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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000438-MR

BOBBIE J. BRIDGES, AND
DONALD M. HEAVRIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 06-CI-005797

JAMES A. EARHART — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

CAPERTON, JUDGE: Appellants, Bobbie J. Bridges and Donald M. Heavrin, appeal from the Jefferson Circuit Court's grant of summary judgment to James A. Earhart in two legal malpractice cases. After a thorough review of the parties' arguments, the record, and the applicable law, we find no error, and accordingly, affirm.

The underlying facts of this appeal involve the complex federal bankruptcy litigation as set forth *In re Triple S Restaurants, Inc.*, 422 F.3d 405, 407 (6th Cir. 2005), and *In re Triple S Restaurants, Inc*., 130 F. App'x 766, 768 (6th Cir. 2005).[1] Earhart represented Bridges and Heavrin in this litigation in two cases, known as the "trust case" and the "fee case." In the trust case, Bridges and Heavrin alleged that Earhart failed to call two witnesses to testify before the United States Bankruptcy Court and that Earhart committed appellate malpractice. Earhart moved for summary judgment on the basis of causation, specifically, that Bridges and Heavrin could not establish sufficient causation to prove that, but for Earhart's alleged failure to call two witnesses, they would have prevailed before the bankruptcy court.

After reviewing the record, including the affidavits of retired Judge Thomas D. Lambros, attorneys Edward H. Stopher and Heavrin, the trial court determined that Earhart was not counsel of record at the time the court imposed deadlines for the naming of witnesses and taking of depositions;[2] that Heavrin was at all times a co-counsel of record; and that Heavrin offered no evidence beyond his opinion that the testimony of the two witnesses would have altered the outcome of the bankruptcy. Thus, the court concluded that Bridges and Heavrin were

[1] Additionally, Heavrin has been involved in multiple federal proceedings relating to the bankruptcy of Triple S Restaurants, including a criminal matter in *United States v. Heavrin*, 144 F. Supp. 2d 769, 772 (W.D. Ky. 2001), and an accompanying attorney fees issue post-acquittal in *United States v. Heavrin,* 305 F. Supp. 2d 719, 720 (W.D. Ky. 2004).

[2] We note that this complex litigation had been proceeding for years prior to Earhart's entry of appearance a mere 18 days prior to trial.

unable to establish by a reasonable degree of probability that the bankruptcy proceedings would have reached a different outcome or that the outcome of the case would have been more favorable to them but for the negligence of Earhart. Accordingly, the trial court granted summary judgment in favor of Earhart in the trust case. We now consider the fee case.

In the fee case, the court granted summary judgment in favor of Earhart on a claim by Heavrin asserting that Earhart was negligent for failing to timely file a petition for an *en banc* rehearing before the United States Court of Appeals for the Sixth Circuit. Earhart moved for summary judgment on the basis of causation, specifically, that Bridges and Heavrin could not establish sufficient causation to prove that, but for Earhart's failure to file a timely petition, they would have prevailed before the Sixth Circuit *en banc.*

After reviewing the record, including the affidavits of retired Judge Thomas D. Lambros, attorneys Edward H. Stopher and Heavrin, the trial court determined that Earhart did indeed deviate from the standard of care to be exercised by a reasonably competent attorney when he failed to timely file a petition for rehearing *en banc* before the Sixth Circuit. However, the court determined that Bridges and Heavrin did not, and were unable to, establish by a reasonable degree of probability that the Sixth Circuit would have granted the petition for rehearing *en banc* or, if so, that the outcome of the case would have been more favorable to them but for the negligence of Earhart. Thus, the trial court granted Earhart's motion for summary judgment in the fee case. It is from these

orders that Bridges and Heavrin now appeal. On appeal, Bridges and Heavrin argue that the trial court improperly granted summary judgment. In support thereof, Bridges and Heavrin additionally argue that missing a filing deadline is negligence *per se*. Earhart argues that the trial court properly granted summary judgment. With these arguments in mind we turn to our applicable standard of review.

At the outset we note that the applicable standard of review on appeal of a summary judgment is, "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material

fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001).

> At issue, a plaintiff in a legal malpractice case:
>
> > [H]as the burden of proving "1) that there was an employment relationship with the defendant/attorney; 2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that the attorney's negligence was the proximate cause of damage to the client." Based on these factors, a legal malpractice case is the "suit within a suit." To prove that the negligence of the attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful.

Marrs v. Kelly, 95 S.W.3d 856, 860 (Ky. 2003)(internal citations omitted). Additionally, we acknowledge the rule in this Commonwealth that expert testimony is not essential in malpractice cases where the negligence is sufficiently apparent that a layman using his own general knowledge would have no difficulty recognizing it. *Stephens v. Denison*, 150 S.W.3d 80, 82 (Ky.App. 2004).

Sub judice, Bridges and Heavrin assert that Earhart missed a filing deadline for rehearing *en banc* in the fee case.[3] Earhart does not dispute the missed filing deadline but instead argues that Bridges and Heavrin failed to sustain their burden of proof regarding causation since Earhart produced expert testimony regarding the remote[4] possibility that the Sixth Circuit would have accepted *en banc* review.[5] We agree.

To prove an attorney's negligence actually caused damage, plaintiff must present facts demonstrating that "he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful." *Marrs* at 860. Thus, to meet the third element of the legal malpractice claim, Bridges and Heavrin must present facts proving that "but for" Earhart's legal negligence, Bridges and Heavrin would have probably been successful in having the Sixth Circuit grant the *en banc* rehearing, or, at the very

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[3] Additionally, Bridges and Heavrin argue that such action should constitute negligence *per se.* We decline to address this argument since Bridges and Heavrin have failed to supply this Court with any jurisprudence regarding legal negligence *per se.*

[4] We note that the Sixth Circuit's Rule 35(c) states:

> (c) Extraordinary Nature of Petition for Rehearing En Banc. A petition for rehearing en banc is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent. Alleged errors in the determination of state law or in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.

[5] Indeed, the expert, retired Chief Judge Thomas D. Lambros, opined that it was more likely that if the fee case had proceeded to *en banc* rehearing that Heavrin would have been required to disgorge *more* of his fees rather than less. *See* T.R. 197-198.

least, present facts that "but for" Earhart's legal negligence, Bridges and Heavrin would have probably been successful in having the Sixth Circuit panel modify favorably their original opinion. Bridges and Heavrin failed in this regard, and moreover, Earhart presented evidence to the contrary.

The trial court did not err in granting summary judgment because the movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute. The burden then shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of fact for trial." *Steelvest* at 482. "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc*., 50 S.W.3d 195, 199 (Ky. 2001). *See also Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky. 2004). Thus, we find no error.

Sub judice, Bridges and Heavrin also assert that Earhart misled them regarding the testimony of two witnesses; that Earhart committed additional appellate malpractice by not including exhibits in the appendix on appeal and by not properly naming Bridges in the appeal; that Earhart mislead his clients as to filing deadlines; and committed malpractice as regard to prejudgment interest in the trust case. Earhart argues that Bridges and Heavrin again failed to sustain their burden of proof regarding causation since Earhart testified that Heavrin was responsible for witness selection; that the two identified witnesses contradicted Bridges and Heavrin's theory of their case; and that Earhart's expert, retired Chief

Judge Thomas D. Lambros, opined that had the two witnesses been presented at trial, it would not have resulted in a favorable outcome for Heavrin. We agree with Earhart that Bridges and Heavrin again failed to sustain their burden of proof regarding causation.

While the trial court was faced with multiple arguments concerning the witnesses, Bridges and Heavrin were unable to establish by a reasonable degree of probability that the bankruptcy proceedings would have reached a different outcome or that the outcome of the case would have been more favorable to them but for the negligence of Earhart. Additionally, Bridges and Heavrin did not offer the trial court any evidence regarding the alleged appellate malpractice and how, but for the negligence of Earhart, Bridges and Heavrin would have fared better on appeal, that is, but for the attorney's negligence, they would have been more likely successful. *See Marrs* at 860. Thus, the trial court did not commit error in granting summary judgment.

Finding no error, we hereby affirm the Jefferson Circuit Court.

ALL CONCUR.

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