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Court of Appeals Cause No. 40141-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL AND THERESA ANNECHINO, PETITIONERS

v.

MICHAEL WORTHY, JOAN COOPER, RESPONDENTS

PETITION FOR REVIEW

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A. Identity of Petitioners.

Michael and Theresa Annechino ask this court to accept review of the Court of Appeals, Division II decision dated June 1, 2011 ("Opinion").

B. Court of Appeals Decision.

Petitioners seek review of the Opinion's holdings: (1) that no quasi-fiduciary relationship was created by the relationship of trust between Petitioners and Respondents, (2) individual bank officers cannot be held liable for breach of fiduciary duties and (3) the bank officers did not gratuitously assume a duty of care. A copy of the decision is in the Appendix.

C. Issues Presented for Review.

ISSUE I: Is a quasi-fiduciary duty created between a depositor and bank officers where the evidence establishes that the depositor, having no experience or knowledge as to how to obtain FDIC insurance on his numerous accounts, asked the bank's officers (based upon their representation that they had the ability to structure accounts so as to secure FDIC coverage) well prior to deciding whether to deposit his life savings in the bank, to determine whether FDIC insurance would be available for all of his accounts, made the deposits recommended without being informed that the bank's "Financial Services Officer" handling the matter, Respondent Kelli Reynolds did not have sufficient expertise, in her words: **"to protect our client who trusted us to protect their interests,"** and as a result, when the bank went bankrupt, the depositor's accounts were not properly FDIC insured resulting in a $500,000 loss to the depositor?

ISSUE II: Can individual bank officers be held to a quasi-fiduciary duty of care, in addition to the bank?

ISSUE III: Did the Respondents gratuitously assume a duty of care to Petitioners?

D. Argument Why Review Should be Accepted.

1. Introduction.

In the present economic crisis, with rampant bank failures and mortgage foreclosures, and bank customers and their life savings at the mercy of a bank officers who fail to fulfill their duties and promises, a simple legal principle has been lost: bank officials who have direct, ongoing and substantive discussions with, and make affirmative verbal and written representations to, potential customers about their ability to structure deposits with their bank so as to make sure that such deposits would be insured by the FDIC have a quasi-fiduciary duty to do so correctly and competently. This Court should accept review because the case law that should be in place to protect bank customers and depositors from actions taken which unnecessarily cause them financial ruin or hardship has been dealt a serious blow, at least in Division II, by the Court of Appeals Opinion, below. This decision makes it virtually impossible for any bank customer to recover from bank officials who play fast and loose with the trust that has been placed in their hands. The Opinion sounds a death knell to bank customers' rights and reasonable expectations. Review by this Court would restore the proper balance in the law.

2. Factual Basis for Review.

Petitioners' uncontroverted evidence establishes that a quasi-fiduciary relationship had been established between Respondents Kelli Reynolds and CEO Michael Worthy and that the duties imposed by such a relationship have been violated by the Respondents' failure to properly structure the Annechinos' bank accounts in such a manner as would have insured full FDIC coverage. These are the salient facts as established below:

1. **The uncontroverted facts are contained in contemporary emails, documents, and admissions and show the nature, quality and extent of the very close and special relationship created by the Respondents with the Petitioners.** *See* EOR 12, Ex. 1 to Complaint and Ex. 4 (hereafter January 2009 letter).

2. **Mr. Worthy admitted that the Bank held itself out publicly as having its deposits FDIC insured as a "tool" to attract new customer deposits and thus supports the inference that he**

sought out customers based upon this representation. EOR 212. Worthy Deposition, p.9. *See* Second Withey Declaration, Ex. 1. *See* Answer on file, paragraph 3.8 where Respondents admitted the same. EOR 23.

3. **Respondant Worthy admitted that Petitioners relied on the "level of service" provided by the Bank of Clark County.** Worthy Deposition, pp.12-13, *See* Second Withey Declaration, Ex. 1. EOR 214-215.

4. **Mr. Annechino contacted the Bank's officers personally well prior to deciding whether to deposit his life savings thus supporting the inference that he was induced to deposit his life savings because of the officers' representations to him that they had the expertise to secure full FDIC coverage for all accounts**. *See* Annechino Declaration. Worthy Deposition, p.16, and Second Withey Declaration, Ex. 1. (Emphasis added.) EOR 217. *See* also Annechino Declaration. EOR 253-254.

5. **The Respondents Worthy and Reynolds affirmatively represented to Mr. Annechino personally that they could and would ensure FDIC insurance for all the accounts by coming up with a plan and recommendation on how to insure the deposits.** EOR 213. Worthy Deposition, p.10. *See* Second Withey Declaration, Ex. 1. (Emphasis added.) (Para. 3.2.) EOR 21-22.

6. **The negotiation of a better interest rate had nothing to do with FDIC insurance and hardly was evidence that Mr. Annechino had any background or expertise in how to secure FDIC insurance for all accounts.** Mr. Annechino's sworn, unrebutted and reasonable statement that: "I did not know the applicable FDIC rules nor did I give [Respondents] any instruction

whatsoever in how to accomplish the creation and structuring of the various account. My family and I relied solely on Reynolds' and Worthy's experience and know how... I had no reason to question them..." *See* Annechino Declaration. EOR 62-63.

7. **Mr. Annechino had direct personal contact with the CEO Worthy of the Bank and with Kelli Reynolds as its "Financial Services Supervisor" to re-iterate his concern that all deposits be FDIC insured.** *See* Annechino Declaration. EOR 62-63.

8. **The Respondents Worthy and Reynolds informed Mr. Annechino that his deposits would be structured so as to obtain FDIC insurance for each of his accounts and undertook specific efforts, albeit erroneous ones, to do so.** "Under my recommendations **we can eliminate 4 accounts and also increase FDIC to $3,000,000,** leaving room here for an additional 1.8 million in deposits." EOR 72. Reynolds also stated "**What I can do is set up one of the joint accounts** you have with Theresa with Alexis and William as beneficiaries and move to the Trust ownership. **That way too, the FDIC coverage I sent you won't be affected.**" EOR 71. *See* Annechino Declaration, Ex. 2.

9. **The Respondents created (Kelli Reynolds) or reviewed (Mike Worthy and Joan Cooper) the proposed structure for the various accounts which they informed Mr. Annechino were appropriate to insure FDIC coverage.** EOR 179. *See* Annechino Declaration, Ex. 1. EOR 68. Complaint P.3.5, EOR 22.

10. **Respondent Reynolds informed the Bank's Executive Vice President and CFO that she had endeavored to "protect our client" and acknowledged that the client (Annechino) "trusted us to protect their interests."** EOR 77. Ex. 4 of the Annechino

Adelman, Executive Vice President/CFO of the Bank of Clark County. **EOR 77.**

11. **It was only AFTER Ms. Reynolds sent this chart and represented that each account would have FDIC insurance that Mr. Annechino decided to make these deposits in the manner suggested by the Respondents.** *See* Annechino Declaration, Ex. 2. EOR 70-73.

12. **Respondent Reynolds's job** title **was "Financial Services Supervisor."** *See* Annechino Declaration, Ex. 4. EOR 77.

13. **Mr. Annechino's declaration stating his total lack of knowledge, experience or understanding of FDIC rules is unrebutted and justifies the inference that he relied upon the Respondents' recommendations in structuring the accounts.**

14. **Respondent Reynolds' admitted that her "inaccurate interpretation" and lack of "expertise" lead to the loss of FDIC insurance for one of the Annechino's accounts that she had improperly structured.** (EOR 77.) *See* Annechino Declaration, Ex. 4.

15. Respondent Worthy's "explanation" of the "error" also thoroughly implicates the Respondents. *See* EOR 60, Withey Declaration, Ex. 3.

16. **Respondent Reynolds's Declaration cannot "retract" her prior admission of fault but it is further proof of her failure to understand and apply FDIC rules.** EOR 179-180. EOR 23. Answer on file at P.3.7 (emphasis added). And see the FDIC's finding: EOR 79.

These facts establish the basis upon which the court should have found, as a matter of law that (1) these Respondents had a quasi-fiduciary duty owed to the Annechinos, (2) a statutory duty is imposed in law on the individual bank officers in these circumstances, and (3) the Respondents gratuitously assumed a duty of care to the Annechinos.

3. The Legal Basis for Review.

a. The Opinion is at Odds With Long Standing Case Precedent.

The nature, extent and character of Petitioners' relationship with Respondents, based upon the uncontested facts summarized above, are not in dispute. The Court of Appeals Opinion reinterpreted and misapplied existing case law, including *Tokarz v. Frontier Savings & Loan,* 33 Wn. App. 456, 459, 656 P.2d 1089 (1982); *Hutson v Wenatchee Federal Savings Loan Assn*, 22 Wn. App 91, 588 P.2d 1192 (1978); and *Liebergesell v. Evans,* 93 Wn.2d 881, 890-891, 613 P.2d 1170 (1980).

The Opinion substantially narrows any opportunity for bank customers to hold a financial institution's executive officers accountable for their negligence or the breach of quasi-fiduciary duty.

In *Hutson v. Wenatchee Federal Savings and Loan Ass'n.*, 22 Wn. App. 91, 100-106, 588 P.2d 1192 (1978), the Division III Court of Appeals held that an extra-contractual "duty" could be created by a bank, sufficient to support a claim of negligence, under appropriate circumstances. Four years later, in *Tokarz v. Frontier Federal Savings & Loan Ass'n.*, 33 Wn. App. 456, 656 P.2d 1089 (1982), the Division III Court of Appeals again dealt with this issue, affirming the rule in *Hutson, supra.*

In *Tokarz*, 33 Wn. App. at 458-59, the Court explained that as a "general rule," the relationship between a bank and a depositor or customer does not ordinarily impose a fiduciary duty, or other extra-contractual duty of care, sufficient to support a negligence/breach of duty claim. However, the *Tokarz* Court also aptly explained the exception to the general rule, *Id.* at 459, as follows:

> However, "special circumstances" may dictate otherwise: one who speaks must say enough to prevent his words from misleading the other party; one who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party; and one who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts. *Klein v. First Edina Nat'l Bank.*[1] Present day commercial transactions are not, as in past generations, primarily for cash; rather, **modern banking practices involve a highly complicated structure of credit and other complexities which often thrust a bank**

[1] *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 196 N.W.2d 619 (1972).

> **into the role of an adviser, thereby creating a relationship of trust and confidence which may result in a fiduciary duty upon the bank** to disclose facts when dealing with the customer. *Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 64 P.2d 101, 106 (1937); *see also Hutson v. Wenatchee F. Sav. & Loan Ass'n*, 22 [Wn. App.] 91, 588 P.2d 1192 (1978). (Emphasis added.)

In *Hutson, supra*, 22 Wn. App. at 103, a lender gave advice to a borrower, respecting availability of credit-life insurance. According to the borrower, the lender agreed to procure credit-life insurance for the borrower, but failed to do so. The *Hutson* court opined: "We believe that this entire pattern for the relationship between an individual borrower and the savings and loan association represents a quasi-fiduciary relationship of trust and confidence." *Id.* In support of its ruling, the *Hutson* court cited the Supreme Court in *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 625, 393 P.2d 287 (1964), in which:

> [T]he court held that there was a duty to disclose information of which a customer was ignorant. This duty arose because the defendant . . . possessed superior business acumen and experience. A customer with less knowledge, experience, and judgment relied upon the company, which knew the customer was so relying.

The *Hutson* Court held that it was a question for the jury, whether the borrower had reasonably relied on the lender's advice, and whether the lender created a duty of reasonable care by offering advice on extra-contractual matters. *Id.* at 105. The trial court's failure to allow the borrower to make this argument at trial, in support of the borrower's negligence claim, was reversible error. *Id.* at 105-06. As the *Hutson* court noted: "The relationship between such parties involves more trust and confidence than is true of ordinary arm's length dealing, even though the lender legitimately profits from the transaction." 22 Wn. App. at p. 105. In *Liebergesell, supra*, the court held noted that a fiduciary relationship "can also arise *in fact* regardless of the relationship *in law* between the parties." citing *Salter v. Heiser*, 36 Wn.2d 536, 550-55, 219 P.2d 574 (1950). *See also* Restatement of Contracts § 472, comment *c* at 898 (1932) ("A fiduciary position . . . includes not only the position of one who is a trustee, executor, administrator, or the like, but that of agent, attorney, trusted business adviser, and indeed any person whose relation with another is such that **the latter justifiably expects his welfare to be cared for by the former."**) (Emphasis added.)

The *Liebergesell* court went on to say:

> Whether such a fiduciary relationship existed in fact in this case depends on the development of factual proof. The facts alleged by the plaintiff in her affidavit in response to the Respondents' motion for partial summary judgment, when considered in a light most favorable to the plaintiff,

> were sufficient to raise a question of fact which prevented summary judgment... **Superior knowledge and assumption of the role of adviser may contribute to the establishment of a fiduciary relationship.** *Id* at p. 891. (Emphasis added.)

In the Opinion of the Court of Appeals below, the Court denies that the bank officials created a relationship of trust sufficient to support a claim of breach of quasi-fiduciary duty. In making that determination, the Court focuses on the factual elements presented in *Hutson*, rather than the underlying rules at issue, as articulated in both *Hutson* and *Tokarz*. Based on the facts presented in *Huston*, the Court creates new law and imposes new, albeit indeterminate, requirements for holding banks and bank officers liable under a theory of breach of quasi-fiduciary duty/negligence. The Opinion seems to hold that an indeterminate number of factual issues presented in *Hutson* are required before a duty can be established. It held:

> [T]here is no evidence that the Bank sought out the Annechinos business, knowingly withheld relevant information from them exercised extensive control over the transaction or received a greater than customary economic benefit from the transaction. Nor is there any evidence that the Annechinos were induced to rely on the Bank due to a close personal relationship or lack of business expertise. On the contrary the Annechinos reviewed the Bank recommendations requested revisions and successfully

> negotiated a favorable interest rate on their deposits. There is no evidence that the party's relationship or the nature of this transaction involved more trust and confidence than a typical arms length transaction.

Opinion at pp.7-8.

According to the Opinion a bank must offer an "extra service" (i.e., extra-contractual service), as in *Hutson*. The bank must also (a) knowingly withhold information relevant to the extra service; (b) exercise extensive control over the transaction; (c) receive greater than customary economic benefit from the transaction; and (d) have a close personal relationship, or (e) superior business expertise. However, the Court does not specify how many additional factual requirements must be established. Therefore, this Opinion not only makes it more difficult to establish a duty, it is uncertain which requirements must be met before a duty can be established. In essence, the Court ruled that the particular facts of *Hutson* and *Tokarz* created necessary conditions for the creation of a quasi-fiduciary duty owed by a bank or financial advisors to their customers. In truth, the "conditions" imposed by the Court of Appeals were merely the factual context in which the duty could arise, not a rigid test without which the duty would not be recognized.

In addition, the Court of Appeals impermissibly resolved the numerous factual disputes, i.e., whether the bank officers withheld highly relevant information from Petitioners, to wit: that Kelli Reynolds "lacked the necessary expertise" to structure the FDIC accounts, whether there is evidence that the bank "sought the Annechino's business;" whether the bank officers exercised extensive control over the transaction because they structured the accounts and the Annechinos relied upon them to do so; whether the Petitioners were induced to rely upon bank officers due to their lack of expertise in how to get FDIC insurance for all the accounts; whether the fact that the Petitioners had successfully negotiated a lower interest rate established that the Petitioners had knowledge of how to obtain FDIC insurance for each account whether there was "more trust" placed in the Respondents than a typical arms length transaction. Doing so was at odds with *Hutson v. Wenatchee Federal Savings and Loan*, 22 Wn. App 91, 588 P.2d 1192 (1978) , which held:

> While the lender's duty is not that of a fiduciary, we hold that, under the circumstances of this case, **it was a jury question** whether the lender had a duty to define any ambiguous of specialized terms which might mislead unknowledgeable and uncounseled customers, members of the lay public who rely on the lender's advice.

22 Wn. App. 91, 105 (1978) (emphasis added). The Court of Appeals Opinion, though it cited *Hutson,* failed to follow this rule by improperly resolving disputed facts against the Petitioners and failing to accord them the reasonable inferences from those facts.

As such, Supreme Court review is important to establish controlling case law on how a quasi-fiduciary duty might be created in the context of banking operations and services. This Court needs to set a clear direction for all concerned, including bank officials. It needs to clear up the confusion created by the Opinion and loosen the narrow restrictions or the right of recovery that this Opinion has created.

b. The Opinion Denied that Bank Officials, in Addition to the Bank, can Create Quasi-Fiduciary Duties.

Controlling case law creates quasi-fiduciary duties in the very individuals in whom bank customers have placed their trust in. By holding an aggrieved customer can recover only, if at all, from the defunct bank, the Court of Appeals has created an insurmountable obstacle to recovery even in cases involving the most egregious breaches of duty by the very individuals who ran the bank into the ground in the first place. Supreme Court guidance is essential to re-establish a right of recovery in circumstances, as here, where a bank customer is lead to believe, by the nature, duration and extent of prior contacts between themselves and bank officers that those individuals are acting in their interest, not solely in the interests of them or the bank they work for. The Court of Appeals held that no personal liability will lie for breach of fiduciary duties committed by a bank officer or employee within the scope of their employment. Only the bank could be held accountable for breach of quasi-fiduciary duties. This was clear error and justifies this Court taking review.

It is axiomatic that the breach of a fiduciary duty is a tort. Personal liability is routinely imposed when fiduciary duties are breached. *Senn v. Northwest Underwriters*, 74 Wn. App. 408 (1994) (Defendant wife breached her fiduciary duty as director of the insolvent insurer and her inaction was a proximate cause of insurer's losses). *Senn* held "[O]fficers and directors have an affirmative duty to be aware of the affairs of the companies they serve and that they can be held liable for activities of other officers and directors which they reasonably should know about." 74 Wn. App at p. 415. Here both Worthy and Reynolds had specific knowledge of what the other was doing. *In Re Eisenberg,* 43 Wn. App. 761, 719 P.2d 187 (1986) (Guardian is personally liable for losses sustained by his ward resulting from a breach of his fiduciary duty of loyalty in the management of the ward's property). Worthy was routinely copied on Reynolds' emails and vice versa. Respondents below claimed that bank employees or officers, uniquely, enjoy immunity for their negligent breaches of fiduciary duty. Respondents cited no authority for such a proposition. None exists. It runs counter to the *Senn* case, *supra,* and established precedent that agents of the principal are personally liable for their negligent acts. Other jurisdictions have found personal liability for breach of fiduciary duty. *See* e.g., *Bennett v. Huish*, 155 P. 3rd 917, 932 (2007), where the defendant unsuccessfully claimed a "corporate shield defense". In *Bennett,* Defendant was a loan broker who took a secret commission for arranging a loan between the Petitioners and a lender. The court found that defendant had fiduciary duties to the Petitioners and that the defendant was personally liable as he had incurred personal liability by "participating in the wrongful activity." *Bennett v. Huish, supra,* at 931.

RCW 62A.4-103 sets a standard of reasonable care owed to bank customers by the bank through its agents and employees. The Bank, a corporate entity, acts through its agents and employees. "A corporation cannot act; it can perform no duty; it can neglect no obligation save by and through its agents and employees." *Pierce v. Spokane International R. Co.*, 15 Wn.2d 431, 439, 131 P.2d 139 (1942).

c. The Bank Officers Gratuitously Assumed a Duty of Care.

In *Roth v. Kay*, 35 Wn.App. 1, 664 P.2d 1299 (1983) a doctor's office represented that it would take care of the necessary paperwork regarding a worker's compensation claim. Whether or not the doctor's office was required to perform this commitment, the failure to perform what was promised caused the patient to suffer financial loss. The court found liability for failure to act as promised as a matter of law. *See* also *Folsom v. Burger King*, 135 Wn.2d 658, 675-676, 958 P.2d 301 (1998).

> [W]e recognize that liability can arise from the negligent performance of a voluntarily undertaken duty. … A person who voluntarily promises to perform a service for another in need has a duty to exercise reasonable care when the promise induces reliance and causes the promise to refrain from seeking help elsewhere.

Here, even if no pre-existing quasi-fiduciary duty was owed to carefully manage the financial deposits of the Petitioner so that they could obtain full FDIC coverage, the defendants each assumed such a duty because their promise to do so induced Mr. Annechino's reliance upon them and led him, as Ms. Reynolds' admits, to "trust them to protect their interests." *See* Ex. 1 to Complaint. EOR 12.

E. Conclusion.

For all the foregoing reasons, this Court should grant the Petition for Review and reverse the trial court's granting of summary judgment for the Respondents.

Dated this 1st day of July, 2011.

Michael E. Withey
Attorney for Petitioners
Michael and Theresa Annechino
Washington State Bar No. 4787

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY_______
DEPUTY

CERTIFICATE OF SERVICE

I, Ronnette Peters Megrey, declare as follows: on July 1, 2011 I caused to be served upon Respondents, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

PETITION FOR REVIEW

Stephen Garrett Leatham	___ via Legal Messenger
Heurlin Potter Jahn, et al.	___ via Facsimile
211 E. McLoughlin Blvd., Ste. 100	_x_ via E-mail
Vancouver, WA 98666-0611	___ via U.S. Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 1st day of July, 2011.

R. Megrey

Ronnette Peters Megrey

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL and THERESA ANNECHINO, husband and wife, Appellants, v. MICHAEL C. WORTHY and SUSAN WORTHY, husband and wife and the marital community composed thereof; JOAN COOPER; KELLI REYNOLDS; UMPQUA BANK, successor in interest to BANK OF CLARK COUNTY; and CLARK COUNTY BANCORPORATION, Respondents.	No. 40141-0-II PUBLISHED OPINION

Armstrong, P.J. — When the State closed the Bank of Clark County (Bank), Michael and Theresa Annechino discovered that approximately $500,000 of their deposits was not insured by the Federal Deposit Insurance Corporation (FDIC). The Annechinos sued the Bank and several individual officers and employees for breach of a fiduciary duty. The Clark County Superior Court dismissed the claims against the individual defendants on summary judgment. On appeal, the Annechinos argue that the Bank's officers and employees established a quasi-fiduciary relationship with them and are personally liable for breaching that duty. Because the Annechinos have failed to establish that the individual defendants entered into a fiduciary relationship with them, we affirm the summary judgment order.

FACTS

In October 2008, the Annechinos[1] decided to transfer their savings from Charles Schwab to the Bank because they had learned that their Schwab deposits would not be fully insured if Schwab failed. Before transferring the funds, the Annechinos wanted to ensure that their deposits would be fully FDIC insured. Michael spoke to Michael Worthy, the chief executive officer of the Bank, and exchanged several e-mails with Kelli Reynolds, a financial services officer at the Bank, expressing this concern.

Reynolds prepared a chart recommending that the Annechinos spread their deposits over seven accounts to provide $3 million in FDIC coverage. She copied Worthy and Joan Cooper, her supervisor, on her e-mail communications with Michael. Michael reviewed the chart and suggested putting one of the accounts in the name of the family trust. He also negotiated a higher interest rate on his deposits. The Annechinos then transferred $1.85 million to the Bank, bringing their total deposits to $3 million.

Reynolds asserts that she never personally assured Michael that his deposits would be fully FDIC insured; rather, she claims that she recommended he review the FDIC rules to verify for himself, or have his accountant verify, that his deposits would be fully insured. Michael counters that Reynolds never told him to review the FDIC rules or to independently verify that his deposits would be fully insured.

In January 2009, the State closed the Bank and appointed the FDIC as receiver. The FDIC determined that approximately $500,000 of the Annechinos' deposits were uninsured and

[1] We refer to the appellants by their first name but intend no disrespect.

issued receivership certificates for the uninsured amount. After learning that the FDIC was withholding a portion of the Annechinos' deposits, Reynolds reviewed her recommendation chart and found no errors. Assuming, therefore, that she must have misinterpreted the FDIC rules, she wrote a letter to the chief financial officer of the Bank explaining the Annechinos' situation and stating:

> It is unfortunate that my interpretation of coverage was not accurate and I am regretful that my expertise was not sufficient to protect our client who trusted us to protect their interests, and seek any options we make [sic] have at our disposal to right this wrong.

Clerk's Papers at 76, 179.

Worthy and Reynolds later learned that, due to an error, the Annechinos' funds were not deposited according to Reynolds's recommendations. When Michael requested that one of the accounts be put in the name of the family trust, Reynolds had suggested changing account 12009528 to a trust account, but the Bank accidentally changed account 12009536 instead. Consequently, funds in excess of FDIC insurance were deposited into the 528 account. Although the Annechinos received monthly statements showing which funds were deposited into which accounts, neither they nor the Bank noticed the error. The parties dispute whether the Annechinos' funds would have been fully FDIC insured but for the Bank's error in changing the wrong account to a trust account.

The Annechinos sued Worthy, Reynolds, Cooper, Umpqua Bank (the successor in interest to the Bank), and the Clark County Bancorporation. The individual defendants moved for summary judgment, arguing they could not be held personally liable for the Annechinos' loss. The trial court granted their motion and dismissed the claims against Worthy, Reynolds, and Cooper.

ANALYSIS

I. Standard of Review

We review summary judgment orders de novo. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). We will affirm an order granting summary judgment if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ranger*, 164 Wn.2d at 552.

II. Fiduciary Duty

The Annechinos argue that the critical issue before us is whether Worthy and Reynolds established a quasi-fiduciary relationship with them when they sought assurances that their deposits would be fully FDIC insured and relied on Worthy and Reynolds' superior knowledge to structure their accounts accordingly.[2] They rely primarily on *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980), *Tokarz v. Frontier Savings & Loan Ass'n*, 33 Wn. App. 456, 656 P.2d 1089 (1982), and *Hutson v. Wenatchee Federal Savings & Loan Ass'n*, 22 Wn. App. 91, 588 P.2d 1192 (1978). Worthy and Reynolds counter that none of the Annechinos' authorities supports holding bank officers and employees personally liable for breaching a fiduciary duty to a bank customer. We agree.

As a general rule, participants in a business transaction deal at arm's length and do not enter into a fiduciary relationship. *Liebergesell*, 93 Wn.2d at 889. The rule applies to

[2] The Annechinos do not include Cooper in this or any of their other arguments concerning personal liability. Accordingly, we affirm the trial court's order dismissing the Annechinos' claims against Cooper without further discussion.

transactions between a bank and a depositor. *Tokarz*, 33 Wn. App. at 458-59. But special circumstances may establish a quasi-fiduciary relationship in fact where one would not normally arise in law. *Liebergesell*, 93 Wn.2d at 890; *Tokarz*, 33 Wn. App. at 459; *Hutson*, 22 Wn. App. at 102-03.

For example, in *Liebergesell*, our Supreme Court considered whether special circumstances established a fiduciary relationship between a borrower and a lender where a businessman induced a widowed school teacher to lend him money at a 20 percent interest rate, even though he knew that interest rates over 12 percent were illegal. *Liebergesell*, 93 Wn.2d at 884-85. The lender, in contrast, had no business expertise, considered the borrower a friend, and relied on him for financial advice. *Liebergesell*, 93 Wn.2d at 884-85. But when she attempted to collect the unpaid interest, the borrower raised usury as an affirmative defense. *Liebergesell*, 93 Wn.2d at 885-86. In considering whether the lender could estop the borrower from raising the usury defense, based on a fiduciary relationship between the parties, the *Liebergesell* court reviewed the relevant case law and listed several factors that may establish a fiduciary relationship in fact where one would not normally arise in law:

> For instance, in *Salter v. Heiser*, [36 Wn.2d 536, 550-55, 219 P.2d 574 (1950)], lack of business expertise on the part of one party and a friendship between the contracting parties were important in establishing the right to rely. *Graff v. Geisel*, 39 Wn.2d 131, 141-42, 234 P.2d 884 (1951). Superior knowledge and assumption of the role of adviser may contribute to the establishment of a fiduciary relationship. Friendship seemed a determinative element under the facts of *Gray v. Reeves*, 69 Wash. 374, 376-77, 125 P. 162, 163 (1912).

Liebergesell, 93 Wn.2d at 891. The *Liebergesell* court then concluded that the lender had submitted sufficient evidence to establish a fiduciary relationship and overcome summary judgment. *Liebergesell*, 93 Wn.2d at 891.

Similarly, in *Tokarz*, Division Three of our court considered whether a savings and loan association had a duty to disclose to a borrower that his builder was having financial problems and was unable to perform other contracts in which the savings and loan was the lender. *Tokarz*, 33 Wn. App. at 458. The *Tokarz* court first observed that a bank generally does not enter into a fiduciary relationship with a depositor or customer, but it acknowledged that modern banking practices involve complexities that "often thrust a bank into the role of an adviser, thereby creating a relationship of trust and confidence which may result in a fiduciary duty upon the bank to disclose facts when dealing with the customer." *Tokarz*, 33 Wn. App. at 458-59 (citing *Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 64 P.2d 101, 106 (1937)). But the *Tokarz* court concluded that no special circumstances established a fiduciary duty in that case, because there was no evidence that the savings and loan: (1) took on any extra service for the borrower, other than furnishing the money for constructing a home; (2) received any greater economic benefit from the transaction, other than the normal mortgage; (3) exercised extensive control over the borrower's construction project; or (4) was asked by the borrower if there were any lien actions pending against the builder. *Tokarz*, 33 Wn. App. at 462-63.

Finally, in *Hutson*, Division Three of this court considered whether a savings and loan association had a duty to define the phrase "mortgage insurance" for a borrower where the borrower alleged that she had asked the lender to procure credit life insurance (which pays the balance of the mortgage if the mortgagor dies), but the lender procured only mortgage insurance (which insures the lender if the borrower defaults on the mortgage). *Hutson*, 22 Wn. App. at 92,

100. The lender never explained the difference between the two and, when the borrower saw that she was paying for mortgage insurance, she believed it was credit life insurance. *Hutson*, 22 Wn. App. at 93. Division Three recognized that a "lender is not a fiduciary in the common sense of the term" because it profits from the business transaction. *Hutson*, 22 Wn. App. at 102. But the court observed that the lender in this case had (1) advised the borrower about the availability of a federal subsidy and reviewed and submitted the application to the federal government on her behalf; (2) persuaded the borrower to obtain a home construction loan, rather than a home improvement loan, because the former would be easier to finance; and (3) offered to provide an "extra service" by arranging credit life insurance for the borrower. *Hutson*, 22 Wn. App. at 92, 94, 102-03. The *Hutson* court held:

> While the lender's duty is not that of a fiduciary, we hold that, under the circumstances of this case, it was a jury question whether the lender had a duty to define any ambiguous or specialized terms which might mislead unknowledgeable and uncounseled customers, members of the lay public who rely on the lender's advice. The relationship between such parties involves more trust and confidence than is true of ordinary arm's-length dealing, even though the lender legitimately profits from the transaction.

Hutson, 22 Wn. App. at 105.

Applying these principles, we hold that the facts of this case are not sufficient to overcome the general rule that parties to a business transaction deal at arm's length and do not enter into a fiduciary relationship. Viewing the facts in the light most favorable to the Annechinos, we will assume that the Bank took on an "extra service" by agreeing to help the Annechinos structure their accounts to provide full FDIC coverage, and that Worthy and Reynolds never advised the Annechinos to independently verify the FDIC rules and regulations. Even so, there is no evidence that the Bank sought out the Annechinos' business, knowingly withheld relevant information from them, exercised extensive control over the transaction, or received a greater than customary economic benefit from the transaction. Nor is there any evidence that the Annechinos were induced to rely on the Bank due to a close personal relationship or lack of business expertise. On the contrary, the Annechinos reviewed the Bank's recommendations, requested revisions, and successfully negotiated a favorable interest rate on their deposits. There is no evidence that the parties' relationship or the nature of this transaction involved more trust and confidence than a typical arm's length transaction.

Furthermore, even assuming the facts are sufficient to create a fiduciary relationship, *Tokarz* establishes that a *bank* may enter into such a relationship with a depositor:

> [M]odern banking practices . . . often thrust a *bank* into the role of an adviser, thereby creating a relationship of trust and confidence which may result in a fiduciary duty upon the *bank* to disclose facts when dealing with the customer.

Tokarz, 33 Wn. App. at 459 (emphasis added). Similarly, *Hutson* held that a savings and loan association, through the actions of one of its employees, had established a fiduciary relationship with a borrower. *Hutson*, 22 Wn. App. at 102-03. Neither case establishes that a bank officer or employee, acting within the ordinary scope of his or her duties, can be individually liable for breaching the *bank's* fiduciary duty to a customer.

The Annechinos cite *Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 875 P.2d 637 (1994), for the proposition that "[p]ersonal liability is routinely imposed when fiduciary duties are breached." Br. of Appellants at 20. In *Senn*, an insurance company was placed into receivership and the receiver sued the company's president and secretary for breach of a fiduciary duty. *Senn*, 74 Wn. App. at 410-11, 413. The president and secretary were husband and wife and owned all of the company's stock. *Senn*, 74 Wn. App. at 410-11. Division One of this court held that the secretary clearly owed a fiduciary duty to the *company* under RCW 48.05.370,[3] and that her failure to discover the president's conversion of over $12 million in insurance premium payments was a breach of that duty. *Senn*, 74 Wn. App. at 414-17. The *Senn* court did not hold the secretary personally liable for breaching a fiduciary duty to a third party.

Senn is consistent with Washington case law, which generally holds that a corporate officer cannot be held personally liable unless the officer knowingly and in bad faith commits or condones a wrongful act in the course of carrying out his or her duties. *See Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven*, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982); *see also Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979); *Consulting Overseas Mgmt., Ltd. v. Shtikel*, 105 Wn. App. 80, 84-85, 18 P.3d 1144 (2001) (citing *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 753, 489 P.2d 923 (1971)).

Senn is also consistent with case law from other jurisdictions holding that corporate officers generally owe a fiduciary duty to their *corporation*, but owe no such duty to third parties unless they knowingly participate in wrongful conduct. *Slottow v. Am. Cas. Co. of Reading, Pa.*, 10 F.3d 1355, 1359 (9th Cir. 1993) ("[A] corporation's employees owe no independent fiduciary duty to a third party with whom they deal on behalf of their employer.") (internal quotation marks

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[3] RCW 48.05.370 provides:

> Officers and directors of an insurer or a corporation holding a controlling interest in an insurer shall be deemed to stand in a fiduciary relation to the insurer, and shall discharge the duties of their respective positions in good faith, and with that diligence, care and skill which ordinary prudent persons would exercise under similar circumstances in like positions.

omitted) (applying California law); *Grierson v. Parker Energy Partners 1984-I*, 737 S.W.2d 375, 377 (Tex. App. 1987) ("Corporate officers owe a fiduciary duty to the shareholders and the corporation. Generally, however, they owe no duty to third persons. They may not, however, direct or participate in tortious acts. A corporate agent who knowingly participates in tortious or fraudulent acts may be held individually liable to third persons even though he performed the act as an agent for the corporation.") (internal citations omitted). Here, there is no evidence that Worthy or Reynolds knowingly participated in wrongful conduct or acted in bad faith when helping the Annechinos structure their accounts. Accordingly, they cannot be held personally liable for the Annechinos' loss.

III. Alternative Arguments

The Annechinos also rely on *Roth v. Kay*, 35 Wn. App. 1, 664 P.2d 1299 (1983), to argue that Worthy and Reynolds voluntarily assumed a duty to properly structure their accounts and, therefore, can be held personally liable for failing to do so. In *Roth*, a worker brought a negligence claim against a doctor for failing to file his worker's compensation application with the Department of Labor and Industries. *Roth*, 35 Wn. App. at 2. Division One of this court held that the doctor arguably had a statutory duty to file the application under RCW 51.28.020, but even if the doctor had gratuitously agreed to file the application, "'one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.'" *Roth*, 35 Wn. App. at 3-4 (quoting *Glanzer v. Shepard*, 135 N.E. 275, 276 (1922) (Cardozo, J.)).

Roth is distinguishable. There, the doctor gratuitously agreed to perform a service outside the scope of a typical doctor-patient relationship. Here, Worthy and Reynolds were acting on behalf of the Bank, the parties were engaged in a business transaction, and the service they agreed to perform, even if characterized as an "extra service," was still within the scope of a normal banking transaction. To hold that Worthy and Reynolds voluntarily assumed a duty to the Annechinos in this context would eviscerate the general rule that parties to a business transaction generally deal at arm's length and do not assume a duty to one another or enter into a special relationship absent the circumstances described above. *Liebergesell*, 93 Wn.2d at 889; *Tokarz*, 33 Wn. App. at 458-59; *Hutson*, 22 Wn. App. at 102-03, 105.

Finally, the Annechinos argue in passing that RCW 62A.4-103,[4] which requires banks to "exercise ordinary care," also applies to bank employees. Br. of Appellants at 22. We decline to address this argument. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) ("[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment as been made.").

Accordingly, we affirm the trial court's summary judgment order dismissing the Annechinos' claims against the individual defendants in this case.

Armstrong, P.J.

We concur:

[4] Chapter 62A.4 RCW codifies Article 4 of the Uniform Commercial Code, which concerns bank deposits and collections. RCW 62A.4-101. RCW 62A.4-103(a) provides:

> The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure.

No. 40141-0-II

Quinn-Brintnall, J.

Johanson, J.