23-1945

United States Court of Appeals
for the
Fourth Circuit

In re: ESTATE OF LARRY W. COOK, Deceased

JANINE SATTERFIELD, in her capacity as Administrator for the Estate of Larry W. Cook, Deceased,

Plaintiff/Appellant,

– v. –

WELLS FARGO BANK, N.A.; NAVY FEDERAL CREDIT UNION,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

REPLY BRIEF OF APPELLANT

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THE BANKS MISTAKENLY ASSERT TITLE 8.4A'S EXCLUSIVITY.

Citing a recent decision from Virginia's intermediate appellate court, the banks here claim that Virginia's Title 8.4A preempts all claims arising under any other law – including common law – relating to wire transfers. The uniform code's drafters felt otherwise:

> With the adoption of Article 4A, electronic fund transactions are governed not only by Article 4A, but also common law, contract, Federal Reserve rules, Federal Reserve operating letters, ...

J.J. White and R.S. Summers, *Uniform Commercial Code*, §1-2 at p. 132 (1993).

> ... the Drafting Committee intended that Article 4A would be supplemented, enhanced, and in some places, superseded by other bodies of law... The Article is intended to synergize with other legal doctrines.

T.C. Baxter and R. Bhala, "The Interrelationship of Article 4A with Other Law," 45 Business Lawyer 1485, 1485 (1990).

The UCC thus does not relieve receiving banks from ordinary duties, especially those related to their depositors. As one court, citing both White & Sanders and Baxter & Bhala, put it, "receiving banks cannot conduct their business with blinders on to extenuating circumstances." *Sheerbonnet, Ltd. v. American Express Bank, Ltd.*, 951 F. Supp. 403, 411 (S.D.N.Y. 1995).

The banks' actions here are worse than just a blinders-on approach; the plaintiff stated claims of *profound* negligence occurring even after Navy

Federal knew of its depositor's incapacity. The complaint paints a portrait of Navy Federal's decision to report the vulnerable depositor to Adult Protective Services, even as it continued to vacuum millions of dollars out of his account.

A. THE *LENTZ* CASE IS INAPPOSITE TO THIS CASE.

The facts here stand in stark contrast to those in *Navy Federal Credit Union v. Lentz*, 78 Va. App. 250, 890 S.E.2d 827 (2023), to the point that it is inapposite. The depositor there was not incapacitated; she simply fell victim to a scammer who gained access to the Facebook account of the victim's friend. *Id.* at 254, 890 S.E.2d at 829. Her credit union made just two transfers, on consecutive days, to a legitimate, recognizable domestic bank in Austin, Texas. *Id.* This contrasts with 74 transfers over a six-month period here, including to locations like "165 alley behind the old Phraya Karai Temple Wat."

The credit union in *Lentz* had no reason to suspect fraud, and understandably took no steps to protect its depositor. Not so here: Navy Federal acknowledged its suspicion and took steps to address it, specifically alerting APS about the dozens of wires going to suspicious payees overseas over an extended time. Like the defendants in *Kellermann v. McDonough*, 278 Va. 478, 684 S.E.2d 786 (2009), Navy Federal assumed a duty of care, but then simply laid that duty aside, knowingly wiring money to a back alley in

Thailand. The Uniform Commercial Code does not exonerate entities from breaches of such duties.

1. <u>Navy Federal Assumed a Duty with Respect to Larry Cook</u>.

Virginia law has long regarded as "ancient learning" the premise that "one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Nolde Bros., Inc. v. Wray*, 221 Va. 25, 28, 266 S.E.2d 882, 884 (1980) (quoting *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922)). This holding is consistent with Restatement (Second) of Torts § 323, imposing liability for breaches of assumed duties. *Didato v. Strehler*, 262 Va. 617, 628, 554 S.E.2d 42, 48 (2001). What differentiates this case from other assumption of duty cases is this – it is not Satterfield's position that the banks owed a duty to Mr. Cook to protect him from the fraud being perpetrated by the scammers. Rather, they breached their duty to him by knowingly and purposely reviewing, accepting and sending for processing wires that were blatantly in violation of other statutes, being sent by an incapacitated, vulnerable man.

For instance, one could be held liable for negligence with a simple hand gesture signaling that it was safe for a driver to turn. *See Ring v. Poelman*, 240 Va. 323, 327, 397 S.E.2d 824, 826 (1990) (noting that an assumed duty could arise based on evidence that motorist signaled to another motorist that it was

safe to proceed); *see also* ***Nolde Bros. v. Wray***, 221 Va. 25, 28-29, 266 S.E.2d 882, 884 (1980) (acknowledging common law principle of assumed duty but holding that law would not recognize any such duty where motorist's gestures could not be interpreted as a signal that it was safe to proceed). If a signaling gesture can be an assumed duty, which is non-verbal communication, stepping into a situation voluntarily, then it is most certainly an assumption of duty to report an individual, believing him to be incapacitated and susceptible to financial exploitation.

Moreover, stating that the bank "would like to assist" is sufficient to plead that the bank assumed a duty sufficient for a cause of action sounding in negligence against a bank regarding wire transfers. *See Pirata P.S.C. v. Bank of Am., N.A.*, 2024 U.S. Dist. LEXIS 270 *18 (W.D. Ky. Jan. 2, 2024). Interestingly, the *Pirata* court held specifically that since the plaintiff was a customer, there was no need to allege the duty to protect against the actions of a third party. *See id*. Mr. Cook was the customer at both banks. They owed him a duty because of that status alone. Thereafter, Navy Federal went further down the road, taking actions along the way, all the time, blindly allowing the wire transfers to occur.

2. Banks Owe a Duty of Care to Their Customers, Outside the Confines of the UCC.

Moreover, Banks owe a duty of care to their customers. *See, e.g., Marlin v. Moody Nat'l Bank, N.A.*, 248 Fed. Appx. 534, 540 (5th Cir. 2007). A duty of care may arise when the bank has been notified of a fraud. *See, e.g., Das v. Bank of Am.*, 186 Cal. App. 4th 727, 112 Cal. Rptr. 3d 439, 451-452 (Cal. Ct. App. 2010) (discussing *Murray v. Bank of Am., N.A.*, 354 S.C. 337, 580 S.E.2d 194 (S.C. Ct. App. 2003) (finding duty of due care where the evidence showed plaintiff notified the bank of fraud)). In this case, there are two distinct points at which Navy Federal was alerted to financial exploitation – the first when Larry Cook notified Navy Federal on October 6, 2020 of an "infraudulent" [sic] charge in another account, and then again on January 28, 2021 via letter from Adult Protective Services stating that Mr. Cook was an adult in need of services and a high risk for financial exploitation.

B. ARTICLE 8.4A DOES NOT PRE-EMPT SATTERFIELD'S REMEDIES.

The foundation of the judgment below is an expansive view of the concept of statutory preemption. This contrasts with the consistent approach of Virginia's highest court: "Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms." *Giordano v. McBar Indus., Inc.*, 284 Va. 259, 267

n.8, 729 S.E.2d 130, 134 (2012); *Pond v. United States*, 69 F.4th 155, 164 n.9 (4th Cir. 2023). A statutory framework that governs the mechanics of wire transfers cannot be expanded – especially as here, by elevating a comment[1] to the status of positive law – to bar long-recognized common-law rights of action based on well-established duties.

The banks' behavior before and after each of these 74 wire transfers fell outside the scope of the UCC's procedural statutes. Virginia recognizes that some common-law claims may proceed despite the application of Title 8.4A, *Schlegel v. Bank of America, N.A.*, 271 Va. 542, 551, 628 S.E.2d 362, 367 (2006), as long as the claims do not "fall squarely within the confines" of the Title. *Id*. at 555, 628 S.E.2d at 368. This is such a case. The district court erroneously took an expansive view of the scope of Title 8.4A's provisions, leading it to dismiss this case prematurely.

Federal courts can and do try cases alleging violations just like this. For one recent example, a district court entered a $500,000 judgment against a bank for Zelle transactions. The court heard evidence about the training that

[1] The Supreme Court of Virginia has cautioned against allowing official comments to "become devices for expanding the scope of Code sections where language within the sections themselves defies such an expansive interpretation." *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 102, 546 S.E.2d 696, 703 (2001).

tellers received, internal security measures, fraud detection, and the like. *See Studco Bldg. Sys. United States LLC v. 1st Advantage Fed. Cred. Union*, 2023 U.S. Dist. LEXIS 24818 (E.D. Va. Jan. 12, 2023). Satterfield was summarily denied her ability to present evidence strikingly similar to what presented in *Studco*.

This litigation should instead proceed to trial. The plaintiff pleaded a claim for which relief can be granted under long-recognized principles of assumed duties. The Court should reverse and remand the case for that trial.

JANINE SATTERFIELD, Individually and in Her capacity as Administrator for the Estate of LARRY W. COOK

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Dated: March 15, 2024 /s/ Kimberley Ann Murphy
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I hereby certify that on this 15th day of March, 2024, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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