IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

MODOC NATION a/k/a MODOC TRIBE OF OKLAHOMA; RED CEDAR ENTERPRISES, INC.; EAGLE TG, LLC; BUFFALO MTE, LLC; TALON MTE, LLC; MODOC MTE, LLC; and WALGA MTE, LLC,	)	
Plaintiffs/Counterclaim Defendants,	)	Case No. 4:19-cv-00588-CVE-JFJ
vs.	)	
RUSTY BOHL,	)	
Defendant, and	)	
RAJESH SHAH; SHARAD DADBHAWALA; SOFTEK MANAGEMENT SERVICES, LLC; SOFTEK FEDERAL SERVICES, LLC; and SOFTEK SOLUTIONS, INC.,	)	
Defendants/Counterclaimants,	)	
vs.	)	
BLAKE FOLLIS; TROY LITTLEAXE; and LEGAL ADVOCATES FOR INDIAN COUNTRY, LLP,	)	
Counterclaim Defendants.	)	

REPLY BRIEF OF TROY LITTLE AXE AND LEGAL ADVOCATES FOR INDIAN COUNTRY, LLP, IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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I. Introduction.

The papers submitted by Defendants/Counterclaim Plaintiffs ("Softek") in opposition to the Rule 56 Motion of Troy Little Axe (individually "Little Axe") and Legal Advocates for Indian Country, LLP (together with Little Axe, "LAIC"), are insufficient to avoid the rendition of summary judgment in favor of LAIC. Even without regard for the inadequacy of Softek's papers, its counterclaim, based on alleged violations of Oklahoma's Rules of Professional Conduct (ORPC"), is barred as a matter of law.

II. There is no Evidence of Controverted *Material* Facts.

In connection with LAIC's Motion to Dismiss, Dkt. # 61, Softek's Second Amended Counterclaims against LAIC, Dkt. # 82, LAIC's Supplemental Motion for Summary Judgment, Dkt. # 86,[1] LAIC's Motion to Dismiss Softek's Second Amended Counterclaims, Dkt. # 93, and Softek's Response in Opposition to LAIC's Rule 56 papers, Dkt. # 116, this Court has been provided with three (3) Declarations signed by Little Axe, Dkt. #s 61-1, 86-1, and 104, two (2) Declarations signed by Defendant Rajesh Shah, Dkt. #s 76-2 and 99, one (1) Declaration signed by Defendant Sharad Dadbhawala, Dkt. # 96, one (1) Declaration signed by Softek's counsel, Ryan Dreveskracht, Dkt. # 117,[2] and numerous documents.

Plaintiffs' Supplemental Motion for Summary Judgment expressly notes the deficiencies in Softek's Counterclaim and the reasons why it cannot prevail against the Plaintiffs. Dkt. # 86 at pp. 9-14. LAIC's Motion to Dismiss also notes the reasons why Softek cannot prevail on its counterclaim against LAIC. Dkt. # 93 at pp. 5-10. Softek's Brief, Dkt. # 116, the Declarations identified above, and the documents provided to the

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[1] Plaintiffs' Supplement set out a section of "Statement of Undisputed Material Facts" supported by references to Little Axe's Supplemental Declaration. Softek provided no formal response to those undisputed facts. Rather, Softek's brief contained a narrative rendition of facts that was, primarily, a synopsis of the contents of documents which, in reality, speak for themselves. That scenario also occurred in *Morrison v. Stonebridge Life Ins. Co.*, 2015 WL 137261 (W.D. Okla.), in which the court stated:

> Plaintiff did not oppose Defendant's Motion in the manner required by Rule 56 or LCvR56.1(c). Instead of addressing the facts stated in the Motion, Plaintiff presents her own statement of facts. The Court could consider Defendant's stated facts to be undisputed due to Plaintiff's failure to address them. ... In the interest of justice, the Court instead has compared the two statements and gleaned from them the material facts that are not in dispute.

Id. at note 2. Indeed, what Softek has presented in this case fails to comply with the requirements of Local Rule LCv56.1(c)

[2] Dreveskracht also submitted a Declaration, Dkt. # 98, to identify potential areas of discovery under FRCP 56(d).

Court by Softek do not cure, under Rule 56, the deficiencies in the Counterclaim. Indeed, they add nothing of consequence to the Rule 56 analysis and, as a result, cannot serve as the bases upon which to deny summary relief to LAIC.

A Rule 56 movant "can meet their initial burden 'simply by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim.'" *Breen v. Black*, 709 Fed. Appx. 512, 513 (10th Cir. 2017) (attached hereto as Exhibit 1). The burden then shifts to the non-movant to set forth facts which "must not only be admissible as evidence, but must reveal a genuine dispute as to a material fact." *Id*.

> An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. ... If a party that would bear the burden of persuasion at trial does not come forward with sufficient evidence on an essential element of its prima facie case, all issues concerning all other elements of the claim and any defenses become immaterial.

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). Softek's Declarations and exhibits do not meet the Rule 56 burden. "'Factual disputes that are irrelevant or unnecessary will not be counted.'" *U.S. v. Simons*, 129 F.3d 1386, 1388 (10th Cir. 1997); *see also* subparts A, B, C, and D, below. Because Softek bears the burden of proof in connection with its Counterclaim, LAIC's Rule 56 Motion should be granted.

A. *Shah Declaration, Dkt. # 76-2, Does not Substantively Address the Counterclaim*

Mr. Shah's Declaration is cited on six (6) occasions in Softek's opposition papers, Dkt. # 116 at notes 6, 8, and 20-23, but none of the cited material meaningfully addresses the issues.[3] Paragraphs 18 and 19 only mention LAIC in the context of (i) not obtaining a waiver of conflict of interests, as alleged in the Counterclaim[4] and (ii) drafting agreements between the Modoc Nation and Softek. The Declaration contains no explanation of the conflicts of interest, what confidential information LAIC supposedly disclosed to others, or to whom it was divulged. The issues and facts addressed in the Declaration are not material because they are not essential to the proper disposition of LAIC's motion. *Adler, supra*, at p. 670.

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[3] Although notes 9-12 appear as "*Id.*" references to Shah's Declaration, they are citations to Dkt. # 99, Shah's second Declaration.
[4] The Counterclaim itself provides no details of the claimed conflicts of interest, Dkt. # 82, other than to allege that Little Axe filed a declaration, Dkt. # 61-1, in support of the Modoc Nation's Motion to Dismiss Softek's Counterclaim, Dkt. # 61, in which Little Axe stated facts related to business and financial arrangements between the Modoc Nation and Softek Management Services, LLC.

B. *Dadbhawala's Declaration Provides no Evidentiary Support for the Counterclaim*

Mr. Dadbhawala's Declaration, Dkt. # 96, is limited to describing the relevant business relationships, bookkeeping protocols and platforms used, persons with access to the financial information, and the damages claimed against the Plaintiffs. It does not address LAIC's alleged violations of the ORPC upon which the Counterclaim is entirely based and should not be considered in ruling on LAIC's Rule 56 Motion.

C. *Shah Declaration, Dkt. # 99, Fails to provide Fact to Support the Counterclaim*

Mr. Shah's second Declaration, Dkt. # 99, mentions LAIC on numerous occasions but suffers from the same lack of material information required by Rule 56. Rather, the Declaration recites immaterial information related to (i) conversations between Shah and LAIC, *id*. at ¶s 5, 6, 8, (ii) the preparation and execution of various documents, *id*. at ¶s 3, 4, 8, 9, 15, (iii) the Modoc Nation's relationship with the Small Business Administration, *id*. at ¶s 11, 12, 13, (iv) the parties' performance of various agreements, *id*. at ¶s 14, 15, 16, (v) meetings related to financial and operational issues, *id*. at ¶ 17, (vi) a Modoc Nation newsletter, *id*. at ¶ 19, and (vii) the Declarations signed by Little Axe in connection with this case. *Id*. at ¶s 27, 28, 29. Although Shah's second Declaration also identifies LAIC as Softek's counsel, *id*. at ¶s 20, 21, 24, 25, 26, 27, not one of those paragraphs provides any details into LAIC's alleged conflicts of interest or disclosures of confidences. Instead, Shah merely concludes, without factual support, that "LittleAxe [*sic*] failed to maintain the confidentiality of the information Softek shared with him" but fails to identify what information was shared, with whom it was shared, and why it was confidential. Indeed, Shah's Declaration establishes that Softek was happy with LAIC's activities and involvement with Softek but contains no evidentiary support for the Counterclaim.

D. *Attorney Dreveskracht's Declaration Fails to Meet the Burden of Rule 56*

The second Declaration of attorney Ryan Dreveskracht, Dkt. # 117, likewise is inadequate to avoid rendition of summary judgment in LAIC's favor. Dreveskracht merely identifies documents, assumedly to raise some inference of misconduct by LAIC in the hope of avoiding summary judgment. Yet, merely

identifying (i) documents authored by LAIC, *id*. at exhibits 1-7, (ii) an invoice for which no exhibit is provided, (iii) a spreadsheet, an accountant's audit reports, and a balance sheet, *id*. at exhibits 9, 10, 16, 11, (iv) copies of corporate minutes, resolutions, development plans, *id*. at exhibits 12, 14, 13, 15, and (v) a Corporate Management Services Agreement that required SBA approval but never received same, hardly achieves the assumed purpose.[5] More importantly, the contents of the exhibits do not even begin to support the allegations of the Counterclaim that LAIC violated the ORPC by engaging in activities that presented conflicts of interest, failed to disclose same, and improperly disclosed confidential information. Neither does the content of the exhibits, *see* Dkt. 116 at p. 8, notes 22-26, give rise to a reasonable inference that there is admissible evidentiary support for the Counterclaim, as required by Rule 56.

III. Shah, Dadbhawala, Softek Federal Services, LLC, and Softek Solutions, Inc., Cannot Assert a Claim for Violating Attorney Disciplinary Rules.

The "Attorney Contract" at issues was between Softek Management Services, LLC, and LAIC. Dkt. # 76-6.[6] Because no attorney-client relationship existed between and/or among LAIC, Mr. Shah, Mr. Dadbhawala, Softek Federal, and Softek Solutions, they can make no claim against LAIC. *E.g.*, *Kimble v. Arney,* 90 P.3d 598, 602 (Okla. Civ. App. 2004).

IV. Softek's Claim Based on Alleged Violations of the Rules of Professional Conduct Cannot Succeed as a Matter of Law.

Softek's opposition papers, Dkt. # 116, make it patently obvious that the cause of action against LAIC rests entirely on LAIC's alleged breaches of standards found in the ORPC.[7] Specifically, LAIC's malfeasance

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[5] Mr. Dreveskracht's Declaration runs afoul of the following statement made in *In re Hentges*, 373 B.R. 709 (N.D. Okla. 2007):

> Documents submitted in support of or in opposition to a motion for summary judgment "must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) ...and the affiant must be a person through whom the exhibits could be admitted into evidence."

Id. at 716; *see also Burns v. Holcombe*, 2010 WL 2756954, *4 (E.D. Okla.)

[6] The agreement provided that LAIC was retained "to meet the needs of [Softek management Services, LLC's] client [Red Cedar Enterprises ...." Dkt.#76-6 at ¶ 1 (emphasis supplied).

[7] Softek summarized its position as follows: The conduct of [LAIC] in this matter contravenes the oath that every lawyer takes upon admission to the bar: fidelity and unswerving loyalty to his or her client; an unyielding obligation to serve the client faithfully, fairly, and honestly ...." Dkt. # 116, at p. 7.

is alleged to be (i) disclosure of confidential information and (ii) engaging in and failing to reveal conflicts of interest to the detriment of Softek in violation of various ORPC provisions. Dkt. # 116 at pp. 8-10.

The ORPC is based on the ABA Model Rules. The ABA has provided the following guidance:

> [V]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

MODEL RULES OF PROFESSIONAL CONDUCT, 1992 Ed., pp. 8-9 (emphasis supplied).

It is well established on a national level that "[d]isciplinary rules are not designed to be a basis for civil liability and they do not create a private cause of action." *Weiszman v. Kirkland & Ellis*, 732 F. Supp. 1540, 1544 (D. Colo. 1990); *see also Bickel v. Mackie,* 447 F. Supp. 1376, 1383–84 (N.D. Iowa) ("Violation of the Code of Professional Ethics is not tantamount to a tortious act ...."), *aff'd,* 590 F.2d 341 (8th Cir. 1978); *TEW v. Arky, Freed, Stearns, et al., P.A.,* 655 F. Supp. 1573, 1575 (S.D. Fla.1987) ("Violation of a [disciplinary] rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.... [The rules] are not designed to be a basis for liability."), *aff'd,* 846 F.2d 753 (11th Cir.), *cert. denied,* 109 S. Ct. 142 (1988); *Tingle v. Arnold, Cate and Allen*, 199 S.E.2d 260, 263 (Ga. App. 1973) (violation of statute enumerating special duties of attorneys shows an intention to provide ethical guidelines for attorneys and does not create a private cause of action); *Hill v. Willmott*, 561 S.W.2d 331, 334 (Ky. App. 1978) ("Nowhere does the Code of Professional Responsibility or the Rules attempt to establish standards for civil liability of attorneys for their professional negligence.").

Oklahoma law is in accord. In *Mahorney v. Waren*, 60 P.3d 38 (Okla. Civ. App. 2002), an incarcerated inmate sued his attorney for malpractice following his conviction on first degree murder charges. The district

court dismissed the case for failure to state a claim upon which relief could be granted. In affirming that decision, the appellate court stated:

> As a preliminary matter, we note Appellant specifically alleged this cause of action is based on three provisions of the now outmoded *Code of Professional Responsibility* (superseded by *Rules of Professional Conduct,* 5 O.S., Ch. 1, App. 3–A, effective July 1, 1988). We point out that a violation of such rules does not provide a basis for a private action in tort. Rather, the Oklahoma Supreme Court possesses original and exclusive jurisdiction to prosecute any alleged attorney rule violations.

Id. at 40 (emphasis supplied).

Insofar as Softek's cause of action is concerned, it is clear that all of their "issues" with LAIC relate to and/or stem from perceived ethical violations that cannot provide a factual or legal basis to assert a plausible claim or identify a cognizable theory of professional negligence.

The Declarations discussed above at pages 2-4, submitted by Messrs. Shah, Dadbhawala, and Dreveskracht, fall far short of the requirements of FRCP 56 and precedent holding that to avoid summary judgment the non-movant must come forward with specific facts. None of the information provided in the Declarations is material to the claims made against LAIC. The Declarations merely consist of conclusions, arguments, and speculation and establish that there is a lack of evidence from which a jury could conclude that LAIC engaged in violations of the ORPC by revealing client confidences and engaging in conflicts of interest. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." *Conaway v. Smith,* 853 F.2d 789, 794 (10th Cir.1988). The Declarations are noteworthy for other reasons. First, Shah engages in rank speculation when he states that "LittleAxe [*sic*] was either acting in his sole interest or in the interests of Plaintiffs/Counterclaim Defendants throughout his entire engagement as Softek's legal counsel." Dkt. # 99, ¶ 23. Second, nowhere does Shah ever (a) state that LAIC was advised that certain information was deemed to be confidential by Softek and not to be provided to third parties or (b) identify the persons to whom LAIC supposedly disclosed the information. Dkt. # 99. Finally, none of the Declarations even attempt to explain how that Little Axe's presence at meetings and participation in business

operations rises to the level of "legal and fiduciary advice." *Id*. at ¶ 20. Therein lies the problem with the vague recitations provided by Softek; quite simply, they do not provide the specific evidentiary support required to avoid summary judgment.

V. Softek's Breach of Fiduciary Duty Theory of Recovery Fails as a Matter of Law.

At the outset, there are several points of note. First, Softek's argument as to the lawyer/witness rule is not applicable to the present case. LAIC does not represent any party in this litigation. Little Axe is merely a fact witness. Even if Little Axe were representing a party, because Softek is challenging the value of LAIC's legal services, ORPC 3.7 (a)(2) would expressly permit Little Axe to testify. Second, subsequent to the execution of the Attorney Contract between LAIC and Softek, Dkt. # 76-6, the interests of the Modoc Nation and Softek were anything but adverse and Mr. Shah's second Declaration refutes any contention to the contrary. Third, the Rule 56 record is devoid of any evidence that Softek took issue with LAIC's fees or actions before being served with the Complaint in this case.

As noted previously, each theory of recovery set forth in Softek's Counterclaim, Dkt. # 82, rests on an allegation of a breach by LAIC of a claimed duty of good faith and/or loyalty in violation of the ORPC. According to the First Claim – Breach of Fiduciary Duty, LAIC "had a duty of loyalty, and a duty to provide sound legal advice to Softek." *Id*. at ¶ 52; *see also id*. at ¶ 55. LAIC "has failed to maintain the duty of loyalty" based on (i) "divulging confidential information," *id*. at ¶ 53, (ii) filing "a declaration in support of ... Modoc against the interests of ... Softek," *id*. at ¶ 54,[8] and (iii) "failing to recuse himself from any litigation against ... Softek on behalf of ... Modoc." *Id*. According to the Second Claim – Legal Malpractice, LAIC "owed and continue[s] to owe Softek a duty of loyalty and a duty to provide sound legal advice." *Id*. at ¶ 58. LAIC allegedly breached those duties by failing to advise Softek of "potential and actual conflicts of interest between Softek and Modoc, and failing to seek an informed waiver of any conflicts of interest before Softek engaged ... LAIC

[8] The fact that Little Axe is an attorney who has signed Declarations does not, without more (and Softek has provided nothing more) does not preclude him from executing and submitting those Declarations. FRCP 56 contains no such prohibition and no cases have been located that hold otherwise.

as legal counsel." *Id*. at ¶ 60. That allegation flies in the face of Shah's second Declaration and the "Attorney Contract" language that expressly stated that LAIC had "disclosed all conflicts of interest and [would] not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Agreement." Dkt. # 76-6, p. 2 at ¶ 7. According to the Third Claim – Unjust Enrichment, Softek paid fees "in expectation of good faith legal services provided..." "for legal services not provided and/or provided in bad faith to the benefit of ... LAIC, and Modoc." Dkt. # 82 at ¶ 63. According to the Fourth Claim – Intentional Interference With A Contractual Relationship, LAIC breached its "duty of continuing loyalty to ... Softek [by its] intentional interference with the contractual relationship [LAIC] had an active role in creating." *Id*. at ¶ 65. According to the Fifth Claim – Tortious Interference With prospective Economic Advantage, Softek claims, on the basis of information and belief, that its reasonable expectation of profits from business dealings with the Plaintiffs was destroyed by LAIC's breach of its "duties of loyalty" to Softek. *Id*. at ¶ 66. From the foregoing, the conclusion is inescapable that the allegations of all five (5) theories of recovery are based on claimed violations of the ORPC and do not stand alone as bases for monetary relief.

"Oklahoma jurisprudence follows the *transactional approach* for its definition of a 'cause of action.' The operative events that underlie a party's claim set the parameters for its cause of action. This conceptual approach ensures that litigants are able to invoke different theories of liability ...." *Resolution Trust Corp. v. Greer*, 911 P.2d 257, 260 (Okla. 1995)(italics in original); *see also Mann v. State Farm Mut. Auto. Ins. Co*., 669 P.2d 768, 772 (Okla. 1983) ("a cause of action includes all theories of recovery or types of damages stemming from one occurrence or transaction ...."); *Cruse v. Bd. of County Comr's,* 910 P.2d 998, 1004 n. 34 (Okla. 1995) ("right of action" refers to a right to a remedy and is distinguished from a "cause of action").

In *Murphy v. Gruber*, 241 S.W.3d 689 (Tex. Civ. App. 2007), the court appeared to apply the majority rule in considering the issue of "whether certain claims pleaded as breach-of-fiduciary-duty and fraud claims

are really impermissibly fractured professional negligence ...." *Id*. at 691.[9] In addressing the issue, the *Murphy* Court stated that "characterizing conduct as a "misrepresentation" or "conflict of interest" does not alone transform what is really a professional negligence claim into either a fraud or a breach-of-fiduciary-duty claim." *Id*. at 697. The court added:

> In summary, some Texas courts have recognized that breach-of-fiduciary-duty claims alleging the lawyer obtained an improper benefit from his representation or improperly failed to disclose his own conflict of interest are not professional negligence claims. But other courts have held the claim is a professional negligence claim if the claim is really that the lawyer's conflict of interest prevented him from adequately representing the client. As is apparent from our review of cases, there is a lack of clarity in this area of the law. Some of that may be attributable to the fact that the relationship between the lawyer and the client is inherently a fiduciary relationship. In non-lawyer cases in which there is a fiduciary relationship, many of the claims against the fiduciary are labeled breach-of-fiduciary-duty claims. However, with lawyers, the standard of care in negligence claims is often defined by the characteristics of that inherent fiduciary relationship. As a result, courts refer to the fiduciary relationship that the lawyer has to the client and use fiduciary standards to define the standard of care required of lawyers. ... And courts have most often applied those standards to conclude that the claims are really negligence, not breach-of-fiduciary-duty claims.

Id. at 696 (emphasis supplied) (internal citation omitted).[10]

Consistent with the *Murphy* decision, in *Standish v. Sotavento Corp*., 755 A.2d 910 (Conn. App. 2000), plaintiffs, the limited partners of Morningside, sought to invalidate a note and mortgage executed by Morningside and its general partner, Lemieux, securing a loan provided by Sotavento, a licensed mortgage broker. Braunstein, the president of Sotavento, also acted as counsel for Lemieux and Morningside in connection with the loan. Plaintiffs alleged that Braunstein breached his fiduciary duty to Morningside "and violated the Rules of Professional Conduct when he, as an attorney, entered into a business transaction with a client and failed to inform the client, *in writing,* that the client should seek advice from independent counsel."

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[9] The rule against fracturing holds that "'a case arising out of an attorney's alleged bad legal advice or improper representation' may not 'be split out into separate claims for negligence, breach of contract, or fraud [(or any other non-negligence theory)] because the real issue remains one of whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise.'" *Beck v. Law Office of Edwin J. (Ted) Perry, Jr., P.C.*, 284 S.W.3d 416, 426 - 27 (Tex. Civ. App. 2009) (brackets in original).

[10] In *Murphy*, unlike the present litigation in which Softek alleges that LAIC was unjustly enriched, there was no allegation that the attorneys "deceived [plaintiffs], pursued their own pecuniary interests over the [plaintiffs'] interests, or obtained any improper benefit by continuing to represent both clients." *Murphy*, 241 S.W.3d at 699. Softek's theory of recovery is based on violation of the ORPC.

Id. at 914 (emphasis in original). In affirming the rendition of summary judgment, the court stated that the trial "court properly determined that the issue of whether Braunstein had violated the Rules of Professional Conduct is a matter properly addressed to the statewide grievance committee." *Id*. In so holding the appellate court stated:

> Even if Braunstein's actions did constitute such a breach, that would not create an issue of material fact that would preclude the granting of a motion for summary judgment. "Violation of a Rule [of the Rules of Professional Conduct] should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." ... Accordingly, the court properly concluded that there was no merit to the plaintiffs' claim that there is a material fact in dispute as to whether Braunstein breached the Rules of Professional Conduct.

Id. at 915 (emphasis supplied) (internal citations omitted) (brackets in original); *see also Mahorney v. Waren*, 60 P.3d 38 (Okla. Civ. App. 2002) (dismissal of legal malpractice claim based on alleged violations of ORPC).

In the present litigation, all five (5) theories of recovery are based on alleged violations of the ORPC. Yet, Softek offers no specific evidence of such violations. Rather, its papers in opposition to LAIC's Rule 56 Motion are cast in generalities, vague assertions, assumptions, and conclusions. Not only is the claim barred as a matter of the substantive law, it is barred by the requirements of Rule 56. Based on the foregoing, Oklahoma's "transactional approach" demands that if Softek's position is without merit, then all theories of recovery that comprise the single cause of action must be summarily adjudicated in LAIC's favor.

VI. Conclusion.

The Court is respectfully requested to grant LAIC's Motion for Summary Judgment and render judgment in accordance therewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of this document was served by electronic service to the following parties as shown below on this 14th day of May, 2020:

Anthony S. Broadman
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Charles D. Neal, Jr.
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/s/ Bruce A. McKenna
Bruce A. McKenna

511-2004

EXHIBIT 1

709 Fed.Appx. 512
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

Theresia Renee BREEN, Plaintiff-Appellant,
v.
Jamie BLACK; Allyson Black,
Defendants-Appellees.

No. 16-8105
|
Filed September 15, 2017

Synopsis

Background: Following contentious divorce, former wife filed suit against husband and his current wife, asserting claims for civil stalking, tortious interference with existing business relations, slander, and libel. The United States District Court for the District of Wyoming granted defendants' motion for summary judgment, and former wife appealed.

Holdings: The Court of Appeals, Terrence L. O'Brien, Circuit Judge, held that:

[1] former wife had burden of showing, in form of affidavits, deposition transcripts, or other documents, existence of genuine dispute as to material fact, and

[2] hearing on motion for summary judgment was appropriate time for defendants to assert evidentiary challenges to former wife's affidavit in support of her opposition to motion.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (2)

[1] **Federal Civil Procedure** Tort cases in general

On summary judgment, once former husband and his current wife noted lack of evidence by former wife on essential elements of claims against husband and current wife for civil stalking, tortious interference with existing business relations, slander, and libel, burden shifted to former wife to demonstrate, in form of affidavits, deposition transcripts, or other documents, existence of genuine dispute as to material fact. Fed. R. Civ. P. 56(c).

[2] **Federal Civil Procedure** Affidavits

Hearing on motion by former husband and his current wife for summary judgment was appropriate time to hear their hearsay and foundation challenges to former wife's affidavit in support of her opposition to motion, in former wife's action against husband and current wife for civil stalking, tortious interference with existing business relations, slander, and libel. Fed. R. Civ. P. 56.

(D.C. No. 1:15-CV-00168-NDF) (D. Wyoming)

Attorneys and Law Firms

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Robert J. O'Neil, Robert J. O'Neil Attorney at Law, Gillette, WY, for Defendants-Appellees

Before BRISCOE, O'BRIEN, and BACHARACH, Circuit Judges.

ORDER AND JUDGMENT*

Terrence L. O'Brien, Circuit Judge

After contentious divorce and child custody proceedings, Theresia Renee Breen ***513** filed this lawsuit against her ex-husband, Jamie Black, and his wife, Allyson Black. She raised a variety of claims, including civil stalking, tortious interference with existing business relations, slander, and libel. The district court entered a summary judgment in favor of the Blacks on all claims, citing Breen's failure to provide sufficient admissible evidence to support her allegations. We affirm.

We review the district court's grant of summary judgment de novo, applying the same legal standard as the district court. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). Summary judgment must be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Conversely, "[t]o avoid summary judgment, the evidence must be such that a reasonable jury could return a verdict for the nonmoving party." *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993). The nonmovant must identify sufficient evidence pertinent to the material issues of the case; "[c]onclusory allegations ... will not suffice." *Diaz v. Paul J. Kennedy Law Firm*, 289 F.3d 671, 675 (10th Cir. 2002) (internal quotation marks omitted). A motion for summary judgment improvidently denied is equally inappropriate as one improvidently granted.

[1]Breen makes three arguments on appeal. She first tells us the Blacks did not meet their initial burden to make "a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670-71 (10th Cir. 1998). We see it differently. Because the Blacks will not bear the burden of persuasion at trial, they can meet their initial burden "simply by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *See id.* at 671. The Blacks satisfied this standard by delineating the elements of the claims in their summary judgment motion and asserting a lack of admissible evidence to support those elements. The burden then shifted to Breen to go beyond her pleadings by setting forth facts, in the form of affidavits, deposition transcripts, or other documents listed in Fed. R. Civ. P. 56. *See Adler*, 144 F.3d at 671. Those facts must not only be admissible as evidence, but must reveal a genuine dispute as to a material fact. Fed. R. Civ. P. 56(c).

[2]In her second argument, Breen contests the fairness of the summary judgment hearing. After she filed an opposition brief, the district judge allowed both sides to present further arguments at a motions hearing. There, the Blacks challenged the admissibility of Breen's evidence (which consisted largely of her own affidavit) on hearsay and foundational grounds. Feeling "sandbagged," Aplt. Corrected Opening Br. at 10, Breen contends the Blacks should have raised this challenge in their opening brief; she also faults the district judge for not giving her an adequate opportunity to respond. Her first contention is a non-starter—the Blacks could not have challenged the admissibility of the affidavit's contents in their opening brief because Breen's affidavit was not then available; it appeared only *after* the Blacks' brief was filed. Moreover, the admissibility of Breen's "evidence" was a legitimate topic: ***514** affidavits used to oppose summary judgment must "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant ... is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). With respect to the second contention, the hearing transcript shows Breen was afforded an adequate opportunity to present and support her claims and even to correct numerous citation deficiencies in her opposition brief.

Finally, Breen insists she established genuine issues of material fact sufficient to preclude summary judgment. That is hardly the case. In its summary judgment order, the district judge went through the elements of each claim and carefully explained why Breen had not provided sufficient admissible evidence to support any claim or to create a genuine dispute of material fact, taking into account the applicable statutes of limitation. We have nothing to add to that thorough and cogent analysis.

We affirm the summary judgment on all claims. In addition, we deny Breen's motion to supplement the appellate record with deposition excerpts not included in the district court record. "[W]e conduct [our] review from the perspective of the district court at the time it made its ruling," reviewing only those materials adequately brought to the judge's attention. *Adler*, 144 F.3d at 671; *see, e.g.*, *Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1474-76 & n.4 (10th Cir. 1993) (declining to consider deposition transcripts because they were not before the district judge who made the summary judgment ruling). We have "an inherent equitable power to supplement the record on appeal with matters that were not before the district court," *United States v. Balderama-Iribe*, 490 F.3d 1199, 1202 n.4 (10th Cir. 2007) (internal quotation marks omitted), but Breen has not persuaded us such a "rare exception" to Federal Rule of Appellate Procedure

10(e) is appropriate here, *see* *United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000).

All Citations

709 Fed.Appx. 512

Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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