STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

SKM DRILLING SERVICES, INC., and
SKM ENVIRONMENTAL SERVICES, INC.,

Plaintiffs,

v

File No. 04-8037-NM
HON. PHILIP E. RODGERS, JR.

SMITH, HAUGHEY, RICE & ROEGGE, P.C.,

Defendant.
/

C. William Garratt (P13858)
Attorney for Plaintiffs

Bruce W. Neckers (P18198)
Paul A. McCarthy (P47212)
Attorneys for Defendant

DECISION AND ORDER GRANTING
DEFENDANT'S SECOND MOTION FOR SUMMARY DISPOSITION

On August 19, 2004, this Court granted Defendant's Motion for Summary Disposition brought pursuant to MCR 2.116(C)(8) because Plaintiffs' original Complaint did not allege facts giving rise to a duty of Defendant to Plaintiffs. The Court gave the Plaintiff fourteen (14) days in which to file an amended complaint.

The Plaintiff filed an amended complaint asserting a legal malpractice claim against the Defendant as a third-party beneficiary of the contract for legal services between Sandra Myers and the Defendant. The Defendant filed a second motion for summary disposition claiming that the Defendant owed no duty to the Plaintiffs as third-party beneficiaries. The Defendant brings its motion pursuant to MCR 2.116(C)(8) and (10).

The standard of review for a (C)(8) motion is set forth in *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most

favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163; 483 NW2d 26. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was most recently set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

The question presented is whether the corporate Plaintiffs are third-party beneficiaries of the contract between Sandra Myers and the Defendant for legal services and can maintain an action against the Defendant for legal malpractice.

It is undisputed that Sandra Myers entered into a contract with the Defendants to represent her with regards to then-pending litigation in the case of *Schultz v Myers*, File No. 01-7769-CZ, in the Circuit Court for Antrim County. In that litigation, the parties were litigating the ownership and control of these Plaintiff corporations. During the pendency of that litigation, Myers was solely responsible for running the Plaintiff corporations and, by order dated July 16, 2001, Myers was to manage the corporate entities in compliance with Michigan law. The Plaintiff corporations were named parties to, and bound by, that litigation.

While Sandra Myers was responsible for managing the Plaintiff corporations, an employee of the corporations was injured on the job. The corporations did not have worker's compensation insurance as required by law. The employee sued the corporations seeking compensation for his injuries and he prevailed. The corporations were held liable.

The Plaintiff corporations, therefore, maintain that they are third-party beneficiaries of the contract between Myers and the Defendant. As such, they assert that they can maintain an action against the Defendant for legal malpractice because the Defendant failed to advise Myers to maintain worker's compensation insurance and they were liable to an employee for his work-related injuries. The Defendant, on the other hand, claims that the third-party beneficiary exception to the general rule that an attorney can only be liable to a client for malpractice is applicable in the limited context of estate planning only and does not apply here. *Mieras v DeBona*, 452 MI 278, 301, 302; 550 NW2d 202 (1996); *Bullis v Downes*, 240 Mich App 462 (2000); and *Karam v Law Offices of Ralph J. Kliber*, 253 Mich app 410 (2003).

The general rule of law implicated in this case dictates that "an attorney will be held liable for . . . negligence only to his client, and cannot, in the absence of special circumstances, be held liable to anyone else." 7 Am Jur 2d, Attorneys at Law, § 232, p 274. Our Supreme Court refused to extend malpractice liability against opposing counsel by a party-opponent in *Friedman v Dozorc*, 412 Mich 1, 24-25; 312 NW2d 585 (1981) where the Court held:

> The creation of a duty in favor of an adversary of the attorney's client would create an unacceptable conflict of interest which would seriously hamper an attorney's effectiveness as counsel for his client. Not only would the adversary's interest interfere with the client's interest, the attorney's justifiable concern with being sued for negligence would detrimentally interfere with the attorney-client relationship.

Traditional legal doctrine thus mandates that only a person in the special privity of the attorney-client relationship may sue an attorney for malpractice. This rule exists to ensure the inviolability of the attorney's duty of loyalty to the client. "Allowing third-party liability generally would detract from the attorney's duty to represent the client diligently and without reservation. The essential purpose of the general rule against malpractice liability from third-parties is thus to prevent conflicts from derailing the attorney's unswerving duty of loyalty of representation to the client." *Atalanta Int'l Ins Co v Bell*, 438 Mich 512, 518-519; 475 NW2d 294 (1991).

The parties both acknowledge that there is a limited exception in the area of estate planning that has been recognized in Michigan. While the Defendant contends that the exception is confined to the estate planning area, the Plaintiffs cite numerous cases from other states where the courts have held, under similar circumstances, that a non-client may sue an attorney for malpractice.

Resort to the jurisprudence in other states is not permissible. Michigan courts have addressed this issue and refused to expand *Mieras*. In *Paulowett v Martin* (1998 WL 1992540 Mich App), the Court of Appeals rejected the contention that *Mieras* permits any reasonably foreseeable third party to file a claim of legal malpractice, reasoning as follows:

> Plaintiffs claim that, under *Mieras*, any reasonably foreseeable third-party beneficiary of the attorney-client relationship can sue for malpractice. We disagree. Throughout its opinion, the *Mieras* Court carefully confined its analysis to the duty owed to beneficiaries named in a will. The *Mieras* Court reasoned that the relationship did not present a conflict of interest because the beneficiaries named in the will were also third-party beneficiaries of the contract between the attorney and the testator. *Id.* At 298-299. Therefore, the attorney owed the beneficiaries a tort-based duty to draft the documents with the requisite standard of care. *Id.* at 299.

Nor does the unpublished decision of *Linn v Youatt* (1999 WL 33447026 Mich App) help Plaintiffs. Linn alleged she was the intended third-party beneficiary of defendant attorney's representation of her father regarding the drafting of a deed. Linn claimed that the defendant attorney owed her a duty because she was a named grantee, and therefore an intended beneficiary,

on the quit-claim deed that defendant drafted for her father. The Court rejected her claim, and refused to extend the limited exception recognized in *Mieras*, holding as follows:

> However, even though plaintiff was one of the named grantees on the quit-claim deed, the initial contract between defendant and plaintiff's father for the drafting of the deed was not primarily or unquestionably for the benefit of plaintiff, but rather was primarily for the benefit of plaintiff's father, who did not want to relinquish control of the property.

Similarly, in *Joseph v Killeen* (2002) WL 737869 Mich App, the Court affirmed the trial court's grant of summary disposition in favor of the defendant attorney. Here, the Court of Appeals again recognized the narrow exception recognized in *Mieras*, stating as follows:

> One exception to this rule [that an attorney can only be sued for malpractice by his or her client] is that a testator's attorney owes a narrow duty to the beneficiaries named in a will, by virtue of their third-party beneficiary status, to draft the will in accordance with the testator's intent.

Finally, in *Cortran v Dinnan* (1999 WL 33453834 Mich App), the Court of Appeals considered, and rejected, the converse of the very argument Plaintiffs make to this Court.

In *Cortran*, the defendant attorney represented Crim Tec Systems, Inc., and Vysion, Inc. in a patent infringement matter. Peter Schmitt, the majority owner of Crim Tec and the sole owner of Vysion, and two other companies solely owned by him, brought suit claiming they were third-party beneficiaries of defendant's representation. The Court noted that "Plaintiffs here argue for an additional third-party malpractice claim exception based upon the relationship of an attorney for a close corporation to the corporation's stockholders." *Id.* The Court recognized that "[a] corporation exists as an entity apart from its shareholders, even where the corporation has but one shareholder," and rejected plaintiffs' third-party beneficiary argument, holding as follows:

> In the absence of a clear mandate that an attorney's breach of a duty to his client's shareholder gives rise to legal malpractice claim, and in the further absence of any argument by the parties regarding the policy considerations of such a holding [i.e., conflict of interest], we will not expand the exception allowing third-parties to sue attorneys for malpractice here. *Id.*

The "policy considerations" referenced in *Cortran* are those carefully evaluated by the Michigan Supreme Court in *Mieras*, including whether recognizing the limited third-party

beneficiary exception could possibly compromise an attorney's unswerving duty of loyalty to his/her client. Because the interests of a shareholder and a corporation often diverge, the exception cannot apply.

Because corporations and shareholders are distinct persons under the law, and because their interests often diverge, the limited exception recognized in *Mieras* will not, as a matter of law, permit a corporation to sue its shareholder's attorney for the tort of legal malpractice.

Nor can Plaintiffs' pursue a contract claim under Michigan's third-party beneficiary statute, MCL 600.1405. As the Michigan Supreme Court stated in *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422 (2003), "[a] person is a third-party beneficiary of a contract only when that contract establishes that a promissor has undertaken a promise directly to or for that person." *Schmalfeldt*, 469 Mich 422, 428. The Court must "turn to the contract language itself to determine whether a party is an intended third-party beneficiary, specifically whether the contract contains a promise to directly benefit a third-party. *Id.* at 429. Because North Pointe's insurance contract did not contain a promise to directly benefit Schmalfeldt, no claim could be made and summary disposition was appropriate. *Id.*"

Here, the retainer agreement between Smith, Haughey, Rice & Roegge and Sandra Myers is clear and unambiguous. It contains not a single promise to take any action or provide any advice to either of the Plaintiff entities. Neither corporation is even mentioned in the retainer agreement, which ends the inquiry and is fatal to Plaintiff's claim. Moreover, the retainer agreement is specific in referring to the defense of the case of *Antony Schultz v Myers*, Case No. 01-7709-02 and to other parties or matters.

Additionally, Plaintiffs are not, as a matter law, third-party beneficiaries because Defendant's representation was to directly benefit Ms. Myers - who alone stood to lose her ownership interest in her home, personal property, and stock ownership in SKM. The representation provided SKM was an indirect benefit at best which, as a matter of law, bars any claim of third-party beneficiary under MCL 600.1405.

Conclusion

Plaintiffs' Amended Complaint must be dismissed. The Court previously dismissed a direct claim of legal malpractice. The Plaintiffs now attempt to invoke third-party beneficiary status. As

a matter law, *Mieras* and its progeny squarely preclude the extension of the limited third-party beneficiary exception in the shareholder/corporation context because doing so has the potential of compromising an attorney's unyielding duty of loyalty to his/her client. Furthermore, the *Cortran* decision squarely rejected the converse of the very claim Plaintiffs advance.

Nor can Plaintiff assert a breach of contract claim under MCL 600.1405 because the retainer agreement makes no mention of SKM and, as a matter of law, SKM cannot claim third-party beneficiary status.

Accordingly, Plaintiffs' Amended Complaint is hereby dismissed and summary disposition granted in Defendant's favor.

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 12/08/04