

NO. 70019-7-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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SCOTT ANDERSON TRUCKING, INC., a Utah corporation,

Appellant,

v.

PACCAR FINANCIAL CORP., a Washington corporation,

Respondent.

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BRIEF OF RESPONDENT

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## INTRODUCTION

PACCAR Financial Corp. ("PACCAR Financial") owed no duty to Scott Anderson Trucking, Inc. ("SATI") to protect it from third-party Glen Davis' criminal act. Scott Anderson himself believed Davis to be a "crook" who might attempt to abscond with the truck. Yet SATI made numerous loan payments on Davis' behalf, and failed for over a month to record the title it received from PACCAR Financial, permitting Davis to defraud SATI by masquerading as Anderson.

SATI failed to establish a "special relationship" that might give rise to a duty. And notwithstanding its repeated assertions, no evidence in this record shows that PACCAR Financial failed to follow its usual and ordinary procedures to identify callers seeking duplicate papers. PACCAR Financial receives similar requests almost "daily," but over the last 40 years, it has never seen anyone commit a fraud in this fashion. Davis' extraordinary fraud was as unforeseeable as it was unlawful. Without a special relationship and foreseeability, PACCAR Financial had no duty to protect SATI from Davis.

Even though SATI recovered the truck, it sued PACCAR Financial. The trial court granted summary judgment, correctly ruling that PACCAR Financial owed no duty to SATI and did not cause it any damages. This Court should affirm.

## STATEMENT OF THE CASE

SATI is a trucking company based in Salt Lake City, Utah. CP 19. Anderson is SATI's President and Rule 30(b)(6) witness. CP 20, 39, 41. PACCAR Financial is a wholly owned subsidiary of truck-manufacturer PACCAR INC, offering financing to buyers of Peterbilt and Kenworth trucks throughout the United States. CP 19.

Sometime in 2007, SATI hired subcontractor Glen Davis as a "subhauler" on a multi-year road-construction project in Salt Lake City, Utah, also leasing Davis' truck. CP 19, 114-16. At that time, and since December 2005, Davis was a PACCAR Financial customer, having purchased a 2004 Kenworth W900 ("truck"). CP 19. Davis is not a party in this appeal. CP 1.

**A. Davis entered into a security agreement to finance a Kenworth truck with Rush Truck Centers, with the understanding that Rush would assign the lease to PACCAR Financial.**

Davis signed a Security Agreement Retail Installment Contract ("Security Agreement") with Rush Truck Centers of Texas ("Rush") to purchase the truck. CP 53-54. Davis agreed to pay 54 monthly installments in the amount of \$2,243.01 each. *Id.* Davis also agreed that Rush could assign the Security Agreement to PACCAR Financial, who would take all of Rush's rights, title and

interest. CP 54. Rush assigned the Security Agreement to PACCAR Financial on January 29, 2006. *Id.*

**B. Believing that Davis was a “crook” who might try to abscond with the truck, Anderson pursued his own business interests by making loan payments to PACCAR Financial and creating a lien on the truck.**

Every third-party payor presumably has its reasons for volunteering to pay another’s debt. SATI was no exception. When SATI agreed to make Davis’ loan payments, Anderson believed that Davis was a “crook,” a “thief,” and a “liar,” who might try to abscond with the truck:

[Davis] was about as big a crook as there was and I was afraid what was going to happen was I was going to keep paying his payments to PACCAR for him each month, making – so that they don’t come repossess the truck. He was going to go out and find some good buddy to borrow him \$25,000 to hurry and send it to PACCAR and get the title on and be lighting out of there and I would be left holding the bag for everything that I had been paying on the truck for the last three years.

CP 45; CP 111 (Anderson stating “I was concerned Davis might abscond with the tractor”). Anderson’s belief was based in large part on Davis’ poor work-ethic, which Anderson witnessed first-hand. CP 45. Davis was ultimately “run off” of every job he was on. *Id.* If paid by the hour, Davis would be the first to load his truck every morning to get on the clock, but then worked slower than anyone else. *Id.* He would just “dog it” all day, and wound up hauling less material. *Id.*

Anderson was thus concerned about Davis' morals long before volunteering to pay off the PACCAR Financial loan. *Id.* In his opinion, Davis "had none." *Id.* Anderson had learned that Davis had absconded with money owed to the Hells Angels. *Id.* Davis repeatedly told Anderson that he could not work in Las Vegas. *Id.* This apparently arose when Davis failed to turn money over to the Hells Angels after selling t-shirts at their Las Vegas gathering. *Id.*

But SATI was not the only third party who volunteered to make payments to PACCAR Financial on Davis' behalf: financial records show that a Mary Rothenberg made payments that were credited to Davis' account. CP 80. Indeed, it is very common for third parties to make loan payments on behalf of PACCAR Financial customers. *Id.* PACCAR Financial applies payments as directed and does not inquire into the relationship between the customer and any third- party payors. *Id.*

**C. SATI and Davis entered into a Security Agreement – to which PACCAR Financial was not a party – and SATI paid off Davis' loan.**

Anderson and Davis agreed that SATI would deduct from Davis' wages any payments that it made. CP 44. At some point, they entered a written agreement that SATI would take a security interest in Davis' truck in exchange for paying off the loan balance.

*Id.* They agreed that after SATI paid off the loan and received the title from PACCAR Financial, it would have a new title issued documenting its lien on the truck. *Id.*

Anderson never informed PACCAR Financial that SATI was asserting a lien on the truck. CP 189-90. He did not know a precise amount for SATI's purported lien, stating "Well, I would just be the lienholder on the truck. There wouldn't really be an amount on that actual truck . . . ." *Id.*

PACCAR Financial told Anderson it needed Davis' written authorization for SATI to pay off the truck. CP 44, 54. After receiving Davis' paperwork, PACCAR Financial faxed the loan-payment information to Davis, apparently at SATI. CP 54. PACCAR received a check for the loan balance, \$24,175.82, apparently drawn on SATI's checking account. CP 55. Pursuant to Davis' instructions, PACCAR Financial sent the certificate of title to SATI at an address that Davis provided. *Id.*

**D. Despite Anderson's belief that Davis might try to abscond with the truck, SATI did not record its lien.**

SATI received the original certificate of title from PACCAR Financial around December 4, 2009. CP 46. SATI then did nothing. CP 45-46, 111. Anderson frequently deals with vehicle financing and

knew that he needed to record the lien to perfect SATI's interest in the truck. CP 45-46. But he delayed recording the lien on the title, claiming he wanted to present the title in person when he planned to be in Nevada two months later. CP 111.

**E. Davis defrauded SATI, falsely representing himself as Anderson to acquire title to the truck.**

Nearly five weeks after SATI received the title from PACCAR Financial, Kimberly Slater (Senior Contract Administrator for PACCAR Financial in Denton, Texas, where Davis' loan was processed) received a phone call from a man identifying himself as "Scott Anderson" from SATI. CP 55, 73. Calling from the Nevada Department of Motor Vehicles, he told Slater that he had lost the certificate of title PACCAR Financial had previously sent him and asked her to fax a new lien release to the Nevada DMV. CP 73-74.

PACCAR Financial regularly gets calls from customers who have lost their certificates of title and need a subsequent lien release. CP 74. Indeed, these types of calls are "very common." *Id.*

PACCAR Financial's policy is to ask every caller seeking a lien release for identifying information. CP 55, 74. This is Slater's regular practice. *Id.* Although she does not distinctly recall the specifics of this particular conversation, Slater has no reason to

believe that she departed from her regular practice. *Id.* Slater would not have sent the lien release if she had reason to doubt that she was speaking to Anderson. *Id.*

Contrary to SATI's assertions, Slater did not say that she "did not question Davis." BA 9 (citing CP 73-74, 118). Rather, she did not question the callers' assertion that he had lost his title, stating "we get calls like this daily." CP 73-74, 118. Slater testified that she would not have sent the lien release without being "satisfied" that she was speaking to Anderson. CP 74.

Slater received a faxed lien release from the Department of Motor Vehicles that was partially filled out. CP 74. Slater presented this to her supervisor, Karen Raney, for her signature. *Id.* This too was not unusual – Raney signed the release, and Slater faxed it back to the Nevada DMV. CP 55, 74.

PACCAR Financial subsequently learned that this caller was Davis, masquerading as Anderson. CP 24, 118. Davis absconded with the truck, just as Anderson had feared. CP 91, 111.

For almost 40 years, Raney has worked in the Denton office where Davis' loan was held. CP 55-56. She has never seen another case of lien-release fraud. CP 56. Raney is unaware of any other case of lien-release fraud anywhere at PACCAR Financial. *Id.*

**F. SATI recovered the truck, but nonetheless sued PACCAR Financial.**

SATI neglects to mention that it recovered the truck, obtaining both title and possession. CP 20. Nonetheless, SATI sued PACCAR Financial in January 2012, alleging breach of contract and negligence. CP 1, 3. The court granted PACCAR Financial's motion for summary judgment. CP 198-99. SATI appealed. CP 196.

**ARGUMENT**

**A. The standard of review is *de novo*.**

This Court reviews summary judgment rulings *de novo*, making the same inquiry as the trial court, "*i.e.*, summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Robb v. City of Seattle***, 176 Wn.2d 427, 432, 295 P.3d 212 (2013). The Court considers the facts and reasonable inferences from the facts in the light most favorable to the nonmoving party. ***Robb***, 176 Wn.2d at 432-33. This standard is the same under Texas law. ***Dyess v. Harris***, 321 S.W.3d 9, 13 (Tex. App. 2009) ("We review summary judgments *de novo*. . . . Like the trial court, we must indulge every reasonable inference in favor of the nonmovant . . . take all evidence favorable to him as true, and resolve any doubts in his favor").

The principal issue here is whether PACCAR Financial owed SATI a duty. Whether a duty exists is a question of law. *Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998) (citing *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984))). “It is an elementary principle that an indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured . . . .” *Kim*, 143 Wn. 2d at 194-95 (quoting *Routh v. Quinn*, 20 Cal. 2d 488, 491, 127 P.2d 1 (1942) and citing *Folsom* 135 Wd.2d at 671).

**B. Washington law applies, where there is no conflict between Washington law and Texas law.**

Our courts engage in choice-of-law analysis only when there is “an actual conflict between the laws or interests of Washington and the laws or interests of another state.” *Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007); *Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 664, 230 P.3d 625 (2010). A “real” conflict arises when the result would be different under the laws of the two states. *Erwin*, 161 Wn.2d at 692; *Freestone*, 155 Wn. App. at 664. Where Washington’s laws and interests do not conflict with the foreign

state's laws and interests, there is a "false" conflict and local law applies. *Id.*

Neither party identified a conflict before the trial court, nor does SATI assert one in its opening brief. CP 1-4, 25-27, 99-103; BA 12 n.2. Thus, Washington law applies. *Erwin*, 161 Wn.2d at 692; *Freestone*, 155 Wn. App. at 664.

But SATI claims that "[t]he parties agree that Texas law applies." BA 12 n.2 (citing CP 25-27). SATI takes completely out of context PACCAR Financial's statement that the law "with the most significant contacts should apply." *Id.* PACCAR Financial was not agreeing that Texas law applies, but was correctly explaining Washington law on choice of law to be that Washington law applies absent a real conflict of laws, in which case the law of the state with the most significant contracts applies:

The threshold determination in a trial court's choice-of-law analysis is whether there is an actual conflict between Washington law and the law of another state. *Rice v. Dow Chemical Co.*, 124 Wn.2d 205, 210, 875 P.2d 1213 (1994) (en banc). Where there is no conflict of law, local law should apply. *Freestone Capital Partners, L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 664, 230 P.3d 625 (2010). Otherwise, the law of the state with the most significant contacts should apply. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145 (1971).

CP 26-27. Again, where, as here, neither party asserts a real conflict, Washington law applies. *Erwin*, 161 Wn.2d at 692; *Freestone*, 155 Wn. App. at 664.

**C. PACCAR Financial owed SATI no duty and did not proximately cause SATI's alleged damages in any event.**

**1. In Washington, a private actor generally has no duty to protect others from third-party criminal acts.**

"The general rule at common law is that a private person does not have a duty to protect others from the criminal acts of third parties." *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991); *Kim*, 143 Wn.2d at 195. "This is an expression of the policy that 'one is normally allowed to proceed on the basis that others will obey the law.'" *Kim*, 143 Wn.2d at 195 (quoting *Hutchins*, 116 Wn.2d at 236).

Washington cases recognizing an exception to this rule have generally fallen into two categories: the defendant has a special relationship (1) with the plaintiff, or (2) with the criminal. *Kim*, 143 Wn.2d at 196; *Robb*, 176 Wn.2d at 433. Recognized "special relationship[s]" include common carriers and passengers, innkeepers and guests, landowners and members of the public they hold their land open to, and a custodian and his ward. *Nivens v. 7-11*

**Hoagy's Corner**, 133 Wn.2d 192, 203 n.2, 943 P.2d 286 (1997) (citing RESTATEMENT (SECOND) OF TORTS §314(A) (1965)).

Even where a special relationship exists, a duty to protect against third-party criminal acts arises only if the harm is foreseeable:

Our recognition of a duty does not end the present inquiry, however. No duty arises unless the harm to the invitee by third persons is foreseeable.

**Nivens**, 133 Wn.2d at 205. In other words, the duty itself arises only when there is a special relationship *and* the harm is foreseeable. 133 Wn.2d at 205. But an omission, even if negligent, does not give rise to a duty to protect from third-party criminal acts. **Robb**, 176 Wn.2d at 435-36. Rather, the duty extends only to affirmative acts (*id.*):

[A]n affirmative act . . . creates or exposes another to a situation of peril. Foreseeability alone is an insufficient basis for imposing a duty.

Our courts have also recognized a third exception under the RESTATEMENT (SECOND) OF TORTS § 302(B) (1965) ("§ 302(B)"), providing that a duty to protect against third-party criminal acts may arise when the negligent actor knows or should know that his actions "involve an unreasonable risk of harm" (§ 302(B)):

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of

harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

This third exception applies “where the actor’s own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable [person] would take into account.” § 302(B) cmt. e. In other words, not just any risk of harm gives rise to a duty. *Kim*, 143 Wn.2d at 196. Rather, “an unusual risk of harm, a ‘high degree of risk of harm,’ is required.” 143 Wn.2d at 196 (quoting § 302(B) cmt. e). And despite its recognition that this third exception exists, our Supreme Court “has not yet found a duty to protect a third party from the criminal acts of another absent a special relationship.” *Robb*, 176 Wn.2d at 435.

But this Court found such a duty in *Parrilla v. King Cnty.*, 138 Wn. App. 427, 157 P.3d 879 (2007). There, an altercation broke out between two passengers on a metro bus. *Parrilla*, 138 Wn. App. at 430. The driver pulled the bus over, ordering all passengers to disembark. *Id.* One passenger, Courvoisier Carpenter, refused, “exhibiting bizarre behavior, including acting as if he were talking to somebody outside of the vehicle although nobody was there, yelling unintelligibly, and striking the windows of the bus with his fists.” *Id.* at

431. When Carpenter again refused to disembark, the driver exited the bus, leaving Carpenter inside with the engine running. *Id.* Carpenter, who was “heavily” under the influence of illegal recreational drugs, including PCP, drove the bus down Martin Luther King Way, injuring the Parrillas. *Id.*

This Court recognized that a duty to protect from third-party criminal conduct generally requires a “special relationship,” but held that the duty also arises where an affirmative, negligent act creates or exposes another to a “recognizable high degree of risk”:

[A] duty to guard against a third party's foreseeable criminal conduct exists where an actor's own affirmative act has created or exposed another to a recognizable high degree of risk of harm through such misconduct, which a reasonable person would have taken into account.

*Id.* at 439 (citing § 302(B) and *Kim*, 143 Wn.2d at 197-200). This Court held that the bus driver's affirmative act of leaving a “severely impaired” individual in a 14-ton bus, idling on the roadside, created a high degree of risk of harm. *Parrilla*, 138 Wn. 2d at 440-41.<sup>1</sup>

In so holding this Court distinguished *Parrilla* from *Kim*, in which no duty arose:

Unlike the situation in *Kim*, the driver here acted with knowledge of peculiar conditions which created a high

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<sup>1</sup> While common carriers owe a heightened duty to their passengers – a recognized special relationship – they do not owe such a duty to non-passengers, such as the Parrillas.

degree of risk of intentional misconduct. In *Kim*, the defendant merely left an empty vehicle, keys in the ignition, in a private parking lot.

*Id.* at 440. The key features of *Parrilla* giving rise to the duty are: (1) the driver's awareness that Carpenter was acting in a "highly volatile manner"; (2) Carpenter's demonstrated "tendency toward criminal conduct"; and (3) an "instrumentality [the bus] uniquely capable of inflicting severe injuries." *Id.* at 140-41. PACCAR Financial is aware of no other Washington case finding a duty to protect against third-party criminal acts absent a special relationship.

## **2. Texas law is the same.**

SATI agrees that Washington and Texas law governing PACCAR Financial's alleged liability are "in accord." CP 96. As in Washington, the "general rule" in Texas is that "a person has no legal duty to protect another from the criminal acts of a third person." *Walker v. Harris*, 924 S.W.2d 375, 377, 39 Tex. Sup. Ct. J. 777 (1996). Also as in Washington, a duty to protect acts may arise if the defendant knew that "because of its acts," the crime might occur:

To impose liability on a defendant for negligence in failing to prevent the criminal conduct of another, the facts must show more than conduct that creates an opportunity to commit crime—they must show both that the defendant committed negligent acts and that it knew or should have known that, because of its acts, the crime (or one like it) might occur.

**Richardson v. Crawford**, No. 10-11-00089-CV, 2011 Tex. App. Lexis 8150 (Oct. 12, 2011)<sup>2</sup> (quoting **Barton v. Whataburger, Inc.**, 276 S.W.3d 456, 462 (2008), *rev. denied*, 2012 Tex. Lexis 35 (Jan. 13, 2012)); *see also*, **Phan Son Van v. Pena**, 990 S.W.2d 751, 753-55, 42 Tex. Sup. Ct. J. 453 (1999); **Nixon v. Mr. Prop. Mgmt. Co.**, 690 S.W.2d 546, 550, 28 Tex. Sup. Ct. J. 384 (1985).

And as in Washington, the duty arises only if the third-party criminal act is foreseeable. **Phan**, 990 S.W.2d 753. "Foreseeability . . . requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission." **Doe v. Boys Club of Greater Dallas, Inc.**, 907 S.W. 2d 472, 478, 38 Tex. Sup. Ct. J. 732 (1995). The inquiry is whether a reasonable person would contemplate the criminal act as a result of the defendant's negligent conduct. **Doe**, 907 S.W.2d at 478. "Foreseeability requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury." 907 S.W.2d at 478.

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<sup>2</sup> The citation is in this format because Texas no longer publishes appellate decisions in the Southwest Reporter. Nonetheless, since 2003, all Texas appellate decisions must be published and are considered precedential. Tx. RAP 47.7 and comment thereto. Thus, **Richardson** is a published decision. *Id.* For the Court's convenience, we attach a copy of the decision and Tx. RAP 47.7.

**3. There is no duty, where there is no special relationship between PACCAR Financial and SATI.**

SATI asserts no special relationship between PACCAR Financial and Davis. Instead, SATI apparently argues that PACCAR Financial somehow induced SATI pay Davis' loan, thereby creating a special relationship that permits SATI to recover from PACCAR Financial. BA 17, 19. But SATI fails to cite the record to support these unfounded assertions. *Id.* And on the contrary, SATI's own complaint made no mention of any inducement or coercion, but alleged that to "avoid Davis defaulting on his loan agreement obligations with Paccar, **SATI made payments to Paccar on Davis's behalf pursuant to an agreement between SATI and Davis** beginning in or about early 2007." CP 2 (emphasis added).

The only record evidence even remotely related to SATI's later allegations is the self-serving and carefully-crafted declaration of SATI's own officer manager, Tina Gardner, claiming that PACCAR Financial employee Lisa Robison "suggested ... that Paccar knew that SATI required continued operation of Davis' truck pursuant to a lease between SATI and Paccar" and that PACCAR Financial sought to "leverage" SATI's need for Davis' truck to "persuade" SATI to make Davis' loan payments. CP 182-83. But contrary to SATI's

claims, there is no evidence in the record that “SATI required continued operation of Davis’ truck” or that PACCAR Financial had any knowledge about SATI’s trucking needs. CP 182-83.

As a matter of common sense, the assertion that SATI needed Davis’ truck is as dubious as it is unsupported. Davis’ truck was one of 300 SATI had on the job. CP 43. Even SATI does not suggest that it would have been damaged by having 299 trucks on the job instead of 300. *Id.* Besides, Anderson swore that Davis routinely did as little work as possible. CP 45-46.

But if SATI really needed a 300<sup>th</sup> truck, then it easily could have acquired it: as Anderson stated, “I’m in the trucking business and I buy and sell trucks all the time.” CP 45. SATI does not explain why Anderson could not have obtained a replacement for Davis’ truck. BA 17-19. SATI does not even suggest that it did not have another truck or could not easily acquire one. *Id.* Indeed, there is no indication that SATI could not have subcontracted a different – and more responsible – subhauler and leased his truck. CP 43-45. In short, SATI’s suggestion that PACCAR Financial had “leverage” with which to coerce SATI is baseless.

PACCAR Financial and SATI had no “special relationship,” but even if they had, no duty could have arisen because Davis’ fraud

was unforeseeable. PACCAR Financial could not have reasonably foreseen that providing a lien release to a caller identifying himself as Anderson would result in theft of the truck. **Nivens**, 133 Wn.2d at 205. Although PACCAR Financial frequently receives calls from people seeking lien releases, it has never before seen a fraud like this. CP 56. PACCAR Financial did not have to divine whether this one caller was a liar and a thief.<sup>3</sup>

**4. The bank cases upon which SATI principally relies do not suggest that there is a special relationship here.**

SATI principally relies on bank cases, mostly from other states, to support its assertion that a “special relationship” with PACCAR Financial arose out of SATI’s willingness to pay off Davis’ loan. BA 14-24. SATI strains to compare PACCAR Financial to a bank, but cites no binding authority for the proposition that a fiduciary or “special” relationship exists between a lender (*e.g.*, a bank) and someone who voluntarily pays off another’s loan. *Id.*

Rather, “[a]s a matter of law, a guarantor cannot rely upon the relationship between a lender and a borrower to create a fiduciary duty running from the lender to the guarantor.” **Miller v. United States Bank, N.A.**, 72 Wn. App. 416, 426, 865 P.2d 536 (1994). A

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<sup>3</sup> Foreseeability is discussed more fully below, at Argument § C 4.

lender is not its borrower's fiduciary and there must be a special relationship between the lender and borrower before a fiduciary duty exists. *Miller*, 72 Wn. App. at 426-27.

SATI admits that the "general rule in Washington is that '[a] bank owes no duty of care to a noncustomer with whom it has no relationship'." BA 19 (quoting *U.S. Bank, Nat'l. Ass'n v. Whitney*, 119 Wn. App. 339, 349, 81 P.3d 135 (2003)). SATI argues, however, that a bank may owe a duty to a noncustomer when there is a "special relationship." BA 20 (citing *Zabka v. Bank of Am. Corp.*, 131 Wn. App. 167, 171-72, 127 P.3d 722 (2005), *rev. denied*, 158 Wn.2d 1012 (2006)). But neither *Zabka*, nor any other Washington decision, holds that there is a special relationship between a bank and a noncustomer. *Zabka*, 131 Wn. App. at 170-71.

In *Zabka*, Bank of America ("BoA") opened checking accounts at two different branches for related business entities SeaCap Fund, L.P. ("SeaCap") and its general partner, Seattle Capital Group, L.L.C. ("Capital"). 131 Wn. App. at 168. Robert and Debra Zabka ordered a \$300,000 wire transfer to the Capital checking account to secure their limited partnership interest in SeaCap, understanding that their funds would be transferred to SeaCap. *Id.* at 169 & n.1. After a

series of transfers between SeaCap and Capital, the principals of SeaCap and Capital stole the Zabkas' \$300,000. *Id.*

The Zabkas sued BoA, claiming negligence, among other torts. *Id.* at 168 The trial court dismissed the suit under CR 12(b)(6), and this Court affirmed, summarily holding that BoA owed the Zabkas no duty. *Id.* at 172-74. Particularly relevant here, this Court held that there was no duty, even though (1) BoA may have failed to follow its protocols; and (2) its failure may have facilitated the third-party criminal conduct (*id.* at 173):

There is evidence that [BoA] failed to follow standard procedures and monitor transactions according to its own internal standards. [BoA's] failures may have facilitated the theft of the Zabkas' money, but [BoA] did not have a duty to prevent their loss. The trial court correctly dismissed the negligence claims on a CR 12(b)(6) motion.

**Zabka** is inapposite. If anything, it supports PACCAR Financial's case, holding that a duty will not arise from the failure to follow internal protocols, even if the failure may facilitate third-party criminal conduct. *Id.* But in any event, the only evidence before this Court is that PACCAR Financial did follow its protocols to seek identifying information. CP 74.

The Texas cases SATI relies on are also inapposite. In ***Gilstrap v. Bleakley***, lender First National Bank financed borrower

Bleakley's loan on an oil rig. 636 S.W.2d 736, 738 (Tex. App. 1982). Bleakley informed First National that a third party, Gilstrap, would pay off the loan balance as part of a sale between Bleakely and Gilstrap. *Id.* at 739. Although Gilstrap did not pay off the balance, First Bank gave him the title without demanding payment or conferring with Bleakley. *Id.* The appellate court affirmed the trial court's ruling that First Bank was negligent. *Id.* at 741.

***Gilstrap*** is plainly inapposite, as Bleakley was First Bank's customer. ***Gilstrap*** would only apply to a claim by Davis against PACCAR Financial, and only if it had released the title to SATI before SATI paid the loan balance. That did not happen.

***City Bank v. Compass Bank*** is similarly inapposite. BA 22 (citing ***City Bank v. Compass Bank***, No. EP-10-CV-62-KC, 2010 U.S. Dist. LEXIS 66260 (W.D. Tex. July 2, 2010)).<sup>4</sup> There, SamCorp obtained a \$3,000,000 line of credit from City Bank, and obtained a \$4,000,000 line of credit from State National Bank. ***City Bank***, *supra*, at \*2. One of the purposes of the National Bank credit line was to refinance the City Bank credit line, retiring any outstanding debt to City Bank via a direct money transfer from National Bank to

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<sup>4</sup> A copy of this District Court Order is attached for the Court's convenience.

City Bank. *Id.* Instead, National Bank made the line of credit available to SamCorp without first paying off the City Bank debt. *Id.*

When the two banks learned that both credit lines were open and had been drawn down simultaneously, they called SamCorp into default and began conflicting collection efforts. *Id.* at \*3. City Bank sued National Bank's new owner, Compass Bank, for the amounts they were unable to recover through collections. *Id.*

The District Court denied Compass Bank's Fed. R. Civ. P. 12(b)(6) motion to dismiss, noting that Texas "may" recognize a duty where "the potential victim's identity, the mode of harm, and the way to avoid that harm are all particularly known to the bank in advance." *Id.* at \*7-\*8. Thus, the court found a duty, where National Bank knew that its new credit line was supposed to pay off City Bank's old credit line, knew or should have known the safest and most appropriate way to pay off the old credit line, and could easily see the risk of leaving both lines open. *Id.* at \*8-\*9. In short, closing the City Bank credit line was a part of National Bank's contractual obligation, and it failed to perform. *Id.*

This matter is entirely unlike **City Bank**, in which the claim was premised on National Bank's failure to perform as directed. Here, PACCAR Financial properly sent the title to SATI as directed.

Davis latter fraudulently obtained a lien release. PACCAR Financial did not owe SATI a duty to prevent Davis' crime.

**5. There is no duty, where PACCAR Financial did not create a high degree of risk of harm to SATI.**

Since there is no "special relationship," PACCAR Financial would have a duty to protect SATI against third-party criminal acts only if it took affirmative, negligent action that created or exposed SATI to an unusually high degree of risk of harm. *Kim*, 143 Wn.2d at 196; § 302(B) cmt. e. In *Parrilla* – the only Washington case imposing such a duty – the negligent actor, a metro bus driver, knew that one of his passengers was "severely impaired," "highly volatile" and prone to criminal conduct, yet left him alone in a 14-ton bus, an "instrumentality uniquely capable of inflicting severe injuries." 138 Wn. 2d at 440-41. This Court held that the driver owed a duty to parties injured when the passenger stole the bus, crashing it into cars just down the street. *Id.*

Unlike the driver in *Parrilla*, PACCAR Financial had no idea that it was dealing with a third-party who had demonstrated a "tendency toward criminal conduct." *Id.* PACCAR Financial's Slater thought she was talking to Anderson, who had every right to the lien release he was requesting. *Compare* 138 Wn.2d at 440-41 *with* CP

74. Slater believes she followed PACCAR Financial's protocol of seeking identifying information from callers asking for a lien release. CP 74. Slater would not have sent the lien release without being satisfied that she was speaking to Anderson. *Id.* Nothing in the record contradicts Slater's sworn assertions.

The uncontroverted evidence is also that nothing like this has ever happened at PACCAR Financial – at least not in the last 39.5 years. CP 56. PACCAR Financial regularly receives calls from persons seeking a lien release. CP 74. But no such caller has ever committed a fraud like this. CP 56. Davis' criminal misconduct simply was not foreseeable, so PACCAR Financial had no duty to protect against it. *Parrilla*, 138 Wn. App. at 439.

**6. Even assuming arguendo that PACCAR Financial was negligent, Davis' criminal act was a superseding cause of SATI's alleged injuries.**

A superseding cause is a third-party act that cuts off the antecedent negligence of a prior actor. *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 812, 733 P.2d 969 (1987) (citing RESTATEMENT (SECOND) OF TORTS § 440 (1965)). Whether an act is superseding (as opposed to intervening) turns on the following three-part inquiry: "whether (1) the intervening act created a *different type of harm* than otherwise would have resulted from the actor's

negligence; (2) the intervening act was *extraordinary* or resulted in extraordinary consequences; (3) the intervening act *operated independently* of any situation created by the actor's negligence." **Campbell**, 107 Wn.2d at 812-13 (citing RESTATEMENT (SECOND) OF TORTS § 442 (1965)) (emphases original).

Essentially, the issue is again foreseeability – the underpinning of a superseding cause “is the *absence of its foreseeability*.” **Campbell**, 107 Wn.2d at 813 (quoting **Herberg v. Swartz**, 89 Wn.2d 916, 927, 578 P.2d 17 (1978)). Thus, the inquiry here is whether PACCAR Financial, when it sent the lien release to the Nevada DMV, should have realized Davis was an imposter defrauding SATI of a truck. As noted above, his criminal act was not foreseeable.

SATI argues “Paccar concededly did foresee potential fraud, and ignored or disregarded its own policy of verifying identification of an individual requesting documentation.” BA 20-21. This claim is baseless. In Raney's 39.5 years with PACCAR Financial, she has never seen such an extraordinary incidence of brazen fraud. CP 56. This is an extraordinary intervening act.

Also unfounded is SATI's assertion that PACCAR Financial ignored its policies. BA 20-21. Slater did not recall the specifics of

her conversation with Davis, but had no reason to believe that she did not follow the protocol of seeking identifying information. CP 74. That is the only honest answer Slater could give, where there is nothing remarkable or memorable about a conversation that occurs almost “daily.” CP 118. The only evidence in the record is that Slater would not have sent the lien release to Nevada without being confident that she was speaking to Anderson. CP 74.<sup>5</sup>

Finally, SATI seems to suggest that PACCAR Financial had a duty to assume that any caller, at any given time, might be trying to deceive PACCAR Financial for the unlawful purpose of stealing a truck. BA 20, 24, 26. This plainly contradicts the underlying premise of the rule that parties generally have no duty to protect against third-party criminal acts: that an actor, negligent or not, may presume that others will follow the law. *Kim*, 143 Wn.2d at 195. In other words, PACCAR Financial may assume that persons calling for a lien release – or for any other reason – are acting legally. *Id.* Again, that presumption was accurate for at least 40 years, and likely much longer. CP 56. Davis’ fraud is extraordinary.

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<sup>5</sup> SATI repeats the same unsupported claims throughout its brief. BA 24. The single fact that Davis, who knew Anderson for years, was able to defraud PACCAR Financial into thinking that he was Anderson, does not *ipso facto* prove that PACCAR Financial “failed to comply with its own policies” for identifying callers. *Id.*

## **7. SATI's own negligence caused its injuries.**

SATI is a sophisticated business entity. Anderson openly acknowledges that he buys and sells trucks "all the time." CP 45. Thus, as part of his business, Anderson deals with vehicle titles "quite often." CP 46. He was well-aware that he had to record the title on Davis' truck to protect his lien. *Id.* But when SATI received the title per Davis' instructions and agreement with SATI, Anderson did nothing. CP 46-47. He held the title, intending to record it two months later. *Id.*

Yet by the time Anderson received the title, he was already convinced that Davis was a "crook" who would try to "abscond" with the truck. CP 45, 111. Anderson's belief that Davis was a "crook," a "thief," and a "liar," was based on their two-year-long working relationship. CP 43-45. Anderson was concerned about Davis' "morals" before even agreeing to pay off his loan balance, bluntly stating, "He had none." CP 45.

In short, SATI had every reason to record the title immediately, as it suspected that Davis would try to abscond with the truck. Incredibly, SATI did nothing despite its concerns.

Unlike SATI, PACCAR Financial had no personal relationship with Davis and no reason to think that he was less than honest.

PACCAR Financial took Davis' purchase obligations on assignment from Rush. CP 54. PACCAR Financial's only knowledge of Davis was that he had had problems making his loan payments. That alone does not reflect on his moral character or propensity to commit a crime of dishonesty.

In sum, the trial court correctly followed the general rule that there is no duty to protect against third-party criminal acts. This Court should affirm.

**D. PACCAR Financial had no contract with SATI.**

SATI did not enter a contract with PACCAR Financial simply by agreeing to pay off Davis' loan obligation. But even assuming a contract arose, there was no breach, and SATI could not recover tort damages in any event. This Court should affirm.

SATI argues that it became PACCAR Financial's "banking customer" where "Paccar offered to forego foreclosing on Davis' loan if SATI promised to pay loan installments and insurance; and SATI accepted." BA 29. SATI essentially argues that in stepping into Davis' shoes, a new contract was created. *Id.* But all PACCAR Financial "promised" to do was not to foreclose its loan so long as someone made the payments – an obligation it already had under its loan agreement with Davis. *Id.*; CP 58-62.

PACCAR Financial is not a bank, SATI is not its customer, and the parties did not create a new contract – SATI merely made Davis' loan payments. SATI provides no authority for the proposition that voluntarily making a third-party's payments creates a new contract between the voluntary payor and the lender. BA 29-31.

Inverting SATI's argument exposes its weakness. SATI asserts that in exchange for PACCAR Financial's promise not to foreclose, SATI agreed to make Davis' loan payments. *Id.* But PACCAR Financial plainly would have had no breach-of-contract claim against SATI had SATI not paid. SATI would surely agree that any breach claim would lie only against Davis.

Even if there was a contract between SATI and PACCAR Financial, which there was not, SATI cannot establish a breach. PACCAR Financial released its lien and sent SATI the certificate of title upon receiving SATI's full payment. CP 111. Any purported contract was then fully executed. There is no evidence of a further agreement to force SATI to act promptly to prevent Davis from committing fraud.

Yet SATI seems to suggest that PACCAR Financial, as the senior lienholder, somehow owed SATI (as a purported junior lienholder that failed to perfect its lien) a continuing duty to protect it

against third-party crimes. BA 28-31. The first and most obvious flaw in SATI's argument is that PACCAR Financial had no idea that SATI was asserting a lien on Davis' truck. CP 189-90. In any event, SATI provides no authority that a senior lienholder owes a junior lienholder any duty, much less a duty that extends six weeks after its lien is released. BA 28-31.

Moreover, both Washington and Texas have held that when damages are purely economic, parties to a contract must recover under the contract, not in tort. See, e.g., ***Sharyland Water Supply Corp. v. City of Alton***, 354 S.W.3d 407, 418 55 Tex. Sup. Ct. J. 46 (2011); ***Cox v. O'Brien***, 150 Wn. App. 24, 34, 206 P.3d 682 (2009). Thus, even if there were a new contract – which there was not – then SATI could not recover in tort for purely economic losses.

Finally, SATI's alternative argument that it is an "intended beneficiary" of the Davis/PACCAR Financial contract is equally unavailing. CP 31-32. A third-party beneficiary contract "requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract." ***Burke & Thomas Inc. v. Int'l Org. of Masters, Mates & Pilots***, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979) (citing, ***American Pipe & Constr. Co. v. Harbor Constr. Co.***, 51 Wn.2d 258, 266, 317 P.2d

521 (1957)). That the contracting parties may have desired to confer a benefit on a third-party, or to advance his interests, is insufficient. **Lonsdale v. Chesterfield**, 99 Wn.2d 353, 361, 662 P.2d 385 (1983). Rather, they must intend to assume a direct obligation to the third party:

If the terms of the contract *necessarily require the promisor to confer a benefit upon a third person*, then the contract, and hence the parties thereto, *contemplate a benefit to the third person . . .* The 'intent' which is a prerequisite of the beneficiary's right to sue is 'not a desire or purpose to confer a particular benefit upon him,' nor a desire to advance his interests, but an *intent that the promisor shall assume a direct obligation to him*.

**Lonsdale**, 99 Wn.2d at 361 (emphases original) (quoting **Vikingstad v. Baggott**, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955)).

Similarly, Texas has a "presumption against conferring third-party beneficiary status on noncontracting parties." **Sharyland**, 354 S.W.3d at 420. It is not enough that the third party is "directly affected by the parties' conduct, or that he 'may have a substantial interest in a contract's enforcement.'" 354 S.W.3d at 421. Rather, third-party beneficiary status will arise only when the contacting parties intended to confer a "direct" benefit on the third party and "clearly and fully spelled out" that intent in the written contract (*id.*):

[i]n deciding whether a third party may enforce or challenge a contract between others, it is the contracting parties' intent

that controls. . . . The intent to confer a direct benefit upon a third party “must be clearly and fully spelled out or enforcement by the third party must be denied.” . . . Incidental benefits that may flow from a contract to a third party do not confer the right to enforce the contract. . . . A third party may only enforce a contract when the contracting parties themselves intend to secure some benefit for the third party and entered into the contract directly for the third party’s benefit.

SATI does not even seriously suggest that any of the required conditions have been met. BA 31-32. There is plainly no indication that Davis and PACCAR Financial intended to confer a benefit on any third party. Neither assumed a “direct obligation” to SATI or to anyone else. *Lonsdale*, 99 Wn.2d at 361. Even assuming that SATI received some incidental benefit in the use of Davis truck, that does not create a third-party beneficiary contract. *Sharyland*, 354 S.W.3d at 421. SATI’s claim fails.

In sum, there is no contract between SATI and PACCAR Financial, but even assuming there is, there was no breach. This Court should affirm.

### CONCLUSION

PACCAR Financial did not owe SATI any duty to protect against Davis’ crime, where there is no special relationship, PACCAR Financial did not create a high degree of risk of harm, and Davis’ extraordinary criminal act was unforeseeable. PACCAR

Financial and SATI had no contract, but even if they did, there was no breach. This Court should affirm.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August, 2013.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 8<sup>th</sup> day of August 2013, to the following counsel of record at the following addresses:

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JOHN KENNEDY RICHARDSON AND AS NEXT FRIENDS OF MINOR CHILDREN, SARAH RICHARDSON, JOHN RICHARDSON, AND JOSHUA RICHARDSON; SUNSHINE RICHARDSON, INDIVIDUALLY AND AS SURVIVING HEIR OF JOHN KENNEDY RICHARDSON; AND KATELYN RICHARDSON, INDIVIDUALLY AND AS SURVIVING HEIR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN KENNEDY RICHARDSON, Appellants v. MICHAEL LEE CRAWFORD, Appellee

No. 10-11-00089-CV

COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO

*2011 Tex. App. LEXIS 8150*

October 12, 2011, Opinion Delivered  
October 12, 2011, Opinion Filed

**SUBSEQUENT HISTORY:** Petition for review denied by *Richardson v. Crawford*, 2012 Tex. LEXIS 35 (Tex., Jan. 13, 2012)

**PRIOR HISTORY:** [\*1]

From the 414th District Court, McLennan County, Texas. Trial Court No. 2007-2176-5. *Richardson v. Crawford*, 2011 Tex. App. LEXIS 6578 (Tex. App. Waco, Aug. 17, 2011)

**DISPOSITION:** Affirmed.

**COUNSEL:** For Appellant/Relator: Blaine A. "Bat" Tucker, ATTORNEY AT LAW, Houston, TX.; Chad Baruch, THE LAW OFFICE OF CHAD BARUCH, Rowlett, TX., David J. Fisher, ORGAIN BELL & TUCKER LLP, Silsbee, TX.

For Appellee/Respondent: Andy McSwain, FULBRIGHT WINNIFORD PC, Waco TX.

**JUDGES:** Before Chief Justice Gray, Justice Davis, and Justice Scoggins.

**OPINION BY:** AL SCOGGINS

**OPINION**

**MEMORANDUM OPINION ON REHEARING**

After considering the motion for rehearing filed by appellants, Ben L. Richardson Sr. and Melba Richardson, individually and as surviving heirs of John Kennedy Richardson and as next friends of minor children, Sarah Richardson, John Richardson, and Joshua Richardson; Sunshine Richardson, individually and as surviving heir of John Kennedy Richardson; and Katelyn Richardson, individually and as surviving heir and personal representative of the estate of John Kennedy Richardson, we deny the motion; however, we withdraw our opinion and judgment of August 17, 2011, and substitute the following to make non-dispositive clarifications.

## I. INTRODUCTION

Appellants complain about a summary judgment granted in favor of appellee, Michael Lee Crawford. In three issues, appellants argue that the trial court erred in: (1) granting summary judgment in favor of appellee because material fact issues existed as to their negligent entrustment and negligent storage claims; and (2) overruling objections to third-party [\*2] testimony regarding "(a) the killer's intent to steal the handgun, and (b) the intent to kill [the deceased]." We affirm.

## II. BACKGROUND

This appeal stems from the murder of John Kennedy Richardson on June 5, 2005, by his wife, Gretchen Williams Richardson. Gretchen admitted to shooting John on a Waco highway during the early morning hours of June 5, 2005, with a .38 Smith & Wesson snub-nose, five-shot revolver that was owned by appellee.

Gretchen and appellee both worked as real estate agents at Stewart R. Kelly Real Estate, Inc. d/b/a Kelly, Realtors ("Kelly Realtors"), a local company specializing in real estate transactions. By all accounts, Gretchen and appellee were friends. Gretchen, however, did not get along with many of her co-workers, and in fact, many of her co-workers alleged that they were scared of how manipulative, vindictive, hateful, and intimidating Gretchen could be.<sup>1</sup> Appellee testified that he did not see that side of Gretchen. He and Gretchen often had lunch together and shared "off-color" jokes via email. Despite rumors to the contrary, appellee denied that he had an affair with Gretchen, though several of Gretchen's colleagues provided statements to police indicating [\*3] that Gretchen boasted of having affairs with several men, including several at the Kelly Realtors office. Appellee claimed that Gretchen told him that she was unhappy with her marriage, but she never indicated that she intended to kill her husband. Appellee recommended that Gretchen seek a divorce.

1 One of Gretchen's colleagues recalled an instance where Gretchen "forked" someone's yard. "Forking" apparently involves the concealing of forks in the ground with the prongs up so that anyone who walks across the yard will be injured by the spikes. In addition, several colleagues recalled that Gretchen yelled at John on the phone and often stated that she hated him. However, no evidence in the record indicates that appellee was aware of these incidents.

Gretchen testified that her downward spiral began in January 2005, when she became depressed during recovery from a hysterectomy. At that time, Gretchen began abusing prescription pain pills and staying out during all hours of the night. Several of Gretchen's colleagues observed her asleep at her desk when they arrived at work early in the morning. Gretchen acknowledged that she continually worked to obtain more prescription pain pills through [\*4] doctors and other sources.

When Gretchen arrived home just before midnight on June 4, 2005, John confronted Gretchen about her drug abuse. Gretchen had been drinking alcohol that night, and she had taken some Ambien and five to eight Hydrocodone pills. John told Gretchen that he had informed the doctors who had prescribed the pills about her drug abuse and requested that they no longer prescribe medications to Gretchen. Enraged, Gretchen verbally and physically fought with John until he let her leave the house. Gretchen was intent on showing John that he could not stop her from procuring drugs whenever she wanted.

After leaving the house, Gretchen went to the Kelly Realtors office. When she arrived at the office, it was dark, as it was shortly after midnight on June 5th. Gretchen recalled that appellee left a loaded gun in his desk drawer, which was intended to be used by women in the office who either came in early or stayed late and were without a male escort. Appellee testified that the Compass Bank building next door had recently been robbed; he believed that the women in the office could use the protection. Gretchen stated that appellee told the women of the office that they could [\*5] also take the gun with them for protection when showing properties to suspicious people or in bad parts of town. Gretchen recalled that she took the gun to show properties on four or five different occasions. Appellee, however, denied that the women had permission to take the gun off the premises of the office. Nevertheless, when Gretchen arrived at the office on June 5th, she went to appellee's office, opened his desk drawer, moved to the side the tray that was concealing the gun, and took the gun with her. Gretchen noted that she called John after she left the office, but he answered the phone angry and full of questions.<sup>2</sup>

2 Gretchen initially testified that she pulled into a strip mall located on Franklin Avenue to call John from a pay phone, though she had her cell phone in the car. However, she could not recall exactly where the telephone

call was made, and she acknowledged that police "[p]robably" discovered when the phone call was made by "tracing through cell phone records."

Gretchen left the office and went to an apartment complex in Robinson, Texas, to buy drugs. She alleged that it was her intent to use the gun taken from appellee's desk for protection during the drug deal, [\*6] not for the showing of properties. She bought \$400 worth of drugs, which, according to Gretchen, may have included methamphetamines.

According to Gretchen, as she was driving on Loop 340 towards her home in Lorena, Texas, she realized that John was flashing the lights of his truck while driving behind her. They both pulled over to the side of the road and stopped their vehicles. Gretchen believed that John had followed her to witness the purchase of the drugs, which "really put [her] in a state." John got out of his truck and approached Gretchen. Appellee's gun sat in Gretchen's lap, wrapped in a T-shirt. John yelled at Gretchen as he approached, and after she exited the vehicle, she yelled "Just shut up!" while firing a warning shot into the air. John continued to argue with Gretchen and instructed her to stay away from the couple's children. Gretchen then shot John several times, including once in the leg and twice in the back. Gretchen alleged that she only recalled shooting John in the leg and that her next memory was of John's head in her lap when the police arrived. She did remember, however, panicking about the drugs and trying to plant them on John so that she would not be charged [\*7] with drug possession. John died as a result of the gunshot wounds inflicted by Gretchen.

When first questioned by police about the incident, Gretchen blamed an unknown African-American male for the shooting and claimed that it was a drug deal that had gone bad. She later admitted to shooting John and subsequently pleaded guilty to the murder of John, which resulted in a forty-year prison sentence for her.

On June 6, 2007, appellants filed their original petition against appellee and defendants, Kelly Realtors, Stewart Ragan Kelly, and Trammell Reid Kelly, asserting wrongful death and survival claims based upon theories of negligent entrustment and "negligent storage of a dangerous instrumentality."<sup>3</sup> Appellee filed a general denial, denying all of the allegations contained in appellants' original petition, and a motion to designate Gretchen as a responsible third party--a motion which the trial court granted.

3 In their first amended petition, appellants dropped all of their claims against all defendants except appellee.

Appellee later filed a traditional motion for summary judgment, arguing that issues of material fact did not exist as to appellants' causes of action. Appellants filed a [\*8] response to appellee's summary judgment motion, which included, among other things, the full deposition testimony of appellee; Gretchen; Stewart; Trammell; and Tracy A. O'Connor, a Lieutenant with the Robinson Police Department who investigated this incident; various written statements given by Gretchen's colleagues at Kelly Realtors; and documents pertaining to handgun safety and the procurement of a concealed handgun license.

Appellee filed objections to appellants' summary judgment evidence, all of which were denied by the trial court except for:

the purported testimony of Gretchen Richardson, to the extent that it is utilized in a manner contrary to her guilty plea to first[-]degree murder, which includes both the intent to commit homicide, as well as a denial of any lack of capacity, with respect to pages 68-69 of the Gretchen Richardson deposition, Exhibit 1.<sup>4</sup>

The trial court subsequently granted appellee's motion for summary judgment and ordered that appellants take nothing from appellee. This appeal followed.

4 On pages 68-69 of her deposition, Gretchen testified that she "definitely didn't" intentionally and knowingly kill John. This testimony contradicted her previously-entered [\*9] guilty plea, and as such, the trial court sustained appellee's objection to this testimony.

### III. NEGLIGENT ENTRUSTMENT & NEGLIGENT STORAGE OF A FIREARM

In their first issue, appellants argue that Texas courts recognize the tort claim of negligent entrustment of a firearm and that the trial court erred in concluding that no material fact issue existed as to the elements of appellants' negligent entrustment claim. In their second issue, appellants contend that, even if Gretchen's use of appellee's gun was unauthor-

ized, Texas courts should recognize a claim for negligent storage of a firearm and that material fact issues exist as to that claim.

#### A. Standard of Review

We review the grant or denial of a traditional summary judgment de novo. See *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 n.7 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003). A movant is entitled to summary judgment if he demonstrates that no genuine issues of material fact exist and that he is entitled to judgment as a matter of law. See TEX. R. CIV. P. 166a(c); see also *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). The movant bears the burden of proof in a traditional [\*10] motion for summary judgment, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. See *Sw. Elec. Power Co.*, 73 S.W.3d at 215. We take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. See *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

We will affirm a traditional summary judgment only if the record establishes that the movant has conclusively proved its defense as matter of law or if the movant has negated at least one essential element of the plaintiff's cause of action. *IHS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004); see *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005); see *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). Only when the movant has produced sufficient evidence to establish its right to summary judgment does the burden shift to the non-movant to come [\*11] forward with competent controverting evidence raising a genuine issue of material fact with regard to the element challenged by the defendant. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999).

#### B. Applicable Law

At the outset of our analysis of appellants' contentions, we note that this Court has not recognized a cause of action for negligent entrustment of a firearm. A few other Texas courts, however, have recognized a cause of action for negligent entrustment of a firearm. See *Prather v. Brandt*, 981 S.W.2d 801, 806 (Tex. App.--Houston [1st Dist.] 1998, pet. denied); *Kennedy v. Baird*, 682 S.W.2d 377, 378-79 (Tex. App.--El Paso 1984, no writ). In recognizing this cause of the action, the courts have analogized negligent entrustment of a firearm to negligent entrustment of an automobile. See *Prather*, 981 S.W.2d at 806; see also *Kennedy*, 682 S.W.2d at 378-79.

The Second Restatement of Torts provides that a person who gives a chattel to another, knowing the other person, due to youth, inexperience, or other factors, is likely to use the chattel in a manner involving unreasonable risk of harm to himself or others, may be held liable for harm caused by the use of the chattel. RESTATEMENT (SECOND) OF TORTS § 390 [\*12] (1965); see *Prather*, 981 S.W.2d at 806 (citing *Rodriguez v. Spencer*, 902 S.W.2d 37, 42 (Tex. App.--Houston [1st Dist.] 1995, no writ)).

To establish negligent entrustment of an automobile, a plaintiff must prove the following elements: (1) the owner entrusted the automobile (2) to a person who was an incompetent or reckless driver (3) who the owner knew or should have known was incompetent or reckless; (4) the driver was negligent; and (5) the driver's negligence proximately caused the accident and the plaintiff's injuries. *Prather*, 981 S.W.2d at 806; see *Mayes*, 236 S.W.3d at 758.

#### C. Negligent Entrustment

Though we have not specifically recognized a cause of action for negligent entrustment of a firearm, even if we were to apply the negligent entrustment factors articulated in *Prather* and *Mayes*, we cannot say that appellants' summary judgment evidence raises a genuine issue of material fact so as to preclude summary judgment.<sup>5</sup> See *Prather*, 981 S.W.2d at 806; see also *Mayes*, 236 S.W.3d at 758.

<sup>5</sup> Though we analyze the merits of appellants' first issue, this should not be interpreted to mean that we recognize "negligent entrustment" to include personal property, in general, or of a firearm, [\*13] in particular, as a cause of action.

In his motion for summary judgment, appellee asserted that: (1) he had no legal duty to prevent unforeseeable criminal acts; (2) the evidence did not establish that he could have foreseen Gretchen's intentional act of murdering John; (3) appellants' negligent entrustment claim must fail because there is no evidence that he knew that Gretchen was

incompetent or reckless in handling guns and because Gretchen engaged in an intentional act using the gun; and (4) Gretchen's criminal act is a superseding cause breaking the causation chain.

In her deposition testimony, Gretchen admitted that it was not foreseeable to anyone at Kelly Realtors that she would kill John. She did testify that she was depressed and abusing drugs, but she hid that from her colleagues at the office, though she described herself as a "walking time bomb." She also admitted that John kept several guns around the house and that a couple of them were left unsecured underneath their bed or in a closet. When asked whether she knew how to use a gun "enough to where you could shoot and kill your husband," Gretchen responded in the affirmative. She also recalled going to a gun range and learning [\*14] how to shoot a gun when she was seventeen years old and that she had shot a rifle with her mother-in-law. Despite her experience with handling firearms, Gretchen did not believe that she was "fit or qualified to use a handgun for off-site self-defense protection."

Gretchen noted that she only told appellee that she had some family problems, but she did not "use him as a sounding board." She did not recall telling appellee about any violence or threats of violence in her home or about her drug use. She did, however, tell appellee about affairs that she was having. Gretchen recalled that she often joked with other colleagues at Kelly Realtors about killing John by poisoning his food<sup>6</sup>; however, there is no testimony establishing that she informed appellee of her intent to kill John. When Gretchen's trial counsel asked Gretchen whether she would have murdered John had appellee not provided the gun, she responded:

We would have argued, and I would have driven off to my brother's house and probably stayed gone for a while, like I did other times. . . . If I hadn't had it with me, there would have been no way to kill him, and it was just an instant reaction, just anger and--you know.

Gretchen [\*15] characterized the scope of appellee's permission to use the gun as follows:

He had said if we were meeting a client that we were leery of, we could take it with us, or if--his preference was that clients would meet us at the office so that other people could see them and, you know, they would know that someone was aware that that's who we were going to be with, but if that wasn't the case and another male agent was not available, that we could use the gun.

Nevertheless, she took the gun for protection while she purchased drugs from a dealer at an apartment complex in Robinson. Lieutenant O'Connor described Gretchen's taking of the gun for that purpose as a theft.

6 Lieutenant O'Connor stated that, based on his investigation, Gretchen's murder of John was premeditated and that, when she spoke to police at the scene of the incident, she was cold, callous, and "[n]oncaring." Lieutenant O'Connor did not believe that Gretchen handled the gun negligently or that the gun discharged accidentally. Furthermore, the fact that the gun was wrapped in a T-shirt led Lieutenant O'Connor to conclude that Gretchen sought to conceal the gun.

Appellee stated that he had no knowledge of the shooting or that [\*16] Gretchen intended to shoot John. At the time of the incident, appellee was on a cruise to Mexico with his wife. Appellee denied giving anyone permission to use the gun in the commission of a criminal act or to take the gun out of the office, though Gretchen was permitted to use the gun "[i]f she had an issue in the office." Appellee was unaware that Gretchen was abusing drugs or that she was depressed.

As a general rule, "a person has no legal duty to protect another from the criminal acts of a third person." *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). But, in *Phan Son Van v. Pena*, the Texas Supreme Court noted that:

The act of a third person in committing an intentional tort or crime *is a superseding cause* of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless* the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

990 S.W.2d 751, 753 (Tex. 1999) (emphasis in original); see *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 550 (Tex. 1985) [\*17] (holding that third-party criminal conduct is a superseding cause unless the criminal conduct is a foreseeable result of such negligence).

To impose liability on a defendant for negligence in failing to prevent the criminal conduct of another, the facts must show more than conduct that creates an opportunity to commit crime--they must show both that the defendant committed negligent acts and that it knew or should have known that, because of its acts, the crime (or one like it) might occur.

*Barton v. Whataburger, Inc.*, 276 S.W.3d 456, 462 (Tex. App.--Houston [1st Dist.] 2008, pet. denied); see *RESTATEMENT (SECOND) OF TORTS* § 448 (1965); see also *R.K. v. Ramirez*, 887 S.W.2d 836, 846 (Tex. 1994) (Enoch, J., dissenting) (noting that the essence of negligent entrustment is an awareness by the entrustor of the propensity of the actor to commit the act upon which the negligence claim is based).

"Foreseeability . . . requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission." *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). A danger is foreseeable if its general character might reasonably be anticipated, [\*18] if not its precise manner. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). This determination involves a practical inquiry, based on common experience applied to human conduct, and asks whether the injury might reasonably have been contemplated as a result of the defendant's conduct. *Doe*, 907 S.W.2d at 478. Importantly, "[f]oreseeability requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury." *Id.*

Here, Gretchen admitted that no one at Kelly Realtors, including appellee, could have foreseen that she intended to murder John. In addition, Gretchen stated that she wore a "mask" at work to conceal her depression, drug abuse, and the problems she was allegedly having at home. Assuming without deciding that appellee was negligent in leaving the gun in his desk for others at the office to use, appellants have not tendered evidence demonstrating that appellee knew or should have known that Gretchen would use his gun to shoot John. In fact, Gretchen testified that she took the gun from appellee's desk to use for protection while she purchased drugs, which was also outside the [\*19] scope of permission provided by appellee. Essentially, Gretchen used appellee's gun in the commission of two separate criminal acts. Though appellee was aware that Gretchen was not happy in her marriage to John, appellee had no knowledge that Gretchen intended to kill John. Rather, appellee suggested that Gretchen file for divorce. As such, we believe that Gretchen's intentional act of shooting John was unforeseeable and would constitute a superseding cause of harm which breaks the chain of causation.<sup>7</sup> See *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596-97 (Tex. 1987) (finding, in a negligent entrustment case, no proximate cause because the defendant's entrustment of a truck to a driver did not cause the accident, and the defendant's knowledge about the driver's record of speeding tickets did not lead it to foresee the accident resulting in injury)<sup>8</sup> see also *Pena*, 990 S.W.2d at 753; *Doe*, 907 S.W.2d at 478; *Nixon*, 690 S.W.2d at 550; *Barton*, 276 S.W.3d at 462.

7 We also note that if a party pleads guilty to a crime, her plea is admissible as a judicial admission in a civil case arising from the same transaction, which was the case here. See *Thomas v. Uzoka*, 290 S.W.3d 437, 453 n.11 (Tex. App.--Houston [14th Dist.] 2009, pet. denied). [\*20] Moreover, Gretchen was estopped from contesting the guilty plea or testifying contrary to the guilty plea. See *Thompson v. Cont'l Airlines*, 18 S.W.3d 701, 703 (Tex. App.--San Antonio 2000, no pet.) ("Judicial estoppel is a common law doctrine that applies when a party tries to contradict his or her own sworn statement made in a prior judicial proceeding."); see also *Delese v. Albertson's, Inc.*, 83 S.W.3d 827, 831 (Tex. App.--Texarkana 2002, no pet.); *Johnston v. Am. Med. Int'l*, 36 S.W.3d 572, 576 (Tex. App.--Tyler 2000, pet. denied) ("A prior conviction may work a collateral estoppel in a subsequent proceeding if the identical issues for which estoppel is sought were litigated and directly determined in a prior criminal proceeding. When an issue . . . was litigated and critical to the prior criminal conviction, [the convicted party] is estopped from attacking the judgment or any issue necessarily decided by the guilty verdict. Thus, a criminal defendant cannot litigate the issue of his guilt again in a civil action, since a fully litigated issue should not be retried. Further, a plea of guilt, as opposed to a conviction after trial, also collaterally estops a plaintiff from relitigating [\*21] his guilt, since a valid guilty plea serves as a full and fair litigation of the facts necessary to establish the elements of the crime." (internal citations & quotations omitted)). As such, Gretchen's testimony that she did not intend to kill John is clearly contradictory to her guilty plea, is not permissible, and

cannot be used to create a fact issue as to intent. *See Thomas*, 290 S.W.3d at 453 n.11; *Delese*, 83 S.W.3d at 831; *Johnston*, 36 S.W.3d at 576; *Thompson*, 18 S.W.3d at 703.

8 Specifically, in *Schneider*, Esperanza Transmission Company, an oil-field pipeline company, provided a pick-up truck to one of its employees for business and personal use. 744 S.W.2d 595, 595 (Tex. 1987). The employee and a friend of his went to a dance one night. *Id.* Upon leaving the dance hall, the employee stated that he had drunk too much and asked his friend to drive the pick-up truck. *Id.* The friend subsequently collided with the rear of a vehicle driven by Schneider. *Id.*

Because the summary judgment record conclusively negates the proximate causation element of appellants' negligent entrustment cause of action, we cannot say that the trial court erred in granting summary judgment in appellee's favor. [\*22] *See Mason*, 143 S.W.3d at 798; *Grinnell*, 951 S.W.2d at 425; *see also Mayes*, 236 S.W.3d at 758; *Prather*, 981 S.W.2d at 806. And, as a secondary ground supporting the trial court's summary judgment order, we note that the summary judgment record demonstrates that Gretchen has experience handling firearms, though she does not have a license to carry a firearm; her house contained several unsecured firearms; that she hid her alleged emotional instability from her colleagues; and that appellee did not have any inkling that Gretchen was mentally unstable or lacked experience handling firearms; thus, the record conclusively negates the reckless or incompetent element of appellants' negligent entrustment claim. *See Mayes*, 236 S.W.3d at 758; *Prather*, 981 S.W.2d at 806; *see also Williams v. Steves Indus., Inc.*, 699 S.W.2d 570, 571 (Tex. 1985) ("[W]hether a driver has a license does not determine whether a driver is, in fact, incompetent.") (emphasis in original); *Robson v. Gilbreath*, 267 S.W.3d 401, 406 (Tex. App.--Austin 2008, pet. denied) (stating that mere involvement in an accident does not create an inference or conclusion that a driver is incompetent or reckless, and evidence that a driver [\*23] is inexperienced, without more, does not permit an inference that a driver lacked judgment or perception or was otherwise an incompetent driver). Based on the foregoing, we overrule appellants' first issue.

#### D. Negligent Storage

With respect to their second issue, appellants acknowledge that no Texas court has recognized an independent cause of action for negligent storage of a firearm. Nevertheless, appellants direct us to cases from several other states where such a claim purportedly exists. *See, e.g., Jupin v. Kask*, 447 Mass. 141, 849 N.E.2d 829, 842 (Mass. 2006); *Galara v. Koskovich*, 364 N.J. Super. 418, 836 A.2d 840, 851 (N.J. 2003); *Heck v. Stoffer*, 786 N.E.2d 265, 271 (Ind. 2003); *see also Andrew J. McClurg, Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 Conn. L. Rev. 1189 (2000). While the authority cited by appellants from other state courts constitutes persuasive authority, none of it is binding on this Court. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (stating that opinions from any federal or state court may be relied on a persuasive authority, but Texas appellate courts are obligated to follow only higher Texas courts and the United States Supreme [\*24] Court). Given that neither the Texas Supreme Court nor our sister courts in Texas have recognized a claim for negligent storage of a firearm, we decline to do so at this time.<sup>9</sup> Accordingly, we overrule appellants' second issue.

9 It is also noteworthy to mention that one Texas court declined to hold a gun store liable with regard to a complaint that is similar to the negligent-storage contention made here. *See Ambrosio v. Carter's Shooting Ctr., Inc.*, 20 S.W.3d 262, 269 (Tex. App.--Houston [14th Dist.] 2000, pet. denied). In *Ambrosio*, a Smith & Wesson handgun was stolen from an unlocked display case at a gun store by a customer when the store attendants were helping other customers. *Id.* at 264. Subsequently, the stolen gun was sold to another, who used the gun in several violent crimes, including the murder of a man during a carjacking. *Id.* The family of the man killed during the carjacking filed suit against the gun store for negligence, negligence per se, strict liability, and gross negligence. *Id.* at 263. Specifically, appellants asserted that "appellee violated its duty to exercise care in the storage and display of its firearms" and that the violation of this duty caused the death [\*25] of Alek Ambrosio. *Id.* Appellants also argued that appellee's lax security previously resulted in thefts of other guns from the store. *Id.* at 269. The *Ambrosio* court held that summary judgment was proper because "appellee's failure to exercise care in the storage and display of its firearms is too remote and attenuated from the criminal conduct of the . . . car[j]ackers to constitute a legal cause of injury to either Alek Ambrosio or his parents." *Id.* at 266.

#### IV. LIEUTENANT O'CONNOR'S TESTIMONY

While not presented in their original appellate brief as a separate and distinct issue, appellants, in their third issue, complain about Lieutenant O'Connor's testimony regarding Gretchen's intent to steal appellee's gun from his desk. Citing *Fairow v. State*, 943 S.W.2d 895, 899 (Tex. Crim. App. 1997) (en banc), appellants assert that Lieutenant O'Connor's

testimony about his belief that Gretchen stole appellee's gun from appellee's desk should have been excluded because it: (1) was speculative and based on conjecture; (2) was not based on personal knowledge; and (3) did not satisfy *Texas Rule of Evidence 701*. See *TEX. R. EVID. 701*. We disagree.

Lieutenant O'Connor's statements about Gretchen's [\*26] intent to steal appellee's handgun were based on his investigation of the incident, which included the consideration of the totality of the circumstances. See *Lee v. State*, 29 S.W.3d 570, 577 (Tex. App.--Dallas 2000, no pet.) ("Police officers may testify to explain how the investigation began and how the defendant became a suspect."); see also *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (stating that intent may "be inferred from circumstantial evidence[,] such as acts, words, and the conduct of the appellant"); *Osborn v. State*, 92 S.W.3d 531, 536-37 (Tex. Crim. App. 2002) (noting that although police officers typically testify as qualified experts under *Texas Rule of Evidence 702*, an officer may also be considered a lay witness under *Texas Rule of Evidence 701*); *Fairow*, 943 S.W.2d at 898 (holding that police officers may generally offer lay-opinion testimony concerning matters about which they have personal knowledge and experience in their employment as a law enforcement officer and specifically concerning the meaning of certain behavior of criminal suspects they encounter); *Ledesma v. State*, 677 S.W.2d 529, 531 (Tex. Crim. App. 1984) (noting that the requisite culpable [\*27] mental state may be inferred from the surrounding circumstances). As the investigating officer, Lieutenant O'Connor was permitted to testify regarding his opinion about what had happened that evening/early morning. See *Lee*, 29 S.W.3d at 577; see also *Osborn*, 92 S.W.3d at 536-37; *Fairow*, 943 S.W.2d at 898. Therefore, we reject appellant's argument that Lieutenant O'Connor's testimony about Gretchen's intent to steal appellee's gun was inadmissible. Accordingly, we overrule appellant's third issue.

#### V. CONCLUSION

Having overruled all of appellants' issues, we affirm the judgment of the trial court.

AL SCOGGINS

Justice

Before Chief Justice Gray,

Justice Davis, and

Justice Scoggins

Affirmed

Opinion delivered and filed October 12, 2011

petition for discretionary review or other request for relief. The Court of Criminal Appeals may, at any time, order that a "do not publish" notation be changed to "publish."

- (c) *Civil Cases.* Opinions and memorandum opinions in civil cases issued on or after January 1, 2003 shall not be designated "do not publish."

#### 47.3. Distribution of Opinions

All opinions of the courts of appeals are open to the public and must be made available to public reporting services, print or electronic.

#### 47.4. Memorandum Opinions

If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it. An opinion may not be designated a memorandum opinion if the author of a concurrence or dissent opposes that designation. An opinion must be designated a memorandum opinion unless it does any of the following:

- (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
- (b) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas;
- (c) criticizes existing law; or
- (d) resolves an apparent conflict of authority.

#### 47.5. Concurring and Dissenting Opinions

Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc.

#### 47.6. Change in Designation by En Banc Court

A court en banc may change a panel's designation of an opinion.

#### 47.7. Citation of Unpublished Opinions

- (a) *Criminal Cases.* Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, "(not designated for publication)."
- (b) *Civil Cases.* Opinions and memorandum opinions designated "do not publish" under these rules by the courts of appeals prior to January 1, 2003 have no precedential value but may be cited with the notation, "(not designated for publication)." If an opinion or memorandum opinion issued on or after that date is erroneously designated "do not publish," the erroneous designation will not affect the precedential value of the decision.

#### Notes and Comments

Comment to 1997 change: This is former Rule 90. Subdivision 47.1 makes clear that a memorandum opinion should not be any longer than necessary. Subdivision 47.5 is amended to make clear that only justices who participated in the decision may file an opinion in the case. Judges who are not on a panel may file an opinion only in respect to a hearing or rehearing en banc. Former Rule 90(h), regarding publication of opinions after the Supreme Court grants review, is repealed.

Comment to 2002 change: The rule is substantively changed to discontinue the use of the "do not publish" designation in civil cases, to require that all opinions of the court of appeals be made available to public reporting services, and to remove prospectively any prohibition against the citation of opinions as authority in civil cases. The rule favors the use of "memorandum opinions" designated as such except in certain types of cases but does not change other requirements, such as those in *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635-636 (Tex. 1986). An opinion previously designated "do not publish" has no precedential value but may be cited. The citation must include the notation, "(not designated for publication)." Of course, whenever an opinion not readily available is cited, copies should be furnished to the court and opposing counsel.

Comment to 2008 change: Effective January 1, 2003, Rule 47 was amended to prospectively discontinue designating opinions in civil cases as either "published" or "unpublished." Subdivision 47.7 is revised to clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated "do not publish" should be considered "unpublished" cases lacking precedential value. All opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged. Subdivisions 47.2 and 47.7 are amended to clarify that memorandum opinions are subject to those rules.



CITY BANK, Plaintiff, v. COMPASS BANK, Defendant.

EP-10-CV-62-KC

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
TEXAS, EL PASO DIVISION

2010 U.S. Dist. LEXIS 66260

July 2, 2010, Decided

July 2, 2010, Filed

**SUBSEQUENT HISTORY:** Related proceeding at *City Bank v. Compass Bank*, 2011 U.S. Dist. LEXIS 129654 (W.D. Tex., Nov. 9, 2011)

**PRIOR HISTORY:** *City Bank v. Compass Bank*, 717 F. Supp. 2d 599, 2010 U.S. Dist. LEXIS 47857 (W.D. Tex., 2010)

**COUNSEL:** [\*1] For City Bank, Plaintiff, Counter Defendant: David Moises Mirazo, Brown McCarroll, L.L.P., El Paso, TX; Mark C. Walker, Cox Smith Matthews Incorporated, El Paso, TX; Richard A. Illmer, Brown McCarroll, L.L.P., Dallas, TX.

For Compass Bank, Defendant, Counter Plaintiff: Samuel S. Allen, Jackson Walker, L.L.P., San Angelo, TX.

**JUDGES:** KATHLEEN CARDONE, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** KATHLEEN CARDONE

**OPINION**

**ORDER**

On this day, the Court considered Defendant Compass Bank's *Rule 12(b)(6)* Motion to Dismiss ("Motion") (Doc. No. 5), City Bank's Response ("Response") (Doc. No. 7), and Compass Bank's Reply ("Reply") (Doc. No. 10). For the reasons set forth below, the Motion is **GRANTED** in part and **DENIED** in part.

## I. BACKGROUND

The instant case embraces the claims brought by City Bank against Compass Bank in connection with the collapse of the Sambrano Corporation. A more complete recitation of the background to this dispute has been set forth in the Court's Order of May 12, 2010 ("May Order"), filed both in cause number EP-09-CV-96-KC and in the instant case as well (Doc. No. 19). An abbreviated version of the facts, taken from City Bank's pleadings, is set forth below. *See* Pl.'s Orig. Pet. (Doc. No. 1 at 6-22).

The [\*2] Sambrano Corporation ("SamCorp") was a general contracting business in El Paso, Texas. *See* Pl.'s Orig. Pet. PP 4-5. In September 2005, SamCorp obtained a \$ 3,000,000 line of credit from City Bank, which was secured by liens on company property and personally guaranteed by certain SamCorp principals. *Id.* PP 5-8. During August and September 2007, SamCorp sought and obtained a \$ 4,000,000 line of credit from State National Bank, <sup>1</sup> which was also secured by various liens and personal guarantees. *Id.* PP 18, 21-24. As one of the purposes of this new line of credit was to refinance the old line of credit, any outstanding indebtedness on the City Bank line of credit was to be retired using

some of the proceeds of the State National line of credit. *Id.* P 18. However, instead of first paying off the outstanding City Bank indebtedness by a direct transfer of money, State National Bank made the line of credit available to SamCorp directly once it was established, and SamCorp did not effect the payoff. *Id.* PP 32-33.

1 This took place while State National Bank was an independent entity; Compass Bank is now State National Bank's successor in interest for the purposes of this case and any references [\*3] to the two institutions are functionally interchangeable. Pl.'s Orig. Pet. P 2.

In January 2008, the two banks finally learned that both lines of credit were open and drawn down simultaneously, which led both banks to call SamCorp in default and commence sometimes conflicting collection efforts. *Id.* PP 39-47. City Bank avers that, while it achieved some success in recovering monies owed to it, approximately \$ 1,500,000 remains unpaid. *Id.* P 46. Subsequently, City Bank brought claims against Compass Bank for negligence, breach of contract, and money had and received. *Id.* PP 48-57. <sup>2</sup> Compass Bank seeks to have these claims dismissed pursuant to *Rule 12(b)(6)*. See generally *Mot.*

2 City Bank also previously brought claims against Compass Bank sounding in fraudulent transfer, conversion, and tortious interference with contract; those claims were addressed in the Court's May Order.

## II. DISCUSSION

### A. Standard

A motion to dismiss pursuant to *Rule 12(b)(6)* challenges a complaint on the basis that it fails to state a claim upon which relief may be granted. *FED. R. CIV. P. 12(b)(6)*. In ruling on a *Rule 12(b)(6)* motion, the court must accept well-pleaded facts as true and view them in a light most [\*4] favorable to the plaintiff. *Calhoun v. Hargrove*, 312 F.3d 730, 733 (5th Cir. 2002); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Still, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations and quotation marks omitted); see also *Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5th Cir. 2005) (stating that a court need not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions.").

Though a complaint need not contain "detailed" factual allegations, the "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Twombly*, 550 U.S. at 555 (internal citation omitted). Thus, to survive a motion to dismiss, a plaintiff's complaint must allege sufficient facts "to state a claim to relief that is plausible on its face." *Id.* at 570. Nevertheless, "a well-pleaded complaint may proceed even if its strikes a savvy judge [\*5] that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)).

### B. Negligence Claim

City Bank asserts a claim of negligence against Compass Bank in connection with the foregoing events. See Pl.'s Orig. Pet. PP 48-50. A claim for negligence encompasses four key elements: 1) the defendant owed the plaintiff a duty; 2) the defendant breached that duty; 3) the breach proximately caused the plaintiff's injuries; and 4) the plaintiff, as a result, suffered damages. See *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 710 (Tex. 2003). Whether one party owes a duty of care to another party, under any given set of circumstances, is a question of law, and Texas common law takes "into account not only the law and policies of this State, but the law of other states and the United States" when deciding this issue. *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 351 (Tex. 1995). Courts consider various policy factors, including the "risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against [\*6] the injury, and the consequences of placing the burden on the defendant" when deciding whether a duty of care exists between two parties. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).

#### 1. Duty of care

Compass Bank argues that it did not owe a duty of care to City Bank in connection with the SamCorp refinancing. *Mot.* P 9. It argues that it had no existing relationship with City Bank in the context of the SamCorp transactions and

that a duty of care should not be implied from its internal operating procedures, which may have called for a direct payment to an existing lender in a refinancing situation. *See id.* Compass Bank also cites *Owens v. Comerica Bank*, 229 S.W.3d 544, 547 (Tex. Ct. App. 2007), to support the proposition that Texas law imposes no duty of care on banks with regard to unrelated third parties, even if a bank's internal policy would have prevented the third party harm but was ignored in a particular case. *Id.* City Bank responds that this issue is meant to be addressed on summary judgment and points out that *Owens* itself was a summary judgment opinion. Resp. 3-4. There is no prohibition, though, on a court's consideration of a party's duty of care [\*7] when deciding a motion to dismiss. *See Davis v. Dallas County*, 541 F. Supp. 2d 844, 850-53 (N.D. Tex. 2008) (discussing the duty of care issue while ruling on a *Rule 12(b)(6)* motion to dismiss). Accordingly, the Court addresses the substance of this issue here.

Courts frequently cite Texas negligence law for the proposition that "a bank owes no duty to someone who is not a customer and with whom the bank does not have a relationship." *Owens*, 229 S.W.3d at 547. This rule, however, is generally applied in cases where a plaintiff claims to have been defrauded, or otherwise victimized, by an account holder at a bank, and proceeds to claim against the bank under the theory that, had the bank more closely supervised all of its customer accounts, the bank could have surmised that a customer was operating a fraudulent scheme. *Id.* at 546-47; *see also Red Rock v. Jafco, Ltd.*, 79 F.3d 1146, 1996 WL 97549, at \*4 (5th Cir. 1996) (unpublished opinion) ("A bank, however, owes no legal duty of care to investigate or disclose its customers' conduct or intent to third parties with whom the bank's customers do business."). Where the potential victim's identity, the mode of harm, and the way to avoid that [\*8] harm are all particularly known to the bank in advance, by contrast, Texas law may well impose a duty of care on the bank in connection with that victim. *See Guerra v. Regions Bank*, 188 S.W.3d 744, 747 (Tex. Ct. App. 2006) (citing the traditional factors of "risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant"). Such a circumstance differs markedly from a case in which a fraud victim argues that a bank should have been continually monitoring all transactions over all customer accounts for unspecified indicia of fraudulent activity.

The facts in the instant case, as pleaded by City Bank, put this case in the exception noted above. Here, according to the pleadings, State National Bank knew of the existing line of credit between City Bank and SamCorp, knew that it was supposed to be paid off from the new line of credit before cash was advanced to SamCorp, knew or should have known that the most appropriate and secure way to retire the City Bank loan was a bank-to-bank payment, failed to use that method, and knew or [\*9] should have known that SamCorp's having two lines of credit open and drawn down at the same time was dangerous to SamCorp and its creditors or stakeholders. Pl.'s Orig. Pet. PP 18-19, 30-34, 48-50. In a case of negligent execution of a refinancing transaction (by placing money in the hands of the borrower with the mere hope that it would be paid to the old lender, rather than remitting it directly), it appears that the traditional factors all weigh in favor of finding a duty of care. *See Guerra*, 188 S.W.3d at 747 (outlining the factors). The risk and foreseeability of harm to City Bank seems clear, and the likelihood of harm is not inconsiderable should SamCorp pocket or spend the proceeds instead of paying them over properly. Weighed against these concerns is the questionable social utility of giving the money to the borrower directly,<sup>3</sup> the trivial costs involved in avoiding this path by means of making a direct bank-to-bank payment, and the open question of who, if not the new lender, may better ensure that the old lender is repaid when the new lender decides to transact a refinancing with the borrower.

3 The social utility of refinancing transactions themselves is not at issue in [\*10] this case, as City Bank is only complaining of the way in which the SamCorp transaction was executed, not the fact that a refinancing was undertaken at all. Accordingly, the conduct at issue, whose social utility must be measured as part of a duty of care analysis, is not the overall refinancing. Rather, the conduct at issue is the particular choice to execute a refinancing by placing cash in the hands of the borrower before the old loan is paid off, instead of first executing a bank-to-bank payment.

Compass Bank argues that "SNB was entitled to assume that City could protect itself." Mot. P 9. It claims that direct payment to the old lender was primarily meant to benefit Compass Bank, by retiring the old loan to ensure the seniority of the new lender's liens, and should therefore not be a standard of care owed to others. *Id.* It is unclear, though, as to how City Bank could have protected itself from a negligently executed refinancing transaction when the decisions as to how to initiate and carry out that transaction were taken by third parties without any notification to City Bank. Moreover, Compass Bank cites no precedent and offers no logic to support the contention that standards [\*11] of care that benefit a defendant's own interests cannot also be legally enforceable as protective of a plaintiff. Indeed, in some areas of tort law, such as traffic accidents, it is almost axiomatically true that all standards of care in the realm of safe driving, if adhered to, would benefit both tortfeasors and accident victims. The dual-benefit nature of these standards is no reason to conclude that they are not legally enforceable against tortfeasors when harms befall their victims. Thus, a

rule requiring a direct bank-to-bank payment could have operated both for the benefit of Compass Bank and have been a standard of care owed by Compass Bank to others, just as a rule against driving with excessive speed protects both the prospective speeder as well as his potential victim.

While there appears to be no Texas precedent which squarely addresses the issue of a negligently executed refinancing, the Court is aware of a relevant case decided by the Maryland state supreme court. See *Chicago Title Ins. Co. v. Allfirst Bank*, 394 Md. 270, 905 A.2d 366 (Md. 2006). Texas courts, when interpreting Texas common law, often turn to out-of-state cases for guidance; accordingly, this Court refers to *Chicago* [\*12] *Title* for guidance in the instant case. See *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 662-63 (Tex. 2008) (holding that Texas courts may look to out-of-state precedent); see also *SmithKline Beecham*, 903 S.W.2d at 351 (same).

In *Chicago Title*, a borrower ("Shannahan") was seeking to refinance loans secured by liens on his house. 905 A.2d at 369. The new lender, Armada Mortgage Corporation, retained the services of First Equity and the Chicago Title Insurance Company to effect this transaction. *Id.* at 368-69. First Equity issued a number of checks in order to effect the refinancing, including a check mailed directly to Mellon Bank to retire a first mortgage on the property and a check mailed directly to Farmers Bank to retire partially a second mortgage on the property. *Id.* at 370. More controversially, First Equity also delivered two checks to Shannahan personally - one payable to him, which represented his "cash out" on the refinance, and another payable to Farmers Bank, which was to complete the retirement of second mortgage. *Id.* Shannahan delivered both checks to a branch of Farmers Bank, at which he also happened to hold a checking account, and that bank credited [\*13] both checks towards Shannahan's checking account instead of crediting the second check towards the outstanding loan balance. *Id.* First Equity eventually learned that the earlier loan and lien held by Farmers Bank had not been retired, due to this mis-crediting, and sued both its bank (Allfirst Bank) as well as Farmers Bank in order to ascertain who was responsible for misdirecting its money. *Id.* at 371.

The Maryland state supreme court held that Farmers Bank was responsible to First Equity under a theory of negligence, despite the fact that Farmers Bank and First Equity had no pre-existing business relationship in the context of the Shannahan loans. *Id.* at 382-83. This was because the second check was payable to Farmers Bank directly - not to Shannahan - and the surrounding circumstances made it clear that it was meant to complete the retirement of the second mortgage. *Id.* The court held that Farmers Bank's gratuitous crediting of its own money to Shannahan's personal account was its own mistake and that First Equity should not bear the burden of this loss. *Id.* While this holding concerns a case of negligence on the part of the old lender, as opposed to negligence of a new lender, [\*14] it establishes the proposition that a bank may be liable to a non-customer if it causes harm to that non-customer by negligently executing its part of a refinancing transaction. Moreover, the *Chicago Title* court observed, in passing, that the new lender's entrustment of the final payoff check to the refinancing borrower could itself constitute contributory negligence, and should thus be evaluated by the lower courts in further proceedings. *Id.* at 383 n.12.

If First Equity's agent's entrusting the Farmer's Bank payoff check to Shannahan could constitute contributory negligence, then Compass Bank's making the full line of credit available to SamCorp, with the understanding that SamCorp would arrange to repay City Bank, could qualify as negligence *a fortiori*. The final payoff check in *Chicago Title* was made explicitly payable to Farmers Bank - a procedural safeguard which itself should have prevented mis-crediting the funds - yet the Maryland state supreme court was still willing to contemplate that entrusting such a check to the borrower could be negligent. In the instant case, SamCorp was entrusted with clear, unrestricted funds from its new line of credit, with no procedural safeguards [\*15] in place to ensure that it applied the first tranche of such funds towards paying down its old line of credit. <sup>4</sup> This scenario poses an even greater risk that the funds may be misdirected or misappropriated.

4 Farmer's Bank mis-crediting of the funds in the face of this procedural safeguard, of course, was the primary form of negligence found in *Chicago Title*. As there was no such procedural safeguard in place in the instant case, no party can be found negligent on a strictly analogous basis. However, Compass Bank's entrustment of funds to SamCorp without any procedural safeguards at all is analogous, and potentially more negligent, than First Equity's entrustment of the final payoff check to Shannahan, instead of sending it to Farmer's Bank directly.

There is one critical doctrine, however, as-yet unaddressed by the parties, which casts some doubt as to the availability of a Texas law negligence claim in the instant case. The common law in most states restricts the availability of negligence claims against alleged tortfeasors when the harms suffered by the plaintiff are deemed to be purely "economic" harms, unaccompanied by personal injury or property damage. See, e.g., *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 285-90 (Tex. Ct. App. 2000). [\*16] The damages alleged by City Bank in the

instant case are plausibly economic-only in nature. In *Chicago Title*, the Maryland state supreme court articulated its "intimate nexus" test, which allows for a recovery sounding in negligence for purely economic losses under certain circumstances. See *Chicago Title*, 905 A.2d at 381-82. Such circumstances were found in that case, and by analogy could plausibly exist in the instant case, as both cases involve refinancing transactions where the banks know of the positions of all the other parties. See *id.* However, it is unclear whether Texas common law would recognize such a test. Instead, it seems possible that Texas law precludes recovery under such circumstances, notwithstanding the policy arguments in favor of such an approach. See *Coastal Conduit*, 29 S.W.3d at 287-89 (holding that Texas has a strict rule against recovery under negligence in cases where the harms are purely economic); see also *Express One v. Steinbeck*, 53 S.W.3d 895, 898-99 (Tex. Ct. App. 2001) (explaining policy reasons).

The main policy argument against economic-harm liability discussed in *Express One* is "the difficulty, if not impossibility, of placing a reasonable limit [\*17] on a defendant's liability to those who suffer solely economic damages." *Express One*, 53 S.W.3d at 899. The intimate nexus test adopted by Maryland is explicitly meant to allay this concern and provide some means to curb such potentially limitless liability for purely economic harms. *Chicago Title*, 905 A.2d at 381. It remains unclear, however, whether Texas courts would be satisfied with this solution to the problem; at least one intermediate Texas court of appeals rejected similar solutions from other states in favor of a strict rule against recovery for purely economic harms under the tort of negligence. See *Coastal Conduit*, 29 S.W.2d at 288 (rejecting holdings from California and New Jersey). Accordingly, the Court does not dismiss the negligence claim at this point, but requires the parties to brief the purely economic loss issue as part of any summary-judgment pleadings.

## 2. Other negligence elements

The remaining three elements of a negligence claim are breach, causation and damages. See *Mission Petroleum Carriers*, 106 S.W.3d at 710. Compass Bank argues that City Bank's pleadings are "conclusory and indistinct" on these issues and thus fail to satisfy the *Twombly* standard. Mot. [\*18] PP 8-10. This argument has little merit. City Bank has included a great deal of factual detail in its pleadings, setting forth the circumstances behind the claims at issue and making clear the way in which it believes the elements of the negligence claim have been satisfied. See Pl.'s Orig. Pet. PP 5-47. City Bank sets forth the dates and amounts involved in setting up and drawing down the new line of credit (alleged breach), sets forth how SamCorp's actions placed it in default with both banks (alleged causation), and the events surrounding the collection efforts of both banks and the resulting collapse of SamCorp (alleged causation and damages). See *id.* Rather, it is Compass Bank's contentions concerning City Bank's pleadings which are themselves conclusory and indistinct, repeating language from legal precedent without explaining how any of the three remaining elements were insufficiently pleaded. See Mot. P 10. Accordingly, the Court does not dismiss this claim on the basis that the last three elements of negligence fail to satisfy the pleading requirements.

## 3. Intervening cause

Compass Bank also argues that the actions of "SamCorp and its principals" served as "new and independent, [\*19] intervening causes" of the harms at issue, which precludes Compass Bank's liability under a negligence theory. Mot. P 10. Texas law regards "a new and independent cause" as one "that intervenes between the original wrong and the final injury such that the injury is attributed to the new cause rather than to the first and more remote cause." *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006). But not every intervening act is an independent cause which excuses the earlier actor from liability. "If the intervening force was foreseeable at the time of the defendant's negligence, the force is considered to be a 'concurring cause' of the plaintiff's injuries and the defendant remains liable for the original negligence." *Id.* at 451 (internal citations omitted). As one commentator put it, where the "the first actor negligently creates a risk of harm and the second actor negligently triggers the risk, both actors are tortfeasors, both are causes in fact of the harm, and both are commonly held liable to the plaintiff." DAN B. DOBBS, THE LAW OF TORTS § 186 (2000).

The facts of the instant case, as pleaded by City Bank, fall squarely within the realm of concurring cause. Compass Bank [\*20] created a risk of loss in this situation by making the full amount of the new line of credit available to SamCorp without first retiring the old loan with a bank-to-bank payment. SamCorp's subsequent acts could plausibly be seen as a foreseeable result of the situation created by Compass Bank - merely pulling the trigger that was initially set by Compass Bank. On the such facts, there is no reason to conclude that SamCorp's acts must be regarded as a new and independent cause that would relieve Compass Bank of liability; rather, the opposite would appear to be the case. Thus, the Court does not dismiss the negligence claim on such a theory.

## C. Contract Claim

### 1. Third party beneficiary status

In addition to its claim for negligence, City Bank has also brought a contracts claim against Compass Bank, asserting that it was an intended third-party beneficiary of the contract executed between SamCorp and State National Bank, and that such third-party rights have been violated by the way in which the refinancing was executed. Pl.'s Orig. Pet. PP 51-54. Compass Bank has moved to dismiss this claim, arguing that City Bank does not, in fact, qualify as a third-party beneficiary under the contract [\*21] at issue. Mot. PP 11-12.

A third-party beneficiary may be entitled to sue over a contract if the contracting parties intended to secure a benefit to the third party and entered into the contract "directly for the third party's benefit." *MCI Telecomm. Corp. v. Tex. Util. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). By contrast, a third party who is only an incidental beneficiary of a contract between other parties cannot sue to enforce the contract. *Id.* A third-party beneficiary can either be a donee or a creditor beneficiary of one of the parties to the contract. *See id.* Here, it is clear that City Bank would stand as a creditor beneficiary if it was a beneficiary at all, as SamCorp owed City Bank money and the new loan would serve to refinance that debt. *See* Pl.'s Orig. Pet. P 32. Compass Bank argues that "City [Bank] makes no allegation that any loan agreement or contract between SamCorp and SNB conferred any benefit upon City" and observes that City Bank did not attach copies of the documents in question to the pleadings. Mot. P 12. But this characterization of City Bank's pleadings is wrong. City Bank avers, in so many words, that the "State National Loan Documents required State [\*22] National to directly pay off SamCorp's outstanding liability to City Bank." Pl.'s Orig. Pet. P 32. Seeing an old debt paid off is a benefit, as the existence of the category of "creditor beneficiary" makes clear. Moreover, while it is permissible to attach critical documents, such as contracts, to the pleadings in a civil case, Compass Bank points to no rule of law requiring such attachments, or allowing negative inferences to be drawn from their absence. *See Kennedy v. Chase Manhattan Bank*, 369 F.3d 833, 839 (5th Cir. 2004) (permitting a trial court to consider an agreement attached to the complaint at the motion to dismiss stage, but not requiring attachments in contract cases). Instead, even if a negative inference may be drawn from the lack of an attachment, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal citations and quotation marks omitted).

In its Reply, Compass Bank invites the Court to examine the loan documents filed into evidence in the companion case EP-09-CV-96-KC, arguing that judicial notice may be had of these documents [\*23] and that reference to judicially-noticed material does not convert the instant Motion into one for summary judgment. Reply P 9. Compass Bank argues that a fair reading of those documents would rebut City Bank's averment that the loan documents in question were sufficient to confer third-party beneficiary status. *Id.* The Court, however, declines this invitation to wade into hundreds of pages of miscellaneous evidence at this stage in the proceedings. Instead, the Court instructs the parties to brief this matter on the evidence at the summary judgment stage. City Bank's pleadings are facially sufficient; thus, the contract claim should not be dismissed.

### 2. Statute of frauds

Compass Bank also argues that the Texas statute of frauds serves to defeat the contract claim. Mot. P 13 (citing *TEX. BUS. & COMM. CODE* § 26.02). It argues that, because "City Bank does not allege that its third party beneficiary status arises from" an agreement that satisfies the statute of frauds, the claim should fail for insufficient pleading. This argument misstates the law. The Fifth Circuit has held that "pleadings need not identify every element of [a] claim, particularly where the contested elements relate [\*24] to the affirmative defense of the statute of frauds." *EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank*, 467 F.3d 466, 470 (5th Cir. 2006). A trial court may dismiss a claim on a *Rule 12(b)(6)* motion on the basis of an affirmative defense, but only if that "defense appears on the face of the complaint." *A2D Techs., Inc. v. MJ Sys., Inc.*, 269 F. App'x 537, 541 (5th Cir. 2008) (citing *EPCO*, 467 F.3d at 470).

In the instant case, it is not clear that facts allowing the invocation of the statute of frauds appear on the face of City Bank's complaint. The statute of frauds provisions cited by Compass Bank only require that a loan agreement involving a bank, whose value exceeds \$ 50,000, must be in writing and signed by the party to be bound, and that all rights and obligations of the parties to the loan are to be determined solely by reference to that signed writing. *See* Mot. P 13; *see also* *TEX. BUS. & COMM. CODE* § 26.02(b)-(c). City Bank avers that a loan agreement, with relevant third-party beneficiary terms, existed between SamCorp and State National Bank. *See* Pl.'s Orig. Pet. P 32. Under the *EPCO* doctrine this is sufficient; City Bank need not aver particularly that the agreement [\*25] was in writing and signed. *See* 467 F.3d at 470. Unless City Bank specifically averred that the agreement was oral or was unsigned, it is not facially appar-

ent that the statute of frauds undermines its claim. *Cf. Sullivan v. Leor Energy LLC, No. H-05-CV-3913, 2006 U.S. Dist. LEXIS 73609, 2006 WL 2792909, at \*2 (S.D. Tex. Sept. 27, 2006)* (holding that the affirmative defense of the statute of frauds was available at the motion to dismiss stage when the complaint acknowledged on its face that the employment agreement at issue was unsigned and contemplated a term of more than one year). Accordingly, the Court does not dismiss the contract claim on the basis of the statute of frauds. Instead, the Court can only evaluate this defense on the evidence at the summary judgment phase.

#### D. Money Had and Received Claim

City Bank also asserts a claim for money had and received, in connection with a check for approximately \$ 1,000,000 that was paid by the City of El Paso to SamCorp for some construction work. *See* Pl.'s Orig. Pet. PP 36, 55-57. That check was deposited in SamCorp's operating account held at Compass Bank in December 2007, shortly before the defaults were called and SamCorp collapsed. *Id.* PP 36-37.

Money had and received [\*26] is an equitable remedy under Texas law. *Edwards v. Mid-Continent Office Distribs., L.P., 252 S.W.3d 833, 837 (Tex. Ct. App. 2008)*. "[I]t seeks to prevent unconscionable loss to the payor and unjust enrichment to the payee." *Id.* (citing *Bryan v. Citizen's Nat'l Bank in Abilene, 628 S.W.2d 761, 763 (Tex. 1982)*). "To prove the claim, a plaintiff must show that a defendant holds money which in equity and good conscience belongs to him." *Id.* (citing *Best Buy Co. v. Barrera, 248 S.W.3d 160, 162-63 (Tex. 2007)*).

Under this standard, City Bank's claim for money had and received cannot survive. City Bank avers in its pleadings that Compass Bank applied the \$ 1,000,000 payment as a credit toward the outstanding State National loan, implying that Compass Bank kept these proceeds. *See* Pl.'s Orig. Pet. P 37. This could support such a claim if considered alone. But Compass Bank did not actually retain this payment as a credit against the State National loan through the period of SamCorp's collapse; rather, it re-advanced the money from the line of credit to the operating account shortly before the collapse. *See* May Order 33-34. <sup>5</sup> The Court also found that the funds, then apparently held in the operating [\*27] account, were spent and dissipated before or during the period in which SamCorp collapsed and that Compass Bank was not continuing to hold this sum of money for itself. *Id.* Thus, given the facts as already determined by the Court, City Bank cannot show that Compass Bank "holds money which in equity and good conscience belongs to" City Bank. *Edwards, 252 S.W.3d at 837*. To whom the money belongs is hardly the issue at this stage, because Compass Bank simply is not holding it. Accordingly, the claim for money had and received is dismissed by the Court.

<sup>5</sup> The Court may rely on its previous findings of fact in connection with these issues. *See Mowbray v. Cameron County, 274 F.3d 269, 281 (5th Cir. 2001)*.

### III. CONCLUSION

For the reasons set forth above, the Motion is **GRANTED** in part and **DENIED** in part. The Motion is **DENIED** with respect to City Bank's first two claims; namely, the claims sounding in negligence and contract. The Motion is **GRANTED** with respect to the money had and received claim, as this claim is incompatible with the facts that the Court has already found in connection with the subject-matter of this case.

In connection with the negligence claim, the Court **ORDERS** the parties to [\*28] brief the issue of the availability of such a remedy under Texas law, in situations where the harms are purely economic, upon submitting any summary judgment pleadings.

In connection with the contract claim, the Court **ORDERS** the parties to make any evidence-based arguments at the summary judgment stage, using appropriate citations to the documents at issue.

**SO ORDERED.**

**SIGNED** on this 2nd day of July, 2010.

/s/ Kathleen Cardone

KATHLEEN CARDONE

UNITED STATES DISTRICT JUDGE