COURT OF APPEALS
DECISION
DATED AND RELEASED

August 20, 1997

NOTICE

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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2283

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

JOSEPH P. SEPANEK, JR., A/K/A JOSEPH SEPANEK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IRENE M. SEPANEK, A/K/A IRENE SEPANEK,

PLAINTIFF-APPELLANT,

V.

M & I BANK OF BURLINGTON, A WISCONSIN CORPORATION, F/K/A BANK OF BURLINGTON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Joseph P. Sepanek, Jr., individually and as personal representative of the estate of Irene M. Sepanek, appeals from an order granting M & I Bank of Burlington's motion for summary judgment. We affirm.

In 1989, Joseph's mother, Irene Sepanek, opened two checking accounts at the Bank of Burlington, n/k/a M & I Bank of Burlington (the Bank). At that time, she signed payable on death (P.O.D.) beneficiary designation forms for each account designating her friend, Carol Gould, as the P.O.D. beneficiary of the accounts. At the time of this designation, the Bank's computer software did not allow for entry and display of P.O.D. beneficiary information. In 1993, the Bank added software with this capability but did not post P.O.D. information for accounts which were opened prior to the installation of this software.

In January 1994, Irene executed "Agent (Power of Attorney) Designation" forms for the accounts and designated her son, Joseph, as her agent. Joseph was living in Kentucky; Irene lived in Burlington, Wisconsin. The forms, which required Joseph's signature, stated that "[n]o present or future ownership or right of survivorship is conferred by this designation." The forms did not reveal Irene's previous P.O.D. beneficiary designation on the accounts.

Joseph contends that in executing a power of attorney and naming him as her agent, his mother effectuated her desire to have him involved in her estate. Irene also made out a new will naming Joseph as her sole beneficiary; her prior will named Gould as her sole beneficiary. Irene wanted Joseph "on her bank accounts to make sure everything was covered." Joseph interpreted his mother's wishes to be that he should have sole and complete access to her financial affairs. Irene never informed Joseph that she had designated Gould her P.O.D. beneficiary on the accounts.

Irene was hospitalized on February 16, 1994. Joseph returned to Wisconsin and visited the Bank on February 17 and asked a customer service representative, Mary Kim Lois, "if anyone had any other interest" in Irene's

accounts. Joseph sought to verify that only he and his mother "were on the accounts." Lois confirmed that only Joseph and his mother were on the accounts. She did not divulge the existence of the P.O.D. beneficiary designations.

Irene died on February 19. The next Monday Joseph advised the Bank of Irene's death, and Lois again confirmed that no one else was on the accounts and that the accounts were frozen. Shortly thereafter, Joseph found applications for the P.O.D. beneficiary designations in his mother's papers and again asked the Bank to confirm who was on Irene's accounts. Once again, the Bank representative identified Irene and Joseph. Joseph then questioned the Bank representative regarding the P.O.D. beneficiary designations and the Bank confirmed Gould's status as P.O.D. beneficiary.

Several weeks later, Joseph confirmed with the Bank that the funds remained in the accounts. However, without notice to Joseph and over his previously stated objection, the Bank paid out the account funds ($58,968.16) to Gould on or about April 15, 1994. Joseph then sued the Bank in his individual capacity and as personal representative of Irene's estate. Joseph's amended complaint alleged breach of fiduciary duty, negligent misrepresentation, promissory estoppel, breach of good faith duty and breach of contract. The trial court granted summary judgment to the Bank. Joseph appeals.

An appeal from a grant of summary judgment raises an issue of law which we review de novo by applying the same standards employed by the trial court. *See* ***Brownelli v. McCaughtry,*** 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to

judgment as a matter of law. *See* ***Streff v. Town of Delafield,*** 190 Wis.2d 348, 353, 526 N.W.2d 822, 824 (Ct. App. 1994).

In granting summary judgment to the Bank, the trial court ruled that the Bank was statutorily discharged from claims relating to its payment of Irene's account balances to Gould under the P.O.D. beneficiary designations and did not make any misrepresentations to Joseph.[1]

On appeal, Joseph argues that there are competing reasonable inferences which should have precluded summary judgment. *See* ***Leverence v. U.S. Fidelity & Guar.,*** 158 Wis.2d 64, 74, 462 N.W.2d 218, 222 (Ct. App. 1990) (summary judgment inappropriate if different inferences can be drawn from facts). The undisputed facts are that Joseph asked the bank representative, Lois, whether anyone else had an interest in Irene's accounts and to verify that only he and Irene were on the accounts. Joseph argues that a fact finder could reasonably infer that he was inquiring regarding the status of the accounts and sought revelation of any matters relevant to the accounts, including the existence of a P.O.D. beneficiary. Joseph argues that the Bank's response to his inquiries was a misrepresentation in light of the P.O.D. designations. Joseph's argument in this regard necessarily hinges on a contention that Gould had a legally recognizable interest in the accounts before Irene died. This contention is unsupported in the law.

"A P.O.D. account belongs to the original payee during the original payee's lifetime and not to the P.O.D. beneficiary or beneficiaries." Section

[1] Although the trial court granted the Bank's dismissal and summary judgment motions, we review the trial court's order as one granting summary judgment. The parties submitted, and the trial court considered, affidavits. Under these circumstances, the proceedings were held on summary judgment. *See* § 802.06(2)(b), STATS.

705.03(2), STATS. "A beneficiary of a P.O.D. account is a party only after the account becomes payable to the beneficiary by reason of the beneficiary's surviving the original payee." Section 705.01(6), STATS. A "party" to an account is "a person who, by the terms of an account, has a present right, subject to request, to payment therefrom other than as agent." ***Id***.

Applying these statutes, we reject Joseph's claim that Gould had a legal interest in the accounts before Irene died which should have been disclosed by the Bank. Under the statutes, Gould was not a party to the account and did not have an interest in it until Irene died and Gould presented proper proof of her P.O.D. beneficiary status. *See* § 705.06(1)(c), STATS. (balance on P.O.D. account payable to P.O.D. beneficiary on request after presentation of proof of death and that P.O.D. beneficiary survived all persons named as original payees). When asked whether there was anyone else with an interest in the accounts, the Bank correctly responded that the interests were limited to Irene and Joseph, her agent and holder of a power of attorney. Under the undisputed facts and the applicable statutes, Gould did not have a right to the account during Irene's lifetime. Therefore, the Bank did not misrepresent the status of the accounts and cannot be held liable for negligent misrepresentation.[2]

We also conclude that the Bank's failure to reveal the existence of a P.O.D. beneficiary in response to Joseph's inquiries after Irene's death was harmless because Joseph was without authority to control the accounts or move

[2] The elements of negligent misrepresentation are (1) a representation of fact; (2) the representation was untrue; (3) the maker of the representation must have been negligent in making the representation; and (4) the recipient of the representation believed it was true and relied upon it to his or her detriment. *See* ***Goossen v. Estate of Standaert,*** 189 Wis.2d 237, 250, 525 N.W.2d 314, 319-20 (Ct. App. 1994).

the funds to another account because his power of attorney terminated at Irene's death. *See* § 243.07(4)(a), STATS.; *see also* ***Roth v. Filipek***, 25 Wis.2d 528, 534, 131 N.W.2d 286, 289 (1964).[3]

A bank which pays an account to a P.O.D. beneficiary upon presentation of proof that the beneficiary survived the original payee(s) is discharged from claims for amounts so withdrawn. *See* § 705.06(2) & (1)(c), STATS. There is no allegation that the Bank paid Gould in the absence of the requisite proof. Furthermore, we have already held that the Bank was not negligent in its representations to Joseph.[4] The trial court correctly concluded that the statute discharged the Bank from liability for paying the account balances to Gould.

Joseph argues that the P.O.D. accounts were "special accounts" with an accompanying fiduciary relationship, rather than a mere creditor-debtor relationship. The trial court disagreed, as do we.

The deposit of funds in a bank creates a creditor-debtor relationship grounded in contract. *See* ***Schaller v. Marine Nat'l Bank***, 131 Wis.2d 389, 394-95, 388 N.W.2d 645, 648 (Ct. App. 1986). In contrast, a "special account" is a deposit "'for a specific purpose, and for that alone … does not establish the relation of debtor and creditor between the depositor and the bank, but establishes

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[3] In so stating, we do not suggest that such would have been appropriate if Joseph had learned of the P.O.D. designations before his mother's death. We question whether such an act would have been in keeping with Joseph's fiduciary duty to his mother as holder of a power of attorney. *See* ***Hoeft v. Friedli***, 164 Wis.2d 178, 186-87, 473 N.W.2d 604, 607 (Ct. App. 1991). A fiduciary may not self-deal to his or her own benefit. *See* ***State v. Hartman***, 54 Wis.2d 47, 56, 194 N.W.2d 653, 657 (1972) (fiduciary acts for the benefit of the principal).

[4] Negligence of the bank is an exception to the discharge of claims under § 705.06(2), STATS. *See* ***Brooks v. Bank of Wis. Dells***, 161 Wis.2d 39, 467 N.W.2d 187 (Ct. App. 1991).

a fiduciary relation which is sometimes declared to be that of principal and agent ….'" ***Bender v. Neillsville Bank***, 10 Wis.2d 282, 285, 102 N.W.2d 744, 746 (1960) (quoted source omitted). An account which bears a P.O.D. designation does not fall within these criteria and the record does not substantiate that Irene's accounts were otherwise special accounts. Irene's accounts were commingled with other accounts at the Bank; Irene was not entitled to withdraw the exact funds she deposited. A conventional checking account with a P.O.D. designation belongs to the original payee during his or her lifetime, *see* § 705.03(2), STATS., and is used by the original payee in his or her discretion. In the absence of additional evidence, such an account is not a "special account" within the meaning of ***Bender.***

We also reject Joseph's claim that a fiduciary relationship existed between Irene and the Bank. He contends that it was significant that Irene gave Joseph a power of attorney which appeared to contravene her previous P.O.D. designation. Joseph also points to events surrounding his inquiries regarding the accounts while Irene hospitalized and after her death. He contends that both he and Irene were dependent on the Bank for information regarding the status of the accounts because Irene was elderly and Joseph was visiting from another state and had no idea that his mother had made a P.O.D. designation.

"'A fiduciary relationship arises from a formal commitment to act for the benefit of another … or from special circumstances from which the law will assume an obligation to act for another's benefit.'" ***Production Credit Ass'n v. Croft***, 143 Wis.2d 746, 755, 423 N.W.2d 544, 547 (Ct. App. 1988) (quoted source omitted). "Manifest in the existence of a fiduciary relationship is that there exists an inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of facts involved, or other conditions giving to one an

advantage over the other." ***Id***. at 755-56, 423 N.W.2d at 547. None of these characteristics apply here. The trial court found nothing in the record which permitted a finding that Irene's age made her dependent upon the Bank. The Bank had no advantage over Irene with regard to her conventional checking accounts. The parties had a conventional depositor-bank relationship.

Joseph argues that he established his claims of promissory estoppel, breach of good faith duty, and breach of contract/wrongful payment. However, all of these claims are premised upon Joseph's contention that Gould had an interest in the accounts and that the Bank misinformed him in response to his inquiries. We have already rejected this claim.

Finally, Joseph contends that the Bank's failure to disclose the P.O.D. beneficiary modified the contract governing the accounts and effectively eliminated Irene's P.O.D. beneficiary designations. We disagree. The Bank did not misrepresent the status of the accounts to Joseph. Therefore, the premise of Joseph's claim that the contract was orally amended is fatally flawed. The Bank paid the P.O.D. accounts pursuant to the applicable statutes and did not breach any contractual obligation in doing so.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.