RENDERED: AUGUST 25, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002157-MR

THOMAS HENSLEY — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 94-CI-00041

WARREN SCOVILLE, PSC; WARREN SCOVILLE;
AND UNKNOWN DEFENDANTS — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant, Thomas Hensley, appeals from a summary judgment dismissing his legal malpractice action against Warren Scoville. As we agree that there is no genuine issue of material fact and that appellee is entitled to judgment as a matter of law, we affirm the judgment of the Laurel Circuit Court.

On December 31, 1991, Snowden Baker, Jr. and Jeffrey Payne were shot while at the residence of appellant. Baker died as a result of his wounds, but Payne recovered. On February 21, 1992, appellant was indicted for murder, assault in the first

degree, and persistent felony offender in the second degree. Appellant's trial commenced on January 19, 1993. Appellant was represented at trial by retained counsel, Warren Scoville. The jury found appellant guilty of murder and first-degree assault. On February 12, 1993, appellant was sentenced in accordance with the jury's recommendation, to 50 years for murder and 20 years for first-degree assault, with the sentences to run consecutively. Appellant's conviction was affirmed by the Kentucky Supreme Court on February 25, 1994.

On January 22, 1994, appellant filed a civil complaint in Laurel Circuit Court against his attorney Warren Scoville on grounds of negligence, malpractice, misrepresentation, fraud, and violation of his civil and constitutional rights. Appellant also named as unknown defendants those insurance companies or corporations which provided Scoville with malpractice insurance. Appellant sought a jury trial, and actual, punitive, and compensatory damages. The complaint was dismissed on April 26, 1994 for insufficient service of process, but was ordered reinstated by this Court on August 11, 1995. A trial date was set for September 8, 1997. After several motions for continuances filed by Scoville, trial was again set for September 15, 1999. On July 21, 1999, Scoville filed a motion for summary judgment, with a supporting affidavit from attorney William Gary Crabtree. Crabtree, an experienced trial attorney, stated that he had reviewed the complete record, including the trial transcript, and concluded that, in his expert opinion, Scoville's representation met the standard of care and did not

depart from the quality of professional conduct customarily provided by members of the legal profession. On August 2, 1999, appellant filed a response to Scoville's motion, including as exhibits post-trial questionnaires from several of the trial jurors. On August 13, 1999, the court entered an order granting Scoville's motion, and dismissing appellant's complaint. The court stated that the affidavit by Crabtree established that Scoville met the standard of care. The court acknowledged the questionnaires directed to trial jurors filed by appellant, but stated that these questionnaires did not constitute expert opinion to controvert that of Crabtree and create an issue of fact. The court further noted, citing Ray v. Stone, Ky. App., 952 S.W.2d 220 (1997), that Hensley cannot maintain an action against Scoville until such time as he has proven his innocence of the underlying criminal charges.

On August 23, 1999 appellant filed a motion pursuant to CR 59.05, requesting the court set aside or vacate the August 13, 1999 order and allow appellant to amend his complaint to include a new claim that Scoville had never informed him of the Commonwealth's offer of a plea bargain. The motion was denied on August 24, 1999, and this appeal followed.

On appeal, appellant argues that the court erred in granting Scoville's motion for summary judgment and dismissing appellant's complaint. Appellant contends that Scoville "prosecuted [him] more than the Commonwealth's attorney did", lied, and then altered or helped to alter the trial tape and transcript. Among the instances of malpractice cited by

appellant are allegations that Scoville made various statements at the trial which were "devastating" to appellant's case, such as, "This is America, this is Kentucky, everybody has a right to their day in court, somebody has to represent people like Thomas Hensley and Stephanie Baker, and I hope you won't hold this against me." Appellant alleges that these remarks are not contained on the audiotapes or in the transcript of the trial because the trial tapes were altered by Scoville.

The standard of review of a trial court's granting of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 780 (1996). We are to view the record in the light most favorable to the party opposing the motion and resolve all doubts in its favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

In a suit against an attorney for malpractice, the plaintiff must prove: (1) that the attorney was employed by the plaintiff; (2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that such negligence resulted in and was the substantially contributing factor in the loss to the plaintiff. Daugherty v. Runner, Ky. App., 581 S.W.2d 12, 16 (1978), citing Maryland Casualty Co. v. Price, 231 F. 397 (4th Cir. 1916).

We agree with the trial court that summary judgment was proper. A party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Steelvest, 807 S.W.2d at 482. Appellant offered no evidence sufficient to counter the affidavit of Crabtree that Scoville's representation met the standard of care. The post-trial questionnaires offered by appellant are inadmissable speculation, unproven facts, and distortions which cannot be used to impeach a jury verdict. See Howard v. Commonwealth, Ky., 240 S.W.2d 616 (1951); McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986) cert. denied, 481 U.S. 1059, 105 S. Ct. 2203, 95 L. Ed. 2d 858 (1987), which holds such interviews incompetent evidence to establish grounds for a new trial except to establish that a verdict was made by lot.

Further, appellant has offered no evidence to meet the third prong of the test, that Scoville's negligence resulted in and was the substantially contributing factor in the loss to appellant. Daugherty, 581 S.W.2d at 16. With regard to attorney malpractice in a criminal case, in Ray v. Stone, Ky. App., 952 S.W.2d 220, 224 (1997), this Court stated:

> Before it can be demonstrated that the attorney's actions were the proximate cause of his damages, the plaintiff must establish his innocence. "If a criminal defendant obtains post-conviction relief and proves by a preponderance of the evidence that he is innocent of the underlying offense, he has then satisfied this prerequisite and may be able to prove his attorney's malpractice was the proximate cause of his injuries." Peeler v. Hughes & Luce, 868 S.W.2d 823, 832, aff'd, 909 S.W.2d 494 (Tex. 1995).

Appellant has been unsuccessful in his attempts to obtain post-conviction relief, and has not established his innocence. Id. On September 30, 1997, appellant filed a motion in Laurel Circuit Court to vacate judgment pursuant to RCr 11.42, alleging ineffective assistance of counsel. An evidentiary hearing was held on April 15, 1999, and the motion denied by the court on May 20, 1999. This Court affirmed the decision of the Laurel Circuit Court in an unpublished opinion, 1999-CA-001694-MR, rendered on May 5, 2000.

Appellant further argues that the court erred in finding that Scoville committed no constitutional and civil rights violations. Appellant argues that Scoville denied appellant the right to a fair trial and a meaningful appeal, and violated his right to liberty. Appellant contends that Scoville was a state actor because he represented appellant in the courtroom, and because of the affidavit he filed contradicting appellant's RCr 11.42 motion. The trial court found that Scoville was acting as a private party, and not as a state actor, as Scoville was a private attorney retained by appellant to whom appellant paid a fee. In Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc., Ky., 862 S.W.2d 297, 298-299 (1993), cert. denied, 511 U.S. 1126, 114 S. Ct. 2132, 128 L. Ed. 2d 863 (1994) and 511 U.S. 1135, 14 S. Ct. 2153, 128 L. Ed. 2d 878 (1994), the Kentucky Supreme Court concluded that whether a private entity is a state actor must be determined by considering the aggregate of all relevant factors, such as whether the entity is performing a traditionally public function, whether the state

exercises coercive or significant power over the entity, and whether the state and the private entity are intertwined in a symbiotic relationship. The actions of Scoville in representing appellant in the courtroom and filing an affidavit in response to appellant's RCr 11.42 motion, considered in light of the aggregate of relevant factors, clearly does not compel a finding of state responsibility. Id. Accordingly, the trial court correctly found that Scoville was acting as a private party and not as a state actor as could give rise to constitutional or civil rights claims.

Appellant's final argument is that the court erred in denying his CR 59.05 motion to set aside or vacate its summary judgment. Appellant filed his civil complaint against Scoville on January 22, 1994, but contends that he was not aware until the April 15, 1999 evidentiary hearing on his RCr 11.42 motion, that the Commonwealth had offered a plea bargain. Appellant alleged in his CR 59.05 motion that Scoville had never informed him of the Commonwealth's offer. Appellant argues that regardless of whether summary judgment was warranted on his initial claim, that because of the new claim presented in his CR 59.05 motion, the summary judgment should be set aside and appellant allowed to amend his complaint to include the new claim.

CR 59.01(g) does give the trial court discretion to grant a new trial on the basis of newly discovered evidence. However, in exercising its discretion, the trial court has standards and where the new evidence is not controlling or doesn't demand a different verdict, the trial court has not

abused its discretion in denying said motion. Thomas v. Surf Pools, Inc., Ky. App., 602 S.W.2d 437 (1980); Gibbs v. Commonwealth, Ky. App., 723 S.W.2d 871 (1986). When the evidence is not so decisive, it doesn't compel a new trial. Id. If the appellant was not aware of a plea bargain, that fact alone would not justify a new trial on the malpractice claim.

For the foregoing reasons, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas Hensley, Pro Se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

R. William Tooms
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