[Cite as *Jackson v. McKinney*, 2015-Ohio-1977.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

CLARENCE T. JACKSON	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NO. 26288
	:	
v.	:	T.C. NO. 13CV5955
	:	
CHARLES A. McKINNEY	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 22nd day of May, 2015.

. . . . . .

JEFFREY D. SLYMAN, Atty. Reg. No. 0010098, 211 Kenbrook Drive, Suite #5, Vandalia, Ohio 45377
Attorney for Plaintiff-Appellant

CHARLES A. McKINNEY, Atty. Reg. No. 0039214, 118 W. First Street, Suite 618 Talbott Tower, Dayton, Ohio 45402
Defendant-Appellee

. . . . . .

FROELICH, P.J.

{¶ 1} Clarence T. Jackson appeals from a judgment of the Montgomery County

Court of Common Pleas, which granted summary judgment to Attorney Charles A. McKinney on Jackson's legal malpractice claim. For the following reasons, the trial court's judgment will be reversed and the matter will be remanded for further proceedings.

I. Procedural History

{¶ 2} On October 2, 2013, Jackson filed a complaint[1], alleging that his former attorney, McKinney, committed legal malpractice while representing him in a lawsuit in federal court against SelectTech Services, Corp., his former employer. The complaint alleged that on April 3, 2012, the federal district court dismissed the employment discrimination action with prejudice because McKinney "continually failed to respond to Court's Orders."

{¶ 3} On April 10, 2014, McKinney moved for summary judgment on Jackson's malpractice claim. McKinney's memorandum in support of the motion detailed the course of the federal court action. According to the memorandum, on March 26, 2012, the district court had ordered Jackson to show cause why the action should not be dismissed for lack of prosecution. McKinney advocated to Jackson that he voluntarily dismiss the federal action, given that Jackson had financial problems and could not afford to pursue the litigation; Jackson allegedly refused and attempted to raise money instead. McKinney states that the district court dismissed the action on April 3, 2012.

{¶ 4} McKinney raised several arguments in his summary judgment motion. First, he stated that the parties' engagement agreement entitled him to stop working on the federal litigation when Jackson was no longer able to pay for legal services. Second,

---

[1] This action is a refiling of *Jackson v. McKinney*, Montgomery C.P. No. 2012 CV 6809, which was voluntarily dismissed.

even assuming that McKinney had a duty to provide continued representation, McKinney asserted that Jackson was required to provide the affidavit of an expert to substantiate that McKinney's representation in the federal court action constituted a breach of McKinney's duty to Jackson, and that the federal judge's adverse ruling was not admissible to establish the alleged breach of the standard of care. Third, McKinney claimed that Jackson could not establish a causal connection between McKinney's conduct and his (Jackson's) alleged loss. Fourth, McKinney asserts that Jackson's failure to heed his (McKinney's) legal advice was the proximate cause of Jackson's alleged damages.

{¶ 5} Jackson opposed the summary judgment motion. He argued that, even if his failure to finance the federal litigation permitted McKinney to "stop work," McKinney should have withdrawn as counsel, not simply allowed the case to be dismissed with prejudice. Jackson asserted that he did not need to produce the affidavit of an expert to establish this breach of a duty. Finally, Jackson asserted that McKinney's malpractice was the proximate cause of his "loss of option to pursue litigation against SelectTech."

{¶ 6} In granting McKinney's motion for summary judgment, the trial court focused on McKinney's argument that expert testimony was required to establish a breach of duty. The court stated:

> * * * [T]here is no evidence properly before it of any Order or Orders issued in the underlying case. There are no dates or copies of any Orders pled or attached to either the Complaint or in response to summary judgment. Next, the affidavit of Defendant encompasses the entirety of his representation of the Plaintiff and results in his opinion, as noted [i.e., that

> he (McKinney) did not violate the standard of care owed to Jackson]. This opinion directly refutes the allegations of the Complaint.
>
> * * *
>
> A finder of fact would have to do more than look at a concluding Order (if produced). It would have to know whether the processes leading to that concluding Order were or were not professionally reasonable. This can only be determined through the input of an expert.

{¶ 7} The trial court further concluded that, even if Jackson could establish a breach of duty, Jackson had "failed through any evidence, expert or otherwise, to show how he has been damaged. * * * [S]ome evidentiary nexus of negligence and resulting damages should be presented and Plaintiff has failed to present any."

{¶ 8} Jackson appeals from the trial court's judgment, claiming that the trial court erred in granting summary judgment to McKinney.

II. Summary Judgment

{¶ 9} Pursuant to Civ.R. 56(C), summary judgment is proper when (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds, after construing the evidence most strongly in favor of the nonmoving party, can only conclude adversely to that party. *Zivich v. Mentor Soccer Club, Inc.,* 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998). The moving party carries the initial burden of affirmatively demonstrating that no genuine issue of material fact remains to be litigated. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988). To this end, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary

judgment. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). Those materials include "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, filed in the action." *Id.* at 293; Civ.R. 56(C).

{¶ 10} Once the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the party's pleadings. *Dresher* at 293; Civ.R. 56(E). Rather, the burden then shifts to the nonmoving party to respond, with affidavits or as otherwise permitted by Civ.R. 56, setting forth specific facts that show that there is a genuine issue of material fact for trial. *Id.* Throughout, the evidence must be construed in favor of the nonmoving party. *Id.*

{¶ 11} We review the trial court's ruling on a motion for summary judgment de novo. *Schroeder v. Henness,* 2d Dist. Miami No. 2012 CA 18, 2013-Ohio-2767, ¶ 42. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. of Edn.,* 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 119-20, 413 N.E.2d 1187 (1980). Therefore, the trial court's decision is not granted deference by the reviewing appellate court. *Powell v. Rion,* 2012-Ohio-2665, 972 N.E.2d 159, ¶ 6 (2d Dist.).

{¶ 12} It is undisputed that, on March 17, 2009, Jackson engaged McKinney to represent him an employment discrimination case against SelectTech. According to the engagement agreement, McKinney reserved the *right to withdraw* from representation for several reasons, including Jackson's "failure to promptly pay billing statements." The

billing provision further indicated that, unless invoices were paid promptly, "we will stop work on your case. If the matter is before the court at that time, *we may ask for permission to withdraw as your counsel* depending on the amount of outstanding fees and the degree of your failure to pay." (Emphasis added.)

{¶ 13} As noted by the trial court, the parties have provided little evidence to establish the underlying facts of the employment discrimination action and McKinney's representation of Jackson in that action. The exhibits attached to McKinney's motion for summary judgment establish the following facts.[2]

{¶ 14} On June 26, 2009, a complaint was filed against SelectTech in *Jackson v. SelectTech Service Corp.*, S.D. Ohio No. 3:09-245; McKinney represented Jackson in the action. McKinney contacted counsel for SelectTech on December 31, 2009, indicating that, after discussion with Jackson, Jackson was declining a settlement offer.

{¶ 15} In January 2011, Jackson was notified that he had been overpaid unemployment benefits. In March 2011, a foreclosure action was brought against Jackson by CitiMortgage regarding Jackson's home. Jackson (pro se) sent correspondence to CitiMortgage, responding to the complaint. In June 2011, McKinney filed a motion in the CitiMortgage action, seeking a two-week continuance to respond to the mortgage company's motion for summary judgment; the motion stated "Defendant advises the court that he is only now been able to retain counsel to represent him in this

---

[2] McKinney did not authenticate any of the documents attached to his motion for summary judgment. Similarly, Jackson did not authenticate the documents attached to his opposition memorandum. However, neither party objected to the trial court's consideration of these exhibits due to lack of authentication. Accordingly, we will consider any authentication argument to be waived for purposes of this appeal. *See, e.g., American Tax Funding, LLC. v. Whitlow*, 2d Dist. Montgomery No. 23182, 2010-Ohio-3333, ¶ 13, fn.3.

matter." McKinney filed a second motion for a continuance in July 2011. On March 28, 2012, the court in the foreclosure action filed a notice of sale, indicating that the property would be sold on May 18, 2012. (It is unclear how the exhibits concerning the unemployment benefits and foreclosure action are relevant to McKinney's representation of Jackson in the action against SelectTech, but they apparently demonstrate that McKinney was providing a variety of legal services to Jackson.)

{¶ 16} Several email messages were exchanged between McKinney and Jackson from March 27, 2012 to April 9, 2012. On March 27, 2012, Jackson wrote to McKinney regarding the SelectTech action. The message concerned medical records that Jackson had faxed to McKinney to support his claim, the possibility of Jackson's filing assault charges against a doctor, and of the need for Jackson to provide additional funds "for impending/late filings and trials action." Jackson asked McKinney for an itemized list and accounting of the costs for the funds McKinney was requesting and information about when those funds would be needed.

{¶ 17} Later that night (March 27), McKinney responded, in part[3]:

> * * * The case is set for trial but we needed to file certain pretrial documents to prepare for trial. As I mentioned several times, we were out of money to continue the case. The defendants, who have money, have prepared for trial and want a financial sanction against us for not filing the trial preparation documents. We have to respond before the judge makes a decision on the defendant's motion. I wish I could continue the case for

[3] Unlike Jackson's emails to McKinney, which are statements of a party-opponent, McKinney's responses to Jackson's emails appear to be hearsay. Nevertheless, Jackson did not raise a hearsay objection in the trial court.

free but I cannot afford to do so. I appreciate your efforts to raise the funds.

Judge Rice has ordered us to respond in 10 days as to why the case should not be dismissed for failure to prosecute. We need to respond that you will finance the case, dismiss the case entirely, or ask to dismiss the case without prejudice so that you can reinstitute the case at a later time when your finances turn around.

I am concerned about your house. If you have time, we can call the mortgage company from my office to see what can be worked out. Have you heard from the VA?

{¶ 18} On March 30, 2012, Jackson emailed McKinney, "Sir, have you completed the estimated amount needed to go forward and a breakout of the services that these funds will provide? As you said, we need to move quickly on this!"

{¶ 19} The next day (Saturday, March 31), McKinney provided a "rough conservative estimate of the legal fees expected to be incurred from this point and for a projected 5 day trial." The estimate itemized trial preparation and trial costs, totaling 143.5 hours at $200 per hour, for a total of $28,700.

{¶ 20} On Monday, April 2, 2012, Jackson responded, asking "Is this an all up front fee or can it be broken up into manageable portions?" Jackson again wrote on April 4, stating that he had $1,500 and other arrangements were being made to obtain additional funds. Jackson asked for a prompt reply.

{¶ 21} On April 9, 2012 (the last email provided by McKinney), McKinney wrote, "I have the information from the attorney regarding your foreclosure. Please call me to set a time to pick these up."

{¶ 22} McKinney's evidence in support his of motion for summary judgment included a telephone log, highlighting a particular telephone number; presumably the highlighted number belonged to Jackson, but there is no evidence supporting that, nor is there any evidence regarding the substance of those telephone calls. McKinney also provided a billing statement regarding the action against SelectTech, noting total billing of $5,722.35 between 2009 and 2012; one invoice from November 2011, for $349.67, remained outstanding. The billing statement did not indicate what services (foreclosure, unemployment compensation, federal litigation, etc.) were covered by the invoices.

{¶ 23} Finally, McKinney supported his summary judgment motion with an affidavit, stating that he was an attorney in good standing with the Ohio Supreme Court and detailing his employment history as an attorney. With respect to his conduct as an attorney, McKinney stated:

> 9. During my 34 years of practicing law and, more specifically, during my 24 years of practicing in the areas of labor and employment law, I have learned, adhered to and governed my business practice and client representation in accordance with, at least, the standard of care typically expected of practicing attorneys in the greater Dayton, Ohio region that practice in the areas of labor and employment law.
>
> 10. Based on my years of experience, knowledge, skill, and my personal knowledge of the facts, circumstances and laws implicated and involved during my representation of Clarence T. Jackson, and to a reasonable degree of professional, legal probability or certainty, I did not

violate the standard of care owed to Mr. Jackson by an attorney practicing in the Dayton, Ohio geographical area and within these particular fields of law, at any time while furnishing legal services to Mr. Jackson.

{¶ 24} Jackson's evidence in response to the motion for summary judgment consisted of copies of numerous checks and receipts for payment to McKinney and an affidavit, which acknowledged that he had retained McKinney to represent him in the action against SelectTech, but denied that was ever informed of a settlement offer. Jackson further stated:

3. That at no time did I ever indicate to Defendant that I "was not able to finance his case."

4. That whenever Defendant provided me with an invoice, I paid him in a timely manner;

5. That at no time did I authorize Defendant to "stop work" on my case;

6. That at no time did the Defendant express to me his desire to withdraw from my case[.]

{¶ 25} Jackson also attached his sworn answers to McKinney's request for admissions. In his answers, Jackson admitted that he hired McKinney to represent him, that he was obliged to pay for deposition transcripts, and that he had opened an eatery during the course of the federal litigation. Jackson denied that he used money on the eatery rather than legal fees, that he failed to pay for the deposition transcripts, that he was informed that the federal case would be dismissed for failure to prosecute if no response was filed to a show cause order, that he had refused to voluntarily dismiss the SelectTech case, and that McKinney had advised him that he (McKinney) would not file a

response to the show cause order if attorney fees were not paid.

{¶ 26} None of the filings in the federal employment discrimination action has been made part of this record by either party. Consequently, the evidence in this case does not reflect what McKinney filed as counsel for Jackson in federal court, what counsel for SelectTech filed, and what orders or judgments were rendered by the federal district court. The parties apparently agree that the federal district court dismissed the action with prejudice on April 3, 2012, but McKinney's narrative summary of the federal court action in his memorandum in support of his summary judgment motion is not evidence.

{¶ 27} To establish a cause of action for legal malpractice based on negligent representation, Jackson must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss. *Vahila v. Hall*, 77 Ohio St.3d 421, 674 N.E.2d 1164 (1997), syllabus; *McCarty v. Pedraza*, 2014-Ohio-3262, 17 N.E.3d 71, ¶ 6 (2d Dist.).

{¶ 28} Before Jackson was required to demonstrate that he could establish his legal malpractice claim, McKinney had an initial responsibility of informing the trial court of the basis for his motion, and identifying "evidentiary materials" in the record that demonstrate his entitlement to summary judgment. *E.g.*, *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996); *Nationstar Mtge., L.L.C. v. Wagener*, 8th Dist. Cuyahoga No. 101280, 2015-Ohio-1289, ¶ 13. In our view, McKinney did not meet this initial burden on at least two elements of a legal malpractice claim.

{¶ 29} First, McKinney claims that Jackson cannot establish that he had a duty to Jackson. We recently stated in *McCarty v. Pedraza*, 2014-Ohio-3262, 17 N.E.3d 71 (2d Dist):

> " 'The duty of an attorney to his client is to "* * * exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, and to be ordinarily and reasonably diligent, careful, and prudent in discharging the duties he has assumed." ' " *Yates v. Brown,* 185 Ohio App.3d 742, 2010-Ohio-35, 925 N.E.2d 669, ¶ 17 (9th Dist.), quoting *Palmer v. Westmeyer,* 48 Ohio App.3d 296, 298, 549 N.E.2d 1202 (6th Dist.1988), quoting 67 Ohio Jurisprudence 3d, Malpractice, Section 9, at 16 (1986). Rule of Professional Conduct 1.3 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." A comment to this rule explains that "[d]elay and neglect are inconsistent with a lawyer's duty of diligence, undermine public confidence, and may prejudice a client's cause. Reasonable diligence and promptness are expected of a lawyer in handling all client matters and will be evaluated in light of all relevant circumstances. * * *" Comment 3, Prof.Cond.R. 1.3.

McCarty at ¶ 8. Comment 4 further notes that

> [a] lawyer should carry through to conclusion all matters undertaken for a client, unless the client-lawyer relationship is terminated as provided in Rule 1.16. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not

mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

{¶ 30} Under Rule of Professional Conduct 1.16, an attorney may withdraw from the representation of client if any of several circumstances exists, including when (1) "withdrawal can be accomplished without material adverse effect on the interests of the client" and (2) "the client fails *substantially* to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given *reasonable* warning that the lawyer will withdraw unless the obligation is fulfilled." (Emphasis sic.) Prof.Cond.R. 1.16(b)(1), (5). When withdrawing from representation, an attorney must take steps, to the extent reasonably practicable, to protect the client's interest. Prof.Cond.R. 1.16(d). "The steps include giving due notice to the client, allowing *reasonable* time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client." (Emphasis sic.) *Id.*

{¶ 31} The record demonstrates that McKinney agreed to represent Jackson in an action against Jackson's former employer, SelectTech, and that an action was filed. According to the engagement agreement, McKinney reserved the right to stop work *and withdraw* from representation if Jackson failed to promptly pay billing statements. McKinney's emailed statements to Jackson indicate that Jackson was having financial problems and that Jackson needed additional funds to further finance the litigation. McKinney's billing report indicates that Jackson failed to pay a $349.67 invoice from November 2011. By March 2012, the parties in the federal action were supposed to exchange pretrial documents, and the trial court issued a show cause order as to why the

action should not be dismissed for lack of prosecution.

{¶ 32} McKinney states that, because Jackson failed to pay legal fees, Jackson did not establish that McKinney owed Jackson a duty to continue to prosecute Jackson's action. The duty was created when McKinney agreed to represent Jackson. Although McKinney may have had grounds to terminate the attorney-client relationship, there is no evidence that McKinney had terminated the attorney-client relationship due to Jackson's failure to pay or that McKinney took any action to "ask for permission to withdraw as [Jackson's] counsel" and stop representing Jackson in the federal action or concerning any other legal matter.

{¶ 33} McKinney's March 27 email to Jackson noted a need to respond in the federal court action, and there is no mention by McKinney of any intent to terminate his representation. McKinney emailed Jackson on April 9, 2012 – after the federal action was dismissed – regarding the legal matter concerning Jackson's house; again, nothing in that communication suggested that McKinney had terminated the attorney-client relationship, in whole or part. In short, McKinney's evidence does not support a conclusion that McKinney no longer had a duty to competently represent Jackson as a client in the federal action when Jackson's federal action was dismissed on April 3, 2012.

{¶ 34} Second, McKinney failed to satisfy his initial burden on the issue of causation. McKinney claims that Jackson failed to demonstrate a causal connection between his (McKinney's) representation and Jackson's loss. However, nothing in McKinney's evidence in support of his motion for summary judgment touches on causation. Even accepting the standard of causation advocated by McKinney, *see Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209,

2008-Ohio-3833, 893 N.E.2d 173, McKinney has not presented any evidence, by way of his own affidavit or otherwise, that regardless of his (McKinney's) actions, the federal action would have been dismissed or Jackson would not have prevailed in the federal court action had it proceeded.

{¶ 35} McKinney asserts that Jackson caused his own injury by failing to agree to voluntarily dismiss the federal lawsuit. McKinney's March 27, 2012 email to Jackson stated that the federal court had issued a show cause order as to why the case should not be dismissed for failure to prosecute and that "[w]e need to respond that you will finance the case, dismiss the case entirely, or ask to dismiss the case without prejudice so that you can reinstitute the case at a later time when your finances turn around." McKinney's email also indicated that the federal court had given Jackson ten days to respond, which suggested that Jackson had until April 6, 2012 to decide on a course of action. The action was dismissed on April 3, 2012. McKinney's suggestion to Jackson that he voluntarily dismiss his action did not absolve McKinney of his responsibility to respond to the show cause order, even if it was only to request to withdraw and/or to allow Jackson time to retain new counsel or proceed pro se. And considering the evidence in the light most favorable to Jackson, the record does not reflect that Jackson was aware that he needed to decide how to proceed prior to April 3, 2012. McKinney's evidence did not establish that Jackson could not prove causation, such that Jackson had a reciprocal burden to demonstrate the existence of a genuine issue of material fact on this element of his claim.

{¶ 36} McKinney did present some evidence on whether he breached his duty of care. McKinney opined in the last paragraph of his affidavit that he did not violate the

standard of care owed to Jackson. McKinney's opinion was stated to be "to a reasonable degree of professional, legal probability or certainty." *See Toliver v. Duwel*, 2d Dist. Montgomery No. 24768, 2012-Ohio-846, ¶ 65 (attorney-defendant's affidavit is sufficient to carry initial burden under Civ.R. 56(C) in legal malpractice action). McKinney asserts that the burden shifted to Jackson to present the opinion of an expert to establish a breach of duty.

{¶ 37} "[I]n an action for legal malpractice, one must set forth expert testimony to establish an attorney's alleged malpractice or breach of duty and care, unless the breach is so obvious that it can be determined by the court or is within the ordinary knowledge and experience of laymen." (Internal quotations and citation omitted.) *Yates v. Barilla*, 9th Dist. No. 11CA010055, 2012-Ohio-3876, ¶ 8. "[N]ot every violation of the ethical rules contained in the Rules of Professional Conduct constitutes legal malpractice, and not every act of legal malpractice constitutes a violation of ethical rules requiring discipline." *Powell v. Rion*, 2012-Ohio-2665, 972 N.E.2d 159, ¶ 26 (2d Dist.).

{¶ 38} McKinney allegedly breached his duty of care by failing to respond the federal court's show cause order, knowing that the federal district court would dismiss the action with prejudice for lack of prosecution if good cause was not shown. McKinney did not provide any evidence as to how he responded to the trial court's show cause order, and his memorandum in support of his summary judgment motion suggests that no response was filed. He apparently relies on his email communications to show that, prior to the federal court's order of dismissal, he advised Jackson to voluntarily dismiss the action.

{¶ 39} Construing the evidence in the light most favorable to Jackson, the

evidence reflects that McKinney advised Jackson that they needed to respond to the federal court's show cause order by informing the court that Jackson would "finance the case, dismiss the case entirely, or ask to dismiss the case without prejudice so that you can reinstitute the case at a later time when your finances turn around." McKinney did not inform Jackson that they needed to respond before April 3, 2012. In response to McKinney's email, Jackson attempted to learn how much money would be needed and to obtain that money. McKinney responded to Jackson's inquiries about the money needed to finance his case, but never filed a response to the show cause order, knowing that SelectTech had sought sanctions against Jackson and that a failure to respond to the show cause order would result in dismissal with prejudice.

{¶ 40} We recognize that a violation of a Rule of Professional Conduct "should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Prof.Cond.R., Preamble 20. "The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. * * * Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct." *Id*.

{¶ 41} With the sparse evidentiary record before us, this appears to be one of the rare circumstances where the opinion of an expert is not required to create a genuine issue of material fact on whether a breach of duty occurred. The evidence, as construed in Jackson's favor, reflects possible violations of Prof.Cond.R. 1.3 and 1.16, as well as the commonly-recognized obligation to be ordinarily and reasonably diligent, careful, and

prudent in discharging the duties McKinney had assumed; although not dispositive, this is relevant to whether McKinney breached a duty to Jackson. And, a conscious decision not to respond to a show cause order, knowing that such a failure will result in the dismissal of a viable claim with prejudice, is not a matter of trial strategy, the reasonableness of which requires the opinion of an expert. It may be that a more developed record by McKinney would lead to a need for Jackson to respond with an expert opinion on whether McKinney breached his duty to Jackson. However, based on the record before us, there are genuine issues of material fact as to whether McKinney's actions constituted a breach of duty.

{¶ 42} Jackson's assignment of error is sustained.

III. Conclusion

{¶ 43} The trial court's grant of summary judgment to McKinney will be reversed, and the matter will be remanded for further proceedings.

. . . . . .

FAIN, J. and WELBAUM, J., concur.

Copies mailed to:

Jeffrey D. Slyman
Charles A. McKinney
Hon. Neal B. Bronson, Visiting Judge