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/Cross-appellants

On Appeal from the Business and Consumer Court

APPELLANTS' REPLY BRIEF AND RESPONSE TO APPELLE'S CROSS APPEAL

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1. RMD cannot refute the duty acknowledged by RMD's agents.

RMD contends that it did not owe duties to protect the MacMillans or to look for elder financial abuse. While RMD correctly notes that there are no reported decisions in Maine requiring financial advisors to have a duty to protect their clients, there are also no decisions providing that financial advisors are free to ignore extremely unusual conduct by their client, as happened here. There are no reported cases regarding whether financial advisors have any obligations to protect their clients or whether they need to look out for obvious signs of elder financial abuse.

RMD cannot refute that its agents – as well as both parties' experts – have clearly acknowledged that the financial advisors are obligated to try to protect their clients from fraudulent activity and to look for signs that something is amiss.

When asked whether protecting their clients from fraudulent activity is part of their fiduciary duty, RMD's general counsel testified as follows:

> WITNESS: I don't know if I've heard it specifically said that it's part of our fiduciary obligation, but it is certainly part of our obligations as an investment advisory firm to try to protect our clients from fraudulent activity.

RM Davis 30(b)(6) depo., p. 206:15-19; A. 306, ¶ 261. Peter Richardson[1] was asked whether "the duty of care includes the duty to look out for warning signs," and he

[1] RMD's counsel represented that Richardson is part of the control group of RMD. Richardson Depo 43:19-20.

answered, "Yes." Richardson Depo. at 22:15-17; A. 306, ¶ 263. Likewise, in its Answer, RMD admitted that it "knows that it needs to take steps to protect its clients who are over 65 years old from elder financial abuse," and that "it needs to be on alert for elder financial abuse." A. 306-307, ¶¶ 264, 265. RMD's expert states that financial advisors have a duty to take steps to protect their senior clients and to look out for elder financial exploitation. A. 307, ¶¶ 273-275. Likewise, the MacMillans' expert is also clear as to the duty of care, including the duty to detect and protect. A. 308, ¶¶ 277-279. With all this testimony in the record, RMD cannot continue to steadfastly deny that it has duties to protect its clients and look for warning signs.

2. It is not a duty to be clairvoyant – just recognize the obvious.

RMD argues that it cannot be clairvoyant. Red Br. 31. But nobody is expecting clairvoyance. Rather, the MacMillans are simply contending that RMD should uphold the duties of a reasonable financial advisor and that RMD should have done what it said it would do – take action to protect its clients from fraudulent activity, look for warning signs, take prudent steps to protect its clients, and be alert for elder financial abuse. Moreover, RMD said that it would be there when you need us and work tirelessly to ensure your financial legacy. A. 292-293, ¶¶ 155-156. RMD said it would "thoroughly understand you" and this knowledge would allow RMD to "protect our clients from fraudulent activity." A. 292, 309, ¶¶ 155(d), 284.

This is not a case of subtle signs that something was amiss. Instead, this was

a case involving obvious signs of elder financial abuse and diminished capacity. A. 331, ¶¶ 429-430. The many warnings signs are discussed in section 10 herein. Carr, however, was in "introductory mode" and had little knowledge about even the most basic things and missed all of them. A. 315-316, ¶¶ 324-327.

RMD admits that this extremely strange transaction is a sign of elder financial exploitation, and their expert admits that it is also a sign of diminished capacity. A. 319-320, ¶¶ 357-358. RMD acknowledges that it was a radical departure from their past disciplined behavior. A. 325, ¶¶ 393-395. Peter Richardson testified that both transactions – the $280,000 transaction and the liquidation of the IRA – were unusual transactions for the MacMillans which were warning signs for fraudulent activity. A. 323-324, ¶¶ 376-378, 384, 385. Richardson further testified that it should cause RMD to ask a lot of questions and to advise them of the consequences of doing that, including advising against the transaction and needing to learn more about it. A. 326, ¶¶ 399-401. Of course, George did not notice that it was a strange transaction, did not ask questions, and did not provide advice. A. 302, 303, 328-329, 331, ¶¶ 224, 228, 233-236, 411-417, 430.

Clairvoyance was not needed here. The fraud could have been thwarted with basic rudimentary financial advisor work.

3. RMD was supposed to Know Your Client to prevent fraud.

Rather than attempting to argue that Carr knew his client (which he obviously

did not), RMD attempts to argue that the KYC concept only applies when RMD is providing advice, and it is not for protecting the client. This argument contradicts RMD's previous representations. After all, RMD represented that the relationship would simplify the business of your life to protect your wealth as clients would have the benefit of ongoing advice and keep you on track in an ever-changing world. A. 292, ¶¶ 155, 156. RMD explicitly represented that it would Know Your Client as it helps "protect our clients from fraudulent activity." A. 309, ¶ 284. Indeed, the KYC rule – which is part of the duty of care – allows RMD to protect its clients and notice when things are out of the ordinary. A. 309-310, ¶¶ 281-291. These record citations show that there was much evidence in this case that the Know Your Client rule is instrumental for a financial advisor in protecting its clients and noticing the signs of elder financial abuse or diminished capacity.[2]

RMD's attempt to limit the Know Your Client rule does not make sense. The fiduciary duty is supposed to be broad and should not be limited to exclude such large transactions. *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Rel. No. 5248, 84 FR 33669 (June 5, 2019) ("The investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship").

[2] The only exception among the witnesses is George Carr, who stated, "I'm not sure what you mean by know your client" and "I don't know the specifics of it – of that regulation or that policy." A. 315, ¶ 323.

Moreover, if RMD was not providing advice during these transactions, as it now claims, then that is troubling. RMD should have been diligent in looking for signs of elder financial abuse, asking questions, and in providing wise advice, including the advice not to do the transactions. A. 326, 330-332, ¶¶ 400, 428-436.

4. Bruce was obviously exhibiting diminished capacity.

RMD argues that the MacMillans were not experiencing diminished capacity. Red Br. 35. This is an odd contention as the record is clear that Bruce was obviously showing all the signs of diminished capacity.

The indications of diminished capacity are the same as the signs for elder financial abuse. A. 317-318, ¶¶ 341-343. This includes (a) an unexpected request, (b) an uncharacteristic request, (c) a large liquidation request, (d) a strange request, (e) a deviation from the financial investment plan, and (f) a transaction that results in a large tax loss. A. 318-320, ¶¶ 344-363. There is no dispute in this case that all these things were present.

Moreover, RMD's own policy for diminished capacity includes when the client is "acting strangely." A. 312, ¶ 311. Bruce's conduct in this case, in requesting a "financially insane" transaction that the financial advisors had never seen before, is the epitome of acting strangely. A. 322, 324, ¶¶ 372, 380-386.

5. The factors of *Alexander v. Mitchell* favor the MacMillans.

To decide the issue of duty, RMD urges the Court to examine the factors of

Alexander v. Mitchell, 2007 ME 108, in ruling on whether there should be a duty imposed on financial advisors. Red Br. 37-40. The *Alexander* factors only apply if the duty question "does not rest on well-established notions of duty," and inasmuch as all the witnesses testified to their understanding of the many facets of duty in the relationship between a financial advisory and client, it would appear unnecessary to delve into these facts. Nonetheless, the policy framework of *Alexander v. Mitchell* supports the recognition of a duty here.

The MacMillans do not seek creation of a novel obligation untethered from existing fiduciary principles. Rather, they seek application of an investment advisor's fiduciary duty which includes the duty to know its clients, the duty to take steps to look for elder financial abuse and diminished capacity, the duty to act as a prudent person to monitor the investments, and the duty to protect its client from elder financial abuse, especially when confronted with unusual, uncharacteristic, and inconsistent client conduct. RMD's own professionals confirm that within the investment advisory industry, it is understood and expected that advisors look for red flags and pause to assess when confronted with unusual transactions that raise concern. A 377-385, ¶¶ 254-279; A. 435-439, ¶¶ 401-409. Accordingly, the MacMillans are not looking for something new but something that is completely in line with the testimony of this case. *See also* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Rel. No.

5248, 84 FR 33669 (June 5, 2019) ("The investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship").

First, recognition of a duty here is supported by both the "hands of history" and "our ideals of morals and justice," and RMD's own argument demonstrates why. RMD acknowledges that it trains its professionals on elder financial abuse and that it implemented mitigation mechanisms, including a Trusted Contact policy, to address the recognized risk of exploitation affecting elderly clients. Red Br. 36-37; *see also* A. 377-385, ¶¶ 254-279; A. 395-396, ¶¶ 307-311; A. 435-439, ¶¶ 401-409. Those measures did not arise in the absence of a historical understanding; the measures reflect a professional, societal, and legal evolution recognizing that financial exploitation is a foreseeable risk that commonly manifests at the point where money is moved. A. 375, ¶ 250; A. 436, ¶ 402; *see e.g.* 32 M.R.S. § 16801 *et. seq*. Indeed, the recognition of a duty here is very consistent with the duties obligations and duties acknowledged by RMD as discussed in sections 1-3 above.

Under *Alexander*, RMD's internal policies and awareness are relevant because they reflect a historical and societal understanding – now widely shared by regulators, legislatures, and the profession – that financial exploitation of elderly clients is a foreseeable risk that arises at the moment assets are liquidated or transferred. *See* A. 304-305, 436 ¶¶ 250, 402; A. 436, ¶ 402. Industry training, mitigation policies, and legislative authorization for advisor intervention all

undermine RMD's claim that fiduciary responsibility is confined to passive order-taking in the face of unusual transactions. Rather, financial advisors should take elder financial abuse seriously in all transactions, especially after having made the representations in this case, including the representation that they would work tirelessly, help with the business of your life, protect your wealth, and know your client to protect them "from fraudulent activity." A. 292-293, 309, ¶¶ 155-156, 284.

Second, the "convenience of administration of the rule" favors recognition of a duty here. RMD already trains its employees to recognize red flags and to report suspicious and unusual transactions. A. 305-306, ¶¶ 254-259. All employees at RMD are supposed to take elder financial exploitation seriously. A. 306, ¶ 257. To detect elder financial abuse, RMD trains its employees to look for warning signs and to be on heightened awareness with its elderly clients. A. 306, ¶¶ 257-258. Detecting elder financial abuse is consistent with RMD's fiduciary duty. A. 306, ¶ 262. RMD's claim that such a duty would be unworkable is belied by the undisputed reality that these practices are already embedded in ordinary financial advisory operations across the industry. A. 377-385, ¶¶ 254-279; A. 435-440, ¶¶ 401-410. A duty requiring reasonable inquiry when unusual, uncharacteristic, and inconsistent client conduct does not impose a new burden; it reflects the professional judgment that advisors should already exercise. *See* e.g., A. 306-307, ¶¶ 260-269.

Third, society's ideas of where the loss should fall favors recognition of a

duty. As the record reflects, financial advisors are better positioned than lay clients to detect exploitation risks because they are licensed professionals who receive training and continuing education specifically addressing detecting and preventing elder financial exploitation. A. 417-418, ¶ 366. Moreover, the elderly clients are likely suffering from diminished capacity and are easier to fool. A. 304, 308, 312, ¶¶ 245-246, 278, 310. Allocating responsibility does not shift liability from criminals to advisors; it reflects a societal judgment that fiduciaries must apply their duty to know the client and recognize when the client is taking action that departs sharply from established goals and patterns to prevent foreseeable harm from occurring.

Accordingly, all the factors from *Alexander v. Mitchell*, 2007 ME 108, align with the recognition that a financial advisor's fiduciary duty and duty of care include the duty to know its clients, the duty to act as a prudent person, the duty to take steps to look for elder financial abuse and diminished capacity, and the duty to protect the client from elder financial abuse, especially when confronted with unusual, uncharacteristic, and inconsistent client conduct.

6. Bruce MacMillan lied to RMD.

RMD repeatedly emphasizes that Bruce did not tell the truth and deceived them. There is little dispute on this point, but this argument is unavailing.

First, if Carr knew his client, which he did not because he was in "introductory mode" (A. 316, ¶ 327), then it should have been noticeable. Indeed, Bruce was acting

so out of character with both transactions that it should have caused concern and skepticism. A. 322, 326, ¶¶ 372, 397-400.

Second, RMD tries to imply that it should be able to trust its client. However, in a client-financial advisor relationship, the trust is not a two-way street. Indeed, RMD and its expert all state that a financial advisor should be skeptical and not always trust the client, especially if a senior client asks for the assets to be liquidated. A. 304-305, 307, 320, 326 ¶¶ 250, 272, 364-365, 402.

Third, as RMD is aware, elder financial abuse has been a growing problem impacting their elderly clients. A. 303-304, ¶¶ 237-245. By definition, fraud involves untruthfulness. A. 304-305, ¶ 250. So, of course, financial advisors must maintain a healthy level of skepticism when their elder clients are making transfers, especially when the transfer is large, unexpected, contrary to the investment plan, made with a high degree of urgency, or when a senior client is acting differently. When any of these warning signs are present, the industry standard is for the financial advisor to be very skeptical and take the appropriate actions in an effort to protect the client. A. 304-305, 326, ¶¶ 250-253, 402.

Fourth, as people age, they lose mental acuity and become easier to fool. A. 304, 308, 311, 320, ¶¶ 246, 278, 302, 361. Bruce got fooled in this case. He was acting in an age-appropriate manner for someone with diminished capacity. Unfortunately, Carr could not remember his training and has no understanding of

cognitive decline or elder financial abuse. A. 316, ¶¶ 327-332.

7. A short delay of the strange transaction would be prudent.

RMD attempts to argue that when Bruce made an extremely strange request – so strange that three RMD employees (Carr, Richardson, Dubois) had never seen it before – that RMD would have violated its duties by delaying the transaction. Red Br. at 32. This argument is meritless for several reasons.

First, RMD has no authority that mandates it had to immediately make the sales without pausing even one day. Indeed, that is not the rule. Such a rule would make no sense, and it would thwart the many times that RMD has already said that it needs to protect its clients and look out for financial abuse. RMD's general counsel testified that RMD gets at least one business day after the trade is requested and he knows of no case where there is liability for waiting two days. RM Davis 30(b)(6) depo., p. 167-168.

Second, RMD is directly contradicting its own witnesses who state that they can delay a transaction. A. 326, ¶¶ 401-403. It is in their training that they should ask questions and be skeptical when a client ask for money to be moved, as "it is better for a client to be delayed an extra day or two in money movement." Multiple people at RMD said that this was good advice in January 2022. A. 326, ¶ 402.

Third, RMD's expert says that when there are warning signs, the financial advisor should escalate the situation to compliance, legal or a supervisor. A. 326, ¶

404. Similarly, RMD's chief compliance officer testified that when there is a sign of elder financial abuse, one of the three things that their financial advisor should do is escalate the issue to a manager or compliance. A. 327, ¶ 406. Obviously, going to a manager or compliance takes time, and so these witnesses have testified that the transactions do not need to be completed immediately.

Fourth, the MacMillans' expert states that RMD should not have done the uncharacteristic transactions without taking many more measures, including escalating the issue and putting a pause on the transaction. A. 331, ¶¶ 430-431.

Accordingly, for each of these reasons, it is clear that RMD did not have to immediately make the trades. Rather, Carr should have realized that these were very unusual, uncharacteristic, and/or strange transactions. Carr should have asked a lot of questions of both Bruce and Linda MacMillan, and he should have escalated it.

8. Not all the loss was to an international crime ring.

RMD attempts to blame all the loss on "third party criminals" or an international crime ring." Red Br. at 31, 40. However, RMD conveniently forgets that over $330,000 went to the IRS – not an international crime ring. Moreover, RMD tries to contend that it had nothing to do with the transaction, that is not true. RMD played a critical role in the scam because RMD quickly sold all the MacMillans stocks while not asking questions because it incorrectly deemed the relationship to be over. A. 299, 330-331 ¶¶ 204-206, 426-429. By selling the 50-100

stocks, RMD caused the MacMillans to incur enormous income and therefore an enormous amount of taxes. Before the international crime ring got any money, RMD had caused the MacMillans to lose over $330,000 to the IRS. RMD's appropriate duty is to know your client, look for signs of elder financial abuse, take action to protect the client, and note when things are unusual, uncharacteristic or strange.

9. RMD committed numerous breaches of its duties.

RMD attempts to argue that there is no evidence of breach. Red Br. at 41. However, there is bountiful evidence of breach, including the following: (1) RMD failed to follow its trusted contacts policy in 2019 and in 2022.[3] A. 312-315, ¶¶ 307-322. (2) Carr was simply in "introductory mode" and failed to know his client and failed to recognize what should have been obvious warning signs. A. 315-316, 331, ¶¶ 324-327, 429. (3) Carr does not understand the know your client rule nor does he have good knowledge about detecting and preventing elder financial abuse. A. 315-317, ¶¶ 323, 328-336. (4) In the short telephone calls, Carr failed to work tirelessly to ensure the MacMillans' financial legacy. A. 292, 299, 300, ¶¶ 155(a), 203, 217. (5) Carr incorrectly deemed the relationship to be over during the February 9, 2022, call and thus failed to be alert for issues of elder financial abuse and diminished

[3] RMD ignores the fact that it violated its trusted contacts policy in 2019 by failing to discuss it with the MacMillans and failing to encourage the MacMillans to establish trusted contacts for when they were acting strangely. A. 312-313, ¶¶ 307-313. The MacMillans would have followed this advice. If RMD had followed its policy in 2019, then it would then be able to contact the trusted contacts in February 2022 when Bruce was acting extremely strangely. A. 314-315, ¶¶ 319-322.

capacity. A. 302, ¶¶ 228-230. (6) Carr failed to ask many questions. A. 300, 326, 328, 331, ¶¶ 217, 397, 399, 411, 430. (7) Carr failed to recognize that Bruce was taking a sharp departure from the engrained history. A. 322-323, ¶¶ 370-378. (8) RMD failed to see any red flags and was not surprised by the highly unusual transactions. A. 300-302, ¶¶ 210-211, 223-225. (9) Carr never advised Bruce to not do either transaction. A. 326, 328, ¶¶ 400, 413. (10) Carr failed to warn Bruce about fraud, diminished capacity, and elder financial abuse. A. 303, 328, 331, ¶¶ 233-234, 414-416, 430. (11) Carr never escalated the matters to compliance or his superiors at RMD. A.328, 329, ¶¶ 409, 419. (12) Carr failed to tell Bruce that the transactions were contrary to the investment plan. A. 303, 318, 320, 329, ¶¶ 236, 346-347, 362, 417. (13) Carr liquidated Linda's account without asking her questions and checking her diminished capacity regarding the highly unusual transaction. A. 330, 332, ¶¶ 423, 424, 433-436. (14) Carr failed to take any action to protect his clients. A. 307, 330, ¶¶ 268-271, 428. (15) Carr quickly made the trades of 50-100 stocks, causing the MacMillans to incur $300,000+ in negative tax consequences. (16) Carr failed to do any of the three things that RMD says he should do when there are warning signs present. A. 327, ¶ 406.

It is important to emphasize that there are numerous examples where the conduct of George Carr was contrary to what RMD agents – as well as both experts – stated he should have done. The following are a few examples.

First, RMD admits that part of their fiduciary duty is to know their client, and the know your client concept is important to financial advisors to meet their duty of care as it shows when something is unusual or acting strangely. A. 308-309, ¶¶ 280-286. Yet, the record shows that Carr did not know his clients and was completely unable to ascertain when the MacMillans were doing something unusual as Carr was in "introductory mode." A. 315-316, ¶¶ 324-327.

Second, RMD's designated expert admits that it is an industry standard within the financial services industry to be sensitive to detecting elder financial abuse. A. 307, ¶¶ 271. He further states that financial advisors have a duty to take steps to protect their senior clients, to look out for elder financial exploitation and to look for red flags of elder financial exploitation. A. 307-308, ¶¶ 272-276. However, Carr has a strikingly poor knowledge of elder financial abuse, does not understand the warning signs, and gave no indication that he was looking for elder financial abuse while Bruce was making extremely large withdrawals. A. 316-317, ¶¶ 328-337.

Third, RMD acknowledges that it is important for a competent investment advisor to know the size of the client's transfers to have insight into the client and what their needs are. A. 321, ¶ 367. Carr, however, had no idea of the withdrawal amounts and could not even given an estimate. A. 316, ¶¶ 326-327. Peter Richardson states that the withdrawal of $280,000 was uncharacteristic and unusual and a sign of fraudulent activity. A. 323, ¶¶ 377-379.

Fourth, RMD testified that that its duties to Bruce do not end in the middle of a conversation. A. 302, ¶ 230. Rather, RMD admits that 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, ¶ 230. However, Carr breached his duties by stopping to look for elder financial abuse and deeming the relationship to be over in the middle of the call. A. 302, ¶¶ 228-229.

Fifth, RMD states that it is important for financial advisers to look for uncharacteristic actions by their clients. A. 319, ¶ 350-352, 355. Peter Richardson states that if he got an uncharacteristic request, it would be 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. 327, ¶ 407. In addition, Richarson states that he would want to have an understanding as well and he would have a lot of questions. A. 327, ¶ 407. Both the February 3, 2022, and February 9, 2022, transactions involved large liquidation requests and were very uncharacteristic of the MacMillans. A. 315, 319, 322, 323, ¶¶ 321, 350, 355, 370, 377. Nonetheless, Carr completely failed to notice that these transactions were uncharacteristic of the MacMillans. A. 300-302, ¶¶ 210-211, 223-224. Moreover, he failed to ask questions or take any action. A. 300, 328-329, ¶¶ 208, 217, 411-420. Indeed, Carr asked so few questions in the February 9,

2022, call that he did not know what Bruce was doing to do with the IRA withdrawals, and thus Carr had no idea what the explanation was for the financially insane liquidation request. A. 301, ¶ 221.

Sixth, RMD made many representations to the MacMillans, but it does not attempt to argue that it upheld its representations to the MacMillans. There are numerous quotes from RMD of what an advisory relationship should be like (A. 293, ¶ 156), but RMD breached those statements. That is, RMD has not attempted to argue that it was "there when you need us" for the MacMillans or that it worked "tirelessly to ensure your financial legacy." A. 293, ¶ 155(a). RMD does not try to argue that its advisors became "an extension of your family." A. 293, ¶ 155(b). RMD does not contend that it simplified the business of your life – not just your finances as RMD does "much more than thoughtful asset management." A. 293, ¶ 155(c). RMD does not contend that it was able to "thoroughly understand you" while giving "ongoing advice and counsel" to guide you "in an ever-changing world." 155(e). Nor does RMD attempt to argue that it provided "an extraordinary level of personal service." A. 293, ¶ 155(g).

10. George Carr breached his duty by missing all the warning signs.

RMD has the duty to look for warning signs and detect elder financial abuse. A. 306-307, ¶¶ 261-266. RMD also had the duty to inform the clients if they suspect something. A. 306, ¶ 263. Here, Carr breached his duties by missing the warning

signs and having no concerns. A. 300-302, ¶¶ 210-211, 223-224.

First, Bruce was uncharacteristically different from his normal talkative, engaging demeanor. Bruce is engaging, talkative, affable, someone who it is difficult to have a short conversation with. A. 295, ¶¶ 169, 172, 173. However, in his conversations with RMD on February 3 and 9, 2022, he was not talkative or engaging, and they were both very short calls. A. 299, 300 ¶¶ 203-204, 217. That is a warning sign. Also, he would not say much about the real estate investment and that is also a warning sign. A. 299, 321, ¶¶ 204, 368. Indeed, RMD admits that if a client is unwilling to provide a reason for what they are doing, that is a sign of elder financial exploitation, and that is the case here. A. 319, ¶ 356.

Second, Bruce is careful and responsible with his finances, meticulous, detailed and smart, and makes good decisions. A. 295, ¶¶ 170, 171, 174. His decisions on February 3 and February 9, 2002, were not good decisions. A. 321, ¶ 368. It is a warning sign that a person who makes smart decisions suddenly requests a liquidation of assets and incurs huge negative tax consequences. A. 321, ¶ 368.

Third, these requests were unexpected. The MacMillans had just had a two-hour conversation in December 2021 and an hour conversation on January 21, 2022. A. 294, ¶¶ 167-168. The MacMillans had not voiced any displeasure with RMD and had not shown any desire to invest in real estate. A. 293, ¶¶ 161-162. Rather, their goal was to keep their income down and their taxes low, by taking only the minimum

required distributions from their IRAs. A. 293, ¶ 159. The requests for large transactions on February 3, 2022, and February 9, 2022, were very unexpected. A. 321, ¶ 369. It should have been a significant warning sign when the MacMillans suddenly wanted to invest in an "exciting real estate opportunity," suddenly wanted to leave RMD, and were suddenly willing to realize an enormous amount of state and federal taxes. A. 321, ¶ 369.

Fourth, the requests here were far different from the MacMillans' fifteen-year account history. The MacMillans had never made a transfer or withdrawal of over $20,000, and the first liquidation was $280,000. A. 323, ¶ 376-377. This was an uncharacteristically large transaction that should have been a very significant warning sign. A. 323, ¶ 376-379. The second liquidation for withdrawal was even larger and should have raised even more concerns. A. 318, 322, ¶ 349, 370.

Fifth, the MacMillans always followed the advice of RMD. A. 295-296, ¶¶ 178, 179. They did not have investment ideas. A. 293, 295 ¶¶ 158, 160, 178. They were given the advice to not pay off their mortgage (A. 296, ¶ 185), so it was unusual for them to disregard that advice and act contrary to it. A. 300, ¶ 212. Moreover, it was quite unusual for them to come up with their own investment ideas, as that had never happened in fifteen years. A. 322, ¶ 371.

Sixth, the transaction to liquidate over a million dollars in an IRA and lose more than $300,000 in taxes is extraordinarily unwise and financially insane. No

reasonable person does that, and certainly not clients like the MacMillans who indicated their plan was to take only the minimum required distributions from their IRAs for the purpose of keeping their income taxes low. The IRA is for retirement. The unexpected withdrawal of a tax deferred IRA of this size is a huge warning sign that something is terribly wrong. It is even more of a warning sign that Bruce was trying to do this on February 9, 2022, in an urgent manner and offering no explanation that would make any sense to a competent financial advisor. A. 322, ¶ 372.

Seventh, for fifteen years with RMD, the MacMillans followed an investment plan that was appropriately allocated and diversified and not over concentrated. A. 293, 296, ¶¶ 158, 180. It was a warning sign to see Bruce making such a sudden departure from that long history. The sudden liquidation requests for the purpose of withdrawing the entirety of their IRAs and joint account were very much contrary to the investment plan and a clear warning sign of elder financial exploitation and/or diminished capacity. A. 323, 326, ¶¶ 373, 397-400.

Eighth, it is a warning sign that Bruce could not provide a reasonable explanation for the liquidation request and planned money movement in the two significant transactions. A. 69, 299, 319, 323, ¶¶ 72-73, 204, 356, 374.

Ninth, disciplined investing means that someone is thoughtful in their decision making and thinking through the advantages and disadvantages of each investment

opportunity. A. 296, ¶ 183. The MacMillans consistently followed a disciplined approach to investment strategy, but they suddenly changed at the end. A. 325, ¶ 395. Carr was not aware of any instance in which the MacMillans did something with their investing that was undisciplined. A. 296, ¶ 183. Bruce then made a radical departure from his previous investing track record. A. 325, ¶ 394. This sudden, uncharacteristic change was a warning sign.

Tenth, the transaction that Bruce requested on February 9, 2022, is extraordinarily unusual and rare, largely because of the enormous tax implications. The transaction involves taking a $300,000+ tax hit. It is such an unusual transaction that neither George Carr, Peter Richardson, nor Caleb Dubois had ever seen another client liquidate over a million dollars from a tax-deferred IRA other than the MacMillans. A. 323-324, ¶¶ 380-382. This is the definition of an unusual request, of the client acting strangely, and/or a deviation from the financial plan. A. 324, ¶¶ 383-386. If RMD does not identify this transaction as a warning sign, then it is difficult to imagine what could ever qualify as a warning sign. A. 319, ¶¶ 350, 355.

11. The claims are not barred by intervening acts.

RMD contends that it cannot be a proximate cause of the MacMillans' loss because the actions of third-party criminals constituted an intervening and superseding cause. Red Br. 53.

"The question of whether a defendant's acts or omissions were the proximate

cause a of plaintiff's injuries is generally a question of fact, reserved for the jury's determination." *Tolliver v. DOT*, 2008 ME 83, ¶ 42. This Court has "consistently explained that the principle of proximate cause contains two elements, substantially and foreseeability." *Id.* RMD's conduct – specifically, its execution of trades that were unusual, uncharacteristic, and inconsistent with the MacMillans' goals – substantially contributed to a harm that was foreseeable. RMD's intervening-cause argument fails for the following reasons.

First, RMD argues that the fraudsters, not RMD, were the proximate cause because they stole the MacMillans' funds. That argument ignores a significant portion of the loss: more than $330,000 was paid to the IRS as a direct result of the liquidation of tax-deferred retirement accounts. That money was not taken by the fraudsters. It resulted from RMD's execution of the liquidation itself. At a minimum, a reasonable factfinder could – and should – conclude that RMD's conduct was a substantial factor in causing this portion of the harm.

Second, "under Maine law, it is possible that there may be more than one proximate cause to a particular accident." *Dana Warp Mill v. Unger*, 2009 Me. Super. LEXIS 115, at *17 (citing *Fournier v. Rochambeau Club*, 611 A.2d 578, (Me. 1992)). The existence of third-party criminal conduct does not absolve RMD whose own conduct was also a substantial factor in producing a foreseeable harm. RMD's argument improperly seeks to transform proximate cause into sole cause. The fact

that the fraudsters' theft may also constitute a proximate cause does not negate RMD's liability for losses foreseeably resulting from the transactions it executed and its failure to act.

Third, this argument proves too much. If the court were to adopt RMD's approach, then there could never be a cause of action against a financial advisor for failure to protect a client. Financial advisors could always argue that there was an intervening act. In effect, this would obliterate the duties. This argument is essentially an end run around the issue of whether there is a duty, and in effect, it is trying to establish a rule that financial advisors do not have a duty to be on alert for elder financial abuse and fraudulent activity committed by third parties. If the court were to adopt RMD's argument, then those duties would evaporate. Indeed, at that point, RMD would merely have the duty to look out for warning signs of elder financial abuse, except when it is committed by a third-party criminal. Inasmuch as elder financial abuse is always committed by third parties, there could never be a lawsuit against a financial advisor.

12. Elder financial exploitation is an extremely foreseeable harm.

Part of the causation analysis is whether the harm is foreseeable. Of course, elder financial abuse is extremely foreseeable as it is an enormous problem, especially in Maine. A. 303-305, ¶¶ 237-241, 244, 251. It is such a big problem that statutes have been passed to try to combat it, and it is now standard practice in the

industry to teach all the employees at RMD to look for the signs of elder financial abuse and diminished capacity. A. 305, 306 ¶¶ 252, 257; *see e.g.* 32 M.R.S. § 16801 *et. seq.* RMD seemed to believe it could "protect our clients from fraudulent activity" by knowing its clients. A. 292, 309, ¶¶ 155(c), 284, 285.

Moreover, the majority of scams involve the movement of money, and the majority of scams involve deception or untruthfulness. A. 304-305, ¶ 250. Because of this, RMD should have been on heightened awareness when a senior client was unexpectedly and uncharacteristically moving. A. 305, ¶¶ 250, 252.

Considering the prevalence of elder financial abuse and the obviousness of the many warning signs, RMD certainly should have had a reason to anticipate this case of elder financial abuse, as the harm in this case was very foreseeable.

13. Causation is not speculative.

RMD argues that it is too speculative to find causation. Red Br. 55. In essence, RMD is belittling the efficacy of its own protection measures – and the measures of others in the financial services industry – to protect seniors from scams.

There are four measures that RMD should have followed. First, the financial advisor should ask a lot of questions and discuss the issue of elder financial abuse, diminished capacity, and deviation from the investment plan directly with the client. A. 326, 327, 331, 332, ¶¶ 399, 402, 405-408, 430, 436. Second, the financial advisor should contact the trusted contacts or ask permission to expand the trusted contacts.

A. 327, 331, ¶¶ 406, 430. Third, the financial advisor should escalate to the more senior people at RMD including the attorney in charge of compliance. A. 326-328, 331, ¶¶ 404, 406, 409, 430. Fourth, a financial advisor can put a hold on the transaction or delay the transaction. A. 326, 331 ¶¶ 401, 402, 403, 431.

There is a good reason that the financial services industry has this added vigilance with their senior clients in looking for signs of elder financial abuse and/or diminished capacity, and then after detecting the signs, having detailed conversations with the client, escalating to others within the organization, contacting trusted contacts, and possibly putting a pause on the transaction. The reason is that these measures are very effective in working to protect the client and preventing the scam. A. 331, ¶ 431. If RMD had done the measures that it was supposed to undertake to protect its clients, the protective measures would have worked – as they designed to be effective – and the scam would have been discovered.

Following the trusted contacts policy should have made a huge difference. By getting proper authorizations and then contacting the trusted contacts, the policy would have worked and the scam would have been uncovered. A. 315, ¶ 322. Indeed, RMD has acknowledged that the trusted contacts policy can help protect senior clients against scams. A. 312, ¶ 309.

Contacting Linda MacMillan in this situation would have helped expose the scam. A. 330, 332, ¶ 423, 434. Carr did not speak with Linda about the February 9,

2022, transaction and the decision to sell all the stocks in her IRA. A. 301, ¶ 218. If Carr had spoken with Linda or asked questions of Linda, Linda would have had no idea what to say and would not have had any credible answers. It would have quickly become apparent that there was no real estate transaction, and something was terribly amiss. Rather, Linda would have trusted RMD and simply told him about needing to transfer the money to Coinbase, thereby exposing the scam. A. 330, ¶ 423.

If Carr had taken any of these actions in asking Bruce the questions he is supposed to ask, it would have made all the difference in the world. Bruce was in a trance and had tunnel vision. But with these questions and actions, Bruce would have snapped out of the trance, gotten a better perspective, and seen what was going on. These questions would have had the desired effect of getting Bruce to notice the fraud, and getting Bruce to notice that his actions did not make sense. A. 329, ¶ 420.

Alen Watson told Bruce to keep things confidential because Alen claimed that they did not know who had been trying to hack into the MacMillans' account and steal the money and perhaps it was RMD. However, Bruce could never imagine that anybody at RMD was involved. Accordingly, if George had pressed Bruce with questions, Bruce would have opened up and told RMD everything that was going on as Bruce had so much trust in RMD. RMD had a fifteen-year track record of credibility with the MacMillans, and if RMD had expressed concern, the MacMillans would have told RMD everything that was going on and the scam would

have been exposed. A. 329, ¶ 421.

If Carr had ever said something about elder financial abuse or the prospect of fraud to Bruce, that would have snapped Bruce out of the focused tunnel vision that he was in. Such prompts would have had a profound impact on Bruce. A. 329, ¶ 422.

Causation is a factual issue in this case, and there are more than enough facts to establish causation that if RMD had followed its own procedures to protect its clients, that it could have protected its clients.

14. Bruce did not have actual authority over Linda's account.

RMD contends that it is undisputed that Linda authorized Bruce to be her agent and to make financial decisions on her behalf. Red Br. 43. However, there is no evidence that Linda ever manifested an intention to make Bruce her agent; at most, the record reflects Bruce's belief that he had authority. This is not a distinction without a difference – this distinction matters.

For an agency relationship to exist with actual authority, there must be a manifestation of consent by the principal. *Camden Nat'l Bank v. Crest Constr., Inc.*, 2008 ME 113, ¶ 19. This requirement applies equally to express and implied actual authority and requires evidence of words or conduct by the principal from which consent can be reasonably inferred. *Id*. Evidence of manifestation must come from the principal, not from the agent's subjective understanding.

Here, RMD points only to Bruce's generalized statement – such as his belief

that he was the "commander in chief" of the household finances – as evidence of authority. Those statements are not evidence of manifestation. They are conclusory descriptions of Bruce's belief about the marital relationship, not examples of any words, acts, or conduct by Linda evidencing her consent to delegate authority over her IRA. The record contains no documentary evidence, no testimony describing affirmative conduct by Linda, and no specific course of conduct attributable to Linda that could satisfy the manifestation requirement.

In the absence of evidence of Linda consenting, the Business Court relied on Bruce's belief alone to supply the missing element of agency. But the law does not permit that substitution, and even if it did, it would be improper to permit that substitution in a motion for summary judgment.

15. Linda never ratified Bruce's acts.

RMD contends that Linda ratified Bruce's liquidation of her account through silence or acquiescence, and her conduct in accepting the benefit of the proceeds from the liquidation. Red Br. 50. The theories fail for the following reasons.

First, RMD's silence-based theory rests on the assumption that Linda's failure to express disapproval during a conversation with FBI and her decision to not pursue criminal charges against her husband – constitutes ratification of the liquidation. That assumption is legally untenable. A spouse's decision not to report or prosecute her husband does not constitute evidence that she knowingly approved of his

liquidation of her IRA, nor does it satisfy any recognized requirement of assent under agency law.

Second, RMD's contention that Linda ratified the liquidation by "accepting the benefits" of the transaction likewise fails. Ratification through acceptance of benefits requires proof that the principal knowingly and voluntarily accepted a benefit conferred by the unauthorized act. Here, the liquidation resulted in the loss of over one million dollars, the imposition of more than $330,000 in tax liability, and the destruction of the MacMillans' retirement security. Those consequences cannot reasonably be characterized as benefits. Absent evidence that Linda knowingly accepted the benefit of the act of liquidation, ratification cannot be inferred as a matter of law.

16. The second summary judgment was improper due to a dispute of facts.

RMD argues that the Business Court was right to discredit Bruce's affidavit in opposition to the second motion for summary judgment. This Court has held that "when an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony changed." *Zip Lube v. Coastal Sav. Bank*, 1998 ME 81, ¶ 10.

During Bruce's third day of deposition, he was repeatedly asked ambiguous and confusing questions; questions that called for legal conclusions that most lay

people would not know or understand. *See e.g.* MacMillan Dep. Day 3 at 9:20-21, ("what authority did you have to order George Carr to liquidate Linda's IRA" followed by an objection to form as it assumed Bruce had authority); MacMillan Dep. Day 3 at 12:15-16 ("why didn't you need her permission to liquidate her IRA"). Bruce is not a sophisticated person. A. 468, ¶ 452. And yet, the questions he experienced at his depositions called for legal conclusions on authority – answers which only a sophisticated and trained person could provide. Accordingly, the questions were ambiguous – enough to render summary judgment improper when controverted by Bruce's affidavit. *See* e.g. A. 460-473, ¶¶ 437-460.

Importantly, Linda and Bruce as lay people never considered whether Bruce had authority to liquidate Linda's IRA. A. 470, ¶ 456. It was during discovery that Bruce learned that RMD needed to speak with Linda to liquidate her IRA. A. 476, 478, ¶¶ 463, 470. RMD was not aware of any express authority that Bruce had, nor did they believe he had authority, which is why they testified that Carr needed Linda's permission to liquidate her account. Paired with the ambiguous questions, the Court erred in granting summary judgment holding that Bruce had authority.

Dated: January 9, 2026

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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:

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