[Cite as *Wagar v. Brinkman*, 2009-Ohio-2421.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

BARBARA WAGAR	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23019
vs.	:	T.C. CASE NO. 07CV1603
DANIEL E. BRINKMAN	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 22nd day of May, 2009.

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GRADY, J.:

{¶1} This is an appeal from a summary judgment for the Defendant attorney in a legal malpractice case.

{¶2} Defendant, Daniel Brinkman, is an attorney licensed to practice law. He maintains an office in Montgomery County. In 1998, Brinkman was retained by Plaintiff, Barbara Wagar,

to represent her in procuring a decree of divorce from her husband, Dixon Folkerth.

{¶3} Wagar told Brinkman that Folkerth was a participant in the State Teacher Retirement System ("STRS") and that Folkerth would resist dividing his STRS benefits to provide Wagar the share of those benefits to which she is entitled. Brinkman told Wagar that he was familiar with division of STRS benefits and would act to protect her interests. He advised her, however, that because by law STRS could not be ordered to pay Wagar her share of Folkerth's benefits directly, any requirements in that regard would have to be through court orders requiring Folkerth to pay Wagar her share.

{¶4} A final judgment and decree of divorce was granted on October 13, 1998. The decree provides that, with respect to any STRS benefits he is due, Folkerth upon his retirement "must elect the retirement benefits option which provides (Wagar) with the maximum survivorship benefits under said retirement benefits plan." After identifying Wagar's proportionate share of any benefit Folkerth would be due, the decree further provides for its future modification should the law be amended to permit a direct division of STRS benefits, and that the parties would cooperate in procuring such modifications.

{¶5} The foregoing provisions of the decree were obtained through Brinkman's efforts. There is evidence that he advised Wagar that, should Folkerth fail to comply with those provisions, Brinkman would seek a contempt citation requiring Folkerth to comply. Wagar agreed to that proposal.

{¶6} Folkerth subsequently retired, but did not elect to provide STRS survivor benefits to Wagar after his death. Folkerth paid Wagar her share of the monthly STRS retirement benefits he received. When the law changed in 2002, Brinkman obtained a modification allowing STRS to pay Wagar her share directly. However, those payments terminated following Folkerth's death in 2004 because he had not elected the survivorship option prior to entering actual retirement. As a result, Wagar is not entitled to receive any future benefits from STRS, notwithstanding a further change in the law following his death that would have allowed Folkerth to change his election after he retired.

{¶7} Wagar commenced an action against Brinkman on claims for relief alleging legal malpractice. After responsive pleadings were filed, Brinkman moved for summary judgment. His motion was supported by Brinkman's own deposition and the affidavits of two attorneys. Wagar filed a motion contra, supported by her own deposition and the deposition and

affidavit of an attorney.

{¶8} The trial court granted Brinkman's motion for summary judgment. The court found that the essential facts were not in dispute. The court further found that the affidavit of Brinkman's expert, Attorney F. Ann Crossman, who opined that Brinkman had not breached the duty of care he owed Wagar, satisfied the obligation imposed by *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-107, requiring Wagar to offer evidence from which reasonable minds could find that Brinkman breached his duty of care. Wagar relied on her own deposition, in which she testified that Brinkman had held himself out as experienced regarding division of STRS benefits. The court rejected Wagar's deposition and affidavit as insufficient, finding that expert opinion is required to prove the malpractice Wagar's complaint alleged. The court also rejected the deposition and affidavit of Wagar's expert, Attorney Craig A. Newburger, finding that he is not competent to offer an expert opinion concerning Brinkman's alleged negligence.

{¶9} Wagar filed a notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶10} "THE COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF BY FINDING THAT PLAINTIFF IS REQUIRED TO HAVE AN

EXPERT IN THIS CASE."

{¶11} "To establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (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, 421-22, 1997-Ohio-259, syllabus.

{¶12} It is undisputed that Wagar's claim for relief arises out of Brinkman's legal representation of her, and that the court never reached the issue of damages, having granted summary judgment for Brinkman on the breach of duty prong of Wagar's malpractice claim. Wagar argues on appeal that the trial court erred in so doing because, with respect to the breach of duty prong, Wagar satisfied the burden imposed by *Dresher v. Burt* "to set forth specific facts showing there is a genuine issue for trial," *Id.*, at 293.

{¶13} "A 'duty' is an obligation imposed by law on one person to act for the benefit of another person due to the relationship between them. When risks and dangers inherent in the relationship or incident to it may be avoided by the

obligor's exercise of care, an obligor who fails to do so will be liable to the other person for injuries proximately resulting from those risks and dangers if the injuries were reasonably foreseeable. In negligence cases the duty is always the same: to conform to the legal standard of reasonable conduct in the light of apparent risk. What a defendant must do, or must not do, is a question of the standard of conduct reasonably required to satisfy the defendant's duty. See Prosser & Keeton on Torts (5 Ed.1984) 356, Section 53.

{¶14} "In general, a standard of 'reasonable' conduct implies a minimum standard of care. But, if a condition by its nature requires the application of knowledge and skill superior to that of the ordinary person, one who possesses that superior knowledge and skill and who fails to employ it for the benefit of another when their relation requires it will be held liable for injuries proximately resulting from that failure. Such persons must use the care and skill reasonable in the light of their superior learning and experience, not simply a minimum standard of care. For those persons the relevant standard of conduct is 'good practice.' See *id.* at 185, 189, Section 32."

{¶15} *Berdyck v. Shinde*, 66 Ohio St.3d 573, 578-579, 1993-Ohio-183.

{¶16} *Berdyck* involved an allegation of nursing malpractice, but the distinction between a minimum standard of ordinary care and the higher standard of good practice likewise applies to negligence claims arising out of the practice of medicine or the practice of law. On claims alleging legal malpractice, the standard of conduct is "the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated." *Harrall v. Crystal* (1992), 81 Ohio App.3d 515, 525. Generally, because the conduct necessary to satisfy that standard is a matter "beyond the knowledge or skill possessed by lay persons," Evid.R. 702(A), expert testimony is required to prove what that standard would require which an attorney failed to do. *McInnis v. Hyatt Legal Clinics* (1984), 10 Ohio St.3d 112.

{¶17} Wagar testified in her deposition (Dkt. 31) that "I knew from the git go that there would be problems with the STRS account" (T. 11), and that Brinkman "would help (her) get (her share of) the STRS benefit." (T. 12-13). Wagar further testified that she told Brinkman that Folkerth would not sign the survivorship designation needed to do that, and that "Dan's response to that was, well, if he doesn't, it's okay, we'll get a Court order and change it." (T. 14). Wagar

further testified:

{¶18} "Well, I tried telling him again he wasn't going to do it. * * * I said, I want to make sure, you know, that you've worked with teachers and with pensions and particularly with STRS because I already knew that STRS was a real problem. I said, I know I'm entitled to a percentage of it. I want to get it. I will tell you my husband will make every effort not to give it to me, and Dan said, I know how they work, it'll be fine." (T. 21).

{¶19} Wagar repeated her testimony in an affidavit attached to her memorandum contra Brinkman's motion for summary judgment. (Dkt. 38). Wagar further stated that she later learned that Brinkman's assurances were founded on his belief that the court could order Folkerth to obtain a policy of life insurance benefitting Wagar for her share of his pension in the event Folkerth failed to make a survivorship designation, adding, at paragraph 7: "This was ridiculous as I had told Mr. Brinkman, repeatedly, that Dixon was in extremely bad health. As it turned out, though he did try, Dixon was not able to obtain any life insurance." Wagar further stated, at paragraph 18: "Mr. Brinkman knew all of this yet he gave me bad or wrong advice."

{¶20} Attorney Brinkman testified in his deposition

(Dkt. 32) that if a party subject to a divorce decree violated its terms "you can file a motion for contempt because they violated the order," and "[t]hat's how we handle situations and that's the only way we could handle this particular situation back before the law changed." (T. 58).

{¶21} The difficulties and inequities that existed with respect to the division through a decree of divorce of benefits provided by Ohio's retirement systems for its public employees when Brinkman advised and represented Wagar are illustrated by the Supreme Court's opinion in *Cosby v. Cosby*, 96 Ohio St. 3d 228, 2002-Ohio-4170. The law has since been changed to remedy those problems, but too late to correct the loss that Wagar suffered through her former husband's violation of the duties imposed on him by their divorce decree. Whether Brinkman breached the duty of care he owed Wagar in that connection presents a different question, however.

{¶22} When an attorney promises a client that he will or will not do a certain thing, such as filing a particular pleading, and the attorney breaches that particular promise, the attorney may be liable to the client in damages for breach of his contract of employment. *McInnis v. Hyatt Legal Services; Nalls v. Nystrom* (2004), 159 Ohio App.3d 200.

However, an attorney is not a guarantor of the outcome of litigation, and his failure to achieve the client's purposes and objectives, standing alone, is insufficient to prove a breach of the attorney's duty of care, absent proof that his performance fell below the standard of conduct applicable to his representation and that the attorney's particular act or omission proximately caused the injuries to his or her interests of which the client complains.

{¶23} Wagar argues that the trial court erred in finding that evidence presented in her own deposition and affidavit, and Brinkman's deposition, is insufficient to satisfy her duty under *Dresher v. Burt* in relation to her legal malpractice claim. Wagar points out that the advice Brinkman gave her was incorrect because "no court order could possibly obtain benefits for (her). Only Mr. Dixon Folkerth's signature on the correct form and at the correct time could accomplish (her) goal." (Brief, p. 3).

{¶24} The evidence on which Wagar relies demonstrates that she made Brinkman aware of the likelihood that her former husband would not comply with an order to designate Wagar his survivor for purposes of his STRS benefits, and that Brinkman advised Wagar that in that event her former husband would be in contempt of court and subject to an order requiring him to

comply. The evidence also shows that Brinkman was possibly unaware that, even with a court order, Folkerth's failure to designate Wagar his survivor could not subsequently be changed. The evidence also shows that Wagar was injured as a proximate result of her former husband's misconduct.

{¶25} However, neither the consequences Wagar suffered nor Brinkman's acts or omissions are sufficient to prove that he breached the duty of care he owed Wagar. Evidence probative of the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances is necessary to prove the particular standard of conduct applicable to Brinkman's duty of care. Evidence that Brinkman's particular acts or omissions fell below that standard is necessary to prove a breach of the duty of care he owed Wagar. Because those are matters beyond the knowledge or skill possessed by lay persons, Wagar was required to offer expert testimony to prove those matters. Therefore, the trial court did not err when it found Wagar's deposition and affidavit, supplemented by Brinkman's deposition, insufficient for that purpose.

{¶26} Wagar also contends that her alternative to the course Brinkman recommended was to offer to reimburse Folkerth for any set-off from the full STRS benefit he would receive

but for the election he was required to make. Wagar argues that Folkerth, being interested only in the reduction in his benefits resulting from an election, likely would have accepted such an offer, and that in view of Folkerth's poor health, any reimbursement would have been neither lengthy in term nor costly in amount.

{¶27} These contentions go more to the issue of proximate cause than to the issue of Brinkman's breach of his duty of care. Wagar does not argue that she made Brinkman aware that she would choose the reimbursement alternative. Further, finding that Folkerth would have accepted Wagar's offer would require a jury to speculate in order to make a finding of fact. Most importantly, Wagar's contentions regarding a reimbursement scheme are not probative of the standard of the knowledge, skill, and ability ordinarily possessed by an attorney in like circumstances, and how Brinkman's acts or omissions fell below that standard.

{¶28} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶29} "THE COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF BY FINDING THAT PLAINTIFF'S PROFFERED EXPERT FAILED TO ESTABLISH THAT DEFENDANT BREACHED THE STANDARD OF CARE."

{¶30} Wagar filed the deposition of Craig A.

Newburger (Dkt 33), who testified that he was licensed to practice law in 2001 (T. 19) and is a sole practitioner (T. 31) who maintains an office in Butler County. (T.8). Newburger testified that his areas of practice are personal injury, criminal, and domestic relations law. (T. 31-33), and that domestic relations law accounts for about ten to fifteen percent of his practice activity. (T. 32). He testified that he had participated in eleven divorce proceedings (T. 33), none of which involved division of STRS retirement benefits. (T. 34). Newburger claimed to have an understanding of STRS benefits because he is an enrollee in STRS, having taught at public institutions (T. 34), and because he deals with pension plan administrators regarding STRS. (T. 35).

{¶31} Newburger opined that Defendant Brinkman breached the duty of care he owed Wagar when he told her that he had an expertise in division of STRS benefits he did not have and failed to obtain co-counsel who had the necessary expertise. (T. 159-160). Newburger was critical of Brinkman's apparent misapprehension that Folkerth could be required to obtain life insurance for Wagar's benefit (T. 162), as well as Brinkman's possible misunderstanding concerning his ability to obtain information he needed from STRS. (T. 161).

{¶32} The foregoing matters could pertain to Brinkman's ethical obligations, but they do not demonstrate a standard of conduct applicable to a legal malpractice claim. When asked if he was aware of a standard of conduct that would pertain to Brinkman's representation of Wagar regarding STRS benefits, Newburger was unable to identify any. (T. 94-95).

{¶33} Wagar argues that Newburger's testimony establishes that, due to his claimed expertise concerning STRS benefits, Brinkman owed a greater-than-usual duty of care to Wagar that he did not have. However, other than his several speculations about what Brinkman could have done, Newburger did not identify what that higher duty required Brinkman to do or how Wagar was injured as a proximate cause of any failures on Brinkman's part.

{¶34} Evid.R. 702(B) provides that a witness may testify as an expert if "[t]he witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." The trial court rejected Newburger's evidence on a finding that Newburger lacks the experience or expertise to render an expert opinion regarding Brinkman's alleged breach of his duty of care. The correctness of that finding is manifest from Newburger's testimony. Indeed, he was unable to even state

the standard of care applicable to Brinkman's representation of Wagar.

{¶35} The second assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. And FAIN, J., concur.

Copies mailed to:

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Hon. Mark S. O'Connor