

STATE OF MAINE  
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT  
BCD-CV-20-07

KELSEY HERRICK, et al.,

Plaintiffs

**COMBINED ORDER ON MOTIONS  
FOR SUMMARY JUDGMENT**

v.

MELISSA MONTEJANO, et al.

Defendants

Before the Court are Defendant Attorney Jessica Demers's and Defendant Bourque & Clegg LLC's motions for summary judgment. For the following reasons, the Court grants both motions.

**BACKGROUND**

This is a professional negligence case arising out of Defendants Jessica Demers's and Bourque and Clegg's representation of plaintiff Herrick during Herrick's divorce from her husband Jody Brooks. In addition to Herrick, the Complaint also names as Plaintiffs the children of Herricks and Brooks (the "Minor Plaintiffs"). The following facts are not in dispute.

In 2011, Herrick decided to divorce her husband, Jody Brooks, and retained Bourque and Clegg to represent her in the divorce. (Demers S.M.F. ¶¶ 2, 4-5; B&C S.M.F. ¶ 6.) Demers was at that time an attorney employed at Bourque and Clegg and was the only attorney who assisted Demers during the divorce. (Demers S.M.F. ¶¶ 2 4-5; B&C S.M.F. ¶ 7.) The fee agreement between by Bourque & Clegg and Herrick names Herrick as the only client. (Demers S.M.F. ¶ 6; B&C S.M.F. ¶ 9.) The Springvale District Court entered a divorce judgment on June 7, 2012. (Demers S.M.F. ¶ 13; B&C S.M.F. ¶ 15.)

Paragraph 17 of the judgment provided that:

Defendant [Jody Brooks] shall maintain his life insurance policy in the amount of \$300,000 with a reputable insurance company, naming Plaintiff as beneficiary thereof, until child support and spousal support obligations established hereunder cease, and shall provide periodic proof, upon request by Plaintiff, that said policy is in full force and effect.

(Demers S.M.F. ¶ 16; B&C S.M.F. ¶ 17.) At the time of the judgment, Brooks worked at the Portsmouth Naval Shipyard and had a Federal Employees Group Life Insurance (“FEGLI”) policy.

(Demers S.M.F. ¶ 3; B&C S.M.F. ¶ 4.) The last time that Herrick and Demers discussed Jody Brooks’s life insurance was on June 6, 2012, the day of the divorce trial. (Demers S.M.F. ¶ 22; B&C S.M.F. ¶ 22.) Demers told Herrick that Herrick would need to call Brooks’s employer to make sure that Brooks named Herrick as the beneficiary of Brooks’s life insurance policy. (Demers S.M.F. ¶ 23; B&C S.M.F. ¶ 20.)

Pursuant to the judgment, Brooks’s Attorney was required to prepare and present the Court with two Qualified Domestic Relations Orders (“QDROs”) in order to effectuate the Court’s award of 50% of Brooks’s Thrift Savings Plan (“TSP”) and 50% of Brooks’s Federal Employee Retirement System Account (“FERS Account”) to Herrick. (Demers S.M.F. ¶¶ 14-15.) Brooks’s attorney failed to do this. (Demers S.M.F. ¶ 31.) Instead, Demers prepared the QDROs and mailed them to the Court on August 8, 2012. (Demers S.M.F. ¶ 32.) On September 6, 2012, Demers mailed certified copies of the QDROs to the Office of Personnel Management (“OPM”) and the TSP Legal Processing Unit. (Demers S.M.F. ¶ 34.)

On October 31, 2012, Demers ended her employment at Bourque & Clegg and started her own law firm. (Demers S.M.F. ¶ 35; B&C S.M.F. ¶ 33.) In March 2013, Bourque & Clegg, on behalf of Herrick, filed a contempt action against Jody Brooks to recover unpaid legal fees that the Divorce Judgment obligated him to pay to Bourque & Clegg. (B&C S.M.F. ¶ 27.) Bourque and

Clegg continued to represent Herrick in proceedings related to the collection of these legal fees until February 7, 2014. (Pl.’s Opp. to B&C S.M.F. ¶ 62; B&C Reply S.M.F. ¶ 62.) On July 5, 2013, OPM mailed a letter to Bourque and Clegg regarding Brooks’s FERS Account and which requested a certified copy of the Divorce Judgment. (Demers S.M.F. ¶ 38.) Bourque and Clegg forwarded the letter to Demers. (Demers S.M.F. ¶ 39.) In August 2013, Demers mailed a certified copy of the Judgment as well as another copy of the QDRO to OPM. (Demers S.M.F. ¶¶ 39, 41.)

In early 2019 Brooks died in an automobile accident after having married Melissa Montejano.<sup>1</sup> (Demers S.M.F. ¶ 43; B&C S.M.F. ¶ 34.) Brooks was covered by the same FEGLI policy at the time of his death. (Pl.’s Add’l S.M.F. ¶ 56.) Brooks, however, had not designated a beneficiary for his FEGLI policy. (Demers S.M.F. ¶ 53.) On January 20, 2019, Herrick inquired about obtaining Brooks’s FEGLI benefits and Herrick received an application. (Demers S.M.F. ¶ 44.) On March 4, 2019, Herrick learned that her application had been denied and that the FEGLI benefits were being paid to Defendant Montejano. (Demers S.M.F. ¶ 45.) The stated reason for the denial was that the divorce Judgment had not been received by the FEGLI office prior to Brooks’s death and that the Judgment did not expressly reference Brooks’s FEGLI policy. (Demers S.M.F. ¶¶ 45-50; B&C S.M.F. ¶ 36-37.)

Plaintiffs filed the complaint in this matter on July 31, 2019. (Compl. at 12.) The Complaint was received by the court on August 2, 2019. (Compl. at 1.)

### **STANDARD OF REVIEW**

“The function of a summary judgment is to permit a court, prior to trial, to determine whether there exists a triable issue of fact or whether the question[s] before the court [are] solely . . . of law.” *Bouchard v. American Orthodontics*, 661 A.2d 1143, 44 (Me. 1995). “[S]ummary

<sup>1</sup> Melissa Montejano is also named as a defendant in Plaintiffs’ complaint.

judgment is appropriate when the portions of the record referenced in the statements of material fact disclose no genuine issues of material fact and reveal that one party is entitled to judgment as a matter of law.” *Currie v. Indus. Sec., Inc.*, 2007 ME 12, ¶ 11, 915 A.2d 400.

## **DISCUSSION**

Both Demers and Bourque and Clegg argue that summary judgment should be granted in their favor because Plaintiff Herrick’s claims are barred by the statute of limitations and because they did not owe the Minor Plaintiffs a duty of care. Plaintiffs oppose the motion on two grounds. First, Plaintiffs argue that a genuine issue of material fact exists with regard to whether the defendants breached the applicable duty of care within the limitations period. Second, Plaintiffs argue that, because the Minor Plaintiffs are the intended third-party beneficiaries of Brooks life insurance benefits, the Defendants owed them a duty of care. The Court does not find either of Plaintiffs’ arguments persuasive.

### **I. Statute of Limitations**

“[A] civil action against an attorney for professional negligence, malpractice, or breach of contract for legal services “shall be commenced within 6 years after the cause of action accrues.” *Packgen, Inc. v. Bernstein*, 2019 ME 90, ¶ 1, 209 A.3d 116 (quoting 14 M.R.S. § 752). The limitations period begins to run “from the date of the act or omission giving rise to the injury, not from the discovery of the malpractice, negligence or breach of contract . . . .” *Id.*; 14 M.R.S. § 753-B.

The undisputed facts of this case show that the only legal services the Defendants provided to Herrick within the period of limitations was to mail a QDRO and certified copy of the judgment to OPM and to represent Herrick in proceedings related to a motion for contempt. Plaintiffs’ legal malpractice claims, however, are not based on any alleged negligence in connection with either of

these acts. Instead, Plaintiffs claims are based on alleged omissions or negligent failures to act by the defendants which resulted in Herricks's failure to obtain Brooks's FEGLI benefits. Specifically, Plaintiffs claim that Defendants' breached their duty by: (1) failing to file a copy of the judgment with the FEGLI office; (2) failing to inquire with Brooks's divorce attorney if either he or Brooks had filed a copy of the Judgment with the FEGLI office; and (3) failing to inquire with the FEGLI office if the judgment had been filed.

Plaintiffs argue that because the Defendants' negligent conduct was an omission, there is therefore no certain date on which the Plaintiffs' cause of action accrued. Plaintiffs aver that the date is a question of fact for the jury to decide and that a genuine issue of material fact therefore exists. Because the Complaint was filed on July 31, 2019, however, the Plaintiffs may only pursue relief for a cause of action which accrued on or after July 31, 2013. 14 M.R.S §§ 752, 753-B. In order to defeat Defendants' motions for summary judgment, Plaintiffs must therefore generate a prima facie case that a negligent omission occurred within the limitations period. *Pawlendzio v. Haddow*, 2016 ME 144, ¶ 14, 148 A.3d 713 ("to defeat a defendant's motion for summary judgment, a plaintiff must present evidence sufficient to generate a prima facie case of a legally cognizable claim"). In other words, the Plaintiffs must present evidence that (1) the Defendants failed to act; (2) the Defendants' failure to act breached the standard of care owed to the Plaintiffs; and (3) the Defendants' failure to act occurred within the six years preceding the filing of the complaint in this matter.

There is no genuine dispute that the defendants failed to file a certified copy of the Divorce Judgment with the FEGLI office or investigate whether Jody Brooks had named Herrick as the beneficiary of his FEGLI policy. This failure, however, is not so obviously a breach of duty that a

breach may be determined as matter of law or is within the ordinary knowledge of laymen.<sup>2</sup> *Id.* ¶ 12 (citing *Kurtz & Perry, P.A. v. Emerson*, 2010 ME 107 ¶ 26, 8 A.2d 677). Expert testimony is therefore required to establish that these failures constitute a breach of the Defendants’ duty. *Id.* Plaintiffs are unable to defeat Defendants’ motions for summary judgment simply by alleging that the Defendants breached their duty. *See id.* ¶ 14.

In support of their statements of material fact, Plaintiffs have filed depositions of the Defendants and Plaintiff Herrick as well as correspondence between Herrick’s attorney and the FEGLI Office. None of Plaintiffs’ statements of material fact reference any expert testimony which would establish that the standard of care required either Demers or Bourque & Clegg to inquire into whether the FEGLI Office had received a copy of the divorce judgment or whether Jody Brooks had named Herrick as the beneficiary of his FEGLI policy. Similarly, there is no expert testimony which would establish that the Defendants were required to perform either of these acts after July 31, 2013, the date six years prior to the filing date of the complaint in this case. Given the absence of expert testimony, Plaintiffs are unable to generate a prima facie case that the Defendants committed a breach of duty within the limitations period. *See id.* ¶¶ 12, 14. Accordingly, there is no genuine issue of material fact in regard to whether the Defendants are liable to Plaintiff Herrick for professional negligence and the Defendants are entitled to a judgment as a matter of law on Plaintiff Herrick’s claims. *Currie v. Indus. Sec., Inc.*, 2007 ME 12, ¶ 11, 915 A.2d 400.

<sup>2</sup> For instance, paragraph 17 of the Divorce Judgment required Jody Brooks to maintain a \$300,000 life insurance policy with a “reputable insurance company.” The Divorce Judgment does not mention Brooks’s FEGLI policy. Additionally, the parties agree that Brooks did not name Herrick—or any other person—as the beneficiary of his policy. There is thus no dispute that Brooks’s failure to name Herrick as the beneficiary caused Herrick’s injury.

## **II. No Duty Was Owed to the Minor Plaintiffs**

14 M.R.S. § 853 provides “[i]f a person entitled to bring any of the actions under sections 752 to 754 . . . is a minor . . . when the cause of action accrues, the action may be brought within the times limited herein after the disability is removed.” In light of this provision, Defendants cannot argue that the claims of the Minor Plaintiffs are time barred. Defendants do however, argue that summary judgment should be granted because neither Defendant owed the Minor Plaintiffs a duty of care. Plaintiffs do not dispute that the Minor Plaintiffs were not clients of either Defendant. (Pl.’s Opp. to Demers S.M.F. ¶ 9; Pl.’s Opp. to B&C S.M.F. ¶¶ 9-10.) Instead, Plaintiffs argue that the Minor Plaintiffs are owed a duty of care as intended beneficiaries of the Defendants’ legal assistance. (Pl.’s Opp. S.M.F. ¶ 9.) Specifically, the Plaintiffs claim that they were the intended beneficiaries of financial benefits such as child support payments and life insurance payments. (Pl.’s Opp. S.M.F. ¶ 9.)

As a general rule, “an attorney owes a duty of care to only his or her client.” *Estate of Cabatit v. Canders*, 2014 ME 133, ¶ 21, 105 A.3d 439. Only “in limited and rare situations, when an attorney’s actions are intended to benefit a third party and where policy considerations support it” will an attorney owe a duty of care to “a limited class of nonclients.” *Id.* “An attorney will never owe a duty of care to a nonclient, however, if that duty would conflict with the attorney’s obligations to his or her clients.” *Id.* “The existence of a duty of care is a question of law . . . .” *Reid v. Town of Mt. Vernon*, 2007 ME 125, ¶ 14, 932 A.2d 539.

In this case, there is no genuine dispute in regard to who was the intended beneficiary of Brooks’s FEGLI policy. Both the Plaintiffs and the Defendants agree that, pursuant to the Divorce Judgment, Brooks was required to name Plaintiff Herrick—not the Minor Plaintiffs<sup>3</sup>—as the

<sup>3</sup> Plaintiffs, in fact, concede the Brooks wanted to name the Minor Plaintiffs as the beneficiaries of his policy. (B&C S.M.F. ¶ 19; Pl.’s Opp. B&C S.M.F. ¶ 19.)

beneficiary of his policy. Moreover, there are multiple and competing interests involved in a divorce proceeding; interests which include the custodial, emotional and financial support of children. *Miller v. Miller*, 677 A.2d 64, 68 (Me. 1996). Any recognition that an attorney representing a party to a divorce also owed a duty of care to that party's minor children could create multiple conflicts of interest, and also could impose an undue burden on the legal profession. *Estate of Cabatit*, 2014 ME 133, ¶¶ 18, 21. Given the undisputed facts in the summary judgment record, the Court is able to determine as a matter of law that neither Demers nor Bourque and Clegg could have owed the Minor Plaintiffs a duty of care as nonclients. *Id.*; *Reid*, 2007 ME 125, ¶ 14, 932 A.2d 539.

### **CONCLUSION**

There is no genuine issue of material fact with respect to whether the Attorney Defendants committed professional negligence within the six years preceding the filing of the complaint in this matter. The Court also concludes that, as a matter of law, the Attorney Defendants did not owe the Minor Plaintiffs a duty of care.

**The entry is**

**Defendant Jessica Demers's Motion for Summary Judgment is GRANTED.**

**Defendant Bourque and Clegg's Motion for Summary Judgment is GRANTED.**

**The clerk is directed to incorporate this order into the docket by reference. M.R. Civ. P. 79(a).**

**Date: August 10, 2020**

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/s  
M. Michaela Murphy  
Justice, Superior Court**