dovetails with the holding of *Torgerson*, which provides that extrinsic evidence of a statutorily required writing may not be considered to establish its existence. The trial court here improperly considered a wide range of evidence of intent on the part of Brownfield. *Torgerson* establishes a contrary principle. The trial court cited *Humleker* and asserted that it establishes a different rule. It does not. In fact *Humleker* and *Torgerson* are consistent. Both cases focus on evidence of whether there had been a written rejection of UIM coverage under RCW 48.22.030. Both hold that no substitute for the statutorily mandated document is sufficient, but they do so on slightly different facts — facts that are highly significant to applying the proper legal rule in this case.

In *Torgerson* there was no written, signed UIM rejection, contrary to statute. Moreover, there was no direct proof that such a writing ever existed physically. The insurer relied instead on “habit and custom evidence” to argue that there “must” have been one. *Id.*, 91 Wn. App. at 955. The *Torgerson* court rejected the use of such extrinsic evidence.

The public policy underlying the requirement of a written rejection militates against the admission of evidence of habit or routine. . . . So proving intent of parties at the time

of contracting does not delete the legislative intent requiring a written rejection.

*Id.* at 963.

In *Humleker*, by contrast, no one disputed the existence of a written summary of the coverages offered for the Franz Bakery truck fleet. The summary included explicit language rejecting UIM coverage. The Franz insurance representative had signed this document. The *sole* question on appeal was whether this signed, written summary constituted a written rejection under RCW 48.22.030. *Humleker* does not in any manner concern a situation in which the document at issue did not exist; rather, the issue was only whether the writing whose existence was acknowledged was statutorily satisfactory. In holding that the written, signed summary met the statutory requirements, the *Humleker* court focused on the functional identity of the summary form and the prescribed statutory form.

“The summary form stated that the named insured’s signature on the summary form ‘indicates that you have read and understand each state form and that the selections or rejections marked on the state forms have been accepted by you without signing and dating each form.’ CP at 289.

The summary form also stated, “This form provides a summary of the selected Limits by State.”

*Humleker*, 159 Wn. App. at 673.

*Humleker* itself acknowledges that the rule was the same in *Torgerson*. “Further, in *Torgerson* . . . Division Three applied the same rule to different facts.” That is, the existence of the subject document was disputed in *Torgerson* but not in *Humleker*. “Here [in *Humleker*], because there is a written rejection, we may consider extrinsic evidence of the parties’ intent when the rejection was signed.” *Id.* at 684. Respondents glide over this essential distinction in setting for the holding of *Humleker*.

Bank of America offers up another strained argument based on a marriage license under RCW 26.04.090. Marriage license cases are inapposite because marriage exists apart from a mere writing. The establishment of marriage is much more informal than what is required for a will or a signed contract of deposit under RCW 30.22.060. We file taxes as married couples and claim the exemption without filing our marriage license along with it. The IRS does not object. We are sued and are subject to actions enforcing judgments as married people and no one asks for our marriage licenses. We sue for enforcement of community

property rights if our deceased spouse purports to dispose of our portion of the community property. Nobody asks for our marriage licenses. A spouse goes to the hospital to render an end-of-life determination regarding his or her brain-dead spouse on a ventilator. The hospital unplugs the machine without having required production of the marriage license. The hospital may look to a document signed by the soon-to-be-deceased, but whether the spouse is a spouse need not be proven by an original marriage certificate, which hardly anybody keeps anyway.

The obvious absurdity of Bank of America's marriage license analogy merely underscores its difference from a POD bank account and the singular importance of formalities with respect to the latter. Marriage is a relationship between two people that is sufficiently established for legal purposes by the fact of the relationship. A marriage certificate is not the *sine qua non* of marriage. It is merely documentary evidence of a marriage that *exists independently of the certificate*. The vows are significant; the legal authority of the judge or clergyman is significant. But the certificate is not. Signing the marriage certificate sometimes happens during late stages of the reception, often when the newlyweds are in the advanced throes of inebriation which, in other contractual contexts,

might be grounds for invalidating the contract based on lack of knowing consent. A champagne-induced wobble in the spouses' signatures does not invalidate the marriage, although it might render the certificate unsuitable for framing..

By contrast, a POD account, by Washington statute, *exists only by virtue of the signed contract of deposit.*

The other points in Respondents' opposition are sufficiently covered in Appellant's Opening Brief.

Finally, even if Appellant's argument here is rejected, at the very least, Rhodes's testimony precludes summary judgment in favor of Respondents. If the court does not accept that the only reasonable conclusion based on the proffered evidence is that there was no signed contract of deposit, there is at least a fact issue as to whether there was a signed contract of deposit, which even Respondents agree is necessary under RCW 30.22.060.

### **III. CONCLUSION.**

On the de novo standards applicable to this appeal, the court should REVERSE the trial court's ruling and GRANT Appellant's motion for summary judgment and DENY Respondents' motions for summary

judgment. In the alternative, the court should REVERSE the trial court's grant of summary judgment for Respondents and REMAND for further proceedings.

Dated: October 31, 2011

PHILLABAUM LEDLIN MATTHEWS SHELDON  
& KIME, PLLC

By: 

Karl W. Kime, WSBA #41668  
ATTORNEYS FOR APPELLANT  
Estate of Vance Brownfield

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury of the laws of the state of Washington that on this date true and correct copies of the document to which this declaration is attached were served by the method indicated below, and addressed to the following:

Michael A. Roozkrans	<input type="checkbox"/>	U.S. Mail
Michael A. Roozkrans, PLLC	<input checked="" type="checkbox"/>	Hand Delivered
422 W. Riverside, Suite 1330	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201	<input checked="" type="checkbox"/>	Telecopy (Fax): 509-624-6202
Thomas F. Webster	<input checked="" type="checkbox"/>	U.S. Mail
Webster Law Office, P.L.L.C.	<input type="checkbox"/>	Hand Delivered
116 N. Main St.	<input type="checkbox"/>	Overnight Mail
Colville, WA 99114	<input checked="" type="checkbox"/>	Telecopy (Fax): 509-685-2267

DATED: October 31, 2011

