STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL ASSOCIATION OF CREDIT MANAGEMENT, INC., as Trust Mortgagee of the Trust Estate of Central Builders Supplies Co., Inc., and as Assignee of Members of Central Builders Supplies Co., Inc., CERTAINTEED CORPORATION, DESIGN HOUSE, GEORGIA-PACIFIC CORPORATION, MAKITA, U.S.A. INC., MARQUETTE GAYLORD WAREHOUSE, INC., d/b/a HAGER DISTRIBUTION, GAYLORD, CO., HAGER DISTRIBUTION, INDIANAPOLIS, CO., HAGER DISTRIBUTION, JOLIET, CO., and HAGER DISTRIBUTION, SPRINGFIELD, CO., MARQUETTE LUMBERMENS WAREHOUSE, INC., d/b/a HAGER DISTRIBUTION, GRAND RAPIDS, CO., MARQUETTE SAGINAW WAREHOUSE, INC., d/b/a HAGER DISTRIBUTION, SAGINAW, CO., MORGAN PRODUCTS LTD., d/b/a MORGAN DISTRIBUTION, OWENS CORNING FIBERGLASS, SCHULTZ, SNYDER & STEELE LUMBER COMPANY, and UNITED STATES GYPSUM COMPANY,

Plaintiffs-Appellants,

v

DELOITTE & TOUCHE,

Defendant-Appellee.

UNPUBLISHED
June 30, 1998

No. 191754
Washtenaw Circuit Court
LC No. 93-000539 NM

Before: Corrigan, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this accountant malpractice case. We affirm.

The trial court granted defendant's motion for summary disposition based on its finding that defendant did not owe a duty to plaintiffs. The parties agreed that there are essentially three tests for determining when an accountant owes a duty to a third party who used the accountant's audit report and accompanying financial statements: (1) the direct contact/privity test; (2) the test based on Restatement Torts, 2d, § 552, and (3) the foreseeability test. This Court adopted the Restatement test in *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 36; 436 NW2d 70 (1989).

Plaintiffs first argue that in determining an accountant's liability to third parties, Michigan should adopt a foreseeability approach, as set forth in *H Rosenblum, Inc v Adler*, 93 NJ 324; 461 A2d 138; 35 ALR4th 199 (1983). Plaintiffs argue that "the movement in Michigan is toward the Foreseeability Standard." In support of this assertion, plaintiffs first note that in *Stockler*, *supra*, this Court did not reject the foreseeability standard, but rather concluded under the facts of that case, it was unnecessary to address whether a broader standard of foreseeability should be adopted. See *Stockler*, *supra* at 36-37. Plaintiffs also rely on *In re DeLorean Motor Co*, 56 BR 936, 944 (Bankr ED Mich, 1986), in which the court concluded that "reliance by foreseeable third-parties [is] an appropriate factor to consider in deciding if an accountant or other professional owes a duty of care to another." Next, plaintiffs point out that Michigan courts have held other professionals liable to third parties where the professional's negligence would foreseeably injure that third party. Finally, plaintiffs claim that other states have adopted the foreseeability doctrine.

We disagree with plaintiffs' assertion that Michigan has been moving toward the foreseeability standard in accountant liability. On the question of an accountant's duty to third parties, the Restatement standard was adopted by a panel of this Court, which declined to address whether the foreseeability standard was applicable. The Restatement standard was subsequently codified by the Legislature. See MCL 600.2962; MSA 27A.2962. Plaintiffs' reliance on a single case from federal bankruptcy court is therefore unpersuasive. Likewise, the cases cited by plaintiffs involving psychiatrists,[1] doctors,[2] and abstracters[3] do not provide a cogent basis for applying a foreseeability standard in cases of accountant malpractice. Furthermore, plaintiffs essentially concede in their reply brief that the foreseeability rule is not widely followed.

Plaintiffs recognize that the Legislature has adopted the Restatement standard. Plaintiffs note, however, that their cause of action accrued before MCL 600.2962; MSA 27A.2962 took effect. Plaintiffs argue that the fact that the Legislature saw fit to address the issue supports their argument that the judicial trend was toward the adoption of a foreseeability standard. Plaintiffs offer no evidence of this legislative intent, however, and in light of the fact that no Michigan court ever actually approved the foreseeability doctrine, we do not believe that plaintiffs have articulated a compelling reason to apply the foreseeability standard in causes of action that accrued prior to the effective date of MCL 600.2962; MSA 27A.2962.

Applying the Restatement standard, we conclude that the trial court did not err in finding that defendant did not owe a duty to plaintiffs. Under the Restatement test, plaintiffs must establish that

(1) defendant supplied its report to plaintiffs or that it knew that CBS would give the report to them, and (2) defendant intended or knew that CBS intended the information to influence plaintiffs' transactions. See *Raritan River Steel Co v Cherry, Bakaert & Holland*, 322 NC 200, 215; 367 SE2d 609 (1988). Plaintiffs have satisfied neither condition.

Only two plaintiffs, Owens Corning Corporation and Georgia-Pacific Corporation, actually received copies of the 1990 audited financial statement. However, defendant did not supply its report to these plaintiffs, and they have produced no evidence that defendant knew that its client would give the report to them. Furthermore, plaintiffs have not shown that defendant intended, or knew that the client intended, the information to influence these plaintiffs' transactions.

Plaintiffs argue that a question of fact remains under the Restatement test because Peter Ruma, a Deloitte partner, testified that he was aware of both how CBS operated and that creditors and vendors use financial statements. We disagree. A general awareness that creditors and vendors use financial statements does not constitute evidence that defendant knew that any particular creditor would use its reports and the financial statements. Accordingly, under the Restatement test, plaintiffs have not established that defendant owed a duty to them.

With regard to the remaining plaintiffs, they cite no authority for the proposition that an accountant may be held liable to a third party who did not receive both the audited financial statements and the auditor's report. Even the *Rosenblum* court limited the applicability of the foreseeability test to third parties that received the entire audited financial statement. See *Rosenblum*, *supra* at 352-353. We decline plaintiffs' invitation to extend accountant liability to third parties who did not receive both the audited financial statements and the auditor's report.[4]

Finally, plaintiffs argue that the trial court should have allowed them to amend their complaint to include allegations of gross negligence and intentional misrepresentation. This Court will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion that results in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

Amendment is generally a matter of right rather than grace. *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 456; 502 NW2d 696 (1992). A trial court should freely grant leave to amend if justice so requires. MCR 2.118(A)(2). Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Phinney v Verbrugge*, 222 Mich App 513, 523; 564 NW2d 532 (1997).

The trial court held that a motion to amend plaintiffs' complaint to add an allegation of gross negligence would be futile because plaintiffs had not cited any case law that held that the scope of an auditor's duty to third parties varies depending on whether negligence or gross negligence is alleged. Although on appeal plaintiffs cite "*Ultramares* [*Corp v Touche, Niven & Co*, 255 NY 170, 182-183; 174 NE 441; 74 ALR 1139 (1931)] and its progeny," the *Ultramares* court held that an accountant must be in privity of contract with the person seeking to impose

liability or there must be a bond "so close as to approach that of privity." *Ultramares*, *supra* at 182-183. Thus, *Ultramares* provides no support for plaintiffs' claim, and the trial court correctly found that a motion to amend plaintiffs' complaint would be futile.

The trial court also found that a motion to amend plaintiffs' complaint to add a claim of fraud would be futile. We agree. In order to state a claim for fraud or misrepresentation, plaintiff must prove (1) that defendant made a material representation; (2) that the representation was false; (3) when defendant made the representation, defendant knew it was false, or made it recklessly without knowledge of its truth or falsity; (4) that defendant made it with the intent that plaintiff would act upon it; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff suffered injury. *James v City of Burton*, 221 Mich App 130, 134-135; 560 NW2d 668 (1997). The trial court found that plaintiffs were unable to establish that defendant made a representation to them or that defendant made a misrepresentation with the intention that it would be acted on by plaintiffs. Plaintiffs do not point to any evidence in the record that suggests that these factual findings were erroneous. Accordingly, the trial court did not abuse its discretion in refusing to allow plaintiffs to amend their complaint.

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Maura D. Corrigan
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra

[1] *Davis v Lhim*, 124 Mich App 291; 335 NW2d 481 (1983), remanded 422 Mich 875 (1985). In 1989, the Michigan Legislature codified mental health professionals' duty to warn third parties of danger from their patients. See MCL 330.1946; MSA 14.800(946).

[2] *Duvall v Golden*, 139 Mich App 342; 362 NW2d 275 (1984).

[3] *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974).

[4] As another court explained:

> Our holding that reliance on the audited financial statements is required in these kinds of cases stems in part from an understanding of the audit report. An audit report represents the auditor's opinion of the accuracy of the client's financial statement at a given period of time. The financial statements themselves are the representation of management, not the auditor. Isolated statements in the report particularly the net worth figure, do not meaningfully stand alone; rather, they are interdependent and can be fully understood and justifiably relied on only when considered in the context of the *entire* report, including any qualifications of the auditor's opinion and any explanatory footnotes included in the statements. [*Raritan River Steel Co*, *supra* at 207 (citations omitted).]