IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-737

Filed: 16 April 2019

Davie County, No. 14 CVS 32

JOHN F. STOWERS AND WIFE SUSAN EDWARD STOWERS, Plaintiffs,

v.

MICHAEL J. PARKER, JULIE A. PARKER AND PARKER AND PARKER, A GENERAL PARTNERSHIP, Defendants.

Appeal by plaintiffs from order entered 16 December 2015 by Judge Kevin M. Bridges in Davie County Superior Court. Heard in the Court of Appeals 14 February 2019.

Herman L. Stephens for plaintiffs-appellants.

Chad Bomar for defendants-appellees.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors, for Lawyers Mutual Liability Insurance Company of North Carolina, amicus curiae.

BERGER, Judge.

John F. Stowers and Susan Edwards Stowers ("Plaintiffs") appeal from the trial court's order denying Plaintiffs' motion to continue and granting summary judgment in favor of Michael J. Parker, Julie A. Parker, and Parker and Parker, a

General Partnership ("Defendants") on Plaintiffs' legal malpractice claim. This is the second time that this dispute is before this Court. *See Stowers v. Parker*, ___ N.C. App. ___, ___ 796 S.E.2d 406, ___, COA16-747, 2017 WL 676963 (2017) (unpublished) (*"Stowers I"*). In *Stowers I*, Plaintiffs argued that the trial court had erred by (1) granting Defendants' motion for summary judgment and (2) denying Plaintiffs' motion to continue. *Id.*, ___ N.C. App. at ___, 796 S.E.2d at ___, 2017 WL 676963, *2. However, the *Stowers I* Court dismissed that appeal as interlocutory because counterclaims were still pending in the trial court. *Id.* Defendants voluntarily dismissed the counterclaims with prejudice on November 28, 2017, so the matter is now ripe for appellate review.

Factual and Procedural Background

Because only procedural aspects of this case have changed since *Stowers I*, we adopt the pertinent facts from that opinion:

> In 2008, plaintiffs hired defendant Michael J. Parker ("Mr. Parker") to represent them in *Lakey v. Stowers* (08 CVS 299), a dispute over ownership of a private road in Davie County, North Carolina. The case ended on 26 May 2010 when the trial court granted the Lakeys' motion for summary judgment, declared them sole owners of Horseshoe Trail, and enjoined plaintiffs from further use of the road.
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> On 16 May 2013, plaintiffs initiated the instant action by filing a verified complaint against Mr. Parker; his partner, Julie A. Parker; and their law firm, Parker and Parker (collectively, "defendants"). On 12 November 2013, plaintiffs filed an amended complaint, contending that Mr. Parker failed to adequately argue the dispositive summary

judgment motion in *Lakey v. Stowers*, and that all defendants were liable for his alleged malpractice. On 12 December 2013, defendants filed an answer, a motion to dismiss, and counterclaims for fraud and misrepresentation. The trial court denied defendants' motion to dismiss plaintiffs' complaint on 4 December 2014.

On 23 April 2015, defendants filed a motion for summary judgment, which was denied. Plaintiffs subsequently moved for a continuance of the trial, and defendants consented on the condition that the court enter a discovery scheduling order. On 8 May 2015, the trial court entered an order scheduling trial for 18 January 2016 and setting a timeline for the parties' discovery. The court ordered plaintiffs to designate, by 15 July 2015, all expert witnesses that they intended to call at trial. The discovery scheduling order specifically directed that "[n]o expert witnesses may be designated by the parties other than as set forth herein."

On 15 July 2015, plaintiffs designated Laurel O. Boyles ("Mr. Boyles") as their sole legal expert witness. According to the expert witness designation, Mr. Boyles believed that Mr. Parker failed to exercise the requisite standard of care in defending against the Lakeys' motion for summary judgment. However, when defendants deposed Mr. Boyles on 26 October 2015, he withdrew all of the opinions outlined in plaintiffs' expert witness designation. Specifically, Mr. Boyles testified that he would not offer any opinion that defendants: "failed to use their best judgment in the prosecution" of the underlying case; "failed to exercise reasonable and ordinary care and diligence" in using or applying their knowledge and skill; or "failed to represent [plaintiffs] with the skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. . . ." Mr. Boyles also testified that he held no opinion on the issues of causation or damages.

On 24 November 2015, defendants filed a second motion for summary judgment. According to defendants, North Carolina law requires the plaintiff in a legal

malpractice action to "establish the standard of care and practice via expert testimony." Defendants contended that plaintiffs would be unable to "offer competent evidence" with respect to those issues because Mr. Boyles withdrew his opinions, and the discovery scheduling order "makes clear that Plaintiffs may designate no expert witness after" 15 July 2015. Defendants also submitted the affidavit of their own legal expert witness, G. Gray Wilson ("Mr. Wilson"), who opined, *inter alia*, that Mr. Parker "exercised reasonable and ordinary care and diligence in the use of his skill and application of knowledge to [Plaintiffs'] cause; and he represented [plaintiffs] with such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. . . ." Mr. Wilson further opined that Mr. Parker's legal services "did not proximately cause any damage to [Plaintiffs] because the Lakey plaintiffs would more likely than not have prevailed on the merits in the underlying lawsuit even had their summary judgment motion been denied."

On 7 December 2015, the trial court held a hearing on various motions that had been filed. In support of their motion for summary judgment, defendants proffered case law, Mr. Wilson's affidavit, the discovery scheduling order, and Mr. Boyles's deposition testimony. Plaintiffs submitted an affidavit from Mr. Boyles, asking to withdraw as plaintiffs' expert witness and explaining that he "was physically and mentally unable to testify" to his opinions in the case. Plaintiffs requested that the trial court "either deny [Defendants'] motion or continue it" and allow plaintiffs to find another expert witness "within a reasonable period of time[.]"

On 16 December 2015, the trial court entered an order granting defendants' motion for summary judgment and denying as moot plaintiffs' previously filed motions to compel and to modify the discovery scheduling order.

Stowers I, ___ N.C. App. at ___, 796 S.E.2d at ___, 2017 WL 676963, *1-2.

The *Stowers I* Court dismissed Plaintiffs' initial appeal as interlocutory on February 21, 2017. After Defendants voluntarily dismissed their pending counterclaims with prejudice on November 28, 2017, Plaintiffs timely appealed.

Analysis

Plaintiffs contend that the trial court erred by (1) granting Defendants' motion for summary judgment and (2) denying Plaintiffs' motion to continue. We address each issue in turn.

"We review the trial court's summary judgment order *de novo*." *Moore v. Jordan*, ___ N.C. App. ___, ___, 816 S.E.2d 218, 221 (2018) (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2018). "A genuine issue of material fact has been defined as one in which the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action . . . ." *Smith v. Smith*, 65 N.C. App. 139, 142, 308 S.E.2d 504, 506 (1983) (citation and quotation marks omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. All inferences of fact must be drawn against the movant and

in favor of the nonmovant." *Strickland v. Hedrick*, 194 N.C. App. 1, 9, 669 S.E.2d 61, 67 (2008) (citations and quotation marks omitted).

As the party moving for summary judgment, the defendant bears the "initial burden of showing that an essential element of plaintiff's case did not exist as a matter of law or showing through discovery that plaintiff had not produced evidence to support an essential element of her claim." *Rorrer v. Cooke*, 313 N.C. 338, 350, 329 S.E.2d 355, 363 (1985). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Frank v. Funkhouser*, 169 N.C. App. 108, 113, 609 S.E.2d 788, 793 (2005) (citation and quotation marks omitted).

> A party may not withstand a motion for summary judgment by simply relying on its pleadings; the non-moving party must set forth specific facts by affidavits or as otherwise provided by N.C. Gen. Stat. § 1A-1, Rule 56(e), showing that there is a genuine issue of material fact for trial. The other methods for setting forth specific facts under Rule 56 are through depositions, answers to interrogatories, admissions on file, documentary materials, further affidavits, or oral testimony in some circumstances. If a party does not so respond, summary judgment, if appropriate, shall be entered against him.

Strickland v. Doe, 156 N.C. App. 292, 294-95, 577 S.E.2d 124, 128 (2003) (*purgandum*).

> In order to show negligence in a legal malpractice action, the plaintiff must first prove by the greater weight of the evidence that the attorney breached the duties owed

to his client, *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954), and then show that this negligence proximately caused damage to the plaintiff, *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985). The duties promulgated by *Hodges* are:

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action [o]n behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

Hodges, 239 N.C. at 519, 80 S.E.2d at 145-46.

In *Rorrer v. Cooke*, we elaborated on the standard of care applicable to attorneys, stating:

> The third prong of *Hodges* requires an attorney to represent his client with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. The standard is that of members of the profession in the same or similar locality under similar circumstances.

Rorrer, 313 N.C. at 356, 329 S.E.2d at 366.

Haas v. Warren, 341 N.C. 148, 151-52, 459 S.E.2d 254, 255-56 (1995).

Accordingly, the plaintiff bears the burden *at trial* in a legal malpractice matter of proving that

> defendants breached the standard of care of other members of the profession in the same or similar locality under similar circumstances. However, *in this summary judgment proceeding*, plaintiff [is] required to produce evidence on the standard of care only if defendants first produced evidence that they in fact complied with the standard of care in the community. . . . [I]n a summary judgment proceeding, the nonmovant, here plaintiff, is not required to make out a *prima facie* case, but only has to refute any showing made that his case is fatally deficient.

Cheek v. Poole, 98 N.C. App. 158, 166, 390 S.E.2d 455, 460 (1990) (*purgandum*).

Here, a discovery scheduling order was entered on May 8, 2015, which stated, in relevant part:

> 1. On or before **July 15, 2015**, plaintiffs shall designate all expert witnesses they intend to call, if any, at trial.
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> 3. Witnesses not so designated will not be permitted to testify at trial. No expert witnesses may be designated by the parties other than as set forth herein.

On July 15, 2015, Plaintiffs filed their expert designation, which identified Mr. Boyles as Plaintiffs' only expert witness regarding the applicable standard of care. During his deposition on October 26, 2015, however, Mr. Boyles withdrew his opinions regarding Defendants' alleged legal malpractice and the applicable standard of care.

On November 24, 2015, Defendants moved for summary judgment challenging Plaintiffs' ability to proffer evidence of the applicable standard of care without Mr.

Boyles' testimony. In support of their motion for summary judgment, Defendants proffered the affidavit of their legal expert, Mr. Wilson, which stated that Defendants had complied with the "standard and accepted practices in the same or similar communities as Mocksville, Davie County, NC for attorneys with similar training and experience as Mr. Parker." In his affidavit, Mr. Wilson further opined that

> Michael Parker used his best judgment in the prosecution of the litigation entrusted to him by the Stowers in the *Lakey v. Stowers* case; he exercised reasonable and ordinary care and diligence in the use of his skill and application of knowledge to the Stowers' cause; and he represented the Stowers with such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of tasks they undertake.

By supporting their motion for summary judgment with Mr. Wilson's affidavit, Defendants satisfied their initial burden of producing evidence that they in fact complied with the standard of care in the community.

Consequently, Plaintiffs were required to "set forth specific facts by affidavits or as otherwise provided by N.C. Gen. Stat. § 1A-1, Rule 56(e), showing that there is a genuine issue of material fact for trial" to survive summary judgment. *Doe*, 156 N.C. App. at 294-95, 577 S.E.2d at 128 (citation omitted). Plaintiffs failed to satisfy this burden. In response to Defendants' motion for summary judgment, Plaintiffs conceded that they were unable to proffer any evidence that Defendants breached the applicable standard of care without Mr. Boyles' testimony and argued that Plaintiffs

would be "unfairly prejudiced in the presentation of their case" unless the trial court granted them additional time to "find and identify" another expert witness to testify regarding the applicable standard of care. As Plaintiffs did not oppose Defendants' motion for summary judgment with a forecast of evidence regarding the applicable standard of care as required per Rule 56(e), the trial court properly granted Defendants' motion for summary judgment.

Plaintiffs have also asserted that the trial court erred by denying their motion to continue. "[T]he decision to grant or deny a continuance is solely within the discretion of the trial judge and will be reversed only when there is a manifest abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Cox v. Roach*, 218 N.C. App. 311, 321, 723 S.E.2d 340, 347 (2012) (citations and quotation marks omitted). Here, the trial court "considered the pleadings, court file, affidavits submitted, deposition testimony and transcripts submitted, and the arguments of counsel" before denying Plaintiffs' motion to continue. As Plaintiffs have not shown that the trial court's denial of their motion to continue amounted to an abuse of discretion, we affirm.

Conclusion

We affirm the trial court's grant of Defendants' motion for summary judgment and denial of Plaintiffs' motion to continue.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).