

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-17-11

PAMELA W. GLEICHMAN et al.,)
)
 Plaintiffs,)
)
 v.)
)
 ROSA SCARCELLI, et al.,)
)
 Defendants.)

**ORDER ON DEFENDANT
NORMAN HANSON & DETROY,
LLC’S MOTION FOR SUMMARY
JUDGMENT**

Defendant Norman Hanson & DeTroy, LLC (“NHD”) has moved for summary judgment pursuant to M.R. Civ. P. 56(c) on the remaining claims brought against it by Plaintiffs Pamela W. Gleichman and Karl Norberg, both individually and in his capacity as Trustee of the Scarcelli-Norberg Holdings Trust (“SNH Trust”) (hereafter collectively “Plaintiffs”). Plaintiffs opposed the motion. The Court heard oral argument on the motion on September 14, 2017. Counsel for both parties appeared and were heard.

PROCEDURAL HISTORY¹

I. Parties

This motion comes before the Court in the context of a history of litigation between Plaintiffs and Defendant Rosa Scarcelli, who is Pamela Gleichman’s daughter and Karl Norberg’s step-daughter. (Plaintiff’s Statement of Additional Facts (“P.S.A.F.”) at ¶ 1.) Ms. Gleichman is the grantor and lifetime beneficiary of the SNH Trust; Mr. Norberg is its trustee. (P.S.A.F. ¶ 15.)

Ms. Gleichman founded two property companies: Defendant Stanford Management, LLC

¹ The facts in this section are drawn from the parties’ Statements of Facts filed in support of their briefing on this motion. The information in this section is meant solely to provide context for the procedural posture of this case and nothing herein should be construed as a finding of fact by the Court.

(“Stanford”) and Defendant Acadia Maintenance, LLC (“Acadia”). (P.S.A.F. ¶ 1.) Today, Ms. Scarcelli owns 51% of Stanford; SNH Trust owns 49%. (Defendant’s Statement of Undisputed Material Facts (“S.M.F.”) at ¶ 22.) Acadia’s ownership is disputed; Defendants claim it is owned 100% by Stanford while Plaintiffs allege Ms. Gleichman retains a 49% ownership interest in the company.² (S.M.F. ¶ 21; Plaintiff’s Statement of Facts in Dispute (“P.S.F.D.”) at ¶ 21.) Ms. Scarcelli manages both companies. (P.S.A.F. ¶¶ 1, 15.) NHD is a law firm that has served as legal counsel to Ms. Scarcelli individually and on behalf of Stanford. (S.M.F. ¶¶ 6-8, 11-14.) It is disputed whether NHD has served as counsel to Acadia.³ (S.M.F. ¶ 20; P.S.F.D. ¶ 20.)

II. NHD Motion for Judgment on the Pleadings and the Present Motion

Plaintiffs alleged various causes of action against NHD arising out of its representation of Ms. Scarcelli, Stanford, and Acadia in the 22 counts of their Second Verified Amended Complaint (“Amended Complaint”). NHD was granted judgment on the pleadings as to Count VIII (conversion) and Count XI (abuse of process) of the Amended Complaint, and Count XVI (“punitive damages”) was dismissed as to NHD, in the Court’s Order entered December 15, 2016, granting in part and denying in part NHD’s motion for judgment on the pleadings.

NHD now moves this Court to grant summary judgment in its favor on three of the remaining Counts against it: Count XVII, which alleges professional negligence; Count XVIII, which alleges both that NHD breached its own independent fiduciary duty to Plaintiffs and that NHD aided and abetted Ms. Scarcelli in breaching her fiduciary duty to Plaintiffs; and Count XIX, which alleges negligent infliction of emotional distress. *See* Amended Complaint.

² The resolution of this disputed fact is unnecessary in deciding the present motion.

³ This factual dispute is likewise immaterial to the present motion.

BACKGROUND FACTS

NHD was involved in a failed exercise at reconciliation between the parties to this lawsuit in Fall 2008 whereby they attempted to bring some peace to their acrimonious relationship by redrafting the Operating Agreements for Stanford and Acadia. (P.S.A.F. ¶¶ 4-6.) Majority ownership and control of these companies had been transferred to Ms. Scarcelli in January of 2007. (P.S.A.F. ¶ 1.) NHD claims that it was serving only as counsel to Ms. Scarcelli in this process. (S.M.F. ¶ 6.) Plaintiffs allege that it can be implied from the facts that they too were represented by NHD in the redrafting exercise. (P.S.A.F. ¶¶ 4-6.) NHD continued to represent Ms. Scarcelli from 2008 until at least 2012; it is not clear from the record whether NHD continues to serve as counsel to Ms. Scarcelli personally at present on matters apart from this lawsuit. (S.M.F. ¶¶ 6, 8; P.S.A.F. ¶¶ 7-9, 35).

STANDARD OF REVIEW

Summary judgment is granted to a moving party where “there is no genuine issue as to any material fact” and the moving party “is entitled to judgment as a matter of law.” M.R. Civ. P. 56(c). A material fact is one capable of affecting the outcome of the litigation. *Savell v. Duddy*, 2016 ME 139, ¶ 19, ___ A.3d ___. A genuine issue exists where the jury would be required to “choose between competing versions of the truth.” *MP Assocs. v. Liberty*, 2001 ME 22, ¶ 12, 771 A.2d 1040.

To survive a defendant’s motion for summary judgment, the plaintiff must establish a prima facie case for every element of the plaintiff’s cause of action. *See Savell*, 2016 ME 139, ¶ 18, ___ A.3d ___. A plaintiff cannot create a factual dispute for purposes of defeating summary judgment merely by raising “conclusory allegations, improbable references, and unsupported speculation[,]” even where “concepts such as motive or intent are issue.” *Dyer v. D.O.T.*, 2008 ME 106, ¶ 14, 951 A.2d 821.

DISCUSSION

I. DIRECT CLAIMS

All three remaining Counts against NHD involve direct claims.⁴ Count XVII also includes a derivative claim whereby the Plaintiffs purport to bring a suit for professional malpractice against Defendant NHD on behalf of Defendant Stanford and Defendant Acadia; Count XVIII includes an aiding and abetting claim whereby Plaintiffs allege that NHD aided and abetted Ms. Scarcelli in breaching her fiduciary duty to Plaintiffs (collectively, the “Indirect Claims”).⁵ For organizational purposes, the Court will first discuss the direct claims of all three Counts before moving on to the Indirect Claims.

A. Rules of Law: Attorney-Client Relationship and Fiduciary Duties Owed by Attorneys to Third Parties

“[A]n attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney’s professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.” *Bd. of Overseers of the Bar v. Mangan*, 2001 ME 7, ¶ 9, 763 A.2d 1189. An attorney-client relationship “may be implied from the conduct of the parties.” *Bd. of Overseers of the Bar v. Dineen*, 500 A.2d 262, 264-65 (Me. 1985). An attorney for a business entity does not have an attorney-client relationship with its officers, directors, or shareholders simply by virtue of its representation of the entity. *See generally Savell v. Duddy*, 20016 ME 139, 147 A.3d 1179.

In general, “an attorney owes a duty of care to only his or her client.” *Savell v. Duddy*, 2016

⁴ See Note 5 *infra*.

⁵ The Court uses this term only as an organizational tool to distinguish the claims discussed in Part II of this Order from those discussed in Part I. Several Counts of the Amended Complaint allege multiple grounds for liability and the Court distinguishes them this way as a matter of cognitive convenience. It is not used as a legal term of art.

ME 139, ¶ 20, 147 A.3d 1179 (citing *Estate of Cabatit v. Canders*, 2014 ME 133, ¶ 21, 105 A.3d 439). Only in “limited and rare situations” may this Court find that an attorney owes a duty of care to a “limited class of nonclients.” *Cabatit*, 2014 ME 133, ¶ 21, 105 A.3d 439. Specifically, the Court may find a duty where that attorney’s services are intended to benefit a third party and public policy considerations support such a finding. *Id.* However, an attorney will never owe a duty to a nonclient “if that duty would conflict with the attorney’s obligations to his or her clients.” *Id.* (citing *Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 11, 54 A.3d 710).

B. Norman Hanson DeTroy Has Never Had an Attorney-Client Relationship with Any Plaintiff During the Statutory Period

Ms. Gleichman and Mr. Norberg concede that NHD has never served as their personal counsel. They nonetheless claim that a factual dispute remains over whether an attorney-client relationship can be implied from NHD’s role in drafting revised operating agreements of Stanford and Acadia in Fall 2008. This provides the grounds for Plaintiffs’ direct claim for professional negligence in Count XVII, as well as their direct claim for breach of fiduciary duty in Count XVIII.

The Court need not reach the issue of whether an attorney-client relationship can be implied from NHD’s representation of Stanford in redrafting Stanford and Acadia’s operating agreements, because it lies beyond the six-year statute of limitations for actions against attorneys, which accrues at the time of the alleged violation of duty. *See* 14 M.R.S.A. §§ 752, 753-B(1). Any factual dispute as to whether an attorney-client relationship may be implied from NHD’s involvement in the negotiation or drafting of Stanford and Acadia’s operating agreements in Fall 2008 is thus immaterial.

Plaintiffs raise two answers to the statute of limitations issue: first, that the burden was on NHD to raise the statute of limitations in their motion; second, that NHD’s implied representation of Plaintiffs continued beyond the 2008 redrafting of Stanford’s operating agreement. This first

argument conflates two procedural windows and their respective burdens. The burden was on Defendant to raise the defense of the statute of limitations in its Answer to the Amended Complaint. *See* M.R. Civ. P. 8(c). NHD, in fact, did raise the defense on Page 31 of their Answer to the Amended Complaint.

The second argument is merely a bald assertion, made for the first time in earnest in Plaintiffs' Opposition to the present motion. At oral argument, Plaintiffs were unable to articulate facts that could give rise to an implied attorney-client relationship within the statute of limitations; in their Statement of Additional Facts, Plaintiffs concede that they allege NHD represented them only during the 2008 redrafting exercise. *See* P.S.F.D. ¶¶ 7, 23; P.S.A.F. ¶¶ 4-9 (detailing Plaintiffs' view of the 2008 redrafting; conceding that Plaintiffs had independent counsel during later disputes). The Court thus rules that there is no dispute of material fact that NHD has never served as legal counsel to the Plaintiffs within the statutory period.

C. Norman Hanson Detroy Did Not Owe Plaintiffs Fiduciary Duties as Third-Parties

Plaintiffs counter that even if this Court does not find that there is any material factual dispute over whether NHD ever shared an attorney-client relationship with Plaintiffs, that there nonetheless is a genuine factual dispute over whether NHD owed a continuing fiduciary duty to Plaintiffs under a non-client third-party beneficiary theory.

Plaintiffs argue that a reasonable jury could find that NHD owed a duty to Plaintiffs because they have an ownership interest in and founded Stanford; Stanford operated properties owned by Plaintiffs or their entities; and Stanford was majority-owned and managed by Ms. Scarcelli, who was likewise represented by NHD individually.

Plaintiff cites no authority to support a finding of a third-party duty under these facts, and this Court could find none. Indeed, our Law Court has been explicit that an attorney owes a

fiduciary duty to a third party only in the rare and limited circumstances where the representation is *intended* to benefit a third party and policy considerations support finding such a duty. *See Cabatit*, 2014 ME 133, ¶ 21, 105 A.3d 439. Here, Plaintiffs have not alleged that they were the intended beneficiary of NHD's representation of Stanford or Ms. Scarcelli. Plaintiffs' relationship to Stanford is simply too attenuated for a reasonable juror to conclude that NHD's representation of Stanford was intended to be for the benefit of Plaintiffs.

Furthermore, the policy considerations in this case militate against finding NHD owed Plaintiffs a fiduciary duty. Our Law Court has held that an attorney will never owe a duty to a third party where it would conflict with the attorney's duty to her client. *Id.* There is no genuine factual dispute that Plaintiffs' interests have been adverse to Ms. Scarcelli and Stanford at many times during the statutory period, notwithstanding Plaintiffs' purported interest in Stanford. Finding that NHD nonetheless owed a duty to these Plaintiffs is incompatible with our adversarial form of justice and as such has been properly forbidden by our Law Court.

In sum, there is no genuine dispute of fact over whether NHD has served as counsel to Plaintiffs or whether an attorney-client relationship could be implied between NHD and Plaintiffs during the statutory period. Likewise, there is no genuine factual dispute over whether NHD has ever owed a fiduciary duty to Plaintiffs as third parties. Defendant NHD is entitled to judgment as a matter of law as to the direct claim of professional negligence in Count XVII and the direct claim for breach of fiduciary duty in Count XVIII.

D. Norman Hanson DeTroy Did Not Owe Plaintiffs a Duty to Protect Them from Emotional Distress

In Count XIX, Plaintiffs allege that NHD is liable to Ms. Gleichman and Mr. Norberg personally for causing them emotional distress. Mr. Norberg cannot bring such a claim in his capacity as trustee for NSH Trust because trusts are incapable of emotional distress. Plaintiffs

allege that NHD reasonably should have foreseen that Ms. Gleichman and Mr. Norberg would suffer emotional distress as a result of NHD's representation of Ms. Scarcelli, Stanford, and Acadia.

Generally speaking, persons do not owe one another a duty to exercise due care to avoid causing emotional distress. *Curtis v. Porter*, 2001 ME 158, ¶ 18, 784 A.2d 18. The Court knows of no case where our Law Court (or any other Maine court) has held that an attorney owes a nonclient a duty to exercise reasonable care to avoid causing the nonclient emotional harm, and Plaintiffs have not drawn the Court's attention to any. Maine law only allows claims for negligent infliction of emotional distress by clients against attorneys, and even then such claims are reserved for cases of egregious attorney misconduct or personal losses beyond the economic. *Garland v. Roy*, 2009 ME 86, ¶ 24, 976 A.2d 940.

Plaintiffs offer no policy argument for why negligent infliction of emotional distress liability should be extended to nonclients, but instead urge the Court to find that such liability should lie in this case because it is "a very personal matter; a closely held, family business." Opposition at 15. But the family context illustrates precisely why negligent infliction of emotional distress should never extend to nonclients. Practitioners of family law would feel reticent to zealously advocate for their clients under the looming threat of liability for negligent infliction of emotional distress to opposing parties. Cross-examination in any hearing would lose its fact-finding functionality as lawyers might choose not to ask relevant questions out of fear that they may upset the witness. In sum, a lawyer's duty to exercise due care to avoid causing emotional distress to third parties would inevitably conflict with the lawyer's duty to advocate for her client: exactly the result that the Law Court has been explicit about avoiding. *See Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 11, 54 A.3d 710.

For these reasons, the Court holds that there are no facts in the summary judgment record to establish liability for Defendant NHD to Plaintiffs Ms. Gleichman and Mr. Norberg for emotional distress, and Defendant NHD is entitled to judgment as a matter of law as to Count XIX. Therefore, the Court hereby **grants** Defendant NHD's motion as to Count XIX and grants judgment in its favor.

II. INDIRECT CLAIMS

A. Derivative Claim: Professional Negligence Claim on Behalf of Stanford

In Count XVII, Plaintiff Mr. Norberg purports to bring a derivative suit against NHD on behalf of Defendant Stanford in his capacity as trustee of NSH Trust, which is a minority owner of Stanford. [Plaintiffs also purport to bring a derivative suit against Acadia, although they do not clearly articulate which Plaintiff would have standing to bring such a suit. Presumably, Plaintiffs claim standing under Ms. Gleichman's disputed ownership interest in Acadia.]

"In a shareholder's derivative suit, the wrong complained of is to the corporation, and the shareholder is merely a nominal plaintiff." *Spickler v. York*, 566 A.2d 1385, 1390 (Me. 1989). Maine's derivative action rules require derivative plaintiffs be situated to "fairly and adequately represent the interests of the members similarly situated in enforcing *the right of the association*." M.R. Civ. P. 23B (emphasis added). In discussing the analogous federal requirement, the Supreme Court has explained that it is "intended to prevent shareholders from suing in the place of the [company] in circumstances where the action would disserve the legitimate interests of the company or its shareholders." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532 n.7 (1984) (citation omitted). Courts in other jurisdictions have further clarified that the derivative plaintiff "owes the [company] his undivided loyalty[;]" uncolored by ulterior motives, personal interests, or a personal agenda. *Fere v. Erickson & Sederstrom, P.C.*, 718 N.W.2d 501 (Neb. 2006).

While Mr. Norberg's motives in pursuing this derivative claim presents a factual issue, on the record as a whole there can be no dispute that the claims Mr. Norberg asserts against NHD are not claims of a breach of duty to Stanford. Nowhere do Plaintiffs allege NHD mishandled the discrete legal matters it has been handling for Stanford since 2015. Instead, Mr. Norberg complains that NHD, on Stanford's behalf, took positions that were adverse to SNH Trust. Mr. Norberg's position is that in representing Stanford in litigation brought against it, NHD owed Stanford a duty to refuse to fend off the claims Plaintiffs brought against Stanford. Following Plaintiffs logic, once these Plaintiffs sued Stanford, no lawyer could defend Stanford, because to do so would be to support the oppression of the minority owner. It cannot be the case that business associations are not entitled to representation whenever they are sued derivatively by an owner, member, or shareholder.

It is unclear from the Amended Complaint and Plaintiffs' briefing on the present motion to what extent the Plaintiffs also purport to be bringing a derivative cause of action against NHD on behalf of Acadia based on Ms. Gleichman's assertion that she retains a 49% interest in that company. *See* Amended Complaint, ¶¶ 254-257. The Court notes that the issue of Acadia's ownership—and whether NHD has ever represented Acadia—remains in dispute. Nonetheless, further factual development on these issues is unnecessary because the claim can still be disposed of on summary judgment. If Ms. Gleichman is indeed purporting to bring a derivative claim against NHD on behalf of Acadia, this claim must fail as a matter of law regardless for the same reasons Mr. Norberg's claim against NHD on behalf of Stanford as trustee of the SNH Trust must fail. These reasons, explained above in this same Part, need not be repeated here.

Having already ruled in favor of Defendant NHD as to the direct claim in Count XVII, the Court hereby **grants** Defendant NHD's motion for summary judgment as to Count XVII and grants

judgment in its favor.

B. Aiding and Abetting Claim: NHD Cannot be Liable to Plaintiffs for Aiding and Abetting Ms. Scarcelli in Allegedly Violating her Fiduciary Duties

In Count XVIII, Plaintiffs allege that, in the course of its representation of Ms. Scarcelli, NHD aided and abetted Ms. Scarcelli in breaching her fiduciary duty to them. Defendant Ms. Scarcelli has also moved for summary judgment on this Count; if she were to prevail, Defendant NHD would likewise prevail on the underlying aiding and abetting claim. However, the Court need not rule on Ms. Scarcelli's motion to decide the instant motion.

As this Court has consistently stated in this Order, an attorney will never owe a duty to a nonclient "if that duty would conflict with the attorney's obligations to his or her clients." *Cabatit*, 2014 ME 133, ¶ 21, 105 A.3d 439. The Court has explained the policy rationale underpinning this rule elsewhere in the Order. *See, e.g.,* Parts I.D.-E., *supra*.

If a claim like Plaintiffs' were allowed, it would improperly interfere with the attorney-client relationship. Ms. Scarcelli has an interpretation of her obligation under Stanford and Acadia's operating agreements, and she retained NHD as counsel to defend her interests in disputes with Ms. Gelichman and Mr. Norberg with respect to those agreements. If Plaintiffs are correct that Ms. Scarcelli's interpretation of her obligations was wrong and that her actions breached a fiduciary duty owed to Plaintiffs, that is between her and Plaintiffs. But to allow Plaintiffs' claim of aiding and abetting breach of fiduciary duty is to interpose Ms. Scarcelli's litigation adversaries between her and her litigation counsel in precisely the way Maine law forbids. *See Cabatit*, 2014 ME 133, ¶ 21, 105 A.3d 439. Even if Ms. Scarcelli were wrong in her interpretation of the operating agreement, Plaintiffs cannot hold NHD liable for aiding and abetting Ms. Scarcelli by defending her interpretation of that agreement.

Plaintiffs cite to numerous decisions in other jurisdictions where courts have held that an

injured plaintiff may bring suit against an attorney for aiding and abetting her client in causing the injury. The Court has reviewed the cases cited and found that many are either distinguishable on their facts or do not stand for the broad application of aiding and abetting liability that Plaintiffs urge in this case. To the extent that any of the cases cited would extend liability to Plaintiffs in this case, the Court declines to follow them for the policy reasons explained above.

In conclusion, there are no facts in the summary judgment record which could support a judgment for Plaintiffs as to the aiding and abetting claim against NHD in Count XVIII. Having already disposed of the direct claim for breach of fiduciary duty in Part I, *supra*, of this Order, the Court hereby also rules that Defendant NHD is not liable to Plaintiffs for aiding and abetting Ms. Scarcelli in breaching her fiduciary duty to Plaintiffs on the facts presented in the summary judgment record, and Defendant NHD is therefore entitled to judgment as a matter of law on Count XVIII. Defendant NHD's motion is hereby **granted** as to Count XVIII and the Court grants judgment in its favor.

CONCLUSION

Based on the foregoing, the Court **grants** Defendant NHD's motion for summary judgment as to all Counts remaining against it.

IT IS SO ORDERED:

Judgment is to be entered in favor of Defendant NHD on Count XVII (professional negligence), Count XVIII (breach of fiduciary duty), and Count XIX (negligent infliction of emotional distress).

The Clerk is instructed to enter this Order on the docket for this case by incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: September 26, 2017

**_____ /S
M. Michaela Murphy, Justice
Business and Consumer Court**