STATE OF MICHIGAN

COURT OF APPEALS

JODY SMITH and EARL HACKNEY,

Plaintiffs-Appellants,

v

ONAWAY COMMUNITY FEDERAL CREDIT UNION,

Defendant-Appellee.

UNPUBLISHED
October 21, 2004

No. 246196
Presque Isle Circuit Court
LC No. 01-002474-CK

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting defendant summary disposition under MCR 2.116(C)(10). This case arises out of a $50,000 certificate of deposit (CD) issued by defendant which plaintiffs allege was wrongfully paid to Margery J. Lopiccolo because of the withdrawal restriction on the face of the CD.

Plaintiffs first argue that the trial court erred in allowing defendant to assert the defenses of another because a CD is a negotiable instrument and, under the Uniform Commercial Code, defendant was only entitled to its personal defenses. We disagree because the CD at issue is not a negotiable instrument.

Resolution of this issue requires interpretation of the contractual provisions of the CD. The interpretation of a contract is a question of law that this Court reviews de novo. *Rednour v Hastings Mutual Ins Co*, 468 Mich 241, 243; 661 NW2d 562 (2003). This issue further involves application of statutory language, which is also reviewed de novo. *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 124 (2004).

Contrary to plaintiffs' argument, the CD at issue does not meet the unambiguous first requirement of a negotiable instrument under the plain language of MCL 440.3104(1)(a) that it must be "payable to bearer or to order." See *Halloran*, *supra* at 577 (clear and unambiguous statutory language enforced as written). Rather, the CD states that it is "payable to owners" of the CD.

Further, the CD is not a negotiable instrument because it is non-transferable. The CD at hand bears the following notation: "This Share Certificate may not be pledged, transferred or

assigned, except to the Credit Union." MCL 440.3104(4) states that "[a] promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable." Thus, by the plain language of MCL 440.3104(4), the CD at issue is not a negotiable instrument, and plaintiffs are not entitled to relief based on their claim that it was a negotiable instrument.

Next, plaintiffs argue that the trial court erred in granting defendant summary disposition pursuant to MCR.2116(C)(10) because a genuine material issue of fact existed as to whether plaintiffs placed the withdrawal restriction on the CD before or after the revocation of the relevant power of attorney (POA). We disagree.

This Court reviews a trial court's grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Id*. at 120. The trial court considers all the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* If the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.*

The POA, which granted plaintiff Smith her authority to act as Lopiccolo's agent, specifically restricted Smith's authority, in relevant part, as follows: (1) my agent cannot divert my assets to herself, her creditors or estate; (2) my agent is a fiduciary; (3) my agent's ability to make gifts on my behalf is limited to continuing or completing "any gifts or gift program of mine with any of my real estate or personal property, to my spouse, any of my children, their spouses or their descendants, or to any charitable organization."

A grant of a general power of attorney forms a fiduciary relationship between the principal and the attorney-in-fact. *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1984). Further, a "fiduciary owes a duty of good faith to [her] principal and is not permitted to act for [herself] at [her] principal's expense during the course of his agency. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

Based on the uncontroverted facts, we conclude that Smith exceeded her authority in creating the jointly held CD and violated the express provisions in the POA. The general rule governing a power of attorney is that it "should be strictly construed" and it "cannot be extended by construction." *Long v City of Monroe*, 265 Mich 425, 427; 251 NW 582 (1933). Under the terms of the POA, Smith could not make a gift to herself because she was not within the class of persons entitled to gifts and the attempted transfer would also consist of diverting Lopiccolo's assets to herself. By creating the jointly held CD, Smith improperly gave herself a gift from Lopiccolo's assets.

Second, Smith's creation of a jointly owned CD would have effectively stripped Lopiccolo of all ownership and dominion of the CD. Any owner of a joint account may withdraw the entire account. *Treasury Dep't v Comerica Bank*, 201 Mich App 318, 325; 506 NW2d 283 (1993). Thus, Smith's creation of a jointly held CD gave her the immediate right to

withdraw any or all of the money from the CD. This is another reason that the creation of the CD violated the POA.

Therefore, we find that the trial court correctly determined that Smith breached her fiduciary duty to Lopiccolo under the POA when she created the jointly held CD. The transaction was invalid. Further, the trial court was also correct in its determination that because Smith had no authority to create the CD, she subsequently had no authority to impose withdrawal restrictions, and when she attempted to impose these restrictions was irrelevant. It follows then that defendant's act of cashing the CD and transferring the money to Lopiccolo was proper. Thus, the trial court properly granted defendant's motion for summary disposition and denied plaintiffs' motion for summary disposition.

We affirm.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey