REL: February 28, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Mary Beasley Schaeffer and Ellise Beasley Long, as personal representative of the estate of Emma Glass Beasley, deceased

v.

Jan Garrison Thompson

Appeal from Dallas Circuit Court
(CV-13-900142)

MOORE, Judge.

Mary Beasley Schaeffer and Ellise Beasley Long, as personal representative of the estate of Emma Glass Beasley, deceased, appeal from a summary judgment entered by the Dallas

Circuit Court ("the trial court") in favor of Jan Garrison Thompson. Schaeffer and Long are hereinafter referred to collectively as "the plaintiffs." We reverse and remand.

Procedural History

On May 31, 2013, the plaintiffs filed a verified complaint against Thompson alleging, pursuant to the Alabama Legal Services Liability Act ("the ALSLA"), Ala. Code 1975, § 6-5-570 et seq., that Thompson had committed legal malpractice in his representation of them in a previous case, i.e., case number CV-05-40 ("the underlying case").[1] On July 16, 2013, Thompson filed a motion to dismiss; within that same document, Thompson asserted a counterclaim for fees that he contended the plaintiffs owed him as a result of his representation of them in the underlying case.

On November 1, 2015, the plaintiffs filed an amended complaint. Thompson filed an answer to the amended complaint on August 1, 2018. On August 10, 2018, the plaintiffs filed a second amended complaint. The complaint, as finally amended, alleged that Thompson had committed legal malpractice

[1]The judgment in the underlying case was ultimately appealed to the Alabama Supreme Court. See Schaeffer v. Poellnitz, 154 So. 3d 979 (Ala. 2014).

in his representation of the plaintiffs in the underlying case. Specifically, the plaintiffs argued that Thompson had erred in presenting evidence of a $28,000 judgment to the jury and that Thompson had failed to explain the term "hereditament" to the jury. The plaintiffs also argued that Thompson had failed to present certain evidence and arguments, that he had failed to request certain jury instructions, and that he had failed to make a certain objection at the trial of the underlying case. On August 22, 2018, Thompson answered the second amended complaint.

On September 28, 2018, Thompson filed a motion for a summary judgment on the legal-malpractice claims ("the first summary-judgment motion"). Thompson argued that all of the plaintiffs' allegations of malpractice involved decisions he made at the trial in the underlying case and that he could not be held liable for his decisions as to trial strategy. The only exhibit that Thompson attached to the first summary-judgment motion was the trial transcript from the underlying case. On December 31, 2018, the plaintiffs filed a motion to strike the first summary-judgment motion. On January 10, 2019, the plaintiffs filed the affidavit of James Starnes, an

attorney, who averred that Thompson had breached the applicable standard of care by introducing the $28,000 judgment at the trial in the underlying case and by failing to explain the meaning of the word "hereditaments." Starnes further averred that, with regard to the other allegations of legal malpractice, he needed "testimony from Thompson ... as to his reasoning" for the decisions he made before making a determination as to whether Thompson had breached the standard of care. On January 10, 2019, the plaintiffs filed a motion for an extension of time to obtain evidence pursuant to Rule 56(f), Ala. R. Civ. P. They alleged that they had propounded discovery requests to Thompson, that Thompson had not answered that discovery, and that "[p]ertinent discovery of [Thompson] and key witnesses is needed to help resolve [certain] genuine issues of material fact." The plaintiffs also filed a response to the first summary-judgment motion on January 10, 2019.

On January 11, 2019, the trial court denied the plaintiffs' motion for an extension of time to obtain evidence. On January 18, 2019, the trial court entered an order granting the first summary-judgment motion, finding

"that the decisions complained of by the [plaintiffs] constitute 'strategic decisions' made during the course of Trial, for which [Thompson] is protected" and stating that "[n]o further evidence or expert testimony is needed."

On January 18, 2019, Thompson filed a motion for a summary judgment as to his request for the payment for legal services he had rendered to the plaintiffs in the underlying case ("the second summary-judgment motion"). On February 4, 2019, the trial court entered an order certifying its January 18, 2019, judgment as final, pursuant to Rule 54(b), Ala. R. Civ. P. The next day, the trial court entered an order noting that the second summary-judgment motion filed by Thompson was pending. On February 11, 2019, the plaintiffs filed a notice of appeal to the Alabama Supreme Court.

On February 13, 2019, the plaintiffs filed a motion to strike the second summary-judgment motion. The next day, the plaintiffs filed a motion for an extension of time to obtain evidence and for an order compelling answers to discovery. The plaintiffs also filed a response to the second summary-judgment motion.

On March 14, 2019, the Alabama Supreme Court issued an order dismissing the plaintiffs' appeal from the first summary-judgment order because "the Notice of Appeal [arose] from an improper Rule 54(b), Ala. R. Civ. P., certification." Schaeffer v. Thompson (No. 1180363, March 14, 2019).

On May 8, 2019, the trial court entered an order granting the second summary-judgment motion. The trial court noted that it had reviewed Thompson's invoice and had "disallow[ed certain] charges as not being successful." The plaintiffs filed a postjudgment motion on June 7, 2019. The trial court denied that motion on June 10, 2019. On July 15, 2019, the plaintiffs filed a notice of appeal to the Alabama Supreme Court; that court subsequently determined that the appeal was within this court's appellate jurisdiction and transferred the appeal to this court, pursuant to Ala. Code 1975, § 12-3-10.

Standard of Review

> "We review this case de novo, applying the oft-stated principles governing appellate review of a trial court's grant or denial of a summary-judgment motion:
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> > "'We apply the same standard of review the trial court used in determining whether the evidence presented to the trial court created a genuine issue of material fact. Once a party moving for a summary judgment

> establishes that no genuine issue of material fact exists, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. "Substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." In reviewing a summary judgment, we view the evidence in the light most favorable to the nonmovant and entertain such reasonable inferences as the jury would have been free to draw.'
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> "Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C., 792 So. 2d 369, 372 (Ala. 200[0]) (citations omitted)."

American Liberty Ins. Co. v. AmSouth Bank, 825 So. 2d 786, 790 (Ala. 2002).

Discussion

On appeal, the plaintiffs first argue that Thompson failed to meet his initial burden of establishing his right to a summary judgment on their legal-malpractice claims. They assert that there is no Alabama caselaw holding that an attorney is not liable for legal malpractice based on decisions the attorney made during the trial of a case. They also assert that Thompson failed to present in support of his first summary-judgment motion expert testimony indicating that he did not breach the applicable standard of care.

"In actions under the ALSLA, a party must present expert testimony to establish the standard of care unless that standard is within common knowledge." Barney v. Bell, 172 So. 3d 849, 855 (Ala. Civ. App. 2014) (citing Valentine v. Watters, 896 So. 2d 385, 393 (Ala. 2004)). In Barney, this court held that, because the attorneys, who were defendants in a legal-malpractice case, did not "present any expert testimony as to the standard of care or the propriety of their conduct" in support of their summary-judgment motion, the attorneys "did not make a prima facie showing that they were entitled to a summary judgment," 172 So. 3d at 855-56, and, thus, that the trial court had "erred in entering a summary judgment in favor of [the attorneys] on that claim." 172 So. 3d at 856. Similarly, in Free v. Lasseter, 31 So. 3d 85, 90 (Ala. 2009), our supreme court reasoned:

> "Lasseter and the firm presented no argument or evidence as to the dispositive issue of the standard of care under § 6-5-572(3)a.[, Ala. Code 1975,] or the breach of that standard under § 6-5-572(4). ... It is clear that the burden never shifted to Free to present substantial evidence of her legal-malpractice claim. Because the motion did not comply with the requirements of Rule 56(c), Ala. R. Civ. P., summary judgment was not proper."

In the present case, Thompson, like the attorneys in Barney and Free, failed to present any evidence, expert or otherwise, indicating that he did not breach the standard of care in his representation of the plaintiffs in the underlying case. Indeed, the only evidence he offered in support of his first summary-judgment motion was the transcript of the trial in the underlying case.

In his first summary-judgment motion, Thompson cited several cases holding that a decision concerning trial strategy cannot form a basis for an inadequate-assistance-of-counsel claim.[2] Thompson also cited Herston v. Whitesell, 348

[2]For example, Thompson cited Clark v. State, 196 So. 3d 285, 306 (Ala. Crim. App. 2015), in which the Alabama Court of Criminal Appeals reasoned:

> "'Trial counsel's decisions regarding what theory of the case to pursue represent the epitome of trial strategy.' Flowers v. State, 2010 Ark. 364, 370 S.W.3d 228, 232 (2010). 'What defense to carry to the jury, what witnesses to call, and what method of presentation to use is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.' State v. Miller, 194 W. Va. 3, 16, 459 S.E.2d 114, 127 (1995).
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> > "'"'[T]he mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel's failure to present that theory.'" Hunt v. State, 940 So. 2d 1041, 1067 (Ala. Crim. App. 2005), quoting Rosario-Dominguez

So. 2d 1054, 1057 (Ala. 1977), for the propositions that, "while [an attorney's] advice may be wrong ..., it may nevertheless be reasonable," and that "[a]n attorney 'is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction.'" (Quoting Goodman v. Walker, 30 Ala. 482, 496 (1857).) In Herston, the supreme court also specifically stated that "[w]hether the [attorneys] breached their duty to use reasonable care and skill under the alleged facts of this case is for the jury to decide." 348 So. 2d at 1057. In Herring v. Parkman, 631 So. 2d 996, 1002 (Ala. 1994), the Alabama Supreme Court, relying on Herston, reasoned:

> v. United States, 353 F. Supp. 2d 500, 513 (S.D.N.Y. 2005). "Hindsight does not elevate unsuccessful trial tactics into ineffective assistance of counsel." People v. Eisemann, 248 A.D. 2d 484, 484, 670 N.Y.S.2d 39, 40-41 (1998).'
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> "Davis v. State, 44 So. 3d 1118, 1132 (Ala. Crim. App. 2009). '"The fact that [a] defense strategy was ultimately unsuccessful with the jury does not render counsel's performance deficient."' Bush v. State, 92 So. 3d 121, 160-61 (Ala. Crim. App. 2009) (quoting Heath v. State, 3 So. 3d 1017, 1029 (Fla. 2009)). See also Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000) ('"Simply because the ... defense did not work, it does not mean that the theory of the defense was flawed."' (citations omitted))."

> "[The attorney's] recommendation that [certain witnesses, including the plaintiffs in the case,] not testify ... was based on a decision within the province of [the attorney's] exercise of judgment as to trial strategy. Although a lawyer owes his client a duty to exercise 'such reasonable care and skill and diligence as other similarly situated legal service providers in the same general line of practice in the same general area ordinarily have and exercise in a like case,' Ala. Code 1975, § 6-5-580(1), '[a]n attorney "is not answerable for an error in judgment upon points of ... nice or doubtful construction."' Herston v. Whitesell, 348 So. 2d 1054, 1057 (Ala. 1977) (quoting Goodman v. Walker, 30 Ala. 482, 496 (1857)). 'The duty of using reasonable care and skill applies to the manner in which the attorney pursues the case and the law which he applies to the case.' Herston, 348 So. 2d at 1057. Indeed, 'the decision not to call a particular witness is usually a tactical decision' for the attorney. Luke v. State, 484 So. 2d 531, 533 (Ala. Crim. App. 1985). [The attorney] stated that he advised [the plaintiffs] not to testify because he did not want to subject either of them to cross-examination or impeachment by the prosecution. This choice of trial strategy, although it did not prevent a conviction, will not support a malpractice claim. [The plaintiffs] presented no evidence that [the attorney] failed to use reasonable care and skill in conducting their defenses."

In the present case, however, Thompson did not introduce an affidavit in support of his first summary-judgment motion asserting his reasoning for the strategic decisions that he had made at the trial in the underlying case. In fact, as noted previously, the only evidence he submitted in support of his first summary-judgment motion was the transcript of the

trial in the underlying case. Therefore, we conclude that Thompson failed to establish that his decisions in the trial of the underlying case were tactical such that they would not support a legal-malpractice claim.

Additionally, Thompson argues that this case falls within the common-knowledge exception, and, thus, he says, he was not required to introduce expert testimony. We note, however, that Thompson did not raise this issue in his first summary-judgment motion. Therefore, we do not address whether that exception applies in this case. See, e.g., Choice Builders, Inc. v. Complete Landscape Serv., Inc., 955 So. 2d 437, 441 (Ala. Civ. App. 2006) ("The other arguments that [Complete Landscape Service, Inc.,] raises in its appellee's brief or in its brief in support of its application for rehearing were not argued at the trial-court level as a reason for entering a summary judgment against [Choice Builders, Inc.]; thus we will not now consider those arguments on appeal."); see also Wilson v. C-Sharpe Co., 37 So. 3d 797, 804-05 (Ala. Civ. App. 2009).

Based on the foregoing, we conclude that the trial court erred in entering a summary judgment in Thompson's favor on the plaintiffs' legal-malpractice claims.

The plaintiffs next argue that the trial court erred in granting the second summary-judgment motion. Because this court's reversal of the summary judgment on the legal-malpractice claims might affect the trial court's decision as to the second summary-judgment motion, we pretermit discussion of the issues relating to the propriety of the order entered on the second summary-judgment motion. See, e.g., Congress v. U.S. Bank, N.A., 98 So. 3d 1165, 1170 (Ala. Civ. App. 2012) ("In light of our reversal of the judgment on this particular issue, and because the trial court's determination on this issue on remand may affect the other issues raised by Congress in this appeal, we pretermit discussion of Congress's other issues.").

Conclusion

Based on the foregoing, we reverse the trial court's judgment to the extent that it entered a summary judgment in Thompson's favor with regard to the first summary-judgment motion relating to the plaintiffs' legal-malpractice claims, and we remand the cause for further proceedings. We pretermit review of the propriety of the trial court's ruling on the second summary-judgment motion; we note, however, that the

trial court is permitted, but not required, to alter that ruling on remand.

REVERSED AND REMANDED.

Thompson, P.J., and Donaldson and Hanson, JJ., concur.

Edwards, J., recuses herself.