

IN THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

MICHAEL D. LAND

PLAINTIFF

VS.

CIVIL ACTION NO. CI2021-008-JA

McRAE LAW FIRM, PLLC;
JUSTICE CHUCK McRAE, ESQ;
AND DREW MARTIN, ESQ.

DEFENDANTS

**DEFENDANTS' MEMORANDUM BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

COME NOW defendants, by counsel, and submit their Memorandum Brief in Support of Motion for Summary Judgment, as follows:

I. INTRODUCTION

Mike Land hired the McRae Law Firm on July 14, 2017, to pursue a potential alienation of affection (“AOA”) claim related to his wife’s alleged affair with Danny Gray. (Ex. A, ¶ 4).¹ Attorneys Chuck McRae and Drew Martin worked on the case for the McRae Law Firm. During the initial meeting, Land advised McRae and Martin that his wife, Tee Land, was suspected of having an affair with Danny Gray. Land now claims that during this initial meeting on July 14, 2017, he also advised McRae and Martin that he suspected that his wife was having an affair also with a “beer distributor from the coast.”² However, Land admits that he did not know the “beer distributor’s” name (Paul Bertucci) at the time of this meeting and did not actually learn of his identity until Danny Gray was deposed in the divorce proceeding between the Lands in February 2018. (Ex. D, pp. 32-33).

Land fired the McRae Law Firm in December of 2019. He then hired his current counsel. Land’s current counsel filed an AOA suit against Bertucci and not Danny Gray on January 15,

¹ All citations to exhibits refer to the exhibits to defendants’ Motion for Summary Judgment.

² Defendants deny that Land mentioned a suspected affair with this unknown “beer distributor from the coast” during the initial visit. Regardless, this makes no difference for purposes of this motion.

2020. However, on November 12, 2020, Judge Emfinger dismissed the AOA suit against Bertucci. Judge Emfinger found that the statute of limitations on this AOA suit against Bertucci ran at the latest on October 31, 2017. (Ex. C).³

Land then filed this legal malpractice suit against the defendants alleging that the defendants failed to timely file suit against Bertucci. However, since the statute of limitations ran before Bertucci's identity was known, defendants committed no legal malpractice. Moreover, even if suit had been timely filed against Bertucci, all admissible evidence shows that Bertucci did not alienate Tee Land's affections. There was no valid basis for an AOA suit against Bertucci. Accordingly, plaintiff fails to state a valid claim against these defendants and these defendants are entitled to summary judgment as a matter of law.

II. PERTINENT FACTS

Mike Land married Theresa ("Tee") Land on August 15, 1992. Tee alleges that over the years, her relationship and affections for Mike Land deteriorated. Mike Land moved out of the bedroom shared with Tee in 2012. Tee testified that she began an affair with Danny Gray in 2012 and the affair continued into the spring of 2013. (Ex. E, pp. 22 and 64). Tee's feelings for Mike Land never returned. She testified, "Because my feelings for Mike Land ended in 2012. They've never - - I've not loved Mike since 2012 . . ." (Ex. E, p. 72). She also testified that she reached the point of a final no return in the marriage by "2013 for sure." (Ex. E, p. 73).

Tee moved out of the marital home on October 31, 2014 and never returned. She testified that she "moved out of the marital residence because we no longer had a marriage. My husband left me years before that." (Ex. F, p. 17). She explained that her husband "moved upstairs separating him from me," "was distant," "was agitated and was on a lot of prescription

³ Land did not take an appeal for a final decision to the Supreme Court.

medications” and tried “to financially punish me for doing something he didn’t like.” (Ex. F, p. 17).

In June of 2014, Tee reached out to Paul Bertucci and began a relationship with him. She testified that she reached out to him because her marriage had fallen apart and she was being totally neglected at home. (Ex. E, p. 15). Tee claims that her relationship with Bertucci did not become sexual until December of 2014. (Ex. E, p. 15). Of importance, Tee testified, “I made my decision to file for divorce from Mike Land long before I talked to Paul [Bertucci], so it had no effect.” (Ex. E, p. 47). She further testified, “Paul Bertucci had nothing to do with me leaving Mike Land or me filing for divorce.” (Ex. E, p. 51).

On July 14, 2017, Mike Land hired McRae Law Firm to pursue a potential AOA claim against Danny Gray. Land told defendants about Tee’s suspected affair with Danny Gray. Again, Land **alleges** that he also advised defendants that he suspected Tee may be having an affair with a “beer distributor,” but it is undisputed that Paul Bertucci’s identity was not known until the deposition of Danny Gray in February 2018. (Ex. D, pp. 32-33).⁴

Mike Land fired defendants in December of 2019. Land’s current counsel then filed an AOA suit against Bertucci on January 15, 2020. On November 12, 2020, Judge Emfinger dismissed the AOA suit against Bertucci, finding that the statute of limitations on any AOA suit ran, at the latest, on October 31, 2017, which was three years from the date Tee Land moved out of the house. (Ex. C).

Mike Land then filed this legal malpractice suit against defendants. However, defendants are entitled to summary judgment because the statute of limitations ran before the identity of

⁴ Tee Land was deposed on August 24, 2017. Land’s divorce counsel questioned Tee about potential affairs with Gray, Bill Brown and Jonathan Smith. (Ex. F, pp. 21-22). She did not question Tee about any affair with Bertucci or a “beer distributor” which indicates that Mike Land knew nothing about a beer distributor on the coast at that time.

Bertucci was known. Defendants are also entitled to summary judgment because Land cannot show that Bertucci alienated Tee's affections and because defendants did not breach the standard of care owed to him.

III. ARGUMENT & LAW

a. Summary Judgment Standard

A court should grant a motion for summary judgment "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 the moving party is entitled to a judgment as a matter of law." *Ill. Cent. R.R. Co. v. Jackson*, 179 So.3d 1037, 1044 (Miss. 2015) (quoting Miss. R. Civ. P. 56(c)). "The moving party has the burden of proving there is no genuine issue of material fact." *Lyon v. McGee*, 249 So. 3d 436, 441 (Miss. Ct. App. 2018) (internal citations omitted). Once the moving party has shown there is no genuine issue of material fact, the burden of rebuttal shifts to the non-moving party to introduce specific facts that show there is a genuine issue of material fact. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1213 (Miss. 1996). "Moreover, summary judgment is appropriate when the nonmovant fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Lyon*, 249 So. 3d at 442.

b. Elements of Legal Malpractice.

"In order to recover for legal malpractice, a plaintiff must prove by preponderance of the evidence the existence of a lawyer-client relationship, negligence on the part of the lawyer in handling his client's affairs entrusted to him, and some injury proximately caused by the lawyer's negligence." *Baker Donelson Bearman & Caldwell, P.C. v. Muirhead*, 920 So.2d 440, 449 (Miss. 2006) (internal citations omitted). In order to fulfill the third element, a party must prove that he

would have won the “case-within-the-case.” He must make a showing that but for the alleged malpractice, he would have prevailed on the merits. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1215 (Miss. 1996).

c. This legal malpractice claim fails because the Statute of Limitations for the AOA claim expired before Defendants and Mike Land knew the identity of Paul Bertucci and had sufficient evidence to file suit against him.

“[A] claim for alienation of affection must be filed within three years after the cause of action accrues.” *Carr v. Carr*, 784 So. 2d 227, 230 (Miss. Ct. App. 2000) (internal citations omitted). “Under Mississippi law, a claim of alienation of affection accrues when the alienation or loss of affection is finally accomplished. The accrual of the claim, then, occurs when the affections of the spouse involved in the extramarital relationship are alienated. The affections of the spouse wronged by the affair are irrelevant to a determination of when the cause of action accrued.” *Fulkerson v. Odom*, 53 So. 3d 849, 852 (Miss. Ct. App. 2011) (quoting *Hancock v. Watson*, 962 So.2d 627, 631 (Miss. Ct. App. 2007)).

In Judge Emfinger’s November 12, 2020, Order granting Paul Bertucci’s motion for summary judgment on the AOA claim, he found that the statute of limitations began running, at the latest, on October 31, 2014, when Tee Land left the marital home. (Exhibit C). Land now claims that on July 14, 2017, when he had his initial meeting with defendants, he mentioned that he suspected that Tee Land may also be having an affair with an unknown party—a “beer distributor on the coast”.⁵ It is undisputed, however, that neither Land nor defendants learned of Paul Bertucci’s identity until Danny Gray’s February 18, 2018 deposition in the divorce case filed by Tee Land. (Ex. D, pp. 32-33).

⁵ Defendants dispute that plaintiff made this statement.

Judge Emfinger ruled that the statute of limitations on the AOA claim ran on October 31, 2017 at the latest. (Ex. C). Since Land and defendants did not learn the identity of Paul Bertucci until several months after the expiration of the statute of limitations, it was not possible for defendants to file suit against Paul Bertucci before the statute of limitations had expired. Therefore, defendants did not breach the standard of care and are entitled to summary judgment in this legal malpractice suit.

d. Plaintiff's AOA claim would have failed because he cannot prove that Tee Land's affections were alienated by Paul Bertucci.

In order for plaintiff to prevail on his legal malpractice claim against defendants, plaintiff has to make a showing that he would have prevailed in the AOA claim against Paul Bertucci. In Mississippi, a claim for AOA requires three elements: "(1) wrongful conduct of the defendant; (2) loss of affection or consortium; and (3) causal connection between such conduct and loss." *Fitch v. Valentine*, 959 So.2d 1012, 1025 (Miss. 2007). The "causal connection" element requires that the wrongful conduct of the defendant actually induced the loss of affection or consortium rather than other factors, or even the actions of the plaintiff. *Bland v. Hill*, 735 So.2d 414, 419 (Miss. 1999); *see also Pierce v. Cook*, 992 So. 2d 612, 621 (Miss. 2008).

Here, the evidence clearly shows that Tee Land's affections were alienated long before the relationship with Paul Bertucci began. Tee Land is the only witness with personal knowledge regarding her affections for Mike Land and, therefore, her sworn testimony is the best (and only) source of authoritative evidence on the matter.

Tee Land has unequivocally testified that her affections for Mike Land ended prior to her relationship with Bertucci:

Q: What effect did your sleeping with Paul Bertucci have on your decision to file for divorce from Mike Land?

A: I made my decision to file for divorce from Mike Land long before I talked to Paul, so it had no effect.

...

Q: When did you permanently reach this point of no return? Was it when you left the house?

A: I permanently reached this point of no return, I believe it was in – I don't know if it was in 2013 or 2014 when Mike pulled his little stunt to cut me off from my health insurance, my life insurance, my car insurance, withdrew all the money out of our accounts and shredded my credit cards, and then did the same two weeks later. I was scared of him and what he would do. That's what ended it for me.

(Exhibit E, pp. 47 and 72-73.

As illustrated by the above excerpts, it was not the actions of Paul Bertucci that drove Tee Land away, but instead the actions of Mike Land, which occurred before the Bertucci affair began. In addition to cancelling his wife's credit cards and insurance policies, Tee Land testified that Mike Land was addicted to prescription drugs and had left the marital bed to sleep upstairs, citing both of these as reasons why she fell out of love with him prior to her relationship with Paul Bertucci.

(Exhibit E, pp. 23-24 and 49).

Moreover, during the time period that Tee claims she lost all affections for Mike Land, she admittedly engaged in an extramarital affair with Danny Gray. (Ex. E, pp. 22 and 64). This further demonstrates that Tee Land's affections for Mike ended before Bertucci entered the picture.

Tee Land is the best and only witness who can testify to her affections for Mike Land. She has repeatedly and consistently testified that Mike Land's drug abuse, behavior, isolation, and malevolence drove her away before she began her relationship with Bertucci. She also admitted to a prior affair with Danny Gray. Accordingly, plaintiff cannot show that Paul Bertucci was the source and cause of Tee's alienation of affection from Mike Land. Therefore, plaintiff cannot

prove the causation element of his subject claim for malpractice, and defendants are entitled to summary judgment.

e. Defendants did not breach the standard of care.

“[A] lawyer owes his client the duty to exercise the knowledge, skill, and ability ordinarily possessed and exercised by the members of the legal profession similarly situated. Failure to do so constitutes negligent conduct on the part of the lawyer.” *Luvenc v. Waldrup*, 903 So. 2d 745, 748 (Miss. 2005) (quoting *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205 (Miss. 1996)). Generally, expert testimony is necessary to support a malpractice action where one must analyze a situation in which special skills, knowledge, experience, or learning is required. *Dean v. Conn*, 419 So.2d 148, 150-1 (Miss. 1982); *see also Stevens v. Lake*, 615 So. 2d 1177, 1185 (Miss. 1993).

Defendants did not breach the standard of care by failing to file suit against Bertucci before October 31, 2017. Defendants did not know Bertucci’s identity prior to that date, when suit actually could have been filed. Assuming that Mr. Land did in fact mention a “beer distributor from the coast”, this very limited information was not sufficient to impose a duty upon defendants to file suit. (Ex. G).

Mississippi law requires the use of expert testimony to support a malpractice action where one must analyze a situation that is beyond the comprehension of a layman. This situation is exactly that. In support of their argument, defendants have designated expert witness Michael V. Cory to testify on their behalf. Cory opines that defendants “did not breach the standard of care by failing to file an alienation of affection suit against Paul Bertucci on or before October 31, 2017.” He also opined that based on the evidence presented, Mr. Land could not show that the actions of Mr. Bertucci were the proximate cause of the alienation of Tee Land’s affections. (Ex. G). On the other hand, plaintiff has designated **no experts** to testify in this case. As explained

above, plaintiff is required to have expert testimony that supports his position. Therefore, Mr. Cory's opinions are uncontradicted.

Summary judgment is appropriate when a plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case. Proving that defendants breached the standard of care is an element essential to plaintiff's case. Because plaintiff cannot provide evidence in support of this element, he cannot succeed on his claim as a matter of law.

IV. CONCLUSION

Plaintiff's malpractice cause of action necessarily fails. He will be unable to prove the "case-within-a-case" because the only reliable evidence with respect to Tee Land's affections indicates that it was the plaintiff that alienated her, not Paul Bertucci. Even so, by the time the plaintiff and the defendants learned of Bertucci's identity, the statute of limitations had already expired. Moreover, plaintiff has no expert as to the standard of care who refutes the opinions of Mr. Cory. For any and/or all of these reasons, plaintiff's claims fail. Accordingly, defendants ask the court to grant their Motion for Summary Judgment.

Respectfully submitted,

McRAE LAW FIRM, PLLC;
CHUCK McRAE;
AND DREW MARTIN

BY: /s/ George E. Abdo, III
OF COUNSEL

GEORGE E. ABDO, III - MS BAR NO. 9782
gabdo@danielcoker.com
CRISTOFOR M. TAYLOR – MS BAR NO. 106343
ctaylor@danielcoker.com
DANIEL COKER HORTON & BELL, P.A.
4400 OLD CANTON ROAD, SUITE 400
POST OFFICE BOX 1084
JACKSON, MISSISSIPPI 39215-1084
TELEPHONE: 601-969-7607
FACSIMILE: 601-969-1116

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2022, I electronically filed the foregoing pleading or other document with the Clerk of the Court using the MEC system which sent notification of such filing to all counsel of record.

/s/ George E. Abdo, III