a punishment in many cases. But as the referee said, "[a]t some point, mitigation must yield to considerations of protection of the public." We have passed that point.

In sum, we cannot ignore that Switzer disobeyed a direct order of this court. We previously suspended Switzer, but he continued to practice, flouting our previous ruling. A suspension order is a command, not a suggestion. The offenses admitted are serious, and the need to deter others from this type of conduct weighs heavily. If attorneys ignore our suspension orders without consequence, it undermines the authority of this court. We determine that the only appropriate discipline is disbarment.

CONCLUSION

We adopt the referee's recommendation. We find that Switzer violated his oath of office and several rules governing attorneys. It is the judgment of this court that Switzer should be disbarred from the practice of law.

JUDGMENT OF DISBARMENT.

FREEDOM FINANCIAL GROUP, INC., ET AL., APPELLANTS, V. JANICE M. WOOLLEY, INDIVIDUALLY, ET AL., APPELLEES.

792 N.W.2d 134

Filed November 12, 2010. No. S-09-1302.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Corporations: Actions: Parties.** As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.

4. **Corporations: Actions: Parties: Proof.** If a shareholder can establish an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, then the individual can pursue his or her claims.
5. ____: ____: ____: ____. In order to establish an individual harm, the shareholder must allege a separate and distinct injury or a special duty owed by the party to the individual shareholder.
6. **Corporations: Actions: Parties: Damages.** Even if a shareholder establishes that there was a special duty, he or she may only recover for damages suffered in his or her individual capacity, and not injuries common to all the shareholders.
7. ____: ____: ____: ____. If a shareholder is permitted to bring an action personally to recover his or her proportionate share of the damages suffered by the corporation, a subsequent recovery by or for the corporation would be equivalent to a double recovery for him or her.
8. **Corporations: Actions: Parties.** Even though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation.
9. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
10. **Attorney and Client: Parties.** A lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties, absent facts establishing a duty to them.
11. **Attorney and Client: Parties: Negligence: Liability.** A common set of cohesive principles for determining the extent of an attorney's duty, if any, to a third party includes: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

Michael L. Schleich and Timothy J. Thalken, of Fraser Stryker, P.C., L.L.O., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Freedom Financial Group, Inc. (FFG), as well as related entities, Bethel Enterprises Limited Liability Company (Bethel Enterprises); Freedom Group, Inc.; Freedom Financial, Inc.; Freedom Asset Management, Inc.; Mid-America Employment Services, Inc.; and U.S. Securities Management, LLC (collectively appellants), appeal the decision of the Douglas County District Court granting summary judgment to Janice M. Woolley, individually; Marks Clare & Richards, L.L.C. (Marks Clare); and Janice M. Woolley, P.C., L.L.O. (collectively appellees). FFG filed a legal malpractice action against appellees, alleging that Woolley failed to provide competent legal services, resulting in monetary loss to appellants.

The district court determined that Woolley owed no legal duty to the related entities and entered summary judgment against them. The district court also held that FFG was prohibited from recovering damages rightly accruing to Presidents Trust Company, L.L.C. (Presidents Trust), or that were common to all members of Presidents Trust. Upon finding that FFG did not allege individual damages, the district court granted appellees' motion for summary judgment.

FACTS

Presidents Trust was an independent, nondepository limited liability company (LLC) chartered in South Dakota. FFG was the sole shareholder of Presidents Trust. Bethel Enterprises is the parent company to FFG, Freedom Group, Freedom Financial, Freedom Asset Management, Mid-America Employment Services, and U.S. Securities Management. Simply stated, Bethel Enterprises owned FFG, which was in turn the sole owner of Presidents Trust.

On or about July 10, 2003, Presidents Trust, through various marketing agents, began soliciting individuals to invest in its "Fixed Income Trust" concept (FIT Program). David Klasna, president of both FFG and Presidents Trust, stated in his deposition that Presidents Trust was the only entity allowed to market the FIT Program, an investment concept.

The marketing materials for the FIT Program made reference only to Presidents Trust.

On July 18, 2003, Presidents Trust sought legal counsel from Woolley, of Marks Clare, regarding the legalities of the FIT Program. Woolley and Marks Clare provided an opinion letter to Presidents Trust, addressed to Klasna. In that letter, Woolley stated that the FIT Program was exempt from registration under South Dakota statutes. In the opinion letter, Woolley indicated that she and Marks Clare had "confined our review to the South Dakota statutes, administrative rules and Federal statutes." Subsequent to the issuing of the opinion letter, Presidents Trust began marketing the FIT Program in earnest. The Securities Exchange Commission (SEC) began an investigation shortly thereafter.

The FIT Program, as marketed through Presidents Trust, was identified as "an individual Income Trust . . . designed to provide a secured income." The marketing materials state that the FIT Program is "established by [the investor] with Presidents Trust Company as trustee. [Presidents Trust] is a South Dakota Chartered Trust Company and subject to all Banking Regulations and Compliance of the State." The documentation provided for the FIT Program by Presidents Trust made no mention of any parent or sister company.

On September 4, 2003, the SEC sent a cease-and-desist letter to Presidents Trust. The SEC determined that the FIT Program was selling unsecured promissory notes and was an unregistered investment company. The SEC also determined that the investment program had been misrepresented to investors, that it was a highly risky venture, and that Presidents Trust was strapped for cash. The SEC determined that Presidents Trust had advertised the program through both independent sales agents and an affiliated broker-dealer network known as Freedom Financial, one of the related entities. Presidents Trust was placed into receivership in South Dakota, and a receiver was appointed pursuant to South Dakota state law.

On January 13, 2006, appellants filed suit against appellees, alleging that Woolley had been negligent in opining that the FIT Program was not a security. FFG and the related entities

claimed that their reliance on Woolley's advice resulted in significant damages to all of the companies.

Jon Patrick Pierce, president of Bethel Enterprises, stated in his deposition that over the telephone and in e-mails, he had requested Woolley to look into the securities issues. Pierce said that Woolley met with some of the investors after questions were raised regarding whether the FIT Program was a security. Pierce claimed that Woolley assured him that the FIT Program was exempt from registration.

In his affidavit, Pierce stated that Presidents Trust was a wholly owned subsidiary of FFG and that Presidents Trust was a "'pass through' entity," so that all profits and losses would pass through Presidents Trust to FFG. Presidents Trust was intended to provide administrative services for the FIT Program. Pierce stated that Freedom Financial was also a wholly owned subsidiary of FFG and served as a broker-dealer for the FIT Program and FFG. Pierce claimed that Woolley was aware of the interrelationships between the companies.

Pierce alleged that Woolley's advice led to the failure of the FIT Program and the financial collapse of the companies. Pierce stated that FFG was the company that had originally hired Woolley and Marks Clare to give legal advice regarding the FIT Program. Pierce provided affidavits from two attorneys who opined that Woolley's advice failed to meet the professional standard for an attorney under the circumstances and that the FIT Program could have been marketed in such a way to meet the federal securities regulations.

In Klasna's deposition, he also stated that he had asked Woolley to look at federal securities law as well as South Dakota state banking law, but that there is no record of that request. Klasna stated that he was aware that "things of this nature were regulated as securities" and that they were hoping to find an exemption. He also claimed to have said as much to Woolley. Klasna admitted that he did not remember whether he had specifically asked Woolley to look into securities law, but he said that it was implied, if not stated outright.

Klasna stated that FFG had collected funds for the sale of the FIT Program before Woolley rendered her opinion, but that those funds were put in safekeeping until they were certain the

FIT Program could be released. Klasna admitted that they did not ask Woolley whether the FIT Program was a security until after investors raised the issue. Klasna alleged that even after investors questioned whether the FIT Program required registration, Woolley continued to assure him that the FIT Program met the definition of a trust and was exempt. Klasna also stated he did not believe that Woolley understood the FIT Program or the potential securities problems.

One of the agents for FFG stated that Woolley was adamant that the FIT Program was not a security. He also stated that he was under the impression that Woolley did not truly understand the FIT Program and that he felt a second opinion was needed. The agent stated that Woolley's opinion letter was utilized in the marketing material for the FIT Program.

Various experts were called to testify for appellants, including an expert witness who said that he believed the loss to FFG was $2,124,557. He testified that his calculations were based on the assumption that Presidents Trust would have sold over $49 million worth of product and that his interest rate calculations were correct. Another expert witness was also deposed on FFG's behalf and testified in his deposition that Presidents Trust would have seen a return of at least 24 percent. Another expert witness also agreed that the FIT Program had been very successful before being shut down. An attorney testified that a competent attorney would have noted that Presidents Trust raised a security issue and would have notified the client of such.

In Woolley's deposition, she stated that she did not remember discussing securities with FFG or Presidents Trust. Woolley said that she did not recall reviewing securities law because the primary issues FFG had were with banking and trust law. Woolley stated that she knew FFG had consulted with another law firm on pieces of the FIT Program, so she did not consider federal securities law. Woolley stated that her understanding was that FFG's concern regarding securities law was limited to South Dakota state law. Woolley claimed that she was asked to determine what the ramifications would be if any part of the FIT Program was determined to be a security.

The district court granted Woolley's motion for summary judgment, finding that neither FFG nor the related entities had standing to sue. We affirm.

ASSIGNMENTS OF ERROR

Appellants assign, consolidated and restated, that the district court erred when it (1) determined that FFG could not bring a direct action for its lost earnings as the sole member of an LLC and (2) determined that Woolley did not owe a duty to the related entities.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1]

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

FFG Has No Standing to Sue

We first turn to whether FFG has standing to bring this suit. It is undisputed that Woolley had an attorney-client relationship with both Presidents Trust and FFG. As noted, Presidents Trust, an LLC, is a wholly owned subsidiary of FFG. Presidents Trust is not a party to this suit, and the South Dakota receiver declined to pursue a professional negligence action against Woolley or Marks Clare.

FFG claims that it lost profits which would flow through Presidents Trust to FFG as the sole member of the LLC. FFG also claims that it lost the value of its investment in Presidents Trust, which was allegedly rendered worthless when Presidents Trust was placed in receivership in South Dakota. The district

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[1] *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009).

[2] *Id.*

court determined that FFG was attempting to recover damages belonging to Presidents Trust and its receiver, or that were common to all members of Presidents Trust, and concluded that FFG did not have standing to bring suit. We agree.

[3] As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.[3]

[4-6] In *Meyerson v. Coopers & Lybrand*,[4] we held that if a shareholder can establish an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, then the individual can pursue his or her claims. In order to establish an individual harm, the shareholder must allege a separate and distinct injury or a special duty owed by the party to the individual shareholder.[5] Even if a shareholder establishes that there was a special duty, he or she may only recover for damages suffered in his or her individual capacity, and not injuries common to all the shareholders.[6]

FFG argues that the district court failed to correctly apply the factors found in *Meyerson* as to when a shareholder may recover in a direct suit. FFG also argues that because it had a special relationship to Woolley, its suit falls into an exception to the rule that a shareholder cannot recover for a wrong done to a corporation.[7] We find the damages FFG alleges belong in total to the receiver for Presidents Trust.

South Dakota banking law provides that the receiver is the "owner" of any Presidents Trust assets, including claims against third parties. The applicable South Dakota statute provides in part that "[t]he receiver, under the direction of the director,

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[3] *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] See *id.*

shall take charge of any insolvent trust company and all of its assets and property and liquidate the affairs and business for the benefit of clients, creditors, and owners."[8] FFG claims that it can recover lost profits because those profits would "pass through" Presidents Trust and accrue to FFG; but those alleged profits now belong to the receiver for Presidents Trust under South Dakota law.

[7] We note that *Meyerson*, while applicable to the case at bar, is not helpful to FFG's claim. In that case, we stated that "'[i]f a stockholder is permitted to bring an action personally to recover his proportionate share of the damages suffered by the corporation, a subsequent recovery by or for the corporation would be equivalent to a double recovery for him.'"[9]

[8] A "'diminution in value of a stockholder's investment is a concomitant of the corporate injuries resulting in lost profits.'"[10] We stated that "[e]ven though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation."[11]

FFG has also failed to establish that Woolley owed it a special duty. In *Meyerson*, we found that a special duty existed, because we assumed that the plaintiffs "alleged conduct on the part of [the defendant] outside the scope of the auditing contracts, for which conduct [the defendant] owed plaintiffs a direct duty of care."[12] The same reasoning as applied to attorneys and what constitutes a special duty can be found in *Livingston v. Adams & Fouts, P.L.L.C.*,[13] where the court found that a law firm owed a fiduciary duty to the plaintiff and two closely held corporations. The court determined that the duty owed by the law firm did not rise to the level

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[8] S.D. Codified Laws § 51A-6A-45 (2004).

[9] *Meyerson, supra* note 3, 233 Neb. at 763-64, 448 N.W.2d at 134.

[10] *Id.* at 764-65, 448 N.W.2d at 134.

[11] *Id.* at 765, 448 N.W.2d at 135.

[12] *Id.* at 766, 448 N.W.2d at 135.

[13] *Livingston v. Adams & Fouts, P.L.L.C.*, 163 N.C. App. 397, 594 S.E.2d 44 (2004).

of a "special duty," however, because the duty owed to the plaintiff was not "separate and distinct" from that owed to the other entities.[14] We find the reasoning of *Livingston* to be persuasive, and we adopt that definition of "special duty" within this context.

Applying the definition of "special duty" to the present case, FFG cannot demonstrate that Woolley owed it a special duty. FFG alleges that it was harmed because it relied on the advice Woolley provided, but Woolley rendered the same opinion letter to both FFG and Presidents Trust. Woolley's duty to FFG is therefore neither separate nor distinct from the duty owed to Presidents Trust. As such, FFG has failed to show that it can recover any damages.

We also note that FFG's argument would allow a member of an LLC to use the corporate form as a shield to protect itself from personal liability for acts taken by an LLC while still allowing an individual to collect damages, such as lost profits, incurred by the LLC. Under Neb. Rev. Stat. § 21-2629 (Reissue 2007), "[a] member of [an LLC] shall not be a proper party to proceedings by or against [an LLC] except when the object is to enforce a member's right against or liability to the [LLC]." As a member of an LLC, FFG is not a proper party to this suit, because Woolley's alleged liability is to Presidents Trust and any potential damages would also belong to Presidents Trust. FFG may not attempt to use the corporate form of the LLC to shield itself from liability and then use the same corporate form as a sword to recover damages or enforce liability to the LLC.

We therefore find that FFG did not have standing, and FFG's first assignment of error is without merit.

Woolley Did Not Owe Duty to Related Entities

[9] In its second assignment of error, FFG claims the district court erred when it determined that Woolley did not owe a duty to any of the other related companies and that the related entities did not have standing. In a civil action for

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[14] *Id.* at 405, 594 S.E.2d at 50.

legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.[15] No one disputes that FFG and Presidents Trust were the only parties that had an attorney-client relationship with Woolley. Instead, appellants argue that Woolley owed a duty to the related entities as third-party beneficiaries.

[10,11] "In Nebraska, a lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties, absent facts establishing a duty to them."[16] In *Perez v. Stern*,[17] we outlined a common set of cohesive principles for determining the extent of an attorney's duty, if any, to a third party: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession. We also stated that "when an attorney is retained specifically to advance the interests of third parties, absent countervailing circumstances," as in *Perez*, we will impose a duty.[18]

Appellants cite three pieces of evidence they say support their claim that the related entities were third-party beneficiaries: the fact that (1) Presidents Trust's marketing material listed "affiliated entities" that included three of the related entities, (2) Pierce showed Woolley an organizational chart that demonstrated the relationship between the entities, and (3) Woolley had contact with one of the employees of Freedom Financial. But none of the factors found in *Perez* weigh in favor

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[15] *Wolski v. Wandel*, 275 Neb. 266, 746 N.W.2d 143 (2008).

[16] *Perez v. Stern*, 279 Neb. 187, 191, 777 N.W.2d 545, 550 (2010).

[17] *Perez, supra*.

[18] *Id*. at 193, 777 N.W.2d at 551.

of finding that Woolley and Marks Clare owed a duty to anyone other than FFG and Presidents Trust.

Unlike the plaintiffs in *Perez*, FFG has not demonstrated that Woolley knew her opinion would benefit the related entities or that the alleged harm to the related entities was foreseeable. FFG has also failed to specifically allege damages suffered by the related entities and has been unable to allege a sufficiently close connection between Woolley's actions and the claimed damages. FFG has been unable to demonstrate that imposing liability under these circumstances would prevent future harm. And, finally, we find that imposing liability under the circumstances would impose an undue burden on the legal profession. Therefore, FFG's second assignment of error is also without merit.

CONCLUSION

We find that FFG did not have standing to sue, because any damages would go to the receiver and not to FFG. We also find that FFG did not demonstrate that Woolley owed it a "special duty" separate and distinct from the duty Woolley owed Presidents Trust. FFG cannot use the corporate form of an LLC as a shield from liability while still attempting to recover profits it claims to have lost. We also find that the related entities do not have standing to sue because there was no attorney-client relationship between the related entities and Woolley, and we decline to impose liability on the basis that the related entities were third-party beneficiaries.

AFFIRMED.