[Cite as *Passerell v. Cordell,* 2015-Ohio-1767.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

DAVID PASSERELL, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants/ Cross-Appellees,	:	
	:	**CASE NO. 2014-A-0050**
- vs -	:	
STUART CORDELL, ESQ., et al.,	:	
Defendants-Appellees/ Cross-Appellants.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2012 CV 00333.

Judgment: Affirmed.

Nicholas P. Weiss and *Gerry Davidson,* Fanger & Associates, LLC, 36 Alpha Park, Highland Heights, OH 44143 (For Plaintiffs-Appellants/Cross-Appellees).

John W. Becker, P.O. Box 139, Hinckley, OH 44233 (For Defendants-Appellees/Cross-Appellants).

COLLEEN MARY O'TOOLE, J.

{¶1} Plaintiffs-Appellants/Cross-Appellees, David and Michael Passerell, appeal from the July 15, 2014 judgment of the Ashtabula County Court of Common Pleas, granting summary judgment in favor of Defendants-Appellees/Cross-Appellants, Stuart Cordell, Esq. and Warren and Young, P.L.L. This appeal arises from a legal malpractice action initiated by former clients, David and Michael Passerell, against

Attorney Cordell and his law firm, Warren and Young. On appeal, David and Michael allege the trial court erred in determining that they could not succeed on the element of proximate cause in their claim for legal malpractice and that they could not prove a conflict of interest without expert testimony. Attorney Cordell and Warren and Young have filed a cross-appeal asserting the trial court erred in deciding that expert opinion testimony was not required on the standard of care regarding Attorney Cordell's actions or omissions related to an ex parte hearing on a motion for a temporary restraining order. For the reasons discussed in this opinion, we affirm.

{¶2} The Passerell family includes four brothers, David, Michael, Joseph, and Steven, and one sister, Patricia Stanton. The four brothers each own 25 percent of AllPass Corporation, a manufacturer of water heater parts located in Ashtabula, Ohio. The corporate code of regulations for AllPass authorizes the election of four directors. Each brother serves as a director. Joseph was named president. The brothers regularly voted in a 2-2 tie.

{¶3} In 2004, the brothers executed a "tie-break" agreement. The agreement was by and between the shareholders of AllPass. It purported to empower David to break tie votes among the board of directors.

{¶4} Around 2005, Joseph and Steven stopped honoring that agreement. Joseph hired Attorney Cordell with the law firm of Warren and Young to represent AllPass. In addressing the deadlock issues, Attorney Cordell advised the brothers that the tie-break agreement may not be enforceable because it purported to proxy a director's voting power, instead of a shareholder's, which could be a violation of a director's fiduciary duty.

{¶5} David and Michael became suspicious and started to believe that Joseph was using AllPass funds for his own personal use. As animosity among the brothers grew, David and Michael retained Fanger and Associates, LLC to represent them.

{¶6} Eventually, the discord reached its peak in 2011. In February, David and Michael sought the assistance of Attorney Jeffrey Fanger in order to devise a plan to terminate their brother, Joseph, as AllPass' president. After determining that no conflict existed, Attorney Fanger engaged in an investigation of Joseph and completed an extensive "report." On April 19, 2011, David and Michael called a special meeting of the directors. In order to achieve their goal in removing Joseph from his position, David and Michael included a "fifth director," their sister, Patricia, who attended the meeting.

{¶7} At that meeting, Attorney Fanger produced the previously unseen "report" that his office had prepared which he claimed contained evidence detailing conduct by Joseph that justified his termination as president. The claims included that Joseph started a competing business and misused corporate assets and equipment. David and Michael also claimed that Patricia had been elected as AllPass' fifth director. The "report" was not admissible before the trial court. Over the objection of Joseph and Steven, David, Michael, and Patricia voted to terminate Joseph's presidency.

{¶8} In response to his termination, on April 29, 2011, Joseph Passerell filed a complaint for declaratory and injunctive relief and for damages against David, Michael, Patricia, and AllPass in the Lake County Court of Common Pleas, Case No. 11CV001096. On May 13, 2011, Joseph moved for a preliminary injunction. David and Michael requested that Attorney Cordell enter an appearance on their behalf in the Lake County litigation. At that time, Attorney Cordell stated that he informed them of a

potential conflict. However, David and Michael insisted that he undertake their representation.

{¶9} Attorney Cordell agreed only to a limited representation including the filing of a notice of appearance, a motion to transfer the Lake County litigation to Ashtabula County, and a motion to stay the proceedings. On May 26, 2011, Attorney Cordell received a letter from Joseph's counsel which raised the issue of a potential conflict. On June 2, 2011, Attorney Cordell informed all interested parties via email that he would be withdrawing from the case.

{¶10} On Friday, June 3, 2011, Joseph Passerell filed a motion for a temporary restraining order. Attorney Cordell indicated he received notice of the TRO motion via an email that same day, which he forwarded to Michael as soon as he read it. The email stated that Attorney Cordell would be notified if the court agreed to meet with counsel for the plaintiff that day. Attorney Cordell was not contacted that day before he left the office for the weekend around 3:30 p.m. However, Plaintiffs' counsel apparently sent an email to Attorney Cordell at 4:42 p.m. regarding the TRO. Attorney Cordell stated he never read that email before the ex parte hearing was later conducted and concluded by the Lake County Court of Common Pleas on June 6, 2011.

{¶11} Attorney Cordell stated he had an early morning meeting with other clients in Geneva, Ohio on Monday, June 6, 2011. Attorney Cordell said he first became aware of the scheduled TRO hearing after 10:00 a.m. that day when he received an email from Attorney Fanger stating that "there apparently is a hearing today in Lake County at 10 am that may move forward on an ex parte basis." Also, Michael called Attorney Cordell relaying the same information. As a result, Attorney Cordell called the

Lake County Court of Common Pleas. He was informed that the hearing was being conducted ex parte and that the court does not send out notices of TRO hearings.

{¶12} Thus, the matter was heard by the Lake County Court of Common Pleas ex parte on June 6, 2011. Neither Attorney Cordell nor Attorney Fanger attended. A temporary restraining order was granted that day, effective for 14 days, and a hearing on the motion for preliminary injunction was set for June 15, 2011.

{¶13} On June 7, 2011, Attorney Cordell filed a motion to withdraw as counsel in the Lake County litigation. Three days later, his motion was granted. Thereafter, new counsel for David and Michael became involved. The hearing on the motion for preliminary injunction was delayed. In fact no hearing on that motion ever took place. A deal between David, Michael, and Joseph to settle the Lake County litigation occurred in July 2011. On September 21, 2011, a final settlement was reached and that lawsuit was dismissed.

{¶14} On April 27, 2012, David and Michael Passerell filed a complaint for legal malpractice against Attorney Cordell and Warren and Young in the Ashtabula County Court of Common Pleas, Case No. 2012 CV 00333. After receiving an extension of time, Attorney Cordell and Warren and Young filed an answer on June 28, 2012.

{¶15} The parties underwent substantial discovery and mediation but were unable to reach a settlement. Attorney Cordell and Warren and Young engaged the services of an expert who opined that Attorney Cordell had not breached any duty which included the fact that he did not appear at the TRO ex parte hearing. David and Michael believed otherwise but did not engage an expert because they thought that the

breach was so obvious and the harm so evident that an expert was unnecessary to prove legal malpractice.

{¶16} On October 3, 2013, David and Michael filed a motion for summary judgment, which Attorney Cordell and Warren and Young opposed. The trial court overruled the motion for summary judgment on December 20, 2013.

{¶17} Thereafter, Attorney Cordell and Warren and Young filed a motion for summary judgment on May 15, 2014, which David and Michael opposed. The trial court granted the motion for summary judgment on July 15, 2014.

{¶18} David and Michael Passerell filed a timely appeal on August 12, 2014. Attorney Cordell and Warren and Young filed a cross-appeal on August 21, 2014.

{¶19} On appeal, David and Michael Passerell raise the following two assignments of error:

{¶20} "[1.] The Ashtabula Court of Common Pleas erred in granting Appellees', STUART CORDELL and WARREN & YOUNG, PLL's, motion for summary judgment based on its opinion that Appellants could not succeed on the element of proximate cause in their claim for legal malpractice without expert testimony.

{¶21} "[2.] The Ashtabula Court of Common Pleas erred in granting Appellees', STUART CORDELL and WARREN & YOUNG, PLL's, motion for summary judgment based on its opinion that Appellants could not prove a conflict of interest of (sic) without expert testimony."

{¶22} In their first assignment, David and Michael argue the trial court erred in granting Attorney Cordell's and Warren and Young's motion for summary judgment based on its opinion that they could not succeed on the element of proximate cause in

their claim for legal malpractice without expert testimony. In their second assignment, David and Michael contend the trial court erred in granting Attorney Cordell's and Warren and Young's motion for summary judgment based on its opinion that they could not prove a conflict of interest without expert testimony.

{¶23} Because David and Michael's two assignments of error are interrelated, we will address them together.

{¶24} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66 * * * (1993). Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. *See e.g*. Civ.R. 56(C).

{¶25} "When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 121 * * * (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359 * * * (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfork Southern Corp*., 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, 'whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' *Anderson v. Liberty Lobby, Inc.,*

477 U.S. 242, 251-252 * * * (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105 * * * (1996)." *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6. (Parallel citations omitted.)

{¶26} "With respect to Attorney Malpractice, the Ohio Supreme Court has held that '(t)o establish a cause of action for legal malpractice based on negligent representation, a plaintiff 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.'" *Garland v. Simon-Seymour*, 11th Dist. Geauga No. 2009-G-2897, 2009-Ohio-5762, ¶47, quoting *Vahila v. Hall*, 77 Ohio St.3d 421 (1997), syllabus. "Failure to prove any one of these elements entitles a defendant to summary judgment on a legal malpractice claim." *Hinton v. Masek*, 11th Dist. Trumbull No. 2013-T-0110, 2014-Ohio-2890, ¶14.

{¶27} "'Summary judgment in favor of the attorney is appropriate when a plaintiff fails to supply expert testimony on alleged negligence that is "neither within the ordinary knowledge of the layman nor so clear as to constitute negligence as a matter of law."' *Brunstetter v. Keating*, 11th Dist. Trumbull No. 2002-T-0057, 2003-Ohio-3270, ¶16, quoting *Bloom v. Dieckmann*, 11 Ohio App.3d 202, 203 * * * (1st Dist.1983). In all but a few cases, expert testimony is required to support allegations of legal malpractice. *Brunstetter, supra*." (Parallel citation omitted.) *Hinton, supra,* at ¶15.

{¶28} "The merits of the malpractice action often depend on the merits of the underlying case when proximate cause is an issue. As such, a plaintiff in a legal

malpractice action may be required to demonstrate the merits of the underlying claim. *Eastminster Presbytery v. Stark & Knoll*, 9th Dist. No. 25623, 2012-Ohio-900, ¶6, citing *Vahila* at 427-428. Although the Ohio Supreme Court has held that the 'case-within-a-case' doctrine does not apply to every legal malpractice case, *Vahila* at 428, it remains relevant in cases where 'the theory of the malpractice case places the merits of the underlying litigation directly at issue.' *Eastminster* at ¶7, quoting *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, * * * ¶18. In order to prove causation in these cases, the plaintiff must prove that but for the attorney's negligence, the plaintiff would have obtained a better outcome in the underlying case. *Eastminster* at ¶7, citing *Environmental Network* at ¶18. In this way, '[a]ll the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiffs former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial(.) *Id.*, quoting Restatement of the Law 3d, Law Governing Lawyers 390, Section 53, Comment b (2000).'" (Parallel citation omitted.) *C&K Indus. Servs. v. McIntyre, Kahn & Kruse Co., L.P.A.*, 8th Dist. Cuyahoga No. 98096, 2012-Ohio-5177, ¶16.

{¶29} The comment to Ohio's conflict-of-interest rule, Prof. Cond. Rule 1.7, states: "The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict of interest provisions of these rules. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client."

{¶30} Although summary judgment is a "very potent procedural tool" used by judges which circumvents a plaintiff's ability to proceed to trial, it was properly utilized in this case. *See* Beiner, *The Misuse of Summary Judgment,* 34 Wake Forest L. Rev. 71 (1999). Based on the facts presented and construing the evidence most strongly in favor of David and Michael, there is no genuine issue as to any material fact, reasonable minds can come to but one conclusion which is adverse to David and Michael, and Attorney Cordell and Warren and Young are entitled to judgment as a matter of law on the legal malpractice claims against them.

{¶31} David and Michael rely on law from other jurisdictions to support their arguments. Regarding Ohio law, they assert that courts generally do not require expert witnesses on causation and that because their damages, consisting solely of legal fees paid to lawyers others than Attorney Cordell and Warren and Young from the date of the alleged malpractice (June 6, 2011 when the TRO was granted), no expert was needed. However, the record reveals that David and Michael's damage claims extend beyond just their legal fees. If fact, both David and Michael testified via depositions that in addition to legal fees their damage claims consisted of lost wages for the years from the date of the 2011 settlement of the Lake County litigation to the date each would have voluntarily decided to retire. Such lost wages amount to a combined total in the three million dollar range. Both David and Michael also testified to the theory that but for the alleged malpractice of Attorney Cordell and Warren and Young in this case, they would have prevailed in the Lake County litigation. Thus, David and Michael's case relies entirely upon success on the merits of the underlying Lake County case.

{¶32} In order to prevail, David and Michael must establish a proximate causal connection which would require them to address complex business litigation, various procedural issues, and corporate law. Such would require them to prove the case within the case. To do so would require them to present expert testimony to try to establish that the entire result of the case would have been different by establishing how they would have prevailed in the Lake County litigation. *See, e.g., Environmental Network, supra.* "Prevailing" in the Lake County litigation means establishing that the termination of Joseph was lawful, which goes well beyond the mere issuance of a TRO, thereby requiring expert testimony.

{¶33} The trial court properly summarized the foregoing in its July 15, 2014 judgment entry:

{¶34} "Under the particular circumstances of this case, in order to establish a causal connection between the conduct of the Defendants and the Plaintiffs' claimed damage or loss, the Plaintiffs must present evidence related to two points. First, that if Cordell had attended the hearing, the judge would not have granted the restraining order. Second, if the judge had not granted the restraining order, the Plaintiffs would have had a better outcome in the case – that is, would not have incurred the claimed damage or loss. In order to establish proximate cause in this case, it is apparent that the Plaintiffs must prove the case within the case. Given the equitable nature of temporary restraining orders, and the fact that they are not amenable to a jury determination, the jury in this legal malpractice case could not properly evaluate the evidence on the element of proximate cause without the benefit of expert testimony on

the question of whether or not the outcome of the underlying case would have been different, but for the negligence of the defendants."

{¶35} This court recognizes that the particular circumstances of a case can mandate expert opinion evidence on issues of proximate causation. In addressing a similar issue, this court recently held in *Hinton, supra,* at ¶19:

{¶36} "Despite appellant's conclusory statement, we fail to discern what aspect of appellee's representation was so obviously negligent that appellant was not required to submit an expert report. Under the circumstances, an expert was necessary to opine on the manner in which appellee's representation allegedly fell below professional standards of conduct as well as how the alleged breach proximately caused appellant damage. Because appellant failed to submit an expert report, appellee was entitled to judgment as a matter of law."

{¶37} David and Michael rely on Attorney Fanger's "report." As stated, at the April 19, 2011 special meeting, Attorney Fanger produced this previously unseen "report" that his office had prepared which he claimed contained evidence detailing conduct by Joseph that justified his termination as president. The claims included that Joseph started a competing business and misused corporate assets and equipment. This "report," however, does not eliminate the need for expert opinion testimony on proximate cause. David and Michael base their case on this "report" which was neither authenticated nor properly introduced. Even if the "report" were admissible, David and Michael cannot prove causation on the specific circumstances of their claims without expert opinion evidence.

{¶38} In addition, contrary to David and Michael's conflict of interest assertion on appeal, the trial court did not rule that an expert witness was required to "*prove* a conflict of interest." Rather, the trial court stated in its July 15, 2014 judgment entry:

{¶39} "In the case at bar, it is undisputed that the Defendant, Stuart Cordell, was confronted with an apparent conflict of interest in representing the Plaintiffs and their business in a court action brought against them by a co-owner of the business. * * * In order for the jury to understand the standard of care by which to evaluate Cordell's conduct, it will be necessary to interpret and apply the Rules of Professional Conduct, to know whether there was an actual or potential conflict, and whether Cordell's actions or omissions in response to the apparent conflict fell below the applicable standard of care. Under the facts and circumstances in this case, the complexities of conflicts of interest and an attorney's professional obligations are not so obvious or well known as to be within the common knowledge of a layperson. The Court finds that in order to establish any of the Plaintiffs' allegations arising from actual or potential claims of conflict of interest, expert testimony is required to establish the appropriate standard of care, and the failure to disclose an expert on this issue, at this stage, is fatal to the Plaintiffs' ability to establish the elements necessary to establish a cause of action for legal malpractice."

{¶40} In this case, there is, and was, no dispute that a potential conflict of interest existed. Attorney Cordell informed David and Michael of the potential conflict in writing prior to taking their representation as requested. Potential conflicts of interest are governed by the Rules of Professional Conduct, which are beyond the normal experience and understanding of laymen. *See* Ohio Prof. Cond. Rules 1.7, 1.9, and 3.7. "Because of the very nature and complexity of the Code of Professional

Responsibility and the conduct of legal matters, expert testimony is required * * *." *Northwestern Life Ins. Co. v. Rogers*, 61 Ohio App.3d 506, 512 (10th Dist.1989); *see also DeMeo v. Provident Bank*, 8th Dist. Cuyahoga No. 89442, 2008-Ohio-2936, ¶44. Thus, the trial court properly held that David and Michael's claims failed because they could not proceed without expert testimony on these issues. The court properly granted summary judgment in favor of Attorney Cordell and Warren and Young.

{¶41} David and Michael Passerell's two assignments of error are without merit.

{¶42} On cross-appeal, Attorney Cordell and Warren and Young raise the following assignment of error:

{¶43} "The Trial Court erred in deciding that expert opinion testimony was not required on the standard of care regarding Defendant-Appellee-Cross-Appellant Cordell's actions or omissions related to the *ex parte* hearing on the motion for temporary restraining order in the Lake County Litigation."

{¶44} In light of our determination regarding David and Michael Passerell's two assignments of error, Attorney Cordell's and Warren and Young's assignment of error on cross-appeal is rendered moot. *See* App.R. 12(A)(1)(c).

{¶45} For the foregoing reasons, appellants' assignments of error are not well-taken and cross-appellants' assignment of error is moot. The judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.