

No. 29846-9-III

Kulik, J. (dissenting) — RCW 30.22.060 requires banks to maintain a signed contract of deposit for each account. The majority relies on cases involving lost documents. *See, e.g., Smyser v. Smyser*, 19 Wn.2d 42, 140 P.2d 959 (1943) and *Deglow v. Smith*, 77 Wn.2d 128, 459 P.2d 786 (1969). To prove a lost instrument, the one proposing its validity must show its execution, its delivery, and its contents. *Deglow*, 77 Wn.2d at 129. These elements must be proved by evidence that is clear and positive and of such character as to leave no reasonable doubt as to the terms and condition of the instrument. *Id.* (quoting *Scurry v. City of Seattle*, 56 Wash. 1, 2-3, 104 P. 1129 (1909)). In other words, the evidence must be clear, cogent, and convincing. *Id.*

The facts here do not establish by clear, cogent, and convincing evidence that Mr. Brownfield executed the required contract or that a contract existed. The majority relies on statements made by William Carson, a Numerica service representative, who had no knowledge as to whether Mr. Brownfield executed a signed contract at Bank of America (BOA). The majority also relies on evidence presented by Beth Theodorson.

Ms. Theodorson does not remember meeting with Mr. Brownfield and Karen Rhodes, but she testified as to her certainty that she would have obtained signed contracts of deposits before inputting any information into the bank's computer system. In

contrast, BOA's designee under CR 30(b)(6) believed it was BOA policy for employees who handled contract changes to write "superseded" on the old contract and "updated" on the new contract. Computer records indicate that on September 25, 2008, changes were made to the two accounts. However, BOA cannot locate any updated, signed signature cards showing a change on September 25, 2008.

Significantly, Ms. Rhodes testified that she did not recall that Mr. Brownfield signed anything during their visit to BOA:

Q. Okay. Did your Uncle Vance sign the same document you did?

A. I don't remember that he did.

Q. Do you recall if he signed any documents?

A. I don't recall that he signed anything.

Clerk's Papers at 391.

The two BOA accounts at issue do not show any change designating that the accounts were "updated" on September 25, 2008. Instead, the last change signed by Mr. Brownfield states "supersedes" when he took his deceased wife's name off the accounts.

BOA cannot prove the execution or existence of a signed card by clear, cogent, and convincing evidence. Consequently, we cannot assume that the card was lost. I would reverse and grant summary judgment in favor of the Estate.

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Kulik, J.