[Cite as *Komorowski v. John P. Hildebrand Co., L.P.A.*, 2015-Ohio-1295.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101500

TERESE KOMOROWSKI

PLAINTIFF-APPELLANT

vs.

JOHN P. HILDEBRAND CO., L.P.A., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED IN PART, DISMISSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-752483

BEFORE: Celebrezze, A.J., McCormack, J., and Stewart, J.

RELEASED AND JOURNALIZED: April 2, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Appellant, Terese Komorowski, brings this appeal challenging the grant of summary judgment in favor of appellees, John P. Hildebrand, Co., L.P.A. and John P. Hildebrand, Sr. ("Jack"), in her legal malpractice action against them and John P. Hildebrand, Jr. ("Jake"). She also challenges the court's decision to deny her motion for summary judgment in part, and the court's decisions regarding certain discovery matters. After a thorough review of the record and pertinent law, we reverse in part, dismiss in part, and remand.

I. Factual and Procedural History

{¶2} Terese's husband, Kenneth Komorowski, died on June 14, 2009. Prior to his death, he contributed significantly to the finances of the household. He paid two mortgages on the home where he, Terese, and their two children lived. Ken was ill prior to his death and he missed mortgage payments for a few months prior to his untimely passing. Shortly after Ken's death, Terese learned that the two mortgages on the home were in arrears and notices sent to Ken from the first mortgagee indicated that it would seek foreclosure if the mortgage was not made current, including penalties for late payments. Terese attempted to contact the mortgagee to discuss the matter, but she was not a signatory on the note secured by the first mortgage, so the bank would not discuss the matter with her. She attempted to cure the arrearage by tendering a check for the amount of outstanding payments less the penalties with the first mortgage lender, but the

bank refused to accept her certified check because it was for less than the full amount it required to cure the default.

{¶3} Prior to the filing of any foreclosure action, as a result of this and other issues surrounding her husband's death, Terese sought the assistance of an attorney. Jake agreed to represent her and accepted a $1,800 retainer on July 15, 2009 without a written fee agreement. Jake and Terese differ on the type and amount of work that Terese had engaged Jake to do. Terese testified in her deposition that Jake would attempt to resolve any foreclosure issues so she could remain in her home as well as handle her late husband's estate. Jake testified that he would expend nine or ten hours doing whatever he could in that time on her foreclosure issues.[1] He never advised her that his license to practice law was suspended in January 2009, which he indicated he did not discover until November 2009. He also never provided her with written fee bills indicating the work performed or hours billed. He also received the original cashier's check that Terese had attempted to pay to the bank and retained it at his office.

{¶4} A foreclosure action was filed by the bank on July 20, 2009. A timely answer was not filed in the case, and a default judgment was entered on May 20, 2010. Jake attempted to file a motion for leave to plead and answer on June 8, 2010, using Jack's name and bar registration number accompanied by an entry of appearance naming Jack as attorney for Terese. However, the court denied leave to plead. Ultimately,

[1] It should be noted that Jake's deposition had to be compelled by the court after several attempts to depose him were unsuccessful. He had admittedly read the deposition testimony of others in preparation for his own deposition.

Terese's home was sold at sheriff's sale and an order confirming the sale was entered on September 3, 2010.

{¶5} According to Jake's deposition testimony, soon after the notice of appearance was filed, he moved to New York for several months. Jake further testified that by this time, he was no longer representing Terese, but failed to inform her of that. Terese testified that she called his cell phone and office numerous times during this period. She testified that she spoke with Jack a few times, either in person or over the phone, in an effort to contact Jake. She testified that at one point, Jack said "if he had to go down and file the information himself, it would be handled."

{¶6} Jack and Jake operated out of the same office and used the name "Hildebrand & Hildebrand" from approximately 2004 through 2009. However, both testified they operated separate practices that merely shared office space. The firm name was used in phone book advertisements, as well as on a website advertising the services of the firm. Letterhead bearing the name was also used.

{¶7} On April 4, 2011, Terese filed an action individually and as representative of her husband's estate against Jake, Jack, and John P. Hildebrand Co., L.P.A. She asserted claims of malpractice, conspiracy, fraud, and conversion.

A. Summary Judgment for Jack

{¶8} In Terese's first two assignments of error, she alleges that the court erred in granting summary judgment in favor of Jack and his business entity John P. Hildebrand Co., L.P.A.

> Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined 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 such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶9} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988). In *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996), the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991). Under *Dresher*, "the 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." *Id*. at 296. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id*. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. *Id*.

{¶10} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty. Commrs.*, 87 Ohio App.3d 704, 622 N.E.2d 1153 (4th Dist.1993). An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party.

* * * [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul*, 71 Ohio App.3d 46, 50, 593 N.E.2d 24 (8th Dist.1990).

> To establish a cause of action for legal malpractice, a claimant must demonstrate the existence of an attorney-client relationship giving rise to a duty, a breach of that duty, and damages proximately caused by that breach. *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 105, 538 N.E.2d 1058. Accordingly, as we explained in *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, 887 N.E.2d 1167, "[i]f a plaintiff fails to establish a genuine issue of material fact as to any of the elements, [the attorney] is entitled to summary judgment." *Id*. at ¶ 8.

New Destiny Treatment Ctr., Inc. v. Wheeler, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 25.

{¶11} Here and below, Jack argued that he owed no duty to Terese because no attorney-client relationship ever existed between them. Terese admitted in her deposition that she did not hire Jack as her attorney, and he uses this to argue such a relationship was never established.

{¶12} For a malpractice claim to succeed, there must be an attorney-client relationship. The important considerations are the manifest intentions of the attorney and prospective client. *Id*. at ¶ 26.

> A relationship of attorney and client arises when a person manifests an intention to obtain legal services from an attorney and the attorney either consents or fails to negate consent when the person has reasonably assumed that the relationship has been established. *Id*.; 1 Restatement of the Law 3rd, The Law Governing Lawyers (2000) 126-128, Section 14. Thus, the existence of an attorney-client relationship does not depend on an express contract but may be implied based on the conduct of the parties and the reasonable expectations of the putative client.

Id.

{¶13} A review of the evidence in a light most favorable for Terese leads to the conclusion that there remains a material question of fact regarding this issue. The possibility of the establishment of a legal relationship occurred, according to Terese's testimony, when she met with Jack in person with her brother present. When Terese explained her exasperation about Jake, she said that Jack indicated "if he had to go down and file the information himself, it would be handled." Viewed in a light most favorable to Terese, this could establish an attorney-client relationship. Jack, through prior conversations with Terese, was aware of her predicament and possibly agreed to provide her legal aid in some manner. He was also aware that Jake's license to practice law was suspended as early as November 2009.

{¶14} Jack disputes that he ever said he would personally assist Terese. This amounts to a disputed question of material fact. An attorney-client relationship may

have been formed at this point. It is for the jury to weigh the credibility of this testimony and determine if Jack indeed agreed to intervene in the situation between Terese and Jake by filing something in the foreclosure action. John P. Hildebrand, Co., L.P.A. may be liable under agency principles for the actions of Jack in this matter.

{¶15} It is also possible that Jack may be held responsible under traditional principles of partnership law. The fact that Terese stated she did not hire Jack is not conclusive where she could hold the reasonable belief that she hired Jake as part of the Hildebrand & Hildebrand firm. In the present case, Jake and Jack held themselves out to be a legal partnership by advertising under the Hildebrand and Hildebrand name. Simply because a registered business entity with that name does not exist does not lessen the impression this advertising of legal services under this name has on the public. Under such circumstances, a partnership may be implied where a party relied on those representations.

{¶16} R.C. 1776.38(A), effective in 2008, states,

> [i]f a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to any person to whom the representation is made if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable

> with respect to that liability jointly and severally with any other person consenting to the representation.

{¶17} Here, public advertisements were made that represented that a partnership existed between Jack and Jake. But also under the facts of this case, Terese did not base her decision to hire Jake on any of these representations. She did not see any of the advertisements for the Hildebrand & Hildebrand firm and based her decision to hire Jake on the recommendation of another who did not disclose Jake's last name or any association with Jack. Terese testified she did not have knowledge of any partnership when she hired Jake. But this unreasonably narrows the possible reliance Terese may have placed on the partnership. What little Jake did to assist Terese that exists in the record demonstrates that Terese had a reasonable basis to believe that Jake worked for or was a partner in the Hildebrand & Hildebrand firm. A letter sent on Terese's behalf to the attorney representing the bank in the foreclosure action was also sent to Terese. That letter was drafted by Jake on Hildebrand & Hildebrand firm letterhead. Terese did not speak with Jack about her difficulties reaching Jake until 2010, after Jack had stopped using the name, but Terese may have had a reasonable belief that the Hildebrand & Hildebrand firm was working on her behalf.[2] That belief appears bolstered in the record when appeals to Jack to have Jake contact Terese were successful. Nothing in the record demonstrates that anyone informed Terese that the Hildebrand & Hildebrand firm did not exist or no longer existed. A material question of fact remains in that respect.

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[2] By November 2009, Jack stopped using the Hildebrand & Hildebrand name.

{¶18} Further, a formal partnership is not required in order for one to be liable for the actions of one acting as a partner. A partnership will be implied "when the parties have acted in such a way that a partnership has come into operation. The relevant inquiry is not whether the parties intend that the law describe their relationship as a partnership, but rather whether they intend a relationship that includes the essential elements of partnership." *Allen v. Niehaus*, 1st Dist. Hamilton Nos. C-000213 and C-000235, 2001 Ohio App. LEXIS 5540, *20 (Dec. 14, 2001), citing The Law of Agency and Partnership (3 Ed.2001), Chapter 1, Section 3. R.C. 1776.22(A) states, "any association of two or more persons to carry on as co-owners a business for-profit forms a partnership, whether or not the persons intend to form a partnership."

{¶19} In such a situation, one partner may be liable for the acts or omissions of other partners, even fraudulent acts when carried out to further partnership goals. The actions and advertisements of Jake and Jack leave no question that they held themselves out as a partnership.

{¶20} Finally, this court cannot say that Terese could not have arrived at a better outcome had she received competent legal representation. The prejudice to her case carried all the way through the appellate process as this court even noted that she failed to participate in the underlying foreclosure action until a default judgment was granted when overruling her assigned errors in a previous appeal. She was also able to produce an amount of money to bring her first mortgage current shortly after learning of its delinquency and it would be speculation to rule at this time that the outcome of her case

would have been the same had adequate steps been taken in 2009. Jack claims Terese was unable to come up with the money necessary to save her home, but she testified that she could have borrowed money from her parents. Therefore, a material question of fact exists in this regard as well.

{¶21} Therefore, the trial court erred in granting summary judgment in favor of Jack and his company.

B. Summary Judgment for Terese

{¶22} In her third assignment of error, Terese argues that her motion for summary judgment should have been granted against all parties. The motion as it relates to Jack and his business entity have been disposed of above. The trial court did grant Terese's motion for summary judgment related to Jake, but only as to liability for her fraud claim. The denial of summary judgment, however, is generally not a final appealable order. R.C. 2505.03(A) provides, "[e]very *final order*, judgment, or decree of a court and, when provided by law

* * * may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction." (Emphasis added.) With limited exception, the denial of a motion for summary judgment is not cabable of review as it is interlocutory in nature when it is not determinative of the action or a substantial right. That is the case here. No rights have been substantially affected or determined by the court's denial of Terese's motion for summary judgment. Therefore, it is not ripe for review at the present time. *Browder v. Shea*, 10th Dist. Franklin No. 04AP-1217,

2005-Ohio-4782; *Palmer v. Pheils*, 5th Dist. Delaware No. 03CAE04025, 2003-Ohio-6114. This portion of the appeal is dismissed.

C. Motion to Compel

{¶23} In Terese's fourth assignment of error, she alleges that the trial court should have granted her motion to require Jack and Jake to produce a document Jake viewed in preparation for his deposition. Jake reviewed a number of documents prior to his deposition, including an email from Jack that contained attached documents purportedly related to insurance coverage. The documents, which are not a part of the record, are described as communications between Jack and Minnesota Lawyers Mutual Insurance ("MLM"), a company providing legal malpractice insurance to Jack. The trial court found that the documents contained attorney work product.

{¶24} To assert this privilege,

> a party must "establish[] that the documents he or she seeks to protect were prepared 'in anticipation of litigation.'" *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006) (citation omitted). "[I]n anticipation of litigation" has been defined by the Sixth Circuit as "'prepared or obtained *because* of the prospect of litigation.'" *Id*. (citation omitted) (emphasis in original). That belief has two parts — a party must subjectively believe litigation is a possibility, and that subjective belief must be objectively reasonable. *Id*. at 594 (citation omitted).
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> To assert attorney-client privilege, the Sixth Circuit has stated that: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *United States v. Goldfarb*, 328 F.2d 280, 281 (6th Cir.1964) (citations omitted).

United States v. Smith, 245 F.R.D. 605, 613 (N.D.Ohio 2007). That court went on to note that "production of privileged documents to another party waives both the attorney-client privilege and the work product privilege with respect to another party seeking the same materials." *Id*., citing *In re Columbia/HCA Healthcare Corp. Billing Practices Litig*., 293 F.3d 289, 304, 306-07 (6th Cir.2002). However, "'disclosure to a person with an interest common to that of the attorney or the client normally is not inconsistent with an intent to invoke the work product doctrine's protection and would not amount to such a waiver.'" *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 564 (E.D. Pa.1989), quoting *In re Doe*, 662 F.2d 1073, 1081 (4th Cir.1981).

{¶25} The work-product privilege is codified in Civ.R. 26(B)(3) in Ohio:

> Subject to the provisions of subdivision (B)(5) of this rule [relating to retained experts], a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor.

"Good cause" requires a showing that the information sought is relevant and otherwise unavailable. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 57.

{¶26} Applying these factors to the present case, Jack voluntarily sent the documents he now claims are protected to Jake for inspection prior to deposition. By this act, Jack may have made these documents relevant in the case. A party conducting a deposition is entitled to know what materials the deponent used to refresh recollections in

preparation for the deposition. Evid.R. 612. However, Terese was not able to demonstrate that this information was necessary and unavailable. Jack had already produced communications between him and MLM. Terese had Jack's application for insurance that listed Hildebrand & Hildebrand as the firm insured under the policy as well as communications Jack sent to MLM removing that name from the policy. The trial court's determination that Terese did not establish good cause in this case is not an abuse of discretion.

{¶27} Additionally, the sharing of information between codefendants has been found, when analyzing federal rules, not to constitute waiver of the work-product privilege:

> "[D]isclosure to an adversary waives the work product protection as to items actually disclosed." *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 90 (E.D.N.Y. 1981). As the Court of Appeals for the District of Columbia Circuit stated, "the health of the adversary system — which spawned the need for protection of an attorney's work product from discovery by an opponent — would not be well served by allowing [parties] the advantages of selective disclosure to particular adversaries, a differential disclosure often spurred by considerations of self-interest." *In re Subpoenas Duces Tecum*, 738 F.2d [1367] at 1372 [(D.C.Cir.1984)]. By the same token, "disclosure to a person with an interest common to that of the attorney or the client normally is not inconsistent with an intent to invoke

> the work product doctrine's protection and would not amount to such a waiver." *In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981), cert. denied, 455 U.S. 1000, 102 S.Ct. 1632, 71 L. Ed. 2d 867 (1982).

In re Sunrise Sec. Litig., 130 F.R.D. 560, 564 (E.D.Pa.1989).

> "The purpose of the work-product rule is '(1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.' Civ.R. 26(A). To that end, Civ.R. 26(B)(3) places a burden on the party seeking discovery to demonstrate good cause for the sought-after materials."

Id., quoting *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 16. Holding that the sharing of information between codefendants waives this privilege does not advance these goals. Therefore, it was not an abuse of discretion for the trial court to deny Terese's motion to compel production of the email and attached documents.

III. Conclusion

{¶28} The trial court erred in granting summary judgment to Jack where material questions of fact remain regarding the formation of an attorney-client relationship and whether Jack may be liable for the actions of Jake through agency and partnership principles. The trial court's decision to deny Terese's motion as to Jake is interlocutory in nature and not capable of review at this time. Finally, the court did not err in finding that a document that contained attorney work-product was not subject to disclosure in this case.

{¶29} This cause is reversed in part, dismissed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover costs from appellee.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE
TIM McCORMACK, J., and
MELODY J. STEWART, J., CONCUR