



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-385-4432 • TDD: 703-352-4139

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September 29, 2008

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Matthew Ranck, Esq.
Eccleston & Wolf, P.C.
2001 S. Street, N.W., Suite 310
Washington, DC 20009-1125

Rodney Leffler, Esq.
Alexa Mosely, Esq.
Leffler & Hyland, P.C.
4163 Chain Bridge Road
Fairfax, Virginia 22030-4102

Paul Jacokes, Pro Se
1350 Beverly Road, Apt. 612
McLean, Virginia 22101

Re: Jacokes v. Cottrell, et al.
CL 2007-12712

Dear Counsel:

This matter came before the Court on Defendants' Motion for Summary Judgment, and on Plaintiffs' Motion to Compel. After considering the oral and written arguments of counsel, the pleadings, and the relevant legal authority, the Court denies both motions.

Background

James Cottrell and his firm represented Paul Jacokes in connection with Jacokes' March, 2007 divorce. The disputed property issues were ultimately resolved in a hybrid mediation-arbitration proceeding before the Honorable Bruce Bach, acting as judge pro tempore. Jacokes was unhappy with the outcome, with the services Cottrell rendered, and with the size of Cottrell's bill. When Cottrell sought to collect the outstanding portion of the bill, this malpractice action ensued.

OPINION LETTER

Under the Court's scheduling order of January 28, 2008, both parties were required to designate expert witnesses by July 8, 2008. Jacokes failed to designate any experts by that date, and Defendants' first Motion for Summary Judgment was heard on August 1, 2008. The motion was denied, with leave to raise it again after the close of discovery. Discovery having closed, Defendants again seek summary judgment. Their argument is that Jacokes has failed to designate an expert witness; and that in an action for professional malpractice an expert is required to establish (1) the standard of care Cottrell was required to exercise, (2) any deviation from the standard, and (3) any causal link between the deviation and Jacokes' loss.

Analysis

The Court has reviewed each of the points raised in Plaintiffs' Motion to Compel, including the individual discovery requests, and the Defendants' responses. It is clear that Defendants have fully responded to each of Plaintiffs' requests, and that the Motion to Compel is without merit.

"Summary judgment upon all or any part of a claim may be granted to a party entitled to such judgment when no genuine issue of material fact remains in dispute, and the moving party is entitled to judgment as a matter of law...Additionally, the trial court must consider inferences from the facts in the light most favorable to the non-moving party, unless the inferences are strained, forced or contrary to reason." *Andrews v. Ring*, 266 Va. 311, 318, 585 S.E.2d 780 (2003) (internal citations omitted). Summary judgment is a drastic remedy which was unknown at common law. It should be applied only where no trial is necessary because no evidence could affect the result. *Shevel's, Inc. v. Se. Assoc.*, 228 Va. 175, 181-82, 320 S.E.2d 339 (1984).

The trial court has a duty to make an independent evaluation of the record and determine whether summary judgment is appropriate, even where both parties believe no genuine issue of material fact remains in dispute. *Cent. Nat. Ins. v. Va. Farm Bur. Ins.*, 222 Va. 353, 356, 282 S.E.2d 4 (1981). The burden of demonstrating that no genuine issues of material fact exist rests with the moving party and the non-moving party is not required to produce evidence to support his or her pled allegations. *See, O'Brien v. Snow*, 215 Va. 403, 405, 210 S.E.2d 165, (1974).

"Unless a malpractice case turns upon matters within the common knowledge of laymen, or upon rules which have ripened into rules of law, expert testimony is required to establish the appropriate professional standard, to establish a deviation from that standard, and to establish that such a deviation was the proximate cause of the claimed damages." *Seaward Int'l, Inc. v. Price Waterhouse*, 239 Va. 585, 592, 391 S.E.2d 283 (1990). "In certain rare instances, however, expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience." *Beverly Enter. v. Nichols*, 247 Va. 264, 267, 441 S.E.2d 1 (1994). *See also, Gregory v. Hawkins*, 251 Va. 471, 468 S.E.2d 891 (1996) (assuming, without deciding that expert testimony was necessary in a malpractice action); *Whitley v. Chamouris*, 265 Va. 9, 574 S.E.2d 251 (2003) (aff'g damage award for malpractice even though no expert testimony was presented at trial).

Defendants ask the Court to hold as a matter of law that Plaintiff will be unable to prove their liability for professional malpractice without expert testimony. None of the cases or other authorities they cite hold that expert testimony is required in a malpractice action as a matter of law, the Court has been unable to find any Virginia Case holding that expert testimony in a malpractice action is required as a matter of law, and this Court declines to do so either. While it may be possible for Defendants to demonstrate that this malpractice case is not one of the unusual instances where expert testimony is unnecessary, they have not done so here, and as the moving party that is their burden. *See, O'Brien*, 215 Va. at 405.

Even though it is rare for a malpractice case to be proven without expert testimony, it is possible. *See, Whitley v. Chamouris*, 265 Va. at 9. Whatever doubts the Court has about Plaintiff's ability to prove his case without an expert, nothing before the Court demonstrates that it is impossible as a matter of law. And of course, even though this case is not now ripe for summary judgment, the situation might be very different after Plaintiff has rested.

Conclusion

Defendants, as the moving party, bear the burden of proving that no genuine issue of material fact exists for the fact finder to decide. Although the Court has significant doubts about the Plaintiff's ability to prove legal malpractice without an expert, it is not the case that he is unable to do so as a matter of law. Accordingly, the Defendants' Motion for Summary Judgment is denied. Plaintiff's Motion to Compel is also denied. The Court has exercised its discretion under Rule 1:13 and entered an order reflecting this ruling.

Sincerely,



Jonathan C. Thacher
Circuit Court Judge, Fairfax County

JCT/njl

OPINION LETTER

