STATE OF MICHIGAN

COURT OF APPEALS

STARK FUNERAL SERVICE, a/k/a MOORE MEMORIAL CHAPEL, INC,

Plaintiff,

v

NATIONAL CITY BANK OF MICHIGAN/ILLINOIS, f/k/a FIRST OF AMERICA BANK DETROIT,

Defendant-Third-Party Plaintiff-Appellant,

v

PRE-NEED NETWORK, INC, and JOSEPH ITALIANO,

Third-Party Defendants,

and

EMPLOYEES LIFE COMPANY MUTUAL,

Third-Party Defendant-Appellee.

UNPUBLISHED
March 8, 2002

No. 226936
Oakland Circuit Court
LC No. 97-545784-CK

Before: Cavanagh, P.J., and Neff and B. B. MacKenzie*, JJ.

PER CURIAM.

Third-party plaintiff National City Bank of Michigan/Illinois ("National City") appeals as of right the trial court's grant of summary disposition in favor of third-party defendant Employees Life Company Mutual ("ELCO"). We affirm.

I

Plaintiff Stark Funeral Service ("Stark") and National City entered into a contract in 1987, by which National City agreed to act as an escrow agent for funds plaintiff received for prepaid funeral contracts. Third-party defendant Joseph Italiano recruited plaintiff and other

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

funeral homes to pool their prepaid funeral accounts, which were subsequently managed by his company, third-party defendant Pre-Need Network, Inc. ("PNN"). National City was to act as an escrow agent for the funds, pursuant to the Michigan Prepaid Funeral Contract Funding Act, MCL 328.211 *et seq*. In 1989, National City and Italiano executed a contract formalizing their agreement that PNN and Italiano were to manage the pooled accounts they recruited and deposited with National City.

National City, working with Italiano as a broker representative,[1] invested the escrowed funds in annuities with Washington National Insurance. However, when Washington National discontinued writing these annuities in 1989, National City, working through Italiano, "transferred" the annuities to ELCO. In 1994, at Italiano's direction, ELCO converted the annuities into life insurance policies. The conversion created a shortfall in the funds required to meet the funeral contract obligations.

On June 11, 1997, plaintiff sued National City alleging mismanagement of the escrow funds. National City then filed a third-party complaint against Italiano and PNN. On January 28, 1998, National City amended its complaint to add ELCO as a defendant. National City subsequently obtained a $255,087 default judgment against Italiano and PNN, and settled with plaintiff by covering the deficiencies in the funeral contract holders' accounts. On September 9, 1999, the court granted summary disposition in favor of ELCO. The court denied National City's motion to amend its complaint and its motion for reconsideration.

II

National City first argues that the trial court erred in granting summary disposition of National City's negligence count against ELCO. We disagree. On appeal, a trial court's grant of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek, supra* at 337. The moving party must specifically identify the matters regarding which there are no disputed factual issues, *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Smith, supra* at 455. The party opposing the motion then has the burden of showing by evidentiary proofs that a genuine issue of material fact exists. *Id.*

[1] Italiano was a representative of the broker-dealer, Washington National Equity Company, which marketed Washington National Insurance annuities.

To establish a prima facie case of negligence, a plaintiff must prove that there was:

> (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. [*Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).]

National City contends that summary disposition of its negligence claim was improper because there was a genuine issue of fact regarding whether ELCO reasonably relied on Italiano's purported authority in converting the annuities to life insurance policies. However, ELCO argues that it owed no duty to National City; thus, the issue of Italiano's authority is irrelevant. If there is no duty, summary disposition is proper. See *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). Whether a duty exists is a question of law for the court. *Id*.

National City alleged in its complaint that ELCO owed a duty under its contract and MCL 328.211 *et seq*. ELCO has no contractual duty because National City concedes that no contract existed between them and, in fact, withdrew its breach of contract claim.

Nonetheless, National City argues that its negligence claim is viable because ELCO owed National City a statutory duty. We disagree. National City specifically asserts that ELCO's statutory duty is derived from MCL 328.232(1), which provides, "A person who converts funds paid pursuant to a prepaid funeral contract to his or her own use or benefit, other than as authorized by this act, shall be guilty of a felony … ." However, this provision merely delineates the penalty for converting funds. It does not assign ELCO an affirmative duty to National City.

Furthermore, a plain reading of MCL 328.211 *et seq.* indicates that the act is intended to regulate the sellers and providers of prepaid funeral contracts and the depositories or escrow agents of the funds, for whom it establishes affirmative duties. See MCL 328.222 and 328.224. There is no indication that the act contemplated regulating the companies in which the funds were invested. Therefore, because ELCO did not owe a duty to National City, the trial court's grant of summary disposition was proper as to National City's negligence claim.

III

National City next argues that the trial court erred in granting summary disposition of National City's unjust enrichment claim. Again, we disagree. The elements of unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). National City contends that there were genuine issues of fact regarding Italiano's authority to authorize the conversion of the annuities to life insurance policies and ELCO's purported reliance on that authority. Thus, if the conversion was unauthorized, ELCO was unjustly enriched because it received more than $100,000 in surrender charges and other benefits while National City paid over $250,000 to Stark for the losses caused by the conversion.

If Italiano had actual authority or ELCO reasonably relied on his apparent authority, then ELCO committed no wrongdoing, and there is no justification for National City's claim. National City asserts that Italiano did not have actual or apparent authority.

First, National City contends that neither the 1987 Investment Advisor & Management Agreement nor the 1989 Third-Party Administration Agreement gave Italiano actual authority to direct the conversion of the annuities. We agree.

The 1987 agreement was between National City and Washington National Equity Company and its representative, Italiano,[2] which did give Italiano the authority to direct investments. However, this agreement no longer had effect once the Washington National annuities were sold, and, consequently, National City no longer conducted business with Washington National Equity, and ELCO annuities were purchased. Although ELCO asserted that these agreements continued in the same manner, ELCO presented no evidence to substantiate this claim. The 1989 agreement was between National City and The Pre-Need Network, Inc., and it specifically listed the responsibility for investing monies under "Responsibilities of Escrow Agent," i.e., National City.

While we conclude that Italiano did not have actual authority, we hold that he did have apparent authority and ELCO was reasonable in its reliance. Apparent authority arises where acts and appearances lead a third person reasonably to believe that an agency relationship exists. *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 216; 565 NW2d 907 (1997). Such authority must arise from the principal and cannot be established through only the acts of the agent. *Id*.; *Meretta v Peach*, 195 Mich App 695, 699; 491 NW2d 278 (1992). "In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances." *Id*. The question here is whether an ordinarily prudent person, conversant in the prepaid funeral contract business, would be justified in assuming that Italiano had the authority to authorize the conversion of the annuities. See *id*.

ELCO presented a March 30, 1994 letter from Italiano which directed ELCO to make the conversion to life insurance, which stated, "Pursuant to our joint discussion and our communications with First of America Bank it is in the best interest of all parties involved … to convert the existing annuity policies …." The reply letter, dated March 31, 1994, stated in part,

> First of all in your letter of March 30 you indicate that pursuant to our joint discussions and our communications with First of America Bank, the change is being made. I have not had any discussion or communication with First of America. Am I supposed to discuss this with Hudson Meade before proceeding? Based on my discussion with you I was of the opinion that you discussed this and received the trustees' approval for the conversion from annuity to life insurance.
>
> Based upon the trustees' direction and your authority on behalf of the trustees, we will convert the above trust ….

ELCO argues that its reliance on Italiano's authority was reasonable given its past practice of dealing almost exclusively with Italiano and limited contact with National City. Edmund Kulpins, executive vice-president of ELCO, testified in his deposition that ELCO originally met with National City and Italiano when the rollover of annuities occurred from

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[2] "D.B.A, The Pre-Need Network of Southfield, Michigan."

Washington National to ELCO. Kulpins testified that any other contact directly with National City was limited to sporadic phone calls. Kulpins further testified that other surrenders of annuities had been completed by ELCO at the direction of Italiano, where the escrow agent was National City. The evidence showed that Italiano and PNN had broad authority in directing the National City escrow account investments. National City placed Italiano in a position where ELCO reasonably relied on his representations regarding investments, given National City's past practices and the business relationships between the parties.

Further, when a principal has placed an agent in a situation of authority such that "a person of ordinary prudence, conversant with business usages and the nature of the particular business," is justified in assuming that the agent was authorized to perform on behalf of the principal a particular act, and the act has been performed, the principal is estopped from denying the agent's authority to perform it. *Id.* at 699-700. Because ELCO reasonably relied on Italiano's apparent authority, National City failed to show that the benefit, if any, derived from the conversion unjustly enriched ELCO. The mere fact that a person benefits another is not of itself sufficient to require restitution on a theory of unjust enrichment. *In re McCallum Estate*, 153 Mich App 328, 335; 395 NW2d 258 (1986). Therefore, we hold that summary disposition was proper with regard to National City's unjust enrichment claim.

IV

National City further argues that the trial court abused its discretion in denying National City's motion for leave to amend its complaint. We disagree. We will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Doyle v Hutzel Hosp*, 241 Mich App 206, 211-212; 615 NW2d 759 (2000).

If a court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would not be justified. MCR 2.116(I)(5). An amendment would not be justified if it would be futile. *Weymers, supra* at 658.

National City sought to amend its complaint based on a pending assignment of rights from Stark, and upon additional information learned in discovery, i.e., that ELCO converted the annuities to life insurance policies, taking surrender charges and causing a shortage of funds. National City admitted at the summary disposition hearing that the assignment of rights had not yet occurred. The trial court denied National City's motion "because it would be untimely, if no assignment of right has taken place … and because, again, Stark was not a third party beneficiary of any of ELCO[']s] policies." We note that, given the trial court's reasoning, National City's argument on appeal, that the motion was not untimely because National City brought the motion as soon as it discovered that ELCO took surrender charges, is irrelevant.

An amendment would be futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Given our above analysis of National City's claims, and the fact that National City intended to base its additional claims on rights assigned from Stark, the amendment would have been futile. The assignment of rights had not yet occurred, and there was no guarantee that the

assignment would occur. Further, National City makes no argument that it was a third-party beneficiary to ELCO's policies.

V

Lastly, National City argues that the trial court abused its discretion in denying its motion for reconsideration. We disagree. A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Id*.

> [A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. [MCR 2.119(F)(3); *Rickerson, supra* at 233.]

National City's arguments in its motion for reconsideration were a restatement of its previous arguments. Because National City did not show that the trial court was misled[3] and presented no new issues, we hold that the trial court did not abuse its discretion in denying National City's motion for reconsideration.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Janet T. Neff
/s/ Barbara B. MacKenzie

[3] To the extent that National City argues that the trial court based its decision on an inadmissible hearsay statement by Italiano concerning his authority, we find no error.