IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 21-0040

THOMAS KONESKY,

Plaintiff, Third-Party Defendant & Appellant

v.

KEVIN KELLER; KAREN L. REIFF; CHURCH, HARRIS, JOHNSON & WILLIAMS, P.C., and JOHN DOES A–Z,

Defendants, Third-Party Plaintiff & Appellees,

KEVIN KELLER,

Third-Party Plaintiff,

v.

DONITA KONESKY,

Third-Party Defendant.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Eighth Judicial District Court, Cascade County, the Honorable Elizabeth Best, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

Plaintiff Tom Konesky respectfully replies to the Church Harris Defendants' response as follows:

ARGUMENT

In an attempt to salvage the district court's legally erroneous order granting their motion for summary judgment, the Church Harris Defendants have oversimplified the district court's order and overcomplicated Konesky's argument on appeal. This case should be reversed because the district court erred when it held that a law firm did not owe a duty to its client, and again when it determined material issues of fact without considering required expert testimony.

Church Harris argues that the district court should be affirmed for three reasons. First, the district court had already decided that Defendant Kevin Keller breached the contract with Konesky, so Church Harris cannot be at fault. Second, Konesky did not meet his burden at the summary judgment stage to produce evidence of legal malpractice. Third, the district court did not misapply the law regarding the legal elements of a malpractice claim.

Church Harris's first argument is wrong because the legal malpractice claim against it extends beyond the inadequacies of the

contract. It also encompasses Church Harris's representation of Konesky in the immediate aftermath of Keller's breach. But for Church Harris's conduct, Konesky would not be in his present position, even if Keller had breached the contract. Therefore, the defendants' liability is not mutually exclusive.

Second, Church Harris dedicates the majority of its brief to explaining away the district court's statement: "[n]o such duty has been shown." The district court meant what it said, and it was wrong. The existence of a duty is a question of law, and Church Harris clearly owed Konesky, its client, a duty. The scope of that duty and Church Harris's breach thereof is a question of fact that the district court is not empowered to decide. The district court should instead have allowed Konesky to complete discovery and produce expert testimony on the issue of Church Harris's malpractice. Had he been so allowed, he would have raised a genuine issue of material fact, precluding summary judgment.

Church Harris's final argument makes a mockery of the rules of civil procedure and the civil justice process. Church Harris brazenly claims that Konesky failed to meet his burden in opposing summary

judgment because he offered speculation rather than evidence. But that argument ignores the procedural posture of the case when Church Harris filed its summary judgment motion: many months remained before the expert disclosure deadline and the close of discovery. If Church Harris's argument is permitted to prevail, civil defendants will have a powerful incentive to move for summary judgment *before* the expert disclosure and discovery deadlines in order to claim that they should prevail because the plaintiffs have not yet produced the evidence they are entitled to pursue in discovery.

I. Konesky is not seeking a double recovery from separate defendants, but rather the opportunity to be made whole by defendants who jointly contributed to his damages.

Church Harris accuses Konesky of attempting to "recover duplicative remedies from separate defendants." (Answer Br. at 7.) Church Harris insists that the most Konesky is entitled to is Keller's performance of the contract or his payment of damages for his breach. (Answer Br. at 21.) But Konesky is in danger of not securing any damages from Keller for his breach. That is because Keller has capitalized on Church Harris's poor draftsmanship to claim that the residential lease had no value to Konesky. Church Harris also advised

Konesky to cash Keller's check paying off the promissory note, an act that effectively evicted Konesky from the property by extinguishing his remaining interest. Church Harris and Keller jointly contributed to Konesky's damages. Konesky will not be made whole if the liability of the defendants is held to be mutually exclusive.

When Konesky filed his complaint, he asserted that Church Harris had "a duty to negotiate, draft, and review the documents involved in this Property transaction so that they effectuated the bargain reached by [him] and Mr. Keller, protected [his] financial interest in the Property, and secured [his] stated interest in living on the Property rent-free through 2027." (D.C. Doc. 2 at 7.) At that time he did not yet know that Church Harris had drafted a lease that protected Konesky against Keller's right to unilaterally terminate the lease, but then accepted another lease drafted by Keller's attorney that did include a unilateral right of termination for Keller. (D.C. Doc. 9 (Depo. Karen Reiff at 56); D.C. Doc. 42 at 3.) At the time he filed his complaint, Konesky also did not yet appreciate the legal consequences of Church Harris's advice to accept Keller's prepayment of the mortgage and cash the check in full satisfaction of the promissory note. (D.C. Doc. 9 (Depo.

Karen Reiff at 71–72).) Church Harris's failure to expressly reserve Konesky's tenancy in the farmhouse in the deed and the mortgage, or to otherwise make the value of the lease reasonably ascertainable from the transaction documents enabled Keller to insist that even if he breached the mortgage with Konesky, Konesky has suffered no loss of right or value. This lack of clarity ultimately invited Keller to allege in his counterclaims against the Koneskys that Keller rather than Konesky suffered a financial loss as a result of the fire. (D.C. Doc. 59.) But for Church Harris's malpractice before and after Keller's breach of contract, Keller would not be able to argue that Konesky has suffered no damages from Keller's breach of contract.

Confusion, delay, and unnecessary expense occasioned by poor draftsmanship has been accepted as an aspect of damages in a claim of attorney malpractice before. In *Babcock Place Ltd. v. Berg, Lilly, Andriolo & Tollefsen*, 2003 MT 111, 315 Mont. 364, 69 P.3d 1145, this Court recognized that a law firm cannot compel parties to a transaction to act in conformance with their contractual obligations, but it can be held liable for negligence that causes "several years of delay and expense." ¶ 10. It is not yet clear whether Keller will be successful in his

attempt to argue that he rather than Konesky suffered a financial loss as a result of the fire, or that Konesky's right to remain living rent-free on the property through 2027 had no value. Those matters will presumably be decided by the trial currently set for December 6, 2022. (D.C. Doc. 63.) If Keller succeeds in either one of those arguments, then Church Harris will have failed to secure Konesky's primary interest in this property transaction.

Keller's actions and Church Harris's combined to cause Konesky's damages. Konesky is not seeking a double recovery, (*Compare* Opening Br. at 34 n.1 *with* Answer Br. at 7), but he cannot know the true scope of the damage caused by Church Harris until a trier of fact determines the financial cost to Konesky of Keller's breach of contract. But, if Keller succeeds in any respect in his countersuit against Konesky, Keller will have obviated the district court's other summary judgment order holding him liable to Konesky for breach of contract. And if the summary judgment order in favor of Church Harris is not reversed, Konesky will be left with no recourse against either defendant.

The existence of such a possibility illustrates why the district court was wrong to conclude that Keller's liability and Church Harris's

liability are mutually exclusive. Like the plaintiff in *Babcock*, Konesky has suffered "years of delay and expense" as a result of the combination his previous attorneys' negligence and a third party's breach of contract. *Babcock Place Ltd.*, ¶ 10. And like it did in *Babcock*, this Court should hold that the issue of material fact as to whether the law firm followed the requisite standard of care when it handled a real estate transaction should be "determined by the trier-of-fact." *Babcock Place Ltd.*, ¶ 31.

II. The district court erroneously concluded that no duty existed between a law firm and its client.

Church Harris's motion for summary judgment was premised on the preceding and largely successful motion for summary judgment that Konesky had filed against Keller. The district court accepted Church Harris's self-serving argument that if Keller was found to have breached the contract, then Church Harris could not have committed malpractice. The district court agreed that it did not need to consider record evidence or forthcoming evidence about the scope of Church Harris's duty and breach thereof because "[n]o legal duty has been shown." (D.C. Doc. 50 at 5.) But Konesky *did* show that Church Harris owed him a duty.

It is undisputed that "[t]he existence of a legal duty is a question of law." (D.C. Doc. 50 at 4 (citing *Rhode v. Adams*, 1998 MT 73, ¶ 12, 288 Mont. 278, 957 P.2d 1124).) According to the district court, no expert testimony was needed to delineate the scope or breach of a duty that did not exist as a matter of law. The district court viewed *Rhode* as an analogous case because that case addressed the limited nature of an attorney's duty to a *non-client*. *Rhode*, ¶¶ 13, 21. In the district court's view, Konesky's argument about Church Harris's duty to him was equally preposterous: "a lawyer does not have a duty to prevent a breach of a contract," or "to ensure its performance," or to "require a negotiated contract to contain terms to which the parties did not mutually agree." (D.C. Doc. 50 at 6 (citing *Federal Deposit Ins. Corporation v. Peterson*, 104 Mont. 447, 67 P.2d 305 (1937) and *Boles v. Simonton*, 242 Mont. 394, 401, 791 P.2d 755, 759 (1990).) The district court saw no need to consider forthcoming expert testimony about the scope and breach of duties that it found not to exist as a matter of law.

But Konesky never maintained that Church Harris owed him such duties. It is the district court's own misunderstanding of the factual record that caused it to believe that Konesky expected Church Harris to

include contractual provisions to which the parties did not agree, or that he expected Church Harris to prevent Keller's breach of contract. Konesky addressed the district court's factual errors on this point in his Opening Brief. (Appellant's Opening Br. at 24–27.) In short, Konesky's argument to the district court was *not* that Ms. Reiff was negligent by failing to insist that he and Keller sign the lease she drafted or by somehow preventing Keller's breach of contract. Rather, Konesky's argument was that Ms. Reiff was negligent by drafting and agreeing to rent and casualty terms that enabled Keller to unilaterally terminate the lease after the fire, and to claim that Konesky's residential interest had no value. (D.C. Doc. 41 at 5–6.) The district court's misunderstanding of the factual record allowed it to conclude in a perfunctory manner that Church Harris did not owe Konesky the duty he claimed.

However, the parties all agreed that Church Harris did owe Konesky, its client, a duty. Specifically, the parties agreed that Church Harris had at the very least, "a duty to [reasonably] negotiate, draft, and review the documents involved in (the transaction between Mr. Konesky and Mr. Keller) [and to] reasonably secure to Mr. Konesky,

under the circumstances, the rights and remedies which real estate sale-and-purchase contracts can reasonably be expected to secure." (D.C. Doc. 36 at 4, 6) (internal quotations omitted).

Church Harris argues now on appeal that the district court did not err by ruling that "[n]o legal duty has been shown," (D.C. Doc. 50 at 5), but rather that the district court's entire order "assumed the existence of the admitted duty," (Appellee's Br. at 17). This charitable interpretation of the district court's order is belied by the language of the order. The district court took pains to articulate the duties that Church Harris did not owe Konesky:

> a lawyer does not have a duty to prevent a breach of a contract, [. . . or] to ensure its performance, [. . . or to] require a negotiated contract to contain terms to which the parties did not mutually agree.

(D.C. Doc. 50 at 6.) Church Harris is simply incorrect that that district court assumed the existence of the duty Church Harris owed to Konesky. Rather, the district court dismissed Konesky's arguments about duty after summarizing them in a specious manner. (*See* D.C. Doc. 50 at 4–6.) The district court erred as a matter of law when it ruled that Church Harris did not owe its longtime client a duty.

III. The district court inappropriately determined the scope of Church Harris's duty without considering required expert testimony.

If this Court agrees that Church Harris did owe Konesky a duty and the district court erred by concluding otherwise, then the next question to be addressed is whether to affirm the district court for having reached the right result, even if its analysis was flawed. *See State v. Christensen*, 2014 MT 294, ¶ 12, 377 Mont. 7, 338 P.3d 45 ("It has long been our practice to uphold the District Court when it reached the right result, regardless of the District Court's rationale.") Whether the next step in the analysis is framed as the scope of Church Harris's duty to Konesky, the standard of care it owed to him, the breach of the standard of care or duty, malpractice, or simply negligence, this question is an issue of fact that requires expert testimony. *Babcock Place Ltd.*, ¶ 21, ("[o]nly expert testimony can establish the standard of care in a legal malpractice case"); *Moore v. Does*, 271 Mont. 162, 165, 895 P.2d 209, 210 (1995) ("As a general rule, only expert testimony can establish the standard of care in a legal malpractice case."); *Aetna Finance Co. v. Ball*, 237 Mont. 535, 538, 774 P.2d 992, 994 (1989); *Carlson v. Morton*, 229 Mont. 234, 239, 745 P.2d 1133, 1137 (1987)

("[I]n the great majority of malpractice cases . . . there can be no finding of negligence in the absence of expert testimony to support it.") (quoting Prosser and Keeton on The Law of Torts, § 32, 5th Edition, (1984).

That this element of a malpractice case requires expert testimony is not a novel proposition, despite Church Harris's arguments to the contrary. (*See* Answer Br. 9–14.) In *Aetna Finance Co.*, this Court determined that when parties in a legal malpractice case "dispute the specific duties for which the attorney-client relationship was created, and not the general duties owed clients in general . . . [that] dispute is one of material fact." *Aetna Finance Co.*, 237 Mont. at 538, 774 P.2d at 994. Similarly, in *Babcock Place Ltd.*, this Court held that by "provid[ing] an expert who declared by affidavit that [the defendant attorney] failed to meet the requisite standard of care for attorneys drafting contracts, [. . . the plaintiff] raise[d] a material issue of fact, regarding the proper standard of care, which must be resolved by a trier-of-fact." *Babcock Place Ltd.*, ¶ 22. All Konesky is asking in this appeal is the opportunity to meet his burden to raise a material issue of fact regarding the scope of Church Harris's duty to him and its breach thereof. Mont. R. Civ. P. 56(c)(3).

IV. Konesky did not fail to meet his burden in opposing summary judgment but was rather denied the opportunity to meet his burden by the district court's premature ruling.

Church Harris faults Konesky for not having filed an affidavit in accordance with Montana Rule of Civil Procedure 56(f) identifying "the specific evidence and reason why it could not be timely presented in opposition to summary judgment." (Answer Br. at 16.) Church Harris also derides Konesky's arguments about its breach of the standard of care as "unsupported speculation." (Answer Br. at 8.) Both of those arguments illustrate why Church Harris's motion for summary judgment was premature and should have been denied. Civil defendants should not be allowed to prevail on summary judgment *before* the close of discovery because the plaintiff has not yet completed discovery. This is not the situation Rule 56(f) is designed to remedy.

Rule 56(f) provides,

> [i]f a party opposing the [summary judgment] motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order.

Church Harris cites *Rosenthal v. County of Madison*, 2007 MT 277, ¶¶ 38–43, 339 Mont. 419, 170 P.3d 493, for the proposition that it is

"[a]ppropriate to deny [a] party opposing summary judgment the opportunity for further discovery when that party does not establish, by affidavit pursuant to Rule 56(f), M.R.Civ.P., how the proposed discovery could preclude summary judgment." (Answer Br. at 16.) The court in *Rosenthal* denied the plaintiff's Rule 56(f) motion because the plaintiff failed to conduct any discovery at all for almost a year, and then on the eve of the motions deadline sought leave to conduct additional discovery. ¶ 41. The district court denied the motion, and this Court affirmed. This Court held,

> [a] district court does not abuse its discretion in denying a M.R. Civ. P. 56(f) motion where the party opposing a motion for summary judgment does not establish how the proposed discovery could preclude summary judgment. . . . A court need not force a party to undergo more discovery when the only reason to believe that additional, relevant evidence would materialize is the plaintiff's apparent hope of finding a proverbial "smoking gun."

Rosenthal, ¶¶ 38, 42 (internal alterations and citation omitted).

The differences between *Rosenthal* and this case are many. First, Church Harris moved for summary judgment on August 13, 2020, three months before the deadline for disclosure of expert reports set out in the Court's initial scheduling order, and four months before the close of discovery. (D.C. Docs. 35, 18.) Konesky opposed the motion on several

grounds, including that it was premature for Church Harris to seek summary judgment on his claim of professional negligence before he had an opportunity to present expert testimony establishing the standard of care owed to him by Church Harris in this transaction, and Church Harris's breach thereof. (D.C. Doc. 41 at 9.) However, the Court granted Church Harris's summary judgment motion on October 14, 2020, three weeks before the expert disclosure deadline, and two months before the close of discovery. (D.C. Doc. 50.)

Second, Konesky had not neglected to conduct discovery in the lead up to Church Harris's motion for summary judgment. On the contrary, by August of 2020, Konesky had served numerous requests for discovery on all parties, and had conducted depositions of all the fact witnesses and the corporate representative.

Third, Konesky was not seeking leave of court to conduct more discovery or to extend the discovery deadline. Rather, he informed the Court that he expected to have all the evidence he needed to raise a genuine issue of material fact in opposition to summary judgment, and he intended to produce that evidence in accordance with the court's scheduling order. The district court acknowledged Konesky's argument

that Church Harris's motion was premature, but ruled that a "standard of care opinion would be used to prove a breach of a duty[, but n]o legal duty has been shown." (D.C. Doc. 50 at 5.)

Rule 56(f) would not have provided Konesky the relief that Church Harris faults him for not having sought. (Answer Br. at 16.) He did not need a continuance in order to complete discovery or produce an expert report. He simply needed the district court to defer ruling on the premature summary judgment motion until the court's own deadline for disclosure of expert reports had arrived.

If this Court were to accept Church Harris's argument that Konesky failed to meet his burden in opposing summary judgment because he did not file a Rule 56(f) affidavit or motion, this Court would invite unacceptable gamesmanship in civil discovery. Under that regime, defendants would have every incentive to move for summary judgment well before the close of discovery in order to disadvantage plaintiffs for not having completed discovery months before they are required to. This Court should reject that proposition and instead remand this case for the simple reason that Konesky should not be

faulted for not having completed discovery before the deadlines set out in the district court's scheduling order.

CONCLUSION

Church Harris compromised and ultimately failed to protect Konesky's main interest in the contract, and did so while another version of the contract that would have protected his interests was languishing in a drawer. Church Harris then poorly advised Konesky to accept his own money as payment for his property, thereby assenting to his ouster from his own land. But for Church Harris's poor draftsmanship and advice, Konesky would have retained at least a *de jure* right to remain living on his land and the value of that right would be unassailable. Hence, the fact that Keller breached the contract does not absolve Church Harris of its malpractice and the attendant harm caused to its client.

The district court was made aware of these facts but avoided considering them by concluding that there was no duty between a law firm and its client. Now, Church Harris brazenly asserts that Konesky's claims are "speculative," even though Church Harris's premature motion and the court's premature ruling deprived Konesky

of the opportunity to do more than proffer what his expert would have said in a timely disclosed report.

The district court relied on mistakes of material fact and erroneously determined the scope of Church Harris's duty to its long-time client without considering necessary expert testimony on the subject. For any one of these reasons, this Court should reverse the summary judgment order in favor of Church Harris, vacate the final judgment entered pursuant to that order, and remand this case so Konesky can prove to a jury the ways in which Church Harris failed to fulfill its professional obligations to him.

Respectfully submitted this 24th day of May, 2021.

By: /s/ *Caitlin Boland Aarab*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Reply Brief is printed with a proportionally-spaced roman text, Century Schoolbook, and a typeface of 14 points, and is double-spaced except for footnotes and quoted, indented material. This brief contains 3,687 words, as calculated by Microsoft Word for Windows, excluding the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

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