

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. BCD-25-166

BRUCE MACMILLAN, INDIVIDUALLY AND AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF LINDA MACMILLAN

Appellants,

v.

R.M. DAVIS, INC.

Appellee

On Appeal from the Business and Consumer Court

APPELLANTS' BRIEF

Attorney for Appellants
Bruce W. Hepler, Esq. Bar No. 8007
Law Offices of Bruce W. Hepler, LLC
75 Pearl Street
Portland, ME 04101
t: (207) 772-2525
f: (207) 772-2111

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INTRODUCTION

Senior financial abuse is an enormous problem in the United States. There are estimates that seniors are defrauded of over twenty-eight billion dollars per year.

There are many different types of scams perpetrated on seniors. However, there are two general characteristics of the majority of scams. First, for the scammers to get the funds, there usually needs to be the movement of money, including selling stock, liquidating an account, or withdrawing funds. Second, the scams generally concern fraud or dishonesty. Seniors can be unwitting targets as they are less likely to understand when they are being deceived, and are oftentimes not as knowledgeable about understanding the technology that is used to deceive them.

Financial advisors are at the vanguard of trying to help protect seniors. They are trained to look for red flags, warning signs, and diminished capacity. In short, they are to look for anything unusual, and to know what is unusual, the financial advisors must “know your client.” In particular, financial advisers need to be skeptical and closely examine the movement of money, especially when it is a large amount and/or out of the ordinary.

In this case, two seniors – Bruce (76) and Linda MacMillan (72) were the victims of a scam that took their entire life savings. Meanwhile, their financial advisory firm – R.M. Davis (“RMD”) – did not recognize the obvious red flags and the many ways in which the MacMillans were taking a radical departure from

everything they had done in their fourteen-year history with RMD. Indeed, the transactions – involving liquidating IRA accounts and paying exorbitant tax penalties – were something that was unprecedented and unseen before by several experienced professionals at RMD. These transactions were not simply unusual for the MacMillans, but unusual for any client of RMD, largely because no clear thinking individual would liquidate tax deferred IRAs and pay hundreds of thousands of dollars in taxes.

While RMD admits that it owes the MacMillans fiduciary duties, including the duty to know your client, the duty to act as a prudent person, the duty to protect their clients, and the duty to look for elder financial abuse, RMD now alleges that its duty does not extend to protecting the MacMillans. The Superior Court agreed with RMD and granted summary judgment on the issue of duty. The Superior Court, however, defined the issue of duty much too narrowly, ignored the course of dealing between the parties, and ignored the many ways in which RMD admits that it owed duties to its clients.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The MacMillans were elderly people who followed the advice of RMD.

Bruce and Linda MacMillan became clients of RMD in April, 2007. A. 291, ¶ 148. For over fourteen years, Peter Richardson of RMD served as MacMillans' investment advisor. A. 291, ¶ 152.

As of February 1, 2022, Bruce was 76 and Linda was 72. A. 290, ¶ 141. Bruce has noticed the erosion of his cognitive skills for over ten years, including becoming more gullible and trusting. A. 290, ¶¶ 143-144. Bruce retired in 2016, largely because his cognitive skills were declining. A. 290, ¶ 142. Linda's decline was even steeper, with an evident decline in her cognitive ability. A. 291, ¶¶ 145-146.

The MacMillans had three accounts managed by RMD: one IRA account in Bruce's name, one IRA account in Linda's name, and one joint investment account, with right of survivorship. A. 291, ¶ 150. There was \$280,000 in the joint account and the IRAs totaled over a million dollars. A. 291, ¶ 150. The money was in 50 to 100 securities. A. 330, ¶ 425.

In the fourteen years with RMD, the MacMillans followed the recommendations and investment strategy set by RMD, and they did not make changes to the investment strategy. A. 296, ¶ 179-182. The MacMillans did not bring their own ideas for what stocks or investment to purchase, and instead, they steadfastly followed the advice of RMD. A. 295-296, ¶¶ 178-182. Bruce delegated the day-to-day investments to RMD, and they followed a disciplined approach. A. 295, ¶ 177. For the fourteen years prior to January 2022, there was never an instance in which the MacMillans did not follow the advice of RMD. A. 296, ¶ 182. An important account objective for the MacMillans in 2022 was to minimize their income and tax liability. A. 294, 297, 325, ¶¶ 165, 187, 391.

RMD describes Bruce MacMillan as being careful and responsible with regard to his financial matters. A. 295, ¶¶ 170, 171. Bruce is described as being meticulous, thorough, detailed, smart, intelligent, and as someone who would make good decisions. A. 295, ¶ 174. From RMD’s perspective, the MacMillans seemed happy with RMD. A. 296, ¶ 186.

B. RMD represents that it will protect the MacMillans from fraudulent activity.

RMD made numerous representations to the MacMillans which show the context of the relationship between the parties. RMD told the MacMillans that RMD would be “there when you need us” and that RMD would “work tirelessly to ensure your financial legacy.” A. 292, ¶ 155(a). RMD represented that its advisors would be an extension of your family and that RMD would “simplify the business of your life – not just your finances,” as the MacMillans were instructed to rely on RMD “for much more than thoughtful asset management.” A. 292, ¶ 155(b), (c). RMD represented that it would “thoroughly understand you,” “provide an extraordinary level of personal service,” and it would have face-to-face meetings. A. 292, ¶ 155(d), (e), (g). Most importantly, RMD even told the MacMillans that they would “Know Your Client” to protect the MacMillans from fraudulent activity:

Know Your Client

- At R.M. Davis client service is a number one priority. We develop strong and close professional relationships with our clients. This knowledge not only helps us serve our clients better

but **it also helps us protect our clients from fraudulent activity**

A. 309, ¶ 284.

RMD made these representations to the MacMillans, wanting their clients to feel protected. A. 292, 307, ¶¶ 155, 268. In contrast, it is important to note that there is no allegation that RMD ever told its clients the things that it is arguing in this case – e.g., that it has not duty to its clients beyond its investment advice or that RMD has no duty to try to prevent fraud or elder financial abuse.

C. RMD admitted it has the duty to know your client and to try to detect elder financial abuse.

It is undisputed that elder financial abuse is problem in the financial advisor industry. A. 303, 305-306, ¶¶ 237-238, 254-259. The problem has increased with financial scams targeting people aged sixty-five and older, often because they have diminished capacity. A. 303, 312, ¶¶ 239, 306. RMD is aware of this problem, and has read about and studied the problem to educate itself and its employees, and to help protect its clients. A. 304, ¶¶ 242-245.

RMD acknowledges that it owes fiduciary duties to its clients, including the duty of loyalty and the duty of care, and that protecting its clients from fraudulent activity is part of these duties. A. 306, ¶¶ 260-261. With senior clients, RMD is aware that financial scammers target individuals who are sixty-five and older, and that as people age, there is generally a slip and decline in their mental acuity decreasing the

likelihood that the client may be able to recognize when they are being tricked or deceived. A. 303, 304, ¶¶ 239, 246.

The employees at RMD get training regarding elder financial abuse, which includes training all employees to look for red flags and warning signs that someone is potentially subject to elder financial abuse. A. 305-306, ¶¶ 254-256. RMD admits that the duty of care includes the duty to look out for warning signs, and a duty to inform clients if they suspect something. A. 306, ¶ 263. RMD's training also includes trying to detect signs of diminished capacity. A. 311, ¶ 296. According to RMD, the warning signs that RMD should be looking out for include the following:

- An unexpected request. A. 318, ¶¶ 345, 346.
- An uncharacteristic request, especially considering the client's personality and account history. A. 318-319, ¶¶ 344, 351, 352, 355.
- A large liquidation request or withdrawal. A. 318-319, ¶¶ 349, 350, 355.
- An unusual request. A. 319, 323, ¶¶ 352, 353, 378.
- When the client is acting strangely. A. 309, 310, 312, ¶¶ 282, 291, 304, 311.
- A deviation from the financial investment plan. A. 318, 319, 320, ¶¶ 346, 347, 357, 362, 363.
- Anything that seems suspicious. A. 318, ¶¶ 342, 343, 348.
- If a client is unwilling to provide a reason for what they are doing. A. 319, ¶ 356.
- A transaction that results in a large tax loss. A. 320, ¶ 358.

RMD acknowledges that it has the duty to Know Your Client. A. 308-310, ¶¶ 280-288. RMD admits that detecting elder financial abuse and protecting its clients from fraudulent activity are part of its fiduciary duties. A. 306, ¶¶ 261-262. RMD admits that its investment representatives should look for red flags or warning signs of elder financial abuse and try to protect their clients, including elderly clients. A. 307-308, ¶¶ 275-276. It is also a fact that RMD teaches its employees to detect diminished capacity, and RMD's expert states that it is industry standard to detect diminished capacity and all financial advisors are obligated to be on the lookout for clients who are suffering from diminished capacity. A. 310-311, ¶¶ 293-303.

RMD admits that to meet its duty of care to provide advice in the best interests of the client, RMD needs to thoroughly understand the client; accordingly, it is important for RMD to have strong individual relationships with its clients. A. 309, ¶ 286. RMD repeatedly acknowledges that the duty to know your client helps an investment advisor know when something is strange or out of the ordinary, and thus helps RMD protect the client. A. 309-310, ¶¶ 282-285, 288-291.

Knowing its client helps RMD know when something unusual, unexpected, or uncharacteristic is happening, and it helps RMD notice when a client may not be telling the truth, when the client is doing something out of character, or when the client is acting strangely. A. 309, ¶ 282. Moreover, as acknowledged by RMD and its expert, an investment advisor should not trust what the client says. A. 307, ¶ 272.

Rather, because many scams involve untruthfulness or deception, investment advisors should be on heightened alert and be skeptical when a senior client asks to make a large transfer. A. 305, ¶ 252. Indeed, RMD acknowledges that its financial advisors should be skeptical, especially if a senior client asks for the assets to be liquidated. A. 320, ¶¶ 364-365.

RMD has admitted paragraphs 134 and 135 of the Complaint, alleging that “RMD knows that it needs to take steps to help protect its clients who are over 65 years old from elder financial abuse” and that “RMD knows that it needs to be on the alert for elder financial abuse.” A. 306-307, ¶¶ 264, 265. At depositions, RMD went much further as its general counsel admitted that protecting its clients from fraudulent activity is part of its obligations to its clients. A. 306, ¶ 261. RMD acknowledged that detecting elder financial abuse is consistent with RMD’s fiduciary duties. A. 306, ¶ 262. RMD’s designated expert admitted that it is an industry standard within the financial services industry to try to prevent losses to senior clients resulting from elder financial abuse and that financial advisors have a duty to take steps to protect their senior clients and to look out for elder financial exploitation. A. 307, ¶¶ 266, 273.

RMD has also acknowledged that it has the duty to try to detect diminished capacity. A. 310-311, ¶¶ 293-303. RMD’s expert admits that it is an industry standard within the financial services industry to try to detect diminished capacity in

your clients, and he further states that all financial advisors are obligated to be on the lookout for clients who are suffering from diminished capacity. A. 310, ¶ 294. RMD's financial advisors get training on parts of the aging process and are instructed to look out for signs of diminished capacity. A. 311, ¶¶ 295, 296, 299, 302. RMD further states that as people grow older, it is more likely that there will be signs of diminished capacity. A. 311, ¶ 302. RMD's designated expert states that being aware of signs of diminished capacity is something that should be included in the training for financial advisors and that financial advisors should be on the lookout for signs of diminished capacity. A. 312, ¶ 304.

D. RMD adopted a trusted contacts policy to help protect its senior clients.

A trusted contacts policy is a policy that allows a financial advisory firm to contact a person whom the client has designated as a trusted contact in limited circumstances, such as when there is concern that the client is acting oddly. The policy is primarily used to help protect the client from fraud and to detect diminished capacity.

RMD adopted a trusted contacts policy to try to protect its clients and mitigate the risk of elder financial abuse. A. 312, ¶¶ 307-310. RMD's general counsel stated that the trusted contacts policy is consistent with a financial advisor's fiduciary duties. A. 312, ¶ 308. The trusted contacts policy can protect against scams and help protect clients by thwarting financial exploitation of a senior client. A. 312, ¶ 309.

The trusted contacts policy is closely tied to the concept of diminished capacity, as the trusted contacts are to be contacted when there are concerns regarding diminished capacity. A. 312, ¶¶ 307-310.

RMD's Trusted Contacts Policy states that "a growing number of clients will suffer from some form of dementia or diminished capacity in the later stages of life's journey. It is important to acknowledge that diminished capacity may impact a client's ability to make financial decisions and manage their own financial affairs and to be proactive in supporting clients in planning for that possibility." A. 312, ¶ 310. The Trusted Contacts Policy provides that for all clients over sixty, the financial advisor should encourage clients to establish trusted contacts that RMD can call in three situations. A. 312, ¶ 311. The third situation is "if the Portfolio Manager and/or Portfolio Administrator believe the client is acting confused, providing illogical instructions, or otherwise acting strangely." A. 312, ¶ 311.

RMD created a Trusted Contacts Policy for its employees and a policy called "Planning for Diminished Capacity" which is dated March 31, 2022, and was meant to be shared with its clients. A. 312, 314, ¶¶ 307, 318.

RMD failed to comply with the Trusted Contact policy in two respects.

First, while the policy requires the financial advisor to encourage all clients over sixty to establish trusted contacts that RMD can call in three situations (A. 312, ¶ 311), RMD failed to follow this policy. Indeed, RMD representatives never

discussed with the MacMillans the issue of having trusted contacts for the three different situations. A. 313, 314, ¶¶ 312, 317. Accordingly, RMD never encouraged the MacMillans to establish trusted contacts with whom RMD could talk with when the MacMillans were acting strangely. A. 313, ¶ 312. As clients who always followed the advice of RMD, the MacMillans would have followed that advice if it had been given. A. 296, 314, ¶¶ 182, 320.

Second, the Trusted Contacts Policy also provides that “whenever the client establishes a trusted contact with R.M. Davis, the Portfolio Administrator should help facilitate the establishment of the same trusted contract at the relevant custodian(s)” such as Fidelity. RMD failed to do that with the MacMillans. A. 313, ¶ 313.

E. RMD transfers management responsibility to George Carr.

On December 16, 2021, the MacMillans had an annual portfolio review with RMD which lasted two hours. A. 294, ¶ 167. In the call, the MacMillans did not express any dissatisfaction with RMD, nor did they state that they were thinking of investing in real estate. A. 294, ¶ 167. They did, however, talk about wanting to keep their taxable income and taxes low. A. 294, ¶ 167. Indeed, every year at the portfolio review, Bruce would always ask how they can reduce their taxes, as it was clear that keeping taxes low was important to the MacMillans. A. 294, ¶ 165.

On January 1, 2022, the MacMillans' account was transferred to George Carr after a half hour meeting between Richardson and Carr (though Carr cannot remember anything from that meeting). A. 60, 317, ¶¶ 7, 337. Thereafter, Carr was the MacMillans' investment advisor.

On January 21, 2022, the MacMillans and Carr had a one-hour conversation, mostly about whether to pay the mortgage down. Carr advised against paying off the mortgage, and the MacMillans agreed to that course of action. A. 294, ¶ 168.

Carr was the MacMillans' investment advisor for just over a month – until February 9, 2022, when Carr incorrectly deemed the relationship to be over. A. 302, ¶¶ 228-230.

F. The scam.

On February 1, 2022, Linda and Bruce received a dramatic, multi-colored Windows Defender pop-up on her laptop, saying that their banking information had been compromised, their electronic devices had been hacked, and their phones were probably tapped. The pop-up told them to call a Microsoft 1-800 number for further guidance, which they promptly did. A. 297, ¶ 188.

The MacMillans spoke to a “senior security analyst” at Microsoft who told them to be extremely cautious about any usage of their electronic devices until Microsoft could investigate further. The Microsoft analyst wanted the MacMillans to protect their finances and put them in touch with a “Fidelity fraud prevention

specialist” named Alen Watson. A. 297, ¶ 189.

Watson had much information about their Fidelity accounts, and Watson told Bruce that he had prevented someone from stealing \$100,000 from that account. A. 297, ¶¶ 190-191. Watson reported that the theft attempt came through the Fidelity switchboard and involved the use of the MacMillans’ Social Security numbers. Watson portrayed himself as a knowledgeable and experienced savior, and he stated that he was able to stop the fraudulent withdrawal. A. 297, ¶ 192.

Watson stated he had been in touch with his contacts at Social Security, and they required absolute confidentiality about the situation. A. 297, ¶ 193. As a result of all this occurring in just a short period, the MacMillans were terrified and shaken to the core. A. 298, ¶ 194.

The MacMillans later learned that the alleged security analyst at Microsoft and the Fidelity fraud prevention specialist (Alen Watson) were scammers. A. 298, ¶ 195. The scammers used effective social engineering and scamming techniques, including frightening their marks, building trust, and emphasizing the need to move quickly and confidentially. A. 298, ¶ 196.

Watson was smooth, comforting, seemingly knowledgeable and confident that he had thwarted the theft. He took the MacMillans from frightened and shaken people to being comforted that a white knight had saved them and was now taking charge, along with the help of the Social Security Administration. A. 298, ¶ 198.

Watson said Social Security required the MacMillans to get new Social Security cards. All the MacMillans investment funds would need to be transferred to a Social Security-approved safe house, which in this case was Coinbase, a leading cryptocurrency organization. Then, the funds would be transferred back to the Fidelity accounts when things were deemed safe and secure for the MacMillans by Microsoft, Fidelity, and Social Security. A. 298, ¶ 199.

G. February 3, 2022 call.

Just a few days after having last spoken with George Carr on January 21, 2022, Bruce MacMillan called RMD on February 3, 2022 and asked RMD to liquidate the entire joint investment account of \$280,000. A. 299, 291 ¶¶ 201, 150. Carr called Bruce to simply confirm the request. A. 299, ¶ 202. It was a very short call, and Carr did not ask any probing questions. A. 299, 300, ¶¶ 203, 208.

Prior to the withdrawal, the MacMillans' largest withdrawal was no more than \$20,000. A. 323, ¶ 376. Incredibly, Carr was not surprised by the unexpected request to withdraw such an enormous amount of money on February 3, 2022, and Carr did not recognize that there was anything out of character regarding the request to make a large withdrawal on February 3, 2022. A. 300, ¶¶ 210, 211.

RMD contradicts Carr and admits that the withdrawal of \$280,000 was uncharacteristic of the MacMillans. A. 323, ¶ 377. RMD further admits that a

warning sign to look for to protect a client from fraudulent activity is when a client makes an unusual transaction, and this was an unusual transaction. A. 323, ¶ 378.

Carr now admits that the withdrawal of \$280,000 was inconsistent with the MacMillans' past practices. A. 300, ¶ 213. In addition, RMD acknowledges that it was out of character for the MacMillans to not follow the advice from RMD (to not payoff the mortgage) because they always followed RMD's advice. A. 300, ¶ 212.

H. February 9, 2022 call.

On February 9, 2022, Bruce MacMillian had a short call with George Carr and Bruce asked Carr to liquidate both the tax-deferred IRA accounts. A. 300, ¶¶ 215-217. These retirement accounts contained over a million dollars. A. 291, ¶ 150. In the short call with George Carr on February 9, 2022, George did not ask any probing questions, and Bruce did not say much at all. A. 300, ¶ 217. Carr did not know what the MacMillans were going to do with the money from the IRA withdrawals, as Carr stopped asking questions. A. 301, 302, ¶¶ 221, 228. The transaction resulted in huge negative tax consequences for the MacMillans of more than \$330,000. A. 301, 331, ¶¶ 222, 430.

Carr was not surprised by the request on February 9, 2022, to liquidate the IRA accounts and Carr did not have any concerns nor did he see any red flags. A. 301-302, ¶¶ 223, 224. However, Carr, Richardson, and RMD's general counsel had **never** seen such an unusual transaction where a client withdraws over a million

dollars from a tax-deferred account and incurs income tax on the withdrawal. A. 324, ¶¶ 380-386.

As to the IRA account for Linda, George Carr acknowledged that Bruce MacMillan did not have legal authority over the account. A. 330, ¶ 424. Linda was not on the February 9, 2022 call. A. 301, ¶ 218. Accordingly, because Linda MacMillan did not affirmatively consent to the liquidation of her individual retirement account, RMD breached its duty of loyalty to her by liquidating the account. A. 332, ¶ 435.

For the joint account, RMD had a fiduciary duty to both account owners, Bruce MacMillan and Linda MacMillan. A. 332, ¶ 432. While Bruce MacMillan had the authority to do transactions within the account, RMD's duty of loyalty required RMD to discuss with Linda MacMillan the significant liquidation, recognize the red flags/warning signs, and take steps to protect Linda MacMillan as well as Bruce Macmillan. A. 332, ¶ 433. That is, in light of the many warning signs that were present, Carr should have discussed the issues with Linda and asked her many questions. A. 332, ¶ 436. Contacting Linda MacMillan in this situation would have helped expose the scam the MacMillan's were victims of. A. 332, ¶ 434.

Even if George Carr is correct that he asked Linda Macmillan one question, that is a breach of the standard of care. Carr should have had many questions of Linda MacMillan to see why she was doing this transaction, why she was acting out

of character, and to evaluate Linda MacMillan's actions for signs of elder financial exploitation or diminished capacity. A. 332, ¶ 436.

The MacMillans had approximately 50 to 100 securities, and RMD issued sale orders for each of those securities. A. 330, ¶ 426.

I. Carr incorrectly deemed the relationship to be over.

The February 9, 2022 call between George Carr and Bruce MacMillan was quite short. A. 300, ¶ 215. Carr did not ask questions. A. 300, ¶ 217. In fact, Carr asked so few questions that he did not know what the MacMillans were going to do with the money from the IRA withdrawals, and Carr does not recall that he talked with Bruce about making a real estate investment in the February 9, 2022 call. A. 301, ¶ 221.

The reason that Carr gave for not asking questions was that Carr claims that in the February 9, 2022 call, Bruce stated that he was firing RMD, and that ended the MacMillans' relationship with RMD at that very moment during the conversation. A. 302, ¶ 228. Carr claims that once Mr. MacMillan stated he wanted to withdraw his money, then Carr is no longer the financial advisor, is not being paid for his advice, and it's a very different legal authority that Carr has. A. 302, ¶ 228.

However, Carr's excuse was false. Bruce did not say that he was terminating RMD. A. 300, ¶ 216. Moreover, contrary to Carr's claim that his relationship ended and changed *during* the February 9, 2022 call, RMD's management of the

MacMillans' accounts ended a week later. A. 302, ¶ 229. Furthermore, RMD itself disagrees with Carr's claim. Instead, RMD acknowledges that its duties to Mr. MacMillan do not end in the middle of a conversation as Carr continued to have a fiduciary duty to look for diminished capacity and elder financial exploitation throughout the conversation on February 9, 2022, including if Carr saw strange behavior. A. 302, ¶¶ 229-230.

Accordingly, and contrary to Carr's contention, Carr still had the fiduciary duty to the MacMillans and the duty to look for warning signs and ask many questions. A. 326, 327, 331, 332, ¶¶ 399, 402, 405-408, 430, 436. However, Carr abandoned those duties in the middle of the call, and he failed to fulfill his duties. Although RMD had represented that it would be "there when you need us" and that RMD would "work tirelessly to ensure your financial legacy" (A. 292, ¶ 155(a)), Carr obviously failed to uphold those representations.

J. The MacMillans' management of their finances.

The MacMillans divided responsibilities, and Bruce had more interest in managing the financial affairs of their household, just as Linda had more interest in managing the meal preparation. A. 332, ¶¶ 437-438. While Bruce described himself as the "household director of finance and administration," it was simply a self-description and never agreed to by Linda. A. 333, ¶¶ 440-443.

Linda never abdicated her authority or role over her finances. A. 333, ¶ 444.

Instead, she was an active participant in the financial affairs of the household. A. 333, ¶ 445. Over the years, Linda went to all meetings with RMD, as well as the annual reviews, some of the Senior College events, and the telephone calls prior to February 2022. A. 333, ¶¶ 446-449. Bruce cannot recall any time, prior to February of 2022, when he made decisions on the financial affairs of their household without Linda's knowledge. A. 334, ¶ 451.

Prior to hiring counsel, neither Linda nor Bruce ever considered the issue of authority and whether Bruce had the authority to make unilateral decisions regarding Linda's individual IRA. A. 334, ¶ 454. Linda never provided Bruce with authority to liquidate her individual IRA. A. 334, ¶ 455. Linda and Bruce never considered whether Bruce had authority to liquidate Linda's IRA. A. 334, ¶ 456.

Before the call with George Carr on February 9, 2022, Bruce did not tell Linda that he was going to instruct George Carr to liquidate Linda's IRA. Linda had no knowledge of that, and Bruce did not discuss it with her. A. 334, ¶ 457. On February 9, 2022, George Carr did not believe that Bruce had authority over Linda MacMillan's individual retirement account. A. 335, ¶ 464.

K. George Carr did not know his clients and was not well trained on the risks his clients faced.

Carr was aware that the MacMillans took withdrawals out of their accounts for their income, but he had no idea as to how much, and could not even give an estimate. A. 316, ¶ 326. Carr did he know how much they had in their accounts or if

they had trusted contacts. A. 315, ¶ 324-325. Carr blamed his lack of knowledge to being in an “introductory mode” with the MacMillans. A. 316, ¶ 327.

When asked whether it was important for Carr to know his clients, Carr stated he is not sure what is meant by “know your client” and that he didn’t “know the specifics of it – of that regulation of policy.” A. 315, ¶ 323.

Carr does not know whether cognitive decline, including memory issues, happens more with seniors. A. 316, ¶ 331. He believes that he has had training on elder financial abuse, but Carr does not recall the substance of the training. A. 316, ¶ 332. Additionally, Carr does not remember anything he has read regarding trying to prevent elder financial abuse, nor does he even know if elder financial abuse is a problem within the financial services industry. A. 316, ¶¶ 328-329. Carr does not believe that seniors are more vulnerable to being harmed financially. A. 317, ¶ 334. Accordingly, Carr does not believe he needs to have additional vigilance with senior clients. A. 317, ¶ 335. Carr’s lack of knowledge regarding these important aspects of his job is disturbing.

George Carr failed miserably at his duty to “know your client” as he did not know the MacMillans’ account history (A. 315-316, ¶¶ 324-327), did not notice that that the request to withdraw \$280,000 was 14X larger than the MacMillans’ biggest transaction over the past fifteen years (A. 300, 323, ¶¶ 210-211, 376-379), did not know Bruce was a person who was meticulous and made smart financial decisions

(A. 295, ¶¶ 170-174), and was not surprised at the very unusual and extraordinarily rare transaction of withdrawing over a million dollars from a tax-deferred IRA (A. 324, 301-302, ¶¶ 380-386, 223-224). RMD acknowledges that given their past practices and history, the MacMillans were acting very differently, and they took a “radical departure” from their previous history. A. 325, ¶¶ 394-395. Because Carr did not know his clients, Carr missed the warning signs and failed to notice that anything was out of the ordinary. A. 301-302, ¶¶ 223-225.

In addition, Carr failed to be skeptical. While RMD acknowledges that its financial advisors should be skeptical if a senior client asks for all their assets to be liquidated (A. 320, ¶¶ 364-365), the facts of the case are very clear that George Carr was not skeptical in this case.

In April 2022, the MacMillans learned of the scam. They lost over \$1,300,000 in this ordeal. A. 330, ¶ 425 There were two aspects to the damages: the scammers got approximately \$1,000,000, and in addition, the MacMillans lost approximately \$330,000 in taxes. The MacMillans lost this enormous amount of taxes even though an important account objective was to keep their taxes low. A. 293, 294, 301, 319, 331, ¶¶ 159, 165, 222, 357, 430.

L. The MacMillans filed suit against RMD.

From the outset of this case, the MacMillans have clearly and unequivocally stated the fact that George Carr did not talk to Linda MacMillan. Indeed, in the

demand letter dated September 2, 2022 to RMD, the MacMillans emphatically stated that Carr failed to talk to Linda MacMillan:

If RMD had balked at doing this – either asking more questions, talking to Linda MacMillan (she was an account holder, too, and these sales were made without talking to her).

...

George did not even make a call to Linda MacMillan (who is an account holder).

...

Third, they could have escalated the issue to Linda Macmillan, to a trusted contact, to a relative, or to a more senior person at RMD with a relationship with Bruce.

A. 335, ¶ 462.

The MacMillans later filed suit against RMD for breach of contract and breach of fiduciary duty. The Complaint did not repeat the clear statement that Carr made the sales without talking to Linda. Indeed, the Complaint did not need to according to Maine’s standards of notice pleading. “Under the notice pleading standard, ‘the purpose of the complaint is to provide the defendant with fair notice of the claim against him,’ but it is not required to include every detail necessary for a defendant to be prepared for trial.” *Doe v. Roe*, 2022 ME 39, ¶ 23,. The notice-pleading standard has a forgiving nature. *Garey v. Stafford Management*, 2024 ME 46, ¶ 7.

Moreover, the MacMillans could not be certain whether RMD needed to get Linda’s consent until George’s deposition, which was held on November 28, 2023, as they did not know whether they might have signed some document for RMD

authorizing Bruce to make decisions for Linda’s account without her knowledge. A. 336, ¶ 470.

This Court has been clear in stating that “it is a function of discovery, and not of a complaint, to provide a defendant ‘with all material details’ of the allegations against them.” *Doe v. Roe*, 2022 ME 39, ¶ 23 (quoting *Casco Bank & TR. Co. v. Rush*, 348 A.2d 239 (Me. 1975)). However, RMD failed to take advantage of the discovery rules on this point. RMD failed to interpose any discovery on this point. For example, RMD failed to ask the MacMillans for all bases for the claims of negligence or breach of contract. Similarly, RMD failed to ask Bruce MacMillan who was on the calls and failed to ask whether Linda participated in the calls. A. 336, ¶ 471.

M. Procedural history and motions.

On June 28, 2024, RMD filed its first motion for summary judgment. The MacMillans largely based their opposition on the admissions made by RMD in discovery where RMD admitted (1) it had the duty to try to protect the MacMillans from elder financial abuse and (2) it failed to detect the numerous warning signs. In addition, the MacMillans opposed the motion, in part, based on the fact that Linda MacMillan was not present for the February 9, 2022 call when Carr liquidated Linda’s separately owned IRA account. In the reply, RMD attempted to take the

position that this was a new allegation fabricated “in desperation” to defeat summary judgment and should have been in the complaint.

In response, the MacMillans showed that RMD’s claim was false. Indeed, it was not a new claim and not made in desperation. In the very first letter to RMD, the MacMillans clearly stated that Linda was not on the February 9, 2022 call. Moreover, under this Court’s decisions regarding notice pleadings, the statement that Linda was not on that call did not need to be in the complaint. *See, e.g., Doe v. Roe*, 2022 ME 39, ¶ 23 (“Under the notice pleading standard, ‘the purpose of the complaint is to provide the defendant with fair notice of the claim against him,’ but it is not required to include every detail necessary for a defendant to be prepared for trial.”). Rather, this Court has stated that is the purpose of broad discovery. *See, e.g., Doe v. Roe*, 2022 ME 39, ¶ 23 (quoting *Casco Bank & TR. Co. v. Rush*, 348 A.2d 239 (Me. 1975) (“[I]t is a function of discovery, and not of a complaint, to provide a defendant ‘with all material details’ of the allegations against them.”)).

In an order dated September 5, 2024, the trial court took the position that “the Complaint does not sufficiently allege a claim based on the liquidation of Linda MacMillan’s retirement account without her authorization.”

Therefore, on September 10, 2024, in an abundance of caution, the MacMillans filed a motion to amend the complaint to add two paragraphs to simply

confirm what they had stated to RMD from the outset of the case – e.g., that Linda was not on the call. *See* A. 53, new paragraphs ¶¶ 108.1, 108.2.

In an order dated October 28, 2024, the trial court granted the MacMillans motion to amend the complaint. A. 23-27. On that same date, the trial court granted the motion for summary judgment in part and denied the motion in part. A. 14-22. The court recognized that RMD admitted to owing a fiduciary duty to the MacMillans, but the court concluded that the MacMillans needed to show “a duty to protect clients from elder abuse arising from third party fraud.” A. 18. The court concluded that there was no such duty and granted summary judgment in favor of RMD on the fiduciary duty claim. A. 20.

On November 12, 2024, the MacMillans filed a motion for reconsideration. The motion was based, in part, on the trial court omitting numerous important facts from its order, failing to recognize that RMD admitted that it has the duties to the MacMillans that are at issue in this case, and the court incorrectly stated that RMD took action to mitigate harm with the Trusted Contacts policy when the facts clearly show that RMD violated its own trusted contacts policy. In an order dated December 26, 2024, the trial court denied this motion. A. 57-58.

Thereafter, the Court allowed RMD to reopen discovery and take another deposition of Bruce MacMillan. A. 27. Mr. MacMillan reiterated that Linda was not

on the call and that Linda did not know that her IRA account was being liquidated. A. 334, 337, ¶¶ 457-458, 477-478.

On January 27, 2025, RMD filed a second motion for summary judgment, arguing that Bruce had the authority to make trades on Linda's account without her knowledge or consent. In an order dated April 8, 2025, the trial court granted this motion. A. 28.

STATEMENT OF ISSUES

1. Whether RMD owes a fiduciary duty to the MacMillans in this case.
2. Whether Bruce had authority to liquidate Linda's IRA account.

STANDARD OF REVIEW

On appeal from the granting of a summary judgment, this Court reviews the evidence in the summary judgment record in the light most favorable to the nonmoving party, which in this case is the MacMillans. The Court shall determine, de novo, whether there is any genuine dispute of material fact and whether the Defendant is entitled to a judgment as a matter of law. *Janusz v. Bacon*, 2022 ME 57, ¶ 7; *State v. Moosehead Mtn Resort, Inc.*, 2024 ME 50, ¶ 18; see M.R. Civ. P. 56(c). RMD has the burden to show that the trial court's decision was based on a correct application of the law and the undisputed facts. *Id.*

LEGAL ARGUMENT

A. RMD owes a broad fiduciary duty.

In the Order dated October 28, 2024, the Superior Court granted summary judgment on the issue of duty, concluding that RMD has no duty to protect the MacMillans from third party bad actors. A. 20. However, the court erred by taking too narrow of a view of duty to fit the contours of this case. Instead, the issue of duty should be a simple issue to resolve, largely because RMD itself has admitted that it owed fiduciary to the MacMillans, including the duty to know your client, the duty to act as a prudent person, and the duty to look out for elder financial abuse.

1. The Superior Court viewed duty too narrowly.

While the representatives of RMD repeatedly admit that they owe fiduciary duties to their clients and that they have the duty to know their clients and to look for elder financial abuse, RMD attempts to frame the issue of duty in a much narrower fashion to have it contoured to the facts of this case. That is, RMD attempts to look at the issue of duty under specific facts and circumstances of this case.

A similar issue regarding duty occurred in *Rickett v. VIP Tour & Charter Bus Co.*, PORSC-CV-19-499, 2022 Me. Super. LEXIS 97 (May 13, 2022), where the parties agreed that the tour bus company owed a duty to its passengers, but they argued over how narrowly that duty should be defined, “thus conflating the elements of duty and breach.” *Id.* at *6. The court stated that “[t]his is a common

occurrence when summary judgment motions are being litigated as parties seeking to avoid liability often attempt to gerrymander themselves out of the imposition of a duty by narrowly defining the duty owed so that it does not encompass them.” *Id.* at *6. The court refused to impart case specific facts into the determination of whether there was a duty as that would result in an infinite number of duties, and instead, the court stated that duty “must remain general in nature and avoid conclusions about the facts of a particular case.” *Id.* at *7 That is, the court should avoid fact specific duty determinations and refuse “to contour [the defendant’s] duty to fit the specific factual circumstances before it.” *Id.* at *8.

In the *VIP* case, the court relied, in part, on *Marshall v. Burger King Corp.*, 856 N.E.2d 1048 (Ill. 2006). In the *Marshall* case, the Illinois Supreme Court stated as follows:

Further, to the extent defendants suggest we could create a rule of law narrower than the exemption discussed above to absolve them of liability, they are actually requesting that we determine, as a matter of law, that they did not breach their duty of care. It is inadvisable for courts to conflate the concepts of duty and breach in this manner. Courts could, after all, “state an infinite number of duties if they spoke in highly particular terms,” and while particularized statements of duty may be comprehensible, “they use the term duty to state conclusions about the facts of particular cases, not as a general standard.” 1 D. Dobbs, *Torts* § 226, at 577 (2001); *see also* 54 *Vand. L. Rev.* at 712-17 (discussing problems associated with using the duty element of negligence to render decisions that no breach occurred as a matter of law). Thus, the issue in this case is not whether defendants had a duty to install

protective poles, or a duty to prevent a car from entering the restaurant, or some such other fact-specific formulation. Because of the special relationship between defendants and the decedent, they owed the decedent a duty of reasonable care. The issue is whether, in light of the particular circumstances of this case, defendants breached that duty. That question cannot be answered at this stage of the proceedings. *See Espinoza*, 165 Ill. 2d at 114 (issue of breach is for jury to decide provided there is genuine issue of material fact regarding that issue).

Marshall v. Burger King Corp., 856 N.E.2d 1048, 1061 (Ill. 2006).

Similarly, in *Norfolk S. Ry. Co. v. Zeagler*, 748 S.E.2d 846, 293 Ga. 582 (Ga. 2013), the Georgia Supreme Court concluded the trial court erred by failing to appreciate the distinctions between duty and breach, and the court criticized three other cases for “wrongly incorporating breach or causation analysis in the duty determination.” *Id.* at 590; *see also* Thomas C. Galligan, Jr., Continued Conflation Confusion in Louisiana Negligence Cases: Duty and Breach, 97 TULANE LAW REVIEW (2023) (by combining duty and breach, courts are making this combination into a legal question and improperly taking the issue of breach away from the jury while transforming it into a judicial decision).

In this case, the Superior Court did exactly what the above-cited decisions are warning should not be done. The Superior Court took a unnecessarily narrow view of duty, stating that the “fiduciary duty needed to go beyond taking care of their client’s funds and providing sound advice, to include a duty to protect clients from elder financial abuse arising from third party fraud.” A. 18. That was an error.

There was no need to narrowly contour the issue of duty to the facts of this case. In effect, the Superior Court combined the issues of duty and breach. Rather, it is obvious that RMD owes duties to the MacMillans, as that is undisputed. Accordingly, the Superior Court erred by combining the issues of duty and breach and by narrowly contouring the issue of duty, and the judgment of the Superior Court should be vacated as RMD owed fiduciary duties to the MacMillans.

A further problem with the court's narrow definition is that it is completely focused on just part of the damages in this case. While the MacMillans did incur damages to the third party fraudsters (as recognized by the trial court), the MacMillans also incurred \$330,000 of the damages when RMD liquidated the tax deferred IRA accounts, causing huge negative tax consequences. This damage was not from third party fraud, and it was incurred before the fraudsters got their hands on a single penny. A. 301, 322, 331, ¶¶ 222, 372, 430. By narrowly defining the issue of fraud to simply look at the third party fraud, the trial court ignored the fact that the MacMillans also incurred massive damages in tax penalties.

2. RMD admits it owed fiduciary duties to the MacMillans.

There is no dispute that RMD owed fiduciary duties to the MacMillans, and RMD has admitted this obvious fact. RMD admits that it owes a fiduciary duty to its clients, including the duty of loyalty and the duty of care. A. 306, ¶ 260. This alone should be enough to decide this appeal and vacate the judgment of the Superior

Court. It should then be for a jury to decide whether the facts of this case show a breach of the duty, and whether that breach proximately caused damages to the MacMillans.

However, if that is not enough, the facts and circumstances of this case show the many aspects of the broad fiduciary duty owed by RMD.

3. The SEC states that the fiduciary duty is broad and flexible.

RMD is an investment advisory firm that is registered with the Securities and Exchange Commission, and George Carr is an investment advisor and a certified financial planner. A.59, ¶ 3. The SEC has stated unequivocally that an adviser “is a fiduciary,” who has “learn[ed] the personal and intimate details of the financial affairs of clients.” *In the Matter of Arleen W. Hughes*, Exchange Act Release No. 4048 (Feb. 18, 1948). The advisory is a fiduciary who “has asked for and received the highest degree of trust and confidence on the representation that she will act in the best interests of her clients.” *Id.*¹

In 2019, the SEC published an interpretation of the standard of conduct for investment advisers under the Investment Advisers Act of 1940. Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Rel. No. 5248, 84 FR 33669 (June 5, 2019). “The adviser’s fiduciary

¹ It is clear that George Carr failed to act in the best interests of the MacMillans in this case. Indeed, his fiduciary duties remained throughout the February 9, 2022 call, yet he failed to notice any of the numerous, obvious warning signs. A. 302, ¶ 230.

duty is principles-based and applies to the entire relationship between the adviser and its client.” *Id.* at 9.

The SEC emphasized that the “investment adviser’s fiduciary duty is broad” and it is flexible depending upon the circumstances of the situation. The “principles-based approach ... expresses broadly the standard to which investment advisers are held while allowing them flexibility to meet that standard in the context of their specific services.” *Id.* at 5. This approach “follows the contours of the relationship between the adviser and its client” and further allows the adviser and its client to shape that relationship. *Id.* at 9. “The specific obligations that flow from the adviser’s fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal.” *Id.* at 10.

In this case, the facts show that the parties shaped that relationship and that duty in a very broad manner. This is shown both through the broad relationship between the parties as well as the repeated testimony of RMD representatives that they had the duty to know their client and the duty to look for diminished capacity and/or elder financial abuse.

The MacMillans had a very close relationship with RMD and intended to remain with RMD indefinitely. A. 9-12, ¶¶ 151-178. RMD made all the investment choices and the MacMillans did not make changes to the investment strategy set by RMD. A. 293, 295-296, ¶¶ 158-160, 177-183. The relationship between RMD and

the MacMillans is not simply limited to picking investments, as it was far broader than that, and even goes to **protection**. Indeed, the factual record is loaded with instances in which RMD recognizes its obligation to **protect** its clients. A. 292, 304-310, 312, 319, 320, 323, ¶¶ 155(c), 242, 253, 261-264, 268-270, 273, 276, 279, 283-285, 288, 309, 352, 364, 378.

RMD goes to lengths to make its clients feel protected and let them know that the relationship goes beyond investment advice and helps clients protect their finances and manage the business of their life. RMD wants its clients to feel protected, and RMD wants to protect their wealth. A. 307, ¶¶ 268-269. RMD tells its clients that it has fiduciary responsibilities. A. 292, ¶ 155(f). RMD tells its clients that it will “work tirelessly to ensure your financial legacy.” A. 292, ¶ 155(a). RMD tells its clients that “Your Advisors will become an extension of your family.” A. 292, ¶ 155(b). RMD further tells its clients, “We will help you simplify the business of your life—not just your finances—as you accumulate, protect, and transition your wealth, or even your business, to the next generation or owner. You can call on R.M. Davis for much more than thoughtful asset management.” A. 292, ¶ 155(c). RMD further stated that it would provide all of this “with an extraordinary level of personal service.” A. 292, ¶ 155(g).

RMD provides advice to the clients on a diverse array of topics. These topics included long-term care insurance coverage, selecting an identity protection

provider, social security benefits, income tax issues, property insurance coverage, mortgage issues, and life insurance. A. 292, ¶ 154.

Some of the ways in which RMD is able to provide this “extraordinary level of personal service” and to make the client feel protected is that RMD believes it has the duty to know your client, the duty to act as a prudent person, and to protect them from fraud.

a. RMD has the duty to know your client.

The central part of this case is that RMD had the duty to “Know Your Client” (and it failed miserably in breaching this duty). The Superior Court, however, largely ignored this important part of the case. One of the reasons that the know your client rule is so important is that it is directly tied to protecting clients from elder financial abuse perpetrated by third parties.

Traditionally, the know your client standard is particularly important for a financial advisor to follow. It is widely accepted and not controversial. A. 310, ¶ 289. The experts for both parties agree that investment advisors have the duty to know their clients. A. 310, ¶¶ 287-291.

RMD admits that the know your client rule is part of RMD’s fiduciary duty and is important to meet its duty of care. A. 308-309, ¶¶ 280, 281. Knowing your client includes knowing the client’s assets, debts, investments, goals, lifestyle, spending habits, family, jobs, sources of income, investment preferences,

personality, account history, and tax objectives. A. 309-310, ¶¶ 287, 290. RMD acknowledges that knowing their client allows RMD to spot warning signs and detect when something is unusual, doing something out of character, acting strangely, or perhaps not telling the truth. A. 309, ¶¶ 282, 285. In short, knowing your client helps RMD see when something is out of character and then protect your client from fraudulent activity. A. 309-310, ¶¶ 283, 285, 288.

In a presentation to seniors, RMD summed up many of the concepts in this case quite well. RMD represented that it took the following measures:

Know Your Client

- At R.M. Davis client service is a number one priority. We develop strong and close professional relationships with our clients. This knowledge not only helps us serve our clients better but it also helps us protect our clients from fraudulent activity

A. 309, ¶ 284.

Accordingly, in this “Know Your Client” handout given to senior clients, RMD is acknowledging its duty to know its clients, as well as its duty to protect its clients from fraudulent activity. This “Know Your Client” document (A. 309, ¶ 284) directly shows the tie to protecting “clients from fraudulent activity” committed by third parties. The document is similarly applicable to protecting a client from making

an extremely unwise transaction that is against the long-standing objective to minimize taxes.²

b. RMD has the duty to follow the prudent person standard.

RMD tells its clients that it “maintains a ‘prudent person’ standard in the management of its clients’ assets and is sensitive to fiduciary responsibilities of managing client investment portfolios.” A. 292, ¶ 155(f). RMD admits that the standard applies to the conduct of its financial advisors. A. 319, ¶ 354. The Supreme Court states that the duty of prudence includes a duty to regularly review and monitor investments. *See Tibble v. Edison International*, 575 U.S. 523, 528, 530 (2015).

RMD further states that the prudent person standard requires it to look out for certain uncharacteristic activity by a client, including the responsibility to look for exactly what happened in this case – a request to liquidate a million dollars of IRA accounts. A. 319, ¶ 350. RMD admits that when asked to liquidate a million dollars of IRA accounts, RMD should ask a lot of questions, advise against the transaction, learn more about the transaction, advise the client that the client is making a deviation from the financial plan developed by RMD, and advise the client of the consequences of doing that. A. 318, 326, ¶¶ 347, 399-400. RMD further states that

² Of course, the facts of this case show that George Carr did not know the MacMillans nor his responsibilities. Consequently, he missed the many warning signs and failed to take any action to protect the MacMillans. A. 315-317, 321-324, ¶¶ 323-337, 367-386. Carr did not even know what the know your client is. A. 315, ¶ 323.

when it receives a highly unusual request, the financial advisor can put a hold on the transaction. A. 326, ¶¶ 401-403. Indeed, RMD has acknowledged that when receiving an uncharacteristic request, it is important to talk with the client to make sure that the client fully understands the implications of what they are doing, and it would be fine if that took an extra day or two to transpire before completing the transaction. A. 326, ¶ 402.³

Accordingly, RMD and its financial advisors must meet the prudent person standard, and that standard includes the duty to regularly monitor investments, to look out for uncharacteristic activity of a client, to ask many questions, to advise the client when they are attempting to make a trade that is contrary to the client's financial objective, to raise red flags, and to delay the transaction.

c. RMD has a duty to protect its clients from elder financial abuse.

The Superior Court failed to consider the many instances in which RMD recognizes the duties that it has to its senior clients. Financial advisors are in a critically important position to be able to detect and prevent elder financial exploitation. Indeed, RMD understands its obligation to try to protect its elder clients.

“RMD knows that it needs to take steps to help protect its clients who are over

³ Of course, the undisputed facts are that RMD did none of these things. Rather, George Carr thought the relationship was over and did not ask questions nor provide any advice. A. 321-324, 328-329, ¶¶ 368-386, 411-420.

65 years old from elder financial abuse.” A. 306, ¶ 264. RMD admits that the duty of care includes the duty to look out for warning signs, also known as red flags, and a duty to inform clients if they suspect something. A. 306, ¶ 263. “RMD knows that it needs to be on the alert for elder financial abuse.” A. 307, ¶ 265. RMD’s designated expert admits that it is an industry standard within the financial services industry to try to prevent losses to senior clients resulting from elder financial abuse. A. 307, ¶ 266.

Elder financial abuse has been a growing problem in the financial services industry. A. 303, ¶¶ 238-240. It is estimated that seniors lose more than \$28 billion per year as a result of senior financial abuse. “RMD knows that elder financial abuse is a problem,” and RMD knows that the problem has been increasing over time. A. 303, ¶¶ 237-240. “RMD is aware of the prevalence of elder financial abuse.” A. 304, ¶ 241.

RMD tries to keep up on information relating to scams on seniors, as RMD wants to protect its clients. A. 304, ¶ 242. RMD had data showing there are more complaints of elder financial exploitation in Maine than in any other state, and so RMD was particularly aware of what a serious problem there is in Maine with elder financial exploitation. A. 305, ¶ 251.⁴

⁴ This was not simply on a per capita basis. Rather, the data of RMD shows that there were complaints in Maine than in any other state. Recognizing Maine’s comparatively small population, this data from RMD shows what a massive problem Maine has regarding elder financial abuse. A. 305, ¶ 251.

RMD acknowledges that as people age, there is generally a slip and decline in their mental acuity, and as the mental acuity decreases, they may not be able to recognize when they are being tricked or deceived. A. 304, ¶ 246. RMD understands that financial scams against seniors can often take advantage of a senior's lack of familiarity with technology. A. 304, ¶ 247.

As to elder financial abuse, RMD has read about it, learned about it, studied it, educated themselves on it, and they are concerned about it. A. 304, ¶ 243. The employees at RMD get training regarding elder financial abuse. A. 305, ¶ 254. All employees at RMD are supposed to take elder financial exploitation seriously and be on heightened awareness, and to detect elder financial abuse, RMD trains its employees to look for red flags and warning signs that somebody is potentially subject to elder financial abuse. A. 306, ¶¶ 256-258. RMD does training on trying to prevent elder financial abuse, including how to spot signs of elder financial abuse, what steps to take if you spot signs of elder financial abuse, the trusted contacts policy, and training on certain statutes such as the Senior Protection Act and the Maine statutes. A. 306, ¶ 259.

Again, as with the Know Your Client rule and the Prudent Person standard, RMD also recognizes that it has the duty to look for warning signs and protect their clients from fraudulent activity. A. 306, ¶¶ 261-264. Although RMD's recognition of its obligation to detect and protect against elder financial abuse was completely

ignored by the trial court, it should be very important in establishing the relationship between RMD and the MacMillans. As discussed above, the SEC stated that the fiduciary duty is flexible to meet the contours of the relationship between the parties, and it is clear that the parties in this case viewed RMD as having an obligation to protect its clients from elder financial abuse.

d. Diminished capacity and a trusted contacts policy.

Considering its aging clientele, the issue of diminished capacity is extremely important to RMD. A. 312, ¶ 310. RMD’s designated expert admits that it is an industry standard within the financial services industry to try to detect diminished capacity in your clients. A. 310, ¶ 294. Indeed, all financial advisors are obligated to be on the lookout for clients who are suffering from diminished capacity. A. 311, ¶ 295.

In addition to being on the lookout for signs of diminished capacity, RMD created a Trusted Contacts Policy for its employees and a policy called “Planning for Diminished Capacity” which is dated March 31, 2022, and was meant to be shared with its clients. A. 312, 314, ¶¶ 307, 318. This Trusted Contacts Policy provides that for all clients over sixty, the financial advisor should encourage clients to establish trusted contacts that RMD can call in three situations. The third situation is “if the Portfolio Manager and/or Portfolio Administrator believe the client is acting confused, providing illogical instructions, or otherwise **acting strangely**.” A.

312, 314, ¶¶ 311, 320. The trusted contacts policy can help protect clients and can help thwart financial exploitation of a senior client and protect against scams. A. 312, ¶ 309.

By implementing the trusted contacts policy, RMD recognizes its duty to look for diminished capacity and to try to protect its clients. Again, under the flexible standard of the SEC, this should weigh heavily in favor of RMD owing a duty in this case.

4. Marjorie Kessler v. Morgan Stanley.

There are few reported cases on the duties of a financial advisor, and the reason is that the majority of the cases are decided in arbitration. However, there is a recent case with remarkably similar facts to the case at hand, and it shows that the financial services industry views the advisor as having duties to notice red flags and take action to protect an elderly client.

A 75-year-old woman was defrauded of approximately \$1.75 million from a sophisticated internet scam. There are many similarities to the present case including the following:

- Ms. Kessler was 75 years old.
- Ms. Kessler received an alert from Microsoft urging her to immediately call an 800 number. The scam consisted of telling the woman that she needed to convert her money into gold bars.

- The gold bar scam was ridiculous and would be apparent to most clear-thinking adults but the story scared the victim. The scammers told Ms. Kessler that her assets would be frozen.
- Just like this case, the scammers told Ms. Kessler that she needed to keep it secret.
- Over a nine-day period, Ms. Kessler withdrew a third of her life savings from her Morgan Stanley account and had it transferred to her bank account. Like in this case, the money did not go directly to the scammers.
- Ms. Kessler had a six-year history with Morgan Stanley and she argued that her sudden and uncharacteristic requests to withdraw money should have been alarming and raised red flags.
- As in the case here, the Morgan Stanley investment advisor failed to ask questions, failed to notice that her conduct was out of the ordinary, and failed to follow the trusted contacts policy.
- As in this case, Morgan Stanley defended itself by alleging that Kessler’s mental state appeared normal, the transfer was made to another well-established financial institution, that she lied to her investment advisor, that and that some of the key steps to the transaction (such as purchasing gold bars and cryptocurrency) took place away from Morgan Stanley.
- Morgan Stanley argued that: “Morgan Stanley simply followed the valid and reasonable instructions of its established client who lied to Morgan Stanley about the true use of the funds to purposefully evade detection.”

An arbitration was held before a three-judge panel pursuant to rules approved by the SEC. On February 10, 2025, the arbitrators ruled in favor of the claimant and found the investment advisor liable for negligence in the sum of \$843,000. *Marjorie Kessler v. Morgan Stanley*, FINRA Dispute Resolution, Case No. 24-00155, February 10, 2025.

While not controlling on this court, this case is added weight that the financial services industry recognizes that financial advisers owe positive duties to elderly clients to know the client and recognize red flags.

B. RMD breached the duty proximately causing damages to the MacMillans.

The issues of breach and proximate cause were briefed before the trial court. However, those issues do not appear to be relevant in this appeal as the trial court did not err in deciding them. In short, those are both issues involving factual issues and properly decided by a jury. In this case, there is a mountain of evidence showing breaches, including missing the warning signs, allowing the imposition of enormous tax consequences, not asking questions, deeming the relationship over in the middle of the February 9 call, not speaking with Linda, not acting in the client's best interests, not knowing the client, not following the trusted contacts policy, and not putting a hold on the transaction. Moreover, the damages were very foreseeable in this case, and if RMD had followed its procedures and fiduciary duties, the scam would have been thwarted. A. 328-330, ¶¶ 411-423.

C. The Superior Court erred in deciding the second motion for summary judgment and the issue of authority.

RMD's second summary judgment motion was based upon RMD's argument that Bruce was Linda's agent, and that Bruce had authority to liquidate her IRA. He did not. To support this contention, RMD put forth three theories of agency: apparent authority, actual authority, and ratification of unauthorized acts. In a convoluted

opinion, the trial court granted summary judgment, finding that Bruce had implied actual authority. A. 28-32.

1. There was no apparent authority.

“Apparent authority is authority, although not actually granted, the principal knowingly permits the agent to exercise or that the principal holds the agent out as possessing.” *Remmes v. Mark Travel Corp.*, 2015 ME 63, ¶ 22. Unlike, implied actual authority, apparent authority is based on a third-party’s belief that a party is the principal’s agent. *Remmes*, 2015 ME 63, ¶ 22; *Camden Nat’l Bank v. Crest Constr., Inc.*, 2008 ME 113, ¶ 19. “Apparent authority exists only when the conduct of the principal leads a third party to believe that a given party is the principal’s agent.” *Remmes*, 2015 ME 63, ¶ 22 (emphasis added). “[T]he third person must believe the agent to be authorized.” *QAD Investors, Inc. v. Kelly*, 2001 ME 116, ¶ 19 (quoting RESTATEMENT (SECOND) OF AGENCY § 8 cmt. c).

In this case, RMD confirmed that it needed Linda’s approval to liquidate her IRA. A. 475-476, ¶¶ 465-467. RMD has presented no evidence that it believed Bruce had authority for Linda, as RMD believed only Linda could liquidate her account. A. 475-476, ¶¶ 465-467. It is clear that RMD did not believe Bruce had authority to liquidate Linda’s individual retirement account. Indeed, the facts of this case show that “George Carr did not believe that Bruce had authority over Linda MacMillan’s

individual retirement account.” A. 475-476, ¶ 464. With this admission, it is clear that there is no apparent authority.

2. There was no actual implied authority.

In the alternative, RMD argued that Bruce had actual implied authority. The trial court appears to have adopted this as the basis for summary judgment. A key distinction between implied actual authority and apparent authority is the “manifestation of consent by the principal” which “goes to the perception of the agent not the third party.” *Camden Nat’l Bank*, 2008 ME 113, ¶ 19.

Bruce and Linda were husband and wife. This alone did not constitute Linda’s implied manifestation of assent for Bruce to be her agent. *Larison v. Home of the Innocents*, 551 S.W. 3d. 36, 42 (Ky. Ct. App. 2018) (marital relationship does not create a presumption of agency in husband and there needs to be an executed power of attorney or the wife’s conduct must create an appearance of authority in her husband with the defendant).

For Bruce to have implied actual authority, this Court must conclude Bruce’s agency from the “facts and circumstances attendant to the transaction, such as the words used or the customs and relations of the parties” and that Linda manifested an intent for Bruce to act as her agent. *Camden Nat’l Bank*, 2008 ME 113, ¶ 19. Further, this Court must conclude that liquidating Linda’s individual retirement account was

within the scope of Bruce's authority. Both conclusions must be concluded viewing the facts in the light most favorable to the MacMillans.

The trial court erred when it concluded that "Linda authorized Bruce to make financial decisions regarding her IRA." A. 30. The cited facts by the Court do not show a manifestation of consent by Linda. Rather, at most, they show a belief by Bruce that he had authority. Bruce's belief pertaining to his authority is irrelevant unless Linda manifests that authority. RMD fails to show that Linda manifested consent to provide Bruce with the authority over her account, as the evidence is that she did not do that.

In fact, RMD repeatedly denied and qualified its answers in the MacMillan's separate statement of material facts – stating the cited testimony only speaks to Bruce's belief and not what Linda's state of mind or knowledge. *See e.g.* A. 482 ("OBJECTION: The statement is inadmissible because the cited record testimony of Bruce MacMillan lacks the proper foundation to support the statement about what Linda knew").

Furthermore, even if Bruce had some implied actual authority (and he did not), there is a genuine question of fact as to the scope of that authority. The trial court improperly concluded that Bruce's implied authority encompasses all "decisions with respect to her IRA." A. 31. In fact, the trial court did not analyze or opine on the scope of the authority.

Bruce liquidated Linda's IRA without Linda's knowledge or authorization. A. 334, 337, ¶¶ 456-457, 477-478. Prior to asking George Carr to liquidate her individual retirement account, Bruce never discussed the decision with Linda. A. 471, ¶ 457. After Bruce requested the liquidation of Linda's individual retirement account, RMD emailed Bruce about the tax withholdings for the recently closed account. A. 336-337, ¶ 474. Bruce did not share this information with Linda. A. 337, ¶ 475. Similarly, when the MacMillans received a statement a few days later from Fidelity, Bruce did not share that statement either. A. 337, ¶¶ 476, 479. If Bruce was acting within his authority, why did Bruce not share this information with Linda? The answer is self evident – Bruce was acting unilaterally and without authority from Linda. Moreover, Bruce had never before made decisions on their finances without Linda's knowledge. A. 334, ¶ 451

Even if Bruce had some authority as Linda's agent, liquidating her individual retirement account was clearly beyond the scope of his authority or reasonably believed necessary authority, and his actions cannot be imputed to Linda. *Estate of Frost*, 2016 ME 132, ¶ 19 (when scope is exceeded, actions have no legal effect).

3. There was no ratification

RMD also argued that Linda ratified Bruce's unauthorized actions. The trial court did not credit this meritless argument in its decision.

“The action of a purported agent is of no legal effect if the action exceeds the authority granted by the principal.” *Estate of Frost*, 2016 ME 132, ¶ 19. “A principal may ratify the action and thereby give legal effect to a transaction otherwise inoperative as to the principal.” *Id.* Ratification is the affirmance by the principal to give the act the effect “as if originally authorized by him.” *QAD Investors, Inc.*, 2001 ME 116, ¶ 22. However, for the principal to affirm the action, the principal must know all material facts which she is ratifying. *Remmes v. Mark Travel Corp.*, 2015 ME 63, ¶ 21.

In this case, RMD is unable to provide any evidence of when Linda learned of the material facts which RMD asserts she ratified. *See* A. 481 – 483, ¶¶ 475-480.

CONCLUSION

For each of the foregoing reasons, as well as the reasons stated in Plaintiff’s oppositions to the two motions for summary judgment, Plaintiffs respectfully request that this Court vacate the judgment of the Superior Court.

/s/ Bruce W. Hepler

Bruce W. Hepler, Bar No. 8007
Attorneys for Plaintiffs/Appellants

Law Offices of Bruce W. Hepler, LLC
75 Pearl Street
Portland, Maine 04101

brucehepler1@gmail.com
t: (207) 772-2525
f: (207) 772-2111

CERTIFICATE OF SERVICE

I, Bruce W. Hepler, Attorney for Appellants Bruce and Linda MacMillan hereby certify that I have today caused two copies of the Brief of Appellants to be served upon the following party by first class mail:

Susan Weidner, Esq.
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101

Dated: November 17, 2025

/s/ Bruce W. Hepler

Bruce W. Hepler, Esq., Maine Bar No. 8007
Attorney for Bruce and Linda MacMillan
Appellants/Plaintiffs

Law Offices of Bruce W. Hepler
75 Pearl Street
Portland, Maine 04101
Tele: (207) 772-2525
Fax: (207) 772-2111