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# IN THE COURT OF APPEALS OF INDIANA

Trina M. Spainhower,

*Appellant-Plaintiff,*

v.

Smart & Kessler, LLC (f/k/a Smart Kessler & Lowe, LLC), Smart Kessler Lowe (a/k/a Smart & Kessler), John M. Smart, III, Douglas W. Kessler, and Brian K. Lowe,

*Appellees-Defendants.*

August 24, 2021

Court of Appeals Case No. 20A-SC-1629

Appeal from the Johnson Circuit Court

The Honorable Dan E. Marshall, Special Judge

Trial Court Cause No. 41C01-1911-SC-3097

**Najam, Judge.**

## Statement of the Case

[1] Trina M. Spainhower appeals the small claims court's denial of her claim for fraud against Smart & Kessler, LLC ("the law firm" or "the firm")[1] and its partners John M. Smart, III, Douglas W. Kessler, and Brian K. Lowe. The court denied Spainhower's claim on two grounds: that her fraud claim was instead a claim for legal malpractice and, as such, was not timely filed; and, in the alternative, that she had failed to meet her burden of proof to show fraud.

[2] Spainhower's claim was based entirely on the law firm's representation to her that her initial consultation would be with an attorney belonging to the firm, a representation that was false in that the purported attorney, Matthew Boehning, was not licensed to practice law. We conclude that Spainhower's claim is not a claim for legal malpractice because the misrepresentation occurred before she met with Boehning and did not occur within an attorney-client relationship. But we also conclude that Spainhower has not met her burden of proof to show that the misrepresentation was made with an intent to deceive or a reckless ignorance of the truth, as required to prove fraud. Thus, we affirm the judgment.

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[1] The law firm is formerly known as Smart Kessler & Lowe, LLC, and is also known as Smart Kessler Lowe or Smart & Kessler.

## Facts and Procedural History

[3] In late 2013, Spainhower called the law firm "seeking . . . legal representation for a domestic matter . . . ." Tr. Vol. II at 5. Spainhower "spoke to the receptionist," and the receptionist told Spainhower that "they had an attorney on staff," Boehning, with whom Spainhower could meet for an initial consultation. That initial consultation required a $100 fee, which Spainhower paid. The firm issued her a receipt "[f]or Matt Boehning consultation." Appellant's App. Vol. II at 12.

[4] Spainhower met with Boehning for the initial consultation on November 8, 2013. Spainhower's mother also participated in the consultation via telephone. A few days later, on November 13, Spainhower executed an agreement for legal services with the firm, described as "attorneys licensed to practice law in the State of Indiana." *Id.* at 13. The agreement identified Boehning as an "[a]ttorney[]" and one of the law firm's several attorneys who might work on Spainhower's case. *Id.* At some point, Spainhower was presented with Boehning's business card, which described him as an "Attorney at Law." *Id.* at 12. And each of the "[p]rofessional [s]ervices" described on the firm's subsequent invoice submitted to Spainhower was performed by Boehning. *Id.* at 20-21.

[5] About one year later, in 2014, Spainhower dismissed the law firm because her case "was not moving forward at all." Tr. Vol. II at 6. Thereafter, she learned, "pretty randomly," that Boehning was not in fact licensed to practice

law. *Id.* In May of 2016, she contacted the firm about Boehning and spoke with Kessler. Kessler informed her that the law firm had learned around "the summer of 2015" that Boehning "had passed the [b]ar exam in 2013" but had not completed "certain course requirements from [l]aw [s]chool," and that the law firm had terminated Boehning. *Id.* at 7. Kessler then asked Spainhower "to write [the law firm] a formal letter" to seek a refund of the amount paid for Boehning's work. *Id.* Spainhower then wrote a letter stating that the firm had "failed in its due diligence" and sought a refund of $6,640, paid by her mother and a refund of the $100 initial consultation fee, which Spainhower had paid.[2] *Id.* She also expressed "disappointment that the firm did not on its own accord inform [her]" that Boehning was not an attorney.[3] *Id.*

[6] Kessler responded to Spainhower's letter by stating that there would be no refund unless Spainhower hired another attorney and executed a release of any and all claims against the firm. Spainhower refused to pay more "out of [her] pocket for a mistake" of the firm. *Id.* at 8. Meanwhile, she filed grievances with the Indiana Supreme Court Disciplinary Commission about the conduct of the firm's partners. Three days after receiving Spainhower's grievances, the Commission dismissed two of them after having "determined that [they did] not raise a substantial question of misconduct." Appellant's

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[2] At trial, Spainhower identified the amount paid by her mother as $6,740. But according to the law firm's invoice, that total amount would include the $100 fee.

[3] The record does not disclose how many other clients of the firm Boehning purported to represent as if he were licensed to practice law.

App. Vol. II at 27-28. The Commission dismissed the third grievance four days after having received it for the same reason. *Id.* at 29.

[7] In November of 2019, Spainhower filed her notice of claim with the small claims court. In her notice, she alleged fraud and sought to recover her $100 initial consultation fee. She also sought treble damages of $300 and court costs of $165 for a total claim for $465. She identified no other claims against the firm in her notice.

[8] At the subsequent hearing, Spainhower stated that "the agreement for legal services began on November 13th, 2013," five days after the initial consultation, and that "*[t]hat time period is not part of this claim* . . . . I am only addressing the day of service for November 8th for the consultation." Tr. Vol. II at 6 (emphasis added). She further stated that she "paid the [$100] consultation fee out of my pocket. . . . I paid the fee for a service I didn't receive. Any ordinary business would . . . have a responsibility to issue a refund. . . . So that's why *I'm addressing just this* . . . ." *Id.* at 13 (emphasis added). At the close of her case-in-chief, Spainhower reiterated that her claim was all about the "representation that [Boehning] was an attorney . . . *prior to my going in for the appointment*." *Id.* at 32 (emphasis added). Moreover, in discussing the law firm's response to her discovery that Boehning was not an attorney, Spainhower made clear that "[t]he treble damages is why I'm explaining all this," meaning how the firm had responded after she discovered and confronted the firm with the fact that Boehning was not an attorney. *Id.* at 17.

[9] The law firm argued that Spainhower's claim was instead a claim for legal malpractice. Under that theory, the firm continued, Spainhower's claim was barred by the two-year statute of limitations applicable to legal malpractice claims, and the six-year statute of limitations for fraud claims was not applicable. The court agreed with the firm, finding that Spainhower's claim was a legal malpractice claim and, thus, time-barred under the two-year statute of limitations. However, the court found in the alternative that, even if Spainhower had timely pleaded a claim for fraud, she had failed to meet her burden of proof. This appeal ensued.

## Discussion and Decision

### *Standard of Review*

[10] Spainhower appeals from the small claims court's judgment. Judgments in small claims actions are "subject to review as prescribed by relevant Indiana rules and statutes." Ind. Small Claims Rule 11(A). Under Indiana Trial Rule 52(A), the clearly erroneous standard applies to appellate review of facts determined in a bench trial with due regard given to the opportunity of the small claims court to assess witness credibility. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1067 (Ind. 2006). This "deferential standard of review is particularly important in small claims actions, where trials are 'informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.'" *Id*. at 1067-68 (quoting *City of Dunkirk Water & Sewage Dep't v. Hall*, 657 N.E.2d 115, 116 (Ind. 1995)). Although the method of proof may be informal, the parties in a small claims court bear the same

burdens of proof as they would in a regular civil action on the same issues. *LTL Truck Serv. LLC v. Safeguard, Inc.*, 817 N.E.2d 664, 668 (Ind. Ct. App. 2004). The party who bears the burden of proof must demonstrate that she is entitled to the recovery sought. *Id*. Pure questions of law are reviewed *de novo*. *Trinity Homes,* 848 N.E.2d at 1068. And because Spainhower appeals from a negative judgment, she must establish that the evidence is without conflict and, as a whole, unmistakably and unerringly points to a conclusion contrary to the trial court's judgment. *Wilson v. State*, 157 N.E.3d 1163, 1170 (Ind. 2020).

[11] Spainhower also proceeds *pro se* in this appeal. "It is well settled that *pro se* litigants are held to the same legal standards as licensed attorneys." *Basic v. Amouri*, 58 N.E.3d 980, 983 (Ind. Ct. App. 2016). "We will not become an advocate for a party, or address arguments that are inappropriate or too poorly developed or expressed to be understood." *Id*. at 984.

***Spainhower claimed fraud, and her claim was not within an attorney-client relationship.***

[12] Spainhower initially argues on appeal that the court erred when it concluded that her claim against the law firm was a claim for legal malpractice and not a claim for fraud. The applicable statute of limitations is to be ascertained by reference to the nature of the harm alleged rather than by reference to theories of recovery. *Whitehouse v. Quinn*, 477 N.E.2d 270, 273 (Ind. 1985). "In other words, the applicable statute of limitations is ascertained by identifying the nature or substance of the cause of action and not of the form of the

pleadings." *Id*. Here, the nature of the harm alleged is the initial misrepresentation, not any deficiency in the legal services that Boehning later purported to provide. In other words, Spainhower's claim arose from a single misrepresentation which occurred before her consultation with Boehning.

[13] The nature and substance of Spainhower's claim against the law firm was one for fraud, not legal malpractice. Only fraud claims that are "substantively part of" legal malpractice claims are controlled by the two-year statute of limitations for the malpractice claim. *Saylor v. Reid*, 132 N.E.3d 470, 473-74 (Ind. Ct. App. 2019) (citing *Myers v. Maxson*, 51 N.E.3d 1267, 1277 n.10 (Ind. Ct. App. 2016)), *trans. denied*. For a claim for fraud to be controlled by the two-year statute of limitations for legal malpractice, the alleged fraud must have occurred "within the attorney-client relationship." *Keystone Distrib. Park v. Kennerk, Dumas, Burke, Backs, Long, & Salin*, 461 N.E.2d 749, 752 (Ind. Ct. App. 1984).

[14] The primary and essential factual predicate for a legal malpractice claim is an attorney-client relationship. Thus, we question the premise that a potential client can even establish an attorney-client relationship with an individual engaged in the unauthorized practice of law. But we need not decide that precise question because, here, the fraud alleged in Spainhower's claim occurred before an attorney-client relationship could have been established with the firm.

### *Fraud in the Inducement*

[15] Spainhower did not claim fraud in the provision of legal services but fraud in the inducement, namely, that she was fraudulently induced to pay $100 to meet with an "attorney" for an initial consultation when, in fact, the person with whom she met, Boehning, was not an attorney. Spainhower's notice of claim sought to recover treble damages derived from the $100 fee and court costs. Appellant's App. Vol. II at 39. During her testimony, she expressly stated that the period of time covered by the agreement for legal services "is not part of this claim," Tr. Vol. II at 6; she made clear that she was seeking recovery of only the $100 "for a service I didn't receive," and "that's why I'm addressing *just this*," *id.* at 13 (emphasis added); she stated that her claim was about "the representation that [Boehning] was an attorney . . . *prior* to my going in for the appointment," *id.* at 32 (emphasis added); and she made clear that she was not seeking to recover the $6,640, which her mother had paid the law firm, fees that were charged after an attorney-client relationship had been established under a written agreement. Moreover, while a significant portion of Spainhower's testimony concerned the firm's dealings with her after her independent discovery that Boehning was not an attorney, she made clear that "[t]he treble damages is why I'm explaining all this." *Id.* at 17.

[16] Spainhower made it clear that her claim was limited to the misrepresentation in late 2013 that she would meet with an attorney at the initial consultation. The statement made by an agent of the law firm to Spainhower that she could pay $100 to meet with an "attorney," which was false, is not "substantively

part of" a malpractice claim. *See Saylor*, 132 N.E.3d at 473-74; *see also Keystone Distrib. Park*, 461 N.E.2d at 752. That is, the alleged fraud here—that Spainhower was told she would meet with an attorney for an initial consultation—is not an act "within the attorney-client relationship." *See Keystone Distrib. Park*, 461 N.E.2d at 752.

[17] "The elements of an action for legal malpractice are: (1) employment of an attorney, which creates a duty to the client; (2) failure of the attorney to exercise ordinary skill and knowledge (breach of the duty); and (3) that such negligence was the proximate cause of (4) damage to the plaintiff." *Reiswerg v. Statom*, 926 N.E.2d 26, 30 (Ind. 2010) (quotations and citations omitted). But none of these elements applies on these facts. First, while Spainhower paid for employment of an attorney, a "Matt Boehning consultation," Appellant's App. Vol. II at 12, Boehning was not an attorney. Second, Spainhower does not claim that Boehning failed to exercise ordinary skill and knowledge during the consultation. And neither does she allege that Boehning was negligent or that any such negligence was the proximate cause of her damages.

[18] In a legal malpractice claim, the theory of recovery is negligence arising from the provision of legal services within an attorney-client relationship. But Spainhower's claim is not grounded on such negligence. Instead, she alleges that she was misled into paying a fee for a consultation with Boehning, a non-attorney. Therefore, she properly pleaded fraud in the inducement of that contract for a single, stand-alone consultation.

[19] Fraudulent inducement occurs when a party is induced through fraudulent misrepresentations to enter into a contract. *Lightning Litho, Inc. v. Danka Industries, Inc.*, 776 N.E.2d 1238, 1241 (Ind. Ct. App 2002), *trans. denied*. Because fraudulent inducement is a "hybrid" of tort and contract, the measure of damages in fraudulent inducement and fraudulent misrepresentation cases is the benefit of the bargain. *Id.* at. 1241-43. Spainhower paid for a consultation with an attorney, and she did not get the benefit of her bargain. As she told the court, "I paid the fee for a service I didn't receive." Tr. Vol. II at 13. Her claim for damages is simply that she paid a fee to meet with an attorney, that the person with whom she met was engaged in the unauthorized practice of law, and that the firm was not entitled to charge an attorney's fee for such services. These facts are similar to those in *Hill v. Ward*, 45 Ind. App. 458, 91 N.E. 38, 41 (1910), where we held that a plea of fraud in the inception was good where a note was given for medical services rendered by a person not licensed to practice and receive pay for such services.

[20] Because Spainhower did not assert a negligence claim but, rather, a fraudulent inducement claim, the court erred when it held that her claim was barred by the two-year statute of limitations for legal malpractice. Instead, her claim for fraud was governed by the six-year statute of limitations for fraud claims and was not time barred.

### *Spainhower did not meet her burden to show fraud*

[21] Although we disagree with the court's conclusion regarding the proper statute of limitations, that does not end our analysis. The court also ruled against

Spainhower in the alternative, namely, that even if her claim was a timely presented fraud claim, Spainhower failed to meet her burden of proof. To show fraud, Spainhower had to show "(1) a material misrepresentation of past or existing facts; (2) made with knowledge or reckless ignorance of falsity; (3) causing the claimant to rely upon the misrepresentation to the claimant's detriment." *America's Directories, Inc. v. Stellhorn One Hour Photo, Inc.*, 833 N.E.2d 1059, 1067 (Ind. Ct. App. 2005), *trans. denied*. Significantly, "[a]n intent to deceive is an essential element of actual fraud." *Kapoor v. Dybwad*, 49 N.E.3d 108, 124 (Ind. Ct. App. 2015) (quoting *Daly v. Showers*, 104 Ind. App. 480, 486, 8 N.E.2d 139, 142 (1937)), *trans. denied*.

[22] Again, Spainhower's claim for fraud is that an agent of the law firm told her she would meet with an attorney for the initial consultation, which turned out to be false. There is no question that the firm misrepresented a material fact when it held Boehning out to be a licensed attorney with the firm, that Spainhower had a right to rely on that representation, and that she in fact relied on that representation to her detriment when she paid the $100 consultation fee. *See American's Directories, Inc.*, 833 N.E.2d at 1067. But more is required to prove actual fraud. Spainhower must also prove that the misrepresentation was made either with the firm's actual knowledge or with reckless disregard or ignorance as to its truth or falsity. *See Scott v. Bodor, Inc.*, 571 N.E.2d 313, 319 (Ind. Ct. App. 1991).

[23] There is no evidence that the firm had actual knowledge that Boehning was not licensed to practice law when it held Boehning out as an attorney and a

member of the firm. And reckless disregard or ignorance requires more than mere carelessness, negligence, or a mistake of fact. *See Shine v. Loomis*, 836 N.E.2d 952, 958-59 (Ind. Ct. App. 2005), *trans. denied*. Spainhower was required to show that, if the firm did not have actual knowledge of the statement's falsity, the firm nonetheless had a "high degree of awareness" that Boehning was not an attorney but failed to inquire further and remained willfully ignorant, which she did not do. *See id.* at 959. Thus, we cannot say that the court erred when it concluded, in effect, that the facts did not establish either the "intent to deceive" or the reckless disregard required for a showing of actual fraud.

[24] This case illustrates the perils of proceeding *pro se*. Spainhower did not allege *constructive* fraud, she does not argue on appeal that she intended to allege constructive fraud, and she does not assert on appeal that this Court should consider such a claim in the first instance. *See* Ind. Appellate Rule 46(A)(8)(a). We do not undertake the burden of developing arguments for a party because that is the party's duty. *See Maser v. Hicks*, 809 N.E.2d 429, 432 (Ind. Ct. App. 2004).

[25] Had Spainhower alleged constructive fraud, she may well have prevailed on that claim. "Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Kapoor*, 49 N.E.3d at 124 (quoting *Budd v. Bd. of Comm'rs of St. Joseph Cnty.*, 216 Ind. 35, 39, 22 N.E.2d 973, 975

(1939)). "Neither actual dishonesty nor intent to deceive is an essential element of constructive fraud." *Id.* (quoting *Daly*, 8 N.E.2d at 142). Indeed, it is the "presence or absence of such an intent" that "distinguishes actual fraud from constructive fraud." *Id.* (quoting *Daly*, 8 N.E.2d at 142).

[26] A law firm owes a legal or equitable duty to verify that its members are authorized to practice law. The Indiana Rules of Professional Conduct make clear that it is "misleading" for a firm to hold a non-lawyer out as a member of the firm. Ind. Professional Conduct Rule 7.5 cmt. [1]. The Rules of Professional Conduct also place an affirmative duty on partners in a firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Prof. Cond. R. 5.1(a). And, of course, the practice of law by non-lawyers is the unauthorized practice of law. *See* Ind. Admission and Discipline Rule 24 (prohibiting the unauthorized practice of law). Here, the firm enabled a non-lawyer to engage in the unauthorized practice of law, which was a breach of its obligations under the Rules of Professional Conduct and Rules for Admission and Discipline. As the Rules of Professional Conduct recognize, "[t]he legal profession is largely self-governing." Prof. Cond. R. pmbl. [10]. Thus, a law firm has an affirmative duty to make certain that its members held out to the public as lawyers are, in fact, licensed to practice law and in good standing. It is not too much to expect such due diligence. Given these obligations, we think the Commission was too quick to dismiss Spainhower's grievances without a further inquiry.

[27] Spainhower did not allege constructive fraud, and it would be inappropriate for this Court to decide this appeal under that theory. Thus, we hold that Spainhower stated a claim for actual fraud, which was not barred by the statute of limitations, but that the small claims court did not err when it concluded that she had failed to meet her burden of proof on that claim. Thus, we affirm the judgment.

[28] Affirmed.

Pyle, J., and Tavitas, J., concur.