Court of Appeals Cause No. 40141-0-II

No. 86220-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL AND THERESA ANNECHINO, PETITIONERS

v.

MICHAEL WORTHY, JOAN COOPER, RESPONDENTS

SUPPLEMENTAL BRIEF OF PETITIONERS

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TABLE OF CONTENTS

I. INTRODUCTION 1

A. ISSUES 4

B. ASSIGNMENT OF ERROR 7

1. The Trial Court and Court of Appeal Erred in Finding That the Defendants Owed No Quasi-Fiduciary Duties to Plaintiffs Where Uncontradicted Evidence Exists as to the Nature, Degree and Extent of the Relationship Between the Plaintiffs and Defendants. 7

a. Standard of Review 7

b. Factual Statement 9

2. 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 Defendants With the Plaintiffs. 10

a. Mr. Worthy admitted that the Bank held itself out publicly as having the Bank and its deposits as FDIC insured. 11

b. Defendant Worthy admitted that Plaintiffs relied on the "level of service" provided by the Bank of Clark County... 11

c. Mr. Annechino contacted the Bank's officers personally, well prior to deciding whether to deposit his life savings. 12

d. Defendants Worthy and Reynolds stated to Mr. Annechino personally that they could and would ensure FDIC insurance for all the accounts. 13

e. 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. 14

f. The defendants 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.. 14

g. The Defendants 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. 15

h. Defendant 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." 15

i. 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 defendants. 16

j. Defendant Reynolds' job title was "Financial Services Supervisor." 16

k. Mr. Annechino's Declaration stating his total lack of knowledge, experience or understanding of FDIC rules is unrebutted. 17

l. The undisputed facts show the Defendants breached these duties. 18

1. Defendant 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. 18

2. Defendant Worthy's "explanation" of the "error" also thoroughly implicates the Defendants. 19

3. Defendant Reynolds' Declaration cannot "retract" her prior admission of fault but is further proof of her failure to understand and apply FDIC rules. 19

II. LEGAL ARGUMENT 21

A. The Uncontroverted Evidence Establishes That, as a Matter of Law, a Quasi-Fiduciary Relationship Was Established Between Defendants Reynolds and Worthy and the Annechinos. 21

B. The Personal Liability of the Defendant Bank Officers Flows From Their Breach of Fiduciary Duties 24

C. Defendants Erroneously Claimed Below That the Statutory Duties Set Forth in RCW 62A.4-103, Are Imposed Only on the Bank and Not Its Agents or Employees. 26

D. Defendants Erroneously Claim That They Have Assumed No Duty to Structure Plaintiffs' Accounts Although They Concede That Applicable Tort Principles Would Certainly Establish Such a Duty 27

IV. CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Adamski v. Tacoma Gen. Hosp., 20 Wn. App. 98, 579 P.2d 970 (1978) ... 8

Bennett v. Huish, 155 P. 3rd 917 (2007) ... 27, 28

In Re Eisenberg, 43 Wn.App.761, 719 P.2d 187 (1986) ... 27

Folsom v. Burger King, 135 Wn.2d 658, 958 P.2d 301 (1998) ... 30

J.N. v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 871 P.2d 1106 (1994) ... 7

Lakes at Mercer Island Homeowners Assoc. v. Witrack, 71 Wn. App. 177, 810 P.2d 27, *review denied,* 117 Wn.2d 1013 (1991) ... 7

Liebergesell v. Evans, 93 Wn.2d 881, 613 P.2d 1170 (1980) ... 22, 23, 24

Magula v. Benton Franklin Title Co., 131 Wn.2d 171, 930 P.2d 307 (1997) ... 9, 10

McCorkle v. Hall, 56 Wn. App. 80, 782 P.2d 574 (1989), *review denied,* 114 Wn.2d 1010 (1990) ... 8

McCutcheon v. Brownfield, 2 Wn. App. 348, 467 P.2d 868 (1970) ... 23

Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, (2005) ... 29

Pierce v. Spokane International R. Co., 15 Wn.2d 431, 131 P.2d 139 (1942) ... 28

Powell v. Viking Ins. Co., 44 Wn. App. 495, 722 P.2d 1343 (1986) ... 8

Roth v. Kay, 35 Wn. App. 1, 664 P.2d 1299 (1983) ... 29

Salter v. Heiser, 36 Wn.2d 536, 219 P.2d 574 (1950) ... 23

Schoneman v. Wilson, 56 Wn. App. 776, 785 P.2d 845 (1990) ... 7

Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (1992)...... 9

Senn v. Northwest Underwriters, 74 Wn. App. 408 (1994)................ 26, 27

Tokarz v. Frontier Savings & Loan, 33 Wn. App. 456, 656 P2d 1089 (1982).. 22

Twelker v. Shannon & Wilson, Inc., 88 Wn.2d 473, 564 P.2d 1131 (1977)9

Young v. Key Pharm., Inc., 112 Wn.2d 216, 77 P.2d 182 (1989)............ 10

Zobrist v. Culp, 18 Wn. App. 622, 570 P.2d 147 (1977), *rev'd,* 95 Wn.2d 556 (1981).. 8

Statutes

RCW 62A.4-103 28

Other Authorities

Bernstein et al., *Failed Financial Institution Litigation: Remember When,* 5 N.Y.U.J.L. and Bus. 243 (2009) 1

Keeley et al., *"Superpowers" of Federal Regulators: The Subprime Mortgage crisis and Bond Claim Issues Arising from Take Over by the FDIC.* 16 Fidelity L. J. 1, 5-8 (2010)... 2

Morgenson & Story, *"In Financial Crisis, No Prosecutions of Top Figures," N.Y. Times,* April 14, 2011 2

Restatement of Contracts § 472, comment *c* at 898 (1932)...................... 21

Rules

12 C.F.R. Sec. 330.9 Joint Ownership Accounts..................................... 21

I. INTRODUCTION

In the present economic crisis, with rampant bank failures and mortgage foreclosures, a simple legal principle must be underscored: 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.

The 2008-2010 Recession was the largest financial downturn in the U.S. economy since the Great Depression and cost millions of Americans their homes, jobs, life savings and financial assets. The collapse of the Washington Mutual (WAMU) bank in September of 2008 represented the largest bank failure in U.S. history. See Bernstein et al., *Failed Financial Institution Litigation: Remember When,* 5 N.Y.U.J.L. and Bus. 243 (2009). Banks in four U.S. states with more than $1 billion in assets were closed by regulators in a single day on February 13, 2009, the most in one day since 1992. Id. at p. 244. States and federal regulators closed 25 banks in 2008, matching the total for 2001-2007, as home foreclosures rose and bank profits tumbled. Id. The subprime mortgage crisis which accompanied these bank failures exceeded in the total amount of failed assets ($371 billion) that of the Savings and Loan crises from 1986 through 1995 ($228.4 billion). See Keeley et al., *"Superpowers" of Federal Regulators: The Subprime Mortgage crisis and Bond Claim Issues Arising from Take Over by the FDIC.* 16 Fidelity L. J. 1, 5-8 (2010).

Despite the horrendous social and economic cost of this financial debacle, statistical analyses establishes that there have been very few prosecutions of financial officers. During the S & L crisis, for instance, special governmental task forces referred 1,100 cases to prosecutors resulting in more than 800 bank officials going to jail. See Morgenson & Story, *"In Financial Crisis, No Prosecutions of Top Figures," N.Y. Times,* April 14, 2011.

http://www.nytimes.com/2011/04/14/business/14prosecute.html?pagewanted=all.

From 2007 to 2011, during the worst of the financial crisis, an average of only 72 financial officers per year have been referred for criminal prosecutions. Id. According to Syracuse University's "Transactions Records Access Clearinghouse" bank regulators referred 1,837 cases to the Justice Department. Id.

This sorry record begs the central question in this case. With bank failures at an all-time high and criminal prosecutions lagging far behind, what civil remedies do bank depositors and customers have against the financial officers when they go beyond the normal banker/depositor relationship to establish a close relationship of trust, considered advice and fidelity with them and yet fail in their duties to act in their customers' best interests and the bank fails. In such circumstances the bank itself cannot be sued because it is bankrupt, in FDIC receivership and its successor bank does not assume any of their liabilities. One answer would be that the Federal Deposit Insurance Corporation was established to protect such customers. But such protection only applies if the bank officials have properly structured the customer's accounts to provide FDIC insurance. But where, as here, the faulty advice that these financial officers provide concerns how to make sure the depositor has full FDIC insurance on ALL of their accounts and ALL of their funds, the customer is potentially remediless.

In truth, the law does not turn a blind eye toward such aggrieved customers. An established legal doctrine can, in certain limited circumstances, place a quasi-fiduciary duty on such financial officers so that any breach of that duty will give rise to a remedy in law to customers whose life savings are placed at risk.

In this case the lower courts have denied that such a doctrine protects the Annechino family from financial ruin. Review and reversal by this Court is essential to protect unsuspecting bank customers from financial disaster and allow these financial officers, with whom the Annechinos have established a trust relationship, to spread the risk of such loss through available insurance markets rather than place the entire burden upon the innocent parties, here Michael and Theresa Annechino.

To the extent the law is not clear that quasi-fiduciary duties exist, this Court can clarify it. To the extent the law might be said to deny the Annechinos any remedy against these financial officers, this Court can insure that they are protected.

A. ISSUES

The critical issue in this case can be framed as follows:

ISSUE: Is a quasi-fiduciary duty created between a depositor and defendant Bank officials where there is uncontradicted documentary evidence that the depositor:

1. Contacted the Bank's officers well prior to deciding whether to deposit his life savings in the Bank.
2. The Bank stated publicly that its deposits were FDIC insured.
3. In email and telephone communications the depositor made it clear that he would only make deposits into accounts that were fully FDIC insured in their entirety.

4. The defendant bank officials represented to the depositor that they could and would do so.
5. The depositor had direct contact with the CEO and Financial Officers of the Bank to re-iterate his concern that all deposits be FDIC insured.
6. The defendant bank officials informed the depositor that his deposits would be structured so as to obtain FDIC insurance for each of his accounts.
7. The defendant bank officials created and advised the depositor of the structure for the various accounts which the bank officials believed and informed the depositor were FDIC insured.
8. It was only AFTER the defendants' bank officers sent this structure to the depositor and represented that each account would have FDIC insurance that the depositor decided to make these deposits in the manner suggested by the defendants.
9. One bank official stated in writing that she was endeavoring to "protect our client" and that the clients "trusted us to protect their interests."

10. The depositor also had telephonic discussion with the Bank's CEO to negotiate the amount of the interest rate that the accounts would receive.

At the outset it is important to re-iterate the legal and factual basis of the Plaintiffs' case. The factual predicates to the legal issue identified above are all uncontradicted and a matter of record. The clear cut legal issue for this court, on *de novo* review, is whether the contacts between Michael Annechino and the defendants can properly be characterized as:

(1) limited to those of a normal depositor in a bank, as defendants argued below and the trial court and Court of Appeals adopted or

(2) were of such a nature, extent and duration that the defendants created quasi-fiduciary duties to the Annechinos, as Plaintiffs contend and this Court should find.

B. ASSIGNMENT OF ERROR

1. The Trial Court and Court of Appeal Erred in Finding That the Defendants Owed No Quasi-Fiduciary Duties to Plaintiffs Where Uncontradicted Evidence Exists as to the Nature, Degree and Extent of the Relationship Between the Plaintiffs and Defendants.

a. Standard of Review

Review of a motion granting or denying summary judgment is "*de novo*". *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 871 P.2d 1106 (1994) (the Court of Appeals reversed summary judgment, holding that an issue of fact existed as to whether the school district had acted reasonably). *Lakes at Mercer Island Homeowners Assoc. v. Witrack*, 71 Wn. App. 177, 810 P.2d 27, *review denied,* 117 Wn.2d 1013 (1991) (the Court of Appeals reversed summary judgment for the homeowners associated, holding that there was a genuine issue of material fact as to whether 25-foot trees planted by the defendant violated a restrictive covenant forbidding fences over six feet). *Schoneman v. Wilson*, 56 Wn. App. 776, 785 P.2d 845 (1990) (The trial court's grant of summary judgment in a quiet title action was reversed on the ground that an issue of fact existed as to whether a real estate sales contract had been abandoned). *McCorkle v. Hall*, 56 Wn. App. 80, 782 P.2d 574 (1989), *review denied,* 114 Wn.2d 1010 (1990) (The trial court was reversed on the ground that issues of fact existed as to whether a liability release clause in a health club contract was so conspicuous that plaintiff could not have unwittingly signed it). *Powell v. Viking Ins. Co.,* 44 Wn. App. 495, 722 P.2d 1343 (1986) (Summary judgment in favor of the plaintiff in an action seeking declaration of uninsured motorist coverage was reversed on ground that credibility problems of the insured's spouse made summary judgment inappropriate). *Adamski v. Tacoma Gen. Hosp.,* 20 Wn. App. 98, 579 P.2d 970 (1978) (The trial court was reversed, the Court of Appeals holding that there were inferences requiring trial with reference to the issues of agency and negligence). *Zobrist v. Culp*, 18 Wn. App. 622, 570 P.2d 147 (1977), *rev'd,* 95 Wn.2d 556 (1981) (In a quiet title action, the trial court was reversed, the court of Appeals holding that there were fact issues relative to the railroad right-of-way and reversion for non-use). *Twelker v. Shannon & Wilson, Inc.,* 88 Wn.2d 473, 564 P.2d 1131 (1977) (The trial court was reversed, having granted a dismissal of the plaintiff's claims of libel and slander, the Supreme Court holding that factual issues were raised by the affidavits of plaintiff's experts).

The defendants bear the burden of establishing there are no genuine issues of material fact, and they are held to a "strict standard."

Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant and all inferences from the evidence must be construed in the light most favorable to the nonmoving party. *Magula v. Benton Franklin Title Co.,* 131 Wn.2d 171, 930 P.2d 307 (1997). The moving party bears the burden of showing that the Plaintiffs may not recover, as a matter of law, as to any of the claims or causes of action brought and that there is no genuine issue for trial on any such claims. *Young v. Key Pharm., Inc.,* 112 Wn.2d 216, 225, 77 P.2d 182 (1989). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. *Magula v. Benton Franklin Title Co.,* 131 Wn.2d 171, 930 P.2d 307 (1997).

b. Factual Statement

Plaintiffs' uncontroverted evidence establishes that a quasi-fiduciary relationship had been established between defendants Reynolds and Worthy and that the duties imposed by such a relationship have been violated by a failure to properly structure the Annechinos' bank accounts in such a manner as would have insured full FDIC coverage. The uncontroverted facts are contained in contemporaneous emails, documents and admissions and show the nature, extent, and quality of the very close and special relationship created by the Defendants own actions toward Plaintiffs.

The emails, Defendant Reynolds' January 2009 letter to her Bank superior, the Defendants' Answer, and the sworn testimony and admissions by Michael Worthy all establish that the relationship between the Plaintiffs and these Defendants went far beyond the usual depositor/banker relationship, as Defendants contend. Mr. Annechino did not just happen to show up at the Bank one day to deposit funds in the Bank. There were extensive and ongoing communications between the parties about these deposits. Defendant Kelli Reynolds stated to senior Bank personnel that in structuring the Annechino accounts to insure FDIC coverage, she was endeavoring to "protect our client" and that the clients "trusted us to protect their interests." *See* EOR 12, Exh. 1 to Complaint and Exh. 4 (hereafter January 2009 letter). This accurate characterization of the relationship is not controverted by any of the declarations filed by defendants below. What is **uncontested** about these interchanges, which the defendants simply cannot ignore or deny, include the following facts which justify the finding that Defendants owed quasi-fiduciary, statutory and/or a voluntarily assumed legal duties to Plaintiffs:

1. **Mr. Worthy admitted that the Bank held itself out publicly as having the Bank and its deposits as FDIC insured.**

Mr. Worthy testified to this fact:

Q. Did the Bank of Clark County represent itself to the community as being -- having deposits that were FDIC insured?
A. Yes.
Q. What does that mean to you?
A. Well, I'd probably characterize that answer. As an FDIC-insured institution, what it meant to me was that **we paid premiums to the FDIC so that we were able to represent that insurance coverage for our depositors.** It **differentiated us** from other financial institutions that would be gathering deposits, particularly credit unions, which are not FDIC insured, brokerage companies, which are not FDIC insured. So in the business of gathering deposits as the primary funding mechanism for our business, **we would have wanted to use that as a tool to attract new deposits.**

(emphasis added)

EOR 212. Worthy Deposition, p.9. *See* Second Withey Declaration, Exh. 1. *See* Answer on file, paragraph 3.8, where defendants admitted the same. EOR 23.

2. **Defendant Worthy admitted that Plaintiffs relied on the "level of service" provided by the Bank of Clark County.**

Q. And how do you know Michael Annechino?
A. I'm trying to think back. He and his wife and their children had lived in, I want to say, Richfield, Washington, and established deposit accounts with us at the Bank of Clark County. And I don't recollect the particular window of time, but I would have said it would have been in the early 2000s -- 2003, 2004,

maybe. They relocated later to the east coast. And their experience, I think, as they recounted it to us was **they didn't find financial institutions where they moved to have the same level of service that we had offered over time** and opted to leave much of their deposit business with us despite the fact that they had moved across the country. (emphasis added).

Worthy Deposition, pp. 12-13, *See* Second Withey Declaration, Exh. 1. EOR 214-215.

3. Mr. Annechino contacted the Bank's officers personally, well prior to deciding whether to deposit his life savings.

See Annechino Declaration. In such communications, Mr. Annechino made it clear that he would only make deposits into account that were fully FDIC insured in their entirety. This is substantiated by Defendant Worthy's deposition testimony:

And I'm confident he would have said, though I don't recall the specific language, **that he would be seeking accounts that were insured under FDIC guidelines.**

Q. Do you recall him stating to you that he wouldn't make the deposits unless they were FDIC insured or words to that effect?

A. I don't recall specific language, but **I guess I would say that I would have understood his expectation was that he had FDIC insurance.**

Worthy Deposition, p. 16, and Second Withey Declaration, Exh. 1 (Emphasis added). EOR 217 *See* also Annechino Declaration. EOR 253-254.

4. Defendants Worthy and Reynolds stated to Mr. Annechino personally that they could and would ensure FDIC insurance for all the accounts.

Q. By the same token, then did **you and the bank assume a responsibility to the customers to structure accounts in ways that complied with the FDIC rules**, if that is what the customers desired?

A. **We would have and did consistently** take the approach that we were an FDIC-insured institution and **here are the parameters that can ensure that your deposits are covered by FDIC insurance.**

EOR 213. Worthy Deposition, p.10. *See* Second Withey Declaration, Exh. 1 (emphasis added).

Mr. Worthy's Answer to Plaintiffs' Complaint further admits that "Mr. Annechino spoke with Mr. Worthy and Mr. Worthy indicated that he understood that Bank **representatives had come up with a plan to insure the deposits,** and further discussed with Mr. Annechino the interest rate that would be received on these accounts." See Answer on file at paragraph 3.10 (emphasis added.) EOR 23. The Answer further admits to other conversations: (1) that Mr. Annechino indicated that he had confidence in the Bank, and that Kelli Reynolds indicated that the Bank appreciated his loyalty (Para. 3.6); (2) that Mr. Annechino had at least one conversation with Michael Worthy regarding increasing his deposits with the bank (Para. 3.2). EOR 21-22.

5. **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.**

5. **The defendants 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.**

Defendant Reynolds e-mailed plaintiffs stating "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, Exh. 2. It is clear that it was Ms. Reynolds, not Mr. Annechino, who took responsibility for eliminating certain accounts and "setting up" the new accounts—all to the end of insuring full FDIC coverage.

7. **The Defendants 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.**

The declaration of Kelli Reynolds admits that she prepared the "Recommended Account Structures & FDIC [Coverage]" which she emailed to Mr. Annechino. *See* Reynolds' declaration. EOR 179. *See* Annechino Declaration, Exh. 1. EOR 68. The defendants' Answer states: **"Kelli Reynolds stated the chart had been submitted to Joan Cooper and Michael Worthy."** P.3.5, EOR 22.

8. **Defendant 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. Exh. 4 of the Annechino declaration is the January 26, 2009 letter of Ms. Reynolds to Julie Adelman, Executive Vice President/CFO of the Bank of Clark County and it recounts:

"I reviewed all the [Annechino] accounts and formatted my results in a chart of ownerships and balances and submitted to Mike Worthy and my manager Joan Cooper. Based on my recommendation, Michael

Annechino wired money bringing their total balances to 3 million dollars, only to find FDIC has seized $1,392,171.60 in funds they claim are not structured properly to be insured…**I regret my expertise was not sufficient enough to protect our client who trusted us to protect their interests…" EOR 77.**

9. 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 defendants.

See Annechino Declaration, Exh. 2. EOR 70-73.

10. Defendant Reynolds' job title was "Financial Services Supervisor."

See Annechino Declaration, Exh. 4. EOR 77. By financial services, plaintiffs reasonably assumed that defendant was referring to services related to planning, managing and providing banking, investment, financial planning and insurance services. The term "Supervisor" implies a certain level of authority and expertise. Mr. Annechino had every right to rely upon the Bank's CEO and Financial Services Supervisor, and did so.

11. Mr. Annechino's Declaration stating his total lack of knowledge, experience or understanding of FDIC rules is unrebutted.

He states "I did not know the applicable FDIC rules nor did I give [Defendants] 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... At no point in any of the discussions between me and [Defendants] did they appear to be anything less than 100% confident that they knew what they were doing." Id. EOR 64. There was a huge disparity between the knowledge and experience of the Defendants regarding the FDIC rules and how to apply them and Mr. Annechino.

These uncontradicted facts establish the factual basis upon which the court should find, as a matter of law and based upon the legal authority cited by Plaintiffs that (1) these Defendants had a quasi-fiduciary duty owed to the Annechinos, (2) a statutory duty is imposed in law in these circumstances and (3) the Defendants gratuitously assumed a duty of care to the Annechinos.

11. The undisputed facts show the Defendants breached these duties.

Furthermore the facts are simply uncontested that Worthy and Reynolds' errors, misunderstanding and/or lack of expertise or experience in structuring bank deposits to ensure FDIC coverage was a breach of these duties causing the Annechinos to lose up to $500,000 in deposits. Tellingly, the Defendants have offered two somewhat conflicting versions of how it was that the way they structured the accounts ended up leaving the Annechinos exposed and without FDIC insurance for a significant sum of money. What is common about **both** explanations is that it was **their errors** in structuring or numbering these accounts that lead to this loss, not anything that the Annechinos did. The first was offered by Kelli Reynolds which takes full responsibility for her inaccurate interpretation of FDIC rules. The second was offered by Michael Worthy is in his e-mail to Mr. Withey. *See* Exh.3 to Withey Declaration. Both caused this loss. The undisputed facts of breach of duty are:

1. **Defendant 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.**

Reynolds' letter to her bank supervisors (EOR 77 *See* Annechino Declaration, Exh. 4), quoted above, clearly establishes that she takes responsibility for the loss to the Annechinos.

2. Defendant Worthy's "explanation" of the "error" also thoroughly implicates the Defendants.

See EOR 60, Withey Declaration, Exh. 3. Worthy claims, erroneously, that everything was fine until Mr. Annechino suggested that account number 012009528 be changed to the name of the Annechino Family Trust but that bank personnel actually changed a different account incorrectly. In truth, under FDIC rules the original structure was wrong and did not insure up to $500,000 in insurable deposits.

3. Defendant Reynolds' Declaration cannot "retract" her prior admission of fault but is further proof of her failure to understand and apply FDIC rules.

Ms. Reynolds' lack of fundamental knowledge and ability to properly structure accounts is further demonstrated through her declaration submitted in the trial court where she tries to justify her actions and, in fact, shift the blame onto the Annechinos. EOR 179-180. She represents that her initial proposed bank account structures would have been fully insured. This is patently untrue as can be proven by FDIC regulations. 12 C.F.R. Sec. 330.9 Joint Ownership Accounts, provides:

> (b) Determination of insurance coverage. The interests of each co-owner in all qualifying joint accounts shall be added together and the total shall be insured up to the SMDIA (standard maximum deposit insurance amount).

In October 2008, the SMDIA was $250,000. Reynolds proposed structure recommended the creation of three joint accounts with a total deposit amount of $2,000,000. The maximum amount of insurance in the joint deposit category was only $250,000 per depositor. Reynolds recommendations would leave $1,000,000 uninsured. What is clear and what the defendants have in fact admitted in their Answer is that "...the Annechino accounts **could have been structured** to provide $3.0 million if FDIC insurance..." EOR 23. Answer on file at P.3.7 (emphasis added). But Reynolds continues to fail in her basic knowledge concerning FDIC rules. She admitted such lack of expertise in her January 2009 letter. *See* EOR 77. Annechino Declaration, Exh. 4. The FDIC stated:

> There were two accounts in the joint ownership category. Each depositor is allowed up to $250,000 of deposit insurance for his or her share in all joint accounts at the same financial institution. Michael and Theresa Annechino were signatories on account 12003471 for $437,604.72 and Michael, Theresa, Alexis and William Annechino were signatories on account 12009528 for $1,009,287.08. These two accounts totaled $1,496,882.80. Since each of the four signatories received $250,000 of deposit insurance, the remaining uninsured balance was $496,882.80. EOR 79.

II. LEGAL ARGUMENT

A. The Uncontroverted Evidence Establishes That, as a Matter of Law, a Quasi-Fiduciary Relationship Was Established Between Defendants Reynolds and Worthy and the Annechinos.

The nature, extent and character of Plaintiffs' relationship with Defendants, based upon the uncontested facts summarized above, are not in dispute. Under *Tokarz v. Frontier Savings & Loan,* 33 Wn. App. 456, 459, 656 P2d 1089 (1982) the defendants, given the "complexities which often thrust a bank into the role of an adviser," thereby created "a relationship of trust and confidence" which lead to the creation of a fiduciary duty. This relationship was such that Mr. Annechino "justifiably expects his welfare to be cared for" in regard to FDIC insurance. *Liebergesell v. Evans,* 93 Wn.2d 881, 890-891, 613 P.2d 1170 (1980). (A fiduciary relationship exists if in fact the relationship of the parties is such that one party justifiably expects his welfare to be cared for by the other.)

Under *Liebergesell,* there can be two kinds of fiduciary duty: one imposed as a matter of law (attorney to client, trustee to beneficiary, doctor to patient) and a quasi-fiduciary duty created as a result of the relationship between the parties. 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) .

> "A confidential or fiduciary relationship between two persons may exist either because of the nature of the relationship between the parties historically considered fiduciary in character; *e.g.*, trustee and beneficiary, principal and agent, partner and partner, husband and wife, physician and patient, attorney and client; or the confidential relationship between persons involved may exist in fact."

McCutcheon v. Brownfield, 2 Wn. App. 348, 356-57, 467 P.2d 868 (1970) . *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.").

The *Lebergesell* 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 defendants' 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).

This is a case where the law should impose a quasi-fiduciary duty because the facts of the case establish that the bank and its officers had far superior knowledge about how to structure bank accounts so as to insure FDIC coverage, affirmatively represented such know how to the depositor and recommended and created the very structures that resulted in the completely avoidable loss to the depositor. The bank stated that their goal was to "protect our client" because they "trusted us to protect their interest." There can hardly be a better case for the imposition of a fiduciary duty in the banking context than this case.

Such duty is only "quasi" because the bank officials have their own financial interest in the transactions involved and cannot act "solely" in the interest of its depositors. But since the facts clearly establish that a relationship of trust was developed between the fiduciary and its client, and those facts are, as here, uncontested, a quasi-fiduciary relationship will be held to exist in law. Therefore a breach of those duties of fidelity, and care can give rise to liability on the part of the fiduciary, here the bank officials involved.

Defendant Reynolds admits that the bank officials acted "to protect our client" because they "trusted us to protect their interests." *See* Annechino Decl. Exh. 4. EOR 77. There is no legitimate dispute that the defendants' knowledge of the complexities of FDIC coverage far exceeded that of the Plaintiffs because Plaintiffs had none. The duties imposed by such a relationship have been violated by the defendants' failure to disclose that they did not and could not ensure FDIC coverage, that they lacked the expertise to do so, and because it was their error which caused the Annechinos to lose $500,000.

The Defendants below argued that since the bank had provided the Annechinos with some information about FDIC insurance that the burden was upon them to establish the accounts correctly. The trial court appeared to accept this argument. But this argument ignores the fact that throughout ALL of the transactions it was Kelli Reynolds and Michael Worthy who took sole responsibility for structuring the accounts and the Annechinos were never informed by the Bank that they had to review the defendants' work to make sure it was correct. At a minimum, such argument presents a factual issue precluding summary judgment.

B. The Personal Liability of the Defendant Bank Officers Flows From Their Breach of Fiduciary Duties

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 asserted below that no personal liability will lie for breach of fiduciary duties committed by a bank officer or employee within the scope of their employment. 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. Defendants below claimed that bank employees or officers, uniquely, enjoy immunity for their negligent breaches of fiduciary duty. Defendants 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 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.

C. Defendants Erroneously Claimed Below 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 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. 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). Defendants' interpretation would render the bank regulation meaningless. Secondly, "liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, (2005).

D. Defendants Erroneously Claim That They Have Assumed No Duty to Structure Plaintiffs' Accounts Although They Concede That Applicable Tort Principles Would Certainly Establish Such a Duty.

Defendants complained below that plaintiffs had not identified a "brown cow" case on all fours with this case. Defendants disregarded the case of *Roth v. Kay*, 35 Wn. App. 1, 664 P.2d 1299 (1983) set forth in Plaintiffs' Motion for Summary Judgment. EOR 44. In that case, 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 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. Reynolds 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.

IV. CONCLUSION

For all the foregoing reasons, this Court, on *de novo* review, should reverse the trial court's and court of appeals' granting of summary judgment for the Defendants and either grant summary judgment for the Plaintiffs or remand for trial.

Dated this 30th day of November, 2011.

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

CERTIFICATE OF SERVICE

I, Ronnette Peters Megrey, declare as follows: on November 30, 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:

SUPPLEMENTAL BRIEF

Stephen Garrett Leatham Heurlin Potter Jahn, et al. 211 E. McLoughlin Blvd., Ste. 100 Vancouver, WA 98666-0611	___ via Legal Messenger ___ via Facsimile _x_ via E-mail _x_ via U.S. Mail
Philip A. Talmadge Sidney Tribe Talmadge/Fitzpatrick 18010 Southcenter Parkway Tukwila, WA 98188-4630	___ via Legal Messenger ___ via Facsimile _x_ via E-mail _x_ via U.S. Mail
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Orginal filed with:
Supreme Court
Clerk's office
Olympia, WA

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 30th day of November, 2011.

Ronnette Peters Megrey