

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ANDREA KATER,

Appellant

v.

SWARTZ, CAMPBELL & DETWEILER,

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2823 EDA 2012

Appeal from the Order Entered September 5, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): November Term, 2004, No. 4398

BEFORE: BENDER, P.J., DONOHUE, J., and MUSMANNO, J.

MEMORANDUM BY BENDER, P.J.

FILED DECEMBER 20, 2013

Andrea Kater (Kater) appeals from the order entered September 5, 2012, granting summary judgment in favor of the law firm of Swartz, Campbell & Detweiler (Firm), in a legal malpractice action initiated by Kater against the Firm for services rendered in connection with the filing of post-trial motions and an appeal to this Court from a verdict in a vehicle accident case. After review, we affirm.

The trial court set forth the following recitation of the underlying facts and the basis for her legal malpractice claims:

[Kater] commenced this action by Writ of Summons on December 2, 2004. She filed her Complaint April 30, 2010 alleging that Swartz, Campbell & Detweiler committed legal malpractice in the handling of her defense post-verdict in *Bell v. Kater*, December Term, 2000, #2635 (hereinafter "the underlying case.")

The underlying case arose out of a motor vehicle accident, which occurred on October 25, 1999. On that date, Andrea Kater was injured during her shift at Paul's Run retirement community and sought treatment at Frankford Hospital. By the time she returned to Paul's Run, her shift had ended, so she returned to her car and when driving out of the parking lot, struck Edward Bell. Edward Bell was employed by Paul's Run as a security supervisor on the date of the accident.

[Kater's] insurer, American Independent Insurance Company, retained the Law Firm of Mednick, Mezyk & Kredon to represent Andrea Kater as a defendant in the personal injury lawsuit instituted by Edward Bell. The case went to trial on July 29, 2002, and a Philadelphia jury returned a verdict of Two Million Dollars (\$2,000,000) against Andrea Kater.

Following the verdict, American Independent Insurance Company retained the firm of Swartz, Campbell & Detweiler to handle post-trial motions and an appeal to Superior Court. The actions taken by Swartz, Campbell & Detweiler on Andrea Kater's behalf form the basis of Kater's claim for legal malpractice in the instant matter.

[Kater] filed her Complaint on April 30, 2010. [Kater] claims that Swartz, Campbell & Detweiler committed legal malpractice because the firm "(a) Never raised the issue of a potential Worker's Compensation Defense; (b) Never raised any Immunity Defense; (c) Failed to adequately represent the interest of Plaintiff Andrea Kater; (d) Failed to timely file an Appeal to Superior Court; (e) Negligently failed to analyze the issues involved in the case of *Bell v. Kater*."

Trial Court Opinion (T.C.O.), 12/5/12, at 1-2 (citations to the record omitted). In May 2012, the Firm filed a motion for summary judgment. Following oral argument, the trial court granted the motion and dismissed Kater's complaint.

Kater raises the following issues in her timely appeal: (1) whether there is a genuine issue of fact as to the duty the Firm owed her; (2)

whether the Firm should have questioned the trial court's subject matter jurisdiction when it filed post-trial motions in the underlying litigation; and (3) whether there is a genuine issue of fact regarding the potential outcome of a timely filed motion to strike or vacate judgment in the underlying litigation. **See** Appellant's Brief at 4.

We review Kater's claims under the following standard:

Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.

Summary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.

Cassel-Hess v. Hoffer, 44 A.3d 80, 84-85 (Pa. Super. 2012) (quoting **Englert v. Fazio Mech. Servs., Inc.**, 932 A.2d 122, 124 (Pa. Super. 2007) (citations omitted).

In order to state a claim for legal malpractice, a plaintiff must demonstrate (1) employment of the attorney or other basis for a duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of damage to the plaintiff. **See Kituskie v. Corbman**, 714 A.2d 1027, 1029 (Pa. 1998).

[A] legal malpractice action in Pennsylvania requires the plaintiff to prove that he had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case (often referred to as proving a “case within a case”).

Kituskie, 714 A.2d at 1030.

Essentially, Kater argues that she and Bell were co-employees at the time of the accident and that, therefore, the Firm should have raised the Workers’ Compensation Act, 77 P.S. §§ 1 *et seq.* (the Act) as a defense or jurisdictional bar in the post-trial litigation of the underlying case. **See** 77 P.S. § 72 (providing immunity from liability for the compensable injuries caused by a fellow employee). According to Kater, the Firm’s failure to do so was a breach of its duty to exercise ordinary skill and knowledge. Her argument is devoid of merit.

Kater does not demonstrate evidentiary support for her argument, and this Court has previously rejected an attempt by her to untimely argue that she is entitled to co-employee immunity. **See Bell v. Kater**, 943 A.2d 293 (Pa. Super. 2008) (concluding that Kater’s failure to plead or present evidence of her employment status *to the fact-finder* rendered the immunity afforded by the Act unavailable), *appeal denied*, 960 A.2d 454 (Pa. 2008).

Moreover, the substance of Kater’s present claim cannot be divorced from the procedural posture of the underlying case. In the underlying case, the Firm’s first opportunity to raise the Act came when it filed a post-trial motion on Kater’s behalf.

Post-trial relief may not be granted unless the grounds therefor, if then available, were raised in pre-trial proceedings or by motion, objection, point of charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial.

Pa.R.C.P. 227.1(b)(1). However, Kater's employment status at the time of the accident was not raised as an issue during pre-trial proceedings or at trial. Therefore, it would have been inappropriate for the Firm to raise her employment status as a ground for post-trial relief. **See, e.g., Shelhamer v. Crane**, 58 A.3d 767, 771 (Pa. Super. 2012) (reversing an order granting a new trial because the ground for post-trial relief had not been asserted during trial).

Similarly, the Firm could not raise Kater's employment status on appeal. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a); **Bell**, 943 A.2d at 299 ("Determinations relevant to course and scope of employment involve issues of fact and credibility which should only be determined by the trial court by examining the evidence."); **see also Dilliaine v. Lehigh Valley Trust Co.**, 322 A.2d 114, 116 (Pa. 1974) ("Appellate court consideration of issues not raised in the trial court results in the trial becoming merely a dress rehearsal.").

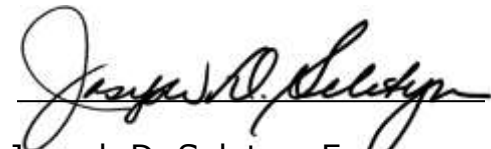
Nevertheless, Kater contends that the immunity afforded co-employees by the Act is a jurisdictional bar not subject to waiver, and thus her belated reliance on the Act should be accepted, citing in support **LeFlar**

v. Gulf Creek Indus. Park No. 2, 515 A.2d 875, 879 (Pa. 1986). **LeFlar** was decided under peculiar procedural circumstances, most of which are not relevant here. **See, e.g., LeFlar**, 515 A.2d at 878 (describing the “procedural labyrinth” of the case, which included parallel claims before a workmen’s compensation board and the trial court). It is noteworthy, though, that in **LeFlar** employment status was an issue developed during trial and presented to the jury. **Id.** at 879. Accordingly, **LeFlar** is inapposite to the matter before us.

For the above reasons, we conclude there was no failure to exercise ordinary skill and knowledge in the Firm’s representation of Kater, and we discern no error of law or abuse of the trial court’s discretion in granting the Firm’s motion for summary judgment.¹ Accordingly, we affirm.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/20/2013

¹ To the extent Kater also argues that the Firm should have presented facts in support of her premise that she and Bell were co-employees, and that, if they had, a motion to strike the judgment against her would have been successful, we conclude such argument is speculative and without legal support.