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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 43A03-1002-CT-70

INTERLOCUTORY APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0709-CT-1047

October 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Law firm Parr Richey Obrebskey & Morton (“Parr Richey”) and partner Kent M. Frandsen appeal the trial court’s grant of partial summary in favor of Biomet, Inc., on Biomet’s complaint for legal malpractice. Although Biomet sought partial summary judgment on duty and breach, the trial court entered summary judgment on issues pertaining to liability as well. We affirm the trial court’s entry of partial summary judgment on duty and breach, but we remand this case for a trial concerning proximate cause and damages, which is what Biomet actually sought in its motion for partial summary judgment.

Facts and Procedural History

Biomet, which is headquartered in Warsaw, Indiana, manufactures orthopedic devices for sale, distribution, and use worldwide. Around September 1997 Biomet retained the Lebanon, Indiana, law firm of Parr Richey to pursue a legal malpractice claim against Barnes & Thornburg (“B&T”) in connection with B&T’s representation of Biomet in a patent infringement case involving the design of a hip prosthesis. In October 1997 Parr Richey, on behalf of Biomet, filed a complaint for legal malpractice against B&T in Allen Superior Court. Parr Richey amended the complaint in June 1998.

In May 2001 B&T filed a motion for summary judgment, which the trial court granted. In July 2003 this Court reversed the trial court’s grant of summary judgment in favor of B&T, thus allowing Biomet’s litigation against B&T to proceed. *Biomet, Inc. v. Barnes & Thornburg*, 791 N.E.2d 760 (Ind. Ct. App. 2003). Although B&T sought transfer, the Indiana Supreme Court denied transfer on October 23, 2003.

For nearly two and a half years after the Indiana Supreme Court denied transfer, Parr Richey, acting by and through Frandsen, the only attorney to enter an appearance in the case, took no action to prosecute Biomet's legal malpractice claim against B&T. On April 3, 2006, B&T filed an Indiana Trial Rule 41(E) motion to dismiss for failure to prosecute. Trial Rule 41(E) instructs:

Whenever there has been a failure to comply with these rules or *when no action has been taken in a civil case for a period of sixty [60] days*, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

(Emphasis added).

A Trial Rule 41(E) hearing was held in May 2006. Frandsen attended the hearing on behalf of Biomet. The following colloquy occurred between the trial court and Frandsen:

FRANDSEN: . . . This is the most uncomfortable I've ever found myself in a Courtroom because I have screwed up in material ways and my client is at risk. I intend to tell the truth and take *full* responsibility for what has happened. Before I fall on my sword score completely, I would like to respond to some of the things that Mr. [Forrest] Bowman [Jr.] [B&T's attorney] has reported because I do think the Court has considerable discretion as to how it wishes to proceed. I don't deny this case is an old one. It started old. Much of the time though that has been spent in this litigation has been spent litigating the novel issue of law. It took considerable work to get the record together and to get the Summary Judgment Motions briefed, heard and decided. The Court of Appeals took time to decide. The Supreme Court considered transfer. This case has not been without action.

THE COURT: What has happened? Why has nothing happened since transfer wasn't granted, sir?

FRANDSEN: That's a fair question, Your Honor. First of all, I was stunned personally when the Court of Appeals issued the decision it made. I was extremely busy in my practice. This case takes a lot of time to put together. It has been one (1) of those cases where I couldn't bring myself to dig into it enough to be ready to do what needs to be done. This is not an automobile accident case, Your Honor. This involves difficult issues that were involving patent litigation that frankly has been very uncomfortable for me and I don't know that I've ever felt competent to deal with the underlying merits of the judgment that is at issue in this case.

THE COURT: But your firm has been in this case since 1997, sir.

FRANDSEN: I understand that. My partner, Mr. Obrebskey, accepted this case and we agreed to handle this matter. I have been the one that has handled this case and it's been difficult because it takes time. When [Mr. Bowman] indicated after the Supreme Court [denied transfer] that he intended to file another Summary Judgment Motion, that's not an excuse for not immediately jumping back into the battle, but it is a statement of what—I didn't know the basis for it and there was no explanation as to what would be the next legal challenge to the claim, but it was not a surprise. . . . So for a period of time, we were waiting on that not knowing what to expect. When that did not come, . . . I simply could not get to where I could take or have anyone else take the time to get into the merits of the case. I take *full* responsibility for it and we were in communication with Biomet. We indicated to our client that we would do things *but we simply didn't do them*. We would get going on the case. Biomet seriously wants this case pursued and resolved on its merits. *We've not been able to get that done*. Mr. Bowman indicated that it took his 41(E) Motion to prompt us to action. There is nothing in the record that I can tell, Your Honor, to dispute that but I can tell you on my oath as an attorney that that is not correct. The process of transitioning this case away from our law firm was already in place when this 41(E) Motion came in. Communications had already occurred with Spellmeyer & Somer [sic] to transfer this case to them if arrangements could be made between Biomet and Spellmeyer & Somer [sic] to handle it. . . . This case is just not one you can jump into. I'm sorry to say we should have done a little more analysis of what was involved before we made the decision.

THE COURT: It isn't testimony, but I want to know when did you begin the process of contacting that law firm to take this case over? How long ago, sir?

FRANDSEN: . . . I would say in late 2005 or early 2006 is when the decision was made that they were going to have to find somebody other than me to handle this case. It took a period of time for them, I believe, to find someone who they wanted to have hand it and who wanted to handle it. . . .

THE COURT: Okay, well let me ask you a question and only you can answer this question because you are the only attorney of record. Answer this question for me. Why, between April 3rd and today, hasn't the Chicago law firm entered an appearance. That is my first question. . . . Question number two (2) is why didn't the Chicago law firm enter its appearance, respond to the Motion to Dismiss or even ask for an extension of time as lead counsel to respond to it? They didn't do that, why? Tell me, please.

FRANDSEN: Well I think, frankly, I told them that *it was my job to rescue this case*. It's not their job to rescue this case. They have been given the material for the *Pro Hac Vice* process. They are trying to determine and I've talked with two (2) partners in that firm, along with Mr. Gearing, an associate, as to exactly who is going to do it and who is going to appear. . . .

* * * * *

THE COURT: . . . The question is if we talk about the judicial system, why should I penalize this Defendant? Why should I penalize this Defendant because of what you have described as your inaction, sir? I guess I want to try to understand that.

FRANDSEN: That's a fair question. Well I guess I would say that number one (1), you would be penalizing Biomet, my client because of my inaction. . . .

* * * * *

FRANDSEN: . . . Biomet wants this case pursued, Your Honor. Unfortunately for Biomet, they have been unable to get a lawyer who will do what it takes to get it done. I take *full* responsibility for that. What I would like to see happen, and Mr. Bowman says, "Well why haven't you withdrawn?" Well I was not going to withdraw. I don't feel like I should just abandon these people entirely, although *some might say I effectively abandoned them*. . . .

THE COURT: . . . Do you not agree, regardless of who represents them, that the Plaintiff, of course acting only as it can through lawyers, has some duly [sic] obligation to pursue its case, since the Supreme Court refused transfer, had some duty to do something between then and April or May of 2006. Would you agree with me?

FRANDSEN: I would agree with that, Your Honor.

THE COURT: . . . Certainly dismissal of any case, especially for lack of prosecution, is a drastic remedy. On the other hand, the Plaintiff's lack of activity through its lawyers for a period of three (3) years is in and of itself fairly drastic and dramatic, is it not?

FRANDSEN: It is unusual, Your Honor.

THE COURT: Is it drastic and dramatic, sir?

FRANDSEN: Um (sic)—

THE COURT: I'm putting you on the spot, I know, but I'm putting you on the spot on purpose.

FRANDSEN: That's fine. . . . In a case involving a large company and a legitimate claim involving substantial dollars, it would be extremely unusual for there to be lack of action for a couple of years.

THE COURT: Okay, I understand that point. Alright, is there anything else you want to tell me, sir?

FRANDSEN: I know you are in a tough spot. I apologize to the Court, I apologize to Mr. Bowman, I apologize to Barnes & Thornburg, and I apologize to my client. I don't like to have everyone be here because of my inactivity. *Whatever my emotional inability to focus on this case has been*, I apologize for it. I guess I am just asking—generally my record is not this way.

Appellants' App. p. 45-58 (emphases added).

Frandsen later executed and filed an affidavit in the B&T case in which he said that the "oral statements and representations made by [him] at the . . . dismissal hearing were true and accurate[.]" *Id.* at 200; *see also id.* at 196-98.

In late May 2006 the trial court granted B&T's Trial Rule 41(E) motion to dismiss. Upon learning of the dismissal, Frandsen emailed Biomet representatives as follows:

I feel terrible about this and take responsibility for it.

Frankly, given the discretion vested in the trial court in dealing with these motions and the applicable standard of review (affirmance required absent an abuse of discretion), I have no reason to think an appeal would be successful.

Id. at 119.

Parr Richey, on behalf of Biomet, filed a motion to correct error seeking reinstatement of Biomet's complaint against B&T. The trial court denied the motion in August 2006. No appeal was taken.

Biomet retained new counsel and in September 2007 filed a complaint for legal malpractice against Parr Richey and Frandsen in Kosciusko Circuit Court. Parr Richey and Frandsen filed an answer in which they alleged that Biomet's alleged injuries were attributable to the comparative fault and/or negligence of Biomet's own employees, officers, and attorneys; employees, partners, and attorneys at the Chicago law firm of Spellmire & Sommer; and any other nonparty whose identity was not known at the time.

In October 2009 Biomet moved for partial summary judgment on the issues of duty and breach. *Id.* at 122 ("Biomet, Inc., by counsel, respectfully moves the Court to enter an Order granting partial summary judgment in its favor and against Defendants establishing that Defendants owed a duty to Biomet and breached the same in connection with Defendants' representation of Biomet in the aforementioned [B&T] Litigation"). Biomet thus requested that "[t]his case should thereafter proceed forward to trial on

the issue of *damages proximately* resulting from such breach.” *Id.* at 125 (emphasis added).

Parr Richey and Frandsen filed a response in which they designated an affidavit executed by Frandsen in November 2009. In the affidavit, Frandsen took a different position than the one he took at the Trial Rule 41(E) hearing in May 2006. This time, instead of taking “full responsibility,” Frandsen placed blame on other individuals for the delay in prosecuting the B&T case:

11. In late 2005 or early 2006, well in advance of the filing of Barnes & Thornburg’s Rule 41(E) motion [which was filed on April 3, 2006], I communicated to Dan Hann of Biomet’s legal department the fact that I had not been able to devote the time needed to development of the case and I hoped Biomet had other counsel who could take over primary responsibility for its prosecution.

12. Mr. Hann indicated he had sensed for some time that we were not pursuing the case and he had an idea of other counsel who might be willing and able to assume its prosecution for Biomet. Either that day or sometime shortly thereafter he relayed to me that George Spellmire was a Chicago attorney who was currently representing Biomet in other pending matters and he thought that was an option for taking over prosecution of the case.

* * * * *

14. On February 22, 2006, I wrote to Mr. Spellmire and provided him with documentation concerning Biomet’s claim against Barnes & Thornburg and invited Mr. Spellmire to request any additional needed documentation. In that correspondence I suggested that he might have a better feel for some of the legal and factual questions in the case.

15. The process of transitioning the *Biomet* case away from my law firm had already begun before Barnes & Thornburg’s April 3, 2006 Rule 41(E) motion was filed. Even prior to receiving that motion, I had been expecting Mr. Spellmire’s firm to enter their appearance as counsel for Biomet in the litigation.

16. Once the Rule 41(E) motion was received, I communicated that fact to Mr. Hann and Mr. Spellmire and indicated I expected to be able to successfully oppose the motion. But I wanted to be able to advise the Court in my response as to the identity of new counsel who would be . . . joining us in its prosecution.

* * * * *

19. Biomet has its own legal department, including attorneys who are and were licensed to practice law in Indiana and who are aware of Rule 41(E) and the progress of the *Biomet* case prior to the Rule 41(E) motion. During the pendency of the *Biomet* case, I communicated with Mr. Hann and other attorneys in Biomet's legal department.

* * * * *

22. I provided unsworn oral argument on Biomet's behalf at the May 18, 2006 hearing on the motion to dismiss pursuant to Rule 41(E) before the Allen Superior Court in *Biomet, Inc. v. Barnes & Thornburg*. Brad Tandy, acting general counsel of Biomet, and Jack Dearing of the law firm of Spellmire & Sommer, also attended the hearing on Biomet's behalf.

23. At the hearing on Barnes & Thornburg's motion to dismiss, I took responsibility for my own failures, believing that it was the right thing to do and that it also would improve our chances of keeping the case alive. But I did not foreclose fault or partial responsibility on the part of Biomet's legal department, Mr. Spellmire or the Spellmire & Sommer law firm for not timely transferring the case, or not responding with timely help in joining the litigation before the Rule 41(E) motion was even filed or in responding to the motion.

* * * * *

26. I informed Biomet of [the trial court's] order granting the Rule 41(E) motion by email on June 1, 2006. I stated in my email to Biomet that I felt terrible about this and that I took responsibility for it. In so stating, I intended to take responsibility for my own actions, but not to exonerate or foreclose fault for any inaction by Biomet's legal department or by Mr. Spellmire or the Spellmire & Sommer law firm.

Id. at 177-80.

Following a hearing, the trial court granted partial summary judgment in favor of Biomet in December 2009. The court's order provides in pertinent part:

2. That the Defendant, Parr Richey Obrebskey & Morton, through Kent M. Frandsen, breached its duty to the Plaintiff, Biomet, Inc., in connection with the prior representation of Biomet, Inc. in certain litigation wherein Biomet, Inc. was Plaintiff and Barnes & Thornburg was Defendant in the Allen Superior Court, Cause Number 02D01-9710-CT-395.

3. That there are no genuine issues of material fact concerning the existence and breach of a duty owing to Biomet, Inc. by the Defendants, as only a single inference can be drawn from the designated materials and, that is, the Defendants breached their duty as Biomet, Inc.'s counsel, to exercise ordinary skill and knowledge in representing Biomet in Cause Number 02D01-9710-CT-395.

4. That the Defendants are the sole and only parties at fault and are liable for damages, if any, suffered by Biomet, Inc., and neither non-party nor party defenses are available to the Defendants.

5. That genuine issues of material fact exist with regard to Plaintiff's damages, if any, and no ruling was sought with regard thereto, nor is any made by this Order.

6. That the Plaintiff and Defendants should be ordered to mediate the issues of damages and the Honorable Gene Duffin should be appointed as Mediator.

Id. at 8-9. The trial court certified its order for interlocutory appeal, and this Court accepted jurisdiction of the appeal pursuant to Indiana Appellate Rule 14(B).

Discussion and Decision

Parr Richey and Frandsen appeal the trial court's grant of partial summary judgment in favor of Biomet. Indiana Trial Rule 56 allows a party to move for summary judgment on "all or any part" of a claim. When reviewing a grant of summary judgment, our standard of review is the same as that of the trial court. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1269 (Ind. 2009). Considering only those facts that

the parties designated to the trial court, we must determine whether there is a “genuine issue as to any material fact” and whether “the moving party is entitled to a judgment as a matter of law.” Ind. Trial Rule 56(C); *Dreaded, Inc.*, 904 N.E.2d at 1269-70. In answering these questions, the reviewing court construes all factual inferences in the non-moving party’s favor and resolves all doubts as to the existence of a material issue against the moving party. *Dreaded, Inc.*, 904 N.E.2d at 1270. The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law; and once the movant satisfies the burden, the burden shifts to the non-moving party to designate and produce evidence showing the existence of a genuine issue of material fact. *Id.*

The elements of a legal malpractice claim are “(1) employment of an attorney, which creates a duty to the client; (2) failure of the attorney to exercise ordinary skill and knowledge (breach of the duty); and (3) that such negligence was the proximate cause of (4) damage to the plaintiff.” *Reiswerg v. Statom*, 926 N.E.2d 26, 30 (Ind. 2010). Biomet moved for partial summary judgment on the elements of duty and breach and requested a trial on the elements “of damages proximately resulting from such breach.” Appellants’ App. p. 125.

It is undisputed in this case that Parr Richey and Frandsen owed Biomet a duty to exercise ordinary skill and knowledge in representing Biomet in connection with the B&T litigation and that they breached this duty. In fact, on appeal Parr Richey and Frandsen do not challenge the trial court’s determination that they breached this duty. Rather, relying on Indiana’s Comparative Fault Act, Indiana Code chapter 34-51-2, they

limit their appeal to challenging the part of the trial court's decision which allocates to them "sole" fault "for damages, if any, suffered by Biomet." Appellants' App. p. 9. Parr Richey and Frandsen argue that because Frandsen's 2009 affidavit demonstrates that there is a genuine issue of material fact as to whether they are 100% at fault, summary judgment was improperly entered in favor of Biomet.

Under Indiana's Comparative Fault Act, a defendant may assert a "nonparty defense" seeking to attribute fault to a nonparty. *Dennerline v. Atterholt*, 886 N.E.2d 582, 598 (Ind. Ct. App. 2008), *reh'g denied, trans. dismissed*; *see also* Ind. Code §§ 34-51-2-14 ("In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty. This defense is referred to in this chapter as a nonparty defense."), -15 ("The burden of proof of a nonparty defense is upon the defendant, who must affirmatively plead the defense."). In addition, "[u]nder the Comparative Fault Act, liability is to be apportioned among persons [the claimant, the defendant, and any nonparty] whose fault caused or contributed to causing the loss in proportion to their percentages of 'fault' as found by the jury." *City of Crawfordsville v. Price*, 778 N.E.2d 459, 462-63 (Ind. Ct. App. 2002); *see also* Ind. Code §§ 34-51-2-7,¹ -8.

¹ Indiana Code section 34-51-2-7 provides in pertinent part:

(b) The court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. . . . In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property, tangible or intangible, regardless of whether the person was or could have been named as a party. The percentage of fault of parties to the action may

Comparative fault addresses proximate cause and damages, which are elements upon which Biomet did not seek summary judgment. *See Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 109 (Ind. 2002) (“Under the Comparative Fault Act, liability is to be apportioned among persons whose fault caused or contributed to causing the loss in proportion to their percentages of ‘fault’ as found by the jury. As a result, the jury is first required to decide whether an actor’s negligence was a proximate cause of the plaintiff’s injury.”); *see also* I.C. § 34-51-2-14. That is, Biomet’s motion for partial summary judgment sought to eliminate duty and breach, but it did not seek to resolve all issues bearing on liability. *See* Appellants’ App. p. 125. A number of these issues thus remained open, including comparative fault among the claimant Biomet, the defendants, and the nonparty Chicago law firm. *See Reisweg*, 926 N.E.2d at 30 (noting that plaintiff’s partial motion for summary judgment on her complaint for legal malpractice “sought to eliminate breach and factual causation, but it did not seek to resolve all issues bearing on liability. A number of these issues remained open, including comparative fault as between the plaintiff and the defendant and as among the defendants, scope of liability, and any affirmative defenses.”).

total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant’s loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant’s death, injury, or property damage, the jury shall return a verdict for the defendant and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury then shall determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of the defendant by the amount of damages determined under subdivision (3) and shall then enter a verdict for the claimant in the amount of the product of that multiplication.

Although fault apportionment under the Comparative Fault Act is uniquely a question of fact to be decided by the jury, at some point it may become a question of law for the trial court. *Price*, 778 N.E.2d at 463. That point is reached when there is no dispute in the evidence and the factfinder is able to come to only one logical conclusion. *Id.*; *see also* Ind. Code § 34-51-2-9 (“In an action based on fault that is tried by the court without a jury, the court shall make its award of damages according to the principles specified for juries in sections 7 and 8 of this chapter.”). Here, however, Biomet did not request summary judgment on proximate cause or damages. As our Supreme Court stated in *Reiswerg*, if Biomet wanted to move for summary judgment on liability, it should have done so. 926 N.E.2d at 32. “[It] cannot now claim a victory greater than [it] sought and greater than [it] placed in issue.” *Id.* Although the trial court included a provision in its summary judgment order that “neither non-party nor party defenses are available to the Defendants,” Appellants’ App. p. 9, this was error as comparative fault was not before the trial court.² We therefore reverse this portion of the trial court’s order and remand for a trial as to both proximate cause and damages.

Affirmed in part, reversed in part, and remanded.

MAY, J., and BROWN, J., concur.

² This is the very argument that Parr Richey and Frandsen made in their response to Biomet’s motion for partial summary judgment. *See* Appellants’ App. p. 8 (“The plaintiff only requests the entry of partial summary judgment as to the issues of duty and breach, so there is no dispute that the issues of proximate cause and damages are not part of the Court’s consideration at this time.”), 17 (“[T]he Court cannot enter summary judgment on the issues of proximate cause, comparative fault, and damages. These are factual issues that cannot be decided as a matter of law in this motion and which are reserved for the trier of fact at this time.”), 19 (“Proximate cause and damages are not part of this motion and no ruling should be made on those issues.”). Accordingly, Parr Richey and Frandsen properly argue in their appellate brief, “The entry of summary judgment should be reversed as to the allocation of fault between Frandsen, Biomet, and the non-party attorneys.” Appellants’ Reply Br. p. 12.