STATE OF MICHIGAN

COURT OF APPEALS

DAVID CHAMNESS,

Plaintiff-Appellee,

v

MATTHEW S. DEPERNO,

Defendant-Appellant,

and

STEPHEN J. HESSEN, STEPHEN L. SIMONS, J. RYAN CONBOY, and KREIS, ENDERLE, CALLANDER, & HUDGINS, P.C.,

Defendants.

UNPUBLISHED
March 4, 2008

No. 267691
Kalamazoo Circuit Court
LC No. 04-000658-AV

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

In this legal malpractice action, defendant Deperno appeals by leave granted the circuit court's order on appeal, which reversed the probate court's orders granting summary disposition in favor of defendants, and imposing costs and sanctions on plaintiff's counsel. We reverse, and reinstate the probate court's orders.

Defendant argues that the circuit court erred in reversing the probate court's order granting summary disposition pursuant to MCR 2.116(C)(6) and (8). We agree that summary disposition was properly granted pursuant to MCR 2.116(C)(8).[1] This Court reviews de novo a trial court's grant of summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

[1] Because we find that summary disposition was properly granted pursuant to MCR 2.116(C)(8), we will not review defendants' claim regarding MCR 2.116(C)(6).

MCR 2.116(C)(8) provides that summary disposition may be granted, where "[t]he opposing party has failed to state a claim on which relief can be granted." "A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone." *Feyz, supra* at 672. "When a challenge to a complaint is made, the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Id.*

Generally, "[t]o state a claim for legal malpractice, a plaintiff must allege (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was the proximate cause of an injury, and (4) the fact and the extent of the injury alleged." *Kloian v Schwartz*, 272 Mich App 232, 240; 725 NW2d 671 (2006). The first of these elements establishes a "duty" defined as an "obligation the defendant has to the plaintiff to avoid negligent conduct." *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). "If there is an attorney-client relationship, a duty to use and exercise reasonable care, skill, discretion, and judgment with regard to the representation of the client exists as a matter of law." *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2001).

Accordingly, the "traditional legal doctrine mandates that *only* a person in the privity of an attorney-client relationship could sue an attorney for malpractice." *Ginther v Zimmerman*, 195 Mich App 647, 651; 491 NW2d 282 (1992) (emphasis supplied). "The essential purpose of that rule is to prevent consideration of the interests of those outside the relationship from interfering with the attorney's duty to loyally represent a client." *Id.* In other words, "[t]here has been a reluctance to permit an attorney's actions affecting a nonclient to be a predicate to liability because of the potential for conflicts of interest that could seriously undermine counsel's duty of loyalty to the client." *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 254; 571 NW2d 716 (1997). This Court has held that the "lack of duty . . . is the proper ground for summary disposition of a claim of legal malpractice" brought without any attorney-client relationship. *Ginther, supra* at 650.

Plaintiff does not allege that an attorney-client relationship existed between him and James Chamness's attorneys. Moreover, plaintiff implicitly concedes on appeal that an attorney-client relationship did not exist. Clearly, plaintiff cannot maintain his legal malpractice action in the traditional sense. However, plaintiff argues that the doctrines of third-party beneficiary liability and equitable subrogation provide him with avenues to maintain his legal malpractice action. We disagree.

In *Mieras v DeBona*, 452 Mich 278, 308; 550 NW2d 202 (1996) (Boyle, J.), our Supreme Court recognized a limited exception to the rule requiring an attorney-client relationship for "beneficiaries named in a will [who] may bring a tort-based cause of action against the attorney who drafted the will for negligent breach of the standard of care owed to the beneficiary by nature of the beneficiary's third-party beneficiary status." That exception was allowed because of the limited chance that conflicts of interest would occur in that context:

> Recognizing a tort-based cause of action under these circumstances does not create a conflict of interest for two reasons. First, because beneficiaries of a will have no rights under the will before the testator's death, a disgruntled beneficiary's cause of action does not ripen until the death of the testator. Merely drafting and executing a will creates no vested right in the legatee until the death

> of the testatrix. Second, the only obligation owed by the attorney to named beneficiaries is to exercise the requisite standard of care in fulfilling the intent of the testator as expressed in the will. An attorney would never face conflicting obligations to the testator and the beneficiaries by drafting a document that properly fulfills the testator's intent as expressed in that document. Further, the testator is always free to change the beneficiary of the will, and the displaced beneficiary will have no cause of action. [*Id.* at 301 (internal citations and quotation marks omitted).]

Further, in the will drafting context, "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 that that third party can maintain a suit for negligence by the attorney." *Beaty*, *supra* at 259. However, "this theory has not been expanded to cover a situation in which the benefit to the third party is one that is merely indirect, incidental, or consequential." *Id.*

Here, the defendant attorneys did not draft the will or trust documents naming plaintiff as a beneficiary. Nor is there any allegation suggesting that the attorney-client relationship between James Chamness and defendants was in some other way "unquestionably" for the benefit of plaintiff. *Beaty*, *supra* at 259. At best, any benefit that plaintiff might derive from that relationship "is merely indirect, incidental, or consequential" and that is insufficient to avoid the rule requiring an attorney-client relationship involving plaintiff. *Id.*

We also reject plaintiff's argument that the equitable subrogation applies here.

> This doctrine is best understood as allowing a wronged party to stand in the place of the client, assuming specific conditions are met. Those conditions are: (1) a special relationship must exist between the client and the third party in which the potential for conflicts of interest is eliminated because the interests of the two are merged with regard to the particular issue where negligence of counsel is alleged, (2) the third party must lack any other available legal remedy, and (3) the third party must not be a "mere volunteer," i.e., the damage must have been incurred as a consequence of the third party's fulfillment of a legal or equitable duty the third party owed to the client. [*Beaty, supra* at 254-255 (citations omitted).]

We find that the circuit court erroneously concluded that all of the elements from *Beaty* were met in the instant case. We conclude that plaintiff fails to satisfy any of the prongs. First, there is no "special relationship" between plaintiff and James Chamness by which their interests are so merged that any possibility of conflicting interests between them has been eliminated. To the contrary, the record demonstrates that plaintiff's position has been to adamantly oppose James Chamness in administering the estate. Second, plaintiff clearly has other legal remedies. He has already filed an action to remove James Chamness as personal representative in probate court and plaintiff may entertain a breach of fiduciary action against him as well. Moreover, plaintiff is not foreclosed from filing a disciplinary action against defendants alleging the same ethical violations he raised here. Third, plaintiff has not alleged that he suffered any damages "as a consequence of [his] fulfillment of a legal or equitable duty" that he owed to James Chamness or the estate. Because plaintiff has satisfied none of the conditions that must all be

satisfied to raise a valid equitable subrogation claim, the probate court properly rejected that claim.

In sum, the probate court properly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8), because plaintiff "has failed to state a claim on which relief can be granted." Plaintiff cannot maintain his legal malpractice claim, as a matter of law, because an attorney-client relationship did not exist, and because the facts of the case do not fit the narrow exceptions for a third-party legal malpractice action under a third-party beneficiary theory or the doctrine of equitable subrogation. Accordingly, we reverse the circuit court's ruling that reversed the probate court's grant of summary disposition in favor of defendants.

Further, we reinstate the probate court's award of sanctions on the basis that plaintiff's legal malpractice claim was frivolous. See MCR 2.625(A)(2); MCL 600.2591(3). "'A trial court's determination that an action is frivolous is reviewed for clear error.'" *BJ's & Sons Constr Co v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005) (citations omitted). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed." *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). Having concluded that the probate court correctly determined plaintiff's claim to be without legal merit, we find no clear error in the award of sanctions against him. See *Lloyd v Avadenka*, 158 Mich App 623, 626; 405 NW2d 141 (1987) (sanctions were appropriate where the "plaintiff's claim could not be supported by the evidence at trial and, therefore, defendants were entitled to judgment as a matter of law.")

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter