

**IN THE CHANCERY COURT OF THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

MARIE MURPHY, Special Deputy
Commissioner of the Department of
Commerce and Insurance for the State
of Tennessee,)

Petitioner,)

v.)

SMART DATA SOLUTIONS, LLC,)
a Tennessee limited liability company,)
AMERICAN TRADE ASSOCIATION,)
INC., an Indiana nonprofit corporation with)
its principal place of business in Tennessee,)
AMERICAN TRADE ASSOCIATION,)
LLC, an Arkansas limited liability company,)
SERVE AMERICA ASSURANCE,)
a corporation with an unknown location,)
BART S. POSEY, SR., an individual,)
ANGIE POSEY, an individual,)
OBED W. KIRKPATRICK, SR.,)
an individual,)
LINDA KIRKPATRICK, an individual,)
WILLIAM M. WORTHY, II, an individual,)
COLIN YOEELL, an individual,)

Respondents.)

No. 10-507-III

**Damages Petition Against
Evans Petree PC and
William L. Hendricks, Jr.**

2011 NOV -7 AM 9:59
 CLERK & MASTER
 DAVIDSON CO. CHANCERY CT
 D. J. & M.
 FILED

**LIQUIDATOR’S MEMORANDUM IN RESPONSE TO MOTION TO DISMISS
BY EVANS PETREE PC AND WILLIAM L. HENDRICKS, JR.**

INTRODUCTION

Petitioner, Marie Murphy, Special Deputy Commissioner of the Department of Commerce and Insurance for the State of Tennessee, files this response to the Motion to Dismiss the Amended Petition by Evans Petree PC and William L. Hendricks, Jr. (“the Lawyers”), in her official capacity as statutory Liquidator (“the Liquidator”) of the businesses comprised of and known by the names: American Trade Association, Inc. (“ATA”), American Trade Association,

LLC (“ATALLC”), (hereinafter ATA and ATALLC are collectively “the ATA entities”); Smart Data Solutions, LLC (“SDS”), and Serve America Assurance (“SAA”).

The Liquidator’s Amended Petition complies with the legal standard in Tennessee for a complaint. The Lawyers’ motion is without merit and should be denied.

LEGAL STANDARD

In its September 1, 2011, Memorandum and Order (the “Order”), the Court noted that the first aspect of the applicable law in the instant case is the Rule 12.02(6) motion to dismiss standard, which the Tennessee Supreme Court set out in Pam Webb v. Nashville Area Habitat for Humanity, Inc., No. M2009-01552-SC-R11-CV (July 21, 2011, at 3). In that case the Tennessee Supreme Court provided a blueprint of the standard courts are to apply when ruling on a Rule 12.02(6) motion to dismiss. Id. at 3-5.

The Supreme Court reasoned that, in considering a motion to dismiss, courts “must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.” Id. at 4 (citations omitted). Further, a trial court should grant a motion to dismiss “only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” Id. at 4 (citations omitted).

Under Tennessee Rule of Civil Procedure 8, Tennessee follows a liberal notice pleading standard, see Leach, 124 S.W.3d at 92-93, which recognizes that the primary purpose of pleadings is to provide notice of the issues presented to the opposing party. Id. at 4-5 (citations omitted). A complaint “need not need contain detailed allegations of all the facts giving rise to the claim,” but “it must contain sufficient allegations to articulate a claim for relief.” Id. at 5 (citation omitted).

In its September 1, 2011, Order, this Court set out that the second aspect of applicable law is the essential elements of a legal malpractice claim, which are provided in Lazy Seven Coal Sales v. Stone & Hinds, P.C., 813 S.W.2d 400, 403 (Tenn. 1991). To survive dismissal, a claim for legal malpractice must plead that the lawyers owed the clients a duty, that they breached the duty, and the breach of duty proximately caused damages to the client. Order at 5.

ARGUMENT

I. The Liquidator's Amended Petition contains sufficient allegations to articulate a claim for legal malpractice; specifically, the Lawyer's duty is properly alleged.

The Lawyers incorrectly assert that there are no factual allegations of a duty owed to the receivership entities in the Amended Petition. The Court in its Memorandum and Order examined Somma v. Gracey, 544 A.2d 668 (Conn. App. Ct. 1998) and Erickson v. Civic Nat'l Bank, 422 S.W.2d 373 (Mo. Ct. App. 1967) to determine that a critical aspect of the essential element of duty in a legal malpractice claim is identification of the scope of that duty. The Court in its Order concluded that there was an insufficient basis to allege that a duty existed between the Lawyers and the receivership entities in the Original Petition. The Amended Petition cures these defects.

A. The Lawyers acted as general counsel and performed legal services related to all aspects of the receivership entities' business.

The Amended Petition has alleged numerous specific duties that the Lawyers were either requested to perform, or assumed with knowledge and/or consent in their role as general counsel for the receivership entities (¶¶ 33-111). Contrary to the Lawyers' allegations in their Motion to Dismiss, the Amended Petition does much more than add the phrase "general counsel" to its

factual allegations.¹ The duties taken on by the Lawyers and alleged in the Amended Petition include, but are not limited to, those summarized by duty, paragraph in which alleged, and exhibit number in Appendix A attached. As is apparent from the communications attached as exhibits to the Amended Petition, the Lawyers were engaged and/or assumed the duty of performing all legal services needed to develop the receivership entities' business and attempt to keep it alive and functioning.

Each of these duties was assumed by the Lawyers either (1) at the express request of the receivership entities or (2) voluntarily, but with the consent of the receivership entities. Under Tennessee law, an attorney who assumes a duty of representation of a client owes a duty of care to that client. Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400, 405-406 (Tenn. 1991). When a person adopts the profession of the law, and assumes to exercise its duties in behalf of another for hire and reward, he must be held to employ in his undertaking a reasonable degree of care and skill; and if any injury result to the client from want of such reasonable care and skill, the attorney must respond to the extent of the injury sustained. Bruce v. Baxter, 75 Tenn. 477, 481 (1881), *cited in* Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400, 405 (Tenn. 1991). A signed engagement letter is not necessary to create a duty owed by an attorney. An attorney owes a duty of care even to third parties where he undertakes a representation that directly benefits him. *See, e.g.,* Tartera v. Palumbo, 453 S.W.2d 780 (Tenn. 1970); Stinson v. Brand, 738 S.W.2d 186 (Tenn. 1987); Collins v. Binkley, 750 S.W.2d 737 (Tenn. 1988).

The Amended Petition contains six (6) monetary causes of action (¶¶ 54-111). Each cause of action sets out duties owed by the Lawyers, the breach of these duties, and the resulting

¹ It is significant; however, that William Hendricks identifies himself as the receivership entities' "general counsel" and that his actions bear out that moniker.

damages. The Amended Petition has sufficiently laid out the duties that the Lawyers were retained for, or assumed in their role as general counsel. The Lawyers' breaches of these duties were the proximate cause of the damages alleged in the Amended Petition. Based on the standards set forth by this Court and in Webb, Somma, and Erickson, the Amended Petition sufficiently articulates a claim for legal malpractice.

B. The Amended Petition sufficiently alleges that the Lawyers owed a duty to prevent the receivership entities from making fraudulent transfers to Bart Posey.

As alleged in the Amended Petition, the Lawyers owed a duty to SDS not to facilitate or represent Bart Posey, an owner of SDS, in his transfer of funds from SDS accounts for his personal or other use. The source of this duty is the prohibition against attorneys representing multiple parties where the parties have a conflict of interest. The Liquidator has alleged in the Amended Petition that Bart Posey transferred in excess of \$1.2 million from SDS for his personal use (¶¶ 54-67). The Liquidator alleges that the Lawyers, based on their broad representation of SDS, knew or should have known that SDS was insolvent at the time these transfers were made. (¶¶ 59)

The Court concluded in its Order that the Malpractice Petition did not meet the Webb test and that, to withstand dismissal, the Petition requires allegations of some facts to support the conclusory labels that the transfers in issue constituted conversion, fraud or embezzlement. Those defects were cured in the Amended Petition.

In ¶ 30 the Liquidator has alleged that, based on the tax returns and analysis of financial records, SDS was insolvent at the time the transfers were made. Distributions by an LLC can be made in the manner provided in the LLC documents. Tenn. Code Ann. § 48-249-305. No distributions can be made, however, if the transfer would render the LLC insolvent. Tenn. Code

Ann. § 48-249-306. The transfers made by Posey either rendered SDS insolvent or were made while SDS was insolvent, making them unlawful distributions pursuant to Tenn. Code Ann. § 48-249-306.

Hendricks and other attorneys at Evans Petree who represented both Posey and SDS, as general counsel, knew or should have known that SDS was insolvent.² In addition to the fact that their fees were not getting paid, the Lawyers were in a position to know that there was no insurance to pay claims and that numerous states were cutting off the ability of SDS to do business. Amended Petition, ¶ 59. They knew that Posey sent SDS money to Evans Petree to be used for Posey. Amended Petition, ¶¶ 54-61. They had a duty to recognize and act upon the conflict of interest that facilitated Posey's fraudulent transfers, conversions, and/or unlawful distributions of SDS funds. Where attorneys so far involve themselves in a transaction that a trier of fact could find that they were representing multiple interests, they could be liable for negligence on that basis. Stinson v. Brand, 738 S.W.2d 186, 190 (Tenn. 1987).

The Amended Petition has sufficiently laid out the allegations of insolvency and the Lawyers' knowledge of the insolvency. The Amended Petition has sufficiently alleged that the Lawyers' involvement in SDS's day-to-day business operations would have put the Lawyers on notice that the transfers to Posey were unlawful. The Amended Petition has sufficiently alleged that the Lawyers' concurrent representation of Posey and SDS created an incurable conflict of interest with regard to the advisability of the fraudulent transfers. Contrary to the Respondents' broad statements about attorneys not being responsible for their clients' transfers, a finder of fact

² Indeed, correspondence between Hendricks and Posey indicate that SDS's legal bill with Evans Petree was in serious arrears and that Hendricks was concerned with collection of the balance. See Amended Petition, Exhibit 5.

will ultimately determine whether, in light of these unique facts, the Lawyers breached the standard of care by not preventing their clients from making these fraudulent transfers.

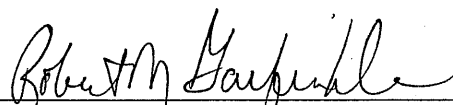
II. The malpractice claim is not time barred.

The Lawyers incorrectly state in their motion to dismiss that the malpractice claim is time-barred, because SDS knew in February 2009 that the Beema/SAA product was a sham. In fact, the damages alleged in each cause of action in the Amended and Original Petition occurred within a year of the liquidation proceedings. See Amended Petition, ¶¶ 60, 66, 89, 94, 100, 109. Further, each alleged negligent act performed by the Lawyers within the year preceding the liquidation proceedings is an act of negligence leading to the overall damages suffered by the entities.

Accordingly, the causes of action in the Amended Petition are not time-barred.

CONCLUSION

For the foregoing reasons, the Liquidator respectfully submits that the Motion to Dismiss should be denied.



Robert M. Garfinkle, Tn. Bar No. 5354
Phillip G. Young, Jr., Tn. Bar No. 21087
Garfinkle, McLemore & Young, PLLC
2000 Richard Jones Road, Suite 250
Nashville, Tennessee 37215
Phone: (615) 383-9495
Fax: (615) 292-9848
E-mail: rgarfinkle@gmylaw.com
E-mail: pyoung@gmylaw.com

Special Counsel for Marie Murphy,
Special Deputy Commissioner, in her
Official Capacity as Statutory Liquidator

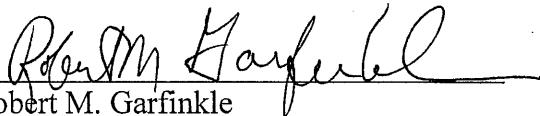
CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document has been forwarded by United States Mail, first class, with sufficient postage, and by e-mail, on this, the 7th day of November, 2011, to the following parties:

Craig V. Gabbert, Jr., Esq.
D. Alexander Fardon, Esq.
Harwell, Howard, Hyne, Gabbert & Manner PC
315 Deaderick Street, Suite 1800
Nashville, Tennessee 37238

cvg@h3gm.com
alex.fardon@h3gm.com

Attorneys for Evans Petree, PC, William L. Hendricks, Jr.,
Russell J. Hensley, and Theodore T. Katai


Robert M. Garfinkle

Appendix A

Duties	Paragraph(s) in which alleged	Supporting Exhibit Numbers
Representation of SDS as general counsel	33, 55, 65, 69, 75, 83, 85, 93, 100, 104, 106	1
Representation of SDS and Posey in North Carolina proceedings	36, 69, 75	11, 12
Representation of receivership entities and Posey in actions by numerous states to halt receivership entities' business	38	2, 3, 4, 5
Participation in administrative and operational structure and functioning of the receivership entities, including planning to restructure the receivership entities to avoid regulatory agencies	39, 41, 104	5, 6, 2, 7
Helping acquire insurance	41, 78, 83, 84, 85, 93, 98, 104	5
Representing the receivership entities in civil suits	41, 104	5
Representing the receivership entities in regulatory actions	41, 104	5
Working on collection of amounts due from Beema/SAA	41, 104	5
Handling customer complaints	42, 105	8, 9
Negotiating and drafting contracts with marketers	42, 105	4
Representing Posey individually	42, 55, 65, 69, 75, 81, 105	10
Establishment of the business relationship with William Worthy and Beema/SAA	78	13, 14
Dealing with the investigation of Posey and receivership entities by TN C&I	81	2, 3, 4
Investigating purported coverage of Beema/SAA	83, 84, 85	13, 14, 15, 16