

RENDERED: SEPTEMBER 27, 2002; 10:00 a.m.  
ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT:  
DECEMBER 11, 2003 (2002-SC-0986-D)

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-003017-MR

WILLIAM McNEELEY

APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT  
HONORABLE STEPHEN N. FRAZIER, JUDGE  
ACTION NO. 94-CI-00390

LOWELL E. SPENCER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUDGEL, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: William McNeeley, pro se, has appealed from an order entered by the Johnson Circuit Court on November 16, 1999, which granted Lowell E. Spencer's motion for summary judgment and dismissed McNeeley's complaint for legal negligence<sup>1</sup>. Having concluded that there is no genuine issue as to any material fact and that pursuant to the doctrine of collateral estoppel Spencer is entitled to summary judgment as a matter of law, we affirm.

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<sup>1</sup>Kentucky Rules of Civil Procedure (CR) 56.03.

McNeeley, who was represented by Spencer, was convicted of murder<sup>2</sup> for the heinous killing of Sherman Newsome, the two-year-old son of Rebecca Newsome.<sup>3</sup> McNeeley's jury trial was held in Johnson Circuit Court in 1992<sup>4</sup>, and he received a sentence of life in prison. Evidence presented by the Commonwealth showed that McNeeley inflicted the fatal injuries on the toddler by stomping on his stomach and back.

McNeeley has unsuccessfully pursued post-conviction relief by direct appeal and by motions pursuant to RCr<sup>5</sup>11.42 and CR 60.03. McNeeley's conviction was first reviewed by our Supreme Court in an opinion rendered on March 24, 1994. The Supreme Court noted some trial errors, but it affirmed McNeeley's conviction and sentence<sup>6</sup> on the grounds that any errors were harmless due to the compelling evidence of guilt<sup>7</sup> McNeeley then filed an RCr 11.42 motion, claiming that Spencer had provided him with ineffective assistance of counsel, and that he

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<sup>2</sup>Kentucky Revised Statutes (KRS) 507.020.

<sup>3</sup>McNeeley lived with his wife and their four children and with Rebecca Newsome and her six children.

<sup>4</sup>The record from the underlying criminal case has not been certified for our review, but the record on appeal indicates that McNeeley was indicted by a Martin County grand jury for the January 20, 1992, murder of Sherman J. Newsome. The case was transferred to Johnson Circuit Court on a change of venue so the question of McNeeley's guilt could be decided by an impartial jury.

<sup>5</sup>Kentucky Rules of Criminal Procedure.

<sup>6</sup>Case No. 1992-SC-000906-MR.

<sup>7</sup>RCr 9.24.

was entitled to a new trial. The Johnson Circuit Court, without conducting an evidentiary hearing, denied McNeeley's RCr 11.42 motion. On September 26, 1997, this Court affirmed that order, and concluded that McNeeley had failed to show that he had received ineffective assistance of counsel during his murder trial.<sup>8</sup> McNeeley next attempted to have his conviction and sentence vacated in September 1998, by filing a CR 60.03 motion. McNeeley alleged that newly discovered evidence concerning a potassium level test performed on the child showed that the previous claimed time of death was incorrect. In denying the CR 60.03 motion, the Johnson Circuit Court concluded that even if this new evidence were considered,<sup>9</sup> it would not with reasonable certainty change the guilty verdict. On April 5, 2002, this Court affirmed the denial of the CR 60.03 motion, on the ground that CR 60.03 was not intended to provide the type of relief sought by McNeeley.<sup>10</sup>

The civil complaint that is the basis for this appeal was filed in the Johnson Circuit Court on September 12, 1994, after our Supreme Court had affirmed McNeeley's conviction in his direct appeal. The complaint alleged that Spencer had committed

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<sup>8</sup>Case No. 1995-CA-003128-MR.

<sup>9</sup>The trial court also found that McNeeley's CR 60.03 motion was not brought within a reasonable time.

<sup>10</sup>Case No. 2001-CA-000073-MR. On appeal from the trial court's denial of his CR 60.03 claim, McNeeley raised a host of issues that were not originally presented to the trial court. This Court also agreed with the trial court's determination that the CR 60.03 motion was not brought within a reasonable time as required by the rule.

legal malpractice during his representation of McNeeley on the murder charge, and it sought monetary damages. On November 16, 1999, the trial court granted Spencer's motion for summary judgment and dismissed McNeeley's complaint.<sup>11</sup> This appeal followed.

McNeeley argues in his brief to this Court that the trial court erred by granting summary judgment, and he sets forth several instances of alleged negligence by Spencer during his representation on the murder charge, including: (1) that Spencer failed to impeach certain witnesses, (2) that Spencer failed to call certain witnesses who may have provided favorable testimony; and (3) that Spencer failed to request a mistrial. McNeeley contends that these several instances of alleged negligence by Spencer present genuine issues of material fact. The flaw in McNeeley's argument is that the issue of whether Spencer provided him with reasonably competent representation at his murder trial has already been litigated and decided unfavorably to McNeeley in the denial of his RCr 11.42 motion. Accordingly, we hold that since McNeeley's claim of ineffective assistance of counsel was found adversely to him in the RCr 11.42 proceeding, the doctrine of collateral estoppel precludes the relitigation of the issue of Spencer's effectiveness in this negligence action, and the trial court's granting of summary judgment in favor of Spencer was

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<sup>11</sup>From the record, it appears that the five-year lapse between the commencement of the lawsuit and the granting of summary judgment was due to both periods of inactivity and procedural matters.

correct as a matter of law.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>12</sup> In Paintsville Hospital Co. v. Rose<sup>13</sup> the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."<sup>14</sup> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law.<sup>15</sup> There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.<sup>16</sup> "The record must be

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<sup>12</sup>CR 56.03.

<sup>13</sup>Ky., 683 S.W.2d 255 (1985).

<sup>14</sup>Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

<sup>15</sup>Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

<sup>16</sup>Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."<sup>17</sup>

In Napier v. Jones By & Through Reynolds<sup>18</sup> this Court discussed the application of the doctrine of collateral estoppel:

Although collateral estoppel and res judicata are cut from the same cloth, the effect of collateral estoppel is different from that of res judicata:

The basic distinction between the doctrines of res judicata and collateral estoppel, . . . has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

In McNeeley's RCr 11.42 motion alleging ineffective assistance of counsel, he attempted to show, as the standard set out in Strickland v. Washington,<sup>19</sup> requires, that counsel's representation fell below an objective standard of

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<sup>17</sup>Steelvest, supra at 480.

<sup>18</sup>Ky.App., 925 S.W.2d 193, 195-96 (1996)(citing City of Louisville v. Louisville Professional Firefighters Association Ky., 813 S.W.2d 804, 807 (1991)).

<sup>19</sup>466 U.S. 668, 688, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). Accord Gall v. Commonwealth, Ky., 702 S.W.2d 37, 40 (1985).

reasonableness.<sup>20</sup> In this negligence action, McNeeley is also alleging as one of the required elements for legal malpractice, that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances.<sup>20</sup> Thus, since the doctrine of collateral estoppel bars McNeeley from relitigating an issue in this legal malpractice action that has already been found adversely to him in the RCr 11.42 action, the granting of summary judgment to Spencer was correct as a matter of law.

In Ray v. Stone,<sup>21</sup> this Court discussed the applicability of the doctrine of collateral estoppel to a case where a convicted criminal defendant has sued his defense attorney for legal malpractice:

Decisions addressing whether and under what circumstances a convict may sue his defense attorney for legal malpractice illustrate the difficulty the courts have encountered in resolving the issue in light of competing policy considerations. Numerous jurisdictions have held that a defendant who pleads guilty may not thereafter maintain such an action. In so holding, these decisions have generally applied collateral estoppel to preclude the action.<sup>22</sup> For the most part, the doctrine has been applied in one or both of the following approaches toward barring the claim: (1) the plaintiff, who stands convicted, is precluded from

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<sup>20</sup>Stephens v. Denison, Ky.App., 64 S.W.3d 297, 298-99 (2001).

<sup>21</sup>Ky.App., 952 S.W.2d 220, 223 (1997).

<sup>22</sup>See generally Gregory G. Sarno, Annotation, Legal Malpractice in Defense of Criminal Prosecution 4 A.L.R.5th 273 (1992) for a comprehensive compilation and analysis of decisions on this subject.

relitigating the issue of his admitted guilt in a collateral civil case and is thereby unable to establish his innocence as a prerequisite to proving causation or one of the elements of the alleged negligence; (2) postconviction denial of relief based on ineffective assistance of counsel precludes a civil action for legal malpractice[emphasis added].

Although the case at bar is easily distinguishable from Ray since Ray pled guilty, the dicta contained in the last sentence in the passage quoted above nonetheless represents a correct statement of the law in most of the jurisdictions that have addressed this issue.

Since this particular issue has not been decided by a published case in Kentucky, we have reviewed the case law from other jurisdictions for guidance. In Barrow v. Pritchard,<sup>23</sup> the Court of Appeals of Michigan stated:

In order to establish a cause of action for legal malpractice, the plaintiff has the burden of establishing the following elements: (1) the existence of an attorney-client relationship (the duty); (2) negligence in the legal representation of the plaintiff (the breach); (3) that the negligence was a proximate cause of an injury (causation); and (4) the fact and extent of the injury alleged (damage). Simko v. Blake, 448 Mich. 648, 655[, ] 532 N.W.2d 842 (1995). As previously indicated, in order for a defendant in a criminal case to establish that he did not receive the effective assistance of counsel, he must show (1) that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment, and (2) that the deficiency was

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<sup>23</sup>235 Mich.App. 478, 597 N.W.2d 853, 857 (1999).



prejudicial to the defendant. Tommolino, 187 Mich.App. at 17, citing Strickland, *supra*.

There is ample authority in other jurisdictions to support the conclusion that, for purposes of collateral estoppel, the standards for establishing ineffective assistance of counsel in a criminal forum and legal malpractice in a civil suit are equivalent. See, e.g., Rowe v. Schreiber, 725 So.2d 1245 (Fla.App., 1999); Kramer v. Dirksen, 296 Ill.App.3d 819[, ] 231 Ill.Dec. 169[, ] 695 N.E.2d 1288 (1988); Sanders v. Malik, 711 A.2d 32 (Del., 1998); Ray v. Stone, 952 S.W.2d 220 (Ky.App., 1997); Gill v. Blau, 234 A.D.2d 506[, ] 651 N.Y.S.2d 182 (1996); Younan v. Caruso, 51 Cal.App.4th 401[, ] 59 Cal.Rptr.2d 103 (1996); Zeidwig v. Ward, 548 So.2d 209 (Fla. 1989); [and] Johnson v. Raban, 702 S.W.2d 134 (Mo.App., 1985).

Although case-law discussion of the requirements to establish ineffective assistance of counsel and legal malpractice may contain language disparity, we believe the standards are sufficiently similar in substance to support the application of the defense of collateral estoppel. The first step of the Strickland standard and the breach element of a claim of legal malpractice are the same, i.e., trial counsel must act reasonably. Further, the second step of the Strickland standard (prejudice) and the causation element of a claim of legal malpractice are also the same, i.e., a defendant must show that trial counsel's alleged deficiency affected the outcome of a criminal trial. Finally, although defendants were not parties to plaintiff's motion for a new trial based on ineffective assistance of counsel in the federal court, we agree with this Court's extensive analysis in Knoblauch v. Kenyon, 163 Mich.App. [712,] 719-725, [415 N.W.2d 286 (1987),] that mutuality of estoppel is not necessary before a defendant in a legal malpractice action can use the defense of collateral estoppel [footnote omitted].

Similarly, in Johnson v. Raban,<sup>24</sup> the Court of Appeals of Missouri stated:

In the present case, the adequacy of defendant's representation was determined by the direct infusion of that point into plaintiff's [ineffective assistance of counsel] motion. The denial of that motion met all the criteria for the effective invocation of defensive collateral estoppel. The hearing on the motion decided the same issue of fact present in the malpractice case; the hearing resulted in a judgment on the merits; plaintiff was a party to both cases; and plaintiff had a full and fair opportunity to litigate the issue. The collateral estoppel effect of the previous decision in the [ineffective assistance of counsel] motion therefore precludes plaintiff from relitigating the issue of defendant's negligence.

Accordingly, we adopt this general rule; and in applying it to the case sub judice, we hold that since the issue of whether Spencer provided competent assistance to McNeeley during his representation of him on the murder charge has previously been determined adversely to McNeeley in the denial of his RCr 11.42 motion claiming ineffective assistance of counsel, McNeeley is barred by the doctrine of collateral estoppel from relitigating that same issue in this legal malpractice action.

For the foregoing reasons, the order of the Johnson Circuit Court granting Spencer's motion for summary judgment is affirmed.

ALL CONCUR.

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<sup>24</sup>702 S.W.2d 134, 138 (Mo.Ct.App. 1985).

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