The Supreme Court of Ohio

Michael A. Kelley, Jr.

v.

Phillip W. Gerth

Case No. 2018-1724

RECONSIDERATION ENTRY

Franklin County

It is ordered by the court that the motion for reconsideration in this case is denied.

(Franklin County Court of Appeals; No. 18AP-487)

Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

Michael A. Kelley, Jr.

v.

Phillip W. Gerth

Case No. 2018-1724

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Franklin County Court of Appeals; No. 18AP-487)

Maureen O'Connor
Chief Justice

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael A. Kelley, Jr.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 18AP-487
Philip W. Gerth,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

JOURNAL ENTRY

By a decision and judgment entry filed October 9, 2018, this appeal was dismissed for failure to file a brief that complies with the Ohio Rules of Appellate Procedure. On October 30, 2018, appellant filed an application for reconsideration of that dismissal. Because we find no obvious error or issue that was not considered in our entry dismissing this appeal, appellant's application for reconsideration is denied. *Mathews v. Mathews* (1981), 5 Ohio App.3d 140 (10th Dist. 1982).

Judge G. Gary Tyack

Judge William A. Klatt

Judge Jennifer Brunner

cc: Clerk, Court of Appeals

[Cite as *Kelley v. Gerth*, 2018-Ohio-4080.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael A. Kelley, Jr.	:	
Plaintiff-Appellant,	:	
		No. 18AP-487
v.	:	(C.P.C. No. 17CV-5235)
Philip W. Gerth,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 9, 2018

On brief: *Michael A. Kelley, Jr.*, pro se. **Argued:** *Michael A. Kelley, Jr.*

On brief: *Anspach Meeks Ellenberger LLP*, and *David A. Herd*, for appellee. **Argued:** *David A. Herd.*

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Plaintiff-appellant, Michael A. Kelley, Jr., appeals a decision and entry filed by the Franklin County Court of Common Pleas on June 8, 2018 denying his motion for summary judgment and granting summary judgment to defendant-appellee, Philip W. Gerth. Because, instead of a brief, Kelley has filed a largely illegible and unintelligible document that fails to even substantially comply with any of the rules governing practice and procedure before this Court, we sua sponte dismiss this appeal.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On June 9, 2017, Kelley filed a generally incomprehensible document titled an "affidavit" accompanied by miscellaneous attachments in an apparent effort to sue Gerth for malpractice. (June 9, 2017 Kelley Aff.) Gerth answered on June 22, 2017. (June 22, 2017 Answer.) Within a matter of months, both parties had moved for summary judgment. (Dec. 11, 2017 Gerth Mot. for Summ. Jgmt.; Jan 3, 2018 Kelley Mot. for Summ. Jgmt.) As

is true of his other filings, Kelley's motion for summary judgment and accompanying materials were largely indecipherable. (Jan 3, 2018 Kelley Mot. for Summ. Jgmt.)

{¶ 3} However, Gerth's motion and accompanying affidavit with exhibits explained that Kelley retained him to determine if there was any viable appeal that could be taken from Kelley's pro se federal Medicaid case and, if so, to file such an appeal. (Dec. 1, 2017 Gerth Aff. at ¶ 3, attached to Dec. 11, 2017 Gerth Mot. for Summ. Jgmt.) After reviewing the case, Gerth determined that no non-frivolous appeal could be taken. *Id.* at ¶ 4-6, 8-10. When Gerth communicated that conclusion and offered other options, Kelley did not evince interest in pursuing other avenues and continued to insist on an appeal in the federal case. *Id.* at ¶ 6-10. Gerth declined to file a frivolous appeal, terminated the representation, and returned the unearned balance of Kelley's retainer. *Id.* at ¶ 9, 11.

{¶ 4} On June 8, 2018, the trial court denied Kelley's motion for summary judgment and granted Gerth's motion. (June 8, 2018 Decision & Entry, in passim.) Kelley now timely appeals.

II. DISCUSSION

{¶ 5} The document that purports to be Kelley's brief does not contain assignments of error. (June 28, 2018 Kelley Filing, in passim.) App.R. 16(A)(3). Nor does it contain any intelligible arguments pointing to how the trial court erred and from which we might infer a possible assignment of error. App.R. 16(A)(7). There are no table of contents, no table of authorities, no issues presented, no statement of the case, no statement of facts, and no conclusion to "briefly stat[e] the precise relief sought." App.R. 16(A)(1) through (8). The filing is not signed and does not provide Kelley's contact information. Civ.R. 11. It contains no certificate of service. Loc.R. 2(E) of the Tenth District Court of Appeals; Civ.R. 5(B)(4). It is not formatted as required and is, in fact, illegible in significant part. App.R. 19(A); Loc.R. 2(D) and 8(A)(1) of the Tenth District. Kelley's filing is not a brief in any traditional sense of the word and fails to comply with substantially any of the rules of this Court or the Ohio Rules of Civil or Appellate Procedure.

III. CONCLUSION

{¶ 6} As Kelley has failed to file a brief even substantially in conformity with the Ohio Rules of Appellate Procedure we sua sponte dismiss this appeal. App.R. 18(C).

Appeal dismissed.

TYACK and KLATT, JJ., concur.

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
GENERAL DIVISION

MICHAEL A. KELLEY, JR.,	:		
Plaintiff,	:	**Case No.**	**17 CVH-06-5235**
v.	:	**Judge:**	**Guy L. Reece, II**
PHILIP W. GERTH,	:		
Defendant.	:		

DECISION AND ENTRY
GRANTING DEFENDANT'S DECEMBER 11, 2017
MOTION FOR SUMMARY JUDGMENT
AND
DENYING PLAINTIFF'S DECEMBER 27, 2017
MOTION FOR SUMMARY JUDGMENT

REECE, J.

This matter is before the Court on Defendant Philip W. Gerth's ("Defendant") December 11, 2017 Motion for Summary Judgment, Plaintiff Michael A. Kelley, Jr.'s ("Plaintiff") December 27, 2017 Motion for Summary Judgment, and Defendant's January 4, 2018 Response to Plaintiff's Motion for Summary Judgment and/or Reply in Support of Defendant's Motion for Summary Judgment.

The motions have been fully briefed and are deemed submitted to the Court pursuant to Loc.R. 21.01.

BACKGROUND

Plaintiff commenced this action, *pro se*, against Defendant on June 9, 2017. In a rambling and often incoherent affidavit, which for purposes of this decision will be treated as a complaint, Plaintiff seems to allege that Defendant committed legal malpractice by failing to

timely file an appeal to a decision issued by Judge Marbley of the United States District Court for the Southern District of Ohio. The federal case appears to be related to a denial by the State of Ohio's Medicaid program for a medical procedure for Plaintiff.

In his Motion for Summary Judgment, Defendant argues there are no genuine issues of material fact in this case and he is entitled to summary judgment in his favor as a matter of law. Defendant argues Plaintiff has failed to present any evidence of legal malpractice. To the contrary, Defendant argues he provided the legal services Plaintiff requested but ultimately decided he could not in good faith file an appeal on Plaintiff's behalf so he refunded the unused portion of Plaintiff's retainer money.

Defendant explains that Plaintiff approached him on June 6, 2016, only eight days before the appeal deadline was to run out with respect to the federal case. The parties entered into an attorney-client relationship on June 6, 2016, and pursuant to the terms of the Attorney-Client Retainer Agreement, Defendant began reviewing Plaintiff's case. The Attorney-Client Retainer Agreement provides, in pertinent part, as follows:

4. SCOPE OF SERVICES

> CLIENT is retaining ATTORNEY to provide the following specified representation or legal services: on behalf of CLIENT, review the case history, determine if a viable lawsuit still exists, *and if so*, appeal a Medicaid denial to a court. ATTORNEY will commence providing such representation or legal services to CLIENT upon the fulfillment of CLIENT'S obligations specified in paragraph two (2) of this Agreement.[1]

(Emphasis added.)

Defendant contends that, in less than 72 hours, he reviewed the case history and sent Plaintiff an e-mail advising that an appeal would have no chance of success, further advising that

[1] Paragraph 2 of the Agreement deals with the payment of a retainer fee.

a new lawsuit and/or administrate appeal be filed instead. In the affidavit attached to his motion, Defendant states that he then followed up with a telephone call to Plaintiff on June 10, 2016, to advise Plaintiff of the same. Defendant maintains Plaintiff was not persuaded by Defendant's reasoning and insisted that Defendant file an appeal. Defendant contends that later that same day he sent another e-mail to Plaintiff, titled "End of Representation," reiterating that he could not in good faith file an appeal and that he was ending his representation. Plaintiff's father having already paid to Defendant $1,600.00, which represented one-half of the retainer fee, Defendant then returned to Plaintiff's father the balance of the unused fee, which amounted to $755.00.

Defendant argues that Plaintiff, as of June 10, 2016, still had four days until the appeal time ran out with respect to the federal case. If Plaintiff wished to appeal the federal court's decision, Defendant argues Plaintiff still had time to either find another attorney or file the appeal himself, further noting that Plaintiff initiated and litigated the federal action *pro se*, and has filed and litigated this action *pro se*.

Defendant further informs the Court that Plaintiff filed a grievance against him with the Ohio Supreme Court Disciplinary Counsel on August 5, 2016, alleging violation of the Scope of Services paragraph of the Attorney-Client Retainer Agreement. After reviewing the grievance, the Disciplinary Counsel found that Defendant had not violated that provisions of the agreement because he reviewed Plaintiff's case and determined that a viable case did not exist so he therefore did not file an appeal. Defendant attached the Disciplinary Counsel's letter to his affidavit.

In his Motion for Summary Judgment, Plaintiff argues Defendant has malpracticed him and Plaintiff has suffered damages as a result of the same. However, other than his conclusory statements, Plaintiff fails to explain how he has been malpracticed or to present any expert

testimony with respect to the same. Plaintiff attached to his motion a copy of the federal district court's decision dismissing Plaintiff's case, along with a copy of the Attorney-Client Retainer Agreement, the $755.00 check from Defendant to Michael Kelley, Sr., a letter from an Aetna representative outlining an action plan between Plaintiff and his case manager, e-mails between Plaintiff and Defendant, and what appear to be e-mails between several Aetna representatives.

In his combined Reply in Support of Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment, Defendant again argues that Plaintiff has failed to present any evidence to support the elements of a legal malpractice claim or otherwise establish that Defendant committed legal malpractice. Defendant again directs the Court's attention to the language of the parties' Attorney-Client Retainer Agreement and argues he performed the services he said he would perform. The fact that Defendant ultimately decided an appeal was not appropriate, the argument continues, does not mean he did not provide legal services or that he caused Plaintiff to fail to timely file an appeal, noting that Plaintiff could have himself filed the appeal if he disagreed with Defendant's legal assessment and advice.

LAW & ANALYSIS

I. SUMMARY JUDGMENT

Civ.R. 56 provides that, before summary judgment may be granted, a trial court must determine that: 1.) there is no genuine issue as to any material fact that remains to be litigated; 2.) the moving party is entitled to judgment as a matter of law; and 3.) it appears from the evidence that reasonable minds can come to but one conclusion, and that conclusion, when viewing the evidence in a light most favorable to the party against whom the motion for summary judgment is made, is adverse to that same party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). While "[s]ummary judgment is a procedural device to

terminate litigation and to avoid a formal trial where there is nothing to try," Ohio courts have warned that summary judgment "must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion." *Norris v. Ohio Standard Oil Co.*, 70 Ohio St.2d 1, 2-3, 433 N.E.2d 615 (1982), citing *Morris v. First National Bank & Trust Co.*, 21 Ohio St.2d 25, 28, 254 N.E.2d 683 (1970).

Furthermore, when considering the merits of a motion for summary judgment, a trial court must pay particular attention to the shifting burdens between the moving and non-moving parties. The moving party bears an initial burden of informing the court of the basis for its motion and of "identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the non-moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). If the moving party does not point to some evidence of the type listed in Civ.R. 56(C), which demonstrates that the non-moving party has no evidence to support its claims, a motion for summary judgment must be denied. Id. However, once the moving party meets its initial burden, the burden then shifts to the non-moving party to bring to the court's attention facts showing a genuine issue for trial, and if this reciprocal burden is not met, summary judgment must be granted. Id.

In determining whether there are genuine issues as to any material fact(s), a trial court must examine the applicable substantive law. *Miller v. Loral Defense Systems*, 109 Ohio App.3d 379, 383, 672 N.E.2d 227 (9th Dist.1996). "A 'material fact' depends on the substantive law of the claim being litigated." *Hoyt, Inc. v. Gordon & Associates, Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505 (1986). "[T]he substantive law will identify which facts are material. Only

disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Miller*, 109 Ohio App.3d at 383, citing *Anderson*, 477 U.S. at 248.

II. SELF-REPRESENTED LITIGANTS

As a threshold matter, the Court notes that Plaintiff is a self-represented litigant. However, the Court advises Plaintiff that parties "'who choose to represent themselves in judicial proceedings are entitled to no greater constitutional protections than those who choose to be represented by counsel.'" *Tumison v. AG*, 10th Dist. Franklin No. 03AP-457, 2004-Ohio-1062, ¶5, citing *Franklin County Dist. Bd. of Health v. Sturgill*, 10th Dist. Franklin No. 99AP-362, 1999 Ohio App. LEXIS 5984 (Dec. 14, 1999), quoting *Justice v. Kolb*, 10th Dist. Franklin No. 79AP-768, 1980 Ohio App. LEXIS 10849 (June 3, 1980). The Ohio Rules of Civil Procedure apply equally to all litigants, and *pro se* litigants "are presumed to have knowledge of the law and legal procedures and *** they are held to the same standard as litigants who are represented by counsel." *State ex rel. Fuller v. Mengel*, 100 Ohio St.3d 352, 2003-Ohio-6448, 800 N.E.2d 25, ¶10, quoting *Sabouri v. Ohio Dept of Job & Family Services*, 145 Ohio App.3d 651, 654, 763 N.E.2d 1238 (10th Dist.2001). Therefore, the Court must apply all procedural rules to all parties equally, regardless of whether the parties are represented by counsel or not.

III. LEGAL MALPRACTICE

To establish a claim of legal malpractice based on negligent representation, a plaintiff must show that: 1.) the attorney owed a duty or obligation to the plaintiff, 2.) the attorney breached that duty or obligation by failing to conform to the standard of care required by law, and

3.) there is a causal connection between the conduct complained of and the resulting damage or loss. *Vahila v. Hall*, 77 Ohio St.3d 421, 427, 674 N.E.2d 1164 (1997).

Unless the alleged breach is so obvious as to be "within the common understanding of lay persons or is so obvious that it may be determined as a matter of law," expert testimony is required to establish a breach of a duty of care and support allegations of legal malpractice. *Roselle v. Nims*, 10th Dist. Franklin No. 02AP-423, 2003-Ohio-630, ¶25, citing *Bloom v. Dieckmann*, 11 Ohio App.3d 202, 203, 464 N.E.2d 187 (1st Dist.1983). See, also, *Hahn v. Jennings*, 10th Dist. Franklin No. 04AP-24, 2004-Ohio-4789, ¶15, citing *McInnis v. Hyatt Legal Clinics*, 10 Ohio St.3d 112, 113, 461 N.E.2d 1295 (1984); *Pearce v. Duffy*, 10th Dist. Franklin No. 93APE11-1512, 1994 Ohio App. LEXIS 3692, 8 (August 16, 1994). "For purposes of summary judgment, expert witnesses may submit affidavits outlining their opinions which are based upon their personal view of the file, pleadings and evidence submitted." *Roselle*, 2003-Ohio-630, at ¶27, citing *Nwankpa v. Hines*, 10th Dist. Franklin No. 98 AP-147, 1998 Ohio App. LEXIS 4266 (Sept. 17, 1998); *Tomlinson v. Cincinnati*, 4 Ohio St.3d 66, 446 N.E.2d 454 (1983).

In light of the foregoing and having reviewed the parties' respective arguments and motions, the Court finds Defendant, as the moving party with respect to his motion, has satisfied his initial burden of coming forth with evidence to support his motion and has identified those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of Plaintiff's claim. The Court further finds Plaintiff, as the non-moving party with respect to Plaintiff's motion, has failed to bring to the Court's attention facts showing a genuine issue for trial. Plaintiff has failed to present any Civ.R. 56(C) evidence to support his claim of legal malpractice in this case.

Accordingly, the Court hereby **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

IT IS SO ORDERED.

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Additional material from this filing is available in the Clerk's Office.