o/a 5-5-86

CASE NO. 67,777

IN THE SUPREME COURT OF FLORIDA

BARNETT BANK OF WEST FLORIDA,

Petitioner,

v.

W. RICHARD HOOPER,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON MERITS

Robert P. Gaines
Beggs & Lane
Post Office Box 12950
Pensacola, Florida 32576
904/432-2451
Attorneys for Petitioner

TABLE OF CONTENTS

CITATION OF AUTHORITIES

CONTENTS OF APPENDIX

STATEMENT OF THE CASE

This court has accepted jurisdiction on conflict grounds to review a decision of the District Court of Appeal of Florida, First District, (A 1-7) that conflicts with a decision of the District Court of Appeal of Florida, Third District (A 8-13).

Dr. W. Richard Hooper filed a complaint seeking to void a promissory note to Barnett Bank of West Florida on the ground that Barnett failed to disclose to him material facts relating to the loan transaction. At the conclusion of the evidence, the trial judge directed a verdict in favor of Barnett.

Upon appeal by Dr. Hooper, the District Court of Appeal of Florida, First District, reversed the judgment with directions to submit the case to a jury.

STATEMENT OF THE FACTS

The district court of appeal summarized the evidence as follows (A 2-4):

> In reviewing the directed verdict, we are required to view the evidence in a light most favorable to Dr. Hooper. So viewed, the evidence shows the following: When Dr. Hooper moved to Pensacola in 1973 he began doing business with the bank. He appointed the bank trustee of a trust and personal representative of his estate. Several years later, Dr. Hooper became interested in

making a tax shelter investment. In June, 1981, he met with Hosner to discuss tax shelter investments. Hosner took him to see Edwin Riffel, the loan officer in charge of Hosner's accounts at the bank. Dr. Hooper testified that Riffel told him he was familiar with Hosner investments, and they were sound and had passed IRS scrutiny. Dr. Hooper decided to make a tax shelter investment with Hosner and borrowed $50,000.00 from the bank for the investment.

During the spring of 1982, Harry Stump, the assistant vice president at the bank who supervised the bookkeeping department, the proof department and the cash management department, became concerned at the rather large amount of uncollected funds in the Hosner Enterprises account. He also became suspicious that Hosner was involved in a check-kiting scheme. When the uncollected funds reached approximately $200,000.00 in the Hosner Enterprises account in early May, Stump met with Riffel on May 11 and conveyed his suspicions to Riffel. Riffel was aware of the large amount of uncollected funds in the Hosner Enterprises account and was additionally concerned because Hosner was delinquent in his loan payments. In fact, early in May, Riffel had told Hosner he had to get some money into his account. Also, by May 1982, Riffel knew that the IRS was investigating Hosner.

In his deposition prior to trial, Stump had testified that he became personally convinced that Hosner was check-kiting around May 10, 1982. However, at the trial, he explained that his deposition testimony had been too hasty and that a more accurate description of his feelings on May 11 was that he was concerned about a check-kiting scheme, but the scheme was not confirmed because "you can't confirm that it is a kite until you start to put a stop to it."

On May 11, Stump instructed bank employees to make copies of the checks which were being deposited to the Hosner account and send the copies to him, and only then could the deposits be credited to Hosner's account. After this particular reporting procedure began, the uncollected funds activity on Hosner's account increased.

On May 14, Stump admitted, the situation had deteriorated to the point that Stump felt the bank was "at risk." In other words, the uncollected funds in the Hosner account were very great, so that if the bank continued to pay the checks presented on the account, it might be paying out money which was not in the bank, and which could not be collected, and the bank would lose money. In an effort to protect the bank, Stump made the decision to return all Hosner checks presented to the bank on May 13 on the grounds that they were being drawn against uncollected funds. A computer printout of bank transactions, which is reviewed daily by bank officers, was prepared on the evening of Friday, May 14. However, this printout would not ordinarily be reviewed by other bank officials until the next business day, which was Monday, May 17. Stump testified that May 17 was the first time other bank officials would have known that Hosner's checks were being returned on the basis of uncollected funds. Stump testified that after May 11 he did not discuss the Hosner situation with Riffel again until May 19 or 20.

The transaction giving rise to this litigation occurred as follows: Late in the afternoon of May 14, during a break from surgery, Dr. Hooper received a call from Hosner. He returned the call. Hosner put Dr. Hooper on hold and then came back on the line with Riffel in a three-way conversation. Dr. Hooper asked to borrow $90,000.00 for purposes of investment. Riffel agreed to the loan. The conversation was very short and was

ended when Dr. Hooper had to return to surgery. Late that evening, after banking hours, a promissory note prepared by Riffel and a check, representing the proceeds of the loan in the sum of $89,865.00, were delivered to Dr. Hooper for his signature by a messenger from Hosner's office. He signed the note and endorsed the check and these were returned to the messenger. A copy of this check for $89,865.00, introduced into evidence at the trial, shows that the back of the check is stamped "for deposit only, Hosner Enterprises, Inc., 1170027502." Also introduced into evidence was a deposit slip dated May 17, depositing into the Hosner account a sum of money which included a check for $89,865.00.

Meanwhile, at about this same time, another bank in town, First American Bank, began refusing to pay Hosner's checks. On May 17, checks totaling $270,000.00 were returned to the appellee bank from First American Bank. On May 24, the Hosner Enterprises account had insufficient funds and the appellee bank had confirmed a check-kiting scheme. Nevertheless, by May 26, the account had been "zeroed out." At the conclusion of his testimony, Stump admitted that without deposit of Dr. Hooper's approximately $90,000.00 check, Hosner's account would have been overdrawn "$87,000.00 or something."

Dr. Hooper testified he never received any benefit from the $90,000.00 he gave to Hosner. Moreover, he testified that had he known of the IRS investigation, of the check-kiting scheme, of the fact that Barnett had refused to honor checks on the Hosner Enterprises' account to protect its position, that Hosner was at the bank because he was told he needed to get money to the bank to cover overdrafts and delinquent loans, he would not have made the loan. Riffel testified, as justification for his actions, that he did not

disclose any information to Dr. Hooper concerning Hosner's account on May 14 because of the duty of confidentiality the bank owed to its depositor, Hosner.

SUMMARY OF THE ARGUMENT

Although the District Court of Appeal, First District, has attempted to distinguish its holding from that in Milohnich v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969), (A 8-13), the holdings conflict. The Third District in Milohnich held that a bank can be found liable to a depositor for revealing information about the depositor's account. The First District has held in this case that a bank may forfeit the principal and interest of a loan if it does not reveal to the borrower (even though the borrower makes no inquiry) confidential information about the status of the account of another depositor.

The rule in Milohnich is preferable because it comports with the expectations of depositors that their financial affairs will be treated confidentially. It also comports with the strong public policy expressed in Article I, Section 23, of the Constitution of the State of Florida adopted in 1980, which guarantees every natural person the right to be let alone. This court should resolve the conflict between these two cases by approving the Milohnich rule.

ARGUMENT

It is important to note that the holding of the First District is not that there was evidence from which a jury could find a conspiracy between Barnett and Hosner to defraud Dr. Hooper. The essence of its holding is stated in its opinion as follows (A 5):

> Although we are compelled to acknowledge that we are required to reach a decision based upon our review of a cold record, we nevertheless are of the opinion that the evidence below was subject to conflicting inferences concerning whether a confidential relationship existed between the parties and whether the bank had knowledge of material facts which it was required to disclose, under the governing legal standards, and that reasonable minds might well have reached differing conclusions on these issues. Accordingly, we are of the view that the trial court should have submitted these issues to the jury.

The First District appears to have based its decision on a faulty analysis of cases from other jurisdictions. It also overlooked Federal regulations that apply to applications for bank loans.

One of the cases cited by the First District in several places in its opinion was also one heavily relied upon by Dr. Hooper, Richfield Bank and Trust Company v. Sjogren, 309 Minn. 362, 244 N.W.2d 648 (1976). Another case upon which the First District and Dr. Hooper primarily rely is First National Bank in Lenox v. Brown, 181 N.W.2d 178 (Iowa 1970). However, those two cases were based upon findings of fraud.

Richfield Bank and Trust Company v. Sjogren, 309 Minn. 362, 244 N.W.2d 648 (1976) began as an action to recover on a promissory note executed by Mr. and Mrs. Sjogren. They defended on a claim of fraudulent concealment. The money was borrowed to purchase some additional air purification units from a corporation named National Pollution Eliminators, Inc. Mr. and Mrs. Sjogren had previously purchased a service route and ten air purification units from National. The president of National suggested the additional purchase, stating that financing could be arranged through Richfield Bank. Mr. and Mrs. Sjogren met at the bank with Michael Thompson, one of its loan officers. Mr. and Mrs. Sjogren had no previous dealings with the bank. Thompson approved the loan, knowing that the proceeds would go to National for purchase of the additional units. The Sjogrens subsequently learned that National was insolvent and could not deliver the units.

The evidence in regard to Thompson's involvement with National Pollution went considerably further than the evidence that Dr. Hooper was able to present of Barnett's knowledge of Hosner's activities. The court summarized that evidence at page 650 as follows:

> Equally significant for purposes of this appeal is evidence showing that Michael Thompson, the loan officer of Richfield Bank and the only employee of the bank with whom respondents dealt, (a) was the only bank officer who handled National Pollution's account at the Richfield Bank; (b) was listed by National Pollution as its credit reference to such customers as the respondents; (c) had personally loaned National Pollution $7,000 or $8,000 of his own money; (d) had received certain "fringe" benefits from National Pollution such as traveling at the company's expense and using a Cadillac automobile furnished by the company; and (e) was an active participant in the affairs and decisions of the company, and, indeed, was described by one of the employees of National Pollution as "calling all the shots" for National Pollution from February or March 1972 onward, and as being involved in "just about everything that happened on a day-to-day basis in that company." Based on this evidence the jury found that Michael Thompson knew of the pertinent financial condition of National Pollution at the time of the Sjogren loan and of the actions, concealment, and representations of the officers of National Pollution in the conduct of their business in relation to the Sjogrens.

The court then discussed in some detail the duty of disclosure on the part of one who has a confidential or fiduciary relationship to another and who has actual knowledge of fraud. The court pointed out that there is a difference between knowledge of insolvency and knowledge of fraud. It said that the determinative question was whether Thompson actually knew that National Pollution was so irretrievably insolvent that

it had no reasonable expectation of fulfilling its obligations under the contract. It concluded that there was substantial evidence to show such actual fraud, expressing its ultimate holding as follows at page 652:

> Therefore, we hold that under the unique and narrow "special circumstances" of this case, in which the bank had actual knowledge of the fraudulent activities of one of its depositors, it had an affirmative duty to disclosure (sic) those facts to the respondents before it engaged in making the loan to respondents which furthered the fraud.

The differences between Richfield and this case are obvious. The loan officer in Richfield was very closely involved in the affairs of National Pollution. He knew that National Pollution was to receive the loan proceeds as payment for air purification units. He also knew that those units were not available when the payment was made. He knew that National Pollution was not merely insolvent but was irretrievably insolvent.

In the instant case, the officer who made the loan knew only that the proceeds were to be used for a tax shelter investment to be made through Mr. Hosner, that Hosner was the subject of an IRS investigation, that Hosner was to some extent delinquent in a loan account at the bank and that Hosner had been writing checks on uncollected funds.

Richfield therefore applies a principle that is not supported by the evidence in this case. That principle has

no effect on whether Florida should continue to apply a rule of confidentiality.

The other case principally relied upon by the First District and Dr. Hooper is First National Bank in Lenox v. Brown, 181 N.W.2d 178 (Iowa 1970). Again a bank brought an action on a promissory note with the defense of fraud being raised. In upholding the decision of the trial judge in an equitable action, the court summarized the evidence of fraud as follows at page 184:

> XI. In summary we now find, plaintiff bank made a loan to defendants Brown, (1) at that time knowing the proceeds thereof were being used by them to purchase an interest in certain personalty; (2) then holding a recorded substantial encumbrance on the property so being acquired; (3) but designedly failed to reveal such facts to the borrowers prior to consummation or renewal of the loan transaction; and (4) at all times secretly intended to ameliorate its unfavorable financial position attendant upon prior improvident encumbrance dealings with Evans by effecting the loan to defendants.

Again, the facts that led the court to find fraud are not present here. The evidence showed that the bank officer in Brown indicated that the business in which Brown was to invest was doing well when he knew that such was not the case. The court also pointed to the fact that the bank was not called upon to disclose any confidential information because the encumbrances on the property being purchased with the loan proceeds were a matter of public record.

As recognized by the First District, the evidence presented does not support an inference that Barnett or its loan officer was guilty of actual fraud that would overcome its obligation not to reveal confidential financial information about its depositor.

Dr. Hooper frankly admitted that he had not asked Mr. Riffel for advice about the investment he was to make with Mr. Hosner (T 131). The only thing that he asked Mr. Riffel was whether the bank would make the loan (T 117). He did not tell Mr. Riffel anything about what was to be done with the loan proceeds, nor does the record show what was done (T 166). On the other hand, under Florida law Barnett had an affirmative obligation not to reveal confidential information about the status of its depositors.

The First District also relies upon Klein v. First Edina National Bank, 293 Minn. 418, 196 N.W.2d 619 (1972). However, the bank prevailed in that case. The plaintiff, Mrs. Klein, sought to recover stock that she had pledged to the bank as security for a loan to a third party. A verdict was directed against her. The judgment against her was affirmed on appeal. The court summarized its holding as follows:

> The main question for us is whether defendant's relationship to plaintiff was such as to impose on defendant a duty to inform plaintiff of all the details of the transaction. The trial court held that plaintiff failed to make a prima facie

showing of such a relationship, and we agree.

The First District also places reliance upon Tokarz v. Frontier Federal Savings and Loan Association, 33 Wash.App. 456, 656 P.2d 1089 (1983). Again, the court affirmed a judgment for the lending institution. The plaintiffs contended that Frontier Federal should have advised them of the condition of a contractor who was building a home for them with financing from Frontier Federal. The Washington court applied the familiar rule that there is ordinarily no duty of disclosure upon the bank and affirmed a summary judgment in its favor. One of the factors pointed to by the Washington court that is also present in this case was the absence of any inquiry by the borrower about the financial condition of the builder. It will be recalled that in this case Dr. Hooper did not make any inquiry of Barnett as to the advisability of the transaction with Mr. Hosner into which he was entering (T 117).

Recognizing the problem that a bank may have in complying with its new rule in view of the holding in Milohnich v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969) (A 8-13), the First District suggests in its footnote 5 that the bank can merely refuse to make the loan. In so stating, the court has apparently overlooked

the obligations imposed on a bank by the regulations under the Equal Credit Opportunity Act, Title VII of the Consumer Credit Protection Act, Title 15, United States Code, §§1601 et seq. The regulations are found as Part 202, Title 12, Code of Federal Regulations (A 14-18).

Section 202.9 of the regulations (A 17) requires a bank to notify a loan applicant of adverse action in writing. The notification must contain a statement of specific reasons for the action taken or a disclosure of the applicant's right to a statement of reasons within 30 days after receipt by the bank of a request made within 60 days of such notification. Although this notification requirement is applicable to many situations, there is an exception in the regulations for the type of business loan for which Dr. Hooper applied. However, Section 202.3(e)(2) (A 16) provides in regard to applications for business credit that Section 202.9 relating to notifications is applicable if an applicant within 30 days after oral or written notification that adverse action has been taken requests in writing the reasons for such action.

In short, a bank cannot merely inform an applicant that it is unwilling to make a loan. In many situations it is required to either give the applicant the reasons for its refusal to make the loan or inform the applicant of his

right to ask for such reasons. In the case of a business loan such as this, upon written request of the applicant, it must state the reasons.

In this case, Dr. Hooper did not ask Barnett for advice about his proposed investment (A 4 and T 117). Dr. Hooper was given full control of the loan proceeds (A 4 and T 118). Barnett had no way of knowing what Dr. Hooper and Mr. Hosner planned to do with the money. The First District holding requires Barnett to volunteer defamatory information about its depositor, Mr. Hosner, because he might intend to use the loan proceeds improperly.

The public policy in Florida of not allowing one to pry into the affairs of another was expressed when the citizens adopted Section 23 of Article I of the Constitution in 1980. That section provides:

> SECTION 23. Right of Privacy.-- Every natural person has the right to be left alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Although this provision of the Declaration of Rights of the Constitution of the State of Florida appears to be primarily directed against governmental intrusion, we believe that it also means that the people of Florida do not want their courts to require their banks to disclose to other

citizens their private financial affairs.

CONCLUSION

This court should approve the holding in Milohnich v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969), respecting the confidentiality of the financial affairs of the citizens of Florida. It should reverse the decision of the District Court of Appeal, First District, with directions to affirm the judgment of the trial court.

Robert P. Gaines
Beggs & Lane
Post Office Box 12950
Pensacola, Florida 32576
904/432-2451
Attorneys for petitioner

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing was delivered to Donald H. Partington, Esquire, 800 First Florida Bank Building, Post Office Box 12585, Pensacola, Florida 32573, and a copy mailed to J. Thomas Cardwell, Esquire, Post Office Box 231, Orlando, Florida 32801, on February 26, 1986.

Of counsel for petitioner