STATE OF MICHIGAN

COURT OF APPEALS

GARY ANDERSON, LOUIS SCOHY and GEORGE SQUIER,

Plaintiffs-Appellants,

v

GREGORY, MOORE, JEAKLE, HEINEN, ELLISON & BROOKS, P.C. and GORDON A. GREGORY,

Defendants-Appellees.

UNPUBLISHED
October 15, 1999

No. 206424
Macomb Circuit Court
LC No. 95-003631 NZ

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right a circuit court order dismissing their claims and granting summary disposition pursuant to MCR 2.116(C)(8) and (10) in favor of defendants. We affirm.

On appeal, plaintiffs first argue that the trial court erred in granting summary disposition to defendants on their legal malpractice claim on the basis that an attorney-client relationship was not created by the parties. Plaintiffs contend that an attorney-client relationship was established when they requested legal advice from defendant Gregory in relation to the legality of the early retirement proposals. We disagree.

A trial court's grant or denial of summary disposition is reviewed de novo on appeal. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). A motion for summary disposition brought under MCR 2.116(C)(8) may be granted where the opposing party has failed to state a claim upon which relief could be granted. This motion tests the legal sufficiency of a claim by the pleadings alone, without consideration of any documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995); *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). All factual allegations offered in support of the claim are accepted as true. *Simko, supra; Wade, supra* at 162-163. A motion under MCR 2.116(C)(8) should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could justify a right of recovery. *Simko, supra; Wade, supra* at 163.

On the other hand, a motion for summary disposition brought under MCR 2.116(C)(10) may be granted where there is no genuine issue of material fact, except as to the amount of damages. This motion tests whether there is factual support for the claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The court must consider the pleadings, affidavits, depositions, admissions, and any other evidence to determine whether a genuine issue of any material fact exists to warrant trial. *Id.*

It is a well-accepted maxim in Michigan that an attorney assumes a position of the highest trust and confidence, and is obligated to use reasonable skill, care, discretion, and judgment when representing a client. *Beattie v Firnschild*, 152 Mich App 785, 790; 394 NW2d 107 (1986). Where one fails in this obligation, an attorney may be responsible for damages arising out of a legal malpractice claim. To sustain a cause of action in legal malpractice, the plaintiff is required to prove the following elements: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993).

In this case, the primary issue in dispute is whether an attorney-client relationship was, in fact, created between the parties by virtue of their brief conversation during a break in the Union's board meeting, during which plaintiffs allegedly sought personal legal advice from defendant Gregory in connection with the early retirement proposals. Plaintiffs contend that they considered defendant Gregory their personal attorney at the time of the inquiry, and that defendant Gregory certainly knew that plaintiffs were trusting and relying on his opinion in deciding whether to accept the proposals. Defendant Gregory, on the other hand, denies that an attorney-client relationship was established by the mere casual inquiry, particularly because plaintiffs were fully aware that defendant Gregory legally represented the Union regarding this matter.

The general rule of law implicated in this matter instructs 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." *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 518; 475 NW2d 294 (1991) (Brickley, J.), quoting 7 Am Jur 2d, Attorneys at Law, §232, p 274. In other words, traditional legal doctrine dictates that only a person in the special privity of the attorney-client relationship may sue for malpractice. *Id.*

In this case, plaintiffs do not dispute that defendant Gregory had an existing attorney-client relationship with the Union at the time they made their inquiry. However, despite this fact, they nonetheless insist that an implied attorney-client relationship was created because defendant Gregory expressed his professional opinion on the validity of the early retirement proposals in response to an isolated, casual inquiry by plaintiffs. On the evidence before us, we agree with the trial court that, under the circumstances, plaintiffs could not have reasonably believed that defendant Gregory created a professional attorney-client relationship with plaintiffs, individually. We find that, given the fact that the brief discussion occurred during a short recess in a Union board meeting, during which the early retirement proposals were being discussed and voted upon, the more logical conclusion is that defendant Gregory offered an opinion on the plans to plaintiffs as officers and directors of the Union. There is no evidence to suggest that plaintiffs ever asked defendant Gregory whether they should

personally accept the proposal if it passed. Moreover, defendant Gregory's minimal contact with plaintiffs in relation to this issue, and the lack of documentary evidence to support the claim that an attorney-client relationship existed by virtue of their brief conversation, contradict plaintiffs' position that defendant Gregory should have known that plaintiffs were seeking advice on a personal matter. Further, there is no indication of any type of agreement for payment or other such indicia that the parties sought to enter into a contractual relationship. Thus, we are not convinced by the evidence that defendant Gregory was acting on behalf of plaintiffs' personal best interests, or that he was required to do so. Accordingly, we hold that plaintiffs failed to plead a cause of action for legal malpractice, and the trial court did not err in granting summary disposition to defendants.

Plaintiffs next argue that the court erred in finding that defendants did not breach the requisite standard of care as set forth by their expert witnesses. However, in light of our conclusion that there was no attorney-client relationship between the parties, the issue of whether the attorney breached the applicable standard of care is moot. It is axiomatic that there can be no tort liability arising from a breach of duty where there is no duty owed. *Beaty*, *supra* at 262.

Third, plaintiffs contend that the trial court erred in granting summary disposition to defendants on the breach of fiduciary duty claim. Specifically, they claim that even in the absence of an attorney-client relationship, Michigan courts have recognized a cause of action for breach of fiduciary duty under certain circumstances, such as these. We do not conclude that the trial court erred in granting summary disposition on this claim.

This Court previously held that the absence of an attorney-client relationship does not necessarily mean that there is no fiduciary duty; rather, it simply means that a fiduciary duty cannot be established as a matter of law. *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 514-515; 309 NW2d 645 (1981). Thus, a plaintiff may claim a breach of fiduciary duty if he can establish factual circumstances in which he reasonably reposed faith, confidence, and trust in the attorney's advice. *Beaty*, *supra* at 260; *Fassihi*, *supra* at 515. However, "it is unreasonable for a nonclient to repose confidence and trust in an attorney when any of the interests of the client and the nonclient are adverse." *Beaty*, *supra* at 260-261. Our Supreme Court "has repeatedly declined to recognize a fiduciary obligation running to a potentially adverse party because such a duty would necessarily 'permeate all facets of the litigation' and have a significantly deleterious effect on the attorney's ability to make decisions for the benefit of his client." *Id*. at 261, quoting *Friedman v Dozorc*, 412 Mich 1, 23; 312 NW2d 585 (1981).

In the present case, it is clear that the Union (defendants' client) and plaintiffs had adverse interests with regard to the early retirement agreements. The Union as a whole had an interest in having the early retirement agreements pay as little money as possible to plaintiffs as prospective early retirees, while plaintiffs had an interest in obtaining the greatest benefit possible. Thus, under *Beaty*, it was not reasonable for plaintiffs to "repose confidence and trust" in defendant Gregory, and the trial court properly granted summary disposition to defendants on this claim.

Next, plaintiffs assert that the trial court erred in granting summary disposition to defendants on their fraudulent misrepresentation and/or silent misrepresentation claim. We disagree. Plaintiffs' fraud

claim is premised on two theories. First, plaintiffs argue that defendant Gregory committed active fraud by providing materially false and misleading advice to them regarding the validity and enforceability of the early retirement proposals, knowing that plaintiffs were relying on his advice to decide whether to accept the contracts. Second, plaintiffs allege that defendant Gregory committed silent fraud by failing to divulge the contents of a letter given to the Union voicing his concerns and potential problems with the validity of the plans.

To establish a cause of action for fraudulent misrepresentation, plaintiff must prove the following elements: (1) the defendant made a material representation that was false; (2) the representation was known by defendant to be false when it was made, or made recklessly without knowledge of its truth or falsity; (3) the defendant intended plaintiff to rely on the representation; (4) the plaintiff acted in reliance upon it; and (5) the plaintiff suffered damages. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). An action for fraudulent misrepresentation must be predicated on a statement relating to a past or existing fact; future promises are not actionable. *Id.* Moreover, there can be no fraud when a person has the means to determine that a representation is not true. *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

Alternatively, under a "silent fraud" theory, the element of false material representation may be satisfied by the failure to divulge a fact or facts that the defendant had a good faith duty to disclose. *Lorenzo v Noel*, 206 Mich App 682, 684-685; 522 NW2d 724 (1994); *Fassihi, supra* at 517. An action based on the failure to reveal certain information is one of fraudulent concealment or silent fraud. *Lorenzo, supra* at 684; *Fassihi, supra*. However, the Supreme Court has cautioned that silence or failure to reveal relevant information cannot constitute actionable fraud unless it occurred under circumstances where the individual had a legal duty of disclosure. *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981).

We conclude that plaintiffs' fraud claims are without merit. First, plaintiffs could have sought their own lawyer's advice regarding the retirement plan. *Nieves, supra* ("[t]here can be no fraud where a person has the means to determine that a representation is not true"). Second, the statements made by defendant Gregory regarding the early retirement plan do not rise to the level of factual assertions, but, rather, were only expressions of an opinion. *Webb v First of Mich Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992) (mere expressions of professional opinion do not constitute fraud); see, also, *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987) (an action for fraud may not be predicated on the expression of an opinion). Third, the alleged misrepresentation was not false. Plaintiffs claim that defendant Gregory committed fraud by misleading them into thinking that the early retirement proposal was valid and by failing to divulge the contents of the December 5, 1994, letter to the opposite effect. However, the comments made by defendant Gregory to plaintiffs were not necessarily inconsistent with the letter. In the letter, defendant Gregory did not conclude that the proposed early retirement contracts were invalid, but, rather, defendant Gregory opined that the proposal was not impervious to potential challenges. Further, defendant Gregory did not have a legal duty to disclose the contents of the letter to plaintiffs because the letter would not have been subject to disclosure under the attorney-client relationship between defendants and the Union. *US Fidelity, supra* (silence or failure to reveal relevant information cannot constitute fraud unless the individual had a legal

duty of disclosure); *Fassihi, supra* at 517-518 (the defendants did not have a duty to disclose certain information because it was privileged under the attorney-client relationship); see, also, *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989) (a claim of negligent misrepresentation is not actionable unless the party owes the relying party a duty of care). The trial court did not err in granting summary disposition to defendants on plaintiffs' fraud claims.

Plaintiff also challenges the trial court's grant of summary disposition to defendants on plaintiff's third party beneficiary claim. Plaintiffs have failed to present specific facts demonstrating that they were the intended beneficiaries of the attorney-client contract. *Beaty, supra* at 259 ("third party beneficiary liability is premised on the concept that the initial attorney-client contract was so unquestionably for the benefit of the third party . . ."). In the present case, defendants were retained to represent the Union and the interests of the union members as a whole. Plaintiffs in their individual capacities were not reasonably the intended beneficiaries of the contract for legal representation. Third party beneficiary theory does not extend to a situation in which the benefit to the third party is merely indirect, incidental, or consequential. *Id*. at 259. The trial court did not err in granting summary disposition.

With regard to plaintiffs' tortious interference claim, we conclude that this issue has been abandoned on appeal because plaintiffs have failed to cite any authority for their position. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 722; 575 NW2d 68 (1997). On the merits, we further conclude that summary disposition was properly granted to defendants because plaintiffs have failed to establish that defendant Gregory tortiously interfered with a contractual relation or business relationship. *Winiemko v Valenti*, 203 Mich App 411, 415-417; 513 NW2d 181 (1994); *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 12-13; 506 NW2d 231 (1993). For example, plaintiffs have not established that "defendant was a 'third party' to the contract or business relationship." *Reed, supra* at 13. As correctly stated by the trial court, defendants were not third parties, but, rather, they were agents of the Union. Further, "corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation." *Id*. The withholding of the information in the December 5, 1994, letter did not solely benefit defendants, in fact, they withheld at the request of the Union president for the benefit the Union, the client.

We affirm.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot