Circuit Court for Montgomery County
Case No. 487158V

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1886

September Term, 2023

ROBERT A. ERRERA, ET AL.

v.

SHULMAN ROGERS GANDAL PORDY & ECKER PA, ET AL.

Berger,
Leahy,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: July 8, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This case concerns proceedings brought in the Circuit Court for Montgomery County by six investors, Appellants, who, between 2016 and 2018, fell victim to a Ponzi scheme orchestrated by non-party Kevin Merrill. In 2021, Appellants brought suit against Gary Day and Jeff May, and their corporation Credit Portfolio Lending II, LLC ("CPL2"; collectively "the CPL2 Defendants"), for their role in operating CPL2 as a "feeder fund" for Merrill's Ponzi scheme. Appellants also brought suit against the law firm Shulman Rogers, Gandal, Pordy & Ecker, P.A., and one of its attorneys, Scott Museles ("Appellees"), for their role representing Day and May in the creation of CPL2. The suit alleged, among other things, that Appellees had committed legal malpractice against Appellants notwithstanding the fact that none of the Appellants were represented by Appellees. The court ultimately granted summary judgment in favor of Appellees. This timely appeal followed.

QUESTIONS PRESENTED

Appellants present one question for our review, which we have rephrased slightly as follows:[1]

> Whether the trial court erred when it entered summary judgment for the Appellees.

For the following reasons, we affirm.

[1] Appellants phrased the question as follows:

> Did the Circuit Court err in granting the Shulman Defendants' motion for reconsideration, vacating its earlier order denying in part their motion for summary judgment, and, instead granting summary judgment to the Shulman Defendants?

BACKGROUND

Appellants are six individuals who unfortunately found themselves the victims of a Ponzi scheme perpetuated primarily by Kevin Merrill. Merrill, who ultimately pled guilty, is presently serving a sentence in federal prison, and is not a party to this case. Appellants alleged that between 2016 and 2018, Gary Day and Jeffrey May operated CPL2 as a "feeder fund" for the purpose of perpetuating the Ponzi scheme. Appellants alleged that they were informed that their investments would be used to finance consumer debt portfolios through Merrill's debt collection business, and their investments were instead misappropriated in furtherance of Merrill's Ponzi scheme.

Central to the appeal at issue is the Business Loan and Security Agreement ("BLSA") created by Appellees for the CPL2 Defendants. Appellees drafted the BLSA in February 2016 for use by the CPL2 Defendants in any potential future business dealings with then-unknown investors. Appellees allege that the creation of the BLSA had concluded before any of the Appellants were identified or invested in CPL2. The BLSA was a three-way contract between Merrill and his associated partners and businesses (the "Borrowers"), unnamed noteholders who would become investors in the future (the "Lenders"), and CPL2 as the "Administrative Agent" for the Lenders.[2]

The BLSA outlined the terms of the relationship and commitments of the parties. The BLSA provides that certain actions taken by the Administrative Agent, CPL2, were for the "benefit of the Lenders." The BLSA also makes repeated references to counsel for

[2] CPL2 was also classified as a Lender.

the Borrowers and Lenders, implying that the Lenders -- later, Appellants -- could consult counsel other than Appellees, indicating that Appellees did not represent Appellants. The BLSA also included an indemnification clause whereby any future Lenders agreed to indemnify CPL2 against any disputes that may arise under the BLSA from actions taken by CPL2 as the Administrative Agent.

In September 2018, it was revealed that Merrill's debt collection business was actually a Ponzi scheme. Following this revelation, Appellants sued the CPL2 Defendants for fraud, breach of fiduciary duty, and related torts, and additionally sued Appellees for "Aiding and Abetting Fraud," "Professional Malpractice," and "Aiding and Abetting Breach of Fiduciary Duty." Appellees moved to dismiss the claims against them, which was granted regarding the claims of aiding and abetting fraud and breach of fiduciary duty, but was denied as to the claim of professional malpractice. The court allowed discovery to proceed against Appellees on the professional malpractice claim to allow Appellants the opportunity "to show that they were intended beneficiaries of the relationship" between Appellees and the CPL2 Defendants. In denying the motion to dismiss, the court acknowledged that even with discovery,

> [Appellants] may be unsuccessful in their efforts to show that they were intended beneficiaries of the relationship that CPL 2 had with the [Appellants]. Moreover, it may ultimately be shown that the "intended beneficiary" exception to the general privity rule is inapplicable because there was too much conflict in the parties' positions,[] or that the scope of the [Appellants] representation of CPL 2 was much more limited tha[n] [Appellants] suggest.

Following discovery, the CPL2 Defendants and Appellees moved for summary judgment. Appellees argued that Appellants failed to demonstrate a genuine dispute of material fact regarding whether a relationship existed between Appellees and Appellants such that the legal malpractice claim could proceed. The court heard arguments on the motion for summary judgment on September 21, 2023. The court denied Appellees' motion for summary judgment regarding the legal malpractice claim.

Appellees filed a motion to reconsider the denial of summary judgment as to the legal malpractice claim, and on October 16, 2023, the court granted the motion for reconsideration, thereby granting Appellees motion for summary judgment. In so ordering, the court noted that although "the issue of intent is usually a question of fact, nevertheless, the ultimate question in the context here - of whether [Appellees] owed a legal duty to the non-client [Appellants] - is a question of law for the court." Explaining that any benefit provided by Appellees here would have been "indirect and incidental to the benefits intended for the actual client," the court emphasized that none of the Appellants had any contact with Appellees, and even so, "while, under the BLSA defendant CPL 2 was to be acting as the agent for the future 'lenders,' the interests of [the CPL2 Defendants] were not squarely the same as the interests of the other lenders [Appellants]." This timely appeal followed.[3]

[3] Appellants devote significant argument in their opening brief alleging various failures on the part of Appellees, including failing to disclose material information regarding outstanding obligations of previous funds run by Day and May, failing to register the CPL2 notes as securities, and failing to disclose that Day and May were not licensed brokers. These arguments are not relevant here, however, because the trial court granted summary judgment for Appellees after finding that Appellees owed no duty of care to

STANDARD OF REVIEW

"[T]he ruling on a motion for reconsideration is ordinarily discretionary," and "the standard of review in such a circumstance is whether the court abused its discretion." *Wilson-X v. Dep't of Hum. Res.*, 403 Md. 667, 674-75 (2008). "Except to the extent that they are subsumed in [the question of whether the trial court abused its discretion], the merits of the judgment itself are not open to direct attack." *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475-76 (1997).[4] "A circuit court abuses its discretion when no reasonable person would take the view adopted by the court, or when the court acts without reference to any guiding rules or principles." *Sydnor v. Hathaway*, 228 Md. App. 691, 708 (2016) (internal quotations omitted).

Maryland Rule 2-501(f) provides that after a party moves for summary judgment, "[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." We review a court's grant of summary judgment *de novo*. *Gambrill v. Bd. of Educ. of Dorchester Cnty.*, 481 Md. 274, 297 (2022).

Appellants to sustain a legal malpractice claim. The court never addressed the merits of Appellants allegations pertaining to the legal malpractice claim. We will not address these arguments on appeal.

[4] *In re Adoption/Guardianship No. 93321055/CAD* arose from an appeal following the denial of the appellant's motions for reconsideration. Although the present appeal stems from the grant of a motion for reconsideration instead, the general principle still follows: we do not reevaluate the original judgment and only ask whether the trial court abused its discretion in its handling of the motion for reconsideration.

We "must discern whether a genuine dispute of material fact exists and will review the circuit court's legal conclusions for correctness." *Carter v. Aramark Sports and Entertainment Services, Inc.*, 153 Md. App. 210, 225 (2003). "Because there must be evidence upon which the jury could reasonably find for the plaintiff, general allegations that do not show facts in detail and with precision are insufficient to prevent summary judgment." *Mitchell v. Rite Aid of Maryland, Inc.*, 257 Md. App. 273, 315 (2023) (cleaned up). "Indeed, conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment, and an opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions." *Carter*, 153 Md. App. at 225 (cleaned up). "After a determination that there is no genuine dispute of material fact, we only reverse a grant of summary judgment that is based on an incorrect interpretation of the law." *Shapiro v. Hyperheal Hyperbarics, Inc.*, 263 Md. App. 424, 467 (2024).

In this instance, the court would have abused its discretion if no reasonable person would have granted summary judgment, i.e. if there existed a genuine dispute of material fact such that summary judgment would have been inappropriate. Thus, while we review the court's grant of a motion for reconsideration for an abuse of discretion, our review of the underlying decision -- the ultimate grant of summary judgment for Appellees -- is essentially *de novo*. If, upon our *de novo* review, we determine that a genuine dispute of material fact did exist regarding whether Appellants were owed a duty by Appellees, we would conclude that the court abused its discretion in granting summary judgment for Appellees. Finding no such dispute, however, we shall affirm.

DISCUSSION

I. The trial court did not err in entering summary judgment for Appellees.

Appellants argue that the trial court erred when it granted Appellees' motion for reconsideration following the court's denial of Appellees' motion for summary judgment on the count alleging legal malpractice. Appellants contend that the trial court incorrectly found that Appellants were not third-party intended beneficiaries of the contract between Appellees and the CPL2 Defendants, and as such, the court erred in finding that Appellees did not owe Appellants any duty of care in order to sustain the legal malpractice claim. Appellants also contend that the trial court erred when it stated that although "the issue of intent is usually a question of fact, nevertheless, the ultimate question in the context here - of whether the [Appellees] owed a legal duty to the non-client plaintiffs - is a question of law for the court," and argue that the question of whether a nonclient third party is an intended beneficiary of an attorney-client relationship is fact-intensive and should be reserved for a jury, rather than dismissed at the summary judgment stage.

In turn, Appellees argue that the trial court properly found that there was no genuine dispute of material fact regarding whether Appellants were intended beneficiaries of the attorney-client relationship between Appellees and the CPL2 Defendants. Appellees additionally argue that Maryland law is abundantly clear that whether a legal duty of care exists is a question of law, and therefore the court did not err in stating as such.

It is well settled in Maryland that in the context of torts, "the existence of a legal duty is a question of law for the court." *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 722 (2013). *See also 100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co.*, 430 Md. 197, 211

(2013) ("Whether a legal duty exists between parties is a question of law to be decided by the court."); *Bobo v. State*, 346 Md. 706, 716 (1997) ("The existence of a duty is a matter of law to be determined by the court and, therefore, is an appropriate issue to be disposed of on motion for dismissal.").

Turning to legal malpractice specifically, the question of duty becomes slightly more complicated. "Although the attorney-client relationship is contractual by nature, the essence of a malpractice claim against an attorney sounds in negligence—the 'negligent breach of the contractual duty.'" *Bennett v. Gentile*, 487 Md. 604, 615 (2024) (quoting *Flaherty v. Weinber*g, 303 Md. 116, 130 (1985)). "Maryland, as a general rule, adheres to the strict privity rule in attorney malpractice cases." *Flaherty*, 303 Md. at 130. As such, an attorney typically only owes a duty of care to a client and is not liable for any harm that may befall a non-client party. In *Flaherty*, however, the Court acknowledged that in particular instances, an attorney may be liable for harm to a nonclient under the third-party beneficiary theory:

> Thus, to establish a duty owed by the attorney to the nonclient the latter must allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship. In this regard, the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party.

Flaherty, 303 Md. at 130-31. "The third-party beneficiary exception is narrow; it does not apply to a plaintiff who 'might conceivably derive some indirect benefit from the contractual performance of the attorney and his client.'" *Pinner v. Pinner*, 240 Md. App. 90, 115 (2019) (quoting *Flaherty*, 303 Md. at 131). Accordingly, "an incidental benefit to

a nonclient will not impose a duty upon an attorney." *Noble v. Bruce*, 349 Md. 730, 747 (1998) (citing *Flaherty*, 303 Md. at 131 n. 6).

In expounding on the third-party beneficiary theory, this Court explained in *Goerlich v. Courtney Industries, Inc.*, that "[w]here the third party can allege and prove that the client intended him to be a third-party beneficiary of the attorney's services and where his interests are identical to those of the client, a suit for legal malpractice may be maintained by that third party." 84 Md. App. 660, 664 (1990) (holding that there was no third-party beneficiary status when any benefit was incidental and parties' interests were "diametrically opposed.") This court reiterated this standard in *Pinner*, noting that the third-party beneficiary standard "only applies when the non-client can show that 'the client intended him to be a third-party beneficiary of the attorney's services and where his interests are identical to those of the client[.]'" 240 Md. App. at 115 (quoting *Goerlich* 84 Md. App. at 664).

Most recently, the Supreme Court of Maryland reiterated that "[t]o claim third-party beneficiary status, the beneficiary will have to allege and then prove, as the Court said in *Flaherty*, 'that the intent of the client to benefit the non-client was a direct purpose of the transaction or relationship.'" *Bennett*, 487 Md. at 615 (quoting *Flaherty*, 303 Md. at 130-31) (holding that summary judgment was appropriate when there was no genuine dispute regarding material facts that alleged that any benefit to the nonclient was merely incidental).

Appellants argue that although several cases from this Court hold that to satisfy the third-party beneficiary test, the nonclient must have an identical interest to the client, we

should instead utilize only the "direct purpose" standard. As such, the Appellants contend that they sufficiently showed that the intent of the CPL2 Defendants to benefit the nonclient Appellants was a direct purpose of the transaction or relationship with Appellees in creating the BSLA, due to the repeated statements that the Administrative Agent was taking particular actions "for the benefit of the Lender."

We disagree. Although the Supreme Court has not necessarily adopted the identical interests test, opinions from this court -- which we are bound to follow -- denote an identical interest requirement. Accordingly, we must consider whether the trial court erred in finding that the interests of Appellants and the CPL2 Defendants were not identical for the purposes of establishing that Appellees owed a duty of care to the nonclient Appellees under the third-party beneficiary theory.

Critically, the interests of Appellants were not identical to the interests of the CPL2 Defendants. Appellants do not challenge the identity of interests, and only argue that this is the incorrect standard. Our review of the record and application of controlling case law, however, indicates that when using the identical interests standard, Appellees plainly owed no duty to Appellants in this instance as Appellants interests were not aligned with the interests of the CPL2 Defendants. The BLSA specifically included an indemnification clause, which allowed for, as the trial court phrased it, "if not an actual conflict, . . . the potential for conflict so that the interests of CPL 2 and the other potential lenders were not evenly aligned." We agree with the well-reasoned analysis of the trial court. Notably, the indemnification of the CPL2 Defendants strongly suggests that a future conflict of interests could arise such that the CPL2 Defendants and Appellants could have a direct conflict with

one another, the opposite of what is contemplated by the identical interests standard of *Goerlich* and *Pinner*.

Even under the direct purpose standard, Appellants' argument fails. This is an exceedingly narrow exception requiring a showing "that the intent of the client to benefit the non-client was a direct purpose of the transaction or relationship." *Flaherty*, 303 Md. at 130-31. The direct purpose of the relationship between the CPL2 Defendants and Appellees was clearly for the benefit of the CPL2 Defendants. Third-party beneficiary status considers "whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party." *Id*. at 130. Even if the interests of the CPL2 Defendants and Appellants are not perfectly identical, it nonetheless requires that Appellees primary purpose was to impart a particular benefit on Appellants as well, rather than a benefit that is indirect and incidental.

As Appellees point out, Appellants have both sued the CPL2 Defendants for deceiving them and fraudulently inducing them to invest in CPL2 for the purpose of perpetuating Merrill's Ponzi scheme, and argue that the CPL2 Defendants intended them to be a third-party beneficiary from the relationship between Appellees and the CPL2 Defendants. Quite simply, it does not follow that the same parties that intentionally sought to defraud Appellants also intended for the Appellants to benefit from Appellees' work in creating the BLSA for the CPL2 Defendants such that their interests were identical or that Appellants benefit was the direct purpose of the relationship. Appellants argument that the conduct of the CPL2 Defendants has no bearing on whether Appellants sought to infer a direct benefit on them is unpersuasive. Critically, Appellees had no contact with any of

the Appellants, nor had any of the Appellants even been identified when Appellees provided legal counsel to the CPL2 Defendants in the creation of the BLSA. To hold that Appellees were duty-bound to some unspecified potential future Lenders for a potential incidental benefit is beyond the scope of what was contemplated in *Flaherty* and its progeny.

The motions court acknowledged that the question of intent is typically a question of fact that would be reserved for the jury. The court continued, however, noting that the ultimate question here was whether any duty was owed by an attorney to a third party. While we acknowledge that questions of fact may sometimes be relevant in determining whether Appellees owed a duty to Appellants in this instance, Appellants did not demonstrate a genuine dispute of material fact such that a reasonable jury could conclude that Appellees intended for Appellants to be third-party beneficiaries to the attorney-client relationship between Appellees and the CPL2 Defendants. Given that there was no genuine dispute of any material fact, the court did not err in granting Appellees motion for reconsideration following the initial denial of Appellees motion for summary judgment. We, therefore, affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.