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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000510-MR

MEREDITH L. LAWRENCE AND
MEREDITH L. LAWRENCE, P.S.C. APPELLANTS

APPEAL FROM GALLATIN CIRCUIT COURT
v. HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 15-CI-00113

BINGHAM GREENEBAUM DOLL, L.L.P.;
BINGHAM MCHALE L.L.P.; J. RICHARD
KIEFER; ROBERT CARRAN; AND
TALIFERRO, CARRAN, & KEYS, P.L.L.C. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, TAYLOR, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: May a criminal defendant who has been convicted by a jury and who has not had his conviction overturned on post-conviction proceedings sustain a legal malpractice action against his criminal defense attorneys for alleged

negligence occurring during the criminal defense representation? No. The trial court properly dismissed, without prejudice, Meredith Lawrence's complaint alleging professional negligence against his criminal defense attorneys because it did not allege that Lawrence had been exonerated on appeal.

BACKGROUND

Lawrence, a former member of the Kentucky bar, was found guilty in federal court of violating 26 U.S.C. §7206(1), a felony. He was sentenced in 2012 to 27 months' imprisonment, and he was automatically suspended from the practice of law. *Kentucky Bar Ass'n v. Meridith L. Lawrence*, 2012-SC-000406-KB.[1] Lawrence directly appealed the federal conviction, where his convictions were affirmed. *See U.S. v. Lawrence*, 557 Fed. Appx. 520 (6th Cir. 2014) (rehearing *en banc* denied April 21, 2014); *Lawrence v. U.S.*, 135 S.Ct. 223 (2014) (denying the petition for a writ of *certiorari*). Lawrence then sought a new trial pursuant to Federal Rule of Criminal Procedure 33, the same being denied. *U.S. v. Lawrence*, 2015 WL 428087 (E.D. Ky. 2015).

Lawrence also sought post-conviction relief in the form of a 28 U.S.C. §2255 petition to vacate, set aside, or correct sentence (a post-conviction appeal similar to Kentucky's ineffective assistance of counsel claims brought pursuant to Kentucky Rules of Criminal Procedure 11.42). His §2255 petition was denied, and

[1] Though Lawrence's first name is spelled "Meredith" in the pleadings herein, we have compared the Kentucky Supreme Court's order relating to "Meridith" Lawrence to Meredith Lawrence's information with the Kentucky Bar Association and believe the two names represent the same person. *Compare*, *Kentucky Bar Association v. Meridith L. Lawrence*, 2012-SC-000406-KB, *with* http://www.kybar.org/resource/resmgr/Lawrence,_Meredith_Lynn.pdf.

the district court denied a certificate of appealability to the United States Sixth Circuit Court of Appeals. *U.S. v. Lawrence*, 2016 WL 3212161 (E.D. Ky. 2016); *U.S. v. Lawrence*, 2016 WL 4803934 (E.D. Ky. 2016). Lawrence has since petitioned the Sixth Circuit for a certificate of appealability. *Lawrence v. U.S.*, 16-5870 (filed June 17, 2016).

While this litigation was occurring, Lawrence filed a Complaint on October 5, 2015, in Gallatin Circuit Court against his former defense attorneys and their respective law firms. In Lawrence's Complaint, Lawrence alleged his attorneys committed professional negligence while defending Lawrence in his criminal trial.[2] Concerning the alleged negligent conduct, Lawrence's Complaint claimed it "caused the criminal defense of Mr. Lawrence to become an utter failure and subjected Mr. Lawrence to ineffective assistance of counsel." Nothing in the Complaint alleges that Lawrence's direct or post-conviction appeals have been successful, nor has Lawrence alleged that he has been exonerated or pardoned. Likewise, his Complaint does not allege that he has been acquitted of the charges. For all intents and purposes, the Complaint facially demonstrates only that Lawrence remains guilty of the crimes for which he was convicted in federal court.

The trial court granted the Appellees' motions to dismiss the case for failure to state a claim upon which relief can be granted. Kentucky Rules of Civil

[2] The Complaint also named as a plaintiff Lawrence's professional service corporation. The Complaint alleges solely the one count of professional negligence that relates to Lawrence's individual conduct, thus the analysis is the same for both Lawrence and the P.S.C.

Procedure (CR) 12.02(f). The trial court also denied Lawrence's CR 59 and 60 motion to alter, amend, or vacate. Lawrence now appeals.

STANDARD OF REVIEW

We review the denial of a CR 12.02(f) motion *de novo*, accepting as true the plaintiff's factual allegations in the complaint and asking if the plaintiff would be entitled to relief if the facts alleged in the complaint could be proved. *Carruthers v. Edwards*, 395 S.W.3d 488, 491 (Ky. App. 2012) (citations omitted).

ANALYSIS

This case places squarely before us the issue of whether criminal defendants who have been convicted of their charges and who have not had those convictions overturned on post-conviction appeals may sustain legal malpractice actions against their criminal defense attorneys. As our Court has issued opinions on similar subjects and always dismissed the malpractice claims, and our state's Supreme Court has likewise indicated it would, too, dismiss such suits, and the majority of foreign jurisdictions dismiss such suits, we adopt the logic in those opinions and agree with the trial court that Lawrence's Complaint should have been dismissed without prejudice.

A legal malpractice claim in Kentucky requires a plaintiff to prove: (1) an employment relationship between the plaintiff and the attorney; (2) the attorney neglected his or her duty to exercise the ordinary care that a reasonably competent attorney acting in the same or similar circumstances would exercise and; (3) the attorney's negligence was the proximate cause of the plaintiff's

damages. *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003) (citing *Stephens v. Denison*, 64 S.W.3d 297, 298-99 (Ky. App. 2001)). "In this context, proximate cause involves a 'but for' determination, *i.e.*, but for the attorney's malfeasance, the client – read: defendant – would not have been convicted." *U.S., ex rel. U.S. Attorneys ex rel. Eastern, Western Districts of Kentucky v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 156 (Ky. 2014) (footnote omitted).

It is that "but for" proof that becomes problematic. Many states, including Kentucky, view a criminal defendant's own actions as the "sole, proximate, and producing cause of the indictment, conviction, and resultant incarceration[.]" *Ray v. Stone*, 952 S.W.2d 220, 224 (Ky. App. 1997). Because the defendant's own actions are the "but for" cause of his damages, public policy often prohibits a criminal defendant who has neither been exonerated nor proven actually innocent from maintaining a legal malpractice action against his or her defense attorneys.

For example, in *Ray* a defendant pleaded guilty to a trafficking charge and was unsuccessful in post-conviction appeals. The defendant then filed a legal malpractice action against his criminal defense attorney alleging negligent representation. Our Court held that the defendant was collaterally estopped from litigating the issue of his innocence because he had pleaded guilty to the crimes and he had not received any post-conviction relief for ineffective assistance of counsel. *Id*. at 223-24.

In so doing, the *Ray* Court adopted the public policy argument that prohibits defendants from financial gains either directly or indirectly resulting from criminal acts. "There being no fact question concerning his innocence, public policy compels us to conclude that any acts or omissions by attorney Stone are not the cause of Ray's alleged damages." *Id*. at 224. It was Ray's "own unlawful conduct" that was "the sole, proximate, and producing cause of the indictment, conviction, and resultant incarceration[.]" *Id*. The *Ray* Court further held that to prove an attorney's actions were the proximate cause of a criminal defendant's injuries, "the plaintiff must establish his innocence." As Ray's guilty plea destroyed any innocence claim, he could not prove proximate causation, and the Court would not permit Ray to profit off of his own wrongdoing. *Id*.

While *Ray* is illustrative of the public policy concerns, its ultimate holding is not helpful in resolving the instant case. Here, the issue with Lawrence's Complaint is not that it fails to allege actual innocence, but it fails instead to allege that Lawrence has obtained post-conviction relief. To resolve whether a criminal defendant must first be exonerated through a post-conviction appeal before bringing a professional negligence case against his attorneys, we turn to *Stephens v. Denison*, 150 S.W.3d 80 (Ky. App. 2004).

In a case with facts similar to the instant case, our Court again rejected a legal malpractice cause of action against a criminal defendant's attorney. The *Stephens* defendant was convicted after a jury trial and sentenced to imprisonment for twenty years. His conviction was upheld on direct appeal. Thomas Stephens

then filed a legal malpractice suit against his attorney, claiming his attorney failed to notify Stephens about a plea offer "until it was too late to accept it[,]" and that his attorney "was under the influence of cocaine during the trial." *Id*. at 81.

The circuit court granted summary judgment to Stephens' attorney because Stephens failed to present expert testimony to support his legal malpractice claim. *Id*. at 82. A panel of this Court rejected that proposition. *Id*. It nonetheless affirmed the order granting summary judgment because Stephens had not been exonerated through a post-conviction appeal prior to bringing his malpractice claim.

To reach that conclusion, the Court adopted the public policy reasons announced in *Canaan v. Bartee*, 276 Kan. 116, 72 P.3d 911 (Kan. 2003). In *Canaan*, the Kansas Supreme Court surveyed foreign courts and determined that the majority of courts require either that a criminal defendant show he or she has been exonerated by post-conviction relief or that he or she is actually innocent prior to suing his or her defense lawyers for malpractice. 72 P.3d at 915-16. These jurisdictions provide myriad justifications for such rules:

- They prohibit the inequitable shifting of the responsibility for a criminal's actions to another person. *Id*. at 916. *See also Coscia v. McKenna & Cuneo*, 25 P.3d 670, 673 (Cal. 2001) (citing *Wiley v. County of San Diego*, 966 P.2d 983 (Cal. 1998)).

- They maintain the public policy of not awarding damages to a guilty person. *Canaan*, 72 P.3d at 916. *See also Hicks v. Nunnery*, 643 N.W.2d 809, 824 (Wisc. App. 2002).
- They do not allow a criminal to profit off of his or her illegal conduct. *Canaan*, 72 P.3d at 916. *See also Humphries v. Detch*, 712 S.E.2d 795 (W.V. 2011).
- They avoid the difficulty with proving causation in the civil case when the criminal's own actions "caused" the resulting criminal punishment. *Canaan*, 72 P.3d at 916. *See Ang v. Martin*, 114 P.3d 637 (Wash. 2005) (*en banc*).
- They avoid undermining the criminal post-conviction process by prohibiting the legal malpractice action from overruling the judgments entered in the criminal post-conviction proceedings. *Canaan*, 72 P.3d at 916.
- They preserve judicial economy because settled matters in the criminal action will not be relitigated in the civil action. *Canaan*, 72 P.3d at 916. *See also Steele v. Kehoe*, 747 So.2d 931, 933 (Fla. 1999).
- They create bright-line rules to allow statute of limitations to be determined in malpractice actions. *Canaan*, 72 P.3d at 916.

- They allow a criminal defendant to use all of the available post-conviction remedies in the criminal case. *Canaan*, 72 P.3d at 916.
- They avoid the conflicting standards of proof in criminal and civil proceedings, *i.e.*, making a jury determine in a civil malpractice action whether the plaintiff has proven by a preponderance of the evidence that, but for the negligence of his attorney, the jury in the criminal case would not have found the defendant guilty beyond a reasonable doubt. *Canaan*, 72 P.3d at 916.
- They avoid the chilling effect on thorough defense lawyering. *Canaan*, 72 P.3d at 916.
- They protect criminal defendants from having their former defense attorneys produce privileged information or evidence against the defendants in the course of defending the malpractice action. *Shaw v. State, Dept. of Admin., Public Def. Agency*, 816 P.2d 1358, 1361 (Alaska 1991).
- And they ensure an adequate supply of lawyers willing to represent indigent clients. *Canaan*, 72 P.3d at 916. *See also Glenn v. Aiken*, 569 N.E.2d 783, 788 (Mass. 1991).

These public policy arguments apply to both requiring exoneration through a post-conviction appeal and to requiring actual innocence before

sustaining a legal malpractice cause of action. We again note here that the instant case only concerns whether one must obtain exoneration through a post-conviction appeal prior to filing a legal malpractice claim against his or her defense attorneys. From the face of Lawrence's Complaint, it is apparent that Lawrence has not obtained post-conviction exoneration, and if exoneration is a prerequisite, then Lawrence's Complaint should have been dismissed without prejudice.[3] It is, however, worth pointing out that some states require both exoneration through a post-conviction appeal *and* proof of actual innocence, while some states require only that one be exonerated through post-conviction relief. *See Gibson v. Trant*, 58 S.W.3d 103, 108-09 (Tenn. 2001) (collecting cases).

We find many of these public policy arguments compelling. For example, our jurisprudence has already established that the statute of limitations for a legal malpractice claim in a criminal case does not begin to run until the appeal is final. *See Stephens v. Denison*, 64 S.W.3d 297 (Ky. App. 2001). This delayed running of the statute of limitations permits criminal defendants to fully and thoroughly pursue their appellate remedies in their criminal cases. As the criminal conviction likely resulted in the loss of liberty, it is of utmost importance

[3] Proof of innocence has been further parsed into guilt in fact versus legal guilt. *See, e.g., Glenn v. Aiken*, 569 N.E.2d 783, 787 (Mass. 1991) ("A negligent failure to move to suppress evidence seized in clear violation of the defendant's constitutional or statutory rights could lead to a conviction that would have been totally forestalled by the allowance of a motion to suppress. Such a former criminal defendant might well not be able to prove his innocence of such a crime and, under the cases that make proof of his innocence an element of his case against his former attorney, the attorney would be free from liability."). Again, we do not delve into whether Kentucky would require either factual or legal innocence, as Lawrence failed to even allege that he had obtained post-conviction relief, which we hold is a necessary first predicate to a legal malpractice cause of action against a criminal defense attorney.

that the law scrutinize the conviction before addressing the potential ancillary issue of whether the defendant is entitled to money damages.

In the same vein, finalizing the criminal appellate process before the civil malpractice proceedings begin ensures that no privileged information is disclosed by the attorney during civil proceedings. And by requiring exoneration through the post-conviction process, we lessen the number of frivolous malpractice lawsuits brought against criminal defense attorneys, thus ensuring that those attorneys have more time to thoroughly defend their clients in criminal cases.

On the other hand, we find the judicial economy argument unavailing. Our courts are capable of handling both civil and criminal cases. Judicial economy concerns come into play more when dealing with conducting one trial for multiple defendants, *see Cohron v. Commonwealth*, 306 S.W.3d 489, 493-94 (Ky. 2010), not when dealing with a civil case that is separate and distinct from a criminal case. In fact, it would be illogical to raise the tort of professional negligence in the confines of a criminal case. A claim of professional negligence in a criminal case is an ineffective assistance of counsel claim, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and successfully maintaining an ineffective assistance of counsel claim results in a new trial, not in money damages to the defendant. Furthermore, our courts and our Commonwealth exist in part to ensure our citizens enjoy life, liberty and property. KY. CONST. § 2 ("Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a

republic, not even in the largest majority."). We cannot ensure those rights if we are also denying causes of action under the auspices of judicial economy.

The Kentucky Supreme Court also has indicated it would adopt the exoneration rule. When faced with the ethical and legal implications of allowing a defendant to waive his or her ineffective assistance of counsel claims in exchange for a guilty plea, the Court recently stated in *obiter dicta*:

> Admittedly, in Kentucky, the viability of a malpractice claim following a guilty plea is in doubt. Saving a lengthy discussion of our malpractice landscape, suffice it to say that without having his conviction overturned, a defendant's attempt at proving proximate cause becomes extraordinarily difficult, virtually impossible.

U.S. Attorneys, 439 S.W.3d at 156.

Thus, our precedent, the Kentucky Supreme Court's *obiter dicta*, and the majority of our sister states indicate that we should adopt an exoneration rule. We hold that a criminal defendant must plead in his complaint that he has received post-conviction relief in his or her criminal case before his or her legal malpractice cause of action may proceed.

In the instant case, Lawrence's Complaint makes one allegation of professional negligence and no allegation that Lawrence has been exonerated. Thus, Lawrence's Complaint was properly dismissed without prejudice. We have also reviewed Lawrence's remaining arguments raised in his brief and find them legally deficient. Many of the arguments simply hash out his professional negligence claim against his criminal defense attorneys, thus they are not proper

for us to review. Lawrence also claims the trial court should not have dismissed his intentional infliction of emotional distress, overcharge, and other claims against his criminal defense attorneys. We need not resolve these issues either, as the Complaint alleges a single cause of action – professional negligence. His ancillary claims all stem from the same professional negligence claim, *see, e.g., Abel v. Austin*, 411 S.W.3d 728, 737-38 (Ky. 2013), a claim that fails due to the lack of exoneration. Finally, Lawrence claims the judge erred by converting a motion to dismiss into a motion for summary judgment and not permitting a reasonable opportunity for discovery. This claim likewise fails, as it is apparent from the face of the Complaint that the case should have been dismissed without prejudice, and no resort to extrinsic evidence was required.

Accordingly, we affirm the trial court's order dismissing the case without prejudice.

ALL CONCUR.

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