IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONALD J. ROKKAN, individually; and DONALD J. ROKKAN, personal representative of the Estate of Marsaelle F. McHale, deceased,	)	**No. 29379-3-III**
Appellants,	)	
v.	)	**Division Three**
GESA CREDIT UNION, a corporation; and PAULA MILLER and JOHN DOE MILLER, wife and husband,	)	
Respondents.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Donald Rokkan, as both beneficiary and personal representative of the estate of Marsaelle McHale, filed suit against respondents Gesa Credit Union and Paula Miller. The trial court granted judgment for respondents on the majority of the claims, and a jury rejected the remaining claims. Mr. Rokkan appeals. We affirm.

FACTS

In March 2000, Marsaelle McHale picked up a check in the amount of $94,832.09 from U.S. Bank. She then proceeded to Gesa Credit Union's Richland Branch (Gesa) to deposit the check. Oneta Denson accompanied Ms. McHale.

While Ms. McHale was entering the building, Gesa employee and longtime friend Paula Miller was on her way down the front staircase on a work-related errand. The two visited and walked to member services representative Cindy Cook's desk so that Ms. McHale could conduct a transaction. According to respondents, Ms. Miller then left before Ms. McHale conducted her business. According to Ms. Denson, Ms. Miller stayed near during the entire transaction.

Ms. McHale used the check, along with money in her account, to purchase three term share certificates with six-month maturity dates that would automatically renew and continue to accrue interest. Although not required, she named beneficiaries for each one. Ms. Denson states that Ms. Cook suggested that it would be "wise" to do so. Ms. Cook denies saying this.

The first and second certificates each were for $75,000 and named Ms. McHale's brother as beneficiary on one certificate and her niece and nephew as joint beneficiaries on the other. The third certificate was for $50,000 and named Ms. Miller as beneficiary.

According to Ms. Denson, Ms. McHale was uncertain whom to name as beneficiary for the third certificate. She allegedly turned to Ms. Miller and said, "[h]ow about you, Paula?" Ms. Miller and Ms. Cook deny that this occurred. Ms. Miller testified that she did not know she was a beneficiary until Ms. McHale died in 2005.

Ms. McHale was given a copy of each certificate; the original certificates remained on file at Gesa. She subsequently received maturity notices and account statements reflecting the fact that she had these three term share accounts at Gesa in addition to her checking and savings accounts. Mr. Rokkan, a close friend of Ms. McHale, had her power of attorney. He was aware of the accounts, but was unaware there were any beneficiaries.

At some point during this time, Mr. Rokkan called Gesa to ask what course of action to take regarding the term share accounts. Ms. Miller advised him to continue letting them accrue interest. This he did. According to Mr. Rokkan, Ms. McHale told him that she wanted him to have the certificates, which were turned over to the named beneficiaries upon her death.[1]

In April 2008 Mr. Rokkan filed suit. The suit alleged abuse of an elderly person, negligent estate planning, misrepresentation, fraudulent concealment, breach of fiduciary

[1] Mr. Rokkan was the primary recipient of the remainder Ms. McHale's estate, which was valued in excess of $600,000.

duty, violation of the Washington Consumer Protection Act[2] (CPA), negligence, negligent supervision, and conversion. During pretrial motions, Mr. Rokkan sought permission to discuss his conversations with Ms. McHale regarding her intent that he receive the term share accounts. The court suppressed the statements pursuant to the Dead Man statute, RCW 5.60.030.

Trial began in June 2010. After Mr. Rokkan rested his case, the court entertained Gesa's motion for judgment as a matter of law. The court granted the motion as to the CPA, negligent estate planning, fraudulent concealment, negligence, and negligent supervision claims. Mr. Rokkan unsuccessfully sought reconsideration of the court's order concerning the CPA claim.

At the conclusion of Gesa's case-in-chief, Mr. Rokkan again requested reconsideration of the dismissal of the CPA claim. The court again denied the request. On July 9, 2010, the jury found in favor of respondents on the final two claims; the verdict was filed with the court that day. On July 16, Mr. Rokkan filed a motion for a new trial and scheduled it for hearing on August 13. However, he did not properly note the hearing before the trial court. In its response, Gesa requested dismissal of the motion based upon his failure to comply with CR 59. Mr. Rokkan then filed a motion for leave to file a motion for a new trial.

[2] Chapter 19.86 RCW.

A hearing was held on September 7, 2010. The court denied the motion as untimely and also denied the motion for leave to file another motion for a new trial. Gesa prepared an order consistent with the court's decision. The order, filed September 8, stated that the jury verdict started the 30-day appeal period. Mr. Rokkan filed his notice of appeal on September 15.

ANALYSIS

This appeal argues that the trial court erred in granting judgment as a matter of law on the CPA, negligence, fraudulent concealment, and negligent supervision and training claims. Mr. Rokkan also asserts that the trial court erred by denying his motion for judgment as a matter of law and by excluding evidence pursuant to the Dead Man statute. Both parties request attorney fees in the matter. Gesa also contends that these issues are not properly before the court because the appeal was not filed within 30 days of the jury verdict. We will first address the timeliness argument before discussing the appellant's contentions.

Timeliness

It is fundamental that a party cannot appeal until entry of a final judgment, order or other decision. CR 54(a); CR 58; RAP 2.2(a); RAP 5.2(c). Once a final judgment is entered, a party has 30 days from that date by which to file a notice of appeal. RAP

5.2(a). A jury verdict must be reduced to judgment by a court in order to become final. *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 179-180, 422 P.2d 515 (1967). Moreover, an appeal from a post-trial motion brings with it the underlying action. RAP 2.4(c).

Despite the axiomatic nature of these rules, Gesa argues the jury verdict was the date that began the appeal period rather than the September 8, 2010 final order that resolved the post-trial motions and memorialized the verdict. Gesa cites no authority holding that a trial court can alter either the time for appeal or the orders from which an appeal can be taken. The trial court entered its final order on September 8, 2010; that was the first appealable order entered in this case. RAP 2.2(a)(1). The notice of appeal was filed seven days later. It was timely. RAP 5.2(a). Accordingly, the appeal is properly before this court.

CPA Claim

Mr. Rokkan first contends that the trial court erred in granting judgment as a matter of law regarding his CPA claim. We review *de novo* a trial court's decision to either grant or deny a judgment as a matter of law. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). "Judgment as a matter of law is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all

reasonable inferences, substantial evidence exists to sustain a verdict for the nonmoving party." *Id.* Substantial evidence is that which would convince an unprejudiced, thinking mind of the truth of the declared premise. *Cowsert v. Crowley Maritime Corp.*, 101 Wn.2d 402, 405, 680 P.2d 46 (1984).

In order to prevail on a CPA claim, a private plaintiff must demonstrate that the defendant (1) engaged in an unfair or deceptive act or practice (2) in trade or commerce, that (3) affects a public interest (4) injurious to either business or property, and (5) that the defendant's act caused the damage. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787-793, 719 P.2d 531 (1986).

The public interest element may be established by considering five relevant factors. Those five factors are:

> (1) Whether the acts or practices were committed in the course of the defendant's business?
> (2) Are the acts part of a pattern or generalized course of conduct?
> (3) Were repeated acts committed prior to the act involving plaintiff?
> (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff?
> (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

Id. at 790. It is not necessary that all factors be present, nor is any single factor dispositive in determining whether an alleged CPA violation involves the public interest. *Id.* at 791. Here, the trial court granted judgment against the CPA claim after determining

it failed the public interest element because four of the five factors were absent. Mr. Rokkan challenges that assessment.

It is readily apparent the acts complained of occurred in the course of business. Accordingly, the first factor of the public interest test is present. However, even taking all evidence in Mr. Rokkan's favor, the only indication of the allegedly untoward conduct is the testimony given by Ms. Denson, which only details the single transaction at Gesa. Accordingly, the second factor is not present, as there is no evidence that the alleged misbehavior is part of a pattern or generalized course of conduct. The third factor is absent for this same reason; there is no evidence of prior similar acts. There is likewise no evidence that there was a "real and substantial" potential for repetition of the alleged conduct. On the contrary, Ms. Miller and Ms. Cook testified that, as a rule, they did not give advice as to whether someone should name a beneficiary. Ms. Denson's testimony might well speak to one event but it does not prove a real and substantial potential for repetition. Finally, there is no evidence that many consumers were likely to be affected by the alleged wrongful behavior. In sum, there is insufficient evidence in the record to suggest that there is a public interest in the single transaction that occurred. The trial court did not err in granting judgment on this claim.

Negligence Based Claims

Appellant next contends that the trial court erred in granting judgment as a matter of law regarding the negligence claims because Ms. Denson's testimony was substantial evidence that Ms. Miller breached her duty to refrain from self-dealing and that Ms. Cook was negligent in advising that it would be "wise" to name beneficiaries to the term share accounts. The essence of the latter argument is that Ms. Cook negligently impacted Ms. McHale's estate planning.

However, even when Ms. Denson's testimony is considered most favorably, Ms. Miller was not *involved* in the transaction, but was merely present. There is nothing to suggest a violation of a duty to avoid self-dealing, if such a duty existed. Accordingly, the trial court did not err on this point.

Nor was there error in dismissing the negligence claim regarding Ms. Cook's actions. Taking the record in the light most favorable to Mr. Rokkan, Ms. Denson testified that it was Ms. Cook's idea to make a beneficiary designation, and that she told Ms. McHale that it would be "wise" to do so. Even if this was a negligent statement that could impact estate planning, the record is clear that Ms. McHale engaged in the relevant estate planning in 2002 *after* creating the term share accounts. Gesa's actions did not alter the estate planning; the estate planning simply failed to account for the certificates.

Mr. Rokkan next argues that the trial court committed error in dismissing his

fraudulent concealment claim because substantial evidence shows that Ms. Miller failed to notify him of her interest in the certificate when she advised him to make no changes in the related accounts.

Fraudulent concealment occurs where one who has a duty to disclose fails to do so. *Oates v. Taylor*, 31 Wn.2d 898, 903, 199 P.2d 924 (1948). Fraudulent concealment occurs when:

> "(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
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> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
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> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
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> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading."

Richland Sch. Dist. v. Mabton Sch. Dist., 111 Wn. App. 377, 385, 45 P.3d 580 (2002) (quoting Restatement (Second) of Torts §551 (1977)), *review denied*, 148 Wn.2d 1002 (2003). "'That duty arises where the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other; or where, by the lack of business experience of one of the parties, the other takes advantage of the situation by remaining

silent.'" *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993) (quoting *Oates*, 31 Wn.2d at 904).

However, even when taking all inferences in Mr. Rokkan's favor, the evidence was insufficient to submit this claim to a jury. Even if Ms. Miller had knowledge that she was one of the named beneficiaries on the term share accounts, it was not knowledge that was peculiar to her. Mr. Rokkan had the ability to simply look through the relevant paperwork to find the copies of the certificates that were given to Ms. McHale at the time they were created. It was even possible for him to present his power of attorney at the bank and view the certificates in order to ascertain the beneficiaries. The fact that Ms. Miller was one of the certificate beneficiaries could have been readily obtained by Mr. Rokkan had he been inclined to do so, and was therefore not peculiar. The trial court did not err in granting judgment on this point.

Mr. Rokkan next challenges the trial court's denial of his motion for judgment as a matter of law that Ms. Miller and Ms. Cook were acting within the scope of their employment. To this end he also challenges the trial court's denial of a portion of his jury instruction that stated that Ms. Miller and Ms. Cook were acting within the scope of their employment.[3]

[3] Mr. Rokkan also challenges instructions 7 and 8 as impermissibly inviting the jury to find against Mr. Rokkan on the issue of scope of employment. We will not consider this challenge since he did not take exception to the instructions below. RAP

However, it is apparent from the record that there was a genuine issue regarding whether they were acting within the scope of their employment since Gesa had policies in place specifically prohibiting self-dealing. Construing this in a light most favorable to Gesa, there was substantial evidence that if self-dealing occurred, Ms. Miller and Ms. Cook were engaged in a frolic rather than acting within the scope of their employment. Thus, the trial court did not err in denying the motion, nor did it err in denying the challenged portion of the instruction.

Mr. Rokkan also contends that the trial court erred in not submitting his negligent supervision and training claims to the jury. The heart of his argument is that substantial evidence exists to support the claim because Gesa had in place a policy that was intended to prevent employees from using their positions for personal gain, yet it did not act to prevent the alleged injuries. Moreover, Mr. Rokkan argues that, because Gesa employees were supposed to inform customers of the potential for assets to pass outside their will if beneficiaries are named, Gesa was negligent in training.

An employer cannot be held liable for negligently supervising an employee unless the employer knew, or in the exercise of reasonable care should have known, that the employee presented a risk of danger to others. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993), *review denied*, 123 Wn.2d 1027 (1994). The employer

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2.5(a).

may only be held liable for acts beyond the scope of employment if it had knowledge of "the dangerous tendencies of its employee." *Id.*

As noted previously, there is no evidence in the record that Ms. Miller used her position for personal gain. Because Ms. Miller was not the employee conducting the transaction, it could hardly be stated that she was using her position *as an employee* for personal gain—the most that could be said is that she was using her influence as a friend, but that is simply insufficient.

Nor do we accept the argument that Gesa failed to properly train its employees as to the legal effects of creating beneficiaries. It is illegal in this state for a nonattorney to give legal advice. Chapter 2.48 RCW, *et seq*. Thus, it would be illegal for Gesa employees to state that beneficiary designations could bypass estate planning since that would constitute legal advice. Gesa can hardly be negligent in failing to train its employees to unlawfully give legal advice.

Dead Man Statute

Mr. Rokkan's last argument is that the trial court erred by excluding his proposed testimony about his conversation with Ms. McHale regarding her desires for the term share certificates. He believes ER 803(a)(3) controls over RCW 5.60.030 when the two conflict.

We need not discuss this argument. The excluded evidence was not germane to the previously discussed causes of action which were dismissed as a matter of law. None of those claims failed because of this testimony. Similarly, neither of the two issues submitted to the jury—breach of fiduciary duty and negligent misrepresentation—were affected by the ruling. The evidence merely went to damages rather than any issue of liability on those two theories. Any error would have been harmless.

The parties' requests for attorney fees are denied. The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Siddoway, J.