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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

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Morgan Murphy

v.

Marjorie Forney

Appeal from Jefferson Circuit Court
(CV-17-247)

PER CURIAM.

AFFIRMED; NO OPINION.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim,
Stewart, and Mitchell, JJ., concur.

Sellers, J., dissents.

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SELLERS, Justice (dissenting).

I respectfully dissent from this Court's decision to affirm without an opinion the summary judgment in favor Marjorie Forney in this legal-malpractice action asserted against her by Morgan Murphy stemming from an underlying divorce proceeding involving child custody.

Morgan Murphy ("the husband") and Erica Murphy ("the wife") were married in February 2014; one child was born of the marriage. In June 2015, the wife filed a complaint seeking a divorce. In her complaint, the wife averred, among other things, that it was in the minor child's best interest that the parties have joint legal custody of the child, with the wife having "primary" physical custody. The husband retained Forney, an attorney licensed to practice law in Alabama, to represent him. According to the husband, Forney knew that he desired to have sole or, at the least, partial physical custody of the child; however, Forney failed to file a counterclaim asserting a custody claim. Forney expressed her concern to the husband, both before and after trial, about the impact on the case of failing to file a counterclaim seeking custody.

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During the divorce proceedings, the trial court concluded that it lacked subject-matter jurisdiction to award the husband physical custody of the child because he had not filed a counterclaim seeking custody; accordingly, the court denied the husband an opportunity to present any evidence in support of his being awarded physical custody. The trial court thereafter entered a final judgment of divorce providing, among other things, that the husband and the wife would have "joint and legal custody" of the child and that the wife would have "primary" physical custody of the child.

The husband terminated Forney's services, and his new counsel moved the trial court to alter, amend, or vacate the judgment or, alternatively, to order a new trial; the trial court denied that motion. The husband appealed to the Court of Civil Appeals, arguing that the trial court erred in failing to recognize that § 30-3-1, Ala. Code 1975, provides that, "[u]pon granting a divorce, the court may give the custody ... of the children of the marriage to either father or mother, as may seem right and proper," and that that error by the trial court violated his right to due process.

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While the husband's appeal in the divorce proceeding was pending before the Court of Civil Appeals, he filed an action against Forney pursuant to the Alabama Legal Services Liability Act, § 6-5-570 et seq., Ala. Code 1975 ("the ALSLA"), asserting that Forney had negligently failed to assert a counterclaim seeking sole physical custody of the child for the husband and that her failure to do so had caused him to suffer damage. The trial court stayed the legal-malpractice action pending a ruling by the Court of Civil Appeals in the divorce proceeding.

The Court of Civil Appeals reversed the judgment and remanded the case in the divorce proceeding, concluding that the trial court incorrectly determined that it lacked subject-matter jurisdiction to award the husband physical custody of the child and that the court thus erred in denying the husband an opportunity to present evidence in support of an award of custody:

"Notwithstanding the fact that the [husband] did not file a counterclaim regarding the child's custody, § 30-3-1 provides that a circuit court hearing a divorce case has the authority to enter a judgment awarding 'either father or mother, as may seem right and proper,' the custody of children of the marriage.

"The circuit court's jurisdiction to do so is derived from the principles of equity; where a child is physically present within the jurisdiction of a circuit court in this state, the court has inherent authority to act to protect the welfare and best interests of the child. [Ex parte Handley], 460 So. 2d 167 (Ala. 1984)]. A party need not specifically invoke the circuit court's inherent jurisdiction; rather, any pleading showing on its face that the welfare of a child requires an order with respect to its custody and support is sufficient to invoke the jurisdiction of the circuit court to settle the matter. Handley. Once the circuit court's jurisdiction is thus invoked, any matter affecting a child may become the subject of its adjudication. Handley.'

"Ex parte Lipscomb, 660 So. 2d 986, 989 (Ala. 1994). The circuit court incorrectly concluded that it lacked subject-matter jurisdiction to award the [husband] custody of the child and erred to reversal by denying the [husband] an opportunity to present evidence in support of an award of sole physical custody of the child to him."

Murphy v. Murphy, 253 So. 3d 403, 406 (Ala. Civ. App. 2017).

On remand, the trial court conducted another hearing, and, based on the evidence presented, it entered a judgment awarding the husband and the wife "shared legal and physical custody" of the child.

Forney thereafter moved the trial court, pursuant to Rule 12(c), Ala. R. Civ. P., for a judgment on the pleadings in the

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legal-malpractice action; that motion was converted to a motion for a summary judgment pursuant to Rule 56(c), Ala. R. Civ. P. In response, the husband reasserted his argument that Forney's alleged malpractice in failing to assert a counterclaim for sole physical custody of the child proximately caused him to suffer damage. The husband attached to his response the affidavit of a similarly situated attorney, who testified as follows about the standard of care in the divorce proceeding, and his opinion concerning the breach thereof:

"I am familiar with the standard or duty of care of divorce attorneys practicing in and around Jefferson County, Alabama. In a divorce action, if a respondent spouse desires full or partial physical custody of a child, that spouse's divorce attorney should file a counterclaim (or counter-complaint) seeking physical custody. That is routine and standard practice for Jefferson County divorce attorneys. It would be a breach of the standard or duty of legal care for the respondent spouses' attorney to fail to assert a counterclaim seeking physical custody in the responsive pleading.

". . . .

"It is my opinion that [Forney] in this case breached the aforementioned standard of care in this case by failing to assert a counterclaim for custody for [the husband]. Further, it is foreseeable that the presentation [of] evidence regarding the respondent spouse's desire for custody may be denied

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by a court if a counterclaim (or counter-complaint) for custody is not formally asserted.

"Had [Forney] made a counterclaim for custody for [the husband], the trial judge would have believed she had jurisdiction over the custody issue and would have been required to hear that evidence and issue a custody ruling based on that evidence.

".....

"It is my opinion that the failure by [Forney] ... to include a counterclaim (or counter-complaint) for physical custody of [the husband's] child violated the standard or duty of legal care and caused or contributed to the original trial court's ruling that it did not have subject matter jurisdiction over such a claim for physical custody and to exclude evidence regarding [the husband's] claim for physical custody."

Forney moved the trial court to strike the affidavit, arguing that Murphy established the applicable standard of care in the legal-malpractice action; that issue was sharply disputed, prompting additional briefing and arguments by the parties. Although the trial court considered the husband's proffered affidavit, it nonetheless entered a summary judgment in favor of Forney, concluding that Murphy established the applicable standard of care in the legal-malpractice action. The husband moved the trial court to alter, amend, or vacate the summary judgment in favor of Forney; that motion was denied.

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The issue presented in this appeal is whether Murphy establishes the appropriate standard of care in the husband's legal-malpractice action. Section 6-5-580 of the ALSLA states that the plaintiff has the burden of proving that the legal-service provider breached the applicable standard of care. Section 6-5-572(3)(a) of the ALSLA defines the standard of care applicable to legal-service providers:

"The standard of care applicable to a legal service provider is that level of such reasonable care, skill, and diligence as other similarly situated legal service providers in the same general line of practice in the same general locality ordinarily have and exercise in a like case."

(Emphasis added.) See also Ala. Code 1975, § 6-5-580. The language of § 6-5-572(3)(a) expressly states that the standard of care in a legal-liability action is measured against the reasonable care, skill, and diligence of "other similarly situated legal service providers in the same general line of practice in the same general locality ... in a like case." Generally, a plaintiff alleging a legal-malpractice claim must prove "by expert testimony both the applicable standard of care and that the lawyers breached that standard." Wachovia Bank, N.A. v. Jones, Morrison & Womack, P.C., 42 So. 3d 667, 679 (Ala. 2009). In Valentine v. Watters, 896 So. 2d 385, 394

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(Ala. 2004), this Court explained the common-knowledge exception to the statutory requirement of expert testimony:

"[A]n exception to the general requirement that a plaintiff present expert testimony in support of a legal-malpractice claim occurs where a legal-service provider's want of skill or lack of care is so apparent as to be understood by a layperson and requires only common knowledge and experience to understand it."

In this case, the husband presented the affidavit of a similarly situated legal-service provider, who testified concerning the applicable standard of care in the divorce proceeding and gave his opinion that Forney had breached that standard of care. Forney offered nothing to rebut the expert's testimony. On appeal, she cites no legal authority suggesting that an appellate opinion suffices as an exception to the general rule requiring expert testimony in a legal-malpractice action. The Murphy opinion, stemming from an appeal in a divorce action, does not address the standard of care required of attorneys in similar situations, nor does it address whether an attorney's failure to file a counterclaim seeking custody as a responsive pleading would be reasonable. Rather, the Murphy opinion is directed at the actions of the trial judge, not the attorney charged with malpractice. Although

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Murphy might appear to excuse Forney's failure to file a counterclaim, it primarily holds that the trial court, pursuant to principles of equity, had subject-matter jurisdiction to hear the husband's claim for sole physical custody of the child and to award him custody, despite the fact that he filed no responsive pleading seeking custody. Even assuming Murphy could be considered an exception to the general rule requiring expert testimony in a legal-malpractice action, which issue is sharply disputed, it can hardly be said that the matter, involving the applicable standard of care and whether that standard was breached, would be within the common knowledge of a layperson. In this case, at the summary-judgment stage, Forney should have provided expert testimony disputing the husband's proffered affidavit opining that she had a duty to file a counterclaim under the circumstances presented. Accordingly, Forney's reliance on Murphy as the basis for a summary judgment, without expert testimony that she did not violate the applicable standard of care, is misplaced. Simply stated, Murphy does not stand for the proposition that an attorney need not file a counterclaim seeking custody of a child in a divorce action; rather, Murphy

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prohibits a trial court from excluding testimony from a parent on the basis that such a counterclaim was not filed. Rather than limiting a trial court's jurisdiction to claims filed, Murphy expands jurisdiction so that a trial court may consider any and all testimony related to custody issues, whether properly pleaded or not. Because I conclude that the trial court erred in entering a summary judgment in favor of Forney, I would reverse that judgment and remand the case for further proceedings.