IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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CUYAHOGA COUNTY

NOEL CUMMINGS,	)	CASE NO. CV 16 859296
	)	
Plaintiff,	)	JUDGE PAMELA A. BARKER
	)	
v.	)	OPINION AND JOURNAL ENTRY ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT AND/OR ATTACHMENTS THERETO
	)	
HARVEY ABENS IOSUE CO., LPA, et al.	)	
	)	
Defendants.	)	
	)	
	)	
	)	

This matter is before the Court on Defendants' Motion For Judgment On The Pleadings ("Defendants' Motion"), Plaintiff's Brief in Opposition to Defendants' Motion ("Plaintiff's Brief"), Plaintiff's Motion To Strike Defendants' Answer To Plaintiff's Complaint And/Or Attachments Thereto ("Plaintiff's Motion"), and Defendants' Brief In Opposition To Plaintiff's Motion ("Defendants' Brief").

In Defendants' Motion, Defendants argue that Plaintiff's Complaint, and the Defendants' Answer and exhibits attached thereto, demonstrate that they are entitled to judgment as a matter of law because: 1.) Plaintiff's legal malpractice claim set forth in her Complaint is barred by the applicable one-year statute of limitations; and 2.) Defendants were not the proximate cause of Plaintiff's injuries since she executed the settlement agreement with GCRTA subsequent to retaining new counsel, Lawrence Mays, to represent her in negotiating the settlement. The exhibits attached to Defendants' Answer are copies of the following: 1.) a 2/6/15 email from Plaintiff to Defendant Harvey;[1] an e-mail chain by and between Plaintiff and

[1] Exhibit A.

Kathleen Minahan of GCRTA;[2] this Court's Opinion and Journal Entry on Defendants' Motion for Sanctions in Case Number 849836;[3] a May 7, 2015 letter directed to Plaintiff from the Ohio Supreme Court Disciplinary Counsel;[4] the Settlement Agreement and Release between GCRTA and Plaintiff;[5] an engagement letter or agreement by and between Attorney Lawrence Mays and Plaintiff;[6] and a 2/17/2015 Notice of Electronic Filing in the federal district court case No. 1:14-cv-01729-JG together with an e-mail exchange between Ms. Minahan and Plaintiff.[7]

In Plaintiff's Brief, Plaintiff argues, in relevant part, that this Court may not rely upon the "unauthenticated" exhibits containing "irrelevant hearsay" attached to Defendants' Answer, for purposes of deciding Defendant's Motion.[8] Indeed, in Plaintiff's Motion, Plaintiff asserts that because the exhibits attached to Defendants' Answer do not qualify as "written instrument[s]" under Civ.R. 10(C),[9] they must be stricken.[10]

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[2] Exhibit B.

[3] Exhibit C. Subsequent to the filing of this Court's Opinion and Journal Entry in Case Number 849836, the instant matter was consolidated with that case.

[4] Exhibit D.

[5] Exhibit E.

[6] Exhibit F.

[7] Exhibit G.

[8] Plaintiff's Brief, at page. 8.

[9] Civ.R. 10(C) provides in relevant part: "A copy of any written instrument attached to a pleading is a part thereof for all purposes."

[10] Plaintiff relies upon or cites to Civil Rules 8(B) and 10(C) as the bases for her argument that this Court should strike the Defendants' Answer and/or attachments. However, it is Civ.R. 12(F) that governs motions to strike; that provision reads: "Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter." Under Civ.R. 12(F), a court may strike an insufficient claim or defense from a pleading. *Anderson v. Smith*, 196 Ohio App.3d 540, 543, 2011-Ohio-5619, 964 N.E.2d 468 (10th Dist.). Civ.R. 12(F) does not provide a basis to strike an entire Answer, but only any defense(s) included therein. The two bases for Defendants' Motion are: 1.) that Plaintiff's malpractice claim is barred by the one-year statute of limitations, which defense is asserted as Defendants' Ninth Defense in their Answer; and 2.) that Plaintiff's claim is barred because Defendants' actions were not the proximate cause of Plaintiff's damages, which defense is asserted as Defendants' Tenth Defense. To the extent Plaintiff's Motion can be construed as a motion to strike these two defenses, that motion or request is denied. And, to the extent that Plaintiff's Motion, at least in part, constitutes a request to have this Court strike the exhibits attached to Defendants' Answer, the Court declines to strike them, and indeed, as demonstrated in the body of this Opinion,

In Defendants' Brief, Defendants respond by citing and discussing precedent from Ohio appellate courts, including the Eighth District Court of Appeals, for their argument that since the exhibits were attached to their Answer and therefore, are part of the pleadings, this Court may and should consider them in deciding Defendants' Motion.

Motions for judgment on the pleadings are governed by Civ.R. 12(C). Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "In ruling on a Civ.R. 12(C) motion, the court is permitted to consider both the complaint and the answer as well as any material attached as exhibits to those pleadings." *Bank of America, N.A. v. Michko*, 8th Dist. Cuyahoga No. 101513, 2015-Ohio-3137, ¶37, citing *Schmitt v. Educational Serv. Ctr.*, 8th Dist. Cuyahoga No. 97605, 2012-Ohio-2208, 970 N.E.2d 1187, ¶10. "'Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law.'" *Rayess v. Educational Comm. For Foreign Med. Graduates*, 134 Ohio St.3d 509, 2012-Ohio-5676, 983 N.E.2d 1267 ¶18, quoting *State ex rel. Midwest Pride IV. Inc. v. Pontious*, 75 Ohio St.3d 565, 569-570, 1996 Ohio 459, 664 N.E.2d 931 (1996).

It is the Eighth District Court of Appeals' decisions in *Michko* and *Schmitt*, as well as the Seventh District Court of Appeals' decision in *Jackson v. Rohrbaugh*, 7th Dist. Mahoning No. 14 MA 39, 2015-Ohio-2112, ¶¶16, 17, upon which Defendants rely in arguing that this Court can and should consider the seven exhibits attached to their Answer in ruling upon Defendants' Motion. A review of these cases, as well as cases cited and relied upon by Plaintiff, and

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must review and has reviewed them to evaluate whether or not they constitute "written instrument[s]" so as to be considered by this Court in ruling on Defendants' Motion. They do not constitute "redundant, immaterial, impertinent or scandalous matter". Civ.R. 12(F).

additional Ohio case law, demonstrates that an initial determination as to whether or not the seven exhibits submitted with Defendants' Answer, or any one or more of them, constitute "written instrument[s]" as that term is used in Civ.R. 10(C) is necessary in order to decide Defendants' Motion.

In *Michko*, although the plaintiff had attached to its complaint copies of documents, to include a warranty deed, the court upheld the trial court's granting of the motion for judgment on the pleadings based upon the fact that the defendant had admitted in her answer that the plaintiff was entitled to a declaration that the warranty deed was valid notwithstanding an omitted signature. *Michko, id.* at ¶38. In so finding, the Court noted or stated that defendant Michko was not a party to the warranty deed at issue.[11] The inclusion of this statement may be construed to mean that: if defendant Michko had been a party to the warranty deed, the deed would have qualified as a written instrument under Civ.R. 10(C); and, as a "written instrument", the deed would have been considered in evaluating the motion for judgment on the pleadings, even if defendant Michko had not admitted its validity in her Answer.

In *Ferchill v. Beach Cliff Board of Trustees,* 162 Ohio App.3d 144, 2005-Ohio-3475, 832 N.E.2d 1238 (8th Dist. No. 2005), ¶¶15, 16, the Court concluded that since collateral estoppel is not a proper defense for a motion for judgment on the pleadings because it necessitates looking beyond the face of the pleadings, the defendant – and by inference, the trial court - had improperly relied upon an Eighth District Court of Appeals' opinion rendered in a prior case involving the same parties, that the defendant had attached to its amended answer.[12] In so

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[11] *Id.*

[12] *Inskeep v. Burton*, 2nd Dist. Champaign No. 2007 CA 11, 2008-Ohio-1982, ¶9 (discussing the procedural history of *Ferchill, supra*).

concluding, the Court noted that up until that point in time, no Ohio court had ruled that an appellate court opinion was a proper "written instrument" under Civ.R. 10(D). *Id.*, ¶11.

In *Inskeep v. Burton*, 2nd Dist. Champaign No. 2007 CA 11, 2008-Ohio-1982, the Second District Court of Appeals, citing, discussing and relying upon *Ferchill*, *supra*, concluded that "a trial court's opinion in another matter is not the sort of written instrument proper for designation as 'a part of the pleading' in the context of a motion for judgment on the pleadings." *Inskeep*, *supra*, ¶17. In reaching this conclusion, and as correctly stated in Plaintiff's Motion, the court noted that "the term 'written instrument' in Civ.R. 10(C) has primarily been interpreted to include documents that evidence the parties' rights and obligations, such as negotiable instruments, 'insurance policies, leases, deeds, promissory notes, and contracts.' *1 Klein & Darling, Baldwin's Ohio Practice* (2004), 744-45." *Id. See Davis v. Widman*, 184 Ohio App.3d 705, 2009-Ohio-5430, 922 N.E.2d 272, ¶18 (where the court, in the context of reviewing a trial court's dismissal of a complaint under Civ.R. 12(B)(6), noted that "'accounts' and 'written instruments' (usually contracts) that are attached to a complaint are incorporated into the complaint pursuant to Civ.R. 12(C), and the trial court may consider them...", but concluded that "[p]hotographs are not 'account[s]' or 'written instruments' that are incorporated into the complaint pursuant to Civ.10(C); and therefore, the Widmans' reliance upon these for dismissal [was] inappropriate.")

In *Jackson*, the documents attached to the defendant's answer that the Seventh District Court of Appeals found the trial court had properly considered in ruling on the defendant's motion for judgment on the pleadings were certified copies of an agreed journal entry and decree of dissolution, as well as a transcript of a hearing. *Jackson*, *id.* at ¶¶ 16, 17. But, in *State*

of Ohio, ex rel., Daryl Vandenbos, Relator v. City of Xenia, 2nd Dist. Greene No. 14-CA-14, the Second District Court of Appeals, citing and relying upon its prior decision in *Inskeep*, concluded that attachments consisting of orders, opinions and pleadings in previous matters and other writings, did not qualify as "written instrument[s]" that could be considered by the trial court in ruling on a motion for judgment on the pleadings. The Court explained in relevant part as follows:

> We***conclude that the ***attachments (excerpts of civil services rules, civil service meeting notes and transcript, and a memorandum concerning Xenia's position on Vandenbos's seniority credit) are more like a trial court's opinion than a negotiable instrument, insurance policy, deed, or contract, and likewise not the sort of written instrument proper for designation as "part of the pleading" under Civ.R. 10(C). Thus, we consider the allegations contained in the verified complaint and the answer in deciding Respondents' motion for judgment on the pleadings.

Vandenbos, supra, ¶14. (*But, see State ex rel. Lockard v. Wellston City Sch. Dist. Bd. Of Educ.*, 4th Dist. Jackson No. 14CA5, 2015-Ohio-2186, ¶9, where the Fourth District Court of Appeals, while agreeing with the Second District that "not everything attached to a pleading is a 'written instrument' under Civ.R. 10(C), nonetheless concluded that the relator's exhibits establishing his military service period and setting forth his entitlement to purchase STRS service credit, and the respondent's exhibits consisting of four collective bargaining agreements applicable to the relator's employment period, constituted "written instrument[s]" that could be considered in deciding a motion for judgment on the pleadings.)

The only Ohio case this Court could locate where a court determined whether or not it was proper to consider copies of e-mails in ruling on a motion for judgment on the pleadings is the Fifth District Court of Appeals' decision in *White v. King*, 5th Dist. Delaware No. 14 CAE 02 0010, 2014-Ohio-3896, *discretionary appeal allowed by* 142 Ohio St.3d 1421, 2015-Ohio-1353.

In that case, the Court found that "[u]nder the circumstances presented, we will not countenance appellant's challenge to the trial court's utilization of documents that appellant presented to the court as his own complaint attachments." *Id.*, ¶16. In the instant matter, it is not Plaintiff that attached copies of an e-mail and e-mail chains to her pleading, but Defendants.

In *Schmitt*, it was because the subject employment contract between the plaintiff and a defendant was not attached to the pleadings, but was attached to a defendant's motion for judgment on the pleadings that the Court, citing *Michko* for the proposition that in ruling on a motion for judgment on the pleadings a trial court is limited to the complaint, answer and exhibits or documents attached thereto, affirmed the trial court's denial of the motion. *Schmitt* did not involve a situation where the contract or a "written instrument" under Civ.R. 10(C), had been attached to the defendant's answer, so as to permit the trial court to consider it.[13]

Applying the above-discussed case law to the instant matter, this Court finds as follows. The e-mail, e-mail chains, this Court's previous entry and opinion in Case No. CV-15-849836 filed before this case was consolidated with it, the letter from Disciplinary Counsel, and the federal district court Notice of Filing do not constitute "written instrument[s]" as that term is used in Civ.R. 12(C), and therefore will not be considered in deciding Defendants' Motion. The only two exhibits attached to Defendants' Answer that do qualify as "written instrument[s]" are: 1.) Defendant's Exhibit E, or the Settlement Agreement and Release executed by Plaintiff

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[13] In *C&K Indus. Servs. v. McIntyre, Kahn & Kruse Co., L.P.A.*, 8th Dist. Cuyahoga No. 92233, 2009-Ohio-2373, ¶¶10-12, the Eighth District Court of Appeals noted that "a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings" and "may not be converted to a summary judgment motion when matters outside the pleadings are submitted". Then the Court concluded that since the federal court opinion upon which the defendants had relied had been attached to the motion and considered as evidence that the issues raised in the complaint were conclusively decided against the plaintiffs in prior litigation, it had been improperly considered by the trial court.

on February 23, 2015 or a contract to which Plaintiff is a party; and 2.) Exhibit F, or the Engagement letter or agreement by and between Plaintiff and Attorney Lawrence Mays executed on February 20, 2015 or a contract to which Plaintiff is a party.[14] However, these two exhibits, when considered together with Plaintiff's Complaint and Defendants' Answer do not demonstrate that Plaintiff filed her legal practice complaint against Defendants beyond the applicable one year statute of limitations and therefore, Defendants are not entitled to judgment as a matter of law against Plaintiff on this basis.

Nonetheless, these two exhibits do demonstrate that Plaintiff did retain new counsel on February 20, 2015, Lawrence Mays, to represent her in the settlement with GCRTA, and that she executed the settlement agreement on February 23, 2015 or at the time she was represented by Attorney Mays. The engagement letter or agreement reads in relevant part that [Mr. Mays] indicated to [Plaintiff] that [h]e would represent [her] in finalizing settlement with [her] employer and provide [Plaintiff] advice and counsel on a Settlement Agreement and Release with Greater Cleveland Regional Transit Authority, make an appearance in the litigation currently before Judge Gwin, and respond to the Defendants' Notice of Dispute."

Paragraph 14 of the Settlement Agreement with GCRTA provides in relevant part that "Cummings understands that she has twenty-one (21) days within which to consider whether to execute the Agreement"; "[a]ny decision Cummings makes to sign th[e] Agreement before the end of the 21-day period is knowingly and voluntarily made": and "Cummings may revoke th[e] Agreement within seven (7) calendar days after signing it by providing written notice of

[14] Nowhere in Plaintiff's Brief does Plaintiff assert that she did not execute these contracts or agreements, and Plaintiff's Motion does not include as a basis to strike these two exhibits, sworn testimony via affidavit or even any unsworn assertion that she did not execute these contracts or agreements.

revocation to Kathleen M. Minahan...."[15] Paragraph 17 of the Settlement Agreement provides in relevant part that "[t]he undersigned further state that they have carefully read this Agreement, that its contents have been fully explained to them by their counsel, that they know and understand its contents and they sign this Agreement in good faith as their own free act"; and that "they are executing this Agreement voluntarily and with full knowledge and understanding of its contents and have had the opportunity to have an attorney of their choice review this Agreement."

To establish a cause of action for legal malpractice, a plaintiff must show: (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss. *Lewis v. Keller*, 8th Dist. Cuyahoga No. 84166, 2004-Ohio-2265, ¶8, citing *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 427-428, 1997 Ohio 259, 674 N.E.2d 1164. The elements of a legal malpractice claim are stated in the conjunctive, and the failure to establish an element of the claim is fatal. *Rivera v. Crosby*, 194 Ohio App.3d 147, 153, 2011-Ohio-2265 (8th Dist.), citing *Williams-Roseman v. Owen* (Sept. 21, 2000), Franklin App. No. 99AP-871, 2000 Ohio App. LEXIS 4254. In *Rivera, supra*, at 153, the Court explained in relevant part as follows:

> """[T]he proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred." [Citation omitted. This definition encompasses a sense of "but for" in that an original, wrongful, or negligent act in a natural and continuous sequence produces a result that would not have taken place without the act. [Citation omitted.] In other words, proximate cause is "'that without which the accident would not have happened,

[15] Exhibit E attached to Defendants' Answer.

and from which the injury or a like injury might have been anticipated.'" [Citations omitted.]

In her Complaint, Plaintiff alleges that Defendants represented her with regard to a dispute between her and her employer, GCRTA and in the "Underlying Litigation" associated therewith, i.e., Case No. 1:14-cv-01729,[16] and as her lawyer(s) Defendants breached the standard of care owed to her as their client by "breach[ing] the contingency agreement", by failing to advise that the settlement as proposed and subsequently accepted was inconsistent with, and contrary to O.R.C. §145.91(R)(2)(h), and by seeking oral modification of the agreement that placed Defendants' recovery of attorney fees ahead of Plaintiff's interests and thereby violated the canons of Professional Ethics.[17] Plaintiff alleges that as a result of these breaches, she has suffered damages, specifically being denied the cash settlement payable to her pursuant to the written contingency agreement and court settlement, not receiving the percentage of the settlement due her, and experiencing anxiety and emotional distress.[18]

This Court finds Defendants' arguments to be well-taken. First, any damages Plaintiff allegedly suffered as a result of her settlement with GCRTA were not proximately caused by any alleged breach(es) of the standard of care owed to her by Defendants, since by the time she executed that Agreement she had secured Lawrence Mays to represent her with regard to that litigation and settlement, and she voluntarily chose to sign the Settlement Agreement.

Moreover, the remaining alleged breach(es) of the standard of care owed her by Defendants are really alleged breach(es) of the contingency fee agreement or contract dispute

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[16] Exhibit E attached to Defendants' Answer demonstrates that Plaintiff settled that "Underlying Litigation" with GCRTA by executing the Settlement Agreement on February 23, 2015.

[17] Plaintiff's Complaint, ¶¶4, 5, 6, 7, 9, 11, 12, 13, 14, 17, 22, 23 Exhibit E attached to Defendants' Motion, First paragraph. The Ohio Supreme Court has exclusive jurisdiction over alleged violations of the "canons of Professional Ethics" by lawyers.

[18] Plaintiff's Complaint, ¶¶30, 31, 32.

that are already the subject of the first lawsuit filed by Plaintiff against Defendants, Case No. CV-15-849836, with which the instant case has been consolidated,[19] and in this Court's opinion, are barred by the economic loss doctrine. Under the economic loss doctrine,[20] a party cannot recover purely economic losses in a tort action against another party based upon the breach of contractually created duties." *Stancik v. Deutsche Nat'l Bank*, 8th Dist. Cuyahoga No. 102019, ¶39, citing *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d. "The reasoning behind the economic loss doctrine is that tort law is not intended to compensate parties for monetary losses suffered as a result of duties that are owed to them simply as a result of the contract." *Stancik, supra*, citing *Digi-know, Inc. v. PKXL Cards, Inc.*, 8th Dist. Cuyahoga No. 96034, 2011-Ohio-3592, ¶2, citing *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn.*, 54 Ohio St.3d 1, 7, 560 N.E.2d 206 (1990). Although Plaintiff alleged that she suffered anxiety and emotional distress as a result of Defendants' alleged breach(es) of the contingency fee agreement or contract, she did not allege serious emotional distress or health problems/physical injury resulting therefrom. *See Stancik, supra*. Thus, the economic loss doctrine bars Plaintiff's claims set forth against Defendants that are based upon Defendants' alleged breach(es) of the contingency fee agreement.

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[19] In this court's opinion, since the two cases were consolidated prior to the filing of Defendants' Motion and Plaintiff's Brief, this Court can review the allegations set forth in Plaintiff's amended complaint filed in Case No. CV-15-849836.

[20] Economic losses "are intangible losses that do not arise from tangible physical harm to persons or property." *Stancik v. Deutsche Nat'l Bank*, 8th Dist. Cuyahoga No. 102019, 2015-Ohio-2517, ¶39, quoting *RWP, Inc. v. Fabrizi Trucking & Paving Co.*, 8th Dist. Cuyahoga No. 87382, 2006-Ohio-5014, ¶20.

Accordingly, Defendants' Motion is **GRANTED**.

Plaintiff's Motion is **DENIED**.

IT IS SO ORDERED.

Pamela A. Barker 4-28-16

Judge Pamela A. Barker **Dated**