RENDERED: FEBRUARY 8, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001337-MR

JOHN DOE # 1-37;
JANE DOE # 1-6;
and other similarly-situated
John Doe and Jane Doe victims,
as a class — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 06-CI-05590

GOLDEN & WALTERS, PLLC;
J. DALE GOLDEN; EUGENE GOSS;
MARK DAVID GOSS; FERNANDEZ
FRIEDMAN GROSSMAN & KOHN, PLLC;
DAVID A. FRIEDMAN; ROBERT E. REEVES;
REEVES & ASSOCIATES; ROBERT L.
TREADWAY, JR.; WILLIAM LARRY
HUFFMAN; GAYLE E. SLAUGHTER;
BARRY LYNN DEMUS, JR.; OCTAVIUS
GILLIS; CHRISTOPHER ANDRE
WILLIAMS; CRAIG JOHNSON; DAVID
T. JONES; JOHN DOE NOS. 1-16 — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

COMBS, JUDGE: The procedural history of the litigation underlying this appeal is long and complicated. The matter has been before this Court three times. It arises collaterally from a number of putative class actions filed in federal court alleging civil rights violations against members of the Lexington Fayette Urban County Government (LFUCG). The appellants were plaintiffs in the action underlying the appeal. They are a putative class of unnamed alleged victims of still more alleged civil rights violations. The appellees were defendants in the underlying action. They are individual attorneys and law firms that represented a number of the initial alleged victims of the claimed civil rights violations in the federal putative class action litigation.

In an opinion rendered in the parties' first appeal to this Court, we included the following summary of the relevant history of the federal court proceedings:

> This case arises out of a series of federal class actions filed in the United States District Court for the Eastern District of Kentucky: *Guy v. Lexington-Fayette Urban County Government* (*Guy); Doe # 1-9 v. Miller* (*Doe I); Doe # 1-33 v. Lexington-Fayette Urban County Government* (*Doe II); Doe # 1-44 v. Lexington-Fayette Urban County Government* (*Doe III*); and *Doe v. Miller.*
>
> . . . .

Guy was filed on October 15, 1998, by four named plaintiffs on behalf of themselves and a class of similarly-situated persons who were allegedly sexually abused as minors by Ron Berry through their involvement with Micro-City Government. Berry was the director of Micro-City Government, a nonprofit, community service program for disadvantaged youth that was sponsored and funded, in part, by LFUCG. The action alleged that LFUCG violated the plaintiffs' civil rights because it continued to fund Micro-City Government, despite having knowledge that Berry was a sexual predator.

Before any ruling had been made on the issue of class certification, the named plaintiffs of *Guy* filed a joint motion with LFUCG to enter an agreed order of dismissal based on a tentative settlement agreement making no provisions for putative class members. Craig Johnson and David Jones, who were not named plaintiffs, then moved to be allowed to represent the putative class of plaintiffs. They also filed a motion seeking to require the district court to issue notice to the putative class members of any settlement or denial of certification. They later filed a motion to intervene and an intervening complaint.

On February 4, 2000, the district court entered an order approving the settlement of three of the four named plaintiffs with LFUCG and dismissing their claims against LFUCG, with prejudice. The district court denied the joint motion of Johnson and Jones to intervene but noted that the statute of limitations remained tolled for them and for all putative class members of *Guy* until the denial of class certification or the dismissal of the case. After a hearing, the district court entered an order on February 28, 2000, rejecting a *pro se* motion by the fourth named plaintiff to disapprove the settlement. The order approved the settlement between LFUCG and the

fourth named plaintiff and dismissed his claims against LFUCG.

Although there was no party left in the case to urge class certification, the district court ruled on that issue in an April 4, 2000, order. The district court found that the fact that additional putative class members had not presented themselves since the suit was filed in October 1998, despite considerable publicity surrounding the case, indicated that the class was likely not so numerous that joinder was impracticable, one of the prerequisites of a federal class action. Further, the court ruled that notice to putative class members was not warranted because the class failed to meet the prerequisites for certification.

A second class action, *Doe I*, was filed on May 3, 2000, by a group of named plaintiffs, which ostensibly included Johnson and Jones, who had been unable to intervene in *Guy*. Filed on behalf of the same class as *Guy*, *Doe I* also raised essentially the same civil rights claims against LFUCG. Before the district court had ruled on the issue of certification in *Doe I*, the named plaintiffs entered into a tentative settlement agreement with LFUCG making no provision for the putative class members. This agreement was expressly contingent on the denial of class certification. And on June 28, 2002, the trial court entered an order denying class certification, approving the settlement agreement, and dismissing the case. No notice was given to the putative class members of the denial of certification or of the settlement.

The third class action, *Doe II*, was filed on September 25, 2002, by a group of named plaintiffs on behalf of the same class as *Guy* and *Doe I*. *Doe II* also raised civil rights claims against LFUCG. The district court denied class certification, holding that the plaintiffs of *Doe II* were collaterally estopped from relitigating the merits of class certification based on the denial of

> certification in *Doe I*. On April 25, 2003, the district court dismissed as time-barred all the claims of all of the named plaintiffs except for one *Doe II* plaintiff. Some of the claims of the remaining named *Doe II* plaintiffs were also dismissed at that time as time-barred. Ultimately, the remaining claims of the remaining plaintiffs were dismissed as time-barred on August 22, 2003.
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> *Doe III* was filed against LFUCG on January 13, 2003, by a group of named plaintiffs on behalf of the same class as the three previous cases. On November 21, 2003, the federal district court ruled that the plaintiffs' claims in *Doe III* were time-barred.
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> . . . [T]he named Appellants of *Doe III* also filed another related case: *Doe v. Miller*. *Doe v. Miller* is slightly different in focus from the earlier cases. The plaintiffs of *Doe v. Miller* sought to intervene in *Guy* and *Doe I* under Fed.R.Civ.P. 60(b)(4), alleging that the lack of notice to the putative class members of those cases violated due process and rendered those judgments void. These claims were purportedly rejected by the district court in an October 7, 2002, order.

Doe v. Golden & Walters, PLLC, 173 S.W.3d 260, 262-63, 266-67 (Ky. App. 2005) (footnotes and paragraph headers omitted).

The plaintiffs below appealed the federal district court's holdings in *Guy*, *Doe I*, *Doe II*, and *Doe III*, and *Doe v. Miller* to the United States Sixth Circuit Court of Appeals. In our opinion rendered in the second appeal to this Court, we summarized those federal court proceedings as follows:

> The primary issue raised by the [plaintiffs below] before the Sixth Circuit was whether the district court erred when it failed to notify potential class members that it was dismissing *Guy* and *Doe I*. The Sixth Circuit held

> that the federal district court did err when it failed to provide such notice. However, the Sixth Circuit noted that the *Doe I* settlement was contingent upon dismissal of the class action. Because the Sixth Circuit did not want to disturb the settlement in *Doe I*, it did not reverse the district court's dismissal of that case. The Sixth Circuit did reverse the district court's dismissal of *Guy* and ordered *Guy* reopened. The Sixth Circuit noted that by doing so the [plaintiffs'] statutes of limitations would be tolled and their claims effectively revived. Finally, the Sixth Circuit stated that "[b]ecause *Guy* is being reopened . . . there is no longer a final judgment determining the issue of class certification." Therefore, the Sixth Circuit remanded "the issue of class certification to the district court for reconsideration on the merits." *Doe v. Lexington-Fayette Urban County Government*, [407 F.3d 755, 767 (6th Cir. 2005)].

Goss v. Doe #1 -37, 2007-CA-001978-MR, 2009 WL 2408343, at *3 (Ky. App. Aug. 7, 2009) (footnotes omitted).

Following the district court's dismissal in *Doe II*, but prior to the Sixth Circuit remand, the plaintiffs filed a putative class action in Fayette Circuit Court alleging legal malpractice against most of the attorneys involved in the underlying federal class action litigation. They argued that the attorneys who represented the initial, named plaintiffs in federal court had committed malpractice while litigating those claims by abandoning the interests of the putative members of the broader class of individuals allegedly injured by the civil rights violations. The Fayette Circuit Court dismissed this claim, finding, in pertinent part, that no

attorney-client relationship existed and that the attorneys owed no fiduciary duty to the plaintiffs. The plaintiffs appealed.

On appeal, this Court concluded that the Fayette Circuit Court lacked subject matter jurisdiction of the case because it had been filed before any of the causes of action asserted had accrued. In *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260 (Ky. App. 2005), we reversed and remanded with instructions to dismiss the unripe claims without prejudice.

When the Sixth Circuit's opinion became final, the plaintiffs filed a second complaint against the attorneys, alleging that the attorneys had breached their fiduciary duty to protect the plaintiffs' interests during the litigation of *Guy and Doe I.* Additionally, the plaintiffs claimed that they had an implied contract of representation with the attorneys; that the attorneys breached that contract; and that the attorneys engaged in fraud, deceit, and misrepresentation. With respect to damages, the plaintiffs alleged they had "expended substantial resources and finances to undo the misconduct, fraud, deceit, misrepresentation, and attorney misconduct" allegedly committed by the attorneys. The plaintiffs admitted that their counsel had "obtained an Opinion and Order from the Sixth Circuit Court of Appeals . . . which reversed the damage done by the malpractice and negligence of" the attorneys and that they had "successfully undone [the attorneys'] misconduct and negligence."

The defendant attorneys filed various motions to dismiss, arguing that they had no attorney-client relationship with the plaintiffs; that they owed no fiduciary duty to the plaintiffs; that they had not engaged in fraud, misconduct or misrepresentation; and that the plaintiffs could not prove any damages. Additionally, several of the attorneys argued they could have no liability because they were only involved in the *Doe I* litigation and that the Sixth Circuit had not reversed or remanded that case. The Fayette Circuit Court concluded as follows:

> As a result of the Sixth Circuit's decision reversing and remanding the denial of class certification in the *Guy* litigation, all of the Plaintiffs, as putative class members in both the *Guy* and *Doe I* actions, as well as *Doe II*, *Doe III*, and *Doe v. Miller* are now litigating their claims against the LFUCG and others in U.S. District Court. The decisive language of the Sixth Circuit supporting dismissal of this action is "[b]ecause *Guy* is being reopened, [ ] there is no longer a final judgment determining the issue of class certification." *Doe v. LFUCG*, 407 F.3d at 767. Because there is no final judgment with respect to the issue of class certification, this Court finds that it does not have subject matter jurisdiction to address Plaintiffs' claims herein against the above-named Defendants.

With respect to whether the attorneys owed a duty of care to the plaintiffs, the court noted as follows:

> This Court previously ruled in Civil Action No. 03-CI-2737 that the above-named defendants owed no duty of care to the Plaintiffs because there was no privity of contract between the two groups and absent privity there was no attorney-client relationship. At or about the same time as this Court entered its previous order, Judge Hood

> concluded the Plaintiffs were, in fact, in privity with the class representatives and their counsel in both *Guy* and *Doe I*. *See Memorandum Opinion & Order*, U.S. Dist. Ct. E.D. Ky., # 02-439-JMH, 01/09/03, at 4-6. Judge Hood relied on the rationale and reasoning posited in *Becherer v. Merrill Lynch*, 193 F.3d 415 (6th Cir. 1999) and *Deposit Guaranty National Bank of Jackson, Mississippi v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980).
>
> The Court has reconsidered that position in light of those decisions that an attorney-client relationship can, in fact, be established with putative class members or intended beneficiaries absent privity of contract. *Sparks v. Craft*, 75 F.3d 257 (6th Cir.1996) (citing *Hill v.* [*Willmott*, 561 S.W.2d 331, 334 (Ky. App. 1978)] and *Seigle v. Jasper*, [867 S.W.2d 479, 483 (Ky. App. 1993)]. Moreover, as Plaintiff's argue, and the Court now agrees, even absent an attorney-client relationship, a fiduciary duty can be created . . . . *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) and *Amchem Products v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

However, the Fayette Circuit Court concluded that the plaintiffs could not prove any injury or damages. The court noted the plaintiffs had based their malpractice claim on the alleged lost opportunity to pursue their claims against LFUCG. As noted by the circuit court, the Sixth Circuit's opinion restored the Plaintiffs to the position "they would have been in prior to *Doe I*, *Doe II* and *Doe III*." Furthermore, the court noted that even if the attorneys' actions were negligent, the plaintiffs "have no injury at this time because their right to pursue

their claims against LFUCG was not lost or at least have [sic] been restored." The parties appealed.

On appeal, the plaintiffs and the defendant attorneys agreed that the Fayette Circuit Court had erred by concluding that the claims were not ripe for decision. The attorneys argued that the circuit court had also erred by concluding that an attorney-client relationship existed and that the attorneys owed the plaintiffs a fiduciary duty. The plaintiffs argued that the trial court erred when it concluded that they had not suffered any damages. They also argued that they had presented sufficient evidence of fraud, deceit, and misrepresentation and that an attorney-client relationship existed. Upon our review, we determined that the ripeness issue was dispositive.

On appeal, we noted that whether the plaintiffs' claims were ripe depended upon whether their alleged damages were fixed and non-speculative. We observed that the Sixth Circuit had resurrected the plaintiffs' claims by reopening the *Guy* case and holding that they could litigate their claims in that proceeding. We concluded that "any damages associated with the Plaintiffs' loss of the ability to pursue their claims are fixed. The amount of those damages is zero because the Plaintiffs are now permitted to pursue their claims." This did not end our analysis, however.

We observed as follows:

> [T]he loss of the opportunity to pursue their claims is not the only damage the Plaintiffs alleged. In this, the second legal malpractice action, the Plaintiffs also allege damage because they were forced to incur fees and pay other costs to obtain a favorable ruling from the Sixth Circuit in order to resurrect their claims. The Plaintiffs and the Attorneys argue these alleged damages are fixed and non-speculative.

Goss, 2009 WL 2408343, at *6.

We agreed that the alleged damages were fixed and non-speculative. We observed that the plaintiffs had begun litigating *Doe II* and *Doe III* and prosecuting their appeal before the Sixth Circuit at specific points in time and that the litigation and appeal had ended at a specific point in time. Thus, we concluded that attorney fees associated with that litigation could be calculated. We also concluded that whatever costs the plaintiffs had incurred with regard to that litigation and appeal had been incurred within that time frame and could also be calculated. "Therefore, they are fixed and non-speculative and, to the extent the Plaintiffs' claims revolve around those damages, they are ripe." *Id.*

We noted that this analysis still did not conclude the matter, however. We further observed as follows:

> Although the ability of the Plaintiffs to pursue their claims has been resolved in their favor, whether the Plaintiffs can successfully litigate those claims is yet to be seen. To the extent the actions or inactions by the Attorneys had a negative impact on the Plaintiffs' ability to successfully litigate their claims, the Plaintiffs may be damaged. In the time between the litigation

> of *Guy* and *Doe I*, witnesses may have disappeared, memories may have faded, and evidence may have been lost. Whether these circumstances exist and-if they exist-whether they will have a negative impact on the Plaintiffs' claims cannot be determined until the district court litigation is concluded. Therefore, litigation of this measure of damages is not yet ripe.
>
> Because a portion of the potential damages are not fixed and are speculative, we could affirm the circuit court's dismissal of this matter as unripe. In the alternative, we could reverse the circuit court's dismissal and remand this matter for trial on the damages that are fixed and non-speculative. However, neither course of action would be the most economically judicious way to proceed. If we affirm, the Plaintiffs will be forced to refile their complaint after the conclusion of the district court action and may face arguments with regard to the statute of limitations on their legal malpractice claims. If we remand for trial, the parties may be forced to litigate the legal malpractice issue piecemeal; once on the currently fixed potential damages and once on the potential damages that may surface during the district court litigation. Therefore, we are vacating that portion of the circuit court's order dismissing this action as unripe and remanding this matter for the entry of an order placing this matter in abeyance pending resolution of the district court litigation.

Id. The matter was remanded and held in abeyance by the Fayette Circuit Court.

On January 14, 2016, the plaintiffs filed a motion requesting that the matter be returned to the active docket of the Fayette Circuit Court. Upon remand of the *Guy* litigation to the federal district court, the plaintiffs, as putative class members, had litigated their substantive claims against LFUCG. They noted that a final disposition of the federal litigation had been entered by the Sixth Circuit

Court of Appeals on August 20, 2015, and that time for filing a *writ of certiorari* to the Supreme Court of the United States had expired. The motion was granted and the matter was restored to the court's active docket.[1]

In an order and opinion entered on July 24, 2017, the Fayette Circuit Court granted summary judgment to the defendant attorneys. The court concluded that the attorneys were entitled to judgment as a matter of law with respect to the claims asserted against them because an attorney-client relationship had not been established with the unidentified members of the putative class and that the attorneys owed them no fiduciary duty. This appeal followed.

Before us now, the appellants contend that the trial court erred by concluding that the appellee attorneys did not owe a fiduciary duty to the putative class members. The dispositive question on appeal is whether putative class members have a cause of action for malpractice against attorneys who filed the putative class action complaint where **no class was ever certified**.

In our 2009 opinion, we agreed in principle that an attorney-client relationship **could** be established even without privity of contract and that, depending on the circumstances, it might be shown that the appellee attorneys

[1] On April 19, 2016, counsel for a defendant attorney, Eugene Goss, filed notice with the court that Goss had died on December 23, 2015. On December 27, 2016, counsel for Goss filed a motion to dismiss based upon the plaintiffs' failure to revive the action in the name of the representative of the defendant. On January 19, 2017, Goss was dismissed with prejudice.

owed the appellants a fiduciary duty. We observed that the Fayette Circuit Court simply had not found that an attorney-client relationship existed between the then-defendant attorneys and the putative class members, nor had it found that the attorneys owed the then-plaintiffs a fiduciary duty under the circumstances. We noted as follows:

> [A]ny such findings must be based on facts that are not in evidence before us. The record before us consists of the documents filed in the limited litigation that took place following the filing of the Plaintiffs' second complaint. We do not have in the record any of the evidence or documents filed in the litigation following the filing of the Plaintiffs' first complaint. It appears from the record, in particular from the circuit court's opinion and order, as well as the discussions that took place during arguments before that court, that the parties and the court have information from the initial litigation to which we are not privy. Therefore, we cannot comment on whether the Plaintiffs will be able to successfully establish that an attorney-client relationship existed or that the attorneys owed a fiduciary duty. We can only state that they should have the opportunity to do so.

Id. at *7.

The appellants have been afforded that opportunity, and they have not shown the existence of an attorney-client relationship or that the appellee attorneys breached any duty to the putative class members.

Upon our review of a grant of summary judgment, we must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of

law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR[2] 56.03. Because summary judgment involves only legal questions and factual findings are not at issue, "an appellate court need not defer to the trial court's decision and will review the issue *de novo.*" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

In their brief to this Court, the appellants explain that upon remand, the federal district court again declined to certify the putative class. In fact, the federal district court granted summary judgment to all the LFUCG defendants on all claims (except *two*) alleging abuse as having occurred during Berry's time on the payroll of LFUCG for a summer lunch program (1982-1997) which had not been extinguished by the statute of limitations (tolled since the filing of *Guy*). Those plaintiffs settled their claims. Notably, in light of the federal court's ultimate rulings related to the applicability of sovereign immunity, the statutes of limitations, and the absence of a state actor, not a single named plaintiff represented by the defendant attorneys would have qualified for any compensation whatsoever.

The basis for asserting liability in this action is the appellee attorneys' actions in filing the underlying putative class action against LFUCG. The appellants contend that the attorneys thereafter breached a duty to them by

[2] Kentucky Rules of Civil Procedure.

willfully abandoning the interests of the putative class members once the named plaintiffs had settled their claims against the government. They contend that the compensation received by the alleged victims who were permitted to proceed after the reopening of *Guy* "paled in comparison to the amounts received by [the putative] class representatives and the Attorney Defendants in *Doe I* and *Guy*."

However, no class was ever certified in the underlying action pursuant to the requirements of Federal Rules of Civil Procedure 23. And the appellants have not presented any evidence whatsoever to show either the existence of an attorney-client relationship or the breach of any fiduciary duty to any putative class members. The appellants candidly acknowledge that "the record today is as devoid of evidence as it was in 2009." A party opposing a properly supported motion for "summary judgment motion cannot defeat it without presenting at **least some** affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991) (emphasis added).

The appellants contend that the appellee attorneys made admissions against interest "in a hurried attempt to obtain a quick payout . . . during a time when the LFUCG was willing to settle without relying upon the Statute of Limitations defense . . . ." However, we are unaware of the nature of those alleged admissions and how or if they might relate to the creation of an attorney-client

relationship with the unnamed, unknown putative class members. Furthermore, we reject the contention of the appellants that the appellee attorneys signed pleadings on behalf of unknown, unnamed members of a putative class that never came into existence. The federal district court has broad authority to exercise control over the proposed class action and, given its duty to protect the public, the responsibility to approve notice of a proposed settlement of the action. *McWilliams v. Advanced Recovery Systems*, 176 F. Supp. 3d 635 (S.D. Miss. 2016)

In 2007, the American Bar Association issued a formal opinion based upon the Model Rules of Professional Conduct in which it concluded that no attorney-client relationship existed between lawyers and potential members of a putative class action. ABA Formal Op. 07-445 (April 11, 2007). It observed that an attorney-client relationship "does not begin **until the class has been certified** and the time for opting out by a potential member of the class has expired." *Id.* at 2 (emphasis added). "If the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation." *Id.*

We find nothing in our code of professional responsibility or in our substantive law to suggest that the appellee attorneys in this case had the sweeping ethical, legal, or fiduciary obligations for which the appellants argue. The appellants have presented no evidence to indicate that that they had an express

agreement, an implied agreement, or any expectation whatsoever that any of the appellee attorneys represented any one of them.

Under the circumstances, we are not persuaded that the appellee attorneys (who were never appointed class counsel) undertook the legal representation of, or were otherwise bound by, a fiduciary duty to protect the interests of the absent members of a putative class of alleged victims that has never been certified by any court and with whom they never had the slightest contact. Consequently, we hold that the trial court did not err by concluding that the appellee attorneys were entitled to summary judgment. Given our analysis, we need not specifically address the circuit court's dismissal of the action against the late Eugene Goss.

We affirm the summary judgment of the Fayette Circuit Court.

ALL CONCUR.

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