[Cite as *Ryan v. Huntington Trust,* 2015-Ohio-1880.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

KATHLEEN M. RYAN, et al. PLAINTIFFS-APPELLANTS	)	CASE NO. 12 MA 84
VS.	)	OPINION
HUNTINGTON TRUST, JMD fka SKY TRUST NA, et al. DEFENDANTS-APPELLEES	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 10 CV 3968
JUDGMENT:	Affirmed.

JUDGES:

Hon. Cheryl L. Waite
Hon. Frank D. Celebrezze, Jr., of the Eighth District Court of Appeals, sitting by assignment.
Hon. Sean C. Gallagher, of the Eighth District Court of Appeals, sitting by assignment.

Dated: May 12, 2015

[Cite as *Ryan v. Huntington Trust,* 2015-Ohio-1880.]

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WAITE, J.

{¶1} Appellant Kathleen M. Ryan appeals the decision of the Mahoning County Common Pleas Court granting summary judgment to three defendants in a case involving allegations of breach of fiduciary duty, concealment of assets, fraudulent inducement and negligence. The matter arose due to a trust created by Appellant's mother, Elizabeth L. Ryan. Appellant sued the trustee, the drafter of the trust, and the trust advisor. All defendants filed motions for summary judgment. As Appellant failed to properly rebut the evidence in support of summary judgment, the court granted summary judgment to all three. Appellant has not established any basis for liability against the lawyer who drafted the trust or the trust advisor, and summary judgment was properly granted to them on that basis. Appellant failed to properly rebut the trustee's motion for summary judgment, hence, summary judgment was appropriately granted to the trustee. Appellant's argument regarding the lack of specific judgment entries pertaining to a variety of pending motions is moot, as all pending motions are deemed overruled at the time of final judgment. Appellant's assignments of error have no merit, and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Appellant Kathleen Ryan initiated the underlying suit challenging the formation and administration of a trust created by her mother, Elizabeth Ryan. Appellant alleged that the trust drafter, advisor and trustee collectively breached the trust by failing to provide her with adequate funds from the trust for her living expenses. Appellant also alleged that the drafter of the trust should have known that her mother was not legally competent, and thus, committed fraud in the inducement

with regard to the creation of the trust. In addition to challenging the formation of the trust, Appellant alleged that the trust was mismanaged by the trustee, Huntington Trust, and by the trust advisor, Ralph Zerbonia. Huntington Trust is the successor in interest to the original trustee, Sky Trust N.A. Appellant also alleged impropriety with respect to an IRA account that was one of the primary assets of the trust. Appellant further alleged that a parcel of real estate was improperly conveyed from the trust. A fourth defendant, Youngstown State University, was dismissed from the case and is not a part of this appeal

{¶3} Appellant's mother, Elizabeth, created an irrevocable spendthrift trust on March 28, 2003, within a week of her husband's death. According to the trust document, Elizabeth transferred to the trust all of her personal property, real property, financial accounts, and notes receivable. Elizabeth, as the settlor and initial beneficiary of the trust, received from Sky Trust, the trustee, $2,000 per month until her death on December 11, 2004. As the secondary beneficiary, after Elizabeth's death Appellant would be entitled to $2,000 per month. The trust document directs the trustee to distribute $2,000 of the net trust income and/or principal to Appellant, or to apply the amount directly to her bills for her benefit. The trust designated Appellee Ralph Zerbonia as a trust advisor. (Ryan Trust, Section 6.06.)

{¶4} The trust document gives the trustee absolute discretion to pay "such amounts from principal as it deems advisable to the Beneficiary, or for the benefit of the Beneficiary for the health, education, maintenance or support of the Beneficiary in clear and exigent circumstances," when there has been a recommendation from the

trust advisor. (Ryan Trust, p. 3.) The section concerning the trustee's discretion specifically explained that the discretion is intended to manage the rate at which trust assets are dissipated: "In this regard the Settlor instructs that the Trustee is to be circumspect in making distributions to principal, being cognizant that [Appellant] has never been good at managing her finances, and recognizing that the Settlor desires that the trust principal last for the lifetime of [Appellant], if possible." (Ryan Trust, p. 3.)

{¶5} Appellant began receiving funds as the trust beneficiary in January of 2005. The trust accounting filed by Appellee Huntington Trust in support of its motion for summary judgment reflects $44,075.32 in distributions from trust assets to Appellant in 2005. In 2006, distributions were $31,373.41; in 2007, $33,690.26; and in 2008, due in part to court costs in connection with Appellant's incarceration in Virginia, $54,664.86. In 2009 the trust distributed approximately $48,000.00, and in 2010 it distributed approximately $36,000.00.

{¶6} The trust document also grants the trustee power to "[s]ell, convey, exchange, convert, improve, repair, manage, operate, and control" trust property. (Motion for Summary Judgment of Ralph Zerbonia, Exhibit A, p. 4.) The trustee exercised this power to sell property located at 55 Huxley Place, Newport News, Virginia, a trust asset.

{¶7} Each of the three defendants filed motions for summary judgment. The trial court granted summary judgment, in separate judgment entries, to each:

Huntington Trust, Ralph Zerbonia and Nils P. Johnson. Appellant filed a timely appeal of these entries.

{¶8} On November 6, 2012, we granted a motion for a limited remand in order to allow the trial court to rule on a pending motion for reconsideration. On remand, the trial court denied Appellant's motion. Appellant filed an appeal of this later ruling, which is designated Appeal No. 13 MA 29, challenging the trial court's review of the motion for reconsideration. We allowed the two appeals to be argued together, but they have not been consolidated and each appeal has been resolved separately.

FIRST ASSIGNMENT OF ERROR

> The court erred in failing to rule on outstanding motions, including an amended complaint, knowing that Huntington had failed to comply with discovery requests and discovery was incomplete prior to ruling on summary judgment.

{¶9} Appellant contends that the trial court's decision to grant Appellees' summary judgment motions prior to ruling on a number of pending motions was error. One such motion contained a request to file an amended answer. Other motions dealt with various discovery issues, mediation, and other pretrial matters.

{¶10} The three summary judgment motions were filed within a few weeks of each other. Huntington Bank filed on January 31, 2012; Ralph Zerbonia filed on February 2, 2012; and Nils P. Johnson filed *instanter* with leave of court, on February 21, 2012.

{¶11} Appellant's motion for extension of the discovery deadline and trial timeline was filed on January 20, 2012, eighteen days after the discovery deadline (January 2, 2012) had passed. (6/28/11 Scheduling Order.) On February 10, 2012, while the Huntington Bank and Zerbonia summary judgment motions were pending, the trial court denied Appellant's motion to extend the discovery deadline and her motions to continue mediation, the final pretrial, and the May 15, 2012, trial. On February 21, 2012, after having her motion to extend the discovery deadline denied, Appellant filed yet another motion to compel discovery from Huntington Trust. On February 27, 2012, while the renewed motion to compel discovery was pending, Appellant filed a memorandum in opposition to all three summary judgment motions.

{¶12} On March 2, 2012, when Appellees were filing their expert witness disclosures, Appellant filed motions for reconsideration, asking the trial court to reconsider its decision as to her requests to extend the discovery deadline, including the deadline for expert witnesses and reports, and again seeking to extend mediation, final pretrial, and the trial dates. These motions, as well as a motion for leave to amend the complaint, were filed two months after the dispositive motions deadline had passed and three months after the discovery deadline had passed.

{¶13} On appeal, Appellant cites the federal rules of civil procedure and federal caselaw in support of her argument that the trial court should have entered specific rulings on pending motions before entering judgment. Appellant's decision to rely on federal law is mistaken. Suits in Ohio common pleas courts are governed by the Ohio Rules of Civil Procedure: "These rules prescribe the procedure to be

followed in all courts of this state in the exercise of civil jurisdiction at law or in equity." Civ.R. 1(A).

{¶14} Further, in Ohio a motion "not expressly decided by the trial court when the case is concluded is ordinarily presumed to have been overruled." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 3, 2002-Ohio-2985, 770 N.E.2d 58, ¶13. This presumption is based on the "logic that, by issuing a final judgment in a pending case, the trial court has exhibited an intent to completely dispose of the * * * proceeding; under such circumstances, it must be presumed that the court wanted to dispose of all other pending motions in a manner consistent with the final disposition of the case." *State ex rel. Fontanella v. Kontos*, 11th Dist. No. 2007 T 0055, 2007-Ohio-5213, ¶9. Thus, this record reflects the trial court's denial of all pending motions by means of the entry of final judgment. It is not an abuse of discretion for a trial court to dispose of pending motions in this manner. *Id.*

{¶15} With regard to Appellant's motion to amend the complaint, the Ohio Civil Rules provide:

> A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written

> consent or the court's leave. The court shall freely give leave when justice so requires.

Civ.R. 15(A).

{¶16} Appellant's original complaint was filed on October 19, 2010. Appellant's motion to amend her complaint was filed on March 2, 2012. Appellant argues that the trial court should have allowed her to amend her complaint because, according to Appellant, Appellees did not obey the direction to comply with discovery as set forth in the trial court's June 24, 2011 scheduling order. In support of this argument Appellant cites *Peterson v. Teodosio*, 34 Ohio St.2d 161, 175, 297 N.E.2d 113 (1973):

> [W]here it is possible that the plaintiff, by an amended complaint, may set forth a claim upon which relief can be granted, and it is tendered timely and in good faith and no reason is apparent or disclosed for denying leave, the denial of leave to file such amended complaint is an abuse of discretion.

{¶17} In *Peterson*, the party sought to amend a facial error in the complaint. The party had omitted the date of discovery relevant to the count of fraud that was the basis of the lawsuit. In *Peterson* the correction was necessary to complete the elements of the cause of action at an early stage in the suit.

{¶18} Unlike the plaintiff in *Peterson*, Appellant sought leave to amend the complaint two years after the suit was filed. Appellant's motion was made only after all opposing parties had filed motions for summary judgment and the trial court's

deadline for Appellant's response to summary judgment had passed. The substance of Appellant's motion to amend did not address any defect in the original complaint. Instead, Appellant referred to a document received on February 10, 2012, as additional evidence. Appellant does not explain why this document, which did not affect the allegations in the complaint, made it necessary to file an amended complaint. There is nothing in this record that supports a conclusion that the trial court abused its discretion in denying a motion to amend the complaint after discovery had concluded and after summary judgment motions had been filed. The record supports the trial court's apparent conclusion that no amendment was necessary and that the matter was ripe for judgment.

{¶19} Apart from the failure of the trial court to specifically rule on each of the pending motions, Appellant does not identify any error or abuse of discretion in the trial court's implied denial of Appellant's outstanding motions. "[A]bsent an abuse of discretion an appellate court must affirm a trial court's disposition of discovery issues." *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998). "An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable decision." *Id.* This record does not reflect an unreasonable, arbitrary, or unconscionable action by the trial court in entering final judgment rather than separately denying all pending motions. Appellant's first assignment of error is without merit and is overruled.

SECOND ASSIGNMENT OF ERROR

> The trial court erred in failing to consider the facts as presented in the pleadings and evidence of the plaintiff that presented genuine issues of material fact in dispute.

THIRD ASSIGNMENT OF ERROR

> The court made legal conclusions, allowed affiants to make legal conclusions, improperly weighed evidence and made judgments on witness credibility based on the pleadings of Nils Johnson and the affidavits of Crystal Hudspeth and Ralph Zerbonia.outside [sic] the scope of summary judgment and properly left for a jury.

{¶20} Appellant's second and third assignments of error both address the trial court's compliance with Civ.R. 56 when ruling on Appellees' motions for summary judgment. For that reason, the two assignments will be evaluated together. The standard of review for our evaluation of a trial court's decision to grant summary judgment is *de novo*. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is governed by Civ.R. 56(C), which states:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it

> appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶21} A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel*, *Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (1999). In summary judgment, a court may not resolve ambiguities in the evidence presented and is strictly limited to the "evidence or stipulation" in the record. *Inland Refuse Transfer Company v. Browning–Ferris Industries of Ohio*, *Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). Before summary judgment can be granted, the court must determine that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶22} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim*." (Emphasis sic.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the burden

shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest on the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute exists over material facts, *Henkle v. Henkle*, 75 Ohio App.3d 732, 600 N.E.2d 791 (1991). At summary judgment, unlike trial, the evidentiary material a court may consider is strictly limited: "No evidence or stipulation may be considered except as stated in this rule." Civ.R. 56(C). The material explicitly allowed by the rule includes only "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact." Civ.R. 56(C).

{¶23} "The proper method for introducing evidentiary materials not specifically authorized by Civ.R. 56(C) is to incorporate them by reference into a properly framed affidavit." *Citibank v. McGee*, 7th Dist. No. 11 MA 158, 2012-Ohio-5364, ¶14; Civ.R. 56(E). The absence of a properly framed affidavit requires a court to exclude material, even copies of government records, where that material has not been properly placed in the record. *CitiMortgage v. Foster*, 7th Dist. No. 11MA115, 2012-Ohio-6274, ¶9-11. Civ.R. 56(E) states that: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." The nonmoving party, in response to a motion for summary judgment, must produce some evidence that suggests that a reasonable

factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn*., 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (1997).

{¶24} Appellant alleges that the trial court improperly weighed the evidence produced by Appellees in support of their motions for summary judgment and allowed the affiants to make legal conclusions. However, Appellant has not identified any fact or averment in any affidavit filed in this instance to indicate that it is unlikely the affiant possessed the necessary personal knowledge. In the absence of any indication that the affidavits filed in support of Appellees' motions are not based on the necessary personal knowledge, it is generally accepted that "[a] mere assertion of personal knowledge satisfies Civ.R. 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit." *Residential Funding Co., LLC v. Thorne*, 6th Dist. No. L-09-1324, 2010-Ohio-4271, ¶70.

{¶25} Appellees each produced motions for summary judgment accompanied by affidavits sworn by parties who explained their knowledge and set forth specific facts establishing competence to discuss the matters set forth in each affidavit. Each affiant specifically referenced and incorporated the documents attached to the affidavit. Appellant did not. What purports to be the "VERIFICATION AFFIDAVIT OF 'PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT' [sic]" is a copy of a document composed of two sentences:

> I, KATHLEEN M/ RYAN, the undersigned Affiant and a Plaintiff in the above- captioned case, being first duly sworn, depose and [sic] that I

> am over the age of eighteen (18) years, sui juris, and am a United States citizen currently, and at all material times hereto have been a resident of the City of Newport News, Commonwealth of Virginia. Further, I have read the foregoing "PLAINTIFFS' [sic] RESPONSE TO DEFENDANT'S [sic] MOTION FOR SUMMARY JUDGMENT," and that the factual averments and representations set forth therein are true and correct to the nest [sic] of my knowledge, information and belief.

{¶26} Appellant never filed the actual affidavit, and the acknowledgement paragraph that Appellant may have signed does not include any specific averments or otherwise identify the facts to which she purports to attest. Thirteen exhibits attached to Appellant's response are not referenced in or incorporated by any affidavit. No other affidavit or authenticating material was offered in support of these thirteen exhibits filed by Appellant.

{¶27} Appellant's apparent attempt to reference the voluminous contents of her response to summary judgment does not itself "set forth such facts as would be admissible in evidence," nor does her statement of citizenship and residence establish her personal knowledge of the range of information included in the document or incorporate by reference any evidentiary materials attached to the document. Civ.R. 56(E). Although Appellant attempts to explain the deficiencies of her response by alluding to discovery documents received within weeks of the due date for her response motion, the documents she describes simply do not address the subject matter of the claims made in her complaint or the motions for summary

judgment. Appellant completely failed to present or place in the record, whether by affidavit or otherwise, any evidence that supported her complaint. In the absence of material in the record demonstrating the existence of material facts requiring litigation, summary judgment in favor of the defendants was appropriate. *Temple*, *supra.* This record reflects the trial court's compliance with Civ.R. 56. The decision to enter summary judgment was not error, and Appellant's second and third assignments of error are overruled.

FOURTH ASSIGNMENT OF ERROR

> The trial court erred in determining that Defendant Johnson is immune from liability based on **Simon v. Zipperstein 32 Oh. St. 3d 74; 512 NE 2d. 636 (1987),** [sic] and in concluding that his only act was "merely to assist in transferring assets to the trust."

{¶28} This assignment of error affects only the drafter of the trust document, Appellee Nils Johnson. Appellant alleges that the trial court erred in its application of *Simon v. Zipperstein*, 32 Ohio St.3d 74, 512 N.E. 2d 636 (1987), when it determined that Appellee Johnson was immune from liability. In *Simon* the Supreme Court found:

> [I]n Ohio * * * an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice.

Id. at 76.

{¶29} The rule in *Simon* was reaffirmed in *Shoemaker v. Gindlesberger*, 118 Ohio St. 3d 226, 2008-Ohio-2012, 887 N.E.2d 1167: "We decline to change the rule of law in this state that bars an action for negligence against a lawyer by a plaintiff who is not in privity with the client." *Id.* at ¶20. *Shoemaker* dealt with children who were beneficiaries under their mother's will. They sued their mother's attorney for preparing a deed that transferred some of the mother's property in a way that increased estate taxes, and thus, decreased the children's inheritance. In *Shoemaker*, the Ohio Supreme Court continued to uphold the principle that potential beneficiaries, such as children who might inherit under their parents' will, cannot sue the parents' attorney regarding estate planning, absent a showing of privity with or proof of malice by the attorney.

{¶30} Appellant contends that she has presented evidence of malice and that Appellee Johnson did not act with the full knowledge of his client due to Elizabeth Ryan's alleged legal incompetence which Appellant states was due to mental impairments. Again, no evidence pertaining to malice or impairment has been placed in the record by Appellant. Moreover, the acts Appellant alleges to be evidence of malice appear to be unconnected to the actual service Appellee Johnson performed: drafting the trust document. Appellant does not specifically address the privity requirement. This record reflects that based on *Simon* and *Shoemaker*, Appellee Johnson is immune from liability from the type of claims presented in Appellant's complaint. The trial court properly granted summary judgment to Johnson. Appellant's fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

> The court erred in determining that Ralph Zerbonia is not a fiduciary and owes no duty to Kathleen or Patrick Ryan, and in failing to consider the illegal use of his authority to evict the plaintiffs and to approve funds that amounted to over $7,000 for legal fees to evict the family from their home upon Defendant Huntington's request and not the request of Plaintiff.

{¶31} In Appellant's fifth assignment of error she seeks to have the Court ignore Appellee Zerbonia's status as an uncompensated trust advisor who has no access to trust assets and, instead, find that he should be considered a fiduciary. Zerbonia is listed in the trust only as an advisor. A trust advisor has only the authority given by the terms of the trust instrument. *Papiernik v. Papiernik*, 45 Ohio St.3d 337, 544 N.E.2d 337 (1989), paragraph five of the syllabus. According to Appellant, the trial court should have found that Appellee Zerbonia exceeded his authority as trust advisor when he approved the trustee's decision to sell the house owned by the trust. Appellant clearly disagrees with the decision made by the trustee that the house was an undesirable drain on trust assets due to its state of disrepair and Appellant's failure to keep the mortgage current as a condition of occupancy. Appellant does not explain, however, how Appellee Zerbonia exceeded his authority when agreeing with the recommendation that the house be sold. The trust clearly allows the advisor to make recommendations. (Ryan Trust, Section 6.06.) Nor does Appellant explain her belief that Appellee Zerbonia, as trust advisor, had a duty

relevant to reporting on the status of an IRA as a part of the trust. Appellant fails to establish any legal basis for her allegations concerning the IRA and offers no legal support for her argument concerning fiduciary obligations.

{¶32} The trial court's April 6, 2012, judgment entry granting Appellee Zerbonia's motion for summary judgment reflects the trial court's determination that there was no evidence presented that Appellant suffered an injury resulting from inclusion of the IRA in the trust, and that even if Appellant had suffered some injury attributable to this inclusion, Appellee Zerbonia, as a trust advisor, would not be culpable for that injury. The trial court further found no evidence of record that Appellee Zerbonia breached his responsibility as trust advisor by recommending regular disbursements of trust assets to Appellant and her creditors. Finally, the trial court found that there was no evidence that Appellee Zerbonia was involved in fraudulently inducing the creation of the trust. Nothing in the record before us or presented by Appellant on appeal contradicts the trial court's findings. Appellant's fifth assignment of error is overruled.

Conclusion

{¶33} The trial court did not err in granting summary judgment to Appellees. Appellant has not established any basis of liability regarding Appellee Johnson, who drafted the trust, or Appellee Zerbonia, who was listed in the trust as a trust advisor. As far as Appellee Huntington Trust, the trustee, is concerned, Appellant failed to present evidence pursuant to Civ.R. 56 to rebut the motion for summary judgment, and thus, Appellant did not raise any genuine issues of material fact for trial. The trial

court was not required to specifically rule on each of Appellant's pending motions prior to granting summary judgment, as all pending motions are deemed overruled at the time final judgment is granted. Appellant's five assignments of error are without merit and are overruled. The judgment of the trial court is affirmed.

Celebrezze, Jr., J., concurs.

Gallagher, J., concurs.