PM 7-20-10

No. 40141-0-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL AND THERESA ANNECHINO,

Appellants/Plaintiffs,

v.

MICHAEL AND SUSAN WORTHY, et al.,

Respondents/Defendants

APPELLANTS' REPLY BRIEF

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DIVISION II
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I. INTRODUCTION

The Respondents' "Amended Brief" ("Response") is long on post hoc rationalizations and disputed factual assertions but short on the law in Washington which clearly recognizes that quasi fiduciary duties may be created "in fact" due to the relationship created between the parties. At best, the Respondents' attempt to rewrite the clear factual record, by their reliance upon the later-submitted declarations of Michael Worthy and Kelli Reynolds, rather than the contemporaneous correspondence and emails authored by them, merely creates genuine issues of material fact which should be resolved by a jury at trial, not by a court on summary adjudication.

As Appellants ("Annechinos") have demonstrated, the contemporaneous factual record establishes that the nature, quality and extent of the relationship between them and the Respondents (one in which the Respondent Reynolds admitted that the Appellants "trusted us to protect their interests") compels the conclusion that a quasi-fiduciary relationship, not merely a routine banker/depositor relationship, was created. But in either event, reversal is warranted, minimally to allow a jury trial on the factual issues which are squarely raised by the Response, including

1. Whether the nature, quality and extent of the relationship created between the Annechinos and the Respondents imposed a duty of trust and responsibility on them which is cognizable in law; and

2. Whether, as Respondents argue, the loss suffered was solely the fault of the Annechinos.

It is hornbook law that it is the Respondents' burden, as the party moving for summary judgment, to meet the "strict standard" that there are NO genuine issues of material facts, and that ALL inferences of facts construed in a light most favorable to the Appellants. See *Scott v. Pac. W. Mountain Resort,* 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992)*; Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 930P2d 307 (1997). Respondents pay lip service to these important CR 56 principles but then proceed to utterly ignore them in their brief. Rather Respondents ask this court to accept a version of the facts that is highly slanted in favor of them as the moving party and which draws all inferences against the Annechinos. This will not do. The Response proves too much: it proves that, at the very worst, the key facts underlying the question of whether a quasi fiduciary duty was created, are hotly contested.

II. ARGUMENT

A. THE RESPONDENTS' "STATEMENT OF FACTS" IS REPLETE WITH CONTESTED MISCHARACTERIZATIONS OF FACT AND POST HOC RATIONALIZATIONS FOR THEIR OWN FAILURE TO STRUCTURE THE ACCOUNTS CORRECTLY

The Response contains numerous misstatements of fact and strained arguments which simply highlight the need to have a jury resolve such factual disputes. Equally telling, the Response fails to even recite, let alone attempt to address, the many parts of the contemporaneous record which establishes that the Respondents have created a relationship of reliance, trust, loyalty and thus a duty of fiduciary care. The list of Respondents' factual mischaracterizations and post hoc rationalizations is long:

1. **"At most, plaintiffs contend that their claimed damages arose because a Bank employee made a mistake at work."** Response at p.1. Actually "at most" the plaintiffs both contend and establish that the Respondents

    a. made material misrepresentations to the Annechinos about their ability to structure their life's savings accounts in a manner that would insure FDIC insurance yet

    b. lacked "the expertise to protect our client who trusted us to protect their interests." (in Kelli Reynolds' words) EOR 77.

These key words: "protect" "trusted us" "their interests" somehow don't find their way into the Response brief. These words, and the inference from the fact that Kelli Reynolds characterized her relationship with the Annechinos in that manner, are totally consistent with the finding that a relationship of trust, reliance, loyalty, i.e., of a fiduciary character was created. Yet the Response claims that they, and the trial court, interpreted the facts in a light most favorable to the Annechinos. Clearly they did not. They repeat this fundamental error in their Response.

2. **Mr. Annechino "focused on whether plaintiffs could receive a premium interest rate on those deposits." ... "It is also clear that Mr. Annechino's decision to deposit further funds with the Bank was because of the "great rate" he received."** Response at p. 3 and p. 9. The emails between Michael Annechino. Kelli Reynolds and Michael Worthy contain numerous references to Mr. Annechino's desire to obtain FDIC insurance on all of his accounts, on the fact that it was the Bank officers who would come up with the proper plan to insure the deposits, and that he was accepting their recommendations. The record establishes this "focus":

   a. "Under my [Kelli's] recommendations we can eliminate 4 accounts and also increase FDIC to $3 million" EOR 72;

   b. "What I [Kelli] can do is set up one of the joint accounts...and move to the Trust ownership...[so] the FDIC coverage I sent you won't be affected." EOR 71);

   c. These actions and recommendations were based upon their experience and expertise in such matters (and knowledge of which he had NONE).

   d. The emails do contain one reference to an interest rate but only in the context of Mr. Annechino stating that he had "confidence" in the bank. CP 73.

No one fairly reading this email stream could claim in good conscience that Mr. Annechino's focus was on a quarter of a point on the interest rate, rather than insuring that his family's life savings were protected by FDIC insurance. Respondents reasons for mischaracterizing the record are obvious: the Respondents think they need to bend the facts to support their contentions that Mr. Annechino was not a novice at banking matters but rather an "apparently successful business person" (Response at p. 2). They ignore Mr. Annechino sworn declaration that he knew nothing of FDIC requirements and that he and his family relied solely on Reynolds and Worthy's experience, personal assurances and know-how which he "had no reason to question…" EOR 64. The law requires that the Respondents, the trial court and indeed this court accept the true state of affairs as reflected in the email exchange and Mr. Annechino's declaration and draw all inferences in favor of the Annechinos, not the Respondents.

3. **"Annechinos place great weight on the letter Ms. Reynolds wrote… (CP 12), but ignore Ms. Reynolds sworn testimony as to her understanding of the true facts that led her letter to be inaccurate. CP 179-80." Response at p. 10.**

Herein lies the "rub"—the central failing of the Response. The Respondents want this Court to follow the trial court down the path of the Respondents' fabricated falsehoods and accept as the "true facts" all of

Ms. Reynolds post-hoc rationalizations and excuses for her conduct. In fact and in law, this Court, on *de novo* review, should accept the statement that she regretted that her "expertise was not sufficient enough to protect our client who trusted us to protect their interests…" (EOR 77) as true and draw all reasonable inferences there from. Respondents' entire argument rests on the slenderest of threads: that this Court accept their assertion that her letter was inaccurate. But even her declaration cannot deny that she said what she said in the letter, that she lacked the expertise to accomplish what her clients trusted her to accomplish and that as a result the Annechino lost hundreds of thousands of dollars. Those are the "true facts."

4. **"No one at Bank of Clark County assumed the role of financial advisor to Mr. Annechino.**" Response at p. 20.

Not true. Certainly having ongoing discussions on the phone and through emails between the Bank's Chief Executive Officer and its Financial Services Supervisor" and a prospective and actual client/customer in which these officers received information, made recommendations for and created and structured a number of complicated bank accounts involving millions of dollars places them in the role of a financial advisor. Ms. Reynolds was clear: SHE made "recommendations [so] we can eliminate 4 accounts and also increase FDIC to $3 million"

EOR 72; SHE "set up one of the joint accounts...and move to the Trust ownership...[so] the FDIC coverage [she] sent [Annechino] won't be affected." EOR 71); If this isn't financial advice, what is it? These series of actions went far beyond that of a "typical, bank customer transaction" (Response at p. 20), presumably a bank teller opening an account and accepting a deposit, as the Respondents would have this Court believe. Although Ms. Reynolds' post hoc declaration claims that she encouraged Mr. Annechino to "independently verify insurance coverage" (Response at p. 20) there is nothing in the emails which makes any reference to such advice. It would be up to the jury to sort out this conflicting evidence.

The point is clear. Respondents brief is chock full of factual assertions that are inconsistent with the record but which only prove the Plaintiffs point: either the facts as contained in the contemporaneous emails and correspondence by accepted as true (in which case Plaintiffs were entitled to summary judgment) or this Court reverse for a jury trial to resolve these now disputed issues of material fact.

B. THE RESPONSE MISSTATES THE LAW ON FIDUCIARY DUTY.

In addition to mischaracterizing the facts, the Response tries to read out of existence the developing law related to under what circumstances a fiduciary or quasi fiduciary duty can be created in fact.

The Response pays lip service to the undeniable proposition, as stated in *Liebergesell v. Evans,* 93 Wn.2d 881, 890-891, 613 P.2d 110 (1980) and *Tokarz v. Frontier Savings & Loan*, 33 Wn.App. 456, 459, 656 P.2d 1089 (1982) that a fiduciary relationship can exist "in fact" if the relationship is such that one party justifiably expects his welfare to be cared for by the other. As Tokarz found, this fundamental principle of law can be applied to a relationship where, as here, the "complexities which often thrust a bank into the role of an advisor" can create a relationship of "trust and confidence."

Rather than acknowledge this fundamental legal proposition, which is dispositive of this appeal, the Response attempts to draw unimportant factual distinctions between the facts of these cases, and the other controlling authority cited in Plaintiffs Opening Brief and the facts here. For instance the Response argues that the Annechinos are not in the position of a "widowed school teacher with no expertise in business" nor were they "socially acquainted" with the bank officers. (Response p. 17, citing *Liebergesell*'s facts). By so doing, the Response misses the forest for the trees.

No court, including the *Liebergesell* court itself, has held that the specific facts of the Liebergesell case are the "necessary conditions" for the creation of a fiduciary duty "in fact". To do so would limit the broader legal holding to the very specific facts of *Liebergesell,* whereby, if Respondents logic were followed, only widowed school teachers would have the protection of a fiduciary relationship. Such is neither the law, nor equitable. To the contrary *Liebergesell* found that it was the character of the relationship, in all of its factual detail complexity, which gave rise to the understanding that the plaintiff there "appreciated [the defendants'] superior knowledge of financial affairs and considered his advice important in arranging her family's finances." Id at p. 884-885. These are the dispositive factual elements which *Liebergesell's* holding rests upon, not whether the plaintiff was a widow or socially acquainted with the defendants.

All of these factual elements are present here. The factual record and reasonable inference there from are clear that:

(1) The Annechinos appreciated (and followed) the defendants' advice;

(2) They had superior knowledge of FDIC rules and how to structure the various accounts to make sure FDIC insurance was available for them,

(3) They obviously considered their advice important because they took it, and

(4) They followed their advice in arranging the family's finances.

The Response attempts to avoid the actual holding of *Liebergesell* by recasting and mischaracterizing it. (Response at p. 18). They claim the "salient characteristics of a fiduciary relationship" include: "friendship between the contracting parties and "lack of business expertise on the part of one party." Respondents claim that the facts "alleged [sic] by the plaintiffs here far fall short of establishing a fiduciary relationship under this test." Id.

But the "test" of whether a fiduciary duty is created "in fact" cannot be limited to a relationship where there is "friendship" or a "lack of business expertise." To make these elements the "necessary conditions" of a fiduciary relationship would thoroughly emasculate this important doctrine. Although friendship and a total lack of business expertise might be factors a court or jury would consider in determining the issue, the essence of a fiduciary relationship, whether in fact or in law, is that a relationship of trust and confidence was created where the relations with another such that the "latter justifiably expects his welfare to be cared for by the former." See Restatement of Contacts Section 472, comment c at p. 898, cited with approval in *McCutcheon v. Brownfield*, 2 N.App. 348, 356, 57, 467 P.2d 868 (1970).

Kelli Reynolds' own description of the relationship between her and the Annechinos (i.e., that she failed to protect their client who trusted them to protect their interests) fits this true "test" like a glove. Try as hard as they might, the Respondents simply cannot read this accurate and telling description of the trust relationship out of existence. The lack of friendship or social acquaintance is not dispositive.

C. THE DEFENDENTS ATTEMPT TO AVOID PERSONAL LIABILITY FOR THEIR BREACH OF FIDUCIARY DUTIES FAILS AS A MATTER OF LAW.

As the facts cited above establish, there is no doubt that the defendants failed to secure FDIC insurance for all of the Plaintiffs' accounts and as a result breached the duty of care owed to the Annechinos. Under either of the two "scenarios" of bank error cited by the two defendant bank officers Reynolds and Worthy, both were completely avoidable errors.

Defendants' Opposition Brief argues that no personal liability will lie for breach of fiduciary duties committed by a bank officer or employee within the scope of their employment. They argue that only their employer, the Bank is subject to such liability. They are wrong.

It is fundamental that the breach of a fiduciary duty is a tort. As Plaintiffs pointed out in their Opening Brief, 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.

The Defendants attempt to distinguish *Senn* on its facts is unavailing. They claim that the case is limited to a case of "blatant fraud". This distinction was not the rationale of the decision. Senn rests on the notion that one who breached a fiduciary duty can be held personally liable, irrespective of the precise factual circumstances in which a breach of fiduciary duty took place.

Here the fact establish that 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 Reynold's emails and vice versa.

Defendants attempt to distinguish *Eisenberg* is also unavailing. They claim that since the guardian had fiduciary duties recognized in law (guardian/ward) and is therefore distinguishable. But this begs the question. The Annechinos claim that the nature of the relationship between them and the Defendants created a fiduciary in fact, under the case law cited above. Assuming this to be true, then *Eisenberg* stands for the proposition that these officers can be held personally liable for their breach of fiduciary duties. Defendants claim that bank employees or officers, uniquely, enjoy immunity for their negligent breaches of fiduciary duty. Defendants' Opposition cited no authority for such a proposition. None exists. It runs counter to the *Senn* case, *supra,* and *In Re Eisenberg, supra,* that agents of the principal are personally liable for their negligent acts.

Defendants' citation to *One Pacific Towers Homeowners' Association v. HAL Real Estate Investments. Inc.,* 108 Wa. App. 330, 347, 30 P.3d 504 (2001), aff'd in part and rev'd in part, 148 Wn.2d 319, 613 P.3d 1094 (2002) is curious. It supports Plaintiffs position that corporate officers can be held liable for torts (here, breaches of fiduciary duties) committed with the scope of their corporate duties. There is no requirement that these "torts" are limited to intentional torts or blatant frauds or embezzlement, even though the facts of other cases cited may have involved such conduct. But even if misrepresentation were required, the facts of record and inferences there from establish that a material issue of triable fact exists whether the Defendants misrepresented to the Annechinos their ability and expertise to properly structure their accounts so as to provide full FDIC insurance. Ms Reynolds admitted in writing after the loss occurred that she lacked the necessary expertise to structure the Annechinos' account properly, clearly a material omission, given that no such acknowledgment of her limitations were ever communicated to the Annechinos. Therefore Defendants' attempt to avoid liability fails under Washington law.

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 plaintiffs and a lender. The court found that defendant had fiduciary duties to the plaintiffs 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.

Defendants seek to place the blame for the improper structure of the accounts by relying on the advice provided by the FDIC. This advice is simply the hearsay and inadmissible opinion of the FDIC and has no affect on the duties owed to plaintiffs by the defendants. It does not immunize the defendants from their own breach of fiduciary duties. At best, it creates genuine issues of material fact as to the responsibility, if any, of the Annechinos in this loss. It is uniquely for the jury to determine whether the Annechinos' reliance upon the repeated representations and expertise of the Defendants was justified in light of all the circumstances. The trial court, by resolving this factual issue against the Annechinos erred.

D. DEFENDANTS OPPOSITION ERRONEOUSLY CLAIMS THAT THE STATUTORY DUTIES SET FORTH IN RCW 62A.4-103, ARE IMPOSED ONLY ON THE BANK AND NOT ITS AGENTS OR EMPLOYEES.

RCW 62A.4-103 sets a standard of reasonable care owed to bank customers by the bank through its agents and employees. Again, Defendants in their Opposition cite no authority for the proposition that this duty is owed by the bank alone and not their CEO or Financial Services Supervisor. None exists.

As the Annechinos established in their Opening Brief, the Bank, a corporate entity, acts only 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). Defendant's interpretation of this Act would render the bank regulation meaningless. And see, *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, (2005).

E. DEFENDANTS ERRONEOUSLY CLAIM THAT THEY HAVE ASSUMED NO DUTY TO STRUCTURE ANNECINOS' ACCOUNTS ALTHOUGH THEY CONCEDE THAT APPLICABLE TORT PRINCIPLES WOULD CERTAINLY ESTABLISH SUCH A DUTY.

Defendants continue to disregard the case of *Roth v. Kay*, 35 Wn.App. 1, 664 P.2d 1299 (1983) which Plaintiffs' argued in the Opening Brief and in the trial court below. See Motion for Summary Judgment. EOR 44. In that case, a doctor's office represented that it would take care 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 fiduciary duty was owed to carefully manage the financial deposits of the Plaintiffs 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. Reynold's admits, to "trust them to protect their interests." *See* Exh. 1 to Complaint. EOR 12. There is no dispute on these facts and the duty imposed by law flows directly from the nature of the relationship which these defendants openly and knowingly created with the Annechinos.

F. DEFENDANTS' MOTION FOR A STAY WAS PROPERLY DENIED BY THE TRIAL COURT.

Defendants in the Amended Opposition attempts to revive an argument raised in the trial court that the trial court should have stayed this action rather than resolving it, so that the court could wait to see whether the FDIC might somehow compensate the Annechinos for their full lose. At the time of resolving this case on summary judgment the Annechinos has suffered a real and cognizable loss. The notion that the FDIC might compensate them out of the remaining assets of the failed bank is sheer speculation and, as the trial court correctly found, does not justify staying this action. This decision, even if properly before this Court on appeal, should be affirmed.

III. CONCLUSION

For all the foregoing reasons this Court should either grant summary judgment for Plaintiffs, or minimally, reverse the trial court's order granting summary judgment for the Defendants a and remand for trial on the disputed issues of material fact that are present in this record.

RESPECTFULLY SUBMITTED this 17th day of September, 2010.

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CERTIFICATE OF SERVICE

I, Carolann Funk, declare as follows: on September 30, 2010 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:

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

DATED at Vancouver, Washington this 30th day of September, 2010.

Carolann M. Funk
Carolann Funk