

STATE OF MICHIGAN
COURT OF APPEALS

RONALD WILLIAM COOPER, THOMAS
DAVID COOPER, and YVONNE R. COOPER,

UNPUBLISHED
July 19, 2011

Plaintiffs-Appellants/Cross-
Appellees,

and

WILLIAM J. COOPER,

Plaintiff,

v

EDGEWATER BANK and 1ST SOURCE BANK,
a/k/a FIRST SOURCE BANK,

No. 296189
Berrien Circuit Court
LC No. 2009-000024-CZ

Defendants-Appellees,

and

FIFTH THIRD BANK,

Defendant/Cross-Plaintiff-Appellee,

and

MIDWAY BAPTIST CHURCH,

Defendant/Cross-Defendant-
Appellee/Cross-Appellant,

and

DENNIS R. LOWELL,

Defendant/Cross-Defendant.

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's orders granting in part defendant Midway Baptist Church's motion for summary disposition as to plaintiffs' claims involving defendants Edgewater Bank and Fifth Third Bank, denying defendant 1st Source Bank's motion for summary disposition, and granting summary disposition in favor of plaintiffs pursuant to MCR 2.116(I)(2) as to the claims involving 1st Source. Plaintiffs maintain that the trial court improperly granted summary disposition in favor of Edgewater and Fifth Third and partial summary disposition in favor of Midway Baptist in a December 23, 2009, order. Midway Baptist cross appeals as of right the January 12, 2010, order because it contends that the trial court erred by granting summary disposition in favor of plaintiffs regarding the claims involving 1st Source. We affirm in part, reverse in part and remand for proceedings consistent with this opinion.

This action involves a power of attorney that Eleanor Cooper created shortly before her death¹ for changing the beneficiaries of her certificates of deposit (CDs). In January 2008, Eleanor was 83 years old and lived alone. She was hospitalized from late January 2008 through the beginning of February 2008. On or about February 18, 2008, Eleanor asked her friend Dennis Lowell to act as her attorney in fact. Eleanor had known Lowell since the mid-1970s from Midway Baptist Church. She saw him at church on Sundays, and he regularly helped her with "odd jobs" such as cleaning storm gutters, fixing her toilet, raking leaves, and repainting. Initially, Lowell declined Eleanor's request, but after she persisted, he finally agreed to accept the power of attorney. Eleanor had been divorced for years and was estranged from her sons Ronald and Thomas Cooper who are plaintiffs in the instant action. She instructed Lowell to change the beneficiaries of her CDs at Edgewater, Fifth Third, and 1st Source Banks from her sons to Midway Baptist. On or about February 27, 2008, Eleanor was readmitted to the hospital and her condition was not good. Lowell was subsequently able to change the CD beneficiaries at Edgewater and Fifth Third. On March 3, 2008, 1st Source informed Lowell that in addition to the power of attorney, it wanted further documentation regarding his authority to change the beneficiaries of Eleanor's CDs. That day Lowell went to the hospital and Eleanor signed a letter to 1st Source instructing it to change the beneficiary of her CDs. On March 4, 2008, Eleanor died. Lowell submitted the letter signed by Eleanor to 1st Source on March 4, 2008, and when he returned on March 5, 2008, he explained that his power of attorney had expired because of Eleanor's death. 1st Source had Lowell sign an "assignment form" and completed the change of beneficiaries on the CDs.

Plaintiffs argue that the trial court improperly granted summary disposition to Edgewater, Fifth Third, and Midway Baptist on the claims involving the Edgewater and Fifth Third CDs. We review the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich

¹ A probate action, 2008-0229-DE-M, before Berrien County Probate Judge Mabel Johnson Mayfield was pending at the time the complaint was filed.

109, 118; 597 NW2d 817 (1999). “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Id.* at 120. The moving party has the initial burden of supporting its position by affidavits, depositions, admissions or other documentary evidence, and then the burden shifts to the opposing party to establish that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In reviewing a motion granted under (C)(10), we only consider the substantively admissible evidence actually proffered in opposition to the motion. *Maiden*, 461 Mich at 121. A trial court considers the evidence in the light most favorable to the non-moving party. *Id.* “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.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

“A power of attorney provides the agent with all the rights and responsibilities of the principal as outlined in the agreement.” *In re Estate of Capuzzi*, 470 Mich 399, 402; 684 NW2d 677 (2004). “A primary purpose of a power of attorney is to evidence the delegation of authority to perform particular legal acts, which the principal could personally perform, to an appointed agent.” *Persinger v Holst*, 248 Mich App 499, 504; 639 NW2d 594 (2001). “[P]owers of attorney are to be construed in accordance with the principles governing the law of agency.” *VanderWall v Midkiff*, 166 Mich App 668, 677; 421 NW2d 263 (1988). “It is a longstanding legal principle that a duly authorized agent has the power to act and bind the principal to the same extent as if the principal acted.” *Capuzzi*, 470 Mich at 402. “In effect, the agent stands in the shoes of the principal.” *Id.*

In *Crane v Kangas*, 53 Mich App 653, 655; 220 NW2d 172 (1974), quoting 1 Callaghan’s Michigan Civil Jurisprudence, Agency, §§ 187-189, pp 309-311, this Court opined:

“It is a firmly established rule, frequently reiterated, that powers of attorney are strictly construed and cannot be enlarged by construction. Accordingly, a power of attorney which specifies the acts which may be performed may not be extended by construction so as to authorize the performance of other acts not mentioned.

The attorney may perform only those acts specified in the power of attorney, and the scope of his powers should be determined from a proper construction of the instrument.”

Accordingly, we look to the plain language of the power of attorney to determine the scope of the attorney in fact’s authority. *Id.*; *Penfold v Warner*, 96 Mich 179, 180; 55 NW 680 (1893). See *Bergman v Dykhouse*, 316 Mich 315, 319-320; 25 NW2d 210 (1946); *Kuite v Lage*, 152 Mich 638, 640; 116 NW 467 (1908). We give the language its plain and ordinary meaning. *Penfold*, 96 Mich at 181; see also *Crane v Reeder*, 21 Mich 24 (1870).

The plain language of the power of attorney indicates that Lowell had the authority to change the beneficiaries of the Edgewater and Fifth Third CDs. Because the power of attorney does not define the terms “execution” or “transfer,” we refer to a dictionary to determine the

ordinary meaning of the terms. *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006). Black's Law Dictionary (9th ed) defines "execution" as "[t]he act of carrying out or putting into effect" or "[v]alidation of a written instrument, such as a contract or will, by fulfilling the necessary legal requirements." Black's Law Dictionary (9th ed) defines "transfer" as follows:

1. Any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease or creation of a lien or other encumbrance. The term embraces every method – direct or indirect, absolute or conditional, voluntary or involuntary – of disposing or parting with property or with an interest in property . . . 2. Negotiation of an instrument according to the forms of law . . . 3. A conveyance of property or title from one person to another . . .

The trial court properly found that Lowell's actions constituted the execution of certificates of deposits because he "fulfilled the legal requirements of transferring [the] [CDs] from 'in trust for the children of [Eleanor]' in one case and 'pay on death of [Eleanor]' in the other case to the church." Lowell "executed" CDs by fulfilling the necessary legal requirements to create CDs of which Midway Baptist was the beneficiary. He submitted the original CDs to Edgewater and Fifth Third and was provided with new CDs that showed that Midway Baptist was the beneficiary. The power of attorney gave Lowell the power to execute CDs or "any other type or form of document required to transfer any said monies and any other documents required to accomplish any transaction." Changing the beneficiaries constituted a "transfer of monies" because it was an indirect "mode of disposing of or parting with" monies, conditioned on the death of Eleanor. The definition of "transfer" encompasses "every method" of "parting with property or an interest in property." Plaintiffs concede that Lowell had the authority to execute documents to transfer money, and their argument that Lowell's actions did not transfer monies is unpersuasive given the plain and ordinary meaning of the language in the power of attorney. See *Penfold*, 96 Mich at 181; *Crane*, 21 Mich 24 (1870). Transferring the beneficiaries also required execution of other documents required to accomplish "any transfer transaction." We affirm the grant of summary disposition to Edgewater and Fifth Third, and partial summary disposition to Midway Baptist related to the CDs from those financial institutions.

Midway Baptist argues on cross-appeal that the trial court erred by granting summary disposition in favor of plaintiffs on its claims related to CDs from 1st Source Bank because there was a genuine issue of material fact regarding whether Lowell completed all actions necessary to change the CD beneficiaries before Eleanor's death. We agree.

In *Capuzzi*, 470 Mich at 402-403, our Supreme Court explained:

It is also well-settled that the death of the principal revokes the authority of the agent, unless the agency is coupled with an interest. Any act done by the agent after the principal dies cannot affect the estate. This is true even if an agent performed some of the acts necessary in a single transaction but not all of them. If an agent is in the midst of a transaction when the principal dies, the transaction cannot continue regardless of the principal's previously stated wishes

. . . Notably, if a third party requires additional information to confirm that the agent has authority to act or if, for example, the third party requires completion of an additional form indicating power of attorney, then the agent has obviously *not completed all actions necessary for the transaction*. If the principal dies before the agent meets the third party's requirements, then the third party is not required to follow the directive of the agent. This is because all necessary actions have not been completed by the agent before the principal dies. [Citations omitted.]

First, there is a genuine issue of material fact regarding whether Eleanor was alive when Lowell submitted the additional documentation concerning his authority under the power of attorney that was requested by 1st Source. Lowell claims that he submitted the letter signed by Eleanor to 1st Source on March 4, 2008, at approximately 1:00 p.m. and that the branch manager had already left and was not available to discuss the CDs. According to Lowell, he visited Eleanor first and then went to 1st Source. Viewing the evidence in the light most favorable to Midway Baptist, Lowell's deposition testimony suggests that Eleanor was alive when he provided 1st Source with the letter. The bank manager contends that when Lowell returned March 4, 2008, with the requested documentation, she spoke to him and he informed her that Eleanor had died early that afternoon. Accordingly, there is a genuine issue of material fact because the record "leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. This issue is material because if Eleanor was dead when Lowell submitted the documentation from Eleanor regarding his authority to change the CD beneficiaries, then Lowell had "obviously not completed all actions necessary for the transaction" and judgment in favor of plaintiffs would be proper. *Capuzzi*, 470 Mich at 403.

Second, there is a genuine issue of material fact concerning whether the 1st Source assignment forms had to be signed before the CD beneficiaries could be changed. The bank manager attested that on March 5, 2008, the 1st Source "[b]ranch administration authorized the change of [payable on death] on the eight (8) [CDs] with the explanation that the paperwork was in our hands before the death" and that 1st Source asked Lowell to sign the assignment forms as a "formality." At a hearing on Midway Baptist, 1st Source and Lowell's motions for summary disposition, the attorney for 1st Source informed the trial court that the assignment form was required to change CD beneficiaries according to 1st Source's internal rules. Thus, a genuine issue of material fact exists as to whether the assignment form was required or a mere formality. We note that whether the assignment form was needed in order to change the CD beneficiaries is only material if Lowell submitted the requested documentation regarding his authority to change the beneficiaries before Eleanor's death because otherwise Lowell would not have completed all necessary actions for the transaction. See *Capuzzi*, 470 Mich at 403. In light of the existence of questions of material fact, we reverse the trial court's grant of summary disposition to plaintiffs related to the 1st Source Bank CDs.

We deny plaintiffs' request for attorney fees and actual damages pursuant to MCR 7.216(C)(1)(b). Under MCR 7.216(C)(1), a party may move for actual and punitive damages or other disciplinary action under MCR 7.211(C)(8). Plaintiffs failed to make the proper request in a motion under MCR 7.211(C)(8); a request contained in a brief does not constitute a motion under this court rule. Further, Midway Baptist's brief on appeal was not vexatious because it did not grossly disregard the requirements of a fair presentation of the issues to this Court. MCR 7.216(C)(1)(b).

Midway Baptist's alternative argument that a constructive trust should be imposed to give effect to Eleanor's intent is unpreserved and raised for the first time on appeal. *Polkton Charter Twp v Pellegroni*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Though we may address an unpreserved issue if it involves a question of law and the facts necessary for its resolution have been presented, we decline to address this argument. *Royce v Chatwell Club Apts*, 276 Mich App 389, 399; 740 NW2d 547 (2007). On remand, justice does not require that Midway Baptist be granted leave to amend its pleadings pursuant to MCR 2.118(A)(2) because it cannot establish the elements for a constructive trust claim.

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens