

RENDERED: OCTOBER 6, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002031-MR
AND
NO. 2005-CA-002109-MR

HENRY WAKE HUFFMAN

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM CARTER CIRCUIT COURT
v. HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 01-CI-00396

DELORES WOODS BAKER

APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; PAISLEY,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: This case involves an appeal of a jury verdict in litigation alleging legal malpractice. On June 14, 2005, the Carter Circuit Court entered an order awarding Henry Wake Huffman \$17,000.00 in damages and \$5,553.33 in costs and interest against attorney Delores Woods Baker. On Baker's

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

motion, the award of \$5,553.33 in costs and interest was subsequently reversed by the court by order of September 1, 2005. It is from this latter order that Huffman, acting *pro se*, now appeals. Baker has filed a cross-appeal.

Huffman's malpractice claim against Baker arose from a title search that she performed for him in connection with his purchase of a Carter County farm comprised of approximately 185 acres. His family had owned the farm for nearly three hundred years, and Huffman wanted to acquire the property so that it would remain in his family. As far as Huffman knew at that time, a four-fifths' interest in the land belonged to his uncle, Wake. The remaining one-fifth interest belonged to another uncle, Chris, who was deceased. Wake had told Huffman that he was willing to sell him his share of the property. Huffman, a contractor by occupation, had employed Baker on various legal matters over a period of about fifteen years. He asked her to perform a title search on the property in order to determine what had happened to Chris's one-fifth interest.

In July 1998, Baker presented Huffman with a letter in which she stated: "It is my opinion that Wake Huffman has good and marketable title to the subject property." She explained to Huffman that Chris's heirs had deeded away their interests in the property to Wake **before** Chris's death. By operation of the after-acquired-title doctrine, Baker believed that their

interests in the property were wholly extinguished and they did not inherit any share in the property after Chris's death.

Relying on the letter, Huffman believed Wake to be the sole owner of the property. He made an agreement with Wake to acquire the property; the agreed consideration was the balance owed by Wake on a promissory note that was being held by Citizens National Bank (now known as Citizens Bank of Grayson). The balance on the note was approximately \$19,000.00, which Huffman paid in full. (The land was later appraised and valued at \$98,000.00).

Huffman was then sued by a number of his cousins, all heirs of Chris, who claimed fractional ownership of the farm (Carter Circuit Court Civil Action 99-CI-00224). Baker represented Huffman and moved to dismiss the suit on the basis of the after-acquired-title doctrine. The circuit court denied the motion on November 24, 1999, holding as follows:

The Defendants' assertion that the claims of the Plaintiffs are barred by the After Acquired Title Doctrine are misplaced and in error. That doctrine is not applicable to the facts of the case[.]

Baker withdrew her representation in the case on February 7, 2000; she recommended to Huffman that he find another attorney. After some difficulty in finding another lawyer willing to take the case, Huffman hired Robert Miller, who proceeded to defend the case on a theory of adverse

possession. The case was ultimately resolved through mediation. Huffman paid the plaintiffs sums totalling \$15,375.00. In exchange, he received quit-claim deeds to the farm. The case was dismissed as settled on September 24, 2001.

On December 18, 2001, Huffman filed a legal malpractice action against Baker. The case was tried before a jury on June 28, 2005. Huffman presented no expert testimony on the subject of Baker's alleged negligence. By a vote of nine to three, the jury returned a verdict in favor of Huffman and awarded him damages of \$17,000.00. The final judgment of the court added to this amount the sum of \$5,553.33 for costs and interest at eight percent (8%) per annum to run from May 23, 2001. Although the significance of the date from which interest was computed was not explained in the order, Baker has noted that it was the date on which Huffman paid his cousins the amounts as agreed upon in the settlement.

On July 25, 2005, Baker filed a motion for judgment notwithstanding the verdict; she also sought the alternate relief that the court grant a new trial or that it alter or amend its judgment. On September 1, 2005, the Carter Circuit Court denied the motion except with respect to the amount of \$5,553.33 in costs and interest. It amended the judgment by deleting that amount. This appeal and cross-appeal followed.

The issues on direct appeal are whether the circuit court erred: in allowing the case to be heard by a jury, in not granting Huffman's motion for summary judgment, in improperly instructing the jury regarding damages, and in deleting the costs and interest amount from the final judgment. The issue on cross-appeal is whether the circuit court erred in denying Baker's motion for a directed verdict. Baker argues that she was entitled to a directed verdict because Huffman failed to present any expert testimony to support a finding that she acted negligently.

At the opening of the trial, Huffman's counsel made an unsuccessful motion to dismiss the jury by contending that malpractice was not a jury issue and that the case ought to be decided in a bench trial. Huffman argues on appeal that the denial of the motion was error since marketability of title is a question of law. Therefore, it was not appropriate for resolution by a jury. In denying the motion, the court held that at issue was the alleged negligence of Baker -- not the marketability of Huffman's title. It held that the alleged negligence in the performance of duty is a jury question. We agree.

As it would be in negligence cases generally, the question of whether the conduct of the attorney meets the standard of care test is one for the trier of the facts to determine.

Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. App. 1979)

(citations omitted). Thus, the court did not err in overruling the motion and in allowing a jury to hear the case.

We shall next address Baker's argument on cross-appeal. She contends that expert testimony was required at trial to prove that she was negligent and that the court erred in failing to grant her motions for a directed verdict and for judgment notwithstanding the verdict.

A plaintiff in a legal malpractice case bears the burden of proving three elements:

1) that there was an employment relationship with the defendant/attorney;

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 the attorney's negligence was the proximate cause of damage to the client.

Marrs v. Kelly, 95 S.W.3d 856, 860 (Ky. 2003)(citations omitted).

Baker's argument is directed at the sufficiency of the evidence presented to prove the second element of failure to exercise the duty of ordinary care. Expert testimony is required in legal malpractice cases unless "the negligence is so apparent that a layperson with general knowledge would have no

difficulty recognizing it[.]” Stephens v. Denison, 150 S.W.3d 80, 82 (Ky. App. 2004).

In this case, Baker gave Huffman her opinion that the interests of Chris’s heirs in the property had been extinguished under the after-acquired-title doctrine, a theory that Baker herself has described in her cross-appeal as “esoteric.” No expert testimony was presented to explain or to establish how this advice constituted a breach of her duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances. The only expert testimony presented was provided by Charles Holbrook, who testified on behalf of the defense. Holbrook is an attorney who has been practicing law since 1970 with a concentration of sixty to eighty percent of his time in the areas of real estate and title work. Holbrook testified that Baker was not acting unreasonably or negligently in relying on the doctrine of after-acquired title; that he had relied on the doctrine in the past; and that it is a sound principle in Kentucky law.

The evidence offered at trial to support a finding that Baker had acted negligently consisted of the following:

- (1) that the court entered the order of November 24, 1999, in the initial action (99-CI-00224), denying Baker’s motion to dismiss on the

grounds that the doctrine of after acquired title was not applicable to the case;

(2) that Baker withdrew her representation after the trial court denied her motion to dismiss;

(3) that Huffman testified that he had a great deal of difficulty finding an attorney to take his case after Baker withdrew her representation. He also testified that the numerous other attorneys whom he consulted told him that the doctrine of after-acquired title did not apply to his case. Defense counsel's objection to these comments as hearsay was sustained, but the jury did hear the testimony and was not admonished;

(4) that Huffman's second attorney, Robert Miller, who succeeded Baker, proceeded on a theory of adverse possession (not the after-acquired property doctrine) before the case finally went to mediation; and

(5) that rather than advancing to trial, the underlying case was resolved through mediation with Huffman paying the plaintiffs \$15,375.00.

This evidence was not substantively sufficient to support a finding that Baker's title opinion amounted to a breach of her professional duty to Huffman. However, Huffman contends that the order of November 24, 1999, denying Baker's motion to dismiss, became "the law of the case" as a whole and that it was, therefore, sufficient to sustain a finding of negligence *per se*. He relies on Hogan v. Long, 922 S.W.2d 368, 370 (Ky. 1995)(citations omitted), which contains the following language:

a final decision, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved and is binding upon the parties, the trial court, and the Court of Appeals.

As the language of Hogan makes clear, however, only a **final** decision has this binding effect. An interlocutory order does not constitute "the law of the case." See Cartmell v. Urban Renewal and Community Development Agency of City of Maysville, 419 S.W.2d 719, 721-22 (Ky. 1967). If any adverse interlocutory ruling (such as this order denying a motion to dismiss) were deemed to constitute sufficient evidence of negligence *per se*, no attorney could escape liability for malpractice. Winning and losing theories of cases are propounded constantly without raising the spectre of malpractice.

Furthermore, even if the Carter Circuit Court were correct and the theory of after-acquired title did not apply to the circumstances of this case, a mistaken theory of law subject to the test of a trial cannot be assumed automatically to amount to malpractice. Expert testimony was required to show that Baker's reliance on the doctrine constituted a breach of her professional duty to Huffman. In arguing his motion for a bench trial, Huffman's own trial counsel admitted that the matter was "too complicated and confusing to address to the jury." Determining whether Baker's reliance on the theory constituted negligence was indeed a matter beyond the ken of a layperson without the assistance of expert testimony. We hold that the absence of expert testimony was fatal to a finding of negligence and that the court erred in failing to direct a verdict on this issue. Accordingly, we reverse on this issue as asserted in Baker's cross-appeal.

Huffman has argued on appeal that the court should have granted his motion for summary judgment. We disagree. Since it was based on Huffman's mistaken belief that the order of November 24, 1999, was irrefutable proof of Baker's negligence, it was based on an erroneous premise. The court did not err in declining to enter summary judgment on this issue.

Having determined that the court erred as a matter of law in failing to direct a verdict because of the necessity for

expert testimony, we need not discuss the issue of damages and the alleged error as to the jury instructions on damages.

The order of the Carter Circuit Court is reversed. We remand for entry of a judgment consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE *PRO SE*:

Henry Wake Huffman
Grayson, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Robert L. Caummisar
Grayson, Kentucky