

FILED: January 19, 2000

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MARY ANN JEFFRIES and WILMA
JEFFRIES,

Appellants,

v.

DAVID B. MILLS and AARON J. BELL,

Respondents.

(16-95-06217; CA A98657)

Appeal from Circuit Court, Lane County.

George J. Woodrich, Judge.

Argued and submitted July 21, 1998.

David V. Gilstrap argued the cause for appellants. With him on the briefs was Davis, Gilstrap, Hearn & Welty.

Thomas W. Brown argued the cause for respondent David B. Mills. With him on the brief were Cosgrave, Vergeer & Kester, LLP, Charles D. Carlson, and Brown, Roseta, Long, McConville, Kilcullen & Carlson.

William G. Wheatley argued the cause for respondent Aaron J. Bell. With him on the brief were Maureen A. DeFrank and Jaqua & Wheatley, P. C.

Before De Muniz, Presiding Judge, and Haselton and Linder, Judges.

LINDER, J.

Plaintiff Wilma Jeffries's appeal as to defendant Aaron Bell dismissed; summary judgment on count one of Mary Ann Jeffries's claim against defendant David Mills reversed; otherwise affirmed.

LINDER, J.

This is a legal malpractice action brought against two attorneys based on their failure to prevent the sale of stock in closely held family corporations. Plaintiff Mary Ann Jeffries first hired defendant-attorney David Mills to represent her in a bankruptcy matter. Mary Ann's judgment creditors offered to purchase Mary Ann's stock from the bankruptcy trustee and presented the proposal to the bankruptcy court for approval. Mills did not attend the hearing on the proposed sale or file objections on Mary Ann's behalf, and the bankruptcy court ordered the sale. Mary Ann subsequently hired defendant-attorney Aaron Bell to file a motion for relief from that order. That motion was denied. Later, Mary Ann brought this malpractice action against both Mills and Bell. Her mother-in-law, Wilma Jeffries, who also held stock in the family corporations, joined in the action and alleged negligence on the theory that the sale of Mary Ann's stock diminished the value of her own. The trial court entered summary judgment in favor of both

defendants and against both plaintiffs.

Plaintiffs appeal, raising numerous assignments of error that call on us to resolve, *inter alia*, whether defendants owed a duty to Wilma, who was not their client; whether Mary Ann's claims against Mills were time-barred; and whether Mary Ann could establish causation with regard to her action against Bell. As we explain below, we hold that one of Mary Ann's counts against Mills was not time-barred. We therefore reverse entry of summary judgment as to that count. We dismiss Wilma's appeal of summary judgment entered in favor of Bell for lack of jurisdiction. In all other respects, we affirm.

I. THE SUMMARY JUDGMENT RECORD

Because this case was resolved on a motion for summary judgment, we follow the familiar standard of review set out in *Jones v. General Motors Corp.*, 325 Or 404, 420, 939 P2d 608 (1997). That is, we view the summary judgment record in the light most favorable to plaintiffs, the nonmoving parties, to determine if a genuine issue of material fact exists and if defendants are entitled to judgment as a matter of law. *Id.* In this case, however, the parties dispute what records are properly before us on summary judgment. On appeal, plaintiffs assert that the affidavits they filed in response to Mills's motion for summary judgment created genuine issues of material fact precluding summary judgment. However, Mills challenged the competency of those affidavits below and urged the trial court to disregard them. Shortly thereafter, plaintiffs filed a motion for leave to file supplemental affidavits. They did not admit in that motion that the original affidavits were insufficient, but they did assert that the proffered supplemental affidavits were intended to correct any alleged insufficiencies. The trial court did not rule on Mills's challenge to the original affidavits and, as described below, ultimately denied plaintiffs' motion for leave to file supplemental affidavits. We cannot determine on this record whether the trial court actually considered the original affidavits in granting summary judgment. Before examining the record to determine whether defendants were entitled to summary judgment, we therefore must first determine what record is properly before us.

The dispute over plaintiffs' affidavits arose when, in response to Mills's motion for summary judgment, plaintiffs submitted affidavits from Mary Ann and her husband, Michael. Mills argued that the trial court should disregard those affidavits because they failed to comply with ORCP 47 D. That rule provides that supporting and opposing affidavits on summary judgment "shall be made on *personal knowledge*, shall set forth such facts as would be *admissible* in evidence, and shall show affirmatively that the affiant is *competent* to testify to the matters stated therein." (Emphasis added.) The adequacy of the affidavits under ORCP 47 D is a legal question. *German v. Murphy*, 146 Or App 349, 353, 932 P2d 580 (1997).

Both Mary Ann's and Michael's affidavits consist of a series of one-sentence averments that merely incorporate specified paragraphs of the factual summary in plaintiffs' memorandum in opposition to summary judgment. That summary is 16 pages in length. It consists of numbered paragraphs containing statements that frequently blend factual allegations with legal conclusions. In incorporating paragraphs of the factual summary, often several at a time, the affiants purport not to adopt the "legal conclusions" in the summary, but they do not identify the particular statements they consider to be the disavowed "legal conclusions." Likewise, in incorporating and adopting statements of fact from the summary, purportedly based on each affiant's personal knowledge, the affidavits do not identify the incorporated statements.⁽¹⁾

The form and substance of the affidavits present other problems as well. Because of their novel structure, the affidavits provide scant basis for understanding whether or how the affiants had personal knowledge or are competent to testify regarding several of the factual allegations.⁽²⁾ See ORCP 47 D (affiant must "show affirmatively" that he or she is "competent to testify to the matters stated therein"). Also, it is not obvious that all of the facts incorporated into the affidavits constitute admissible evidence. At a minimum, the process by which plaintiffs chose to place information into the summary judgment record

