

NOTICE

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2015 IL App (1st) 142114-U

No. 1-14-2114

Filed October 30, 2015

FIFTH DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

HELEN BASISTA, Individually and as Parent and Legal
Guardian of her three minor children, Candice Basista,
Crystal Basista and Nicholas Basista,

Plaintiff-Appellant,

v.

DAVID ALMS,

Defendant-Appellee

(Stephen Basista, Plaintiff).

) Appeal from the
) Circuit Court
) of Cook County
)
)
) No. 12 L 650
)
)
) Honorable
) John H. Ehrlich,
) Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

ORDER

¶ 1

Held: The trial court's order dismissing the legal malpractice complaint filed by plaintiff on behalf of her children was affirmed as plaintiff's complaint was insufficient to demonstrate that the children were the intended third party beneficiaries of the attorney-client relationship on which the claim was based and, therefore, to establish that the attorney

owed them a duty. However, the court's order dismissing the complaint with prejudice was reversed in order to allow plaintiff to amend her complaint in order to plead a legal malpractice claim against the attorney on behalf of the trust.

¶ 2

Plaintiff Helen Basista, as parent and legal guardian of her three minor children, Candice Basista, Crystal Basista and Nicholas Basista (the children), filed a legal malpractice action against defendant David Alms, an attorney. She alleged the children were beneficiaries under a trust and had been deprived of their share of the trust as a result of Alms' negligent advice to his client, the trustee/executor of the trust, who had converted trust assets to her own ends. The trial court dismissed plaintiff's sixth amended complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)) for failure to state a cause of action, finding Alms owed no duty to the children as they were not intended nonclient third party beneficiaries of the attorney-client relationship between Alms and the trustee. It dismissed the complaint with prejudice and denied plaintiff's motion to reconsider, implicitly denying plaintiff's motion for leave to amend the complaint. On appeal, plaintiff argues the court erred in dismissing the complaint as her allegations established the children were intended beneficiaries of the attorney-client relationship between Alms and the trustee. She also argues the children had a cause of action against Alms even though they were not the only beneficiaries of the trust, the court abused its discretion in denying plaintiff leave to amend her complaint and she should have been allowed to sue Alms on behalf of the trust. We affirm in part and reverse in part.

¶ 3

BACKGROUND

¶ 4

At issue here is the sufficiency of the sixth amended complaint for legal

malpractice plaintiff filed "as mother and next best friend of" the children. The complaint charged that Alms committed legal malpractice in his role as the attorney for the trustee administering a trust under which the children were beneficiaries. Plaintiff originally filed the complaint in the chancery division of the circuit court but the case was transferred to the law division at her request.¹

¶ 5 The following factual allegations are taken from the sixth amended complaint. In February 1992, Alms drafted a joint revocable living trust (the trust) for John and Virginia Basista. In 1994, plaintiff married Stephen Basista, one of John and Virginia's sons. She and Steven had three children: Candice, Crystal and Nicholas. John died in 2002. In October 2003, Virginia retained Alms to amend the trust in order to provide for grandchildren and other beneficiaries, such as plaintiff and her three children, not previously included in the trust. Alms drafted an amendment to the trust whereby plaintiff would receive 10% of the trust assets on Virginia's death and Candice, Crystal

¹ The sixth amended complaint also identifies Stephen Basista, plaintiff's former husband, as a plaintiff, alleging that, as a result of Alms' negligent advice and counsel to the trustee, Stephen did not receive the full value of his percentage interest in the trust. However, Stephen has not appealed the dismissal of the complaint. Therefore, only the dismissal of plaintiff's action filed on behalf of her children is at issue.

The proceedings leading to the filing of the sixth amended complaint spanned four years. In 2010, plaintiff had filed a complaint against the trustee in the chancery division of the circuit court of Cook County seeking an accounting of the trust. In January 2012, plaintiff, individually and on behalf of her children, filed a complaint for legal malpractice against Alms in the law division of the circuit court. The law division judge stayed the legal malpractice action pending the outcome in the chancery accounting action. In January 2013, the accounting action was settled. Plaintiff then filed a sixth amended complaint in the chancery proceeding asserting the legal malpractice claim against Alms. On plaintiff's motion, the chancery judge transferred the case to the law division. The original law division case was dismissed for want of prosecution but subsequently reinstated by agreement of the parties. Plaintiff's legal malpractice action in the law division then proceeded on the sixth amended complaint originally filed in the chancery division but renumbered with the original law division case number.

and Nicholas would each receive 2% of the trust assets. In July 2005, Virginia requested Alms to amend the trust again in order that plaintiff's share of the trust go directly to Candice, Crystal and Nicholas. As a result, each of the children would receive approximately 5.33% of the trust assets and plaintiff would receive nothing. In a July 2006 letter, Alms informed plaintiff's divorce attorney that, pursuant to Virginia's instructions, the children were entitled to receive approximately 5.33% of the trust assets after expenses. Virginia died in September 2005.

¶ 6 Plaintiff alleged that Kathleen Basista, as the trustee of the trust property and the executor of Virginia's estate, retained Alms in September 2005 as counsel to the trustee and the estate. She asserted that Kathleen, as trustee, made distributions from the trust to assorted beneficiaries, including herself, that were vastly disproportionate to their percentage interests under the terms of the trust while distributing "virtually nothing" to the children despite their collective 16% bequest under the trust and Virginia's intentions. Plaintiff alleged that an accounting in September 2012 and January 2013 showed Kathleen converted \$400,000 of the trust assets to her own use and the use of her husband and that Kathleen, in her role as trustee, dissipated the value of the trust property by her negligence and self dealing. She alleged in particular that Kathleen had failed to maintain the real properties that were the primary assets of the trust, collect rents and pay taxes on those properties, timely sell the properties and honestly account for revenues collected on the properties as rents and that Kathleen otherwise converted approximately \$400,000 of trust assets to the benefit of herself and her husband.

¶ 7 Plaintiff alleged Alms had advised trustee/executor Kathleen "that such improper distributions were lawful and [that he] did nothing to prevent [her] negligen[t] self

dealing." Plaintiff claimed Alms was the co-trustee of the trust and co-executor of Virginia's estate and was retained as counsel to the trustee of the trust and counsel to the estate on or about September 2005. She asserted,

"For Alms as counsel to the trustee of the Trust and to the estate to have allowed the improper distributions made by the trustee, the dissipation of the property of the Trust and the improper and illegal conversion of Trust assets due to the acts of the trustee, does not meet the professional standards of an attorney *** and the duty of due care and is negligent malpractice."

Plaintiff alleged that, when Virginia retained Alms in 2003 to amend the trust, plaintiff and her children were intended beneficiaries of Virginia and therefore clients of Alms.² She also alleged that, when Alms was retained by Kathleen as counsel to the trust and retained by Virginia's estate as counsel to the estate, plaintiff and the children were intended beneficiaries of Virginia and were clients of Alms by operation of law. She asserted that Alms had a duty to provide legal services to plaintiff and the children within the professional standards of Illinois and with the exercise of due care. Plaintiff alleged Alms committed legal malpractice "for his negligent failure to properly advise the executor of the estate and the trustee of the Trust so as to protect his third party clients" plaintiff and the children and sought in excess of \$100,000 in damages and that she had not discovered Alm's malpractice until August 2011.

² The complaint actually alleges that plaintiff and her children were intended beneficiaries "of Helen [plaintiff]," but this is clearly a typographical error as plaintiff would not be an intended beneficiary "of Helen," *i.e.*, of herself. Instead, read in context, the allegation must be that plaintiff and her children were intended beneficiaries "of Virginia."

¶ 8 Alms filed a section 2-615 motion to dismiss. Citing *Pelham v. Griesheimer*, 92 Ill. 2d 13 (1982), he argued plaintiff failed to plead a cause of action for legal malpractice as she had not set forth sufficient facts establishing that the children were the intended third party beneficiaries of the relationship between Alms and trustee Kathleen.³ The court granted the motion to dismiss. It first held that plaintiff had failed to plead a cause of action as she had failed to plead that the purpose and intent of the relationship between Alms and his client, trustee Kathleen, was to benefit plaintiff and her children as nonclient third parties. It determined plaintiff, therefore, failed to plead the existence of an attorney-client relationship, "the necessary first element to any legal malpractice cause of action."

¶ 9 The court also agreed with Alms that the complaint should be dismissed on the basis that an adversarial relationship existed between trustee Kathleen and the children and plaintiff therefore could never prove Alms owed them a duty. It held that the scope of an estate attorney's work is not solely to distribute a trust's assets to named beneficiaries and, given the allegations in the complaint, plaintiff could never plead or prove "that Alm's primary duty was to [the children] and, therefore, would not be conflicted in his role as Kathleen's attorney." The court also stated that the children were due a combined 16% of the trust assets and their relatively low percentage "leads to the conclusion that Alms faced potential conflicts with each of the named beneficiaries." "Had [the children's] percentage been 50% or greater, they would be in a

³ In *Pelham v. Griesheimer*, 92 Ill. 2d 13 (1982), our supreme court held that an attorney-client relationship can exist between an attorney and a nonclient third party but only if the nonclient is a "third-party direct beneficiary" of the attorney-client relationship. *Pelham*, 92 Ill. 2d at 21. "The key consideration is the attorney's acting at the direction of or on behalf of the client to benefit or influence a third party." *Id.* at 21.

much better position of arguing that the primary purpose of the attorney-client relationship between Alms and Kathleen was to benefit the plaintiffs." The court further noted that, "[s]ince an attorney's paramount duty runs to the client, it is impossible for an attorney to give primacy to a nonclient third-party's minority adverse interests when they arise." Noting that "for nearly four years the plaintiffs have tried but failed to plead a legal malpractice cause of action" and "it is evident that they are unable to do so," the court dismissed the complaint with prejudice.

¶ 10 Plaintiff filed a motion to reconsider asserting various errors by the trial court. She claimed, *inter alia*, that the allegation in her complaint that "Kathleen retained Alms as attorney for the trust" was "inadvertently incorrect" as, "in fact, Virginia retained Alms to draft the trust and amended the trust and she also retained him to act as attorney for the trust" and "Kathleen did not pay any fees to Alms to represent the trust until she was personally sued by the children in 2010." Plaintiff asserted these "actual facts" were not learned until after the court issued its ruling dismissing her complaint. She sought, "at the very least," leave to amend the complaint "to clearly make the assertion that Virginia Basista hired Alms in all respects and in all his duties, with the intention of providing benefits to the third party beneficiary children in this case." Plaintiff also requested leave to amend the complaint to "more completely allege" the theory that her suit should be viewed as being brought by trust beneficiaries on behalf of the trust. She asserted the children could proceed on behalf of the trust as, although generally a trustee can sue an attorney on behalf of the trust for the benefit of its beneficiaries, it would be futile to ask the trustee to do so here since the trustee had been allowed to loot the trust's assets by the attorney's legal malpractice.

¶ 11 The court denied plaintiff's motion to reconsider on June 16, 2014, reiterating that the complaint was dismissed with prejudice. Plaintiff timely filed a notice of appeal from the court's orders.

¶ 12 ANALYSIS

¶ 13 Plaintiff argues the trial court erred in dismissing the sixth amended complaint under section 2-615 as (1) the allegations of the complaint were sufficient to state a cause of action by nonclient third party beneficiaries for negligent legal malpractice, (2) the court abused its discretion when it dismissed the sixth amended complaint with prejudice and denied leave to amend the complaint, (3) the children had a cause of action against defendant even though they were not the only beneficiaries of the trust and (4) they should have been allowed to sue defendant on behalf of the trust.

¶ 14 A section 2-615 motion to dismiss challenges the legal sufficiency of a plaintiff's complaint. *In re Estate of Lis*, 365 Ill. App. 3d 1, 12 (2006). When reviewing the sufficiency of a complaint, the court accepts as true all well-pleaded facts and all reasonable inferences that can be drawn from those facts. *Id.* at 12-13. The complaint should not be dismissed unless it is clear that no set of facts could be proven that would entitle the plaintiff to relief. *Id.* at 13. We review the trial court's decision on a section 2-615 motion to dismiss *de novo*. *Id.* We find the court did not err in dismissing the complaint for failure to state a cause of action. It did, however, err in dismissing the complaint with prejudice.

¶ 15 1. Sufficiency of the Complaint

¶ 16 In order to prevail on a legal malpractice claim, the plaintiff must plead and prove that (1) the defendant attorney owed the plaintiff client a duty of due care arising from

the attorney-client relationship; (2) the defendant attorney breached that duty and (3) the plaintiff suffered injury as a proximate result. *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1023 (2010). If plaintiff fails to prove any one of these elements, she cannot prevail on her legal malpractice action. *Reddick v. Suits*, 2011 IL App (2d) 100480, ¶ 31. Whether a legal duty exists is a question of law we review *de novo*. *In re Estate of Powell*, 2014 IL 115997, ¶ 14. We agree with the trial court that the allegations in plaintiff's sixth amended complaint were insufficient to establish the existence of an attorney-client relationship between her children and Alms.

¶ 17 Generally, an attorney owes a duty of care only to his client and therefore is liable in negligence only to his client, not to third parties. *In re Estate of Powell*, 2014 IL 115997, ¶ 14; *Schechter v. Blank*, 254 Ill. App. 3d 560, 563 (1993). However, as our supreme court explained in *Pelham v. Griesheimer*, 92 Ill. 2d 13 (1982), if a nonclient is a "third-party intended beneficiar[y] of the relationship between the client and the attorney," then an attorney-client relationship can exist between an attorney and a nonclient third party as well. *Pelham*, 92 Ill. 2d at 20; *In re Estate of Powell*, 2014 IL 115997, ¶ 14.

"In the area of legal malpractice, the attorney's obligations to his client must remain paramount. In such cases[,] the best approach is that the plaintiffs must allege and prove facts demonstrating that they are in the nature of third-party intended beneficiaries of the relationship between the client and the attorney in order to recover in tort. [Citations.] By this we mean that to establish a duty owed by the defendant attorney to the nonclient[,] the nonclient must allege and prove that the intent of the client

to benefit the nonclient third party was the primary or direct purpose of the transaction or relationship." *Id.* at 20-21.

"The key consideration is the attorney's acting at the direction of or on behalf of the client to benefit or influence a third party." *Id.* at 21. The attorney must have been hired by the client specifically for the purpose of benefitting the third party. *Schechter*, 254 Ill. App. 3d at 564. The fact that a third party may benefit from an attorney's representation of a client does not mean that the attorney thereby owes a duty to the third party. *Id.* at 566-67.

¶ 18 In plaintiff's sixth amended complaint, she made the following allegations. Kathleen, as the trustee of the trust property and the executor of Virginia's estate, retained Alms in September 2005 as counsel to the trustee and the estate. Kathleen, as trustee, made disproportionate distributions from the trust, converted \$400,000 of trust assets to her own use and dissipated the value of the trust property by her negligence and self dealing. Alms had advised Kathleen, the trustee of the trust and executor of the estate, "that such improper distributions were lawful and did nothing to prevent [her] negligence [*sic*] self dealing."

"For Alms as counsel to the trustee of the Trust and to the estate to have allowed the improper distributions made by the trustee, the dissipation of the property of the Trust and the improper and illegal conversion of Trust assets due to the acts of the trustee, does not meet the professional standards of an attorney *** and the duty of due care and is negligent malpractice."

Alms committed legal malpractice "for his negligent failure to properly advise the

executor of the estate and the trustee of the Trust so as to protect his third party clients," plaintiff and the children.

¶ 19. The crux of these allegations is that Alms committed legal malpractice in advising his client Kathleen in her role as trustee of the trust and executor of the estate and that the children, beneficiaries under the trust, suffered injury as a result. Plaintiff did not allege she or her children retained Alms. Instead, she alleged trustee/executor Kathleen retained him in September 2005. As plaintiff specifically alleged that Alms was retained by Kathleen and that the negligence occurred in Alms' advice to Kathleen in her role as trustee/executor, the attorney-client relationship underlying plaintiff's legal malpractice claim is the relationship between Alms and Kathleen. Since Alms was hired by Kathleen, he owed the children a duty of care only if they were the intended beneficiaries of his attorney-client relationship with Kathleen. *Harris v. Vitale*, 2014 IL App (1st) 123514, ¶ 17; *Pelham*, 92 Ill. 2d at 21 ("for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party"). Accordingly, in order to state a cause of action for Alm's negligence, plaintiff had to sufficiently plead facts establishing that the primary purpose and intent of the attorney-client relationship between Alms and Kathleen was to benefit or influence the children. The sixth amended complaint is devoid of any such allegation. Nowhere does plaintiff allege that Alms acted at the direction of or on behalf of Kathleen in order to benefit or influence the children, let alone that the primary purpose of the Alms-Kathleen relationship was to benefit the children. Accordingly, plaintiff did not sufficiently allege that the children were third-party intended beneficiaries of the Alms-Kathleen

relationship.

¶ 20 Plaintiff argues that she pleaded the sole purpose of the trust agreement was to benefit the trust beneficiaries, including the children. She asserts it is clear from the allegations of the complaint that the retention of Alms, first by Virginia and then by Kathleen, was for the primary purpose of protecting the beneficiaries and trust assets. She claims "it was then Alms['] duty to see that the decisions made and actions taken correctly and properly carried out the intent of Virginia to benefit the children as part of the class of trust beneficiaries."

¶ 21 There is no question that plaintiff's allegations could arguably state a cause of action for legal malpractice in the Alms-Virginia attorney-client relationship. In her complaint, she alleged that, when Virginia retained Alms in 2003 to amend the trust, she and her children were intended beneficiaries of Virginia and therefore clients of Alms. Taking as true her allegation that Virginia's intent in amending the trust was to provide for plaintiff and her children, among other beneficiaries, this allegation would be sufficient to support a showing that the children were third-party intended beneficiaries of the attorney-client relationship between Alms and Virginia. See *McHale v. Russell*, 131 Ill. 2d 509, 520-21 (1989) (evidence that testator engaged attorney to draft a will transferring her interest in real property to the plaintiffs upon her death showed the plaintiffs were testator's intended, rather than contingent, third party beneficiaries of her contract for professional services with the attorney).

¶ 22 However, plaintiff is not challenging Alm's conduct during the course of Alms' attorney-client relationship with Virginia, such as his drafting of the trust or the amendments thereto. Instead, she is challenging Alm's conduct during his later

attorney-client relationship with Kathleen. She is challenging his alleged negligence in giving advice to Kathleen, in her role as trustee and executor, that enabled Kathleen to misappropriate trust funds and make inequitable distributions from the trust. Since plaintiff specifically alleged that Kathleen retained Alms as trustee and executor and that Alms negligently advised trustee/executor Kathleen, the alleged negligence therefore must have occurred during the course of the Alms-Kathleen attorney-client relationship, not the former Alms-Virginia relationship. Plaintiff did allege that, when Alms was retained by Kathleen as counsel to the trust and retained by Virginia's estate as counsel to the estate, plaintiff and the children were intended beneficiaries of *Virginia* and were clients of Alms by operation of law. But again, this allegation is directed to plaintiff and her children being the intended beneficiaries of the Alms-Virginia relationship and does not support her claim that they were intended third-party beneficiaries of the Alms-Kathleen attorney-client relationship that underlies her legal malpractice action.

¶ 23 Following *Pelham*, the "key inquiry [is] whether the attorney acted at the direction of or on behalf of the client to benefit or influence the third party." *Reddick*, 2011 IL App (2d) 100480, ¶¶ 40-43 (citing *McHale*, 131 Ill. 2d at 518-20; *Ogle v. Fuiten*, 102 Ill. 2d 356, 363 (1984); *Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank of Belleville*, 261 Ill. App. 3d 750, 760-61 (1994)). There is nothing in plaintiff's allegations that indicates Alms' acted at Kathleen's direction to benefit the children specifically or even the trust beneficiaries generally. If the children were benefitted by the Alms-Kathleen relationship, any such benefit was incidental the true purpose the relationship. If, as plaintiff alleged, Kathleen retained Alms to represent her in her role as trustee of the trust and executor of the estate, then Alms' primary purpose was to assist Kathleen

in the administration of the trust and the estate. "[T]he primary purpose of the attorney's relationship with the executor [is] to assist the executor in the proper administration of the estate." *Jewish Hospital of St. Louis, Missouri*, 261 Ill. App. 3d at 763; see also *Neal v. Baker*, 194 Ill. App. 3d 485, 488 (1990) (the primary purpose of the attorney-client relationship between the estate executor and the executor's attorney "was to assist [the executor] in the proper administration of its duties"). Similarly, the primary purpose of an attorney's relationship with a trustee is to assist the trustee in the proper administration of the trust.

¶ 24 There is no question that, as beneficiaries of the trust, the children were intended to receive a benefit from the trust and could arguably receive some benefit from the administration of the trust during the Alms-Kathleen relationship. However, " '[t]he fact that a third party may benefit from an attorney's representation of his client does not mean that the attorney thereby owes a duty to the third party.' " *Reddick*, 2011 IL App (2d) 100480, ¶ 36 (quoting *Schechter v. Blank*, 254 Ill. App. 3d 560, 566 (1993)). Even though beneficiaries of a decedent's trust are intended to benefit from the trust, the attorney for the trust cannot be held to a duty to the beneficiary of the trust due to the potentially adversarial relationship between the trust's interests in administering the trust and the interests of the beneficiaries thereof. See *Jewish Hospital of St. Louis, Missouri*, 261 Ill. App. 3d at 763 (in the context of an attorney's relationship with the executor of an estate). Alms' primary duty was to Kathleen as trustee and executor and not to the beneficiaries of the trust or the estate, including the children. Alms did not have an attorney-client relationship with any of the beneficiaries of the trust. We therefore find that it would not be possible for plaintiff to plead a cause of action in this regard.

¶ 25 Plaintiff alleged the legal malpractice occurred when Alms gave negligent advice to Kathleen. Since she failed to allege facts demonstrating that the children were third-party intended beneficiaries of the attorney-client relationship between Alms and Kathleen, she failed to state a cause of action for legal malpractice against Alms for his negligence. The trial court did not err in dismissing the complaint on this basis.

¶ 26 2. Minority Beneficiaries

¶ 27 Plaintiff argues the court erred in ruling that, as the children were minority beneficiaries with only 16% of the trust assets, this created potential conflicts of interest for Alms and the children could not show that Alm's primary duty was to them. We have already determined that plaintiff could never prove that the intended purpose of Kathleen's retention of Alms was to benefit the children as, under the allegations of the complaint, Alm's primary duty was to the trust and Kathleen as trustee and not to the beneficiaries of the trust. Therefore, we need not address this basis for the court's dismissal of the complaint.

¶ 28 3. Suit on Behalf of the Trust

¶ 29 Plaintiff also argues that the trial court abused its discretion when it dismissed the sixth amended complaint "with prejudice" and denied her motion for leave to amend the complaint.⁴ She asserts that, even if the children were not intended beneficiaries of the attorney-client relationship between Alms and the trustee, they should be allowed to sue Alms on behalf of the trust. Plaintiff explains that, although the right to sue on behalf of a trust resides with the trustee, beneficiaries may sue a third party such as an attorney on

⁴ The trial court did not expressly address plaintiff's request for leave to amend stated in her motion to reconsider. However, by its denial of the motion and reiteration that the complaint was dismissed "with prejudice," it implicitly denied plaintiff leave to amend.

behalf of a trust where, as here, it would be futile for the beneficiaries to ask the trustee to sue the attorney. Plaintiff asserts the lawsuit should have been viewed as being brought on behalf of the trust or, alternatively, that the children should have been given time to make a formal demand on the trustee and then to amend their complaint to account for the procedural requirement.

¶ 30 The decision to grant a motion to amend pleadings rests within the sound discretion of the trial court, and we will not reverse the court's decision absent an abuse of that discretion. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 69. In determining whether the trial court properly denied a party's motion to amend, we consider "whether: (1) the proposed amendment would cure the defective pleading; (2) the proposed amendment would surprise or prejudice the opposing party; (3) the proposed amendment was timely filed; and (4) the moving party had previous opportunities to amend." *Id.* A proposed amendment must meet all four factors but, if it fails to state a cognizable claim and thus fails to cure the defective pleading, we need not proceed with further analysis. *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 74 (2010).

¶ 31 We note *ab initio* that, although plaintiff sought leave to amend her complaint in her motion to reconsider the dismissal of her sixth amended complaint with prejudice, she did not provide the trial court with a proposed seventh amended complaint that would arguably cure the defects in the sixth amended complaint. Rather, she requested leave to amend the complaint to "more completely allege" her theory that her lawsuit should be viewed as being brought on behalf of the trust.⁵ Implicit in elements two

⁵ In her motion to reconsider the dismissal, plaintiff had also requested leave to

(whether the opposing party would be prejudiced by the amendment) and three (whether the proposed amendment is timely) above is that there be a proposed amendment. *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 532 (1995). When, as here, all that has been requested is leave to file a complaint containing facts not yet known, "further inquiry into these elements is all but impossible." *Id.* However, "Illinois policy favors an adequate and appropriate hearing of a litigant's claim on the merits and a cause of action should not be dismissed with prejudice without first giving the litigant a chance to amend unless it is clear that no set of facts can be proved under the pleading which would entitle the plaintiff to relief." *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 584–85 (2003). Therefore, as discussed below, if plaintiff can adequately plead that Alms breached its duty to the trust and that the children have standing as

amend her complaint "to clearly make the assertion that Virginia Basista hired Alms in all respects and in all his duties, with the intention of providing benefits to the third party beneficiary children in this case." She claimed that her allegation that Kathleen retained Alms in 2005 was incorrect and, in fact, Virginia (who died in 2005) retained Alms to represent the trust and Kathleen did not retain Alms until 2010. However, plaintiff does not raise the trial court's denial of this request to amend on appeal. Instead, plaintiff argues that she "should be allowed the opportunity to plead facts, which *if available*, would be sufficient to plead a prima facie cause of action" and, "*if* this [appellate] court finds that the factual allegations need additional pleading, it should remand the case for that purpose." (Emphasis added.)

Plaintiff does not explain what these additional facts or allegations are, let alone specifically mention her request for leave to add allegations regarding Virginia's retention of Alms. Besides arguing that she should have been allowed to proceed on behalf of the trust, her sole basis for seeking reversal of the court's denial of her request for leave to amend is her assertion that, as the motion to dismiss was "the first challenge to [her] factual allegations," she "should be allowed at least one opportunity to replead if the facts enable [her] to do so." Without more, this argument is inadequate for our review of whether the trial court abused its discretion in denying her leave to amend her complaint to add allegations that Virginia somehow retained Alms to represent the trust after her death. Accordingly, plaintiff has forfeited this argument as it is not clearly defined and sufficiently presented. *Franciscan Communities, Inc. v. Hamer*, 2012 IL App (2d) 110431, ¶ 22.

beneficiaries to sue Alms on behalf of the trust, she could be entitled to relief.

¶ 32 "[A] written trust possesses a distinct legal existence that is recognized by statute (760 ILCS 5/4 *et seq.* (West 2000)) and can sue or be sued through its trustee in a representative capacity on behalf of the trust." *Sullivan v. Kodsi*, 359 Ill. App. 3d 1005, 1010 (2005). Generally, a trustee, not a beneficiary, has standing to sue third parties on behalf of a trust. *Axelrod v. Giambalvo*, 129 Ill. App. 3d 512, 519 (1984); *Ready v. Ready*, 33 Ill. App. 2d 145, 152 (1961) ("The right to sue in the ordinary case vests only in the trustee"). Nevertheless, "[i]f the trustee refuses to bring the action after demand, or refuses to act, the beneficiary may bring an action making the third party and the trustee parties defendant." *Ready*, 33 Ill. App. 2d at 152; *Axelrod*, 129 Ill. App. 3d at 519 (citing Restatement (Second) of Trusts, § 282, cmt. e (1959)). In order to state a claim on behalf of a trust, the beneficiary's complaint must allege a demand on the trustee or a refusal by the trust to act. *Id.* at 152-53.

¶ 33 Plaintiff's complaint did not allege a demand on or refusal by the trustee, Kathleen, to sue Alms for legal malpractice. However, we agree with plaintiff that, under the circumstances here, any demand on the trustee here would be futile as it was Alms' alleged legal malpractice that enabled Kathleen to misappropriate the trust's assets and she was the perpetrator of the fraud and conversion underlying the legal malpractice action. Where a demand on a trustee to pursue a claim against a third party would be futile, the plaintiff need not allege that such a demand was made. As explained persuasively in *Tipsword v. I.F.D.A. Services, Inc.*, 2011 WL 2610390 (S.D. Ill. July 1, 2011):

"[T]here is an exception to the general rule that beneficiaries cannot

sue for injuries to a trust where, as is alleged here, *the trustee of a trust is itself involved in culpable misconduct against the trust, necessitating the bringing of an action by a beneficiary of the trust.* That exception provides that, where there is a need to bring an action for injuries to a trust:

'If the trustee refuses to bring the action, after demand, or fails to act, or the trusteeship is vacant, or the trustee has been absent for many years, *or the trustee has an adverse interest, or has conspired to defeat the trust,* or the trustee is held to be estopped to sue the third party, the beneficiary may bring the action against the third person. The necessities of the case entitle the beneficiary to proceed directly.' " (Emphasis added.) *Tipsword*, 2011 WL 2610390,

at *3-4 (quoting George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, *The Law of Trusts and Trustees* § 869 (3d ed. 2000 & Supp.2010) (footnotes omitted) (collecting cases)).⁶

Alms, as attorney for the trust, owed a duty to the trust to ensure that the trust be distributed according to Virginia's intentions. If Alms was negligent in performing that duty, the trust is entitled to pursue him for any injuries it suffered as a result of the negligence. If plaintiff's allegations regarding Kathleen's malfeasance are true, trustee

⁶ We are aware that " 'lower federal court decisions are not binding on Illinois courts, but may be considered persuasive authority.' " *Asset Exchange II, LLC v. First Choice Bank*, 2011 IL App (1st) 103718, ¶ 19 (quoting *People ex rel. Ryan v. World Church of the Creator*, 198 Ill. 2d 115, 127 (2001)). Given the dearth of Illinois case law on the question of whether a beneficiary *must* make a demand on a trustee before proceeding with an action against a third party on behalf of a trust, we expand our analysis to include federal case law. *Id.*

Kathleen had an adverse interest to the beneficiaries and the trust and would be unlikely to pursue an action against Alms on behalf of the trust. Accordingly, her culpable misconduct would necessitate a trust beneficiary sue for injuries to the trust without making a demand on Kathleen first. *Tipsword*, 2011 WL 2610390, at *3-4. Plaintiff should have been granted leave to amend the complaint in order to pursue the legal malpractice claim against Alms on behalf of the trust.

¶ 34 We note that the trial court stated that "for nearly four years the plaintiffs have tried but failed to plead a legal malpractice cause of action" and "it is evident that they are unable to do so." Plaintiff's legal malpractice action was pending for four years only because the law division stayed the legal malpractice action until the outcome of plaintiff's chancery accounting action against Kathleen. As plaintiff points out, Alms' motion to dismiss her sixth amended complaint was the first and only substantive motion directed to the sufficiency of her legal malpractice claim. Accordingly, as plaintiff's legal malpractice claim was substantively dismissed only once and she might be able to plead a cause of action on behalf of the trust, she should have been granted leave to amend her complaint to state that claim. We therefore affirm the trial court's dismissal of the complaint but reverse its finding that the complaint be dismissed "with prejudice" and its implicit denial of plaintiff's request for leave to amend. Plaintiff is granted leave to amend her complaint to plead a legal malpractice claim on behalf of the trust.

¶ 35 CONCLUSION.

¶ 36 For the reasons stated above, we affirm the trial court's dismissal of the sixth amended complaint but reverse its dismissal of the complaint "with prejudice" and its

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implicit denial of plaintiff's request for leave to amend. Plaintiff shall be allowed to amend her complaint to state a legal malpractice claim against Alms on behalf of the trust.