

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Schottenstein, Zox & Dunn, LPA,	:	
Plaintiff-Appellee,	:	
v.	:	No. 08AP-851 (C.P.C. No. 07CVH-06-8029)
C.J. Mahan Construction Company, LLC,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on July 23, 2009

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*Vorys Sater Seymour and Pease LLP, Alan T. Radnor and Thomas H. Fusonie*, for appellee.

*Eugene R. Butler Co., LPA, and Eugene R. Butler*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, C.J. Mahan Construction Company, LLC, appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of plaintiff-appellee, Schottenstein, Zox & Dunn, LPA, on plaintiff's claim for attorney fees and on defendant's counterclaim for legal malpractice. Because no genuine issue of material fact exists and plaintiff is entitled to judgment as a matter of law, we affirm.

## **I. Procedural History**

{¶2} On June 18, 2007, plaintiff filed a complaint against defendant seeking payment of \$119,117.52 in attorney fees and costs for services rendered to defendant on two separate matters. Defendant responded with an answer filed on July 27, 2007, specifically denying that plaintiff provided legal services to defendant with a reasonable value of \$119,117.52 for which plaintiff had not already been paid. Defendant also asserted the following affirmative defenses: estoppel, accord and satisfaction, "prior material breach of the parties' agreement," "prior payment by Defendant of the reasonable value of the goods and services rendered by Plaintiff," and failure "to satisfy a condition precedent to the enforcement of their right to seek payment for services rendered to Defendant." (Answer, ¶4-8.)

{¶3} In addition, defendant asserted a counterclaim alleging plaintiff, through its partner Roger Sabo, breached a duty of care and failed to conform to the standard required by law in representing defendant in an action in Stark County, one of the two bases for plaintiff's claim for attorney fees. In particular, defendant alleged Sabo failed to argue in the appeal of the Stark County matter that the trial court granted summary judgment against defendant on a ground never raised and on evidence never presented. Defendant alleged such a breach of duty caused defendant to incur damages in excess of the amount defendant allegedly owed to plaintiff. Accordingly, defendant demanded judgment on its counterclaim in an amount that exceeded plaintiff's claims. Plaintiff responded to the counterclaim on October 5, 2007, asserting several affirmative defenses, including, as pertinent here, the statute of limitations.

{¶4} On March 24, 2008, plaintiff moved for summary judgment on its complaint and on defendant's counterclaim. Plaintiff first asserted it was entitled to summary judgment on its claim for attorney fees because it had two "accounts stated" with defendant, both of which included attorney fees that were fair and reasonable. In support, plaintiff attached the affidavit of Jeffrey R. Deibel, plaintiff's credit manager, that incorporated by reference several exhibits relating to the amounts defendant owed for legal services plaintiff rendered on the two accounts.

{¶5} Plaintiff further asserted it was entitled to summary judgment on defendant's counterclaim because (1) defendant could not maintain a direct claim of legal malpractice against a law firm, (2) R.C. 2305.11, the statute of limitations applicable to legal malpractice actions, time-barred the counterclaim, and (3) Sabo did not breach any duty of care owed to defendant. In support, plaintiff attached the affidavit of Sabo that incorporated by reference numerous exhibits pertaining to his representation of defendant in the Stark County legal matter.

{¶6} On April 10, 2008, defendant filed a memorandum contra plaintiff's motion for summary judgment. Defendant first disputed the amount it owed on the two accounts. In support, defendant attached the affidavit of its secretary/treasurer, Michael A. Coccia, who attested that the total amount defendant owed plaintiff was \$116,165.66. As to its counterclaim, defendant argued that plaintiff, as the law firm employing Sabo, was a proper counterclaim defendant. Moreover, defendant asserted that, even if its counterclaim was time-barred, it was nonetheless entitled to assert the claim as a recoupment defense since not only did the claim arise out of the same transaction as plaintiff's claim for relief, but Sabo breached his duty of care to defendant. In support of its

arguments, defendant attached the affidavits of its president, C. Jeffrey Mahan, its counsel, Eugene Butler, and its expert witness, James Leickly. Defendant contemporaneously filed a Civ.R. 56(F) motion for continuance.

{¶7} On April 21, 2008, plaintiff filed a memorandum contra defendant's Civ.R. 56(F) motion, a motion to strike the affidavits of Coccia and Leickly as violating Civ.R. 56(E), and a response to defendant's memorandum contra. In its response, plaintiff reasserted the arguments it raised in its motion for summary judgment as to its complaint for attorney fees. Regarding defendant's counterclaim, plaintiff argued that defendant waived the affirmative defense of recoupment by not asserting it in its answer and, in any event, failed to present competent rebuttal evidence creating a genuine issue of material fact on any of the elements of defendant's legal malpractice claim.

{¶8} In a decision and entry filed June 25, 2008, the trial court granted summary judgment to plaintiff on defendant's counterclaim, finding it to be time-barred. In doing so, the court rejected defendant's recoupment defense, concluding defendant failed to properly assert it pursuant to the requirements of *Riley v. Montgomery* (1984), 11 Ohio St.3d 75. In particular, the court stated defendant not only failed to assert recoupment as an affirmative defense in its answer, but failed to raise the defense at all until it filed its memorandum contra plaintiff's summary judgment motion. The court further noted defendant's counterclaim could not be construed to allege recoupment, observing that defendant's counterclaim did not seek merely to reduce plaintiff's right to relief but sought judgment against plaintiff in an amount exceeding plaintiff's claims. Accordingly, the court dismissed the counterclaim without addressing its merits.

{¶9} The trial court nonetheless denied summary judgment to plaintiff on its claim for attorney fees. Based on the conflicting affidavits, the court acknowledged a genuine issue of material fact in whether the accounts revealed \$119,117.52 or \$116,165.66 in unpaid attorney fees and expenses. Lastly, the court determined that its decision rendered the parties' pending motions moot.

{¶10} On September 22, 2008, the parties filed a stipulation that the amount of the unpaid accounts was \$116,165.66 and that plaintiff was entitled to prejudgment interest of \$24,474.90. The trial court filed its final judgment entry on September 24, 2008, adopting the parties' stipulations, granting plaintiff's summary judgment motion in its entirety, and entering judgment for plaintiff in the amount of \$140,640.66 plus costs and post-judgment interest at the statutory rate.

## **II. Assignment of Error**

{¶11} Defendant appeals, assigning a single error:

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN GRANTING SUMMARY JUDGMENT ON A TECHNICAL PLEADING REQUIREMENT THAT CONTRAVENES BOTH THE CIVIL RULES AND THE CASE LAW IN THIS STATE.

{¶12} Appellate review of summary judgment is de novo. *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. Summary judgment is appropriate only when the party moving for summary judgment demonstrates that (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could

come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183.

{¶13} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party may not fulfill its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims. *Id.*

{¶14} If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. *Id.* However, once the moving party discharges its initial burden, the nonmoving party bears the burden of offering specific facts demonstrating a genuine issue for trial. *Id.* The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Id.*; Civ.R. 56(E).

{¶15} Defendant contends the trial court erred as a matter of law in determining defendant failed to properly plead the defense of recoupment in its answer and counterclaim. Defendant maintains not only that Civ.R. 8(C) and the Ohio Supreme Court's decision in *Riley*, *supra*, establish a counterclaim as the proper vehicle by which

to raise the defense of recoupment, but that defendant properly asserted its recoupment defense in its counterclaim.

{¶16} Because an appellate court must affirm a trial court's judgment if there are any valid grounds to support it, we need not decide the issue defendant raises. See *Joyce v. Gen. Motors Corp.* (1990), 49 Ohio St.3d 93, 96 (noting an appellate court must affirm the judgment on review if that judgment is legally correct on other grounds, as any error is not prejudicial in view of the correct judgment the trial court reached). Even if we assume, without deciding, that defendant properly pleaded the defense of recoupment premised on plaintiff's alleged malpractice, thereby circumventing the statute of limitations applicable to its legal malpractice claim, defendant nonetheless failed to establish a genuine issue of material fact as to the elements of that claim.

{¶17} To prevail on a claim for legal malpractice based upon negligent representation, a plaintiff must establish: (1) the attorney owed a duty or obligation to the plaintiff; (2) the attorney breached that obligation and failed to conform to the standard law requires; and (3) the conduct complained of is causally connected to the resulting damage or loss. *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, syllabus. The failure of a party asserting a legal malpractice claim to establish any one of the three elements entitles the opposing party to summary judgment. *Katz v. Fusco* (Dec. 9, 1997), 10th Dist. No. 97APE06-846.

{¶18} At this juncture, the facts in the Stark County case, as revealed in this record, are pertinent. Sabo represented defendant before the Occupational Safety and Health Review Commission regarding safety violations that involved two employees of defendant's subcontractor, Mohawk Re-Bar Services, Inc. ("Mohawk"), who were working

at a bridge project in Canton, Ohio. A crane that defendant's employee operated came into contact with a high voltage line, electrocuting two Mohawk employees who were rigging the crane to transfer bundles of rebar.

{¶19} An action for negligence and intentional tort was initiated against Mohawk and defendant in the Stark County Common Pleas Court. Defendant demanded that Mohawk, Mohawk's insurance carrier, or both provide a defense pursuant to the applicable provisions of the subcontract between Mohawk and defendant. The insurance carrier refused. Defendant filed a cross-claim against Mohawk for contractual indemnification, for failing to provide insurance, and for failing to hold defendant harmless. Defendant also asserted claims against Mohawk's insurance carrier for failing to provide a defense. Defendant retained Sabo to represent its separate interests against Mohawk and Mohawk's insurance carrier. Sabo agreed that defendant's corporate in-house counsel, James Johnston, would assist him in researching pertinent case law and drafting legal memoranda.

{¶20} Defendant's insurance counsel reached an agreement in principle with the two Mohawk employees. Defendant's insurance counsel asked Sabo to draft language to be included in the settlement agreements that reserved any claims defendant may have had against Mohawk and its insurance carrier. Sabo drafted the language and provided it to defendant's insurance counsel, who included it in the executed settlement agreements. Because Mohawk also settled with the employees, they dismissed their claims.

{¶21} Defendant and Mohawk then pursued their claims against each other. During that litigation, Mohawk moved for summary judgment on all claims. Mohawk's motion, however, did not argue that defendant's settlement of the underlying action with



the two employees barred defendant from seeking indemnity or recovery of defense costs from Mohawk. With Johnston's assistance, Sabo prepared a response to Mohawk's summary judgment motion.

{¶22} The trial court granted Mohawk's motion for summary judgment, concluding that, notwithstanding the settlement language, the employees' dismissing their claims against Mohawk and defendant before the issue of liability could be determined precluded defendant's indemnity claims. Following discussion with Johnston, Sabo recommended that defendant appeal the trial court's judgment. Sabo and Johnston together formulated defendant's appellate strategy, including what errors to assign. In its appellate brief, defendant asserted, among others, that the trial court "erred in ruling that a dismissal of a lawsuit filed by employees of Mohawk that alleged both intentional tort and negligence precludes an action for indemnity by Mahan." (Sabo affidavit, Exhibit 3, viii & 18.) The Fifth District Court of Appeals subsequently affirmed the trial court's decision.

{¶23} Within that context, defendant's counterclaim alleged Sabo breached his duty to defendant and failed to conform to the standard the law required. Specifically, defendant alleged Sabo on appeal failed to argue the Stark County trial court erred in granting summary judgment against defendant on a ground never raised and on evidence never presented: whether defendant's settlement with the two employees extinguished any rights defendant may have had against Mohawk for indemnity. In its motion for summary judgment on its complaint against defendant, plaintiff asserted defendant could not establish its legal malpractice claim against plaintiff because Sabo actually raised the trial court's error in defendant's appellate brief in the Fifth District Court of Appeals.

Plaintiff further argued that although the appellate court upheld the trial court's decision, it did not do so on the basis that defendant failed to raise the error.

{¶24} To support its summary judgment motion, plaintiff attached Sabo's affidavit. Sabo averred that "in pursuing Mahan's indemnity claims against Mohawk in *Tingler*, both at the trial court and Fifth Appellate District, I rendered appropriate legal advice to Mahan and took the appropriate steps to pursue Mahan's indemnity claims." (Sabo affidavit, ¶57.) According to the affidavit, "[t]hese steps included raising as one of Mahan's assignments of error, the trial court's error in deciding that Mahan's settlement with the plaintiff in *Tingler* precluded Mahan's indemnity claim against Mohawk." Id. Sabo's affidavit concluded that his "actions conformed to the standard of care and I did not breach any duty or obligation to Mahan." Id.

{¶25} Because a defendant in a legal malpractice action may testify regarding whether he or she met the applicable standard of care, independent expert testimony on that issue is not required. *Vahdati'bana v. Scott R. Roberts & Assoc. Co.*, 10th Dist. No. 07AP-581, 2008-Ohio-1219, ¶31, citing *Roselle v. Nims*, 10th Dist. No. 02AP-423, 2003-Ohio-630. Sabo's affidavit states his actions conformed to the standard of care; thus, it is sufficient to carry plaintiff's initial burden under Civ.R. 56(C). Pursuant to *Dresher*, supra, the burden then shifted to defendant to point to or submit some evidentiary material demonstrating the existence of genuine issues of material fact.

{¶26} Generally, in legal malpractice cases, expert testimony is required to prove that an attorney's conduct breached the duty the attorney owed to the client, unless the claimed breach is "well within the common understanding of \* \* \* laymen[.]" *Goldberg v. Mittman*, 10th Dist. No. 07AP-304, 2007-Ohio-6599, ¶11, quoting *McInnis v. Hyatt Legal*

*Clinics* (1984), 10 Ohio St.3d 112, 113. We cannot say plaintiff's alleged failure to assign an error pertaining to the potentially preclusive effect of defendant's settlement agreements on an indemnity claim against Mohawk is sufficiently within the common understanding of lay people so as to eliminate defendant's obligation to submit expert testimony on plaintiff's alleged failure to comply with the standard of care. See *id.*

{¶27} Defendant offered the affidavit of its expert, James Leickly, in opposition to plaintiff's motion for summary judgment. As to the form of affidavits submitted for that purpose, Civ.R. 56(E) provides, in part, that "[s]upporting 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."

{¶28} Evid.R. 702 sets forth the circumstances under which a witness may testify as an expert. Pursuant to that rule, the witness must be qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony. In addition, the witness's testimony must be based upon reliable scientific, technical or other specialized information and must either relate to matters beyond the knowledge or experience of lay persons or dispel a misconception common among lay persons.

{¶29} Evid.R. 702 must be read in conjunction with Evid.R. 703 and 705 to determine whether an expert witness's affidavit suffices for the purpose of opposing an adequately supported motion for summary judgment. *Nu-Trend Homes, Inc. v. Law Offices of DeLibera, Lyons & Bibbo*, 10th Dist. No. 01AP-1137, 2003-Ohio-1633, ¶50, citing *C.R. Withem Ent. v. Maley*, 5th Dist. No. 01 CA 54, 2002-Ohio-5056, ¶34. Evid.R.

703 states, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Evid.R. 705 permits an expert to "testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying facts or data \* \* \* in response to a hypothetical question or otherwise."

{¶30} In his affidavit, Leickly states that he is a licensed attorney in Ohio and practiced in the area of commercial litigation in Ohio trial and appellate courts since 1986. (Leickly affidavit, ¶2-3.) He avers he recently researched whether a trial court may grant summary judgment on a ground that no party ever raised or argued, and he concluded a trial court errs in doing so. (Leickly affidavit, ¶4-5.) He states this court agreed with his conclusion and reversed the trial court's grant of summary judgment upon that issue in a 2007 case. (Leickly affidavit, ¶6.) Leickly further avers he is "familiar with the facts of the 2005 appeal prosecuted by Roger Sabo of Schottenstein, Zox & Dunn in the Stark County case of Tingle v. Mahan, et al." and that "[b]ased upon my education, my experience, my research and my knowledge, it is my opinion that the failure by an experienced litigator to raise such an issue constitutes a material departure from the ordinary standard of care required of a practitioner in this state handling appeals of summary judgments." (Leickly affidavit, ¶7-8.)

{¶31} Leickly's affidavit does not meet the requirements of Evid.R. 705 and thus does not constitute admissible evidence under Civ.R. 56(E). Leickly does not disclose the underlying facts he used in reaching his conclusion; he merely states that he is "familiar with the facts of the 2005 appeal prosecuted by Roger Sabo." An expert's affidavit that includes only his or her qualifications and opinion fails to comply with Evid.R. 705 and is

thus inadmissible under Civ.R. 56(E). *Nu-Trend*, supra, at ¶¶55-60 (concluding the affidavit of expert attorney insufficient to meet Civ.R. 56(E) because it failed to comply with Evid.R. 705); *C.R. Withem*, supra, at ¶¶33-37 (affirming trial court conclusion that attorney affidavit setting forth only the attorney's qualifications and opinion did not meet Evid.R. 705 and was thus "not sufficient to sustain the [plaintiff's] malpractice claim"); *Jarrett v. Forbes, Fields & Assoc. Co., LPA*, 8th Dist. No. 88867, 2007-Ohio-5072, ¶18 (noting "[i]t is improper for an expert's affidavit to set forth conclusory statements and legal conclusions without sufficient supporting facts").

{¶32} Further, although Leickly references the "ordinary standard of care," he fails to identify the standard of care required of an attorney prosecuting an appeal from a trial court's grant of summary judgment, as well as any causal connection between the alleged breach and resulting damages. Specifically, Leickly merely suggests in general terms that the failure to assign as error a trial court's decision to grant summary judgment on a basis that no party raised falls below the standard. Moreover, Leickly does not assert Sabo did not raise such an error on appeal; nor does he address a causal connection between Sabo's alleged failure to do so and any resulting damage or loss. See *Katz*, supra.

{¶33} In the final analysis, defendant was required to rebut Sabo's own expert opinion that he did not commit malpractice in handling the appeal of the Stark County matter. As such, defendant was required to support its memorandum contra with an expert opinion (1) setting forth the facts underlying the alleged legal malpractice, (2) stating Sabo's conduct in prosecuting the appeal in the underlying legal matter was not in accordance with the knowledge, skill and ability ordinarily exercised in the legal profession in similar situations, and (3) establishing that Sabo's alleged malpractice

caused damage or loss to defendant. As defendant failed to do so, the trial court properly granted summary judgment to plaintiff on defendant's counterclaim.

{¶34} Accordingly, defendant's assignment of error is overruled.

{¶35} Having overruled defendant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and TYACK, JJ., concur.

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