[Cite as *Huffman v. Huntington Bancshares, Inc.*, 2019-Ohio-2531.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Virginia Huffman,	:	
Plaintiff-Appellant,	:	
		No. 18AP-667
v.	:	(C.P.C. No. 16CV-10108)
Huntington Bancshares, Inc., et al.	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 25, 2019

On brief: *DeSanto & McNichols,* and *Debra J. DeSanto,* for appellant.

On brief: *Reminger Co., L.P.A.,* and *Melvin J. Davis,* for appellees Pappas Gibson, LLC, et al. **Argued:** *Melvin J. Davis.*

APPEAL from the Franklin County Court of Common Pleas

NELSON, J.

{¶ 1} The essential facts of this case are not nearly as difficult to figure out as the claimed theories of legal harm that plaintiff-appellant Virginia Huffman has sought to maintain in the trial court and on this appeal from the summary judgment ruling against her.

{¶ 2} The record is clear that Ms. Huffman has experienced credit difficulties, and that here, in the end, she was excused from liabilities of more than $100,000. Because she was delinquent in identifying any expert who could explain and support her claimed basis for legal malpractice, and because the trial court further found her asserted damages to be speculative at best, she lost on the summary judgment that we now affirm.

{¶ 3} In a nutshell, drawing from Ms. Huffman's complaint and her own deposition testimony, she sought to acquire the home of her late father by taking over his mortgage obligations on the house. *See, e.g.*, Huffman Depo. at 39 (consensus that "it was a good decision, there was equity in the house"), 43 ("Everybody agreed, oh, yeah, this way we won't have to sell the house. We can close the estate; everybody would be happy"), 51 (father earlier had taken out "a loan or a mortgage * * * * I don't understand the bank stuff"), 62 (intent "to assume the mortgage"). Her lawyers at Pappas Gibson, LLC (collectively, defendant-appellees "Pappas Gibson") facilitated the transmission from lender Huntington Bank of a "SINGLE LOAN GUARANTEE" of her father's debt on the home mortgage loan. *Id*. at 58-60 (correspondence referencing single loan guarantee; "I was made aware that I had to sign documents to get the house"); *see also* Plaintiff's Ex. B (Single Loan Guarantee). "The property was transferred to Plaintiff" Huffman on October 31, 2012, Complaint at ¶ 10, and she signed the single loan guarantee about three weeks later, on November 19, 2012. *Id*. at ¶ 14. She signed the document without reading it, she says, because her lawyers had told her "this was what I needed to do to assume the loan." Huffman Depo. at 62-63.

{¶ 4} While that original loan to her father had been in the amount of $140,477.49 (on a house valued at his death at around $170,000), *id*. at 60, 32, the loan had been paid down to roughly $124,000 by the time she signed the single loan guarantee. *Id*. at 76, 108-09. Ms. Huffman moved into the home in early 2013, *id*. at 72, and lived there until she sold it in October of 2015, *id*. at 75. Over that time, she made approximately $23,000 in payments on the debt. *Id*. at 78. Thus, at the time of her sale, the debt on the home loan stood at approximately $101,000. *Id*. at 80, 109.

{¶ 5} Ms. Huffman sold the house for around $229,000. *Id*. at 80. She says that after taxes and fees, she was paid something on the order of $209,000 for the sale. *Id*. at 89. Although she says that she had put some money into improving the house, she admits that she made a profit on the sale. *Id*. at 90-91. That profit proved to be larger than one might have anticipated because she did not pay Huntington Bank the $101,000 balance on its loan after she learned "there was no lien on the home." *Id*. at 84 (Q: "After you sold the house, you would agree you did not make any attempts to pay off the $101,000?" A: "No, because they told me there was no lien on the home."). The sale proceeds were deposited into Ms. Huffman's account at Huntington Bank, and she promptly "went to the bank and

took every penny out of Huntington." *Id*. at 88. The bank eventually wrote off the loan. *Id*. at 95, 129.

{¶ 6} So then...Ms. Huffman sued the bank. And she sued her lawyers who had facilitated her uninterrupted acquisition and possession of the house through the single loan guarantee device. The bank counterclaimed, seeking repayment of the $101,000 it was out; Ms. Huffman and the bank then agreed to drop all claims and counterclaims between them, and the trial court entered a Stipulated Entry of Dismissal with prejudice of those bank-related claims. May 16, 2018 Stipulated Entry; *see also* July 11, 2018 Decision and Entry Granting Pappas Gibson Mot. for Summ. Jgmt. at 2. The matter before us, therefore, involves only Ms. Huffman's legal malpractice claim against Pappas Gibson.

{¶ 7} Ms. Huffman seems somewhat ambivalent about having acquired the home. Although conceding that in conversations with her family, "they all thought it would be a great idea for me to buy the house," Huffman Depo. at 39, and that "I was made aware that I had to sign documents to get the house," *id*. at 59, and that "if I would not have taken the house I would not have made that profit," *id*. at 91, when asked, "[h]ow do you believe you were damaged by taking the home?", she responds: "this was the home of my mom and dad. My mom died in the bedroom. I watched my dad come close to dying in that house. I really did not want to buy that house * * * * That house was not really great." *Id*. at 103.

{¶ 8} But ultimately, her complaint about her lawyers apparently is not that she wound up living in and then selling the house for a profit, *see id*. at 68 (as matters progressed, she did not tell lawyers she didn't want the house), but rather that they did not appropriately confer with and explain to her that she was guaranteeing the bank's loan to her father (through the "SINGLE LOAN GUARANTEE") rather than assuming his mortgage as her own. *See id*. at 62 ("I was told this is what I needed to sign to assume the mortgage"). The trial court seems to have been accurate in ascertaining that "[t]he gravamen of Plaintiff's legal malpractice claim is that Defendants' failure to personally review the Single Loan Guarantee with Plaintiff constitutes a breach of duty which gave rise to * * * alleged damages." Decision and Entry at 6.

{¶ 9} On March 14, 2018—almost a year and a half after Ms. Huffman filed her complaint, more than ten months after the supplemental disclosure deadline, and one month after the court-established discovery cut-off date—Pappas Gibson filed its motion

for summary judgment, submitting two grounds for dismissal of Huffman's legal malpractice claim. "Not surprisingly," the law firm wrote, "Huffman has failed to identify any expert witness to opine that [Pappas Gibson] breached the standard of care. She has likewise failed to submit any evidence of actual damages." Pappas Gibson Mot. for Summ. Jgmt. at 2. Expert testimony to prove a breach of duty is generally required in legal malpractice cases, the motion argued, and "[a]t this point of the proceedings * * * it is too late for Huffman to rectify this critical error." *Id.* at 8, 9. Beyond pointing to that failure in Ms. Huffman's case, Pappas Gibson put forth its own affidavits reciting that its services had "allowed Virginia Huffman * * * to keep [the] home and take over the existing loan as she requested," and that the firm had "met the applicable standard of care" and not caused damages to Ms. Huffman. Gibson Aff. at ¶ 4-6; Pappas Aff. at ¶ 6, 8-9.

{¶ 10} Ms. Huffman, through counsel, opposed the motion on April 23, 2018, putting forward for the first time an affidavit from one James H. Stempien averring in operative part that Pappas Gibson "had a duty to Plaintiff, Virginia Huffman to personally explain the difference between a loan guarantee and a mortgage. Further, to merely inform Plaintiff to come to the office to sign documents [absent an explanation from lawyers] is not proper and does constitute a deviation from the applicable standard of care *I would expect* from counsel in this type of situation. * * * * I have prepared no written report in this matter." Stempien Aff. filed April 23, 2018, ¶ 5-6 (emphasis added). She also argued, among other points and without record citations, that "[h]er credit was damaged, she paid attorney fees for the advice of Defendants and she continues to incur attorney fees for the present litigation to rectify that [sic] negative credit remarks by * * * Huntington." April 23, 2018 Memo in Opp. at 14.

{¶ 11} In reply, Pappas Gibson observed, among other things, that the "basis of Mr. Stempien's [belated affidavit] opinion is unknown to Pappas and Gibson because he was not disclosed as an expert witness and therefore not deposed." May 9, 2018 Reply Brief at 2.

{¶ 12} After properly outlining the standard for summary judgment and the elements of a legal malpractice claim (duty, breach, and resulting damages), the trial court noted that Ms. Huffman's witness disclosures and supplemental disclosures had not identified an expert, and that while she thereafter had responded to an interrogatory by

saying that she "anticipate[d] utilizing the services of James Stempien, Esq. or Thomas Martello, Esq.," and despite having then promised to confirm the identity of an expert by October 6, 2017, she did not do so and "does not dispute that she failed to formally identify her expert pursuant to Local Rule 43." Decision and Entry at 10. "Among the stated purposes of the Franklin County Local Rules is to ensure the fair and efficient administration of all cases. Defendants were entitled to the identification of Plaintiff's experts as well as the report detailed in Loc. R. 43.03(c). Because Stempien was not disclosed by Plaintiff before the deadlines set by the Court," the trial court ruled, "his affidavit is hereby excluded from this matter pursuant to Loc. R. 43.04." *Id*. at 11. Having noted that " 'except in unusual circumstances, an action in legal malpractice may not be maintained without expert testimony' " to avoid speculation on the standard of care, *id*. at 8, the court found that "Plaintiff failed to meet her reciprocal burden" on the element of breach of duty and therefore granted summary judgment to Pappas Gibson on that ground, *id*. at 11.

{¶ 13} As an additional basis for the summary judgment grant, the trial court noted that although the law firm had pointed to deposition testimony from Ms. Huffman acknowledging that she could not specify to what extent or whether her credit rating had been injured by her failure to pay off the bank debt, and despite her invoking "in general terms that she suffered injury as a result of her credit score being diminished and that she incurred attorney fees," she "fails to point the Court to any specific * * * evidence which would meet Plaintiff's reciprocal burden" to come forward with proof substantiating her claim. *Id*. at 12. Ms. Huffman's failure to show how she had been injured by the alleged malpractice therefore was an independent ground for granting the law firm's summary judgment motion. *Id*.

{¶ 14} On appeal, Ms. Huffman brings us two assignments of error:

> [1.] The trial court erred when it excluded the affidavit of Appellant's expert witness, James H. Stempien, Esq., pursuant to Loc. R. 43 and thereby finding Appellant failed to meet her reciprocal burden of producing an expert to testify that Appellees had breached their duty of care in its decision granting summary judgment.
>
> [2.] The trial court erred by ruling that Appellant's damages are speculative and that she cannot demonstrate that she suffered

> damages as a result of Huntington writing off the debt on her credit bureau as a charge-off in its summary judgment order.

Appellant's Brief at 18, 27.

{¶ 15} "[T]he decision to admit or exclude evidence lies within the sound discretion of the trial court, and an appellate court will not disturb such a decision absent an abuse of discretion." *Foster v. Sullivan*, 10th Dist. No. 13AP-876, 2014-Ohio-2909, ¶ 16.

{¶ 16} We review the grant of summary judgment de novo, mindful that summary judgment is appropriate when, with the evidence construed most strongly in favor of the nonmoving party, reasonable minds could come to but one conclusion that no genuine issue of material fact exists and when against that backdrop the moving party is entitled to judgment as a matter of law. *See, e.g., Pohmer v. JPMorgan Chase Bank, N.A.*, 10th Dist. No. 14AP-429, 2015-Ohio-1229, ¶ 16. When the moving party has advised the court of the basis for its motion and specifically identified those portions of the record properly substantiating its position and showing through evidence of the types enumerated in Civ.R. 56(C) that there is no material fact to support the other party's claim(s), summary judgment is proper if the nonmoving party does not meet its reciprocal burden to point to specific evidentiary facts demonstrating a genuine issue for trial. *See id.* at ¶ 17, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996).

{¶ 17} Here, the trial court was correct in granting summary judgment both because of Ms. Huffman's failure to comply with the rules in identifying any expert witness to support her contention that the professional standard of care was breached, and because of her failure to point to evidence tending to show what her damages were from the malpractice she alleged. "The failure of a party asserting a legal malpractice claim to establish any one of the three elements [duty, breach, and resulting damages] entitles the opposing party to summary judgment." *Lundeen v. Graff*, 10th Dist. No. 15AP-32, 2015-Ohio-4462, ¶ 12, citing *Katz v. Fusco*, 10th Dist. No. 97APE06-846, 1997 Ohio App. Lexis 5614.

{¶ 18} Ms. Huffman describes as a mere "technicality" her failure to follow the rules in providing expert testimony evidencing legal malpractice; the niceties of expert witness identification requirements, she says, should not trump "the interest of justice." *See* Appellant's Brief at 20, 21 (adding that she had "identified Mr. Stempien as a potential

expert in her discovery answers," albeit after the witness disclosure deadlines and without a summary of his opinions and his basis for them).

{¶ 19} But Local Rule 43 of the Franklin County Common Pleas Court makes it incumbent on "[e]ach party [to] * * * serve on all parties and file with the court a written disclosure of all persons with * * * expert knowledge whom the party reserves the option to call as witnesses," to make such disclosure "no later than the date for disclosure designated in the Case Schedule," and to include a "brief description of the expert's qualifications and summary of the expert's opinions and the basis or theory of that opinion." Loc.R. 43.01, 43.02, 43.03(c). The Rule also is clear with regard to "Exclusion of Testimony": "Any witnesses not disclosed in compliance with this rule may not be called to testify at trial, unless the trial judge orders otherwise for good cause and subject to such conditions as justice requires." *Id.* at 43.04.

{¶ 20} Ms. Huffman was on notice that "[t]his court has approved of reading Loc.R. 43 in conjunction with Civ.R. 56(E) [on summary judgment grants] under the circumstances in this case." *Foster*, 2014-Ohio-2909 at ¶ 19, citing *Nu-Trend Homes, Inc. v. Law Offices of DeLibera, Lyons & Bibbo*, 10th Dist. No. 01AP-1137, 2003-Ohio-1633, ¶ 71-73. In *Foster*, we said again that "[w]hether or not a witness is generally known does not excuse compliance with Loc.R. 43. * * * Moreover, due to appellant's failure to properly disclose [an expert], the trial court was authorized under Loc.R. 43 to exclude [his] affidavit] from the summary judgment evidence, and the trial court did not err in doing so." *Foster* at ¶ 20.

{¶ 21} Ms. Huffman never sought to apprise the trial court of why Mr. Stempien had not been identified as her expert or his opinions summarized in keeping with local rule, arguing only that his affidavit established that "Defendants breached their duty by not explaining the documents Plaintiff was signing and merely having a receptionist give Plaintiff the paperwork." Memo in Opp. to Def.'s Mot. for Summ. Jgmt. at 12. Even putting aside the question of whether Mr. Stempien's affidavit reference to "the applicable standard of care I would expect from counsel in this type of situation" speaks to the professional standard of care at issue (as it arguably might given his further reference to an objective duty to "personally explain"), *see* Stempien Aff. at ¶ 5, the trial court did not abuse its discretion by ruling that "[b]ecause Stempien was not disclosed by Plaintiff before the

deadlines set by the Court, his affidavit is * * * excluded from this matter pursuant to Loc. R. 43.04." Decision and Entry at 11. Especially in the context of Ms. Huffman's sustained refusal, in the face of various deadlines and subsequent inquires, formally to identify her expert, *see id.* at 10, we do not deem the trial court unreasonable, arbitrary, or unconscionable in suggesting that the "fair and efficient administration of justice" that the rule is meant to enhance would be thwarted here by disregarding it. *Id.* at 11.

{¶ 22} Ms. Huffman does not even attempt to distinguish *Foster*'s holding on the permissible exclusion of an expert who had not been identified pursuant to rule; rather, she urges that here, in differentiation from *Foster*'s medical malpractice context, she required no expert testimony at all to make out her legal malpractice case. Appellant's Brief at 23; Appellant's Reply at 11-12. She waived that argument, however, by not having presented it to the trial court in opposing summary judgment. And we would not find it persuasive in this particular case in any event.

{¶ 23} Ms. Huffman's argument against waiver that she "could not have anticipated the trial court's ruling to completely throw out her expert witness testimony" and that she "had no knowledge that the trial court would completely exclude the affidavit of her expert witness" because the witness had not previously been identified, Appellant's Reply at 13, 14, is belied by the plain text of Loc.R. 43 and specifically by Loc.R. 43.04 on "Exclusion of Testimony." Her related argument that Pappas Gibson had not warned her sufficiently of the potential result, in that "Appellees did not argue in their motion for summary judgment that any witness now disclosed by Appellant should not be considered by the court for failure to disclose the witness in accordance with Local Rule 43," Appellant's Reply at 12-13, while of no real force given the clarity of the rule itself, also does not square with the language Pappas Gibson did use in its motion argument that "Huffman has failed to present expert testimony to establish a breach of duty," Def.'s Mot. for Summ. Jgmt at 8: "To date," Pappas Gibson wrote in its March 14, 2018 motion filing, "Huffman has failed to respond with the identification of her expert witnesses. At this point of the proceedings—ten months after the supplemental disclosure deadline and one month after the discovery cutoff—*it is too late for Huffman to rectify this critical error*." *Id.* at 9 (emphasis added, and further detailing failures to comply with disclosure dates and failure of Ms. Huffman's malpractice counsel to keep promise to confirm identity of expert by October 6, 2017); *see also id.* at 8

(arguing that generally, "expert testimony is required to support allegations of professional malpractice").

{¶ 24} Ms. Huffman's argument to us that her case could have gone forward even absent any expert testimony of malpractice is improper as made for the first time on appeal. *See, e.g., Tucker v. Leadership Academy for Math*, 10th Dist. No. 14AP-100, 2014-Ohio-3307, ¶ 20.

{¶ 25} And we don't think the argument would have worked anyway. Ms. Huffman's whole case, such as it is, seems based on the premise that she needed her lawyers to explain to her that the "SINGLE LOAN GUARANTEE" they'd facilitated was the guarantee of her father's loan and not the assumption of her father's mortgage. By insisting that these concepts are beyond the ken of a layperson such as herself, Ms. Huffman undercuts her argument that she can make out her case for breach of the professional standard of care without an expert witness. Her expressed view, that is, that her "case does not involve complex legal issues that even necessitate the use of an expert witness to prove the breach of duty" by Pappas Gibson, Appellant's Brief at 23, and that "the breach of duty in this case is well within the understanding of a layman," Appellant's Reply Brief at 14, seems at least in some tension with her overarching theme that she was let down after having "hired experts to make sure this was done correctly," Huffman Depo. at 63; *see also, e.g., id.* at 66 ("I don't know" the difference between a mortgage and a lien); Pl.'s Memo in Opp. to Def.'s Mot. for Summ. Jgmt. at 14 ("This is not a simple case").

{¶ 26} The trial court also was correct that Ms. Huffman failed to point to specific evidence of damages that she claims to have suffered as a result of the alleged legal malpractice, and summary judgment was appropriate on that ground as well. Indeed, the trial court's conclusion that "Plaintiff's damages are speculative" was if anything an overly generous description of the claimed harm. Decision and Entry at 11-12.

{¶ 27} Pappas Gibson's summary judgment motion pointed to substantial record evidence that, despite the allegations of her unverified complaint that "her credit has been severely damaged," *see* Complaint at ¶ 45, *see also id.* at ¶ 44, Ms. Huffman had not suffered compensable damages as a result of the legal representation. Def.'s Mot. for Summ. Jgmt. at 11-12. That evidence included her own testimony that "I was made aware I had to sign documents to get the house" (Huffman Depo. at 59); that she then paid about $23,000 in

loan payments, lived in the home for a few years, and sold it for $229,000 (*id.* at 80); and that "Yes, I made a profit, and no, if I would not have taken the house I would not have made that profit * * * *" (*id.* at 91); *see also* Def.'s Mot. for Summ. Jgmt. at 12 (providing case authority that a lower credit score, in and of itself, would not be compensable). The referenced evidence also included Ms. Huffman's testimony that she lacked any actual knowledge or proof that the bank's write-off of her debt caused any damage to her credit score or was the basis for credit denials. *Id.* at 99-100.

{¶ 28} Ms. Huffman responded with the bare, unsupported assertions that "her credit was damaged" and that she had incurred unspecified attorney fees, and she also asserted that "[w]hether Plaintiff made money or did not make money is irrelevant to the case at hand." Pl.'s Memo in Opp. to Def.'s Mot. for Summ. Jgmt. at A17. Her briefing to this court again submits without citation that "[t]here is no question that Appellant has incurred additional legal fees as a direct result of Appellee's negligence," Appellant's Brief at 27; repeated verbatim in Reply Brief at 17. It then argues that she "testified in her deposition that her credit score was negatively impacted by Huntington Bank showing the charge-off on her credit bureau and that she was able to get an apartment with her credit score prior to the charge-off being shown * * * and unable to get an apartment * * * after the charge-off * * * *" *Id.* at 32; repeated verbatim in Reply Brief at 16.

{¶ 29} Of course, her $101,000 debt would not have been written off had she paid that obligation from her $209,000 proceeds on the sale of the home. As she in fact testified: "They told me I could pay off the loan. But I was not going [to] pay off the loan after speaking to a customer service rep from Huntington National Bank when the title company told me there was no lien on the property." Huffman Depo. at 82-83; *see also id.* at 84 (made no post-sale attempts to pay off the loan).

{¶ 30} But even setting that point aside, it is simply not true that her testimony reflects injury to her credit score from the write-off. Asked directly (in one of the passages she cites as somehow supporting her position): "the fact that Huntington marked it as written off, do you know if that * * * negatively impacted your credit score?" she responded: "Well, I don't check my credit score all the time because it's depressing. I can't say if a drop took place; I do not know that." *Id.* at 99 (also noting that her credit score before all this "was not great. It was not great."). She then reiterated: "I don't know exactly" what impact,

if any, the bank write-off had on her credit score. *See also, e.g., id.* at 131 (no one has told her what her credit score would be without the bank write-off; and she cannot "exactly" say).

{¶ 31} And as to the apartment owners who for some reason may have seen her as a dubious risk, she likewise acknowledged that no one told her that the bank write-off had anything to do with rental decisions, *id.* at 100, 101 (also adding, "I don't know their process"), 104 (has not yet even submitted any application for an apartment rental), 105 (prospective renters "didn't run anything on me" and have not looked at her credit report [the score on which she says she does not "check * * * all the time"]).

{¶ 32} Moreover, Ms. Huffman offered no quantification whatsoever of her supposition that being credited as a mortgagor for the $23,000 in loan payments she did make would have moved her credit score, and she did not even venture a guess as to by what degree her score would have changed under her preferred scenario. *See, e.g., id.* at 71 ("It didn't hurt it, but it certainly didn't help me"). Her testimony was even muddled as to whether she had used any of the couple hundred thousand dollars she received from sale of the home to pay off unrelated debts that had gone into the collections process. *Id.* at 101 (at first answering with a flat "No," before saying "I used my Wage Works card").

{¶ 33} Suffice it to say that upon review of the briefing and the record, we find no reason to question the trial court's characterization of Ms. Huffman's damage claim as "speculative," Decision and Entry at 11, or to overrule the trial court's holding that Ms. Huffman "fails to point the Court to any specific Civ. R. 56 evidence which would meet Plaintiff's reciprocal burden" on her claimed damages, *id.* at 12. And as we have emphasized before: "in a legal malpractice action, 'it is axiomatic that compensatory damages must be shown with certainty, and damages which are merely speculative will not give rise to recovery.' The evidence must establish a calculable financial loss because one of the essential elements of a legal malpractice claim is a causal connection between the conduct complained of and resulting damage or loss." *Nu-Trend Homes,* 2003-Ohio-1633 at ¶ 42, quoting *Endicott v. Johrendt,* 10th Dist. No. 99AP-935, 2000 Ohio App. Lexis 2697; further citation omitted.

Conclusion

{¶ 34} The bottom line in this case is that, at least from a financial standpoint, Ms. Huffman appears to have made out very well with regard to the particular transaction at issue. She has not pointed to any ascertainable damages from the breach of professional duty she alleges, and she failed within the schedule set by the trial court and for a substantial time thereafter to provide an expert witness on the standard of care, as she had needed to do under the circumstances of this legal malpractice case.

{¶ 35} We overrule both of Ms. Huffman's assignments of error, and we affirm the trial court's grant of summary judgment to the Pappas Gibson defendants.

Judgment affirmed.

BROWN and BRUNNER, JJ., concur.

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