2016 IL App (1st) 132071-U
No. 1-13-2071

THIRD DIVISION
May 25, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE GOLDFARB CORPORATION, ALONNA GOLDFARB, STANLEY GOLDFARB, and MARTIN GOLDFARB, Plaintiffs-Appellants, v. MUCH, SHELIST, FREED, DENENBERG AMENT & RUBENSTEIN, P.C., Defendant-Appellee,	)))))))))))))	Appeal from the Circuit Court of Cook County. No. 09 L 522 The Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The grant of summary judgment on plaintiffs' malpractice claim in favor of defendant firm on the basis of the lack of attorney-client relationship was reversed due to the existence of genuine issues of material fact whether an implied attorney-client relationship arose between plaintiffs and defendant. Plaintiffs presented evidence that defendant, through its attorneys, gave legal advice regarding entering into an agreement for certain transactions and releases to plaintiffs individually and not merely as officers and directors of the corporation, that led to an adversary proceeding brought against them by the corporation's trustee in bankruptcy for breach of their fiduciary duties based on those transactions. Alternatively, there is a genuine issue of material fact whether plaintiffs were intended third-party beneficiaries of the attorney-

client relationship between defendant and the corporation. Plaintiff presented evidence that defendant was involved in the negotiations and drafting of the agreement for transactions and releases that primarily benefited plaintiffs and not the corporation. (2) A release in a bankruptcy adversary proceeding against the plaintiffs did not constitute an alternate ground to affirm the judgment in favor of defendant because that release concerned amounts due in connection with the bankruptcy Trustee's claims against plaintiffs and did not clearly contemplate a release of defendant from claims for malpractice.

¶ 2 On appeal, plaintiffs argue that the court improperly granted summary judgment to defendant because there is a genuine issue of material fact whether defendant, by its conduct, created an attorney-client relationship with plaintiffs.

¶ 3 Defendant argues that summary judgment was properly granted in its favor where plaintiffs cannot show two elements of a claim for malpractice: (1) existence of an attorney-client relationship; and (2) damages. Defendant alternatively argues that summary judgment was properly granted in its favor on the alternative basis that the action is barred by the other affirmative matter of the release in the bankruptcy adversary proceeding.

¶ 4 We hold that summary judgment was improperly granted because there is a genuine issue of material fact whether there was an implied attorney-client relationship between defendant and plaintiffs. Because of our disposition, we do not reach defendant's additional argument regarding damages. We also reject defendant's argument that the release in the bankruptcy proceedings constitutes an alternate ground to affirm the grant of summary judgment.

¶ 5 BACKGROUND

¶ 6 Plaintiff The Goldfarb Corporation (Goldfarb Corporation) is a Canadian corporation with its principal place of business in Toronto, Ontario. The corporation is publicly traded and is listed on the Canadian stock exchange. Plaintiffs Alonna Goldfarb, Martin Goldfarb, and Stanley Goldfarb (plaintiffs) are officers and/or directors of the Goldfarb Corporation and are residents and citizens of Canada.

¶ 7 Defendant, Much, Shelist, Freed, Denenberg Ament & Rubenstein, P.C.,[1] is a law firm in Chicago, Illinois.

¶ 8 In April 1995 plaintiff Goldfarb Corporation purchased a majority interest in Fleming Packaging Corporation (Fleming), which was a Delaware corporation with its principal place of business in Peoria, Illinois. Fleming was one of the largest North American printers of labels and manufacturers of packaging for spirits and specialty products. Fleming had 10 divisions. Beginning in 1995 and through February 10, 2003, plaintiffs Alonna Goldfarb, Martin Goldfarb, and Stanley Goldfarb served as directors and/or officers of Fleming.

¶ 9 Fleming was a party to a loan agreement executed in August 1995 with Bank One N.A. (Bank One) and various other national and state banks as participating lenders (Lenders). Fleming and Bank One amended the loan agreement several times. Only the fifth amendment to the loan agreement (Fifth Amendment) is relevant to the facts of this case and this appeal.

¶ 10 Leading up to the Fifth Amendment, in late 2001 Fleming experienced a financial downturn. Plaintiffs considered restructuring the corporation and selling individual divisions. In May 2002, Fleming engaged defendant to act as its attorney in connection with the sale of Fleming's Webkote division, memorialized by a May 21, 2002 written engagement letter. The engagement letter stated that the scope of representation included only "the sale of [Fleming's] Webkote division." In June 2002, plaintiffs and Fleming agreed to sell the Webkote division for $26 million, a much higher amount than expected. The sale was expected to close in September 2002.

¶ 11 In June 2002, Fleming began attempting to sell another division of Fleming, the Spiralkote division. Defendant again represented Fleming in connection with the sale of this

[1] The name of defendant firm at the time of this lawsuit was actually Much, Shelist, Denenberg Ament & Rubenstein, P.C. and is now Much Shelist, P.C.

division. Defendant and Fleming did not execute another engagement letter memorializing any expanded scope of representation to include the sale of the Spiralkote division. The Spiralkote division sold for $4 million in December 2002.

¶ 12 The Lenders then agreed to allow plaintiffs to similarly restructure the remaining divisions of Fleming for future sale. Plaintiffs and the Lenders began negotiating the Fifth Amendment to the loan agreement to allow the restructuring of Fleming. From approximately October 2002 through November 2002, plaintiffs and the Lenders exchanged "term sheets" comprising their agreement. Defendant represented Fleming in connection with these negotiations, again without executing a new engagement letter modifying the scope of representation.

¶ 13 In early January 2003, the Lenders, through Joanna Anderson at Bank One, informed plaintiff Alonna Goldfarb that the Lenders were no longer supporting a restructuring of Fleming. Instead, the Lenders wanted plaintiffs to turn over control of Fleming to the Lenders and resign as officers and directors of Fleming so that the Lenders could file for bankruptcy on behalf of Fleming and sell the company. The Lenders also demanded that plaintiffs release them from any and all potential claims for lender liability, execute board resolutions for both Fleming and the Goldfarb Corporation, and approve the Fifth Amendment allowing Fleming to sign the Fifth Amendment.

¶ 14 Defendant continued to negotiate with Fleming's Lenders and the Fifth Amendment was redrafted to provide for the turnover of Fleming from plaintiffs to the Lenders for the sale of Fleming through bankruptcy. There was no further engagement letter between defendant and Fleming expanding their scope of representation to include this representation.

¶ 15 Plaintiffs contend that Don Hershman and Scott Schreiber, attorneys at defendant firm, represented the individual plaintiffs as well as Fleming in the negotiations with the Lenders and advised them about the propriety of agreeing to the Fifth Amendment and their rights and fiduciary duties in connection with the Fifth Amendment. Plaintiffs state that defendant, through Hershman and Schreiber, attended the Goldfarb Corporation's January 16, 2003 board meeting and advised individual plaintiffs and the Goldfarb Corporation board that entering into the Fifth Amendment and agreeing to the other demands by the lenders complied with their fiduciary duties to Fleming and to its creditors under U.S. law.

¶ 16 The minutes of the Goldfarb Corporation's January 16, 2003 board meeting, taken by plaintiff Alonna Goldfarb, state, in relevant part, as follows:

"Minutes of the meeting of the Board of Directors of THE GOLDFARB CORPORATION, held by conference call on Thursday, January 16, 2003, at the hour of 8:30 o'clock in the forenoon (Toronto time).

PRESENT:

Martin Goldfarb, Alonna Goldfarb, Marshall Cohen, Bud Coughlan, Peter Doering, Stanley Goldfarb, Michael Kirby, Robert Sutherland

Being a quorum of the members of the board. Also present by invitation of the Board was Karen Killeen, Chief Financial Officer to the Corporation, Peter Dunne of Cassels [*sic*] Brock & Blackwell, and Scott Schreiber and Don Hershman of Much Shelist et al.

* * *

FLEMING UPDATE.

Mr. Martin Goldfarb informed the Board that [the] meeting was called to provide an update regarding Fleming and the actions of Fleming's lenders. He reviewed the history

of negotiations with the bank starting with the term sheet agreed upon in the fall and the banks' later retraction. He also informed the Board that the Corporation had advanced US $765,000 of the US $1.5 million of subordinated debt that the Corporation had agreed to lend Fleming in certain circumstances, including reaching agreement with the banks. This was done as a sign of good faith on the Corporation[']s part, following the banks' statement that a deal had been reached.

At this point the Lenders have officially provided Fleming with notice of default on its loan agreements.

Fleming has retained bankruptcy counsel: Scott Scheiber and Don Hershman. Counsel then briefed the Board on its obligations in the new situation. Fleming has entered the zone of insolvency and as a result, the Board has fiduciary obligations to Fleming's creditors. Counsel also has been in touch with the banks' counsel. The banks want to maximize collateral and remove The Goldfarb Corporation[] from its involvement in Fleming.

In return for the [Goldfarb] Corporation[']s resignation from Fleming's Board of Directors and entering into a voting trust arrangement assigning its shares in Fleming to a bank nominee, the banks have agreed to release Fleming's claim on the Corporation for the remaining US$735,000 of subordinated debt and to treat the US$735,000 of subordinated debt advanced pari Passau[2][*sic*] with the bank's debt. Additionally, it will cover all obligations of the Goldfarb Corporation for George Gialenios' stay bonus. Fleming will be put up for sale. By selling the company before July (the previously agreed sale date) it is apparent that the sale price will not cover all of the outstanding debt

[2] "*Pari passu*" is a Latin phrase that means "on an equal footing," and is often used in lending to describe where multiple assets, credits, or debts are treated equally without any preference.

as there has not been time for the benefits of the restructuring plan to materialize. A bank appointed consultant will manage the sale process.

If the Goldfarb Corporation does not accept this proposal then the banks will provide debtor in possession financing and put Fleming into bankruptcy.

The Board discussed with counsel the US rules regarding payment of unsecured claims.

Clearly, Fleming is running out of cash. By allowing the sale to proceed at this time counsel advised that the Board would be acting in Fleming's best interests and fulfilling its duties. After discussion, the Board concluded that at this time there were no viable alternatives.

Counsel advised that directors would not be personally liable for the payment of income taxes, or given that the CEO and CFO had control of the case, for the payment of payroll taxes. The banks have committed to advance funds for payroll taxes once the amendment is settled.

This is a recognized process in the US. Counsel noted that we do not have sufficient control over the process to act in our view of the best interests of Fleming.

The Board asked counsel to negotiate with the Lenders an indemnification from all claims as an addition to the agreement negotiated. Clearly, they are in control and we should not be held responsible for their actions."

¶ 17 On February 10, 2003, the parties executed the Fifth Amendment. Although the Goldfarb Corporation was not a party to the original loan agreement, the Fifth Amendment states that it is "among" Fleming, the lenders, Bank One, and also the Goldfarb Corporation, and that the Goldfarb Corporation "is executing this Amendment solely to undertake the agreements made by

it and to receive the benefits provided to it in this Amendment." The Fifth Amendment recited that events of default occurred under the loan agreement, and that Fleming, the Goldfarb Corporation, and the guarantors[3] requested that the Lenders modify the terms of the loan agreement. In relevant part, the Fifth Amendment provided as follows:

> "ARTICLE II. GOLDFARB CORPORATION/CONTROL OF THE BOARD OF DIRECTORS OF [FLEMING]
>
> 2.1 Goldfarb Corporation hereby represents that it is the owner of at least 80% of the Capital Stock of [Fleming] and controls 3/7 of the Board of Directors of [Fleming]. In consideration of the agreements of the Lenders in Section 2.2 hereof, in fulfillment of its fiduciary obligation and for other good and valuable consideration, Goldfarb Corporation hereby agrees (i) to the terms of this Amendment, (ii) to cause its officers to resign from the Board of Directors of the Company, (iii) to provide an irrevocable proxy to vote all shares of Capital Stock of the Company owned by Goldfarb Corporation to George Gialenios and (iv) to execute such further documents and agreements as may be required by the Required Lenders or the Agent to carry out the above agreements. The Lenders agree that they will not enforce Goldfarb Corporation's obligations to fund additional subordinated debt in the amount of $735,000 under the letter agreement of Goldfarb Corporation dated March 11, 2002.
>
> 2.2. If the Company and the Guarantors are sold pursuant to the sale program described in Recital B and the Net Sale Proceeds exceed $8,000,000 in the aggregate, the Lenders agree to deliver to Goldfarb Corporation from the proceeds of sale of the

[3] The signature page of the Fifth Amendment indicates that the guarantors are "fp LABEL COMPANY, INC." AND "fp ESTATE INCORPORATED." Joseph G. Anderson signed on behalf of both companies as the secretary. No issue is raised in this case regarding the guarantors.

Company and the Guarantors received by the Agent (payable immediately following the date on which the last of the Net Cash Proceeds of sale of the Company and the Guarantors pursuant to such sale program are received by the Agent) 3.5% of the Net Sale Proceeds. ***

* * *

ARTICLE IV: CONDITIONS PRECEDENT. This Amendment shall not be effective until the Company, Goldfarb Corporation and the Guarantors shall have delivered the following to the Agent, and the following events shall have occurred, unless waived by the Required Lenders in writing.

4.1 This Amendment shall have been signed by the Company, Goldfarb Corporation, each Guarantor and the Required Lenders.

* * *

4.3 A written opinion of the Company's, Goldfarb Corporation's and Guarantors" counsel addressing the issues in Section 3.1 and 3.2.

* * *

4.5 Goldfarb Corporation shall have provided to George Gialenios an irrevocable proxy to vote all Capital Stock of the Company owned by it and shall have executed such further documents in connection therewith as requested by the Agent or the Required Lenders.

4.6 All existing directors of the Company shall have resigned except for George Gialenios.

ARTICLE V. MISCELLANEOUS.

* * *

> 5.4 As further consideration for the agreements and understandings herein, the Agent and the Lenders, on behalf of themselves and their respective employees, agents, executors, heirs, successors and assigns (the 'Releasing Parties'), hereby release Goldfarb Corporation, its officers, directors, employees, agents, attorneys, shareholders, successors and assigns (the 'Released Parties'), from any liability, claim, right or cause of action which now exists or hereafter arises as a result of acts, omissions or events occurring on or prior to the date hereof, whether known or unknown, arising from or in any way related to this Amendment, the loan Agreement, the other Loan Documents and all transactions relating to this Amendment, the Loan Agreement or any of the other Loan Documents provided, however, that Releasing Parties do not release the Released Parties from any losses or damages caused by fraud."

¶ 18 The Fifth Amendment was signed by Joseph A. Anderson, as CFO of Fleming, on behalf of Fleming, by Alonna Goldfarb, as secretary of the Goldfarb Corporation, on behalf of the Goldfarb Corporation, and by Bank One and the Lenders.

¶ 19 The Fifth Amendment also provided that the parties would execute all documents necessary to effectuate the agreement. The Lenders executed a release where they agreed not to enforce the Goldfarb Corporation’s obligation to fund subordinated debt owed to Fleming in the amount of $735,000 under a letter agreement with the Lenders dated March 11, 2002. Gialenios also executed a guaranty release ("Termination of Guaranty Obligation") releasing the Goldfarb Corporation from its guaranty of Gialenios’ employment agreement with Fleming. Also, the members of the board of directors of the Goldfarb Corporation tendered their written resignations. Plaintiffs refer to all these agreements as the "Fifth Amendment Transactions."

¶ 20 On February 10, 2003, the same date the Fifth Amendment was executed, the Goldfarb Corporation executed a written consent in *lieu* of a special meeting of its board of directors. The written consent in *lieu* of a special meeting of the board of directors stated that the Goldfarb Corporation's board of directors was presented with the Fifth Amendment "to facilitate its intent to sell Fleming Packaging as a going concern," under which the Goldfarb Corporation would "transfer all voting rights concerning its stock of Fleming Packaging to George A. Gialenios under a Proxy." The Goldfarb Corporation's written consent in *lieu* of a special meeting of its board of directors authorized and directed that the Goldfarb Corporation enter into the Fifth Amendment agreement and "consummate the transactions contemplated in the Amendment Documents."

¶ 21 Pursuant to the Fifth Amendment's requirement of a "written opinion of the Company's, Goldfarb Corporation's and Guarantors' counsel" regarding the Fifth Amendment, the Goldfarb Corporation's special Ontario counsel, Casells Brock, submitted an opinion letter dated February 11, 2003. In this letter, Casells Brock stated, "We have acted as special Ontario counsel to The Goldfarb Corporation," and stated that it reviewed the Fifth Amendment "[i]n our capacity as special Ontario counsel to the Corporation." Casells Brock stated its opinion that "[t]he execution, delivery and performance by the Corporation of each Document" under the Fifth Amendment do not "violate any statute or regulation of the Province of Ontario or Canada."

¶ 22 Defendant also submitted an opinion letter, dated February 10, 2003, stating it has "acted as counsel to Fleming Packaging Corporation." Defendant opined that "[t]he execution, delivery and performance of the Fifth Amendment, and all agreements executed by Fleming Packaging in connection therewith, are within Fleming Packaging's powers, have been duly authorized, and are not in contravention with any law of the State of Illinois of which we are aware or the terms

of its certificate of incorporation or by-laws." We note that defendant's opinion letter was dated and submitted after the January 16, 2003 Goldfarb Corporation board meeting.

¶ 23 After execution of the Fifth Amendment, defendant represented Fleming in its bankruptcy filing pursuant to a new written engagement letter dated March 31, 2003. Fleming filed for bankruptcy in the United States Bankruptcy Court for the Central District of Illinois in May 2003, case number 03-82408. Substantially all of Fleming's assets were sold in June 2003.

¶ 24 In July 2004, plaintiffs were sued by the chapter 7 trustee for the estate of Fleming in a bankruptcy adversary proceeding, *Rafool v. The Goldfarb Corporation, et al.*, Adv. Case No. 04-8166. The trustee sued each of the plaintiffs in this case: Goldfarb Corporation, Martin Goldfarb, Stanley Goldfarb, and Alonna Goldfarb, referred to in the adversary complaint as "the Goldfarb individual defendants," as well as George Gialenios and Joe Anderson,[4] who, along with the Goldfarb individual defendants, were collectively referred to in the Complaint as the "Directors and Officers." Plaintiffs retained other counsel to represent them in the adversary proceeding. The adversary complaint alleged that, at that time, the Goldfarb Corporation owned 82% of Fleming's stock[5] and directly controlled Fleming's board of directors. The complaint alleged that the individual Goldfarb defendants were officers and/or directors of both Fleming and the Goldfarb Corporation. The adversary complaint alleged breach of fiduciary duties and various avoidance actions under the Bankruptcy Code and state law, based on plaintiffs' failure to sell Fleming in 2002 or earlier and their Fifth Amendment transactions. The adversary complaint alleged that Goldfarb Corporation and the individual Goldfarb defendants breached

[4] George Gialenos was alleged to be a director and officer of Fleming. Joseph Anderson was alleged to be an officer of Fleming who was an "independent restructuring professional" hired by Fleming as its chief financial officer in September 2003.

[5] The adversary proceeding complaint alleged that Goldfarb Corporation had acquired 60% of Fleming's stock on or about April 28, 1995 and the following year acquired an additional 22% of Fleming's stock, totaling 82%.

their fiduciary duties to Fleming and Fleming's creditors by "their conduct with respect to the Fifth Amendment transactions." Specifically, the adversary complaint alleged that "the Officers and Directors owed a fiduciary duty to the Debtors and were required to carry out all their obligations to [Fleming] in good faith, honestly and with undivided loyalty, which included an obligation to avoid self-dealing at [Fleming's] expense." The complaint further alleged that "[w]hile [Fleming was] insolvent and/or within the zone of insolvency, the Officers and Directors also owed [Fleming's] creditors a fiduciary duty that required them to avoid self-dealing at the creditors' expense." The complaint alleged that each of the Fifth Amendment Transactions "were made or caused to be made, to or for the benefit of Goldfarb [Corporation]."

¶ 25 Plaintiffs filed a motion for summary judgment of the bankruptcy adversary complaint on March 3, 2008. On April 11, 2008, the court granted the summary judgment motion in part, dismissing the portion of the adversary complaint based on plaintiffs' failure to sell the company in 2002, but denied the motion with respect to the Fifth Amendment Transactions. Just before trial, plaintiffs settled the remaining claims with the trustee for $1.45 million. According to the deposition testimony of the chief financial officer of Goldfarb Corporation, Karen Killen, plaintiffs' insurer paid 60% of this settlement and plaintiffs' attorneys' fees.

¶ 26 On January 16, 2009, plaintiffs filed this lawsuit against defendant in circuit court. The original complaint was dismissed on May 4, 2009. Plaintiffs' first amended complaint was stricken.

¶ 27 On July 1, 2009 plaintiffs filed a two-count second amended complaint against defendants alleging professional negligence (Count I) and breach of fiduciary duties (Count II). Defendant filed a motion to dismiss pursuant to section 2-615 (735 ILCS 5/2-615 (West 2008)),

which was granted in part, dismissing Count II for breach of fiduciary duty on the ground that it was duplicative of Count I. The court denied the remainder of the motion to dismiss.

¶ 28 Defendant then moved to dismiss the remaining professional negligence claim pursuant to section 2-619 (735 ILCS 5/2-619(a)(6) (West 2008)), raising the affirmative matter of the release in the bankruptcy adversary proceeding. The court denied this motion to dismiss on October 30, 2009, on the ground that the adversary proceeding release did not encompass malpractice claims against defendant but, rather, only claims in the adversary proceeding.

¶ 29 Defendant then filed a motion for summary judgment, arguing that there was no attorney-client relationship between it and plaintiffs. Defendant denies that it was plaintiffs' attorney. Rather, according to defendant's statement of facts, Fleming retained Don Hershman "to divest certain divisions of Fleming, and then later retained Hershman and Scott Schreiber *** to handle its financial workout with Fleming's lenders and to provide pre-bankruptcy legal services." Defendant denies representing plaintiffs "in any respect."

¶ 30 Plaintiffs filed a cross-motion for summary judgment, arguing that the evidence in the record showed the existence of an attorney-client relationship and satisfied the elements of a malpractice claim.

¶ 31 On March 13, 2013, the court entered a memorandum opinion and order granting defendant's motion and denying plaintiffs' cross-motion for summary judgment. The court found that plaintiffs could not maintain a legal malpractice action against defendant because defendant did not enter into an attorney-client relationship with plaintiffs and therefore did not owe plaintiffs a duty. The court found that the only attorney-client relationship defendant entered into was with the corporate client Fleming. The court further found that, as the attorney for the corporation, defendant did not owe the shareholders and officers a fiduciary duty, nor was there

any evidence that plaintiffs were intended third-party beneficiaries of the attorney-client relationship between defendant and Fleming.

¶ 32 Plaintiffs filed a motion to reconsider, which included an affidavit by plaintiff Alonna Goldfarb, which was executed after the date summary judgment was entered in favor of defendant. Plaintiffs again argued that defendant entered into an attorney-client relationship with them, separately from the attorney-client relationship between defendant and Fleming.

¶ 33 On May 29, 2013, the court entered a memorandum opinion and order denying the motion to reconsider, reaffirming its previous findings. Plaintiffs timely appealed.

¶ 34 After briefing, on August 15, 2014 defendant filed a motion to strike plaintiff's reply brief or, in the alternative, for leave to file a sur-reply. On August 18, 2014, we entered an order that plaintiff's reply brief would not be stricken but granting defendant leave to file a sur-reply brief. On September 3, 2014, plaintiff filed a motion for leave to file a sur-sur-reply brief, which we allowed by order of September 9, 2014, which reserved ruling on the matter until plaintiff's sur-sur-reply was filed.

¶ 35 ANALYSIS

¶ 36 I. Preliminary Matters

¶ 37 A. Defendant's Request to Strike Plaintiffs' Reply Brief

¶ 38 In response to defendant's request to strike plaintiffs' reply brief, we find that plaintiffs waived their arguments regarding damages for the loss of value of Fleming and the denial of their motion to reconsider by not raising them in their opening brief. These arguments will not be considered. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Richard v. Nederlander Palace Acquisition, LLC*, 2015 IL App (1st) 143492, ¶ 30. We also find that while plaintiffs were responding to an argument made by defendant concerning the collateral source rule, we need not

consider that argument because we are reversing on other grounds. We further find that the affidavit of Alonna Goldfarb, filed with plaintiff's motion for reconsideration, was not before the court at the time it ruled on the motion for summary judgment, and will therefore not be considered here.

¶ 39 B. Whether Plaintiffs Are Proper Parties

¶ 40 Defendants first argue that the only proper plaintiff in this case is the Goldfarb Corporation, and not the individual plaintiffs. To support this argument, defendant does not point to any evidence but, rather, looks to the allegations of the complaint. Defendant argues that plaintiffs did not bring this action in their capacities as directors of Fleming but, rather, as directors and officers of plaintiff Goldfarb Corporation. Plaintiffs reply that they indeed brought this action in their capacities as directors of Fleming, not plaintiff Goldfarb Corporation. Plaintiffs argue that their second amended complaint seeks damages from defendant for negligently advising plaintiffs on their fiduciary obligations as corporate directors of *Fleming*.

¶ 41 We reject defendant’s argument. The second amended complaint alleges malpractice by defendant in the capacity of an attorney-client relationship with plaintiffs as officers and directors of Fleming. The second amended complaint alleges that plaintiffs Alonna Goldfarb, Martin Goldfarb, and Stanley Goldfarb, as well as plaintiff Goldfarb Corporation, all individually served as officers and directors of Fleming. The malpractice alleged is for damages to plaintiffs from the bankruptcy adversary proceeding resulting from faulty advice to plaintiffs individually, which includes the individual Goldfarbs as well as plaintiff Goldfarb Corporation, in their capacity as officers and directors of Fleming. Defendant argues that the only malpractice alleged by plaintiffs is only in their capacity as members of the board of Goldfarb Corporation because the bankruptcy adversary proceeding was based on the Fifth Amendment transactions,

which benefited the Goldfarb Corporation, and not Fleming. This argument is circular. The fact that the Fifth Amendment transactions benefited plaintiffs and the Goldfarb Corporations was the very basis for the adversary proceeding. The adversary proceeding was brought against both the individual Goldfarb plaintiffs and plaintiff Goldfarb Corporation, as officers and directors of Fleming, not the Goldfarb Corporation. The adversary complaint alleged that the Fifth Amendment transactions benefiting plaintiffs constituted self-dealing and a breach of plaintiffs' fiduciary duties to Fleming and Fleming's creditors.

¶ 42 Defendant also argues that plaintiffs cannot be parties to this suit because "the Individual Goldfarbs resigned as members of the Fleming Board at the time of the Fifth Amendment." First, defendant does not cite to any authority for this assertion, thereby forfeiting it. See Ill. S. Ct. R. 341(h)(7), (i) (eff. Feb. 6, 2013). Second, plaintiffs' resignation from the board of Fleming was part of the terms of the Fifth Amendment agreement; plaintiffs were still officers and board members of Fleming at the time of the alleged malpractice. See *Dowell v. Bitner*, 273 Ill. App. 3d 681 (1995) (held officer's resignation will not sever liability for transactions completed after termination of the party's association with the corporation if the transactions began during the existence of the relationship or were founded on information acquired during the relationship).

¶ 43 We find that plaintiffs have sufficiently alleged malpractice in the form of faulty legal advice given to them while they were in their positions as officers and directors of Fleming. Therefore, we address whether there is a genuine issue of material fact whether there was an attorney-client relationship between defendant and plaintiffs specifically as officers and directors of Fleming.

¶ 44 II. Summary Judgment

¶ 45 Summary judgment is appropriate where the pleadings, depositions, affidavits, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). "The purpose of summary judgment is not to try a question of fact, but to determine whether one exists" that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421 (2002).

¶ 46 Our standard of review of a grant of summary judgment is well established. The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002) (citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517 (1993)); *Bagent*, 224 Ill. 2d at 162 (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004), and *Gilbert*, 156 Ill. 2d at 517). " 'Genuine' is construed to mean that there is evidence to support the position of the non-moving party." *Ralston v. Casanova*, 129 Ill. App. 3d 1050, 1058 (1984) (citing *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376 (1974)). "When determining whether a genuine issue of material fact exists, the court must find such an issue supported by evidentiary facts revealed in the record." *Riverton Area Fire Protection District v. Riverton Volunteer Fire Department*, 208 Ill. App. 3d 944, 951 (1991) (citing *Seefeldt v. Millikin National Bank*, 154 Ill. App. 3d 715, 718 (1987), citing *Harrington v. Chicago Sun-Times*, 150 Ill. App. 3d 797, 801 (1986)). " 'In determining the genuineness of a fact, a court should ignore personal conclusions, opinions, and self-serving statements and consider only facts admissible in evidence under the rules of evidence.' " *Riverton Area Fire Protection District*, 208 Ill. App. 3d at 951 (quoting *Seefeldt*, 154

Ill. App. 3d at 718, citing *Malawy v. Richards Manufacturing Co*., 150 Ill. App. 3d 549, 571 (1986)).

¶ 47 In determining the existence of a genuine issue of material fact, we must construe pleadings, depositions, admissions, exhibits, and affidavits on file in the case "strictly against the movant and liberally in favor of the opponent." *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986) (citing *Kolakowski v. Voris*, 83 Ill. 2d 388, 398 (1980)). This court reviews a grant of summary judgment *de novo*. *Roth v. Opiela*, 211 Ill. 2d 536, 542 (2004); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 48 Under our *de novo* review, we must determine whether there is a genuine issue of material fact regarding plaintiffs' sole claim for malpractice. "The basic principles governing legal malpractice claims are well established." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 225 (2006). "In order to prevail in a legal malpractice claim, a plaintiff must show: (1) the existence of an attorney-client relationship establishing a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that, 'but for' the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) damages." *Sterling Radio Stations, Inc. v. Weinstein*, 328 Ill. App. 3d 58, 62-63 (2002) (citing *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 351 (2000)). See also *Tri-G, Inc*., 222 Ill. 2d at 225-26. " 'If the plaintiff fails to establish any element of the cause of action, summary judgment for the defendant is proper.' " U*SF Holland, Inc. v. Radogno, Cameli, & Hoag, P.C.*, 2014 IL App (1st) 131727, ¶ 51 (quoting *Bagent v. Blessing Care Corp*., 224 Ill. 2d 154, 163 (2007)). The parties largely dispute whether there is a genuine issue of material fact as to the first element: whether an attorney-client relationship was formed. Defendant also argues that summary judgment was properly granted where there is no genuine

issue of material fact regarding the final element of damages. We conclude summary judgment was improperly granted because there are genuine issues of material fact regarding whether there was an implied attorney-client relationship between defendant and plaintiffs. Because of our disposition, we do not reach defendant's additional argument regarding damages.

¶ 49 The circuit court below ruled that plaintiffs failed to establish the very first element: the existence of an attorney-client relationship. In a legal malpractice action, the plaintiff must prove that the defendant owed it a duty of care arising out of an attorney-client relationship. *Union Planters Bank, N.A. v. Thompson Coburn LLP*, 402 Ill. Ap. 3d 317, 342 (2010). "The attorney-client relationship is a voluntary, contractual relationship that requires the consent of both the attorney and client." *People v. Simms*, 192 Ill. 2d 348, 382 (2000). The relationship cannot be created by either party alone. " '[T]he client must manifest [his or her] authorization that the attorney act on [his] behalf, and the attorney must indicate [his or her] acceptance of the power to act on the client's behalf.' " *Simms*, 192 Ill. 2d at 382 (quoting *Simon v. Wilson*, 291 Ill. App. 3d 495, 509 (1997)). "A client cannot unilaterally create the relationship, and the putative client's belief that the attorney is representing him is only one consideration." *Meriturn Partners, LLC v. Banner & Witcoff, Ltd.*, 2015 IL App (1st) 131883, ¶ 10 (citing *Rosenbaum v. White*, 692 F.3d 593, 601 (7th Cir.2012)).

¶ 50 Plaintiffs argue that the court erred in its determination because an attorney-client relationship can be established like any other contract and may be express or implied, oral or written. Plaintiffs argue that "the evidence in the record, at a minimum, raises a genuine question of material fact that [defendant] and [plaintiffs] entered into an attorney-client relationship." Plaintiffs argue that the trial court did not consider whether the evidence created a genuine issue of material fact but, rather, itself determined issues of material fact in determining that there was

no evidence of an attorney-client relationship. Plaintiffs contend that this was a "procedurally improper conclusion at the motion for summary judgment stage." Plaintiffs recite that "[i]f the undisputed material facts could lead reasonable observers to divergent inferences, or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Pielet v. Pielet*, 2012 IL 112064, ¶ 53.

¶ 51 In its memorandum opinion and order granting summary judgment to defendant, the circuit court seemed to largely rely on the lack of a written retainer agreement and bills between defendant and plaintiffs:

> "[T]he evidence in the record, including the full depositions of the witnesses in addition to the documents, bills, and retainer agreements, clearly and unequivocally demonstrates that [defendant] entered into an attorney-client relationship with the corporate client Fleming and not with the individual Plaintiffs here, either in their capacity as shareholders, officers, and directors of Goldfarb or in their capacity as shareholders, officer, and directors of Fleming."

¶ 52 We look to (a) defendant's evidence in support of its summary judgment motion, then to (b) plaintiffs' refuting evidence during the cross-motions for summary judgment below, and then we (c) analyze whether there is a genuine issue of material fact.

¶ 53 A. Defendant's Evidence in Support of Summary Judgment

Refuting an Attorney-Client Relationship

¶ 54 Defendant relies largely on the fact that the written retainer agreement was solely with Fleming and on the fact that there is no written retainer agreement or other written documentation of an attorney-client relationship with plaintiffs. Defendant cites to the only two retainer agreements in this case between Fleming and defendant, and to the depositions of "all of

the [p]arties" including defendant's attorneys, Scott Schreiber and Don Hershman, that there was no retainer agreement or written or electronic communication between defendant and plaintiffs or bills to plaintiffs, and that plaintiffs did not specifically ask them to be their attorneys. Schreiber and Hershman testified that defendant's only client was Fleming, the corporation. Schreiber and Hershman denied that they represented the Fleming board or its members.

¶ 55 Defendant also cites to the deposition testimony of George Gialenios, Fleming's chief executive officer during the relevant times alleged, and Karen Killeen, the Goldfarb Corporation's chief financial officer.

¶ 56 Gialenios testified that he hired defendant in January 2003 to represent Fleming with regard to the financial negotiations surrounding the bankruptcy. Gialenos executed the March 2003 retention agreement between defendant and Fleming. Gialenios testified that Tobias Keller of the firm of Pachulski Stang Ziehl Young & Jones sent him a letter, dated December 19, 2002, regarding the obligations and duties of the officers and directors of financially distressed companies, which was forwarded to Alonna Goldfarb. Defendant argues that this letter demonstrates that plaintiffs had other counsel.

¶ 57 Karen Killeen testified that she understood that defendant represented Fleming. Killeen further testified that Casells Brock, the Goldfarb Corporation's outside counsel, billed the Goldfarb Corporation for work on the Fleming financial issues as well as for attendance at Goldfarb Corporation board meetings.

¶ 58 B. Plaintiffs' Evidence of Attorney-Client Relationship

Opposing Summary Judgment

¶ 59 The evidence plaintiffs rely on in arguing that there was a genuine issue of material fact that defendant represented them as directors of Fleming, is comprised of the following: (i) the

minutes of the Goldfarb Corporation's January 16, 2003 board meeting; (ii) testimony of plaintiff Alonna Goldfarb; (iii) testimony of Karen Killeen; (iv) testimony of Edgar Howbert; (v) testimony of Joanna Anderson; and (vi) what plaintiffs refer to as defendant's own evidence / judicial admissions. The documentary evidence and testimonial evidence cited by plaintiffs are each summarized separately under the remaining subparts of this section.

¶ 60 1. Minutes of the January 16, 2003, Goldfarb Corporation Board Meeting

¶ 61 Plaintiffs cite to the minutes of the January 16, 2003 Goldfarb Corporation board meeting as evidence that Shreiber and Hershman advised plaintiffs that entering into the Fifth Amendment satisfied their fiduciary obligations to Fleming and its creditors. Alonna Goldfarb testified at her deposition that she prepared the minutes of this meeting, and that all references to the "Board" referred to the Goldfarb Corporation board, since they were minutes of a meeting of the Goldfarb Corporation board of directors. The relevant portions of the minutes are set forth above in the factual background.

¶ 62 2. Testimony of Plaintiff Alonna Goldfarb

¶ 63 Plaintiffs also rely on the deposition testimony of plaintiff Alonna Goldfarb, who testified that she prepared the minutes of the January 16, 2003 Goldfarb Corporation meeting minutes. In the minutes, all references to the "Board" referred to the Goldfarb Corporation board, since they were minutes of a meeting of the Goldfarb Corporation board of directors. Present, either physically or by phone on the teleconference call, were herself, Karen Killeen (Goldfarb Corporation's chief financial officer), and plaintiffs Stanley Goldfarb and Martin Goldfarb, as well as Scott Schreiber and Don Hershman, attorneys for defendant. Plaintiff Martin Goldfarb acted as chairman of the meeting.

¶ 64 At her deposition, plaintiff Alonna Goldfarb conceded that there was no retention agreement with defendant, nor were there any bills received by the Goldfarb Corporation from defendant. However, Alonna Goldfarb testified that where the minutes indicate that "counsel" briefed the board on its obligation in the light of Fleming's pre-bankruptcy financial situation, the word "counsel" referred to Schreiber and Hershman. Alonna also testified that it was her understanding that at that point the board had fiduciary obligations to Fleming's creditors, according to what counsel told her. Alonna further testified that where the minutes indicate that counsel advised that by allowing the sale of Fleming to proceed the board would be acting in Fleming's best interests and fulfilling its duties, the "counsel" referred to was either Schreiber or Hershman. Where the minutes indicate that they do not have sufficient control over the process to act in the best interest of Fleming, "[i]t means that [Schreiber] or [Hershman] told us that we could not proceed under the circumstances with what we thought was the best interest of Fleming and we had to sign the Fifth Amendment." When asked whether defendant ever acquiesced or agreed to act as counsel for plaintiffs, Alonna testified, "I believe they did." When counsel asked how defendant acquiesced or agreed to act as counsel for plaintiffs, Alonna testified, "Through their actions."

¶ 65 3. Testimony of Karen Killeen

¶ 66 Plaintiffs argue that the testimony of the Goldfarb Corporation's chief financial officer, Karen Killeen, that defendant was plaintiffs' U.S. counsel establishes a genuine issue of material fact that defendant was indeed plaintiffs' counsel. Killeen worked only for the Goldfarb Corporation, not Fleming. Plaintiffs rely on the following testimony by Killeen:

> "Q: There’s a reference in the first line and then towards the last line about U.S. counsel. Do you know who that refers to?

A: Our only counsel would have been [defendant].

Q: And when you say our counsel, are you referring to Fleming or Goldfarb?

A: This is a Goldfarb Corporation bill.

Q: Is it your opinion that [defendant] acted as attorney for the Goldfarb Corporation?

A: U.S.? Yes, U.S. attorney.

Q: For U.S. matters. And can you tell me the basis for that opinion?

A: Our Canadian counsel is not familiar with U.S. law, and rules, and regulations in regulatory matters. They do not have an affiliate in the United States.

* * *

Q: Any other reason that you believe that [defendant] acted as the Goldfarb's U.S. attorneys?

A: They were in communication with our management team. I always understood that.

Q: I'm just trying to get at the basis for your understanding. Is that someone who communicated to you from their management team, or how did you come to that understanding?

A: I don't have a specific answer for that. When we had an issue, we would go to them. They would respond and answer our questions."

¶ 67 It is unclear from plaintiff's excerpt of Killeen's testimony submitted in briefing on summary judgment below what the references to U.S. counsel in the Goldfarb Corporation bill referred to.

¶ 68 Plaintiffs also argue that Killeen's email of January 15, 2003 to Schreiber creates a genuine issue of material fact. In this email, Killeen asked Schreiber to advise plaintiffs about

their negotiations with the bank and the effect, if any, of a public announcement scheduled for January 16, 2003 on those negotiations.

¶ 69 4. Testimony of Edgar Howbert

¶ 70 Plaintiffs argue that Howbert, Bank One's attorney, testified that defendant negotiated for both Fleming and plaintiffs, and that the issues facing plaintiffs were the "primary focus" of the negotiations. Plaintiffs rely on the following specific testimony of Howbert:

"Q. Is it your understanding that [defendant] negotiated aspects of the Fifth Amendment on behalf of the [plaintiffs]?

A. I dealt a lot with Scott Schreiber during the month of January, as I recall, on I believe all the issues that were on the table, but I don't know who he was speaking on behalf of necessarily.

Q. So some of the issues concerned requests by the Goldfarbs, whereas other issues concerned requests by Fleming, is that fair to say?

A. Yes. And I indicated earlier, the Goldfarb questions were the primary focus."

¶ 71 5. Testimony of Joanna Anderson

¶ 72 Plaintiffs argue that the testimony of Joanna Anderson, an employee of the lead lender, Bank One, establishes a genuine issue of material fact, that defendant was plaintiffs' attorney. Anderson was in charge of the Fleming loan. Anderson testified at her December 5, 2003 deposition that plaintiffs only negotiated the Fifth Amendment through counsel, and that she thought Scott Schreiber and defendant were plaintiffs' counsel. At her deposition, Anderson testified to the following:

"Q: Who did the bank negotiate with on behalf of the Goldfarbs?

A: We talked to George, Joe and [defendant].

Q: So the people who were negotiating with the bank on behalf of the Goldfarbs were George Gialenios, Joe Anderson, and [defendant]?

A: Yes."

¶ 73 Plaintiffs also argue that Anderson's contemporaneous notes about the Fleming loan and negotiations leading up to the execution of the Fifth Amendment raise a genuine issue of material fact that plaintiffs asked defendant to represent them in 2003. According to Anderson's notes, plaintiffs were hiring defendant to represent them. Anderson noted in a January 27, 2003 note that plaintiffs and defendant had discussions concerning an indemnification from the bank for directors and officers, and that these discussions occurred after the Goldfarb Board requested at the January 16, 2003 board meeting that Scott Schreiber and Don Hershman attempt to negotiate an indemnification for them from the bank. Plaintiffs argue that, from Anderson's notes, "[a] reasonable inference is that [defendant] agreed to negotiate an indemnification in direct response to the [plaintiffs'] request to do so as their counsel."

¶ 74 Anderson also noted that Scott Schreiber informed counsel for Bank One, Ed Howbert, that there was "no deal" unless (1) $765,000 was given back, (2) there was a release from $735,000, and (3) $500,000 of the subdebt was paid back. Plaintiffs urge that these demands concerned plaintiffs and the Goldfarb Corporation, not Fleming, and are evidence that defendant, through Scott Schreiber, accepted plaintiff Alonna Goldfarb's request to act as counsel to plaintiffs. Plaintiffs assert that these negotiated demands by Schreiber comprise the Fifth Amendment transactions for which plaintiffs were later sued and which form the basis of this lawsuit.

¶ 75 6. Defendant's Own Evidence / Judicial Admissions

¶ 76 Plaintiffs also argue that defendant's own evidence creates a genuine issue of material fact where it admitted that it accepted plaintiffs' request to act as their counsel and represented plaintiffs "in, at least, their capacities as Fleming board members." The portions of defendant's evidence relied on by plaintiffs is the deposition testimony of Scott Schreiber and Don Hershman, attorneys at defendant firm, and the opinion of defendant's expert.

¶ 77 Plaintiffs argue that, while Schreiber denied that the Fleming board was defendant's client, Schreiber testified at his deposition that he gave advice to the Fleming board of directors repeatedly. Specifically, plaintiffs rely on the following testimony by Schreiber:

"Q: Who were you giving legal advice to?

A: The board of Fleming collectively."

¶ 78 Plaintiffs also argue that Don Hershman testified that defendant gave advice to the Fleming board. The following is an excerpt from Hershman's deposition testimony, during questioning about the minutes of the meeting of the board of directors of the Goldfarb Corporation on January 16, 2003 (Exhibit 7):

"Q: That document indicates that you were present for this board meeting. Do you see that?

A: Yes.

Q: And it says you were present by invitation. Do you recall how you came to be at this board meeting?

A: I do not.

Q: Do you have any recollection of this board meeting at all?

A: Since seeing this yesterday, yes.

Q: Did you participate in person or by phone; do you recall?

A: By phone.

Q: Were you with Mr. Schreiber when you participated in the board meeting?

A: Yes.

* * *

Q: Do you recall having a conversation with anyone about the issue of whether [defendant] could represent Fleming and at the same time represent Goldfarb Corporation?

A: Not that I recall.

* * *

Q: Do you remember at any time speaking with anyone about whether [defendant] could represent Fleming and also represent members of the board of Fleming?

A: Not that I recall.

* * *

Q: How did you come to be at the board meeting?

A: I don't recall.

* * *

Q: Do you recall the discussions of the zone of insolvency at this Goldfarb board meeting which is described in Exhibit 7?

A: I do not.

* * *

Q: And the question in your mind is whether Board with an upper case B means the Fleming board or does it mean the Goldfarb board or might it mean both boards?

A: Yes.

Q: And you don’t know which it is intended to mean?

A: Exactly.

Q: But what we can say is that advice regarding the zone of insolvency was given during that meeting?

A: Yes.

Q: And that advice that there was a fiduciary obligation owing to creditors on behalf of somebody?

A: Correct.

* * *

Q: Let's take, for example, a person who is on both boards, and I believe it's true to say that Martin Goldfarb was on the board of Fleming and the board of Goldfarb. Do you recall that?

A: I don't.

Q: Assume with me for a moment that that is true or was true.

A: Okay.

Q: The advice concerning the zone of insolvency and the fiduciary obligations would extend to Martin Goldfarb, correct?

A: Yes.

Q: And it would extend to anyone else who was on the Goldfarb board who was also on the Fleming board, correct?

A: Correct.

Q: It would extend to them as individual human beings, correct?

A: Correct.

* * *

Q: So when you go to a board meeting and you give advice to the board, you are giving advice to the individual members of the board as well?

A: Yes.

Q: And you are giving it to them in their capacity as an individual human being?

A: In their capacity as a member of the board of directors."

¶ 79 Schreiber similarly maintained at his deposition that he was advising the Fleming board, but he was vague when it came to his recollection of what advice he gave at the plaintiff Goldfarb Corporation board meeting. Schreiber testified, in relevant part, as follows:

"Q: Did you ever have any discussions about fiduciary duties with the Goldfarbs or any of them?

A: In the context of Fleming's obligations to the creditors, I had that conversation. I discussed with the Goldfarbs that Fleming's board has a fiduciary obligation to its creditors.

Q: And were you giving that advice to the Fleming board?

A: I had given that advice to the Fleming board, I believe. I think I was also at this meeting reiterating it for the Goldfarb board that the Fleming board had a fiduciary obligations to its creditors.

* * *

Q: Who was giving that advice to them at the board meeting, correct?

A: We were advising the Fleming board. We were not advising the Goldfarb board.

* * *

Q: And then it goes on to say, 'By allowing the sale to proceed at this time, counsel advised that the board would be acting in Fleming's best interest in fulfilling its duties.'

Do you recall saying that?

A: I don't recall saying that.

Q: Might have, might not?

A: Probably might have said something like that, okay ***.

* * *

Q: Going on on this Exhibit 7 here [the Goldfarb Corporation meeting minutes], it says, in the next paragraph, 'counsel advised that directors would not be personally liable for the payment of income taxes or given that the CEO and CFO had control of the cash for the payment of payroll taxes.'

Do you see that?

A: Yes, I do.

Q: Did you give that advice?

A: I don't recall."

¶ 80 Although Schreiber maintained at his deposition that he represented only Fleming, the line between advice to Fleming and advice to plaintiffs and plaintiff Goldfarb Corporation became increasingly blurred when plaintiffs' counsel attempted to elicit clearer answers from Schreiber until, finally, Schreiber admitted there was "overlap" and "off-line" advice to the board of plaintiff Goldfarb Corporation because it was a majority shareholder of Fleming:

"Q: Did the Fleming board of directors know that you were going to the Goldfarb board meeting?

A: Some of them did because they were – there was an overlap.

Q: Did they give you permission to do that?

A: Not that I'm aware of.

* * *

Q: Did you need permission to do it?

A: No, I don't think so.

Q: Why not?

A: Because there was an overlap. Because the Goldfarb Corporation was 80 percent shareholder, if I remember. It is very common in my practice that I will be consulted off-line per se, off-line out of a board meeting, with a majority shareholder about a situation where the shareholder is involved.

Q: And you'll give that shareholder advice?

A: I will tell that shareholder what's going on at a board meeting. I'll tell that shareholder the status, but I will not give that shareholder advice.

Q: Would you tell that shareholder that the board of directors has fiduciary duties of one kind or another?

A: It depends if the topic came up. I don't know.

Q: Would that constitute advice if you did?

A: No, because it's a shareholder, and if this person is not a director of the corporation then it's not advice.

Q: If he was a director it would be advice?

A: If it was – if he was a director he probably would have heard it already.

Q: If he was director it would be advice?

A: It would be advice.

Q: It would be advice, correct?

A: Yeah."

¶ 81 Schreiber was asked at his deposition about a legal invoice from defendant to Fleming dated February 1, 2003, where there were two entries for January 13, 2003 for preparing for and participating in a "conference call with clients," which is the date of the teleconference board meeting of the Goldfarb Corporation. Schreiber testified the notation for "clients" referred to "[w]hoever I was on the call with."

¶ 82 Plaintiffs also argue that defendant's own expert witness, Gerald Munitz, concluded that defendant represented the individual plaintiffs, at least as directors of Fleming. Munitz opined at his deposition that an attorney-client relationship existed between defendant and plaintiffs, in their capacities as directors of Fleming. Munitz testified as follows:

"Q: Okay. So a relationship of lawyer and client did exist between [defendant] and [plaintiffs] Martin Goldfarb, Stanley Goldfarb and/or Alonna Golfarb I'm going to say in regard to their position as directors of Fleming?

A: Yes."

¶ 83 C. Is There a Genuine Issue of Material Fact?

¶ 84 Plaintiffs argue that there is a genuine issue of material fact whether defendant entered into an attorney-client relationship with plaintiffs. Plaintiffs also argue that the evidence shows

that they were, at the very least, intended third-party beneficiaries of the relationship between defendant and Fleming during the course of the drafting and execution of the Fifth Amendment.

¶ 85 Upon reviewing the above evidence, under our *de novo* review we determine that there is a genuine issue of material fact regarding whether an attorney-client relationship was formed between plaintiffs and defendant.

¶ 86 1. Clarifying the Evidence We Consider in Our Review

¶ 87 We first clarify the role of certain pieces of evidence in our review of the summary judgment. Plaintiffs argue that the testimony by Schreiber, Hershman, and Munitz constitute judicial admissions, citing *Renshaw v. Black,* 299 Ill. App. 3d 412, 418-19 (1998). Plaintiffs argue that these judicial admissions establish that defendant represented and gave legal advice to plaintiffs in their capacity as officers and/or directors of Fleming. Plaintiffs argue that, "[s]ince the [plaintiffs] were sued by the Trustee as directors of Fleming and, in turn, sued [defendant] for negligence in giving them advice as directors of Fleming, this alone is sufficient to overturn the Order granting summary judgment."

¶ 88 The deposition testimony of Schreiber and Hershman is a party admission, not a judicial admission. Supreme Court Rule 212(a)(2) provides that discovery depositions can be used "as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person." Ill. S.Ct. R. 212(a)(2) (eff. Jan. 1, 2011). See also *Calloway v. Bovis Lend Lease, Inc*., 2013 IL App (1st) 112746, ¶ 88. Discovery depositions may be used to impeach the testimony of the deponent as a witness, as a party admission, and for any purpose for which an affidavit may be used. *Skonberg v. Owens-Corning Fiberglas Corp*., 215 Ill. App. 3d 735, 749 (1991) (citing *Security Savings & Loan Association v. Commissioner of Savings & Loan Association*, 77 Ill. App. 3d 606 (1979)). On the other hand,

"[j]udicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86 (2010) (citing *Robins v. Lasky*, 123 Ill. App. 3d 194, 198 (1984)).

¶ 89 The testimony of Munitz, defendant's expert, is also not a judicial admission but, rather, an evidentiary admission which is subject to challenge and can be controverted. *Renshaw*, 299 Ill. App. 3d at 418. Such an evidentiary admission can, however, raise a factual question precluding summary judgment. *Id.* at 418-19.

¶ 90 Regarding the remaining third party witnesses, we emphasize that our focus is on the conduct of plaintiffs and defendant, and the plaintiffs' resulting belief. In analyzing the testimony of the non-party witnesses in this case, our focus remains on the parties and their agents and their interactions. The attorney-client relationship cannot be created by a third party who has no authority to act. *Torres v. Divis*, 144 Ill. App. 3d 958, 963, 494 N.E.2d 1227, 1231 (1986) (citing *Zych v. Jones*, 84 Ill. App. 3d 647 (1980)). Whether the non-party witnesses believed there was attorney-client relationship between defendant and plaintiffs has no bearing on whether in fact there was such an attorney-client relationship between plaintiffs and defendant.

¶ 91 Defendant makes a last-ditch argument against consideration of the minutes in its reply brief by arguing that the minutes constitute inadmissible hearsay and should not be considered, citing to *Agins v. Schonberg*, 397 Ill. App. 3d 127, 136 (2009), *Gunn v. Sobucki*, 352 Ill. App. 3d 785, 789 (2004), and *Zonta v. Village of Bensenville*, 167 Ill. App. 3d 354, 357 (1988). However, defendant did not raise this objection in the circuit court below and so has waived it. See *Parkway Bank & Trust Co. v. Meseljevic*, 406 Ill. App. 3d 435, 443 (2010) (a failure to object constitutes a waiver of the issue on review). Indeed, defendant not only failed to object to the

minutes as hearsay below, defendant actually relied on the minutes and included them as an exhibit in its own motion for summary judgment.

¶ 92 2. Clarifying the Law:

An Attorney-Client Relationship Can Be Implied

¶ 93 We also clarify the applicable law, which hold that an attorney-client relationship can be implied. Defendant's propositions do not represent an accurate full statement of the law on this issue. Defendant argues that there was no attorney-client relationship with plaintiffs as a matter of law because there was no written retainer agreement or any other documentation to evidence an attorney-client relationship between defendant and plaintiffs. Defendant argues that Illinois law "requires explicit authorization for the formation of an attorney-client relationship," citing to *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 13 (2009) ("the client must explicitly authorize the attorney to work on his behalf and the attorney must indicate an acceptance of that authority to work on the client's behalf.").

¶ 94 Contrary to defendant's argument, precedent provides that an attorney-client relationship can be found based on the conduct of the defendant attorney and does not necessitate an "explicit request." The above cherry-picked language from *Kensington's Wine Auctioneers & Brokers* is not a full and accurate statement of the law on the formation of an attorney-client relationship. For the above statement of the law found in *Kensington's Wine Auctioneers & Brokers*, the court in that case cited to and relied on *Wildey v. Paulsen*, 385 Ill. App. 3d 305 (2008). But the court in *Wildey* looked to the entirety of the parties' conduct, not simply a strict request to act as counsel

and response indicating assent. The court looked at counsel's conduct, as well as the client interview sheet, the retainer agreement and bills, in finding an attorney-client relationship.[6]

¶ 95 It is true that the attorney-client relationship "requires the consent of both the attorney and client." *Simms*, 192 Ill. 2d at 382. " '[T]he client must manifest [his or her] authorization that the attorney act on [his] behalf, and the attorney must indicate [his or her] acceptance of the power to act on the client's behalf.' " *Simms*, 192 Ill. 2d at 382 (quoting *Simon*, 291 Ill. App. 3d at 509).

¶ 96 But a formal or written agreement is not a prerequisite to the formation of an attorney-client relationship. *Herbes v. Graham*, 180 Ill. App. 3d 692, 699 (1989). A contract of retainer may be express or implied, written or oral. See *Zych*, 84 Ill. App. 3d at 651. The lack of such documents or explicit request thus does not establish as a matter of law that there was no attorney-client relationship.

¶ 97 It is undisputed that there is no written retainer agreement or bills between plaintiffs and defendant, or other correspondence explicitly detailing a request and acceptance between defendant and plaintiffs. The question is not whether an explicit attorney-client relationship was formed but, rather, whether an implied attorney-client relationship was formed. The parties' citation to any cases hinging on such documentary evidence is therefore inapposite to this case and does not aid our analysis.

¶ 98 Further, while defendant stresses the fact that there were two written retainer agreements with Fleming, and no retainer agreement with plaintiffs, it is undisputed that the original scope of

[6] We note that plaintiffs' citation to *Wildey* in support of their argument is therefore somewhat misplaced, as there it was not only counsel's conduct but also other objective pieces of evidence, such as a client interview sheet, retainer agreement and bills, that established the attorney-client relationship.

the retainer agreement with Fleming kept getting expanded by further representation on other matters for Fleming leading to the negotiation and drafting of the Fifth Amendment, without any further additional written retainer agreements. Defendant attempts to downplay this fact by arguing that the retainer agreement pertained to the same client and the same general subject of representation, but there is no denying the fact that defendant's representation even of Fleming went beyond the scope of the original written retainer agreement. " 'If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved.' " *Board of Managers of Eleventh St. Loftominium Association v. Wabash Loftominium, L.L.C.*, 376 Ill. App. 3d 185, 195 (2007) (quoting *SWS Financial Fund A v. Salomon Brothers, Inc.*, 790 F. Supp. 1392, 1398 (N.D.Ill.1992). "However, '[i]f a lawyer has served a client over a substantial period in a variety of matters, the client may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.' " (Emphasis omitted.) *Id.* An attempt to minimize the nature of the alleged attorney-client relationship by focusing on the initial specific retainer agreement and subsequent bankruptcy representation retainer agreement is not persuasive in light of the undisputed broader ongoing representation throughout the entire pre-bankruptcy period of Fleming, especially where plaintiffs were the common management group of both Fleming and the Goldfarb Corporation. See *Wabash Loftominium, L.L.C.*, 376 Ill. App. 3d at 196 (holding that an attempt to minimize the nature of the attorney-client relationship by focusing on specific assignments in 2000 and 2004 was not persuasive in light of the extensive representation of corporations having a common management group).

¶ 99 Defendant also argues that plaintiffs cannot "bootstrap" their own alleged attorney-client relationship as directors of a corporation upon defendant's representation of the corporation. In support of its argument, defendant cites to: *Reddick v. Suits*, 2011 IL App (2d) 100480, ¶ 35;

ABC Trans National Transportation, Inc. v. Aeronautics Forwarders, Inc., 90 Ill. App. 3d 817, 831 (1980); *Blue Water Partners, Inc. v. Mason*, 2012 IL App (1st) 102165; *Michel v. Gard*, 181 Ill. App. 3d 630 (1989); and *Felty v. Hartweg*, 169 Ill. App. 3d 406 (1988).[7] These cases all simply restate the same general proposition that an attorney for a corporation does not owe a duty to directors and officers or shareholders. Moreover, plaintiffs do not even make such a "bootstrap" argument that there was an attorney-client relationship with defendant based solely on the fact that they were officers and directors.

¶ 100 The fact that plaintiffs were officers and directors of the corporation does not establish that they were therefore also individually clients of defendant. However, it also does not mean that they were *not* clients of defendant. Dual representation can and does occur, despite apparent conflicts. The current Illinois Supreme Court Rules of Professional Conduct instruct that if the interests of the company and individuals differ, counsel can only represent both if such differences will not hinder the attorney's representation, if both are aware of the conflict, and if both consent to the joint representation. IL R S CT RPC Rule 1.7 (eff. Jan. 1, 2010). We must apply the law to the facts of each case to determine whether an attorney-client relationship was formed, whether express or implied.

¶ 101 Finally, also contrary to defendant's protestation, the client's belief is a legitimate consideration in determining whether an implied attorney-client relationship was formed, and the analysis does focus on the client's viewpoint rather than that of the attorney. *Herbes*, 180 Ill. App. 3d at 699. However, a client cannot unilaterally create the relationship, and the putative client's belief that the attorney is representing him is only one consideration. *Meriturn Partners*,

[7] *Schechter v. Blank*, 254 Ill. App. 3d 560 (1993) is entirely inapposite as it involved a debtor's attorney and the trustee in a bankruptcy case, not a corporation and its officers and directors, and so we do not discuss this case.

LLC, 2015 IL App (1st) 131883, ¶ 10 (citing *Rosenbaum v. White*, 692 F.3d 593, 601 (7th Cir. 2012)).

¶ 102 But, "[i]f an attorney knows that a person is relying on his performance of services and he performs for that person's benefit without limitation, *an attorney-client relationship can be found*." (Emphasis added.) *Meriturn Partners, LLC*, 2015 IL App (1st) 131883, ¶ 10. This statement of the law summarizes all the above principles and is the most on-point for our analysis of the particular facts of this case.

¶ 103 3. Application of the Law to the Facts of This Case

¶ 104 The evidence put forth by plaintiffs in opposition to defendant's summary judgment motion presents genuine issues of material fact concerning the formation of an attorney-client relationship with plaintiffs in their capacities as officers and directors of Fleming, and not solely to Fleming, the corporation.

¶ 105 "Whether an attorney-client relationship exists, and thus whether the attorney owes a duty to a particular person, is a question of law." *Meriturn Partners, LLC*, 2015 IL App (1st) 131883, ¶ 10 (citing *Blue Water Partners, Inc. v. Mason*, 2012 IL App (1st) 102165, ¶ 38). "However, findings of fact often must be made concerning the formation of the attorney-client relationship to, for example, resolve disputes concerning communications, acts undertaken, or the parties' respective understandings." *Id*. In this case, the many disputed facts necessitate resolution by a trier of fact.

¶ 106 We find the following emphasized portions of the minutes of the January 16, 2003 board meeting of the Goldfarb Corporation create a genuine issue of material fact whether there was an attorney/client relationship with plaintiffs:

"Minutes of the meeting of the *Board of Directors of THE GOLDFARB CORPORATION*, held by conference call on Thursday, January 16, 2003, at the hour of 8:30 o'clock in the forenoon (*Toronto time*).

PRESENT:

Martin Goldfarb, Alonna Goldfarb, Marshall Cohen, Bud Coughlan, Peter Doering, Stanley Goldfarb, Michael Kirby, Robert Sutherland

Being a *quorum of the members of the board*. Also present by invitation of the Board was *Karen Killeen, Chief Financial Officer to the Corporation*, Peter Dunne of Cassels [sic] Brock & Blackwell, and Scott Schreiber and Don Hershman of Much Shelist et al.

* * *

Fleming has retained bankruptcy counsel: *Scott Scheiber and Don Hershman*. *Counsel then briefed the Board on its obligations in the new situation*. Fleming has entered the zone of insolvency and as a result, the Board has fiduciary obligations to Fleming's creditors. *Counsel also has been in touch with the banks' counsel*. The banks want to maximize collateral and remove *The Goldfarb Corporation*[] from its involvement in Fleming.

In return for the [Goldfarb] Corporation[']s resignation from Fleming's Board of Directors and entering into a voting trust arrangement assigning its shares in Fleming to a bank nominee, the banks have agreed to release Fleming's claim on the Corporation for the remaining US$735,000 of subordinated debt and to treat the US$735,000 of subordinated debt advanced pari Passau with the bank's debt. Additionally, it will cover all obligations of the Goldfarb Corporation for George Gialenios' stay bonus. Fleming will be put up for sale. ***

* * *

The Board discussed with counsel the US rules regarding payment of unsecured claims.

Clearly, Fleming is running out of cash. By allowing the sale to proceed at this time *counsel advised that the Board would be acting in Fleming's best interests and fulfilling its duties*. After discussion, the Board concluded that at this time there were no viable alternatives.

Counsel advised that directors would not be personally liable for the payment of income taxes, or given that the CEO and CFO had control of the case, for the payment of payroll taxes. The banks have committed to advance funds for payroll taxes once the amendment is settled.

* * *

The Board asked counsel to negotiate with the Lenders an indemnification from all claims as an addition to the agreement negotiated. *** (Emphases added.)"

¶ 107 Alonna Goldfarb, who drafted these minutes, testified that where the minutes indicate that "counsel" briefed the board on its obligation in the light of Fleming's pre-bankruptcy financial situation, the word "counsel" referred to Schreiber and Hershman.

¶ 108 Karen Killeen, Goldfarb Corporation's chief financial officer, also testified that the reference to counsel refers to the Goldfarb Corporation's U.S. counsel, and that the Goldfarb Corporation's only U.S. counsel was defendant. Killeen also testified to an email of January 15, 2003 to Schreiber where she asked him to advise plaintiffs about their negotiations with Bank One.

¶ 109 The minutes indicate that Schreiber and Hershman were present by invitation, and the constitution of the quorum of members of the Goldfarb Corporation, as well as the other individuals present, clearly indicated that it was a board meeting for the Goldfarb Corporation.

¶ 110 The case of *Meriturn Partners*, 2015 IL App (1st) 131883, is dispositive. The facts in *Meriturn Partners* are extremely similar to this case. In *Meriturn Partners*, this court held that the evidence supported the finding that an intellectual property attorney consented to perform services for an entire transaction involving investment by a private equity company and outside investors, so as to establish attorney-client relationship with the investors, even though the retainer letter referred only to the private equity company. The trial court had found that the attorney owed a duty of care to the investors as well, and this court affirmed. The written retention agreement was only between Meriturn Partners, LLC and the defendants. *Meriturn Partners*, 2015 IL App (1st) 131883, ¶ 11. Despite this retainer agreement, the facts showed that the attorney knew that other investors were going to be involved and knew that their investment was dependent on his work. *Id.* at ¶ 13. There was a conference call meeting with not only the plaintiff but also the investors, and the attorney knew that the investors were on the conference call in which he gave legal advice, but the attorney never expressed any concern about exchanging confidential information. *Id.* The attorney also did not attempt to clearly limit the scope of his representation during that call to only the stated services in the retainer agreement. *Id*. This court held that the evidence as a whole showed that the attorney performed services for the transaction as a whole, not just for Meriturn. *Id*.

¶ 111 Further, this court held even if we were to have found that no attorney-client relationship existed between defendants and the outside investors, the plaintiffs could recover on the basis that they were known third-party beneficiaries to the undisputed attorney-client relationship

between Meriturn and defendants. *Id*. at ¶ 14. This court further held that, "because the aim of the representation was to provide advice about patent ownership for the entire transaction, defendants' duty extended to the outside investors who were to directly benefit from defendants' services." Id. at ¶ 15. "Defendants knew or should have foreseen that a breach of the requisite duty of care would result in a loss for both Meriturn and the outside investors. There was evidence introduced at trial that [the defendant's attorney] even directly gave some of the outside investors legal advice." *Id*. Further, it was "undisputed that defendants were retained to provide legal services concerning the entire $6 million investment." *Id*.

¶ 112 The facts of this case parallel the facts of *Meriturn Partners.* Plaintiffs have presented evidence that here, just as in *Meriturn Partners*, defendant's attorneys participated in a conference call involving plaintiffs during which they gave legal advice that was not limited to defendant's alleged restricted scope of representation. Also, the advice given pertained to the entire transaction, which involved not only Fleming but also, primarily, plaintiffs.

¶ 113 Defendant attempts to minimize the minutes of the Goldfarb Corporation board meeting by arguing that there was other counsel present at the meeting, and that "the minutes do not identify which counsel was making the alleged statements." But the fact that other counsel was present does not prove that defendant was not also acting as counsel for plaintiffs. A client may form an attorney-client relationship with more than one attorney or law firm on the same legal matter. See *Firkus v. Firkus*, 200 Ill. App. 3d 982, 990 (1990). Moreover, the Goldfarb Corporation's outside counsel present at the board meeting was Canadian counsel, who was not qualified to give advice regarding U.S. law. The opinion letter submitted by the Goldfarb Corporation's outside Canadian counsel pursuant to the Fifth Amendment rendered an opinion only as to compliance with the laws of Ontario and Canada. The advice given by counsel at the

Goldfarb Corporation meeting pertained to U.S. law regarding plaintiffs' fiduciary duties. According to Killeen's deposition testimony, the only U.S. counsel present for the Goldfarb Corporation board meeting who could give the above advice regarding U.S. law were defendant's attorneys, Don Hershman and Scott Schreiber.

¶ 114 Moreover, these minutes were for the board meeting of *plaintiff Goldfarb Corporation*, not a board meeting of Fleming. Defendant has not presented any evidence explaining why its attorneys participated in the Goldfarb Corporation board meeting at all, unless they were indeed giving advice to plaintiffs. Had defendant's attorneys only restricted defendant's representation to Fleming as its client, it would have advised *Fleming*'s board of directors at a board meeting for *Fleming*, not the Goldfarb Corporation. There would be no reason for defendant's attorneys to participate in the Goldfarb Corporation board meeting unless defendant's attorneys were giving advice to plaintiffs.

¶ 115 As apparent from the above excerpts from their depositions, Hershman and Schreiber were also unclear as to whether they were giving advice to solely Fleming the corporation or to plaintiffs as board members and officers of both Fleming and the Goldfarb Corporation. Indeed, Schreiber did not even distinguish between the Fleming board and the Goldfarb Corporation board, testifying at his deposition that he and Hershman "were advising the Fleming board," at the *Goldfarb Corporation* board meeting. Schreiber then admitted that it was "very common in my practice that I will be consulted off-line per se, off-line out of a board meeting, with a majority shareholder about a situation where the shareholder is involved." Schreiber admitted that if the shareholder was also a director of the corporation, this would be legal advice. It is undisputed that the Goldfarb Corporation, comprised of the individual Goldfarb plaintiffs, was

also a director of Fleming, and that two of the individual Goldfarb plaintiffs were directors of Fleming.

¶ 116 Defendant has not presented any evidence establishing that it was, instead, plaintiffs' Canadian counsel who advised plaintiffs at the Goldfarb Corporation meeting. Though Hershman and Schreiber were adamant and clear in their initial testimony during their depositions that they were attorneys only for Fleming, they were vague as to how they actually came to be involved in the Goldfarb Corporation board meeting. Schreiber testified that he could not "recall." However, Schreiber testified at his deposition that defendant's legal invoice to Fleming for legal work on January 13, 2003 in preparing for and participating in a conference call with "clients" referred to "[w]hoever I was on the call with," which included the individual plaintiffs and the board of the Goldfarb Corporation. Schreiber also testified that he could not recall the discussions of the zone of insolvency at this Goldfarb board meeting. But when questioned about the Goldfarb Corporation minutes' recitation, "By allowing the sale to proceed at this time, counsel advised that the board would be acting in Fleming's best interest in fulfilling its duties," Schreiber testified he "[p]robably might have said something like that, okay."

¶ 117 Defendant's argument that the evidence establishes that another counsel advised plaintiffs is not borne out by the record. Defendant cites to the deposition testimony of George Gialenios, the CEO of Fleming. Gialenios testified that Tobias Keller of the firm of Pachulski Stang Ziehl Young & Jones sent him a letter providing an opinion to the officers and directors of Fleming regarding the obligations and duties of the officers and directors of financially distressed companies, which was forwarded to Alonna Goldfarb. While defendant argues that the Keller letter supports an inference that defendant did not provide any legal advice to plaintiffs, because Keller ostensibly provided the legal advice to Fleming's officers and directors, the letter actually

cuts against defendant. While Gialenios forwarded the letter to Alonna Goldfarb, this does not indicate that Keller provided advice to the Fleming board members. In reviewing both Gialenios' deposition as well as the letter from Keller to Gialenios, it is apparent that the letter was sent solely to Gialenios, at his request. It was not sent to all the officers and directors of Fleming.

¶ 118 Moreover, nowhere in the Keller letter does he provide any legal advice regarding the Fifth Amendment and its transactions or to negotiations with the Lenders. The letter only provides a summary of directors' fiduciary duty while in the zone of insolvency generally, without regard to any contemplated transactions. The letter does not mention anything about the negotiations with the Lenders, much less provide advice regarding the negotiations and Fifth Amendment transactions. Also, it is undisputed that defendant acted as Fleming's attorney for the entire transaction and period of time leading up to and including Fleming's bankruptcy. The Keller letter does not disprove plaintiffs' assertion that defendant provided legal advice to them. At best, it creates a further genuine issue of material fact.

¶ 119 Defendant argues that plaintiffs' belief was unreasonable, and that their "unreasonable subjective 'belief' " that defendant "at some point also agreed to represent them" is "not sufficient to create an attorney-client relationship," citing to four cases: *Kopka v. Kamensky & Rubenstein*, 354 Ill. App. 3d 930, 935-36 (2004) and *Felty v. Hartweg*, 169 Ill. App. 3d 406, 410 (1988), where the courts held that the claim that a corporate attorney knew or should have known that a shareholder would rely on the attorney's services was insufficient to give rise to a duty of care. Defendants also cite to *Bastian v. Petren Resources Corp*., 271 Ill. App. 3d 232, 238 (1995) and *Gold v. Vasileff*, 160 Ill. App. 3d 125, 127-28 (1987), which held that the plaintiffs' belief that the attorney was representing them was unreasonable and could not be the basis of a breach of fiduciary duty action.

¶ 120 None of these cases are on point. In *Kopka*, the attorneys and accounting firm were hired *after* the plaintiff shareholder tendered his resignation and there was no evidence that the plaintiff shareholder was an intended third-party beneficiary of the services provided. *Kopka*, 354 Ill. App. 3d at 935-36.

¶ 121 In *Felty*, the court held that the plaintiff minority shareholder failed to establish the existence of an implied attorney-client relationship between the attorney and the minority shareholders, or that the minority shareholders were intended third-party beneficiaries of the relationship between the attorney and the corporation, because there was no evidence that the relationship was intended to benefit the minority shareholders. *Felty*, 169 Ill. App. 3d at 410. The court noted that "[e]ven in closely held corporations, minority shareholders often have conflicting interests with the corporation." *Id*. In the case before us, on the other hand, plaintiffs were all officers and directors of Fleming and plaintiff Goldfarb Corporation was the majority shareholder of Fleming.

¶ 122 In *Bastian* this court held that the defendant law firm owed no duty to the plaintiff investors where the firm drafted an offering memoranda sent to plaintiffs indicating that the firm was acting as "counsel to the partnership," and at the time plaintiffs were not partners. *Bastian*, 271 Ill. App. 3d at 238.This court held that the plaintiffs "certainly knew they were not members of the partnerships" and so any belief that the firm was representing them was unreasonable. *Id*.

¶ 123 In *Gold*, the court held that an attorney representing sellers of grocery business owed no fiduciary duty to the buyers and, if the buyers reposed trust and confidence in the seller's attorney, it was "unreasonably placed." *Gold*, 160 Ill. App. 3d at 128.

¶ 124 In this case, unlike *Kopka*, plaintiffs were all still officers and directors of Fleming during defendant's representation of Fleming and defendant's work on the Fifth Amendment

negotiations with the bank. Unlike *Felty*, plaintiff Goldfarb Corporation was the majority shareholder and a director of Fleming and the individual plaintiffs were all also officers and directors of Fleming, and there is evidence that defendant's representation of Fleming during the bank negotiations resulting in the Fifth Amendment was intended to benefit plaintiffs and indeed did benefit plaintiffs. Further, whereas the line of representation was clearly drawn in *Bastian*, in this case there is evidence that defendant participated in the Goldfarb Corporation's board meeting and gave advice specifically to plaintiffs pertaining to the Fifth Amendment transactions. Finally, unlike *Gold*, plaintiffs were all officers and directors of Fleming and the Goldfarb Corporation was the majority shareholder of Fleming and were not on the opposite side of the transaction.

¶ 125 We conclude there is enough evidence to raise genuine issues of material fact whether the advice of counsel referred to in the minutes referred to defendant's attorneys, whether that advice given was to plaintiffs, including the Goldfarb Corporation, as well as Fleming, and whether it was reasonable for plaintiffs to assume from defendant's conduct that defendant was essentially also acting as their counsel, and not only as counsel for Fleming.

¶ 126 Defendant also argues that "[t]he fact that third parties, such as Plaintiffs here, may derive an incidental benefit from [defendant's] work on behalf of Fleming does not create a duty on behalf of the attorney to third parties such as The Goldfarb Corporation or the Individual Goldfarbs because the primary purpose of Fleming's retention of [defendant] was to benefit Fleming." (Emphasis in original.)

¶ 127 But a claim for malpractice may indeed be maintained by a party who was an intended third-party beneficiary of an attorney-client relationship. To establish a legal malpractice action, the facts must show that the plaintiff was a client of the defendant, *or that the primary purpose of*

the attorney-client relationship between the defendant and a third party was to benefit the plaintiff. (Emphasis added.) *Michel v. Gard*, 181 Ill. App. 3d 630, 637 (1989) (citing *Pelham v. Griesheimer*, 92 Ill. 2d 13 (1982), *York v. Stiefel*, 99 Ill. 2d 312 (1983)). *Pelham* held that a nonclient could maintain a cause of action for malpractice if he were able to prove that "the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party." *Pelham*, 92 Ill. 2d at 21.

¶ 128 While defendant characterizes any benefit to plaintiffs from the Fifth Amendment transactions as incidental, and asserts that the primary purpose was to benefit Fleming, plaintiff Goldfarb Corporation was a party to the Fifth Amendment and the entirety of the Fifth Amendment transactions primarily benefited plaintiffs and plaintiff Goldfarb Corporation, not Fleming. The terms of the Fifth Amendment included the following: in return for the Goldfarb Corporation's resignation from Fleming's board and entering into a voting trust arrangement assigning its shares in Fleming to a bank nominee, the banks would release Fleming's claim on the Goldfarb Corporation for $735,000 of subordinated debt and to treat the $735,000 of subordinated debt "pari Passau with the bank's debt"; the Lenders agreed to execute a release where they agreed not to enforce the Goldfarb Corporation's obligation to fund subordinated debt owed to Fleming for the $735,000 under a letter agreement with the Lenders dated March 11, 2002; the bank would cover all obligations of the Goldfarb Corporation for George Gialenios' stay bonus; Fleming would be put up for sale and the Lenders would pay the Goldfarb Corporation 3.5% of the net proceeds received from the sale of Fleming.

¶ 129 Contrary to defendant’s assertion that it was plaintiffs themselves who did all the negotiating with the Lenders, plaintiffs presented evidence that defendant, through its attorneys

Hershman and Schreiber, indeed negotiated with the Lenders on behalf of plaintiff Goldfarb Corporation and individual plaintiffs.

¶ 130 Howbert, Bank One's attorney, testified that he "dealt a lot with Scott Schreiber during the month of January" and some of the issues concerned requests by the Goldfarbs and other issues concerned requests by Fleming but "the Goldfarb questions were the primary focus."

¶ 131 Joanna Anderson, who worked for Bank One, the lead lender, and was in charge of the Fleming loan, testified that the people who were negotiating with the bank on behalf of the Goldfarbs were George Gialenios, Joe Anderson, and defendant. Anderson's January 27, 2003 note stated that plaintiffs and defendant had discussions concerning an indemnification from the bank for directors and officers, and that these discussions occurred after the Goldfarb Board requested at the January 16, 2003 board meeting that Scott Schreiber and Don Hershman attempt to negotiate an indemnification for them from the bank. Anderson testified that her contemporaneous notes also reflected that Schreiber informed counsel for Bank One, Howbert, that there was "no deal" unless (1) $765,000 was given back, (2) there was a release from $735,000, and (3) $500,000 of the subdebt was paid back. In fact, this very deal was negotiated and became one of the Fifth Amendment transactions that were the basis of the bankruptcy adversary proceeding.

¶ 132 Meanwhile, defendant is inconsistent even in its own brief on appeal regarding whether it participated in the negotiations. At one point in its brief defendant denies ever conducting any negotiations for the Fifth Amendment, and at another place in its brief defendant maintains that it negotiated but only on behalf of Fleming. We readily conclude that there is a genuine issue of material fact regarding defendant's role in the negotiations that benefited plaintiffs in the Fifth Amendment transactions.

¶ 133 We determine, under our *de novo* review, that there is a genuine issue of material fact whether defendant and plaintiffs entered into an attorney/client relationship with plaintiffs. As this court has previously observed, "findings of fact often must be made concerning the formation of the attorney-client relationship to, for example, resolve disputes concerning communications, acts undertaken, or the parties' respective understandings." *Meriturn Partners, LLC*, 2015 IL App (1st) 131883, ¶ 10. This is such a case.

¶ 134 We emphasize that in *Meriturn Partners*, we affirmed the judgment finding an attorney-client relationship, while in this case we are not making any factual findings; we are only determining that there is a genuine material fact on the issue. We determine that if the evidence in *Meriturn Partners* supported a judgment finding an attorney-client relationship, the extremely similar facts of this case readily support finding that a genuine issue of material fact exists such that the issue should be submitted to a trier of fact.

¶ 135 At the very least, there is a genuine issue of material fact whether plaintiffs were intended third-party beneficiaries of the attorney/client relationship between defendant and Fleming. Summary judgment based on the element of attorney-client relationship should not have been granted.

¶ 136 III. Other Matter Defeating The Claim: Release

¶ 137 Finally, we briefly address defendant's alternative argument that we should nevertheless affirm the grant of summary judgment because plaintiffs' claim for malpractice is barred by the release they signed in the bankruptcy adversary proceeding, which they had argued in their 2-619 motion to dismiss based on other affirmative matter barring the claim that was denied by the

circuit court.[8] Plaintiffs, however, reply that the release in the adversary proceeding concerned only the claims brought by the Trustee. We may affirm a trial court's judgment on any grounds which the record supports. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 48 (citing *Water Tower Realty Co. v. Fordham 25 E. Superior, L.L.C.*, 404 Ill. App. 3d 658, 665 (2010)). Here, however, the release does not support the grant of judgment in favor of defendant.

¶ 138 Illinois courts recognize and give effect to releases that are specific and pertain to claims that are within the contemplation of the parties. See *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 23 (2003). "Where a release is clear and explicit, the court must enforce it as written." *International Insurance Co.*, 242 Ill. App. 3d at 623 (citing *Continental Illinois National Bank & Trust Co. v. Sax*, 199 Ill. App. 3d 685, 693 (1990)). However, general words in the release are restrained by specific recitals contained in the document. *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1014 (2010). Releases are strictly construed against the benefitting party and must be written with great particularity. *Id*. "[A] release will not be construed to defeat a valid claim that was not within the contemplation of the parties at the time the agreement was executed, and general words of release are inapplicable to unknown claims." *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 614 (2007) (citing *Farm Credit Bank*, 144 Ill. 2d at 447-48; *Thornwood, Inc.*, 344 Ill. App. 3d at 21). Moreover, the guiding principle is that " '[t]he intention of the parties controls the scope and effect of the release, and this intent is discerned from the release's express language as well as the circumstances surrounding the agreement.' " *Janowiak*, 402 Ill. App. 3d at 1014 (quoting *Fuller Family Holdings*, 371 Ill. App. 3d at 614). Where a release provides very general language that does not

[8] We note that an order denying a motion to dismiss, which is an interlocutory, non-final order, may be reviewed as a step in the procedural progression leading to the grant of the final judgment specified in the notice of appeal. See *CitiMortgage, Inc. v. Hoeft*, 2015 IL App (1st) 150459, ¶ 8.

indicate with any clear definition what claims were within the contemplation of the parties, " 'the courts will restrict the release to the thing or things intended to be released and will refuse to interpret generalities so as to defeat a valid claim not then in the minds of the parties.' [Citation.]" *Thornwood*, 344 Ill. App. 3d at 21.

¶ 139 Guided by the above principles, we do not read the adversary proceeding release as contemplating the release of any malpractice claim against defendant. Rather, as the circuit court found in ruling on defendant's 2-619 motion based on the release, it was a general release pertaining only to claims for amounts due in relation to the Trustee's claims in the adversary proceeding. The settlement agreement in the bankruptcy adversary proceeding provided the following, in relevant part:

> "WHEREAS, the Trustee and the Defendants wish to resolve all disputes between the Trustee and the Defendants, including (without limitation) all matters the Trustee alleged or that could have been alleged against the Defendants in Rafool v. The Goldfarb Corporation, et al., Adv. Case No. 04-8166 (the "*Litigation*") before the United States Bankruptcy Court for the Central District of Illinois (the "*Claims*");
>
> * * *
>
> 1. The Settlement Amount. This Agreement constitutes the full settlement of all of the Claims in exchange for the undertakings and obligations of the Defendants pursuant to this Agreement ***.
>
> * * *
>
> 3. Mutual Release. The Trustee, in his individual capacity as well as in his capacity as Trustee, and each of the Defendants hereby mutually release each other, their past, present, and future agents, brokers, representatives, principals, attorneys, affiliate,

predecessors, successors, heirs, executors and assigns, from amounts due – including damages, attorneys' fees, costs, and expenses – in connection with the Claims for any conduct through the Effective Date."

¶ 140 The use of the word "Claims" refers to the preamble clause definition of "Claim" as "all matters the Trustee alleged or that could have been alleged against the defendants" (plaintiffs here) in the adversary proceeding, thus meaning only the claims by the Trustee against plaintiffs. There is nothing in the above release language indicating any contemplation by the parties of releasing any claims for malpractice. *Cf. Weisblatt v. Colky*, 265 Ill. App. 3d 622 (1994) (holding a release of a party's former attorney was effective where both parties clearly contemplated the malpractice claim being released, and the client was represented by new counsel during the drafting and execution of the release).

¶ 141 Further, when a release is executed contemporaneously with the settlement agreement, " 'they are considered one contract and the information needed to determine what "claims, demands, and causes of action" were intended can be derived from the face of the [contemporaneously executed documents].' " *Thornwood*, 344 Ill. App. 3d at 22 (quoting *First National Bank of Geneva v. Lively*, 211 Ill. App. 3d 1, 5 (1991)). The release in the bankruptcy adversary proceeding was executed contemporaneously with the settlement agreement in that case, which indicates that only the claims in the adversary proceeding were contemplated by the release. We therefore hold that the adversary proceeding release does not bar plaintiffs' current action for professional negligence against defendant, and we cannot affirm summary judgment in favor of defendant on this alternate ground.

¶ 142 CONCLUSION

¶ 143 We reverse the grant of summary judgment because there are genuine issues of material fact regarding the existence of an implied attorney-client relationship between plaintiffs and defendant. Alternatively, at the very least, there remains a genuine issue of material fact whether plaintiffs were intended third-party beneficiaries of the attorney-client relationship between defendant and Fleming. Defendant was highly involved with plaintiffs in every step of the negotiations and drafting of the Fifth Amendment, which incorporated transactions and releases concerning plaintiffs specifically in their corporate capacities, and not just the corporation (Fleming).

¶ 144 We reject defendant's alternative argument that summary judgment was proper because the release in the bankruptcy adversary proceeding constitutes other affirmative matter barring this action. The release in the bankruptcy adversary proceeding does not bar this action. The release signed by plaintiffs in the bankruptcy adversary proceeding appears to be comprehensive concerning the release of any amounts already due in connection with the Trustee's claims, but is not clear that it contemplated releasing plaintiffs' attorneys from claims for malpractice.

¶ 145 Due to the genuine issues of material fact, the entry of summary judgment in favor of defendant must be reversed. We remand for further proceedings consistent with our order.

¶ 146 Reversed and remanded.