

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001909-MR

STEVEN E. WARMAN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 07-CI-03225

BRIAN P. HALLORAN

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

ACREE, JUDGE: The appellant, Steven Warman, seeks reversal of the Kenton Circuit Court's grant of summary judgment in favor of the appellee. The circuit court properly determined that no genuine issues of material fact exist and properly

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

characterized the appellant's malpractice claim as frivolous. Further, the circuit court did not abuse its discretion by denying the appellant's motion for extension of time to respond to the motion for summary judgment. Therefore, we affirm.

In December of 2005, Brian Halloran was appointed to represent Warman in the appeal of his federal criminal conviction to the United States Court of Appeals for the Sixth Circuit. On January 16, 2006, Halloran filed an appearance of counsel and subsequently ordered copies of the trial transcripts. While still awaiting at least one transcript and prior to the establishment of a briefing schedule for the case, Halloran received the appellant's motion to terminate him as counsel. Termination was ordered on October 20, 2006.

Acting *pro se*, Warman filed a complaint alleging professional malpractice on the part of Brian Halloran and the law firm of Bookings, Moeves and Halloran, PLLC (referred to collectively as Halloran). He further alleged that Halloran signed a false certification with regard to service of his response to Warman's motion to terminate.

The appellee filed a motion for summary judgment on June 13, 2008. The motion was noticed for hearing on July 7, 2008. Prior to the hearing, Warman filed a motion for extension of time to respond to the summary judgment motion. On July 18, 2008, an order granting Warman an extension until August 18, 2008, was issued. However, he claims he was never aware of the extension.

Subsequently, Warman filed additional motions for further extensions of time. Those motions were denied. Warman never filed a response to the motion for summary judgment.

On September 22, 2008, the circuit court entered summary judgment finding Warman failed to establish that Halloran's actions amounted to malpractice or that he had suffered damages. As to his second claim, the circuit court found Warman's assertion regarding the certification to be false. Once again, the court noted that even if his allegation was true, he failed to establish that he suffered damages as a result because Halloran was in fact terminated. Ultimately, the court concluded,

[i]n short, Warman presents no evidence that Halloran breached his duties to Warman. He presents no evidence of actual damages. Warman's stated causes of action herein are utterly frivolous, constitute an abuse of the system, and appear to be little more than the disgruntled rumblings of a convicted criminal seeking to shift blame to anyone other than himself for his current situation. Justice demands that such a farce come to a swift end.

Warman was granted his first request for an extension of time and it was clearly within the circuit court's discretion to deny his subsequent requests. Further, it is without question that Warman failed to set forth facts necessary to establish a cause of action for legal malpractice.

Ohio law governs the substance of this case and demands that the following elements be established for malpractice; 1) the attorney must owe a duty or obligation to the plaintiff, 2) the obligation must be breached and the attorney

must fail to conform to the standard required by law; and 3) there is a casual connection between the conduct complained of and the resulting damages.

Vahdati'bana v. Scott R. Roberts & Associates Co., L.P.A., Slip Copy, 2008 WL 713936, ¶ 28 (No.87AP-581)(Ohio App. 10 Dist., March 18, 2008).

Warman failed to establish that Halloran breached his obligation. In fact, the record clearly indicates that at the time the motion for termination of Halloran was filed a briefing schedule had not been issued by the Sixth Circuit Court. Further, there is no indication that Warman suffered any damages. In fact, it is clear he was able to fully pursue his appeal in the Sixth Circuit which ultimately affirmed his conviction. On appeal, Warman fails to set forth any new facts that would establish his claim.

This court reminds the appellant that Kentucky Rule of Civil Procedure (CR) 73.02 provides that

If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so lacking in merit that it appears to have been taken in bad faith.

CR 73.02(2)(4). “[I]f the court finds that the appeal is totally lacking in merit in that no reasonable attorney could assert such an argument, bad faith may be inferred, and the appeal is frivolous.” *Leasor v. Redmon*, 734 S.W.2d 462, 464 (Ky. 1987).

Warman’s appeal is without merit. To the extent that any arguments set forth in his brief are not discussed herein, it is because they are either not

properly before this court or they are unworthy of mention. If Warman were an attorney, the frivolous nature of this appeal would clearly warrant the imposition of attorney's fees as it is so lacking in merit that bad faith could be inferred.

However, appellees do not request the imposition of fees in this case. Instead, this court cautions Warman and advises him to consider CR 73.02(2)(4) in the future.

The decision of the circuit court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven E. Warman, *Pro se*
Morgantown, West Virginia

BRIEF FOR APPELLEE:

G. Todd Hoffpauir
Cincinnati, Ohio