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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,
as Assignee and Subrogee of Skils'Kin,

Plaintiff,

v.

WASHINGTON TRUST BANK,

Defendant.

PLAINTIFF TRAVELERS CASUALTY AND SURETY COMPANY OF
AMERICA'S BRIEF IN ANSWER TO THE BRIEF AMICUS CURIAE
OF THE WASHINGTON BANKERS ASSOCIATION

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ARGUMENT

I. WBA Argues Points Not Supported by the Record or the Law

One would think from reading the Washington Bankers Association's ("WBA") brief that the WBA is addressing a different case.

A. This Case Does Not Involve Automated Banking Systems

The WBA argues that the modern banking system "relies on automation to process" checks and that it "would not be possible for banks" to inspect every check manually to determine whether it had an unauthorized customer signature, indorsement or alteration. (WBA's Brf., pp. 3-4). But this case has nothing to do with automated banking systems. Patterson submitted these checks *in person to live tellers*, who exchanged the checks for currency in violation of the bank's own teller manual. The WBA's arguments about modern automated banking are a complete red herring.

B. If the Court Wishes to Address the Issue of Patterson's Authority, It Should Find That She Had No Authority to Cash These Checks

The WBA argues that Patterson had the legal authority to cash the clients' checks and that all of the payees were Skils'Kin clients. (*E.g.* WBA's Brf., pp. 9-12, 14, 19). As the WBA concedes, the issue of Patterson's authority is not before this Court. Regardless, the argument

fails, both legally and factually.

Representative payees *do not* have the authority to indorse and cash checks payable to their clients. No power of attorney, guardianship order or other court order gave Skils'Kin or Patterson the authority to indorse and cash the payees' checks. While Patterson and Skils'Kin had limited authority to manage the payees' funds under the Representative Payee Program, Washington law is crystal clear that this did not imply that they had authority to cash the clients' checks. *Coleman v. Seattle Nat'l Bank*, 109 Wash. 80, 83-85 (1919) (agent who had written authority to "transact any and all business" for the principal did not have authority to indorse and transfer negotiable instruments of the principal); *California Stucco Co. of Wash. v. Marine Nat'l Bank*, 148 Wash. 341, 343-44 (1928) ("If mere employment furnishes apparent authority to indorse checks, then no business would be safe"); *Toadvine v. Northwest Trust & State Bank*, 122 Wash. 609, 613-14 (1922) (written authority to "collect all moneys and pay the same to the treasurer" did not imply authority to indorse and transfer checks payable to the treasurer).¹

¹ These cases are grounded in sound public policy and remain good law, even after adoption of the UCC. The UCC defers to other state law to determine whether someone has authority to sign an instrument. RCW 62A.3-402(a) (incorporating the law of contract to determine whether a signature by a purported representative is binding on the purported principal). The WBA cites Section 3-402 as if it made Patterson's signatures authorized signatures of the payees. (WBA's Brf., pp. 14 & 19). That statute says no such thing.

Neither Washington Trust Bank (“WTB”) nor the WBA has ever cited any statute, regulation or other law giving representative payees under this Social Security program the authority to cash their clients’ checks. If Congress and the Social Security Administration (“SSA”) had intended to preempt state law requiring a power of attorney, a guardianship order or the like in such transactions, they would have said so expressly. In fact, the SSA has said the opposite. A Social Security publication, in a section entitled “Limits to What a Payee May Do,” states that a representative payee like Skils’Kin may not “sign legal documents on behalf of the beneficiary.” (*2014 Guide for Organizational Representative Payees*, p. 23).² Skils’Kin had no right to sign checks on behalf of its clients.

Moreover, as a factual matter, not all the payees were even Skils’Kin clients, and the record establishes that WTB took no steps to determine whether the payee on any given check was or was not a Skils’Kin client. Thus, even if Skils’Kin and Patterson had authority to indorse client checks (they did not), WTB had no way of knowing whether these checks were even client checks. There is no factual or legal basis for

² Available at <https://www.ssa.gov/payee/documents/2014OrgGuide%20-%20FINAL2.pdf> (visited Aug. 25, 2016)

the WBA's argument that Patterson had authority to indorse and cash the checks on behalf of the payees.

C. The WBA's General Arguments About Section 4-406 and Loss Allocation Under the Code Are Wrong

The WBA announces broadly that "RCW 62A.4-406 applies to all types of fraud." (WBA's Brf., pp. 7-9). Notably, the WBA does not quote the *actual language* of RCW 62A.4-406 anywhere in this argument or explain why it might apply to this particular type of fraud. As Travelers has explained, the section does not apply at all under the facts of this case. (Travelers' Opening Brf., pp. 16-26). Under the egregious facts presented here, the Code does not shift the loss from the bank to the customer under Section 4-406. *See, e.g., Ford Motor Credit Co. v. United Services Automobile Ass'n*, 11 UCC Rep. Serv. 361, 364, 1972 WL 20865 (N.Y. City Civil Ct. 1972) (bank was "palpably negligent" in paying a check without the named payee's indorsement; "there is no "notice" [the customer] could have given at any time that would have been superior to that derived from even a cursory examination of the instrument by" the teller).

The WBA argues that customers can obtain insurance to cover check fraud losses. (WBA's Brf., p, 7). This argument is specious. Banks, too, have fidelity insurance in the form of financial institution

bonds. WTB tendered this loss to its financial institution bond carrier just as Skils'Kin received coverage from Travelers. The law allocates loss pursuant to the terms of the UCC, irrespective of whether one party or another may or may not have insurance.

II. Patterson's Signature on the Backs of the Checks Was Not an Indorsement, Alteration or Unauthorized Customer Signature

The WBA argues that Patterson's signature was not unambiguously for a purpose other than an indorsement. (WBA's Brf., pp. 12-15). The WBA ignores Travelers' point that there is no conceivable purpose for the signature to be categorized as an indorsement. (Travelers' Opening Brf., pp. 27-34)

The example set forth in the official comment under Section 3-204 is neutral and does not advance the WBA's argument at all. The comment says that an unqualified signature "*may* be an indorsement even though the signer intended the signature to be a receipt." UCC § 3-204 Official Cmt. 1 (emphasis added). The comment does not say "must," as the WBA implies. A signature "may" be an indorsement or it "may" be a receipt.

The example in the comment does not set forth enough facts to determine whether the signature was an indorsement or a receipt. The comment does not say, for example, whether the check was cashed over the counter with the payor bank, as in the present case, or deposited to a

depository bank with cash back to the depositor. In the latter, more typical situation, the depositor *negotiates* the check to the bank, which then must itself negotiate the check through the clearing system for presentation to the payor bank. A negotiation requires an indorsement, so it would make good sense in this latter situation to presume that the signer intended to indorse the check. It makes no sense to speak of an indorsement, however, with regard to cashing a check over the counter with the payor bank. Cashing a check with the payor bank does not require an indorsement. (Travelers Opening Brf., pp. 28-31)

Under RCW 62A.3-204(a), whether a signature is an indorsement or a receipt depends on the clarity of the signer's intent. Patterson manifestly and obviously *did not* intend to negotiate these checks, which would have required an indorsement. Rather, the evidence is that Patterson unambiguously intended one and only one thing: to exchange the checks for cash. The only document she signed to memorialize her receipt of that cash was the back of the check. Under the facts of this case, Patterson unambiguously intended to sign her name as a receipt rather than as an indorsement. There is no legal or factual basis to conclude anything else.

The WBA also makes a half-hearted alternative argument that, even if the signatures were not unauthorized indorsements, they were

alterations or unauthorized customer signatures. (WBA's Brf., p. 15).

WTB has waived these arguments so they are not before this Court. Even so, nothing on these checks was altered, and the WBA does not explain how these signatures could possibly be unauthorized customer signatures given that they appear on the backs of the checks, where the payee rather than the drawer-customer signs.

III. The WBA Does Not Address the Second Certified Question

The WBA argues generally that WTB met its obligations to provide a statement of account under RCW 62A.4-406(a) (WBA's Brf., pp. 15-18), but it does not address the factual and legal issues presented by the second certified question with regard to electronic banking. (*See* Travelers' Opening Brf., pp. 37-42). The general points offered by the WBA do not assist in resolving the second question certified by the district court.

IV. Washington Trust Bank Failed to Exercise Ordinary Care

Neither WTB nor the WBA understands the "ordinary care" issue under the third certified question. WTB argued that the issue arises under RCW 62A.4-406(e). (WTB's Brf., p. 39). Travelers explained in its reply brief why this was wrong. (Travelers' Reply, pp. 16-18). To its credit, the WBA does not even attempt to support WTB's misunderstanding of the issue.

Instead, the WBA argues that the “ordinary care” issue arises if *RCW 62A.3-406* applies, an argument that WTB has never made. (WBA’s Brf., pp. 18-19). Even so, this is also wrong. Section 3-406 only applies to checks bearing “an alteration” or “a forged signature.” *RCW 62A.3-406(a)*. The checks in this case have neither.

The third certified question asks whether WTB failed to exercise ordinary care as a matter of law. The WBA argues nothing more than that Patterson must have had authority to cash the checks and that WTB did nothing wrong. The WBA does not ground this argument in any law or the record of this case. The trade association understandably wants to help its member, but arguing that WTB acted reasonably as a matter of law simply because “we say so” is no argument at all.

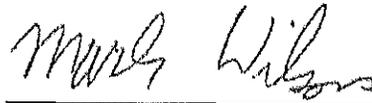
CONCLUSION

The Court should answer the first certified question “no,” not reach the second certified question, and answer the third certified question “yes.” Nothing in the WBA’s brief should prompt a different result.

Respectfully submitted,



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Travelers vs. Washington Trust Bank
Supreme Court No. 92483-0
USDC – Eastern District of WA No. CV-13-0409-JLQ

For filing, please find attached Plaintiff's Travelers Casualty And Surety Company Of America's Brief In Answer To The Brief Amicus Curiae Of The Washington Bankers Association.

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