

RENDERED: JANUARY 25, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001349-MR

AHLAN WA SAHLAN HOSPITALITY COMPANY  
d/b/a HOLIDAY INN EXPRESS

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT  
HONORABLE ALLEN RAY BERTRAM, JUDGE  
ACTION NO. 11-CI-00200

UNITED CITIZENS BANK OF SOUTHERN KENTUCKY, INC.  
and AARON L. MOSS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; COMBS AND STUMBO, JUDGES.

COMBS, JUDGE: Ahlan Wa Sahlan Hospitality Company, d/b/a Holiday Inn Express (Holiday Inn), appeals from the dismissal of its claims against United Citizens Bank of Southern Kentucky, Inc. (Citizens Bank), for failure to state a claim upon which relief can be granted. On appeal, Holiday Inn argues that the

Taylor Circuit Court erred as a matter of law. After our review of the record, we disagree and, therefore, we affirm.

Holiday Inn is a foreign corporation with its principal place of business in Campbellsville, Kentucky. Holiday Inn is in the business of providing lodging to the general public. At all times relevant to the present case, Aaron L. Moss was employed by Holiday Inn as the manager of the Campbellsville Holiday Inn. In his capacity as manager, Moss received checks from customers, which he was authorized to receive and negotiate on behalf of Holiday Inn.

In August of 2009, Moss opened an account at Citizens Bank in Campbellsville. He began to convert checks fraudulently for his own personal use and benefit. He made deposits and withdrawals into the Citizens Bank account for a period of eight months before the embezzlement scheme was discovered. Holiday Inn did not become aware of the embezzlement until approximately April of 2010. By that time, Moss had embezzled approximately \$51,571.42 -- only some of which has been recovered by Holiday Inn.

Holiday Inn filed a complaint in the Taylor Circuit Court alleging that Citizens Bank failed to exercise ordinary or reasonable care regarding Holiday Inn's funds. It also argues that Citizens Bank should have attempted to identify the relationship between Holiday Inn and Moss, who completed a form authorizing himself as Holiday Inn's owner. Holiday Inn claimed that Citizens Bank's conduct was negligent and that Citizens Bank owed it a duty of care.

Upon motion by Citizens Bank, the Taylor Circuit Court entered an order dismissing Holiday Inn's claims for failure to state a claim upon which relief could be granted because Holiday Inn was not a customer of the bank.

Holiday Inn now appeals.

On appeal, Holiday Inn correctly argues that dismissals for failure to state a claim are disfavored in the law. But is also argues that Citizens Bank breached a duty of care to Holiday Inn by allowing Moss to open the account without first inquiring into the identity of "Ahlan Wa Sahlan Hospitality Company d/b/a Holiday Inn Express." Citizens Bank counters by contending that there is no precedent in Kentucky for a duty of care flowing from a bank to third parties who are neither customers nor account holders.

When ruling on a motion to dismiss for failure to state a claim under Kentucky Rule[s] of Civil Procedure (CR) 12.02, a trial court should not dismiss "unless the pleading party appears not to be entitled to relief under any state of facts which could be proved in support of his claim." *Weller v. McCauley*, 383 S.W.2d 356, 357 (Ky. 1964). This rule does not involve a determination of fact by the court; rather, it is purely a question of law. *Certain Underwriters and Lloyd's, London v. Abundance Coal, Inc.*, 352 S.W.3d 594, 596 (Ky. App. 2011). Upon review, if the trial court has not considered matters outside the pleadings, our review is *de novo*. *Id*; *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364 (Ky. App. 2004).

Holiday Inn proposes that this Court establish new law and impose a general duty of care upon banks to non-customer third parties. We cannot do so.

No Kentucky state courts have addressed the issue of the legal duty of a bank to a non-customer third party. The issue has only been addressed in unpublished opinions by Kentucky's two federal district courts, which could only speculate as to how our state courts would rule. Both federal that reviewed the matter concluded that a bank does not owe a duty to a non-customer third party. *See, S. Appalachian Coal Sales, Inc. v. Citizens Bank of N. Ky.*, 2008 WL 4467297 (E.D.Ky 2008), *vacated in part on other grounds*; *John W. Stone Oil Distributer, LLC v. PBI Bank, Inc.*, 2011 WL 560422 (W.D.Ky. 2011) (“[W]hile the trend in Kentucky law is to recognize a bank’s duty where a plaintiff has a particular relationship with it, no Kentucky courts have found a duty of care to a non-customer third party”).<sup>1</sup>

The only circumstance where a duty could conceivably be construed to arise between a bank and a non-customer third party under existing Kentucky law would be where a fiduciary duty exists. *Cf., Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991); *Henkin, Inc. v. Berea Bank and Trust Co.*, 566 S.W.2d 420 (Ky.App. 1978). A fiduciary duty only exists where there is a special relationship, and it is not a duty to be imposed lightly. Rather, a

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<sup>1</sup> While we are aware of CR 76.28(4)(c), which prohibits the citation of unpublished cases as binding precedent where other published precedent exists, we do not cite these cases for their precedential value. Indeed, federal courts follow our lead when interpreting state law. Nonetheless, these cases are illustrative of the fact that the issue has not yet been addressed in the Commonwealth.

fiduciary duty is “the highest order of duty imposed by law.” *In re Sallee v. Fort Knox Nat’l Bank, N.A.*, 286 F.3d 878, 891 (6thCir. 2002). No fiduciary duty is involved (or even alleged) in the case before us.

The reluctance of the federal courts to create a duty owed by banks to non-customer third parties is largely supported by the overwhelming majority of jurisdictions whose case law we reviewed for guidance. *See, e.g., Zabka v. Bank of America Corp*, 127 P.3d 722 (Wash. App. 2005); *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 226 (4thCir 2002)(North Carolina); *Winkler v. Batter Trading, Inc.*, 89 A.D.3d 1016 (New York, 2011); *Grad v. Associated Bank, N.A.*, 336 Wis.2d 474 (Wis. App. 2011); *Frederick v. Smith*, 7 A.3d 780, 783 (New Jersey, 2010); *Rodriguez v. Bank of the West*, 75 Cal.Rptr.3d 543, 548 (Cal. App. 2008); *Weil v. First Nat’l Bank of Castle Rock*, 983 P.2d 812 (Colo. App. 1999); *Volpe v. Fleet Nat’l Bank*, 710 A.2d 661 (Rhode Island, 1998); *Portage Aluminum Co. v. Kentwod Nat’l Bank*, 307 N.W.2d 761 (Mich. 1981). Creation of such a duty appears to be a matter more properly left to the purview of the General Assembly.

We affirm the order of the Taylor Circuit Court dismissing this matter.

ALL CONCUR.

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