



Indiana, LLC (“Waldrip Development”) owned the post office in Henryville, Indiana, and Defendant Todd Waldrip owned and managed Waldrip Development.

On March 3, 2012, a tornado damaged the roof of the building housing the post office. Berkley was the third party claims adjuster for a claim asserted by Waldrip Development related to the tornado damage sustained by the post office. Pursuant to the lease, Waldrip Development was contractually obligated to repair the damage to the roof of the building. Berkley originally issued a joint check to Waldrip Development and the mortgage holder of the property in settlement of the claim. At the request of Waldrip Development, however, Berkley subsequently cancelled the joint check and made the check directly payable to a friend of Mr. Waldrip and another unknown individual. Mr. Waldrip then misappropriated the funds and failed to use the insurance proceeds to repair the building. Instead, the lessee of the building, the United States Post Office (“USPS”), completed the repairs at its own expense on November 8, 2012.

At this same time, Waldrip Development was experiencing financial difficulties and its lender filed a foreclosure action in Clark Circuit Court II. On February 28, 2013, Crown Holdings purchased the building housing the post office as part of the foreclosure action. On March 8, 2013, the USPS sent a demand letter to Waldrip Development requesting reimbursement for \$45,274.42, the cost of the repairs. This letter was not sent to Crown Holdings. The USPS then negotiated an assignment of the Waldrip development lease with Crown Holdings. Throughout these negotiations, neither Crown Holdings nor the agent for USPS who negotiated the assignment was aware that the USPS had paid for the repairs to the roof. More than a year after the assignment, the

USPS began deducting the cost of the building repairs from rent owed to Crown Holdings under the lease.

On January 28, 2015, Crown Holdings filed its complaint in this action. Crown Holdings amended its complaint on June 23, 2015, alleging various claims against various defendants. The only claim brought against Berkley in the Amended Complaint is a common law claim for aiding and abetting civil fraud. Berkley has now moved to dismiss that claim.

### **Legal Analysis**

#### **I. Standard of Review**

Berkley has filed its motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). In this procedural context, the Court must accept as true all well-pled factual allegations in the complaint and draw all ensuing inferences in favor of the non-movant. *Lake v. Neal*, 585 F.3d 1059, 1060 (7th Cir. 2009). Nevertheless, the complaint must “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,” and its “[f]actual allegations must . . . raise a right to relief above the speculative level.” *Pisciotta v. Old Nat’l Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007) (citations omitted). The complaint must therefore include “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see* Fed. R. Civ. P. 8(a)(2). Stated otherwise, a facially plausible complaint is one which permits “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

#### **II. Discussion**

Berkley first argues that Crown Holdings fails to state a valid claim for “aiding and abetting a civil fraud” because no such tort is recognized under Indiana law.<sup>1</sup> Crown Holdings rejoins that while Indiana courts may not have explicitly recognized the claim of aiding and abetting a civil fraud, they have adopted Section 876 of the Restatement (Second) of Torts concerning aiding and abetting for intentional torts such as fraud. Accordingly, Crown Holdings argues that its claim against Berkley should not be dismissed on the grounds that it is not a recognized claim under Indiana law.

A similar issue was addressed in *Abrams v. McGuireWoods LLP*, 518 B.R. 491 (N.D. Ind. 2014). In *Abrams*, the court addressed whether Indiana recognizes aiding and abetting breach of fiduciary duty as a cause of action. Observing that Indiana courts recognize liability for breach of fiduciary duty as well as aiding and abetting liability for torts in general, the court determined that it would “not represent a departure for Indiana courts to recognize aiding and abetting liability for the particular tort of breach of fiduciary duty.” *Id.* at 499-500.

In analogous fashion, we are persuaded that even though it may not yet have specifically recognized the cause of action of aiding and abetting civil fraud, the Indiana Supreme Court would likely do so. As in *Abrams* with regard to breach of fiduciary duty claims, Indiana courts recognize liability for civil fraud claims. *E.g.*, *Finney v. Relphorde*, 612 N.E.2d 191 (Ind. Ct. App. 1993) (discussing the availability of treble damages upon a finding of civil fraud under Indiana law). Moreover, “Indiana courts

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<sup>1</sup> Because this is a diversity case, Indiana law applies to the substantive claims. *RLI Ins. Co. v. Conseco, Inc.*, 543 F.3d 384, 390 (7th Cir. 2008).

have adopted Section 876 of the *Restatement (Second) of Torts* concerning aiding and abetting ... for both intentional torts and negligence actions.” *Pinkney v. Thomas*, 583 F. Supp. 2d 970, 978-79 (N.D. Ind. 2008) (citations omitted). Accordingly, although neither party has pointed us to nor has our research revealed an Indiana case expressly recognizing liability for aiding and abetting civil fraud, we believe it is likely that an Indiana court would allow such a claim to go forward, and we therefore will not dismiss Crown Holdings’s claim against Berkley on this basis.

This does not end our inquiry, however. Having determined that Indiana courts would likely recognize a claim for aiding and abetting civil fraud, we turn next to determine whether Crown Holdings has adequately pled such a claim. For the reasons detailed below, we find that it has not. As Berkley argues, Crown Holdings has failed to plausibly allege an underlying civil fraud claim and therefore cannot state an aiding and abetting claim against Berkley. In short, without the underlying fraud, there is nothing that Berkley could be deemed to have aided and abetted.

To state a claim for fraud, a plaintiff must allege: “(1) a material misrepresentation of past or existing facts; (2) made with knowledge or reckless ignorance of falsity; (3) which caused the complainant to rely on the misrepresentation to the complainant’s detriment.” *Ohio Farmers Ins. Co. v. Indiana Drywall & Acoustics, Inc.*, 970 N.E.2d 674, 684 (Ind. Ct. App. 2012). The underlying fraud claim alleged here is brought against Waldrip Development, Mr. Waldrip, and Unknown Defendant. Crown Holdings alleges that these defendants knew that the insurance proceeds were to be used exclusively for repair of the post office, and rather than use those funds for that purpose,

Mr. Waldrip requested that the joint check issued by Berkley be cancelled and reissued as a single payee check payable to the Unknown Defendant. Crown Holdings further alleges that, once Berkley did as requested, Waldrip Development, Mr. Waldrip, and/or Unknown Defendant misappropriated the insurance proceeds.

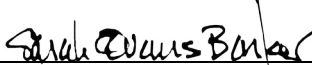
However, there is no allegation in the Amended Complaint that Waldrip Development, Mr. Waldrip, or Unknown Defendant at any point had communicated with Crown Holdings such that any of the three did make or could have made a material misrepresentation to Plaintiff nor is there any allegation that Crown Holdings relied to its detriment on any such misrepresentation, as required to state a claim for fraud under Indiana law. Accordingly, because Crown Holdings has not framed an underlying claim for fraud, its claim against Berkley for aiding and abetting civil fraud cannot stand.

### **III. Conclusion**

For the foregoing reasons, Defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

Date: 2/12/2016

  
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SARAH EVANS BARKER, JUDGE  
United States District Court  
Southern District of Indiana

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