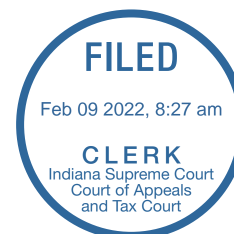
MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Alisa Wright,

Appellant-Defendant, Counterclaimant and Third-party Plaintiff

v.

Hollingsworth & Zivitz, P.C.,

Appellee-Plaintiff, Counterclaim Defendant

Janice Mattingly,

Appellee-Third-party Defendant

February 9, 2022

Court of Appeals Case No. 21A-CC-439

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-1708-CC-8022

Vaidik, Judge.

Case Summary

[1] Hollingsworth & Zivitz, P.C. ("the Law Firm") sued a former client, Alisa Wright, for unpaid legal fees. Wright countersued the Law Firm and her individual attorney (collectively, "the Attorneys"), alleging breach of contract and legal malpractice. The Attorneys moved for summary judgment on all claims, which the trial court granted. Wright appeals, and we affirm.

Facts and Procedural History

[2] Wright[1] married Alan Lance Wright ("Lance") in 1987. In 2005, Wright started a private business, BioConvergence LLC ("BioC"). Wright was Chief Executive Officer of BioC and hired Lance first as Chief Engineering Officer and later as Chief Operating Officer. In 2012, Lance filed for divorce. Wright hired attorney Andrew Soshnick to represent her in the divorce proceedings. Due in part to the various assets owned by the couple, including BioC and several properties, litigation was complicated and went on for several years. While the case was pending, Wright discovered what she believed to be evidence of Lance's poor work performance at BioC. Wright wanted to pursue this as a "dissipation of marital assets" theory in the divorce case in order to claim she should receive more than an equal division of the marital estate.

[1] Parts of the record refer to Wright as "Alisa Kilgas," which appears to be her post-divorce name. As she and the Attorneys refer to her as "Wright," we will do the same.

However, Soshnick was unable to conduct some of the discovery relating to this claim due to a conflict of interest.

[3] In 2015, Wright met with attorneys from the Law Firm regarding the dissipation claim. The Law Firm and Wright entered into a "Family Law Fee Agreement," which provides in part:

> [Wright] has requested that [the Law Firm] represent [Wright] in [her dissolution-of-marriage] action. This agreement is limited in its scope to include only the issues specifically listed herein. No other matter currently pending or arising in the future, including an appeal of this action, is covered by this agreement and no attorney/client relationship exists with respect to any such matter.

Appellees' App. Vol. II p. 134.

[4] Janice Mattingly was the Law Firm attorney assigned to Wright's case. Soshnick continued his representation of Wright, with Mattingly providing co-representation focused on the dissipation claim. Mattingly informed Wright that the dissipation claim was "not strong" and "based on a theory not previously accepted by Indiana courts," but Wright nonetheless wished to pursue the claim. *Id.* at 21. Of particular importance to Wright was presenting testimony from Kathryn Eddy, a former employee of BioC. Eddy sued Wright and BioC in 2012, and that litigation remained ongoing. Wright wanted Eddy to testify in the divorce case, while Mattingly and Soshnick felt Eddy's testimony would be harmful to the case overall. In 2016, Mattingly deposed Eddy and wrote a legal memorandum on the use of Eddy's testimony to

support the dissipation claim. She sent this memorandum to a potential consulting witness, FTI Consulting. FTI Consulting later produced a redacted version of the memorandum to Eddy in the employment lawsuit as part of its responses to non-party discovery requests.

[5] A final hearing on the divorce was held in September 2016. Soshnick and Mattingly presented Wright's dissipation theory and examined and cross-examined many witnesses. Eddy was not called to testify. Thereafter, the divorce court issued findings of fact and conclusions of law, rejecting Wright's dissipation claim and finding she had not rebutted the presumption of an equal division of marital assets.

[6] In 2017, the Law Firm filed a complaint in Hamilton Superior Court, alleging Wright failed to pay attorney's fees. Wright filed a counterclaim against the Law Firm and a third-party complaint against Mattingly, alleging:

> [O]n December 15, 2015, she executed the "Family Law Fee Agreement" attached to the Complaint as Exhibit A (the "Contract").
>
> * * *
>
> In order to induce Wright to hire Hollingsworth & Zivitz, Janice Mattingly ("Mattingly"), an attorney with Hollingsworth & Zivitz, made a number of representations to Wright including, but not limited to: she was very experienced in family law, she had experience taking cases to trial, she had extensive experience in the presiding Judge's court, she would ensure that any issues would be preserved for appeal, there were no conflicts of interest in pursuing the delayed non-party discovery, she could complete

> the necessary discovery quickly, she could prosecute the restraining order violations, she had the knowledge and experience necessary to complete trial preparation, and she could take the Lawsuit to trial on the scheduled trial date approximately two (2) months later (collectively, these are the "Representations").
>
> On or about December 15, 2015, in reliance on the Representations, Wright entered into the Contract and retained Hollingsworth & Zivitz to serve as her co-counsel in the Lawsuit.
>
> However, Hollingsworth & Zivitz and Mattingly not only failed to live up to the Representations, they failed to exercise the ordinary skill and knowledge necessary to successfully and appropriately represent Wright in the Lawsuit by, inter alia: failing to conduct the necessary discovery, failing to pursue multiple restraining order violations, failing to properly pursue claims for dissipation of assets, failing to properly object to improper testimony and evidence, failing to properly examine and cross-examine witnesses, breaching attorney-client privilege and failing to prepare adequately or properly for the trial.

Id. at 11-13. Mattingly then listed her three claims against the Attorneys, two labeled "legal malpractice" and one labeled "breach of contract." *Id.* at 14. Under each, she alleged the Attorneys breached either their "duty" or "the Contract" by "failing to live up to the Representations and/or failing to exercise ordinary skill and knowledge while representing Wright in the [divorce proceedings]." *Id.*

[7] The Attorneys moved for summary judgment on Wright's counterclaim and third-party complaint, and the Law Firm sought summary judgment on its

complaint for unpaid fees. In support of the motions for summary judgment, the Attorneys designated a written report from an expert witness, who opined in part:

> The primary "theory of the case" advanced by Wife, seems to have been that she should receive a disproportionate share of the marital estate as a result of Husband's dissipation of assets. The discovery conducted by her counsel certainly included an adequate pursuit of evidence necessary to advance the elements of this theory. **The fact that the discovery failed to yield evidence sufficient to convince the trial court of her theory does not equate to inadequate discovery having been conducted.**
>
> Taken to its logical conclusion, Wife's theory of the case would require her to not only prove her underlying allegations as to Husband's behavior/performance, but also to then be able to assign a dollar value to losses incurred by BioC, LLC as a result of his behavior. If she could pass that hurdle, which she did not do, she would then be required to have a valuation expert conclude that this quantifiable amount reduced earnings such that the business was of a lower value. Barring the existence of a diversion of potential corporate business to another entity or embezzlement of funds, (neither of which existed), it is almost inconceivable that Wife could have met her burden to put a "number" on such an amorphous claim of dissipation, let alone find a valuation expert who would agree that the actual value of the business was diminished by it. **The fact that Wife's attorneys did not present this evidence at trial appears to be a function of its non-existence not a lack of conducting appropriate discovery.**

Id. at 106 (emphases added). As to Mattingly's handling of witnesses, the expert witness could find "no deficiency" and stated it was Mattingly's role to "defer

to [Soshnick's] strategy and decisions." *Id.* at 107. Finally, the expert opined that

> [Wright's] theory of the case was, in my opinion, very unlikely to have ever gained traction with the Trial Court. Nevertheless, her counsel, based upon my review of the materials provided, pursued it vigorously. Their lack of success was predictable and the ultimate Decree was well within the parameters of the statutes controlling disposition of marital estates. It appears that Wife was well advised by counsel of the weaknesses of her case but nevertheless insisted on pursuing her theory. They did so, but the evidence was insufficient to persuade the Trial Court.

Id. at 107-08.

[8] Wright filed a response opposing summary judgment but did not designate any expert testimony. A hearing was held on the summary-judgment motions in January 2020. The following month, the trial court granted the Attorneys' motion. In doing so, the court found Wright's "breach-of-contract claim" was in substance a legal-malpractice claim, and thus addressed all her claims as legal malpractice. The court then found the Attorneys had established undisputed evidence they had not breached the standard of care or caused Wright damage. The trial court also granted the Law Firm's motion for summary judgment for collection of unpaid fees.

[9] Wright now appeals.

Discussion and Decision

[10] Wright contends the trial court erred by granting the Attorneys' motions for summary judgment. We review such motions de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[11] As an initial matter, the Attorneys argue Wright waived her arguments by failing to follow the Indiana Rules of Appellate Procedure. Specifically, the Attorneys argue Wright failed to file an adequate appendix and failed to appropriately cite to the record in her brief. We agree Wright failed to follow several appellate rules. Wright's four-volume appendix contains only the trial court's order on the motions for summary judgment and the evidence she designated in opposition to summary judgment. She notably does not include the complaint, counterclaim, any of the summary-judgment briefing, or the summary-judgment evidence designated by the Attorneys. While Wright contends, per Indiana Appellate Rule 50(A)(1), that she need only include documents "necessary" for our review, Appellant's Reply Br. p. 26, it's hard to imagine how the aforementioned documents would not be necessary for our review of a summary-judgment determination.

[12] Furthermore, Wright's brief does not contain adequate citation to the record. At no point in her thirty-six-page fact section does Wright cite to her appendix. Instead, she cites to individual documents within the appendix, without volume or page numbers, and some of her contentions contain no citation at all. *See* Ind. App. R. 22(C) ("Any factual statement shall be supported by a citation to the volume and page where it appears in an Appendix, and if not contained in an Appendix, to the volume and page it appears in the Transcript or exhibits, e.g., Appellant's App. Vol. II p. 5; Tr. Vol. I, pp. 231-32."). This forced us to rely on Attorneys' appendix for our review. We remind counsel it "is a complaining party's duty to direct our attention to the portion of the record that supports its contentions." *In re Moeder*, 27 N.E.3d 1089, 1097 n.4 (Ind. Ct. App. 2015), *reh'g denied*, *trans. denied*. Failure to comply with the appellate rules does not necessarily result in waiver of an issue, but it is appropriate where noncompliance impedes our review. *Id.* Because we feel able to address Wright's claims on the merits, we do so below.

I. Breach of Contract

[13] Wright first argues the trial court erred in addressing her breach-of-contract claim as a legal-malpractice claim. The trial court found that "[w]hile a party may be entitled to recover from an attorney for the failure to perform a specific task, the agreement here of [the Attorneys] to pursue a dissipation claim for [Wright] was not such a specific task." Appellant's App. Vol. II p. 20. Rather, the trial court found Wright labeling the claim as breach of contract "does not change the nature of the claim as a failure of [the] Attorneys to perform the

representation in a manner consistent with the standard of care." *Id.* As such, the trial court concluded this claim was one of legal malpractice. We agree.

[14] At issue here is the categorization of Wright's claim. This Court addressed this issue in a similar context in *Alvarado v. Nagy*, 819 N.E.2d 520 (Ind. Ct. App. 2004). Alvarado hired an attorney to represent him in a sentence-modification attempt. He paid the attorney a flat fee, but when the modification attempt was unsuccessful, Alvarado demanded a refund. The attorney refused, and Alvarado sued, alleging the fee was "unearned." *Id.* at 522. The trial court dismissed the case, finding the claim was one of attorney discipline and therefore only our Supreme Court had jurisdiction. We reversed and concluded

> that Alvarado's perhaps inartfully drafted complaint for damages states a claim for legal malpractice. We make this determination after evaluating the nature of the underlying substantive claim set out in the complaint. In so doing, **we look beyond the labels used by Alvarado, and look instead to the substance and central character of the complaint, the rights and interests involved, and the relief demanded.**

Id. at 525 (emphasis added); *see also Shideler v. Dwyer*, 417 N.E.2d 281, 278 (Ind. 1981) ("[T]he number and variety of Plaintiff's technical pleading labels and theories of recovery cannot disguise the obvious fact apparent even to a layman that this is a malpractice case.").

[15] Here, although Wright labels this claim as "breach of contract," in substance it is one of legal malpractice. In her counterclaim, Wright alleges the fee agreement was a contract between her and the Attorneys and that the Attorneys

breached that contract "by failing to live up to the Representations and/or failing to exercise ordinary skill and knowledge." This is a legal-malpractice claim. *See Oxley v. Lenn*, 819 N.E.2d 851, 856 (Ind. Ct. App. 2004) (noting legal malpractice involves "the failure by the attorney to exercise ordinary skill and knowledge"). Wright further argues she gave the Attorneys "specific tasks" and "instructions" outside of the fee agreement—including calling Eddy as a witness at trial—and that the Attorneys' failure to perform these actions supports a breach-of-contract claim. Appellant's Br. p. 48. But these alleged deficiencies all go back to the Attorneys' representation of Wright in the divorce case. Merely rephrasing one's claim as breach of contract and citing certain deficiencies as the "breaches" cannot disguise that this is a malpractice case. *See Keystone Distrib. Park v. Kennerk, Dumas, Burke, Backs, Long, & Salin*, 461 N.E.2d 749, 751 (Ind. Ct. App. 1984) (rejecting plaintiff's contention his claim was for breach of contract because "the 'verbal contract' to employ the attorney and the attorney's alleged failure to perform allege, in essence, the tort of legal malpractice.").

[16] The trial court did not err in addressing Wright's "breach of contract" claim as one of legal malpractice.

II. Legal Malpractice

[17] Having determined all of Wright's claims sound in legal malpractice, we turn to the merits of the claims. In Indiana, an attorney is generally required to exercise "ordinary skill and knowledge." *Clary v. Lite Machs. Corp.*, 850 N.E.2d 423, 432

(Ind. Ct. App. 2006), *trans. denied*. The elements of legal malpractice are as follows: "(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." *Id.* at 430. A defendant is entitled to summary judgment when the undisputed material facts negate at least one element of the plaintiff's claim. *Id.*

A. Litigation Strategy and Decisions

[18] Wright first alleges the Attorneys breached the standard of care by not deposing or calling certain witnesses, not conducting proper discovery, and by "failing to identify and secure an expert witness by the deadline established by the court." Appellant's Br. p. 59. The trial court found the Attorneys were entitled to summary judgment on these legal-malpractice claims because Wright failed to designate expert testimony establishing the Attorneys breached their duty of care. We agree.

[19] The Attorneys designated expert testimony that indicated their discovery in the divorce case was "adequate," their handling of witnesses revealed "no deficiency," and the failure to include testimony from an expert witness "appears to be a function of its non-existence not a lack of conducting appropriate discovery." Appellees' App. Vol. II p. 106. The burden then shifts to Wright to come forward with contrary evidence. *Will v. Meridian Ins. Grp., Inc.*, 776 N.E.2d 1233, 1237 (Ind. Ct. App. 2002), *trans. denied*. To prove legal malpractice, expert testimony is normally required to demonstrate the standard

of care by which an attorney's conduct is measured. *Storey v. Leonas*, 904 N.E.2d 229, 238 (Ind. Ct. App. 2009), *trans. denied*. The only exception to the rule is when the question is within the common knowledge of the community as a whole or when an attorney's negligence is so grossly apparent that a layperson would have no difficulty in appraising it. *Id.* This exception "is very limited and applies solely in cases of obvious and transparent malpractice." *Barkal v. Gouveia & Assocs.*, 65 N.E.3d 1114, 1122 (Ind. Ct. App. 2016).

[20] Wright argues expert testimony is not required to support her claims and cites this exception. But her claims involve complex issues regarding discovery, expert testimony, and other trial procedure and strategy. None of these claims involve "obvious and transparent malpractice." And notably, while Wright cites this exception, she does not argue that the malpractice she alleges is within the common knowledge of the community or grossly apparent. Therefore, as Wright failed to present the testimony of an expert supporting her allegation that the Attorneys breached the standard of care, the trial court properly granted summary judgment on these legal-malpractice claims.

B. Disclosure of Legal Memorandum

[21] Wright next argues the Attorneys committed legal malpractice by disclosing a legal memorandum to FTI Consulting.[2] The Attorneys point to designated

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[2] The Attorneys' expert witness did not opine on this claim. So unlike the claims above, Wright was not required to provide expert testimony here. *See Thomsen v. Musall*, 708 N.E.2d 911, 912 (Ind. Ct. App. 1999) (expert testimony "is not necessarily required to oppose a summary judgment motion" where the movant

evidence showing any privileged information in the memorandum was redacted and therefore argue Wright sustained no damages from this alleged breach. We agree.

[22] Wright contends that although the memorandum was redacted, she "incurred unnecessary attorneys' fees in other litigation as a result of Attorneys' production of her privileged legal memorandum to a third party." Appellant's Br. p. 62. But she did not designate any evidence to support this contention.[3] Once a movant designates evidence showing no genuine issue of material fact, "the nonmovant may not rest upon the mere allegations of her pleadings; instead, she must designate to the trial court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto." *McDonald v. Lattire*, 844 N.E.2d 206, 215 (Ind. Ct. App. 2006). As Wright failed to do this, the Attorneys negated an element of her legal-malpractice claim and were entitled to summary judgment on the issue. *See id.* at 216 (finding summary judgment was appropriate where movant "negate[d] at least one of the elements . . . essential to a negligence claim.").

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fails to establish the absence of any genuine issue of material fact), *reh'g granted in part* 713 N.E.2d 900, *trans. denied*.

[3] Wright cites "Kilgas ¶ Aff. 59" for this contention, but that paragraph does not involve the production of the Eddy memorandum. *See* Appellant's Br. p. 62; Appellant's App. Vol. II p. 225. In her reply brief, she further cites to over one hundred pages of the appendix and argues these support the contention. These pages show a lengthy discovery dispute between Wright and Eddy in the employment lawsuit. But Wright does not direct us to the parts of this dispute that involve the privileged memorandum, and in fact the Eddy memorandum appears to be one of hundreds of documents at issue in the discovery dispute. She also provides no evidence of additional fees relating to the Attorneys' production of the memorandum. We agree with the trial court that this is insufficient evidence to show damages.

[23] The trial court properly granted summary judgment on this legal-malpractice claim.[4]

[24] Affirmed.

Brown, J., and Weissmann, J., concur.

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[4] Wright also argues the trial court erred in granting the Law Firm's motion for summary judgment on its complaint against her. However, her argument is based on the arguments we already have addressed and rejected.