NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JOSEPH FLYNN, Appellant v. WILSON, MORROW, BRODERICK, O'NEILL & THOMPKINS, L.L.P., AND WILSON, MORROW, BRODERICK, THOMPKINS & FLYNN, L.L.P., Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1375 EDA 2012

Appeal from the Order April 9, 2012
In the Court of Common Pleas of Montgomery County
Civil Division at No.: 05-12139

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: January 3, 2013

Appellant, Joseph Flynn, appeals from the order of April 9, 2012 granting summary judgment in favor of Appellees, the law firms of Wilson, Morrow, Broderick, O'Neill & Thompkins, L.L.P., and Wilson, Morrow, Broderick, Thompkins, & Flynn, L.L.P. We reverse the order granting summary judgment in favor of Appellees, and remand for further proceedings.

The trial court stated the factual history of this malpractice action as follows:

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* Retired Senior Judge assigned to the Superior Court.

On June 15, 2000 [Appellant] and his wife, Grace Flynn were involved in a serious automobile accident that occurred in Pennsylvania. The accident took place when a vehicle driven by John Michael Yoder collided with a vehicle driven by the Appellant and owned by Grace Flynn. At the time of the accident, Grace Flynn was a belted, rear seat passenger in the vehicle that she owned. As a result of the impact, the Appellant sustained minor physical injuries while his wife suffered fatal injuries. Grace Flynn never regained consciousness and died ten days after the accident.

Following the accident, the Appellant and the Estate of Grace Flynn retained the services of [Appellees] to represent them in their claims against tortfeasor John Yoder.[a] The Appellees filed wrongful death and survival claims on behalf of Appellant and against Mr. Yoder. Appellees never pursued a claim against Mr. Yoder for negligent infliction of emotional distress. In September of 2001, the Appellees settled the action against Mr. Yoder for the full amount of his automobile insurance policy limit.

[a] The case was brought to Appellees by Appellant's son, Sean P. Flynn, Esq., who at the time was a partner with the Appellee law firms.

Thereafter, on November 29, 2004, Appellant filed a two-count Complaint against Appellees alleging negligence and breach of contract. The action was initiated in Philadelphia but was subsequently transferred to Montgomery County by stipulation of both parties. On November 17, 2006, Appellees filed a Motion for Summary Judgment on the basis of the absence of an attorney-client relationship. On January 5, 2007, Appellant filed his Answer to said Motion. Subsequently, the Appellee[s'] Motion was denied by Order dated January 18, 2007. Following a protracted period of discovery, the Appellees filed the instant Motion for Summary Judgment on March 7, 2011. In response, Appellant filed his Answer to said Motion on April 6, 2011. Oral argument on said Motion took place before the [trial court] on March 1, 2012. By Order dated April 9, 2012, the [trial court] granted Summary Judgment in favor of Appellees based on Appellant's failure to prove compensable

> damages. On April 27, 2012, the Appellant appealed the April 9, 2012 Order to the Pennsylvania Superior Court.

(Trial Court Opinion, 7/06/12, at 1-2).[1]

Appellant raises two questions for our review:

> A. Did the [trial] court err in granting summary judgment, on the claim of negligent infliction of emotional distress, when there was evidence sufficient for a jury to conclude [Appellant] suffered physical manifestations of his emotional distress when he had gone to his personal physician and complained about symptoms?
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> B. Did the [trial] court err in granting summary judgment on the claim of negligent infliction of emotional distress when [Appellant] supplied a report from the treating physician which indicated that [Appellant] was suffering from "anxiety" from the horrific accident that killed his wife?

(Appellant's Brief, at 3).

Both of Appellant's questions challenge the trial court's determination that Appellant could not prove the underlying tort of negligent infliction of emotional distress in order to carry his malpractice claim against Appellees. We agree with Appellant that the trial court improperly determined that Appellees were entitled to summary judgment because of an "absence of a factual dispute." (Trial Ct. Op., 7/06/12, at 2).

Our standard of review of an appeal from a grant of summary judgment is well-settled. As stated by our Supreme Court:

> As has been oft declared by this Court, summary judgment is appropriate only in those cases where the record clearly

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[1] A review of the docket indicates that Appellant was not ordered to file a statement of errors complained of on appeal pursuant to Rule 1925(b). The trial court filed its Rule 1925(a) opinion on July 6, 2012.

> demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. When considering a motion for summary judgment, the trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party. In so doing, the trial court must resolve all doubts as to the existence of a genuine issue of material fact against the moving party, and, thus, may only grant summary judgment where the right to such judgment is clear and free from all doubt. On appellate review, then,
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> > an appellate court may reverse a grant of summary judgment if there has been an error of law or an abuse of discretion. But the issue as to whether there are no genuine issues as to any material fact presents a question of law, and therefore, on that question our standard of review is *de novo*. This means we need not defer to the determinations made by the lower tribunals.
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> To the extent that this Court must resolve a question of law, we shall review the grant of summary judgment in the context of the entire record.

Summers v. Certainteed Corp., 997 A.2d 1152, 1159 (Pa. 2010) (citations and quotation marks omitted).

> Thus, our responsibility as an appellate court is to determine whether the record either establishes that the material facts are undisputed or contains insufficient evidence of facts to make out a *prima facie* cause of action, such that there is no issue to be decided by the fact-finder. If there is evidence that would allow a fact-finder to render a verdict in favor of the non-moving party, then summary judgment should be denied.

Babb v. Ctr. Cmty. Hosp., 47 A.3d 1214, 1223 (Pa. Super. 2012) (citation omitted).

In the instant case, to survive a motion for summary judgment, Appellant was required to make out a *prima facie* cause of action for legal malpractice by Appellees.

> [T]o prevail in a legal malpractice action, a plaintiff-client must demonstrate the following: (1) employment of the defendant-attorney or other basis of duty owed to the plaintiff-client by the defendant-attorney; (2) the failure of the defendant-attorney to exercise ordinary skill and knowledge in the exercise of that duty; (3) such failure was the proximate cause of actual damages to the plaintiff-client.

Capital Care Corp. v. Hunt, 847 A.2d 75, 82 (Pa. Super. 2004) (citation omitted). Furthermore, in a claim for loss of a viable cause of action due to legal malpractice, "a plaintiff must prove a case within a case since he must initially establish by a preponderance of the evidence that he would have recovered a judgment in the underlying action." ***Kituskie v. Corbman***, 714 A.2d 1027, 1030 (Pa. 1998). Here, the trial court determined that Appellant failed to carry his burden of "proof of a physical manifestation of the emotional distress" in the underlying action for negligent infliction of emotional distress. (Trial Ct. Op., 7/06/12, at 5).

To make a *prima facie* claim of negligent infliction of emotional distress:

> [T]he plaintiff must have experienced physical injury as a result of having been exposed to the traumatic event. Initially, physical injury had to be accompanied by some type of physical impact no matter how minor, and did not include conditions manifested only as "transitory, non-recurring" mental or emotional problems. However, under controlling case law, a plaintiff who can show such problems as "long continued nausea or headaches, repeated hysterical attacks or mental aberration" has demonstrated adequate physical injury sufficient to sustain a cause of action. Relying on Comment c to Section 436A, the eminent Justice Frank Montemuro, now retired, writing for a panel of this Court, previously held that "symptoms of severe depression, nightmares, stress and anxiety, requiring psychological treatment, and . . . ongoing mental, physical and

> emotional harm" sufficiently state physical manifestations of emotional suffering to sustain a cause of action.

Toney v. Chester County Hosp., 961 A.2d 192, 200 (Pa. Super. 2008), *affirmed*, 36 A.3d 83 (Pa. 2011) (footnote, emphasis and citations omitted).

Here, Appellant submitted the July 10, 2000 notes of his physician, Dr. Vachani of the Veteran's Administration Clinic, which stated that since the accident, Appellant was "not feeling really well," had developed a rash, and was suffering from anxiety. (Plaintiff's Response to Motion for Summary Judgment, 4/06/11, at Exhibit 1). Dr. Vachani later supplemented the report with a note that "[Appellant] was suffering from an acute anxiety syndrome due to the sudden death of his wife caused by a motor vehicle accident." (***Id.*** at Exhibit 2). Nonetheless, the trial court granted summary judgment because it determined that Appellant's medical notes stating that he "was not feeling too good lately as his wife recently passed away in an accident" were "not the kind of physical manifestation of emotional trauma that warrants recovery." (Trial Ct. Op., 7/06/12, at 5). Accordingly, the court determined that he could not make out the underlying claim for negligent affliction of emotional distress, and therefore Appellant's negligence and breach of contract claims were without merit. (***See id.*** at 6).

However, viewing this note in the light most favorable to Appellant as the non-moving party, we cannot agree with the trial court that Appellant's symptoms of anxiety fail to state physical manifestations of emotional suffering to sustain a cause of action for negligent infliction of emotional distress. ***See Toney***, ***supra*** at 200. The degree of anxiety Appellant

experienced and whether it was sufficiently ongoing to meet the standard for negligent infliction of emotional distress are genuine issues of material fact. ***See Babb***, ***supra*** at 1223. Therefore, the trial court abused its discretion in granting summary judgment where Appellees were not entitled to judgment as a matter of law. ***See id***; ***see also Summers***, ***supra*** at 1159.

Order reversed. Case remanded. Jurisdiction relinquished.