IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

Case Number 4D13-4831
L.T. Number 502010CA008347XXXXMBAA

KARIM H. SAADEH,

Plaintiff/Appellant,

vs.

COLETTE MEYER, ESQ.,

Defendant/Appellee.

Appeal from the Circuit Court of the Fifteenth Judicial Circuit
In and for Palm Beach County, Florida
Honorable Peter D. Blanc

ANSWER BRIEF OF APPELLEE

David J. Sales
Florida Bar Number 794732
david@salesappeals.com
DAVID J. SALES, P.A.
1001 North U.S. Highway One
Suite 200
Jupiter, FL 33477
(561) 744-0888
(561) 744-0888 (fax)
Counsel for Defendant/Appellee

TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

In a separate proceeding, a circuit court judge granted an emergency petition for the appointment of temporary guardian for Karim Saadeh. Colette Meyer was the lawyer for the temporary guardian appointed by the court, Deborah Barfield. The court later determined that Saadeh was not incapacitated and dismissed the petition for guardianship. Saadeh, Plaintiff and Appellant in this action, then sued Defendant and Appellee Meyer in a single count of "PROFESSIONAL NEGLIGENCE AND BREACH OF DUTY" (R.524), for acts Meyer is alleged to have undertaken in conjunction with the temporary guardianship. Meyer moved for summary judgment on the grounds that (1) she was never Saadeh's attorney, was never in privity with Saadeh, and owed Saadeh no duty of care, and (2) Meyer was immune from suit for her actions related to the guardianship proceedings. (R.5364-72) The trial court in this case granted Meyer's motion for summary judgment, and Saadeh appeals.

Saadeh's Amended Complaint. While Saadeh's initial brief ("IB") contains a nearly eight page factual statement (IB.1-8), he devotes only a single paragraph (IB.7-8), without any record citations, to the allegations of his Amended Complaint, his operative pleading. (R.506-41)[1] Meyer provides more detail here so that the Court can see what Saadeh actually alleged. According to the Amended

[1]Meyer's Appendix ("MAP."), Tab ("T") 1.

Complaint, Saadeh's children engaged Meyer, a lawyer, to assist them in a scheme of protecting their prospective inheritances when Saadeh, a man of advanced age, commenced a romantic relationship with a woman named Randa Rinker. (R.508) Saadeh alleged that Meyer retained Barfield to act on behalf of Saadeh's children, and Barfield in turn engaged Meyer to pursue guardianship proceedings, which resulted in the temporary guardianship of Saadeh. (R.508-09) According to the allegations, "[i]n actual fact, Meyer and Barfield were pursuing the selfish interests of [Saadeh's] children." (R.510)[2]

The Amended Complaint alleges in detail a series of missteps and errors on the part of a court-appointed attorney for Saadeh, Jacob Noble, which caused Noble to fail to protect Saadeh from his children, and led to the appointment of Barfield as Saadeh's emergency temporary guardian. (R.512) According to Saadeh, Barfield, Noble, and Meyer endeavored to have Saadeh execute a trust instrument whose "true purpose was to preserve [Saadeh's] property for his children." (R.512) Without Saadeh's consent, Meyer and Noble then obtained an order from the circuit court approving a purported settlement of the guardianship matter, and discharging the examining committee which was appointed to assist in

[2]Meyer acknowledges that the trial court was obliged to accept Saadeh's allegations as true, to the extent they were not contradicted by his own sworn testimony. As discussed below, the trial court complied with this obligation. That does not mean, of course, that Meyer acknowledges those allegations as truth in fact.

resolving the issue of Saadeh's capacity. (R.514) Moreover, "Meyer and Noble by guile or carelessness, deceived the Court and obtained an order" without disclosing applicable law and the "fact that the proposed trust would be an irrevocable trust." (R.514) Saadeh initially refused to sign the resulting trust instrument but "began to succumb to the misrepresentations by his children and defendants Meyer, Noble and Barfield," who later "conspired to mislead and manipulate" him into executing such a trust. (R.514) Because the trust was irrevocable, though labeled revocable, Saadeh alleged that he sustained damages. (R.516)[3]

In his allegations directed specifically at Meyer (R.524-34), Saadeh asserted that Meyer "owed a duty of care" to Saadeh because Meyer was Barfield's lawyer and Barfield (who was court-appointed) owed "a legal duty" to act in Saadeh's best interest. (R.526) Because Meyer allegedly "participated directly" in developing "the concept of the trust and in drafting the trust," Saadeh alleged that he "was to be the beneficiary of Meyer's legal services." (R.526) As part of a scheme to "pressure and manipulate" Saadeh into executing the trust, "Meyer provided legal advice to [Saadeh] regarding how the trust would work," causing Saadeh to believe he would have control of the trust, and be able to make independent decisions. (R.528) Meyer knew the trust was irrevocable despite being labeled revocable,

[3]As this Court has chronicled, the circuit court judge in the guardianship matter actually found that the trust was "void ab initio," a ruling which this Court affirmed. *Jasser v. Saadeh*, 97 So. 3d 241, 247, 249 (Fla. 4th DCA 2012).

knew that Saadeh was over 80 years old, lacked a formal education, and spoke English as a second language. (R.528) Meyer knew the trust posed a gift tax liability and "failed to disclose" that the trust was negligently drawn. (R.530) She failed to warn Saadeh of the risk of tax liability, and the need to engage tax professionals to advise him. (R.530) She "negligently drafted" transfer documents which resulted in adverse tax consequences, and "failed to warn" Saadeh of those effects. (R.530) She failed to obtain independent tax advice. (R.530)

With respect to Meyer's purpose, Saadeh alleged that Meyer was not acting for Saadeh's benefit but was rather acting for the benefit of her "other clients," Saadeh's children. (R.532) Instead of protecting Saadeh from exploitation, "Meyer assisted in the exploitation of … Saadeh" to obtain all his property and assets and place them in the control of Saadeh's children. (R.532) Thus, according to Saadeh, "Meyer breached her respective duties to plaintiff." (R.532) The damages sought against Meyer were incurred in "mitigation" and to avoid the alleged tax consequences that the trust would have imposed. (R.532)

Saadeh's Sworn Deposition Testimony. Saadeh gave a deposition (R.5373-5427, MAP.T2) under oath, through an Arabic interpreter. (R.5377) He denied that Meyer represented him; rather, she was the lawyer for Saadeh's children. (R.5382) Saadeh's children "turned against" him in 2009 when they became concerned that Rinker was trying to take his property away. (R.5386) Saadeh later married Rinker

and, as a result, Saadeh and his children became "enemies" and did not speak with one another again until early 2013. (R.5386-87) More specifically, Saadeh and his children were "enemies" (1) during the preparation of the subject trust documents, (2) while Saadeh was represented by Noble, his court-appointed lawyer, and (3) while Barfield was involved in matters related to Saadeh. Moreover, Saadeh "understood that Ms. Meyer was representing [his] children as [his] enemies" because she was "supporting them." (R.5387) Even when Saadeh asserts that Meyer "came and advised" him, he "knew that she was representing [his] enemies." (R.5387) When asked why Saadeh sued Meyer, he explained that "she was the lawyer helping [his] enemies." (R.5391) When asked whether he trusted Meyer, Saadeh said, "Of course not." (R.5391) In all events, Saadeh was clear that Meyer "never worked for [him]." (R.5391-92)

Saadeh does not recall ever speaking to Meyer (R.5396), and admitted she did nothing to put pressure on him, besides what she said in court. (R.5397)

Meyer's Motion for Summary Judgment. Meyer moved for summary judgment. (R.5364-72) The factual record upon which she relied consisted of Saadeh's own allegations and his sworn testimony. Meyer relied on the legal authorities which preclude professional negligence actions against lawyers in the absence of privity, or the providing of legal services to a client intended to benefit a third party (*e.g.*, the intended beneficiary of a will). (R.5366-67) Because Meyer

was acting for persons whose interests were adverse to Saadeh's interest, Saadeh could not claim that he was an intended third-party beneficiary of Meyer's legal services to her clients. (R.5367) Meyer also sought summary judgment on the ground that her actions in the guardianship were absolutely privileged in accordance with the Florida Supreme Court's decision in *Levin, Middlebrooks, Madie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994). All of Meyer's actions and communications with Saadeh arose out of either her representation of Saadeh's children or as the lawyer for Barfield, whom the circuit court appointed as Saadeh's temporary guardian. As such, they were absolutely privileged. (R.5369-71)

Saadeh's Opposition. Saadeh opposed motion and raised the same issues he raises on appeal, including, (1) Saadeh was an intended beneficiary of legal services provided to Meyer's client, Barfield; (2) privity existed between Meyer and Saadeh because Meyer provided "advice" about the trust and prepared transfer documents; and (3) the litigation privilege does not apply because Meyer was Saadeh's attorney.[4]

[4]Saadeh's opposition is included as item 22 of his Appendix filed with this Court. Meyer was unable to locate this item in the record on appeal. Meyer acknowledges, however, that it was submitted to the trial court for consideration and does not oppose its consideration by this Court, or an order appropriately supplementing the record.

Meyer's Reply Memorandum. Meyer served a reply memorandum (R.5553-59) in which she emphasized the undisputed fact that, at all times, Saadeh had his own court-appointed lawyer, as well as trust and estate counsel who counseled Saadeh. (R.5554) Meyer also noted earlier sworn interrogatory responses (R.1901-43) in which Saadeh expressly stated that Meyer was adverse to Saadeh. (*See* R.1916 ("From the outset, this petitioner [Meyer] was adverse to the interests of the Ward [Saadeh] and coordinated the effort to deny the Ward his due process rights to an examining committee and to have the Ward sign a mislabeled and misleading trust document….")).

Hearings on Meyer's Motion. The trial court conducted two hearings on Meyer's motion. Saadeh has not supplied the Court with a transcript of the first hearing. (*see* R.5498-5501 (notice of hearing)), and there is no record before this Court of the parties' arguments. Still, the trial court later asked the parties to return for further argument (R.6090), and a transcript of that hearing is included in the record. (R.6088-6148, MAP.T3) Before hearing additional argument, the trial court explained its view that a legal malpractice claimant like Saadeh cannot "simply create an attorney-client relationship in his own mind." (R.6091-93) As the trial court noted, Saadeh's allegations were consistent with Meyer's "looking out for the interests of Saadeh's children" and it was undisputed that she promoted their interests in the guardianship proceedings. (R.6091) While obviously taking

Saadeh's factual allegations to be true, the trial court also reasoned that Meyer did not create an attorney-client relationship or any other duty when she convinced Saadeh to sign off on the trust documents. (R.6091) The trial court acknowledged that the facts alleged by Saadeh might support some other kind of claim, but did not appear to support a claim for legal malpractice. (R.6097)

After hearing additional argument from the parties' lawyers, the trial court ruled that Meyer was entitled to summary judgment. (R.6130-31) The trial court then reduced its ruling to a written order: "the undisputed facts taken in the light most favorable to Saadeh establish Meyer's entitlement to the entry of summary judgment in her favor for the reasons stated on the record at the hearing of December 6, 2013." (R.6073, MAP.T4)

SUMMARY OF THE ARGUMENT

As Saadeh admitted under oath, Meyer was never Saadeh's lawyer. She represented Saadeh's children and later represented Barfield, a temporary guardian appointed by the circuit court in the guardianship proceedings. She was never in privity with Saadeh, and owed him no duty of care that could support a claim for professional negligence. Even taking Saadeh's allegations as true, the trial court was correct in reasoning that Meyer did not establish an attorney-client relationship with Saadeh when (as contended by Saadeh) she persuaded him to sign trust documents in an effort to settle the guardianship proceedings. A lawyer who

attempts or succeeds in persuading an adversary to take an action against his adversary's interests, whether through negligence or otherwise, does not become his adversary's lawyer.

Because Saadeh was not in privity with Meyer, he could sue her for malpractice only if he fell within the limited category of circumstances where third-parties are intended beneficiaries of legal services provided by a lawyer to a client. The undisputed facts do not permit such a conclusion in this case. The entire tenor and theory of Saadeh's claim was that Meyer acted in concert with Saadeh's children and Barfield to try and deprive Saadeh of his property, or at least control over his property, so as to conserve their prospective inheritance. The limited circumstances recognized by Florida courts to overcome a lack of privity when suing a lawyer require that the lawyer's actual client intend to confer a benefit on the stranger to the attorney-client relationship.

As the trial court concluded, the interests of Meyer's clients were always adverse to the interests of Saadeh, and those adverse interests were protected by separate, independent counsel appointed by the court. Meyer's clients did not, according to Saadeh, intend to benefit Saadeh. To the contrary, according to Saadeh, Meyer's clients were trying to harm him. Because the undisputed facts reveal that Meyer was acting in the interest of Saadeh's children—whom Saadeh

recognized as his "enemies"—Sadeeh could not have been an intended beneficiary of the attorney's services.

Meyer's actions were also subject to the rule of absolute privilege announced in *Levin*. The discrete allegations of wrongdoing by Meyer all bore some relationship to judicial proceedings. Regardless of the alleged tortious nature of Meyer's conduct, these allegations cannot form the basis for a claim against Meyer.

ARGUMENT

I. Meyer Was Entitled to Summary Judgment on the Single Count of Professional Negligence Because the Undisputed Facts Reveal that She Was Never Saadeh's Lawyer, Was Not in Privity with Saadeh, and Was Adverse To Saadeh in Her Representation of Saadeh's Children and the Temporary Guardian.

Standard of Review. "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law…. Thus, [the] standard of review is de novo." *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). "[W]hether a 'duty of care' exists is a question of law to be determined solely by the court," which is also reviewed de novo. *L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550, 557 (Fla. 4th DCA 2008); *see also DaimlerChrysler Ins. Co. v. Arrigo Ent., Inc.*, 63 So. 3d 68, 73 (Fla. 4th DCA 2011) ("Whether a legal duty exists in a negligence action is a question of law for the court.").

A. Meyer Was Not Saadeh's Lawyer.

There are three elements to a claim for legal malpractice: "(1) the attorney must be employed by or in privity of contract with the plaintiff; (2) the attorney must have neglected a reasonable duty; and (3) the negligence must have resulted in and was the proximate cause of loss to the plaintiff." *Dadic v. Schneider*, 722 So. 2d 921, 923 (Fla. 4th DCA 1999) (citation omitted). The existence of a lawyer's duty generally depends on the presence of the first of these elements. *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So. 2d 315, 317, n. 3 (Fla. 3d DCA 1985). Privity between a lawyer and a client is required for two reasons. First, the imposition of liability in the absence of privity would deprive a party of the right to control his or her own contract. Second, imposing a duty to the general public "would impose a huge potential burden of liability on the contracting parties." *Id*. (citation omitted).

Thus, in a fundamental way, a lawyer cannot be sued for malpractice by someone who is not the lawyer's client. That is particularly true in a proceeding where all parties are represented by counsel. As the First District has explained, "We know of no authority … holding that where both parties are represented by counsel, an error by the lawyer not representing the allegedly injured party will render him liable to that party. *Drawdy v. Sapp*, 365 So. 2d 461, 462 (Fla. 1st DCA 1978). In *Drawdy*, the court held that a lawyer who represented the husband in a

divorce case could not be sued by the wife for negligently preparing documents which transferred the husband's interest in property to the wife. *Id.* When there are "two sides" in a legal matter with differing "interests to be protected," the courts do not "hold a lawyer responsible to all parties" in the absence of fraud or theft.[5] *Adams v. Chenowith*, 349 So. 2d 230, 231 (Fla. 4th DCA 1977); *see id.* (in real estate transaction, seller's lawyer does not owe a duty of care to buyer, even if seller's lawyer negligently prepares closing and causes buyer to overpay for the property); 4 Legal Malpractice § 34:4 (2013 ed.) ("The rule of privity of contract prevails where a nonclient sues the attorney for errors in handling a transfer of property interests…."), *quoted in Dingle v. Dellinger*, 2014 WL 470679 at *4 (Fla. 5th DCA Feb. 7, 2014).

The undisputed facts in this case reveal that Meyer was never Saadeh's lawyer and was not in privity with him. It is also undisputed that Saadeh had his own lawyer, Noble, who was appointed by the circuit court in the temporary guardianship proceedings. In fact, Saadeh sued Noble as well, and articulated the difference between his status and that of Meyer. As Saadeh alleged in the Amended Complaint, "Defendant Noble was appointed by the Court as attorney for plaintiff in certain incapacity and guardianship proceedings. Defendant Noble

[5]While portions of Saadeh's allegations against Meyer may have implied the commission of intentional torts such as fraud or misrepresentation, Saadeh asserted no intentional tort claims against Meyer. Rather, Saadeh's sole legal claim against Meyer sounded in negligence.

was thereby in privity with the plaintiff…. As such, Noble owed a duty of professional care, candor and loyalty to the plaintiff." (R.520-22) In respect of Meyer, the allegations which gave rise to her duty were that she was Barfield's lawyer: "As attorney for the court appointed guardian, Meyer owed a duty of care to … Saadeh." (R.526) As in the trial court, Saadeh refers the Court to no disputed material fact which would have given rise to an attorney-client relationship between Saadeh and Meyer.

Contrary to what Saadeh suggests (IB.32-34), the trial court did accept as true Saadeh's representations of his communications with Meyer in an effort to get him to sign the trust documents. The trial court merely—and properly—rejected his arguments that Meyer's conduct constituted legal advice that gave rise to an attorney-client relationship:

> The allegations involved in preparing trust documents, *even coupled with Mr. Saadeh's description of her conversations with him* regarding what he believed was an effort to convince him to sign off on those trust documents, in my mind, did not create an attorney-client relationship or even duty that would attach to such a relationship.
>
> The record seems very clear to me even from Mr. Saadeh's own deposition testimony. I believe, that Mr. Noble, who was the attorney for Mr. Saadeh appointed by the court, invited Miss Meyer to speak to Mr. Saadeh about that particular document. And, in my mind, the fact that you allege that she discussed it with him, which I understand is in dispute, and you allege that she prepared or contributed to preparing those trust documents, does not create that relationship.

(R.6091-92 (emphasis added)) The trial court analogized the matter to a plea negotiation in which a defendant relies on a prosecutor trying to persuade the defendant to plead guilty. In that setting, the prosecutor does not become the defendant's lawyer if his advice as to the likely term of imprisonment proves faulty. (R.6092-93)

Moreover, as the trial court also acknowledged (R.6093-94), the lines of authority and responsibility in guardianship proceedings are clearly delineated by statute. Pursuant to section 744.331(2)(b), Florida Statutes, the court "shall appoint an attorney for each person alleged to be incapacitated." The court did so. (R.4818) Pursuant to section 744.331(2)(c), the attorney for the alleged incapacitated person cannot serve as guardian for that person, or attorney for the guardian. As the trial court commented, "Seems to make sense." (R.6093-94) The particular circumstances of incapacity proceedings—where, as here, the positions of the alleged incapacitated person and temporary guardian are antagonistic—are accordingly different from those of concluded guardianship proceedings. Meyer's duty of care was to her clients seeking to *impose* a guardianship on Saadeh. He had his own, court-appointed lawyer charged with the responsibility of protecting him. That duty and independent responsibility to act for Saadeh's interests did not dissipate upon the appointment of a temporary guardian. In fact, Saadeh alleged that Noble caused him the same injury for which he sued Meyer, arising out of the

execution of the trust documents (R.522; 528; 530), all of which occurred after the appointment of the temporary guardian. During the relevant period of time, Noble never ceased to be Saadeh's lawyer, and those responsibilities were never transferred to Meyer.

B. Saadeh Was Not an Intended Beneficiary of Meyer's Legal Services.

As the Florida Supreme Court has noted, "Florida courts have uniformly limited attorneys' liability for negligence in the performance of their professional duties to clients with whom they share privity of contract…. The only instances in Florida where this rule of privity has been relaxed is where it was the apparent intent of the client to benefit a third party. The most obvious example of this is the area of will drafting." *Angel, Cohen & Rogovin v. Oberon Investment, N.V.*, 512 So. 2d 192, 194 (Fla. 1987) (citing *Lorraine*, 467 So. 2d at 317 ("In limited circumstances, … an intended beneficiary under a will may maintain a legal malpractice action against the attorney who prepared the will, if through the attorney's negligence a devise to that beneficiary fails."); *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. 4th DCA 1976) (lawyer's duty to testator's intended beneficiary stems from the lawyer's undertaking to perform services for testator) (other citation omitted)). Still, "Florida courts have refused to expand this exception to include incidental third-party beneficiaries. For the beneficiaries' action in negligence to fall within the exception of the privity requirement, testamentary

intent as expressed in the will must be frustrated by the attorney's negligence." *Angel*, 512 So. 2d at 194. Claims purporting to rest upon the third-party beneficiary exception to the rule of privity which do not meet this requirement are properly disposed of as a matter of law. *See DeMaris v. Asti*, 426 So. 2d 1153 (Fla. 3d DCA 1985) (affirming dismissal of malpractice claim where plaintiff's allegations failed to suggest that the intent of the lawyer's client was frustrated).

Thus, in *Angel*, the supreme court reinstated a summary judgment in favor of a law firm sued for malpractice on these facts. The defendant law firm represented a man named Triester. Triester was the lawyer for the plaintiff in a transaction which resulted in the sale of the plaintiff's wholly-owned subsidiary to a secret buyer, who turned out to be Triester himself. Triester then sold the corporation for a higher price to someone else. The defendant in the malpractice action was the law firm that represented Triester and prepared the purchase and sale documents. The plaintiff alleged that the law firm was "negligent in preparing the documents or failing to inform [the plaintiff] of the nature and extent of the transactions or in permitting Treister to use the documents for defrauding [the plaintiff]." 512 So. 2d at 193. The trial court granted a summary judgment. The Third District reversed, concluding that privity between the plaintiff and the law firm defendant was not required. Applying a balancing test based on California law, the Third District considered such factors as the potential "moral blame" of the law firm, and that

public policy weighed "in favor of imposing a duty" on the law firm. *Oberon Investments, N.V. v. Angel, Cohen & Rogovin*, 492 So. 2d 1113, 1115 (Fla. 3d DCA 1986). That duty, the Third District held, was to act in the "best interest" of the plaintiff, even though the plaintiff was not the law firm's client. *Id.* The Third District reversed because, if the law firm "knew that Treister was a fiduciary for [the plaintiff] and knew of the potential conflict," such a duty would arise. Disputed facts as to these issues precluded summary judgment. *Id.*

On discretionary review, the supreme court expressly rejected the Third District's reasoning and holding, reinstating the summary judgment in favor of the law firm:

> In the instant case, respondent was not the client of the petitioner and thus lacked the requisite privity customarily required to maintain an action sounding in negligence against an attorney. Nor does the respondent, as an incidental third-party beneficiary, fit within Florida's narrowly defined third-party beneficiary exception. Respondent's assertion that the petitioner knew or should have known of potential conflict between the interests of Treister and the respondent further undercuts his reliance on the third-party beneficiary exception. If, as respondent alleges, the petitioner knew of the conflict of interest between Treister and respondent, it was equally apparent that the professional services rendered Treister were not to benefit respondent. If, on the other hand, the petitioner did not know of the conflicting interest of Treister and respondent, petitioner's only duty was to its client, Treister. Accordingly, even should the material facts in dispute be resolved in the respondent's favor, they would not support its cause of action.

512 So. 2d at 194. The supreme court also expressly declined to "expand th[e] limited exception" to the privity requirement based on the California decision

balancing test relied upon by the Third District. *Id.* (citing *Biakanja v. Irving* , 49 Cal. 2d 647, 320 P.2d 16 (1958)).

In this case, there was no "apparent intent," *id.* at 194, on the part of Meyer or her clients—whether Saadeh's children or Barfield—to benefit Saadeh. According to Saadeh's own allegations:

- "In actual fact, Meyer and Barfield were pursuing the selfish interests of [Saadeh's] children." (R.510)
- Their "true purpose was to preserve [Saadeh's] property for his children." (R.512)
- They were only able to cause Saadeh to sign the trust instrument by causing him to "to succumb" to the misrepresentations of Meyer, Barfield and his children. (R.516)
- In fact, Meyer and Barfield "conspired to mislead and manipulate" him into executing the trust. (R.516)
- Meyer tried to "pressure and manipulate" Saadeh. (R.528)
- Meyer lied or misrepresented facts to Saadeh. (R.516)
- Meyer and her co-defendants obtained a court order approving a settlement of the guardianship matter, without Saadeh's consent. (R.514)

While it is the intent of Meyer's clients that counts in addressing the third-party beneficiary exception to the privity requirement, Saadeh's interrogatory response and deposition testimony served to confirm there was no expectation by anyone that Meyer or her clients were acting for Saadeh's benefit. His subjective view was

that Meyer was never acting as his attorney. She was instead acting in the interest of Saadeh's children, whom Saadeh regarded as his "enemies." (R.5386-91; *see also* R.1916, (Saadeh's interrogatory response: Meyer was "adverse" to Saadeh "from the outset"))

As the trial court necessarily recognized (R.6091-92), Saadeh could not escape the clear effect of the privity requirement by merely alleging (R.525) that Meyer owed him a legal duty, or by calling himself one of Meyer's "clients" (R.532) in his pleading. Before this Court, Saadeh acknowledges (IB.12-17) the privity requirement and the limitations on exceptions to that requirement, citing some of the same authorities relied upon by Meyer. In an effort to overcome his own allegations—that Meyer acted exclusively for others who were *opposed* to Saadeh's interests—Saadeh constructs (IB.13-14) the following tautology: because Saadeh was a "beneficiary" of the very trust he alleges was against his interest, he must have been an intended "beneficiary" of Meyer's work.

Saadeh's argument makes no sense, of course, because the whole concept of an intended "third-party beneficiary" of a lawyer's work is that the "beneficiary" will benefit if the lawyer properly discharges his duty to his client. *See, e.g., Tartell v. Chera*, 668 So. 2d 1105, 1106 (Fla. 4th DCA 1996) (person is not third-party beneficiary of a contract unless "the parties to the contract intended to primarily

and directly benefit" that person); Black's Law Dictionary,[6] "***third-party beneficiary***" (9th ed. 2009) ("A person who … stands to benefit from the contract's performance."); *id.*, "***benefit***" ("Advantage; privilege… Profit or gain."); Merriam-Webster Dictionary, "benefit" ("a good or helpful result or effect").[7] According to Saadeh's own allegations and testimony, what Meyer, Barfield and Saadeh's children had in mind was to cause him *harm*, not to confer any benefit on him. They did not seek, as in the case of a testator whose wishes are not fulfilled, to increase Saadeh's wealth. Rather, Saadeh's children are alleged to have sought to enrich themselves, and reduce Saadeh's wealth, or at least his access to that wealth, by having him declared incapacitated. Proper fulfillment of Meyer's duties to her clients could simply never have 'benefitted' Saadeh. Partial fulfillment of those objectives, in fact, was what Saadeh alleges caused him damage. Such impossibly irreconcilable and contradictory positions made this case ripe for summary judgment.

Saadeh does not advance his argument through his citation to the Fifth District's recent decision in *Dingle*, which involved a lawyer's alleged failure to properly draft documents "gifting property" to the plaintiffs. A client (Kyreakakis) retained a lawyer (Dellinger) to prepare a quitclaim document to give property to

[6]Available on Westlaw.

[7]Available at www.merriam-webster.com/dictionary/benefit

the plaintiffs (the Dingles). After Kyreakakis died and his widow challenged the conveyance, the Fifth District held (in a separate case) that the conveyance was invalid; the Dingles then sued Dellinger and his firm.

Citing this Court's decision in *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So. 2d 1028, 1031 (Fla. 4th DCA 1994) the Fifth District held a party asserting legal malpractice on the basis of a third-party beneficiary theory must allege: "(1) a contract; (2) *an intent that the contract primarily and directly benefit the third party*; (3) breach of the contract; and (4) resulting damages to the third party." 2014 WL 470679 at *1 (emphasis added). Moreover, a "party is an intended third-party beneficiary only if the parties to the contract clearly express, or the contract expresses, an intent to primarily and directly benefit the third party." *Id.* (citing *Caretta Trucking*; *Jenne v. Church & Tower, Inc.*, 814 So. 2d 522, 524 (Fla. 4th DCA 2002)).

The Fifth District held that the Dingles' complaint should have survived a motion to dismiss because they alleged facts sufficient to bring them within the narrow exception of the privity requirement. Specifically, as Saadeh notes (IB.15), although a real estate transaction is typically a two-sided transaction with differing interests, that was not so in *Dingle* because Kyreakakis's intent was to make a gift of property, much as a testator does when leaving a bequest to an heir. 2014 WL 470679 at *3. There simply was no "adversarial relationship or differing interests

to be protected," and there was no conflict between the interests of the Dingles and Kyreakakis. This made the transaction, effectively, a one-sided transaction. *Id.* at 4.

Contrary to the allegations of his Amended Complaint, and his sworn testimony,[8] Saadeh argues (IB.15) from *Dingle* that in this case there were "no 'differing interests to be protected.' The trust, as a purported settlement of Saadeh's incapacity case, *involved no one's interests other than Saadeh's*" (emphasis added). Again, the argument makes no sense in the context of assertions that *Saadeh* was the *intended* beneficiary of Meyer's employment because Saadeh consistently maintained that Meyer's clients intended and acted to *deprive* him of his rights and property. Their interests, as alleged and sworn to by Saadeh, were the interests they sought to vindicate by pursuing the temporary guardianship and causing Saadeh to execute the trust instrument. Certainly, Saadeh later averred in an affidavit that *Meyer* told him the trust was "for his benefit." (IB.15) But his contradictory assertion did not raise a disputed issue of material fact because in the context of the third-party beneficiary exception to the privity requirement, it was the intent of *Meyer's clients*, not Meyer, which Saadeh needed to establish to avoid summary judgment. Saadeh raised no dispute suggesting that Meyer and her clients

[8]Parties facing a summary judgment motion cannot repudiate prior deposition testimony. *Carriage Hills Condominium, Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 336 (Fla. 4th DCA 2013) (citing *Ellison v. Anderson*, 74 So. 2d 680, 681 (Fla. 1954)).

wanted to *benefit* Saadeh. Doing so would have totally undermined the remainder of his factual allegations.

Saadeh argues that a "triable issue of fact" (IB.21) remained as to his status as an intended beneficiary of Meyer's employment by others because Saadeh was an "intended beneficiary of the guardianship." (IB.22 (citing Op. Att'y Gen. Fla. 96-94 (1996)). Again, the argument suffers from a tautological construct because Saadeh's claim was that Meyer's clients pursued and obtained the temporary guardianship in an effort to harm rather than benefit him. The Attorney General opinion upon which Saadeh relies, as Saadeh notes (IB.22) in turn relies upon the Florida Supreme Court's decision in *Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass'n, Inc.*, 581 So. 2d 1301 (Fla. 1991). The issue in that case was the applicable limitations period for a malpractice claim against engineers who, like lawyers, are subject to section 95.11(4)(a), Florida Statutes (imposing a two-year period). Section 95.11(4)(a) expressly states that it is "limited to persons in privity with the professional." Since the plaintiff's claim was predicated on a third-party beneficiary theory of professional negligence, the supreme court had to decide whether the two-year limitations

period applied, which would have barred the plaintiff's claim. The court construed the statute strictly and held that it did not apply. 581 So. 2d at 1303-04. [9]

Contrary to what Saadeh suggests (IB.22), the supreme court did not in the setting of *Baskerville* register any expansion of the scope of liability for purported third-party beneficiaries of a professional services contract. Both the Attorney General and Saadeh—by merely repeating (IB.22) the Attorney General's incomplete quotation of *Baskerville*—omit the supreme court's citation to *Angel* and two cases. One case, *McAbee*, stands for the proposition that an "attorney preparing [a] will has [a] duty to [the] client's intended beneficiaries." 581 So. 2d at 1303. The other, *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990), relied on hornbook law, *i.e.*, the Restatement (Second) of Torts § 552, to hold that an accountant may be liable to a third-party when negligently inducing that third-party to loan the accountant's client money. Recognizing conflicting lines of authority in this area, the supreme court followed the Restatement, which expressly imposes liability for the negligent supply of false information "for the guidance of others in their business transactions." *Id.* at 12.

[9]Opinions of the Attorney General are merely persuasive authority and do not bind the Court. *Palm Beach County v. Hudspeth*, 540 So. 2d 147, 152 (Fla. 4th DCA 1989). Moreover, the Attorney General opinion cited by Saadeh is also distinguishable because that opinion concerns a person a guardian appointed for a ward after a final hearing. Saadeh was never adjudicated incapacitated and at all times was represented by his own lawyers, Noble and Connors (another co-defendant in the trial court).

Saadeh's remaining authorities (IB.25-26) on this issue likewise fail to alter the proper means to assess whether a legal malpractice claimant is an intended third-party beneficiary of an attorney-client relationship. In *Rushing v. Bosse*, 652 So. 2d 869, 873 (Fla. 4th DCA 1995), "not only was the child the intended beneficiary of the adoption, but defendants were the attorneys for the adoptive parents, who evidently intended to *benefit the child by adopting her*." *Id.* (emphasis added). Thus, the Court held that "cause of action for professional negligence against the attorney who institutes and proceeds with a private adoption proceeding does not require privity between the child and attorney." *Id.*

Saadeh describes (IB.30) *Hodge v. Cichon*, 78 So. 3d 719 (Fla. 5th DCA 2012) as "strikingly similar" to the facts of this case, but with respect to the issue present here—whether a nonclient was an intended beneficiary of a lawyer's services—the cases are miles apart. *Hodge* concerned the failure of court-appointed guardians and their lawyers to comply with a court order directing the implementation of an estate plan of a man in his nineties, Cowart, whom the court had declared partially incapacitated. The plaintiffs alleged that they were intended beneficiaries of the legal services which the court ordered to be provided "because they were beneficiaries under Cowart's wills." *Id.* at 721.

The Fifth District reversed a summary judgment in favor of the defendants because disputed material facts showed that "the overall intent of Cowart's

retaining counsel was to create and establish a [family limited partnership] for the purpose of preserving and maintaining the estate assets and preventing its dissipation through estate taxes." *Id.* at 722. As Saadeh notes (IB.31), the defendants emphasized the "adversarial nature," *Id.* at 721, of the relationship among the cast of beneficiaries identified by the Court. But the Fifth District found that there *was no conflict* with respect to Cowart's testamentary intent, which was to *benefit* all of his beneficiaries. The important language quoted by Saadeh (IB.31) is that the "the actions of retained counsel and the direction of the court in ordering the implementation of the estate plan were intended to benefit all and harm none." 78 So. 3d at 722; *see also id.* ("The purpose of the estate plan was to benefit all named and intended beneficiaries; the larger the net estate, the better for all who might partake."). The disputed facts that precluded summary judgment concerned whether Cowart—the "client"—intended to confer a benefit on the plaintiffs. *Id.* 723. There was no dispute in this case as to the intent of Meyer's clients.

Saadeh includes *Winston v. Brogan*, 844 F. Supp. 753 (S.D. Fla. 1994) as "another example" (IB.28) of a third-party beneficiary "allowed to sue the attorney for negligence," but the case is merely one of many involving the testamentary intent of a lawyer's client and the lawyer's failure to ensure that an heir received what the client wanted. *See id.* at 756 ("[I]t would not be unreasonable to conclude

that Bruce Winston personally, as one of only two beneficiaries of his mother's will, was an intended third party beneficiary of the defendants' professional services."). As Saadeh nearly concedes (IB.25), we can glean little from *Greenberg v. Mahoney Adams & Criser, P.A.*, 614 So. 2d 604 (Fla. 1st DCA 1993) which would warrant a change in existing law. The court not only failed to report what the case was about, it also declined to delineate the limits of the third-party exception to the privity requirement. *See id.* at 605 ("we decline to consider whether there are other factual and legal arguments which, if they had been considered by the trial court, might also have justified dismissal.").

Finally, the fact that the law treats a temporary guardian and ward similarly in certain settings to a guardian and ward upon the conclusion of guardianship proceedings (IB.25-27) did not remove Saadeh's obligation to materially dispute the *intent* of Meyer's clients, including Barfield, in seeking to avoid a summary judgment. Having alleged that Meyer and her clients purposefully and wrongfully subjected him to guardianship proceedings and improper control over his mind and property, Saadeh cannot simultaneously argue that the resulting relationship between Meyer and her clients was for his benefit. In thoughtfully assessing this fundamental inconsistency, the trial court reasoned,

> [W]hen I look at the factual allegations in this case, they all seem to be consistent with … Meyer looking out for the interests of Saadeh's children who apparently, *it is undisputed*, that she represented or at

> least promoted their interests in this particular case. And I'm referring to the guardianship case.

(R.6091 (emphasis added)). In fact, while Saadeh's allegations sound more like an intentional tort claim than a legal malpractice claim, Saadeh was the master of his pleading and chose to sue in negligence.[10] Making that choice imposed an obligation to plead and prove that Meyer and her clients *intended* the opposite of what the trial court found was undisputed, that they were out for Meyer's clients alone. With these facts undisputed, an essential element of Saadeh's legal claim was lacking and the trial court properly entered summary judgment for Meyer. *See Dingle*, 2014 WL 470679 at *1 (citing *Caretta Trucking*, 647 So. 2d at 1031) (third-party beneficiary theory must show "intent that the contract primarily and directly benefit the third party").

II. Meyer's Conduct Was Subject to *Levin*'s Absolute Privilege Because It Was Related to Judicial Proceedings.

Standard of Review. The Court's review is de novo. *See DelMonico v. Traynor*, 116 So. 3d 1205 (Fla. 2013) (reviewing de novo trial court's grant of summary judgment on grounds of privilege pursuant to *Levin*).

Meyer was also entitled to summary judgment on the grounds of the privilege articulated in *Levin*: "absolute immunity must be afforded to any act

[10]As Meyer suggested to the trial court (R.6120), the formulation of professional liability claims on theories of negligence rather than intentional torts is often motivated by the terms of an errors and omissions coverage carried by lawyers.

occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior, so long as the act has some relation to the proceeding." 639 So. 2d at 608. The power to correct misconduct in judicial proceedings accordingly lies not with angry or disappointed litigants bent on suing every one of its participants; rather, it rests with the trial court and its contempt powers to "protect its integrity." *Id.*

The latter statement in *Levin* turns out to be the important factor in determining the scope of the litigation privilege. As the supreme court noted more recently in *DelMonico*, in "formalized judicial settings," the "potential harm" that may result from misconduct can be "mitigated by … formal requirements such as notice and hearing, the comprehensive control exercised by the trial judge whose action is reviewable on appeal, and the availability of retarding influences such as false swearing and perjury prosecutions." 116 So. 3d at 1217 (citation and internal quotations omitted). Incapacity proceedings, of course, have all these protections and in fact, even if every one of Saadeh's allegations were true, the system worked. Saadeh's incapacity was removed, his rights were restored, and his positions were later vindicated on appeal by this Court. *E.g.*, *Jasser*, *supra.* It is for these reasons that Saadeh does not get to sue the lawyer who represented the temporary guardian appointed by the court. *Cf. Ross v. Blank*, 958 So. 2d 437 (Fla. 4th DCA 2007) (psychologist in custody proceeding afforded absolute immunity); *Boczar v.*

Glendening, 555 So. 2d 1286 (Fla. 2d DCA 1990) (physician examining child victim enjoyed judicial immunity from malpractice claim because examination made in course of judicial proceeding); *Zock v. Miller*, 505 So. 2d 18 (Fla. 3d DCA 1987) (court-appointed psychiatrist enjoys judicial immunity).

The character or extent of Meyer's right to immunity was not diminished when she, Barfield and others conducted the guardianship proceedings in an allegedly false or deceptive manner, or fraudulently procured a settlement of those proceedings. As the Eleventh Circuit held in *Green Leaf Nursery v. E.I. du Pont de Nemours & Co.*, 341 F.3d 1292, 1302-03 (11th Cir. 2003) and *Florida Evergreen Foliage v. E.I. du Pont de Nemours & Co.*, 470 F.3d 1036, 1041-42 (11th Cir. 2006), *Levin* extends immunity to those who stand accused of fraudulent litigation tactics, and the fraudulent procuring of a settlement. Such actions are among those taken "during the course of a judicial proceeding" and are entitled to absolute immunity. *Green Leaf*, 341 F. 3d at 1302 (immunity for litigation conduct, untruthful testimony, trial misconduct, disobeying court orders, and false litigation positions, all of which "related to" underlying litgation); *Florida Evergreen*, 470 F. 3d at 1040-42 (immunity for "fraudulent inducement" to settle litigation, "fraud on the court," and "RICO violations"). As the *Levin* court indicated, a party's remedy in such a setting lies with the court supervising the proceedings during which such alleged misconduct takes place. *Green Leaf*, 341 F.3d at 1302 ("The Florida

Supreme Court recognized the trial court's inherent power as a reason for favoring an absolute immunity for litigation conduct…. For example, in this case, Plaintiffs could have filed a contempt motion before the trial court in the Underlying Litigation as a remedy for DuPont's misconduct. Plaintiffs chose instead to pursue fraud actions in subsequent litigation, which is precisely the strategy that the Florida Supreme Court intended to preclude by announcing the *Levin* rule.").

Decisions following *Levin* have confirmed its breadth and scope, and rarely struggled with the supreme court's strong language in curbing suits arising out of judicial proceedings. In *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 384 (Fla. 2007), the supreme court confirmed that *Levin*'s "holding was without qualification as to the nature of the judicial proceedings, whether based on common law, statutory authority, or otherwise." The court noted that *Levin* had been applied to "uphold the use of the privilege in such diverse actions as … conspiracy and tortious conduct in interfering with custody and visitation rights," and adoption proceedings. *Id.* (citing *Van Horn v. McNabb*, 715 So. 2d 380, 381 (Fla. 4th DCA 1998); *Rushing v. Bosse*, 652 So. 2d 869, 875-76 (Fla. 4th DCA 1995)).

Saadeh's arguments (IB.36-39) on the issue of Meyer's immunity consist of two important features. The first is his erroneous refusal to recognize that *Levin* applies to *all* judicial proceedings, not just those with "winners and losers." (IB.36)

Whether a particular proceeding is "adverse" (IB.36) makes no difference because immunity attaches "without qualification as to the nature of the judicial proceedings." *Echevarria*, 950 So. 2d at 384. Thus, Saadeh's extensive policy arguments (IB.36-39) as to how guardianship proceedings should and should not be viewed are totally misplaced. This brings into focus the second important feature of Saadeh's argument—the failure to cite any decision on the law of judicial immunity, save one (IB.39), a California decision holding that the litigation privilege does not bar a "garden variety legal malpractice action" which "alleges the client's attorney failed to competently represent the client's interests." *Kolar v. Donahue, McInsotsh & Hammerton*, 145 Cal App. 4th 1532, 52 Cal Rptr. 3d 712, 714 (2006).

Meyer agrees that litigation immunity does not extend to claims for malpractice where there is privity between a lawyer and a client, and Saadeh did not need to consult the law of "other states" [sic] (IB.39) to make this point. *See Schreiber v. Rowe*, 814 So. 2d 396, 398-99 (Fla. 2002) (quoting *Windsor v. Gibson*, 424 So. 2d 888, 889 (Fla. 1st DCA 1982) (actions of public defenders in representing criminal defendants are not subject to judicial immunity: "the public defender is an advocate, who … owes a duty only to his client, the indigent

defendant. His role does not differ from that of privately retained counsel.").[11] The mere fact that a client can sue his or her own lawyer for malpractice does not mean that *nonclients* can. It does not do Saadeh any good, at the very end of his argument to suggest (IB.39) that there is some other claim "akin to a malpractice claim," which must also necessarily survive *Levin*. Saadeh's claim was in all pertinent respects an effort to shoehorn his tangled allegations of intentional wrongdoing into a claim for legal malpractice against Meyer. Meyer was immune from suit for such a claim by Saadeh, whom the undisputed facts show was never Meyer's client.

CONCLUSION

The trial court properly entered summary judgment in favor of Meyer because there were no disputed material facts concerning the lack of an attorney-client relationship between Meyer and Saadeh, or Saadeh's status as a purported, intended beneficiary of Meyer's legal services. Even if summary judgment were inappropriate on these grounds, Meyer was entitled to summary judgment because she was immune from suit by Saadeh. This Court should affirm the judgment of the trial court.

[11]While not subject to judicial immunity, public defenders do benefit personally from the sovereign immunity afforded by section 768.28, Florida Statutes. *See Schreiber*, 814 So. 2d at 399.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been sent by electronic mail to the Clerk of Court and to all counsel on the attached list on this 14th day of May, 2014.

/s/ David J. Sales /s/
Florida Bar Number 794732
david@salesappeals.com
DAVID J. SALES, P.A.
1001 North U.S. Highway One
Suite 200
Juipter, FL 33477
(561) 744-0888
(561) 744-0888 (fax)

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing is in Times New Roman 14-point font and complies with the requirements of Fla. R. App. P. 9.210(a)(2).

/s/ David J. Sales /s/
David J. Sales
Florida Bar Number 794732

ATTORNEY LIST
Karim H. Saadeh v. Michael Connors, et al. 4D13-4831

Attorney for Appellee
Colette Meyer
Jack Scarola
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
Telephone: 561.686.6300
Facsimile: 561.684.5816
jsx@searcylaw.com
mep@searchlaw.com

Colette Meyer
Michael A. Gort
Meyer Law Firm
1070 E. Indiantown Road
Suite 312
Jupiter, FL 33477
Telephone: 561.748.7720
Facsimile: 561.748.7730
ServiceCKM@MeyerLawFirmFL.com
servicemag@meyerlawfirmfl.com
colette@meyerlawfirmfl.com
kandyce@meyerlawfirmfl.com

Attorney for Appellant
Bryan J. Yarnell
byarnell@gilbertyarnell.com
eservice@gilbertyarnell.com
Gilbert Yarnell
11000 Prosperity Farms Road
Suite 205
Palm Beach Gardens, FL 33410
Telephone: 561.622.1252
Facsimile: 561.799.1904

Attorney for Appellee
Michael Connors
William J. Berger
Weiss, Handler, et al.
2255 Glades Road, Suite 218A
Boca Raton, FL 33431
Telephone: 561.997.9995
Facsimile: 561.997.5280
wjb@weissandhandlerpa.com
filings@weissandhandlerpa.com
tc@weissandhandlerpa.com

Kenneth Pollock
Shendell & Pollock, P.L.
2700 N. Military Trail
Suite 150
Boca Raton, FL 33431
Telephone: 561.241/2323
Facsimile: 561.241.2330
ken@shendellpollock.com
britt@shendellpollock.com
grs@shendellpollock.com
diran@shendellpollock.com
Marianne@shendellpollock.com