[Cite as *Roth v. Fitch, Kendall, Cecil, Robinson & Barry Co., LPA*, 2024-Ohio-2559.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

MICHAEL J. ROTH, SUCCESSOR ADMINISTRATOR OF THE ESTATE OF JAMES E. THOMPSON, DECEASED,

Plaintiff-Appellant,

v.

FITCH, KENDALL, CECIL, ROBINSON & BARRY CO., LPA ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 23 CO 0035

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2021 CV 226

BEFORE:
Mark A. Hanni, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Stephen P. Hanudel, for Plaintiff-Appellant and

Atty. Hamilton DeSaussure, Jr. and *Atty. Orville L. Reed, III*, Stark & Knoll Co., L.P.A., for Defendants-Appellees.

Dated: June 28, 2024

HANNI, J.

{¶1} Appellant Michael J. Roth, Successor Administrator of the Estate of James E. Thompson, deceased, appeals a motion for summary judgment granted by the Columbiana County Common Pleas Court in favor of Appellees Fitch, Kendall, Cecil, Robinson & Barry Co., LPA, and Timothy Barry, Ian Robinson, and Paul Clewell, on his legal malpractice claim. Appellant asserts that the trial court erred by granting summary judgment in Appellees' favor and by denying his motion for reconsideration. Appellant also contends that the trial court erred by granting Appellees' motion to strike the affidavit of his expert and by failing to grant his motion for leave to deem that affidavit as a supplemental expert report.

{¶2} For the following reasons, we sustain Appellant's first assignment of error. We find that the trial court erred by granting summary judgment in favor of Appellees because genuine issues of material fact exist regarding whether Appellees breached the standard of care as to legal malpractice.

{¶3} In 2021, we decided the underlying case on which this legal malpractice claim is based. *See Thompson Farms, Inc. v. Estate of Thompson*, 7th Dist. Columbiana No. 20 CO 0014, 2021-Ohio-2364. We set forth the factual history of that case, some which is relevant here.

{¶4} James E. Thompson (James) was the son of Harold and Shirley. Harold and Shirley have three other adult children, Lynelle Thompson Zimmerman, Diane Thompson Baltputnis, and David Thompson.

{¶5} Harold and Shirley formed Thompson Farms, Inc. (TFI) in 1968, with Harold as the president and Shirley as secretary and treasurer for over 50 years. TFI farmed 772 acres of land owned by Harold and Shirley and through their trusts, they each owned 34% of TFI, and James and David each owned 16% of TFI.

{¶6} James and David worked for TFI and planted soybeans, corn, and winter wheat, which were harvested and sold as grain. James and his wife, Susan Mowery, owned 211 acres of farmland, which was adjacent to TFI's farmland. James was also a commercial truck driver.

{¶7} TFI bought chemicals, fertilizer and seed (collectively called "inputs") for its farm and James' farm to take advantage of volume discounts. James would record the inputs used at his farm and TFI would bill him annually for them.

{¶8} Witnesses at trial testified that James was the man to talk to in order to do business with TFI. *See Thompson Farms,* 2021-Ohio-2364, ¶ 13. Shirley testified that Harold was slowing down due to his age and moving responsibility for the grain farming to James. (Tr. at 273). She stated that she and Harold were still involved in the business and Harold supervised at the farm daily until his death in 2016. (Tr. at 273).

{¶9} Susan Mowery testified that James told her in 2008 that he and Harold were trying something different due to Harold slowing down at TFI and James increasing responsibilities there. (Tr. at 143, 147-151). She indicated that James did not elaborate. (Tr. at 147-151). Witnesses testified to James' increased duties, but Shirley stated that James had no more responsibility than other family members. (Tr. at 150). She also testified that Harold never told her that James assumed daily control over TFI's grain business after 2008, but she agreed that James negotiated purchases and sales on its behalf. *Id*.

{¶10} Harold was still president of TFI until he died in 2016 and Shirley then inherited his ownership. *Id*. at ¶ 16. James died in 2017 and Susan Mowery was appointed fiduciary of his estate.

{¶11} On December 1, 2017, TFI filed for declaratory judgment against Appellant in the Columbiana County Court of Common Pleas. TFI alleged that from 2008-2016, James converted $460,000 of TFI's inputs and fuel to use on his own farm and he never paid for them. TFI further alleged that James sold grain from TFI's farm and kept the money. TFI also averred that it paid James $160,000 over four years to buy a combine, but James misrepresented that these payments were for "custom combining" that he performed on TFI farmlands and not the actual combine.

{¶12} TFI stated that it submitted a creditor's claim under R.C. 2117.06 for $460,699.13, but Appellant rejected it. TFI requested a declaration for monies owed, specific performance, restitution, interest, and attorney fees.

{¶13} On March 5, 2018, Appellant, represented by Appellees Robinson and Barry at Appellees' law firm, filed an answer with counterclaims. The counterclaim

alleged that at his death, James owned substantial assets, including farm machinery and equipment located at the TFI farm. The counterclaim stated that James was a minority shareholder in TFI and worked with Harold until 2008, when Harold began to retire.

{¶14} The counterclaim averred that from 2008-2017, James performed the majority of TFI's work, including planting, harvesting, buying farm supplies, selling and hauling crops, repairing equipment, negotiating oil and gas leases, and general farm repairs. The counterclaim asserted that TFI did not compensate James from 2008-2017 and he received no shareholder distributions.

{¶15} Appellant's first count alleged under R.C. 2109.50 *et. seq*. that TFI concealed, embezzled, and/or conveyed farm machinery, equipment, tools, and grain owned by James. Appellant alleged that James bought a 2009 Freightliner for $42,150 by personal check and TFI withheld it from Appellant. Appellant also alleged that TFI withheld: (1) a 350 Computrac monitor and radar gun for the 1535 grain drill; (2) tractor weights removed from the JD 6330 tractor; (3) a tractor that TFI made $20,000 worth of payments; (4) a half-interest in an Allis Chalmers dozer; (5) a hay rake; (6) a center three connection for the tractors; and (7) combine equipment manuals. Appellant also claimed that TFI kept grain and proceeds from the sale of 56 acres of wheat James planted in fall of 2016 on James' farmland.

{¶16} Appellant's second claim requested declaratory judgment as to those assets in the first count. The third claim alleged conversion of the identified equipment.

{¶17} The fourth count of the counterclaim alleged breach of contract, asserting that James provided most of the labor for TFI to operate its grain farming and was not compensated. The claim averred that James was paid a minimum annual salary for his work prior to 2008, but after 2008, he agreed with Harold that he would not take a salary or shareholder distribution. Appellant alleged that James fulfilled his obligations and TFI failed to fulfill its obligations by failing to pay for his work and using his equipment in TFI farm operations.

{¶18} The fifth count of the counterclaim alleged unjust enrichment. Appellant asserted that James conferred a benefit on TFI by managing and working its grain operation, TFI knew James conferred the benefit, and knew that he expected to be compensated for his services.

{¶19} On June 3, 2019, Appellees Barry and Clewell filed a motion for leave to amend Appellant's answer to add a seventh affirmative defense of the statute of frauds. The court granted the motion on September 19, 2019.

{¶20} On March 10, 2020, Appellant, through Appellees, filed a motion in limine to prohibit TFI from introducing testimony about James' alcohol abuse at trial. The court overruled the motion.

{¶21} On May 29, 2020, one month before trial, Appellant, through Appellees, sought leave to again amend its answer and counterclaim to assert more specific claims of unjust enrichment. Appellant asserted that discovery and progression of the case produced additional issues. TFI opposed the motion, asserting that Appellant was trying to expand the scope of the case with new claims.

{¶22} The trial court summarily denied Appellant's motion to amend.

{¶23} The case proceeded to trial. Shirley Thompson testified on behalf of TFI, as well as Lynelle Thompson Zimmerman, Diane Thompson Baltputnis' son Eric, and James Witherow, James' best friend. Susan Mowery testified for Appellant, as did witnesses who testified to James' increased role at TFI after 2008.

{¶24} Janice Jasinski also testified for Appellant. She is a principal at the CPA firm of Shroedel, Sullin & Bestic. (Tr. at 589). She testified that she reviewed TFI's federal tax returns from 2006-2017, its invoices for inputs from 2010-2016, 1099s for James from TFI for 2009-2016, and various other exhibits. She questioned how TFI could take the total amount of inputs as deductions for its business expenses on its tax returns, yet allege this same amount as a claim against Appellant. (Tr. at 599). She stated that she found no record of a receivable from James listed on TFI's tax returns for the inputs from 2010-2016, even though TFI listed other receivables. (Tr. at 601). She explained that including the total amount of inputs as business deductions saved TFI $83,396 in taxes and the total inputs amount for $460,699.13 was the same amount TFI claimed Appellant owed to it. (Tr. at 603). She further testified that records showed that the four payments made by TFI to James of $40,000 were for custom combining performed by James for TFI and were not to purchase the combine as alleged by TFI. (Tr. at 608).

{¶25} Ms. Jasinski further testified that records showed that TFI paid no money to James from 2010-2016 and he received no shareholder distributions during this time. (Tr.

at 609-610). She opined that James should have received $2,528 for his stockholder distribution through the relevant years. (Tr. at 611).

{¶26} On a general verdict form, the jury found in favor of TFI and awarded it $260,000 in damages. On a separate general verdict form, the jury awarded damages in favor of Appellant in the amount of $42,528. The jury also awarded ownership of the Computrac and radar gun to Appellant.

{¶27} On July 6, 2020, the court issued a judgment entry in favor of TFI for $217,472 and ownership of the Computrac and radar gun to Appellant.

{¶28} TFI filed a motion for prejudgment interest and Appellant, through Appellees, filed an opposition motion. The court granted the motion, awarding TFI $27,174.71 in interest, accruing from the date that TFI presented its claim to Appellant.

{¶29} Appellant appealed three of the trial court judgment entries to this Court. *See Thompson Farms, Inv. v. Estate of James. E. Thompson, Deceased*, 7th Dist. Columbiana No. 20 CO 0014, 2021-Ohio-2364. The first challenged the court's denial of its second motion to amend its counterclaims. *Id*. at ¶ 1. The second alleged error in denying its motion in limine to prohibit TFI from offering testimony about James' alcoholism. *Id*. The third challenged the granting of pre-judgment interest to TFI. *Id.*

{¶30} On June 25, 2021, we found that the trial court did not abuse its discretion in denying Appellant's motion to amend or commit plain error by denying the motion in limine. *Id*. at ¶ 3. We found that the trial court abused its discretion by awarding prejudgment interest based on the uncertainty of the amount attributable to breach of the oral contract since the verdict and damages were on general verdict forms. *Id.* We reversed and vacated the trial court's determination on prejudgment interest.

{¶31} Susan Mowery was removed as fiduciary of Appellant. An interim Special Administrator was appointed to Appellant on June 23, 2021. Michael J. Roth was appointed Successor Administrator for Appellant's Estate.

{¶32} On July 6, 2021, Appellant filed the complaint for legal malpractice against Appellees and alleged three negligence claims. The first was based on Appellees Robinson, Barry, and Clewell failing to allege unjust enrichment for monies paid for James' property in the possession of TFI. Appellees' law firm was sued through vicarious liability.

{¶33} In the second claim, Appellant alleged that Appellees Robinson, Barry, and Clewell failed to hire a labor economist to provide an opinion as to the monetary value of James' labor in farming and managing TFI's farmland from 2008-2017. Appellant asserted that this type of work was not within a layperson's knowledge and therefore required expert testimony. Appellees' law firm was sued through vicarious liability.

{¶34} The third claim alleged that Appellees Robinson, Barry, and Clewell failed to present competent, credible, and reliable evidence and argument to support its fourth and fifth counterclaims. Appellant alleged that it was entitled to monetary compensation from James' labor in farming and managing TFI's farmland from 2008-2017. Appellees' law firm was sued through vicarious liability.

{¶35} Appellees filed an answer admitting, *inter alia*, that Appellee Barry was the primary attorney representing Appellant against TFI and Attorney Clewell assisted him. Appellees indicated that Appellee Robinson suffered serious health issues and was not involved in the trial. Appellees admitted that Susan Mowery was involved in all aspects of the litigation and Appellee Barry communicated with her on the progress of litigation. Appellees further admitted that they did not hire an expert to provide an opinion on the monetary value of James' labor to TFI after 2008. Appellees filed a counterclaim alleging unpaid legal fees in the amount of $118,503.12.

{¶36} On September 16, 2022, Appellees filed a motion for summary judgment asserting they were entitled to judgment on Appellant's legal malpractice claims of failure to hire an expert and failure to present a claim for a monetary amount for James' labor. They cited Susan Mowery's deposition testimony that Appellant was not requesting money from TFI for James' labor because the labor value equaled the amount of TFI's claim for inputs allegedly owed by Appellant for use on James' farm. Appellees further asserted that no legal malpractice occurred because they presented an unjust enrichment claim, despite Appellant's assertion to the contrary.

{¶37} Appellant's response to the motion for summary judgment included a "supplemental" affidavit from Attorney David Dingwell. Appellant had filed an expert opinion from Attorney Dingwell during discovery and attached this affidavit to its response. Appellant asserted that the affidavit incorporated Attorney Dingwell's earlier report and

expounded upon it based on arguments made by Appellees. Appellant filed a motion for the court to deem Attorney Dingwell's second report "a supplemental expert report."

{¶38} Appellees replied and filed a motion to strike Attorney Dingwell's affidavit, asserting that it set forth new opinions not found in his original report. Appellant filed a response to the motion to strike.

{¶39} The trial court held a hearing on the motions and on April 24, 2023, the trial court granted summary judgment for Appellees. The court found that Appellees presented plausible legal theories at trial about the value of James' labor and those theories were consistent with Appellant's wishes. The court held that while Appellant was unhappy with the verdict and believed counsel should have presented a different theory or additional evidence, such as an expert witness, "hindsight… is 20/20, and cannot be the basis for concluding that Defendants' conduct in representing the plaintiff in the subject trial fell short of the required standing and constitutes legal negligence or malpractice." (June 20, 2023 J.E.).

{¶40} The court also granted Appellees' motion to strike Attorney Dingwell's affidavit and denied Appellant's motion to deem the report a supplemental expert report.

{¶41} The court held that the only remaining issue for trial was Appellees' counterclaim for $118,503.12 in legal fees. The court stated that Appellees could file a motion for summary judgment and briefing and argument would be scheduled.

{¶42} On May 10, 2023, Appellant filed a motion for reconsideration in the trial court. Appellant asserted that the court failed to provide detailed factual findings and references to record evidence to support its decision. Appellant contended that the court provided only conclusory remarks and conflicting evidence presented to the court warranted sending the case to the jury. Alternatively, Appellant requested that the court use the proper Civ.R. 54(b) language so that Appellant could appeal the summary judgment ruling before adjudication of the counterclaim for attorney fees.

{¶43} On May 22, 2023, the trial court issued a judgment entry stating that it reconsidered its decision and would not reverse it. It denied Appellant's motion for reconsideration, but granted the request to defer ruling on the attorney fees counterclaim until Appellant exhausted an appeal on the summary judgment motion.

{¶44} On June 20, 2023, Appellant filed a notice of appeal and alleges three assignments of error.

{¶45} In the first assignment of error, Appellant asserts:

> **THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT AND DENYING THE ESTATE'S MOTION FOR RECONSIDERATION**.

{¶46} Appellant contends that an attorney is charged with understanding Evid.R. 701 and 702 and knowing if he should retain an expert witness when testimony is beyond that ordinarily understood by a layperson. Appellant submits that Appellee Barry was aware that an expert was needed to provide an opinion about the monetary value of James' farming labor and management after 2008. Appellant explains that Appellee Barry asked Ms. Jasinski to provide such testimony, but he did not look elsewhere when she stated it was beyond her expertise.

{¶47} Appellant asserts that Appellees breached the standard of care for legal malpractice because they were required to present a monetary value for James' increased duties and management so a jury could determine damages and whether an offset existed. Appellant reasons that no layperson knew the value of James' increased duties and only an expert could determine that monetary value from reviewing and analyzing tax return data, USDA Farm Service Agency records, and Ohio Crop Production Budgets. Appellant asserts that Susan Mowery continuously reminded Appellee Barry of the need to present the monetary value to the jury. Appellant notes that Susan Mowery even conducted her own research and gave this information to Appellee Barry.

{¶48} Appellant cites our decision in *State v. Butcher*, 7th Dist. Columbiana No. 21 CO 0013, 2022-Ohio-928, ¶ 21, holding that it was not reasonable strategy when an attorney failed to raise evidence that would advance a client's interest. Appellant acknowledges that *Butcher* is a criminal case concerning the ineffectiveness of trial counsel, but posits that it is similar to the reasonable trial strategy for legal malpractice claims. Appellant cites numerous criminal cases on the ineffective assistance of counsel in failing to hire an expert witness.

{¶49} Appellant also cites Susan Mowery's affidavit where Appellee Barry admitted to her that he "missed it" when she demanded to know at trial where the monetary value of James' labor was presented. Appellant asserts that Appellee Barry and Clewell were not aligned on whether to even assert that an agreement existed for inputs-for-wages between Harold and James. Appellant contends that it was imperative for Appellees to present an expert to establish a monetary value because TFI presented a monetary value for inputs allegedly used by James on his farmland. Appellant submits that it was necessary so that the jury could determine if a bargained-for exchange actually existed.

{¶50} Appellant also asserts that Appellees failed to fully pursue the unjust enrichment claim concerning James' increased duties and personal property that TFI never returned, like the 2009 Freightliner. Appellant alleges that this also breached the standard of care owed to Appellant.

{¶51} Appellees respond that the evidence demonstrates that they exercised due care because they followed Appellant's instructions by advancing the theory Appellant wanted to advance at trial. They cite Susan Mowery's deposition testimony stating that she wanted them to establish that TFI compensated James' increased labor in the form of the inputs that he used on his own farm. Appellees explain that they advanced this theory at trial. They note that the TFI wages James determined for himself before 2008 were less than the value of the inputs that he used on his farm. They reason that establishing that James worked for a setoff of the inputs was more beneficial than placing a monetary value on his labor because of this lesser value.

{¶52} Appellees further assert that they could not hire an expert to opine a monetary value for James' labor because no evidence of his duties existed to assess such a value. They explain that without facts about his duties, an expert could not calculate a monetary value to show that the value of James' labor after 2008 was more than that he had received from TFI's inputs to use on his land. Appellees cite Appellant's brief stating that "there was no person alive who witnessed firsthand what James exactly did or have knowledge of its value." (Br. at 20).

{¶53} Appellees also contend that contrary to Appellant's assertion, they did assert an unjust enrichment claim regarding James' equipment. They cite the counterclaim language stating that TFI failed to pay or compensate James for all his work and for using his equipment in TFI farm operations. (Counterclaim at 33). They further quote the claim language that it was "unjust and unequitable to allow Thompson Farms, Inc. to retain the benefit of James E. Thompson's work without compensating him, and to pay the estate for the use of his equipment." (Counterclaim at 36). Appellees further assert that these claims were presented at trial and the trial court issued a jury instruction on them.

Summary Judgment Standard of Review

{¶54} An appellate court reviews a summary judgment ruling de novo. *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we apply the same test as the trial court in determining whether summary judgment was proper.

{¶55} A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. *Mercer v. Halmbacher*, 2015-Ohio-4167, 44 N.E.3d 101 (9th Dist.), ¶ 8; Civ.R. 56(C). The initial burden is on the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.,* 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (1995), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶56} If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id*.; Civ.R. 56(E). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos*., 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

Legal Malpractice Claim

{¶57} The Ohio Supreme Court has held that a defendant is entitled to summary judgment if a plaintiff fails to establish a genuine issue of material fact as to any of the following elements of a legal malpractice action: "(1) an attorney-client relationship, (2) professional duty arising from that relationship, (3) breach of that duty, (4) proximate cause, (5) and damages." *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, 887 N.E.2d 1167, ¶ 8, citing *Vahila v. Hall,* 77 Ohio St.3d 421, 427, 674 N.E.2d 1164 (1997); *Krahn v. Kinney,* 43 Ohio St.3d 103, 105, 538 N.E.2d 1058 (1989).

{¶58} To establish a breach, the plaintiff must show that the attorney failed to conform to the applicable standard of care. "The duty of an attorney to his client is to ' * * * exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, and to be ordinarily and reasonably diligent, careful, and prudent in discharging the duties he has assumed.' " *Hutchins v. McCamic*, 7th Dist. Monroe No. 22 MO 0023, 2023-Ohio-4174, quoting *Dillon v. Siniff*, 4th Dist. Ross No. 11CA3268, 2012-Ohio-910, ¶ 19-22 (citations omitted).

{¶59} Ordinarily, a plaintiff must present expert testimony to establish the professional standard of care and whether the attorney breached that standard. *McInnis v. Hyatt Legal Clinics,* 10 Ohio St.3d 112, 113, 461 N.E.2d 1295 (1984). If the legal malpractice claim concerns a claim that is so obvious or that comes within the ordinary knowledge and experience of jury members, then an expert is not necessary. *Id.*

{¶60} As to causation, different standards of proof apply. *Resor v. Dicke*, 2023-Ohio-4087, 228 N.E.3d 723, (3d Dist.), ¶ 20. While a plaintiff in a legal malpractice case may have to provide some evidence of the merits of the underlying claim, he or she is not required to prove "in every instance, that he or she would have been successful in the underlying matter." *Vahila*, 77 Ohio St.3d at 428. However, when the legal malpractice claim "places the merits of the underlying litigation directly at issue," the plaintiff must demonstrate that they would have been successful in the underlying case. *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.,* 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173, ¶ 19. Plaintiff must prove by a preponderance of the evidence that "but for [defendant's] conduct, they would have received a more favorable outcome in the underlying matter." *Id.* at ¶ 19.

{¶61} Appellees met their initial burden on summary judgment. They asserted that Appellant could not succeed on the legal malpractice claim because they presented evidence and argument at trial consistent with Susan Mowery's wishes and instructions as she was the executrix of Appellant at the relevant time. They cite Susan Mowery's deposition testimony stating that the value of James' labor services for TFI after 2008 equaled the amount that TFI requested for the inputs. (Mowery Depo. at 61). Appellees cite her trial testimony that she could not guess the monetary value of James' labor and the monetary value was the amount of the inputs requested by TFI in its complaint. (Trial Tr. at 73). From this, we find that Appellees have informed the court of the basis of their summary judgment motion and identified portions of the record that they believe supports their claim.

{¶62} The burden therefore shifted to Appellant to identify specific facts to show that genuine issues of material fact exist. Civ.R. 56(C). The non-moving party cannot rest upon the mere allegations or denials in the pleadings, but must identify these facts by affidavit or other means identified in Civ.R. 56(C). Civ.R. 56(E).

{¶63} Setting aside Attorney Dingwell's affidavit attached to the response to the summary judgment motion, Appellant met its reciprocal burden on summary judgment. Appellant attached the affidavit of Susan Mowery, who attested that Appellees took her trial and deposition testimony out of context as they presented it in support of their summary judgment motion. Appellant also attached to its response the original expert report of Attorney Dingwell, the depositions of Appellees Barry and Clewell, and the transcript of the underlying litigation.

{¶64} In her affidavit, Susan Mowery clarified her belief that James and Harold had an agreement for the value of James' increased labor and responsibilities in exchange for inputs to be paid by TFI for James' farm. (Mowery Aff. at 2). She stated that she knew that it would be difficult to prove that this agreement existed since both parties were deceased and Appellees Clewell and Barry disagreed on whether to assert that the agreement existed. Susan Mowery attested that she had no intention of initiating civil litigation against TFI for financial compensation for James' increased labor or for TFI's use of James' equipment on TFI farmland. (Mowery Aff. at 2). However, she stated that once TFI initiated litigation for inputs, she sought to protect Appellant's financial

interests and hired Appellees since she was untrained in the law. She attested that she trusted that Appellees would advocate for Appellant, identify claims and defenses, gather evidence, and conduct legal research to provide proper advice and present proper witnesses to advance its claims. (Mowery Aff. at 2-3).

{¶65} Susan Mowery attested that she told Appellees that Appellant needed an expert witness to analyze and submit a monetary value for James' increased labor, management, and equipment use if TFI requested a monetary payment for inputs. (Mowery Aff. at 4). She stated that she told Appellee Barry she wanted to present a monetary value so the jury could compare the amount TFI asserted for the inputs and compare it to the monetary value for James' labor. (Mowery Aff. at 3).

{¶66} Susan Mowery also attested that Appellee Barry did not prepare or advise her on responding at her deposition where opposing counsel asked about the monetary value of James' labor, services and equipment. (Mowery Aff. at 4). She noted that she could not provide a value because even though the deposition took place one year after the case began, Appellees had not pursued a numerical value. (Mowery Aff. at 4). Susan Mowery further attested that by this time, they had consulted with Janice Jasinski, who told them that she could not opine on such a monetary value because it was not within her expertise. (Mowery Aff. at 4). Susan Mowery explained that she tried to calculate her own numerical value, but she lacked expertise to do so and expected Appellees to retain an expert on the matter, since they were the legal professionals. (Mowery Aff. at 4).

{¶67} Appellant also attached Appellee Barry's deposition testimony and referred to it in response to the summary judgment motion. Attorney Barry acknowledged taking notes in preparing the TFI case and agreed that some of those notes referred to determining a numerical value as to James' increased labor and responsibilities at TFI. (Barry Depo. at 47; Exh. 5). Appellee Barry acknowledged an August 6, 2018 note which stated "2010-2016 – how much should JT have been paid? Accountant." (Barry Depo. at 47; Exh. 5). He also confirmed a discussion with Susan Mowery and Janice Jasinski about placing a monetary value on James' labor, services, and equipment. (Barry Depo. at 58). He recalled asking Ms. Jasinski if anyone at her firm handled this type of issue and she checked with another accountant. (Barry Depo. at 59). Appellee Barry stated

that they determined that her firm had no such expert. (Barry Depo. at 59). When asked if any further steps were taken to find such an expert, Appellee Barry responded, "Susan was making that effort." (Barry Depo. at 59). He confirmed that he left that issue to Susan Mowery, although they had no agreement for her to do so, and he gave her no direction to pursue in order to find such an expert. (Barry Depo. at 60).

{¶68} Appellee Barry further testified that he received a January 26, 2019 email from Ms. Jasinski about setting up a conference call with her partner, a business valuator, to obtain information relating to a farmer's salary in the area. (Barry Depo. at 71). He testified that no further action was taken. (Barry Depo. at 71). He also confirmed notes on a conference call he had with Susan Mowery, her daughter, and Ms. Jasinski dated February 13, 2019 where he wrote, "Did JT get paid for doing all the work? Susan looking into this." (Barry Depo. at 80). Appellee Barry acknowledged that Susan would still rely on Appellees' legal advice and it was still his responsibility to make sure that Appellees represented Appellant's best interest. (Barry Depo. at 97-98).

{¶69} Appellee Barry also testified about notes he took dated March 23, 2020 from a phone call he had with Susan Mowery and her daughter Philadelphia Howells on March 18, 2020. He acknowledged that one of his notations stated, "SM wants to calculate what JT should have been paid?" (Barry Depo. at 158). He testified that he did not recall the substance of that conversation. (Barry Depo. at 159). He also acknowledged that he received a letter from Susan dated March 25, 2020 and recalled that Susan wanted to assert claims against TFI that she enumerated in the letter, which totaled approximately $1,000,000. (Barry Depo. at 160). He recalled that he handwrote, "Expert talked with Janice" on that letter and he stated that he believed he spoke to Ms. Jasinski, but he could not recall the substance of the conversation. (Barry Depo. at 160). He did recall a conversation with Ms. Jasinski a year earlier discussing a farm manager's salary and she told him that this type of valuation was more likely to come from an economist. (Barry Depo. at 160-161). He noted that Susan Mowery had attached to her letter calculations of a farm manager's average salary from PayScale, and a market report from Farm & Dairy. (Barry Depo. at 162).

{¶70} Appellee Barry further testified Susan had included with her letter a contention that TFI owed James $565,194.91 based on her calculations from 2010-2016.

(Barry Depo. at 162-163). She also added numerical values for each piece of equipment. (Barry Depo. at 163). He testified that he had handwritten "Contact Janice Jasinski on the top of the letter and handwrote, "Exp[o]rt needed, annual wage, specific EXP." When asked if he had said, "expert or export," he replied, "I don't know." (Barry Depo. at 168).

{¶71} Appellee Barry also acknowledged writing, "Farm Manager" on top of the letter. (Barry Depo. at 168). When asked what that referred to, he could not recall. (Barry Depo. at 169). When asked if he had spoken to Susan Mowery about the ability to present a dollar figure for James' labor at trial, Appellee Barry could not recall. (Barry Depo. at 184). He testified that he thought they had a conversation about the letter, but he could not remember its substance. (Barry Depo. at 164). He confirmed that he made no effort to try to find an expert at that point. (Barry Depo. at 164-165).

{¶72} Appellant also attached the original expert opinion of Attorney Dingwell to its response to the summary judgment motion. Attorney Dingwell opined that Appellee Barry failed to retain an expert to establish the value of James' increased labor and services to TFI, even though this was the primary issue in defending against TFI's claim and in advancing Appellant's counterclaim. He asserted that Appellees should have focused on presenting James' increasing role and responsibilities at TFI after 2008, as well as the financial benefit to TFI of using the farm equipment that James owned.

{¶73} Attorney Dingwell reasoned that Appellees should have retained the expert to establish the economic value of James' labor to TFI as TFI would have had to hire and pay one or more persons to perform James' duties once Harold retired. Attorney Dingwell refers to various notes in the evidence by Appellees acknowledging the contemplation of retaining such an expert. He opined that failing to retain an expert constituted a breach of the standard of care. He asserts that had Appellees presented an expert to give the jury an economic value of James' labor and services, it would have had a basis to compare with TFI's economic value placed on the inputs. Attorney Dingwell also faulted Appellees for allowing the jury to complete general verdict forms, stating that it did not allow the parties to know the breakdown of the values used by the jury.

{¶74} In granting Appellees' motion for summary judgment, the court held that Appellees' trial theories "relating to the valuation of the farm labor of James E. Thompson during the time period in question, were plausible, and consistent with the wishes of the

client; and did not, as a matter of law, constitute legal negligence or legal malpractice." The court further found that while it appreciated that Appellant was dissatisfied with the verdict and Appellant wished Appellees had presented other theories, evidence, or an expert witness, this was "hindsight" and "hindsight is 20/20."

{¶75} However, as Appellant notes, it was not "hindsight" when Susan Mowery presented her direction to Appellees that an expert witness should be retained to opine a numerical value for James' increased role at TFI after 2008. It was during discovery, prior to trial, and when continuances were granted and discovery deadlines rescheduled. Appellee Barry made handwritten notes about the expert witness issue and he acknowledged discussions and emails about it with Ms. Jasinski and Susan Mowery. Yet, Appellee Barry could not recall why no action was taken to retain such an expert or why it was solely the responsibility of Susan Mowery and Ms. Jasinski, neither of whom had the legal expertise to determine if such an expert was needed and to retain one.

{¶76} Based upon the above, we find that Appellant met its reciprocal burden on summary judgment and conflicting evidence existed as to whether Appellees breached the applicable standard of care owed to Appellant. Accordingly, we reverse the trial court's granting of summary judgment on this issue.

{¶77} Appellant also asserts that the trial court erred by granting Appellees' motion for summary judgment on Appellees' failure to allege unjust enrichment as to Appellant's personal property that TFI used and kept at its farm. This assertion also has merit.

{¶78} As Appellees note, they did present such a counterclaim in the amended answer and counterclaim for Appellant. The fifth claim of the counterclaim against TFI is entitled "Unjust Enrichment" and incorporates all prior allegations, including TFI failing to pay James for all of his work and "for the usage of James E. Thompson's equipment in farm operations" for TFI. The first claim of the counterclaim alleged that James bought farm equipment for his own farm and the claim identified the specific pieces of equipment in paragraph 18 under the first claim for relief. The fifth claim of the counterclaim alleged that it was "unjust and unequitable [sic] to allow Thompson Farms, Inc. to retain the benefit of James E. Thompson's work without compensating him and to pay the estate for the use of its equipment."

{¶79} However, despite Appellees' assertion to the contrary, the transcript does not establish that the court instructed the jury on unjust enrichment. The court informed the jury that Appellant asserted a counterclaim as to conversion of the equipment, dividends, and the custom combining. (Trial Tr. at 714-718). The court further instructed the jury that Appellant presented the affirmative defenses of laches, and statute of limitations. (Trial Tr. at 720). There were no jury instructions presented on unjust enrichment.

{¶80} Appellant also contends that the trial court should have denied Appellees' motion for summary judgment because they failed to attach an expert report to their motion. Ohio courts have held that summary judgment may be granted when an attorney-defendant presents his own affidavit or an independent expert affidavit and the plaintiff fails to file an opposing expert affidavit with his response. *See Dillon v. Siniff,* 4th Dist. Ross No. 11CA3268, 2012-Ohio-910, ¶ 19-22 ("Ohio courts have uniformly held that summary judgment is warranted when an attorney-defendant presents *his own* or an independent expert's affidavit and the plaintiff fails to respond with an opposing expert affidavit.") (Emphasis added.) The record contains an affidavit from Appellee Barry.

{¶81} Accordingly, we find that Appellant's first assignment of error has merit.

{¶82} In its second and third assignments of error, Appellant asserts:

> **THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTION TO STRIKE DAVID DINGWELL'S AFFIDAVIT.**
>
> **THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DEEM DAVID DINGWELL'S AFFIDAVIT AS A SUPPLEMENTAL EXPERT REPORT**.

{¶83} "A trial court's decision to grant or deny a motion to strike is within its sound discretion and will not be overturned on appeal unless the trial court abuses its discretion." *Douglass v. Salem Cmty. Hosp*., 2003-Ohio-4006, 153 Ohio App. 3d 350, 358, 794 N.E.2d 107, 113, ¶ 20 (7th Dist.).

{¶84} Civ.R. 56(E) provides that:

> [t]he court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

{¶85} Civ.R. 56(C) states that a court ruling on a motion for summary judgment may not consider any evidence unless it conforms to Civ.R. 56. *Douglass, supra*, at ¶ 21. Affidavits filed under Civ.R. 56(E) must also comply with the Rules of Evidence pertaining to opinion admissibility. *Id*. Evid.R. 702 requires an expert to testify as to matters beyond knowledge of a layperson, be qualified as an expert regarding the subject matter, and base his or her testimony on reliable information. Evid.R. 703 allows expert opinion to be admitted when it is based on facts or date admitted into evidence or perceived by expert.

{¶86} The parties focus on Civ.R. 26, which governs discovery. The trial court granted Appellees' motion to strike Attorney Dingwell's affidavit and denied Appellant's motion to deem the affidavit a supplemental expert report. The court explained that it granted the motion to strike based on the arguments presented by Appellees in their motion. Appellees asserted in their motion that Attorney Dingwell's affidavit should be struck because it addressed new issues and matters not disclosed in his expert report. Citing Civ.R. 26(B)(7), Appellees contended that Attorney Dingwell was limited in his affidavit to only those matters that he set forth in his expert report.

{¶87} Civ.R. 26(B)(7) concerns disclosure of expert testimony and provides that a party must identify any witness that is going to testify at trial under Evid.R. 702, 703 or 705. Civ.R. 26(B)(7)(a). The Rule requires that the parties exchange expert reports and must provide supplemental reports no later than 30 days before trial. Civ.R. 26(B)(7)(b)(c). Civ.R. 26(B)(7)(c) further provides that an expert cannot testify or provide opinions at trial on matters not disclosed in his report. Civ.R. 26(E) sets forth a party's duty to supplement discovery responses in certain situations.

{¶88} Appellees are correct that "it is not supplementation when the affidavit contains an entirely new opinion about a new issue [ ]." *Riverside Drive Enterprises, LLC v. Geotechnology, Inc*., 2023-Ohio-583, 209 N.E.3d 845, ¶ 15 (1st Dist.). A court may

exclude expert testimony when it violates this rule. *Id.* at ¶14, citing *Jones v. Murphy*, 12 Ohio St.3d 84, 85, 465 N.E.2d 444 (1984).

{¶89} Appellees specifically challenge Attorney Dingwell's affidavit opinions concerning jury instructions and jury interrogatories, "capital assets," the probate court inventory, and proximate cause, "among other opinions." (Appellees' motion to strike.). They assert that these opinions were not raised in Attorney Dingwell's original expert report.

{¶90} However, Attorney Dingwell referred to the lack of jury interrogatories in his original expert report. In fact, his expert report contains a section labeled, "**d. The jury signed general verdict forms; no jury interrogatories were submitted by either party**." (Dingwell expert report). While he concentrated on the general verdict forms in this part of his expert report, he did note that neither party submitted jury interrogatories.

{¶91} Attorney Dingwell also indirectly addressed proximate cause when he discussed the failure to present an expert on a monetary value for James' increased responsibilities and repeatedly stated that the jury would have found an agreement of wages-for-inputs and determined a far greater award if that kind of expert witness was presented at trial. Attorney Dingwell also reserved the right to supplement his report.

{¶92} In addition, Appellees raised issues at Attorney Dingwell's deposition that he subsequently addressed and clarified in his affidavit. At his deposition, he was asked about the unjust enrichment counterclaim, (Dingwell Depo. at 40-41) and the probate inventory and assets. (Dingwell Depo. at 43-44). He addressed these issues in his supplemental report.

{¶93} In any event, the trial court's ruling on the motion to strike did not impact the court's summary judgment decision. The trial court did not rely on the affidavit in granting summary judgment. Further, we held above that Appellant met the reciprocal burden on summary judgment, even without the affidavit.

{¶94} Accordingly, we decline to address Appellant's second and third assignments of error as they are rendered moot based upon our decision on Appellant's first assignment of error.

{¶95} For the above reasons, we find merit to Appellant's first assignment of error and find Appellant's second and third assignments of error moot.

Waite, J., concurs.

Robb, P.J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained. Appellant's second and third assignments of error are moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is reversed. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.