[Cite as *Jones v. Masters*, 2015-Ohio-993.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CARL JONES Appellant v. JOHN MASTERS, et al. Appellees	C.A. No. 27000 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2010-10-6800

DECISION AND JOURNAL ENTRY

Dated: March 18, 2015

CARR, Judge.

{¶1} Appellant, Carl Jones, appeals an order that granted summary judgment to appellee, attorney John Masters. This Court reverses and remands.

I.

{¶2} For many years, Carl "Mick" Jones worked at the Schwebel Baking Company. During his employment, he held a variety of jobs, some of which required him to work in the production area and others of which involved general facility maintenance. As an active union member, Mr. Jones knew that employees had concerns about the level of flour dust on the production floor and that some employees had reported developing breathing problems as a result. Mr. Jones also began to experience difficulty breathing at some point while he was employed in the production process. When the difficulty persisted to the point at which his ability to play sports was impaired, Mr. Jones sought medical treatment. His physicians

diagnosed him with asthma attributed to flour dust in the production area, and he ultimately left his job as a result.

{¶3} In 2007, Mr. Jones sued Schwebel for an employer intentional tort, represented by attorneys John Sivinski and Robert Marcis II. Schwebel moved for summary judgment, and attorney Sivinski filed a voluntary dismissal under Civ.R. 41(A)(1)(a) on Mr. Jones' behalf without opposing the motion. Attorney Sivinski refiled the complaint on December 22, 2008. A limited amount of discovery commenced, but on September 11, 2009, attorney Sivinski moved to withdraw as counsel for Mr. Jones, citing deterioration in the attorney-client relationship and Mr. Jones' desire to retain attorney Masters. Four days later, Schwebel moved for summary judgment. Mr. Jones did not respond, and the trial court granted summary judgment to Schwebel on December 8, 2009. No appeal was taken from that judgment.

{¶4} In October 2010, Mr. Jones sued attorneys Masters and Sivinski, along with several of their respective associates and law firms, for legal malpractice. Attorney Masters moved for summary judgment, arguing that even if Jones had responded to the motion for summary judgment in the underlying case, Schwebel would still have been granted summary judgment. Specifically, Attorney Masters argued that based on the undisputed facts, Schwebel had demonstrated that it did not intend to injure Jones or act with the belief that an injury to Jones was substantially certain to occur. In so doing, attorney Masters argued that the common law standards governing substantial certainty applied to statutory employer intentional torts under R.C. 2745.01. The trial court concluded that genuine issues of material fact remained and denied attorney Masters' motion for summary judgment on February 28, 2013.

{¶5} On April 19, 2013, attorney Masters moved the trial court to reconsider its order denying summary judgment, in effect moving for summary judgment for a second time and on a

different basis: that the Ohio Supreme Court had issued a new opinion that clarified the legal analysis under R.C. 2745.01 and rendered the "substantial certainty" analysis obsolete. The trial court granted attorney Masters' motion for summary judgment on that basis, and this appeal followed.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING SUMMARY JUDGMENT DISMISSING THE LEGAL MALPRACTICE CLAIM OF PLAINTIFF CARL JONES AGAINST DEFENDANT JOHN MASTERS.

{¶6} Mr. Jones' assignment of error argues that the trial court erred by granting summary judgment on his malpractice claim. Specifically, he maintains that the trial court incorrectly determined that even had attorney Masters opposed Schwebel's motion for summary judgment, Mr. Jones could not have obtained a better outcome in the underlying proceeding. We agree.

{¶7} This Court reviews an order granting summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Under Civ.R. 56(C), "[s]ummary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10. The substantive law underlying the claims provides the framework for reviewing motions for summary judgment, both with respect to whether there are genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Burkes v. Stidham*, 107 Ohio App.3d 363, 371 (8th Dist.1995).

{¶8} A claim of legal malpractice requires the plaintiff to prove that the attorney owed a duty to the plaintiff, that the attorney breached that duty and failed to conform to the standard of care, and that the failure proximately caused damages to the plaintiff. *Vahila v. Hall*, 77 Ohio St.3d 421 (1997), syllabus. This Court has recently explained proximate cause in the context of legal malpractice:

> A claim of legal malpractice requires the plaintiff to prove that the attorney owed a duty to the plaintiff, that the attorney breached that duty and failed to conform to the standard of care, and that the failure proximately caused damages to the plaintiff. As a general rule, "the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case * * * [and] a plaintiff in a legal malpractice action may be required, depending on the situation, to provide some evidence of the merits of the underlying claim."

(Internal citations omitted.) *Eastminster Presbytery v. Stark & Knoll*, 9th Dist. Summit No. 25623, 2012-Ohio-900, ¶ 6, quoting *Vahila* at 427-428. The plaintiff must prove "that there is a causal connection between the conduct complained of and the resulting damage or loss," which may require evidence related to the merits of the underlying claim. *Vahila* at 427-428.

{¶9} In this case, Mr. Jones has argued that attorney Masters committed malpractice by failing to respond to Schwebel's motion for summary judgment and that, if a response had been filed, summary judgment would not have been granted. In answering this question, we must look to the law applicable to the underlying case itself at the time the case was decided. *See, e.g.*, *Eastminster*, 2012-Ohio-900, at ¶ 9-10, 15-17 (concluding that given the legal framework applied by the trial court and affirmed by this Court in the underlying case, the appellant would not have prevailed on summary judgment had an exhibit been included in the record.).

{¶10} In the underlying case, Mr. Jones asserted a claim for an employer intentional tort against Schwebel. It appears from the appellate briefs that neither party disputes that R.C.

2745.01 is applicable to this case, and so the language of the statute is the starting place for our analysis. It provides, in part:

> (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
>
> (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

R.C. 2745.01(A)/(B). This statute is but the latest in a series of attempts by the legislature to circumscribe the breadth of relief available to injured workers who allege that they were intentionally harmed by their employers in a manner that is beyond the scope of the workers' compensation system. *See generally Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 14-33 (summarizing the history of employer intentional torts in Ohio).

{¶11} We need not reiterate the lengthy history of employer intentional torts here except to note that it provides the legal context for the trial court's December 8, 2009, decision. By that date, some courts of appeals had found R.C. 2745.01 unconstitutional. *See, e.g., Warren v. Libby Glass, Inc.*, 6th Dist. Lucas No. L-09-1040, 2009-Ohio-6686, ¶ 34; *Henson v. Cleveland Steel Container Corp.*, 11th Dist. Portage No. 2008-P-0053, 2009-Ohio-180, ¶ 41-43; *Barry v. A.E. Steel Erectors, Inc.*, 8th Dist. Cuyahoga No. 90436, 2008-Ohio-3676. Other courts of appeals interpreted R.C. 2745.01 to, in effect, "codif[y] the common law employer intentional tort," and "require[] evidence that the employer knew that the injury was substantially certain to occur." *Shanklin v. McDonald's USA, LLC*, 5th Dist. Licking No. 2008 CA 00074, 2009-Ohio-251, ¶ 40. *See also Houdek v. ThyssenKrupp Materials N.A., Inc.*, 8th Dist. Cuyahoga No. 95399, 2011-Ohio-1694, ¶ 43-45, *rev'd Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491,

2012-Ohio-5685. In any event, the Supreme Court of Ohio had not resolved the questions of the constitutionality of R.C. 2745.01 and the degree of intent required to prove a cause of action under R.C. 2745.01(A) until *after* the trial court granted Schwebel's motion for summary judgment. *See Kaminski*, 2010-Ohio-1027 (holding that R.C. 2745.01 does not violate the Ohio Constitution); *Houdek*, 2012-Ohio-5685 (holding that R.C. 2745.01(A) always requires a demonstration of specific intent to injure an employee.). Indeed, the Supreme Court did not resolve the latter question until the trial court in this case had denied attorney Master's motion for summary judgment in the first instance.

{¶12} With respect to the element of proximate cause the relevant law in a legal malpractice case is the law applicable to the underlying case *at the time of the alleged malpractice*. *See Eastminster*, 2012-Ohio-900, at ¶ 9-10, 15-17. This is a significant qualification because when a trial court determines whether summary judgment may be entered under Civ.R. 56, the substantive law determines what facts are material and provides the court's legal framework for analyzing the motion. *Anderson*, 477 U.S. at 248; *Burkes*, 107 Ohio App.3d at 371. Nonetheless, Attorney Masters renewed his motion for summary judgment in the legal malpractice case in light of the newly released opinion in *Houdek* and put forth additional arguments based on the holding of that case. The trial court relied explicitly on *Houdek* when it granted summary judgment to attorney Masters, despite the fact that the case had not been decided until almost three years after the trial court entered judgment in the underlying case.

{¶13} We therefore conclude that the trial court erred by granting summary judgment to attorney Masters upon consideration of a recently decided case instead of with reference to the state of the law as it existed when the alleged malpractice occurred. Mr. Jones' assignment of error is sustained on that basis.

III.

{¶14} Mr. Jones' assignment of error is sustained, and the judgment of the Summit County Court of Common Pleas is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee, John Masters.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CONCURS.

HENSAL, P. J.
DISSENTING.

{¶15} At the time the trial court dismissed Mr. Jones's intentional tort action, the Ohio Supreme Court had not interpreted Revised Code Section 2745.01, which had only been in effect for a few years. The Supreme Court has explained that, "[i]n the absence of a specific provision in a decision declaring its application to be prospective only, * * * [a] decision shall be applied retrospectively as well[.]" *State ex rel. Bosch v. Indus. Comm. of Ohio*, 1 Ohio St.3d 94, 98 (1982). There were no such "specific provisions" in *Houdek*, accordingly, its effect was "not to make new law but only to hold that the law always meant what the court says it now means." *Ohio Bur. of Workers' Comp. v. Mullins*, 140 Ohio App.3d 375, 378 (4th Dist.2000). In *Houdek*, the Supreme Court clarified the elements of an employer intentional tort claim under Section 2745.01. According to it, "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system." *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 25. Upon review of the record, I believe that the trial court correctly concluded that "there is no evidence that Schwebel deliberately intended to cause [Mr. Jones] to suffer from an occupational disease * * *." I, therefore, respectfully disagree with the majority's conclusion that the trial court erred when it granted summary judgment to Mr. Masters.

APPEARANCES:

DAVID P. BERTSCH, Attorney at Law, for Appellant.

RICHARD G. WITKOWSKI and NICHOLAS J. DERTOUZOS, Attorneys at Law, for Appellee.