[Cite as *Chilton-Clark v. Fishel*, 2016-Ohio-7135.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Cynthia L. Chilton-Clark,	:	
Plaintiff-Appellant,	:	
		No. 16AP-76
v.	:	(C.P.C. No. 13CV-10427)
Ronald D. Fishel,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 30, 2016

On brief: *David A. Tawney*, for appellant.

On brief: *Reminger, Co., L.P.A.*, and *Kevin P. Foley*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, P.J.

{¶ 1} Plaintiff-appellant, Cynthia L. Chilton-Clark, appeals the January 5, 2016 judgment entry of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Ronald D. Fishel. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} On September 18, 2013, appellant filed a complaint against appellee arising out of professional accounting services rendered by appellee. Specifically, appellant alleged three causes of action against appellee: negligence, breach of contract, and breach of fiduciary duty. Appellant alleged that, as a result of appellee's failure to provide accounting services, she incurred "monetary loss, including but not limited to the loss [sic] revenue for the various businesses, the loss of various business ventures, the

imposition of tax liens, penalties and interest." (Complaint at 2.) On October 11, 2013, appellee filed an answer to the complaint.

{¶ 3} On August 28, 2015, the trial court filed an order and entry amending the case schedule and providing that the discovery deadline was October 26, 2015. On December 7, 2015, appellee filed a motion for summary judgment. On December 21, 2015, appellant filed a response to the motion for summary judgment. On December 28, 2015, appellee filed a reply brief. On December 31, 2015, appellant filed a supplemental disclosure of witnesses. On January 5, 2016, the trial court filed an order and entry granting appellee's December 7, 2015 motion for summary judgment in favor of appellee.

II. Assignments of Error

{¶ 4} Appellant appeals and assigns the following two assignments of error for our review:

> [I.] The Trial Court abused its discretion in ruling on the Motion for Summary Judgment on behalf of the Defendant.
>
> [II.] The Trial Court abused its discretion in ruling that the Plaintiff was required to have expert testimony to prove the accounting misconduct of the Defendant.

{¶ 5} In her first assignment of error, appellant asserts the trial court erred by granting summary judgment in favor of appellee. In her second assignment of error, appellant asserts the trial court erred by finding that she was required to provide expert testimony in support of her claim for professional negligence. As appellant's assignments of error are interrelated, we discuss them together.

III. Discussion

{¶ 6} An appellate court reviews summary judgment under a de novo standard. *Brisco v. U.S. Restoration & Remodeling, Inc.*, 10th Dist. No. 14AP-533, 2015-Ohio-3567, ¶ 19, citing *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995). Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being

entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 7} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). If the moving party fails to satisfy its initial burden, the court must deny the motion for summary judgment; however, if the moving party satisfies its initial burden, summary judgment is appropriate unless the non-moving party responds, by affidavit or otherwise as provided under Civ.R. 56, with specific facts demonstrating a genuine issue exists for trial. *Id.*; *Hall v. Ohio State Univ. College of Humanities*, 10th Dist. No. 11AP-1068, 2012-Ohio-5036, ¶ 12, citing *Henkle v. Henkle*, 75 Ohio App.3d 732, 735 (12th Dist.1991).

{¶ 8} Here, appellant asserted three claims against appellee: negligence, breach of contract, and breach of fiduciary duty. However, in its decision, the trial court found that "[i]n this case, all three causes of action fall within the purview of professional malpractice, because all three causes flow from the professional relationship between [appellant], the client, and [appellee], the service provider." (Order and Entry at 3.) Having found that appellant's claims were essentially a single claim of "professional malpractice," the trial court stated that "[appellant] is required to present expert testimony to establish that [appellee's] actions or inactions fell below the standard of care of a reasonably prudent accountant within that profession. [Appellant] has presented no expert testimony to support her claim for professional malpractice." (Order and Entry at 3.) Furthermore, the trial court also noted the following:

> [Appellant's] response, filed December 21, 2015, suggests that an unnamed expert has recently been retained to opine about the applicable standard of care and whether [appellee] breached said standard. The scheduled discovery deadline expired on October 26, 2015, six weeks before [appellee's] Motion for Summary Judgment was filed. Coupled with the fact that this action was originally filed in 2010, the Court will not grant [appellant] leave to add an expert witness this late in the pending case, and [appellant] has not requested leave as of the date of this decision.

(Order and Entry at 3, fn. 1.)

{¶ 9} We begin by reviewing the trial court's determination that appellant's "three causes of action fall within the purview of professional malpractice." (Order and Entry at 3.) In the context of legal and medical malpractice,[1] courts have held that "[m]alpractice by any other name still constitutes malpractice." *Muir v. Hadler Real Estate Mgt. Co.*, 4 Ohio App.3d 89, 90 (10th Dist.1982). *See Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, 10th Dist. No. 10AP-290, 2010-Ohio-5872, ¶ 15 ("When the gist of a complaint sounds in malpractice, other duplicative claims are subsumed within the legal malpractice claim."); *Burnside v. Leimbach*, 71 Ohio App.3d 399, 403 (10th Dist.1991) (finding that "[w]hile the doctor-patient relationship is fundamentally one in contract, * * * whenever a patient brings an action on that contract for a breach thereof, or the alleged negligent performance of it, the action is not on the contract, but is rather in tort"). "[P]rofessional misconduct may consist either of negligence or of breach of the contract of employment. It makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice." *Muir* at 90. In cases involving breach of contract and professional negligence claims against accountants, courts have applied this principle to find that where the factual allegations supporting breach of contract and professional negligence claims are the same, "the breach of contract claim is simply a restatement of the negligence claim." *Fronczak v. Arthur Andersen, L.L.P.*, 124 Ohio App.3d 240, 245 (10th Dist.1997). *See Cohen & Co. v. Breen*, 8th Dist. No. 100775, 2014-Ohio-3915, ¶ 31; *Offenbeher v. Lomax Soful & Foster, Inc.*, 9th Dist. No. 17725 (Sept. 25, 1996).

{¶ 10} Here, having thoroughly reviewed the allegations in appellant's complaint, we can not find on the facts of this case that the trial court erred in determining that

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[1] " 'The term "malpractice" refers to professional misconduct, *i.e.*, the failure *of one rendering services in the practice of a profession* to exercise that degree of skill and learning normally applied *by members of that profession* in similar circumstances.' " (Emphasis sic.) *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, ¶ 15, quoting *Strock v. Pressnell*, 38 Ohio St.3d 207, 211 (1988), citing 2 Restatement of the Law 2d, Torts, Section 299(A) (1965). At common law, the term "malpractice" was limited to professional misconduct in the legal and medical professions. *Evans v. Chapman*, 28 Ohio St.3d 132, 134 (1986); *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 179 (1989), fn. 4. Furthermore, accounting is not listed among the professions to which the statute of limitations for claims of malpractice applies. R.C. 2305.11(A). Although it is common to refer to professional misconduct claims against accountants as "malpractice," for purposes of clarity, we shall refer to this claim as "professional negligence." *See Haddon View Invest. Co. v. Coopers & Lybrand*, 70 Ohio St.2d 154, 157 (1982); *Smith v. Dayton Builders Supply, Inc.*, 2d Dist. No. 12835 (Dec. 11, 1991) (finding that a "claim of accountant liability is nothing more than a professional negligence claim").

appellant's claims were essentially restatements of a professional negligence claim. *See Rosen v. Lax*, 9th Dist. No. 27367, 2016-Ohio-182, ¶ 16 (by analogy, in a legal professional setting, claims of negligent misrepresentation, professional negligence, breach of fiduciary duty, and legal malpractice were subsumed within claim for legal malpractice); *Fronczak* at 245.

{¶ 11} Next, we consider whether the trial court properly granted summary judgment on appellant's claim of professional negligence. In order to establish a claim for professional negligence, a plaintiff must demonstrate: (1) the existence of a duty, (2) breach of that duty, and (3) damages proximately caused by the breach. *Damon's, Inc. v. Burman*, 10th Dist. No. 99AP-10 (Dec. 21, 1999), citing *Second Natl. Bank of Warren v. Demshar*, 124 Ohio App.3d 645, 648 (11th Dist.1997); *Ballreich Bros., Inc. v. Criblez*, 3d Dist. No. 05-09-36, 2010-Ohio-3263, ¶ 19; *Driftmyer v. Carlton*, 6th Dist. No. L-06-1029, 2007-Ohio-2036, ¶ 50. "If the party moving for summary judgment in a negligence action can point to evidence illustrating that the nonmoving party will be unable to prove any one of these elements, then the movant is entitled to judgment as a matter of law." *Demshar* at 648. *See Katz v. Fusco*, 10th Dist. No. 97APE06-846 (Dec. 9, 1997).

{¶ 12} Generally, in a professional negligence case, "[w]here the alleged negligence involves the exercise of professional skill and judgment, expert testimony is required to establish the prevailing standard of care, a breach of that standard, and proximate cause." *Ullmann v. Duffus*, 10th Dist. No. 05AP-299, 2005-Ohio-6060, ¶ 19, citing *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97, 103-04 (1992). However, expert testimony is not required where the conduct is "within the comprehension of laymen [sic] and requires only common knowledge and experience to understand and judge it." *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130 (1976). *See Ullmann* at ¶ 19, quoting *Jones v. Hawkes Hosp. of Mt. Carmel*, 175 Ohio St. 503 (1964), paragraph one of the syllabus ("Although expert testimony is required where an inquiry 'pertains to a highly technical question of science or art or to a particular professional or mechanical skill[,]' expert evidence is not required 'where the subject of the inquiry is within the common, ordinary and general experience and knowledge of mankind.' "); *Harris v. Levy*, 10th Dist. No. 11AP-301, 2012-Ohio-21, ¶ 22, quoting *Schottenstein, Zox & Dunn, LPA v. C.J. Mahan Constr. Co.*, 10th Dist. No. 08AP-851, 2009-Ohio-3616, ¶ 26, quoting *Goldberg v. Mittman*, 10th Dist. No.

07AP-304, 2007-Ohio-6599, ¶ 11 ("Generally in legal malpractice cases, expert testimony is required to prove an attorney's conduct breached the duty the attorney owed to the client unless the claimed breach is ' "well within the common understanding of * * * laymen[.]" ' "). "Thus, '[i]n all but a few cases, expert testimony is required to support allegations of professional malpractice.' " *Lundeen v. Graff*, 10th Dist. No. 15AP-32, 2015-Ohio-4462, ¶ 17, quoting *Party Dock, Inc. v. Nasrallah*, 10th Dist. No. 99AP-1345 (Oct. 5, 2000), citing *Bruni* at 130.

{¶ 13} Appellant asserts that "the accounting misconduct alleged in this matter comes within the common understanding of laymen." (Appellant's Brief at 14.) Appellant did not raise this argument before the trial court, either in her response to the motion for summary judgment or in an affidavit filed in support of her response. Therefore, we decline to consider appellant's argument for the first time on appeal. *Brisco* at ¶ 21; *Barker v. Century Ins. Group*, 10th Dist. No. 06AP-377, 2007-Ohio-2729, ¶ 30 (finding "plaintiff cannot now change the theory of his case and present new arguments for the first time on appeal").

{¶ 14} In *Breen*, Cohen & Company ("Cohen"), an accounting firm, filed a breach of contract action against James P. Breen, a former client, for non-payment for services rendered pursuant to a letter of engagement. Breen filed a counterclaim against the accounting firm for "accounting malpractice and professional negligence." *Id.* at ¶ 14. Before trial, however, Breen dismissed his counterclaim because he was unable to secure an expert witness. After Breen dismissed his counterclaim, Cohen filed a motion in limine to preclude Breen from introducing evidence concerning alleged professional negligence or failure to satisfy the applicable standards of care. The trial court granted the motion in limine because Breen had no expert to support his claim that Cohen breached the standard of care. However, the trial court allowed Breen to cross-examine a partner at Cohen regarding services he provided and their relation to the engagement letter, to the extent that such testimony did not involve applicable accounting standards. Following trial, a jury rendered a verdict in favor of Cohen.

{¶ 15} On appeal, Breen asserted that "[w]here an element of [Cohen's] claim was that it performed its duties under the contract, the trial court erred by barring [Breen] from introducing evidence of, cross-examining witnesses regarding, or even making

reference to, [Cohen's] failure to perform its duties according to the standards underlying and set forth in the contract." *Id.* at ¶ 17. The court found that despite the fact that Breen withdrew his counterclaim for professional negligence due to lack of expert testimony, "it appears he attempted to offer his own testimony on this issue by couching his claim as one for breach of contract, contending that Cohen did not comply with the contractual terms by failing to adhere to the accounting standards referenced in the letter of engagement." *Id.* at ¶ 30. The court found that "[d]espite framing his claim as one for breach of contract, the claim that Cohen failed to adhere to applicable accounting standards is in essence a claim of malpractice." *Id.* at ¶ 34. Therefore, the court concluded that since Breen lacked expert testimony, the trial court did not err in granting the motion in limine to exclude evidence that Cohen's services fell below the standard of care for accounting professionals.

{¶ 16} Here, in support of his motion for summary judgment, appellee submitted his own affidavit, appellant's answers to interrogatories, and the affidavit of appellee's counsel. Appellee averred that, at all times relevant to the instant matter, he was a certified public accountant. In 2002, Gary Clark, appellant's husband at the time, sought appellee's professional assistance in preparing joint tax returns for Gary Clark and appellant. Gary Clark subsequently requested appellee's professional services for various businesses.

{¶ 17} In 2007, appellee informed Gary Clark that until he received compensation for his services, he would not complete additional accounting work, including the preparation of tax returns, for appellant, Gary Clark, or the couple's businesses. Appellee averred that appellant was present on several occasions when appellee stated that he would not complete any accounting work until he was compensated. Appellee further averred that he was not paid to complete any such services, and he never represented to appellant or Gary Clark that he would complete such services. Finally, appellee averred that it is within reasonable standards of accounting to require payment before performing services. Based on our review of the record, we find that appellee, with reference to materials of the kind contemplated by Civ.R. 56, met his initial burden of identifying those portions of the record demonstrating an absence of a genuine issue of material fact.

{¶ 18} Next, we consider whether appellant's response, by affidavit or as otherwise provided by Civ.R. 56, sets forth specific facts demonstrating a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. Although appellant filed a response to appellee's motion for summary judgment, she failed to provide expert testimony to establish the requisite standard of care. Instead, in her response, appellant stated: "[Appellant] has also recently hired an expert to give an opinion as to the above issues relating to the filing of tax returns and professional negligence. A report is pending from this expert witness and will be provided as soon as it is completed." (Appellant's Memo. Contra Sum. Jgmt. at 4.)[2] However, appellant failed to include an affidavit from such expert in support of her response to summary judgment. Indeed, appellant did not disclose the identity of this expert witness, or even what she expected the expert would say, until December 31, 2015, over one week after she filed her response to the motion to summary judgment. As noted by the trial court in its decision, appellant failed to disclose the identity of this expert witness prior to the discovery cut-off date and failed to seek leave of court to offer this expert witness' testimony. Therefore, on the facts of this case, we find appellant failed to provide expert testimony as required in support of her professional negligence action. *See Katz* (finding that the trial court did not err in striking affidavit of expert witness where plaintiff failed to disclose expert witness before discovery cut-off date); *Harris* at ¶ 22-30 (finding trial court did not err in dismissing legal malpractice complaint where plaintiff failed to timely disclose an expert witness).

{¶ 19} Therefore, because appellant failed to provide expert testimony in support of her claim for professional negligence, on the facts of this case, we find the trial court did not err in granting summary judgment in favor of appellee. Accordingly, we overrule appellant's first and second assignments of error.

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[2] We note that on July 31, 2014, in her initial disclosure of witnesses, appellant listed "[a] representative of PDI Forensics" as providing expert testimony regarding appellee's accounting practices. (July 31, 2014 Disclosure.) Supplementing her response to an interrogatory request to identify all expert witnesses, appellant listed the names and contact information for two witnesses from "PD Eye Forensics, LLC." (May 18, 2015 Response.) However, in an affidavit attached to appellee's motion for summary judgment, counsel for appellee averred that on October 1, 2015, he sent a letter to appellant confirming that, based on conversations between counsel, representatives from PD Eye Forensics, LLC were no longer being retained by appellant as expert witnesses and that appellant did not have any expert witnesses. Counsel for appellee further averred that appellant had not responded to the letter or indicated that it was incorrect in any way. We further note that appellant, in her response to the motion for summary judgment, did not dispute that her previously disclosed expert witnesses were no longer retained.

IV. Conclusion

{¶ 20} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

LUPER SCHUSTER and BRUNNER, JJ., concur.