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• We affirm the court's dismissal of the appellants' negligent misrepresentation claim. This claim, which was based solely on statements in a securities regulations filing, fails because the appellants did not allege that they received the statements.

• We reverse the court's dismissal of the appellants' fraudulent misrepresentation claim to the extent that it is based on statements made in letters Kirkpatrick Pettis sent or authorized Engle to send to its customers. The appellants plausibly claimed that the letters created a false impression about Engle's leaving her employment with Kirkpatrick Pettis.

• We reverse the court's dismissal of the appellants' fraudulent concealment claim that was also based on these letters. The appellants plausibly claimed that they would not have transferred their business to Engle's new broker-dealer if material facts regarding her discharge had been disclosed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and STEPHAN, JJ., not participating.

ALLEN ROOS AND DEAN ROOS, COTRUSTEES OF THE LESLIE D. ROOS AND RUBY S. ROOS TRUST, ET AL., APPELLANTS, V. KFS BD, INC., A NEBRASKA CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLEES.

799 N.W.2d 43

Filed December 10, 2010. No. S-09-477.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. It accepts all the factual allegations in the complaint as true and draws all reasonable inferences for the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.
3. ____: ____. When a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.

4. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
6. **Securities Regulation: Federal Acts: Liability: Words and Phrases.** Control person liability is a federal statutory remedy imposing joint and several liability on persons who have the power to control the conduct of a person violating securities laws.
7. **Securities Regulation: Federal Acts: Liability.** Liability for controlling persons is secondary and depends upon showing liability for a primary violation of the Securities Exchange Act of 1934.
8. **Securities Regulation: Federal Acts: Courts: Jurisdiction.** Federal courts have exclusive jurisdiction over violations of the Securities Exchange Act of 1934.
9. ____: ____: ____: ____. Because a claim of control person liability under 15 U.S.C. § 78t (2006) depends upon showing an underlying violation of the Securities Exchange Act of 1934, federal courts also have exclusive jurisdiction over such claims.
10. **Corporations.** As a general rule, two separate corporations are regarded as distinct legal entities even if the stock of one is owned wholly or partly of the other.
11. **Corporations: Liability.** A parent corporation is not liable for the acts of its subsidiary merely because of stock ownership.
12. ____: ____. Separate from claims of derivative liability, a parent corporation can be liable for its own participation in its subsidiary's unlawful conduct if it used its ownership interest to intervene and direct the subsidiary's actions.
13. **Corporations: Liability: Proof.** Under the theory of direct participant liability, it is not sufficient to show that the parent and subsidiary corporations shared common directors.
14. ____: ____: ____. For a plaintiff to prevail in a direct participant claim, it must distinguish the intervening conduct from a parent corporation's normal control of a subsidiary—such as supervising the subsidiary's finance and budget decisions or general policies. The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.

Appeal from the District Court for Otoe County: PAUL W. KORSLUND, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

J.L. Spray and Randall V. Petersen, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

James M. Bausch and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee KFS BD, Inc.

Joseph E. Jones and Timothy J. Thalken, of Fraser Stryker, P.C., L.L.O., for appellee Mutual of Omaha Insurance Company.

HEAVICAN, C.J., CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

I. SUMMARY

The appellants are former customers of Rebecca Engle, a stockbroker formerly employed by Kirkpatrick Pettis, the predecessor of KFS BD, Inc. The appellants sued KFS BD, a Nebraska corporation and Mutual of Omaha company, and Mutual of Omaha Insurance Company (collectively the defendants). The appellants' theories of recovery hinged on the following allegations: (1) Kirkpatrick Pettis misrepresented to them and to federal regulators why Kirkpatrick Pettis terminated Engle's employment; and (2) the defendants concealed the true reason for Engle's discharge.

The district court sustained the defendants' motions to dismiss all of the appellants' claims except their negligent misrepresentation claim. Later, it overruled the appellants' motion to file a third amended complaint and granted summary judgment to KFS BD on the appellants' negligent misrepresentation claim.

We affirm in part, and in part reverse as follows:

- We reverse that part of the court's order dismissing the appellants' fraudulent misrepresentation and fraudulent concealment claims.
- We affirm that part of the court's order dismissing the appellants' "control person" liability claim against Mutual of Omaha Insurance Company (Mutual).
- We reverse that part of the court's order dismissing the appellants' agency claim against Mutual.
- We affirm the court's order of summary judgment for the defendants on the appellants' negligent misrepresentation claim.

• We affirm the court's order denying the appellants leave to amend their complaint.

II. BACKGROUND

1. Complaint's Allegations

The background facts in the appellants' operative complaint are substantially the same as those set out in *Knights of Columbus Council 3152 v. KFS BD, Inc*.[1] Although the parties presented additional evidence in this case at the summary judgment hearing, that evidence was only relevant to the appellants' negligent misrepresentation claim. As we explain below, the appellants' negligent misrepresentation claim fails as a matter of law. But we do not consider the evidence presented at the summary judgment hearing to analyze the court's order sustaining the defendants' motions to dismiss. For reviewing that order, we accept as true the following factual statements and reasonable inferences from the appellants' complaint and attached exhibits.[2]

Kirkpatrick Pettis employed Engle from January 1998 to November 2000. Kirkpatrick Pettis was a Mutual company and KFS BD's predecessor. KFS BD is a wholly owned subsidiary of Mutual.

Kirkpatrick Pettis received numerous customer complaints about Engle. In the spring of 2000, Kirkpatrick Pettis experienced a "catastrophic failure" of its compliance and supervisory obligations, leading to the eventual collapse of the business. Mutual's chairman and chief executive officer, president, and board of directors took "heightened" control of Kirkpatrick Pettis and the supervision of Engle.

In December 2000, the defendants knowingly filed or caused to be filed a false and intentionally misleading "Form U-5" with the National Association of Securities Dealers (NASD), now known as the Financial Industry Regulatory Authority, Inc., regarding Engle's separation from KFS BD. In the Form

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[1] See *Knights of Columbus Council 3152 v. KFS BD, Inc., ante* p. 904, 791 N.W.2d 317 (2010).

[2] See *id.*

U-5, the defendants represented that Engle's separation from KFS BD's employment was the result of KFS BD's closing its office located in Nebraska City, Nebraska. The defendants also allowed Engle and "Schuster" (a coworker) to falsely represent to customers that Kirkpatrick Pettis was closing the Nebraska City office because of a reduction in its sales force. In reality, Kirkpatrick Pettis had asked Schuster to stay and operate the office and had discharged Engle for cause.

The fraud was intended to conceal Engle's improper, wrongful, and negligent acts from the public, existing clients, and new clients. It allowed Engle to be hired by another broker-dealer and to continue offering investment advice to her customers. And it prevented the NASD from investigating Engle's separation from KFS BD, disciplining her, making a public record of her misdeeds, and preventing her from working in the industry. The appellants alleged claims of fraudulent misrepresentation, fraudulent concealment, and negligent misrepresentation. Additionally, they alleged separate claims of "control person" liability and agency liability solely against Mutual.

2. District Court's Orders

Upon the defendants' motions to dismiss, the court dismissed the appellants' fraudulent misrepresentation and fraudulent concealment claims. Also, it dismissed the appellants' control person liability and agency claims against Mutual. The only remaining claim was the appellants' negligent misrepresentation claim. Later, the court overruled the appellants' motion to file a third amended complaint and sustained KFS BD's second motion for summary judgment on the appellants' negligent misrepresentation claim.

III. ASSIGNMENTS OF ERROR

The appellants assign that the district court erred as follows:

(1) in dismissing their claims of fraudulent misrepresentation and fraudulent concealment;

(2) in dismissing their claims against Mutual;

(3) in sustaining KFS BD's motion for summary judgment on their negligent misrepresentation claim;

(4) in sustaining KFS BD's objection to exhibit 30, a witness' affidavit; and

(5) in denying their motion for leave to file a third amended complaint.

IV. STANDARD OF REVIEW

[1-3] We review a district court's order granting a motion to dismiss de novo. We accept all the factual allegations in the complaint as true and draw all reasonable inferences for the nonmoving party.[3] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.[4] When a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[5]

[4] Summary judgment is proper if the pleadings and admissible evidence offered show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[6]

[5] Permission to amend a pleading is addressed to the discretion of the trial court, and we will not disturb the trial court's decision absent an abuse of discretion.[7]

V. ANALYSIS

1. Order Dismissing Claims

We first address the appellants' assignment that the court erred in dismissing their fraudulent misrepresentation and fraudulent concealment claims and their claims against Mutual.

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *State ex rel. Wagner v. Gilbane Bldg. Co., ante* p. 223, 786 N.W.2d 330 (2010).

[7] See *Ferer v. Aaron Ferer & Sons*, 278 Neb. 282, 770 N.W.2d 608 (2009).

(a) The Fraudulent Misrepresentation Claim Survives

The court dismissed the appellants' fraudulent misrepresentation claim because the appellants had failed to plead that they received, or were aware of, a misrepresentation about Engle's discharge upon which they could rely. We agree that the appellants must show that they relied upon some statement other than the Form U-5, or show that they received the information contained in the filing. As we held in *Knights of Columbus Council 3152*, to the extent that the appellants premised their misrepresentation and concealment claims on statements in the Form U-5, they must show that they were recipients of these statements. They cannot state a claim by alleging that they relied on the lack of regulatory action because of this filing.[8] We also agree that they did not allege they were recipients of statements in the Form U-5.

But in their general allegations, the appellants alleged that the defendants allowed Engle and Schuster to falsely represent to customers that Kirkpatrick Pettis was closing the Nebraska City office. They alleged that Kirkpatrick Pettis had discharged Engle for misconduct. This allegation is sufficient to survive a motion to dismiss. We cannot say that the complaint fails to show a reasonable expectation that the appellants could prove their claim, i.e., show they received a misrepresentation authorized by Kirkpatrick Pettis that Engle was leaving its employment because it was closing the Nebraska City office. Nor can we say no reasonable expectation exists that they can prove Kirkpatrick Pettis knew its agents were making misleading representations to its customers. Thus, the court erred in dismissing the defendants' fraudulent misrepresentation claim.

(b) The Fraudulent Concealment Claim Survives

Similarly, the court dismissed the appellants' fraudulent concealment claim. It found that the appellants failed to allege that they had access to or relied on the Form U-5. But again, the appellants alleged that the defendants concealed the reason for

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[8] *Knights of Columbus Council 3152, supra* note 1.

Engle's discharge by filing the false Form U-5 *and* by permitting its agents to conceal and misrepresent the facts. If, apart from the filing, the appellants could show that they were recipients of misleading representations that contained omissions amounting to a fraudulent concealment, their claim would be viable. The district court erred in dismissing their fraudulent concealment claim.

(c) Control Person Liability

[6] The appellants alleged that Mutual was jointly and severally liable as a controlling person under 15 U.S.C. § 78t (2006). Control person liability is a federal statutory remedy imposing joint and several liability on persons who have the power to control the conduct of a person violating securities laws. Section 78t(a) sets out the elements required for control person liability under the Securities Exchange Act of 1934 (Securities Exchange Act):

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

[7-9] Controlling persons under this section can include parent corporations.[9] But liability for controlling persons is secondary and depends upon showing liability for a primary violation of the Securities Exchange Act.[10] Federal courts have exclusive jurisdiction over violations of the Securities Exchange Act.[11] Because a claim of control person liability under 15 U.S.C. § 78t depends upon showing an underlying violation of the Securities Exchange Act, federal courts also have exclusive jurisdiction over such claims. The court dismissed this claim

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[9] See Annot., 182 A.L.R. Fed. 387 (2002).

[10] See, e.g., *In re Cutera Securities Litigation*, 610 F.3d 1103 (9th Cir. 2010); *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124 (2d Cir. 1994).

[11] See 15 U.S.C. § 78aa (2006).

because control person liability applies only to a federal securities fraud claim. The appellants do not specifically argue this ruling in their brief, and we conclude that the court did not err in dismissing the appellants' claim to the extent it relied on control person liability.

(d) Direct Participant Liability

Although we have determined that the appellants' claim of control person liability fails, most federal courts of appeals have held that control person liability does not exclude common-law agency claims.[12] The appellants contend that their allegations of Mutual's control over Kirkpatrick Pettis are relevant to their agency theory of recovery. The court rejected the appellants' claim of agency liability. It determined that the appellants failed to allege that Kirkpatrick Pettis had acted on Mutual's behalf in firing Engle or filing the Form U-5.

[10,11] "As a general rule, two separate corporations are regarded as distinct legal entities even if the stock of one is owned wholly or partly of the other."[13] So a parent corporation is not liable for the acts of its subsidiary merely because of stock ownership.[14] But circumstances exist when a parent corporation can be directly or derivatively liable for the acts of its subsidiary.

Regarding their motion to dismiss, the appellants informed the court that they based their agency theory of liability against Mutual on apparent authority. The appellants stated that they did not intend to plead derivative theories of liability such as alter ego or piercing the corporate veil. We conclude that despite the appellants' label of apparent authority, the issue raised by their allegations is direct participant liability. Under the theory of direct participant liability, Mutual could only be liable for actions taken by Kirkpatrick Pettis if it had directed

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[12] 2 Thomas Lee Hazen, The Law of Securities Regulation § 7.12[2] (6th ed. 2009).

[13] 1 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 43 at 285 (perm. ed., rev. vol. 2006).

[14] See, e.g., *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998).

its subsidiary to conceal material facts or make false representations about Engle's discharge or to permit Kirkpatrick Pettis' agents to do so.

[12-14] Separate from claims of derivative liability, a parent corporation can be liable for its own participation in its subsidiary's unlawful conduct if it used its ownership interest to intervene and direct the subsidiary's actions.[15] But under the theory of direct participant liability, it is not sufficient to show that the parent and subsidiary corporations shared common directors.[16] For a plaintiff to prevail in a direct participant claim, it must distinguish the intervening conduct from a parent corporation's normal control of a subsidiary—such as supervising the subsidiary's finance and budget decisions or general policies.[17] "The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility."[18]

The appellants concede that their allegations that Kirkpatrick Pettis acted as Mutual's agent in discharging Engle could have been clearer. But they argue that their complaint was sufficient to survive a motion to dismiss. Also, they argue that discovery has revealed evidence that Mutual commanded Kirkpatrick Pettis' actions.

In scrutinizing the complaint, we find the following: (1) Paragraph 13 alleged that Mutual took heightened control of Kirkpatrick Pettis, including supervision of Engle; and (2) paragraph 14 alleged that the defendants allowed Engle and Schuster to falsely represent to customers and Kirkpatrick Pettis that the Nebraska City office was being closed because of a reduction in the sales force. These paragraphs are sufficient to survive a motion to dismiss.

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[15] See, *Bestfoods, supra* note 14; *Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739 (7th Cir. 1989); *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 864 N.E.2d 227, 309 Ill. Dec. 361 (2007); 10 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 4878 (perm. ed., rev. vol. 2010).

[16] See *Bestfoods, supra* note 14.

[17] See *id.*

[18] *Id.*, 524 U.S. at 72.

The allegation in paragraph 13, that Mutual took heightened control of supervising Engle, implicitly included its involvement in a decision to discharge her for cause. And paragraph 14 alleged Mutual's direct involvement or authorization of false or misleading misrepresentations regarding Engle's discharge. These allegations were sufficient to suggest a claim for direct participant liability, and we cannot say that there was no reasonable expectation of proving this claim through discovery. Thus, the court erred in dismissing the appellants' claim against Mutual for failing to state a claim regarding its own conduct.

We emphasize, however, that the appellants' claim is not that Mutual controlled Kirkpatrick Pettis to the extent that we should not recognize their separate corporate identities.[19] Instead, their claim is that in this specific instance, Mutual used its ownership control to achieve the intended result of misleading the appellants about Engle's discharge. The appellants cannot premise direct participant liability on the mere fact that Kirkpatrick Pettis shared directors with Mutual. The evidence must show that a Mutual officer intervened in the management of Kirkpatrick Pettis to direct its conduct.

2. The Appellants' Negligent Misrepresentation Claim Fails

The appellants' negligent misrepresentation claim rested solely upon their allegations that Kirkpatrick Pettis supplied false information to the NASD on the Form U-5. As stated above, this claim is insufficient as a matter of law because they failed to allege that they were recipients of the alleged misrepresentation.[20] The appellants' third amended complaint similarly failed to allege that they were recipients of statements in the Form U-5. So the court's ruling that they could not file the third amended complaint does not change our analysis. Similarly, exhibit 30, a witness' affidavit, was relevant only to their claim that they could rely on the lack of regulatory

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[19] See *Hayes v. Sanitary & Improvement Dist. No. 194*, 196 Neb. 653, 244 N.W.2d 505 (1976).

[20] *Knights of Columbus Council 3152, supra* note 1.

action taken because of the Form U-5 filing. We rejected that argument in *Knights of Columbus Council 3152*.[21] Because the appellants failed to allege that they received statements made in the Form U-5, the court did not err in (1) granting KFS BD summary judgment, (2) excluding exhibit 30, and (3) denying leave to file a third amended complaint.

VI. CONCLUSION

We conclude that the appellants' negligent misrepresentation claim fails as a matter of law. We reverse, however, the court's order dismissing the appellants' fraudulent misrepresentation and fraudulent concealment claims. And we reverse the court's dismissal of their claim against Mutual to the extent that the appellants premised their claim upon Mutual's direct participation in Kirkpatrick Pettis' alleged misrepresentations or fraudulent concealment. We remand the cause for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and STEPHAN, JJ., not participating.

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[21] See *id.*

FELICIA WRIGHT, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CHASITY WRIGHT, APPELLANT, V. OMAHA PUBLIC SCHOOL DISTRICT, APPELLEE.

PORTIA DENAY LOYD, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, DEIDRA LOYD, APPELLANT, V. OMAHA PUBLIC SCHOOL DISTRCT, APPELLEE.

791 N.W.2d 760

Filed December 10, 2010. Nos. S-10-048, S-10-067.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
2. ____: ____. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.