NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0080

DONNA WILTZ

VERSUS

J. RENEE MARTIN & ANTHONY T. MARSHALL D/B/A ANTHONY T. MARSHALL & ASSOCIATES

Judgment Rendered: SEP 19 2014

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number C578946

The Honorable Todd Hernandez, Judge Presiding

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Robert W. Hallack **Baton Rouge, LA**	**Counsel for Plaintiff/Appellant,** **Donna Wiltz**
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J. Renee Martin **Baton Rouge, LA**	**Counsel for Defendant/Appellee,** **J. Renee Martin**

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McC McClendon, J. concurs and assigns reasons

WHIPPLE, C.J.

In this legal malpractice action, plaintiff, Donna Wiltz, appeals the trial court's judgment granting a motion for summary judgment in favor of defendant, Anthony T. Marshall d/b/a Anthony T. Marshall & Associates, and dismissing Wiltz's claims against this defendant. For the reasons that follow, we reverse.

FACTS & PROCEDURAL BACKGROUND

This action arises from a slip and fall accident on December 24, 2007 at the Walgreens Drug Store on Government Street in Baton Rouge, Louisiana, purportedly resulting in injuries to Wiltz. Following her accident, Wiltz retained the services of attorney J. Renee Martin to represent her in her damage claim against Walgreens.

On December 23, 2008, the eve of the one-year anniversary of the accident, Martin fax-filed[1] a petition for damages to the East Baton Rouge Parish Clerk of Court's Office. In a letter dated January 6, 2009, some fourteen days after the fax-filing of the petition, Martin wrote a letter to Wiltz on the firm letterhead of the "Office of Anthony T. Marshall and Associates," stating that she was confirming Wiltz's request for Martin to no longer represent her in her personal injury claim. The letter further advised Wiltz that she had until 5:30 p.m. that day, i.e., January 6, 2009, to pay the entire filing fee or her action would prescribe, "as we explained to you in our message on December 23, 2008, and again on yesterday and today."

Upon receipt of Martin's letter, Wiltz's husband went to the law office of Anthony T. Marshall & Associates to retrieve his wife's file. At some point thereafter, Wiltz discovered that the filing fee was not paid and the original documents were not filed within the time allotted for by LSA-R.S. 13:850(B), and

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[1]Pursuant to LSA-R.S. 13:850(A), "[a]ny paper in a civil action may be filed with the court by facsimile transmission," and any "[f]iling shall be deemed complete at the time that the facsimile transmission is received and a receipt of transmission has been transmitted to the sender by the clerk of court." Further, upon compliance with the provisions set forth in LSA-R.S. 13:850(B) for the payment of fees and submission of the original signed document, "[t]he facsimile when filed has the same force and effect as the original." LSA-R.S. 13:850(A); see also LSA-R.S. 13:850(B).

therefore, her petition was dismissed and her potential action against Walgreens was prescribed.[2]

On June 2, 2009, Wiltz filed the instant suit for damages against J. Renee Martin and Anthony T. Marshall d/b/a Anthony T. Marshall & Associates ("Marshall"), alleging that the defendants were liable to her for their legal malpractice in failing to timely file the necessary pleadings and in failing to remit the required filing fees, which ultimately led to the dismissal of her action against Walgreens. The petition further alleged that Marshall was liable under LSA-C.C. art. 2320 as the employer of Martin at the time of the malpractice.[3]

Marshall answered the petition, denying all allegations against him, and subsequently filed a motion for summary judgment. In his motion for summary judgment, Marshall contended that he was entitled to judgment in his favor because: (1) he was not Martin's employer as she was an independent contractor; and (2) no attorney-client relationship existed between Marshall and Wiltz as the two never entered into a contractual agreement.

A hearing on Marshall's motion for summary judgment was held on November 14, 2011, wherein the trial court granted the motion for summary judgment in open court. Thereafter, Wiltz filed a motion for a new trial, averring: (1) the motion for summary judgment was not properly served on her; (2) a new witness had come forward who could provide new facts as to the relationship between Martin and Marshall; and (3) the ruling of the trial court was contrary to the law. On May 16, 2012, the trial court granted Wiltz's motion for a new trial.

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[2]At all times pertinent hereto, LSA-R.S. 13:850(B) provided that within **five** days, exclusive of legal holidays, after the clerk of court has received the transmission, the party filing the document shall forward the following to the clerk: (1) the original signed document; (2) the applicable filing fee, if any; and (3) a transmission fee of five dollars. In Acts 2012, No. 826, § 1, the statute was amended to provide that original documents and applicable filing fees shall be forwarded to the clerk within **seven** days after a fax filing. However, under either statutory period, the facsimile filing undisputedly was not timely completed.

[3]Louisiana Civil Code article 2320 provides in pertinent part: "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."

Thereafter, Marshall re-urged his motion for summary judgment. A hearing on the re-urged motion for summary judgment was conducted on February 4, 2013, wherein the trial court heard argument and allowed the introduction of evidence by counsel for Wiltz. After taking the matter under advisement and announcing that it would consider the opposition filed, the trial court issued a "ruling"[4] on April 30, 2013, granting Marshall's motion for summary judgment and dismissing Wiltz's claims against him. Specifically, the trial court stated there was "no attorney-client agreement between [Ms. Wiltz] and Anthony Marshall" and "there is no evidence that Marshall was Martin's employer." A judgment reflecting the same and dismissing Wiltz's claims against Marshall was signed on September 23, 2013.

Wiltz then filed the instant appeal, seeking reversal of the September 23, 2013 judgment.[5]

DISCUSSION

A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to a material fact, and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2). The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out that there is an absence of factual support for one or more elements essential to the adverse party's

[4]Although styled as a "RULING," the court's "ruling" was essentially a statement of the court's reasons and provided for the submission of a "JUDGMENT TO BE SIGNED ACCORDINGLY."

[5]The current status of Wiltz's claim against Martin is not clear from the record. The record reflects only that a preliminary default was entered against Martin and that Martin thereafter filed a "RESERVATION OF RIGHTS TO FILE EXCEPTION AND ANSWER," answering the petition on her own behalf and generally denying all allegations.

claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2).

It is well established that appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Honor v. Tangipahoa Parish School Board, 2013-0298 (La. App. 1st Cir. 11/1/13), 136 So. 3d 31, 35, writ denied, 2014-0008 (La. 2/28/14), 134 So. 3d 1181.

Applying these precepts, the crucial issues herein are whether genuine issues of material fact exist as to: (1) whether there was an attorney-client relationship between Marshall and Wiltz; and (2) whether Marshall was vicariously liable, pursuant to LSA-C.C. art. 2320, for Martin's alleged negligent acts.

In support of his motion for summary judgment, Marshall asserts that he was never a party to any contract with Wiltz, and therefore, there was no attorney-client relationship between them. Marshall further contends that he is not vicariously liable for the alleged negligent acts of Martin because he and Martin did not have an employer-employee relationship. Specifically, Marshall contends that Martin was retained as an independent contractor to handle domestic matters for his office and that they shared fees on domestic matters only, with Martin maintaining separate files regarding all other matters.

Marshall relies on his affidavit, the only evidence submitted in support, wherein he states:

> 1) He never met Ms. Wiltz;
> 2) His law office never entered into an agreement with Ms. Wiltz;
> 3) He had no knowledge of Ms. Wiltz until after her action prescribed;
> 4) His office did not maintain a file for Ms. Wiltz, nor was she made part of his office "tickler system";
> 5) His agreement with Martin pertained strictly to handling domestic clients and there was no fee sharing;
> 6) He has never filed a personal injury lawsuit with a client as *pauper*;
> 7) His office did not incur any expenses associated with Ms. Wiltz; and

8) He took no action to give Ms. Wiltz the perception that he was her attorney.

In opposition to the motion for summary judgment, Wiltz relies on the copy of the petition that Martin fax-filed on her behalf on December 23, 2008, in which the fax cover sheet for the petition bears the letterhead "The Law Offices of Anthony T. Marshall & Associates." Further, while Martin alone signed the petition, the names of both Marshall and Martin appear under the signature line on the petition. Wiltz also submitted without objection (and again relies upon) the January 6, 2009 letter that she received from Martin, which was printed on the letterhead of "The Law Offices of Anthony T. Marshall & Associates," with J. Renee Martin listed as an attorney on the letterhead.[6] In support of her contention that the trial court erred in granting summary judgment, Wiltz points to language in this letter which she argues specifically indicates that Marshall was also representing her in her claim against Walgreens. In particular, the letter states:

1) Enclosed please find a copy of your file as you requested a copy of all information provided to **this firm**;
2) Please be aware that your case prescribes on today, January 6, 2009, as your full filing fee is due by 5:30 p.m, as **we** explained to you in **our** message on December 23, 2008 and again on yesterday and today;
3) Also, please notify **us** of your new counsel, as we will be filing into the record **our** attorney's lien in accord with your contract for all work performed at our hourly fee and any and all costs and expenses incurred on your behalf;
4) Please feel free to contact **us** if you have any questions and/or concerns.

In further opposition to the motion for summary judgment, Wiltz submitted and relies upon an affidavit from her husband, Joseph Wiltz, wherein he states: (1) he retrieved his wife's file from "The Law Offices of Anthony T. Marshall and Associates"; (2) there was no separate sign for J. Renee Martin; and (3) that after

[6]Notably, there is no asterisk or other symbol next to Martin's name identifying her as being "of counsel" or otherwise reflecting any other limited relationship with the firm.

waiting two hours, Marshall noticed him and Marshall then personally told J. Renee Martin to deliver the file to Mr. Wiltz immediately, which she did.[7]

Our supreme court has stated that the existence of an attorney-client relationship turns largely on the client's subjective belief that it exists. In re Austin, 2006-0630 (La. 11/29/06), 943 So. 2d 341, 345. Moreover, great deference is given to the client's subjective belief as to whether an attorney-client relationship exists. Nonetheless, the ultimate question is whether there is a reasonable, objective basis to determine that an attorney-client relationship was formed. In re Austin, 943 So. 2d at 348.

The evidence introduced by Wiltz in opposition to the motion for summary judgment, as outlined above, provides a reasonable basis upon which a fact finder could conclude that Wiltz reasonably believed that Marshall was also representing her in her damage claim against Walgreens. Although Wiltz did not enter into a contract directly with Marshall, we do not find that this fact alone is determinative under the particular facts of this case. Instead, it is undisputed that while Wiltz contracted with Martin, Martin sometime thereafter "shuttered her law office" and began working at Marshall's law office. Moreover, the evidence submitted by Wiltz shows that Martin was working at Marshall's office when the alleged malpractice occurred and was conducting her legal business out of the firm's office and on the firm's letterhead. Contrariwise, Marshall's affidavit presents a conflicting version of the facts, including the nature of his relationship with both Martin and Wiltz.[8] Accordingly, given the conflicting evidence in the record as to

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[7]Wiltz also submitted documents from the Office of the Louisiana Secretary of State, showing that "Marshall Law Firm, A Professional Limited Liability Company" was not active at the time of the alleged malpractice. There is no indication that Marshall disputes this evidence. Accordingly, any potential defense that Marshall may have under the laws governing such business entities was not raised and is not at issue herein.

[8]In Keller v. LeBlanc, 368 So. 2d 193, 194 (La. App. 1st Cir. 1979), writ denied, 369 So. 2d 457 (La. 1979) and McFarland v. Conroy, 2013-0109 (La. App. 1st Cir. 9/13/13) (unpublished opinion), this court stated that an express agreement between the parties is required in order to establish an attorney-client relationship. We find these cases distinguishable from the instant

whether an attorney-client relationship existed, summary judgment was inappropriate. See Frisard v. State Farm Fire and Casualty Company, 2006-2353 (La. App. 1st Cir. 11/2/07), 979 So. 2d 494, 499 (In legal malpractice action, the trial court erred in granting a motion for partial summary judgment where there was conflicting evidence on the issue of whether an attorney-client relationship existed.) See also Francois v. Reed, 97-1328 (La. App. 1st Cir. 5/15/98), 714 So. 2d 228, 230 (In legal malpractice action, the trial court erred in granting a motion for summary judgment as genuine issues of fact remained as to the existence of an attorney-client relationship. The defendant attorney argued that she was not retained to prosecute the plaintiff's personal injury lawsuit, rather, she agreed only to do a favor for a friend and inquire about the status of the suit. In opposition, the plaintiff offered a letter from the defendant attorney stating that she represented plaintiff in connection with his personal injury lawsuit.) Thus, summary judgment was not warranted.

We further find that summary judgment is inappropriate as genuine issues of material fact exist as to whether Marshall is vicariously liable for the alleged negligent acts of Martin, pursuant to LSA-C.C. art. 2320. Specifically, genuine issues of material fact exist as to the degree of control that Marshall exercised over Martin.[9] Although Marshall's affidavit offered in support of the motion for summary judgment states that his agreement with Martin only related to domestic matters and that she performed her work as an independent contractor, he did not introduce any evidence to support these statements, which are essentially

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matter, as these cases did not involve a contractual agreement with one attorney, who subsequently began working with a different law firm, taking the client file with her. Moreover, Wiltz's express agreement with Martin could be viewed as sufficient to satisfy the express-agreement requirement in the instant matter.

[9]To determine whether the employee is an independent contractor or a mere servant, the control exercised by the employer over the employee must be examined. Hughes v. Goodreau, 01-2107 (La. App. 1st Cir. 12/31/02), 836 So. 2d 649, 656, writ denied, 2003-0232 (La. 4/21/03), 841 So. 2d 793.

conclusory and self-serving. Moreover, Wiltz introduced contradictory evidence to the same, specifically, the January 6, 2009 letter that she received from Martin, written on the letterhead of the law firm of Anthony T. Marshall & Associates, with Martin listed as an attorney of the firm and no indication that Martin's relationship with the firm was limited.

With regard to Wiltz's reliance on Rule 7.10(a) of the Rules of Professional Conduct,[10] proof of a violation of an ethical rule by an attorney, standing alone, does not constitute actionable legal malpractice *per se* or proof of factual causation. However, the Rules of Professional Conduct will usually be relevant in defining the legal standard of care, which may vary depending upon the particular circumstances of the relationship. Teague v. St. Paul Fire and Marine Ins. Co., 2006-1266 (La. App. 1st Cir. 4/7/09), 10 So. 3d 806, 824-25, writ denied, 2009-1030 (La. 6/17/09), 10 So. 3d 722; Leonard v. Reeves, 2011-1009 (La. App. 1st Cir. 1/12/12), 82 So. 3d 1250, 1257. Here, the undisputed evidence demonstrates that Martin was routinely listed on Marshall's letterhead as an attorney with his firm with no indication that their relationship was limited in any manner. We find that this evidence alone creates a genuine issue of fact as to whether there was an employer/employee relationship between Marshall and Martin, and therefore, potential vicarious liability pursuant to LSA-C.C. art. 2320. As such, we find no support in the record for the trial court's statement that "there was no evidence that Marshall was Martin's employer." Instead, on the record before us, unresolved issues of fact remain which preclude summary judgment.

[10]Rule 7.10(a) provides that a lawyer or law firm shall not use a firm name, logo, letterhead, professional designation or trade name that violates the Rules of Professional Conduct. Further, pursuant to Rule 7.10(f), lawyers may state or imply that they practice in a partnership or other organizational business entity "only when that is the fact."

CONCLUSION

For the above and foregoing reasons, the September 23, 2013 judgment of the trial court, granting summary judgment and dismissing Donna Wiltz's claims against Anthony T. Marshall d/b/a Anthony T. Marshall & Associates, is hereby reversed. The case is remanded for further proceedings. Costs of this appeal are assessed to the defendant, Anthony T. Marshall d/b/a Anthony T. Marshall & Associates.

REVERSED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0080

DONNA WILTZ

VERSUS

J. RENEE MARTIN & ANTHONY T. MARSHALL D/B/A ANTHONY T. MARSHALL & ASSOCIATES

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McCLENDON, J., concurs.

While I recognize that the plaintiff will bear the burden of proof at trial to establish the existence of the attorney-client relationship, see **Costello v. Hardy**, 03-1146 (La. 1/21/04), 864 So.2d 129, 138, I find the evidence presented, specifically including Ms. Martin's name appearing on the letterhead of the "The Law Offices of Anthony T. Marshall & Associates" and Mr. Marshall's name on the signature line of the fax-filed petition, "minimally sufficient" to create genuine issues of material fact. Therefore, I respectfully concur with the result reached by the majority.