

IN THE SUPREME COURT OF THE STATE OF OREGON

ROBERT J. BOYER,

Plaintiff-Appellant,
Petitioner on Review,

v.

SALOMON SMITH BARNEY, a
Delaware corporation; DEAN MICHAEL
HOWELL; and DEAN K. MORELL,

Defendants-Respondents,
Respondents on Review.

Supreme Court
No. S 055192

Court of Appeals
No. A 123799

Multnomah County Circuit
No. 0212-12721

RESPONDENTS' BRIEF ON THE MERITS

Review of the Opinion of the Court of Appeals
on Appeal From the Judgment of the Circuit Court of
the State of Oregon for Multnomah County
The Honorable Edward J. Jones

Date of Opinion: June 27, 2007
Author of Concurring Opinion: Armstrong, J.
Joined by: Brewer, C.J., Schuman and Ortega, J.J.,
and Murphy, J., pro tempore
Author of Dissenting Opinion: Edmonds, J.
Joined by: Landau, Haselton, Wollheim, and
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INTRODUCTION

In this case, plaintiff Robert Boyer asks that the court depart from its settled authority defining the requirements of a special relationship. In a line of cases stretching back several decades, this court has firmly established the principle that a plaintiff can pursue tort claims for economic damages arising from a contractual relationship only if the defendant was authorized to exercise independent judgment for the benefit of the plaintiff.

Plaintiff is a commodities investor who maintained an account at defendant Salomon Smith Barney. Plaintiff asserted that Smith Barney and two of its employees breached an agreement and were negligent in canceling one of plaintiff's commodities orders and in liquidating one of his commodities positions. Before trial, the court granted judgment on the pleadings against plaintiff's negligence claim on the ground that defendants were not subject to a standard of care apart from that set forth in the parties' agreement. Plaintiff tried his breach of contract claim to the jury, which returned a verdict for Smith Barney. The court of appeals affirmed the trial court's judgment by an equally divided court.

The trial court and court of appeals correctly concluded that plaintiff did not properly allege a negligence claim. Even when construed in the light most favorable to plaintiff, the pleadings do not permit the inference that plaintiff authorized defendants to exercise independent judgment for his benefit, such as by selecting investments without plaintiff's prior approval. Instead, the pleadings show that plaintiff maintained a nondiscretionary brokerage account with defendants, which is not sufficient to establish a special relationship.

As a consequence, plaintiff has invited the court to fashion a new rule that would allow a party to a contract to sue in tort if the other party exercises judgment in a manner that benefits both parties. This proposal would fundamentally alter the concept of a special relationship as established by this court. Plaintiff's proposed rule could

transform a broad array of commercial relationships into special relationships because commercial relationships typically involve the exercise of judgment by one party and are mutually beneficial. After all, that is precisely why parties enter into commercial transactions. The court should decline plaintiff's invitation to effectively overturn its special relationship cases and should affirm the judgment of the trial court and the decision of the court of appeals.

QUESTIONS PRESENTED ON REVIEW

1. Does Oregon's special relationship doctrine permit a plaintiff to pursue tort claims for economic losses arising from a contractual relationship when the defendant is not authorized to exercise independent judgment on the plaintiff's behalf? Should the court expand the doctrine to permit the assertion of tort claims under such circumstances?
2. Has Boyer satisfied his burden under ORS 19.415(2) to make a record that demonstrates that the claimed error substantially affected his rights?

PROPOSED RULES OF LAW

1. The court should adhere to its settled precedent establishing the elements of a special relationship. When a plaintiff seeks to recover economic damages in tort arising from a contractual relationship, the plaintiff must establish that the defendant was authorized to exercise independent judgment on the plaintiff's behalf. Parties to a contract are not engaged in a special relationship merely because one of the parties is authorized to act in a manner that may produce a mutual financial benefit to the parties.
2. ORS 19.415(2) obligates an appealing party to establish that any claimed error substantially affected its rights. When, as here, an appealing party simply speculates that it might have offered different evidence in support of a dismissed claim, the party has not satisfied its burden to make a record that demonstrates that the claimed error was prejudicial.

STATEMENT OF FACTS

Plaintiff commenced this action in December 2002, asserting several claims arising from his commodities trading account at Smith Barney. Plaintiff eventually filed a third amended complaint, which asserted claims for negligence and breach of contract. Plaintiff alleged that Smith Barney and two of its employees, defendants Dean Morell and Dean Howell, were negligent in canceling a commodities trade that plaintiff had placed and in liquidating one of plaintiff's commodities positions. For the breach of contract claim, plaintiff repeated the specifications of wrongdoing that formed the basis of his negligence claim, and also alleged that defendants breached their agreement with plaintiff in connection with an earlier commodities trade and in closing plaintiff's account. (ER 9-12.)

Before the commencement of trial, defendants moved for judgment on the pleadings against plaintiff's negligence and breach of contract claims. Defendants argued that plaintiff could not properly assert a negligence claim because the parties' duties and obligations are governed by the Commodities Client Agreement (the "Agreement") that plaintiff signed when he opened his account at Smith Barney. Defendants also contended that plaintiff's specifications of wrongdoing were deficient because they involved actions expressly permitted by the Agreement. The court granted defendants' motion for judgment on the pleadings as to plaintiff's negligence claim, but concluded that the breach of contract claim would be tried to the jury. (SER 2-3.)

The jury returned a verdict for Smith Barney on all counts of plaintiff's breach of contract claim. The trial court entered a general judgment, and later a supplemental judgment awarding attorney fees, costs, and disbursements, in favor of defendants. Plaintiff appealed only the judgment on the pleadings dismissing his negligence claim.

The court of appeals affirmed the trial court's judgment by an equally divided court. The concurring opinion framed the issue as "whether the pleadings

establish that plaintiff cannot prevail on his negligence claim against defendants." *Boyer v. Salomon Smith Barney*, 213 Or App 560, 561, 162 P3d 1016 (2007). After reviewing the pleadings and the Agreement, which was attached to defendants' answer, the court held that the pleadings did not show that the parties were in a special relationship that would permit plaintiff to assert a negligence claim against defendants. *Id.* at 568.

In reaching its decision, the concurrence relied principally on this court's line of cases that culminated in *Bennett v. Farmers Ins. Co.*, 332 Or 138, 26 P3d 785 (2001). In *Bennett*, this court held that when parties are engaged in a contractual relationship, a special relationship exists only when the nature of the relationship allows one party to exercise independent judgment on the other's behalf or to act to protect the other's economic interests. *Id.* at 160-63. As summarized by the concurrence:

"[*Bennett*] explained that it is a defendant's exercise of independent judgment *on behalf of a plaintiff*, not the defendant's exercise of control of the plaintiff's activities, that is the gravamen of a special relationship giving rise to a tort duty. * * * '[T]he law does not imply a tort duty simply because one party to a business relationship begins to dominate and to control the other party's financial future.' * * * Instead, 'the law implies a tort duty only when that relationship is of the type that, by its nature, allows one party to exercise judgment *on the other party's behalf*.'" *Boyer*, 213 Or App at 566 (quoting *Bennett*, 332 Or at 161-62).

The concurrence concluded that the Agreement in this case was similar to that involved in *Bennett* because it did not impose on defendants "any obligation to exercise independent judgment on plaintiff's behalf or to act to secure or protect plaintiff's economic interests." *Boyer*, 213 Or App at 567. To the contrary,

"the control that the contract gave defendants over plaintiff's commodity futures trading account and trading activity was control to protect *their* economic interests, not *plaintiff's*. In other words, the relationship that the contract created was *not* a relationship in which defendants assumed any responsibility to act *on plaintiff's behalf for plaintiff's benefit*. Hence, the trial court did not err in entering judgment on the pleadings in favor of defendants." *Id.* at 568.

The dissent agreed that the appropriate test was whether the pleadings showed that plaintiff and defendants were in a special relationship, which exists if defendants were subject to a standard of care independent of the terms of the parties'

agreement or were authorized to exercise independent judgment on plaintiff's behalf and in plaintiff's best interests. *Id.* at 573. The dissent, however, concluded that the pleadings were susceptible of more than one reasonable interpretation and could be construed to suggest that the parties had entered into a relationship whereby defendants "would exercise their discretion to further plaintiff's financial interests." *Id.* at 576.

SUMMARY OF ARGUMENT

The trial court and court of appeals correctly concluded that defendants were entitled to judgment on the pleadings on plaintiff's negligence claim. Plaintiff is not entitled to maintain a negligence claim because the pleadings do not permit the inference that plaintiff was engaged in a special relationship with defendants. To properly plead such a claim, plaintiff was required to allege facts to show that defendants were authorized to exercise independent judgment on plaintiff's behalf for plaintiff's benefit. In the context of a securities brokerage account, the stockbroker's authority to exercise independent judgment on the client's behalf turns on whether the broker has discretion to select investments for the client without the client's permission or prior approval.

Plaintiff's complaint does not allege that defendants had discretionary investment authority or were otherwise authorized to exercise independent judgment on his behalf. In fact, the specific allegations of the complaint show that defendants acted in a nondiscretionary capacity by executing securities trades at plaintiff's direction. This limited relationship is further supported by the Agreement, which reveals that the only "discretion" that defendants had over plaintiff's account was the ability to cancel plaintiff's orders and to liquidate his positions when he exceeded his margin credit limits. Because the pleadings cannot reasonably be interpreted to show that plaintiff and defendants were engaged in a special relationship, plaintiff is not entitled to pursue his negligence claim.

Even if the trial court had erred in dismissing plaintiff's negligence claim, the error would be harmless. Plaintiff based his negligence claim and his breach of

contract claim on identical allegations of wrongdoing by defendants. The specifications of breach that formed the basis of plaintiff's negligence claim were repeated verbatim as instances of breach for plaintiff's breach of contract claim. At the close of the evidence, the trial court ruled that only one of the specifications—specification (f), which alleged that Smith Barney failed to properly account for plaintiff's December 13, 2000, margin payment—should be submitted to the jury. The trial court ruled that the seven remaining specifications were deficient because they were premised on specification (f) or were not supported by evidence.

The jury returned a verdict for Smith Barney on all counts, including a specific finding that Smith Barney had properly accounted for plaintiff's margin payment. On appeal, plaintiff did not assign error to the trial court's decision submitting only specification (f) to the jury, or to the jury's finding that Smith Barney properly accounted for the margin payment. As a consequence, plaintiff received adverse determinations as to each and every one of the alleged breaches that form the basis of his negligence claim. Plaintiff's argument on appeal that he might have offered different evidence in support of his negligence claim had it not been dismissed is insufficient under ORS 19.415(2), which requires an appellant to make a record that demonstrates prejudicial error. Thus, even if the trial court had erred in not allowing plaintiff to proceed with his negligence claim, that error would be harmless because the trial court and jury determined that plaintiff's specifications of breach were deficient.

ARGUMENT

- I. **The Pleadings Do Not Show That Plaintiff and Defendants Were Engaged in a Special Relationship.**
 - A. **A special relationship exists only if a party is authorized to exercise independent judgment on the other party's behalf.**

This court has issued a series of decisions establishing the principle that when the parties' relationship arises out of a contract, a plaintiff "may bring a claim for negligence if the other party is subject to a standard of care independent of the terms of

the contract." *Georgetown Realty v. The Home Ins. Co.*, 313 Or 97, 106, 831 P2d 7 (1992). In *Georgetown Realty*, the court concluded that a liability insurer that had undertaken defense of the insured was subject to such a standard of care:

"When a liability insurer undertakes to 'defend,' it agrees to provide legal representation and to stand in the shoes of the party that has been sued. The insured relinquishes control over the defense of the claim asserted. Its potential monetary liability is in the hands of the insurer. That kind of relationship carries with it a standard of care that exists independent of the contract and without reference to the specific terms of the contract." *Id.* at 110-11 (footnote omitted).

In subsequent decisions, the court emphasized that the critical inquiry in determining whether a contractual relationship can give rise to tort claims is whether one party is authorized to exercise judgment on the other's behalf. In *Conway v. Pacific University*, 324 Or 231, 240, 924 P2d 818 (1996), the court explained that when the parties' relationship arises from a contract, a heightened duty of care is triggered when one party to the agreement has authorized the other to exercise independent judgment:

"This is so because the party who is owed the duty effectively has authorized the party who owes the duty to exercise independent judgment in the former party's behalf and in the former party's interests. In doing so, the party who is owed the duty is placed in a position of reliance upon the party who owes the duty; that is because the former has given responsibility and control over the situation at issue to the latter, the former has a right to rely upon the latter to achieve a desired outcome or resolution."

After listing several examples of relationships that implicate a special responsibility, the court pointed out that the common thread was that one party was authorized to exercise independent judgment on the other's behalf: "In all those relationships, one party has authorized the other to exercise independent judgment in his or her behalf and, consequently, the party who owes the duty has a special responsibility to administer, oversee, or otherwise take care of certain affairs belonging to the other party." *Conway*, 324 Or at 241.

The court next addressed the special relationship doctrine in *Bennett*, 332 Or at 138. *Bennett* reaffirmed the principle that the critical element of a special relationship is whether one party is authorized to exercise independent judgment on the

other party's behalf. In reaching its decision, the court expressly rejected the plaintiff's argument that a special relationship exists if one party has relinquished control of its financial interests or future to the other:

"By concentrating on the fact that Farmers, over time, exerted more and more control over his financial interests, plaintiff misunderstands the fundamental focus of our inquiry in *Georgetown Realty* and other 'special relationship' cases. The focus is not on the subject matter of the relationship, such as one party's financial future; nor is it on whether one party, in fact, relinquished control to the other. The focus instead is on whether the *nature of the parties' relationship itself* allowed one party to exercise control in the first party's best interests. In other words, the law does not imply a tort duty simply because one party to a business relationship begins to dominate and to control the other party's financial future. Rather, the law implies a tort duty only when that relationship is of the type that, by its nature, allows one party to exercise judgment on the other party's behalf. *Conway*, 324 Or at 241." *Bennett*, 332 Or at 161-62.

Thus, under *Bennett*, *Conway*, and *Georgetown Realty*, the touchstone for a special relationship is whether one party is authorized to exercise independent judgment on the other party's behalf. As detailed below, the pleadings in this case do not show the existence of any such relationship.

B. A securities broker is authorized to exercise independent judgment when he or she has investment discretion over the customer's account.

In the context of securities brokerage accounts, the broker's authority to exercise independent judgment on the client's behalf turns on whether the account is "discretionary," as opposed to "nondiscretionary." In *Berki v. Reynolds Securities, Inc.*, 277 Or 335, 560 P2d 282 (1977), this court concluded that a stockbroker who did not have discretion to make independent investment decisions on behalf of his client was not a fiduciary of the client:

"The plaintiff failed to prove any facts which would give rise to a fiduciary relationship between him and the defendants. The agreement was at best an agreement by the broker to buy and sell at the direction of the plaintiff. A stockbroker acting as here is not a fiduciary. A broker's duty is complete and his authority ceases when a purchase or sale in accordance with the agreement is made and he has fully accounted." *Id.* at 342.

In *Wallace v. Hinkle Northwest, Inc.*, 79 Or App 177, 717 P2d 1280 (1986), the court of appeals distinguished *Berki* on the ground that the pleadings and proof

showed that the broker exercised investment discretion over plaintiffs' account. Plaintiffs alleged and defendants acknowledged that "[m]ost or all securities transactions were entered into by defendant Gimbol [the broker] without either prior approval or acquiescence by plaintiffs." *Wallace*, 79 Or App at 180. Because there was evidence to show that defendants had exercised discretion in selecting plaintiffs' investments, the court held that plaintiffs could maintain a claim for breach of fiduciary duty against defendants. *Id.* at 182.

In *Thompson ex rel. Thorp Family Charit. v. Federico*, 324 F Supp 2d 1152 (D Or 2004), the court, applying Oregon law, determined that plaintiff was not entitled to maintain claims for negligence, negligent misrepresentation, and breach of fiduciary duty against defendants arising from a brokerage account. The court began by noting the limited duties owed by a stockbroker in a nondiscretionary account:

"As a general matter, a stockbroker is an agent of his client. *Caravan Mobile Home Sales, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 769 F.2d 561, 567 (9th Cir.1985). A broker's agency authority, however, is narrowed when he or she acts pursuant to a nondiscretionary account agreement. *Id.* Essentially, 'the agency relationship created by a nondiscretionary account arises when the client places an order and terminates when the transaction ordered is complete.' *Id.* And, importantly, a nondiscretionary 'stockbroker assumes no continuing obligation to advise his clients of information that affects their securities.' *Id.*; see also *Berki v. Reynolds Secs., Inc.*, 277 Or. 335, 337-38, 342, 560 P.2d 282 (1977)." *Thompson*, 324 F Supp 2d at 1166.

After reviewing Oregon decisions regarding special relationships, the court concluded that plaintiff could not maintain his claims for negligence, negligent misrepresentation, and breach of fiduciary duty. Due to the nondiscretionary nature of the brokerage account, the court ruled that there was no special relationship between plaintiff and defendants. *Id.* at 1167 ("plaintiff, rather than defendants, had control over decisions regarding the Trust's investments, thus undermining plaintiff's position that a 'special relationship' existed supporting his * * * claims").¹

¹ *Berki's* and *Thompson's* discussion and analysis of the limited duties arising from nondiscretionary accounts are consistent with the prevailing view that a broker's duties in a nondiscretionary account are narrow. See *de Kwiatkowski v. Bear, Stearns & Co., Inc.*,

C. The pleadings do not show that defendants exercised independent judgment on plaintiff's behalf.

The pleadings in this case do not permit the conclusion that plaintiff had a special relationship with defendants. Plaintiff's complaint is devoid of any allegation that defendants exercised independent judgment in selecting plaintiff's investments. In fact, the complaint shows that defendants served in a nondiscretionary capacity by executing trades at plaintiff's direction, rather than making unilateral investment decisions for plaintiffs' benefit.

In his brief on the merits, plaintiff relies on paragraphs 5-7, 9, and 10 of his third amended complaint to support his argument that he had a special relationship with defendants. Petitioner's Br. at 2-3, 5-6, 11. As summarized by plaintiff, these allegations show that "defendants were a 'full service' firm, had consultants who would 'help earn money for their customers,' who, in fact kept close contact with customers and provided them with 'research and investment recommendations,' who had 'complete control' over the process of executing trades, and whose services were provided 'for the purpose of furthering [the customer's] economic and financial interests.'" Petitioner's Br. at 5.

These allegations do not permit the inference that defendants exercised independent judgment or discretionary control over plaintiff's commodities account. The general allegation that Smith Barney holds itself out as a full service firm with trained financial consultants who will help to earn money for their clients, Third Amended Complaint ¶ 5, says nothing about the nature of plaintiffs' account, specifically whether defendants had authority to make unilateral investment decisions for plaintiff's benefit. Likewise, the allegations in paragraphs 6 and 7 that plaintiff would receive "professional, high quality, personal financial services" or "timely and accurate information" (ER 2) shed no light on whether defendants had any ability to exercise independent judgment on plaintiff's behalf. *Cf. Conway*, 324 Or at 242 n.5 ("[T]he fact that Conway trusted the

306 F3d 1293, 1302 (2d Cir 2002) (describing duties in nondiscretionary account and summarizing relevant caselaw).

dean to communicate accurate information did not transform the relationship between Conway and Pacific University into a 'special relationship.'").

If anything, plaintiff's allegations reveal that defendants served as a traditional nondiscretionary broker. For example, plaintiff alleges that defendants acted "as his agent to provide him with financial consultation and services including executing his commodities transactions." Third Amended Complaint ¶ 6. (ER 2.) *See also id.* ¶ 9 ("defendants had complete control to execute and carry out [plaintiff's] commodities transactions"). Additionally, plaintiff alleges that defendant Howell called several times a day to keep plaintiff informed of developments in the commodities markets. *Id.* ¶ 7.

Thus, rather than alleging that defendants had authority to select investments without his permission or approval, plaintiff has alleged a quintessential nondiscretionary relationship in which defendants provided investment advice and recommendations, and executed trades at plaintiff's direction. Indeed, the specific allegation that forms the basis of plaintiff's claims illustrates that plaintiff, not defendants, made the investment decisions in plaintiff's account:

"Sometime between approximately 6:30 a.m. and 7:00 a.m. on December 14, 2000 *Mr. Boyer placed two orders with defendants, one for thirty February 2001 Crude Oil contracts and another for three January 2001 Natural Gas contracts. Defendants accepted and placed both orders.*" Third Amended Complaint ¶ 19. (ER 4) (emphasis added.)

Consequently, plaintiff's allegations not only fail to allege facts sufficient to show that defendants exercised independent judgment on plaintiff's behalf, they are inconsistent with such a relationship.

The Agreement, which is appended to defendants' answer, confirms this conclusion. The Agreement begins by reciting that Smith Barney is serving as plaintiff's "broker and/or dealer" (App-1 to Appellant's Opening Br.), as opposed to an investment adviser or manager with authority to select investments for plaintiff. Although the Agreement gives Smith Barney the power to refuse to accept plaintiff's orders, to liquidate positions in plaintiff's account, to cancel open orders, and to require plaintiff to

transfer his account to another firm, Agreement ¶¶ 5, 9, the Agreement makes it clear that the authority granted to Smith Barney is for its protection, not for plaintiff's benefit. For example, as an adjunct to Smith Barney's authority to liquidate plaintiff's commodities positions, the Agreement provides that plaintiff "shall be liable for all losses in my accounts whether or not my accounts are liquidated and for any debts and deficiencies in my accounts including all debts and deficiencies resulting from a liquidation of my accounts." Agreement ¶ 10.²

Additionally, the text of the provisions that authorize Smith Barney to liquidate plaintiff's positions leaves no doubt that Smith Barney is acting on its own behalf. *See* Agreement ¶ 5 ("I [plaintiff] understand that you have, at any time, and in your sole discretion, the right to limit or reduce positions in my account, to decline to accept orders and to require that my accounts be transferred to another firm. I understand that if I do not promptly transfer my positions upon your demand you reserve the right to liquidate positions in my accounts at your discretion."); Agreement ¶ 9 ("[W]henever in your discretion you consider it necessary, you may without prior demand or notice, when and if you deem appropriate based on your own business judgment * * * liquidate the positions in my account, * * * sell any property belong[ing] to me or in which I have an interest, cancel any open orders for the purchase and sale of any property, * * * *all at my sole risk.*") (emphasis added).

The concurring opinion recognized that these provisions did not give rise to a special relationship because they did not authorize defendants to exercise independent judgment on plaintiff's behalf:

"[T]he relationship that the [Agreement] established between plaintiff and defendants is not one in which defendants assumed any obligation to exercise independent judgment on plaintiff's behalf or to act to secure or protect plaintiff's economic interests. Trading in commodity futures is a highly risky undertaking. It also is highly regulated by the federal

² In *Berki*, 277 Or at 341-42, this court cited an analogous provision in the brokerage account agreement in concluding that defendant stockbrokers were not in a fiduciary relationship with their customer.

government and by the exchanges through which the trading occurs. Here, the [Agreement] between plaintiff and Salomon Smith Barney seeks to place all risk of loss as a result of trades in plaintiff's account on plaintiff and to minimize any risk of loss to Salomon Smith Barney. The control that the contract gave defendants over plaintiff's trading activities was control to protect Salomon Smith Barney's interests, not plaintiff's. Under those circumstances, defendants cannot be understood to have had a fiduciary obligation to act to protect plaintiff's economic interests." *Boyer*, 213 Or App at 567 (citations omitted).

Rather than focusing on the critical issue whether defendants had unilateral authority to select investments for plaintiff's benefit (i.e., investment discretion), the dissent looked generally to whether defendants had "control" over plaintiff's account, which the dissent concluded makes this case like *Wallace*, not *Berki*. *Boyer*, 213 Or App at 576. This analysis not only overlooks the important distinction between *Berki* and *Wallace*, but also fails to follow *Bennett's* central principle that it is the exercise of independent judgment on behalf of the plaintiff, not control over plaintiff's activities, that is the necessary ingredient of a special relationship. *Bennett*, 332 Or at 161-62.

The dissent's analysis also fails to account for the significant differences in the allegations in *Wallace* and in this case. In *Wallace*, plaintiff specifically alleged that defendants "exercised discretionary control" over their investments and that "[m]ost or all securities transactions were entered into by defendant Gimbol without either prior approval or acquiescence by plaintiffs." *Wallace*, 79 Or App at 180. In this case, by contrast, plaintiff does not allege that defendants had discretionary control or the ability to select investments without plaintiff's prior approval. Indeed, the only "control" alleged by plaintiff was that defendants had control to "execute and carry out [his] commodities transactions" and had control over margin limits, credit limits, and information. Third Amended Complaint ¶¶ 9, 10. (ER 2-3.) As explained above, this type of "control" does not give defendants the ability to exercise investment discretion for plaintiff's benefit, which is required for a special relationship.

Finally, even if plaintiff had alleged that defendants had discretion to select investments on his behalf, the claimed misconduct in this case has nothing to do with the

exercise of investment discretion. Plaintiff alleges that defendants were negligent in failing to inform him that they were canceling one of his commodities orders and in liquidating one of his commodities positions. Third Amended Complaint ¶ 45. This alleged conduct does not involve an exercise of discretionary investment authority for plaintiff's benefit. To the contrary, it involved defendants pursuing their own interests by exercising their contractual right under the Agreement to refuse to accept plaintiff's orders and to liquidate his positions. Agreement ¶¶ 5, 9. *Cf. Conway*, 324 Or at 244 ("Conway and the university each were pursuing their own interests at the time that the dean made the misrepresentations to Conway. Consequently, the parties were not in a special relationship * * *.") (footnote omitted).

II. The Court Should Not Expand the Special Relationship Doctrine as Plaintiff Suggests.

In his brief on the merits, plaintiff proposes a broad expansion of the special relationship doctrine. As detailed above, this court has carefully delineated the special relationship doctrine in the line of cases culminating in *Bennett*. In those cases, the court has determined that a plaintiff who seeks to recover economic damages arising from a contractual relationship must establish that the defendant was authorized to exercise independent judgment on the plaintiff's behalf. Plaintiff, however, urges the court to rule that a special relationship exists whenever one party to an agreement exercises judgment that "at least in part" benefits the other party to the agreement. Petition for Review at 1.

The court should decline plaintiff's invitation to fundamentally alter the special relationship doctrine. Plaintiff's proposed formulation could transform nearly every arm's-length commercial relationship into a special relationship. For example, if a nondiscretionary securities broker is deemed to have a special relationship with its customer simply because the broker's actions further the customer's financial interests as well as the broker's, then a banker, mortgage broker, credit card issuer, or any merchant

could also be considered to be in a special relationship because its actions further the economic interests of its customers. In fact, given that most commercial relationships involve a degree of judgment by one party and mutual financial benefit to both parties (which is the very point of the relationship), plaintiff's proposed rule could bring nearly all commercial relationships within the ambit of a special relationship.

Such a rule would be at odds with the rationale underlying the special relationship doctrine. The court's special relationship cases turn on a common question; namely, has one party relinquished power over its own affairs to the point where it has authorized the other party to step into its shoes, manage its affairs, or make independent decisions for its benefit? *See, e.g., Georgetown Realty*, 313 Or at 110 (liability insurer who undertakes to defend "stand[s] in the shoes of the party that has been sued. The insured relinquishes control over the defense of the claim asserted. Its potential monetary liability is in the hands of the insurer."); *Conway*, 324 Or at 240 (party who authorizes other party to exercise independent judgment on former party's behalf "is placed in a position of reliance upon the party who owes the duty; that is, because the former has given responsibility and control over the situation at issue to the latter, the former has a right to rely upon the latter to achieve a desired outcome or resolution."); *Bennett*, 332 Or at 162-63 ("As defined by the agreement, the nature of their relationship was not one in which Farmers was to step into plaintiff's shoes and to manage his business affairs. Accordingly, the parties were not in a 'special relationship,' and Farmers did not owe plaintiff a duty in tort.").

In its present formulation, the court's special relationship doctrine strikes an appropriate balance. When a party seeks to recover economic losses arising from a commercial relationship, the party is limited to contract remedies unless it has entrusted its financial affairs to the other party by allowing it to exercise independent judgment to make decisions on its behalf. If the party has authorized the other to exercise such judgment, then the party may pursue tort claims as well as contract claims. The court

should reject plaintiff's invitation to disturb this balance by formulating a rule that could transform most contractual relationships into special relationships, thereby subjecting ordinary commercial transactions to tort claims and tort remedies.

III. The Amicus Briefs Focus on Issues Not Germane to the Parties' Dispute.

Three amici curiae filed briefs in support of plaintiff's petition on review. The amicus briefs, which were filed by the Public Investors Arbitration Bar Association ("PIABA"), the Oregon Trial Lawyers Association ("OTLA"), and the State of Oregon, urge the court to reverse the decision of the court of appeals. While the amici each offer different reasons for reversal, their arguments have little to do with the issues presented in this case.

Beginning with PIABA's brief, PIABA points out that securities brokers and brokerage firms are heavily regulated and are subject to duties imposed by the Financial Industry Regulatory Authority, the New York Stock Exchange, the Securities and Exchange Commission, and state blue-sky laws. PIABA Br. at 5-10. PIABA then faults the court of appeals for ignoring these duties in issuing its decision. *See, e.g.*, PIABA Br. at 4 ("[T]he concurrence in *Boyer* ignores well established duties that stockbrokers owe to customers in all cases."); *id.* at 7 ("The *Boyer* concurrence ignores the basic suitability standard of care * * *"). PIABA asks that the court issue an opinion holding that these regulatory and statutory duties "establish a standard of care which exist independently of any contractual duties." PIABA Br. at 17.

PIABA's arguments betray a fundamental misunderstanding of the issues involved in this dispute and the scope of the court of appeals' decision. In this case, plaintiff does not allege that defendants violated any of the duties discussed by PIABA, such as the suitability rule, the know your customer rule, the duty of supervision, or any other statutory or regulatory requirement. To the contrary, plaintiffs' complaint simply alleges that defendants acted improperly in canceling an order and liquidating a position after plaintiff exceeded his margin limits. At trial and on appeal, the parties framed the

issue as whether the pleadings show that plaintiff and defendants were engaged in a special relationship.

Because plaintiff did not allege a violation of any of the duties mentioned by PIABA, the court of appeals naturally did not address those issues in either the concurrence or the dissent. Given the narrow scope of the court's opinion, PIABA's warning that the decision will undermine the duties imposed on brokers by regulatory agencies is simply incorrect. By urging this court to resolve questions that are not part of the dispute between the parties, PIABA is, in effect, improperly asking this court to address an abstract, nonjusticiable issue. *See Yancy v. Shatzer*, 337 Or 345, 349, 97 P3d 1161 (2004) ("[A] controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests.").

The State of Oregon's amicus brief is also off the mark. The State's brief rests on the mistaken view that the concurrence looked only to the Agreement and did not consider plaintiff's allegations in determining that no special relationship existed. State of Oregon Br. at 1-2, 5, 7. According to the State, the existence of a special relationship "is determined by *all* the facts pertinent to the relationship, including, but not limited to, the particular transaction involved, the communications between the parties, the length and history of the relationship, and any applicable professional standards of care." State of Oregon Br. at 7.

Contrary to the State's contention, the concurring opinion did, in fact, consider plaintiff's allegations in determining whether a special relationship existed. *See Boyer*, 213 Or App at 561-63. As detailed in Section I.C., *supra*, nothing in plaintiff's complaint permits the inference that defendants were authorized to exercise independent judgment on plaintiff's behalf, which is required for a special relationship. To the extent that the State believes that the concurrence should have assumed a relationship that was not alleged, it makes the same error as PIABA in asking the court to decide issues that are not presented in this case.

Unlike the briefs filed by PIABA and the State of Oregon, OTLA's amicus brief at least purports to base its analysis on the pleadings in this case. After spending several pages quoting the pleadings, however, OTLA then urges the court to rule that stockbrokers are *per se* subject to a special relationship, notwithstanding the allegations of a plaintiff's complaint. *See* OTLA Br. at 10 ("We urge the recognition of such a *per se* rule under Oregon law."). OTLA supports its proposal with the assertion that brokers are trusted professionals like lawyers and are subject to duties of care under various rules, regulations, and statutes. OTLA Br. at 10-11. In advancing this argument, OTLA, like PIABA, overlooks the fact that plaintiff failed to allege that defendants violated any such duty of care. Moreover, OTLA offers no sound reason why the court should overrule *Berki* and its special relationship cases and rule that stockbrokers and their customers are automatically engaged in a special relationship even if the customer has not authorized the broker to exercise independent judgment for the customer's benefit.

OTLA does go on to argue that the pleadings in this case show that defendants exercised control and discretion over plaintiff's account, but that contention is not supported by the pleadings. As explained above, plaintiff's third amended complaint does not allege that defendants had investment discretion or otherwise had authority to exercise independent judgment on plaintiff's behalf. To the contrary, the particular allegations of plaintiff's complaint reveal that defendants executed commodities trades at plaintiff's direction, Third Amended Complaint ¶¶ 6, 9, 19, which is the hallmark of a nondiscretionary account.

The only "discretion" that defendants had over plaintiff's account was the authority to cancel plaintiff's orders and to liquidate his positions when he exceeded his margin limits. As made evident by the terms of the Agreement, that "discretion" allowed defendants to take actions *contrary* to plaintiff's interests, not in his interests. OTLA's attempt to transform defendants' limited discretion under the Agreement into broad investment discretion over the account finds no support in the pleadings and is contrary to

the Agreement. Because the pleadings cannot reasonably be construed to show that defendants exercised independent judgment on plaintiff's behalf, the trial court and the court of appeals correctly concluded that the parties were not engaged in a special relationship.

IV. Any Error Below Was Harmless.

Even if the trial court and court of appeals had erred in concluding that plaintiff could not maintain his negligence claim, this court should affirm nonetheless because plaintiff has not shown that the claimed error substantially affected his rights. In connection with plaintiff's claim for breach of contract, the trial court and the jury determined that plaintiff's specifications of breach were deficient. Plaintiff did not appeal from those determinations. Because plaintiff's negligence claim is premised on those same deficient specifications, he would have no basis for proceeding on that claim even if the trial court erred in dismissing the claim.

ORS 19.415(2) provides that "[n]o judgment shall be reversed or modified except for error substantially affecting the rights of a party." In *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 173-74, 61 P3d 928 (2003), the court explained that ORS 19.415 requires more than speculation that an alleged error affected the rights of an appealing party:

"The possibility that an error might have resulted in a different jury verdict is insufficient under the statute. Instead, the court must be able to conclude, from the record, that the error 'substantially affect[ed]' the rights of the losing party. Moreover, the statute protects the trial court judgment from reversal or modification 'except for' error substantially affecting a party's rights, indicating that reversal of a judgment is the exception, not the rule. The rule embodied in ORS 19.415(2) is neutral as between plaintiffs and defendants; it places the burden to make a record that demonstrates prejudicial error on whichever party loses in the trial court and then seeks reversal or modification of the judgment on appeal."

Error that does not substantially affect the rights of the appealing party (and thus does not satisfy ORS 19.415) is considered harmless error. See *Baker v. English*, 324 Or 585, 590, 932 P2d 57 (1997) ("a determination that an error did not substantially

affect a party's rights leads to the conclusion that the error was not prejudicial, *i.e.*, was 'harmless,' and that the judgment shall be affirmed").

In *Shoup*, the issue before the court was whether the trial court's error in submitting an invalid specification of negligence to the jury "substantially affect[ed]" defendant's rights so as to justify reversing or modifying the judgment under ORS 19.415(2). 335 Or at 166. The jury had considered three specifications of negligence, two of which were valid, and had returned a general judgment for plaintiff. Before this court, defendant argued that the trial court's error in submitting the invalid specification warranted reversal because, absent the error, the outcome of the trial might have been different. *Shoup*, 335 Or at 171.

The court rejected defendant's argument and held that ORS 19.415(2) requires more than speculation concerning whether an alleged error affected a jury's verdict. *Shoup*, 335 Or at 174. Because defendant had not identified anything in the record to demonstrate that the jury based its verdict on the invalid specification, defendant was unable to show that the trial court's error substantially affected its rights. Accordingly, the court concluded that under ORS 19.415(2), there was "no basis to reverse the trial court judgment and order a new trial." *Shoup*, 335 Or at 179.

This case presents even more compelling circumstances for application of the harmless error doctrine. Plaintiff's third amended complaint alleges the same eight specifications of wrongdoing in support of his negligence claim and his breach of contract claim (second count). *Compare* Third Amended Complaint ¶ 45(a)-(h) with ¶ 55(a)-(h) (ER 8-9, 11). Those specifications identified the ways in which defendants allegedly breached duties owed to plaintiff with respect to his December 2000 commodities orders:

- "a. By failing to timely inform Mr. Boyer as to what defendants were going to do with his December 14, 2000 orders;

- "b. By failing to disclose to Mr. Boyer that Smith Barney was going [to] force him to trade the February 2001 Crude Oil contracts within a day of his purchase on December 14, 2000;
- "c. By failing to tell Mr. Boyer in a timely manner that Smith Barney would only fill one of his December 14, 2000 commodities orders but not both;
- "d. By failing to timely disclose to Mr. Boyer on December 14, 2000 that Smith Barney canceled his order for three January 2001 Natural Gas Contracts;
- "e. By failing to timely inform Mr. Boyer that Smith Barney was going to cancel his December 14, 2000 Natural Gas contracts order[.];
- "f. By failing to properly account for the \$7,422 margin call payment Mr. Boyer made on December 13, 2000;
- "g. By accepting Mr. Boyer's December 14, 2000 orders;
- "h. By placing Mr. Boyer's Crude Oil order on December 14, 2000 without informing him that he would be forced to sell his positions within a day." Third Amended Complaint ¶¶ 45, 55 (ER 8-9, 11).

Before trial, the court granted defendants' motion for judgment on the pleadings against plaintiff's negligence claim. Then, after plaintiff rested, defendants moved for a directed verdict against plaintiff's breach of contract claim. The trial court granted defendants' motion with respect to seven of the eight specifications of breach, leaving only specification (f), on the ground that the seven specifications stemmed from specification (f) or were not supported by evidence:

"[Paragraph] 55 comes down to the failing to properly account. And I mean, the rest of it is all arguments. They're all issues that flow from that failure, but ultimately that's what it's about." Transcript of Proceedings, Dec. 16, 2003, at 95-98 (SER 5-8).

With respect to specification (f), the jury expressly found that Smith Barney had properly accounted for plaintiff's margin payment. *See* Verdict at 3 ("[D]id Smith Barney fail to properly account for [plaintiff's] margin payment of December 13, 2000?" "Yes ___ No X") (SER 11.) Plaintiff did not assign error to the jury's finding or to the trial court's determination that the remaining specifications were not appropriate for submission to the jury. Because plaintiff received final, adverse determinations as to each of the specifications forming the basis of his negligence claim, any error that the

trial court may have committed in ruling that plaintiff could not maintain his negligence claim is harmless.

In his brief on the merits, plaintiff offers two reasons why the claimed error is prejudicial. Plaintiff first contends that the trial court's and the jury's determinations that his contract claim was deficient may not be applicable to his negligence claim. Plaintiff suggests that the trial court and the jury might have ruled against him on his contract claim based on a determination that the misconduct alleged was "not within the implied terms of the contract." Petitioner's Br. at 12.

Plaintiff's argument is belied by the jury's verdict form and the trial transcript, which show that the rejection of plaintiff's contract claim had nothing to do with the characterization of the claim as a contract claim rather than a negligence claim. In limiting the specifications of breach that went to the jury, the trial court ruled that the specifications all stemmed from defendants' alleged failure to properly account for plaintiff's margin payment—specification (f). (SER 5-8.) With respect to specification (f), the jury found that Smith Barney was required to properly account for plaintiff's margin payments, but that it had not failed to do so. (SER 11.) In light of these determinations, which are equally applicable to plaintiff's negligence claim, plaintiff's contention that the trial court's or the jury's findings were unique to his contract claim is incorrect.

Next, plaintiff argues that even though the negligence and contract claims were based on identical allegations, plaintiff might have offered different evidence had he been allowed to proceed with his negligence claim. *See* Petitioner's Br. at 12 ("it cannot be assumed that plaintiff's evidence on his negligence claim would have duplicated his evidence on the breach of contract claim"). This argument is inconsistent with *Shoup*. *Shoup* makes it clear that the appellant bears the burden of "mak[ing] a record that demonstrates prejudicial error." 335 Or at 173. As applied to this case, it was plaintiff's burden to show that he would have offered different evidence in support of his negligence

claim. By assuming that plaintiff *might* have offered different evidence in support of the identical specifications of his negligence claim, plaintiff fails to heed *Shoup's* teaching that an appellant must demonstrate prejudicial error. Plaintiff's supposition that he might have offered different evidence does not satisfy his burden to show prejudicial error. Accordingly, under ORS 19.415(2) and *Shoup*, even if the trial court erred in dismissing plaintiff's negligence claim, plaintiff has not shown that the error substantially affected his rights.

CONCLUSION

The court of appeals correctly concluded that plaintiff could not maintain his negligence claim against defendants. Neither plaintiff's complaint nor the Agreement permits the inference that defendants were authorized to exercise independent judgment on plaintiff's behalf and for plaintiff's benefit, which is necessary to establish a special relationship. Moreover, even if plaintiff could show that the courts below erred in dismissing his negligence claim, he has failed to discharge his burden to show that any such error was prejudicial. For these reasons, the court should affirm the judgment of the trial court and the decision of the court of appeals.

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CERTIFICATE OF FILING AND SERVICE

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I further certify that on the 26th day of February, 2008, I filed the original and 12 copies of respondents' brief on the merits by mailing them to:

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