COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1461 **2009CV2949**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

HERMAN GRAD, MARYA GRAD, KEITH GILLAM, MURIELLE VENDETTE-GILLAM, IVAN VELEV AND MAIA VELEVA,

PLAINTIFFS-APPELLANTS,

V.

ASSOCIATED BANK, N.A.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. Herman Grad, Marya Grad, Keith Gillam, Murielle Vendette-Gillam, Ivan Velev, and Maia Veleva (collectively, Grad) appeal a judgment dismissing their claims against Associated Bank, N.A. Grad's

complaint alleged Associated was negligent in failing to discover that one of its customers was using Associated's services to defraud him. Grad also alleged Associated aided and abetted the customer's tortious conduct. The circuit court granted Associated's motion to dismiss. We conclude dismissal of Grad's negligence claim was proper because a bank's duty of care to a noncustomer does not require the bank to affirmatively investigate a customer's activities for possible fraud.[1] Furthermore, the circuit court properly dismissed Grad's aiding and abetting claim because he did not allege that Associated intended to assist the customer's tortious conduct—a necessary element of aiding and abetting liability. We therefore affirm.

BACKGROUND

¶2 The following facts are from Grad's complaint and are taken as true for purposes of this appeal. From 2006 to 2009, Oxford Global Partners, LLC, perpetrated a massive investment fraud disguised as a sophisticated foreign currency trading program. Oxford told potential investors that they would earn steady returns by selling short a certain foreign currency with a low interest rate and using the proceeds to purchase a long position in a different currency yielding a higher interest rate. This would allegedly generate a "swap credit" that would be paid as interest to the investors. Oxford promised that any funds invested in the program would be held in a segregated account at Credit Suisse in Switzerland in the name of "Crown Forex SA," a Swiss company. In fact, no such account

[1] Associated also argues the circuit court properly dismissed Grad's negligence claim because public policy considerations preclude liability. Because we conclude dismissal was warranted on other grounds, we do not address Associated's public policy argument. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts need not address every issue when one issue is dispositive).

existed, and Oxford never transferred any funds to Crown Forex SA. Instead, individuals associated with Oxford converted the funds for their own benefit.

¶3 In reliance on Oxford's representations, Grad decided to invest in the currency trading program and appointed Oxford as "sub advisor" for his investments. In 2008, individuals associated with Oxford opened an account at Associated in the name of "Crown Forex, LLC." Oxford instructed Grad to deposit funds into Associated's Crown Forex account. Between March 4 and May 28, 2009, Grad deposited about $10 million into the account. Oxford then moved these funds into other accounts and ultimately misappropriated them.

¶4 In October 2009, Grad sued Associated, contending it was negligent in failing to discover and prevent Oxford's fraudulent conduct. Grad also alleged Associated aided and abetted Oxford's breach of a fiduciary duty to Grad and conversion of Grad's property.

¶5 Specifically, Grad alleged Associated failed to comply with federal banking regulations and industry standards in its handling of the Crown Forex account. Grad also alleged Associated "turned a blind eye to numerous indicia of fraud surrounding the … [a]ccount." For instance, although the account was opened in the name of "Crown Forex, LLC," there were no companies registered under the name "Crown Forex" in the United States, with the exception of an obviously unrelated New Jersey corporation. Additionally, because "Crown Forex, LLC" was not a validly registered business entity, it did not have a valid taxpayer identification number, which federal regulations require a bank to obtain before opening an account. Furthermore, the address associated with the Crown Forex account was invalid, "Crown Forex, LLC" did not have a listed phone number, and the account's signatories were not registered or licensed investment

advisors. The signatories often transferred large amounts of money from the Crown Forex account into other accounts they held at Associated, and other funds from the account were transferred to "offshore banking centers in high-risk jurisdictions or countries that are known havens for financial secrecy." Grad alleged that these "conspicuous red flags … should have caused [Associated] to contact federal law enforcement immediately, and to take steps to freeze transactions in the account until it could complete an investigation into their legitimacy."

¶6 Associated moved to dismiss Grad's complaint. Following oral argument, the circuit court granted the motion. The court concluded Grad's complaint did not establish that Associated breached a duty of care under the circumstances because "unless there is notice to the bank of some irregularity … from a third party … the bank has no duty to a third party." Grad now appeals.

DISCUSSION

¶7 "A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint." ***Watts v. Watts***, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). Whether a complaint states a claim for relief is a question of law that we review independently. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). We accept the facts stated in the complaint as true and draw all reasonable inferences from those facts in favor of stating a claim. ***Meyer v. Laser Vision Inst.***, 2006 WI App 70, ¶3, 290 Wis. 2d 764, 714 N.W.2d 223. A complaint should be dismissed for failure to state a claim only when it is quite clear there are no conditions under which the plaintiff can recover. ***Casteel v. McCaughtry***, 176 Wis. 2d 571, 578, 500 N.W.2d 277 (1993).

I. Negligence claim

¶8 To state a claim for negligence, a plaintiff must plead facts that, if true, would establish four elements: (1) the existence of a duty of care on the part of the defendant; (2) a breach of that duty of care; (3) a causal connection between the defendant's breach and the plaintiff's injury; and (4) actual loss or damage resulting from the breach. ***Hoida, Inc. v. M & I Midstate Bank***, 2006 WI 69, ¶23, 291 Wis. 2d 283, 717 N.W.2d 17. The first element—duty—involves two aspects: (1) the existence of a duty of ordinary care; and (2) an assessment of what ordinary care requires under the circumstances. ***Id.***, ¶27. Although Wisconsin follows the dissent from ***Palsgraf v. Long Island Railroad Co.***, 162 N.E. 99 (N.Y. 1928), which concluded that everyone owes a duty to the world at large, this duty is not unlimited but is restricted to what is reasonable under the circumstances. ***Hocking v. City of Dodgeville***, 2009 WI 70, ¶12, 318 Wis. 2d 681, 768 N.W.2d 552. Thus, where there is "no duty under the circumstances, no breach occurred, and there [is] not a viable negligence claim." ***Id.***, ¶13.

¶9 Associated contends it cannot be held liable for Grad's losses because it did not have a duty to Grad, a noncustomer, to investigate and discover Oxford's fraudulent conduct. On two previous occasions, our supreme court has considered the scope of a bank's duty to a noncustomer who claims a bank failed to detect and prevent a customer's fraud. *See* ***Commercial Discount Corp. v. Milwaukee W. Bank***, 61 Wis. 2d 671, 214 N.W.2d 33 (1974); ***Hoida***, 291 Wis. 2d 283. In both cases the court held that the bank did not have a duty to the noncustomer to take certain actions.

¶10 In ***Commercial Discount***, 61 Wis. 2d at 679, the Simplex Shoe Company had two checking accounts with Milwaukee Western Bank.

Commercial Discount Corporation had a perfected security interest in Simplex's funds. ***Id.*** Simplex drew checks on the Milwaukee Western accounts to pay other creditors. ***Id.*** at 674, 685-86. Commercial Discount sued Milwaukee Western for return of the funds paid to the other creditors, alleging that Milwaukee Western was liable for aiding and abetting Simplex "in diverting all of said funds to the payment of other obligations." ***Id.*** at 686.

¶11 Our supreme court affirmed dismissal of Commercial Discount's claim. Adopting rationale from ***Gendler v. Sibley State Bank***, 62 F. Supp. 805 (N.D. Iowa 1945), the court concluded a bank does not owe a "duty of inquiry" to a third party with an adverse claim to money deposited unless the bank has specific notice of the adverse claim. ***Commercial Discount***, 61 Wis. 2d at 687-88. After receiving notice of the claim, the bank has a duty "to wait a reasonable time … to allow the claimant to begin legal action." ***Id.*** at 688. However, before receiving notice, the bank does not have a duty to investigate and detect its customers' fraud. ***Id.*** at 687-88.

¶12 Grad concedes "***Commercial Discount*** held that a defendant bank was not liable for funds diverted by a fraudster account holder unless [the bank] had specific knowledge of the fraud[.]" However, he argues that ***Commercial Discount*** is distinguishable because it involved an aiding and abetting claim, not a negligence claim. *See* ***id.*** at 685-86. We disagree. The ***Commercial Discount*** court's reasoning applied generally to "tort" and was not limited to aiding and abetting liability. The court explained, "[T]he liability of a bank to an adverse claimant to a deposit is based on tort and … to constitute a 'tort' there must be a duty owing by one party to another and a breach of that duty." ***Id.*** at 687. Thus, while ***Commercial Discount*** did not explicitly address negligence, its reasoning is equally applicable in the context of a negligence claim.

¶13 Grad also attempts to distinguish ***Commercial Discount*** because it adopts rationale from ***Gendler***, an Iowa case. He notes that, unlike Wisconsin, Iowa follows the ***Palsgraf*** majority opinion and does not recognize a universal duty of care. *See, e.g.*, ***Bain v. Gillispie***, 357 N.W.2d 47, 49 (Iowa Ct. App. 1984). However, in ***Commercial Discount*** our supreme court adopted its own characterization of ***Gendler*** and incorporated relevant aspects of ***Gendler***'s reasoning as "the applicable law" of Wisconsin. ***Commercial Discount***, 61 Wis. 2d at 688. Four decades earlier, the court had adopted the ***Palsgraf*** dissent's universal duty rule in ***Osborne v. Montgomery***, 203 Wis. 223, 234 N.W. 372 (1931). *See* ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 644 n.12, 517 N.W.2d 432 (1994) (citing ***Osborne*** as the source of the universal duty rule in Wisconsin). The court repeatedly restated the universal duty rule thereafter. *See, e.g.*, ***Schilling v. Stockel***, 26 Wis. 2d 525, 531-32, 133 N.W.2d 335 (1965); ***Longberg v. H. L. Green Co.***, 15 Wis. 2d 505, 515-16, 113 N.W.2d 129 (1962). Against this historical backdrop, there can be little doubt that the court decided ***Commercial Discount*** with full recognition of the universal duty rule. In light of the rule, ***Commercial Discount*** delineates the *scope* of a bank's duty to a noncustomer under circumstances similar to those here. ***Commercial Discount*** is therefore relevant authority on the issue before us, despite its reliance on ***Gendler***.

¶14 Moreover, our supreme court recently confirmed the limited scope of a bank's duty to noncustomers in ***Hoida***, 291 Wis. 2d 283. There, a bank's customer "fraudulently misappropriated approximately $650,000 of [a] project's construction loan proceeds." ***Id.***, ¶1. A subcontractor sued the bank, arguing the bank was negligent for failing to take certain steps that allegedly would have detected the customer's conduct and prevented the subcontractor's losses. ***Id.*** The subcontractor alleged the bank failed to follow "basic industry standards" that

would have required it "to identify the subcontractors and materialmen for the project; to verify that sufficient work on the project had been completed to 'justify disbursement'; and to collect lien waivers … before disbursing funds from [the] loan." ***Id.***, ¶20. The subcontractor claimed that "if the [bank] does not complete these tasks, it is reasonably foreseeable that subcontractors and materialmen will be harmed." ***Id.***

¶15 The court rejected the subcontractor's negligence theory, holding that the bank's "duty of ordinary care under the circumstances did not include the obligation to undertake the [fraud prevention] tasks [the subcontractor] seeks to impose on [it]." ***Id.***, ¶39. The court noted the bank had "no special relationship, such as a fiduciary relationship" with the subcontractor, ***id.***, ¶34, and concluded the bank's duty to the subcontractor did not extend to detecting and preventing its customer's fraudulent activities, even if industry standards would have required the bank to take action, *see* ***id.***, ¶44.

¶16 Grad asserts ***Hoida*** is inapplicable because, in that case, the bank had a contract with its customer that limited its liability by disclaiming certain duties. *See* ***id.***, ¶38. However, the subcontractor in ***Hoida*** was not a party to that contract. We do not read ***Hoida*** as resting on the bank's contract with the customer. Rather, the contract in ***Hoida*** was one factor in the court's analysis of "what a reasonable [bank] … would be obliged to do in similar circumstances." ***Id.***, ¶34. The absence of a contract between Associated and Oxford in this case does not make ***Hoida*** inapplicable.

¶17 Grad also contends our reading of ***Hoida*** and ***Commercial Deposit*** conflicts with Wisconsin's universal duty rule. However, both ***Hoida*** and ***Commercial Deposit*** teach that, although in Wisconsin every person owes a duty

to the world, that duty is not boundless. *See* ***Hoida***, 291 Wis. 2d 283, ¶¶27, 30 n.15. Our supreme court recently reaffirmed this view, stating, "While Wisconsin has adopted the minority view from [***Palsgraf***], which established that everyone owes a duty to the world at large, the duty owed to the world is not unlimited but rather is restricted to what is reasonable under the circumstances." *See* ***Hocking***, 318 Wis. 2d 681, ¶12. ***Hoida*** and ***Commercial Deposit*** establish the duty of care that is reasonable under circumstances where a noncustomer sues a bank for failing to detect or prevent a customer's fraud. Both cases hold that a bank's duty to noncustomers does not extend to monitoring its customers' accounts for fraudulent activities.

¶18 Contrary to the dissent's assertion, we do not read ***Commercial Discount*** and ***Hoida*** "for the broad proposition that a bank has no duty to monitor its customers' accounts for fraudulent activity." *See* dissent, ¶40. A bank may have a duty to monitor customers' accounts; however, the issue in this case is whether the bank owes that duty *to noncustomers*. Based on ***Commercial Discount*** and ***Hoida***, we conclude a bank does not.

¶19 The dissent also criticizes our reliance on Grad's status as a noncustomer, suggesting that consideration of Grad's status conflicts with the universal duty rule. *See* dissent, ¶44. We disagree. Grad's status as a noncustomer is one fact that is pertinent to establishing the bank's duty of care under the circumstances. As our supreme court explained in ***Hoida***:

> [W]hat is within the duty of ordinary care depends on the circumstances under which the claimed duty arises. For example, *what is comprised within ordinary care may depend on the relationship between the parties* or on whether the alleged tortfeasor assumed a special role in regard to the injured party.

Hoida, 291 Wis. 2d 283, ¶32 (emphasis added). Thus, while not determinative, Grad's status as a noncustomer is relevant to the duty analysis.

¶20 Despite the holdings of ***Hoida*** and ***Commercial Deposit***, Grad cites three cases from other jurisdictions to support his argument that a bank owes noncustomers a duty to investigate and detect customers' fraud. *See* ***Wymore State Bank v. Johnson Int'l Co.***, 873 F.2d 1082 (8th Cir. 1989); ***Patrick v. Union State Bank***, 681 So. 2d 1364 (Ala. 1996); ***Sun 'n Sand, Inc. v. United Cal. Bank***, 582 P.2d 920 (Cal. 1978). However, as the Fourth Circuit has noted, "Courts in numerous jurisdictions have held that a bank does not owe a duty of care to a noncustomer with whom the bank has no direct relationship." ***Eisenberg v. Wachovia Bank, N.A.***, 301 F.3d 220, 225 (4th Cir. 2002) (collecting cases). Grad's reference to isolated cases does not convince us to depart from the principle set forth in ***Hoida*** and ***Commercial Discount***, particularly in light of the substantial authority from other jurisdictions supporting our position.

¶21 Grad also relies heavily upon Associated's alleged violations of federal banking regulations to support his claim that Associated had a duty to detect and prevent Oxford's fraud. Yet, there is no private right of action for violation of the relevant federal banking regulations. *See* ***B.E.L.T., Inc. v. Wachovia Corp.***, 403 F.3d 474, 476 (7th Cir. 2005) (regulation requiring banks to notify Treasury Department of "any known or suspected Federal criminal violation" does not create a private right of action for damages); ***Hanninen v. Fedoravitch***, 583 F. Supp. 2d 322, 326 (D. Conn. 2008) (neither USA Patriot Act nor Bank Secrecy Act authorizes private right of action); ***El Camino Res., Ltd. v. Huntington Nat'l Bank***, 722 F. Supp. 2d 875, 923 (W.D. Mich. 2010) (Bank Secrecy Act does not create private right of action). Indeed, Grad does not contend that the federal banking regulations create a private right of action.

¶22 Instead, Grad argues that the federal regulations impose a common law duty of care upon Associated. We disagree. Multiple federal courts have concluded that, because the federal banking regulations do not authorize a private right of action, they cannot be used to create a common law duty of care. For instance, in ***In re Agape Litigation***, 681 F. Supp. 2d 352, 357-58, 360 (E.D.N.Y. 2010), victims of a Ponzi scheme sued the bank where they had deposited their funds and alleged the bank "breached a duty of care imposed by the monitoring requirements of the Bank Secrecy Act[.]" After restating the general rule that banks do not have a duty to protect noncustomers from customers' intentional torts, the ***Agape*** court held that the plaintiffs could not rely on the Bank Secrecy Act to create a duty. ***Id.*** at 360. The court concluded, "[B]ecause the Bank Secrecy Act does not create a private right of action, the Court can perceive no sound reason to recognize a duty of care that is predicated upon the statute's monitoring requirements." ***Id.***

¶23 Similarly, in ***Marlin v. Moody National Bank, N.A.***, 2006 WL 2382325, at *7 (S.D. Tex. Aug. 16, 2006), plaintiffs alleged that "the Bank Secrecy Act imposes a duty on banks to investigate, prevent money laundering, and report suspicious activity." Again, the court flatly rejected the plaintiffs' argument:

> The obligation under [the Bank Secrecy Act] is to the government rather than some remote victim. The [bank's] obligation is not to roam through its customers looking for crooks and terrorists. By that act, banks do not become guarantors of the integrity of the deals of their customers. It does not create a private right of action and, therefore, does not establish a standard of care.

Id.; *see also* ***Armstrong v. American Pallet Leasing, Inc.***, 678 F. Supp. 2d 827, 875 (N.D. Iowa 2009) ("Because the Bank Secrecy Act does not permit a private

right of action, it follows that it cannot be construed as giving rise to a duty of care flowing to plaintiffs in this case."); ***Aiken v. Interglobal Mergers & Acquisitions***, 2006 WL 1878323, at *2 (S.D.N.Y. July 5, 2006) (court may not impose duty of care based on Bank Secrecy Act because it does not permit a private right of action).

¶24 The dissent argues that the federal cases we cite are "of limited value in determining the scope of the duty of care in this case" because they come from jurisdictions that do not subscribe to Wisconsin's universal duty rule. *See* dissent, ¶47. The dissent takes issue with the fact that these jurisdictions limit duty based on certain factors, particularly foreseeability of harm. *See* ***id.*** However, even in Wisconsin, the scope of a defendant's duty of care is not unlimited. *See* ***Hocking***, 318 Wis. 2d 681, ¶12. Furthermore, we do not agree that the holdings in ***Agape***, ***Marlin***, ***Armstrong***, and ***Aiken*** rely upon each jurisdiction's distinct conception of duty. These cases do not analyze factors like foreesability of harm in order to conclude that federal banking regulations do not impose a duty of care. Instead, they conclude that, because a bank's obligation under the regulations is "to the government rather than some remote victim," the regulations should not be used to impose common law liability. *See* ***Marlin***, 2006 WL 2382325, at *7.

¶25 Moreover, the dissent's claim that the federal regulations form a basis for common law liability is unconvincing. *See* dissent, ¶¶48-49. As the dissent recognizes, such a regulation must express a legislative intent that the regulation could become a basis for civil liability. *See* ***id.***, ¶48. The dissent concedes the relevant banking regulations contain no such expression. *See* ***id.***, ¶49. Instead, the dissent infers the expression from the absence of an expression to the contrary. *See* ***id.*** We cannot make such a leap.

¶26 The circuit court in this case noted that the banking industry "is among the most highly regulated industries that we have. It is regulated at the Federal level. It is regulated at the State level. … [N]owhere do I hear anyone saying that any banking regulation … would carry with it some duty that the civil courts could … enforce[.]" The court concluded that if the banking industry "should be subjected to the type of lawsuits that would be suggested in this case," such a decision "should be made by the [legislature]." We agree, and we therefore decline to hold that federal banking regulations create a common law duty of care. Thus, because Associated's duty of care to Grad did not require Associated to investigate and detect Oxford's fraud, we conclude the circuit court properly dismissed Grad's negligence claim.

¶27 The dissent points out that we decline to reach Associated's argument that public policy factors preclude liability. *See* dissent, ¶50. However, there is no need for us to address public policy, given that we conclude Associated's duty of care to Grad did not require Associated to investigate and detect Oxford's fraud. "An appellate court should decide cases on the narrowest possible grounds." ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

II. Aiding and abetting claim

¶28 In addition to his negligence claim, Grad also contends Associated is liable for aiding and abetting Oxford's intentional torts—namely, breach of fiduciary duty and conversion. A person is liable in tort for aiding and abetting if the person: (1) undertakes conduct that, as a matter of objective fact, aids another in the commission of an unlawful act; and (2) consciously desires or intends that his conduct will yield such assistance. ***Winslow v. Brown***, 125 Wis. 2d 327, 336,

371 N.W.2d 417 (Ct. App. 1985). Intent is therefore an essential element of an aiding and abetting claim: "Mere presence, with no effort to prevent unlawful conduct, is not aiding and abetting unless an intent to assist is communicated." ***Id.*** at 336-37.

¶29 Grad's complaint does not allege that Associated intended to assist Oxford in breaching a fiduciary duty to Grad or converting his property. To the contrary, Grad's complaint alleges that, had Associated known about the fraud, it would have "[frozen] the accounts and immediately report[ed] the suspicious facts and circumstances to law enforcement." This assertion forms the crux of Grad's negligence claim—he alleges Associated was negligent because, had it detected Oxford's fraudulent conduct, it would have somehow acted to prevent the fraud. This allegation is inconsistent with a theory that Associated intended to assist Oxford's intentional torts.

¶30 Despite his complaint's failure to allege intent, Grad contends a jury could "infer the intent required for aiding and abetting from [Associated's] inaction in the face of wrongdoing." We disagree. Wisconsin courts have consistently held that a defendant's mere presence at the commission of a tortious act is insufficient to support an inference of intent to assist, even if the defendant does not attempt to stop the tortious act. For instance, in ***Winslow***, 125 Wis. 2d at 329, the plaintiff was riding a bicycle on a trail reserved for bicycle use when he was struck by an automobile in which the defendants were passengers. He sought damages from the passengers, alleging that they aided and abetted the driver's tortious conduct. ***Id.*** We concluded the circuit court properly dismissed the aiding and abetting claim because "passively accompanying a driver on an unlawful trip does not raise an inference of a willingness to assist." ***Id.*** at 336-37; *see also* ***Edwardson v. American Family Mut. Ins. Co.***, 223 Wis. 2d 754, 765,

589 N.W.2d 436 (Ct. App. 1998) (Mere presence, with no effort to prevent the tortious act, is not sufficient to impose aiding and abetting liability.).

¶31 Grad cites ***Fredrickson v. Kabat***, 266 Wis. 442, 446-47, 63 N.W.2d 756 (1954), for the proposition that a jury may infer intent to aid and abet based on "evidence that a person is present at the commission of [a tort], without disapproving or opposing it[.]" However, the relevant quotation from ***Fredrickson*** actually reads:

> A mere bystander at the commission of an assault and battery does not become liable as a participant because he does not interfere to prevent it. But, "evidence that a person is present at the commission of an assault and battery, without disapproving or opposing it, is evidence from which, *in connection with other circumstances*, the jury may infer that he assented thereto, and lent to it his countenance and approval, and was thereby aiding and abetting the same."

Id. (emphasis added; citation omitted) (quoting ***Rhinehart v. Whitehead***, 64 Wis. 42, 45, 24 N.W. 401 (1885)). Thus, ***Fredrickson***, like ***Winslow***, holds that a defendant's mere presence, combined with failure to try to prevent a tortious act, does not allow a jury to infer intent to assist. Rather, there must be "other circumstances" showing that the defendant "assented [to the tortious act], and lent to it his countenance and approval[.]" ***Fredrickson***, 266 Wis. at 446-47. Here, Grad has not alleged any such "other circumstances" that would allow a jury to infer that Associated intended to assist Oxford's tortious conduct. Accordingly, the circuit court properly dismissed Grad's aiding and abetting claim.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶32 BRUNNER, J. (*concurring in part; dissenting in part*). I agree that Grad has failed to allege that Associated Bank in any way intended to assist Oxford's intentional torts, and fully join Part II of the court's opinion.

¶33 However, I do not agree that Grad has failed to state a claim for negligence. If Grad's allegations are true, the Crown Forex account was so obviously fraudulent that, had Associated Bank bothered to look, it would have discovered the sham and prevented the misappropriation of millions of dollars. The court today concludes that, despite numerous federal banking regulations requiring Associated Bank to know its customers and what they are up to, the bank has no affirmative duty to investigate its customers' potential fraud. I cannot agree with that conclusion because it is inconsistent with Wisconsin law.

¶34 Wisconsin subscribes to the minority view of ***Palsgraf v. Long Island Railroad Co.***, 162 N.E. 99 (N.Y. 1928), which holds that everyone owes a duty to the world at large to refrain from acts that may harm others. *See* ***Hocking v. City of Dodgeville***, 2009 WI 70, ¶12, 318 Wis. 2d 681, 768 N.W.2d 552. Citing ***Hoida, Inc. v. M & I Midstate Bank***, 2006 WI 69, ¶¶30-32, 291 Wis. 2d 283, 717 N.W.2d 17, the ***Hocking*** court emphasized that the duty "is not unlimited but rather is restricted to what is reasonable under the circumstances." ***Hocking***, 318 Wis. 2d 681, ¶12.

¶35 The pertinent regulations require that banks know who they are dealing with. Banks must implement a written Customer Identification Program that includes risk-based procedures sufficient for the bank to "form a reasonable

belief that it knows the true identity of each customer." 31 C.F.R. § 1020.220(a)(1), (2).[1] At a minimum, the bank must collect, before opening an account, the prospective business customer's name, address, and taxpayer identification number. 31 C.F.R. § 1020.220(a)(2)(i)(A)(1)-(4).

¶36 But that is not all. Within a reasonable time after the account is opened, the bank must *use* that information to verify the customer's identity. 31 C.F.R. § 1020.220(a)(2)(ii). If a bank cannot verify a business customer's true identity, it must take additional steps to "obtain information about individuals with authority or control" over the account. 31 C.F.R. § 1020.220(a)(2)(ii)(C). And a bank's identification program must provide for circumstances in which it will refuse to open an account, or close an account after attempts to verify a customer's identity have failed. 31 C.F.R. § 1020.220(a)(2)(iii)(A), (C).

¶37 Grad alleges Associated Bank completely abdicated its duties under these regulations. Associated Bank permitted Oxford to open the account in the name of a nonexistent company. Because the company's existence was complete fantasy, the business did not have a valid taxpayer identification number. Oxford provided a fake address. Associated Bank apparently did not even obtain a valid phone number.[2]

[1] All references to Title 31 of the Code of Federal Regulations are to the 2011 version unless otherwise noted.

[2] Ironic, because the fraudsters' marketing included a toll-free telephone number which they advertised to Christian audiences on hundreds of radio stations throughout the country using the slogan, "follow the money, truth seekers." ***United States Commodity Futures Trading Comm'n v. Cook***, 2009 WL 4823369, at *3 (D. Minn. Dec. 8, 2009).

¶38 A bank's responsibility does not end at collecting and verifying the customer's identity. The financial institution must "maintain a due diligence program that includes policies, procedures, and controls that are reasonably designed to detect and report any … suspicious activity conducted through or involving any private banking account that is established, maintained, administered, or managed in the United States by such financial institution." 31 C.F.R. § 1010.620(a). The program must, at a minimum, ascertain the identity of all nominal and beneficial owners of the account, the source of the deposited funds and the purpose for which the funds are to be used. 31 C.F.R. § 1010.620(b)(1), (3). Further, the bank must "[r]eview the activity of the account to ensure that it is consistent with the information obtained about the client's source of funds, and with the stated purpose and expected use of the account …." 31 C.F.R. § 1010.620(b)(4). Any suspicious activity conducted "to, from, or through" the account must be reported to federal authorities. ***Id.***; *see also* 12 C.F.R. § 208.62 (2011); 31 C.F.R. § 1020.320.

¶39 Grad alleges Associated Bank's program to ferret out suspicious activity was woefully inadequate. The program allegedly failed to account for large, round-dollar wire transfers out of the Crown Forex account soon after the funds were deposited. The outgoing funds were allegedly directed to offshore banking centers in high-risk jurisdictions or countries known for financial secrecy. All this, and Associated Bank was allegedly aware the entire time that the money in the Crown Forex account was held in trust and invested on behalf of the plaintiffs.

¶40 Given Wisconsin's formulation of duty and the circumstances of this case, what possible justification can there be for granting Associated Bank's motion to dismiss on duty grounds? Despite ***Hoida***'s repeated directive that a

party's duty of ordinary care depends on what is reasonable under the circumstances, *see* ***Hoida***, 291 Wis. 2d 283, ¶¶30-32, the court concludes that this case is controlled by two decisions with different facts: ***Commercial Discount Corp. v. Milwaukee Western Bank***, 61 Wis. 2d 671, 214 N.W.2d 33 (1974), and ***Hoida***. Neither stands for the broad proposition that a bank has no duty to monitor its customers' accounts for fraudulent activity.

¶41 In ***Commercial Discount***, 61 Wis. 2d at 685-88, our supreme court held that no aider and abettor liability attached to a bank that merely completed transactions at its customer's behest. The court construed the plaintiff's "aider and abettor" allegation as "charging the defendant with knowledge that the funds deposited and drawn on the [customer's] account belonged to another person." ***Id.*** at 687. The court concluded that even if the bank had such knowledge, it amounted only to the "means" of determining whether the money was properly deposited or withdrawn. ***Id.*** at 687-88. In other words, a bank is entitled to assume that, absent contrary notice by a third party, a business customer has authority over the funds deposited to, and withdrawn from, its account. That is not the same as holding that a bank has no duty to investigate and detect its customers' fraud.

¶42 ***Hoida*** is also inapposite. In that case, a real estate developer obtained a loan from M & I Bank, who in turn hired McDonald Title Company to disperse construction funds to a general contractor. ***Hoida***, 291 Wis. 2d 283, ¶¶3-6. Hoida, a subcontractor who had not been paid, filed suit against M & I and McDonald Title after an investigation uncovered that the developer and general contractor had misappropriated a large amount of the loan. ***Id.***, ¶¶7, 11, 13. Hoida alleged that M & I and McDonald Title were required to identify Hoida as a subcontractor on the project, verify that the progress on the project was sufficient

to justify the release of funds requested by the general contractor and the developer, or secure lien waivers from Hoida. ***Id.***, ¶20. Our supreme court, in concluding that neither M & I nor McDonald Title had a duty to prevent Hoida's losses, extensively analyzed the contracts between the developer, M & I and McDonald Title to establish the standard of care, which did not include the affirmative acts alleged by Hoida. ***Id.***, ¶¶35, 38-40. Again, ***Hoida*** does not stand for the broad rule that a bank has no duty to monitor its customers' accounts for fraud.

¶43 In addition, Grad draws a valid distinction between ***Hoida*** and the present case. The court does not read ***Hoida*** as resting on M & I's contracts with the developer and McDonald Title, *see* majority, ¶16, but those contracts plainly informed the ***Hoida*** court's duty of care analysis, *see* ***Hoida***, ¶¶35, 38-40. Here, there is no contract from which we may determine the scope of Associated Bank's duty of care. ***Hoida*** is therefore of limited value in determining what is reasonable under the circumstances of this case.

¶44 The court places great emphasis on the fact that Grad was not an Associated Bank customer. The significance of this fact is not immediately apparent to me. If Wisconsin is to remain a ***Palsgraf*** minority state, then as long as Associated Bank owed a duty of care to someone, *anyone* injured by a breach of that duty is entitled to recover damages. Indeed, that is Justice Andrews' primary point in his ***Palsgraf*** dissent. *See* ***Palsgraf***, 162 N.E. at 103 (Andrews, J., dissenting) ("There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to [someone] being the natural result of the act, not only that one alone, but all those in fact injured may complain."). Wisconsin's duty rule holds that each person is obligated to refrain from acts that will cause foreseeable harm to others "even

though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act." ***Dixson v. Wisconsin Health Org. Ins. Corp.***, 2000 WI 95, ¶22, 237 Wis. 2d 149, 612 N.W.2d 721. The court's analysis misses the mark because it focuses on the identity of the harmed person rather than the foreseeability of the harm. *See* ***Antwaun A. v. Heritage Mut. Ins. Co.***, 228 Wis. 2d 44, 56, 596 N.W.2d 456 (1999) (existence of a duty hinges on foreseeability). In doing so, the court treats injured parties differently depending solely on whether they happened to use Associated Bank's services.[3]

¶45 The federal cases cited by the court add little to the analysis. It is well established that federal courts are courts of limited jurisdiction, and may hear actions only where authorized by Congress. ***Lawrence Twp. Bd. of Educ. v. New Jersey***, 417 F.3d 368, 371 (3rd Cir. 2005). Because the federal banking regulations Grad cites are silent as to whether they permit a private cause of action, it is no surprise that federal courts have declined to create one. *See* ***Alexander v. Sandoval***, 532 U.S. 275, 286-87 (2001) ("Without [such language], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."). That does not, however, preclude this court from permitting Grad's suit. *See* ***id.*** at 287 ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.").

[3] Even if Wisconsin law permitted this court to limit the standard of care based on the identity of the person harmed, I would still conclude that the bank in this case owes a duty to Grad. Grad alleges that the bank knew the funds in the Crown Forex account were held in trust on behalf of individuals with whom the bank had no relationship. The court does not discuss this fact in its analysis of the issue.

¶46 Perhaps recognizing that we are not bound by a federal court's refusal to recognize a private cause of action, the court cites four district court cases holding that the federal banking regulations do not impart a common-law duty of ordinary care. *See* majority, ¶¶22-23 (citing ***In re Agape Litig.***, 681 F. Supp. 2d 352 (E.D.N.Y. 2010); ***Armstrong v. American Pallet Leasing, Inc.***, 678 F. Supp. 2d 827 (N.D. Iowa 2009); ***Marlin v. Moody Nat'l Bank., N.A.***, 2006 WL 2382325 (S.D. Tex. Aug. 16, 2006); and ***Aiken v. Interglobal Mergers & Acquisitions***, 2006 WL 1878323 (S.D.N.Y. July 5, 2006)).

¶47 None of those district court cases hold even persuasive value. As the court concedes, these authorities are premised on the federal courts' refusal to recognize a private cause of action, s*ee* majority, ¶22, a conclusion which is not binding on this court, *see* ***Alexander***, 532 U.S. at 287. And in any event, none of those decisions applied the law of jurisdictions that subscribe to Wisconsin's view of duty. They are therefore of limited value in determining the scope of the duty of care in this case. *See* ***Del Lago Partners, Inc. v. Smith***, 307 S.W.3d 762, 767 (Tex. 2010) (under Texas law, duty requires balancing of a number of factors, including risk, foreseeability, likelihood of injury, and the consequences of placing the burden on the defendant); ***J.A.H. v. Wadle & Assocs., P.C.***, 589 N.W.2d 256, 258 (Iowa 1999) (duty involves balancing the relationship between the parties, reasonable foreseeability of harm to the injured person, and public policy considerations to determine whether a particular person is entitled to be protected from a particular type of harm); ***Palsgraf***, 162 N.E. at 99 (under New York law, duty is predicated upon foreseeability of injury to the person harmed). What is more, ***Marlin***, which was subsequently cited by ***Armstrong***, did not provide even a single authority for its conclusion that "[b]anks have no duty to non-customers." *See* ***Marlin***, 2006 WL 2382325, at *7. And ***Armstrong*** is not even on point, as the

issue there was whether the bank and its customers had a fiduciary relationship, not whether the bank owed its customers a duty of ordinary care. *See* ***Armstrong***, 678 F. Supp. 2d at 874-75.

¶48 Instead, Wisconsin law will, under certain circumstances, look to the content of statutes and regulations to discern the requisite standard of care. This is so when the harm inflicted was the type the statute was designed to prevent, the person injured was within the class of persons sought to be protected, and there is some expression of legislative intent that the statute become a basis for the imposition of civil liability. ***Taft v. Derricks***, 2000 WI App 103, ¶12, 235 Wis. 2d 22, 613 N.W.2d 190.

¶49 Here, the banking regulations Grad cites were designed to ferret out precisely the type of criminal enterprise that caused Grad's injury. *See* 31 U.S.C. § 5311 (2010). Although the statutes and regulations do not explicitly permit a private cause of action, "the requisite [legislative] intent [regarding civil liability] may be supplied by necessary implication from the language of the statute." ***Nordeen v. Hammerlund***, 132 Wis. 2d 164, 168-69, 389 N.W.2d 828 (Ct. App. 1986). Congress knew how to preclude liability for financial institutions, and has provided only one "safe harbor," found in 31 U.S.C. § 5318(g)(3) (2010), which immunizes against civil liability for voluntary disclosures of possible violations of laws or regulations. Notably, Congress has not similarly immunized financial institutions for their *failure* to make required reports or keep required records. Indeed, Associated Bank may be subject to civil penalties for its failure to do those things. *See* 31 C.F.R. § 1010.820.

¶50 If it is appropriate to preclude liability in this case, it must be done by application of public policy, an issue that the court declines to reach. *See*

majority, ¶1 n.1. But what public policy is served by shielding from liability a bank that, contrary to federal regulations, allowed a customer to create an account with totally false information, never verified that information, and never investigated transfers of huge sums in suspicious configurations to high-risk jurisdictions? Based on Grad's allegations, each of the public policy factors often cited by Wisconsin courts supports the imposition of liability in this case. Grad's injury followed directly from Associated Bank's negligence, which was so egregious that it should be required to compensate Grad for his losses. The harm that flowed from Associated Bank's negligence was in no way extraordinary or unforeseen. Imposing liability in this case would not place any higher burden on financial institutions than that already placed by federal regulations. Given the public concern for protecting investors and the stability of our financial system, I cannot conceive of a case in which public policy is more supportive of allowing a third party to proceed against financial institutions for their negligent failure to follow banking laws. The matter should at least be remanded for further proceedings, as application of public policy is a matter best left until after a jury has found the relevant facts. *See* ***Kessel v. Stansfield Vending, Inc.***, 2006 WI App 68, ¶36, 291 Wis. 2d 504, 714 N.W.2d 206.

¶51 Federal banking regulations make clear that a financial institution may not stand idly by as its accounts are used for fraud. Because I conclude that those regulations establish a standard of care that Associated Bank has allegedly breached, I respectfully dissent.