[Cite as *Estate of Hards v. Walton*, 2010-Ohio-3596.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93185

ESTATE OF BERTINA HARDS, ET AL.

PLAINTIFFS-APPELLANTS

vs.

GERALD WALTON, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-609552

BEFORE: Stewart, J., McMonagle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: August 5, 2010

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MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, Jacqueline Adams, as the administratrix of the estate of Bertina Hards, appeals from a summary judgment in favor of defendant-appellee, Gerald Walton, on her complaint that Walton, her attorney, committed legal malpractice by missing a filing deadline to respond to a dispositive motion, causing the court to grant the motion as unopposed. Her five assignments of error broadly challenge two points: the summary judgment and the court's decision to hear and resolve a number of outstanding motions on the morning of the scheduled trial.

I

{¶ 2} The facts are uncontested. The underlying action giving rise to the legal malpractice allegation involved an abuse of process claim that Adams filed against attorney Michael Shore. At the time, Adams was both the guardian of Hards's estate and Hards's personal guardian. She retained Shore to represent the estate in an action against an investment bank. A dispute between Shore and the estate arose over certain fees owed to Shore, and the probate division of the Lake County Court of Common Pleas ruled in Shore's favor. The estate sought relief from that judgment, and Shore filed a motion to have Adams removed as guardian of the estate. The probate court granted the estate's motion for relief from judgment and vacated its earlier judgment against the estate. The probate court then appointed another attorney "master commissioner" to make a recommendation on Shore's motion for fees and his request to have Adams removed as guardian of the estate. The master commissioner recommended that Shore not be awarded any additional fees and further recommended that Adams be removed as guardian. The probate court adopted the master commissioner's recommendations by denying Shore's motion for additional fees and removing Adams as the guardian of the estate (although it permitted her to continue serving as Hards's personal guardian). Hards died shortly after the probate

court issued its ruling, and the probate division of the Geauga County Court of Common Pleas appointed Adams administratrix of Hards's estate.

{¶ 3} The estate then filed a complaint against Shore in the general division of the Cuyahoga County Court of Common Pleas, alleging abuse of process. Shore filed a motion for judgment on the pleadings. The estate employed two attorneys to prosecute the action: Walton and James Flaherty. The attorneys agreed that Flaherty would research and draft all filings for the estate and that Walton would be responsible for filing the documents after proofreading and editing. Flaherty forwarded to Walton a response to Shore's motion for judgment on the pleadings, but a family emergency caused Walton to be away from his office and he neglected to tell his associates to handle the response or seek an extension of time in which to respond. The deadline for responding to the motion for judgment on the pleadings established by the court passed before Walton discovered that the response had not been filed. When Walton discovered that the response had not been filed, he immediately filed it, but learned that the "motion had already been considered." The court found the motion for judgment on the pleadings "unopposed, well-taken and granted" and dismissed the action with prejudice.

{¶ 4} Walton informed the estate of the adverse ruling. The estate did not appeal from that ruling, but nearly one year later filed a motion for relief

from judgment. Walton submitted an affidavit in support of the motion, claiming that the ongoing family emergency distracted him from filing a timely response and stating that he "neglected" to instruct his associates to file the response or seek an extension of time in which to respond. The court denied that motion as moot, apparently because the estate had refiled the abuse of process claim (the second *Shore* action) in another action in the same court but assigned to a different judge.

{¶ 5} The second *Shore* action was subsequently dismissed, despite the estate's claims that judgment on the pleadings in the first *Shore* action had been a dismissal without prejudice. On appeal, we affirmed the dismissal, finding that the judgment on the pleadings in the first *Shore* action constituted an adjudication on the merits and was thus res judicata that could not be relitigated in a second action between the same parties. See *Estate of Hards v. Shore*, 8th Dist. No. 86103, 2005-Ohio-6385, at ¶15.

{¶ 6} This action against Walton for legal malpractice followed. The estate alleged that Walton's failure to file a timely response to the motion for judgment on the pleadings in the first *Shore* action breached the standard of care for attorneys. The parties engaged in discovery, and the court set deadlines for the submission of expert reports. The estate sought an extension of the deadline to submit expert reports, but just days later filed a motion for summary judgment on the issue of Walton's liability. It relied on

Walton's admission of neglect made in his affidavit filed in support of the estate's motion for relief from judgment in the first *Shore* action to show its entitlement to judgment as a matter of law on the issue of Walton's liability. Walton filed his own motion for summary judgment, relying on his own opinion that he had not violated the applicable standard of care. He also noted that the estate offered no expert testimony to refute that opinion, choosing to rely solely on Walton's concession that he did not timely file a brief in opposition to the motion for judgment on the pleadings in the first *Shore* action. The court granted Walton's motion for summary judgment on grounds that the estate "failed to present genuine issues of material fact for trial affirmatively refuting defendant's proffered evidence." The court further held that all pending motions were moot.

II

{¶ 7} The following elements are necessary to establish a cause of action for legal malpractice: "(1) an attorney-client relationship, (2) professional duty arising from that relationship, (3) breach of that duty, (4) proximate cause, (5) and damages." *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, 887 N.E.2d 1167, at ¶8, citing *Vahila v. Hall*, 77 Ohio St.3d 421, 427, 1997-Ohio-259, 674 N.E.2d 1164; *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 105, 538 N.E.2d 1058. The elements of a legal malpractice claim are stated in the conjunctive, and the failure to establish

an element of the claim is fatal. See *Williams-Roseman v. Owen* (Sept. 21, 2000), 10th Dist. No. 99AP-871.

{¶ 8} Walton concedes that an attorney-client relationship existed between him and the estate and that he had a professional duty arising from that relationship. The issues for resolution are whether Walton breached a professional duty by failing to file a timely response to the motion for judgment on the pleadings in the first *Shore* action and, if so, whether the breach of that professional duty proximately caused the estate injury.

A

{¶ 9} "The duty of an attorney to his client is to '* * * exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, and to be ordinarily and reasonably diligent, careful, and prudent in discharging the duties he has assumed.'" *Palmer v. Westmeyer* (1988), 48 Ohio App.3d 296, 298, 549 N.E.2d 1202, quoting 67 Ohio Jurisprudence 3d (1986) 16, Malpractice, Section 9.

{¶ 10} Ordinarily, expert testimony is required to establish the relevant standard of care for an attorney, but an exception exists in actions where the breach or lack thereof is so obvious that it may be determined by the court as a matter of law, or is within the ordinary knowledge and experience of laymen. *McInnis v. Hyatt Legal Clinics, Inc.* (1984), 10 Ohio St.3d 112, 461

N.E.2d 1295; *Bloom v. Dieckmann* (1983), 11 Ohio App.3d 202, 464 N.E.2d 187.

{¶ 11} Under the circumstances, no expert testimony was required to prove that Walton's failure to file a brief in opposition to Shore's motion for judgment on the pleadings in the first Shore action constituted a breach of his duty to be reasonably diligent, careful, and prudent in discharging the duties he assumed for the estate. Missed filing deadlines are the bane of attorneys and constitute the leading cause of legal malpractice complaints. See Morrison (2002), Legal Malpractice: The Law in Arkansas and Ways to Avoid its Reach, 55 Ark.L.Rev. 267, 300. Some courts have held that missing a filing deadline is malpractice as a matter of law. See, e.g., *Kohler v. Woollen, Brown & Hawkins* (1973), 115 Ill.App.3d 455, 460, 304 N.E.2d 677 (holding attorneys liable for malpractice for missing wrongful death filing deadline); *Stanski v. Ezersky* (App.1994), 621 N.Y.S.2d 18, 19, 210 A.D.2d 186 (finding negligent as matter of law attorney's missing of medical malpractice filing deadline).

{¶ 12} Ohio has no such per se rule of legal malpractice, and we see no need to create one. In the proper case, expert testimony may well be required to counter assertions that an attorney's actions were guided by discretion or professional judgment. However, Walton has not asserted that his failure to file a response to the motion for judgment on the pleadings

stemmed from the exercise of professional judgment. He conceded that he missed the filing deadline because he was distracted by a family emergency. This was an admission that he breached the standard of care and obviated the estate's need for an expert to address this issue.

{¶ 13} It makes no difference to our conclusion that Walton supported his motion for summary judgment with a new affidavit in which he concluded that the services he rendered to the estate "were consistent with the prevailing standard of skill, care and proficiency customarily exercised by attorneys in civil cases in Cuyahoga County, Ohio." While it is true that an attorney can act as a self-serving expert in assessing whether that attorney's own conduct breached the applicable standard of care, cf. *Hoffman v. Davidson* (1987), 31 Ohio St.3d 60, 61, 508 N.E.2d 958, Walton's new affidavit contradicted his earlier affidavit. In the first affidavit, Walton undeniably admitted that he "neglected" to file opposition to a motion or to ensure that his associates did so. "Malpractice" is nothing more than professional negligence. By admitting his negligence, Walton conceded that he had not been reasonably diligent, careful, and prudent in discharging the duties he assumed.

{¶ 14} Walton also maintains that expert testimony is required because the law contemplates and excuses "tardy" filings as a means of granting relief from judgment under the Civ.R. 60(B)(1) ground of excusable neglect.

Whether family issues might have "excused" his neglect for purposes of obtaining relief from judgment under Civ.R. 60(B) is immaterial to the analysis of whether the initial conduct giving rise to the motion for relief from judgment was not negligent.

{¶ 15} Finally, we reject Walton's argument that he merely filed a "tardy" response to Shore's motion for relief from judgment, so the court's recitation that the motion was "unopposed" was clearly mistaken. "Tardy" is another word for "late." The court has no obligation to consider late filings, although it may choose to do so in its discretion. There is nothing in the record to suggest that Walton first sought leave to file the response brief instanter, or that he offered any justification for the late filing that might demonstrate an abuse of the court's discretion. Nothing in the Rules of Civil Procedure bars the court from granting motions as "unopposed," so the court did not err by ignoring a response filed out of rule and granting the motion as unopposed.

B

{¶ 16} We do, however, find merit to Walton's argument that summary judgment on the legal malpractice claim was justified because the estate offered no evidence to establish the element of proximate cause.

{¶ 17} In *Sabolik v. HGG Chestnut Lake Ltd. Partnership*, 180 Ohio App.3d 576, 2009-Ohio-130, 906 N.E.2d 488, we stated the following about proximate cause:

{¶ 18} "'[T]he proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred.' *Aiken v. Indus. Comm.* (1944), 143 Ohio St. 113, 117, 28 O.O. 50, 53 N.E.2d 1018. This definition encompasses a sense of 'but for' in that an original, wrongful, or negligent act in a natural and continuous sequence produces a result that would not have taken place without the act. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 287, 21 O.O.3d 177, 423 N.E.2d 467. In other words, proximate cause is 'that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated.' *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 143, 539 N.E.2d 614, quoting *Corrigan v. E.W. Bohren Transport Co.* (C.A.6, 1968), 408 F.2d 301, 303." Id. at ¶21.

{¶ 19} Acting as his own expert, Walton filed an affidavit in which he claimed that his failure to file a brief in opposition to the motion for judgment on the pleadings did not proximately cause the motion to be granted. Walton said that the estate's complaint in the *Shore* case had incorrectly stated a cause for abuse of process based on its fee dispute with Shore, but that the

estate really should have filed a claim of legal malpractice. So even had the estate filed a timely opposition to the motion for judgment on the pleadings, Walton opined that there was no legal basis for opposing the motion that would have caused the complaint to survive. The estate offered no expert testimony to rebut Walton's opinion that a timely response to the motion for judgment on the pleadings would have averted an adverse ruling.

{¶ 20} A motion for judgment on the pleadings is characterized as a delayed Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted. The trial court is obligated to view a motion for judgment on the pleadings by accepting all material allegations of the complaint as true. See *Kincaid v. Erie Ins. Co.*, 183 Ohio App.3d 748, 2009-Ohio-4372, 918 N.E.2d 1036, at ¶18. A motion for judgment on the pleadings should be granted when the court finds beyond doubt that the plaintiff can prove no set of facts entitling recovery. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus

{¶ 21} The court granted Shore's motion for judgment on the pleadings by stating that the motion had been "unopposed," and "well-taken[.]" Despite the court's notation that the motion had been unopposed, the court plainly undertook a substantive review of the motion as evidenced by its finding that motion was "well-taken." By granting the motion under the applicable standard for granting a motion for judgment on the pleadings, the

court must have taken the allegations of the complaint as true and found that the estate offered no set of facts that would entitle it to relief. So the failure to file a brief in opposition to the motion for judgment on the pleadings could not have been the sole reason that the court granted judgment on the pleadings.

{¶ 22} Moreover, our review of the late-filed brief in opposition to the motion for judgment on the pleadings convinces us that it would have been futile in averting judgment on the pleadings. The brief in opposition argued that Shore had "misinterpreted the nature of the Complaint" and that the estate sought relief only on the basis of abuse of process. But Shore made the specific argument that the estate failed to set forth an abuse of process claim that included an allegation that Shore initiated his complaint with probable cause, noting that the estate's complaint repeatedly alleged that Shore instituted his claim without probable cause.[1] The late-filed brief in opposition offered nothing more than this "response": "Plain reading shows that each of the elements of Abuse of Process has been repeated in each of the 11 counts." This was a wholly inadequate response because it failed to

[1]The elements of the tort of abuse of process are: "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed * * *; and (3) that direct damage has resulted from the wrongful use of process. * * * " *Yaklevich v. Kemp, Schaeffer & Rowe Co.*, 68 Ohio St.3d 294, 298, 1994-Ohio-503, 626 N.E.2d 115.

address Shore's argument that the estate failed to make any allegation that Shore instituted his fee action *with* probable cause. Shore's motion for judgment on the pleadings noted that the estate repeatedly alleged that Shore had no basis for seeking fees and that his actions in representing the estate and seeking fees amounted to a "fraud, malpractice and misconduct." Plainly, if Shore had fraudulently tried to obtain fees, he could not have instituted his fee action with the kind of probable cause required as a basic element of an abuse of process claim.

{¶ 23} It follows that the arguments raised in the late-filed brief in opposition to the motion for judgment on the pleadings would have been unavailing. The estate cannot show that Walton's failure to file the brief proximately caused the court to grant judgment on the pleadings as the motion would certainly have been granted even if the brief in opposition had been timely filed. We therefore find that the court did not err by granting summary judgment on the legal malpractice claim.

III

{¶ 24} The estate next argues that the court denied it due process of law by ordering that 15 pending substantive and procedural motions would be heard and adjudicated on the day of trial. We summarily overrule this assignment of error because it relies in large part on unrecorded statements allegedly made by the court during a pretrial conference with the parties, and

those statements are not a part of the record on appeal. See *Ostrander v. Parker-Fallis Insulation Co.* (1972), 29 Ohio St.2d 72, 74, 278 N.E.2d 363. Moreover, by granting summary judgment, the court essentially mooted consideration of the outstanding motions.

Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR