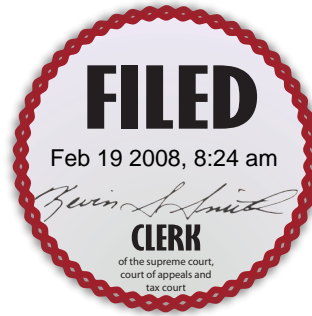


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT NESBITT,

Appellant-Plaintiff,

vs.

KATIE JACKEL,

Appellee-Defendant.

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No. 49A05-0706-CV-347

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn Moberly, Judge
Cause No. 49D12-0506-CT-023114

February 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff Robert Nesbitt appeals the trial court's grant of summary judgment in favor of appellee-defendant Katie Jackel regarding his legal malpractice claim against Jackel. Specifically, Nesbitt argues that the trial court abused its discretion in striking his expert witness's affidavit regarding the standard of care of an estate planning attorney. Moreover, Nesbitt argues that the grant of summary judgment was erroneous because a genuine issue of material fact existed as to whether Jackel committed legal malpractice in drafting Nesbitt's estate planning documents. Concluding that the trial court properly struck the expert witness's affidavit and properly granted summary judgment for Jackel, we affirm.

FACTS

Sometime in 2003, eighty-eight-year-old Nesbitt, who resided in an assisted living facility in West Lafayette, became concerned about his estate planning documents that he had executed in Ohio years ago when he and his wife lived there. After receiving a direct mail solicitation from United Financial Systems Corporation (UFSC) that advertised the "avoidance of probate," Nesbitt contacted a representative from the company. Appellant's App. p. 68.

A UFSC representative visited Nesbitt at the retirement community, and it was determined that the vast majority of Nesbitt's wealth was concentrated in Exxon Mobil and Pfizer stocks. Nesbitt subsequently purchased a "trust package" from UFSC for \$2495. Pursuant to an agreement executed with UFSC, Nesbitt retained UFSC as his "agent to engage the services of an attorney for the preparation of certain legal documents." Id. at 365. On July 28, 2003, Jackel telephoned Nesbitt and informed him

that she was the attorney who would be drafting Nesbitt's estate planning documents. Jackel was an independent contractor attorney for UFSC and maintained her office in the UFSC offices in Indianapolis.¹

Although Jackel could not recall many specifics about the conversation, she acknowledged that she typically discusses the contents of the client's financial organizer, as well as the reasons for creating a trust. Jackel believed that she would have discussed the concepts of a pour-over will, powers of attorney, and a living will with Nesbitt. Jackel also stated that she would have answered all of Nesbitt's questions regarding his estate plan. Finally, Jackel acknowledged that she had no concerns about Nesbitt's mental health or competency, and she believed that Nesbitt understood the nature of the estate planning documents that she was going to draft for him.

Thereafter, Jackel drafted the documents and forwarded them to Nesbitt. Jackel asked Nesbitt to contact her if he had any questions when he reviewed and executed the documents. Thereafter, on August 27, 2003, Kay Larsen, a financial planner and representative of UFSC, delivered an estate planning binder to Nesbitt that included a will, a revocable living trust, powers of attorney, and other related documents. Larsen instructed Nesbitt in the mechanics of signing each document and witnessed Nesbitt's signature. Larsen also obtained copies of monthly statements from Nesbitt evidencing his stockholdings in Pfizer and Exxon that were valued in excess of \$250,000. During that meeting, Nesbitt and Larsen discussed the possibility of Nesbitt selling his stock and

¹ Jackel graduated from Valparaiso Law School in 1996 and worked as an independent contractor for UFSC. Although Jackel subsequently moved to Ann Arbor Michigan in 2005, she retained a post office box address in Indianapolis.

purchasing some annuities. Larsen explained to Nesbitt that she had consulted Betty Maddux—an accountant—to analyze the tax consequences of the stock sale. Larsen explained to Nesbitt that his tax liability for selling the stock would amount to \$113.

As a result of the representations that Larsen and Maddux made regarding the capital gains tax liability, Nesbitt sold all of his stock in early September 2003 and purchased four annuity contracts through four different insurance companies. It was later determined that Nesbitt's capital gains tax on the sale of his stock amounted to over \$37,000. As a result, because there were no assets for Nesbitt to place in trust, the trust remained unfunded except for Nesbitt's checking account that held only nominal funds. Thereafter, all of the insurance companies cancelled the annuity contracts and returned Nesbitt's premiums to him.

On March 29, 2005, Nesbitt sued UFSC, Larsen, Jackel, and Maddux for breach of fiduciary duty, fraud and misrepresentation, and securities fraud. Nesbitt included a count against Jackel for legal malpractice and a claim against Maddux for accounting malpractice. As a result, Nesbitt sought the following damages:

- (a) \$2495 for unnecessary purchase of will and revocable living trust
- (b) \$37,321 for capital gains tax incurred
- (c) Loss of value of Pfizer and Exxon stock
- (d) Loss of income and stock dividends
- (e) Accounting fees
- (f) Attorney fees
- (g) Prejudgment interest
- (h) Costs of the action
- (i) Punitive damages.

Appellant's App. p. 6-7. Nesbitt claimed that Larsen "misrepresented facts to plaintiff and persuaded plaintiff that he sell his entire stockholdings in order to purchase deferred annuities through defendants Larsen and UFSC." Id. at 15-16. Nesbitt also asserted that the capital gains tax consequences were "grossly misrepresented" and that he "suffered damages as a result of [the] defendants' misrepresentations." Id. at 15.

On April 21, 2006, the trial court approved a joint case management plan that the parties had agreed upon. That plan required Nesbitt to disclose his witnesses by May 15, 2006, and Jackel was required to disclose her witnesses by June 15, 2006. After Nesbitt failed to provide the required expert disclosures in accordance with the case management plan, Jackel informed Nesbitt's counsel by email on June 9, 2006, of the missed deadlines. In that correspondence, Jackel stated that she was reserving the right to disclose her experts after Nesbitt disclosed his. Nesbitt's counsel did not acknowledge or object to Jackel's communication.

On July 28, 2006, Nesbitt provided answers to Jackel's interrogatories. When asked to name "each person (including any expert) who will testify" about Nesbitt's contention that the will and trust were "unnecessary," Nesbitt responded: "Richard Bartholomew and estate planning attorney to be named. Id. at 38 (emphasis added). The discovery process closed on August 15, 2006.

On August 28, 2006, Nesbitt settled his claims against UFSC and Larsen for \$45,000. Nesbitt also dismissed Maddux from the action. Thereafter, on September 1, 2006, Jackel filed a motion for summary judgment, claiming that she was entitled to judgment as a matter of law because it "is undisputed that Jackel did not proximately

cause any of the damages that [Nesbitt alleged that he] suffered in his complaint.” Id. at 48. In support of her claim, Jackel submitted the affidavit of Brian Hewitt, an estate planning attorney. In essence, Hewitt opined in the affidavit that Jackel did not breach the required standard of care.

Nesbitt filed an opposition to the motion for summary judgment and submitted an affidavit from Bartholomew. Bartholomew, an accountant and estate planning attorney, averred that it was his opinion that Jackel breached the standard of care in her representation of Nesbitt because she failed to: (1) disclose conflicts of interest; (2) examine Nesbitt’s existing estate plan; (3) determine Nesbitt’s need for the trust package that UFSC had sold to him; (4) determine his health status and mental capacity to make the estate planning decisions sold to him by UFSC; (5) disclose that the UFSC sales agent would endeavor to sell him annuities; (6) inform Nesbitt of the need for independent tax advice on the sale of capital assets; (7) follow Nesbitt’s directive to have his daughter present when the documents were signed; and (8) act in her client’s best interests.

Thereafter, Jackel filed an amended motion for summary judgment, and moved to strike Bartholomew’s affidavit, claiming, among other things, that Bartholomew had not been timely disclosed as an expert witness. In response, Nesbitt moved to strike the affidavit of Hewitt—Jackel’s expert—on the grounds that Jackel’s expert was similarly not timely disclosed.

Following a hearing, the trial court granted Jackel’s motion to strike Bartholomew’s affidavit, denied Nesbitt’s motion to strike Hewitt’s affidavit, and granted Jackel’s motion for summary judgment on February 28, 2007.

In relevant part, the trial court's order provided that:

The Defendant supplied adequate expert testimony by way of an affidavit to negate the Plaintiff's claim of legal malpractice. In response, for the first time, the Plaintiff designated an affidavit of Mr. Bartholomew, an attorney. Mr. Bartholomew had never been disclosed as an expert witness. Even in response to the Defendant's e-mail addressing the failure to disclose an expert, Plaintiff did not reply. Plaintiff listed Mr. Bartholomew as a potential witness on his Witness List, but did not identify him as an expert. The Indiana Trial Rules specifically require supplementing an interrogatory that requests expert witness information. The Defendant sent such regarding what the Plaintiff thought an expert would opine. Plaintiff never disclosed who the expert would be nor what his opinion would be until filing the response to the Amended Motion for Summary Judgment. For the first time, Plaintiff attached an affidavit from Mr. Bartholomew expressing an opinion. The Defendant timely filed a Motion to Strike the affidavit of Mr. Bartholomew. The court grants the Defendant's motion and strikes the affidavit of Mr. Bartholomew in response to the Defendant's Amended Motion for Summary Judgment. In addition, during the hearing on February 2, 2007, the Plaintiff orally moved to strike the affidavit of Mr. Hewitt. The court denies this motion. There are no grounds to strike Mr. Hewitt's affidavit. The Defendant complied with the Case Management Order by the June 9 email, and disclosed Mr. Hewitt well in advance of the filing of the Amended Motion for Summary Judgment.

The Court grants Defendant's Amended Motion for Summary Judgment as to Count IV of Plaintiff's Complaint, legal malpractice, only.

Appellant's App. p. 11-12. Thereafter, the trial court entered an order clarifying that final judgment had been entered with regard to Jackel: "Jackel is awarded a final judgment against Plaintiff, Robert K. Nesbitt, as to all claims and allegations pled by Mr. Nesbitt against Ms. Jackel in Plaintiff's Complaint for Damages. All of the issues in this case as to Ms. Jackel are now resolved." Id. at 9. Nesbitt now appeals.

DISCUSSION AND DECISION

I. Motion to Strike

Nesbitt contends that the trial court abused its discretion in striking Bartholomew's affidavit. Specifically, Nesbitt argues that the "logic and effect of the circumstances" of this case compel the conclusion that the affidavit was erroneously stricken because there was "no danger of surprise or prejudice" to Jackel. Appellant's Br. p. 14.

In resolving this issue, we note that the decision to grant or deny a motion to strike a summary judgment affidavit is vested in the trial court's sound discretion. City of Gary v. McCrady, 851 N.E.2d 359, 363 (Ind. Ct. App. 2006). We should reverse such an exercise of discretion only when the decision is clearly against the logic and effect of the facts and the circumstances. Price v. Freeland, 832 N.E.2d 1036, 1039 (Ind. Ct. App. 2005).

As discussed above, Nesbitt answered Jackel's interrogatories on July 28, 2006. When asked to name "each person (including any expert) who will testify" about Nesbitt's contention that the will and trust was "unnecessary," Nesbitt responded: "Richard Bartholomew and estate planning attorney to be named." Appellant's App. p. 38. The discovery process closed, and Nesbitt never supplemented his answers to the interrogatories.

It is apparent that because Nesbitt did not identify an expert witness or opinions regarding the standard of care for an estate planning attorney in accordance with the case management plan directives, Jackel made the strategic decision to file a summary judgment motion in part because of Nesbitt's inability to establish essential elements of

his cause of action. Jackel's summary judgment motion also included Hewitt's affidavit, and it was not until Nesbitt filed his memorandum in opposition to the motion for summary judgment on January 16, 2007, that he submitted Bartholomew's affidavit, which offered opinions regarding the standard of care for an estate planning attorney.

We note that the exclusion of the testimony from an undisclosed witness is one of the sanctions available to the trial court when a party fails to comply with discovery directives. Brown v. Terre Haute Reg. Hosp., 537 N.E.2d 54, 58 (Ind. Ct. App. 1989). Here, documents produced by Nesbitt revealed that Bartholomew prepared his 2003 taxes, calculated the \$37,321 capital gains tax liability, and drafted letters to the annuity companies to obtain the return of Nesbitt's funds. Even though Bartholomew was disclosed as a fact witness, and even as an expert on tax issues, Nesbitt failed to identify him as an expert on estate planning issues prior to the close of discovery. Moreover, Nesbitt failed to supplement his interrogatories and he did not obey the directives under the case management plan.

Even when Jackel informed Nesbitt's counsel on June 9, 2006 that he was not in compliance with the case management plan regarding expert witness disclosures, there was no response. When Jackel filed her first motion for summary judgment, Nesbitt did not seek relief from the case management plan or seek to reopen discovery. Instead, Nesbitt waited until January 2007 to disclose Bartholomew as an expert on estate planning issues. Given these circumstances, we conclude that the trial court acted within its discretion in excluding Bartholomew's affidavit on this basis.

We also note that Bartholomew’s affidavit did not adequately explain the reasoning or methodology for reaching his opinions. In Doe v. Shults-Lewis Child and Family Services, 718 N.E.2d 738, 750 (Ind. 1999), our Supreme Court observed that

[i]n addition to asserting admissible facts upon which the opinion is based, an expert opinion affidavit must also state the reasoning or methodologies upon which it is based. The trial court must be provided with enough information to proceed with a reasonable amount of confidence that the principles used to form the opinion are reliable.

In this case, Bartholomew set forth the following purported “facts” in his affidavit in order to establish that Jackel had breached a duty of care that she owed to Nesbitt:

j. Ms. Jackel . . . made no effort to determine if indeed Mr. Nesbitt had need of the “trust package” UFS[C] sold him.

. . .

l. There is no evidence that Ms. Jackel assessed the capacity of Mr. Nesbitt, particularly in light of his age, living circumstances, health, and nature of his assets, to understand the consequences of what he was doing, his ability to express the reasons leading to such decisions, his ability to assess the substantive appropriateness of his decisions, and whether the trust package he had been sold fit with his long-term goals and objectives.

Appellant’s App. p. 616. Notwithstanding the above, the record contradicts these averments. Specifically, Jackel testified in her deposition that the revocable living trust instrument that she drafted accomplished Nesbitt’s stated goal of avoiding the probate process. Id. at 383-85. Moreover, Jackel testified that, in accordance with her habits as a practicing estate planning attorney, she would have discussed the following with Nesbitt: (1) the contents of the personal and financial organizer; (2) Nesbitt’s reasons for wanting a trust; (3) the pour-over will, powers of attorney, and living will. Jackel also acknowledged that she would have answered questions that Nesbitt might have directed to her about his estate plan. Id. at 381, 384-87. Jackel also observed that during the

course of her conversations with Nesbitt that she had no doubts about Nesbitt's mental health or competency and that Nesbitt understood the estate planning documents that she was drafting on his behalf. Id. at 385. Jackel also maintained that she had no idea that Larsen would be delivering the trust documents, that she did not know Larsen, and that she had no knowledge of any annuity sales to Nesbitt. Id. at 388, 389, 392.

In light of the above, it is apparent that the record does not support the factual assertions that Bartholomew advanced in his affidavit as the bases for his opinions. Moreover, the affidavit did not set forth adequate reasoning and methodology for Bartholomew's opinions, inasmuch as his assertions were directly contradicted by the record. Therefore, it is apparent that the trial court could have stricken Bartholomew's affidavit on this basis as well.

II. Summary Judgment

Nesbitt next claims that the trial court erred in granting Jackel's motion for summary judgment. Specifically, Nesbitt asserts that a genuine issue of material fact exists as to whether Jackel was negligent in representing him.

We initially observe that summary judgment is appropriate only if the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Bowman ex rel. Bowman v. McNary, 853 N.E.2d 984, 988 (Ind. Ct. App. 2006). Once the moving party makes a prima facie showing that judgment as a matter of law is appropriate, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a

genuine issue for trial. S.E. Johnson Cos., Inc. v. N. Indiana Pub. Serv. Co., 852 N.E.2d 1, 5 (Ind. Ct. App. 2006), trans. denied. We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Id. On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. Sizemore v. Erie Ins. Exch., 789 N.E.2d 1037, 1038 (Ind. Ct. App. 2003). A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous. Id. at 1038-39. Finally, we may affirm a grant of summary judgment upon any theory that is supported by the designated evidence in the record. Prairie Material Sales, Inc. v. Lake County Council, 855 N.E.2d 372, 376 (Ind. Ct. App. 2006), trans. denied.

Legal malpractice claims are similar to other negligence claims in that the plaintiff must prove there was a duty, a breach of that duty, and damages that are proximately caused by the breach. Stowers v. Clinton Cent. Sch. Corp., 855 N.E.2d 739, 745 (Ind. Ct. App. 2006), trans. denied. More specifically, the elements of legal malpractice are: (1) employment of the attorney; (2) failure by the attorney to exercise ordinary skill and knowledge; and (3) such negligence is a proximate cause; (4) of the plaintiff's damages. Legacy Healthcare, Inc. v. Barnes & Thornburg, 837 N.E.2d 619, 624 (Ind. 2005). Summary judgment is appropriate where the moving party has negated at least one element of a plaintiff's claim. Kostidis v. General Cinema Corp., 754 N.E.2d 563, 567 (Ind. Ct. App. 2001).

In this case, when Jackel filed her amended motion for summary judgment, she

included Hewitt's affidavit in her designated evidence. Hewitt set forth his qualifications establishing that he was an expert on Indiana estate planning, the factual predicates and grounds for his opinions, and the reasoning and methodology used in reaching his conclusions. Appellant's App. p. 566-70. Hewitt then offered his opinion that Jackel had met the standard of care for an Indiana estate planning attorney as follows:

12.

c. the scope of Katie Jackel's representation was limited to the drafting of estate planning documents and advice related to transferring assets to a trust, if requested.

d. Plaintiff's cause of action is for damages related to tax advice and stock sale and annuity purchase transactions of which Katie Jackel was not a party, for which she was not engaged and about which she was not asked.

...

f. Katie Jackel clearly informed the Plaintiff to contact her if she had any questions.

g. There is no evidence that Katie Jackel had any knowledge of Mr. Nesbitt's financial transactions that resulted in damages of which Plaintiff complains.

h. Plaintiff had the burden to seek out Katie Jackel's advice and counsel on the issues of which he complains [sic] if he wanted her advice.

13. It is my opinion that Katie Jackel had no duty to advise Robert Nesbitt concerning the sale of his stock, income or capital gains tax matters, or his purchase of annuities.

14. It is my opinion Katie Jackel did not deviate from the standard of care of an Indiana attorney under these circumstances.

Appellant's App. p. 568-69.

At the outset, we note that Nesbitt orally moved to strike Hewitt's affidavit at the summary judgment hearing that was conducted on February 2, 2007, where he alleged that Jackel had failed to disclose Hewitt as an expert witness in accordance with the case management plan. Jackel responded that Nesbitt had not demonstrated any prejudice by the late disclosure, that Nesbitt's oral motion was untimely, and that Jackel had reserved

the right to disclose her expert in the June 9, 2006 email. Hence, Jackel argued that although the trial court had properly struck Bartholomew's affidavit, she was nonetheless entitled to summary judgment because Nesbitt could not prove the elements of his claims without any expert testimony. Id. at 750-78.

After hearing counsels' arguments, the trial court declined to strike Hewitt's affidavit because it was determined that Jackel had "complied with the case management order by the email on June 9 and disclosed Hewitt well in advance of the filing of the amended motion for summary judgment." Id. at 12. In light of these circumstances, we agree with the trial court's decision not to strike Hewitt's affidavit.

That said, we must determine whether the designated evidence entitled Jackel to summary judgment. Because we have determined that the trial court properly struck Bartholomew's affidavit from the designated evidence, Nesbitt had no expert testimony to present regarding the standard of care that was applicable to Jackel, let alone a deviation from the applicable standard of care. Therefore, Nesbitt could not prove the essential elements of his claims regarding either the duty owed or the breach of that duty by Jackel.

In contrast, Hewitt's affidavit supports the determination that Jackel did not breach the standard of care applicable to an Indiana estate planning attorney. And without any expert testimony, Nesbitt was unable to rebut Hewitt's conclusions. Therefore, Jackel established the absence of any genuine issue of material fact regarding the standard of care in representing Nesbitt or a breach of that duty. See Boczar v. Reuben, 742 N.E.2d 1010, 1018 (Ind. Ct. App. 2001) (affirming the trial court's grant of summary judgment

in favor of the attorney, including his clients' legal malpractice counterclaim, because the clients "failed to designate any evidence establishing that [the attorney] committed malpractice," after the clients failed to present expert testimony in support of their claim).

Thus, the designated evidence that was properly before the trial court established that Jackel's representation was limited to the drafting of Nesbitt's estate planning documents. There is nothing in the record to suggest that Jackel's preparation of those documents in July 2003 proximately caused Nesbitt to sell his stocks two months later and incur substantial capital gains taxes. Indeed, Nesbitt testified that the faxes he received from Maddux on September 17, 2003, were the only documents that he relied upon when determining whether to sell the stock and purchase annuities. Appellant's App. p. 351-52. Moreover, Nesbitt admitted that he only talked to Larsen about selling the stock. *Id.* at 352. Hence, the designated evidence established that Jackel's representation of Nesbitt was not a proximate cause of his alleged harm. See Hockett v. Breunig, 526 N.E.2d 995, 998 (Ind. Ct. App. 1988) (observing that summary judgment was properly entered for the attorneys because their conduct was not the proximate cause of the plaintiff's damages). For all of these reasons, we conclude that the trial court properly entered summary judgment for Jackel.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.