IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1994 Term

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No. 21896

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PATRICIA L. PETERS,
Plaintiff-Petitioner

v.

NANETTE PETERS, Executrix of the Estate of John Lewis Peters, deceased, as such Executrix, and NANETTE PETERS, in her individual right, DON RANDALL PETERS, JOHN MICHAEL PETERS, and the WHITESVILLE STATE BANK, a corporation,
Defendants-Respondents

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Appeal from the Circuit Court of Boone County
Honorable E. Lee Schlaegel, Jr., Judge
Civil Action No. 89-C-147

AFFIRMED

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Submitted: 12 January 1994
Filed: 24 March 1994

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JUSTICE NEELY delivered the Opinion of the Court.

JUSTICE MILLER dissents and reserves the right to file a dissenting opinion.

SYLLABUS

1. "'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syl. pt. 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of N.Y., 148 W. Va. 160, 133 S.E.2d 770 (1963).' Syl. pt. 1, Massey v. Jim Crockett Promotions, Inc., 184 W. Va. 441, 400 S.E.2d 876 (1990). Syl. pt. 3, Shell v. Metropolitan Life Ins. Co., 183 W. Va. 407, 396 S.E.2d 174 (1990)." Syl. pt. 1, Stemple v. Dobson, 184 W. Va. 317, 400 S.E.2d 561 (1990).

2. Passbook presentation clauses are for the purpose of preventing payment to one who is not a depositor and may be waived by the bank. The clauses are not meant to protect a depositor against withdrawals by a co-depositor. To hold otherwise would place a heavy burden on a bank to mediate between co-depositors, one of the burdens that the legislature obviously sought to remove by enacting W. Va. Code 31A-4-33 [1993].

3. Although the imposition of a duty that an affidavit be taken from all owners concerning any actions taken in regard to an account or certificate by another joint owner arguably might

provide depositors with more security, there exists no West Virginia law requiring a bank to inquire of or inform one joint depositor about the action of another joint depositor. The purpose of W. Va. Code 31A-4-33 [1993], which allows any joint depositor to withdraw funds from any joint account, is to relieve a financial institution from just such meddling.

4. The rules of a bank voluntarily adopted by it become a valid agreement or contract between the bank and its depositors when an account is opened and the passbook is issued or a certificate of deposit purchased pursuant to the printed rules set forth in the passbook or the certificates. However, mere boilerplate recitals of the obligation to present passbooks or surrender endorsed certificates at the time of withdrawal constitute nothing more than general statements of bank policy and as such create no substantive rights in depositors. Thus, when the terms relating to the requirement of presentation of a passbook or certificate are positioned or articulated in such a way as to make it evident that a Bank does not intend the terms to be binding, no contract exists as to those terms.

Neely, J.:

This appeal resulted from a suit brought by Patricia L. Peters ("Patricia") who alleged that the Whitesville State Bank ("the Bank") improperly paid out to the decedent John Lewis Peters ("John"), Patricia's late husband, the proceeds of certain bank accounts held jointly by Patricia and John. On cross motions for summary judgment, the Circuit Court of Boone County, relying on W. Va. Code 31A-4-33 [1993], awarded judgment to the Bank, holding that the Bank was not liable to Patricia as a matter of law under the facts and circumstances presented. Patricia's appeal followed.

The undisputed facts relevant to this appeal are as follows: Patricia and John were married on 2 April 1973. They lived together in Boone County until 7 March 1989 when John died testate. Patricia and John had no children; John was survived by Nanette Peters, Don Randall Peters and John Michael Peters, his children from a previous marriage, and his widow Patricia.

On 17 April 1978, Patricia and John established joint checking and passbook savings accounts at the Bank. Each of these accounts was in the form of a joint tenancy with a right of survivorship. In connection with the establishment of the joint

savings account, the Bank issued John and Patricia a passbook in the names of John L. or Patricia Peters to be used in making withdrawals from their account. Printed in the passbook were the rules and regulations governing the relation between the depositors and the Bank. At the beginning of the regulations appears the following:

> "NO PAYMENTS WILL BE MADE EXCEPT UPON PRESENTATION OF THIS BOOK."

Rules Number 5 and 7, also printed in the passbook, are pertinent for our purposes:

> 5. Deposits and the interest thereon may be withdrawn by the depositor in person or by written order; but in either case, the passbook must be presented, so that such payments may be entered therein.
>
> 7. In all cases, a payment upon presentation of the deposit shall be a discharge to the bank for the amount so paid.

Both John and Patricia contributed funds in unknown proportions to the accounts, and both from time to time withdrew funds from the accounts.

During the course of their marriage, the parties purchased from the Bank two certificates of deposit ("CDs"), each in the initial

principal face amount of $10,000 and each of which was held in the form of a joint tenancy with right of survivorship. The CDs were made payable to John L. Peters or Patricia Peters; each certificate was negotiable; each matured certificate was payable at a determined future time; and each certificate provided that it was "payable on its return properly endorsed." Each of the certificates bears on its face the following:

> This bank is prohibited by Federal Law from paying this deposit in whole or in part before maturity and from paying interest after maturity.

As the CDs matured, they were renewed as provided for in the certificates. At no time did the Bank act as a trustee for either Patricia or John or undertake to manage the affairs or act in a fiduciary capacity for either or both of the parties.

In June 1984, John, claiming that he had lost his passbook and certificates, withdrew funds in the checking account and the savings account; he also redeemed the two CDs then current, one of which had not yet matured and was thus subject to an early withdrawal penalty, to wit, a forfeiture of three months' interest in the amount of $456.30. Notwithstanding the aforementioned rules printed in the passbook and on the certificates, the Bank allowed John to

withdraw the funds on deposit in both accounts without presentation of either the passbook or the certificates.

In September 1984, Patricia presented the CDs then current to the Bank and asked that the CDs be renewed. The Bank refused to do so, apprising her of her husband's withdrawal of the funds on deposit represented by the CDs. At no time before the presentation of the CDs by Patricia had the Bank alerted her to her husband's withdrawal of the funds.

On 3 April 1989, Patricia filed suit against Nanette Peters, Don Randall Peters, John Michael Peters and the Bank on the grounds that John's actions were unlawful and that the Bank had acted unlawfully in permitting the withdrawal of funds and the cashing of the CDs. In her complaint, Patricia requested that the court require the Bank to reimburse her in the amount of $20,000 plus interest from the date it permitted John to liquidate the two certificates in question. In its answer, the Bank asserted that Patricia's complaint failed to state a claim upon which relief could

[1]Because the fundamental issues on appeal involve the lawfulness of the payment of the account proceeds by the Bank to John, for present purposes any issues relating to the liability (if any) of the decedent's children are not relevant to this appeal.

be granted and that the Bank had acted lawfully and properly within the confines of its contractual relationship with John and Patricia.

On 3 May 1992, the court granted the Bank summary judgment, ruling that W. Va. Code 31A-4-33 [1993] relieved the Bank of liability to Patricia because the Bank had paid the funds to Patricia's co-depositor. We think the court was correct in so holding.

I.

In Syllabus Point 3 of Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963), we established the standard to be employed in determining whether summary judgment is proper:

> A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.

See also Massey v. Jim Crockett Promotions, Inc., 184 W. Va. 441, 400 S.E.2d 876 (1990); Stemple v. Dobson, 184 W. Va. 317, 400 S.E.2d 561 (1990); Shell v. Metropolitan Life Ins. Co., 183 W. Va. 407, 396 S.E.2d 174 (1990). Summary judgment is not proper "unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse

party cannot prevail under any circumstances." Aetna Casualty & Sur. Co. v. Federal Ins. Co. of N.Y., 148 W. Va. at 171, 133 S.E.2d at 177. (Citations omitted). With this standard in mind, we turn to the errors assigned by Patricia on appeal.

II.

Patricia argues that the lower erred as a matter of law or otherwise abused its discretion in granting the Bank summary judgment by disposing all issues in reliance upon W. Va. Code 31A-4-33 [1993]. W. Va. Code 31A-4-33 [1993], otherwise known as the West Virginia Banking Statute, provides in pertinent part:

> (b) When a deposit is made by any person in the name of such depositor and another or others and in form to be paid to any one of such depositors, or the survivor or survivors of them, such deposit, and any additions thereto, made by any of such person, upon the making thereof, shall become the property of such persons as joint tenants. All such deposits, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to any one of them during the lifetime of them, or to the survivor or survivors after the death of any of them.
>
> (c) Payment to any joint depositor and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge for all payments made on account of such deposit, prior to the receipt

> by the banking institution of notice in writing, signed by any one of such joint tenants not to pay such deposit in accordance with the terms thereof. Prior to the receipt of such notice no banking institution shall be liable for the payment of such sums.

As the lower court found, the statute is designed to protect a bank from liability to a depositor in situations where, as here, it in good faith pays funds from a joint account to a co-depositor. See Delong v. Farmers Building & Loan Association of West Virginia, 148 W. Va. 625, 137 S.E.2d 11, 16 (1964).

According to Patricia, the Bank rules requiring presentment of the passbook and certificates before money was permitted to be withdrawn from the accounts waived the protection otherwise afforded under W. Va. Code 31A-4-33 [1993]. In support of this contention, she cites Badders v. Peoples Trust Co., 236 Ind. 347, 140 N.E.2d 235 (1957) for the proposition that a clause requiring presentation of a passbook makes a bank liable to a depositor for payments made to a co-depositor for the passbook even when there is a statute which otherwise relieves the bank of liability for payments to a co-depositor.

We do not follow Badders, however, because, in our judgment, passbook presentation clauses are for the purpose of

preventing payment to one who is not a depositor and may be waived by the bank. The clauses are not meant to protect a depositor against withdrawals by a co-depositor. To hold otherwise would place a heavy burden on a bank to mediate between co-depositors, one of the burdens which the legislature obviously sought to remove by enacting W. Va. Code 31A-4-33 [1993].

Furthermore, depositors often lose or mislay passbooks and CDs. If we accede to Patricia's argument, then banks will be required to put depositors to endless hassle when passbooks or CDs are lost or mislaid. In the case before us both the bank and the community in which it is located are very small and the depositors are typically well-known to all bank employees, circumstances that persist throughout rural West Virginia and redound to the incalculable benefit of the ordinary consumer of bank services.

III.

[2]Indeed, this judge has never had a personal bank account in the City of Charleston because he refuses to do business with a bank where he is not known personally by every employee of the institution. Unfortunately, the recent bank mergers and buy-outs are tending to destroy personal banking much to the detriment of civilization. Sic transit gloria mundi.

In support of her contention that summary judgment was improper, Patricia also argues that the Bank was negligent in permitting John to withdraw funds from the accounts without making reasonable and adequate inquiries into his failure to produce the passbook and certificates as well as in failing to notify the other joint depositor of the withdrawals.

Patricia relies on Zulplkoff v. Charleston National Bank, 77 W. Va. 621, 88 S.E. 116 (1916) for the proposition that under suspicious circumstances a bank has the duty to exercise due care to determine that the person to whom payment is being made is entitled to receive it and, if necessary to make this determination, to make reasonable inquiries. Zulplkoff, however, is distinguishable from this case. In Zulplkoff, a person obtained possession of the owner's passbook without the owner's knowledge and, presenting the passbook to the bank, withdrew funds from the owner's account. The owner claimed that the Bank was negligent in failing to inquire adequately as to whether the passbook was really his.

This case, in contrast, involves joint owners of accounts. Although the imposition of a duty that an affidavit be taken from all owners concerning any actions taken in regard to an account or certificate by another joint owner arguably might provide depositors

with more security, there exists no West Virginia law requiring a bank to inquire of or inform one joint depositor about the action of another joint depositor. As stated above, the purpose of W. Va. Code 31A-4-33 [1993], which allows any joint depositor to withdraw funds from any joint account, is to relieve a financial institution from just such meddling. Thus, the statute allows a financial institution to pay any joint depositor all funds without any duty to ascertain the contribution of the individual joint owners to the account.

Furthermore, unlike Zulplkoff, where the impostor was a stranger to the bank, the Bank in this case had no reason to suspect any wrongdoing when John withdrew the funds from the accounts. See Brooks v. Erie County Savings Bank, 169 A.D. 73, 154 N.Y. 692, 693 (1915). The evidence showed that: (1) John and Patricia had been customers of the Bank for many years and (2) Bank personnel were well-acquainted with the Peters; (3) Bank personnel knew that John and Patricia held several joint accounts; and (4) the Peters frequently withdrew funds from their various joint accounts separately. Given this course of dealing, there were no circumstances tending to show that the Bank had knowledge or notice sufficient to put it on inquiry that John was not entitled to withdraw

funds. We think the circuit court was correct in finding no question of fact was presented as to the Bank's negligence.

IV.

We also agree with the circuit court's rejection of Patricia's breach of contract claim. Specifically, Patricia argues that the Bank entered into a contractual arrangement with her assuring her that presentment of passbooks and certificates of deposits were required before payments from joint accounts would be made. According to Patricia, by allowing John to withdraw the full value of the accounts without presentation of the passbook and to redeem the CDs before maturity without production of the certificates themselves, the Bank violated its contract with Patricia.

Clearly, as stated in Badders, supra, a statute which specifies that payment to one of the co-owners of a joint account discharges a bank's obligation does not prevent the bank by contract from enlarging its liability if it sees fit to do so. The rules of a bank voluntarily adopted by it become a valid agreement or contract between the bank and its depositors when an account is opened and the passbook is issued or a CD purchased pursuant to the printed

rules set forth in the passbook or the certificates. Zuplkoff, supra.

It has also been held, however, that mere boilerplate recitals of the obligation to present passbooks or surrender endorsed certificates at the time of withdrawal constitute nothing more than general statements of bank policy and as such create no substantive rights in depositors. See Beizer v. Financial Savings & Loan Association, 172 Cal.App. 3d 133, 218 Cal.Rptr. 143 (1985). Thus, when the terms relating to the requirement of presentation of a passbook or certificate are positioned or articulated in such a way as to make it evident that a Bank does not intend the terms to be binding, no contract exists as to those terms. Id.; Coristo v. Twin City Bank, 257 Ark. 554, 520 S.W.2d 218 (1975); Pulliam v. Pulliam, 738 S.W.2d 846 (Ky.App. 1987).

In this case, it is clear that the Bank did not intend the clauses in the passbook to constitute commitments to its depositors. As the court in Coristo v. Twin City Bank, supra explained, treatment of passbooks has undergone a change in banking: before bank statements were renders to depositors, the passbook were the only record of the account. Now, according to Robert Milam, president of the Bank, although the requirement of presentment of

the passbook is the standard rule, withdrawal without the passbook is possible and allowable, so long as the passbook was presented at least once every six months to be updated.

V.

Finally, Patricia claims that the Bank is liable to her for wrongfully assisting in a breach of fiduciary duty by Mr. Peters. Under Patricia's theory, the Bank, as fiduciary to Patricia and John, was obligated to make inquiries before paying out funds in the absence of passbook or certificate presentment.
We disagree.

Where there is a general deposit of money in a bank, the title to and beneficial ownership of the money is vested in the bank, and the relation between it and the depositor is that of debtor and creditor. Southern Elec. Supply Co. v. Raleigh County National Bank, 173 W. Va. 780, 320 S.E.2d 515 (1984). A deposit creates an ordinary debt, and not a privilege or right of a fiduciary character. United States Fidelity & Guaranty Co. v. Home Bank, 77 W. Va. 665, 88 S.E. 109 (1916). Likewise, a certificate of deposit creates the relation of debtor and creditor between a bank and the certificate

holders. Finance Corporation v. Bank, 99 W. Va. 230, 128 S.E. 294 (1925).

The cases cited by Patricia, to wit, United States Fidelity & Guaranty Co. v. Home Bank, 77 W. Va. 665, 88 S.E. 109 (1916) and Guaranty Co. v. Hood, 12 W. Va. 157, 7 S.E.2d 872 (1940) fail to support her contention that the Bank owed her a fiduciary duty which it breached in permitting John to withdraw the funds. These cases involved guardianship and estate administrator accounts which by their nature are fiduciary accounts.

Although a bank may incur liability for its participation in a fiduciary's diversion of trust funds, this type of liability is predicated on three elements. First, the account must consist of trust funds. Second, the bank must have some knowledge of the trust character of the deposited funds. Third, the bank must have knowledge of the contemplated fraud or diversion and it must assist or participate in the diversion for its own benefit. See United States Fidelity & Guaranty Co. v. Hood, 122 W. Va. 157, 7 S.E.2d 872 (1940). None of these elements is present in this case. The funds at issue here were not trust funds at all; they were merely jointly deposited funds held in an "or" type account by a husband

and wife, a practice so common to married couples that it could never constitute notice to a bank of a fiduciary or trust character.

Furthermore, Patricia's theory that the Bank breached its fiduciary duty to her in paying out the funds without first making inquiries of her as joint depositor flies in the face of W. Va. Code 31A-4-33 [1993] which specifically provides that a bank need not make such inquiries but instead is free to pay out funds to either party to joint "or" type account. As stated above, W. Va. Code 31A-4-33 [1993] is designed to protect banks from the burdens that would be imposed upon them by a rule such as the one advanced by Patricia: under such a rule, banks would be required to make inquiries of every husband or wife whose co-depositor was withdrawing funds from a joint "or" type account. Recognizing the enormous economic costs such a rule would impose, the legislature quite fittingly alleviated these burdens by establishing a bright-line test -- written notice -- for determining when a bank is on notice that it should not permit withdrawal of funds by a joint depositor. See W. Va. Code 31A-4-33(c) [1993]. In short, the statute makes clear that a bank has no duty of inquiry when paying funds to joint depositors, at least in the absence of written notice to the contrary.

We would note that we are not unsympathetic to Patricia's sense of betrayal in this situation. However, we do not believe the Bank breached any duties to her or any contract. The bank obviously had a duty to exercise good faith and use ordinary care in the handling of these certificates of deposit. There being no evidence that the Bank breached this standard, we do not believe the Bank is liable to Patricia for her own loss of ownership interest in the accounts and the CDs. Patricia was betrayed by John, not by the bank. The bank was merely trying to be helpful and accommodating, and while the general rule these days is that no good deed will go unpunished, we choose to make an exception in this case.

Accordingly, for the foregoing reasons, we find that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Therefore, the judgment of the Circuit Court of Boone County is affirmed.

Affirmed.