

IN THE SUPREME COURT OF IOWA

NO. 23-0866

**WILLIAM AND MARY GOCHE, LLC, GLOBAL ASSETS, LLC, and
JOSEPH GOCHE,
Plaintiffs-Appellants**

vs.

**KOSSUTH COUNTY BOARD OF SUPERVISORS in their capacity as
Trustees of Drainage Districts 4, 18, and 80, ROGER TJARKS, PAM
WYMORE, KYLE STECKER, JACK PLATHE, GENE ELSSBECKER,
GALEN CASEY, DONNIE LOSS, DON MCGREGOR, AND DON BESCH
Defendants-Appellees.**

and

**BOLTON & MENK, INC.,
Defendants-Appellees.**

**APPEAL FROM THE KOSSUTH COUNTY DISTRICT COURT CASE NO.
LACV027745**

**THE HONORABLE JUDGE JOHN M. SANDY
PRESIDING JUDGE**

DEFENDANT-APPELLEE BOLTON & MENK, INC.'S BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. DID THE DISTRICT COURT CORRECTLY DISMISS PLAINTIFFS' PETITION BECAUSE BOLTON & MENK, INC. AND THE BOARD OF SUPERVISORS DID NOT OWE FIDUCIARY DUTIES TO APPELLANTS?**

Kurth v. Van Horn, 380 N.W.2d 693 (Iowa 1986)

Iowa Code Chapter 468

Iowa Administrative Code 193C-8.2(1)

ROUTING STATEMENT

This case should be retained by the Supreme Court to clearly establish that engineers retained by a board of supervisors to fulfill a public function do not have a fiduciary duty to individual land owners in a drainage district, which is an issue of first impression.

STATEMENT OF THE CASE

The Appellants claim that Bolton & Menk, Inc. (“B&M”), a professional services company that provided engineering and surveying services to the Appellee-Defendants Members of the Kossuth County Board of Supervisors (“Supervisors”), breached fiduciary duties owed to Appellants who are individual land owners in the drainage districts.

B&M and the Supervisors filed separate motions to dismiss Appellant’s Amended Petition for failure to state a claim based primarily on the argument that neither B&M nor the Supervisors owes fiduciary duties to Appellants. The district court correctly concluded that none of the Appellees owed fiduciary duties to Appellants, and dismissed the Amended Petition.

With respect to B&M, the district court dismissed Count IV (Breaches of Fiduciary Duties by Bolton & Menk) on the basis that there was “no conceivable state of facts under which [B&M] owed Plaintiffs any fiduciary duties” because B&M and Plaintiffs never had a direct relationship. App. P. 662, 667.

The district court dismissed Count VI (Conspiracy to Breach Fiduciary Duties) because liability for a conspiracy claim under Iowa law requires a wrongful act causing injury, and B&M's alleged actions in performing engineering work are not wrongful; rather, it was the alleged misuse of that information that caused harm. *Id.* at 667. The district court dismissed Count V (Aiding and Abetting Breaches of Fiduciary Duties by Non-Trustee Defendants) in a separate order in which it dismissed Appellant's claims against the Board. App. P. 713. The district court found that the claim for aiding and abetting the breach of fiduciary duties could not survive where the Supervisors owed no fiduciary duties to Appellants.

There is no law under which B&M could owe fiduciary duties to Appellants, who were never B&M's clients. As to the conspiracy and aiding and abetting claims, B&M's actions in preparing its reports were lawful and no liability can attach, regardless of whether that information was later misused.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' PETITION BECAUSE BOLTON & MENK, INC. AND THE BOARD OF SUPERVISORS DID NOT OWE FIDUCIARY DUTIES TO APPELLANTS.

A. PRESERVATION OF ERROR.

B&M joins Defendants-Appellees Supervisors' position that error was not preserved by Appellants filing a notice of appeal as stated in Defendant-Appellees' Motion to Dismiss, previously filed with this Court.

B. SCOPE OF REVIEW.

On review of a motion to dismiss, the appellate court reviews for correction of errors at law. *Shumate v. Drake University*, 846 N.W.2d 503, 507 (Iowa 2014).

C. PLEADING MALICIOUS, WILLFUL, WANTON, OR RECKLESS ACTS DOES NOT CHANGE THAT MEMBERS OF A BOARD OF SUPERVISORS AND BOLTON & MENK, INC. DID NOT OWE FIDUCIARY DUTIES TO INDIVIDUAL LANDOWNERS IN A DRAINAGE DISTRICT.

Appellants did not assert separate claims for punitive damages against B&M, and do not appear to include B&M under their argument asserted in Section C of Appellants' Proof Brief. Rather, the focus appears to be on Appellants' claims for the same against Defendants-Appellees Supervisors. Appellants should not be permitted to ambush B&M in their reply, and the Court should rule that Appellants' failure to make any legal arguments asserting why the district court erred in dismissing all of Appellants' claims against B&M (except to the extent the aiding and abetting the Supervisors' alleged breach of its fiduciary duties could be automatically revived if the Supervisors do owe such fiduciary duties) constitutes a waiver. *Hylar v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996) (citing Iowa R.App.P.

14(a)(3) failure to argue an issue or cite authority in support may be deemed a waiver of that issue); *Doss v. State*, 961 N.W.2d 701, n.4 (Iowa 2021).

To the extent Appellant’s argument in Section C is intended to apply to B&M and is not waived as to B&M, B&M hereby joins in Defendants-Appellees Supervisors’ argument in Section C of their Proof Brief, and B&M further asserts the following arguments.

1. BOLTON & MENK DID NOT OWE FIDUCIARY DUTIES TO APPELLANTS

The district court correctly dismissed Appellant’s claim that B&M was liable to Appellants on a theory of breach of fiduciary duties because there was “no conceivable state of facts under which [B&M] owed Plaintiffs any fiduciary duties” because B&M and Appellants never had a direct relationship. App. P. 662.

“A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship.” *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986). “Some of the indicia of a fiduciary relationship include the acting of one person for another; the having and exercising of influence over one person by another; the inequality of the parties; and the dependence of one person on another.” *Irons v. Community State Bank*, 461 N.W.2d 849, 852 (Iowa App. 1990). “Fiduciary

duty arises, for example, between attorneys and clients, guardians and wards, and principals and agents.” *Oeltjenbrun v. CSA Investors, Inc.*, 3 F.Supp.2d 1024, 1053 (N.D. Iowa 1998) (citing *Kurth*, 380 N.W.2d at 698)). Whether a duty exists under the facts of a case is a question of law. *Stotts v. Eveleth*, 688 N.W.2d 803, 810 (Iowa 2004).

B&M has not found and is not aware of any Iowa law holding that engineers are fiduciaries of their clients, let alone non-clients. Iowa law provides for actions against engineers based only in negligence and breach of contract. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612, 615 (Iowa 1992). Other states, such as Minnesota and Indiana, have explicitly rejected the notion that professional service providers, such as engineers, are fiduciaries for their clients. See, e.g., *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 329-31 (Minn. App. 2007) (“relationship of architect and client is not a fiduciary one”); *Strauss Veal Feeds, Inc. v. Mead and Hunt, Inc.*, 538 N.E.2d 299, 303 (“An architect does not owe a fiduciary duty to its employer; rather, the architect’s duties to its employer depend upon the agreement it has entered into with that employer”). Bolton & Menk is not aware of any state law that holds an engineer owes fiduciary duties to its client, let alone non-clients.

In reality, Engineers *cannot* owe fiduciary duties because the statutory code of professional conduct requires that professional engineers owe their ultimate duties of care to the public—even above clients:

(1) Responsibility to the public. Licensees shall conduct their professional practices in a manner that will protect life, health and property and enhance the public welfare. If their professional judgment is overruled under circumstances where safety, health and welfare of the public are endangered, they shall inform their employer or client of the possible consequences, notify such other proper authority as may be appropriate, and withdraw from further services on the project.

Licensees shall neither approve nor certify engineering or land surveying documents that may be harmful to the public health and welfare and that are not in conformity with accepted engineering or land surveying standards.

Iowa Administrative Code 193C-8.2(1). This conflicts with the very nature of a fiduciary duty, which demands utmost loyalty to the client.

In the district court proceedings, Appellants attempted to argue in response to B&M's Motion to Dismiss that Iowa Code Chapter 468 is the source for B&M's fiduciary duties. This allegation was not pleaded in Appellants' Amended Petition, and it does not appear that Appellants have asserted it in this appeal.¹ Nonetheless, Chapter 468 does not contain any authority for the proposition that B&M owed

¹ Appellants' Section E Argument asserts that Iowa Code Chapter 468 establishes fiduciary duties between the Supervisor-Trustee Defendants and Appellants, but it does not argue this chapter establishes fiduciary duties between B&M and Appellants.

fiduciary duties to Appellants. The district court concluded that, at best, B&M may have owed fiduciary duties to Defendants-Appellees Supervisors as their hired engineer for the work at issue in Appellants' Amended Petition. App. P. 661. But the district court noted that Appellants did not cite and the court could not find any Iowa cases holding that fiduciary duties could be "chained from one party to the next," such that B&M would owe fiduciary duties to Appellants by operation of B&M's duties to the Supervisors. *Id.* at 662. The district court also found that Appellants had not pleaded any facts alleging that Appellants had put faith, confidence, and trust in B&M, or that B&M was required to give advice to Appellants, or that B&M acted for the benefit of Appellants. *Id.* Appellants have similarly failed to assert any legal argument in their appeal establishing a basis for their claim that B&M owed fiduciary duties to Appellants.

2. APPELLANTS FAILED TO STATE A CLAIM FOR AIDING AND ABETTING THE BREACH OF A FIDUCIARY DUTY.

The district court correctly dismissed Appellant's claim that B&M aided and abetted the breach of fiduciary duties by the Supervisors because the Supervisors did not owe fiduciary duties to Appellants. App. P. 713.

Appellants alleged the Supervisors allowed Appellants to install private tiling in DD80 and DD4, and later reneged on that agreement and ordered Appellants to remove it. Appellants alleged that B&M aided and abetted the Supervisors by

providing engineering services in the form of a report that merely identified the locations of the private tiling work. Appellants also argue that B&M aided and abetted the Supervisors when the Supervisors assessed Appellants for a portion of B&M's engineering fees for preparing an engineering report related to DD18.

Aiding and abetting requires “a wrong to the primary party, knowledge of the wrong on the part of the aider, and substantial assistance by the aider in the achievement of the primary violation.” *Vroegh v. Iowa Dep't of Corr.*, 972 N.W.2d 686, 709 (Iowa 2022). “The conduct of a party is a proximate cause of damages when it is a substantial factor in producing damages and when the damages would not have happened except for the conduct.” *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 323 (Iowa 1992).

The district court dismissed this claim in its April 18, 2023 Order on the basis that it was contingent upon the Supervisors breaching fiduciary duties, and that the Supervisors had no such duties to Appellants as individual land owners. App. P. 713. B&M joins in and adopts the arguments in Defendants-Appellees Supervisors Proof Brief that Defendants-Appellees Supervisors did not owe fiduciary duties to Appellants as individual land owners and, for those reasons, Appellants cannot maintain a claim against B&M for aiding and abetting the breach of fiduciary duties which do not exist.

3. APPELLANTS FAILED TO STATE A CLAIM FOR CONSPIRACY TO BREACH A FIDUCIARY DUTY.

The district court dismissed Appellant's claim that B&M conspired to breach the Defendants-Appellees Supervisor's fiduciary duties because liability for a conspiracy claim under Iowa law requires a wrongful act causing injury, and B&M's alleged actions in performing engineering work are not wrongful; rather, it was the alleged misuse of that information that caused harm. App. P. 666.

“A person becomes subject to liability for harm caused by the tortious conduct of another when that person: (a) does a tortious act in concert with the other or pursuant to a common design with the other (traditional conspiracy) . . .” *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994) (citing Restatement (Second) of Torts § 876 at 315 (1979) (emphasis added). “Civil conspiracy is not in itself actionable; rather it is the acts causing injury undertaken in furtherance of the conspiracy which give rise to the action.” *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220, 233 (Iowa 1977) (citing *Shannon v. Gaar*, 6 N.W.2d 304, 308 (Iowa 1942) (emphasis added)). As explained in *Shannon*, “[t]he gist of an action such as this is not, as appellees assert, the conspiracy, but the wrong done and the resulting damage. It is well settled that an allegation of conspiracy may be regarded as surplusage and recovery had against all defendants shown to have participated in the wrongful act which results in damage.” 6 N.W.2d 308 (emphasis added).

Appellants' conspiracy claim is based upon the allegation that B&M knew the Supervisors intended to harm Appellants using B&M's report and invoices and are therefore liable for providing them. Appellants' claim as pleaded is the converse of a conspiracy claim—it is entirely focused on the conspiracy aspect, not the actions. It alleges B&M *knew* the trustees intended to harm Plaintiffs, and is therefore liable for the injury. A conspiracy claim, however, requires B&M commit wrongful acts in concert or coordination with the trustees. As the district court correctly concluded, B&M had the legal right to perform engineering services for a client and bill for those services. App. P. 666. The alleged “wrongful acts” causing harm were the Supervisors misusing the report to order removal of private tiling and improperly apportioning B&M's fees to Appellants. *Id.* B&M had no control over or participation in these acts, and therefore cannot be held responsible for them under a theory of conspiracy.

D. IOWA CODE § 468.526A AND § 670.12 DO NOT APPLY TO BOLTON & MENK, INC.

Appellants do not assert this argument against B&M; they assert it only as to the “Supervisor-Trustee Defendants.” Appellants should not be permitted to ambush B&M in their reply, and the Court should rule that Appellants' failure to make any legal arguments asserting why the district court erred in dismissing all of Appellants' claims against B&M (except to the extent the aiding and abetting the Supervisors' alleged breach of its fiduciary duties could be automatically revived if the

Supervisors do owe such fiduciary duties) constitutes a waiver. *Hylar*, 548 N.W.2d at 876; *Doss*, 961 N.W.2d at n.4.

To the extent Appellant’s argument in Section D is intended to apply to B&M and is not waived as to B&M, B&M hereby joins in Defendants-Appellees Supervisors’ argument in Section D of their Proof Brief, and B&M further asserts the following arguments.

Section 468.526A by its plain terms applies only to “trustees,” and B&M is not a trustee. “When the language of a statute is plain and its meaning clear, the rules of statutory construction do not permit us to search for meaning beyond the statute's express terms.” *Rock v. Warhank*, 757 N.W.2d 670, 673 (Iowa 2008). The meaning of “trustees” is defined throughout Chapter 468. Section 468.506(1)-(4) defines the eligibility of trustees, which includes an individual or entity with an interest in land located in the election district and residency within the district or adjacent county. In contrast, the definition of “engineer” contains the express requirement that it be “disinterested.” Iowa Code § 468.10(1). It cannot be disputed that B&M is not and has never been a “trustee” within the meaning of Section 468.526A and, therefore, this section of the statute does not apply to it, regardless of its meaning.

E. BOLTON & MENK, INC. DOES NOT OWE FIDUCIARY DUTIES TO APPELLANTS UNDER IOWA CODE CHAPTER 468 OR ANY OTHER LAW.

Appellants do not assert this argument against B&M; they assert it only as to the “Supervisor-Trustee Defendants.” Appellants should not be permitted to ambush B&M in their reply, and the Court should rule that Appellants’ failure to make any legal arguments asserting why the district court erred in dismissing all of Appellants’ claims against B&M (except to the extent the aiding and abetting the Supervisors’ alleged breach of its fiduciary duties could be automatically revived if the Supervisors do owe such fiduciary duties) constitutes a waiver. *Hylar*, 548 N.W.2d at 876; *Doss*, 961 N.W.2d at n.4.

To the extent Appellant’s argument in Section E is intended to apply to B&M and is not waived as to B&M, B&M hereby joins in Defendants-Appellees Supervisors’ argument in Section E of their Proof Brief.

B&M incorporates by reference its argument in Section C(1) regarding the lack of any legal basis for Appellants to claim B&M owed fiduciary duties to Appellants. With respect to Iowa Code Chapter 468, B&M further argues that there are no provisions within Iowa Code Chapter 468 that state an engineer owes fiduciary duties to Appellants as private landowners within a drainage district. Rather, Section 468.10(1) specifically requires that any engineer retained by a drainage district be “disinterested.” Appellants have offered no arguments

supporting a claim that Iowa Code Chapter 468 creates fiduciary duties between an engineer hired by the drainage district and an individual landowner within a district.

F. THE DISTRICT COURT CORRECTLY DISMISSED THE PLAINTIFFS' PETITION AS TO BOLTON & MENK, INC. BECAUSE NEITHER IT NOR THE BOARD OF SUPERVISORS OWED FIDUCIARY DUTIES TO APPELLANTS AND BOLTON & MENK, INC.'S ACTS WERE LAWFUL.

B&M cannot be held liable for malicious, willful, and wanton, or reckless misconduct in the breach of fiduciary duties where neither B&M nor the Supervisors owed any such fiduciary duties in the first place. B&M hereby incorporates by reference its arguments in Section C(1)-(3) establishing why B&M did not owe fiduciary duties to Appellants and why it cannot be held liable for conspiracy to breach fiduciary duties or aiding and abetting the breach of fiduciary duties by the Supervisors.

CONCLUSION

Appellants did not make any legal arguments asserting why the district court erred in dismissing all of Appellants' claims against B&M except to the extent the aiding and abetting the Supervisors' alleged breach of its fiduciary duties could be revived if the Supervisors do have such fiduciary duties. For this reason alone, this Court should deem any such arguments waived. Nonetheless, the district court's dismissal of Appellants' Amended Petition was correct and should be affirmed. As a matter of law, B&M and the Supervisors owed no fiduciary duties to Appellants

as individual landowners in a drainage district. Accordingly, all of Appellants claims for conspiracy, aiding and abetting, and punitive damages also fail as a matter of law.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellee Bolton & Menk, Inc. requests oral argument in this matter.

Dated: November 1, 2023

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ATTORNEY'S COST CERTIFICATE

I certify that the actual cost of reproducing the necessary copies of Defendant-Appellee Supervisors' Brief and Request for Oral Argument consisting of 22 pages was the sum of \$0.00.

Dated: November 1, 2023

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Brief contains 3,071 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in Size 14 font.

Dated this 1st Day of November, 2023.

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CERTIFICATE OF FILING

I, Jeffrey W. Coleman, hereby certify that I electronically filed the foregoing Defendant-Appellee Bolton & Menk, Inc. Brief And Request For Oral Argument with the Clerk of the Iowa Supreme Court on November 1, 2023.

I, Jeffrey W. Coleman, hereby further certify that on November 1, 2023, I served the foregoing Defendant-Appellee Bolton & Menk, Inc. Brief And Request For Oral Argument by the electronic filing system, to the following attorneys of record:

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