STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2024
A09-2182
A09-2204

Peoples National Bank of Mora,
Respondent,

vs.

BWHC, LLC, et al.,
Defendants (A09-2024, A09-2204),
Appellants (A09-2182),

James E. Klapmeier, et al.,
Appellants (A09-2024),
Defendants (A09-2182),

Steven J. Klapmeier, et al.,
Appellants (A09-2204),

and

Klapmeier Lending Company, LLC, intervenor,
Appellant (A09-2024),

Klapmeier Lending Company, LLC,
Intervenor (A09-2182, A09-2204).

Filed September 21, 2010
Affirmed
Connolly, Judge

Kanabec County District Court
File No. 33-CV-06-299

D. Sherwood McKinnis, Grant W. Lindberg, Lindberg & McKinnis, P.A., Cambridge, Minnesota (for respondent)

Martin A. Carlson, Law Offices of Martin A. Carlson, Ltd., Minneapolis, Minnesota (for appellants-BWHC, LLC, Steven and Jolie Klapmeier)

Dean C. Eyler, Brian A. Dillon, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, Minnesota; and

Jon C. Saunders, Anderson, Larson, Hanson & Saunders, PLLP, Willmar, Minnesota (for appellants-James E. Klapmeier, Juliette H. Klapmeier and Klapmeier Lending Company, LLC)

Seth J. Leventhal, Fafinski, Mark & Johnson, P.A., Eden Prairie, Minnesota (for appellants-Alan Klapmeier and Sara Dougherty)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Collins, Judge.*

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

In these consolidated appeals, appellants challenge the district court's grant of summary judgment in favor of respondent. Because the district court did not err in its application of the law and correctly concluded that there were no genuine issues of material fact, we affirm.

FACTS

This case arises out of a transaction in which respondent Peoples National Bank of Mora (bank) loaned money to appellant BWHC, LLC (BWHC) and received guaranties from appellants James and Juliette Klapmeier, Alan Klapmeier and Sara Dougherty, and

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

Steven and Jolie Klapmeier. BWHC was defrauded by its employee Marvel Sohl, who stole hundreds of thousands of dollars from the company. As a result of Sohl's embezzlement, BWHC became insolvent and defaulted on its loan payments to the bank, and the Klapmeiers and Sara Dougherty became liable for the various amounts owing on their guaranties.

The relationships of the parties are as follows: James and Juliette Klapmeier are married to each other; James Klapmeier is Steven Klapmeier's father and Alan Klapmeier's uncle; Steven and Jolie Klapmeier are married to each other; and Alan Klapmeier and Sara Dougherty are married to each other. James Klapmeier owned, and Steven Klapmeier ran, American Marine Limited Inc. (AML) before AML was dissolved and its assets were sold to BWHC in March 2002. Steven and Jolie Klapmeier and Alan Klapmeier and Sara Dougherty owned BWHC.

On February 1, 2002, Steven Klapmeier wrote a letter to Roger Rinerson, the bank's president, in regard to financing BWHC's purchase of AML.[1] The letter referenced previous discussions between BWHC's representatives and the bank. The letter indicated that the bank would loan BWHC $1.5 million pursuant to the issuance of a promissory note secured by BWHC's assets, a personal guaranty of James Klapmeier, and two limited personal guaranties of the BWHC shareholders.

AML and BWHC entered into a purchase agreement on March 28, 2002. Steven Klapmeier, as president and chief executive officer of BWHC, signed a loan agreement

[1] The letter was also signed by William King, who assisted Steven and Alan Klapmeier with the financing and acquisition of AML's assets.

with the bank for $1.5 million dated March 28, 2002. Steven Klapmeier and Rinerson also signed a commercial security agreement dated March 28 that gave the bank a security interest in property belonging to BWHC. Steven and Jolie Klapmeier signed a personal guaranty, also dated March 28, in which they "absolutely and unconditionally guarantee[d]" to the bank payment of BWHC's debt up to $75,000 plus interest and costs. Alan Klapmeier and Sara Dougherty signed an identical guaranty. James and Juliette Klapmeier signed a guaranty in the amount of $1.5 million that was secured by real-estate mortgages.

BWHC eventually defaulted. The bank sued, alleging that the unpaid amount due and owing was $1,180,817.60 plus continuing interest; all of the appellants admitted the default but denied liability. The bank brought claims against BWHC for breach of contract and replevin; contract claims against James and Juliette Klapmeier pursuant to their guaranty for $1,180,817.60 and for foreclosure of the mortgage that secured the guaranty; contract claims against Steven and Jolie Klapmeier pursuant to the $75,000 guaranty, as well as a veil-piercing claim for the entire amount due and owing; identical claims against Alan Klapmeier and Sara Dougherty as those brought against Steven and Jolie Klapmeier; and a claim for unjust enrichment against all parties.

BWHC and its owners raised several affirmative defenses in their answer, including a failure of consideration and a number of equitable defenses essentially asserting that the bank behaved inequitably. They also asserted counterclaims against the bank, alleging that the bank breached its fiduciary duty to BWHC and the guarantors, a violation of the Uniform Fiduciaries Act (UFA), and unjust enrichment. James and

Juliette Klapmeier raised affirmative defenses based on the statute of limitations, laches, lack of consideration, unclean hands, and failure to state a claim, and they brought counterclaims based on negligence, bad faith, and the UFA. After the bank moved for summary judgment, appellant-intervenor Klapmeier Lending Company LLC (KLC) moved to bring counterclaims against the bank as assignee of Alan Klapmeier, which were based on allegations of fraudulent concealment and violations of the UFA and the Uniform Commercial Code (UCC).

The district court granted the bank's motion for summary judgment, denied KLC's motion to bring a counterclaim on behalf of Alan Klapmeier, and denied James and Juliette Klapmeier's motion to amend their pleadings and assert counterclaims. In its thoughtful and well-reasoned opinion, the district court concluded that all of appellants' counterclaims failed as a matter of law. The district court reasoned that claims under the common law and the UFA were preempted by Article 3 of the UCC, that BWHC's owners could have reasonably discovered Sohl's embezzlement by exercising due care and diligence, and that their UCC claims failed because there was no evidence of the bank's alleged knowledge of Sohl's breach of her fiduciary duty. The district court concluded that there was adequate consideration for James and Juliette Klapmeier's guaranty because it was relied on by the bank and that their defense of fraudulent inducement failed because the alleged oral agreement directly contradicted the terms of the written personal guaranty. It concluded that the counterclaim KLC sought to bring was identical to previously asserted claims and that it, too, failed as a matter of law.

Finally, because BWHC was not represented by an attorney in district court,[2] the court found that BWHC had failed to show any genuine issues of material fact, concluding that summary judgment was therefore also appropriate against BWHC.

This appeal followed.

D E C I S I O N

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, we review de novo whether the district court erred in its application of the law and whether there were any genuine issues of material fact when viewing the evidence in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). "When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. Thus, to avoid summary judgment, the nonmoving party must present evidence that is "sufficiently probative with respect to an essential element of the nonmoving party's case to permit

[2] Although BWHC was represented by counsel at the time it and its owners filed their answer and counterclaim, that law firm subsequently withdrew from representation. It is undisputed that BWHC was not represented by an attorney when it sought to respond to the bank's motion for summary judgment, which is the time relevant to the district court's decision.

reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I. The district court did not err in granting summary judgment against James and Juliette Klapmeier and KLC.

A. Consideration

James and Juliette Klapmeier and KLC (collectively, James and Juliette Klapmeier[3]) argue that a genuine issue of material fact exists as to whether their guaranty was a separate transaction entered into after the BWHC loan was issued, which, they argue, would therefore require new and independent consideration.

James and Juliette Klapmeier contend that the district court erred by rejecting their consideration defense on the basis of *Southdale Center, Inc. v. Lewis*, which holds that when a lender makes a loan to a third party, the lender's reasonable reliance on a guaranty amounts to adequate consideration for the guaranty even if "no benefit whatever" accrues to the guarantor. 260 Minn. 430, 439, 110 N.W.2d 857, 863 (1961). James and Juliette Klapmeier cite evidence tending to show that they were in Arizona on March 28 and therefore could not have signed the guaranty on that date, arguing that the *Southdale* rule applies only if the guaranty was executed before or concurrently with the loan. But under Minnesota law, "if it was the understanding at the time the creditor parted with its money that an additional guaranty would be obtained, and if it was furnished pursuant to the original agreement, such guaranty or undertaking relates back to

[3] James and Juliette Klapmeier and KLC filed a joint brief on appeal, and no issues raised are unique to KLC. For ease of reference, we refer to them collectively as "James and Juliette Klapmeier."

the inception of the original contract and no new consideration is necessary." *First Nat'l Bank of Hopkins v. Int'l Machs. Corp.*, 279 Minn. 188, 192, 156 N.W.2d 86, 88 (1968).

It is undisputed that James and Juliette Klapmeier actually signed the guaranty. The bank relied on the signed guaranty, as well as the February 1 letter indicating that James Klapmeier intended to provide a guaranty for BWHC's loan, which was written by Steven Klapmeier in his role as BWHC's managing partner. Assuming for purposes of summary judgment that James and Juliette Klapmeier signed the guaranty after March 28, they have nevertheless failed to show the existence of a genuine issue of *material* fact. James and Juliette Klapmeier have not suggested any plausible theory for why they signed the guaranty if it was not intended to support an extension of credit to BWHC. Because the bank's reliance on the guaranty is adequate consideration and the guaranty relates back to the loan to BWHC, the district court correctly concluded that the guaranty was supported by adequate consideration.

B. Fraudulent Inducement

James and Juliette Klapmeier argue that the district court's denial of their motion to amend their answer to include fraudulent inducement as an affirmative defense was based on the erroneous exclusion of admissible parol evidence. But the district court expressly agreed with James and Juliette Klapmeier that parol evidence is admissible to show that a contract is not valid when one is induced to enter into it by fraudulent oral representations. Instead, the district court concluded that the affirmative defense failed as a matter of law because the alleged misrepresentation was directly refuted by the text of the guaranty.

"In determining whether parol evidence is admissible, a distinction is drawn between evidence tending to show that no contract has ever been made and evidence to contradict, vary, or add to the terms of a written contract." *Hamilton v. Boyce*, 234 Minn. 290, 292, 48 N.W.2d 172, 173-74 (1951). It is longstanding law that fraud may vitiate a contract. *In re Trusteeship Under Will of Melgaard*, 200 Minn. 493, 504, 274 N.W. 641, 647 (1937). Although the parol-evidence rule "excludes evidence outside a written document which varies or contradicts the plain terms of the document," it does not "exclude evidence of fraudulent oral representations by one party which induce another to enter into a written contract." *Johnson Bldg. Co. v. River Bluff Dev. Co.*, 374 N.W.2d 187, 193 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985). To justify setting aside a written contract, the parol evidence must be clear and convincing. *Norwest Bank Minn., N.A. v. Midwestern Mach. Co.*, 481 N.W.2d 875, 881 (Minn. App. 1992), *review denied* (Minn. May 15, 1992).

To establish a claim of fraudulent inducement, James and Juliette Klapmeier were required to prove that the bank intended for them to act based on fraudulent representations and that they were induced to act in reliance on those representations. *See Johnson Bldg. Co.*, 374 N.W.2d at 193. "Where there is an inconsistency between oral promises and the written terms of an agreement, the issue is whether there could be reasonable reliance on the promise." *Id.* at 194. Reliance on an oral representation is "unjustifiable as a matter of law . . . if the written contract provision explicitly stated a fact completely contradictory to the claimed misrepresentation." *Id.* A party is not "entitled to rely upon oral promises which were directly contradictory" to the terms of a

written agreement. *Dahmes v. Indus. Credit Co.*, 261 Minn. 26, 35, 110 N.W.2d 484, 490 (1961).

James and Juliette Klapmeier assert only that Rinerson fraudulently misrepresented that the guaranty would expire upon Alan Klapmeier's infusion of capital into BWHC. The guaranty is not ambiguous on this point. Instead, by its terms it "is an absolute and continuing guaranty" for present and future debt incurred by BWHC and "cannot be revoked *and will remain in effect until the debt is paid in full*." (Emphasis added.) Not only did the guaranty not mention anything about expiring upon the infusion of capital to BWHC by Alan Klapmeier, it expressly contemplated remaining in effect until revocation and was by its plain terms not revocable until any debt incurred under it by BWHC was paid in full. Thus, the district court correctly concluded as a matter of law that the alleged oral representations could not have been reasonably relied upon by James and Juliette Klapmeier, which defeated an affirmative defense of fraudulent inducement.

C. UCC Claim

James and Juliette Klapmeier brought a claim under Minn. Stat. § 336.3-307 (2008), Minnesota's version of section 3-307 of the UCC. They contend that there was sufficient evidence to create a genuine issue of material fact as to whether the bank had actual knowledge of Sohl's breach of fiduciary duty. We disagree.

Under Minnesota's version of Article 3 of the UCC, if an instrument is taken from a fiduciary for payment or value, the taker (the bank) has knowledge of the fiduciary's (Sohl's) fiduciary status, and the represented person's (BWHC's) claim to the instrument

or its proceeds is based on the fiduciary's transaction being a breach of her fiduciary duty, then the taker "has notice" of the fiduciary's breach if it "knows of the breach of the fiduciary duty" and the instrument is issued by the fiduciary as such and made payable to her personally. Minn. Stat. § 336.3-307(b)(3). The word "knows" in section 336.3-307(b)(3) refers to "actual knowledge." Minn. Stat. § 336.1-202(b) (2008). The taker is subject to a claim by the represented person to recover based on the fiduciary breach if the taker had notice of the breach of fiduciary duty—that is, if the bank had actual knowledge of Sohl's embezzlement. *See* Minn. Stat. § 336.3-306 (2008).

Although the district court mistakenly stated that James and Juliette Klapmeier failed to allege actual knowledge by the bank, we must ignore any harmless error and may affirm a summary judgment on any ground. Minn. R. Civ. P. 61; *Presbrey v. James*, 781 N.W.2d 13, 16 (Minn. App. 2010). Thus, the question on appeal is whether there was sufficient evidence of the bank's actual knowledge to create a genuine issue of material fact. James and Juliette Klapmeier cast aspersions at the bank by suggesting that Rinerson knew about Sohl's embezzlement scheme. The district court accurately summarized their allegations:

> Specifically, they infer and suspect that Mr. Rinerson knew that Ms. Sohl was embezzling money from BWHC, LLC by cashing company checks that totaled approximately $394,570. They allege that the Bank had knowledge of Ms. Sohl's embezzlement prior to making the BWHC, LLC loan, thus fraudulently inducing the collective guaranties of the defendants. The defendants also allege that the Bank altered and/or destroyed loan documents in an effort to cover up its knowledge of Ms. Sohl's embezzlement.

Again, to resist a motion for summary judgment when the movant has made the necessary showing, the nonmoving party must present specific facts sufficient to create a fact question for the jury. Minn. R. Civ. P. 56.05; *see also DLH*, 566 N.W.2d at 71 (holding that evidence merely creating a "metaphysical doubt" regarding a factual issue does not establish a genuine issue of material fact for trial). James and Juliette Klapmeier rely on mere suspicions, and not on the specific facts or evidence needed to resist the bank's motion for summary judgment.

Further, BWHC itself authorized Sohl to take the basic actions she took: writing and cashing checks to herself drawn on BWHC's account. Pursuant to BWHC's corporate authorization resolution, both Steven Klapmeier and Marvel Sohl were "authorized, for and on behalf of this corporation, at any time or from time to time to borrow money from Peoples National Bank of Mora in such amounts, for such times . . . and upon such terms as he or they may see fit" and "to do, authorize and agree to any and all other things at any time or from time to time in connection with any of the foregoing as . . . they may deem appropriate."

Absent actual knowledge of Sohl's embezzlement, the bank was presumptively required to follow the corporate authorization resolution. Caselaw makes clear:

> Under the Minnesota version of the UCC, an account holder is generally barred from recovering from the bank the value of a series of forged checks written on the account by a single forger if the account holder does not exercise reasonable promptness in examining his or her account statements and notifying the bank of any forged checks.

Stowell v. Cloquet Co-op Credit Union, 557 N.W.2d 567, 570 (Minn. 1997) (quotation omitted). The underlying rationale is that an account holder is "in a better position to uncover a pattern of forgery by a trusted employee" than the bank. *Id.* at 572 (quotation omitted). As long as account statements were mailed to BWHC—and it is undisputed that they were and that they were never inspected by any BWHC shareholders or employees other than Sohl—then the risk of fraud or embezzlement should be borne by BWHC rather than the bank. *See id.* at 571-72.

D. Fraudulent Concealment

James and Juliette Klapmeier also contend that the bank owed a duty to disclose material facts, and that they therefore should have been permitted to amend their pleadings to assert a defense and counterclaim of fraudulent concealment. We disagree.

If "unique and narrow special circumstances" are present and a bank has actual knowledge of fraudulent activity, the bank may have an affirmative duty to disclose those facts to the account holder. *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 369, 244 N.W.2d 648, 652 (1976) (internal quotation marks omitted). Fraud may be shown if the bank conceals material facts "peculiarly within [its] own knowledge." *Id.* at 365, 244 N.W.2d at 650 (quotation omitted). But *Stowell* establishes that account activity is not peculiarly within a bank's knowledge as long as the bank mails the account statements to the account holder. 557 N.W.2d at 570. There is no evidence that the bank concealed anything from BWHC or its shareholders. Additionally, as discussed above, James and Juliette Klapmeier have failed to make a sufficient showing of actual knowledge. Because a defense or counterclaim of fraudulent concealment fails as a matter of law, the

district court properly denied the motion of James and Juliette Klapmeier to amend their answer.

II. The district court did not err in granting summary judgment against Alan Klapmeier and Sara Dougherty.

A. Actual Knowledge

Alan Klapmeier and Sara Dougherty also contend that there is sufficient evidence to create a fact question for the jury concerning the bank's actual knowledge of Sohl's embezzlement. They contend that the district court's determination that the loss was a result of their own negligence is unsupported by evidence, but do not otherwise cite any evidence in support of the claim of actual knowledge.

First, as discussed above, the evidence in the record is insufficient to create a genuine issue of material fact regarding the bank's actual knowledge. Second, there is evidence that BWHC did not exercise reasonably prudent business practices. The bank sent statements to BWHC, which were never reviewed by any of the shareholders and no one at BWHC other than Sohl. Under Minnesota law, the bank fulfilled its obligations by mailing these statements; the risk of no one receiving or reading them was borne by BWHC and its shareholders, who failed to exercise reasonable promptness in examining the account statements. *See id.* at 570-72.

B. UCC Preemption

Alan Klapmeier and Sara Dougherty argue that the district court erred by following dicta from this court's opinion in *Bradley v. First Nat'l Bank of Walker, NA*, 711 N.W.2d 121 (Minn. App. 2006), rather than the supreme court's opinion in *Richfield*,

when deciding that their claims under the common law and the UFA were preempted by Article 3 of the UCC. We conclude that *Richfield* does not apply to the facts of this case and that the district court did not err in applying *Bradley*.

Bradley involved a case of check-withdrawal fraud. 711 N.W.2d at 123. Claims were asserted under the UFA and common law, and the *Bradley* court held that those claims were barred by the three-year statute of limitations under the UCC rather than the general six-year limitations period that applied to claims under the UFA and at common law. *Id.* at 123-27. In *Richfield*, the supreme court upheld a jury verdict barring a bank from recovering on its promissory note based on a fraudulent-concealment theory. 309 Minn. at 363, 244 N.W.2d at 649. The supreme court cautioned that its decision was dependent on the "unique and narrow special circumstances" of the case, which included the bank's actual knowledge of fraudulent activity. *Id.* at 369, 244 N.W.2d at 652 (internal quotation marks omitted).

Because the record does not contain sufficient evidence to resist summary judgment on the basis of actual knowledge, *Richfield* is distinguishable. Further, *Bradley* was a statutory decision under Article 3 of the UCC; *Richfield* was not. Indeed, the current version of Minn. Stat. § 336.3-307, which was considered in *Bradley*, was not passed until 1992. *Bradley*, 711 N.W.2d at 122 n.1 (citing 1992 Minn. Laws ch. 565, § 35, at 1840). Thus, *Bradley* did not overrule a supreme court precedent, but based its decision on a statute enacted subsequent to the *Richfield* decision.

Alan Klapmeier and Sara Dougherty also mischaracterize parts of the *Bradley* opinion relied on by the district court as dicta. On facts very similar to those in the

instant case, the *Bradley* court held that "the UCC pervasively occupies this field of law," which is why the shorter statute of limitations under the UCC barred the UFA claim. *Id.* at 127. The court also held that "the UCC preempted [the] common law negligence and contract claims." *Id.* Subsequent to *Richfield*, the supreme court has used expansive language in regard to the UCC, explaining that "the essence of the Uniform Commercial Code" is that it creates "a complete and independent statutory scheme enacted for the governance of all commercial transactions" and "is intended to displace tort liability." *Hapka v. Paquin Farms*, 458 N.W.2d 683, 688 (Minn. 1990) (construing Article 2).

The UCC provides that extant laws "supplement its provisions" if they are not "displaced by the particular provisions of the Uniform Commercial Code." Minn. Stat. § 336.1-103(b) (2008). To the extent the common law would impose liability where none exists under the UCC, it is displaced by the UCC. To the extent Alan Klapmeier and Sara Dougherty suggest that Article 3 of the UCC is consistent with their common-law claims of fraudulent inducement and fraudulent concealment, they merely argue a distinction without a difference. Because none of the appellants, including Alan Klapmeier and Sara Dougherty, presented evidence to the district court sufficient to create a genuine issue of material fact as to whether the bank had actual knowledge of Sohl's breach of her fiduciary duty, the UCC claim fails as a matter of law.

C. Spoliation

Spoliation is the destruction of evidence, and sanctions may be appropriate when a person knows or should know that the evidence destroyed was relevant to litigation. *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 41 (Minn. App. 2009). A district court's

decision to impose sanctions for spoliation is reviewed for an abuse of discretion. *Id.* "[A] finding of spoliation may result in certain inculpatory facts being accepted as true as a remedy for the infraction." *Id.* Alan Klapmeier and Sara Dougherty concede that they "have not sought sanctions for spoliation so the issue is not directly on appeal," but nonetheless contend that the bank's spoliation is evidence of its underlying malfeasance in this matter. Because they concede, and we agree, that spoliation is not an issue on appeal, they have not met their burden of showing reversible error, and we will not address this issue.

III. The district court did not err in granting summary judgment against BWHC and Steven and Jolie Klapmeier.

A. Representation by Counsel

"Generally, a corporation must be represented by a licensed attorney when appearing in court, regardless of whether the person seeking to represent the corporation is a director, officer or shareholder." *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753, 754 (Minn. 1992). "Minnesota follows the common law rule that a corporation may appear only by attorney." *Id.* Further, "the right of a party to a suit in court to appear in person therein does not entitle him to appear for a corporation, even if he owns all its capital stock [because] the corporation is a distinct legal entity." *Id.* (quotation omitted). The underlying rationale is that non-attorneys are not subject to court supervision or discipline or to the ethical standards of the bar. *Id.* A corporation is an artificial entity created by law that can only act through agents, and its non-attorney agents owe a duty

only to it and not to the courts. *Id.* Thus, "a corporation *must* be represented by a licensed attorney when appearing in district court." *Id.* at 756 (emphasis added).

BWHC and Steven and Jolie Klapmeier rely on *Save Our Creeks v. City of Brooklyn Park*, which holds that the requirement that a corporation be represented by counsel in legal proceedings is not jurisdictional and is a curable defect because "the rules of civil procedure are intended to favor resolution of cases on the merits." 699 N.W.2d 307, 309-10 (Minn. 2005). In *Save Our Creeks*, the supreme court fashioned a "narrowly crafted" test for deciding under what circumstances an amendment curing the lack of an attorney's signature should be allowed:

> [A]n amendment to add an attorney's signature to a corporation's complaint should be permitted when the following four elements are met: (1) the corporation acts without knowledge that its action was improper; (2) upon notice, the corporation diligently corrects its mistake by obtaining counsel, but in no event may it appear in court without an attorney; (3) the nonattorney's participation in the action is minimal; and (4) the nonattorney's participation results in no prejudice to the opposing party. We emphasize that as to the first prong, if a corporation knows or should know that its action is improper, amendment will not be allowed.

Id. at 311.

BWHC and Steven and Jolie Klapmeier rely heavily on the word "generally" in *Nicollet Restoration* and contend that *Save Our Creeks* creates an exception to the rule that a corporation may only appear in district court through a licensed attorney. However, by its express terms, *Save Our Creeks* did not create an exception to this rule;

instead, it stated the test that must be satisfied to allow a corporate party amendment to cure this defect. *See id.*

The bank correctly observes that *Save Our Creeks* involved a defective complaint that was signed by a non-attorney. *Id.* at 309 (referring to "the failure to affix an attorney's signature to the complaint"). Here, the bank sued BWHC and the other defendants in 2006, and the district court did not grant summary judgment until 2009. More importantly, when the first prong of the *Save Our Creeks* test is not met—that the corporation knows or should know that it could not appear in district court through a non-attorney agent—the defect is not curable. *Id.* at 311. Jolie Klapmeier, a licensed attorney, had served as BWHC's general counsel. After three years of litigation, and considering one of the shareholders was an attorney and BWHC's general counsel, we think it fair to say that BWHC should have known that it was required to be represented by an attorney.

Moreover, in relation to the third prong of the *Save Our Creeks* test, BWHC and Steven and Jolie Klapmeier contend that "BWHC's participation could not have been more minimal. All the company did was send a memorandum to the court stating that it adopted the positions taken by its co-defendants who were represented by counsel." This argument proves too much. Because summary judgment was appropriate against all the other appellants, and BWHC admits that it merely wished to adopt their positions, it cannot show that any alleged error was prejudicial.

B. Actual Knowledge

BWHC and Steven and Jolie Klapmeier also contend that the district court erroneously resolved credibility disputes in favor of the bank, and that when drawing reasonable inferences in their favor, there was sufficient evidence of the bank's actual knowledge of Sohl's embezzlement scheme to create a genuine issue of material fact. They cite deposition testimony regarding bank procedures and assert that Rinerson, the bank's president, knew or should have known that Sohl was cashing the checks to herself.

However, for the reasons discussed above, we conclude that the record does not contain sufficient evidence to create a question of material fact for the jury in regard to the bank's actual knowledge. The question is not whether the bank knew that Sohl was cashing checks to herself, but whether it knew that she was breaching her fiduciary duty by embezzling money from BWHC. She was in fact authorized to write checks to herself from BWHC funds and cash them, and the bank regularly mailed statements to BWHC. Any inference that the bank was actually aware that Sohl was stealing money from BWHC would be hopelessly speculative.

Affirmed.