COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP232 **Cir. Ct. No. 2012CV2146**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

BRUCE W. BULLAMORE AND RUSSELL C. BULLAMORE,

PLAINTIFFS-APPELLANTS,

V.

ROBERT W. BEDNAR, INDIVIDUALLY AND IN HIS CAPACITY AS SUCCESSOR CO-TRUSTEE OF THE ELEANOR H. ROBSEL REVOCABLE TRUST DATED JANUARY 25, 2008, AS AMENDED BY THE FIRST AMENDMENT TO TRUST DATED DECEMBER 3, 2008, ROBBYN M. SHYE, RICHARD ROBSEL, INDIVIDUALLY AND IN HIS CAPACITY AS SUCCESSOR CO-TRUSTEE OF THE ELEANOR H. ROBSEL REVOCABLE TRUST DATED JANUARY 25, 2008, AS AMENDED BY THE FIRST AMENDMENT TO TRUST DATED DECEMBER 3, 2008 AND NEIL F. GUTTORMSEN, IN HIS CAPACITY AS TRUSTEE OF THE RUSSELL W. BULLAMORE AND ELEANOR H. BULLAMORE REVOCABLE TRUST DATED JUNE 3, 2003,

DEFENDANTS,

EUGENE J. BROOKHOUSE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Brothers Bruce W. and Russell C. Bullamore appeal an order dismissing their claims against Attorney Eugene J. Brookhouse. After their father died, Brookhouse assisted their former stepmother in redoing her estate plan, eliminating them as beneficiaries. We conclude that the Bullamores pled no claim by which Brookhouse owed them, third-party nonclients, a duty, and that the court acted properly in dismissing their complaint with prejudice and in denying their motion for leave to amend their complaint a third time. We affirm.

¶2 Russell W. Bullamore married Eleanor H. Bednar. It was the second marriage for both. Each had two children: Russell's were Bruce and Russell, "Jr.", used only for clarity; Eleanor's were Robert Bednar and Robbyn Shye.

¶3 On June 3, 2003, Attorney Neil Guttormsen created for Russell and Eleanor the Russell W. Bullamore and Eleanor H. Bullamore Revocable Trust (the Bullamore Trust). Under its terms, on the death of the first settlor the trust would become irrevocable and the surviving settlor would be made trustee. The surviving settlor would have a limited right to invade the corpus during his or her lifetime and on his or her death; the remainder was to be divided equally among Bruce, Russell, Jr., Bednar, and Shye.

¶4 At the same time, Russell and Eleanor executed a "Declaration of Transfer and Addendum to the Trust." It provided that all assets of any nature were to be transferred to the trust, whether currently owned or later-acquired and whether record ownership of title was in Russell's and/or Eleanor's name.

¶5 Russell died on August 21, 2006. Eleanor married Richard Robsel. Brookhouse helped Eleanor draft and fund the Eleanor H. Robsel Revocable Trust (the Eleanor Trust) on January 25, 2008, as amended on December 3, 2008. The beneficiaries of the Eleanor Trust were Bednar, Shye, and Robsel.

¶6 Eleanor died on April 3, 2011. The Eleanor Trust assets were distributed pursuant to its terms. No longer beneficiaries, the Bullamores received nothing. They filed this action against Bednar, Shye, Robsel, and Guttormsen.

¶7 Six months later, they filed an amended complaint adding Brookhouse. The Bullamores alleged that Brookhouse was negligent in providing legal advice to Eleanor and in drafting documents she was not authorized to execute, as he "knew or should have known" the terms of and assets titled in the Bullamore Trust, and that he committed fraud in advising and assisting her during her life and "taking action" after her death. They claimed that his malfeasance resulted in the distribution of assets belonging to the Bullamore Trust in a manner contrary to its terms. At bottom, their claim was that, although Brookhouse represented Eleanor, he owed them a duty of care.

¶8 Brookhouse moved to dismiss on the basis that neither cause of action stated a claim upon which relief could be granted. At the hearing on the motion, the court indicated its inclination to grant Brookhouse's motion. It first queried, however, what discovery the Bullamores had undertaken and, if allowed to replead, what they would do to cure the deficiencies in the current complaint. The Bullamores responded that they had deposed Brookhouse and subpoenaed records of financial institutions and so "could plead more particularity and detail" or advance legal theories such as conspiracy, aiding and abetting a conspiracy, and intentional interference with an inheritance. The court expressed skepticism that

those causes of action were viable under the facts and noted that, despite their discovery, they had not sought to replead in the nine months since filing the complaint against Brookhouse. The court granted Brookhouse's motion, dismissed the case with prejudice, and denied the Bullamores' oral motion to replead.

¶9 The Bullamores nonetheless filed a second amended complaint that reiterated the negligence claim and included the new legal theories at which the court had looked askance. Brookhouse moved to dismiss that complaint. Although their claims had been dismissed on the merits, the Bullamores moved for leave to file a third amended complaint. Before that motion was addressed, however, they filed the notice of appeal leading them to this court.

¶10 Our review of the grant of a motion to dismiss a complaint for failure to state a claim is de novo. ***State ex rel. Lawton v. Town of Barton***, 2005 WI App 16, ¶9, 278 Wis. 2d 388, 692 N.W.2d 304 (Ct. App. 2004). Such a motion "tests the legal sufficiency of the complaint." ***Watts v. Watts***, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). We accept as true all facts pleaded by the plaintiff and make all reasonable inferences in favor of him or her. ***Id.*** Dismissal is appropriate if it appears certain that the plaintiff could not recover under any set of facts. ***Kohlbeck v. Reliance Constr. Co., Inc.***, 2002 WI App 142, ¶9, 256 Wis. 2d 235, 647 N.W.2d 277. We review the court's decision to dismiss the case with prejudice for an erroneous exercise of discretion. ***Haselow v. Gauthier***, 212 Wis. 2d 580, 590-91, 569 N.W.2d 97 (Ct. App. 1997).

¶11 Generally speaking, an attorney is not liable to third parties for negligence in the performance of his or her duties to a client, even if the negligent advice causes a third party harm. ***Tensfeldt v. Haberman***, 2009 WI 77, ¶77, 319

Wis. 2d 329, 768 N.W.2d 641. An exception exists for beneficiaries in the estate-planning context. *See* ***Auric v. Continental Cas. Co.***, 111 Wis. 2d 507, 509, 331 N.W.2d 325 (1983).

¶12 Brookhouse did not create the BullamoreTrust, however, and the Bullamores are not beneficiaries of the Eleanor Trust. There is no indication that Brookhouse did anything other than draft the Eleanor Trust per the wishes of his client, Eleanor. "[T]hird parties claiming to be intended beneficiaries based only on evidence extrinsic to [an estate-planning] document are barred from proceeding with malpractice suits against the drafting attorney as a matter of law." ***Beauchamp v. Kemmeter, Lathrop & Clark, LLP***, 2001 WI App 5, ¶23, 240 Wis. 2d 733, 625 N.W.2d 297 (2000).

¶13 Another exception to the general rule of attorney immunity from liability to nonclients is fraud. *See* ***Goerke v. Vojvodich***, 67 Wis. 2d 102, 105-06, 226 N.W.2d 211 (1975). The elements of a fraud claim are a false representation, an intent to defraud, and reliance upon the representation resulting in damage. ***Id.*** at 107. Fraud also may consist of a failure to disclose information where there is a duty to do so. ***Doe v. Archdiocese of Milwaukee***, 2005 WI 123, ¶49, 284 Wis. 2d 307, 700 N.W.2d 180. The circumstances constituting the alleged fraud must be stated with particularity. WIS. STAT. § 802.03(2) (2011-12). They must specify the time, place and content of the misrepresentation and the particular individuals involved. *See* ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶21, 283 Wis. 2d 555, 699 N.W.2d 205.

¶14 The Bullamores' fraud claim fails all around. The amended complaint alleges that Brookhouse gave Eleanor legal advice that resulted in her using Bullamore Trust funds for unauthorized purposes. It does not allege what

his advice was, how it constituted a false representation, or to what extent Eleanor followed it; that Brookhouse withheld information he had a duty to disclose, what that information might be, from whom it was withheld, or why he had a duty to disclose it; that Brookhouse intended the unnamed misrepresentation to defraud the Bullamores, or that they relied on the false statement or nondisclosure; that Brookhouse actually knew about the Declaration of Trust, what assets it contained, or how they were titled; or how, as the Bullamores style their appellate issue, Brookhouse "actively participated in the client's breach of the client's fiduciary duty to the third parties."

¶15 The Bullamores direct our attention to ***Tensfeldt***, which, they posit, "held that an attorney is liable when the attorney's acts 'might have a tendency to either frustrate the administration of justice or to obtain for his [or her] client something to which [the client] is not justly and fairly entitled.'" The full quote reads:

> [The attorney] must not be guilty of any fraudulent acts, and he [or she] must be free from any unlawful conspiracy with either his [or her] client, the judge, or any other person, which might have a tendency to either frustrate the administration of justice or to obtain for his [or her] client something to which [the client] is not justly and fairly entitled.

319 Wis. 2d 329, ¶63 (citation omitted). Thus, the underlying fraud still must be properly pled.

¶16 Despite not raising the issue in the circuit court, the Bullamores next urge this court to rule in their favor on grounds of public policy. *See* ***Auric***, 111 Wis. 2d at 513. "The practice in this court is [to not] consider an issue raised for the first time on appeal." ***Clay v. Bradley***, 74 Wis. 2d 153, 161, 246 N.W.2d 142 (1976). In any event, on these facts public policy cuts the other way.

> When the only evidence a plaintiff relies on is extrinsic to the estate planning documents, the testator's intentions are at least as likely thwarted as not….
>
> Holding attorneys accountable to a nebulous class of third parties who are likely to be more concerned with their own hopes of inheritance than testator intent … compromises the duty an attorney owes to the client.

Beauchamp, 240 Wis. 2d 733, ¶¶18-19. Before dismissing the Bullamores' complaint with prejudice, the court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***Haselow***, 212 Wis. 2d at 590-91. We must uphold its decision.

¶17 We also see no error in the court's denial of the Bullamores' motion to replead. Whether to permit a complaint to be amended is likewise within the circuit court's discretion. ***Columbia Propane, L.P. v. Wisconsin Gas Co.***, 2003 WI 38, ¶13, 261 Wis. 2d 70, 661 N.W.2d 776. The Bullamores already had filed an amended complaint. That, their discovery, and the passage of nine months—fifteen since commencing the original lawsuit—put them no closer to stating a cognizable claim. In addition, they filed another action against the same defendants in another court. We agree with the circuit court that it was "not fair at this point to let [them] yet again try to find other causes of action."

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).