UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

FERRIS & SALTER, P.C.

Plaintiff,

v. **File No. 0:12-cv-00109-JRT-SER**

THOMSON REUTERS CORPORATION,
d/b/a WEST PUBLISHING CORPORATION,
d/b/a FINDLAW.

Defendant.

MEMORANDUM OF LAW
PLAINTIFF'S ANSWER TO DEFENDANT'S MOTION TO DISMISS
AND TO ENLARGE ANSWER PERIOD

INTRODUCTION AND FACTS

Plaintiff Ferris & Salter, P.C. is a long-standing plaintiff's personal injury Ann Arbor, Michigan law firm specializing in medical negligence, wrongful death, and serious personal injury claims. Ferris and Salter, P.C., brings this professional negligence action and breach of contract action against Thomson Reuters Corporation because its professional computer engineers in November 2008 destroyed the connection/link between Plaintiff's web-site inquiry section and Plaintiff's e-mails, which was in existence for years before Plaintiff hired Defendant. As a result, Plaintiff lost hundred of thousands of dollar in attorneys fees over a 15 month period.

For many years prior to 2008, Plaintiff had a website, Ferris-Salter.com, with an inquiry section for clients to send e-mail/inquiries to Don Ferris and Heidi Salter-Ferris concerning plaintiff's personal injury claims. From its website, Plaintiff received hundreds of inquiries each year, resulting in numerous meritorious cases being filed, and successfully litigated, with hundreds of thousands of dollars in attorneys fees being generated for Plaintiff and its principals..

During this same period prior to 2008, Plaintiff paid thousands of dollars to web-based services which specialized in directing cases to its subscribing law firms. Among these services were medicalmalpractice.com, lawyers.com, druglitigationlawyers.com, ExpertHub.com, Lawfirms.com, and LeadManager@SWIDigital.com. These services directed hundreds of e-mail inquiries to Plaintiff's website each year, resulting in numerous meritorious cases being filed, and successfully litigated, with hundreds of thousands of dollars in attorneys fees being generated for Plaintiff and its principals.

Contrary to the claims of Defendant, Defendant did not develop Plaintiff's website. Part of Defendant's business is to provide professional services calling for specialized skill and knowledge in designing, re-designing, and hosting websites for law firms.

In November, 2008, Plaintiff hired Defendant to provide professional services to optimize Plaintiff's website, and to host its website. In performing these services, in November, 2008, Defendant's professional computer engineers and agents negligently

destroyed the previous connection/link between Plaintiff's web-site inquiry section and Plaintiff's e-mails, which was in existence before Plaintiff hired Defendant.

Defendants did not repair the connection/link until February, 2010. During this 15 month period, Plaintiff paid the previously listed services thousands of dollars for the case inquiries/leads which Plaintiff never received because of Defendant's agents' negligence. As a direct and proximate result of Defendant's employees' and agents' negligence in destroying the connection/link for over 15 months, Plaintiff lost numerous clients with meritorious cases, and lost hundreds of thousands of dollars in attorney's fees.

Plaintiff discovered Defendant's negligence in February, 2010, when Communications Concepts, Inc. attempted to send a splash page to the connection /link which Defendant's destroyed. It never arrived at the web-site. Plaintiff's then contacted Defendant, **which in a series of e-mails, admitted that they had negligently destroyed our connection/link.** Defendant found the 730 e-mails (along with hundreds of others not at issue in this lawsuit), and forwarded them to Plaintiff. However, by this time, clients with meritorious cases had hired other attorneys.

PROCEDURAL HISTORY

Prior to filing a lawsuit for professional negligence, Plaintiff demanded consequential damages from Defendant for its admitted negligence. When Defendant refused, Plaintiff filed a professional negligence case in Washtenaw County Circuit Court. Plaintiff did not allege a breach of contract. Plaintiff's complaint alleged professional negligence only.

Defendant's timely removed the professional negligence case to the Federal District Court for the Eastern District of Michigan, Case No. 5:11-CV-12448-JAC-MJH, as a diversity action in which the damages at issue are more than $75,000. 28 U.S.C. 1441(a).

Defendant then filed a Motion to Dismiss or in the Alternative, to Transfer the case to this Court under Rule 12(b)(6) and/or 28 U.S.C. 1404(a). *See* Defendant's Motion (copy attached to the accompanying Declaration of Don Ferris as Exhibit 1.) In making the motion, Defendant did not argue that Plaintiff's claim (which again was solely for professional negligence) should be dismissed for lack of merit or failure to state a claim upon which relief could be granted – Defendant instead argued that the forum selection clause in the contract between the parties controlled, and the case had to be litigated in Minnesota under that clause.

Plaintiff argued against the transfer, contending that the contract did not control because this was a professional negligence action, which under Minnesota law is independent of the contract. *See* Plaintiff's Answer to Motion to Dismiss (copy attached to the accompanying Declaration of Don Ferris as Exhibit 2). Plaintiff argued this was strictly a tort/professional negligence action not based on the contract; and under Minnesota law, it is clear that a professional has a duty, independent of any contract, to exercise such care, skill, and diligence as a person in that profession ordinarily exercises under the circumstances, and that a tort action independent of the contract may be maintained to recover for economic loss. *See City of Eveleth v Ruble*, 302 Minn. 249, 253; 225 N.W.2d

521, 524 (Minn. 1974); and *Arden Hills North Homes Association v. Pemtom, Inc.,* 475 N.W.2d 495 (Minn. App. 1991) Defendant's computer engineers who destroyed Plaintiff's connection/link are professionals. Minnesota courts have stated that "[a] 'professional service,' within the meaning of an insurance exclusion 'is one calling for specialized skill and knowledge in an occupation . . . [t]he skill required to perform a professional service is predominantly intellectual or mental rather than physical.'" *Piper Jaffray Cos., Inc., v Nat'l Union Fire Ins. Co. of Pittsburg,* 967 F.Supp 1148, 1156 (D. Minn.1997) (quoting *Ministers Life v. St. Paul Fire & Marine Ins. Co.,* 483 N.W.2d 88, 91 (Minn. App. 1992). As such, the forum selection provision did not apply to this tort/professional negligence action.

Defendant filed a reply brief, but once again, Defendant did not ask that the professional negligence case be dismissed on its merits. *See* Defendant's Reply Brief (copy attached to the accompanying Declaration of Don Ferris as Exhibit 3.) While Defendant did not concede that it contracted to provided "professional services", and did not concede that Minnesota law permits Plaintiff to make a tort claim under the circumstances of this case, it stated:

> "This Court need not reach that issue [whether a tort claim was viable under Minnesota law]to decide the present motion, however, since Plaintiff's email claim plainly 'arises out of' the contracts, regardless of whether it is characterized as a tort claim or a contract claim." (fn. 3, Exhibit 3).

The District Court for the Eastern District of Michigan granted Defendant's Motion to Dismiss, finding:

1. That for a tort claimed filed in a Michigan court, Michigan law controls on the issue of whether Plaintiff can bring a claim for professional negligence. *See* Court's Opinion, p. 4 (copy attached as Ex. 1 to Declaration of John K. Rossman).

2. There is no precedent in Michigan to recognize computer consultants as professionals. *See* Court's Opinion, p. 5

3. Even if a tort action would lie, it would still arise out of the contracts, thus falling within the broad language of the forum selection clauses. *See* Court's Opinion, p. 6

4. The forum selection clause should be enforced by dismissing the case "without prejudice to the Plaintiff's ability to re-file this action in an appropriate forum." *See* Court's Opinion, p. 9.

Plaintiff has done so. The only action pending before the Federal District Court for the Eastern District of Michigan was a professional negligence action. Plaintiff has re-filed that professional negligence action in this Court, an appropriate forum..[1]

---

[1]Plaintiff has also added a Count II for breach of contract. In paragraph 32 of Count II – Breach of Contract, Plaintiff "contends that these negligent actions fall outside the parameters of the hiring agreement. If this Court rules otherwise, then Defendant's computer engineer's actions detailed in paragraph 29 above are a breach of contract."

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on it face.'" *Ashcroft v Iqbal,* 556 U.S. 662 (2009) (quoting *Bell v Atlantic Corp. v Twombly,* 550 U.S. 544, 570 (2007)).

ARGUMENT

I. ISSUE PRECLUSION DOES NOT BAR PLAINTIFF'S PROFESSIONAL\ NEGLIGENCE CLAIM

In order for Defendant to prevail on its claim that Plaintiff is collaterally estopped from bringing a professional negligence action under Minnesota law because of issue preclusion, Defendant must prove five elements:

> (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determine by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment.

Robinette v Jones, 476 F.3d 585, 589 (8th Cir. 2007) (quoting *Anderson v Genuine Parts Co.,* 128 F.3d 1267, 1273 (8th Cir. 1997). Plaintiff must prove **all five** elements.

The only one of these elements that Defendant can prove is the first – that the parties in this lawsuit are identical. Plaintiff will discuss the other four serially.

As to element 2, the issue sought to be precluded is not the same as the issue involved in the prior action. The issue in the District Court for the Eastern District of Michigan was

whether venue should be transferred. Defendant was not seeking a ruling on the merits of Plaintiff professional negligence claim, or whether Plaintiff had stated a claim that is plausible on its face. In fact, Defendant was instead arguing that the claim was subsumed by and arose out of the contract, and because of that, the forum selection clause of the contract applied.

As to element 3, the issue sought to be precluded was not actually litigated in the prior action. It must be remembered that District Judge Cook unequivocally found that in a tort claim filed in a Michigan court, Michigan law applies. Even though no Michigan court has decided the issue of whether computer engineers can be sued for professional negligence, Judge Cook found – based on an unpublished case in the Federal District Court for the Northern District Court interpreting Michigan law, that Michigan law does not recognize computer engineers as professionals. *Heidtman Steel Prods., Inc. v Compuware Corp.,* 2000 WL 621144, at *14 (N.D.Ohio, Feb. 15, 2000). In other words, Minnesota law had nothing to do with determining whether a tort claim filed in Michigan is viable. And regardless, when Judge Cook wrote "In any event, even if a tort action would lie, that action – based upon the allegedly severed link to Plaintiff's e-mal account, would "arise out of" the contracts (fn. 3, p. 6 Opinion), he agreed with Defendant's statement that:

> "This Court need not reach that issue to decide the present motion, however, since Plaintiff's email claim plainly 'arises out of' the contracts, regardless of whether it is characterized as a tort claim or a contract claim."
> (fn. 3, Exhibit 3).

As to element 4, the issue sought to be precluded was not determined by a valid and final judgment. **Plaintiff cannot overemphasize the final ruling of the Court:**

"[T]he Court grants the Defendant's motion to dismiss without prejudice to the Plaintiff's ability to re-file this action in an appropriate." (p. 9, Opinion)

The only cause of action that Plaintiff brought was a professional negligence action. If Judge Cook was making a decision which was dispositive of Minnesota law on professional negligence actions, he would not have dismissed this professional negligence action without prejudice to **re-file this action** in Minnesota.[2] By his ruling, Judge Cook gave explicit permission to Plaintiff to re-file its cause of action -- professional negligence action against Defendant --in Minnesota federal court.

As to the fifth element, the determination in the prior action was not essential to the prior judgment. Plaintiff will not reiterate what was stated above. Suffice it to say that any pronouncement on how this Court might rule on the viability of a professional negligence action under Minnesota law was clearly *dicta,* and played no role in Judge Cook's decision in his findings that:

1. That for a tort claimed filed in a Michigan court, Michigan law controls on the issue of whether Plaintiff can bring a claim for professional negligence. *See* Court' Opinion, p. 4 (copy attached as Ex. 1 to Declaration of John K. Rossman).

---

[2]Plaintiff agrees with Defendant that in this Court, Minnesota law would apply to Plaintiff's professional negligence claim, whereas Michigan law would apply in a Michigan action. In fact, the contract at issue provides that Minnesota law will apply.

2. There is no precedent in Michigan to recognize computer consultants as professionals. *See* Court's Opinion, p. 5

3. Even if a tort action would lie, it would still arise out of the contracts, thus falling within the broad language of the forum selection clauses. *See* Court's Opinion, p. 6

4. The forum selection clause should be enforced by dismissing the case "without prejudice to the Plaintiff's ability to re-file this action in an appropriate forum." *See* Court's Opinion, p. 9.

For these reasons, Plaintiff is not collaterally estopped from bring its professional negligence action by issue preclusion.

II. THE "LAW OF THE CASE" DOCTRINE LIKEWISE DOES NOT BAR PLAINTIFF'S PROFESSIONAL NEGLIGENCE CLAIM.

Contrary to Defendant's contention, Judge Cook did not base his dismissal without prejudice to re-file this action ruling on Minnesota law regarding professional negligence actions against computer engineers. Therefore, there is no "law of the case on this issue." In fact, Judge Cook specifically ruled that Minnesota tort law did not apply to his decision. That issue is a matter of first impression – whether in Minnesota, a professional negligence claim is viable against Defendant for the actions of its computer engineers in destroying the previous connection/link between Plaintiff's web-site inquiry section and Plaintiff's e-mails, which was in existence before Plaintiff hired Defendant. There is no published case directly on point.

Simply put, there was no settled issue that prevents re-litigation. *See Kansas Publ. Employees Ret. Sys. v. Blackwell, Sanders, Metheny, Weary, & Lombardi, L.C.,* 114 F.3d 679, 687 (8th Cir. 1997), *cert. denied,* 522 U.S. 1068 (1998). Moreover, unlike the five elements test applicable to "issue preclusion", the "law of the case" is a "doctrine of discretion, not a command to the courts." *Little Earth of the United Tribes, Inc. v U.S. Dept. Of Hous. & Urban Dev.,* 807 F.2d 1433, 1440 (8th Cir. 1986) (citing *Arizona v California,* 460 U.S. at 618. Because Judge Cook did not base his decision, even in part, on Minnesota law, and cited no Minnesota tort law in his opinion, there is no reason for this Court to find that Minnesota state courts will not recognize a tort claim for professional negligence against Defendant for the negligence of its computer engineers.

III. THE CIRCUMSTANCES OF THIS CASE PERMIT A PROFESSIONAL NEGLIGENCE CLAIM AGAINST DEFENDANT.

As permitted by Judge Cook, Plaintiff re-filed its professional negligence claim against Defendant in this Court. Count I of the complaint alleges professional negligence – based on Defendant's professional computer engineers destroying the connection/link to the website from client inquiries. [3] This is an issue of first impression. There is no case law directly on point. However, there are indications in Minnesota law that computer engineers

---

[3]As was stated previously, Plaintiff has added a second count of Breach of Contract, alleging in paragraph 32 that "Plaintiff contends that these negligent actions fall outside the parameters of the hiring agreement. If this Court rules otherwise, then Defendant's computer engineer's actions detailed in paragraph 29 above are a breach of contract."

should be held to a professional standard of care, and can be sued for professional negligence.

Minnesota law is clear that a person who suffers damages as a result of professional negligence is not limited to contractual damages. There is a tort cause of action independent of the contract, for damages caused by violation of the standards applicable to professionals. Under Minnesota law, it is clear that a professional has a duty, independent of any contract, to exercise such care, skill, and diligence as a person in that profession ordinarily exercises under the circumstances, and that a tort action independent of the contract may be maintained to recover for economic loss. *See City of Eveleth v Ruble*, *supra* at 524; and *Arden Hills North Homes Association v. Pemtom, Inc., supra.* Defendant's computer engineers who destroyed Plaintiff's connection/link are professionals. Minnesota courts have stated that "[a] 'professional service,' within the meaning of an insurance exclusion, 'is one calling for specialized skill and knowledge in an occupation . . . [t]he skill required to perform a professional service is predominantly intellectual or mental rather than physical.'" *Piper Jaffray Cos., Inc., v Nat'l Union Fire Ins. Co. of Pittsburg, supra* at 1156.

Defendant argues that this ruling should be limited to insurance contract exclusions. Plaintiff admits that the ruling was in that context – however, there is no reason to conclude that Minnesota state courts would not come to the same conclusion in determining the viability of a tort action against a computer engineer for professional negligence. After all,

computer engineers "have a specialized skill and knowledge in an occupation', and they perform "predominately intellectual or mental" skills, not physical.

Defendant has found four cases in which courts interpreting other state's laws have held otherwise. Two are published – *Columbus McKinnon Corp. v China Semiconductor Co.,* 867 F. Supp 1173, 1182-83 (W.D. N.Y. 1994) interpreting New York state law; and *Racine Cnty v Oracular Milwaukee, Inc.,* 767 N.W.2d 280, 286 (Wis. Ct. App. 2009) *aff'd on other grounds,* 781 N.W.2d 88 (Wis. 2010) interpreting Wisconsin law.[4] These four cases appear to be the sum total supporting Defendant's conclusion that this Court should rule that Minnesota law conclusively prohibits Plaintiff's professional negligence action. Defendant refers to these two published cases and two unpublished cases, the "strong majority of courts"which hold that computer engineers may not be sued for professional negligence.

Plaintiff has found a number of cases which suggest that these four cases will not be followed by Minnesota state courts in deciding this issue. This Court should consider four other cases in determining whether Plaintiff should be allowed to sue Defendants for their computer engineers' destroying Plaintiff's connection/link – an action which was not even contemplated by the contract, nor for which Defendant's engineers were hired.

In *Diversified Graphics, LTD. v Groves,* 868 F.2d 293 (8th Cir., 1988), Diversified sued Groves and Ernst & Whinney for negligence, breach of fiduciary duty, and breach of

---

[4]The two unpublished cases: a Northern District of Ohio federal case interpreting Michigan law, *Heidtmann Steel Products, supra;* and a trial court in Pennsylvania interpreting Pennsylvania law, *Rapidigm, Inc. v ATM Mgmt. Servs., Inc.,* 2003 WL 23146480 (July 10, 2003).

contract for it failure to provide a computer system for its business that was "turnkey", instead providing them with a system that was difficult to operate and failed to adequately meet its needs. A jury awarded substantial damages to Diversified. On appeal, E & W argued that they should have been held to an ordinary, rather than a professional standard of care. The Eighth Circuit Court of Appeals disagreed, finding that Diversified had properly pled and proved a negligence action and a professional standard of care based on allegations that E & W had failed to act reasonably in light of its superior knowledge and expertise in the area of computer systems. The Court therefore upheld the negligence verdict. [5]

Applying the standard of review for Rule 12(b)(6) motion – which is whether Plaintiff has stated a "claim for relief that is plausible on it face.'" *Ashcroft v Iqbal, supra* -- this Court should find, for the same reasons as the Eighth Circuit found in *Diversified*, that Plaintiff has properly pled a professional negligence action based on allegations that Plaintiff hired Defendant to provide professional engineer services to optimize its website.

In *Martin v Indiana Michigan Power Company,* 383 F.3d 574 (6th Cir. 2004), the Court recognized that "computer professionals" are exempt from the overtime provisions of the FLSA. In order to be a "computer professional", and exempt from overtime, the employee must be compensated on a salary or fee basis of not less than $250 per week and/or on an hourly basis of 6 and ½ time the minimum wage (approximately $40 per hour), and the employees "primary duty consists of the performance of . . . "[w]ork that requires theoretical

[5] However, the Court also found that the damage award was duplicative because the jury awarded damages for both professional negligence, and breach of fiduciary duty.

and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and [the employee is] employed and engaged in these activities as a computer analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field." Plaintiff contends that Defendant's employees who destroyed Plaintiff's connection link meets this definition of a "computer professional," and can be sued for professional negligence.

In *Data Processing Services, Inc. v L.H. Smith Oil Corp.,* 492 N.E.2d 314 (Ind. App. 1986), the Court found that Smith had properly sued Data Processing for breach of an agreement to provide computer services, and was not restricted by the UCC provisions relating to the sale of goods, finding:

> "Those who hold themselves out to the world as possessing skill and qualification in their respective trades or professions impliedly represent they possess the skill and will exhibit the diligence ordinarily possessed by well informed members of the trade or profession. . . . [citations omitted, citing cases involving attorneys, construction company, roofing company, building contract, architect, and doctor]. We hold these principles apply with equal force to those who contract to develop computer programming.

Finally, Minnesota courts have always recognized a tort action for negligence against an engineer – that a person who is injured by the negligence of an engineer may sue, even absent a contract. *See Waldor Pump & Equipment Co. v Orr-Schelen-Mayeron & Assocs., Inc.,* 386 N.W.2d 375 (Minn. App. 1986), citing *City of Mounds View v Wallijarvi,* 263 N.W.2d 420, 423 (Minn. 1978). "The reasonable skill and judgment expected of professionals must be rendered to those who foreseeably rely upon the services."

In *City of Mounds, supra,* the Supreme Court explained the reasoning underlying the rule:

"Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. Thus, doctors cannot promise that every operation will be successful; a lawyer can never certain that a contract he drafts is without latent ambiguity; and an architect cannot be certain that a structural design will interact with natural forces as anticipated. Because of the inescapable possibility of error which inheres I these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonable expected from similarly situated professionals." *Id.* at 424.

Plaintiff contends that the same reasoning applies to computer engineers. They have the same degree of discretion and uncertainty as a structural engineer, an electrical engineer, a chemical engineer, an industrial engineer, an aeronautical engineer, etc. Simply put, there is nothing different about a computer engineer from other engineers that prevents them from being sued for professional negligence under Minnesota law.

CONCLUSION

For all of the above reasons, this Court should find that Plaintiff has stated a "claim for relief that is plausible on it face.'" for professional negligence, and deny Defendant's Motion to Dismiss Count I of Plaintiff's Complaint.

Dated: April 4, 2012

/s/ Don Ferris

DON FERRIS P26436
FERRIS & SALTER, P.C.
Attorney for Plaintiff
4158 Washtenaw Ave.
Ann Arbor, MI 48108

313/677-2020

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to John Rossman, Esq., rossmanj@moss-barnett.com

/s/ Jennifer Lacy
Jennifer Lacey