

IN THE COURT OF APPEALS
STATE OF GEORGIA

IVAN HENDRIK,)
)
APPELLANT)
)
vs.)
)
HEATHER FITZGERALD,)
)
APPELLEE)
)
_____)

APPEAL CASE NO. 05-147

BRIEF OF APPELLEE HEATHER FITZGERALD

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Introduction

This is a legal malpractice and libel action brought against attorney Heather Fitzgerald by her former client, Ivan Hendrik. Hendrik founded and served as the CEO of the multi-media company, Silver Vein Media, from 1991 through July 2002. He hired the Atlanta attorney, Heather Fitzgerald, to represent him in a shareholder's lawsuit in which he faced allegations of accounting fraud. Well-respected by her peers, Fitzgerald has been practicing law since she graduated from Emory Law School in 1988. In her 17 years in the legal profession, Fitzgerald had never been sued.

Hendrik's lawsuit is based upon a simple clerical error. In an attempt to have the accounting fraud charges dismissed against Hendrik, Fitzgerald's secretary mistakenly filed a wrong version of the Motion to Dismiss with the court. This version of the motion was factually incorrect and contained false allegations of sexual harassment against Hendrik. Although Fitzgerald immediately corrected her secretary's error by filing the correct version of the Motion to Dismiss, Hendrik chose to file the lawsuit against Fitzgerald.

In her response to Hendrik's two-count complaint, Fitzgerald asserted affirmative defenses against both the legal malpractice and libel charges. Fitzgerald persuasively argued that as a limited purpose public figure, Hendrik could not recover for libel. In addition, Hendrik could not recover because the inclusion of erroneous facts in the Motion to Dismiss was purely accidental and not done with actual malice. Finally, Fitzgerald asserted that the privileged pleadings rule, Ga. Code Ann. § 51-5-8, served as an absolute bar against recovery for libel. Regarding Hendrik's cause of action for legal malpractice, Fitzgerald demonstrated that Hendrik failed to show that she breached her duty as a lawyer to provide legal services skillfully, and that Hendrik failed to prove that she was the proximate cause of his injuries.

The Superior Court of Fulton County properly granted Fitzgerald's Motion for Summary Judgment, holding that Hendrik failed to rebut the presumption that Fitzgerald provided legal services skillfully, and that he failed to provide evidence that she was the proximate cause of his injuries. The Appellee, Heather Fitzgerald, files this brief requesting that the Court of Appeals reject Hendrik's appeal and affirm the Superior Court's ruling.

Statement of the Case

On May 3, 2005, Ivan Hendrik ("Hendrik") filed a two-count complaint in the State of Georgia's Superior Court of Fulton County against Heather Fitzgerald, his former attorney, which alleged legal malpractice and libel. The complaint against Fitzgerald was based upon inaccurate information included in the original Motion to Dismiss filed on behalf of her client, Ivan Hendrik. The motion to dismiss included false allegations that Hendrik had previously been accused of sexual harassment. (R. 2-7).

In her written answer to Hendrik's complaint, Fitzgerald dismissed his allegations in their entirety and asserted affirmative defenses for the counts of legal malpractice and libel. Fitzgerald asserted three affirmative defenses against the libel charge. First, she claimed that Hendrik, as a limited purpose public figure, inserted himself into a public controversy through his charitable donations of large sums of money and real estate to help eradicate violence against women. Second, Fitzgerald emphatically stated that the inclusion of erroneous facts in the Motion to Dismiss was purely accidental and was not done with a malicious intent. Third, Fitzgerald stated that the privilege afforded to pleadings within the meaning of Ga. Code Ann. § 51-5-8 served as an absolute bar against Hendrik's cause of action for libel. Fitzgerald also asserted two affirmative defenses against the legal malpractice claim. She declared that Hendrik had reviewed the Motion to Dismiss and failed to notify her of its factual errors. Hendrik also failed to rebut the presumption that Fitzgerald provided legal services skillfully. (R. 16-17).

On July 2, 2005, counsel for Fitzgerald filed a Motion for Summary Judgment on the grounds that no genuine issues of material fact regarding either count of libel or legal malpractice existed. (R. 20-21). Fitzgerald's attorney, Benjamin Gladstone, even filed an affidavit on her behalf in support of the Motion for Summary Judgment due to the lack of genuine issues of material fact concerning both counts of Hendrik's complaint. (R. 22). An affidavit in opposition to Fitzgerald's Motion for Summary Judgment was filed by the attorney for Hendrik, Jeremy Little, who argued that genuine issues of material fact did exist. (R. 77).

After having reviewed all the pleadings, including all exhibits, deposition testimony, and affidavits submitted in support and in opposition to Fitzgerald's Motion for Summary Judgment,

and having heard extensive oral arguments from the attorneys representing both parties, the court granted Fitzgerald's Motion for Summary Judgment on both counts of legal malpractice and libel on July 9, 2005. (R. 89)

On August 2, 2005, Hendrik appealed the Superior Court's order and final judgment to the Georgia Court of Appeals pursuant to Ga. Const. art. VI, § 4. In his appeal, Hendrik requested that the Court of Appeals reverse the Superior Court's order granting summary judgment to Fitzgerald. (R. 90-91).

Statement of Facts

Appellant Ivan Hendrik, a resident of Atlanta, Georgia, founded and served as the CEO of the multi-media company, Silver Vein Media, from 1991 through July 2002. (R. 3). Since July, 2002, Hendrik has served as the National Director and founder of Dreams Never End, a national, non-profit organization that provides services to victims of sexual and violent crimes. (R. 2). On February 23, 2005, Hendrik hired Appellee and Atlanta attorney, Heather Fitzgerald, to represent him in a shareholder's lawsuit in which he faced allegations of accounting fraud. (R. 3). The "Accounting Fraud" lawsuit against Hendrik, Jones v. Silver Vein Media, Ivan Hendrik et al., was brought in the United States District Court for the Northern District of Georgia. (R. 3).

On February 25, 2005, Fitzgerald recommended to Hendrik that a motion to dismiss the allegations against him was proper. (R. 3). During a telephone conversation with Hendrik on March 8, 2005, Fitzgerald stated that she had completed a rough draft of the Motion to Dismiss and kindly offered to send the motion to him to review. (R. 3). Fitzgerald emphasized to Hendrik that the Motion to Dismiss was a work in progress and still required editing before it

could be filed. (R. 3). Hendrik proceeded to review the draft of the Motion to Dismiss, and noticed that it contained factual errors which stated that he had previously been accused of sexual harassment by a former employee. (R. 27). Despite this knowledge, Hendrik willingly chose not to notify his attorney, Fitzgerald, of the errors contained in the draft. (R. 28). Instead, Hendrik informed Fitzgerald that he had reviewed the draft of the Motion to Dismiss and did not see any problems with it. (R. 29).

Fitzgerald filed the Motion to Dismiss in a timely manner on behalf of Hendrix in the “Accounting Fraud” case on March 10, 2005. (R. 4). Mason Dixon, an investigative reporter for the *Atlanta Journal-Constitution*, was informed that Fitzgerald’s Motion to Dismiss referenced allegations of sexual harassment against Hendrik. (R. 4). The next day, Dixon published an article in the *Atlanta Journal-Constitution* that made mention of the allegations. (R. 4). Upon learning of Dixon’s story, Fitzgerald immediately contacted the *Atlanta Journal-Constitution* and demanded a retraction regarding the false allegations. (R. 45). Consequently, the *Atlanta Journal-Constitution* retracted the story the very next day. (R. 45).

In fact, Fitzgerald realized that her secretary had inadvertently filed the wrong version of the Motion to Dismiss soon after it was filed on March 10, 2005. (R. 44). Fitzgerald immediately submitted the correct version of the Motion to Dismiss to the court on March 11, 2005. (R. 45). However, the amended Motion to Dismiss was not accepted and stamped by the clerk’s office until March 14, 2005. (R. 45). Fitzgerald, who had spent more than forty hours doing diligent legal research and preparing the Motion to Dismiss, also promptly called and left Hendrik a message, notifying him that her secretary had mistakenly filed the wrong version of the

Motion to Dismiss. (R. 46, 47).

After reading Dixon's story in the *Atlanta Journal-Constitution* on March 11, 2005, Hendrik called Fitzgerald to express concern about the publication of the allegations. (R. 47). Fitzgerald assured him that she had already called the newspaper to demand a retraction. (R. 47). Hendrik informed Fitzgerald that he appreciated her timely response to the matter. (R. 47). Furthermore, Hendrik acknowledged that he had always been satisfied with Fitzgerald's prior work as his personal lawyer. (R. 37).

Hendrik claimed that he lost credibility in the community and experienced emotional distress after the publication of the article in the *Atlanta Journal-Constitution*. (R. 27). However, Hendrik's credibility in the community had already been questioned in a prior publication. (R. 39). Before the publication of the article in the *Atlanta Journal-Constitution*, an article in the January 12, 2005 edition of the *Atlanta Business Chronicle*, a paper read by business and community leaders, discussed the serious accounting fraud charges pending against Hendrik. (R. 39). The article described the charges which alleged that Hendrik falsely inflated the profits of his company, Silver Vein Media. (R. 39).

Fitzgerald was an experienced lawyer. (R. 44) After graduating from Emory Law School in Atlanta with honors, she began practicing law in 1988. (R. 44). Until the Hendrik complaint, Fitzgerald had never been sued. (R. 44).

Questions Presented

1. In granting Fitzgerald's Motion for Summary Judgment on the libel claim, did the lower court properly conclude that Hendrik was a limited purpose public figure as a

- matter of law due to his involvement in the public controversy of violence against women and because his participation was germane to that controversy?
2. Did the lower court correctly determine that Hendrik is barred from recovery on his libel claim because the factually incorrect Motion to Dismiss mistakenly filed by Fitzgerald's secretary is protected by the pleadings privilege rule under Ga. Code Ann. § 51-5-8?
 3. In granting the Fitzgerald's Motion for Summary Judgment on the legal malpractice claim, did the lower court come to the correct conclusion that Hendrik was unable to provide a material dispute showing that Fitzgerald breached her duty as an attorney to provide legal skills in an ordinary and skillful manner?
 4. Did the lower court properly determine that Fitzgerald was not the proximate cause of Hendrik's injuries due to the fact that no person could have foreseen that the mistakenly filed Motion to Dismiss could be the direct cause of Hendrik's emotional distress?

Summary of Argument

In granting summary judgment in favor of Fitzgerald, the lower court correctly ruled that Hendrik could not recover for libel under Ga. Code Ann. § 51-5-8. The privilege afforded to pleadings within the meaning of this statute serves as an absolute bar against Hendrik's cause of action for libel. All charges, allegations, and averments contained in regular pleadings such as the Motion to Dismiss filed by Fitzgerald which are pertinent and material to the relief sought, whether legally sufficient to obtain it or not, are privileged. However, false or malicious these

pleadings may be, they are not libelous. All information contained within the Motion to Dismiss is pertinent and material to the structure and object for which the motion was filed. As a result, Fitzgerald is immune from all liability and Hendrik is barred from recovery under his libel claim.

Hendrik also can not recover for libel due to his role as a limited purpose public figure. The test for determining liability in a libel case turns on whether the libeled party is a public or private figure. Accordingly, there are two types of public figures: public figures for all purposes and public figures for limited purposes. The Georgia Supreme Court adopted a three-prong test to determine whether a person is a limited-purpose public figure as a matter of law. Under this test, the court must isolate the public controversy, examine the plaintiff's involvement in the controversy, and determine whether the alleged defamation was germane to the plaintiff's participation in the controversy. Through his charitable work and efforts to end violence against women, Ivan Hendrik clearly satisfies all three of these prongs, and is thus barred from recovery on the claim of libel.

The lower court also properly determined that the evidence was more than sufficient to authorize a ruling of summary judgment in favor of Fitzgerald on the count of legal malpractice. To prevail on such a claim, one must prove that the attorney breached her duty to use "such skill, prudence, and diligence as lawyers of ordinary skills and capacity commonly possess and exercise in the performance of the tasks which they undertake." In malpractice claims against attorneys, it is of the utmost importance that competent evidence of the acceptability of a particular conduct is presented by expert witnesses to determine what a competent lawyer would have done under similar circumstances. Moreover, the defendant, not the plaintiff, must be the proximate cause of

the tort in order to gain recovery. If an intervening factor breaks the chain of causation leading from defendant to plaintiff, there can be no recovery.

Hendrik failed to offer expert testimony that could rebut the presumption that Fitzgerald performed her legal services in an ordinary and skillful manner as would any other reasonable attorney in similar circumstances. The facts demonstrate that Fitzgerald exercised a reasonable degree of skill, care, prudence, and diligence towards Hendrik at all times. Finally, the lower court also properly found that Hendrik himself was the proximate cause of his harm because he read a copy of the Motion to Dismiss and offered his attorney, Fitzgerald, no objections to its content.

Based on the arguments presented above, this Court of Appeals should reject all of Hendrik's claims and affirm the lower court's decision to grant Fitzgerald's Motion for Summary Judgment.

Standard of Review

This is an appeal from the Superior Court's order granting summary judgment to the Appellee, Heather Fitzgerald, which is reviewed de novo in this court. Under Ga. Code Ann. § 9-11-56, summary judgment can only be granted if the moving party has demonstrated that no genuine issue of material fact exists and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. Sewell v. Trib Publications, Inc., 276 Ga.App. 250, 622 S.E.2d 919 (Ga.App. 2005). Mathis v. Cannon, 252 Ga.App. 282, 556 S.E.2d 172 (Ga.App. 2001). Following this rule, a defendant may prevail at summary judgment by showing the court that the documents and affidavits from experts,

depositions, and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the plaintiff's case. Williams v. Steplar, 227 Ga.App. 591, 490 S.E.2d 167 (Ga.App. 1997). In this case, the Superior Court was correct in its determinations and the Court of Appeals should affirm the ruling of the lower court.

Argument

I. Libel

A. Legal Background-Constitutional Concerns

Throughout the years the tort of libel has undergone drastic changes. In 1964, the United States Supreme Court revolutionized the law of libel with its decision in New York Times Co. v. Sullivan. This landmark decision held that the constitutional guarantees of free speech and free press prohibited a public official from recovering damages for defamatory criticism of his conduct unless the official proves the offensive statement was made with "actual malice." This new standard of "actual malice" requires a public official to prove that the defendant had knowledge that the statement was false, or was made with reckless disregard of whether it was true or false. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1291, (D.C. Cir. 1980).

Only three years later, the United States Supreme Court was able to apply the New York Times' rule on actual malice in Curtis Publishing Co. v. Butts. Here, the court defined "public figures" as individuals who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." This ruling

extended the constitutional privilege established in New York Times to protect criticism of not only public officials, but also public figures in both the realms of government and in the private sector. As a result, libel actions could no longer be based on negligence if the plaintiff was deemed to be a public official or public figure. Id.

The United States Supreme Court subsequently explored the difference between public figures and private persons in defamation cases involving statements of public concern in Gertz v. Robert Welch, Inc. Gertz noted at length two fundamental differences between public and private persons. First, public figures typically have greater access to the media which gives them “a more realistic opportunity to counteract false statements than private individuals normally enjoy.” Second, and more importantly, “public figures...voluntarily expose themselves to increased risk of injury from defamatory falsehoods concerning them.” Plainly stated, public figures invite attention and scrutiny. Waldbaum, 627 F.2d at 1292.

In trying to define who is a public figure, Gertz created two sub-classifications: persons who are public figures for all occasions (general purpose public figure), and those who are public figures for particular public controversies (limited purpose public figure). The court explained that some persons may hold positions with “such pervasive fame or power” that they are considered public figures for all purposes. More often, the court continued, “an individual involuntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” Waldbaum, 627 F.2d at 1291.

B. Hendrik’s role as a limited purpose public figure bars him from recovering for libel.

In Mathis v. Cannon, the Georgia Supreme Court set out the proper standards in the form

of a three-prong test for determining whether plaintiffs in a defamation suit are limited purpose public figures. Under this test, the court must isolate the public controversy, examine the plaintiff's involvement in the controversy, and determine whether the alleged defamation is germane to the plaintiff's participation in the controversy. Mathis, 556 S.E.2d at 176.

Through an application of this test to the facts set forth in the record, the lower court correctly determined that Ivan Hendrik was a limited purpose public figure as a matter of law. Likewise, as a limited purpose public figure, Hendrik is unable to recover on his claim for libel against his attorney, Heather Fitzgerald. An analysis of the Mathis test will show that not only was Hendrik deeply involved in a public controversy, but also the alleged defamation was germane to the plaintiff's participation in that controversy.

1. The eradication of violence and abuse against women is a public controversy.

As the founder and national director of Dreams Never End, a non-profit organization dedicated to helping victims of sexual and violent crimes, Hendrik was involved in a public controversy. This controversy dealt with how to help eradicate the social epidemic of violence against women. A controversy is deemed public if it affects those not directly involved and if it is debated in the public square. Public controversies also must involve a legitimate public concern. Silvester v. American Broadcasting Cos., 839 F.2d 1491, 1494, 1495 (11th Cir. 1988).

Examples of public controversies include corruption in the gambling industry (Silvester v. American Broadcasting Cos.) and the safety of Atlanta's Olympic Park during the 1996 Olympics (Atlanta Journal Constitution v. Jewell). Corruption in the gambling industry in Silvester was both a newsworthy and legitimate public concern as the controversy was debated publicly on

programs such as “20/20” and in newspapers such as the *Wall Street Journal* and the *New York Times*. Silvester, 839 F.2d at 1494. Similarly, the safety concerns of Atlanta’s Olympic Park was an important public concern that was discussed in the public arena by millions, written about in publications, and debated on numerous television programs. Atlanta Journal-Constitution v. Jewell, 251 Ga.App. 808, 555 S.E.2d 175 (Ga.App. 2002).

In similar fashion to the scenarios in Silvester and Jewell, clearly the social issue of sexual and violent crimes is a public controversy. This epidemic of sexual and violent crimes is truly a legitimate public concern. Without a doubt, it is a controversy that generates discussion and debate throughout the United States. These crimes affect not just the victims and activists (Hendrik) but also society at large. The first prong of the Mathis test is satisfied because violence against women is a public controversy.

2. Hendrik is involved in a public controversy.

As the national director of Dreams Never End, Hendrik was deeply involved in the public controversy of violence against women. A plaintiff in a libel case will be considered “involved in a public controversy” if he purposefully tries to influence the outcome of a public controversy or, because of his position in the controversy, could realistically be expected to have an impact on its resolution. Sparks v. Peaster, 260 Ga.App. 232, 237, 581 S.E.2d 579 (Ga.App. 2003). These types of persons include artists, athletes, business people, dilettantes, and anyone who may be famous or infamous because of who he is or what he has done. Riddle v. Golden Isles Broadcasting, LLC., 275 Ga.App. 701, 703, 621 S.E.2d 822 (Ga.App. 2005).

The Jewell court determined that Olympic Park security guard, Richard Jewell, became

involved in a public controversy due to the comments and statements he made to the media regarding the safety and security of the Olympic Park in the aftermath of the Park's bombing. Jewell, 555 S.E.2d at 176. The Mathis court also deemed the plaintiff to have been involved in a public controversy due to his crucial role in helping the Solid Waste Management Authority obtain business commitments from other county and city governments throughout South Georgia. Mathis, 573 S.E.2d at 382.

Comparable to the plaintiff in Mathis, Hendrik voluntarily injected himself into the public controversy of violence against women when he founded Dreams Never End. As the self-appointed director of this national organization and through his many contacts with celebrities and the elite which he created throughout the years as a prominent businessman and philanthropist, Hendrik had the power and resources to help eradicate violence and abuse against women. While Hendrik has chosen not to communicate personally with the media, he clearly has access to the national media. Multiple newspapers and television programs such as "60 Minutes" have requested interviews with him. Instead, Hendrik has chosen to communicate with the media through the Public Relations department of Dreams Never End. Due to Hendrik's status as a philanthropist and wealthy businessman, it is abundantly clear that he has purposefully tried to influence the outcome of the public controversy of violence against women through his work with Dreams Never End.

3. Alleged defamation against Hendrik is germane to his participation in the public controversy.

The false allegations of sexual harassment contained in Fitzgerald's Motion to Dismiss, as

reported by the *Atlanta Journal-Constitution*, are definitely germane or relevant to the public controversy of violence against women. To satisfy the third-prong of the Mathis test, the court must determine that the alleged defamation was germane to the plaintiff's participation in the public controversy. Mathis, 573 S.E.2d at 381. According to Jewell, anything which might touch on the controversy is relevant. Jewell, 555 S.E.2d at 178. The Sparks court also emphasized that a publication is germane if it might help the public decide how much credence should be given to the plaintiff. Sparks, 581 S.E.2d at 583.

In Sparks, the court held that information regarding the plaintiff's character and stability was relevant to the amount of trust that the public may place in his statements and assertions. Id. The Silvester court also ruled that the allegedly defamatory "20/20" broadcast was germane to the plaintiff's participation in the controversy surrounding corruption in the gambling industry. Silvester, 839 F.2d at 1497.

Similarly, the false allegations of sexual harassment against Hendrik were indisputably germane to his involvement in the public controversy of eradicating sexual violence and abuse against women. Like in Sparks, the allegations of sexual harassment are germane to the amount of trust and credibility supporters of Dreams Never End owe to Hendrik. As a man who has devoted his life and financial resources to cure the societal ill of violence against women, Hendrik's credibility and trust is potentially lost due to these allegations. As in the case of Jewell, anything which might touch the controversy of violence against women is relevant. This especially applies to an organization whose national director was accused of sexual harassment in a major newspaper. In agreement with Sparks, these allegations will definitely help the public

decide how much credence should be given to Hendrik. Thus, the third and final prong of the Mathis test is completely satisfied.

4. Conclusion

The lower court correctly granted Fitzgerald's Motion for Summary Judgment based on its determination that Hendrik is a limited purpose public figure and is thus barred from recovering on his libel claim. The above analysis has clearly demonstrated that Hendrik met all three necessary prongs to be considered a limited purpose public figure under the Mathis test. The Georgia Court of Appeals must affirm the Superior Court of Fulton County's decision to grant summary judgment in favor of Fitzgerald.

C. Pleadings Privilege

The Superior Court of Fulton County was correct in granting Heather Fitzgerald's Motion to Dismiss based on its decision that the pleadings privilege rule applied to the disputed motion. Fitzgerald's Motion to Dismiss meets every necessary requirement to attain absolute immunity from Hendrik's action for libel.

1. Fitzgerald's Motion to Dismiss is a privileged pleading.

Fitzgerald is absolutely immune from liability under the pleadings privilege rule adopted by the Georgia Courts. According to the pleadings privilege rule, Ga. Code Ann. § 51-5-8, "all charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction which are pertinent and material to the relief sought, whether legally sufficient to obtain it or not, are privileged." Allegations contained in these pleadings shall not be deemed libelous no matter how false or malicious they may be. Howard v. Dekalb County Jail Staff, 205

Ga.App. 116, 117, 421 S.E.2d 309 (Ga.App. 1992).

In the case of Williams v. Stepler, the court applied the pleadings privilege rule holding attorney Stepler immune from all liability after she wrongfully denied her husband, Williams, custody of their son through a protective order which was later reversed. This case, however, emphasized that the absolute privilege afforded under the pleadings rule has been broadly construed by the Georgia Courts to cover not just pleadings, but also “official court documents” including protective orders (Williams v. Stepler), an affidavit in support of an arrest warrant (Watkins v. Laser/Print-Atlanta), a filing with the Georgia state employment agency (Land v. Delta Airlines), and various other quasi-judicial proceedings and administrative tribunals. Williams v. Stepler, 227 Ga.App. 591, 595, 490 S.E.2d 167 (1997). Similarly, in Wilson v. Sullivan, the court ruled that Wilson was absolutely immune from false allegations of perjury and suborning perjury against Sullivan which he swore to in a bill. The court held that these allegations were material and pertinent to the object for which the bill was filed (to get an injunction), and the facts were material and pertinent to the whole structure of the bill even though they were legally insufficient. Wilson v. Sullivan, 81 Ga. 238, 7 S.E.2d 274, 276 (Ga. 1888). The purpose of this pleadings privilege rule is to promote the public welfare, thus allowing members of the legislature, judges of courts, jurors, lawyers and witnesses to speak freely their minds without incurring the risk of legal action. Stewart v. Walton, 254 Ga. 81, 82, 326 S.E.2d 738 (Ga. 1985).

Similar to Williams v. Stepler, the Motion to Dismiss filed by Fitzgerald is appropriately included under the umbrella of acceptable pleadings covered by the rule. The motion undoubtedly

falls within the category of official court documents. Also similar to Wilson v. Sullivan, all of the information contained in the Motion to Dismiss, including the false allegations of sexual harassment, are both pertinent to the whole structure of the motion and pertinent and material to the object for which the motion was filed: to dismiss the accounting fraud charges against Hendrik. This purpose was in fact reached as the Motion to Dismiss was successful.

In conclusion, Fitzgerald's motion to dismiss satisfied all of the requirements necessary to gain the absolute immunity afforded by the pleadings privilege rule. This privilege is absolute and not conditional. Based on these considerations, the Georgia Court of Appeals must affirm the lower court's ruling that the pleadings privilege under Ga. Code Ann. § 51-5-8 applies to Fitzgerald's Motion to Dismiss.

II. Legal Malpractice

In count two of his complaint, Ivan Hendrik alleged that his former attorney, Heather Fitzgerald, committed legal malpractice when her secretary mistakenly filed the wrong version of the Motion to Dismiss. Hendrik must establish three elements in order to prevail in a legal malpractice action. The first element which requires Hendrik to employ Fitzgerald as his attorney has already been established. The second element required that Hendrik show that Fitzgerald breached her duty to represent him with ordinary care, skill, and diligence. Finally, the third element required Hendrik to prove that Fitzgerald's alleged negligence was the proximate cause of the injuries he suffered. Allen v. Lefkoff, Duncan, Grimes & Dermer, 265 Ga. 374, 375, 453 S.E.2d 719 (Ga. 1995).

In the following analysis, I will demonstrate that Fitzgerald never breached her duty to

represent Hendrik as would any other lawyer in the same or similar circumstances. I will also discuss how Hendrik failed to offer sufficient evidence that Fitzgerald was the proximate cause of his injuries. Based on the conclusions drawn from this analysis, I ask the Georgia Court of Appeals to affirm the lower court's decision granting summary judgment in favor of Fitzgerald.

A. Fitzgerald did not breach her duty owed to Hendrik.

Fitzgerald represented Hendrik at all times with a high level of care, and did not breach this sacred duty as her client has alleged. Members of all professions performing professional services have a duty to exercise a reasonable degree of skill, care, prudence, and diligence which ordinary members, employed by their respective professions, commonly possess and exercise.

Housing Authority of Atlanta v. Greene, 259 Ga. 435, 436, 383 S.E.2d 867 (Ga. 1989).

Likewise, an attorney has the duty to act with ordinary care, skill, and diligence in representing his client. Barnes v. Turner, 278 Ga. 788, 851, 606 S.E.2d 849 (Ga. 2004).

The Hughes court emphasized that the burden is always on the plaintiff to show breach of duty in a legal malpractice action. Hughes v. Malone, 146 Ga.App. 341, 344, 247 S.E.2d 107 (Ga.App. 1978). The court in Rapid Group held that the attorney breached the standard of care owed to his client by failing to respond to discovery which resulted in a default judgment. Here, the court stressed that an attorney breaches her duty if she “willfully or negligently fails to apply commonly known and accepted legal principles and procedures through ignorance of basic principles of law or through a failure to act reasonably to protect his client's interests” after undertaking to accomplish a specific result. Rapid Group Inc. v. Yellow Cab of Columbus, Inc.,

253 Ga.App. 43, 44, 557 S.E.2d 420 (Ga.App. 2001). Similarly, Barnes held that the attorney also failed to meet the standard of care owed to his client. Barnes, 606 S.E.2d at 851.

Unlike the attorney in Barnes, Fitzgerald did not breach her duty owed to Hendrik. Instead, Fitzgerald met her duty to represent Hendrik with ordinary and reasonable care. In contrast to the attorney in Rapid Group, Fitzgerald did not willfully or negligently allow her secretary to file the wrong version of the Motion to Dismiss. To show that she respected the duty owed to her client, Hendrik immediately corrected the secretary's error by submitting an Amended Motion to Dismiss with the court. In contrast to the careless attorneys in Rapid Group and Barnes, Fitzgerald devoted hours and hours of her time to researching the legal and factual elements pertaining to Hendrik's case. Not only did Fitzgerald spend a significant amount of time editing and proofreading the Motion to Dismiss, but she also filed it diligently and in a timely manner. It is clear that Fitzgerald did not breach the duty owed to Hendrik.

B. Expert Testimony

Hendrik's failure to rebut the presumption that his attorney, Fitzgerald, provided legal services skillfully bars him from recovering on the claim of legal malpractice. Under Ga. Code Ann. § 9-11-9.1(a), the plaintiff in an action alleging professional malpractice is required to file with the original complaint an affidavit of an expert competent to testify. Morris v. Atlanta Legal Aid Society, Inc., 222 Ga.App. 62, 64, 473 S.E.2d 501 (Ga.App. 1996). This expert's affidavit must set forth at least one negligent act or omission claimed to exist and the factual basis for each claim. Id.

Expert testimony is necessary to establish the parameters of acceptable professional

conduct. According to the Hughes court, juries are unable to rationally apply negligence principles to professional conduct without evidence of what a competent lawyer would have done under similar circumstances. Hughes, 247 S.E.2d at 109. In Hughes, the court affirmed summary judgment in favor of the attorney due to the plaintiff's inability to offer expert testimony which rebutted the presumption that the attorney acted in an ordinary and skillful manner. Id.

According to Berman, these experts are necessary so that juries will not speculate about what "professional custom" or standard of care is required in a legal malpractice action. Berman v. Rubin, 138 Ga.App. 849, 853, 227 S.E.2d 802 (Ga.App. 1976). However, evidence of ethical violations (if offered by expert testimony) can never serve as a legal basis for a legal malpractice claim in the state of Georgia. Allen v. Lekoff, Duncan, Grimes & Dermer, 265 Ga. 374, 375, 453 S.E.2d 719 (Ga. 1995). In Allen, the court disallowed any evidence relating to violations of the Code of Professional Responsibility. In fact, the McEachern court did the same and held that relevant evidence regarding ethical violations may be deemed inadmissible if its probative value is outweighed by its potentially unduly prejudicial impact or its tendency to confuse the issues or mislead the jury. McEachern v. McEachern, 260 Ga. 320, 321, 394 S.E.2d 92 (Ga. 1990).

Like the expert in Morris, Hendrik's expert, Sanjay Premakumar, failed to set forth one negligent act or omission required to rebut the presumption that Fitzgerald provided legal services skillfully. Similar to the plaintiffs in Allen and McEachern, Premakumar relied solely on the "Georgia Rules of Professional Responsibility" especially Rule 1.1 which states that "a lawyer shall provide competent representation to a client." Relying on the holdings of Allen and McEachern, any possible violation of an ethical standard such as Rule 1.1 can not serve as the

basis for Hendrik's claim of legal malpractice. Similar to McEachern, these possible ethical violations put forth by Hendrik's expert may be deemed inadmissible by the court. Clearly, Premakumar's testimony, which is based solely on possible ethical infractions, should not be considered because it clouds the issue and may prejudice the jury. Similar to Hughes, the expert testimony of Sanjay Premakumar is not sufficient to defeat the presumption that Fitzgerald provided legal services to Hendrik as would any other attorney.

C. Fitzgerald was not the proximate cause of Hendrik's alleged injuries.

Fitzgerald's actions as legal counsel for Hendrik were not the proximate cause of his alleged injuries which included emotional distress. A client may recover for legal malpractice only if the negligence of the attorney proximately caused the damage to the client. Morris, S.E.2d at 504. Under Ga. Code Ann. § 51-12-9, damages, which are the legal and natural result of the action done, are not too remote to be recovered. However, damages traceable to the act, but which are not its legal and natural consequences, are too remote to be recovered. Strickland v. Dekalb Hospital Authority, 197 Ga.App. 63, 64, 397 S.E.2d 576 (Ga.App. 1990). Likewise, a wrongdoer is not responsible for a consequence which is merely a possibility, but instead is only responsible for a consequence which is probable according to ordinary and usual experience. Natural are probable consequences are those consequences which can be foreseen. Id at 65. These consequences tend to happen frequently and can easily be expected to occur again given the right conditions and circumstances. Id at 66. In these types of cases, "the inquiry is not whether the defendant's conduct constituted a cause in fact of the injury, but rather whether the causal connection between that conduct and the injury is too remote for the law to countenance a

recovery.” Collie v. Hutson, 175 Ga.App. 672, 673, 334 S.E.2d 13 (Ga.App. 1985).

In Collie, the plaintiff's wife brought a wrongful death suit against police officers after an escaped felon shot and killed her husband. However, the court held that the police officers were not the proximate cause of her husband's death because the escapee's act was unforeseeable. Id at 13. In addition, the appellant in Dekalb v. Strickland alleged that the sole proximate cause of the injury he sustained when he shot his wife “was the incapacitating effect of the drugs which had been administered to him” by a medical doctor after the shooting, and the doctor’s subsequent failure to supervise him while he was under the influence of drugs. Dekalb, 397 S.E.2d at 578.

Similar to the scenario laid out in Dekalb, the injuries allegedly sustained by Hendrik are clearly too remote to be considered the natural and probable consequences of Fitzgerald’s filing of the Motion to Dismiss. Also similar to the facts of Collie, Hendrik’s injuries were not foreseeable. Fitzgerald can not be held responsible for Hendrik’s injuries which are merely possible but yet highly improbable. In order to recover, Hendrik’s injuries needed to be probable. No person could reasonably expect to hold a police officer liable for the crimes committed of an escaped felon (Collie), nor could someone expect to hold a doctor liable for a shooting committed by an escaped patient (Dekalb). Likewise, no person could have foreseen that the mistake made by Fitzgerald’s secretary would be the direct cause of Hendrik’s alleged emotional distress. The Court of Appeals should affirm the lower court’s ruling due to the fact that Fitzgerald was not the proximate cause of Hendrik’s alleged injuries.

D. Hendrik’s failure to read and object to the factual errors contained in the Motion to Dismiss served as an intervening factor which bars recovery.

Hendrik can not prevail on his claim for legal malpractice because he failed to notify his attorney, Fitzgerald, of the factual errors contained in the draft of the motion to dismiss after having reviewed its content. Causation must be established in every tort action including legal malpractice. Berman, 227 S.E.2d at 804. If an intervening factor exists which breaks the chain of causation leading from the Appellant to the Appellee, recovery is barred. Id. In Berman v Rubin, the Appellant's failure to read and comprehend the unambiguous legal documents constituted an intervening cause. As a result, the Appellant Berman was barred from recovering for his alleged injuries. Id.

The "read or perish" rule states simply that when one can read a document, he must do so, or suffer the consequences. Id. According to the Berman court, when a document's meaning is unambiguous and requires no legal explanation, and the client is well-educated, without a disability, and has the opportunity to read what he signed, no action for legal malpractice based on the attorney's misrepresentation of the document will exist. Id. The Hudson court stressed that there are few rules of law more fundamental than that which requires a party to "read what he signs and be bound thereby." Hudson v. Windholz, 202 Ga.App. 882, 887, 416 S.E.2d 120 (Ga.App. 1992). In the case of Hudson, the plaintiff signed a release form that barred her from suing the defendant; however, the plaintiff changed her mind and wished to seek damages against the defendant but could not due to the release form which she had signed. Id.

Like the Appellant in Berman, Hendrik also read a draft of the Motion to Dismiss. Instead of informing his attorney that the draft contained errors which he supposedly found offensive, he did nothing. Like Berman, Hendrik was also a well-educated man without disability. He had

great capability and intelligence. Hendrik had achieved much success and wealth as the founder and former CEO of the multi-media company, Silver Vein Media. Just like Berman, Hendrik was capable of understanding the unambiguous Motion to Dismiss which he read and reviewed.

Similar to the release executed by the plaintiffs in Hudson, Fitzgerald's well-crafted Motion to Dismiss was plainly worded and lacked legal jargon that could have confused Hendrik. Thus, like in the cases of Hudson and Berman, Hendrik's failure to read, comprehend, and object to any pertinent factual errors served as an intervening factor which bars him from recovering for legal malpractice.

E. Conclusion.

Ivan Hendrik can not recover on his claim for legal malpractice against Heather Fitzgerald. The analysis proved that Fitzgerald never breached her duty to exercise a reasonable degree of skill, care, prudence, and diligence towards her client, Hendrik. Hendrik also failed to offer competent evidence rebutting the presumption that Fitzgerald skillfully provided legal services to him. The evidence overwhelmingly shows that it is not foreseeable, nor is it probable that Fitzgerald's actions could have been the proximate or direct cause of the alleged injuries suffered by Hendrik. In light of the fact that Hendrik was a defendant in a publicized accounting fraud case, there were many possible causes for his alleged emotional stress. To reach the conclusion that Fitzgerald was responsible for these injuries is both extremely improbable and remote.

As an educated and successful business leader suffering from no disability, it was Hendrik's responsibility under the "read or perish rule" to report any objectionable factual errors to his attorney, Fitzgerald, which he discovered while reading the Motion to Dismiss. His failure

to do so means that Hendrik will be prevented from prevailing on his claim for legal malpractice. Consequently, it is for these reasons that the Court of Appeals must affirm the Superior Court's decision to grant Heather Fitzgerald's Motion for Summary Judgment.