[Cite as *Effinger v. Nicholson*, 2024-Ohio-5818.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JEFFREY R. EFFINGER, :

Plaintiff-Appellant, :

No. 113670

v. :

ANTONIO NICHOLSON, ESQ, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: December 12, 2024

Civil Appeal from the Cuyahoga County Common Pleas Court
Case No. CV-22-969897

Appearances:

Robert J. Gargasz, *for appellant*.

Winter|Trimacco, LPA, Jason D. Winter, and Courtney J. Trimacco, *for appellees*.

ANITA LASTER MAYS, J.:

{¶1} Plaintiff-appellant Jeffrey Effinger ("Effinger") appeals the trial court's decision granting summary judgment and finding that the defendants-appellees Antonio Nicholson and Nicholson Law, LLC ("the appellees") have no liability for legal malpractice. We affirm the trial court's decision granting summary judgment and its findings. We also overrule the appellees' assignment of error.

I. Facts and Procedural History

{¶2} Effinger hired the appellees to represent him in his divorce from Carrie Effinger ("Carrie"). During the divorce proceedings, Effinger decided to sell his marital home to his parents, Maureen and Robert Effinger ("the parents"). Effinger wanted to remain in the home, but the home was owned jointly by Effinger and Carrie. According to Effinger, he wanted his parents to purchase the home to relieve him of a substantial mortgage debt and real estate tax debt and permit him the opportunity to live in the home.

{¶3} According to Effinger, the appellees stated that they would represent both Effinger and the parents in the real estate transaction, which the appellees deny. As part of the purchase agreement for the home, the parents were to deposit $150,000 in escrow with Carrie's legal representative, Max Haupt ("Haupt"). The parents believed that the purchase money was to demonstrate their good faith and financial capability.

{¶4} On November 4, 2021, Maureen Effinger met with Haupt and gave him the check for $150,000, believing that she was purchasing the marital home. The next day, at the final divorce hearing, it was discovered that Haupt gave the money to Carrie as part of her share of the equity in the home. As a result, the parents were not able to purchase the property.

{¶5} The appellees argue that they never agreed to represent the parents in the real estate transaction and that the parents met with Haupt on their own and arranged for the purchase of the home. On November 4, 2021, Effinger and Carrie appeared in court to finalize their separation agreement. The appellees read each line of the separation agreement aloud to Effinger to ensure his understanding.

{¶6} According to the separation agreement, regarding the marital property, Effinger agreed that he would be awarded the martial home and that he and his parents would pay Carrie $150,000 for her portion of the equity in the home. Effinger initialed each page of the separation agreement and signed the entire agreement at the end. The divorce court issued the decree of the divorce and adopted and incorporated the separation agreement.

{¶7} Effinger attempted to modify the divorce decree, but the Fifth District Court of Appeals dismissed his appeal. Effinger argued that the appellees advised him to not read the document and just sign the papers, so he was not aware of the terms of the agreements concerning the marital home.

{¶8} On October 12, 2022, Effinger filed a complaint against the appellees, who filed their answer on December 14, 2022. On January 12, 2023, the appellees filed a motion for judgment on the pleadings, and the trial court denied their motion. The trial court ordered Effinger's expert report due on September 17, 2023, and the appellees' expert report due October 17, 2023.

{¶9} Effinger's expert report was submitted to the trial court on July 29, 2023. Effinger's expert's report stated, in part:

> That Atty. Antonio Nicholson was retained and hired by Robert Effinger & Maureen Effinger as their attorney to provide them legal representation and advice concerning and involving their consideration of and decision to proceed with the purchase of the marital residence located at 8668 Lansdale Avenue, NW, North Canton, Ohio 44720 from their son Jeffrey Effinger and their daughter-in-law Carrie Effinger for the purchase price of $150,000.00, with the then existing mortgage indebtedness to be paid and satisfied prior to transfer of title, etc., alias set forth above.
>
> That Jeffrey Effinger as a seller of the real estate referred to in paragraph No. 5 above was also represented by Atty. Antonio Nicholson.
>
> That, as previously stated above, Mr. & Mrs. Effinger, on or about November 3, 2021, did as Buyers, verbally agree to purchase the fee simple title interest to the above-mentioned marital residence from their son. Jeffrey Effinger and Carrie Effinger as sellers, for the sum of $150,00.00; with the understanding and agreement that the outstanding mortgage indebtedness owed to Freedom Mortgage Corporation would be fully paid and satisfied from the $150,000.00 purchase price proceeds and the premises would be free of Liens and encumbrances, subject only to current taxes and assessments, not yet due or payable; and with the right to have a final walkthrough inspection of the premises prior to transfer of title. It was Atty. Nicholson who had suggested and recommended this purchase arrangement to his divorce client, Jeffrey Effinger.
>
> That Atty. Nicholson was negligent in his legal advice and representations due to his failure to cause or demand that the verbal agreement entered into by Mr. & Mrs. Effinger to purchase the subject real estate from their son, Jeffrey Effinger and their daughter-in-law Carrie Effinger for $ 150,000.00 etc., be reduced to a written agreement and be signed by all parties, to wit: by the buyers, Robert Effinger & Maureen Effinger and by the sellers, Jeffrey Effinger (son of the buyers) and Carrie Effinger (daughter-in-law of the buyers).

As per the Ohio statute of frauds, RC 1335.05 an agreement to buy or sell real estate must be in writing, in order to be binding and enforceable as between the parties to the transaction. A copy of RC 1335.05 is attached hereto, incorporated herein and marked as Exhibit No. 1.

The written buy-sell contract which Atty. Nicholson failed to prepare, or provide or demand, would have or should have included at the minimum, provisions as follow: i) That the Buyers receive a policy of title insurance issued by a title insurance company licensed to do business in Ohio in the amount of the $150,000.00 purchase price insuring that the Buyers, Mr. & Mrs. Effinger, receive a good, marketable title, free of liens and encumbrances, except for current taxes and assessments; ii) Designation of a qualified, disinterested third party to serve as escrow agent. This could have been a licensed agent of the title insurance company providing the Owner's Policy of Title Insurance to the Buyers, as discussed above and as authorized by RC 3953.23 and .231, copies attached, incorporated herein and marked as Exhibit Nos. 2 & 2A.

In this matter, Atty. Max Haupt was not a disinterested, neutral third-party escrow agent. Instead, he was the attorney for Carrie Effinger, one of the sellers, who at the same time as verbally agreeing to sell the subject real estate to Mr. & Mrs. Effinger was also involved in a contested, and apparently contentious divorce action against the other seller, Jeffrey Effinger. Atty. Haupt represented Carrie Effinger in both the divorce proceeding and as a seller of the subject real estate; iii) It is the fiduciary duty of a qualified, disinterested escrow agent to cause the terms, conditions and provisions of a real estate purchase agreement to be fully carried out, as agreed to in writing by the parties. In this case, such duties would have included obtaining mortgage loan pay-off amounts and instruction from the mortgage holder Freedom Mortgage Corporation, in order to satisfy the mortgage indebtedness; and that the payoff of the mortgage indebtedness be disbursed from the $150,000.00 purchase price deposited with Atty. Haupt as escrow agent by the buyers. When fully paid, the mortgage indebtedness would have been removed as an encumbrance upon the premises. Also the escrow agent would have paid any and all delinquent real estate taxes and assessments from the $150,000.00 purchase price proceeds which the buyers had deposited with the escrow agent; and after payment of any other closing costs, the escrow agent would have disbursed any monies remaining, to the sellers, equally. Finally, the escrow agent would not have permitted the deed of conveyance to be recorded or the title to the premises to transfer to the buyer unless the buyer would obtain a good and marketable title to the premises, free of all liens and encumbrances except taxes and assessments not yet due or payable, and in the event $150,000.00 was insufficient to accomplish the above outcome, the escrow agent would have notified the parties, both buyers and sellers, and would not have permitted the title to transfer and the deed to be recorded without further communication with the sellers and buyers; iv) Also, a clause in the written purchase agreement giving the right to the buyers to conduct a final walk through inspection of the premises and that this right of inspection be carried out immediately prior to transfer of title in order to ensure to Buyers that the premises had not been damaged; further in the event that the premises had been damaged, as in this case, to allow recourse to the Buyers prior to transfer of title. It would have been the duty of the escrow agent to enforce such a right of entry for a walkthrough inspection by the buyers before the title transferred. Again, in this case there was no written purchase agreement containing a right of final inspection to the buyer.

Finally, Atty. Nicholson's failure to demand or cause the above matters to be included and set forth in the Separation agreement was negligent. Instead, the separation agreement, as signed and approved by Atty. Nicholson's client, Jeffrey Effinger at Article 7A, pages 9-10 recited and ordered that the sum of $150,000 was to be paid by Jeffrey Effinger and his parents, Mr. & Mrs. Effinger to the wife (Carrie Effinger) for her portion of the equity in the marital residence. This was not the verbal agreement entered into by Mr. & Mrs. Effinger as Buyers to purchase the marital premises. This was not the understanding of Mr. & Mrs. Effinger as buyers. Likewise, it was not the verbal agreement entered into by Jeffrey Effinger as a Seller. Further Mr. & Mrs. Effinger were joined as parties to the divorce litigation. Atty. Nicholson failed to object to the terms set forth in the Separation agreement as being inconsistent with and contrary to the verbal agreements made by Carrie Effinger and Jeffrey Effinger as sellers with Mr. & Mrs. Effinger, as Buyers. Atty. Nicholson did not object, nor did he instruct his client Jeffrey Effinger not to sign the Separation agreement as prepared and submitted by Atty. Haupt; and further Atty. Nicholson did not inform the Court of the contrary, inconsistent and conflicting provisions included at page 9-10, Article

7A of the Separation agreement with the verbal agreements of Jeffrey Effinger and Carrie Effinger to sell the marital premises to Mr. & Mrs. Effinger. Instead, Atty. Nicholson placed his signature of approval in the Judgment Entry, Decree of Divorce. The Separation agreement, as signed and approved by Atty. Nicholson's client, Jeffrey Effinger, was adopted and incorporated into the Judgment Entry, Decree of Divorce.

The various failures of Atty. Nicholson as set forth above in paragraph Nos. 8 and 9 above were negligence on the part of Atty. Nicholson. Atty. Nicholson failed in his duties to competently advise his clients, Mr. & Mrs. Effinger and to competently and diligently protect the legal interests and financial interests of his clients in the purchase of the premises located at 8668 Lansdale Avenue, NW, North Canton, Ohio 44720, resulting in their loss of the $150,000.00 deposit, which they delivered and presented to Atty. Haupt, as escrow agent.

Further Atty. Nicholson failed to competently and diligently protect the legal interests and financial interests of his client, Jeffrey Effinger in and to the marital residence, and in particular the equitable interest of Jeffrey Effinger in and to the marital residence.

It can also be concluded that the failure of Atty. Nicholson to cause or demand that the verbal agreement to purchase real estate as entered into by Mr. & Mrs. Effinger to be reduced to an enforceable written contract, allowed a fraud to be worked on them. Due to the fraud, the resulting damage was their loss of the $150,000.00 check/deposit delivered and presented to Atty. Haupt, acting as "escrow agent" on November 3, 2021. Instead of Atty. Haupt causing the Freedom Mortgage Corporation mortgage indebtedness to be fully paid off and satisfied from the $150,000.00 proceeds received, apparently Atty. Haupt disbursed the entire $150,000.00 escrow deposit to his client, Carrie Effinger and/or otherwise according to her direction. A complete itemization and accounting of the disbursements as made by Atty. Haupt as escrow agent was not provided by him and are unknown at this time. It is reasonable to believe that a written purchase agreement, signed by all parties, and containing and setting forth all terms and conditions of the sale of the real estate, as verbally agreed and including the designation of a disinterested, third party to act as escrow agent, who would have ensured that the buyers received a good and marketable title to the premises, free of liens and encumbrances, would have resulted in a binding, enforceable contract, and further would have avoided the loss of the $150,000.00 deposit/payment made by Mr. & Mrs. Effinger. That Mr. & Mrs. Effinger pursuant to the advice and instructions provided to them by Atty. Nicholson, did on November 3, 2021, present and deliver the $150,000.00 cashier check to Atty. Haupt, as escrow agent; the check was made payable to Atty. Haupt and Carrie Effinger, as payment for purchase of the subject real estate. However, in return Mr. & Mrs. Effinger received nothing and instead, as set forth above, have lost $150,000.00.

The above damages suffered by Mr. & Mrs. Effinger, and the loss of the $150,000.00 which they deposited with Atty. Max Haupt acting as escrow agent, was a direct and proximate result of the carelessness and negligence of Atty. Nicholson to provide competent advice and to provide protection to his said clients by way of properly drawn written real estate purchase agreement, executed by both the sellers and buyers.

Finally, the negligent and careless conduct of Atty. Nicholson, all as outlined and discussed above, were in the opinion of this writer violations of the Ohio Rules of Professional Conduct as promulgated by the Supreme Court of Ohio. In particular, the conduct of Atty. Nicholson violated: "Rule 1.1: Competence: A lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." and "Rule 1.3 Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client."

The violations of the above referenced Ohio Rules of Professional Conduct do encompass and describe the negligence and carelessness of Atty. Nicholson in representing his clients, and an apparent indifference on the part of Atty. Nicholson as to the resulting damages suffered by his clients, Robert Effinger & Maureen Effinger, parents of Jeffrey R. Effinger; and to Jeffrey R. Effinger.

Report and Affidavit of Michael J. Scherach, ESQ. In Support of Legal Malpractice Claim Against Antonio Nicholson and/or Nicholson Law, LLC, submitted by Jeffrey Effinger (July 29, 2023).

{¶10} After numerous proceedings and filings by both parties, the appellees filed a motion for summary judgment on December 28, 2023. On January 31, 2024, the trial court granted summary judgment in favor of the appellees.

{¶11} Effinger filed this appeal assigning two errors for our review:

> 1. The trial court erred by granting defendants Antonio Nicholson, Esq. and Nicholson Law, LLC's motion for summary judgment finding that defendants have no liability for legal malpractice that had been proven to exist and that proximately caused their client injury and damages; and
>
> 2. The trial court erred by denying Jeffrey R. Effinger's motion for summary judgment on his proven claim of malpractice accomplished by defendants' Antonio Nicholson, Esq, and his firm Nicholson Law, LLC as their existed no genuine issue of fact before the trial court, and all elements of legal malpractice of Antonio Nicholson, Esq. had been established and proven as required by law, and injury and damages to client Jeffrey R. Effinger had been demonstrated as being proximately caused by said legal malpractice of defendants.

{¶12} While the appellees did not assign an error arguing that the trial court erred in granting their motion for summary judgment and denying Effinger's, nor did they file a cross-appeal, they raised an assignment of error arguing that the trial court erred by considering all of the evidence submitted by Effinger because the evidence did not comply with Civ.R. 56 and the rules of evidence.

II. Summary Judgment

A. Standard of Review

{¶13} "We review summary judgment rulings de novo, applying the same standard as the trial court." *U.S. Bank Trust Natl. Assn. v. Keane*, 2024-Ohio-727, ¶ 16 (8th Dist.), citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Civ.R. 56 provides for when summary judgment is appropriate: (1) no genuine issue as to any material fact exists; (2) the party moving for summary judgment is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party. "The party moving for summary judgment bears this burden and must set forth specific facts that demonstrate its entitlement to summary judgment." *Id.*, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). "If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, summary judgment is appropriate only if the nonmoving party fails to establish the existence of a genuine issue of material fact." *Id.*, citing *id.* at 293.

B. Law and Analysis

{¶14} In Effinger's first assignment of error, he argues that the trial court erred by granting the appellees' motion for summary judgment, finding that the appellees have no liability for legal malpractice that had been proven to exist and that proximately caused their client injury and damages. Effinger contends that the appellees are liable for legal malpractice because they were negligent in failing to demand that the separation agreement represent the verbal agreement that the parents had to purchase the marital home rather than give Carrie $150,000 for her interest in the marital home. All other claims of legal malpractice in the expert report concerned the parents and not Effinger. The parents are not a party to this case, so we will only consider claims of legal malpractice directly involving the appellees' duty to Effinger.

{¶15} Effinger signed and initialed every page of the separation agreement but argues that the appellees advised him to not read the document and just sign. "Ohio law favors the enforcement of an in-court settlement agreement voluntarily reached between the parties." *Obloy v. Sigler*, 2015-Ohio-877, ¶ 12 (8th Dist.), citing *Walther v. Walther*, 102 Ohio App.3d 378, 383 (1st Dist.1995). "Such an agreement is binding and enforceable, so long as it is not procured by fraud, duress, overreaching, or undue influence." *Id.*, citing *id.* "Furthermore, 'neither a change of heart nor poor legal advice is a reason to set aside a settlement agreement.'" *Id.*, quoting *id.*

{¶16} Article 20 of the separation agreement that Effinger initialed and signed states:

> Each party fully understands all of the terms of this Agreement, and the terms represent and constitute the entire understanding between them. No provision in this Agreement is to be interpreted for or against any party because that party or that party's legal representative drafted the provision.

> Captions contained herein are inserted as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this Agreement or any provision hereof.
>
> This agreement sets forth the entire agreement between the parties with regard to the subject matter hereof. There are no other agreements, covenants, representations or warranties, whether express or implied, oral or written.
>
> Each party has read this Agreement and finds it to be in accordance with his or her understanding, and his or her signature in the presence of the witnesses indicated below.

{¶17} Effinger now maintains that he was not aware that the $150,000 would be given to Carrie for her share of the equity in the marital home, even though it was stated in the separation agreement, because the appellees told him not to read it and thus committed legal malpractice.

> "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*, 43 Ohio St.3d 103, 105 (1989). Accordingly, as we explained in *Shoemaker v. Gindlesberger*, 2008-Ohio-2012, '[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."

Meehan v. Smith, 2022-Ohio-2359, ¶ 27 (8th Dist.), quoting *New Destiny Treatment Ctr., Inc. v. Wheeler*, 2011-Ohio-2266, ¶ 25.

{¶18} The facts in this instant case are analogous to the facts in *Schneider, Smeltz, Ranney & LaFond, P.L.L. v. Kedia*, 2003-Ohio-4567 (8th Dist.), where Kedia, the appellant, argued that his attorneys committed legal malpractice because he signed a settlement agreement with terms different from those to which he told the attorneys he would agree. *Id.* at ¶ 12. The appellant argued that he signed the agreement without reading it. However,

> [t]he separation agreement which Kedia signed provides that "each party fully understands all the terms herein set forth, which terms represent and constitute the entire understanding between them, and each has read this Agreement and finds the same to be in accordance with his and her understanding, and each does hereby voluntarily execute this Agreement and affix his or her signature hereto in the presence of the witnesses indicated below."

Id. at ¶ 13.

{¶19} This court, in *Schneider*, ruled that "[a]s a matter of law, the firm did not breach any duty to its client under these circumstances." *Id.* at ¶ 14. We find the same is true in this case. Effinger had an opportunity to read the agreement and all the terms before signing. Additionally, Effinger initialed each page of the agreement, and his initials are next to the part of the agreement that explains how the marital property would be distributed. The facts reveal Effinger signed a statement that stated he fully understood the terms, had read the agreement, and found it to be in accordance with his understanding. He cannot now contradict that statement to create a genuine issue of fact for trial. *Id. See, e.g., Spatar v. Avon Oaks Ballroom*, 2002-Ohio-2443, ¶ 21 (11th Dist.).

{¶20} In reviewing the elements of attorney malpractice, it is clear that an attorney-client relationship between Effinger and Nicholson gave rise that a duty existed. However, the analysis above, does not reveal a breach of that duty. In *Shoemaker v. Gindlesberger*, 2008-Ohio-2012, the court held that "[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." The second element has not been established. Therefore, we need not address the third element of injury or damages.

{¶21} Therefore, Effinger's first assignment of error is overruled.

{¶22} In Effinger's second assignment of error, he argues that the trial court erred in denying his motion for summary judgment against the appellees for his legal malpractice claims. As stated above, Effinger has not demonstrated that the appellees committed legal malpractice against him.

{¶23} Therefore, Effinger's second assignment of error is overruled.

III. Appellees' Assignment of Error

{¶24} The appellees raised an assignment of error arguing that the trial court erred by considering all of the evidence submitted by Effinger because the evidence did not comply with Civ.R. 56 and the rules of evidence. In the trial court's journal entry granting the appellees' summary judgment motion, it stated, in part:

> Defendants Antonio Nicholson, Esq. and Nicholson Law, LLC's motion for summary judgment, filed 12/28/2023, is granted. The court, having considered all the evidence and having construed the evidence most strongly in favor of the non-moving party, determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact, and that defendant is entitled to judgment as a matter of law. Summary Judgment is therefore entered in favor of defendant and against plaintiff.

Journal Entry No. 173012001 (Jan. 31, 2024).

{¶25} The appellees argue that the trial court erred in considering nonadmissible evidence such as settlement discussions, malpractice insurance, affidavits, unauthenticated texts, transcribed telephone conversations, and the reports from Effinger's experts. However, the trial court did not specify what evidence it considered nor what evidence it reviewed. The appellees did not provide this court with evidence supporting this assignment of error, just inferences. App.R. 16(A)(7). We cannot make a determination from the record that the trial court incorrectly considered nonadmissible evidence. *See Walsh v. Walsh*, 2023-Ohio-1675, ¶ 9 (8th Dist.), citing *Thornhill v. Thornhill*, 2009-Ohio-5569, ¶ 11 (8th Dist.) ("According to App.R. 12(A)(2), an appellate court may decline to address an assignment of error if an appellant fails to cite any legal authority to support his argument.").

{¶26} Therefore, the appellees' assignment of error is overruled.

{¶27} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

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.

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ANITA LASTER MAYS, JUDGE

WILLIAM A. KLATT, J.,* CONCURS (WITH SEPARATE OPINION);
SEAN C. GALLAGHER, P.J., DISSENTS (WITH SEPARATE OPINION)

(*Sitting by assignment: William A. Klatt, J., retired, of the Tenth District Court of Appeals.)

WILLIAM A. KLATT, J.,* CONCURRING:

{¶28} I concur in the majority opinion. I write separately to point out an additional basis for affirming the trial court's judgment. To establish a claim for legal malpractice, a plaintiff must prove both the breach of a standard of care and damages proximately resulting from that breach. Here, even if the appellees breached a duty of care by not properly explaining the substance of the separation agreement, appellant suffered no damage. In fact, the appellant benefitted from the agreement.

{¶29} Prior to the separation agreement, the appellant owned a 50 percent interest in the marital residence (subject to a mortgage lien). Pursuant to the separation agreement, the appellant acquired a 100 percent interest in the marital residence (subject to the same mortgage lien). Therefore, the appellant realized a financial benefit from the separation agreement. Without proof of damages proximately caused by the breach of duty, there can be no recovery for legal malpractice.

SEAN C. GALLAGHER, P.J., DISSENTING:

{¶30} Whether an attorney breached a duty owed to a client does not depend on whether an agreement entered by the client is enforceable. Because the majority focuses on the enforceability of a separation agreement instead of the legal malpractice claims advanced, I respectfully dissent.

{¶31} I disagree with the majority's disregard of Effinger's arguments solely based on *Schneider, Smeltz, Ranney & LaFond, P.L.L. v. Kedia*, 2003-Ohio-4567, ¶ 14 (8th Dist.), a case cited in a cursory argument presented by the appellees regarding the enforceability of the separation agreement. Whether the separation agreement is enforceable is irrelevant to the question raised in this appeal that there are genuine issues of material fact as to whether Nicholson breached the duty he owed to Effinger to render competent legal advice before Effinger executed the separation agreement. The majority opinion essentially creates a rule in this district that legal malpractice can never be based on an attorney's alleged misrepresentation of the effect of the terms contained in a document the client signs because the client is always required to read and understand the document regardless of their attorney's advice. That, in no uncertain terms, cannot be the rule. Transactional attorneys would always be absolved of their responsibility if the majority's decision becomes the rule of law.

{¶32} First and foremost, Nicholson's claim with respect to *Kedia* is limited to the proposition that Effinger "is bound by the separation agreement he signed."

That argument is beside the point in this case, in which the primary issue is whether there is disputed evidence of a breach of a duty owed by Nicholson preceding execution of the agreement.

{¶33} In order to advance a claim of malpractice, Effinger has to, in part, proffer evidence of a breach of duty and damages. Enforceability of the settlement agreement pertains to damages, not whether a breach of duty occurred. The majority is merging two separate and distinct issues. Effinger would be unable to demonstrate that he was damaged by any alleged breach of duty for legal malpractice if he was not bound by the terms of a separation agreement. If Effinger was not bound by the terms of the separation agreement, then his attorney's advice in entering that agreement, if indeed a breach of the standard of care, would not have caused any damage to Effinger. Thus, even assuming that Nicholson is correct that Effinger is bound by the terms of the separation agreement, that conclusion does not impact the question whether the attorney breached his duty owed to the client by providing deficient legal advice regarding the settlement agreement entered. The majority opinion is taking the appellees' argument out of context and crafting that into a new argument not actually presented.

{¶34} Nevertheless, *Kedia* is inapplicable. In *Kedia*, a law firm initiated an action on an account for unpaid services rendered. *Id.* The defendant claimed that those fees were the product of malpractice because he had engaged the attorney to enter settlement negotiations on his behalf that resulted in a different outcome than anticipated. *Id.* The attorney presented the defendant with a draft settlement agreement that was later executed, *but there were no allegations that the attorney advised the defendant of the contents or effects of that document*. *Id.* From that undisputed fact, the panel concluded the client failed to proffer any evidence "that the firm had reason to believe that [its client] was relying on it to inform him of any terms which were different from those they had discussed." *Id.* Instead, the undisputed evidence demonstrated that "[t]he firm gave him a copy of the agreement before he signed it so that he could evaluate the terms himself." *Id.* That demonstrated that there was no breach of duty because the client never asked his attorney to explain the document, the consequences of the document, or any issues with enforceability of the document.

{¶35} *Kedia* presents a remarkably different fact pattern from the current case, in which Effinger expressly claims that he was not advised as to the effects of the contents of the settlement document, which it turned out contained settlement terms that resulted in a different form of settlement than Effinger had initially discussed with his attorney. Further, Effinger alleged that his attorney failed to advise him that the sale of the home could not be enforced without a signed writing such that the divorce settlement document would not be legally sufficient. *Kedia* has no bearing on this case. And importantly, I would not rely on that case to create a bright-line rule in this district that proffered evidence of an attorney affirmatively misadvising a client as to the contents or legal effect of a document does not constitute legal malpractice per se because the client must always read and independently understand the document. For this reason, I cannot join the majority's analysis that will always absolve an attorney of malpractice based on the client's need to read and understand documents independently of the legal advice rendered.

{¶36} And finally, the majority claims that Effinger was not damaged because he retained the home subject to a mortgage despite the separation agreement not achieving his intended result. That conclusion is not self-evident, and it is an issue that Nicholson has not raised in his brief — Nicholson's sole argument as to damages is limited to a break in the causal chain caused by the malfeasance of another attorney. Regardless, the undisputed evidence demonstrated that the couple owed $120,000 on the existing mortgage owed on the marital home. Had the home been purchased by Effinger's parents, at the least each would have been entitled to a share of the $30,000 equity in the home if the property value were divided evenly. Further, Effinger retained the house but only subject to the bank's mortgage note, not a home owned free and clear by his parents. The conclusion that Effinger has presented no genuine issues of fact as to damages is not borne out by the record.

{¶37} For these reasons, I must respectfully dissent. Notwithstanding, because the majority has not addressed the arguments raised in Effinger's merit brief, I will not offer any advisory opinion on those matters.