SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

January 9, 2007

David August, D.O.
55 Comanche Circle
Millsboro, DE 19966-9285

William J. Cattie, III, Esquire
300 Delaware Avenue, Suite 1015
P.O. Box 588
Wilmington, DE 19899-0588

RE: David August v. Larry W. Fifer
C.A. No. 05C-09-005-ESB

Date Submitted: October 6, 2006

Dear Mssrs. August and Cattie:

This is my decision on defendant Larry W. Fifer's ("Fifer") motion for summary judgment in this legal malpractice case. The plaintiff is David August ("August"). Fifer is an attorney. August retained Fifer to represent him in a domestic relations matter on October 14, 2002. August terminated Fifer on January 8, 2003. August filed a complaint alleging a number of errors by Fifer. Fifer filed an answer denying the allegations and a motion for summary judgment arguing (1) that August had no standing to bring a claim against Fifer because August's claim against Fifer was part of August's bankruptcy estate, and (2) that August had not identified an expert witness in discovery.

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[1] Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.[2] The Court views the evidence in a light most favorable to the nonmoving

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[1] *Moore v. Sizemore*, *405 A.2d 679, 680 (Del. 1979).*

[2] *Id. at 681.*

party.[3] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[4] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, then summary judgment must be granted.[5] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.[6]

August filed a voluntary petition for bankruptcy on September 30, 2004. He did not disclose in his petition that he had a contingent, unliquidated claim against Fifer. August's bankruptcy plan was approved by the Bankruptcy Court on June 28, 2005. Through the operation of law, the contingent, unliquidated claim was transferred to the bankruptcy estate.[7] It remains part of the bankruptcy estate because August never disclosed the claim in his bankruptcy plan. Under 11 U.S.C. §554(d), even after the estate has been discharged, property that is not abandoned or administered remains part of the estate. The estate has not abandoned the claim. Since the right to prosecute the claim vested in the bankruptcy estate upon filing the bankruptcy petition, the claim remains part of the bankruptcy estate. Upon approval of the bankruptcy plan, August became divested of his property interest in the claim and, as a result, he no longer possesses standing to bring this claim against Fifer.[8]

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[3] *Id. at 680.*

[4] *Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett*, *477 U.S. 317, 322-23 (1986).*

[5] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

[6] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

[7] 11 U.S.C. §541(a)(1).

[8] *See Coates v. DeMott,* 1994 WL 89018 (Del.Ch.).

I gave August a long time to find an expert witness, but he never did. It is well-settled Delaware law that claims of professional malpractice must be supported by expert testimony.[9] In order to recover from an attorney's malpractice, the client must prove the employment of the attorney and the attorney's neglect of a reasonable duty, as well as the fact that such negligence resulted in and was the proximate cause of loss to the client.[10] An exception to this rule exists, however, when the professional's mistake is so apparent that a layman, exercising his common sense, is perfectly competent to determine whether there was negligence.[11] Nothing that Fifer has alleged to have not done properly fits within this exception. Therefore, August's failure to retain an expert witness is fatal to his claim against Fifer.

Fifer's motion for summary judgment is granted. Earlier in the case, August filed a motion to compel regarding Fifer's failure to produce discovery. I granted the motion, but did not enter sanctions, pending the outcome of the case. Having concluded that August did not have standing to bring this claim and was, as a practical matter, also unable to pursue it, I have decided not to enter sanctions against Fifer.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

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[9] *Alston v. Hudson,* 700 A.2d 735 (Table), 1997 WL 560883 (Del. Supr.).

[10] *Weaver v. Lukoff*, 511 A.2d 1044 (Table), 1986 WL 17121 (Del.Supr.).

[11] *Larrimore v. Homeopathic Hospital Associates*, 181 A.2d 573, 577 (Del. 1962).