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Brief for Appellee/Cross-Appellant Second Annual Benton National Moot Court Competition Briefs, 17 J. Marshall L. Rev. 1071 (1984)

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IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

No.

WILLIAM DUFFY,
APPELLANT/CROSS-APPELLEE
—vs.—
LINCOLN COUNTY STATE BANK
CORPORATION,
APPELLEE/CROSS-APPELLANT

On Appeal From the Appellate Court
of the State of Marshall

BRIEF FOR
LINCOLN COUNTY STATE BANK CORPORATION,
APPELLEE/CROSS-APPELLANT

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QUESTIONS PRESENTED

1. Whether the court below correctly held that the *Rylands v. Fletcher* rule of strict liability does not apply to Lincoln's maintenance of personal financial information in a computer.
2. Whether the court below correctly held that the maintenance of personal financial information in a computer is not an ultra-hazardous or abnormally dangerous activity.
3. Whether the court below erred in holding that a record-keeper, such as a bank, has a duty to its customers to hold financial records regarding its customers in confidence.
4. Whether, if such a duty is found to exist, the court below erred in holding that Lincoln breached this duty by making disclosure to the State of Marshall Securities Commission pursuant to an informal request of the Commission.
5. Whether the court below erred in holding that, due to the state of the art of computer technology and the difficulty of proving a breach, the doctrine of *res ipsa loquitor* should apply in establishing the negligence of Lincoln regarding disclosure of personal information stored in a computer.
6. Whether the court below erred in denying Lincoln's motion to dismiss Count II of Duffy's complaint regarding negligent disclosure of personal information through a computer.

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The opinion and judgement of the Circuit Court for the County of Lincoln, State of Marshall was rendered and entered on February 12, 1982. *Duffy v. Lincoln County State Bank Corporation*, No. 81-101 (Cty. Lincoln 1982). The Appellate Court of the State of Marshall entered its opinion and judgment on December 3, 1982. The Appellate Court of the State of Marshall entered its opinion and judgment on December 3, 1982. *Lincoln County State Bank Corporation v. Duffy*, No. 82-999 (Marshall 1982).

STATEMENT OF THE CASE

In this action the plaintiff William Duffy (Duffy) has appealed and the defendant Lincoln County State Bank Corporation (Lincoln) has cross-appealed from a decision of the Appellate Court for the State of Marshall. The Appellate Court reversed in part, affirmed in part and remanded a decision of the Lincoln County Circuit Court denying Lincoln's Motion to dismiss both counts of Duffy's complaint.

The facts which gave rise to this action are as follows. Duffy is a controlling shareholder of Baker Properties, Inc. (Baker), a publicly held corporation chartered under the laws of the State of Marshall. (R. 1). Nancy Barnes (Barnes), in her capacity as an attorney in the offices of the State of Marshall Securities Commission (Commission), investigated Duffy's purchase of the controlling interest in Baker in 1976. (R. 2). On March 26, 1981, a newspaper article concerning a plan by Baker's to reor-
⊥1 ganize caused the Commission to begin an⊥ investigation into Baker with Barnes as chief investigator. (R. 2). In the course of her investigation, Barnes wrote to banks operating in Lincoln County requesting information as to whether Duffy, Baker or any other known Baker shareholders maintained accounts at these banks. (R. 2).

The defendant Lincoln was one of the banks which received Barnes' informal request. (R. 2). A Lincoln executive informed Barnes that Duffy was a Lincoln customer, and at Barnes' informal request agreed to send Barnes a list of Duffy's personal account types and numbers. (R. 14). Although it is agreed that a correct search instruction was entered into Lincoln's computer, the system instead caused complete information detailing transactions from Duffy's personal accounts from January 15, 1981 to April 15, 1981 and other personal information to be automatically sent to Barnes. (R. 14).

Upon receipt of this information, Barnes noticed a $75,000.00 electronic fund transfer into Duffy's personal account from a Baker account in the First State Bank of Marshall recorded on January 20, 1981. (R. 2). The Commission then requested further information from Lincoln under a subpoena which Lincoln complied with. (R. 14). Uneasy about the investigation, Lincoln on June 11, 1981 cancelled a $150,000.00 line of credit which had been extended to Duffy in 1980. (R. 2, 14). Duffy alleges that, as a result, he was unable to exercise an option he held to purchase land for $140,000.00 until June 15, 1981 and that the day after the option had expired, a third party bought the land for⊥ ⊥2 $220,000.00. (R. 3). Later the Commission ended its investigation having found no impropriety on Duffy's part, and the Commission returned to Duffy his bank records. (R.14).

Thereafter, Duffy filed a two count complaint in the Circuit Court for the County of Lincoln. (R. 14). Count I alleges that Lincoln's use of a computer to maintain its customers' personal financial information is an ultra-hazardous or abnormally dangerous activity and that Lincoln is strictly liable for any harm flowing from such use. (R. 3). Duffy alleges that he was harmed by virtue of his inability to exercise his land purchase option and that he suffered severe emotional distress. (R. 4). Under this count, Duffy seeks damages against Lincoln of $80,000.00 for pecuniary loss and $750,000.00 for mental and emotional stress, plus attorney's fees and costs. (R. 4). Count II of Duffy's complaint alleges negligent disclosure of personal information which invaded Duffy's privacy rights and expectations of confidentiality in personal information. (R. 5). Duffy seeks the same damages in Count II as in Count I. (R. 5).

Lincoln filed a Motion to Dismiss Duffy's complaint, arguing that the State of Marshall does not recognize the use of computers to process information as an ultra-hazardous activity, and further that such use is not an ultra-hazardous activity since; (1) it is an activity commonly used in both the private and public sectors; (2) the use of computers to process information is necessary and valuable to society and that the value outweighs any possible harm a computer could cause by inadvertently releasing personal information; and, (3), it is⊥ necessary in order ⊥3 for a bank to effect its business and that as such, a computer is appropriately utilized for this purpose. (R. 6-7).

Lincoln further argued that Count II should be dismissed since the State of Marshall does not recognize a common law duty of a bank to protect customer records and no contract existed between Duffy and Lincoln relative to this duty. (R. 7). Lincoln also argued that even if a duty was found to apply, Duffy

had failed to allege sufficient facts constituting a breach of duty and that *res ipsa loquitor* did not apply. (R. 7).

Duffy filed a Response in Opposition to Lincoln's Motion to Dismiss, arguing that public policy required the adoption of strict liability for harm caused by computers used to process personal financial information and that public policy also required the adoption of a common law duty of confidentiality on the part of the bank. (R. 9).

The Circuit Court for the County of Lincoln denied Lincoln's Motion to Dismiss in a Memorandum Order by Judge G. B. Watkins dated February 12, 1982. (R. 10). The court, faced with two questions of law in a case of first impression, found; (1) that under the rule of *Rylands v. Fletcher*, strict liability should apply for public policy reasons against record-keepers who keep large quantities of sensitive, personal financial information in computer data banks; and, (2) that implicit in the imposition of strict liability is recognition of a bank's duty to its customers to act with care in maintaining this information. (R. ⊥411-12). The court further⊥ determined that there existed substantial ground for difference of opinion on the questions of law and that therefore an immediate appeal would advance the ultimate termination of the litigation. (R. 12).

The Appellate Court of the State of Marshall, Mink, Barry and Johnston, J. J. affirmed in part and reversed in part the denial of Lincoln's motions to dismiss by the court below and remanded the case in an opinion by Chief Judge Mink dated December 3, 1982. (R. 13). The court reversed the decision below denying the Motion to Dismiss as to Count I, reasoning, that as a matter of public policy, strict liability would place an unreasonable burden on record-keepers, impair the flow of information and have a deleterious effect on commerce. (R. 15). The court, therefore, held that the use of a computer to maintain personal financial information was not an ultra-hazardous or abnormally dangerous activity. (R. 15). The court affirmed the Circuit Courts' denial of Lincoln's motion to discuss as to Count II, holding that a bank has a duty to its customers to act with care in maintaining sensitive personal financial information concerning them. (R. 15). The court held further that the doctrine of *res ipsa loquitor* should apply in order to establish negligent disclosure of personal information through a computer, that Duffy's complaint would be sufficient if he alleged control by Lincoln over the instrumentality of the disclosure, and that but for Lincoln's negligence, this disclosure would not have occurred. (R. 16).

On April 15, 1983, this Court entered an Order Granting Leave to Appeal on Duffy's Petition for Leave to Appeal and Lincoln's Petition for Leave to Cross-Appeal.⊥ ⊥5

SUMMARY OF ARGUMENT

The rule of strict liability enunciated in *Rylands v. Fletcher* and its progeny is a doctrine with definite limitations on its scope of application. These limitations stem directly from the factual circumstances in which the doctrine was originally conceived and applied. The paradigm case in which *Rylands* strict liability has been applied involves a defendant's dangerous and inappropriate use of land which causes physical harm to an adjoining landowner in obedience to natural, physical laws. Even where there have been some slight variations from this paradigm, courts have uniformly required the elements of *physical harm* to a person or property which occurs because of the close *geographic relationship* between that person and defendant's activity, before such strict liability has been imposed.

The present case does not involve any physical harm to Duffy, nor is the harm occassioned by the geographic proximity of Lincoln's activity to Duffy. Indeed, Lincoln's activity of computer maintainence of personal financial information cannot physically harm bank customers, and any geographic relationship between Duffy and Lincoln's activity is irrelevant to any risk created. This court should reject such a revoluntionary expansion of *Rylands* strict liability as courts have consistently doen in the past.

Moreover, the application of strict liability is not justified under the original rule of *Rylands v. Fletcher* since the use of computers in storing financial or other personal information is not abnormal or inappropriate to the place where⊥ it is main- ⊥6
tained. This is true whether this court conceives of the "place where it is maintained" as the State of Marshall, the community of financial institutions, or the national community as a whole. Similarly, the Restatement of Torts, §§ 519, 520, do not allow application of strict liability to the present case, since Lincoln's activity is not ultra-hazardous, for it does not involve an extreme danger to others, nor is it clear that the risk cannot be eliminated by the exercise of due care.

Lincoln's use of a computer to maintain personal financial information also cannot be deemed abnormally dangerous and therefore strict liability cannot attach to this activity under the Restatement (Second) of Torts, §§ 519, 520. Section 520 of the Restatement (Second) of Torts sets forth several factors which must be considered in determining whether an activity is abnor-

mally dangerous. In this case these factors are not present, since: (1) there does not exist a high degree of risk of harm to the person, land, or chattels of another, and no risk of any physical harm resulting from Lincoln's use of a computer; (2) the likelihood of serious harm resulting from this slight risk is minimal; (3) it may be possible to eliminate any risk that exists; (4) the use of a computer to process customer information is a common usage, appropriate to a bank; and, (5) the value to the community of Lincoln's computerized information processing far out-
⊥7 weighs any dangerous attributes.⊥

Important public policy considerations strongly militate against the imposition of strict liability in the present case. Computer maintainence of large amounts of personalized information is a socially beneficial activity upon which the prosperity of the financial community and, to an increasing extent, our society, depend. The application of strict liability to this activity would place an unreasonable burden on all those engaged in computer maintainence of personal information, a burden many smaller entities and businesses would be unable to bear. Moreover, *Rylands* strict liability is applied to only the most dangerous activities. Any evaluation of the harms caused by such computer uses, and the balancing of the relevant economic consequences such liability would occassion, should be left to the legislature which is better equipped to handle such policy resolutions.

In addition, there are numerous aspects of the present case which compel the conclusion that strict liability should not be applied in the present case. First, it is possible to eliminate a substantial degree of the risk by the exercise of the utmost care in engineering, programming and maintaining the computer. Also, appellant faces no evidentiary problems in proving appellee's negligence. Finally, Duffy voluntarily encountered Lincoln's activity with full knowledge of the concomitant risks and his harm was brought about by the intentional intervention of a third party.

The Appellate Court was incorrect in concluding that a bank should be under a duty to keep financial information about its
⊥8 customers in confidence. Any expectation of privacy or⊥ confidentiality which a customer, such as Duffy, has in his financial records is forfeited when he discloses the information to a third party, the bank in the course of his bank transactions. Any check, financial statements and deposit slips contain information voluntarily given to the bank and are the business records of the bank and not the private papers or property of the customer. Having revealed information to the Lincoln County State

bank, Duffy assumed the risk of any subsequent disclosure and could not limit governmental access to that information. Therefore, Lincoln did not breach any duty owing to Duffy when it supplied information pursuant to a "request" by an investigator of the of the State of Marshall Securities Commission. Even if it is found that there is a duty arising from an implied contract of confidentiality, such a duty is qualified when, as in this case, there is an overriding duty on the part of the bank to disclose information in the public interest of effective law enforcement. And, in view of the policy considerations involved in weighing the competing interests of an organization's legitimate need for financial information against an individual's desire of confidentiality in that information, any adoption of a right to financial privacy should be done by the legislature and not the courts.

Even if it is found that there is a duty of confidentiality, the Appellate Court was incorrect in ruling that the doctrine of res ipsa loquitor applies. Duffy's complaint fails to state facts upon which it can be concluded or even assumed that Lincoln or its agent or servant was in⊥exclusive control of the instrumentality ⊥9 which caused the injury complained of. Likewise, the facts and allegations in the record fail to meet the requirements that there be facts and circumstances from which one can conclude that more often than not, an occurrence or accident of the type involved results from a failure to exercise reasonable care by the party in charge of the instrumentality. Mere assumption by the Appellate Court judge that in the state of the art of computer technology an incident such as occurred in this case happens only by the failure of those in charge to use due care, is not a valid basis on which to invoke the doctrine, and such a ruling should be reversed.

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT THE APPELLEE'S ACTIVITY OF MAINTAINING LARGE QUANTITIES OF PERSONAL FINANCIAL INFORMATION IN COMPUTERS IS NOT SUBJECT TO STRICT LIABILITY.

A. *Lincoln's activity falls outside the scope of the doctrine enunciated in Rylands v. Fletcher and its progeny.*

In rejecting the applicability of *Rylands* strict liability to Lincoln's activity, the Appellate Court for the State of Marshall relied on the limitations upon the breadth of the *Rylands v. Fletcher* doctrine. In order to better understand these limitations one must consider the origins of this type of strict liability.

Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), *aff'd* L.R. 3 H.L. 33 (1868), the seminal case for the application of strict liability to ultra-hazardous or abnormally dangerous activities, was decided as part of the English Common Law's ongoing efforts to
⊥10 provide a system a redress for unlawful⊥ interference with a landowner's right to the possession and quiet enjoyment of his land. *State of New Jersey DEP v. Ventron, et. al.*, slip op. (N.J. S. Ct. July 21, 1983). In *Rylands* defendant was found liable for damage done by water escaping into an adjoining landowner's mine. As with the more traditional causes of action, nuisance and trespass, liability for the damage was found without any proof of negligence on the part of the defendant. The *Ryland* court's extension of strict liability was based upon an analogy to the strict liability previously applied for damages caused by trespassing cattle, dangerous animals and "absolute" nuisances. Prosser, *The Law of Torts*, § 78 at 505. The close relationship between the liability imposed in *Rylands* and the more traditional causes of action for interference with a landowner's rights indicates that there are definite parameters upon the reach of this doctrine of strict liability.

This intimate relationship is further illustrated by the difficulty many courts have in distinguishing between them. *See* Comment; *The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, or Absolute Nuisance*, 1978 Ariz. St. L. J. 99. Moreover, a few courts, while explicitly rejecting the *Rylands* doctrine, nonetheless covertly apply the same principle under nuisance and trespass theories. Prosser, *supra*, § 78 at 509. The connection between these doctrines has led at least one commentator to suggest that *Rylands* liability should be termed "strict liability nuisance." *See* Comment, *The Rylands v.*
⊥11 *Fletcher Doctrine in America*, *supra*, at 108.⊥

Advertance to the cases imposing *Rylands* strict liability reinforces the factual constraints upon the application of this type of liability, since they invariably involve land usages and conditions which cause physical harm to an innocent party in a close geographic proximity. *See, e.g.*; *Cities Service Co. v. State,* 312 So.2d 799 (Fla. App. 1975) (settling pond for phosphate slimes).

In every one of the previous cases imposing strict liability to an ultra-hazardous or abnormally dangerous activity there have been the elements of *physical damage* caused by defendant's activity to one in close geographic proximity to that activity. Comment f to § 520 of the Restatement (Second) of Torts states that "[f]or an activity to be abnormally dangerous, not only must it create a danger of *physical harm* to others, but the danger must be an abnormal one. . ." (emphasis added). The ele-

ment of physical damage to plaintiff's person or property has consistently been required by courts before *Rylands* strict liability is applied. *See, e.g., Celebrity Studios, Inc. v. Civetta Excavating, Inc.,* 72 Misc.2d 1077, 340 NYS2d 694 (1973). In *Celebrity* the noise from defendant's construction activity caused the plaintiff, a tenant in an adjoining building, to sustain substantial economic harm. Although the court admitted that recovery would be allowed where such sound waves had caused physical damage, it refused to extend *Rylands* strict liability where, plaintiff's damages were non-physical or "intangible." *Id.* at 1079-80.

In the present case Duffy does not allege that Lincoln's activity caused him any physical harm; rather, Duffy asserts ⊥economic loss and mental and emotional distress. This is ⊥12
not the type of harm which is compensated by courts under the strict liability doctrine of *Rylands v. Fletcher*. The damages which would be sustained as a result of Lincoln's activity, if any, would not be the concrete, physical harm to person or property which has heretofore justified the imposition of strict liability under the *Rylands* doctrine, but a more ethereal, subjective harm, such as a loss of an element of privacy. The absence of any physical harm to appellant in the present action should compel this Court to decline to impose strict liability under the *Rylands* doctrine and further indicates the vast factual chasm between the present cause of action and all the previous causes which courts have deemed suitable for the imposition of such strict liability.

The vast majority of cases applying *Rylands* strict liability have involved defendant's dangerous and inappropriate use of land which causes physical harm to an adjoining landowner through the exercise of natural physical laws. While there has been some variation from this paradigm over the years, the factual differences have been slight. These variations primarily relate to the location of either plaintiff or defendant's activity. *See, e.g., McLane v. Northwest Natural Gas Co.,* 255 Or. 324, 467 P.2d 635 (1970) (plaintiff harmed while on defendant's land). Nevertheless, these cases all involve a *physical harm* to the plaintiff sustained by virtue of his *geographic proximity* to defendant's activity. Thus, these cases are significant, not so much for their variations, as for their consistencies with the paradigm case for the application of *Rylands* strict liability.⊥ ⊥13

Siegler v. Kuhlman, 81 Wash.2d 448, 502 P.2d 1181 (1972) is cited by some scholars as the most maverick case employing the *Rylands* doctrine since there the court applied strict liability to defendant's activity of transporting highly flammable sub-

stances in large quantities on a public highway. Yet, a closer look at *Siegler* evinces no far-reaching expansion of the *Rylands* doctrine. Significantly, the storage of such volatile substances in large quantities had previously been held to be an abnormally dangerous activity to which strict liability would apply. *Yommer v. McKenzie*, 255 Md. 220, 257 A2d 138 (1969). In addition, liability had been imposed for the storage of gasoline where plaintiff was harmed while on defendant's land. *McLane v. Northwest Natural Gas Co.*, 255 Ore. 324, 467 P.2d 635 (1970). Thus, *Siegler* does not signify a departure from the traditional limitations upon the application of the *Rylands* doctrine; rather, it represents a gradual extension of such liability to analogous factual situations closely resembling the instances where such liability has previously been applied.

Significantly, Siegler involved a *physical* harm to plaintiff brought into being by her close *geographic connection* to the defendant's activity. Certainly, *Siegler* cannot be held to justify the dramatic expansion appellant urges upon this Court in the present case.

Similar attempts at such a revolutionary expansion of the doctrine of strict liability first enunciated in *Rylands v. Fletcher* have been consistently rejected. *See, e.g., Coffey v. Dist. of Okla.*
⊥14 *County,* 547 P.2d 947 (Okla. 1976). In *Gaston v. ⊥Hunter,* 121 Ariz. 33, 588 P.2d 326 (Ariz. App. 1978), the court held that strict liability under §§ 519, 520 of the Restatement (Second) of Torts would not extend to the use of investigational drugs. In rejecting such an innovative expansion the court declared that, "[t]he law of abnormally dangerous activities traditionally contemplates a hazardous activity occurring in a specific place which causes harm to others in some geographic proximity." *Id.* at 341.

These cases strongly indicate that there are certain limitations upon the application of the *Rylands* doctrine of strict liability. The courts continued insistence on the elements of physical harm to plaintiff and a geographic relationship between defendant's activity and plaintiff suggests certain factual parameters outside of which strict liability is not justified under this doctrine. The present case does not involve physical harm to Duffy caused by Lincoln's activity. Moreover, there is no geographic relationship between Duffy and Lincoln's activity which allowed the harm to be sustained. The appellant's cause of action implies that strict liability under the *Rylands* principle is a doctrine without boundaries, with potential application to every area of human endeavor. The origins and previous applications of *Rylands* strict liability compel a contrary conclusion.

B. *Application of strict liability is not justified under the original rule of Rylands v. Fletcher or either the original or the revised Restatement of Torts.*

Application of strict liability is not justified in the present case under any of the three available standards. As ⊥15 the Appellate Court for the State of Marshall declared, "[h]owever narrowly construed, the rule of *Rylands* is not applicable to a computer user's liability." (R. 14.)

The principle that has emerged from *Rylands v. Fletcher* and its progeny is that strict liability will be imposed on a defendant when his activity damages another and is unduly dangerous and inappropriate to the place where it is maintained, in light of the character of that place and its surroundings. *See* Prosser, *Selected Topics on the Law of Torts,* 1954, 134-149. Thus, as the Appellate Court correctly noted, the focus in the inquiry of whether strict liability is to be applied in this particular case should not be on the tendency or likelihood of personal financial information to escape from the place where it is stored; rather, the emphasis should be on whether Lincoln's activity of maintaining such information is abnormal or inappropriate in character. (R. 14).

Certainly, the use of computers by financial institutions to store large quanities of information about its customers relating to their financial transactions with the bank cannot be viewed as being abnormal or inappropriate to the place where it is maintained. It is not abnormal for Lincoln to store such information in computers since financial institutions universally rely on computers to aid them in storing the voluminous and complex series of transactions that they participate in everyday. A determination of the appropriateness of Lincoln's activity would necessitate an identification of the character of the applicable surroundings to be considered. Any view of the applicable surroundings ⊥16 would seem to reinforce the notion that Lincoln's activity is an appropriate one, whether one considers geographic location, relative position in the business community or in the national community as a whole.

The use of computers in maintaining large quantities of personal financial information about its customers should not be considered a "non-natural" use of land since it is in no way "exceptional or unusual, considering the locality in which it is carried on." *Reter v. Talent Irrigation District,* 258 Or. 140, 482 P.2d 170 (1971). A plethora of courts have held that where the challenged activity is a common or typical one in the locale where it is carried on, *Rylands* strict liability will not be imposed. *See,*

e.g. McKenzie v. Pacific Gas & Elec. Co., 200 Cal. App. 2d 731, 19 Cal. Rptr. 628 (1962) (power line);

The original Restatement of Torts, §§ 519, 520 embraces the principle of *Rylands* but limits it to an "ultra-hazardous activity" of the defendant. The emphasis in cases decided under this standard is on the extreme danger of the challenged activity and the impossibility of eliminating it with the utmost care, rather than on the relation of the activity to its surroundings. Prosser, *The Law of Torts* § 78 at 512 (4th ed. 1971). In accordance with this more mechanical test, focusing primarily on the degree to which an activity is dangerous in an abstract and general sense, the use of computers to store personal information cannot justify the application of strict liability. There simply is not an extreme danger posed to persons or their property by such an
⊥17 activity. Furthermore,⊥the small danger that is present could be eliminated by better engineering, maintainance, programming or other checks on the release of such personal information.

Sections 519 and 520 of The Restatement (Second) of Torts revise this test and provide a number of factors to guide courts in deciding as a matter of law whether *Rylands* strict liability should be applied to the challenged activity. *Langan v. Valicopters Inc.,* 88 Wash. 2d 855, 861, 567 P.2d 218, 221 (1977). The Restatement (Second) of Torts § 520, Comment (f) states that "several of [the factors] will be required for strict liability."

Some of the factors included in the Restatement (Second) of Torts, § 520 are clearly not present in this case. A key factor, "the inappropriateness of the activity to the place where it is carried on," is lacking. Restatement (Second) of Torts, § 520(e). This factor embodies the non-natural limitation added by the House of Lords in the *Rylands* decision and therefore prevents an overly broad application of strict liability. *See Yommer v. McKenzie,* 255 Md. 220, 225, 257 A.2d 138, 141 (1969) (court emphasized that the inappropriateness of the activity was the most crucial factor). In *Dye v. Burdick,* 262 Ark. 124, 140, 553 S.W.2d 833, 840 (1977), the court refused to apply strict liability since the dam which burst was not inappropriate to its location.

In Cairl v. City of St. Paul 268 N.W. 2d 908 (Minn. 1978), the court refused to apply strict liability to high-speed chases by city police, since such an activity is not unusual or inappropriate
⊥18 in a metropolitan area. This line of⊥cases illustrates the underlying idea that strict liability applies only where activity is "out of place" such that "victims are particularly helpless in the face of danger against which they cannot, and should not be expected to take adequate precautions, and yet which may cause

them overwhelming loss." Reynolds, *Strict Tort Liability: Has Abnormal Danger Become a Fact?*, 34 Okla. L.R. 76, 82 (1981). In the present case, Duffy was free to forgo banking with Lincoln in order to avoid the risk that the computer would divulge any information. *See Gaston v. Hunter* 121 Ariz. 33, 48, 588 P.2d 326, 341 (Ariz. App. 1978) ("one who voluntarily encounters the dangerous activity, or is a participant in it, may not recover").

Another factor which is not present in this case is "the extent to which the activity is not a matter of common usage." Restatement (Second) of Torts § 520(d). The Restatement (Second) of Torts, § 520, Comment (i) states that an activity is "a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community." Where an activity is a common one, courts have held that strict liability is inapplicable. *See Chicago & North Western Railway Co. v. Tyler*, 482 F.2d 1007, 1009-10 (8th Cir. 1973) (soil conservation dams in universal use, therefore no strict liability). It is reasonable to expect that most people have information concerning them stored in at least one computer. *See* Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 Tex. L.R. 837, 838 (1971) (hereinafter "*Personal Dossier*"). Computers have become a⊥daily fact of life in to- ⊥19
day's society and their use in processing all types of information, including bank records, cannot be characterized as uncommon.

Along with the common use of computers has come a common understanding that computers, although highly efficient, are no more infallible than are the humans who construct and program them. This is significant in determining whether a computer malfunction, like the error in this case, constitutes an abnormal danger, since the "usual dangers resulting from an activity are not regarded as abnormal." Restatement (Second) of Torts, § 520, Comment (i). The "usual dangers" associated with computerized information processing include unauthorized disclosure of information either by active penetration of the system or by the kind of inadvertent error which occurred in this case. *See Personal Dossier*, at 863. Hence, the common use of computers for information processing militates against a finding that such an activity is abnormally dangerous.

Factor (f) of the Restatment (Second) of Torts, § 520 (1977) requires a weighing of the value of the activity to the community against "its dangerous attributes." Computers have become invaluable tools in almost all aspects of modern society and the many advantages provided by their use — including quicker and

less costly information management — far outweigh any potential danger involved.

Under factor (c) of the Restatement (Second) of Torts, § 520, the "inability to eliminate the risk by the exercise of reasonable care" must be considered. Where it is possible to elimi-
⊥20 nate the risk of harm, courts have held that the activity⊥cannot be deemed abnormally dangerous. *See Fleege v. Cimpl*, 305 N.W. 2d 409 (S.D. 1981) (pump in water which electrocuted swimmer could have been made safe, held, not abnormally dangerous and strict liability did not apply). In the present case proper computer engineering, programming or maintenance could have prevented the malfunction.

Comment (m) to the Restatement (Second) of Torts, § 520, states that "when safety cannot be attained by the exercise of due care, there is reason to regard the danger as an abnormal one." Conversely here, where the danger can be avoided, it cannot be characterized as abnormal.

The remaining two factors from § 520 require a consideration of whether there exists a high degree of risk of harm and the likelihood that the harm will be great. Comment (g) to § 520 requires the harm to be "major in degree" and states that "it is not enough that there is a recognizable risk of some relatively slight harm. . ."

The harm which can be considered is limited to that harm which is foreseeable. *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 921 (10th Cir. 1981). The "foreseeable orbit of harm" limits the extent of liability which can arise from an activity found to be ultra-hazardous. *Mazza v. Berlanti*, 206 Pa. Super. 505, 508, 214 A.2d 257, 259 (1965). It is not foreseeable that the inadvertent disclosure of one's banking records to an investigating state agency would ultimately result in the cancellation of one's line of credit. Although such a disclosure may compromise a customer's privacy interests, the likelihood of serious harm result-
⊥21 ing therefrom is minimal.⊥Moreover, the probability of such a disclosure taking place is not "major in degree". Rather, there exists only a slight chance that personal financial information will be accidentally disclosed and only a slight chance that such a disclosure will result in any serious harm. Although it is *possible* that serious harm could result to the customer, the *likelihood* of this occurring is not sufficient to create an abnormal danger which would justify the application of strict liability in this case.

Hence, evaluation of the six factors required by section 520 of the Restatement (Second) of Torts reveals that none are present in this case and that, therefore, there exists no abnormal

danger in Lincoln's use of a computer to process customer information. Accordingly, strict liability in tort under the Restatement (Second) of Torts § 519 cannot be applied.

C. *Important public policy considerations strongly militate against the imposition of strict liability.*

A balancing of the relevant social, political, economic and legal factors compels the conclusion that justice requires that Lincoln's activity not be subject to judicially imposed strict liability. If such liability is imposed on computer maintenance of personal financial information, it would make all entities such as the appellee insurers and impose upon them a burden which is beyond their capacity to bear. The use of computers in maintaining such information is practiced not only by large financial institutions but also by small Savings and Loans, already threatened with the specter of bankruptcy due to other economic pressures. In addition, many small businesses ⊥and nu- ⊥22
merous non-profit organizations such as hospitals and schools use computers in a similar fashion. To apply strict liability to such activities would, as the Appellate Court pointed out, impose an "unreasonable burden on record-keepers." (R. 15). In *Ferguson v. Northern States Power Co.*, 239 N.W.2d 190, 194 (1976), the court rejected *Rylands* strict liability to the maintenance of electrical wires because of the "severe economic consequences which may be sustained by the many small electric utilities in the state by the abrupt imposition of such a rule." The court indicated that if such liability were to be imposed it should be done by the legislature which is "better equipped to resolve economic problems of this nature." *Id.*; *See also*, *Wirth v. Mayrath Industries, Inc.*, 278 N.W.2d 789, 793 (N.D. 1979).

Moreover, the computer use challenged here is a socially beneficial activity which is of prime importance to advances in our domestic economy and competitiveness in global marketplaces. Imposition of strict liability on so vital an activity would have a pronounced "chilling effect" on the use of computer technology.

Where the challenged activity is similarly necessary and valuable to society, courts have generally refused to apply *Rylands* strict liability to it. Thus, earlier American courts refused to apply strict liability to dangerous enterprises where they were indispensable to the commercial and industrial growth of the country. *See, e.g.*, *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221 (Tex. 1936). Although the vitality of this rationale lessened with the development of the country's ⊥resources, it retains its force ⊥23
in appropriate circumstances. Thus, courts have consistently

rejected strict liability's application to electric companies because of both the necessity and great value of electrical power to our society. *Hernandez v. George E. Failings Co.*, 642 P.2d 749 (Wash. App. 1981); *Wirth v. Mayrath Industries, Inc.* 278 N.W. 789, 794 (N.D. 1979). Computers already occupy, or soon will, a similar critical and essential place in our society. Thus, strict liability should not be imposed in the present case both because of the unreasonable burden it would put on such computer activity and because the tremendous benefits computers confer on our society outweigh any advantage to be gained by the application of strict liability.

Furthermore, strict liability should be applied by courts only to the most hazardous activities. *Dickens v. United States*, 378 F. Supp. 845, 854 (S.D. Tex. 1974), aff'd 545 F.2d 886 (5th Cir. 1977). The maintenance of personal financial information in computers does not have a bad safety record or seem to pose exceptional risks of serious harm so as to justify the application of strict liability. Appellant proposes nearly unlimited liability without fault for any activity and for every extreme harm that activity may cause. This court should reject such a quantum leap in judicially imposed strict liability and restrict application of *Rylands*-like liability to only the most dangerous activities. The evaluation of the harms caused by different enterprises and the balancing of other relevant economic consequences is more the function of the legislature which is much better suited to
⊥24 such policy⊥resolutions. *See, e.g.* S.C. Code § 2-6 (1962) (strict liability for ground damage caused by aviation).

There are also numerous aspects of the present case which compel the conclusion that *Rylands* strict liability should not be imposed on Lincoln's activity. In every instance, such liability is predicated on the inevitability of the risk in the challenged activity, that is, the inability to eliminate, even by the exercise of utmost care, a substantial element of danger. *See Nicholai v. Day*, 264 Or. 354, 506 P.2d 483 (1973) (strict liability not applied because the risks could be controlled by the exercise of reasonable caution). Yet, in the present case it seems clear that it is possible to eliminate a substantial element of danger in appellee's activity by the exercise of the utmost care. In *Arizona State Highway Department v. Bechtold*, 105 Ariz. 125, 460 P.2d 179 (1969), where a faulty "electronic computer-type control" used in traffic signals at an intersection malfunctioned, the court held that the plaintiff would have to show that the computer-programmer failed to use due care in creating and copying the program. *Id.* at 128, 460 P.2d at 182. The court ultimately held for the plaintiff-motorist, based not on strict liability, but on the

negligence of the highway department in not having any form of preventive maintainence of signals.

Similarly, the present cause of action alleges a computer error which presumably was caused by a failure of someone to use due care in either the design, programming or maintainence of the computer. Thus, the present case is not a suitable one for the imposition of strict liability since the⊥computer malfunction ⊥25 allegedly causing Duffy's injuries could have been eliminated by the exercise of reasonable care, and, therefore, appellee should be required to demonstrate that it was *Lincoln's* conduct that fell below the standard of care required of it and thereby caused his harm.

In addition, the activity of computer maintainence of large quantities of personal financial information poses none of the evidentiary problems for establishing the defendant's negligence which usually justify the imposition of strict liability. *See*, *Siegler v. Kuhlman*, 81 Wash. 2d 448, 502 P.2d 1181 (1972). No evidence of negligence is destroyed or lost as part of the malfunction causing appellee's harm. An engineering, programming or maintainence error causing such a malfunction can be identified just as readily after the malfunction as before. Moreover, if the malfunction is brought about by an incorrect computer instruction, evidence of this is preserved too, as it was in the present case. *See* R. 2.

Furthermore, strict liability should not be applied in the present case because Duffy was a voluntary customer of the bank and had reason to know of such risks. *Rylands* strict liability is extended only in favor of members of the public who are involuntarily exposed to danger, not persons entering the premises, participating in the activity or having reason to know of the risk.

Strict liability also does not extend to the present case since the alleged harm was brought about by the Commission's investigation into Duffy's acquisition of a public corporation. Where such harm is caused by the intervening,⊥ intentional act of a⊥26 third party, strict liability should not be imposed.

II. THE APPELLATE COURT ERRED IN CONCLUDING THAT A BANK SHOULD BE UNDER A DUTY TO KEEP FINANCIAL INFORMATION ABOUT ITS CUSTOMERS IN CONFIDENCE.

Appellant, William Duffy, brought a complaint against the appellee, Lincoln County State Bank Corporation (Lincoln) alleging negligent disclosure of personal information arising out of the furnishing of information by Lincoln to the State of Marshall

Securities Commission. Heretofore there has been no statutory law in the State of Marshall prohibiting or regulating the furnishing of information on customers' accounts by banks nor defining or protecting the "right of privacy" claimed by appellant. Nonetheless, in ruling on the propriety of the Circuit Court's denial of Lincoln's motion to dismiss, the Appellate Court held that "a record-keeper, such as a bank, has a duty to its customers to act with care regarding the maintenance of sensitive personal financial information about them" and that "[c]ustomers expect their bank to hold information about them in confidence, and to disclose it only with the customer's consent or for a legally justified reason." (R. 15). The appeal of that ruling now presents this court with the novel question of the existence and scope of a bank's duty of confidentiality concerning the affairs of its customers. A review of the various theories on which a right to confidentiality or privacy in financial records is founded as well as the cases and commentaries to have dealt with the issue ⊥27 reveals that absent legislative enactment, there should⊥be no duty on the part of a bank to keep financial information about its customers in confidence.

A. *There is no duty arising from any common law invasion of privacy theory.*

The tort doctrine of a right to privacy is based on the right of an individual to be let alone, to be free from unwarranted interference by the public in matters in which they are not necessarily concerned. *Wheeler v. P. Sorensen Manufacturing Co.,* 415 S.W.2d 582 (Ky. 1967). This protection extends only to "the privacy of private life and to whatever degree and in whatever connection a man's life has ceased to be private . . . the protection is withdrawn." S. Warren and L. Brandeis. "The Right of Privacy," 4 HARV. L. REV. 193 (1890) *cited in Hollander v. Lubow*, 277 Md. 47, 351 A. 2d 421, *cert. denied* 426 v.s. 936 (1976). As to invasion of privacy arising from disclosure of private facts, there must be *public* disclosure. *See*, W. Prosser, "Privacy," 48 CALIF. L. REV. 383; *Peterson v. Idaho First National Bank*, 83 Idaho 578, 367 P. 2d 284 (1961); *Rush v. Maine Savings Bank*, 387 A. 2d 1127 (Me. 1978).

Since financial records such as copies of checks and deposit slips relating to a checking account are not confidential communications, but are instruments of commercial trade which must necessarily be exposed to numerous persons in the ordinary course of business, there is no privacy interest to be protected against voluntary disclosure. *See, e.g., Adams v. Trust Co. Bank*, 145 Ga. App. 702, 244 S. E. 651 (1978). And since Duffy makes no

claim that the disclosure of information⊥contained in his ac- ⊥28
count was made public but, instead was disclosed only to an investigation of the State of Marshall Securities Commission, Duffy fails to state a claim upon which relief can be granted on the ground of invasion of privacy.

B. *There is no duty arising from any implied contract of confidentiality.*

There is authority to the effect that a bank customer has a property right in the information contained in the records of accounts, deposits and withdrawals kept by a bank and, therefore, a bank is under an implied obligation not to disclose such confidential financial information without the customer's consent. *See, e.g., Peterson v. Idaho First Nat. Bank,* 83 Idaho 578, 367 P.2d 284, 92 A.L.R.2d 891 (1961); *Milohnich v. First Nat. Bank of Miami Springs,* 224 So.2d 759 (Fla. App. 1969); *Brex v. Smith*, 146 A. 34 (N.J. 1929).

On the other hand, there are those cases which hold that there is *no* implied agreement of confidentiality and that a bank customer has no proprietary interest in bank records. These cases state that bank records are the property of the bank and the most a depositor can claim is that the information they contain shall not be disclosed for the deliberate purpose of inflicting substantial injuries upon him. *See, e.g. Cooley v. Bergin,* 27 F.2d 930 (D. Mass. 1928); *Peters v. Sjoholm,* 25 Wash. App. 39, 604 P.2d 527 (1979), *aff'd* 95 Wash.2d 871, 631 P.2d 937 (1981).

Those cases to have found a duty often cite *Tournier v. National Provincial Bank,* 1 K.B. 461 (1924) as the "locus classicus" of the bank's duty of secrecy as regards its⊥customers affairs. ⊥29
I.F.G. Baxter, THE LAW OF BANKING 21-2 (2d ed. 1968) *cited in Milohnich v. First Nat. Bank of Miami Springs,* 224 So.2d at 761. *Tournier* teaches:

> The duty is not absolute and its qualifications can be classified under four headings. These are:
> (a) a disclosure under compulsion of law,
> (b) *where there is a duty to the public to disclose,*
> (c) *where the interests of the bank require disclosure,*
> (d) where the disclosure is made with the express or implied consent of the customer.

Baxter, *supra, cited in Milohnich,* 224 So.2d at 761 (emphasis added). *Accord* 7 Am. Jur. "Banks," § 196, *cited in Peterson v. Idaho First National Bank*, 367 P.2d at 290.

In *United States v. First National Bank of Mobile,* 67 F. Supp. 616, at 624 (S.D. Ala. 1946), it was said: "All agree that a bank should protect its business records from the prying eyes of

the public, moved by curiosity or malice . . ." But where, as here, the request for disclosure came from a valid investigation of the State of Marshall Securities Commission, these are circumstances which give rise to a public duty of disclosure as referred to above. Indeed, there may be a "moral duty of banks to the community in which they do business to use reasonable care in seeing that their depositors are not committing a fraud upon the public." *Cunningham v. Merchant's Nat. Bank,* 4 F.2d 25, 29, (1st Cir.), *cert. denied*, 268 U.S. 691 (1925). Lincoln would be liable only of it acted unnecessarily, promiscuously or maliciously
⊥30 in disclosing the ⊥bank records of its customers. *See State v. McCray,* 15 Wash. App. 810, 551 P.2d 1376 (1976). As a matter of law it can be said that Lincoln acted reasonably under the circumstances in disclosing information to an investigator of the Securities Commission. Thus, to the extent that Duffy's complaint is based on any duty arising from an implied agreement of confidentiality, it should be dismissed. Even assuming arguendo that Duffy did have a right of confidentiality in the bank records, "[b]alanced against the individual's right to privacy . . . is the public's interest in effective law enforcement, which in a proper case can justify certain kinds of warrantless intrusions on an individual's privacy." *Id.,* 551 P.2d at 1379. This is such a case.

Some courts to have addressed the balancing of a party's right to discover relevant facts against the right of a bank customer to maintain reasonable privacy have reached a compromise by requiring that the customer be given notice of the request for information. *See, e.g. Valley Bk. of Nev. v. Superior Ct. of San Joaquin County,* 15 Cal.3d 652, 125 Cal. Rptr. 553, 542 P.2d 977 (1975). This, however, is not a case where such a policy of notice should be implemented. The kind of investigation pursued by the Commission in this case is often the type which is carried on discretely in order that the investigated party is not put on notice and given an opportunity to "cover his tracks." The work and investigations of agencies such as the Securities Commission would be virtually frustrated by requiring that notice be given when, in the public interest, such agency has re-
⊥31 quested account information on a bank customer.⊥

The conclusion that there is no duty on the part of a bank arising from any implied agreement of confidentiality is supported by a decision of the United States Supreme Court and numerous state (and federal) courts to have applied its reasoning. In *United States v. Miller,* 425 U.S. 435 (1976), although the Court recognized the sensitive nature of a banking customer's financial records, it concluded that since the records are the property of the financial institution, the customer has no recog-

nizable privacy interest in them and therefore no Constitutional claim. 425 U.S. at 440-41. A closer look at the *Miller* and later cases will show that the Appellate Court erred in concluding that a bank should be under a duty to keep financial information about its customers in strict confidence.

C. *There is no constitutionally protected right to financial privacy: United States v. Miller.*

The formulation of a right to privacy as a constitutional guarantee will not avail an individual's claim to financial privacy in records kept by a bank. In *United States v. Miller,* the United States Supreme Court held squarely in a 7-2 decision that the records kept by a bank are not the depositor's private papers, but instead are the business records of the bank. The court went on to state that there is no legitimate expectation of privacy in the information kept in such bank records and that, therefore, the bank's compliance with a subpoena for the records from a government investigative agency did not violate the depositor's Fourth Amendment rights. *Miller,* 425 U.S. at 440-41. Quoting its decision in *California Bankers Assn. v. Shultz,* 416 U.S. 21 at 48-49 (1974), the *Miller* Court⊥reiterated,⊥32 "[b]anks are . . . not . . . neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance." *Id.*

The statements made by the Miller Court in elaborating on its decision and in denying the respondent depositor's claims are particularly pertinent to the privacy or confidentiality claim of Duffy in the instant case. The court stated:

> Respondent urges that he has a Fourth Amendment interest in the records kept by the banks because they are merely copies of personal records that were made available to the banks for a limited purpose and in which he has a reasonable expectation of privacy. He relies on this Court's statement in *Katz v. United States,* 389 U.S. 347, 353 (1967), quoting *Warden v. Hayden,* 387 U.S. 294, 304 (1967), that "we have . . . departed from the narrow view" that " 'property interests control the right of the Government to search and seize,' " and that a "search and seizure" become unreasonable when the Government's activities violate "the privacy upon which [a person] justifiably relie[s]." But in *Katz* the Court stressed that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." 389 U.S., at 351. . . .
>
> Even . . . the original checks . . . are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of

> privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." 12 U.S.C. § 1829b(a)(1) . . . The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. (citations omitted).

⊥33 *Miller,* 425 U.S. at 442-443.⊥

D. *Miller teaches that there is no duty of confidentiality on the part of banks.*

Since, in the instant case, Duffy does not look to the United States Constitution as the source of his right to confidentiality but his claim on state tort law grounds, the following commentator's observations are pertinent:

> State judges, however, need not ignore the reasoning of the United States Supreme Court in opinions rejecting a comparable federal constitutional claim. For a state court . . . , opinions of the United States Supreme Court are like opinions of sister state courts or lower federal courts. While neither binding in a constitutional sense nor precedential in a jurisprudential one, they are entitled to whatever weight their reasoning and intellectual persuasiveness warrant.

Falk, "The State Constitution: A More Than 'Adequate' Nonfederal Ground", 61 CALIF. L. REV. 273, 283-84 (1973).

What the "reasoning and intellectual persuasiveness" of the *Miller* decision should tell this court is that any expectation of privacy or confidentiality which a customer, such as Duffy, has in his bank records is forfeited when he discloses the information to a third party, in this case, the bank in the course of his bank transactions. Any checks, financial statements and deposit slips contain information voluntarily given to the bank and are the business records of the bank and not the private papers or property of the customer. Having revealed information to the Lincoln County State Bank, Duffy assumed the risk of any subsequent disclosure and could not limit governmental, i.e. the State of Marshall Securities Commission's access to that information. Therefore, Lincoln did not breach any duty owing to Duffy not only, as the Appellate Court held, when it complied ⊥34 with the subpoena of⊥June 6, 1981 but also when it supplied information pursuant to an April 11, 1981 "request" by the Com-

mission's chief investigator, Nancy Barnes. (R. 2). This view is supported by the decisions of several courts to have adopted the *Miller* reasoning and have held that since there is no legitimate expectation of privacy with respect to bank records then it makes no difference whether any legal process is obtained for the purpose of obtaining the records. The permission of the bank to search its records is deemed adequate for police officers or investigators to obtain them. *See, e.g., United States v. Poole,* 557 F.2d 531 (5th Cir. 1977); *Fitzgerald v. State,* 599 P.2d 572 (Wyo. 1979); *Adams v. Trust Co. Bank,* 145 Ga. App. 702, 244 S.E.2d 651 (1978); *Reporters Committee for Freedom of the Press v. Am. Tel. & Tel.,* 593 F.2d 1030 (C.A.D.C. 1978), cert. denied, 440 U.S. 949 (1979).

Since *Miller*, a number of state courts have adopted the pronouncement of the United States Supreme Court that a bank customer has no reasonable expectation of privacy or confidentiality in bank records. *See, e.g., Adams v. Trust Co. Bank,* 145 Ga. App. 702, 244 S.E.2d 651 (1978) (trial court was correct in granting summary judgment to bank on invasion of privacy issue since bank owed depositor no duty to refrain from disclosing checks and deposit records to depositor's employer); *Fitzgerald v. State,* 599 P.2d 572 (Wyo. 1979) (police officers who obtained defendant's bank records on a voluntary basis from bank without legal process had not engaged in an unlawful search and seizure); *Peters v. Sjoholm,* 604 P.2d 527 (Wash. App. 1979), *aff'd* 95 Wash. 2d 871, 631 P.2d 937 (1981) (no⊥violation of federal or⊥35 state constitutional right of freedom from unreasonable search and seizure by seizure of bank account to pay state tax delinquency).

E. *Contrary to the holding in Burrows v. Superior Court and its progeny, there is no valid basis to adopt a duty of confidentiality.*

In 1974 the California Supreme Court in *Burrows v. Superior Court,* 13 Cal.3d 238, 118 Cal. Rptr. 166, 529 P.2d 590, while acknowledging the *Miller* decision, held under a state constitutional provision that a bank customer has a reasonable expectation of privacy with respect to financial information disclosed to a bank, and that it was improper for the bank to release such information to third party investigators, at least in the absence of a subpoena or other appropriate legal compulsion. Since 1974 there have been many cases to have followed the *Burrows* holding. *See, e.g. Doyle v. State Bar of California,* 32 Cal.3d 12, 184 Cal. Rptr. 720, 648 P.2d 942 (1982); *Suburban Trust Co. v.*

Waller, 44 Md. 335, 408 A.2d 758 (1979); *Charnes v. DiGiacomo,* 200 Colo. 94, 612 P.2d 1117 (1980).

In view of the vast difference between the decisions in these cases and that of the *Miller* line, a review of the reasoning in *Burrows* is therefore appropriate.

At the outset, it is worth noting that the bank customer's right to financial privacy found in *Burrows* and many cases following *Burrows* was said to have been constitutionally founded from various provisions of state constitutions. *See, e.g., Valley Bk. of Nev. v. Superior Ct. of San Joaquin County,* 15 Cal.3d 652, 125 Cal. Rptr. 553, 542 P.2d 977 (1975); *Com. v. DeJohn*; *Charnes v.* ⊥136 *DiGiacomo*. Absent comparable provisions in⊥the State of Marshall Constitution, *Burrows* should be of little persuasion to this court. But for reasons beyond this superficial rebuttal — for reasons which reach into the heart of the *Burrows* reasoning, the *Burrows* decision reveals no valid basis for a duty of confidentiality to be adopted in the State of Marshall.

1. *A bank customer's reasonable expectation:* Among the concerns of the California Supreme Court was that "[f]or all practical purposes, the disclosure by individuals . . . of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account, "*Burrows,* 529 P.2d at 596, and that a bank customer's reasonable expectation in making such disclosure is that "absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes." *Id.* at 593. Conversely, however, it has been said:

> "Every individual must from time to time reach beyond his private enclave, draw other people into his activities, and expose his activities to public view. In any normal life, even in pursuing his most private purposes, the individual must occasionally transact business with other people. When he does so, he leaves behind, as evidence of his activity, the records and recollections of others. He cannot expect that these activities are his private affair. To the extent an individual knowingly exposes his activities to third parties, . . . if the Government is subsequently called upon to investigate his activities for possible violations of the law, it is free to seek out these third parties, to inspect their records, and to probe their recollections for evidence."

Reporters Committee for Freedom of the Press v. American Tel. & Tel. Co., 593 F.2d 1030, 1043 (D.C. Cir. 1978), *cert. denied* 440 U.S. ⊥137 949 (1979). And, in discussing a customers⊥expectations as to

his bank records, the court in *State ex rel. Dorgan v. Union State Bank,* 267 N.W.2d 777 (N.D. 1978) held that bank records are not the private property of a depositor but the business records of the bank and that this is not changed merely because a depositor expects that the records are his private papers. That fact was not changed even when a depositor gave specific written notice to the bank that he considered the records to be his private papers not subject to disclosure absent consent of the depositor.

Having knowingly disclosed information to Lincoln, which information became a part of Lincoln's business records, Duffy has no cause to complain because Lincoln subsequently disclosed its records to the Securities Commission.

2. *The bank is not a neutral entity:* The *Burrows* court took the position as to records regarding a customer's account that the bank was a neutral entity with no significant interest in them. 529 P.2d at 594. *Burrows*, however, did acknowledge that "if the bank is not neutral, as for example where it is itself a victim of the defendant's suspected wrongdoing, the depositor's right of privacy will not prevail." *Id.* An example of such victimization might be where a defendant was passing bad checks.

The *Burrows* court is wrong in concluding that as to the financial records of a customer that the bank is a neutral entity. To begin with, these financial records are not the private property of the customer but are part of the business records of the bank by which a bank conducts its day to day affairs. It has been said that "[c]opies of checks and deposit⊥slips relating to ⊥38 a checking account are not confidential communications but are instruments of commercial trade which must necessarily be exposed to numerous persons in the ordinary course of business. *Adams v. Trust Co. Bank,* 145 Ga. App. at, 244 S.E.2d at 653. And, as pointed out by the United States Supreme Court, banks are not mere bystanders in transactions involving negotiable instruments but have a substantial stake in their availability and acceptance and also are the most easily identifiable party to the instruments. *California Bankers Assn. v. Shultz,* 416 U.S. at 48-49; *United States v. Miller,* 385 U.S. at 440-41.

Therefore, Duffy had no expectation of confidentiality with respect to the records of the bank and Lincoln, as an interested party, was at liberty to disclose any account information in response to even the informal request of the investigators of the Securities Commission.

F. *Any adoption of a right to financial privacy should be done by the legislature.*

The primary protection afforded an individual's right to financial privacy should come from the legislature and not the courts. The legislature is the proper body to weigh all the factors in the delicate balance between an organization's legitimate need for financial information and an individual's desire to be free from unfair intrusions into his private life. In response to this need many states have legislated to regulate the information activities of nongovernmental organizations in recent years. *See* Comment: "The Use and Abuse of Computerized Information: Striking a Balance Between⊥Personal Privacy Interests ⊥139 and Organizational Information Needs," 44 ALB. L. REV. 589, 602-610 (1980). "Resolution of personal privacy issues must address the needs of business information-processing, while attempting to provide the maximum feasible protection for the individual." *Id.* at 608. "A statutory approach would provide both certainty and a clear legal basis from which individual and organizational rights and obligations could be determined." *Id.* at 610.

As was once eloquently expressed:

> Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, . . . Matters of policy . . . are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution.
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> *A.F. of L. v. American Sash Co.,* 335 U.S. 538, 553-57 (1979) (J. Frank further concurring).

III. *Even if it is found that there is a duty of confidentiality, the Appellate Court was incorrect in ruling that the doctrine of res ipsa loquitor applies.*

It is the claim, inter alia, of Lincoln that no facts indicating its negligence were alleged in Duffy's complaint. The Appellate Court ruled, however, that "due to the state of the art of computer technology and the difficulty of proving a breach under such circumstances, the doctrine of *res ipsa loquitor* should ap-

ply to establish the negligent disclosure of personal information through a computer." (R.16). The Appellate Court went on to hold that, thus, Duffy's complaint⊥is sufficient to withstand a ⊥40 motion to dismiss if it alleges that Lincoln "had control over the instrumentality of the disclosure, the computer, and that this disclosure would not have happened but for" Lincoln's negligence. *Id.* The Appellate Court was wrong in that the evidence upon the instant record is not sufficient to give rise to an inference of negligence so as to allow or permit the application of the doctrine of *res ipsa loquitor*.

Courts applying the doctrine of *res ipsa loquitor* generally require that the plaintiff must establish three things with regard to the event resulting in his injury before he can submit his claim to the jury: (1) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (2) it must be such as, in the ordinary course of things, does not occur if the one having such control uses proper case; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. *See, e.g.*, *Warrick v. Giron*, 290 N.W.2d 166 (Minn. 1980).

There is no problem with the third criterion of these requirements since there is no allegation that Duffy was in any way involved with the computer search. However, as to the "control" element stated in criterion one as well as two, the Appellate Court was incorrect in assuming that the instrumentality which allegedly caused the injury was within Lincoln's exclusive control. In fact, the court's focus in assuming that the computer was the instrumentality may also be improper.

It has been agreed that the search request entered into the computer used by Lincoln was correct. (R. 16). However, in spite of a search request merely for identification type⊥information (i.e., name, address, account number and ac- ⊥41 count type), the computer print-out revealed all of Duffy's personal account transactions from January 15, 1981 to April 15, 1981. (R. 2). Such an unrequested print-out could have been caused by an error or "bug" in the computer program itself or by a malfunction due to improper maintenance or manufacture of the computer. Although it is alleged that Lincoln "uses" a computer, (R 1&3), there is no allegation as to ownership and/or maintenance of the computer, or as to who wrote or maintains the program. Where there are two or more persons or causes which might have produced an injury and some, but not all, are under the control of a defendant, a plaintiff must exclude the operation of those causes for which the defendant is under no legal obligation, before the doctrine of *res ipsa loquitor* applies.

Charlton v. Lovelance, 351 Mo. 364, 173 S.W.2d 13 (1943). This Duffy has not done.

Duffy's complaint fails to state facts upon which it can be concluded or even assumed that Lincoln or its agent or servant was the programmer, or the maintainer of the computer program, or the maintainer of the computer. "If it would be sheer speculation to conclude that the cause of the accident was one within the defendant's exclusive control, a case within the doctrine of res ipsa loquitor" has not been made out. *Taylor v. Crane Rental Co.*, 103 App. D.C. 13, 254 F.2d 350 (1958). *See also J & Jay, Inc. v. E. Perry Iron & Metal Co.*, 161 Me. 229, 210 A.2d 462 (1965) (holding that it is sufficient that the jury properly could have excluded the negligence of others than the defendant from
⊥42 the cause of the accident.)⊥

Even if it is found that Lincoln was in exclusive control of the instrumentality, the Appellate Court was incorrect in ruling that the doctrine of *res ipsa loquitor* should apply in this case because of the state of the art of computer technology and the difficulty of proving a breach. The proper application for the doctrine is to be determined by judges applying "their common experience of life" to the event giving rise to the suit and deciding whether the occurrence resulting in injury is such that, in the ordinary course of things, does not happen if those in charge use due care. *See Strick v. Stutsmans*, 633 S.W.2d 148 (Mo. App. 1982). No presumption of negligence is to be drawn from the mere fact of an accident and resulting injury. It is the character or nature of the accident, rather than the fact of the accident, which determines the application of the doctrine. *Id.* It cannot be merely *assumed* by a judge that in the state of the art of computer technology, an incident such as occurred in this case happens only if those in charge fail to use due care.

In sum, the facts and allegations in the record fail to meet the requirements that there be facts and circumstances from which one can conclude that more often than not, an occurrence or accident of the type involved results from a failure to exercise reasonable care by the party in charge of the instrumentality. The Appellate Court was incorrect in holding that the doctrine of *res ipsa loquitor* should apply in this case and such ruling
⊥43 should be reversed.⊥

CONCLUSION

For the reasons hereinbefore stated, it is respectfully submitted:

1. That this Court should affirm the judgment of the court below insofar as it granted Lincoln's motion to dismiss and

held that the rule of strict liability first applied in *Rylands v. Fletcher* is not applicable to Lincoln's use of a computer to process personal financial information.

2. That this Court should affirm the judgment of the court below insofar as it granted Lincoln's motion to dismiss and held that the maintenance of personal financial information in a computer is not an ultra-hazardous or abnormally dangerous activity.
3. That this Court should reverse the judgment of the court below as held that a record-keeper, such as a bank, has a duty to its customers to act with care regarding the maintenance of personal financial information about them and, instead, hold that a bank is under no such duty.
4. In the alternative, should this Court hold that a duty of confidentiality did exist, that this Court should rule that Lincoln, as a matter of law, did not breach any duty to prevent disclosure of confidential information in view of the overriding duty of disclosure based on the public's interest in effective law enforcement.
5. That this Court should reverse the judgment of the court below as held that the doctrine of *res ipsa loquitor* applies in establishing the negligence of Lincoln and, instead, hold that this doctrine does not apply.⊥ ⊥44
6. That this Court should reverse the holding of the court insofar as it denied Lincoln's motion to dismiss and should, therefore, grant the notion to dismiss and rule that Duffy has failed to state a cause of action for negligent disclosure of financial information.⊥ ⊥45

Respectfully submitted,

Counsel for Appellee

ERRATUM

Charles V. Barrett, III and Angela Imbierowicz were inadvertently omitted from the masthead in Vol. 17:2. Their names should have appeared in Vol. 17:2, along with the other Staff Editors, as they do on the masthead of this volume.