IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALIZA, INC., Appellant, v. JOHN N. ZAREMBA and JANE DOE ZAREMBA, individually, and the marital community composed thereof and JOHN N. ZAREMBA, CPA, PS, Respondents, CARL ZAREMBA and REBECCA ZAREMBA, individually, and the marital community composed thereof, Defendants.	)	No. 62497-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 9, 2009

Appelwick, J. — A person does not have a duty to protect another from the criminal acts of a third party unless a special relationship exists. Genuine issues of material fact exist on whether John Zaremba had a special relationship with Aliza such that he owed a duty to protect against the criminal acts of Carl Zaremba. We reverse the trial court's grant of summary judgment.

FACTS

Aliza, Inc., is a family owned business that operates hotels in Washington and Oregon. Since 1975, the accounting firm of John N. Zaremba, CPA, PS, has provided tax and accounting services to Aliza. John Zaremba, owner of the accounting firm, had worked personally with Aliza since 2000. The parties agree that in addition to accounting services John[1] provided Aliza with business referrals and other consulting services.

Beginning in 2004, Aliza sought to sell real property in Arizona and wanted to make it part of a 1031 exchange to defer tax payments. Aliza had engaged in these sorts of sales and used the Archer Group, a local broker, for two exchanges in the 1990s. Zaremba CPA did not perform 1031 exchange services. But, upon learning of Aliza's plans, John asserts he volunteered the information that his son Carl Zaremba's company, 1031, Inc., performed such services. A banking document shows that John was the Vice President of 1031, Inc. Carl also worked at Zaremba CPA, but was not a certified public accountant and did not work on the Aliza account. At the same time John referred Carl, John asserts he also gave Aliza the names of other businesses in Whatcom County that performed 1031 exchanges. Aliza recounts the referral differently; stating that John told Aliza that Carl performed 1031 exchanges "here," meaning Carl performed 1031 exchanges at John's accounting firm, under the supervision of John. Aliza recalls that John also stated it would be better and more convenient for Aliza to use Carl's services.

Aliza hired Carl to perform the 1031 exchange, signing a contract with

[1] We refer to the parties by their first names for clarity. No disrespect is intended.

1031, Inc. The Arizona property closed in 2006, for a net sum of $3,242,176. Aliza used the proceeds to buy other property. Carl transferred the money from the 1031 account to the seller of the other property. A balance of $421,653 remained in Carl and 1031, Inc.'s custody. Carl stole those remaining funds. Carl notified Aliza in writing of his theft. The State charged Carl with theft. He pleaded guilty.

Aliza filed suit against Carl, his wife, John N. Zaremba, CPA, PS, and John individually. Aliza alleged negligence, professional malpractice, breach of fiduciary relationship, negligent misrepresentation, breach of contract, and fraud. John and Zaremba CPA moved for summary judgment on Aliza's claims against them. Aliza opposed the motion for summary judgment and filed the declarations of Dan Kornfield, Aliza Kornfield, and Kathy Bartley in support of its opposition. Four days before the hearing on the motion for summary judgment, John and Zaremba CPA moved to strike a portion of Bartley's declaration relating to the contents of a memo she saw on Carl's desk addressed from Carl to John. They objected to the section of Bartley's declaration on the grounds that it was hearsay, not authenticated, and not in compliance with the best evidence rule.

The trial court granted the motion to strike the portion of Bartley's declaration. The trial court also granted the motion for summary judgment and dismissed all of Aliza's claims against John and Zaremba CPA.

Aliza timely appealed both rulings.

DISCUSSION

I. Bartley Declaration

Aliza argues that the trial court erred in striking a portion of Bartley's declaration, because it does not contain hearsay and the memo was properly authenticated.

An appellate court reviews a trial court's evidentiary ruling made in conjunction with a summary judgment motion de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); Warner v. Regent Assisted Living, 132 Wn. App. 126, 135, 130 P.3d 865 (2006); Seybold v. Neu, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001).

The court struck the following four sentences from the declaration of Kathy Bartley:

> Not long after that I saw a memo in Carl's office addressed to John from Carl. It said that he could not manage on the salary alone. It went on to say that he had taken money from a 1031 exchange and from the account of a client of the accounting firm. The memo said that Carl owned some stock that he might sell to repay the money.

Hearsay is generally not admissible. ER 802. "Hearsay" is testimony of an out-of-court statement that a party offers in court to prove the truth of the matter asserted. ER 801(c). Testimony of an out-of-court statement is not hearsay if it is offered for some other purpose. Patterson v. Kennewick Pub. Hosp. Dist. No. 1, 57 Wn. App. 739, 744, 790 P.2d 195 (1990).

Aliza argues that the stricken statements do not contain hearsay, because they are not offered to prove the truth of the matter asserted. Instead, Aliza

offers the declaration to prove that John had knowledge that Carl took money from an accounting firm client prior to John's referral of Aliza to Carl.

Aliza argues the evidence it seeks to admit is similar to the testimony in Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 78–9, 98 P.3d 1222 (2004) and Moen v. Chestnut, 9 Wn.2d 93, 113 P.2d 1030 (1941). In Domingo, we held that a supervisor's description of what she saw on a videotape was not hearsay when it was offered to show her motive for reprimanding and eventually terminating the employee. 124 Wn. App. at 79. Similarly, in Moen, the court admitted hearsay testimony to show that a driver was aware that an intersection was dangerous, because she had previously engaged in discussions about it. 9 Wn.2d at 109. In both cases relied on by Aliza, the mere fact that the statement was made was itself relevant, regardless of the truth or falsity.

But, here, the portions of the declaration that were stricken by the trial court are only relevant if the assertions of the memo are true: according to Aliza, the "memo was offered to prove that Zaremba had notice that Carl stole money from [a] client." Unlike Domingo, Bartley's motivation as the reader is not at issue. And, unlike Moen, Carl's knowledge as the alleged author is not at issue. Aliza, however, asserts that the declaration was offered to show John's knowledge of the content. But Aliza makes no showing that the contents of the memo had been communicated to John. Absent evidence of its communication to John, the memo is only relevant if Carl did indeed steal money from a client

and John knew about it, but failed to disclose that fact to Aliza. This is inadmissible hearsay.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. ER 901(a). Nothing establishes that Carl actually drafted the memo or otherwise authenticates it as required by ER 901 and ER 902.

Aliza claims that Bartley's testimony is similar to State v. Kinard, 109 Wn. App. 428, 435–36, 36 P.3d 573 (2001), where we held that ER 901 was satisfied even where the original document was not available but the author and the officers who received the note testified about its contents based on their personal knowledge. But, unlike Kinard, Bartley did not author or receive the memo. She does not have any knowledge upon which to establish the memo is what it purports to be. It is not authenticated as required by CR 56(e) and ER 901.

We hold that the trial court did not err in striking a portion of the declaration, because it contained hearsay or was unauthenticated.

II. Motion for Summary Judgment

Aliza argues that the trial court erred in granting Zaremba's summary judgment motion, because genuine issues of material fact exist for the jury to decide. Although the summary judgment order extinguished all of the claims, Aliza only presents arguments on fiduciary relationship, negligent

misrepresentation, and fraud. We consider review of the other claims waived.

We review summary judgment de novo and engage in the same inquiry as the trial court. Heath v. Uraga, 106 Wn. App. 506, 512, 24 P.3d 413 (2001). Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In reviewing summary judgment, we consider supporting affidavits and other admissible evidence based on personal knowledge. A party may not rely on allegations, denials, opinions, or conclusory statements, but must set forth specific material facts for trial. Int'l Ultimate, 122 Wn. App. at 744. The moving party bears the burden of proving there are no genuine issues of material fact. CR 56(c); Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 863, 147 P.3d 600 (2006). We view the facts and reasonable inferences in a light most favorable to the nonmoving party. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003). If the moving party establishes the absence of an issue of material fact, the nonmoving party must set forth specific facts establishing a genuine issue for trial. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Summary judgment is appropriate if in view of all the evidence, reasonable persons could reach only one conclusion. Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

A. Special Relationship

Aliza claims the trial court erred in granting the motion for summary judgment, because John created a special relationship when he acted as its fiduciary by providing business advice beyond that of an accountant. Under Washington law, a private person generally has no duty to protect others from the criminal acts of third parties. Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 223, 802 P.2d 1360 (1991). But a private party may owe a duty to another person to protect from the criminal acts of third persons where a special relationship exists between parties. Id. at 224. For example, Washington courts have recognized a special relationship giving rise to a duty to protect against third party criminal conduct in the context of an innkeeper's relationship to a guest, Gurren v. Casperson, 147 Wash. 257, 265 P. 472 (1928); an institution to an institution's resident, Niece v. Elmview Group Home, 131 Wn.2d 39, 929 P.2d 420 (1997); a university to a student, Johnson v. State, 77 Wn. App. 934, 894 P.2d 1366 (1995); and a business to a business invitee, Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 943 P.2d 286 (1997).

A fiduciary relationship is such a special relationship. In a fiduciary relationship one party "'occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for.'" Liebergesell v. Evans, 93 Wn.2d 881, 889–90, 613 P.2d 1170 (1980) (quoting Restatement of Contracts § 472(1)(c) (1932)). A fiduciary relationship arises as a matter of law in certain relationships—between, for example, attorney and client, doctor and patient, trustee and beneficiary. Liebergesell, 93 Wn.2d at 890. A fiduciary

relationship may also arise from particular facts. Id. at 891; Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 434, 40 P.3d 1206 (2002).

Aliza alleges that John acted as a business advisor and fiduciary over the course of their seven year relationship. Specifically, Aliza alleges the following facts are evidence of the existence of a fiduciary duty: (1) when Aliza considered adding, for the first time ever, health insurance as an employee benefit, John recommended and referred a local insurance broker; (2) John arranged with someone to arrange Dan Kornfield's immigration papers; (3) John introduced Aliza to representatives of Horizon Bank in order to obtain a proposal and recommendations regarding purchasing of property in Puyallup, Washington; (4) John's recommendations to Aliza about particular financing options relating to a proposal from the bank; (5) Aliza consulted with John whenever it considered selling or purchasing property; (6) after Aliza learned that the Hampton Inn in Bellingham was for sale, Aliza asked John to gather information about it, which he did; and (7) if any Aliza managers had questions about employment security, dismissal, or even child support, it was directed to Zaremba CPA staff. Additionally, several times a year, Aliza held meetings with John that lasted 2–3 hours regarding the past, present, and future of the business.

John does not dispute that he provided business advice to Aliza, but contends that it was merely incidental to the tax and accounting services his firm provided. However, viewing the evidence in the light most favorable to the

nonmoving party, the declarations of the Kornfields go beyond a bare assertion of their trust in John and raise genuine issues of material fact about whether a fiduciary relationship in fact existed between them.

A fiduciary relationship gives rise to a duty to disclose. When a special relationship exists "one who speaks must say enough to prevent his words from misleading the other party; one who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party; and one who stands in a confidential or fiduciary relationship to the other party to a transaction must disclose material facts." Tokarz v. Frontier Fed. Sav. & Loan Ass'n, 33 Wn. App. 456, 459, 656 P.2d 1089 (1982). Aliza contends that John breached his fiduciary duty when he stated that Carl performed 1031 exchanges and could perform them "here" and when he then failed to disclose material facts about Carl's performance of 1031 exchanges—notably Carl's qualifications to perform the transactions and the fact that those transactions were performed outside of Zaremba's firm and supervision. The evidence is sufficient to raise a question of fact as to breach of a fiduciary duty, if one is determined to exist.

Aliza asserts that Zaremba's alleged breach of its fiduciary duty proximately caused Aliza's damages. Zaremba contends that Aliza's loss was proximately caused by Carl's misconduct, and that Zaremba had no duty to protect Aliza from the criminal acts of a third party. The issue of proximate causation is a question for the jury. Attwood v. Albertson's Food Ctrs., 92 Wn.

App. 326, 330, 966 P.2d 351 (1998).

Zaremba CPA argues that Carl's criminal act was a superseding cause of Aliza's loss. "'Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are not reasonably foreseeable are deemed superseding causes.'" Crowe v. Gaston, 134 Wn.2d 509, 519, 951 P.2d 1118 (1998) (quoting Cramer v. Dep't of Highways, 73 Wn. App. 516, 520, 870 P.2d 999 (1994)). The foreseeability of an intervening act is a question of fact for the jury. Id. at 520. Aliza presented evidence that John could have reasonably foreseen Carl's criminal acts of embezzlement or theft. As Carl's employer, Zaremba knew Carl's salary, and also knew from his wife, Carl's mother, that Carl was living beyond his means. This is sufficient to raise a material question of fact for the jury on superseding causation.

Summary judgment on this cause of action was improper.

B. Negligent Misrepresentation

The relationship between Aliza and Zaremba may have given rise to a duty to disclose that would impose liability for negligent misrepresentation. A negligent misrepresentation occurs when

> [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977); see ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). A false representation as to a presently existing fact is a prerequisite to a misrepresentation claim. Id. at 182; see also Stiley v. Block, 130 Wn.2d 486, 505–06, 925 P.2d 194 (1996) (promises of future performance are not representations of existing fact). Misrepresentation can also occur through failure to disclose facts which may justifiably induce another to act in a business transaction. Colonial Imps., Inc. v. Carlton Nw., Inc., 121 Wn.2d 726, 731, 853 P.2d 913 (1993). Failure to disclose also serves as a basis for negligent misrepresentation where one party in a business transaction has information "'*necessary to prevent his partial or ambiguous statement of the facts from being misleading.'*" Id. (quoting Restatement (Second) of Torts § 551(2)(b) (1977)).

Misrepresentation by failure to disclose only arises where there exists a duty to exercise reasonable care to disclose the matter. This duty does not require a fiduciary relationship, but some type of special relationship must exist before it will arise. Id. at 732. For example, courts will find a duty to disclose when "'there is a quasi-fiduciary relationship, where a special relationship of trust and confidence has been developed between the parties.'" Id. at 732 (quoting Favors v. Matzke, 53 Wn. App. 789, 796, 770 P.2d 686 (1989)). The duty arises "'where the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other.'" Id. (quoting Oates v. Taylor, 31 Wn.2d 898, 904, 199 P.2d 924 (1948)).

A special relationship between Aliza and Zaremba may have given rise to a duty to disclose. As discussed above, Aliza raises questions of material fact about the nature of its relationship with Zaremba. A jury could find that the facts support a special relationship between the parties, creating a duty to disclose. Furthermore, Aliza also presents questions of fact about whether the ambiguous nature of Zaremba's statements and conduct with respect to Carl's performance of 1031 exchanges—including the statement that Carl could perform the exchange "here," Carl's position as an employee of the CPA firm, his use of the accounting firm's phone number, office space, and time to do 1031 exchanges—were misleading and required disclosure and clarification. These facts and statements may have implied that Carl was a CPA, that 1031 exchanges were handled at Zaremba CPA offices, and that John and Zaremba CPA would supervise the exchange.[2] All of which Zaremba CPA itself asserts are false. This factual controversy requires resolution by the fact finder after consideration of the credibility of the parties and the context of the conversations.

In addition to the special relationship and ambiguous or false statements, Aliza must demonstrate justifiable reliance. "Justifiable reliance" means reliance that is reasonable under the surrounding circumstances. Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 551, 55 P.3d 619 (2002). Generally, this is a question of fact. Barnes v. Cornerstone Inv., Inc., 54 Wn. App. 474, 478, 773

[2] The record also establishes that John told Aliza it would be "better and more convenient" to use Carl's services. Aliza does not argue that these statements amounted to negligent misrepresentation. Consequently we do not address these facts.

P.2d 884 (1989). Given the facts raised, a jury is entitled to consider whether the history between the parties justified Aliza's reliance on John's recommendation that his son could perform the 1031 exchange "here."

As noted in the previous section, questions of fact also exist as to causation and damages. The trial court erred in granting summary judgment of Aliza's negligent misrepresentation claims.

C. Fraud

Last, Aliza claims the trial court erred when it granted summary judgment of its claims for fraud.

To establish fraud, the plaintiff must demonstrate: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) speaker's knowledge of its falsity; (5) speaker's intention that it shall be acted upon by the plaintiff; (6) plaintiff's ignorance of falsity; (7) reliance; (8) right to rely; and (9) damages. Hoffer v. State, 110 Wn.2d 415, 425, 755 P.2d 781 (1988), aff'd. on rehearing, 113 Wn.2d 148, 776 P.2d 963 (1989). "An action for fraud may also be predicated on concealment where there is a duty to disclose." Tokarz, 33 Wn. App. at 463. Usually this duty exists where there is a fiduciary relationship. Id. at 463–4. A party cannot claim to have been taken advantage of, if he had means to acquire the information. Id. at 464.

Here, Aliza again claims that the statement that Carl performed exchanges "here," and comments that Aliza could not earn interest on the transaction amounted to fraud.[3] These are representations of an existing fact.

[3] In its briefing, Aliza claims also that John made misrepresentations about Carl being qualified

The existence of a false statement is a threshold requirement for a claim of fraud. Dan Kornfield stated that:

> John told us that we were not allowed to receive any of the interest and that either Charlotte Archer had done something she shouldn't have, or the IRS [Internal Revenue Service] rules had changed . . . in my own subsequent research I have found that John and Carl were both wrong. Some exchange facilitators may keep the interest, but others pay all or at least part of it to the client.

Whether this statement was made is a question of fact and whether it is false is a question of law not resolved by the briefing. And, as seen above, the meaning and veracity of the statement that Carl could perform the 1031 exchange "here" is also an outstanding question of material fact. Additionally, the issues of materiality, reliance, and right to rely depend upon the relationship between the parties. If a special relationship existed between Zaremba and Aliza, a jury could determine that a history of trust between the parties justifiably led Aliza to use Carl's services for a significant financial endeavor based solely on John's recommendation. Aliza may have known from conversations regarding previous 1031 exchanges that Zaremba did not perform those transactions. But, John's more recent statements may have led them to believe that this had changed. This issue is a question of fact of whether Aliza knew of the possible falsity of John's claims.

As the nonmoving party on summary judgment, Aliza is entitled to the benefit of all inferences from the evidence raised. While Aliza will bear the burden of proof by clear, cogent, and convincing evidence at trial, it has raised

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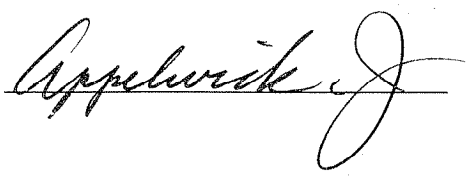
to perform exchanges. But, the record contains no such representations. Neither Dan nor Aliza Kornfield states that John affirmatively represented this fact.

questions of material fact sufficient to sustain a prima facie case of fraud.

Summary judgment on the fraud claim was error.

We reverse and remand for further proceedings.



WE CONCUR: