IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE ESTATE OF
WALTER B. MEINEL, DECEASED.

KANDIS MEINEL,
Petitioner/Appellant,

v.

THE VANGUARD GROUP, INC.,
Respondent/Appellee.

No. 2 CA-CV 2016-0032
Filed October 19, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. PB20120784
The Honorable Christopher P. Staring, Judge

AFFIRMED

COUNSEL

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By Joseph H. Watson
Counsel for Petitioner/Appellant

Perkins Coie LLP, Phoenix
By Howard R. Cabot, Jessica L. Everett-Garcia, and Aaron S. Welling
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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Personal representative Kandis Meinel appeals the probate court's ruling granting summary judgment for The Vanguard Group, Inc. (hereinafter, "Vanguard") on the claim in the petition to garner estate assets that one of its agents breached a fiduciary duty owed her. We agree with the probate court that Vanguard did not owe Kandis a fiduciary duty, and accordingly, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to Kandis, the party opposing summary judgment. *US Airways, Inc. v. Qwest Corp.*, 238 Ariz. 413, ¶ 25, 361 P.3d 942, 949 (App. 2015), *review granted in part* (Ariz. Sept. 20, 2016). Kandis and her husband Walter Meinel owned a joint account through Vanguard. On February 21, 2012, Walter spoke by telephone on a recorded line with Vanguard representative Larry Beall. Walter said he wanted to open a new individual Vanguard account in his name only, and then transfer money from the joint account into the individual account. He explained that he wanted the individual account to be transferred upon his death to Kandis's two siblings and two of his brothers. Beall helped Walter open the new individual account.

¶3 Walter also told Beall he planned to add certain other stock and retirement assets to the joint account. Beall informed Walter that doing so would be a "taxable event" as to those assets. Later in the call, Walter said he wanted to talk more about the

retirement assets and "get [Beall's] advice." But Beall needed to end the call because he was too busy that day, so they scheduled another call.

¶4 In a recorded call on February 23, 2012, Beall helped Kandis create a user profile on Vanguard's website and helped Walter enroll in Vanguard's voice verification system. They did not discuss substantive plans that day, but scheduled another call for March 1.

¶5 On March 1, Beall again spoke with Kandis on a recorded line. During that conversation, the following exchange occurred:

> Beall: I just wanted to have you [Kandis] on a recorded line saying that you are aware that, when these assets are transferred out of the joint account and into Wal[ter]'s individual account, you lose ownership and control of those assets.
>
> Kandis: Yeah. So that's fine.
>
> Beall: Okay. So . . . you're aware of that situation that, when those go out, they . . .
>
> Kandis: Yeah.
>
> Beall: Okay. That's fine. And . . . you agree to this transfer; is that correct?
>
> Kandis: Yep. Yeah, sure.

In another recorded call later that day, Beall again asked Kandis if she agreed to the transfer:

> Beall: [W]e've been discussing the exchange of assets from the joint account into Wal[ter]'s individual account. Uh, we've gone ahead and started that process, uh, for that to happen. You have—is that, uh, okay with you? Are you approving of that transaction?
>
> Kandis: Yes.

After these interactions, Vanguard transferred about $1.6 million from the joint account into the individual account.

¶6 Walter died several weeks later. After Walter's death, Kandis learned that she was not the transfer-on-death beneficiary of the individual account; rather, her two siblings and two of Walter's brothers were the beneficiaries.

¶7 After the estate had filed an application for informal probate, Kandis sued Vanguard, alleging it had breached a fiduciary duty owed her because Beall had not informed her she was not the death beneficiary of the individual account before securing her consent to the transfer.[1] Vanguard moved for summary judgment, arguing it had not breached any duty. After a hearing, the probate court granted summary judgment for Vanguard in an under-advisement ruling, concluding Kandis "ha[d] not shown the existence of a fiduciary duty applicable to Mr. Beall's conversation with [her] or the individual account owned by [Walter]."

¶8 Kandis appeals the ruling, which the probate court certified as final and appealable pursuant to Rule 54(b), Ariz. R. Civ. P., and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(9).

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[1]Kandis's petition contained other causes of action against Vanguard and other defendants, but the only issue Kandis raises on appeal is whether summary judgment was proper as to her claim of breach of fiduciary duty against Vanguard. We limit our discussion to the facts pertinent to that claim.

Analysis

¶9 Kandis argues the probate court erred in ruling there was no question of fact as to whether she had a fiduciary relationship with Beall. The existence of a fiduciary relationship is ordinarily a question of fact, but there must be "sufficient evidence to submit the issue" to the jury. *Rhoads v. Harvey Publ'ns, Inc.*, 145 Ariz. 142, 148, 700 P.2d 840, 846 (App. 1984). And the absence of evidence showing a fiduciary relationship requires the trial court to dismiss the claim as a matter of law. *See id.* at 150, 700 P.2d at 848. We review summary judgment rulings de novo. *US Airways, Inc.*, 238 Ariz. 413, ¶ 25, 361 P.3d at 949; *see also* Ariz. R. Civ. P. 56(a) (summary judgment appropriate if no genuine dispute of material fact and movant entitled to judgment as matter of law).

¶10 Our precedents differentiate between a fiduciary relationship and an "arm's length relationship." *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 24, 945 P.2d 317, 335 (App. 1996). The former is characterized by "'peculiar reliance in the trustworthiness of another,'" going beyond "[m]ere trust in another's competence or integrity." *Id.*, *quoting Stewart v. Phx. Nat'l Bank*, 49 Ariz. 34, 44, 64 P.2d 101, 106 (1937). A fiduciary relationship is "something approximating business agency, professional relationship, or family tie impelling or inducing the trusting party to relax the care and vigilance he would ordinarily exercise." *Taeger v. Catholic Family & Cmty. Servs.*, 196 Ariz. 285, ¶ 11, 995 P.2d 721, 726 (App. 1999), *quoting In re McDonnell's Estate*, 65 Ariz. 248, 252-53, 179 P.2d 238, 241 (1947). The fiduciary holds "superiority of position" over a beneficiary, often manifested as a substitution of the fiduciary's will for that of the beneficiary. *Standard Chartered*, 190 Ariz. at 24, 945 P.2d at 335. Other hallmarks of a fiduciary relationship may include "great intimacy, disclosure of secrets, [or] intrusting of power." *Id.*, *quoting Rhoads*, 145 Ariz. at 149, 700 P.2d at 847 (alteration in *Standard Chartered*).

¶11 Here, when viewed in the light most favorable to Kandis, there is no evidence Kandis and Beall had anything more than an arm's-length relationship typical of a customer and a service representative regarding a non-discretionary account. The only times Beall spoke with Kandis were February 23 and March 1, 2012.

There is no evidence that Beall gave Kandis any financial advice. There is no evidence of intimacy, entrusting of power, or disclosure of secrets between Kandis and Beall, *Standard Chartered*, 190 Ariz. at 24, 945 P.2d at 335, nor any indication that she peculiarly relied on his trustworthiness beyond her general faith in his competence to carry out her instructions, *id.* (peculiar reliance "required" to form fiduciary relationship). Finally, there is no evidence that Beall had the power to substitute his will for Kandis's. *Id.* It is undisputed that Kandis could have withheld her consent to the transfer, and that if she had, Beall could not have completed it.[2] Beall merely helped facilitate the transfer at Kandis's request, after explaining to her that she would have no control over the assets after the transfer and securing her unqualified consent. We agree with Vanguard that "the fact pattern of this case bears none of the markers of a principal/agent relationship."

¶12 Kandis also implicitly argues Vanguard had a fiduciary duty because Beall was acting as a financial advisor to Walter in a manner akin to the defendant in *Stewart*, 49 Ariz. at 40, 44-46, 64 P.2d at 104, 106-07. She emphasizes that Beall gave Walter information about the tax consequences of one course of action he was considering regarding the retirement and stock assets. Assuming arguendo this brief exchange constituted financial advice upon which Walter relied, standing alone it does not approximate the intimate and decades-long relationship of advice and confidence the court considered in *Stewart*.[3] *Cf. Standard Chartered*, 190 Ariz. at 12, 24-26, 945 P.2d at 323, 335-37 (no fiduciary relationship as matter

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[2]As a joint tenant, Walter had rights to all the funds in the joint account, and we are not aware of any legal basis that would have prevented him from withdrawing the full amount and then re-depositing it into an individual account. But apparently Vanguard's internal policy was to obtain consent of the other joint tenant before transferring all of the funds from a joint account directly into an individual account.

[3]Kandis also alleges Beall "[spoke] about himself as a financial adviser," but provides no citation to the record where he did so, nor have we found any such statement in our own review of the record.

of law even though defendant had audited acquisition prospect and certified its financial soundness to plaintiff and plaintiff had trusted and relied on that endorsement without seeking second opinion); *compare McAlister v. Citibank (Ariz.), a Subsidiary of Citicorp*, 171 Ariz. 207, 212, 829 P.2d 1253, 1258 (App. 1992), *with Stewart*, 49 Ariz. at 40, 44-46, 64 P.2d at 104, 106-07. As a matter of law, Kandis did not produce evidence sufficient to support a verdict that Vanguard owed her a fiduciary duty requiring disclosure; thus, the probate court did not err in granting Vanguard's motion for summary judgment.[4] *Cf. Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996) (directed verdict appropriate where facts produced in support of claim have so little probative value that reasonable people could not agree with proponent's conclusion).

¶13 As a final matter, we agree with Vanguard and with the probate court that Kandis's reliance on *Lerner v. DMB Realty, LLC*, 234 Ariz. 397, 322 P.3d 909 (App. 2014), is misplaced. In that case, the buyers of a house claimed their real estate broker, who also represented the sellers, had breached a fiduciary duty by not disclosing that a registered sex offender lived next door, as the broker and the sellers knew. *Id.* ¶¶ 1, 3, 42; *see generally* Restatement (Third) of Agency § 8.06 (2006) (regarding such dual-agency situations). But the issue in *Lerner* was not whether a real estate broker owes a fiduciary duty to her client. Instead, the court's analysis began from the well-established premise that a real estate broker does "owe[] a fiduciary duty to disclose material facts to its client," and then proceeded to consider whether and to what extent that duty may be limited by contract. *Id.* ¶¶ 43-47, *citing Leigh v. Loyd*, 74 Ariz. 84, 87, 244 P.2d 356, 358 (1952). *Lerner* is not instructive on the issue of what circumstances give rise to a fiduciary relationship in the first instance.

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[4]Even assuming for the sake of argument that a fiduciary duty did exist, there is no dispute that Beall informed Kandis that she would "lose ownership and control" of any assets transferred from the joint account to the individual account, and that she consented to the transfer anyway.

Disposition

¶14 We affirm the probate court's judgment for Vanguard.