NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4851-12T2

ESTATE OF ERNEST H. PAULI, SANDRA MURRAY, LORRAINE KIMSEY, and LINDA S. PAULI,

Plaintiffs-Respondents/
Cross-Appellants,

v.

WACHOVIA BANK, N.A., and WELLS FARGO BANK N.A.,

Defendants-Appellants/
Cross-Respondents,

and

MARCIA KELLER,

Defendant.

Argued December 9, 2014 – Decided May 5, 2015

Before Judges Yannotti, Fasciale and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3726-10.

John D. North argued the cause for appellants/cross-respondents (Greenbaum, Rowe, Smith & Davis, LLP, attorneys; Mr. North, of counsel and on the briefs; Jessica A. Goldfinger, on the briefs).

Philip G. Mylod argued the cause for respondents/cross-appellants.

PER CURIAM

Defendant Wells Fargo Bank, N.A.,[1] as successor-in-interest to Wachovia Bank, N.A., appeals from a Law Division judgment entered in favor of plaintiffs[2] following a jury trial, and an order denying its motion for judgment notwithstanding the verdict ("JNOV"). Plaintiffs cross-appeal from the dismissal of their claims of negligence, breach of fiduciary duty, and violation of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 ("CFA"). For reasons that follow, we reverse on Wachovia's appeal, and affirm on plaintiffs' cross-appeal.

This matter originates with a claim made by plaintiffs against Wachovia and a former employee, Marcia Keller, based upon Wachovia's distribution of the proceeds of an individual retirement account ("IRA") certificate of deposit ("CD") to

[1] Although all relevant facts in this case relate to Wachovia Bank, N.A., and its predecessor, First Union Bank ("First Union"), neither First Union nor Wachovia exist presently. First Union merged into Wachovia on September 1, 2001, and Wachovia merged into Wells Fargo Bank, N.A., in December 2008. In this opinion, however, we refer to appellant as "Wachovia" for clarity and ease of reference.

[2] Plaintiffs Sandra Murray, Lorraine Kimsey, and Linda S. Pauli are all daughters of Ernest H. Pauli ("Mr. Pauli"). For ease of reference, and meaning no disrespect, we refer to Mr. Pauli's surviving spouse, Dolores Pauli, and plaintiff Linda Pauli by their first names. Murray is also the executrix of her father's estate.

Dolores after Mr. Pauli's death in August 2008. In September 2010, plaintiffs filed a complaint against Wachovia and Keller asserting breach of contract, as well as claims for negligence, breach of fiduciary duty, and violation of the CFA. In their complaint, plaintiffs essentially alleged that Wachovia wrongfully distributed the account proceeds to Dolores because plaintiffs were the intended and actual beneficiaries of the IRA account. In February 2013, plaintiffs filed an amended complaint asserting essentially the same claims. Neither the original complaint, nor the amended complaint, asserted a promissory estoppel claim.

A jury trial commenced on March 25, 2013, and lasted four days. Before summations, the trial court dismissed all claims against defendant Keller, as well as the claims against Wachovia based on negligence, breach of fiduciary duty, and the CFA. The only surviving claim against Wachovia was for breach of contract. However, the judge advised counsel that he planned to charge the jury, sua sponte, on promissory estoppel as one of two "viable alternative theories for damages[.]" The judge proceeded to charge the jury on breach of contract and, over Wachovia's objection, promissory estoppel. Notably, plaintiffs' counsel never made an argument advancing a claim for promissory estoppel at any time during trial or closing argument.

The jury returned a verdict in favor of defendants on the breach of contract claim, but returned a verdict in favor of plaintiffs on the promissory estoppel claim. Thereafter, the court denied cross-motions for JNOV, and entered judgment in favor of plaintiffs in the amount of $228,517.34, plus interest in the amount of $15,319.58, for a total award of $243,836.92.

I.

We discern the following facts from the trial record. Mr. Pauli was the father of four daughters, three of whom are plaintiffs[3] in this action. Mr. Pauli's first wife, Evelyn Pauli, died in 1996. Mr. Pauli married his second wife, Dolores, in 1999. They remained married for approximately nine years before Mr. Pauli died in August 2008.

On July 16, 2001, Mr. Pauli executed a general durable power of attorney ("POA") appointing Murray as his attorney-in-fact. The POA did not give Murray expressed, specific authority to make gifts or gratuitous transfers. The POA also did not give Murray the authority to designate, change or revoke the beneficiary designations in any retirement benefit or plan, or any payable-on-death or transfer-on-death account.

[3] For the remainder of this opinion, when discussing beneficiary designations, "plaintiffs" shall refer to the three daughters who are plaintiffs.

During the last eight years of his life, Mr. Pauli opened and closed numerous IRAs at First Union, and then Wachovia, as addressed in greater detail below. He also maintained three non-IRA CD accounts, each of which held approximately $53,600 at the time of his death. Mr. Pauli separately designated one of the plaintiffs as the beneficiary on each of these three accounts.

In June 2008, Mr. Pauli suffered a heart attack and thereafter remained hospitalized until his death on August 19, 2008. During this period, he remained on a respirator, largely unresponsive and unable to communicate.

A. Chronology of the IRA CDs

1. IRA CD-1102, IRA CD-3900, and IRA CD-7770

Mr. Pauli opened his first IRA CD ("IRA CD-1102") at First Union on May 23, 2000, in the amount of $113,425.36. He designated his spouse, Dolores, as beneficiary. The account, a thirty-six month IRA CD, renewed automatically, meaning that unless Mr. Pauli affirmatively acted to close the account it would reinvest in a new thirty-six month IRA CD upon maturity.

On February 26, 2003, Mr. Pauli executed a written beneficiary form for IRA CD-1102, designating plaintiffs as sole beneficiaries. The form stated:

> I understand this [d]esignation or [c]hange of [b]eneficiary will be effective on the

> date of receipt by Wachovia and that upon any change of beneficiary, the right of all previously designated beneficiaries to receive benefits under this account shall cease. Accordingly, I hereby revoke my beneficiary designations made previously with respect to this IRA . . . . I have the right to change this designation of beneficiary and to designate a new beneficiary at any time by writing to Wachovia and completing a new form.

On February 27, 2003, Dolores executed a spousal waiver consenting to Mr. Pauli's beneficiary designation.

Approximately three months later, on June 2, 2003, Mr. Pauli reinvested this money in a different IRA CD. Wachovia processed this request with a form titled "IRA Additional Contribution[.]" An internal memo ("Meyhoefer memo") from Carol Meyhoefer, a Wachovia branch employee, instructed the IRA department to, "[p]er instructions from Mr. Pauli, please convert [IRA CD-1102] to an added coverage [CD] product . . . for a [sixty-]month term at 2.71/2.75% rate."

To effectuate this transfer, Wachovia closed IRA CD-1102 and deposited the funds from that account into a newly-opened IRA CD account ("IRA CD-3900"). Princess Sims, a member of the Wells Fargo Estate Team, testified that closing IRA CD-1102 resulted in the termination of the beneficiary designation under that IRA CD. When plaintiffs' counsel questioned Sims regarding Mr. Pauli's intent, she responded:

A: [T]his IRA CD was closed out. And it says "Close, internal transfer."

Q: Because it says, closed on a bank generated document. Is there anything from Mr. Pauli that says close my IRA?

A: I didn't find anything, but I don't think that branches will just close out an account and move it into a new account without direction of the client.

Then, on March 4, 2005, Mr. Pauli reinvested the money from IRA CD-3900 in a new IRA CD ("IRA CD-7770"). He executed a form entitled "IRA[] PLAN AGREEMENT[.]" Although that form provided a specific section to designate beneficiaries, Mr. Pauli left the section blank, declining to explicitly specify a beneficiary.

2. IRA CD-5830 and IRA CD-3226

On June 6, 2000, Mr. Pauli opened a separate IRA CD account ("IRA CD-5830") in the amount of $100,019.43. Although he initially declined to specify a beneficiary, Mr. Pauli designated plaintiffs as beneficiaries on February 26, 2003. On February 27, 2003, Dolores executed a spousal waiver consenting to the designation. Two months later, on April 23, 2003, Mr. Pauli sent Wachovia instructions to close IRA CD-5830 and transfer the funds to Third Federal Savings & Loan, an unrelated bank.

Wachovia closed the account on April 30, 2003, and issued a check payable to Third Federal Savings & Loan. However, after Wachovia issued the check, Mr. Pauli changed his mind and directed the return of the funds to Wachovia. As IRA CD-5830 had already been closed, Wachovia opened a new IRA CD account ("IRA CD-3226").

3. IRA CD-2271

On August 15, 2006, Mr. Pauli went to Wachovia's Manchester office. Keller was a financial specialist in the office at the time. At Mr. Pauli's direction, Keller closed IRA CD-3226, which contained $117,460.12, and IRA CD-7770, which contained $134,577.39, and opened a new IRA CD ("IRA CD-2271") containing the funds from both closed accounts.[4] Mr. Pauli provided neither an explicit beneficiary designation for IRA CD-2271, nor a spousal waiver from Dolores. Murray testified that her father never explained why he merged the IRA CDs.

[4] Plaintiffs' claims against Keller related solely to the fact that she opened the IRA CD account without designating plaintiffs as beneficiaries.

B. IRA Agreements

Each time a customer purchases an IRA CD, Wachovia provides a "Fact Book" that included the terms of the account.[5] Accordingly, each time Mr. Pauli opened a new IRA CD he received a new Fact Book. Each Fact Book contained an IRA Agreement, which, by its express terms, constituted a separate and distinct contract.

In pertinent part, the IRA Agreement provided:

> The IRA shall terminate when the Custodian receives written instructions from the Participant to transfer all of the assets of the IRA to the trustee or custodian of another retirement plan or directly to the Participant, or upon the distribution of all of the assets of the IRA. . . . [I]n order for the Participant to transfer all of the assets of the IRA, the Participant must give the Custodian written instructions to make the transfer at least twenty . . . days prior to the date the transfer is to be made.

Regarding the designation of beneficiaries, the IRA Agreement provided that "[t]he depositor whose name appears on the depositor's IRA Plan Agreement is establishing an [IRA] . . . to provide for his or her retirement and for the support of his or her beneficiaries after death." As explained in the

[5] For clarity and ease of reference, we refer to the Individual Retirement Custodial Account Plan, as contained in section two of the Fact Book, as the "IRA Agreement."

disclosure statement in the beginning of the Fact Book, when a person dies,

> [y]our account balance will be paid to your beneficiary. Your beneficiary is the person, persons, legal entity or entities you designate when you open your Traditional IRA. You may change your beneficiary designation at any time by contacting our IRA Department who will provide you with the appropriate form. Each beneficiary designation you file with us will cancel all previous designations. If a designated beneficiary (including any continent beneficiary) does not survive you, or if there is no record of a designated beneficiary, your account balance will be paid to your spouse, or when there is no spouse, to the personal representative of your estate.

Moreover, the IRA Agreement specifically provided:

> In the event no designation is filed at the time of the Depositor's death or no surviving Beneficiary designation can be located, the Beneficiary shall be the Depositor's surviving spouse. In the event the Depositor does not have a spouse, the Depositor's spouse predeceases the Depositor or cannot be located, the Beneficiary shall be the Depositor's estate.

Gregory Dunn, a financial specialist at Wachovia during the relevant time frame, explained the process required to open an IRA CD. With respect to designating a beneficiary on an IRA CD account, if a customer chose not to designate a beneficiary at the time the account was opened, Dunn would advise the customer

that the spouse becomes the beneficiary by default, and that the beneficiary could be changed at a later date.

Keller also testified that if a customer wanted to designate someone other than his or her spouse as the beneficiary, Wachovia required the spouse to sign the documents, indicating they were aware and approved of not being named as the primary beneficiary. Specifically, Keller stated:

> Q: All right. Now, in completing one of these IRA plan agreements, did you have a routine that you followed in completing the form with a customer?
>
> A: Yes.
>
> Q: And what was the basis or how did you learn that routine to follow?
>
> A: It was through our training and our policy and procedure.
>
> Q: All right. Now, would you tell us, going down through the form, what your . . . procedure was that you would follow in completing one of these IRA plan agreement forms?
>
> A: Well, I would go over the form with the customer. I would explain the top part was his customer information, verify that everything was correct. The middle part was about the actual IRA CD.
>
> . . . .
>
> Q: All right. Now, continue on and tell us what, under your procedure in completing these IRA plan agreements, would you do.

A: The last section is the beneficiary designation.

. . . .

And I would explain to the customer if they wished to designate a beneficiary, this would be the spot where they would do it.

. . . .

Q: So, Ms. Keller, was there a bank policy that applied to those circumstances where the customer . . . indicates a desire to designate someone other than the customer's spouse as a beneficiary?

A: Yes, there was a policy.

Q: And what was the bank's policy that applied to that?

A: The policy was that the spouse had to appear, be properly identified and sign off that the spouse was agreeing to these beneficiaries.

Q: Now, when you say the spouse would have to appear under this bank policy, what do you mean?

A: Appear in front of me or whoever was submitting the beneficiary request.

Q: And where is it that the spouse would sign?

A: On the form right above our signatures, there's a spot where it says, "Spouse signature."

Although both sides agreed that the IRA CDs were subject to terms set forth in the Fact Books provided to Mr. Pauli each

time he opened a new account, the parties disagreed over Mr. Pauli's intent to remove plaintiffs as designated beneficiaries. Defendants asserted that Mr. Pauli terminated several IRA plans, which also terminated any existing beneficiary designations. Absent explicit beneficiary designation and spousal waiver on the new accounts, the distribution defaulted to Dolores.

In opposition, plaintiffs asserted that Mr. Pauli only intended to internally transfer his money between IRA CDs in the same account, and never closed or terminated the accounts designated to plaintiffs. Plaintiffs highlight that Mr. Pauli never provided written instructions to close his accounts, and, after opening the two initial accounts, he never completed the requisite steps to open a new and distinct account.

C. Murray's visit to Wachovia in August 2008

Murray testified that she and Dolores visited a Wachovia branch office twelve days before her father's death. As she had her father's POA, she wanted to check on the status of his accounts after his heart attack. At that time, the Wachovia representative told Murray that Dolores, as the surviving spouse, was the beneficiary of IRA CD-2271, since no beneficiary had been expressly designated.

The following day, Murray went alone to a different Wachovia branch office. During that visit she met with Dunn.

According to Murray's testimony, Dunn told her that "if there's no beneficiary on there, then the spouse will be the beneficiary." However, Dunn called the IRA department to confirm. Murray testified that after speaking to the IRA department, Dunn indicated that plaintiffs were the designated beneficiaries of IRA CD-2271.

Dunn testified that he could not recall the content of his August 7, 2008 conversation with Murray. He explained that his branch office lacked access to IRA account beneficiary information, and that he contacted Wachovia's "consumer bank support IRA area" in order to obtain the information requested by Murray. Dunn testified he only had the authority to

> relay the information [he] got from the IRA area and let [the customer] know that if they want[ed] it in writing who the beneficiaries were that they would need to put it in writing to [Wachovia's] IRA area or [he] would direct them to call [the IRA area] on their own.

However, Dunn could not recall whether the information relayed to Murray concerned the open account or only the closed accounts.

According to Murray's testimony, the IRA department faxed Dunn copies of the IRA change of beneficiary forms for IRA CD-1102 and IRA CD-5830, which he gave to Murray. Dunn also gave Murray a printout of all of Mr. Pauli's accounts with Wachovia.

The printout listed both IRA CD-5830 and IRA CD-1102 as "purged[.]" IRA CD-2271 was active and showed a balance of $228,517.34. The printout also included the three non-IRA CDs designated to plaintiffs.

D. Distributions Following Mr. Pauli's Death

After Mr. Pauli died, Dolores submitted a beneficiary claim form for IRA CD-2271, and Wachovia subsequently distributed the balance, approximately $228,000, to her. Plaintiffs' claims against Wachovia all stem from this distribution. In October 2008, Wachovia distributed the non-IRA CDs to plaintiffs. Each received approximately $53,600.

At the conclusion of the trial, the jury found Wachovia's payment of the IRA CD proceeds to Dolores conformed to Wachovia's contractual obligations under the Fact Book. In finding no breach of contract, the jury apparently accepted Wachovia's position that each IRA CD transaction was a stand-alone account, and that Mr. Pauli never designated plaintiffs as beneficiaries on IRA CD-2271. Nevertheless, the jury found in favor of plaintiffs on the claim of promissory estoppel. The jury apparently relied upon the information that Dunn allegedly provided to Murray on August 7, 2008.

On appeal, Wachovia argues that the trial judge erred by interjecting a promissory estoppel claim, and that the record

otherwise failed to provide a basis for a claim of promissory estoppel. Similarly, Wachovia contends that there was insufficient evidence to support the jury's verdict on the claim.

On cross-appeal, plaintiffs contend their proofs at trial showed that none of the IRA CDs were ever closed or terminated in accordance with the terms of the IRA Agreement, and thus the original beneficiary designations and spousal waivers remained effective. Accordingly, plaintiffs argue that they were the true beneficiaries of IRA CD-2271, and that the jury improperly found that Wachovia did not breach their contract. Plaintiffs also argue that the trial court erred in dismissing their negligence, breach of fiduciary duty, and CFA claims.

II.

The evidential standard governing a motion for JNOV, R. 4:40-2(b), is the same as that for a motion for judgment at the close of a plaintiff's case, R. 4:37-2(b), and a motion for judgment at the close of all evidence, R. 4:40-1.

> "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him [or her] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied[.]"
>
> [Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000) (first alteration in original)

(quoting Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 415 (1997)).]

The trial judge must "'canvass the record, not to balance the persuasiveness of the evidence on one side as against the other, but to determine whether reasonable minds might accept the evidence as adequate to support the jury verdict . . . .'" Dolson v. Anastasia, 55 N.J. 2, 6 (1969) (quoting Kulbacki v. Sobchinsky, 38 N.J. 435, 445 (1962)). "The purpose of JNOV is 'to correct clear error or mistake by the jury,' and not for the judge to 'substitute his [or her] judgment for that of the jury merely because he [or she] would have reached the opposite conclusion[.]'" Barber v. ShopRite of Englewood & Assocs., Inc., 406 N.J. Super. 32, 52 (App. Div.) (alterations in original) (quoting Dolson, supra, 55 N.J. at 6), certif. denied, 200 N.J. 210 (2009).

On appeal, the standard of review is substantially the same. Jastram v. Kruse, 197 N.J. 216, 230 (2008). The appellate court "must afford 'due deference' to the trial court's 'feel of the case,' with regard to the assessment of intangibles, such as witness credibility." Id. at 230 (quoting Feldman v. Lederle Labs., 97 N.J. 429, 463 (1984), cert. denied, 505 U.S. 1219, 112 S. Ct. 3027, 120 L. Ed. 2d 898 (1992)). Applying these standards, and based on our review of the record,

we conclude that Wachovia's motion for JNOV on the claim of promissory estoppel was erroneously denied.

The doctrine of promissory estoppel requires "(1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment[.]" Segal v. Lynch, 211 N.J. 230, 253 (2012) (citation and internal quotation marks omitted). Detrimental reliance requires a demonstration that, as a result of the promise, the plaintiff "took an action that amounted to a substantial change in position." Ross v. Celtron Int'l, Inc., 494 F. Supp. 2d 288, 297 n.1 (D.N.J. 2007) (citation and internal quotation marks omitted).

We conclude the record contains no evidence that plaintiffs took any detrimental action, or failed to take any action that otherwise would have been successful, in reliance upon Dunn's statements.[6] Plaintiffs neither made any outlay in expectation of the distribution, nor forewent any available steps to modify the beneficiary designation. According to Murray, at the time of Dunn's alleged misrepresentations, Mr. Pauli was unresponsive and unable to communicate, already beyond the ability to clarify

[6] Although we seriously question whether Dunn's alleged statements to Murray constituted a clear and definite promise, we need not decide this issue because the record lacks any evidence of detrimental reliance.

his intent or modify the designated beneficiary of his IRA CD. Moreover, there was no evidence that Dolores would have provided spousal waiver for such a change.

At the charge conference, and again at defendant's motion for JNOV, the trial court stated that Murray could have exercised her POA to either close the IRA CD and direct the payment of the proceeds to plaintiffs, or change the beneficiary designation. However, Murray's POA did not authorize her to make gifts or change beneficiary designations.

N.J.S.A. 46:2B-8.13a provides:

> A power of attorney shall not be construed to authorize the attorney-in-fact to gratuitously transfer property of the principal to the attorney-in-fact or to others except to the extent that the power of attorney expressly and specifically so authorizes. An authorization in a power of attorney to generally perform all acts which the principal could perform if personally present and capable of acting, or words of like effect or meaning, is not an express or specific authorization to make gifts.

Moreover, the attorney-in-fact can be required to render an accounting if "there is doubt or concern whether the attorney-in-fact is acting within the powers delegated by the power-of-attorney, or is acting solely for the benefit of the principal." N.J.S.A. 46:2B-8.13.

Had Murray exercised her POA and diverted the IRA CD proceeds to herself and her sisters without her father's

instructions, she would have exceeded her authority. Thus, exercising the POA as suggested by the trial court would have constituted an illegal act and otherwise breached Murray's fiduciary duty. Her inability to perform such an illegal act cannot constitute detriment for the purposes of a claim of promissory estoppel.

The trial court further indicated that plaintiffs could have applied for a restraining order to prevent the payment of the proceeds of IRA CD-2271 to Dolores. This argument lacks merit in light of the fact that, in the present trial, plaintiffs have had ample opportunity to seek legal reparations. There is no evidence in the record to suggest that plaintiffs' substantive legal claims were adversely affected by their failure to seek a restraining order. Plaintiffs' underlying claims failed on the merits, and so any failure to obtain temporary injunctive relief caused no measurable detriment.

Since there was no evidence of any detrimental reliance, there was no basis for the trial court to submit a promissory estoppel claim to the jury. Similarly, the jury's verdict on that claim was against the weight of the evidence, as the trial record clearly demonstrates the absence of detrimental reliance as a matter of law.

Accordingly, we reverse the trial court's denial of Wachovia's motion for JNOV on the claim of promissory estoppel, and direct the entry of an amended judgment dismissing plaintiffs' claims with prejudice.

III.

On plaintiffs' cross-appeal, we conclude that the trial court properly dismissed plaintiffs' claims for negligence, breach of fiduciary duty, and consumer fraud, by directed verdict at the close of the evidence. In deciding a motion for judgment at the close of evidence, we give the defending party "the benefit of the most favorable evidence and inferences to be drawn from that evidence[.]" Frugis v. Braciqliano, 177 N.J. 250, 269 (2003) (citation and internal quotation marks omitted). The trial judge may not consider issues of witness credibility, and if reasonable minds could reach different conclusions, the motion must be denied. Rena, Inc. v. Brien, 310 N.J. Super. 304, 310-11 (App. Div. 1998). However, if the evidence is so one-sided that one party must prevail as a matter of law, then a directed verdict is appropriate. Frugis, supra, 177 N.J. at 269.

We apply the same standard that governed the trial court. Ibid. If the evidence was such that, with all reasonable inferences given to the non-moving party, reasonable minds could

not differ, then we affirm the directed verdict in favor of the moving party. Id. at 269-70. Here, as will be discussed, no reasonable jury could have concluded that plaintiffs satisfied the elements of a claim for negligence, breach of fiduciary duty, or consumer fraud. Therefore, the trial court properly dismissed these claims at the close of evidence.

A. Plaintiffs' Claim of Negligence

As plaintiffs have acknowledged, this is a contract dispute. The terms of the IRA Agreement set forth the contract rights between plaintiffs, as Mr. Pauli's successors, and Wachovia. Indeed, "[w]hen a company agrees to render a service or sell a product, a contract normally will define the scope of the parties' specific obligations." Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2001). Thus, this matter is properly governed by contract law. See Wasserstein v. Kovatch, 261 N.J. Super. 277, 286 (App. Div.) (holding that even where a case is framed as a tort, if the "dispute clearly arises out of and relates to the contract and its breach[,]" then it is properly governed by contract law), certif. denied, 133 N.J. 440 (1993).

"Under New Jersey Law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." Saltiel, supra, 170 N.J. at 316. Indeed, federal cases applying New Jersey law have held

that no negligence claim can be maintained in a contract action unless the plaintiff can establish an independent duty of care. See, e.g., Int'l Minerals & Mining Corp. v. Citicorp N. Am., Inc., 736 F. Supp. 587, 597 (D.N.J. 1990).

In the absence of an independent legal obligation, plaintiffs cannot enhance their damages by disguising this contract action as a negligence claim:

> Merely nominally casting this cause of action as one for [negligence] does not alter its nature. . . . [T]he injury suffered in this case is the type not ordinarily alleged in a tort case. Here there was no personal injury or consequential property damage arising from a traumatic event. Rather the loss is of a nature more normally associated with a contract action. Given these factors and the understanding that the relationship between the parties is governed by a lengthy and comprehensive contractual arrangement, [the case] is more soundly based on contract than on tort.
>
> [New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 494 (App. Div. 1985).]

See also Saltiel, supra, 170 N.J. at 310 (stating that "a contractor's liability for economic loss is limited to the terms of the contract"). Consistent with these well-established principles, a negligence claim was not available to plaintiffs as a matter of law.

B. Plaintiffs' Claim of Fiduciary Relationship

It is well established that a deposit account creates a debtor-creditor relationship rather than a fiduciary relationship. See United Jersey Bank v. Kensey, 306 N.J. Super. 540, 552-53 (App. Div. 1997), certif. denied, 153 N.J. 402 (1998); see also T & C Leasing, Inc. v. Wachovia Bank, N.A., 421 N.J. Super. 221, 228-29 (App. Div. 2011). "[T]here is no presumed fiduciary relationship between a bank and its customer." Kensey, supra, 306 N.J. Super. at 552.

However, a fiduciary duty may arise when "'either one or each of the parties, in entering . . . [the] transaction, expressly reposes . . . a trust and confidence in the other . . . or [because of the] circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence . . . is necessarily implied.'" Id. at 551 (alterations in original) (quoting Berman v. Gurwicz, 189 N.J. Super. 89, 93 (Ch. Div. 1981), aff'd, 189 N.J. Super. 49 (App. Div.), certif. denied, 94 N.J. 549 (1983)). Accordingly, a "fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship[,]" or when "one party places trust and confidence in another who is

in a dominant or superior position." F.G. v. MacDonell, 150 N.J. 550, 563 (1997).

Plaintiffs incorrectly assert that the term "custodian" used in the IRA Agreement established a fiduciary obligation. However, a custodian is not imbued with any fiduciary or otherwise extraordinary obligations. "In a custodian account, the responsibility to the customer is minimal, because the custodian merely holds, buys or sells, transfers or receives securities as directed by the customer." Erlich v. First Nat'l Bank of Princeton, 208 N.J. Super. 264, 286 (Law. Div. 1984).

We find neither evidence nor legal authority that would support plaintiffs' argument that upon opening an IRA CD, a special relationship of trust and confidence arose between Mr. Pauli and Wachovia, or that opening an IRA CD was an "intrinsically fiduciary" transaction. Kensey, supra, 306 N.J. Super. at 551. Plaintiffs presented no expert witnesses or any evidence of an applicable standard of care, or how it was breached. Accordingly, the trial court correctly found that plaintiffs' claim of breach of fiduciary duty failed as a matter of law.

C. Plaintiffs' CFA Claim

Under the CFA, a plaintiff who establishes: "(1) an unlawful practice, (2) an ascertainable loss, and (3) a causal

relationship between the unlawful conduct and the ascertainable loss, is entitled to legal and/or equitable relief, treble damages, and reasonable attorneys' fees[.]" Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 576 (2011) (citation and internal quotation marks omitted). In this regard, unlawful conduct occurs by proof of knowing omissions, affirmative acts, or violations of regulations filed under the CFA. Cox v. Sears Roebuck & Co., 138 N.J. 2, 17-19 (1994).

N.J.S.A. 56:8-2 provides, in relevant part:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice . . . .

Further, CFA claims must comply with Rule 4:5-8(a). Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 112 (App. Div. 2009). Rule 4:5-8(a) provides that "[i]n all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable."

Accordingly, to establish an act of omission a "plaintiff must show that a defendant [] knowingly [] concealed a material fact [] with the intention that plaintiff rely upon the

concealment." Judge v. Blackfin Yacht Corp., 357 N.J. Super. 418, 425 (App. Div.), certif. denied, 176 N.J. 428 (2003). The act must be "'misleading and stand outside the norm of reasonable business practice in that it will victimize the average consumer. . . .'" N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 13 (App. Div.) (alteration in original) (quoting Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 416 (1995), cert. denied, 516 U.S. 1066, 116 S. Ct. 752, 133 L. Ed. 2d 700 (1996) (internal quotation marks omitted)), certif. denied, 178 N.J. 249 (2003).

For a statement to constitute a material misrepresentation, the "statement's content must be susceptible of 'exact knowledge' at the time it is made." Alexander v. CIGNA Corp., 991 F. Supp. 427, 435 (D.N.J. 1997), aff'd o.b., 172 F.3d 859 (3d Cir. 1998); see also Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 380 (App. Div. 1960) ("In order to form the basis for an action in deceit, the alleged fraudulent representation must relate to some past or presently existing fact and cannot ordinarily be predicated upon matters" that have not yet occurred.). CFA claims for the subsequent performance of a contract make clear that an ordinary breach of contract or breach of warranty does not create a claim under the CFA. See Suber v. Chrysler Corp., 104 F.3d 578, 586-87 (3d Cir. 1997).

Plaintiffs submitted two alleged misrepresentations to support a CFA claim against Wachovia: Dunn's alleged indication that plaintiffs were the beneficiaries of IRA CD-2271, and Wachovia's alleged omission to properly instruct Mr. Pauli on beneficiary designation. As to Dunn's alleged statements, they were not made in connection with a sale or execution of a contract, and thus fall outside the CFA.

Regarding Mr. Pauli's lack of beneficiary designation, there is no evidence in the record that Wachovia improperly induced Mr. Pauli to open IRA CD-2271, or that Wachovia failed to fully explain the IRA Agreement to him. Instead, both Dunn and Keller testified regarding Wachovia's established procedure, which clearly provided for the designation of beneficiaries and the requirement of spousal consent upon opening each IRA CD.

In addition, the express language of the IRA Agreement stated that written spousal consent was required in the event the depositor chose to designate a non-spouse beneficiary. Mr. Pauli knew of this requirement, and successfully executed such non-spousal designations at least twice in the past. The Fact Book and IRA Agreement expressly stated that if no other beneficiary was designated, the beneficiary would be the surviving spouse. Wachovia neither omitted to explain how the IRA CD proceeds would be distributed in the event of Mr. Pauli's

death, nor affirmatively misrepresented a then presently existing fact.

Plaintiffs' CFA claim was properly dismissed because: they failed to identify any unlawful conduct that encompassed an unconscionable practice or violation of law; they failed to detail material misrepresentations, reasonable reliance, or resulting damages; and they failed to proffer facts demonstrating a business practice to materially conceal information that ultimately induced them to act. As plaintiffs' unsupported assertions failed to create a material dispute requiring determination by the factfinder, defendant was entitled to judgment as a matter of law on plaintiffs' CFA claim. See Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div.) (stating "a court must dismiss [a] complaint if it has failed to articulate a legal basis entitling plaintiff to relief"), certif. denied, 185 N.J. 297 (2005).

Reversed and remanded, in part, as to the judgment entered against Wachovia, and affirmed, in part, as to the dismissal of plaintiffs' remaining claims.