

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP63
STATE OF WISCONSIN**

Cir. Ct. No. 2009CV18120

**IN COURT OF APPEALS
DISTRICT I**

MORRIS BROWN,

PLAINTIFF-APPELLANT,

v.

FIRST CAPITAL SURETY & TRUST CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Morris Brown appeals from a judgment entered after the circuit court granted First Capital Surety & Trust Corporation's motion for summary judgment. First Capital was the trustee and trust administrator of a spendthrift trust of which Brown was the grantor and beneficiary. Brown argues

that the circuit court erred on summary judgment in concluding that First Capital did not breach the trust agreement or breach its fiduciary duty, and in concluding that Brown did not plead his WIS. STAT. § 551.501 (2009-10)¹ fraud claim with sufficient particularity. For the reasons which follow, we affirm.

BACKGROUND

I. The Trust Agreement

¶2 In July 1999, Brown (with the assistance of counsel), Morgan Chase Trust Company, and Morgan Chase Company created the Morris Brown Settlement Preservation Trust. The trust was funded with a lump sum payment of \$268,750 that Brown received from a wrongful death action after his wife was killed in an automobile accident. First Capital is the successor to the Morgan Chase Trust Company and Morgan Chase Company. Brown and representatives from Morgan Chase Trust Company and Morgan Chase Company each signed the trust agreement.

¶3 Paragraph 3 of the trust agreement expressly describes the trust's purposes as follows:

The primary purpose of this Trust is to protect the settlement amount conveyed to the Trust from wasteful dissipation....

a). A secondary purpose of this Trust is to provide periodic payments to the Beneficiary over a minimum period, initially as provided for in Schedule C.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

b). A secondary purpose of this Trust is to permit the Beneficiary the right to request limited distributions from the Trust's corpus, under Section 4(b) herein, limited in amount and frequency so that the Trust corpus is spendthrift protected.

c). A secondary purpose of this Trust shall be, within the Trustee's sole discretion, to provide funds to the Beneficiary for medical treatment, payment of tax liability and/or assisted living expenses not available through other means.

¶4 The trust agreement's payment instructions, included in Schedule C, directed First Capital, as the trustee, to distribute trust funds to Brown as follows:

- A. \$2,000.00 paid monthly for 15 years. Tax favored payments commence on 08/01/1999 and continue to and including 07/01/2014.
- B. Lump sum payment paid on 07/01 in year and amount as follows:

2014 - \$156,487[.]

But the payment instructions also contained review-and-recalculate and no-guarantee-of-future-payments clauses:

This Schedule of Payment Instructions shall be reviewed and recalculated annually on or before the anniversary of this executed Agreement. Following any distributions from the Trust pursuant to Section 3(b) and 3(c), the periodic payments referred to in Schedule C and Section 3(a) herein shall be reviewed and recalculated within thirty (30) days following said distribution. Grantor acknowledges that the Trustee, the Trust Service Administrator and the Fund Provider have made no guarantee with regard to future payments.

(Emphasis added.) Similarly, paragraph 4(d) of the trust agreement reiterates that the periodic payments set forth in Schedule C were to be "reviewed annually and recalculated." Brown signed the Schedule C payment instructions, just as he had the trust agreement.

¶15 Along with the no-guarantee clause in the Schedule C payment instructions, paragraph 15 of the trust agreement also expressly states that it does not make any guarantee with regard to investment return or performance, stating:

In entering into this Agreement, the Grantor represents that Grantor has read the terms of this Agreement and that those terms are fully understood by Grantor. Grantor has consulted with Grantor's own attorneys concerning this Trust and its terms and conditions. Grantor acknowledges that *Trustee and the Trust Service Administrator have not made any guarantee with regard to investment return or performance.*

(Emphasis added.)

II. The Facts

¶16 In October 1999, only months after the trust's creation, Brown requested a withdrawal of \$25,000 from the trust for a home down payment. The trust agreement permitted a \$25,000 withdrawal for the purchase of a home, but the withdrawal lowered the trust's corpus by approximately ten percent and eroded the trust's previously projected compound interest potential. First Capital's internal records state that two unnamed First Capital employees "[i]nformed Mr. Brown [his] pay[men]ts would change due to [the] withdrawal," but that Brown replied "[h]e want[ed the] final lump [sum] adjusted." First Capital produced these internal records during summary judgment and they are included in the record. Brown's counsel acknowledged at oral argument that Brown did not present any evidence during summary judgment to refute First Capital's claim that Brown asked First Capital to reduce the final lump sum payment, instead of reducing the monthly payments. Per Brown's instructions, First Capital continued to distribute to Brown \$2000 a month as set forth in Schedule C.

¶7 In October 2008, First Capital notified Brown by letter that it anticipated that the trust would terminate in April 2009. First Capital stated in the letter that the anticipated termination date was “based on market performance during the past several years, and the depletion of assets for an unscheduled distribution to you in the amount of \$25,000 in 1999.” The parties appear to agree that the trust terminated as First Capital anticipated in April 2009 and that Brown did not receive the final lump sum payment set forth in Schedule C.

¶8 In November 2009, Brown filed a complaint against First Capital, alleging breach of fiduciary duty, misrepresentation, and violation of WIS. STAT. § 551.501. Brown later filed an amended complaint, alleging breach of fiduciary duty, breach of contract, and a violation of § 551.501, abandoning his misrepresentation claims. In the amended complaint, Brown requested “damages in the amount equal to \$268,750.00 [the principal of the trust], plus the total amount of interest not paid as scheduled, the costs and disbursements of this action[.]”

¶9 First Capital filed a motion for summary judgment, asserting, as relevant to this appeal, that the undisputed facts demonstrated that it complied with the unambiguous terms of the trust agreement, that the trust agreement made no guarantees to Brown about performance of the trust, and that Brown did not plead the WIS. STAT. § 551.501 fraud claim with sufficient particularity. Brown also filed a summary judgment motion. After a hearing and supplemental briefing by the parties, the circuit court granted First Capital’s summary judgment motion, denied Brown’s summary judgment motion, and entered judgment accordingly. Brown appeals.

DISCUSSION

¶10 Brown argues that the circuit court erred in granting First Capital’s motion for summary judgment because the undisputed facts demonstrate that First Capital breached the terms of the trust agreement and its corresponding fiduciary duties, and that Brown properly pled his WIS. STAT. § 551.501 fraud claim. More specifically, Brown claims that: (1) First Capital breached the terms of the trust agreement and its fiduciary duty by failing to pay him the final lump sum payment described in Schedule C because the payment instructions in Schedule C, when read in conjunction with the trust’s primary purpose as set forth in paragraph 3, “guaranteed” Brown the final lump sum payment; (2) First Capital breached the terms of the trust agreement and its fiduciary duty when it failed to review and recalculate Brown’s monthly payments annually, as required by Schedule C and paragraph 4(d), preventing Brown from receiving the “guaranteed” final lump sum payment and thereby damaging him; and (3) the trial court erred in finding that Brown failed to state his § 551.501 fraud claim with sufficient particularity.² Because Brown’s assertions relating to his breach of contract and breach of fiduciary duty claims stem from the same trust agreement provisions, we address issues one and two together, and then address issue three, Brown’s fraud claim.

² Brown’s Statement of Issues, as explained by Brown’s counsel during oral argument, raises the three issues presented here. However, in the Statement of Facts and Argument sections of his appellate brief, Brown appears to raise other issues relating to the trust agreement’s fees and communications clauses. Because those issues are not properly before this court, and because Brown’s counsel conceded those issues during oral argument, we do not address them. We note that under WIS. STAT. § 809.19(1)(b) and (e), counsel’s arguments on appeal are limited to those issues set forth in his Statement of Issues.

¶11 “We review a grant of summary judgment independently, applying the same methodology as the circuit court.” *Pinter v. American Family Mut. Ins. Co.*, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In deciding whether there are factual disputes, the circuit court and the reviewing court consider whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute genuine issues of material fact. *Hennekens v. Hoerl*, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991). We draw all reasonable inferences from the evidence in favor of the nonmoving party. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980), *abrogated on other grounds by Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, ¶28, 303 Wis. 2d 295, 735 N.W.2d 448. Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law that we review *de novo*. *Hennekens*, 160 Wis. 2d at 162.

I. Breach of Contract and Breach of Fiduciary Duty Claims

¶12 Brown alleges that First Capital breached the terms of the trust agreement and its corresponding fiduciary duty in two ways: (1) by failing to comply with the trust’s payment instructions, which allegedly guaranteed Brown the final lump sum payment set forth in Schedule C; and (2) by failing to annually review and recalculate his monthly payments to ensure the allegedly guaranteed final lump sum payment. We address each in turn.

¶13 When evaluating a breach of contract claim, we must first determine whether a valid contract exists. *Pasko v. City of Milwaukee*, 222 Wis. 2d 274, 279, 588 N.W.2d 642 (Ct. App. 1998). Here, the parties appear to agree that the

trust agreement is a binding contract. If a valid contract exists, we then must determine whether a party has violated its terms, and whether the violation is material such that it has resulted in damages. *Id.* “Contracts are construed to achieve the parties’ intent.” *Goldstein v. Lindner*, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. “The terms used in a contract are to be given their plain or ordinary meaning.” *Id.* “The analysis ends if the words convey a clear and unambiguous meaning.” *Id.* “If [the parties’] intent can be determined with reasonable certainty from the face of the contract itself, there is no need to resort to extrinsic evidence.” *Id.* (citation omitted; brackets in *Lindner*). “When the contract is unambiguous, determining its meaning presents a question of law we ... review *de novo*.” *Pasko*, 222 Wis. 2d at 279. “In a breach of contract action, the plaintiff bears the burden of proving that the defendant violated the terms of the contract.” *Acuity Mut. Ins. Co. v. Olivas*, 2006 WI App 45, ¶14, 289 Wis. 2d 582, 712 N.W.2d 374.

¶14 In order to prove a breach of fiduciary duty, a plaintiff must show: “(1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that duty; and (3) the breach of duty caused the plaintiff’s damage.” See *Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶¶40, 54, 312 Wis. 2d 251, 752 N.W.2d 800. “It is well established in Wisconsin that trustees have a fiduciary duty in managing a trust.” *Zastrow v. Journal Commc’ns, Inc.*, 2006 WI 72, ¶22, 291 Wis. 2d 426, 718 N.W.2d 51. We turn to the trust agreement itself to determine the trustee’s duty to the beneficiary. See *McGeoch Bldg. Co. v. Dick & Reuteman Co.*, 253 Wis. 166, 175, 33 N.W.2d 252 (1948) (“the instrument creating the trust or the fiduciary relationship is to be looked to for stipulations fixing the obligations of the parties”); see also *Saros v. Carlson*, 244 Wis. 84, 88, 11 N.W.2d 676 (1943) (“It is a trustee’s paramount duty ... to comply with the terms of the trust.”).

Whether the undisputed facts “satisfy the elements of a claim for a breach of fiduciary duty is a question of law reviewed de novo.” *Groshek v. Trewin*, 2010 WI 51, ¶11, 325 Wis. 2d 250, 784 N.W.2d 163.

A. *Payment Instructions*

¶15 Brown first contends that the payment instructions set forth in Schedule C, when read in conjunction with the trust’s primary purpose as set forth in paragraph 3, *guaranteed* him certain payments. As best we can tell from his briefs, Brown believes that the trust agreement guaranteed him monthly payments, to be recalculated annually until July 2014, and a final lump sum payment of \$156,487 at the trust’s termination. When asked at oral argument to clarify his argument as to what the contract guaranteed and how he was damaged, Brown’s counsel argued that the contract guaranteed Brown a final lump sum payment and that he did not receive the final lump sum payment due to the trust’s early termination.

¶16 Brown’s argument is unsupported by the plain terms of the trust agreement. Paragraph 3 of the trust agreement clearly states that the payment schedule set forth in Schedule C was not permanent, and Schedule C and paragraph 15 of the trust agreement each contain no-guarantee clauses, explicitly stating that the trust agreement did not guarantee Brown *any* payments—either monthly payments or final lump sum payments. We look at each trust agreement clause in turn.

¶17 To begin, paragraph 3 of the trust agreement explicitly states that the payment instructions set forth in Schedule C were not set in stone, stating that one of the trust’s expressed secondary purposes was “to provide periodic payments to the Beneficiary over a minimum period, *initially* as provided for in Schedule C.”

(Emphasis added.) In other words, paragraph 3 explains that Schedule C only set forth the first (or initial) payment schedule and was subject to adjustments if, as happened here, Brown withdrew a substantial portion of the trust's corpus to buy a house, or if the market did not perform as expected.

¶18 Schedule C explicitly states “that the Trustee, the Trust Service Administrator and the Fund Provider have made *no guarantee with regard to future payments.*” (Emphasis added.) The clause's language is broadly drafted and does not limit its reach to the value of each monthly payment, the number of monthly payments, or the amount or existence of a final lump sum payment, but instead states that *no* future payments are guaranteed. See *Lindner*, 254 Wis. 2d 673, ¶12 (“The terms used in a contract are to be given their plain or ordinary meaning.”).

¶19 Paragraph 15 of the trust agreement also expressly dictates that Brown is not guaranteed any particular payment. Paragraph 15, in relevant part, states: “Grantor has consulted with Grantor's own attorneys concerning this Trust and its terms and conditions. Grantor acknowledges that *Trustee and the Trust Service Administrator have not made any guarantee with regard to investment return or performance.*” (Emphasis added.) Again, the clause is broadly drafted and does not limit its reach to either the value of each monthly payment, the number of monthly payments, or the amount or existence of a final lump sum payment. See *id.*

¶20 Because the trust agreement, by its plain terms, did not guarantee Brown *any* payments, much less a final lump sum payment, First Capital, in not paying the final lump sum amount from Schedule C, did not breach the trust agreement, and thus, cannot be said to have breached any fiduciary duty that may

have arisen from the trust agreement. Therefore, we affirm the circuit court's grant of summary judgment with respect to the trust agreement's payment instructions.

B. Review-and-Recalculate Clauses

¶21 Next, Brown argues that First Capital breached the trust agreement and its corresponding fiduciary duty by allegedly failing to annually review and recalculate Brown's monthly payments, as required by Schedule C and paragraph 4(d) of the trust agreement, resulting in the trust's early termination and depriving Brown of his "guaranteed" final lump sum payment. Again, we conclude that Brown's argument is wholly without merit.

¶22 To begin, as the plaintiff, Brown carried the burden of proving that First Capital failed to annually review and recalculate Brown's monthly payments, and Brown failed to meet that burden. *See Acuity Mut. Ins. Co.*, 289 Wis. 2d 582, ¶14; *Berner Cheese Corp.*, 312 Wis. 2d 251, ¶¶40, 54. We have found no evidence in the record that First Capital did not review and recalculate the monthly payments, nor could Brown's counsel cite to any such evidence at oral argument. We agree with the circuit court that "[Brown] has identified no witness who can testify to that matter in order to survive summary judgment."

¶23 In fact, during summary judgment, First Capital produced its internal records, which noted that Brown, after receiving the \$25,000 distribution for the purchase of a property, told First Capital employees that he did not want his monthly payments lowered, but, instead, wanted his final lump sum payment adjusted. Brown's counsel conceded at oral argument that Brown did not offer any evidence to rebut the internal records produced by First Capital. Thus, the record conclusively shows that Brown neither offered evidence of First Capital's

alleged failure to annually review and recalculate the monthly payments nor rebutted First Capital's evidence that Brown instructed First Capital *not* to review and recalculate, leaving the matter undisputed for the purposes of summary judgment.³ See WIS. STAT. § 802.08(2).

¶24 Second, even if Brown had met his burden of proof and demonstrated that First Capital had failed to annually review and recalculate Brown's monthly payments, his argument fails for the same reasons set forth above: the trust agreement did not guarantee Brown any payments in any particular amount or at any time. Thus, *even if* First Capital failed to annually review and recalculate Brown's monthly payments, as Brown argues, Brown has not shown that the failure to review and recalculate damaged him. See *Pasko*, 222 Wis. 2d at 279 (breach of contract claim requires plaintiff to prove damages); *Berner Cheese Corp.*, 312 Wis. 2d 251, ¶40 (breach of fiduciary duty claim requires plaintiff to prove damages).

¶25 Furthermore, the weakness of Brown's argument on damages is revealed by his failure to clearly articulate his alleged damages. Throughout the course of this litigation, Brown's damage estimates ranged from: (1) \$268,750 in his amended complaint; (2) \$211,765.54 in his Statement of Damages submitted to the circuit court; and (3) \$156,487 in his briefs to this court. We need not address amorphous and insufficiently developed arguments. See *Block v. Gomez*, 201 Wis. 2d 795, 811, 549 N.W.2d 783 (Ct. App. 1996). Brown's failure to clearly or

³ Because Brown failed to meet his burden of proof demonstrating that First Capital failed to annually review and recalculate his monthly payments, we need not address Brown's argument that his verbal statements to First Capital were insufficient to amend the trust agreement. See *Patrick Fur Farm, Inc. v. United Vaccines, Inc.*, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (“[W]e decide cases on the narrowest possible grounds.”).

consistently articulate his damages, however, is of no matter, because as we have set forth above, he was guaranteed nothing under the terms of the trust agreement.

¶26 Because Brown failed to prove that First Capital did not annually review and recalculate Brown's monthly payments under the trust agreement, and regardless, because Brown has not shown he was damaged by First Capital's alleged failure, we affirm the circuit court's grant of summary judgment with regard to the review-and-recalculate clauses.

II. WISCONSIN STAT. § 551.501 Fraud Claim

¶27 Finally, Brown submits that the circuit court erred in concluding that his WIS. STAT. § 551.501 fraud claim was not pled with sufficient particularity. He asserts that his allegation in the amended complaint, that First Capital "represented that it would review and recalculate the payments at least annually in order to ensure preservation of the corpus," was sufficient to state his claim.⁴ We disagree and affirm the circuit court.

⁴ Brown's amended complaint alleges the following with regard to his WIS. STAT. § 551.501 fraud claim:

17. The defendant had complete discretion and control of the Trust assets. The defendant represented to the defendant [sic] that it would preserve the assets of the Trust and provide Mr. Brown with statements and reports with regard to the nature and activities of the investments made.

18. Upon information and belief the statements made by the defendant regarding the preservation of the Trust assets and that it would provide Mr. Brown with statements of the activities of the Trustee were false statement [sic] made in connection with the sale of securities and was a violation of Wis. Stat. 551.501.

¶28 WISCONSIN STAT. § 551.501 is entitled “General Fraud” (emphasis omitted), and generally prohibits fraud “in connection with the offer, sale, or purchase of a security.” In Wisconsin, claims of fraud must be pled with particularity, meaning that the pleadings “must specify the particular individuals involved, where and when misrepresentations occurred, and to whom misrepresentations were made.” *Putnam v. Time Warner Cable of Se. Wis., Ltd. P’ship*, 2002 WI 108, ¶26, 255 Wis. 2d 447, 649 N.W.2d 626; *see also* WIS. STAT. § 802.03(2). We require such detailed pleading to “protect[] persons from casual allegations of serious wrongdoing and [to] put[] defendants on notice ‘so that they may prepare meaningful responses to the claim.’” *Putnam*, 255 Wis. 2d 447, ¶26 (citation omitted). Brown’s amended complaint does not meet these requirements.

¶29 In his amended complaint, Brown only alleges that First Capital “represented ... that it would preserve the assets of the Trust and provide Mr. Brown with statements and reports with regard to the nature and activities of the investments made” and that “[u]pon information and belief the statements ... were false.” Such averments do not identify “the particular individuals involved” with the alleged misrepresentations, nor do they specify “where and when [such] misrepresentations occurred.” *See id.* WISCONSIN STAT. § 802.03(2) requires more specificity in order to set forth a claim for fraud. As such, we conclude that the circuit court did not err in dismissing the claim.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

