IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STERLING SAVINGS BANK,	)	**No. 29760-8-III**
Respondent,	)	
v.	)	**Division Three**
	)	
PHILLIP MURPHY, an individual; ROXANNE MURPHY, an individual; DAVID BRICKLIN and ANNE BRICKLIN, husband and wife, as legal custodians for ALEX BRICKLIN, a minor, JACOB BRICKLIN, a minor, and LAURA BRICKLIN, a minor,	)	**UNPUBLISHED OPINION**
Appellants.	)	

Brown, J.—David Bricklin and Anne Bricklin, husband and wife, as legal custodians for minors Alex, Jacob, and Laura Bricklin, appeal the summary dismissal of their negligence and Consumer Protection Act (CPA), chapter 19.86 RCW, claims against Sterling Savings Bank arising from a beneficiary dispute over the proceeds of a certificate of deposit (CD) that Sterling interpleaded in the trial court.

Because the Bricklins fail to establish a tort duty or the elements of a CPA claim, we affirm.[1]

FACTS

When a Sterling customer requests a change to his or her contract of deposit, Sterling's internal account management system generates two documents. First generated is a new contract of deposit, entitled certificate of deposit and certificate of deposit signature card, that verifies the change in ownership (or, as in this case, the change in beneficiaries). A change is not effective until this document is signed by the account owner and received by Sterling. Second, the system generates a CD account summary statement for the customer that reflects the requested change. The CD account summary is not signed by the customer and it is not effective to change the account terms.

Sterling's contract of deposit states: "You intend these rules to apply to this account depending on the form of ownership and beneficiary designation, if any, specified on page 1. . . . Only those of you who sign the permanent signature card may withdraw funds from this account." Clerk's Papers (CP) at 196. The contract of deposit further provides, "We [Sterling] make no representations as to the appropriateness or effect of the ownership and beneficiary designations, except as they determine to whom we pay the account funds." CP at 93.

On August 22, 2006, Gerald Murphy opened a CD account with Sterling's

[1] The Bricklins' motion to substitute David and Anne Bricklin as custodians of Alex, Jacob, and Laura Bricklin for Alex, Jacob and Laura individually as appellants is granted without prejudice to Sterling to recover any potentially allowable fees or costs.

Federal Way branch. The contract of deposit named Mr. Murphy as the sole owner. Mr. Murphy signed the contract on September 9, 2006. On September 20, 2006, Mr. Murphy requested a change to his account to add beneficiaries. On September 20, 2006, Mr. Murphy executed a second signature card indicating a change of beneficiaries for his account. The new beneficiaries were Jennifer, Alex, Jacob, and Laura Bricklin as payable on death (POD) beneficiaries. On February 9, 2007, Mr. Murphy executed a third signature card for the account that again changed the beneficiaries. The new contract of deposit included five beneficiaries: Alex, Jacob, and Laura Bricklin, and Philip Murphy and Roxanne Murphy.

In 2008, Mr. Murphy requested additional changes to the account. The proposed change would have left the account with three beneficiaries: Alex, Jacob and Laura Bricklin. Sterling drafted a customer copy of a CD, listing Mr. Murphy and the three Bricklin children as "account holders." CP at 102. Unlike the September 2006 and February 2007 contract amendments, Sterling never received or located a signed contract of deposit/signature card (the alleged fourth) from Mr. Murphy indicating he wished to limit his account to just three beneficiaries. Anne Bricklin claimed she mailed a signature card to Sterling that would have limited the account beneficiaries to the Bricklin children.

Mr. Murphy passed away in July 2009. The CD balance at the time of his death was $117,000. On July 29, 2009, Anne Bricklin requested payment of the proceeds of

the account to her children. Because the fourth signature card that Anne Bricklin allegedly mailed to Sterling was never received (or according to the Bricklins, was negligently lost), Sterling's records included solely the 2007 contract of deposit with five beneficiaries.

In November 2009, Sterling interpleaded, asking the trial court to direct payments to the proper beneficiaries. The Bricklins opposed Sterling's request for interpleader and counter-claimed for breach of contract, negligence, and CPA violations. In April and May 2010, the Bricklins and Sterling filed cross-motions for summary judgment seeking a judicial determination of their respective duties and obligations in this matter.

In June 2010, the court denied the motions. After conducting discovery, the parties again requested summary judgment. The trial court found in favor of Sterling and summarily dismissed each of the Bricklins' three causes of action. Each party was ordered to pay their own attorney fees. The Bricklins now appeal the court's dismissal of their negligence and CPA claims.[2]

ANALYSIS

A. Negligence

The issue is whether the trial court erred in summarily dismissing the Bricklins' negligence claims. The Bricklins contend Sterling breached a duty of care. Sterling

[2] The Bricklins are not appealing the trial court's breach of contract dismissal. All five beneficiaries have received their respective shares.

denies any duty exists and asserts it is shielded from liability under chapter 30.22 RCW, the financial institution individual account deposit act, and the independent duty doctrine (formerly the economic loss rule).

Initially, Sterling argues the Bricklins' negligence and CPA violation claims are barred by res judicata because the breach of contract dispute is dispositive. Res judicata bars the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000). Applying res judicata requires identity of (1) persons and parties, (2) causes of actions, (3) subject matter, and (4) the quality of persons for or against whom the claim is made in the prior judgment and subsequent action. *Id.* Because the negligence and CPA violation claims are distinct causes of action with separate subject matter and separate requests for relief, res judicata does not bar this appeal.

On an appeal from summary judgment, we engage in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). Our standard of review is de novo. *Id.*

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We construe all facts and reasonable

inferences therefrom in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment–Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). But "bare assertions that a genuine material [factual] issue exists will not defeat a summary judgment motion in the absence of actual evidence." *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

A negligence action may proceed only if the plaintiffs have shown (1) a duty of care was owed to them by the defendant; (2) that duty was breached; (3) that breach was the cause of their harm; and (4) they suffered injury as a result. *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002). The dispositive issue is whether Sterling owed the Bricklins a duty of care.

In *Swiss Baco Skyline Logging, Inc. v. Haliewicz*, 18 Wn. App. 21, 567 P.2d 1141 (1977), the plaintiff corporation was defrauded of timber contract sale proceeds by Emil Haliewicz, a former company president. *Id.* at 22. The Bank of California issued, and Washington Mutual honored, a series of checks payable to "Emil Haliewicz, Swiss Baco Skyline Logging Inc." *Id.* at 25. One of the checks cashed by Mr. Haliewicz, however, was a United States Forest Service refund check issued to "Swiss Baco Skyline" and did not bear Mr. Haliewicz's name. *Id.* at 26. Neither bank had any relationship with Swiss Baco. Regarding the checks issued in Mr. Haliewicz's name, the court held that neither bank owed a duty to Swiss Baco to investigate whether Mr.

Haliewicz actually had authority to receive or cash checks because Swiss Baco was not a "member of the class to whom the bank owed a duty." *Id.* at 30. Regarding the check made out solely to "Swiss Baco Skyline," the court held that Swiss Baco was the payee and under chapter 62A.3-406 RCW[3] and Washington Mutual had negligently honored the check bearing solely Mr. Haliewicz's endorsement. *Id.* The statute created a duty of care to Swiss Baco that the bank failed to satisfy with respect to the check made out only to Swiss Baco.

Many other jurisdictions have held that third party noncustomers are not owed a duty of care by a bank, absent a direct relationship or statutory duty. *See Weil v. First Nat'l Bank of Castle Rock*, 983 P.2d 812 (Colo. Ct. App. 1999); *Volpe v. Fleet Nat'l Bank*, 710 A.2d 661 (R.I. 1998); *Miller–Rogaska*, *Inc. v. Bank One*, 931 S.W.2d 655 (Tex. App. 1996); *Software Design & Application*, *Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal. App. 4th 472, 56 Cal. Rptr. 2d 756 (1996); *Portage Aluminum Co. v. Kentwood Nat'l Bank*, 106 Mich. App. 290, 307 N.W.2d 761 (1981).

Here, no statute creates a duty of care from Sterling to the Bricklins. Furthermore, no common law duty is created. As explained in *Swiss Baco*, the Bricklins are not a member of any class to whom the bank owed a duty. Without demonstrating a duty of care owed to the Bricklins, their negligence claim must fail. The trial court properly dismissed their claim on summary judgment.

[3] Chapter 62A.3–406(b) RCW provides that failure to exercise ordinary care in paying or taking an altered instrument can create liability in negligence.

Since the Bricklins cannot establish a prima facie negligence case, we need not address Sterling's RCW 30.22.210(1) and independent duty doctrine defenses. We note that a bank may, "*without liability*, refuse to disburse any funds contained in the account to any . . . P.O.D. account beneficiary . . . until such time as . . . [t]he payment is authorized or directed by a court of proper jurisdiction." RCW 30.22.210(1)(b) (emphasis added).

Finally, under the independent duty doctrine, "[w]hen no independent tort duty exists, tort does not provide a remedy." *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 389, 241 P.3d 1256 (2010). An injury is remediable in tort only if "the injury is traceable also to a breach of a tort law duty of care arising independently of the contract." *Id.* at 394. Here, the contract of deposit alone creates the sole relationship between the parties. Sterling's duty was to maintain the deposit account for Mr. Murphy according to the terms of the contract of deposit. The Bricklins cannot graft additional duties onto the contract that do not otherwise exist.

B. Consumer Protection Act

The next issue is whether the trial court erred in summarily dismissing the Bricklins' CPA violation claim. The Bricklins contend Sterling's practice of issuing a document to customers showing proposed changes is deceptive.

An action under the CPA requires the plaintiff to establish: "'(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact;

(4) injury to the plaintiff in his or her business or property; and (5) causation.'" *Edmonds v. John L. Scott Real Estate*, 87 Wn. App. 834, 845, 942 P.2d 1072 (1997) (quoting *Hangman Ridge Training Stables*, *Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). Regarding the first element, "an act or practice is unfair or deceptive for purposes of the CPA if it has the capacity to deceive a substantial portion of the public." *Edmonds*, 87 Wn. App. at 845 (citing *Hangman Ridge*, 105 Wn.2d at 785).

In support of this element, the Bricklins theorize that issuing two documents when a customer wants to make a beneficiary change is deceptive. No reason exists to believe Sterling's practice has caused confusion to its other customers. The contract of deposit clearly states, "[y]ou intend these rules to apply to this account depending on the form of ownership and beneficiary designation, if any, specified on page 1. . . . Only those of you who sign the permanent signature card may withdraw funds from this account." CP at 196. The Bricklins do not establish a reason to believe Sterling's alleged deception had the capacity to deceive a substantial portion of the public. *See Micro Enhancement Int'l v. Coopers & Lybrand*, 110 Wn. App. 412, 439, 40 P.3d 1206 (2002) (Mere speculation that an alleged unfair or deceptive act had the capacity to deceive a substantial portion of the public is insufficient to survive summary judgment.). Nothing in this record shows any confusion on Mr. Murphy's part. In any event, one customer's confusion does not amount to an unfair and deceptive act with the capacity

to deceive a substantial portion of the public. Most bank customers are aware that account changes require the bank's receipt of signed documents.

For the above reasons, the Bricklins failed to meet their burden of establishing prima facie evidence of every element for their CPA claim. Accordingly, the trial court did not err in granting Sterling summary judgment dismissal of this claim.

C. Attorney Fees

The Bricklins contend they should have been awarded attorney fees below and for this appeal based on RCW 19.86.090. This statute allows anyone who has been "injured in his or her business or property by a violation" of the CPA to bring a civil action in which he or she may recover attorney fees. RCW 19.86.090. Because the Bricklins have not shown a violation of the CPA at either the trial or appellate level, their request for attorney fees is denied.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, C.J. Sweeney, J.