THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James T. Cowburn, Appellant,

v.

Andrew P. Leventis, Jr. and
Fidelity National Bank, Respondents.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3990
Heard February 9, 2005 – Filed May 16, 2005

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Joe Mooneyham, of Greenville, for Appellant.

Donald R. Moorhead, Mason A. Goldsmith and John L. B. Kehl, all of Greenville and James Timothy White and P. Jay Pontrelli, both of Atlanta, for Respondents.

fiduciary duty on a bank. See Burwell, 288 S.C. at 41, 340 S.E.2d at 790 (stating that mere respect for another's judgment or trust in her character is usually not sufficient to establish a fiduciary relationship). Neither has Cowburn presented any evidence that Adams knew he was placing her in a position of special trust. Regions Bank v. Schmauch, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003) ("[N]o fiduciary relationship between a bank and its depositor exists when the bank is unaware of any special trust reposed in it.").

Cowburn also argues section 408 of the Internal Revenue Code (West 2005) equates IRAs to trusts, thereby making Fidelity a trustee and imposing fiduciary duties on Fidelity. We disagree with Cowburn's interpretation of this section.

Section 408 provides as follows:

> **(a) Individual retirement account.**--For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:
> . . . .
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> **(h) Custodial accounts.**--For purposes of this section, a custodial account shall be treated as a trust if the assets of such account are held by a bank (as defined in subsection (n)) or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which he will administer the account will be consistent with the requirements of this section, and if the custodial account would, except for the fact that it is not a trust, constitute an individual retirement account described in subsection

> (a). For purposes of this title, in the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account shall be treated as the trustee thereof.

(emphais added). Treasury Regulation 1.408-2 (West 2005) clarifies section 408 as follows:

> (a) In general. An individual retirement account must be a trust or a custodial account (see paragraph (d) of this section).
> . . . .
>
> (b) Requirements. An individual retirement account must be a trust created or organized in the United States (as defined in section 7701(a)(9)) for the exclusive benefit of an individual or his beneficiaries. Such trust must be maintained at all times as a domestic trust in the United States. The instrument creating the trust must be in writing and the following requirements must be satisfied.
> . . . .
>
> (d) Custodial accounts. For purposes of this section and section 408(a), a custodial account is treated as a trust described in section 408(a) if such account satisfies the requirements of section 408(a) except that it is not a trust and if the assets of such account are held by a bank (as defined in section 401(d)(1) and the regulations thereunder) or such other person who satisfies the requirements of paragraph (b)(2)(ii) of this section. For purposes of this chapter, in the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account will be treated as the trustee thereof.

(emphasis added).

Our review of the plain language of the statute and the associated regulations persuades us to find that an IRA or custodial account is not a trust per se, but is treated as a trust for purposes of this particular provision of the Internal Revenue Code. In addition, we do not find section 408 imposes particular fiduciary duties on a custodian of an IRA. Therefore, we disagree with Cowburn that section 408 imposes fiduciary duties upon Fidelity sufficient to establish a breach of fiduciary duty claim.

Because we do not find evidence that Fidelity owed Cowburn a fiduciary duty under any of the theories asserted by Cowburn, the trial court properly granted summary judgment on this issue.

d. Negligence

Cowburn asserts a genuine issue of material fact exists to establish his claim of negligence against Fidelity. He contends Fidelity's negligence arose out of the violation of its own polices and the terms of the custodial agreement.

In order to establish a claim for negligence, Cowburn must present evidence of a legal duty owed by Fidelity, a breach of that duty by a negligent act or omission, and damages that were proximately caused by that breach. Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003). "The Court must determine, as a matter of law, whether the law recognizes a particular duty. An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003) (citations omitted).

First, Cowburn argues Fidelity breached its duties pursuant to the custodial agreement because Fidelity did not require him to purchase assets

through its brokerage arm. We disagree with Cowburn's interpretation of this provision.

The provision referred to by Cowburn states: "Unless you give specific instructions to the contrary, we shall effect securities purchases or sales, when possible, through our affiliate, Fidelity National Capital Investors, Inc. at the brokerage commission rate charged for similar accounts." (emphasis added).

We find this provision does not impose a mandatory duty on Fidelity, but rather allows Fidelity to purchase securities through its brokerage arm, "when possible." In addition, Cowburn fails to argue how this alleged violation of the custodial agreement proximately caused his injury. Therefore, we find no factual issue exists with regard to this argument.

Second, Cowburn asserts Fidelity breached its duty to Cowburn by failing to keep adequate and complete records in accordance with Fidelity's internal policies and to annually determine the fair market value of his investments in accordance with its own internal policies and the requirements of the Internal Revenue Code. Further, Cowburn maintains if Fidelity had complied with its policies, and with section 408(i) of the Internal Revenue Code (West 2005), it would have discovered the Program was a Ponzi scheme.

Fidelity's internal policy states regulations require custodians of SDIRAs to report the fair market value of the IRA to the IRS and the IRA holder annually. The internal policy also provides if the IRA contains investments other than publicly traded securities, "the bank must ascertain that they are legitimate methods for determining the FMV [fair market value] available." Section 408(i) of the Internal Revenue Code provides:

> **(i) Reports.**--The trustee of an individual retirement account and the issuer of an endowment contract described in subsection (b) or an individual retirement annuity shall make such reports regarding

> such account, contract, or annuity to the Secretary and to the individuals for whom the account, contract, or annuity is, or is to be, maintained with respect to contributions (and the years to which they relate), distributions aggregating $10 or more in any calendar year, and such other matters as the Secretary may require. The reports required by this subsection--
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> > **(1)** shall be filed at such time and in such manner as the Secretary prescribes, and
> >
> > **(2)** shall be furnished to individuals--
> >
> > > **(A)** not later than January 31 of the calendar year following the calendar year to which such reports relate, and
> > >
> > > **(B)** in such manner as the Secretary prescribes.

Initially, Cowburn fails to argue what records were not kept by Fidelity, resulting in the breach of its duty to Cowburn. Next, the record on appeal includes semi-annual statements issued by Fidelity to Cowburn for the years in which he invested in the Program. These statements indicate the market value of his investments at the end of each reporting period as well as contributions and distributions made during the year. Therefore, these statements comply with Fidelity's internal policies and section 408(i). In addition, the custodial agreement states:

> **Article XIII. Reports and Records.** We shall keep accurate and detailed records of all contributions, receipts, investments, distributions, disbursements, and other transactions relating to the custodial account. We shall provide reports to the IRS and to

> you as required by law and regulations. Unless you file a written statement with us within 60 days after you receive a statement, we shall be relieved and discharged from all liability to you (including your beneficiaries) with respect to all matters set forth in such report.

(emphasis added). The record does not contain any indication that Cowburn alerted Fidelity to any discrepancies on the statements provided. Finally, Cowburn fails to assert how Fidelity breached its duty under its internal policies and section 408(i). Therefore, we find no factual dispute to be determined on this issue.

Third, Cowburn argues Fidelity had a legal duty to comply with the provisions of section 408 of the Internal Revenue Code. He asserts Fidelity breached this duty by allowing Cowburn to invest in non-qualified investments.

Section 408 does not contain a provision stating investments must be "qualified." However, section 408(a) sets forth requirements for IRAs. These requirements must be met in order for a taxpayer to benefit from the tax advantages of IRAs. One of these requirements prohibits investments in life insurance contracts, thereby limiting the type of investments available to a taxpayer. I.R.C. § 408(a)(3). Therefore, contrary to Cowburn's assertion, "qualified" does not mean Fidelity has an obligation to investigate the quality of the investments selected by Cowburn. Rather, Fidelity must ensure the Code does not specifically prohibit a type of investment. Because Cowburn failed to establish a duty pursuant to section 408 of the Internal Revenue Code, we find no genuine issue of material fact.

Fourth, Cowburn asserts Fidelity had a duty under the Anunzio-Wylie Anti-Money Laundering Act to report to him any of his funds sent to offshore banks. Other than a vague reference to the name of the Act, Cowburn cites no authority to support this assertion. Thus, we deem it abandoned on appeal. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513,

514 (1994) (deeming an issue abandoned because the appellant failed to provide pertinent argument or supporting authority).

Fifth, Cowburn asserts Fidelity employees undertook a duty to advise him as to the quality of his investment, and therefore, owed him a duty of care in giving such advice. We disagree.

As previously discussed, in the custodial agreement Fidelity specifically limited its duty to advise Cowburn on his investments. We find no evidence in the record indicating any employees undertook the duty to advise Cowburn, nor any evidence of breach or causation. Because we find no genuine issue of material fact exists concerning Fidelity's purported negligence, the trial court properly granted summary judgment on this issue.

e. Civil Conspiracy against Fidelity and Leventis

Cowburn argues Fidelity provided Leventis with the means of opening SDIRAs for victims of the Ponzi scheme, and the opening of those SDIRAs was essential to the scheme. Therefore, he alleges Fidelity and Leventis acted in a civil conspiracy, which contributed to Cowburn's injury. We disagree.

"It is well-settled in South Carolina that the tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damage." Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000). "In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." First Union Nat'l Bank of South Carolina v. Soden, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998).

The record does not contain any evidence that Fidelity and Leventis had an agreement, or that they joined together for the purpose of injuring

Cowburn. Therefore, we find no genuine issue of material fact exists to establish a claim for civil conspiracy.

CONCLUSION

We find Cowburn's argument that the trial court improperly disregarded his expert's affidavit is not preserved for our review. Furthermore, we affirm the trial court's grant of summary judgment as to Fidelity on all Cowburn's causes of action. As to Cowburn's causes of action against Leventis, we find a genuine issue of material fact exists regarding his private cause of action for violations of S.C. Code Ann. § 35-1-410 and -810 (Supp. 2003) and reverse the grant of summary judgment on those causes of action. As to Cowburn's remaining causes of action, we affirm the trial court's grant of summary judgment.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY and WILLIAMS, JJ., concur.