

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-338

JUNE TERM, 2002

	}	APPEALED FROM:
	}	
Susan J. Cobb	}	Windham Superior Court
	}	
v.	}	DOCKET NO. 379-10-99 Wmcv
	}	
David A. Gibson, Esq.	}	Trial Judge: John P. Wesley
	}	
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Plaintiff Susan Cobb appeals from the superior court's grant of summary judgment against her on her claims of legal malpractice. Cobb brought four professional malpractice claims against David Gibson, a lawyer representing her, alleging that he negligently (1) failed to establish jurisdiction in Cobb's federal ERISA claim against her former employer; (2) conducted discovery on her state claim for wrongful discharge; (3) billed Cobb, notwithstanding a contingency fee agreement; and (4) advised her to photocopy confidential documents belonging to her employer, which led to her termination. The trial court granted summary judgment with respect to the last claim, holding that it was barred by the doctrine of judicial estoppel. The trial court also granted summary judgment with respect to Cobb's three other claims because she failed to make out a prima facie case on each claim. We affirm.

In 1993, Susan Cobb (then Susan Klein), an employee of Banknorth, consulted attorney David Gibson regarding charges of employment discrimination she had filed with the office of the Vermont Attorney General and the Equal Opportunity Commission of the United States. Gibson asked Cobb to provide him with documents regarding her claims against Banknorth. These documents included a salary ranking of male and female bank employees, as well as information regarding the overcharge of a bank customer. Cobb knew that bank policy prohibited the removal of confidential bank documents or their circulation. Despite expressing concern over his request, Cobb obtained and turned the documents over to Gibson.

On February 14, 1996, Gibson filed suit on Cobb's behalf against Banknorth alleging discrimination under Vermont's Fair Employment Practices Act, along with a claim of intentional infliction of emotional distress (IIED). At an August 22 deposition, Banknorth discovered that Cobb had provided Gibson with the bank documents, and on August 23, Cobb was fired from her position at Banknorth, ostensibly for violating the bank's code of conduct by disclosing documents to Gibson.

On November 8, 1996, Gibson filed a federal court action alleging that Cobb's termination was retaliatory in violation of ERISA. The court dismissed the suit, finding that Cobb was not protected by ERISA because she did not disclose the documents in the course of a formal inquiry or proceeding specifically related to ERISA violations.

On January 23, 1997, Cobb complained to the Vermont Attorney General that her termination had been in retaliation for having brought suit against Banknorth. On June 11, the Attorney General's office advised Cobb that, in its opinion, her termination was justified.

In 1998, Cobb dismissed Gibson as her attorney. On March 16, 1998, under the guidance of another lawyer, Cobb

amended her superior court action to include a new wrongful termination count, charging that Banknorth's termination of her was retaliatory, and alleging that the bank's stated motive for her dismissal (a violation of bank policy) was actually a pretext to disguise an illegal motive. The court dismissed the IED claim, but denied Banknorth's motion for summary judgment on the wrongful termination count. The court held that Cobb had provided sufficient evidence on her retaliatory discharge count to withstand summary judgment. After a trial had been scheduled, the parties settled in consideration of Banknorth paying Cobb an undisclosed sum, and the case was marked for dismissal. On June 9, 1999, the parties submitted a stipulation to an entry dismissing the case with prejudice.

Cobb then filed suit against Gibson on October 1, 1999, charging Gibson with multiple instances of breach of professional duty, asserting that Gibson's improper advice to Cobb to provide him with copies of confidential bank documents caused her termination; that Gibson failed to properly establish federal jurisdiction over her ERISA claim; that his inattention to his duties in the Banknorth suit caused prejudicial delay in the resolution of the legal issues; and that his attempt to bill Cobb \$27,000 fell below the standard of care in light of their agreement that he would be paid on a contingency basis. The trial court granted defendant's motion for summary judgment with respect to all counts.

Summary judgment is appropriate when the moving party has demonstrated that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3); State v. G.S. Blodgett Co., 163 Vt. 175, 180, 656 A.2d 984, 988 (1995). In determining whether a material fact exists, the opposing party is entitled to all reasonable doubts and inferences. Id. The nonmoving party may survive a motion for summary judgment if it responds with specific facts raising a triable material issue and is able to demonstrate sufficient evidence to support a prima facie case. Id.

Cobb's suit alleges that Gibson committed professional negligence. To demonstrate professional negligence, a plaintiff must prove that the attorney was in fact negligent and that this negligence was the proximate cause of the plaintiff's injury. Estate of Fleming v. Nicholson, 168 Vt. 495, 497, 724 A.2d 1026, 1028 (1998). In general, as we stated in Fleming, negligence by professionals is established by using expert testimony to: " (1) describe the proper standard of skill and care for that profession, (2) show that the defendant's conduct departed from that standard of care, and (3) show that this conduct was the proximate cause of plaintiff's harm." Id. Usually, the standard of care to which an attorney is held in rendering professional services is the degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent attorney practicing in Vermont. Id. at 498, 724 A.2d at 1028.

Cobb first alleges that Gibson committed professional negligence by failing to establish jurisdiction over her Federal ERISA claim, resulting in its dismissal. Cobb's expert stated that Gibson's negligence was manifested by his "failing to establish the court's jurisdiction in a related federal case, assuming the court had jurisdiction." The court found this insufficient to establish a breach of the standard of care, and noted that it was only a broad assertion which did not indicate how jurisdiction should have been established or how a careful attorney would have established it. If an expert presents " nothing but conclusions B no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected," such testimony will be insufficient to defeat a motion for summary judgment. Morais v. Yee, 162 Vt. 366, 371-2, 648 A.2d 405, 409 (1994) (quoting Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989)). In Morais, the Court found that the affidavit of an accident reconstruction expert which was unsupported by specific facts or any indication of how his opinion was formulated, was insufficient to defeat a summary judgment motion. See Id. at 372, 648 A.2d at 409. The Court stated that, " plaintiffs cannot use its bare allegations to meet their burden of demonstrating a disputed matter of fact. The rules regarding expert testimony cannot be skewed to preclude summary judgment any time a party secures an expert to support its claim." Id.

The statement of Cobb's expert does not establish a specific standard of care regarding ERISA jurisdiction, or the Vermont legal community's knowledge with regard to establishing such jurisdiction. He states only that Gibson's failure to establish jurisdiction, " assuming" jurisdiction existed, would fall below the standard of care. This is insufficient to withstand summary judgment.

Assuming the expert's statements were sufficient to establish the standard of care, however, Cobb also fails to satisfy the element of causation necessary to her claim. She does not show a causal link between the loss of her ERISA claim and any harm she suffered as a result. " [N]egligence on the part of an attorney, standing alone, is not sufficient to

impose liability . . . the plaintiff-client must show that the attorney's negligence was the proximate cause of the injury of which he complains." Brown v. Kelly, 140 Vt. 336, 338, 437 A.2d 1103, 1104 (1981) (citations omitted). The expert does not contend that jurisdiction existed over the claim. Neither does he state that jurisdiction would have been established if Cobb's claim had been properly pled, or that Gibson's pleading caused the dismissal of an otherwise meritorious suit. In order for a plaintiff to prevail in a legal malpractice suit, the client must show that they would have prevailed "but for" the lawyer's failure. Knott v. Pratt, 158 Vt. 334, 336, 609 A.2d 232, 233 (1992). Cobb fails to offer any evidence that Gibson's alleged negligence in handling her ERISA suit caused her any harm. Cobb has not made out a prima facie case of negligence on this count, and the court properly granted summary judgment.

Cobb next alleges that Gibson failed to properly prepare for the state superior court suit by neglecting to take witness depositions according to schedule and failing to respond to her telephone calls and other communications. She asserts that this lack of diligence caused her to suffer a serious delay in the resolution of the legal issues, and contends that this delay forced her to accept a "disadvantageous settlement" of her state law claims. Cobb's claim is likewise unsupported by the necessary expert opinion. As the trial court noted, Cobb's expert recited only "the bare allegations contained in the complaint as examples of behavior falling below the standard of professional care." This fails to satisfy the Morais standard, which requires more than an expert's conclusory and unsupported allegations to withstand summary judgment. Morais, 162 Vt. at 372, 648 A.2d at 409; see also Bowen v. City of Manchester, 966 F.2d 13, 18 n. 16 (1st Cir. 1992) ("summary judgment cannot be defeated by an expert's conclusory assertion about ultimate legal issues"); Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chi., 877 F.2d 1333, 1339 (7th Cir. 1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"); Petersen v. Whiting, 673 N.E.2d 151, 154 (Ohio Ct. App. 1996) (conclusory statement in an affidavit is not sufficient to raise a factual dispute in a summary judgment exercise).

Furthermore, this claim, too, suffers from a more fundamental flaw in that Cobb fails to point to any specific evidence showing that "but for" Gibson's alleged delays she would have negotiated a better settlement, been successful in a trial on the merits, or have been left in a better position. Cobb has not come forward with specific evidence establishing a standard of care, or linking its breach to any harm suffered. See Samplid Enters. v. First Vt. Bank, 165 Vt. 22, 25, 676 A.2d 774, 776 (1996) (allegations of genuine issues of material fact made in opposition to summary judgment must be supported with specific facts in the record)(citing Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986)). Thus, she has likewise not made out a prima facie case on this count, and the court was correct in granting summary judgment.

Cobb also alleges that Gibson committed professional negligence by billing her \$27,000 in legal fees when they had agreed he would be paid on a contingency basis. Assuming that the act of billing can theoretically form the basis of a professional negligence claim, Cobb points to no evidence that Gibson's action breached a specific standard of care. Cobb's expert states only that professional negligence was committed by Gibson's "claiming hourly fees from Plaintiff, assuming their only agreement was for payment based on results he achieved." This statement, too, is a mere conclusion, without citing specific factual bases giving rise to it, for example what the prevailing practice is among A reasonable, careful, and prudent attorney[s] practicing in the jurisdiction of Vermont." Estate of Fleming, 168 Vt. at 498, 724 A.2d at 1028. As such, it is insufficient to withstand a motion for summary judgment.

Cobb's final claim alleges that Gibson committed professional negligence by advising her to provide him with confidential bank documents. The trial court granted Gibson summary judgment on this claim on the basis of judicial estoppel. Although we have acknowledged the doctrine of judicial estoppel, we have neither adopted it nor articulated its elements. Gallipo v. City of Rutland, ___ Vt. ___, ___, 789 A.2d 942, 953 (2001). The United States Supreme Court has generally described the principle as follows: "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." New Hampshire v. Maine, 532 U.S. 742, 749 (2001). The Court of Appeals for the Second Circuit has noted that at least one of the doctrine's essential elements is that the positions possess a "true inconsistency." Simon v. Safelite Glass Corp., 128 F.3d 68, 72-73 (2d Cir. 1997).

The trial court determined that Cobb was asserting a position in the present suit factually inconsistent with one she had taken in her wrongful termination suit against Banknorth when she asserted that Gibson's advice that she provide him with confidential bank documents caused her harm by providing Banknorth with a basis for her termination. The court

concluded that this was inconsistent with her assertion that her termination by Banknorth was in retaliation for her lawsuit against it.

Although arguably the assertion that Cobb's termination for violating Banknorth's confidentiality policy was pretext is not inconsistent with a claim that Gibson's advice allowing for such a termination prejudiced her lawsuit, we need not decide this issue, or more generally the issue of the applicability of judicial estoppel in Vermont, to dispose of her appeal. As noted above, despite her claims that Gibson's multifarious acts of negligence prejudiced her claim against Banknorth, Cobb has failed to come forth with any evidence, expert or otherwise, supporting that element of her claim. This may have been due in part to the fact that Cobb's settlement of her claim against Banknorth precludes her from disclosing its terms, including the amount of settlement. In other words, Cobb has failed to point to evidence that, but for her acts pursuant to Gibson's advice, her suit against Banknorth would have terminated more favorably for her. See Knott, 158 Vt. at 336, 609 A.2d at 233. Thus, we can affirm the court's summary judgment on the basis that Cobb has simply failed to make out a case of harm flowing from Gibson's advice. See In re Handy, 171 Vt. 336, 343, 764 A.2d 1226, 1234 (2000) (we will not reverse trial court's judgment if record discloses any legal ground justifying result, despite ground not being raised below nor briefed on appeal).

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice