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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001470-MR

BOBBY E. BURTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 07-CI-005002

JOHN H. HELMERS, JR.;
LELAND R. HOWARD, II;
AND HELMERS DEMUTH
& WALTON, PLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Bobby E. Burton (Burton) appeals *pro se* from an order of the Jefferson Circuit Court granting appellees' motion for summary judgment. For the following reasons, we affirm.

Burton filed malpractice claims against a succession of attorneys who represented him in a divorce action. Three of the original defendants previously were granted summary judgment. After summary judgment was granted to the remaining three defendants, John H. Helmers, Jr., Leland R. Howard, II, and Helmers Demuth & Walton, PLC (collectively referred to hereinafter as appellees), this appeal followed.

Burton alleged that appellees committed malpractice in two instances: (1) by failing to move to set aside an agreed order, allegedly executed without Burton's authorization by a prior attorney, which nullified a marital settlement agreement between Burton and his former spouse and (2) by failing either to file a post-judgment qualified domestic relations order (QDRO) or to object to the QDRO submitted by opposing counsel.

With respect to the agreed order, its enforceability was resolved by a panel of this court in September 2004.[1] At that time, the trial court's order denying Burton's motion to set aside the agreed order was affirmed. Thus, the statute of limitations for any malpractice claim relating to the enforceability of the agreed order began to run upon entry of this court's decision in 2004. Pursuant to KRS[2] 413.245, the statute of limitations for a legal malpractice action is one year.[3] As

[1] Appeal No. 2003-CA-000812 and Cross-Appeal No. 2003-CA-000942 (September 17, 2004).

[2] Kentucky Revised Statutes.

[3] "KRS 413.245 provides that actions for professional malpractice be brought within one year from the date of occurrence or from the date that the cause of action was, or reasonably should have been, discovered by the party so injured." *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982).

Burton did not file the present malpractice claim relating to the agreed order until 2007, the trial court correctly noted that Burton's claim is barred by the one-year statute of limitations.

With respect to the QDRO claim, the trial court ultimately granted appellees' motion for summary judgment as a result of Burton's failure to retain and disclose expert testimony, as previously ordered by the court. The court determined that expert testimony was necessary because the QDRO issues were highly technical with respect to liability and damages, and were not "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). The court allowed Burton 45 days to retain and disclose expert testimony and to otherwise comply with CR[4] 26.02, even though the deadline for disclosing an expert had passed. After Burton failed to do so, the court granted appellees' motion for summary judgment as a matter of law.

In order for summary judgment to have been properly granted, "[t]he circuit court must have found (1) that there was no genuine issue of material fact, and (2) that appellee was entitled to judgment as a matter of law." *Sexton v. Taylor County*, 692 S.W.2d 808, 809-10 (Ky.App. 1985). "A 'trial court's ruling with regard to the necessity of an expert witness [is] within the court's sound discretion.'" *Nalley v. Banis*, 240 S.W.3d 658, 661 (Ky.App. 2007) (quoting *Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676, 681 (Ky. 2005)). Absent

[4] Kentucky Rules of Civil Procedure.

an abuse of discretion, we will not disturb the trial court's ruling. *See Baptist Healthcare Sys. Inc.*, 177 S.W.3d at 680-81.

On appeal, Burton argues that the trial court abused its discretion by requiring expert testimony to prove his claim of legal malpractice.[5] Here, the trial court articulated its concerns about a jury's ability to determine whether liability exists, and then to calculate any alleged damages, without the assistance of expert testimony. In particular, the court reasoned that in order to determine whether appellees' action or inaction fell below the requisite standard of care, a jury would need to understand the components of a QDRO and whether appellees' failure to file a QDRO and/or object to components of opposing counsel's QDRO was incorrect or prejudicial to Burton. If a jury did find liability, it would then need to compute the damages allegedly flowing therefrom.

Since a QDRO directs the division of pension and retirement benefits, a computation of the value received, versus what Burton would have received but for appellees' alleged negligence, would be necessary. The court determined that this calculation would not be simple as, at a minimum, accounting methods for present and future worth would be needed. For that reason, the court held that expert testimony was required. This ruling was not an abuse of its discretion.[6]

[5] We find it imperative to note that Burton maintains not that the court erred by granting summary judgment based solely on his failure to meet the allotted 45-day deadline to retain and disclose expert testimony, but that he does not need an expert to defeat summary judgment or for his case in chief at trial. "Accordingly, cases such as *Baptist Healthcare Sys. Inc.*, 177 S.W.3d 676, *Poe v. Rice*, 706 S.W.2d 5 (Ky.App. 1986), and *Ward v. Housman*, 809 S.W.2d 717 (Ky.App. 1991) are inapplicable[.]" *Nalley*, 240 S.W.3d at 661.

[6] In a similar vein, Burton claims that two prior appeals, Appeal No. 2005-CA-000489 and Appeal No. 2005-CA-001288, toll the statute of limitations with respect to the QDRO claim. This argument is misplaced. The trial court did not bar the QDRO claim on statute of limitations

See Nalley, 240 S.W.3d at 661; *Baptist Healthcare Sys. Inc.*, 177 S.W.3d at 680-81.

Further, Burton claims that the court abused its discretion in handling his *pro se* pleadings generally, and his request for admissions in particular.[7] We disagree.

The court stayed discovery following Burton's initial request for admissions, as motions to dismiss other defendants were pending and the scope of discovery remained unclear. Appellees timely answered Burton's request for admissions once the stay was lifted, but Burton moved for a hearing to address the matter. At the scheduled hearing, the court decided instead to hear the pending motions for summary judgment, since the trial date was fast-approaching. In the subsequent opinion granting appellees' motion for summary judgment, the court noted "[t]his opinion will dispose of all pending motions[,]" presumably including those pertaining to the request for admissions.

The court's stay of discovery and allowance of time for appellees to respond to Burton's request for admissions did not constitute an abuse of the court's discretion pursuant to CR 36.01(2), which "clearly vests the trial judge with discretion to shorten or lengthen the time limit for responding to requests for admission." *Berrier v. Bizer*, 57 S.W.3d 271, 278 (Ky. 2001). Burton also claims

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grounds; ultimately, the court granted appellees' motion for summary judgment because Burton failed to retain and disclose expert testimony as ordered.

[7] We note that Burton failed to cite to the record, or to provide citations of authority, as required by CR 76.12, in support of his claim that the court generally abused its discretion in handling his *pro se* pleadings.

that the court failed to hear and/or rule on his motion for partial summary judgment; however, the court's order clearly disposed of all pending motions.

Finally, Burton asserts that the court erred by denying his motion to strike the affidavit of opposing counsel, who essentially opined that appellees did not deviate from the standard of care expected of a reasonable attorney. Burton argues further that the court should have scheduled a hearing to address his motion, rather than disposing of the motion in the summary judgment.

Apparently the affidavit was filed in compliance with CR 56.03, which expressly allows affidavits to be considered in connection with a motion for summary judgment. Discretion to strike "from any pleading any insufficient defense or any sham, redundant, immaterial, impertinent or scandalous matter" is conferred upon the court by CR 12.06. However, Burton has neither shown that he preserved this issue below, nor that legal authority supports his claim that he was entitled to a hearing on his motion to strike. Thus, this issue is not properly before us for review.[8]

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

[8] Moreover, the record does not reflect that the court in any way relied upon the affidavit of opposing counsel in ruling on the parties' motions for summary judgment. Thus, even if the court did err by denying Burton's motion to strike, such error was harmless.

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BRIEF FOR APPELLEES:

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