IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

CLARKE LAW FIRM, PLC, *Plaintiff/Counterdefendant/Appellee*,

v.

MOHNACH PAYNE INC.; THOMAS PAYNE
and BARBARA PAYNE, *Defendants/Counterclaimants/Appellants.*

No. 1 CA-CV 12-0709
FILED 11-26-2013

Appeal from the Superior Court in Maricopa County
No. CV2009-030194
The Honorable Katherine M. Cooper, Judge

AFFIRMED

COUNSEL

Clarke Law Firm, PLC, Scottsdale
By Marilee Miller Clarke

Co-Counsel for Plaintiff/Appellee/Counterdefendant

Broening Oberg Woods & Wilson, PC, Phoenix
By Kerry L. Beringhaus and Brian W. Purcell

Co-Counsel for Plaintiff/Appellee/Counterdefendant

Thomas N. Payne Attorney at Law, Paradise Valley
By Thomas N. Payne

Counsel for Defendants/Appellants/Counterclaimants

MEMORANDUM DECISION

Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Donn Kessler joined.

B R O W N, Judge:

¶1 Mohnach Payne Inc., Thomas Payne, and Barbara Payne (collectively "MPI," except as otherwise noted) appeal the trial court's judgment in favor of the Clarke Law Firm, PLC (Clarke) on Clarke's claims for breach of contract, fraudulent transfer, and quantum meruit. MPI argues the court erred in granting directed verdicts in favor of Clarke on Clarke's breach of contract claim and MPI's counterclaim for legal malpractice. Regarding the fraudulent transfer and quantum meruit claims, MPI argues the court (1) failed to properly instruct the jury on liability of the marital community, (2) abused its discretion in restricting the time for closing arguments, and (3) improperly prohibited MPI from rebutting a misleading comment made by Clarke's attorney. For the following reasons, we affirm.

BACKGROUND

¶2 In February 2007, MPI sold certain business assets to Smith West, LLC (Smith West). The terms of the sale were set forth in an Asset Purchase Agreement (APA) in which MPI represented, among other things, that it would conduct the business in the "ordinary course of business," as defined in the APA, at all times prior to closing.

¶3 In October 2007, Smith West demanded that MPI (and its shareholders, John Mohnach and Thomas Payne) indemnify Smith West in the approximate amount of $1,500,000 for funds Smith West borrowed to make payments to its vendors after closing for aged, unpaid invoices. Smith West asserted that MPI had breached its representation and warranty to conduct the business in the "ordinary course" by failing to timely pay vendors before closing of the transaction. MPI countered that it had operated its accounts payable consistent with its ordinary business practices. Per the APA, the dispute was referred to arbitration.

¶4 Clarke represented MPI in the arbitration in California. Following a two-day hearing, the arbitrator issued a detailed award finding that MPI had breached its representation and warranty to act in the ordinary course of business. The arbitrator awarded Smith West damages for the funds it paid to vendors on invoices that were more than 45 days old at the time of closing, plus attorneys' fees, in the amount of $1,730,651.

¶5 Because MPI failed to pay Clarke the attorneys' fees incurred in the arbitration proceeding, in 2009 Clarke filed a complaint against MPI for breach of the parties' retainer agreement. The complaint also included a fraudulent transfer claim against MPI as well as Thomas and Barbara Payne and John and Sharon Mohnach, individually, alleging that after entry of the arbitration award in favor of Smith West, Thomas Payne and John Mohnach "improperly" transferred their "most valuable operating assets" to their wives as a means of "insulat[ing] them from execution" of the Smith West judgment.

¶6 In its answer, MPI asserted that Clarke's legal fees were "excessive and unreasonable" and denied that it had made an illicit transfer of assets.[1] MPI also filed a counterclaim for legal malpractice, alleging that (1) Clarke violated the Arizona Rules of Professional Conduct by disclosing privileged information, derived from its legal representation of MPI, in its complaint, (2) to the extent any of MPI's transfers were not "legal and proper," such transfers were conducted based on Clarke's representations that the transfers were "legal and proper," and (3) Clarke violated Arizona Rule of Professional Conduct ER 1.1 by failing to competently represent MPI during the arbitration proceedings.

¶7 Early in the litigation, MPI filed a "certification" that expert testimony was "not necessary to prove the licensed professional's

[1] Thomas Payne represented MPI and the individual defendants/counterclaimants in the trial court. On appeal, he represents himself as well as Barbara Payne and MPI. John and Sharon Mohnach, who were defendants/counterclaimants in the trial court, did not appeal the judgment entered against them.

standard of care or liability for the counterclaims in this case." Clarke countered that, pursuant to Arizona Revised Statutes (A.R.S.) section 12-2602, a party making a claim against a licensed professional must submit a preliminary expert opinion affidavit setting forth the standard of care applicable to the licensed professional's conduct and explaining how the licensed professional's failure to adhere to that standard caused or contributed to the claimant's injury. The trial court determined expert testimony was necessary to prove the requisite standard of care and ordered MPI to file a preliminary expert opinion affidavit.

¶8 MPI then filed an "A.R.S. § 12-2602 certification" of David D. Dodge, who averred that Clarke's representation of MPI during the arbitration proceedings "was below the standard of care expected of a reasonably competent, knowledgeable and experienced lawyer[.]" Dodge further opined that, had Clarke competently appreciated the significance of the "ordinary course of business" issues and properly "marshal[led] the available evidence concerning" the industry's normal "payment practices," no award of damages against MPI would have been entered.

¶9 Clarke subsequently filed an amended complaint asserting a claim of quantum meruit against Thomas Payne and John Mohnach, individually, alleging they were unjustly enriched by Clarke's legal services. MPI filed an amended answer and counterclaim, abandoning two of its claims of legal malpractice, leaving only its claim that Clarke's representation during the arbitration proceeding fell below the requisite standard of care.

¶10 Following extensive motion practice on numerous issues, the trial court entered minute entry rulings: (1) granting partial summary judgment in favor of Clarke on the reasonableness of its hourly fee and the number of hours expended in its representation of MPI; (2) denying cross-motions for partial summary judgment on the legal malpractice claim against Clarke; (3) denying MPI's motion for partial summary judgment on the fraudulent transfer claim; (4) denying MPI's motion for partial summary judgment on the quantum meruit claim; and (5) granting Clarke's motion to strike Dodge's unsworn letters as inadmissible hearsay.

¶11 Approximately two months before the scheduled trial, Clarke filed motions in limine to exclude any expert testimony not previously disclosed; specifically, new opinion testimony by Dodge and damages testimony by Mohnach (who had not previously been disclosed as an expert witness). MPI responded that Dodge's trial testimony would be "confined to opinions that have been disclosed[.]" After hearing argument, the court granted Clarke's motions. Subsequent to that ruling, Clarke filed a supplemental motion in limine to exclude Mohnach's opinion testimony on the basis that he did not prepare the accounting records that he intended to discuss at trial and therefore lacked sufficient foundation to introduce and discuss those documents. The trial court found that pursuant to Arizona Rule of Evidence 602, Mohnach "lacks the personal knowledge necessary to lay foundation for and to authenticate the accounts payable records of Smith West that [MPI] seeks to introduce through [] Mohnach." Furthermore, the court explained that even if these records were "admitted . . . through another witness," Mohnach "lacks the personal knowledge necessary to testify regarding the data contained in those records and/or to interpret them in any way for the jury."

¶12 The matter proceeded to trial. On the first day of trial, John Mohnach testified that, as part of the sale, MPI had to furnish information on its accounts payable and receivable. In the event those representations were inaccurate, the APA provided for indemnification up to $5,000,000. The accounts payable were represented as $5,316,000, but were approximately $6,000,000 at close. Likewise, the accounts receivable were represented as $2,830,000, but were only $2,550,000 at close.

¶13 In October 2007, the same month Smith West demanded indemnification, MPI acquired a new business, CRS Aerospace, for $1,320,000. In October 2008, four months following the arbitrator's entry of judgment in favor of Smith West, John Mohnach and Thomas Payne transferred ownership of CRS Aerospace from MPI to John and Sharon Mohnach and Thomas and Barbara Payne, individually, leaving no residual MPI assets. John Mohnach testified that during the year following its acquisition, CRS Aerospace's equipment depreciated dramatically and the business retained little value.

¶14 Clarke then testified at length regarding the time, effort, and firm resources that were devoted to defending MPI during the arbitration proceedings. She stated that the firm's fees totaled $295,931.89 and, including the 18% rate of interest provided for in the retainer agreement, Clarke's damages equaled $429,971.89. She explained further that she discussed the transfer of MPI's assets to the Paynes and Mohnachs, individually, and warned that such a transfer could constitute a fraud. She also testified that the firm's retainer agreement was with MPI, not any individual.

¶15 The next day of trial, Mohnach again testified and stated that, before the MPI/Smith West sale, MPI generally paid vendors in the

75 to 80-day range. Although Mohnach presented this testimony at the arbitration hearing, he claimed that his testimony was undermined by Clarke's failure to include a supplier ledger, in its entirety, that demonstrated the business's pre-sale payment practices (the accounts payable I documents). Mohnach also testified that his arbitration testimony that Smith West paid vendors, post-closing, in the 75 to 90-day range was weakened by Clarke's failure to submit a supplier ledger that would have confirmed Smith West's delayed payment practices (the accounts payable II documents). Mohnach also testified that CRS Aerospace was eventually sold for $610,000, but the parties realized no profit because the company's liabilities exceeded the sale price.

¶16 The following day, Clarke testified she relied on Mohnach's opinion that only the explanatory and summation pages of the accounts payable I documents were relevant and informative and therefore she only included those pages as an exhibit for the arbitration hearing.

¶17 At that point, MPI attempted to present the testimony of its expert, David Dodge. After reciting his qualifications to testify regarding the standard of care owed by an attorney to a client, Dodge testified that he reviewed the accounts payable I and accounts payable II documents to evaluate whether Clarke had competently defended MPI during the arbitration proceedings. Clarke immediately objected and the court held a sidebar conference. Noting that the court's pretrial motion in limine ruling precluded the introduction of any undisclosed opinion testimony, Clarke argued that Dodge's testimony was inadmissible. Clarke pointed out that at Dodge's deposition, he specifically testified that he had not reviewed the accounts payable documents and was instead relying on assumptions provided by Mohnach and Payne as to the content of those documents to form his opinions. In response, MPI argued that an expert can testify about "anything, even if it is not admissible[.]" The court ordered that Dodge was prohibited from discussing his review of the accounts payable documents, and any other evidence that was not previously disclosed, but allowed Dodge's testimony to proceed.

¶18 Upon questioning, MPI asked Dodge twice for his opinion based on "all" the documents he had reviewed. Clarke objected and requested to voir dire Dodge, which the court granted. Clarke asked Dodge a single question: "[W]ere any of the opinions that you intend to offer today based at all upon the records or the documents that Mr. Payne has provided to you since the time of your deposition?" Dodge answered: "Most of them, yes." Dodge also admitted that, in preparing his opinions for trial, he "didn't make a distinction between records that were produced before the deposition or after the deposition." Clarke moved to exclude Dodge's testimony, explaining to the court that Dodge's deposition testimony was entirely based on secondhand interpretations of documents and supplied assumptions. Moreover, because Dodge admitted he did not distinguish between evidence he reviewed before or after his deposition, Clarke argued it was impossible for Dodge to testify about his opinions at the time of his deposition. Because there had been no supplemental disclosure subsequent to Dodge's deposition, the court found that Clarke was "severely prejudiced" and unable to properly cross-examine Dodge.

¶19 After additional voir dire of Dodge and extensive discussion between counsel and the trial court, the court ultimately concluded that Dodge could not testify because the basis for his opinions was not disclosed. The court then granted Clarke's motion to exclude Dodge for noncompliance with Arizona Rule of Civil Procedure 26.1. Following the court's ruling, MPI argued that the sanction was too severe and a lesser sanction should be imposed. MPI did not, however, suggest any alternative, lesser sanction. The court then granted Clarke's motion for directed verdict on the malpractice claim because the only expert testimony that could have established the requisite standard of care and causation had been excluded.

¶20 The next day, MPI requested that the court reconsider its entry of a directed verdict and instead declare a mistrial, which the court denied. The court also entered a directed verdict on Clarke's breach of contract claim, finding reasonable persons could not disagree that Clarke had substantially performed the terms of the retainer agreement.

¶21 On the final day of trial, the court informed the jury that "as a matter of law the legal malpractice claim [had been] dismissed" and that judgment had been entered in favor of Clarke in the amount of $429,971.89 on the breach of contract claim. The jury found in favor of Clarke on the claims of fraudulent transfer and quantum meruit, and awarded damages in the amount of $429,971.89. In special interrogatories, the jurors also found that Barbara Payne and Sharon Mohnach potentially benefited from Clarke's representation of MPI in the arbitration proceeding. MPI appealed.

DISCUSSION

I. Exclusion of Dodge's Testimony

¶22 MPI contends that the trial court erred by excluding Dodge's trial testimony, in its entirety, rather than imposing a lesser sanction. MPI also argues the court erred by not conducting an evidentiary hearing to determine whether the discovery violation was harmless and whether it was attributable to counsel rather than the parties.

¶23 "In reviewing a dismissal for discovery violations, we will uphold the trial court's order unless the record reflects a clear abuse of discretion." *Zimmerman v. Shakman*, 204 Ariz. 231, 235, ¶ 10, 62 P.3d 976, 980 (App. 2003). Generally, a court's "discretion in dismissing a case for discovery violations is more limited than when it employs lesser sanctions." *Id*. at 235, ¶ 10, 62 P.3d at 980 (internal quotations omitted). When "a trial is set and imminent," however, the court "possesses considerable latitude" and "barring the introduction of evidence not previously disclosed may be a reasonable sanction." *Id*. at 236, ¶ 16, 62 P.3d at 981. "Trial judges are better able than appellate courts to decide if a disclosure violation has occurred in the context of a given case and the practical effect of any non-disclosure." *Solimeno v. Yonan*, 224 Ariz. 74, 77, ¶ 9, 227 P.3d 481, 484 (App. 2010).

¶24 Pursuant to Rule 26.1(a)(6), a party must disclose: (1) the subject matter on which an expert is expected to testify; (2) the substance of the facts and opinions to which the expert is expected to testify; (3) a summary of the grounds for each opinion; and (4) the qualifications of the witness. If a party fails to comply with this rule of disclosure in advance of trial, "the information shall not be used unless" the party files a motion and affidavit with the court and the motion establishes and the court finds: (1) "that the information could not have been discovered and disclosed earlier even with due diligence" and (2) "that the information was disclosed immediately upon its discovery." Ariz. R. Civ. P. 37(c)(3).

¶25 In this case, Clarke filed a motion in limine two months before trial requesting that the court exclude any undisclosed opinion testimony from Dodge. As a result, MPI was given explicit notice that any undisclosed opinion testimony would be challenged at trial. Instead of immediately supplementing its disclosure, however, MPI responded that Dodge's trial testimony would be "confined to opinions that have been disclosed[.]"

¶26 On day four of trial, MPI called Dodge to testify. At the outset of his testimony, Dodge identified the accounts payable documents he had reviewed to form his opinions and Clarke objected to the testimony on the basis that Dodge had not reviewed the documents at the time of his deposition, which had occurred a year earlier. Following a sidebar discussion, the court determined that Dodge could testify but barred him from relying on any evidence that he reviewed after his deposition. Thus, contrary to MPI's appellate argument, the court attempted to fashion a narrow sanction that would allow MPI to introduce the requisite standard of care evidence without violating the motion in limine ruling and Rule 37(c).

¶27 Nonetheless, immediately upon recommencing examination of Dodge, Thomas Payne twice asked Dodge for his opinion based on "all" the documents he had reviewed, in direct violation of the court's ruling made only moments before. Following Clarke's objections, the court permitted Clarke to voir dire Dodge and he acknowledged that "most" of his opinion testimony was based on the accounts payable documents he reviewed since his deposition. He also admitted that he could not distinguish between the records produced before or after his deposition in forming his opinions.[2] Given Dodge's undisputed admission that his opinions at the time of his deposition were based on assumptions provided by Mohnach and Payne as to the information contained in the accounts payable documents, rather than a firsthand review of the documents, the court properly concluded that Clarke was prejudiced by the disclosure violation.[3] *See* Rule 37(c) cmt. (explaining that prejudice is "inevitable" when disclosures are made during trial and "evidence should be excluded unless it would meet the standards to obtain a new trial for newly discovered evidence").

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[2] During voir dire, Clarke's attorney asked Dodge "[I]f you were to offer opinions today, they would not be based upon assumptions of what documents might show, but would rather be based upon having reviewed the documents and what you believe that they would show, correct, or believe that they show. Would that be a fair statement." Dodge responded "That I know that they show, yes."

[3] Because Thomas Payne was both counsel and a party, the trial court did not need to conduct an evidentiary hearing to determine whether the defendant/counterclaimants "shared the blame for nondisclosure." *See Zimmerman*, 204 Ariz. 236, ¶ 19, 62 P.3d at 981 (internal quotations omitted).

¶28 Moreover, we reject MPI's argument that all prejudice from its disclosure violations would have been ameliorated had the court simply ordered Dodge to submit to a deposition on Friday, May 11, 2012 and then resumed trial on May 14, 2012. The issues and documents underlying Dodge's expert opinion are technical and complicated and we disagree that "a weekend" would have provided Clarke sufficient time to adequately prepare for cross-examination and rebuttal. *See Link v. Pima County*, 193 Ariz. 336, 340, ¶ 10, 972 P.2d 669, 673 (App. 1998) ("Late disclosure will prejudice the opposing party if there is insufficient time to investigate fully and prepare rebuttal before the date for final supplementation of disclosures. Prejudice is also inherent when a trial must be continued after the parties have spent time and resources in preparation.") (internal quotation omitted). Therefore, because MPI had this information in its possession for approximately a year and could have timely disclosed that Dodge would be relying upon it at trial, *see* Rule 37(c)(3), and MPI was put on notice through Clarke's motion in limine that its failure to timely disclose would be challenged at trial, we conclude the trial court did not abuse its discretion by excluding Dodge's testimony. Moreover, because Dodge was MPI's only expert to provide the requisite standard of care evidence, the court did not err by entering a directed verdict in Clarke's favor on the legal malpractice counterclaim.[4]

II. Community Property Jury Instruction

¶29 The Paynes argue the trial court erred by denying their requested instructions on community property. Specifically, the Paynes contend that "omission of the requested jury instructions" prevented the jury from properly determining "whether the Paynes' community [property] was liable" for Clarke's legal fees. Because the jury found Barbara Payne personally liable on the claim of fraudulent transfer and awarded the entire amount of requested damages, $429,971.89, on that count, this issue is moot and we therefore do not address it.

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[4] Likewise, because MPI's defense against Clarke's breach of contract claim was that Clarke violated the retainer agreement by failing to meet the standard of care expected of an Arizona attorney, the trial court did not err by granting a directed verdict in favor of Clarke. Accordingly, we need not address MPI's additional argument that the court improperly excluded the testimony of John Mohnach regarding the accounts payable documents.

III. Time Limitations on Closing Argument

¶30 MPI contends the trial court erred by limiting its time for closing argument. MPI argues that there was no reasonable basis for truncating its argument, resulting in severe prejudice.

¶31 "A trial court has broad discretion to limit the duration and scope of closing arguments." *State v. Davis*, 226 Ariz. 97, 101, ¶ 18, 244 P.3d 101, 105 (App. 2010). The court "may limit counsel to a reasonable time . . . [and] ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." *Herring v. New York*, 422 U.S. 853, 862 (1975). Nonetheless, "such limitations must not be so severe that they . . . risk giving the jury a false impression that the matter to be decided is either unimportant or so straightforward that it does not merit significant argument by counsel." *Davis*, 226 Ariz. at 101-02, ¶ 18, 244 P.3d at 105-06. "Whether a trial court's limitation on summation is reasonable will depend on various factors such as the complexity of the case, the nature of the evidence presented, and the gravity of the offense." *Id.* at 102, ¶ 19, 244 P.3d at 106.

¶32 On the eve of the last day of trial, the court informed the parties they would each have "[n]o more than an hour" for their closing arguments. Thomas Payne responded he "would have a hard time talking that long."

¶33 During Payne's closing argument the following day, the court held several sidebar discussions admonishing Payne not to discuss precluded matters. Approximately forty-five minutes into his argument, the court notified Payne he only had fifteen to twenty minutes to finish. Payne acknowledged the time limits established the previous day, but informed the court he could not finish in the proscribed time period and requested additional time. The court denied the request and Payne stated the court could "cut [him] off." The court then notified Payne when he had three minutes remaining, one minute remaining, and when his time expired.

¶34 Payne raised no objection to the time limits when presented by the court the day before closing arguments, and even suggested he may not use the full time allotted. Although the fraudulent transfer and quantum meruit issues presented to the jury were somewhat complex, we cannot say the court's time limits were an abuse of discretion. Had Payne strictly complied with the court's orders limiting the scope of his closing arguments rather than attempting to address precluded matters, the court would not have needed to interrupt him with repeated sidebar admonishments and Payne would have had additional time to present his remarks. Moreover, we reject Payne's claim that the court's time warnings signaled to the jurors the court's belief that the case was straightforward and clear. *Davis*, 226 Ariz. at 101, ¶ 18, 244 P.3d at 105. The court initially reminded Payne of the time constraints during a sidebar outside the hearing of the jury. Payne responded by informing the court he would not be able to comply and inviting the court to "cut [him] off." The court acted accordingly. Therefore, the court did not abuse its discretion by enforcing the established time limits for closing arguments.

IV. Closing Argument Comments on the Directed Verdicts

¶35 MPI argues the trial court erred by barring Thomas Payne from explaining to the jurors, during his closing argument, the basis for the court's entry of directed verdicts on the malpractice and breach of contract claims.

¶36 At the outset of its closing argument, Clarke's counsel informed the jury that the firm was "vindicated by the Court with respect to [the] malpractice [claim]." Payne did not object. When Payne began his closing argument, however, he attempted to explain to the jury that the case was dismissed based on procedural/evidentiary rulings rather than a determination on the merits. Clarke immediately objected and the court held a sidebar conference. Payne argued that he needed the opportunity to rebut Clarke's claim of "vindication." The court instructed Payne not to address it.

¶37 The trial court has broad discretion to limit the scope of closing arguments. *Davis*, 226 Ariz. at 101, ¶ 18, 244 P.3d at 105. The court may limit counsel to "ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." *Herring*, 422 U.S. at 862.

¶38 Here, we cannot say the trial court abused its discretion by prohibiting Payne from discussing the procedural rulings that preceded the directed verdicts. Had Payne raised a contemporaneous objection to Clarke's characterization of the directed verdicts as a "vindication," there would have been a sound basis for the court to strike the argument. Payne did not do so. Absent such an objection, we conclude the court did not abuse its discretion by limiting the scope of Payne's closing argument to the matters properly submitted to the jury.

CONCLUSION

¶39 For the foregoing reasons, we affirm the trial court's judgment. In our discretion, we deny Clarke's request for attorneys' fees pursuant to A.R.S. § 12-341.01. Clarke is entitled, however, to an award of costs incurred on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

COURT OF APPEALS
STATE OF ARIZONA

Ruth A. Willingham · Clerk of the Court
FILED: mjt