

STATE OF MICHIGAN
COURT OF APPEALS

MAYANNA R. CARSTEN,

Plaintiff-Appellant,

v

NORTH BRIDGE HOLDINGS,
INCORPORATED, d/b/a CONSTITUTION
COFFEE COMPANY, MICHAEL J. CULP,
STEVE REIMER, and FRANK A. BADGER,

Defendants/Cross-Defendants,

and

SENTRA SECURITIES CORPORATION,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED

January 24, 2006

No. 258604

Kent Circuit Court

LC No. 02-007534-NZ

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

I. Facts and Procedural History

On February 19, 2002, plaintiff, Mayanna Carsten, signed a blank sheet of paper to permit her long-time investment representative and friend, Frank A. Badger, to withdraw money from her account at Manufacturer's Life Insurance Company (Manulife). Thereafter, Badger directed Manulife to wire \$200,000 from Carsten's account to an account held by Steve Reimer. Carsten testified that she did not ask Badger why he needed the money or how it would be used and that she agreed to sign the paper because she trusted Badger. Carsten maintains that, a few days later, Badger explained that he needed the money to invest in Constitution Coffee, a company started by Reimer and Michael Culp. Carsten later received a promissory note and other correspondence from Michael Culp, who promised to pay Carsten \$250,000, plus withdrawal costs and taxes by April 19, 2002.

Culp did not pay Carsten as promised and Carsten filed a complaint against defendants on August 2, 2002. Culp, Reimer, Badger, and North Bridge Holdings, d/b/a Constitution Coffee failed to file pleadings in response and the trial court entered default judgments against them on December 27, 2002.¹ With regard to Sentra, the record reflects that Badger had been a registered representative with Sentra Securities from November 1998 to August 17, 2001. In her complaint, Carsten alleged that Sentra contributed to her loss when it made misrepresentations, breached its fiduciary duties to Carsten, violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, and made an unsuitable and negligent investment recommendation for Carsten. Carsten also alleged that, when Badger resigned, Sentra acted negligently when it maintained Badger as Carsten’s investment representative and permitted him to keep Sentra’s signature guarantee stamp.

Sentra filed a motion for summary disposition under MCR 2.116(C)(10) and argued, among other things, that it did not owe a duty to Carsten to prevent Badger from withdrawing her money six months after he resigned as a registered representative of Sentra. Sentra further reasoned that Sentra cannot be held liable based on any alleged apparent authority of Badger’s because Badger acted outside the scope of his authority and Carsten negligently permitted Badger to withdraw her money without any explanation. Sentra also asked the trial court to dismiss Carsten’s MCPA claim because the act does not apply to the sale of securities. In response, Carsten argued that Sentra “violated several securities compliance standards,” when it failed to (1) investigate Badger’s background before it hired him, (2) supervise Badger while he was registered with at Sentra, (3) notify Carsten about Badger’s resignation, (4) transfer Carsten’s account immediately after Badger’s termination, and (5) demand the return of Badger’s signature stamp after Badger’s termination. Accordingly, Carsten maintained that Sentra should be held liable for Badger’s actions and that Badger had apparent authority to act on behalf of Sentra. Carsten further asserted that the MCPA applies because the disputed transaction involved a “business opportunity,” not the sale of securities. Following oral argument, the trial court granted summary disposition to Sentra on all of Carsten’s claims.

II. Analysis

Carsten asserts that the trial court erred when it granted summary disposition to Sentra on her negligence and breach of fiduciary duty claims.² We disagree.

¹ Sentra answered the complaint and filed a cross-claim against the other defendants for contribution or indemnification. The trial court ultimately entered default judgments against defendants on Sentra’s cross-claim and defendants have not appealed that order.

² As our Supreme Court explained in *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003):

Appellate review of the grant or denial of a summary-disposition motion is de novo, and the court views the evidence in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 118, 120; 597 NW2d
(continued...)

“To establish a prima facie case of negligence, a plaintiff must be able to prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Haliw v Sterling Heights*, 464 Mich 297, 309-310; 627 NW2d 581 (2001).

The trial court correctly granted summary disposition to Sentra because Carsten failed to establish a causal connection between Sentra’s alleged negligence and Carsten’s injury. Carsten asserted that Sentra should have performed a more thorough background check on Badger before he was hired and should have supervised him more closely while he worked for the company. However, it is undisputed that Badger asked Carsten for the \$200,000 on February 19, 2001, six months after he resigned from Sentra. Further, ample evidence established that, when Carsten gave Badger the money, Badger had acted as her investment representative for at least thirteen years. Accordingly, Sentra’s alleged failure to investigate Badger’s personal history or its alleged failure, during the brief period in which he worked for Sentra, to adequately supervise Badger, is not in any way related to Carsten’s loss.

Further, were we to find that Sentra had a continuing duty to monitor a former broker’s actions after he terminated his registration with the company, Sentra’s alleged conduct did not proximately cause Carsten’s injury. Contrary to Carsten’s assertions, though Manulife continued to list Badger as Carsten’s investment representative, Sentra did nothing to suggest to Carsten that Badger was affiliated with Sentra and Sentra played no role in the transfer of her funds. Carsten asserts, however, that, when Badger left the company, Sentra had a duty to retrieve the signature guarantee stamp that Badger used to withdraw the \$200,000 from Carsten’s account. We agree with the trial court that un rebutted evidence showed that the purpose of the stamp is to certify the authenticity of a person’s signature and that there is no dispute with regard to the validity of Carsten’s signature. Carsten admits that she signed a blank sheet of paper to allow Badger to withdraw her money and that she did not know whether Badger intended to use the money for personal or professional reasons. Badger did not tell Carsten that the purpose of the withdrawal was to purchase Sentra-approved securities and Carsten did not know or care whether Sentra had any involvement in Badger’s conduct. Further, Carsten did not rely on Badger’s use of the signature stamp because he used it after Carsten signed the paper and after she returned the paper to Badger. Simply put, none of Carsten’s allegations about Sentra’s conduct caused her to sign over the money to Badger. Accordingly, as the trial court ruled, if Carsten could establish the other elements of her negligence claim, Sentra was entitled to summary disposition because any alleged negligence by Sentra did not proximately cause Carsten’s loss.

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817 (1999). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997); *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996).

With regard to Carsten's breach of fiduciary duty claim, "a fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another." *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). Accordingly, "[a] breach of fiduciary duty claim requires that the plaintiff 'reasonably reposed faith, confidence, and trust' in the fiduciary." *Rose v National Auction Group, Inc.*, 466 Mich 453, 469; 646 NW2d 455 (2002), quoting *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260; 571 NW2d 716 (1997). Where a fiduciary relationship exists, the fiduciary "is under a duty to act for the benefit of the other with regard to matters within the scope of the relation." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (2000). A plaintiff is entitled to relief under this theory if the "position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio, supra* at 508.

Were we to find that Sentra had a fiduciary relationship with Carsten, evidence unequivocally established that Sentra had no involvement in Badger's conduct when he asked Carsten for money and when he invested it in Continental Coffee. Moreover, evidence showed that, regardless of the broker-dealer clearing house with which Badger was affiliated over the years, Carsten relied on Badger to make her financial decisions. Indeed, Badger was registered with three other firms during his thirteen year relationship with Carsten. Carsten testified that she did not know that Badger changed firms and, regardless, she placed her trust and confidence in Badger alone. Further, as noted, when she signed over the money, Carsten had no knowledge or belief that Sentra was in any way involved in the transaction. Thus, no evidence shows that Carsten placed any reliance on Sentra when she authorized Badger to withdraw her money.

Carsten nonetheless argues that the trial court should have imposed liability on Sentra because Badger acted with its apparent authority when he asked Carsten to withdraw the money. As this Court explained in *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995):

Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent.

Generally, however, to impose liability on a principal, "the person relying on the agent's authority must not be guilty of negligence." *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29; 480 NW2d 590 (1992).

Carsten's claim again fails because the evidence did not establish that Sentra's conduct led her to believe that Badger acted with its authority when he asked her for the \$200,000. As discussed, Carsten did not establish that she believed or relied upon Sentra when she authorized Badger to withdraw her money. Further, even if the transaction had occurred before Badger resigned as a registered representative with Sentra, it is undisputed that Badger's actions fell outside the scope of his employment. Under his contract with Sentra, Badger was not authorized to sell unapproved securities without the express authorization of Sentra. "Our Supreme Court has repeatedly held that liability cannot be imposed against an employer for torts intentionally committed by an employee that are outside the scope of the employment." *Salinas v Genesys Health System*, 263 Mich App 315, 317; 688 NW2d 112 (2004). Badger was not authorized by

Sentra to sell securities after he left the company and Badger's conduct was clearly outside the scope of any agency relationship with Sentra.

Moreover, Sentra clearly established that Carsten acted on her own and without regard to Badger's relationship with Sentra when she gave Badger full authority over her account. According to her attorney, Carsten, though elderly, was clearly competent to make her own decisions. Evidence further established that Carsten herself was the only person who could authorize someone to withdraw money from her Manulife account and, as discussed, Carsten signed a blank sheet of paper to allow Badger to withdraw the money. By her own admission, Carsten voluntarily signed the paper and did not ask Badger how much money he wanted or what use he would make of it. Sentra cannot be held responsible on a theory of apparent authority in light of this unrebutted evidence that Carsten acted clearly contrary to her own financial interests and wholly unrelated to Badger's relationship with Sentra.

Carsten also asserts that the trial court erred when it dismissed her Michigan Consumers Protection Act claim. Carsten alleged that Sentra should be held liable because Badger committed acts in violation of MCL 445.903(1), which provides, in relevant part:

(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

(x) Taking advantage of the consumer's inability reasonably to protect his or her interests by reason of disability, illiteracy, or inability to understand the language of an agreement presented by the other party to the transaction who knows or reasonably should know of the consumer's inability.

(y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

As discussed, Carsten did not establish that Sentra should be held liable for Badger's conduct. Furthermore, Carsten failed to create an issue of fact to establish that Sentra violated any of the provisions of the MCPA.

We also agree with the trial court that Carsten’s claim must fail because the MCPA does not apply to the sale of securities. “The MCPA expressly provides that it does not apply to ‘[a] transaction or conduct specifically authorized under laws administered by a regulatory board . . . acting under statutory authority of this state’ ” MCL 445.904(1)(a). *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 540; 683 NW2d 200 (2004). In other words, if the general transaction is authorized as set forth in MCL 445.904(1)(a), it is exempt from the MCPA, even if the specific conduct alleged is prohibited. We agree that a claim against a securities firm based on its alleged violation of securities rules is exempted from the MCPA. Securities firms are highly regulated by both the state and federal government, and administrative agencies, as well as organizations like the New York Stock Exchange and the National Association of Securities Dealers. And, though not binding precedent, we also find persuasive decisions from federal courts that have repeatedly held that the sale of securities falls within the exemption of the MCPA. *Vennitilli v Primerica, Inc*, 943 F Supp 793, 798 (ED Mich, 1996); *Dolinka VanNoord and Co v Oppenheimer and Co, Inc*, 891 F Supp 1244, 1251 (WD Mich, 1995); *Mercer v Jaffe, Snider, Raitt and Heuer, PC*, 730 F Supp 74, 79 (WD Mich, 1990).¹

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood

³ For the reasons stated above, we reject Carsten’s argument that the disputed investment was a “business opportunity” rather than the sale of securities.