STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2462

Brown-Wilbert, Inc., et al.,
Appellants,

vs.

Copeland Buhl & Company, P.L.L.P., et al.,
Respondents.

Filed December 30, 2008
Affirmed
Stauber, Judge

Hennepin County District Court
File No. CT048124

Kay Nord Hunt, Lommen, Abdo, Cole & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402; and

George E. Antrim, III, George, E. Antrim, III, P.L.L.C., 201 Ridgewood Avenue, Minneapolis, MN 55403 (for appellants)

Thomas J. Shroyer, Peter A. Koller, Moss & Barnett, P.A., 4800 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-4129 (for respondents)

Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

On appeal from dismissal after remand of appellants' claims for breach of contract, breach of fiduciary duty, and restitution, appellants argue that the district court

erred in dismissing their claims because expert testimony is not required to present a prima facie case for breach of contract or for breach of fiduciary duty, and that if either claim is reinstated, the restitution claim must also be reinstated. Appellants also contend that the district court abused its discretion in refusing to consider appellants' motion to amend their complaint. We affirm.

FACTS

Appellant Brown-Wilbert, Inc. is a Minnesota corporation that manufactures burial vaults, septic tanks, and other concrete products, and arranges for their distribution and sale throughout the upper Midwest. Brown-Wilbert originated from Chandler-Wilbert, Inc., a family business started by appellant Christopher Brown's (hereinafter C.B.) maternal grandfather. In 1995, C.B. and his father Jerry Brown (hereinafter J.B.) incorporated Brown, Inc., purchased all of the stock in Chandler-Wilbert, Inc., and merged the two companies into Brown-Wilbert. At the recommendation of J.B., respondent Lee Harren and respondent accounting firm Copeland Buhl & Co. were retained by C.B. and J.B. to assist in the purchase of Chandler-Wilbert. Although C.B. and J.B. initially agreed that C.B. would buy the majority of the equity in Chandler-Wilbert, and that both would share control of the company on a 50-50 basis, C.B. eventually agreed to a revised proposal whereby C.B. would own 80% of the equity in the company, but J.B. would own 51% of the voting shares. According to C.B., he was led to believe that this proposal was a necessary condition for a loan of $1,000,000 to Brown-Wilbert.

After the transaction, respondents continued to provide accounting and financial services to Brown-Wilbert. But the relationship between C.B. and his father eventually soured, and between 1997 and 2003, respondents allegedly joined with J.B. to squeeze C.B. out of the operations of Brown-Wilbert using a variety of illegal methods. These methods allegedly included presenting inaccurate and misleading financial information, falsifying Brown-Wilbert's audited financial statements, threatening that if C.B. did not accept a buy-out that he would be required to immediately re-pay significant loans to the company, and advocating J.B.'s interests to the detriment of C.B.

In 2002, C.B. brought a shareholder-rights suit against J.B. Respondents sided with J.B. in the shareholder lawsuit and Harren signed an affidavit stating that C.B. "bilked" Brown-Wilbert out of more than $900,000 for personal expenses that were portrayed as business expenses. The lawsuit was settled in 2003, at which time C.B. became the sole owner of Brown-Wilbert. The settlement agreement contained several releases that, inter alia, released J.B., C.B. and Brown-Wilbert from liability to each other arising at any time prior to execution of the releases.

On March 10, 2004, appellants commenced an accounting-malpractice action against respondents alleging the following theories of recovery: breach of contract, breach of fiduciary duty, accounting malpractice, and restitution (hereinafter BW-I). Respondents subsequently moved to dismiss BW-I, alleging that appellants failed to submit the expert-review and expert-identification affidavits required by Minn. Stat. § 544.42 (2006). In the alternative, respondents claimed they were entitled to summary

judgment on the basis that the settlement agreement in the lawsuit between C.B. and J.B. served as a bar to this action.

The district court granted respondents' motion and dismissed all four counts of the complaint in BW-I with prejudice without reaching the issue of the releases previously signed by J.B. and C.B. On appeal, this court affirmed the district court's dismissal of appellants' accounting-malpractice claim for failure to timely satisfy the expert-review and expert-identification affidavit requirements. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, No. A05-340, 2005 WL 3111959, at *3 (Minn. App. Nov. 22, 2005). But this court remanded the remaining three counts with directions for the district court to determine whether expert testimony was necessary to establish a prima facie case on those counts. *Id.*

While BW-I was pending, appellants commenced a second lawsuit against respondents, alleging fraud, intentional misrepresentation, negligent representation, and aiding and abetting as theories of recovery (hereinafter BW-II). The factual allegations of BW-II were very similar to but not identical to those in BW-I. Respondents moved to dismiss BW-II, alleging that it was precluded by the doctrine of res judicata. The district court agreed, concluding that res judicata applied because there was a final judgment on the merits in BW-I, and appellants' complaint in BW-II was a "recasting of the earlier complaint." On appeal, this court reversed the dismissal of BW-II, holding that the judgment in BW-I was not final until the appellate process was exhausted. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 715 N.W.2d 484, 488 (Minn. App. 2006).

The Minnesota Supreme Court granted review of both BW-I and BW-II, and consolidated the two cases. With respect to BW-I, the supreme court affirmed the dismissal of appellants' accounting-malpractice claim on grounds different from those relied on by this court. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 219-20 (Minn. 2007). The supreme court then remanded the case to the district court for further analysis, as previously directed by this court. *Id.* Regarding BW-II, the supreme court held that modification of the judgment on appeal from the dismissal challenged in BW-I altered the res judicata effect of that dismissal and, thus, res judicata did not bar the additional claims against respondents. *Id.* at 222.

Following remand, respondents brought a renewed motion to dismiss, arguing that all of appellants' claims related to the accounting-malpractice claim and, therefore all of appellants' claims should be dismissed under Minn. Stat. § 544.42. In the alternative, respondents again moved for summary judgment, asserting that the releases executed in connection with the settlement of the shareholders' rights lawsuit between C.B. and J.B. barred both. Appellants opposed the motion and filed a motion to consolidate BW-I and BW-II. Shortly thereafter, appellants sought to amend the complaint in BW-I to incorporate the counts pleaded in BW-II.

The district court refused to hear appellants' motion to amend, and denied appellants' motion to consolidate BW-I and BW-II. The district court then granted respondents' motion to dismiss, after conducting an analysis under Minn. Stat § 544.42, as directed by this court. The court held that appellants' breach-of-contract claims and breach-of-fiduciary duty claims were not established through independent grounds,

related to the dismissed accounting malpractice count, and therefore required expert testimony to establish a prima facie case. With respect to appellants' restitution claim, the court stated that restitution "is a remedy, not a cause of action" and dismissed the claim because appellants' other claims were dismissed. In light of the district court's dismissal of appellants' claims under section 544.42, the court did not address respondents' alternative motion for summary judgment. This appeal followed.

D E C I S I O N

I.

A district court's decision to grant or deny a motion to dismiss for failure to comply with statutory requirements regarding the submission of expert affidavits is reviewed under an abuse-of-discretion standard. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 468 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). Questions involving the applicability and construction of those statutes, however, are legal questions, which we review de novo. *Id.* at 468-69.

Minnesota law states that "[i]n an action against a professional alleging negligence or malpractice in rendering a professional service where expert testimony is to be used by a party to establish a prima facie case," the plaintiff must serve on defendants two affidavits. Minn. Stat. § 544.42, subd. 2 (2006). The first affidavit, an affidavit of expert review, must establish that an expert reviewed the case, leading to the opinion that the defendant deviated from the applicable standard of care and that the action caused the plaintiff's injury. *Id.*, subds. 2(1), 3(a)(1). The second affidavit must identify the experts who will testify to these opinions. *Id.*, subds. 2(2), 4(a) (2006). Failure to comply with

the affidavit requirements "results, upon motion, in mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a prima facie case." Minn. Stat. § 544.42, subd. 6 (2006).

Here, on remand from this court, the district court concluded that appellants' claims for breach of contract, breach of fiduciary duty, and restitution require expert testimony to establish a prima facie case. Appellants argue that the district court's conclusion is erroneous. We will discuss each claim in turn.

A. Breach of contract

Breach-of-contract claims and negligence claims are not necessarily redundant. *Carolina Indus. Prods., Inc. v. Learjet, Inc.*, 168 F. Supp. 2d 1225, 1232 (D. Kan. 2001). A cause of action for breach of contract is pleaded if a party alleges a violation of duties arising from an express agreement between the parties, while a cause of action for negligence or malpractice is pleaded when a party simply alleges a violation of the duties imposed by law. *Id.* To establish a breach of contract, a plaintiff must show: (1) the formation of a contract; (2) performance by plaintiff of any conditions precedent; and (3) a breach of the contract by defendant. *Indus. Rubber Applicators, Inc. v. Eaton Metal Prods. Co.*, 285 Minn. 511, 513, 171 N.W.2d 728, 731 (Minn. 1969), *overruled on other grounds by Standslast v. Reid*, 304 Minn. 358, 231 N.W.2d 98 (1975).

Under Minn. Stat. § 544.42, subd. 1(1) (2006), a "professional" includes a "certified public accountant." Courts have held that a breach-of-contract claim may be brought when an accountant fails to perform a specific service that he or she has contracted to perform or the accountant breaks a specific contractual promise. *See, e.g.*,

Funds of Funds, Ltd. v. Arthur Anderson & Co., 545 F. Supp. 1314, 1364 (S.D.N.Y. 1982); *Holland v. Arthur Anderson & Co.*, 469 N.E.2d 419, 429 (Ill. App. Ct. 1984). Expert testimony is generally required in cases involving professionals where the conduct complained of cannot be adequately evaluated by the jury absent the expert testimony. *Hill v. Okay Constr. Co.*, 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977). But expert testimony is not required to establish a prima facie case in breach-of-contract cases where juries can competently evaluate whether a contract has been breached without expert testimony. *See, e.g., Wilson v. Vanden Berg*, 687 N.W.2d 575, 583 (Iowa 2004).

Appellants argue that expert testimony is not necessary to establish the elements of their breach of contract claim. To support their position, appellants point out that Minnesota is a notice-pleading state that does not require absolute specificity in pleadings. *See Meyer v. Best W. Seville Plaza Hotel*, 562 N.W.2d 690, 692 (Minn. App. 1997) (stating that instead of absolute specificity, Minnesota requires that a pleading include a sufficient basis of facts to give fair notice to the opposing party of the claims raised against it), *review denied* (Minn. June 26, 1997). Appellants argue that, in light of the fact that Minnesota is a notice-pleading state, this court should reinstate the breach of contract claim because the claim, as pleaded in the complaint, does not require expert testimony to establish a prima facie case of breach of contract.

Respondents acknowledge that "in an appropriate case, a claimant may sue an accountant or other professional on a breach of contract theory without needing expert testimony to establish a prima facie case," where the "claimant alleges that an accountant breached a specific term of a contract." But respondents contend that this situation is not

present here because appellants failed to identify any specific contractual provision that they claim respondents breached. Respondents argue that in the absence of any allegation that respondents breached a specific contractual provision, it can only be assumed that appellants' breach-of-contract claim is based upon an alleged breach of some implied promise to comply with the professional duties arising out of the accountant-client relationship. Thus, respondents argue that under these circumstances, expert testimony is required for appellants to establish a prima facie case for breach of contract.

We agree. Appellants' complaint alleges: "The [respondents] had annual contracts with engagement letters executed by them and [Brown-Wilbert], and owed [Brown-Wilbert] a duty to perform their contracts with [Brown-Wilbert]," and "[t]hat [respondents] breached their annual contracts with [Brown-Wilbert] causing it substantial damages to be proven at trial." But as the district court found, appellants "do not allege that [respondents] breached a specific contractual promise." Rather, appellants' breach-of-contract claim is so vague that the district court found that "it fails to stand on independent grounds." A further reading of appellants' complaint reveals that the facts supporting appellants' breach-of-contract claim are identical to the facts used in appellants' accounting-malpractice claim. In other words, although appellants pleaded a breach-of-contract claim, the essence of this claim is that (1) respondents owed Brown-Wilbert and C.B. a duty; (2) respondents "breached their duties" to Brown-Wilbert and C.B.; (3) "the breaches of duty by [respondents] constituted a breach of the standard of care expected of accountants in similarly situated metropolitan areas and constituted

negligence;" and (4) respondents' malpractice caused appellants' damages. Thus, a reading of appellants' complaint reveals that appellants' breach-of-contract claim relates to appellants' malpractice claim. Because appellants' breach-of-contract claim relates to the malpractice claim, expert testimony was necessary to establish a prima facie case for breach of contract.

We also note that the supreme court has recognized that the legislative purpose of section 544.42 is "to provide for the early dismissal of frivolous malpractice claims." *Brown-Wilbert*, 732 N.W.2d at 217. By vaguely pleading their breach-of-contract claim in such a manner that it is difficult to determine whether expert testimony is necessary to establish a prima facie case, appellants attempt to avoid the effect of section 544.42, a loophole the legislature most certainly did not intend. As respondents point out, to reinstate appellants' breach-of-contract claim would establish a precedent allowing any party bringing suit against a professional to automatically bypass the requirements of section 544.42 by pleading breach of contract, even if the allegation is completely frivolous. Accordingly, the district court correctly concluded that expert testimony was necessary for appellants to establish their prima facie case for breach of contract.

B. Breach of fiduciary duty

Appellants also contend that the district court erred in concluding that expert testimony was necessary to establish their claim for breach of fiduciary duty. "The general rule is that special circumstances must exist in a relationship between parties for creation of a fiduciary relationship." *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, 738 N.W.2d 401, 406 (Minn. App. 2007), *review denied* (Minn. Dec. 11, 2007).

"Traditionally, those owing fiduciary duties include general partners with limited partners, attorneys with clients, and trustees with beneficiaries." *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 779 (Minn. App. 2006). The fiduciary obligation is premised on trust. *Rice v. Perl*, 320 N.W.2d 407, 410 (Minn. 1982). To establish that respondents breached a fiduciary duty, appellants must show that respondents' actions were so opposed to appellants' interests that one must infer that respondents could not have intended to act in appellants' best interests. *See Westgor v. Grimm*, 318 N.W.2d 56, 59 (Minn. 1982).

Appellants argue that because respondents became "part of [Brown-Wilbert's] management team," they became a "de facto officer or director" of Brown-Wilbert, and therefore respondents owed Brown-Wilbert a fiduciary duty. Because of this alleged fiduciary relationship, appellants argue that their fiduciary-duty claim is distinguishable from their accounting-malpractice claim. Appellants further argue that expert testimony is not necessary to establish a prima facie case for breach of fiduciary duty because their breach of fiduciary duty claim consists of allegations that a lay juror would easily comprehend without expert testimony. *See Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1091 (D. Minn. 2001) (stating that where breach-of-fiduciary-duty claims are "straightforward," such as claims involving an obviously missed deadline or clear case of stealing client funds, expert testimony is not necessary).

"Courts do not generally regard the accountant-client relationship as a fiduciary one." *Fund of Funds*, 545 F. Supp. at 1356. Thus, in order to show a fiduciary relationship, appellants must show more than the standard accountant-client relationship,

such as appellants' assertion that respondents became "de facto officer[s] or director[s]" of Brown-Wilbert. However, "[t]he existence of a fiduciary relationship is a question of fact." *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985). By their very nature, appellants' claims that respondents acted as "de facto officer[s] or director[s]," and therefore owed Brown-Wilbert a fiduciary duty, are outside the common realm of understanding of a juror. Thus, expert testimony would be necessary to establish that a fiduciary duty was owed by respondents.

Moreover, even assuming that a fiduciary duty was owed by respondents, expert testimony would be necessary to show that respondents breached that duty. In *Meyer*, the plaintiff alleged that the attorney defendant engaged in conduct that amounted to a conflict of interest after he gave advice and information to certain individuals. 156 F. Supp. 2d at 1085. The court lumped together the plaintiff's separate claims for breach of fiduciary duty and legal malpractice and dismissed both counts for failure to file expert affidavits pursuant to Minn. Stat. § 544.42. *Id.* at 1091. The court reasoned that "the claims involved in this case do not involve an obviously missed deadline or clear case of stealing client funds. Rather, the claims relate to conflicts of interest, which involve information that is not within the common knowledge of the jury." *Id.* Thus, the court concluded that expert testimony was necessary to establish a prima facie case on each count. *Id.*

Appellants contend that this case is distinguishable from *Meyer* because this case constitutes a straightforward case of whether respondents "took money under the table," and paid "illegal bonuses." But a review of appellants' complaint reveals that the essence

of appellants' cause of action focuses on the conflict of interest between respondents and appellants. For example, appellants' complaint asserts that respondents "were not independent, as required, and acted contrary to the interests of [appellant C.B.], the majority stockholder." A further reading of the complaint demonstrates that the complaint is replete with similar allegations. The conflict-of-interest allegations implicate the standards of the accounting profession, which, as in *Meyer*, are not within the common knowledge of the jury. Accordingly, the district court did not err in concluding that expert testimony was necessary for appellants to establish a prima facie case of breach of fiduciary duty.

C. Restitution

"Restitution is an equitable remedy." *State by Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 896 (Minn. App. 1992), *aff'd on other grounds*, 500 N.W.2d 788 (Minn. 1993). Here, the district court dismissed appellants' restitution claim because restitution is a remedy and not a cause of action, and "can only survive if the other counts survive." Appellants do not challenge the district court's decision on the merits, but argue that if their claims for breach of contract and breach of fiduciary duty are reinstated, the restitution claim should also be reinstated. Because appellants' claims for breach of contract and breach of fiduciary duty are not reinstated, we conclude that the district court properly dismissed appellants' restitution claim.

II.

Under Minn. R. Civ. P. 15.01, a party may amend pleadings after a responsive pleading has been served only by leave of court or with the written consent of the adverse

party. A district court may allow a party to freely amend a pleading when justice so requires. *Id.* Whether amendment should be allowed "depends upon a number of factors, including, in particular, prejudice to the adverse party." *Wilson v. City of Eagan*, 297 N.W.2d 146, 151 (Minn. 1980). A district court's decision on whether to allow a party to amend its pleadings is discretionary, and an appellate court will not disturb that decision unless there has been an abuse of discretion. *Utecht v. Shopko Dep't Store*, 324 N.W.2d 652, 654 (Minn. 1982).

Here, respondents filed their renewed motion to dismiss on June 19, 2007, almost three weeks after the supreme court issued its opinion in the matter. One month later, on July 17, 2007, appellants sought to amend their complaint to add fraud claims. The district court refused to hear appellants' motion to amend, stating:

> The Minnesota Court of Appeals remanded the 2004 Motion to Dismiss with instructions for specific analysis on certain issues. The 2004 motion is the only motion I am to consider on remand. Therefore, I am not going to allow a Motion to Amend Complaint until after I have ruled on the pending Renewed Motion to Dismiss, or in the Alternative, for Summary Judgment. If applicable, I will consider a Motion to Amend Complaint after I have issued my findings on the Renewed Motion to Dismiss.

Appellants argue that the district court abused its discretion in refusing to hear their motion to amend. To support their claim, appellants cite the following language from *Brown-Wilbert*: "we do not intend to foreclose the possibility that [appellants] may move to amend BW-I to incorporate the counts now contained in BW-II or to consolidate the two cases." 732 N.W.2d at 225. Appellants contend that because the supreme court specifically contemplated appellants' ability to amend their complaint to add the claims

brought in BW-II, the district court abused its discretion in refusing to hear appellants' motion to amend.

We disagree. In addition to the language cited by appellants, the supreme court in *Brown-Wilbert* went on to state that "[respondents] may oppose those motions [to amend or consolidate], move to dismiss all counts of BW-I and BW-II as being subject to section 544.42, subdivision 6, or move to abate BW-II." *Id.* Appellants were not given a "free pass" to automatically amend their complaint. This court remanded the matter for a clarification of whether expert testimony was necessary to establish a prima facie case for appellants' claims for breach of contract, breach of fiduciary duty, and restitution. *Brown-Wilbert*, 2005 WL 3111959, at *4. In light of this court's instructions on remand, the district court concluded that it would not consider appellants' motion to amend until after it made a decision on respondents' renewed motion to dismiss. Moreover, appellants did not even file their motion to amend the complaint until a month after respondents filed their renewed motion to dismiss. Therefore, under the circumstances, the district court's decision was not an abuse of discretion.

Appellants further argue that under *TCF Bank & Sav. F.A. v. Marshall Truss Sys., Inc.*, a district court "must rule" on a motion to amend the complaint, and failure to rule is prejudicial error necessitating remand. 466 N.W.2d 49, 54 (Minn. App. 1991), *overruled on other grounds by Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11 (Minn. 1992). But appellants misconstrue the language in *TCF Bank*. In that case, on the same day that respondents moved for summary judgment, appellant moved to amend its complaint to include a claim that arose after the lawsuit was commenced. *Id.* at 54. Each

party briefly addressed the issue in its written summary judgment submission, but the district court, although admittedly aware of the issue, failed to rule on the motion to amend. *Id.* This court held that "[t]he trial court must rule on the motion before we can determine whether it is acting within its discretion. Such a failure to rule was prejudicial error necessitating remand." *Id.*

Here, the district court did not ignore the motion to amend. Rather the court stated that based on this court's directions on remand, the court would not entertain the motion until the issues on remand were resolved. Then, depending on the ruling on respondents' renewed motion to dismiss, the court would consider the motion to amend. Therefore, this case is distinguishable from *TCF Bank*, and the district court did not abuse its discretion in refusing to consider appellants' motion to amend.

In light of our decision to affirm the district court's dismissal of appellants' claims, we need not address respondents' contention that the releases signed in connection with the settlement of the shareholders' rights lawsuit barred appellants' claims here.

Affirmed.