[Cite as *Bond v. Phillips*, 2010-Ohio-5640.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Trudy Bond, Ed.D.	Court of Appeals No. L-10-1197
Appellant	Trial Court No. CVF-09-13377
v.	
Virginia L. Phillips	**DECISION AND JUDGMENT**
Appellee	Decided: November 19, 2010

* * * * *

Terry J. Lodge, for appellant.

Martha L. Riewaldt, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant brings this accelerated appeal of a summary judgment issued by the Toledo Municipal Court in a suit on account.

{¶ 2} Appellant, Dr. Trudy Bond, is a psychologist who had a long relationship with appellee, Virginia Philips. According to appellant, in 2006, appellee's adult

daughter, Dawn Fisher, became the subject of a criminal investigation and was eventually charged, convicted of a crime and sentenced to prison.

{¶ 3} In her affidavit in support of her motion for summary judgment, appellant averred that, at the beginning of the criminal inquiry, appellee approached her to aid Dawn Fisher in her case. According to appellant, appellee promised to "bear 100% of the cost of my services to Dawn Fisher and Dawn's family * * * less insurance covered payments."

{¶ 4} Appellant continued that, following Dawn's indictment, appellant provided counseling for Dawn and her family, communicated with adult parole on her behalf, appeared as a witness in Dawn's community control revocation hearing and, at a custody change hearing in the domestic relations court, provided an assessment report on appellee's ten-year-old grandson to his guardian ad litem after the custody change. In 2006 and 2007, according to appellant, the cost of her services totaled $25,450, all but $5,495 was covered by insurance. When, on demand, appellee refused to pay the outstanding balance, appellant instituted the suit on account that underlies this appeal. Appellee answered appellant's complaint, denying that she had entered into an oral agreement with appellant to pay for services rendered to her daughter and her family.

{¶ 5} In the trial court, the parties filed cross-motions for summary judgment. The trial court initially denied both motions and set the matter for trial. At some later point, the court apparently reconsidered and issued a judgment denying appellant's motion and granting appellee's. The court also awarded appellee $1,875 in attorney fees.

{¶ 6} From this judgment, appellant now brings this appeal. In two assignments of error[1] appellant contends that there were issues of fact in the case that precluded summary judgment and that the court erred in sua sponte awarding attorney fees.

I. Summary Judgment

{¶ 7} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 8} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶ 9} In her motion for summary judgment, appellee relied upon Ohio's statute of frauds, arguing that, even if there was the agreement appellant asserts, it was a promise to answer for the debt of another and, as such, needed to be in writing to be enforceable.

[1]Appellant puts forth a third "assignment," but since the assignment fails to actually assert any error, it will not be addressed.

The trial court's summary judgment did not provide any reasoning, but, since this is the only argument appellee set forth, it is presumably the basis of the judgment.

{¶ 10} In material part, R.C. 1335.05 provides:

{¶ 11} "No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person * * * unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

{¶ 12} Appellee maintains that any services rendered were on behalf of her adult daughter and, therefore, any purported agreement for her to pay would constitute a promise to answer for the debt of another. Such a promise, appellee contends, must be in writing by the plain terms of the statute. Since appellant can produce no such writing, appellee insists, she may not be held to account on the oral contract.

{¶ 13} According to appellant, appellee is not answering for the debt of her daughter, but is a party to an original contract wherein her daughter is a third party beneficiary. Appellant argues that appellee entered into the agreement to advance her own interest, in addition to the interests of her daughter. In such a circumstance, appellant asserts, the statute of frauds is inapplicable.

{¶ 14} "Although a promise to pay the debt of another has been defined as an undertaking by a person not previously liable, for the purpose of securing or performing the same duty for which the original debtor continues to be liable, the question of whether

or not an oral promise comes within the meaning of the Statute of Frauds depends to a great extent upon the nature of the promise and the surrounding circumstances." *Drake, Phillips, Kuenzli & Clark v. Skundor* (1986), 27 Ohio App.3d 337, 339.

{¶ 15} Whether an agreement is an original undertaking, not subject to the statute of frauds, or collateral, requiring a writing, is generally a question of fact. Id. What a party needs to allege and prove to establish an original agreement is, "* * * that the leading purpose of the promisor is to subserve or promote an interest of his own * * *." Id., quoting Annotation (1951), 20 A.L.R.2d 246, 247-248. In Ohio, the test is: in order to recover on an express unwritten promise to pay a debt accrued by another, the plaintiff must show that the "* * * leading object [of a promisor] in making that promise was to subserve some pecuniary or business purpose of his own, although it may be alleged and proved that those services were necessary for and beneficial to not only the [third party beneficiary] but also the [promisor.]" *Wolf v. Friedman* (1969), 20 Ohio St.2d 49, paragraph one of the syllabus.

{¶ 16} The *Drake* case is instructive. There, Skundor entered into an oral agreement with attorney Drake to represent Skundor's son in a criminal matter. When Drake demanded payment for his services from Skundor, Skundor refused. Drake sued. In the trial court, Skundor successfully defended the suit, raising the same statute of frauds argument that is in this case. The court of appeals reversed, applying this standard:

{¶ 17} "Simply stated, if it can be determined that [Skundor] secured the services of Drake for his own benefit, and not merely for his son, the oral promise would constitute an original obligation of the defendant, and would not be subject to the Statute of Frauds." *Drake* at 339-340. Viewing the undisputed evidence, the court of appeals concluded that Drake had established that Skundor's "primary purpose was to subserve his own interests * * *." Id. at 340.

{¶ 18} In this matter, as in *Drake*, appellant submitted evidence which construed in her favor would tend to demonstrate that appellee intended to serve her own interests, as well as those of her daughter, in employing appellant's services. In her affidavit, appellant avers that appellee approached her and requested that appellant provide services to appellee's daughter. Appellee also avers that appellant offered to pay for these services. Moreover, appellee was close to her daughter and her grandchildren and specifically had an interest in denying a change of custody, as that would take her grandchildren to Arizona, far away from her. Appellant supported this last point with an email appellee sent to her, lamenting the transfer of custody.

{¶ 19} On this evidence, we can only conclude that a question of fact exists as to the material issue of appellee's intentions in entering into the alleged agreement. A question of fact on a material issue precludes summary judgment. Accordingly, appellant's first assignment of error is well-taken. Since this case must be remanded, appellant's second assignment of error is moot.

{¶ 20} On consideration whereof, the judgment of the Toledo Municipal Court is reversed. This matter is remanded to said court for trial. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE