COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP636 Cir. Ct. No. 2010CV21290

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

KOSS CORPORATION,

PLAINTIFF-APPELLANT,

V.

PARK BANK,

DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

MICHAEL J. KOSS,

THIRD-PARTY
DEFENDANT-APPELLANT-CROSS-RESPONDENT,

GRANT THORNTON LLP,

THIRD-PARTY DEFENDANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Judgment affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. Over the course of about twelve years, Sujata Sachdeva embezzled approximately $34 million from her employer, Koss Corporation.[1] After the embezzlement was discovered and Sachdeva was convicted of multiple criminal offenses, Koss sued Park Bank, the financial institution through which Sachdeva obtained a large portion of the embezzled funds. Koss's complaint alleged Park Bank was liable for violating Wisconsin's version of the Uniform Fiduciaries Act (UFA). *See* WIS. STAT. § 112.01 (2015-16).[2] Park Bank moved for summary judgment, asserting it could not be held liable under the UFA because there was no evidence it acted in bad faith with respect to Sachdeva's transactions. The circuit court agreed and entered a judgment dismissing Koss's claim against Park Bank.

¶2 On appeal, Koss argues the circuit court erred in dismissing the action on summary judgment because genuine issues of material fact exist regarding whether Park Bank acted in bad faith, as that term is used in the UFA. We disagree and conclude the undisputed material facts do not demonstrate that

[1] Throughout the remainder of this opinion, we refer to Koss Corporation as "Koss." We refer to third-party-defendant-appellant-cross-respondent Michael Koss by his full name.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Park Bank acted in bad faith. We therefore affirm the judgment dismissing Koss's claim.[3]

BACKGROUND

¶3 Sachdeva was placed at Koss by a temporary employment agency in 1989 or 1990. She worked as a temporary employee in Koss's accounting department for three to five months, at which point she was hired as a permanent employee responsible for "[g]eneral accounting functions." In 1991, Sachdeva was promoted to the position of controller. Approximately one year later, she became Koss's vice president of finance, and at some point she was also named the secretary of Koss's board of directors.

¶4 Between about July 1997 and December 2009, Sachdeva embezzled approximately $34 million from Koss. During the time period in which the embezzlement occurred, Koss maintained multiple accounts at Park Bank. It is undisputed that Sachdeva improperly obtained funds from these accounts in three ways.

¶5 First, Sachdeva ordered cashier's checks drawn on funds from Koss's Park Bank accounts and then used those checks to pay her personal

[3] Before granting summary judgment in favor of Park Bank, the circuit court entered an order on July 20, 2015, denying Michael Koss's motion to dismiss Park Bank's third-party claim against him for equitable subrogation, but granting Michael Koss's and Grant Thornton LLP's motion to dismiss Park Bank's third-party claim against them for contribution. Michael Koss appeals the July 20, 2015 order, and Park Bank cross-appeals it. However, we need not address their arguments because we conclude the circuit court properly granted summary judgment dismissing Koss's claim against Park Bank. If Park Bank cannot be held liable to Koss, we need not determine whether Koss is entitled to either contribution or equitable subrogation from Michael Koss or Grant Thornton LLP. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

creditors. Sachdeva's process for obtaining these cashier's checks was as follows. Sachdeva or her assistant, Julie Mulvaney, would call Park Bank and request a cashier's check, providing Park Bank with: (1) the amount of the check; (2) the name of the payee; (3) the account from which the funds should be withdrawn; and (4) the name of the Koss employee who would pick up the check. A Park Bank employee would then process the cashier's check and place the original check, a copy of the check, and a debit memo for the transaction in an envelope labeled either "Koss Corporation" or with the name of the employee expected to pick up the check.

¶6 Sachdeva testified at her deposition that she was not required to sign anything or provide any written documentation in order to obtain cashier's checks, and Park Bank's employees did not ask her any security questions to verify her identity. Only Michael Koss (Koss's president, chief executive officer, and chief financial officer), John Koss, Jr. (the vice president of sales), Sachdeva, and the "vice-president of MIS" were authorized to conduct transactions involving Koss's accounts at Park Bank. However, it is undisputed that Mulvaney, who was not an authorized signatory on Koss's accounts, frequently requested cashier's checks at Sachdeva's direction. Holly Pape, a "relationship manager" employed by Park Bank who was assigned to Koss's accounts, testified Mulvaney was permitted to request cashier's checks based on her verbal representations that she was requesting them on Sachdeva's behalf.

¶7 After Sachdeva or Mulvaney requested a cashier's check from Park Bank, a Koss employee would go to Park Bank to pick up the envelope containing the check. The employee picking up the envelope was not required to sign anything in order to obtain it. He or she would then return to Koss and give the

envelope to Sachdeva or Mulvaney. Sachdeva would subsequently mail the cashier's check to one of her creditors to pay her personal expenses.

¶8 Many of the cashier's checks Sachdeva obtained in this manner were made out to entities like American Express and Chase Manhattan Bank and were used to pay Sachdeva's personal credit card bills. Other checks were made out to payees denoted by their initials, such as "N.M., Inc." or "S.F.A., Inc." Sachdeva used these initials to disguise the fact that the checks were being used to pay luxury retailers like Neiman Marcus and Saks Fifth Avenue.

¶9 Between December 2004 and December 2009, Sachdeva requested 359 cashier's checks drawn on funds from Koss's accounts at Park Bank. The vast majority of the checks were for over $5,000, and some were for over $100,000. Sachdeva would often request multiple cashier's checks in a single day, sometimes payable to the same entity. In total, Sachdeva used cashier's checks obtained through Park Bank to embezzle about $13.3 million from Koss.

¶10 Sachdeva also embezzled funds from Koss by stealing money intended for Koss's petty cash box. It is undisputed that, between July 2005 and November 2009, Sachdeva wrote forty-three checks drawn on Koss's accounts that were payable to "Petty Cash." The checks ranged in amount from $500 to $9,400, and the total amount of all forty-three checks was $171,985. A Koss employee would take each check to Park Bank, endorse and cash it, and then return to Koss with the money. These employees were not authorized signatories on Koss's accounts at Park Bank. After an employee returned to Koss with money intended for the corporation's petty cash box, Sachdeva would take some of the money and instead use it to pay her personal expenses.

¶11 Sachdeva also used wire transfers as part of her embezzlement scheme. Between December 2004 and December 2009, Park Bank made seven wire transfers, totaling $2 million, from Koss's accounts at Park Bank to its accounts at a bank in Chicago. Either Sachdeva or Mulvaney requested those wire transfers. The requests were made over the phone, despite the fact that Koss did not have a wire transfer agreement on file with Park Bank, and, under those circumstances, Park Bank's own policies prohibited it from fulfilling wire transfer requests made by telephone. From February 2008 to December 2009, Koss's Chicago banks wired over $16 million from Koss's accounts to American Express, at Sachdeva's direction. That money was used to pay Sachdeva's personal credit card bills.

¶12 Sachdeva's embezzlement was discovered on December 18, 2009, when an American Express employee called Michael Koss and reported that Sachdeva had used funds wired from Koss's bank accounts to pay her personal credit card bills. Sachdeva was subsequently indicted on federal charges, and in 2010 she pled guilty to six counts of wire fraud. She was sentenced to eleven years in prison and was ordered to pay Koss $34 million in restitution.[4]

¶13 Koss filed the instant lawsuit against Park Bank on December 17, 2010. Koss's complaint asserted a single cause of action for negligence, based on Park Bank's issuance of the cashier's checks that Sachdeva used to pay her

[4] In October 2011, the United States Securities and Exchange Commission (SEC) filed a lawsuit against Koss and Michael Koss alleging, among other things, that Sachdeva was able to hide her embezzlement because Koss and Michael Koss "did not adequately maintain internal controls to reasonably assure the accuracy and reliability of financial reporting." Judgments were entered against Koss and Michael Koss on February 23, 2012. The judgment against Michael Koss prohibits him from publicly denying any of the allegations in the SEC's complaint.

personal expenses. Koss later filed a first amended complaint, which added factual allegations regarding the petty cash checks and wire transfers described above. The first amended complaint reasserted Koss's negligence claim and added a second cause of action, which alleged Park Bank had acted in bad faith in connection with Sachdeva's transactions and was therefore liable for violating the UFA. In November 2013, Koss voluntarily dismissed its negligence claim against Park Bank. It later filed second and third amended complaints, both of which asserted a single cause of action for breach of the UFA.

¶14 Park Bank subsequently moved for summary judgment, arguing it could not be held liable under the UFA because there was no evidence it acted in bad faith with respect to Sachdeva's transactions. In response, Koss argued the evidence was sufficient to create a genuine issue of material fact as to whether Park Bank acted in bad faith. In particular, Koss cited evidence indicating that:

- Pape, Park Bank's relationship manager for Koss's accounts, told Michael Koss after Sachdeva's embezzlement was discovered that the number of cashier's checks Mulvaney had requested was "strange";

- Park Bank issued cashier's checks based on verbal requests by Sachdeva and Mulvaney, the latter of whom was not a signatory on Koss's accounts;

- Park Bank gave cashier's checks ordered by Sachdeva or Mulvaney to Koss employees who were not signatories on Koss's accounts and did not require those employees to provide signatures or verify their identities in any way;

- Park Bank allowed a Koss employee who was not a signatory on Koss's accounts to endorse a counter check payable to "Cash" for $60,000, which money then funded two cashier's checks requested by Sachdeva; and

- Sachdeva testified at her deposition that one of the reasons she chose to use Park Bank to obtain cashier's checks for her embezzlement scheme was because Park Bank made it easy for her to do so.

¶15 Koss further asserted Park Bank ignored "red flags" associated with the cashier's checks and petty cash withdrawals—including the use of payees designated by initials—and "routinely violated its own policies in its handling of Sachdeva's wire transfer requests." Koss also contended Park Bank's "policies to detect suspicious activity were inadequate." Finally, Koss observed its banking expert had opined that Park Bank's conduct amounted to bad faith.

¶16 On March 11, 2016, the circuit court issued a twenty-four-page written decision granting summary judgment in favor of Park Bank. The court concluded "bad faith" under the UFA "requires a showing of some indicia of dishonest conduct or a showing of facts and circumstances 'so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction.'" While the court acknowledged that determining the existence of bad faith is "an extremely fact-specific analysis," it concluded Koss had not provided any evidence to indicate Park Bank had acted in bad faith by failing to investigate and discover Sachdeva's misconduct. The court explained that, while Park Bank "may have been negligent in its treatment of the Koss accounts," Koss had not "provided any evidence that Park Bank intentionally ignored Sachdeva's embezzlement." In other words, "just because Park Bank *could* have discovered Sachdeva's embezzlement does not mean Park Bank *intentionally* ignored it."

¶17 The circuit court subsequently entered a judgment dismissing Koss's UFA claim against Park Bank. Koss now appeals.

STANDARDS OF REVIEW

¶18 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. "Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If so, we then examine the moving party's submissions to determine whether they establish a prima facie case for summary judgment. ***Id.*** If the moving party has made a prima facie showing, we examine the opposing party's affidavits to determine whether a genuine issue exists as to any material fact. ***Id.*** Ultimately, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶19 Here, the circuit court's decision to grant Park Bank summary judgment hinged on its interpretation of the UFA—specifically, the statutory term "bad faith." Statutory interpretation presents a question of law that we review independently. ***State v. Beasley***, 165 Wis. 2d 97, 99, 477 N.W.2d 57 (Ct. App. 1991). Whether the evidence meets the legal standard for bad faith is a subjective inquiry that is typically determined by the trier of fact. *See* ***New Jersey Title Ins. Co. v. Caputo***, 748 A.2d 507, 514 (N.J. 2000). However, bad faith may be determined as a matter of law when "only one inference from the evidence is possible." ***Id.***

DISCUSSION

I. The UFA

¶20 As noted above, Koss's sole remaining claim alleges that Park Bank violated the UFA by acting in bad faith with respect to Sachdeva's transactions. The UFA was approved by the national conference of commissioners on uniform state laws in 1922 and was adopted in Wisconsin in 1925. ***Bolger v. Merrill Lynch Ready Assets Tr.***, 143 Wis. 2d 766, 774, 423 N.W.2d 173 (Ct. App. 1988). "Prior to the adoption of the [UFA], common law imposed upon persons dealing with fiduciaries the duty to assure that fiduciary funds were properly applied to the account of the principal." ***Id.*** Thus, at common law, a bank could be held liable to a principal if it negligently assisted a fiduciary in misappropriating the principal's funds. ***Maryland Cas. Co. v. Bank of Charlotte***, 340 F.2d 550, 553 (4th Cir. 1965). "In some cases, the courts went so far as to charge depository banks with constructive notice of fiduciary misconduct." ***Bolger***, 143 Wis. 2d at 774. As a result, banks were "reluctant to deal with fiduciaries." ***Id.***

¶21 As banks began processing greater numbers of transactions, "debate ensued as to whether it was wise policy to place the duty of monitoring fiduciary accounts for wrongdoing on the bank's shoulders." ***Attorneys Title Guar. Fund v. Goodman***, 179 F. Supp. 2d 1268, 1274 (D. Utah 2001). This debate led to the creation of the UFA, which was intended "to provide relief from the dire consequences of the common law rule," ***Bolger***, 143 Wis. 2d at 774, by eliminating the requirement "that persons dealing with fiduciaries had a duty to assure that a fiduciary was properly dealing with fiduciary funds," ***Larson v. Kleist Builders, Ltd.***, 203 Wis. 2d 341, 347 n.2, 553 N.W.2d 281 (Ct. App. 1996). In contrast to the common law rule, under the UFA, mere negligence by a bank is an

insufficient basis to hold it liable to a principal for a fiduciary's breach. *See* ***Hendren v. Farmers State Bank, S.B.***, 272 S.W.3d 345, 349 (Mo. Ct. App. 2008); *see also* ***Lawyers Title Ins. Corp. v. Dearborn Title Corp.***, 904 F. Supp. 818, 820 (N.D. Ill. 1995) (observing the UFA provides a complete defense when a bank is "merely negligent"). Rather, the UFA "place[s] on the principal the burden of employing honest fiduciaries." ***Bolger***, 143 Wis. 2d at 775 (quoting ***Johnson v. Citizens Nat'l Bank***, 334 N.E.2d 295, 300 (Ill. App. Ct. 1975)).

¶22 Wisconsin's version of the UFA is set forth at WIS. STAT. § 112.01. Koss asserted a claim against Park Bank under § 112.01(9), which states in relevant part:

> DEPOSIT IN NAME OF PRINCIPAL. If a check is drawn upon the account of a fiduciary's principal in a bank by a fiduciary, who is empowered to draw checks upon his or her principal's account, the bank is authorized to pay such check without being liable to the principal, *unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of the fiduciary's obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith.*

(Emphasis added.) It is undisputed that, in order to establish liability under this section, a principal must show either that the bank had actual knowledge of the fiduciary's breach, or that the bank acted in bad faith by paying a particular check. *See* ***Bolger***, 143 Wis. 2d at 775 ("The various subparts of sec. 112.01 … generally preclude liability by a third party dealing with a fiduciary if the third party acts in

good faith and without actual knowledge that the fiduciary is committing a breach of his obligation.").[5]

¶23 Koss does not allege Park Bank had actual knowledge of Sachdeva's embezzlement; it contends only that Park Bank acted in bad faith with respect to Sachdeva's transactions. The UFA does not define the term "bad faith," *see generally* WIS. STAT. § 112.01, and there is a dearth of Wisconsin case law interpreting that term, at least as it is used in the UFA. However, the UFA expressly provides, "This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." Sec. 112.01(14). We therefore look to cases from other jurisdictions to inform our interpretation of the statutory term "bad faith."

¶24 Courts in other jurisdictions have frequently observed that, although the UFA does not define the term "bad faith," it specifies that "[a] thing is done 'in good faith' within the meaning of this section, when it is in fact done honestly, whether it be done negligently or not." *See* WIS. STAT. § 112.01(1)(c); *see also, e.g.*, ***UNR-Rohn, Inc. v. Summit Bank of Clinton Cty.***, 687 N.E.2d 235, 239 (Ind. Ct. App. 1997); ***Hendren***, 272 S.W.3d at 350; ***Edwards v. Northwestern Bank***, 250 S.E.2d 651, 656 (N.C. Ct. App. 1979); ***Master Chem. Corp. v. Inkrott***, 563 N.E.2d 26, 31 (Ohio 1990). "'Bad' being the antonym for 'good,' it then follows

[5] Some courts interpret the UFA as merely establishing a defense to preexisting claims against banks, rather than as establishing a new cause of action against them. *See, e.g.*, ***Appley v. West***, 832 F.2d 1021, 1031 (7th Cir. 1987). Wisconsin courts, however, "appear[] to accept that litigants may pursue a cause of action under [Wisconsin's] codification of the UFA." ***First American Title Ins. Co. v. Westbury Bank***, No. 2012CV1210, 2013 WL 1677911, at *9 (E.D. Wis. Apr. 17, 2013) (citing ***Willowglen Academy-Wis., Inc. v. Connelly Interiors, Inc.***, 2008 WI App 35, ¶1, 307 Wis. 2d 776, 746 N.W.2d 570, and ***Bolger v. Merrill Lynch Ready Assets Tr.***, 143 Wis. 2d 766, 769, 423 N.W.2d 173 (Ct. App. 1988)).

that a thing is done in 'bad faith' when it is in fact done dishonestly and not merely negligently." ***Hendren***, 272 S.W.3d at 350 (quoting ***General Ins. Co. of Am. v. Commerce Bank of St. Charles***, 505 S.W.2d 454, 457 (Mo. Ct. App. 1974)).

¶25 Dishonesty in this context, however, does not require "a high degree of moral guilt." ***Maryland Cas. Co.***, 340 F.2d at 554. Rather, courts interpreting the UFA generally "characterize 'dishonesty' as a way of distinguishing bad faith from mere negligence, and view it as evidencing purposeful conduct." ***Caputo***, 748 A.2d at 513. Unlike negligence, bad faith under the UFA is "willful." ***Melley v. Pioneer Bank, N.A.***, 834 A.2d 1191, 1198 (Pa. Super. Ct. 2003). "It amounts to an intentional desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction." ***Id.*** Courts have therefore held that a bank's

> mere failure to make inquiry, even though there be suspicious circumstances, does not constitute bad faith, *unless such failure is due to the deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction*, that is to say, where there is an intentional closing of the eyes or stopping of the ears.

Davis v. Pennsylvania Co. for Ins. on Lives and Granting Annuities, 12 A.2d 66, 69 (Pa. 1940) (citation omitted; emphasis added); *see also, e.g.*, ***Hendren***, 272 S.W.3d at 351; ***Edwards***, 250 S.E.2d at 657; ***Nations Title Ins. of N.Y., Inc. v. Bertram***, 746 N.E.2d 1145, 1151 (Ohio Ct. App. 2000); ***Research-Planning, Inc. v. Bank of Utah***, 690 P.2d 1130, 1132 (Utah 1984).

¶26 In other words, bad faith is "a reckless disregard or purposeful obliviousness of the known facts suggesting impropriety by the fiduciary." ***Caputo***, 748 A.2d at 514. "It is equivalent to the pharmacist who fills a

prescription while knowing that, if he investigated, he would find the prescription a forgery." ***Goodman***, 179 F. Supp. 2d at 1277. Some courts have also asked whether it was "'commercially' unjustifiable" for a bank to disregard and refuse to learn facts that were readily available to it. *See, e.g.*, ***Maryland Cas. Co.***, 340 F.2d at 554; ***Inkrott***, 563 N.E.2d at 31.

¶27 Based on the foregoing authorities, we conclude bad faith under the UFA requires proof of two elements: (1) circumstances that are suspicious enough to place a bank on notice of improper conduct by the fiduciary; and (2) a deliberate failure to investigate the suspicious circumstances because of a belief or fear that such inquiry would disclose a defect in the transaction at issue. *See, e.g.*, ***Melley***, 834 A.2d at 1198. Critically, a bank's mere negligence in failing to prevent or detect a fiduciary's misconduct is insufficient to support a finding of bad faith under the UFA. *See* ***O'Neal v. Southwest Mo. Bank of Carthage***, 118 F.3d 1246, 1251 (8th Cir. 1997). This conclusion is consistent with the underlying purpose of the UFA, which was "clearly meant to relax the standards of care owed by banks to principals and third parties when dealing with fiduciary accounts." ***Guild v. First Nat'l Bank of Nev.***, 553 P.2d 955, 958 (Nev. 1976).

II. Prima facie case for summary judgment

¶28 Having determined the applicable standard for bad faith under the UFA, we now address Koss's arguments that the circuit court improperly granted summary judgment in favor of Park Bank. Koss first argues Park Bank failed to

make a prima facie case for summary judgment.[6] "A prima facie case is established … when evidentiary facts are stated which if they remain uncontradicted by the opposing party's affidavits resolve all factual issues in the moving party's favor." ***Walter Kassuba, Inc. v. Bauch***, 38 Wis. 2d 648, 655, 158 N.W.2d 387 (1968). Koss argues the evidence Park Bank submitted in support of its summary judgment motion did not meet this standard because it did not establish a lack of bad faith by Park Bank in connection with Sachdeva's misconduct.[7]

¶29 We conclude the evidentiary materials that Park Bank submitted established a prima facie case for summary judgment. To make a prima facie case for summary judgment against a claim of bad faith under the UFA, a moving defendant must do more than simply assert that it acted in good faith or did not act in bad faith. *See* ***UNR-Rohn, Inc.***, 687 N.E.2d at 239; ***Edwards***, 250 S.E.2d at 268-69. A defendant must instead present sufficient evidence from which the only

[6] Technically, our first step when reviewing a decision on a motion for summary judgment is to "examine[] the pleadings to determine whether claims have been stated and a material factual issue is presented." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). Here, however, neither party disputes that Koss's complaint stated a claim or that Park Bank's answer joined issue. We therefore proceed directly to the second step in the summary judgment analysis—determining whether Park Bank's submissions established a prima facie case for summary judgment. *See* ***id.***

[7] Koss also notes that, although the circuit court concluded Park Bank had established a prima facie case for summary judgment, the court did not provide any analysis or cite any evidence in support of that conclusion. Koss asserts, "For this reason alone, summary judgment must be reversed." We reject this argument for two reasons.

First, our review of a decision granting summary judgment is de novo. *See* ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Whether the circuit court provided sufficient reasoning in support of its decision to grant summary judgment is therefore immaterial. Second, the record indicates Koss never argued in the circuit court that Park Bank failed to make a prima facie case for summary judgment. Under these circumstances, Koss can hardly fault the circuit court for failing to provide an extensive analysis of that issue.

reasonable inference to be drawn is that the defendant's conduct did not meet the standard for bad faith discussed above. *See supra* ¶27.

¶30 In support of its motion, Park Bank relied on the affidavit of David Werner, Park Bank's president and CEO. While Koss alleged Sachdeva requested and obtained 359 cashier's checks from Park Bank between December 29, 2004, and December 18, 2009, Werner averred that during roughly the same time period Park Bank "issued a total of more than 60,000 cashier's check for its customers." Werner also averred that forty-nine different Park Bank employees were involved in issuing the cashier's checks Sachdeva requested. In addition, Werner averred that, although Park Bank made seven wire transfers of Koss's funds to Koss's account at a bank in Chicago between March 2006 and February 2009, Park Bank "made a total of more than 40,000 wire transfers for its customers" between January 1, 2005, and December 31, 2009. Werner's affidavit therefore demonstrated that the specific cashier's checks and wire transfers at issue in this case represented a minimal portion of Park Bank's total business during the relevant time period and involved a relatively large number of Park Bank employees.

¶31 Werner also averred that Park Bank provided Koss "with monthly statements of its accounts each and every month." Those monthly statements "set forth each and every petty cash check, each and every cashier's check, and each and every wire transfer withdrawn from Koss' accounts." In addition, until June 9, 2008, the monthly statements included "copies of all canceled checks, debit memos, and debit slips referenced in the monthly statements." Despite receiving these monthly statements, no one from Koss advised Park Bank before December 19, 2009, "that Park Bank should not issue cashier's checks to Koss, or that anything was amiss with Koss' practice of purchasing cashier's checks from

Park Bank." Moreover, prior to December 19, 2009, no one from Koss advised Park Bank "that there was a problem or concern with any transaction in Koss' accounts, nor did anyone from Koss ever question Park Bank as to any withdrawals made from Koss' accounts … or any item listed as withdrawals on any of Koss' monthly statements."

¶32 Park Bank also submitted an excerpt of Michael Koss's deposition transcript in support of its summary judgment motion. Michael Koss testified that, prior to 2010, Koss did not prohibit its employees from using cashier's checks or have any written policy or procedure related to the use of cashier's checks. Park Bank also submitted the deposition transcript of Holly Pape, Koss's "relationship manager" at Park Bank, who testified she never wondered why Sachdeva was requesting cashier's checks to pay American Express instead of "using manual checks from the general checking account." Pape testified that practice was "not unusual at all" and further stated, "It's client's preference."

¶33 Park Bank also relied on the deposition testimony of former Koss employee Betty Caver, who worked in the corporation's accounting department from July 1999 until May 2010 and often went to Park Bank to pick up cashier's checks and obtain petty cash. Caver testified she did not believe there was anything suspicious about how Koss was using petty cash, the amount of petty cash being obtained from Park Bank, the frequency with which she went to Park Bank to obtain petty cash, Koss's use of cashier's checks, or the fact that she, personally, was asked to go to Park Bank to obtain petty cash and cashier's checks. Caver further testified no one at Park Bank ever gave her the impression they believed there was anything suspicious about those transactions.

¶34 Finally, Park Bank cited the deposition testimony of Koss's banking expert, Richard McElroy, Jr. During his deposition, McElroy was asked whether there was "any basis to believe that anybody affiliated with Park Bank failed to investigate because of a fear that doing so would discover embezzlement being done by Sue Sachdeva and Koss Corporation?" McElroy responded, "I haven't seen anything in the documents I've reviewed to indicate that."

¶35 Taken together, the evidence Park Bank submitted in support of its summary judgment motion indicated that: (1) the transactions that comprised Sachdeva's embezzlement scheme represented a minimal portion of the total number of transactions Park Bank processed during the relevant time period and involved a large number of different Park Bank employees; (2) Park Bank provided Koss with monthly statements evidencing the transactions in question, but Koss never voiced any concerns about them; (3) Koss did not have any policy prohibiting or regulating the use of cashier's checks; (4) a Koss employee did not view Koss's use of petty cash or cashier's checks as suspicious, and no one at Park Bank ever indicated they had any suspicions regarding those transactions; and (5) Koss's banking expert conceded he was not aware of anything indicating Park Bank failed to investigate the transactions in question because it feared discovering Sachdeva's embezzlement.

¶36 The only reasonable inferences to be drawn from this evidence are that the circumstances surrounding transactions at issue were not sufficiently suspicious to put Park Bank on notice of Sachdeva's misconduct, and that Park Bank did not willfully fail to investigate the transactions because of a belief or fear that further inquiry would disclose defects in them. *See* ***Melley***, 834 A.2d at 1198. Thus, unless contradicted, the evidence Park Bank submitted in support of its summary judgment motion showed that Park Bank did not act in bad faith in

connection with Sachdeva's transactions. Park Bank therefore established a prima facie case for summary judgment on Koss's UFA claim. *See* ***Walter Kassuba, Inc.***, 38 Wis. 2d at 655.

III. Genuine issues of material fact

¶37 Koss next argues that, even if Park Bank made a prima facie case for summary judgment, Koss submitted sufficient evidence to demonstrate the existence of genuine issues of material fact regarding whether Park Bank acted in bad faith. We disagree. None of the evidence Koss relies on permits a reasonable inference that the circumstances surrounding Sachdeva's transactions were suspicious enough to put Park Bank on notice of her misconduct, or that Park Bank deliberately failed to investigate due to a belief or fear that doing so would disclose defects in the transactions. *See* ***Melley***, 834 A.2d at 1198.

¶38 Koss first highlights the large number of cashier's checks Sachdeva requested and the fact that "millions of dollars" were involved. Koss suggests these factors were so suspicious that it was commercially unjustifiable for Park Bank not to inquire further. However, Koss has not cited any authority indicating the mere fact that a fiduciary conducted frequent transactions involving large amounts of money is sufficiently suspicious that a bank's failure to investigate those transactions constitutes bad faith under the UFA. In fact, several courts have

expressly rejected that notion.[8] Moreover, other courts have recognized that, because there are "many legitimate reasons why an agent and principal might engage in odd checking practices," "mere suspicious circumstances are not enough to require [a bank] to inquire." ***Johnson***, 334 N.E.2d at 300; *see also* ***Sugarhouse Fin. Co. v. Zions First Nat'l Bank***, 440 P.2d 869, 870 (Utah 1968) (stating there "may be a lot of reasons why a principal and his fiduciary may engage in odd and unusual check writing" and the UFA "was intended to cover just such situations").

¶39 Here, Koss provides no contextual support for its contention that the number of cashier's checks and the amounts of money involved were so suspicious that Park Bank's failure to investigate was commercially unjustifiable or otherwise rose to the level of bad faith under the UFA. Koss does not, for instance, provide any evidence regarding the number and amount of other, non-fraudulent transactions Koss engaged in through Park Bank. In other words, Koss provides no evidence to support an inference that the cashier's checks Sachdeva requested, although large in both number and amount, were highly unusual or suspicious in the context of a corporate client like Koss. Even if the transactions at issue may have been "odd," that fact does not demonstrate that Park Bank's

[8] *See, e.g.*, ***Crawford Supply Grp., Inc. v. LaSalle Bank, N.A.***, No. 2009C2513, 2010 WL 320299, at *2, *9 (N.D. Ill. Jan. 21, 2010) (declining to find bad faith where the plaintiff alleged, among other things, that the "frequency and size of the checking transactions and wire transfers … were red flags that should have alerted [the bank] to [the fiduciary's] embezzlement"); ***Heffner v. Cahaba Bank & Tr. Co.***, 523 So. 2d 113, 115 (Ala. 1988) ("We do not believe that the amount and number of transactions carried out on an account containing fiduciary funds, nor the mere names of payees on checks drawn on that account, are sufficient to create bad faith liability based on the bank's action in paying such checks."); ***New Amsterdam Cas. Co. v. National Newark & Essex Banking Co.***, 175 A. 609, 618 (N.J. Ch. 1934), *aff'd*, 182 A. 824 (N.J. 1936) ("No ground is perceived upon which to except from the principles of the common law, as laid down by the authorities and by the rule of the Fiduciaries Act, a fiduciary's check because of the largeness of the amount, and no adjudication has been brought to our attention indicating that it is a badge of fraud.").

failure to investigate the transactions amounted to bad faith, *see* ***Johnson***, 334 N.E.2d at 300, particularly where there is no evidence Park Bank deliberately failed to investigate because it did not want to uncover any defects in the transactions, *see* ***Melley***, 834 A.2d at 1198.

¶40 Koss next asserts it has submitted evidence indicating that Park Bank: (1) issued cashier's checks based on verbal requests by Mulvaney, who was not a signatory on Koss's accounts; (2) allowed Caver, who was not a signatory on Koss's accounts, to endorse a counter check payable to "Cash" for $60,000, which money then funded two cashier's checks Sachdeva requested; (3) had an "admitted policy and practice" of "ignor[ing] deposit agreements and giv[ing] out cashier's checks … to non-signatories so long as the non-signatory verbally uttered the name of an authorized signatory"; (4) permitted Koss employees to pick up cashier's checks at the drive-through window; (5) did not require Sachdeva, Mulvaney, or any Koss employee picking up cashier's checks to provide "any signatures, anything in writing, identification, answers to security questions, or any other verifying information"; and (6) had a policy that a non-signatory's request to withdraw funds "should not be considered suspicious and should not trigger further inquiry for suspicious activity." This evidence does not raise any disputed issues of fact material to the question of whether Park Bank acted in bad faith by failing to investigate.

¶41 For instance, even though the evidence shows that Mulvaney, a non-signatory, requested some of the cashier's checks, it is undisputed that she did so at Sachdeva's instruction and invoked Sachdeva's name when making the requests. Although Koss argues this conduct violated its deposit agreement with Park Bank, Koss does not cite any evidence indicating that violation contributed either to Sachdeva's ability to embezzle funds from Koss or to Park Bank's failure

to discover the embezzlement. There is no evidence Park Bank would have treated any of the checks requested by Mulvaney differently had Sachdeva *personally* requested them. Similarly, there is no indication that Park Bank in any way facilitated Sachdeva's embezzlement by allowing Koss employees to pick up cashier's checks at the drive-through window or by failing to require identification either from those employees or from Sachdeva or Mulvaney. As the circuit court aptly noted, it is undisputed "that every dollar embezzled from Koss was spent by Sachdeva herself and not by one of her employees who physically requested or picked up the cashier's checks."

¶42 Koss also argues the fact that some of the cashier's checks were made payable to "companies with cryptic initials such as 'N.M., Inc.' and 'S.F.A., Inc.'" should have prompted Park Bank to investigate those transactions. However, as the circuit court correctly observed, these cashier's checks "contained no facial irregularities; that is they were made payable to legitimate companies who accepted the checks even with 'initialed' names, and were drawn on Koss's corporate account by an authorized signatory." *See* ***Pernikoff Constr. Co. v. U.S. Bank, N.A.***, No. 4:09CV894JCH, 2010 WL 3258399, at *4 (E.D. Mo. Aug. 16, 2010) (stating defendant banks "had no reason to question" certain checks "because they contained no facial irregularities; in other words, the Checks were made payable to U.S. Bank, and drawn on Plaintiff's corporate checking account by an authorized signatory"). Koss cites no evidence or legal authority supporting its contention that the use of payees designated by their initials should have aroused Park Bank's suspicion. There is no evidence, for instance, that Park Bank had any reason to believe those payees were not legitimate creditors of Koss. There is also no evidence that it was unusual for Koss, or other corporate clients of Park Bank, to refer to payees by their initials.

¶43 We also agree with the circuit court that, even if Park Bank was aware of the initialed companies' actual identities, the mere fact that some of the cashier's checks were payable to luxury retailers is insufficient to establish bad faith on Park Bank's part. In ***Heffner v. Cahaba Bank & Trust Co.***, 523 So. 2d 113, 115 (Ala. 1988), the plaintiff argued the "amount and number" of certain transactions undertaken by a fiduciary, "coupled with the names of the payees of some of the checks drawn," showed that the defendant bank "had knowledge of such facts that its actions in paying the checks amounted to bad faith." The plaintiff specifically cited checks payable to "Weil Furs, Golbro Jewelers, and Cobb-Kirkland, an automobile dealership." ***Id.*** The Alabama Supreme Court rejected the plaintiff's argument, stating, "We do not believe that the amount and number of transactions carried out on an account containing fiduciary funds, nor the mere names of payees on checks drawn on that account, are sufficient to create bad faith liability based on the bank's action in paying such checks." ***Id.*** Similarly, here, the amount and number of the cashier's checks, combined with the names of some of the payees, was insufficient to create bad faith liability on Park Bank's part.

¶44 Koss also relies on Michael Koss's deposition testimony that, after Sachdeva's embezzlement was discovered, Pape told him the number of cashier's checks Mulvaney had requested was "strange." Accepting Michael Koss's testimony as true, Pape's after-the-fact statement that the number of cashier's checks was "strange" does not demonstrate bad faith by Park Bank. As noted above, "[t]he mere failure to make inquiry, even though there be suspicious circumstances, does not constitute bad faith, unless such failure is due to the deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction." ***Davis***, 12 A.2d at 69 (citation

omitted). Pape's alleged, after-the-fact statement to Michael Koss does not demonstrate that Park Bank deliberately failed to investigate Sachdeva's transactions because of a fear that doing so would disclose defects in them.

¶45 Koss next highlights Sachdeva's testimony that one of the reasons she chose to use Park Bank to obtain cashier's checks for her embezzlement scheme was because Park Bank made it easy for her to do so. Again, though, this testimony does not provide any evidence that Park Bank *deliberately* failed to investigate Sachdeva's transactions based on a fear that doing so would disclose defects. At most, Sachdeva's testimony provides evidence that Park Bank acted negligently by making it easy for Sachdeva to embezzle Koss's funds. As noted above, liability under the UFA cannot be premised on mere negligence. *See* ***Hendren***, 272 S.W.3d at 349.

¶46 Koss also argues the evidence shows that Park Bank disregarded "obvious red flags associated with its payment of unusually high sums of petty cash checks." However, as the circuit court observed, Koss has not cited "even one case where the payment of petty cash checks formed the basis for a finding of bad faith" under the UFA. Koss does not cite any legal authority or evidence indicating that Park Bank should have known the amount of petty cash Koss was obtaining was, in fact, unusually high. We do not know, for instance, how much petty cash Koss routinely obtained before Sachdeva's embezzlement began, or how much petty cash other corporate clients of Park Bank typically requested. Koss former employee, Caver, did not consider the amount of petty cash obtained from Park Bank to be suspicious. As noted above, there are "many legitimate reasons why an agent and principal might engage in odd checking practices." ***Johnson***, 334 N.E.2d at 300.

¶47 Koss next argues Park Bank "admitted routine violation of its own policies for satisfying wire transfer requests." We agree with the circuit court's analysis of this issue:

> Koss alleges Park Bank authorized wire transfers totaling over $16 million from Koss's accounts at Park Bank to Koss's accounts at banks in Chicago. Sachdeva then requested those banks to authorize wire transfers to pay off her personal debts to various creditors. Importantly, Park Bank only authorized wire transfers to other Koss accounts; Koss retained control of the money. It is therefore immaterial to this case whether Park Bank violated its internal wire transfer policies because the wire transfers authorized by Park Bank were not part of Sachdeva's embezzlement.

(Citations omitted.) Koss has not cited any legal authority for the proposition that the mere transfer of Koss's funds from its accounts at Park Bank to its accounts at other banks was sufficiently suspicious to put Park Bank on notice of any misconduct by Sachdeva. In addition, Koss has not produced any evidence to suggest that the wire transfers at issue here were in any way unusual, in the context of Koss's overall banking practices and those of Park Bank's other corporate clients. Moreover, Koss does not cite any evidence indicating Park Bank deliberately failed to investigate the wire transfers due to a fear that further inquiry would disclose defects in those transactions.

¶48 Koss also argues the report and testimony of its banking expert, Richard McElroy, Jr., raised a genuine issue of material fact regarding Park Bank's bad faith. In his report, McElroy opined that Park Bank's "failure to detect the numerous examples of suspicious activity … was not commercially justifiable and constituted bad faith." McElroy similarly testified at his deposition that Park Bank engaged in bad faith in connection with Sachdeva's transactions. However, a close review of McElroy's testimony reveals that, in forming that opinion, he did

not employ the legal standard discussed above at ¶27. Moreover, as noted above, when asked whether he had "any basis to believe that anybody affiliated with Park Bank failed to investigate because of a fear that doing so would discover embezzlement being done by Sue Sachdeva and Koss Corporation," McElroy responded, "I haven't seen anything in the documents I've reviewed to indicate that." McElroy's opinions therefore fail to raise a genuine issue of material fact regarding whether Park Bank acted in bad faith.

¶49 Finally, Koss argues the inadequacy of Park Bank's policies and procedures, in and of itself, constituted bad faith. A deficient banking procedure can, under certain circumstances, rise to the level of bad faith under the UFA. *See, e.g.*, ***Inkrott***, 563 N.E.2d at 31. "Whether a bank's policies are commercially unjustifiable, however, is not a relevant inquiry into 'bad faith' unless those procedures evidence the bank's intentional 'closing of the eyes or stopping of the ears.'" ***Goodman***, 179 F. Supp. 2d at 1278 (quoted source omitted). Consequently, "a bank's failure to follow commercially reasonable banking procedures or to comply with its own policies generally will not constitute a lack of good faith." ***Shearson Lehman Bros. v. Wasatch Bank***, 788 F. Supp. 1184, 1194 (D. Utah 1992).

¶50 Here, Koss asserts Park Bank had a policy of "complete[ly] disregard[ing]" signature cards and instead "giv[ing] out money to non-signatories … who merely verbally stated the name of a signatory." However, Koss does not explain how this alleged policy evidences Park Bank's "intentional 'closing of the eyes or stopping of the ears.'" *See* ***Goodman***, 179 F. Supp. 2d at 1278 (quoted source omitted). Moreover, as noted above, there is no evidence to indicate that Park Bank's alleged policy of permitting non-signatories to conduct transactions after verbally invoking a signatory's name in any way permitted Sachdeva's

embezzlement or contributed to Park Bank's failure to discover it. We agree with the circuit court's assessment that Sachdeva "was authorized by Michael Koss to enact every transaction that was part of the embezzlement. Those transactions in fact breached her fiduciary duties to Koss, but she was authorized to enact them nonetheless. Park Bank's procedures themselves did not enable Sachdeva's embezzlement."

¶51 None of the pieces of evidence cited by Koss, whether considered individually or cumulatively, raise a genuine issue of material fact as to whether Park Bank acted in bad faith with respect to Sachdeva's embezzlement. Although the transactions Sachdeva engaged in may appear suspicious or odd in hindsight, Koss has not cited any evidence to indicate that, in the larger context of Koss's banking practices and the banking practices of Park Bank's other corporate clients, the transactions were suspicious enough to put Park Bank on notice of Sachdeva's misconduct. Koss also fails to cite any evidence indicating that Park Bank deliberately declined to investigate Sachdeva's transactions due to a fear that further inquiry would disclose defects in them. On this record, the circuit court properly granted Park Bank's summary judgment motion.

CONCLUSION

¶52 Koss has cited ample evidence that could permit a factfinder to conclude Park Bank was negligent in its failure to investigate and discover Sachdeva's embezzlement. However, a bank's mere negligence in failing to prevent or detect a fiduciary's misconduct is insufficient to support a finding of bad faith under the UFA. *See* ***O'Neal***, 118 F.3d at 1251. As discussed above, the UFA "was specifically intended to relax the common law standard of care owed by banks to principals and third parties when dealing with fiduciary accounts."

Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho, 800 P.2d 1026, 1042 (Idaho 1990). Based on the evidence submitted on summary judgment, permitting Koss's lawsuit to go forward would be antithetical to the UFA's purpose. Accordingly, and for all of the reasons discussed above, we affirm the judgment dismissing Koss's UFA claim against Park Bank.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.