IN THE COURT OF APPEALS OF IOWA

No. 3-179 / 12-0898
Filed April 24, 2013

JAMES W. TAYLOR, TONYA L. TAYLOR, HANS E. TAYLOR, and TAYLOR RECYCLING FACILITY, L.L.C,
Plaintiff-Appellants,

vs.

TIMOTHY HOGAN,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

The plaintiffs appeal from the district court's grant of summary judgment in favor of defendant Timothy Hogan as to plaintiffs' professional negligence claim.

AFFIRMED.

Thomas G. Fisher Jr. of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for appellants.

Thomas D. Hanson of Dickinson, Mackaman Tyler & Hagen P.C., Des Moines, for appellee.

Heard by Doyle, P.J., and Danilson and Mullins, JJ.

DOYLE, P.J.

The plaintiffs appeal from the district court's grant of summary judgment in favor of defendant Timothy Hogan as to plaintiffs' professional negligence claim. We affirm.

I. Scope and Standards of Review.

We review the district court's summary judgment ruling for the correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W .2d 244, 253 (Iowa 2012). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Mueller*, 818 N.W.2d at 253. We review the record in the light most favorable to the party opposing the motion. *Mueller*, 818 N.W.2d at 253.

II. Background Facts.

The facts of this case arise from a series of complicated business deals involving numerous individuals and business entities, many with similar names. For clarity, we will first identify the relevant individuals and entities from which the underlying litigation arose. These facts are undisputed. We then set forth the dispute and subsequent proceedings.

A. Initial Individuals and Entities Involved Prior to 2004.

1. Taylor Recycling Facility LLC and the Taylors.

Plaintiff Taylor Recycling Facility LLC ("NYTRF") is a limited liability company organized under the laws of New York, and has its principal place of business in New York. NYTRF is in the business of, among other things,

converting construction and demolition debris into a product usable by landfills as daily cover for waste. The remaining plaintiffs are James Taylor, Tonya Taylor, and Hans Taylor, all New York residents (collectively "the Taylors"). The Taylors are members of TRFNY.

2. Timothy Hogan.

Defendant Timothy Hogan is a resident of Iowa. He is an attorney, and he is licensed to practice law in Iowa. He practices primarily in real estate development and commercial transaction work.

3. Scott Street Properties, L.C.

Scott Street Properties, L.C. ("SSP"), an Iowa limited liability company, was formed by defendant Tim Hogan in April 2003, and its principal place of business was in Iowa. The original owners of SSP named in article 4.2 of its operating agreement included, in relevant part, Westwood Partners, L.C., an Iowa limited liability company, the sole member of which is Iowa resident Robert Myers. Hogan was not an owner of SSP.

The primary asset of SSP was a parcel of land located in Iowa upon which a waste disposal business, Metro C&D Recyclers, L.C. ("Metro"), operated. Metro, a limited liability company, was formed by Hogan in spring 2003. Metro leased the property from SSP, and SSP acted as Metro's landlord.

In 2004, ownership of SSP changed, discussed in greater detail below, wherein the existing original owners decreased their percentage of ownership of the company to an aggregate of 50%, and NYTRF purchased the remaining 50%. SSP was administratively dissolved in August 2008 pursuant to Iowa Code sections 490A.1320(1) and .1321 (2007).

B. New Entities Involved After 2004.

1. Taylor Recycling Facility of Iowa, LLC.

At some point, the Taylors became interested in investing in Metro and SSP. To that end, the Taylors and Robert Myers, along with other individuals not relevant here, agreed to the following arrangement concerning their respective entities. In March 2004, NYTRF purchased a 50% share of SSP, and the original SSP members, including Westwood, retained the aggregate of the remaining 50%. Additionally, Metro subsequently became Taylor Recycling Facility of Iowa, LLC ("IATRF"), a Iowa limited liability company formed in March 2004 by defendant Tim Hogan for the purpose of operating the recycling facility located on SSP's real estate. The members of IATRF were NYTRF, owning a 50% share, and Westwood and others owning the aggregate of the remaining 50% share.

2. Regency Capital Fund I, LLC.

Regency Capital Fund I, LLC ("RCF") is a Delaware limited liability company formed by Hogan in 2007. RCF's principal place of business is in Iowa. The sole member of RCF is another entity named Regency Capital Fund I Member, LLC ("Regency Members"). RCF was established in 2007 "to be a borrower of a large real estate mortgage backed loan" from a national lender. Hogan explained members of Regency Members "had gone out and worked on obtaining a loan that would cover many properties, and the lender required a particular type of entity to be the borrower. And that is [RCF]." Members of Regency Members included James Myers. Hogan himself was a member of

Regency Members, though he owned the smallest percentage. Hogan is also RCF's registered agent.

***C. Dispute*.**

Viewing the disputed facts in a light most favorable to the plaintiffs, a reasonable fact finder viewing the summary judgment record could find the following facts. From January 2004 through June 2004, IATRF expended monies to modify certain aspects of the recycling facility, including installing equipment at the facility, so it could adequately serve as a designated disposal site. To obtain money to operate, IATRF executed a promissory note on June 28, 2004, in the amount of $1.5 million payable to Northwest Bank, N.A. The note was signed by James Taylor as a manager of IATRF. Contemporaneous with the execution of that promissory note, members of the various entities owning IATRF at that time, including the three Taylors, executed personal individual guarantees in favor of Northwest Bank in various percentages to secure the debt evidenced by the promissory note.

In 2006, NYTRF and the Taylors desired to divest NYTRF's ownership in IATRF and SSP, and two contracts, both effective August 23, were executed to formalize NYTRF's separation. The first contract, "Agreement [IATRF]," recited that NYTRF and the "Iowa Investors," which included Westwood, desired to terminate their relationship by, among other things, the Iowa Investors obtaining refinancing of certain indebtedness, "and promptly following January 1, 2007, obtaining the release of [NYTRF] *and its members* from all obligations pursuant to indebtedness relating to [IATRF] . . . ." (Emphasis added.) Under this contract, the "Iowa Investors" obligations included obtaining and delivering

original guarantee documents and a release of NYTRF and its members from all financing and bank obligations in connection with the ownership and operation of IATRF. The Iowa Investors were also obligated to hold harmless, defend, and indemnify NYTRF and its members from any "claim, costs, losses or expenses arising in connection with such Obligations." The assets of IATRF were to be conveyed to another company, not relevant here, and IATRF was to be dissolved.

The second contract, "Agreement [SSP]," was similar to the other agreement. Agreement SSP identified in the recital that SSP's primary asset was the real estate upon which the waste disposal facility was located. Additionally, the recital stated "the Iowa Investors and [NYTRF] desire to terminate their relationship by [NYTRF] surrendering its ownership interest to [SSP]." As in the other contract, the "Iowa Investors" were obligated to obtain and deliver to NYTRF a release of NYTRF and its members from all financing and bank obligation in connection with SSP, with the same terms and conditions set out in Agreement IATRF, as well as hold harmless, defend, and indemnify NYTRF and its members.

In August 2007, Hogan sent an email to the plaintiffs' attorney, Fred Weinstein, stating: "It is my understanding that [the] only remaining documents to be delivered under the settlement agreement are the canceled personal guarantees from the lender. I will forward the same to you as soon as received by my office." Ultimately, the releases were never provided to NYTRF or the Taylors.

In November 2007, SSP conveyed to RCF by virtue of a warranty deed its primary asset, the real estate upon which the recycling facility was located. The deed was prepared by Hogan. Thereafter a mortgage was obtained by RCF for more than $25,000,000, secured by the real estate transferred from SSP and other properties not relevant here. RCF also executed an assignment of rents received from leasing the recycling facility to the new mortgage lender. A portion of the loan proceeds were paid to satisfy and release the mortgage existing on the SSP property conveyed to RCF. However, the Northwest Bank loan to IATRF for equipment was not paid off by the mortgage proceeds.

In June 2008, Northwest Bank filed a petition at law against IATRF, the Taylors, James Myers, Robert Myers, and other individuals not at issue here, alleging IATRF had defaulted on the note and the remaining individuals were in breach of the personal guarantees. Northwest Bank sought in excess of $1.1 million in its action. NYTRF was not a defendant in that suit. Ultimately, the Taylors were left on the hook for the remaining amount owed on the note after the other entities' members, from whom personal guarantees for the Northwest Bank were obtained, defaulted on the petition.

III. Proceedings.

On October 1, 2008, the plaintiffs filed their petition at law, later amended, against the other entities' and the entities' members, from whom personal guarantees for the Northwest Bank loan were obtained, along with Hogan and RCF. Relevant here, the plaintiffs asserted three claims against Hogan: fraud, civil conspiracy, and professional negligence. The plaintiffs asserted Hogan acted in concert with and on behalf of the various entities, the entities' members,

and individual owners not relevant here when he sent the email to the plaintiffs' attorney representing he would forward the releases of the Taylors personal guarantees to their attorney when Hogan received them, "implying that the documents were forthcoming." Additionally, the plaintiffs alleged that Hogan, despite assuring the Taylors that their releases were on the way, was contemporaneously preparing documents to transfer the SSP real estate to RCF. They also asserted Hogan helped the other entities' members create RCF to launder various properties' titles to rid them of claims of other owners to create the impression of clear title to other investors. Moreover, the plaintiffs asserted that each "of these activities was carried out while Hogan maintained an attorney-client relationship with [SSP]." As part of the fraud and civil conspiracy claims, the plaintiffs specifically asserted Hogan, acting as the various entities and the entities' members attorney, intentionally and knowingly represented to the Taylors that the documents needed to release the Taylors from a personal guarantees were forthcoming, and his representation was both false and made with the knowledge of its falsity.

The plaintiffs also asserted Hogan, serving as SSP's attorney, had a duty to NYTRF and the Taylors to inform them of any sale or transfer of SSP's assets, including the real estate, because NYTRF was a member of SSP. They argued Hogan simultaneously represented the Myers and other individual members of SSP creating a conflict of interest, which Hogan failed to disclose to NYTRF. Hogan denied the claims.

On July 11, 2011, Hogan filed his motion for summary judgment. He argued there was no evidence, let alone clear and convincing evidence, to

support the elements of the fraud and civil conspiracy claims, entitling him to summary judgment as a matter of law. He also asserted the undisputed evidence established he owed no duty to the plaintiffs, entitling him to summary judgment as a matter of law. The plaintiffs resisted, asserting factual questions remained as to whether Hogan acted as SSP's attorney and if he owed the plaintiffs a duty.

On January 9, 2012, the district court entered its ruling on the summary judgment motion granting the motion in favor of Hogan on the professional negligence claim, but denying his motion concerning the fraud and conspiracy claims. The court determined that a material question existed as to whether Hogan was SSP's attorney and the tort claims could therefore not be dismissed. However, the court found the Taylors were not members of SSP, and even if they could be deemed members, the plaintiffs, including NYTRF, had not satisfied the requirements of Iowa Code section 489.902 to bring a derivative action on behalf of SSP. Additionally, the court found the plaintiffs had not satisfied the requirements of that section to bring a direct action as a member of SSP, because they had "not pled that they had suffered a distinct and separate injury, nor [was] there evidence to conclude that they [had]." The court found Hogan owed no special duty to the plaintiffs, and consequently, summary judgment on the professional negligence claim was appropriate. The court then dismissed the professional negligence claim against Hogan.

On March 29, 2012, Hogan filed a motion to dismiss the fraud and conspiracy claims. The motion argued the plaintiffs lacked standing to pursue those claims as well, for the same reasons the district court granted summary

judgment on the professional negligence claim: the plaintiffs were not the proper parties to bring the claims, and therefore lacked standing.

Thereafter, the plaintiffs consented to a stipulated judgment, filed April 13, 2012, and signed by the district court, in which judgment was entered in favor of Hogan and against all of the plaintiffs on the claims of fraud and conspiracy. The stipulated judgment provided:

> The parties agree that the underlying rationale for [the district court's] summary judgment ruling . . . Holding that the professional negligence claim should be dismissed based on a lack of standing under Iowa Code [section] 489.901, 902 and the cases of *C*. *Plus Northwest*, *Inc*., *v*. *DeGroot*, 534 F. Supp. 2d 937, 942 (S.D. Iowa 2008); *Engstrand v*. *West Des Moines State Bank*, 516 N.W.2d 797, 800 (Iowa 1994), has equal applicability to [the] plaintiffs' remaining claims for fraud and conspiracy.

Pursuant to the agreement, the court entered judgment in favor of Hogan and "against all plaintiffs on the claims of fraud and conspiracy on the same ground summary judgment was entered in favor of Hogan on the professional negligence claim. This judgment is final and appealable."

The plaintiffs now appeal.

IV. Discussion.

On appeal, the plaintiffs argue the district court erred in concluding Hogan did not owe a duty of care to the plaintiffs giving rise to a professional duty on Hogan's part. Specifically, the plaintiffs claim:

> The district court erred for two reasons: one, whether [Hogan] represented the New York Investors is, itself, a question of fact that is in dispute, and two, [Hogan] owed a duty to the members of a closely held company where he already admittedly represented some of the members and provided legal counsel to engage in a transaction that is adverse to other owners and directly benefiting himself.

Those arguments relate directly to the merits of the plaintiffs' professional negligence claim. However, the district court's grant of summary judgment in favor Hogan as to the professional negligence claim was technically for lack of standing, and the remaining claims were subsequently disposed of by the parties' stipulation. The plaintiffs do not explain on appeal how they have standing to bring each claim. For the reasons set forth below, we agree with the district court's reasoning.

A. The Individual Taylors.

The plaintiffs' fourth amended petition did not assert Hogan was the direct attorney of any of the plaintiffs; rather, they asserted Hogan maintained an attorney-client relationship with SSP when he was allegedly working in concert with the other entities and their respective members and against the plaintiffs. The plaintiffs' fraud claim went on to assert the plaintiffs were injured by relying upon Hogan's "false and misleading statement" that he was obtaining the releases of the Taylors' personal guarantees, resulting in the reduction of the value of NYTRF's ownership interest in SSP. Likewise, on the conspiracy claim, the plaintiffs alleged the transfer of the SSP real estate caused them damage by reducing the value of the share of SSP owned by NYTRF. The same is true for the plaintiffs' professional negligence claim. The plaintiffs specifically alleged they were damaged by being deprived of any benefit of the transfer of the real estate of SSP, along with losing control of the asset.

Based upon the plaintiffs' own assertions, the injuries, if any, were only to NYTRF. To be sure, the Taylors may be, in turn, damaged by the alleged injury

to NYTRF, but that does not give them standing[1] to pursue a direct suit against Hogan for damages to NYTRF. As one scholar explains:

> There is one important potential overlap between a business organization's litigation claims and the claims of its owners. If a business organization suffers an injury, its owners may suffer a corresponding loss in the value of their respective ownership stakes in the organization. Can an owner sue separately for that injury? The traditional answer under American and Iowa business association law principles is "no." Only the business organization itself may sue and recover for harm to its interests. If that happens, the organization's owners will indirectly benefit from any corresponding increase in the value of their ownership interests.

6 Matthew G. Dore, *Iowa Practice Series: Business Organizations* § 39:4 (2012 ed.) (internal footnotes omitted) ("6 Dore"); *see also Engstrand*, 516 N.W.2d at 800. The rationale for the limitation "[p]rohibiting individual owner actions for injuries to the organization recognizes that the owner suffers only an indirect injury, avoids duplicative litigation, and respects the rights of creditors of the organization who have claims to the organization's assets that are prior to claims of the organization's owners." 6 Dore, § 39 (internal footnotes omitted). Similarly, our supreme court has explained, in the context of corporations:

> As a matter of general corporate law, shareholders have no claim for injuries to their corporations by third parties unless within the context of a derivative action.
>
> There is, however, a well-recognized exception to the general rule: a shareholder has an individual cause of action if the harm to the corporation also damaged the shareholder in his capacity as an individual rather than as a shareholder. . . .
>
> . . . .

[1] "Standing has been defined to mean that a party must have sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of the controversy." *Berent v. City of Iowa City*, 738 N.W.2d 193, 202 (Iowa 2007) (citations and internal quotation marks omitted). The Iowa Supreme Court has frequently described its "test for standing by identifying two elements. A plaintiff must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." *Godfrey v. State*, 752 N.W.2d 413, 418 (Iowa 2008) (citations and internal quotation marks omitted).

> . . . [T]he test is best stated in the disjunctive: in order to bring an individual cause of action for direct injuries a shareholder must show that the third-party owed him a special duty or that he suffered an injury separate and distinct from that suffered by the other shareholders.

Cunningham v. *Kartridg Pak Co*., 332 N.W.2d 881, 883-84 (Iowa 1983). Thus, a mere economic loss to the value of a shareholder's stock is not a "separate and distinct" interest allowing intervention because it is a loss suffered by all shareholders, albeit to differing extents. *Id.* at 884.

Although this case involves a member of a limited liability company and not a corporate shareholder, we find the underlying logic of the shareholder derivative cases applicable in the current context. As with corporate shareholders, the Iowa Code provides for derivative actions by limited liability company members. *Compare* Iowa Code §§ 490.741-.742 (corporations) *with id.* 489.902 (limited liability companies). Moreover, we find little distinction between a right to bring a claim on behalf of the company and a right to defend the company against the claim of another.

The Taylors no doubt had reasons for choosing to invest in SSP through their own entity, NYTRF, rather than directly investing in the company. But by doing so, if there was a direct injury to NYTRF, as asserted by the plaintiffs, the damage would be to NYTRF alone. *See generally id.* § 489.902; s*ee also Engstrand*, 516 N.W.2d at 800. Consequently, even viewing the evidence in a light most favorable to the Taylors, they cannot directly pursue a claim against Hogan for alleged injuries to NYTRF, and they therefore lack standing on their claims. Accordingly, we affirm the district court's grant of summary judgment in favor of Hogan.

B. NYTRF.

"Legal malpractice consists of the failure of an attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the task which they undertake." *Martinson Mfg. Co., Inc. v. Seery*, 351 N.W.2d 772, 775 (Iowa 1984). The longstanding common law rule is that an attorney owes a duty of care only to the client, not to third parties who claim to have been damaged by the attorney's negligent representation. *See Savings Bank v. Ward*, 100 U.S. 195, 200 (1879) ("Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party . . . ."); *Schreiner v. Scoville*, 410 N.W.2d 679, 681 (Iowa 1987) ("Generally, absent special circumstances . . . , an attorney is liable for professional malpractice only to a client.").

Iowa Code section 489.104 provides that a "limited liability company is an entity distinct from its members," making clear

> that the limited liability company is not simply an association of members, but rather is an entity distinct from its members. A limited liability company is thus a legal person that can own property and conduct business apart from its members. Corporations have long been accorded similar treatment, as have partnerships under modern partnership law.

5 Matthew G. Dore, *Iowa Practice Series: Business Organizations* § 13:5 (2012 ed.) (internal quotation marks and footnotes omitted) ("5 Dore"). Because in Iowa, as elsewhere, a limited liability company is a legal entity distinct from its members, it is also the general rule that an attorney representing a limited liability company owes a duty of care solely to the limited liability company, not to its

separate members. *See* 5 Dore, § 2:1 ("Once a business organization is formed, the lawyer represents the entity, rather than any of its constituents.").

Consequently, viewing the facts in a light most favorable to NYTRF, Hogan did not represent NYTRF as a member of SSP. Hogan represented SSP, the entity, and the entity alone. We therefore agree with the district court that Hogan owed no duty to NYTRF based upon its membership in SSP.

Finally, we also find that NYTRF's claim of injuries alleged are purely based upon alleged injuries to SSP—the transfer of SSP's real estate asset without adequate compensation, as the plaintiffs essentially assert, would lessen SSP's value and result in an injury to SSP, and then to NYTRF as a member. Additionally, the alleged loss of future business profits due to the transfer without adequate compensation, as alleged, would too be an injury to SSP. Because NYTRF's claims are not distinct claims to NYTRF, but rather are derivative claims of SSP, NYTRF's direct claims fail. Accordingly, viewing the facts in a light most favorable to plaintiffs, we find the district court did not err in granting Hogan's motion for summary judgment on NYTRF's professional negligence claim. Furthermore, based upon the parties' stipulation, we find no error in the district court's entry of judgment in favor of Hogan on plaintiffs' claims for fraud and conspiracy.

***V. Conclusion*.**

For all of the foregoing reasons, we affirm the district court's grant of summary judgment in favor of Hogan.

AFFIRMED.