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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-548

Filed 15 January 2025

Swain County, No. 20 CVS 89

SMOKY MOUNTAIN COUNTRY CLUB PROPERTY OWNERS ASSOCIATION,
INC., Plaintiff,

v.

ROBERT E. DUNGAN, DUNGAN, KILBOURNE & STAHL, PA, and ALLEN STAHL
& KILBOURNE, PLLC, Defendants.

Appeal by plaintiff from order entered 9 January 2024 by Judge William H.
Coward in Superior Court, Swain County. Heard in the Court of Appeals
6 November 2024.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Jason White, for plaintiff-appellant.

The Van Winkle Law Firm, by Philip S. Anderson and Ronald K. Payne, for defendant-appellee Robert E. Dungan.

Poyner Spruill, by John Michael Durnovich and Daniel G. Cahill, for defendants-appellees Allen Stahl & Kilbourne, PLLC, f/k/a Dungan, Kilbourne & Stahl, P.A.

ARROWOOD, Judge.

Smoky Mountain Country Club Property Owners Association, Inc. (“plaintiff”)

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appeals from the trial court's order granting a motion for summary judgment in favor of Robert Dungan and the law firms of Dungan, Kilbourne & Stahl, P.A., and Allen Stahl & Kilbourne, PLLC ("defendants"). Plaintiff contends the trial court erred in granting a motion for summary judgment based upon an affirmative defense raised in an unverified answer. Defendants contend that the claims were barred by the statutes of limitations and repose and that there is sufficient evidence to support such a determination. We affirm the trial court.

I. Background

This action commenced on 30 April 2020 when plaintiff filed a complaint against defendants alleging negligence in failing to advise plaintiff to collect dues for the Clubhouse at Smoky Mountain Country Club ("SMCC"). Prior to the complaint, plaintiff had retained defendants Robert E. Dungan and the Dungan law firm for legal advice beginning in 2014, with a resolution authorizing Dungan to "[r]eview the Association's governing documents, . . . to advise whether the documents are (i) compliant with current NC law, and (ii) consistent with one another[.]" specifically concentrating on whether plaintiff was obligated to collect and remit the Clubhouse dues. Specifically, plaintiff requested defendant's legal opinion on the obligations of plaintiff set forth in their Clubhouse dues agreement.

Defendant's legal opinion, contained in a letter dated 29 September 2014, provided plaintiff with the following advice:

- a. [T]he Association has neither any legal obligation

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nor any legal right to collect Clubhouse Dues.

b. Article IV, Section 2(1) of the Declaration is invalid.

c. [T]he obligation to pay Clubhouse Dues is not a real covenant at law because the benefitted party is not a party to the restriction and therefore the requirement created by this provision is invalid.

d. Because Clubhouse Dues are not a common expense, we believe that collection of Clubhouse Dues exceeds the Association's authority (under the PCA).

e. Given that the Clubhouse is not a common element owned by the Association, we have serious concerns with the Association enforcing the payment of these dues on Smoky Mountain Owners. Specifically, we believe that the Association's collection efforts, with regards to the Clubhouse Dues, places the Association in jeopardy of being classified as a "Debt Collector." This classification triggers the application of both state and federal law and may subject the Association to substantial liability under the same.

Defendants also advised plaintiff to "cease its collection and enforcement efforts of Clubhouse Dues immediately."

In reliance of defendant's legal advice, plaintiff sent a letter to all owners at SMCC informing them that they would no longer bill for or collect a monthly fee for the Clubhouse Dues. In response to this letter, representatives of SMCC threatened legal action against plaintiff and owners should they refuse to pay Clubhouse dues.

Plaintiff then brought a claim against the developer of SMCC in Swain County seeking declaratory judgment on whether the Clubhouse Dues Agreement was null and void and if repayment of all Clubhouse dues was improperly collected and paid

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to SMCC. The developer of SMCC then filed a counterclaim against plaintiff seeking monetary damages for repudiating the Clubhouse Dues agreement. That litigation ultimately resulted in *Conleys Creek Limited Partnership v. Smoky Mountain Country Club Property Owners Association*, 255 N.C. App. 236 (2017), where this Court held that plaintiff was both authorized by the Planned Community Act to assess Clubhouse dues on the homeowners, and obligated by an establishing declaration to remit those dues to the developer of SMCC. *Id.* at 246–47.

On remand, a jury awarded damages to the developer of SMCC in the amount of \$7,071,054.46, and the trial court entered judgment accordingly on 31 May 2019. In order to stay execution of the judgment, plaintiff filed Chapter 11 Proceedings in the United States Bankruptcy Court for the Western District of North Carolina on 26 July 2019. Plaintiff and SMCC eventually reached a settlement for payment of this judgment.

On 30 April 2020, plaintiff then brought a complaint against defendants with three claims for relief: (1) negligence, legal malpractice, and breach of fiduciary duty, (2) gross negligence, and (3) recovery of attorney fees. Plaintiff specifically alleged that defendants committed malpractice by advising plaintiff that they had no legal right to collect Clubhouse Dues from owners and failed to disclose the legal and economic risks associated with plaintiff breaching its obligations under the Clubhouse Dues Agreement. Furthermore, plaintiff alleged that defendant Robert Dungan committed gross negligence because he had actual knowledge of, and

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intentionally failed to inform plaintiff of, the existence of certain legal authorities that would contradict the legal opinion. Finally, plaintiff requested recovery of attorney fees from defendants arguing that defendants were not entitled to be paid for services they rendered in violation of their duty to plaintiff.

On 1 July 2020, defendants filed a Rule 12(b)(6) motion to dismiss, answers, and affirmative defenses against plaintiff's claims. On 11 August 2020, defendants separately filed a 12(b)(6) motion to dismiss specifically on the grounds that plaintiff's complaint was barred by a three-year statute of limitations and four-year statute of repose period. The trial court granted defendants' motion, stating that plaintiff failed to state a claim upon which relief can be granted.

Plaintiff then filed notice of appeal on this dismissal on 27 October 2020. For that appeal, this Court reversed the trial court's order dismissing plaintiff's complaint under Rule 12(b)(6) and remanded the case for further proceedings. *See Smoky Mountain Country Club v. Dungan*, 282 N.C. App. 208, 2022 WL 952884, at *1 (March 1, 2024). We held that it was improper for the trial court to conclude that plaintiff had failed to state a claim upon which relief could be granted; "[t]aking plaintiff's allegations as true, however, the last act of defendants giving rise to the cause of action may have occurred as late as 5 September 2017. Plaintiff's complaint was filed on 30 April 2020, which is within the three-year statute of limitations period." *Id.* at *5.

On remand, defendants filed an Amended Answer and Additional Affirmative

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Defenses for both the firms and defendant Dungan. In defendants' amended answer, they included twenty-five additional or affirmative defenses. Among these defenses, defendants again asserted that plaintiff's claim is barred by applicable statutes of limitation and repose. Additionally, defendants argued that many of plaintiff's claims are barred by claim preclusion, waiver, and judicial estoppel. Finally, defendants argued that plaintiff was contributorily negligent, specifically alleging that defendants never advised plaintiff to instruct association owners that they are not required to belong to the "clubhouse facility" and may therefore opt out of paying Clubhouse Dues if they desired.

Defendants filed a motion for summary judgment on 24 September 2023 pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. In that motion, defendants argue that they are entitled to summary judgment based on the applicable statutes of limitations and repose, res judicata, and claim preclusion. In support of the motion, defendants attached several documents, including documents from plaintiff's previous cases and their bankruptcy hearing. On 17 November 2023, defendants filed an amended and restated motion for summary judgment. This amended motion included three new documents: plaintiff's production responses, a petition to remove directors from 13 October 2014, and a summary judgment order from 16 July 2015. Finally, on 22 November 2023, defendants filed an affidavit from Mr. Kilbourne, a partner at defendant firm, in which he swore that the underlying litigation that is the basis for this malpractice suit commenced in October 2014 and

concluded on 30 July 2015.

During a hearing on defendants' motion for summary judgment, plaintiff argued that the affidavit submitted by Mr. Kilbourne, which established the applicable dates related to defendants' statutes of limitations and repose defenses, was submitted untimely and should thus not be considered by the trial court. Specifically, plaintiff argued that the affidavit was not filed contemporaneously with the motion for summary judgment and should therefore not be considered for the motion. Furthermore, plaintiff argued that the "last act" which should be considered for the statute of limitations defense was this Court's decision, which was rendered on 5 September 2017 in *Conleys Creek Limited Partnership v. Smoky Mountain Country Club Property Owners Association*, 255 N.C. App. 236 (2017).

The trial court concluded, based upon the pleadings, depositions, interrogatory answers, admissions on file, certified copies of plaintiff's bankruptcy court filings, and the affidavits submitted by defendants that there was no genuine issue of material fact and that defendants were entitled to judgement as a matter of law by an order filed 9 January 2024. Plaintiff gave written notice of appeal on 6 February 2024.

II. Discussion

Plaintiff's sole issue on appeal is that the trial court erred in granting summary judgment in favor of defendants under defendants' unverified amended and restated motion for summary judgment. Specifically, plaintiff argues that the trial court erred by issuing its judgment based on affirmative defenses raised in defendants' unverified

answer. Defendants argue that plaintiff has failed to preserve this issue for appeal. We address each argument below.

A. Preservation of Plaintiff's Appeal

First, defendants argue in their brief that plaintiff has failed to preserve this appeal and it should therefore be dismissed. We disagree.

Pursuant to Rule 10(a)(1) of this Court's Rules of Appellate Procedure, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2023). Failure to do so will waive the issue on appeal. *See in re A.B.*, 272 N.C. App. 13, 16 (2020). Furthermore, "[i]n the absence of *any* ruling by the trial court in the record on appeal, this issue is not properly before us and must be dismissed." *Walden v. Morgan*, 179 N.C. App. 673, 678 (2006) (emphasis added).

Here, defendants specifically argue that while plaintiff made an objection to the trial court considering untimely affidavits submitted by defendants, the trial court never ruled on plaintiff's objection. However, the trial court, by its order, clearly overruled plaintiff's objection when it considered the affidavits. Therefore, we reject defendants' preservation contention.

B. Summary Judgment

Plaintiff's sole issue on appeal is the trial court erred in granting summary

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judgment in favor of defendants. Specifically, plaintiff argues that “there is no admissible evidence of the existence of the affirmative defenses alleged in the unverified Amended Answers, and the trial court erred in granting summary judgment thereon.” We disagree with plaintiff’s framing of the issue. Rather, the issue in this case is whether the trial court properly granted summary judgment by considering evidence present in the record to determine if the statute of limitations had run on plaintiff’s claims.

1. Standard of Review

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows 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’ ” *In re Will of Jones*, 362 N.C. 569, 573 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24 (2007)). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue.” *Dalton v. Camp*, 353 N.C. 647, 651 (2001) (cleaned up). The moving party may meet this burden by showing “either that (1) an essential element of the non-movant’s claim is nonexistent; (2) the non-movant is unable to produce evidence which supports an essential element of its claim; or (3) the non-movant cannot overcome affirmative defenses raised in contravention of its claims.” *Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 605 (2000)

(cleaned up).

2. Consideration of the Kilbourne Affidavit

Defendant first argues that the trial court erred in considering the affidavit submitted by James Kilbourne in making its determination on defendants' motion for summary judgment. We disagree.

"Rule 56 gives the trial court *discretion* over whether to consider certain evidence when ruling on a summary judgment motion." *Timber Integrated Investments, LLC v. Welch*, 225 N.C. App. 641, 648 (2013) (emphasis added). "It has long been the law in North Carolina that in granting or denying a motion for summary judgment under Rule 56, the trial court may consider the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits which are before the court." *Murdock v. Chatham Cnty.*, 198 N.C. App. 309, 315 (2009) (cleaned up). Thus, we review the trial court's consideration of the Kilbourne Affidavit for abuse of discretion.

Here, the trial court, in its order granting defendants' motion for summary judgment, specifically considered an affidavit submitted by Mr. Kilbourne, who was counsel for plaintiff during the trial that is the basis of their legal malpractice claim. Plaintiff contends that this affidavit submitted in support of defendants' motion for summary judgment was untimely and should not have been considered by the trial court in making its judgment. We disagree.

Rule 6(d) of the North Carolina Rules of Civil Procedure requires that "[a]

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written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court.” N.C.G.S. § 1A-1, Rule 6(d) (2023). Furthermore, “[w]hen a motion is supported by affidavit, the affidavit shall be served with the motion.” *Id.*

However, this Court has held “[p]ursuant to Rule 6(d), the trial court is empowered with discretion as to whether to allow affidavits to be filed subsequent to the filing of a motion.” *Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180, 184 (2005). Similarly, this Court has also allowed supporting affidavits to be filed after filing a motion for summary judgment so long as the affidavits are “filed in sufficient time before the hearing to prevent any prejudice to the [opposing party].” *Wachovia Bank & Trust Co., N.A., v. Carrington Dev. Assocs.*, 119 N.C. App. 480, 490 (1995).

Here, defendants filed several supporting documents at least eleven days prior to the hearing for their motion for summary judgment. The hearing for defendants’ motion for summary judgment took place on 4 December 2023. Prior to this date, defendants filed their original motion for summary judgment with supporting documents on 21 September 2023. Furthermore, the amended motion for summary judgment, along with several supporting documents, were filed on 14 November 2023. Finally, the Kilbourne Affidavit was served on 21 November 2023, more than ten days before the motion for summary judgment hearing date.

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This Court has previously held that if an affidavit is filed in an untimely manner, it will not be considered prejudicial to the non-moving party so long as there is “no unfair surprise.” *Carrington Dev. Assocs.*, 119 N.C. App. at 490 (finding that the affidavits filed late contained information already known to the nonmoving party because that same information was noted in the pleadings and papers already filed). Here, defendants had already alleged the facts contained in the Kilbourne Affidavit surrounding defendants’ provisions of legal services and when the “last act” of those services occurred. Nothing in the Kilbourne Affidavit provided any new information that would constitute an “unfair surprise” to plaintiff. Accordingly, plaintiff was not prejudiced by the late submission of these supporting affidavits and the trial court did not err in considering them for defendants’ motion for summary judgment.

Furthermore, in considering defendants’ motion for summary judgment, plaintiff have not supplied any evidence that contests the contents of the Kilbourne Affidavit that would support their contention that the “last act” for the purposes of this malpractice claim was within three years of filing this claim. Rather, plaintiff only attacks the affidavit for being submitted after defendants filed their motion for summary judgment. After the Kilbourne Affidavit was filed, plaintiff provides no additional new evidence that supports their contention that the day of the “last act” for the purposes of this malpractice claim was indeed 5 September 2017. Nor did plaintiff contend it was unable to obtain such evidence due to time it received the Kilbourne Affidavit.

Accordingly, we hold that the trial court did not err nor abuse its discretion in considering this evidence.

3. Statute of Limitations Defense

Plaintiff further argues that the trial court erred in granting summary judgment in favor of defendants because their legal malpractice claim is not barred by the statute of limitations. We disagree.

In North Carolina, “N.C. Gen. Stat. § 1-15(c) governs legal malpractice claims, and establishes a three-year statute of limitations and a four-year statute of repose.” *Goodman v. Holms & McLaurin Att’ys at Law*, 192 N.C. App. 467, 473 (2008) (citations omitted).

Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action[.]

N.C.G.S. § 1-15(c) (2024). The critical question “is not whether an attorney-client relationship existed between [the parties] . . . the statute plainly states that a malpractice action accrues from the date of the ‘last act of the defendant,’ not from the date when the attorney-client relationship either begins or ends.” *Ramboot, Inc. v. Lucas*, 181 N.C. App. 729, 733 (2007). “Moreover, only the last act by [a defendant law firm] that ‘giv[es] rise to the cause of action’ triggers the statute of limitations, not any or all acts undertaken” in the scope of legal representation. *Id.* at 734. “This determination as to the last act giving rise to an action for malpractice is a conclusion

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of law appropriate for the trial judge to make based on the facts presented, such as the dates of relevant events in the attorney-client relationship.” *Id.*

“To determine when the last act or omission occurred we look to factors such as the contractual relationship between the parties, when the contracted-for services were completed, and when *the alleged mistakes could no longer be remedied.*” *Carle v. Wyrick, Robbins, Yates & Ponton, LLP*, 225 N.C. App 656, 661 (2013) (emphasis added). Our Supreme Court has previously held that the “last act” will occur when the attorney no longer has a continuing duty to correct his mistake. *See Hargett v. Holland*, 337 N.C. 651, 653–54 (1994) (holding that attorneys did not have a continuing duty to correct mistakes made in a will right up until the testator died).

Here, plaintiff is seeking to recover damages from legal advice defendant Dungan gave verbally on 24 September 2014 (and on 29 September 2014 in a written memo), where he stated that plaintiff had no legal right to collect Clubhouse Dues from its members. It is uncontested that this was the date in which defendants allegedly rendered negligent advice. Plaintiff then brought this suit on 30 April 2020, almost six years after the allegedly negligent advice was given. Plaintiff argues the “last act” for the purposes of this litigation was when this Court issued its opinion in the underlying litigation on 5 September 2017. Defendants argue the last act for the purposes of this litigation was the date the allegedly negligent advice was rendered or, in the alternative, argue that the last act was on 30 April 2015, when plaintiff filed a counterclaim in the underlying litigation that made retraction of defendants’

allegedly negligent legal advice impossible.

Plaintiff's argument is flawed for several reasons. First, this Court has previously held that the proper measure of the statute of limitations began from the last alleged negligent act at trial, not the subsequent appellate representation of the client where there were no allegations of negligence. *See Teague v. Isenhower*, 157 N.C. App. 333, 337–38 (2003). Plaintiff's argument that the "last act" should be considered the date in which this Court issued its opinion in the underlying litigation is incorrect because plaintiff made no allegations of negligence on the part of defendants during that appeal. Rather, they only argue that defendants gave negligent advice on one specific date, years before that appeal was finalized.

Second, defendants in this case had no continuing duty to correct their mistake after the 29 September 2014 letter. Our Supreme Court has previously held that:

Just as a physician's duty to the patient is determined by the particular medical undertaking for which he was engaged, an attorney's duty to a client is likewise determined by the nature of the services he agreed to perform. An attorney who is employed to draft a will and supervise its execution and who has no further contractual relationship with the testator with regard to the will has no continuing duty to the testator regarding the will after the will has been executed.

Hargett v. Holland, 337 N.C. 651, 655–56 (1994) (emphasis added) (comparing an attorney-client relationship to a physician-patient relationship in stating "[m]ere continuity of the general physician-patient relationship is insufficient to permit one to take advantage of the continuing course of treatment doctrine. Subsequent

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treatment must be related to the original act, omission, or failure which gave rise to the cause of action.” (citation omitted)).

Here, although plaintiff and defendants had an ongoing attorney-client relationship, for the purposes of this litigation, defendants no longer had a continuing duty once they fulfilled plaintiff’s request for legal advice on whether their governing documents were compliant with current North Carolina law. Plaintiff’s own complaint even discusses how defendant Dungan was only retained to review plaintiff’s governing documents and furnish plaintiff with an opinion letter on the legal question presented. Thus, once the opinion letter was rendered, defendants no longer had a continuing duty to plaintiff as to this specific request and the “last act” was the delivery of the opinion letter to plaintiff on 29 September 2014.

Finally, the timeline established by the Kilbourne Affidavit (which as stated above remains largely uncontested) discussed when it became impossible to remedy defendants’ allegedly negligent legal advice. Specifically, the affidavit establishes, and defendants correctly argue, that when plaintiff was sued in the underlying litigation between plaintiff and SMCC clubhouse owners over repudiation of the Clubhouse Dues agreement, the clubhouse owners’ counterclaim seeking damages rather than specific performance made it impossible for defendants to remedy their alleged negligent legal advice. Because the “last act” for the purposes of legal malpractice claims occurs when the allegedly negligent legal advice can no longer be remedied, defendants could no longer retract their legal advice when the clubhouse

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owners materially relied on plaintiff's repudiation of the Clubhouse Dues agreement. The Kilbourne Affidavit further establishes that defendant law firm had no formal role in defending plaintiff in its litigation against SMCC clubhouse owners.

Given plaintiff's erroneous interpretation of the law in establishing the date of the "last act" for purposes of this legal malpractice claim, plaintiff has failed to overcome defendants' statute of limitations defense by showing this claim is timely. The uncontradicted evidence regarding the time of the advice and the subsequent litigation supports a determination that the plaintiff's claims are barred by the statute of limitation, thus, the trial court did not err in granting defendants' motion for summary judgment.

III. Conclusion

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).