2012 IL App (1st) 111509-U

No. 1-11-1509

SIXTH DIVISION
June 29, 2012

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIREMAN'S FUND INSURANCE COMPANY, as Subrogee of Set Environmental, Inc.,	)	Appeal from the Circuit Court of Cook County
Plaintiff,	)	
SELF-INSURED SERVICES COMPANY, and COTTINGHAM & BUTLER CLAIMS SERVICES, INC.,	)	
Plaintiffs-Appellants, Cross-Appellees,	)	
v.	)	No. 09 L 11012
PAUL A. COGHLAN, and PAUL A. COGHLAN & ASSOCIATES, P.C.,	)	Honorable James N. O'Hara,
Defendants-Appellees, Cross-Appellants.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Garcia concurred in the judgment.
Presiding Justice Robert E. Gordon dissented.

O R D E R

¶ 1 Held: The circuit court's dismissal of the amended complaint was proper because

plaintiffs-appellants did not have standing to sue defendants for legal malpractice and breach of fiduciary duty, which were not assignable claims. Dismissal of the amended complaint was also proper where plaintiffs-appellants failed to state a valid claim for implied indemnity. Finally, the trial court did not abuse its discretion in denying defendants' request for attorney fees and costs.

¶ 2 On appeal, plaintiffs-appellants argue the trial court erroneously dismissed their three-count amended complaint, contending that the assignment of the legal malpractice claim to them was permissible under the facts of this case and that they sufficiently pled claims for implied indemnity and breach of fiduciary duty. On cross-appeal, defendants argue the trial court abused its discretion by denying their motion for attorney fees and costs because the facts indicated that plaintiffs-appellants intentionally filed false pleadings. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 This litigation arose from a case filed by a worker against his employer, Set Environmental, Inc., before the Illinois Workers' Compensation Commission (Commission). Defendants, attorney Paul Coghlan and his law firm, Paul A. Coghlan and Associates P.C., represented Set Environmental in the case under a policy of insurance issued by plaintiff Fireman's Fund Insurance Company (Fireman's Fund). Plaintiffs Cottingham & Butler Claims Services, Inc. (C&B) and Self-Insured Services Company (SISC) provided workers' compensation claims adjusting services to Set Environmental.

¶ 5 In April 2008, an arbitrator of the Commission entered a decision against Set Environmental on the sole issue of whether the worker was entitled to penalties and attorney fees based on Set Environmental's delayed payment of disability benefits and untimely payment of medical bills. The arbitrator found that Set Environmental used the unreliable medical opinion of its paid and biased examining physician to accomplish its "ill-intended scheme" to suspend, without justification, the benefits due to the worker, who "testified that he had to live on the street and sell everything he had." The arbitrator also found that Set Environmental offered no meaningful explanation for its delayed payment of medical bills. The arbitrator ordered Set Environmental to pay: $36,150 for its unreasonable and vexatious delay in paying disability benefits; $34,180 in attorney fees; and a penalty of $134,748, which was based on the late payment of medical bills totaling $269,495.

¶ 6 While the workers' compensation case was pending on appeal before the Commission, defendants' representation of Set Environmental was terminated. In June 2008, the parties in the workers' compensation case settled that claim for $450,000. Relevant to the appeal before this court, the parties agreed to a total amount of penalties and attorneys fees of $80,000. Fireman's Fund paid $40,000 of that amount, and C&B and SISC paid the other $40,000.

¶ 7 In August 2009, Fireman's Fund assigned its subrogation rights to C&B and SISC, and Set Environmental also assigned its right to proceed against defendants to C&B and SISC.

¶ 8 In September 2009, C&B and SISC, as subrogees of Set Environmental, sued defendants in the Circuit Court of Cook County for negligence and sought $80,000 in damages. C&B and SISC alleged that: Fireman's Fund had "retained" defendants to represent Set Environmental in

the case before the Commission; defendants failed to produce to the arbitrator cancelled checks, which would have established that $96,039 of the $269,495 in medical bills at issue in that case were actually timely paid; defendants' negligence resulted in the assessment of penalties and attorney fees, which were ultimately compromised to $80,000; Fireman's Fund had assigned its subrogation rights to C&B and SISC; and Set Environmental had assigned its right to proceed against defendants to C&B and SISC.

¶ 9 Defendants moved to dismiss the complaint on various grounds, including the prohibition in Illinois of the assignment of legal malpractice claims.

¶ 10 In response, counsel for C&B and SISC filed a motion to amend the complaint on behalf of Fireman's Fund as the sole plaintiff and subrogee of Set Environmental. The proposed amended complaint alleged, *inter alia*, that Fireman's Fund "retained" defendants and sustained $80,000 in damages. The proposed amended complaint made no allegations of fact concerning C&B and SISC and did not even mention them.

¶ 11 In response, defendants urged the court to deny the motion to amend on various grounds, including the plaintiffs' failure to comply with pleading requirements concerning subrogation, failure to attach the pertinent policy or assignment to the complaint, and failure to ask leave to add a new party and dismiss the original parties. Defendants also filed a motion to bar C&B and SISC's attorney from representing Fireman's Fund.

¶ 12 According to the record, plaintiffs Fireman's Fund, C&B and SISC filed an amended complaint, with Fireman's Fund listed as the subrogee of Set Environmental. The amended complaint now alleged against defendants: (count I) a legal malpractice claim by Fireman's

Fund; (count II) an implied indemnity claim by C&B and SISC; and (count III) a breach of fiduciary duty claim by C&B and SISC. The basis for all three claims was defendants' alleged failure to avoid the award of penalties and attorney fees by producing cancelled checks to the arbitrator. Plaintiffs alleged that Fireman's Fund "retained" C&B and SISC to act as third-party administrators with respect to the workers' compensation case brought against Set Environmental, and C&B and SISC "selected and employed" defendants to represent Set Environmental. Further, C&B and SISC alleged that they were entitled to $40,000 in indemnification from defendants because C&B and SISC were not guilty of any negligence and became liable to the worker "solely because of the employment relationship between them and defendants." In addition, C&B and SISC alleged that defendants owed C&B and SISC a fiduciary duty to use reasonable care in the performance of defendants' duties of employment.

¶ 13 Defendants moved to disqualify plaintiffs' attorney from representing Fireman's Fund due to a conflict of interest. Specifically, defendants asserted that the amended complaint indicated C&B and SISC had paid Fireman's Fund $40,000 to resolve their liability for the subject claim.

¶ 14 Defendants also moved to dismiss the amended complaint based on plaintiffs' failure to seek leave of court to add Fireman's Fund as a co-plaintiff and adequately set forth how Fireman's Fund became subrogated.

¶ 15 In addition, defendants moved the court to dismiss the amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)) for failure to state valid causes of action. Concerning the legal malpractice claim, defendants asserted there was no breach of a duty because they did not prepare or offer into evidence before the arbitrator

the exhibit detailing when Set Environmental paid the medical bills. That exhibit was prepared by C&B and SISC and offered into evidence by the worker. Defendants also asserted that the arbitrator's calculation of the penalty for the late payment of medical bills resulted in a mathematical error that benefitted plaintiffs by approximately $100,000 in understated late medical payments. Further, defendants asserted that dismissal of the amended complaint was proper because (1) they owed no fiduciary duty to C&B and SISC, and (2) any claim against defendants for implied indemnity was barred by the Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 *et seq*. (West 2010)).

¶ 16 In April 2010, the trial court: denied defendants' motion to disqualify plaintiffs' counsel; denied defendants' 2-619 motion to dismiss based on defendants' failure to attach relevant exhibits; and granted defendants' 2-403 motion but gave plaintiffs leave to amend the complaint to remedy the subrogation pleading deficiencies.

¶ 17 Plaintiffs filed an amended complaint containing substantially the same allegations as the previous complaint. Defendants again moved to dismiss it pursuant to section 2-619 of the Code. Defendants argued that plaintiffs failed to state a valid cause of action for legal malpractice; the implied indemnity claim violated the Joint Tortfeasor Contribution Act; and an attorney-client relationship does not create a fiduciary duty to third parties, other than the insurance company.

¶ 18 In August 2010, the trial court granted the 2-619 motion to dismiss, agreeing with defendants that the alleged legal malpractice, *i.e.*, the failure to produce cancelled checks to the arbitrator, would not have changed the arbitration result because all the information contained on the cancelled checks was already in evidence before the arbitrator in other exhibits. The trial

court gave plaintiffs leave to re-plead their claim to reflect a new theory of liability and to specifically allege which medical bills were timely paid based on the late submission of those bills. The trial court also noted that plaintiffs failed to show that their claimed $80,000 in damages were caused by defendants' alleged negligence concerning the $96,039 worth of timely-paid medical bills. Specifically, the trial court stated that, notwithstanding defendants' alleged negligence, plaintiffs' pleadings essentially had admitted that they would have been subject to an $86,728 penalty anyway based on $173,456 worth of bills that were not timely paid. The trial court expressed frustration over addressing plaintiffs' pleading deficiencies again and stated that its order should not be construed as a rejection of the other grounds for dismissal raised in defendants' motion.

¶ 19 Plaintiffs re-pled their complaint a fourth time, alleging that defendants failed to offer into evidence before the arbitrator medical bills and cancelled checks that would have conclusively shown that medical bills totaling $96,039 were timely paid.

¶ 20 Defendants moved to dismiss the amended complaint pursuant to section 2-612 of the Code (735 ILCS 5/2-612 (West 2010)) for failure to comply with the trial court's August 2010 order. Defendants also moved to dismiss the complaint pursuant to section 2-619(9) of the Code for failure to state valid causes of action. Meanwhile, the parties engaged in discovery, and the trial court ordered plaintiffs to produce the assignments of right made by Fireman's Fund and Set Environmental to C&B and SISC.

¶ 21 Upon receipt of the assignments, defendants filed a motion to dismiss pursuant to section 2-619(2) of the Code (735 ILCS 5/2-619(2) (West 2010)) and for attorney fees and sanctions

under Illinois Supreme Court Rule 137 (eff. February 1, 1994). Defendants argued that plaintiffs filed false pleadings which alleged that Fireman's Fund was a party in this case and attempted to conceal the assignments to avoid dismissal. Defendants also argued that plaintiffs did not have the legal capacity to sue defendants and that plaintiffs had consistently ignored the trial court's orders.

¶ 22 In April 2011, the trial court granted defendants' motion to dismiss with prejudice, stating that it adopted and agreed "with the matters as set forth in Defendants' Briefs." The trial court, however, denied defendants' motion for attorney fees and sanctions. Fireman's Fund, C&B and SISC timely appealed the dismissal of their amended complaint, and defendants timely cross-appealed on the issue of the Rule 137 attorney fees and sanctions.

¶ 23 II. ANALYSIS

¶ 24 A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the plaintiff's claim, but asserts certain defects or defenses that defeat the claim. *Solaia Technology, LLC v. Specialty Publishing Co*, 221 Ill. 2d 558, 579 (2006). In ruling upon a 2-619 motion, a court must accept as true all well-pled facts in the complaint, and draw all inferences from those facts which are favorable to the plaintiff. *Mayfield v. ACME Barrel Company*, 258 Ill. App. 3d 32, 34 (1994). However, conclusions of fact or law in the complaint which are not supported by specific factual allegations are not taken as true and are not considered by the court in ruling on the motion. *Id*. A 2-619 motion to dismiss should only be granted in those cases where there are no material facts in dispute and the defendant is entitled to the dismissal as a matter of law. *Id*. Our review of a section 2-619 dismissal is *de novo*. *Solaia Technology, LLC*, 221 Ill. 2d at 579.

An appellate court can affirm a section 2-619 dismissal on any grounds supplied by the record, regardless of the trial court's reasons. *Wilson v. Coronet Insurance Company*, 293 Ill. App. 3d 992, 994 (1997).

¶ 25 A. Legal Malpractice

¶ 26 Although Fireman's Fund was included as a plaintiff on the notice of appeal, it has not filed a brief on appeal and no longer seems to be represented in this matter by counsel for C&B and SISC. Accordingly, we do not address an insurer's ability to pursue a legal malpractice claim as a subrogee.

¶ 27 On appeal, C&B and SISC contend that the assignment of the legal malpractice claim to them was permissible because they had a relationship with Fireman's Fund and Set Environmental and actually suffered a loss due to the alleged legal malpractice. C&B and SISC, which were third-party administrators for Set Environmental in the workers' compensation case, assert that they "selected and employed" defendants for Set Environmental and had to reimburse Fireman's Fund for a portion of the penalties paid in the workers' compensation case as a result of defendants' legal malpractice.

¶ 28 We affirm the trial court's dismissal of plaintiffs' legal malpractice claim with prejudice. Because C&B and SISC did not have an attorney-client relationship with defendants and cannot obtain that relationship by virtue of an assignment, C&B and SISC lack standing to sue for legal malpractice. The general rule remains in Illinois that it is contrary to public policy to voluntarily assign a legal malpractice claim to another. *Learning Curve International, Inc. v. Seyfarth Shaw LLP*, 392 Ill. App. 3d 1068, 1074 (2009); *Brocato v. Prairie State Farmers Insurance*

Association, 166 Ill. App. 3d 986, 988-89 (1988).

¶ 29 Legal malpractice claims are not assignable because the attorney-client relationship is personal and allowing assignments would commercialize legal malpractice suits, imperil the sanctity of the highly confidential and fiduciary relationship existing between the attorney and the client, place an undue burden on the legal profession and the judicial system, and restrict the availability of competent legal services. *Brocato*, 166 Ill. App. 3d at 989.

¶ 30 Although the rule in Illinois permits the transfer of a cause of action for legal malpractice under certain circumstances, those circumstances are not present in this case. See e.g., National Union Insurance Co. v. Dowd & Dowd, P.S., 2 F. Supp. 2d 1013, 1019-23 (N.D.Ill. 1998) (an excess insurer has an equitable right to subrogation against the insured's attorney); *Pelham v. Griesheimer*, 92 Ill. 2d 13, 21 (1982) (an attorney could owe a duty to a non-client as a third-party beneficiary if the non-client proves that the primary intent and purpose of the underlying attorney-client relationship was to benefit or influence the non-client); *Jones v. Siesennop*, 55 Ill. App. 3d 1037, 1041 (1977) (a legal malpractice action does not abate with the death of the plaintiff and may be pursued by the administrator of the plaintiff's estate); *Hoth v. Stogsdill*, 210 Ill. App. 3d 659, 667 (1991) (if a bankruptcy estate owns a bankrupt person's legal malpractice claim, then that estate has the power to assign that claim to the bankrupt person); *Learning Curve International, Inc.*, 392 Ill. App. 3d at 1077 (a corporation's assignment of its legal malpractice claim to its former shareholders did not violate public policy because the assignment was a minor part of the larger transfer of assets in a merger transaction and the shareholders were closely related to and involved with the former corporation and had actually suffered the loss due to the

alleged negligent advice the attorney gave the corporation concerning the risk of incurring a judgment in a trade secrets litigation).

¶ 31 On appeal, C&B and SISC claim that their role as third-party administrators means that they somehow were the employers of the attorney and law firm that were actually retained and paid by Fireman's Fund to represent Set Environmental. The dissent's conclusions that C&B and SISC "retained" defendants and "stand in the same shoes as the insurance company[,Fireman's Fund,] that retain[ed] them" are assumptions that are not based on any well-pleaded allegations that can be found in the amended complaint. Although C&B and SISC would like the court to infer from their extremely vague allegations and unsupported legal conclusions that they stand in the same shoes as Fireman's Fund and hired and retained defendants, C&B and SISC have failed, after being given several chances by the trial court, to make specific factual allegations to support the conclusions of fact and law that they retained, hired or employed defendants. Notably, C&B and SISC alleged only that Fireman's Fund "retained" them to act as third party administrators and they "selected and employed" defendants to represent Set Environmental. C&B and SISC, however, have not alleged any facts indicating what their job duties as third party administrators, which merely provided claims adjusting services to Set Environmental, entailed.

¶ 32 If C&B and SISC had actually hired counsel to represent Set Environmental, it would have been easy (if it were true) to allege specific facts to support that allegation or provide a copy of the retainer agreement. Because C&B and SISC would not allege those facts in their various amended complaints despite several opportunities to do so, the court cannot make the inferential leap that they hired defendants or even played a significant role in Fireman's Fund's decision to

hire defendants.

¶ 33 The history of the pleadings C&B and SISC filed before the trial court, as summarized above, indicates that their vague allegations were an attempt to avoid the bar to their malpractice/breach of fiduciary duty claims. Specifically, in C&B and SISC's initial complaint, they sued defendants as subrogees and alleged that Fireman's Fund had "retained" defendants. Then, in response to defendants' argument that the malpractice claim could not be subrogated, counsel for C&B and SISC moved the trial court to allow him to file an amended complaint with Fireman's Fund as the sole plaintiff and subrogee of Set Environmental. The proposed amended complaint, which did not even mention C&B and SISC, alleged that Fireman's Fund "retained" defendants, was suing them for malpractice, and had sustained $80,000 in damages. After defendants moved the court to bar C&B and SISC's counsel from representing Fireman's Fund, counsel filed another amended complaint, which listed C&B, SISC and Fireman's Fund as the plaintiffs and included the new contention that Fireman's Fund "retained" C&B and SISC, who both then "selected and employed" defendants to represent Set Environmental. None of the amended complaints, however, elaborated on C&B and SISC's job duties, their relationship to either Fireman's Fund or Set Environmental, or what act C&B and SISC took that constituted the employment of the independent contractor law firm.

¶ 34 Contrary to C&B and SISC's argument on appeal, *Learning Curve International, Inc.*, 392 Ill. App. 3d 1068, does not support their assertion that they have standing to sue defendants for malpractice or breach of fiduciary duty. *Learning Curve* involved a merger transaction where the former corporation transferred all its assets to the new corporation, which bought all the stock

of the former shareholders on the condition that the former shareholders, pursuant to the terms of an escrow agreement, would indemnify the new corporation for certain potential liabilities. *Id*. at 1071. After the liability concerning the trade secret litigation was settled, the former corporation, former shareholders and new corporation modified their escrow agreement. *Id*. at 1072. Then, the former and new corporations sued the former corporation's attorney for malpractice. *Id*. The court concluded that when the former corporation modified the escrow agreement to cede control over the lawsuit to its former shareholders and assign 90% of the proceeds from the malpractice claim to its former shareholders, those actions constituted an assignment of its legal malpractice claim to its former shareholders. *Id*. at 1074. The court, however, allowed the assignment of the malpractice claim "under [those] specific circumstances" because it was not an attempted assignment of a bare legal claim. *Id*. at 1077. To the contrary, the assignment was "a minor part of a transaction that encompassed a panoply of other rights and obligations." *Id*.

¶ 35 Here, C&B and SISC are entirely separate entities from Fireman's Fund. Furthermore, C&B and SISC were hardly closely related to and involved with Fireman's Fund and certainly not in the sense that the *Learning Curve* former shareholders, given the transactions at issue in that case, were considered closely related to the former corporation. In addition, the assignment here was certainly not part of any merger or larger transfer of assets. C&B and SISC were simply hired by Fireman's Fund to work for Set Environmental. Accordingly, the attempted assignment at issue before us is exactly the type of mere purchase of a bare legal malpractice claim that the *Learning Curve* court would not have allowed. See *id*. at 1076-77 (discussion about other courts allowing assignment of a claim for malpractice that is part of a general assignment in a

commercial setting and transaction that encompasses a panoply of other assigned rights, duties, and obligations).

¶ 36 C&B and SISC knew that in order to survive defendants' fifth motion to dismiss, they had to plead sufficient facts to show that an attorney-client relationship or fiduciary duty existed between them and defendants. Nevertheless, C&B and SISC never pled any facts to indicate that their relationship with Set Environmental was even remotely similar to Fireman's Fund's relationship with Set Environmental. This court cannot jump in and assume those facts when C&B and SISC never provided them, particularly where such a gross expansion of the standing to sue for malpractice is at stake. The mere allegation that they were a third-party administrator or claims adjustor, whatever that means, does not suffice to give C&B and SISC the same standing as an insurer to pursue a malpractice claim on behalf of its insured.

¶ 37 Furthermore, the relationship between defendants and Set Environmental was not meant to benefit C&B and SISC, who were more akin to an opposing party to a lawsuit where Set Environmental, through Fireman's Fund, sought compensation from C&B and SISC for the arbitrator's penalty award. It has been held that the opposing party to a lawsuit does not fall within the scope of the duty an attorney could owe to a third-party beneficiary. *Brocato*, 166 Ill. App. 3d at 989-990; *Doyle v. Shlensky*, 120 Ill. App. 3d 807, 812 (1983). Therefore, we hold that the trial court properly dismissed the legal malpractice cause of action.

¶ 38 B. Breach of Fiduciary Duty

¶ 39 C&B and SISC also argue that the trial court had no basis to dismiss their claim for breach of fiduciary duty, which was based on their contractual relationship with defendants to

provide legal services to Set Environmental in the workers' compensation claim. C&B and SISC contend they had the capacity to bring the fiduciary duty claim on their own behalf.

¶ 40 We find that the breach of fiduciary duty claim was deficient as a matter of law and properly dismissed because the alleged breached duty arose only from a legal malpractice claim, which cannot be assigned in Illinois and, thus, defendants owed no duty to C&B and SISC. See Grimes v. Saikley, 388 Ill. App. 3d 802, 818 (2009). No cause of action for legal malpractice or breach of fiduciary duty exists where a plaintiff fails to demonstrate the existence of an attorney-client relationship. Kehoe v. Saltarelli, 337 Ill. App. 3d 669, 676 (2003). Public policy dictates that, given the personal and confidential nature of the relationship between the attorney and the client, breach of fiduciary duty claims, like those for legal malpractice, are not assignable. Wilson, 293 Ill. App. 3d at 994-95. An attorney almost never owes a duty to non-clients because a duty owed to third parties in addition to the client would interfere with the duty of undivided loyalty to the client. *Pelham v. Griesheimer*, 92 Ill. 2d at 22-23 (the attorney retained to represent the wife in a divorce action did not owe a duty to the children of the husband and wife).

¶ 41 C&B and SISC argue that their fiduciary duty claim is not based on the duty defendants owed to Set Environmental in the workers' compensation claim and is not based on the assignment. According to C&B and SISC, defendants owed both a duty to Set Environmental, whom defendants were hired to represent, and an independent duty of care to C&B and SISC, who hired them to represent Set Environmental. We do not agree.

¶ 42 C&B and SISC's fiduciary duty claim incorporated and relied upon the alleged legal malpractice claim–*i.e.*, the attorney's failure to produce medical bills and cancelled checks to the

arbitrator–as the basis for the underlying factual liability. Furthermore, no relevant authority or well-pled allegations of fact support C&B and SISC's assertion that defendants were their employees and, thus, owed them a duty to exercise reasonable care in the performance of defendants' duties. We reject C&B and SISC's attempt to equate the assignment of the claim to them with a subrogation action and thereby extend to themselves the benefit of the fiduciary duty defendants owed to Fireman's Fund.

¶ 43 Unlike assignments, there is no prohibition of an insurer's subrogation action for legal malpractice despite the absence of an attorney-client relationship between the insurer and the insured's attorney. See *Smiley v. Manchester Insurance and Indemnity Company of St. Louis*, 71 Ill. 2d 306 (1978) (insurer sued retained attorney); accord *Rogers v. Robson, Masters, Ryan, Brumund and Belom*, 74 Ill. App. 3d 467 (1979). Illinois has long recognized the fiduciary duty of the attorney to both the insured and the insurer. See *Rogers*, 74 Ill. App. 3d at 473 (there is nothing improper about representing the interests of both the insurer and the insured when their interests are harmonious because there is no conflict of interest and the attorney is able to exercise independent judgment for both clients); *Allstate Insurance Company v. Keller*, 17 Ill. App. 2d 44, 53 (1958) (when an insurer's attorney has reason to believe that the discharge of his duties to his client, the insured, will conflict with his duties to his employer, the insurer, it becomes incumbent upon him to terminate his relationship with the client). The insurer is the recipient of the fiduciary duty because it retains the counsel for the insured, participates in all phases of the litigation process, and has an obligation to pay the judgment. See *Maryland Casualty Company v. Peppers*, 64 Ill. 2d 187, 197-98 (1976).

¶ 44 According to the well-pled allegations of the complaint, C&B and SISC were firms that were hired to provide Set Environmental with workers' compensation claim adjusting services. C&B and SISC do not allege that they were insurers of Set Environmental in the workers' compensation claim. Fireman's Fund was the insurer and, thus, had the duty to defend Set Environmental. Consequently, Fireman's Fund retained defendants to represent Set Environmental and was liable under the terms of its insurance coverage for the settlement of the claim. The fact that Fireman's Fund sought compensation from C&B and SISC does not bring C&B and SISC within the scope of the fiduciary duty defendants owed to Fireman's Fund.

¶ 45 We conclude, therefore, that the trial court properly dismissed the breach of fiduciary duty cause of action.

¶ 46 C. Implied Indemnity

¶ 47 C&B and SISC also argue that the trial court had no basis to dismiss their claim for implied indemnity. They contend they had the capacity to bring the indemnity claim on their own behalf because it was based on their contractual relationship with defendants to provide legal services to Set Environmental in the workers' compensation claim. They also claim they stated a valid implied indemnity cause of action where they alleged (1) the existence of a pretort relationship between themselves and defendants; and (2) a qualitative distinction between their conduct and defendants' conduct in causing the damages. We do not agree.

¶ 48 Indemnity is a common law doctrine that shifts the entire responsibility from the party who has been compelled to pay the plaintiff's loss to another who actually was at fault. *Kerschner v. Weiss & Company*, 282 Ill. App. 3d 497, 502 (1999). The right to indemnity may

be express, as in a contractual provision, or may be implied in law, arising in situations in which a promise to indemnify can be implied from the relationship between the parties. *Id.*

¶ 49 Implied indemnity based on quasi-contract principles recognizes that a blameless party (the indemnitee) may be held derivatively liable to the plaintiff based upon that party's legal relationship with the one who actually caused the plaintiff's injury (the indemnitor). *Id.* at 503. In such circumstances, the law implies a promise by the indemnitor to make good the loss incurred by the indemnitee. *Id.* Only a party whose liability is solely derivative may assert a claim for implied indemnity under this theory. *Id.* The requirement of a faultless indemnitee is not met, even though no judgment of fault is entered against the party seeking indemnity, where that party has settled with the plaintiff under a complaint charging fault and it can reasonably be inferred that the party seeking indemnity settled in order to avoid a finding that he was at fault. *Dixon v. Chicago and North Western Transportation Company*, 151 Ill. 2d 108, 120-122 (1992). Although implied indemnity was not abolished by the Joint Tortfeasor Contribution Act, an action for implied indemnity "cannot be maintained where the one seeking indemnity was negligent or otherwise at fault in causing the loss." *Thatcher v. Commonwealth Edison Company*, 123 Ill. 2d 275, 278 (1988).

¶ 50 To state a cause of action for implied indemnity based upon quasi-contractual principles, the party seeking indemnity must allege (1) a pretort relationship between himself and the defendant, and (2) a qualitative distinction between his conduct and the defendant's conduct. *Kerschner*, 282 Ill. App. 3d at 503. Classic pretort relationships which have given rise to a duty to indemnify include lessor and lessee, employer and employee, owner and lessee, and master

and servant. *Id*. at 503-04. The relationship must be more than mere involvement in a common undertaking. *Friedman, Alschuler & Sincere v. Arlington Structural Steel Company, Inc.*, 140 Ill. App. 3d 556, 560 (1985).

¶ 51 C&B and SISC have failed to state a valid cause of action for implied indemnity because they have failed to disclose specific facts, not conclusions, to show that they had a pretort relationship with defendants. As discussed above, C&B and SISC have failed to allege specific facts to support their conclusion that they were defendants' employer or had a contractual relationship with defendants. According to the well-pled facts, C&B and SISC were not derivatively liable to Set Environmental for the $40,000 penalty based upon any relationship with defendants.

¶ 52 Furthermore, it is unlikely that C&B and SISC could meet the requirement of being a faultless indemnitee. Their payment to Fireman's Fund of $40,000 of the $80,000 penalty was not in the nature of a voluntary payment by guiltless parties who were vicariously liable for another's acts. Even though no judgment of fault was entered against them and the record does not establish that Set Environmental charged them with fault in a complaint, the pleadings and record indicate that their $40,000 payment was a result of claims that they had acted negligently in handling the workers' compensation claim.

¶ 53 We conclude that the trial court properly dismissed the implied indemnity claim for failure to state a cause of action. Accordingly, we do not address defendants' arguments that dismissal of the amended complaint was proper based on either plaintiffs' alleged failure to comply with the trial court's order to correct the deficient pleading of the subrogation claim, or

plaintiffs' alleged falsification of the name of the actual parties to this controversy.

¶ 54 D. Cross-Appeal for Sanctions

¶ 55 Defendants argue that the trial court's denial of Rule 137 attorney fees and costs was an abuse of discretion because C&B and SISC's conduct before the trial court was outrageous, vexatious, objectively false, and intended solely for purposes of harassment. Defendants state that as a result of C&B and SISC's misconduct, defendants were subjected to 20 months of ongoing, needless and expensive litigation. Defendants ask this court to remand this cause to the trial court with instructions to conduct an appropriate hearing followed by imposition of Rule 137 sanctions, attorney fees for outside counsel retained by defendants in this matter, and all costs of litigation incurred by defendants up to and including this appeal.

¶ 56 Defendants assert that the trial court's denial of Rule 137 fees and costs was an abuse of discretion where the court had determined that C&B and SISC intentionally filed false pleadings by (1) naming a party that was not actually a party to the case in order to establish standing to sue and (2) concealing the existence of the underlying assignment for months. Defendants' basis for this assertion is the trial court's statement in its April 2011 order, which dismissed the amended complaint with prejudice, that it adopted and agreed "with the matters as set forth in Defendants' Briefs."

¶ 57 Contrary to defendants' argument on cross-appeal, we cannot infer from the trial court's written order a finding that C&B and SISC had intentionally filed false pleadings. Defendants had filed multiple motions to dismiss that urged various grounds for dismissal, yet the trial court did not state that it adopted and agreed with *all* the matters set forth in defendants' briefs. A trial

court's finding of such severe misconduct as the filing of false pleadings by a party warrants an express and clear statement by the trial court.

¶ 58 Rule 137 permits the trial court to impose sanctions on a party or attorney for "filing a pleading, motion, or other paper that is not well grounded in fact and warranted by existing law or which has been interposed for any improper purpose." *In re Marriage of Adler*, 271 Ill. App. 3d 469, 476 (1995). The purpose of the rule is to discourage the pleading of frivolous or false matters and the assertion of claims without any basis in the law, by penalizing attorneys and parties who engage in such conduct. *Baker v. Daniel S. Berger, Ltd.*, 323 Ill. App. 3d 956, 963 (2001).

> "In evaluating the conduct of an attorney [or party], the court must determine what was reasonable at the time of filing. Thus the standard to be used in applying the rule is an objective one. 'It is not sufficient that an attorney "honestly believed" his or her case was well grounded in fact or law.' " *Id.* (quoting *Fremarek v. John Hancock Mutual Life Insurance Co.*, 272 Ill. App. 3d 1067, 1074-75 (1995).

¶ 59 A determination of whether to grant a party's motion for sanctions is a matter committed to the sound discretion of the trial court. *Century Road Builders, Inc. v. City of Palos Heights*, 283 Ill. App. 3d 527, 531 (1996). The trial court's decision will not be disturbed on appeal absent an abuse of discretion. *Wagener v. Papie*, 242 Ill. App. 3d 354, 363 (1993). "A trial court abuses its discretion when its finding is against the manifest weight of the evidence [citation] or if no reasonable person would take the view adopted by it [citation]." *Technology Innovation*

Center, Inc. v. Advanced Multiuse Technologies Corp., 315 Ill. App. 3d 238, 244 (2000). Upon review, the court should consider the following factors: (1) whether the trial court made an informed ruling; (2) whether the court based its ruling on valid reasons that fit the case; and (3) whether the trial court's ruling followed logically from the application of the reasons stated to the particular circumstances of the case. *Kubiak v. City of Kewanee*, 228 Ill. App. 3d 605, 607 (1992).

¶ 60 The trial court's denial of Rule 137 sanctions is supported by the record. Very specific findings must accompany the imposition of sanctions against a party. See *Peterson v. Randhava*, 313 Ill. App. 3d 1, 15 (2000). The record fails to sufficiently demonstrate that plaintiffs intentionally filed false pleadings. Although plaintiffs did not produce the assignment documents until required to do so by order of the trial court, we do not conclude that they intentionally concealed the existence of the assignments where they alleged the facts concerning the assignments in their initial complaint. Furthermore, the adding of Fireman's Fund as a subrogee plaintiff despite the prior assignment is not necessarily an intentional false filing; it could also be attributed to the quality of the legal representation provided to C&B and SISC. Consequently, we do not conclude that C&B and SISC intentionally filed false pleadings. We therefore affirm the trial court's denial of Rule 137 sanctions.

¶ 61 III. CONCLUSION

¶ 62 For the foregoing reasons, we affirm the judgment of the trial court dismissing the amended complaint with prejudice and denying Rule 137 sanctions and attorney fees.

¶ 63 Affirmed.

¶ 64 PRESIDING JUSTICE ROBERT E. GORDON, DISSENTING IN PART.

¶ 65 I respectfully dissent in part. I agree with the majority's conclusion that the trial court's dismissal of plaintiffs' claim for implied indemnity and denial of defendants' motion for Rule 137 attorney fees and costs should be affirmed. However, I would reverse the trial court's dismissal of plaintiffs' legal malpractice and breach of fiduciary duty claims.

¶ 66 A motion to dismiss a claim under section 2-619 of the Code admits the legal sufficiency of the plaintiff's claim, but asserts that certain defects or deficiencies outside the complaint defeat the claim. *Solaia Technology LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). In ruling on a motion to dismiss, courts must accept as true all well-pled facts in the complaint and draw all reasonable inferences from those facts in the light most favorable to the plaintiff. *Mayfield v. ACME Barrel Co.*, 258 Ill. App. 3d 32, 34 (1994). Any conclusions of fact or law in the complaint that are not supported by specific factual allegations are not taken as true and are not considered by the court in ruling on the motion. *Mayfield*, 258 Ill. App. 3d at 34. Motions to dismiss under section 2-619 shall only be granted when there are no material facts in dispute and the defendant is entitled to a dismissal as a matter of law. *Mayfield*, 258 Ill. App. 3d at 34.

¶ 67 In the case at bar, C&B and SISC argue that a question of material fact remains: whether they were sufficiently related to Fireman's Fund and Set Environmental to be allowed to pursue the legal malpractice claim against defendants as assignees of the claim. The majority finds that C&B and SISC were not sufficiently related and may not bring the legal malpractice claim, as assignees of Fireman's Fund, against defendants. I do not find the majority's conclusions persuasive.

¶ 68 The general rule in Illinois states that it is against public policy to assign legal malpractice claims. *Learning Curve International, Inc. v. Seyfarth Shaw LLP*, 392 Ill. App. 3d 1068, 1074 (2009); *Brocato v. Praire State Farmers Insurance Association*, 166 Ill. App. 3d 986, 988-89 (1988). The existence of an attorney-client relationship between the plaintiff and defendant attorney is an essential element of legal malpractice and breach of fiduciary duty claims. *Sexton v. Smith*, 112 Ill. 2d 187, 193 (1986); *Kehoe v. Saltarelli*, 337 Ill. App. 3d 669, 676 (2003). The attorney-client relationship is personal, and allowing assignments of legal malpractice claims would commercialize legal malpractice suits, imperil the sanctity of the highly confidential and fiduciary relationship existing between the attorney and the client, place an undue burden on the legal profession and the judicial system, and restrict the availability of competent legal services. *Brocato*, 166 Ill. App. 3d at 989.

¶ 69 However, Illinois courts have determined that the assignment of legal malpractice claims are allowed under certain circumstances. See, e.g., *Pelham v. Griesheimer*, 92 Ill. 2d 13, 21 (1982) (holding that a nonclient third party may bring a malpractice suit against an attorney if the primary purpose and intent of the attorney-client relationship was to benefit or influence the third party); *Jones v. Siesennop*, 55 Ill. App. 3d 1037, 1041 (1977) (holding that a legal malpractice claim survives the death of the plaintiff and may be pursued by the administrator of the plaintiff's estate); *Hoth v. Stogsdill*, 210 Ill. App. 3d 659, 667 (1991) (holding that a bankruptcy estate which owns a bankrupt person's legal malpractice claim has the power to assign the claim to the bankrupt person).

¶ 70 This court held in *Learning Curve International, Inc. v. Seyfarth Shaw LLP*, 392 Ill. App. 3d 1068 (2009) that the assignment of a legal malpractice claim to a corporation's former stockholders did not violate public policy and reversed a grant of summary judgment to the defendant attorneys because the former stockholders suffered a loss as a result of the malpractice. In *Learning Curve*, the plaintiff had been sued by a third party in a separate federal action (*Playwood Toys, Inc. v. Learning Curve Toys, L.P.*, 2002 U.S. Dist. LEXIS 4298 (N.D. Ill. 2002) rev'd by *Learning Curve Toys, Inc. v. Playwood Toys, Inc.*, 342 F.3d 714 (7th Cir. 2003)), claiming that Learning Curve misappropriated trade secrets. *Learning Curve*, 392 Ill. App. 3d at 1070 (citing *Learning Curve*, 342 F.3d at 720). A jury returned a verdict against Learning Curve, but they successfully moved for a judgment notwithstanding the verdict, and the third party appealed to the United States Court of Appeals for the Seventh Circuit. *Learning Curve*, 342 F.3d at 721. While the appeal was pending, Learning Curve negotiated a merger with another corporation. *Learning Curve*, 392 Ill. App. 3d at 1071. The terms of the merger transaction included a requirement that Learning Curve's stockholders would indemnify the new corporation from all liability arising from or related to all claims, charges, and actions related to the litigation with the third party. *Learning Curve*, 392 Ill. App. 3d at 1071. After the merger was completed, the Seventh Circuit reversed the trial court and reinstated the verdict against Learning Curve. *Learning Curve*, 392 Ill. App. 3d at 1071 (citing *Learning Curve*, 342 F.3d at 731). The new corporation satisfied the verdict and the former stockholders of Learning Curve reimbursed the new corporation. *Learning Curve*, 392 Ill. App. 3d at 1073. The new corporation and Learning Curve filed a legal malpractice action against its attorneys, claiming that they deviated from the

standard of care in advising Learning Curve not to settle. *Learning Curve*, 392 Ill. App. 3d at 1072. The attorneys moved to dismiss the new corporation as a plaintiff because it suffered no losses, and the trial court granted the motion. *Learning Curve*, 392 Ill. App. 3d at 1072. The attorneys then moved for summary judgment, arguing that Learning Curve's assignment of its legal malpractice claims to the new corporation and its former stockholders was improper. *Learning Curve*, 392 Ill. App. 3d at 1073. The trial court granted the motion, finding that Learning Curve's assignment of a legal malpractice claim was improper. *Learning Curve*, 392 Ill. App. 3d at 1073.

¶ 71 On appeal, this court explained at length why the assignment of legal malpractice claims is generally against Illinois public policy. *Learning Curve*, 392 Ill. App. 3d at 1074-76. The confidence inherent to an attorney-client relationship is of a personal nature and cannot be delegated by the attorney without the client's consent. *Learning Curve*, 392 Ill. App. 3d at 1074-75 (quoting *Clement v. Prestwich*, 114 Ill. App. 3d 479, 480-81 (1983)). A client's claim for malpractice arises from this personal relationship and is based on the breach of a personal fiduciary duty owed by the attorney to the client. *Learning Curve*, 392 Ill. App. 3d at 1075 (quoting *Clement*, 114 Ill. App. 3d at 480-81). The assignee of a legal malpractice claim would be a stranger who was owed no duty by the attorney and suffered no harm from the attorney's actions. *Learning Curve*, 392 Ill. App. 3d at 1075 (quoting *Clement*, 114 Ill. App. 3d at 480-81). To allow the assignment of legal malpractice claims would be to create a marketplace for such claims and turn legal malpractice claims into a commodity to be exploited by people unfamiliar with the attorney-client relationship who were never owed a duty by the attorney. *Learning*

Curve, 392 Ill. App. 3d at 1075 (quoting *Clement*, 114 Ill. App. 3d at 480-81). This would lead to numerous negative effects on the legal profession, including unwarranted legal malpractice lawsuits and attorneys having to defend themselves against strangers. *Learning Curve*, 392 Ill. App. 3d at 1075 (quoting *Clement*, 114 Ill. App. 3d at 480-81). Furthermore, we found that Learning Curve's agreement with its former stockholders and the new corporation amounted to an assignment of its legal malpractice claim. *Learning Curve*, 392 Ill. App. 3d at 1074. However, we concluded that the assignment was proper because Learning Curve assigned the claim not to unrelated third parties but to people who had been actually harmed as a result of the malpractice and thus, public policy did not prohibit that type of assignment. *Learning Curve*, 392 Ill. App. 3d at 1077.

¶ 72 The facts in *Learning Curve* are instructive to the facts in the case before us now. In their second amended complaint, C&B and SISC specifically allege that Fireman's Fund hired them to serve as third-party administrators of the workman's compensation claim filed against Set Environmental. C&B and SISC also allege that, as part of their duties as third party administrators, they "selected and employed" defendants to represent Set Environmental. C&B and SISC then conclude that an attorney-client relationship existed between themselves and defendants. See *Mayfield*, 258 Ill. App. 3d at 34 (holding that conclusions of law and fact must be supported by factual allegations). When the Arbitrator awarded penalties and attorneys fees to the employee against the insured, C&B and SISC together paid half of the fee award, and Fireman's Fund, the company that hired them, paid the balance. The facts asserted in C&B and SISC's second amended complaint allege that, like the former stockholders in *Learning Curve*,

they were not unrelated third parties, but instead were parties closely integrated in the administration of the claim who had actually been harmed as a result of the malpractice. *Learning Curve*, 392 Ill. App. 3d at 1077.

¶ 73 In a case such as this, when a third party administrator of a claim suffers actual damages as a result of the negligence of an attorney they retained, a resulting malpractice claim assignment cannot be against public policy for the same reason that the assignment of the malpractice claim was not against public policy in *Learning Curve*: the third party administrator was a closely related party actually harmed by the attorney's alleged malpractice. *Learning Curve,* 392 Ill. App. 3d at 1077.

¶ 74 In defendants' section 2-619 motion to dismiss, they assert that C&B and SISC "had no attorney-client relationship" with defendants based on *Learning Curve*'s general statement that assignment of legal malpractice claims is against public policy because no attorney-client relationship exists. *Learning Curve,* 392 Ill. App. 3d at 1075. This conclusion failed to address the ultimate holding of *Learning Curve,* which found that the facts of the case fell under an exception to the general rule against assigning legal malpractice claims. *Learning Curve*, 392 Ill. App. 3d at 1077 (when the client assigns the legal malpractice claim to a party that was actually harmed by the attorney's alleged malpractice, the public policy concerns against assignment are not triggered). Furthermore, defendants do not deny that C&B and SISC acted as a third party administrator of the claim. C&B and SISC have alleged, by stating that they were third party administrators whose duties included "select[ing] and employ[ing]" defendants and suffered a loss because of defendants' actions, a set of facts that, if proven, supports their assertion that they

had an attorney-client relationship with defendants and thus have standing to bring legal malpractice and breach of fiduciary duty claims against defendants.

¶ 75 In addition, the third party administrator's role in the proceedings must give it standing to bring a legal malpractice claim as a matter of right without even an assignment of the claim. Illinois courts have held that when an insurer retains an attorney to represent its insured, the attorney represents both insurer and insured and must further the interests of both parties. *Bowers v. State Farm Mutual Automobile Insurance Agency*, 403 Ill. App. 3d 173, 179 (2010); *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill. App. 3d 467, 472 (1979). Insurance companies have standing to bring legal malpractice lawsuits against the attorneys they retain to represent their insureds in policy disputes. *Universal Underwriters Insurance Co. v. Judge & James, Ltd.*, 372 Ill. App. 3d 372. I see no reason why this right should not be extended to third party administrators retained by insurance companies to handle the management of claims. Third party administrators are not unrelated third parties, but are closely integrated with the administration of the claim and stand in the same shoes as the insurance company that retains them. See *Learning Curve*, 392 Ill. App. 3d at 1077. In this case, C&B and SISC assert that they made the decision to retain the defendant attorneys to represent the policyholder in the worker's compensation claim, and that they actually sustained actual damages because of defendants' alleged malpractice. Taking this allegation as true, as we must when analyzing a section 2-619 motion to dismiss, C&B and SISC, as third party administrators of the Fireman's Fund policy, are subject to the same attorney-client relationship that would exist between an insurance company and the attorneys they retain to represent a policyholder.

¶ 76 For these reasons, there are material questions of fact to defeat defendants' motion to dismiss, and as a result, I must respectfully dissent.