

**NOT DESIGNATED FOR PUBLICATION**

**MR. AND MRS. CHARLES E. SPAHR, III, KATHERINE SPAHR WARD, LOUISE B. SPAHR, MR. AND MRS. DANIEL SPAHR, MR. AND MRS. DAVID SPAHR, AND ANITA SPAHR** \* **NO. 2000-CA-2561**  
\* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**

**VERSUS** \*

**ROGER DALLAM, GREENBERG & DALLAM, DAVID GREENBERG AND CNA INSURANCE COMPANY** \*  
\* \* \* \* \*

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 98-5840, DIVISION "H"  
Honorable Michael G. Bagneris, Judge

\* \* \* \* \*

**Judge Patricia Rivet Murray**

\* \* \* \* \*

(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray)

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**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

This is a legal malpractice case. The appellants, Mrs. Charles Spahr III, Mrs. Daniel Spahr, Mrs. David Spahr, Charlotte Spahr, Heidi Spahr, Charles C. Spahr, IV, Daniel Spahr, as the natural tutor of the minors, David P. Spahr, Baron A. Spahr, Ann Ward Caldarera and Jeffrey Lawton Ward, appeal the trial court's judgment granting the defendants' summary judgment motion and dismissing their damage claims.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Mr. and Mrs. Charles E. Spahr, III, Katherine Spahr Ward, Louise B. Spahr, Mr. and Mrs. Daniel Spahr, Mr. and Mrs. David Spahr, and Anita Spahr commenced this legal malpractice suit against two attorneys, Roger

Dallam and David Greenberg; the attorneys' law firm, Greenberg and Dallam; and the attorneys' malpractice insurer, Continental Casualty Company (collectively "Defendants"). This malpractice suit stems from a contractual dispute captioned *Terry F. Day, Inc. v. Sam B. Moore et. al.*, No. 39-959, Twenty-Fifth Judicial District Court, Plaquemines Parish. The alleged malpractice was Mr. Dallam's failure to file an answer on plaintiffs' behalf in *Day*, resulting in a default judgment being rendered against plaintiffs in the amount of \$836,546.73 plus interest and costs. Although plaintiffs acknowledged a dispute concerning the validity of the default judgment, they averred that they suffered the following damages: (1) expenses incurred to employ another attorney to contest the invalid judgment; (2) damage to their credit and ability to borrow money and impossibility of selling or mortgaging their property resulting from the invalid judgment being recorded in the records of Jefferson Parish; and (3) "extreme stress" and mental anguish as a result of living in constant fear that they would lose their homes and life savings and that they would be unable to provide for their families. Subsequently, plaintiffs amended their petition to join additional family members as plaintiffs, alleging that these additional plaintiffs suffered loss of consortium damages as a result of the malpractice.

Seeking dismissal of all plaintiffs' claims for mental anguish, mental

disorders, other related “mental” claims, and loss of consortium, defendants moved for summary judgment. Following a hearing, the trial court denied defendants’ motions to dismiss the claims of the client-plaintiffs and granted the motions to dismiss the claims of the non-client plaintiffs. In written reasons for judgment, the trial court defined these two groups of plaintiffs, stating: “[p]laintiffs Louise, Charles, Daniel, David and Anita Spahr and Kate Ward were original clients of the defendant attorneys . . . referred to as ‘*client plaintiffs*.’ The other plaintiffs are the daughters-in-law, grandchildren and nieces and nephews of Louise Spahr . . . referred to as ‘*non-client plaintiffs*.’” (Emphasis in original).

As to the client plaintiffs, the trial court found material factual issues regarding whether they suffered independent mental anguish, mental disorders, and other related “mental” claims as a result of the defendants’ alleged malpractice. That interlocutory ruling is not before us. As to the “non-client plaintiffs,” the trial court found they did not state a claim to recover loss of consortium; particularly, the trial court reasoned:

As to the non-client plaintiffs, the court finds that they had no attorney client relationship with the defendant attorneys and, therefore, defendants could not have breached any duty to these plaintiffs. *Beis* and other jurisprudence regarding recovery of mental anguish damages in the context of legal malpractice cases are limited to those specific instances where an attorney breached a duty owed to a client. The mental anguish claims of the non-client plaintiffs are derivative claims

for which no cause of action exists in the context of a legal malpractice case.

Plaintiffs filed a motion for new trial seeking a reversal of the judgment dismissing the loss of consortium claims of the non-client plaintiffs and seeking reinstatement of both the community property and direct claims of non-client plaintiff wives. The trial court denied the motion for new trial, without a hearing. The trial court granted the plaintiffs' timely filed motion for a devolutive appeal. On appeal plaintiffs seek review of the judgment dismissing their claims.

### **DISCUSSION**

Although this case procedurally was presented to, and ruled on by, the trial court as a motion for summary judgment, we find it more appropriate to treat the issue presented as whether the non-client plaintiffs have plead a right of action. La. C.C.P. art. 927 B (providing that an exception of no right or interest in the plaintiff to institute the suit may be noticed by an appellate court on its own motion). An exception of no right of action is the proper procedural mechanism when, as here, "the facts alleged in the petition provide a remedy under the law to someone, but the plaintiff who seeks the relief for himself or herself is not the person in whose favor the law extends the remedy." 1 Frank L. Maraist & Harry T. Lemmon, *Louisiana Civil Law Treatise, Civil Procedure* § 6.7 (1999).

The pertinent pleading is plaintiffs' Seventh Supplement and Amendment to the Petition, which alleges as follows:

50.

The three spouse plaintiffs sue the defendants based on the following:

- a. Loss of consortium as derivative of their husband's primary claims, tort and breach of fiduciary duty.
- b. For their community property interests in their husband's primary claims, and
- c. For their own primary claims based on (1) implied contract of employment of Mr. Dallam and Greenberg and Dallam in connection with the claims against their husbands, (2) stipulation pour autrui, and (3) tort.

51.

The plaintiff children's loss of consortium claims are derivative of their parents' primary claims and, for Kate Ward, her children's loss of consortium claims are derivative of her primary claims.

To the extent the trial court held that the non-client plaintiffs lack an independent cause of action for emotional distress or mental anguish, we agree. Indeed, as the plaintiffs' amended petition, quoted above, reveals, only the three non-client spouses assert such an independent cause of action. In support of their alleged independent cause of action, these spouses cite *Succession of Killingsworth*, 273 So. 2d 292 (La. 1973). However, that case

is distinguishable in that it involved a legal malpractice action stemming from a succession. Articulating the rationale for allowing an exception to the privity of contract requirement in succession cases, the court in

*Succession of Killingsworth* stated:

'The two situations most productive of third-party claims are will drafting and examination of titles. Both of these situations, by their very nature, lend themselves to injuries to third parties in the event of negligence. In the case of the drafting and execution of wills, the courts have often pointed out that the persons most likely to be injured by mistake are the intended beneficiaries, who are generally not in privity of contract with the attorney; the client is generally deceased by the time the mistake is discovered, and the estate's only claim would seem to be for the recovery of attorney's fees. To deny recovery would thus allow the attorney to escape damages while seriously injuring the intended beneficiary.'

270 So. 2d at 205. That rationale does not apply in the instant case.

Here, the non-client spouses cannot be considered third party beneficiaries to the employment contract between their spouses and Mr. Dallam. The purpose for the employment contract was for Mr. Dallam to represent the client-spouses in the underlying breach of contract case in which they had been named as defendants. The non-client spouses were neither parties to that lawsuit nor to the contract on which that suit was based; thus, they had no need for representation. The indirect effect experienced by the non-client spouses from Mr. Dallam's representation,



including his alleged failure to file an answer, is clearly distinguishable from the direct effect experienced by the legatees for whose benefit the wills in *Killingsworth* were drafted. Hence, the trial court correctly found the non-client spouses lack an independent right of action for emotional distress or mental anguish.

The non-client spouses also argue that the trial court erred in dismissing their community property claims because such claims are recoverable pursuant to La. C.C. art. 2344, which provides:

Damages due to personal injuries sustained during the existence of the community by a spouse are separate property.

Nevertheless, the portion of the damages attributable to expenses incurred by the community as a result of the injury, or in compensation of the loss of community earnings, is community property. If the community regime is terminated otherwise than by the death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after termination of the community property regime is the separate property of the injured spouse.

This article is part of the community property regime provisions of the Civil Code and addresses ownership claims between spouses. This article does not create tort claims; it merely provides a mechanism for a spouse to seek recovery from the other spouse of any monies owed to the community. Moreover, La. C.C.P. art. 686 provides that during the existence of the

marital community, either spouse may sue to enforce a community right. *See Dinger v Shea*, 96-448 (La. App. 3 Cir. 12/11/96), 685 So. 2d 485, (holding husband's community right was fully represented by wife's claims for past and future medical expenses).

Although we affirm the trial court's finding that the non-client plaintiffs lack an independent right of action, we reverse the finding that the non-client plaintiffs lack a derivative claim for loss of consortium. Reaffirming the derivative nature of a loss of consortium claim, the Supreme Court in *Walls v. American Optical Corp.*, 98-0445 (La. 9/8/99), 740 So. 2d 1262, stated: "the derivative claim does not come into existence until someone else is injured,' and . . . a derivative claim, 'may be regarded as a secondary layer of tort liability to the primary victim.'" 98-0445 at p. 16, 696 So. 2d at 1274 (quoting *Ferrell v Fireman's Fund Ins. Co.*, 96-3028 (La. 7/1/97), 696 So. 2d 569)(emphasis in original).

Applying those principles to the instant case, the non-client plaintiffs' have a right of action for loss of consortium secondary to the client plaintiffs' tort claim. In so holding, we rely on the express allegations of the amended petition, quoted above, that: (i) the non-client spouses aver a claim for: "loss of consortium as derivative of

their husband's primary claims, tort and breach of fiduciary duty;" and (ii) the non-client children aver a claim for loss of consortium claims "derivative of their parents' primary claims and, for Kate Ward, her children's loss of consortium claims are derivative of her primary claims." We further rely on the trial court's finding that the client-plaintiffs, at least for summary judgment purposes, have plead an independent claim for mental anguish, mental disorders, and other related "mental" claims as a result of the defendants' alleged malpractice. *See Beis v. Bowers*, 94-0178 (La. App. 4 Cir. 1/19/95), 649 So. 2d 1094 (noting that mental anguish damages may be awarded in legal malpractice action).

These facts distinguish this case from *Tolis v. Shields*, 96-0668 (La. App. 4 Cir. 11/20/96), 684 So. 2d 523; which defendants cite as controlling. In that case, the clients' children asserted a primary claim for legal malpractice as well as a claim for loss of consortium. In affirming the trial court's dismissal of all the children's claims, this court expressly stressed that the children were asserting primary claims and thus declined to recognize a derivative claim for loss of consortium; we held that the children, "who alleged a cause of action against Mr. Shields for legal malpractice and negligence as *primary*

*victims*, failed to state a cause of action for loss of consortium.” 96-0068 at p. 4, 684 So. 2d at 524.

Significantly, we did not hold in *Tolis* that the children lacked a derivative right of action for loss of consortium arising out of their parent’s independent damage claim. Conversely, in this case, we do hold that the non-client plaintiffs possess a derivative right of action for loss of consortium arising out of the client-plaintiffs’ independent damage claim. Of course, all of these claims must be proven by the plaintiffs at trial.

### **DECREE**

For the foregoing reasons, we reverse the judgment of the trial court dismissing the derivative claims for loss of consortium asserted by appellants, Mrs. Charles Spahr III, Mrs. Daniel Spahr, Mrs. David Spahr, Charlotte Spahr, Heidi Spahr, Charles C. Spahr, IV, Daniel Spahr, as the natural tutor of the minors, David P. Spahr, Baron A. Spahr, Ann Ward Calderera and Jeffrey Lawton Ward. In all other respects, we affirm.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**