

FILED

SEP 30 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 298469

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

**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 JOE DOE RHODES,**

Respondents.

BRIEF OF RESPONDENT, BANK OF AMERICA, N.A.

**MICHAEL A. ROOZEKRANS, WSBA# 25194
Attorney for Respondent, Bank of America, N.A.**

Michael A. Roozekrans, PLLC
US Bank Building, Suite 1330
422 West Riverside Avenue
Spokane, WA 99201
(509) 624-6200

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**MICHAEL A. ROOZEKRANS, WSBA# 25194
Attorney for Respondent, Bank of America, N.A.**

Michael A. Roozekrans, PLLC
US Bank Building, Suite 1330
422 West Riverside Avenue
Spokane, WA 99201
(509) 624-6200

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I. INTRODUCTION

Respondent/Defendant, Bank of America, N.A. submits the Brief of Respondent in answer to Appellant/Plaintiff, The Estate of Vance Brownfield's Opening Brief.

This case involves lost signature cards with respect to two accounts belonging to the decedent, Vance Brownfield. The trial court properly considered secondary evidence, in particular the electronic computer records contained on Bank of America's computer system to prove the contents of the lost signature cards. Bank of America's electronic computer records establish that Co-Respondent/Co-Defendant, Karen Rhodes' name was added as a beneficiary to Vance Brownfield's Bank of America accounts ending in 8429 and 1914 on September 25, 2008, the same day he was at the Bank of America North Spokane branch. Given that immediately before Mr. Brownfield went to Bank of America on September 25, 2008, he had gone to Numerica Credit Union and signed a signature card designating Karen Rhodes as a payable on death beneficiary to one of his Numerica accounts, the trial court appropriately determined that a writing existed from which Mr. Brownfield's intent is relevant and must be determined. After the change was made to the computer system, Bank of America sent statements to Vance Brownfield for accounts ending in 8429 and 1914 reflecting and listing Karen Rhodes as an owner.

Mr. Brownfield did not report that there was an error listing Karen Rhodes as an account owner on the statements to Bank of America as he was contractually obligated to do. Accordingly, the trial court appropriately ruled that the Estate's claims are barred based upon the controlling provision of the written Deposit Agreement. Finally, in the alternative, Bank of America submits that the court has the power to reform the contract to correct a mutual mistake.

II. RESPONDENT'S STATEMENT OF THE CASE.

Pursuant to RAP 10.3(b), Respondent Bank of America is not satisfied with the Estate of Vance Brownfield's Statement of the Case; therefore sets forth the following statement of facts and procedural history.

As a preliminary matter, the Estate of Vance Brownfield chose to submit the deposition testimony of Karen Rhodes regarding the transaction between her, the decedent Vance Brownfield and Bank of America that took place on September 25, 2008 in connection with designating Karen Rhodes as the payable on death beneficiary to two of Mr. Brownfield's accounts at Bank of America in the summary judgment proceedings. Thus, by voluntarily submitting the testimony the Estate of Vance Brownfield (hereinafter referred to as "the Estate") waived the Deadman's Statute, RCW 5.60.030. *Estate of Lennon*, 108 Wn. App. 167, 174-175, 29 P.3d 1258 (2001); *Botka v. Estate of Hoerr*, 105 Wn. App.

974, 980, 21 P.3d 723 (2001). Based upon the summary judgment proceedings it is Respondent's understanding that the Estate concedes that it waived the Deadman's Statute.

Defendant, Karen Rhodes lives in Chewelah, Washington. CP 417. In September 2008 she received a call from her uncle, the decedent, Vance Brownfield requesting her to come to Spokane to do some banking. CP 417. Prior to receiving the phone call from her uncle, Karen Rhodes and her long time friend, Debi Pohto, who also lives in Chewelah, had previously planned a shopping trip to Spokane, scheduled for September 25, 2008. CP 309. Karen Rhodes inquired of her friend, Debi Photo if she minded if she went with her uncle to the bank during their planned shopping trip to Spokane. CP 309-310. On September 25, 2008, Karen Rhodes and her friend Debi Pohto drove from Chewelah to Spokane. CP 310. Debi Pohto and Karen Rhodes met Karen's uncle, Vance Brownfield in the parking lot of Fred Meyer on Francis Avenue in Spokane. CP 310. Debi Pohto had never met Vance Brownfield so Karen Rhodes introduced her to him. CP 310. Vance Brownfield got into the back seat of Debi Pohto's car and he gave her instructions how to drive them to the Lyon's Numerica Credit Union Branch. CP 310. Karen Rhodes and Vance Brownfield went into the Lyon's Numerica Credit Union Branch, Debi Pohto waited in the car. CP 310. Upon entering the Numerica Credit

Union, on September 25, 2008 Vance Brownfield and Karen Rhodes met with the Numerica Credit Union member service representative, William Carson. CP 286. Vance Brownfield indicated that he wanted to set up an account where the funds would pass to Karen Rhodes after his death. CP 286. The Numerica Credit Union member services representative, William Carson specifically recalls Vance Brownfield coming into the branch on September 25, 2008. CP 286. William Carson testified that “it was very clear to me that Vance Brownfield knew and understood precisely what he wanted to accomplish by setting up an account with a payable on death designation.” CP 286. Vance Brownfield then signed a signature card at Numerica Credit Union designating Karen Rhodes as the payable on death beneficiary to an account ending in 1362 that had a balance in excess of \$68,000.00. CP 286, 290-291. Notably, Vance Brownfield had another account at Numerica Credit Union (Account Ending 4193) in existence at the time he designated Karen Rhodes as the payable on death beneficiary to his account ending in 1362. CP 287. In September 2008 the balance on Vance Brownfield’s Numerica Credit Union Account Ending in 4193 was approximately \$98,380.26. CP 287, 304. The Estate ultimately received \$98,544.80 in January 2009 after Vance Brownfield’s death from the Numerica Credit Union Account Ending in 4193. CP 287, 306-308.

After leaving Numerica Credit Union on the morning of September 25, 2008 Vance Brownfield instructed Debi Pohto to drive Karen Rhodes and him to the Bank of America's North Spokane Banking Center (branch) located on Wellesley Avenue in Spokane near the Northtown Mall. CP 309. Karen Rhodes and Vance Brownfield went inside Bank of America's North Spokane Banking Center (branch) on September 25, 2008. CP 418. Vance Brownfield explained to the Bank of America employee that he wanted to add Karen Rhodes as a "payable on death" beneficiary to his accounts. CP 418, 419. Vance Brownfield was familiar with the "payable on death" terminology because he had previously added Karen Rhodes to his Numerica Credit Union account immediately before coming into Bank of America on the morning of September 25, 2008. CP 391. The Bank of America employee took a copy of Karen Rhodes' driver's license and social security card. CP 419. After entering information in the computer, the Bank of America employee informed Karen Rhodes and Vance Brownfield that Karen Rhodes' name was on all the accounts. CP 391, 419. Prior to coming to the Bank of America branch on September 25, 2008, Karen Rhodes' mother (Vance Brownfield's sister) had informed her that uncle Vance Brownfield had designated his deceased wife, Virginia Brownfield's niece Suzanne

Valach to one of his accounts.¹ CP 419. Therefore, when the Bank of America employee informed Karen Rhodes and Vance Brownfield that her name had been added to all the accounts, Karen Rhodes realized that was not what her uncle Vance wanted. *Id.* Therefore, Karen Rhodes spoke up and said “I don’t think he wants to add my name to all of his accounts.” *Id.* Vance Brownfield immediately pulled out two of his check books and told the Bank of America employee that he wanted to add Karen Rhodes’ name to two of the specific accounts reflected on the check books. *Id.* It was Karen Rhodes’ understanding that she had been added to two of Vance Brownfield’s accounts at Bank of America on September 25, 2008. *Id.* In fact Vance Brownfield had a total of five accounts at Bank of America. CP 197.

Beth Theodorson was employed by Bank of America in the North Spokane Banking Center (branch) on September 25, 2008. CP 275. Beth Theodorson does not remember serving Vance Brownfield or Karen Rhodes on September 25, 2008. CP 277. Before any Bank of America employee can access the computer system program that manages its customer’s accounts the employee must input their unique user

¹ Based upon records from Banner Bank and the declaration testimony of Shelly Harris, Vance Brownfield designated his wife Virginia Brownfield’s niece, Suzanne Valach as a payable on death beneficiary to his account with Banner Bank on June 6, 2008. CP 163-186. Suzanne Valach received \$97,912.76 from Vance Brownfield’s Banner Bank account following his death. CP 164, 174-176.

identification code together with their password into the computer system. CP 276. Beth Theodorson's unique user identification code appears on the account maintenance history records reflecting that on September 25, 2008 changes were made adding Karen Rhodes' name to Vance Brownfield's accounts ending in 8429 and 1914. CP 276-279, 279-284. Beth Theodorson would not have keyed in or inputted the changes in Bank of America's computer system adding Karen Rhodes' name to the accounts unless Vance Brownfield had signed a Change Authorization form and new signature cards. CP 277, *Also See* CP 193, 194, 195, 240, 243. Thus, after Mr. Brownfield signed a Change Authorization form, Beth Theodorson added Karen Rhodes' name on Vance Brownfield's accounts ending in 8429 and 1914 by performing maintenance or inputting information into Bank of America's computer system on September 25, 2008. CP 194-196, 203-205, 219-221, 276-284.

Bank of America cannot locate the updated signature cards related to Vance Brownfield's accounts ending in 8429 and 1914. Bank of America has undertaken exhaustive search efforts to locate the lost signature cards. CP 155-157, 159-160, 187- 89, 190-191. However, the electronic records contained in Bank of America's computer system with respect to Vance Brownfield's accounts ending in 8429 and 1914 clearly show that Karen Rhodes' name was added to the respective accounts on

September 25, 2008. CP 194, 195, 196, 203, 219, 240, 241, 248, 276, 277, 280. Bank of America's electronic records maintained in its computer system also shows that Karen L. Rhodes is listed as the beneficiary to Vance Brownfield's accounts ending in 8429 and 1914. CP 194, 205, 221, 240, 245, 277, 283.

In addition to the electronic records contained in Bank of America's computer system, the monthly account statements Bank of America sent to Vance Brownfield in the ordinary course of business with respect to accounts ending in 8429 and 1914 clearly reflect Karen Rhodes name being added to the respective accounts after September 25, 2008. CP 94, 104, 132-146, 195, 196, 207, 223, 241, 242, 251, 266. Whereas the statements Bank of America mailed to Vance Brownfield prior to September 25, 2008 only reflect Vance Brownfield's name in the address line. *Id.*

Approximately three months prior to Vance Brownfield designating Karen Rhodes as a payable on death beneficiary to his account at Numerica Credit Union and two of his accounts at Bank of America, Vance Brownfield designated his niece Suzanne Valach as the payable on death beneficiary to one of his accounts at Banner Bank. CP 163-186. Vance Brownfield had other bank accounts, including accounts at Numerica Credit Union, Banner Bank, Bank of America, Westmark Credit

Union and Washington Mutual Savings Bank, that he did not make specific payable on death designations. CP 94, 95, 101-102, 148-154, 164, 185, 197, 235-238, 287, 307. The Estate received approximately \$425,794.48 in distributions from these other bank accounts. *Id.* Notably there were three accounts at Bank of America from which the Estate received a distribution of \$287,237.11. CP 197, 234-238. Based upon the plaintiff's own estimates the Estate had a total value of approximately \$1,349,442.92. CP 94, 101-102.

After Vance Brownfield died on December 31, 2008, Karen Rhodes called Bank of America and inquired whether she was still listed as the payable on death beneficiary of Vance Brownfield's accounts. CP 21, 419. On January 16, 2009 Karen Rhodes presented the death certificate and her identification at Bank of America's North Spokane Branch and requested disbursement of the funds. CP 242, 420. Bank of America's staff could not locate the updated original signature cards. CP 242. However, the fact that Karen Rhodes was the designated beneficiary with respect to accounts ending in 8429 and 1914 was in Bank of America's computer system. *Id.* The staff in the Bank of America North Spokane Branch contacted their manager as well as Bank of America's internal help line staff. *Id.* Both the help line staff and the Branch Manager, Patricia Hulett determined because the computer records

reflected that Karen Rhodes was the payable on death beneficiary it was appropriate to distribute the funds to Karen Rhodes. *Id.* On January 16, 2009 Bank of America issued a cashier's check to Karen Rhodes in the amount of \$209,953.27 which was the sum of the funds on deposit in Vance Brownfield's accounts ending in 8429 and 1914. CP 242, 274.

The Estate brought a lawsuit against Bank of America and Karen Rhodes alleging claims of breach of contract, breach of implied covenant of good faith and fair dealing, conversion, and negligence. CP 5-7. The Estate brought a Motion for Summary Judgment seeking to hold Bank of America and Karen Rhodes liable with respect to the legal claims asserted in the Complaint. CP 39-40. Bank of America moved for summary judgment dismissal of all claims brought by the Estate. CP 325-326. Karen Rhodes joined in Bank of America's Motion for Summary Judgment. CP 489-490. The hearing on the respective Motions for Summary Judgment was heard on March 11, 2011 before the Honorable Greg Sypolt, Spokane County Superior Court Judge. RP 1-43. Judge Sypolt granted Bank of America's Motion for Summary Judgment dismissing all of plaintiff's claims, which Karen Rhodes had joined. CP 531-535. Judge Sypolt denied the Estate's Motion for Summary Judgment. *Id.* The Estate filed a Motion for Reconsideration, which was denied. CP 504-505, 528-529. The Estate appealed. CP 536-543.

III. STANDARD OF REVIEW

This case involves review of the trial court's ruling of two summary judgment motions. Thus, the standard of review is de novo. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

IV. ARGUMENT

A. **The Trial Court Properly Considered Bank of America's Electronic Records Contained In Its Computer System As Proof of the Lost Contract.**

Evidence Rule 1004(a) governs the admissibility of other evidence when the original has been lost or destroyed. ER 1004(a) provides as follows:

ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(a) Original Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.

A claim made against our local ski hill, Mt. Spokane, involving a lost release is one of many illustrative cases of how Washington Courts have dealt with lost documents. *Lunt v. Mount Spokane Skiing Corp.*, 62 Wn. App. 353, 814 P.2d 1189 (1991). In *Lunt*, the plaintiff sustained an

injury while skiing with skies she had rented from Mount Spokane Skiing Corporation. *Id.*, at 356. The injured plaintiff, Ms. Lunt, alleged that she was a business invitee of Mt. Spokane and had not been protected or warned that the Look bindings she rented did not always release and would not protect her from the type of injury she sustained. *Id.*

Mt. Spokane used an enrollment form for lessons and ski rentals that contained language releasing Mt. Spokane from claims or damage resulting from the use of equipment. *Id.* The original form or copy signed by plaintiff, Ms. Lunt, could not be found. *Id.* The plaintiff asserted that she did not recall seeing or signing the release. *Id.* Mt. Spokane moved for summary judgment seeking to dismiss plaintiff's claims based upon the language contained in the release. *Id.* The plaintiff moved to strike portions of the affidavit testimony submitted by Mt. Spokane regarding her execution of the ski school enrollment form containing the release language. *Id.* The trial court denied the Motion to Strike and dismissed plaintiff's claims on summary judgment. *Id.* On appeal, plaintiff argued that there was no evidence that she executed an enrollment form or that its contents were appropriately authenticated. *Id.*, at 362. In affirming the trial court's denial of plaintiff's Motion to Strike, this Court noted that when an original document is lost, a diligent search has been made, and the loss is not the result of proponent's bad faith, secondary evidence is

admissible. *Id.*, at 363. In affirming, this Court also noted that Mt. Spokane offered affidavits as to its procedures requiring execution of the enrollment form to prove its execution. *Id.* Accordingly, the Court of Appeals found that the trial court properly concluded that a reasonable juror could find the enrollment form and disclaimer had been duly executed by the plaintiff, Ms. Lunt. *Id.*

Similarly, in the instant case, Bank of America employees have made a due and diligent search for the lost updated signature cards. CP 155-156, 159-160, 188, 189-191, 242-243. In fact, Bank of America searched through each and every signature card contained in ten banker's boxes containing signatures cards pertaining to closed accounts from the North Spokane Banking Center for the past three years. CP 155-156.

It was Bank of America's procedure to first complete the signature card and get it signed before inputting information into the computer system. CP 193-196, 276-277. Accordingly Karen Rhodes' name would not have been added to Mr. Brownfield's Bank of America accounts ending in 8429 and 1914 and designated as a beneficiary in Bank of America's computer system unless Mr. Brownfield signed a Change Authorization form and new signature cards. *Id.* Further, there is no question the date the changes were inputted into Bank of America's computer system adding Karen Rhodes as a beneficiary to

Mr. Brownfield's two accounts, September 25, 2008, is the same date that Debi Pohto drove Mr. Brownfield and Karen Rhodes to Numerica Credit Union and Bank of America's North Spokane Branch. CP 194, 196, 203, 219, 275-284. In further corroboration of the fact that Karen Rhodes' name was added to Mr. Brownfield's Bank of America accounts ending in 8429 and 1914, the monthly account statements Bank of America mailed to Mr. Brownfield subsequent to September 25, 2008 reflect Karen Rhodes' name compared to the statements sent to Mr. Brownfield by Bank of America prior to September 25, 2008 which reflect only his name on the respective accounts. CP 94, 106-146, 195-196, 207-213, 223-233 241, 251-272. Clearly reasonable minds can reach only one conclusion that Mr. Brownfield executed signature cards or account agreements designating Karen Rhodes as a beneficiary to his Bank of America accounts ending in 8429 and 1914.

In addition to the *Lunt v. Mount Spokane Skiing Corp.* decision, there are numerous Washington Supreme Court and Appellate Court decisions demonstrating the appropriateness of admitting secondary evidence to prove the existence of lost contracts or documents. For example, in *Lutz v. Gatlin*, 22 Wn. App. 424, 590 P.2d 359 (1979), this Court affirmed Spokane County Superior Court's admission of secondary evidence to prove the existence of a promissory note and personal

guaranty, despite the maker of the promissory note and guarantor's testimony that he did not recall whether he had ever signed the note. In *Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 383, 142 P. 869 (1914), the Washington State Supreme Court affirmed the trial court's admission of evidence concerning the election of corporate officers after the evidence established that the corporate minutes had been lost. In *Nelson v. Davenport*, 108 Wash. 259, 183 P. 132, (1919), the trial court refused to allow testimony concerning the weight of garbage loads hauled to feed hogs after the witness testified that the written statements concerning the weight loads were lost. *Id.*, at 264. On appeal the Washington State Supreme Court ruled that the trial court's refusal to allow testimony from the witness that hauled garbage to feed the hogs was erroneous. *Id.*

Moreover, in the criminal context, the Washington State Court of Appeals affirmed the admission of burglary victims' testimony as to the contents of a letter they found in their tenant's residence that they read and destroyed wherein the defendant described his intent to commit burglary of their tool shed. *State v. Detrick*, 55 Wn. App. 501, 502-504, 778 P.2d 529 (1989).

Finally, in *State v. Kinard*, 109 Wn. App. 428, 435, 36 P.3d 573 (2001), this Court affirmed the Spokane County Superior Court's admission of testimony from police officer regarding the contents of a lost piece of

paper containing a phone number in the conviction of defendant for delivery of a controlled substance.

The controlling precedence concerning lost contracts and documents clearly demonstrates that it was most appropriate for the trial court to consider the secondary evidence, in particular Bank of America's electronic records adding Karen Rhodes as a beneficiary to Mr. Brownfield's bank accounts ending in 8429 and 1914 on September 25, 2008, as well as the account statements that Bank of America mailed to Mr. Brownfield reflecting that Karen Rhodes' name had been added to the accounts. CP 94, 105-131, 132-146, 194-196, 204-213, 220-233, 240-272, 275-284. Further, this evidence must be considered together with the Declaration testimony of William Carson the representative of Numerica Credit Union, and Debi Pohto the driver who drove Vance Brownfield and Karen Rhodes to Numerica Credit Union and Bank of America on September 25, 2008. CP 285-308, 309-311. William Carson is the member service representative of Numerica Credit Union who handled the transaction at Numerica Credit Union on September 25, 2008 wherein Mr. Brownfield executed a signature card designating Karen Rhodes as a payable on death beneficiary to one of his Numerica Credit Union accounts. CP 285-291. Vance Brownfield represented to William Carson he wanted to set up an account where the funds would pass to Karen

Rhodes upon his death. CP 286. William Carson testified “[i]t was very clear to me that Vance Brownfield knew and understood precisely what he wanted to accomplish by setting up an account with a payable on death designation.” *Id.* The driver, Debi Pohto testified by declaration that on September 25, 2008 Vance Brownfield gave her detailed instruction and direction to the Lyons Branch of Numerica Credit Union and then to the Bank of America North Spokane branch. CP 310. The date Debi Pohto drove Vance Brownfield to Bank of America’s North Spokane branch is the same date the change adding Karen Rhodes’ name as a beneficiary to Mr. Brownfield’s accounts was entered into Bank of America’s computer system. CP 276-284. Finally, Karen Rhodes testified that her uncle specifically told the Bank of America employee that he wanted to add Karen Rhodes as a payable on death beneficiary to his accounts on September 25, 2008. CP 391.

B. The Lost Updated Signature Cards Can Be Established By Clear Cogent and Convincing Evidence.

To establish a lost instrument, the evidence must be clear, cogent and convincing. *Lutz v. Gatlin*, 22 Wn. App. 424, 428, 590 P.2d 359 (1979) (*citations omitted*) (affirming Spokane County Superior Court Judge Harold Clark’s judgment finding the terms of lost promissory and guaranty had been proven). In the instant case, the totality of the

circumstances listed below leads the reasonable mind to one conclusion that Vance Brownfield designated Karen Rhodes as the payable on death beneficiary with respect to his Bank of America accounts ending in 8429 and 1914.

1. On September 25, 2008 Debi Pohto drove Karen Rhodes to Numerica Credit Union. CP 309-311.
2. On September 25, 2008 Vance Brownfield and Karen Rhodes went into Numerica Credit Union and Vance Brownfield designated Karen Rhodes as the payable on death beneficiary to one of his Numerica Credit Union Accounts with a balance in excess of \$68,000.00. CP 285-291.
3. Immediately after Vance Brownfield signed the signature card at Numerica Credit Union on September 25, 2008, Debi Pohto drove Vance Brownfield and Karen Rhodes to Bank of America's North Spokane Banking Center. CP 309-311.
4. The account maintenance history screens from Bank of America's computer system shows that on September 25, 2008 Vance Brownfield's accounts ending in 8429 and 1914 were changed adding Karen Rhodes' name on the respective accounts. CP 194-196, 203, 219, 240-241, 248, 275-280.
5. Bank of America's electronic records contained in its computer system reflects that Karen Rhodes is listed as a beneficiary with respect to accounts ending in 8429 and 1914. CP 194, 196, 205, 221, 240, 245, 277, 283.
6. Beth Theodorson was employed by Bank of America in the North Spokane Banking Center (branch) on September 25, 2008. CP 275-276.

7. Beth Theodorson's unique user identification code together with her password had to be entered into the computer system before a change was made to the respective accounts. Beth Theodorson's unique user identification code appears on the account maintenance history records showing the date [September 25, 2008] the changes were made adding Karen Rhodes' name to Vance Brownfield's accounts ending in 8429 and 1914. CP 275-281.
8. Beth Theodorson would not have keyed in or inputted the changes in Bank of America's computer system adding Karen Rhodes' name to the accounts unless Vance Brownfield had signed a Change Authorization form and new signature cards. CP 277, *Also See* 193-194, 240, 243.
9. On September 25, 2008, Vance Brownfield told the Bank of America employee that he wanted to add Karen Rhodes as a payable on death beneficiary to his accounts. CP 391, 418-419. Vance Brownfield was familiar with the terminology "payable on death" because immediately before coming to Bank of America on September 25, 2008, he had designated Karen Rhodes as the "payable on death" beneficiary on one of his Numerica Credit Union accounts. CP 419.
10. Following the change made adding Karen Rhodes to Vance Brownfield's bank accounts ending in 8429 and 1914 the monthly bank statements Bank of America mailed to Vance Brownfield's home address reflected that Karen Rhodes' name had been added to the accounts. CP 94, 105-131, 133-146, *Also See* 195-196, 207-213, 223-233, 241, 250-264, 266-272.
11. On January 16, 2009 Numerica Credit Union disbursed \$68,382.04 to Karen Rhodes in connection with Vance Brownfield's September 25, 2008 designation of Karen Rhodes as payable on death beneficiary to his Numerica Credit Union account ending in 1362. CP 287, 299.

12. Approximately three months prior to Vance Brownfield designating Karen Rhodes as a payable on death beneficiary to his account at Numerica Credit Union and accounts at Bank of America, Vance Brownfield designated his niece, Suzanne Valach as the payable on death beneficiary to one of his accounts at Banner Bank. CP 163-164, 167. Following Vance Brownfield's death, on February 4, 2009, Suzanne Valach received a disbursement of \$97,912.76 in connection with Vance Brownfield's Banner Bank account ending in 4811. CP 164, 175.
13. There were several bank accounts at various financial institutions that Vance Brownfield did not designate a specific payable on death beneficiary that passed to his Estate, including three at Bank of America, one at Numerica Credit Union and one at Banner Bank. CP 163-164, 177-186, 197, 234-236, 287, 300-308. Additionally, Vance Brownfield had two more accounts at Washington Mutual Savings Bank and Watermark Credit Union. CP 95, 147-154. The Estate of Vance Brownfield received a disbursement of \$287,237.11 with respect to the three accounts at Bank of America. CP 197, 235-236. The Estate of Vance Brownfield received a disbursement in the amount of \$98,544.80 with respect to Vance Brownfield's account ending in 4193 at Numerica Credit Union. CP 287, 306-308. The Estate of Vance Brownfield received a disbursement from Banner Bank in the amount of \$15,017.79 in connection with Vance Brownfield's Banner Bank account ending in 0435. CP 163-165, 184-186. The Estate Inventory accounted for \$16,424.78 in connection with Vance Brownfield's account at Watermark Credit Union and \$8,570.00 at Washington Mutual Saving Bank. CP 94, 100-101, 147-154.
14. In addition to over \$425,794.48 in proceeds from Vance Brownfield's bank accounts that passed to the Estate, Vance Brownfield had significant stocks and bond holdings that also passed to the Estate. CP 94, 100-102.

15. The Estate of Vance Brownfield will also receive the proceeds from the sale of Vance Brownfield's farm property which it values at \$450,000.00. CP 94, 100-102.
16. According to the Inventory signed by the personal representative, Leslie Schneider, as of March 18, 2009 the Estate of Vance Brownfield had an estimated value of \$1,349,442.92. CP 94, 100-102. This estimate does not include the Banner Bank account of \$97,912.76 that passed to Vance Brownfield's niece Suzanne Valach, or the \$68,382.04 that was distributed from Vance Brownfield's account at Numerica Credit Union to Karen Rhodes.

Based upon all the facts and circumstances set forth above, defendant Bank of America respectfully submits that clear, cogent and convincing evidence exists establishing that Vance Brownfield intended and executed the signature cards designating Karen Rhodes as the payable on death beneficiary of his Bank of America accounts ending in 8429 and 1914.

C. Given That Vance Brownfield Signed A Signature Card At Numerica Credit Union Designating His Niece Karen Rhodes As A Payable On Death Beneficiary Immediately Before Going To Bank of America On September 25, 2008, The Trial Court Properly Considered Secondary Evidence.

The Estate characterizes the necessity of a signature requirement of the Financial Institution Individual Account Deposit Act, RCW 30.22.060 to be analogous with written rejection requirements of Uninsured Motorist and Under Insured Motorist limits that are less than bodily injury limits as

prescribed by RCW 48.22.030. In particular, the Estate argues based upon the *Torgerson v. State Farm Mutual Auto. Ins., Co.*, 91 Wn. App. 952, 957 P.2d 1283 (1998) decision that the trial court improperly considered evidence of both Mr. Brownfield's intent and Bank of America's procedures or business practices. The trial court appropriately decided based upon the recently published decision of *Humleker v. Gallagher Bassett Services, Inc.*, 159 Wn. App. 667, 246 P.3d 249 (2011) that given that immediately before Mr. Brownfield came to Bank of America on September 25, 2008 he signed a signature card at Numerica Credit Union, that "signed writing" opens the door for the Court to consider extrinsic evidence of intent as well as Bank of America's procedures. CP 285-308. Furthermore, three months prior to the September 25, 2008 transaction at Bank of America, Mr. Brownfield signed a signature card at Banner Bank leaving approximately \$97,912.76 to his deceased wife's niece, Suzanne Valach. CP 163-176.

Given the importance of the *Humleker* decision, a full discussion of the facts and the Court's holding is warranted. Furthermore, when referencing the *Humleker* decision in its opening brief the Estate references only selective portions of the decision in support of the Estate's position. In *Humleker* the plaintiff claimed that the summary form his employer, Franz Bakery, signed limiting uninsured motorist

(UM) and underinsured motorist (UIM) coverage to \$60,000 did not comply with RCW 48.22.030 (2)-(4) requiring a specific writing rejecting UM and UIM coverage to be the same limit as third party bodily injury coverage. *Id.*, at 669-673. Defendant, Zurich insurance company submitted the summary form together with Franz Bakery's Chief Financial Officer's Declaration wherein he testified that he understood that UM and UIM had been set at \$60,000 rather than the available \$1 million coverage. *Id.*, at 673. It was clear that the fleet manager of Franz Bakery had a clear understanding that UM and UIM coverage was limited based on his discussions with the insurance broker and the summary form. *Id.*, at 671-672 and footnote 2. The injured plaintiff (Humleker) claimed that the Court should not have considered extrinsic evidence of the parties' intent, specifically the declaration of Franz Bakery's Chief Financial Officer regarding his understanding of UM and UIM coverage. *Id.*, at 684. The Washington Court of Appeals held that because a writing existed in the form of a signed summary form (although not the specific rejection form plaintiff contended was required by statute), the trial court could properly consider extrinsic evidence of intent, including the detailed declaration of plaintiff's employer explaining that he knew and understood that the limits of UM and UIM coverage were set at \$60,000. *Id.*

In the instant case, approximately three months prior to Vance Brownfield designating Karen Rhodes as a payable on death beneficiary to his account at Numerica Credit Union and two of his accounts at Bank of America, Vance Brownfield designated his niece Suzanne Valach as the payable on death beneficiary to one of his accounts at Banner Bank valued at approximately \$97,912.76. CP 163-186. More importantly immediately prior to coming to Bank of America's North Spokane Branch on September 25, 2008, Mr. Brownfield signed a signature card at Numerica Credit Union wherein he designated Karen Rhodes as a payable on death beneficiary to an account that had a balance of \$68,276.26. CP 286, 290-291. Mr. Brownfield then went to Bank of America wherein he specifically told the personal banker at Bank of America that he wanted to add Karen Rhodes as a payable on death beneficiary to his accounts. CP 391. Bank of America's employee inputted the change adding Karen Rhodes as a beneficiary to Vance Brownfield's accounts into Bank of America's computer system on September 25, 2008. CP 192-221, 275-284. Thus, based on the Court of Appeals holding in *Humleker* the trial court properly concluded a writing existed, specifically the signature card from Numerica Credit Union signed on September 25, 2008, from which is relevant to make a determination of Mr. Brownfield's intent with respect to his transactions

on September 25, 2008 at Bank of America. The trial court followed the correct approach to contract construction in determining the parties' intent at the time of contracting.

D. Failure To Produce A Statutorily Required Signed Contract Is Not Fatal To Enforcement By Washington Courts.

Washington Courts have enforced or given effect to a contract that is statutorily required to be signed but cannot be produced. For example RCW 26.04.090 requires a Certificate of Marriage to be signed by both parties to the marriage. However, the Washington State Supreme Court affirmed the Spokane County Superior Court's ruling that Mrs. Frances Eva Hubbell (who claimed to be Mrs. Emmans) to be the wife of the decedent despite the fact that she could not produce the Marriage Certificate. *In re Emmans' Estate*, 117 Wash. 182, 200 P. 1117 (1921). In *Emmans' Estate*, the surviving spouse appointment as the executor of the estate (based on her claimed status as widow or wife of the decedent) was challenged by decedent's sisters. *Id.*, at 183. The purported wife provided testimony that the marriage took place on a trip to Canada although she could not remember the name of the town she was married or the towns she passed through to arrive at the town she alleged the marriage took place. *Id.*, at 184. Nor could she produce the Marriage Certificate. *Id.*, at 185. Based on the purported wife's testimony the Washington State

Supreme Court affirmed Spokane County Superior Court's decision that she qualified to be appointed as the executor based on her status as wife of the decedent. *Id.* Furthermore, the Washington State Supreme Court has enforced the division of property in circumstances where the parties cannot produce a signed contract. *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995), (court found meretricious relationship existed based on number of factor's including parties intent and equitably divided property acquired during relationship in a similar fashion as if the parties had been married, obviously no signed Certificate of Marriage existed). These cases further support that the trial court appropriately considered the secondary evidence as well as the representations made by Mr. Brownfield to the Bank of America employee on September 25, 2008 that he wanted to add Karen Rhodes as a payable on death beneficiary to two of his accounts at Bank of America.

E. **The Estate's Claims Against Bank of America Are Barred Due to Vance Brownfield's Failure to Report and Correct an Alleged Error on His Monthly Statements.**

The Deposit Agreement pertaining to Mr. Brownfield's accounts ending in 8429 and 1914 provides as follows:

Reporting Problems

If you find that your records and ours disagree, if you suspect any problem or unauthorized transaction on your account or you do not receive a statement when expected, call us

immediately at the number for Customer Service on your statement. If you fail to notify us in a timely manner, your rights may be limited.

We Are Not Liable If You Fail To Report Promptly

Except as otherwise expressly provided elsewhere in this agreement, if you fail to notify us in writing of suspected problems or unauthorized transactions within 60 days after we make your statement or items available to you, you agree that:

- you may not make a claim against us relating to the unreported problems or unauthorized transactions, regardless of the care or lack of care we may have exercised in handling your account; and
- you may not bring any legal proceeding or action against us to recover any amount alleged to have been improperly paid out of your account.

CP 428, 461. Bank of America mailed monthly statements to Vance Brownfield with respect to his accounts ending in 8429 and 1914. CP 94, 105-131, 132-146, 195-196, 207-213, 223-233, 241, 251-272, In fact, in response to Requests for Production of Documents the Estate produced copies of the original statements Mr. Brownfield received and many of them appear to have Mr. Brownfield's own handwritten notes on them. CP 94, 105-146. All the statements after September 25, 2008 reflect that Karen Rhodes' name had been added to the accounts. CP 119-131; 140-154. The fact that Karen Rhodes' name appears on the monthly statements issued after September 25, 2008 shows that she was an account

owner. CP 400. The Estate claims that Bank of America 1) breached its contract with Mr. Brownfield by paying the funds to Karen Rhodes after his death, 2) improperly converted the funds by wrongfully paying the funds to Rhodes, and 3) was negligent in paying out the funds in violation of its contract with Mr. Brownfield. CP 5-7. The only logical position that can be taken by the Estate is that adding Karen Rhodes' name to the accounts was in error, given that the Estate claims that Bank of America breached its contract, converted the funds, and was negligent by improperly disbursing the funds to Karen Rhodes after Vance Brownfield's death. Vance Brownfield did not promptly report the error listing Karen Rhodes as an account owner to Bank of America as required by the Deposit Agreement. Thus, Mr. Brownfield's failure to report bars the Estate from bringing claims against Bank of America, including the claims for breach of contract, conversion and negligence in accordance with the Deposit Agreement.

Ironically, the Estate claims that Mr. Brownfield would not have reported the error because Mr. Brownfield went into the bank on September 25, 2008 with the intent of making Karen Rhodes a POD (payable on death) beneficiary. RP 13. The pertinent part of the Estate's concession to the trial court during summary judgment proceedings is set forth below:

[M]ost importantly, Mr. Brownfield would not have objected to that [reporting an error in his account statements] anyway. Apparently, and for purposes of this motion, we're not disagreeing that he went into the bank with the intent of making Karen Rhodes a POD beneficiary. We'll accept that for this motion. It doesn't matter because he didn't sign.

RP 13:16-21. Moreover, in its opening appellate brief, the Estate states:

For purposes of this appeal, it is not disputed that Brownfield intended to make Rhodes a POD beneficiary of the two Accounts.

Appellant's Opening Brief, p. 3. Bank of America, Karen Rhodes and the Estate all agree that Mr. Brownfield truly intended to designate Karen Rhodes as the payable on death beneficiary of his Bank of America accounts ending in 8427 and 1914. Irrespective, if that was not Mr. Brownfield's intention he was contractually required to come forward to the bank and report that there was an error. Mr. Brownfield did not report an error. Accordingly, the Estate is barred from bringing claims against Bank of America as a result of his failure to do so.

Furthermore, the Estate's admission that Mr. Brownfield truly intended to designate Karen Rhodes as the payable on death beneficiary demonstrates that the personal representative of the Estate has absolutely no regard for honoring Mr. Brownfield's true wishes (intentions). Furthermore, despite the fact that the Estate received a distribution of approximately

\$1,349,422.92 in accounts, stocks, bonds, real estate and other assets, it is asking this Court to ignore Mr. Brownfield's intent as well.

F. **The Trial Court Properly Considered The Intent of The Decedent, Vance Brownfield, In Ruling That Bank of America Did Not Breach Its Contract Or Violate The Financial Institution Individual Account Deposit Act.**

In enacting the Financial Institution Individual Account Deposit Act the Washington State legislature did not set forth rules governing circumstances when a signature card has been lost. However, the legislature did mandate that the sections and provisions of the Financial Institution Individual Account Deposit Act are to be liberally construed. RCW 30.22.030. The construction of a contract relies heavily on the parties' intent, the facts surrounding its creation, the subsequent acts of the parties, and the reasonableness of the parties' interpretations. *Sackman Orchards v. Mountain View Orchards*, 56 Wn. App. 705, 706-707, 784 P.2d 1308 (1990). Furthermore, in construing a contract, the court's duty is to determine the parties' intent. *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 340, 738 P.2d 251, 252 (1987). The trial court appropriately ruled that the intent of Mr. Brownfield is paramount, particularly in light of the mountain of evidence regarding Mr. Brownfield's intent to designate his niece, Karen Rhodes as the payable on death beneficiary to his accounts ending in 8429 and 1914. RP 40.

Plaintiff places significant reliance on persuasive authority from the Illinois Court of Appeals decision in *In re Estate of Joseph Waitkevich*, 323 N.E.2d 545 (Ill. App.1975). The facts of *Waitkevich* are very different than those before this Court. In *Waitkevich* a typewritten notation had been placed on the signature card, “payable on death, Felix Palilunas,” but there was no evidence as to precisely when or by whose direction the typed portion of the card was added. *Id.*, at 547. It was clear that the type written notation had been added to the signature card years after the decedent Waitkevich signed the original signature card. *Id.* at 547-548. Although the decedent Waitkevich had been a customer of the bank for a long time no bank employee or other witness came forward to establish that the decedent knew about the type written change to his original signature card. *Id.*, at 549. In refusing to allow the funds to be paid to the purported POD beneficiary Felix Palilunas, the Illinois Appellate Court stated “[w]e simply hold that the evidence must reflect the account holder’s intent.”(*emphasis added*) *Id.* In the instant case there is an overwhelming amount of evidence that Mr. Brownfield intended to designate Karen Rhodes as the beneficiary of the two accounts at issue. Again immediately before going to Bank of America on September 25, 2008 Mr. Brownfield designated Karen Rhodes as the payable on death beneficiary to one of his Numerica Accounts. CP 285-

291, 309-311, 417-418. Mr. Brownfield specifically asked the Bank of America employee to designate Karen Rhodes as the beneficiary. CP 391. Furthermore the Estate has actually stipulated that Mr. Brownfield actually intended Karen Rhodes to be the beneficiary of the two accounts at issue. Furthermore, the *Waitkevich* court determined that the Illinois Savings and Loan Act governing payable on death accounts must be strictly construed. The Washington Financial Institution Individual Account Deposit Act contains an express statutory mandate that the provisions of the Act be liberally construed. RCW 30.22.030(1). Accordingly some level of liberal construction of the provisions of the Financial Institution Individual Account Deposit Act must be made so the court can consider the overwhelming evidence of Mr. Brownfield's true intention to leave his Bank of America accounts ending in 8429 and 1914 to his niece, Karen Rhodes.

Not only is giving regard to the intention of the parties the touchstone for construing a contract, it is also the basic principal used by courts in construing a will. *Estate of Campbell*, 87 Wn. App. 506, 510, 942 P.2d 1008 (1997). In its opening Appellate Brief the Estate makes numerous references to Washington's Will statute and the purpose of preventing fraud by adhering to the formalities of having two attesting witnesses. However, the Estate ignores the basic tenet prescribed by

RCW 11.12.230 that the court shall give due regard to the true intention of the testator. The common law rule that intent of the testator controls and that it is the courts duty in construing a will to give effect to the testator's intent is so established that it has become axiomatic. Nonetheless, the Estate requests this Court to disregard the true intent of Mr. Brownfield and allow it to recover based upon a technicality.

G. Alternatively, The Contract Between Bank of America And Vance Brownfield May Be Equitably Reformed To Correct A Mutual Mistake.

The instant case involves a contract between Bank of America and Vance Brownfield. Plaintiff asserts that Vance Brownfield never signed a new signature card on September 25, 2008. A trial court is vested with the authority to reform a contract if there has been a mutual mistake or unilateral mistake. *Kaufmann v. Woodard*, 24 Wn.2d 264, 270, 163 P.2d 606 (1945). The fact that the party seeking reformation was negligent, careless or inadvertent is not a defense to reformation. *Washington Mutual Sav. Bank v. Hedreen*, 125 Wn.2d 521, 529-531, 886 P.2d 1121 (1994). "If negligence were a defense to a reformation claim, then reformation would almost never be granted because mistake is most frequently the basis for reformation and negligence generally results from a mistake." *Id.*, at 531 (*citations omitted*). The facts necessary to establish the right to reformation must be established by clear, cogent and

convincing evidence. *Kaufmann v. Woodard*, at 269. “Where both parties to a deed or contract have agreed that the instrument is to be executed, the lack of a party’s signature can be supplied by a reformation of the document.” 76 C.J.S. Reformation of Instruments § 36 (1994). Several courts have reformed instruments or contracts to add the signature. *Smith v. Cram*, 230 P. 812 (Or. 1924); *Ames v. Fallert*, 657 P.2d 224 (Or. Ct. App. 1983); *Lane v. Spriggs*, 71 S.W.3d 286 (Tenn. 2002). In *Ames v. Fallert*, the parties were business partners who decided to merge their individual interest in a commercial property to a corporation. *Id.*, at 225. A deed was prepared to transfer the parties’ individual interest into the new corporation, although the plaintiff Ames did not sign the deed. *Id.* The corporation acted as if the deed had been signed and paid the taxes on the property consistent with the parties’ agreement to transfer their individual interest in the property to the corporation. *Id.* Several years later the plaintiff discovered that he had never signed the deed, and he commenced suit seeking a declaratory judgment that he had a half interest in the property. *Id.* The plaintiff testified that he did not intend to transfer his personal interest in the commercial property to the corporation. *Id.* Despite the plaintiff’s testimony the trial court ruled the overwhelming evidence indicates plaintiff intended to sign the deed transferring the property to the corporation. *Id.* In affirming the trial court’s decision, the

Oregon Court of Appeals held that it was clear that the parties intended to convey their individual interest to the corporation, that both parties believed the deed had been signed, and thus there was a mutual mistake. *Id.* at 227. Similarly, in *Smith v. Cram*, 230 P. 812 (Or. 1924), a father and son mortgaged real property. *Id.* at 813-814. Both signed the mortgage but the son failed to sign the document in his capacity as trustee. *Id.* The son not only owned a portion of the real property individually, but also held half of it in trust for other family members. *Id.* Although the son, as trustee, resisted reformation of the mortgage, the court allowed it, because it concluded beyond a doubt that the intention of the parties was to mortgage the entire estate including the trust estate. *Id.* at 815-816. Furthermore, the Tennessee Supreme Court affirmed the reformation of a deed missing a signature on the grounds that clear cogent and convincing evidence existed that decedent's failure to sign one of the four deeds conveying the property to his daughter was simply a mistake. *Lane v. Spriggs*, 71 S.W.3d 286, 287-291 (Tenn. 2002).

As discussed above there is an overwhelming amount of evidence with respect to Mr. Brownfield's intent. The evidence of intent for purposes of determining whether the signature cards should be equitably reformed is properly before the Court for consideration. Furthermore clear cogent and convincing evidence of Mr. Brownfield's intent has been

established. In the alternative to the reasons set forth above, Bank of America respectfully submits that it would be appropriate to equitably reform the respective signature cards to reflect Mr. Brownfield's intent.

V. CONCLUSION

The trial court appropriately considered secondary evidence to prove lost signature cards. Bank of America has established the contents of the lost signature cards by clear, cogent and convincing evidence. The Financial Institution Individual Account Deposit Act does not address the circumstances of lost contracts. The trial court appropriately applied the basic rule of contract construction to look to the intent of the parties in construing the contracts (signature cards).

After Mr. Brownfield received his statements reflecting Karen Rhodes' name on his accounts ending 8429 and 1914, he should have reported an error to Bank of America. Mr. Brownfield's failure to do so bars the Estate from bringing claims against Bank of America pursuant to the terms of the Deposit Agreement. Alternatively, Bank of America respectfully submits that this Court is vested with the power to equitably reform the contracts to reflect the parties' actual intentions.

For the reasons set forth above, the trial court appropriately denied the Estate's Motion for Summary Judgment and granted Bank of America's Motion for Summary Judgment thereby dismissing all claims

against Bank of America and Karen Rhodes. Bank of America respectfully requests this Court to affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 30th day of September, 2011.

MICHAEL A. ROOZEKRANS, PLLC

By: 
MICHAEL A. ROOZEKRANS, WSBA 25194
Attorney for Defendant, Bank of America, N.A.

CERTIFICATE OF SERVICE

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

Karl W. Kime
Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon,
PLLC
421 West Riverside Ave., Suite 900
Spokane, WA 99201

U.S. Mail
 Hand Delivered
 Overnight Mail
 Via Fax to:
(509) 625-1909

Thomas F. Webster
Webster Law Office, P.L.L.C.
116 N. Main Street
Colville, WA 99114

U.S. Mail
 Hand Delivered
 Overnight Mail
 Via Fax to:
(509) 685-2267

DATED this 30th day of September, 2011.


MICHELE C. LINDQUIST