STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

DEAL WIRELESS, LLC and
ALL USA WIRELESS, LLC,
Plaintiffs,

v.

Case No. 19-170895-CB
Hon. James M. Alexander

DELDIN LAW, PLLC, and
MARC A. DELDIN,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' Motion for Summary Disposition. Plaintiffs brought this action claiming that Defendants committed legal malpractice when the firm represented them in an underlying breach of insurance contract case in the United States Eastern District Court for the Eastern District of Michigan.

A short history of events is necessary. In their Complaint, Plaintiffs state they suffered fire damage to a cell phone store on September 20, 2014. On November 25, 2015, Plaintiffs engaged Defendants' services to prosecute their breach of contract claim against Selective Insurance Company of America. Plaintiffs filed suit on December 8, 2015, seeking damages in excess of $1 million dollars. On December 22, 2016, the parties attended mediation. At the conclusion of mediation, the parties signed Notice of Settlement agreeing to a full and complete settlement in the amount of $185,000.

On December 25, 2015, Plaintiffs informed Defendants of their intent to reject the settlement offer. Defendants informed Plaintiffs that they had already accepted and signed the settlement, and

that if Plaintiffs wanted to "reject" the settlement, Defendants would have to withdraw from their representation. Ultimately, Plaintiffs refused to sign the formal settlement agreement, and Defendants filed a motion to withdraw and to impose an attorney's lien on January 6, 2017. Defendants' motion to withdraw was granted on January 17, 2017. On November 27, 2017, the federal court granted Defendants' motion for attorney fees and lien in the amount of $70,213.10.

In the end, Selective Insurance filed a motion to enforce the settlement agreement. The federal court determined that it lacked jurisdiction to hear the motion. On October 12, 2018, Plaintiffs' filed an action in this Court, seeking a declaration that the settlement was unenforceable.[1] Plaintiffs, again, entered into a settlement agreement with Selective Insurance, settling the case for $190,000. A stipulated order dismissing the declaratory action was signed by the Court and entered on February 11, 2019.

In the current action, Plaintiffs' allege that in the course of their representation, Defendants failed to advise Plaintiffs that they would be bound by the settlement agreement the parties signed at facilitation in the underlying federal case. Further, Plaintiffs allege that Defendants submitted an affidavit in support of Selective Insurance's motion to enforce the settlement agreement that contained information protected by the attorney-client privilege. Plaintiffs argue that Defendants' conduct amounted to legal malpractice.

On these general allegations, Plaintiffs filed the present lawsuit on claims of (Count I) legal malpractice; (Count II): professional negligence; and (Count III) breach of fiduciary duty.

Defendants now seek dismissal of Plaintiffs' Complaint under MCR 2.116(C)(7), (C)(8), and (C)(10). A (C)(7) motion considers whether a claim is barred by, among other grounds, the statute of

1 That action was assigned case number 2018-169153-CB.

limitations. A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[2] And a (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden*, 461 Mich at 120.[3]

Defendants argue that they are so entitled because (1) Plaintiffs' Complaint is only one for legal malpractice; (2) Plaintiffs' claims are barred by the two-year statute of limitations; (3) Plaintiffs' claims are barred the doctrine of collateral estoppel; and (4) Plaintiffs cannot establish that Defendants' conduct proximately caused Plaintiffs' alleged injury.

I. Complaint Sounds in Legal Malpractice

First, Defendants argue that Plaintiffs filed a complaint for legal malpractice that included not only a count for malpractice, but also for professional negligence and a count for breach of fiduciary duty. Defendants argue that despite the three counts in Plaintiffs' Complaint is only for legal malpractice. Defendants argue that the Court is not bound by the labels Plaintiffs have chosen, and the Court should dismiss Plaintiffs' professional negligence and breach of fiduciary duty claim as they are redundant.

Defendants argue that in a legal-malpractice claim, Plaintiffs argue that Defendants'

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2 Such a motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).
Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

3 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the

representation fell below the standard of care. In both the professional negligence and breach of fiduciary duty claims, Plaintiffs argue that Defendants representations fell below the standard of care. Since Plaintiffs' claims all rely on the same acts and omissions that form the basis for the duplicative claim, said claims should be dismissed. The Court agrees.

In *Bernard v Dilley*, 134 Mich App 375, 378; 350 NW2d 887 (1984), plaintiff sued her former attorney for legal malpractice, breach of contract, and general negligence. Despite her three-count complaint, plaintiff's alleged damages flowed from her allegation that her former attorney failed to represent her adequately. *Id.* The *Bernard* Court held that the trial court properly dismissed the breach of contract and general negligence claims finding that the complaint was "grounded on malpractice and malpractice only." *Id.* The *Bernard* Court explained:

> To establish a tort, one must first establish a duty to the claimant imposed on the alleged tortfeasor. The only claim of duty contained in plaintiff's first amended complaint arises out of the attorney-client relationship between plaintiff and defendant Dilley. Where the alleged duty arises out of such a relationship, the tort claim is one for malpractice and malpractice only. *Id.*, at 378-79.

After a careful review of Plaintiffs' Complaint, it is a Complaint grounded in malpractice and malpractice only. Plaintiffs' Complaint provides, "[t]his is a legal malpractice case in which Plaintiffs seeks to recover damages caused by Defendants' failure to provide adequate legal advice and violation of attorney client privilege. . . ." (Complaint, at ¶1). Plaintiffs' claim for professional negligence specifically provides that Defendants "failed to adequately advise" Plaintiffs and provided "inadequate legal advisement." (Complaint, at ¶¶ 62, 63).

It is clear, based on Plaintiffs' pleading, that Plaintiffs professional negligence claim arises out of the attorney-client relationship, and any alleged damages flow from Plaintiffs' allegation that

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moving party is entitled to judgment as a matter of law. *Id.* at 120.

Defendants failed to provide adequate legal representation. As such, Plaintiffs' Complaint is one for legal malpractice. Based on the same, Plaintiffs have failed to state a claim for professional negligence, and the same is dismissed.

Further, both Plaintiffs and Defendants agree that in order to maintain a breach of fiduciary duty claim, Plaintiffs must allege "a more culpable state of mind than the negligence required for malpractice." *Prentis Family Fund, Inc v Karmanos Cancer Inst*, 266 Mich App 39, 47; 698 NW2d 900 (2005). Again, after a review of Plaintiffs' Complaint, Plaintiffs have failed to allege that Defendants committed any different or more egregious conduct than what was alleged in their legal malpractice claim. In fact, Plaintiffs' Complaint alleges that Defendants breached their fiduciary duties "by doing all of the acts and omissions as herein alleged." (Complaint, at ¶ 82).

Plaintiffs' claim for breach of fiduciary duty is merely restatement of their legal malpractice claim. Based on the foregoing, Plaintiffs have failed to state a claim for breach of fiduciary duty, and the same is dismissed.

II. Statute of Limitations

Next, Defendants argue that Plaintiffs' claim fails because Plaintiffs failed to file their Complaint within two years of when the claim accrued. As such, Defendants argue that Plaintiffs' legal-malpractice claim is time-barred.

A legal-malpractice claim must be filed within two years of the date on which the claim accrues. MCL 600.5805(8). A claim accrues when the attorney discontinues serving the client in a professional capacity in the matter in which the claim arose. MCL 600.5838(1). Alternatively, a claim accrues within six months of when the client discovered or should have discovered the

existence of a claim. MCL 600.5838(2). The client "may take advantage of whichever provision provides the longer period within which to file." *Chapman v Sullivan*, 161 Mich App 558, 563; 411 NW2d 754 (1987).

In their initial motion, Defendants argue that "January 6, 2017 is the date on which Deldin last performed professional services." Defendants then filed a supplemental brief arguing that the claim accrued as early as December 30, 2016, but not later than January 4, 2017. Initially, Defendants argue that Defendants discontinued their service when they filed their motion to withdraw as counsel on January 6, 2017, and the Court agrees.

On December 30, 2016, Defendants notified Plaintiffs that Plaintiffs had two options, (1) signed to settlement agreement, or (2) refuse to sign and Defendants would have to withdraw as counsel. (Defendants' Exhibit 5). On January 4, 2017, Plaintiffs confirmed that they would not sign the settlement agreement. (Defendants' Exhibit 8). On January 5, 2017, Defendants, again, gave their assessment of the case, and asked that Plaintiffs consent to Defendants withdrawing as counsel. (Defendants' Exhibit 9). Defendants ultimately filed their motion to withdraw on January 6, 2017. (Defendants' Exhibit 11).

Plaintiffs argue that their Complaint was filed on January 5, 2017, but not accepted until the Court opened on January 7, 2017. As such, Plaintiffs argue that their claim for legal malpractice was filed timely and not time barred. The Court agrees. On Saturday, January 5, 2019, Plaintiffs received notification from TrueFiling, which indicated that Plaintiffs' filing was received by the Court and assigned a temporary case number. The Complaint was ultimately accepted by the Court on Monday, January 7, 2019.

MCR 1.108(1) provides that the if the last day of a period falls on a Saturday, Sunday, or

legal holiday in which the Court is closed, "the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday, or a day on which the court is closed pursuant to court order." Here, Plaintiffs filed their Complaint on a Saturday when the Court was closed. Pursuant to MCR 1.108(1), the period to file was extended to the next day that the Court was open, the following Monday, January 7, 2019, the date the Complaint was ultimately accepted.

Based on the foregoing, Plaintiffs filed their Complaint within the two years from which the claim accrued, and Plaintiffs' claim is not time barred. As such, Defendants' motion for summary pursuant to (C)(7) is DENIED.

III. Causation

Next, Defendants argue that Plaintiffs cannot establish negligence or causation as it relates to Plaintiffs' allegation that Defendants violated the attorney-client privilege. Based on the same, Defendants argue that Plaintiffs' claim for legal malpractice should be dismissed.

In order to succeed on a legal malpractice claim, a plaintiff must establish: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Bowden v Gannaway*, 310 Mich App 499, 503; 871 NW2d 893 (2015) (internal citations and quotations omitted).

The proximate causation element of a legal malpractice claim includes both cause in fact and proximate cause. *Pontiac Sch Dist*, 221 Mich App at 613; *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). The *Skinner* Court reasoned:

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause

> or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. *Skinner*, 445 Mich at 163 (internal citations omitted).

"To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich at 164. The *Pontiac School District* Court applied *Skinner*'s causation reasoning to a legal malpractice claim. *Pontiac Sch Dist*, 221 Mich App at 613-615; *Skinner*, 445 Mich at 163-165.[4]

But Defendants argue that Plaintiffs cannot establish negligence or causation as it relates to Plaintiffs' claims regarding the alleged violation of attorney-client privilege because Plaintiffs waived the attorney-client privilege by putting Defendants' representation at issue. As such,

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4 The *Pontiac School District* Court observed:

> In *Skinner*, the Court relied upon *Kaminski v. Grand Trunk W.R.Co.*, 347 Mich. 417, 421-422, 79 N.W.2d 899 (1956), which adopted the following test of conjecture when there were alternative theories of causation requiring a "rule of conjectural choice between equally plausible inferences":
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> > "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence."
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> > "If, however, plaintiff has proven sufficient facts to justify a verdict upon *one* theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury." *Pontiac Sch Dist*, 221 Mich App at 613-14.
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> The *Skinner* Court continued:

We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. . . . [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Skinner*, *supra* at 164-165, citing *Kaminski*, 347

Defendants argue that they were entitled to defend against any allegations regarding the representation. Plaintiffs do not respond to Defendants' arguments as it relates to the alleged violations of the attorney-client privilege.

The Michigan Court of Appeals has held that:

> A party opposing a motion brought under C(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. . . . [W]here the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993) (internal citations omitted).

Since Plaintiffs have failed to produce any evidence, or address Defendants' argument, regarding the alleged violation of the attorney-client, privilege, they have failed to establish the existence of a material factual dispute. Based on the same, Defendants' motion for summary of the violation of the attorney-client privilege is GRANTED, and Plaintiffs' claim for the same is DISMISSED.

As it relates to Plaintiffs' claim for legal malpractice based on inadequate legal advice, the Court finds that Plaintiffs have again failed to establish causation. As previously stated, Plaintiffs' causation must be more than mere speculation. Here, although Plaintiffs submitted an affidavit from their expert, the expert does not explicitly opine that Defendants committed legal malpractice.

Rather, Plaintiffs' expert states that, "[i]n the event that the trier of fact believes Mr. Maktari's recitation of the events leading up to, and which took place at, the December 22 2016 mediation, then it is my professional opinion that the Defendants in this case violated the standard of care if it is true that they recommended to Mr. Maktari that he accept a settlement in the amount of

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Mich 417.

$185,000." (Plaintiffs' Exhibit 6). This opinion, in and of itself, does not create a question of fact as to Plaintiffs' claim for legal malpractice.

One of Plaintiffs' factual allegations to support its legal-malpractice claim is that Defendants advised Plaintiff to accept a settlement without any legal advisement. (Complaint, at ¶43). However, Mazen Maktari, Plaintiffs' agent, executed an affidavit in the federal case after the mediation session. In his affidavit, Maktari, who was present at mediation, and accepted the settlement offer on behalf of Plaintiffs stated, '[t]hat during the mediation, former attorney Deldin strenuously advised me to accept the settlement offer and further advised that if I did not accept the settlement, I would lose at trial and receive zero for damages." (Defendants' Exhibit 19).

Further, Plaintiffs signed a notice of settlement that stated that '[t]he parties do agree to full and complete settlement in the amount of $185,000 payable within 30 days." (Defendants' Exhibit 3). And, Plaintiffs' stated that they signed the Notice of Settlement [b]ased on Attorney Deldin's advisement." (Plaintiffs' Exhibit 1).

It is clear, based on Plaintiffs' own admissions that they were "strenuously" advised regarding the settlement, and the risk associated with continued litigation. Based on the same, Plaintiffs' have failed to establish that a question of fact exists regarding Defendants' alleged legal malpractice

The Court further finds that Defendant's' decisions in their representation are also protected by the attorney-judgment rule. Our Supreme Court articulated this rule as follows: "mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence." *Simko v Blake*, 448 Mich 648, 658; 532 NW2d 842 (1995).

Defendants recommended that Plaintiffs settle the underlying federal case for $185,000. After refusing to sign the formal settlement agreement, Plaintiffs filed an action in this Court to declare the settlement agreement unenforceable. Ultimately, Plaintiffs settled its breach of contract claim against the insurance company for $190,000, a mere $5,000 more than what was achieved by Defendants in the underlying federal action. The Court cannot, as a matter of law, determine that a $5,000 difference was more than a "mere error in judgment" to consitute an action for legal malpractice.

IV. Collateral Estoppel

Assuming arguendo that the Court found that there was a question of fact regarding Plaintiffs' legal-malpractice claim, and that Defendants' actions were not protected by the attorney-judgment rule, the Court would find that the doctrine of collateral estoppel bars Plaintiffs' claim.

Since a federal court entered the decision on which Defendants rely, the Court must apply federal law in determining whether the claim is barred by the doctrine of collateral estoppel. Under federal law, collateral estoppel applies if: (1) the issue was the same issue involved in the federal case; (2) the issue was actually litigated and decided in the federal case; (3) determination of the issue was an essential and necessary part of the decision in the federal case; and (4) plaintiff was afforded a full and fair opportunity to litigate the issue in the federal case. *Central Transport, Inc v Four Phase Systems, Inc*, 936 F2d 256, 259 (CA 6, 1991); *Verizon North, Inc v Strand*, 367 F3d 577, 583 (CA 6, 2004).[5]

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5 Michigan law on collateral estoppel is substantially similar to federal law. Michigan law provides:

> Generally, for collateral estoppel to apply three elements must be satisfied: (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment"; (2) "the same parties must have had a full [and fair] opportunity to litigate the issue"; and

In the federal action, Defendants filed a motion for attorney fees and a charging lien. In the order granting the fees and charging lien, the court states that Plaintiffs "challenge the quality of the results achieved," but notes that Plaintiffs' "faced significant evidentiary challenges." (Defendants' Exhibit 18). The court further notes that Plaintiffs' owner, Maktari, stated that "he did not receive proper advice and counseling" from Defendants. *Id.* The court found that Plaintiffs "would have to have been thoroughly advised of the evidentiary challenges [Plaintiffs] faced, and the consequences of proceeding to trial rather than accepting the $185,000 settlement." *Id.*

Based on the record from the underlying federal action, Plaintiffs had a full and fair opportunity to litigate the issue of Defendants' legal representation, and did, in fact, litigate the same. The federal court entered an order granting Defendants' request for attorney's fees and a lien. In granting the same, the court, necessarily, had to determine that Defendants were entitled to fees based on their legal representation.

V. Conclusion

Based on the foregoing, Defendants' motion for summary of Plaintiffs' claim for legal malpractice is GRANTED and the same is DISMISSED.

This is a final order that resolves the last pending claim and closes the case.

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(3) "there must be mutuality of estoppel." "Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, 'the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.'" *Monat v State Farm Ins Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004), quoting *Storey v Meijer*, Inc, 431 Mich. 368, 373 n 3; 429 N.W.2d 169 (1988) and *Lichon v American Universal Ins Co*, 435 Mich 408, 427; 459 NW2d 288 (1990).

IT IS SO ORDERED

September 4, 2019___ _____ __/s/ James M. Alexander_____

Date Hon. James M. Alexander, Circuit Court Judge