

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 8, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1986

Cir. Ct. No. 2004CV1830

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**THE ESTATE OF VERA RUPPER, BY HER PERSONAL
REPRESENTATIVE, ROBERT GEIMER,**

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

WEST BEND MUTUAL INSURANCE COMPANY,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,**

**HARRY MACCO AND HILLCREST PROPERTIES, LTD., D/B/A BISHOP'S
COURT,**

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,**

v.

VICTORIA A. HALL,

THIRD-PARTY DEFENDANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed; cross-appeal dismissed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Estate of Verna Rupiper appeals an amended order for judgment dismissing its claims against Henry Macco. The Estate argues the circuit court erred in concluding Macco is immune from suit because of his status as licensee of a community based residential facility. We affirm the circuit court’s dismissal of the Estate’s claims against Macco.

¶2 Macco and his co-defendant, Hillcrest Properties, Ltd., cross-appeal the circuit court’s denial of their motion in limine to exclude certain evidence. Because we affirm the circuit court’s dismissal of Macco, this cross-appeal is moot as to him. Because Hillcrest Properties is not a respondent to the Estate’s appeal, it cannot file a cross-appeal. We therefore dismiss Hillside Properties’ cross-appeal.

BACKGROUND

¶3 The following facts are taken from the Estate’s amended complaint. Verna Rupiper was a resident of Bishop’s Court, a community based residential facility (CBRF), from March 2001 to June 2003. A CBRF is “a place where 5 or more adults ... who do not require care above intermediate level nursing care reside” WIS. STAT. § 50.01(1g).¹ While serving as executive administrator of

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Bishop's Court, Victoria Hall wrongfully transferred \$372,725.17 from Rupiper's accounts to herself. Rupiper allegedly received inadequate care at Bishop's Court, specifically in that she was not transferred to a nursing home when Bishop's Court could no longer meet her needs.

¶4 The Estate's amended complaint includes claims against Harry Macco, the state-designated licensee of Bishop's Court under WIS. STAT. ch. 50 and WIS. ADMIN. CODE § HFS 83 (July 2001),² and Hillcrest Properties, the owner and operator of Bishop's Court.³ The second cause of action, "Negligence—Harry Macco," reads in pertinent part:

18. In his capacity as the licensee of the facility, Harry Macco owed certain duties to Verna Rupiper, including, but not limited to those set forth in the Wisconsin Administrative Code and Wisconsin Statutes and the standard of care applicable to the operation of a CBRF.
19. Harry Macco failed to comply with his duties and obligations under the applicable provisions of the Wisconsin Administrative Code, the Wisconsin Statutes, and the standards of care; his negligence included, but was not limited to:
 - a. Failing in his obligations to ensure that Bishop's Court and its operation complied with all laws governing the facility;
 - b. Failing to recognize Verna Rupiper was incompetent and failing to refer Verna Rupiper to protective services;

² All references to WIS. ADMIN. CODE § HFS 83 are to the July 2001 version that was in effect at the time Rupiper was a resident at Bishop's Court. In the current version of the code, HFS 83 is DHS 83 and has been extensively rewritten.

³ Macco and Hillcrest assert that a different entity, Alpha Family Limited Partnership, is the actual owner and operator of Bishop's Court. The distinction between Hillcrest and Alpha is immaterial for purposes of this appeal.

- c. Failing to prevent the existence of and continuation of a financially exploitive relationship between Victoria A. Hall and Verna Rupiper;
- d. Failing to protect Verna Rupiper from a known substantial risk to her health, safety and welfare, causing harm;
- e. Failing to timely transfer Verna Rupiper to a skilled nursing facility;
- f. Failing to ensure prompt and adequate treatment for Verna Rupiper;
- g. Failing to acknowledge, or even attempting to have knowledge of, the systemic failures of the day-to-day operations of Bishop's Court and failing to put into place reasonable measures to ensure the health, safety and welfare of Verna Rupiper.

The third cause of action is a claim for punitive damages against Hillcrest and Macco. It alleges that Macco had a nondelegable duty under the Wisconsin statutes and administrative code to have knowledge of and address systemic failures at Bishop's Court.

¶5 Macco moved to dismiss the claims against him, arguing he cannot be sued for violations of his duties under WIS. STAT. ch. 50 and WIS. ADMIN. CODE § HFS 83. The circuit court granted Macco's motion, concluding that the allegations against him were solely based on violations of his statutory and code-based duties and that such violations do not give rise to a private cause of action. The court entered an amended order for judgment, and the Estate appeals. Macco and Hillcrest cross-appeal, challenging the circuit court's denial of their motion in limine to exclude evidence of alleged medication errors, inadequate staffing, petty thefts and similar occurrences at Bishop's Court.

DISCUSSION

I. The Estate's appeal

¶6 The Estate argues the circuit court erred by granting Macco's motion to dismiss. A motion to dismiss questions the legal sufficiency of the plaintiff's complaint. *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). The legal sufficiency of a complaint is a question of law that we review independently. *Williams v. Security S & L Ass'n*, 120 Wis. 2d 480, 482, 355 N.W.2d 370 (Ct. App. 1994). We must accept as true the facts alleged in the complaint when reviewing a motion to dismiss, *Walberg v. St. Francis Home, Inc.*, 2005 WI 64, ¶6, 281 Wis. 2d 99, 697 N.W.2d 36, and dismissal is improper if there are any conditions under which the plaintiff could recover, *Morgan v. Pennsylvania Gen. Ins. Co.*, 87 Wis. 2d 723, 733, 275 N.W.2d 660 (1979).

¶7 Here, there are no conditions under which the Estate can recover from Macco. CBRF residents do not have a private cause of action against a CBRF licensee for statutory or administrative code violations. *Farr v. Alternative Living Servs., Inc.*, 2002 WI App 88, 253 Wis. 2d 790, 643 N.W.2d 841.

¶8 In *Farr*, Clara Farr was negligently permitted to leave a CBRF on a cold winter morning and suffered frostbite injuries. *Id.*, ¶3. Farr sued the CBRF, alleging it had violated WIS. STAT. ch. 50 and WIS. ADMIN. CODE § HFS 83. *Id.*, ¶6. The CBRF moved to dismiss Farr's complaint, arguing that the complaint only alleged violations of statutory and code-based duties, which did not give rise to a private cause of action. *Id.* The trial court granted the motion and dismissed Farr's claims.

¶9 Upon review, we affirmed the dismissal of Farr’s statutory and code-based claims. We noted that WIS. STAT. § 50.10 provides a private cause of action for nursing home residents for violations of WIS. STAT. ch. 50 and the administrative rules promulgated under it. *Id.*, ¶15. However, § 50.10 applies only to residents of nursing homes, which are different from CBRFs by statutory definition.⁴ *Id.*, ¶16. Additionally, the private remedy in § 50.10 is limited to an action for mandamus or injunctive relief. *Id.* The *Farr* court therefore concluded:

[W]e find no “clear indication” of a legislative intent in chapter 50 to permit CBRF residents to sue for compensatory and punitive damages based solely on alleged violations of the standards for CBRFs set out in the statutes or administrative code.

Id. *Farr* clearly holds that a CBRF resident has no private cause of action for violations of statutory and code-based duties. Because the Estate’s claims against Macco stem from his statutory and code-based duties as the licensee of Bishop’s Court, the trial court properly dismissed them.

¶10 The Estate points out that the *Farr* court allowed the plaintiff’s common law negligence claim to proceed even though her statutory claims failed. The Estate therefore argues the crucial inquiry is whether its amended complaint, like the complaint in *Farr*, is worded broadly enough to include a common law negligence claim.

¶11 In *Farr*, the defendant was both the licensee and the owner and operator of the CBRF. The court found that in addition to its statutory duties as

⁴ “‘Nursing home’ means a place where 5 or more persons ... reside, receive care or treatment and, because of their mental or physical condition, require access to 24-hour nursing services, including limited nursing care, intermediate level nursing care and skilled nursing services.” WIS. STAT. § 50.01(3).

licensee, it had undertaken an added duty “to provide adequate care to Farr” *Id.*, ¶11. However, the Estate has not alleged that Macco personally undertook any duty to Rupiper beyond his duties as licensee. All of the Estate’s allegations against Macco are inexorably linked to his status as Bishop’s Court’s licensee.

¶12 The Estate alleges Macco “failed to comply with his duties and obligations under the applicable provisions of the Wisconsin Administrative Code, the Wisconsin Statutes, and the standards of care.” Pursuant to the administrative code, a CBRF licensee shall ensure the facility and its operation comply with all laws, shall report changes in the client group, shall refer residents who are incompetent to county protective services, shall conduct criminal background checks on the administrator and other employees, and “may not permit the existence or continuation of any condition which is or may create a substantial risk to the health, safety or welfare of any resident.” WIS. ADMIN. CODE § HFS 83.11(3). Failing to do these things is essentially what the Estate’s amended complaint accuses Macco of doing. None of the Estate’s allegations against Macco fall outside his obligations as a licensee.

¶13 The Estate cannot avoid the holding in *Farr* simply by mislabeling alleged statutory or code violations as common law negligence claims. Regardless of how they are labeled, the Estate’s claims against Macco are the sort of claims *Farr* indicated may not proceed. The Estate has not alleged any common law duties independent of the obligations Macco assumed as a licensee. Therefore, pursuant to *Farr*, the trial court properly dismissed Macco.

¶14 In its brief, the Estate now argues “the pleadings allege that Macco, as the *owner, operator and licensee* of Bishop’s Court, had duties to Verna Rupiper and breached those duties, resulting in harm to Rupiper.” (Emphasis

added.) This statement is false. Nowhere in its amended complaint does the Estate allege that Macco is the owner or operator of Bishop's Court. In fact, the amended complaint expressly states, "Hillcrest Properties, Ltd., is a Wisconsin corporation that owns and operates two Wisconsin licensed CBRFs: Bishop's Court ... and Birch Creek[.]" The Estate is attempting to rewrite its amended complaint on appeal to allege that Macco had common law duties to Rupiper as owner and operator of Bishop's Court. However, "[o]ur review of a motion to dismiss is limited to the allegations in the complaint." *Noonan v. Northwestern Mut. Life Ins. Co.*, 2004 WI App 154, ¶30, 276 Wis. 2d 33, 687 N.W.2d 254. Because the Estate's amended complaint does not allege that Macco was the owner and operator of Bishop's Court, the Estate cannot now argue that Macco had common law duties to Rupiper stemming from a role as owner and operator.

II. Macco and Hillcrest's cross-appeal

¶15 Macco and Hillcrest cross-appeal, challenging the circuit court's denial of their motion in limine to exclude evidence of alleged medication errors, inadequate staffing, petty thefts and similar occurrences at Bishop's Court. Because we affirm the circuit court's dismissal of the Estate's claims against Macco, this cross-appeal is moot as to him.

¶16 WISCONSIN STAT. RULE 809.10(2)(b) states that only a "respondent" may file a cross-appeal. A respondent is one who is adverse to an appellant or cross-appellant. WIS. STAT. RULE 809.01(6). Adversity is determined by review of "the notice of appeal and the judgment or order appealed from." *Kettle Moraine Hosp., Inc. v. Hale*, 129 Wis. 2d 373, 375, 385 N.W.2d 514 (Ct. App. 1986).

¶17 In *Estate of Donnell v. City of Milwaukee*, 160 Wis. 2d 529, 532, 466 N.W.2d 670 (Ct. App. 1991), homeowners sued the City of Milwaukee and Target Stores for negligence, trespass, nuisance and condemnation. The trial court granted summary judgment as to both defendants, and the homeowners only appealed the order granting summary judgment to the City. *Id.* The City cross-appealed, asking the court to reverse summary judgment in favor of Target in the event it reversed summary judgment in favor of the City. Target then filed a cross-appeal, challenging the trial court’s dismissal of its claim for third-party contribution and indemnity. *Id.* at 533. The issue became whether Target was a respondent with respect to the homeowners’ appeal. We held it was not:

The residents’ notice of appeal only sought to challenge the trial court’s grant of summary judgment to the City. The notice did not request this court to review the trial court’s grant of summary judgment to Target. It follows that Target was not an adverse party to the homeowners’ appeal and thus not a respondent in that appellate proceeding within the meaning of Rule 809.10(2)(b), Stats.

Id. at 534 (footnote omitted).

¶18 Here, as in *Estate of Donnell*, the Estate has only appealed the dismissal of one defendant. According to the notice of appeal, the Estate appeals “the Amended Order for Judgment ... dismissing Henry Macco as a Defendant in this action.” The trial court’s amended order for judgment states, “Defendant, Harry Macco, is dismissed, with prejudice, from this action on its merits.” Neither the notice of appeal nor the amended order for judgment mentions Hillcrest. After examining the notice of appeal and the order appealed from, we conclude that for purposes of the Estate’s appeal, Hillcrest is not adverse to the Estate. As a result, Hillcrest is not a respondent to the Estate’s appeal and has no right to file a cross-appeal. We therefore dismiss Hillcrest’s cross-appeal.

By the Court.—Order affirmed; cross-appeal dismissed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

