

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0261

CHRISTOPHER SHELTON,
VICKY COSTA, and TODD COSTA,

Appellants,

v.

STATE OF MONTANA, DEPARTMENT
OF PUBLIC HEALTH AND HUMAN
SERVICES, an agency of the State of
Montana, SUSAN RIDGEWAY, AXILON
LAW GROUP, PLLC, PAUL S. HENNING,
AARON J. DAVIES and DOES 1-20,

Appellees.

**APPELLEES SUSAN RIDGEWAY AND
AXILON LAW GROUP, PLLC'S
RESPONSE BRIEF**

On Appeal from the Montana First Judicial Court,
Lewis and Clark County, Judge Menahan

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Appellees Susan Ridgeway and Axilon Law Group, PLLC (collectively “Axilon”), submit this Brief in response to the argument on pages 26-32 of Appellants’ Opening Brief. The remainder of Appellants’ argument does not pertain to Axilon.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether, under the circumstances presented here, attorneys Axilon Law Group and Susan Ridgeway owed a duty to nonclient third parties who were not direct or intended beneficiaries of the attorneys’ work, and where the clients’ and nonclients’ interests were adverse and irreconcilably conflicting.

STATEMENT OF THE CASE

Axilon assisted Melissa Surbrugg (“Melissa”) with a private adoption. *Complaint*, ¶¶ 14, 20, 21; Dkt. 1. Christopher Shelton and Vicki and Todd Costa (collectively, “Chris”) filed claims arising from the adoption on August 8, 2018. *See, Complaint*. The claims alleged various forms of professional negligence against Axilon. *Id.* ¶¶ 59-79.

Axilon moved to dismiss for failure to state a claim upon which relief may be granted under M.R.Civ.P. 12(b)(6) on the grounds that Axilon owed no duty to Chris or the Costas because they were neither the attorneys’ clients nor beneficiaries of their work. *Motion to Dismiss based on Lack of Duty* at 2; Dkt. 16. Oral argument was held on January 3, 2019. *Transcript of Proceedings*; Dkt. 26.

The District Court issued an order granting Axilon's motion to dismiss on January 30, 2019. *Order on Motion to Dismiss*; Dkt. 31.

A year later, on January 29, 2020, Chris filed a motion for relief from that order. *Plaintiffs' Rule 60(b) Motion for Relief of Court's January 30, 2019 Order on Motion to Dismiss*; Dkt. 35. The District Court denied the motion for relief on March 18, 2020. *Order on Motion for Rule 60(b) Relief*; Dkt. 43. Chris filed a notice of appeal in the District Court on April 26, 2024. *Notice of Appeal*; Dkt. 84.

STATEMENT OF FACTS

This case arises from allegations that Axilon and the other defendants were negligent in their respective roles in the adoption of L.S., a baby born to Melissa. *See, Complaint*. Although Axilon disagrees with many of the allegations in the complaint and legal arguments in the brief filed by Chris, they are not addressed here because they do not pertain to the appeal of the order dismissing Axilon.

Both Melissa and L.S. tested positive for methamphetamine and other drugs when L.S. was born in 2016. *Id.* ¶¶ 13, 16. A few days later, Axilon learned that Chris and Melissa were legally married. *Id.* ¶ 23, *Answer* ¶ 23; Dkt. 18. Chris did not know Melissa had been pregnant or given birth to L.S. until nine days after her birth when Axilon attorney Ridgeway found him in jail and attempted to get him to sign an affidavit relinquishing his rights to L.S. *See, Complaint* ¶ 30; *Answer* ¶ 25.

Melissa had prearranged an adoption with the assistance of Axilon.

Complaint ¶ 14. Axilon drafted an affidavit for Melissa to relinquish her parental rights, which she signed after completing relinquishment counseling through Catholic Social Services. *Complaint* ¶ 20; *Answer* ¶ 20. Axilon did not represent Chris in the adoption or otherwise, and there is no allegation to that effect. *See, Complaint.*

Chris is the son of Vicky Costa and the stepson of Todd Costa. *Id.* ¶ 12. They spent considerable time and resources contesting the adoption in the State of Utah through the Utah court system.¹ *Id.* ¶ 38. Axilon did not represent the Costas in the adoption or at all, and there is no allegation in the complaint to that effect. *See, Complaint.*

According to the District Court, the only fact upon which the court relied in granting the motion to dismiss is the fact that Axilon never represented Chris or the Costas. *Order on Motion for Rule 60(b) Relief* at 3. They did not benefit from the

¹ The findings of the Utah court that terminated Chris' parental rights to L.S. are not in the complaint, but they provide context for the allegations. The court found that Chris had a severe drinking problem, was a heavy user of drugs, sold methamphetamine, was a member of the Cossacks motorcycle gang for which he was an enforcer and beat people up, did not help raise his other child with Melissa, had convictions for endangering the welfare of a child, obstruction of police, drugs, DUIs, and theft to name a few. Based upon those and other findings, the court determined Chris abandoned the child, was an unfit parent, and that terminating Chris' parental rights was in the child's best interest. The court thus ruled that Chris' consent to the adoption was not required. *Answer*, Ex. 1 (*Memorandum Decision and Order Terminating Parental Rights*) at 13-17.

attorneys' work, and neither Melissa nor Axilon intended that Chris or the Costas were beneficiaries of the attorneys' work.

STANDARD OF REVIEW

An order of dismissal pursuant to M.R.Civ.P. 12 (b)(6) presents a question of law that is reviewed *de novo* for correctness. *Plouffe v. State*, 2003 MT 62, ¶ 7, 314 Mont. 413, 66 P.3d 316.

SUMMARY OF ARGUMENT

As a general rule an attorney's duty is to her client and not to third parties with whom she has no agency relationship. *See, e.g., Crane Creek Ranch v. Cresap*, 2004 MT 351, ¶ 11, 324 Mont. 366, 103 P.3d 535. The Montana Supreme Court has recognized limited exceptions where the mutual intent of the attorney and client was to benefit the third party, and the interests of the client and the third party are aligned. *See, Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 21, 321 Mont. 432, 92 P.3d 620; *Redies v. ALPS*, 2007 MT 9, ¶ 42, 335 Mont. 233, 150 P.3d 930. In those cases, the Court explicitly held that a drafting attorney owes a duty to nonclient beneficiaries named in a drafted instrument such as a guardianship document, will, or trust. *Id.* In such matters the "duty to a third party is implied because that is the mutual intent of the attorney and client." *Watkins Trust*, ¶ 21. Other than those limited exceptions, the general rule applies, and an attorney's duty runs solely to her client.

Chris was not Axilon's client. Neither Axilon nor Melissa intended that Chris benefit from Axilon's representation of Melissa. Nevertheless, Chris asks the Court to recognize an exception so that an attorney's duty extends to nonclient third parties who are neither in an agency relationship with the attorney, nor are named beneficiaries of the attorney's work. Montana law does not support creating such an exception, particularly here where the interests of the client (Melissa) and the nonclient third party (Chris) are indisputably adverse. Moreover, if the Court creates such an exception here, such recognition would create a conflict of interest prohibited by Rule 1.7 of the Montana Rules of Professional Conduct whenever the client and the third party have conflicting interests. Such is the situation here.

Axilon requests that the Court decline to create another exception and to affirm the District Court's *Order on Motion to Dismiss*.

ARGUMENT

I. MONTANA LAW DOES NOT – AND SHOULD NOT – RECOGNIZE AN ATTORNEY'S DUTY TO NONCLIENT THIRD PARTIES IN DIRECT PARENTAL PLACEMENT ADOPTIONS.

Chris' case rests on a fundamentally flawed argument that Axilon owed a duty of care to him, notwithstanding that (a) he was never Axilon's client, and (b) Chris and Melissa's respective interests are inherently conflicting and adversarial. Chris concedes that Montana Courts have never before recognized an attorney's

duty to nonclients in direct placement adoptions. *See Appellants' Opening Brief* at 26-27. Nor should the Court recognize such a duty, especially here, as the respective interests of the client and the nonclients are directly adverse. Whether the Court should recognize a duty of loyalty to a presumed father where he and the birth mother both fully agree on all aspects of a direct placement adoption is not an issue before the Court and need not be addressed here.

The District Court correctly refused to create an exception to allow Chris to bring claims against the attorneys, stating:

Shelton asks this Court to extend a lawyer's duty to third-party parents in an adoption proceeding. This Court declines to do so. The exception extended by the Montana Supreme Court in *Watkins* applies only in limited circumstances in which a client asks an attorney to perform a task with the express intention of benefiting a third party. In other words, where the client asks the lawyer to use her professional experience to aid a third party.

* * *

The Court finds Ridgeway and Axilon did not owe a duty to Plaintiffs. Because the existence of a duty is an essential element of a negligence claim, and because no duty exists here, Plaintiffs' negligence claims against Ridgeway and Axilon are dismissed pursuant to Montana Rules of Civil Procedure 12(b)(6).

Order on Motion to Dismiss at 6. The District Court's reasoning is fully consistent with Montana law and should be affirmed.

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II. THE COURT SHOULD NOT RECOGNIZE A DUTY OWED BY AXILON TO NONCLIENT CHRIS BECAUSE HIS INTERESTS ARE ADVERSARIAL TO, AND IN DIRECT CONFLICT WITH, THE INTERESTS OF AXILON'S SOLE CLIENT, MELISSA.

Melissa retained Axilon to assist and facilitate the placement of L.S. for adoption with adoptive parents Aaron and Paul. *Complaint* ¶¶ 13, 14. Conversely, Chris *opposed* placement of L.S. for adoption. *Id.* ¶ 38. Chris fails to explain how Axilon could serve the interests of its client Melissa in assisting with the adoption, while concurrently serving the interests of Chris who opposed the adoption. The parties' respective positions were thus inherently adversarial and irreconcilably conflicting. Indeed, imposition of a duty of care for the benefit of Chris would place Axilon in a truly impossible position. The conflict of interests could not be clearer.

Notwithstanding the obvious conflict, Chris contends that the relationship between Melissa and Chris was non-adversarial based on *State ex rel. Sheedy v. Dist. Court* (1923), a 101-year-old case applying statutes that no longer exist. 66 Mont. 427, 433, 213 P. 802, 804. The statutes discussed in *Sheedy* applied to uncontested adoptions in which both biological parents consent and mutually agree to voluntarily relinquish their parental rights and facilitate the adoption. *Id.* Of course, such uncontested proceedings are non-adversarial because in that case all parties have identical interests and seek precisely the same outcome: relinquishment of parental rights and a successful adoption placement. Here, in

contrast, no such unity of interests exists, as Melissa and Chris desired diametrically opposite outcomes, and therefore, *Sheedy* does not support Chris' argument.

Moreover, by arguing for the existence of a duty of care, Chris essentially argues for recognition of a quasi-attorney/client relationship between Chris and Axilon, which renders Montana Rule of Professional Responsibility 1.7 instructive: “[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . the representation of one client will be directly adverse to another client.” As applied here, the interests of Chris are unquestionably adverse to those of Melissa. Therefore, imposition of a duty of care for the benefit of Chris would create an irreconcilable conflict of interest for Axilon.

III. THE LIMITED, NARROW EXCEPTIONS IN WHICH COURTS HAVE RECOGNIZED A DUTY TO A NONCLIENT REQUIRE PERFECTLY ALIGNED INTERESTS OF THE CLIENT AND THE THIRD PARTY NONCLIENT, WHICH ARE NOT PRESENT HERE.

As a general rule, an attorney's duty is to her client, and not to third parties with whom she has no agency relationship. *Crane Creek Ranch*, ¶ 11 (citing *Rhode v. Adams*, 1998 MT 73, 288 Mont. 278, 957 P.2d 1124). Thus, under existing law, Axilon did not owe Chris a duty because he was not Axilon's client.

Specifically, in establishing the general rule, the Montana Supreme Court held that where the interest of a third party is not identical to the interest of the attorney's client, her duty runs solely to her client to the exclusion of the third party. *Rhode*, ¶ 23. In so ruling, the Court discussed the adversarial nature of litigation to emphasize that an attorney cannot have divided loyalties in representing the client. *See, generally, Id.* ¶¶ 17-23.

A. Cases in which courts have recognized a lawyer's duty to a non-party have no application here.

The Court has created a limited exception to the general rule when the mutual intent of the attorney and client is to benefit a third party such as beneficiaries of wills and trusts. *Watkins Trust*, ¶ 21. There, the Court stated that a lawyer who drafts a trust for a client has a duty to a beneficiary of a trust because the mutual intent of the attorney and client is for the attorney's work to benefit the beneficiary. *Id.* *Watkins Trust* was the first instance in which the Court "explicitly held that an attorney owed a duty to a nonclient third party—specifically [the Court] held that a drafting attorney owes a duty to nonclient beneficiaries in the drafted instrument." *Redies*, ¶ 42, (citing *Watkins Trust*, ¶¶ 21-22).

Watkins Trust involved beneficiaries suing an attorney for ultimately losing them money. Carol and Stanley Watkins hired an attorney to draft a trust and will. *Watkins Trust*, ¶ 6. After their death, their stepson Steve was supposed to receive shares in a trucking company that he and Stanley built. *Id.* ¶ 6. After Carolyn and

Stanley died, the parties learned that the trust and the will may have been improperly executed at the attorney's direction. *Id.* ¶ 13.

Steve and the trust sued the attorney, alleging malpractice in connection with the estate plan. *Id.* ¶ 14. The Court found that Steve—an intended beneficiary—may have been owed a duty by the attorney and remanded the matter so the District Court could make that determination. *Id.* ¶¶ 21-23. There, any such duty to the beneficiary would arise from the fact that the client's wishes were to make provisions for the beneficiary. Thus, the interests of the client and the beneficiary were fully aligned, unlike the present case.

Redies arose out of advice given by an attorney to the conservator of a woman who suffered a traumatic brain injury in a bicycle accident. *Redies*, ¶¶ 5-8. It involved a bad faith action in which she claimed her insurer failed to settle a legal malpractice case she brought against the conservator's attorney. *Id.* She contended the attorney should have advised her conservator to utilize a variety of methods to preserve her assets while she was mentally incapacitated due to her injuries. *Id.* ¶¶ 12-20. She contended that because the attorney failed to properly advise her conservator, her "estate was quickly depleted," which caused her to live in poverty. *Id.* ¶ 15. Similar to *Watkins Trust*, the conservator client's intent was for the attorney to serve the interests of the nonclient conservatee. Again, unlike

the present case, the interests of the client in *Redies* and the beneficiary were the same.

B. Chris' analysis of case law is fundamentally flawed.

Contrary to the position taken by Chris, neither *Watkins Trust* nor *Redies* are authority for the proposition that Axilon owed Chris a duty. Both cases dealt with direct beneficiaries of an attorney's work. The attorney in *Redies* advised a client on how to preserve the nonclient's assets. The attorney in *Watkins Trust* advised clients on how to bequeath stock to their stepson. Those cases stand for the proposition that an attorney whose work the client intended to benefit another may have a duty to the beneficiary of the work. In such cases, the interests of the client and the intended beneficiary are perfectly aligned.

However, that is not the scenario here. Chris requests that the Court create a new exception whereby an attorney's duty extends to nonclient third parties affected by adoption when the attorney and client did not intend the work to benefit the third parties, and when the client and the third parties have adverse interests. Such an exception is inconsistent with Montana law and would necessarily divide the attorney's loyalty as between the client and the nonclient third parties.

In a backwards argument, Chris cites the discussion in *Rhode* and asserts that adoptions are non-adversarial, and therefore, Axilon owed them a duty.

However, the Court in *Rhode* did not suggest that an attorney may owe a duty to nonclient third parties when the representation is non-adversarial. The point of the discussion is that an attorney must have undivided loyalty to her client, which precludes the attorney from owing a duty to a nonclient third party whose interests are different or may become different from the client's. *Id.* ¶¶ 17-18, 23. In other words, an attorney's loyalty must run solely to her client and not to third parties with whom she has no agency relationship. *Crane Creek Ranch*, ¶ 11 (citing *Rhode*). The discussion about adversarial matters highlights that an attorney cannot have undivided loyalty to her client and to an opposing party because they have opposite interests.

Since Chris did not have the same interest as Melissa, the holding of *Rhode* conflicts with Chris' argument that the Court should extend Axilon's duty to Melissa to include a duty to Chris. *Rhode*, ¶ 23. Since Chris did not have an agency relationship with Axilon, the holding of *Crane Creek Ranch* also conflicts with Chris' position. *See, Crane Creek Ranch*, ¶ 11 (citing *Rhode*).

IV. POLICY CONSIDERATIONS WEIGH HEAVILY AGAINST RECOGNITION OF A DUTY OWED TO AN ADVERSARIAL NONCLIENT.

Finally, imposing a legal duty for the benefit of nonclients, particularly in this context, would not only radically conflict with settled law, it would also make for bad public policy. Montana's current law properly establishes the nature of the

attorney/client relationship, with a proper and strong emphasis on the lawyer's duty of loyalty exclusively to the client. Creation of the type of duty Chris argues for here would impose an undue and unworkable burden on attorneys and potentially diminish the client's confidence that her lawyer will be working exclusively in her interests, which in turn, would erode public confidence in our legal system. Finally, creation of duties owed to nonclients would undoubtedly trigger a flood of litigation in which nonclients sue attorneys for taking actions in their clients' interests which conflict with the nonclient's interests.

CONCLUSION

Axilon requests that the Court decline to create a new exception from the general rule that an attorney's duty is to her client and not to nonclient third parties with whom she has no agency relationship and to affirm the District Court's *Order on Motion to Dismiss*.

DATED this 8th day of October 2024.

JACKSON, MURDO & GRANT, P.C.

By: David C. Dalthorp
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is 3,081 words, excluding certificates of service and compliance.

By: David C. Dalthorp
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