STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

HOFFMAN & KESSLER, LLP,
a New York registered limited liability
partnership,

Plaintiff/Counter-Defendant, Case No. 2022-195942-CB

vs. HON. Victoria Valentine

C.T. CHARLTON & ASSOCIATES, INC.,
a Michigan corporation,

Defendant/Counter-Plaintiff.

HOFFMAN & KESSLER, LLP
PHILIP J. KESSLER (P15921)
THOMAS D. NOONAN (P60450)
Attorneys for Plaintiff/Counter-Defendant
1270 Avenue of the Americas. Ste. 301
New York, NY 10020
(212) 651-3901
pkessler@hoffmankessler.com

COLLINS EINHORN FARRELL PC
THERESA M. ASOKLIS (P42709)
JEFFREY R. HICKS (P74279)
Attorneys for Plaintiff/Counter-Defendant
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141
theresa.asoklis@ceflawyers.com
jeffrey.hicks@ceflawyers.com

MILLER JOHNSON
TODD A. HOLLEMAN (P57699)
ROBERT M. HARDING (P86509)
Attorney for Defendant/Counter-Plaintiff
409 East Jefferson, Suite 500
Detroit, MI 48226
(313) 300-7324
hollemant@millerjohnson.com
hardingr@millerjohnson.com

OPINION AND ORDER RE PLAINTIFF/COUNTER-DEFENDANT HOFFMAN & KESSLER'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held on the
6th day of April 2023 in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Plaintiff/Counter-Defendant HOFFMAN & Kessler, LLP's ("HK") motion for summary disposition under MCR 2.116 (C)(10) of the Counterclaim filed by Defendant/Counter-Plaintiff, C.T. CHARLTON & ASSOCIATES ("CTCA"). The Court, having reviewed the parties' submission and pleadings, having heard oral argument on March 1, 2023, and being otherwise advised in the premises, hereby GRANTS HK's motion for the reasons set forth below.

FACTS

Background

HK filed a complaint against CTCA for CTCA's failure to pay invoices for legal services HK provided for an arbitration. CTCA filed a counterclaim against HK alleging breach of contract and legal malpractice. HK now files this motion under MCR 2.116(C)(10), seeking dismissal of CTCA's counterclaim.

HK represented CTCA, which was the claimant in the underlying arbitration[1] against Joyson Safety Systems ("JSS") fka Key Safety Systems (KSS),[2] which alleged counts of breach of contract and fraudulent misrepresentation against JSS. These claims related to CTCA assisting JSS in acquiring the assets of Takata Corporation[3] and to CTCA's entitlement to a "success fee" pursuant to the parties' September 2016 Agreement.[4] A pivotal issue in the underlying

[1] The Arbitration also included Christopher T. Charlton, Sr, CTCA's sole shareholder and President. (See CTCA's MSD Ex G: Arbitration Opinion and Order).

[2] For the sake of clarity, the Arbitrator referred to JSS rather than KSS and here the parties interchangeable refer to both JSS and KSS as the respondent in the underlying Arbitration.

[3] Takata is a Japanese-owned manufacturer and supplier of automotive parts.

[4] Section 3 of the Agreement provides:

> If the Takata transaction is successful, [JSS] and CTCA [Charlton] will discuss a success fee not to exceed 1% of the purchase price, which success fee [JSS] and CTCA [Charlton] would mutually determine and which would reflect CTCA's overall contribution to the results obtained (the "Success Fee"). (See CTCA's MSD Ex D).

arbitration was whether, as required under the Agreement, JSS and CTCA engaged in a "discussion" regarding the "success fee." The Arbitrator ultimately found that the parties did engage in such discussions:[5] "[T]he unrefuted evidence shows that JSS engaged in discussions and correspondence regarding a Success Fee before it determined that it would not award a Success Fee."[6] The Arbitrator granted JSS's motion for summary disposition on CTCA's breach of contract claims[7] and subsequently found no liability on CTCA's fraudulent misrepresentation count.[8]

HK subsequently filed this lawsuit against CTCA seeking money CTCA owed for HK's legal representation of CTCA at the arbitration. CTCA in turn filed a counterclaim alleging breach of contract and legal malpractice relating to the arbitration. CTCA argues that HK failed to present to the arbitrator critical witness testimony from Joseph Perkins, former CFO of JSS, who would have demonstrated that there never was nor would there ever be a pivotal *discussion* with CTCA as required by Agreement.

HK now files the motion for summary disposition, seeking to dismiss CTCA's counterclaim. After reviewing the briefs and court file the Court GRANTS HK's MSD under MCR 2.116(C)(10).

Pertinent Facts leading up to the underlying Arbitration

- CTCA and non-party Joyson Safety Systems (JSS) fka Key Safety Systems (KSS) entered into two agreements:[9]
    - One agreement related CTCA assisting JSS with a warranty claim raised by Fiat Chrysler America (FCA); and

[5] CTCA's MSD Ex G p 8; Arbitrator's Opinion and Order.
[6] *Id.*
[7] *Id.*
[8] CTCA's MSD Ex H: Arbitrator's Final Award.
[9] It is undisputed that HK did not draft or negotiate these agreements.

- The second Agreement dated September 15, 2016, was the Agreement at issue in the Arbitration, and related to CTCA assisting JSS in acquiring Takata's assets. This Agreement provides in pertinent part: [10]

> 3. In exchange for the Services, KSS will pay a monthly fee to CTCA of $75,000 a month for a minimum of three (3) months from September 15, 2016, with the first payment due October 15, 2016, or a minimum of six (6) months if KSS is selected as the finalist or one of the finalists to be the acquirer or purchaser in Project Tea (the "Monthly Fee"). All subsequent Monthly Fees shall be paid on a net 30 basis. If the Takata transaction is successful, KSS and CTCA will discuss a success fee not to exceed 1% of the purchase price, which success fee KSS and CTCA would mutually determine and which would reflect CTCA's overall contribution to the results obtained (the "Success Fee"). The Success Fee and all Monthly Fees paid will be creditable against all monies paid under the Sales Support Agreement.

  - Significantly this provision provides that "If the Takata transaction is successful, KSS and CTCA will **discuss a success fee**. . ."
- The Agreement also provides that all claims relating to the agreement are to be settled by arbitration.[11]
- In February 2017, JSS was selected as the lead bidder for Takata's assets.[12]
- On February 13, 2017, CTCA emailed Jason Luo regarding the acquisition fee to which Luo replied that they "will continue evaluating the options."[13]
- In April of 2017, JSS gave notice of its termination of its contract with CTCA, effective May 11, 2017.[14]
- On June 28, 2017, CTCA gave notice to JSS regarding the "success fee" of 1% of the $1.6 billion purchase or $16 million.[15]
- In July of 2017, various emails were exchanged between CTCA and general counsel Matthew Cohn concerning the acquisition fee to which Cohn replied that the "Takata deal isn't signed" or closed.[16]
- Ultimately, JSS informed CTCA that it would not be awarded a success fee.[17]
- In April 2018, JSS completed its acquisition of Takata's assets.[18]

Pertinent Facts relating to the underlying Arbitration

[10] CTCA's MSD Ex D, ¶3: 9/15/2016 Agreement.
[11] CTCA's MSD Ex D, ¶13.: 9/15/16 Agreement.
[12] CTCA's MSD Ex G: Arbitration Opinion, p 3.
[13] HK's MSD Ex 15: emails.
[14] CTCA's MSD Ex G: Arbitration Opinion, p 3 & HK Ex 16: letter.
[15] CTCA's MSD Ex G: Arbitration Opinion, p 3 & HK's Ex 17: 6/28/17 email.
[16] HK MSD Ex 18: email.
[17] CTCA's MSD Ex G: Arbitration Opinion, p 3 & CTCA's Ex N: 8/17/2018 letter.
[18] CTCA's MSD Ex G: Arbitration Opinion, p 3.

- CTCA engaged the legal services of HK to represent it in the underlying Arbitration against JSS relating to CTCA's claim of its entitlement to a success fee.[19] The July 26, 2018, Letter of Engagement[20] provides:

> Description and Scope of Services; Identification of Client
>
> CTCA is retaining us to represent CTCA in connection with CTCA's effort to recover a success fee from Key Safety Systems, Inc. ("KSS"), described in that certain written agreement dated September 15, 2016 between CTCA and KSS (the "Engagement").
>
> CTCA is the Firm's only client in connection with the Engagement.
>
> Except as covered by one or more separate engagement letters or subsequent written modification to this letter, our representation is limited solely to the Engagement. We have not been retained to represent CTCA generally or in connection with any other matter.
>
> We understand that, except as otherwise provided in this letter, we are to provide all reasonable services and take all such action as may be appropriate and necessary in our professional discretion, in consultation with CTCA, to further CTCA's interests in connection with the Engagement.

- CTCA and Christopher T. Charlton then filed their claim for arbitration, alleging breach of contract and fraudulent misrepresentation.[21]
- In March of 2022, JSS filed its Motion for Summary Disposition.[22]
- On May 4, 2022, the Arbitrator granted JSS's Partial Motion for Summary Disposition on the Breach of Contract claim.[23] The Arbitrator found:

[19] The Arbitration also included Christopher T. Charlton, Sr, CTCA's sole shareholder and President of CTCA. (See CTCA's MSD Ex G; Arbitration Opinion and Order). Mr. Charlton is not a party to this present action before the Court.
[20] CTCA's MSD Ex P.
[21] CTCA's MSD Ex G: Arbitration Opinion, p 3.
[22] CTCA's MSD Ex G: Arbitration Opinion, p 4.
[23] CTCA's MSD Ex G: Arbitration Opinion, pp 7-8.

The relevant language in Section 3 provides that if the Takata acquisition is successful, then JSS and CTCA "will discuss a success fee not to exceed 1% of the purchase price, which success fee [JSS] and CTCA would mutually determine and which would reflect CTCA's overall contribution to the results obtained." Thus, JSS was required to "discuss" the Success Fee, but the Success Fee would be "mutually determine[d]." Notably, the Agreement did not specify that JSS was required to pay a Success Fee to CTCA.

After the Takata transaction closed, JSS engaged in various communications with Charlton regarding the Success Fee, and these included meetings between Charlton and JSS's representatives. Ultimately, JSS determined that it would not award Charlton a Success Fee.

JSS's argument that it fulfilled its obligation under Section 3 has merit. At most, Section 3 required JSS to discuss the Success Fee with CTCA, but Section 3 permitted either party to withhold approval for the Success Fee. The parties could have drafted the Agreement to provide that CTCA was guaranteed the Success Fee, but they did not do so. And the unrefuted evidence shows that JSS engaged in discussions and correspondence regarding a Success Fee before it determined that it would not award a Success Fee.

* * *

CTCA and Charlton also contend that JSS nonetheless breached the Agreement because JSS acted in "bad faith" during the Success Fee discussions because there is evidence showing that JSS determined beforehand that it would not pay CTCA a Success Fee. "A lack of good faith cannot override an express provision in a contract." *Eastway & Blevins Agency v Citizens Ins Co of Am*, 206 Mich App 299, 303; 520 NW2d 640 (1994). The Agreement's express terms required only a discussion of the Success Fee, and JSS cannot be said to have acted with a lack of good faith by acting in accord with the Agreement's express provisions.

Given the foregoing, there is no genuine issue of material fact that would bar summary disposition of CTCA and Charlton's Breach of Contract claim. Thus, JSS's dispositive motion is granted with respect to the Breach of Contract claim.

- Subsequently, the Arbitrator denied JSS's motion on the fraudulent misrepresentation claim, finding that the arbitration hearing shall be limited to whether CTCA and Charlton can establish the elements of fraudulent misrepresentation.[24]
- After the arbitration hearing held on May 11, 2022, and May 16, 2022, and after considering Charlton's motion for reconsideration, the Arbitrator issued its Final Award on July 19, 2022, which:[25]

    - denied the claim for fraudulent misrepresentation, finding in part, that Charlton's credibility was suspect and
    - denied Charlton's motion for reconsideration regarding, *inter alia,* the dismissal of the breach of contract claim.
    - The Arbitrator found:

> Moreover, the terms of the Agreement did not afford unilateral discretion to JSS regarding the Success Fee discussion. The Agreement required JSS to have a discussion with CTCA and Charlton regarding a Success Fee after the Takata acquisition was successfully completed, and that is precisely what happened here. There was no obligation in the terms of the Agreement to actually to agree to a

[24] It also held in abeyance the questions of damage limitations, indemnify and attorney fees. (CTCA's MSD Ex G: Arbitration Opinion, pp 8-13). After this Opinion, CTCA moved to add an additional claim of negligent misrepresentation, which the Arbitrator denied in a May 18, 2022, Opinion and Order. CTCA and Charlton later moved for reconsideration of the denial of the motion to add a new claim and the dismissal of the breach of contract claim. (See CTCA's MSD Ex H: Arbitrator's Final Opinion and Order, p 1).

[25] CTCA's MSD Ex H: Arbitrator's Final Opinion and Order.

Success Fee, and if there was such an agreement, it was required to be a mutual agreement between the parties. In that situation, the parties each had the discretion to discuss and potentially negotiate a Success Fee. Thus, CTCA and Charlton have not shown any palpable error related to the dismissal of their breach-of-contract claim.

E. CONCLUSION AND ORDER

If this were a claim in equity perhaps Charlton would be entitled to some Success Fee. Charlton may legitimately have felt that he had negotiated the right to receive such a fee and he may have provided the assistance that would have warranted such a fee, but the contract that Charlton signed put him in a position of being able to be treated precisely how JSS treated him. Charlton has nobody to blame but himself if he did not get the rights he thought he bargained for. The contract language provides Charlton few if any enforceable rights. The only clear and unequivocal promise that Charlton got was a discussion regarding a success fee. He got that discussion.

Notably, at one time during the negotiations Charlton requested 1% equity (in other words, a Success Fee) and that request was rejected. Charlton also knew during negotiations over his compensation that the largest commitment the JSS officers he was dealing with could make without board approval was $1.5 million. Clearly, the success fee envisioned by Charlton was a multiple of that.

While Charlton attempted to rely on oral statements made by Cohn and others during the negotiation process, the contract contains an integration clause, and thus only claims related to the formation of the contract are tenable. The Arbitrator has found that Charlton knew exactly what he had bargained for.

While the testimony was unclear on the issue of whether Charlton was represented by counsel with regard to this agreement, it is of no moment whether he was, in fact, represented. If he was represented by counsel, his lawyer should be answerable for a contract that in effect gives him no rights. If he was not represented by counsel due to the claimed conflict issue, he should have never signed an agreement on a transaction of this magnitude without securing representation. Without the

> benefit of a contract claim, Charlton's path to victory was significantly diminished. The elements of intentional and negligent misrepresentation have a high bar. The testimony in this case does not support Charlton on either of these legal theories. In the end, Charlton accepted the risk that JSS would treat him in a certain way if they won the deal. Acceptance of that risk is fatal to his legal claims.
>
> For the reasons set forth in this Opinion and the two prior Opinions, which are incorporated herein by reference, the Arbitrator finds in favor of JSS and against Charlton on all remaining claims. This Opinion is the last remaining matter in these proceedings which are now concluded.

The Court file does not reflect that CTCA filed a motion to vacate the Arbitration Award. Rather, it filed its counterclaim after HK filed the instant lawsuit against it for its failure to pay invoices for legal services provided.

Pertinent Facts relating to this case before the Court

CTCA argues that "the Arbitrator's decision was made without reference to information known to CFO Joe Perkins, who appeared as a witness at the Arbitration."[26] Such information relates to Mr. Perkins being instructed by KSS[27] management not to discuss with or meet Mr. Charlton concerning any consulting fee.[28] Mr. Perkins avers that before being questioned at the arbitration, he "told Mr. Philip Kessler [CTCA's counsel]" that he "had been instructed by the KSS management not to discuss any consulting fee with Mr. Charlton or to meet with him to discuss fees."[29] Yet, when questioned by Mr. Kessler at the arbitration, Mr. Kessler did not ask "any questions to establish what [he] was told by KSS management in relation to discussing fees owed to Mr. Charlton."[30] And Mr. Perkins avers he was "unaware of KSS ever discussing with Mr.

[26] Plaintiff's Brief, p. 8.
[27] KSS and JSS are used interchangeably throughout the exhibits.
[28] CTCA's MSD Ex A¶6: Perkins Affidavit.
[29] CTCA's MSD Ex A¶10: Perkins Affidavit.
[30] CTCA's MSD Ex A¶11: Perkins Affidavit.

Charlton a consulting fee related to KSS' successful acquisition of Takata because its management refused to do so."[31]

CTCA also relies on the affidavit of Charles Charlton,[32] its founder and chairman, who avers that he was aware of the information possessed by Mr. Perkins; he discussed with Mr. Kessler the value of this information and approved the strategy of presenting Mr. Perkins' testimony at the arbitration hearing; he was rebuffed by Mr. Kessler when he reminded Mr. Kessler to ask Mr. Perkins about whether JSS engaged in discussions regarding the success fee; and that he spoke with the arbitrator who informed him that there was no evidence in the record that JSS had refused to discuss the success fee.[33]

HK now files this MSD seeking to dismiss the counterclaim and arguing that:

- CTCA's breach of contract claim fails because the engagement agreement between CTCA & HK was not a "special agreement" to perform a specific act and is thus indistinguishable from the legal malpractice claim and
- CTCA's legal malpractice claim should be dismissed.

ANALYSIS

Summary disposition under MCR 2.116(C)(10) may be granted where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." This motion tests the factual sufficiency of the complaint and "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). The moving party bears the initial burden of supporting its position. *Smith v Globe Life Ins*

[31] CTCA's MSD Ex A¶7: Perkins Affidavit.
[32] CTCA's MSD Ex B: Charlton's Affidavit.
[33] CTCA's MSD Ex B ¶¶ 11-15 & 17: Charlton's Affidavit.

Co, 460 Mich 446, 455 (1999). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on [MCR 2.116(C)(10)]." MCR 2.116(G)(3)(b).

"The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rest on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Smith*, 460 Mich at 455 (citations omitted; emphasis added).

If the motion for summary disposition is properly made and supported, an adverse party must, by affidavit or otherwise, "set forth specific facts showing there is a genuine issue for trial." MCR 2.116(G)(4). If the adverse party fails to respond, and if appropriate, the court shall grant the summary disposition motion. MCR 2.116(G)(4).

As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Village of Dimondale v Grable*, 240 Mich App 553, 566 (2000) (internal citations and quotations omitted).

Breach of Contract Claim

An attorney may be held liable under a contract theory, but only when it is shown that the attorney breached a "special agreement" rather than a general agreement to provide the

requisite skill or legal services. *Brownell v Garber*, 199 Mich App 519, 524-526 (1993). A "special agreement" is a "contract to perform a specific act," rather than a general agreement "to exercise appropriate legal skill in providing representation in a lawsuit." *Barnard v Dilley,* 134 Mich App 375, 378 (1984). See also *Brownell*, 199 Mich App at 524-526; *Aldred v O'Hara–Bruce,* 184 Mich App 488, 490–491 (1990). As stated in *Brownell v Garber*, 199 Mich App 519, 524-526 (1993) quoting *Babbitt v Bumpus*, 73 Mich 331, 337-338 (1889):

> A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect, and for that purpose. Neither is there any implied contract, when he is employed in a case, or any matter of legal business, that he will bring to bear learning, skill, or ability beyond that of the average of his profession. Nor can more than ordinary care and diligence be required of him, without a special contract is made requiring it. (emphasis added).

.

CTCA admits that the Engagement Agreement "does not guarantee a particular outcome"[34] but argues that HK did commit to undertake specific acts in its representation of Charlton. Charlton's counterclaim for breach of contract alleges:

> **COUNT I – BREACH OF CONTRACT**
>
> 4. CTCA and HK entered into a legal services agreement in which HK would perform certain authorized legal services in a professional and competent manner to CTCA for a fee. HK is in possession of that agreement as amended by subsequent statements and emails by the parties thereto.

[34] See CTCA's Brief, p 11.

5. HK failed to perform the legal services it agreed to perform yet still charged CTCA for those services.

6. HK assessed CTCA costs for items that it agreed it would not charge CTCA for and that CTCA did not agree to pay.

7. In addition, HK performed unauthorized work and charged CTCA for that work.

8. HK also failed to adequately or properly perform the legal services it agreed to perform for CTCA.

9. CTCA incurred damages far in excess of $25,000 as a result of HK's breach that includes $598,595.20 paid HK for services and costs that were not performed at the level agreed to, were not performed at all or were unauthorized, and CTCA seeks full reimbursement of the amounts it paid for the services it did not receive and the unauthorized costs it was charged.

10. In addition, CTCA incurred additional damages in the loss of its arbitration claims valued at $14 million to $16 million that occurred due to HK's failure to adequately perform its services as it agreed.

The Engagement Agreement[35] provides in part:

> CTCA is retaining us to represent CTCA in connection with CTCA's effort to recover a success fee from Key Safety Systems, Inc. ("KSS"), described in that certain written agreement dated September 15, 2016 between CTCA and KSS (the "Engagement").
>
> * * *
>
> Except as covered by one or more separate engagement letters or subsequent written modification to this letter, our representation is limited solely to the Engagement. We have not been retained to represent CTCA generally or in connection with any other matter.
>
> We understand that, except as otherwise provided in this letter, we are to provide all reasonable services and take all such action as may be appropriate and necessary in our professional discretion, in consultation with CTCA, to further CTCA's interests in connection with the Engagement.
>
> * * *

[35] CTCA's MSD Ex P.

Guarantee Disclaimer

> It is important that CTCA understands and accepts that we cannot make, and have not made, any guarantee regarding the outcome of the Engagement. Nothing in this agreement, nor any statements by us, constitutes a promise of results, or a guarantee. Any statements by us about the outcome of litigation, arbitration or other legal proceeding (including, without limitation, any judicial accounting proceeding) are expressions of opinion only.

The Court is not bound by plaintiff's choice of labels for his/her action. *Johnston v. Livonia,* 177 Mich App 200, 208 (1989). The Court agrees with HK and finds that CTCA's claim for breach of contract did not allege the existence of a "contract to perform a specific act." *Barnard,* 134 Mich App at 378. Rather, it alleges that HK breached its agreement to "perform certain authorized legal services in a professional and competent manner;"[36] that HK "failed to perform the legal services it agreed to perform yet still charged CTCA for those services,"[37] that HK assessed CTCA costs for items for which it agreed it would not charge CTCA and to which CTCA did not agree to pay;[38] that HK performed unauthorized work and charged for that work;[39] and that HK [40]"failed to adequately or properly perform the legal services it agreed to perform for CTCA." CTCA seeks damages for "services and costs that were not performed at the level agreed to, were not performed at all or were unauthorized, and failed to adequately or properly perform the legal services it agreed to perform for CTCA" and for damages in the loss of its arbitration claim."[41] When read as a whole CTCA's counterclaim alleges that the type of interest allegedly harmed was CTCA's interest in receiving effective

[36] See CTCA'S counterclaim ¶4.
[37] See CTCA'S counterclaim ¶5.
[38] See CTCA'S counterclaim ¶6.
[39] See CTCA'S counterclaim ¶7.
[40] See CTCA'S counterclaim ¶8.
[41] See CTCA'S counterclaim ¶¶9-10.

representation at the arbitration, which is tantamount to a claim for legal malpractice. (See *Aldred v O'Hara-Bruce*, 184 Mich App 488, 49-491 (1990) "The complaint indicates that defendant was retained not to perform a specific act but to exercise appropriate legal skill in providing legal representation throughout the various stages of the criminal proceedings.... Plaintiffs' complaint as a whole evidences that damages flowed not from defendant's failure to represent their son, but from her failure to do so adequately. We find that this claim is grounded in malpractice only.").

Here the Court finds that the grounds for breach of contract are indistinguishable from the duty to render legal service according to the applicable standard of care and is duplicative of the legal malpractice claim. Further, the Court also agrees with HK that any claim relating to billing issues would be a defense to HK's underlying complaint for legal services. As a result, the Court grants HK's motion for summary disposition as to Count I.

Legal Malpractice Claim

An attorney owes a duty to his or her client to use and exercise reasonable skill, care, discretion, and judgment in the matter for which the attorney is retained. *Simko v Blake,* 448 Mich 648, 655-656 (1995). To succeed on his legal malpractice claim, Plaintiff must establish: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the client; (3) an injury that was proximately caused by the negligence; and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich at 655. A client may only recover in a legal malpractice case if they actually suffered an injury. *Bourke v Warren*, 118 Mich App 694, 697 (1982).

A common defense to a legal malpractice claim is the assertion of the attorney judgment rule. As set forth in *Simko v Blake*, 448 Mich 648, 658 (1995):

> [M]ere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence." *Baker v Beal*, 225 NW2d 106, 112 (Iowa, 1975). Where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment. *Rorrer v Cooke,* 313 NC 338, 340–342; 329 SE2d 355 (1985).

Simko v Blake, 448 Mich 648, 658 (1995).

However, the attorney judgment rule does not apply to shield attorneys from liability for "very gross" errors in judgment. *Basic Food Indus, Inc v Grant*, 107 Mich App 685, 694 (1981).

The attorney judgment rule has been applied as to which witnesses to call at trial, *Simko,* 448 Mich at 659 and to whether to cross-examine a particular witness, *Woodruff v Tomlin*, 616 F2d 924 (6th Cir 1980) (cited favorably by *Simko,* 448 Mich at 660). In *Simko* the Court cited *Woodruff* and held "it is a tactical decision whether to call particular witnesses, as long as the attorney acts with full knowledge of the law and in good faith. *Woodruff, supra* at 933." The *Simko* Court found:

> Here, plaintiffs are alleging that defendant was negligent in not calling Dr. Karbal and Mrs. Simko. This, however, is a tactical decision that this Court may not question. Perhaps defendant made an error of judgment in deciding not to call particular witnesses, and perhaps another attorney would have made a different decision; however, tactical decisions do not constitute grounds for a legal malpractice action. *Woodruff, supra.* Plaintiffs' claim that certain witnesses should have been called is nothing but an assertion that another lawyer might have conducted the trial differently, a matter of professional opinion that does not allege violation of the duty to perform as a reasonably competent criminal defense lawyer.

Simko, 448 Mich at 660-661.

CTCA argues that HK committed legal malpractice by failing to elicit testimony from witness, Joseph Perkins, who testified at the Arbitration hearing. CTCA alleges that Mr. Perkins's testimony would have independently shown JSS's failure to comply with the Agreement's "discussion" obligation. CTCA attaches Mr. Perkin's affidavit,[42] which avers:

1. I am an adult over the age of 18 with personal knowledge of the facts contained in this affidavit, and, if called to testify, could competently testify to them.

2. I was formerly employed as the Chief Financial Officer of Key Safety Systems ("KSS").

3. I am personally aware of the agreement entered into between KSS and C.T. Charlton & Associates concerning consulting fees arising from the potential acquisition of Takata by KSS.

4. Under this agreement, KSS agreed to discuss paying Mr. Charlton a consulting fee in the event that KSS successfully acquired Takata.

5. KSS, with the assistance of Mr. Charlton, did in fact acquire Takata.

6. I was instructed by the management at KSS not to meet with Mr. Charlton about any consulting fees or to speak with Mr. Charlton regarding any such fees.

7. I am unaware of KSS ever discussing with Mr. Charlton a consulting fee related to KSS' successful acquisition of Takata because its management refused to do so.

8. A dispute arose between KSS and Mr. Charlton concerning the consulting fee issue, which was submitted to arbitration.

9. I attended this arbitration as a witness.

[42] CTCA's MSD Ex A: Joseph Perking's Affidavit.

10. Before being questioned at the arbitration, I told Mr. Philip Kessler that I had been instructed by the KSS management not to discuss any consulting fee with Mr. Charlton or to meet with him to discuss fees.

11. When Mr. Kessler questioned me at the arbitration, he did not ask me any questions to establish what I was told by KSS management in relation to discussing fees owed to Mr. Charlton.

CTCA also relies on the affidavit of Charles Charlton,[43] its founder and chairman, who avers that he was aware of the information possessed by Mr. Perkins; he discussed with Mr. Kessler the value of this information and approved the strategy of presenting Mr. Perkins' testimony at the arbitration hearing; he was rebuffed by Mr. Kessler when he reminded Mr. Kessler to ask Mr. Perkins about whether JSS engaged in discussions regarding the success fee; and that he spoke with the arbitrator who informed him that there was no evidence in the record that JSS had refused to discuss the success fee.[44]

HK, however, argues that the Arbitrator found:

> After the Takata transaction closed, JSS engaged in various communications with Charlton regarding the Success Fee, and these included meetings between Charlton and JSS's representatives. ... And the unrefuted evidence shows that JSS engaged in discussions and correspondence regarding a Success Fee before it determined that it would not award a Success Fee.45

HK further argues that Mr. Perkins' testimony at the arbitration hearing established Mr. Perkins did not attend one of these meetings and did not recall being told about the meeting.[46] Therefore, HK argues that Mr. Perkins' affidavit only establishes that ***he*** was told not to discuss the success fee with Charlton and that only ***he*** was "unaware" of JSS ever discussing the success

[43] CTCA's MSD Ex B: Charlton's Affidavit.
[44] CTCA's MSD Ex B ¶¶ 11-15 & 17: Charlton's Affidavit.
[45] CTCA's Ex G: Arbitration Opinion, p 7.
[46] HK's MSD Ex 38, p 88: Deposition of Joseph Perkins.

fee with Charlton. HK argues that Mr. Perkins is unable to provide admissible non-speculative evidence that JSS did not "discuss" the fee with Charlton at these meetings.

The Court agrees that the decision as to whether to elicit this testimony from Mr. Perkins is tantamount to a tactical decision that is protected by the attorney-judgment rule. And Carlton has failed to support its argument that was a gross error in judgment. Further, this unelicited testimony does not affect the findings by the Arbitrator, which specifically found:

> After the Takata transaction closed, JSS engaged in various communications with Charlton regarding the Success Fee, and these included meetings between Charlton and JSS's representatives. ... And the unrefuted evidence shows that JSS engaged in discussions and correspondence regarding a Success Fee before it determined that it would not award a Success Fee.[47]

In other words, the fact that *Mr. Perkins* was told not to discuss a success fee with Charlton does not establish that JSS never discussed a success fee with Charlton. It also does not refute the evidence upon which the Arbitrator relied in determining that JSS engaged in discussion and correspondence regarding a Success Fee: a finding that was made by the Arbitrator despite Mr. Charlton's testimony[48] that JSS "never honored the agreement to sit and talk to me."[49]

Based on the above, summary disposition is proper before discovery is complete because as HK argues, discovery cannot change the language of the agreement, cannot change the Arbitrator's finding that Charlton lacked credibility, and because the Arbitrator already determined that JSS and Charlton discussed the success fee. Further, this legal malpractice action

[47] CTCA's Ex G: Arbitration Opinion, p 7.
[48] The Arbitrator found that Mr. Charlton's credibility was at times suspect. (See CTCA's Ex H: Arbitration Final Opinion and Order, pp 10-12).
[49] HK's Ex. 1, pp 241-241: Transcript.

relates to the underlying litigation where the record was well developed and contains the arbitrator's detailed opinions and rulings.

CONCLUSION

IT IS HEREBY ORDERED for the reasons set forth above that HK's Motion is GRANTED.

This is not a final order and does not close out the case.

IT IS SO ORDERED.

/s/Victoria A. Valentine