STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

THOMAS GUSMANO, individually
and derivatively on behalf of
SHELBY LEASING COMPANY, LLC,

Plaintiff,

vs. Case No. 2015-2670-CB

GIARMARCO, MULLINS & HORTON,
P.C. and WENDY I. PAGE, personal
representative of the estate of
JOSEPH F. PAGE, III,

Defendants.
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OPINION AND ORDER

Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff has filed a response and requests that the motion be denied. Defendants have also filed a reply brief in support of their motion.

I. Factual and Procedural History

Joseph F. Page, III was a licensed attorney in the State of Michigan and a member of the law firm Defendant Giarmarco, Mullins & Horton, P.C. ("Defendant GMH"). Mr. Page passed away in 2014. Defendant Wendy I. Page, Mr. Page's widow, has been appointed the personal representative of Mr. Page's estate.

Mr. Page had served as the attorney for Associated Internists of Macomb, P.C. ("Internists") and other business owed by the following four physicians: Antonio Morreale, III, M.D., Ronald Pierskalla, M.D., Thomas Piazza, M.D. and Steven Taormina, D.O (collectively, "Physicians"). One of those businesses was Shelby-

Macomb Diagnostic Center, PLC ("Shelby Diagnostic"). On behalf of Diagnostic Center, Mr. Page formed Shelby-Macomb Leasing Company, LLC ("Shelby Leasing"). Shelby Leasing was formed to acquire certain equipment and then lease the equipment to Shelby Diagnostic pursuant to a seven year non-cancellable lease ("Lease").

In order to obtain investors in Shelby Leasing, Mr. Page drafted a Private Placement Memorandum ("PPM") for the sale of membership units in Shelby Leasing. Under the PPM, the price of the equipment was 2 million dollars, with 1.5 million being obtained through a secured loan and the remaining $500,000.00 being obtained by selling units to investors for $5,250.00 each, with a minimum purchase of 2 units. The investors were to obtain an 18% return on their investment.

Plaintiff Thomas J. Gusmano ("Plaintiff Gusmano") purchased 25 units in Shelby Leasing. On July 31, 2015, Plaintiff filed his complaint in this matter ("Complaint"). In the complaint, Plaintiff Gusmano asserts that his interest in Shelby Leasing was oppressed by Mr. Page (Count I), that Mr. Page and GMH committed legal malpractice in multiple ways (Count II), and that Mr. Page and GMH breached fiduciary duties they owed to him (Count III).

On October 1, 2015, Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff has filed a response and requests that the motion be denied. In addition, Defendants have filed a reply brief in support of their motion. On January 4, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the

ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

A. Member Oppression (Count I)

In this case, Plaintiff alleges that his minority interest in Shelby Leasing has been subjected to willfully unfair and oppressive conduct by Mr. Page in violation of MCL 450.4515. MCL 450.4515 provides:

> (1) A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member.
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> (2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the

> extent that the actions interfere with distributions or other member interests disproportionately as to the affected member. The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

In their motion, Defendants contend that Plaintiff has not alleged that Mr. Page engaged in any action which can constitute a willfully unfair and oppressive act that substantially interfered with Plaintiff's interest as a member in Shelby Leasing.

In his complaint, Plaintiff alleges that Mr. Page oppressed his membership interests in Shelby Leasing in five ways. The first two center on the allegation that Mr. Page failed to have the guaranties to the Lease executed. (*See* Complaint, at ¶41(a)-(b).) Plaintiff's remaining bases for his oppression claim are that Mr. Page failed to advise the members of Shelby Leasing that there had been a default under the Lease, failed to advise the members that the equipment at issue was being sold, and failed to ensure that Shelby Leasing received its fair share of the purchase price. (See Complaint, at ¶41(c)-(e).)

In response, Defendants assert that the guaranties were executed. In support of their position, Defendants rely on the Lease, which on page 9 includes executed guaranties. (*See* Defendants' Exhibit B.) Plaintiff has not challenged Defendant's evidence. Based on the executed guaranties, the Court is satisfied that the guaranties were executed, and that as a result the first two bases for Plaintiff's oppression claim are without merit.

Defendants also assert in response that Mr. Page cannot be held liable for an oppression claim because he was not in control of Shelby Leasing. As a preliminary matter, the Operating Agreement provides that Shelby Leasing is to be managed by it

executive board (*See* Defendants' Exhibit C, at Section 8.) It is undisputed that Mr. Page, although a member of Shelby Leasing, was not on its executive board. While Plaintiff has presented evidence that Mr. Page, as counsel for Shelby Leasing, rendered advice to the executive board that impacted its decisions (*See* Plaintiff's Exhibit B), it is undisputed that the decisions themselves were made the members of the executive board, not Mr. Page.

While Plaintiff concedes that Mr. Page was not on the executive board, he alleges that Mr. Page oppressed him individually, and Shelby Leasing in general, by failing to advise Shelby Leasing's members of certain events, and by failing to ensure that Shelby Leasing received its fair share of the purchase price paid by Henry Ford for the equipment. (*See* Complaint, at ¶41(c)-(e).) However, Plaintiff has not identified any duty that required Mr. Page, as a member of Shelby Leasing, to advise him or his fellow members about decisions made by the executive board. To the extent Mr. Page may have had a duty to advise and represent Shelby Leasing, it was in the role as Shelby Leasing's attorney, not as one of its members that would potentially have imposed a duty on him to render sound advice and represent its best interests. Accordingly, while such behavior could potentially form the basis for Shelby Leasing's malpractice claim, the Court is convinced that such actions, or failures to act, may not form the basis for a minority oppression claim against Mr. Page where he was not a member of executive board and where his involvement in the activities at issue were as Shelby Leasing's counsel, not as one of Shelby Leasing's members. For these reasons, Defendants' motion for summary disposition of Plaintiff's oppression claim must be granted.

B. Legal Malpractice (Count II)

In their motion, Defendants contend that Plaintiff's legal malpractice claim fails because no attorney-client relationship existed between them and Defendant Gusmano.

"The elements of legal malpractice are: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v. Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004).

In his response, Plaintiff Gusmano does not dispute that he did not have an attorney-client relationship with Defendants; rather, Plaintiff Gusmano asserts that Count II was brought derivatively on behalf of Shelby Leasing, which did have an attorney-client relationship with Defendants.

As a preliminary matter, the Complaint alleges that Defendants committed legal malpractice by breaching their duties to Shelby Leasing, not Plaintiff Gusmano. Further, Defendants concede that Shelby Leasing was their client. (*See* Motion at p.12.) Accordingly, Defendants' motion for summary disposition of Count II based on the lack of an attorney-client relationship must be denied.

Defendants also contend that Plaintiffs cannot establish the causative element of his damage claim. However, mere statements of belief that a plaintiff will not be able to meet the elements of its claim is insufficient to shift the burden to the plaintiff in connection with a motion brought under MCR 2.116(C)(10). *Lowrey v LMPS &LMPJ, Inc.*, ---Mich App ---; ---NW2d --- (2015). Instead, "a moving party must identify the issues about which there is no genuine issue of fact and present evidence, which if unrebutted, would establish the moving party's right to summary disposition." *Id.* In this

case, Defendants fails to present evidence in support of their belief. As a result, Defendants' position is not properly support and must be rejected at this time.

C. Breach of Fiduciary Duty (Count III)

"A fiduciary relationship arises from the reposing of faith, confidence, and trust, and the reliance of one upon the judgment and advice of another." *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194; 196; 480 NW2d 910 (1991). "Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable, and the origin of the confidence is immaterial." *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 515; 309 NW2d 645 (1981). "Furthermore, whether there exists a confidential relationship apart from a well-defined fiduciary category is a question of fact." *Id.*

In their motion, Defendants contend that a plaintiff may not maintain a claim for breach of fiduciary duty where the only claim of duty arises out of an attorney-client relationship. However, as discussed above, it is undisputed that Defendants and Plaintiff Gusmano did not have an attorney-client relationship. Accordingly, Defendants' contention is irrelevant to the instant matter.

In addition, Defendants contend that the portion of Plaintiff Gusmano's claims based on Mr. Page's alleged conflict of interest must be dismissed. Specifically, Defendants contend that any potential conflict of interest may not form the basis for a cause of action. While the Michigan Rules of Professional Conduct do govern an attorney's conduct in instances involving conflicts of interest, MRPC 1.0(b) provides that the rules do not give rise to a cause of action for damages caused by an attorney's failure to comply with the rules. Plaintiff has not responded to Defendants' position.

Based on the unambiguous language of MRPC 1.0(b), the Court is satisfied that the Plaintiff's claims are barred to the extent that Plaintiff seeks to recover damages based on Defendants' possible violation of any of the Michigan Rules of Professional Conduct.

Finally, Defendants contend that the Operating Agreement precludes Plaintiff from asserting a claim for damages against a member of Shelby Leasing, including Mr. Page. Specifically, Defendants rely on section 9.2 of the Operating Agreement, which provides, in part, that "[n]o member....shall be liable for monetary damages to the Company or any Member for any breach of duty to the Company..." (*See* Defendants' Exhibit C.) In this case, Plaintiff Gusmano's claims are based on his contention that Defendant Page breached his duties to Plaintiff Gusmano, not Shelby Leasing. As a result, the Court is convinced that Section 9.2 does not act to bar Plaintiff's claims.

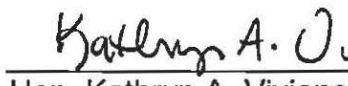
IV. Conclusion

For the reasons discussed above, Defendants' motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically, Defendants' motion for summary disposition of Plaintiff's oppression claim and the portion of Plaintiff's breach of fiduciary duty claim based solely on violations of the Michigan Rules of Professional Conduct are GRANTED. The remainder of Defendants' motion is DENIED.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: MAR 14 2016



Hon. Kathryn A. Viviano, Circuit Court Judge