

STATE OF MICHIGAN
COURT OF APPEALS

BANKER & BRISEBOIS CO.,

Plaintiff-Appellant,

v

JOHN C. MADDOX, C.P.A., and SILBERSTEIN
UNGAR, P.L.L.C., f/k/a MADDOX UNGAR
SILBERSTEIN, P.L.L.C., f/k/a MADDOX
UNGAR, P.L.L.C., f/k/a UNGAR &
ASSOCIATES, P.L.L.C., a/k/a CONCRETE
ACCOUNTING,

Defendants-Appellees.

UNPUBLISHED
April 29, 2014

No. 310993
Oakland Circuit Court
LC No. 2010-115061-CK

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Banker & Brisebois Company (B&B) is a small, family-owned advertising firm that used the accounting services of John Maddox for nearly a decade, first while he worked at Mathews, Reich, Perna and Rottermond (MRPR) and then when he left to become an equity partner at Silberstein Ungar (SU).¹ At a meeting in 2003, Maddox allegedly promised to “keep an eye” on B&B’s controller to ensure that she was not stealing from the company. Four years later, the controller engaged in a two-year-long embezzlement scheme, stealing over \$400,000 before committing suicide in 2009. B&B filed suit against Maddox and SU, alleging various claims related to their failure to detect the fraud and advise B&B. The circuit court summarily dismissed B&B’s contract, accountant malpractice, and breach of fiduciary duty claims based on the failure to create a genuine issue of material fact.

We affirm the dismissal of B&B’s malpractice and fiduciary duty claims. While the circuit court correctly determined that B&B failed to create a triable issue on many of its claimed contractual breaches, the court improperly dismissed this count against SU limited to its duty to notify B&B of potential fraud. The court also should have considered and granted B&B’s

¹ The accounting firm frequently changed names depending on the identity of the equity partners at any given time. For ease of reference, we refer to the firm by its most recent name.

motion to amend its complaint to add a contractual claim against Maddox, limited to this issue. We therefore vacate the circuit court's orders on this narrow ground and remand for further proceedings.

I. BACKGROUND

B&B is a small company, owned and operated by Harry Gilmore and his children, Lee and Anne Gilmore. For decades, the company accountant was a close family friend who provided a wide range of business consulting services. He took a hands-on role in running B&B, making monthly visits to manage financial affairs and render advice. In the mid-1990s, that accountant became terminally ill and recommended that B&B use the services of Jim Mathews at MRPR. Although Harry claims that he believed MRPR provided the same level of service as the former accountant, the MRPR representatives were rarely on site. MRPR's annual engagement letter indicated that its services were limited to "compil[ing], from information [B&B] provide[d], the annual balance sheet and the related statements of income, retained earnings, and cash flows" and preparing annual tax return forms. The letter advised B&B that MRPR would "not audit or review . . . financial statements." Moreover, MRPR's "engagement [could] not be relied upon to disclose errors, fraud, or illegal acts that may exist." "However," the letter continued, MRPR promised to "inform [B&B] of any material errors that come to [MRPR's] attention and any fraud or illegal acts that come to [MRPR's] attention, unless they are clearly inconsequential." Joel Ungar managed the B&B account on MRPR's behalf until he left the company in the late 1990s. Maddox then took over.

In the late 1990s, B&B hired a family friend, Lou Ann Oles, to serve as the company controller. Oles took over the day-to-day bookkeeping and financial role for B&B. Oles limited the information B&B provided to MRPR to prepare the taxes and annual balance sheet and Maddox agreed that his company had previously requested unnecessarily excessive documentation.

In 2003, Oles's lifestyle suddenly changed; she leased a sports car, began dressing more fashionably, joined a country club, and took expensive vacations. Lee became concerned that Oles was funding this lifestyle by stealing from B&B. He and Harry requested a meeting with Mathews and Maddox. The parties disagree about what happened at that meeting. Maddox averred that Mathews offered to have MRPR representatives come to B&B after-hours to conduct a forensic accounting, but the Gilmores were uncomfortable with that idea. According to Maddox, Mathews also recommended that the Gilmores ask their bank to send duplicate copies of their account statements to their houses so they could personally reconcile the accounts. Maddox avowed at his deposition, "I've never specifically been requested to do anything" regarding suspicious activity on the part of Oles.

The Gilmores, on the other hand, claimed that Mathews and Maddox gave them advice to monitor potential theft, such as having a second person tally checks and inspect the bank statements. They claimed that B&B was already taking these actions. According to the Gilmores, the 2003 meeting concluded with an agreement "that Maddox would closely watch for any signs of fraud in light of B&B's concerns." The parties agree, however, that neither party ever raised concerns about Oles again. The Gilmores never followed up with Maddox or anyone

at MRPR or SU to determine if evidence of wrongdoing had been uncovered and neither Maddox nor his associates ever volunteered any information on this subject.

In 2004, Maddox left MRPR to join Ungar at SU, first as a one-half and later one-third equity partner. Using Maddox's and Ungar's history with the B&B account, Maddox convinced B&B to follow him to this new venture. He provided a business card to B&B describing SU as "CPAs and Business Advisors" and listing services similar to those available at MRPR. For the next five years, Maddox provided services on behalf of SU.

In October 2009, Oles committed suicide. In the weeks after her death, B&B discovered that Oles had improperly authorized bonuses for herself and forged Lee Gilmore's signature on checks she wrote to herself. These events began in 2007. Oles absconded with \$401,000 over the two-year period. The Gilmores contacted Maddox and he came to B&B's headquarters. Maddox had left SU less than a week before Oles's death to start his own firm and had not taken the B&B account with him, however. Maddox allegedly commented that Oles's failure to give him certain information "raised flags or suspicion with him." The parties disagree whether Maddox was referring to Oles's decision in the late 1990s to limit MRPR's access to B&B financial records or her conduct since the 2003 meeting.

B&B filed suit against Maddox and SU for failing to discover and notify B&B about Oles's activities. They alleged that while Maddox worked with MRPR, he provided "accounting and tax preparation services for both B&B and the Gilmores, overseeing B&B's bookkeeping department, advising B&B on general and day-to-day concerns regarding employees, healthcare and many other issues, and handling corporate entity changes for B&B." B&B alleged that Maddox continued to provide these services at SU and, "[i]n addition, Maddox began to assume even more comprehensive and complex financial and business undertakings on behalf of B&B and the Gilmores, rendering evaluations and advice with regard to general business, profitability, and employee matters." B&B also cited the 2003 meeting after which it alleged that "it was agreed that Maddox would keep a close eye on Oles and the corporate books for anything suspicious or out of the ordinary that might point to embezzlement from the Company." After Oles's death, according to B&B, Maddox suddenly and falsely asserted that he had only ever provided tax services to the company and had no role in monitoring Oles. Despite suspicions cited by Maddox and e-mail correspondence showing that the numbers presented by Oles were not always accurate and that Oles was hesitant to provide supporting documentation, Maddox never reported back to the Gilmores.

B&B alleged accountant malpractice against Maddox and SU based on their failure to monitor Oles's activities despite the "specific[] assign[ment]" of that task at the 2003 meeting, "to detect approximately \$401,000 in fraudulent checks" written by Oles, to follow up with B&B and warn the company of Oles's suspicious behavior and accounting errors, and "to institute even the most basic of safeguards or fraud protection with regard to Oles'[s] job performance." B&B also alleged that Maddox and SU breached their fiduciary duties to B&B. B&B asserted that the fiduciary duty arose "[b]y virtue of the accountant-client relationship . . . as [B&B's] certified public accountant and financial and business advisor." B&B cited the same conduct amounting to malpractice in support of these counts. B&B finally raised a breach of contract claim against SU alone. In relation to this count, B&B alleged:

52. Plaintiff, B&B, entered into an agreement in the late 1990's with the Accounting Firm for the performance of accounting, tax preparation, and business advisory services on B&B's and the Gilmore's behalf.

53. The Accounting Firm further agreed in 2003 to safeguard and protect the Company from embezzlement by taking protective measures including monitoring Oles'[s] business activities in light of her significant lifestyle change.

B&B claimed to have paid SU \$161,502.50 for its services from 1997 through 2009.² And yet, B&B alleged, SU "failed to safeguard and protect the Company by taking protective measures including monitoring Oles'[s] business activities, and as a result Oles was able to embezzle without detection \$401,000 from B&B between August 7, 2007 and October 23, 2009."

Following discovery, Maddox and SU sought summary disposition of these claims pursuant to MCR 2.116(C)(8) and (10). After separate hearings and relying on (C)(10), the circuit court dismissed B&B's complaint in its entirety. In relation to SU, the court noted, "Essentially, [B&B] seeks to hold [SU] liable for a 2003 promise allegedly made by the Defendant, John Maddox, wherein he would keep a close eye on [B&B's] bookkeeper." The court found "no evidence of a fiduciary duty between" SU and B&B and opined that B&B "blurs the distinction between the separate Defendants" in making this claim. In relation to B&B's accountant malpractice claim against SU, the court stated, "The failure to perform allegedly contracted for services gives rise to a contract and not a tort or a malpractice cause of action." Again, the court noted that B&B's claim was based on the 2003 promise made by Maddox to watch Oles and the argument that SU "was somehow obligated to oversee Olds [sic] and failed to do so." This sounded in breach of contract, not malpractice, according to the court. Moreover, the court could find no duty on SU's part based on a contract made in the mid-1990s before SU was formed and with no SU principal in attendance. The court also dismissed the breach of contract claim, ruling "there's no evidence binding this Defendant to a commitment made by a member of MRPR in 2003, let alone that it was breached."

The court later dismissed B&B's claims against Maddox based on MCR 2.116(C)(10) in a terse fashion. In relation to the breach of fiduciary duty claim, the court concluded, "[T]he evidence does not create a question of fact as to whether Defendant Maddox had any fiduciary duty to [B&B], let alone that he breached the same." The court further determined that "the evidence presented does not create a question of fact as to the elements of" the malpractice claim. The court continued, B&B's "claim is grounded on an alleged promise made by Maddox. However, the failure to perform allegedly contracted for services gives rise to a contract and not a tort in malpractice." The court could not consider a breach of contract claim against Maddox because B&B had not raised it. This appeal followed.

² In the complaint, B&B did not seem to appreciate that SU was an entirely separate entity from MRPR and did not take B&B as a client until 2004.

II. STANDARD OF REVIEW

The circuit court granted Maddox's and SU's motions for summary disposition based on MCR 2.116(C)(10). We review de novo that decision. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).]

III. FIDUCIARY DUTY

B&B challenges the circuit court's conclusion that neither Maddox nor SU owed it a fiduciary duty. "Whether to recognize a cause of action for breach of fiduciary duty is a question of law reviewed de novo, because the existence of a duty is generally a question of law." *Calhoun Co v Blue Cross & Blue Shield of Mich*, 297 Mich App 1, 20; 824 NW2d 202 (2012).

We first consider defendants' argument that the accountant malpractice statute, MCL 600.2962, abrogates the common law and creates the lone cause of action for accountant errors, thereby precluding any claim based on the breach of a fiduciary duty.

The common law remains in force until "changed, amended or repealed." Whether the Legislature has abrogated, amended, or preempted the common law is a question of legislative intent. We will not lightly presume that the Legislature has abrogated the common law. Nor will we will extend a statute by implication to abrogate established rules of common law. "Rather, the Legislature 'should speak in no uncertain terms' when it exercises its authority to modify the common law." [*Velez v Tuma*, 491 Mich 1, 11-12; 821 NW2d 432 (2012) (citations omitted).]

MCL 600.2962 "applies to an action for professional malpractice against a certified public accountant." MCL 600.2962(1). The statute by its own language does not apply to other actions against an accountant. The statute's second sentence—"A certified public accountant is liable for civil damages in connection with public accounting services performed by the certified public accountant only in 1 of the following situations"—must be read in harmony with the first. See *Frank v William A Kibbe & Assocs, Inc*, 208 Mich App 346, 350-351; 527 NW2d 82 (1995) ("In construing a statute, the court should presume that every word has meaning and avoid a

construction which would render a statute, or any part of it, surplusage or nugatory.”), *id.* at 354 (“Provisions must be read in the context of the entire statute so as to produce a harmonious whole.”). Under the plain language of the statute, an accountant’s *malpractice* liability is limited to the circumstances described in the statute, but other causes of action against an accountant remain intact.³

The circuit court correctly determined, however, that neither Maddox nor SU had a fiduciary relationship with B&B. “ ‘Fiduciary relationship’ is a legal term of art,” defined by our Supreme Court as follows:

“[A] relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.” [*In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003), quoting *Black’s Law Dictionary* (7th ed) (second alteration in original).]

“ ‘[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another.’ However, the placement of trust, confidence, and reliance must be reasonable” *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43-44; 698 NW2d 900 (2005) (citations omitted, alteration in original).

Common examples this Court has recognized include where a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser. In these situations, complete trust has been placed by one party in the hands of another who has the relevant knowledge, resources, power, or moral authority to control the subject matter at issue. [*Karmey*, 468 Mich at 74 n 3 (citation omitted).]

B&B cannot establish a fiduciary relationship in this case. First, the accountant-client relationship is not a traditionally recognized fiduciary relationship. There is no Michigan caselaw holding that an accountant generally owes a fiduciary duty to his or her clients. Rather,

³ We acknowledge that the federal district court for the eastern district of Michigan reached a contrary result in *Yadlosky v Grant Thornton, LLP*, 120 F Supp 622, 634 (ED Mich, 2000). We are not bound by federal decisions interpreting Michigan law. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 604; 673 NW2d 111 (2003).

Michigan, as with other states, only finds a fiduciary relationship when special facts support such a heightened duty. See *Shwayder Chem Metallurgy Corp v Baum*, 45 Mich App 220; 206 NW2d 484 (1973) (finding a fiduciary relationship where the accountant began as a private consultant but was then hired as the plaintiff company's business manager). See also *Vtech Holdings Ltd v PriceWaterhouseCoopers, LLP*, 348 F Supp 2d 255, 268 (SD NY, 2004) ("In New York, the accountant-client relationship does not generally give rise to a fiduciary relationship absent special circumstances, such as the accountant's commission of active fraud on the client. Even the existence of a consulting relationship does not automatically establish a fiduciary relationship."); *Fleet Nat'l Bank v H&D Entertainment*, 926 F Supp 226, 242 (D Mass, 1994) ("Where an accountant merely performs basic accounting functions, no fiduciary relationship is created."); *Iacurci v Sax*, 139 Conn App 386, 405; 57 A3d 736 (2012) (holding that no fiduciary relationship is created when the accountant simply prepares the client's yearly tax returns, but may arise when the accountant "undertake[s] tasks such as managing the plaintiff's funds, advising the plaintiff with regard to investments or recommending financial transactions.").

No one at MRPR or SU was socially acquainted with the B&B principals. At no time did B&B hire Maddox as an in-house employee. This case is therefore inapposite of *Shwayder Chem*. Neither Maddox nor SU committed fraud against their client. While Maddox and SU provided professional advice when requested by B&B beyond the mere preparation of tax returns, the creation of a fiduciary relationship would be attenuated in this case. Accordingly, B&B cannot prove a fiduciary relationship under the fourth *Karmey* factor—the existence of a traditionally recognized fiduciary relationship.

B&B also cannot show that a fiduciary duty arose based on the second *Karmey* factor—assumption of control or responsibility. There is no record indication that Maddox or SU took control or responsibility over B&B in any fashion. B&B always maintained in-house bookkeepers and financial staff. B&B acknowledged that the MRPR and SU representatives took a much more hands-off approach with the company than had its previous accountant. Although Lee Gilmore averred at his deposition that "MRPR was overseeing the accounting department," he later acknowledged that this statement was not supported by the evidence. Accepting B&B's evidence as true, the most Maddox and SU did was provide advice on various business matters. Such advice could be freely rejected by B&B, negating a fiduciary relationship under this factor.

B&B also did not create a genuine issue of material fact that a fiduciary relationship arose because it "place[d] trust in the faithful integrity of [Maddox and SU], who as a result gain[ed] superiority or influence over" it. While the Gilmores alleged that they placed their trust in Maddox and SU as their accountants, they have not pleaded or raised facts raising the trust to the level of a fiduciary relationship. The placement of trust must be reasonable in a fiduciary relationship. See *Prentis Family Foundation*, 266 Mich App at 43-44. B&B's trust that Maddox and SU would monitor Oles and uncover her fraud was unreasonable under the circumstances. B&B knew that Maddox was not conducting day-to-day or even monthly financial review of the company. Reconciling bank statements was their job, Harry and Lee Gilmore admitted. Despite their previous concerns about Oles's integrity, they completely entrusted that task to her and stopped overseeing her work. Without access to B&B's bank statements and detailed company records regarding income and expenses, neither Maddox nor SU had any way to discover the particular fraud perpetrated by Oles. Moreover, even if Maddox promised at the 2003 meeting to

“keep an eye on” Oles, it was unreasonable for B&B to believe that Maddox had continued such oversight four years later when neither party ever followed up to discuss the issue. Furthermore, it was not reasonable for B&B to rely on Maddox’s vague statement that he would monitor Oles, to mean that he would put fraud prevention safeguards into place, or conduct forensic accounting services to detect fraud. Such services would have been expensive and the Gilmores should have noticed that no bill was forthcoming.

Similarly, B&B cannot establish that Maddox or SU “ha[d] a duty to act for or give advice to” it regarding Oles’s fraud. Oles did not begin her embezzlement scheme until four years after Maddox allegedly promised to keep an eye on her. Even the Gilmores acknowledge that they uncovered no evidence that Oles was committing any type of fraud in 2003, when their suspicions were piqued. By 2007, B&B’s fears were so allayed that it allowed Oles to function alone as the accounting department with no employees or supervisors to interfere with or even notice her illegitimate acts. As the fear of fraud was seemingly a thing of the past, B&B cannot show that an eternally continuing duty to oversee Oles was a “matter[] falling within the scope of the relationship” between the accountant and client. The circuit court therefore properly dismissed B&B’s fiduciary duty claims against Maddox and SU.

IV. MALPRACTICE

The circuit court dismissed B&B’s malpractice claims against Maddox and SU because they were based on Maddox’s alleged breach of the 2003 promise to keep an eye on Oles. The breach of such a promise is based in contract, not tort, ruled the court. The court also ruled that the evidence presented by B&B did not create a genuine issue of material fact on the elements of a malpractice claim.

The circuit court correctly ruled that in order for a “tort” action to stand, “ [t]here must be some breach of duty distinct from breach of contract.’ ” *Rinaldo’s Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 83; quoting *Hart v Ludwig*, 347 Mich 559, 563; 79 NW2d 895 (1956). An accountant-client relationship, like many other business relationships, however, is born from a contract. The contract encompasses a duty to provide certain services or do certain acts. It also encompasses a duty to perform the services and acts underlying the contract with due care. Malpractice arises from the breach of the duty of care owed to the client under the contract. *Saur v Probes*, 190 Mich App 636, 638; 476 NW2d 496 (1991); *Malik v William Beaumont Hosp*, 168 Mich App 159, 168; 423 NW2d 920 (1988). The duty of care is separate and distinct from the contractual duty to provide services and therefore a plaintiff can raise both tort and breach of contract claims in one action.

In relation to an action arising out of subpar medical care, our Supreme Court described the difference between the malpractice and contract actions that could be raised:

“The 2 causes of action are dissimilar as to theory, proof and damages recoverable. Malpractice is predicated upon the failure to exercise requisite medical skill and is tortious in nature. The action in contract is based upon a failure to perform a special agreement. Negligence, the basis of the one, is foreign to the other. The damages recoverable in malpractice are for personal injuries, including the pain and suffering which naturally flow from the tortious act. In the

contract action they are restricted to the payments made and to the expenditures for nurses and medicines or other damages that flow from the breach thereof.” [Stewart v Rudner, 349 Mich 459, 468; 84 NW2d 816 (1957) (citation omitted).]

Here, B&B’s malpractice and contract claims were based on separate theories—the malpractice claim was based on the idea that Maddox and SU failed in their duties to adequately protect and advise their client, and the contractual claim was based on a failure to take specific agreed-upon actions. Although the malpractice claim arose from contracted-for services, it is not precluded. Accordingly, the circuit court erred in dismissing B&B’s malpractice claims on this ground.

The question remains whether B&B created a genuine issue of material fact that Maddox and SU committed accountant malpractice. “Professional malpractice involves the breach of a duty owed by one rendering professional services to a person who has contracted for such services.” *Saur*, 190 Mich App at 638. In order to state a claim for malpractice, a plaintiff must allege (1) the existence of a professional relationship; (2) negligence in the performance of the duties within that relationship; (3) proximate cause; and (4) the fact and extent of the client’s injury. See *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995) (defining legal malpractice). MCL 600.2912a provides, in relevant part, for a defendant’s malpractice liability:

(1) . . . [I]n an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:

(a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

MCL 600.2962 more specifically addresses accountant malpractice, in relevant part, as follows:

(1) This section applies to an action for professional malpractice against a certified public accountant. A certified public accountant is liable for civil damages in connection with public accounting services performed by the certified public accountant only in 1 of the following situations:

(a) Subject to subsection (2), a negligent act, omission, decision, or other conduct of the certified public accountant if the claimant is the certified public accountant’s client.^[4]

B&B presented evidence that within the confines of their professional relationship, Maddox agreed to monitor Oles and report back to B&B with any suspicious or concerning information. B&B also presented evidence that it expected Maddox and SU to continue MRPR’s

⁴ Subsection (2) limits liability when the claimant is not a client of the accountant.

services, which included notifying B&B of “material errors” uncovered during the course of its work. Although Maddox denies that such an oral promise was made in 2003, we are bound at the summary disposition phase to accept the nonmoving party’s evidence as true. Neither Maddox nor SU deny the more general duty.

B&B also presented sufficient evidence that Maddox breached his duty of due care to survive summary disposition. In 2006 and 2009, Maddox or other SU employees discovered accounting errors in the information provided by B&B. In both years, Maddox or the employees requested to review B&B’s general ledger, both to investigate the errors and to prepare B&B’s personal property tax return. Oles rejected Maddox’s requests, instead providing e-mail explanations for the errors and a summary report for tax preparation purposes. Yet, Maddox never raised any concerns with the Gilmores. Again, we are bound to interpret the evidence in B&B’s favor. If not for this limitation, we would find no breach given that four years had elapsed since the Gilmores’ initial concerns with Oles’s activities, no follow-up conversation ever occurred between B&B and its accountant, and B&B essentially allowed Oles to become a one-woman accounting department suggesting that their concerns had been assuaged. Under these circumstances, we would discern no negligence in the failure to report the 2006 and 2009 incidents. And following the MRPR engagement letter, which B&B believed bound Maddox and SU, Maddox complied by notifying the B&B accounting department, i.e. Oles, of the errors discovered.

In any event, B&B cannot create a genuine issue of material fact that Maddox’s and SU’s failure to report the 2006 and 2009 incidents was a proximate cause of its losses. Oles committed embezzlement in two ways: through fraudulent pay bonuses and forged checks. The fraudulent bonuses were processed through B&B’s private human resources vendor. Maddox and SU had no connection or contact with that vendor. Maddox and SU never reviewed records from that source. Accordingly, Maddox and SU had no way to discover the fraudulent bonuses.

The forged checks could only be discovered by reconciling B&B’s accounts. In 2007, the last employee under Oles’s supervision left and B&B did not replace her. Oles then changed the method by which B&B received its bank account statements from paper to on-line. Although Lee claimed he had always reviewed those statements, the Gilmores never noticed that they stopped receiving the statements. Maddox and SU would have no way to know about this change in internal operating procedures at B&B. Maddox and SU did not have access to the company’s safe where the paper checks were housed to discover that any were unaccounted for. The only way any accountant—MRPR, Maddox or SU—could have discovered the fraud was if they reconciled B&B’s bank accounts against the general ledger, a task that was never assigned to them. Investigation into the accounting errors discovered by Maddox and other SU employees would not have led to discovery of Oles’s embezzlement scheme. Neither would the production of B&B’s general ledger absent the bank statements.

As defendants could not have discovered the embezzlement or protected against it, they cannot be the proximate cause of B&B’s injuries. The circuit court therefore correctly dismissed these claims.

V. BREACH OF CONTRACT

B&B also challenges the circuit court's dismissal of its breach of contract claim against SU. This claim arose out of the mid-1990s contract with MRPR and Maddox's 2003 promise to keep an eye on Oles. B&B contended that these contracts followed Maddox to SU as he and Ungar convinced B&B to follow Maddox to SU. SU thereby promised to continue the services being provided to B&B by Maddox at MRPR.

"The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). "There are five elements of a valid contract: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Calhoun Co*, 297 Mich App at 13 (quotation marks and citation omitted). There must be "a meeting of the minds on all essential terms of a contract" and without this "a contract does not exist." *Id.* (quotation marks and citation omitted). Whether there is a meeting of the minds "is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Id.* (quotation marks and citation omitted).

First and foremost, the circuit court erred in concluding that Maddox did not have the power to bind SU to the contract entered by MRPR in the 1990s and the promise he made to B&B in 2003. In a partnership, each partner has the right to manage and conduct the partnership business, including the right to create obligations. *Crane & Bromberg, Law of Partnership* (1968), § 48, pp 272-273. Each partner acts as a principal and as an agent for the partnership. *Id.* at 273. See also *Hunt v Erikson*, 57 Mich 330, 333; 23 NW 832 (1885) ("[I]f they . . . stand to each other in the relation of principals, and in carrying on the business of the firm act merely as its agents, then a partnership does exist."). "Under the general mutual agency among partners, the act of every partner within the apparent scope of partnership business binds the partnership . . ." *Henn & Alexander, Laws of Corporations* (3d ed), § 22, p 70. See also *Wexford Twp v Seeley*, 196 Mich 634, 641; 163 NW 16 (1917) (emphasis added) ("The rule is too well established to need citation of authorities that one partner cannot bind his copartner by any contract *without* the scope of the partnership, that each partner is the agent for his copartners in the transaction of the business of the copartnership, but *not as to matters foreign to such business.*"); MCL 449.9(1) ("Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership . . .").

Maddox acted within the scope of partnership business when he convinced B&B to move their business from MRPR to SU and when he told B&B that this was a sound decision because he and Ungar had both worked on the B&B account and knew its business. This could be reasonably understood as a promise to continue the services Maddox and MRPR had been providing. Accordingly, SU was liable under contract to provide the services that MRPR had been contractually bound to provide. This would include the preparation of tax returns and the annual balance sheet as described in the MRPR engagement letter. Accepting as true that Maddox promised in 2003 to keep an eye on Oles, that contract would also bind SU.

B&B further created a genuine issue of material fact that a contract existed and that SU breached its contractual obligations. Defendants do not dispute that the parties were competent to contract, that accounting services are a proper subject matter, and that B&B paid for the services as it was obliged to do. The dispute arises over the mutuality of agreement regarding the nature of the contracted-for services.

Defendants claim that SU was only obligated to provide tax return services to B&B. Defendants point to the November 16, 2004 letter sent by Harry Gilmore to MRPR to advise it that B&B would be terminating its services. Specifically, the letter indicated, “We have engaged [SU] to prepare our tax returns for 2004.” B&B presented evidence refuting that claim, however. Maddox admitted that he recommended a human resources vendor to B&B while working for SU. B&B placed into the record various invoices describing services beyond tax preparation, such as “assistance with accounting for capital lease,” “review equipment lease,” “discussing accounting software options,” securing health insurance quotes, “go[ing] over health insurance software,” advising on the distribution of employee bonuses, and participating in a 2008 “meeting re finances of the company.” In a 2008 e-mail, Maddox provided to Anne and Lee Gilmore “comments and suggestions relative to the B&B current compensation plan and financial condition.” These services clearly went beyond the mere preparation of tax returns.

The breaches described by B&B are the failure to monitor Oles and the failure to notify the Gilmores of material errors or evidence of fraud. B&B implies that the accounting errors described in various e-mails between Oles and SU employees were material and should have been disclosed. B&B further implies that Oles’s unwillingness to provide the general ledger and other documentation were signs of potential fraud that SU should have reported. B&B also cited the failure to “institute[] even the most basic of safeguards or fraud protection with regard to the specific task of monitoring Oles.”

The accounting errors described in the e-mail correspondence were likely immaterial and appear to have been remedied after discussions with Oles. Moreover, B&B presented no evidence that the agreement to “keep an eye” on Oles required the imposition of safeguards or fraud protection. Yet, the evidence creates a triable issue whether SU breached its duty to notify B&B of potential fraud. While Maddox claimed in his deposition that Oles’s unwillingness to provide additional documentation was not concerning, the Gilmores swore that Maddox contradicted this statement in their conversation after Oles’s death. Accordingly, whether the failure to notify B&B of these refusals is a question for the fact finder. The circuit court therefore erred in granting summary disposition in SU’s favor on this limited issue. We vacate that portion of the summary dismissal order and remand for further proceedings.

IV. AMENDMENT OF COMPLAINT

Finally, B&B challenges the circuit court’s failure to address its request to amend its complaint in its response to defendants’ motions for summary disposition. Specifically, B&B wanted to add a breach of contract claim against Maddox individually. We review for an abuse of discretion a circuit court’s decision on a motion for leave to amend a pleading. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400-401; 729 NW2d 277 (2006).

Generally, a party may amend its complaint as a matter of right. *Ben P. Fyke & Sons v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973). “Leave shall be freely given” for an amendment “when justice so requires.” MCR 2.118(A)(2). Leave to amend should be denied only in limited situations such as where the amendment would cause undue delay, the party seeking amendment is acting in bad faith or has failed to cure pleading deficiencies after repeated amendments, or when the amendment would be futile. *In re Kostin*, 278 Mich App 47, 52; 748 NW2d 583 (2008). Moreover, when a court dismisses a plaintiff’s claims under MCR 2.116(C)(10), “the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” MCR 2.116(I)(5).

In this case, the circuit court ignored B&B’s amendment request. As noted above, B&B had a limited contractual cause of action against SU. That same claim could be raised against Maddox individually. This is the first amendment B&B requested and there is no apparent dilatory motive. Accordingly, on remand, the circuit court should grant B&B’s motion.

We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. As neither party prevailed in full, costs may not be taxed. MCR 7.219. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher