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 REPLY BRIEF

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ARGUMENT

Dr. Hooper's entire argument is based upon a false premise--that there was proof that Barnett knew that Hosner was engaged in defrauding Dr. Hooper. Not only was there absolutely no evidence that Barnett had any such knowledge, there was no evidence that Hosner did defraud Dr. Hooper.

Dr. Hooper has only one objection to our statement of the facts. He wishes to add the fact that in the conversation with Dr. Hooper, to which Barnett was not a party, Hosner told Dr. Hooper that money was needed that day for Dr. Hooper's investment. There was no evidence that the loan was used for any other purpose.

The record does not reveal what was done with the loan proceeds, except that Dr. Hooper endorsed the check that was made out solely to him, that Dr. Hooper turned the check over to a representative of Hosner and that the check was deposited in one of Hosner's accounts at Barnett. There was absolutely no evidence to show what Hosner did with the money.

As far as reliance upon a confidential relationship with Barnett is concerned, the record shows that Dr. Hooper had previously made a tax shelter investment with Hosner that, at the time of the loan in question, had apparently produced a substantial tax saving for Dr. Hooper (T 129-130). It was no doubt because of that transaction that Dr. Hooper did

not take the trouble to make any inquiry whatsoever to Barnett as to how it felt about the transaction (T 131).

The bank cases upon which Dr. Hooper relies that found against the bank involved fraudulent conduct by a bank official. They would not be applicable even if Hosner was shown to be guilty of perpetrating a fraud upon Dr. Hooper unless the bank officer had actual knowledge that the bank would benefit from a fraud being perpetrated on the customer.

The only new case cited by Dr. Hooper is Johnson v. Davis, 480 So.2d 625 (Fla. 1985). Neither the confidentiality of bank records nor any duty owed by a third party who becomes aware of a fraudulent transaction was involved in that case. The purchasers of a house sued the sellers for breach of contract, fraud and misrepresentation in actively concealing a defect in the roof. This court affirmed a finding by the district court of appeal that there was such a misrepresentation that would have justified the return to the purchasers of their deposit payment.

We have previously pointed out that in the first case relied upon by Dr. Hooper the court found actual fraudulent concealment by the bank officer who had a personal financial interest in the company that was to benefit from the loan proceeds. We refer to our discussion of Richfield Bank and Trust Company v. Sjogren, 309 Minn. 362, 244 N.W.2d 648 (1976), that begins on page 7 of our main brief.

We have also pointed out the differences between this case and the next case heavily relied upon by Dr. Hooper, First National Bank in Lenox v. Brown, 181 N.W.2d 178 (Iowa 1970). In our discussion of that case that begins on page 10 of our main brief, we pointed out that there was no requirement on the bank in that case to reveal anything confidential because the encumbrances in question were matters of public record. The bank officer handling the matter also knew that the loan proceeds would be used to improve the position of the bank--a fact that is not present in this case.

Dr. Hooper brushes over the fact that another case relied upon by the District Court of Appeal, First District, reaches an opposite result. In Tokarz v. Frontier Federal Savings and Loan Association, 33 Wash.App. 456, 656 P.2d 1089 (1983) the judgment in favor of the lending institution was affirmed. One of the points made by the court was that there had been no inquiry by the borrower, a factor that is also present in this case.

Finally, Dr. Hooper conveniently overlooks the provisions of the regulations under the Equal Credit Opportunity Act that are applicable to his loan. He attempts to avoid the clear provisions of the regulations discussed on page 13 of our main brief that require a bank to disclose the specific reason for refusing to make a loan upon a proper inquiry by

the loan applicant.

CONCLUSION

A bank officer should not be required to decide whether a jury is going to find the peculiar circumstances that require disclosure and therefore hold the bank liable to a loan applicant or will find that the peculiar circumstances did not exist and will hold the bank liable to the depositor whose expectations of confidentiality have been violated. The only rule that can be followed in the real world of banking and business is the one of confidentiality in the vast majority of situations with only the few narrow exceptions that have been recognized by Florida law. The rule of confidentiality should not be changed. The decision of the District Court of Appeal, First District, should be reversed with directions to affirm the judgment of the circuit court.

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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 March 31, 1986.

Robert P Nelson

Of counsel for petitioner