STATE OF MAINE
SAGADAHOC, SS.

BUSINESS AND CONSUMER COURT
LOCATION: WEST BATH
DOCKET NO.: BCD-WB-CV-09-07

NORTHERN MATTRESS CO., INC., ET AL,

Plaintiffs

v.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

BERNSTEIN SHUR SAWYER & NELSON, ET AL,

Defendants

Before the court is the motion of Defendants Bernstein, Shur, Sawyer and Nelson P.A. ("BSSN"), John L. Carpenter and Nelson A. Toner (collectively, "Defendants") for summary judgment on all counts of Plaintiffs' Complaint, to wit: professional negligence (Count I); breach of fiduciary duty (Count II); and negligent infliction of emotional distress (Count III). Also before the court is the motion of Plaintiffs Northern Mattress Company, Inc. ("Northern Mattress" or the "Company") and Peter Redman, for partial summary judgment as to the issue of liability on the claims in their Complaint, and for summary judgment on all counts of Defendants' counterclaim, to wit: breach of contract (Count I); unjust enrichment (Count II); and account annexed (Count III). Both motions are brought pursuant to M.R. Civ. P. 56.

FACTUAL BACKGROUND

In 1991, Peter Redman and his brother, Mark Redman, purchased all of the remaining stock in their parents' company, Northern Mattress. Because of Peter's prior ownership of stock in the Company, the result of the 1991 stock purchase was that Peter owned 53 percent of the stock and Mark owned 47 percent. In addition to being the majority shareholder of Northern Mattress, Peter Redman also became President of the Company in 1991.

In the Spring of 2003, Peter Redman took a ten-month leave of absence from the Company. According to Peter his 2003 leave of absence was part of an agreement he had with Mark pursuant to which Mark would also take a leave of absence at some point in the future. While Peter was on his leave of absence, Mark continued to work with the assistance of a management team and, according to Peter, with continued input and assistance from Peter.

In February 2004, Peter and Mark disagreed with one another regarding control of the Company. In response to the brothers' emerging disagreement, the Company's corporate attorney, Bryan Dench, suggested that they each retain separate counsel. Peter Redman was referred to Nelson Toner, an attorney at BSSN, by one of his acquaintances. Peter retained Toner to assist him with negotiations with Mark regarding the Company and with what Peter regarded as Mark's "demands." *See* Defs.' Supp. S.M.F. ¶ 43; Pls.' Opp. S.M.F. ¶ 43.

Because Mr. Toner's primary area of practice is tax law, he brought in John Carpenter to advise Peter in connection with the ongoing dispute with his brother regarding the management, control and future operations of Northern Mattress. Peter's instructions to Toner and Carpenter were that he wanted Defendants to help him preserve the long-term value of the Company for the two brothers and their families. Peter did not, however, ask Defendants to represent the Company. Defs.' Supp. S.M.F. ¶ 48; Pls.' Opp. S.M.F. ¶ 48. *See also* Northern Mattress Depo. at 573:14-574:4. Defendants maintain that they only agreed to represent Peter, individually, and did not represent the Company. Plaintiffs, however, contend that Defendants later undertook work on behalf of the Company and, on at least one occasion, billed the Company for that work directly.

In early April 2004 and in the run up to Peter's return from his leave of absence, Northern Mattress hired Deborah Gallant as the Company's outsourced Human Resources Manager. On April 6, 2004, Gallant held a meeting with Peter and Mark where they discussed the

implementation of a new management structure. Peter initially agreed to, and was pleased with, Mark being made CEO. However, on April 12, 2004, Peter called Ms. Gallant to inform her that he had changed his mind and no longer wanted Mark to be CEO. According to Ms. Gallant, she told Peter that he should discuss the matter with Mark directly. When Peter informed Mark of his change of heart, a disagreement erupted, resulting in Mark throwing a punch at Peter.

After Gallant spoke with members of the Northern Mattress management team, she prepared a report in April 2004 and concluded that the Company was not a healthy work environment. Defs.' Supp. S.M.F. ¶ 39. She noted a certain degree of dysfunction in the ownership and management dynamic at the Company. The report also noted that Tammy Simpson, a long-time employee of the Company, had a very bad experience working for and with Peter in the past; that Mark Bell (another employee of the Company) and Simpson were concerned not only for themselves, but for the Company; and that Bell and Simpson were terrified at the prospect of Peter returning to the Company and running its day-to-day operations because things were chaotic when Peter was in charge. *Id*. According to Plaintiffs, Ms. Simpson's and Mr. Bell's expressed displeasure with Peter only came after he balked at making Mark CEO.

In addition to their disagreement over management of the Company, one of the issues the brothers faced in early 2004 was a project they had previously agreed to pursue involving the construction and operation of an Ashley Furniture Store in South Portland ("Ashley Expansion"). The Ashley Expansion was originally Peter's idea and had been something the brothers had been discussing prior to April 2004 and prior to the engagement of Defendants' legal services. However, according to Plaintiffs, by the time Defendants were hired, the Ashley Project was no longer something that was being pursued nor was it a project Peter was interested in reviving.

On May 4, 2004 the brothers and their respective attorneys met and negotiated an Interim Agreement to coordinate the short-term management of the Company and to provide a possible framework for its future management. The Interim Agreement had a stated expiration date of July 15, 2004. The agreement included a provision for the creation of a 5-member Board of Directors and an amendment to the Shareholders' Agreement, which removed a disputed mutual consent provision in Article V.[1]

At that meeting, Peter and Mark agreed to move forward with the Ashley Expansion. According to Plaintiffs, however, Peter was pressured into agreeing to move forward with the project and Defendants failed to adequately advise him regarding the Interim Agreement. Although Defendants have asserted that they counseled Peter extensively in the run-up to the meeting, Plaintiffs deny that claim and assert instead that Defendants not only failed to prepare him for the May 4th meeting but that they also ignored Peter's expressed concerns that Mark was trying to force him out of the Company and that any further pursuant of the Ashley Expansion would "make a bigger mess." *See* Pls.' A.S.M.F. ¶ 45F(1).

Notwithstanding Peter's alleged protestations, both Peter and Mark signed the Interim Agreement on May 4, 2004. Ultimately, however, the brothers did not implement the agreement and it expired on July 5, 2004. However, the Ashley project contemplated by the Interim Agreement continued to move forward despite Peter's alleged efforts to stop it. According to

[1] Article V of the Shareholders' Agreement provided that "all significant decisions . . . shall require [the Shareholders'] mutual consent. Defs.' Supp. S.M.F. ¶ 13. *See also* Pls.' Opp. S.M.F. ¶ 13. According to Defendants, this meant that "all significant decisions" would be made jointly by the Redman brothers. *See* Defs.' Supp. S.M.F. ¶ 12; Pls.' Opp. S.M.F. ¶ 12. Plaintiffs qualify Defendants' assertion by noting that the Shareholders' Agreement required Mark and Peter to vote their shares "from the date of this Agreement in favor of the election of John B. Redman, Sr. as a director to serve as the third director on a Board of Directors composed of the two Shareholders and said John B. Redman, Sr." Plaintiffs' Additional Statement of Fact ¶ 7C (hereinafter "Pls.' A.S.M.F. ¶ __"); and Pls.' Opp. S.M.F. ¶ 13. According to Plaintiffs, this provision made John B. Redman, Sr. the "tie-breaker" third member of the Board. Pls.' Opp. S.M.F. ¶ 13; and Defs.' Supp. S.M.F. ¶ 15.

Plaintiffs, this was largely due to Defendants' refusal to listen to his concerns or accede to his wishes.

Next in the line of events relevant to this case is an encounter alleged to have occurred on May 11, 2004. According to Defendants, on that date an incident occurred between Peter Redman and Tammy Simpson that caused Ms. Simpson to lodge a harassment complaint against Peter with Deborah Gallant. Plaintiffs deny that Peter engaged in any conduct warranting a complaint and suggest that Ms. Simpson's complaint represented a concerted effort by her and Mark to undermine Peter's position in the Company.

Thereafter, BSSN drafted a Memorandum, dated June 3, 2004, that was issued by Northern Mattress to Ms. Simpson. The Memorandum notes Ms. Gallant's conclusion in her report that Ms. Simpson's "concerns were legitimate" and Ms. Gallant's recommendation "that the most effective course of action . . . is to establish an office for Peter at a remote site . . . and require that he have no contact of any nature with you [Ms. Simpson]." Pls.' Exh. CC. The Memorandum further acknowledged that "[the Company's] Management has accepted the conclusions and recommendations of Ms. Gallant concerning your [Ms. Simpson's] complaint." *Id.*

Peter contends that the Memorandum, drafted by Defendants, was sent without his knowledge or consent and was contrary to his expressed desire that Defendants challenge Ms. Simpson's allegations and investigate them on his behalf. Pls.' A.S.M.F. 67; Pls.' Supp. S.M.F. ¶ 42. Defendants, however, counter that Peter reluctantly agreed that it would be detrimental to the Company if Ms. Simpson filed a complaint with the Maine Human Rights Commission. Defs.' Supp. S.M.F. ¶ 86. Defendants further assert that, "in light of Peter's stated objective to preserve the Company's value, Defendants concluded that it was not in Peter's best interest to fight Simpson's allegations." Defs.' Supp. S.M.F. ¶ 85.

Northern Mattress was billed for services by BSSN in connection with the Memorandum. Defendants, however, contend that the bill was sent to Northern Mattress in error and should have gone to Peter, individually.

In the midst of all of this, Peter spoke with his father, John Redman Sr., almost daily about Company matters and his dispute with Mark. Peter later suggested to Defendants that one way to resolve the ongoing management deadlocks was to return John Sr. to the Board of Directors. According to Defendants, Toner asked John Sr.'s attorney for permission to speak directly with John, Sr. about Peter's proposal, but the request was denied. Plaintiffs deny this and contend that an email from Defendants to Peter confirms that the law firm unilaterally decided that they did not want to place John, Sr. "in the middle." Pls.' Opp. S.M.F. ¶ 105. In this lawsuit, Peter contends that had his father been elected to the Board, John, Sr. would have prevailed over Mark to abandon the Ashley Expansion which, according to Plaintiffs, led to the downfall of the Company. *Id.* at ¶ 108.

At the heart of it, according to Defendants, BSSN only agreed to represent Peter, individually, and did not represent the Company. *See* Defs.' Supp. S.M.F. ¶¶ 46-55. Plaintiffs assert that Peter came to believe that BSSN represented the Company based the nature of the services rendered by the law firm and based on the fact that certain services were billed by BSSN to the Company rather than to Peter, individually. *See* Pls.' Opp. S.M.F. ¶¶ 46-55.

By early September 2004, Peter fired Defendants and hired Brann & Isaacson, including Peter Brann of that firm, to take Defendants' place. Defendants contend that, after their services had been terminated, Peter executed a $600,000 loan for the Ashley Expansion on September 22, 2004 and a $1,900,000 loan for the project on November 24, 2004. Defs.' Supp. S.M.F. ¶¶ 128-129. Plaintiffs qualify these assertions by arguing that the documents do not reflect that the mortgage and loan were for the Ashley Expansion. Pls.' Opp. S.M.F. ¶¶ 128-129. Plaintiffs go

on to say that the project was so far along by September 2004 that Peter felt he had no choice but to sign the financing documents. Pls.' Opp. S.M.F. ¶¶ 128-129.

Attorney Brann testified that his firm reviewed the documents for the $1.9 million loan and advised Peter with respect to that financing. Unaware that John Redman Sr. was represented, Attorney Brann directly contacted John Sr. about joining the Board of Directors. Defs.' Supp. S.M.F. 132; Pls.' Opp. S.M.F. ¶ 132. John Sr. was re-elected to the Board by both Mark and Peter in September 2004. Defs.' Supp. S.M.F. 133; Pls.' Opp. S.M.F. ¶ 133.

In October 2004, Mark filed a lawsuit against Peter but, as a result of the brothers' discussions with their father, Mark dismissed the lawsuit two weeks later and agreed to allow Peter to return to the Company and take full control of its management. Upon his return, Peter fired a number of senior managers while others, including Simpson and Bell, resigned. In October 2005, Mark filed a second lawsuit seeking dissolution of the Company.

In March 2006 Northern Mattress was sold to an outside liquidator and, in August or September 2006, the Company auctioned its office equipment and buildings. Northern Mattress closed its doors, finally, in March 2006. By the time Northern Mattress went out of business, Peter's parents had both died. Mark committed suicide in July 2006.

Peter and Northern Mattress now bring this litigation against BSSN, Toner and Carpenter.

DISCUSSION

M.R. Civ. P. 56(c) provides that summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." M.R. Civ. P. 56(c)). For purposes of summary judgment, a "material fact is one having the potential to affect the outcome of the suit." *Burdzel*

v. Sobus, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. If ambiguities in the facts exist, they must be resolved in favor of the non-moving party. *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 2, 796 A.2d 683, 685.

I. Defendants' Motion for Summary Judgment As to Northern Mattress's Claims

A. Professional Negligence – Count I of the Complaint

1. Attorney-Client Relationship

Defendants seek judgment on the legal malpractice claim by Northern Mattress on the grounds that neither BSSN nor the individual defendants, Toner and Carpenter, represented the Company. Defendants assert that they only represented Peter Redman. They also argue that, to the extent an attorney-client relationship can be implied, Northern Mattress's claim still fails and is barred due to lack of damages. According to Defendants, any malpractice claim by Northern Mattress is limited to the handling of the Tammy Simpson complaint, which was reflected in the law firm's allegedly erroneous invoices. However, they maintain that this work did not result in any harm to the Company since Ms. Simpson did not file a lawsuit against the Company.

In opposition, Plaintiffs maintain that Defendants did represent Northern Mattress, that Defendants' representation of Northern Mattress was adverse to Peter Redman's interests, and that the Company suffered damage as a result of Defendants' alleged negligence. *See* Pls.' Opp. at 11.

The Law Court has previously explained that an attorney-client relationship arises when "(1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." *Bd. of Overseers*

of the Bar v. Mangan, 2001 ME 7, ¶ 9, 763 A.2d 1189, 1192-93 (quoting *State v. Gordon*, 141 N.H. 703, 692 A.2d 505, 506 (N.H. 1997)).

After a review of the record, the court concludes that there is a genuine dispute of fact as to whether BSSN actually represented Northern Mattress. See *Mangan*, 2001 ME 7, ¶ 7, 763 A.2d at 1192 (explaining that the existence of an attorney-client relationship is a question of fact). While Defendants assert that they were never asked and never agreed to represent Northern Mattress at any time, the June 3, 2004 Memorandum drafted by BSSN and delivered to Ms. Simpson purports to represent a letter from "the Company." In addition, Northern Mattress, rather than Peter Redman, was billed for the legal services related to the Memorandum. Accordingly, the court concludes that there is a dispute of fact as to whether Defendants represented the Company with respect to the Tammy Simpson complaint. *See Larochelle v. Hodson*, 1997 ME 53, ¶ 12, 690 A.2d 986, 989 (explaining that any attorney-client relationship may be implied from the conduct of the parties).

However, the court also concludes that the breadth of the dispute in this case regarding Defendants' purported representation of Northern Mattress that survives summary judgment is limited to the events surrounding the Simpson complaint. The record does not support and, therefore, fails to generate a genuine dispute of fact regarding Plaintiffs' assertion that Defendant's representation of the Company was broader in scope or that, as Plaintiffs suggest, Defendants' representation included the larger shareholder dispute between Peter and Mark Redman, or matters relating to the corporate governance of Northern Mattress, or the Ashley Expansion project.

First, Peter Redman conceded on behalf of Northern Mattress at its corporate deposition that Northern Mattress never asked Defendants to represent it. *See* Defs.' Supp. S.M.F. ¶ 48 (*citing* Corporate Deposition of Northern Mattress at pp. 573:14-574:4. Second, unlike the

Memorandum drafted in connection with the Tammy Simpson matter and the bills that were sent to Northern Mattress regarding the investigation of her complaint, Plaintiffs have not presented any record evidence of legal services provided to the Company, as distinct from Peter Redman, to support an "implied" attorney-client relationship between Defendants and the Company.[2] Rather, the Interim Agreement – which Plaintiffs contend was one result of Defendants' alleged negligence – is expressly an agreement between Mark and Peter Redman, individually.

2. Third-Party Beneficiary

In the alternative, Plaintiffs argue that Northern Mattress was a third-party beneficiary of the Defendants' more general representation of Peter Redman. The court disagrees. *See* Pls.' Opp. at 11 (citing *inter alia Williams v. Mordkofsky*, 901 F.2d 158, 163 (D.C. Cir. 1990)).

Under Maine law,

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties *and* either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

[2] The court is aware of the fact that Plaintiffs assert at Paragraph 45D of their Additional Statement of Material Facts that: "On Wednesday, May 5, 2004, attorneys from Bernstein Shur proceeded to represent Northern [Mattress] and White Horse in drafting contracts to proceed with the Ashley Expansion. According to his bill, Mr. Carpenter began consulting with his firm's construction law department about 'construction issues.' That department began working on the construction management contract and 'project issues.'" *Id*. However, as Defendants note, Mr. Redman's affidavit does not cite to the bill upon which his testimony relies. Under Rule 56, "[t]he court is neither required nor permitted to independently search a record to find support for facts offered by a party." Accordingly, and in the absence of any properly supported assertion demonstrating corporate representation by Defendants, the court concludes that Plaintiffs have failed to generate a genuine dispute of fact regarding Defendants' alleged representation of Northern Mattress with respect to general corporate matters or the Ashley Expansion. Moreover, even if the court could consider A.S.M.F. ¶ 45D without a supporting record citation, nothing about the purported time entries, as quoted, supports Plaintiffs' claim that Defendants were representing Northern Mattress rather than Peter Redman on "construction issues."

Fleet Bank v. Harriman, 1998 ME 275, ¶ 6, 721 A.2d 658, 660 (*quoting* Restatement (Second) of Contracts § 302 (1981)) (emphasis added).

The Law Court has further explained:

> In assessing the relevant circumstances, courts must be careful to distinguish between the consequences to a third party of a contract breach and the intent of a promisee to give a third party who might be affected by that contract breach the right to enforce performance under the contract. If consequences become the focus of the analysis, the distinction between an incidental beneficiary and an intended beneficiary becomes obscured. Instead, the focus must be on the nature of the contract itself to determine if the contract necessarily implies an intent on the part of the promisee to give an enforceable benefit to a third party.

Id. (quoting *Devine v. Roche Biomedical Labs*., 659 A.2d 868, 870 (Me. 1995)).

In this case, Plaintiffs contend that Northern Mattress was a third-party beneficiary of Defendants' representation of Peter Redman by virtue of the fact that "Peter repeatedly told Toner and Carpenter that his objectives were to not lose power in the Company to his brother and to maintain the existing value of [the] Company, and they agreed to do so." Pls.' A.S.M.F. ¶ 37. Nothing in this assertion, however, indicates that Peter had any intent to confer upon the Company any enforceable rights vis-à-vis Defendants' representation. Absent any such intent, Plaintiffs cannot demonstrate that Northern Mattress was, in fact, a third-party beneficiary.

Moreover, it is not clear to the court that Maine law recognizes third-party beneficiary status in the context of attorney malpractice cases. Although Plaintiffs cite to cases from other jurisdictions in which courts have recognized the right of a non-client to sue an attorney for professional negligence under a "third-party beneficiary" theory, the court is aware of no case in which a court in Maine has done so. In support their argument that Northern Mattress may not sue under a third-party beneficiary theory, Defendants cite *Nevin v. Union Trust Co*., 1999 ME 47, ¶¶ 39-42, 726 A.2d 694, 701 in which the Law Court held that "individual beneficiaries do not have standing to sue estate planning attorneys for malpractice when they are not the client

who retained the attorney and when the estate is represented by a personal representative who stands in the shoes of the client." *Id.* at ¶ 41.

Although the Law Court's holding in *Nevin* was specific to estate planning attorneys, the Court's analysis and expressed concern regarding the potential complications and conflicts of interest that may result from conferring third-party beneficiary status on a non-client is instructive in this case. Here, there is no evidence to suggest that Northern Mattress hired Defendants to represent it on general business matters or that Defendants undertook any representation on behalf of Northern Mattress that was distinct from their representation of Peter Redman such that an attorney-client relationship existed.[3] Informed by the *Nevin* analysis and the apparent lack of Maine authority extending third-party beneficiary status to a party who neither retained an attorney nor was directly represented, this court declines to extend such status to Northern Mattress in this case.

Accordingly, in the absence of any indication that an attorney-client relationship existed between Defendants and Northern Mattress regarding matters other than the Simpson complaint or that Peter Redman intended to confer on the Company any rights arising out of Defendants' representation of him, the court concludes that the Company lacks standing to bring a more general claim for professional negligence.

3. Proximate Cause

Defendants' next argument in favor of summary judgment on Plaintiffs' malpractice claim is that Plaintiffs have failed to establish proximate cause.

In professional negligence cases, a plaintiff must show: "(1) a breach by the defendant of the duty owed to the plaintiff to conform to a certain standard of conduct; and (2) that the breach

[3] Indeed, Plaintiffs' own statements of fact demonstrate that other counsel represented Northern Mattress at all relevant times. *See* Pl.'s A.S.M.F. ¶¶ 65, 65B.

of that duty proximately caused an injury or loss to the plaintiff." *Corey v. Norman, Hanson & DeTroy*, 1999 ME 196, ¶ 10, 742 A.2d 933, 938-39. "Proximate cause is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred." *Merriam v. Wanger*, 2000 ME 159, ¶ 8, 757 A.2d 778, 780-81 (internal citations and quotation marks omitted). Further,

> [e]vidence is sufficient to support a finding of proximate cause if the evidence and inferences that may reasonably be drawn from the evidence indicate that the negligence played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonably foreseeable consequence of the negligence. The mere possibility of such causation is not enough, and when the matter remains one of pure speculation or conjecture, or even if the probabilities are evenly balanced, a defendant is entitled to a judgment.

Id.

Plaintiffs assert that Defendants' allegedly negligent representation was the proximate cause of Northern Mattress's failure and Peter Redman's consequent loss of his ownership interest, salary, and other pecuniary damage. Peter Redman further contends that he suffered emotional harm as a result of Defendants' alleged negligence.

Defendants argue that expert testimony is required to establish proximate causation and, because Plaintiffs have failed to put forth any expert testimony making a causal connection between Defendants' alleged negligence and Plaintiffs' alleged harm, Plaintiffs' claim fails as a matter of law. Plaintiffs disagree and contend that expert testimony is not required in this case.

(a) Expert Testimony

Defendants are correct that expert testimony is frequently required in professional negligence cases. Indeed, expert testimony is necessary in any case "involving complex facts beyond the knowledge of the average juror." *Tolliver v. Dep't of Transp.*, 2008 ME 83, ¶ 42, 948 A.2d 1223, 1237. However, a jury may permissibly conclude that proximate cause exists

without expert testimony "[i]f as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed[.]" *Tolliver*, 2008 ME 83, ¶ 42, 948 A.2d at 1236 (quoting W. PAGE KEETON, *PROSSER & KEETON ON THE LAW OF TORTS* 270 (5th ed. 1984)).

Plaintiffs do not appear to dispute that they do not have any expert testimony establishing that Defendants' alleged negligence proximately caused the Company to fail and Peter Redman to suffer pecuniary loss.[4] Therefore, the question is whether the lack of expert testimony is fatal to Plaintiffs' malpractice claims. After a review of the record, the court concludes that it is as to (a) Defendants' representation of Peter, individually, regarding his role as a shareholder of Northern Mattress, (b) damages that allegedly relate to the collapse of the Company and (c) any contention by Northern Mattress that the Company's demise is an element of damage relating to Defendants' handling of Ms. Simpson's complaint.

Defendants' alleged negligent representation of Peter Redman in matters relating to shareholders' rights, corporate governance, finance and other corporate matters and any causal connection to Peter Redman's alleged damages (including the collapse of a multi-million dollar company and his loss of his investment and salary) are complex matters outside the ken of the average juror. Moreover, disputed factual assertions regarding Peter Redman's actions following his take-over of the Company and the fact that he was represented by other counsel when the

[4] Notwithstanding the lack of argument on that point, Plaintiffs do include a number of purported statements of fact under the heading "expert depositions." However, the bulk of the "statements" in that section consists not of statements of any fact but rather purport to "incorporate by reference" Plaintiffs' expert witness designations and every statement contained in those designations. This practice is not in compliance with Rule 56, which requires short and concise statements of fact supported by focused record citation. Further, a review of some of the citations provided (e.g. A.S.M.F. ¶ 216A in which Plaintiffs assert that "expert Norton testified that based on his analysis of tax returns and other financial documents, the involvement in the Ashley Expansion adversely affected the net income of Northern Mattress . . .") does not support a causal link between Defendants' alleged negligence and Plaintiffs' alleged damages. That is, Plaintiffs' expert does not purport to opine that Defendants' alleged negligence was a substantial factor in the Ashley Expansion project or a cause of the Company's ultimate demise. Accordingly, the court disregards Plaintiffs' A.S.M.F. ¶¶ 214-219.

Ashley Expansion was finalized, have generated a question as to whether, even in the face of negligence by Defendants, there may have been multiple causes for Mr. Redman's alleged injuries. As the Law Court has previously explained, it is in cases such as this that "evidence of the [defendant's] responsibility for causation [is] all the more important." *Tolliver*, 2008 ME 83, ¶ 42 n.10, 948 A.2d at 1237 (quoting *Merriam*, 2000 ME 159, ¶ 18, 757 A.2d at 782).[5]

The lack of expert testimony establishing that Defendants' allegedly deficient representation of Peter Redman resulted in the failure of the Company and in Mr. Redman's pecuniary losses is fatal to his claim both for pecuniary damage and for the emotional distress he alleges resulted from that pecuniary loss. So too is the lack of expert testimony establishing that Defendants' handling of Ms. Simpson's complaint resulted in any of the pecuniary losses Northern Mattress seeks. Absent expert testimony establishing that Defendants' handling of Ms. Simpson's complaint somehow damaged or caused the financial collapse of the Company, Northern Mattress's claim for professional negligence fails.

(b) Emotional Suffering

With respect to Peter Redman's claimed emotional suffering as it relates to the Simpson complaint, Defendants contend that it is not compensable in a professional negligence action. After a review of the record, the court disagrees.

[5] Although Plaintiffs cite the business court's order in *Mortgage Solutions of Maine, Inc. v. Keniston*, BCD-WB-CV-07-12 in support of their claim that expert testimony is not required, Keniston is easily distinguishable. First, in denying summary judgment the court did not rule that expert testimony was not required. Rather, it concluded that the lack of expert testimony was not fatal to Plaintiffs' claim at the summary judgment stage because the nature of Plaintiffs' claims and the issue of causation were such that expert testimony *may* not be required. Further, in that case, the question was whether a defendant attorney's alleged failure to disclose information may have prevented his client from removing the check-writing authority of an employee. The damage allegedly suffered was the loss of a discrete amount of money when that employee later disbursed money using the company checking account. In the court's view, the limited scope of the alleged negligence and causation inquiry in that case is easily distinguishable from this case which involves much more complex facts relating to alleged negligence, causation and damages.

Although Defendants are correct that emotional suffering is not compensable in the context of a professional negligence claim where the loss is purely economic, the circumstances surrounding Ms. Simpson's complaint to the Company, Defendants' involvment in that matter, and Peter Redman's allegations as to the emotional impact he suffered as a result are not purely economic and are sufficient to withstand summary judgment. *See Garland v. Roy*, 2009 ME 86, ¶¶ 23-26, 976 A.2d 940, 947-48. Further, even if Mr. Redman's alleged "loss" was purely economic, emotional suffering damages are available when the conduct at issue is intentional "and/or when the attorney has been untruthful with his clients or has wantonly or willfully disregarded the consequences of his or her actions," *Id.* While Defendants contend that their alleged conduct was not sufficiently egregious to entitle Peter Redman to emotional distress damages, his assertions that Defendants drafted and issued the Memorandum, which is critical of him, without his consent and disregarded his repeated requests for a more thorough investigation of Ms. Simpson's allegations, when taken in the light most favorable to him, are sufficient to withstand summary judgment. *See id.* at ¶ 26.

4. Court's Action With Respect To Count I

Based upon all of the foregoing, the court concludes that Defendants' motion for summary judgment on Count I of the Complaint is denied as to that portion of Peter Redman's specific claim that Defendants negligently represented him in connection with the complaint by Tammy Simpson and that Defendant's negligence was a proximate cause of emotional distress and related damages sustained by him.[6] However, Defendants' motion is granted as to all of the remaining claims in Count I of the Complaint.

[6] Because the court has concluded that Mr. Redman's claim for pecuniary damage fails due to sufficient evidence of proximate causation, it need not reach Defendants' additional argument that his claim is derivative rather than direct. *See* 13-C M.R.S. § 751.

B. Plaintiffs' Breach of Fiduciary Duty Claim – Count II of the Complaint

Plaintiffs' breach of fiduciary duty claims are premised on the same conduct alleged in support of their legal malpractice claims. And, as Defendants note, the same rules of causation and standards of proof apply to claims for breach of fiduciary duty and claims of professional negligence. Defs.' Mot. at 25 (citing, *inter alia*, *Steeves v. Bernstein, Shur, Sawyer & Nelson, P.C.*, 1998 ME 210, ¶ 10, n.8, 718 A.2d 186, 189). In addition, a breach of a fiduciary duty may be compensable irrespective of whether that breach also constituted a breach of Defendants' duty "to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise." *Sohn v. Bernstein,* 279 A.2d 529, 532 (Me. 1971). *See also Niehoff v. Shankman & Assocs*., 2000 ME 214, ¶ 7, 763 A.2d 121, 124.

In line with the court's earlier conclusions regarding the legal malpractice claims in this case, Plaintiffs face the same problems of proof with respect to the causal link between their claimed damages, insofar as they relate to alleged economic losses following the Company's collapse, and Defendants' alleged actionable conduct – meaning, in this discussion, breach of fiduciary duty. Accordingly, the claims, if any, by Northern Mattress based on such a breach are all barred and those by Peter Redman arising out of Defendants' representation of him regarding the shareholder dispute, the Ashley Expansion and his pecuniary loss are also barred.

However, the court concludes that Peter Redman's breach of fiduciary claim as it relates to Ms. Simpson's harassment claim, like his malpractice claim, will survive summary judgment.

C. Negligent Infliction of Emotional Distress – Count III of the Complaint

Defendants request summary judgment on Peter Redman's negligent infliction of emotional distress (NIED) claim on the grounds that that claim is necessarily subsumed in his malpractice and breach of fiduciary duty claims. The court agrees. *See Rippett v. Bemis*, 672

A.2d 82, 87-88 (Me. 1996); and *Richards v. Town of Eliot*, 2001 ME 132, ¶ 34, 780 A.2d 281, 293.

As the Law Court has previously explained, when a wrongdoer has committed a tort other than NIED and that separate tort "allows a plaintiff to recover for emotional suffering, the claim for negligent infliction of emotional distress is usually subsumed in any award entered on the separate tort." *Curtis v. Porter*, 2001 ME 158, ¶ 19, 784 A.2d 18, 26. Further, while independent NIED claims have been permitted when a plaintiff establishes a so-called "special relationship," between the plaintiff and the alleged tortfeasor, those cases are not applicable here in light of the fact that Defendants' alleged duty arises out of the attorney-client relationship and because the court has concluded that damages for emotional suffering may be available in connection with Mr. Redman's malpractice claim. *See e.g. Bolton v. Caine*, 584 A.2d 615, 618 (Me. 1990); *Gammon v. Osteopathic Hosp. of Me.* 534 A.2d 1282 (Me. 1987); and *Rowe v. Bennett*, 514 A.2d 802, 807 (Me. 1986)). *See also Bryan R. v. Watchtower Bible & Tract Soc'y, Inc.*, 1999 ME 144, ¶¶ 30-31, 738 A.2d 839, 848. He may not, however, circumvent the restrictions relating to causation and damages attendant to that claim by also alleging negligent infliction of emotional distress.

Accordingly, because Mr. Redman's claimed emotional suffering as a result of Defendants' handling of the Simpson complaint may be compensable in connection with his malpractice and breach of fiduciary duty claims, the court concludes that his NIED claim is subsumed in those separate tort claims. Defendants are entitled to summary judgment on Count III of the Complaint.

D. Punitive Damages

Defendants' final argument in support of summary judgment is that Plaintiffs are not entitled to punitive damages as a matter of law. As Defendants point out, in order to recover

punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant acted with malice. *Shrader-Miller v. Miller*, 2004 ME 117, ¶ 20, 855 A.2d 1139, 1145. Malice, in turn, may be express or implied. *St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.,* 2002 ME 127, ¶ 16, 818 A.2d 995, 1001. Malice must be proven with evidence that a party acted with ill will toward the plaintiff or that the conduct was so outrageous that malice can be implied. "[M]ere reckless disregard of the circumstances" is not sufficient. *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985).

In light of the court's conclusion that Plaintiffs have failed to sufficiently demonstrate a causal link between Defendants' representation regarding the Company's board of directors and the Ashley Expansion and Plaintiffs' alleged damages, Plaintiffs are not entitled to recover punitive damages with respect to that aspect of Defendants' representation. That therefore leaves Peter Redman's malpractice and breach of fiduciary duty claims as limited to his allegations regarding the handling of the Simpson matter. After a review of the record, the court concludes that, while disputes of fact exist as to Defendants' conduct surrounding the investigation (or lack thereof) of Ms. Simpson's complaint and the subsequent Memorandum drafted by Defendants such that Mr. Redman's claim for emotional suffering may survive summary judgment, he has failed to point to evidence demonstrating malice, either express or implied, as distinct from reckless disregard, by *clear and convincing* evidence. Accordingly, Mr. Redman may not recover punitive damages in this case.

II. Plaintiffs' Motion for Partial Summary Judgment as to Liability.

What remains for consideration is Peter Redman's partial motion for summary judgment as to the issue of liability on his claims for professional negligence and breach of fiduciary duty, and his motion for summary judgment on Defendants' Counterclaims related to unpaid

attorneys' fees. After a review of the record and the parties' arguments, the court concludes that summary judgment in favor of Peter Redman is not appropriate.

Defendants seek payment from Mr. Redman for allegedly unpaid fees arising out of their representation of him. Peter Redman contends that any claim for unpaid fees should be barred by Defendants' alleged negligence and/or breach of fiduciary duty. However, in light of the fact that there are disputes of fact regarding Defendants' liability on Plaintiffs' affirmative claims, summary judgment on Defendants' counterclaim under an "unclean hands" theory is similarly not appropriate. Further, contrary to Plaintiffs' contention, the lack of a written fee agreement does not bar Defendants' claim as a matter of law. *See Cloutier, Barrett, Cloutier & Conley, P.A. v. Wax,* 604 A.2d 42, 44 (Me. 1992).

Plaintiffs also contend that Defendants have waived their entitlement to any unpaid fees by virtue of a prior offer by a member of BSSN to waive collection of the fee. Based on this prior offer, Plaintiffs contend that Defendants have waived or released their claim. In opposition, Defendants assert that the prior offer to forego pursuit of any unpaid fee was made in the context of a settlement negotiation and was conditioned on Mr. Redman agreeing not to pursue action against Defendants. They therefore contend that any evidence regarding the alleged offer is inadmissible under M.R. Evid. 408(a). To the extent the prior offer is considered, Defendants argue that it does not constitute an enforceable waiver in light of the fact that Plaintiffs have in fact filed suit, thus failing to fulfill the condition upon which any waiver would have been based.

A review of the parties' statements of fact reveals a dispute as to whether the alleged offer was made in the course of settlement negotiations or whether it was an unconditioned release made by Defendants outside the settlement context. Even if it was not, such that the alleged offer is admissible, there is also a dispute of fact as to whether it was conditioned on Mr.

Redman foregoing legal action such that it would constitute an enforceable waiver. Accordingly summary judgment is not appropriate and Plaintiffs' motion with respect to Defendant's Counterclaim must be denied.

Finally, and as discussed above, because there are disputes of fact relating to Defendants' handling of Ms. Simpson's complaint and whether and to what extent Mr. Redman consented to the issuance of the memo, Plaintiffs' motion for partial summary judgment as to liability on Mr. Redman's remaining claims is also denied.

DECISION

Based on the foregoing and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

A. Plaintiffs' Motion for Partial Summary Judgment as to liability on their Complaint and for Summary Judgment on Defendants' Counterclaim is DENIED.

B. Defendants' Motion for Summary Judgment on Counts I and II of the Complaint is

   (i) DENIED as to that portion of Plaintiff Peter Redman's claims in each Count that Defendants negligently represented him in connection with a harassment complaint lodged against him by Tammy Simpson and that Defendant's negligence was a proximate cause of emotional distress and related damages sustained by him; and

   (ii) GRANTED as to all of the Plaintiffs' remaining claims in those Counts.

C. Defendants' Motion for Summary Judgment on Count III of the Complaint is GRANTED.

Dated: May 3, 2010

s/Thomas E. Humphrey
Chief Justice, Superior Court