



## Alerts

### Attorney Owed No Duty to Plaintiffs as Intended Third-Party Beneficiaries

November 30, 2011

*Lawyers for the Profession® Alert*

*Haul Reddick v. M. Thomas Suits*, 2011 Ill.App. 2d 100480 (Nov. 8, 2011)

#### Brief Summary

Plaintiffs, the executor of a deceased's estate and the surviving widow of the deceased, sued defendants, an attorney and his firm. Defendants had performed legal work reinstating an administratively dissolved corporation. The appellate court held that the trial court properly granted summary judgment in favor of the lawyer, finding that he owed no duty to plaintiffs but only to the corporation (Corporation) as to which the deceased (President) served as president. The attorney's representation of the corporation was not undertaken to directly benefit plaintiffs.

#### Complete Summary

On July 8, 2005, the Corporation was incorporated. Defendants performed the incorporation. The President and two other individuals were the Corporation's original shareholders. The Corporation had acquired the assets of another company (Debtor) that was in the same business and had been represented by defendants. In 2005, the President approached defendants to effect the transfer of assets from the Debtor to the Corporation. The Debtor was at the time in default with respect to a secured creditor and could no longer pay its debts. Defendants provided legal services to both the Debtor and the Corporation. The Debtor's assets were transferred to the secured creditor and then purchased by the Corporation from the creditor in exchange for Corporation assuming the Debtor's secured debt. The Corporation continued to do business with some of the Debtor's trade creditors, but sent letters to others indicating that the Debtor was unable to pay its debts.

The President died on March 3, 2007 after battling an illness. Earlier in 2007, as a result of the President's illness, the executor first became involved with the Corporation. The executor testified that it was his understanding that if a corporation did not remain in good standing, then the shareholders could be liable for the debts incurred by the corporation. From January 2007 until the President's death, the executor reviewed the files relating to the Corporation and talked to the President about the business. As a result of his review, the executor concluded that the Corporation should be sold or liquidated as quickly as possible.

#### Attorneys

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Shortly after the President's death, the executor was elected as the Corporation's president and director. On March 7 or 8, 2007, he learned that the Corporation had been administratively dissolved as of December 1, 2006. The executor directed that the corporation be reinstated and that the registered agent be changed. He wanted the reinstatement because the Corporation's letter of intent required the company to be in good standing, as well as to ensure that the President or his estate would not be personally liable (because the executor believed at the time that shareholders could be personally liable if a corporation was dissolved). The executor did not understand that it was not the shareholders who faced personal liability, but the directors and officers of the corporation who could be liable for the corporation's dealings while it was dissolved. He testified that if he had known that, he would likely have consulted with an attorney and removed himself as an officer and director.

An email from the executor in which he stated that "we need to take care of this pronto" was sent to defendants. Defendants then emailed the executor stating that he had completed the documents needed for reinstatement, and he would send them to the Illinois Secretary of State on March 12, 2007. A parade of missteps and errors then ensued as defendants unsuccessfully attempted to have the Corporation reinstated. The Corporation was not reinstated until May 25, 2007.

Defendants testified that at the beginning of the reinstatement efforts, they understood that if a corporation was dissolved or continued to carry on its regular business, then the officers and directors faced potential personal liability for any obligations the corporation incurred during the period it was dissolved. They did not discuss these risks with the executor. Defendants acknowledged that: (1) reinstating a dissolved corporation is a relatively simple task, although if the task was not completed promptly or correctly, it could create significant risks of potential liability for the officers and directors; (2) they had not accomplished the reinstatement correctly because they forgot or neglected to include the application for reinstatement along with the other materials submitted; and (3) in undertaking to reinstate the Corporation, the sole client was the Corporation. The executor testified that he did not hire defendants to represent him or the other plaintiff personally.

On June 4, 2007, one of the Corporation's resin suppliers sued the Corporation and plaintiffs, seeking \$400,000 for unpaid invoices incurred during the period of the Corporation's dissolution and other claimed damages. The parties ultimately settled the case, and plaintiffs paid \$135,000 to the supplier. They also incurred approximately \$80,000 in attorneys' fees. The estate made all payments for the settlement and attorneys' fees on plaintiffs' behalf. In turn, plaintiffs agreed that any net recovery from a legal malpractice action against defendants would be paid to the estate. On June 8, 2009, the Corporation's landlord filed suit for unpaid rent totaling nearly \$40,000 which was due during the period of Corporation's dissolution.

Plaintiffs alleged that defendants were negligent in failing to take the necessary steps to have the Corporation timely reinstated, and to advise them about the potential personal liability they faced if the Corporation continued to conduct business while it was dissolved. The trial court entered judgment in favor of the defendants, finding that defendants owed no duty to plaintiffs.

Plaintiffs argued that defendants committed legal malpractice when they botched the attempts to reinstate. The court initially noted that generally, an attorney owes a duty only to his client, and not to third persons. In *Pelham v. Griesheimer*, 92 Ill.2d 13, 19 (1982), the Illinois Supreme Court held that to establish a duty between an attorney and a non-client third-party plaintiff, the plaintiff must prove that the "primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third-party." The *Pelham* court acknowledged the California balancing approach, which considers the following factors:

The extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendants' conduct[,] and the policy of preventing future harm.

The court did not adopt this balancing test, however, noting that the test usually reduced to considering whether the services were intended to benefit the plaintiff. The court also noted that the courts employing the California balancing test were more willing to extend the attorney's duty to third-parties in cases in which the attorney's representation was non-



adversarial.

Here, plaintiffs argued that the trial court erred for three reasons: (1) in legal malpractice cases, Illinois has abolished the requirement that the plaintiff be in privity with the defendant-attorney; (2) plaintiffs were the intended third-party beneficiaries of defendants' representation of the Corporation for purposes of reinstating it; and (3) a genuine issue of material fact existed. The appellate court acknowledged that Illinois has abolished the privity requirement and that a third-party, under the proper circumstances, can maintain a legal malpractice action.

Plaintiffs next contended they were intended third-party beneficiaries of defendant's representation of the Corporation. The court noted that the "key consideration" for determining if the attorney owed a duty to the third-party is whether the attorney was "acting at the direction of or on behalf of the client to benefit or influence [the] third-party." The court concluded that defendants owed no duty to plaintiffs. While the executor, in fact, retained defendants, he, in his capacity as agent of the Corporation, retained defendants to represent the Corporation with regard to reinstating it. The corporate entity was defendants' client, and the purpose of defendants' engagement was to restore its good standing. The restoration of the Corporation's good standing would have had an incidental benefit to the directors and officers and they would no longer be personally liable for any contracts entered into or business conducted by the Corporation. The court could not say, however, that defendants were acting at the Corporation's direction to benefit or influence its directors or officers.

### **Significance of Opinion**

This decision is yet another Illinois case following the holding of *Pelham*. In order to avoid making the attorney's duty unlimited, a non-client third-party must establish that the "primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third-party." Incidental benefits to a third-party will not suffice to establish duty.

For more information, please contact [Terrence P. McAvoy](#) or your regular [Hinshaw](#) attorney.

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