STATE OF MICHIGAN

COURT OF APPEALS

MIDWEST MEMORIAL GROUP, LLC,

Plaintiff-Appellee,

v

MARK SINGER, KIMBERLY SINGER, and MKS FAMILY LLC,

Defendants-Appellants,

and

CLAYTON SMART, COMMUNITY TRUST AND INVESTMENT, INTERNATIONAL FUND SERVICES IRELAND LIMITED, CITIGROUP GLOBAL MARKETS d/b/a SMITH BARNEY, PLANTE & MORAN, PLLC, PETER JENSEN, and CURRIE KENDALL PLLC,

Defendants.

UNPUBLISHED
February 14, 2012

No. 301861
Ingham Circuit Court
LC No. 10-000025-CR

MIDWEST MEMORIAL GROUP LLC, ACACIA PARK CEMETERY, ALBION MEMORY GARDENS, CADILLAC MEMORIAL GARDENS EAST, CADILLAC MEMORIAL GARDENS WEST, CHAPEL GARDENS, EASTLAWN MEMORIAL GARDENS AND MAUSOLEUM, ELM LAWN CEMETERY, FLORAL VIEW MEMORIAL GARDENS, FOREST LAWN MEMORIAL GARDENS, FOREST LAWN MEMORIAL PARK, GARDEN OF REST MEMORIAL PARK, GRACELAND MEMORIAL PARK, GRANDLAWN CEMETERY AND MAUSOLEUM, HILLCREST MEMORIAL PARK, KENT MEMORIAL GARDENS, MIDLAND MEMORIAL GARDENS, MOUNT HOPE MEMORIAL GARDENS, NORTHLAND CHAPEL GARDENS, OAKLAND HILLS MEMORIAL

GARDENS, OAKLAWN CHAPEL GARDENS, OAKVIEW CEMETERY, OAKWOOD MEMORIAL MAUSOLEUM, RESTLAWN MEMORIAL GARDENS, ROSELAND PARK CEMETERY, ROSELAND MEMORIAL GARDENS, UNITED MEMORIAL GARDENS, WASHTENONG MEMORIAL PARK AND MAUSOLEUM, WOODLAWN CEMETERY, and WOODMERE CEMETERY,

Plaintiffs-Appellees,

v

No. 301883
Ingham Circuit Court
LC No. 10-000025-CR

CITIGROUP GLOBAL MARKETS, INC. d/b/a SMITH BARNEY,

Defendant-Appellant,

and

CURRIE KENDALL, PLLC, PETER JENSEN, PLANTE & MORAN, PLLC, CLAYTON SMART, MARK SINGER, KIMBERLY SINGER, and MKS FAMILY, LLC,

Defendants.

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

In Docket No. 301861, defendants Mark Singer, Kimberly Singer, and MKS Family LLC (collectively the Singer defendants) appeal as on leave granted from an order of the circuit court denying their motion for summary disposition pursuant to MCR 2.116(C)(7) and to compel arbitration. In Docket No. 301883, defendant Citigroup Global Markets, Inc., doing business as Smith Barney (Smith Barney), appeals as on leave granted from the same order denying its motion to compel arbitration, as well as the denial of defendant's motion to quash subpoenas.[1] We affirm.

I. FACTS

[1] For ease of reference the individual parties are referenced as "plaintiffs" and "defendants" respectively where appropriate.

This case stems from a scheme to steal more than $60 million in cemetery trust funds from 29 Michigan cemeteries. Plaintiff Midwest Memorial Group is the current owner and operator of the cemeteries. In 2003, Craig Bush, a Michigan attorney and businessman, owned the cemeteries. Mark Singer plotted with Clayton Smart, an Oklahoma businessman, to buy the cemeteries from Bush and to steal the trust funds. Mark's wife Kimberly Singer and her limited liability company were involved in the cover-up of the theft.[2] In their complaint, plaintiffs summarized defendants' plan as follows:

> (1) Bush would transfer control of the Cemetery Trust Funds to Smart; (2) once Smart controlled the Cemetery Trust Funds, he would transfer their assets into his own name; and (3) Smart would then use the Cemetery Trust Funds to pay Bush for the Cemeteries and loot the remainder.

At the time defendants began to implement this plan in 2003, Bush kept $68 million in 56 cemetery trust funds in Comerica and LaSalle Banks in Michigan.[3] Bush also had an interest in Summerfield, LLC. Bush met Mark Singer, who was at that time a financial advisor employed by Deutsche Bank in Connecticut. Starting in October 2003, at Mark Singer's direction, Bush transferred the cemetery trust funds to Summerfield accounts at Deutsche Bank and Singer invested the funds in offshore hedge funds. However, after Deutsch Bank denied Smart's application for a loan to purchase the cemeteries,[4] Singer took a position with Smith Barney, partly based on the agreement that Smith Barney would loan Smart the purchase money. Smith Barney then lent Smart $31.5 million,[5] and in August 2004 the Michigan Cemetery Commissioner signed a change-of-control agreement to allow Smart to purchase the cemeteries.[6] The sale was complete in August 2004 and was financed by trust fund assets.

On September 1, 2004, Smart, as the new owner and managing partner of Summerfield, entered into a master trust agreement with defendant Community Trust & Investment (CTI), an Indiana trust company, for the purpose of maintaining and managing the funds received from the sale of burial rights. CTI was appointed trustee for the cemetery trusts. The trust agreement was signed by Smart on behalf of Summerfield, and by David Becher on behalf of CTI. On

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[2] According to plaintiffs, Smart has pleaded guilty to 39 felony counts for his role in the scheme in the instant case as well as a similar one in Tennessee. According to the terms of his multi-jurisdictional plea agreement, he will serve up to 20 years in prison. Mark Singer is serving a prison sentence in Indiana for his role in a similar scheme.

[3] Under the Cemetery Regulation Act, MCL 456.521 *et seq.*, which governs the management of Michigan cemeteries, cemeteries are required to maintain two types of trust funds—irrevocable endowment care funds and pre-paid merchandise trust funds. MCL 456.536.

[4] The bank apparently denied the loan because it could not confirm the existence of Smart's claimed financial resources in the oil and gas industry in Oklahoma.

[5] Smart and Singer allegedly falsified statements concerning collateral for the loan.

[6] Under the Cemetery Regulation Act, MCL 456.521 *et seq.*, permission is required to acquire a controlling interest in an existing cemetery. MCL 456.532.

September 13, 2004, Mark Singer set up 56 Smith Barney accounts in Michigan, and Smart then transferred $60 million in funds into the accounts. At that time, the "Account Application and Client Agreement" forms each included the following arbitration language:

> 6. Arbitration
>
> Arbitration is final and binding on the parties.
>
> *The parties are waiving their right to seek remedies in court, including the right to jury trial.*
>
> * * *
>
> *I agree that all claims or controversies,* whether such claims or controversies arose prior, on or subsequent to the date hereof, *between me and SB* and/or any of its present or former officers, directors, or employees *concerning or arising from* (i) *any account maintained by me with SB individually or jointly with others in any capacity*; (ii) *any transaction involving SB* or any predecessor firms by merger, acquisition or other business combination *and me*, whether or not such transaction occurred in such account or accounts; or (iii) *the construction, performance or breach of this or any other agreement between us, any duty arising from the business of SB or otherwise, shall be determined by arbitration* before, and only before, any self-regulatory organization or exchange of which SB is a member. . . .

The agreements also contained the following language:

> The provisions of this Agreement shall be continuous, shall cover individually and collectively all accounts which I may open or reopen with SB, and shall inure to the benefit of SB's present organization, and any successor organization or assigns; and shall be binding upon my heirs, executors, administrators, assigns or successors in interest.

These initial agreements were opened on behalf of the individual cemetery trusts, which were listed as the account "owners." The agreements were signed by Smart without any indication that he was signing as a trustee, on behalf of CTI, or as any other corporate officer. Over the next six months, Mark Singer and Smart allegedly continued to loot the trust funds, using them for various sham investments. The pair ultimately funneled the money into their own accounts, as well as accounts controlled by Kimberly Singer and others, through fraudulent transactions.

On January 24, 2005, Mikocem, LLC was created in Nevada. On March 14, 2005, Smart filed an application for Mikocem to transact business in Michigan. In addition, in April and May

of 2005, Smart filed "Certificate of Assumed Name" documents for the cemeteries, which listed Mikocem as the underlying name of the business.[7]

According to plaintiffs, after a number of elaborate shell games concerning the locations of the monies that were supposed to be in the accounts, Smith Barney's internal anti-money laundering team finally determined that Smart's transactions were not proper. They allegedly directed Mark Singer to stop doing business with Smart and close the accounts. Singer closed the trust fund accounts but, at approximately the same time, he conspired with CTI to open two new Smith Barney accounts: an "S" account opened in February 2005, and a "CCA" account opened in April 2005 (the "2005 accounts"). Both accounts had CTI listed in its individual capacity as the account holder and Becher as the joint account holder. The "S" account has no designation as to what type of entity the account was for. The "CCA" account states that it is a "Corporation" account. Neither document indicates that the accounts were opened on behalf of a trust. Both documents are signed by Smart, with no designation of his signature being in a representative capacity for either CTI, Summerfield, Mikocem, or on behalf of any trust. Plaintiffs maintain that the accounts were set up as "directed accounts" which gave Mark Singer control over the funds placed in the accounts. According to plaintiffs, Singer and Smart then deposited approximately $13 million into the "S" account, continued their plan to loot the cemetery funds and, among other things, paid off Bush and the loan from Smith Barney with cemetery funds.

In late 2006, authorities in Michigan and Tennessee began investigations into Smart's ownership of the cemeteries in both states.[8] In December 2006, Mark Zausmer, who is now plaintiffs' counsel, was appointed conservator and took control of the cemetery trust funds. He then opened a new Smith Barney account for Mikocem. According to attorney Amy Sitner Applin, who worked with Zausmer, this account was apparently used to hold funds taken in by the cemeteries under contracts for merchandise sold from 2005 and forward during the pendency of the conservator proceedings. Zausmer then created new endowment care trusts for each cemetery, terminated the initial trust agreement and entered into a new "Endowment Care Trust" for each cemetery on July 30, 2007. Applin attested that the conservatorship trusts were entirely new legal entities with new tax identification numbers. On August 23, 2007, Zausmer opened new accounts for the new trusts.

According to Applin's affidavit, at the time Zausmer took control of the cemeteries and the trusts only one trust contained funds in a hedge fund. The money recovered from this account was transferred into one that Zausmer opened on October 8, 2007, as the conservator for Mikocem. This account was used to pay operating expenses, such as vendor bills. Funds

[7] Thus, as of 2005 Mikocem apparently became involved in running the cemeteries. However, it is unclear as to the mechanism of the transfer of control of the cemeteries from Summerfield to Mikocem.

[8] According to plaintiffs, Smart stole $20 million in Tennessee cemetery funds. Also according to plaintiffs, the conservator in the instant case sued Bush separately, and has entered into a court-approved confidential settlement.

representing post-conservatorship sales were also moved from the Mikocem account and deposited into the new cemetery trust accounts.

In the spring of 2009, plaintiff Midwest Memorial Group purchased the 28 cemeteries, as well as the other entities, and took over control of trustee duties for the old and new trusts. On January 8, 2010, plaintiffs filed their first complaint in this action. Plaintiffs' 31-count complaint alleged conspiracy, negligence, fraud, breach of fiduciary duty, common law and statutory conversion, and unjust enrichment, and also sought a constructive trust or equitable lien and disgorgement of the stolen funds.

Defendants moved for summary disposition and to compel arbitration under MCR 2.116(C)(7). They relied on the arbitration clauses in three sets of Smith Barney account opening documents. The trial court concluded that Smart did not have the authority to bind plaintiffs to the 2004 and 2005 arbitration agreements and that the later accounts set up by Zausmer were not at issue in the instant case.

This Court denied defendants' motion for leave to appeal. However, our Supreme Court remanded both cases to this Court for consideration as on leave granted. *Midwest Mem Group, LLC v Singer*, 490 Mich 891; 804 NW2d 736 (2011). The cases were then consolidated for review.

II. ENFORCEABILITY OF ARBITRATION PROVISIONS

Defendants raise a number of arguments in support of their assertion that the trial court erred in refusing to order that plaintiffs arbitrate their claims against defendants. Defendants maintain that the broad language of the arbitration provisions covers the allegations made by plaintiffs and that any one of the sets of agreements signed by Smart and Zausmer mandates arbitration of these claims. Defendants' contend that Smart had the power to bind plaintiffs when he signed the 2004 agreements. Defendants also assert that the possibility that the 2005 accounts opened by Smart and CTI may have been fraudulent, or entered into to continue a fraudulent scheme between Smart, Singer and CTI, is not grounds for avoiding arbitration because these transactions fall within the scope of the Federal Arbitration Act (FAA), 9 USC 1 *et seq.*, which requires that any question concerning the validity of a contract as a whole is for the arbitrator to decide. As to the 2006-08 conservator agreements, defendants maintain that the trial court erred in concluding that the arbitration provision in these customer agreements signed by the conservator did not cover transactions and duties arising out of the cemeteries' prior relationship with Smith Barney.

We review de novo a trial court's decision concerning a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In determining whether summary disposition under MCR 2.116(C)(7) is appropriate, we consider all documentary evidence submitted by the parties, accepting as true all the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. See *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994).

Similarly, whether a dispute is arbitrable, as well as determining "[t]he existence of an arbitration agreement and the enforceability of its terms," are legal questions subject to de novo

review. *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009); *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). The findings of fact underlying a trial court's determination whether a valid contract was formed are reviewed for clear error. *Bynum v ESAB Group Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002). A finding is clearly erroneous if the reviewing court, on the whole record, is left with the definite and firm conviction that mistake has been made. *Id*. Likewise, any question concerning the existence and scope of an agency relationship is a question of fact, reviewed for clear error. *Miskiewicz v Smolenski*, 249 Mich 63, 70; 227 NW 789 (1929).

As a preliminary matter, defendants essentially maintain that the trial court lacked power to decide anything here, particularly with respect to the 2005 agreements. Defendants argue that under federal law the validity of the 2005 agreements should be submitted to an arbitrator. Thus, they contend it was error for the trial court to decide the validity of the agreements, particularly whether the 2005 agreements were fraudulent.

"When deciding whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options v Kaplan*, 514 US 938, 944; 115 S Ct 1920; 131 L Ed 2d 985 (1995). Under Michigan law, "[t]he existence of a contract to arbitrate and the enforceability of its terms is a judicial questions (sic) which cannot be decided by an arbitrator." *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982). See also *Watts*, 242 Mich App at 603. Defendants, however, point to the somewhat odd treatment the Supreme Court has given to claims under the FAA. Under the FAA the Supreme Court looks at the validity of the agreement to arbitrate independently of the validity of the contract as a whole. See *Rent-A-Center, West, Inc, v Jackson*, ___ US ____; 130 S Ct 2772, 2778; 177 L Ed 2d 403 (2010); *Buckeye Check Cashing Inc v Cardegna*, 546 US 440; 444-445; 126 S Ct 1204; 163 L Ed 2d 1038 (2006); *Prima Paint Corp v Flood & Conklin Mfg Corp*, 388 US 395, 402-404; 18 L Ed 2d 1270; 87 S Ct 1801 (1967). Thus, when a party challenges the validity of the arbitration agreement, the trial court decides this issue. However, when a party challenges the validity of the contract as a whole, for example as void for fraud or illegality, the court should enforce the arbitration agreement and send the validity arguments to the arbitrator. *Rent-A-Center*, 130 S Ct at 2778; *Buckeye*, 546 US at 444-445. However,

> [t]he issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (CA11 1992), whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (CA3 2000); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (CA7 2001), and whether the signor lacked the mental capacity to assent, *Spahr v. Secco*, 330 F.3d 1266 (CA10 2003). [*Buckeye*, 546 US at 444 n 1; see also *Rent-A-Center*, 103 S Ct at 2778 n 2.]

Moreover, to the extent defendants' arguments could be read to challenge the trial court's initial decision to decide whether the arbitration agreements applied, "[c]ourts should not assume

that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 US at 944 (citation omitted; alteration by *First Option* Court); see also *Rent-A-Center*, 130 S Ct at 2777 n 1. Thus, unless the parties have some sort of "gateway clause" specifically stating that the parties agree to have the arbitrator decide the initial question of arbitrability, the power stays with the court. *Rent-A-Center*, 130 S Ct at 2778; *First Options*, 514 US at 944-945. Here, because the account agreements did not contain a separate gateway clause, the trial court had the power to decide arbitrability.

As to the validity of the 2005 agreements, the trial court found that the agreements were invalid because Smart signed them in an individual capacity and did not have the power to bind plaintiffs to the agreements.[9] The trial court had the power to decide whether the 2005 agreements, and their included arbitration clauses, ever constituted a contract binding plaintiffs in the first place. *Buckeye*, 546 US at 444 n 1; *Arrow Overall Supply Co*, 414 Mich at 99; *Watts*, 242 Mich App at 603.

As to the correctness of the underlying decision that the 2004 and 2005 contracts were invalid and that plaintiffs were not required to arbitrate their claims, we agree with the trial court's decision.

First, with respect to the trial court's decision concerning the 2004 contracts, we find that the trial court's underlying factual finding that Smart did not have the authority to act for the trusts, or for CTI, when he signed the contracts was not clearly erroneous and, therefore, that plaintiffs were not bound by the arbitration clause therein. Arbitration is a matter of contract. *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006). "[W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions outlined in such contracts, if the contract is not 'contrary to public policy.'" *Bloomfield Estates Improvement Ass'n v City of Birmingham*, 479 Mich 206, 213; 737 NW2d 670 (2007) (citation omitted). But a party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration. *Kaleva-Norman-Dickson Sch Dist v Kaleva-Norman-Dickson Teacher's Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975).

Courts apply a three-part test to determine the arbitrability of an issue:

> "1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract.' This Court has expressed a general disapproval of segregating disputed issues into categories of arbitrable sheep and judicially-triable goats." [*In re Nestorovski Estate*, 283 Mich App at 202 (citations omitted); see also *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007).]

[9] Defendants misread the trial court's second statement— "And I also think the second documents may well be fraudulent"—as being the basis for the trial court's decision.

Defendants focus much of their argument on the breadth of arbitration language in the three sets of Smith Barney account opening documents. But the dispositive issue in this case involves the first condition for the arbitrability of an issue—whether there is an arbitration agreement in a contract between the parties. The trial court correctly determined that there is not.

The relevant terms of the master trust agreement provisions are found in Article IV and Article V. Article IV provides that the trustee has the sole authority to enter into contracts on behalf of the trust:

> 4.3 By way of illustration and not of limitation, and in addition to any inherent, implied or statutory powers it may now or hereafter have, *the Trustee is hereby expressly authorized and empowered with respect to the trust hereby created, in its sole and absolute discretion:*
>
> (a) To purchase or otherwise acquire and to retain, whether originally a part of the Trust or subsequently acquired, any and all stocks, bonds, debentures, notes, mortgages, *securities*, hedge funds or any variety of real or personal property, including stocks or interest in investment trusts and common trust funds, as it may deem advisable, whether or not such investments be of the character deemed permissible for investment by fiduciaries, or be unsecured, unproductive, under-productive, over-productive or of a wasting nature. Investments need not be diversified and may be made or retained with a view to a possible increase in value. The Trustee may at any time render liquid the Trust, in whole or in part, and hold cash or readily marketable securities of little or no yield for such period as it may deem advisable.
>
> * * *
>
> (p) *To execute and deliver any and all instruments in writing which it may deem advisable to carry out any of the foregoing powers.* No party to any such instrument in writing signed by the Trustee shall be obliged to inquire into its validity, or be bound to see to the application by the Trustee of any money or other property or delivered to it by such party pursuant to the terms of any such instrument. [Emphasis added.]

Article V of the agreement provides in part:

> 5.1 Notwithstanding anything in Article IV to the contrary, authority is hereby reserved by the Company to select an investment advisor ("Investment Advisor") to make recommendations to the Trustee regarding the management, administration, investment, reinvestment and disposition of the assets held pursuant to the Master Trust. Investment Advisor shall conform with the investment standards required of Trustee as required by law. Company shall designate in writing the name of the Investment Advisor, if any, and provide a copy of the designation to Trustee. The selection of Investment Advisor shall

> remain effective until written notification of such revocation is received by Trustee. [Emphasis added.]

Defendants argued in the motion before the trial court, as they do on appeal, that Smart, chosen as CTI's investment advisor pursuant to Article V of the trust, had the power to open the accounts and thus bind plaintiffs to the arbitration agreements. Plaintiffs countered that Article V only gave Smart the power to select the investment advisor and to make recommendations, which he did in choosing Smith Barney as the investment advisor, and that Article V did not authorize Smart to execute documents on behalf of the trust beneficiaries. The trial court agreed with plaintiffs, as do we.

The trial court's conclusion that Smart did not have the power to act on behalf of the trusts, through CTI, was supported by the language of the trust and by the evidence presented -- or as is the case here -- not presented, to the trial court. Contrary to defendants' assertion, Article IV squarely vests the power to open and maintain these types of accounts with the trustee, CTI. Even apart from the language quoted above, Article IV provides very broad powers to the trustee to buy, sell and manage funds and property. Moreover, ¶ 4.3(p), in keeping with this broad authority, clearly gave the trustee, CTI, the "sole and absolute discretion" "[t]o execute . . . any and all instruments in writing which it may deem advisable to carry out any of the foregoing powers." In contrast, Article V, on which defendants rely for Smart's authority to bind the trusts, reserved to Smart's company, Summerfield (and thus Smart personally), only the power "to *select an investment advisor to make recommendations* to the Trustee regarding the management, administration, investment, reinvestment and disposition of the assets held pursuant to the Master Trust." Contrary to defendants' arguments, Article V vests no separate power in the "investment advisor" to enter into agreements with a third company.

Defendants incorrectly assert that Summerfield retained the ability to direct the investments under this provision. Article V provided Summerfield the power to pick the brokerage firm the trusts would use and indicated that the *trustee* would then take the investment advice and make investment decisions. Thus, while Smart, acting for Summerfield, could select an investment advisor, he had no inherent power to act on behalf of the cemetery trusts to open the new accounts. Therefore, without a showing that Smart acted directly on CTI's behalf, the trial court did not err in its determination that the contracts were void.

As to that issue, defendants contend that Summerfield chose Smart as the trusts' investment advisor, and thus had the power to act on the trusts' behalf. However, as noted above, an appointment as an investment advisor alone would be insufficient to provide the power to Smart. Moreover, defendants have not shown that, under the language of Article V, Summerfield actually chose Smart as an investment advisor pursuant to the language of the master trust agreement. Article V provides in pertinent part, "Company *shall designate in writing* the name of the Investment Advisor, if any, and provide a copy of the designation to Trustee." As the trial court noted, defendants neither presented anything in writing from Summerfield stating that Smart was to act as the investment advisor nor presented any other documentation stating that Smart was otherwise authorized to act on CTI's behalf as their agent. As noted above, when CTI and Summerfield entered into the Master Trust Agreement, Smart acted for Summerfield and David Becher acted on behalf of CTI. Becher's name is listed as a co-owner on the 2005 CTI accounts. Thus, Becher was presumably the individual who had the

authority to act on CTI's behalf. Defendants have presented nothing to indicate that Becher divested any of this authority back to Summerfield or Smart. The trial court also noted the lack of any supporting documentation that indicated that Smart could directly act on CTI's behalf.

The manner in which Smart signed the agreements also supports the finding that he signed in an individual capacity. "'Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.'" *Riddle v Lacey & Jones*, 135 Mich App 241, 246; 351 NW2d 916 (1984), quoting 2 Restatement Agency, 2d, § 320, p 67. "The manner in which an agent's name appears in a contract is often relevant to establishing whether the agent agreed to become a party to the contract because it may establish whether the agent has manifested assent to become a party to the contract." Restatement Agency, 3d, § 6.01, comment d(1). Here, the agreements contain Smart's signature, without any other language indicated that he was signing on behalf of CTI or the trusts, and Smart did not sign on behalf of Summerfield as an entity.

Given the evidence presented, we conclude that the trial court did not err in its interpretation of the master trust agreement. In addition, its finding that Smart signed as an individual and thus lacked the authority to bind the cemeteries to the 2004 agreements was not clearly erroneous.

As to the 2005 agreements, the trial court found that these were also signed by Smart in an individual capacity, with a belief that they were likely also signed fraudulently. Plaintiffs argue that the trial court was correct because these trusts were opened in CTI's name only. Plaintiffs correctly note that, had CTI opened these accounts on its own behalf rather than on behalf of the cemetery trusts, this action would not bind the trusts, or plaintiffs, to the contracts. But regardless of whether, for example, Becher could have signed the same documents and bound CTI and the cemetery trusts, the fact remains that defendants have presented nothing to show that Smart, who also signed the 2005 documents, could bind either entity. And again, Smart did not sign on behalf of Summerfield or Mikocem. Given defendants' lack of supporting evidence, the trial court's factual determination that Smart again signed individually, and without power to bind the trusts, was not clearly erroneous.

As to the conservator trusts, defendants make much of the broad language in the arbitration agreements, while plaintiffs rely on the fact that the new accounts, opened for new legal entities, are totally separate.

The conservator created new cemetery trusts and opened accounts on their behalf. In support of their claims, plaintiffs presented the affidavit of attorney Amy Sitner Applin, who worked with the conservator, attesting that the conservatorship trusts were entirely new legal entities with new tax identification numbers. Only one of Smart's Smith Barney accounts remained active: a hedge fund account that could not be closed until the investment was redeemed. A circuit court order was entered allowing the conservator to use the funds from that account to operate the cemeteries, and the Mikocem account was opened. The funds that were later deposited into the cemetery trust accounts represented post-conservatorship sales. Zausmer explained at the hearing that the deposits were unrelated to the theft of the trust assets:

> What happened is, that when I came in as conservator, I – our cemetery operations continued. I'm collecting money on a regular basis and we've got trust money. So I've got to set up new accounts. So what I do is I set up 28 new accounts that I've got to deposit new money into. Okay?
>
> This is not the old money that was in these Smith Barney accounts. By the time I came in as conservator, the money in those accounts had been completely looted and was gone. Those accounts were closed. Okay? These are completely new accounts with new trust agreements. I am not the successor as conservator in any sense of the word.

Counsel further indicated that although $5 million was ultimately retrieved from one of Singer's hedge funds at the eleventh hour, an auditor was unable to connect it to the original cemetery funds and thus the trial court allowed him to use the funds for operational expenses; had the funds come from the trusts, he could not have done so. Given this evidence, the trial court's conclusion that the accounts that the court-appointed conservator opened cannot bind entities that were not a party to these agreements is not erroneous. The conservator created new cemetery trusts and opened accounts on their behalf. Attorney Applin and Zausmer himself attested that none of the funds that were deposited into the new conservator accounts came from any of the Smart or CTI accounts that were closed. In light of the evidence supporting the separateness of the entities, and establishing that none of the funds in the conservator accounts were funds from the original cemetery trust funds, the trial court did not err in concluding that the conservator agreements afforded no basis to submit the instant case to arbitration.

Moreover, we find that the language of the arbitration provision itself does not support defendants' position in light of the findings that the 2004 and 2005 contracts were invalid as to plaintiffs. Defendants do not argue that any of the controversy involves the conservator accounts. Instead, defendants rely in part on the language of the arbitration agreements stating that arbitration will apply to "claims or controversies" "concerning or arising from" under any current or previous accounts "maintained by me." However, this does not assist their position, even if "me" refers to the initial cemetery trusts or Mikocem. The trial court correctly found that the 2004 and 2005 accounts were invalid; thus, they do not technically exist, and Mikocem and others never entered into those agreements. Likewise, item (iii) of the arbitration provision, concerning "performance or breach of this or any agreement between us," is inapplicable. Again, there exist no prior agreements between Mikocem and Smith Barney at this point.[10]

Defendants' strongest argument is that item (ii) of the arbitration provision, which provides for arbitration for claims arising out of "any transaction involving [Smith Barney] . . .

[10] Defendants make a half-hearted argument that this provision also nevertheless applies because it refers to the construction, performance, or breach "any duty arising from the business of SB or otherwise." However, this phrase should be read in context with the breach of a business agreement entered into between the signatory and Smith Barney. It is not a blanket agreement to arbitrate, for example, a claim against Smith Barney should one of its employees strike the signatory with a car. This provision does not bind the plaintiffs to arbitration here.

and me, whether or not such transaction occurred in such account or accounts," applies. Here again, however, the prior "transactions" did not "involve," i.e., occur between, Smith Barney and the trusts because, as discussed above, Smart did not have the power to "involve" these entities in the 2004 transactions. And because Smart did not even purport to sign either of the earlier agreements on behalf of Summerfield or Mikocem, defendants cannot rely on the continuation of the entities in the hands of the conservator to support their position. In short, the transactions involved only Smith Barney, Mark Singer, and Smart. Defendants have not shown that the trial court clearly erred when it found that Zausmer's signature on the later documents resulted in the forcing of plaintiffs to arbitrate their claims concerning the earlier actions by defendants.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray