[Cite as *Rathert v. Kemper*, 2011-Ohio-1873.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

KENNETH RATHERT, aka Kenneth Rathert, P.C., Plaintiff-Appellee, - vs - LOIS KRISTINE KEMPKER, Defendant-Appellant.	: : : : : : :	CASE NO. CA2010-06-043 O P I N I O N 4/18/2011

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008-CVH-02030

Kenneth Rathert, 137 North Park Street, Kalamazoo, Michigan 49007, plaintiff-appellee, pro se

George P. Brandenburg, 905 Ohio Pike, Cincinnati, Ohio 45245, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, Lois Kristine Kempker, appeals the decisions of the Clermont County Common Pleas Court entering judgment in favor of plaintiff-appellee, Kenneth Rathert, aka Kenneth Rathert, P.C., and denying her motion for a new trial in a collection action for unpaid attorney fees. For the reasons discussed

below, we affirm the decisions of the trial court.

{¶2} In May 1992, appellee, an attorney practicing law in Kalamazoo, Michigan, entered into an oral contract with appellant to represent her in divorce proceedings in a Michigan domestic relations court. According to appellee, although his hourly rate at the time was $145, he agreed to represent appellant at a reduced rate of $95 per hour as a result of her financial constraints.

{¶3} In a May 15, 1992 engagement letter addressed to appellant at her residence in Kalamazoo, appellee confirmed the terms of their contract. The letter provided, in pertinent part, as follows:

{¶4} "This letter will confirm our May 12, 1992 conference in which I agreed to represent you * * *. The minimum fee is $1,500, $800 of which you have already paid. You will pay the balance of $700 as soon as possible. This minimum fee is the least amount you will be charged and is non-refundable. As we also agreed, you will be making monthly payments of $200-300 on your account.

{¶5} "I will charge you $95 per hour for all time I spend on your case and keep track of my time in increments of quarter hours. * * * I will send you statements about once a month and you will be expected to pay the full balance within TEN (10) DAYS." (Emphasis sic).

{¶6} After her divorce was finalized in 1994, appellant requested that appellee continue to represent her in post-judgment matters in domestic relations court, including her efforts to collect support awards. He also represented her interests in bankruptcy proceedings filed by her ex-husband. Following appellant's relocation to Ohio, appellee sent her another letter in June 1997, confirming that he would continue to charge her a discounted hourly rate of $95 on the related divorce

matters. In the letter, appellee also stated, "I will send you statements about once a month and I would appreciate a payment each month, regardless of the amount you send."

{¶7} According to the record, appellee represented appellant from May 1992 through approximately December 2000. During the course of the parties' relationship, appellant consistently made late and partial payments on the balance owed to appellee. Her last payment was made on December 16, 2002.

{¶8} In October 2008, appellee initiated the instant action against appellant, alleging that she owed $15,176.77 in outstanding legal fees. Appellant filed a counterclaim for breach of contract, unjust enrichment, promissory estoppel, negligent infliction of emotional distress, violations of the Fair Debt Collection Practices Act (FDCPA), and loss of consortium. Appellant's claims centered on her allegation that the parties had agreed upon a maximum fee of $8,000 for all of the legal work performed by appellee for the divorce and post-judgment matters. In her answer, appellant claimed that she paid appellee a total of $13,247.42.

{¶9} Following a bench trial in December 2009, the trial court entered judgment in favor of appellee. In its March 25, 2010 decision, the court concluded that appellant breached the terms of the parties' oral contract and awarded appellee $15,064.10 in unpaid legal fees as damages. The court entered judgment against appellant on her counterclaims.

{¶10} Appellant subsequently moved for a new trial pursuant to Civ.R. 59(A). Following a hearing, the trial court denied appellant's request in its May 21, 2010 decision.

{¶11} Appellant has appealed the trial court's March 25 and May 21

decisions, raising eight assignments of error for our review.[1] Several of the assignments involve similar issues and arguments and will be consolidated for purposes of discussion.

{¶12} Prior to addressing the merits of her assignments, however, we observe that appellant's brief is less than clear with regard to the rationale for her challenges on appeal. The burden of affirmatively demonstrating error on appeal and substantiating one's arguments in support thereof falls upon the appellant. *State v. Fields*, Brown App. No. CA2009-05-018, 2009-Ohio-6921, ¶7, citing *State v. Hairston*, Lorain App. No. 05CA008768, 2006-Ohio-4925, ¶11. See, also, App.R. 16(A)(7). It is not an appellate court's duty to "root out" or develop an argument that can support an assignment of error, even if one exists. *Hairston* at id.; *Hausser & Taylor, LLP v. Accelerated Systems Integration, Inc.*, Cuyahoga App. No. 84748, 2005-Ohio-1017, ¶10. We are mindful of these considerations in addressing the following errors assigned by appellant.

{¶13} Assignment of Error No. 1:

{¶14} "[THE TRIAL] COURT ABUSED ITS DISCRETION BY GRANTING JUDGMENT FOR APPELLEE WITHOUT RECORDS[.]"

{¶15} Assignment of Error No. 5:

{¶16} "[THE TRIAL] COURT ABUSED ITS DISCRETION BY GRANTING ATTORNEY FEES IN THE ABSENCE OF TIME RECORDS, WITH NO EVIDENCE OF FAIR, REASONABLE AND LEGAL VALUE OF SERVICES RENDERED [SIC]."

1. The record indicates that appellee neither filed an appellate brief nor appeared at oral argument in this matter. In failing to file a brief, this court "may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action." App.R. 18(C). The record further indicates that at oral argument, appellant moved to dismiss appellee's underlying action for want of prosecution as a result of his failure to appear. Appellant's motion to dismiss is not well-taken and is hereby overruled.

{¶17} In her first and fifth assignments of error, appellant challenges the trial court's conclusion that appellee was entitled to judgment on his claim that appellant breached the terms of the parties' contract.

{¶18} Citing choice of law principles, the trial court determined that Michigan law applied to the construction of the contract. The court found that the contract was negotiated, formed, and performed in Michigan and related to appellee's representation of appellant in various courts in that state. After applying Michigan law, the court further determined that there was "clearly a meeting of the minds and valid oral agreement that [appellant] would be required to pay for all of the legal services rendered to her by [appellee]." Despite her testimony to the contrary, the court did not find her claim that appellee had agreed to charge a maximum of $8,000 for all legal services rendered to be credible. The court determined that given the course of conduct between the parties of making and accepting late and partial payments, appellant breached the terms of the contract in April of 2003 after failing to make payments for several months.

{¶19} It is well-established that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54 Ohio St.2d 279, syllabus. Because the trier of fact is best able to view the witnesses and observe their demeanor when weighing the credibility of the offered testimony, a reviewing court will presume that the trial court's factual findings and witness credibility determinations are correct. *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77.

{¶20} Appellant argues that the trial court erred in granting judgment in favor

of appellee because he failed to produce adequate time records to establish the fairness of his fee. Appellant also argues that the court "disregarded [appellee's] lack of supporting evidence." Appellant cites to Ohio law in support of her arguments.

{¶21} Upon review, we conclude that the trial court properly applied Michigan law to the parties' contract. As the court noted, there is no evidence in the record of any choice of law by the parties. Under Ohio law, where a conflict of law issue arises in a case involving a contract, choice of law rules require a court to apply the law of the state with "the most significant relationship to the transaction and the parties." *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 477, 2001-Ohio-100, quoting Restatement of the Law 2d, Conflict of Laws (1971), Section 188. To assist in this determination, a court should consider "the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the domicile, residence, nationality, place of incorporation and place of business of the parties." Id. at 477, quoting Restatement of the Law 2d, Conflict of Laws (1971), Section 188(2)(a) through (d).

{¶22} In this case, the state of Michigan had the most significant relationship to the transaction. Evidence introduced at trial indicated that at the time the contract was formed, both parties were residents of the state. The parties discussed the terms of the contract in Kalamazoo. In addition, as the trial court noted, all of the legal work performed pursuant to the contract was conducted in Michigan courts.

{¶23} Michigan law provides that an attorney-client relationship must be established by contract before an attorney is entitled to payment for services rendered. *Plunkett & Cooney, PC v. Capitol Bancorp Ltd*. (1995), 212 Mich.App. 325, 329. The essential elements of a valid contract are: (1) competency of the parties,

(2) proper subject matter, (3) legality of consideration; (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v. Leja* (1991), 187 Mich.App. 418, 422. Once a valid contract has been established, a plaintiff seeking to recover for breach of contract must prove, by a preponderance of the evidence, the terms of the contract, breach of its terms, and resulting injury to the plaintiff. See *In re Brown* (C.A.6, 2003), 342 F.3d 620, 628. Parties may enter into an oral contract for legal services, the terms of which may be demonstrated by a course of dealing and performance. *H.J. Tucker & Assoc., Inc. v. Allied Chucker & Engineering Co*. (1999), 234 Mich.App. 550, 567.

{¶24} Although appellant argues that the parties had agreed to a maximum of $8,000 for all services, as discussed above, the trial court did not find her testimony on that issue to be credible. We must defer to the court's determination in this regard, because, as the trier of fact, it was in the best position to assess her credibility. In addition, although appellant also contends that appellee failed to produce sufficient evidence to substantiate his claim that the fees were owed, appellee produced copies of letters sent to appellant in connection with the work he performed on her behalf during the approximate eight year period he represented her. He also produced ledger statements showing the history of balances owed and payments made by appellant from May of 1992 through December 2002. The ledger statements demonstrated that appellant owed $15,064.10 in legal fees.

{¶25} Based on the foregoing, we find competent, credible evidence in the record to support the trial court's conclusion that appellant breached the terms of the parties' contract. Appellant's first and fifth assignments of error are therefore overruled.

{¶26} Assignment of Error No. 3:

{¶27} "[THE] TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE BY CLAIMING IMPROPER VENUE OF MICHIGAN LAW."

{¶28} Although as written, appellant's third assignment of error states that the trial court erred in using Michigan as the purported "venue" for this action, upon review of the arguments in the assignment, we have construed two issues for our consideration: (1) whether the trial court erred in concluding that appellee's trial counsel was not subject to the FDCPA, and (2) whether the trial court improperly applied Michigan state law to appellant's FDCPA counterclaim.

{¶29} In her counterclaim, appellant alleged that appellee violated several provisions of the FDCPA. Specifically, she averred that appellee committed violations of Sections 1692e(5) and (10), Title 15, U.S.Code. These sections provide that a debt collector is prohibited from "threat[ening] to take any action that cannot legally be taken or that is not intended to be taken," and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." See 1692e(5) and (10), Title 15, U.S.Code. She also claimed that appellee violated Section 1692c(c), Title 15, U.S.Code, by contacting her after she had requested that he cease further communication with her.

{¶30} At trial, appellant did not produce much evidence by way of testimony or documentation to support her FDCPA claims. In her trial brief, she appeared to argue that appellee's trial counsel had violated the FDCPA by failing to send her written notice of the alleged debt.

{¶31} In its decision, the trial court determined that appellant's claim failed, as a matter of law, because appellee did not constitute a "debt collector" for purposes of the FDCPA. The court found that he was a creditor attempting to collect on his own account which "place[d] him outside the purview of the [FDCPA]." The court also found that to the extent that appellant attempted to incorporate allegations against appellee's counsel with regard to violations of the FDCPA, such a claim was not properly before the court because appellee's trial counsel was not a party to the action.

{¶32} On appeal, appellant appears to once again contend that appellee's trial counsel violated the FDCPA. As noted by the trial court, appellee's counsel is not a party to this case. As a result, her argument is not properly before us on appeal and is therefore without merit.

{¶33} With respect to her claim that the trial court erred in applying Michigan law to her FDCPA claim, we likewise find this argument without merit. Our review of the trial court's decision indicates that the court properly applied federal law, and not the laws of the state of Michigan, in construing the applicable provisions of the FDCPA.

{¶34} Based on the foregoing, appellant's third assignment of error is overruled.

{¶35} Assignment of Error No. 2:

{¶36} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE IN DENYING APPELLANT'S DUE PROCESS AND RIGHT TO A FAIR TRIAL [SIC]."

{¶37} Assignment of Error No. 4:

{¶38} "[THE] TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S DECEASED FATHER'S WITNESS TO ORAL AGREEMENT WAS A HEARSAY EXCEPTION [SIC]."

{¶39} Assignment of Error No. 6:

{¶40} "[THE TRIAL] COURT ABUSED ITS DISCRETION BY RE[M]OVING APPELLEE'S FRAUDULENT CONCEALMENT AND ATTORNEY MISCONDUCT FROM THE RECORD."

{¶41} Assignment of Error No. 7:

{¶42} "[THE TRIAL] COURT ABUSED ITS DISCRETION BY IGNORING [THE] INADMISSIBILITY OF APPELLEE'S EVIDENCE."

{¶43} Assignment of Error No. 8:

{¶44} "[THE TRIAL] COURT ABUSED ITS DISCRETION TO THE HARM OF APPELLANT BY DENYING APPELLANT'S COUNTERCLAIM DAMAGES FROM [THE] FRIVOLOUS FIRST FILING."

{¶45} Appellant's second, fourth, sixth, seventh, and eighth assignments of error concern the exclusion of evidence at trial. In addition, although she has not separately assigned as error the trial court's decision denying her motion for a new trial, our review of her brief indicates that she has raised arguments in support of her claim in several of her assignments. As a result, we have elected to address the denial of her motion for a new trial within the context of her remaining assignments of error.

Evidentiary issues

{¶46} It is well-established that decisions regarding the admission or exclusion of evidence are within the discretion of the trial court and will not be

reversed on appeal absent a showing that the court abused its discretion and that a party was materially prejudiced as a result. *Silver v. Jewish Home of Cincinnati*, Warren App. No. CA2010-02-015, 2010-Ohio-5314, ¶59. An abuse of discretion is more than an error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶47} Appellant initially contends that the trial court abused its discretion in denying appellant's request to admit her deceased father's affidavit into evidence at trial. Appellant argues that in his affidavit, Bruce Parker averred that he was present with his daughter at the first meeting with appellee in May of 1992 and that appellee had quoted her a maximum fee of $8,000 for the legal work performed on her behalf. Parker died in June of 2007 and was unavailable to testify at trial. His affidavit was apparently submitted in opposition to a motion for summary judgment filed by appellee in a previous collection action initiated against appellant in 2006. The action was subsequently dismissed by appellee in 2007.

{¶48} The trial court determined that the affidavit was hearsay and excluded it from evidence. Appellant claims that valid hearsay exceptions exist for the admission of the affidavit. First, she claims that under Evid.R. 804(B)(1), Parker's affidavit is admissible "former testimony." However, an affidavit does not constitute "testimony" pursuant to the requirements of this rule. *Kiser v. Allstate Insurance Co*., 144 Ohio Misc.2d 12, 2007-Ohio-6070, ¶10. Although it is a sworn statement, it is "distinguishable from the former testimony of unavailable witnesses addressed by Evid.R. 804(B)(1) because it [is] not subject to cross-examination *at the time of its making*." Id. (Emphasis added.) Contrary to appellant's argument, an affidavit

submitted in response to a summary judgment motion does not constitute testimony subject to cross-examination.

{¶49} Appellant also argues that Parker's affidavit should have been admitted as a statement made under belief of impeding death pursuant to Evid.R. 804(B)(2), as a statement against personal or family history pursuant to Evid.R. 804(B)(4), and as a statement by a deceased or incompetent person under Evid.R. 804(B)(5). However, these exceptions are inapplicable because the statement appellant seeks to admit on behalf of Parker, i.e., that he witnessed appellee telling appellant he would cap her legal fees at $8,000, does not concern the cause or circumstances of Parker's death or his personal or family history. See Evid.R. 804(B)(2) and (4). In addition, it does not qualify as a statement by a deceased or incompetent person because neither Parker's estate nor a personal representative of his estate is a party to the current action. See Evid.R. 804(B)(5).

{¶50} Appellant also claims generally that the trial court abused its discretion in excluding 16 additional trial exhibits, including those allegedly demonstrating that appellee concealed payments made by appellant, made false statements during discovery, and engaged in misconduct and "bad faith actions and filings" in the 2006 case filed against her.

{¶51} Upon review of the record, we find no abuse of discretion on the part of the trial court in excluding the exhibits referenced by appellant. First, the court properly concluded that the exhibits relating to appellee's alleged noncompliance with her discovery requests, and those from the 2006 case were not relevant to the issues presented at the trial on the merits of the instant matter. Moreover, although appellant also claims that the court erred in excluding an additional exhibit allegedly

showing $4,500 in payments made to appellee for which she did not receive credit, the record indicates that upon reviewing the ledger statements introduced into evidence, the court found that she was properly credited by appellee for that amount.

{¶52} Finally, appellant argues that the court "took appellant's second scheduled trial day away without permission" after finding that she had stipulated to the admission of an additional witness' affidavit in lieu of calling him to testify on the second day of trial. Appellant appears to claim that this alleged error violated her due process rights. We find this argument is without merit, as the record clearly indicates that appellant's counsel stipulated to the admission of the affidavit:

{¶53} "THE COURT: Counsel was - - is agreeable to stipulating as to Exhibit E-2, which is the affidavit of Lawrence Mudd. Does that cover all the testimony he's going to offer tomorrow, or is there additional?

{¶54} "[APPELLANT'S TRIAL COUNSEL]: Well, I want to make sure, okay?

{¶55} "THE COURT: Sure.

{¶56} "[APPELLANT'S TRIAL COUNSEL]: If they stipulate to it, that's fine.

{¶57} "THE COURT: If they stipulate to what?

{¶58} "[APPELLANT'S TRIAL COUNSEL]: To the - - to the admission of Mr. Mudd's affidavit so that he doesn't have to be here. There is no paper on him; is there not?

{¶59} "THE COURT: Yeah. Is this - - this is what I have. Is the extent of the testimony that you would have him?

{¶60} "[APPELLEE]: Yup, that's it.

{¶61} "[APPELLANT'S TRIAL COUNSEL]: That's what you have?

{¶62} "[APPELLEE]: As long as we can finish today.

{¶63} "THE COURT: Right.

{¶64} "[APPELLANT'S COUNSEL]: That's correct, [y]our honor.

{¶65} "THE COURT: Okay."

{¶66} Notwithstanding the foregoing exchange, we conclude that even if appellant believed she had not stipulated to the admission of the affidavit, she acquiesced to the stipulation in failing to raise the issue to the trial court prior to the conclusion of the first day of trial. *Wolf v. Wolf*, Warren App.No. CA2008-03-045, 2009-Ohio-1845, ¶27. At that time, appellant informed the court that she was resting her case. Accordingly, any error with regard to the stipulation was invited by appellant. Id. at ¶28. "A party will not be permitted to take advantage of an error which he himself invited or induced the court to make." Id., quoting *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus.

Civ.R. 59(A) motion

{¶67} With regard to her additional appeal from the court's decision denying her motion for a new trial, Civ.R. 59(A) sets forth nine grounds under which a party may seek a new trial, and also permits a court to grant a new trial for "good cause shown." [2] The decision to grant or deny a motion for a new trial is reviewed on appeal under an abuse of discretion standard of review. *Kranz v. Kranz*, Warren

2. These grounds include: "(1) [i]rregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial; (2) [m]isconduct of the jury or prevailing party; (3) [a]ccident or surprise which ordinary prudence could not have guarded against; (4) [e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice; (5) [e]rror in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property; (6) [t]he judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case; (7) [t]he judgment is contrary to law; (8) [n]ewly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial; and (9) [e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application." See Civ.R. 59(A).

App. No. CA2008-04-054, 2009-Ohio-2451, ¶38; *Sharp v. Norfolk & W. Ry. Co*., 72 Ohio St.3d 307, 312, 1995-Ohio-224.

{¶68} In her motion, appellant contended that each of the nine grounds outlined in Civ.R. 59(A) were present to justify a new trial. Upon review of her motion and the transcript of the hearing on the matter, however, it appears that appellant attempted to use several of the grounds as a vehicle to relitigate the issues in the case. The trial court declined to consider such arguments and we likewise will not entertain them on appeal.

{¶69} It appears that the gravamen of her request for a new trial centers on her assertion that her trial counsel suffered from a "medical episode." In her motion, appellant argued that this caused "confusion and disorientation" during the trial, which prohibited her counsel from representing her effectively. In support of her request, she offered both her own affidavit and that of her step-mother, Karen Parker, a witness to the trial. She also submitted the affidavits of her trial counsel and his treating physician.

{¶70} In her affidavit, appellant averred that during the course of the trial, she observed that her counsel "could barely speak and did not seem to be able to focus on any of the details that were part of the day's hearing. He could not find his glasses or papers directly in front of him on the podium * * *." Appellant stated that counsel was unable to ask her questions or object to appellee's arguments, and appeared to be "lost." She was alarmed by his behavior and believed that it was an emergency that could not have been avoided. Parker also averred in her affidavit that she was present in the courtroom during the entire trial. She stated that counsel appeared to be confused and that no one could hear him when he spoke.

{¶71} Counsel's affidavits made similar averments. He claimed that he experienced a health episode which included dizziness and disorientation during the trial. These symptoms apparently affected his ability to concentrate. He stated that the episode occurred without warning and that he was unaware that he was suffering from the symptoms until "several hours after I left the courtroom at the conclusion of the trial and was able to consult with my client." He further averred that during the episode he left the courtroom without properly completing his duties as attorney for appellant. In his supplemental affidavit, he also claimed that as a result of his physical impairment, he was precluded from introducing exhibits and testimony relating to several issues in dispute.

{¶72} Counsel's physician, Douglas Moore, M.D., averred in his affidavit that his patient's medical history included "diabetes, hypertension, coronary artery disease, and [a] previous stroke." He further averred that counsel presented to his office on February 5, 2010 and "describ[ed] an episode during a court appearance on 12/14/09 in which he experienced an episode of dizziness, disorientation, difficulty with concentration and leaving the courtroom before he was scheduled. These symptoms came on suddenly." According to Dr. Moore, the symptoms counsel described could have been indicative of a transient ischemic attack, a precursor to another stroke, or a hypoglycemic episode.

{¶73} The court considered appellant's claim under divisions (A)(1) and (3) of Civ.R. 59, dealing with an irregularity in proceedings preventing a fair trial, and accident or surprise which ordinary prudence could not have guarded against. However, upon review of the evidence submitted by appellant, the court found that she had not demonstrated her entitlement to a new trial. Citing this court's decision

in *Luna-Corona v. Esquivel-Parrales*, Butler App. No. CA2008-07-175, 2009-Ohio-2628, ¶42, the trial court noted that parties in civil actions do not enjoy a constitutional right to effective representation. As such, a reversal of a trial court's decision based upon the ineffective assistance of counsel does not exist when there is no right to counsel. Id.

{¶74} The court found that contrary to counsel's averment in his affidavit, at no time during the course of the trial did he leave the courtroom before completing his duties. Although appellant claimed that she was prohibited from a second day of testimony, as discussed above, the court concluded that appellant had stipulated to the admission of Mudd's affidavit. In addition, although counsel claimed that his medical impairment precluded him from introducing additional evidence, the court noted that he attempted to introduce most, if not all, of the testimony and documents referenced in his supplemental affidavit. The evidence was found to be inadmissible based upon evidentiary rules.

{¶75} The court also found Dr. Moore's affidavit unpersuasive. Of significance to the court was Moore's averment that counsel did not visit him until February 2010, approximately two months after the date of the trial. Given that counsel stated that he had learned of his impairment several hours after the trial had concluded, the court had "difficulty believing that counsel would have waited two months to see a doctor about these concerns." Moreover, Moore's affidavit contained only speculation as to what may have contributed to counsel's alleged health episode.

{¶76} Finally, the court stated that at no time during the course of various court appearances, in-chamber conferences, or at trial did it observe any change in

counsel's behavior or cognitive function. To the court, counsel consistently appeared to be "somewhat forgetful and never quite 'on top of things.'"

{¶77} Based on the foregoing, we conclude that appellant failed to demonstrate an abuse of discretion on the part of the trial court in overruling her motion for a new trial. Appellant's second, fourth, sixth, seventh, and eighth assignments of error are overruled.

{¶78} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.