THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

BEFORE THE COURT-APPOINTED REFEREE
IN RE: THE HOME INSURANCE COMPANY IN LIQUIDATION
DISPUTED CLAIMS DOCKET

In Re Liquidator Number: **2008-HICIL-38**
Proof of Claim Number: **INSU275827-01**
Claimant Name: **James F. Scherr**
Claimant Number:
Policy or Contract Number:
Insured or Reinsured Name:
Date of Loss:

CLAIMANT JAMES F. SCHERR'S SUPPLEMENTAL COMPENDIUM OF NON-NEW HAMPSHIRE CASES CITED IN AMENDED BRIEF AND REPLY TO LIQUIDATOR'S SECTION 15 SUBMISSION

1

Westlaw

461 F.Supp.2d 872
461 F.Supp.2d 872
(Cite as: 461 F.Supp.2d 872)

H

United States District Court,
W.D. Wisconsin.
Mark McCRAW, Plaintiff,
v.
Linda S. MENSCH, Linda Mensch, P.C. and Illinois State Bar Association Mutual Insurance Company, Defendants.
Illinois State Bar Association Mutual Insurance Company, Cross-Plaintiff,
v.
Mark McCraw, Linda S. Mensch, Linda Mensch, P.C., Kurt Neumann, Samuesl Llanas and Keshaw, Inc., Cross-Defendants.
No. 06-C-86-S.

Nov. 9, 2006.

Background: Former client brought legal malpractice action against attorney and her insurer. Insurer filed motion for summary judgment declaring that it had no obligation to provide defense or coverage, and attorney filed cross-motion for determination that her notice to insurer was timely.

Holdings: The District Court, Shabaz, J., held that:
(1) attorney's notice to her insurer of potential claim was timely, and
(2) fact issues remained as to whether separate legal malpractice actions filed against attorney by former clients and their manager could be treated as single claim for purpose of computing policy limits.

Motions granted in part and denied in part.

West Headnotes

[1] Insurance 217 ⚿2919

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty; Conditions Precedent
217k2919 k. Tender or Other Notice. Most Cited Cases

Insurance 217 ⚿3142

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3142 k. In General. Most Cited Cases

Insurance 217 ⚿3147

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3143 Necessity
217k3147 k. Compliance as Condition Precedent. Most Cited Cases
Under Illinois law, notice provisions are valid and act as condition precedent to the insurer's duty to defend and provide coverage.

[2] Insurance 217 ⚿3144

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3143 Necessity
217k3144 k. In General. Most Cited Cases
Under Illinois law, insured's duty to notify insurer arises when it would appear to reasonably prudent person that claim may be brought against insured.

[3] Insurance 217 ⚿3144

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3143 Necessity
217k3144 k. In General. Most Cited

Cases
Under Illinois law, attorney's depositions in connection with dispute between her clients and their manager were not sufficient to trigger attorney's obligation to notify her malpractice insurer of potential claim based on her negotiation of employment agreement, where negotiations occurred ten years earlier, and attorney learned nothing at depositions concerning her representation of clients that she did not know ten years earlier.

[4] Insurance 217 ⚿3155

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3152 Timeliness
217k3155 k. "As Soon as Practicable". Most Cited Cases

Insurance 217 ⚿3168

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3166 Effect of Noncompliance with Requirements
217k3168 k. Prejudice to Insurer. Most Cited Cases
Under Illinois law, attorney's notice to her malpractice insurer of potential claim was not in violation of "as soon as practicable" requirement, even though claim was based on attorney's alleged negligence in negotiating employment agreement between her clients and their manager ten years earlier, where attorney gave notice less than five months after her deposition in clients' action against manager during which she was allegedly made aware of claim against her, and there was no evidence that insurer was somehow impeded in its ability to investigate claim by delay.

[5] Contracts 95 ⚿144

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k144 k. What Law Governs. Most Cited Cases
Under Wisconsin choice of law rules, contract claims are governed by law of state with which contract has its most significant relationship.

[6] Contracts 95 ⚿144

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k144 k. What Law Governs. Most Cited Cases
Under Wisconsin choice of law rules, in determining which state's law to apply in contract dispute, court should consider: (1) place of contracting; (2) place of performance; (3) place of negotiation; (4) location of contract's subject matter; and (5) parties' residences or places of business.

[7] Insurance 217 ⚿1091(4)

217 Insurance
217III What Law Governs
217III(A) Choice of Law
217k1086 Choice of Law Rules
217k1091 Particular Applications of Rules
217k1091(3) Liability Insurance
217k1091(4) k. In General. Most Cited Cases
Under Wisconsin choice of law rules, Illinois, rather than Wisconsin, law applied to attorney's claim that former clients' legal malpractice claim fell within scope of her malpractice insurance policy, even though underlying claim arose in Wisconsin, where attorney and insurer resided in Illinois, and contract was negotiated and executed in Illinois.

[8] Federal Civil Procedure 170A ⚿2501

170A Federal Civil Procedure

170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 k. Insurance Cases. Most Cited Cases
Genuine issue of material fact as to whether separate legal malpractice actions filed against attorney by former clients and their manager arose out of single act, error, or omission or series of related acts, errors, or omissions precluded summary judgment on legal malpractice insurer's claim that both lawsuits should be treated as single claim for purpose of computing policy limits.
***873** Daniel F. Konicek, Konicek & Dillion, PC, Geneva, IL, Robert Marc Chemers, Pretzel & Stouffer, Chicago, IL, for Defendants.

MEMORANDUM AND ORDER

SHABAZ, District Judge.

Plaintiff Mark McCraw commenced this legal malpractice against his former attorney, Linda S. Mensch, her corporation Linda S. Mensch P.C. (collectively "Mensch") and her insurer Illinois State Bar Association Mutual Insurance Company ("Insurer"). On September 13, 2006 the Court granted leave to defendant Insurer to file an amended answer and counter complaint for a declaration of its insurance coverage obligations. The matter is presently before the Court on defendant Insurer's motion for summary judgment declaring that it has no obligation to provide a defense or coverage to defendant Mensch in this action or in the separate state court action commenced by cross-defendants Kurt Neumann, Samuel Llanas and Keshaw, Inc. (collectively "BoDeans") or, alternatively that its coverage obligations are limited. The matter is also before the Court on Mensch's cross motion for a determination that her notice to Insurer was timely and that the two suits constitute distinct claims. The following facts are undisputed for purposes of the present motions.

FACTS

Cross-defendants Kurt Neumann and Samual Llanas are founding members of ***874** the musical group, The BoDeans. In 1985 they formed Cross-Defendant Keshaw Inc. to facilitate The BoDeans' business operations. Plaintiff McCraw was the BoDean's manager. McCraw, Neumann and Llanas were also partners in the Lla-Mann Music Partnership ("Lla-Mann"). McCraw and the Bodeans were Wisconsin residents during the time relevant to this action. Defendant Linda Mensch is an Illinois Attorney. Mensch represented the BoDeans between 1985 and 1997. Among the tasks Mensch undertook during her representation of the Bodeans was the formation of Keshaw, Inc. and Lla-Mann and the negotiation of a 1996 employment agreement between McCraw and the BoDeans.

The relationship between McCraw and the BoDeans failed and the dispute between them culminated in a law suit in Milwaukee County, Wisconsin, Circuit Court. ("underlying action") Defendant Mensch was deposed on June 30 and July 12, 2004 by attorneys for Plaintiff and the BoDeans in connection with the underlying action. Mensch received a letter dated December 3, 2004 from counsel for the BoDeans in which he stated that the BoDeans intended to assert malpractice claims against her. The letter also stated: "based on your own testimony, I sincerely doubt that you are surprised to receive this letter." Mensch forwarded the letter to the Insurer who received it on December 9, 2004.

The governing insurance policies cover claims made and reported during the policy term (or within 60 days after the expiration date). The policies require that claims be reported "as soon as practicable."

Claim means:

1. a demand received by **YOU** for money or services, or the service of a suit or the initiation of an arbitration proceeding against **YOU** that seeks

DAMAGES arising out of **YOUR WRONGFUL ACT;**

2. an incident or circumstance of which **YOU** have knowledge that may result in a demand against **YOU** that seeks **DAMAGES** arising out of **YOUR WRONGFUL ACT.**

The policies exclude claims which were required to be listed in an application but were not so listed. On October 14, 2004 Mensch filed a renewal application wherein she answered "no" to the following question: "During the past 12 months, has any current member of Applicant become aware of any circumstance or incident that could result in a claim or suit which has not been previously reported to ISBA Mutual?"

The policies also include the following limitation:

Two or more **CLAIMS** arising out of a single act, error or omission or a series of related acts, errors or omissions will be treated as a single **CLAIM**.... all such **CLAIMS** will be subject to the Limit of Liability....

In this action McCraw alleges that Mensch was negligent in failing to advise of the need for a written partnership agreement to effectively transfer copyrights and for misrepresenting the effect of the employment agreement between McCraw and the BoDeans. McCraw concedes that Mensch did not represent him in the negotiation of the employment agreement but claims he had an ongoing attorney client relationship with her as a result of his membership in Lla-Mann and that Mensch failed to properly explain the risks of this joint representation.

In a separate action in Wisconsin Circuit Court the BoDeans allege, among other things, that Mensch was negligent in failing to include additional language in the employment agreement, failing to advise ***875** against entering a partnership agreement with McCraw and creating a Wisconsin corporation and partnership without a Wisconsin license to practice law.

MEMORANDUM

Insurer's motion for summary judgment includes two alternative arguments. First, that Mensch's notice of claim was late, negating any coverage obligation under the terms of its 2004 policy and that Mensch's failure to list the claim in her renewal application precludes coverage under the 2005 policy issued as a result. Second, Insurer argues that even if the notice was timely, the two lawsuits should be treated as a single claim with a single claim limit of liability. McCraw, Mensch and the BoDeans all oppose the motion, contending that notice was timely and that the two lawsuits include separate and distinct claims. Additionally, Mensch asserts that nothing in the depositions provided knowledge of a claim and that there is insufficient evidence as a matter of law to establish such knowledge.[FN1]

> FN1. Insurer urges the Court to disregard Mensch's cross motion for summary judgment as untimely. However, since the Court could grant summary judgment in Mensch's favor even in the absence of a formal motion if it concludes that there is no factual dispute, there is no reason to address this contention. Where, as here, all parties are fully aware of the issues and have been afforded the opportunity to present evidence in support of their positions on the legal issue, summary judgment may be granted for either the moving or non-moving party as appropriate. *Lett v. Magnant,* 965 F.2d 251, 261 (7th Cir.1992); 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kanne, *Federal Practice and Procedure* § 2720, at 347, n. 24 and accompanying text (1998).

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favor-

able to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Adequacy of Notice

All parties agree that Illinois law governs whether Insurer is relieved from its coverage obligation as a result of inadequate notice. There is no dispute that Mensch properly notified Insurer of the claim made against her in the December 3, 2004 letter from the BoDeans' counsel. Insurer argues, however, that Mensch first received knowledge of likely claims against her by McCraw and the BoDeans at her depositions in June and July, 2004, and that this amounted to a "claim" as defined in the policy. Insurer then contends that her notice to it of the claim in December, 2004 was not "as soon as practicable," thereby precluding coverage under the the 2004 policy. Insurer further contends that Mensch's failure to list the claim in the October 4, 2004 renewal application was a misrepresentation barring coverage under the 2005 policy issued on that application.

Insurer is entitled to prevail on its motion for a determination of no coverage if, as a matter of law, it has demonstrated that a "claim" existed at the time of ***876** Mensch's depositions thereby triggering her obligation to provide notice and to list the claim in the 2004 application, and that notice in December was not "as soon as practicable." Mensch is entitled to prevail on her cross motion if she can demonstrate that either element is absent as a matter of law. The Court now concludes that as a matter of law a claim did not exist in July, 2004 and that, if such a claim did exist, notification by December was "as soon as practicable" as that term is defined by Illinois law.

[1][2] Notice provisions are valid and act as a condition precedent to the insurer's duty to defend and provide coverage. *Country Mutual Ins. Co. v. Livorsi Marine, Inc.*, 358 Ill.App.3d 880, 883-84, 295 Ill.Dec. 665, 833 N.E.2d 871, 873 (2004). Under Illinois law, the duty to notify arises when it would appear to a reasonably prudent person that a claim may be brought against the insured. *Commercial Underwriters Ins. Co. v. Aires Environmental Services, Ltd.*, 259 F.3d 792, 796 (7th Cir.2001). The question whether an insured had sufficient knowledge to trigger an obligation to provide notice is susceptible to resolution on summary judgment when the facts concerning the insured's knowledge are not in dispute. *Id.*

[3] Considering all the facts and circumstances, the June and July, 2004 depositions were not sufficient to trigger a notice obligation. Mensch learned nothing at the depositions concerning her representation of the BoDeans that she did not know ten years earlier. Her depositions in connection with the underlying action would have been expected given her factual knowledge of the parties' relationship and would not have suggested a likelihood of personal liability to Mensch. Furthermore, the passage of nearly ten years since the negotiation of the employment agreement and nearly twenty years since the partnership formation would have made it seem even less likely that she would be the object of a malpractice action.

In support of its motion for summary judgment Insurer offered no evidence other than the fact of the depositions which would suggest knowledge. However, in response to Mensch's cross motion it offers reference to two brief exchanges during the deposition which it contends demonstrate that "Mensch was not completely unaware that claims

might pend against her." These exchanges consist of several questions concerning her relationship with McCraw during the negotiation of the employment agreement and several concerning whether she held a Wisconsin law license. Under the circumstances, these brief exchanges would not have made it appear to a reasonable person that a claim may be commenced.

[4] Even assuming the limited questioning at her deposition constituted notice to her of a possible claim, her notification of Insurer less than five months after the second deposition was not in violation of the "as soon as practicable requirement" policy. A provision requiring notice as soon as practicable requires notification within a reasonable time. *Sears, Roebuck and Co. v. Seneca Ins. Co.*, 254 Ill.App.3d 686, 692, 194 Ill.Dec. 57, 627 N.E.2d 173, 177 (1993). If there is no dispute concerning the relevant facts and circumstances, the issue whether notice was within a reasonable time is a legal question. *Sonoco Buildings, Inc., Div. of Sonoco Products Co. v. American Home Assurance Co.*, 877 F.2d 1350, 1357 (7th Cir.1989). The purpose of the provision is to insure that the insurer is not prejudiced in its ability to investigate and defend the claims. *Commercial Underwriters*, 259 F.3d at 796. Lack of prejudice to the insurer is a relevant factor in considering whether notice ***877** was timely, however it is not a prerequisite to denial of coverage.

In this case the delay in reporting was relatively short, particularly in light of the tenuous nature of any claim and the period of time that had passed since the events which might be the basis for a claim. Furthermore, there is no suggestion that Insurer was somehow impeded in its ability to investigate the claim by the delay from July to December. It appears that all witnesses who have relevant knowledge of facts are present in this suit and there is no likelihood that ten years after the relevant incidents their memories faded significantly during the added five months. Insurer cites no Illinois law suggesting that a five month delay is unreasonable. The policy itself provides for a sixty day reporting period after the end of the policy term of claims made during the policy term, implying that a delay in excess of sixty days between knowledge of a claim and its reporting is anticipated.

Accordingly, the Court concludes that the Mensch defendants are entitled to a determination on summary judgment that coverage cannot be denied on the basis that notice of a claim was not provided as soon as practicable or that a preexisting claim was not properly included in the October 2004 application.

Claim Limit

The second issue is whether the two pending lawsuits should be treated as a single claim for the purpose of computing policy limits. The parties disagree whether Illinois or Wisconsin law should apply to this issue. Accordingly, analysis must begin with resolution of the choice of law.

Wisconsin's choice of law principles apply. *Sybron Transition Corp. v. Security Ins. Co. of Hartford*, 107 F.3d 1250, 1255. Wisconsin choice of law jurisprudence is, even by admission of the Wisconsin Supreme Court, an irreconcilable and confusing collection of decisions. *Drinkwater v. American Family Mut. Ins. Co.*, 2006 WI 56, ¶ 32-34, 290 Wis.2d 642, 714 N.W.2d 568. Wisconsin law applies different analyses depending on whether the issue presented is a question of contract law or tort law.

[5][6][7] When the issue is one of contract law, Wisconsin applies the law of the state with which the contract has its most significant relationship. *State Farm Mut. Auto. Ins. Co. v. Gillette*, 2002 WI 31, ¶ 26, 251 Wis.2d 561, 641 N.W.2d 662. A question of the interpretation of an insurance policy is governed by this approach. *Id.* at ¶ 27. This "grouping-of-contacts" approach requires consideration of the following relevant contacts: (1) place of contracting; (2) place of performance; (3) place of

negotiation; (4) location of the subject matter of the contract; (5) residences or places of business of the parties. *Sybron*, 107 F.3d at 1255. To the extent that the question whether there is a single claim within the meaning of the insurance contract is a policy interpretation issue, there is no question that Illinois law would apply. An Illinois insurer is insuring an Illinois attorney, licensed to practice law in Illinois, and the contract was negotiated and executed in Illinois.

The issue presented by the motion is whether the separate actions filed by McCraw and the BoDeans against Mensch "aris[e] out of a single act, error or omission or a series of related acts, errors or omissions." Notwithstanding that this claim appears to hinge entirely on insurance contract interpretation, Insurer urges the Court to apply Wisconsin's entirely different set of factors to determine the choice of law if a tort issue is presented. *See Gillette* 2002 WI 31 at ¶ 53, 251 Wis.2d 561, 641 N.W.2d 662 (listing the five "choice influencing factors" applied in tort ***878** actions). Wisconsin endorses the application of choice of law principles on an issue by issue basis, and personal injury cases may involve both insurance contract interpretation issues to which the "grouping-of-contacts" factors apply, and tort issues to which the five "choice-influencing-factors" apply. *see id.*(separately applying the contract choice of law factors to insurance policy interpretation and tort choice of law factors to tort damages issue). However, there is nothing to suggest that interpretation of the disputed policy language is in any way a tort claim or implicates Wisconsin tort law.

Whether the actions for which Mensch might ultimately be held liable are a "single act" or "a series of related acts" depends entirely on the meaning of those words and not on tort law. It is a purely contractual issue which has no tort implications. *cf. Drinkwater v. American Family Mut. Ins. Co.*, 2006 WI 56, 290 Wis.2d 642, 714 N.W.2d 568.(applying tort factors to subrogation issues dependent on the underlying tort law). Accordingly, there is no reasonable argument to apply Wisconsin law to the interpretation of the Illinois insurance policy at issue.

[8] Illinois law holds that the "related acts" language at issue is ambiguous and must be interpreted against the insurer and in favor of coverage. *Doe v. Illinois State Medical Inter-Insurance Exchange,* 234 Ill.App.3d 129, 137, 174 Ill.Dec. 899, 599 N.E.2d 983, 988 (1992). In accordance with this approach, Illinois has held that separate acts of medical negligence in the course of treating a single patient constitute separate unrelated claims, rendering the insurer potentially liable for separate occurrence limits. *Id.,* 234 Ill.App.3d 129, 139, 599 N.E.2d 983, 990. The issue is whether the insured committed more than one discrete act of negligence which caused injury. *Id.* Whether a defendant committed specific acts of negligence is a matter for jury determination. *Id.*

Applying these standards to the claims alleged in the pending lawsuits, it is apparent the trials may result in proof of discrete acts of negligence which would support a determination that there are multiple claims. For example, McCraw alleges that Mensch was negligent in failing to provide for a written partnership agreement which reflected the transfer of copyrights to Lla-Mann in 1985 when the partnership was formed. Meanwhile, the BoDeans allege that Mensch was negligent in the negotiation of the management contract between McCraw and Keshaw, Inc. in 1996. Certainly these two actions, separated by ten years, are discrete acts of negligence which would constitute separate, unrelated claims for purposes of the "related acts" limitation in the policy if they are proved at trial.

Insurer's myopic focus on Mensch's potential conflict of interest during her representation of the parties is inconsistent with Illinois' focus on whether Mensch committed discrete acts of negligence which may have caused injury. Whether Mensch committed more than one discrete act of negligence is a matter of factual dispute which is not subject to resolution on this motion.

ORDER

IT IS ORDERED that defendant Illinois State Bar Association Mutual Insurance Company's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that the motion of the Mensch defendants for summary judgment is granted insofar as it seeks a determination that Insurer may not deny coverage on the basis of inadequate*879 notification of claims and is in all other respects DENIED.

W.D.Wis.,2006.
McCraw v. Mensch
461 F.Supp.2d 872

END OF DOCUMENT

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987 S.W.2d 129
(Cite as: 987 S.W.2d 129)

H

Court of Appeals of Texas,
Houston (14th Dist.).
Dr. Richard GILLESPIE, et al., Appellants,
v.
James Franklin SCHERR, Noel Gage and Gage, Beach & Ager, Appellees.
No. 14-97-00479-CV

Dec. 30, 1998.
Order Denying Rehearing and Clarifying Opinion Feb. 4, 1999.

Chiropractors who were named plaintiffs in an uncertified class action, but were left out of settlements, brought legal malpractice action against counsel. Other chiropractors who were not named plaintiffs in prior action intervened. The 129th District Court, Harris County, Patrick Mizell, J., granted summary judgment and rendered take-nothing judgment against intervenors, who appealed. The Court of Appeals, Edelman, J., held that: (1) act of filing class action did not establish attorney-client relationship with unnamed plaintiffs, and thus attorneys had no precertification duty to intervenors, and (2) claims that contracts of representation formed basis for attorney-client relationships were not raised below, and thus provided no grounds for appellate relief.

Affirmed.

O'Neill, J., filed dissenting opinion.

West Headnotes

[1] Attorney and Client 45 ⚿64

45 Attorney and Client
45II Retainer and Authority
45k64 k. What Constitutes a Retainer. Most Cited Cases
Attorneys' act of filing a class action suit on behalf of all state chiropractors against insurance companies that refused or delayed payment did not, absent certification, establish an implied attorney-client relationship with those state chiropractors who were not named as plaintiffs, and thus, attorneys for named plaintiffs in class action lawsuit owed no precertification duty to potential class members that could be basis for claim of malpractice.

[2] Courts 106 ⚿91(.5)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k91 Decisions of Higher Court or Court of Last Resort
106k91(.5) k. In General. Most Cited Cases

Courts 106 ⚿97(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(1) k. In General. Most Cited Cases
While state courts may draw upon the precedents of any federal or state court, they are obligated to follow only higher state courts and the United States Supreme Court.

[3] Attorney and Client 45 ⚿26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Liabilities to Adverse Parties and to Third Persons. Most Cited Cases

Lawyer's professional duty generally does not extend to persons whom the lawyer never represented, even if the lawyer's work was intended to benefit them.

[4] Attorney and Client 45 ⚿64

45 Attorney and Client
45II Retainer and Authority
45k64 k. What Constitutes a Retainer. Most Cited Cases

Parties 287 ⚿35.31

287 Parties
287III Representative and Class Actions
287III(B) Proceedings
287k35.31 k. In General; Certification in General. Most Cited Cases
Until a trial court determines that all prerequisites to certification are satisfied, there is no class action, the case proceeds as an ordinary lawsuit, and attorneys for named class members have no authority to represent or otherwise act on behalf of the unnamed class members. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[5] Parties 287 ⚿35.1

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.1 k. In General. Most Cited Cases
Prerequisites to maintaining a class action apply equally to settlement classes as to litigation classes. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[6] Parties 287 ⚿35.31

287 Parties
287III Representative and Class Actions
287III(B) Proceedings
287k35.31 k. In General; Certification in General. Most Cited Cases
Until the trial court certifies a class, a suit brought as a class action is treated as if it were brought by the named plaintiffs suing on their own behalf. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(c)(1).

[7] Parties 287 ⚿35.31

287 Parties
287III Representative and Class Actions
287III(B) Proceedings
287k35.31 k. In General; Certification in General. Most Cited Cases
Potential class members do not have an interest in litigation brought as a class action unless and until the class is certified by the trial court. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[8] Appeal and Error 30 ⚿171(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k171 Nature and Theory of Cause
30k171(1) k. In General; Adhering to Theory Pursued Below. Most Cited Cases
Claims that attorney-client relationships were formed by contracts of representation between attorneys and some intervenors was not asserted in trial court, and thus, provided no grounds for appellate relief, where sole basis for alleged relationship upon which legal malpractice action was asserted was not contractual, but was attorneys' act of filing a class action on behalf of all potential class members, a basis common to all intervenors.

[9] Judgment 228 ⚿185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
Attorney, as summary judgment movant, had no burden to negate the existence of a contractual attorney-client relationship between himself and intervenors in legal malpractice action, where intervenors pleaded only the existence of a non-

contractrual relationship based on attorney's act of filing a class action on behalf of all potential class members.

[10] Pleading 302 ⚿427

302 Pleading
302XVIII Waiver or Cure of Defects and Objections
302k427 k. Objections to Evidence as Not Within Issues. Most Cited Cases
Existence of a contractual attorney-client relationship giving rise to a tort duty could not have been tried by consent based on putative clients' replies and accompanying affidavits in response to attorneys' motions for summary judgment in legal malpractice case, where a contractual relationship was mentioned in each reply only in passing as an item of background information and not as a basis upon which liability was being asserted.
***130** David M. Gunn, Joseph F. Archer, James C. Ferrell, Houston, for appellant.

Donald M. Hudgins, Michael D. Hudgins, Mary C. Thompson, Houston, for appellee.

Panel consists of Justices ANDERSON, EDELMAN and O'NEILL.

OPINION

RICHARD H. EDELMAN, Justice.

In this legal malpractice case, appellants [FN1] appeal a take-nothing summary judgment granted in favor of James Franklin Scherr, Noel Gage, and Gage, Beach & Ager, on the grounds that: (1) appellants had an attorney-client relationship with appellees; (2) appellees breached their fiduciary duty to, and committed fraud against, appellants; (3) appellants were damaged by appellees' actions; and (4) appellants Stewart Stephenson and Richard Ivy had contracts of representation with appellees. We affirm.

FN1. The appellants in this case are: Kathryn Keith-Arden, George Aubert, William Colgin, C.X. Domino, Richard Gillespie, Kurt Griesser, Kenneth N. Huete, Richard Ivy, John P. Johnston, George Junkin, David Niekamp, Odion Ojo, Tracy Sanders, L.S. Stancil, Stewart Stephenson, Ted Stephenson, Gene Chapman, and A. Kent Rice.

Background

Appellants are chiropractors licensed to practice in Texas. Appellees are two attorneys and a law firm who filed a class action in El Paso (the "class action") on behalf of all chiropractors in Texas against insurance companies who refused or delayed payment of the chiropractors' bills for services to patients. However, the class was never certified,*131 and, during the six year period between filing and dismissal of the class action, settlements were entered into and approved for some of the named plaintiffs (the "settling plaintiffs").

Thereafter, other named plaintiffs (the "Beard plaintiffs"), who were left out of the settlements, sued appellees in Harris County for fraud and breach of fiduciary duty. Appellants, who were not named plaintiffs, intervened in that case asserting similar claims, and a separate trial was ordered for their claims. The claims of the Beard plaintiffs were tried in 1995, and the jury rendered a partial verdict in favor of the plaintiffs, but the case was settled before judgment was entered.

In 1996, appellants and appellees filed cross motions for summary judgment in this case. Appellees' motions argued that they had no attorney-client relationship with appellants and that appellants sustained no damage as a result of appellees' actions. The trial court granted appellees' motions and entered a take-nothing judgment against appellants in April of 1997.

Standard of Review

A summary judgment may be granted if the evidence referenced in the motion or response shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or response. *See* TEX.R. CIV. P. 166a(c). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference in favor of the nonmovant. *See American Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 425 (Tex.1997). When a plaintiff and defendant both move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review the summary judgment evidence presented by both sides, determine all questions presented, and render such judgment as the trial court should have rendered. *See Commissioners Court of Titus County v. Agan,* 940 S.W.2d 77, 81 (Tex.1997).

Implied Duty

[1] The first of appellants' four points of error argues that summary judgment was improperly granted for appellees because appellants had an attorney-client relationship with appellees. Appellants contend that appellees' actions in purporting to file a class action on behalf of all Texas chiropractors established an implied attorney-client relationship with all potential class members. Appellants' second point of error argues that summary judgment should have been granted in their favor because appellees breached their fiduciary duty to, and committed fraud against, appellants by failing to seek class certification in a timely manner and by failing to apprise appellants of the settlement and account for and distribute the settlement funds to them.

[2][3] Appellants have cited and we have found no case finding an implied attorney-client relationship to exist before class certification between an attorney who files the class action and any unnamed class members. [FN2] Appellants urge us to follow federal decisions [FN3] which, in the context of class certification, recognize the *general* existence of a fiduciary duty to unnamed class members once a class action suit is filed. *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank,* 55 F.3d 768, 801 (3 rd Cir.1995) (stating that class attorneys owe the entire class a fiduciary duty once the class complaint is filed), *cert. denied,* 516 U.S. 824, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995). However, appellants have cited and we have found no decision which has defined the scope of such a duty or addressed it with regard to an actual claim for recovery against an attorney for its breach. Although not cited by either side, the only case we have found in which ***132** the issue was addressed held that lawyers for named plaintiffs in an uncertified class action owe no duty to unnamed class members. *See Formento v. Joyce,* 168 Ill.App.3d 429, 118 Ill.Dec. 857, 522 N.E.2d 312, 317 (Ill.App.Ct.1988). Similarly, in Texas, a lawyer's professional duty generally does not extend to persons whom the lawyer never represented, even if the lawyer's work was intended to benefit them. *See Barcelo v. Elliott,* 923 S.W.2d 575, 579 (Tex.1996) (holding that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries in the will or trust).[FN4]

FN2. Appellants' reliance on *Bloyed* to support their contention is misplaced because *Bloyed* involved a class action in which the class had been certified. *See General Motors Corp. v. Bloyed,* 916 S.W.2d 949, 952 (Tex.1996).

FN3. While Texas courts may draw upon the precedents of any federal or state court, they are obligated to follow only higher Texas courts and the United States Supreme Court. *See Penrod Drilling Corp. v. Williams,* 868 S.W.2d 294, 296 (Tex.1993).

FN4. *Cf. Huie v. DeShazo,* 922 S.W.2d 920, 925-26 (Tex.1996) (holding that the trustee who retains an attorney to advise him in administering the trust, rather than

the trust beneficiary, is the attorney's client for purposes of asserting the attorney-client privilege).

[4][5][6][7] Moreover, a class action may be maintained as such only by order of the trial court. *See* TEX.R. CIV. P. 42(c)(1). Until a trial court determines that all prerequisites to certification [FN5] are satisfied, there is no class action, the case proceeds as an ordinary lawsuit, [FN6] and attorneys for named class members have no authority to represent or otherwise act on behalf of the unnamed class members. Under these circumstances, we decline to hold that named plaintiffs' attorneys owe a precertification duty to unnamed class members. We therefore overrule appellants' first point of error and need not address appellants' second and third points of error concerning breach of duty and existence of damage.

FN5. The prerequisites to maintaining a class action are that: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See* TEX.R. CIV. P. 42(a). These requirements apply equally to settlement classes as to litigation classes. *See Bloyed,* 916 S.W.2d at 954-55.

FN6. Before certification, suits brought as class actions are governed by rules of procedure applicable to lawsuits generally rather than those specific to class actions. *See America Online, Inc. v. Williams,* 958 S.W.2d 268, 273 (Tex.App.-Houston [14 th Dist.] 1997, no writ). Until the trial court certifies a class, a suit brought as a class action is treated as if it were brought by the named plaintiffs suing on their own behalf. *See id.* Thus, potential class members do not have an interest in the litigation unless and until the class is certified. *See, e.g., American Express Travel Related Services Co., Inc. v. Walton,* 883 S.W.2d 703, 707 (Tex.App.-Dallas 1994, no writ) (holding that because the trial judge, who was a cardholder, did not have an interest in the litigation until he certified the class, he was not an interested party at the time he certified the class, and was thus not disqualified to do so).

Contractual Relationship

[8] Appellants' fourth point of error argues that the summary judgment evidence created a fact issue as to whether appellants Ivy and Stephenson had an attorney-client relationship with appellee Scherr based on executed contracts of representation. Scherr argues that the summary judgment was proper because: (1) Ivy and Stephenson never pled the existence of an attorney-client relationship based on an express contract; (2) that contention does not appear in their summary judgment response, but only their cross-motion for summary judgment; (3) they did not produce a copy of the contract establishing the relationship; and (4) Ivy and Stephenson suffered no damage as a result of Scherr's actions.

In the absence of a special exception being filed by Scherr, we will construe the pleadings liberally in favor of Ivy and Stephenson and uphold their petition as to a cause of action that may reasonably be inferred from what is stated even if an element of the claim is not specifically alleged. *See Boyles v. Kerr,* 855 S.W.2d 593, 601 (Tex.1993). Appellants' third amended plea in intervention makes no mention of any agreements between Scherr, Ivy, and Stephenson or of any other facts suggesting the existence of a contractual relationship. Rather, it alleges liability only on the basis that appellees filed suit "purporting to represent [appellants] in a class action suit." The only reference to a contractual relationship in the plea in intervention is in the paragraph entitled "Damages" which states that, in

"addition to their contractual damages and extra-contractual damages," appellants were entitled to recover*133 pre-judgment and post-judgment damages.

Appellants' motion for partial summary judgment states in part:

> Intervenors [Ivy and Stephenson] had contracts with [appellees]. However, Intervenors believe that [appellees] created an attorney client relationship with all intervenors via their actions. Thus [appellees] owed all Intervenors the duty to perform as ordinary, prudent attorneys, and to exercise that performance in the utmost good faith. Intervenors claims for negligence and for breach of fiduciary duty are by there [sic] very nature based on "violation of a standard imposed, not by agreement, but by societal norms." On a claim for breach of fiduciary relationship, "it is immaterial whether the undertaking is in the form of a contract."

(citations omitted). Appellants' motion makes no other mention of any contractual relationship and has no evidence attached to it to support the contention that Ivy and Stephenson had contracts with any of the appellees.

In appellants' reply to Scherr's motion for summary judgment, the section entitled "Background Facts," states that "[n]one of the unnamed class members, some of whom had signed contracts with Defendants, received any of the settlement proceeds...." Attached to this reply are: (i) affidavits of Stephenson and Ivy in which each of them state that they signed a contract of employment for Scherr to represent them in the class action; and (ii) a letter from Scherr's office acknowledging receipt of Ivy's executed contingency fee contract. However, the body of the reply does not otherwise mention any contractual relationship but addresses only Scherr's contention that appellants suffered no damage as a result of his actions.

Even under a liberal construction, the alleged agreements between Scherr and Ivy and Stephenson are mentioned in appellants' pleadings and summary judgment motion and responses, if at all, only in passing, and are not asserted as a basis for the attorney-client relationship upon which liability is claimed. Instead, appellants' sole basis for asserting liability against appellees, as reiterated in the quoted passage above, is appellees' actions in filing the class action on behalf of all potential class members, and that basis is asserted as being common to all appellants. Therefore, we find no merit in appellants' challenge to the summary judgment against the purported claims based on Ivy's and Stephenson's alleged contracts of representation with the appellees because no such claims were asserted. Accordingly, appellants' fourth point of error is overruled, we need not address Scherr's cross point of error, and the judgment of the trial court is affirmed.

HARRIET O'NEILL, Justice, dissenting.
Because I believe a fact issue exists as to whether Ivy and Stephenson had an attorney-client relationship with appellee Scherr based upon alleged contracts of representation, I respectfully dissent. Otherwise, I concur in the majority opinion.

OPINION ON MOTION FOR REHEARING

RICHARD H. EDELMAN, Justice.

Appellants' motion for rehearing is overruled, and the following opinion is submitted to clarify the portion of the preceding majority opinion (the "opinion") addressing appellants' fourth point of error. That point argued that the summary judgment evidence raised a fact issue as to whether Ivy and Stephenson had an attorney-client relationship with Scherr based on executed contracts of representation.

[9] As noted in the opinion, appellants' live pleading, the third amended plea in intervention, contains as its only basis for imposing a tort duty on Scherr the implied, non-contractual relationship al-

legedly created by appellees' actions in filing the class action on behalf of all potential class members. Because the plea does not allege a *contractual* relationship between any of the appellants and appellees, it does not support the existence of a tort duty based on a contractual attorney-client relationship. Therefore, Scherr had no burden as the summary judgment movant to negate the existence of ***134** such a contractual relationship, and appellants' evidence could not raise a fact issue on that unpled theory of recovery.

[10] Nor could the existence of a contractual relationship giving rise to a tort duty have been tried by consent based on appellants' replies to appellees' motions for summary judgment and their accompanying affidavits because that relationship was mentioned in each reply only in passing as an item of background information and not as a basis upon which liability was being asserted. Like the plea in intervention, each reply claimed liability based only on the implied, non-contractual relationship allegedly existing between *all* of the appellants and appellees.

O'NEILL, J., not participating.

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final, in all criminal cases of whatever grade, with such exceptions and under such regulations as may be provided in this Constitution or as prescribed by law.

(b) The appeal of all cases in which the death penalty has been assessed shall be to the Court of Criminal Appeals. The appeal of all other criminal cases shall be to the Courts of Appeal as prescribed by law. In addition, the Court of Criminal Appeals may, on its own motion, review a decision of a Court of Appeals in a criminal case as provided by law. Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion.

(c) Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and, in criminal law matters, the writs of mandamus, procedendo, prohibition, and certiorari. The Court and the Judges thereof shall have the power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgments. The court shall have the power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction.

Amended Aug. 11, 1891, proclamation Sept. 22, 1891; Nov. 8, 1966; Nov. 8, 1977, eff. Jan. 1, 1978; Nov. 4, 1980, eff. Sept. 1, 1981; Nov. 6, 2001.

§ 5a. Supreme Court, Court of Criminal Appeals, Court of Appeals; Clerk of Court; Terms

Sec. 5a. The Supreme Court, Court of Criminal Appeals, and each Court of Appeals shall each appoint a clerk of the court, who shall give bond in the manner required by law, may hold office for four years subject to removal by the appointing court for good cause entered of record on the minutes of the court, and shall receive such compensation as the legislature may provide.

§ 5b. Supreme Court, Court of Criminal Appeals; Location; Term

Sec. 5b. The Supreme Court and the Court of Criminal Appeals may sit at any time during the year at the seat of government or, at the court's discretion, at any other location in this state for the transaction of business, and each term of either court shall begin and end with each calendar year.

§ 6. Courts of Appeals; terms of Justices; clerks

Sec. 6. (a) The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court. The Court of Appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a section is necessary to decide a case. Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and

regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

(b) Each of said Courts of Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a term of six years and shall receive for their services the sum provided by law.

(c) All constitutional and statutory references to the Courts of Civil Appeals shall be construed to mean the Courts of Appeals.

Amended Aug. 11, 1891, proclamation Sept. 22, 1891; Nov. 7, 1978; Nov. 4, 1980, eff. Sept. 1, 1981; Nov. 5, 1985; Nov. 6, 2001.

§ 7. Judicial Districts; District Judges; terms or sessions; absence, disability or disqualification of Judge

Sec. 7. The State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution. Each district judge shall be elected by the qualified voters at a General Election and shall be a citizen of the United States and of this State, who is licensed to practice law in this State and has been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who has resided in the district in which he was elected for two (2) years next preceding his election, and who shall reside in his district during his term of office and hold his office for the period of four (4) years, and who shall receive for his services an annual salary to be fixed by the Legislature. The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law. He shall hold the regular terms of his Court at the County Seat of each County in his district in such manner as may be prescribed by law. The Legislature shall have power by General or Special Laws to make such provisions concerning the terms or sessions of each Court as it may deem necessary.

The Legislature shall also provide for the holding of District Court when the Judge thereof is absent, or is from any cause disabled or disqualified from presiding.

Amended Aug. 11, 1891; Nov. 6, 1949; Nov. 5, 1985.

§ 7a. Judicial Districts Board; reapportionment of judicial districts

Sec. 7a. (a) The Judicial Districts Board is created to reapportion the judicial districts authorized by Article V, Section 7, of this constitution.

(b) The membership of the board consists of the Chief Justice of the Texas Supreme Court who serves as chairman, the presiding judge of the Texas Court of Criminal Appeals, the presiding judge of each of the administrative judicial districts of the state, the president of the Texas Judicial Council, and one person

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SUBCHAPTER A. SUPREME COURT

§ 22.001. Jurisdiction

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses, either before or after the decision of the case in that court.

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

(e) For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 1106, § 1, eff. June 20, 1987; Acts 2003, 78th Leg., ch. 204, § 1.04, eff. Sept. 1, 2003.

Historical and Statutory Notes

The 1987 amendment in subd. (a)(6) deleted "substantive" following "an error of", deleted "that affects the judgment" preceding "has been committed", and inserted ", and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction".

Section 3 of the 1987 amendatory act provides:

"This Act applies only to judgments in cases that become final on or after the effective date [June 20, 1987] of this Act. A judgment that became final before the effective date of this Act is governed by Chapter 22, Government Code, as it existed at the time the judgment was rendered, and that law is continued in effect for that purpose."

Acts 2003, 78th Leg., ch. 204 added subsec. (e).

Prior Laws:

Acts 1845, p. 143.
Rev.Civ.St.1879, art. 1011.
Acts 1892, p. 19.
G.L. vol. 10, pp. 383, 875.
Rev.Civ.St.1895, arts. 940, 941, 945.