S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

EDWARD ROMAN, Plaintiff-Appellant,	UNPUBLISHED February 27, 2001
v	No. 216061 Macomb Circuit Court
SCOTT C. BRIGGS, RONALD J. BRIGGS, and MICHIGAN MEDICAID PLANNING STRATEGIES, Defendants-Appellees.	LC No. 97-005602-NZ

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

This action arises out of plaintiff's liquidation of his stock portfolio to purchase an annuity and insurance policies on the advice of defendants, resulting in a capital gains tax liability of approximately $50,000. Plaintiff alleged a violation of the Michigan Uniform Securities Act, fraud, and negligence due to defendants' failure to inform him of the tax consequences of liquidating his stock portfolio. Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that they could not be held liable for fraud because plaintiff knew of the tax consequences before his stocks were sold. Defendants also argued that they could not be held liable under the Securities Act because defendants were not financial advisers within the meaning of the act. The trial court agreed and granted summary disposition in favor of defendants. Plaintiff appeals by delayed application for leave granted. We affirm in part, reverse in part and remand for further proceedings.

Plaintiff first argues that defendants violated the Michigan Uniform Securities Act, fraudulently concealed the tax consequences of plaintiff liquidating his stocks, and negligently breached their duty of care arising from the special relationship they had with plaintiff as insurance agents. We disagree. A trial court's grant or denial of summary disposition pursuant to MCR 2.116(C)(10), based on a finding that there is no genuine issue as to any material fact, is reviewed de novo. *Markillie v Bd of Co Rd Comm'rs of Co of Livingston*, 210 Mich App 16, 18; 532 NW2d 878 (1995). The appellate court, like the trial court, must view the depositions, affidavits, and documentary evidence in a light most favorable to the nonmoving party and must make all legitimate inferences in favor of the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff's claim under the Michigan Uniform Securities Act, MCL 451.501 *et seq.*; MSA 19.776(102) *et seq.*, was based on an allegation that defendants violated subsection 102(a) of the act, MCL 451.502(a); MSA 19.776(102)(a), which provides in relevant part:

> (a) It is unlawful for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or commodity contracts or their purchase or sale, whether through the issuance of analyses or reports or otherwise:
>
> (1) To employ any device, scheme, or artifice to defraud the other person.

Plaintiff argues that defendants fall within the scope of this provision because under subsection 401(f) of the act, MCL 451.801(f); MSA 19.776(401)(f), they were investment advisers. Although the term "investment adviser" does not appear in subsection 102(a), the description of an investment adviser in subsection 401(f) is substantially the same as the description of persons intended to be reached by subsection 102(a). *People v Cook*, 89 Mich App 72, 87; 279 NW2d 579 (1979). Subsection 401(f) provides in part:

> (f) "Investment adviser" means any person who, for consideration, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or commodity contracts, or as to the advisability of investing in, purchasing, or selling securities or commodity contracts, who, for consideration and as a part of a regular business, issues or promulgates analyses or reports concerning securities or commodity contracts, or who acts as a finder in conjunction with the offer, sale, or purchase of a security or commodity . . . .

Defendants argue that they do not fall within this definition of "investment adviser" because they did not receive consideration for investment advice as a part of this transaction. In *Cook*, this Court stated that merely because the defendant received consideration "as a result of" investment advice, he did not receive consideration "primarily for" the advice and was not an investment adviser:

> Subsection 102(a) was intended to reach persons who are specially compensated for rendition of investment advice. "The essential distinction to be borne in mind in (applying this provision to) borderline cases . . . is the distinction between compensation for advice itself and compensation for services of another character to which advice is merely incidental." Uniform Securities Act, 401(f), Official Comment, Reprinted in Loss & Cowett, Blue Sky Law, p. 339. [*Id.* at 86-87.]

Similarly, here, the documents before the trial court established that although defendants would have received money for selling insurance to plaintiff, this money was not payment for investment advice. Because defendants were not investment advisers, they were not subject to the prohibitions of subsection 102(a) of the Securities Act, and the trial court was therefore correct in granting summary disposition on this claim.

Plaintiff next contends that the trial court erred in granting summary disposition of plaintiff's negligence and fraud claims. The trial court correctly stated that negligent misrepresentation requires that a party justifiably relied to his detriment on information provided without reasonable care by one who owed the relying party a duty of care. *Stockler v Rose*, 174 Mich App 14, 30; 436 NW2d 70 (1989). In determining whether to impose a duty of care, this Court evaluates factors such as the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Girvan v Fuelgas Co*, 238 Mich App 703, 711; 607 NW2d 116 (1999).

Plaintiff asserts that defendants breached a special duty to plaintiff under *Stein v Continental Casualty Co*, 110 Mich App 410; 313 NW2d 299 (1981), modified in part *Harts v Farmers Ins Exchange*, 461 Mich 1, 11; 597 NW2d 47 (1999). *Stein* is distinguishable from the facts of this case, however, because there this Court was discussing the duty of an insurer to inform an insured regarding the adequacy of the policy's coverage. *Id*. at 416. In the present case, plaintiff asserts that defendants had a duty to inform plaintiff regarding the tax consequences of liquidating stocks, a subject outside the realm of the insurer-insured relationship.

In *Harts, supra* at 11, our Supreme Court held that an insurer owes its insured a duty when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. None of these factors applies to defendants in the present case. Thus, we agree that no special relationship imposing a duty on defendants existed to affirmatively advise plaintiff on the tax consequences of the transaction. That is, there would be no liability by defendants if they made no representations regarding tax consequences.

However, defendants would be liable if plaintiff is able to establish that he detrimentally relied on an affirmative misrepresentation by defendants. On this issue, we believe that there exists a genuine issue of material fact. First, we note that this issue does not solely involve the issue whether plaintiff understands the general concept of capital gains taxes. The evidence in this case clearly establishes that there is no genuine issue of material fact that plaintiff knew prior to this transaction that he could, in general terms, incur capital gains tax liability by selling stock at a profit. Indeed, plaintiff had previously liquidated assets from which he had paid capital gains taxes and his monthly securities statement revealed plaintiff's unrealized taxable gains. That fact, however, is not conclusive to the question whether plaintiff may have detrimentally relied on a representation by defendants that this particular transaction would be tax free. Indeed, plaintiff makes such an averment in his affidavit:

> 5. That at this meeting, Scott C. Briggs informed me that **by placing the money into an annuity**, there were no market risks, that I would have a guaranteed principal and interest return, and that **there would be no** penalties or

> **taxes associated with this transaction** and that amazingly, there would be no charges or fees associated with this process.
>
> 6. That it was **my understanding that all I was doing was transferring my funds from one brokerage company to another brokerage company** and in purchasing this annuity, I would be financially more secure. [Emphasis added.]

There certainly are transactions which may be tax-free. For example, one could sell securities held in a 401(k) deferred compensation plan, roll the proceeds over to an Individual Retirement Account, and purchase new securities, all without incurring a tax liability if handled properly. Obviously, the transaction involved was not such a tax-free transaction. However, what is relevant is that a representation that a transaction is, in fact, tax-free is not inherently unbelievable. Therefore, if defendants made such a misrepresentation, plaintiff may have relied on that misrepresentation to his detriment and his claim on this ground is viable.

Whether such a representation was made, and whether there was reliance by plaintiff,[1] represents a genuine issue of material fact to be resolved by the jury.

For the above reasons, the trial court should have denied summary disposition as to the misrepresentation claim.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Hilda R. Gage

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[1] In this regard, we are particularly troubled by the fact that plaintiff made no effort to determine if he could cancel the sell order upon learning of the magnitude of the tax liability. However, that is a consideration for the jury, not this Court.