THIRD DIVISION
June 29, 2018

No. 1-17-2300

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SALVATORE MILAZZO and JANET MILAZZO, individually and derivatively on behalf of WINDY CITY LIMOUSINE COMPANY, LLC, an Illinois limited liability company, and JKS LIMOUSINES, LLC, and Illinois limited liability company,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	16 L 438
WOLIN & ROSEN, LTD., an Illinois professional corporation, and MICHAEL E. PILDES,	)	Honorable Neil H. Cohen,
Defendants-Appellees.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County granting defendants' motion to dismiss plaintiffs' second amended complaint is affirmed. Plaintiffs failed to allege the existence of an attorney-client relationship with defendants to support their individual claim of attorney negligence; plaintiffs failed to allege facts demonstrating defendants' conduct was the proximate cause of their alleged injuries in support of their derivative

claims of attorney negligence; plaintiffs' breach of fiduciary duty claims are duplicative of their legal malpractice claims; and plaintiffs failed to allege defendants aided or abetted the allegedly tortious conduct of a third party.

¶ 2 Plaintiffs, Salvatore Milazzo (Sal) and Janet Milazzo (Janet), formerly operated Windy City Limousine Company, LLC (Windy City) and JKS Limousines, LLC (JKS), with George Jacobs. Jacobs is not a party to this appeal. Defendants, Wolin & Rosen, Ltd. and Michael Pildes are, respectively, a law firm and attorney that were involved in the creation and operation of Windy City and JKS as well as various lawsuits surrounding the companies. Plaintiffs, individually and derivatively on behalf of Windy City and JKS, filed a five-count second amended complaint against defendants alleging defendants breached various duties to plaintiffs individually and to the business entities, and that defendants aided and abetted Jacobs in breaching his fiduciary duties to plaintiffs and the businesses. Defendants filed a motion to dismiss the second amended complaint in its entirety. The circuit court of Cook County dismissed with prejudice counts I and II of the second amended complaint which alleged defendants breached duties defendants owed to plaintiffs as defendants' clients. The ruling was based on a finding the court made in prior cases before the same judge that defendants did not represent the individual plaintiffs. The court dismissed the remaining counts of the second amended complaint without prejudice. Plaintiffs elected not to replead the counts dismissed without prejudice and the trial court entered a final order.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 There are five separate lawsuits between the parties pending before the same trial judge. All of the cases arise from the operation of Windy City and Sal and Janet's formation of a competing business after their employment with Windy City ended. Plaintiffs filed their second

amended complaint in this case in April 2017. The following are allegations taken from plaintiffs' second amended complaint in this case.

¶ 6 In the early 1990s Sal and Jacobs had competing limousine businesses. Around 1998 Carey International, Inc. (Carey) acquired Jacobs' limousine business and later Carey acquired Sal's business. Thereafter Carey employed Jacobs, Sal, and Janet. Carey terminated Jacobs in 2005, and Jacobs approached Sal about forming their own limousine business. Sal agreed. Jacobs had a friend, Stan Subeck, form Two-S Group, LLC (Two-S) for the new limousine business, and also recommended defendants "as attorneys for their new company and for the Jacobs and Milazzos with regard to their personal interests in the new company." The new company was to pay defendants "for the representation of all of them." Plaintiffs allege defendant Pildes participated in the drafting or reviewing of the Two-S operating agreement, and during that process, "Sal told Pildes that he was counting on Pildes to ensure that his and Janet's personal interests were protected by the Operating Agreement." Pildes later told Sal he (Sal) was "fine to sign it." Sal left his employment with Carey to work in the new business at Jacobs' urging. Jacobs also convinced Sal to raise funds for the new business from investors with a "Private Placement Memorandum" (PPM). Two-S changed its name to Windy City. Sal and Janet invested in the new business through the PPM.

¶ 7 Jacobs formed Windy City Limousine Manager LLC (Manager) with himself as the sole manager and Jacobs, Sal, and Subeck as the voting members of the LLC. Manager owned all of Windy City's "Class B membership interests" and the "Class A membership interests" were divided among the PPM investors. Defendants also represented Manager. Sal told Pildes of his concern that the structure of the business "appeared to be tilted to giving Jacobs control of the limousine business because Jacobs and Subeck have majority control of Manager." Pildes allegedly "assured Sal that his and Janet's personal interests would be fully protected by

Manager's Operating Agreement that was under development." Jacobs also formed JKS Limousines, LLC (JKS) to own, register, and lease vehicles to be provided to Windy City. Janet was president of JKS. Plaintiffs allege:

> "Wolin & Rosen were engaged to represent JKS and its members, just as they represented Windy City and Manager and their members. Pildes had multiple communications with and gave advice to Janet regarding the formation and operation of JKS and the drafting of its Operating Agreement. Janet relied on Pildes to protect her personal interests in JKS as well as to give her advice in her capacity [as] President of JKS."

¶ 8 After Windy City began operations, Carey sued Jacobs, Sal, and Janet based on Jacobs' alleged breach of his noncompete agreement and wrongful use of trade secrets (hereinafter referred to as "the Carey litigation"). Defendants represented Sal and Janet in the Carey litigation. Plaintiffs allege there was no written retainer agreement between the Milazzos and defendants because it was defendants' "custom and practice not to prepare retainer agreements for existing clients." The Carey litigation was resolved by settlement. Defendants did not inform plaintiffs they were terminating their attorney-client relationship with the Milazzos.

¶ 9 Janet believed that defendants continued to represent JKS and to represent its members personally. Janet had authority to discuss JKS matters with defendants but Jacobs did not because he was not a member, officer, or employee of JKS. Plaintiffs allege defendants knew Jacobs was exercising dominion and control over JKS unlawfully because they either created JKS' operating agreement or reviewed it. Sal and Janet "continued to rely on and look to [defendants] to protect their personal interests in the Windy City entities." Defendants did not tell plaintiffs they did not represent Sal and Janet "or that they represented Jacobs' interests to

the exclusion of the Milazzos'." Jacobs later purported to terminate Janet from JKS and refused to grant her access to its books and records.

¶ 10 Plaintiffs allege that because defendants represented them defendants owed plaintiffs the duty to "disclose all material information to them, advise them, act to protect their personal interests, refrain from taking actions that were contrary to their interests, and resign from representing all parties once their representation became conflicted." Plaintiffs also allege defendant had a legal duty not to facilitate, participate with, or aid and abet Jacobs in breaching Jacobs' fiduciary duties. Plaintiffs allege Jacobs owed plaintiffs a fiduciary duty to disclose to them all material facts concerning the Windy City entities because the entities were closely held companies. Plaintiffs allege defendants breached their duty to them by:

- failing to disclose the related entities "were structured to allow Jacobs to dominate and control the entities;"
- failing to protect plaintiffs from Jacobs' domination;
- telling Sal and Janet their personal interests were protected by the entities' operating agreements when that was not true;
- failing to disclose that defendants considered Jacobs their primary client and their intention to advance his interests even when those conflicted with the interests of their other clients including plaintiffs, and doing so;
- failing "to act or advise or protect the interests of JKS and its members from Jacobs' wrongful domination and control;
- failing to disclose to JKS that Jacobs' actions with regard to JKS were unlawful or to take any action to prevent it;

- not resigning their conflicted representation of Jacobs, the Windy City entities, and the entities' members individually.

¶ 11 Plaintiffs allege Jacobs caused Subeck to form Windy City Bus Leasing (WCBL) to circumvent JKS and the Milazzos. WCBL was to supply vehicles to Windy City despite JKS having been formed for that purpose. Subeck was the sole member of WCBL. All of the investors in Windy City were investors in WCBL except the Milazzos. Plaintiffs allege, "on information and belief, [defendants] reviewed WCBL's organizational documents, were aware of their contents, and were aware that WCBL was designed to and was actively usurping the vehicle supply corporate opportunity of JKS. [Defendants] failed to disclose these facts to their clients JKS, its officers and members, including Janet[,] and failed to recommend or take any action to protect JKS and its members' interests." Defendants also failed to take action to protect JKS's interests when defendants knew that WCBL inflated the cost of vehicles to Windy City. Jacobs also induced Janet to sign a guarantee of WCBL's obligations by JKS by telling her that defendants reviewed and approved it, which plaintiffs allege defendants did. Plaintiffs allege defendants knew these guarantees were contrary to the interests of JKS and its members, including the Milazzos, but failed to disclose their negative effects or to recommend and take action to protect those interests.

¶ 12 Plaintiffs further allege defendants knew or should have known that Windy City sold PPM interests in contravention of the terms of the PPM, damaging the Milazzos and Windy City. Defendants allegedly breached their duty to disclose the violations of the PPM to Windy City and its members and to recommend and take action to protect plaintiffs' interests.

¶ 13 The second amended complaint further alleged Sal and Jacobs had an ongoing dispute about purchasing buses from a certain company that Sal considered unsafe. Jacobs demanded JKS purchase these buses without authority. Plaintiffs allege defendants knew Jacobs lacked

authority to direct JKS to purchase the buses, failed to disclose that fact to JKS and its members, and failed to recommend or take action to protect the interests of JKS and its members. As the dispute over the buses escalated, "Jacobs requested and received from the defendants a legal opinion declaring his authority to terminate Windy City executive officers which the defendants knew or should have known was intended to be Jacobs' basis for terminating Sal and Janet." Jacobs showed this opinion to Sal, and Jacobs did terminate Sal as Vice President of Windy City and Janet as CFO. Jacobs also purported to terminate Janet from JKS and prevented her from performing her duties as president of JKS. Defendants allegedly knew Jacobs wrongfully terminated Janet because defendants knew Jacobs was neither a member nor officer of JKS. Defendants knew Jacobs' actions were adverse to plaintiffs' interests but failed in their duty to protect plaintiffs' interests. Defendants also had a duty to cease representing Jacobs when Jacobs' interests became adverse to plaintiffs but failed to do so.

¶ 14 The Milazzos filed a separate lawsuit against WCBL. Defendants represented WCBL, "thereby breaching their duties of loyalty to their other clients, Windy City, Manager, JKS and their members, including the [Milazzos.]"

¶ 15 After their termination the Milazzos formed another limousine company named Signature Transportation Group, Inc. (Signature). Jacobs sued Signature for "allegedly poaching Windy City's customers and wrongfully suing Windy City's purported 'trade secrets' " (hereinafter referred to as "the Windy City litigation"). Defendants represent Windy City in the Windy City litigation, which plaintiffs allege "is in derogation of their past and ongoing fiduciary duties to their clients, including the Milazzos."

¶ 16 Count I of plaintiffs' second amended complaint alleges defendants negligently breached their duties to the Milazzos "by failing to give the Milazzos notice of Jacobs' wrongful conduct, failing to recommend or take actions to protect the Milazzos from Jacobs' misconduct, giving

advice to Jacobs that was adverse to the Milazzos' interests, and failing to withdraw from the representation of all parties due to their conflicts of interests."

¶ 17 Count II of plaintiff's second amended complaint is for defendants' wilful and wanton breach of fiduciary duties to the Milazzos. Count II alleges defendants had a fiduciary duty to the Milazzos "to disclose Jacobs' actions that were designed to and had the natural and expected result of damaging the Milazzos' personal interests, the duty to recommend actions that the Milazzos could take to protect their interests, the duty not to advance Jacobs' interests at the expense of the Milazzos, and the duty to withdraw from representing all parties when it became clear that Jacobs' actions were in conflict with the Milazzos' interests." Plaintiffs allege defendants knowingly and willingly breached the duties of care they owed to the Milazzos with the purpose and intention of advancing the interests of their client, Jacobs, at the expense of their other clients, the Milazzos.

¶ 18 Count III of plaintiff's second amended complaint alleges defendants aided and abetted Jacobs' misconduct that damaged plaintiffs. Count III alleges defendants took several material steps in support of and in furtherance of Jacobs' conduct.

¶ 19 Count IV is a derivative claim "for and on behalf of Windy City and JKS." Count IV alleges defendants breached the duties of care they owed to Windy City and JKS, specifically the duties of undivided loyalty; to disclose relevant information, including Jacobs' alleged misconduct, to persons within the entities who are in a position to protect it and advance its interests; to advise and protect the entities from Jacobs' actions that are contrary to the entities' interests; and to withdraw from the representation of all parties when defendants' clients' interests became conflicted.

¶ 20 Count V is for defendants' wilful and wanton breaches of fiduciary duties defendants owed to Windy City and JKS. Count V alleges defendants owed the same duties stated in Count

II to Windy City and JKS, and alleges defendants "knowingly and wilfully breached the duties of care they owed to Windy City and JKS with the principal purpose and intention of advancing the interests of their client, Jacobs, at Windy City's and JKS' expense."

¶ 21 Count VI is a derivative claim on behalf of Windy City and JKS alleging defendants aided and abetted Jacobs' misconduct and breaches of fiduciary duties Jacobs owed to Windy City and JKS.

¶ 22 Defendants filed a motion to dismiss plaintiffs' second amended complaint. Defendants moved to dismiss Counts I and II of the complaint on the grounds those counts duplicated the allegations in the first two counts of plaintiffs' first amended complaint. The trial court had dismissed the first two counts of plaintiffs' first amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). Defendants argued Counts I and II of the second amended complaint should be dismissed for the same reasons the trial court dismissed the same counts in the first amended complaint. Defendants moved to dismiss Counts III, IV, V, and VI pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)) for failure to state a claim upon which relief can be granted.

¶ 23 The trial court granted defendants' motion to dismiss as to Counts I and II of the second amended complaint with prejudice. The court found that it previously dismissed Counts I and II of the first amended complaint with prejudice because before that first dismissal the court had already ruled against the Milazzos on the existence of an attorney-client relationship between them and defendants when the court ruled on the Milazzos' consolidated motion to disqualify defendants as attorneys for the Windy City entities and Jacobs in the four other cases pending before the court. The court found Counts I and II of the second amended complaint "replead[] these claims which have already been dismissed with prejudice." The court rejected the Milazzos' argument they could allege facts showing an attorney-client relationship if the court

allowed discovery. The court found that such discovery had already occurred in connection with the motion to disqualify, and that the "depositions presented to [the] court established the absence of any attorney-client relationship between the Milazzos and [defendants] as to the transactions at issue."

¶ 24 The trial court then found that to state a claim under Count III of the second amended complaint the Milazzos' had to allege "facts showing that [defendants] knew that Jacobs' conduct constituted a breach of fiduciary duty and that [defendants] provided Jacobs with substantial assistance or encouragement in breaching his fiduciary duties to the Milazzos." The court struck the allegations in Count III of alleged duties owed by defendants to the Milazzos' based on an attorney-client relationship with prejudice. The court found defendants owed no such duties to the Milazzos. Regarding the remaining allegations the court found Count III failed to allege any specific facts showing that defendants substantially assisted Jacobs in any breach of fiduciary duty, noting that knowledge of a breach of fiduciary duty and failing to act on such knowledge does not constitute encouragement or substantial assistance. The court found that Count VI for aiding and abetting fails to state a claim for the same reasons as Count III.

¶ 25 The trial court found Count IV fails to state a claim for legal malpractice and "Count V, which is a duplicative derivative claim for breach of fiduciary duty, also fails to state a claim." The court found Count IV fails to state a claim for legal malpractice because it "does not allege any facts showing that [defendants] committed a specific act of negligence that proximately caused actual monetary damage to Windy City or JKS." The court characterized Count IV as simply alleging defendants were aware of Jacobs' conduct and that Jacobs' conduct damaged the entities.

¶ 26 Plaintiffs elected not to replead and stood on their complaint. The trial court entered a final order of dismissal. This appeal, from the orders granting defendants' motions to dismiss plaintiffs' first and second amended complaints and the final order of dismissal, followed.

¶ 27 ANALYSIS

¶ 28 Plaintiffs' appeal challenges rulings pursuant to sections 2-619 and 2-615 of the Code. We review the circuit court's order granting a section 2-619 motion to dismiss *de novo*. *Andrews v. Gonzalez*, 2014 IL App (1st) 140342, ¶ 16. "A motion to dismiss a claim based on section 2-619 of the Code ([citation]) admits the legal sufficiency of the plaintiff's allegations but asserts affirmative matter that avoids or defeats the claim. [Citation.] On review, we accept well-pled facts as true and construe the facts in the light most favorable to the nonmoving party." *1002 E. 87th St. LLC v. Midway Broadcasting Corp.*, 2018 IL App (1st) 171691, ¶ 13.

> "The phrase 'affirmative matter' encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action. [Citation.] For that reason, it is recognized that a section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the plaintiff's cause of action much in the same way that a section 2-615 motion to dismiss admits a complaint's well-pleaded facts. [Citation.]
>
> If the 'affirmative matter' asserted is not apparent on the face of the complaint, the motion must be supported by affidavit. (Ill.Rev.Stat.1989, ch. 110, par. 2-619(a); see also 4 R. Michael, Illinois Practice § 41.8, at 334 (1989) (observing that 'materials of the same nature as are used to support motions for summary judgment' may serve as support for the motion), citing *Sierens v. Clausen*, 60 Ill. 2d 585, 588 (1975) (noting, in the absence of supporting affidavits, that answers to interrogatories may be used in evidence to the same

> extent as discovery depositions and that discovery depositions may be used for any purpose for which affidavits may be used).) By presenting adequate affidavits supporting the asserted defense ([citation]), the defendant satisfies the initial burden of going forward on the motion. The burden then shifts to the plaintiff.
>
> The plaintiff must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. The plaintiff may do so by 'affidavit[ ] or other proof.' [Citation.] A counteraffidavit is necessary, however, to refute evidentiary facts properly asserted by affidavit supporting the motion else the facts are deemed admitted. If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115-16 (1993).

¶ 29 "We review the circuit court's order granting a section 2-615 motion to dismiss *de novo*." *Mitchell v. People*, 2016 IL App (1st) 141109, ¶ 14.

> "The question presented by a motion to dismiss a complaint under section 2-615 of the Code is whether the complaint alleges sufficient facts that, if proved, would entitle the plaintiff to relief. [Citation.] Such a motion challenges only the legal sufficiency of the complaint. [Citation.] We accept all well pleaded facts and reasonable inferences from the facts in a light most favorable to the plaintiff, with the critical inquiry being whether the allegations are sufficient to state a cause of action on which relief can be granted. [Citations.] A court should only dismiss a complaint under section 2-615 where no set of facts can be proved, which would

> entitle the plaintiff to recovery. [Citation.] In other words, if the pleadings put at issue one or more facts material to recovery under a claim, evidence must be taken to resolve such issues, and judgment dismissing that claim on the pleadings is inappropriate. [Citation.] A claim need only show a possibility of recovery, not an absolute right to recovery, to survive a section 2-615 motion. [Citation.]" *Gress v. Lakhani Hospital, Inc.*, 2018 IL App (1st) 170380, ¶ 11.

¶ 30 A. Plaintiffs' Individual Negligence and Breach of Fiduciary Duty Claims

¶ 31 Counts I and II of plaintiffs' second amended complaint are for negligence and breach of fiduciary duties, respectively.

> "To state a cause of action for negligence properly, a plaintiff must establish the following elements: that the defendant owed a duty of care to the plaintiff; that the defendant breached that duty; and that the breach was the proximate cause of the plaintiff's injuries. [Citation.] Whether a duty exists is a question of law for the determination of the trial court. [Citation.] In order for the trial court to find the existence of a duty, the defendant and the plaintiff must stand in such a relationship to one another that the law imposes upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. [Citation.] Consequently, an attorney can only be liable in negligence to persons to whom he or she owes a duty. [Citation.]
>
> The general rule in Illinois is that an attorney owes a duty of care only to his client and not to third parties. [Citation.] This limited liability serves to protect the personal, highly confidential and fiduciary nature of the attorney-client relationship. [Citation.] However, a narrow exception to this privity requirement has been carved out in limited circumstances. An attorney *** owes a duty to a

> third party only where hired by the client specifically for the purpose of benefitting that third party. [Citations.]" *Kopka v. Kamensky & Rubenstein*, 354 Ill. App. 3d 930, 934 (2004).

¶ 32 Counts I and II of the second amended complaint alleging negligence by defendants and breach of defendants' fiduciary duties to the Milazzos are premised on the existence of an attorney-client relationship between defendants and the Milazzos individually. Plaintiffs' first argue they have not waived their objection to defendants' representation of Windy City and JKS. This argument is based on part of the trial court's order on their motion to disqualify defendants from the related litigation, which formed one of the bases of the trial court's order dismissing Counts I and II of plaintiffs' first amended complaint and provided the grounds for dismissal of plaintiffs' second amended complaint.

¶ 33 The trial court's ruling on the motion to disqualify states, in part:

> "The Milazzos were well aware of any alleged conflict of interest from the beginning of the Original Litigation [(the first of the five cases surrounding Windy City)]. By waiting five months to move to disqualify [defendants,] while actively litigating the Original Litigation, the Milazzos have waived any conflict of interest. *Furthermore, even if waiver did not apply, the Milazzos have wholly failed to show that disqualification is warranted as discussed below*." (Emphasis added.)

The court went on to reject plaintiffs' argument that work defendants performed for the Windy City entities constituted work done individually for the Milazzos; and the court held nothing indicated a substantial relationship between the Carey litigation and any litigation pending before the trial court, thus defendants could not be disqualified based on the Carey litigation.

¶ 34 The trial court's order dismissing Counts I and II of the first amended complaint found that Count I of the first amended complaint did not allege any facts showing the existence of an attorney-client relationship between the Milazzos and defendants but was instead based on alleged negligence in defendants' representation of Windy City and Jacobs. The court held Count II of the first amended complaint "must be dismissed *** because it is duplicative of Count I" pursuant to *Pippen v. Pedersen & Houpt*, 2013 IL App (1st) 111371, ¶ 23. That order also states: "Furthermore, Count I is also subject to dismissal under § 2-619 because this court has already ruled against the Milazzos on the existence of an attorney-client relationship."

¶ 35 In dismissing the second amended complaint, the court wrote:

> "This court previously dismissed Counts I and II of the [First] Amended Complaint ***. These claims were dismissed with prejudice because this court had already ruled against the Milazzos on the existence of an attorney-client relationship between the Milazzos and [defendants.] This court specifically found that the Milazzos did not individually have any attorney-client relationship with [defendants] except as to [the Carey litigation.] *** The depositions presented to [the] court established the absence of any attorney-client relationship ***."

The prior ruling on the motion to disqualify was only one ground on which the trial court dismissed Counts I and II of the first amended complaint, but that prior ruling was the sole basis on which the court dismissed Counts I and II of the second amended complaint.

¶ 36 Plaintiffs argue the trial court's dismissal of Counts I and II based on the ruling on the motion to disqualify was error because the requirements for the application of *res judicata* are not met. The *res judicata* doctrine consists of three requirements: "(i) identity of parties or their privies in the lawsuits; (ii) identity of causes of action; and (iii) final judgment on the merits rendered by a court of competent jurisdiction. [Citation.] *** If all three requirements of the

doctrine are satisfied, *res judicata* 'bars not only what was actually decided in the first action but also whatever could have been decided.' [Citation.]" *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 52. In this case plaintiffs assert (1) the parties in the two cases are different, (2) there is no identity of claims, and (3) the ruling based on wavier is not a ruling on the merits.

¶ 37 Defendants respond plaintiffs forfeited their *res judicata* argument by failing to raise it before the trial court. Defendants argued below that the trial court's prior ruling on plaintiffs' motion to disqualify required dismissal of plaintiffs' legal malpractice claims, but plaintiffs did not argue that *res judicata* did not apply. "It is well settled that an unsuccessful party may not advance a new theory of recovery on appeal [citation], and that doing so results in forfeiture of that issue [citations.] The purpose of this court's forfeiture rules is to encourage parties to raise issues in the trial court, thus ensuring both that the trial court is given an opportunity to correct any errors prior to appeal and that a party does not obtain a reversal through his or her own inaction. [Citation.]" (Internal quotation marks omitted.) *Thompson v. N.J.*, 2016 IL App (1st) 142918, ¶ 21. Defendants' motion to dismiss plaintiffs' second amended complaint argued, in part, that the trial court had "already ruled that no [attorney-client] relationship existed between the defendants and the Milazzos," citing the order on the motion to disqualify. Plaintiffs' response to defendants' motion does not argue the trial court may not rely on its prior ruling on the motion to disqualify because the parties are different, the claims are different, or the ruling on the motion to disqualify was not a ruling on the merits. We agree with defendants that plaintiffs have forfeited their argument *res judicata* does not apply.

¶ 38 Forfeiture of the *res judicata* argument aside, we may affirm the trial court based on any reason found in the record. In its ruling on the second amended complaint the trial court found the Milazzos did not establish the existence of an attorney-client relationship based in part on

their depositions. For the following reasons we find the trial court properly relied upon the admissions in those depositions to find that no attorney-client relationship existed between the Milazzos and defendants.

¶ 39 Plaintiffs assert direct evidence of an attorney-client relationship consists of their allegation Jacobs hired defendants to represent Windy City *and* its members, and defendants' representation of the Milazzos in the litigation related to the alleged breach of Jacobs' noncompete provisions in his employment contract with Carey. Plaintiffs assert the indirect evidence of the attorney-client relationship with the Milazzos is the absence of a retainer agreement for the Carey litigation, which on information and belief was because it is defendants' custom and practice not to prepare such agreements for existing clients, and that defendants never announced their withdrawal of their representation of the Milazzos after the Carey litigation. Plaintiffs further argue that the facts alleged "demonstrate that the Milazzos reasonably believed that the defendants continued to be their attorneys and were looking out for their interests," and establish the Milazzos' reliance on an attorney-client relationship and defendants' knowledge of that reliance.

¶ 40 Defendants assert the Milazzos both admitted under oath that the only time they requested defendants to represent them personally was for the Carey litigation, and these unequivocal admissions establish as a matter of law that defendants did not represent the Milazzos personally at any other time. Defendants argue that given the Milazzos' admissions, the trial court correctly found no attorney-client relationship exists between the Milazzos and defendants. Defendants cite the trial court's order on the motion to disqualify, which states, in a footnote: "The Milazzos admit that the only time either of them requested that [defendants] represent individually [*sic*] was in the Carey Litigation. [Citation.] Sal testified that he used other attorneys for his personal matters. [Citation.]" The order cites Sal's and Janet's

depositions. Moreover, the trial court's order granting defendants' motion to dismiss the second amended complaint states: "The depositions *** established the absence of any attorney-client relationship *** as to the transactions at issue."

¶ 41 In reply, plaintiffs assert defendants forfeited this argument by failing to raise it in the trial court and, moreover, plaintiffs argue "the only ruling in the Windy City litigation that is the law of that case is that the motion to disqualify was denied because it was untimely. Everything else contained in the ruling is *dicta*."

¶ 42 In this instance we reject plaintiffs' forfeiture argument. We find defendants raised the argument the Milazzos' admissions establish the absence of an attorney-client relationship before the trial court. Defendants' motion to dismiss the second amended complaint argues that the trial court "has already ruled that no such relationship existed between the defendants and the Milazzos and dismissed these allegations with prejudice." That argument cites the trial court's ruling on the motion to disqualify, which does not expressly rely on the admissions but at minimum cites the Milazzos admissions in ruling "there is no basis for disqualification." We find this is sufficient to preserve the issue. See, *e.g.*, *Shook v. Tinny*, 122 Ill. App. 3d 741, 744 (1984) ("The record discloses that plaintiff did mention the defense of *res judicata* (of which collateral estoppel is one branch) in her argument before the trial court and in her post trial motion in this garnishment proceeding. Accordingly, for purposes of this appeal, we believe the trial court and the parties had sufficient notice of the issue to preserve it for consideration by this court."). Regardless, a "key purpose of the waiver doctrine is to prevent unfair prejudice to an opposing party: If one party neglects to raise an argument at the trial level, the adversary may be forestalled from presenting evidence in rebuttal, and thus it is proper to bar the first party from springing the argument at the appellate level where the presentation of evidence is no longer possible." *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437,

453 (2007). Plaintiffs are not prejudiced by consideration of their own admissions which the trial court specifically noted when it first ruled on the issue of the existence of an attorney-client relationship. Plaintiffs had the opportunity to address the argument in their reply, and we can conceive no additional evidence plaintiffs could have presented to forestall the argument had defendants raised their admissions argument more expressly to the trial court.

¶ 43 Turning to defendants' argument the trial court properly found no attorney-client relationship between the Milazzos and defendants based on the Milazzos' admissions, defendants assert, relying on *Filrep, S.A. v. Barry*, 88 Ill. App. 3d 935 (1980), that the admissions in the related litigation are subject to judicial notice; and defendants cite *Blue Water Partners, Inc. v. Mason, Foley and Lardner*, 2012 IL App (1st) 102165, for the proposition that a shareholder plaintiff who admittedly had not retained the corporation's attorney on an individual basis is not the corporation's attorney's client as a matter of law.

¶ 44 In *Filrep*, one of the issues on appeal was "whether it was improper for the trial judge to take judicial notice of the contents of a record in an earlier proceeding in the same court, which was presided over by another judge and in which the defendant in the instant case was the plaintiff." *Filrep*, 88 Ill. App. 3d at 936. *Filrep* involved a suit by the plaintiff to recover money owed on an oral contract for the defendant to purchase Simmental cattle from the plaintiff. *Id.* One of the conditions of the sale was that the cows the defendant purchased would be fertile and would never have been bred. *Id.* at 936-37. At the trial, the defendant testified that one of the cows he received was with calf upon delivery and two of the cows delivered to him were sterile. *Id.* at 937-38. The defendant testified all three cows were slaughtered. *Id.* at 938. Following the noon recess taken at the conclusion of the defendant's testimony, the trial judge informed the parties he had taken judicial notice of an earlier case tried before a different trial judge in which the defendant in *Filrep* was the plaintiff. *Id.* The prior case had been brought to the judge's

attention during a lunch time conversation with other judges. *Id.* The trial judge in *Filrep* discovered that in the prior case, the defendant admitted facts pursuant to Illinois Supreme Court Rule 216 showing that the three cows at issue had not been slaughtered when the defendant said they were. *Id.* "The trial judge commented on his findings as follows: 'I don't like to see perjury in this court, and that is what my impression is of what I have heard to this time.' " *Id.* at 939. The trial judge entered judgment in favor of the plaintiff. *Id.*

¶ 45 On appeal, the defendant argued the trial judge committed reversible error "when he took judicial notice of the record in the earlier case." *Id.* The *Filrep* court relied primarily on our supreme court's decision in *People v. Davis*, 65 Ill. 2d 157 (1976), in which, according to the *Filrep* court, our supreme court "expressed a more flexible approach to the question of judicial notice." *Id.* (citing *Davis*, 65 Ill. 2d 157). In *Davis*, our supreme court noted that "[e]arlier cases in this court would appear to preclude a judge from taking judicial notice of the orders or decrees entered in other cases in the court in which he presides." *Davis*, 65 Ill. 2d at 164. The court found that "[t]o the extent that these and similar holdings may be thought to create an inflexible rule requiring formal proof of earlier court records only by authenticated or certified copies of those records and proof identity, they are incompatible with considerations of judicial economy and efficiency essential to the disposition of present-day caseloads." *Id.* Rather, "the extension of the doctrine of judicial notice to include facts which, while not generally known, are readily verifiable from sources of indisputable accuracy is an important aid in the efficient disposition of litigation, and its use, where appropriate, is to be commended." *Id.* at 165. The *Davis* court held the trial court properly took judicial notice of a prior conviction entered by the same trial judge presiding over the case on appeal in *Davis*. *Id.* The *Davis* court declined to adopt Federal Rule of Evidence 201(b), preferring to "await the report of our Committee on Evidence, which is considering a new code of evidence for Illinois." *Id.* But see Ill. R. Evid. 201(b) (eff. Jan. 1,

2011) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is *** (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

¶ 46 After discussing *Davis*, and our supreme court's decision in *In re W.S., Jr., a Minor*, 81 Ill. 2d 252 (1980), the *Filrep* court held "the trial judge in the case at bar properly took judicial notice of the facts in the earlier case which indicated that the defendant here had committed perjury. These facts are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy." *Filrep*, 88 Ill. App. 3d at 941. In this case, the trial court's order dismissing the second amended complaint takes judicial notice of its prior finding that the Milazzos admitted defendants did not represent them personally, which was contained in its ruling denying the motion to disqualify in another case before it (the consolidated Windy City matters, which do not include the case before this court ("The depositions presented to this court established the absence of any attorney-client relationship between the Milazzos and [defendants] as to the transactions at issue.")). The trial court properly took judicial notice of the adjudicative facts in the related Windy City cases. *Id.*; *Davis*, 65 Ill. 2d at 162.

¶ 47 Similarly, "a reviewing court may take judicial notice of a written decision that is part of the record of another court because these decisions are readily verifiable facts that are capable of instant and unquestionable demonstration." (Internal quotation marks omitted.) *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶ 37. In *Aurora*, the issue in the case was whether the plaintiff in the mortgage foreclosure action being appealed was a collection agency under the Collection Agency Act or whether it was a subsidiary of a federal savings bank and thus exempt from the Collection Agency Act. *Aurora Loan Services*, LLC, 2013 IL App (1st) 121700, ¶ 25. In support of its claim it was a subsidiary and thus exempt, the plaintiff "cited several cases in which the courts took judicial notice of documents that established Aurora is a

wholly owned subsidiary of Aurora Bank, formerly Leham Brothers Bank, a federally chartered savings bank." *Id.* ¶ 38. The court took judicial notice of those written decisions and found the plaintiff was a subsidiary of a bank exempt from the requirements of the Collection Agency Act. *Id.* We find *Aurora* analogous to the case currently before this court. In *Aurora*, the court took judicial notice of a finding of an adjudicative fact in a written order in a different case involving the same party. See *id.* Here, we may take judicial notice of the trial court's finding of fact that the Milazzos admitted in their depositions that "the only time either of them requested that [defendants] represent [them] individually was in the Carey Litigation."

¶ 48 Having taken notice of plaintiffs' admissions, we next consider whether they establish defendants did not have an attorney-client relationship with the Milazzos individually. In support of that proposition, defendants cite *Blue Water Partners, Inc.*, 2012 IL App (1st) 102165. In *Blue Water Partners*, the plaintiff was the vice-president and an equal shareholder in a business incorporated by the defendant law firm. *Blue Water Partners, Inc.*, 2012 IL App (1st) 102165, ¶ 23. The plaintiff alleged the defendants breached their duties to the plaintiff in several ways arising from the defendants' efforts in setting up a competing business for the plaintiff's former partner. *Id.* ¶ 25. The court began by stating that "to go forward on a legal malpractice claim, a plaintiff must first establish the existence of an attorney-client relationship that gave rise to a duty of care on the part of the attorney. [Citation.] The question of whether a duty exists is one of law that the circuit court answers in the first instance. [Citation.]" *Id.* ¶ 38. The court noted that "[a] duty of care to a third party may arise where [the attorney is] hired by the client specifically for the purpose of benefitting that third party. [Citation.]" (Internal quotation marks omitted.) *Id.* "Thus, for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party. [Citation.] Proof of intent to benefit or influence a third

party must be specific. A claim that the third party is a shareholder in the corporation is by itself insufficient to establish a duty on the part of the attorney for the corporation in favor of the shareholder third-party." *Id.* ¶ 38. In a deposition, the plaintiff in *Blue Water Partners* admitted that at no time had he retained the defendants as his attorney personally. *Id.* ¶ 40. The court called this "unequivocal evidence that no attorney-client relationship ever arose with the defendants." *Id.* ¶ 41. In *Blue Water Partners*, the plaintiff also argued that an attorney-client relationship arose based on the defendants' efforts on his behalf. *Id.* The court rejected the plaintiff's argument, finding "the facts (including statements under oath by [the plaintiff]) support only one conclusion: that no attorney-client relationship ever existed between [the plaintiff] and the defendant attorneys." *Id.* ¶ 42. The court went on to find that the record evidence did not support, either directly or as a matter of inference, that the defendants were hired for the primary purpose of benefitting the plaintiff. *Id.* ¶ 43. The court found that for the nearly two years the attorney-client relationship existed between the defendants and the company, "nothing in the record reveals an intent of the relationship to either benefit or influence [the plaintiff.]" *Id.*

¶ 49 In this case, we also find the Milazzos' admission to be unequivocal evidence that no attorney-client relationship existed between them and defendants outside the Carey litigation. Here, as in *Blue Water Partners*, the Milazzos admitted that the only time they requested an attorney from defendants to represent them personally was in the Carey litigation. Plaintiffs rely on the fact defendants never formally informed the Milazzos their representation of them was ending after the Carey litigation. "If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. [Citation.] However, [i]f a lawyer has served a client over a substantial period in a variety of matters, the client may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of

withdrawal. [Citation.]" (Internal quotation marks omitted.) *Board of Managers of Eleventh Street Loftominium Ass'n v. Wabash Loftominium, L.L.C.*, 376 Ill. App. 3d 185, 195 (2007). In this case, the Milazzos' admission contradicts finding defendants represented the Milazzos "over a substantial period in a variety of matters."

¶ 50 Plaintiffs' factual allegations are also insufficient to establish that defendants represented the Milazzos over a substantial period. (We also note the trial court found that discovery to attempt to develop facts to establish the existence of an attorney-client relationship between the Milazzos and defendants has already occurred and failed produce such evidence. The trial court's order dismissing the second amended complaint states: "Finally, the Milazzos suggest that they could allege facts showing an attorney-client relationship if discovery was allowed. Such discovery, however, already occurred in connection with the Motion to Disqualify.") "The general rule in Illinois is that an attorney owes a duty of care only to his client and not to third parties." *Kopka*, 354 Ill. App. 3d at 934. The complaint does not allege that the Milazzos individually retained defendants. See *id.* at 935. "An attorney *** owes a duty to a third party only where hired by the client specifically for the purpose of benefitting that third party. [Citations.] In order for a nonclient third party to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party. [Citation.]" *Id.* at 934-35. The complaint cannot be construed to allege that the primary purpose and intent of defendants' engagement was to protect the Milazzos' personal interests in the Windy City entities. Construing the complaint liberally in plaintiffs' favor the primary purpose of the attorney-client relationship was to form the Windy City entities. See *Reddick v. Suits*, 2011 IL App (2d) 100480, ¶ 46. ("In determining intended versus incidental beneficiaries, the court continued its focus on the client and the goal of the representation."). The complaint alleges the Milazzos informed and/or believed

defendants were protecting their personal interests in the entities. Those allegations are insufficient to support the existence of an attorney-client relationship.

¶ 51 In *Felty v. Hartweg*, 169 Ill. App. 3d 406 (1988), the plaintiff was a minority shareholder in a closely held corporation and the defendant had been the attorney for the company. *Felty*, 169 Ill. App. 3d at 407. The complaint alleged the defendant failed to inform the plaintiff of misconduct by officers of the corporation, thereby causing the plaintiff to suffer a loss. *Id.* The plaintiff made several allegations he contended "set forth special circumstances giving rise to an attorney-client relationship" between himself and the defendant. *Id.* at 408. Relevant here is the allegation that the defendant knew or should have known the company's shareholders "were going to rely and did rely [on him] to act in the best interests of the individual shareholders." (Internal quotation marks omitted.) *Id.* The court held "[t]he allegation that he should have known he was expected to protect the minority shareholders is an allegation which places upon him a duty not imposed by law. Even if, as alleged, he knew of those expectations that would not necessarily have imposed a duty which he would owe to a client." *Id.* at 410.

¶ 52 The second amended complaint fails to allege, and the Milazzos admissions preclude finding, the existence of an attorney-client relationship between the Milazzos and defendants. Therefore, Count I of the second amended complaint cannot stand. *Kopka*, 354 Ill. App. 3d at 934. Plaintiffs argue Count II of the second amended complaint is a different claim with different elements. However, Count II of the second amended complaint for breach of fiduciary duties is based on the same operative facts as Count I. See *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 761 (2008). "Despite the fact that actions for legal malpractice and breach of fiduciary duty are conceptually distinct, when *** the same operative facts support actions for legal malpractice and breach of fiduciary [duty] resulting in the same injury to the client, the actions are identical and the later should be dismissed as duplicative." (Internal quotation marks omitted.) *Id.* at 760.

Accordingly, the trial court properly dismissed Counts I and II of plaintiffs' second amended complaint.

¶ 53 B. Plaintiffs' Aiding and Abetting Claim

¶ 54 Count III of plaintiffs' second amended complaint alleges defendants aided and abetted Jacobs' misconduct by taking several material steps in support of and in furtherance of Jacobs' actions.

> "In Illinois, to properly plead the tort of aiding and abetting, one must allege the following elements: (1) the party whom the defendant aids must perform a wrongful act which causes an injury; (2) the defendant must be regularly aware of his role as part of the overall or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation. [Citations.]" (Internal quotation marks omitted.) *Grimes v. Saikley*, 388 Ill. App. 3d 802, 819 (2009) (citing *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 27-28 (2003) (quoting *Wolf v. Liberis*, 153 Ill. App. 3d 488, 496 (1987))).

¶ 55 Plaintiffs argue that even if they "have not alleged facts demonstrating an attorney-client relationship [with defendants], they can still prevail on this claim by alleging facts and raising inferences from those facts demonstrating *** defendants knew Jacobs' actions breached duties owed to the Milazzos and *** defendants substantially assisted or encouraged Jacobs' breaches of duties to the plaintiffs." Plaintiffs argue the second amended complaint "alleges numerous ways *** defendants directly and indirectly assisted Jacobs in his efforts to dominate and seize control of Windy City and JKS from the Milazzos." We have held plaintiffs failed to allege facts demonstrating an attorney-client relationship between the Milazzos and defendants.

¶ 56 Defendants argue the trial court properly dismissed Count III for aiding and abetting Jacobs' breaches of fiduciary duties owed to the Milazzos, and Count VI for aiding and abetting Jacobs' breaches of fiduciary duties to Windy City and JKS, because plaintiffs failed to plead facts showing defendants were regularly aware of Jacobs' allegedly tortious activities or that defendants substantially assisted the alleged principal violation. Defendants argue plaintiffs only allege failure to act, not active participation in Jacobs' alleged breach. Specifically, defendants argue the following alleged acts do not constitute substantial assistance:

- allowed Jacobs to dominate and control Windy City
- failed to take any action to disclose/failed to disclose
- failed to advise
- took no action
- did not recommend action.

Defendants argue "substantial assistance" requires "action such as concealing, withholding information, or preparing materials, much more than failing to act." Plaintiffs argue in their reply that they have alleged exactly those things. Specifically plaintiffs argue they alleged defendants "concealed and withheld material facts from their clients the Windy City entities and they withheld legal advice from the entities as to what they might do to protect themselves from Jacobs' misconduct. They prepared the document used by Jacobs to terminate Sal and Janet." Plaintiffs also argue that defendants' mere knowledge of Jacobs' misconduct, and their failure to disclose it to their clients, would constitute "*per se* 'substantial assistance or encouragement' to Jacobs" and a breach of defendants' duties to their clients.

¶ 57 Defendants' argument is based, in part, on this court's decision in *Thornwood, Inc.*, 344 Ill. App. 3d 15. In *Thornwood*, after this court found the plaintiff raised a genuine issue regarding the validity of a release of all claims and reversed the trial court's order based on that

release dismissing the plaintiff's complaint, the court addressed the defendant law firm's alternative argument that this court should affirm the dismissal because the complaint failed to state any claims against the defendant law firm upon which relief could be granted. *Thornwood, Inc.*, 344 Ill. App. 3d at 27. The complaint alleged the defendant law firm aided and abetted: a breach of fiduciary duty, a scheme to defraud, and a scheme of fraudulent inducement. *Id.* at 18. The plaintiff in *Thornwood* had been partners with James Follensbee in the development of property as a residential community and golf course. *Id.* at 18. Follensbee approached outside entities about the possibility of developing the property as a Professional Golfers Association (PGA) Tournament Players Course (TPC). *Id.* at 19. Development of the property for the PGA would significantly increase the value of the plaintiff's and Follensbee's investments, but based on an early communication from the PGA, Follensbee told the plaintiff that the PGA's involvement in the development project was not feasible. *Id.* Unbeknownst to plaintiff, however, Follensbee continued to negotiate with the other entities on developing the property for the PGA. *Id.* The defendant law firm participated in Follensbee's negotiations with the PGA. *Id.* at 20. When the development appeared not to be moving forward, the plaintiff told Follensbee he wanted to liquidate the partnership. Follensbee refused but offered to buy out the plaintiff. *Id.* at 19. Follensbee never disclosed his continued negotiations on development of the property for the PGA or that the plaintiff's investment was likely to gain significant value in the near future because of those negotiations. *Id.* Follensbee used the defendant law firm to assist him in acquiring the plaintiff's interest in the partnership. *Id.* at 20.

¶ 58 This court recognized that the "mere receipt of copies of letters authored by Follensbee, which expose his breach of fiduciary duty [to the plaintiff], probably does not constitute aiding and abetting under Illinois law." *Id.* at 29. The court found the plaintiff had alleged more, specifically that the defendant law firm "aided and abetted by knowingly and substantially

assisting Follensbee in breaching his fiduciary duty by (1) communicating the competitive advantages available to the Partnership from the PGA/TPC plan to other parties, but specifically not to Thornton; (2) expressing Follensbee's interest in purchasing Thornton's interest in the Partnership and negotiating the purchase of that interest without disclosing to Thornton the continued negotiations with the PGA ***; (3) reviewing and counseling Follensbee with regard to the production of investment offering memoranda, financial projections, and marketing literature, which purposely failed to identify Thornton as a partner; and (4) drafting, negotiating, reviewing, and executing documents, including the Jenner & Block and Follensbee Releases, relating to the purchase of Thornton's interest and the PGA/TPC Plan with knowledge that Thornton was not aware of the PGA/TPC plan." *Id.* This court found "[a]ll of these acts are alleged to have been perpetrated by [the defendant law firm] while it had knowledge that Thornton and Follensbee were partners, that Follensbee had a duty to disclose the PGA/TPC plan to Thornton, and that Follensbee did not disclose the PGA/TPC plan to Thornton despite having the opportunity and duty to do so." *Id.* This court held it could not dismiss the complaint for failure to state a claim. *Id.*

¶ 59 Conversely, in *Grimes*, the defendant attorneys were the attorneys for the public administrator, who took over administration of an estate after the decedent's executrix (his widow) was removed for mismanaging estate assets. *Grimes*, 388 Ill. App. 3d at 805-06. The plaintiffs (decedent's children) alleged the defendant attorneys, in violation of their duty to the estate and the plaintiffs, aided and abetted the former attorneys of the executrix of the estate, the executrix, and the executrix's family. *Id.* at 819. The specific acts of aiding and abetting the plaintiffs alleged were that the defendants "(1) 'knowingly allowed' [the executrix's] family to take, use, or damage property ***; (2) 'knowingly failed to gather, inventory[,], and protect the assets of the estate' ***; (3) 'explicitly refused to file suit' ***, and (4) 'failed to take any action

to recover estate assets' " *Id.* The *Grimes* court held "[w]hile allegations of having knowledge and failing to take certain actions may be part of a cause of action for negligence in certain instances, those allegations do not allege that defendants (1) were regularly aware of their regular role in the tortious activity at the time of the assistance or (2) substantially assisted in the principal violation." *Id.* The court also found that the allegation the defendants directed the executrix's family to take personalty and fixtures from the estate when they had no right to do so failed to allege the defendants substantially assisted in the wrongful acts or were regularly aware of their role in the wrongful acts. *Id.* at 820.

¶ 60 Applying the foregoing principles to the allegations in Count III and Count VI, we find plaintiffs failed to allege sufficient facts to state a claim personally or derivatively for aiding and abetting. We initially note plaintiffs' argument defendants independently owed them a duty to disclose all facts known to them that were material to the attorney-client relationship in support of their claim certain "failures to disclose" by defendants constitute aiding and abetting. Any allegations that defendants aided and abetted Jacobs by breaching an alleged duty to the Milazzos to disclose material information fail because defendants owed no such duty to the Milazzos personally. Further, plaintiffs cite no authority for their assertion defendants' failure to disclose would constitute "*per se* 'substantial assistance or encouragement' to Jacobs."

¶ 61 Count III and Count VI of plaintiffs' second amended complaint fail to state a cause of action for aiding and abetting because the allegations in the second amended complaint are primarily allegations of "having knowledge and failing to take certain actions." See *id.* at 819. The operative phrases in plaintiffs' specific allegations of aiding and abetting are: "failed to take any action to disclose;" "failed to advise;" "took no action to advise *** or recommend or take action;" "failed to recommend or take any action;" "failed to advise *** or recommend or take action;" "[n]either defendant advised;" "failed to advise;" "failed to disclose;" "failed to disclose

*** or recommend or take any action;" "did not disclose *** or recommend to take action;" "failed and refused to withdraw their representation." Plaintiffs cite no authority for their implicit argument that a breach of a fiduciary duty that benefits another party's tortious conduct constitutes aiding and abetting that tortious conduct. [1] A fiduciary or attorney-client relationship between the defendant and the injured party is not an element of the claim for aiding and abetting. See *Wolf*, 153 Ill. App. 3d at 496. Further, simply alleging a defendant breached its own fiduciary duty is not sufficient to allege that defendant was "regularly aware of their regular role in the tortious activity" of another or "substantially assisted in the principal violation." "While allegations of having knowledge and failing to take certain actions may be part of a cause of action for negligence in certain instances, those allegations do not allege that defendants (1) were regularly aware of their regular role in the tortious activity at the time of the assistance or (2) substantially assisted in the principal violation." *Grimes*, 388 Ill. App. 3d at 819. Those instances where having knowledge and failing to take certain actions may be part of a cause of action for negligence are those in which the party with knowledge who fails to act owed the injured party a duty to do so. The foregoing allegations that defendants aided and abetted Jacobs because defendants breached their duties to their clients fail to state a claim for aiding and abetting. *Id.*

¶ 62 Count III of the second amended complaint also alleges defendants prepared the Windy City entities' operating agreements in a manner that allowed Jacobs to dominate and control the businesses, and defendants urged the Milazzos to sign the operating agreements knowing they

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[1] Under a theory of concert of action, a defendant can be liable for giving substantial assistance to a third party in accomplishing a tortious result if the defendant's own conduct, separately considered, breached a duty to the injured party. *Wolf*, 153 Ill. App. 3d at 496. *Wolf* recognized "concert of action" as a separate theory of recovery from "aiding and abetting." See *id.* Plaintiffs' second amended complaint does not allege a theory of concert of action.

were looking to defendants to protect their interests and the operating agreements did not do so. Defendants respond even if plaintiffs' allegations are true, the Milazzos cannot complain that defendants aided and abetted a breach of fiduciary duty by Jacobs where the Milazzos had an opportunity and a duty to learn the contents of the operating agreements before they signed them. Defendants cite *Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303, ¶ 27, in which this court relied on prior rulings establishing that:

> "One is under a duty to learn, or know, the contents of a written contract before he signs it, and is under a duty to determine the obligations which he undertakes by the execution of a written agreement. [Citation.] And the law is that a party who signs an instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by misrepresentations. [Citations.]" (Internal quotation marks omitted.) *Tucker*, 2012 IL App (1st) 103303, ¶ 27.

¶ 63 The *Tucker* court held the plaintiffs in that case were under a duty to determine the contents of their agreement, "and any claims regarding oral representations countering the clear language of their contract *** are insufficient under the law." *Id.* ¶ 28. Plaintiffs in reply do not dispute the rule but argue it applies only to arm's length transactions. Plaintiffs argue that defendants failed to "cite any cases holding that a client is unjustified in relying on his attorney's analysis of and advice regarding a complex limited liability operating agreement." Plaintiffs' argument must fail in this case, because as we have held, the Milazzos, individually, were not defendants' clients. Plaintiffs do not dispute they had the opportunity to learn the contents of the operating agreements. The allegations concerning defendants' structuring of the operating agreements fail to state a claim defendants aided and abetted Jacobs' alleged breach of his

fiduciary duty to plaintiffs by structuring the operating agreements the way he did. *Id.* ¶ 27. We also note plaintiffs' assertion defendants drafted a legal opinion concerning Jacobs' right to terminate Janet that was used as the basis for her termination. Plaintiffs have not cited to this opinion letter in the record. Assuming, *arguendo*, the second amended complaint makes that allegation[2], we are not persuaded defendant stated a claim for aiding and abetting. The second amended complaint fails to allege specific facts establishing the letter substantially assisted the termination. Even if Jacobs relied on the letter it would not render the termination immune from challenge. Plaintiffs also allege defendants assisted Jacobs in pursuing a Petition for Indirect Criminal Contempt to gain leverage over the Milazzos. Missing from that allegation are facts demonstrating that in filing the petition Jacobs committed a "wrongful act." The allegations in Counts III and VI of the second amended complaint fail to state a claim for aiding and abetting in favor of the Milazzos, Windy City, or JKS.

¶ 64 C. Plaintiffs' Derivative Negligence and Breach of Fiduciary Duty Claims

¶ 65 Count IV of plaintiffs' second amended complaint is a derivative claim on behalf of Windy City and JKS alleging negligence by defendants. Count V realleges the allegations of specific acts of aiding and abetting in Count III and all of the allegations of negligence in Count IV. The operative facts of each count are the same—defendants knew Jacobs was acting contrary to and harming defendants' clients' interests, defendants failed to inform their clients of Jacobs' conduct or advise them how to protect themselves, and failed to withdraw from their conflicted representation of Jacobs and Windy City and JKS. We find Count V is duplicative of Count IV and was properly dismissed. *Nettleton,* 387 Ill. App. 3d at 761.

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[2] The second amended complaint only alleges the letter concerned Jacobs' authority to terminate Windy City executives, Jacobs showed Sal the letter, and then Jacobs terminated Sal and Janet.

¶ 66 As for plaintiffs' negligence claim, plaintiffs argue on appeal that the second amended complaint alleges: (1) Windy City and JKS were defendants' clients, therefore defendants had a duty to disclose Jacobs' conduct detrimental to them to someone who could take action to protect Windy City and JKS; (2) defendants failed to make the required disclosures of material fact; and (3) the failure to disclose proximately damaged Windy City and JKS in several ways. Plaintiffs assert these allegations are sufficient to state a claim for negligence. Defendants argue plaintiffs failed to allege defendants were negligent in their services to Windy City and JKS. Defendants call plaintiffs' allegations merely a variety of allegations against Jacobs that defendants should have known about and should have disclosed to the Milazzos. Defendants assert the allegations do not include "specific facts showing either 'but for' causation or actual damages" to Windy City or JKS. Defendants also complain that most of plaintiffs' alleged damages are unrelated to any underlying litigation.

¶ 67 "To state a cause of action for negligence properly, a plaintiff must establish the following elements: that the defendant owed a duty of care to the plaintiff; that the defendant breached that duty; and that the breach was the proximate cause of the plaintiff's injuries." *Kopka*, 354 Ill. App. 3d at 934. Plaintiffs allege, and there is no dispute, that Windy City and JKS were defendants' clients, thus defendants owed them a duty of care. Further, "[a] fiduciary relationship exists between an attorney and his client as a matter of law. [Citation]" *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 351-52 (2000). "Once such a relationship is established:

> "the attorney-client relationship gives rise to certain duties owed by the attorney to the client without regard to the specific terms of any contract of engagement. Among the fiduciary duties imposed upon an attorney are those of fidelity, honesty, and good faith in both the discharge of contractual obligations to, and

> professional dealings with, a client. [Citation.] *** Breach of fiduciary duty by an attorney gives rise to an action on behalf of the client for proximately-resulting damages." *Id.*

"One of the functions of this duty of loyalty is to impose an affirmative obligation to disclose certain information that falls within the scope of the fiduciary relationship." *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1008 (2010).

¶ 68 Taking the allegations in the second amended complaint as true and construing them liberally in plaintiffs' favor, the second amended complaint alleges defendants failed to inform its client, JKS of the wrongful termination of its president, of which it was aware; failed to inform its client, JKS, of the tortious interference with its contract with Windy City by WCBL, of which it was aware; and failed to inform its client, Windy City, of the breach of the PPM, of which it was aware. These allegations are not sufficient to state a claim for negligence against defendants.

¶ 69 First, as similarly stated above, even assuming Jacobs used the legal opinion letter to purport to Janet he had legal authority to terminate her, plaintiffs failed to allege how the writing of the letter was the proximate cause of Janet's termination. As for the remaining claims, this court's decision in *Kopka* is instructive. In *Kopka*, 354 Ill. App. 3d at 932, the plaintiff, an attorney, resigned from his former law firm. The terms of the law firm's shareholders' agreement required the firm to repurchase the plaintiff's shares in the firm. *Id.* The firm did not repurchase the plaintiff's shares. At the time the plaintiff resigned, the firm had a large debt to a bank. The remaining members of the plaintiff's former firm incorporated a new firm with the assistance of the defendant law firm. *Id.* Subsequently, the bank accelerated the note owed by the plaintiff's former firm, demanded payment, and eventually filed suit against the members of the plaintiff's former firm. *Id.* As a result of the lawsuit by the bank, the plaintiff personally paid

a portion of the debt. *Id.* The plaintiff filed a lawsuit against the defendant law firm that had helped the remaining members of the plaintiff's former law firm incorporate a new firm. *Id.* The plaintiff's complaint alleged, *inter alia*, negligence and breach of fiduciary duty. The plaintiff alleged the defendant law firm helped to convert and deplete the assets of the plaintiff's former firm thereby depriving the plaintiff of payment for his shares upon his resignation and the nonpayment of the debt resulting in the lawsuit against the plaintiff which caused him to personally repay a portion of the debt. *Id.* This court held the trial court properly dismissed the plaintiff's negligence claim where the plaintiff "failed to allege facts supporting a breach of any duty and how such a breach proximately caused an injury." *Id.* at 938. The court found the plaintiff failed to plead any facts indicating how any acts of the defendant law firm proximately caused the plaintiff's former firm to fail to repurchase the plaintiff's shares because the fact the new firm was incorporated was not a proximate cause of any damages incurred by the plaintiff. *Id.* The court also found the plaintiff failed to indicate how his having to pay a portion of the former firm's debt was attributable to the defendant law firm's actions. *Id.*

¶ 70 We find the allegations in this case are similar to those in *Kopka*. Plaintiffs' complaint alleges defendants knew about Jacobs' conduct and failed to inform its clients Windy City and JKS, and plaintiffs allege that JKS was deprived of its leadership and incurred additional debt, Windy City lost revenue, and JKS lost business opportunities; but plaintiffs failed to indicate how defendant's knowledge of Jacobs' actions and failure to act proximately caused those alleged injuries.

> "Proximate cause consists of two requirements: cause in fact and legal cause. [Citation.] A defendant's conduct is a 'cause in fact' of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury. [Citation.] If the plaintiff's injury would not have occurred absent the defendant's conduct, then the

> conduct is a material element and substantial factor in bringing the injury. [Citation.] On the other hand, 'legal cause' is based largely on foreseeability and the court must consider whether the injury is of the type that a reasonable person would see as a likely result of his conduct. [Citation.] If a defendant's conduct does nothing other than furnish a condition by which the injury is made possible, and the condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury. [Citation.]" (Internal quotation marks omitted.) *Feliciano v. Geneva Terrace Estates Homeowners Ass'n*, 2014 IL App (1st) 130269, ¶ 37.

¶ 71 In *Kopka*, the plaintiff alleged the defendant law firm assisted in depleting the assets that would have been used to repurchase his shares and pay the former firm's debt. *Kopka*, 354 Ill. App. 3d at 932. The court still found the plaintiff in *Kopka* failed to allege the defendant firm's actions were the proximate cause of the former firm's failure to purchase the plaintiff's shares or pay the debt. *Id.* at 938. Here, defendants' inaction is even more attenuated from the injury than in *Kopka*. Here, the second amended complaint only alleged defendants failed to inform its clients of Jacobs' actions detrimental to them. If we were to infer that with this knowledge Windy City and JKS *might* have been able to stop Jacobs, there are no facts alleged supporting a finding that the alleged injuries would not have occurred absent the defendants' conduct. Defendants also allegedly represented WCBL, an alleged competitor of JKS, in a lawsuit filed by the Milazzos. However the allegations in the complaint are insufficient to determine if this representation constitutes a conflict of interest for defendants. The complaint fails to allege sufficient facts to state a claim for negligence in favor of Windy City or JKS, and Count IV of the second amended complaint was properly dismissed.

¶ 72 CONCLUSION

¶ 73 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 74 Affirmed.