[Cite as *Trutschel v. Kettering Med. Ctr.*, 2009-Ohio-3302.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

MATTHEW B. TRUTSCHEL :

Plaintiff-Appellant : C.A. CASE NO. 22816

v. : T.C. NO. 2006 CV 2728

KETTERING MEDICAL CENTER : (Civil appeal from
dba KETTERING COLLEGE OF Common Pleas Court)

MEDICAL ARTS :

Defendant-Appellee :

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O P I N I O N

Rendered on the 2nd day of July, 2009.

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FROELICH, J.

{¶ 1} This case is before the court on Plaintiff-appellant Matthew Trutschel's direct appeal from a March 14, 2008, trial court decision granting summary judgment in favor of Defendant-appellee Kettering Medical Center, dba Kettering College of

Medical Arts (KCMA). For the first time, Trutschel also attempts to challenge the trial court's January 10, 2007, decision to disqualify his original trial counsel. For the following reasons, we will affirm the judgment of the trial court.

I

{¶ 2} In 2002 or 2003, Trutschel started researching schools that offered Physician Assistant (PA) programs, including KCMA. After reviewing KCMA's website and the 2003-2004 program bulletin, Trutschel decided to apply to KCMA's PA program. Preceding formal acceptance, Trutschel had to take classes at Sinclair Community College and Kettering Medical Center in order to fulfill various prerequisites. Following completion of those prerequisites, Trutschel enrolled in KCMA's PA Program in the fall of 2005.

{¶ 3} Prior to his enrollment, Trutschel had received school program bulletins from KCMA for the 2003-2004 and 2005-2006 academic years, both of which included an overview of the school's PA program. Both bulletins stated that students must maintain a "C-" or higher grade in all course work and a minimum grade point average (GPA) of 2.5. The bulletins also explained that if a student failed to meet these requirements, he would be placed on academic probation for one semester and that he would be dismissed for continued failure to meet these standards. Trutschel claims that there was no provision for academic probation after his enrollment.

{¶ 4} During the summer prior to the start of the fall 2005 term, KCMA advised its PA students that as part of their Medical History and Physical Examination I course, they should purchase and study a textbook entitled *Medical Terminology Systems* because they would be required to take a medical terminology test and must obtain a

grade of 80% or better on the exam. At the start of the term, Trutschel received a course syllabus for Principles of Clinical Medicine I and learned that he was also required to earn an 80% or better on that course's exam. Neither of these specific course requirements was set forth in either of the bulletins.

{¶ 5} After two failed attempts to pass the medical terminology exam, Trutschel chose to stop attending classes, even though the school offered further testing opportunities. Trutschel did not adhere to the school's withdrawal procedures, and he left the program before he received the school's December 23, 2005, letter formally advising him that he was being placed on academic probation.

{¶ 6} In late November, 2005, Trutschel's attorney had discussions with KCMA's attorney regarding what would be reflected on Trutschel's official transcript for the fall 2005 semester. As a follow-up to that conversation, KCMA's attorney sent a letter to Trutschel's attorney which stated, "[p]er our discussion today, the Kettering College of Medical Arts will not place any designations on [Trutschel's] transcript or file on Monday (November 21, 2005) concerning his course work this last semester. KCMA will extend the Monday deadline until we have had reasonable opportunity to discuss settlement possibilities." No evidence was offered regarding further negotiations. The following month, KCMA sent Trutschel a final grade report, which stated that he had received an "F" for each course. Trutschel concludes that his transcript is necessarily derived from this grade report and that he is unable to apply to other schools because of failing grades on his transcript, which were placed there in violation of his agreement with KCMA. However, Trutschel has never requested or seen a transcript of his grades, and KCMA stated that failing grades were never placed

onto his official transcript.

{¶ 7} Trutschel filed a complaint against KCMA on April 6, 2006, alleging breach of contract, fraud, and a violation of the Ohio Consumer Sales Practices Act. Due to the involvement of the attorneys in reaching the November, 2005, agreement and the likelihood that they would be called to testify as witnesses at trial, both parties filed motions to disqualify the other party's attorney from continued representation. The trial court granted both motions. KCMA filed a motion for summary judgment, to which Trutschel responded. The trial court granted summary judgment in favor of KCMA on all three claims. Trutschel appeals.

II

{¶ 8} Trutschel presents four assignments of error, the first three of which attack the trial court's decision to grant summary judgment in favor of KCMA.

{¶ 9} Summary judgment pursuant to Civ.R. 56 should be granted only if no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the initial burden of showing that no genuine issue of material fact exists for trial. Id. The burden then shifts to the non-moving party to set forth specific facts which show that there is a genuine issue of material fact for trial. Id. Throughout, the evidence must be construed in favor of the nonmoving party. Id.

{¶ 10} An appellate court reviews summary judgments de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. In other words, we review such judgments independently and without deference to the trial court's determinations. Id.

III

{¶ 11} Trutschel's First Assignment of Error:

{¶ 12} "THE COURT ERRED IN RULING THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT WITH REGARDS TO PLAINTIFF-APPELLANT'S BREACH OF CONTRACT CLAIM."

{¶ 13} In his first assignment of error, Trutschel argues that the trial court erred in granting summary judgment in favor of KCMA on his breach of contract claim, which is based on the alleged agreement between Trutschel's attorney and KCMA's attorney that no grades would be placed on Trutschel's official transcript. "To prove a breach of contract claim, a plaintiff must show 'the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.'" *Nilavar v. Osborn* (2000), 137 Ohio App.3d 469, quoting *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600.

{¶ 14} In order to prove the existence of a contract, the elements of offer, acceptance, and consideration must be present. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369. Furthermore, the plaintiff must show that both parties consented to the terms of the contract, that there was a "meeting of the minds" of both parties, and that the terms of the contract are definite and certain. *McSweeney v. Jackson* (1996), 117 Ohio App.3d 623, 631. These elements are not present in this case.

{¶ 15} KCMA's attorney sent a letter to Trutschel's attorney, which stated, "[p]er our discussion today, the Kettering College of Medical Arts will not place any designations on [Trutschel's] transcript or file on Monday (November 21, 2005)

concerning his course work this last semester. KCMA will extend the Monday deadline until we have had reasonable opportunity to discuss settlement possibilities." KCMA's letter demonstrates that the terms of any potential contract were neither definite nor certain, and that those terms were still under negotiation. There was no "meeting of the minds." Thus, the burden shifted to Trutschel to set forth specific facts to show that there was a genuine issue of material fact. *Harless,* supra. Trutschel offered nothing, failing to meet that burden.

{¶ 16} Furthermore, even if the agreement had risen to the level of a contract, there is no evidence of a breach. Trutschel admitted in his deposition that he never requested or even saw an official transcript. Instead, after he received a grade report with failing grades, he assumed that those grades would be reflected on his official transcript. KCMA's Program Director of the PA Department stated in an affidavit that the failing grades were never placed on Trutschel's official transcript. Trutschel again offered nothing in response in order to meet his burden of showing a genuine issue of material fact.

{¶ 17} Because there are no genuine issues of material fact regarding his breach of contract claim, Trutschel's first assignment of error will be overruled.

IV

{¶ 18} Trutschel's Second Assignment of Error:

{¶ 19} "THE COURT ERRED IN RULING THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT WITH REGARDS TO PLAINTIFF-APPELLANT'S MISREPRESENTATION/FRAUD CLAIMS."

{¶ 20} In his second assignment of error, Trutschel claims that the trial court

erred in granting summary judgment in favor of KCMA regarding his fraud claim. In order to prove fraud, a plaintiff must show: "(1) a false representation; (2) knowledge by the person making the representation that it is false; (3) intent by the person making the representation to induce the other to rely on the representation: (4) rightful reliance by the other to his detriment; and (5) an injury as a result of the reliance." *Garofolo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 105, internal citation omitted.

{¶ 21} Trutschel's complaint alleges that he relied on KCMA's 2005-2006 bulletin when he enrolled in the PA program and that if he had known that certain representations made in the bulletin were not true, he would not have enrolled. Specifically, Trutschel insists that although the bulletin stated that if a student fails to earn at least a "C-" in each course and/or fails to maintain a 2.5 minimum grade point average, he will be placed on academic probation, there was no academic probation after his enrollment. Trutschel also alleges that he was not made aware of the requirements that he must achieve at least an 80% on the exams in the Principles of Clinical Medicine I and Medical History and Physical Examination I (including the medical terminology exam) courses until shortly before the semester started.

{¶ 22} As to his claim that there was no academic probation after his enrollment, Trutschel admitted in his deposition that he did not follow the school's procedures for withdrawal. After two failed attempts to pass the medical terminology exam, Trutschel chose to stop attending classes, despite the fact that the school would have offered further testing opportunities. Trutschel acknowledged that he did not adhere to the school's withdrawal procedures, and because he withdrew before he could have been placed on academic probation, it "never affected me." In other words, he left the

program before the school was able to place him on academic probation. In fact, apparently unaware that Trutschel had chosen to withdraw, the school sent a letter dated December 23, 2005, advising him that he was being placed on academic probation. Thus, the trial court properly concluded that Trutschel's fraud claim in regard to the alleged lack of academic probation was negated by his own actions.

{¶ 23} Trutschel's fraud claim also fails in regard to KCMA's requirements for passing the exams in the Principles of Clinical Medicine I and Medical History and Physical Examination I courses because he fails to meet his burden of demonstrating a genuine issue of material fact as to whether there was a false representation by KCMA.

{¶ 24} The bulletin upon which Trutschel insists that he relied specifically advised, "The information in this Bulletin is designed to be as accurate as possible. *** The college reserves the right to make any such changes as circumstances require." Trutschel was aware that "the PA program was in a period of flux," in large part due to pending legislation that proposed licensing PAs and requiring a master's degree. Most importantly, Trutschel acknowledged in his deposition that he was aware that specific course requirements would be set out in each individual course syllabus rather than the overall progression requirements set forth in the general bulletin. Nevertheless, Trutschel did not request any of the course syllabi prior to his enrollment, nor did he offer any complaints about the testing requirements when he did receive the syllabi. KCMA offered an affidavit stating that a student could receive a grade lower than 80% on the exams, yet still receive at least a "C-" for the course and maintain at least a 2.5 GPA. Trutschel offered no evidence in rebuttal to establish any genuine issue of

material fact on these claims.

{¶ 25} There is no evidence in the record from Trutschel to contest KCMA's evidence that it had no knowledge of any false representations or that the "disclaimer" language in the bulletin negated any rightful reliance by Trutschel. Therefore, summary judgment was appropriate, and the second assignment of error will be overruled.

V

{¶ 26} Trutschel's Third Assignment of Error:

{¶ 27} "THE COURT ERRED IN RULING THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT WITH REGARDS TO PLAINTIFF-APPELLANT'S CLAIM FOR VIOLATIONS OF THE OHIO CONSUMER SALES PRACTICES ACT AND THAT SUCH CLAIM WAS AN ATTEMPTED EDUCATIONAL MALPRACTICE CLAIM IN DISGUISE."

{¶ 28} In his third assignment of error, Trutschel contends that the trial court erred in granting summary judgment in favor of KCMA because the court wrongly found that his claim was really for educational malpractice rather than for a violation of the Ohio Consumer Sales Practices Act (the Act). Trutschel argues that KCMA "made unfair and deceptive statements to Mr. Trutschel under Ohio Rev. Code Section 1345.02 of the Ohio Consumer Sales Practices Act. These acts rise to the level of unconscionable consumer sales practices according to Ohio Rev. Code Section 1345.03(B)(6)." Specifically, he claims that both the change of grade requirements and KCMA's failure to provide instruction for the medical terminology exam constituted violations of the Act.

{¶ 29} We begin by recognizing that the Act is applicable to relationships between a student and a regulated professional school because the school is a "supplier" of services to a student "consumer" in a "consumer transaction" as those terms are defined by R.C. 1345.01. *Malone v. Academy of Court Reporting* (1990), 64 Ohio App.3d 588, 594, citation omitted. Therefore, we turn to the question of whether there were any genuine issues of material fact regarding the alleged violations of the Act.

{¶ 30} Revised Code 1345.02(B)(1) prohibits a supplier from committing an unfair or deceptive act or practice in connection with a consumer transaction by presenting the product or service as having "sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have." R.C. 1345.02(B)(1). In alleging a violation of this section, "a consumer is not required to demonstrate that a supplier intended to be unfair or deceptive." *Mannix v. DCB Service, Inc.,* Montgomery App. No. 19910, 2004-Ohio-6672, citation omitted. Trutschel claims that through its bulletin KCMA unfairly led him to believe that he was required to earn a minimum grade of "C-" in each class and to maintain an overall GPA of 2.5 in order to remain in academic good standing. However, shortly before the start of classes, he learned that he must obtain at least an 80% in order to pass two of his exams. KCMA explained that there was no change in the minimum grade requirements because even if a student failed to earn an 80% on those exams, the student could still receive at least a "C-" in the course. Trutschel offered no evidence to rebut this claim and therefore failed to meet his burden of establishing a genuine issue of material fact regarding the alleged violation of R.C. 1345.02(B)(1).

{¶ 31} Alternatively, Trutschel relies on R.C. 1345.03(B)(6), which prohibits a supplier from committing an unconscionable act or practice when "the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to the customer's detriment." In order to recover under R.C. 1345.03, a consumer must show that a supplier acted unconscionably and knowingly. *Karst v. Goldberg* (1993), 88 Ohio App.3d 413, 418. "[S]cienter is a necessary element and must be proven prior to an unconscionable act being found under R.C. 1345.03." *Bierlein v. Bernie's Motor Sales, Inc.* (June 12, 1986), Montgomery App. No. 9590. This differs from R.C. 1345.02 where scienter is not required. *Hanna v. Groom,* Franklin App. No. 07AP-502, 2008-Ohio-765, ¶36 (internal citations omitted).

{¶ 32} Trutschel bases this claim on the same alleged misrepresentations about grade requirements made by KCMA. He argues that through its bulletin the school knowingly misled him to believe that he was required to earn a minimum grade of "C-" in each class and to maintain an overall GPA of 2.5 in order to remain in academic good standing when, in fact, the school should have known that he must obtain at least an 80% in order to pass two of his exams. Under R.C. 1345.01(E), the legislature defined "knowledge"; "knowledge means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness." KCMA countered by pointing out that even if a student failed to earn an 80% on those exams, the student could still receive at least a "C-" in the courses. Trutschel offered no evidence in rebuttal, failing to meet his burden of establishing a genuine issue of material fact regarding the alleged violation of R.C. 1345.03(B)(6).

{¶ 33} Finally, Trutschel also argues a violation of the Act in that KCMA should have offered a separate course on medical terminology rather than combining it with the Medical History and Physical Examination I course and requiring students to study a medical terminology text on their own before being tested on that material. This is the only portion of Trutschel's claims that the trial court found was an impermissible attempt to allege educational malpractice.

{¶ 34} "A claim that educational services provided were inadequate constitutes a claim for 'educational malpractice.' *** Ohio does not recognize educational malpractice claims for public policy reasons." *Lawrence v. Lorain Cty. Community College* (1998), 127 Ohio App.3d 546, citations omitted.

{¶ 35} Trutschel's reliance on *Malone v. Academy of Court Reporting,* supra, is misplaced. The *Malone* case involved a school that had advertised to prospective students that successful completion of the school's paralegal program would yield an associate's degree, when, in fact, the academy had not been certified or accredited to issue such a degree.

{¶ 36} Similarly, Trutschel's reliance on *Behrend v. State* (1977), 55 Ohio App.2d 135, is not controlling, primarily because the case did not involve an alleged violation of the Act; actually it bolsters the trial court's ruling discussed in the second assignment of error. In *Behrend,* the school lost accreditation after the plaintiffs' enrollment and advised students that the accreditation would be renewed, although the school later decided to terminate the program, and accreditation therefore was not renewed. The trial court held that while there was no fraud because at the time when the school told its students that the accreditation would be renewed, there was no

evidence in the record that those statements were made with knowledge that they were untrue or made with any intent to mislead, there could be a contractual violation. Id. at 142.

{¶ 37} Unlike *Malone* and *Behrend,* KCMA's accreditation is not at issue here. Instead, Trutschel's claim in this case is more akin to the *Lawrence* case in so far as Trutschel argues that KCMA's instruction on medical terminology was substandard and inappropriate. Because Trutschel's contention that the instruction on medical terminology was inadequate amounts to a claim of educational malpractice, which is not recognized in the state of Ohio, the trial court did not err in granting summary judgment in favor of KCMA on that claim.

{¶ 38} Trutschel's third assignment of error will be overruled.

VI

{¶ 39} Trutschel's Fourth Assignment of Error:

{¶ 40} "THE COURT ERRED WHEN IT DISQUALIFIED PLAINTIFF-APPELLANT'S ORIGINAL TRIAL COURT COUNSEL."

{¶ 41} Trutschel insists that the trial court should not have disqualified his original trial attorney from continuing her representation of him. An order disqualifying counsel is a final appealable order. *Kala v. Aluminum Smelting & Refining Co., Inc.* (1998), 81 Ohio St.3d 1, 3, citing *Stevens v. Grandview Hospital and Medical Center* (Oct. 20, 1993), Montgomery App. No. 14042, and *Russell v. Mercy Hospital* (1984), 15 Ohio St.3d 37. "An appellant who fails to challenge a final appealable order within thirty days of the decision as provided by App.R. 4(A) waives all rights of review." *Johnson v. Burns* (June 15, 1999), Franklin App. No. 98AP-1020, citing *Dayton*

Women's Health Ctr. v. Enix (1990), 52 Ohio St.3d 67. The trial court disqualified Trutschel's counsel on January 10, 2007; however, Trutschel did not file a notice of appeal until June 30, 2008. Because Trutschel failed to perfect a timely appeal from the trial court's order disqualifying his trial counsel, he has waived any error.

{¶ 42} Even if a timely appeal had been filed, in reviewing a trial court's decision to disqualify a party's counsel, we apply an abuse of discretion standard. *Litigation Management, Inc. v. Bourgeois*, Cuyahoga App. No. 91818, 2009-Ohio-2266, ¶13. An abuse of discretion implies that the trial court's attitude in reaching its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 43} When faced with the issue of whether a lawyer can serve both as an advocate and as a witness, "[t]he court must first determine the admissibility of his testimony....If the court finds the testimony admissible, the party or court may move for the attorney to be disqualified and the court must then consider whether any exceptions to the Disciplinary Rules are applicable, thus permitting the attorney to testify and continue representation." *155 N. High, Ltd. v. Cincinnati Ins. Co.* (1995), 72 Ohio St.3d 423, 427-28, 1995-Ohio-85, citing *Mentor Lagoons, Inc. v. Rubin* (1987), 31 Ohio St.3d 256, paragraph two of the syllabus.

{¶ 44} In *A.B.B. Sanitec West, Inc. v. Weinstein,* Cuyahoga App. No. 88258, 2007-Ohio-2116, the trial court disqualified the defendant's attorney because he "was significantly involved in the events giving rise to this matter and [he] will in all probability be a material fact witness in this matter." The appellate court reversed, finding that the trial court failed to employ the analysis set forth in *155 N. High*, supra.

An attorney who might be a witness need not be disqualified, but one who "ought to be called" must be, unless an exception to the Rules apply.

{¶ 45} Disciplinary Rule 5-102(A) establishes the general rule that "[i]f a lawyer learns or it is obvious that he *** ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and *** shall not continue the representation of the trial, except that he may continue the representation and he *** may testify in the circumstances enumerated in DR5-101(B)(1)-(4)." Trutschel argues that the applicable exception is found in DR5-101(B)(4), which provides that a lawyer may testify "if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer *** as counsel in the particular case." Generally, the exception contemplates an attorney who has some distinctive expertise in a specialized area of the law. *155 N. High*, supra, at 429, citation omitted. Intimate familiarity with the case or increased expenses fail to meet this standard. Id., citations omitted.

{¶ 46} Trutschel insists that his attorney's disqualification caused a substantial hardship do to counsel's specialized knowledge of the Ohio Consumer Sales Practices Act. Citing *Mentor Lagoons,* supra, at 725-26, the trial court rejected this argument, pointing out that "[t]he issues of the present case are not complex and although [Trutschel's attorney]...may be highly experienced and knowledgeable regarding the...Act, the Court believes that other competent counsel can be employed."

{¶ 47} Trutschel's contract claim centers on the discussions between his attorney and KCMA's attorney. To the extent any agreement was memorialized, it was

by a single-sentence letter, which indicated that negotiations were ongoing. Therefore, it was obvious from the nature and facts of the claim that Trutschel's attorney "ought to be called as a witness," and we find no abuse of discretion in the court's determination that no exception to the Rules applies.

{¶ 48} Trutschel's fourth assignment of error will be overruled.

VII

{¶ 49} Having overruled all four of Trutschel's assignments of error, the judgment of the trial court will be Affirmed.

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DONOVAN, P.J. and GRADY, J., concur.

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