[Cite as *Flynn v. Pollock*, 2017-Ohio-966.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104516

BONNIE FLYNN, EXECUTOR

PLAINTIFF-APPELLANT

vs.

CANDACE POLLOCK, ESQ., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-844751

BEFORE: Laster Mays, J., E.T. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: March 9, 2017

ATTORNEY FOR APPELLANT

L. Bryan Carr
1392 SOM Center Road
Mayfield Heights, Ohio 44124

ATTORNEYS FOR APPELLEES

Victoria L. Vance
Michael J. Ruttinger
Paul Janowicz
Edward E. Taber
Tucker Ellis L.L.P.
950 Main Avenue, Suite 1100
Cleveland, Ohio 44113

ANITA LASTER MAYS, J.:

{¶1} The plaintiff-appellant, Bonnie Flynn ("Flynn"), appeals the trial court's decision to grant summary judgment to defendants-appellees, Candace Pollock, et al. ("Pollock"), and asks this court to reverse the trial court's decision and remand this matter for trial. We reverse the trial court's decision granting summary judgment to the appellees and remand.

I. Facts

{¶2} Both appellant and appellees agree that Pollock was hired by the family of Glenna Lankford ("Lankford") to handle some affairs of Lankford's estate. Flynn states that those affairs included Pollock filing for Medicaid on behalf of Lankford so that Lankford's nursing home stay would be paid for by Medicaid; and filing a transfer-on-death deed for the transfer of Lankford's home to her adult son. Pollock, however, disagrees, and states that her responsibilities were limited to just filing the Medicaid paperwork.

{¶3} According to Flynn, Pollock breached her legal duties to Lankford by not filing the Medicaid application, failing to respond to communications from the Lankford family, and failing to respond to communications from the attorney representing the nursing home. Pollock was contacted by the Lankford family to help them with estate planning and nursing home issues. In March 2014, Pollock was provided with a completed asset protection analysis letter that detailed Lankford's assets including a

checking account, her home, and life insurance policy. During this meeting, Pollock discussed the Medicaid paperwork and the fact that Lankford's home needed to be transferred into her son's name.

{¶4} In June 2014, Pollock was paid $2,500 from Lankford for her services. Also in June, the Lankford family met with Pollock to discuss the $13,000 debt to the nursing home for Lankford's care. During the next few months, the Lankford family claims that Pollock failed to communicate with them citing that Pollock was experiencing family health matters and that her husband passed away. On July 31, 2014, Pollock asked the family to complete another Medicaid application because she lost the first application they filled out months ago. According to the appellant, Pollock never filed the application. In addition, the record does not indicate that Pollock filed the application. In fact, the Lankford family emailed Pollock on November 20, 2014, to inquire about Pollock filing the application for Medicaid. Also in January of 2015, in their termination of services email, the Lankford family stated that "we have since been advised by Medicaid that the proper documentation was not presented in order to file." Pollock also did not respond to the family's request for communication and updates even after Lankford passed away on September 14, 2014.

{¶5} On October 29, 2014, Timothy Toma ("Toma"), the attorney for the nursing home, sent a letter to Pollock inquiring about payment for the outstanding bill Lankford owed to the nursing home. The bill had increased to $27,811.58. Pollock called Toma and left a voicemail message stating that her husband had passed away and it took her

longer than she expected to "get back in the saddle." Numerous times Toma attempted to contact Pollock, but the Lankford family claims that Pollock failed to respond to Toma and to them. On January 16, 2015, after failing to hear from Pollock for months, the Lankford family terminated the attorney-client relationship. Pollock billed the Lankford family for her services and detailed her time spent working on their case. Pollock billed the Lankford family for 1.8 hours of work from May 2014 through July 2014. Her detailed invoice does not include filing the Medicaid application.

{¶6} On April 27, 2015, the appellant filed a complaint on behalf of the Lankford estate against Pollock for attorney malpractice. On January 8, 2016, Pollock filed her motion for summary judgment. The trial court granted the summary judgment. As a result, the appellant filed this timely appeal alleging one assignment of error:

> I. The trial court erred in granting the appellees' motion for summary judgement.

II. Summary Judgment

A. Standard of Review

{¶7} The trial court granted summary judgment as to all of Flynn's claims.

> This court reviews the lower court's granting of summary judgment de novo. *Baiko v. Mays*, 140 Ohio App.3d 1, 7, 746 N.E.2d 618 (8th Dist.2000), citing *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987); *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 699 N.E.2d 534 (8th Dist.1997); *Dragmen v. Swagelok Co.*, 8th Dist. Cuyahoga No. 101584, 2014-Ohio-5345, ¶ 15. An appellate court affords no deference to the trial court's ruling and conducts an independent review of the record to determine whether summary judgment is appropriate. *K.S. v. Pla-Mor Roller Rink*, 8th Dist. Cuyahoga No. 103139, 2016-Ohio-815, ¶ 7. The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party. * * * [T]he

> motion must be overruled if reasonable minds could find for the party opposing the motion. *Saunders v. McFaul*, 71 Ohio App.3d 46, 50, 593 N.E.2d 24, (8th Dist.1990).

KeyBank Natl. Assn. v. Thalman, 8th Dist. Cuyahoga No. 102624, 2016-Ohio-2832, ¶ 11.

{¶8} Under Civ.R. 56, summary judgment is appropriate when:

> (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party.

Pla-Mor Roller Rink at ¶ 8.

{¶9} "The party moving for summary judgment has the initial burden to show that no genuine issue of material fact exists." *Id.* at ¶ 9.

> In *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996), the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991). Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Id*. at 296.

KeyBank Natl. Assn. at ¶ 13.

B. Law and Analysis

{¶10} In Flynn's sole assignment of error, she argues that the trial court erred in granting the appellees' motion for summary judgment. The trial court granted the motion because Flynn failed to support her legal malpractice claims with expert testimony.

> The following elements are necessary to establish a cause of action for legal malpractice: (1) an attorney-client relationship, (2) professional duty arising

> from that relationship, (3) breach of that duty, (4) proximate cause, and (5) damages. *Estate of Hards v. Walton*, 8th Dist. Cuyahoga No. 93185, 2010-Ohio-3596, citing *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, 887 N.E.2d 1167. The elements of a legal malpractice claim are stated in the conjunctive, and the failure to establish an element of the claim is fatal. *Id*., citing *Williams-Roseman v. Owen*, 10th Dist. Franklin No. 99AP-871, 2000 Ohio App. LEXIS 4254 (Sept. 21, 2000).

Andolsek v. Burke, 8th Dist. Cuyahoga No. 100701, 2014-Ohio-3501, ¶ 20.

> **{¶11}** In order to substantiate a claim for legal malpractice,
>
> [W]e note that it is well settled in Ohio that in order to prevail on a legal malpractice claim a plaintiff must demonstrate, through expert testimony, by a preponderance of the evidence, that the representation of the attorney failed to meet the prevailing standard of care, and that the failure proximately caused damage or loss to the client. *Zafirau v. Yelsky*, 8th Dist. Cuyahoga No. 89680, 2008-Ohio-1936, ¶ 27. Further, the Supreme Court made it clear that there must be a causal connection between the lawyer's failure to perform and the resulting damage or loss. *Jarrett v. Forbes*, 8th Dist. Cuyahoga No. 88867, 2007-Ohio-5072, ¶ 19, explaining *Vahila v. Hall*, 77 Ohio St.3d 421, 674 N.E.2d 1164 (1997).

Id. at ¶ 21.

{¶12} Whereas, expert testimony is required to sustain a claim of legal malpractice, except where the alleged errors are so simple and obvious that it is not necessary for an expert's testimony to demonstrate the breach of the attorney's standard of care. *McWilliams v. Schumacher*, 8th Dist. Cuyahoga Nos. 98188, 98288, 98390, and 98423, 2013-Ohio-29, citing *Hirschberger v. Silverman*, 80 Ohio App.3d 532, 538, 609 N.E.2d 1301 (6th Dist.1992). *See also McInnis v. Hyatt Legal Clinics*, 10 Ohio St.3d 112, 113, 461 N.E.2d 1295 (1984); *Rice v. Johnson*, 8th Dist. Cuyahoga No. 63648, 1993 Ohio App. LEXIS 4109 (Aug. 26, 1993); *Cross-Cireddu v. Rossi*, 8th Dist. Cuyahoga No. 77268, 2000 Ohio App. LEXIS 5480 (Nov. 22, 2000). *Id.* at ¶ 23.

{¶13} In this matter, the first two elements necessary to establish a cause of action for legal malpractice is not in dispute. There was an attorney-client relationship and a professional duty arising out of that relationship. The third element regarding the breach of duty is in dispute. The appellant did not provide expert testimony to substantiate her claim of legal malpractice regarding the third element. Flynn argues that Pollock's errors were so obvious that expert testimony was not necessary to demonstrate that Pollock breached her duty. *See, e.g., Friedland v. Djukic*, 191 Ohio App.3d 278, 2010-Ohio-5777, 945 N.E.2d 1095, ¶ 27 (8th Dist.) ("Expert testimony is ordinarily required to establish the breach of duty in a legal malpractice case, unless the breach is within the ordinary knowledge of lay people"). We agree. Expert testimony as to the standard of care was not necessary because it is within the ordinary knowledge of lay people to determine whether there was a lack of communication between the parties and the lack of filing necessary paperwork could be a breach of duty. *See, e.g., Phillips v. Courtney*, 8th Dist. Cuyahoga No. 84232, 2004-Ohio-6015 (expert testimony as to the standard of care was not necessary because it was within the common knowledge of the jurors whether the attorney ensured that the application was filed within two years of the client's termination of employment).

{¶14} Like in *Phillips*, it does not require expert testimony to determine whether Pollock's potential lack of communication or failure to file the Medicaid application could constitute a breach of duty. Either Pollock has evidence that she performed the duties she promised the Lankford family, or she does not. It's a question of fact not law.

The Lankford family claims that Pollock did not fulfill her duties as outlined in their agreement. At this juncture of the case, the issue does not lie within the complexities of Medicaid law or estate planning. The issue deals with a question of whether Pollock took any action as it relates to what was agreed upon in the engagement letter. An ordinary layperson can make a simple determination as to whether Pollock did any work for the Lankfords.

{¶15} An ordinary layperson is someone who is not an expert. An ordinary layperson has or should have the ability to judge if Pollock fulfilled her agreement with the Lankfords. For example, if a person hires a painter to paint their home, and then claims that the house was not painted, an expert is not needed to see if the house has been painted. However, if the claim is that the house was painted, but not to industry standards, then an expert would be needed to testify because an ordinary layperson is not equipped to understand industry standards of house painting. Likewise, it is possible for someone to look at the evidence presented and determined if Pollock filled out and filed an application for Medicaid. It is also possible that an ordinary layperson can determine if the written agreement between the parties contained provisions where Pollock agreed to file a transfer-on-death deed. Therefore, the trial court erred in granting summary judgment to the appellees, and the sole assignment of error is sustained.

{¶16} The judgment of the trial court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellees the 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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ANITA LASTER MAYS, JUDGE

EILEEN T. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR