

CASE NO. A10-716
STATE OF MINNESOTA
IN COURT OF APPEALS

Peggy Greer,

Appellant,

v.

Professional Fiduciary, Inc.; Wells Fargo Bank,
N.A.; Wells Fargo Investments, L.L.C. d/b/a
Wells Fargo Private Bank Elder Services; and
Ruth Ostrom,

Respondents.

**APPELLANT'S BRIEF IN REPLY TO
RESPONDENT RUTH OSTROM**

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TABLE OF CONTENTS

Table of Authorities	3
Introduction.....	4
Arguments	
I. Ms. Greer Properly Appealed The District Court’s Order With Regard To The Dismissal Of Claims Against Ms. Ostrom	4
II. Ms. Ostrom, As Attorney For PFI, Is Not Immune From Suit By Ms. Greer.....	5
III. Professionals Are Not Excluded From Aiding And Abetting Liability, And Ms. Greer Has Sufficiently Plead Facts To Establish Ms. Ostrom’s Liability	7
Conclusion	9
Supplemental Appendix ¹	11

¹ Pursuant to Minn. Stat. § 480A.08 Subd. 3 (c), Appellant has provided a true and correct copy of cited unpublished case law in her Supplemental Appendix.

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF AUTHORITIES

Cases:

<i>Ames v. Brandvold</i> , 138 N.W. 786 (Minn. 1912)	4
<i>Camp v. Dema</i> , 948 F.2d 455 (8th Cir. 1991)	8
<i>In re Senior Cottages of America, LLC</i> , 482 F.3d 997, 1007 (8th Cir. 2007)	7
<i>In re Temporomandibular Joint (TMJ) Implants</i> , 113 F.3d 1484 (8th Cir. 1997) ..	8
<i>Kellar v. VonHoltum</i> , 568 N.W.2d 186 (Minn.App. 1997)	4
<i>Siler v. Principal Financial Securities, Inc.</i> , No. C1-00-576, 2000 WL 1809048, (Minn.App. 2000)	7, 8-9
<i>Witzman v. Lehrman, Lehrman & Flom, et al.</i> , 601 N.W.2d 179 (Minn. 1999)	7, 8

Secondary Authorities:

Restatement (Third) of The Law Governing Lawyers § 51	5, 6
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INTRODUCTION

Appellant Peggy Greer respectfully submits this Reply to the Brief of Respondent Ruth Ostrom² in the above-referenced matter.

ARGUMENTS

I. MS. GREER PROPERLY APPEALED THE DISTRICT COURT'S ORDER WITH REGARD TO THE DISMISSAL OF CLAIMS AGAINST MS. OSTROM.

In her Brief, Ms. Ostrom argues that Ms. Greer has not appealed the District Court's Order Granting Motion To Dismiss Claims Against Wells Fargo and Ostrom [And] Order Granting, In Part, Motion To Dismiss Claims Against PFI ("November 9 Order") with regard to the dismissal of claims against Ms. Ostrom. It seems that Ms. Ostrom has confused the District Court's findings of fact and conclusions of law with the actual holding in its Order. (Add. 25.) While Ms. Greer has already briefed the standard of review on this appeal, it bears repeating that "[t]he only question on review of a judgment on the pleadings is whether the complaint sets forth a legally sufficient claim for relief." *Kellar v. VonHoltum*, 568 N.W.2d 186, 190 (Minn.App. 1997). See (Ostrom's Br. at 2.) and (Appellant's Br. at 7.) As such, the appellate court must decide the case "as it should have been below, solely on the complaint, and giving the pleader the benefit of every intendment and inference which a jury might legitimately draw from its allegations." *Ames v. Brandvold*, 138 N.W. 786 (Minn. 1912).

² For the Court's convenience, Ms. Greer is filing separate reply briefs to address arguments raised by the three respondents and the amici curiae in this appeal. The combined word count of Ms. Greer's reply briefs is less than the total word count allowed for in a single reply brief under Minn. R. Civ. App. P. 132.01 Subd. 3 (2010).

Ms. Ostrom, however, would have this Court do just the opposite and limit its review to only dicta provided by the District Court. (Ostrom's Br. at 3.) This runs counter to the long accepted standard of review for judgments on the pleadings.

Ms. Greer thus properly raises the District Court's dismissal of her claims against Ms. Ostrom on this appeal.

II. MS. OSTROM, AS ATTORNEY FOR PFI, IS NOT IMMUNE FROM SUIT BY MS. GREER.

Ms. Ostrom also relies on the District Court's November 9 Order for the assertion that "absent extreme circumstances such as fraud or the commission of a crime [...] a lawyer is immune from suit by a non-client." (Ostrom's Br. at 4.) Therefore, Ms. Ostrom argues, she "could not have committed a tort against [Ms. Greer]." (Ostrom's Br. at 4.) These arguments, however, are not supported by the authority relied on by the District Court and Ms. Ostrom.

Section 51 of the Restatement (Third) of The Law Governing Lawyers ("Restatement") provides:

"[A] lawyer owed a duty to use care [...] in each of the following circumstances:

[...]

(4) to a nonclient when and to the extent that:

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to the scope of representation to prevent or rectify a breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud *or (ii) the lawyer has assisted or is assisting the breach*["]

(emphasis added). Contrary to Ms. Ostrom's arguments, the standard in the excerpt relied on by the District Court does not limit a lawyer's liability to assistance in the

commission of a crime or fraud. (Ostrom's Br. at 4.) Rather, the operative word is "or." The lawyer may be held liable to a nonclient for preventing or failing to rectify a breach of fiduciary duty *either* where the breach is a crime or fraud, *or* where the lawyer assisted in the breach of fiduciary duty. The Restatement goes on to state:

"A lawyer representing a client in the client's capacity as a fiduciary [...] may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. [...] A lawyer is usually so situated as to have special opportunity to observe whether the fiduciary is complying with those obligations. [...] *A lawyer who knowingly assists a client to violate the client's fiduciary duties is civilly liable* [...]. Moreover, to the extent that the lawyer has assisted in creating a risk of injury, *it is appropriate to impose a preventive and corrective duty on the lawyer.*"

Restatement (Third) of The Law Governing Lawyers § 51 (h) (emphasis added).

In her Complaint, Ms. Greer plead that Ms. Ostrom not only assisted in PFI's breaches of fiduciary duties, but committed the acts herself upon the authorization of PFI. (App. 8-9, 12-14.) Ms. Ostrom's assistance in the breaches of fiduciary duties—torts that were recognized as sufficiently plead by the District Court—not only establish her liability to Ms. Greer through the Restatement cited by the District Court, but establish "a preventive and corrective duty" on Ms. Ostrom. Restatement (Third) of The Law Governing Lawyers § 51 (h). *See* (Appellant's Opening Br. at 17-18.)

The District Court incorrectly found that Ms. Ostrom could not be held liable under any theory, because she owed no duty to Ms. Greer, as a nonclient. (Add. 25). Based on the Restatement relied on by the District Court, however, Ms. Greer sufficiently plead claims against Ms. Ostrom because the claims against PFI establish commission of its torts, Ms. Ostrom was authorized to and assisted in carrying out PFI's torts, and this

assistance imposed a duty on Ms. Ostrom, which she breached. (App. 13-14.)

For these reasons, this Court should reverse the District Court's dismissal of Ms. Greer's claims against Ms. Ostrom and remand for further proceedings.

III. PROFESSIONALS ARE NOT EXCLUDED FROM AIDING AND ABETTING LIABILITY, AND MS. GREER HAS SUFFICIENTLY PLEAD FACTS TO ESTABLISH MS. OSTROM'S LIABILITY.

Ms. Ostrom further questions Ms. Greer's reliance on *Witzman v. Lehrman, Lehrman & Flom, et al.* In support of arguments that Ms. Ostrom is liable for torts committed against Ms. Greer. (Ostrom's Br. At 4.) Her arguments fail as a matter of law.

In Minnesota, courts "have long relied on the well-recognized rule that all who actively participate in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it after it is done are jointly and severally liable for the resulting injury." *Witzman v. Lehrman, Lehrman & Flom, et al.*, 601 N.W.2d 179, 185-86 (Minn. 1999). *See Siler v. Principal Financial Securities, Inc.*, No. C1-00-576, 2000 WL 1809048, at *6 (Minn.App. 2000). Therefore, Minnesota law recognizes claims based on aiding and abetting the tortious conduct of another. *Id.* at 186.

In *Witzman*, the Supreme Court of Minnesota further recognized that professionals are not excluded from aiding and abetting liability. *Id.* at 187. *See In re Senior Cottages of America, LLC*, 482 F.3d 997, 1007 (8th Cir. 2007) (recognizing that attorneys may be held liable for aiding and abetting breaches of fiduciary duties). In doing so, the court stated that claims must be interpreted to establish whether the facts satisfy the following

elements: “(1) the primary tort-feasor must commit a tort that causes an injury to the plaintiff; (2) the defendant must know that the primary tort-feasor’s conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tort-feasor in the achievement of the breach.” *Id.*

Regarding the first element, Ms. Greer plead numerous allegations against PFI that involved its representation by Ms. Ostrom. (App. 8-11.) The District Court found some of these allegations sufficient to survive PFI’s Rule 12 motion to dismiss Ms. Greer’s claims for breach of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress. (Add. 25.) Thus, the District Court held, Ms. Greer stated a claim that PFI—the primary tort-feasor with regard to Ms. Ostrom—committed torts causing injury to Ms. Greer. (Add. 25.)

Courts next examine the second and third elements of aiding and abetting liability—whether the defendant knew that the primary tort-feasor breached its duties and whether the defendant provided substantial assistance—in tandem, with particular focus on the facts and circumstances of each case. *Witzman*, 601 N.W.2d at 188. As such, “where there is a minimal showing of substantial assistance, a greater showing of scienter is required,” and vice versa. *Id.* quoting *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991). See *In re Temporomandibular Joint (TMJ) Implants*, 113 F.3d 1484, 1495 (8th Cir. 1997) (“the stronger the evidence of substantial assistance, the less evidence of general awareness is required”). Thus, where a plaintiff identifies a significant amount of assistance in carrying out a tort, there is a lesser requirement for showing the amount of knowledge. See *Siler*, 2000 WL 1809048, at *6 (allegations showing actions taken by an

agent sufficiently support a finding that agent had knowledge that the principal was committing a tort).

In this case, Ms. Greer's Complaint alleges that the very actions of Ms. Ostrom—in her role as PFI's attorney and agent—caused some of PFI's breaches of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress after PFI's discharge as Ms. Greer's guardian. (App. 8-14) These actions did not merely reflect attorney advice; these were affirmative actions carried out by Ms. Ostrom in furtherance of PFI's breaches of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress. (App. 8-14.) Furthermore, Ms. Ostrom was advised of her breaches by Ms. Greer and asked to refrain from further disclosures of Ms. Greer's confidential information, yet Ms. Ostrom refused. (App. 14.) All of these facts and circumstances point not only to Ms. Ostrom's knowledge of PFI's torts, but also to Ms. Ostrom's active and substantial assistance in carrying out these torts.

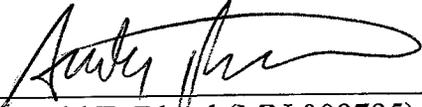
For these reasons, this Court should reverse the District Court's dismissal of Ms. Greer's claims against Ms. Ostrom and remand for further proceedings.

CONCLUSION

Ms. Greer's Complaint, when all allegations are deemed to be true and all inferences flowing therefrom are drawn in her favor as the law requires, states a claim for relief against Ms. Ostrom. Ms. Greer therefore respectfully asks this Court to reverse the District Court's dismissal of her claims against Ms. Ostrom, and remand for further proceedings.

DATED: August 9, 2010

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