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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000573-MR

PAULA PAYTON; AND
MARY BLAKELY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 98-CI-006346

THOMAS E. CLAY; LACEY T. SMITH;
AND THOMAS E. CLAY, PSC — APPELLEE

AND

NO. 2005-CA-000823-MR

LACEY T. SMITH — CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 98-CI-006346

PAULA PAYTON; MARY BLAKELY;
AND THOMAS E. CLAY — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON,[1] JUDGE; PAISLEY,[2] SENIOR JUDGE; MILLER,[3] SPECIAL JUDGE.

JOHNSON, JUDGE: Paula Payton and Mary Blakely have brought this appeal from a judgment of the Jefferson Circuit Court entered on March 7, 2005, dismissing their legal malpractice complaint filed against their former attorneys Thomas E. Clay, Thomas E. Clay, PSC, and Lacey T. Smith following a jury verdict in favor of the attorneys.[4] Having concluded that the trial court did not err in allowing or excluding certain evidence, properly instructed the jury, and properly granted a directed verdict in favor of Clay and Smith, we affirm.

Payton and Blakely alleged the legal malpractice occurred during Clay and Smith's representation of them in an action in the Bullitt Circuit Court in a case styled Holland Income Tax, Inc. v. Payton and Blakely.[5] At the time that the Bullitt Circuit Court case was filed Payton and Blakely were engaged in business preparing income tax forms. Holland brought

[1] Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] 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 Kentucky Revised Statutes (KRS) 21.580.

[3] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

[4] Additionally, Smith has filed a cross-appeal against Clay, Payton and Blakely. We do not reach the merits of Smith's cross-appeal because it is moot in light of our affirmance of the trial court.

[5] Civil Action No. 93-CI-00395.

suit for injunctive relief against Payton and Blakely to enforce a written franchise agreement and non-competition agreement it had with Payton and Blakely. Holland obtained a temporary injunction enjoining Payton and Blakely from performing tax preparation business while the lawsuit was pending, and a permanent injunction enjoining Payton and Blakely for five years under the non-competition agreement and awarded Holland over $23,000.00 in damages for breach of the agreements.

Payton and Blakely then filed suit against Clay and Smith for legal malpractice. Specifically, Payton and Blakely asserted that Clay and Smith were negligent in representing them by failing to file a counterclaim for Holland's alleged breach of contract, failing to file two separate appeals they were paid to file, failing to file a brief in this Court after Holland filed an appeal regarding the temporary injunction, failing to answer interrogatories, failing to answer requests for production of documents, failing to answer requests for admissions, failing to timely file a post-trial brief in the Bullitt Circuit Court, and failing to certify parts of the Bullitt Circuit Court record favorable to Payton and Blakely to this Court. The trial court directed a verdict in favor of Clay and Smith on the claim that Payton and Blakely could no longer bring a breach of contract action against Holland due to Clay

and Smith's negligence and a jury found in favor of Clay and Thomas in regard to the remaining claims. This appeal followed.

Payton and Blakely first assert that the trial court erred by permitting Judge Thomas Waller to testify during the trial of this matter. Judge Waller presided over the action Holland filed against Payton and Blakely in the Bullitt Circuit Court. He was called to testify during the malpractice trial by Clay and Smith. Prior to trial, Payton and Blakely filed a motion in limine seeking to prevent Judge Waller from testifying. The trial court denied the motion and permitted Judge Waller to testify; however, he was not permitted to express any opinions. At trial, Payton and Blakely renewed their objection to Judge Waller's testifying on the basis that his testimony was prejudicial in itself, even if he only testified concerning the proceedings and occurrences during the Bullitt Circuit Court action and did not provide opinion testimony regarding the alleged legal malpractice. This objection was overruled and Judge Waller was permitted to testify.

Payton and Blakely rely upon Marrs v. Kelly,[6] in support of their contention that the trial judge erred in permitting Judge Waller to testify during the trial of the malpractice case. In Marrs, a legal malpractice action was

[6] 95 S.W.3d 856 (2003).

filed on the basis that an attorney was negligent in failing to introduce relevant evidence on behalf of his client in a workers' compensation proceeding. In a deposition taken for the malpractice action, the administrative law judge who presided over the workers' compensation action testified that she would not have changed her award even if the evidence the attorney failed to introduce had been presented. On the basis of this testimony, the trial court granted summary judgment in favor of the attorney in the malpractice action.

Our Supreme Court held that the testimony of the administrative law judge should not have been allowed "as it confused the role of an objectively reasonable judge with the views of the particular judge and resulted in application of the wrong standard for determining whether the legal malpractice case should have been submitted to the trier of fact."[7] We conclude, however, that Marrs is distinguishable from the facts in the case before us. First, Marrs does not totally prohibit a judge who presided over the action underlying a legal malpractice action from testifying in the legal malpractice action. Rather, "when the objective standard is observed in a legal malpractice case, the judge in the underlying case may not testify as to what a reasonable judge should have done."[8] Judge

[7] 95 S.W.3d at 859.

[8] Id. at 861.

Waller did not provide improper testimony. In the case before us, he merely testified concerning the events and proceedings in the underlying action between Holland and Payton and Blakely. The trial court specifically prohibited Judge Waller from expressing the type of opinions that the administrative law judge gave in Marrs.

Although testimony concerning the events which occurred during the underlying proceeding might have been available from another source as Payton and Blakely contend, we cannot conclude it was an abuse of the trial court's discretion to permit Judge Waller to provide this testimony. Because Judge Waller was not permitted to provide an opinion as to the ultimate issue of what a reasonable judge or jury would have done had Clay and Smith not been allegedly negligent in their representation of Payton and Blakely, it was not error for the trial court to allow his testimony in the legal malpractice case.

Payton and Blakely next contend that the trial court erred in permitting Clay and Smith's expert witness, retired Judge Michael O. McDonald, to testify regarding matters not disclosed in Clay and Smith's CR[9] 26.02 disclosure. We review a trial judge's decision to admit or to exclude evidence for an

[9] Kentucky Rules of Civil Procedure.

abuse of discretion.[10] The trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[11] In the case before us, we cannot conclude the trial court's admission of Judge McDonald's opinions outside of those revealed in Clay and Smith's CR 26.02 disclosure constituted an abuse of discretion.

CR 26.02(4) provides as follows:

> Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (a)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Payton and Blakely propounded such an interrogatory to Clay and Smith and, in their answer, Clay and Smith identified Judge McDonald as an expert they intended to call to testify. Clay and Smith further noted that Judge McDonald had advised "that the Plaintiffs would not be able to establish that they suffered an adverse result in the appeal referenced in VII(d) of the

[10] Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000).

[11] Id. at 581 (citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

complaint because no response was filed." At trial, Payton and Blakely objected to Judge McDonald's being permitted to express an opinion regarding any alleged acts of negligence committed by Clay and Smith in the Holland action other than the failure to respond to the appeal noted in the answer to the interrogatory.

The trial court overruled Payton and Blakely's objection on the basis that it had already permitted their expert witness to express opinions that had not been disclosed when the expert was deposed by Clay and Smith. Specifically, the trial court permitted Payton and Blakely's expert to testify as to how Clay and Smith's alleged negligence was the proximate cause of damages to Payton and Blakely despite their counsel's stating during the expert's deposition that he did not believe the expert could offer such testimony because that was the ultimate question for the jury to decide. The trial court ruled that because he had permitted Payton and Blakely's expert to testify regarding causation he would also permit Clay and Smith's expert to testify in rebuttal to that testimony. We cannot conclude that this decision on the part of the trial court resulted in an unfair proceeding and, therefore, it was not an abuse of discretion to admit the testimony of Judge McDonald.

Payton and Blakely also contend that the trial court committed error by not instructing the jury regarding the specific acts of negligence they alleged were committed by Clay

and Smith in the underlying action. Additionally, they contend that the trial court erred by not instructing the jury on punitive damages. Payton and Blakely requested that the trial court give the jury a negligence instruction which set forth the general duty of Clay and Smith to exercise the degree of skill and care of reasonably competent attorneys in undertaking representation of Payton and Blakely and also set forth that such duty included as specific duties the various acts of negligence that they claimed were committed by Clay and Smith. The trial court rejected the instruction containing the specific duties and instructed the jury regarding the general duty alone.

Blakely and Payton contend that the instruction did not provide the jury with enough information to make an informed decision. We disagree. Kentucky law mandates that trial courts use "bare bones" jury instruction in all civil actions.[12] As stated by our Supreme Court,

> The general rule for the content of jury instructions on negligence is that they should be couched in terms of duty. They should not contain an abundance of detail, but should provide only the bare bones of the question for jury determination. This skeleton may then be fleshed out by counsel on closing argument.[13]

[12] Olfice, Inc. v. Wilkey, 173 S.W.3d 226, 229 (Ky. 2005) (citing Lumpkins v. City of Louisville, 157 S.W.3d 601 (Ky. 2005)).

[13] Rogers v. Kasdan, 612 S.W.2d 133, 136 (Ky. 1981) (citing Cox v. Cooper, 510 S.W.2d 530, 535 (Ky. 1974)).

"The question to be considered on an appeal of an allegedly erroneous instruction is whether the instruction misstated the law."[14] It is not a matter of "which set of proposed instructions best stated the law, but rather whether the delivered instructions misstated the law."[15] In the case before us, the instructions submitted to the jury correctly set forth the law in regard to the duty Clay and Smith owed to Payton and Blakely in undertaking to represent them in the Holland action. The proposed instruction sought by Payton and Blakely, although it correctly stated the general duty owed by Clay and Smith, contained such an abundance of detail in the specific duties that it gave "undue prominence to facts and issues."[16] Such an instruction as the one tendered by Payton and Blakely created a "rigid list of ways in which a defendant must act in order to meet his duty."[17] The trial court did not err in rejecting the proposed instruction.

Payton and Blakely also contend the jury should have been given an instruction on punitive damages. To recover punitive damages in a legal malpractice case, it must be proven that the attorney "acted with fraud, ill will, recklessness,

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[14] Olfice, 173 S.W.3d at 229 (citing Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 823 (Ky. 1992)).

[15] Id. at 230 (citing Meyers, supra at 823).

[16] Rogers, 612 S.W.2d at 136.

[17] Id.

wantonness, oppressiveness, (or) willful disregard of the (client's) rights" [citation omitted].[18]

In their brief, Payton and Blakely assert that they were entitled to an instruction on punitive damages on the basis that they gave Clay money to file two separate appeals that were never filed and that Clay used the money "to file other appellate procedures in that action." We cannot conclude that such allegations, even if true, constitute actions being carried out with recklessness, malice, or deceit especially in light of the fact the money was apparently used for appellate procedures on behalf of Payton and Blakely. As such, we cannot conclude the trial court misapplied the law in denying Payton and Blakely's requested instruction on punitive damages.

Payton and Blakely further contend that the trial court committed error by denying their motion to amend their complaint during the trial to add "Paula and Mary, Inc." as a plaintiff. We disagree. Paula and Mary, Inc. was apparently an S corporation that Payton and Blakely had formed while running their tax business for the purposes of reporting their business income. During the trial, Payton and Blakely moved the trial court to amend their complaint to name the corporation as a plaintiff. The trial court denied the motion.

[18] Hendry v. Pelland, 73 F.3d 397, 400 (D.C.Cir. 1996).

The trial court has wide discretion in permitting the amendment of pleadings.[19] In this case, we cannot conclude the trial court abused its discretion in denying the motion to amend the complaint to name the corporation as a plaintiff. This action had been pending for over six years when it went to trial. Payton and Blakely were certainly aware that they had established the corporation for the purposes of running their tax business. Further, there does not appear to be any reason why the amendment was necessary to the presentation of this matter to the jury. Clay and Smith do not appear to have made an issue that the proper party to the lawsuit was the corporation rather than Payton and Blakely themselves. Further, Payton and Blakely have not alleged any harm or prejudice they sustained as a result of the denial of their motion to amend. Therefore, we conclude that the trial court did not abuse its discretion by denying the motion to amend the complaint.

Finally, Payton and Blakely contend that the trial court erred in directing a verdict in favor of Clay and Smith on the allegation that the attorneys' negligence resulted in Payton and Blakely being unable to maintain a breach of contract action against Holland. The trial court granted the motion for directed verdict on the basis that Payton and Blakely could still bring an action against Holland for breach of contract because the statute

[19] Givens v. Boutwell, 701 S.W.2d 146 (Ky.App. 1988).

of limitations for filing such an action had not expired at the time of the trial of this matter. Payton and Blakely assert that this ruling was erroneous because such a claim must have been brought as a counterclaim to Holland's action against them in the Bullitt Circuit Court and was, therefore, barred by res judicata.

We agree with Clay and Smith that Holland's action in the Bullitt Circuit Court seeking an injunction against Payton and Blakely to enforce its non-competition clause does not preclude Payton and Blakely from pursuing a breach of contract claim against Holland. The Bullitt Circuit Court action seeking an injunction does not carry res judicata effect concerning any breach of contract claim Payton and Blakely might have against Holland arising from their business relationship. The granting of the injunction in favor of Holland in its action against Payton and Blakely was interlocutory and did not constitute a final judgment on the merits of any claim for breach of contract[20].

Based upon the foregoing, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

[20] Morgan v. Goode, 151 Ky. 284, 152 S.W. 584, 585 (Ky. 1912).

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