

2011 WL 8191586 (Okl.Dist.) (Trial Pleading)  
District Court of Oklahoma.  
Oklahoma County

Danny L. SELLERS, Successor Co-Trustee of the Imogene W. Sellers Trust, Plaintiff,

v.

FIRST ENTERPRISE BANK, and John Does and Persons Unknown, Defendants.

FIRST ENTERPRISE BANK, Third-Party Plaintiff,

v.

JPMORGAN CHASE BANK, N.A. and Danny Sellers, individually, Third-Party Defendants.

No. CJ20103030.

May 5, 2011.

**First Amended Petition**

Dunn Swan & Cunningham, [Sheldon B. Swan](#), OBA #11538, 2800 Oklahoma Tower, 210 Park Avenue, Oklahoma City, Oklahoma 73102, Telephone: (405) 235-8318, Telecopier: (405) 235-9605, Email: [sswan3435@aol.com](mailto:sswan3435@aol.com), Attorneys for Plaintiff.

Judge [Bryan C. Dixon](#).

**(Parties)**

1. Plaintiff, Danny L. Sellers, is now, and at all times mentioned in this petition was, a resident of Roff, Pontotoc County, Oklahoma. Plaintiff is a Successor Death Co-Trustee of the Imogene W. Sellers Trust dated May 26, 2004. At all times mentioned in this petition, Imogene W. Sellers, now deceased, was a resident of Oklahoma City, Oklahoma County, Oklahoma. The Imogene W. Sellers Trust empowers Plaintiff to prosecute these claims in favor of the Trust.

2. Defendant, First Enterprise Bank (“Defendant”), is now, and at all times mentioned in this petition was, a corporation engaged in the banking business and incorporated under the laws of the State of Oklahoma, with its principal place of business located in Oklahoma City, Oklahoma County, Oklahoma.

3. Defendants John Does and Persons Unknown (“Individual Defendants”) are Defendants that are Board Members, President, and employees of Defendant, First Enterprise Bank, and may be residents of Oklahoma County. The names of the directors, officer, and employees of the Defendant, who are responsible for the events and happenings referred to in this Petition and caused the damage to the Trust, are unknown to Plaintiff at this time.

4. Plaintiff brings suit against Defendant and Individual Defendants to recover the amounts paid out of Imogene W. Seller's Trust bank accounts and certificates of deposit on forged checks and statements. Defendant's bank bears liability for facilitating forgery, breach of fiduciary duty, aiding and abetting fiduciary wrongdoing, negligence, and breach of its contract with its special depositor when it paid such items without any valid order from the Trust, and without the Trust's knowledge or consent.

**(General Allegations)**

5. Imogene W. Sellers (“Imogene”) was married to Lonnie Warren Sellers. There were two children of their union, Danny L. Sellers (“Danny”) and Lonnie Gene Sellers. (“Lonnie”).

6. During their marriage, Imogene and Lonnie Warren Sellers acquired assets including a home, bank accounts, and certificates of deposit.
7. Lonnie Warren Sellers died on July 30, 2003, survived by Imogene and leaving all of his assets to her.
8. At the time of Lonnie W. Sellers, Sr.'s death, Imogene had on deposit with Defendant two bank accounts and three certificates of deposit. Imogene from time to time deposited sums of money into the bank accounts and/or renewed the certificates of deposit under the customary and ordinary rules and regulations applicable to banking institutions.
9. On May 26, 2004, Imogene, as settlor, entered into the Imogene W. Sellers Revocable Trust dated May 26, 2004 (the "Trust") coupled with a Pour-Over Will.
10. The Trust was prepared by attorney Barry T. Rice. Imogene was designated trustee of the Trust, and Danny and Lonnie were designated successor co-trustees of the Trust in the event of Imogene's death, resignation, or written statement of inability to manage affairs from any individual named Attorney-in-fact of Imogene. Imogene was the sole beneficiary of the Trust until her death.
11. Imogene funded the Trust with her two bank accounts and three certificates of deposit by assignment. Specifically, on May 26, 2004, Imogene wrote a letter to Defendant directing Defendant to assign certain accounts (consisting of the two bank accounts and three certificates of deposit) to the Trust.
12. Imogene was an **elderly** women, who died on December 21, 2010 after this lawsuit was filed by Plaintiff. Due to a stroke, Imogene has difficulty writing and thus has a distinctive signature, as can be seen from her signature on the May 26, 2004 letter to Defendant.
13. On May 27, 2004, Imogene, as Trustee of the Trust (hereinafter "Imogene Trustee"), opened two Trust bank accounts with, and became a special depositor of, Defendant. One account was a Trust checking account, numbered XXXXXXXXX, and the other account was a Trust money market account, numbered XXXXXXXXX. Both Trust accounts were located at Defendant's bank. The signature cards, deposit agreements and trust certificates used to open the Trust accounts had the distinctive signature of Imogene, on the front. During this same time, Imogene Trustee transferred her three \$10,000 certificates of deposit to the Trust, which were specifically placed by Defendant's bank in the name of the "Imogene W. Sellers Trust".
14. Defendant's bank promised and agreed, among other things, to hold the deposited Trust monies for the special account of the Trust and to repay the monies on the proper order and purpose of the Trustee. Under the agreement, the special account was to be debited only for checks properly drawn in accordance with the signature card. Withdrawals were permitted only by check bearing the distinctive signature of Imogene Trustee, and/or subsequently the signature of Lonnie Co-Trustee or Danny Co-Trustee.
15. The Trust duly performed all the terms and conditions of the agreement to be performed by the Trust.
16. At various times during 2004, the Trust had on deposit with Defendant monies in excess of \$245,000.00, which Defendant duly received for deposit in the name of the Trust and consisted of two bank accounts and three certificates of deposit. (Schedule of Trust Checking Account, Exhibit "1" hereto; Schedule of Trust Money Market Account, Exhibit "2" hereto.)
17. Specifically, Defendant, in consideration of the sum of \$10,000 paid to Defendant's bank, issued a certificate of deposit numbered 4058 to the order of the Trust (not Imogene individually), for the sum of \$10,000, whereby Defendant agreed to pay that amount plus interest three months after the date of the surrender of the certificate of deposit, properly endorsed by the Trust. Said certificate was originally issued to Imogene in September 6, 1988.

18. Defendant, in consideration of the sum of \$10,000 paid to Defendant's bank, also issued a certificate of deposit numbered 1804260 to the order of the Trust (not Imogene individually), for the sum of \$10,000, whereby Defendant agreed to pay that amount plus interest three months after the date of the surrender of the certificate of deposit, properly endorsed by the Trust. Said certificate was originally issued to Imogene in November 9, 2001.

19. Defendant, in consideration of the sum of \$10,000 paid to Defendant's bank, also issued a certificate of deposit numbered 7005042 *to the order of the Trust* (not Imogene individually), for the sum of \$10,000, whereby Defendant agreed to pay that amount plus interest twenty four months after the date of the surrender of the certificate of deposit, properly endorsed by the Trust. Said certificate was originally issued to Imogene in March 4, 2002.

20. All three certificates were expressly automatically renewable, non-negotiable, and non-transferable, and were located at Defendant's bank. All three original certificates of deposit are still in the possession of the Trust.

21. From this point forward, Imogene Trustee maintained the checking account, money market account, and certificates of deposit *in Defendant's bank in the name of the Trust*, with authority given on that date for withdrawals from the accounts by the Trustees of the Trust.

22. When Imogene's health continued to decline, Lynn Marie Davis ("Davis") was hired to care for Imogene. Imogene suffered from several physical ailments and took numerous medications. As a caretaker at Imogene's house, Davis provided Imogene with medications and performed grocery shopping and other various odd jobs around the home.

23. Imogene had difficulty writing legibly due to a stroke so on occasion she would sign a Trust check and have Davis fill in the date, payee and amount of the check to pay for groceries and household bills. Davis did not have authorized access to the Trust checkbook or Trust certificates of deposit, or permission to sign Trust checks or statements to surrender payment of Trust certificates of deposit with Defendant's bank.

24. Only after all funds were depleted from the Trust accounts, the Defendant became suspicious of irregularities in said accounts and contacted Adult Protective Services regarding Imogene on April 22, 2008.

25. On or about April 29, 2008, Adult Protective Services contacted Lonnie and advised him of possible forgery and **financial** exploitation of Imogene by Davis. As soon as knowledge of the possible forgery came to the Trust's attention, Lonnie and Danny reported to Defendant the irregularities found by Adult Protective Services and as to whether or not Davis had withdrawn any money from the Trust accounts. Lonnie and Danny demanded that Defendant exhibit the cancelled checks to the Trustee of the Trust.

26. In response, Defendant informed Lonnie and Danny that the Trust certificates of deposit had been surrendered for payment, and began the process of compiling bank records on the Trust bank accounts and Trust certificates of deposit. A new signature card dated April 30, 2008 was thereafter issued which had the signatures of "Danny L. Sellers" and "Lonnie Gene Sellers", as Co-trustees of the Imogene W. Sellers Trust, on the front. The April 30, 2008 signature card is stamped "This Card Supercedes all Others".

27. On April 29, 2008, Lonnie and Danny reported to the police department, City of The Village, Oklahoma County, Oklahoma, the possible forgery and **financial** exploitation of Imogene by Davis. On that same day, a police officer, accompanied by Lonnie and Danny, arrived at Imogene's home and observed Davis' termination as caretaker and removal from Imogene's home.

28. On May 1, 2008, the Investigation Division of the police department interviewed Imogene, Lonnie and Betty Hammond (Imogene's nurse). The investigation revealed that Davis was over-medicating Imogene with prescription drugs such that she was unable to manage her **financial** affairs. Until recently, Imogene had not seen the forged cancelled checks by Davis. Moreover,

until recently, the trustees of the Trust never received monthly Trust bank statements from Defendant because Davis intercepted and concealed said statements before they came to the attention of the impaired Imogene or Co-trustees.

29. Accordingly, Plaintiff did not discover the forgery and the fact the Trust checks and Trust certificates of deposit were paid by Defendant on unauthorized signatures and endorsements until the Defendant produced the bank records in response to the Grand Jury Subpoena (referenced below) and said bank records were produced to Plaintiff by the State prosecutor. Plaintiff could not, through the exercise of reasonable diligence, have discovered Davis' forgeries and misconduct prior to this time because of the nature of Davis' fraud and Defendant's facilitation of Davis' illegal conduct.

30. On May 7, 2008, the Investigation Division of the police department interviewed a cab driver named Kendall Fulk ("Fulk"). The investigation revealed that Davis requested the assistance of Fulk in cashing numerous forged checks at Defendant's bank. The forgery scheme was such that Davis would contact Fulk by phone for a cab ride and Fulk would take Davis to the Defendant's bank. Davis drew a check on the Trust account at Defendant's bank made payable to "Cash". Davis forged Imogene's (not Imogene Trustee's) signature. Fulk would then go inside his bank and cash the forged Trust check for Davis while she waited in the cab. Fulk's bank paid the cash to Fulk, and Defendant charged the amount against the Trust account. When Fulk returned, he would give Davis the cash and Davis would give Fulk a \$30 tip. Toward the end of the forgery scheme, Fulk attempted to cash four forged Trust checks for Davis at his bank (Chase). All of those checks were rejected.

31. The Investigation Division of the police department also interviewed a next door neighbor to Imogene, Lorraine Hammill ("Hammill"). The investigation revealed that Davis requested the assistance of Hammill in cashing numerous forged checks at Defendant's bank. The forgery scheme was such that Davis would ask Hammill to cash a Trust check at Defendant's bank. Davis drew a check on the Trust account at Defendant's bank made payable to "Cash". Davis then forged Imogene's (not Imogene Trustee's) signature. Hammill would then go inside the Defendant's bank and cash the forged Trust check for Davis. Defendant paid the cash to Hammill, charging the amount against the Trust account. When Hammill returned, she would give Davis the cash.

32. On May 13, 2008, the Investigation Division of said police department issued a Grand Jury Subpoena to Defendant for Imogene Trustee's bank records. The records were produced by Defendant on June 5, 2008 to the State Attorney General. A review of those bank records revealed that Davis presented forged hand-written statements to Defendant to surrender payment of the three \$10,000 Trust certificates of deposit.

33. Specifically, on August 7, 2007, Davis prepared a hand-written statement to Defendant, forged Imogene's (not Imogene Trustee's) signature to the statement, and presented it to Defendant for surrender of payment of Trust certificates of deposit numbered 4058 and 1804260. On August 10, 2007, Defendant, in violation of its contract with the Trust, and without any valid order from the Trustee and without the Trust's knowledge or consent, surrendered early payment of both certificates of deposit (with penalty). Payment of \$5,000 was made to Trust account numbered XXXXXXXXX, and payment of \$14,987.96 was made to Trust account numbered XXXXXXXXX. No part of the amount paid by Defendant's bank from the early surrender of the certificates of deposit have been received by anyone for the benefit of the Trust, for the reasons discussed below.

34. On November 6, 2007, Davis prepared a second hand-written statement to Defendant, forged Imogene's (not Imogene Trustee's) signature, and presented it to Defendant for surrender of payment of Trust certificate of deposit numbered 7005042: On November 9, 2007, Defendant, in violation of its contract with the Trust, and without any valid order from the Trustee and without the Trust's knowledge or consent, surrendered early payment of that certificate of deposit (with penalty). Payment of \$2,000 was made to Trust account numbered XXXXXXXXX, and payment of \$7,971.73 was made to Trust account numbered XXXXXXXXX. No part of the amount paid by Defendant's bank from the early surrender of the certificate of deposit have been received by anyone for the benefit of the Trust, for the reasons discussed below.

35. The investigation further revealed fraudulently endorsed and forged checks such that between October 15, 2004 and April 10, 2008, virtually all the Trust monies with Defendant's bank were withdrawn from the two Trust accounts in violation of the parties contract, and without any valid order from the Trust and without the Trust's knowledge or consent.

36. Even a casual inspection of the forged checks shows that the person who signed the checks "Imogene" was not the person who signed the signature card "Imogene Trustee". No part of the amount described below paid by Defendant's bank has been received by anyone for the benefit of the Trust.

37. Of the \$244,687.00, Davis and/or Cole are known to have made use of Trust checks totaling \$189,890.00 by forging Imogene's signature (individually) to the check after making "Cash", "Fulk" or "Cole" the payee and forging Imogene's endorsement (individually) on the back of the check. (Schedule of Trust Checking Account, Exhibit "1" hereto; Schedule of Trust Money Market Account, Exhibit "2" hereto.)<sup>1</sup>

38. Specifically, the investigation revealed that Fulk, the cab driver, cashed and charged to the Trust accounts sixty-seven (67) checks to which Imogene's signature was forged, for a total of \$84,435.00 between January 17, 2007 and April 3, 2008. Davis made use of these Trust checks by forging Imogene's signature (individually) to the check after making "Cash" or "Fulk" the payee and forging Imogene's endorsement (individually) on the back of the check. Fulk also endorsed the Trust checks and presented same for payment to his bank. Defendant honored the checks on presentation, and charged the sum of the forged checks to the Trust account. (Schedule of Checks Cashed by Fulk, Exhibit "3" hereto.)

39. The investigation revealed that Hammill, the next door neighbor, cashed and charged the Trust account thirty-seven (37) checks to which Imogene's signature was forged, for a total of \$43,850.00 between October 17, 2005 and June 15, 2007. Davis made use of these Trust checks by forging Imogene's signature (individually) to the check after making "Cash" the payee and forging Imogene's endorsement (individually) on the back of the check. Hammill also endorsed the Trust checks and presented same for payment to Defendant's bank. Defendant honored the checks on presentation, and charged the sum of the forged checks to the Trust account. (Schedule of Checks Cashed by Hammill, Exhibit "4" hereto.)

40. The investigation revealed Melissa Garcia ("Garcia"), Davis' granddaughter, cashed and charged the Trust account five (5) checks to which Imogene's signature was forged, for a total of \$1,175.00 between May 26, 2007 and June 8, 2007. All five checks cleared the Defendant's bank on June 15, 2007. Davis is believed to have made use of these Trust checks by forging Imogene's signature (individually) to the check after making Garcia the payee and forging Garcia's endorsement on the back of the check and presenting same for payment. Defendant honored the checks on presentation, and charged the sum of the forged checks to the Trust account. (Schedule of Checks Cashed by Garcia, Exhibit "5" hereto.)

41. The investigation revealed that Sheila Cole ("Cole"), a former caretaker of Imogene, cashed and charged the Trust account forty-three (43) checks to which Imogene's signature was forged, for a total of \$60,430.00 between October 15, 2004 and October 17, 2005. Cole made use of these Trust checks by forging Imogene's signature (individually) to the check after making "Cole" the payee and endorsing the back of the check and presenting same for payment to Defendant's bank. Defendant honored the checks on presentation, and charged the sum of the forged checks to the Trust account. The investigator was unable to locate Cole, who has an outstanding Oklahoma County arrest warrant against her, and believed to be deceased. (Schedule of Checks Cashed by Cole, Exhibit "6" hereto.)

42. In summary, the Trust money market account had \$45,100 wrongfully withdrawn from it. All of these Trust checks were made out to payee "Cash" or "Cole". The Trust checking account had \$144,790 wrongfully withdraw from it. The monies from the surrender of payment of the three Trust certificates of deposit are included in these amounts. Plaintiff still has possession of the three certificates of deposit. In paying the certificates of deposit and checks, Defendant breached its duty to the Trust, in that Defendant paid the certificates of deposit and checks and debited the amounts of them to the Trust accounts on the forged endorsement of Davis. No part of the amount paid by Defendant has been received by the Trust or anyone for the benefit of the Trust.

43. Upon information and belief, at least between October 15, 2004 and April 10, 2008, employee tellers of Defendant, routinely communicated with Davis, Fulk and Hammill about the Trust accounts and certificates of deposit, the payment of trust funds, insufficient funds, and knew or should have known that Davis was causing those issues when she, Fulk and/or Hammill presented Defendant with high-dollar forged checks for cash to Davis. These communications occurred despite Defendants' knowledge that Davis was not authorized to conduct banking business for the Trust, pursuant to the Trust account agreement with the Defendant.

44. Defendant and Individual Defendants failed to properly supervise its employee tellers, and failed to follow sound banking practices and compliance oversight, by allowing its employee tellers to take instructions regarding withdrawal of money from Trust accounts from an unauthorized person without ever confirming with its client, Imogene Trustee, the authority of that person to do so.

45. Defendant and Individual Defendants unauthorized communications with Davis, Fulk and/or Hammill, rather than with Imogene or Plaintiff - the persons authorized to take action with reference to the Trust accounts at Defendant's bank - enabled and facilitated Davis' scheme of forgeries, and her successful embezzlement and conversion of all of the funds from the Trust accounts.

46. Defendant engaged in unsound banking practices, such as obtaining unverified signatures on certificates of deposit as illustrated above, and its failure to adhere to and follow internal controls and to comply with written internal teller policies and procedures contributed to and enable Davis to perpetrate her forgeries and fraud against the Trust.

47. Defendant, through its bank officers and employees, had knowledge that the majority of withdrawals of trust funds from the Trust accounts, by non-customer on-us checks, which caused the Trust accounts to have insufficient funds, were for the benefit of Davis, Fulk and/or Hammill, who were not authorized signatories to the Trust accounts.

48. On May 8, 2009, Davis was charged (and ultimately pled guilty) to a 5-count indictment for various offenses including forgery and **financial** exploitation of a vulnerable **elderly** adult by a caretaker, in violation of 21 O.S. § 843.1.

49. On March 15, 2010, Plaintiff retained counsel and notified Defendant of the possible Trust claims for breach of contract and negligence against Defendant, and requested bank records and documentation.

50. After receiving the State prosecutor's files on this matter on March 22, 2010, Plaintiff duly demanded payment of the sum of \$189,890.00 charged to the Trust accounts, but Defendant refused, and still refuses, and no part of that sum has been paid to the Trust.

### **COUNT I -- FACILITATING FORGERY**

51. Plaintiff incorporates by reference paragraphs 1 - 50 of the Petition.

52. Defendant, pursuant to its account agreement with Plaintiff, knew that Imogene Trustee was the authorized signatory to the two Trust accounts and negligently failed to ascertain that the signatures on the forged checks were not the genuine signatures of Imogene Trustee under circumstances which reflect Defendants knew or reasonably should have known such checks and statements to surrender payment of Trust certificates of deposit should not be honored and required investigation due to the number, size, and amount of activity involved in the Trust accounts.

53. Defendant and Individual Defendants aided and assisted Davis and Cole in their forgeries by communicating with Davis, Fulk, Cole, Hammill and/or Garcia regarding the status of the Trust accounts and then by authorizing payment of the forged checks and certificates of deposit to Fulk, Cole, Hammill and Garcia for cash.

54. Defendant and Individual Defendants knew when certain of such forged checks were presented for payment that funds within the Trust Accounts were near deficient or insufficient.

55. Defendant and Individual Defendants' unauthorized communications with Fulk, Cole, Hammill and/or Garcia and its failure to verify Imogene Trustee's signature on checks and statements to surrender payment of certificates of deposit presented for large sums of money written to Fulk, Cole, Hammill and/or Garcia for cash assisted Davis and Cole in their forgeries and caused damage to Plaintiff in amounts totaling in excess of \$189,890.00.

56. As a result of said facilitating forgery, the Trust is entitled to recover from the Defendants all damages suffered by it as a proximate result thereof.

**COUNT II -- BREACH OF FIDUCIARY DUTY AND/  
OR AIDING AND ABETTING FIDUCIARY WRONGDOING**

57. Plaintiff incorporates by reference paragraphs 1 - 56 of the Petition.

58. Defendant owed a fiduciary duty to the Trust: (i) to ensure that payments made to a fiduciary were applied according to the Trust's purposes; (ii) to act in the utmost good faith toward the Trust; (iii) to disclose all material facts about the special accounts; (iv) to comply with all applicable banking laws, rules, and regulations; and (v) to conduct the banking business of Trust in a manner consistent with the best interests of the Trust and in accordance with the contractual obligations owed to the Trust.

59. By the conduct of the Defendant and Individual Defendants as more fully described hereinabove, the Defendant breached its fiduciary duty to the Trust.

60. Defendant and Individual Defendants are also liable for aiding and abetting Davis' breach of fiduciary duty as caretaker of Imogene Trustee.

61. Defendant and Individual Defendants knew they were dealing with a fiduciary and fiduciary funds of a Trust. In the instant case, the name on the signature cards, deposit account, and trust certificate includes the words "Imogene Sellers trustee for The Imogene Sellers Trust under Agreement dated May 26, 2004". Thus, Defendant is charged with notice of the potential trust nature of the funds. Moreover, Davis was hired to care for Imogene; Davis represented to Fulk and Hammill that she did not drive, and on numerous occasions asked Fulk and Hammill to drive her to the Defendant's bank to cash a check; on each such occasion, Fulk or Hammill and Davis would either go through the drive-through or enter the lobby of the Defendant's bank and Davis would present a check for cash to a teller; on each occasion, the teller would ask Fulk or Hammill to indorse the check because Davis was not a customer of the Bank and the employee teller was unable to verify Imogene's signature; at one point, the teller even asked Davis if she was married to Fulk; many of the checks that Davis presented to the Defendant's Bank for cash were for amounts that exceeded \$1,500.00; the teller never asked Davis for photo identification, never verified that Davis was a customer of the Defendant's Bank, never verified the signature/indorsement on the check with the signature card of Imogene, never asked Davis to indorse the check, and never refused to cash the check because Davis was a non-customer; on each such occasion, the teller would take the amount of cash from the teller drawer and deliver the cash to Davis, who would receive it; further, Davis, Fulk and/or Hammill would then exit the Bank.

62. Defendant and Individual Defendants knew that Davis was breaching her duty; notice is implied by the fact that Defendant contacted Adult Protective Services on April 22, 2008 regarding the **financial** exploitation of Imogene by Davis, and in the number, size, and amount of irregular activity in the Trust accounts.

63. Defendant and Individual Defendants substantially participated in Davis' wrongdoing and were aware of the eventual chronic insufficiency of the Trust's funds; Defendant and Individual Defendants knowingly charged the Trust accounts for non-trust purposes.

64. As a result of said breaches of fiduciary duty and aiding and abetting in fiduciary wrongdoing, the Trust is entitled to recover from the Defendants all damages suffered by it as a proximate result thereof.

### **COUNT III - NEGLIGENCE OR GROSS NEGLIGENCE**

65. Plaintiff incorporates by reference paragraphs 1 - 64 of the Petition.

66. Paying the monies in the special Trust accounts to an authorized signatory and/or endorser for Trust purposes was clearly part of the business of Defendant and Individual Defendants. It was the duty of Defendant and Individual Defendants to pay on checks drawn on it by the Trust when, but only when, the checks had the authorized signature and endorsement of the Trustee.

67. Defendant and Individual Defendants were negligent in dealing with the forged checks, which tended to and did aid in the cashing of the forged checks, and failed to exercise due and ordinary care in that regard. The checks were purported to have been made by Imogene individually but were a forgery and not made by the Trust, the Trustee or by the Trust's authority. Defendant and Individual Defendants were grossly negligent in paying the Trust monies to Fulk, Hammill, Cole and Garcia rather than the Trust, and allowing Davis to convert the special account monies from the Trust accounts.

68. Defendant and Individual Defendants were grossly negligent in their employment, supervision and/or training of its employees and/or failed to prevent their violation of applicable banking laws.

69. Because of such gross negligence, the Trust was damaged in an amount in excess of \$189,890.00, consisting of the lost Trust monies. The Plaintiff is also entitled to an award of punitive damages.

### **COUNT IV - VIOLATION OF UCC § 4-401/BREACH OF CONTRACT**

70. Plaintiff incorporates by reference paragraphs 1 - 69 of the Petition.

71. Defendant allowed charges against the special Trust accounts which did not bear the authorized signature required by the Deposit Agreement between Plaintiff and Defendant. Said charges are believed to exceed \$189,890.00.

72. Defendant charged Plaintiff's Trust accounts in violation of the agreement between Plaintiff and Defendant, said charges were not authorized by Plaintiff, were not payable in accordance with the agreement, and thus were not properly payable pursuant to [12A O.S. § 4-401](#).

73. Plaintiff demanded repayment of the forged checks and Defendant refused repayment.

74. Plaintiff has suffered damages as a direct result of Defendants violation of [12A O.S. § 4-401](#), believed to be in excess of \$189,890.00.

### **COUNT V -BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

75. Plaintiff incorporates by reference paragraphs 1 - 74 of the Petition.



76. When Plaintiff opened the Trust accounts at Defendant's bank, Plaintiff entered into an special account agreement with Defendant, thereby creating a special deposit of funds in a fiduciary account.

77. The special account agreement obligated Defendant to act in good faith and in accordance with the terms of the contract.

78. Defendant failed to act in good faith when it violated the express terms of the account agreement and routinely communicated with unauthorized persons regarding the Trust accounts.

79. Defendants and Individual Defendants routine communications with unauthorized persons regarding Plaintiff's account at Defendant's bank, specifically with Fulk, Cole, Hammill and/or Garcia, facilitated Davis and Cole's forgeries, fraud and conversion upon and against Plaintiff.

80. Defendant and Individual Defendants was negligent, and failed to exercise ordinary care and act in good faith when it routinely honored forged checks, for large sums of money, for the benefit of Davis and Cole.

81. Defendant and Individual Defendants failed to act in good faith and in accordance with the expectations of the parties when it wholly failed to examine for authenticity the signature on checks and statements to surrender certificates of deposit for thousands of dollars drawn on Plaintiff's account.

82. Defendant and Individual Defendants failed to act in good faith and to exercise ordinary care when it honored forged checks resulting in an insufficient balance to Plaintiff's accounts.

83. Plaintiff has suffered damages as a direct result of Defendants failure to act in good faith.

84. Defendant's failure to exercise ordinary care in its handling of Plaintiff's Trust accounts, its failure to examine checks for large amounts of money written to or for the benefit of Davis and Cole for authenticity, and its routine communications with Fulk, Cole, Hammill and/or Garcia, directly contributed to Plaintiff's loss.

85. Plaintiff prays for a judgment in its favor against Defendants in an amount to be determined at trial, plus punitive damages, interest, costs and fees.

#### **COUNT VI - VIOLATION OF OKLAHOMA BANKING CODE, 6 O.S. § 712**

86. Plaintiff incorporates by reference paragraphs 1 - 85 of the Petition.

87. Defendant and Individual Defendants communicated with Fulk, Hammill, Cole and/or Garcia concerning the Trust accounts at Defendant's bank, authorized the payment of forged checks to Fulk, Hammill, Cole and Garcia, for the benefit of Davis and Cole, knowing the amounts paid on those checks would result in deficient funds in Plaintiff's account, and willfully facilitated Davis and Cole's fraud upon Plaintiff.

88. Plaintiff prays for a judgment in its favor against Defendants for the sums equal to the amounts of such forged checks and unauthorized surrender of certificates of deposit, in an amount to be determined at trial.

#### **COUNT VII - EQUITABLE ACCOUNTING**

89. Plaintiff incorporates by reference paragraphs 1 - 88 of the Petition.

90. Defendant should be required to render an accounting to Plaintiff of all transactions and other activities they conducted with or on behalf of the Trust as depository bank, or while it stood in a fiduciary and confidential relationship with the Trust, including all monies paid to or for the benefit of the Trust, Davis, Fulk, Cole, Hammill or Garcia.

91. In the event that any other wrongdoings by Defendant is uncovered in connection with its accounting, Plaintiff prays for all appropriate relief, whether monetary or otherwise.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment against Defendant and Individual Defendants as follows:

- a. With respect to Counts IV and VI, Plaintiff prays for judgment for the amount of \$189,890.00 with legal interest on this sum;
- b. With respect to Counts I, II, III, and V, Plaintiff prays for judgment for compensatory damages and punitive damages against Defendant and Individual Defendants, in such amount as is appropriate and is proven at trial, but in an amount exceeding \$189,890.00;
- c. For an accounting by Defendant in the respects set forth in Count VII of this Petition;
- d. For recovery of its costs to the extent allowed by law, and for such other and further relief, whether legal or equitable, to which Plaintiff is entitled.

#### Footnotes

- 1 Heather Price, named as payee in a check described on Exhibit "1", is Davis' daughter.