SUPREME COURT OF FLORIDA

CITIZENS NATIONAL BANK AND TRUST COMPANY, HENRY W. HANFF, MELVIN C. DRAFT, AUSTIN L. FILLMON, PANDURANG Z. KAMAT, LESTER MALLETT, JAMES M. MARLOWE, DENNIS L. MURPHY, RALPH W. SHANNON, THOMAS D. STELNICKI, in their individual capacities and as directors,

Petitioners,

vs.

LOUE E. STOCKWELL, JR. and CAMILLE L. LAROSE,

Respondents.
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CASE NO. 85,923

District Court of Appeal,
2d District - No. 94-03217

Discretionary Proceeding to Review a Decision of the Second District Court of Appeal

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Respondents' Brief on the Merits

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

The Respondents/Plaintiffs, Loue Stockwell and Camille L. LaRose, will be referred to as "Stockwell & LaRose." The Petitioners/Defendants, Citizens National Bank and Trust Company, Henry W. Hanff, Melvin C. Draft, Austin L. Fillmon, Pandurang Z. Kamat, Lester Mallett, James M. Marlowe, Dennis L. Murphy, Ralph W. Shannon, Thomas D. Stelnicki, in their Individual Capacities and as Directors, will be referred to collectively as "Citizens." The Office of the Comptroller of the Currency will be referred to as "the OCC." The following reference symbols will be used:

"R" -- indicates the page numbers in the Record on Appeal to the Second District.

"A" -- indicates the page numbers in the appendix to this brief.

Citations to material appearing in the Record on Appeal to the Second District will also contain parallel cites to the appendix of this brief.

STATEMENT OF THE FACTS AND OF THE CASE

Respondents, Stockwell & LaRose, offer the following statement to provide this Court with essential facts which were omitted from Citizens' initial brief. This statement will also clarify certain mischaracterizations of Stockwell & LaRose's position in this matter.

In February 1988, the OCC gave Citizens authority to organize a national bank. (R-55; A-3). This authority gave Citizens the ability to enter into contracts for construction, employment of officers and other tasks related to opening a

national bank. Later that year, Stockwell & LaRose, who were and are stockholders of Citizens, began contract negotiations with Citizens for employment as its executive officers. (R-55; A-3). On April 28, 1988, eight months before the bank actually opened for business and before the stock was sold, both Stockwell & LaRose entered into employment contracts with Citizens. (R-55-56; A-3-4). These contracts were later amended by addenda dated November 15, 1990. (R-55-56; A-3-4). Both agreements called for ten year terms of employment, commencing February 25, 1988. (R-56; A-4).

Stockwell & LaRose were aware of the National Bank Act and agreed to a clause in their contracts that permitted termination without cause. (R-55; A-3). Paragraph 8 stated that:

> This agreement shall terminate upon the first to occur of the following: ... (e) Termination by the bank without cause, including termination in the event of merger, acquisition or consolidation of the Bank, provided that in such event the Bank shall pay to Executive an amount equal to Executive's base salary (based on Executive's base salary in effect on the date of termination) for the remainder of the term of the Employment Agreement payable in equal monthly installments over the balance of the term of this agreement, or in lump sum, in the discretion of the Executive. (R-77-78, 87-88,A-25-26, 35-36).

The contract also contained provisions for stock options and other benefits which would accrue to Stockwell & LaRose even if their employment was terminated before the end of the ten year period. (R-74-75, 84-85; A-22-23, 32-33). The contracts were hardly the "golden parachutes" described by Citizens. Stockwell & LaRose's base salaries were only $45,000 per annum for

LaRose and $60,000 per annum for Stockwell with a modest 7% raise each year after the bank attained profitability. (R-74-75, 84-85; A-22-23, 32-33).

The employment contracts were acknowledged by the Board of Directors of Citizens. (R-57; A-5). The OCC reviewed the contracts in August, 1993, and approved their form, including the severance provisions and their compliance with 12 C.F.R. § 7.5220. (R-56-57; A-4-5).

Stockwell & LaRose faithfully performed their duties as executive officers of Citizens. (R-56; A-4). During their tenure as executive officers, Stockwell & LaRose were approached by Steve Duckworth ("Duckworth") concerning various business deals. (R-57; A-5). Duckworth was a close personal friend of Henry W. Hanff ("Hanff"), the Chairman of the Board of Citizens. (R-57; A-5). Hanff requested that Stockwell & LaRose meet with Duckworth and consider bringing him into Citizens as a director. (R-57; A-5). Stockwell & LaRose opposed any involvement with Duckworth. (R-57; A-5).

Stockwell & LaRose were later subpoenaed to a grand jury investigation into Duckworth's activities. (R-58; A-6). Hanff suggested that Stockwell & LaRose should attempt to be excused from their subpoenas. (R-58; A-6). Stockwell & LaRose did not seek an excuse and testified before the grand jury. (R-58; A-6). Hanff was unhappy with Stockwell and LaRose for not seeking to be excused from testifying. (R-58;A-6) Hanff was also unhappy because Stockwell and LaRose voiced concerns over his violation of the Bank Control Act (R-58;A-6).

At all times material to the complaint, Southtrust Corporation and Southtrust Bank of Pinellas County (collectively, "Southtrust") and Citizens were engaged in merger negotiations. (R-58; A-6). Southtrust offered to purchase the stock of Citizens for a certain price per share if Southtrust were required to assume the existing employment contracts. (R-58; A-6). Southtrust offered a higher price per share if the stock could be purchased without the assumption of Citizens' existing employment contracts. (R-58-59; A-6-7).

At a special meeting of the Board of Directors on September 2, 1993, Citizens notified Stockwell & LaRose that their employment was terminated without cause. (R-59; A-7). Citizens requested that Stockwell & LaRose execute releases in exchange for partial payments of the amounts due under the severance provisions. (R-59; A-7). Stockwell & LaRose refused to accept the partial payments and sign the releases. (R-59; A-7). Citizens then failed to pay Stockwell & LaRose the wages, severance pay and benefits required by their employment contracts. (R-59; A-7).

Stockwell & LaRose filed an action against Citizens alleging breach of contract, breach of implied covenant of good faith, tortious interference, conspiracy, retaliatory discharge and a shareholder's derivative action for declaratory relief. (R-1-31, 53-93; A-1-41). As officers of the bank, Stockwell & LaRose expressly did not challenge their termination, but only challenged Citizens' failure to pay severance benefits called for in their employment contracts. Citizens filed a motion to dismiss on the grounds that the National

Bank Act, 12 U.S.C. § 24 (Fifth) (1989 & Supp. 1993) precluded all of Stockwell & LaRose's claims. (R-138-45).

The trial court reluctantly granted the motion to dismiss as to all counts. (R-329; A-42). The trial court found that Count V, for retaliatory discharge, could not be founded on 28 U.S.C. § 1875 because that section does not contemplate a cause of action for retaliation for appearing as a witness before a grand jury. (R-329; A-42). The court found all other counts to be precluded by operation of the National Bank Act, as argued by Citizens. (R-329-330; A-42-43).

The trial court based its decision upon the holding of *International Bank of Miami v. Bennett*, 513 So. 2d 1294 (Fla. 3d DCA 1987), *cert. denied* 485 U.S. 988 (1988). (R-330; A-43). The trial court noted that "[w]hile Judge Jorgenson's dissent in that case seems the better reasoned and the more consistent with a free enterprise economic system, this court is bound by the doctrine of stare decisis to apply the decision of the majority." (R-330; A-43). Thus, the trial court held that none of the other counts stated a cause of action pursuant to the operation of the National Bank Act. (R-330; A-43). Stockwell & LaRose declined to amend the complaint, stipulated to the entry of a final order of dismissal with prejudice, and timely filed an appeal to the Second District[1].

A unanimous three-judge panel of the Second District reversed the trial court's dismissal of Count I, the count alleging breach of the employment contracts. The Second District held that the appeal presented a single issue:

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[1] Stockwell & LaRose did not appeal the dismissal of Count V for retaliatory discharge pursuant to 28 U.S.C. § 1875.

"Whether federal statutes and regulations permit a national bank to enter into a contract with an employee and thereafter ignore the terms of the contract which provided for termination benefits." (A-47). The Second District disagreed with *Bennett* and held that the National Bank Act does not address the issue of severance benefits. (A-49). Furthermore, the Second District held that it was "logical and just that the bank officer may enforce any and all reasonable terms and conditions contained in the employment agreement." (A-49-50). The Second District found the holding in *Bennett* to be unreasonable in light of clarifying regulations under the National Bank Act and certified conflict to the Court. (A-50). Citizens petitioned the court for a writ of certiorari based upon the certification of conflict.

The Second District also affirmed the trial court's dismissal of Counts III, IV, VI and VII. Although the Appellate Rules do not provide for the filing of a cross petition under the present circumstances, on July 14, 1995, Stockwell & LaRose filed a notice of their intention to argue error in the Second District's affirmance of the dismissal of the foregoing counts.[2]

SUMMARY OF ARGUMENT

Citizens repeatedly mischaracterizes the plaintiffs' claims as challenging the *termination* of Stockwell & LaRose. Stockwell & LaRose's claims arise from various grounds, none of which challenge Citizens' right to terminate Stockwell & LaRose. National bank officers have the right to enter into employment

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[2] Stockwell and LaRose do not seek review of the affirmance of the dismissal of Count II.

contracts on reasonable terms. Stockwell & LaRose entered into freely negotiated employment contracts with Citizens which specifically permitted their termination without cause and provided for severance benefits in the event of such termination. The provisions were reasonable, providing Stockwell & LaRose with compensation for the unexpired term consistent with their salary levels.

An important national banking regulation, found at 12 C.F.R. § 7.5220, clarifies the intent of the National Bank Act. The cases holding that severance benefits are not enforceable either precede 12 C.F.R. § 7.5220 or fail to consider its effect. The only reported cases considering 12 C.F.R. § 7.5220 uphold the enforceability of severance benefits. Defendants' reliance *on International Bank v. Bennett*, 513 So. 2d 1294 (Fla. 3d DCA 1987), *cert. denied* 485 U.S. 988 (1988) is misplaced because that case is factually distinguishable and did not address the impact of 12 C.F.R. § 7.5220. Furthermore, Citizens' argument that the OCC is withdrawing the regulation is misleading because the regulation is still in effect, and even if withdrawn, the current state of law will not change, as recognized by the OCC.

Stockwell & LaRose are not attempting to achieve indirectly what the National Bank Act prevents them from achieving directly. The National Bank Act precludes Stockwell & LaRose, as officers, from suing Citizens for wrongful termination for general damages. In contrast, Stockwell & LaRose sued for freely negotiated severance benefits which were approved by both Citizens'

Board and the OCC. The benefits were the product of free negotiation between the parties. Stockwell & LaRose are not attempting to achieve a wrongful termination action through the "back door." Stockwell & LaRose are merely asking the bank to honor its reasonable and freely negotiated contractual obligations.

The original intent of the National Bank Act of 1874 must be considered in light of the 1971 regulations promulgated by the OCC. The regulation in question has not been withdrawn by the OCC and is entitled to due deference as representing the current state of the law. National banks and their officers are sophisticated and may negotiate reasonable contractual terms which do not impinge upon the national bank's right to terminate the officer without cause. Once such agreements have been entered, both parties should be bound. National banks should not be permitted to negotiate an attractive severance package and then dishonor that commitment once the bank officer has been terminated without cause. Such a result is not fair or equitable and is not in harmony with the basic tenets of contract law.

Allowing terminated officers to enforce the severance provisions of their contracts will not impede national banks' ability to terminate incompetent officers and jeopardize the stability of national banks. National banks who cannot afford to pay or prefer not to pay severance benefits can choose not to offer such benefits--as long as they forthrightly do so during contract negotiations and such benefits do not become a part of the bank officer's contract. By refusing to

enforce severance provisions, courts would make it more difficult for national banks to obtain qualified bank officers. Qualified and experienced bank officers will be reluctant to work for national banks who are free to ignore any and all severance benefits no matter how sincerely they were contracted for at the time of employment. The National Bank Act should not allow national banks to offer employment contracts with negotiated severance benefits while secretly keeping their fingers crossed behind their backs.

The Second District erred in affirming the dismissal Count III (tortious interference), Count IV (conspiracy), Count VI (a shareholder's derivative action for declaratory judgment and other relief for breach of fiduciary duty by the directors), and Count VII (a shareholder's derivative action for declaratory judgment and other relief for failure to comply with corporate requirements and material omissions). The National Bank Act's authorization for national banks to terminate employees "at will" cannot be interpreted as eliminating all other contract or common law rights. If the National Bank Act were construed as broadly as the Second District has held, national bank officers would forfeit all of their contractual and employment rights at the national bank door. This result is not the intent of the National Bank Act, nor would it be beneficial to the banking industry. The National Bank Act, when interpreted in light of its clarifying regulations, should not destroy a bank officer's rights as a stockholder or his or her rights as an individual to sue third parties for their wrongs.

ARGUMENT

I. National bank officers have the right to contract for severance benefits on reasonable terms pursuant to the authority of a regulation promulgated under the National Bank Act and cases interpreting that regulation.

The National Bank Act has a long legislative history, beginning in 1874. National Banking Act of 1874, ch. 106, § 8, 13 Stat. 101 (1874) . The applicable section of the Act states that national banks "have the power...[t]o elect or appoint...officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at their pleasure, and appoint others to fill their places." 12 U.S.C. § 24 (Fifth). That provision has remained unchanged since the original 1874 enactment.

In 1971, under the authority of the National Bank Act, the OCC promulgated 12 C.F.R. § 7.5220. This section states that: "The board of directors of a national bank, pursuant to paragraph fifth of 12 U.S.C. § 24, may enter into employment contracts with its officers and employees upon reasonable terms and conditions." 12 C.F.R. § 7.5220. This regulation was originally published only in the Comptroller's Manual for National Banks and other similar manuals. 36 Fed. Reg. 17,000 (1971). However, as explained in the Federal Register at the time this regulation was codified in the Code of Federal Regulations:

> These rulings, which interpret and apply the laws and regulations relating to national banks and general principles of prudent banking, have become of increasing importance not only to national banks but to persons dealing with national banks and to the public generally. The Comptroller has accordingly concluded

> that the public interest requires the publication of these rulings in the Code of Federal Regulations.

Id.

This regulation expressly cites 12 U.S.C. § 24 and authorizes national banks to enter into reasonable employment contracts. This 1971 regulation by the OCC was an attempt to restrict the draconian results of a broad reading of the National Bank Act. Without the guidance of this regulation, the National Bank Act could be interpreted as disallowing any type of enforceable right under an employment agreement. The OCC promulgated this regulation to clarify the statutory mandate.

Only four reported cases, including the Second District's opinion on appeal in this case, have interpreted 12 C.F.R. § 7.5220. In *First National Bank of Danville v. Reynolds*, 491 N.E. 2d 218, 219 (Ind. App. 1986), the First National Bank of Danville ("Danville Bank") employed George Reynolds as its president for a fixed period under a written employment contract. Reynolds chose to resign from employment before the end of the contract term. *Id.* at 220. Danville Bank refused to pay the severance benefits contemplated by the employment contract. *Id.* Reynolds sued Danville Bank and the bank moved for dismissal pursuant to Section 24 of the National Bank Act. *Id.* The trial court denied the motion to dismiss and Danville Bank appealed. *Id.*

The appellate court held that the National Bank Act did not invalidate the severance pay provisions of Reynolds' contract. *Id.* The court placed great weight on the interpretive regulation at 12 C.F.R. § 7.5220, which had been in

effect since 1971. *Id.* Applying what the court called "rudimentary principles of statutory construction," it found Danville Bank's position to be indefensible. *Id.* at 222. The appellate court even considered assessing costs against the Danville Bank in light of the complete lack of merit to the appeal. *Id.* at 223. Although *Reynolds* is somewhat distinguishable because Reynolds resigned from his position, the court placed great weight on 12 C.F.R. § 7.5220 and stressed the bank's duty to apply the clear meaning of the regulation. *Id.* at 222. The court did not decide whether the severance benefits would be payable if Reynolds had been terminated.

Schmidt v. Park Avenue Bank, N.A., 558 N.Y.S. 2d 779 (N.Y. Sup. Ct. 1990) also cites 12 C.F.R. §7.5220. In *Schmidt*, the Park Avenue Bank entered into a written employment contract with Gaillard Schmidt as Executive Vice-President. *Id.* at 779. The contract provided for severance pay upon termination. *Id.* Schmidt alleged in his complaint that various actions of the bank resulted in his constructive termination. *Id.* Park Avenue Bank refused to pay any severance benefits and Schmidt filed suit. *Id.* Park Avenue Bank filed a motion to dismiss for failure to state a cause of action pursuant to the National Bank Act. *Id.*

Park Avenue Bank argued that the National Bank Act allowed the bank to dismiss officers without incurring any liability and the liquidated damages clause in the employment contract impermissibly limited the bank's ability to terminate its officers. *Id.* at 780. Schmidt, however, pointed to 12 C.F.R. § 7.5220 and its express provision allowing banks and officers to enter into reasonable

employment contracts. *Id.* Schmidt differentiated between cases dealing with a bank's power to discharge and cases dealing with the payment of severance benefits after discharge. *Id.* Schmidt argued that payment of severance benefits is a "reasonable term and condition" of such an agreement, as authorized by 12 C.F.R. § 7.5220. *Id.*

The appellate court agreed with Schmidt and held that Schmidt stated a cause of action. *Id.* at 780. As required, the court accepted Schmidt's allegations of termination as true for the purpose of deciding the motion to dismiss. The court considered this issue from the perspective of an officer who had been terminated -- not one who resigned. *Id.* at 780. Thus, the court faced the potential conflict between 12 C.F.R. § 7.5220 and the National Bank Act and determined that no conflict existed.

The court noted that the National Bank Act has been consistently interpreted to allow a national bank to discharge an officer "without incurring liability for breach of contract or wrongful termination." *Id.* The court further noted that the cases on this issue decided prior to the 1971 regulation are silent as to the issue of severance benefits. *Id.* Although the bank was free to terminate Schmidt without fear of liability for wrongful termination, the court held that the bank could not avoid its contractual liability for severance benefits. *Id.*

The only other case citing 12 C.F.R. § 7.5220 is *Ewert v. Drexel National Bank*, 649 N.E. 2d 487 (Ill. App. 1995). Ewert was the president and chief operating officer of Drexel National Bank. *Id.* at 488. Ewert and Drexel Bank

entered into a three year employment contract providing for a salary of $100,000 per year. *Id.* The contract permitted Drexel Bank to fire Ewert at any time without cause. *Id.* However, the contract also contained severance provisions which provided that even if terminated early, Ewert would be entitled to receive his full salary under the employment contract as severance pay. *Id.*

Drexel Bank terminated Ewert after less than three months of employment. *Id.* Drexel Bank continued to pay severance benefits for some time and then ceased payments under the authority of the National Bank Act. *Id.* at 489. The court held that the National Bank Act precluded a suit for wrongful termination but did not prohibit contract provisions which provide for severance benefits. *Id.* The court agreed with the trial court judge's remark that "...the issue is whether the bank is responsible for living up to obligations..." *Id.* at 490.

The *Ewert* court carefully considered the interaction of the National Bank Act and its clarifying regulation 12 C.F.R. § 7.5220. *Id.* at 491. The court went on to distinguish the result in *Copeland,* finding that the result was now far less persuasive in light of 12 C.F.R. § 7.5220 promulgated in 1971. *Id.* at 492. Finally the court considered, discussed and applied the reasoning of *Reynolds* and *Schmidt. Id.* The court concluded that an officer of a national bank has the right to contract for severance benefits in a written employment contract. *Id.*

Citizens' only response to the persuasiveness of *Ewert* is that "[t]he *Ewert* court relied on *Schmidt* and *Reynolds, with no independent analysis...*" (Citizens' Brief on the Merits, p. 28) (emphasis in original). In actuality, the court's

analysis was thorough, and a reading of the opinion belies Citizens' argument that *Ewert* contains no independent analysis. *Ewert* re-states the bank's arguments, considers the National Bank Act and its regulations, distinguishes the cases cited by the bank, analyzes *Reynolds* and *Schmidt* and explains their applicability. *Id.* at 491-93. Citizens' dismissal of *Ewert* as containing no "reasoning" or "independent analysis" is a fairly lame attempt to avoid a persuasive authority in a strikingly similar factual situation. *Ewert* is on-point and in harmony with the Second District's analysis on this issue.

Any other cases involving this issue either pre-date the 1971 regulation at 12 C.F.R. § 7.5220 or completely disregard its effect. The *Bennett* opinion, which is in conflict with the Second District's decision below, does not discuss the impact of 12 C.F.R. § 7.5220. The *Bennett* court's disregard of this relevant regulation casts doubt upon its holding. When the interpretation of a statute such as the National Bank Act is at issue, it is always appropriate to refer to a clarifying regulation. *Koshlan v. Helvering*, 298 U.S. 441, 445 (1936). *Bennett* did not give full consideration to all of the applicable law. Under the circumstances, *Bennett* should not be given weight as controlling or even persuasive authority. *See, e.g., Ewert v. Drexel National Bank*, 649 N.E. 2d 487 (Ill. App. 1995) (holding that the decision in *Copeland v. Melrose National Bank*, 173 N.E. 898 (N.Y. App. 1930) was not as persuasive given the promulgation of 12 C.F.R. § 7.5220 in 1971).

II. 12 C.F.R. § 7.5220 does not circumvent the National Bank Act by allowing national bank officers to "indirectly" sue for wrongful termination or damages for early termination.

Citizens repeatedly argues that national bank officers should not be permitted to "obtain *indirectly* -- through the guise of suing for 'severance' benefits -- the unpaid compensation that they could not obtain *directly* through a suit for 'damages' for early termination." (Citizens' Brief on the Merits, p. 9) (emphasis in original). Citizens asserts that this principle is what differentiates cases such as *International Bank of Miami v. Bennett*, 513 So. 2d 1294 (Fla. 3d DCA 1987) from the Second District's decision in this case and other cases cited by Stockwell & LaRose. Citizens contends that suits for damages for early termination and suits for freely contracted severance benefits are two different ways of expressing the same cause of action. (Citizens' Brief on the Merits, p. 9).

According to Citizens, the seminal decision on this point is the 1930 decision in *Copeland v. Melrose National Bank*, 241 N.Y.S. 429 (N.Y. App. 1930), *aff'd* 173 N.E. 898 (1930). The New York Supreme Court held that a dismissed national bank officer could not recover severance benefits under an employment contract. *Id.* at 430. The court reasoned that allowing recovery under a severance provision would essentially permit the result forbidden by the National Bank Act. *Id.*

However, this decision was rendered 41 years before the promulgation of 12 C.F.R. § 7.5220, which clarified the interpretation of the National Bank Act.

This regulation has an undeniable effect upon the interpretation of contract issues under the National Bank Act. As noted by the Illinois court in *Ewert v. Drexel National Bank*, 649 N.E. 2d 487, 492 (Ill. App. 1995), the *Copeland* decision is "not now persuasive even in the State of New York, after the enactment of the current regulation pursuant to the National Bank Act which allows a national banking organization association to enter into reasonable contracts with its employees," citing 12 C.F.R. § 7.5220. The Second District, in the decision below, also distinguished cases following *Copeland* based upon their failure to consider the effect of 12 C.F.R. § 7.5220. (A-49).

Copeland also considered severance provisions in employment agreements to be *ultra vires* and in violation of the restrictions of the National Bank Act. *Copeland*, 241 N.Y.S. at 431. *Copeland's* conclusion that severance pay agreements violate the restrictions of the National Bank Act is questionable in light of the late clarification provided by 12 C.F.R. § 7.5220. *Copeland* also stated that enforcing severance provisions "would be to countenance a patent subterfuge designed to circumvent the law." *Id.* at 430. Characterizing freely negotiated severance benefits as a "patent subterfuge" is a clear departure from the implications of 12 C.F.R. § 7.5220 and the case law interpreting that provision. It is also contrary to our society's basic belief in freedom of contract.

Considering the facts in this case, Citizens is actually the party attempting a subterfuge. Citizens and Stockwell & LaRose entered into a freely negotiated employment contract permitting termination without cause. However, Citizens

agreed to pay severance benefits as part of the written employment agreement. Stockwell & LaRose relied upon these terms of the contract, accepted employment and served faithfully until terminated. Once terminated, Citizens then refused to pay the promised severance benefits. The clear subterfuge in this case is not by Stockwell & LaRose who merely negotiated mutually agreeable severance benefits, but upon Citizens who enticed Stockwell & LaRose with severance benefits which they apparently had no intention of honoring. There is an element of deceit in the bank's conduct.

Citizens' arguments that permitting severance benefits will effectively thwart national banks' ability to terminate bank officers is without merit. (Citizens' Brief on the Merits, p. 12). Citizens contends that national banks will face the same liability in actions for severance benefits as they would in actions for breach of an employment contract, as forbidden by the National Bank Act. (Citizens' Brief on the Merits, p. 12). However, permitting national bank officers to contract for severance benefits does not thwart national banks' ability to terminate their officers. National banks are still free to terminate their officers, but are obligated to pay any agreed upon severance benefits. The amount of severance benefits paid and the potential impact on the bank are completely within the control of the bank. National banks can choose to limit their liability for severance pay if they deem necessary by refusing to agree to such benefits or limiting the amounts of such benefits at the time of entering into the employment contract. However, banks which agree to pay severance benefits to

entice employment of one unwilling to work without such benefits should not be able to disavow them later when such benefits become payable. The interpretation urged by Stockwell & LaRose does not force national banks to pay severance benefits, nor does it deprive banks of their right to terminate an officer without cause. It only forces them to live up to their freely negotiated commitments.

III. Citizens' attacks on 12 C.F.R. §7.5220 and the Second District's public policy analysis are without merit.

Citizens' attacks on the Second District's decision below are two-pronged. Citizens challenges the Second District's reliance on 12 C.F.R. § 7.5220 and challenges the court's public policy analysis. First, Citizens argues that 12 C.F.R. § 7.5220 is "entitled to no weight in this proceeding whatsoever." (Citizens' Brief on the Merits, p. 18). Citizens cites an announcement in the Federal Register that the OCC "intends to *withdraw* this ruling." (Citizens' Brief on the Merits, p. 18) (emphasis in original). From this statement, Citizens concludes that this regulation is entitled to no weight.

However, Citizens' reasoning fails in two respects. First, the OCC has announced an intention to withdraw this rule but has not yet withdrawn the rule. The rule continues to be in full force and effect as 12 C.F.R. § 7.5220. In fact, the OCC has requested comments on the withdrawal, indicating that a final determination has not been made. 60 Fed. Reg. 11924. Until the OCC issues its final ruling on this matter, no weight can be given to this announcement of

intention to withdraw. It is axiomatic that this regulation is still in full force and effect until officially withdrawn, particularly since the regulation may not be withdrawn at all.

Secondly, even if the regulation is withdrawn, the withdrawal does not affect the current state of the law. The OCC stated in a comment specific to § 7.5220 that this ruling is being removed only because it is "unnecessary to reiterate this standard." 60 Fed. Reg. 11930. Furthermore, the OCC was clear that the withdrawal of this regulation was not intended to change the law on this issue in any way. *Id.* The OCC stated:

> The OCC's proposed removal or transfer of these sections does not imply any alteration of the underlying authority for national bank activity. The interpretive rulings the OCC proposed to remove or transfer are grounded in statutory authority which remains unchanged. Unless otherwise noted, these proposed changes to part 7 are not intended to effect any change in the substance or influence of the interpretive rulings beyond that described in this preamble.

Id. Thus, force and effect of 12 C.F.R. § 7.5220 remains unchanged. Citizens' characterization of 12 C.F.R. § 7.5220 as "obsolete" has no basis in any of the authority Citizens has cited. (Citizens' Brief on the Merits, p. 22) The only absolute feature in this case is the gloss that Citizens asks this court to put on the National Bank Act. That gloss may have been practical in 1874, when America was still recovering from the civil war, but it is clearly obsolete today.

This announcement by the OCC actually strengthens the impact of the standard set out in 12 C.F.R. § 7.5220. The OCC is considering eliminating § 7.5220 only because it deems the regulation unduly repetitive of standards

already set out in existing *statutory* authority. Thus, the OCC takes the position that the power of national banks to enter into employment agreements on reasonable terms in grounded in the statutory authority of the National Bank Act itself. 60 Fed. Reg. 11930.

Citizens' other arguments regarding the relative weight to be given an "interpretive ruling" carry little persuasive authority given that the substance of this interpretive ruling is firmly grounded in statutory authority. *Id.* The withdrawal of this regulation, if it ever occurs, does not change the substance or interpretation of existing law. The principle of law that national banks have the ability to contract with their officers on reasonable terms exists and will continue to exist in full force and effect.

Citizens also argues that the Second District has improperly drawn upon its own view of what makes good banking policy. (Citizens' Brief on the Merits, p. 17). However, Citizens presents no evidence that the Second District acted in contravention of legislative intent. Divining legislative intent is one of the tasks courts routinely undertake. The Second District noted that the National Bank Act did not address the issue of severance benefits. (A-49). Nothing cited by Citizens has identified any legislative authority to the contrary. The Second District's ruling does not conflict with any express statements of legislative will. Nor does the decision nullify Section Fifth of the National Bank Act, which still remains in full force and effect by prohibiting actions for wrongful termination or breach of contract for early termination. In fact, the Second District expressly

rejected Citizens' policy arguments finding them to be in contravention of the legislative intent. (A-50). The Second District preserved the right of a national bank to terminate an officer without cause, but construed the National Bank Act to make it less harsh and mean so that a bank officer is not stripped of all rights for working for a national rather than a state bank.

IV. Public policy and the legislative intent of the National Bank Act favor permitting national bank officers to contract for severance benefits in their employment agreements.

The purpose of Section Fifth of the National Bank Act was to give national banks the discretion to terminate an officer without fear of liability for wrongful termination or breach of contract based upon early termination. This interpretation has not been questioned by any of the authorities cited. However, to assume the purpose of this section was also to prevent any claims for freely negotiated severance benefits is a very large leap of logic. It is unlikely that severance benefits were a common feature of the banking employment world of 1874.

Congress intended to protect the national bank's ability to terminate an officer without fear of liability for wrongful discharge or damages for breach of contract based upon early termination. Thus, Congress protected the national banks against causes of action which they could not control. If a national bank entered into an employment agreement for a definite period, a discharged officer could bring such actions but for Section Fifth of the National Bank Act.

However, protecting the national bank from the results of its own contract negotiations is another matter. Discharged bank officers have no claim to any severance benefits *unless* the bank, through arm's length negotiations, previously agreed to pay such benefits. National banks who fear that large severance benefits would endanger their safety and stability have a responsibility to negotiate for lesser severance benefits or no severance benefits at all. A fundamental principle of contract law is that contracts are law made by the parties themselves. A national bank will not be bound by any contractual provisions it has not freely taken upon itself.

The effect of 12 C.F.R. § 7.5220 was merely to confirm the ability of national banks and their officers to enter into freely negotiated employment contracts on reasonable terms. Both national banks and their officers are sophisticated parties who are able to understand the consequences of the contracts they enter. National banks are not compelled to contract to pay severance benefits. However, once national banks have promised severance benefits as part of an employment package, they should not be permitted to disavow those benefits.

Principles of fairness and equity dictate that an employer should not be permitted to promise severance benefits and then choose to ignore their duty to pay such benefits when they become payable. National bank officers accept employment in reliance on such offers and should be permitted to enforce their reasonable expectations. To allow national banks to contract for severance

benefits and then escape their liability for such benefits would be to countenance a fraud by the banks. Such a result is not equitable, is not in accordance with established public policy, and is not required to effectuate the purposes of the National Bank Act.

As noted by the Second District, an interpretation that prohibits contracting for severance benefits may actually harm the banking industry. (A-50). Talented banking professionals will be wary of leaving secure employment for a position at a national bank knowing the bank can refuse to pay severance benefits. This built-in financial insecurity for bank officers may lead to a reluctance on the part of qualified and experienced officers to accept employment with national banks. The promise of lucrative severance benefits will not lure experienced bank officers who know the promises are illusory.

In response to the argument that Citizens' interpretation will actually hurt the banking industry, Citizens notes that national banks have not yet ground to a halt as a result. (Citizens' Brief on the Merits, p. 29). However, the same can be said for banks which have honored their severance pay provisions. The state banking system is alive and well, even though its officers have rights to sue for benefits and damages for breaches of employment contracts. This fact lays bare the utter speciousness of Citizens' argument that the Second District's opinion is a threat to the national banking system.

Citizens also argues that national banks will fear discharging any officers knowing that all the officer must do is "plead a 'sympathetic' case -- whether true

or not -- and then embroil the bank in years of disruptive and expensive litigation." This argument is completely without merit. Any rights of a discharged officer would be based upon the mutually agreed upon terms and conditions of the employment agreement. National banks are sophisticated enough to protect themselves through their employment contracts. If a bank honors its contractual obligations there is no cause for litigation. It is Citizens' callous disregard of its freely negotiated obligations that precipitated this dispute - not Citizens' condescending notion that Stockwell and LaRose, who organized and profitably ran the bank for years, are trying to plead a "sympathetic case."

National banks may need some protections for their right to discharge bank officers. However, national banks do not need to be protected from freely negotiated contractual terms of their own choosing. National banks and their officers should be free to contract for severance benefits. Such a result is contemplated by fundamental principles of contract law and the free enterprise system. Forcing national banks to honor their contracts for severance benefits is the most equitable way to resolve this issue while still preserving the national bank's rights under the National Bank Act.

V. The National Bank Act does not preclude Plaintiffs' additional claims.

The Second District improperly affirmed dismissal of plaintiffs' Counts III, IV, VI and VII.[3]

[3] Stockwell and LaRose do not seek review of the affirmance of the dismissal of Count II.

The most important point about Count III is that it is not directed against the bank. Instead, Stockwell and LaRose sue two of their fellow stockholders and directors on the theory that for their own pecuniary gain and not in the furtherance of the interest of the bank, wrongfully, personally interfered with the employment relationship between the bank and Stockwell & LaRose, and induced the bank to terminate their employment agreements. Count IV, conspiracy, merely adds the other directors and fellow stockholders, and alleges that they together participated in a conspiracy to interfere with Stockwell & LaRose's employment to further their own personal pecuniary interests, and not in the interest of the bank and its other stockholders. The bank is not exposed to liability as a result of these counts, so the National Banking Act simply does not apply. The National Banking Act cannot be construed to strip officers of their common law rights to sue persons or entities other than the bank. Counts VI and VII are stockholder derivative suits. They are brought by Stockwell & LaRose in their capacity as *stockholders*, not in their capacity as bank officers. These counts are not directed against the bank. Instead, they are brought in the name of the bank against individual wrongdoers. Because these counts are not directed against the bank, and are not brought by Stockwell and LaRose as officers of the bank, they should not be precluded by the National Banking Act.

In dismissing the foregoing four counts, the Second District unnecessarily and improperly eliminates Stockwell and LaRose's rights as *stockholders.* A bank stockholder should not forfeit his or her rights simply because he or she

becomes a bank officer. Furthermore, the Second District's holding improperly prohibits a bank officer from suing third parties who unlawfully induced the bank to sever the officer's employment relationship. The Second District's dismissal of these counts goes far beyond what is necessary to preserve a national bank's right to terminate a bank officer without cause. It immunizes abusive and illegal conduct on the part of third parties, including other stockholders and directors of a bank.

The National Bank Act cannot be construed as eliminating all of a national bank officer's common law rights. It is well established that statutes in derogation of the common law are strictly construed. *See, e.g., Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977); *City of Tampa v. Braxton*, 616 So. 2d 554, 555 (Fla. 2d DCA 1993). Courts will not interpret a statute to displace common law rights any further than is necessary. *Carlile*, 354 So. 2d at 364. A statute designed to change the common law must be clear and unequivocal or the presumption is that no change was intended. *Id.* Thus, the National Bank Act's authorization for national banks to terminate employees at will cannot be interpreted as eliminating any other contract or common law rights. This conclusion is bolstered by the affirmation of contract rights by the OCC in promulgating 12 C.F.R. § 7.5220.

The Second District based its affirmance of the dismissal of Counts III, IV, VI and VII on the fact that these counts "challenge the decision to terminate the Appellant's employment or are based on facts which surround that decision." (A-

50). However, the clear thrust of the allegations in not a challenge of Citizens' decision to terminate Stockwell & LaRose. Each count seeks to *enforce against third parties* a contractual or common law right that is not precluded by any express provision of the National Bank Act.

If the National Bank Act were construed as broadly as the Second District has indicated, national bank officers would have to forfeit all of their contractual and employment rights at the national bank door. National bank officers would be powerless to control any aspect of their employment. This result is not the intent of the National Bank Act, nor would it be beneficial to the banking industry. The National Bank Act, when interpreted in light of its clarifying regulations, cannot destroy all of a person's rights based on their status as a national bank officer.

Count III states a cause of action for tortious interference with Stockwell & LaRose's business relationship with Citizens by individual shareholders. Other courts have considered this issue and held that national bank officers can state a cause of action for tortious interference. *Kozlowsky v. Westminster National Bank*, 86 Cal. Rptr. 52, 55 (Cal. Ct. App. 1970); *Kemper v. Worcester*, 435 N.E. 2d 827, 830-31 (Ill. App. 1982). Although the bank may be privileged to discharge Stockwell & LaRose at any time, the National Bank Act does not protect a third party who unjustifiably induces the termination. *Kozlowsky*, 86 Cal. Rptr. at 55. Furthermore, the issue of whether the individual defendants were privileged because of their positions as directors of the bank is a defense that they will have the burden of establishing, but does not affect the

determination of whether the complaint states a cause of action. *Kemper,* 435 N.E. 2d at 830.

Count IV states a cause of action for conspiracy by corporate officers to commit tortious interference. *See Albritton v. Gandy*, 531 So.2d 381 (Fla. 1st DCA 1988); *Sloan v.* Sax, 505 So.2d 526 (Fla. 3d DCA 1987). As stated previously, the bank may be privileged to discharge its officers, but third parties are not immune from actions for tortious interference. *Kozlowsky*, 86 Cal. Rptr. at 55. Again, the issue whether the individual defendants were privileged because of their positions as directors of the bank is a defense which defendants may raise, but does not prevent Stockwell & LaRose from stating a cause of action. *Kemper,* 435 N.E. 2d at 830.

Counts VI and VII state a shareholder's derivative cause of action for the directors' breach of fiduciary duty and failure to comply with corporate requirements. Such claims are uniquely derivative in nature and stand independent of the plaintiff's other actions. *See Alario v. Miller*, 354 So. 2d 925 (Fla. 2d DCA 1978). The bank's privilege to discharge its officers does not extend to immunize the bank from a cause of action by Stockwell and LaRose in their capacity as *shareholders. See Kozlowsky*, 86 Cal. Rptr. at 55. In essence, a derivative action is a suit by the bank against its directors, and cannot be barred by the National Bank Act.

None of the above referenced counts are barred by operation of the National Bank Act. Each count alleges a cause of action separate and distinct

from the bank's decision to terminate Stockwell & LaRose. The privilege to terminate bank officers granted to national banks by the National Bank Act cannot be interpreted to preclude the types of actions alleged in Counts III, IV, VI and VII.

CONCLUSION

Citizens urged the Second District and urges this Court to construe the National Bank Act in a way that makes the Act unnecessarily mean. It does not have to be so. The purposes of the Act can be preserved with the kinder, gentler construction given it by the Second District and the other courts that have considered the matter in light of 12 C.F.R. §7.5220. Citizens' attempt to portray this as a threat to the national banking system is hollow and unrealistic. The Second District's opinion preserves the right of a national bank to terminate an officer without cause, and preserves the freedom of parties to contract, which is one of the basic organizing principles of our society. The Second District's holding as to Count I should be affirmed. *Bennett* should be overruled.

However, in affirming the dismissal of Counts III, IV, VI and VII, the Second District extinguished rights that should not be extinguished by the National Bank Act. These rights include the individual rights of Stockwell and LaRose to sue third parties who are responsible for harming them; as well as their rights as stockholders to pursue derivatively third parties who have harmed the bank. These causes of action should not be extinguished by the National

Bank Act, and this court should reverse the Second District's affirmance of their dismissal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. mail to Gary L. Sasso, Esq. and Sylvia H. Walbolt, Esq., P.O. Box 2861, St. Petersburg, Fla. 33731 this 14 day of August, 1995.

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