[Cite as *Globalcor Assocs., L.L.C. v. Law Office of Robert Soles, John L. Juergenson & John L. Juergenson Co., LPA*, 2019-Ohio-2208.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GLOBALCOR ASSOCIATES, LLC	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	Case No. 2018CA00090
LAW OFFICE OF ROBERT SOLES	:	
JOHN L. JUERGENSON and	:	
JOHN L. JUERGENSON CO., LPA	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2017 CV 2551
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	May 28, 2019

APPEARANCES:

For Plaintiff-Appellant:	For Defendants-Appellees Robert E. Soles, Jr. and the Law Offices of Robert E. Soles, Jr.
RICHARD C. ALKIRE DEAN NIEDING 200 Spectrum Office Building 6060 Rockside Woods Blvd. Independence, OH 44131	TIMOTHY T. BRICK MONICA A. SANSALONE SHANE A. LAWSON Gallagher Sharp LLP Sixth Floor, Bulkley Building 1501 Euclid Ave. Cleveland, OH 44115

Delaney, J.

{¶1} Plaintiff-appellant Globalcor Associates, LLC ("Globalcor") appeals from the July 9, 2018 Judgment Entry of the Stark County Court of Common Pleas granting the motion for summary judgment of defendants-appellees Robert E. Soles, Jr. and the Law Offices of Robert E. Soles, Jr. (collectively "Soles").

FACTS AND PROCEDURAL HISTORY

Soles represents Globalcor in Kelev and foreclosure litigation

{¶2} This case arose in 2017 as a refiled legal malpractice case. Jeffrey Melton ("Melton") is described as a property developer, manager, and owner who operates through various corporate entities including, e.g., Globalcor. In 2011, Globalcor purchased property in Akron, Ohio known as the "Bank Building," including a liquor license and bar equipment for a nightclub that operated on the first floor of the building. Globalcor obtained financing to purchase the Bank Building from a lender known as Kelev Funding ("Kelev").

{¶3} After the purchase, Globalcor renovated the Bank Building and operated The Bank Nite Club. According to Globalcor, a buyer named Sam Oliver came forward and entered an agreement with Globalcor to operate The Bank Nite Club in October 2011. Oliver purportedly intended to purchase the Bank Building, but before the transaction could take place, Kelev "wrongfully took possession of the Bank Building and locked Globalcor out, killing the deal with [Oliver]." (Brief, 3).

{¶4} Soles points out that Globalcor failed to pay the mortgage or taxes on the property, never found a buyer, and defaulted on the high-interest loan from Kelev.

{¶5} Soles represented Globalcor during ensuing litigation with Kelev and in a subsequent tax foreclosure action filed by the Summit County Fiscal Officer.

{¶6} Globalcor, via Melton, acknowledged satisfaction with Soles' representation in the Kelev litigation and in the tax foreclosure proceeding. When asked whether Soles "did a good job" for Globalcor in the Kelev litigation, Melton said "yes," and when asked what Soles should have done differently, he said, "Nothing." When asked whether Soles was negligent in his representation of Globalcor throughout the foreclosure proceedings, Melton responded, "No."

{¶7} Globalcor did not pay the back taxes on the Bank Building and a sheriff's sale was scheduled for March 17, 2015. Soles notified Melton of the sheriff's sale on March 3, 2015, via an email which Melton read on March 6, 2015.

{¶8} The parties agree that bankruptcy was discussed as an option to prevent the sheriff's sale. At this point the parties' accounts diverge.

The option of bankruptcy is raised

{¶9} On March 16, 2015, Melton went to Soles' office to discuss options to save the Bank Building. Soles told Melton bankruptcy was an option, but he did not litigate bankruptcies, although "someone in [his] office" did. Soles escorted Melton into the office of attorney John Juergensen.[1]

{¶10} Globalcor asserts Soles told Juergensen that Melton needed more time to "complete a sale" of the Bank Building, and that both Soles and Juergensen determined that a Chapter 11 bankruptcy should be filed.

[1] The relationship between Soles, Juergensen, and John L. Juergensen Co., LPA is discussed in greater detail infra.

{¶11} Soles asserts Globalcor was separately represented in the bankruptcy by John Juergensen of John L. Juergensen Co., LPA, and that Juergensen filed a "skeleton Chapter 11 petition that intentionally omitted related schedules" because Melton ultimately hoped the bankruptcy would be dismissed.

{¶12} Soles left Melton in Juergensen's office to discuss the bankruptcy. Melton agreed to pay Juergensen $500 to file a "bare bones" Chapter 11 petition. Juergensen filed the Chapter 11 petition the same day and sent notice of the filing to the Summit County Sheriff's Department.

{¶13} Globalcor acknowledges its "immediate goal was to delay the Sheriff's sale until a sale or refinancing of the Bank Building could occur, [thus] pursuing a Chapter 11 was Globalcor's best option to pay off its creditors and maintain control of its most valuable asset, the Bank Building." (Brief, 9). Nevertheless, Globalcor argues the strategy of filing a skeletal Chapter 11 petition was doomed to fail; therefore Soles breached the duty of care in purportedly failing to refer Globalcor to bankruptcy counsel until shortly before the sheriff's sale and contributed to Juergensen's alleged failure to meet the standard of care in filing the Chapter 11 petition.

{¶14} Ultimately, the Chapter 11 bankruptcy was converted to a Chapter 7 and the bankruptcy trustee sold the Bank Building to Kelev.

{¶15} In the wake of the bankruptcy, Globalcor argues the negligence of Soles and Juergensen resulted in the loss of deals which could have led to purchase of the Bank Building and/or paid creditors. Globalcor also argues Soles was responsible, at least in part, for disparaging him to a potential lender. The details of that allegation are

reviewed in more detail infra in the affidavits of Attorney Anthony J. DeGirolamo and Michael P. Sanderson.

The relationship between Soles, Juergensen, and Globalcor

{¶16} Globalcor maintains that throughout Juergensen's representation in the bankruptcy, Melton believed Juergensen was "one of Soles' attorneys" because there was no new or different fee agreement once Juergensen became involved; Juergensen was listed in the February 1, 2012 fee agreement as a "professional assigned to perform legal services for the Client" and assigning him an hourly rate; there was no signage indicating Juergensen's practice was separate from Soles'; and Melton received Juergensen's fax transmissions via Soles' fax machine.

{¶17} From 2008 until April 30, 2012, Juergensen was an "of counsel" member of the Law Offices of Robert E. Soles, Jr. During that period, Soles maintained malpractice coverage for Juergensen.

{¶18} Soles no longer maintained malpractice coverage for Juergensen as of April 30, 2012. Juergensen's separate legal malpractice coverage lapsed in March 2016. Globalcor was not advised of the changes to Juergensen's coverage.

{¶19} After the "of counsel" relationship ended, Juergensen continued to maintain his office within the Soles building and to pay rent. Juergensen used copiers in the building with his own code and was billed therefor. He used the Soles postage meter and tracked his own postage. He had his own fax machine but sometimes used the Soles fax machine with a code and was billed for the usage. He also used some portions of the common areas such as a refrigerator and the conference room. Juergensen shared a computer network with Soles until March 2016 with each able to access the other's files.

{¶20} Soles responds that Juergensen was employed by John L. Juergensen Co., L.P.A., and never met Melton, or had any involvement in any Globalcor litigation, before the referral in March 2015. Juergensen's firm was separately incorporated and has had separate signage at the street and at the building entrance since "mid-2012." Juergensen had separate business cards, conspicuous letterhead, and signed his pleadings with a Juergensen Firm signature block.

{¶21} On May 13, 2016, Globalcor filed a complaint in legal malpractice against, e.g., Soles, Juergensen, and John L. Juergensen Co., L.P.A. (collectively "Juergensen") as case number 2016 CV 01133 in the Stark County Court of Common Pleas. Globalcor voluntarily dismissed the action prior to filing of any dispositive motions.

{¶22} The instant action was refiled on December 21, 2017, and the trial court incorporated the filings from the 2016 case. Soles and Juergensen filed motions for summary judgment. Globalcor filed a response which included, e.g., the affidavits of Attorney Anthony J. DeGirolamo and Michael P. Sanderson.[2] These affidavits are relevant to the parties' arguments in the instant appeal.

{¶23} DeGirolamo's affidavit executed on May 2, 2017 states the following in pertinent part regarding Globalcor's claims against Soles:

> Affidavit of Anthony J. DeGirolamo
>
> * * * *.

[2] Globalcor had identified DeGirolamo as its standard-of-care expert regarding Juergensen's conduct in the 2016 case; DeGirolamo stated in his deposition at that time that he didn't know whether making a referral was a problem and he was less qualified to speak to the actions of Soles. DeGirolamo's affidavit was filed in the 2017 case as part of Globalcor's response to Soles' motion for summary judgment.

1. I have been licensed to practice law in the state of Ohio since 1992. My practice is concentrated in the area of bankruptcy law.

2. My practice almost exclusively is commercial bankruptcy. I have been a Chapter 7 panel trustee for the Bankruptcy Court since August of 2003. I have been a Trustee in Chapter 7 cases, thousands of times with 101 new cases being assigned to me in the month of March, 2017. I have prosecuted chapter 11 cases for 50 companies or individuals in my career.

3. In connection with the opinions I have in this matter, I have reviewed the following documents and records:

a. Affidavits of Michael Sanderson, Shawnte Davon Hardin, Jeffrey Melton and John Juergensen.

b. The deposition transcripts of Jeffrey Melton, John Juergensen, Robert Soles, and all deposition exhibits.

c. The expert report of Timothy Hefty.

d. Email of John Juergensen with cellphone records attached.

4. It is my opinion that John Juergensen fell below the applicable standard of care of an attorney representing a company in a Chapter 11 Bankruptcy * * * *.

* * * *.

7. After the Chapter 11 Bankruptcy had been converted to a Chapter 7 Bankruptcy, Mr. Soles participated in a conversation, along with Mr. Juergensen, and Michael P. Sanderson wherein they each disparaged Mr. Melton to Mr. Sanderson, a lender who had the ability to complete a purchase of the Bank Building which would have satisfied the claims of the creditors to the bankruptcy. This disparagement is a breach of the standard of care and apparently was a substantial factor in the final decision by Mr. Sanderson not to fund the deal.

* * * *.

9. The following are the opinions I hold in regard to Robert Soles' representation of Globalcor:

a. His conduct in disparaging or being present during the disparaging of Mr. Melton, the principal of Globalcor, to a potential lender after the Chapter 11 bankruptcy was converted to a Chapter 7 Bankruptcy, fell below the applicable standard of care.

b. Insofar as Mr. Soles represented Globalcor in connection with the tax foreclosure action, he failed to refer Globalcor to a bankruptcy attorney capable of properly prosecuting a Chapter 11 case sooner than a week before the sheriff sale.

c. His failure to refer Globalcor to bankruptcy counsel capable of properly prosecuting a [C]hapter 11 case sooner was a contributing factor to John Juergensen's inability to meet the standard of care applicable to him in connection with the Chapter 11 Bankruptcy filed by him on March 16, 2015.

d. His conduct fell below the standard of care in disparaging or being present during the disparaging of Mr. Melton to a potential lender, Michael Sanderson, which caused damage to Globalcor.

10. As a direct and proximate result of Mr. Soles' breach of the applicable standard of care in connection with referring Globalcor to a bankruptcy attorney capable of properly prosecuting a [C]hapter 11 case, such breach was a contributing factor to John Juergensen's substandard representation of Globalcor in the Chapter 11 Bankruptcy.

12. [*sic*] As a direct and proximate result of Robert Soles participation in a conversation disparaging Jeffrey Melton to a lender, Michael P. Sanderson, for the purpose of purchasing the Bank Building during the pendency of the Chapter 7 Bankruptcy, such conduct was a substantial factor in the final decision not to fund that loan.

13. All opinions expressed in the above paragraphs of this Affidavit I hold to a reasonable degree of professional certainty.

* * * *.

{¶24} DeGirolamo then provided the following supplementation to his affidavit on May 18, 2018:

* * * *.

1. In supplementation of my previous Affidavit in the above-captioned matter, dated May 2, 2017, I provide the following additional information.

2. I had a telephone conversation with Robert E. Soles, Jr. after I became involved in the Chapter 11 bankruptcy matter involving Globalcor Associates, LLC.

3. The conversation I had took place in late May or early June 2015, during which conversation Robert E. Soles, Jr. discussed with me a conversation he participated in with Michael Sanderson.

4. The gist of the conversation was that Robert E. Soles, Jr. questioned Mr. Sanderson as to why Mr. Sanderson would do the deal with Jeff Melton involving the purchase of the [B]ank [B]uilding out of the bankruptcy at an amount of approximately $2 million.

* * * *.

{¶25} The affidavit of Michael P. Sanderson executed April 17, 2017 states the following in pertinent part:

1. I was the CEO/Member of Ashjen Capital Holdings Ltd. In 2015 * * *.

* * * *.

3. I was introduced to Jeff Melton [through someone working with] Mr. Melton and his attorneys in connection with obtaining financing for the purchase of the premises * * * known as the Bank Building.

* * * *.

5. I * * * visited the premises [of the Bank Building] on or about June 8, 2015. I was afforded entry upon the premises by counsel for the Chapter 7 Bankruptcy Trustee * * *.

6. Before the site visit and walk through occurred, I had received at least one telephone call from two individuals who identified themselves as attorneys representing Jeffrey Melton. This conversation was initiated by one of the individuals who called me at [my telephone number].

7. The telephone call initiated by the two lawyers for Mr. Melton concerned questioning about the loan * * *. Specifically, the lawyers asked the question "why would you loan Jeff Melton $2 million dollars?"

8. At the time this telephone call was made and prior thereto, I was ready, willing, and able to loan funds to Mr. Melton and/or JLR Associates, Inc. to purchase the Bank Building out of bankruptcy.

> 9. After this call was made, a variety of factors came into play which accounted for this loan not being funded. However, when the final decision was made by me not to fund the loan, the fact that Mr. Melton's two counsel questioned why I would loan money to Jeff Melton was a substantial factor in such final decision.
>
> * * * *.

{¶26} On July 9, 2018, the trial court granted summary judgment on behalf of Soles and denied summary judgment on behalf of Juergensen.

{¶27} Globalcor now appeals from the trial court's decision granting summary judgment on behalf of Soles.

{¶28} Globalcor raises one assignment of error:

ASSIGNMENT OF ERROR

{¶29} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS LAW OFFICES OF ROBERT E. SOLES, JR. L.P.A. AND ROBERT E. SOLES, JR."

ANALYSIS

{¶30} In its sole assignment of error, Globalcor argues the trial court erred in granting summary judgment on behalf of Robert E. Soles, Jr. and the Law Offices of Robert E. Soles, Jr. We disagree.

{¶31} We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions,

> affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * *
> A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶32} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Seniah Corp. v. Buckingham, Doolittle & Burroughs, LLP*, 5th Dist. No. 2017CA00109, 2018-Ohio-855, 109 N.E.3d 69, ¶ 37, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶33} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall,* 77 Ohio St.3d 421, 429,

674 N.E.2d 1164 (1997), citing *Dresher v. Burt,* 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶34} To prevail upon its legal malpractice claim against Soles, Globalcor must prove: "(1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss." *Bates v. Meranda*, 5th Dist. Licking No. 16-CA-28, 2016-Ohio-5749, ¶ 18, citing *Vahila v. Hall,* 77 Ohio St.3d 421, 1997–Ohio–259, syllabus. "In all but a few cases, expert testimony is required to support allegations of legal malpractice." *Id*., citing *Brunstetter v. Keating,* 11th Dist. Trumbull No.2002–T–0057, 2003–Ohio–3270, ¶ 16.

{¶35} In the instant case, Soles' motion for summary judgment asserted that he competently represented Globalcor in both the Kelev and foreclosure litigation and obtained favorable results. He then properly referred Melton to Juergensen, a separate entity, for bankruptcy advice.

{¶36} Globalcor's argument in opposition asserted that Soles' bankruptcy referral was not timely and therefore prevented the Chapter 11 from being successfully prosecuted; Soles personally made disparaging remarks about Melton to a potential lender; and Soles is responsible for Juergensen's alleged negligence under a theory of apparent authority. Globalcor supported its response to Soles' arguments with, e.g., the affidavit of Attorney Anthony DeGirolamo attesting to the standard of care.

Bankruptcy referral

{¶37} Globalcor's claim that Soles was negligent in making an untimely referral to bankruptcy counsel is supported by the following statement in DeGirolamo's affidavit: "Insofar as [Soles] represented Globalcor in connection with the tax foreclosure action, he failed to refer Globalcor to a bankruptcy attorney capable of properly prosecuting a Chapter 11 case sooner than the week before the sheriff sale" and further, ***** Soles' breach of the applicable standard of care in connection with referring Globalcor to a bankruptcy attorney capable of properly prosecuting a Chapter 11 case * * * was a contributing factor to [Juergensen's] substandard representation." (DeGirolamo affidavit, paragraphs 9b and 10).

No cause of action for negligent timely referral

{¶38} As Soles points out, "negligent referral" is not a viable cause of action. *Lucre v. Aid Pest Control, Inc.*, 5th Dist. Stark No. 98CA00078, 1998 WL 819771, *3, appeal not allowed, 85 Ohio St.3d 1403, 706 N.E.2d 786 (1999).

{¶39} First, Globalcor responds with a list of medical malpractice cases which purportedly stand for the principle that "courts in Ohio recognize professional malpractice claims based on failure to make a timely referral." We disagree with this assessment. In *Ander v. Clark*, 10th Dist. Franklin No. 14AP-65, 2014-Ohio-2664, a licensed optometrist observed an abnormality in a patient's eyes in 2003, but failed to recommend or perform additional tests and failed to refer the patient to an ophthalmologist. The patient was not properly diagnosed and treated until 2012, when a different optometrist referred her to a specialist. The trial court granted a Civ.R. 12(B)(6) motion to dismiss on the basis of the statute of repose, agreeing with the defendants' inference that the negligence occurred

in 2003 when the optometrist failed to investigate further or refer to a specialist. The appellate court disagreed and reversed, noting the complaint did not state when the negligence occurred because "[*h]ow much time should pass before a referral to a specialist is not part of the complaint*, and requires discovery and further development of the case. It is reasonable to infer that the alleged negligence did not arise until some period of time had passed." (Emphasis added.) *Ander v. Clark*, 10th Dist. Franklin No. 14AP-65, 2014-Ohio-2664, ¶ 8. The dismissal was therefore "premature" because although further discovery might show the claim to be time-barred, but at that stage of the litigation it could not be said that the plaintiff could prove no set of facts entitling her to recovery. *Id.*, ¶ 10. We disagree that *Ander* supports appellant's theory of a cause of action for negligent referral.

{¶40} In *Guiliani v. Shehata*, 1st Dist. No. C-130837, 2014-Ohio-4240, 19 N.E.3d 971, a doctor treating a patient for prostate cancer failed to timely diagnose the patient's colon cancer, despite several red flags that should have indicated the possibility of colon cancer. The medical malpractice claim was premised upon failure to timely diagnose. *Id.,* ¶ 1. This case does not support appellant's theory of a cause of action for negligent referral.

{¶41} In *Bradley ex rel. Estate of Bradley v. Univ. Hosps. of Cleveland, Inc.*, 8th Dist. Cuyahoga No. 79104, 2001 WL 1654762, *1, the plaintiff sued several medical providers, including the patient's primary-care physician who treated him for an ear infection on the day before his death but failed to timely refer him for emergency treatment of bacterial meningitis. The jury found in favor of the primary-care physician and the appeal is brought by providers who treated the patient after his transfer to a hospital and

placement on a ventilator, when subsequent problems arose leading to his death. We disagree that this case supports appellant's theory of a cause of action in legal malpractice for negligent referral.

{¶42} Finally, in *Rodgers v. Genesis Healthcare Sys., Inc.*, 5th Dist. Muskingum No. CT2015-0030, 2016-Ohio-721, at ¶ 28, we affirmed the trial court's decision granting a motion to dismiss a medical malpractice case for failure to file an affidavit of merit. Following a car accident, the plaintiff was treated in an emergency room and contended that, e.g., providers there failed to recognize the severity of her injuries and failed to properly treat her. We disagree that this case supports appellant's theory of a cause of action in legal malpractice for negligent referral.

Globalcor has not supported its claim of negligent timely referral

{¶43} Globalcor asserts that its complaint is "failure to make a *timely* referral." Aside from problems with the cause of action, we find Globalcor's evidence does not support its argument. Placing the claim within the context of legal malpractice, on appeal Globalcor alleges Soles breached his duty of competent representation by failing to make a bankruptcy referral earlier ["Plaintiff has made out a *prima facie* claim of malpractice based upon Soles' failure to timely refer Globalcor for a Chapter 11 bankruptcy." (Brief, 22)]. We agree with the trial court's reading of the DeGirolamo affidavit, however. Globalcor's expert asserts Soles failed to make a referral to an attorney "capable" of properly prosecuting a Chapter 11 bankruptcy. Further, the affidavit does not indicate how this failure to refer to a capable attorney proximately caused damage to Globalcor because there is no evidence offered that the timing of the referral had any effect upon the outcome. Appellant cites a number of facts in the record in support of its argument

that Soles should have recognized earlier in *his* representation of Globalcor, in the foreclosure proceedings, that bankruptcy could or should be pursued. This inference is not supported by or developed in the DeGirolamo affidavit, however.

{¶44} Moreover, we concur that DeGirolamo's affidavit contains conclusory opinions that Soles' referral was untimely and that any untimeliness changed the outcome of the bankruptcy filing. Civ.R. 56(E) provides in part: "Supporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence,* and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." (Emphasis added.) The trial court found the DeGirolamo affidavit insufficient to oppose the motion for summary judgment as to the timeliness of the referral.

{¶45} The circumstances under which a witness may testify as an expert are set forth in Evid.R. 702, which states: A witness may testify as an expert if all of the following apply:

> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical or other specialized information. * * *

{¶46} Evid.R. 702 must be read in conjunction with Evid.R. 703 and 705 to determine whether or not an expert witness's affidavit suffices for the purpose of opposing an adequately-supported motion for summary judgment. *C.R. Withem Enterprises v. Maley,* Fairfield App. No. 01 CA 54, 2002–Ohio–5056, at ¶ 34. Evid.R. 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing." Evid.R. 705 allows the expert to "testify in terms of opinion or inference and give his reasons therefor after disclosure of the underlying facts or data * * * in response to a hypothetical question or otherwise."

{¶47} The expert affidavit in a legal malpractice case therefore must provide underlying facts in support of the expert's opinion that the defendant attorney committed malpractice. *Maley*, supra, 2002-Ohio-5056 at ¶ 34. DeGirolamo's affidavit repeatedly states Soles failed to refer Globalcor to an attorney capable of properly prosecuting a Chapter 11 bankruptcy, which we agree is different than asserting Soles failed to make a timely referral. Specifically, there is no discussion of any underlying facts in support of the conclusion that the timing of the referral resulted in any failure by Juergensen to meet the standard of care. There is no factual support for the inference that a different bankruptcy attorney would have achieved a more favorable result, especially when there was no intention by Globalcor to proceed with the Chapter 11; the goal was to buy time to prevent the sheriff's sale.

{¶48} In the affidavit, DeGirolamo offers no facts, no statement of what a different bankruptcy attorney might have done in the case, nor any statement as to why the time of the referral affected Juergensen's actions. The affidavit does not state what an

ordinarily competent attorney would have done which Soles failed to do. Construing the affidavit most favorably toward Soles, reasonable minds could only find that it states no facts but merely expresses a bare, conclusory opinion that Soles was negligent in making the referral. *See, C.R. Withem Enterprises v. Maley*, 5th Dist. Fairfield No. 01 CA 54, 2002-Ohio-5056, ¶ 32.

{¶49} We find there is no genuine issue as to any material fact and that Soles is entitled to judgment as a matter of law regarding the claim that he was negligent in failing to make a timely referral to a capable bankruptcy attorney.

Purported disparagement of Melton

{¶50} Globalcor also contends Soles was negligent in allegedly making, or participating in the making of, a disparaging statement regarding Melton: "Why would you loan Jeff Melton $2.1 million dollars?" This question was purportedly posed to Sanderson by from one of "two individuals identifying themselves as attorneys representing Mr. Melton" prior to a site visit by Sanderson, Melton, a potential lender, and broker. Soles denies making any disparaging comments regarding Melton to a potential lender, and Juergensen confirmed Soles was not involved in disparaging statements about Melton to potential lenders. The trial court found Sanderson's affidavit insufficient to support Globalcor's malpractice claim against Soles because there is no evidence Soles made the remark, or that the remark was disparaging, because Sanderson noted a combination of factors resulted in his decision not to make the loan, although the purported call was a substantial factor.

{¶51} On appeal, Globalcor argues Soles had a fiduciary duty to act in its best interest, and disparagement of Melton is a violation of that duty. The problem is, however,

that even Sanderson's affidavit does not state unequivocally that Soles made the statement or was present when it was made, and Soles denies making the statement. Soles' denial is corroborated by Juergensen. Globalcor contends Soles admitted making the statement to DeGirolamo, but that isn't what DeGirolamo's affidavit says. Regarding the alleged disparagement, DeGirolamo states, "[t]he gist of the conversation was that [Soles] questioned Mr. Sanderson as to why Mr. Sanderson would do the deal with Jeff Melton involving the purchase of the [B]ank [B]uilding out of the bankruptcy at an amount of approximately $2 million." It is not clear from this statement whether DeGirolamo refers to his own conversation with Soles, or to a conversation Soles described to DeGirolamo. Either way, this statement does not unequivocally corroborate Globalcor's assertion that Soles disparaged Melton.

{¶52} Conclusory allegations are insufficient to create disputed facts; Globalcor must produce evidence on any issue for which it bears the burden of production at trial. *Hamann v. Longaberger Co.*, 5th Dist. Muskingum No. C.T. 94-10, 1994 WL 476395, *1, citing *Wing v. Anchor Media Ltd. of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), at paragraph three of the syllabus. An unsupported allegation in the pleadings is not sufficient to require a denial of a summary judgment. The main purpose of the summary judgment statute is to enable a party to go behind allegations in the pleadings and assess the proof in order to see whether there is a genuine need for trial. *Cunningham v. J. A. Myers Co.*, 176 Ohio St. 410, 413, 200 N.E.2d 305 (1964). See also, *Starke v. Doe*, 5th Dist. Stark No. 2007CA00018, 2007-Ohio-5522, ¶ 31 ["Appellant's reliance on Appellee's statement he was 'caught up' in the fighting, when taken in context,

does not create a disputed factual issue to rebut Appellee's affidavit he did not assault Appellant" when appellant offered no other evidence to support claim against appellee].

{¶53} Moreover, we note Globalcor offers no definition of disparagement but argues the statement breaches Soles' fiduciary duty of acting solely for the benefit of Globalcor. "Disparage" is defined as "[t]o speak slightingly of; to criticize (someone or something) in a way showing that one considers the subject of discussion neither good nor important," and/or "[t]o degrade in estimation by disrespectful or sneering treatment." Black's Law Dictionary (10th ed. 2014). Even if we were to assume for the sake of argument that Soles himself stated to Sanderson, "Why would you loan Jeff Melton $2 million dollars," absent any context, we cannot find this statement is disparaging of Melton. The question itself is innocuous and lends itself to numerous interpretations, including that the unnamed "two attorneys" were merely investigating options on behalf of their client.

{¶54} We find there is no genuine issue as to any material fact and that Soles is entitled to judgment as a matter of law regarding the claim that he made, or participated in, the making of a disparaging statement about Melton.

Soles is entitled to summary judgment on both theories of apparent authority and apparent agency

{¶55} Finally, Globalcor argues the trial court erred in finding Soles is not responsible for Juergensen's negligence under alternative theories of apparent authority and apparent agency.

{¶56} Globalcor argues Soles misled Melton into believing Juergensen was part of the Soles firm, thereby inducing Melton to "allow" Juergensen to file the petition for Chapter 11 bankruptcy upon his first meeting with Juergensen. Globalcor seeks to

impose vicarious liability upon Soles for Juergensen's purported negligence. In its brief on appeal, Globalcor asserts Juergensen was "clothed with apparent authority" *and* acted as the "apparent agent" of Soles in filing the Chapter 11 petition.

{¶57} "Apparent authority" and "apparent agency" are sometimes referred to interchangeably but are in fact two different theories. In *McFarland v. Niekamp, Weisensell, Mutersbaugh & Mastrantonio, LLP*, 9th Dist. Summit No. 28462, 2017-Ohio-8394, at ¶ 17-18, the Ninth District Court of Appeals explained:

> Apparent authority *** * *** is sometimes referred to as the 'holding out' theory." *Mason v. Labig*, 2d Dist. Greene No. 87–CA–91, 1989 WL 72234, *5, 1989 Ohio App. LEXIS 2596, *13 (June 29, 1989), quoting *Arthur v. St. Peters Hosp.*, 169 N.J.Super. 575, 405 A.2d 443, 446 (N.J. Super 1979). The Ohio Supreme Court has explained the type of evidence necessary to establish apparent authority as follows:
>
> In order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. *Master Consol. Corp. v.*

> *BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), syllabus.
>
> In determining whether an agent is acting with apparent authority, the court must examine the principal's acts, and not the agent's acts. *Id.* at 576, 575 N.E.2d 817. When the principal's acts have clothed the agent with the appearance of authority, the principal is liable for the agent's acts. *Id.* at 576–577, 575 N.E.2d 817. "An agent acts within the scope of their employment when they act with actual authority or apparent authority." *Barnes v. Village of Cadiz*, 7th Dist. Harrison No. 01 531 CA, 2002 WL 925040, *5, 2002 Ohio App. LEXIS 7290, * 15 (Mar. 19, 2002), citing *Master Consol. Corp.* at 576, 575 N.E.2d 817.

{¶58} To establish liability premised upon apparent authority, therefore, establishment of a principal/agent relationship is a prerequisite. Soles and Juergensen did not have a principal/agent relationship when Melton retained Juergensen for the bankruptcy proceedings. Thus, as the trial court concluded, the doctrine of "apparent authority" is inapplicable because Soles and Juergensen were separate entities. "Apparent agency is a distinct concept from apparent authority; while the first works to create an agency relationship between two parties, the second expands the authority of an actual agent, and thus, apparent authority is relevant only if actual agency has already been established." 2A C.J.S. Agency § 153.

{¶59} To establish liability premised upon apparent agency, a plaintiff must show that (1) the defendant made representations leading the plaintiff to reasonably believe

that the wrongdoer was operating as an agent under the defendant's authority, and (2) the plaintiff was thereby induced to rely upon the ostensible agency relationship to his detriment. *Shaffer v. Maier*, 68 Ohio St.3d 416, 627 N.E.2d 986 (1994), citing *Johnson v. Wagner Provision Co.*, 141 Ohio St. 584, 49 N.E.2d 925 (1943), paragraph four of the syllabus. Simply stated, there is a "holding out" of the agent as such to the public by the principal and a reliance on that holding out by the plaintiff. *Id*.

{¶60} Globalcor asserts Juergensen was "clothed with apparent authority" *and* acted as the "apparent agent" of Soles in filing the Chapter 11 petition. As the trial court noted, this argument commingles two distinct concepts, apparent authority and apparent agency. At the time of the March 16, 2015 meeting in Soles' office, Soles and Juergensen operated independently and no express agency relationship existed between the two. We therefore concur with the trial court that Globalcor cannot succeed on a theory of apparent authority.

{¶61} On appeal, however, Globalcor also attempts to enforce a theory of apparent agency. Soles points out that Globalcor's argument before the trial court was that Juergensen acted with apparent authority, and waived its argument as to apparent agency. Our review of the record supports Soles' position.

{¶62} In his motion for summary judgment, Soles argued he was not vicariously liable because no evidence supported claims of "partnership by estoppel" or "apparent agency"; specifically, there was no evidence of detrimental reliance, a required element. Globalcor responded by distinguishing "apparent authority" from "apparent agency," asserting its argument for Soles' vicarious liability it premised upon the former:

* * * *.

> The court in *Master Consol. Corp.* [*v. BancOhio Nat'l Bank,* 61 Ohio St.3d 570, 575 N.E.2d 817 (1991)] also distinguished apparent authority and agency by estoppel noting that apparent authority arises when a person manifests to another that an agent or third person is authorized to act for him, irrespective of whether the person really intended to be bound, whether the person told the same thing to the agent, and whether the other person changed his position. *Master Consol. Corp., supra* at fn. 5.

As such, it is not necessary in this instant matter that Globalcor changed its position due to the holding out. Indeed, the essence of *Master Consol. Corp.* is that it is not necessary to prove that Globalcor would not have hired Juergensen had he known that Juergensen was not a member of the Soles Firm. Instead, what Plaintiff is obligated to show are the elements of apparent authority as indicated above. In this regard, Globalcor had an ongoing relationship with Soles for many years. Soles handled the Kelev litigation and was defending Globalcor in the foreclosure action by the Summit County Fiscal Officer. It was in connection with the foreclosure action that Soles held Juergensen out to Melton as having authority to act on behalf of the Soles Firm by virtue of the very first document (fee agreement) Melton signed in connection with his retention of Soles. Thus, as of February 1, 2012, it was reasonable for Melton to conclude that Juergensen was part of the

> Soles Firm. [ ]. Globalcor thereafter had an ongoing relationship with the Soles Firm and was never informed one way or another that the relationship presented in the contract between Soles and Juergensen was in any way changed. **Further, Juergensen presented no contract to Melton indicating that there was some other contractual arrangement that should apply.** [Emphasis in original.]
>
> The uncontested facts show that Soles introduced Melton to Juergensen so that Juergensen could represent Globalcor in connection with the Chapter 11 bankruptcy being filed. Further, Melton testified that at all times pertinent he had good reason to believe that Juergensen was acting as a member of the Soles Firm. [ ].
>
> As such, Plaintiff has established facts necessary to support the application of the doctrine of apparent authority to this matter. The effect of this application is that the Soles Firm is responsible for the negligence of its apparent agent, Juergensen.
>
> * * * *.
>
> Plaintiff's Combined Brief in Opposition to Defendants' Motions for Summary Judgment, May 30, 2018, 26-27.

{¶63} Before the trial court, therefore, Globalcor argued Soles clothed Juergensen with the appearance of authority and therefore as principal is liable for the agent's acts. Globalcor argued the elements of "apparent agency" do not apply because it was

proceeding on a theory of "apparent authority." It is well-settled that issues not raised in the trial court may not be raised for the first time on appeal; such issues are deemed waived. *Smith v. Swanson*, 5th Dist. Stark No. 2003CA00140, 2004-Ohio-2652, ¶ 16, citing *Schottenstein v. Schottenstein,* Franklin App. No. 02AP–842, *2003–Ohio–5032,* ¶ 8, internal citation omitted.

{¶64} Even if we were to find Globalcor did not waive its argument as to apparent agency, we find reasonable minds could not conclude that Melton held a reasonable, good faith belief that Juergensen was a member of Soles' firm in March 2015. Globalcor must establish (1) that Soles made representations leading Melton to reasonably believe that the Juergensen was operating as an agent under Soles' authority, and (2) Melton was thereby induced to rely upon the ostensible agency relationship to his detriment.

{¶65} Globalcor points to two affirmative representations made by Soles: 1) during the meeting with Melton on March 6, 2015, Soles stated, "I personally don't do bankruptcies. I have someone in my office that does," and 2) when Melton retained Soles and executed a fee agreement on February 1, 2012, the agreement listed Juergensen as "of counsel." With respect to the latter, Melton testified that he only glanced at the agreement and did not remember the "of counsel" designation when he met and retained Juergensen in 2015. We therefore find no reliance upon the ostensible agency relationship related to the fee agreement.

{¶66} With respect to the former, however, even if we were to assume Soles made the statement in exactly the words alleged, Melton also testified that it didn't matter to him whether Juergensen was a member of the Soles firm or had his own firm; Melton needed

someone to file the bankruptcy because the purpose of the filing was to stop the sheriff's sale.

{¶67} We conclude, therefore, that it appears from the evidence in the record before us that reasonable minds can come to but one conclusion as to Soles' liability under theories of apparent authority and apparent agency, and that conclusion is adverse to Globalcor, even construing the facts in Globalcor's favor.

CONCLUSION

{¶68} We find no genuine dispute of material fact exists and Soles is entitled to judgment as a matter of law. Globalcor's sole assignment of error is overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.,

Hoffman, P.J. and

Wise, Earle, J., concur.