

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20th JUDICIAL DISTRICT, PART III

MARIE MURPHY, Special Deputy)	
Commissioner of the Department of)	
Commerce and Insurance for the State of)	
Tennessee,)	
)	
Petitioner,)	No. 10-507-III
)	
v.)	“Damages Petition Against
)	Evans Petree PC and
SMART DATA SOLUTIONS, LLC, and others,)	William L. Hendricks, Jr.”
)	
Respondents.)	

COPY

**REPLY MEMORANDUM SUPPORTING THE MOTION TO DISMISS
THE PETITION FOR FAILURE TO STATE A CLAIM**

Evans Petree and Mr. Hendricks have moved the Court to dismiss the Petition against them for failure to state a claim as a matter of law. The Liquidator’s response confirms that the Court should grant the motion.

I. THE MOTION DOES NOT RAISE ANY FACTUAL ISSUE.

The Liquidator repeatedly asserts that the motion presents a “factual challenge” and raises “factual questions.” That assertion is simply wrong. In their lead memorandum supporting the motion, Evans Petree and Mr. Hendricks first “accept[ed] the Petition’s allegations of fact as true for purposes of this motion” (Lead Memo, p. 2 n. 1) and then recited those allegations in detail (*id.* pp. 2-7). Indeed, despite chanting the mantra, the Liquidator has not actually identified one “factual question” raised by the motion.

The motion does not present any issue of fact. The main basis for granting the motion is that the Petition fails to identify any *duty* to SDS that Evans Petree or Mr. Hendricks breached (*see id.* pp. 9-14). The existence and scope of a legal duty are matters of law, not of fact. *See, e.g., Concklin v. Holland*, 138 S.W.3d 215, 219-21 (Tenn. 2003) (affirming dismissal under Rule

12.02(6) where complaint for negligence failed to identify an applicable legal duty imposed by Tennessee law); Bell v. Icard, Merrill, 986 S.W.2d 550, 554-57 (Tenn. 1999) (affirming dismissal under Rule 12.02(6) where complaint for abuse of process failed to allege conduct that constituted an improper act in the use of process).

As a matter of law, Evans Petree and Mr. Hendricks did not have a duty “to conduct reasonable due diligence” of insurers or potential insurers when the Petition does not allege that SDS ever asked them either to conduct any such an investigation or to advise SDS on whether SDS should make premium payments to any particular entity (see Lead Memo. pp. 10-13 and authorities cited there). *As a matter of law*, Evans Petree and Mr. Hendricks did not have a duty to prevent SDS from making distributions to or for the benefit of its owner (see id. pp. 13-14 and authorities cited there). The Liquidator has not addressed the authorities cited by Evans Petree and Mr. Hendricks that show the absence of an applicable duty. Nor has the Liquidator cited any contrary authority. The Liquidator appears to believe it is sufficient to merely assert that Evans Petree and Mr. Hendricks breached a “duty” to SDS. It is not. Cf. Webb v. Nashville Area Habitat for Humanity, Inc., No. M2009-01552-SC-R11-CV (July 21, 2011), slip op. at 5 (“courts are not required to accept as true assertions that are merely legal arguments or “legal conclusions” couched as facts”) (copy attached to Liquidator’s response memorandum).¹

The Petition fails not because of a disputed issue of fact. The Petition fails because, even when the facts it alleges are taken as true, “such facts do not constitute a cause of action as a matter of law.” Sellick v. Miller, 301 S.W.3d 636, 639 (Tenn. Ct. App. 2009) (citation omitted).

¹ The Liquidator’s claim has also become something of a moving target. The Petition plainly asserts that Evans Petree and Mr. Hendricks breached a duty to SDS by advocating SDS’s position that it was not an insurer rather than adopting the contrary position of state regulators (see Petition ¶¶ 31-32, 37, 42-43, 100-01). Yet the Liquidator now insists that she has made no such assertion. In any event, the assertion does not present a viable cause of action (see Lead Memo. p. 10).

II. ESTOPPEL DOES NOT REQUIRE THAT THE LAWSUITS AT ISSUE INVOLVE THE SAME CAUSE OF ACTION.

The Liquidator successfully contended in the Worthy/Beema² Lawsuit and the Ketchum/Andone Lawsuit that SDS made the premium payments at issue in justifiable reliance upon the false representations of the defendants in those cases, who then stole SDS's money (see Lead Memo. pp. 7-9, 14-15). The Liquidator now seeks to pursue an inconsistent theory in this lawsuit: that the "malpractice" of Evans Petree and Mr. Hendricks proximately caused the same loss. The Liquidator claims she is free to take this contrary position because "legal malpractice was not part of" her earlier lawsuits.

The Liquidator again is incorrect as a matter of law. Estoppel bars a party from taking inconsistent positions on a *dispositive issue* (for example, causation) in successive lawsuits; it does not require that those successive lawsuits involve identical *causes of action*. In fact, the doctrine presumes assertion of a different cause of action. See Morris v. Esmark Apparel, Inc., 832 S.W.2d 563, 565 (Tenn. Ct. App. 1991) ("Generally speaking, the term "collateral estoppel" refers to the judicially-promulgated policy of repose preventing relitigation of a particular dispositive issue which was necessarily or actually decided with finality in a previous suit involving at least one of the parties *on a different cause of action.*") (emphasis added). Having successfully taken the position that others deceived SDS into paying the premiums at issue and then stole the money, the Liquidator and SDS are estopped from now claiming that some alleged failure of SDS's lawyers caused the same loss.

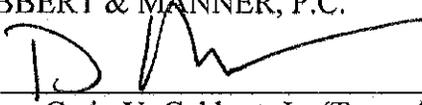
² The Liquidator did not actually name Beema Pakistan Company Ltd. (the Commissioner's former client) as a defendant in the Worthy/Beema Lawsuit, and the record in these proceedings suggests that the Liquidator has taken no other action with respect to Beema, despite Beema's March 29, 2010 offer "as Re-insurers, to settle all legitimate claims prior to August 31st 2009" (3/30/10 S. Hiestand Aff. Ex. A p. 2).

CONCLUSION

The Liquidator may not base a claim against SDS's former lawyers on duties that do not exist as a matter of law. Nor may the Liquidator take a position in this lawsuit that is inconsistent with the position she had SDS successfully take in prior lawsuits. Evans Petree and Mr. Hendricks respectfully request that the Court dismiss the Petition pursuant to Tennessee Rule of Civil Procedure 12.02(6).

Respectfully submitted,

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Certificate of Service

Before 5 p.m. on August 24, 2011, I caused this document to be sent by facsimile transmission and by first-class mail to:

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