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ATTORNEY FOR APPELLANT:

WILLIAM J. STEVENS
Lakeside, Michigan

ATTORNEYS FOR APPELLEE:

DANIEL A. GIOIA
ANN MARIE WOOLWINE
Burke Costanza & Carberry LLP
Merrillville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RICHARD A. SWOBODA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 46A04-1102-CT-39
	)	
RICHARD STALBRINK, JR.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Patrick Blankenship, Special Judge
Cause No. 46D01-0709-CT-175

August 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Richard A. Swoboda appeals the grant of summary judgment in favor of Richard Stalbrink, Jr., in Swoboda's claim for legal malpractice. Swoboda presents two issues for our review, which we consolidate and restate as follows: Did the trial court properly grant summary judgment in favor of Stalbrink?

We affirm.[1]

In 1996, Swoboda and his wife moved their sizable investment portfolio over to Dunes Estate Planning, which was owned and operated by Donna Pavlos, a close family friend. In 2000, Pavlos began charging Swoboda management fees, in addition to trade commissions. Dissatisfied with Pavlos's management of his investments, Swoboda wrote a lengthy letter to her in September 2005, questioning a number of her actions. One of Swoboda's concerns was the management fee Pavlos had instituted on top of trade commissions. Thereafter, on September 29, 2005, Swoboda discovered that Pavlos was not licensed to act as a financial planner and therefore was not legally permitted to charge a management fee.

Swoboda negotiated an agreement with Pavlos whereby she would pay back the management fees with interest and secure the debt with a mortgage on her home.[2] Swoboda asked Stalbrink, a lawyer who was representing Swoboda on other matters, to swiftly prepare a written settlement agreement and the necessary mortgage documents. Swoboda specifically indicated that he wanted the agreement to preserve his right to pursue other claims of fraud or mismanagement that might be subsequently discovered, as his investigation of the matter was

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[1] Swoboda has petitioned for oral argument, and we deny that request by separate order issued contemporaneously with this opinion.

[2] The agreement also involved Swoboda's wife, Patsy, and Pavlos's husband, John.

still ongoing. He also directed Stalbrink to include a confidentiality clause, as Swoboda suspected his friend had been charging illegal fees to her other clients.

The parties, including spouses, met at Stalbrink's office on October 4, 2005 to finalize the agreement. At the meeting, John Pavlos expressed particular interest in making sure that things remain confidential. At the conclusion of the meeting, the Swobodas and the Pavloses signed the settlement agreement (Agreement I), mortgage, and promissory note that Stalbrink had prepared. Agreement I provided, in part, as follows:

> WHEREAS, the Pavlos[3] had portrayed themselves as licensed "Financial Planners/Advisors", during the time period from April 2000 through June 30, 2005; and
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> ****
>
> WHEREAS, Pavlos acknowledge that they were not licensed and therefore unable to legally institute a management fee for the time periods mentioned herein, furthermore, Pavlos falsely reported the holdings or earnings to the Swobodas which resulted in an inflated portfolio and also wrongfully inflated management fees, and;
>
> ****
>
> WHEREAS, Swoboda and Pavlos desire to settle all matters pertaining to the Pavlos and the Pavlos as Dunes Estate Planning's mis-management, mis-representation and wrongful assessment of management fees to Swoboda for the time period from April of 2000 to June 30, 2005, as well as to settle all disputes by and between them.
>
> NOW, THEREFORE, in consideration of the covenants and promises made herein, the parties hereby agree as follows:
>
> 1. Pavlos shall execute a mortgage and note pledging their home…as security for repayment to Swoboda the amount of $36,260.07 which equals $31,537.00 plus interest of four percent (4%) during the time period from 4-1-00 through 1-01-06…. This amount represents the management fees wrongfully collected for the time period mentioned herein plus interest….
>
> ****
>
> 4. …Each party agrees that this agreement shall be confidential in nature and the terms hereof shall not be disclosed to any third party provided that the

[3] The agreement is reproduced as originally written. We recognize that it improperly uses "Pavlos" as both singular and plural. The extent of John's involvement in Dunes Estate Planning is not clear from the record before us, though it appears he played some role in the business.

> Pavlos comply and the amounts herein are paid in full on or before September 30, 2006. Should the amounts not be paid in full Swoboda [sic] or should Swoboda find that there is fraud or other misrepresentations which have taken place in the management of his investments with the Pavlos, he shall first notify them and then, subsequent to the notification, he shall be free and able to disclose the terms hereof and the actions of Pavlos without threat of recourse or damage.
>
> ****

Appellant's Appendix at 21-23.

Within weeks of the execution of Agreement I, Swoboda discovered that Pavlos had committed additional acts of fraud, forgery, and/or misrepresentations as to Swoboda's investment accounts during the relevant time period. Swoboda promptly informed the Pavloses of his findings, as required by paragraph 4 of Agreement I, in hopes of negotiating a new agreement with them. At the end of October, Swoboda asked Stalbrink to draft the new settlement agreement and related documents and to set up a meeting with the Pavloses. Further, Swoboda informed Stalbrink that if the matter was not settled "Federal and/or Civil action will be filed and/or turned over to the appropriate governmental agencies for prosecution." *Id*. at 191.

Stalbrink prepared a new settlement agreement (Agreement II), mortgage, and note, which the Swobodas and Pavloses executed on January 6, 2006. While Agreement II contained much of the same language as Agreement I, there were new provisions, such as the following:

> WHEREAS, Swoboda and Pavlos entered into an agreement pertaining to wrongfully inflated and wrongfully charged management fees on or about the 4th day of October, 2005 in the amount of $36,260.07 wherein Pavlos agreed to repay said amounts to Swoboda on or before September 30, 2006.
>
> WHEREAS, since entering into the above-mentioned agreement, Swoboda discovered that at least eleven (11) annuity policies were purchased

> by Pavlos during the period of time described herein. That said annuity policy agreements were entered into without an authorized signature from Swoboda and without providing the documentation of the terms and conditions of said purchases to Swoboda. The policy agreements and terms and conditions were in fact executed by Donna Pavlos, by signing Swoboda's names on said policies without the consent, knowledge or authorization of Swoboda.
>
> WHEREAS, Swoboda has incurred damages from the actions of Pavlos amounting to $181,387.00 to date, which actions include the wrongfully charged fees and expenses and penalties which will be incurred because of the wrongful, deceptive and unauthorized purchase of the above-mentioned annuities.

Id. at 231-32. With respect to the settlement of these issues, Agreement II provided that the Pavloses would execute a mortgage and note pledging their home as security for repayment to Swoboda in the amount of $181,387 plus annual interest of 7.25%, with the mortgage and note due and payable in full by November 15, 2006. Upon recording of the note and mortgage, Agreement II provided that the previous note and mortgage relating to Agreement I "shall be executed by Swoboda and provided to the Pavlos."[4] *Id*. at 233. Further, Agreement II contained the same confidentiality provision as Agreement I, except that the date was changed from September 30 to November 15, 2006, reflecting the new due date.

In August 2006, Donna Pavlos committed suicide. Thereafter, John Pavlos retained counsel and refused to honor Agreement II, claiming that the agreement was unenforceable for lack of consideration because Agreement I was a general release of all claims between the parties. Upon advice of new counsel, Swoboda eventually settled the matter against the Pavloses for $18,000.

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[4] Accordingly, Swoboda executed a release of the mortgage on January 13, which was recorded on January 17, 2006, along with the new mortgage and promissory note.

On September 21, 2007, Swoboda filed a complaint for professional negligence against Stalbrink in LaPorte County Superior Court.[5] Stalbrink moved for summary judgment in April 2009. Swoboda opposed the motion and filed a cross-motion for partial summary judgment. At the conclusion of the summary judgment hearing on June 1, 2009, which Swoboda did not attend, the trial court granted summary judgment in favor of Stalbrink and denied Swoboda's cross-motion. On appeal, another panel of this court reversed the grant of summary judgment on procedural grounds (i.e., lack of notice) and remanded for a new hearing on the motion. *Swoboda v. Stalbrink*, 46A05-0906-CV-359 (January 19, 2010).

Following remand, Swoboda moved for a change of judge, and another special judge was appointed to hear the case. On December 17, 2010, the court held a summary judgment hearing on Stalbrink's motion for summary judgment. The trial court entered the order granting summary judgment on January 6, 2011. Swoboda now appeals the grant of summary judgment.

Our standard of review of a summary judgment decision is well settled.

> A party is entitled to summary judgment upon demonstrating the absence of any genuine issue of fact as to a determinative issue unless the non-moving party comes forward with contrary evidence showing an issue of fact for trial. An appellate court reviewing a trial court summary judgment ruling likewise construes all facts and reasonable inferences in favor of the non-moving party and determines whether the moving party has shown from the designated evidentiary matter that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. But a de novo standard of review applies where the dispute is one of law rather than fact.

[5] The original judge recused himself because Stalbrink was a local magistrate at the time. A special judge from Porter County was then appointed. We note further that Stalbrink is currently a judge in LaPorte County Superior Court.

Dugan v. Mittal Steel USA, Inc., 929 N.E.2d 184, 185-86 (Ind. 2010) (citations omitted).

In order to establish legal malpractice, a plaintiff must demonstrate that he 1) employed the attorney, 2) who failed to exercise ordinary skill and knowledge, 3) proximately causing, 4) damage to the plaintiff. *Hill v. Bolinger*, 881 N.E.2d 92 (Ind. Ct. App. 2008), *trans. denied*. Thus, as long as Stalbrink negated at least one element of Swoboda's case, the trial court's grant of summary judgment will be upheld. *See id*.

In the instant case, we are confronted with pure questions of law. Swoboda initially argues that Agreement I was a general release of all claims, which directly conflicted with his expressed wishes and allegedly prevented him from seeking redress for later discovered misconduct. Further, he claims that Agreement II did not resolve the damage caused by the erroneous drafting of Agreement I because Agreement II is unenforceable. In this regard, he argues that the Pavloses received no new consideration in exchange for their agreement to pay substantially more for the general release, which they had already obtained. We need only address the enforceability of Agreement II, as our determination of that issue is dispositive. Therefore, we assume without deciding that Agreement I was a general release.

Swoboda's argument that the Pavloses received no new consideration in exchange for Agreement II is unavailing. The undisputed evidence reveals that confidentiality was of significant importance to the Pavloses. Both agreements contained confidentiality clauses, which specifically provided that if Swoboda discovered additional fraud or misrepresentations in the management of his investments, "he shall first notify [the Pavloses] and then, subsequent to the notification, he shall be free and able to disclose the terms hereof

and the actions of Pavlos without threat of recourse or damage." *Appellant's Appendix* at 23 and 234. Therefore, upon Swoboda's new discoveries after the execution of Agreement I and his notification to the Pavloses, the matter was no longer confidential. By entering into Agreement II, the Pavloses were able to regain confidentiality of the matter, in hopes of shielding themselves from claims from other clients and prosecution by governmental authorities. This surely qualifies as new consideration for their promise to pay the increased settlement amount.

In sum, the record reveals that Agreement II was supported by mutual consideration and is enforceable. Moreover, any potential damage caused by the alleged error in the drafting of Agreement I was resolved by Agreement II, which effectively rescinded and replaced Agreement I. Thus, Swoboda cannot establish the element of damage in his malpractice action, and the trial court properly granted summary judgment in favor of Stalbrink.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.