[Cite as *Harris v. Levy*, 2012-Ohio-21.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Linda M. Harris,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	No. 11AP-301
v.	:	(C.P.C. No. 08CVA-13912)
Yale R. Levy et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees/ Cross-Appellants.	:	

D E C I S I O N

Rendered on January 5, 2012

Linda M. Harris, pro se.

Lane, Alton & Horst, LLC, Rick E. Marsh and *Ray S. Pantle,* for appelees/cross-appellants.

APPEAL from the Franklin County Court of Common Pleas.

HARSHA, J.

{¶1} Linda M. Harris brought a legal malpractice action against Yale R. Levy, Gregory Pope, Leighann Poplaski, and Pope & Levy, LLP (Appellees) after they represented her in a probate action. A few weeks before trial, the court notified Harris of its intent to dismiss for her failure to "disclose and/or retain" an expert witness and

ordered her to demonstrate good cause to avoid dismissal. Harris filed what the court deemed to be an inadequate response, resulting in dismissal of the complaint.

{¶2} Harris raises numerous assignments of error for which she provides no supporting analysis, so we summarily reject them. Harris also appeals the trial court's dismissal of her "breach of contract" claims. However, at the trial level the court and parties treated this as a legal malpractice action, not a breach of contract action. Harris cannot for the first time on appeal argue that she made breach of contract claims. Therefore, we reject this argument.

{¶3} Finally, Harris contends that the court erred when it dismissed her legal malpractice claims under Civ.R. 12(B)(6). However, the dismissal entry does not cite that rule, or any other, for its basis. The entry does clearly reflect the court based the dismissal on Harris' failure to retain or disclose an expert witness, i.e. failure to timely prosecute. Thus, the trial court acted within its discretion to dismiss the action under Civ.R. 41(B)(1). The trial court found that Harris needed expert testimony to support her claims. But more than two years after Harris filed the complaint and after two warnings from the trial court of its intent to dismiss, Harris still had not retained an expert witness. Given the history of the case, the trial court could reasonably conclude that Harris could not establish a prima facie case of legal malpractice in a reasonable time. Therefore, the trial court properly dismissed the case. This decision renders the Appellees' cross-assignments of error moot.

I. Facts

{¶4} In September 2008 Linda Harris filed a legal malpractice suit against the Appellees, alleging they acted negligently in their representation of her in a probate court

proceeding. On September 15, 2010 the defendants filed a motion for judgment on the pleadings and motion for summary judgment premised on Harris' failure to support her allegations of legal malpractice with expert testimony. They argued that the time for witness disclosures had passed, and Harris had still not named an expert for the October 12, 2010 trial.

{¶5} A week after the defendants filed this motion and before Harris responded, the trial court filed an entry titled "NOTICE OF INTENT TO DISMISS AND ENTRY VACATING OCTOBER 12, 2010 TRIAL DATE." In it, the court stated:

> Plaintiff has asserted a legal malpractice claim against Defendants related to their representation of Plaintiff in a will contest action and/or related to Defendants' presentation of a will to probate court. In reviewing the file and docket in advance of the pre-trial [conference], the Court notes that Plaintiff has never filed any witness disclosures in this case.[1] She has, therefore, never disclosed an expert witness and it appears that she has not retained one.

{¶6} As stated by the 10th District:

> [E]xpert testimony as to the applicable standard of care is required. In all but a few cases, expert testimony is required to support allegations of professional malpractice. * * * The exception… comes into play only when the breach is so obvious that it is within the ordinary knowledge and experience of laymen. * * *
>
> Given the nature of Plaintiff's Complaint, the Court finds that any purported breach of duty would be beyond the ordinary knowledge and experience of laymen. Therefore, Plaintiff is required to present expert testimony. The failure to do so would subject Plaintiff's claims to a directed verdict at trial. Despite this very clear deficiency, Defendants failed to address it in their Motion for Summary Judgment.

[1] The court subsequently recognized that Harris had filed an initial witness disclosure; however, she did not name any expert witnesses.

> Nevertheless, the Court finds that, absent expert testimony, Plaintiff cannot prevail. As the 10th District stated in *Sheridan v. Metro Life Ins. Co.* (2009), 182 Ohio App.3d 107:
>
> The trial court also dismissed appellants' complaint, sua sponte, under Civ.R. 12(B)(6) for failure to state a claim on which relief may be granted. The Supreme Court of Ohio has stated that "[t]he Rules of Civil Procedure neither expressly permit nor forbid courts to sua sponte dismiss complaints." *State ex rel. Edwards v. Toledo City School Dist.*, 72 Ohio St.3d 106, 108, 1995 Ohio 251, 647 N.E.2d 799. In general, a court may dismiss a complaint on its own motion for failure to state a claim only after the court gives the parties notice of its intention to dismiss and an opportunity to respond. Id. Some courts have recognized an exception to this general rule, however, and have allowed "sua sponte dismissal without notice where the complaint is frivolous or the claimant obviously cannot possibly prevail on the facts alleged in the complaint." Id.
>
> Given the above, the Court hereby notifies Plaintiff of its intent to dismiss her Complaint based on her failure to disclose and/or retain an expert witness. Plaintiff is hereby ordered to demonstrate good cause, if any, to avoid dismissal through a filing with this court. She shall do so within 21 days.
>
> Finally, the October 12, 2010 trial date is hereby VACATED. The Court will reset the matter for trial, if appropriate, after the time for Plaintiff's response has run. It is so ORDERED.

{¶7} Harris filed a number of motions seeking an extension of the 21-day deadline because of health problems. The court did not rule on these motions until January 2011. Though the court was not unsympathetic to Harris' health condition, the court noted that given the passage of four months and her ability to file numerous motions for an extension, she "[c]ertainly * * * could have addressed the Court's order [regarding an expert witness]." Nonetheless, the court again notified Harris of its intent to dismiss her

case for failure to disclose and/or retain an expert and gave Harris an additional 17 days to show good cause to avoid dismissal.

{¶8} Harris filed a response to the show cause order in February 2011. She disagreed with the court's finding that she needed expert testimony to support her claims. Nonetheless, in her response Harris identified Pamela Makowski, Esq. as an expert. Harris submitted internet printouts to the court on Makowski's credentials. She also submitted an excerpt of Makowski's "expert testimony." Although it is unclear, this testimony possibly came from the probate court proceeding for which Harris originally hired the Appellees and evidently replaced them with Makowski. Although Makowski made some general comments about how Harris had not been "well served by her prior counsel," she did not render an expert opinion on whether the Appellees violated the applicable standard of care. Moreover, Makowski's testimony indicates that Harris disputed her fee. For instance, Makowski testified: "So what happened -- and if you go through the fee bill you can see -- I met with her numerous, numerous times. We spent hours and hours trying to get every little piece of paper together. I mean, honestly, I just want to cry when [Harris] says I didn't represent her."

{¶9} Subsequently, the trial court rendered the following decision:

> On September 21, 2010 and January 25, 2011, the Court ordered Plaintiff, proceeding *pro se*, to demonstrate good cause to avoid dismissal. The Court's Orders were based on Plaintiff's failure to disclose and retain an expert witness. In making its Orders, the Court found that Plaintiff needed to present expert testimony in order to survive a directed verdict.
>
> Plaintiff responded to the Court's Orders on February 11 and February 14, 2011. Plaintiff fails to demonstrate good cause to avoid dismissal. She cites * * * a medical malpractice case

> with no relevance to the issues in this case. She takes issue with the Court's finding that expert testimony is required but does not present authority or argument requiring the Court to reconsider its finding.
>
> Finally, Plaintiff's last minute attempt to disclose an expert witness borders on frivolous. Plaintiff indicates that Attorney Pamela Makowski will service as her expert witness. Plaintiff did not disclose Attorney Makowski or any other expert in her August 3, 2009 witness disclosure or at any other time. Plaintiff attaches no letter, affidavit or anything else written by Attorney Makowski indicating that she has been retained as an expert in this case or that she will render an expert opinion. Plaintiff provides a number of copied web pages regarding Ms. Makowski's credentials.
>
> Plaintiff also provides a transcript excerpt from a hearing before Judge Acker in Probate Court wherein Attorney Makowski testified. The testimony does not relate to Plaintiff's claims in this case in any way. Attorney Makowski offers no expert opinion of any kind. In fact, based only on the limited materials submitted to the Court, Attorney Makowski's testimony seems targeted at a fee dispute between her and Plaintiff. It is apparent that Attorney Makowski has not been retained as an expert witness.
>
> Given all of the above, Plaintiff has not demonstrated good cause and, therefore, the Court finds dismissal is appropriate.

{¶10} In a footnote, the court also noted that none of the web pages regarding Makowski's credentials indicated that she "serves as an expert witness."

{¶11} The court dismissed the case with prejudice, and this appeal followed.

II. Assignments of Error

{¶12} Harris assigns twenty-nine errors for our review:

> I. The Trial Court erred in dismissing the Plaintiff-Appellant's malpractice complaint.
>
> II. The Trial Court erred in [d]ismissing Plaintiff's Negligence and Legal Malpractice Claim.

III. The Trial Court erred by excluding a Probate Court Estate hearing transcript that reflected information and expert testimony relevant to the Plaintiff's malpractice claims related to the standard of care and breach of duty.

IV. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled Plaintiff's expert testimony was irrelevant/unrelated to the malpractice case.

V. The Trial Court erred by not allowing Plaintiff-Appellant's expert and qualifying her in that capacity.

VI. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled Plaintiff's expert was inappropriate because she did not advertise herself as an expert in her on-line credentials and treated as not an expert.

VII. The Trial Court erred by not allowing Plaintiff-Appellant to introduce that expert's past and future testimonies and reports.

VIII. The Trial Court erred by not allowing Plaintiff-Appellant to find a new expert once Plaintiff's expert was not accepted.

IX. The Trial Court erred by not granting summary/partial judgment to the Plaintiff-Appellant as she was already entitled to judgment as a matter of law.

X. The Trial Court erred in dismissing Plaintiff-Appellant's Complaint, because Plaintiff had notified the Court of Plaintiff's intent to request to amend complaint, cure deficiencies and correct case errors.

XI. The Trial Court erred by not answering numerous motions for months and causing delays.

XII. The Trial Court erred by deeming Plaintiff-Appellant well-enough to proceed despite her serious illnesses.

XIII. Trial court erred when it dismissed plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled Plaintiff's expert was uninvolved.

XIV. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled Plaintiff's expert was not retained and her testimony not paid for.

XV. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled Plaintiff's expert was inappropriate as she had not agreed to serve as an expert, therefore ignoring Plaintiff's right to subpoena witnesses, including expert witnesses.

XVI. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled Plaintiff's expert was not an expert because she did not list it in her credentials (in effect disqualifying expert for failure to advertise).

XVII. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled Plaintiff's expert did not present expert testimony, and could not.

XVIII. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because of the Court's refusal to recognize statutes regarding expert reports.

XIX. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because of the Court's refusal to recognize the timeliness of filing expert reports vs. the normal discovery period.

XX. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because of the Court's refusal to recognize its long delays and lack of rulings.

XXI. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled based on the Court's determination of an expert being necessary long after discovery had lapsed, and the inappropriateness of that determination being retroactive.

XXII. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled based on the Judge's inappropriate Order for Plaintiff to show good cause why she had not retained an expert.

XXIII. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled based on Plaintiff's failure to show good cause.

XXIV. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled, and abused its discretion.

XXV. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge failed to recognize and respect the 'extraordinary circumstances' of those proceedings as required by law.

XXVI. Trial court erred when it dismissed Plaintiff's complaint for failing to state a claim upon which relief could be granted because Judge ruled based on the Court's failure to fully recognize and respect the severity and incapacity caused by Plaintiff's poor health.

XXVII. Trial court erred by denying Plaintiff-Appellant an explanation as to why her Summary Judgment was not granted and to the specific of which motions were granted or denied by sealing the record.

XXVIII. Trial court erred by treating Plaintiff-Appellant as "not credible" based on a prior Probate Ruling after Plaintiff-Appellant had suffered trauma of a devastating heart attack only weeks before the will contest trial leaving her with the implant of four stents.

XXIX. Trial court's ruling granting motion to dismiss is contrary to law where there were no findings beyond a doubt that Plaintiff could prove no set of facts in support of her claims which would entitled her to relief where all allegations were presumed and accepted as true.

{¶13} The Appellees assign two cross-assignments of error for our review:

> I. THE TRIAL COURT ERRED IN DENYING APPELLEES' OCTOBER 29, 2009 MOTION TO DISMISS AND IMPLICITLY DENYING THEIR AUGUST 2, 2010 MOTION FOR SUMMARY JUDGMENT.
>
> II. THE TRIAL COURT ERRED IN IMPLICITLY DENYING APPELLEES' SEPTEMBER 15, 2010 MOTION FOR JUDGMENT ON THE PLEADINGS/MOTION FOR SUMMARY JUDGMENT.

III. Assignments of Error without Supporting Analysis

{¶14} Although Harris assigns 29 errors for our review, she did not provide any supporting analysis for assignments of error 3 through 29. Although appellate courts afford pro se litigants considerable leniency, we are not required to root out legal arguments for them. Thus we summarily reject these assignments of error under the provisions of App.R. 12(A)(2) and App.R. 16(A)(7).

IV. Propriety of Dismissal

A. "Breach of Contract" Claims

{¶15} In her first assignment of error, Harris contends that the trial court erred when it dismissed her "breach of contract" claims under Civ.R. 12(B)(6). However, the trial court and parties treated this as a legal malpractice action, not a breach of contract action. For instance, when the trial court notified Harris of its intent to dismiss the complaint based on her failure to disclose or retain an expert witness, the court characterized her lawsuit as a "legal malpractice" action. Harris did not refute this characterization and contend that her lawsuit also included breach of contract claims. "[A] party cannot raise new issues or legal theories for the first time on appeal." *Giffin v.*

Cohen, 10th Dist. No. 11AP–360, 2011-Ohio-5487, at ¶28. Therefore, we reject Harris' argument and overrule the first assignment of error.

B. Legal Malpractice Claims

{¶16} In her second assignment of error, Harris contends that the court erred when it dismissed her legal malpractice claims. In the trial court's first notice to Harris of its intent to dismiss her case for failure to disclose or retain an expert, the court cited a case that stood for the proposition that a trial court can sua sponte dismiss a complaint under Civ.R. 12(B)(6). Based on this citation, Harris argues that the court dismissed her case under that rule. And in her appellate brief, Harris identifies the standard for dismissal under Civ.R. 12(B)(6) and contends that her legal malpractice claims survive this standard.

{¶17} However, in the court's second notice of its intent to dismiss and in its entry dismissing Harris' case, the court did not indicate what authority provided the foundation for its decision. To the extent the court might have relied on Civ.R. 12(B)(6), it would have erred. Civ.R. 12(B)(6) provides: "Every defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * failure to state a claim upon which relief can be granted[.]" Generally, a trial court may sua sponte dismiss a complaint under Civ.R. 12(B)(6) after the parties are given notice of the court's intent and an opportunity to respond. *Sheridan v. Metro. Life Ins. Co.*, 182 Ohio App.3d 107, 2009-Ohio-1808, 911 N.E.2d 950, at ¶14. However, once the pleadings have closed, as they had in this case by the time the court issued the show cause order, Civ.R. 12(B)(6) issues should be considered under the standard for a Civ.R.

12(C) judgment on the pleadings. See *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 1996-Ohio-459, 664 N.E.2d 931.

{¶18} However, the trial court could not dismiss Harris' complaint based on her failure to disclose or retain an expert under Civ.R. 12(B)(6) or Civ.R. 12(C). "In considering dismissal under Civ.R. 12(B)(6), a trial court may not rely on allegations or evidence outside the complaint. *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St.3d 206, 207, 680 N.E.2d 985. Rather, the trial court may review the complaint and may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus." *Sheridan* at ¶15. In considering whether to grant a judgment on the pleadings under Civ.R. 12(C), a trial court is "permitted to consider both the complaint and answer * * *." *Chenault v. Ohio Dept. of Job & Family Services*, 10th Dist. No. 10AP-1113, 2011-Ohio-3554, 957 N.E.2d 858, at ¶9. To grant a judgment on the pleadings, the court still must find beyond doubt that the plaintiff can prove no set of facts that would entitle her to relief. Id.

{¶19} Here, the trial court explicitly based its dismissal of Harris' complaint on an issue outside the allegations in the pleadings – Harris' failure to disclose or retain an expert witness. Thus dismissal under Civ.R. 12(B)(6) or 12(C) would not have been appropriate. However, as the Appellees suggest it appears the court actually relied on Civ.R. 41(B)(1) when it dismissed the complaint because of Harris' failure to prosecute and/or comply with the court's discovery order. We conclude that the trial court's dismissal based on Harris' failure to disclose or retain an expert was legally correct under Civ.R. 41(B)(1), even though the dismissal entry is silent about the procedural basis for its ruling.

{¶20} Civ.R. 41(B)(1) provides for involuntary dismissals by the court: "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." "Civ.R. 41(B)(1) requires notice of the court's intention to dismiss so that the party adversely affected has an opportunity to explain why dismissal is inappropriate." *Blazef v. Cleveland Clinic Foundation*, 8th Dist. No. 90877, 2008-Ohio-3814, at ¶8, citing *Sunkin v. Collision Pro, Inc.*, 174 Ohio App.3d 56, 2007-Ohio-6046, 880 N.E.2d 947.

{¶21} We review a trial court's decision to dismiss a case under Civ.R. 41(B)(1) for an abuse of discretion. *Thompson v. Ohio State Univ. Hospitals*, 10th Dist. No. 06AP-1117, 2007-Ohio-4668, at ¶29. The phrase "abuse of discretion" implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. However, in *Sazima v. Chalko*, 86 Ohio St.3d 151, 158, 1999-Ohio-92, 712 N.E.2d 729 (internal citations and quotation marks omitted), the Supreme Court of Ohio explained that for Civ.R. 41(B)(1) dismissal, the abuse of discretion standard of review is heightened:

> [T]he extremely harsh sanction of dismissal should be reserved for cases when [a party's] conduct falls substantially below what is reasonable under the circumstances evidencing a complete disregard for the judicial system or the rights of the opposing party. In other words, dismissal is reserved for those cases in which the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order. Absent such extreme circumstances, a court should first consider lesser sanctions before dismissing a case with prejudice. It is a basic tenet of Ohio jurisprudence that cases should be decided on their merits.

> Thus, although reviewing courts espouse an ordinary abuse of discretion standard of review for dismissals with prejudice, that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits.

{¶22} Generally in legal malpractice cases, expert testimony is required to prove 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[.]" *Schottenstein, Zox & Dunn, LPA v. C.J. Mahan Constr. Co.*, 10tj Dist. No. 08AP-851, 2009-Ohio-3616, at ¶26, quoting *Goldberg v. Mittman*, 10th Dist. No. 07AP-304, 2007-Ohio-6599, at ¶11. Although some of Harris' "assignments of error" indicate her disagreement with the court's decision that she needed an expert, we summarily rejected them in Section III because she provided no supporting analysis for them. Because Harris failed to properly challenge the court's decision on this issue, we presume the court correctly found that Harris could not prove her legal malpractice claims without expert testimony.

{¶23} In *Jones v. Hartranft*, 78 Ohio St.3d 368, 1997-Ohio-203, 678 N.E.2d 530, a medical malpractice action, Jones filed a complaint and dismissed it without prejudice over a year later. He refiled the complaint one year after the dismissal. Id. at 368. Subsequently, Jones delayed in responding to interrogatories from the defendants, and when he did respond, Jones claimed that he would identify an expert witness to testify on the medical standard of care "sufficiently prior to trial to allow for discovery depositions to be taken." Id. at 368-69. However, Jones failed to disclose an expert before the deadline for supplemental witness disclosures expired, and he ignored two subsequent requests the defendants made for the names of additional witnesses. Id. at 369. Two weeks before

trial, one of the defendants sought a continuance and proposed several dates when he would be available for trial. Id. Jones did not respond to the motion, and the court selected the first proposed date. Id.

{¶24} The Friday before trial, Jones moved to reschedule the December 1994 trial for "no sooner than March 20, 1995[.]" Id. The morning of trial, Jones' attorney informed the court that he was prepared to discuss the continuance but was not prepared for trial. Id. After a discussion, the court denied Jones' motion for a continuance. Id. at 370. When Jones' attorney reiterated that he was "not prepared to go forward with any evidence," the court "announced it was dismissing the action 'under Rule 41 for failure to prosecute.' " Id. On appeal, Jones did not contend that the court failed to give the notice required under Civ.R. 41(B)(1). Id. at 371, fn. 2. Instead Jones challenged the court's decision to dismiss the action with prejudice, and we concluded that the trial court abused its discretion. Id. at 370.

{¶25} However, the Supreme Court of Ohio disagreed, finding that "a trial court does not abuse its discretion in dismissing a claim with prejudice under Civ.R. 41(B)(1) when a plaintiff, who has had an objectively reasonable amount of time for discovery, fails to proceed upon a scheduled trial date for want of evidence of defendant's liability." Id. at 371. The Court noted that Jones' first complaint pended for "nearly a year and a half before he voluntarily dismissed it for lack of an expert witness." Id. at 372. Even after the refiled case was pending for over a year, Jones still had no legal support for his claim that his surgeon "breached the standard of care some seventeen years earlier." Id. And "[a]s the trial court observed * * *, Jones was not asking for a continuance because his expert witness was not *available* to testify but because he did not *have* an expert witness." Id.

{¶26} The Supreme Court rejected Jones' argument that the dismissal should have been without prejudice because "[g]iven the history of the case, * * * the trial court could reasonably have concluded that Jones simply could not establish within a reasonable time a prima facie case of malpractice." Id. And while Jones' "dilatory conduct in responding to discovery may not have met the heightened discretion standard for dismissals with prejudice[,] [h]is failure to proceed on the scheduled trial date due to an admitted lack of liability evidence * * * sufficed on its own to meet the heightened standard." Id. "Neither a monetary sanction nor a further continuance could have addressed the problem of a dearth of evidence of liability on the scheduled trial date." Id. See, also, *Thompson*, supra (We found that the Court of Claims did not err in dismissing medical malpractice complaint under Civ.R. 41(B)(1) where plaintiff failed to comply with rule requiring disclosure of expert witness reports that reflect the opinions as to each issue on which the expert will testify); *Blazef*, supra (Eighth District found trial court did not abuse discretion by sua sponte dismissing medical malpractice complaint under Civ.R. 41(B)(1) where court granted motion in limine to exclude expert's deposition testimony, expert was unavailable to testify live to correct the improper testimony, and court already granted two continuances and declined to grant another.).

{¶27} Unlike the court in *Jones*, the trial court in this case did not wait until the scheduled trial date to act on the plaintiff's failure to obtain evidence of the defendants' liability. However, like the plaintiff in *Jones*, Harris had ample opportunity to retain and disclose the necessary expert to substantiate her claims and failed to do so. Harris filed her complaint on September 29, 2008. The initial disclosure of witnesses was due August, 3, 2009, the supplemental disclosure of witnesses was due October 26, 2009,

and the discovery cut-off date was June 21, 2010. Harris never sought modification of the case schedule, see Loc.R. 39.04A, and she did not timely disclose an expert witness under it so that the Appellees would have an opportunity to depose the expert before the discovery cut-off date. The lower court waited until trial was just three weeks away to issue the show cause order. By then, nearly two years had elapsed from the filing of the complaint and Harris still had not named an expert. The trial court gave Harris 21 days to respond to the show cause order. But instead of simply retaining and disclosing an expert in that time, Harris filed motions seeking an extension based on medical problems. And as the trial court pointed out, a response to the show cause order involved a "minimal burden as does consulting or retaining an expert," so Harris certainly could have responded to the show cause order in lieu of filing numerous motions for an extension.

{¶28} Ultimately, Harris did not respond to the order until nearly five months after the court issued it. Harris identified Makowski as an expert, even though as the trial court concluded, it is apparent that Harris did not actually hire Makowski. The trial court aptly noted that the excerpt of Makowski's testimony Harris submitted "seems targeted at a fee dispute between her and [Harris]." And in her fifteenth assignment of error (which we summarily rejected), Harris implicitly acknowledges that she did not hire Makowski, claiming the trial court erred when it ruled her expert was "inappropriate as she had not agreed to serve as an expert" because the court ignored her "right to subpoena witnesses, including expert witnesses."

{¶29} Moreover, Harris failed to demonstrate that Makowski is a legal malpractice expert and has formed an opinion about whether the Appellees violated the applicable standard of care in the probate case. As the trial court noted, none of the materials Harris

submitted demonstrate that Makowski "serves as an expert witness." And even if we presume that Makowski's testimony that Harris had not been "well served by her prior counsel" referred to the Appellees' representation of Harris in the probate proceeding underlying this action, Makowski clearly did not offer an expert opinion that the Appellees violated the standard of care. Thus, the trial court correctly concluded that Makowski offered "no expert opinion of any kind."

{¶30} When the trial court dismissed the complaint, over two years had elapsed since Harris filed it and she still had no expert to establish the Appellees' liability even though the trial court notified her twice of its intent to dismiss and gave her ample opportunity to respond. Thus Harris has no legal support for her claims that the Appellees violated the applicable standard of care. Although we strive to decide cases on their merits, given the history of this case, the trial court, like the trial court in *Jones*, could have reasonably concluded that Harris simply could not establish a prima facie case of legal malpractice in a reasonable time. The trial court would have been well within its discretion, even under the heightened abuse of discretion standard, to sua sponte dismiss the complaint under Civ.R. 41(B)(1). Accordingly, we overrule Harris' second assignment of error.

V. Cross-Appeal

{¶31} In their first and second cross-assignments of error, the Appellees contend that the trial court should have dismissed the legal malpractice complaint or granted a judgment in their favor for various reasons. However, because we have already determined that the trial court could properly dismiss the complaint under Civ.R. 41(B)(1),

the cross-assignments of error are moot, and we need not address them. See App.R. 12(A)(1)(c).

VI. Summary

{¶32} We overrule Harris' first and second assignments of error. We summarily reject her remaining assignments of error. The Appellees' cross-assignments of error are moot.

Judgment affirmed.

HARSHA, ABELE and McFARLAND, JJ.,
sitting by assignment in the Tenth Appellate District.

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