[Cite as *Skoda Minotti Co. v. Novak, Pavlik & Deliberato, L.L.P.*, 2015-Ohio-2043.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101964

SKODA MINOTTI COMPANY

PLAINTIFF

vs.

NOVAK, PAVLIK & DELIBERATO, L.L.P., ET AL.

DEFENDANTS-APPELLEES

[APPEAL BY ROBERT G. SMITH]

DEFENDANT/THIRD-PARTY
PLAINTIFF-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-810085

BEFORE: Kilbane, J., Jones, P.J., and McCormack, J.
RELEASED AND JOURNALIZED: May 28, 2015

APPELLANT

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Robert G. Smith ("Smith"), pro se, appeals the trial court's judgment granting a motion for judgment on the pleadings and a motion in limine in favor of defendant-appellee, Novak, Pavlik & Deliberato, L.L.P., f.k.a. Novak, Robenhalt & Pavlik L.L.P. ("Novak"), and third-party defendant Scott Perlmuter, Esq. ("Perlmuter"). Smith also appeals the trial court's judgment, rendered after a jury verdict, finding him liable to Novak in the amount of $15,184.53. For the reasons set forth below, we affirm.

{¶2} The facts underlying the lawsuit in the instant case arise from a taxpayer mandamus action filed by Smith against the city of Akron — *State ex rel. Smith v. Akron*, Summit C.P. No. CV-2009-04 3107. In April 2009, Smith retained Novak and Perlmuter to bring a taxpayer mandamus action against the city of Akron. Smith sought to compel the production of travel records, receipts, and credit card statements from the mayor of Akron and other city personnel. Smith believed the mayor and other city personnel improperly destroyed these records, which established that they "traveled the world, stayed in four-star hotels, and wined and dined" on the taxpayer's money. Smith also sought damages for the estimated 1,000 documents that were destroyed.

{¶3} Perlmuter, an attorney with Novak, represented Smith in the mandamus

action. Smith entered into a written fee agreement with Novak on a contingency basis. The agreement provided that Smith "agree[s] to reimburse [Novak] for expenses incurred in the investigation, preparation and prosecution of this case and the reasonable cost of professional consultant services regardless of the outcome." In July 2011, Permulter retained Skoda Minotti Company ("Skoda"), on Smith's behalf, to investigate the expenditures incurred by the mayor and other city officials and prepare an expert report with respect to its findings. In January 2012, Skoda submitted a bill to Novak in the amount of $15,488.23 for the services rendered. In October 2012, Smith's case was voluntarily dismissed, without prejudice. Thereafter, Smith terminated the attorney-client relationship with Perlmuter and Novak.

{¶4} Then in July 2013, Skoda filed a complaint against Novak and Smith for the accounting services it provided to Novak for Smith's case. Skoda alleges that both Novak and Smith breached the agreement by failing to pay the outstanding balance. In response, Novak filed an answer and a cross-claim against Smith. In its cross-claim, Novak alleges that Smith is liable to Skoda under the written fee agreement, which obligates him to pay for the costs incurred in hiring an expert.

{¶5} Smith subsequently filed a pro se answer and a third-party complaint against Novak and Perlmuter for legal malpractice in his case against the city of Akron. Smith alleges that Perlmuter was negligent for: (1) failing to present

evidence at an evidentiary hearing; (2) hiring an expert against Smith's wishes and then later claiming an expert was not needed; and (3) dismissing a case that was worth approximately $985,000.

{¶6} Thereafter, Novak and Perlmuter filed a motion for judgment on the pleadings, under Civ.R. 12(C), with respect to Smith's third-party complaint. Novak and Perlmuter argued that Smith could not establish, as a matter of law, the element of proximate cause for legal malpractice claim because he failed to refile his case against the city of Akron. The trial court granted the motion and dismissed Smith's third-party complaint for legal malpractice in January 2014. Smith filed a motion with the trial court to reconsider its decision, which the trial court denied.

{¶7} In August 2014, the matter proceeded to jury trial on Skoda's claim for its expert fee and Novak's claim for indemnification and contribution against Smith. Prior to trial, Novak filed a motion in limine to exclude any evidence of legal malpractice because Smith's legal malpractice claims had been dismissed. The trial court granted the motion. At the conclusion of trial, the jury rendered a verdict in favor of Skoda on its expert fee claim against Novak in the amount of $20,347.43 and in favor of Novak on its cross-claim against Smith in the amount of $15,184.53.

{¶8} Smith now appeals, raising the following four assignments of error for

review, which shall be discussed together where appropriate.

Assignment of Error One

> The trial court erred in granting [Novak and Perlmuter's] motion for judgment on the pleadings with respect to [Smith's] legal malpractice claim.

Assignment of Error Two

> The trial court erred in denying [Smith's] motion for reconsideration of the order dismissing the legal malpractice claim.

Assignment of Error Three

> The trial court erred in granting [Novak's] motion in limine precluding [Smith] from asserting, arguing, or eliciting testimony or otherwise introducing at trial, evidence of any claims of legal malpractice, thereby preventing [him] from presenting his affirmative defenses at trial.

Assignment of Error Four

> The trial court erred in granting judgment for [Novak] for the expense of an expert report without allowing [Smith] to present evidence that the law firm had breached its contract of representation with [Smith], had destroyed any and all value of that expert report, and had otherwise been negligent in its representation in the underlying case so as not to have been entitled to payment for the expert report.

Motion for Judgment on the Pleadings and
Motion for Reconsideration

{¶9} In the first and second assignments of error, Smith argues the trial court erred when it granted Novak and Perlmuter's motion for judgment on the pleadings and denied his motion for the court to reconsider its decision.

{¶10} A motion for judgment on the pleadings presents only questions of law, which we review de novo. *Coleman v. Beachwood*, 8th Dist. Cuyahoga No. 92399, 2009-Ohio-5560, ¶ 15. Motions for judgment on the pleadings are governed by Civ.R. 12(C), which provides that: "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

{¶11} The determination of a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings and any writings attached to the pleadings. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166, 297 N.E.2d 113 (1973). Dismissal is appropriate under Civ.R. 12(C) when, after construing all material allegations in the complaint, along with all reasonable inferences drawn therefrom in favor of the nonmoving party, the court finds that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 1996-Ohio-459, 664 N.E.2d 931.

{¶12} In order to establish a claim of legal malpractice based on negligent representation, the plaintiff must demonstrate "(1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage

or loss." *Vahila v. Hall*, 77 Ohio St.3d 421, 674 N.E.2d 1164 (1997), syllabus, following *Krahn v. Kinney*, 43 Ohio St.3d 103, 538 N.E.2d 1058 (1989).

{¶13} At issue in the instant case is the third prong of the *Vahila* test — a causal connection between the conduct complained of and the resulting damage or loss. Smith maintains that Novak's breach caused him the loss of a forfeiture action for the documents destroyed by the city (approximately $985,000 or $1,000 for each of the 984 missing receipts from the city) and the cost of Skoda's expert report fee. Smith further maintains he dismissed his case because he believed that he had no other choice based on an email from Perlmuter. In the email, Perlmuter states that they need to come up with a new agreement as to fees and expenses. Based on the attitude of the trial court, Perlmuter felt they were going to spend over a week in a trial that they were going to lose.

{¶14} Novak, on the other hand, argues that Smith's failure to refile the action, after it was voluntarily dismissed without prejudice, and litigate the merits of the city case is fatal to his claim that any alleged negligence caused him to incur damages. We find Novak's argument more persuasive in that Smith failed to establish proximate cause when he did not refile and litigate the merits of the city case.

{¶15} In *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173 (*"ENC"*), the Ohio Supreme

Court clarified its holding in *Vahila*, 77 Ohio St.3d at 427-428, 674 N.E.2d 1164. In *ENC*, Goodman Weiss Miller, L.L.P. ("Goodman") represented ENC in a contract dispute. ENC filed a lawsuit against a company and filed a counterclaim against a second company. The matter proceeded to a trial. On the second day of trial, the parties settled. The agreement erased ENC's debt to the second company and transferred $40,000 to ENC to apply toward the legal fees they owed Goodman. One year later, ENC filed a legal malpractice claim, alleging that Goodman's malpractice resulted in a coerced settlement, and it would have achieved a better result if the underlying case had been tried to its conclusion. The malpractice action went to a jury trial. The jury found in favor of ENC and awarded them almost $2,500,000. Goodman then filed a motion for a judgment notwithstanding the verdict. The trial court denied the motion, and the court of appeals affirmed the trial court's judgment. Goodman then appealed to the Ohio Supreme Court. *ENC* at ¶ 4-11.

{¶16} The *ENC* court noted that in *Vahila*, it recognized that '"the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case."' *Id.* at ¶ 15, quoting *Vahila*.

> The *Vahila* court determined that "depending on the situation, [a plaintiff may be required] to provide some evidence of the merits of the underlying claim," but declined to "endorse a blanket proposition that requires a plaintiff to prove, *in every instance*, that he or she would have been successful in the underlying matter." (Emphasis

added.) *Id.* at 428, 674 N.E.2d 1164.

ENC. The *ENC* court then stated:

> The language quoted above shows that the court rejected a wholesale adoption of a "but for" test for proving causation and the mandatory application of the "case-within-a-case doctrine." The doctrine, also known as the "trial-within-a-trial doctrine," provides that "[a]ll the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial; in considering whether the plaintiff has carried that burden, however, the trier of fact may consider whether the defendant lawyer's misconduct has made it more difficult for the plaintiff to prove what would have been the result in the original trial." Restatement of the Law 3d, Law Governing Lawyers, 390, Section 53, Comment b (2000).

Id. at ¶ 16.

{¶17} In holding that not every malpractice case will require the plaintiff to establish that he or she would have succeeded in the underlying matter, "the *Vahila* court necessarily implied that there are some cases in which the plaintiff must so establish." *Id.* at ¶ 17. The *ENC* court noted that ENC's sole theory for recovery is that if the underlying matter had been tried to conclusion, they would have received a more favorable outcome than they obtained in the settlement. Thus, unlike the plaintiffs in *Vahila*, who sustained losses regardless of whether their underlying case was meritorious, ENC could recover only if it could prove that it would have succeeded in the underlying case and that the judgment would have

been better than the terms of the settlement. *Id.* at ¶ 18. The court determined that the theory of ENC's malpractice case placed the merits of the underlying litigation directly at issue because in order to prove causation and damages, ENC had to establish that Goodman's actions resulted in settling the case for less than it would have received had the matter gone to trial. *Id.*

{¶18} The court found that this type of legal malpractice action involves the case-within-a-case doctrine, which means the plaintiff must establish that he or she would have been successful in the underlying matter. It is insufficient for the plaintiff to present simply "some evidence" of the merits of the underlying claim. *Id.* at ¶ 18. The court then reversed the judgment of the court of appeals, holding that ENC "failed to produce sufficient evidence showing that but for [Goodman's] malpractice, they would have achieved a better result in trying the underlying case to its conclusion." *Id.* at ¶ 30.

{¶19} In the instant case, Smith argues that the dismissal of his case caused him to lose the forfeiture action for the documents destroyed by the city, which could have resulted in recovery of approximately $985,000. However, the record demonstrates that in discussing the case, via email, Perlmuter advised Smith that his case would need to be voluntarily dismissed if they could not get a different judge to preside over the matter. In response, Smith stated: "[y]ou are requested to dismiss the present case against the City of Akron and preserve my right to refile.

It is understood that this [is] mutually agreeable [to] you and [y]our law firm." After the case was dismissed, Smith did not refile his claims against the city of Akron.

{¶20} Just as in *ENC*, Smith is alleging a legal malpractice action that involves the case-within-a-case doctrine, which means that Smith must establish that he would have been successful in the underlying matter. Smith failed to do so when he had the opportunity to litigate the merits of his claims by refiling his complaint, after the first dismissal, and chose not to. Thus, Smith has failed to allege a set of facts which, if true, would establish Novak's and Perlmuter's liability, and his legal malpractice claim fails as a matter of law. As a result, the trial court properly granted Novak and Perlmuter's motion for judgment on the pleadings.

{¶21} Having found that the trial court properly granted the motion for judgment on the pleadings, we also find that the trial court's denial of Smith's motion for reconsideration was proper.

{¶22} Accordingly, the first and second assignments of error are overruled.

Motion in Limine

{¶23} In the third and fourth assignments of error, Smith argues the court erred when it granted Novak's motion in limine and disallowed him from presenting evidence regarding his legal malpractice claim and affirmative defenses.

{¶24} In the instant case, at the time of trial, the only issues before the court were whether Novak and Smith were liable to Skoda for its unpaid fees and whether Smith had to indemnify Novak for the fees. Smith filed a partial transcript of the trial proceedings as part of the appellate record. He only submitted a portion of the proceedings prior to trial, at which he objected and requested that his affirmative defenses be maintained. Smith has the duty to provide a transcript for appellate review. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Id.*

> A "motion *in limine*" is defined in Black's Law Dictionary (5 Ed. 1979) 914, as "[a] written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements * * * to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial[,] and granting of [the] motion is not a ruling on evidence and, where properly drawn, granting of [the] motion cannot be error. *Redding v. Ferguson*, Tex. Civ. App. [1973], 501 S.W.2d 717, 724."

State v. Grubb, 28 Ohio St.3d 199, 200-201, 503 N.E.2d 142 (1986).

> "An order granting or denying a motion *in limine* is a tentative, preliminary or presumptive ruling about an evidentiary issue that is anticipated. An appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection when the issue is actually reached during the trial."

Id. at 203, quoting *State v. Leslie*, 14 Ohio App.3d 343, 344, 471 N.E.2d 503 (2d Dist.1984). Thus,

> [a]t trial, it is incumbent upon [the party,] who has been temporarily restricted from introducing evidence by virtue of a motion *in limine*, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal.

Grubb at 203.

{¶25} We note that "[i]n Ohio, pro se litigants are presumed to have knowledge of the law and of correct legal procedure, and are held to the same standard as all other litigants." *Loreta v. Allstate Ins. Co.*, 8th Dist. Cuyahoga No. 97921, 2012-Ohio-3375, ¶ 8, citing *Barry v. Barry*, 169 Ohio App.3d 129, 133, 2006-Ohio-5008, 862 N.E.2d 143 (8th Dist.). In the instant case, Smith failed to include the trial transcript, which prevents us from determining if he preserved the objection for purposes of the appeal and if the trial court abused its discretion in precluding the evidence. Therefore, we must presume regularity with the trial court's decision to grant Skoda's motion in limine.

{¶26} Accordingly, the third and fourth assignments of error are overruled.

{¶27} Judgment is affirmed.

It is ordered that appellees recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the

Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., and
TIM McCORMACK, J., CONCUR